APPENDIX

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Volume 2

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LINDSAY HECOX; JANE DOE, with her next friends Jean Doe and John Doe, *Plaintiffs-Appellees,* v. BRADLEY LITTLE, in his official capacity as Governor of the State of Idaho; SHERRI YBARRA, in her official capacity as the Superintendent of Public Instruction of the State of Idaho and as a member of the Idaho State Board of Education; INDIVIDUAL MEMBERS OF THE STATE BOARD OF EDUCATION, in their official capacities; BOISE STATE UNIVERSITY; MARLENE TROMP, in her official capacity as President of Boise State University; INDEPENDENT SCHOOL DISTRICT OF BOISE CITY, # 1; COBY DENNIS, in his official capacity as superintendent of the	No. 20-35813 D.C. No. 1:20-cv-00184-DCN AMENDED OPINION

Independent School District of Boise City #1; INDIVIDUAL MEMBERS OF THE BOARD OF TRUSTEES OF THE INDEPENDENT SCHOOL DISTRICT OF BOISE CITY, # 1; in their official capacities; INDIVIDUAL MEMBERS OF THE IDAHO CODE COMMISSION, in their official capacities,

Defendants-Appellants,

and

MADISON KENYON; MARY MARSHALL,

Intervenors.

LINDSAY HECOX; JANE DOE, with her next friends Jean Doe and John Doe,

Plaintiffs-Appellees,

v.

BRADLEY LITTLE, in his official capacity as Governor of the State of Idaho; SHERRI YBARRA, in her official capacity as the Superintendent of Public Instruction of the State of Idaho and as a member of the

No. 20-35815

D.C. No. 1:20-cv-00184-DCN

Idaho State Board of Education; INDIVIDUAL MEMBERS OF THE STATE BOARD OF EDUCATION, in their official capacities; BOISE STATE UNIVERSITY; MARLENE TROMP, in her official capacity as President of Boise State University; INDEPENDENT SCHOOL DISTRICT OF BOISE CITY, # 1; COBY DENNIS, in his official capacity as superintendent of the Independent School District of Boise City #1; INDIVIDUAL MEMBERS OF THE BOARD OF TRUSTEES OF THE INDEPENDENT SCHOOL DISTRICT OF BOISE CITY, # 1; in their official capacities; INDIVIDUAL MEMBERS OF THE IDAHO CODE COMMISSION, in their official capacities,

Defendants,

and

MADISON KENYON; MARY MARSHALL,

Intervenors-Appellants.

Appeal from the United States District Court
for the District of Idaho
David C. Nye, Chief District Judge, Presiding

Argued and Submitted November 22, 2022
San Francisco, California
Opinion Filed August 17, 2023
Opinion Withdrawn April 29, 2024
Amended Opinion Filed June 7, 2024

Filed June 7, 2024

Before: Kim McLane Wardlaw, Ronald M. Gould, and Morgan Christen, Circuit Judges.[*]

Opinion by Judge Wardlaw;

SUMMARY[**]

Equal Protection

In an amended opinion, the panel affirmed in part and vacated in part the district court's order preliminarily enjoining Idaho's Fairness in Women's Sports Act, a categorical ban on the participation of transgender women and girls in women's student athletics, and remanded.

The Act bars all transgender women and girls

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[*] Pursuant to General Order 3.2(h), Judge Christen has been drawn to replace Judge Kleinfeld in this matter. Judge Christen has reviewed the briefs and the record, and listened to the recording of the oral argument in this case.

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

from participating in, or trying out for, public school female sports teams at every age, from primary school through college, and at every level of competition, from intramural to elite teams. It also provides a sex dispute verification process whereby any individual can "dispute" the sex of any female student athlete in the state of Idaho and require her to undergo intrusive medical procedures to verify her sex, including gynecological exams. Male student athletes in Idaho are not subject to a similar dispute process.

Applying heightened scrutiny, as set forth in *United States v. Virginia*, 518 U.S. 515, 555 (1996), and *Karnoski v. Trump*, 926 F.3d 1180, 1200–01 (9th Cir. 2019), the panel held that the district court did not abuse its discretion when it found that the Act likely violates the Equal Protection Clause of the Fourteenth Amendment. Because the Act subjects only students who wish to participate in female athletic competition to an intrusive sex verification process and categorically bans all transgender girls and women from competing on female women of girls teams and because the State of Idaho failed to adduce any evidence demonstrating that the Act is substantially related to its asserted interests in sex equality and opportunity for women athletes, the panel affirmed the district court's grant of preliminary injunctive relief to Lindsay Hecox.

The panel vacated the injunction as applied to nonparties. It found that the scope of the injunction was not clear because the order does not specify whether enforcement of the Act is enjoined in whole or in part, nor does it specify whether enforcement of the Act is enjoined facially or as applied to particular persons. The panel instructed the district court on

remand to consider the effect, if any, of the Supreme Court's decision in *Labrador v. Poe*, 144 S. Ct. 921 (2024), before deciding whether it can accord Lindsay Hecox complete relief without enjoining the Act in part or in whole as to all female student athletes in Idaho.

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OPINION

WARDLAW, Circuit Judge:

In March 2020, Idaho enacted the Fairness in Women's Sports Act, Idaho Code §§ 33-6201–06 (2020) (the "Act"), a first-of-its-kind categorical ban on the participation of transgender women and girls in women's student athletics. At the time, Idaho had no history of transgender women and girls participating in competitive student athletics, even though Idaho's interscholastic athletics organization allowed transgender girls to compete on female athletic teams under certain specified conditions. Elite athletic regulatory bodies, including the National Collegiate Athletic Association (NCAA) and the International Olympic Committee (IOC), also had policies allowing transgender women athletes to compete if they met certain criteria. The Act, however, bars all transgender girls and women from participating in, or even trying out for, public school female sports teams at every age, from primary school through college, and at every level of competition, from intramural to elite teams. *See* Idaho Code § 33-6203(1)–(2). The Act also provides a sex dispute verification process whereby any individual can "dispute" the sex of any student

athlete participating in female athletics in the State of Idaho and require her to undergo intrusive medical procedures to verify her sex, including gynecological exams. *See* Idaho Code § 33-6203(3). Student athletes who participate in male sports are not subject to a similar dispute process.

Today, we decide only the question of whether the federal district court for the District of Idaho abused its discretion in August 2020 when it preliminarily enjoined the Act, holding that it likely violated the Equal Protection Clause of the Fourteenth Amendment. Because the Act subjects only students who wish to participate in female athletic competitions to an intrusive sex verification process and categorically bans transgender girls and women at all levels from competing on "female[], women, or girls" teams, Idaho Code § 33-6203(2), and because the State of Idaho failed to adduce any evidence demonstrating that the Act is substantially related to its asserted interests in sex equality and opportunity for women athletes, we affirm the district court's grant of preliminary injunctive relief to Lindsay Hecox. We remand this case to the district court to reconsider the appropriate scope of injunctive relief in light of the Supreme Court's decision in *Labrador v. Poe*, 144 S. Ct. 921 (2024).

I. FACTUAL AND PROCEDURAL BACKGROUND

A.

As the district court noted, and as we recognize in this context, "such seemingly familiar terms as 'sex' and 'gender' can be misleading." *Hecox v. Little (Hecox I)*, 479 F. Supp. 3d 930, 945 (D. Idaho 2020) (quoting

Doe ex rel. Doe v. Boyertown Area Sch. Dist., 897 F.3d 518, 522 (3d Cir. 2018)). We therefore adopt the terminology that has been employed throughout this case.

"Gender identity" is "the term used to describe a person's sense of being male, female, neither, or some combination of both."[1] A person's "sex" is typically assigned at birth based on an infant's external genitalia, though "external genitalia" do not always align with other sex-related characteristics, which include "internal reproductive organs, gender identity, chromosomes, and secondary sex characteristics." A "transgender" individual's gender identity does not correspond to their sex assigned at birth, while a "cisgender" individual's gender identity corresponds with the sex assigned to them at birth. Around two percent of the population are born "intersex," which is an umbrella term for people "born with unique variations in certain physiological characteristics associated with sex, such as chromosomes, genitals, internal organs like testes or ovaries, secondary sex characteristics, or hormone production or response." *Id.* at 946 (internal quotation marks omitted).

Over 1.6 million adults and youth identify as transgender in the United States, or roughly 0.6 percent of Americans who are 13 years old or older.[2] Youth ages 13 to 17 are significantly more likely to

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[1] Joshua D. Safer & Vin Tangpricha, *Care of Transgender Persons*, 381 N. Eng. J. Med. 2451, 2451 (2019).

[2] *See* Jody L. Herman, Andrew R. Flores, Kathryn K. O'Neill, *How Many Adults and Youth Identify as Transgender in the United States?*, Williams Inst. 1 (2022).

identify as transgender, with the Centers for Disease Control (CDC) estimating that roughly 1.8 percent of high school students identify as transgender. *See* Br. of Amici Curiae Am. Acad. of Pediatrics, et al. ("AAP Br.") at 10.

Transgender individuals often experience "gender dysphoria," which is defined by the Fifth Edition, Text Revision, of the Diagnostic and Statistics Manual of Mental Disorders (DSM-5-TR) as a condition where patients experience "[a] marked incongruence between one's experienced/expressed gender and assigned gender, of at least 6 months' duration" that "is associated with clinically significant distress or impairment in social, occupation, or other important areas of functioning."[3] For over thirty years, medical professionals have treated individuals experiencing gender dysphoria following the protocols laid out in the *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People (Version 7)*, which were developed by the World Professional Association for Transgender Health (WPATH). AAP Br. at 19.

B.

On March 16, 2020, Idaho passed House Bill 500 ("H.B. 500"), a categorical ban against transgender women and girls' participation in any public-school funded women's sports, enforced by subjecting all participants in female athletics to an intrusive sex verification process if their gender is disputed by anyone. *See* H.R. 500, 65th Leg., 2d Reg. Sess. (Idaho

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[3] *See* Am. Psychiatric Ass'n, *Diagnostic and Statistics Manual of Mental Disorders* 512–13 (5th ed., text rev. 2022).

2020). Although Idaho was the first state in the nation to issue such a ban, more than twenty other states have enacted similar—though perhaps not as potentially intrusive against all female athletes—restrictions on female transgender athletes.[4]

In the United States, high school interscholastic athletics are generally governed by state interscholastic athletic associations, such as the Idaho High School Activities Association (IHSAA). The NCAA sets policies for member colleges and universities in Idaho and elsewhere, including Boise State University (BSU). Prior to the Act's passage, IHSAA policy allowed transgender girls in 9–12 athletics in Idaho to compete on girls' teams after they had completed one year of hormone therapy

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[4] Since the Act's passage, twenty-four other states have passed laws or regulations limiting the participation of transgender students in women's athletics. However, no other state appears to have enacted an enforcement mechanism for those restrictions like the sex dispute verification process in the Act. *See* Ala. Code § 16-1-52 (2021); 4 Alaska Admin. Code § 06.115(b)(5)(D); Ariz. Rev. Stat. Ann. § 15-120.02 (2022); Ark. Code Ann. § 6-1-107 (West 2021); Fla. Stat. Ann. § 1006.205 (West 2021); Ind. Code Ann. § 20-33-13-4 (West 2022); Iowa Code Ann. § 261I.2 (West 2022); H.B. 2238, 2023 Leg. Sess. (Kan. 2023); Ky. Rev. Stat. Ann. § 164.2813 (West 2022); La. Stat. Ann. § 4:442 (2022); Miss. Code Ann. § 37-97-1 (West 2021); Mo. Rev. Stat. 163.048 (2023); Mont. Code Ann. § 20-7-1306 (West 2021); H. 574 (N. C. 2023); Legis. Assemb. 1489, 68th Legis. Assemb., Reg. Sess. (N.D. 2023); Legis. Assemb. 1249, 68th Legis. Assemb., Reg. Sess. (N.D. 2023); Ohio Rev. Code § 3313.5320; Okla. Stat. Ann. tit. 70, § 27-106 (West 2022); S.C. Code Ann. § 59-1-500 (2022); S.D. Codified Laws § 13-67-1 (2022); Tenn. Code Ann. § 49-7-180 (2022); Tex. Educ. Code Ann. § 33.0834 (West 2022); Utah Code Ann. § 53g-6-902 (West 2022); W. Va. Code Ann. § 18-2-25d (West 2021); S. 92, 67th Leg., Gen. Sess. (Wyo. 2023).

suppressing testosterone under the care of a physician. At that time, NCAA policy similarly allowed transgender women attending member colleges and universities in Idaho (and elsewhere) to compete on women's teams after one year of hormone therapy to suppress testosterone.[5] Idaho itself had no record of transgender women and girls participating in competitive women's sports.

On February 13, 2020, Representative Barbara Ehardt introduced H.B. 500 in the Idaho House of Representatives. At the first hearing on the bill, Ty Jones, Executive Director of the IHSAA, testified that no student in Idaho had ever complained about participation in public school sports by transgender athletes, and that no transgender athlete had ever competed in Idaho under the existing IHSAA policy. Representative Ehardt acknowledged that she had no evidence that any person in Idaho had ever disputed an athlete's eligibility to play based on that athlete's gender.

After the Idaho House Committee approved the bill, Idaho Attorney General Lawrence Wasden warned in a written opinion letter to the House that H.B. 500 raised serious constitutional questions due to the legislation's disparate treatment of transgender and intersex athletes and the potential

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[5] In April 2023, the NCAA updated its policy to require that transgender student-athletes meet the "sport-specific standard[s] (which may include testosterone levels, mitigation timelines and other aspects of sport-governing body policies)" of the national governing body of that sport. *See* Press Release, NCAA, Transgender Student-Athlete Participation Policy (April 17, 2023), https://www.ncaa.org/sports/2022/1/27/transgender-participation-policy.aspx (last visited May 3, 2024).

invasion of all female athletes' privacy inherent in the sex dispute verification process. Nevertheless, the bill proceeded to a debate and passed on the House floor on February 26, 2020.

After passage by the House, H.B. 500 was heard by the Senate State Affairs Committee and sent to the full Idaho Senate on March 10, 2020. On March 11, 2020, the World Health Organization declared COVID-19 a pandemic and many states adjourned legislative sessions indefinitely. The Idaho Senate remained in session, however, and passed H.B. 500 as amended on March 16, 2020. The House concurred in the Senate amendments on March 18, and the bill was delivered to Idaho Governor Bradley Little on March 19, 2020.

As Governor Little considered the bill, critics questioned the legislation's findings and legality. Professor Dorianne Lambelet Coleman, whose work on testosterone and athletics was cited in the legislative findings in support of the bill, wrote to Governor Little urging him to veto the bill and explaining that her research had been misinterpreted and misused in the legislative findings. Similarly, five former Idaho Attorneys General implored Governor Little to veto the Act, labeling it a "legally infirm statute."[6] Nonetheless, Governor Little signed H.B. 500 into law on March 30, 2020, and it went into effect on July 1, 2020.

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[6] *See also* Tony Park et al., 5 *Former Idaho Attorneys General Urge Transgender Bill Veto*, Idaho Statesman (Mar. 17, 2020), https://www.idahostatesman.com/opinion/readers-opinion/article241267071.html (last visited May 23, 2023).

C.

In enacting H.B. 500, the legislature made several findings based on Professor Coleman's study, including "that there are 'inherent [biological] differences between men and women,'" Idaho Code § 33-6202(1) (quoting *United States v. Virginia (VMI)*, 518 U.S. 515, 533 (1996)), and that men have "higher natural levels of testosterone," *id.* § 33-6202(4), which "have lifelong effects, including those most important for success in sport," *id.* § 33-6202(5). Relying on Professor Coleman's work, the legislature found that "[t]he benefit[] that natural testosterone provides to male athletes is not diminished through the use of puberty blockers and cross-sex hormones." *Id.* § 33-6202(11). The legislature also found that "women's performances at the high[est] level [of athletics] will never match those of men." *Id.* § 33-6202(9) (quoting Valerie Thibault et al., *Women and Men in Sport Performance: The Gender Gap Has Not Evolved Since 1983*, 9 J. of Sports Sci. & Med. 214, 219 (2010)). The legislature concluded 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 and accolades, college scholarships, and numerous other long-term benefits that flow from success in athletic endeavors." *Id.* § 33-6202(12).

Three provisions of the Act are most salient to this appeal. First, the Act provides that "[i]nterscholastic, intercollegiate, intramural, or club athletic teams or sports" shall be organized "based on biological sex." *Id.* § 33-6203(1). It specifically provides that:

> Interscholastic, intercollegiate, intramural, or club athletic teams or sports that are sponsored by a public primary or secondary school, a public institution of higher education, or any school or institution whose students or teams compete against a public school or institution of higher education shall be expressly designated as one (1) of the following based on biological sex:
>
> (a) Males, men, or boys;
>
> (b) Females, women, or girls; or
>
> (c) Coed or mixed.

Id. The Act then provides that "[a]thletic teams or sports designated for females, women, or girls shall not be open to students of the male sex." *Id.* § 33-6203(2) (the "categorical ban provision"). The Act's provisions apply to all levels of competition in Idaho state schools, including elementary school and club teams, and do not include any limitation for transgender individuals who wish to participate on athletic teams designated for men. Moreover, the provisions apply not only to public schools, but also to nonpublic "school[s] or institution[s] whose students or teams compete against a public school or institution of higher education." *Id.* § 33-6203(1).

Second, the Act creates a "sex verification" process to be invoked by any individual who wishes to "dispute" a student's sex, providing that:

> A dispute regarding a student's sex shall be resolved by the school or institution by requesting that the student provide a health examination and consent form or other

> statement signed by the student's personal health care provider that shall verify the student's biological sex. The health care provider may verify the student's biological sex as part of a routine sports physical examination relying only on one (1) or more of the following: the student's reproductive anatomy, genetic makeup, or normal endogenously produced testosterone levels.

Id. § 33-6203(3) (the "sex dispute verification provision").

And third, the Act creates an enforcement mechanism to ensure compliance with its provisions by establishing a private cause of action for any student who is "deprived of an athletic opportunity or suffers any direct or indirect harm as a result of a violation of [the Act]." *Id.* § 33-6205(1).

D.

On April 15, 2020, Lindsay Hecox ("Lindsay"), a transgender woman who wishes to try out for the BSU women's track and cross-country teams, and Jane Doe ("Jane"), a cisgender woman who plays on high school varsity teams and feared that her sex would be "disputed" under the Act due to her masculine presentation, filed this lawsuit against Governor Little, Idaho Superintendent of Public Instruction Sherri Ybarra, and various school officials at both the high school and collegiate levels (collectively, "Idaho"). They sought a declaratory judgment that the Act violates Title IX and the United States Constitution, including the Equal Protection Clause, and preliminary and permanent injunctions against the Act's enforcement, as well as an award of costs,

expenses, and reasonable attorneys' fees.

On May 26, 2020, Madison ("Madi") Kenyon and Mary ("MK") Marshall (collectively, "the Intervenors") were permitted to intervene in this case. Intervenors are cisgender women residing in Idaho and collegiate athletes who run track and cross-country on scholarship at Idaho State University. In 2019, both athletes competed against and lost to June Eastwood, a transgender woman athlete at the University of Montana, and found it a "discouraging" and "deflating" experience.

On April 30, 2020, Plaintiffs moved for preliminary injunctive relief based solely on their equal protection claims. The district court issued preliminary injunctive relief in August 2020, ruling that both Plaintiffs were likely to succeed on the merits of their equal protection claims and would suffer irreparable harm if the injunction was not granted, and that the balance of equities weighed in favor of an injunction. Idaho and the Intervenors (collectively, the "Appellants") timely appealed.

We first held oral argument in this appeal on May 3, 2021. At that time, Lindsay informed the court that she had tried out for and failed to make the women's track team and that she subsequently withdrew from BSU classes in late October 2020. Because the parties' arguments raised several unanswered factual questions as to whether Lindsay's claim was moot, we remanded the case to the district court for further factual development and findings on justiciability questions on June 24, 2021.

On July 18, 2022, the district court issued factual findings and concluded that Lindsay's claim was not

moot. We affirmed the district court's determination that Lindsay's claim was not moot in an order issued on January 30, 2023. *See Hecox v. Little* (*Hecox II*), No. 20-35813, 2023 WL 1097255, at *1 (9th Cir. Jan. 30, 2023).[7] We then asked the parties to brief us on which claims remained for decision in this appeal and any intervening authority. The parties agree that the only issue that we must decide is whether the district court abused its discretion in issuing the preliminary injunction.

II. STANDARD OF REVIEW

We review a district court's grant of a preliminary injunction for an abuse of discretion. *Puente Arizona v. Arpaio*, 821 F.3d 1098, 1103 (9th Cir. 2016). That said, "legal issues underlying the injunction are reviewed de novo because a district court would necessarily abuse its discretion if it based its ruling on an erroneous view of law." *adidas Am., Inc. v. Skechers USA, Inc.*, 890 F.3d 747, 753 (9th Cir. 2018) (quoting *GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1204 (9th Cir. 2000)); *see also Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914,

[7] In our January 2023 order, we determined that Lindsay's claim was not moot when she withdrew from BSU in October 2020, because she expressed a concrete plan to re-enroll and try out for BSU sports teams. *Hecox II*, 2023 WL 1097255, at *1. Lindsay followed through on those plans by re-enrolling at BSU after she established Idaho state residency and training to participate in women's sports teams. *Id.* Indeed, Lindsay planned to try out again for the BSU women's cross-country and track teams in Fall 2023, and has been playing for the BSU women's club soccer team since Fall 2022. *Id.*, at *2. Absent the preliminary injunction against the Act's enforcement, Lindsay would be banned from participating on the BSU women's club soccer team. *Id.*

918 (9th Cir. 2003). We do "not 'determine the ultimate merits'" of the case, "but rather 'determine only whether the district court correctly distilled the applicable rules of law and exercised permissible discretion in applying those rules to the facts at hand.'" *Saravia for A.H. v. Sessions*, 905 F.3d 1137, 1141–42 (9th Cir. 2018) (quoting *Fyock v. Sunnyvale*, 779 F.3d 991, 995 (9th Cir. 2015)). However, we will reverse a grant of the preliminary injunction if the district court "based its decision . . . on clearly erroneous findings of fact." *Does 1-5 v. Chandler*, 83 F.3d 1150, 1552 (9th Cir. 1996).

We review the scope of a preliminary injunction for an abuse of discretion. *California v. Azar*, 911 F.3d 558, 567 (9th Cir. 2018).

III. PRELIMINARY INJUNCTION

"A preliminary injunction is 'an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion.'" *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012) (quoting *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997)). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The last two factors "merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009).

A. Likelihood of Success on the Merits

The primary issue presented by this appeal is whether the district court abused its discretion in concluding that Lindsay was likely to succeed on the merits of her equal protection challenge. The Fourteenth Amendment provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. In other words, "all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). The state may not discriminate against classes of people in an "arbitrary or irrational" way or with the "bare . . . desire to harm a politically unpopular group." *Id.* at 446–47.

When considering an equal protection claim, we determine what level of scrutiny applies to a classification under a law or policy, and then decide whether the policy at issue survives that level of scrutiny. Our "general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest," *id.* at 440, otherwise known as rational basis review. However, as gender classifications "generally provide[] no sensible ground for differential treatment," *id.*, "'all gender-based classifications today' warrant 'heightened scrutiny.'" *VMI*, 518 U.S. at 555 (quoting *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136 (1994)). Under heightened scrutiny, "a party seeking to uphold government action based on sex must establish an 'exceedingly persuasive justification' for the classification." *Id.* at 524 (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)).

1. Heightened scrutiny applies.

The district court did not err in concluding that heightened scrutiny applies because the Act discriminates against transgender women by categorically excluding them from female sports, as well as on the basis of sex by subjecting all participants in female athletics, but no participants in male athletics, to invasive sex verification procedures to implement that policy. Appellants contend that the Act classifies based only on sex, not "transgender status," and permissibly excludes "biological males" from female sports under our precedent. *See*, *e.g.*, *Clark ex rel. Clark v. Arizona Interscholastic Ass'n* (*Clark I*), 695 F.2d 1126, 1131–32 (9th Cir. 1982) (holding that excluding boys from a girls' high school volleyball team was permissible to redress past discrimination against women athletes and to promote equal opportunity for women). We conclude that while the Act certainly classifies on the basis of sex, it also classifies based on transgender status, triggering heightened scrutiny on both grounds.

a. The Act discriminates based on transgender status.

Appellants argue that the Act does not discriminate based on transgender status because "[t]he distinction and statutory classification is based entirely on [biological] sex, not gender identity." They assert that the Act's definition of "biological sex" describes only the "physiological differences between the sexes relevant to athletics." But the Act explicitly references transgender women, as did its legislative proponents, and its text, structure, findings, and effect all demonstrate that the purpose of the Act was

to categorically ban transgender women and girls from public school sports teams that correspond with their gender identity.

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 of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979). Here, the district court found that "the law is directed at excluding women and girls who are transgender, rather than on promoting sex equality and opportunities for women." *Hecox I*, 479 F. Supp. 3d at 983. This finding is not clearly erroneous.

Section 33-6202 straightforwardly sets forth the "legislative findings and purpose" of the Act, and makes clear that its animating purpose was to ban transgender women from "biologically female" teams. These findings explicitly discuss transgender women athletes by stating that "a man [sic] who identifies as a woman and is taking cross-sex hormones 'ha[s] an absolute advantage' over female athletes," and noting that "[t]he benefit[] that natural testosterone provides to male athletes is not diminished through the use of puberty blockers and cross-sex hormones." Idaho Code § 33-6202(11).

During the legislative debate on H.B. 500, the Act's supporters stated repeatedly that the Act's purpose was to ban transgender women athletes from participating on female athletic teams in Idaho. Representative Ehardt, who introduced the bill, characterized the law as a "preemptive" strike that would allow Idaho to "remove [transgender women]

and replace them with the young gal that should have been on the team." Representative Ehardt reiterated that the Act would require transgender women to "compete on the side of those biological boys and men with whom they look or, about whom they look alike." Much of the legislative debate centered around two transgender women athletes running track in Connecticut high schools, as well as one running college track in Montana, and the potential "threat" those athletes presented to female athletes in Idaho. When Idaho's then-Attorney General Wasden expressed concerns about the Act's constitutionality, he expressly described it as "targeted toward transgender and intersex athletes."

The plain language of section 33-6203 bans transgender women from "biologically female" teams. The Act divides sports teams into three categories based on biological sex: "(a) Males, men, or boys; (b) Females, women, or girls; or (c) Coed or mixed." *Id.* § 33-6203(1). Sports designated for "females, women, or girls" are not open to students of the male sex. *Id.* § 33-6203(2). And the methods for "verify[ing] the student's biological sex" are restricted to "reproductive anatomy, genetic makeup, or normal endogenously produced testosterone levels." *Id.* § 33-6203(3). However, most gender-affirming medical care for transgender females, especially minors, will not or cannot alter the characteristics described in the only three verification methods prescribed by the Act, thus effectively banning transgender females from female sports.[8] As the district court determined, "the

[8] In 2023, Idaho adopted legislation prohibiting minors from receiving gender-affirming medical care. *See* Idaho Code § 18-1506C, *enjoined by Poe ex rel. Poe v. Labrador*, 2023 WL

overwhelming majority of women who are transgender have XY chromosomes," which indicate the male sex, and transgender women cannot change that genetic makeup when they transition. *Hecox I*, 479 F. Supp. 3d at 984. Similarly, as medical expert Dr. Deanna Adkins opined, many transgender women and girls do not undergo gender-affirming genital surgery to alter their external "reproductive anatomy," often because they cannot afford it or it is inappropriate for their individual needs.

Further, because surgery cannot change transgender women's internal reproductive anatomy by creating ovaries, Dr. Adkins testified that transgender women "typically continue to need estrogen therapy" even after surgery and can never alter their "endogenously produced"—or naturally produced—testosterone levels. By contrast, the Act does *not* allow sex to be verified by a transgender woman's levels of circulating testosterone, which can be altered through medical treatment. A transgender woman like Lindsay, for example, can lower her circulating testosterone levels through hormone therapy to conform to elite athletic regulatory guidelines, but cannot currently alter the endogenous testosterone that her body naturally produces. Yet the district court found and the record before it supports that circulating testosterone is the "one [sex-related] factor that a consensus of the medical community appears to agree" actually affects athletic performance. *Id.*

8935065, at *2 (D. Idaho Dec. 26, 2023), *injunction modified in part sub nom. by Labrador v. Poe ex rel. Poe*, 144 S. Ct. 921 (2024).

Appellants suggest that "biological sex" is a neutral and well-established medical and legal concept, rather than one designed precisely by the Idaho legislature to exclude transgender and intersex people.[9] But the Act's definition of "biological sex" is

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[9] In supplemental briefing, Appellants also argue that the Supreme Court's recent decisions in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022), and *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022), "are fatal to Hecox's claim" because the ratifiers of the Fourteenth Amendment would have understood "male" to correspond to the definition of "biological male" written into the Act. We fail to see how *Dobbs*, a substantive due process decision about whether the federal Constitution protects a woman's right to obtain an abortion, and *Bruen*, a Second Amendment decision about gun rights, are relevant to an equal protection claim based on sex discrimination, unless Appellants are suggesting that the Framers would have understood the term "biological sex" by reference to reproductive anatomy, genetic makeup, or normal endogenously produced testosterone levels. Indeed, the ratifiers of the Fourteenth Amendment would certainly not have understood the Act's definition of "biological sex." For example, the drafters of the Fourteenth Amendment would have had no concept of what "endogenously produced testosterone levels" meant in 1868, because testosterone was not named and isolated as a hormone until 1935. *See* John M. Tomlinson, *The Testosterone Story*, Trends in Urology & Men's Health 34, 35 (2012). Similarly, the ratifiers would not have understood how "genetic makeup" influences sex, as chromosomes were first discovered by Walther Flemming in 1882. D.W. Rudge, *The Man Who Invented the Chromosome*, 97 Heredity 136, 136 (2006) (reviewing Oren Harman, *The Man Who Invented the Chromosome: A Life of Cyril Darlington* (2004)).

Moreover, there is evidence that transgender people have existed since ancient times. *See generally* Lauren Talalay, *The Gendered Sea: Iconography, Gender, and Mediterranean Prehistory, in* THE ARCHEOLOGY OF MEDITERRANEAN PREHISTORY 130–33 (Emma Blake & A. Bernard Knapp eds., 2005). Appellants appear to argue that because transgender

likely an oversimplification of the complicated biological reality of sex and gender. As Dr. Joshua Safer, Executive Director of the Center for Transgender Medicine and Surgery at Mount Sinai, explained in his declaration, citing the Endocrine Society Guidelines:

> The phrase "biological sex" is an imprecise term that can cause confusion. A person's sex encompasses the sum of several biological attributes, including sex chromosomes, certain genes, gonads, sex hormone levels, internal and external genitalia, other secondary sex characteristics, and gender identity. These attributes are not always aligned in the same direction.

Indeed, 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

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people were marginalized in 1868, they should be afforded no constitutional protections on the basis of their transgender status. But this argument would undermine decades of Supreme Court precedent striking down laws that discriminate on the basis of sex. *See Reed v. Reed*, 404 U.S. 71, 76 (1971) (holding that an Idaho statute that preferenced men as administrators of estates "ma[d]e the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment"); *Frontiero v. Richardson*, 411 U.S. 677, 687 (1973) ("[S]tatutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members."); *see also Weinberger v. Weisenfeld*, 420 U.S. 636, 645 (1975); *Craig v. Boren*, 429 U.S. 190, 210 (1976); *Duren v. Missouri*, 439 U.S. 357, 360 (1979); *VMI*, 518 U.S. at 519.

typical binary notions of male and female bodies." Br. of Amici Curiae InterACT at 3–4. Intersex people who identify as women are equally banned under the Act from playing on Idaho women's teams. And while scientists are not fully certain why some people identify as transgender, it appears likely that there is some biological explanation—such as gestational exposure to elevated levels of testosterone—that causes certain individuals to identify as a different gender than the one assigned to them at birth. *See* AAP Br. at 14.

Finally, the Act's discriminatory purpose is further evidenced by the Act's prohibition of "biological males" from female-designated teams because that prohibition affects one group of athletes only—transgender women. *See Crawford v. Board of Education*, 458 U.S. 527, 544 (1982) (explaining that the "disproportionate effect of official action provides an important starting point" for determining whether a "[discriminatory] purpose was [its] motivating factor" (internal quotation marks omitted)). Before the Act's passage, both the IHSAA and the NCAA prohibited cisgender men and boys from participating on female-designated sports teams. Both associations also had policies that allowed transgender women and girls to participate on female athletic teams after completing one year of hormone therapy to suppress testosterone levels. Giving effect to the Act still prohibits men and boys from participating on female athletic teams. But all transgender girls and women, even those who were previously eligible consistent with the IHSAA and NCAA policies, are now barred from female athletics. 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. And where a statute's "undisputed purpose [] and only effect . . . is to exclude transgender girls . . . from participation on girls sports teams," that statute discriminates on the basis of transgender status. *B.P.J. ex rel. Jackson v. W. Va. State Bd. of Educ.*, 98 F.4th 542, 556 (4th Cir. 2024).

In addition to having a discriminatory purpose and effect, the Act is also facially discriminatory against transgender female athletes. We have previously rejected an argument like that Appellants raise here—that because section 33-6203 uses "biological sex" in place of the word "transgender," it is not targeted at excluding transgender girls and women. In *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014), we held that Idaho and Nevada laws that banned same-sex marriage facially discriminated on the basis of sexual orientation, even though the laws did so by classifying couples based on "procreative capacity" instead of sexual orientation. *Id.* at 467–68. We explained:

> Effectively if not explicitly, [defendants] assert that while these laws may disadvantage same-sex couples and their children, heightened scrutiny is not appropriate because differential treatment by sexual orientation is an incidental effect of, but not the reason for, those laws. However, the laws at issue distinguish on their face between opposite-sex couples, who are permitted to marry and whose out-of-state marriages are recognized, and same-sex couples, who are not permitted to marry and whose marriages are not recognized. Whether facial

> discrimination exists "does not depend on why" a policy discriminates, "but rather on the explicit terms of the discrimination." Hence, while the procreative capacity distinction that defendants seek to draw could represent a *justification* for the discrimination worked by the laws, it cannot overcome the inescapable conclusion that Idaho and Nevada do discriminate on the basis of sexual orientation.

Id. at 467–68 (quoting *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991)). Here, the Act's use of "biological sex" functions as a form of "[p]roxy discrimination." *Pac. Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142, 1160 n.23 (9th Cir. 2013). The definition of "biological sex" in the Act is written with "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." *Id.*; *see also Lawrence v. Texas*, 539 U.S. 558, 575 (2003) ("When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination . . . ."). The Act's specific classification of "biological sex" has similarly been carefully drawn to target transgender women and girls, even if it does not use the word "transgender" in the definition.

Adams ex rel. Kasper v. School Board of St. Johns County, 57 F.4th 791 (11th Cir. 2022) (en banc), upon which Appellants rely to support their argument that the Act does not discriminate against transgender girls or women, is inapposite. There, the Eleventh

Circuit upheld a lower court order rejecting an equal protection challenge to a K-12 school policy that provided female, male, and sex-neutral bathrooms and required male students to use the male-designated bathrooms, required female students to use the female bathrooms, and accommodated transgender students with the sex-neutral bathrooms. *See id.* at 797. The policy defined "male" and "female" as the gender identified on a student's birth certificate. *See id.* The Eleventh Circuit rejected the argument that the policy unconstitutionally discriminated on the basis of transgender status because it was "substantially related" to the school district's important interest in securing its pupils' privacy and welfare and was not targeted at transgender students—at most, it had a disparate impact upon them which did not rise to the level of a constitutional violation because no animus was shown. *See id.* at 811. Importantly, in *Adams*—as opposed to here—there was "no [record] evidence suggesting that the School Board enacted the [] policy because of . . . its adverse effects upon transgender students." *Id.* at 810 (second alteration in original) (internal quotation marks omitted). To the contrary, the school district in *Adams* had studied the issues raised by the LGBTQ community and had also enacted policies that affirmatively accommodated transgender students.[10]

Appellants likewise misrely on a footnote in *Geduldig v. Aiello*, 417 U.S. 484 (1974), for the proposition that a legislative classification based on

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[10] Although *Adams* is plainly distinguishable, we express no view on the merits of the decision.

biological sex is not a classification based on transgender status. *See id.* at 496 n.20. In *Geduldig*, the Supreme Court stated that a classification based on pregnancy is not per se a classification based on sex, even though "it is true that only women can become pregnant." *Id.* However, the Court held that "distinctions involving pregnancy" that are "mere pretexts designed to effect an invidious discrimination" are subject to heightened scrutiny. *Id.* Here, it appears that the definition of "biological sex" was designed precisely as a pretext to exclude transgender women from women's athletics—a classification that *Geduldig* prohibits.

Finally, Appellants contend that the Act does not discriminate based on transgender status because the "Act does *not* prohibit biologically female athletes who identify as male from competing on male sports teams consistent with their gender identity." But 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 . . . does not include all members of [a] race does not suffice to make the classification race neutral."); *Nyquist v. Mauclet*, 432 U.S. 1, 7–9 (1977) (holding that singling out some but not all undocumented immigrants for discrimination constituted a "classification based on alienage"); *Mathews v. Lucas*, 427 U.S. 495, 504 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.").

b. Heightened scrutiny applies because the Act discriminates on the basis of transgender status.

We have previously held that heightened scrutiny applies to laws that discriminate on the basis of transgender status, reasoning that gender identity is at least a "quasi-suspect class." *Karnoski v. Trump*, 926 F.3d 1180, 1200–01 (9th Cir. 2019).

In *Karnoski*, we reviewed an injunction against the implementation of a 2017 Presidential Memorandum and Departments of Defense and Homeland Security policies that effectively precluded transgender individuals from serving in the U.S. military. *Id.* at 1189. The district court had applied strict scrutiny in enjoining the policy, while the government argued that the policy should be reviewed under a rational basis standard. *Id.* at 1200. We held that because the implementing policy "on its face treats transgender persons differently than other persons . . . something more than rational basis but less than strict scrutiny applies." *Id.* at 1201. We therefore adopted the heightened scrutiny approach of *VMI* and *Witt v. Department of Air Force*, 527 F.3d 806, 818 (9th Cir. 2008), to review the military's ban on transgender persons who experienced gender dysphoria or who have undergone gender transition.[11]

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[11] The Supreme Court determined in *VMI* that for "cases of official classification based on gender" a reviewing court must apply a "heightened review standard" and determine whether the state has demonstrated an "exceedingly persuasive justification" for the classification. 518 U.S. at 533–34. In *Witt*, we applied a "heightened scrutiny" approach to the military's "Don't Ask, Don't Tell" policy for gay and lesbian service-members, determining that "when the government attempts to intrude upon the personal and private lives of homosexuals . . .

Id. We are thus compelled to review the constitutionality of the Act under heightened scrutiny as it classifies based on transgender status.

Moreover, discrimination on the basis of transgender status is a form of sex-based discrimination. It is well-established that sex-based classifications are subject to heightened scrutiny. *See VMI*, 518 U.S. at 533–34. The Supreme Court recently held in the Title VII context that "it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex." *Bostock v. Clayton County*, 590 U.S. 644, 660 (2020).[12] Indeed, "[m]any courts . . . have held that various forms of discrimination against transgender individuals constitute sex-based discrimination for purposes of the Equal Protection Clause because such policies punish transgender persons for gender non-conformity, thereby relying on sex stereotypes." *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 608 (4th Cir. 2020) (applying heightened scrutiny to a bathroom policy); *see also Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017), *abrogated on other grounds, Illinois Republican Party v. Pritzker*, 972

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the government must advance an important governmental interest, the intrusion must significantly further that interest, and the intrusion must be necessary to further that interest." 527 F.3d at 819.

[12] *See also* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41,390, 41,571 (Aug. 1, 2024) (to be codified at 34 C.F.R. pt. 106) (clarifying that "discrimination on the basis of sex" under Title IX includes discrimination based on "sex stereotypes, sex characteristics . . . and gender identity").

F.3d 760 (7th Cir. 2020) (same); *Brandt ex rel. Brandt v. Rutledge*, 47 F.4th 661, 670–71 & n.4 (8th Cir. 2022) (applying heightened scrutiny to affirm a preliminary injunction against a law that prohibited "gender transition procedures" because the law discriminated on the basis of sex); *Eknes-Tucker v. Marshall*, 603 F. Supp. 3d 1131, 1147 (M.D. Ala. 2022) (applying heightened scrutiny to a law that prohibited various medical treatments for gender dysphoria in minors).[13]

c. Heightened scrutiny applies because the Act discriminates against all participants in female sports.

In addition to discriminating on the basis of transgender status, the Act discriminates on the basis of sex, because only students who participate on female designated sports teams, and not students who participate on male designated sports teams, are subject to the sex dispute verification process. The Act expressly states that only "[a]thletic teams or sports designated for females, women, or girls shall not be open to students of the male sex." Idaho Code § 33-6203(2). The Act does not ban "biological females" from "teams or sports designated for males." Therefore, transgender and cisgender men who compete on male-designated teams are not subject to the sex dispute verification process. The sex dispute

[13] Both Idaho and the Intervenors note that the Eleventh Circuit expressed "grave doubt" in a footnote in *Adams* that transgender people constitute a "quasi-suspect class." *Adams*, 57 F.4th at 803 n.5 (internal quotation marks omitted). This dictum is unpersuasive, as the Eleventh Circuit declined to decide the issue or further opine on its "doubt." In any event, as a three-judge panel we cannot overrule the binding precedent of our circuit. *See Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003).

verification process simply does not apply to male designated sports teams.

The Act thus classifies on the basis of sex by subjecting 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 as a prerequisite for participation on school sports teams. And where women's and girls' sports are subject to separate requirements for educational opportunities that are "unequal in tangible and intangible" ways from those for men, those requirements are tested under heightened scrutiny. *VMI*, 518 U.S. at 547.

2. The Act likely does not survive heightened scrutiny.

The district court correctly concluded that the Act likely does not survive heightened scrutiny. Heightened scrutiny is a "demanding" standard, with the burden "rest[ing] entirely on the State" to demonstrate an "exceedingly persuasive" justification for its differential treatment. *VMI*, 518 U.S. at 533. To survive heightened scrutiny, the government must demonstrate "that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Id.* at 516 (alteration in original) (internal quotation marks and citations omitted). Our review under heightened scrutiny is an extremely fact-bound test, requiring us to "examine [a policy's] actual purposes and carefully consider the resulting inequality to ensure our most fundamental institutions neither send nor reinforce messages of stigma or second-class status." *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d

471, 483 (9th Cir. 2014).

Appellants contend that, "[d]ue to the average physiological differences" between men and women, the Act substantially advances the important state interest of "promot[ing] sex equality . . . by providing opportunities for female athletes to demonstrate their skill, strength, and athletic abilities [and] opportunities to obtain recognition and accolades, college scholarships, and the numerous other long-term benefits that flow from success in athletic endeavors." Idaho Code § 33-6202(12). We have previously held that furthering women's equality and promoting fairness in female athletic teams is an important state interest. *Clark I*, 695 F.2d at 1131. However, on the record before us, the district court correctly determined that the Act's means—categorically banning transgender women and girls from all female athletic teams and subjecting all participants in female athletics to intrusive sex verification procedures—likely are not substantially related to, and in fact undermine, those asserted objectives.

a. *Clark I* and *Clark II* do not control the outcome of Lindsay's claim.

Our decisions in *Clark I* and *Clark ex rel. Clark v. Arizona Interscholastic Ass'n (Clark II)*, 886 F.2d 1191 (9th Cir. 1989), are inapposite. In *Clark I* and *Clark II*, we held that public high schools could constitutionally prohibit cisgender male student athletes from participation on women's teams in order to further the important government interest of "redressing past discrimination against women in athletics and promoting equality of opportunity

between the sexes." *Clark I*, 695 F.2d at 1131.

Specifically in *Clark I*, we held that an Arizona Interscholastic Association policy that separated high school volleyball teams by gender and prohibited boys from playing on girls' teams did not violate the Equal Protection Clause. *Clark I*, 695 F.2d at 1127. There, Clark wished to play on the girls' volleyball team because his particular high school did not offer boys' volleyball teams. *Id.* We first recognized that, in applying heightened scrutiny, "the Supreme Court is willing to take into account actual differences between the sexes, including physical ones." *Id.* at 1229 (citing *Michael M. v. Sonoma Cnty. Superior Ct.*, 450 U.S. 464, 468–69 (1981) (upholding a statutory rape statute that held only males culpable because only women can become pregnant, thus furthering the government's interest in preventing teen pregnancy)). We concluded that general gender separation in school sports was substantially related to the government's interest in women's equality in athletics. *Id.* at 1131. We reasoned that "due to average physiological differences, males would displace females to a substantial extent if they were allowed to compete for positions on the volleyball team." *Id.* Thus, if men were allowed to compete on the women's teams, women's overall athletic opportunities would decrease, while men's overall athletic opportunities would remain greater than women's.

Eight years later, in *Clark II*, the original *Clark I* plaintiff's brother brought a second "mystifying" action challenging the same policy, arguing that the state "ha[d] been wholly deficient in its efforts to overcome the effects of past discrimination against

women in interscholastic athletics, and that this failure vitiate[d] its justification for a girls-only volleyball team." *Clark II*, 886 F.2d at 1193. Applying *Clark I*, we affirmed that the gender classification for Arizona school sports was constitutional. *Id.* at 1194.

Appellants argue that "[t]he only difference between Hecox and the Clark brothers is gender identity," which does not change the physiological advantages that "biological males" have over cisgender women. But this is a false assumption. First, Lindsay takes medically prescribed hormone therapy to suppress her testosterone and raise her estrogen levels. This treatment has lowered her circulating testosterone levels—which impact athletic prowess and have slowed her racing times by at least "five to ten percent"—and her testosterone levels were "well below the levels required to meet NCAA eligibility for cross country and track" in Fall 2022, as the district court found. *See Hecox I*, 479 F. Supp. 3d at 946. Lindsay's treatment has dramatically altered her bodily systems and secondary sex characteristics. As the district court found, "it is not clear that transgender women who suppress their testosterone have significant physiological advantages over cisgender women," unlike the cisgender boys at issue in *Clark I* and *Clark II*. *Id.* at 978. The record in *Clark I* made clear that sex was a valid proxy for average physiological differences between men and women. Here, by contrast, the district court found that the ban on transgender female athletes applies broadly to many students who do *not* have athletic advantages over cisgender female athletes. Thus, a faithful application of *Clark I* supports, rather than undermines, the district court's reasoning here.

Second, as the district court noted, transgender women, "like women generally . . . have historically been discriminated against, not favored." *Id.* at 977. A recent study by the CDC concluded that "transgender students reported significantly higher incidents of being bullied, feeling unsafe traveling to or from school, being threatened with a weapon at school, and being made to engage in unwanted sexual relations." Br. of Amici Curiae GLBTQ Legal Advocates & Defenders and the National Center for Lesbian Rights, at 9; *see also Whitaker*, 858 F.3d at 1051 ("There is no denying that transgender individuals face discrimination, harassment, and violence because of their gender identity."). Unlike the policy in *Clark I*, the Act perpetuates historic discrimination against both cisgender and transgender women by categorically excluding transgender women from athletic competition and subjecting all participants in women's athletics to an invasive sex dispute verification process.

Moreover, the district court correctly found that "under the Act, women and girls who are transgender will not be able to participate in any school sports, unlike the boys in *Clark I*, who generally had equal [or greater] athletic opportunities." *Hecox I*, 479 F. Supp. 3d at 977. Here, unlike in *Clark I*, transgender women are not being denied one "particular opportunity" to participate on women's teams even though their "overall opportunity is not inferior" to that of women. *Clark I*, 695 F.2d at 1126. As a practical matter, the Act bars transgender women and girls in Idaho from all participation in student athletics—under its explicit terms, they cannot play on teams that conform to their transgender status.

The argument advanced by Representative Ehardt that the Act does not discriminate against transgender women because they can still 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. *See Latta*, 771 F.3d at 467 (holding unconstitutional two marriage bans that "distinguish on their face between opposite-sex couples who are permitted to marry and whose out-of-state marriages are recognized, and same-sex couples, who are not permitted to marry and whose marriages are not recognized"). As medical expert Dr. Jack Turban stated, "forcing [transgender students] to play on a sports team that does not match their gender identity would damage their mental health" by "forcing them to express themselves as cisgender." Lindsay declared that she would never compete on a men's team, as it would be "embarrassing and painful to be forced onto a team for men—like constantly wearing a big sign that says 'this person is not a "real" woman.'"

The district court also found that, on the record before it, "transgender women have not and could not 'displace' cisgender women in athletics 'to a substantial extent.'" *Hecox I*, 479 F. Supp. 3d at 977 (quoting *Clark I*, 695 F.2d at 1131). Appellants misrely on a single line from *Clark II* to argue that the participation of just one transgender woman on a team risks displacing any individual cisgender woman: "If males are permitted to displace females on the school volleyball team even to the extent of one player like Clark, the goal of equal participation by females in interscholastic athletics is set back, not

advanced." *Clark II*, 886 F.2d at 1193. This statement, however, was made in response to the argument in *Clark II* that because sex separation had not fully met Arizona's goal of equality of participation in sports, Arizona no longer had an important interest in the policy. We did not think Clark's proposed remedy for the inequality of opportunities for female athletes—allowing him to play on the girls' teams—would advance the "goal of equal participation by females in interscholastic sports." *Id.* Because transgender women represent about 0.6 percent of the general population, the district court did not err in finding it unlikely that they would displace cisgender women from women's sports.

The only issue we decided in *Clark*—whether a sex-based classification was constitutionally permissible—is not in dispute here. Lindsay does not challenge the exclusion of cisgender males from female-designated sports. The question that is presented here—whether a classification based on transgender status is constitutionally permissible—is one that was not presented or discussed in *Clark*.

b. The Act is likely not substantially related to an important government interest.

Nor did the district court err in concluding that the Act likely fails heightened scrutiny because it is not substantially related to its stated goals of equal participation and opportunities for women athletes. The district court concluded that the Act's categorical ban does not advance its asserted objectives based on three factual findings, none of which is "illogical, implausible, or without support in inferences that

may be drawn from the facts in the record." *Pom Wonderful LLC v. Hubbard*, 775 F.3d 1118, 1123 (9th Cir. 2014) (citation omitted). Moreover, the Act's sweeping prohibition on transgender female athletes in Idaho—encompassing all students, regardless of whether they have gone through puberty or hormone therapy, without any evidence of transgender athletes displacing female athletes in Idaho, and enforced through a mechanism that subjects all participants in female athletics to the threat of an invasive physical examination—is likely too unrelated to the State's legitimate objectives to satisfy heightened scrutiny.

First, the district court found that there was scientifically "no evidence to suggest a categorical bar against a transgender female athlete's participation in sports is required in order to promote 'sex equality' or to 'protect athletic opportunities for females' in Idaho." *Hecox I*, 479 F. Supp. 3d at 978–79. Appellants argue that the district court misread the available medical evidence, which they contend demonstrates that endogenous testosterone levels give "biological males" a permanent athletic advantage over cisgender women. However, the district court did not clearly err by relying upon the testimony of a medical expert, Dr. Safer, who testified that there was a medical consensus that the "primary known driver of differences in athletic performance between elite male athletes and elite female athletes" is "the difference in [circulating] testosterone" levels, as opposed to "endogenously produced" testosterone levels, and "[a] person's genetic make-up and internal and external reproductive anatomy are not useful indicators of athletic performance and have not been

used in elite competition for decades." The district court reasonably credited Dr. Safer's opinion that a transgender woman who received hormone therapy to lower her circulating levels of testosterone would likely not have "physiological characteristics" that would lead to enhanced athletic prowess when compared to a cisgender woman.

Appellants presented contrary medical testimony by Dr. Gregory Brown that hormone therapy suppression did not eliminate all of the physiological advantages that an individual experiences through male puberty. However, as the district court found, Dr. Brown's opinion was not supported by the studies he relied upon, because the majority of the studies he cited discussed the average differences between male and female athletes in general, not the difference between transgender and cisgender women athletes. And one study that he cited—the Handelsman study—actually came to the opposite conclusion, concluding that "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."

The studies that the Idaho legislature relied upon to conclude that the benefits of "natural testosterone" could not be diminished through hormone therapy were likewise flawed. For example, one of the studies was altered after peer review to remove its conclusions regarding transgender athletes, and, as Idaho concedes, that "study and its findings were not based specifically on transgender athletes." The legislature also relied on a study by Professor Coleman, who personally urged Governor Little to veto the bill because the legislature had

misinterpreted her work.

Moreover, as the district court found, the Act sweeps much more broadly than simply excluding transgender women who have gone through "endogenous puberty." The Act's categorical ban includes transgender students who are young girls in elementary school or even kindergarten. Other transgender women take puberty blockers and never experience endogenous puberty, yet the Act indiscriminately bars them from participation in women's student athletics, regardless of their testosterone levels. Although the scientific understanding of transgender women's potential physiological advantage is fast-evolving and somewhat inconclusive, we are limited to reviewing the record before the district court. And the record in this case does not ineluctably lead to the conclusion that all transgender women, including those like Lindsay who receive hormone therapy, have a physiological advantage over cisgender women.

Second, as the district court found, there was very little anecdotal evidence at the time of the Act's passage that transgender women had displaced or were displacing cisgender women in sports or scholarships or like opportunities. In 2020, both the IOC and the NCAA required transgender women to suppress their testosterone for only a year for eligibility to compete on women's teams.[14] The record

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[14] Although today the IOC and NCAA policies evaluate eligibility for transgender participation in athletics on a sport-by-sport basis, neither policy endorses the categorical exclusion of transgender women. They instead favor an "evidence-based approach" with "no presumption of advantage." Int'l Olympics Comm., *IOC Framework on Fairness, Inclusion and Non-*

before the district court includes anecdotal evidence of only four transgender athletes who had ever competed in cisgender women's sports, including two high school runners who competed in Connecticut and were subsequently defeated by cisgender women in competition. While the Intervenors state they were defeated by a transgender athlete, June Eastwood, in a running competition at the University of Montana, Eastwood eventually lost to a different cisgender athlete in that same competition. Lindsay's own athletic career belies the contention that transgender women who have undergone male puberty have an absolute advantage over cisgender women: she has never qualified for BSU's track team despite trying out.

There is likewise no evidence in the record of a transgender woman receiving an athletic scholarship over a cisgender woman in Idaho. Moreover, as the

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Discrimination on the Basis of Gender Identity and Sex Variations 4 (2021), https://stillmed.olympics.com/media/Documents/Beyond-the-Games/Human-Rights/IOC-Framework-Fairness-Inclusion-Non-discrimination-2021.pdf#page=4 (last visited June 6, 2023); *see also* Nat'l Collegiate Athletics Ass'n, *Transgender Student-Athlete Participation Policy* (April 17, 2023), https://www.ncaa.org/sports/2022/1/27/transgender-participation-policy.aspx (last visited May 24, 2023). And while the World Athletics Council, the international governing body for track and field, recently adopted a more stringent policy of categorically excluding postpubescent transgender women from elite athletic competitions, its policy does not bar transgender women who have not experienced endogenous puberty from eligibility. *See* Press Release, World Athletics Counsel, World Athletics Council Decides on Russia, Belarus, and Female Eligibility (Mar. 23, 2023), https://worldathletics.org/news/pressreleases/council-meeting-march-2023-russia-belarus-female-eligibility (last visited May 24, 2023).

district court noted, the Act's broad sweep—banning transgender women's participation not just in high school and college athletics, but elementary school and club sports—"belies any genuine concern with an impact on athletic scholarships," which are relevant to only a small portion of the competitive teams encompassed by the Act. *Hecox I*, 479 F. Supp. 3d at 983.

Of course, when applying heightened scrutiny, we "must accord substantial deference to the predictive judgments" of legislative bodies. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665 (1994). But this does not "insulate[]" predictive judgments "from meaningful judicial review altogether." *Id.* at 666. "[U]nsupported legislative conclusions as to whether particular policies will have societal effects of the sort at issue in this case—determinations which often, as here, implicate constitutional rights—have not been afforded deference by the [Supreme] Court." *Latta*, 771 F.3d at 469; *see also Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 784 (9th Cir. 2014) (en banc) ("[T]he absence of any credible showing that the [challenged law] addressed a particularly acute problem" was "quite relevant" to a showing that the law did not survive heightened scrutiny.). A vague, unsubstantiated concern that transgender women might one day dominate women's athletics is insufficient to satisfy heightened scrutiny.

Third, the district court questioned the Act's true objectives, finding that Idaho's interest was not in "promoting sex equality" but in "excluding transgender women and girls from women's sports entirely." *Hecox I*, 479 F. Supp. 3d at 983. Before the Act's passage, the existing NCAA and Idaho state

rules governed transgender women's participation as measured by circulating testosterone levels, and there was no record evidence that transgender women and girls threatened to dominate female student athletics. The record indicates that Idaho may have wished "to convey a message of disfavor" toward transgender women and girls, who are a minority in this country. *See Latta*, 771 F.3d at 476. And "[t]his is a message that Idaho . . . simply may not send" through unjustifiable discrimination.[15] *Id.* at 476.

Further evidencing the lack of means-ends fit between the categorical ban of transgender female

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[15] The Fourth Circuit recently held that West Virginia's categorical ban could not be applied to "prevent a 13-year-old transgender girl who takes puberty blocking medication and has publicly identified as a girl since the third grade from participating in her school's cross country and track teams." *B.P.J. by Jackson v. W. Va. State Bd. of Educ.*, 98 F.4th 542, 550 (4th Cir. 2024). Other federal and state courts have similarly enjoined transgender sports bans, and no categorical ban has yet been upheld on appeal. *See Doe v. Horne*, No. 23-16026 (9th Cir.) (pending appeal challenging the preliminary injunction against Arizona's statute regulating transgender female athlete participation); *A.M. by E.M. v. Indianapolis Pub. Sch.*, 617 F. Supp. 3d 950, 969 (S.D. Ind. July 26, 2022), *appeal dismissed*, No. 22-2332, 2023 WL 371646, at *1 (7th Cir. Jan. 19, 2023) (granting a preliminary injunction against transgender participation in athletics under Title IX); *Roe v. Utah High Sch. Activities Ass'n,* No. 220903262, 2022 WL 3907182, at *1 (Utah Dist. Ct. Aug. 19, 2022) (granting a preliminary injunction against a categorical ban under the Utah Constitution's equivalent of an equal protection clause); *see also Barrett v. Montana*, No. DV-21-581B, at *5–7 (Mont. Dist. Ct. Sept. 14, 2022) (granting summary judgment against a categorical ban on the ground that only Montana public university officials have the authority to regulate athletic competition in public universities).

athletes and the Legislature's purported purpose of promoting athletic equality is the Act's overly broad enforcement mechanism: the sex dispute verification provision, which is integral to the Act's operation.[16] Under the Act, anyone—be it a teammate, coach, parent, or a member of an opposing team—may "dispute" a player's "biological sex," requiring that player to visit her "personal health care provider . . . [who will] verify the student's biological sex" through the player's "reproductive anatomy, genetic makeup, or normal endogenously produced testosterone levels." Idaho Code § 33-6203(3). The Act's express terms limit the verification procedure to a "routine sports physical examination" by "relying *only* on one (1) or more of the following: the student's reproductive anatomy, genetic makeup, or normal endogenously produced testosterone levels." *Id.* (emphasis added). By its plain text, the Act provides that a student's sex can be verified exclusively by these three enumerated methods. Thus, the district court reasonably found incredulous defense counsel's argument that the Act merely required Lindsay to obtain a letter from her

[16] In its petition for rehearing en banc, Idaho argues that Lindsay lacks Article III standing to challenge the dispute and sex verification procedures. Pet. Reh'g En Banc at 2, 15–16. We need not address this argument because we do not consider whether the dispute and sex verification procedures constitute an independent equal protection violation; we address only whether Lindsay is likely to succeed on her equal protection challenge to the transgender ban as a whole. Furthermore, to the extent Idaho challenges Lindsay's standing to challenge section 33-6203(3), we reject the argument. Lindsay has standing to challenge section 33-6203(3) because it is an integral part of the transgender ban that she indisputably has standing to challenge—it supplies "the Act's definition of 'biological sex.'" *Hecox I*, 479 F. Supp. 3d at 984.

doctor stating that Lindsay "is female." *Hecox I*, 479 F. Supp. 3d at 964 & n.19, 983. If that was all that was required to verify a student's sex under the Act, Lindsay could simply obtain such a statement and the Act (and this appeal) would be rendered meaningless.

Any one of the three exclusive procedures requires far more than a "routine sports physical" exam or simply asking whether a patient is female or not. As Lindsay's medical expert Dr. Sara Swobada described, analyzing a student's "genetic makeup" would require referral to a "pediatric endocrinologist" who would conduct a "chromosomal microarray" that would reveal a "range of genetic conditions" beyond sex chromosomes. Hormone testing would also require an "pediatric endocrinologist," and is not a "routine part of any medical evaluation." Of course, the expense and burden of these tests would be borne only by the students who play female athletics and their families.

Requiring a student to find a medical practitioner to examine their reproductive anatomy, which is what a typical gynecological exam entails, is unconscionably invasive, with the potential to traumatize young girls and women. As Dr. Swobada opined, examining a female patient's "reproductive anatomy" would necessitate inspecting a student athlete's genitalia and conducting a pelvic examination or transvaginal ultrasound to determine whether that student has ovaries. She further explained that pelvic examinations for young patients are generally not required for minors, including adolescents, and are only conducted when medically necessary "with sedation and appropriate comfort measures to limit psychological trauma." Yet the Act's

sex verification process subjects girls as young as elementary schoolers to unnecessary gynecological examinations merely because an individual "disputes" their sex.

The psychological burden of these searches falls not only on transgender women like Lindsay but also on *all* women and girls who play female athletics. As amici describe, "[s]ex verification procedures have a long, checkered history in female sports that continue to this day." Br. of Amici Curiae National Women's Law Center, et al. at 15. In the 1960s, the IOC would force female athletes to strip and parade in front of a panel of doctors to prove that they were, in fact, women. *Id.* The process was discontinued after a public outcry. *Id.* One intersex athlete who failed a sex verification procedure described being "so 'tormented' and 'unbearably embarrassed' that 'she attempted suicide' by 'swallowing poison.'" *Id.* at 17 (quoting Ruth Padawer, *The Humiliating Practice of Sex-Testing Female Athletes*, N.Y. Times Magazine (June 28, 2016)). Tellingly, while many athletic organizations have tightened their rules for transgender women's competition since 2020, none appears to have instituted a process that required gynecological examinations or invasive physical examinations.[17] Of the twenty-four other states that have passed restrictions on transgender women's participation in women's sports, none has authorized

[17] The IOC has expressly disavowed invasive sex verification procedures, stating that "[c]riteria to determine eligibility for a gender category should not include gynecological examinations or similar forms of invasive physical examinations, aimed at determining an athlete's sex, sex variations or gender." *See* Int'l Olympic Comm., *supra*, at 5.

a similar sex verification process.[18] Idaho has not offered any "exceedingly persuasive justification" warranting the imposition of this objectively degrading and disturbing process on young women and girls who participate in female athletics.

We must "reject measures that classify unnecessarily and overbroadly by gender when more accurate and impartial lines can be drawn." *Sessions v. Morales-Santana*, 137 582 U.S. 47, 63 n.13 (2017). While the Act purports to further athletic opportunities for Idaho's female students, the district court correctly concluded that the Act does not further this goal, and in fact "appears unrelated to the interests the Act purportedly advances." *Hecox I*, 470 F. Supp. 3d at 979. And "[i]ntentional discrimination on the basis of gender by state action violates the Equal Protection Clause[] where, as here, the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 131 (1994). Thus, we need not and do not decide what policy would justify the exclusion of transgender women and girls from Idaho athletics under the Equal Protection Clause, because the profound lack of means-end fit here demonstrates that the Act likely does not survive heightened scrutiny.

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[18] Most states that have instituted categorical bans on transgender participation in student athletics have verified sex via a student's birth certificate. Oklahoma and Kentucky require a student or a student's parent or legal guardian submit sworn affidavits to confirm their "biological sex." *See* Okla. Stat. Ann. tit. 70, § 27-106(D); Ky. Rev. Stat. Ann. § 164.2813(2).

B. Irreparable Harm

The district court properly concluded that Lindsay faced irreparable harm absent an injunction. "It is well established that the deprivation of constitutional rights unquestionably constitutes irreparable injury." *Hernandez v. Sessions*, 872 F.3d 976, 994 (9th Cir. 2017) (internal quotation marks and citation omitted). Therefore, as the Act is likely unconstitutional, "it follows inexorably . . . that [Hecox] ha[s] [] carried [her] burden as to irreparable harm." *Id.* at 995.

More concretely, if the preliminary injunction is lifted, Lindsay will be barred from trying out for or participating on any women's sports at BSU, including the women's club soccer team, which she joined to improve her running skills and experience "the camaraderie of being on a team." *See* Idaho Code § 33-6203(3). Lindsay would also be subject to the threat of the sex dispute verification process and unnecessary examinations or medical testing. These are all specific "harm[s] for which there is no adequate legal remedy" in the absence of an injunction. *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014).

C. Balance of the Equities & Public Interest

The district court also did not err in concluding that the balance of the equities weighed in favor of a preliminary injunction. The third and fourth preliminary injunction factors—assessing the harm to the opposing party and weighing the public interest—merge where, as here, the government is the opposing party. *Nken*, 556 U.S. at 435. Here, Lindsay faces deeply personal, irreparable harms

without injunctive relief, including being barred from all female college athletic teams and the prospect of invasive medical testing if her gender is "disputed."

The preliminary injunction does not appear to inflict any comparable harm on the Appellants. Under the pre-Act status quo, the NCAA policies for college athletics and the IHSAA policies for high school athletics govern transgender female participation in sports, and Idaho schools have complied with those policies for over a decade. The district court found no "evidence that transgender women threatened equality in sports, girls' athletic opportunities, or girls' access to scholarships in Idaho" during that decade, and thus Appellants failed to demonstrate any harm from issuance of the injunction. *Hecox I*, 479 F. Supp. 3d at 988. Moreover, as the district court found, Intervenors themselves may also be harmed by the sex dispute verification process, to which they are subject simply by virtue of playing sports in Idaho. Because "the public interest and the balance of the equities favor preven[ting] the violation of a party's constitutional rights," *Ariz. Dream Act*, 757 F.3d at 1060 (alteration in original) (internal quotation marks and citation omitted), we affirm that the district court did not abuse its discretion in weighing this factor.

IV. SCOPE OF THE INJUNCTION

Although we agree with the district court that the Act harms "not just the constitutional rights of transgender girls and women athletes . . . [but also] the constitutional rights of every girl and woman athlete in Idaho," we remand to the district court to clarify the scope of the preliminary injunction. *Hecox*

I, 479 F. Supp. 3d at 988. "A district court has considerable discretion in fashioning suitable relief and defining the terms of an injunction," and "[a]ppellate review of those terms 'is correspondingly narrow.'" *Lamb-Weston, Inc. v. McCain Foods, Ltd.*, 941 F.2d 970, 974 (9th Cir. 1991) (quoting *Coca-Cola Co. v. Overland, Inc.*, 692 F.2d 1250, 1256 n.16 (9th Cir.1982)). However, injunctive relief "must be tailored to remedy the specific harm alleged," and "[a]n overbroad injunction is an abuse of discretion." *Id.* (finding that a worldwide injunction to protect a trade secret was *not* an abuse of discretion). Under Federal Rule of Civil Procedure Rule 65(d)(1), "[e]very order granting an injunction . . . must: (A) state the reasons why it issued; (B) state its terms specifically; and (C) describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required."

Here, the scope of the injunction is not clear. Although the district court granted Plaintiffs' motion for preliminary injunction, the court's order does not specify whether enforcement of the Act is enjoined in whole or in part, nor does it specify whether enforcement of the Act is enjoined facially or as applied to particular persons. *See Hecox I*, 479 F. Supp. 3d at 988. On remand, the district court should tailor the injunction to provide the specificity that Rule 65(d)(1) requires.

We do not agree with the Intervenors, however, that the preliminary injunction would necessarily be overbroad as a matter of law if it extends to nonparties despite the district court's dismissal of Lindsay's facial challenge. "[A]n injunction 'should be no more burdensome to the defendant than necessary

to provide complete relief to the plaintiffs before the court.'" *City & County of San Francisco v. Barr*, 965 F.3d 753, 765 (9th Cir. 2020) (quoting *L.A. Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664 (9th Cir. 2011)). "[B]ut there is 'no general requirement that an injunction affect only the parties in the suit.'" *East Bay Sanctuary Covenant*, 993 F.3d 640, 680 (9th Cir. 2021) (quoting *Bresgal v. Brock*, 843 F.2d 1163, 1169–1170 (9th Cir. 1987). Rather, "[t]he equitable relief granted by the district court is acceptable where it is necessary to give prevailing parties the relief to which they are entitled." *Id.* (quotation marks omitted). Before deciding whether it can accord Lindsay complete relief without enjoining the Act in part or in whole as to all female student athletes in Idaho, the district court should consider the effect, if any, of the Supreme Court's decision in *Labrador v. Poe*, 144 S. Ct. 921 (2024).

V.

While we address only the Act before us, and opine on no other regulation or policy, we must observe that both the science and the regulatory framework surrounding issues of transgender women's participation in female-designated sports is rapidly evolving. Since Lindsay filed her initial challenge, the IOC and NCAA have adopted more limited policies as to transgender female participation in women's sports, requiring the governing entities for each sport to formulate sport-specific policies. Relying on medical evidence, many sports organizations have tightened their eligibility criteria for transgender women's teams, including incorporating guidelines for lower testosterone levels

for eligibility to compete.[19] The U.S. Department of Education has proposed new Title IX regulations addressing restrictions on transgender athletes' eligibility that would require "such criteria" to "be substantially related to the achievement of an important educational objective and minimize harms to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied."[20] These more narrowly drawn policies, which are not before us, attempt to balance transgender inclusion with competitive fairness—a policy question that such regulatory bodies are best equipped to address.

VI. CONCLUSION

We recognize that, after decades of women being denied opportunities to meaningfully participate in

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[19] *See*, *e.g.*, USA Swimming, *USA Swimming Releases Athlete Inclusion, Competitive Equity and Eligibility Policy* (Feb. 1, 2022), https://tinyurl.com/mr2k4tvp (announcing a policy for USA Swimming that elite transgender women athletes must show testosterone levels below 5 nmol/L continuously for at least 36 months); Bicycling, *The UCI Announces Changes to Its Policy on Transgender Athletes* (June 17, 2022), https://www.bicycling.com/news/a40320907/uci-transgender-policy-2022/ (announcing a testosterone limit of 2.5 nmol/L for elite bicyclists (halved from the previous 5.0 nmol/L) for a suppression period of 24 months); Olalla Cernuda, *World Triathlon Executive Board approves Transgender Policy*, World Triathlon (Aug. 3, 2022), https://tinyurl.com/yxw4syzw (requiring below a 2.5 nmol/L testosterone level for 24 months for triathletes).

[20] 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. 22860 (proposed April 13, 2023) (to be codified at 34 C.F.R. pt. 106).

athletics in this country, many cisgender women athletes reasonably fear being shut out of competition because of transgender athletes who "retain an insurmountable athletic advantage over cisgender women." *See* Br. of Amici Curiae Sandra Bucha, et al. at 8. We also recognize that athletic participation confers on students not just an opportunity to win championships and scholarships, but also the benefits of shared community, teamwork, leadership, and discipline. *See generally* Br. of Amici Curiae 176 Athletes in Women's Sports (describing the benefits of sports, and diversity in women's sports, on all students). Excluding transgender youth from sports necessarily means that some transgender youth will be denied those educational benefits.

However, we need not and do not decide the larger question of whether any restriction on transgender participation in sports violates equal protection. Heightened scrutiny analysis is an extraordinarily fact-bound test, and today we simply decide the narrow question of whether the district court, on the record before it, abused its discretion in finding that Lindsay was likely to succeed on the merits of her equal protection claim. Because it did not, we affirm the district court's order granting preliminary injunctive relief as applied to Lindsay, vacate the injunction as applied to nonparties, and remand to the district court to address the scope and clarity of the injunction.

AFFIRMED IN PART; VACATED IN PART; REMANDED.

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See Volume 2 for attachments to Amended Opinion

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LINDSAY HECOX; JANE DOE, with her next friends Jean Doe and John Doe, Plaintiffs-Appellees, v. BRADLEY LITTLE, in his official capacity as Governor of the State of Idaho; SHERRI YBARRA, in her official capacity as the Superintendent of Public Instruction of the State of Idaho and as a member of the Idaho State Board of Education; INDIVIDUAL MEMBERS OF THE STATE BOARD OF EDUCATION, in their official capacities; BOISE STATE UNIVERSITY; MARLENE TROMP, in her official capacity as President of Boise State University; INDEPENDENT SCHOOL DISTRICT OF BOISE CITY, # 1; COBY DENNIS, in his official capacity as superintendent of the Independent School District of Boise City #1; INDIVIDUAL	No. 20-35813 D.C. No. 1:20-cv-00184-DCN ORDER

MEMBERS OF THE BOARD OF TRUSTEES OF THE INDEPENDENT SCHOOL DISTRICT OF BOISE CITY, # 1; in their official capacities; INDIVIDUAL MEMBERS OF THE IDAHO CODE COMMISSION, in their official capacities,

Defendants-Appellants,

and

MADISON KENYON; MARY MARSHALL,

Intervenors.

LINDSAY HECOX; JANE DOE, with her next friends Jean Doe and John Doe,

Plaintiffs-Appellees,

v.

BRADLEY LITTLE, in his official capacity as Governor of the State of Idaho; SHERRI YBARRA, in her official capacity as the Superintendent of Public Instruction of the State of Idaho and as a member of the Idaho State Board of Education; INDIVIDUAL

No. 20-35815

D.C. No. 1:20-cv-00184-DCN

MEMBERS OF THE STATE BOARD OF EDUCATION, in their official capacities; BOISE STATE UNIVERSITY; MARLENE TROMP, in her official capacity as President of Boise State University; INDEPENDENT SCHOOL DISTRICT OF BOISE CITY, # 1; COBY DENNIS, in his official capacity as superintendent of the Independent School District of Boise City #1; INDIVIDUAL MEMBERS OF THE BOARD OF TRUSTEES OF THE INDEPENDENT SCHOOL DISTRICT OF BOISE CITY, # 1; in their official capacities; INDIVIDUAL MEMBERS OF THE IDAHO CODE COMMISSION, in their official capacities,

Defendants,

and

MADISON KENYON; MARY MARSHALL,

Intervenors-Appellants.

Before: WARDLAW, GOULD, and CHRISTEN,

Circuit Judges.

In light of the amended opinion filed on June 7, 2024 (Dkt. No. 251), the petitions for rehearing en banc (Dkt. Nos. 219 and 220) are **DENIED** as moot. The parties may file new petitions for panel rehearing or rehearing en banc in accordance with Federal Rules of Appellate Procedure 35(c) and 40(a)(1).

IT IS SO ORDERED.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LINDSAY HECOX; JANE DOE, with her next friends Jean Doe and John Doe, *Plaintiffs-Appellees,* v. BRADLEY LITTLE, in his official capacity as Governor of the State of Idaho; SHERRI YBARRA, in her official capacity as the Superintendent of Public Instruction of the State of Idaho and as a member of the Idaho State Board of Education; INDIVIDUAL MEMBERS OF THE STATE BOARD OF EDUCATION, in their official capacities; BOISE STATE UNIVERSITY; MARLENE TROMP, in her official capacity as President of Boise State University; INDEPENDENT SCHOOL DISTRICT OF BOISE CITY, # 1; COBY DENNIS, in his official capacity as superintendent of the	No. 20-35813 D.C. No. 1:20-cv-00184-DCN ORDER

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No. 20-35815

D.C. No. 1:20-cv-00184-DCN

Idaho State Board of Education; INDIVIDUAL MEMBERS OF THE STATE BOARD OF EDUCATION, in their official capacities; BOISE STATE UNIVERSITY; MARLENE TROMP, in her official capacity as President of Boise State University; INDEPENDENT SCHOOL DISTRICT OF BOISE CITY, # 1; COBY DENNIS, in his official capacity as superintendent of the Independent School District of Boise City #1; INDIVIDUAL MEMBERS OF THE BOARD OF TRUSTEES OF THE INDEPENDENT SCHOOL DISTRICT OF BOISE CITY, # 1; in their official capacities; INDIVIDUAL MEMBERS OF THE IDAHO CODE COMMISSION, in their official capacities

Defendants,

and

MADISON KENYON; MARY MARSHALL

Intervenors-Appellants.

Filed April 29, 2024

Before: Kim McLane Wardlaw, Ronald M. Gould, and Morgan Christen, Circuit Judges.

SUMMARY*

Equal Protection/Transgender Status

In light of the Supreme Court's decision in *Labrador v. Poe*, No. 23A763, slip op. (U.S. Apr. 15, 2024), the panel withdrew its opinions filed on August 17, 2023, published at *Hecox v. Little*, 79 F.4th 1009 (9th Cir. 2023) (affirming the district court's order preliminary enjoining Idaho's Fairness in Women's Sports Act, a categorical ban on the participation of transgender women and girls in women's student athletics), with an amended opinion to follow in due course.

ORDER

The opinions filed on August 17, 2023 (Dkt. No. 218), published at *Hecox v. Little*, 79 F.4th 1009 (9th Cir. 2023), are withdrawn in light of the Supreme Court's decision in *Labrador v. Poe*, No. 23A763, slip op. (U.S. Apr. 15, 2024). An amended opinion will follow in due course.

IT IS SO ORDERED.

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

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LINDSAY HECOX; JANE DOE, with her next friends Jean Doe and John Doe, *Plaintiffs-Appellees,* v. BRADLEY LITTLE, in his official capacity as Governor of the State of Idaho; SHERRI YBARRA, in her official capacity as the Superintendent of Public Instruction of the State of Idaho and as a member of the Idaho State Board of Education; INDIVIDUAL MEMBERS OF THE STATE BOARD OF EDUCATION, in their official capacities; BOISE STATE UNIVERSITY; MARLENE TROMP, in her official capacity as President of Boise State University; INDEPENDENT SCHOOL DISTRICT OF BOISE CITY, # 1; COBY DENNIS, in his official capacity as superintendent of the	No. 20-35813 D.C. No. 1:20-cv-00184-DCN OPINION

Independent School District of Boise City #1; INDIVIDUAL MEMBERS OF THE BOARD OF TRUSTEES OF THE INDEPENDENT SCHOOL DISTRICT OF BOISE CITY, # 1; in their official capacities; INDIVIDUAL MEMBERS OF THE IDAHO CODE COMMISSION, in their official capacities

Defendants-Appellants,

and

MADISON KENYON; MARY MARSHALL

Intervenors.

LINDSAY HECOX; JANE DOE, with her next friends Jean Doe and John Doe,

Plaintiffs-Appellees,

v.

BRADLEY LITTLE, in his official capacity as Governor of the State of Idaho; SHERRI YBARRA, in her official capacity as the Superintendent of Public Instruction of the State of Idaho and as a member of the

No. 20-35815

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Idaho State Board of Education; INDIVIDUAL MEMBERS OF THE STATE BOARD OF EDUCATION, in their official capacities; BOISE STATE UNIVERSITY; MARLENE TROMP, in her official capacity as President of Boise State University; INDEPENDENT SCHOOL DISTRICT OF BOISE CITY, # 1; COBY DENNIS, in his official capacity as superintendent of the Independent School District of Boise City #1; INDIVIDUAL MEMBERS OF THE BOARD OF TRUSTEES OF THE INDEPENDENT SCHOOL DISTRICT OF BOISE CITY, # 1; in their official capacities; INDIVIDUAL MEMBERS OF THE IDAHO CODE COMMISSION, in their official capacities,

Defendants,

and

MADISON KENYON; MARY MARSHALL

Intervenors-Appellants.

Appeal from the United States District Court
for the District of Idaho
David C. Nye, Chief District Judge, Presiding

Argued and Submitted November 22, 2022
San Francisco, California

Filed August 17, 2023

Before: Kim McLane Wardlaw, Ronald M. Gould, and Morgan Christen, Circuit Judges.*

Opinion by Judge Wardlaw;
Partial Concurrence and Partial Dissent by
Judge Christen

SUMMARY**

Equal Protection/Transgender Status

The panel affirmed the district court's order preliminarily enjoining Idaho's Fairness in Women's Sports Act, a categorical ban on the participation of transgender women and girls in women's student athletics.

The Act bars all transgender women and girls from participating in, or trying out for, public school female sports teams at every age, from primary school

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* Pursuant to General Order 3.2(h), Judge Christen has been drawn to replace Judge Kleinfeld in this matter. Judge Christen has reviewed the briefs and the record, and listened to the recording of the oral argument in this case.

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

through college, and at every level of competition, from intramural to elite teams. It also provides a sex dispute verification process whereby any individual can "dispute" the sex of any female student athlete in the state of Idaho and require her to undergo intrusive medical procedures to verify her sex, including gynecological exams. Male student athletes in Idaho are not subject to a similar dispute process.

The panel held that the district court did not abuse its discretion when it found, on the record before it, that plaintiffs were likely to succeed on the merits of their claim that the Act violates the Equal Protection Clause of the Fourteenth Amendment.

Citing *United States v. Virginia*, 518 U.S. 515, 555 (1996), and *Karnoski v. Trump*, 926 F.3d 1180, 1200–01 (9th Cir. 2019), the panel stated that a heightened level of scrutiny applies to laws that discriminate on the basis of transgender status and sex. The district court did not err in concluding that heightened scrutiny applied because the Act discriminates on the basis of transgender status by categorically excluding transgender women from female sports and on the basis of sex by subjecting all female athletes, but not male athletes, to invasive sex verification procedures to implement that policy.

Because the Act subjects only women and girls who wish to participate in public school athletic competitions to an intrusive sex verification process and categorically bans transgender women and girls at all levels, regardless of whether they have gone through puberty or hormone therapy, from competing on female, women, or girls teams, and because the State of Idaho failed to adduce any evidence

demonstrating that the Act is substantially related to its asserted interests in sex equality and opportunity for women athletes, the panel held that plaintiffs were likely to succeed on the merits of their equal protection claim.

Concurring in part and dissenting in part, Judge Christen wrote that given the categorical sweep of the ban on transgender students, the medical consensus that circulating testosterone rather than transgender status is an accurate proxy for athletic performance, and the unusual and extreme nature of the Act's sex verification requirements, the district court did not abuse its discretion by granting injunctive relief.

Disagreeing with the majority in part, Judge Christen wrote that she read the sex dispute verification provision to apply to any student, male or female, who participates on women's or girls' athletic teams. Accordingly, it is the team an athlete chooses to join that dictates whether they are subject to the statute's verification process, not the athlete's sex. Judge Christen also wrote that the district court's injunction lacked specificity as required by Federal Rule of Civil Procedure 65(d)(1) because it failed, among other things, to specify whether it was enjoining all provisions of the Act, or only some of them, or whether it was enjoining any specific provision of the Act in its entirety or only as applied to certain classes of individuals. Finally, Judge Christen stated that the injunction was overbroad to the extent that it applies to transgender women who are not receiving gender-affirming hormone therapy.

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OPINION

WARDLAW, Circuit Judge:

In March 2020, Idaho enacted the Fairness in Women's Sports Act, Idaho Code §§ 33-6201–06 (2020) (the "Act"), a first-of-its-kind categorical ban on the participation of transgender women and girls in women's student athletics. At the time, Idaho had no history of transgender women and girls participating in competitive student athletics, even though Idaho's interscholastic athletics organization allowed transgender girls to compete on female athletic teams under certain specified conditions. Elite athletic regulatory bodies, including the National Collegiate Athletic Association (NCAA) and the International Olympic Committee (IOC), also had policies allowing transgender women athletes to compete if they met certain criteria. The Act, however, bars all transgender girls and women from participating in, or even trying out for, public school female sports teams at every age, from primary school through college, and at every level of competition, from intramural to elite teams. *See* Idaho Code § 33-6203(1)–(2). The Act also provides a sex dispute verification process whereby any individual can "dispute" the sex of any female student athlete in the state of Idaho and require her to undergo intrusive medical procedures to verify her sex, including gynecological exams. *See* Idaho Code § 33-6203(3). Male student athletes in Idaho are not subject to a similar dispute process.

Today, we decide only the question of whether the federal district court for the District of Idaho abused its discretion in August 2020 when it preliminarily enjoined the Act, holding that it likely violated the

Equal Protection Clause of the Fourteenth Amendment. Because the Act subjects only women and girls who wish to participate in public school athletic competitions to an intrusive sex verification process and categorically bans transgender girls and women at all levels from competing on "female[ ], women, or girls" teams, Idaho Code § 33-6203(2), and because the State of Idaho failed to adduce any evidence demonstrating that the Act is substantially related to its asserted interests in sex equality and opportunity for women athletes, we affirm the district court's grant of preliminary injunctive relief.

I. FACTUAL AND PROCEDURAL BACKGROUND

A.

As the district court noted, and as we recognize in this context, "such seemingly familiar terms as 'sex and gender' can be misleading," *Hecox v. Little*, 479 F. Supp. 3d 930, 945 (D. Idaho 2020) (quoting *Doe ex rel. Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 522 (3d Cir. 2018)). We therefore adopt the terminology that has been employed throughout this case.

"Gender identity" is "the term used to describe a person's sense of being male, female, neither, or some combination of both."[1] A person's "sex" is typically assigned at birth based on an infant's external genitalia, though "external genitalia" do not always align with other sex-related characteristics, which include "internal reproductive organs, gender identity, chromosomes, and secondary sex

[1] Joshua D. Safer & Vin Tangpricha, *Care of Transgender Persons*, 381 N. Eng. J. Med. 2451, 2451 (2019)

characteristics." A "transgender" individual's gender identity does not correspond to their sex assigned at birth, while a "cisgender" individual's gender identity corresponds with the sex assigned to them at birth. Around two percent of the population are born "intersex," which is an umbrella term for people "born with unique variations in certain physiological characteristics associated with sex, such as chromosomes, genitals, internal organs like testes or ovaries, secondary sex characteristics, or hormone production or response." *Id.* at 946 (internal quotation marks omitted).

Currently, over 1.6 million adults and youth identify as transgender in the United States, or roughly 0.6 percent of Americans who are 13 years old or older.[2] Youth ages 13 to 17 are significantly more likely to identify as transgender, with the Center for Disease Control (CDC) estimating that roughly 1.8 percent of high school students identify as transgender. *See* Br. of Amici Curiae Am. Acad. of Pediatrics, et al. ("AAP Br.") at 10.

Transgender individuals often experience "gender dysphoria," which is defined by the Fifth Edition of the Diagnostic and Statistics Manual of Mental Disorders (DSM-5) as a condition where patients experience "[a] marked incongruence between one's experienced/expressed gender and primary and/or secondary sex characteristics" that "is associated with clinically significant distress or impairment in social,

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[2] *See* Jody L. Herman, Andrew R. Flores, Kathryn K. O'Neill, *How Many Adults and Youth Identify as Transgender in the United States?*, Williams Inst. 1 (2022).

occupation, or other important areas of functioning."[3] For over 30 years, medical professionals have treated individuals experiencing gender dysphoria following the protocols laid out in the *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People (Version 7)*, which were developed by the World Professional Association for Transgender Health (WPATH). AAP Br. at 19.

B.

On March 16, 2020, Idaho passed House Bill 500 ("H.B. 500"), a categorical ban against transgender women and girls' participation in any public-school funded women's sport, implemented by subjecting all female athletes to an intrusive sex verification process if their gender is disputed by anyone. *See* H.R. 500, 65th Leg., 2d Reg. Sess. (Idaho 2020). Although Idaho was the first state in the nation to issue such a ban, twenty other states have enacted similar—though perhaps not as potentially intrusive against all female athletes—restrictions on female transgender athletes.[4]

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[3] *See* Am. Psychiatric Ass'n, *Diagnostic and Statistics Manual of Mental Disorders* 452–53 (5th ed. 2013).

[4] Since the Act's passage, twenty other states have passed laws limiting the participation of transgender students in women's athletics. However, no other state appears to have enacted an enforcement mechanism for those restrictions like the sex dispute verification process in the Act. *See* Ala. Code § 16-1-52 (2021); Ariz. Rev. Stat. Ann. § 15-120.02 (2022); Ark. Code Ann. § 6-1-107 (West 2021); Fla. Stat. Ann. § 1006.205 (West 2021); Ind. Code Ann. § 20-33-13-4 (West 2022); Iowa Code Ann. § 261I.2 (West 2022); H.B. 2238, 2023 Leg. Sess. (Kan. 2023); Ky. Rev. Stat. Ann. § 164.2813 (West 2022); La. Stat. Ann. § 4:442 (2022); Miss. Code Ann. § 37-97-1 (West 2021); Mont. Code Ann.

In the United States, high school interscholastic athletics are generally governed by state interscholastic athletic associations, such as the Idaho High School Activities Association (IHSAA). The NCAA sets policies for member colleges and universities, including Boise State University (BSU) and other Idaho colleges and universities. Prior to the Act's passage, IHSAA policy allowed transgender girls in K–12 athletics in Idaho to compete on girls' teams after they had completed one year of hormone therapy suppressing testosterone under the care of a physician. At that time, NCAA policy similarly allowed transgender women attending member colleges and universities in Idaho (and elsewhere) to compete on women's teams after one year of hormone therapy to suppress testosterone.[5] Idaho itself had no record of transgender women and girls participating in competitive women's sports.

On February 13, 2020, Representative Barbara

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§ 20-7-1306 (West 2021); Legis. Assemb. 1489, 68th Legis. Assemb., Reg. Sess. (N.D. 2023); Legis. Assemb. 1249, 68th Legis. Assemb., Reg. Sess. (N.D. 2023); Okla. Stat. Ann. tit. 70, § 27-106 (West 2022); S.C. Code Ann. § 59-1-500 (2022); S.D. Codified Laws § 13-67-1 (2022); Tenn. Code Ann. § 49-7-180 (2022); Tex. Educ. Code Ann. § 33.0834 (West 2022); Utah Code Ann. § 53g-6-902 (West 2022); W. Va. Code Ann. § 18-2-25d (West 2021); S. 92, 67th Leg., Gen. Sess. (Wyo. 2023).

[5] In April 2023, the NCAA updated its policy to require that transgender student-athletes meet the "sport-specific standard[s] (which may include testosterone levels, mitigation timelines and other aspects of sport-governing body policies)" of the national governing body of that sport. *See* Press Release, NCAA, Transgender Student-Athlete Participation Policy (April 17, 2023), https://www.ncaa.org/sports/2022/1/27/transgender-participation-policy.aspx (last visited May 23, 2023).

Ehardt introduced H.B. 500 in the Idaho House of Representatives. At the first hearing on the bill, Ty Jones, Executive Director of the IHSSA, testified that no student in Idaho had ever complained about participation in public school sports by transgender athletes, and no transgender athlete had ever competed in Idaho under the existing IHSSAA policy. Representative Ehardt herself acknowledged that she had no evidence to date that any person in Idaho had ever disputed an athlete's eligibility to play based on that athlete's gender.

After the bill passed out of the Idaho House Committee, Idaho Attorney General Lawrence Wasden warned in a written opinion letter to the House that H.B. 500 raised serious constitutional questions due to the legislation's disparate treatment of transgender and intersex athletes and the potential invasion of all female athletes' privacy inherent in the sex dispute verification process. Nevertheless, the bill proceeded to a debate and passed the House floor on February 26, 2020.

After passage by the House, H.B. 500 was heard by the Senate State Affairs Committee and sent to the entire Idaho Senate on March 10, 2020. On March 11, 2020, the World Health Organization declared COVID-19 a pandemic and many states adjourned legislative sessions indefinitely. The Idaho Senate remained in session, however, and passed H.B. 500 as amended on March 16, 2020. The House concurred in the Senate amendments on March 18, and the bill was delivered to Idaho Governor Bradley Little on March 19, 2020.

As Governor Little considered the bill, critics

sharply contested the legislation's findings and legality. Professor Dorianne Lambelet Coleman, whose work on testosterone and athletics was cited in the legislative findings in support of the bill, wrote to Governor Little urging him to veto the bill and explaining that her research was misinterpreted and misused in the legislative findings. Similarly, five former Idaho Attorneys General implored Governor Little to veto the Act, labeling it a "legally infirm statute."[6] Nonetheless, Governor Little signed H.B. 500 into law on March 30, 2020, and it went into effect on July 1, 2020.

C.

In enacting H.B. 500, the legislature made several findings purportedly based on Professor Coleman's study, including "that there are 'inherent [biological] differences between men and women,'" Idaho Code § 33-6202(1) (quoting *United States v. Virginia ("VMI")*, 518 U.S. 515, 533 (1996)), and that men have "higher natural levels of testosterone," *id.* § 33-6202(4), which "have lifelong effects, including those most important for success in sport," *id.* § 33-6202(5). Relying on Professor Coleman's work, the legislature found that "[t]he benefits that natural testosterone provides to male athletes is [sic] not diminished through the use of puberty blockers and cross-sex hormones." *Id.* § 33-6202(11). The legislature also found that "women's performances at the high[est] level [of athletics] will never match those of men." *Id.* § 33-6202(9) (quoting

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[6] *See also* Tony Park et al., 5 *Former Idaho Attorneys General Urge Transgender Bill Veto*, Idaho Statesman (Mar. 17, 2020), https://www.idahostatesman.com/opinion/readersopinion/article241267071.html (last visited May 23, 2023).

Valterie Thibault et al., *Women and Men in Sport Performance: The Gender Gap Has Not Evolved Since 1983*, 9 J. of Sports Sci. & Med. 214, 219 (2010)). The legislature concluded 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 and accolades, college scholarships, and numerous other long-term benefits that flow from success in athletic endeavors." *Id.* § 33-6202(12).

Three provisions of the Act are most salient to this appeal. First, the Act provides that "[i]nterscholastic, intercollegiate, intramural, or club athletic teams or sports that are sponsored by a [public school]" should be organized "based on biological sex." *Id.* § 33-6203(1). It specifically provides that:

> Interscholastic, intercollegiate, intramural, or club athletic teams or sports that are sponsored by a public primary or secondary school, a public institution of higher education, or any school or institution whose students or teams compete against a public school or institution of higher education shall be expressly designated as one (1) of the following based on biological sex:
>
> (a) Males, men, or boys;
>
> (b) Females, women, or girls; or
>
> (c) Coed or mixed.

Id. The Act then provides that "[a]thletic teams or sports designated for females, women, or girls shall

not be open to students of the male sex." *Id.* at § 33-6203(2) (the "categorical ban provision"). The Act's provisions apply to all levels of competition in Idaho state schools, including elementary school and club teams, and do not include any limitation for transgender individuals who wish to participate on athletic teams designated for men. Moreover, the provisions apply to students in nonpublic schools "whose students or teams compete against a public school or institution of higher education." *Id.* at § 33-6203(1).

Second, the Act creates a "sex verification" process to be invoked by any individual who wishes to "dispute" a student's sex, providing that:

> A dispute regarding a student's sex shall be resolved by the school or institution by requesting that the student provide a health examination and consent form or other statement signed by the student's personal health care provider that shall verify the student's biological sex. The health care provider may verify the student's biological sex as part of a routine sports physical examination relying only on one (1) or more of the following: the student's reproductive anatomy, genetic makeup, or normal endogenously produced testosterone levels.

Id. at § 33-6203(3) (the "sex dispute verification provision").

And third, the Act creates an enforcement mechanism to ensure compliance with its provisions by establishing a private cause of action for any student who is "deprived of an athletic opportunity or

suffers any direct or indirect harm as a result of a violation of [the Act]." *Id.* at § 33-6205(1).

D.

On April 15, 2020, Lindsay Hecox ("Lindsay"), a transgender woman who wishes to try out for the BSU women's track and cross-country teams, and Jane Doe ("Jane"), a cisgender woman who plays on high school varsity teams and feared that her sex would be "disputed" under the Act due to her masculine presentation, filed this lawsuit against Governor Little, Idaho Superintendent of Public Instruction Sherri Ybarra, and various school officials at both the high school and collegiate level (collectively, "Idaho"). They sought a declaratory judgment that the Act violates Title IX and the United States Constitution, including the Equal Protection Clause, and preliminary and permanent injunctions against the Act's enforcement, as well as an award of costs, expenses, and reasonable attorneys' fees.

On May 26, 2020, Madison ("Madi") Kenyon and Mary ("MK") Marshall (collectively, "the Intervenors") were permitted to intervene in this case. Intervenors are cisgender women residing in Idaho and collegiate athletes who run track and cross-country on scholarship at Idaho State University. In 2019, both athletes competed against and lost to June Eastwood, a transgender woman athlete at the University of Montana, and found it a "discouraging" and "deflating" experience.

On April 30, 2020, Plaintiffs moved for preliminary injunctive relief based solely on their equal protection claims. The district court issued preliminary injunctive relief in August 2020, ruling

that both Plaintiffs were likely to succeed on the merits of their equal protection claims and would suffer irreparable harm if the injunction was not granted, and that the balance of equities weighed in favor of an injunction. Idaho and the Intervenors (collectively, the "Appellants") timely appealed.

We first held oral argument in this appeal on May 3, 2021. At that time, Lindsay informed the court that she had tried out for and failed to make the women's track team and that she subsequently withdrew from BSU classes in late October 2020. Because the parties' arguments raised several unanswered factual questions as to whether Lindsay's claim was moot, we remanded the case to the district court for further factual development and findings on justiciability questions on June 24, 2021.

On July 18, 2022, the district court issued factual findings and concluded that Lindsay's claim was not moot. We affirmed the district court's determination that Lindsay's claim was not moot in a separate unanimous order issued on January 30, 2023. *See Hecox v. Little (Hecox II)*, No. 20-35813, 2023 WL 1097255, at *1 (9th Cir. Jan. 30, 2023).[7] We then

[7] In our January order, we determined that Lindsay's claim was not moot when she withdrew from BSU in October 2020, because when she left she expressed a concrete plan to re-enroll and try out for BSU sports teams. *Hecox II*, 2023 WL 1097255 at *1. Lindsay followed through on those plans by re-enrolling at BSU after she established Idaho state residency and training to participate in women's sports teams. *Id.* Indeed, Lindsay plans to try out again for the BSU women's cross-country and track teams in Fall 2023, and has been playing for the BSU women's club soccer team since Fall 2022. *Id.* at *2. Absent the preliminary injunction against the Act's enforcement, Lindsay

asked the parties to brief us on which claims remained for decision in this appeal and any intervening authority. The parties agree that the only issue that we must decide is whether the district court abused its discretion in issuing the preliminary injunction.

II. STANDARD OF REVIEW

We review a district court's grant of a preliminary injunction for an abuse of discretion. *Olson v. California*, 62 F.4th 1206, 1218 (9th Cir. 2023). That said, "legal issues underlying the injunction are reviewed de novo because a district court would necessarily abuse its discretion if it based its ruling on an erroneous view of law." *adidas Am., Inc. v. Skechers USA, Inc.*, 890 F.3d 747, 753 (9th Cir. 2018) (quoting *GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1204 (9th Cir. 2000)); *see also Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003). We do "not 'determine the ultimate merits'" of the case, "but rather 'determine only whether the district court correctly distilled the applicable rules of law and exercised permissible discretion in applying those rules to the facts at hand.'" *Saravia for A.H. v. Sessions*, 905 F.3d 1137, 1141–42 (9th Cir. 2018) (quoting *Fyock v. Sunnyvale*, 779 F.3d 991, 995 (9th Cir. 2015)). However, we will reverse a grant of the preliminary injunction if the district court "based its decision . . . on clearly erroneous findings of fact." *Does 1-5 v. Chandler*, 83 F.3d 1150, 1552 (9th Cir. 1996).

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would be banned from participating on the BSU women's club soccer team.

We review the scope of a preliminary injunction for an abuse of discretion. *California v. Azar*, 911 F.3d 558, 567 (9th Cir. 2018).

III. PRELIMINARY INJUNCTION

"A preliminary injunction is 'an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion.'" *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012) (quoting *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam) (emphasis in original)). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). "When the government is a party, these last two factors merge." *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014).

A. Likelihood of Success on the Merits

The primary issue presented by this appeal is whether the district court abused its discretion in concluding that Lindsay was likely to succeed on the merits of her equal protection challenge. The Fourteenth Amendment provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. In other words, "all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). The state may not discriminate against classes of people in an "arbitrary or irrational" way or with the "bare

. . . desire to harm a politically unpopular group." *Id.* at 446–47.

When considering an equal protection claim, we determine what level of scrutiny applies to a classification under a law or policy, and then decide whether the policy at issue survives that level of scrutiny. Our "general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest," *id.* at 440, otherwise known as rational basis review. However, as gender classifications "generally provide[] no sensible ground for differential treatment," *id.*, "'all gender-based classifications today' warrant 'heightened scrutiny.'" *VMI*, 518 U.S. at 555 (quoting *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136 (1994)). Under heightened scrutiny, "a party seeking to uphold government action based on sex must establish an 'exceedingly persuasive justification' for the classification." *Id.* at 524 (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)).

1. Heightened scrutiny applies.

The district court did not err in concluding that heightened scrutiny applies because the Act discriminates against transgender women by categorically excluding them from female sports, as well as on the basis of sex by subjecting all female athletes, but no male athletes, to invasive sex verification procedures to implement that policy. Appellants contend that the Act classifies based only on sex, not "transgender status," and permissibly excludes "biological males" from female sports under our precedent. *See, e.g.*, *Clark, ex rel. Clark v. Arizona*

Interscholastic Ass'n ("*Clark I*"), 695 F.2d 1126, 1131–32 (9th Cir. 1982) (holding that excluding boys from a girls' high school volleyball team was permissible to redress past discrimination against women athletes and to promote equal opportunity for women). We conclude that while the Act certainly classifies on the basis of sex, it also classifies based on transgender status, triggering heightened scrutiny on both grounds.

a. The Act discriminates based on transgender status.

Appellants argue that the Act does not discriminate based on transgender status because "[t]he distinction and statutory classification is based entirely on [biological] sex, not gender identity." They assert that the Act's definition of "biological sex" describes only the "physiological differences between the sexes relevant to athletics." But the Act explicitly references transgender women, as did its legislative proponents, and its text, structure, purpose, and effect all demonstrate that the Act categorically bans transgender women and girls from public school sports teams that correspond with their gender identity.

Section 33-6202 straightforwardly sets forth the "legislative findings and purpose" of the Act, and makes clear that its animating purpose was to ban transgender women from "biologically female" teams. These findings explicitly discuss transgender women athletes by stating that "a man [sic] who identifies as a woman and is taking cross-sex hormones 'had an absolute advantage' over female athletes," and noting that "[t]he benefits that natural testosterone provides

to male athletes is [sic] not diminished through the use of puberty blockers and cross-sex hormones." Idaho Code § 33-6202(11).

During the legislative debate on H.B. 500, the Act's supporters stated repeatedly that the Act's purpose was to ban transgender women athletes from participating on female athletic teams in Idaho. Representative Ehardt, who introduced the bill, characterized the law as a "preemptive" strike that would allow Idaho to "remove [transgender women] and replace them with the young gal that should have been on the team." Representative Ehardt reiterated that the Act would require transgender women to "compete on the side of those biological boys and men with whom they look or, about whom they look alike." Much of the legislative debate centered around two transgender women athletes running track in Connecticut high schools, as well as one running college track in Montana, and the potential "threat" those athletes presented to female athletes in Idaho. When the then-Idaho Attorney General Wasden expressed concerns about the Act's constitutionality, he expressly described it as "targeted toward transgender and intersex athletes."

The plain language of section 33-6203 bans transgender women from "biologically female" teams. The Act divides sports teams into three categories based on biological sex: "(a) Males, men, or boys; (b) Females, women, or girls; or (c) Coed or mixed." *Id.* § 33-6203(1). Sports designated for "females, women, or girls" are not open to students of the male sex. *Id.* § 33-6203(2). And the methods for "verify[ing] the student's biological sex" are restricted to "reproductive anatomy, genetic makeup, or normal

endogenously produced testosterone levels." *Id.* § 33-6203(3). However, most gender-affirming medical care for transgender females, especially minors, will not or cannot alter the characteristics described in the only three verification methods prescribed by the Act, thus effectively banning transgender females from female sports. As the district court determined, "the overwhelming majority of women who are transgender have XY chromosomes," which indicate the male sex, and transgender women cannot change that genetic makeup when they transition. *Hecox*, 479 F. Supp. 3d at 984. Similarly, as medical expert Dr. Deanna Adkins opined, many transgender women and girls do not undergo gender-affirming genital surgery to alter their external "reproductive anatomy," often because they cannot afford it or it is inappropriate for their individual needs.

Further, because surgery cannot change transgender women's internal reproductive anatomy by creating ovaries, Dr. Adkins testified that transgender women "typically continue to need estrogen therapy" even after surgery and can never alter their "endogenously produced"—or naturally produced—testosterone levels. By contrast, the Act does *not* allow sex to be verified by a transgender woman's levels of circulating testosterone, which can be altered through medical treatment. A transgender woman like Lindsay, for example, can lower her circulating testosterone levels through hormone therapy to conform to elite athletic regulatory guidelines, but cannot currently alter the endogenous testosterone that her body naturally produces. Yet the district court found and the record before it supports that circulating testosterone is the "one [sex-related]

factor that a consensus of the medical community appears to agree" actually affects athletic performance. *Id.*

Appellants suggest that "biological sex" is a neutral and well-established medical and legal concept, rather than one designed precisely by the Idaho legislature to exclude transgender and intersex people.[8] But the Act's definition of "biological sex" is

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[8] In supplemental briefing, Appellants also argue that the Supreme Court's recent decisions in *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022) and *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022) "are fatal to Hecox's claim" because the ratifiers of the Fourteenth Amendment would have understood "male" to correspond to the definition of "biological male" written into the Act. We fail to see how *Dobbs*, a substantive due process decision about whether the federal Constitution protects a woman's right to obtain an abortion, and *Bruen*, a Second Amendment decision about gun rights, are relevant to an equal protection claim based on sex discrimination, unless Appellants are suggesting that the Framers would have understood the term "biological sex" by reference to reproductive anatomy, genetic make-up, or normal endogenously produced testosterone levels. Indeed, the ratifiers of the Fourteenth Amendment would certainly not have understood the Act's definition of "biological sex." For example, the drafters of the Fourteenth Amendment would have had no concept of what "endogenously produced testosterone levels" meant in 1868, because testosterone was not named and isolated as a hormone until 1935. *See* John M. Tomlinson, *The Testosterone Story*, Trends in Urology & Men's Health 34, 35 (2012). Similarly, the ratifiers would not have understood how "genetic makeup" influences sex, as chromosomes were first discovered by Walther Flemming in 1882. D.W. Rudge, *The Man Who Invented the Chromosome*, 97 Heredity 136, 136 (2006) (reviewing Oren Harman, *The Man Who Invented the Chromosome: A Life of Cyril Darlington* (2004)).

Moreover, there is evidence that transgender people have existed since ancient times. *See generally* Lauren Talalay, *The*

likely an oversimplification of the complicated biological reality of sex and gender. As Dr. Joshua Safer, Executive Director of the Center for Transgender Medicine and Surgery at Mount Sinai, explained in his declaration, citing the Endocrine Society Guidelines:

> The phrase "biological sex" is an imprecise term that can cause confusion. A person's sex encompasses the sum of several biological attributes, including sex chromosomes, certain genes, gonads, sex hormone levels, internal and external genitalia, other secondary sex characteristics, and gender identity. These attributes are not always aligned in the same direction.
>
> Indeed, two percent of all babies are born

Gendered Sea: Iconography, Gender, and Mediterranean Prehistory, in THE ARCHEOLOGY OF MEDITERRANEAN PREHISTORY 130–33 (Emma Blake & A. Bernard Knapp eds., 2005). Appellants appear to argue that because transgender people were marginalized in 1868, they should be afforded no constitutional protections on the basis of their transgender status. But this argument would undermine decades of Supreme Court precedent striking down laws that discriminate on the basis of sex. *See Reed v. Reed*, 404 U.S. 71, 76 (1971) (holding that an Idaho statute that preferenced men as administrators of estates "ma[d]e the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment"); *Frontiero v. Richardson*, 411 U.S. 677, 687 (1973) ("[S]tatutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members."); *see also Weinberger v. Weisenfeld*, 420 U.S. 636, 645 (1975); *Craig v. Boren*, 429 U.S. 190, 210 (1976); *Duren v. Missouri*, 439 U.S. 357, 360 (1979); *VMI*, 518 U.S. at 519.

"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." Br. of Amici Curiae InterACT at 3–4. Intersex people who identify as women are equally banned under the Act from playing on Idaho women's teams. And while scientists are not fully certain why some people identify as transgender, it appears likely that there is some biological explanation—such as gestational exposure to elevated levels of testosterone—that causes certain individuals to identify as a different gender than the one assigned to them at birth. *See* AAP Br. at 14.

We have previously rejected an argument like Appellants raise here—that because section 33-6203 uses "biological sex" in place of the word "transgender," it is not targeted at excluding transgender girls and women. In *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014), we held that Idaho and Nevada laws that banned same-sex marriage discriminated on the basis of sexual orientation, even though the laws did so by classifying couples based on "procreative capacity" instead of sexual orientation. *Id.* at 467–68. We explained:

> Effectively if not explicitly, [defendants] assert that while these laws may disadvantage same-sex couples and their children, heightened scrutiny is not appropriate because differential treatment by sexual orientation is an incidental effect of, but not the reason for, those laws. However, the laws at issue distinguish on their face between opposite-sex couples, who are

> permitted to marry and whose out-of-state marriages are recognized, and same-sex couples, who are not permitted to marry and whose marriages are not recognized. Whether facial discrimination exists "does not depend on why" a policy discriminates, "but rather on the explicit terms of the discrimination." Hence, while the procreative capacity distinction that defendants seek to draw could represent a *justification* for the discrimination worked by the laws, it cannot overcome the inescapable conclusion that Idaho and Nevada do discriminate on the basis of sexual orientation.

Id. at 467–68 (quoting *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991)). Here, the Act's use of "biological sex" functions as a form of "[p]roxy discrimination." *Pac. Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142, 1160 n.23 (9th Cir. 2013). The definition of "biological sex" in the Act is written with "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." *Id.*; *see also Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) ("A tax on wearing yarmulkes is a tax on Jews."); *Lawrence v. Texas*, 539 U.S. 558, 575 (2003) ("When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination . . . ."). The Act's specific classification of "biological sex" has similarly been carefully drawn

to target transgender women and girls, even if it does not use the word "transgender" in the definition.

Adams ex rel. Kasper v. School Bd. of St. Johns Cnty. ("Adams"), 57 F.4th 791 (11th Cir. 2022) (en banc), upon which Appellants rely to support their argument that the Act does not discriminate against transgender girls or women, is inapposite. There, the Eleventh Circuit upheld a lower court order rejecting an equal protection challenge to a K-12 school policy that provided female, male, and sex-neutral bathrooms and required male students to use the male-designated bathrooms, female students to use the female bathrooms, and accommodated transgender students with the sex-neutral bathrooms. *See id.* at 797. The policy defined "male" and "female" as the gender identified on a student's birth certificate. *See id.* The Eleventh Circuit rejected the argument that the policy unconstitutionally discriminated on the basis of transgender status because it was "substantially related" to the school district's important interest in securing its pupils' privacy and welfare and was not targeted at transgender students—at most, it had a disparate impact upon them which did not rise to the level of a constitutional violation because no animus was shown. *See id.* at 811. Importantly, in *Adams*—as opposed to here—there was "no [record] evidence suggesting that the School Board enacted the [] policy because of . . . its adverse effects upon transgender students." *Id.* at 810 (second alteration in original) (internal quotation marks omitted). To the contrary, the school district in *Adams* had studied the issues raised by the LGBTQ community and had also enacted policies that

affirmatively accommodated transgender students.[9] Moreover, bathrooms by their very nature implicate important privacy interests and are not the equivalent of athletic teams.[10]

Appellants likewise misrely on a footnote in *Geduldig v. Aiello*, 417 U.S. 484 (1974), for the proposition that a legislative classification based on biological sex is not a classification based on transgender status. *See id.* at 496 n.20. In *Geduldig*, the Supreme Court stated that a classification based on pregnancy is not per se a classification based on sex, even though "it is true that only women can become pregnant." *Id.* However, the Court held that "distinctions involving pregnancy" that are "mere pretexts designed to effect an invidious discrimination" are subject to heightened scrutiny. *Id.* Here, it appears that the definition of "biological sex" was designed precisely as a pretext to exclude transgender women from women's athletics—a classification that *Geduldig* prohibits.

Finally, Appellants contend that the Act does not discriminate based on transgender status because the "Act does *not* prohibit biologically female athletes who identify as male from competing on male sports teams consistent with their gender identity." But 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

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[9] Although *Adams* is plainly distinguishable, we express no view on the merits of the decision.

[10] For one, the functions of the bathroom are intended to be private, unlike sporting events.

because a class . . . does not include all members of [a] race does not suffice to make the classification race neutral."); *Nyquist v. Mauclet*, 432 U.S. 1, 7–9 (1977) (holding that singling out some but not all undocumented immigrants for discrimination constituted a "classification based on alienage"); *Mathews v. Lucas*, 427 U.S. 495, 504 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.").

b. Heightened scrutiny applies because the Act discriminates on the basis of transgender status.

We have previously held that heightened scrutiny applies to laws that discriminate on the basis of transgender status, reasoning that gender identity is at least a "quasi-suspect class." *Karnoski v. Trump*, 926 F.3d 1180, 1200–01 (9th Cir. 2019).

In *Karnoski*, we reviewed an injunction against the implementation of a 2017 Presidential Memorandum and Departments of Defense and Homeland Security policies that effectively precluded transgender individuals from serving in the U.S. military. *Id.* at 1189. The district court had applied strict scrutiny in enjoining the policy, while the government argued that the policy should be reviewed under a rational basis standard. *Id.* at 1200. We held that because the implementing policy "on its face treats transgender persons differently than other persons . . . something more than rational basis but less than strict scrutiny applies." *Id.* at 1201. We therefore adopted the heightened scrutiny approach of *VMI* and

Witt v. Dep't of Air Force, 527 F.3d 806, 818 (9th Cir. 2008), to review the military's ban on transgender persons who experienced gender dysphoria or who have undergone gender transition.[11] *Id.* We are thus compelled to review the constitutionality of the Act under heightened scrutiny as it classifies based on transgender status.

Moreover, discrimination on the basis of transgender status is a form of sex-based discrimination. It is well-established that sex-based classifications are subject to heightened scrutiny. *See VMI*, 518 U.S. at 533–34. The Supreme Court recently held in the Title VII context that "it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex." *Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731, 1741 (2020).[12] Indeed, "[m]any

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[11] The Supreme Court determined in *VMI* that for "cases of official classification based on gender" a reviewing court must apply a "heightened review standard" and determine whether the state has demonstrated an "exceedingly persuasive justification" for the classification. 518 U.S. at 533–34. In *Witt*, we applied a "heightened scrutiny" approach to the military's "Don't Ask, Don't Tell" policy for gay and lesbian servicemembers, determining that "when the government attempts to intrude upon the personal and private lives of homosexuals . . . the government must advance an important governmental interest, the intrusion must significantly further that interest, and the intrusion must be necessary to further that interest." 527 F.3d at 819.

[12] *See also* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390, 41571 (proposed July 12, 2022) (to be codified at 34 C.F.R. pt. 106) (clarifying that "discrimination on the basis of sex" under Title IX includes discrimination based on "sex stereotypes, sex characteristics . . . and gender identity").

courts . . . have held that various forms of discrimination against transgender individuals constitute sex-based discrimination for purposes of the Equal Protection Clause because such policies punish transgender persons for gender non-conformity, thereby relying on sex stereotypes." *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 608 (4th Cir. 2020) (applying heightened scrutiny to a bathroom policy); *see also Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017), *abrogated on other grounds*, *Illinois Republican Party v. Pritzker*, 972 F.3d 760 (7th Cir. 2020) (same); *Brandt ex rel. Brandt v. Rutledge*, 47 F.4th 661, 670–71 & n.4 (8th Cir. 2022) (applying heightened scrutiny to affirm a preliminary injunction against a law that prohibited "gender transition procedures" because the law discriminated on the basis of sex); *Eknes-Tucker v. Marshall*, 603 F. Supp. 3d 1131, 1147 (M.D. Ala. 2022) (applying heightened scrutiny to a law that prohibited various medical treatments for gender dysphoria in minors).[13]

c. Heightened scrutiny applies because the Act discriminates against all Idaho female student athletes.

In addition to discriminating on the basis of transgender status, the Act discriminates on the basis

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[13] Both Idaho and the Intervenors note that the Eleventh Circuit expressed "grave doubt" in a footnote in *Adams* that transgender people constitute a "quasi-suspect class." *Adams*, 57 F.4th at 803 n.5 (internal quotation marks omitted). This dicta is unpersuasive, as the Eleventh Circuit declined to decide the issue or further opine on its "doubts." In any event, as a three-judge panel we cannot overrule the binding precedent of our circuit. *See Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003).

of sex, because only women and girls who want to compete on Idaho school athletic teams, and not male athletes, are subject to the sex dispute verification process. The Act expressly states that only "[a]thletic teams or sports designated for females, women, or girls shall not be open to students of the male sex." Idaho Code § 33-6203(2). The Act does not ban "biological females" from "teams or sports designated for males." Therefore, transgender and cisgender men who compete on male-designated teams are not subject to the sex dispute verification process. The sex dispute verification process simply does not apply to male athletes.[14]

The Act thus classifies on the basis of sex by subjecting only women and girls, whether cisgender or transgender, to the risk and humiliation of having their sex "disputed" and then suffering intrusive medical testing as a prerequisite for participation on

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[14] While the ban discriminates on the basis of transgender status, it is important to discuss how it discriminates against all young women and girls. The partial concurrence reads the sex dispute verification provision as applicable to men and boys who wish to participate on women and girls' teams. But this contention disregards that, as the concurrence itself elsewhere acknowledges, "[e]xisting rules already prevented boys from playing on girls' teams before the Act." Partial Concurrence at 66 (quoting *Hecox*, 479 F. Supp. 3d at 982). The record is devoid of any evidence of "men and boys who wish to participate on teams designated for women or girls," *id.* at 72, in Idaho. However, if they exist, male-identifying students who wish to play on girls' teams will never be subject to the sex dispute verification process, because they are already banned from participation in women's teams by virtue of their identity under existing IHSSA policies. Only women and girls will be subject to the degrading specter of having their sex disputed and undergoing invasive and unnecessary medical testing.

school sports teams. And where women and girls are subject to separate requirements for educational opportunities that are "unequal in tangible and intangible" ways from those for men, those requirements are tested under heightened scrutiny. *VMI*, 518 U.S. at 547.

2. The Act likely does not survive heightened scrutiny.

The district court correctly concluded that neither the categorical ban nor sex dispute verification provisions likely survive heightened scrutiny. Heightened scrutiny is a "demanding" standard, with the burden "rest[ing] entirely on the State" to demonstrate an "exceedingly persuasive" justification for its differential treatment. *VMI*, 518 U.S. at 533. To survive heightened scrutiny, the government must demonstrate "that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Id.* at 516 (alteration in original) (internal quotation marks and citations omitted). Our review under heightened scrutiny is an extremely fact-bound test, requiring us to "examine [a policy's] actual purposes and carefully consider the resulting inequality to ensure our most fundamental institutions neither send nor reinforce messages of stigma or second-class status." *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 483 (9th Cir. 2014).

Appellants contend that, "[d]ue to the average physiological differences" between men and women, the Act substantially advances the important state interest of "promot[ing] sex equality . . . by providing opportunities for female athletes to demonstrate their

skill, strength, and athletic abilities [and] opportunities to obtain recognition and accolades, college scholarships, and the numerous other long-term benefits that flow from success in athletic endeavors." Idaho Code § 33-6202(12). We have previously held that furthering women's equality and promoting fairness in female athletic teams is an important state interest. *Clark I*, 695 F.2d at 1131. However, on the record before us, the district court correctly determined that the Act's means—categorically banning transgender women and girls from all female athletic teams and subjecting all female athletes to intrusive sex verification procedures—are not substantially related to, and in fact undermine, those asserted objectives.

a. *Clark I* and *Clark II* do not control the outcome of Lindsay's claim.

Our decisions in *Clark I* and *Clark ex rel. Clark v. Arizona Interscholastic Ass'n*, 886 F.2d 1191 (9th Cir. 1989) ("*Clark II*") are inapposite. In *Clark I* and *Clark II*, we held that public high schools could constitutionally prohibit male student athletes from participation on women's teams in order to further the important government interest of "redressing past discrimination against women in athletics and promoting equality of opportunity between the sexes." *Clark I*, 695 F.2d at 1131.

Specifically in *Clark I*, we held that an Arizona Interscholastic Association policy that separated high school volleyball teams by gender and prohibited boys from playing on girls' teams did not violate the Equal Protection Clause. *Clark I*, 695 F.2d at 1127. There, Clark wished to play on the girls' volleyball team

because his particular high school did not offer boys' volleyball teams. *Id.* We first recognized that, in applying heightened scrutiny, "the Supreme Court is willing to take into account actual differences between the sexes, including physical ones." *Id.* at 1229 (citing *Michael M. v. Sonoma Cnty. Superior Ct.*, 450 U.S. 464, 468–69 (1981) (upholding a statutory rape statute that held only males culpable because only women can become pregnant, thus furthering the government's interest in preventing teen pregnancy)). We concluded that general gender separation in school sports was substantially related to the government's interest in women's equality in athletics. *Id.* at 1131. We reasoned that "due to average physiological differences, males would displace females to a substantial extent if they were allowed to compete for positions on the volleyball team." *Id.* Thus, if men were allowed to compete on the women's teams, women's overall athletic opportunities would decrease, while men's overall athletic opportunities would remain greater than women's.

Eight years later, in *Clark II*, the original *Clark I* plaintiff's brother brought a second "mystifying" action challenging the same policy, arguing that the state "ha[d] been wholly deficient in its efforts to overcome the effects of past discrimination against women in interscholastic athletics, and that this failure vitiate[d] its justification for a girls-only volleyball team." *Clark II*, 886 F.2d at 1193. Applying *Clark I*, we affirmed that the gender classification for Arizona school sports was constitutional. *Id.* at 1194.

Appellants argue that "[t]he only difference between Hecox and the Clark brothers is gender

identity," which does not change the physiological advantages that "biological males" have over cisgender women. But this is a false assumption. First, Lindsay takes medically prescribed hormone therapy to suppress her testosterone and raise her estrogen levels. This treatment has lowered her circulating testosterone levels—which impact athletic prowess and have slowed her racing times by at least "five to ten percent"—and her testosterone levels were "well below the levels required to meet NCAA eligibility for cross country and track" in Fall 2022, as the district court found. *See Hecox*, 479 F. Supp. 3d at 946. Lindsay's treatment has dramatically altered her bodily systems and secondary sex characteristics. As the district court found, "it is not clear that transgender women who suppress their testosterone have significant physiological advantages over cisgender women," unlike the cisgender boys at issue in *Clark I* and *Clark II*. *Id.* at 978.

Second, as the district court noted, transgender women, "like women generally . . . have historically been discriminated against, not favored." *Id.* at 977. A recent study by the CDC concluded that "transgender students reported significantly higher incidents of being bullied, feeling unsafe traveling to or from school, being threatened with a weapon at school, and being made to engage in unwanted sexual relations." Br. of Amici Curiae GLBTQ Legal Advocates & Defenders and the National Center for Lesbian Rights, at 9; *see also Whitaker*, 858 F.3d at 1051 ("There is no denying that transgender individuals face discrimination, harassment, and violence because of their gender identity."). Unlike the policy in *Clark I*, the Act perpetuates historic

discrimination against both cisgender and transgender women by categorically excluding transgender women from athletic competition and subjecting all women to an invasive sex dispute verification process.

Moreover, the district court correctly found that "under the Act, women and girls who are transgender will not be able to participate in any school sports, unlike the boys in *Clark I*, who generally had equal [or greater] athletic opportunities." *Hecox*, 479 F. Supp. 3d at 977. Here, unlike in *Clark I*, transgender women are not being denied one "particular opportunity" to participate on women's teams even though their "overall opportunity is not inferior" to that of women. *Clark I*, 695 F.2d at 1126. As a practical matter, the Act bars transgender women and girls in Idaho from all participation in student athletics—under its explicit terms, they cannot play on teams that conform to their transgender status. The argument advanced by Representative Ehardt that the Act does not discriminate against transgender women because they can still 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. *See Latta*, 771 F.3d at 467 (holding unconstitutional two marriage bans that "distinguish on their face between opposite-sex couples who are permitted to marry and whose out-of-state marriages are recognized, and same-sex couples, who are not permitted to marry and whose marriages are not recognized"). As medical expert Dr. Jack Turban stated, "forcing [transgender students] to play on a sports team that does not match their

gender identity would damage their mental health" by "forcing them to express themselves as cisgender." Lindsay declared that she would never compete on a men's team, as it would be "embarrassing and painful to be forced onto a team for men—like constantly wearing a big sign that says 'this person is not a "real" woman.'"

The district court also found that, on the record before it, "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 I*, 695 F.2d at 1131). Appellants misrely on a single line from *Clark II* to argue that the participation of just one transgender woman on a team risks displacing any individual cisgender woman: "If males are permitted to displace females on the school volleyball team even to the extent of one player like Clark, the goal of equal participation by females in interscholastic athletics is set back, not advanced." *Clark II*, 886 F.2d at 1193. This statement, however, was made in response to the argument in *Clark II* that because sex separation had not fully met Arizona's goal of equality of participation in sports, Arizona no longer had an important interest in the policy. We did not think Clark's proposed remedy for the inequality of opportunities for female athletes—allowing him to play on the girls' teams—would advance the "goal of equal participation by females in interscholastic sports." *Id.* Because transgender women represent about 0.6 percent of the general population, the district court did not err in finding it unlikely that they would displace cisgender women from women's sports.

b. The categorical ban provision likely fails heightened scrutiny.

Nor did the district court clearly err, *see Doe v. Snyder*, 28 F.4th 103, 106 (9th Cir. 2022), in finding that the Act's categorical ban provision failed heightened scrutiny because it was not substantially related to its stated goals of equal participation and opportunities for women athletes. The district court found that the categorical ban provision did not advance its asserted objectives for three reasons, none of which were "illogical, implausible, or without support in inferences that may be drawn from the facts in the record." *Pom Wonderful LLC v. Hubbard*, 775 F.3d 1118, 1123 (9th Cir. 2014) (citation omitted). Moreover, the Act's sweeping prohibition on transgender female athletes in Idaho—encompassing all students, regardless of whether they have gone through puberty or hormone therapy, and without any evidence of transgender athletes displacing female athletes in Idaho—is too overbroad to satisfy heightened scrutiny.

First, the district court found that there was scientifically "no evidence to suggest a categorical bar against a transgender female athlete's participation in sports is required in order to promote 'sex equality' or to 'protect athletic opportunities for females' in Idaho." *Hecox*, 479 F. Supp. 3d at 978–79. Appellants argue that the district court misread the available medical evidence, which they contend demonstrates that endogenous testosterone levels give "biological males" a permanent athletic advantage over cisgender women. However, the district court did not err by relying upon the testimony of a medical expert, Dr. Safer, who testified that there was a medical

consensus that the "primary known driver of differences in athletic performance between elite male athletes and elite female athletes" is "the difference in [circulating] testosterone" levels, as opposed to "endogenously produced" testosterone levels, and "[a] person's genetic make-up and internal and external reproductive anatomy are not useful indicators of athletic performance and have not been used in elite competition for decades." The district court credited Dr. Safer's opinion that a transgender woman who endured hormone therapy to lower her circulating levels of testosterone would likely not have different "physiological characteristics" than a cisgender woman that would lead to enhanced athletic prowess.

Appellants presented contrary medical testimony by Dr. Gregory Brown that hormone therapy suppression did not eliminate all of the physiological advantages that an individual experiences through male puberty. However, as the district court found, Dr. Brown's opinion was not supported by the studies he relied upon, because the majority of the studies he cited discussed the average differences between male and female athletes in general, not the difference between transgender and cisgender women athletes. And one study that he cited—the Handelsman study—actually came to the opposite conclusion, concluding that "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."

The studies that the Idaho legislature relied upon to conclude that the benefits of "natural testosterone" could not be diminished through hormone therapy

were likewise flawed. For example, one of the studies was altered after peer review to remove its conclusions regarding transgender athletes, and, as Idaho admits, that "study and its findings were not based specifically on transgender athletes." The legislature also relied on a study by Professor Coleman, who personally urged Governor Little to veto the bill because the legislature misinterpreted her work.

Moreover, as the district court found, the Act sweeps much more broadly than simply excluding transgender women who have gone through "endogenous puberty." The Act's categorical ban includes transgender students who are young girls in elementary school or even kindergarten. Other transgender women take puberty blockers and never experience endogenous puberty, yet the Act indiscriminately bars them from participation in women's student athletics, regardless of their testosterone levels. Although the scientific understanding of transgender women's potential physiological advantage is fast-evolving and somewhat inconclusive, we are limited to reviewing the record before the district court. And the record in this case does not ineluctably lead to the conclusion that all transgender women, including those like Lindsay who have gone through hormone therapy, have a physiological advantage over cisgender woman.

Second, as the district court found, there was very little anecdotal evidence at the time of the Act's passage that transgender women had displaced or were displacing cisgender women in sports or scholarships or like opportunities. In 2020, both the

IOC and the NCAA required transgender women to suppress their testosterone for only a year for eligibility to compete on women's teams.[15] The record before the district court includes anecdotal evidence of only four transgender athletes who had ever competed in cisgender women's sports, including two high school runners who competed in Connecticut and were subsequently defeated by cisgender women in competition. While the Intervenors state they were defeated by a transgender athlete, June Eastwood, in a running competition at the University of Montana, Eastwood eventually lost to a different cisgender athlete in that same competition. Lindsay's own

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[15] Although today the IOC and NCAA policies evaluate eligibility for transgender participation in athletics on a sport-by-sport basis, neither policy endorses the categorical exclusion of transgender women. They instead favor an "evidence-based approach" with "no presumption of advantage." Int'l Olympics Comm., *IOC Framework on Fairness, Inclusion and Non-Discrimination on the Basis of Gender Identity and Sex Variations* 4 (2021), https://stillmed.olympics.com/media/Documents/Beyond-the-Games/Human-Rights/IOC-Framework-Fairness-Inclusion-Nondiscrimination-2021.pdf#page=4 (last visited June 6, 2023); *see also* Nat'l Collegiate Athletics Ass'n, *Transgender Student-Athlete Participation Policy* (April 17, 2023), https://www.ncaa.org/sports/2022/1/27/transgender-participationpolicy.aspx (last visited May 24, 2023). And while the World Athletics Council, the international governing body for track and field, recently adopted a more stringent policy of categorically excluding postpubescent transgender women from elite athletic competitions, its policy does not bar transgender women who have not experienced endogenous puberty from eligibility. *See* Press Release, World Athletics Counsel, World Athletics Council Decides on Russia, Belarus, and Female Eligibility (Mar. 23, 2023), https://worldathletics.org/news/press-releases/council-meeting-march-2023-russia-belarus-female-eligibility (last visited May 24, 2023).

athletic career belies the contention that transgender women who have undergone male puberty have an absolute advantage over cisgender women: she has never qualified for BSU's track team despite trying out in Fall 2020.

There is likewise no evidence in the record of a transgender woman receiving an athletic scholarship over a cisgender woman in Idaho. Moreover, as the district court noted, the Act's broad sweep—banning transgender women's participation not just in high school and college athletics, but elementary school and club sports—"belies any genuine concern with an impact on athletic scholarships," which are relevant to only a small portion of the competitive teams encompassed by the Act. *Hecox*, 479 F. Supp. 3d at 983.

Of course, when applying heightened scrutiny, we "must accord substantial deference to the predictive judgments" of legislative bodies. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665 (1994). But this does not "insulate[]" predictive judgments "from meaningful judicial review altogether." *Id.* at 666. "[U]nsupported legislative conclusions as to whether particular policies will have societal effects of the sort at issue in this case—determinations which often, as here, implicate constitutional rights—have not been afforded deference by the [Supreme] Court." *Latta*, 771 F.3d at 469; *see also Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 784 (9th Cir. 2014) ("[T]he absence of any credible showing that the [challenged law] addressed a particularly acute problem" was "quite relevant" to a showing that the law did not survive heightened scrutiny.). A vague, unsubstantiated concern that transgender women might one day

dominate women's athletics is insufficient to satisfy heightened scrutiny.

Third, the district court questioned the Act's true objectives, ruling that Idaho's interest was not in "promoting sex equality" but "excluding transgender women and girls from women's sports entirely." *Hecox*, 469 F. Supp. 3d at 983. Before the Act's passage, the existing NCAA and Idaho state rules governed transgender women's participation as measured by circulating testosterone levels, and there was no record evidence that transgender women and girls threatened to dominate female student athletics. The record indicates that Idaho may have wished "to convey a message of disfavor" toward transgender women and girls, who are a minority in this country. *See Latta*, 771 F.3d at 476. And "[t]his is a message that Idaho . . . simply may not send" through unjustifiable discrimination.[16] *Id.* at 476.

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[16] Other federal and state courts have enjoined transgender sports bans, and no categorical ban has yet been upheld on appeal. *See Doe v. Horne*, No. CV-23-00185-TUC-JGZ, 2023 WL 4661831, at *1 (D. Ariz. July 20, 2023) (granting a preliminary injunction against Arizona's categorical ban under the Equal Protection Clause and Title IX); *A.M. by E.M. v. Indianapolis Pub. Sch.*, 617 F. Supp. 3d 950, 969 (S.D. Ind. July 26, 2022), *appeal dismissed*, No. 22-2332, 2023 WL 371646, at *1 (7th Cir. Jan. 19, 2023) (granting a preliminary injunction against transgender participation in athletics under Title IX); *Roe v. Utah High School Activities Ass'n*, No. 220903262, 2022 WL 3907182, at *1 (Utah Dist. Ct. Aug. 19, 2022) (granting a preliminary injunction against a categorical ban under the Utah Constitution's equivalent of an equal protection clause); *see also Barrett v. State of Mont.*, No. DV-21-581B, at *5–7 (Mont. Dist. Ct. Sept. 14, 2022) (granting summary judgment against a categorical ban on the ground that only Montana public

We must "reject measures that classify unnecessarily and overbroadly by gender when more accurate and impartial lines can be drawn." *Sessions v. Morales-Santana*, 137 582 U.S. 47, 63 n.13 (2017). While the Act purports to further athletic opportunities for Idaho's female students, the district court correctly concluded that the Act does not further this goal, and in fact "appears unrelated to the interests the Act purportedly advances." *Hecox*, 470 F. Supp. 3d at 979. And "[i]ntentional discrimination on the basis of gender by state action violates the Equal Protection Clause[] where, as here, the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 131 (1994). Thus, we need not and do not decide what policy would justify the exclusion of transgender women and

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university officials have the authority to regulate athletic competition in public universities).

We note that in *B. P. J. v. W. Va. State Bd. of Educ.*, 550 F. Supp. 3d 347 (S.D.W. Va. 2021), a district court enjoined West Virginia's similar categorical ban, finding that B.P.J., a twelve-year-old transgender girl who wished to play middle school athletics, was likely to succeed on the merits of her equal protection and Title IX claims. *See id.* at 353–57. In January 2023, the district court reversed course and granted summary judgment to the state, dissolving the injunction and holding that the state's definition of "biological sex" was "substantially related to athletic performance and fairness in sports." *B. P. J. v. W. Va. State Bd. of Educ.*, No. 21-00316, 2023 WL 111875, at *8 (S.D.W. Va. Jan. 5, 2023). The Fourth Circuit stayed the district court's January order pending appeal, and the Supreme Court denied the application to vacate that injunction. *See W. Va. v. B. P. J., by Jackson*, 143 S. Ct. 889 (2023). As of this writing, transgender girls such as B. P. J. may participate in West Virginia school athletics.

girls from Idaho athletics under the Equal Protection Clause, because the total lack of means-end fit here demonstrates that the Act likely does not survive heightened scrutiny.

c. The sex dispute verification provision likely fails heightened scrutiny.

The district court also correctly concluded that the sex verification provision likely failed heightened scrutiny because Idaho failed to demonstrate an "exceedingly persuasive justification," *VMI*, 518 U.S. at 534, for subjecting only young women and girls to the humiliating and intrusive burden of the sex verification process.[17]

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[17] Idaho contends that we should dismiss the challenge to the sex dispute verification provision of the Act, because the district court primarily analyzed the provision's constitutionality as to Jane's claim, which the parties have stipulated is now moot. However, Lindsay brought the same constitutional challenges to the sex dispute verification provision as Jane did in her complaint, and argued in her motion for preliminary injunction that she also would be subjected to the sex dispute verification process. Indeed, Appellants recognized that Lindsay challenged the sex dispute verification provision when they argued in front of the district court that "Lindsay [could not] establish an injury in fact because the State Board of Education ha[d] not yet promulgated regulations governing third-party sex verification disputes," *Hecox*, 469 F. Supp. 3d at 962, and that Lindsay would not have to go through the sex dispute process because her "health care provider [could] simply sign[] an 'other statement' stating that Lindsay is female." *Id.* at 964.

The district court reviewed these arguments and concluded that Lindsay had standing to challenge the sex dispute verification provision, because "it is not speculative to suggest Lindsay's sex would be disputed." *Id.* at 961. The court then held that the sex dispute verification provision likely did not survive heightened scrutiny because of the "injury and indignity

Under the Act, anyone—be it a teammate, coach, parent, or a member of an opposing team—may "dispute" a player's "biological sex," requiring that player to visit her "personal health care provider . . . [who will] verify the student's biological sex" through the player's "reproductive anatomy, genetic makeup, or normal endogenously produced testosterone levels." Idaho Code § 33-6203(3). The Act's express terms limit the verification procedure to a "routine sports physical examination" by "relying *only* on one (1) or more of the following: the student's reproductive anatomy, genetic makeup, or normal endogenously produced testosterone levels." *Id.* (emphasis added). By its plain text, the Act provides that a student's sex can be verified exclusively by these three enumerated methods. Thus, the district court was not unreasonable in finding incredulous defense counsel's argument that the Act merely required Lindsay to obtain a letter from her doctor stating that Lindsay "is female." *Hecox*, 469 F. Supp. 3d at 983. If that was all that was required to verify a student's sex under the Act, Lindsay could simply obtain such a statement and the Act (and this appeal) would be rendered meaningless.

Any one of the three exclusive procedures requires far more than a "routine sports physical" exam or simply asking whether a patient is female or not. As Lindsay's medical expert Dr. Sara Swobada described, analyzing a student's "genetic makeup" would require referral to a "pediatric endocrinologist"

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inflicted on Jane and all other female athletes," which includes Lindsay. *Id.* at 987. Thus, we decline to dismiss the challenge to the sex dispute verification provision.

who would conduct a "chromosomal microarray" that would reveal a "range of genetic conditions" beyond sex chromosomes. Hormone testing would also require a "pediatric endocrinologist," and is not a "routine part of any medical evaluation." Of course, the expense and burden of these tests would be borne only by female students and their families.

Requiring a student to find a medical practitioner to examine their reproductive anatomy, which is what a typical gynecological exam entails, is unconscionably invasive, with the potential to traumatize young girls and women. As Dr. Swobada opined, examining a female patient's "reproductive anatomy" would necessitate inspecting a student athlete's genitalia and conducting a pelvic examination or transvaginal ultrasound to determine whether that student has ovaries. She further explained that pelvic examinations for young patients are generally not required for minors, including adolescents, and are only conducted when medically necessary "with sedation and appropriate comfort measures to limit psychological trauma." Yet the Act's sex verification process subjects girls as young as elementary schoolers to unnecessary gynecological examinations merely because an individual "disputes" their sex.

The psychological burden of these searches does not just fall on transgender women like Lindsay, but on all women and girls. As amici describe, "[s]ex verification procedures have a long, checkered history in female sports that continue to this day." Br. of Amici Curiae National Women's Law Center, et al. at 15. In the 1960s, the IOC would force female athletes to strip and parade in front of a panel of doctors to

prove that they were, in fact, women. *Id.* The process was discontinued after a public outcry. *Id.* One intersex athlete who failed a sex verification procedure described being "so 'tormented' and 'unbearably embarrassed' that 'she attempted suicide' by 'swallowing poison.'" *Id.* at 17 (quoting Ruth Padawer, *The Humiliating Practice of Sex-Testing Female Athletes*, N.Y. Times Magazine (June 28, 2016)). Tellingly, while many athletic organizations have tightened their rules for transgender women's competition since 2020, none appears to have instituted a process that required gynecological examinations or invasive physical examinations.[18] Of the twenty other states that have passed restrictions on transgender women's participation in women's sports, none has authorized a similar sex verification process.[19]

Idaho has not offered any "exceedingly persuasive justification" warranting the imposition of this objectively degrading and disturbing process on young women and girls. Before the Act's passage, Idaho had no sex verification process in place and nonetheless separated teams by gender. The record is

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[18] The IOC has expressly disavowed invasive sex verification procedures, stating that "[c]riteria to determine eligibility for a gender category should not include gynecological examinations or similar forms of invasive physical examinations, aimed at determining an athlete's sex, sex variations or gender." *See* Int'l Olympic Comm., *supra*, at 5.

[19] Most states that have instituted categorical bans on transgender participation in student athletics have verified sex via a student's birth certificate. Oklahoma and Kentucky require a student or a student's parent or legal guardian submit sworn affidavits to confirm their "biological sex." *See* Okla. Stat. Ann. tit. 70, § 27-106(D); Ky. Rev. Stat. Ann. § 164.2813(2).

devoid of evidence that any boy attempted to join a girls' team. By the plain text of the Act, the purpose of the sex verification process is to identify and exclude transgender women and girls from women's athletics in Idaho. And a "bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *Romer v. Evans*, 517 U.S. 620, 634 (1996) (alteration in original) (citation omitted).

We agree with the district court that, contrary to the Act's express purpose of ensuring women's equality and opportunities in sports, the sex dispute verification process likely will discourage the participation of Idaho female students in student athletics by allowing any person to dispute their gender and then subjecting them to unnecessary medical testing and genital inspections. Because the Act's means undermine its purported objectives and impose an unjustifiable burden on all female athletes in Idaho, the district court did not abuse its discretion by finding that the sex verification provision likely would not survive heightened scrutiny.

B. Irreparable Harm

The district court properly concluded that Lindsay faced irreparable harm absent an injunction. "It is well established that the deprivation of constitutional rights unquestionably constitutes irreparable injury." *Hernandez v. Sessions*, 872 F.3d 976, 994 (9th Cir. 2017) (internal quotation marks and citation omitted). Therefore, as the Act is likely unconstitutional, "it follows inexorably . . . that [Hecox] ha[s] [] carried [her] burden as to irreparable harm." *Id.* at 995.

More concretely, if the preliminary injunction is lifted, Lindsay will be barred from trying out for or participating on any female sports teams at BSU, including the women's club soccer team, which she joined to improve her running skills and to experience "the camaraderie of being on a team." *See* Idaho Code § 33-6203(3). While Lindsay did not make the track team in Fall 2020, the Act would bar her from trying out for the team in Fall 2023, her last opportunity to play NCAA sports. Lindsay would also be subject to the threat of the sex dispute verification process and unnecessary examinations or medical testing. These are all specific "harm[s] for which there is no adequate legal remedy" in the absence of an injunction. *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014).

C. Balance of the Equities & Public Interest

The district court also did not err in concluding that the balance of the equities weighed in favor of a preliminary injunction. When the government is a party to a lawsuit, the balance of the equities and public interest prongs of the preliminary injunction test merge, because government actions presumably are in the public interest. *See Drakes Bay Oyster Co.*, 747 F.3d at 1092; *Nken v. Holder*, 556 U.S. 418, 435 (2009) (holding that "courts must be mindful that the Government's role as the respondent in every removal proceeding does not make the public interest in each individual one negligible"). Here, Lindsay faces deeply personal, irreparable harms without injunctive relief, including being barred from all female college athletic teams and the prospect of invasive medical testing if her gender is "disputed."

A preliminary injunction does not appear to inflict any comparable harm to the Appellants, as the injunction expressly maintained the status quo. Under the status quo, the NCAA policies for college athletics and the IHSAA policies for high school athletics govern transgender female participation in sports, and Idaho schools have complied with those policies for over a decade. The district court found no "evidence that transgender women threatened equality in sports, girls' athletic opportunities, or girls' access to scholarships in Idaho" during that decade, and thus Appellants failed to demonstrate any harm from issuance of the injunction. *Hecox*, 469 F. Supp. 3d at 988. Moreover, as the district court found, Intervenors themselves may also be harmed by the sex dispute verification process, to which they are subject simply by virtue of playing sports in Idaho. Because "the public interest and the balance of the equities favor preven[ting] the violation of a party's constitutional rights," *Ariz. Dream Act*, 757 F.3d at 1060 (alteration in original) (internal quotation marks and citation omitted), we affirm that the district court did not abuse its discretion in weighing this factor.

IV. SCOPE OF THE INJUNCTION

Finally, we reject Intervenors' argument that the scope of the injunction is improper as a matter of law. "A district court has considerable discretion in fashioning suitable relief and defining the terms of an injunction," and "[a]ppellate review of those terms 'is correspondingly narrow.'" *Lamb-Weston, Inc. v. McCain Foods, Ltd.*, 941 F.2d 970, 974 (9th Cir. 1991) (quoting *Coca–Cola Co. v. Overland, Inc.*, 692 F.2d 1250, 1256 n.16 (9th Cir.1982)). However, injunctive

relief "must be tailored to remedy the specific harm alleged," and "[a]n overbroad injunction is an abuse of discretion." *Id.* (finding that a worldwide injunction to protect a trade secret was *not* an abuse of discretion). Under Federal Rule of Civil Procedure Rule 65(d), "[e]very order granting an injunction . . . must: (A) state the reasons why it issued; (B) state its terms specifically; and (C) describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required." However, "injunctions are not set aside under [R]ule 65(d) [] unless they are so vague that they have no reasonably specific meaning." *United States v. Holtzman*, 762 F.2d 720, 726 (9th Cir. 1985).

Here, the scope of the injunction is clear: The district court enjoined the enforcement of any of the provisions of the Act.[20] The district court explicitly held that the injunction would restore the pre-Act status quo, such that the "NCAA policy for college athletes and IHSAA policy for high school athletes" would remain in effect. *Hecox*, 479 F. Supp. 3d at 988. Nor did the district court abuse its discretion as to the scope of the injunction. It concluded that the Act was likely "unconstitutional as currently written," *id.*, and

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[20] The partial concurrence states that it is unclear whether the Court was "enjoining all provisions of the Act or only some of them." Partial Concurrence at 81. However, the district court granted the motion for preliminary injunction in full, *see Hecox*, 479 F. Supp. 3d at 989, and the motion asked the district court to enjoin "enforc[ement of] any of the provisions of" the Act. It does not appear from the record that either party argued that the injunction should apply to only certain provisions of the Act. Thus, no genuine confusion exists regarding whether the entirety of the Act is enjoined.

properly enjoined enforcement of the Act in its entirety.[21] That Lindsay's case involves an as-applied

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[21] The partial concurrence argues that we should remand this case to the district court to tailor the injunction to provide the specificity that Rule 65(d)(1) requires because it is unclear whether the injunction is limited to "transgender women and girls who either have never undergone puberty or have suppressed their testosterone levels through hormone therapy." Partial Concurrence at 82. The concurrence also suggests that the scope of the injunction is overbroad because it might "appl[y] to transgender female athletes" who have gone through puberty and have not received hormone therapy. *Id.* at 83. However, the district court explicitly preserved the "status quo" in Idaho when fashioning the injunction, stating:

> [A] preliminary injunction would not harm Defendants because it would merely maintain the status quo while Plaintiffs pursue their claims. If an injunction is issued, Defendants can continue to rely on the NCAA policy for college athletes and IHSSA policy for high school athletes, as they did for nearly a decade prior to the Act . . . [N]either Defendants nor the Intervenors would be harmed by returning to this status quo.

Hecox, 479 F. Supp. 3d at 988. At the time of the injunction, both policies allowed transgender women and girls "to compete on girls' teams after completing one year of hormone therapy suppressing testosterone under the care of a physician." *Id.* at 947. Thus, the district court specifically stated how the injunction would apply to transgender female athletes who have gone through puberty and not received hormone therapy: those individuals would be required to conform to current NCAA and IHSSA policies circumscribing the extent of their participation in female athletics.

In any event, there is no evidence that Idaho believes the terms of the injunction "have no reasonably specific meaning." *Holtzman*, 762 F.2d at 726. To the contrary, only Intervenors, not Idaho, argued on appeal that the injunction was vague and overbroad, indicating that Idaho school administrators have clearly understood over the past three years what conduct is permissible under the injunction.

challenge does not undermine the district court's findings that the Act is unconstitutional as applied to all women. *See*, *e.g.*, *John Doe No. 1 v. Reed*, 561 U.S. 186, 194 (2010) (holding that a challenge to a category of applications of a statute may be characterized as an as-applied challenge).[22]

V.

While we address only the Act before us, and opine on no other regulation or policy, we must observe that both the science and the regulatory framework surrounding issues of transgender women's participation in female-designated sports is rapidly evolving. Since Lindsay filed her initial challenge, the IOC and NCAA have adopted more

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[22] Intervenors, but not Idaho, contend that the injunction is overbroad because it extends to non-plaintiffs in light of the district court's dismissal of Lindsay's facial challenge. However, in *Doe*, the Supreme Court explained that an as-applied claim could be "'facial' in that it is not limited to plaintiffs' particular case, but challenges application of the law more broadly." *Doe*, 561 U.S. at 194. Because the district court found that the Act harmed "the constitutional rights of every girl and woman athlete in Idaho," *Hecox*, at 479 F. Supp. 3d at 988, it did not abuse its discretion in issuing a preliminary injunction against the entire category of applications of the Act.

In addition, as the partial concurrence persuasively argues, the district court could not accord Lindsay full relief without enjoining the Act in its entirety consistent with the principle that "an injunction 'should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs before the court.'" *City & County of San Francisco v. Barr*, 965 F.3d 753, 765 (9th Cir. 2020) (quoting *L.A. Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664 (9th Cir. 2011)); *see also E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 680 (9th Cir. 2021) (en banc); *Doe #1 v. Trump*, 957 F.3d 1050, 1069 (9th Cir. 2020).

limited policies as to transgender female participation in women's sports, requiring the governing entities for each sport to formulate sport-specific policies. Relying on medical evidence, many sports organizations have tightened their eligibility criteria for transgender women's teams, including incorporating guidelines for lower testosterone levels for eligibility to compete.[23] The U.S. Department of Education has proposed new Title IX regulations addressing restrictions on transgender athletes' eligibility that would require "such criteria" to "be substantially related to the achievement of an important educational objective and minimize harms to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied."[24] These more narrowly drawn policies, which are not before us,

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[23] *See*, *e.g.*, USA Swimming, *USA Swimming Releases Athlete Inclusion, Competitive Equity and Eligibility Policy* (Feb. 1, 2022), https://tinyurl.com/mr2k4tvp (announcing a policy for USA Swimming that elite transgender women athletes must show testosterone levels below 5 nmol/L continuously for at least 36 months); Bicycling, *The UCI Announces Changes to Its Policy on Transgender Athletes* (June 17, 2022), https://www.bicycling.com/news/a40320907/uci-transgender-policy-2022/ (announcing a testosterone limit of 2.5 nmol/L for elite bicyclists (halved from the previous 5.0 nmol/L) for a suppression period of 24 months); Olalla Cernuda, *World Triathlon Executive Board approves Transgender Policy*, World Triathlon (Aug. 3, 2022), https://tinyurl.com/yxw4syzw (requiring below a 2.5 nmol/L testosterone level for 24 months for triathletes).

[24] 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. 22860 (proposed April 13, 2023) (to be codified at 34 C.F.R. pt. 106).

attempt to balance transgender inclusion with competitive fairness—a policy question that such regulatory bodies are best equipped to address.

VI. CONCLUSION

We recognize that, after decades of women being denied opportunities to meaningfully participate in athletics in this country, many cisgender women athletes reasonably fear being shut out of competition because of transgender athletes who "retain an insurmountable athletic advantage over cisgender women." *See* Br. of Amici Curiae Sandra Bucha, et al. at 8. We also recognize that athletic participation confers to students not just an opportunity to win championships and scholarships, but also the benefits of shared community, teamwork, leadership, and discipline. *See generally* Br. of Amici Curiae 176 Athletes in Women's Sports (describing the benefits of sports, and diversity in women's sports, on all students). Excluding transgender youth from sports necessarily means that some transgender youth will be denied those educational benefits.

However, we need not and do not decide the larger question of whether any restriction on transgender participation in sports violates equal protection. Heightened scrutiny analysis is an extraordinarily fact-bound test, and today we simply decide the narrow question of whether the district court, on the record before it, abused its discretion in finding that Lindsay was likely to succeed on the merits of her equal protection claim. Because it did not, we affirm the entry of preliminary injunctive relief against the Act's enforcement.

AFFIRMED.

CHRISTEN, Circuit Judge, concurring in part and dissenting in part:

The Fairness in Women's Sports Act, 2020 Idaho Sess. Laws 967–70 (codified at Idaho Code §§ 33-6201–06) (the "Act"), declares that "[a]thletic teams or sports designated for females, women, or girls shall not be open to students of the male sex." Idaho Code § 33-6203(2). The Act considers transgender women and girls to be "students of the male sex." Accordingly, the Act bans all transgender women and girls from competing in school sports in Idaho on teams that are consistent with their gender identities. The ban applies broadly to all public schools, from kindergarten through college, and to all private schools and colleges whose students or teams compete against public schools or colleges. *Id.* § 33-6203(1). The ban also applies to all kinds of sports, to all grades and ages, and to all types of competition. And the ban extends to all transgender women and girls, including those who are too young to have experienced puberty, those whose use of puberty blockers prevented them from ever going through puberty, and those who have undergone a year or more of hormone therapy to suppress their levels of circulating testosterone. To enforce the ban, the Act permits any individual to "dispute" the sex of any athlete participating in women's or girls' sports. *Id.* § 33-6203(3). If a student's sex is disputed, the statute requires the student to have her health care provider "verify" her "biological sex." *Id.* To provide the necessary verification, the health care provider may rely "only on one (1) or more of the following: the student's reproductive anatomy, genetic makeup, or normal endogenously produced testosterone levels." *Id.*

Lindsay Hecox, a student at Boise State University who wants to participate in her college's women's track team, claims that the Act violates her statutory and constitutional rights, including her Fourteenth Amendment right to equal protection of the laws. Lindsay is a transgender woman who undergoes gender-affirming hormone therapy that reduces her testosterone levels. She would have been eligible to participate in women's sports in Idaho under the policies in place before the Act was adopted, but she is prevented from doing so under the Act.

In August 2020, the district court granted Lindsay's motion to preliminarily enjoin enforcement of the Act pending trial on the merits of her claims. The court entered extensive findings and ruled that Lindsay was likely to succeed on her equal protection claim. *Hecox v. Little (Hecox I)*, 479 F. Supp. 3d 930 (D. Idaho 2020). In doing so, the court reasoned that the Act is not substantially related to the State's important interests in promoting sex equality and providing athletic opportunities for women, because the Act bans transgender women and girls *categorically*, rather than focusing on those transgender women and girls who, by virtue of their testosterone levels, have real athletic advantages over other women and girls. The court also reasoned that the Act's dispute and sex verification provision was likely to hinder, rather than further, the State's important interests "by subjecting women and girls to unequal treatment, excluding some from participating in sports at all, incentivizing harassment and exclusionary behavior, and authorizing invasive bodily examinations." *Id.* at 987.

Like the majority, I conclude that the district

court did not abuse its discretion by granting preliminary injunctive relief. The district court carefully considered the evidence and made findings amply supported by the record. Given our limited and deferential review at this stage of the litigation, the categorical sweep of the ban on transgender students, the medical consensus that circulating testosterone rather than transgender status is an accurate proxy for athletic performance, and the unusual and extreme nature of the Act's sex verification requirements, the district court did not abuse its discretion by concluding that Lindsay was likely to succeed on her equal protection claim.

I also agree with the majority that the district court did not abuse its discretion by enjoining enforcement of the statute against non-plaintiffs. Given the partially facial nature of Lindsay's claims and the Supreme Court's discussion of this subject in *John Doe No. 1 v. Reed*, 561 U.S. 186 (2010), I conclude that the district court acted within its broad discretion.

Although I agree with much of the majority opinion, I respectfully disagree with the majority in certain respects. First, I disagree with the majority's conclusion that "only women and girls who want to compete on Idaho school athletic teams, and not male athletes, are subject to the sex dispute verification process." Maj. Op. at 36. I read the verification provision to apply to any student, male or female, who participates on women's or girls' athletic teams. The verification provision does not apply to any student, male or female, who participates on men's or boys' athletic teams. Accordingly, I conclude that it is the team an athlete chooses to join that dictates whether

they are subject to the statute's verification process, not the athlete's sex. In my view, the majority errs in holding otherwise.

Second, I disagree with the majority's conclusion that the preliminary injunction satisfies the specificity requirements set out in Federal Rule of Civil Procedure 65(d)(1). The injunction does not "state its terms specifically" or "describe in reasonable detail . . . the . . . acts restrained or required."

Finally, I disagree with the majority's conclusion that the district court properly "tailor[ed] the scope of the remedy to fit the nature and extent of the constitutional violation." *City & County of San Francisco v. Trump*, 897 F.3d 1225, 1244 (9th Cir. 2018) (quoting *Hills v. Gautreaux*, 425 U.S. 284, 293–94 (1976)). The district court appears to have enjoined § 33-6203(2) as applied to *all* transgender female athletes. But the court made no findings suggesting that § 33-6203(2) is unconstitutional as applied to transgender women and girls who have gone through puberty and have not received hormone therapy to suppress testosterone. Given the court's finding that the medical consensus treats circulating testosterone as the key factor in determining differences in athletic performance, the injunction is not appropriately tailored.

For these reasons, I would affirm the district court's order in part, vacate it in part, and remand. I therefore concur in part, and respectfully dissent in part, from the court's judgment.

I. Interpreting § 33-6203(3)

Although the majority does not directly address

the issue, I note that the parties interpret the Act's sex verification provision differently. Idaho Code § 33-6203(3) states:

> A dispute regarding a student's sex shall be resolved by the school or institution by requesting that the student provide a health examination and consent form or other statement signed by the student's personal health care provider that shall verify the student's biological sex. The health care provider may verify the student's biological sex as part of a routine sports physical examination relying *only on one (1) or more of the following*: the student's reproductive anatomy, genetic makeup, or normal endogenously produced testosterone levels.

Id. (emphasis added).

Appellants assert that a health care provider may verify a student's biological sex through any means, not only through the three means enumerated in the statute (reproductive anatomy, genetic makeup, and normal endogenously produced testosterone levels). The State argues:

> The statute provides three separate options to verify sex. The first two options, (1) a health examination and consent form or (2) other statement signed by the student's personal health care provider, are not subject to the three criteria mentioned in the third option, the "routine sports physical examination." They are different means, and listed in a completely different sentence. Moreover, the separate, third option, a "routine sports

> physical examination," makes clear that it is permissive, not required, using the term "may."

State's Opening Brief at 38. Lindsay, by contrast, argues that because the statute specifies that providers may rely "only on one (1) or more of the following," it plainly limits health care providers to using one of the three means enumerated in the statute.

I agree with Lindsay. Boiled down, the State interprets the statute to mean that a health care provider may verify a student's sex by: (1) a routine sports physical examination relying on one or more of the enumerated means; *or* (2) any "other statement" relying on any means at all. The State's reading sharply diverges from the language adopted by the legislature and renders the provision's second sentence inoperative. The State argues that the district court failed to apply Idaho's principles of statutory interpretation, *see* State's Opening Brief at 37, but notably fails to identify any support for its anti-textual interpretation, from Idaho or elsewhere. Because the second sentence becomes a dead letter under the State's interpretation, the statute is not reasonably susceptible to the interpretation offered by the State. *See State v. Yzaguirre*, 163 P.3d 1183, 1190 (Idaho 2007) ("In interpreting statutory language, all the words of the statute must be given effect if possible, and the statute must be construed as a whole.").

II. Intermediate Scrutiny Applies Because the Act Discriminates Based on Transgender Status

I agree with the majority, and with the district court, that intermediate scrutiny applies.

Before the passage of the Act, Idaho prohibited "men and boys" from participating on teams designated for women and girls. As the district court pointed out, "general sex separation on athletic teams for men and women . . . preexisted the Act and has long been the status quo in Idaho. Existing rules already prevented boys from playing on girls' teams before the Act." *Hecox I*, 479 F. Supp. 3d at 982. However, Idaho's pre-Act status quo allowed transgender women and girls (i.e., athletes assigned male at birth who identify as female) to participate in women's and girls' sports consistent with Idaho High School Activities Association (IHSAA) and National Collegiate Athletic Association (NCAA) policies. To be eligible, these students had to provide proof that they had undergone at least one year of hormone therapy to suppress their testosterone levels. Hence, although the Act is couched in terms that suggest it classifies student athletes according to their "biological sex," Idaho Code § 33-6203(1), (3), and purports to preclude students of the "male sex" from participating in women's and girls' sports, the ban in fact serves only to prohibit transgender women and girls from women's and girls' sports teams. The ban's exclusive function is to abrogate the IHSAA and NCAA policies allowing transgender women and girls, under limited circumstances, to participate in women's and girls'

sports.[1]

Under these circumstances, that the Act speaks in terms of "biological sex," rather than "transgender status" or "gender identity," is not controlling. The Act changed the status quo by classifying athletes, for the first time, based on transgender status. The conclusion that the Act classifies based on transgender status finds extensive support in controlling case law. In *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979), the Supreme Court recognized that a statute may classify covertly as well as overtly:

> When a statute gender-neutral on its face is challenged on the ground that its effects upon women are disproportionably adverse, a twofold inquiry is thus appropriate. The first question is whether the statutory classification is indeed neutral in the sense that it is not gender-based. If the classification itself, covert or overt, is not based upon gender, the second question is whether the adverse effect reflects invidious

[1] The principal section of the statute, Idaho Code § 33-6203, comprises three subsections. They are all integral parts of the statutory plan to exclude transgender women and girls from women's and girls' sports. Section 33-6203(2) effects a ban, or prohibition, on transgender athletes participating in sports designated for women or girls. Section 33-6203(3), the sex verification provision, is the enforcement mechanism for the ban. Section 33-6203(2) operates exclusively against transgender female athletes for the reasons explained in the text. But any student—male or female, transgender or cisgender—who participates in sports designated for women or girls is subject to the verification provision in § 33-6203(3)).

gender-based discrimination.

Id. at 274. Under *Feeney*, a statute that is gender-neutral on its face nevertheless classifies based on gender if the statutory classification "can plausibly be explained only as a gender-based classification." *Id.* at 275.[2] In *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014), for example, we held that laws defining marriage as a relationship "between a man and a woman," *id.* at 464 n.2, but making no mention of sexual orientation, nevertheless "distinguish[ed] on their face between opposite-sex couples, who are permitted to marry and whose out-of-state marriages are recognized, and same-sex couples, who are not permitted to marry and whose marriages are not recognized." *Id.* at 467. The defendants could not "overcome the inescapable conclusion" that the laws "discriminate[d] on the basis of sexual orientation." *Id.* at 468. We applied the same reasoning in *Pacific Shores Properties, LLC v. City of Newport Beach*, 730 F.3d 1142 (9th Cir. 2013), a Fair Housing Act case, where 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

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[2] I do not conclude that the ban is a transgender-based classification because it has a disproportionate adverse impact on transgender women and girls. The Supreme Court has made clear that disproportionate impact alone does not trigger heightened scrutiny under the Equal Protection Clause. *See Washington v. Davis*, 426 U.S. 229, 242 (1976).

> 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." *McWright v. Alexander*, 982 F.2d 222, 228 (7th Cir. 1992).

Id. at 1160 n.23; *cf. Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) (42 U.S.C. § 1985(3)) ("A tax on wearing yarmulkes is a tax on Jews."); *McWright*, 982 F.2d at 228 (Rehabilitation Act) ("We have warned that an employer cannot be permitted to use a technically neutral classification as a proxy to evade the prohibition of intentional discrimination.").

Given the Act's context, these authorities support the conclusion that the Act classifies based on transgender status. As in *Feeney*, the Act can only be understood as a transgender-based classification. As in *Latta*, the Act distinguishes on its face between cisgender women and girls, who can compete on teams consistent with their gender identity, and transgender women and girls, who are categorically barred from doing so. The Act "use[s] a technically neutral classification"—biological sex—"as a proxy to evade the prohibition of intentional discrimination." *McWright*, 982 F.2d at 228. Indeed, transgender women and girls are the *only* students who are actually affected by the Act's classification; they are the only group banned from participating on athletic teams that are aligned with their gender identities.[3]

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[3] Under the Act, cisgender men and boys may participate on men's and boys' teams and may do so without being subject to

Furthermore, even putting *Feeney*, *Latta*, and *Pacific Shores* aside, no one disputes that heightened scrutiny applies "[w]hen there is a proof that a discriminatory purpose has been a motivating factor in the decision." *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–66 (1977). A discriminatory purpose is shown when "the decision-maker, 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." *Feeney*, 442 U.S. at 279.

These principles map perfectly onto Lindsay's

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the sex verification procedure. So can transgender men and boys. Cisgender women may participate on athletic teams designated for women and girls, though like all athletes on these teams, they are subject to the sex verification procedure that serves as the Act's enforcement mechanism. Transgender women and girls are uniquely disadvantaged under the Act:

	Allowed to Participate on Team Aligned with Gender Identity	**Subject to Verification Provision if Playing on Team Aligned with Gender Identity**
Cisgender men and boys	Yes	No
Transgender men and boys	Yes	No
Cisgender women and girls	Yes	Yes*
Transgender women and girls	No*	Yes*

An asterisk (*) indicates a change from the policies in place before the Act's passage.

challenge because the Act purposefully treats transgender women and girls differently from every other group. The district court found that "the law is directed at excluding women and girls who are transgender, rather than on promoting sex equality and opportunities for women." *Hecox I*, 479 F. Supp. 3d at 983. This finding is well supported. The court inferred a discriminatory purpose from the fact that the Act bars transgender athletes categorically rather than focusing on factors—such as puberty and circulating testosterone—that a consensus of the medical community actually associates with athletic performance. The district court noted that the Act's definition of "biological sex":

> excludes the one factor that a consensus of the medical community appears to agree drives the physiological differences between male and female athletic performance. Significantly, the preexisting Idaho and current NCAA rules instead focus on that factor. That the Act essentially bars consideration of circulating testosterone illustrates the Legislature appeared less concerned with ensuring equality in athletics than it was with ensuring exclusion of transgender women athletes.

Id. at 984. The district court's findings are not clearly erroneous. Indeed, the Act's legislative sponsor, Representative Barbara Ehardt, forthrightly acknowledged that the legislature's purpose in enacting the statute was to force transgender women and girls "to compete on the side of those biological boys and men . . . whom they look alike." This unvarnished record and the district court's cogent

recognition of the real change effected by the Act in Idaho lend strong support for the district court's conclusion that the Act classifies based on transgender status and discriminates against transgender women and girls.

I agree with the district court, and with the majority, that intermediate scrutiny applies because the Act classifies and discriminates on account of transgender status.

III. The Verification Provision Does Not Apply Only to Female Students

I part company, however, with the majority's conclusion that "only women and girls who want to compete on Idaho school athletic teams, and not male athletes, are subject to the sex dispute verification process." Maj. Op. at 36.

On its face, the sex verification provision is applicable to any student, male or female, participating on "[a]thletic teams or sports designated for females, women, or girls." *See* Idaho Code § 33-6203(2). By its terms, the verification process applies to men and boys who wish to participate on teams designated for women and girls, and it does not apply to athletes of any gender who participate on teams designated for men or boys. It is the team an athlete chooses to join that dictates whether they are subject to the statute's verification process, not the athlete's sex.[4]

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[4] The verification process applies to both male and female students, as long as they join, or try to join, teams designated for women or girls. It applies to: (1) cisgender female students who play on women's and girls' teams, as the Act allows; (2)

The majority's approach and my own differ somewhat, but we agree that the Act fails to satisfy heightened scrutiny. The majority analyzes the verification provision in isolation, decides that heightened scrutiny applies because the provision does not apply to males (a proposition with which I respectfully disagree), and then holds that the district court did not abuse its discretion in concluding that Lindsay is likely to succeed on her claim that the verification provision is not substantially related to Idaho's important governmental interests. By contrast, I see no need to analyze the verification provision in isolation. In my view, the verification provision is an integral part of the ban on transgender women and girls participating on women's and girls' teams. It is the critical mechanism by which the ban is implemented and enforced. Thus, I would simply address whether the ban as a whole survives heightened scrutiny. As explained, heightened scrutiny applies because the ban as a whole both classifies and discriminates based on transgender status.

IV. *Clark* Does Not Control

I agree with the majority that our decision in *Clark ex rel. Clark v. Arizona Interscholastic Ass'n*,

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transgender female students who play on women's and girls' teams, as the Act prohibits; (3) transgender male students (i.e., students who are assigned female at birth but identify as male) if they choose to play on women's and girls' teams, as the Act permits; and (4) cisgender male students who play on women's and girls' teams, as the Act prohibits, or who, like the plaintiffs in the *Clark* litigation discussed below, desire to do so. The verification procedure does not apply to any students playing on teams designated for men or boys.

695 F.2d 1126 (9th Cir. 1982), is not controlling here. In *Clark*, we upheld an Arizona policy prohibiting boys from playing on girls' volleyball teams because: (1) "boys' overall [athletic] opportunity [wa]s not inferior to girls'"; and (2) sex served as an "accurate proxy" for "real . . . physiological differences." *Clark*, 695 F.2d at 1131. We held that the exclusion satisfied intermediate scrutiny because "[t]he record makes clear that due to average physiological differences, males would displace females to a substantial extent if they were allowed to compete for positions on the volleyball team," and "athletic opportunities for women would [thereby] be diminished." *Id.*

Appellants' reliance on *Clark* is misplaced. First, the only issue we decided in *Clark*—whether a sex-based classification was constitutionally permissible—is not in dispute here. The district court dismissed Plaintiffs' facial challenges to the Act, *Hecox I*, 479 F. Supp. 3d at 971, in light of *Clark* and the State's argument that the ban "can . . . be constitutionally applied to cisgender boys," *id.* at 969. Idaho has long maintained separate teams and sports for men/boys and women/girls. *See id.* at 982. Those classifications, which for decades have been widely understood as a constitutionally permissible means of advancing equality for women and girls in sports, are not at issue here. The question that *is* presented here—whether a classification based on "biological sex" or transgender status is constitutionally permissible—is one that was not presented in *Clark*.

Second, the facts of this case have little in common with *Clark*. The record in *Clark* made clear that sex was a valid proxy for average physiological differences between men and women. Here, by

contrast, the district court found that the ban on transgender female athletes applies broadly to many students who do not have athletic advantages over cisgender female athletes. In addition, as the district court pointed out, "under the Act, women and girls who are transgender will not be able to participate in *any* school sports, unlike the boys in *Clark*, who generally had equal athletic opportunities." *Id.* at 977 (emphasis added).[5] In sum, Idaho's ban on transgender women and girls must rise or fall on its own merits; *Clark* is legally and factually distinguishable.

V. The Act Is Not Substantially Related to the State's Important Interests and the District Court Did Not Abuse Its Discretion by Granting Preliminary Injunctive Relief

It is undisputed that the State has articulated "important governmental objectives" here: "promot[ing] sex equality" in sports and "providing opportunities for female athletes to demonstrate their skill, strength, and athletic abilities while also

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[5] *See Hecox I*, 479 F. Supp. 3d at 977 ("[T]he Act's categorical exclusion of transgender women and girls entirely eliminates their opportunity to participate in school sports."); *see id.* (noting that "forcing a transgender woman to participate on a men's team would be forcing her to be cisgender, which is 'associated with adverse mental health outcomes'"); *id.* ("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.'"); Lindsay Hecox decl. ¶ 37 ("I would not compete on a men's team. I am not a man, and it would be embarrassing and painful to be forced onto a team for men—like constantly wearing a big sign that says 'this person is not a "real" woman.' I would be an outcast on the men's team.").

providing them with opportunities to obtain recognition and accolades, college scholarships, and the numerous other long-term benefits that flow from success in athletic endeavors." Idaho Code § 33-6202(12). Under intermediate scrutiny, the operative question is simply whether "the discriminatory means employed [by the Act] are substantially related to the achievement of those objectives." *United States v. Virginia*, 518 U.S. 515, 533 (1996) (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)). Given the district court's extensive findings and our limited and deferential review, I agree with the majority that the district court did not abuse its discretion by concluding that Lindsay is likely to succeed on her claim that the Act is not substantially related to the State's interests in promoting equality and providing athletic opportunities, including scholarships, for women.

In large part, the district court concluded that the Act was unrelated to the State's important interests because it excludes transgender women and girls from women's sports, purportedly in the interest of competitive fairness, but it excludes them in ways that bear no relationship to physiological advantages and athletic performance. After reviewing the expert evidence presented by the parties, the district court found that "the sex difference in circulating testosterone of adults explains most, if not all, of the sex differences in sporting performance." *Hecox I*, 479 F. Supp. 3d at 980. Appellants disagree with that finding, but on the record presented to the district court at the preliminary injunction stage, the finding was well supported, and it is not clearly erroneous. Indeed, the district court drew this finding from the

defense expert, Dr. Brown's, own report. *See id.*; Brown decl. ¶ 81.

Given the medical-community consensus regarding the connection between circulating testosterone and athletic performance, the district court reasonably rejected Appellants' contention that the Act's categorical ban is substantially related to the State's interests in promoting equality and providing athletic opportunities for women and girls. The district court found that the ban's broad sweep extends to many transgender women and girls who do not possess physiological advantages over cisgender women and girls. The court noted, for instance, that the ban applies to students who are too young to have experienced puberty. The court found that these girls have no competitive advantage, because, "[b]efore puberty, boys and girls have the same levels of circulating testosterone." *Id.* at 979. These findings are not clearly erroneous. On the contrary, they appear to be undisputed. *See* Brown decl. ¶ 113 ("[B]efore puberty, boys and girls do not differ in height, muscle and bone mass."), ¶ 114 ("This physical advantage in performance arises during early adolescence when male puberty commences after which men acquire larger muscle mass and greater strength, larger and stronger bones, higher circulating haemoglobin as well as mental and/or psychological differences."), ¶ 119 ("[G]ender divergences . . . arise from the increase in circulating testosterone from the start of male puberty."); Safer decl. ¶ 38 ("Increased testosterone begins to affect athletic performance at the beginning of puberty."); Safer suppl. decl. ¶ 13 ("[B]efore puberty there are not noticeable performance difference[s] between boys

and girls. . . . There is simply no basis for the assertion that pre-pubertal children have physical sex-based performance differences.").

The district court also noted that the Act applies to the "population of transgender girls who, as a result of puberty blockers at the start of puberty and gender affirming hormone therapy afterward, never go through a typical male puberty at all." *Hecox I*, 479 F. Supp. 3d at 980. The court found that these athletes too do "not have an ascertainable advantage over cisgender female athletes." *Id.* These findings are not clearly erroneous, and they also appear to be undisputed. Plaintiffs' expert, Dr. Safer, testified consistently with the district court's findings, *see* Safer decl. ¶¶ 47–49, and the defense expert, Dr. Brown, appears to have offered no contrary opinion on this point. Although Dr. Brown argued that transgender women and girls who have gone through puberty have some enduring athletic advantages, even if they later undergo hormone therapy, *see* Brown decl. ¶¶ 11(c)–13, 126–53, 163(c), he did not challenge Dr. Safer's conclusions regarding women who are administered puberty blockers at the start of puberty and gender-affirming hormone therapy afterward.

The district court also found that the Act is unrelated to competitive fairness because it applies to women and girls who, like Lindsay, have undergone hormone therapy and testosterone suppression for twelve months or more. *See Hecox I*, 479 F. Supp. 3d at 979–80. The parties' experts disagree about whether these women and girls have lasting physiological advantages, but the district court's findings are well-grounded in the evidentiary record

that was available to the court. They are consistent with Dr. Safer's opinion that "physiological advantages are not present when a transgender woman undergoes hormone therapy and testosterone suppression," *id.* at 979; with the results of the Harper study, which the parties appear to agree is "the only study examining the effects of gender-affirming hormone therapy on the athletic performance of transgender athletes," *id.* at 980; with the "medical consensus that the difference in testosterone is generally the primary known driver of differences in athletic performance between elite male athletes and elite female athletes," *id.*; with the findings of the Handelsman study—cited by the defense's own expert, *see* Brown decl. ¶ 81—that the "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," *Hecox I*, 479 F. Supp. 3d at 980; and with the IHSAA and NCAA policies that existed before the Act's adoption.

The Act's relationship to its stated purposes is also in tension with its broad application to all sports. It applies not only to elite or highly competitive sports but also to less competitive grade school and club sports. It applies to all ages and grades, and to all sports regardless of physicality, risk of injury, or selectivity. Intermediate scrutiny does not require narrow tailoring, but it does require "a substantial relationship between the exclusion of [transgender athletes] from the team and the goal of . . . providing equal opportunities for women." *See Clark*, 695 F.2d at 1131. Here, the district court reasonably concluded that the "fit" between the Act's means and ends is

sorely lacking.

Finally, the district court found that an integral component of the ban—the State's uniquely invasive dispute and sex verification provision—was likely to hinder rather than advance the Act's stated interest in promoting athletic opportunities for women. The court found that subjecting female athletes to bullying, harassment, and invasive medical procedures is likely to have the perverse effect of discouraging women from participating in scholastic sports, a result directly contrary to the Act's stated purpose. *See Hecox I*, 479 F. Supp. 3d at 985–87. These findings are not clearly erroneous.

Given the district court's extensive and well-supported findings, I agree with the majority that the district court did not abuse its discretion by concluding that Lindsay is likely to succeed on her claim that the Act is not substantially related to its purported goals of promoting sex equality, providing opportunities for female athletes, or increasing female athletes' access to scholarships. Accordingly, the district court did not abuse its discretion by concluding that Lindsay is likely to succeed on the merits of her equal protection claim.

For the reasons given by the majority, I also agree that the district court did not abuse its discretion by concluding that the remaining preliminary injunction factors favored relief. The majority correctly observes that where the State is a party, the last two factors in the *Winter* test for preliminary injunctive relief merge. I only add that the public interest factor favors relief here because "all citizens have a stake in upholding the Constitution," *Preminger v. Principi*,

422 F.3d 815, 826 (9th Cir. 2005), and "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) (citation omitted). In sum, I agree with the majority that the district court did not abuse its discretion by concluding that preliminary injunctive relief was warranted.

VI. The Preliminary Injunction Is Insufficiently Specific

Intervenors also raise several procedural challenges to the preliminary injunction. I conclude that some of them have merit.

Under Rule 65(d)(1) of the Federal Rules of Civil Procedure, "[e]very order granting an injunction . . . must: (A) state the reasons why it issued; (B) state its terms specifically; and (C) describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required." "The Rule was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood." *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974) (per curiam). In addition, "[u]nless the trial court carefully frames its orders of injunctive relief, it is impossible for an appellate tribunal to know precisely what it is reviewing." *Id.* at 477. "Injunctions are not set aside under rule 65(d), however, unless they are so vague that they have no reasonably specific meaning." *United States v. Holtzman*, 762 F.2d 720, 726 (9th Cir. 1985).

The majority deems the preliminary injunction sufficiently specific because "[t]he district court

enjoined the enforcement of any of the provisions of the Act." Maj. Op. at 56. But the district court ruled only that "[t]he Motion for Preliminary Injunction (Dkt. 22) is GRANTED." *Hecox I*, 479 F. Supp. 3d at 989. The court did not specify whether it was enjoining all provisions of the Act or only some of them, or whether it was enjoining any specific provision of the Act in its entirety or only as applied to certain classes of individuals. The court's findings could be understood as implying that the court intended to enjoin the Act's ban solely as to transgender women and girls who do not have athletic advantages over other female athletes—i.e., transgender women and girls who either have never undergone puberty or have suppressed their testosterone levels through hormone therapy. Alternatively, the court's broad language could be read as enjoining the entire Act in all respects, as the majority suggests.

Even if it were clear that the district court intended to enjoin the Act in its entirety, the injunction remains unclear because it does not specify the eligibility rules applicable while the Act is preliminarily enjoined. The majority asserts that the injunction is sufficiently clear because it "explicitly preserved" the NCAA and IHSAA rules in place "[a]t the time of the injunction," Maj. Op. at 57 n.21 (citing *Hecox I*, 479 F. Supp. 3d at 988), rules that "allowed transgender women and girls 'to compete on girls' teams after completing one year of hormone therapy suppressing testosterone under the care of a physician,'" Maj. Op. at 57 n.21 (quoting *Hecox I*, 479 F. Supp. 3d at 947). If that was the court's intent, it did not say so, and as the parties recognize in their

briefs, the NCAA rules have changed substantially since the district court granted the preliminary injunction three years ago.[6] It is unclear whether the "status quo" should be understood as the NCAA rules in place in 2020 or the NCAA rules in place today.

Rather than subjecting school administrators to uncertainty about the scope of the injunction, we should ask the district court to provide the specificity that Rule 65(d)(1) requires.

VII. On the Current Findings, the Injunction Is Overbroad to the Extent It Applies to Transgender Women Who Are Not Receiving Gender-Affirming Hormone Therapy

As discussed, there are no findings in the current record to suggest that Lindsay is likely to succeed on her claim that the ban is unconstitutional as applied to transgender female athletes who have gone through puberty and are not receiving gender-affirming hormone therapy. Accordingly, if the injunction extends to these individuals, the district court likely abused its discretion. *See City & County of San Francisco*, 897 F.3d at 1244 ("Once a constitutional violation is found, a federal court is required to tailor the scope of the remedy to fit the nature and extent of the constitutional violation." (quoting *Hills*, 425 U.S. at 293–94)); *Lamb-Weston, Inc. v. McCain Foods, Ltd.*, 941 F.2d 970, 974 (9th Cir. 1991) ("Injunctive relief . . . must be tailored to

[6] This appeal has been pending for nearly three years due to a backlog in the district court's docket arising from the COVID-19 pandemic and this court's limited remand—conditions that the district court could not have anticipated at the time it granted the preliminary injunction.

remedy the specific harm alleged."). I would vacate in part and remand for the district court to tailor the scope of the remedy to the constitutional violation.

VIII. The District Court Did Not Abuse Its Discretion by Enjoining Enforcement of the Act Against Non-Plaintiffs

Intervenors contend that the preliminary injunction is overbroad because it bars enforcement of § 33-6203 against non-plaintiffs. They argue that this relief was improper because "the district court dismissed Plaintiffs' facial challenge and proceeded only on their as-applied claims." Intervenors' Opening Brief at 59. In light of the Supreme Court's decision in *Doe*, 561 U.S. 186, I agree with the majority that this argument is unpersuasive.

I take no issue with the general proposition that "injunctive relief generally should be limited to apply only to named plaintiffs where there is no class certification." *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1501 (9th Cir. 1996); *see United States v. Texas*, 143 S. Ct. 1964, 1980 (2023) (Gorsuch, J., concurring) ("Traditionally, when a federal court finds a remedy merited, it provides party-specific relief, directing the defendant to take or not take some action relative to the plaintiff. If the court's remedial order affects nonparties, it does so only incidentally.").

Lindsay's claims, however, are neither strictly facial nor strictly as applied, and I join the majority in reading the Supreme Court's decision in *Doe* as approving of precisely the kind of relief Lindsay seeks here. In *Doe*, the plaintiffs were referendum petition signers who did not want their names and addresses,

or the names and addresses of other referendum petition signers, disclosed under the state's Public Records Act (PRA). The Court explained that the plaintiffs' claim was neither purely facial nor purely as applied:

> [The claim] obviously has characteristics of both: The claim is "as applied" in the sense that it does not seek to strike the PRA in all its applications, but only to the extent it covers referendum petitions. The claim is "facial" in that it is not limited to plaintiffs' particular case, but challenges application of the law more broadly to all referendum petitions.

Doe, 561 U.S. at 194. Although the scope of permissible remedies was not the issue before the Court, the Court made clear that the plaintiffs could seek an injunction barring enforcement of the PRA against non-plaintiffs:

> The label is not what matters. The important point is that plaintiffs' claim and the relief that would follow—an injunction barring the secretary of state "from making referendum petitions available to the public"—reach beyond the particular circumstances of these plaintiffs. They must therefore satisfy our standards for a facial challenge to the extent of that reach.

Id. (citation omitted). Given *Doe*, and in light of the partially facial nature of Lindsay's claims, I agree with the majority that the district court permissibly barred enforcement of the Act beyond the individual Plaintiffs.

The relief granted by the district court is consistent with the principle that "an injunction 'should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs before the court.'" *City & County of San Francisco v. Barr*, 965 F.3d 753, 765 (9th Cir. 2020) (quoting *L.A. Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664 (9th Cir. 2011)); *see also E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 680 (9th Cir. 2021) (en banc); *Doe #1 v. Trump*, 957 F.3d 1050, 1069 (9th Cir. 2020). Enjoining enforcement of the Act against Lindsay, while leaving it in place as to others, risks further stigmatizing her because she would be isolated as the only transgender female athlete playing on women's and girls' teams in all of Idaho. It would also deprive her of the opportunity to have transgender teammates and the chance to compete against all female athletes, including other transgender athletes. It would therefore undermine two benefits Lindsay would derive from participating in women's sports: building "camaraderie" and "forming relationships with [her] teammates," Lindsay Hecox decl. ¶ 8; Lindsay Hecox suppl. decl. ¶ 22; and "competing" against other women and girls, Lindsay Hecox decl. ¶¶ 22, 30, 32, 39; Lindsay Hecox suppl. decl. ¶ 17.

IX. Conclusion

For the foregoing reasons, I would affirm the district court's injunction in part, vacate it in part, and remand.

The issues presented in this case are novel and difficult and decisionmakers around the world are still in the process of designing and implementing sensible standards regulating the participation of

transgender women and girls in women's sports. *See generally* 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. 22,860–22,891 (proposed Apr. 13, 2023) (to be codified at 34 C.F.R. § 106.41). Indeed, the parties' briefs acknowledge that since the district court ruled, some of the world's leading athletic organizations, including the International Olympic Committee (IOC) and the NCAA, have revisited their standards governing participation by transgender women in women's athletics. Notably, both organizations continue to allow transgender women to compete.[7]

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[7] In January 2022, the NCAA adopted "a sport-by-sport approach to transgender participation that preserves opportunity for transgender student-athletes while balancing fairness, inclusion and safety for all who compete." Press Release, NCAA, Board of Governors Updates Transgender Participation Policy (Jan. 19, 2022), https://www.ncaa.org/news/2022/1/19/media-center-board-of-governors-updates-transgender-participation-policy.aspx [https://perma.cc/7ZFT-GA6L] (last visited July 27, 2023). Under the NCAA standards, transgender student-athletes are allowed to compete but may be required to "document sport-specific testosterone levels." *Id.*; *see also* Press Release, NCAA, Transgender Student-Athlete Participation Policy, https://www.ncaa.org/sports/2022/1/27/transgender-participation-policy.aspx [https://perma.cc/FH8V-VVKA] (last updated Apr. 17, 2023). The IOC likewise follows a sport-by-sport approach. *See* Int'l Olympic Comm., IOC Framework on Fairness, Inclusion and Non-Discrimination on the Basis of Gender Identity and Sex Variations 1 (Nov. 22, 2021), https://stillmed.olympics.com/media/Documents/Beyond-the-Games/Human-Rights/IOC-Framework-Fairness-Inclusion-Non-discrimination-2021.pdf [https://perma.cc/MX6D-Y4RG] (last visited July 27, 2023). The IOC framework states that "[n]o athlete should be precluded from competing or excluded from competition on the exclusive

The standards adopted by the IOC, the NCAA, and others aim to balance a range of important values and interests, including, among others, inclusion, nondiscrimination, competitive fairness, safety, and completing the still unfinished and important job of ensuring equal athletic opportunities for women and girls. *See* Women's Sports Found., *50 Years of Title IX: We're Not Done Yet* 3 (2022) ("Sports participation is vital to the development of girls and women. The benefits are far-reaching and lifelong, including improved physical, social, and emotional health; enhanced confidence; academic success; leadership opportunities; and so much more. Progress over the last 50 years is impressive, and yet it is not enough. The playing field is not yet level—it's not even close."), https://www.womenssportsfoundation.org/articles_and_report/50-years-of-title-ix-were-not-done-yet/ (last visited July 27, 2023). Policymakers have long recognized that women must have an equal opportunity not only to *participate* in sports but also to *compete* and *win*.

In my understanding, nothing in today's decision, or in the district court's decision, precludes policymakers from adopting appropriate regulations

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ground of an unverified, alleged or perceived unfair competitive advantage due to their sex variations, physical appearance and/or transgender status," and that, "[u]ntil evidence . . . determines otherwise, athletes should not be deemed to have an unfair or disproportionate competitive advantage due to their sex variations, physical appearance and/or transgender status." *Id.* at 4. It also states that "criteria to determine eligibility for a gender category should not include gynaecological examinations or similar forms of invasive physical examinations, aimed at determining an athlete's sex, sex variations or gender." *Id.* at 5.

in this field—regulations that are substantially related to important governmental interests. *See Clark*, 695 F.2d at 1129. This court holds only that the district court did not abuse its discretion in concluding as a preliminary matter that Lindsay is likely to succeed on her claim that this particular statute is not substantially related to important governmental interests.

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See Volume 2 for attachments to Opinion

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

LINDSAY HECOX, *et al.*, Plaintiffs, v. BRADLEY LITTLE, *et al.*; Defendants.	Case No. 1:20-cv-00184-DCN **MEMORANDUM DECISION AND ORDER**

This matter is before the Court on Plaintiffs' Motion for Preliminary Injunction, proposed intervenors' Motion to Intervene, and Defendants' Motion to Dismiss. The Court held oral argument on July 22, 2020 and took the matters under advisement.

Upon review, and for the reasons stated below, the Court GRANTS the Motion for Preliminary Injunction (Dkt. 22); GRANTS the Motion to Intervene (Dkt. 30); and GRANTS in PART and DENIES in PART the Motion to Dismiss (Dkt. 40).

I. OVERVIEW

Plaintiffs in this case challenge the constitutionality of a new Idaho law which excludes transgender women from participating on women's sports teams. Defendants assert Plaintiffs lack standing, that their claims are not ripe for review, that certain of their claims fail as a matter of law, and that they are not entitled to injunctive relief. The

proposed intervenors seek to intervene to advocate for their interests as female athletes and to defend the law Plaintiffs challenge. The United States has also filed a Statement of Interest in support of Idaho's law. Dkt. 53.

The primary question before the Court—whether the Court should enjoin the State of Idaho from enforcing a newly enacted law which precludes transgender female athletes from participating on women's sports—involves complex issues relating to the rights of student athletes, physiological differences between the sexes, an individual's ability to challenge the gender of other student athletes, female athlete's rights to medical privacy and to be free from potentially invasive sex identification procedures, and the rights of all students to have complete access to educational opportunities, programs, and activities available at school. The debate regarding transgender females' access to competing on women's sports teams has received nationwide attention and is currently being litigated in both traditional courts and the court of public opinion.

Despite the national focus on the issue, Idaho is the first and only state to categorically bar the participation of transgender women in women's student athletics. This 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 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.

In addition to precluding women and girls who are transgender and many who are intersex from participating in women's sports, Idaho's law establishes a "dispute" process that allows a currently undefined class of individuals to challenge a student's sex. Idaho Code § 33-6203(3). If the sex of any female student athlete—whether transgender or not—is disputed, the student must undergo a potentially invasive sex verification process. This provision burdens all female athletes with the risk and embarrassment of having to "verify" their "biological sex" in order to play women's sports. *Id.* Similarly situated men and boys—whether transgender or not—are not subject to the dispute process because Idaho's law does not restrict individuals who wish to participate on men's teams.

Finally, as an enforcement mechanism, Idaho's law creates a private cause of action against a "school or institution of higher education" for any student "who is deprived of an athletic opportunity" or suffers any harm, whether direct or indirect, due to the participation of a woman who is transgender on a women's team. *Id.* § 33-6205(1). Idaho schools are also precluded from taking any "retaliation or other adverse action" against those who report an alleged violation of the law, regardless of whether the report was made in good faith or simply to harass a competitor. *Id.* at § 33-6205(2).

Plaintiffs seek a preliminary injunction which would enjoin enforcement of Idaho's law pending trial on the merits. The Court will ultimately be required to decide whether Idaho's law violates Title IX and/or is unconstitutional, but that is not the question before the Court today. The question currently before the

Court is whether Plaintiffs have met the criteria for enjoining enforcement of Idaho's law *for the present time* until a trial on the merits can be held. To issue an injunction preserving the status quo by enjoining the law's enforcement, the Court must primarily decide whether Plaintiffs have constitutional and prudential standing to challenge the law, whether they state facial or only as-applied constitutional challenges, and whether they are likely to succeed on their claim, based upon the current record, that the law violates the Equal Protection Clause of the Fourteenth Amendment.

II. BACKGROUND

On March 30, 2020, Idaho Governor Bradley Little ("Governor Little") signed the Fairness in Women's Sports Act (the "Act") into law. Idaho Code Ann. § 33-6201–6206.[1] Plaintiffs' Complaint challenges the constitutionality of the Act. Among other things, Plaintiffs contend that the Act violates their constitutional rights to equal protection, due process, and the right to be free from unconstitutional searches and seizures. Plaintiffs seek preliminary relief solely on their equal protection claim, arguing the Act discriminates on the basis of transgender status by categorically barring transgender women from participating in women's sports, and also discriminates on the basis of sex by subjecting all women student-athletes to the risk of having to undergo invasive, unnecessary tests to "verify" their sex, while permitting all men student-athletes to participate in men's sports without such risk. Plaintiffs seek a preliminary injunction to enjoin

[1] The Act went into effect on July 1, 2020. Idaho Code § 33-6201.

enforcement of the Act pending trial on the merits.

A. Definitions

As the Third Circuit recently explained, in the context of issues such as those raised in the instant case, "such seemingly familiar terms as 'sex' and 'gender' can be misleading." *Doe ex rel. Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 522 (3d Cir. 2018). The Court accordingly begins by defining relevant terms utilized in this decision.

"Sex" is defined as the "anatomical and physiological processes that lead to or denote male or female. Typically, sex is determined at birth based on the appearance of external genitalia." *Id.*

A person's "gender identity" is his or her "deep-core sense of self as being a particular gender." *Id.* "Although the detailed mechanisms are unknown, there is a medical consensus that there is a significant biologic component underlying gender identity." Dkt. 22-9, ¶ 18.[2]

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[2] The Court relies on various declarations filed in support of the Motion for Preliminary Injunction and Motion to Intervene for medical definitions of the terms used herein, and to identify the proposed intervenors and their arguments. The Court also considers extra-pleading materials when assessing Plaintiffs' Motion for Preliminary Injunction. The Court does not, however, rely on extra-pleading materials (other than those of which it takes judicial notice) in its assessment of Defendants' Motion to Dismiss, and accordingly does not treat the Motion to Dismiss as a Motion for Summary Judgment. *Olsen v. Idaho State Bd. of Med.*, 363 F.3d 916, 921–22 (9th Cir. 2004) (finding a represented party's submission of extra-pleading materials justified treating the motion to dismiss as a motion for summary judgment). Pursuant to Federal Rule of Evidence 201(c), the Court has discretionary authority to take judicial notice,

The term "cisgender" refers to a person who identifies with the sex that person was determined to have at birth. *Boyertown*, 897 F.3d at 522.

"Transgender" refers to "a person whose gender identity does not align with the sex that person was determined to have at birth." *Id.* A transgender woman "is therefore a person who has a lasting, persistent female gender identity, though the person's sex was determined to be male at birth." *Id.*

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." *Id.* "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." Dkt. 22-2, ¶ 19. If left untreated, symptoms of gender dysphoria can include severe anxiety and depression, suicidality, and other serious mental health issues. *Id.* at ¶ 20. Attempted suicide rates in the transgender community are over 40%. Dkt. 1, at ¶ 103.

The term "intersex" is an umbrella term for a person "born with unique variations in certain physiological characteristics associated with sex, "such as chromosomes, genitals, internal organs like testes or ovaries, secondary sex characteristics, or

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regardless of whether it is requested to do so by a party, and does in fact do so in this case as it relates to certain materials identified below. Fed. R. Evid. 201.

hormone production or response." Dkt. 22-1, at 2 (citing Dkt. 22-2, ¶ 41). Some intersex traits are identified at birth, while others may not be discovered until puberty or later in life, if ever. *See generally* Dkt. 22-2, at 11–16.

B. The Parties

1. Plaintiffs

Plaintiffs in this action include Lindsay Hecox, and Jean and John Doe on behalf of their minor daughter, Jane Doe (collectively "Plaintiffs").[3] Lindsay is a transgender woman athlete who lives in Idaho and attends Boise State University ("BSU"). As part of her treatment for gender dysphoria, Lindsay has undergone hormone therapy by being treated with testosterone suppression and estrogen, which lower her circulating testosterone levels and affect her bodily systems and secondary sex characteristics. Dkt. 1, ¶ 29. Lindsay is a life-long runner who intends to try out for the BSU women's cross-country team in fall 2020, and for the women's track team in spring 2021. *Id.* at ¶ 33. Under current NCAA rules, Lindsay could compete at NCAA events in September—when she has completed one year of hormone treatment.[4]

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[3] Plaintiffs Jean, John, and Jane Doe have been granted permission to proceed under pseudonyms. Dkt. 48.

[4] Due to the COVID-19 pandemic, the Mountain West conference in which BSU participates recently postponed sports competitions for fall sports. However, as of the date of this decision, BSU has not announced whether it will alter the training programs or tryouts for the cross-country team, and the Court has been advised by Plaintiffs' counsel that Lindsay is continuing her individual training program in preparation for tryouts.

Id. at ¶ 32.

Jane is a 17-year old girl and athlete who is cisgender. Dkt. 1, ¶¶ 39, 42. Jane has played sports since she was four and competes on the soccer and track teams at Boise High School, where she is a rising senior. *Id.* at ¶¶ 40, 45. After tryouts in August, Jane intends to play on Boise High's soccer team again in fall 2020.[5] *Id.* Because most of her closest friends are boys, she has an athletic build, rarely wears skirts or dresses, and has at times been thought of as "masculine," Jane worries that one of her competitors may dispute her sex pursuant to section 33-6203(3) of the Act. *Id.* at ¶ 47.

2. Defendants

The defendants named in this action (collectively "Defendants") include Governor Little; Idaho Superintendent of Public Instruction Sherri Ybarra; the individual members of the Idaho State Board of Education (Debbie Critchfield, David Hill, Emma Atchley, Linda Clark, Shawn Keough, Kurt Liebich, and Andrew Scoggin); Idaho state educational institutions BSU and Independent School District of Boise City #1 ("Boise School District"); BSU's President, Dr. Marlene Tromp; Superintendent of the Boise School District, Coby Dennis; the individual members of the Boise School District's Board of Trustees (Nancy Gregory, Maria Greeley, Dennis Doan, Alicia Estey, Dave Wagers, Troy Rohn, and Beth Oppenheimer); and the individual members of

[5] Although try-outs for the Boise High soccer team have recently been postponed, the Court has been advised that small group training for the girls' soccer team may begin as early as August 17, 2020.

the Idaho Code Commission (Daniel Bowen, Andrew Doman, and Jill Holinka).

3. Proposed Intervenors

Proposed intervenors Madison ("Madi") Kenyon and Mary ("MK") Marshall (collectively "Madi and MK" or the "Proposed Intervenors") are Idaho cisgender female athletes. Like Lindsay and Jane, Madi and MK are "female athletes for whom sports is a passion and life-defining pursuit." Dkt. 30-1, at 2. Madi and MK both run track and cross-country on scholarship at Idaho State University ("ISU") in Pocatello, Idaho. *Id.* Both competed against a transgender woman athlete last year at the University of Montana and had "deflating experiences" of running against and losing to that athlete. *Id.*, at 3; Dkt. 30-2, ¶¶ 12, 14–15; Dkt. 30-3, ¶ 11. The Proposed Intervenors support the Act and wish to have their personal concerns fully set forth and represented in this case.

C. The Act

1. Overview

Idaho passed House Bill 500 ("H.B. 500"), the genesis for the Act, on March 16, 2020. Dkt. 1, ¶ 90. In the United States, high school interscholastic athletics are generally governed by state interscholastic athletic associations, such as the Idaho High School Activities Association ("IHSAA"). *Id.* at ¶ 66. The NCAA sets policies for member colleges and universities, including BSU. *Id.* at ¶ 67. Prior to the passage of H.B. 500, the IHSAA policy allowed transgender girls in K-12 athletics in Idaho to compete on girls' teams after completing one year

of hormone therapy suppressing testosterone under the care of a physician for purposes of gender transition. *Id.* at ¶ 71. Similarly, the NCAA policy allows transgender women attending member colleges and universities in Idaho to compete on women's teams after one year of hormone therapy suppressing testosterone. *Id.* at ¶ 75.

2. Legislative History

On February 13, 2020, H.B. 500 was introduced in the Idaho House by Representative Barbara Ehardt ("Rep. Ehardt"). On February 19, 2020, the House State Affairs Committee heard testimony on H.B. 500. *Id.* at ¶ 80. Ty Jones, Executive Director of the IHSAA, answered questions at that hearing and noted that no Idaho student had ever complained of participation by transgender athletes, and no transgender athlete had ever competed under the IHSAA policy regulating inclusion of transgender athletes. *Id.* at ¶ 81. In addition, millions of student-athletes have competed in the NCAA since it adopted its policy in 2011 of allowing transgender women to compete on women's teams after one year of hormone therapy suppressing testosterone, with no reported examples of any disturbance to women's sports as a result of transgender inclusion. *Id.* at ¶ 76. Rep. Ehardt admitted during the hearing that she had no evidence any person in Idaho had ever challenged an athlete's eligibility based on gender. *Id.* at ¶ 80.

On February 21, 2020, H.B. 500 was passed out of the House committee. *Id.* at ¶ 82. On February 25, 2020, Idaho Attorney General Lawrence Wasden ("Attorney General Wasden") warned in a written opinion letter that H.B. 500 raised serious

constitutional and other legal concerns due to the disparate treatment and impact it would have on both transgender and intersex athletes, as well as its potential privacy intrusion on all female student athletes. *Id.* at ¶ 83. On February 26, 2020, the House debated the bill. Rep. Ehardt referred to two high school athletes in Connecticut and one woman in college who are transgender and who participated on teams for women and girls. *Id.* at ¶ 84. Rep. Ehardt argued that the mere fact of these athletes' participation exemplified the "threat" the bill sought to address. *Id.* The bill passed the House floor after the debate. *Id.*

After passage in the House, H.B. 500 was heard in the Senate State Affairs Committee and was passed out of Committee on March 9, 2020. *Id.* at ¶ 85. The next day, the bill was sent to the Committee of the Whole Senate for amendment, and minor amendments were made. *Id.* at ¶ 86. One day later, on March 11, 2020, the World Health Organization declared COVID-19 a pandemic and many states adjourned state legislative sessions indefinitely. *Id.* at ¶ 89. By contrast, the Idaho Senate remained in session and passed H.B. 500 as amended on March 16, 2020. *Id.* at ¶ 90. After the House concurred in the Senate amendments, the bill was delivered to Governor Little on March 19, 2020. *Id.*

Professor Dorianne Lambelet Coleman, whose work was cited in the H.B. 500 legislative findings, urged Governor Little to veto the bill, explaining her research was misused and that "there is no legitimate reason to seek to bar all trans girls and women from girls' and women's sport, or to require students whose sex is challenged to prove their eligibility in such

intrusive detail." *Id.* at ¶ 91. Professor Coleman endorsed the existing NCAA rule, which mirrors the IHSAA policy, and stated: "No other state has enacted such a flat prohibition against transgender athletes, and Idaho shouldn't either." *Id.*

Five former Idaho Attorneys General likewise urged Governor Little to veto the bill "to keep a legally infirm statute off the books." *Id.* at ¶ 92. They urged Governor Little to "heed the sound advice" of Attorney General Wasden, who had "raised serious concerns about the legal viability and timing of this legislation." *Id.* Nevertheless, based on legislative findings that, *inter alia*, "inherent, physiological differences between males and females result in different athletic capabilities," Governor Little signed H.B. 500 into law on March 30, 2020.[6] Idaho Code § 33-6202(8); Dkt. 1, ¶ 93.

For purpose of the instant motions, the Act contains three key provisions. First, the Act provides that "interscholastic, intercollegiate, intramural, or club athletic teams or sports that are sponsored by a public primary or secondary school, a public institution of higher education, or any school or institution whose students or teams compete against

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[6] On the same day, Governor Little also signed another bill into law, H.B. 509, which essentially bans transgender individuals from changing their gender marker on their birth certificates to match their gender identity. *Id.* at ¶ 93–94. Enforcement of H.B. 509 is currently being litigated in *F.V. and Dani Martin v. Jeppesen et al.*, 1:17-cv-00170-CWD, because another judge of this Court previously permanently enjoined Idaho from enforcing a prior law that restricted transgender individuals from altering the sex designation on their birth certificates. *F.V. v. Barron*, 286 F. Supp. 3d 1131, 1146 (D. Idaho 2018).

a public school or institution of higher education" shall be "expressly designated as one (1) of the following based on biological sex: (a) Males, men, or boys; (b) Females, women, or girls; or (c) Coed or mixed." Idaho Code § 33-6203(1). The Act mandates, "[a]thletic teams or sports designated for females, women, or girls shall not be open to students of the male sex." *Id.* at § 33-6203(2). The Act does not contain comparable limitation for any individuals—whether transgender or cisgender—who wish to participate on a team designated for males.

Second, the Act creates a dispute process for an undefined class of individuals who may wish to "dispute" any transgender or cisgender female athlete's sex. This provision provides:

> A dispute regarding a student's sex shall be resolved by the school or institution by requesting that the student provide a health examination and consent form or other statement signed by the student's personal health care provider that shall verify the student's biological sex. The health care provider may verify the student's biological sex as part of a routine sports physical examination relying only on one (1) or more of the following: the student's reproductive anatomy, genetic makeup, or normal endogenously produced testosterone levels. The state board of education shall promulgate rules for schools and institutions to follow regarding the receipt and timely resolution of such disputes consistent with this subsection.

Id. at § 33-6203(3).

Third, the Act creates an enforcement mechanism to ensure compliance with its provisions. Specifically, the Act creates a private cause of action for any student negatively impacted by violation of the Act, stating:

> (1) Any student who is deprived of an athletic opportunity or suffers any direct or indirect harm as a result of a violation of this chapter shall have a private cause of action for injunctive relief, damages, and any other relief available under law against the school or institution of higher education.
>
> (2) Any student who is subject to retaliation or other adverse action by a school, institution of higher education, or athletic association or organization as a result of reporting a violation of this chapter to an employee or representative of the school, institution, or athletic association or organization, or to any state or federal agency with oversight of schools or institutions of higher education in the state, shall have a private cause of action for injunctive relief, damages, and any other relief available under law against the school, institution, or athletic association or organization.
>
> (3) Any school or institution of higher education that suffers any direct or indirect harm as a result of a violation of this chapter shall have a private cause of action for injunctive relief, damages, and any other relief available under law against the government entity, licensing or accrediting

> organization, or athletic association or organization.
>
> (4) All civil actions must be initiated within two (2) years after the harm occurred. Persons or organizations who prevail on a claim brought pursuant to this section shall be entitled to monetary damages, including for any psychological, emotional, and physical harm suffered, reasonable attorney's fees and costs, and any other appropriate relief.

Id. at § 33-6205.

D. Procedural Background

Plaintiffs filed the instant suit on April 15, 2020. The lawsuit primarily seeks: (1) a judgment declaring that the Act violates the United States Constitution and Title IX, and also violates such rights as applied to Plaintiffs; (2) preliminary and permanent injunctive relief enjoining the Act's enforcement; and (3) an award of costs, expenses, and reasonable attorneys' fees. *Id.* at 53–54. On April 30, 2020, Plaintiffs filed the instant Motion for Preliminary Injunction, seeking preliminary relief on their Equal Protection Claim. Dkt. 22. The Proposed Intervenors filed a Motion to Intervene on May 26, 2020 (Dkt. 30), and Defendants filed a Motion to Dismiss on June 1, 2020. Dkt. 40. After each was fully briefed, the Court held oral argument on all three motions on July 22, 2020.

III. ANALYSIS

Since there are three pending motions with different applicable legal standards, the Court will set forth the appropriate legal standard when addressing

each motion. Because the Court's decision on the Motion to Intervene will determine the parties in this action, and its decision on the Motion to Dismiss will determine whether Plaintiffs may bring their Motion for a Preliminary Injunction, the Court begins with the Motion to Intervene, follows with Defendants' Motion to Dismiss, and, since the Court finds the Motion to Dismiss is appropriately denied in part and granted in part, concludes with consideration of the Motion for Preliminary Injunction.

A. Motion to Intervene (Dkt. 30)

The Proposed Intervenors seek to intervene to advocate for their interests and to defend the Act, arguing they "face losses to male athletes" and "stand opposed to any legally sanctioned interference with the opportunities that they have enjoyed as female competitors, and that would deprive them and other young women of viable avenues of competitive enjoyment and success within a context that acknowledges and honors them as females." Dkt. 30-1, at 4. The Proposed Intervenors request intervention as a matter of right, or, alternatively, permissive intervention, under Federal Rule of Civil Procedure 24. Plaintiffs oppose the Motion to Intervene. Dkt. 45; Dkt. 51-1. Defendants are in favor of intervention and suggest the Proposed Intervenors' perspectives "can help inform the Court when it balances hardships and determines the public consequences of the relief Plaintiffs seek." Dkt. 44, at 2.

1. Legal Standard

Where, as here, an unconditional right to

intervene in not conferred by federal statute,[7] Federal Rule of Civil Procedure 24 authorizes intervention as of right or permissive intervention.

Rule 24(a) contains the standards for intervention as of right, and provides that a court must permit anyone to intervene who, on timely motion: "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2).

The Ninth Circuit has distilled the aforementioned provision into a four-part test for intervention as of right: (1) the application for intervention must be timely; (2) the applicant must have a "significantly protectable" interest relating to the property or transaction that is the subject of the action; (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect that interest; and (4) the applicant's interest must be inadequately represented by existing parties in the lawsuit. *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 817 (9th Cir. 2001) ("*Berg*") (citation omitted).

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[7] While a federal statute does not authorize intervention by the Proposed Intervenors, the United States is statutorily authorized to intervene in cases of general public importance involving alleged denials of equal protection on the basis of sex. 28 U.S.C. § 517; *see also United States v. Virginia*, 518 U.S. 515, 523 (1996). The United States filed its Statement of Interest in support of the Act pursuant to 28 U.S.C. § 517. Dkt. 53.

The Court must construe Rule 24(a)(2) liberally in favor of intervention. *Id.* at 818. In assessing interventions, courts are "guided primarily by practical and equitable considerations." *Arakaki v. Cayetano*, 324 F.3d 1078, 1083 (9th Cir. 2003) (citing *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998)). However, it is the movant's burden to show that it satisfies each of the four criteria for intervention as of right. *Prete v. Bradbury*, 438 F.3d 949, 954 (9th Cir. 2006)

In general, Rule 24(b) also gives the court discretion to allow permissive intervention to anyone who has a claim or defense that shares with the main action a common question of law or fact. Fed. R. Civ. P. 24(b)(1)(B). In addition, in exercising its discretion under Rule 24(b), the Court must consider whether intervention will unduly delay or prejudice the adjudication of the original parties' rights. Fed. R. Civ. P. 24(b)(3).

2. *Analysis*

a. Intervention as of Right

Plaintiffs argue intervention as of right should be denied because the Proposed Intervenors claim interests that are neither cognizable under the law nor potentially impaired by the disposition of the present lawsuit. Plaintiffs also argue intervention as of right is unavailable because Defendants adequately represent the Proposed Intervenors' interests.

i. Timeliness of Application

In support of their arguments against permissive intervention, Plaintiffs suggest the Proposed

Intervenors' participation will likely delay and prejudice the adjudication of Plaintiffs' claims. Dkt. 45, at 17. Plaintiffs do not, however, contest the timeliness of the application to intervene with respect to intervention as of right. To the extent necessary, the Court will accordingly address the timeliness of the application when assessing permissive intervention.

ii. Protectable Interest

To warrant intervention as of right, a movant must show both "an interest that is protected under some law" and "a 'relationship' between its legally protected interest and the plaintiff's claims." *California ex rel. Lockyer v. United States*, 450 F.3d 436, 441 (9th Cir. 2006) ("*Lockyer*") (quoting *Donnelly*, 159 F.3d at 409). "Whether an applicant for intervention demonstrates sufficient interest in an action is a practical, threshold inquiry. No specific legal or equitable interest need be established." *Berg*, 268 F.3d at 818 (citing *Greene v. United States*, 996 F.2d 973, 976 (9th Cir. 1993)).

The Proposed Intervenors claim a significant and protected interest in having and maintaining "female-only competitions and a competitive environment shielded from physiologically advantaged male participants to whom they stand to lose." Dkt. 30-1, at 7; *see also* Dkt. 52, at 4 n. 1. Plaintiffs characterize this interest as a mere desire to exclude transgender students from single-sex sports, which is not significantly protectable. Dkt. 45, at 10–11. As Plaintiffs note, the Ninth Circuit has held cisgender students do not have a legally protectable interest in excluding transgender students from single-sex

spaces. *Parents for Privacy v. Barr*, 949 F.3d 1210, 1228 (9th Cir. 2020) (rejecting Title IX and constitutional claims of cisgender students based on having to share single sex restrooms and locker facilities with transgender students).

However, the Ninth Circuit has also held that redressing past discrimination against women in athletics and promoting equality of athletic opportunity between the sexes is unquestionably a legitimate and important interest, which is served by precluding males from playing on teams devoted to female athletes. *Clark, ex rel. Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126, 1131 (9th Cir. 1982) ("*Clark*"). Regardless of how the Proposed Intervenors' interest is characterized—either as a right to a level playing field or as a more invidious desire to exclude transgender athletes—they do claim a protectable interest in ensuring equality of athletic opportunity. The importance of this interest is the basic premise of almost fifty years of Title IX law as it applies to athletics, and, as recognized by the Ninth Circuit, is unquestionably a legitimate and important interest. *Clark*, 695 F.2d at 1131. The Proposed Intervenors argue the only way to protect equality in sports is through sex segregation without regard to gender identity. Whether this argument is accurate or constitutional is not dispositive of the issue of whether the Proposed Intervenors have an interest in this suit.

Just as Plaintiffs have an interest in seeking equal opportunity for transgender female student athletes, the Proposed Intervenors have an interest in seeking equal opportunity for cisgender female student athletes. As such, to find the Proposed

Intervenors are without a protectable interest in the subject matter of this litigation would be to hold that no party has an interest in this litigation. *See*, *e.g.*, *Johnson v. San Francisco Unified Sch. Dist.*, 500 F.2d 349, 353 (9th Cir. 1974) (explaining all students and parents have an interest in a sound educational system, and that interest is surely no less significant where it is entangled with the constitutional claims of a racially defined class).

Further, Defendants acknowledged at oral argument what seems beyond dispute—Idaho passed the Act to protect cisgender female student athletes like Madi and MK. Because the Proposed Intervenors are the "intended beneficiaries" of the Act, their interest is neither "undifferentiated" nor "generalized." *Lockyer*, 450 F.3d at 441 (citation omitted); *see also Cty. of Fresno v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980) (finding small farmers had a protectable interest in action seeking to enjoin a federal statute passed regarding lands receiving federally subsidized water where the small farmers were "precisely those Congress intended to protect" with the statute). If the Act is declared unconstitutional or substantially narrowed as result of this litigation, Madi and MK may be more likely to have to choose between competing against transgender athletes or not competing at all. Such an interest is sufficiently "direct, non-contingent, [and] substantial" to constitute a significant protectible interest in this action. *Lockyer*, 450 F.3d at 441 (alteration in original) (quoting *Dilks v. Aloha*

Airlines, 642 F.2d 1155, 1157 (9th Cir. 1981)).[8]

iii. Impairment of Interest

The "significantly protectable interest" requirement is closely linked with the requirement that the outcome of the litigation may impair the proposed intervenors' interests. *Lockyer*, 450 F.3d at 442 ("Having found that [intervenors] have a significant protectable interest, we have little difficulty concluding that disposition of this case, may, as a practical matter, affect [them]."). If a proposed intervenor "'would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene.'" *Berg*, 268 F.3d at 822 (quoting Fed. R. Civ. P. 24 advisory committee note to 1966 amendment).

The relief requested by Plaintiffs may affect the Proposed Intervenors' interests. Should Plaintiffs prevail in this lawsuit, the Proposed Intervenors will not have the protection of the law they claim is vital to ensure their right to equality in athletics. Further, they "will have no legal means to challenge [any] injunction" that may be granted by this Court. *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d

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[8] Plaintiffs also argue the outcome of this lawsuit will not advance the Proposed Intervenors' claimed interests because Madi and MK, as collegiate athletes, will still be required to compete against non-Idaho teams and athletes who are subject to the rules of the NCAA, which allow participation of women who are transgender after one year of testosterone suppression. Yet, the fact that a challenged law may only partially protect an intervenor from harm does not mean that the intervenor does not have an interest in preserving that partial protection, and Plaintiffs do not cite any authority to the contrary.

1489, 1498 (9th Cir. 1995) (abrogated by further broadening of intervention as of right for claims brought under the National Environmental Policy Act in *Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011)); *see also Lockyer*, 450 F.3d at 443 (finding impairment where proposed intervenors would have no alternative forum to contest the interpretation of a law that was "struck down" or had its "sweep substantially narrowed"). Under such circumstances, the Proposed Intervenors satisfy the impairment requirement for intervention as of right.

iv. Adequacy of Representation

The "most important factor" to determine whether a proposed intervenor is adequately represented by an existing party to the action is "how the [proposed intervenor's] interest compares with the interests of existing parties." *Arakaki*, 324 F.3d at 1086 (citations omitted). When an existing party and a proposed intervenor share the same ultimate objective, a presumption of adequacy of representation applies. *Id.* There is also an assumption of adequacy where, as here, the government is acting on behalf of a constituency that it represents. *United States v. City of Los Angeles*, 288 F.3d 391, 401 (9th Cir. 2002). In the absence of a "very compelling showing to the contrary, it will be presumed that a state adequately represents its citizens when the applicant shares the same interest." *Arakaki*, 324 F.3d at 1086 (internal quotation marks and citation omitted).

Despite their individual interests in the instant litigation, even "interpret[ing] the requirements broadly in favor of intervention," it is clear that the

ultimate objective of both the Proposed Intervenors and Defendants is to defend the constitutionality of the Act. *Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 955 (9th Cir. 2009) (alteration in original) (quoting *Donnelly*, 159 F.3d at 409); *see also Prete*, 438 F.3d at 958–959 (holding that a public interest organization seeking intervention to defend a state constitutional ballot initiative failed to defeat the presumption of adequate representation when the ultimate objective of both the organization and the defendant government was to uphold the measure's validity).[9] Given this shared objective, the presumption of adequacy of representation applies, and the Proposed Intervenors must make "a very compelling showing" to defeat this presumption. *Arakaki*, 324 F.3d at 1086.

The Ninth Circuit has identified three factors for evaluating the adequacy of representation: (1) whether the interest of an existing party is such that it will undoubtedly make all of a proposed intervenor's arguments; (2) whether the existing party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary elements to the proceeding that existing parties would neglect. *Id.* "The prospective intervenor bears the burden of demonstrating that existing parties do not adequately represent its interests." *Nw.*

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[9] In *Prete*, the Court explained that while "it is unclear whether this 'assumption' rises to the level of a second presumption, or rather is a circumstance that strengthens the first presumption, it is clear that 'in the absence of a very compelling showing to the contrary,' it will be presumed that the Oregon government adequately represents the interests of the intervenor-defendants." *Id.* at 957 (quoting *Arakaki*, 324 F.3d at 1086).

Forest Res. Council v. Glickman, 82 F.3d 825, 838 (9th Cir. 1996). However, this burden is satisfied if a proposed intervenor shows that representation "may be" inadequate. *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10 (1972)).

The Proposed Intervenors argue that their participation in this lawsuit is necessary because Defendants include "multiple agencies and voices of the Idaho government that represent multiple constituencies including constituencies with views and interests more aligned with Plaintiffs than proposed intervenors." Dkt. 30-1, at 10. The Proposed Intervenors also suggest they bring a unique perspective the government cannot adequately represent because the "personal distress and other negative effects suffered by female athletes from the inequity of authorized male competition against females is not felt by institutional administrators." *Id.* Neither of these arguments is convincing.

First, regardless of the "multiple constituencies" represented, or beliefs of individual constituents voiced before H.B. 500 was passed,[10] there is no

[10] As Plaintiffs note, although Attorney General Wasden issued an opinion letter explaining that H.B. 500 was likely unconstitutional at the request of a legislator, Attorney General Wasden is statutorily required to represent the State in all courts, Idaho Code section 67-1401(1), and his Deputy Attorney General vigorously defended the Act in both briefing on the pending motions and during oral argument. As such, there is no evidence to suggest that Attorney General Wasden will not fulfill his statutory duties. In addition, the Proposed Intervenors contend BSU will not adequately represent their interests because BSU has a Gender Equality Center that advances the interests of transgender students. Dkt. 30-1, at 11–13. However, as Plaintiffs highlighted during oral argument, BSU could have

reason to believe that Defendants cannot be "counted on to argue vehemently in favor of the constitutionality of [the Act]." *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1306 (9th Cir. 1997). Defendants' retention of an expert witness, "proactive filing of a motion to dismiss and the arguments they have advanced in support of that motion," and fervent opposition to Plaintiffs' Motion for a Preliminary Injunction, "suggest precisely the opposite conclusion." *Animal Legal Defense Fund v. Otter*, 300 F.R.D. 461, 465 (D. Idaho 2014). As even the Proposed Intervenors observe in their proposed opposition to Plaintiffs' Motion for Preliminary Injunction, the "legal authorities, standards, and arguments" in opposing Plaintiffs' motion for a preliminary injunction are "well covered" by Defendants. Dkt. 46, at 5.

Likewise, the Proposed Intervenors' "particular expertise in the subject of the dispute" as cisgender female athletes who have competed against a transgender woman athlete does not amount to a compelling showing of inadequate representation by Defendants. *Prete*, 438 F.3d at 958–959. To the extent they lack personal experience, Defendants can "acquire additional specialized knowledge through discovery (e.g., by calling upon intervenor-defendants to supply evidence) or through the use of experts." *Id.* at 958. Defendants have also already referred to the

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realigned itself as a party if it felt it could not support the Act, but instead gave over representation to the State and has accordingly adopted the positions of the State. Dkt. 62, at 28: 10–15. The Proposed Intervenors' arguments regarding Attorney General Wasden and BSU are not a compelling showing of inadequate representation.

experiences of both Madi and MK in opposing Plaintiffs' Motion for a Preliminary Injunction. Dkt. 41, at 19–20. Thus, the Proposed Intervenors' personal experience is insufficient to provide the showing necessary to overcome the presumption of adequate representation. *Prete*, 438 F.3d at 959.

However, the Court cannot find Defendants "will undoubtedly make" all of the Proposed' Intervenors' arguments. *Arakaki*, 324 F.3d at 1086. Specifically, there are two limiting constructions that Defendants could, and in fact have, advocated to support dismissal of Plaintiffs' suit and/or assuage constitutional doubts clouding the Act: (1) the Act is not self-executing and requires another individual to invoke the "dispute process" before any transgender athlete will be precluded from playing on a women's team; and (2) to verify her sex, a transgender female athlete need only submit a form from her health care provider verifying that she is female. Defendants invoked such limiting constructions in their briefing on the Motion to Dismiss and reaffirmed them during oral argument. *See*, *e.g.*, Dkt. 40-1, at 3, 6–7; Dkt. 59, at 5–6; Dkt. 62, at 44:13–25, 66:21–25. Thus, that the "the government will offer . . . a limiting construction of [the Act] is not just a theoretical possibility; it has already done so." *Lockyer*, 450 F.3d at 444.

In contrast to Defendants' attempt to narrow the Act, the Proposed Intervenors suggest the Act must be read broadly to categorically preclude transgender women from ever playing on female sports teams, regardless of whether they become the target of a dispute or whether they can obtain a sex verification letter from a health care provider. These are far more than differences in litigation strategy between

Defendants and the Proposed Intervenors. *City of Los Angeles*, 288 F.3d at 402–403 ("[M]ere differences in strategy . . . are not enough to justify intervention as of right."). This conflicting construction goes to the heart of interpretation and enforcement of the Act.

The Court therefore concludes that the Proposed Intervenors have "more narrow, parochial interests" than the Defendants. *Lockyer*, 450 F.3d at 445 (finding proposed intervenors overcame the presumption of adequacy of representation where the government suggested a limiting construction of a law in its motion for summary judgment); *Citizens for Balanced Use v. Montana Wilderness Ass'n*, 647 F.3d 893, 899 (9th Cir. 2011) (holding proposed intervenors overcame presumption of adequate representation where they sought to secure the broadest possible interpretation of the Forest Service's Interim Order, while the Forest Service argued that a much narrower interpretation would suffice to comply with the Interim Order). Through the presentation of direct evidence that Defendants "will take a position that actually compromises (and potentially eviscerates) the protections of [the Act]," the Proposed Intervenors have overcome the presumption that Defendants will act in their interests. *Lockyer*, 450 F.3d at 445.

Liberally construing Rule 24(a), the Court finds that the Proposed Intervenors have met the test for intervention as a matter of right. Alternatively, however, the Court finds permissive intervention is also appropriate.

b. Permissive Intervention

The Court's discretion to grant or deny permissive intervention is broad. *Spangler v. Pasadena City Bd.*

of Educ., 552 F.2d 1326, 1329 (9th Cir. 1977) (citation omitted). The Ninth Circuit has "often stated that permissive intervention requires: (1) an independent ground for jurisdiction; (2) a timely motion; and (3) a common question of law and fact between the movant's claim or defense and the main action." *Freedom from Religion Found., Inc. v. Geithner*, 644 F.3d 836, 843 (9th Cir. 2011) (citations omitted). "In exercising its discretion," the Court must also "consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). When a proposed intervenor has otherwise met the requirements, "[t]he court may also consider other factors in the exercise of its discretion, including the nature and extent of the intervenors' interest and whether the intervenors' interests are adequately represented by other parties." *Perry*, 587 F.3d at 955 (quoting *Spangler*, 552 F.2d at 1329).

Plaintiffs do not dispute that the Proposed Intervenors have an independent ground for jurisdiction and share a common question of law and fact with the defense of the main action. Plaintiffs instead argue that permissive intervention should be denied because existing parties adequately represent the Proposed Intervenors' interests, and because intervention would unduly delay or prejudice the adjudication of the rights of the original parties. Dkt. 45, at 16–19. As explained above, the Proposed Intervenors have shown Defendants may not adequately represent their interests because Defendants have advanced a limiting construction of the Act and thus *undoubtedly will not* make all of the arguments Madi and MK will make. *Arakaki*, 324

F.3d at 1086. The Court accordingly rejects Plaintiffs' contention that permissive intervention should be denied because Defendants adequately represent the Proposed Intervenors' interests.

Plaintiffs also argue the Proposed Intervenors' participation will likely delay and prejudice the adjudication of Plaintiffs' claims because Madi and MK waited six weeks after Plaintiffs filed their Complaint to seek intervention. This argument fails because the Ninth Circuit has held an application to intervene is timely where, as here, it is filed less than three months after the complaint. *See*, *e.g.*, *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995) (finding motion to intervene filed four months after initiation of a lawsuit to be timely); *Citizens for Balanced Use v. Montana Wilderness Ass'n*, 647 F.3d 893, 897 (9th Cir. 2011) (deeming motion to intervene timely when it was filed "less than three months after the complaint was filed and less than two weeks after [Defendant] filed its answer to the complaint.").

Plaintiffs next contend they will be prejudiced if they are unable to obtain a ruling from this Court before the fall sports season begins, and that the any disruption of the briefing schedule to accommodate the Motion to Intervene could delay resolution of Plaintiffs' request for emergency relief. This concern is moot because the Motion to Intervene was fully briefed prior to oral argument on July 22, 2020, and the Court is issuing the instant decision on all three pending motions before the fall sports season begins.

Finally, Plaintiffs argue intervention could prejudice the adjudication of their claims because

counsel for the Proposed Intervenors have a history of utilizing misgendering tactics that will delay and impair efficient resolution of litigation. For instance, the Motion to Intervene is replete with references to Lindsay using masculine pronouns and refers to other transgender women by their former male names. The Court is concerned by this conduct, as other courts have denounced such misgendering as degrading, mean, and potentially mentally devastating to transgender individuals. *T.B., Jr. ex rel. T.B. v. Prince George's Cty. Bd. of Educ.*, 897 F.3d 566, 577 (4th Cir. 2018) (describing student's harassment of transgender female teacher by referring to her with male gender pronouns as "pure meanness."); *Hampton v. Baldwin*, 2018 WL 5830730, at *2 (S.D. Ill. Nov. 7, 2018) (referencing expert testimony that "misgendering transgender people can be degrading, humiliating, invalidating, and mentally devastating.").

Counsel for the Proposed Intervenors responds that they have used such terms not to be discourteous, but to differentiate between "immutable" categories of sex versus "experiential" categories of gender identity, and that the terms they use simply reflect "necessary accuracy." Dkt. 52, at 8 (quoting *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973)). Such "accuracy," however, is not compromised by simply referring to Lindsay and other transgender females as "transgender women," or by adopting Lindsay's preferred gender pronouns.[11] *See*, *e.g.*, *Edmo v.*

[11] The Court does not take issue with identifying Lindsay (or any other transgender women) as a transgender woman or transgender female, a male-to-female transgender athlete or individual, or as a person whose sex assigned at birth (male)

Corizon, 935 F.3d 757 (9th Cir. 2019) (consistently referring to transgender female prisoner using her chosen name and female gender pronouns); *Canada v. Hall*, 2019 WL 1294660, at *1 n. 1 (N.D. Ill. March 21, 2019) ("Although immaterial to this ruling, the Court would be derelict if it failed to note the defendants' careless disrespect for the plaintiff's transgender identity, as reflected through . . . the consistent use of male pronouns to identify the plaintiff. The Court cautions counsel against maintaining a similar tone in future filings."); *Lynch v. Lewis*, 2014 WL 1813725, at *2 n. 2 (M.D. Ga. May 7, 2014) ("The Court and Defendants will use feminine pronouns to refer to the Plaintiff in filings with the Court. Such use is not to be taken as a factual or legal finding. The Court will grant Plaintiff's request as a matter of courtesy, and because it is the Court's practice to refer to litigants in the manner they prefer to be addressed when possible.").[12]

Ultimately, however, that the Proposed Intervenors' counsel used gratuitous language in their briefs is not a reason to deny Madi and MK the opportunity to intervene to support a law of which they are the intended beneficiaries. Moreover, during oral argument, counsel for the Proposed Intervenors was respectful in advocating for Madi and MK

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differs from her gender identity (female). *Edmo*, 935 F.3d at 772. Each of these descriptions makes counsel's point without doing so in an inflammatory and potentially harmful manner.

[12] Personal preferences or beliefs and organizational perceptions or positions notwithstanding, the Court expects courtesy between all parties in this litigation. In an ever contentious social and political world, the Courts will remain a haven for fairness, civility, and respect—even in disagreement.

without needlessly attempting to shame Lindsay or other transgender women. That counsel did so illustrates there is no need to misgender Lindsay or others in order to "speak coherently about the goals, justifications, and validity of the Fairness in Women's Sports Act." Dkt. 52, at 8. Counsel should continue this practice in future filings and arguments before the Court.

In sum, the Court will allow Madi and MK to intervene as of right, and, alternatively, finds permissive intervention is also appropriate. The Court will accordingly collectively refer to Madi and MK hereinafter as the "Intervenors."

B. Motion to Dismiss (Dkt. 40)

Defendants filed a Motion to Dismiss Plaintiffs' action, contending Plaintiffs lack standing, that their claims are not ripe for review, and that their facial challenges fail as a matter of law.

1. Legal Standard

A motion to dismiss based on a lack of Article III standing arises under Federal Rule of Civil Procedure 12(b)(1). *Maya v. Centex Corp.*, 658 F.3d 1060, 1067 (9th Cir. 2011); *Valentin v. Hosp. Bella Vista*, 254 F.3d 358, 362–63 (1st Cir. 2001) (applying Rule 12(b)(1) to a motion to dismiss on grounds of ripeness or mootness). A motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) may challenge jurisdiction either on the face of the pleadings or by presenting extrinsic evidence for the court's consideration. *Safer Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004) (holding a jurisdictional attack may be facial or factual). "In a

facial attack, the challenger asserts that the allegations contained in the complaint are insufficient on their face to invoke federal jurisdiction. By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." *Id.* Where, as here, an attack is facial, the court confines its inquiry to allegations in the complaint. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000).

When ruling on a facial jurisdictional attack, courts must "accept as true all material allegations of the complaint and must construe the complaint in favor of the complaining party." *De La Cruz v. Tormey*, 582 F.2d 45, 62 (9th Cir. 1978) (citing *Warth v. Seldin*, 422 U.S. 490, 501 (1975)). However, the plaintiff bears the burden of alleging facts that are legally sufficient to invoke the court's jurisdiction. *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014).

Rule 12(b)(6) permits a court to dismiss a case if the plaintiff has "fail[ed] to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). A Rule 12(b)(6) dismissal may be based on either a 'lack of a cognizable legal theory' or 'the absence of sufficient facts alleged under a cognizable legal theory.'" *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1121 (9th Cir. 2008) (citation omitted). In deciding whether to grant a motion to dismiss, the court must accept as true all well-pled factual allegations made in the pleading under attack. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A court is not, however, "required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Sprewell v.*

Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001). However, a "complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief." *Id.* (citing *Morley v. Walker*, 175 F.3d 756, 759 (9th Cir. 1999)).

Dismissal without leave to amend is inappropriate unless it is beyond doubt that the complaint could not be saved by amendment. *See Harris v. Amgen, Inc.*, 573 F.3d 728, 737 (9th Cir. 2009) (citations omitted). The Ninth Circuit has held that "in dismissals for failure to state a claim, a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Cook, Perkiss and Liehe, Inc. v. N. California Collection Serv., Inc.*, 911 F.2d 242, 247 (9th Cir. 1990) (citations omitted).

2. Analysis

a. Standing

The "irreducible constitutional minimum" of Article III standing consists of three elements: (1) the plaintiff must have suffered an injury in fact; (2) that is fairly traceable to the challenged conduct of the defendant and not the result of the independent action of some third party not before the court; and (3) that is likely to be redressed by a favorable judicial decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). To survive a Rule 12(b)(1) motion at the pleading stage (a facial challenge to subject-matter jurisdiction), the complaint must clearly allege facts demonstrating each element of standing. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016).

Defendants suggest Plaintiffs lack standing because they have failed to allege that they have suffered an injury in fact.[13] Dkt. 40-1, at 6. "To establish injury in fact, a plaintiff must show that he or she has suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo*, 136 S. Ct. at 1548 (quoting *Lujan*, 504 U.S. at 560). "A plaintiff threatened with future injury has standing to sue if the threatened injury is 'certainly impending,' or there is a 'substantial risk that the harm will occur.'" *In re Zappos.com, Inc.*, 888 F.3d 1020, 1024 (9th Cir. 2018) (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014)). A plaintiff cannot establish standing by alleging a threat of future harm based on a chain of speculative contingencies. *Nelsen v. King Cty.*, 895 F.2d 1248, 1252 (9th Cir. 1990).

Defendants argue Plaintiffs have not alleged an injury in fact because all alleged harms are conjectural, hypothetical, or based on a chain of speculative contingencies. Specifically, Defendants suggest that Lindsay's alleged harm of being subject to exclusion from participation on a women's sport teams, and Jane's alleged harm of being required to verify her sex, cannot occur unless each Plaintiff first makes a women's athletic team, and a third party then disputes either Plaintiffs' sex according to regulations that the State Board of Education has not

[13] Defendants do not challenge the causation and redressability elements of standing.

yet promulgated.[14] Dkt. 40-1, at 6. This argument fails with respect to both Plaintiffs.

i. Lindsay

The Act categorically bars Lindsay from participating on BSU's women's cross-country and track teams. Idaho Code § 33-6203(2) ("Athletic teams or sports designated for females, women, or girls *shall* not be open to students of the male sex.") (emphasis added). Although Defendants contend Lindsay will not be harmed unless she first makes the BSU team and someone then seeks to exclude her through a sex verification challenge, the Act prevents BSU from allowing Lindsay to try out for the women's team at all.

The Act also subjects BSU to a risk of civil suit by any student "who is deprived of an athletic opportunity or suffers any direct or indirect harm," if BSU allows a transgender woman to participate on its athletic teams. Idaho Code § 33-6205(1). A student who prevails on a claim brought pursuant to this section "shall be entitled to monetary damages, including for any psychological, emotional, and physical harm suffered, reasonable attorney's fees and costs, and any other appropriate relief." *Id.* at 6205(4). Defendants' claim that the Act's categorical bar against Lindsay's participation on BSU's women's teams is not "self-executing" because it "has no

[14] Defendants also maintain that "because HB 500 has not yet come into effect, all alleged harm is future harm—and Plaintiffs have not shown that the alleged injuries are certainly impending, or that there is substantial risk of harm occurring." Dkt. 40-1, at 6. Since the Act went into effect July 1, 2020, this argument is moot.

independent enforcement mechanism," is meritless in light of the risk of significant civil liability the Act imposes on any school that allows a transgender woman to participate in women's sports. Dkt. 59, at 5.

The harm Lindsay alleges—the inability to participate on women's teams—arose when the Act went into effect on July 1, 2020. That Lindsay has not yet tried out for BSU athletics or been subject to a dispute process is irrelevant because the Act bars her from trying out in the first place. The Supreme Court has long held that the "injury in fact" required for standing in equal protection cases is denial of equal treatment resulting from the imposition of a barrier, not the ultimate inability to obtain the benefit. *Ne. Florida Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 664 (1993) ("When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing"); *Clements v. Fashing*, 457 U.S. 957, 962 (1982) (finding political officers had standing to challenge provision of Texas Constitution requiring automatic resignation for some officeholders upon their announcement of candidacy for another office because injury was the "obstacle to [their] candidacy" for a new office, not the fact that they would have been elected to a new office but for the law's prohibition); *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 281 n. 14 (1978) (holding twice-rejected white male applicant had standing to challenge medical school's admissions program which reserved 16 of 100 places

in the entering class for minority applicants, because the requisite "injury" was plaintiff's inability to *compete* for all 100 places in the class, simply because of his race, not that he would have been *admitted* in the absence of the special program). Lindsay has adequately alleged an injury because she cannot compete for a position on BSU's women's cross-country and track teams in the first place, regardless of whether or not she would ultimately make such teams.[15]

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[15] Citing *Braunstein v. Arizona Dep't of Transp.*, 683 F.3d 1177, 1185 (9th Cir. 2012), Defendants argue that even where the government discriminates on the basis of a protected category, only those who are "personally denied equal treatment have a cognizable injury under Article III." Dkt. 59, at 3. In *Braunstein*, the Ninth Circuit considered a white male engineer's lawsuit alleging the Arizona Department of Transportation violated his right to equal protection by giving general contractors a financial incentive to hire minority-owned subcontractors. *Braunstein*, 683 F.3d at 1184. Braunstein alleged that these preferences prevented him, as a non-minority business owner, from competing for subcontracting work on an equal basis. *Id.* at 1185. However, Braunstein did not submit a quote or attempt to secure subcontract work from any of the prime contractors who bid on the government contract. *Id.* at 1185. The Ninth Circuit held that because Braunstein's surviving claim was for damages, rather than for declaratory and injunctive relief, Braunstein had to show more than that he was "able and ready" to seek subcontracting work. *Id.* at 1186. The Court determined Braunstein had not established an injury for purposes of his claim for damages because Braunstein had "done essentially nothing to demonstrate that he [was] in a position to compete equally with the other contractors." *Id.* By contrast, Lindsay seeks declaratory and injunctive relief, and has demonstrated she is "able and ready" to join the BSU cross-country and track teams. *Id.* at 1186 (citing *Gratz v. Bollinger*, 539 U.S. 244, 261–62 (2003) (holding plaintiff had standing to challenge university's race-conscious transfer admissions policy, even

In addition, even if BSU risked civil liability and allowed Lindsay to try out for, or join, a women's team, it is not speculative to suggest Lindsay's sex would be disputed. Lindsay is a nineteen-year-old transgender woman who has bravely become the public face of this litigation, and, in doing so, has captured the attention of local and national news. *See*, *e.g.*, James Dawson, *Idaho Transgender Athlete Law To Be Challenged in Federal Court*, https://www.boisestatepublicradio.org/post/idaho-transgender-athlete-law-bechallenged-federal-court#stream/0 (Apr. 15, 2020); Julie Kliegman, SPORTS ILLUSTRATED, *Idaho Banned Trans Athletes from Women's Sports. She's Fighting Back*, https://www.si.com/sports-illustrated/2020/06/30/idaho-transgender-ban-fighting-back (June 30, 2020); Roman Stubbs, THE WASHINGTON POST, *As transgender rights debate spills into sports, one runner finds herself at the center of a pivotal case* https://www.washingtonpost.com/sports/2020/07/27/idaho-transgender-sports-lawsuit-hecox-v-little-hb-

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though he never applied as a transfer student, because he demonstrated that he was "able and ready to do so.") Lindsay has adequately alleged that she is ready and able to join BSU's women's cross-country and women's track teams and also that she is in a position to compete with other students who try out for BSU's women's track and cross-country teams. Specifically, Lindsay alleges she has been training hard to qualify for such teams, that she is a life-long runner who competed on track and cross-country teams in high school, and that she will try out for the cross-country team in fall 2020 and track team in spring 2020 if BSU allows her to do so. Dkt. 1, at ¶¶ 6, 25, 33. Such allegations are sufficient to establish standing for Lindsay's claims. *Braunstein*, 683 F.3d at 1185–86.

500/ (July 27, 2020).[16]

In addition to such headlines, prominent athletes, including Billie Jean King and Megan Rapinoe, have, due to the Act, called for the NCAA to move men's basketball tournament games scheduled to be played in Idaho next March to another state. *Id.* On the other side of the coin, advocates in favor of the Act, including 300 high-profile female athletes, signed a letter asking the NCAA not to boycott Idaho over passing the Act. Ellie Reynolds, THE FEDERALIST, *More Than 300 Female Athletes, Olympians Urge NCAA to Protect Women's Sports*, https://thefederalist.com/2020/07/30/more-than-300-female-athletes-olympians-urge-ncaa-to-protect-womens-sports/ (July 30, 2020). In light of the extensive attention this case has already received, and widespread knowledge that Lindsay is transgender, it is untenable to suggest she would *not* be subject to a sex dispute if BSU allowed her the opportunity to try out for, or join, a women's team.[17]

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[16] The Court takes judicial notice of such articles because they are matters in the public realm. "When a court takes judicial notice of publications like websites and newspaper article, the court merely notices what was in the public realm at the time, not whether the contents of those articles were in fact true." *Prime Healthcare Services, Inc. v. Humana Ins. Co.*, 230 F. Supp. 3d 1194, 1201 (citing *Heliotrope Gen. Inc. v. Ford Motor Co.*, 189 F.3d 971, 981 n. 118 (9th Cir. 1999)). The Court references such articles solely to illustrate that this case has received local and national attention, and not for the truth of the contents of the articles. *Id.*

[17] As mentioned, BSU cannot allow Lindsay this opportunity under section 33-6203(2) of the Act. Given BSU's awareness that Lindsay is a transgender woman, the Act directs that BSU "shall

Defendants also argue Lindsay lacks standing because she has not alleged facts to show she could compete under the current NCAA rules, such as dates showing she has undergone hormone treatment for one calendar year prior to participation on women's sports teams. However, Lindsay alleged in the Complaint that she is being treated with both testosterone suppression and estrogen, and that she is eligible to compete in women's sports in fall 2020 under existing NCAA rules for inclusion of transgender athletes. Dkt. 1, at ¶¶ 29, 32. Because the Court must accept such allegations as true and construe them in Lindsay's favor, Lindsay has adequately alleged she is eligible to participate on women's teams under the NCAA's regulations despite the Complaint's omission of the exact dates of her treatment. *De la Cruz*, 582 F.2d at 62.

Nonetheless, Defendants claim Lindsay has not adequately alleged she is otherwise eligible to play on women's teams because the U.S. Department of Education Office of Civil Rights ("OCR") recently issued a Letter of Impending Enforcement Action ("OCR Letter") opining that allowing transgender high school athletes in Connecticut to participate in women's sports violated the rights of female athletes under Title IX.[18] Dkt. 40-1, at 7 n.1, 10 n. 2. However,

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not" permit her to join the women's team, regardless of whether a third-party challenges Lindsay's sex. Idaho Code § 33-6203(2).

[18] The OCR Letter was filed by the OCR in Connecticut court cases involving claims by three high school student-athletes and their parents due to the Connecticut Interscholastic Athletic Conference's policy of permitting transgender women to compete on women's teams. Dkt. 41, at 25. Although the parties do not raise the issue, the Court takes judicial notice of the OCR Letter,

the OCR Letter itself states that "it is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such." Dkt. 41, at 68. Because it is expressly not the OCR's formal policy and may not be cited or construed as such, the OCR Letter does not render Lindsay ineligible from participating on women's teams. In addition, the OCR Letter is also of questionable validity given the Supreme Court's recent holding in *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1741 (2020) (clarifying that the prohibition on discrimination because of sex in Title VII includes discrimination based on an individual's transgender status); *see also Emeldi v. Univ. of Oregon*, 698 F.3d 715, 724 (9th Cir. 2012) (interpreting Title IX provisions in accordance with Title VII). The Court accordingly rejects Defendants' claim that Lindsay may not otherwise be eligible to play women's sports due to the OCR Letter.

Defendants also imply Lindsay cannot establish an injury in fact because the State Board of Education has not yet promulgated regulations governing third-party sex verification disputes. Dkt. 40-1, at 3, 6. Regardless of how they are written, any future regulations cannot alter the Act's categorical bar against transgender women participating on women's teams. Under the Act, women's teams "shall not be

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filed by Defendants in support of their Opposition to the Motion for Preliminary Injunction, and cited by Defendants in their Motion to Dismiss, because the Court may take judicial notice of "proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to the matters at issue." *United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992).

open to students of the male sex." *Id.* at § 33-6203(2). Future regulations could not alter this mandate without eliminating a key component of the Act by overriding specific language of the statute.

In essence, Defendants' argument regarding Lindsay's standing is essentially a claim that Lindsay has not suffered any injury because there is no guarantee the Act will be enforced. Defendants have not identified any "principal of standing," or "any case that stands for the proposition that [the Court] should deny standing on the assumption that the regulated entity under the statute will simply violate the law and not do what the law says." Dkt. 62, at 52:5–9. In fact, the Supreme Court rejected a similar argument by the State of Georgia in *Turner v. Fouche*, 396 U.S. 346, 361 (1970). In *Turner*, the Supreme Court held a non-property owner had standing to raise an, equal protection claim against a state law requiring members of the board of education to be property owners. The Court addressed Georgia's contention that the non-property owner lacked standing to challenge the law in the absence of evidence that the law had been enforced, noting: "Georgia also argues the question is not properly before us because the record is devoid of evidence that [the property ownership requirement] has operated to exclude any [non-property owners] from the Taliaferro County board of education." *Id.* at 361 n. 23. The *Turner* Court neatly rejected this contention, stating, "Georgia can hardly urge that her county officials may be depended on to ignore a provision of state law." *Id.* Moreover, given the civil liability and significant damages any regulated entity in Idaho now faces if they allow a transgender woman to participate on woman's sport

teams, the Act's enforcement is essentially guaranteed. Idaho Code § 33-6205.

In addition to the injury of being barred from playing women's sports, Lindsay also claims an injury of being forced to turn over private medical information to the government if her sex was challenged. Dkt. 1, at ¶¶ 157, 168. Defendants argue this injury is "not based in [the Act's] text, which requires a 'health examination and consent form or other statement signed by the student's personal health provider' when there is a dispute, and does not require that the health care provider expound further or disclose any underlying health information." Dkt. 40-1, at 8. However, if BSU violates the Act by allowing Lindsay to participate in women's sports and another student challenges Lindsay's sex, the Act also provides a health care provider can verify Lindsay's sex relying *only* on one or more of the following: her reproductive anatomy, genetic makeup, or normal endogenously produced testosterone levels. Idaho Code § 33-6203(3). Evaluating any of these criteria would require invasive examination and/or testing and would also necessarily reveal extremely personal health information such as Lindsay's precise genetic makeup. Moreover, it would be impossible for Lindsay to demonstrate a "biological sex" permitting participation on a women's team based on any of these three criteria. Dkt. 55, at 7–8.

Defendants counter that Plaintiffs' concerns are overblown and that the verification process is not an invasive as Plaintiffs make it out to be. They suggest a health care provider may verify a student's "biological sex" based on something other than the three expressly listed criteria due to the "health

examination and consent form or other statement provision" language outlined in the Act. Dkt. 40-1, at 3 (claiming that the Act does not require the health care provider "to use the three specified factors in providing an 'other statement' verifying 'the students biological sex.'") During oral argument, defense counsel confirmed that Lindsay can play on female sport's teams if her health care provider simply signs an "other statement" stating that Lindsay is female. Dkt. 62, at 66:21-25; 67:4–9.

It is "a cardinal principle of statutory construction" that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (internal quotation marks and citations omitted); *United States v. Menasche*, 348 U.S. 528, 538–539 (1955) ("It is our duty to give effect, if possible, to every clause and word of a statute." (internal quotation marks omitted); *Beck v. Prupis*, 529 U.S. 494, 506 (2000) (it is a "longstanding canon of statutory construction that terms in a statute should not be construed so as to render any provision of that statute meaningless or superfluous.")

If the Court were to adopt Defendants' aforementioned construction of the statute, the entire legislative findings and purpose section of the Act would be rendered meaningless. Idaho Code § 33-6202 (explaining inherent physiological differences put males at an advantage in sports, requiring sex-specific women's teams to promote sex equality). So too would the Act's mandate that athletic teams or sports designated for females, women, or girls "shall not be open to students of the male sex." *Id.* at § 33-

6203(2). Defendants' contention that Lindsay would not be subject to the invasive and potentially cost-prohibitive medical examination codified in Idaho Code section 33-6203(3) because her health care provider could simply verify that she is female is impossible to reconcile with the rest of the Act's provisions.[19] As such, Lindsay has also alleged a non-speculative risk of suffering an invasion of privacy if BSU violated the law and allowed her to try out for the women's cross-country or track team.

ii. Jane

Jane has also alleged an injury in fact because, by virtue of the Act's passage, she is now subject to disparate, and less favorable, treatment based on sex. As a female student athlete, Jane risks being subject to the "dispute process," a potentially invasive and expensive medical exam, loss of privacy, and the embarrassment of having her sex challenged, while male student athletes who play on male teams do not face such risks. The Supreme Court has long recognized that unequal treatment because of gender like that codified by the Act "is an injury in fact" sufficient to convey standing. *Heckler v. Mathews*, 465 U.S. 728, 738 (1984) (finding plaintiff claimed a judicially cognizable injury where a statute subjected him to unequal treatment solely because of his gender); *Davis v. Guam*, 785 F.3d 1311, 1315 (9th Cir.

[19] During oral argument, Plaintiffs' counsel stated that they would be happy to consider entering into a consent decree if Defendants were willing to agree that this interpretation of the statute was authoritative and binding in Idaho. Dkt. 62, at 70:16–21. Defendants did not respond to this suggestion, and the parties have not notified the Court of any subsequent talks regarding a potential consent decree.

2015) ("[Plaintiff's] allegation—that Guam law provides a benefit to a class of persons that it denies him—is 'a type of personal injury [the Supreme Court] has long recognized as judicially cognizable.'") (quoting *Heckler*, 465 U.S. at 738).

The male appellee in *Heckler* challenged a provision of the Social Security Act that required certain male workers (but not female workers) to make a showing of dependency as a condition for receiving full spousal benefits. *Heckler*, 465 U.S. at 731–35. However, the statute also "prevent[ed] a court from redressing this inequality by increasing the benefits payable to" male workers. *Id.* at 739. Thus, the lawsuit couldn't have resulted in any tangible benefit to plaintiff. The Supreme Court nevertheless held that appellee's claimed injury of being subject to unequal treatment solely because of his gender was "a type of personal injury we have long recognized as judicially cognizable." *Id.* at 738. The *Heckler* Court explained plaintiff had standing to challenge the provision because he sought to vindicate the "right to equal treatment," which isn't necessarily "coextensive with any substantive rights to the benefits denied the party discriminated against." *Id.* at 739. In *Davis*, the Ninth Circuit read *Heckler* "as holding that equal treatment under law is a judicially cognizable inquiry that satisfies the case or controversy requirement of Article III, even if it brings no tangible benefit to the party asserting it." *Davis*, 785 F.3d at 1315.

As a cisgender girl who plays on the Boise High soccer team and who will run track on the girl's team in the spring, Jane is subject to worse and differential treatment than are similarly situated male students

who play for boy's teams in Idaho.[20] Jane has suffered an injury because she is subject to disparate rules for participation on girls' teams, while boys can play on boys' teams without such rules. *Id.* (holding Guam's alleged denial of equal treatment on the basis of race through voter registration law was a judicially cognizable injury); *see also Melendres v. Arpaio*, 695 F.3d 990, 998 (9th Cir. 2012) (holding that Latino plaintiffs had standing to challenge policy targeting Latinos in connection with traffic stops based on their "[e]xposure to this policy while going about [their] daily li[ves]," even though "the likelihood of a future stop of a particular individual plaintiff may not be 'high'") (citation omitted).[21] That Jane has not had her sex challenged does not change the fact that she is subject to different, and less favorable, rules for

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[20] The Court uses the specific terms "girl" and "girl's teams" for Jane, and "transgender woman" and "woman's teams" for Lindsay, due to their respective ages and year in school. The terms are generally interchangeable, however, since the Act applies to nearly all girls and women student athletes in Idaho. Idaho Code § 33-6203(1).

[21] Defendants suggest *Melendres* is inapposite because each of the plaintiffs in *Melendres* had been subjected to targeted traffic stops, and because plaintiffs presented evidence that the defendants had an ongoing policy of targeting Latinos. Dkt. 59, at 2–3 n. 1. Defendants argue this case is distinguishable because no one has challenged either Plaintiff's sex, and because Defendants have no policy or practice to mount such challenges in the future. *Id.* This argument ignores that regulated entities, such as BSU and Boise High, are statutorily required to ensure that transgender women or girls do not play on female sports' teams, are also responsible for resolving sex disputes, and risk significant civil liability if they fail to comply with the statute. Idaho Code §§ 33-6203(3), 6205. The requirements the statute itself places on regulated entities is evidence that the policy will be enforced.

participation on girls' teams that similarly situated boys are not.

In addition to being subject to disparate treatment on the basis of her sex, Jane reasonably fears that her sex will be disputed and that she will suffer the further injury of having to undergo the sex verification process. Dkt. 1, ¶¶ 46–50. In *Krottner v. Starbucks Corp.*, 628 F.3d 1139 (9th Cir. 2010), the Ninth Circuit addressed the Article III standing of victims of data theft where a thief stole a laptop containing "the unencrypted names, addresses, and social security numbers of approximately 97,000 Starbucks employees." *Id.* at 1140. Some employees sued, and the only harm that most alleged was an "increased risk of future identity theft." *Id.* at 1142. There was no evidence that the thief had actually used plaintiffs' specific identities. The Ninth Circuit determined this was sufficient for Article III standing, holding that the plaintiffs had "alleged a credible threat of real and immediate harm" because the laptop and their personal information had been stolen. *Id.* at 1143.

Jane also alleges a credible threat of being forced to undergo a sex verification process. Jane has identified why she is more likely than other female athletes to be subjected to the dispute process. Specifically, Jane "worries that one of her competitors may decide to 'dispute' her sex" because she "does not commonly wear skirts or dresses," "most of her closest friends are boys," she has "an athletic build," and because "people sometimes think of her as masculine." Dkt. 1, at ¶¶ 46–47. Further, even in the absence of Jane's specific characteristics, her general fear of being subjected to the dispute is credible

because the Act currently provides that essentially anyone can challenge another female athlete's sex and protects any challenger from adverse action regardless of whether the dispute is brought in good faith or simply to bully or harass. Although, as Defendants note, the State Board of Education may promulgate regulations that narrow the Act's dispute process, Jane risks being subject to the currently unlimited process as soon as she tries out for Boise High's soccer team on or around August 17, 2020.

Under the Act's dispute process, Jane may have to verify that she is female in order to play girls' sports, and, given the clear meaning of the statute, such verification must be based on her reproductive anatomy, genetic makeup, or normal endogenously produced testosterone levels. Idaho Code § 33-6203(3). As discussed above, Defendants' claim that Jane can simply provide a health examination and consent form from her sports physical, or "other statement" from her personal health care provider, appears impossible to reconcile with the clear language of the Act. Dkt. 40-1, at 7. Jane's risk of being forced to undergo an invasion of privacy simply to play sports represents an "injury in fact" sufficient to confer standing. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) ("A plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement. But one does not have to await the consummation of threatened injury to obtain preventive relief.") (internal quotation marks, alterations, and citations omitted).

Because it finds both Lindsay and Jane have alleged an injury in fact, the Court turns to

Defendants' ripeness argument.

b. Ripeness[22]

Defendants also seek dismissal because this case is purportedly unripe. Ripeness is a question of timing. *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000). It is a doctrine "designed to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Id.* (internal quotation marks and citation omitted).

The "ripeness inquiry contains both a constitutional and prudential component." *Portman v. Cty. of Santa Clara*, 995 F.2d 898, 902 (9th Cir. 1993). As Defendants acknowledge, the constitutional component of the ripeness injury is generally coextensive with the injury element of standing analysis. Dkt. 40-1, at 9; *California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1094 n. 2 (9th Cir. 2003) (noting, "the constitutional component of ripeness is synonymous with the injury-in-fact prong of the standing inquiry"); *see also Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 81 (1978) (finding that an "injury in fact" satisfies the constitutional ripeness inquiry). Defendants' constitutional ripeness arguments fail for the same reasons that their standing arguments fail.

The prudential component of ripeness "focuses on

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[22] Standing and ripeness are closely related. *Colwell v. Dep't of Health and Human Services*, 558 F.3d 1112, 1123 (9th Cir. 2009). "But whereas standing is primarily concerned with *who* is a proper party to litigate a particular matter, ripeness addresses *when* that litigation may occur." (emphasis in original) (internal quotation marks and citations omitted).

whether there is an adequate record upon which to base effective review." *Portman*, 995 F.2d at 903. In evaluating prudential ripeness, the Court must consider "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Thomas*, 220 F.3d at 1141. Ultimately, prudential considerations of ripeness are discretionary. *Id.* at 1142.

i. Fitness for Judicial Review

The Supreme Court and Ninth Circuit have recognized the difficulty of deciding constitutional questions without the necessary factual context. *See*, *e.g.*, *W.E.B. DuBois Clubs of Am. v. Clark*, 389 U.S. 309, 313 (1967); *Thomas*, 220 F.3d at 1141. In *Thomas*, several landlords challenged an Alaska statute that banned discrimination on the basis of marital status, arguing the statute violated their First Amendment rights. 220 F.3d at 1137. For instance, the landlords claimed, *inter alia*, that the City's prohibition on any advertising referencing a marital status preference violated their right to free speech. The Ninth Circuit found the free speech claim was not ripe because no "concrete factual scenario" demonstrated how the law, as applied, infringed the landlords' constitutional rights. *Id.* at 1141. Specifically, the landlords had never advertised or published a reference to marital status preference in the past in connection with their rental real estate activities, nor had expressed any intent of doing so in the future. *Id.* at 1140 n. 5. On this record, the Ninth Circuit held the alleged free speech violation did not rise to the level of a justiciable controversy. *Id.*

Here, unlike in *Thomas*, Plaintiffs' claims are concrete and Plaintiffs clearly delineate how the Act harms them in their specific circumstances. Specifically, Jane is a life-long student athlete who will try out for Boise High School's girls' soccer team in August 2020. Because of various identified traits that have led others to classify her as masculine, Jane reasonably fears she may be subject to a sex dispute challenge. That a specific individual has not threatened such challenge is immaterial because the Act has never been in effect during a school sport's season and the sex dispute challenge has thus never before been available, and, by virtue of being a female student athlete, Jane risks being subject to a sex dispute challenge as soon as she tries out for Boise High's girls' soccer team. Lindsay is also a life-long athlete who has alleged a desire and intent to try out for BSU's women's cross-country team this fall. If BSU permitted her to try out, Lindsay would meet the rules under the NCAA, and the rules in Idaho prior to the Act's passage, to participate by the time BSU will have its first NCAA meet. However, Lindsay is now categorically barred from trying out for the cross-country team under the Act.

Defendants have not addressed such as-applied challenges and have not identified any factual questions that preclude consideration of such challenges at this juncture.[23]

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[23] Although Defendants again highlight that the Department of Education has not yet established the rules and regulations applicable to the sex verification process, Defendants do not articulate how the forthcoming rules and regulations could possibly change the Act's core prohibitions and requirements; could allow transgender women athletes to participate on

Further, legal questions that require little factual development are more likely to be ripe. *Thomas v. Union Carbide Agric. Products Co.*, 473 U.S. 568, 581 (1985). The issues Lindsay and Jane raise are primarily legal: whether the Act violates the Constitution and Title IX in light of its categorical exclusion of transgender women and girls from school sports and its sex-verification scheme for all female student athletes. As such, the Act's legality involves a "pure question of law" and Plaintiffs claims are fit for judicial review now. *Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431, 1435 (9th Cir. 1996) (finding claims were ripe and issue was purely legal where organization which arranged trips to Cuba challenged regulation restraining right to travel to Cuba, even though organization had not applied for, and had not been denied, the specific license required under regulation).

ii. Hardship to the Parties should the Court Withhold Consideration

When a plaintiff challenges a statute or regulation, hardship is more likely if the statute has a direct effect on the plaintiff's daily life. *Texas v. United States*, 523 U.S.296, 301 (1998). Hardship is less likely if the statute's effect is abstract. *Id.* at 302 (rejecting argument that ongoing "threat to

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women's teams; could exempt a girl or woman whose sex is disputed from the verification process; or could add to the narrow list of criteria that can be used to verify a girl's or woman's biological sex. Defendants are simply mistaken that impending regulations could possibly alleviate Plaintiffs' concerns, or that such rules must be established before Lindsay can be excluded from women's sports and before Jane can be subjected to a sex verification challenge.

federalism" could constitute hardship).

Here, the Court is satisfied that the Plaintiffs stand to suffer a hardship should the Court withhold its decision. If the Court declines jurisdiction over this dispute, Lindsay will be categorically barred from participating on BSU's women's teams this fall and will also lose at least a season of NCAA eligibility, which she can never get back. Dkt. 1, at ¶ 34. Similarly, as soon as she tries out for fall soccer, Jane is subject to disparate rules and risks facing a sex verification challenge. If the Court withholds its decision, both Plaintiffs risk being forced to endure a humiliating dispute process and/or invasive medical examination simply to play sports.[24] Given the reasonable threat that the Act will be enforced within days of this decision, as well as the hardship such enforcement will impose on Lindsay and Jane, the Court exercises its discretion to accept jurisdiction over this dispute.

c. Facial Challenge[25]

Finally, Defendants argue Plaintiffs' facial

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[24] Lindsay will not have even this choice unless BSU violates the Act, exposing itself to civil suit, and allows her to join the women's team.

[25] "Facial and as-applied challenges do not enjoy a neat demarcation, but conventional wisdom defines facial challenges as 'ones seeking to have a statute declared unconstitutional in all possible applications,' while as-applied challenges are 'treated as the residual, although ostensibly preferred and larger, category.'" *Standing--Facial Versus As Applied Challenges--City of Los Angeles v. Patel*, 129 HARV. L. REV. 241, 246 (2015)("*Facial Versus As Applied Challenges*") (quoting Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges*, 99 CAL. L. REV. 915, 923 (2011)). However, as many scholars

challenges fail as a matter of law because the Act's provisions can be constitutionally applied. Facial challenges are "disfavored" because they: (1) "raise the risk of premature interpretation of statutes on factually barebone records;" (2) run contrary "to the fundamental principle of judicial restraint"; and (3) "threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 451 (2008) (internal quotation marks and citations omitted). As such, the Supreme Court has held, a "facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that *no set of circumstances* exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987) (emphasis added). As previously discussed, the Ninth Circuit has held that an Arizona policy of excluding boys from playing on girls' sports teams was constitutionally permissible. *Clark*, 659 F.2d at 1131. Thus, Defendants argue the Act can clearly be constitutionally applied to cisgender boys, and Plaintiffs' facial challenges fail.

Plaintiffs counter that the *Salerno* language does not represent the Supreme Court's standard for adjudicating facial challenges. Dkt. 55, at 17 (citing

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note, the distinction, if any, between a facial and an as-applied challenge is difficult to explain because there is a disconnect between what the Supreme Court has outlined and what happens in actual practice. *Facial Versus As Applied Challenges*, 129 HARV. L. REV. at 247; *see also* Gillian E. Metzger, *Facial Challenges and Federalism*, 105 COLUM. L. REV. 873, 882 (2005).

City of Chicago v. Morales, 527 U.S. 41, 51–52, 55 n. 22 (1999) (plurality) (finding an ordinance was facially invalid even though it also had constitutional applications and observing that, "[t]o the extent we have consistently articulated a clear standard for facial challenges, it is not the *Salerno* formulation, which has never been the decisive factor in any decision of this Court, including *Salerno* itself."). As Plaintiffs point out, *Salerno*'s "no set of circumstances" test was called into question by the Supreme Court in *Morales* and has been the subject of considerable debate. *Morales*, 527 U.S. at 55 n. 22; *see also Janklow v. Planned Parenthood, Sioux Falls Clinic*, 517 U.S. 1174, 1175 (1996) (stating that the "dicta in *Salerno* does not accurately characterize the standard for deciding facial challenges[.]"); *Washington State Grange*, 552 U.S. at 449 (noting that some Members of the Supreme Court have criticized the *Salerno* formulation); *Almerico v. Denney*, 378 F. Supp. 3d 920, 924–926 (D. Idaho 2019) (outlining debate regarding viability of *Salerno*'s "no set of circumstances" test); *Does 1-134 v. Wasden*, 2018 WL 2275220, at *4 (D. Idaho May 17, 2018) (noting the ongoing debate regarding *Salerno* and "what types of constitutional claims would warrant a facial challenge, when a facial challenge becomes ripe, and the level of scrutiny that should be applied to the challenged statute").

Notwithstanding such controversy, the Ninth Circuit has consistently held that *Salerno* is the appropriate test for most facial challenges.[26] *S.D.*

[26] Exceptions to *Salerno*'s "no set of circumstances" test have been developed but are not applicable here. For instance, *Salerno* does not apply to certain facial challenges to statutes

Myers, Inc. v. City & Cty. of San Francisco, 253 F.3d 461, 467 (9th Cir. 2001) (explaining that the Ninth Circuit will not reject *Salerno* in contexts other than the First Amendment or abortion "until the majority of the Supreme Court clearly directs us to do so."); *Almerico*, 378 F. Supp. 3d at 925 ("Time and again, plaintiffs have attempted to escape the effect of the *Salerno* standard, only to see their path foreclosed by the Ninth Circuit."). The Supreme Court also continues to apply *Salerno* to most facial challenges, albeit with some limited exceptions. *See*, *e.g.*, *Washington State Grange*, 552 U.S. at 449 (holding a plaintiff can succeed on a facial challenge only by establishing that no set of circumstances exists under which the law could be valid).

However, Plaintiffs suggest an exception to the *Salerno* test, recently applied by the Supreme Court in *City of Los Angeles v. Patel*, 576 U.S. 409, 418 (2015), is applicable. In *Patel*, the Supreme Court cited *Salerno* with approval, but also explained that when assessing whether a statute meets the "no set of circumstances" standard, the Supreme Court "has considered only applications of the statute in which it actually authorizes or prohibits conduct." *Id.* In addressing a facial challenge to a statute authorizing warrantless searches, the *Patel* Court held the "proper focus of the constitutional inquiry is the group for whom the law is a restriction, not the group for

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under the First Amendment. *Planned Parenthood of S. Arizona v. Lawall*, 180 F.3d 1022, 1026 (9th Cir. 1999). The Supreme Court also held *Salerno*'s "no set of circumstances" test does not apply to "undue burden" challenges to statutes regulating abortion in *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 895 (1992).

whom the law is irrelevant." *Id.* (quoting *Casey*, 505 U.S. at 894). Plaintiffs argue a facial challenge is appropriate here because transgender and cisgender girls and women, are those for "whom the law is a restriction," while the Act is "irrelevant" to cisgender boys. Dkt. 55, at 18 (quoting *Patel*, 576 U.S. at 418).

While the Court recognizes *Patel* implied that the "method for defining the relevant population" test may apply to all facial challenges, *Patel* unfortunately did not explain when such test is applicable, whether it is appropriate in contexts other than abortion or the Fourth Amendment, or how to distinguish those cases where the test is appropriately used for facial adjudication from others where it is not. Nothing in the *Patel* opinion "even explains why *Casey*'s method of defining the relevant population to which a statute applies should be transplanted to adjudicate Fourth Amendment unreasonableness claims, especially when *Casey* was confined to the abortion context before *Patel*." *Facial Versus As Applied Challenges*, 129 HARV. L. REV. at 250. Plaintiffs do not cite, and the Court has not located, any subsequent Ninth Circuit or Supreme Court case where *Patel*'s method for defining the relevant population has been used outside the abortion or Fourth Amendment context. Absent such guidance, the Court declines to extend *Patel* to create a new exception to *Salerno*'s "no set of circumstances test" here.

Plaintiffs also suggest that a motion to dismiss is not the proper vehicle for Defendants' opposition to their facial challenge, as the distinction between facial and as-applied challenges "goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint." *Citizens United v. Fed.*

Election Comm'n, 558 U.S. 310, 331 (2010). However, *Citizens United* involved a facial challenge to a federal statute which purportedly violated plaintiffs' First Amendment rights. As noted *supra*, note 26, *Salerno* does not apply to facial challenges under the First Amendment. *Lawall*, 180 F.3d at 1026. As such, *Citizens United* appears inapplicable to cases where, as here, Plaintiffs facial challenges do not involve the First Amendment.

Further, the District of Idaho has frequently dismissed facial challenges at the Motion to Dismiss stage under *Salerno*, including facial challenges brought under the Fourteenth Amendment. *See*, *e.g.*, *Almerico*, 378 F. Supp. 3d at 926 (dismissing facial due process and equal protection challenge to Idaho statute requiring any healthcare directive executed by women in Idaho to contain provision rendering directive without force during pregnancy); *Williams v. McKay*, 2020 WL 1105087, at *5 (D. Idaho March 6, 2020) (dismissing prisoner's facial First Amendment challenge to prison's grievance policy); *Wasden*, 2018 WL 2275220 at *18 (dismissing all facial constitutional challenges to Idaho's Sexual Offender Registration and Community Right-to-Know Act).

In sum, the Court is not convinced an exception to *Salerno* applies to Plaintiffs' facial Fourteenth Amendment challenges and will dismiss such claims. The Court will not dismiss Plaintiffs' as-applied Fourteenth Amendment challenges to the Act.[27]

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[27] Plaintiffs also bring facial challenges under the Fourth Amendment. Given the confusion created by *Patel* and uncertainty as to whether *Patel* applies here, the Court will deny dismissal of Plaintiffs' facial Fourth Amendment challenges

C. Motion for Preliminary Injunction (Dkt. 22)

1. Legal Standard

Injunctive relief "is an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (citing *Mazurack v. Armstrong*, 520 U.S. 968, 972 (1997)). A party seeking a preliminary injunction must establish: (1) a likelihood of success on the merits; (2) likely irreparable harm in the absence of a preliminary injunction; (3) that the balance of equities weighs in favor of an injunction; and (4) that an injunction is in the public interest. *Id.* at 20. Where, as here, "the government is a party, these last two factors merge." *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014) (citing *Nkhen v. Holder*, 556 U.S. 418, 436 (2009)).

A preliminary injunction can take two forms. 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.*

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without prejudice. However, even if the Court later determines that all of Plaintiffs' facial challenges fail, the Court rejects Defendants' suggestion that if the Court dismisses all facial challenges, all of Plaintiffs' other requests for relief, including all requests for injunctive relief, should be dismissed. Dkt. 59, at 8. Plaintiffs seek preliminary and permanent injunctive relief enjoining enforcement of the Act both facially and as applied. Dkt. 1, at 53 (Prayer for Relief, paragraph D, requesting injunctive relief "as discussed above" which includes reference to Plaintiffs' as-applied challenges in paragraphs A and B). Dismissal of Plaintiffs' facial challenges does not require dismissal of their requests for injunctive relief.

U.S. Dist. Court, 840 F.2d 701, 704 (9th Cir. 1988). A mandatory injunction "orders a responsible party to take action." *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 484 (1996). A mandatory injunction "'goes well beyond simply maintaining the status quo,'" requires a heightened burden of proof, and is "'particularly disfavored.'" *Marlyn Nutraceuticals, Inc. v. MucosPharma GmbH & Co.*, 571 F.3d 873, 879 (9th Cir. 2009) (quoting *Anderson v. U.S.*, 612 F.2d 1112, 1114 (9th Cir. 1980)). In general, mandatory injunctions "'are not granted unless extreme or very serious damage will result and are not issued in doubtful cases or where the injury complained of is capable of compensation in damages.'" *Id.* (quoting *Anderson*, 612 F.2d at 111).

While the parties do not address the issue, the relevant "status quo" for purposes 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") (internal quotation marks and citation omitted). Here, Plaintiffs' motion for preliminary injunction was filed to contest the enforceability of H.B. 500—Idaho's new Act. The status quo, therefore, is the policy in Idaho prior to H.B.500's enactment. Injunctions that prohibit enforcement of a new law or policy are prohibitory, not mandatory. *Arizona Dream Act*, 757 F.3d at 1061; *Bay Area Addiction Research & Treatment, Inc. v. City of Antioch*, 179 F.3d 725, 732

n. 13 (9th Cir. 1999) (requested preliminary injunction against enforcement of new zoning ordinance was not subject to heightened burden of proof since relief sought was prohibitory injunction that preserved the status quo pending a decision on the merits). Thus, if the Court grants Plaintiffs' preliminary injunction, it will be issuing a prohibitory injunction to preserve the status quo pending trial on the merits, rather than forcing Defendants to take action.

2. Analysis

a. Equal Protection Clause

The Equal Protection Clause of the Fourteenth Amendment requires that all similarly situated people be treated alike. *City of Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985). Equal protection requirements restrict state legislative action that is inconsistent with core constitutional guarantees, such as equality in treatment. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015). However, the Fourteenth Amendment's "promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons." *Romer v. Evans*, 517 U.S. 620, 631 (1996). The Supreme Court has attempted to reconcile this reality with the equal protection principle by developing tiers of judicial scrutiny. *Latta v. Otter*, 19 F. Supp. 3d 1054, 1073 (D. Idaho) ("*Latta I*"), *aff'd*, *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014) ("*Latta II*"). "The level of scrutiny depends on the characteristics of the disadvantaged group or the rights implicated by the

classification." *Latta I*, 19 F. Supp. 3d at 1073.

When a state restricts an individual's access to a fundamental right, the policy must withstand strict scrutiny, which requires that the government action serves a compelling purpose and that it is the least restrictive means of doing so. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16-17 (1973). The Supreme Court has recognized that the Constitution protects a number of fundamental rights, including the right to privacy concerning consensual sexual activity, *Lawrence v. Texas*, 539 U.S. 558, 578 (2003), the right to marriage, *Obergefell*, 135 S. Ct. at 2599, and the right to reproductive autonomy, *Eisenstadt v. Baird*, 405 U.S. 438, 455 (1972). Access to inter-scholastic sports is not, however, a constitutionally recognized fundamental right. *See*, *e.g*, *Walsh v. La. High Sch. Athletic Ass'n*, 616 F.2d 152, 159–60 (5th Cir. 1980) (explaining that a student's interest in playing sports "amounts to a mere expectation rather than a constitutionally protected claim of entitlement[.]").

When a fundamental right is not at stake, a court must analyze whether the government policy discriminates against a suspect class. *Cleburne*, 473 U.S. at 440 (identifying race, alienage, and national origin as suspect classifications vulnerable to pernicious discrimination). Because government policies that discriminate on the basis of race or national origin typically reflect prejudice, such policies will survive only if the law survives strict scrutiny. *Id.* Strict scrutiny review is so exacting that most laws subjected to this standard fail, leading one former Supreme Court Justice to quip that strict scrutiny review is "strict in theory, but fatal in fact."

Fullilove v. Klutznick, 448 U.S. 448, 519 (1980).

Statutes that discriminate on the basis of sex, a "quasi-suspect" classification, need to withstand the slightly less stringent standard of "heightened" scrutiny.[28] *Craig v. Boren*, 429 U.S. 190, 197 (1976); *United States v. Virginia*, 518 U.S. 515, 533 (1996) ("*VMI*"). To withstand heightened scrutiny, classification by sex "must serve important governmental objectives and must be substantially related to achievement of those objectives." *Craig*, 429 U.S. at 197. "The purpose of this heightened level of scrutiny is to ensure quasi-suspect classifications do not perpetuate unfounded stereotypes or second-class treatment." *Latta I*, 19 F. Supp. 3d at 1073 (citing *VMI*, 518 U.S. at 533).

The District of Idaho determined transgender individuals qualify as a quasi-suspect class in *F.V. v. Barron*, 286 F. Supp. 3d 1131, 1143–1145 (2018) ("*Barron*").[29] While not specifically stating that

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[28] Heightened scrutiny is also referred to as "intermediate scrutiny." *See*, *e.g.*, *Clark v. Jeter*, 486 U.S. 456, 461 (1988). The Court uses the term "heightened" scrutiny for consistency.

[29] As the *Barron* Court explained, the Supreme Court employs a four-factor test to determine whether a class qualifies as suspect or quasi-suspect: (1) when the class has been "historically subjected to discrimination;" (2) has a defining characteristic bearing no "relation to ability to perform or contribute to society;" (3) has "obvious, immutable, or distinguishing characteristics;"" and (4) is "a minority or is politically powerless." *Id.* at 1144 (quoting *United States v. Windsor*, 570 U.S. 744 (2003)). The *Barron* Court determined transgender individuals meet each of these criteria. *Id.* This test has also been employed by district courts in other states to find transgender people are a quasi-suspect class. For instance, in *Adkins v. City of New York*, 143 F. Supp. 3d 134, 139 (S.D.N.Y.),

transgender individuals constitute a quasi-suspect class, the Ninth Circuit has also held that heightened scrutiny applies if a law or policy treats transgender persons in a less favorable way than all others. *Karnoski v. Trump*, 926 F.3d 1180, 1201 (2019). Further, although in the context of Title VII, the Supreme Court has, as mentioned, recently stated, "it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex." *Bostock v. Clayton Cty., Ga.*, 140 S. Ct. 1731, 1741 (2020).

Finally, the least stringent level of scrutiny is rational basis review. Rational basis review 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. Doe*, 509 U.S. 312, 319–321 (1993). "[A] classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity." *Id.* at 319 (citations omitted). Rational-basis review in equal protection analysis "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *Id.* (quoting *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993)). Under rationale basis review, a classification "must be upheld against equal protection challenge if there

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the court determined: (1) transgender individuals have a history of persecution and discrimination and, moreover, "this history of persecution and discrimination is not yet history"; (2) transgender status bears no relation to ability to contribute to society; (3) transgender status is a sufficiently discernible characteristic to define a discrete minority class; and (4) transgender individuals are a politically powerless minority. *Id.* at 139.

is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Id.* at 320 (quoting *Beach*, 508 U.S. at 313).[30]

b. Appropriate level of scrutiny

Plaintiffs argue heightened scrutiny is appropriate in this case because the Act discriminates on the basis of both transgender status and sex. Dkt. 22-1, at 12 (citing *VMI*, 518 U.S. at 55). Defendants acknowledge that the Act may be subject to heightened scrutiny but suggest the Act does not discriminate on the basis of transgender status or sex because it simply "treats all biological males the same and prohibits them from participating in female sports to protect athletic opportunities for biological females." Dkt. 41, at 13 n. 8. While contending, "[n]either the Supreme Court nor the Ninth Circuit has recognized 'gender identity' as a suspect class,"[31] the Intervenors argue the Act nonetheless passes heightened scrutiny. Dkt. 46, at 13–18. Finally, the

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[30] Yet, even under rational basis review, if a court finds that a classification is "born of animosity toward the class of persons affected," a law that implicates neither a suspect classification nor a fundamental right may be ruled constitutionally invalid. *Romer*, 517 U.S. at 634; *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973) (striking down provision of Food Stamp Act that denied food stamps to households of unrelated individuals where the legislative history suggested Congress passed the provision in an effort to prevent "hippie communes" from receiving food stamps). Thus, even under rational basis review, a policy that is primarily motivated by animus will not pass constitutional muster. *Id.* at 534.

[31] However, as noted *supra*, the Ninth Circuit has explicitly held heightened scrutiny applies if a law or policy treats transgender persons in a less favorable way than all others. *Karnoski*, 926 F.3d at 1201.

United States contends that even assuming, *arguendo*, that the Act triggers heightened scrutiny, it "readily withstand[s] this form of review." Dkt. 53, at 5.

Because all parties focus their arguments on the Act's ability to withstand heightened scrutiny, and because the Court finds heightened scrutiny is appropriate pursuant to *Craig*, 429 U.S. at 197, *VMI*, 518 U.S. at 533, *Barron*, 286 F. Supp. 3d at 1144, and *Karnoski*, 926 F.3d at 1201, the Court applies this level of review.[32]

c. Likelihood of Success on the Merits-Lindsay

i. Discrimination based on transgender status

Defendants and the United States suggest the Act does not discriminate against transgender individuals because it does not expressly use the term "transgender" and because the Act 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. Dkt. 41, at 13 n. 8; Dkt. 53, at 13. The Ninth Circuit rejected a similar argument in *Latta II*, 771 F.3d at 468. In *Latta II*, the Ninth Circuit considered defendants' claim that Idaho and Nevada's same-sex marriage bans did not discriminate on the basis of sexual orientation, but rather on the basis of procreative capacity. The Ninth

[32] While maintaining heightened scrutiny is appropriate, Plaintiffs also argue the Act fails even rational basis review. Dkt. 22-1, at 12, 25–26. Because the Court finds provisions of the Act fail to withstand heightened scrutiny, it does not further address this argument.

Circuit rebuffed this contention, explaining:

> Effectively if not explicitly, [defendants] assert that while these laws may disadvantage some same-sex couples and their children, heightened scrutiny is not appropriate because differential treatment by sexual orientation is an incidental effect of, but not the reason for, those laws. However, the laws at issue distinguish on their face between opposite-sex couples, who are permitted to marry and whose out-of-state marriages are recognized, and same-sex couples, who are not permitted to marry and whose marriages are not recognized. Whether facial discrimination exists 'does not depend on why' a policy discriminates, 'but rather on the explicit terms of the discrimination.' Hence, while the procreative capacity distinction that defendants seek to draw could represent a *justification* for the discrimination worked by the laws, it cannot overcome the inescapable conclusion that Idaho and Nevada do discriminate on the basis of sexual orientation.

Id. at 467–68 (emphasis in original) (quoting *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991)).

Similarly, the 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. Hence, while the physiological differences the Defendants suggest support the categorical bar on transgender women's participation in women's sports may justify the Act, they do not overcome the inescapable conclusion that the Act discriminates on the basis of transgender status. *Id.* at 468.

As mentioned, the Ninth Circuit has held that classifications based on transgender status are subject to heightened scrutiny. *Karnoski*, 926 F.3d at 1201. The Court accordingly applies heightened scrutiny to the Act. Under this level of scrutiny, four principles guide the Court's equal protection analysis. The Court: (1) looks to the Defendants to justify the Act; (2) must consider the Act's actual purposes; (3) need not accept hypothetical, *post hoc* justifications for the Act; and (4) must decide whether Defendants' proffered justifications overcome the injury and indignity inflicted on Plaintiffs and others like them. *Latta I*, 19 F. Supp. 3d at 1077. When applying heightened scrutiny, the Court does not adopt the strong presumption in favor of constitutionality or heavy deference to legislative judgments characteristic of rational basis review. *SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471, 483 (9th Cir. 2014). Further, under heightened scrutiny review, the Court must examine the Act's "actual purposes and carefully consider the 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).

ii. The Ninth Circuit's holding in *Clark*

At the outset, the Court recognizes that sex-discriminatory policies withstand heightened scrutiny when sex classification is "not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances." *Michael M. v. Superior Ct. of Sonoma Cty.*, 450 U.S. 462, 469 (1981) (upholding law that held only males criminally liable for statutory rape because the consequences of teenage pregnancy essentially fall only on girls, so applying statutory rape law solely to men was justified since men suffer fewer consequences of their conduct). The Equal Protection Clause does not require courts to disregard the physiological differences between men and women. *Michael M.*, 450 U.S. at 481; *Clark*, 695 F.2d at 1131.

As repeatedly highlighted by Defendants, the Intervenors, and the United States (collectively hereinafter the Act's "Proponents"), the Ninth Circuit in *Clark* held that there "is no question" that "redressing past discrimination against women in athletics and promoting equality of athletic opportunity between the sexes" is "a legitimate and important governmental interest" justifying rules excluding males from participating on female teams. *Clark*, 695 F.2d at 1131. In *Clark*, the Ninth Circuit determined a policy in Arizona of excluding boys from girls' teams simply recognized "the physiological fact that males would have an undue advantage competing against women," and would diminish opportunity for females. *Id.* at 1131. The *Clark* Court also explained that "even wiser alternatives to the one chosen" did not invalidate Arizona's policy since it was "substantially related to the goal" of providing

fair and equal opportunities for females to participate in athletics. *Id.* at 1132.

While the Court recognizes and accepts the principals outlined in *Clark*, *Clark*'s holding regarding general sex separation in sport, as well as the justifications for such separation, do not appear to be implicated by allowing transgender women to participate on women's teams. In *Clark*, the Ninth Circuit held that it was lawful to exclude cisgender boys from playing on a girls' volleyball team because: (1) women had historically been 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 volleyball teams. *Clark*, 695 F.2d at 1131. These principals do not appear to hold true for women and girls who are transgender.

First, like women generally, women who are transgender have historically been discriminated against, not favored. *See*, *e.g.*, *Barron*, 286 F. Supp. 3d at 1143–1145. In a large national study, 86% of those perceived as transgender in a K–12 school experienced some form of harassment, and for 12%, the harassment was severe enough for them to leave school. National Center for Transgender Equality, 2015 U.S. Transgender Survey: Idaho State Report 1–2, https://www.transequality.org/sites/default/files/docs/usts/USTSIDStateReport%281017%29.pdf (October 2017). According to the same study, 48% of transgender people in Idaho have experienced homelessness in their lifetime, and 25% were living in poverty. *Id.* Rather than a general separation

between a historically advantaged group (cisgender males) and a historically disadvantaged group (cisgender women), the Act excludes a historically disadvantaged group (transgender women) from participation in sports, and further discriminates against a historically disadvantaged group (cisgender women) by subjecting them to the sex dispute process. The first justification for the Arizona policy at issue in *Clark* is not present here.

Second, under the Act, women and girls who are transgender will not be able to participate in any school sports, unlike the boys in *Clark*, who generally had equal athletic opportunities. *Clark*, 695 F.2d at 1131; Dkt. 58-3, at ¶¶ 24–28 (explaining that forcing a transgender woman to participate on a men's team would be forcing her to be cisgender, which is "associated with adverse mental health outcomes."); *see also* Dkt. 22-6, ¶¶ 35–37. 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." Dkt. 58, at 11 (citing Dkt. 58-3, ¶¶ 24–28).[33] As such, the Act's categorical

[33] The Intervenors rely on an expert opinion from Dr. Stephen Levine claiming gender-affirming policies (such as allowing transgender individuals to play on sports teams consistent with their gender identity) are instead harmful to transgender individuals. *See generally*, Dkt. 46-2. However, another judge of this Court previously determined that Dr. Levine is an outlier in the field of gender dysphoria and placed "virtually no weight" on his opinion in a case involving a transgender prisoner's medical care. *Edmo v. Idaho Dep't of Corr.*, 258 F. Supp. 3d 1103, 1125 (D. Idaho 2018) (*vacated in part on other grounds in Edmo v. Corizon*, 935 F.3d 757 (9th Cir. 2019)); *see also Norsworthy v. Beard*, 87 F. Supp. 3d 1164, 1188–89 (N.D. Cal. 2015) (noting Dr.

exclusion of transgender women and girls entirely eliminates their opportunity to participate in school sports—and also subjects all cisgender women to unequal treatment simply to play sports—while the men in *Clark* had generally equal athletic opportunities.

Third, it appears transgender women have not and could not "displace" cisgender women in athletics "to a substantial extent." *Clark*, 695 F.2d at 1131. Although the ratio of males to females is roughly one to one, less than one percent of the population is transgender. Dkt. 22-1, at 22. 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 (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. It appears untenable that allowing transgender women to compete on women's teams would substantially displace female athletes.[34]

Levine's expert opinion overwhelmingly relied on generalizations about gender dysphoria, contained illogical inferences, and admittedly included references to a fabricated anecdote). At this stage of the proceedings, the Court accepts Plaintiffs' evidence regarding the harm forcing transgender individuals to deny their gender identity can cause.

[34] The United States suggests the Ninth Circuit held participation by just one cisgender boy on the girls' volleyball team would "set back" the "goal of equal participation by females in interscholastic sports." Dkt. 52, at 10 (citing *Clark by and through Clark v. Arizona Interscholastic Ass'n*, 886 F.2d 1191, 1193 (1989) ("*Clark II*"). The part of *Clark II* the United States references responded to plaintiff's "mystifying" argument that

And fourth, it is not clear that transgender women who suppress their testosterone have significant physiological advantages over cisgender women. The Court discusses the distinction between physical differences between men and women in general, and physical differences between transgender women who have suppressed their testosterone for one year and women below. However, the interests at issue in *Clark*—Defendants' central authority—pertained to sex separation in sport generally and are not necessarily determinative here.[35]

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the Arizona school association had been "wholly deficient in its efforts to overcome the effects of past discrimination against women in interscholastic athletics, and that this failure vitiate[d] its justification for a girls-only volleyball team." *Id.* The Ninth Circuit noted that it was true that participation in Arizona interscholastic sports was still far from equal. Id. In light of this inequity, the *Clark II* Court could not see how plaintiff's "remedy" of allowing him to play on the girl's team would help. *Id.* Thus, the *Clark II* Court's statement regarding participation by one male athlete was in the context of plaintiff's argument that he should be permitted to play on the girl's team because there was no justification for women's teams. *Id.* The *Clark II* Court remained focused on the risk that a ruling in plaintiff's favor would extend to all boys and would engender substantial displacement of girls in school sports. *Id.* (observing that the issue of "males . . . outnumber[ing] females in sports two to one" in school sports would "not be solved by opening the girls' team to Clark *and other boys*.") (emphasis added); *see also id.* ("Clark does not dispute our conclusion in *Clark I* that 'due to physiological differences, *males would displace females to a substantial extent if they were* allowed to compete for positions on the volleyball team.") (quoting *Clark*, 695 F.2d at 1131) (emphasis added).

[35] As Attorney General Wasden advised the legislature before it passed the Act: "The issue of a transgender female wishing to

iii. The Act's justifications

The legislative findings and purpose portion of the Act suggests it fulfills the interests of promoting sex equality, providing opportunities for female athletes to demonstrate their skill, strength, and athletic abilities, and by providing female athletes with opportunities to obtain college scholarship and other accolades. Idaho Code § 33-6202(12). Plaintiffs do not dispute that these are important governmental objectives. They instead argue that the Act is not substantially related to such important governmental interests. At this stage of the litigation, and without further development of the record, the Court is inclined to agree.

(1) Promoting Sex Equality and Providing Opportunities for Female Athletes

As discussed, *supra*, section II.C, the legislative record reveals no history of transgender athletes ever competing in sports in Idaho, no evidence that Idaho female athletes have been displaced by Idaho transgender female athletes, and no evidence to suggest a categorical bar against transgender female athlete's participation in sports is required in order to promote "sex equality" or to "protect athletic opportunities for females" in Idaho. Idaho Code § 33-6202(12); *see* Dkt. 1, at ¶¶ 80–83. Rather than presenting empirical evidence that transgender

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participate on a team with other women requires considerations beyond those considered in *Clark* and presents issues that courts have not yet resolved." Letter from Attorney General Wasden to Rep. Rubel (Feb. 25, 2020), https://www.idahostatesman.com/latest-newsarticle240619742.ece/BINARY/HB%20500%20Idaho%20AG%20response.pdf.

inclusion will hinder sex equality in sports or athletic opportunities for women, both the Act itself and Proponents' rely exclusively on three transgender athletes who have competed successfully in women's sports.

Specifically, during the entire legislative debate over the Act, the only transgender women athletes referenced were two high school runners who compete in Connecticut, and who were, notably, also defeated by cisgender girls in recent races.[36] Dkt. 22-3, Ex. B, at 8; *see also* Associated Press, *Cisgender female who sued beats transgender athlete in high school race*, https://www.fox61.com/article/news/local/transgender-athlete-loses-trackrace-lawsuit-ciac-high-school-sports/520-df66c6f5-5ca9-496b-a6ba-61c828655bc6 (Feb. 15, 2020). Notably, unlike the IHSAA and NCAA rules in place in Idaho before the Act, Connecticut does not require a transgender woman athlete to suppress her testosterone for any time prior to competing on women's teams. Dkt. 41, at 33; Dkt. 45, at 7.

The Intervenors identify a third transgender athlete, June Eastwood, and argue that their athletic opportunities were limited by Eastwood's participation in women's sports. Dkt. 46, at 8. The State also highlights this example. Dkt. 41, at 18. However, Eastwood was not an Idaho athlete and the competition at issue took place at the University of Montana. Dkt. 45, at 10 n. 7. So, the Idaho statute would have no impact on Eastwood. More

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[36] Rep. Ehardt also vaguely referenced a college transgender athlete, but it is not clear from the record who this athlete is or where she competed. Dkt. 22-3, Ex. B, at 8.

importantly, although the Intervenors lost to Eastwood, Eastwood was also ultimately defeated by her cisgender teammate. *Id.* And, losing to Eastwood at one race did not deprive the Intervenors from the opportunity to compete in Division I sports, as both continue to compete on the women's cross-country and track teams with ISU. Dkt. 30-1, at 2.

The evidence cited during the House Debate on H.B. 500 and in the briefing by the Proponents regarding three transgender women athletes who have each lost to cisgender women athletes does not provide an "exceedingly persuasive" justification for the Act. *VMI*, 518 U.S. at 533 ("To summarize the Court's current directions for cases of official classification based on gender: Focusing on the differential treatment for denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is 'exceedingly persuasive.'"). Heightened scrutiny requires that a law solves an actual problem and that the "justification must be genuine, not hypothesized." *VMI*, 518 U.S. at 533. In the absence of any empirical evidence that sex inequality or access to athletic opportunities are threatened by transgender women athletes in Idaho, the Act's categorical bar against transgender women athletes' participation appears unrelated to the interests the Act purportedly advances.

Plaintiffs have also presented compelling evidence that equality in sports is *not* jeopardized by allowing transgender women who have suppressed their testosterone for one year to compete on women's teams. Plaintiffs' medical expert, Dr. Joshua Safer, suggests that physiological advantages are not

present when a transgender woman undergoes hormone therapy and testosterone suppression. Before puberty, boys and girls have the same levels of circulating testosterone. Dkt. 22-9, at ¶ 23. After puberty, the typical range of circulating testosterone for cisgender women is similar to before puberty, and the circulating testosterone for cisgender men is substantially higher. *Id.*

Dr. Safer contends there "is a medical consensus that the difference in testosterone is generally the primary known driver of differences in athletic performance between elite male athletes and elite female athletes." Dkt. 22-9, at ¶ 25. Dr. Safer highlights the only study examining the effects of gender-affirming hormone therapy on the athletic performance of transgender athletes. *Id.* at ¶ 51. The small study showed that after undergoing gender affirming intervention, which included lowering their testosterone levels, the athletes' performance was reduced so that relative to cisgender women, their performance was proportionally the same as it had been relative to cisgender men prior to any medical treatment. *Id.* In other words, 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. *Id.*

Defendants' medical expert, Dr. Gregory Brown, also confirms that male's performance advantages "result, in large part (but not exclusively), from higher testosterone concentrations in men, and adolescent boys, after the onset of male puberty." Dkt. 41-1, at ¶ 17. While Dr. Brown maintains that hormone and testosterone suppression cannot fully eliminate

physiological advantages once an individual has passed through male puberty, the Court notes some of the studies Dr. Brown relies upon actually held the opposite. *Compare* Dkt. 41-1, at ¶ 81 *with* Dkt. 58-2, at ¶ 7 (highlighting that the Handelsman study upon which Dr. Brown relies states that "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."). Further, the majority of the evidence Dr. Brown cites, and most of his declaration, involve the differences between male and female athletes in general, and contain no reference to, or information about, the difference between cisgender women athletes and transgender women athletes who have suppressed their testosterone. Dkt. 41-1, at ¶¶ 12–112, 114–125.

Yet, the legislative findings for the Act contend that even after receiving hormone and testosterone suppression therapy, transgender women and girls have "an absolute advantage" over non-transgender girls. Idaho Code § 33-6202(11). In addition to the evidence cited above, several factors undermine this conclusion. For instance, there is a population of transgender girls who, as a result of puberty blockers at the start of puberty and gender affirming hormone therapy afterward, never go through a typical male puberty at all. Dkt. 22-9, ¶ 47. These transgender girls never experience the high levels of testosterone and accompanying physical changes associated with male puberty, and instead go through puberty with the same levels of hormones as other girls. *Id.* As such, they develop typically female physiological characteristics, including muscle and bone structure, and do not have an ascertainable advantage over

cisgender female athletes. *Id.* Defendants do not address how transgender girls who never undergo male puberty can have "an absolute advantage" over cisgender girls. Nor do Defendants address why transgender athletes who have never undergone puberty should be categorically excluded from playing women's sports in order to protect sexual equality and access to opportunities in women's sports.

The Act's legislative findings do claim the "benefits that natural testosterone provides to male athletes is not diminished through the use of puberty blockers and cross-sex hormones." Idaho Code § 33-6202(11). However, the study cited in support of this proposition was later altered after peer review, and the conclusions the legislature relied upon were removed. Dkt. 58, at 17; Dkt. 58-2, at ¶ 19; Dkt. 62 at 80:10–25; 81:1–10; 95:24–25, 96. Defendants provide no explanation as to why the Legislators relied on the pre-peer review version of the article or why Defendants did not correct this fact in their briefing after the peer reviewed version was published. In fact, the study did not involve transgender athletes at all, but instead considered the differences between transgender men who increased strength and muscle mass with testosterone treatment, and transgender women who lost some strength and muscle mass with testosterone suppression. Dkt. 58, at 17. The study also explicitly stated it "is important to recognize that we only assessed proxies for athletic performance . . . it is still uncertain how the findings would translate to transgender athletes." Anna Wiik et. al, *Muscle Strength, Size, and Composition Following 12 months of Gender-affirming Treatment in Transgender Individual*, J. CLIN. METAB., 105(3):e805-e813

(2020).[37]

In addition, several of the Act's legislative findings which purportedly demonstrate the "absolute advantage" of transgender women are based on a study by Doriane Lambelet Coleman. Idaho Code § 33-6202(5), (10). Professor Coleman herself urged Governor Little to veto H.B. 500 because her work was misused, and she also endorsed the NCAA's rule of allowing transgender women to participate after one year of hormone and testosterone suppression. Betsy Russell, *Professor whose work is cited in HB500a, the transgender athletes bill, says bill misuses her research and urges veto*, IDAHO PRESS https://www.idahopress.com/eyeonboise/professor-whose-work-is-cited-in-hb-a-the-transgenderarticle_0e800202-cacl-5721-a7690328665316a8.html (Mar. 19, 2020).

The policies of elite athletic regulatory bodies across the world, and athletic policies of most every other state in the country, also undermine Defendants' claim that transgender women have an "absolute advantage" over other female athletes. Specifically, the International Olympic Committee and the NCAA require transgender women to suppress their testosterone levels in order to compete

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[37] The legislative findings and the citations in the Proponents' briefs cite this study as Tommy Lundberg et al., *Muscle strength, size and composition following 12 months of gender-affirming treatment in transgender individuals: retained advantage for transwomen*, Karolinska Institute (Sept. 26, 2019). The correct reference for the published study is Anna Wiik et al., *Muscle Strength, Size, and Composition following 12 Months of Gender-affirming Treatment in Transgender Individuals*, J. CLIN. METAB., 105(3):e805-e813 (2020).

in women's athletics. *Id.* at ¶ 45. The NCAA policy was implemented in 2011 after consultation with medical, legal, and sports experts, and has been in effect since that time. Dkt. 1, ¶ 76. Millions of student-athletes have competed in the NCAA since 2011, with no reported examples of any disturbance to women's sports as a result of transgender inclusion.[38] *Id.* Similarly, every other state in the nation permits women and girls who are transgender to participate under varying rules, including some which require hormone suppression prior to participation. The Proponents' failure to identify any evidence of transgender women causing purported sexual inequality other than four athletes (at least three of whom who have notably lost to cisgender women) is striking in light of the international and national policy of transgender inclusion.

Finally, while general sex separation on athletic teams for men and women may promote sex equality and provide athletic opportunities for females, that separation preexisted the Act and has long been the status quo in Idaho. Existing rules already prevented boys from playing on girls' teams before the Act. IHSAA Non-Discrimination Policy, http://idhsaa.org/

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[38] In their Response to the Motion for Preliminary Injunction, Defendant's highlight the circumstances of one transgender woman athlete who competed in women's sports after suppressing her hormones, Cece Telfer, to suggest testosterone suppression does not eliminate the physiological advantages of transgender women athletes. Dkt. 41, at 17–18. The Court finds, and Defendants concede, that such anecdotal evidence does not establish that hormone therapy is ineffective in reducing athletic performance advantages in transgender women athletes. *Id.* at 18.

asset/RULE%2011.pdf ("If a sport is offered for both boys and girls, girls must play on the girls team and boys must play on the boys team. . . If a school sponsors only a single team in a sport. . . Girls are eligible to participate on boys' teams. . . . Boys are not eligible to participate on girls' teams."). However, the IHSAA policy also allows transgender girls to participate on girls' teams after one year of hormone suppression. Similarly, the existing NCAA rules also preclude men from playing on women's teams but allow transgender women to compete after one year of testosterone suppression. Because Proponents fail to show that participation by transgender women athletes threatened sexual equality in sports or opportunities for women under these preexisting policies, the Act's proffered justifications do not appear to overcome the inequality it inflicts on transgender women athletes.

The Ninth Circuit in *Clark* ruled that sex classification can be upheld only if sex represents "a legitimate accurate proxy." *Clark*, 695 F.2d at 1129. The *Clark* Court further explained the Supreme Court has soundly disapproved of classifications that reflect "archaic and overbroad generalizations," and has struck down gender-based policies when the policy's proposed compensatory objective was without factual justification. *Id.* Given the evidence highlighted above, it appears the "absolute advantage" between transgender and cisgender women athletes is based on overbroad generalizations without factual justification.

Ultimately, the Court must hear testimony from the experts at trial and weigh both their credibility and the extent of the scientific evidence. However, the

incredibly small percentage of transgender women athletes in general, coupled with the significant dispute regarding whether such athletes actually have physiological advantages over cisgender women when they have undergone hormone suppression in particular, suggest the Act's categorical exclusion of transgender women athletes has no relationship to ensuring equality and opportunities for female athletes in Idaho.

(2) Ensuring Access to Athletic Scholarships

The Act also identifies an interest in advancing access to athletic scholarships for women. Idaho Code § 33-6202(12). Yet, there is no evidence in the record to suggest that the Act will increase scholarship opportunities for girls. Just as the head of the IHSAA testified during the legislative debate on H.B. 500 that he was not aware of any transgender girl ever playing high school girls' sports in Idaho, there is also no evidence of a transgender person ever receiving any athletic scholarship in Idaho. Idaho Education News, *Lawmakers hear emotional testimony but take no action on transgender bill*, Idaho News 6, https://www.kivitv.com/news/education/making-the-grade/lawmakers-hear-emotionaltestimony-but-take-no-action-on-transgender (Feb. 20, 2020). Nor have the scholarships of the Intervenors—the only identified Idaho athletes who have purportedly been harmed by competing against a transgender woman athlete—been jeopardized. Both Intervenors continue to run track and cross-country on scholarship with ISU, despite their loss to a transgender woman athlete at the University of Montana. Dkt. 30-1, at 2.

The Act's incredibly broad sweep also belies any

genuine concern with an impact on athletic scholarships. The Act broadly applies to inter-scholastic, intercollegiate, intramural, or club athletic teams or sports that are sponsored by a public primary or secondary school, or a public institution of higher education, or any school or institution whose students or teams compete against a public school or institution of higher education. Idaho Code § 33-6203(1). Thus, any female athlete, from kindergarten through college, is generally subject to the Act's provisions. Clearly, the need for athletic scholarships is not implicated in primary school and intramural sports in the same way that it may be for high school and college athletes. As such, "the breadth of the [law] is so far removed from [the] particular justifications" put forth in support of it, that it is "impossible to credit them." *Romer*, 517 U.S. at 635.

Based on the dearth of evidence in the record to show excluding transgender women from women's sports supports sex equality, provides opportunities for women, or increases access to college scholarships, Lindsay is likely to succeed in establishing the Act violates her right to equal protection. This likelihood is further enhanced by Defendants' implausible argument that the Act does not actually ban transgender women, but instead only requires a health care provider's verification stating that a transgender woman athlete is female. *See*, *e.g*, Dkt. 40-1, at 3; Dkt. 41, at 4; Dkt. 62, at 66:21–25; 67:1–25; 68:1–17.

Defense counsel confirmed during oral argument that if Lindsay's health care provider signs a health form stating that she is female, Lindsay can play women's sports. Dkt. 62, at 66:21–25. In turn,

Plaintiffs' counsel affirmed that Lindsay's health care provider will sign a form verifying Lindsay is female. *Id.* at 70:5–21. If this is indeed the case, then each of the Proponents' arguments claiming that the Act ensures equality for female athletes by disallowing males on female teams falls away. Under this interpretation, the Act does not ensure sex-specific teams at all and is instead simply a means for the Idaho legislature to express its disapproval of transgender individuals. If "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." *Moreno*, 413 U.S. at 534.

(3) The Act's Actual Purpose

The Act's legislative findings reinforce the idea that the law is directed at excluding women and girls who are transgender, rather than on promoting sex equality and opportunities for women. For instance, the Act's criteria for determining "biological sex" appear designed to exclude transgender women and girls and to reverse the prior IHSAA and NCAA rules that implemented sex-separation in sports while permitting transgender women to compete. Idaho Code § 33-6203(3).

Specifically, an athlete subject to the Act's dispute process may "verify" their sex using three criteria: (1) reproductive anatomy, (2) genetic makeup, or (3) endogenous testosterone, i.e., the level of testosterone the body produces without medical intervention. *Id.* This excludes some girls with intersex traits because they cannot establish a "biological sex" of female based on these verification metrics. Dkt. 22-9, ¶ 41. It

also completely excludes transgender girls.

Girls under eighteen generally cannot obtain gender-affirming genital surgery to treat gender dysphoria, and therefore will not have female reproductive anatomy. Dkt. 22-2, ¶ 13. Many transgender women over the age of eighteen also have not had genital surgery, either because it is not consistent with their individualized treatment plan for gender dysphoria or because they cannot afford it. *Id.* With respect to genetic makeup, the overwhelming majority of women who are transgender have XY chromosomes, so they cannot meet the second criteria. And, by focusing on "endogenous" testosterone levels, rather than actual testosterone levels after hormone suppression, the Act excludes transgender women whose circulating testosterone levels are within the range typical for cisgender women.

Thus, the Act's definition of "biological sex" intentionally excludes the one factor that a consensus of the medical community appears to agree drives the physiological differences between male and female athletic performance. Dkt. 22-9, at ¶ 25. Significantly, the preexisting Idaho and current NCAA rules instead focus on that factor. That the Act essentially bars consideration of circulating testosterone illustrates the Legislature appeared less concerned with ensuring equality in athletics than it was with ensuring exclusion of transgender women athletes.

In addition, it is difficult to ignore the circumstances under which the Act was passed. As COVID-19 was declared a pandemic and many states adjourned state legislative session indefinitely, the

Idaho Legislature stayed in session to pass H.B. 500 and become the first and only state to bar all women and girls who are transgender from participating in school sports. *Id.* at ¶ 89. At the same time, the Legislature also passed another bill, H.B. 509, which essentially bans transgender individuals from changing their gender marker on their birth certificates to match their gender identity. Governor Little signed H.B. 500 and H.B. 509 into law on the same day. That the Idaho government stayed in session amidst an unprecedented national shut down to pass two laws which dramatically limit the rights of transgender individuals suggests the Act was motivated by a desire for transgender exclusion, rather than equality for women athletes, particularly when the national shutdown preempted school athletic events, making the rush to the pass the law unnecessary.

Finally, the Proponents turn the Act on its head by arguing that transgender people seek "special" treatment by challenging the Act. Dkt. 53, at 9–10; Dkt. 62, at 92:16–22. This argument ignores that the Act excludes *only* transgender women and girls from participating in sports, and that Lindsay simply seeks the status quo prior to the Act's passage, rather than special treatment. Further, the Proponents' argument that Lindsay and other transgender women are not excluded from school sports because they can simply play on the men's team is analogous to claiming homosexual individuals are not prevented from marrying under statutes preventing same-sex marriage because lesbians and gays could marry someone of a different sex. The Ninth Circuit rejected such arguments in *Latta*, 771 F.3d at 467, as did the

Supreme Court in *Bostock*, 140 S. Ct. at 1741–42.

In short, the State has not identified a legitimate interest served by the Act that the preexisting rules in Idaho did not already address, other than an invalid interest of excluding transgender women and girls from women's sports entirely, regardless of their physiological characteristics. As such, Lindsay is likely to succeed on the merits of her equal protection claim. Again, at this stage, the Court only discusses the "likelihood" of success based on the information currently in the record. Actual success—or failure—on the merits will be determined at a later stage.

d. Likelihood of Success-Jane

The Act additionally triggers heightened scrutiny by singling out members of girls' and women's teams for sex verification. *VMI*, 518 U.S. at 555 (["A]ll gender-based classifications today warrant heightened scrutiny") (internal quotation marks and citation omitted). Defendants argue that the Act does not treat females differently because "it requires any athlete subject to dispute, whether male or female, to verify his or her sex." Dkt. 41, at 13 n. 8. Defendants suggest males are equally subject to the sex verification process because they may try to participate on a woman's team. *Id.* This claim ignores that all cisgender women are subject to the verification process in order to play on the team matching their gender identity, while only a limited few (if any) cisgender men will be subject to the verification process if they try to play on a team contrary to their gender identity.

Defendants' argument also contradicts the express language of the Act, which mandates,

"[a]thletic teams or sports designated for females, women, or girls *shall* not be open to students of the male sex." *Id.* at § 33-6203(2) (emphasis added). Males are not subject to the dispute process because female teams are not open to them under the Act.[39] By arguing that people of any sex who seek to play women's sports would be subject to sex verification, Defendants ignore that the Act creates a different, more onerous set of rules for women's sports when compared to men's sports. Where spaces and activities for women are "different in kind . . . and unequal in tangible and intangible ways from those for men, they are tested under heightened scrutiny." *VMI*, 518 U.S. at 540.

It is also clear that a sex verification examination is unequal to the physical sports exam a male must have in order to play sports. Being subject to a sex dispute is itself humiliating. The Act's dispute process also creates a means that could be used to bully girls perceived as less feminine or unpopular and prevent them from participating in sports. And if, as the Act states, sex must be verified through a physical examination relying "only on one (1) or more of the following: the student's reproductive anatomy, genetic makeup, or normal endogenously produced testosterone levels," girls like Jane may also have to endure invasive medical tests that could constitute an invasion of privacy in order to "verify" their sex. Idaho

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[39] Moreover, males were already excluded from female sports teams under the long-standing rules in Idaho prior to the Act's passage. Defendants do not explain why women must risk being subject to the onerous sex verification process in the name of equality in sports when women already had single sex teams without the risk of a sex dispute prior to the Act's passage.

Code § 33-6302(3).

As Plaintiffs' expert, Dr. Sara Swoboda, a pediatrician in Boise with approximately 1,500 patients across Idaho, explains, none of the aforementioned physiological characteristics are tested for in any routine sports' physical examination. Dkt. 22-10, ¶ 21. If a health care provider was to verify a patient's sex related to their reproductive anatomy, genes or hormones, none of that testing is straightforward or ethical without medical indication. *Id.* at ¶ 22. Nor would it actually "verify biological sex," "either alone or in any combination," as this "would not be consistent with medical science." *Id.* at ¶ 21.

For example, "'reproductive anatomy' is not a medical term. That could include internal reproductive organs, external genitalia, or other body systems." *Id.* at ¶ 28. Further, "medically unnecessary pelvic examination would be incredibly intrusive and traumatic for a patient" and would not be conducted. *Id.* at ¶ 29. Pelvic examinations in "pediatric patients are limited to patients with specific concerns such as acute trauma or infection," and are not conducted as a general practice. *Id.* at ¶ 27. "In young patients, such an exam would often be done with sedation and appropriate comfort measures to limit psychological trauma." *Id.* "Pediatric consensus recognizes that genitalia exams are always invasive and carry the risk of traumatizing patients if not done with careful consideration of medical utility, discussion about the purpose and subsequent findings of any exam with the patient and their family, and explicit consent of the patient." *Id.* In addition, determining whether an individual has ovaries or a uterus may also require

more intrusive testing including "transvaginal ultrasounds and may require referral to pediatric gynecologists, endocrinologists, and geneticists. None of this testing would be a necessary part of a sports physical or any standard medical examination absent medical concerns and indications of underlying health conditions necessitating treatment." *Id.* at ¶ 30.

Similarly, determining a patient's "genetic makeup" would require genetic testing. Such testing is complicated and personal and reveals a significant amount of information. *Id.* at ¶ 23. It is done by a specialist and would require a pediatric endocrinologist if performed on a minor like Jane. *Id.* at ¶ 24. Where a patient presents with a constellation of medical concerns that indicate a need for genetic testing, they are referred to a pediatric endocrinologist for a chromosomal microarray:

> This type of testing reveals a significant amount of very sensitive and private medical information. A chromosomal microarray looks at all 23 pairs of chromosomes that an individual has and would reveal things beyond just whether a person has 46-XX, 46-XY, or some combination of sex chromosomes. In ordering genetic testing of this kind, a range of genetic conditions could be revealed to a patient and a patient's family. [Dr. Swoboda does] not do genetic testing as a routine part of any medical evaluation and [is] not aware of any pediatric practice that would (absent specific medical indications). Even in cases where a patient presents with possible medical or genetic conditions based off of medical or family history that would warrant

> genetic testing, such testing is complex and often requires insurance preauthorization.

Id. at ¶ 25.

Nor would hormone testing be conducted as a part of a normal physical examination, or without clear medical indication. *Id.* at ¶¶ 21–22. Hormone testing would also require a referral to a pediatric endocrinologist and could reveal sensitive information. *Id.* at ¶¶ 24, 31. "Specific testing of genetics, internal or external reproductive anatomy, and hormones could reveal information that an individual was not looking to find out about themselves and then could result in having to disclose information to a school and community that could be deeply upsetting to pediatric patients." *Id.*

Given the significant burden the Act's dispute process places on all women athletes, the Court must decide whether Defendants' proffered justifications overcome the injury and indignity inflicted on Jane and all other female athletes through the dispute process. *SmithKline*, 740 F.3d at 481–83. Instead of ensuring "long-term benefits that flow from success in athletic endeavors for women and girls," it appears that the Act hinders those benefits by subjecting women and girls to unequal treatment, excluding some from participating in sports at all, incentivizing harassment and exclusionary behavior, and authorizing invasive bodily examinations. Idaho Code § 33-6202(12). Because, as discussed above, Defendants have not offered evidence that the Act is substantially related to its purported goals of promoting sex equality, providing opportunities for female athletes, or increasing female athlete's access to scholarship,

Jane is also likely to succeed on her equal protection claim. Idaho Code § 33-6202(12).

e. Irreparable Harm

Lindsay and Jane both face irreparable harm due to violations of their rights under the Equal Protection Clause. "It is well established that the deprivation of constitutional rights unquestionably constitutes irreparable injury." *Hernandez v. Sessions*, 872 F.3d 976, 994 (9th Cir. 2017) (internal citations omitted); *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir. 1997) (holding that an equal protection violation constitutes irreparable harm).

Beyond this dispositive presumption, Lindsay and Jane will both suffer specific "harm for which there is no adequate legal remedy" in the absence of an injunction. *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014). If Lindsay is denied the opportunity to try out for and compete on BSU's women's teams, she will permanently lose a year of NCAA eligibility that she can never get back. Lindsay is also subject to an Act that communicates the State's "moral disproval" of her identity, which the Constitution prohibits. *Lawrence v. Texas*, 539 U.S. 558, 582–83 (2003). When Jane tries out for Boise High's women's soccer team, she will be subject to the possibility of embarrassment, harassment, and invasion of privacy through having to verify her sex. Such violations are irreparable. *Obergefell*, 135 S. Ct. at 2606 ("Dignitary wounds cannot always be healed with the stroke of a pen."). Lindsay and Jane both also face the injuries detailed *supra*, section III.B.2, if the

Act is not enjoined.[40]

The Court accordingly finds Plaintiffs will likely suffer irreparable harm if the Act is not enjoined. *Alliance for the Wild Rockies*, 632 F.3d at 1131 (noting plaintiffs must establish irreparable harm is likely, not certain, in order to obtain an injunction).

f. Balance of the Equities and Public Interest

Where, as here, the government is a party, the "balance of the equities" and "public interest" prongs of the preliminary injunction test merge. *Drakes Bay Oyster Co.*, 747 F.3d at 1092. In evaluating the balance of the equities, courts "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter*, 555 U.S. at 24. As explained above, Plaintiffs' harms weigh significantly in favor of injunctive relief.

In stark contrast to the deeply personal and irreparable harms Plaintiffs face, a preliminary injunction would not harm Defendants because it would merely maintain the status quo while Plaintiffs pursue their claims. If an injunction is issued, Defendants can continue to rely on the NCAA policy for college athletes and IHSAA policy for high school

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[40] The Intervenors outrageously contend that Lindsay has not shown she will suffer irreparable harm because she has not alleged that she will commit suicide if she is not permitted to participate on BSU's women's sports teams. Dkt. 46, at 2. Clearly, a risk of suicide is not required to establish irreparable harm. The Intervenors' attempt to twist the tragically high suicide rate of transgender individuals into a requirement that Lindsay must be suicidal to establish irreparable harm is distasteful.

athletes, as they did for nearly a decade prior to the Act. In the absence of any evidence that transgender women threatened equality in sports, girls' athletic opportunities, or girls' access to scholarships in Idaho during the ten years such policies were in place, neither Defendants nor the Intervenors would be harmed by returning to this status quo.

Further, the Intervenors are themselves subject to disparate treatment under the Act. While the Intervenors have never competed against a transgender woman athlete from Idaho, or in Idaho, they risk being subject to the Act's sex dispute process simply by playing sports. As Plaintiffs' counsel noted during oral argument, the Act "isn't a law that pits some group of women against another group of women. This is a law that harms all women in the state, all women who are subject to . . . the sex verification process, and, of course, particularly women and girls who are transgender and are now singled out for categorical exclusion." Dkt. 62, at 89:23–25; 90:1–4.

Moreover, it is "always in the public interest to prevent the violation of a party's constitutional rights." *Melendres*, 695 F.3d at 1002. By establishing a likelihood that the Act violates the Constitution, Plaintiffs "have also established that both the public interest and the balance of the equities favor a preliminary injunction." *Ariz. Dream Act*, 757 F.3d at 1069 ("[T]he public interest and the balance of the equities favor preven[ting] the violation of a party's constitutional rights.") (internal quotation marks and citation omitted).

g. Bond Requirement

Finally, Plaintiffs request that the Court waive the bond requirement under Federal Rule of Civil Procedure 65(c). The Ninth Circuit has held that requiring a bond "to issue before enjoining potentially unconstitutional conduct by a governmental entity simply seems inappropriate because . . . protection of those rights should not be contingent upon an ability to pay." *Johnson v. Couturier*, 572 F.3d 1067, 1086 (9th Cir. 2009). In any event, Defendants do not contest Plaintiffs' request that the Court waive the bond. The Court will accordingly grant Plaintiff's request.

IV.CONCLUSION

The Court recognizes that this decision is likely to be controversial. While the citizens of Idaho are likely to either vehemently oppose, or fervently support, the Act, the Constitution must always prevail. It is the Court's role—as part of the third branch of government—to interpret the law. At this juncture, that means looking at the Act, as enacted by the Idaho Legislature, and determining if it may violate the Constitution. In making this determination, it is not just the constitutional rights of transgender girls and women athletes at issue but, as explained above, the constitutional rights of every girl and woman athlete in Idaho. Because the Court finds Plaintiffs are likely to succeed in establishing the Act is unconstitutional as currently written, it must issue a preliminary injunction at this time pending trial on the merits.

V.ORDER

Now, therefore IT IS HEREBY ORDERED:

1. The Motion to Intervene (Dkt. 30) is GRANTED;
2. The Motion to Dismiss (Dkt. 40) is GRANTED IN PART and DENIED IN PART. It is GRANTED with respect to Plaintiffs' facial Fourteenth Amendment constitutional challenges, it is DENIED with respect to Plaintiffs' as-applied constitutional claims and in all other respects;
3. The Motion for Preliminary Injunction (Dkt. 22) is GRANTED.

DATED: August 17, 2020

David C. Nye
Chief U.S. District Court Judge

Idaho Code § 33-6202
Legislative findings and purpose

(1) The legislature finds that there are "inherent 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);

(2) These "inherent differences" range from chromosomal and hormonal differences to physiological differences;

(3) Men generally have "denser, stronger bones, tendons, and ligaments" and "larger hearts, greater lung volume per body mass, a higher red blood cell count, and higher haemoglobin," Neel Burton, The Battle of the Sexes, Psychology Today (July 2, 2012);

(4) 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 and Contemporary Problems 63, 74 (2017) (quoting Gina Kolata, Men, Women and Speed. 2 Words: Got Testosterone?, N.Y. Times (Aug. 21, 2008));

(5) The biological differences between females and males, especially as it relates to natural levels of testosterone, "explain the male and female secondary sex characteristics which develop during puberty and have lifelong effects, including those most important

for success in sport: categorically different strength, speed, and endurance," Doriane Lambelet Coleman and Wickliffe Shreve, "Comparing Athletic Performances: The Best Elite Women to Boys and Men," Duke Law Center for Sports Law and Policy;

(6) 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);

(7) 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;

(8) 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");

(9) A recent study of female and male Olympic performances since 1983 found that, although

athletes from both sexes improved over the time span, the "gender gap" between female and male performances remained stable. "These suggest that women's performances at the high level will never match those of men." Valerie Thibault et al., Women and men in sport performance: The gender gap has not evolved since 1983, 9 Journal of Sports Science and Medicine 214, 219 (2010);

(10) As Duke Law professor and All-American track athlete Doriane Coleman, tennis champion Martina Navratilova, and Olympic track gold medalist Sanya Richards-Ross recently wrote: "The evidence is unequivocal that starting in puberty, in every sport except sailing, shooting, and riding, there will always be significant numbers of boys and men who would beat the best girls and women in head-to-head competition. Claims to the contrary are simply a denial of science," Doriane Coleman, Martina Navratilova, et al., Pass the Equality Act, But Don't Abandon Title IX, Washington Post (Apr. 29, 2019);

(11) The benefits that natural testosterone provides to male athletes is not diminished through the use of puberty blockers and cross-sex hormones. A recent study on the impact of such treatments found that even "after 12 months of hormonal therapy," a man who identifies as a woman and is taking cross-sex hormones "had an absolute advantage" over female athletes and "will still likely have performance benefits" over women, Tommy Lundberg et al., "Muscle strength, size and composition following 12 months of gender-affirming treatment in transgender individuals: retained advantage for the transwomen," Karolinksa Institutet (Sept. 26, 2019); and

(12) Having separate sex-specific teams furthers efforts to promote sex equality. Sex-specific teams accomplish this by providing opportunities for female athletes to demonstrate their skill, strength, and athletic abilities while also providing them with opportunities to obtain recognition and accolades, college scholarships, and the numerous other long-term benefits that flow from success in athletic endeavors.

Idaho Code § 33-6203
Designation of athletic teams

(1) Interscholastic, intercollegiate, intramural, or club athletic teams or sports that are sponsored by a public primary or secondary school, a public institution of higher education, or any school or institution whose students or teams compete against a public school or institution of higher education shall be expressly designated as one (1) of the following based on biological sex:

(a) Males, men, or boys;

(b) Females, women, or girls; or

(c) Coed or mixed.

(2) Athletic teams or sports designated for females, women, or girls shall not be open to students of the male sex.

(3) A dispute regarding a student's sex shall be resolved by the school or institution by requesting that the student provide a health examination and consent form or other statement signed by the student's personal health care provider that shall verify the student's biological sex. The health care provider may verify the student's biological sex as part of a routine sports physical examination relying only on one (1) or more of the following: the student's reproductive anatomy, genetic makeup, or normal endogenously produced testosterone levels. The state board of education shall promulgate rules for schools and institutions to follow regarding the receipt and timely resolution of such disputes consistent with this subsection.

20 U.S.C. § 1681
Sex

(a) Prohibition against discrimination; exceptions

No person in the United States 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, except that:

(1) Classes of educational institutions subject to prohibition

in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;

(2) Educational institutions commencing planned change in admissions

in regard to admissions to educational institutions, this section shall not apply (A) for one year from June 23, 1972, nor for six years after June 23, 1972, in the case of an educational institution which has begun the process of changing from being an institution which admits only students of one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Secretary of Education or (B) for seven years from the date an educational institution begins the process of changing from being an institution which admits only students

of only one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Secretary of Education, whichever is the later;

(3) Educational institutions of religious organizations with contrary religious tenets

this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization;

(4) Educational institutions training individuals for military services or merchant marine

this section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine;

(5) Public educational institutions with traditional and continuing admissions policy

in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex;

(6) Social fraternities or sororities; voluntary youth service organizations

this section shall not apply to membership

practices--

(A) of a social fraternity or social sorority which is exempt from taxation under section 501(a) of Title 26, the active membership of which consists primarily of students in attendance at an institution of higher education, or

(B) of the Young Men's Christian Association, Young Women's Christian Association, Girl Scouts, Boy Scouts, Camp Fire Girls, and voluntary youth service organizations which are so exempt, the membership of which has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age;

(7) Boy or Girl conferences

this section shall not apply to--

(A) any program or activity of the American Legion undertaken in connection with the organization or operation of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(B) any program or activity of any secondary school or educational institution specifically for--

(i) the promotion of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(ii) the selection of students to attend any such conference;

(8) Father-son or mother-daughter activities at educational institutions

this section shall not preclude father-son or mother-daughter activities at an educational institution, but if such activities are provided for students of one sex, opportunities for reasonably comparable activities shall be provided for students of the other sex; and

(9) Institution of higher education scholarship awards in "beauty" pageants

this section shall not apply with respect to any scholarship or other financial assistance awarded by an institution of higher education to any individual because such individual has received such award in any pageant in which the attainment of such award is based upon a combination of factors related to the personal appearance, poise, and talent of such individual and in which participation is limited to individuals of one sex only, so long as such pageant is in compliance with other nondiscrimination provisions of Federal law.

(b) Preferential or disparate treatment because of imbalance in participation or receipt of Federal benefits; statistical evidence of imbalance

Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex

participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area: Provided, That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

(c) "Educational institution" defined

For purposes of this chapter an educational institution means any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department.

45 C.F.R. § 86.41
Athletics

(a) General. No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.

(b) Separate teams. Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose of major activity of which involves bodily contact.

(c) Equal opportunity. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:

(1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;

(2) The provision of equipment and supplies;

(3) Scheduling of games and practice time;

(4) Travel and per diem allowance;

(5) Opportunity to receive coaching and academic tutoring;

(6) Assignment and compensation of coaches and tutors;

(7) Provision of locker rooms, practice and competitive facilities;

(8) Provision of medical and training facilities and services;

(9) Provision of housing and dining facilities and services;

(10) Publicity.

Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but the Director may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

(d) Adjustment period. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the elementary school level shall comply fully with this section as expeditiously as possible but in no event later than one year from

the effective date of this regulation. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the secondary or post-secondary school level shall comply fully with this section as expeditiously as possible but in no event later than three years from the effective date of this regulation.