

**Case Nos. 20-35813, 20-35815**

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**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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LINDSAY HECOX, et al.,  
Plaintiffs-Appellees,

vs.

BRADLEY LITTLE, et al.,  
Defendants-Appellants,

and

MADISON KENYON, et al., Intervenor-Appellants

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On Appeal from the United States District Court  
for the District of Idaho  
D.C. No. 1:20-cv-00184-DCN  
(Nye, D.C., Presiding)

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**APPELLANTS' OPENING BRIEF**

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## **DISCLOSURE STATEMENT**

The Appellants are 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; THE 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; THE INDIVIDUAL MEMBERS OF THE BOARD OF TRUSTEES OF THE INDEPENDENT SCHOOL DISTRICT OF BOISE CITY #1, in their official capacities; and THE INDIVIDUAL MEMBERS OF THE IDAHO CODE COMMISSION, in their official capacities. No disclosure is required under Federal Rule of Appellate Procedure 26.1.

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## **JURISDICTIONAL STATEMENT**

Plaintiffs claimed the district court had subject matter jurisdiction under 28 U.S.C. § 1331. Defendants challenged the district court's jurisdiction, arguing Plaintiffs lacked standing and that their claims were not ripe. The district court rejected Defendants' arguments and entered its order on August 17, 2020, granting Plaintiffs' motion for a preliminary injunction. ER 001-87. On September 16, Defendants timely filed a notice of appeal under Federal Rule of Appellate Procedure 4(a)(1)(A). ER 092-94. This Court has jurisdiction over appeals of interlocutory orders granting injunctive relief. 28 U.S.C. § 1292(a)(1).

## **ISSUES PRESENTED FOR REVIEW**

1. Did the district court err and misapply this Court's precedents by holding that a law that acknowledges males' physiological athletic advantages, and therefore excludes males from female sports to ensure fair opportunities for females, violates the Equal Protection Clause unless it contains an exception for transgender persons whose gender identity is female, but whose biological sex is male?
2. Did the district court err by holding that a law that excludes males from female sports, but allows both sexes to participate in male sports, violates

the Equal Protection Clause because it includes sex-verification procedures for female sports, but not male sports?

### **RELEVANT STATUTORY PROVISIONS**

The relevant statutory authority is Idaho's Fairness in Women's Sports Act, Idaho Code §§ 33-6201 through -6206. It is set forth in a separate addendum. 9th Cir. R. 28-2.7.

### **STATEMENT OF THE CASE**

This appeal challenges a federal district court's preliminary injunction order nullifying an Idaho statute before it ever affected anyone, including Plaintiffs. The statute at issue is the Fairness in Women's Sports Act, Idaho Code §§ 33-6201 through -6206. The Act excludes members of the male sex from participating in sports designated for athletes of the female sex due to males' physiological advantages, consistent with settled Ninth Circuit law. *See Clark ex rel. Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126 (9th Cir. 1982), *cert. denied*, 464 U.S. 818 (1983) (*Clark I*); *Clark ex rel. Clark v. Arizona Interscholastic Ass'n*, 886 F.2d 1191 (*Clark II*). The Act also permits male and co-ed teams, both of which are open to members of either sex. *See* Idaho Code § 33-6203.

To ensure the Act's protections for female athletes, the Act provides that if a dispute arises over a student's sex and eligibility for female sports, the student may establish female sex in one of three ways: through a high school health examination

and consent form signed by a health care provider, which all student-athletes must submit; through another written statement signed by the student's health care provider; or through a sports physical examination, in which the health care provider relies on one of three specified criteria to determine sex. *See* Idaho Code § 33-6203(3). *See also* ER 417-19 (Idaho High School Activities Association Health Examination and Consent Form); IHSAA Rule 13 (available at <https://idhsaa.org/asset/RULE%2013.pdf>) (requiring high school athletes to submit form). The Act does not provide any sex-verification procedures for male or co-ed sports, because they are open to all, regardless of sex.

In support of the bill, the Idaho Legislature made a number of findings based on court decisions, scholarly publications, and scientific studies recognizing the physiological advantages members of the male sex have over their female counterparts. Idaho Code § 33-6202(8)-(11). The Legislature also described the Act's purpose:

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.

*Id.* § 33-6202(12).

Two plaintiffs challenged the Act, on both facial and as-applied grounds. *See* ER 757-816. They sued Governor Little and a number of other state and local

officials. *Id.* They seek declaratory relief that the Act violates their rights under the Fourteenth and Fourth Amendments of the U.S. Constitution, and under Title IX. ER 809. They also seek injunctive relief prohibiting the Act’s enforcement. ER 809-10.

One plaintiff is Lindsay Hecox, who is transgender, and whose sex is male but whose gender identity is female.<sup>1</sup> *See* ER 680. Hecox is a student at Boise State University who wanted to try out for the women’s cross-country and track teams. ER 681. Hecox alleges that the Act discriminates on the basis of gender identity or transgender status<sup>2</sup> in violation of the Equal Protection Clause because it does not

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<sup>1</sup> This case involves issues regarding both sex and gender, or gender identity, as well as physiological differences between the sexes.

“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.

“Gender” is a “broader societal construct” that encompasses how a “society defines what male or female is within a certain cultural context.” A person’s gender identity is their subjective, deep-core sense of self as being a particular gender.

*Doe ex. rel. Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 522 (3d Cir. 2018), *cert. denied sub nom. Doe v. Boyertown Area Sch. Dist.*, 139 S. Ct. 2636 (2019) (citations omitted). The distinction between sex and gender identity is important when physiological differences are relevant, such as in athletics. To avoid any confusion about nomenclature, this brief uses the terms “sex” and “gender” or “gender identity” as the Third Circuit defined them in *Boyertown*.

<sup>2</sup> *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1756 n.6 (2020) (“there is no apparent difference between discrimination because of transgender status and discrimination because of gender identity.”)

provide an exception for members of the male sex whose gender identity is female to participate in female sports.<sup>3</sup>

Plaintiff Jane Doe is a high school student whose female sex matches her gender identity. *See* ER 689. Doe is a student at Boise High School who participates in sports. ER 688. Doe alleges the Act constitutes unlawful sex discrimination under the Equal Protection Clause because it subjects students who participate in female sports to the risk that their sex might be disputed and subject to verification. Those who wish to participate in male sports are not subject to the same risk, because male sports are open to both sexes, and therefore there is no need to verify sex to determine eligibility.

Hecox and Doe moved for a preliminary injunction prohibiting Defendants from implementing or enforcing the Act, arguing that the Act violates the Equal Protection Clause. ER 564-66. Two Idaho State University athletes whose sex and gender identity are female—Madison Kenyon and Mary Marshall—moved to intervene to defend the Act, which they support. ER 520-23. Defendants moved to dismiss Plaintiffs’ claims on several grounds. ER 516-19. And the United States Department of Justice filed a Statement of Interest, arguing that the Act is constitutional. ER 299-314.

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<sup>3</sup> Plaintiffs also assert other constitutional and statutory violations, but those claims are not relevant to this appeal, because the district court’s preliminary injunction is based solely on equal protection claims.

The district court held oral argument on the motions on July 22, 2020. *See* ER 95-222 (transcript of hearing). It issued its Memorandum Decision and Order on August 17, 2020. ER 001-87.

The court's Memorandum Decision and Order resolved all three pending motions. The district court granted the motion to intervene, both as of right, and under permissive intervention. ER 025, 029, 087.

The court granted in part and denied in part Defendants' motion to dismiss. ER 087. The court granted Defendants' motion to dismiss Plaintiffs' Equal Protection facial challenges, because they could not meet the *United States v. Salerno*, 481 U.S. 739 (1987), standard of proving no set of circumstances under which the Act could be validly applied. *See* ER 050-54. The court noted that "the Ninth Circuit has held that an Arizona policy of excluding boys from playing on girls' sports teams was constitutionally permissible," ER 050 (citing *Clark I*), and credited Defendants' argument that the Act applies to all members of the male sex and "can clearly be constitutionally applied to cisgender boys." ER 050.<sup>4</sup>

Nevertheless, the district court also granted the motion for preliminary injunction. ER 087. The court held that the Act likely violates the Equal Protection Clause as applied to Hecox. *See* ER 060-79. In doing so, the district court rejected

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<sup>4</sup> The court rejected Defendants' arguments that Plaintiffs' claims should be dismissed on standing and ripeness grounds. *See* ER 031-49.

the *Clark* principle, which is based on relevant physiological differences between the sexes. *See* ER 062-66. While the Act, like *Clark*, makes a distinction based on sex and physiology, and classifies based on sex, the court focused instead on gender identity. *See* ER 060-66. Even though the Act makes no distinctions based on gender identity and does not classify on the basis of gender identity, the court concluded that “the Act on its face discriminates” against “transgender women athletes.” ER 061. The court’s reasoning appears to be that because the Act does not contain an exception based on gender identity, it therefore has a disparate impact on transgender persons whose sex is male but whose gender identity is female; and that impact equals facial discrimination based on gender identity. In any event, the court’s holding in effect grafts a new requirement onto *Clark*: the Equal Protection Clause allows states to exclude members of the male sex from female sports to protect fair opportunities for members of the female sex, *but only if states make an exception for those whose sex is male but gender identity is female, regardless whether this exception conflicts with the physiology-based legislative purpose.*

The court also determined that the Act likely violates the Equal Protection Clause as applied to Doe. *See* ER 079-83. The court held that the Act unlawfully discriminates on the basis of sex because the Act has procedures designed to prohibit males from participating in female sports, but no similar procedures applicable to male sports. *See* ER 079-80. Those procedures include resolving a dispute about

the sex of a participant in female sports. The court's analysis overlooked the fact that there would be no reason for a similar dispute involving male sports because male sports are open to all, regardless of sex. The court also interpreted the Act to require allegedly invasive methods of establishing sex in the event of a dispute, rather than acknowledging the simpler methods the Act allows. *See* ER 080-83. *See also* ER 040-41.

### **SUMMARY OF THE ARGUMENT**

This Court should reverse the district court and vacate its order enjoining enforcement of Idaho's Fairness in Women's Sports Act, a new state law protecting fair opportunities for female athletes. The district court erred as a matter of law by refusing to follow the principles this Court established in the *Clark* cases, and by mistakenly concluding that the Act facially discriminates on the basis of gender identity or transgender status. The Equal Protection Clause does not prohibit laws that acknowledge relevant differences between the sexes and make distinctions based on those relevant differences.

The district court's most fundamental legal error was its failure to acknowledge the relevant physiological differences between the sexes in athletics, the only arena in which the Act applies. The district court failed to apply an important principle from this Court's *Clark* decisions, which confirm that biology and physiology matter in athletics. The only difference between Hecox and the

Clark brothers is gender identity, which does not change the universally recognized sex-based physiological advantages male-sexed athletes have to out-compete and displace female-sexed athletes.

The district court's failure to recognize the importance of the physiological differences between the sexes in athletics also led it to misapply the law in analyzing Doe's sex discrimination claim. If, as *Clark* establishes, it is constitutionally permissible to exclude males from female sports, then it must be lawful to have a mechanism to enforce that exclusion. Sex verification for participants in female sports is an appropriate mechanism because it directly serves the important purpose of preserving opportunities for members of the female sex. The fact that no similar verification mechanism accompanies male sports is immaterial, because no one is excluded from those sports based on sex. Therefore, sex-verification is irrelevant, if not nonsensical, with respect to male sports. Different rules based on sex do not run afoul of the Constitution where real differences between the sexes justify distinctions based on sex. *See Nguyen v. INS*, 533 U.S. 53 (2001); *Michael M. v. Sonoma Cnty. Superior Ct.*, 450 U.S. 464 (1981).

### **STANDARD OF REVIEW**

Upon appeal of a preliminary injunction, the district court's conclusions of law are reviewed de novo, its underlying factual findings are reviewed for clear error,

and the scope of the injunction is reviewed for abuse of discretion. *Padilla v. Immigration & Customs Enforcement*, 953 F.3d 1134, 1141 (9th Cir. 2020).

## ARGUMENT

“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. Natural Resources Def. Council, Inc.*, 555 U.S. 7, 20 (2008). “[I]njunctive relief [is] an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” *Id.* at 22.

The district court concluded that both Plaintiffs were likely to succeed on the merits of their Equal Protection claims. Those conclusions were based on significant legal errors that require reversal of the district court’s injunction under the *de novo* review standard.

### **I. The District Court Erred By Concluding Hecox Is Likely to Succeed on the Merits.**

The district court committed several important legal errors in concluding Hecox is likely to succeed on the merits.

#### **A. The district court erred by failing to apply *Clark I and II*.**

In *Clark I and II*, this Court established that it is constitutionally permissible—and satisfies heightened scrutiny—to exclude males from female sports due to unfair physiological advantages males enjoy. “There is no question” that “promoting

equality of athletic opportunity between the sexes” is “a legitimate and important governmental interest” justifying rules excluding males from female sports. *Clark I*, 695 F.2d at 1131. Such a rule does not violate the Equal Protection Clause because “it is substantially related to the goal” of providing fair and equal opportunities for females to participate in athletics. *Id.* at 1132. This Court recognized that real physiological differences between the sexes justify this conclusion. “[D]ue to average physiological differences” between the sexes, “males would displace females to a substantial extent if they were allowed to compete for positions on the [female] team” and “athletic opportunities for women would be diminished.” *Clark I*, 695 F.2d at 1131; *see also Clark II*, 886 F.2d at 1192.

Excluding males from female sports to promote sex equality and protect fair opportunities for female athletes is precisely what the Act does. Hecox’s male sex justifies dismissal of Hecox’s Equal Protection claim given the physiological differences between the sexes recognized in *Clark I* and *II*.

The district court disregarded the physiological differences *Clark* found determinative for Equal Protection purposes. The district court determined that physiologically-based differences between the sexes were not sufficient to exclude male-sexed athletes from female sports. The court focused not on sex, but instead on Hecox’s gender identity. And it faulted Idaho’s legislature for failing to make an

exception based on gender identity and for failing to craft more precise rules for promoting fairness in female sports.

The district court erred by refusing to apply *Clark I* and *II*. Those cases directly rejected the district court's criticism in this case that a legislature used sex as a proxy for ensuring fairness in female sports. In *Clark I*, for example, this Court explained that the Equal Protection Clause allows legislatures to recognize "average real differences between the sexes" and to use them "as a proxy" in lieu of other standards in the case of athletics. 695 F.2d at 1131.

Not only was the district court wrong as a matter of law for refusing to apply *Clark* and criticizing Idaho's legislature for using sex as a proxy, its focus on gender identity is logically wrong. Unlike sex, gender identity has no established correlation to athletic ability.

The district court's departure from settled Ninth Circuit law was error that should be reversed. The Act is constitutionally based on physiological differences between the sexes, a distinction *Clark I* and *II* established is permissible in athletics.

**B. The district court erred by holding the Act violates equal protection by discriminating based on gender identity.**

The district court attempted to distinguish *Clark* by analyzing Hecox's claim as facial discrimination based on gender identity. See ER 060-61. The court cited *Karnoski v. Trump*, 926 F.3d 1180 (9th Cir. 2019), for the proposition that laws that

discriminate on the basis of gender identity and treat all transgender persons differently than others are subject to heightened scrutiny. ER 058.

But the Act, unlike the policy in *Karnoski*, does not single out transgender persons. Nor does it treat transgender persons, as a class, less favorably than all others. *Karnoski* involved a Trump administration policy that first excluded all transgender persons from military service, then changed to a policy that explicitly identified certain “transgender” persons and excluded them. This Court noted that the policy—by its explicit language—regulated transgender persons “[o]n its face,” and “treat[ed] transgender persons differently than other persons” who were not transgender. 926 F.3d at 1201. This Court emphasized several instances of the policy explicitly referring to transgender individuals:

[The policy] states that “*Transgender persons* with a history or diagnosis of gender dysphoria are disqualified from military service, except under [certain] limited circumstances,” that “*Transgender persons* who require or have undergone gender transition are disqualified from military service,” and that “*Transgender persons* without a history or diagnosis of gender dysphoria . . . may serve . . . in their biological sex.”

*Id.* (emphasis in original). On that basis, it held the policy discriminated on the basis of gender identity and held it subject to heightened scrutiny. *Id.*

Compare that to the Fairness in Women’s Sports Act. The Act does not regulate on the basis of gender identity in any way, much less facially. Nor does the Act treat persons differently based on gender identity. Gender identity is irrelevant

to the Act's function and purpose, because gender identity, unlike sex, does not correlate to physiological differences between the sexes relevant to athletics. In fact, the Act treats some transgender persons more favorably than other persons, because their sex (irrespective of irrelevant gender identity), gives them no unfair advantage. A transgender person whose sex is female but whose gender identity is male can play on any sports team, male or female. The Act has no effect on that person relating to their gender identity. A person whose sex and gender identity are both male can play only on male teams. That person has more limited options, but it has nothing to do with gender identity. The distinction and statutory classification is based entirely on sex, not gender identity. The Act makes no distinctions or exceptions, favorable or unfavorable, based on gender identity.

The district court appears to have conflated the concepts of a law's classifications and its justifications in erroneously concluding that the Act discriminates "on its face" based on gender identity. *See* ER 061. The court relied on *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014), but that case involved laws that did in fact discriminate on their face against same-sex couples by declaring same-sex marriages against public policy. In contrast, the Act contains no explicit ban or classification based on gender identity.

The district court may have assumed that the Act has a disparate impact on some transgender persons. The Act certainly does not negatively affect those whose

sex is female, because regardless of gender identity, they may play on any team they wish. Unlike the policies and laws at issue in *Karnoski* and *Latta*, the Act does not discriminate, facially or otherwise, against a class of persons because of their gender identity (*Karnoski*) or sexual orientation (*Latta*). But the Act may burden those whose sex is male and gender identity is female, if they prefer to play on female sports teams. Assuming that the Act does have a disparate negative impact on a subset of transgender persons, that impact alone cannot justify condemning the law as unconstitutional discrimination based on gender identity.

The Act does not facially discriminate on the basis of transgender status. Nowhere does the Act state that transgender athletes are prohibited from participating in sports. Instead, the Act bans athletes of the male sex from participating in sports designated for athletes of the female sex. The statute is neutral toward transgender status on its face. The district court erred by concluding that the Act discriminates on its face against transgender women.

When a statute is neutral on its face toward an alleged suspect or quasi-suspect class, but is challenged based on disparate impact, the Court must determine whether the adverse effect reflects invidious discrimination, because “purposeful discrimination is ‘the condition that offends the Constitution.’” *Pers. Adm’r of Massachusetts v. Feeney*, 442 U.S. 256, 274 (1979) (quoting *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 16 (1971)). Invidious intent to discriminate

against transgender individuals cannot automatically be assumed because of the impact the statute has on some transgender individuals. Just as a legislative classification concerning pregnancy is not automatically a sex-based classification, even though only women can become pregnant, *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 271 (1993) (citing *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974)), a legislative classification concerning biological sex is not automatically a classification based on transgender status—especially when the statute is neutral as to gender identity, an essential component of transgender status.<sup>5</sup> “Discriminatory purpose . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker 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.” *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 271–72 (1993) (quoting *Mass. v. Feeney*, 442 U.S. 256, 279 (1979)) (alterations and quotation marks omitted) (emphasis added).

As a result of its error in concluding the Act discriminates on its face against transgender women, the district court failed to analyze whether any assumed

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<sup>5</sup> The term “transgender” is “[a]n umbrella term for people whose gender identity and/or gender expression differs from what is typically associated with the sex they were assigned at birth.” GLAAD Media Reference Guide – Transgender, <https://www.glaad.org/reference/transgender>. See also *Boockvar v. Giuliani*, 140 S. Ct. at 1756 n.6 (defining “transgender” in the same manner as GLAAD, and explaining that “there is no apparent difference between discrimination because of transgender status and discrimination because of gender identity”).

disparate impact was motivated by discriminatory intent to harm transgender women. There is no doubt the legislature was aware its law could exclude those whose sex is male but gender identity is female from female sports. But the Act was motivated by the legislature's desire to protect fair athletic opportunities for members of the female sex, not to look for ways to disadvantage transgender persons. *See* Idaho Code § 33-6202(12) (sex-specific teams “promote sex equality” and “provid[e] opportunities for female athletes”).

The district court did surmise that the Act was the result of animus toward transgender persons.<sup>6</sup> But that suggestion is contradicted by compelling evidence to the contrary, which demonstrates that the Act was borne of a desire to protect fair athletic opportunities for members of the female sex, not to harm transgender persons. The Act does not attempt to regulate transgender persons as a class. It does not exclude transgender persons from sports. It does not exclude any transgender persons from male sports. And the Act treats some transgender persons more favorably than others, allowing them to participate in either male or female sports.

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<sup>6</sup> Among other things, the court relied on the timing of the legislation's passing at the end of the legislative session, when another bill affecting transgender persons' rights also passed, as evidence that the Act was aimed at harming transgender persons. *See* ER 078. The fact is, many bills passed near the end of the session, as they do every year. And the other bill the court cited, House Bill 509, had other legislative sponsors, and entirely different purposes. The court's focus on these questionable bases to discern animus demonstrates the principle that inquiries into legislative motives “are a hazardous matter.” *Michael M.*, 450 U.S. at 469 (citations omitted).

The Act simply reaffirms what this Court concluded in *Clark I* and *II*: males have physiological advantages that justify excluding them from competing against biological females, regardless of gender identity.

**C. Even if the Act discriminated on the basis of gender identity, it would satisfy heightened scrutiny under *Clark*.**

Assuming *arguendo* that the Act must satisfy heightened scrutiny with respect to Hecox’s gender identity discrimination claim, it meets that standard so long as it “serve[s] important governmental objectives and [is] substantially related to achievement of those objectives.” *Clark I*, 695 F.2d at 1129 (quoting *Craig v. Boren*, 429 U.S. 190, 197 (1976)). “In applying this standard, the Supreme Court is willing to take into account actual differences between the sexes, including physical ones.” *Clark I*, 695 F.2d at 1129.

We start with the proposition that “[t]here is no question” that “promoting equality of athletic opportunity between the sexes” is “a legitimate and important governmental interest” justifying rules excluding males from female sports. *Clark I*, 695 F.2d at 1131. The Act excludes males from female sports to promote sex equality and protect fair opportunities for female athletes, so neither the district court nor Plaintiffs challenge the fact that the Act satisfies the first half of the heightened scrutiny test.

Nonetheless, the district court abandoned this Court’s analysis in *Clark* in deciding whether the Act is substantially related to the important purpose of

providing fair opportunities in female sports. The district court violated the *Clark* principles and improperly held the Act to a much higher standard because it ignored “actual differences between the sexes” and instead focused almost entirely on gender identity.

The district court ignored or rejected the *Clark* principle that a “substantial relat[ionship]” to admittedly important objectives requires only a reasonable fit, not a perfect one. *Clark I* recognized the well-settled principle that a legislature satisfies heightened scrutiny attendant to sex-based classifications even if its sex-based rule isn’t the most precise fit that a legislature might have designed to serve its constitutionally-approved purpose of protecting fair opportunities for the female sex in sports. “[E]ven wiser alternatives than the one chosen does not serve to invalidate the policy [of excluding males from female sports] since it is substantially related to the goal” of providing fair and equal opportunities for females to participate in athletics. 695 F.2d at 1132.

The district court condemned the Act because it is based on *Clark’s* “actual differences between the sexes,” and did not make an exception for a subset of transgender athletes, based not on sex, but gender identity. The fact that the Act does not seek to also protect opportunities for other historically disadvantaged groups beyond members of the female sex, such as some transgender persons, does not render it unconstitutional. Just as the Act does not seek to afford any special

protections based on gender identity, nor does it seek to afford any special protections to racial or religious minorities. That’s because the Act is not designed to remedy all social ills at once. It’s focused solely on the physiological difference between the sexes to ensure male physiological advantages do not unfairly impact members of the female sex in sports. The fact that the legislature did not also attempt to address other social ills in this legislation does not render it constitutionally suspect or unsound. *See Dandridge v. Williams*, 397 U.S. 471, 486-87 (1970) (“the Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all”).

Rather than acknowledging *Clark’s* substantial relationship test, the district court suggested that the Idaho Legislature had to justify a reason for not using another standard that might allow some transgender females to participate in female sports, such as the one created by the NCAA and also employed by the IHSAA. *See* ER 072-74, 078.<sup>7</sup> Those organizations have chosen to make exceptions for members of the male sex to participate on female teams if they meet two criteria: (1) their

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<sup>7</sup> The district court also criticized the Act for being overinclusive. *See* ER 070-71 (criticizing the Act for excluding from female sports transgender females who never underwent puberty). There is no suggestion that either plaintiff in this as-applied case fits this category, so the criticism is irrelevant. But even if it were relevant, the United States Supreme Court rejected a very similar argument in *Michael M.* *See* 450 U.S. at 475 (plurality opinion) (rejecting challenge that California statute was overbroad “because it ma[de] unlawful sexual intercourse with prepubescent females, who are, by definition, incapable of becoming pregnant”).

gender identity is female; and (2) they undergo some hormone therapy designed to reduce their acknowledged physiological advantages. While these rules may be motivated by a valid policy goal to provide inclusive opportunities for transgender persons, nothing in the Constitution requires all governmental entities to adopt similar rules.

The district court criticized the legislature for not accepting standards created by bodies it does not control, and implied that the legislature has a duty to consider standards created by other organizations and offer a special justification if it decides to set a standard of its own that deviates from those organizations' rules. The district court suggested the legislature must establish a scientific basis for deciding not to create an exception to its rule excluding males from female sports for members of the male sex whose gender identity is female. It suggested states must justify a departure from hormone-therapy rules like those adopted by the NCAA. It ignored evidence from Defendants and the Intervenors showing that science and real-life experiences demonstrate that hormone therapy does not reduce the physiological advantages members of the male sex enjoy. Instead, it credited Plaintiffs' 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." ER 069.

The district court's approach was wrong for legal and practical reasons. First, neither the *Clark* cases nor any principle of constitutional law requires a legislature

to make exceptions to an otherwise valid rule based on real differences between the sexes. And no state legislature is bound by rules established by other bodies. The legislature need not accept their rules. Nor does it have a constitutional duty to justify a departure from them if it decides to set its own rules.

And practically speaking, the Constitution should not bind legislatures to evolving standards created by organizations that may change their standards over time, or disagree about the efficacy of scientific efforts to alter biology or physiology. The district court criticized Idaho for not accepting the NCAA's current policy, which is mirrored by the IHSAA. It suggested that there exists an "international and national policy of transgender inclusion," ER 073, and that Idaho must adopt that policy.

Aside from the fact that the Constitution is not beholden to evolving policy choices made by others, the district court's reasoning is subject to another fundamental flaw: there is no consensus that elevates inclusion over fairness in female sports. For example, World Rugby studied all available science and concluded that members of the male sex should be excluded from female rugby at the highest levels, regardless of gender identity or hormone therapy, because hormone therapy cannot eliminate the physical advantages members of the male sex

have over their female counterparts.<sup>8</sup> The International Olympic Committee (IOC) has adopted a standard different from the NCAA's, and World Athletics (formerly IAAF) has yet an even stricter standard than the IOC's. *See* ER 704-06.<sup>9</sup> If that weren't enough, the United States Department of Education's Office of Civil Rights has established a policy that allowing male-sexed athletes whose gender identity is female to participate in female sports violates Title IX. *See* ER 371-416.

The district court's error lay not only in choosing the NCAA's standard over these other organizations' standards, but was much more fundamental. None of these organizations has the power to define a constitutional standard, or to bind state legislatures to follow suit. The varying standards adopted by athletic organizations and government agencies reflect policy choices, not constitutional demands.

Gender identity does not change physiological athletic ability, but sex does. Recognizing this incongruity in the narrow area of sports does not conflict with the principle that sex is irrelevant in other contexts, such as employment, and discrimination on the basis of sex or gender identity in those contexts is unlawful.

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<sup>8</sup> *See* World Rugby transgender policy and explanation for its adoption, available at: <https://playerwelfare.worldrugby.org/?documentid=231> and <https://playerwelfare.worldrugby.org/?documentid=232>.

<sup>9</sup> Apparently, there is even uncertainty or disagreement within the IOC about the appropriate standard. *See* Sean Ingle, *IOC delays new transgender guidelines after scientists fail to agree*, THE GUARDIAN ([https://www.theguardian.com/sport/2019/sep/24/ioc-delays-new-transgender-guidelines-2020-olympics?CMP=share\\_btn\\_link](https://www.theguardian.com/sport/2019/sep/24/ioc-delays-new-transgender-guidelines-2020-olympics?CMP=share_btn_link)) (Sept. 24, 2019).

*See, e.g., Bostock*, 140 S. Ct. 1731. Just as a person’s sex may be relevant for some sex-specific rules, but irrelevant for others (e.g., employment decisions), so too is gender identity.

The district court also suggested that the legislature had to demonstrate that it was remedying an actual harm, rather than preventing a perceived potential future harm, by excluding males from female sports. *See* ER 068-69 (suggesting legislature must present “empirical evidence” to protect female athletic opportunities by excluding members of the male sex).<sup>10</sup> This approach is contrary to this Court’s decisions in the *Clark* cases. There is no indication in *Clark I* or *II* that this Court

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<sup>10</sup> Similarly, the district court concluded that Defendants failed to show a substantial relationship to the important government interest because there are so few transgender females, allowing transgender females to participate on female teams would displace only a few members of the female sex. *See* ER 065-66. This analysis is flawed on multiple levels. It ignores the fact that the Act prevents all biological males from competing on female teams, and it is the physiology of the individual that is the determining factor, not the person’s gender identity. The Act protects females from having to compete against all biological males in order for a spot on a female team, which this Court upheld in *Clark I* and *II* as a constitutionally permissible action. When the district court concluded that Defendants failed to meet the “substantial relationship” prong of the heightened scrutiny test, the court misapprehended the purpose of the Act: it is not to prevent transgender women from competing on female teams but to prevent all biological males from competing on female teams, which is constitutionally allowed, and which is substantially related the important governmental interest of preserving the ability of biological women to compete with other biological women. In addition, the court’s criticism is contrary to this Court’s decision in *Clark II*. *See* 886 F.2d at 1193 (“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”). In other words, a state need not prove that hordes of students of the male sex will invade female sports to justify the rule.

required Arizona to wait until males were competing in female sports and causing actual harm by displacing females before it could take action to protect female athletic opportunities. Rather, it was the well-established principle that male physiological advantages justified the rule that was conclusive in determining that the policy excluding males did not amount to a violation of the Equal Protection Clause.

The same principle that applied in *Clark* applies here. Legislatures need not satisfy the standard for injunctive relief, putting on empirical proof of actual, ongoing harm before they are able to legislate, even in cases involving heightened scrutiny.

Although the court in *Clark* had the benefit of empirical evidence regarding male athletes' sex-based physiological advantages over female athletes, heightened scrutiny has no specific empirical evidence requirement. "The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 391 (2000). As the Fourth Circuit explained,

the Constitution does not mandate a specific method by which the government must satisfy its burden under heightened judicial scrutiny. On the contrary, the nature and quantity of any showing required by the government "to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." Even when applying strict scrutiny—requiring a

more taxing proof threshold than the one we apply here—the government may, in appropriate circumstances, carry its burden by relying “solely on history, consensus, and ‘simple common sense.’” Thus, while the government must carry its burden to establish the fit between a regulation and a governmental interest, it may resort to a wide range of sources, such as legislative text and history, empirical evidence, case law, and common sense, as circumstances and context require.

*United States v. Carter*, 669 F.3d 411, 418 (4th Cir. 2012) (internal citations omitted).<sup>11</sup>

The Fourth Circuit’s explanation is consistent with this Court’s analysis when it applied heightened scrutiny in the context of pretrial detention, explaining, “we neither ‘demand’ findings, studies, statistics or other evidence showing that undocumented immigrants pose an unmanageable flight risk nor impose an ‘empirical data requirement’ on the defendants. . . . We do not hold Proposition 100 ‘void ... for want of evidence.’” *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 784 (9th Cir. 2014) (citing *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 391 (2000)).

The D.C. Circuit elaborated that this principle requires a degree of deference to the legislature—even when applying heightened scrutiny—particularly when the legislature is predicting a future harm: “deference must be accorded to [congressional] findings as to the harm to be avoided and to the remedial measures

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<sup>11</sup> Citing *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 391 (2000); *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995); *United States v. Staten*, 666 F.3d 154, 160–61, 167–68 (4th Cir. 2011); *Satellite Broadcasting & Commc’ns Ass’n v. FCC*, 275 F.3d 337, 355, 360 (4th Cir. 2001).

adopted for that end, lest we infringe on traditional legislative authority to make predictive judgments.” *Nat’l Ass’n of Mfrs. v. Taylor*, 582 F.3d 1, 15 (D.C. Cir. 2009) (quoting *Turner Broad. Sys., Inc. v. F.C.C.*, 520 U.S. 180, 196 (1997), and citing *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 391 (2000)). This Court has likewise recognized the importance of affording some deference to the legislature’s judgment—while applying heightened scrutiny—as to what solutions are appropriate for solving serious problems. *Peruta v. Cty. of San Diego*, 824 F.3d 919, 945 (9th Cir. 2016) (en banc) (citing *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665 (1994)).

The legislature may justify a law under heightened scrutiny by looking to sources besides direct empirical evidence of harm occurring in the state, such as “studies and anecdotes pertaining to different locales altogether.” *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995). *See also Edenfield v. Fane*, 507 U.S. 761, 771 (1993) (applying intermediate scrutiny in context of commercial speech and suggesting that a law could be justified by anecdotal evidence from the state or another state). In making its predictive judgments, “a state legislature is not constitutionally required to wait for conclusive scientific evidence before acting to protect its citizens from serious threats of harm.” *King v. Governor of the State of New Jersey*, 767 F.3d 216, 239 (3d Cir. 2014), *abrogated on other grounds by Nat’l*

*Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) (citing *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 822 (2000)).

The district court imposed an evidentiary standard on Defendants that is not supported by case law—Defendants are not required to provide empirical evidence of harm currently occurring in Idaho, even under heightened scrutiny. Defendants are allowed to rely on the empirical evidence cited in legislative findings, anecdotes from other locales, the history of inequality in athletic opportunities between the sexes, and common sense. The Court should afford the Idaho Legislature deference as it exercises its judgment to predict harms to female athletes in Idaho and act to preemptively avoid that harm.

Even if Defendants were unfairly burdened with an obligation to present evidence justifying the legislature's choice not to alter a rule *Clark* found perfectly constitutional (i.e., the legislative choice not to create an exception to the *Clark* rule to allow some members of the male sex to participate in female sports based on gender identity), they met that obligation.

The legislature cited substantial evidence supporting the *Clark* rule that permits excluding males from female sports due to sex-based advantages males enjoy. *See* Idaho Code § 33-6202. The legislature also cited evidence that supported its choice not to make an exception to the *Clark* rule for members of the male sex who identify as female. The legislature found, based on scientific study, that

hormone therapy administered to members of the male sex does not even the playing field with members of the female sex. *See id.* § 33-6202(11). Defendants bolstered those legislative findings with the declaration of Professor Gregory Brown, an expert in sports science. ER 420-515. He is a professor of exercise science in the University of Nebraska Kearney's Department of Kinesiology and Sport Sciences. ER 420. His thorough opinion, supported by numerous scientific studies and data, is that biological male physiology—not merely currently circulating testosterone—is why males have a decided advantage over females in athletic contests. ER 424. *See also* ER 457-73 (relying on numerous authorities to describe physiological differences between the sexes). Due to males' physiological differences from women, administration of androgen inhibitors (i.e., drugs designed to reduce circulating testosterone levels) to male-to-female transgender persons does not eliminate their performance advantages. *See* ER 473-82.

The district court dismissed all this evidence based on criticisms that don't hold up to scrutiny. It criticized the legislature for citing a study that was later revised following peer review, ER 071-72, but those superficial criticisms ignore the substance of the study.<sup>12</sup> The revised study did remove some conclusory

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<sup>12</sup> The court made much of the fact that the study the legislature cited had been republished after peer review and chided Defendants for not highlighting the post-review article. ER 071-72 & n.37. In fact, Defendants' expert, Professor Brown, cited and relied on the later published peer-reviewed version of the study. ER 433, 479-80. Admittedly, the study and its findings were not based specifically on

statements. But it did not alter the findings on which the legislature relied. Hormone therapy does not eliminate the physiological advantages members of the male sex have over their female counterparts. *See* ER 433, 479-80 (expert declaration of Professor Brown discussing the study’s findings).

The court also misinterpreted the scientific studies Professor Brown relied on to discount his thoroughly documented opinion. The court erroneously stated that Professor Brown’s cited studies confirm that currently circulating testosterone is the only thing that matters. *See* ER 070 (accepting, without any critical analysis, the summary submitted by Dr. Safer, Plaintiffs’ expert, of the articles cited by Professor Brown). That is false, and any fair, objective review of the science would reject the court’s conclusion. The Handelsman study the court cites, if read in its entirety, makes this perfectly clear. It explains that historical—not current—circulating testosterone gives males who have gone through puberty advantages that are “fixed and irreversible,” as well as others that “are likely to be irreversible.” ER 474-75 (Prof. Brown quoting the Handelsman article the district court cited for the opposite proposition).

The district court certainly committed some errors in reviewing the evidence regarding whether hormone therapy can eliminate male physiological advantages,

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athletes. But they did address hormone therapy administered to members of the male sex, and found that such therapy did not eliminate physiological advantages. ER 479-80.

but this appeal is not focused on those errors. The district court was wrong as a matter of law to require any empirical evidence to justify the legislature's adoption of the sex-based rule *Clark I* and *II* established as constitutionally sound, and for criticizing the legislature for failing to adopt an exception to that rule for certain members of the male sex who identify as female.

**II. The District Court Erred By Concluding Doe Is Likely to Succeed on the Merits.**

The district court committed several legal errors in concluding Doe is likely to succeed on the merits.

**A. The district court failed to apply the principle that the Equal Protection Clause does not prohibit laws that recognize real, relevant differences between the sexes.**

The United States Supreme Court has made clear that laws that recognize real differences between the sexes do not violate the Equal Protection Clause simply because they treat the sexes differently. If a person's sex is relevant to justify a sex-specific rule, it does not violate the Constitution. *See Nguyen*, 533 U.S. 53; *Michael M.*, 450 U.S. 464.

In *Nguyen*, the Supreme Court held that a statute that treated unwed fathers differently from mothers for purposes of establishing a child's citizenship did not violate the Equal Protection Clause. The law at issue accepted a mother's parentage, but imposed significantly greater burdens on fathers to establish a relationship with children to vouch for their citizenship. The Court focused on biological differences

between the sexes to hold that a legislature's use of these real differences to make different sex-specific rules was perfectly constitutional.

The Court explained that recognizing relevant differences between the sexes does not and should not offend the Constitution. “The difference between men and women in relation to the birth process is a real one, and the principle of equal protection does not forbid” legislatures from recognizing this difference between the sexes. 533 U.S. at 73. In fact, “[t]o fail to acknowledge even our most basic biological differences . . . risks making the guarantee of equal protection superficial, and so disserving it.” *Id.*

The Court went on to endorse sex differences as a proxy, even if they are not a perfect match. “We have explained that an exceedingly persuasive justification is established by showing at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.” 533 U.S. at 70 (quotations and citations omitted). “None of our gender-based classification equal protection cases have required that the statute under consideration must be capable of achieving its ultimate objective in every instance.” *Id.* “The Constitution . . . does not require that [the legislature] elect one particular mechanism from among many possible methods of establishing paternity, even if that mechanism arguably might be the most scientifically advanced method.” *Id.* at 63. As long as the sex-based

“differential treatment is inherent in a sensible statutory scheme,” it satisfies the Equal Protection Clause. *Id.* at 64.

In *Michael M.*, the Supreme Court upheld a sex-based California statutory rape law that made males, but not females, liable for the crime. As the plurality explained, the Supreme Court “has consistently upheld statutes” where the sex-based classification “realistically reflects the fact that the sexes are not similarly situated in certain circumstances.” 450 U.S. at 468. It rejected the notion that California must follow other states and make its law gender-neutral. *See id.* at 473 and 481 (Stewart, J., concurring) (agreeing with plurality’s rejection of argument that California must adopt gender-neutral statute simply because other states have such a rule). And as Justice Stewart summarized in his concurring opinion, “the Equal Protection Clause does not mean that the physiological differences between men and women must be disregarded. . . . The Constitution surely does not require a State to pretend that demonstrable differences between men and women do not really exist.” *Id.* at 481 (Stewart, J., concurring).

The district court violated the sensible principles set forth in *Nguyen* and *Michael M.* by holding Doe was likely to succeed on her sex discrimination claim. The court based its decision on the fact that the Act subjects those who want to participate in female sports to a risk that they might have to verify their sex if their eligibility is disputed, but participants in male sports face no similar risk.

The court's decision is contrary to logic and constitutional law. The Act protects female opportunities in sports by excluding males from female sports due to males' inherent physiological advantages. There is no similar objective physiological reason to exclude females from male sports. So the Act doesn't exclude females from male sports.

Consistent with this physiologically-based dichotomy, the Act creates sex-based eligibility rules for female sports, but not male sports. Because female sports exclude male-sexed athletes, there are rules to determine whether a person qualifies for a female sport based on sex. Because male sports exclude no one based on sex (because female-sexed athletes have no average advantage over male counterparts), there is no logical reason to have sex-based qualification rules.

Ignoring this simple logical difference, the district court held the Act discriminates against Doe as a person of the female sex because her chosen sports that match her gender identity (female sports) have sex-based eligibility rules, but male sports don't. The court's conclusion is based on the flawed premise that there is a reason to verify the sex of a male sports participant. The legislature would have no rational basis for imposing sex-qualifications in male sports, where sex doesn't matter and has no relationship to eligibility. The district court missed the forest for the trees and failed to recognize that the "differential treatment is inherent in a sensible statutory scheme." *Nguyen*, 533 U.S. at 64.

**B. The district court misinterpreted the Act in a way that exaggerates the speculative harm Doe might suffer in the unlikely event her sex were disputed.**

Compounding its error in failing to recognize a constitutionally valid reason to treat female and male sports' eligibility requirements differently, the district court misconstrued the Act to speculate about harm Doe might suffer in the unlikely event her sex-eligibility for female sports might be disputed.

It bears worth repeating: the Act's purpose is to exclude athletes of the male sex, regardless of gender identity or any other non-sex characteristic, from competing in female sports with an unfair physiological advantage. It is undisputed that Doe's sex is female. Admittedly, there is a non-zero risk that someone might try to mount an unsuccessful challenge to Doe's sex-eligibility for female sports. There is a similar non-zero risk that someone might attempt to challenge Doe's sports eligibility for other reasons, such as her residency or academic qualifications. In all those unlikely cases, she has an easy fix. She can simply point to uncontroversial, existing records and resolve any unmeritorious challenge.

In the unlikely event of a dispute about Doe's sex, the Act allows Doe three different options to verify her sex: (1) through her health examination and consent form, already on file with her school; (2) through a "statement signed by the student's personal health care provider" to "verify the student's biological sex"; or

(3) through a “routine sports physical examination relying on” one of anatomy, genetics, or testosterone. Idaho Code § 33-6203(3).

Instead of noting either of the first two easy fixes, the district court accepted Plaintiffs’ skewed view of the Act and concluded that Doe faced a much more difficult burden. The court decided that in the event she might be challenged, Doe would be forced to undergo an invasive examination to establish one of the three criteria (anatomy, genetics, or testosterone) mentioned in connection with the third option (routine sports physical examination). The court failed to properly construe the Act and recognize what would happen in the unlikely event someone challenged Doe’s sex. Instead, the court adopted a strained interpretation and concluded that Doe faced a risk of allegedly unconstitutional privacy invasions in the event her sex was challenged. *See* ER 080-83.

This court reviews a district court’s interpretation of a state statute de novo. *Brunozzi v. Cable Comms., Inc.*, 851 F.3d 990, 995 (9th Cir. 2017). When interpreting a state statute as a matter of first impression, this Court “determine[s] what meaning the state’s highest court would give to the law.” *Id.* at 998 (quoting *Bass v. Cty. of Butte*, 458 F.3d 978, 981 (9th Cir. 2006)). “Thus, [the Court] must follow the state’s rules of statutory interpretation.” *Id.*

Under Idaho law, if a statute is unambiguous, its “words must be given their plain, usual, and ordinary meaning; and the statute must be construed as a whole.”

*State v. Olivas*, 158 Idaho 375, 379, 347 P.3d 1189, 1193 (2015). On the other hand, if a statute is capable of more than one reasonable construction, it is ambiguous. *Id.* To interpret an ambiguous statute, Idaho courts “determine legislative intent by examining ‘not only the literal words of the statute, but also the reasonableness of proposed constructions, the public policy behind the statute, and its legislative history.’” *Id.* (quoting *City of Sandpoint v. Sandpoint Indep. Highway Dist.*, 139 Idaho 65, 69, 72 P.3d 905, 909 (2003)). If a statute is ambiguous, courts are “‘obligated to seek an interpretation of [the] statute that upholds its constitutionality.’” *Olivas*, 158 Idaho at 380, 347 P.3d at 1194 (quoting *In re Bermudes*, 141 Idaho 157, 159, 106 P.3d 1123, 1125 (2005)).

The district court failed to follow these rules in interpreting the Act’s sex-verification procedures. Instead of applying Idaho’s statutory interpretation rules, the court relied on federal rules designed for interpreting federal statutes. *See* ER 40. Had the court properly applied applicable statutory interpretation rules, it would have concluded that the Act does not require any physical examination, invasive or otherwise, to resolve a dispute over an athlete’s sex.

The Act 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.

Idaho Code §33-6203(3).

Simply by giving this language its plain, unambiguous meaning, the court should have perceived that 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."

Even giving the court the benefit of the doubt and viewing the statutory language as ambiguous, the court violated Idaho's statutory construction rules in deciding that an invasive examination is required in the event of a dispute. The court failed to consider the legislative history. Section 33-6203(3), as originally introduced in House Bill 500, provided: "If disputed, a student may establish sex by presenting a signed physician's statement that shall indicate the student's sex based solely on: (a) The student's internal and external reproductive anatomy; (b) The student's normal endogenously produced levels of testosterone; and (c) An analysis of the student's genetic makeup." (available on Idaho Legislature website at <https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2020/legislation/>)

[H0500.pdf](#)). In light of concerns raised about that process, the Senate amended the verification procedures, resulting in the very different language of the bill that was actually enacted, allowing verification through other means—and it was this revised scheme for verification that was actually passed by both Houses and signed by the Governor. The court gave no consideration to those significant changes. Instead, it simply accepted Plaintiffs’ characterization that the amendments were “minor.” ER 010. And the court violated its duty to construe the statute in a way that would avoid constitutional privacy objections, which it could have done by acknowledging the verification procedures that require no further examination.

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**STATEMENT OF RELATED CASES**

Under Ninth Cir. Rule 28-2.6, Defendants are not aware of any related case.

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 12, 2020.

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W. SCOTT ZANZIG  
Deputy Attorney General

**Case Nos. 20-35813, 20-35815**

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**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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LINDSAY HECOX, et al.,  
Plaintiffs-Appellees,

vs.

BRADLEY LITTLE, et al.,  
Defendants-Appellants,

and

MADISON KENYON, et al., Intervenor-Appellants

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On Appeal from the United States District Court  
for the District of Idaho  
D.C. No. 1:20-cv-00184-DCN  
(Nye, D.C., Presiding)

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**ADDENDUM TO APPELLANTS' OPENING BRIEF**

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November 12, 2020

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## STATUTORY PROVISIONS

### Idaho Code § 33-6201

33-6201. SHORT TITLE. This chapter shall be known and may be cited as the "Fairness in Women's Sports Act."

### Idaho Code § 33-6202

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**

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.

### **Idaho Code § 33-6204**

33-6204. PROTECTION FOR EDUCATIONAL INSTITUTIONS. A government entity, any licensing or accrediting organization, or any athletic association or organization shall not entertain a complaint, open an investigation, or take any other adverse action against a school or an institution of higher education for maintaining separate interscholastic, intercollegiate, intramural, or club athletic teams or sports for students of the female sex.

### **Idaho Code § 33-6205**

33-6205. CAUSE OF ACTION. (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, an

### **Idaho Code § 33-6206**

33-6206. SEVERABILITY. The provisions of this chapter are hereby declared to be severable and if any provision of this chapter or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of the remaining portions of this chapter.