

Nos. 20-35813, 20-35815

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

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

Defendants-Appellants,

and

MADISON KENYON; and MARY MARSHALL,

Intervenors-Appellants.

On Appeal from the United States District Court
for the District of Idaho
Civil Case No. 1:20-cv-00184-DCN
Hon. David C. Nye

**EXCERPTS OF RECORD
VOLUME 1 (ER 1-87)**

LAWRENCE G. WASDEN
Attorney General

STEVEN L. OLSEN
DAYTON P. REED
SCOTT ZANZIG
Deputy Attorneys General
954 W. Jefferson, 2nd Floor
P.O. Box 83720
Boise, ID 83720-0010
Telephone: (208) 334-2400
steven.olsen@ag.idaho.gov
dayton.reed@ag.idaho.gov
scott.zanzig@ag.idaho.gov

Counsel for Defendants-Appellants

KRISTEN K. WAGGONER
JOHN J. BURSCHE
CHRISTIANA M. HOLCOMB
ALLIANCE DEFENDING FREEDOM
440 First Street, NW, Suite 600
Washington, DC 20001
Telephone: (202) 393-8690
kwaggoner@ADFlegal.org
jbursch@ADFlegal.org
cholcomb@ADFlegal.org

BRUCE D. SKAUG
RAUL R. LABRADOR
SKAUG LAW. P.C.
1226 E. Karcher Road
Nampa, ID 83687
Telephone: (208) 466-0030
bruce@skauglaw.com
raul@skauglaw.com

ROGER G. BROOKS
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260
Telephone: (480) 444-0020
rbrooks@ADFlegal.org

CHRISTOPHER P. SCHANDEVEL
ALLIANCE DEFENDING FREEDOM
20116 Ashbrook Place, Suite 250
Ashburn, VA 20147
Telephone: (571) 707-4655
cschandlevel@ADFlegal.org

Counsel for Intervenors-Appellants

ECF No.	Document Description	Pages
VOLUME 1		
63	Memorandum decision and order granting motion to intervene, granting motion for preliminary injunction, and granting in part and denying in part motion to dismiss	1–87
VOLUME 2		
65	Intervenors’ notice of preliminary injunction appeal	88–91
64	Defendants’ notice of preliminary injunction appeal	92–94
62	Transcript of motion hearing on July 22, 2020	95–222
58-1	Supplemental declaration of Deanna Adkins, MD, in support of Plaintiffs’ motion for preliminary injunction	223–237
58-2	Supplemental declaration of Joshua D. Safer, MD, FACP, FACE, in support of plaintiffs’ motion for preliminary injunction	238–247
58-3	Expert declaration of Jack L. Turban, MD, MHS, in support of plaintiffs’ motion for preliminary injunction	248–275
57	Exhibit A to affidavit of Dr. Stephen Levine	276–298
VOLUME 3		
53	Department of Justice Statement of Interest	299–314
46-1	Declaration of Chelsea Mitchell in opposition to preliminary injunction	315–325
46-2	Expert affidavit of Stephen B. Levine, M.D.	326–370

ECF No.	Document Description	Pages
41 (excerpt)	Appendix 1 to defendants' response to motion for preliminary injunction (OCR decision)	371–416
41 (excerpt)	Appendix 2 to defendants' response to motion for preliminary injunction (IHSAA consent and physical examination forms)	417–419
41-1	Expert declaration of Gregory A. Brown, Ph.D. FACSM, with attachment	420–515
VOLUME 4		
40	Defendants' motion to dismiss	516–519
30	Motion to intervene	520–523
30-2	Declaration of Madison Kenyon in support of intervention	524–531
30-3	Declaration of Mary Marshall in support of intervention	532–537
30-4	Intervenors' answer to verified complaint	538–563
22	Plaintiffs' motion for a preliminary injunction	564–566
22-2	Expert declaration of Deanna Adkins, MD, in support of plaintiffs' motion for preliminary injunction	567–600
22-3	Declaration of Andrew Barr in support of plaintiffs' motion for preliminary injunction	601–612
22-4	Expert declaration of Helen Carroll in support of plaintiffs' motion for preliminary injunction	613–627
22-5	Expert declaration of Mary Fry, PHD, in support of plaintiffs' motion for preliminary injunction	628–676

ECF No.	Document Description	Pages
22-6	Declaration of plaintiff Lindsay Hecox in support of motion for preliminary injunction	677–686
VOLUME 5		
22-7	Declaration of plaintiff Jane Doe in support of motion for preliminary injunction	687–691
22-8	Declaration of Jean Doe in support of motion for preliminary injunction	692–695
22-9	Expert declaration of Joshua D. Safer, MD, FACP, FACE, in support of plaintiffs’ motion for preliminary injunction	696–743
22-10	Expert declaration of Sara Swoboda, MD, in support of plaintiffs’ motion for preliminary injunction	744–756
1	Complaint for declaratory and injunctive relief	757–816
	District Court Docket Sheet	817–835

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 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.

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

“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

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

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, 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.

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 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

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

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 *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

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.

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.

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 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 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.

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).

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

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

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).

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)

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.

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

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.

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 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. Forest Res. Council v. Glickman*, 82 F.3d 825, 838 (9th Cir. 1996). However, this burden is satisfied if a proposed intervenor shows that

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).

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 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

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 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.

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 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.

Liberalizing 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. 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

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) 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.

argument, counsel for the Proposed Intervenor was respectful in advocating for Madi and MK 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 “Intervenor.”

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

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

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

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 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

substantial risk of harm occurring.” Dkt. 40-1, at 6. Since the Act went into effect July 1, 2020, this argument is moot.

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

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-be-challenged-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*

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 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.

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-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

Defendants also argue Lindsay lacks standing because she has not alleged facts to

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

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, 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

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, 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).

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 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 as 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

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.

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. 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 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*

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.

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. Ripeness²²

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

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).

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 inquiry 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 Env'tl. 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 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

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

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 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.

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 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 Challenge²⁵

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 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).

Finally, Defendants argue Plaintiffs’ facial 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 *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. 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.

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 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).

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 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

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)).

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 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.

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. 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 interscholastic 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 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

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.), 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.

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 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

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.

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 Intervenor argues the Act nonetheless passes heightened scrutiny. Dkt. 46, at 13–18. Finally, the 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,

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.

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.

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 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 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

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. 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.

displace female athletes.³⁴

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

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

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 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 vitiat[e] 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 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-news/article240619742.ece/BINARY/HB%20500%20Idaho%20AG%20response.pdf>.

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 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*

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.

school race, <https://www.fox61.com/article/news/local/transgender-athlete-loses-track-race-lawsuit-ciac-high-school-sports/520-df66c6f5-5ca9-496b-a6ba-61c828655bc6> (Feb. 15, 2020). Notably, unlike the IHSA 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 Intervenor identifies a third transgender athlete, June Eastwood, and argues 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 importantly, although the Intervenor lost to Eastwood, Eastwood was also ultimately defeated by her cisgender teammate. *Id.* And, losing to Eastwood at one race did not deprive the Intervenor 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 in women’s athletics. *Id.* at ¶ 45. The NCAA

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).

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/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

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.

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 pre-existing 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.kivity.com/news/education/making-the-grade/lawmakers-hear-emotional-testimony-but-take-no-action-on-transgender> (Feb. 20, 2020). Nor have the scholarships of the Intervenor—the only identified Idaho athletes who have purportedly been harmed by competing against a transgender woman athlete—been jeopardized. Both Intervenor 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 interscholastic, 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 IHSA 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

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.

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 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, ¶ 11. 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 disapproval” 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

⁴⁰ The Intervenor 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 Intervenor’s 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.

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 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

Nos. 20-35813, 20-35815

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

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

Defendants-Appellants,

and

MADISON KENYON; and MARY MARSHALL,

Intervenors-Appellants.

On Appeal from the United States District Court
for the District of Idaho
Civil Case No. 1:20-cv-00184-DCN
Hon. David C. Nye

**EXCERPTS OF RECORD
VOLUME 2 (ER 88–298)**

LAWRENCE G. WASDEN
Attorney General

STEVEN L. OLSEN
DAYTON P. REED
SCOTT ZANZIG
Deputy Attorneys General
954 W. Jefferson, 2nd Floor
P.O. Box 83720
Boise, ID 83720-0010
Telephone: (208) 334-2400
steven.olsen@ag.idaho.gov
dayton.reed@ag.idaho.gov
scott.zanzig@ag.idaho.gov

Counsel for Defendants-Appellants

KRISTEN K. WAGGONER
JOHN J. BURSCH
CHRISTIANA M. HOLCOMB
ALLIANCE DEFENDING FREEDOM
440 First Street, NW, Suite 600
Washington, DC 20001
Telephone: (202) 393-8690
kwaggoner@ADFlegal.org
jbursch@ADFlegal.org
cholcomb@ADFlegal.org

BRUCE D. SKAUG
RAUL R. LABRADOR
SKAUG LAW. P.C.
1226 E. Karcher Road
Nampa, ID 83687
Telephone: (208) 466-0030
bruce@skauglaw.com
raul@skauglaw.com

ROGER G. BROOKS
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260
Telephone: (480) 444-0020
rbrooks@ADFlegal.org

CHRISTOPHER P. SCHANDEVEL
ALLIANCE DEFENDING FREEDOM
20116 Ashbrook Place, Suite 250
Ashburn, VA 20147
Telephone: (571) 707-4655
cschandlevel@ADFlegal.org

Counsel for Intervenors-Appellants

ECF No.	Document Description	Pages
VOLUME 1		
63	Memorandum decision and order granting motion to intervene, granting motion for preliminary injunction, and granting in part and denying in part motion to dismiss	1–87
VOLUME 2		
65	Intervenors’ notice of preliminary injunction appeal	88–91
64	Defendants’ notice of preliminary injunction appeal	92–94
62	Transcript of motion hearing on July 22, 2020	95–222
58-1	Supplemental declaration of Deanna Adkins, MD, in support of Plaintiffs’ motion for preliminary injunction	223–237
58-2	Supplemental declaration of Joshua D. Safer, MD, FACP, FACE, in support of plaintiffs’ motion for preliminary injunction	238–247
58-3	Expert declaration of Jack L. Turban, MD, MHS, in support of plaintiffs’ motion for preliminary injunction	248–275
57	Exhibit A to affidavit of Dr. Stephen Levine	276–298
VOLUME 3		
53	Department of Justice Statement of Interest	299–314
46-1	Declaration of Chelsea Mitchell in opposition to preliminary injunction	315–325
46-2	Expert affidavit of Stephen B. Levine, M.D.	326–370

ECF No.	Document Description	Pages
41 (excerpt)	Appendix 1 to defendants' response to motion for preliminary injunction (OCR decision)	371–416
41 (excerpt)	Appendix 2 to defendants' response to motion for preliminary injunction (IHSAA consent and physical examination forms)	417–419
41-1	Expert declaration of Gregory A. Brown, Ph.D. FACSM, with attachment	420–515
VOLUME 4		
40	Defendants' motion to dismiss	516–519
30	Motion to intervene	520–523
30-2	Declaration of Madison Kenyon in support of intervention	524–531
30-3	Declaration of Mary Marshall in support of intervention	532–537
30-4	Intervenors' answer to verified complaint	538–563
22	Plaintiffs' motion for a preliminary injunction	564–566
22-2	Expert declaration of Deanna Adkins, MD, in support of plaintiffs' motion for preliminary injunction	567–600
22-3	Declaration of Andrew Barr in support of plaintiffs' motion for preliminary injunction	601–612
22-4	Expert declaration of Helen Carroll in support of plaintiffs' motion for preliminary injunction	613–627
22-5	Expert declaration of Mary Fry, PHD, in support of plaintiffs' motion for preliminary injunction	628–676

ECF No.	Document Description	Pages
22-6	Declaration of plaintiff Lindsay Hecox in support of motion for preliminary injunction	677–686
VOLUME 5		
22-7	Declaration of plaintiff Jane Doe in support of motion for preliminary injunction	687–691
22-8	Declaration of Jean Doe in support of motion for preliminary injunction	692–695
22-9	Expert declaration of Joshua D. Safer, MD, FACP, FACE, in support of plaintiffs’ motion for preliminary injunction	696–743
22-10	Expert declaration of Sara Swoboda, MD, in support of plaintiffs’ motion for preliminary injunction	744–756
1	Complaint for declaratory and injunctive relief	757–816
	District Court Docket Sheet	817–835

Bruce D. Skaug
bruce@skauglaw.com
ID Bar No. 3904
Raul R. Labrador
raul@skauglaw.com
ID Bar No. 5469
SKAUG LAW, P.C.
1226 E. Karcher Road
Nampa, ID 83687
(208) 466-0030
(208) 466-8903 Fax

Roger G. Brooks*
rbrooks@ADFlegal.org
NC Bar No. 16317
Jeffrey A. Shafer*
jshafer@ADFlegal.org
IL Bar No. 6230713
ALLIANCE DEFENDING FREEDOM
15100 N. 90th St.
Scottsdale, AZ 85260
(480) 444-0020
(480) 444-0028 Fax

Kristen K. Waggoner*
kwaggoner@ADFlegal.org
D.C. Bar No. 242069
Parker Douglas*
pdouglas@ADFlegal.org
MI Bar No. P83242
Christiana M. Holcomb*
cholcomb@ADFlegal.org
D.C. Bar No. 176922
ALLIANCE DEFENDING FREEDOM
440 First St. NW, Suite 600
Washington, D.C. 20001
(202) 393-8690
(202) 347-3622 Fax

*Admitted *pro hac vice*

Attorneys for Intervenors

**UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO**

LINDSAY HECOX, and JANE DOE with her
next friends JEAN DOE and JOHN DOE,

Plaintiffs,

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; 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;

Case No. 1:20-cv-00184-DCN

**NOTICE OF APPEAL
PRELIMINARY INJUNCTION
APPEAL**

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; THE INDIVIDUAL MEMBERS OF THE IDAHO CODE COMMISSION, in their official capacities,

Defendants,

and

MADISON KENYON and MARY MARSHALL,

Intervenors.

NOTICE IS HEREBY GIVEN that Intervenors, Madison Kenyon and Mary Marshall, appeal to the United States Court of Appeals for the Ninth Circuit from the District Court’s Order granting Plaintiffs’ Motion for Preliminary Injunction (ECF No. 63) entered in this action on August 17, 2020.

Intervenors’ Representation Statement is attached.

Respectfully submitted this 16th day of September, 2020.

Bruce D. Skaug
bruce@skauglaw.com
ID Bar No. 3904
Raul R. Labrador
raul@skauglaw.com
ID Bar No. 5469
SKAUG LAW, P.C.
1226 E. Karcher Road
Nampa, ID 83687
(208) 466-0030
(208) 466-8903 Fax

By: /s/ Roger G. Brooks
Roger G. Brooks*
rbrooks@ADFlegal.org
NC Bar No. 16317
Jeffrey A. Shafer*
jshafer@ADFlegal.org
IL Bar No. 6230713
ALLIANCE DEFENDING FREEDOM
15100 N. 90th St.
Scottsdale, AZ 85260
(480) 444-0020
(480) 444-0028 Fax

Kristen K. Waggoner*
kwaggoner@ADFlegal.org
D.C. Bar No. 242069

Parker Douglas*
pdouglas@ADFLegal.org
MI Bar No. P83242
Christiana M. Holcomb*
cholcomb@ADFLegal.org
D.C. Bar No. 176922
ALLIANCE DEFENDING FREEDOM
440 First St. NW, Suite 600
Washington, D.C. 20001
(202) 393-8690
(202) 347-3622 Fax

Attorneys for Intervenors

CERTIFICATE OF SERVICE

I hereby certify that on September 16, 2020, I filed the foregoing Notice of Appeal electronically through the CM/ECF system, which caused all counsel of record to be served by electronic means, as more fully reflected in the Notice of Electronic Filing.

s/ Roger G. Brooks

Attorney for Intervenors

LAWRENCE G. WASDEN
ATTORNEY GENERAL

STEVEN L. OLSEN, ISB #3586
DAYTON P. REED, ISB #10775
SCOTT ZANZIG, ISB #9361
Deputy Attorneys General
954 W Jefferson, 2nd Floor
P. O. Box 83720
Boise, ID 83720-0010
Telephone: (208) 334-2400
Facsimile: (208) 854-8073
steven.olsen@ag.idaho.gov
dayton.reed@ag.idaho.gov
scott.zanzig@ag.idaho.gov

Attorneys for Defendants

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO**

LINDSAY HECOX, and JANE DOE with
her next friends JEAN DOE and JOHN
DOE,

Plaintiffs,

v.

BRADLEY LITTLE, et al.,

Defendants.

Case No. 1:20-cv-00184-DCN

**NOTICE OF PRELIMINARY
INJUNCTION APPEAL**

Defendants 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, hereby appeal from the Memorandum Decision and Order granting Plaintiff's motion for preliminary injunction, entered on August 17, 2020 (Dkt. 63), to the Ninth Circuit Court of Appeals.

A Representation Statement is filed herewith pursuant to Ninth Circuit Rule 3-2.

DATED this 16th day of September, 2020.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By: /s/ W. Scott Zanzig
W. SCOTT ZANZIG
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 16, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following persons:

Richard Eppink
AMERICAN CIVIL LIBERTIES UNION
OF IDAHO FOUNDATION
REppink@acluidaho.org

Matthew K. Wilde
BOISE STATE UNIVERSITY
OFFICE OF GENERAL COUNSEL
mattwilde@boisestae.edu

Gabriel Arkles
James Esseks
Chase Strangio
AMERICAN CIVIL LIBERTIES FOUNDATION
garkles@aclu.org
jesseks@aclu.org
cstrangio@aclu.org

*Attorney for Defendants Boise State
University and Marlene Tromp*

Bruce D. Skaug
Raul R. Labrador
bruce@skauglaw.com
raul@skauglaw.com

Kathleen Hartnett
Elizabeth Prelogar
Andrew Barr
COOLEY LLP
khartnett@cooley.com
eprelogar@cooley.com
abarr@cooley.com

Roger G. Brooks
Jeffrey A. Shafer
ALLIANCE DEFENDING FREEDOM
rbrooks@ADFlegal.org
jshafer@ADFlegal.org

Catherine West
LEGAL VOICE
cwest@legalvoice.org

Kristen K. Waggoner
Parker Douglas
Christiana M. Holcomb
ALLIANCE DEFENDING FREEDOM
kwaggoner@ADFlegal.org
pdouglas@ADFlegal.org
cholcomb@ADFlegal.org

Attorneys for Plaintiffs

Attorneys for Intervenors

/s/ W. Scott Zanzig
W. SCOTT ZANZIG
Deputy Attorney General

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

LINDSAY HECOX; and JANE DOE,
along with her next friends JEAN
DOE AND JOHN DOE,

Plaintiffs,

vs.

Case No. 1:20-CV-184-DCN

Boise, Idaho
July 22, 2020
9:01 a.m.

BRADLEY LITTLE, in his official
capacity as Governor of the
State of Idaho; SHERRI YBARRA,
in her official capacity 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; THE
INDIVIDUAL MEMBERS OF THE IDAHO
CODE COMMISSION, in their
official capacities,

Defendants.

*Proceedings recorded by
stenography; transcript
produced by computer-
aided transcription.*

TRANSCRIPT OF MOTION HEARING PROCEEDINGS

BEFORE THE HONORABLE DAVID C. NYE
UNITED STATES DISTRICT COURT CHIEF JUDGE

APPEARANCES:

For the Plaintiffs:

MR. RICHARD A. EPPINK
American Civil Liberties Union of
Idaho Foundation
P.O. Box 1897
Boise, Idaho 83701

MS. ELIZABETH PRELOGAR
Cooley, LLP
1299 Pennsylvania Avenue NW, Suite 700
Washington, D.C. 20004

MR. ANDREW BARR
Cooley, LLP
380 Interlocken Crescent, Suite 900
Broomfield, Colorado 80022

MS. CATHERINE A. WEST
LegalVoice
907 Pine Street, Suite 700
Seattle, Washington 98101

MR. CHASE STRANGIO
MR. GABRIEL ARKLES
MR. JAMES ESSEKS
American Civil Liberties Union
Foundation
125 Broad Street, 18th Floor
New York, New York 10004

MS. KATHLEEN HARNETT
Cooley, LLP
101 California Street, Fifth Floor
San Francisco, California 94111

For the Defendants:

MR. W. SCOTT ZANZIG
MR. STEVEN L. OLSEN
Office of the Idaho Attorney General
P.O. Box 83720
Boise, Idaho 83720

For the Proposed
Intervenors:

MR. ROGER G. BROOKS
MR. JEFFREY A. SHAFER
MS. CHRISTIANA HOLCOMB
MR. PARKER DOUGLAS
Alliance Defending Freedom
15100 North 90th Street
Scottsdale, Arizona 85260

MR. BRUCE D. SKAUG
Skaug Law, P.C.
1226 East Karcher Road
Nampa, Idaho 83687

Court Reporter:

MS. ANNE BOWLINE, RMR, CRR
anne_bowline@id.uscourts.gov

I N D E X

<u>MOTIONS</u>	<u>PAGE</u>
Motion to Intervene	
Mr. Brooks	10
Mr. Zanzig	20
Mr. Eppink	22
Mr. Brooks	33
Motion to Dismiss	
Mr. Zanzig	37
Ms. Prelogar	48
Mr. Zanzig	62
Motion for Preliminary Injunction	
Ms. Prelogar	69
Mr. Zanzig	92
Mr. Brooks	101
Ms. Prelogar	116

1 (Proceedings commenced at 9:01 a.m., July 22, 2020.)

2 THE COURTROOM DEPUTY: The Court will now hear the
3 motion hearing for Hecox, et al., versus Little, et al. Case
4 Number 1:20-CV-184-DCN.

5 Counsel, if you'll please state your appearances,
6 beginning with plaintiffs' counsel.

7 MR. EPPINK: Thank you. Ritchie Eppink for the
8 plaintiffs. I'm here with one of my clients, Lindsay Hecox,
9 who is over here.

10 MS. PRELOGAR: Good morning, Your Honor. Elizabeth
11 Prelogar representing the plaintiffs.

12 MR. ZANZIG: Good morning, Your Honor. I'm Scott
13 Zanzig, deputy attorney general, on behalf of all the
14 defendants.

15 MR. OLSEN: Good morning, Your Honor. I'm Steve
16 Olsen here representing all of the defendants as well.

17 MR. WUCETICH: Good morning, Your Honor. Peter
18 Wucetich on behalf of the United States.

19 THE COURT: And in the jury box.

20 MR. BROOKS: Your Honor, Roger Brooks on behalf of
21 the proposed intervenors.

22 MR. SHAFER: Good morning, Your Honor. Jeff Shafer
23 on behalf of the intervenors.

24 MR. SKAUG: Your Honor, Bruce Skaug, Idaho counsel
25 for intervenors.

1 THE COURT: And the people behind you, are they the
2 intervenors?

3 MR. BROOKS: These are my clients, Your Honor, yes,
4 and one of my colleagues at the end, Christiana Holcomb.

5 THE COURT: Okay. Thank you.

6 And then on video, who do we have?

7 MR. ESSEKS: Your Honor, good morning. My name is
8 James Esseks with the ACLU, counsel for the plaintiffs.

9 MS. ARKLES: Your Honor, my name is Gabriel Arkles,
10 and I'm also with the ACLU on behalf of the plaintiffs.

11 MR. STRANGIO: Good morning, Your Honor. Chase
12 Strangio, also with ACLU on behalf of the plaintiffs.

13 MS. WEST: My name is Catharine West with LegalVoice,
14 also representing the plaintiffs.

15 MS. HARNETT: Good morning, Your Honor. My name is
16 Kathleen Harnett with Cooley, LLP. I'm also here on behalf of
17 the plaintiffs.

18 MR. BARR: Andrew Barr with Cooley, LLP, also on
19 behalf of the plaintiffs.

20 THE COURT: For those of you in the courtroom, there
21 are some people here by Zoom conference because of where they
22 are located. If they come to Idaho and they return, they have
23 to self-isolate. And rather than make them do that, I've
24 allowed them to participate by videoconference.

25 Before we get started, Counsel, there's just a couple

1 preliminary matters that I, unfortunately, need to deal with.
2 The first one is cameras in the courtroom. There is a -- I'm
3 sorry?

4 There's a local Rule 83.1 that prohibits all forms,
5 means, and manners of taking photographs, tape recordings,
6 videotaping, broadcasting anywhere in the courthouse. There
7 is a general order number 345 that I signed several months ago
8 that modifies that and does allow cameras in the hallways but
9 not in the courtroom. So for those of you who showed up
10 hoping to video, that's why you cannot in the courtroom.

11 Second matter, as I understand, there are some people
12 with signage and who are chanting. They have every right to
13 do that outside. If they want to use their signs inside the
14 courthouse, I'm going to ask them to go to the overflow
15 courtroom, which is Courtroom Number 3. It is being broadcast
16 into there, and they can do -- put up their signs in there if
17 they want. None of us in here will see those signs so it
18 can't have any undue influence on anyone.

19 And the final thing, there was a request for
20 post-hearing media interviews with some of the counsel or
21 parties. My standard practice is I leave that up to counsel.
22 If they want to consent to an interview, they know what their
23 ethical rules are, and they can do the interview. But it
24 cannot be done on this floor because I don't want to disrupt
25 other proceedings. They can do it down on the first floor

1 inside the courthouse if they would like.

2 Now, for today, there are three pending motions for
3 today, and we'll take them up in this order. And I believe
4 this order was suggested by the parties. And that is we'll
5 take up the motion to intervene first. Then we'll do the
6 motion to dismiss and then the motion for preliminary
7 injunction.

8 And I'll set the stage for arguments today simply by
9 saying that Idaho enacted a new law, first of its kind in
10 America, I believe, that exclude biological males from
11 participating on women's sports teams. That law is titled
12 Fairness in Women's Sports. The law technically went into
13 effect on July 1st of 2020, but before that date, plaintiffs
14 filed a complaint challenging the constitutionality of the law
15 and whether it violates Title IX and seeking a preliminary
16 injunction stopping the enforcement of the law until the Court
17 decides the issues in this case.

18 Defendants argue that the plaintiffs lack standing,
19 plaintiffs' claims are not ripe for review, and that they fail
20 as a matter of law and that plaintiffs are not entitled to
21 injunctive relief. The proposed intervenors seek to intervene
22 to advocate for their interests as biological female athletes
23 and to defend the law the plaintiffs challenge. And then the
24 United States Attorney General has also filed a statement of
25 interest in support of Idaho's law.

1 Now, by giving you that background, I don't mean to
2 restrict you in any way in your arguments, or you're welcome
3 to correct me. I just want you to know that's my
4 understanding of what the case is so you know where you need
5 to clarify things if necessary.

6 So at this point in time, the proposed intervenors
7 may make their argument on motion to intervene. I'll remind
8 you, you have 20 minutes to do that. And you may do that
9 however you wish, both among attorneys and as to your opening
10 and rebuttal.

11 MR. BROOKS: I'll be behind the screen here.

12 THE COURT: And I was going to remind everybody the
13 Plexiglas is there for a reason. When you are arguing at the
14 lectern, you may remove your mask. We do ask that when you're
15 done, you wipe down everything you touch.

16 MR. BROOKS: And, Your Honor, if I may, I think you
17 allowed 20 minutes to me on the argument to intervene and ten
18 minutes to State. The State has informed me that they don't
19 propose to take ten minutes and would be happy to cede five
20 minutes to me, if that's agreeable to the Court.

21 THE COURT: If they're not going to take their ten
22 minutes, you can have it.

23 MR. BROOKS: I think they wanted to reserve five.

24 THE COURT: Okay.

25 MR. BROOKS: And I would like to reserve five for

1 rebuttal.

2 THE COURT: Now, that's fine. I don't keep track of
3 the time. I'm not very good at that. So that requirement is
4 on you. But I will tell you my law clerk will let me know if
5 you go over your time.

6 MR. BROOKS: I will adhere to my time, Your Honor.

7 THE COURT: Thank you.

8 MR. BROOKS: Your Honor, as I said, I'm Roger Brooks
9 with Alliance Defending Freedom on behalf of the proposed
10 intervenors, who have been seated in the jury box. And if
11 they get to decide the matter, that would simplify things.
12 Madison Kenyon and M.K. Marshall, they are both runners,
13 cross-country and track, at Idaho State University. In high
14 school they devoted countless hours to improving their times
15 by seconds, by fractions of a second. And now it is their
16 major life activity in college. They are direct targets and
17 beneficiaries of this litigation.

18 When I dive into the intervention case law --
19 something I had not had occasion to do in 30 years of
20 practice -- it seemed like one of these areas where everything
21 is on one hand and the other hand. And there are strong
22 words, and there are apparent absolutes. And then they get
23 qualified and apparently almost contradicted. But as I read
24 them perhaps the third time, I realized they were not
25 contradicted and we could untangle them with care.

1 Page 4 of our -- page 5 of our brief, we've broken
2 out the five basic points of analysis under Rule 24 for
3 intervention of right in the Ninth Circuit. And that is
4 timeliness, a legally protectable interest, the risk that this
5 litigation will significantly impair that interest, and the
6 risk that the existing parties, to quote the Ninth Circuit,
7 may not adequately represent the applicants' interest. That's
8 the *Prete v. Bradbury* case from 2006. And all of these are
9 construed, says the Ninth Circuit, in *Alisal Water Corp.* under
10 a -- construed broadly in favor of intervention and accepting
11 as true the facts and the facts alleged in support of the
12 motion to intervene.

13 So timeliness, I'm not going to take time to talk
14 about time. I think timeliness is fairly evident on its face.

15 Do the intervenors have a protectable interest? The
16 plaintiffs in their opposition to our intervention say no, no
17 protectable interest. But, Your Honor, on the contrary,
18 theirs is exactly the type of interest, the very interest that
19 is recognized and protected by the Fairness in Women's Sports
20 Act. If they had no interest, then no one has an interest in
21 this law.

22 And that interest is the right for equal experience
23 and opportunity for fair competition on a level playing field.
24 The Ninth Circuit has recognized that as an important interest
25 in the *Clark* case way back in 1982, the equality of athletic

1 opportunity they said is an important interest.

2 That interest, if I may refer to a sister circuit,
3 was elaborated by the Second Circuit in 2004 in the *McCormick*
4 case. They referred to it as a matter so fundamental to the
5 experience of sports, the chance -- the chance to be
6 champions. And, indeed, the value of that experience is the
7 basic premise of almost 50 years now of Title IX law as
8 applied to athletics, the athletic competition, and the
9 experience of fair competition and intense competition matters
10 to education and the development of the individual.

11 Now, rolling that all up in a package, the Ninth
12 Circuit in *Lockyer* said that where intervenors in defense of a
13 statute are the intended beneficiaries, they have a legally
14 protected interest. That's page 441 of the *Lockyer* case,
15 450 F.3d.

16 Practical impairments, the third prong, I think is
17 also evident. It is indeed the object of this lawsuit to
18 strike down the law and impair the protection that it affords
19 my clients.

20 So that brings us to the fourth prong, the adequate
21 representation prong. That's where the legal maze is. The
22 general rule under Rule 24, particularly by the Supreme Court,
23 never changed. And the *Trbovich* case back in 1972 says that
24 the burden of making a showing that their interests may not be
25 adequately represented, quote, "should be treated as minimal."

1 Well, that's the one hand.

2 On the other hand, courts sometimes say that there's
3 an assumption of adequacy when the government is acting on
4 behalf of a constituency that it represents and that you have
5 to rebut that presumption with a compelling showing. Well,
6 "compelling showing," that's strong words in that particular
7 case. And, of course, the plaintiffs would like to stop
8 there.

9 But you've heard this one before. There's a third
10 hand. The Ninth Circuit has said in the *Arakaki* case in 2003
11 that the presumption of that representation is only triggered
12 when the applicant's interest is identical to that of one of
13 the parties. Identical. Now, that's a high bar in order to
14 trigger the high bar.

15 And, in fact, in case after case, before and after
16 that time, the Ninth Circuit has reversed lower courts to
17 allow intervention alongside government defendants over the
18 objection of the government. Let me tick those off. That's
19 what happened in the *Southwest Center for Biological Diversity*
20 case in 2001, *California v. Lockyer* in 2006, *Citizens for*
21 *Balanced Use* in 2011.

22 And I should just add for framing, the plaintiffs
23 cite no case in which the government supported intervention of
24 a target beneficiary of a statute to help defendant, and that
25 was denied. And I have myself been unable to find any.

1 So, Your Honor, what factors support intervention
2 alongside the government in those Ninth Circuit cases that I
3 have just listed? Well, the basic proposition is that
4 representation may not be adequate for the general government
5 interest, may not be identical to the focused -- what the
6 Court called in *Citizens for Balanced Use* -- the focused or,
7 quote, "parochial interest" of the intervenor.

8 Well, in ordinary life, we think of a parochial
9 interest as a narrow thing, narrow, perhaps selfish. And
10 sometimes that may be true and sometimes not true. But the
11 decisive point now is that it's a different interest than the
12 general public interest. And a particular instance of a
13 focused -- a parochial interest is the one I mentioned
14 earlier; that is, when the intervenors are the intended
15 beneficiaries. Under -- the Ninth Circuit said in the *Lockyer*
16 case that a definite parochial interest where the intervenors
17 are the intended beneficiaries of the challenged law. That's
18 *Lockyer*, 450 F.3d at 451.

19 And that's exactly the situation here. I am not here
20 representing some general advocacy organization that wants to
21 be heard. I'm here representing two young women who are
22 directly impacted by the phenomenon that this law addresses
23 and directly protected by the law.

24 And the Ninth -- this district -- according to this
25 district, in 2014, in a district-level proceeding in the

1 *Center for Biological Diversity* litigation, Judge Lodge wrote
2 that where the impact of any injunction, quote, "Will be
3 suffered by intervenors, not the government, intervenors have
4 made the necessary showing of distinct interests." That's 214
5 Westlaw 3445733 at star 7.

6 And, of course, that's true here. If Your Honor were
7 to enjoin this law, it's not going to impact the Idaho
8 treasury or disrupt the functions of the government. What
9 it's going to do only and specifically is impact young women
10 and girls like my clients. So under the teaching of Judge
11 Lodge in that 2014 *Center for Biological Diversity* case, we
12 should be done with the analysis.

13 But ticking through what I see in those cases
14 further, Your Honor, interests are not identical in this case
15 because some of the defendants have publicly embraced
16 interests that at least create tension in their advocacy. And
17 we cite on page 11 to 13 of our memo an instance of that
18 particularly relating to Boise State University. This case
19 has media. It has signs, people who want to hold up signs.
20 It's controversial and complex precisely because of the
21 perceived tensions between the rights and interests of women
22 and those of transgender individuals.

23 Well, my clients' interests are different than those
24 of the State as a whole. They don't suffer from tension.
25 They are here to represent the interests of young women and

1 girls, the targets of this litigation. So their interests are
2 not perfectly aligned.

3 I think another phrasing of the case law would be
4 exactly the same proposition is the representation may not be
5 adequate, and that is all, of course, that needs to be shown,
6 for the government and intervenor have different, quote,
7 "ultimate objectives." And that's another articulation that
8 you can find in the *Arakaki* case. And if they have different,
9 nonidentical ultimate objectives, the representation may not
10 be adequate.

11 And, indeed, in the *Southwest Center for Biological*
12 *Diversity* case, the Ninth Circuit doubted whether that
13 presumption I mentioned earlier of adequate representation by
14 the government even applies at all in settings in which the
15 question of how aligned those ultimate objectives are is
16 complex, to use their word. They didn't have to reach a
17 conclusion about it. All they had to do was say if it's a
18 complex question, then we can't have a presumption of adequate
19 representation because we just don't know.

20 Here again, individuals categorically, unequivocally
21 want protection against competition by males in girls' teams
22 and events as the law on its face provides.

23 And, Your Honor, we cited in our brief and discussed
24 again on page 6 the related principle that kind of illustrates
25 the conflicting interests or the more limited interests that

1 the government has. But the principle that's in the *Lockyer*
2 case that says, "Willingness to suggest a limiting
3 construction in defense of a statute is an important
4 consideration in determining whether the government will
5 adequately represent its constituents' interests."

6 Now, as I learned things, court's and, indeed,
7 government's prudent policy may, indeed, be to avoid
8 controversy and conflict and to look for limiting
9 interpretations. And in this case, as you will have seen, in
10 the government's papers, as in the *Lockyer*, there they said
11 it's not just a theoretical publicity. The government has
12 already done so. And I think Your Honor will see that here.
13 The government, perhaps entirely appropriately for the
14 government, has looked for limiting interpretations to avoid
15 or put off controversy, whereas my clients are eager to see
16 this law in full effect, giving them protection now, from the
17 day of its enactment. So another reason that we believe
18 representation may be inadequate.

19 Your Honor, on page 14 of our brief, we've kind of
20 further detailed some ways in which the prior history of
21 statements by the Attorney General's Office may complicate
22 their ability to defend the law. And, sure enough -- we said
23 that in our opening brief. And, sure enough, in the
24 plaintiffs' reply memorandum on their preliminary injunction
25 request, they are already citing this earlier writing from the

1 Attorney General's Office that we mentioned. A complication
2 for the attorney general's advocacy that doesn't exist for me
3 and my clients' interests. Again, a reason that our
4 interests -- their ability to fully -- the attorney general's
5 ability to fully represent all of the arguments that my client
6 would like to make is, in fact, constrained.

7 Your Honor, I will -- let me conclude by saying that
8 the intervenors, we believe, have amply demonstrated that
9 representation by the attorney general may be inadequate. My
10 clients have a different and focused interest of an intended
11 beneficiary. The State, for various reasons, I think we've
12 demonstrated is not capable and willing to make all the same
13 arguments that my clients would, which the Ninth Circuit said
14 is the test in the *Arakaki* case. And the State has already
15 adopted narrowing interpretations that my clients disagree
16 with, different positions that we will take.

17 And to sum that up, the Ninth Circuit in the
18 *Southwest Center for Biological Diversity* case said --
19 reminded us that, quote, "It is not applicant's burden at this
20 stage in the litigation to anticipate specific differences in
21 trial strategy. It's sufficient to show that because of the
22 differences in interest, it's likely the defendants will not
23 advance the same argument as intervenor applicants."

24 We believe we've shown that. And as the *Southwest*
25 *Center* case went on to say, if the interests or the objectives

1 are not positively identical, then the burden on intervenors
2 to demonstrate inadequate representation is not a compelling
3 burden but a minimal burden. And they said that in the
4 *Southwest Center* case where the intervenor was seeking to
5 intervene alongside the government defendant.

6 Just by way of contrast, let me point out that the
7 very different fact situation in one notable Ninth Circuit
8 case where they denied intervention alongside the government,
9 and that was the *Arakaki* case. But if you read the fine print
10 in that case, you'll find an interesting thing about it, which
11 is what was being dealt with there was a Me Too application by
12 a group that purported to represent the interests of native
13 Hawaiians for intervention that had already been granted to a
14 different group that purported to represent interests of
15 Native Hawaiians.

16 And the government and the judge made a factual
17 finding in that case that the parties, the government, and the
18 intervenor, already allowed in, quote, "Have demonstrated that
19 they are capable and willing to make all of Hoohuli's
20 arguments," close quote. And that's *Arakaki*, 324 at 1087.
21 Your Honor, no such situation exists here. Indeed, it is just
22 the opposite. So we respectfully request that my clients'
23 motions to intervene be granted, Your Honor.

24 THE COURT: Before you sit down, I think I wrote down
25 that last citation wrong. Is it F.3d?

1 MR. BROOKS: I'm sorry. One moment. The *Arakaki*
2 case, Your Honor?

3 THE COURT: Yes.

4 MR. BROOKS: That is 324 F.3d, and the pinpoint cite
5 is 1087.

6 THE COURT: Thank you. I believe I should have said
7 this before you came up. I didn't. I was not a law student
8 who felt like I had to ask a question every day in every
9 class, nor was I the law student who felt like I had to answer
10 every one of the law professor's questions. I'm not going to
11 ask a whole lot of questions because I want you to use your
12 time as you see fit. If I have a question that is bugging me,
13 I will ask it. But don't be surprised -- the fact that I'm
14 not asking questions doesn't mean that I'm not interested or
15 paying attention.

16 MR. BROOKS: Your Honor, you're also clearly not a
17 judge who falls asleep on the bench. I've seen that.

18 THE COURT: Not yet.

19 MR. BROOKS: So I thank you for your close attention.

20 THE COURT: Thank you.

21 Now, was there somebody else who wanted to argue in
22 behalf of intervenors?

23 MR. ZANZIG: I'm Scott Zanzig, a deputy attorney
24 general. I'll be very brief. The State of Idaho welcomes all
25 viewpoints to be expressed in this case. There are deeply

1 held beliefs on both sides of this issue. This case requires
2 the Court to consider the public interest. And for that
3 reason, we have members of the public who have a strong
4 interest in the outcome of this case, the intervenors, and we
5 believe justice will best be served if the Court grants the
6 motion for intervention, at least on a permissive basis.

7 THE COURT: Before you sit down, I do have a question
8 now. Tell me, if I were to deny the motion to intervene, I
9 believe that then gives the intervenors the right to an
10 immediate appeal. So if that happens, does that stay these
11 proceedings? Which would not be in your interests. Well, it
12 would not be in your interests if I granted the preliminary
13 injunction.

14 MR. ZANZIG: That's true. I have not considered that
15 issue about an appeal, Your Honor, so I don't really have a
16 position prepared to address on that as to what that would
17 mean for our case.

18 THE COURT: I didn't prepare for that one either.
19 That's why I'm asking you. Okay. Because you're the only one
20 that I think would be negatively opposed to a stay during an
21 appeal. Plaintiffs wouldn't -- if I grant the preliminary
22 injunction. They'd like that. You would not.

23 MR. ZANZIG: That's correct, Your Honor. We would
24 not -- we would not be happy with the injunction being
25 granted.

1 THE COURT: But I have to concede I don't know how
2 the Ninth Circuit does that, so I won't deal with that right
3 now.

4 MR. ZANZIG: Thank you.

5 THE COURT: Thank you.

6 I think the plaintiffs are opposed to the motion.

7 MR. BROOKS: Your Honor, if I may, did I leave my
8 glasses near you somewhere there? No. I have them on. I
9 apologize. I found them.

10 THE COURT: It happens.

11 MR. EPPINK: Thank you, Your Honor. Ritchie Eppink
12 for the plaintiffs. Just the question Your Honor just was
13 asking counsel for the State, there would be a right to appeal
14 if intervention is denied. I don't believe there would be any
15 automatic stay, so the Court would have to consider that. The
16 Ninth Circuit would have to consider that as to whether a stay
17 would be appropriate while any intervention appeal was
18 considered.

19 But, Your Honor, this case, this is a quintessential
20 example of where the State will adequately represent the
21 interests of those who support its newly enacted statute,
22 which is a statute that the governor, who's the lead defendant
23 here, signed into law and that the other defendants, all of
24 them government officials and entities, are obligated to carry
25 out.

1 Now, the plaintiff, Lindsay Hecox, who is here, has
2 sued because House Bill 500 prevents her, bars her from
3 playing school sports altogether. She can't even join an
4 intramural club at Boise State. And plaintiff Jane Doe has
5 sued because she can only play under the continuous threat
6 that she will have to prove with medical evidence that she's a
7 woman anytime her gender is challenged.

8 Now, the proposed intervenors undoubtedly have strong
9 feelings about House Bill 500, which the State defends here,
10 but they have not met the standard for intervention. And I
11 want to focus first on the issue of adequate representation.

12 Now, indeed, on an ordinary motion for intervention,
13 the proposed intervenors only have to make a bare minimal
14 showing of inadequacy. But here, as the proposed intervenors
15 seem to acknowledge, the State's defense is presumed adequate.
16 In fact, there's a double presumption. The Court must presume
17 that the State's defense is adequate because, as one thing,
18 it's acting on behalf of Idahoans who support the law. That's
19 become unequivocally clear in its papers it's filed in this
20 case. But, in addition, the State must also presume that the
21 State's defense is adequate here because the State and the
22 proposed intervenors have the same ultimate objective, the
23 same as the circuit said in *Perry* versus the Proposition 8
24 official proponents, the same ultimate bottom line, which is
25 to preserve House Bill 500 in law.

1 And it's the proposed intervenors' burden because of
2 that -- those presumptions, both of them, to overcome those,
3 to rebut those. And to do that, rather than a minimal burden,
4 they have to make a very compelling showing to the contrary,
5 and their showing here is not compelling.

6 You can see that, Your Honor, just from looking at
7 what have come to be known in the circuit as the *Arakaki*
8 factors. We've talked about *Arakaki* already. *Arakaki* talks
9 about whether or not the interests of the proposed intervenors
10 is such that it's so different that the State will not make
11 all of their arguments.

12 The Court can also weigh whether or not the State's
13 capable and willing to make those arguments. And the Court
14 can also weigh whether the proposed intervenors offer some
15 necessary element that the State's going to neglect. And
16 those factors are repeated and now have become known as the
17 *Arakaki* factors from that *Arakaki v. Cayetano* case where the
18 circuit denied intervention on adequacy grounds because the
19 governor of Hawaii, who was the lead defendant in that case,
20 was going to adequately defend the state law. The proposed
21 intervenors in *Arakaki* wanted to make arguments that the
22 government was not even making, and, yet, intervention was
23 still denied.

24 The most important factor the circuit said in *Arakaki*
25 was how the interest of the proposed intervenors compares to

1 the interests of the existing parties. Now, what do -- as far
2 as adequacy, what do the proposed intervenors say? Well, when
3 they find their motion to intervene, the State had not yet
4 filed any briefs in the case opposing the plaintiffs'
5 positions. But since then the State has. It's filed both a
6 motion to dismiss on standing and ripeness grounds, and it has
7 vigorously opposed the plaintiffs' preliminary injunction
8 motion, both on those justiciability grounds as well as on the
9 merits directly.

10 Now, the proposed intervenors don't even take such a
11 vigorous approach. They don't seek dismissal outright, which
12 the State does. And on the preliminary injunction motion, the
13 proposed intervenors acknowledge in their own proposed brief,
14 which the Court has allowed them to file conditionally, that
15 the legal authorities' standards and arguments are well
16 covered by the State in its own opposition to the preliminary
17 injunction motion.

18 So after seeing the State's defense, both a motion to
19 dismiss and a robust opposition to the preliminary injunction
20 motion, the would-be intervenors in their reply brief are able
21 to identify just two concrete reasons why they've met their
22 very compelling showing. They say, number one, that they
23 would like to unpack the State's equal protection arguments.
24 And that's just not what inadequacy is under the intervention
25 standard. Differences in litigation strategy are not enough.

1 The circuit has told us repeatedly. The State here directly
2 attacks the plaintiffs' arguments both as to the bill
3 generally and specifically as to excluding transgender
4 athletes from sport. There's zero reason to believe that the
5 State won't advance any and all of those arguments in its
6 briefing because it essentially already has. The State has
7 not waived or abandoned any of its arguments or potential
8 arguments.

9 Now, there may be -- perhaps what the proposed
10 intervenors are saying is that there's some differences in
11 style and degree between the State's interests and the
12 proposed intervenors' interests. But the circuit has
13 specifically told us that those differences in style and
14 degree are not enough to overcome the presumption of adequacy.
15 So not only will the State here undoubtedly make all of the
16 arguments that the proposed intervenors want to make, it has
17 shown that it will actually make more arguments. And you see
18 that when you look at the second concrete reason why the
19 proposed intervenors say that they have made their very
20 compelling showing. They say that the State has endorsed a
21 more narrow reading of House Bill 500.

22 Now, what the State actually does is stretch -- try
23 to stretch the meaning of the bill so that it can add another
24 reason for dismissing this case. It attempts to contort House
25 Bill 500 to advance its standing and ripeness arguments.

1 But what the State now makes equally plain,
2 especially in its reply on the motion to dismiss, in support
3 of its motion to dismiss, that it's to going to defend the
4 bill vigorously on the merits. It doesn't say that Ms. Hecox
5 won't be excluded from sports by House Bill 500. It just says
6 that the Court should wait to figure out when she will be
7 excluded from sport. That is a more vigorous strategy than
8 even the proposed intervenors have mounted here.

9 That's a far cry from -- proposed intervenors refer
10 to the *Lockyer*, and that's a far cry from what happened in
11 *Lockyer*. In *Lockyer* the United States government had
12 indicated that it wasn't even going to argue that the proposed
13 intervenors' interests were protected by its new law that the
14 State of California was challenging. That's exactly not
15 what's happening here. The State has signaled clearly here
16 that it's going to ultimately protect those interests if the
17 Court allows the case to proceed beyond this stage without
18 dismissing it on standing or ripeness grounds.

19 Now, though, in the proposed intervenors' reply
20 brief, they don't call back too much to these interests. They
21 mentioned today about Boise State University has certain
22 policies; the AG issued an opinion during the session that
23 they say should give the Court reason to doubt those
24 defendants or the Boise State defendants' aggressiveness in
25 this case and that the AG may not defend this aggressively.

1 Those are actually very insightful because now that
2 the issue -- now that the matter has been put at issue before
3 the Court, the AG's office represents its clients, including
4 the governor who signed the bill. And though the AG's opinion
5 may be instructive to the Court as to what an independent
6 legal analysis would look like, in representing these
7 defendants, the State has made clear that it's going to
8 abandon those -- that legal analysis and aggressively attack
9 the merits of plaintiffs' position.

10 And Boise State has done so as well. Boise State
11 could have realigned itself as a party if it felt it supported
12 this bill. But, in fact, it has given over its representation
13 to the AG in this case and taken -- adopted all of those
14 positions that the State has advanced on behalf of the
15 governor and other State officials.

16 Now turning to the interest prongs, there's two of
17 them that the intervenors have to show to make their of-right
18 intervention stick. Proposed intervenors have made clear in
19 their brief that the only interest -- the only interest that
20 they rely on here is their desire not to compete with women
21 who are transgender. And that interest just doesn't qualify,
22 for one, because it's not a significant protectable interest.
23 There's no legally protectable interest in excluding
24 transgender students from single sex activities. The proposed
25 intervenors have failed to point to a single case recognizing

1 such an interest.

2 And it also doesn't qualify, that interest qualify,
3 because the lawsuit isn't about that. The lawsuit is not
4 going to strike down the NCAA policy that exists now, which
5 the proposed intervenors didn't -- don't like. And for that
6 matter, even if those proposed intervenors were in high
7 school, it wouldn't strike down the Idaho High School
8 Activities Association's prior policy, which allowed
9 transgender athletes, women transgender athletes, to
10 participate, or, for that matter, of the policy of the
11 Olympics or World Athletics. The proposed intervenors will
12 have to sue different parties in a separate lawsuit to get
13 that relief.

14 And so if their interest is simply to defend House
15 Bill 500 as to Idaho alone and not the majority of their
16 competitions, then the existing defendants, the State
17 defendants, and Boise State, for that matter, are doing just
18 that. The proposed intervenors have to come here and show
19 some sort of necessary interest, something that's going to be
20 left out of this. And what they've said is, well, we really
21 don't like the fact that we have to compete with transgender
22 athletes at all, but that's not going to stop because of this
23 case.

24 Now, as to permissive intervention, the Court should
25 deny permissive intervention for the very same reasons,

1 because it's looking at permissive intervention as with really
2 all intervention decisions. The Court's looking at practical
3 considerations. And in particular the Circuit has told us
4 that when we're looking at permissive intervention, you can
5 look at the nature and extent of the interests; you can look
6 at the inadequacy of the existing representation. And you see
7 that, for instance, in *Perry*, which I talked about before.

8 But, really, the Court shouldn't look very far at
9 all. The Court can look to a decision that this Court, Judge
10 Winmill writing that decision, in *ALDF v. Otter, Animal Legal*
11 *Defense Fund v. Otter*. There you had the identical situation
12 that you have here. You have a brand-new state law that the
13 plaintiffs were challenging on both constitutional grounds and
14 federal statutory grounds, and you had proposed intervenors
15 that showed up and said the very same thing that the proposed
16 intervenors are saying here; that we are the direct target, we
17 are the specific target, we are the beneficiaries of this new
18 law. We have a discrete personal interest that are not shared
19 by the general public.

20 And, in fact, in *ALDF* they said, We have financial
21 and property interests that the State simply doesn't have
22 because the State doesn't have, you know, our finances, our
23 property that are at stake in this case. And they said, We
24 will make additional arguments that the State's just not going
25 to make, and we have specialized knowledge and expertise to

1 bring to this case that the State doesn't have.

2 And Judge Winmill, this Court, denied intervention
3 both of right and permissive intervention in that case on
4 adequacy. He -- the Court recognized the presumptions, both
5 of those presumptions, recognized that very compelling
6 showing, and said, for those reasons, I'm going to deny
7 intervention of right. For those reasons, I'm going to deny
8 permissive intervention. The place for these people is to be
9 amicus curia. That's where they will be, and that's where
10 they are.

11 And although the proposed intervenors say there's not
12 a case where the State -- where intervention has been denied,
13 where the State hasn't supported it, in *ALDF* the State filed a
14 paper saying, we don't oppose intervention. Now, if you want
15 to split hairs and say that's not supporting the motion,
16 perhaps you can. But that's exactly what this Court did in
17 *ALDF*. Proposed intervenors showed up. They had -- they said
18 the very same things these proposed intervenors were saying.
19 The State didn't oppose it, just as they don't here. And
20 Judge Winmill made the wise decision to say, "You don't meet
21 the of-right standards. Permissive intervention isn't
22 appropriate either. Let's situate you as amicus."

23 Because, indeed, Your Honor, there are many people
24 who are interested in the outcome of any piece of civil
25 litigation. And especially that's so in a case like this one

1 where we have a new state statute that has drawn a lot of
2 attention. And there will be all sorts of places where the
3 various people interested in the outcome of this litigation
4 will end up. Some won't be formally involved at all. Some
5 will show up in this case as witnesses. Some will
6 undoubtedly, at some point in this case, show up as amicus
7 curae.

8 But the question for this Court here is, who has full
9 party status in this case? Full party status with everything
10 that comes with it: showing up at every status conference,
11 taking your own depositions, propounding your own discovery,
12 all of the discovery skirmishes that come with that and the
13 various battles that add a whole 'nother angle to this case
14 an, ultimately, inevitably, necessarily so, add to the
15 duration, the work involved in this case for the Court and the
16 parties and the delay involved altogether.

17 And so the question for this Court now is, where do
18 we situate these constituents? Did these two students provide
19 their evidence to the State here and to the Court? Yes, in
20 fact, they have. The State has already cited their
21 declarations and basically brought them in as witnesses for
22 the State in this case. Can counsel -- can the proposed
23 intervenors connect the State with additional experts? Yes,
24 they can. In fact, the State is using the very same experts
25 that the proposed intervenors have used in other cases. And

1 can these students add their legal arguments to the case
2 through amicus briefing? Yes. And that's exactly how this
3 Court handled it in *ALDF*.

4 So, again, this is the quintessential example where
5 the State is the proper party to defend the State's statute,
6 and it is thoroughly defending it already. And so we ask that
7 the Court deny the motion to intervene.

8 If the Court has any questions, I'll be happy to try
9 to answer.

10 THE COURT: I do not.

11 MR. EPPINK: Thank you, Your Honor.

12 THE COURT: You do have five minutes.

13 MR. BROOKS: Thank you, Your Honor.

14 THE COURT: Counsel, I hate to be a stickler, but if
15 you would put your mask back on.

16 MR. EPPINK: Yes, Your Honor.

17 THE COURT: Thank you.

18 MR. BROOKS: Your Honor, we have the peculiar
19 situation where the plaintiff assures us that the State will
20 adequately represent my clients' interests. The State, on the
21 other hand, says, no, the intervenors will add valuable
22 arguments and voice to this litigation. And it remains true
23 that plaintiffs have found no case where intervention of right
24 has been denied, where that was the view of the State.

25 Now, of course, the plaintiffs oppose intervention

1 precisely because it's true that my clients, speaking through
2 counsel, will add value, add arguments, add different
3 perspective and insight into this litigation. They want that
4 out for an interested, for a tactical reason. It is not
5 helpful to their case. They would like to portray this case
6 as a conflict between abstract state policy and an individual,
7 but it's not, Your Honor. This law was passed because of an
8 impact on specific individuals, such as my clients here in the
9 courtroom. This is a difficult conflict between desires and
10 interests and experiences of real people in the state of Idaho
11 and is -- that is part of what is important to be made part of
12 this litigation.

13 Counsel emphasized, as I told you that they would,
14 the language from certain cases about the presumption of
15 adequacy when the State is representing. But I think between
16 our brief and our argument, I have taken the Court through the
17 Ninth Circuit case law that says, well, yes, sometimes and not
18 other times. And particularly where the alignment of
19 objectives is a complex question, then there is no such --
20 there is no such burden. And indeed the burden on the part of
21 the intervenor for intervention of right is to quote the court
22 in the *Southwest Center* case minimal.

23 Of course -- of course the proposed intervenors have
24 the same big picture, ultimate goal, of defending the statute.
25 That, Your Honor, is true effectively in almost every one of

1 those Ninth Circuit cases that I took you through. That's
2 routine in intervention. That's not what Courts are talking
3 about when they talk about identity interest and those same
4 ultimate objectives and all the same arguments. They're
5 talking about a much finer level of resolution.

6 Counsel referenced the *Arakaki* case. I will say, as
7 I brought up earlier, that whole opinion is about the second
8 set of intervenors, when intervenors planning to represent the
9 same interests were already in. I propose that it would be
10 appropriate to return to the *Arakaki* case when the next group
11 of young women seek to intervene after we've already been
12 allowed in. That would be the place where *Arakaki* is aligned.

13 Counsel talked about the State's demonstrated
14 willingness to defend the law aggressively, and I don't doubt
15 they will defend the law aggressively. But aggressively does
16 not equal identically. And to show that there's agreement and
17 to find a quote that shows that I agree with the State on a
18 particular argument is no proof at all that they would
19 advance, quote, "all the same arguments." So that's really by
20 the by. You don't deny intervention because the intervenor
21 agrees with the defendant party on some issues.

22 Counsel's argument, late in his argument, that my
23 clients simply have no interest because there is no case
24 recognizing such an interest, an interest in the experience
25 during their college years of fair competition of an equal

1 opportunity for success for victory. His argument that there
2 was no such interest is, I don't see a case that says that's
3 an interest, and this law, in essence, isn't valid. But
4 that's assuming the conclusion. Of course, I cited, Your
5 Honor, to the *Clark* case where the Ninth Circuit said that
6 that experience of fair competition, the athletic experience,
7 and equal opportunity is an important Governmental interest.
8 It's an important governmental interest because it's important
9 for certain citizens who are affected, and those citizens are
10 my clients. It cannot be an important governmental interest
11 without being a specific important interest of my clients.

12 Of course, as Your Honor said in your introductory
13 remarks, while sports have been segregated by sex in this
14 nation and around the world since time immemorial, this is the
15 first such statute in this law that we're aware of. So, yes,
16 it's the first such statute. But to deny that my clients --
17 but it confers an interest on my clients. They are the
18 intended beneficiaries. And to deny that there's an interest
19 is assuming the invalidity of the law at the threshold to keep
20 out my clients' ability to defend the validity of the law.
21 That's not right.

22 And, Your Honor, I think counsel's argument regarding
23 permissive intervention, I believe that we've addressed
24 permissive intervention adequately in the papers. It's
25 largely the same issues as intervention as of right, and we

1 believe that my clients are entitled to intervention as of
2 right. So I will not take additional time discussing the
3 permissive intervention issues. Thank you, Your Honor.

4 THE COURT: Thank you.

5 Counsel, it is my practice usually to take matters
6 under advisement. It's a little difficult to do on this
7 particular motion, but I'm going to do it anyway in this
8 fashion. I'm going to take the motion to intervene under
9 advisement. But in doing so, for purposes of today, I'm going
10 to grant the intervenors' amicus curae status so that their
11 brief can be read and their arguments can be heard on the
12 motions today.

13 MR. BROOKS: Thank you, Your Honor.

14 THE COURT: All right. So with that in mind, let's
15 turn to the motion to dismiss.

16 MR. ZANZIG: Our motion to dismiss is based on
17 well-developed rules the federal courts use to ensure that
18 they decide only the questions that are necessary to resolve
19 actual controversies between the parties. So courts step in
20 when a defendant is doing something to harm a plaintiff.
21 Courts don't jump in prematurely into policy debates to decide
22 hypothetical challenges about things that might not ever
23 happen. And the standing and ripeness doctrines overlap in
24 this area to ensure that courts are dealing only with
25 real-life controversies, not just complaints from citizens who

1 might disagree with the law or who speculate that the law
2 might have a negative impact on them sometime in the future.

3 The other issue that we raise in our motion to
4 dismiss is a rule that courts apply due to concerns for
5 separation of powers and federalism issues. Federal courts
6 try not to unanimously interfere with the other political
7 branches' actions. They decide only the questions necessary
8 to resolve a dispute between the parties. And only in rare
9 circumstances is it appropriate to have a facial challenge
10 like the one that the plaintiffs are bringing here. Courts
11 are reluctant to hear those challenges for good reason,
12 because they entirely nullify a law.

13 We're asking the Court to dismiss plaintiffs' case
14 because they can't establish standing and ripeness, which is
15 their burden. They have suffered no actual harm today from
16 any defendant's action under House Bill 500, the Fairness Act.
17 There are no allegations that any defendant has made a threat
18 or has plans to take any action to exclude either plaintiff
19 from any sports.

20 The feared future harms that the plaintiffs talk
21 about are completely dependent on potential actions that third
22 parties not before the Court might take in the future. Maybe
23 someone will dispute their sex under House Bill 500, and
24 they'll have to verify their sex. But there's no allegation
25 that either plaintiff can identify a single person who intends

1 to do that.

2 In addition, even if the plaintiffs had standing and
3 could establish ripeness, they could not prove that the
4 Fairness Act would be unconstitutional every time it prevented
5 a male from trying to play female sports. And for that
6 reason, plaintiffs' facial challenges should be dismissed with
7 prejudice as a matter of law.

8 Let me talk a little bit about the first issue that
9 we're raising here, the standing and ripeness question. As
10 I've said, typically to establish standing and ripeness,
11 courts say a plaintiff must show injury in fact. That is,
12 I've already been harmed by something that the defendant has
13 done. Here we don't have that. And so the plaintiffs are
14 trying to rely on a special exception to that typical rule
15 under Article III that sometimes allows a plaintiff to
16 complain about future injury but only if we can be fairly
17 certain that that injury is going to occur.

18 The constitution doesn't allow every person with a
19 speculative fear to come into court. What the courts have
20 said is -- is that a plaintiff complaining about future injury
21 has to show that that future injury is imminent or certainly
22 impending. And the United States Supreme Court emphasized in
23 the *Clapper v. Amnesty International* case that this is an
24 especially rigorous burden where someone is challenging a
25 statute or other actions of another branch of the government.

1 So how do we decide whether a future injury is likely
2 enough to satisfy Article III? Well, a case that we cited in
3 our reply brief, the *Safer Chemicals* case from the Ninth
4 Circuit last year, does a very good job of talking about the
5 rules courts use when a party wants to bring a challenge based
6 on an alleged future injury. And the primary test that's
7 relevant here that *Safer Chemicals* discussed is the test for
8 pre-enforcement challenges to a law or practice.

9 And what courts said there is we want to make sure
10 that there's a genuine threat of imminent prosecution. In
11 this case we're not talking about a criminal approach, so it's
12 not a prosecution. But here that test would be there's a
13 genuine threat that some defendant is about to take an action
14 that's going to harm the plaintiffs.

15 And what the Ninth Circuit told us is there's three
16 things that a Court should look at to find out whether we can
17 make that prediction. One is whether the plaintiff has a plan
18 to take some action that's proscribed by law, and here that's
19 not really an interest. But the other two critical issues in
20 that test are, number one, has the defendant communicated some
21 specific warning or threat that it's going to take action
22 against the plaintiff? And the other, has the defendant shown
23 a history in the past of enforcing the law in the way the
24 plaintiff fears?

25 Neither plaintiff can satisfy this pre-enforcement

1 challenge test because there's no allegation that any
2 defendant has any plan to enforce House Bill 500 against
3 either plaintiff. And there certainly is no allegation and
4 could be no evidence of any past history of enforcement
5 because it's a brand-new law.

6 The other test that the Ninth Circuit talked about in
7 that case typically applies when a plaintiff is going to apply
8 for a benefit and fears that the plaintiff will be turned
9 down. And in that situation, courts sometimes use what's
10 called the firm prediction rule, and that comes out of a
11 concurring opinion that Justice O'Connor wrote some years ago.
12 But, essentially, do we have enough information here that the
13 Court could make a firm prediction that the plaintiffs are
14 going to be harmed in the way they claim? That can't happen
15 here because both plaintiffs' alleged injuries are speculative
16 and dependent on hypothetical third-party disputes about their
17 sex that they claim may happen in the future.

18 Let's talk about each plaintiff just for a little
19 bit. Plaintiff Jane Doe, her claim is entirely speculative.
20 What act is any defendant about to do that might hurt her?
21 None. What act of a third party not before the Court is about
22 to hurt her? We don't know anything about that either. She
23 says she fears that somebody might dispute her sex, but she
24 doesn't identify a single person who's going to do that, no
25 one with a current intent to do that. It's pure speculation.

1 THE COURT: So what you're telling me is that it's
2 speculation that the State's going to enforce the law that
3 they invoked?

4 MR. ZANZIG: No. We're talking right now about Jane
5 Doe. And Jane Doe --

6 THE COURT: So it's pure speculation that the State's
7 going to enforce the law that they just enacted against Jane
8 Doe?

9 MR. ZANZIG: It's certainly -- there's no reason for
10 the State to enforce the law against Jane Doe.

11 THE COURT: Then why have the law?

12 MR. ZANZIG: Because Jane Doe is not transgender.

13 THE COURT: I understand that.

14 MR. ZANZIG: And so the only way that anything would
15 happen to Jane Doe is if someone is going to dispute the fact
16 that she's a girl. Where's the facts that show that that's
17 going to happen? She's identified herself as a female who
18 identifies as a girl and plays female sports. The State is
19 not going to -- Boise High School is not going to challenge
20 the fact that she's a girl. There's -- no defendant is going
21 to make that kind of a challenge. So the only way that would
22 happen, the only way this would come into play for her is if
23 someone made some spiteful challenge to her and then she was
24 forced to verify her sex, which the law would allow her to do
25 very simply by pointing to the health examination form that's

1 already in Boise High School's files that shows that she's a
2 female. So there's just no harm that can come to her even if
3 this speculative challenge occurs.

4 Have I answered --

5 THE COURT: I understand your argument.

6 MR. ZANZIG: Let's talk a little bit about the other
7 plaintiff, Lindsay Hecox. She's got a number of problems
8 herself. One is imminence. Will there even be fall sports?

9 THE COURT: Let me back up one second on Jane Doe
10 again. What about the fact that she's treated differently
11 than her male counterparts? They don't have to make that
12 proof even if they're challenged.

13 MR. ZANZIG: Well, she doesn't have to make that
14 proof either, unless she's challenged. And there's no reason
15 to believe that she'll be challenged.

16 THE COURT: That's not what I said, though. The men
17 don't have to make that proof even if they're challenged. She
18 does.

19 MR. ZANZIG: Oh, no. That's not true. If a
20 biological male went to play a female sport and was
21 challenged --

22 THE COURT: What about the biological male who's
23 playing a male sport but he's effeminate?

24 MR. ZANZIG: Oh, absolutely true, Your Honor. With
25 male sports, they're open to either sex.

1 THE COURT: Because of Title IX?

2 MR. ZANZIG: Well, yes. And in this case because of
3 the biological differences. Biological females don't have the
4 physical advantage, so the law doesn't prohibit them from
5 participating in male sports. House Bill 500 completely
6 allows that. So all sexes are treated equally with respect to
7 male sports, and both sexes are treated equally with respect
8 to female sports in the sense that they can both be
9 challenged. Neither can be challenged if they want to
10 participate in male sports; both can be challenged in female
11 sports.

12 THE COURT: Okay.

13 MR. ZANZIG: Let's talk a little bit about Lindsay
14 Hecox and her ripeness and standing problems. As I mentioned,
15 first is imminence. We don't even know whether Boise State is
16 going to have fall sports this year that would allow her to
17 try out. But even if they do, could we really make a firm
18 prediction that she's going to be harmed by House Bill 500 on
19 the current record? Her claim depends entirely on her
20 interpretation of the law that the law is somehow
21 self-executing and that Boise State will bar her from even
22 trying out.

23 But that's not the way the statute is written. The
24 statute does not say that every school must take steps to
25 verify the sex of every athlete who wants to play female

1 sports. It doesn't. Instead, it's designed to allow for
2 individual challenges, disputes about a person's sex and
3 eligibility.

4 And so what do we know about what Boise State will do
5 here? What -- what do we know about any current plans Boise
6 State has to harm Lindsay Hecox? There's no allegation that
7 they have put in place a plan to bar her from tryouts. We
8 know that Ms. Hecox can't satisfy the Ninth Circuit test for
9 pre-enforcement challenges because Boise State certainly
10 hasn't communicated any threat or warning to her that it's
11 going to bar her from trying out. Boise State has no history
12 of barring students like Lindsay Hecox.

13 So the only way she would be barred from
14 participating in sports at Boise State is if some third party
15 raises a challenge. And we have no allegation that there's
16 any party out there with that current intent to do that.

17 And so there's no way to firmly predict that either
18 plaintiff is going to be harmed by House Bill 500 in the
19 future. There's no threat from any defendant right now to
20 harm either plaintiff under House Bill 500, and there's no
21 history of any defendant having taken any action against
22 anybody under House Bill 500. And for those reasons, the
23 plaintiffs can't establish standing.

24 I'd like to touch on a couple other issues that they
25 raised. One is they suggest that the Court need not find

1 standing for both plaintiffs in order to proceed with all
2 claims in this case. That's simply not true. That general
3 rule applies when both -- or all plaintiffs have the exact
4 same interests and are suing the same defendants. But here
5 we've got completely different plaintiffs with different
6 claims suing different defendants.

7 So, for example, to accept the plaintiffs' argument,
8 we would have to agree that Jane Doe has a right to standing
9 to assert claims on behalf of transgender people even though
10 she's not transgender. We would have to assume that Jane Doe
11 has a right to sue Boise State as a defendant even though she
12 has no relationship with that institution.

13 And conversely, to accept their argument, we would
14 have to agree that Lindsay Hecox can sue the Boise School
15 District, even though she's not a student there. It just
16 doesn't work when the claims are different. So the Court
17 needs to examine both parties' standing and ripeness.

18 Finally on this issue, the plaintiffs suggest that by
19 citing to some affirmative action cases that if a plan makes
20 an equal protection challenge, the plaintiff doesn't have to
21 have any real harm. That's not true. And I think one case
22 that makes it pretty clear that they have exaggerated that
23 rule is the *Bronstein* case that we cited from the Ninth
24 Circuit. And it says, no, even if you're going to make an
25 equal protection challenge, you have to show that you're

1 really affected by a law, not just that you might be in a
2 category that could be affected. You've got to show that it's
3 had a real effect on you somehow. And because there's no
4 standing, no ripeness, the equal protection argument they're
5 making just doesn't work.

6 The last issue I want to talk about is the facial
7 challenge issue that we've raised. And here the plaintiffs
8 cannot meet the *United States v. Salerno* standard of showing
9 that there's no set of circumstances under which this statute
10 could be constitutionally applied. We know that because we
11 have clear Ninth Circuit precedent in the *Clark* case that says
12 it's perfectly constitutional to have separate sports for
13 separate sexes and to exclude males from female sports.

14 House Bill 500 does just that. Any male, regardless
15 of gender identity, who wants to participate in female sports
16 can be subject to a dispute and will need to verify the female
17 sex. And if they can't do it, it didn't matter what their
18 gender identity is; they will be excluded.

19 Plaintiffs try to argue that *Salerno* is not the rule
20 in the Ninth Circuit, but we've cited plenty -- I'm not going
21 to go over what we've cited in our brief, but I think we've
22 cited plenty of law that shows they're wrong on that point.
23 They try to make the argument that House Bill 500 only applies
24 to transgender people, to transgender women and girls. It
25 doesn't bar males who identify as a male from female sports.

1 It's just not true. You can look at the statute's plain
2 language, and it will exclude a biological male from female
3 sports regardless of gender identity. The statute doesn't
4 talk about gender identity, doesn't use the word
5 "transgender." It's not based on that. It's based on
6 biological differences.

7 Unless the Court has any other questions, I'll save
8 any remaining time for rebuttal.

9 THE COURT: I do not. Thank you.

10 Before you go, was there anyone else who wanted to
11 argue on behalf of dismissing? Let's hear from that side.

12 MR. BROOKS: Your Honor, we did not brief that motion
13 and do not wish to speak to it. Thank you.

14 THE COURT: And how about the federal government?

15 MR. WUCETICH: Yes, Your Honor. We did not brief
16 that motion either, so we --

17 THE COURT: Thank you.

18 MS. PRELOGAR: Good morning, Your Honor. I'm
19 Elizabeth Prelogar. I represent the plaintiffs, Lindsay Hecox
20 and Jane Doe.

21 Lindsay and Jane are women athletes in Idaho who are
22 directly targeted and harmed by H.B. 500. Under H.B. 500,
23 Lindsay is categorically barred from being able to participate
24 in school sports on BSU's women's teams because she is
25 transgender. And under H.B. 500, Lindsay and Jane and every

1 woman and girl athlete in the state of Idaho now faces the
2 threat of a sex verification process that's designed to
3 enforce that policy of exclusion.

4 Our plaintiffs are injured by this law and have
5 standing to challenge it. The case is ripe, and the State's
6 suggestion that there's something wrong with the facial
7 challenge in this context lacks merit. The State's motion to
8 dismiss should be denied.

9 I'd like to begin with the issue of standing, Your
10 Honor, and respond to the State's suggestion in this case that
11 the harms and actual injuries that H.B. 500 inflicts are
12 speculative or actual; that they're not yet concrete and
13 imminent. Because I think that is not correct if you look at
14 how this law operates and how it was intended to operate.

15 H.B. 500 took effect on July 1, so it is now the law
16 in Idaho, which means that on the statute books, there is this
17 categorical bar on women and girls who are transgender, and
18 this separate set of rules that apply to women and girls'
19 teams and creates a sex verification mechanism only for
20 players on those teams as compared to men and boys, who don't
21 have any prospect of sex verification.

22 And I want to begin with Lindsay, who now falls
23 within this categorical bar and will be completely precluded
24 from being able to play school sports. I should say at the
25 outset that I don't understand the State to contest that that

1 is actual injury; that closing off school sports to a class of
2 girls based on their transgender status harms them. And
3 instead what the State is saying is that we aren't certain
4 that this injury will occur; that maybe it's too speculative;
5 that maybe third parties have to come in and dispute Lindsay's
6 sex for her to be excluded; or that maybe other things will be
7 impediments and will stand in Lindsay's way. And I think if
8 we just walk through all of those arguments, none of them
9 withstands scrutiny. And the thing that stands in Lindsay's
10 way is H.B. 500 itself.

11 So the first argument that the State makes is that
12 Lindsay needs to try out for and make the BSU team. And only
13 then we'll see if our sex is disputed and she's excluded. But
14 the problem with that argument is that it ignores the
15 provision of H.B. 500 itself that says that BSU's women's
16 teams shall not be open to Lindsay. This is Idaho code
17 33-6203(2). This is the provision that says that BSU shall
18 not make its team open in the first place based then on the
19 criteria that the statute newly sets forth that it's designed
20 to identify the class of girls who are excluded based on their
21 transgender status.

22 And so what that means is Lindsay won't have the
23 opportunity to try out for or make the BSU team in the first
24 place. The statute commands that the team simply shall not be
25 open to her and the idea that we have to wait for BSU to

1 threaten that harm or tell Lindsay that she can't join I think
2 ignores the reality. It's the statute that's telling Lindsay
3 that. It's the Idaho legislature's enactment of language that
4 makes clear now that women and girls who are transgender are
5 not permitted to play on women's teams. That was the purpose
6 and design and effect of this bill, and that will be its
7 actual operation in this case.

8 And I'll just note as well, Your Honor, that if, in
9 fact, Lindsay were permitted to try out for and join the team,
10 I think it's a certainty that her sex would be disputed.
11 She's a women who's known to be transgender, so the idea that
12 this is a hypothetical concern or too speculative or that who
13 are the third parties out there who would possibly do this, I
14 think it's very clear that even if BSU were to violate the law
15 and permit Lindsay to try out for and join the team, there
16 would be a sex dispute.

17 And I should note, Your Honor, that it's not just the
18 sex dispute mechanism that enforces the statute. There's also
19 a very broad private right of action here. So this is the
20 provision Section 33-6205. This is a broad private right of
21 action that gives any student who claims to be aggrieved by a
22 violation of H.B. 500 and harmed either directly or even
23 indirectly a right of action to sue the school and to seek
24 injunctive relief, money damages, other appropriate relief.

25 So the premise here that this law isn't going to be

1 enforced and that BSU won't -- won't follow the clear dictates
2 and commands of the law I think ignores that it's backed up by
3 the very real prospect of then a student having a cause of
4 action against BSU.

5 And, ultimately, I think there's just no principle of
6 standing, and the State's been unable to identify any case
7 that stands for the proposition that you should deny standing
8 on the assumption that the regulated entity under the statute
9 will simply violate the law and not do what the law says.
10 Right now in Idaho, it's unlawful for BSU to let Lindsay join
11 the team.

12 Now, the second argument that the State makes in this
13 regard is that Lindsay has to actually show that she'll make
14 the team in the first place and that she can't prove injury in
15 fact until she makes that showing. But, once again, I think
16 the State's ignoring that the team will not be open to
17 Lindsay, and it's further ignoring a long line of equal
18 protection precedent that makes clear that when you are denied
19 an equal playing field and denied an equal opportunity to try
20 to participate and obtain a benefit, you do not have to make a
21 further showing that you would actually get the benefit. That
22 will, of course, make sense because it's hard to prove that
23 you would necessarily get the contract if you submit a bid or
24 that you would necessarily get admitted to a university class
25 if you tried.

1 And so here I think under governing Supreme Court and
2 Ninth Circuit case law, it's clear that Lindsay doesn't have
3 to show that she would necessarily make the team if she tried
4 out because what H.B. 500 does is it prevents her from having
5 an equal opportunity to try out in the first place and to make
6 the team. And that itself is a clear cognizable equal
7 protection harm.

8 The State referred to the *Bronstein* case, and I think
9 it's actually a useful case for Your Honor to look at because
10 in *Bronstein*, the concern there was if you're going to
11 challenge this kind of law, you have to show that you actually
12 want to obtain the benefit. So, for example, if you're
13 challenging a discriminatory membership policy of a club, you
14 have to show you want to join the club. Or if you're
15 challenging discriminatory rules about submitting bids, you
16 have to show that you're actually planning to submit a bid.

17 Lindsay makes that showing here. She wants to join
18 the women's cross-country team and the women's track team.
19 She's training hard to and trying to position herself to be
20 able to compete. And what stands in her way is H.B. 500,
21 which now changes the rules in Idaho and just says that those
22 teams shall not be open to her.

23 I want to respond as well to the arguments about
24 Title IX. The State and also the United States argue that
25 maybe Title IX independently bars Lindsay, and so that would

1 prevent her from being able to play on a women's team. But I
2 think that ignores the Supreme Court's recent decision in the
3 *Bostock* case. So the Title IX arguments are based on a recent
4 decision by the Office of Civil Rights, which ruled in
5 considering a different -- materially different policy in
6 Connecticut that there might be a Title IX violation.

7 But that OCR policy itself by its own terms said that
8 it's not a formal binding statement of policy; that it is not
9 meant to be cited or relied upon or construed as such. And,
10 of course, it considered different facts in Connecticut. But
11 that policy -- or that decision was actually issued before the
12 Supreme Court's decision in the *Bostock* case. What *Bostock*
13 held is that in the context of Title VII prohibiting
14 discrimination in employment; that discrimination on the basis
15 of transgender status is a form of discrimination on the basis
16 of sex. And so the Supreme Court clarified that Title VII
17 protects against transgender discrimination. And, of course,
18 Title IX and Title VII use similar language. The Ninth
19 Circuit in the *Emaldi* case made clear that they should have a
20 parallel interpretation.

21 So I think the argument here that Title IX stands in
22 Lindsay's way gets things exactly backwards. Title IX
23 protects Lindsay. It provides further independent protection
24 in addition to the equal protection clause that would ensure
25 that she cannot be discriminated against on the basis of her

1 transgender status in athletic opportunities in her schools.
2 So I think, again, that the suggestion here that the Court
3 should deny standing on the basis that maybe there's some
4 other impediment is misplaced.

5 I also want to respond to the arguments about the
6 NCAA rules, because here, again, the State has suggested that
7 maybe that's an independent barrier; maybe Lindsay doesn't
8 qualify under those rules. The NCAA rules that govern sports
9 around the nation at the collegiate level require that girls
10 who are transgender undergo hormone suppression, testosterone
11 suppression, for a year. But Lindsay has adequately alleged
12 her compliance with those rules. She has been undergoing
13 hormone suppression since September 2019, so she'll be at the
14 year mark in September 2020. And that will be before the
15 women's cross-country team at BSU participates in any kind of
16 NCAA-sponsored event.

17 So I think what that shows is there's no barrier,
18 based on the NCAA rules, to Lindsay's ability to participate
19 and try out for the BSU team. The only barrier here is
20 H.B. 500. That's what's harming her. That's the actual
21 injury in fact.

22 I want to turn to Jane, who I think has two forms of
23 injury here as well. Under the law in Idaho now, there is a
24 different set of rules governing participation in girls' teams
25 as compared to boys' teams. What H.B. 500 does is it creates

1 this new sex verification mechanism, the first of its kind in
2 the country, and it puts women and girls in the position now
3 of having to potentially verify their sex to the satisfaction
4 of their school and using the statutory criteria in order to
5 continue to be able to play school sports. And there's no
6 parallel provision for men's and boys' teams in the state.

7 So what that means is right now there are two
8 different rules governing girls' sports and boys' sports, and
9 it's singling out girls' sports for worse and differential
10 treatment. And Jane is a woman who plays on the Boise High
11 soccer team and who will run track in the spring who's very
12 much affected by the rules.

13 As the Supreme Court has recognized and the Ninth
14 Circuit has echoed, there is a cognizable constitutional
15 injury that comes from this kind of facial classification in a
16 statute and the kind of differential rules that we see
17 H.B. 500 embodying. And that's, for example, the *Heckler v.*
18 *Mathews* case. The Ninth Circuit echoed it in *Davis v. Guam*.
19 These are cases that recognize that there is an Article III
20 injury that comes from the mere fact of being subject to
21 unequal treatment and to a different set of rules. And that's
22 what Lindsay and Jane and every woman and girl athlete in the
23 state now faces. That alone suffices for injury in fact.

24 But, in addition to this, Jane reasonably fears that
25 her sex will be disputed and that she'll suffer the further

1 injury of having to undergo the verification process. What
2 the statute provides is that any student can challenge another
3 student's sex, and at that point, the girl who's challenged
4 has to come forward and prove that she is sufficiently woman
5 to be able to play on the team. And the statute says what you
6 look at are three criteria: reproductive anatomy, genes, and
7 endogenous hormone levels.

8 Now, those are criteria that are not normally
9 assessed as part of the clearance to play sports. Our expert
10 doctor has explained that. She does a number of these
11 physical exams every year to clear athletes, and you don't
12 look at those factors because those factors don't have any
13 relevance to the ability or safety to play sports.

14 And so what this means is that a girl whose sex is
15 challenged, like Jane or Lindsay or any other woman in Idaho
16 who's an athlete, would have to go and get an additional
17 examination or get additional proof that she is a woman based
18 on her reproductive anatomy; her genes; or her endogenous,
19 naturally occurring hormone levels.

20 So the State's suggestion that Jane could just pull
21 out her normal health exam and consent form that Boise High
22 already has on record and show that that says she's a woman,
23 that wouldn't suffice, Your Honor, because that form isn't
24 measuring the fact of being a woman by reference to these
25 three statutory criteria. And so of necessity, the statute

1 itself requires that a woman undergo this additional
2 examination or inquiry in order to verify her sex, and that
3 creates a further cognizable harm. The State suggests that
4 maybe Jane's sex will never be challenged. We can't know for
5 sure and that that's enough to defeat standing.

6 But I think that this case is actually quite similar
7 to the case of *Melendres v. Arpaio*, which we cite in our
8 brief. *Melendres* was a Ninth Circuit case that involved a
9 discriminatory policy of subjecting Latinos to traffic stops
10 based on profiling. And in that case, the argument was made
11 that the individual plaintiffs maybe -- who were Latinos and
12 so subject to the policy -- couldn't show a sufficient
13 likelihood that they themselves would be subject to a stop.
14 But the Ninth Circuit rejected that claim and upheld the
15 fact-finding of the District Court that because this was a
16 policy in effect, because it hung over the heads of every
17 plaintiff in that case, that at any time he or she could be
18 stopped on the basis of being Latino, that sufficed to create
19 standing.

20 And I think that same analysis applies here.
21 H.B. 500 is a policy that is in effect in the state of Idaho.
22 It hangs over the head of every woman and girl athlete in the
23 state who now knows that at any time someone could come in and
24 challenge her sex at an important meet or competition and that
25 she then would have to comply with this verification process

1 that's humiliating and different from any rules that govern
2 boys' sports.

3 I want to briefly respond to the ripeness arguments.
4 The State I think recognizes that ripeness and standing very
5 much overlap in this context. I think that most of the
6 ripeness arguments fail for the same reason as the standing
7 arguments in this case.

8 The one additional argument that the State makes in
9 its brief is that we have to wait for promulgations or
10 regulations by the State Board of Education. And I think it's
11 important to recognize that nothing in those regulations could
12 change or address the violations that our plaintiffs are
13 experiencing in this case.

14 So under the statute, the State Board of Education
15 has limited authority to create regulations that govern what
16 the statute calls the receipt and timely resolution of a sex
17 verification dispute. So this would be something like here's
18 how you submit a challenge, and here's the amount of time that
19 the entity or school has to resolve the challenge. But the
20 statute further says that the State Board of Education cannot
21 act in a way that's inconsistent with H.B. 500.

22 So what that means is that the State Board of
23 Education has no authority to, for example, dispense with
24 genetics verification altogether and say women and girls don't
25 have to undergo that process. And it also has no authority to

1 depart from the criteria in the statute that are meant to
2 exclude girls who are transgender. So it can't, for example,
3 depart from those three criteria -- reproductive anatomy;
4 genes; and hormones, naturally occurring hormones -- and say
5 that that other criteria will suffice.

6 And so what that means is there's just simply no
7 possibility here that those regulations could do anything to
8 address the constitutional and statutory problems with this
9 law. Those problems exist on the face of the statute, and the
10 State Board of Education can't act in a manner that would be
11 consistent with the statute.

12 Finally, I want to respond to the arguments about the
13 facial challenge in this case. What I want to say at the
14 outset is that we're here on a motion to dismiss, and this
15 argument about the line between a facial and an as-applied
16 challenge doesn't provide a basis to dismiss a complaint. As
17 the Supreme Court said in the *Citizens United* case, that line
18 goes to the scope of the remedy that should ultimately be
19 afforded at the end of the case. It goes to the relief that
20 you can obtain but not the propriety of bringing a complaint
21 in the first instance. So I think that none of these
22 arguments provide a base to dismiss the complaint here.

23 But in any event, I think the attack on the facial
24 challenge fails. And to understand that, I think it's really
25 important to recognize what H.B. 500 does, because the State

1 says that this is just a rule of sex separation in sport. It
2 keeps boys off of girls' teams, and that's constitutional.
3 But that isn't what H.B. 500 does. That was already the law
4 in Idaho. That was the law under the prior rules which
5 provided that boys couldn't play on girls' teams. This was
6 the NCAA rule at the collegiate level. At the high school
7 level, it was the rule from the Idaho High School Activities
8 Association. This is Rule 11.

9 And what the -- and those rules were accompanied by a
10 rule of inclusion for girls who are transgender, permitting
11 them to play on girls' teams if they suppressed their hormones
12 for a year. So that's in line with some of the most
13 restrictive rules even governing elite athletic competitions.

14 And what H.B. 500 does is it alters the status quo
15 and changes the rule of sport in Idaho only as applied to
16 women and girls. The rules for men haven't changed. They
17 still can't play on girls' teams. They were barred before;
18 they're barred now. But what did change is the new rule in
19 H.B. 500 that girls who are transgender are categorically
20 excluded and the new burden that's imposed on all women and
21 girls and their teams in the state that says that they might
22 have the threat of sex verification.

23 As the Supreme Court said in the *Pate1* case, in
24 assessing a facial challenge, you have to look at the group
25 for whom the law is a restriction, not the group for whom the

1 law is irrelevant. And here the law is irrelevant for men and
2 boys because it doesn't change the rules on the law. But it's
3 very much a restriction for women who are transgender and for
4 all women in the state because now there are new rules
5 governing their participation in sports.

6 Those are the groups who are targeted by this law,
7 and for those groups there is no valid application of the law.
8 It survives a facial -- a challenge on facial grounds because
9 the things that make H.B. 500 unconstitutional and invalid as
10 applied to Lindsay equally show it can't be applied to any
11 girl who's transgender. And the same things that make the sex
12 verification problematic for Jane shows that it can't be
13 applied to any woman or girl in the state because that is
14 differential treatment that is not justified under the law.

15 So whether the Court views this as a law that simply
16 has no relevance for men or as a facial challenge to a
17 category of applications, I think that these claims withstand
18 scrutiny, and they are validly brought as facial challenges.
19 And I'll just note that of course we've also brought
20 as-applied claims, and there's no basis to dismiss those.

21 I'm happy to answer any questions the Court has.
22 Otherwise, we'd ask the Court to deny the motion to dismiss.

23 THE COURT: Thank you. I have no questions.

24 MR. ZANZIG: Your Honor, I'd like to just touch on a
25 few issues that were raised. First, I think that one thing we

1 have to keep in mind when we're thinking about this law is
2 what it really does and what it doesn't do, because we're
3 hearing a lot of allegations about what this law requires or
4 what it does. And if you read the plain language of the
5 statute, it just doesn't match.

6 The idea is this law's designed to say there's a
7 biological difference between males and females, and so the
8 only way to make sure that female sports are not subject to
9 that biological disadvantage that men would bring to co-ed
10 competition is to say that we're going to have female sports
11 for biological females only. That's -- that's the reason for
12 this statute.

13 It makes sense that men and women are treated
14 differently because there's a biological difference between
15 men and women that is relevant in sports. That's been
16 recognized over and over by the courts.

17 So there's nothing wrong with saying we need to have
18 some test that makes sure that if our rule is only biological
19 females can participate in female sports, to make sure that --
20 that we are -- that that aspect of the law can be enforced.
21 That's why there's a procedure in case of a dispute to make
22 sure that only biological females are in that sport. It
23 wouldn't make sense to have a similar verification for male
24 sports when we say either sex is welcome here. There would
25 just be no reason to verify a person's sex when sex is

1 completely irrelevant to the male sports, because they're open
2 to all.

3 Now, in addition, we've heard over and over about how
4 there's this invasive test that Jane Doe would have to undergo
5 and that the statute itself doesn't allow her to simply use
6 her health examination form. But I would urge the Court to
7 read the real language of the law that was passed, not the
8 original bill, because the original bill would have required
9 those three factors to be used.

10 But when the bill went over to the Senate side, it's
11 important to note that there were significant amendments to
12 Section 33-6203(3). And in our brief we quoted the original
13 and then the current -- the actual bill that was passed. And
14 here's what it says about having to verify sex. It says that
15 a dispute shall be resolved by the school "requesting that the
16 student provide" and then it lists a number of things. One of
17 them is a health examination and consent form, and then it
18 says or other statements signed by the student's personal
19 health care provider that verifies the student's sex.

20 Okay. So the health care -- the health examination
21 and consent form is something that we cited to in our brief
22 and actually attached as an exhibit so the Court can see it,
23 but it's a form that every student in high school sports in
24 Idaho has to submit at least twice if they participate all
25 four years. And that form specifically requires the medical

1 professional to designate male or female. And so this law, if
2 there were a dispute, allows simply that form to be submitted
3 to verify the student's sex.

4 The only place you see those remaining factors that
5 were part of the original bill are in another sentence that
6 says the health care provider may -- may verify the student's
7 biological sex as part of an exam relying on one of these
8 factors. "May" doesn't mean it's required. So that's just
9 wrong. The misinterpretation of the law is what gives rise to
10 this alleged fear and harm. It's just not there.

11 The *Melendres* case that was discussed is very
12 different from what we have here. In *Melendres*, the situation
13 was, is there were Latinos, plaintiffs, who had actually been
14 subject to these stops. They feared that they would be
15 subject to another stop in the future. And the reason the
16 Court said they had standing because of that potential future
17 harm was because there was a formal government policy in place
18 saying we're going to keep making these kind of stops.

19 There is no formal policy at issue here saying that
20 we -- any state defendant is going to dispute any student's
21 sex, none. What they're relying on is the possibility that
22 some third party not before the Court is going to do that, and
23 that's completely different from *Melendres*.

24 I would also like to just address briefly the facial
25 challenge arguments. I would urge the Court -- if there's any

1 question about whether our motion is appropriate, I would urge
2 the Court to read Judge Winmill's decisions in *Almerico v.*
3 *Denney*, which we cited in our brief. He does a thorough job
4 of analyzing under equal protection whether a facial challenge
5 is proper at the motion to dismiss stage and decides that, in
6 fact, it is and that facial challenge claims there were
7 dismissed. The same thing should happen here.

8 The fact that there might have been other
9 organizations with rules that also excluded males from female
10 sports in the past doesn't mean that the legislature is
11 prohibited from occupying that space and putting in place its
12 own laws. It might be different if we had a statute on the
13 books that the legislature changed, but that's not what
14 happened here. There was no prior statute that said no males
15 can participate in female sports. And so the legislature has
16 a right to put its rule in place without regard to rules that
17 other organizations may have in place and may change if they
18 want to.

19 Unless the Court has any other questions, I'll sit
20 down.

21 THE COURT: I do have one question. Are you telling
22 me that under the actual language of the Act as it came out of
23 the Senate, if Lindsay's doctor signed a health form that said
24 she's female, that's the end of the discussion? She can play?

25 MR. ZANZIG: I believe that's the case, Your Honor.

1 The way the statute is written --

2 THE COURT: And it doesn't matter what the basis is
3 for the doctor's decision that she's female?

4 MR. ZANZIG: As we interpret this law, there are
5 three ways that a person can satisfy a dispute. One is with
6 the high school health examination form. That wouldn't apply
7 to Lindsay because she's not in high school. And so there's
8 two other ways that she could do it. One would be having a
9 signed statement from her health care provider. The other
10 would be for her health care provider to do an exam, a routine
11 physical exam, and use one of the three statutory criteria.

12 THE COURT: So even though she's not in high school,
13 she can have her doctor sign a form saying she's a female, and
14 that would work? It doesn't have to be the high school form?

15 MR. ZANZIG: If her doctor were willing to say that,
16 that would be the end of it under this statute.

17 THE COURT: And that's the definition of a doctor?
18 Does it have to be a medical, physical doctor? Could it be a
19 psychologist or a psychiatrist?

20 MR. ZANZIG: The statute says personal health care
21 provider. I don't think it's as specific as what you're
22 suggesting. So --

23 THE COURT: So could that be your counselor?

24 MR. ZANZIG: I think that would be stretching it. I
25 think it would have to be some health care professional,

1 someone licensed in health care.

2 THE COURT: So if they have an Idaho -- would that
3 have to be under the Board of Medicine?

4 MR. ZANZIG: Well, I would say you probably would
5 need either a physician, a physician's assistant, or a nurse
6 practitioner. Those would be the types of people who would
7 typically do an examination, physical examination of a person.
8 I don't think a counselor would normally do a physical
9 examination of a person.

10 THE COURT: It has to be a physical examination, not
11 a mental?

12 MR. ZANZIG: Well, it says your health care provider
13 can provide a statement, and it doesn't expound on that.

14 THE COURT: That she is a woman? That's all it has
15 to say?

16 MR. ZANZIG: That the health care provider has to
17 verify the person's sex.

18 THE COURT: Okay. Thank you.

19 Before we move on to the next issue, the preliminary
20 injunction, I guess I have two things. One, if you would like
21 to take a brief recess, I'm happy to do that so people can go
22 and take their mask off for a couple minutes. Or we can push
23 through. It doesn't matter to me. I'm getting used to my
24 mask. Two -- do you need a break? We're going to take a
25 break.

1 And, two, I have been informed that several people
2 are using their cell phones in the courtroom. Whether or not
3 it's with the camera, you cannot use cell phones in the
4 courtroom, period. The one exception I guess is if you're
5 taking notes on that phone, and I would allow that. But so
6 I'm just cautioning you, if you're using your cell phone,
7 please don't, unless it's for the sole purpose of taking
8 notes. And you must text or type a lot quicker than I do with
9 one finger.

10 So let's take a ten-minute recess, and then we'll
11 come back and take up the preliminary injunction. We'll be in
12 recess.

13 (At 10:40 a.m., a recess was taken until 10:56 a.m.)

14 THE COURT: Please be seated.

15 All right. I believe now we're ready to turn to the
16 motion for preliminary injunction. Go ahead.

17 MS. PRELOGAR: Good morning, again, Your Honor.
18 Elizabeth Prelogar representing the plaintiffs Lindsay Hecox
19 and Jane Doe.

20 Our clients are two women who wish to continue to
21 participate in the school sports they love. They seek only a
22 return to the status quo in Idaho where women and girls who
23 are transgender are not categorically barred from
24 participating in school sports and where all women athletes in
25 the state can engage in sports on equal terms with boys and

1 men. We are likely to succeed on the merits of our equal
2 protection claim. Our clients will be irreparably harmed if
3 H.B. 500 remains in effect and the balance of the equities
4 weigh strongly in our clients' favor.

5 THE COURT: Let me just ask you a question there.
6 Based on what was just said, is it possible for your clients
7 to get a letter from a health care provider saying they're
8 female?

9 MS. PRELOGAR: Absolutely, Your Honor. Lindsay's
10 doctor would certainly certify that she's a woman, so I think
11 there would be no question of that. And if the State's
12 actually correct that H.B. 500 in fact permits women who are
13 transgender to compete in accordance with their doctor's
14 certification on that basis, then I think that -- I think
15 that's hard to square with the statute and what we know about
16 the legislature's intent. But if that in fact is the
17 interpretation that this Court adopts and that the State is
18 willing to agree to, we would be happy to consider, for
19 example, entering into a consent decree that makes the
20 authoritative interpretation of the statute and binds the
21 state throughout Idaho.

22 I think our concern, of course, is that the language
23 of the statute I think is hard to square with this new
24 interpretation. And, of course, because of the mechanisms in
25 H.B. 500 that are intended to give third parties the ability

1 here to challenge sex or to bring a cause of action, absent
2 that kind of binding authoritative interpretation from this
3 Court, we're concerned that the statute will in fact be
4 implemented and enforced in line with what we think is the
5 most natural reading of its text.

6 So it remains a concern for us in this case. So I
7 think if Your Honor agreed with the State's interpretation and
8 thought that the statute does not categorically bar women who
9 are transgender and would permit Lindsay to compete with her
10 doctor's note, which she could certainly get, then I think the
11 right result would be to enter the preliminary injunction,
12 grant that relief, make sure that the statute can't be
13 enforced with respect to the other parties under the cause of
14 action for the sex verification mechanism, and then move
15 forward from there. That would be our request of this Court.

16 But putting that interpretation to the side, if, in
17 fact, the State doesn't want to enter into a consent decree,
18 then I think what's clear is that H.B. 500 does discriminate
19 on the base of transgender status and sex, and so it triggers
20 higher scrutiny in this case. That means the burden's on the
21 State. It has to come forward and provide an exceedingly
22 persuasive justification for this law, and the State can't
23 meet its burden here.

24 This is a sweeping categorical ban on the
25 participation of girls who are transgender in school sports.

1 As Your Honor mentioned at the outset of the hearing, it's the
2 first of its kind in the nation. It's more restrictive than
3 the policies of any other state, all of which permit women who
4 are transgender to play under varying rules and policies.
5 It's more restrictive than the rules of the most elite
6 athletic regulatory bodies in the world -- the Olympics, World
7 Athletics -- all of which permit women who are transgender to
8 compete on women's teams under rules that require hormone
9 suppression.

10 And the Idaho legislature enacted this rule without
11 identifying a single problem with the existing policies in
12 Idaho that match those rules of the NCAA and the Olympics
13 regarding hormone suppression. And the State of Idaho enacted
14 with this law without citing a single piece of evidence that
15 ties the new statutory criteria to an asserted state interest;
16 that is, reproductive anatomy, genes, and endogenous hormone
17 levels. Idaho will not be able to satisfy higher scrutiny
18 here.

19 Meanwhile, absent a preliminary injunction, our
20 clients will be irreparably harmed. Lindsay faces a complete
21 ban on being able to play school sports at all, and Lindsay
22 and Jane and all women and girl athletes in this state now
23 have the threat of this verification dispute that's governing
24 their participation in school sports and is intended to
25 enforce the policy of exclusion.

1 On the other side of the balance, the State
2 identifies no harm that would occur from a return to the
3 status quo and the policies that existed in Idaho for over a
4 decade. And so we would urge the Court to grant a preliminary
5 injunction in this case.

6 And I want to focus on the preliminary issue and
7 identify to the Court the discrimination on the basis of
8 transgender status and sex that's inherent in this statute.
9 Because I think, again, the State's suggestion here that this
10 is just a normal rule of sex separation in sport completely
11 ignores how H.B. 500 changed the law in Idaho and the new
12 groups who are now being targeted and excluded and harmed by
13 this law.

14 As I mentioned before, the prior rules in Idaho
15 already had sex separation in sport. No one's challenged
16 those laws. We're seeking a return to them through a
17 preliminary injunction and a return to the status quo. So
18 there were already rules in place that said that boys can't
19 play on girls' teams. Again, at the collegiate level, that
20 was the NCAA rules. At the high school level, it was Rule 11
21 of the Idaho High School Activities Association. And it was
22 coupled with the rule permitting women who are transgender to
23 compete if they suppressed their endogenous hormones for a
24 year.

25 But what H.B. 500 does is it changes the rules

1 fundamentally. It creates this new categorical exclusion of
2 girls who are transgender, and it creates the new enforcement
3 mechanism of this sex verification dispute that exists now on
4 the face of this statute and singles out girls' teams for
5 worse and differential treatment.

6 And I think the idea or the State's suggestion that
7 this bill doesn't target individuals on the basis of
8 transgender status is inconsistent with the plain text because
9 if you look at the statute and you look at
10 Section 33-6203(3) -- so this is the sex verification
11 enforcement provision -- what the statute does is it lists
12 criteria to prove that you're a woman that are intentionally
13 drawn narrowly to exclude girls who are transgender. This is
14 the provision that sets forth those criteria: reproductive
15 anatomy, genes, and endogenous hormones. And it uses the word
16 "only"; that that's the only basis to prove eligibility to
17 participate on a woman's team. And those criteria are, of
18 course, entirely correlated with being a woman who's
19 transgender who would not be able to satisfy those criteria.
20 That's the whole purpose and reason that these new criteria
21 exist in the law.

22 I think it's also clear that if you look at the
23 legislative findings that specifically refer to women who are
24 transgender, this is legislative finding 11. And I'll want to
25 discuss it further when we talk about how the intermediate

1 scrutiny standard applies, but that expressly refers to girls
2 who are transgender. And if the State's objection here is
3 that the statute doesn't actually use that term, well, that's
4 inconsistent with governing security and Ninth Circuit
5 precedent that recognizes that when a class is targeted and
6 defined using criteria that focuses on conduct or that
7 correlates with the protected group, that it's reasonable to
8 infer that it is targeted at and aimed at that class.

9 And I'll just give you one example, Your Honor. The
10 Ninth Circuit in the *Latta v. Otter* case that we cited in our
11 brief considered an argument there in a ban on same-sex
12 marriage that didn't actually target people on the basis of
13 sexual orientation, because it didn't use that term. And the
14 Court rejected that and clearly recognized that that was the
15 group who was uniquely targeted by that law.

16 Or as the Supreme Court put it, a couple of decades
17 ago, a tax on wearing yarmulkes is a tax on Jews. And so too
18 here, H.B. 500 by defining biological sex in this way and
19 choosing these three criteria is targeting girls on the basis
20 of their transgender status. I think that conclusion follows
21 naturally from the text and from precedent.

22 And I think it's also appropriate to look at the
23 context and the history here. The whole purpose of H.B. 500
24 is to create this new categorical rule of exclusion; that the
25 sponsor said that that was what H.B. 500 was doing. It was

1 focused on making sure that girls who are transgender
2 categorically cannot play on women's teams. That was the sole
3 focus of the legislative debate on the bill. There was no
4 general talk about sex separation in sport or those prior
5 rules that boys can't play on girls' teams. This was all
6 about making sure that transgender girls can't play on girls'
7 teams.

8 And I think that's evident too from the context here
9 that Idaho legislature considered H.B. 500 at the same time as
10 it was considering two other bills that also target people on
11 the base of their transgender status. That's the birth
12 certificate bill and then a bill involving medical care.

13 So, you know, I think what this shows is that if you
14 look -- if you back up for a moment and you look at what was
15 happening in the legislature, what the purpose of the law is,
16 what the design and operation and intended effect is, this is
17 a bar -- this is a bill that targets and discriminates on the
18 basis of transgender status. And counsel for the State
19 acknowledged that in that letter from the attorney general to
20 the legislature informing the legislature of the
21 constitutional infirmities with this bill.

22 H.B. 500 also discriminates on the basis of sex and
23 the sex verification process. Your Honor, I think it's really
24 important to understand that this is a provision that only
25 applies to girls' teams, so I think counsel for the State

1 acknowledged that there would be no sex verification for
2 participants in boys' teams because, of course, there are no
3 restrictions on who can play on those teams. So sex
4 verification only comes into play with respect to players on
5 women's teams.

6 And what I think the State was saying was that any
7 person, man or woman, could be challenged if they seek to play
8 on a women's team. But I think that's wrong, Your Honor,
9 because there would be no reason for a boy who wants to play
10 on a girls' team to go through sex verification because he
11 wouldn't be saying he's a woman. He might have another claim,
12 like the plaintiff in the *Clark* case that those parties have
13 cited, the boy who wanted to play on the girls' volleyball
14 team. He might have an equal protection claim or another
15 legal argument that he should be entitled to play. But he
16 wouldn't be saying that he's a woman, so he would never go
17 through sex verification.

18 The only people who would go through sex verification
19 are women and girls who seek to play on women's teams. And
20 the only purpose of having sex verification is to basically
21 funnel girls in the state through the sex verification process
22 so that you can identify and isolate and then exclude girls
23 who are transgender.

24 And just one final point on this. I'll note that
25 every other state in the nation has a sex separation rule in

1 sport, but no other state has a sex verification mechanism.
2 It's simply not necessary for the general rule of sex
3 separation. It's only necessary for transgender exclusion.

4 So we know the statute discriminates on the basis of
5 transgender status and sex, and what that means is the state
6 bears the burden here. It has, under heightened scrutiny, the
7 obligation to come forward and show that this bill is
8 substantially related to an important government interest.

9 And, Your Honor, I don't think the State can carry
10 that burden here. The interest is important. They've said
11 the interest is ensuring the quality for women in sports and
12 redressing past discrimination. But the State cannot achieve
13 that interest by discriminating against women and girls now.
14 Those who are transgender and who are categorically excluded
15 and all women and girls now who are subject to sex
16 verification and have to go through this humiliating process
17 of providing information about their reproductive anatomy,
18 their genes, or their endogenous hormone levels.

19 And I think the key thing to recognize here, Your
20 Honor, is that those are the three statutory criteria. And
21 the State has provided no evidence that any of those three
22 criteria are actually tied to an asserted State interest in
23 protecting equality in sports. So it's true that there is a
24 performance advantage that boys have over girls generally in
25 sport, but there is no evidence, zero scientific evidence to

1 suggest that that performance advantage comes from
2 reproductive anatomy or that it's based on genes or based on
3 naturally occurring hormone levels.

4 And the State itself again acknowledged this in that
5 letter to the legislature when it pointed out to the
6 legislature when it was debating this bill that the
7 legislative findings actually didn't support any focus on
8 these particular criteria as tied to that concern about a
9 performance advantage. And the reason for that, Your Honor,
10 is because that performance advantage is explained by
11 circulating testosterone levels. There is a scientific
12 consensus on that. That is the key to understanding why men,
13 as a class, generally outperform women in sport.

14 And what's so notable about H.B. 500 and the way it
15 changes the law in Idaho is that was the prior rule in Idaho.
16 Women and girls who are transgender could play if they
17 suppressed their circulating testosterone and followed that
18 kind of suppression. Girls who are transgender generally have
19 around the same levels of testosterone as women who are not
20 transgender. That was the prior rule in Idaho. And what
21 H.B. 500 does is it turns away from that, and it expressly
22 precludes reliance on that one factor that does have some
23 correlation and relationship with the asserted State interest
24 in this case.

25 Now I want to respond directly to legislative

1 finding 11. This is the finding in the statute that expressly
2 refers to women and girls who are transgender. It's Idaho
3 code 33-6202(11). And what this does is it says that even
4 following hormone suppression, women and girls who are
5 transgender have -- and I'm going to quote here because the
6 legislature itself purported to be quoting from a study. The
7 quote is that they have an absolute advantage over women who
8 aren't transgender and, quote, "Will still likely have
9 performance benefits."

10 And the legislature there is citing a study. They
11 cite to *Lundberg*. The study is actually called WIIK. The
12 experts refer to it as WIIK, if you want to find it in the
13 record and --

14 THE COURT: W-I-C?

15 MS. PRELOGAR: W-I-I-K.

16 But I think the problem with the reliance on this
17 study as the only basis to make this conclusion is manifest,
18 and there are a couple of reasons for that. So one is the
19 quotes that the legislature attributed to this study were
20 actually removed by the authors of that study before it was
21 finalized. So the study came out in draft form. It was prior
22 to peer review. Those quotes appear in a prior version of the
23 study. But before the legislature acted in this case in March
24 of this year, the study was finalized, and all of that
25 language was removed, apparently in recognition by the authors

1 that the data and analysis of the study didn't actually
2 support those kind of sweeping conclusions and that they
3 couldn't be relied upon as such.

4 So I think from the outset, the legislature's
5 presumption here that there was data to support this idea that
6 even following hormone suppression there's an absolute
7 advantage for women and girls who are transgender is flawed
8 and relies on language and ideas that the lead authors of the
9 study that they were citing retreated from and recognized were
10 not supported.

11 If you actually look into that study, I think it
12 shows why you can't support those kinds of sweeping
13 statements. It was a study that was not performed on
14 athletes. It didn't measure athletic performance. And the
15 authors themselves recognized and stated that some of the
16 findings in the study could be attributed to things like
17 repeated performance of the exercise. So, basically, the
18 people that -- participants in the study did the exercises
19 multiple times and got better at the test over time.

20 I think that this is far too slender a reed to
21 justify a sweeping categorical ban on all women and girls who
22 are transgender given that the mountain of evidence on the
23 other side demonstrating that it's actually circulating
24 testosterone that is key to understanding the performance
25 disparity in sport.

1 And, Your Honor, I think it's appropriate to rely not
2 only on the science, although I think the science
3 dispositively weighs in our favor, but I think it's also
4 important to look at real-world experience here. So every
5 other state in the nation permits women and girls who are
6 transgender to participate under varying rules. And as I
7 mentioned, the Olympics, World Athletics, the most elite
8 athletic regulatory bodies in the world have made the same --
9 have drawn the same conclusion; that there is fair play if
10 women and girls suppress their testosterone.

11 And if you look at the experience under those other
12 policies, there is no indication of any kind of substantial
13 dominance or displacement of women and girls who are
14 transgender over those who are not. No woman who's
15 transgender has ever even qualified for the Olympics. And the
16 State and the proposed intervenors and the United States have
17 scoured the country, and they've come up with a grand total of
18 four women athletes who are transgender that they cite to who
19 experienced some success in school sports. Two of those women
20 competed at the college level. They've now graduated. Two
21 other women completed at the high school level. They also
22 just graduated. And what's notable is all four of those women
23 were defeated at times by girls who are not transgender.

24 So I think, again, the suggestion here that there was
25 some kind of problem to address or some indication that there

1 would be substantial displacement doesn't comport with the
2 reality of the on-the-ground experience in other
3 jurisdictions.

4 And it's also out of touch with the reality in Idaho
5 because, of course, as I mentioned, the prior rules in Idaho
6 permitted girls who are transgender to compete. Those rules
7 were on the book for over a decade, and the Idaho legislature
8 heard no evidence that there had been any problem with those
9 rules or that they had created the kind of concerns that would
10 animate this type of law.

11 And just the final thing I would note, Your Honor, is
12 the sweep of this law, the breadth of it. Because this is a
13 categorical ban. It applies at all level of schooling from
14 kindergarten to college. It applies at all level of sport
15 club, intramural. Any school sports in Idaho are covered.
16 And it applies to all girls who are transgender, no matter
17 their individual circumstances. It would sweep in, for
18 example, a girl who's transgender and has used puberty
19 blockers so she's never gone through her endogenous puberty,
20 and she's never experienced elevated levels of testosterone
21 that would be different from a girl who's not transgender.

22 This law has incredible breadth, and I think this
23 kind of categorical ban, when you're thinking about state
24 interest in probing here, our likelihood of success on the
25 merits cannot be justified as substantially related based on

1 the criteria that the legislature was using.

2 I want to respond as well to the reliance on the
3 *Clark* case. Both the State and the United States feature this
4 *Clark* case from the Ninth Circuit as a central tenet of their
5 argument, and I think, actually, that reliance is wholly
6 misplaced and that looking at the analysis in *Clark* actually
7 fortifies our claims of an equal protection violation here.

8 So in *Clark* that was a rule of general sex separation
9 in sport. A boy wanted to play on the girls' volleyball team
10 because there was no boys' volleyball team, and he raised a
11 equal protection challenge. The Ninth Circuit rejected that
12 challenge, and in doing so, it cited three considerations.
13 The first one was that there was a stipulation in the *Clark*
14 case that there was a performance advantage that men had over
15 women and that if they were permitted to play on women's
16 teams, they would substantially displace women and there would
17 be no fair opportunity for girls.

18 The second consideration that the *Clark* case cited
19 was that there had been historic discrimination against women
20 in sport that needed to be redressed. And the third
21 consideration was that there was overall equality of
22 opportunity for men in the state because they can play on
23 boys' teams. And there were other outlets, so they weren't
24 wholly barred just by virtue of not being able to play on the
25 girls' volleyball team.

1 And I think it's significant to look at the analysis
2 in that case, Your Honor, because I think here all of the
3 considerations cut in the opposite direction. So first with
4 that stipulated fact of substantial displacement and
5 performance advantage, as I just reviewed, I think here that
6 the science shows that that was due to circulating
7 testosterone. And here what H.B. 500 does is it eliminates
8 the reliance on circulating testosterone and actually says
9 that has to be wholly excluded.

10 And then with respect to the concern about historic
11 discrimination, well, here the answer to that just cannot
12 possibly be that what you should do is discriminate further
13 against women in sport. And that's exactly what H.B. 500
14 does. It discriminates against Lindsay and all women and
15 girls who are transgender by saying that they are cut out from
16 opportunities to participate in school sport at all. And it
17 discriminates against all women and girls in the state by
18 burdening them now with a sex verification process and
19 conditioning their participation in athletics on potential
20 compliance with anyone who disputes their sex.

21 And then, finally, with respect to the overall
22 equality of opportunity point, here, of course, if women and
23 girls who are transgender are barred from playing school
24 sports, they won't have any opportunity at all. They'll be
25 completely excluded from this athletic opportunity that's so

1 important for so many people in this state. So I think the
2 overall equality concern cut in exactly the opposite
3 direction.

4 I'd like to turn to the harms warranting preliminary
5 injunction in this case. And I think they're apparent, and I
6 think they also relate to some of the standing arguments that
7 we were discussing before. But I'll just briefly review them
8 for the Court.

9 For Lindsay, she'll be precluded from playing school
10 sports at all, and that was the design and the purpose and the
11 effect of this law. The sponsors said the whole reason to
12 have H.B. 500, the whole reason the legislature acted to
13 depart from the ordinary rule of sex separation in sport was
14 to make sure that girls who are transgender cannot play. So
15 that is the intended effect, and that is the irreparable harm
16 that Lindsay faces.

17 Without a preliminary injunction, she won't be able
18 to play school sports this fall or spring. She'll lose
19 important eligibility time under the NCAA rules, and it will
20 all be due to her transgender status.

21 Now, there have been some suggestions by all of the
22 counsel lined up on the other side that this isn't actually a
23 bar because she could just be required to play on the men's
24 team. And I want to focus on this, Your Honor, because I
25 think it's a really important point. That is not an option

1 for Lindsay or for women and girls who are transgender. She's
2 not a man, and it would run counter to her treatment for
3 gender dysphoria to force her into that space and limit her
4 opportunities to playing only on that team. It would be
5 painful and humiliating. It would be like hanging a sign
6 around her neck that she's not a woman and will never qualify
7 as one. And it could very potentially subject her to the risk
8 of harassment and further discrimination.

9 And I think the impetus behind this idea or this
10 argument, the logical conclusion that it would turn to is that
11 there just can't be a category of discrimination against
12 transgender people because the answer would always be that
13 they should just be required to act as though they're not
14 transgender and they should just be forced into spaces that
15 are inconsistent with their gender identity.

16 But that is not the law. The Ninth Circuit recently
17 rejected those kinds of arguments in the *Parents for Privacy*
18 *v. Barr* case. Those arguments I think are inconsistent with
19 the Supreme Court's decision in the *Bostock* case, where the
20 same claim could have been made that the woman who was
21 transgender could have avoided being fired from her job if
22 only she acted as a man who presented as such at work. That
23 is not the law. This is a class that is protected, and the
24 answer to discrimination against people who are transgender is
25 not to say that they should simply act as though they're not.

1 In addition to the harms that Lindsay faces, now Jane
2 and Lindsay and all the women and girls in Idaho are faced
3 with the prospect of this sex verification scheme that, again,
4 singles out women's teams for a new and different set of
5 rules, and for different and worse treatment than men and
6 boys' teams. And that itself is an equal protection injury
7 that courts have recognized constitutes irreparable harm for
8 purposes of a preliminary injunction. That kind of unequal
9 treatment under the law stands in and of itself as a basis to
10 recognize that there is an irreparable equal protection injury
11 at stake that ought to be addressed through injunctive relief.

12 On the other side of the equation, a return to the
13 status quo, which would be the rule of sex separation in
14 sport, along with the rule of inclusion for women who are
15 transgender, if they have suppressed their circulating
16 testosterone, the state identifies no harms on the other side
17 that would come from that return.

18 The only claimed interest here is that this would
19 harm women who aren't transgender. And, you know, I think at
20 the outset it's important to recognize that women in that
21 position are not facing a categorical exclusion. So even if
22 there were a cognizable interest there -- and I don't think
23 there is -- you would have to consider that the difference in
24 treatment of potentially having to play with girls who are
25 transgender but getting to play school sports versus being

1 categorically barred from school sports altogether, which is
2 what Lindsay faces.

3 But in any event, it's not a cognizable interest.
4 The idea that women who are not transgender shouldn't have to
5 play with those who are rests on this idea I think that there
6 would be some kind of unequal aspect of that competition that
7 is based on transgender status. And as I just explained, the
8 science doesn't support that. Rules like the prior Idaho rule
9 that focused on circulating testosterone were expressly
10 designed to ensure that equal playing field. That's why the
11 Olympics permits women to play in that situation and why
12 Lindsay could qualify to play on a women's Olympics team, but
13 she can't even qualify to play sports at any level in Idaho.

14 So I think the suggestion that there's some kind of
15 unfair advantage is misplaced and out of touch with the
16 science. And, instead, I think what it reflects is that if a
17 woman who's transgender works hard and tries hard and throws
18 herself into it and experiences some success that it is not
19 correct to attribute that to her transgender status as opposed
20 to her hard work and her determination and her drive, just
21 like any other athlete in the state.

22 So I think what that means is in the end, there is no
23 harm on the other side and no interest here. This isn't a law
24 that pits some group of women against another group of women.
25 This is a law that harms all women in the state, all women now

1 who are subject to this differential treatment in the sex
2 verification process, and, of course, particularly women and
3 girls who are transgender and are now singled out for the
4 categorical exclusion.

5 I think H.B. 500 rests on stereotype and not on
6 science. It rests on the stereotype -- the harmful stereotype
7 that there is something different and threatening about girls
8 who are transgender; that they are forever physically superior
9 to women who are not transgender. It rests on the concept
10 that women who are not transgender need protection from girls
11 who are, and that girls who are transgender need and deserve
12 no protection at all. I think that betrays the premise and
13 the promise of equal protection and that the balance of
14 equities tip sharply in our clients' favor.

15 I'd be happy to answer any questions you have, Your
16 Honor, or I'll reserve time for rebuttal.

17 THE COURT: I only have one question, and it has
18 nothing to do with the merits of your argument itself but more
19 the timing of the situation. Do you know, through your
20 clients, when tryouts are for them?

21 MS. PRELOGAR: So my understanding, Your Honor, is
22 that there have been no announced delays to the fall sports
23 season at either BSU or Boise High School. In fact, the Idaho
24 High School Activities Association just released guidance
25 suggesting that the fall sports season will begin as planned

1 on August 10. And BSU, my understanding is that the girls who
2 are interested in running cross-country will begin practicing
3 all together in August and that the trials will actually occur
4 in September.

5 THE COURT: Do you know when in August?

6 MS. PRELOGAR: I do not know the specific date. I
7 believe it's later in August, something like the first week of
8 school, but I can try to get confirmation of that.

9 THE COURT: I'm just trying to decide. One of the
10 upsides to the whole COVID thing is that I haven't been
11 holding a whole lot of civil hearings, so I don't have a whole
12 lot of matters under advisement, which means that I should be
13 able to get this out quicker than normal. But I want to know
14 what my end dates are.

15 MS. PRELOGAR: Absolutely. Well, we appreciate that,
16 Your Honor, and we appreciate your setting this briefing
17 schedule and holding this hearing in time to try to get a
18 decision before the fall sports season so that our plaintiffs
19 won't suffer that harm.

20 THE COURT: Thank you.

21 Counsel.

22 MR. ZANZIG: I understand that we have an hour total
23 time for anyone in opposition to this motion. I want to let
24 the Court know that in advance I had a conversation with
25 Mr. Brooks, and we've agreed to split that hour equally,

1 30 minutes apiece.

2 THE COURT: And the federal government's not going to
3 argue?

4 MR. WUCETICH: The federal government's resting on
5 its statement of interest.

6 THE COURT: Thank you.

7 Let me state, before you start, I want to commend you
8 all to sticking to your time. I always hate it when I have to
9 say time's up.

10 MR. ZANZIG: I'll try to keep that in mind.

11 THE COURT: That wasn't a shot across the bow.

12 MR. ZANZIG: This is really a case about who decides
13 elected officials or the Courts. And it turns really on a
14 policy choice, not a legal requirement. There's strong
15 feelings on both sides of this issue, but the issue really is,
16 does the constitution require that a state give special
17 protection to transgender girls if it wants to make rules
18 based on biological differences to protect opportunities for
19 biological females in sports. The United States government
20 agrees with us that the constitution does not require that.
21 Settled Ninth Circuit precedent and biological science say,
22 no, this is a perfectly valid regulation.

23 If we had to -- if the constitution said, If you want
24 to create some sort of benefit for females, you need to also
25 make exceptions and protect other disadvantaged groups, then

1 all affirmative action programs would be violating the equal
2 protection clause left and right because no program can
3 protect every disadvantaged group. You've got to make a
4 policy choice if you're the legislature. And reasonable minds
5 can differ on that policy. Some might feel that because of
6 the disadvantages that transgender girls have suffered that we
7 ought to make that exception for them and make them available
8 to play in female sports because they're going to feel
9 comfortable there.

10 On the other side of the issue, our legislature has
11 decided, no, we think that it's so important for biological
12 females that they have their own space and that they have an
13 equal playing field that we don't want to make that special
14 exception.

15 We would like the Court to deny the motion for a
16 preliminary injunction for a number of reasons, beginning with
17 the reasons we already talked about in the motion to dismiss.
18 And I'm not going to belabor those issues, but I do want to
19 point out that Supreme Court precedent in the *Lujan* case makes
20 clear that a plaintiffs' burden to establish standing is much
21 higher if the plaintiff wants an injunction. It's not -- it's
22 not anymore that we just look at the pleadings and any
23 allegations, go. They've got the burden of proof to prove
24 that they have standing. And for all the reasons we talked
25 about already, I submit, Your Honor, that you will not find

1 any evidence to support the notion that any one of the
2 defendants is about to cause any harm to either plaintiff.

3 I'd also like to just point out that even if the
4 Court got to the merits here and wanted to consider the motion
5 for preliminary injunction, it would have to, at the outset,
6 recognize that it can't grant the relief that's been requested
7 here because it's relief that's available only under a facial
8 challenge. And as we've argued, this would not be an
9 appropriate facial challenge.

10 The motion should also be denied because the
11 plaintiffs can't establish a likelihood of success on the
12 merits. The only claim that's at issue here is the equal
13 protection. They have asserted other claims in their
14 complaint, but those are the basis of this motion.

15 We agree with the United States that the Ninth
16 Circuit decisions in the *Clark* cases pretty much resolves this
17 issue. It says it's okay to have separate sports teams for
18 males and females because it's based on really biological
19 differences. House Bill 500 is no different. It's based on
20 biology. That alone should resolve this.

21 But the *Clark* case is important for other reasons
22 too, because even if we want to examine this, *Clark* makes
23 clear that a rule, like House Bill 500 puts in place,
24 satisfies heightened scrutiny. So even if we have to satisfy
25 heightened scrutiny, because, in some ways, this law does

1 treat males and females differently, *Clark* says we do. The
2 plaintiffs essentially concede, as *Clark* held, that we have an
3 important government interest in providing opportunities for
4 females in sport. That's -- that's not really at issue.

5 The only issue that the plaintiffs take with House
6 Bill 500 is they say there's not a substantial relationship
7 between what your law says and that goal. They quibble with
8 whether it's some sort of perfect match because maybe you
9 could have a statute that was based not just on sex
10 differentiation, but you could look at other factors to
11 separate people in sports, by weight, by other abilities. But
12 *Clark* makes clear that that's not required. The equal
13 protection clause doesn't say you've got to have a perfect
14 match. *Clark* says it's just got to be a reasonable
15 relationship. And if we're talking about sports and
16 opportunities for females in sports, it is perfectly valid and
17 substantially related to draw the line between the sexes. And
18 that's what House Bill 500 does.

19 Even if, though, we didn't have *Clark* already having
20 resolved that issue, and even if we had to start parsing the
21 way we've separated out these two groups and meet some higher
22 standard than heightened scrutiny, we would. The science
23 supports the rule that the Idaho legislature put in place.

24 Now, there was some criticism of the legislative
25 findings saying that that article that was cited in the

1 legislative findings was altered a little bit during peer
2 review before it was published ultimately, the suggestion
3 being that there's no scientific evidence to support the
4 notion that we have no way of guaranteeing that we can equal
5 the playing field between men and women simply through some
6 hormone therapy.

7 That is false. There is no scientific consensus, as
8 was suggested, that somehow by administering hormone therapy
9 to a biological male we can even them out and take away all of
10 the advantages. That's just not true. We've submitted the
11 declaration of a sports science expert, Professor Gregory
12 Brown, and he went through a painstaking process of reviewing
13 all types of literature. And he came to the conclusion that
14 the science says that, at least now, for the treatments that
15 we have available, that there is no way for these treatments
16 to even that playing field. You cannot take away all of the
17 physical advantaging a biological male has through hormone
18 therapy.

19 And, again, he does even cite to the WIJK study that
20 was mentioned. Even after it was revised, it still supports
21 the notion that males retain an advantage after they have
22 undergone this therapy.

23 If that weren't enough, the article that the
24 plaintiffs' own expert relied on, Dr. Safer, he cites an
25 article, Handelsman article, in paragraph 25 of his original

1 declaration. And as we pointed out in our brief, if you read
2 that article, it says that, yes, hormone therapy can reduce
3 some advantages, but that there is an enduring advantage that
4 a biological male retains that can't be affected by that kind
5 of therapy.

6 For example -- and this is also something that
7 Professor Brown talks about -- one thing that's really
8 important in sports is bone density, because stress fractures
9 are pretty common in sports. Biological males have a bone
10 density advantage that isn't altered in any way by taking
11 hormone therapy. Hormone therapy can reduce to some extent
12 muscle mass, but even there, as Professor Brown says in his
13 declaration, it doesn't eliminate that advantage.

14 What science does is it confirms what we've known for
15 a long time: Biological males have physical advantages that
16 give them an advantage over biological females in athletic
17 events. And House Bill 500 simply recognizes that scientific
18 fact and decided to make a policy choice to use that as the
19 basis for drawing the line between biological females and
20 biological males.

21 The other thing that was suggested -- well, let's
22 look at the real world. And there are only a few examples
23 that we've pointed out where some of these transgender female
24 athletes have really performed well.

25 It's pretty amazing when you look at some of the

1 circumstances when someone like Cece Telfer can go from no
2 better than ranked 200th in the country as a man and then
3 transitions and for her final year in college competes and
4 wins the NCAA title. That -- that, in and of itself, is a
5 perfect example of how a year's worth of hormone therapy
6 didn't even the playing field there. If it really evened the
7 playing field, then Cece Telfer should have remained at about
8 200th in the country, not winning NCAA titles.

9 Plaintiffs argue that House Bill 500 is not about
10 protecting females in sports; it's really just some bad animus
11 against transgender persons. But that doesn't hold up to
12 simple analysis.

13 If what this really were were a statute that was
14 based on false stereotypes about not wanting to be around
15 transgender people, then the legislature would have written a
16 statute that said, We're going to exclude all transgender
17 students from sports. It didn't do that. In fact, if you're
18 a transgender boy or man, the statute allows you to play
19 wherever you want. You can play on the female teams; you can
20 play on the male teams.

21 So this isn't about some nasty animus against
22 transgender girls and women. What it is is a decision that
23 the legislature made and had the opportunity to make without
24 violating the constitution that they were drawing the line at
25 biology, and they weren't going to make a special exception

1 for transgender girls and women to allow them to compete
2 because they didn't think that would be fair to the biological
3 women.

4 The law aligns perfectly with biology. It's not
5 based on gender identity in any way. And the equal protection
6 clause doesn't require a state to make special exceptions
7 based on gender identity.

8 I'm just briefly going to touch on the other factors
9 that the plaintiffs would have to prove in order to get an
10 injunction. The balance of hardships and public interests are
11 closely related. The intervenors here have demonstrated that
12 they've got a strong interest. They're members of our public.
13 They've got a strong interest in the protection this statute
14 provides. I'm not going to try to describe everything for
15 them because their counsel's going to speak. But I think it's
16 important to recognize that there's more than one side to this
17 story when we look at the balance of hardships and public
18 interest.

19 And the State itself has important interests at stake
20 that we shouldn't just throw under the rug. Anytime a court
21 enjoins enforcement of a state law, the state suffers
22 irreparable harm. That's been held over time and again by the
23 United States Supreme Court.

24 In addition, the State of Idaho has an interest in
25 maintaining the integrity of sports for biological females.

1 That was the purpose of the law here. That's what they're
2 trying to protect. And it's fine for them to draw a line at
3 sex. They don't have to parse it further than that. This is
4 all about a policy choice, not a legal choice.

5 With respect to irreparable harm, Jane Doe cannot
6 establish that because even in the unlikely event of a
7 challenge, she can simply refer to the form that's already on
8 file establishing that she is a female, no harm whatsoever.

9 Lindsay Hecox might suffer some future harm if she
10 were challenged and if she couldn't verify her sex through one
11 of the statutory ways, but we don't know if that's going to
12 happen. But even if it did and she were unable to satisfy the
13 statute, she still got some opportunities to play in sport. I
14 understand she -- that's not her preferred option, and I
15 understand the arguments that counsel is making that she would
16 much prefer to compete on the women's team. But we haven't
17 said you can't play anywhere. We're not just saying
18 transgender people, you're not welcome.

19 On the other side of the equation, people like the
20 intervenors, other Idaho female sports participants would be
21 potentially subject to harm in the form of competing against a
22 biological male who's a transgender girl now and has a
23 physical advantage. And given all of that, I don't think you
24 can say that the balance of these factors weighs heavily in
25 favor of the plaintiffs. I think it's pretty even when we

1 look at it.

2 So for all those reasons, the Court should deny the
3 motion for preliminary injunction. And I'm happy to answer
4 any questions.

5 THE COURT: It's just the same question. If I have a
6 decision out by August 10, is that going to affect BSU in any
7 way? Do you know?

8 MR. ZANZIG: I'm being told no.

9 THE COURT: Okay. Mr. Brooks. Be sure to take your
10 glasses with you.

11 MR. BROOKS: Thank you.

12 THE COURT: Sorry. I shouldn't have said that.

13 MR. BROOKS: Well, I hope you've had the experience
14 yourself.

15 THE COURT: Oh, I have.

16 MR. BROOKS: Your Honor, I'd like to start, if I may,
17 with a little plain speech. The Fairness in Women's Sports
18 Act discriminates based on sex. There are no bones about it.
19 There are no apologies. There are not dodges. That's what it
20 does: It divides students into teams based on sex. And it
21 is, therefore, subject to some level of heightened
22 intermediate equal protection scrutiny. The *Clark* court not
23 very helpfully referred to a standard, quote, "somewhere in
24 between rational basis and straight scrutiny."

25 In the *Craig v. Borne* case, the Supreme Court was a

1 little more helpful in what sometimes is called the near-beer
2 case. In there they said to stand up against an equal
3 protection challenge, classifications by gender, quote -- they
4 said gender; they meant sex in that case -- quote, "Must serve
5 important governmental objectives and must be substantially
6 related to achievement of those objectives." So important
7 objectives substantially related.

8 And, Your Honor, the Fairness in Women's Sports Act
9 passes that intermediate scrutiny, that in-between scrutiny,
10 with flying colors. And, indeed, the plaintiffs admit on
11 page 12 of their reply, plaintiffs do not challenge that
12 separation, referring to the male/female separation.

13 So why do I say that the answer is so clear? Why
14 don't the plaintiffs challenge that? Because courts are not
15 shy to overturn laws that perpetuate or enforce traditional
16 sex roles, and yet they have emphatically not done so when it
17 comes to separation of sports. Courts are no slaves in this
18 country to stereotypes in area.

19 So sex division in athletics -- and this is very
20 important, I think, Your Honor, for the whole analysis in this
21 case to bear in mind that sex division in athletics exists.
22 And it's permitted under our equal protection law for a
23 reason. But what is the interest? The Ninth Circuit has
24 said, as I mentioned earlier, that there's no question that
25 promoting equal athletic opportunity as between the sexes is

1 a, quote, "important governmental objective." And that's, as
2 I said, the whole driving logic of Title IX. So that's the
3 interest.

4 How is division by sex substantially related to that?
5 Well, there's been a fair amount of discussion. I'd refer you
6 to pages 10 and 11 of our briefs, and that is the *Clark* court
7 itself said and cited the Supreme Court decision. There's no
8 question that the Supreme Court allows for these average real
9 differences between the sexes to be used as a proxy for
10 athletic capabilities. And they said that their record makes
11 clear that due to average physiological differences, males
12 would displace females to a substantial extent if they were
13 allowed to compete.

14 Well, counsel pointed out -- to some extent their
15 record was stipulated, but their record is very clear here as
16 well. And there's been a fair amount said about circulating
17 hormone levels and what Professor Brown did or didn't say or
18 what the articles do or don't say. Because the reason for sex
19 separation is so important to Your Honor's analysis of this
20 case, I urge close attention to Professor Brown's report on
21 the court. That is, you will find there an extremely
22 carefully stated and well-documented explication of the
23 durable, the fundamentally unalterable difference in
24 physiological and, therefore, athletic capabilities between
25 the sexes. And to the extent counsel standing here have given

1 different characteristics -- characterizations of that, I'm
2 quite confident that your study of the report and of the
3 plaintiffs' experts on this topic will find that I'm
4 describing what he says accurately.

5 And the criteria that -- the criteria that the
6 legislature chose here -- as counsel for the State said, the
7 legislature chose that physiological, that biological line.
8 And the three criteria that they chose are very directly
9 linked to the fact of the biological maleness. They, you
10 know, did a reasonable job of picking criteria that are
11 tightly related to biological maleness. Indeed, reproductive
12 anatomy is definitionally related to the character of
13 maleness, and that's not a stereotype. And that's not old,
14 unenlightened 1980s law. That's biology. That doesn't
15 change. And Your Honor can refer to the more recent *Bauer*
16 case from the Fourth Circuit where they admitted that those
17 biological facts are still the facts.

18 With regard to Brown, it has been said, in
19 plaintiffs' briefs at least, that Brown opined that
20 circulating hormone levels are all that matters for athletic
21 performance. If you change the levels, it suggests they solve
22 the unfairness, and there's no problem anymore.

23 I need to say that that is an absolutely false
24 description of Dr. Brown's opinion and all of the science he
25 cites. He does say that circulating hormone levels drive body

1 changes in males during puberty, of course. Article after
2 article he cites has graphs and curves that show that as
3 circulating hormone levels go up, the body changes. This
4 happens to all of us males as we go through puberty. He
5 doesn't say and none of the articles that he cites say that
6 lowering circulating hormone levels unrings that bell or
7 reverses those bodily changes, makes you shorter, changes your
8 bone structure and strength, as counsel mentioned.

9 On the contrary, I would refer you particularly to
10 Section 3 of his report, where he said that administration of
11 cross-sex hormones -- and that includes these hormone
12 suppressors -- does not eliminate their performance advantage
13 over women or adolescent girls. That's what he says.

14 There's -- there was a brief mention in here, and
15 there's more in the papers, about the hypothetical case of a
16 male boy whose puberty is suppressed from day one, from before
17 it begins, so that he never goes through any of these puberty
18 changes. Your Honor, I would just point out there's almost
19 nothing about that in the record. Certainly neither plaintiff
20 claims that situation is utterly speculative and concerns, I
21 believe, facts that are not in the least before this Court.

22 So having said that, let me ask what is Hecox's
23 theory? What is plaintiffs' theory? What is their request?
24 And there's been so much talk and so many pages you would
25 think that's not a question we should have to ask, but we do.

1 And that is because, Your Honor, there are two sharply
2 inconsistent theories in plaintiffs' papers and arguments that
3 gets swapped back and forth faster than the eye can follow.
4 I'd like to try to unpack that.

5 One I will call the categorical attack that claims
6 that excluding males who identify as girls or women from
7 female athletics violates equal protection, period. And then
8 there's the individualized attack that says it's unreasonable
9 to exclude girls who claim a transgender identity from female
10 sports if they have eliminated that male physiological
11 advantage somehow, if that were possible.

12 So which theory are they pursuing? We're sort of
13 left to guess. Let's follow both of those because neither of
14 them works.

15 First, the categorical attack that participation
16 simply must be based on claimed gender identity without regard
17 to physiological advantage and without regard to hormones.

18 Plaintiffs certainly do advance this theory.
19 Ms. Prelogar said in her argument that the law cannot be
20 applied against any girl who is transgender. That follows
21 what they did in their briefs and their preliminary injunction
22 memorandum. On page 14 they say only transgender students are
23 categorically barred from participation on athletic teams.
24 This constitutes discrimination based on gender identity.
25 And, importantly, the injunction they request doesn't draw any

1 lines about hormone suppression, physiological capabilities,
2 circulating testosterone, none of that.

3 So if the categorical attack is what they're asking
4 this Court to accept, then, Your Honor, I think it's important
5 to realize that all that's been written and all that's been
6 said. And it's a lot about hormone suppression and
7 circulating testosterone levels are utterly irrelevant to
8 their legal attack. It's just camouflage because they say
9 that all must be allowed to participate in women's and girls'
10 sports based on claimed gender identity, whether or not
11 there's been any medical intervention that would reduce
12 physiological advantage.

13 And, of course, that absolute logic extends to all
14 sports. We're talking about track where people don't collide
15 with each other, but that logic would extend to all sports
16 where obviously perhaps even more dramatic implications of the
17 height, weight, and body strength and bone density advantages
18 of a male body.

19 The legal implication of the categorical attack is,
20 if anything, even more surprising when you stop and think
21 about it, Your Honor, because what the plaintiffs are asking
22 this Court to do is to order discrimination based solely on
23 gender identity. Let me prove that. Here's the scenario we
24 have. The registration desk later next month of -- well,
25 let's take it to a high school. We have a registration desk

1 for high school girls' basketball, and two individuals with
2 male bodies, male chromosomes step up to that desk and say, "I
3 want to play on the girls' team." One of them says, "I have a
4 female gender identity." And according to the categorical
5 attack, the answer has to be, "Well, come on in. You're
6 likely to be a star." And the other says, "I have a male
7 gender identity. I'm not good enough to make the boys' team,
8 but I want to play, and I think I'm good enough for the girls'
9 team." Well, the answer to that individual would be no.

10 So they're asking you to order that the male-bodied
11 individual with a female gender identity can go onto the
12 girls' team and the male-bodied individual with a male gender
13 identity may not. That's discrimination based on literally
14 nothing except gender identity. That's unprecedented. And I
15 would point out, as well, that equal protection law never --
16 it sometimes prohibits; it never requires discrimination based
17 on any category. And separation based on gender identity is a
18 separation that is entirely unhinged from the whole physical
19 and legal justification for the existence of that separate
20 girls' team in the first place.

21 Let's change tacks to the individualized attack, and
22 that tack has -- the individualized attack, the -- well, what
23 about the person who's taken hormones? What about the NCAA
24 rules? What about, what about. That has no connection at all
25 with the injunction that's requested, so it's a little bit

1 different to pin down its profiles. But plaintiffs do advance
2 this theory. They object in their preliminary injunction
3 memorandum at page 18 that "Many women and girls who are
4 transgender do not have circulating hormone levels of typical
5 transgender men." And they have much discussion about that.
6 As I've said, the science suggests that it wouldn't really
7 matter, but they're making this attack you need to make
8 individualized evaluations.

9 Their logic appears to be that it's unfair or
10 unreasonable to exclude from female sports males who don't
11 have a physiological advantage. They would say that some
12 individuals with similar athletic capabilities are allowed
13 onto girls' competition -- that is females -- and other
14 individuals who they would contend have similar physiological
15 capabilities are not allowed, and that would be the males.
16 And they say that violates equal protection.

17 I've already said the factual premise of equal
18 capability and unringing the bell is false, but let's talk
19 about the legal implications of that argument. First, gender
20 identity is irrelevant -- is irrelevant to that argument. If
21 the argument is that exclusion from girls' teams based on sex
22 has no reasonable basis in individual cases, where the
23 individual has no objective advantage, well, that logic
24 applies with equal force for a short boy who has no hope on
25 the boys' varsity basketball team. And I can speak personally

1 from experience on that.

2 The implication is that you must sort by performance
3 and capability rather than by sex in order to satisfy equal
4 protection. And that, Your Honor, leads us to requiring an
5 individual-by-individual analysis of capability for which
6 hormone levels might be a proxy. And I believe, factually,
7 you'll find that they're not.

8 An individual inquiry or sort of permission in or out
9 of the women's team ultimately means mandatory co-ed athletics
10 divided only by ability and the depth of women's sports,
11 because the science -- the statistics cited by Dr. Brown in
12 his report make it clear that the numbers are such that you
13 would end up with tiered sports, with men dominating the top
14 tiers. You'd have a top tier -- and Dr. Brown cites a number
15 of sources, including published statistics from Duke Law
16 Professor Coleman that says that your top tier would be all
17 male. The second tier of competitors in a league would
18 probably be all male. You go down a ways, and finally you'd
19 get to the very good male athletes. And the nation's best
20 women would be on par and down a ways to the very athletic
21 girls and the male -- or the boys who are not so good.

22 And so to mandate case-by-case capability admission
23 into teams is to mandate co-ed sports. Well, the plaintiffs
24 would say, no, no, we're just talking about transgender
25 individuals. But that takes right back to discriminating

1 based strictly on gender identity without any physiological
2 basis, although physiological issues were the justification
3 for separation in the first place.

4 Your Honor, the law says no to all that. No
5 individual justify -- individual level tests or justification
6 for a statutory divide is required under equal protection of
7 the law. We've discussed that in our brief on page 18, and
8 I'll just cite specifically to the Supreme Court's *Lalli v.*
9 *Lalli* case, in which a plurality, although nobody disagreed on
10 this point, said few statutory classifications are entirely
11 free from the criticism that they sometimes produce
12 inequitable results. And that's consistent with the
13 requirement that the law need only be substantially related to
14 important governmental interests. The legislature doesn't
15 have to bat a thousand. Consistent with equal protection, the
16 laws can work on averages without violating the constitution.

17 And the plaintiffs' argument that transgender
18 individuals in competition are rare simply confirms that the
19 line that the law -- the statute the legislature has drawn is
20 indeed substantially related to their goal of avoiding
21 unfairness. Any other result would substantially deprive
22 girls and women of equal athletic opportunities and honors
23 which, of course, is precisely the opposite of the interests
24 announced in *Clark* and pursued by Title IX.

25 Let me respond to a few other things, Your Honor.

1 Let's talk for a moment about Plaintiff Doe. And the whole
2 challenge there is that only girls may be asked to provide
3 verification. Your Honor, that is rebranding a protection, a
4 distinctive right as discrimination. As we've seen from
5 *Clark*, the law is clear that you can have separate women's and
6 separate girls' sports for a class, females, who historically
7 had fewer opportunities and currently have biological
8 disadvantages.

9 Your Honor, where any opportunity is reserved for a
10 particular class, there has to be a means of confirming
11 eligibility for that class if it's challenged, and this is
12 just routine. If you have -- in many contexts in government
13 contracting, there are preferences or requirements for
14 women-owned businesses. Well, a business that seeks
15 preference through this women-owned business preference may
16 have to prove, to verify the sex of its owners. And
17 male-owned businesses can't qualify. They're not going to be
18 asked to prove the sex of their owners, because that's sex
19 discrimination.

20 And the *Bauer* case, which dealt with lower physical
21 fitness standards for FBI trainee women than men, in this day
22 and age, there might be some dispute about eligibility. And a
23 person claiming eligibility for that lower standard might have
24 to prove eligibility for that standard, which is to say sex.
25 And a person who doesn't claim eligibility for the benefit,

1 for the lower standard, won't be asked to prove sex. Is that
2 sex discrimination? It's not.

3 Your Honor, the plaintiffs cite no authority that
4 finds that where government provides a benefit or a protection
5 to a historically disadvantaged class requiring those who
6 claim eligibility to prove membership violates equal
7 protection because those who don't claim eligibility don't
8 have to prove anything. And that is all that goes on in this
9 statute. It is routine. It is inherent in the nature of any
10 effort to protect a class.

11 Let me speak to the issue of harm, Your Honor.
12 Because as counsel has indicated and to some extent deferred
13 to me on, the law addressed the situation affecting real women
14 with real harms. If the law is enjoined, it seems certain
15 that my clients will not face equal opportunities on the
16 track, on the court next season, as will be true of other
17 young women. I do call your attention to their declarations,
18 where they describe their experiences and the efforts they've
19 made and then gone head to head in their college athletic
20 experience against a male-bodied athlete running in female
21 cross track and pushed down in the rankings and witnessed a
22 teammate pushed off a victory podium by this male.

23 And while Eastwood has graduated, Hecox is here
24 declaring an intention to repeat exactly that scene here in
25 Idaho next year. That's why we're here. We're here because

1 it matters. We're not here because there won't be any impact
2 or because it doesn't matter.

3 Plaintiffs try to say there's no real harm or big
4 deal for three reasons. One, they say males who run women's
5 events based on gender identity can't necessarily beat all
6 women. Two, they say only a few transgender athletes want to
7 compete in female competitions, so, hey, it's not a big deal.
8 And, three, they submitted what is to me the very remarkable
9 declaration of Professor Mary Fry, who says it's not a big
10 deal because athletics isn't about winning. She says that
11 athletes who, quote, "emphasize winning" suffer an excessive,
12 quote, "ego orientation." She says that they are too focused
13 on the, quote, "trappings of individual success," close quote.
14 And she says those girls, those women are likely to suffer
15 from, quote, anxiety. She's basically saying, so you lost,
16 calm down.

17 Your Honor, winning isn't everything, and good
18 sportsmanship is an important part of the athletic experience.
19 But it's not okay if we have an athletic system that
20 guarantees that if you're born female, you're going to get
21 extra lessons in losing. The *McCormick* court in the Second
22 Circuit said we don't place great weight -- this is 370 F.3d
23 at 295 -- nor do we place great weight on the school
24 district's arguments that girls are simply not interested in
25 winning. And that, Your Honor, is essentially the argument

1 that we're getting back again from Dr. Fry.

2 It is certainly true that male-bodied athletes, at
3 least some, can't beat all girls or women. As you heard, Cece
4 Telfer could, having been 200-something in the male rankings.
5 But the fact that not all male-bodied athletes can beat all
6 girls or women is irrelevant. This is not a numbers game.
7 The *Clark* Court, again, said in its second decision in 1989,
8 if males are permitted to displace females, even to the extent
9 of one player, the goal of equal participation by females in
10 interscholastic athletics is set back. That's page 1193 in
11 that decision.

12 A quick word about *Bostock*, Your Honor. The *Bostock*
13 case dealt with a case where the question before the Court
14 was, is there discrimination based on sex in the context of
15 employment in which discrimination based on sex was illegal.
16 And they didn't conflate gender identity with sex, but they
17 parsed through gender identity and sexual orientation and said
18 the type of discrimination that's inflicted here required
19 consideration of sex, so there was discrimination based on
20 sex, which is illegal under Title VII.

21 Now, the question of is there discrimination based on
22 sex is not the question presented by this -- by this case. As
23 I said at the very beginning of my argument, the answer is
24 yes, and it's legal. So, Your Honor, once we bring that back
25 into focus, we realize that the important teaching of *Bostock*

1 is Justice Gorsuch's emphatic teaching about analyzing laws
2 based on their words and the specifics of that law. And, of
3 course, the *Bostock* case was about Title VII. It wasn't about
4 equal protection. It didn't declare any new categories of
5 protection. It had nothing to do with that. It said there's
6 discrimination based on sex here in employment, and that's
7 illegal.

8 And here, Your Honor, there's discrimination based
9 only on sex. And that's legal, and it's the plaintiffs that
10 are asking you to create a new form of discrimination in law,
11 which is required discrimination based on gender identity in
12 the way that I spelled out earlier. Your Honor, that's not
13 justified by any physiological consideration. That's not
14 justified by anything in this record, and it should not be
15 ordered.

16 And with that, Your Honor, I will stop, unless you
17 have any questions.

18 THE COURT: I do not. Thank you.

19 MR. BROOKS: Thank you, Your Honor.

20 MS. PRELOGAR: Your Honor, I have a few points that
21 I'd like to respond to in the claims that have been raised in
22 argument today.

23 The State now is defending H.B. 500 and is suggesting
24 that we're not likely to establish success on the merits of
25 our equal protection claim on the theory that there's very

1 good reason to categorically bar all women and girls who are
2 transgender from playing school sports. And I just want to
3 note at the outset the inconsistency with that position and
4 their claim that actually that's not what H.B. 500 does; that
5 it doesn't categorically bar women and girls who are
6 transgender, and that, therefore, their claim that we lack
7 standing in this case or for some reason the case is not ripe.

8 I think, actually, the State's acknowledgment here
9 helps to fortify and demonstrate that this is a law that draws
10 classifications and distinctions on the basis of transgender
11 status and sex, and that, therefore, triggers the State's
12 burden in this case to justify that law under heightened
13 scrutiny.

14 And, Your Honor, I think that is a critical point
15 here. It is the State's burden. Idaho is the actor that has
16 taken the action here of erecting this categorical ban and
17 drawing these classifications, and that means that we're in
18 the realm of heightened scrutiny where the State has to come
19 forward and show an exceedingly persuasive justification for
20 this law. So even if there were some relevant debate about
21 the science or even if there weren't total consensus on that
22 fact, that means the State loses and can't carry its burden.
23 Because if it's going to discriminate on these bases and it's
24 going to target women and girls who are transgender and force
25 them to undergo this rule of categorical exclusion, they have

1 to come forward and show that that rule and that law is
2 actually justified. And I would submit that they have not
3 made that showing here.

4 But I think, again turning to the science, there
5 really isn't a dispute about the key factor that explains the
6 performance advantage in sport. So the State has cited the
7 testimony or the declaration of their expert, Professor Brown,
8 and I think one of the things that is so notable -- he does,
9 in fact, rely on a substantial number of studies. But if you
10 look at them, those studies, again, are focused on and
11 reinforce the conclusion that circulating testosterone is the
12 key here; that it is the principal driver of explaining some
13 of these physiological differences that become apparent
14 between boys and girls starting in puberty; and that that is,
15 therefore, the key to understanding why you see the disparity
16 in sport.

17 And that, of course, is reflected in the rules again
18 of these elite athletic bodies, the International Olympics
19 Committee, World Athletics, that are expert in trying to
20 determine rules of fair play in sport and have recognized that
21 there can be a rule of transgender inclusion that is focused
22 on that metric, circulating testosterone.

23 So if you look at that declaration and you look in
24 particular at the underlying studies, there was a reference to
25 the Handelsman study. Those studies all confirm the

1 centrality of circulating testosterone in understanding these
2 physiological differences.

3 And I'd, of course, urge Your Honor as well to look
4 at the declaration of our expert, Dr. Safer, who submitted two
5 of them, one with our initial motion for a preliminary
6 injunction and one with our reply. And I think that Dr. Safer
7 well explains the science that underlies this and the
8 consensus on the role that circulating testosterone plays.

9 But if you look further at the studies that Dr. Brown
10 refers to, what you'll find is that none of them look at the
11 criteria in H.B. 500. None of them are establishing a causal
12 connection based on reproductive anatomy or genes or
13 endogenous hormone levels alone, separate and apart from
14 circulating testosterone.

15 So I think it's the State's burden to come forward
16 and show that based on the criteria and classifications in
17 this statute, that it can actually show the requisite
18 connection here, the substantial relationship. And there
19 isn't scientific evidence in that regard.

20 Now, the claim of the State and the proposed
21 intervenors is that, actually, hormone suppression doesn't
22 necessarily take care of things altogether because there is
23 some enduring advantage. The State brought up, for example,
24 bone density as something. And, you know, I want to say at
25 the outset that this argument ignores the sweep and the

1 breadth of H.B. 500, which applies to girls who are
2 transgender, who have never undergone their endogenous
3 puberty, and so who have never experienced those elevated
4 levels of testosterone that the State is now claiming can be
5 used to justify this law.

6 That class of women altogether wouldn't have any
7 scientific basis to assume that there is this kind of enduring
8 physiological difference. And I think the fact that H.B. 500
9 sweeps so broadly is evidence of what the intent was here. It
10 wasn't to try to tailor this rule to an idea of fair play in
11 sport. It was intended to try to target all girls and women
12 who are transgender in this state on that status alone and
13 make sure that they were excluded.

14 But just focusing for a moment on the group of women
15 and girls who are transgender who did undergo their endogenous
16 puberty, where there is now a claimed enduring advantage, I
17 think, again, the science doesn't bear this out. And I urge
18 the Court to look specifically at the rebuttable declaration
19 of Dr. Safer in this case.

20 Let's just focus on bone density in particular. The
21 State says that's entirely unaffected, but the science shows
22 otherwise. Paragraph 17 of Dr. Safer's rebuttal declaration
23 cites relevant evidence that, in fact, suppressing circulating
24 testosterone has dramatic effects on the body, including with
25 respect to bone density.

1 And as Dr. Safer further explains, even if there is
2 some physical or physiological traits that are not reversed,
3 there's no showing and no evidence to show that those traits
4 remain a competitive advantage in sport necessarily when they
5 are no longer accompanied by higher levels of circulating
6 testosterone.

7 So, again, thinking about things like bones or
8 height, there's not evidence or reason to conclude across the
9 board that that would necessarily be an advantage, and, in
10 fact, it could be a distinct disadvantage. For example, a
11 runner who has bigger bones might be heavier and weighted down
12 and not have the same level of testosterone to propel or power
13 the body. And this shows up in weightlifting as well, where
14 women who are transgender might be in a heavier weight class,
15 but they won't have the same bone and muscle ratio as women
16 who are not transgender in that same weight class.

17 So I think even taking the argument on its own terms,
18 there's no clear science to establish that that represents the
19 kind of enduring performance advantage in sport that could
20 justify a law of this -- of this category.

21 And, finally, even if there were some small residual
22 performance advantage -- and I don't think the State has shown
23 it here -- I think Your Honor would have to consider that in
24 the context of the wide variation that already exists in
25 sport. And this is wide variation, intrasex variation. Of

1 course, women have all different kinds of height and body
2 types and physiological traits. That is part of the nature of
3 sport and competition. I'll just give one example. Michael
4 Phelps, the Olympic swimmer, his wingspan is far larger than
5 the ordinary swimmer. He has double-jointed elbows, which
6 help him to propel himself in the water. His body produces
7 about half the lactic acid of an ordinary athlete, so he's
8 able to recover far more quickly.

9 And yet to say that something like that automatically
10 creates unfair competitive advantages in sport I think ignores
11 that there is widespread variation, intrasex variation, in
12 sport, and this would have to be considered and positioned in
13 that context. And then the question would become, is there
14 any reason to think that there is so much of a performance
15 advantage that there's just categorical unfairness and that
16 the right result here is just to totally bar women and girls
17 who are transgender from being able to compete? And I think
18 the answer to that is no. The State cannot carry its burden
19 in that regard.

20 And that doesn't mean to respond to a point from the
21 proposed intervenors that states have to necessarily sort by
22 performance capability or height or other measures. We are
23 not asking or directing that the State has to do any
24 particular regulation here. What we're doing is responding to
25 the lines the State itself decided to draw and the

1 distinctions and the classifications that the State itself
2 instituted here. That's what creates the relevant inquiry.
3 So this is not about trying to tie a State's hands and impose
4 some version of equality. This is about measuring a State by
5 its own actions and taking a look at the categories that the
6 State has decided to draw to determine whether those can be
7 justified and whether this discrimination on the basis of a
8 protected status can satisfy intermediate scrutiny.

9 And that's ultimately all we're asking here, is a
10 return to the status quo in this case to the rules that
11 governed school sport in Idaho for a decade, where boys were
12 not permitted to play on girls' teams but where there was
13 regulation on the basis of circulating testosterone that
14 permitted a measure of transgender inclusion.

15 I want to respond to the point that the proposed
16 intervenors made that sex verification is actually a benefit
17 here. This is clearly a harm, Your Honor. This is a
18 different set of rules for women's and girls' teams, an
19 additional burden, one that's humiliating, that will require
20 intrusive inquiries into things like reproductive anatomy and
21 genes and hormone levels that are naturally occurring that are
22 no part of any normal clearance process to play school sports.
23 The legislature chose to act to burden all women in order to
24 enforce this measure of transgender exclusion. I don't think
25 that you can flip it and actually characterize that as a

1 benefit.

2 And I think that reveals kind of the more fundamental
3 problem with the idea that there are harms on both sides here.
4 I think that that is a false dichotomy. As I explained, this
5 hinges on this idea that there's necessarily unfair
6 competition in school sports; that you have to separately keep
7 apart women who are transgender from women who are not; and
8 that there's some fundamental problem in permitting them to
9 play together.

10 There are so many women who are not transgender, Your
11 Honor, who have no opposition to permitting women who are
12 transgender to play on their teams. They have widespread
13 support for their teammates. And I think to suggest that this
14 is a law that takes women who are transgender and it's them
15 against everyone else is just categorically wrong and ignores
16 the realities and ignores the harms that occur to all women
17 from policies like this one.

18 And, finally, I want to respond to the point that
19 what we're seeking is some kind of special exception here. I
20 think that is not the case at all, and the suggestion that
21 what we're trying to do is ask the Court to discriminate on
22 the basis of gender identity itself, it gets things exactly
23 backward.

24 Under this kind of theory, there would be no such
25 thing as transgender discrimination because the

1 counterargument would always be made that if you credit that
2 and try to redress that harm, well, then, ultimately, you're
3 just discriminating against people because their gender
4 identity matches their sex aligned at birth. And that's not
5 the way this works; that's not the way the equal protection
6 clause functions. We are not seeking a special exception
7 here. We are seeking for this Court to validate the principle
8 of equal protection that says that when the State chooses to
9 act and it chooses to classify and it chooses to discriminate,
10 it has to carry its burden to justify that law.

11 The State says this is just a policy choice. And, of
12 course, the Idaho legislature has discretion to make policy
13 judgments within the bounds of the constitution. But it
14 exceeded these bounds here. We are likely to be able to show
15 that this law violates equal protection, our plaintiffs are
16 irreparably harmed, and the balance of the equities weighs in
17 our favor.

18 Because the Idaho legislature acted in an
19 unconstitutional manner, we respectfully request the issuance
20 of a preliminary injunction here. And if you have any other
21 questions, Your Honor, I'm, of course, happy to answer them.

22 THE COURT: No, I do not.

23 MS. PRELOGAR: Thank you, Your Honor.

24 THE COURT: Thank you.

25 Let me ask this question, just as maybe thinking out

1 loud. Do any of you think at this point that it is necessary
2 to have an evidentiary hearing on the preliminary injunction
3 issue? Or can I rely on the declarations that have already
4 been submitted?

5 MR. ZANZIG: Your Honor, we're comfortable with the
6 record as it stands.

7 THE COURT: Plaintiffs?

8 MS. PRELOGAR: We are as well, Your Honor.

9 MR. BROOKS: Yes, Your Honor.

10 THE COURT: Okay. That's how I would prefer to do
11 it, but I want to make sure we're all on the same page.

12 I am going to take all three of these motions under
13 advisement. I understand the urgency of the situation at
14 least in terms of the preliminary injunction. As I said
15 earlier, I'm quite confident that we can get a decision out by
16 August 10. I may only get it out on the preliminary
17 injunction, but my plan is to get it out on all three motions.
18 And we'll see how that goes.

19 I do want to commend everybody on their oral
20 arguments today as well as on the briefs that they have filed.
21 It certainly makes my task easier to have well-written
22 documents and well -- I was going to say well-oraled oral
23 arguments, but that's not the way to say it. So thank you. I
24 normally would go into recess now and come down and shake
25 everybody's hands, but COVID's preventing me from doing that.

1 So I won't do that. That doesn't mean I don't want to. But
2 unless anybody has something else that they've got, court is
3 in recess. Thank you very much.

4 (Proceedings concluded at 12:21 p.m., July 22, 2020.)

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T E

I, ANNE BOWLINE, a Registered Merit Reporter and Certified Realtime Reporter, do hereby certify that I reported by machine shorthand the proceedings contained herein on the aforementioned subject on the date herein set forth, and that the foregoing 127 pages constitute a full, true and correct transcript.

Dated this 29th day of July, 2020.

/s/ Anne Bowline

ANNE BOWLINE
Registered Merit Reporter
Certified Realtime Reporter

Richard Eppink (Bar No. 7503)
AMERICAN CIVIL LIBERTIES UNION
OF IDAHO FOUNDATION
P. O. Box 1897
Boise, ID 83701
United States
T: (208) 344-9750 ext. 1202
REppink@acluidaho.org

Elizabeth Prelogar*
COOLEY LLP
1299 Pennsylvania Avenue,
NW Suite 700
Washington D.C. 20004-2400
T: (202) 842-7800
F: (202) 842-7899
eprelogar@cooley.com

Gabriel Arkles*
James Esseks*
Chase Strangio*
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
125 Broad St.,
New York, NY 10004
T: (212) 549-2569
garkles@aclu.org
jesseks@aclu.org
cstrangio@aclu.org

Andrew Barr*
COOLEY LLP
380 Interlocken Crescent,
Ste. 900
Broomfield, CO 80021-8023
T: (720) 566-4000
F: (720) 566-4099
abarr@cooley.com

Kathleen Hartnett*
COOLEY LLP
101 California Street 5th Floor
San Francisco, CA 94111-5800
T: (415) 693-2000
F: (415) 693-2222
khartnett@cooley.com

Catherine West*
LEGAL VOICE
907 Pine Street, Unit 500
Seattle, WA 98101
T: (206) 682-9552
F: (206) 682-9556
cwest@legalvoice.org

* Admitted *Pro hac vice*

Attorneys for Plaintiffs

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO**

LINDSAY HECOX, et al.,

Plaintiffs,

v.

BRADLEY LITTLE, et al.,

Defendants.

No. 1:20-cv-184-CWD

**SUPPLEMENTAL DECLARATION
OF DEANNA ADKINS, MD, IN
SUPPORT OF PLAINTIFFS'
MOTION FOR PRELIMINARY
INJUNCTION**

I, Deanna Adkins, MD, declare as follows:

1. I have personal knowledge of the matters stated in this declaration.

2. As set forth in greater detail in my previously submitted declaration dated April 24, 2020, my background and credentials include the following: I served as the Fellowship Program Director of Pediatric Endocrinology at Duke University School of Medicine for fourteen years and am currently the Director of the Duke Center for Child and Adolescent Gender Care; I have treated approximately 500 transgender and intersex young people in my career. My CV is attached to my previously submitted declaration.

3. I reviewed the declaration of Stephen Levine, MD, dated June 4, 2020. Here, I respond to the central points raised in Dr. Levine's declaration. I do not specifically address each study or article cited by Dr. Levine, but instead explain the overall problems with some of the conclusions that he draws and provide data showing why such conclusions are in error. I reserve the right to supplement my opinions concerning Dr. Levine's opinions if necessary as the case proceeds.

“BIOLOGICAL SEX”

4. In his discussion of “the biological baseline of sex,” Dr. Levine provides no citations—with the exception of one citation to his own work—and oversimplifies the biological components of sex.

5. As I explained in paragraphs 42 through 44 of my previous declaration, sex-related characteristics include external genitalia, internal reproductive organs,

gender identity, chromosomes, and secondary sex characteristics. All of these characteristics have biological bases.

6. Dr. Levine claims that “The sex of a human individual at its core structures the individual’s biological reproductive capabilities—to produce ova and bear children as a mother, or to produce semen and beget children as a father.” (Levine Decl. ¶ 12.) But this is not how we define or think about sex as a matter of science of medicine. For example, many individuals are unable to produce ova or semen, but have other sex characteristics. I have been involved in designating sex for over one hundred infants and the medical standards look at multiple factors, among which reproductive capacity is just one, to determine sex assignments at birth.¹ If we designate sex incorrectly at birth, protocol is to update it once the person is old enough to articulate their gender identity and re-assign consistent with gender identity.

7. It also is not correct that in medicine we only look at whether an individual has 46-XX or 46-XY chromosomes to understand the biological components of sex. (Levine Decl. ¶12.) As the Endocrine Society guidelines explain, the terms “[b]iological sex, biological male or female . . . are imprecise and should be avoided.”² Generally speaking, “[t]hese terms refer to physical aspects of maleness

¹ Cools, M., Nordenström, A., Robeva, R. et al., Caring for individuals with a difference of sex development (DSD): a Consensus Statement. *Nat Rev Endocrinol* 14, 415–429 (2018).

² Hembree, Wiley C., et al., Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guideline, *J Clin Endocrinol Metab*, Vol. 102, Issue 11, 1 November 2017, 3869–3903.; Berenbaum S., et al., Effects on gender identity of prenatal androgens and genital appearance:

and femaleness [but] these may not be in line with each other (e.g., a person with XY chromosomes may have female-appearing genitalia).”³

TREATMENT PROTOCOLS FOR TRANSGENDER YOUTH

8. I am currently a provider to approximately 350 transgender youth.

Each patient is treated individually by a multi-disciplinary team.

9. Though Dr. Levine claims that the treatment protocols for transgender youth and adolescents recommended by the World Professional Association for Transgender Health (“WPATH”), the Endocrine Society, and the American Academy of Pediatrics (“AAP”) are not in the best interests of such patients, that is contrary to an overwhelming body of contemporary research that says the opposite as well as to the teachings of clinical practice, including mine.

Evidence from girls with congenital adrenal hyperplasia. *J Clin Endocrinol Metab* 2003;88(3):1102-6; Dittmann R, et al., Congenital adrenal hyperplasia. I: Gender-related behavior and attitudes in female patients and sisters. *Psychoneuroendocrinology* 1990;15(5-6):401-20; Cohen-Kettenis P. Gender change in 46,XY persons with 5alpha-reductase-2 deficiency and 17beta-hydroxysteroid dehydrogenase-3 deficiency. *Arch Sex Behav* 2005;34(4):399-410; Reiner W, Gearhart J. Discordant sexual identity in some genetic males with cloacal exstrophy assigned to female sex at birth. *N Engl J Med* 2004;350(4):333-41.

³ Wylie et al. (2017); Meyer-Bahlburg H. Gender identity outcome in female-raised 46,XY persons with penile agenesis, cloacal exstrophy of the bladder, or penile ablation. *Arch Sex Behav* 2005;34(4):423-38; Reiner W. Assignment of sex in neonates with ambiguous genitalia. *Curr Opin Pediatr* 1999;11(4):363-5; Byne W, Sekaer C. *The question of psychosexual neutrality at birth*. In Legato M, ed. *Principles of Gender Specific Medicine*. San Diego: Academic Press, 2004:155-66. Coates S, Wolfe S. Assessment of gender and sex in children in Noshpitz J, ed. *Handbook of Child and Adolescent Psychiatry: Clinical Assessment/Intervention*. New York: John Wiley and Sons; 2004:242-52; Cohen-Bendahan C, van de Beek C, Berenbaum S. Prenatal sex hormone effects on child and adult sex-typed behavior: methods and findings. *Neurosci Biobehav Rev* 2005;29(2):353-84.

10. WPATH is the leading association of medical and mental health professionals in the treatment of transgender individuals. The AAP is an association representing more than 67,000 pediatricians. The Endocrine Society is an organization representing more than 18,000 endocrinologists. WPATH and the Endocrine Society have published widely accepted standards of care for treating gender dysphoria, which are based on considerable scientific and medical research, and which have been endorsed by the AAP.

11. Dr. Levine critiques WPATH because it is “a voluntary membership organization” and “attendance at its biennial meetings has been open to trans individuals who are not licensed professionals.” (Levine ¶ 54.) This critique is misplaced, as an organization can be both an advocacy and a scientific organization, as is WPATH. This is not a new phenomenon in medicine. The American Diabetes Association, for example, is a professional association that both advocates for patients with diabetes and is a scientific organization. Rigorous papers are presented at the WPATH meetings and well-funded scientific research is reported on.

12. Dr. Levine’s critique also ignores the November 2017 Endocrine Society Guidelines on the treatment of gender-incongruent persons. This more recent treatment protocol mirrors the WPATH Standards of Care and recommends pubertal suppression and gender-affirming hormone therapy for adolescents and young adults who meet the clinical standards.⁴ The guidelines were developed

⁴ Wylie et al. (2017).

through rigorous scientific processes in which “followed the approach recommended by the Grading of Recommendations, Assessment, Development, and Evaluation group, an international group with expertise in the development and implementation of evidence-based guidelines.”⁵ The guidelines affirm that patients with gender dysphoria often must be treated with “a safe and effective hormone regimen that will (1) suppress endogenous sex hormone secretion determined by the person’s genetic/gonadal sex and (2) maintain sex hormone levels within the normal range for the person’s affirmed gender.”⁶

13. Dr. Levine critiques WPATH and its members claiming, “most current members of WPATH have little ongoing experience with the mentally ill.” (Levine Decl. ¶ 60.) In my clinic, as is recommended by the Endocrine Guidelines, every patient is treated by a multi-disciplinary team that includes a social worker, psychological, psychiatrist, and an endocrinologist. The providers are all well-trained faculty and clinicians at Duke with years of experience diagnosing and treating mental health conditions.

14. Dr. Levine’s only support for his critique of the AAP’s position on affirming gender identity in youth is an article by James Cantor in the Journal of Sex & Marital Therapy. Cantor’s article is his opinion and critique but relies on outdated evidence and misinformation about the benefits of gender affirming

⁵ *Id.*

⁶ *Id.*

treatment for children and adolescents.⁷ In any event, a lone critique of the medical standards that govern the profession is not a legitimate basis to attack well-researched, widely accepted medical protocols. By contrast, these protocols are being followed by thousands of medical providers to achieve life-saving ends for our patients.

15. Dr. Levine claims that “the use of puberty blockers for transgender children, [is] a recent phenomenon.” (Levine Decl. ¶ 83.) However, puberty blockers began to be used in transgender patients in 2004, which is not considered recent in medicine. We also have over thirty years of data on the impact of puberty blockers on children who undergo precocious puberty⁸ that we can apply to the transgender population. There is no evidence of short or long-term negative effects on patients who receive puberty blockers from the more than thirty years of data that we have. And for transgender youth (as compared to those treated for precocious puberty), the treatment is used for a much shorter period of time, in order to pause puberty before either initiating puberty with cross-sex hormones or resuming endogenous puberty. This medication is also used in adolescents and adults undergoing

⁷ Olson, K. R., Durwood, L., DeMeules, M., & McLaughlin, K. A. (2016). Mental health of transgender children who are supported in their identities. *Pediatrics*, 137(3). Durwood, L., McLaughlin, K. A., & Olson, K. R. (2017). Mental health and self-worth in socially transitioned transgender youth. *Journal of the American Academy of Child & Adolescent Psychiatry*, 56(2), 116-123.

⁸ Children with precocious puberty develop signs of puberty before the typically expected time. In some this can happen as early as 12 months of age and puberty blockers are used to pause puberty until the appropriate time.

chemotherapy to preserve fertility and in patients with hormone sensitive cancers, like breast and prostate cancer.

16. Though Dr. Levine warns about delaying puberty, pubertal suppression in transgender youth does not delay puberty beyond the typical range. (Levine Decl. ¶ 92.) Pubertal development has a very wide variation among individuals. Puberty in individuals assigned male at birth typically begins anywhere from age nine to age fourteen, and sometimes does not complete until a person's early twenties. For those individuals assigned female at birth, puberty typically ranges from age eight to age seventeen.⁹ Protocols used for transgender youth would tend to put them in the latter third of typical puberty but nothing outside of the typical range.¹⁰ As such there is no reason to assume, and no data to support, Dr. Levine's assumption that slightly delaying puberty will have negative short- or long-term consequences. This is particularly true given the life-saving results early treatment has for transgender youth.¹¹

17. Dr. Levine incorrectly suggests that lifelong hormone treatment is, as a blanket matter, bad for one's health. (Levine Decl. ¶¶ 92–93.) There is nothing inherently harmful about undergoing hormone treatment to sustain one's health. Many transgender people have been on hormone therapy for decades, and we are

⁹ Wyshak, Grace, PhD and Frisch, Rose E., Evidence for a Secular Trend in Age of Menarche, April 29, 1982, *N Engl J Med* 1982; 306:1033-1035.

¹⁰ Wylie et al. (2017); Euling SY, Herman-Giddens ME, Lee PA, et al. Examination of U.S. puberty-timing data from 1940 to 1994 for secular trends: panel Findings. *Pediatrics*. 2008;1221: S172–S191.

¹¹ Turban JL, King D, Carswell JM, et al. Pubertal Suppression for Transgender Youth and Risk of Suicidal Ideation. *Pediatrics*. 2020;145(2):e20191725.

not seeing proof of negative health outcomes as a result. Likewise, many non-transgender individuals must undergo hormone treatment for the majority of their lives, and it is well-managed. This includes patients with Turner syndrome, Klinefelter syndrome, premature ovarian failure, and cancer. Moreover, not all individuals who initiate gender-affirming hormone therapy continue such therapy for the entirety of their lives. Transgender women who have testicles surgically removed, for example, no longer take testosterone suppressors after the procedure. Some transgender individuals also may limit or change the dose of hormone therapy that is needed at different stages of life, not unlike cisgender women undergoing menopause and experiencing changing hormones.

18. It also is not true, as Dr. Levine suggests, that gender-affirming surgical treatment that involves the removal of internal reproductive organs is “inevitably sterilizing.” (Levine ¶ 90.) Many people undergo fertility preservation before any treatment that would compromise fertility. Many more transgender people may be treated with gender affirming surgery that has no impact on fertility such as chest reconstruction, breast augmentation, and facial feminization, which are among the more common surgical treatments for transgender patients. Though Dr. Levine warns of risks of infertility related to gender-affirming hormone therapy, this too is speculative and not borne out by data. Many transgender individuals conceive children after undergoing hormone therapy.¹² More generally, many

¹² Light AD, Obedin-Maliver J, Sevelius JM, Kerns JL. Transgender men who experienced pregnancy after female-to-male gender transitioning. *Obstet Gynecol.* 2014;124(6):1120-1127; Maxwell S, Noyes N, Keefe D, Berkeley AS, Goldman KN.

medical interventions that are necessary to preserve a person's health and well-being can impact an individual's fertility, but we proceed with the treatment after informed consent.

19. Given the extreme dysphoria that many transgender individuals experience with respect to their genitals, it is not true, as Dr. Levine suggests, that data concerning loss of genital sensation and orgasm in non-transgender individuals can be applied to transgender individuals. (Levine Decl. ¶ 91.) Distress of genital change and sensation loss for someone who has a positive association with their genital characteristics does not translate to the experience of someone who might experience disgust and extreme distress at the sight of their genitals. It is simply not reasonable to compare cisgender experiences to transgender experience in the context of genital sensation.

20. Though Dr. Levine attacks the widely accepted treatment protocols for transgender patients, recent studies affirm just how critical such treatment is for the long-term health of pediatric patients with gender dysphoria. In a 2020 study published in *Pediatrics*, the official journal of the American Academy of Pediatrics, researchers concluded that "Treatment with pubertal suppression among those who wanted it was associated with lower odds of lifetime suicidal ideation when compared with those who wanted pubertal suppression but did not receive it.

Pregnancy Outcomes After Fertility Preservation in Transgender Men. *Obstet Gynecol.* 2017;129(6):1031-1034; Neblett MF 2nd, Hipp HS. Fertility Considerations in Transgender Persons. *Endocrinol Metab Clin North Am.* 2019;48(2):391-402.

Suicidality is of particular concern for this population because the estimated lifetime prevalence of suicide attempts among transgender people is as high as 40%.”¹³ More recent studies than those cited by Dr. Levine also show significantly improved outcomes for patients who undergo gender-affirming surgery when such surgery is medically indicated.¹⁴

21. Ultimately, it appears from Dr. Levine’s declaration that his central point is that it is not healthy to be transgender and that government policies and medical practice should consider efforts to make people not transgender (i.e., encourage people to live in accordance with their assigned sex at birth rather than their gender identity). This approach to treating transgender people is known to be extremely harmful and is considered unethical by every major medical association.¹⁵

¹³ Turban JL, King D, Carswell JM, et al. Pubertal Suppression for Transgender Youth and Risk of Suicidal Ideation. *Pediatrics*. 2020;145(2):e20191725.

¹⁴ Bränström, R., & Pachankis, J. E. (2019). Reduction in mental health treatment utilization among transgender individuals after gender-affirming surgeries: a total population study. *American Journal of Psychiatry*; Wiepjes, C. M., et al. (2018). The Amsterdam cohort of gender dysphoria study (1972–2015): trends in prevalence, treatment, and regrets. *The Journal of Sexual Medicine*, 15(4), 582-590.

¹⁵ American Academy of Child & Adolescent Psychiatry. Conversion Therapy. 2018. https://www.aacap.org/AACAP/Policy_Statements/2018/Conversion_Therapy.aspx; American Medical Association. Health care needs of lesbian, gay, bisexual and transgender populations. H-160.991. 2017. <https://policysearch.ama-assn.org/policyfinder/detail/H-160.991%20?uri=%2FAMADoc%2FHOD.xml-0-805.xml>; Rafferty, J., & Committee on Psychosocial Aspects of Child and Family Health. (2018). Ensuring comprehensive care and support for transgender and gender-diverse children and adolescents. *Pediatrics*, 142(4).

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on: 6/28/2020



Deanna Adkins, MD

EXHIBIT C

BIBLIOGRAPHY

1. American Academy of Child & Adolescent Psychiatry. Conversion Therapy. 2018. https://www.aacap.org/AACAP/Policy_Statements/2018/Conversion_Therapy.aspx.
2. American Medical Association. Health care needs of lesbian, gay, bisexual and transgender populations. H-160.991. 2017. <https://policysearch.ama-assn.org/policyfinder/detail/H-160.991%20?uri=%2FAMADoc%2FHOD.xml-0-805.xml>.
3. Berenbaum S., et al., Effects on gender identity of prenatal androgens and genital appearance: Evidence from girls with congenital adrenal hyperplasia. *J Clin Endocrinol Metab* 2003; 88(3):1102-6.
4. Coates S, Wolfe S. Assessment of gender and sex in children in Noshpitz J, ed. Handbook of Child and Adolescent Psychiatry: Clinical Assessment/Intervention. New York: John Wiley and Sons; 2004:242-52.
5. Cohen-Bendahan C, van de Beek C, Berenbaum S. Prenatal sex hormone effects on child and adult sex-typed behavior: methods and findings. *Neurosci Biobehav Rev* 2005; 29(2):353-84.
6. Cohen-Kettenis P. Gender change in 46,XY persons with 5alpha-reductase-2 deficiency and 17beta-hydroxysteroid dehydrogenase-3 deficiency. *Arch Sex Behav* 2005; 34(4):399-410.
7. Cools, M., Nordenström, A., Robeva, R. et al. Caring for individuals with a difference of sex development (DSD): a Consensus Statement. *Nat Rev Endocrinol* 14, 415–429 (2018).
8. Dittmann R, Kappes M, Kappes M, et al., Congenital adrenal hyperplasia. I: Gender-related behavior and attitudes in female patients and sisters. *Psychoneuroendocrinology* 1990; 15(5-6):401-20.
9. Durwood, L., McLaughlin, K. A., & Olson, K. R. (2017). Mental health and self-worth in socially transitioned transgender youth. *Journal of the American Academy of Child & Adolescent Psychiatry*, 56(2), 116-123.
10. Hembree, Wiley C., et al., Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guideline, *J Clin Endocrinol Metab*, Vol. 102, Issue 11, 1 November 2017, 3869–3903.

11. Light AD, Obedin-Maliver J, Sevelius JM, Kerns JL. Transgender men who experienced pregnancy after female-to-male gender transitioning. *Obstet Gynecol.* 2014;124(6):1120-1127.
12. Maxwell S, Noyes N, Keefe D, Berkeley AS, Goldman KN. Pregnancy Outcomes After Fertility Preservation in Transgender Men. *Obstet Gynecol.* 2017;129(6):1031-1034.
13. Meyer-Bahlburg H. Gender identity outcome in female-raised 46,XY persons with penile agenesis, cloacal exstrophy of the bladder, or penile ablation. *Arch Sex Behav* 2005; 34(4):423-38.
14. Neblett MF 2nd, Hipp HS. Fertility Considerations in Transgender Persons. *Endocrinol Metab Clin North Am.* 2019;48(2):391-402.
15. Olson, K. R., Durwood, L., DeMeules, M., & McLaughlin, K. A. (2016). Mental health of transgender children who are supported in their identities. *Pediatrics*, 137(3).
16. Rafferty, J., & Committee on Psychosocial Aspects of Child and Family Health. (2018). Ensuring comprehensive care and support for transgender and gender-diverse children and adolescents. *Pediatrics*, 142(4).
17. Reiner W. Assignment of sex in neonates with ambiguous genitalia. *Curr Opin Pediatr* 1999;11(4):363-5; Byne W, Sekaer C. *The question of psychosexual neutrality at birth.* In Legato M, ed. *Principles of Gender Specific Medicine.* San Diego: Academic Press, 2004:155-66.
18. Reiner W, Gearhart J. Discordant sexual identity in some genetic males with cloacal exstrophy assigned to female sex at birth. *N Engl J Med* 2004;350(4):333-41.
19. Turban JL, King D, Carswell JM, et al. Pubertal Suppression for Transgender Youth and Risk of Suicidal Ideation. *Pediatrics.* 2020;145(2): e20191725.
20. Wiepjes, C. M., et al. (2018). The Amsterdam cohort of gender dysphoria study (1972–2015): trends in prevalence, treatment, and regrets. *The Journal of Sexual Medicine*, 15(4), 582-590.
21. Wylie et al. (2017); Euling SY, Herman-Giddens ME, Lee PA, et al. Examination of U.S. puberty-timing data from 1940 to 1994 for secular trends: panel Findings. *Pediatrics.* 2008;1221: S172–S191.
22. Wyshak, Grace, PhD and Frisch, Rose E., Evidence for a Secular Trend in Age of Menarche, April 29, 1982, *N Engl J Med* 1982; 306:1033-1035.

Richard Eppink (Bar No. 7503)
AMERICAN CIVIL LIBERTIES UNION
OF IDAHO FOUNDATION
P. O. Box 1897
Boise, ID 83701
United States
T: (208) 344-9750 ext. 1202
REppink@acluidaho.org

Elizabeth Prelogar*
COOLEY LLP
1299 Pennsylvania Avenue,
NW Suite 700
Washington D.C. 20004-2400
T: (202) 842-7800
F: (202) 842-7899
eprelogar@cooley.com

Gabriel Arkles*
James Esseks*
Chase Strangio*
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
125 Broad St.,
New York, NY 10004
T: (212) 549-2569
garkles@aclu.org
jesseks@aclu.org
cstrangio@aclu.org

Andrew Barr*
COOLEY LLP
380 Interlocken Crescent,
Ste. 900
Broomfield, CO 80021-8023
T: (720) 566-4000
F: (720) 566-4099
abarr@cooley.com

Kathleen Hartnett*
COOLEY LLP
101 California Street 5th Floor
San Francisco, CA 94111-5800
T: (415) 693-2000
F: (415) 693-2222
khartnett@cooley.com

Catherine West*
LEGAL VOICE
907 Pine Street, Unit 500
Seattle, WA 98101
T: (206) 682-9552
F: (206) 682-9556
cwest@legalvoice.org

* Admitted *pro hac vice*

Attorneys for Plaintiffs

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO**

LINDSAY HECOX, et al.,

Plaintiffs,

v.

BRADLEY LITTLE, et al.,

Defendants.

No. 1:20-cv-184-CWD

**SUPPLEMENTAL DECLARATION
OF JOSHUA D. SAFER, MD,
FACP, FACE, IN SUPPORT OF
PLAINTIFFS' MOTION
FOR PRELIMINARY
INJUNCTION**

I, Joshua D. Safer, MD, FACP, FACE, declare as follows:

1. I have personal knowledge of the matters stated in this declaration.
2. As set forth in greater detail in my previously submitted declaration dated April 24, 2020, my background and credentials include the following: I am a Staff Physician in the Endocrinology Division of the Department of Medicine at the Mount Sinai Hospital and Mount Sinai Beth Israel Medical Center in New York, NY. I serve as Executive Director of the Center for Transgender Medicine and Surgery at Mount Sinai. I have served as a Transgender Medicine Guidelines Drafting Group Member for the International Olympic Committee (“IOC”) since 2017. I have also served since 2019 as a drafting group member of the transgender medical guidelines of World Athletics, formerly known as the International Amateur Athletic Federation (“IAAF”). My CV is attached to my previously submitted declaration.

3. I reviewed the declaration of Gregory A. Brown, Ph.D. (“Brown Decl.”) dated June 3, 2020, and am responding to certain statements therein. Here, I respond to the central points raised in Dr. Brown’s declaration. I do not specifically address each study or article cited by Dr. Brown, but instead explain the overall problems with the conclusions that he draws and provide data showing why such conclusions are in error. I reserve the right to supplement my opinions concerning Dr. Brown’s opinions if necessary as the case proceeds.

4. In his declaration, Dr. Brown makes three general arguments: “a. At the level of elite, college, high school, and recreational competition, men or boys have an advantage over comparably aged women or girls, in almost all athletic contests; b.

Biological male physiology and anatomy is the basis for the performance advantage that men or boys have over women or girls, in almost all athletic contests; and c. Administration of androgen inhibitors and cross-sex hormones to men, or adolescent boys, after male puberty, and administration of testosterone to women or adolescent girls, after female puberty, does not eliminate the performance advantage of men or adolescent boys over women or adolescent girls in almost all athletic contests.” (Brown Decl. ¶ 11.)

5. With respect to point (a), it is my opinion that on average, beginning during puberty, cisgender men and boys have better performance outcomes in most athletic competition as compared to cisgender women and girls. However, this is not a controversial statement and is beside the point here, as it does not concern the alleged performance advantages of transgender athletes (as opposed to men versus women generally).

6. As to Dr. Brown’s point (b), he states that “[b]iological male physiology and anatomy is the basis for the performance advantage.” (Brown Decl. ¶ 11.)

7. This point is not supported by the studies that Dr. Brown cites. Rather, these studies explain that the advantage observed among cisgender boys and men is due to circulating testosterone levels that typically diverge significantly between cisgender males and females at puberty. Dr. Brown only speculates that any advantage is not due to testosterone alone but other physiological factors that he describes as “male physiology and anatomy.” This claim is not supported by the studies that exist and that we both cite. For example, Dr. Brown cites Handelsman

et al, which 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.” (Brown Decl. ¶ 81 (emphasis added).)

8. In paragraphs 63 and 64, Dr. Brown cites to additional studies that look at differences between adult cisgender men and adult cisgender women. These studies make no claims about inherent differences in athleticism that are independent of levels of circulating testosterone. (Brown Decl. ¶¶ 63–64.) The Gershoni et al. study compares genes from adult cisgender men and adult cisgender women. (Brown Decl. ¶ 63.) However, hormone levels might explain the differences observed. Notably, the largest number of genes observed to be different are related to breast tissue, which is a type of tissue that can be changed with hormone therapy. The Haizlip et al. study (Brown Decl. ¶ 64) reviews 56 articles relating to sex-based differences in skeletal muscle. This study draws no conclusions about the impact of hormone suppression or circulating testosterone on the differences the authors observe, underscored by the authors’ concluding observations that future “studies should be aimed at determining the role of hormonal interventions in males and females given their clinical relevance” and that “[t]his review summarizes key findings in skeletal muscle physiology in the hopes of bringing to the forefront areas of future research”¹

9. In addition, none of the studies cited by Dr. Brown about comparative foot and toe size of cisgender men and cisgender women look at the impact of

¹ K. M. Haizlip, et al., Sex-based differences in skeletal muscle kinetics and fiber-type composition, 30 *PHYSIOLOGY (BETHESDA)*, 39 (2015).

circulating testosterone on those differences. In fact, several of the articles (cited in Brown ¶ 72) simply look at intra-sex differences among male athletes with no data about any differences between cisgender men and cisgender women.

10. The proven impact of circulating testosterone on the body is the reason why the Olympics, World Athletics, and the National Collegiate Athletic Association (“NCAA”) focus on testosterone suppression for transgender and intersex inclusion in women’s sports. Though Dr. Brown calls these standards into question, claiming that they still allow for levels of circulating testosterone above what is typical for cisgender women, he fails to note that (a) some cisgender women have testosterone levels of up to approximately 5 nmol/L;² and (b) these are the best practices that have been in place for years with absolutely no evidence of any dominance among transgender women at the elite level—in fact no trans woman has ever even qualified for the Olympics.

11. The majority of the studies that Dr. Brown cites and almost the entirety of his declaration have nothing to do with transgender women who have suppressed testosterone. For example, the data about the general differences between male and female athletes cited in paragraphs 12-112 and 114-125 includes no reference to or information about transgender athletes. That is also true of the first *fourteen* studies (those identified from letters (a) through (l) in paragraph 20) that Dr. Brown

² Approximately 6% to 10% of women have a condition called polycystic ovary syndrome (PCOS), which can raise women’s testosterone levels up to 4.8 nmol/L. See Handelsman DJ, et al. Circulating testosterone as the hormonal basis of sex differences in athletic performance. *Endocrine Reviews* 2018; 39:803-29 (pp. 806-807).

references. These studies have no bearing on transgender athletes who have suppressed testosterone—i.e., the impact of hormone therapy on physiological characteristics relative to undergoing endogenous puberty.

12. Though Dr. Brown states that “a number of studies indicate that males’ athletic advantages over females begin before puberty, and may be apparent as early as six years of age,” the cited studies are epidemiological studies from which cause cannot be assessed. (Brown Decl. 23.) The studies merely observe phenomena across a population sample but do not determine the cause for whatever is observed. Here, for example, the role played by cultural factors is not addressed in these studies. Thus, differences could be explained by, among other things, greater encouragement of athleticism in boys and greater opportunities to play sports. (Brown Decl. ¶ 23.)

13. Moreover, the more detailed studies that Dr. Brown cites state that before puberty there are not noticeable performance difference between boys and girls. For example, Dr. Brown cites Louis J. G. Gooren & Mathijs C. M. Bunck, *Transsexuals & Competitive Sports*, 151 *European J. of Endocrinology* 425 (2004) in paragraph 114 of his declaration stating: “[b]efore puberty, boys and girls do not differ in height, muscle and bone mass. Recent information shows convincingly that actual levels of circulating testosterone determine largely muscle mass and strength.” (Brown Decl. ¶ 114.) Likewise, Dr. Brown references Tonnessen et al., which states that “[m]ale and female athletes perform almost equally in running and jumping events up to the age of 12.” (Brown Decl. ¶ 49.) Similar conclusions can be found in

almost every study he cites. There is simply no basis for the assertion that pre-pubertal children have physical sex-based performance differences.

14. With respect to point (c), Dr. Brown and I both agree that levels of circulating testosterone are the definitive factor impacting sex-based performance differences between cisgender males and females beginning in puberty.

15. I disagree with and the science does not support Dr. Brown’s assertion that “[a]dministration of androgen inhibitors and cross-sex hormones to men, or adolescent boys, after male puberty . . . does not eliminate the performance advantage of men or adolescent boys over women or adolescent girls in almost all athletic contests.” (Brown Decl. ¶ 11.)

16. Though Dr. Brown argues that testosterone suppression is not sufficient to reduce any performance disparities between transgender women and girls and cisgender women and girls, his assumptions are not borne out by data.

17. Dr. Brown states that “[i]t is obvious that some effects of male puberty that confer advantages for athletic performance—in particular bone size and configuration—cannot be reversed once they have occurred.” (Brown Decl. ¶ 128.) This is misleading. First, decreased muscle will have some impact on corresponding bone. That means that bone grows when corresponding muscle grows and bone shrinks when corresponding muscle shrinks (Hart NH et al. *J Musculoskelet Neuronal Interact* 2017; 17:114-139.) Second, carrying larger bones without typical male range levels of circulating testosterone does not necessarily confer an athletic

advantage. As I explained in my previous declaration, it could potentially slow a runner down or change an athlete's weight class.

18. The Knox study that Dr. Brown discusses in paragraphs 138 through 144 does not accurately assess the impact of sustained hormone therapy on transgender women. The study documented the effects of administering hormone therapy to cisgender males for a period of 20 weeks. By contrast, transgender women who are on consistent treatment and eligible to participate on women's teams under prevailing NCAA or Olympic inclusion policies would be suppressing their levels for at least one full year.

19. The Wiik study that Dr. Brown cites does not study athletes at all. As the authors report, because the subjects were not athletes, findings might be attributable in part to the subjects improving over time as they got better at the items tested. For example, for knee flexion, the authors state “. . . measurements in the TW [transgender women] most likely arose from the learning effects from repeating the test . . .” All the Wiik study shows is that testosterone makes a difference with regard to muscle. More testosterone is associated with more strength and more muscle mass. Also, the Wiik study is only “provocative,” meaning the findings are not conclusive but should be studied in the future. The authors themselves state, “[i]t is also important to recognize that we only assessed proxies for athletic performance, such as muscle mass and strength. Future studies are needed to examine a more comprehensive battery of performance outcomes in transgender athletes” and “. . . it is still uncertain how the findings would translate to transgender athletes . . .”

20. The Scharff study that Dr. Brown cites (his final cited study dealing with transgender individuals) also does not support the conclusion he draws. Transgender women had a decrease in grip strength and transgender men had an increase in grip strength while on their respective hormone regimens. (Brown Decl. ¶ 151.) Dr. Brown suggests that the decrease in grip strength observed among transgender women still left them with more strength than would be expected for most cisgender women. However, the study was only intended to demonstrate the direction of change, not its absolute amount. The absolute degree of change in a larger population of transgender women along with the net impact on specific athletic activities remains conjecture, subject to future study.

21. My opinions about the impact of hormone therapy, including testosterone suppression and estrogen, on transgender people are not from the Harper study as the Defendants suggest. They are, by contrast, drawn from my more than 15 years of treating transgender patients with hormone therapy, my training as an endocrinologist, my review of the literature concerning the impact of circulating testosterone on athletic performance, and my experience as an expert in establishing policies for the inclusion of transgender athletes in the Olympics and World Athletics.


22. The Harper study, although modest with a sample of eight individuals, is the only study of transgender female athletes treated for a sustained period of time with (1) evaluation of athletic performance prior to gender affirming treatment relative to cisgender men followed by (2) evaluation of athletic performance after gender affirming treatment relative to cisgender women. This study, even with its

limits, supports the conclusion that suppression of testosterone *does* diminish performance outcomes for women who are transgender.

23. Research with greater rigor must be done along the lines of the Harper study, but until that time there is no reason to conclude that the opposite of the Harper findings is true.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on: June 25, 2020



Joshua D. Safer, MD, FACP, FACE

Richard Eppink (Bar No. 7503)
AMERICAN CIVIL LIBERTIES UNION
OF IDAHO FOUNDATION
P. O. Box 1897
Boise, ID 83701
United States
T: (208) 344-9750 ext. 1202
REppink@acluidaho.org

Elizabeth Prelogar*
COOLEY LLP
1299 Pennsylvania Avenue,
NW Suite 700
Washington D.C. 20004-2400
T: (202) 842-7800
F: (202) 842-7899
eprelogar@cooley.com

Gabriel Arkles*
James Esseks*
Chase Strangio*
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
125 Broad St.,
New York, NY 10004
T: (212) 549-2569
garkles@aclu.org
jesseks@aclu.org
cstrangio@aclu.org

Andrew Barr*
COOLEY LLP
380 Interlocken Crescent,
Ste. 900
Broomfield, CO 80021-8023
T: (720) 566-4000
F: (720) 566-4099
abarr@cooley.com

Kathleen Hartnett*
COOLEY LLP
101 California Street 5th Floor
San Francisco, CA 94111-5800
T: (415) 693-2000
F: (415) 693-2222
khartnett@cooley.com

Catherine West*
LEGAL VOICE
907 Pine Street, Unit 500
Seattle, WA 98101
T: (206) 682-9552
F: (206) 682-9556
cwest@legalvoice.org

* Admitted *pro hac vice*

Attorneys for Plaintiffs

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO**

LINDSAY HECOX, et al.,

Plaintiffs,

v.

BRADLEY LITTLE, et al.,

Defendants.

No. 1:20-cv-184-CWD

**EXPERT DECLARATION OF
JACK L. TURBAN, MD, MHS,
IN SUPPORT OF PLAINTIFFS'
MOTION FOR PRELIMINARY
INJUNCTION**

I, Jack L. Turban, MD, MHS, have been retained by counsel for Plaintiffs Lindsay Hecox and Jane Doe, with her next friends, Jean Doe and John Doe, as an expert in connection with the above-captioned litigation.

1. The purpose of this declaration is to respond to certain opinions set forth by Dr. Stephen Levine in opposition to Plaintiffs' Motion for Preliminary Injunction. Here, I respond to the central points raised in Dr. Levine's declaration ("Levin Decl."). I do not specifically address each study or article cited by Dr. Levine, but instead explain the overall problems with the conclusions that he draws and provide data showing why such conclusions are in error. I reserve the right to supplement my opinions concerning Dr. Levine's opinions if necessary as the case proceeds.

2. I have actual knowledge of the matters stated in this declaration. In preparing this declaration, I reviewed the materials listed in the attached Bibliography (Exhibit B), as well as the Expert Report of Dr. Stephen Levine. I may rely on those documents as additional support for my opinions. I have also relied on my years of research and other experience, as set out in my curriculum vitae (Exhibit A), and on the materials listed therein. The materials I have relied upon in preparing this declaration are the same types of materials that experts in my field of study regularly rely upon when forming opinions on the subject. I may wish to supplement these opinions or the bases for them as a result of new scientific research or publications or in response to statements and issues that may arise in my area of expertise.

BACKGROUND AND QUALIFICATIONS

3. I am currently a clinical fellow in psychiatry at Harvard Medical School, where I research the mental health of transgender youth. Beginning on July 1, 2020, I will be a Fellow in Child and Adolescent Psychiatry at Stanford University.

4. I received my undergraduate degree in neuroscience from Harvard College. I received both my MD and Masters of Health Science degree from Yale University School of Medicine. I am writing in my capacity as a mental health researcher.

5. My research focuses on the mental health of transgender youth. While at Yale, I was awarded the Ferris Prize for my thesis entitled “Evolving Treatment Paradigms for Transgender Youth.” In 2017, I received the United States Preventative Health Services Award for Excellence in Public Health based on my work related to the mental health of transgender youth. I have lectured on the mental health of transgender youth at Yale School of Medicine and Massachusetts General Hospital (a teaching hospital of Harvard Medical School).

6. I have served as a manuscript reviewer for numerous professional publications including *The Journal of The American Medical Association*, *The Journal of The American Academy of Child & Adolescent Psychiatry*, *Pediatrics*, *The Journal of Adolescent Health*, and *The American Journal of Public Health*. I have served as lead author for textbook chapters on the mental health of transgender youth, including for *Lewis’s Child & Adolescent Psychiatry: A Comprehensive Textbook* and the textbook of The International Academy for Child & Adolescent

Psychiatry and Allied Professionals. I am co-editor of the textbook, *Pediatric Gender Identity: Gender-affirming Care for Transgender and Gender Diverse Youth*.

7. I have published extensively on the topic of transgender youth, including five articles in peer-reviewed journals in the past two years alone.

8. I have never testified as an expert at trial or in deposition. I am being compensated at an hourly rate of \$250 per hour for preparation of expert declarations and reports, and \$400 per hour for time spent preparing for or giving deposition or trial testimony. My compensation does not depend on the outcome of this litigation, the opinions I express, or the testimony I provide.

SUMMARY OF OPINIONS

9. Dr. Levine is an adult psychiatrist who appears to have limited understanding of the research involving the mental health of children and adolescents who are transgender. He applies outdated research about pre-pubertal children presenting to gender clinics to make broad arguments about the treatment of transgender patients of all ages. His sweeping claims about alleged harms of affirming treatment for transgender youth are contradicted by all recent data, which show precisely the opposite of what he argues: youth and young adults who are affirmed in their gender identity and who have access to social transition and appropriate medical treatment, including puberty blockers and gender affirming hormones, have favorable mental health outcomes.

10. In this declaration, I cite relevant literature to support my opinions that: (1) existing evidence supports transition for transgender youth; (2) the “desistence”

literature that Dr. Levine cites does not apply once a young person reaches the earliest stages of puberty; (3) the “watchful waiting” approach that Dr. Levine describes is only relevant to pre-pubertal children and is not generally practiced in the United States; (4) “regret” is not common among youth who receive gender affirming treatment and all existing evidence regarding gender-affirming care for transgender youth has shown positive mental health outcomes; and (5) efforts to force transgender people to be cisgender are dangerous and unethical.

EXISTING EVIDENCE SUPPORTS SOCIAL TRANSITION FOR TRANSGENDER YOUTH

11. Though the premise of Dr. Levine’s declaration is that social transition for transgender youth is harmful to youth who undergo it, existing evidence shows the opposite. For example, Dr. Levine neglects to cite the recent work of Dr. Kristina Olson at The University of Washington, which found that transgender youth who socially transition have levels of depression no different from cisgender controls and only marginally elevated levels of anxiety (in the pre-clinical range).¹ As Olson’s team explains in their 2017 manuscript (Durwood et al.), “our findings of normative levels of depression, slightly higher rates of anxiety [pre-clinical], and high self-worth in socially transitioned transgender children stand in marked contrast with previous

¹ Olson, K. R., Durwood, L., DeMeules, M., & McLaughlin, K. A. (2016). Mental health of transgender children who are supported in their identities. *Pediatrics*, 137(3). Durwood, L., McLaughlin, K. A., & Olson, K. R. (2017). Mental health and self-worth in socially transitioned transgender youth. *Journal of the American Academy of Child & Adolescent Psychiatry*, 56(2), 116-123.

work with gender non-conforming children who had not socially transitioned.”² In other words, the research shows that youth who are treated consistent with their gender identity and allowed to socially transition have better mental health than cohorts of youth who were not allowed to socially transition. In contrast, if a transgender child’s gender identity is not supported, and professionals attempt to make them cisgender, they have a higher likelihood of attempting suicide.³ Among transgender people who were exposed to efforts to make them cisgender during childhood, 90% had considered suicide.⁴ The dangers of efforts to force transgender people to be cisgender are further described below.

12. Dr. Levine also implies that allowing a child to socially transition makes them identify more strongly as transgender and thus more likely to “persist” in their transgender identity. (Levine Decl. ¶ 64.) A study recently published by Dr. Olson’s group, which Dr. Levine also failed to cite, has found this not to be true.⁵ The study authors found that gender identification did not meaningfully differ before and after social transition.

² Durwood, L., McLaughlin, K. A., & Olson, K. R. (2017). Mental health and self-worth in socially transitioned transgender youth. *Journal of the American Academy of Child & Adolescent Psychiatry*, 56(2), 116-123.

³ Turban, J. L., Beckwith, N., Reisner, S. L., & Keuroghlian, A. S. (2020). Association between recalled exposure to gender identity conversion efforts and psychological distress and suicide attempts among transgender adults. *JAMA Psychiatry*, 77(1), 68-76.

⁴ *Id.*

⁵ Rae, J. R., Gülgöz, S., Durwood, L., DeMeules, M., Lowe, R., Lindquist, G., & Olson, K. R. (2019). Predicting early-childhood gender transitions. *Psychological Science*, 30(5), 669-681.

13. In addition, no evidence establishes a “social contagion” theory of gender transition mentioned by Dr. Levine. He claims that “[i]n the case of adolescents . . . there is evidence that peer social influences through ‘friend groups’ (Littman) or through the internet can increase the incidence of gender dysphoria or claims of transgender identity.” (Levine Decl. ¶ 51.) The Littman study he cites was an anonymous online survey of the parents of transgender youth, recruited from websites where this notion of “social contagion” leading to transgender identity is popular. The anonymous survey participants were asked what they thought was the etiology of their children’s transgender identity. Some of these parents believed that their children became transgender as a result of watching transgender-related content on websites like YouTube and having LGBTQ friends. The obvious alternative interpretation is that these youth sought out transgender-related media and LGBTQ friends because they wanted to find other people who understood their experiences and could offer support. If the study had surveyed the children in addition to their parents, they may have been able to establish if this were the case. Unfortunately, the Littman study is based on an anonymous survey of parents only. No conclusions can be drawn from the Littman study other than the fact that some anonymous people recruited from the Internet theorize that transgender identity is due to social contagion. This theorizing from people online does not establish a true phenomenon. No study to date has found a psychosocial determinant of gender

identity. Preliminary biological studies have estimated that gender identity is as much as 70% heritable.⁶

14. In addition, there is no established medical phenomenon of “rapid onset gender dysphoria” as Dr. Levine claims. (Levine Decl. ¶ 63.) This term entered the literature through this same article from Dr. Lisa Littman. A correction was published on this article, which noted, “Rapid-onset gender dysphoria (ROGD) is not a formal mental health diagnosis at this time. This report did not collect data from the adolescents and young adults (AYAs) or clinicians and therefore does not validate the phenomenon.”⁷ The correction goes on to say “the term should not be used in any way to imply that it explains the experiences of all gender dysphoric youth . . .”

**“DESISTENCE LITERATURE” DOES NOT APPLY ONCE YOUTH REACH
THE EARLIEST STAGES OF PUBERTY**

15. Dr. Levine references a body of literature commonly referred to as the “desistence literature.” (Levine Decl. ¶ 61.) He incorrectly states that this literature found that “the large majority of children who present with gender dysphoria will desist from desiring a transgender identity.” (Levine Decl. ¶ 33.) The studies cited by Dr. Levine did not use the current DSM-5 gender dysphoria diagnosis. Rather, most of these studies used the DSM-IV construct of “gender identity disorder.” One could meet criteria for the DSM-IV diagnosis of gender identity disorder without identifying

⁶ Turban, J. L., & Ehrensaft, D. (2018). Research Review: Gender identity in youth: treatment paradigms and controversies. *Journal of Child Psychology and Psychiatry*, 59(12), 1228-1243.

⁷ Littman, L. (2019). Correction: Parent reports of adolescents and young adults perceived to show signs of a rapid onset of gender dysphoria. *PloS One*, 14(3), e0214157.

as transgender because the diagnostic criteria did not require identification with a gender other than the one assigned to the person at birth. This problem with the diagnosis was remedied with the new DSM-5 diagnosis of “gender dysphoria in children,” which requires a child to have “a strong desire to be of the other gender or an insistence that one is the other gender (or some alternative gender different from one’s assigned gender).” Furthermore, a large proportion of children in these studies did not even meet criteria for DSM-IV’s “gender identity disorder” diagnosis. Because these children did not necessarily identify as transgender to begin with, it is not surprising that they did not identify as transgender at follow-up.

16. Perhaps more importantly, these studies all examined *pre-pubertal* children. There is broad consensus that once youth reach the earliest stages of puberty (i.e. Tanner 2) and identify as transgender, “desistence” is rare.⁸ The notion of “desistence” therefore is not generally applied to transgender people once they reach Tanner 2 (the earliest stage of puberty). Even the researchers who published the dataset about desistance that Dr. Levine cites are clear that once a child reaches puberty, it is not medically appropriate to withhold affirming treatment. When discussing individuals in high school and college who have transitioned, this data is completely irrelevant.

⁸ Turban JL, DeVries ALC, Zucker K. Gender Incongruence & Gender Dysphoria. In Martin A, Bloch MH, Volkmar FR (Editors): *Lewis’s Child and Adolescent Psychiatry: A Comprehensive Textbook*, Fifth Edition. Philadelphia: Wolters Kluwer 2018.

THE “WATCHFUL WAITING” APPROACH REFERS TO THE TREATMENT OF PREPUBERTAL YOUTH ONLY

17. Dr. Levine references the “watchful waiting” approach to the treatment of transgender youth. (Levine Decl. ¶¶ 33–34.) This approach was developed by the VUMC Center for Expertise in Gender Dysphoria in Amsterdam and only applies to the treatment of prepubertal youth.

18. “Watchful waiting” refers to advising parents to wait until the earliest stages of puberty before facilitating a social transition for their child. The VUMC clinic does not advocate for “watchful waiting” once transgender adolescents reach the earliest stages of puberty (i.e. Tanner 2). At that developmental stage, they recommend affirmation of the adolescent’s gender identity. In fact, the VUMC clinic was the first clinic in the world to utilize pubertal suppression and gender-affirming hormones for transgender youth and has published on the positive outcomes for youth who receive these medical interventions.⁹

19. Most practitioners in the U.S. do not follow the “watchful waiting” approach for prepubertal youth, as there is concern that forcing a child to wait until the beginning of puberty to facilitate social transition may promote stigma and damage relationships between the child and their parents and clinicians, which could subsequently lead to adverse mental health outcomes.¹⁰ In any event, “watchful

⁹ De Vries, A. L., McGuire, J. K., Steensma, T. D., Wagenaar, E. C., Doreleijers, T. A., & Cohen-Kettenis, P. T. (2014). Young adult psychological outcome after puberty suppression and gender reassignment. *Pediatrics*, *134*(4), 696-704.

¹⁰ Turban, J. L., & Ehrensaft, D. (2018). Research Review: Gender identity in youth: treatment paradigms and controversies. *Journal of Child Psychology and Psychiatry*, *59*(12), 1228-1243.

waiting” is not considered an ethical model of treatment for a young person once puberty has begun in the U.S. or elsewhere.

ALL EXISTING EVIDENCE SHOWS THAT, AMONG TRANSGENDER YOUTH WHO RECEIVE GENDER-AFFIRMING MEDICAL INTERVENTIONS, MENTAL HEALTH OUTCOMES ARE FAVORABLE AND REGRET IS RARE

20. In the largest longitudinal study of transgender adolescents to date, 98.1% of those who started pubertal suppression continued on to receive gender-affirming medical care.¹¹ This same study found extremely low rates of surgical regret among transgender adults: 99.4% of transgender women and 99.7% of transgender men did not have identified surgical regret.

21. All existing data examining the mental health outcomes of transgender adolescents who received pubertal suppression indicate positive mental health outcomes. In a study of 55 transgender people from the Netherlands—the only study following young transgender people through receiving pubertal suppression, gender-affirming hormones, and gender-affirming surgeries—none regretted treatment.¹² Over the course of treatment, their mental health and global functioning scores improved. By the end of the treatment protocol, these properly treated transgender young adults had global functioning scores on par with the general population of the

¹¹ Wiepjes, C. M., Nota, N. M., de Blok, C. J., Klaver, M., de Vries, A. L., Wensing-Kruger, S. A., ... & Gooren, L. J. (2018). The Amsterdam cohort of gender dysphoria study (1972–2015): trends in prevalence, treatment, and regrets. *The Journal of Sexual Medicine*, 15(4), 582-590.

¹² De Vries, A. L., McGuire, J. K., Steensma, T. D., Wagenaar, E. C., Doreleijers, T. A., & Cohen-Kettenis, P. T. (2014). Young adult psychological outcome after puberty suppression and gender reassignment. *Pediatrics*, 134(4), 696-704.

Netherlands. This is a remarkable finding, given the high rates of anxiety, depression, and suicidality generally seen among transgender people, most of whom are unable to access this type of care. A recent study from our group found that among transgender people who expressed a desire for pubertal suppression, those who accessed it had a 70% lower odds of considering suicide in their lifetime.¹³ In another study by Costa et al., transgender youth who received pubertal suppression in addition to psychological support had better global functioning scores than those who received psychological support alone.¹⁴ In other words, Dr. Levine’s suggestion that “[w]hat is known [about the impact of treatment] . . . is not encouraging” is not accurate. (Levine Decl. ¶ 77.) The data that we do have is all encouraging regarding the mental health benefits of gender-affirming medical interventions for transgender youth.

22. Dr. Levine cites a study by Dhejne et al. that examined long-term follow-up of transgender individuals who received gender-affirming surgeries. He states that, “the Swedish follow-up study found a suicide rate in the post-SRS [Sex Reassignment Surgery] population 19.1 times greater than that of controls . . . ” (Levine Decl. ¶ 78.) Dr. Levine’s extrapolation from this data set is flawed. First, the control group Dr. Levine references consists of cisgender people. This is not an

¹³ Turban, J. L., King, D., Carswell, J. M., & Keuroghlian, A. S. (2020). Pubertal suppression for transgender youth and risk of suicidal ideation. *Pediatrics*, 145(2).

¹⁴ Costa, R., Dunsford, M., Skagerberg, E., Holt, V., Carmichael, P., & Colizzi, M. (2015). Psychological support, puberty suppression, and psychosocial functioning in adolescents with gender dysphoria. *The journal of sexual medicine*, 12(11), 2206-2214.

appropriate control group. Transgender people face a range of stressors that affect their mental health, most prominently societal rejection based on being transgender. Though gender-affirming surgery improves mental health, it cannot eliminate societal discrimination for many people, and thus even after surgery, many transgender people still suffer elevated rates of mental health problems compared to cisgender people. This reality of mental health challenges even with gender-affirming care is not a valid argument against the provision of gender-affirming care. The very study Dr. Levine cites explains this point: “no inferences can be drawn as to the effectiveness of sex reassignment as a treatment for transsexualism [sic]. In other words, the results should not be interpreted such as sex reassignment *per se* increases morbidity and mortality. Things might have been even worse without sex reassignment. As an analogy, similar studies have found increased somatic morbidity, suicide rate, and overall mortality for patients treated for bipolar disorder and schizophrenia. This is important information, but it does not follow that mood stabilizing treatment or antipsychotic treatment is the culprit.”¹⁵ Second, the study was published in 2011, and it followed individuals who had surgery when the surgical techniques were not as advanced and discrimination in society was far worse.

23. A more recent study of Swedish population registry data once again found (unsurprisingly, given the stressors faced) evidence that transgender people suffer from mental health needs at higher rates than cisgender people; however, this

¹⁵ C. Dhejne et al. (2011), Long-Term Follow-Up of Transsexual Persons Undergoing Sex Reassignment Surgery: Cohort Study in Sweden, *PLoS ONE* 6(2) e16885, 7.

study also found a reduction in mental health treatment needs among transgender people following gender-affirming surgery.¹⁶ The authors of this more recent study conclude: “The longitudinal association found in the present study between gender-affirming surgery and reduced mental health treatment utilization, combined with the physical and mental health risks of surgery denial, supports policies that provide gender affirming surgeries to transgender individuals who seek such treatments.”¹⁷

EFFORTS TO FORCE TRANSGENDER PEOPLE TO BE CISGENDER ARE DANGEROUS AND UNETHICAL

24. Dr. Levine advocates for psychotherapeutic attempts to change a young person’s gender identity from transgender to cisgender. He offers a litany of speculative and unsupported harms of “being transgender” and concludes that “one cannot assert with any degree of certainty that once a transgendered person, always a transgendered person, whether referring to a child, adolescent, or adult, male or female,” suggesting that there should be a therapeutic goal of preventing someone from being transgender.¹⁸ (Levine Decl. ¶ 109.) Often, this approach is colloquially referred to as “gender identity conversion therapy.” Given that it is not considered an

¹⁶ Bränström, R., & Pachankis, J. E. (2019). Reduction in mental health treatment utilization among transgender individuals after gender-affirming surgeries: a total population study. *American Journal of Psychiatry*.

¹⁷ *Id.*

¹⁸ As just one example of this, Dr. Levine cites only himself in non-peer reviewed articles in support of the idea that transgender individuals are “strongly narcissistic” and have difficulty forming romantic attachments. (Levine ¶ 98.) I am not familiar with any data that demonstrate increased rates of narcissism among transgender individuals. Likewise, Dr. Levine suggests that transgender individuals only form attachments to other transgender individuals, again without any data to support this supposition, which I have never seen borne out in any data. (Levine ¶ 96.)

appropriate therapeutic modality, it is often referred to in the academic literature as “gender identity conversion efforts.”

25. All relevant major medical organizations have issued clear statements that gender identity conversion efforts should not be practiced, including The American Medical Association,¹⁹ The American Academy of Pediatrics,²⁰ and The American Academy of Child & Adolescent Psychiatry.²¹

26. In a recent paper from our team at Harvard Medical School, published in *JAMA Psychiatry*, we found that, after adjusting for a range of potentially confounding variables, exposure to gender identity conversion efforts was associated with greater odds of attempting suicide.²² The increased odds of attempting suicide were even greater for transgender people who were exposed to gender identity conversion efforts during childhood.

27. Dr. Levine is correct in pointing out that our study in *JAMA Psychiatry* was cross-sectional. In the realm of scientific evidence, this level of evidence is less

¹⁹ American Medical Association. Health care needs of lesbian, gay, bisexual and transgender populations. H-160.991. 2017. <https://policysearch.ama-assn.org/policyfinder/detail/H-160.991%20?uri=%2FAMADoc%2FHOD.xml-0-805.xml>. Accessed June 21, 2020.

²⁰ Rafferty, J., & Committee on Psychosocial Aspects of Child and Family Health. (2018). Ensuring comprehensive care and support for transgender and gender-diverse children and adolescents. *Pediatrics*, 142(4).

²¹ The American Academy of Child & Adolescent Psychiatry. Conversion Therapy. 2018. https://www.aacap.org/AACAP/Policy_Statements/2018/Conversion_Therapy.aspx Accessed June 21, 2020.

²² Turban, J. L., Beckwith, N., Reisner, S. L., & Keuroghlian, A. S. (2020). Association between recalled exposure to gender identity conversion efforts and psychological distress and suicide attempts among transgender adults. *JAMA Psychiatry*, 77(1), 68-76.

conclusive than a randomized controlled trial. However, given that gender identity conversion efforts have been labeled unethical by the major medical organizations cited above, it is not possible to conduct a randomized controlled trial of gender identity conversion efforts. No institutional review board would allow such a study to proceed. Because such a study design is not ethically permissible or feasible, we must rely on the evidence we currently have. All existing evidence suggests that trying to force a transgender person to be cisgender is harmful to those exposed to this intervention.²³ There is no evidence of any benefit from such interventions.

28. Rejection of a young transgender person's gender identity is one of the strongest predictors for adverse mental health outcomes. Family rejection of a young transgender person's gender identity is associated with mental health problems for these youth.²⁴ Non-acceptance by peers is another major risk factor for mental health problems.²⁵ Inability to obtain gender congruent government identification has been shown to be associated with adverse mental health outcomes.²⁶ Given that all data

²³ Not all transgender people will desire medical or surgical interventions. However, for these individuals, it would still be unsafe and unethical to try to force them to live as their sex assigned at birth. Doing so would be a clear violation of the policy statements set forth by these major professional organizations.

²⁴ Travers, R., Bauer, G., & Pyne, J. (2012). Impacts of strong parental support for trans youth: A report prepared for Children's Aid Society of Toronto and Delisle Youth Services. *Trans Pulse*.

²⁵ de Vries, A. L., Steensma, T. D., Cohen-Kettenis, P. T., VanderLaan, D. P., & Zucker, K. J. (2016). Poor peer relations predict parent-and self-reported behavioral and emotional problems of adolescents with gender dysphoria: a cross-national, cross-clinic comparative analysis. *European Child & Adolescent Psychiatry*, 25(6), 579-588.

²⁶ Scheim, A. I., Perez-Brumer, A. G., & Bauer, G. R. (2020). Gender-concordant identity documents and mental health among transgender adults in the USA: a cross-sectional study. *The Lancet Public Health*, 5(4), e196-e203.

point to the conclusion that non-acceptance of a person's gender identity leads to poor mental health outcomes, it is likely that rejection of a transgender person's gender identity by forcing them to play on a sports team that does not match their gender identity would damage their mental health. Doing so would also be, in essence, forcing them to express themselves as cisgender, and as described above, forcing a transgender person to be cisgender is associated with adverse mental health outcomes.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on: June 26, 2020



JACK L. TURBAN, MD, MHS

EXHIBIT A

Jack L. Turban MD MHS

401 Quarry Road
Stanford, California 94304
650-498-4960
jturban@stanford.edu

EDUCATION

Yale School of Medicine New Haven, CT 2012-2017
Doctor of Medicine & Master of Health Science with honors. Clinical rotations included inpatient pediatrics, inpatient child psychiatry, inpatient adolescent psychiatry, residential adolescent psychiatry, psychiatric consult liaison service, clinical neuromodulation, neurology clinics, and neurosurgery. Completed award-winning masters' thesis as a Howard Hughes Medical Institute (HHMI) medical research fellow on evolving treatment paradigms for transgender youth. Clerkship Grades: All Honors

Harvard University Cambridge, MA 2007-2011
B.A. Neurobiology magna cum laude. Coursework included clinical neuroscience, systems neurobiology, visual neuroscience, positive psychology, neurobiology of behavior, CNS regenerative techniques, neuroanatomy, vertebrate surgery, and extensive coursework in dramatic theory and practice. International study included Spanish language (Alicante, Spain), stem cell biology (Shanghai, China), and studying how visual art may be used as a window into the mechanisms of neural processing (Trento, Italy). Honors thesis completed at The Massachusetts Eye & Ear Infirmary studying inner-ear development and regeneration. GPA: 3.8/4.0

WORK EXPERIENCE

Stanford Healthcare Palo Alto, CA 2020-2022
Fellow in Child & Adolescent Psychiatry. Fellow in child and adolescent psychiatry. Research focuses on pediatric gender identity and LGBTQ health.

Harvard Medical School Boston, MA 2017-2020
Clinical Fellow in Psychiatry. Resident physician in the MGH/McLean integrated adult, child, and adolescent psychiatry program. Research focuses on pediatric gender identity and LGBT mental health.

Clarion Healthcare Consulting, LLC Boston, MA 2011-2012
Associate Consultant. Worked as a strategy and management consultant for top ten pharmaceutical companies and emerging biotech. Areas of focus included neuroscience business development, life cycle management, and innovation in new product commercialization.

Harvard Summer School in Mind/Brain Sciences Trento, Italy 2011-2012
Resident Director. Directed a study abroad program for Harvard undergraduate and Italian graduate students, introducing them to the basic principles of neuroscience and cognitive psychology.

RESEARCH EXPERIENCE

The Fenway Institute Boston, MA 2017-Present
LGBT Mental Health Research. Currently using data from the National Transgender Discrimination Survey to determine the adult mental health correlates of recalled childhood experiences including exposure to conversion therapy and access to gender-affirming hormonal interventions.

McLean Institute for Technology in Psychiatry Belmont, MA 2017-Present
LGBT Mental Health Research. Conducting cross-sectional studies that examine the associations between geosocial "hook-up apps," internalizing psychopathology, and compulsive sexual behavior. Utilizing the TestMyBrain platform.

Yale Program for Research on Impulsivity & Impulse Control Disorders New Haven, CT 2016-Present
Clinical Research. Conducted a study on US military veterans who had recently returned from deployment, studying rates and comorbidities of those veterans who exhibit compulsive sexual behavior facilitated by social media. Currently studying psychiatric morbidities among veterans who send sexually explicit self-images over social media.

Jack L. Turban MD MHS

401 Quarry Road
Stanford, California 94304
650-498-4960
jturban@stanford.edu

Yale Child Study Center New Haven, CT 2015-2017
Medical Education Research. Conducted a study to evaluate pediatric attending and medical student knowledge regarding transgender pediatric patient care. Additionally studied participants' personal ethical views regarding pubertal blockade and cross-sex hormone therapy for adolescent patients.

Eaton-Peabody Laboratory Cambridge, MA 2009-2011
Basic Research. Worked at the Massachusetts Eye and Ear Infirmary laboratory, studying stem cells of the inner ear and working toward cochlear hair cell regeneration.

Novartis Pharmaceuticals Shanghai, China 2009-2009
Intern. Worked as a biological research intern, studying the role of Math-1 in inner-ear development and regeneration.

LEADERSHIP

MGH Psychiatry Gender Lab Meetings 2019-Present
Founder. Established monthly lab meetings for those in the MGH psychiatry department to discuss ongoing research regarding transgender mental health.

Yale School of Medicine Cultural Competence Committee New Haven, CT 2012-2017
Chair. Worked with individual course directors to develop course material on cultural competence. Authored case studies on handling pediatric patient sexuality (Professional Responsibility Course), authored a pre-clinical lecture on LGBT healthcare (Ob/Gyn Module), and lectured on transgender pediatric patient care (Pediatrics Clinical Clerkship).

Dean's Advisory Committee on LGBTQ Affairs (Yale School of Medicine) New Haven, CT 2016-2017
Member. Served on the advisory committee to the Dean of Yale School of Medicine, advising on issues related to LGBTQ affairs.

Yale HIV Dermatology Roundtable New Haven, CT 2014-2017
Founder. Eighty percent of patients suffering from HIV face a dermatologic manifestation of their disease. Struck by these patients' experience of stigma, I organized a bi-monthly interdisciplinary roundtable to improve research, education, and clinical care in HIV dermatology. Interventions have included primary care provider training on the treatment of genital warts and improved referral systems for cutaneous malignancies.

Yale Gay & Lesbian Medical Association New Haven, CT 2013-2017
President. Led a group of medical students focused on supporting careers in medicine for LGBT individuals. Organized mixers with LGBT organizations from other graduate schools and with LGBT faculty. Coordinated trips to GLMA national conferences. Worked with the medical school administration to create an LGBT faculty advisor position.

VOLUNTEER WORK & ADVOCACY

American Academy of Child & Adolescent Psychiatry "Break the Cycle" 2017-2017
Event Coordinator. Worked with Dr. Andres Martin to coordinate a fundraising indoor cycling event for the AACAP *Break The Cycle* fundraising campaign to fight children's mental illness.

Yale Hunger & Homelessness Auction New Haven, CT 2012-2014
Logistics Co-Chair. Organized a group of ten students to coordinate entertainment, donations, and event logistics for the Yale annual charity auction. All proceeds for the auction go to support local charities.

Yale School of Medicine Admissions Committee New Haven, CT 2015-2017
Interviewer. Served as a full voting member of the admissions committee. Responsibilities include student interviewing, recruitment, and organizing LGBT-focused activities for admitted students.

Jack L. Turban MD MHS

401 Quarry Road
Stanford, California 94304
650-498-4960
jturban@stanford.edu

Harvard College Admissions New Haven, CT

2012-Present

Interviewer. Interviewing students from the Boston area for admission to Harvard College.

SELECTED PUBLICATIONS

Turban, J. L., Passell E, Scheer L, Germine L. Use of Geosocial Networking Applications Is Associated With Compulsive Sexual Behavior Disorder in an Online Sample. *The Journal of Sexual Medicine*. [ePub ahead of print]

Turban, J. L., Keuroghlian, A. S., & Mayer, K. H. Sexual Health in the SARS-CoV-2 Era. *Annals of Internal Medicine*. [ePub ahead of print]

Suoizzi, K., **Turban, J.**, & Girardi, M. (2020). Focus: Skin: Cutaneous Photoprotection: A Review of the Current Status and Evolving Strategies. *The Yale Journal of Biology and Medicine*, 93(1), 55.

Malta, M., LeGrand, S., **Turban, J.**, Poteat, T., & Whetten, K. (2020). Gender-congruent government identification is crucial for gender affirmation. *The Lancet Public Health*. [ePub ahead of print]

Turban, J. L., King, D., Carswell, J. M., & Keuroghlian, A. S. (2020). Pubertal suppression for transgender youth and risk of suicidal ideation. *Pediatrics*, 145(2).

Turban, J. L., Shirk, S. D., Potenza, M. N., Hoff, R. A., & Kraus, S. W. (2020). Posting Sexually Explicit Images or Videos of Oneself Online Is Associated With Impulsivity and Hypersexuality but Not Measures of Psychopathology in a Sample of US Veterans. *The Journal of Sexual Medicine*, 17(1), 163-167.

Turban, J. L., Beckwith, N., Reisner, S. L., & Keuroghlian, A. S. (2020). Association between recalled exposure to gender identity conversion efforts and psychological distress and suicide attempts among transgender adults. *JAMA Psychiatry*, 77(1), 68-76.

Acosta, W., Qayyum, Z., **Turban, J. L.**, & van Schalkwyk, G. I. (2019). Identify, engage, understand: Supporting transgender youth in an inpatient psychiatric hospital. *Psychiatric Quarterly*, 90(3), 601-612.

Turban, J. L. (2019). Medical Training in the Closet. *The New England Journal of Medicine*, 381(14), 1305.

Turban, J. L., King, D., Reisner, S. L., & Keuroghlian, A. S. (2019). Psychological Attempts to Change a Person's Gender Identity from Transgender to Cisgender: Estimated Prevalence Across US States, 2015. *American Journal of Public Health*, 109(10), 1452-1454.

Turban, J. L., & Keuroghlian, A. S. (2018). Dynamic gender presentations: understanding transition and "de-transition" among transgender youth. *Journal of the American Academy of Child and Adolescent Psychiatry*, 57(7), 451-453.

Turban, J. L., Carswell, J., & Keuroghlian, A. S. (2018). Understanding pediatric patients who discontinue gender-affirming hormonal interventions. *JAMA Pediatrics*, 172(10), 903-904.

Turban, J. L. (2018). Potentially Reversible Social Deficits Among Transgender Youth. *Journal of Autism and Developmental Disorders*, 48(12), 4007-4009.

Turban, J. L., Shadianloo S. Transgender & Gender Non-conforming Youth. *IACAPAP e-Textbook of Child and Adolescent Mental Health*. Geneva. International Association of Child and Adolescent Psychiatry and Allied Professionals, 2018.

Jack L. Turban MD MHS

401 Quarry Road
Stanford, California 94304
650-498-4960
jturban@stanford.edu

Turban, J. L., & van Schalkwyk, G. I. (2018). "Gender dysphoria" and autism spectrum disorder: Is the link real?. *Journal of the American Academy of Child & Adolescent Psychiatry*, 57(1), 8-9.

Turban, J. L., Winer, J., Boulware, S., VanDeusen, T., & Encandela, J. (2018). Knowledge and attitudes toward transgender health. *The clinical teacher*, 15(3), 203-207.

Turban, J. L., & Ehrensaft, D. (2018). Research review: gender identity in youth: treatment paradigms and controversies. *Journal of Child Psychology and Psychiatry*, 59(12), 1228-1243.

Turban, J. L., DeVries, A.L.C., Zucker, K. Gender Incongruence & Gender Dysphoria. In Martin A, Bloch MH, Volkmar FR (Editors): *Lewis's Child and Adolescent Psychiatry: A Comprehensive Textbook, Fifth Edition*. Philadelphia: Wolters Kluwer 2018.

The American Academy of Child & Adolescent Psychiatry. Policy Statement on 'Reparative Therapy' for LGBT Youth, 2017.

Turban, J. L., Genel, M. (2017) Evolving Treatment Paradigms for Transgender Patients. *Connecticut Medicine*, 81(8), 483-486.

Turban, J., Ferraiolo, T., Martin, A., & Olezeski, C. (2017). Ten things transgender and gender nonconforming youth want their doctors to know. *Journal of the American Academy of Child & Adolescent Psychiatry*, 56(4), 275-277.

Turban, J. L. (2017). Transgender Youth: The Building Evidence Base for Early Social Transition. *Journal of the American Academy of Child and Adolescent Psychiatry*, 56(2), 101.

Turban, J. L., Potenza, M. N., Hoff, R. A., Martino, S., & Kraus, S. W. (2017). Psychiatric disorders, suicidal ideation, and sexually transmitted infections among post-deployment veterans who utilize digital social media for sexual partner seeking. *Addictive Behaviors*, 66, 96-100.

Turban, J. L., Martin A. (2017) Book Forum: Becoming Nicole. *Journal of the American Academy of Child & Adolescent Psychiatry*, 56(1): 91-92.

Turban, J. L.*, Lu, A. Y*., Damisah, E. C., Li, J., Alomari, A. K., Eid, T., ... & Chiang, V. L. (2017). Novel biomarker identification using metabolomic profiling to differentiate radiation necrosis and recurrent tumor following Gamma Knife radiosurgery. *Journal of neurosurgery*, 127(2), 388-396.

Kempfle, J. S., **Turban, J. L., & Edge, A. S.** (2016). Sox2 in the differentiation of cochlear progenitor cells. *Scientific Reports*, 6, 23293.

PRESENTATIONS & ABSTRACTS

Turban JL, McFarland C, Walters O, Rosenblatt S. An Overview of Best Outpatient Practice in the Care of Transgender Individual. Oral Presentation, Annual Meeting of the American Psychiatric Association, Philadelphia, 2020. [Accepted, but cancelled due to COVID19]

Turban JL, Lakshmin P, Gold J, Khandai C. #PsychiatryMatters: Combating Mental Health Misinformation Through Social Media and Popular Press. Oral Presentation, Annual Meeting of the American Psychiatric Association, Philadelphia, 2020. [Accepted, but cancelled due to COVID19]

Jack L. Turban MD MHS

401 Quarry Road
Stanford, California 94304
650-498-4960
jturban@stanford.edu

Turban JL, The Pen and the Psychiatrist: Outreach and Education Through the Written Word. Oral Presentation, Annual Meeting of the American Academy of Child & Adolescent Psychiatry, Chicago, 2019.

Turban, JL, For Better and For Worse: Gender and Sexuality Online, Annual Meeting of the American Academy of Child & Adolescent Psychiatry, Chicago, 2019.

Turban, JL, Gender Diverse Young Adults: Narratives and Clinical Considerations, Annual Meeting of the American Academy of Child & Adolescent Psychiatry, Chicago, 2019.

Turban, JL, Transgender Youth: Controversies and Research Updates, Oral Presentation, Annual Meeting of the American Psychiatric Association, San Francisco, 2019.

Turban, JL, Beckwith N, Reisner S, Keuroghlian A. Exposure to Conversion Therapy for Gender Identity Is Associated with Poor Adult Mental Health Outcomes among Transgender People in the U.S. Poster Presentation, Annual Meeting of the American Academy of Child & Adolescent Psychiatry, Seattle, 2018.

Shirk SD, **Turban JL**, Potenza M, Hoff R, Kraus S. Sexting among military veterans: Prevalence and correlates with psychopathology, suicidal ideation, impulsivity, hypersexuality, and sexually transmitted infections. Oral Presentation, International Conference on Behavioral Addictions, Cologne, Germany, 2018.

Turban JL, Gender Identity and Autism Spectrum Disorder. Oral Presentation, Annual Meeting of the American Academy of Child & Adolescent Psychiatry, Washington D.C., 2017.

Turban JL, Tackling Gender Dysphoria in Youth with Autism Spectrum Disorder from the Bible Belt to New York City. Oral Presentation, Annual Meeting of the American Academy of Child & Adolescent psychiatry, Washington D.C., 2017.

Turban JL, Affirmative Protocols for Transgender Youth. Oral Presentation, Annual Meeting of the American Academy of Child & Adolescent Psychiatry, Washington D.C., 2017.

Turban JL, Evolving Management of Transgender Youth. Oral Presentation, Klingenstein Third Generation Foundation Conference, St Louis, 2017.

Turban, JL, Potenza M, Hoff R, Martino S, Kraus S. Clinical characteristics associated with digital hookups, psychopathology, and clinical hypersexuality among US military veterans. Oral Presentation, International Conference on Behavioral Addictions, Haifa, Israel, 2017.

Lewis J, Monaco P, **Turban JL**, Girardi M. UV-induced mutant p53 keratinocyte clonal expansion dependence on IL-22 and ROR γ T. Poster, Society of Investigative Dermatology, Portland, 2017.

Turban JL, Winer J, Encandela J, Boulware S, VanDeusen T. Medical Student Knowledge of and Attitudes toward Transgender Pediatric Patient Care. Abstract, Gay & Lesbian Medical Association, St Louis, 2016.

Turban JL, Lu A, Damisah E, Eid T, Chiang V. Metabolomics to Differentiate Radiation Necrosis from Recurrent Tumor following Gamma Knife Stereotactic Radiosurgery for Brain Metastases. Oral Presentation, 14th Annual Leksell Gamma Knife Conference, New York City, 2014.

Turban JL, Lewis J, Girardi M. UVB-induced HMGB1 and extracellular ATP increase Langerhans cell production of IL-23 implicated in ILC3 activation. Poster, Society of Investigative Dermatology, Scottsdale, 2016.

Jack L. Turban MD MHS

401 Quarry Road
Stanford, California 94304
650-498-4960
jturban@stanford.edu

Turban JL, Lewis J, Girardi M. Characterization of cytokine pathways associated with Langerhans cell facilitation of UVB-induced epidermal carcinogenesis. Poster, American Society of Clinical Investigation, Chicago, 2016.

Lewis J, **Turban JL**, Girardi M, Michael Girardi. Langerhans cells and UV-radiation drive local IL22+ ILC3 in association with enhanced cutaneous carcinogenesis. Poster, Society of Investigative Dermatology, Scottsdale, 2016.

Sewanani L, Zheng D, Wang P, Guo X, Di Bartolo I, Marukian N, **Turban JL**, Rojas-Velazquez D, Reisman A. Reflective Writing Workshops Led By Near Peers During Third-Year Clerkships: A Safe Space for Solidarity, Conversation, and Finding Meaning in Medicine. Poster & Workshop, Society of General Internal Medicine, New Haven and Hollywood, 2016.

EDUCATIONAL PRESENTATIONS

Gender-affirming Care for Transgender Elders. McLean Geriatric Psychiatry Seminar Series, 2019
Writing about Gender & Sexuality (Guest Lecture), Course: Sexual Outcasts & Uncommon Desires, Emerson College, 2019
Gender-affirming Care for Transgender and Gender Diverse Patients on Inpatient Psychiatric Units, MGH Inpatient Psychiatry Seminar Series, 2019
Transgender & Gender Non-conforming Youth, MGH/McLean Adult Residency program, 2018
Writing about Gender Identity for the Lay Audience (Guest Lecture), Course: Kids These Days, Emerson Journalism Program, 2017
International Approaches to the Treatment of Gender Incongruence, VU Medical Center, Amsterdam, 2017
Time to Talk About It: Physician Depression and Suicide, Yale Clerkship Didactics, 2017
Medical Management of Adolescent Gender Dysphoria. Yale Pediatrics Clerkship, 2015-2016
Medical Management of Children and Adolescents with Gender Dysphoria, Yale Pediatrics Residency Didactics, 2016
Reflective Writing Workshop Leader. Yale Surgery Clerkship, 2015-2016
Langerhans Cell Facilitation of Photocarcinogenesis. Yale Department of Dermatology Research Forum, 2016
Panel: Treating Transgender & Gender Non-conforming Patients in the Emergency Setting. Yale Emergency Medicine Clerkship, 2016
Panel: Challenges to the Learning Climate: Difficult Patients, Harassment, and Mistreatment. Yale Pre-Clinical Orientation, 2016
Panel: Personal Behavior and Professionalism, Introduction to the Profession, 2016

AWARDS & HONORS

American Academy of Child & Adolescent Psychiatry Pilot Research Award, \$15,000 (2019-2020)
American Psychiatric Association Child & Adolescent Psychiatry Fellowship (2019-2021)
Ted Stern Scholarship and Travel Award (2019)
Ted Stern Scholarship and Travel Award (2018)
Medaris Grant (2018)
United States Preventative Health Services Award for Excellence in Public Health (2017)
NBC Pride 30 Innovator (2017)
Ferris Thesis Prize, Yale School of Medicine (2017)
Parker Prize, Yale School of Medicine (2017)
Howard Hughes Medical Institute Medical Research Fellowship (2015-2016)
American Academy of Child and Adolescent Psychiatry Life Members Mentorship Grant (2016)
Student Scholarship, Gender Conference East (2016)
Farr Award for Excellence in Research (2016)
Yale Office of International Medical Education Grant, Buenos Aires, Argentina (2016)
Yale Office of International Medical Education Grant, VU Medical Center, The Netherlands (2016)
Yale Summer Research Grant (2012)

Jack L. Turban MD MHS

401 Quarry Road
Stanford, California 94304
650-498-4960
jturban@stanford.edu

AIG International Scholar, Harvard College (2007-2011)
Harvard International Study Grant, Alicante, Spain (2008)
David Rockefeller International Study Grant, Shanghai, China (2009)

PROFESSIONAL MEMBERSHIPS

American Medical Association, Member
American Psychiatric Association, Member
American Psychiatry Association, Council on Communications
American Academy of Child & Adolescent Psychiatry, Member
American Academy of Child & Adolescent Psychiatry, Media Committee
Journal of the American Medical Association, Peer Reviewer
Journal of the American Academy of Child & Adolescent Psychiatry, Peer Reviewer
Pediatrics, Peer Reviewer
Journal of Adolescent Health, Peer Reviewer
Academic Psychiatry, Peer Reviewer
Journal of Autism and Developmental Disorders, Peer Reviewer
Journal of Child Psychology and Psychiatry, Peer Reviewer
American Journal of Public Health, Peer Reviewer
Journal of Clinical Medicine, Peer Reviewer
Brain Sciences, Peer Reviewer
Journal of Homosexuality, Peer Reviewer
American Journal of Geriatric Psychiatry, Peer Reviewer

EXHIBIT B

BIBLIOGRAPHY

1. The American Academy of Child & Adolescent Psychiatry. Conversion Therapy. 2018. https://www.aacap.org/AACAP/Policy_Statements/2018/Conversion_Therapy.aspx.
2. American Medical Association. Health care needs of lesbian, gay, bisexual and transgender populations. H-160.991. 2017. <https://policysearch.ama-assn.org/policyfinder/detail/H-160.991%20?uri=%2FAMADoc%2FHOD.xml-805.xml>.
3. Bränström, R., & Pachankis, J. E. (2019). Reduction in mental health treatment utilization among transgender individuals after gender-affirming surgeries: a total population study. *American Journal of Psychiatry*.
4. Costa, R., Dunsford, M., Skagerberg, E., Holt, V., Carmichael, P., & Colizzi, M. (2015). Psychological support, puberty suppression, and psychosocial functioning in adolescents with gender dysphoria. *The Journal of Sexual Medicine*, 12(11), 2206-2214.
5. de Vries, A. L., Steensma, T. D., Cohen-Kettenis, P. T., VanderLaan, D. P., & Zucker, K. J. (2016). Poor peer relations predict parent-and self-reported behavioral and emotional problems of adolescents with gender dysphoria: a cross-national, cross-clinic comparative analysis. *European Child & Adolescent Psychiatry*, 25(6), 579-588.
6. de Vries, A. L., McGuire, J. K., Steensma, T. D., Wagenaar, E. C., Doreleijers, T. A., & Cohen-Kettenis, P. T. (2014). Young adult psychological outcome after puberty suppression and gender reassignment. *Pediatrics*, 134(4), 696-704.
7. Durwood, L., McLaughlin, K. A., & Olson, K. R. (2017). Mental health and self-worth in socially transitioned transgender youth. *Journal of the American Academy of Child & Adolescent Psychiatry*, 56(2), 116-123.
8. Littman, L. (2019). Correction: Parent reports of adolescents and young adults perceived to show signs of a rapid onset of gender dysphoria. *PloS one*, 14(3), e0214157.
9. Olson, K. R., Durwood, L., DeMeules, M., & McLaughlin, K. A. (2016). Mental health of transgender children who are supported in their identities. *Pediatrics*, 137(3).

10. Rae, J. R., Gülgöz, S., Durwood, L., DeMeules, M., Lowe, R., Lindquist, G., & Olson, K. R. (2019). Predicting early-childhood gender transitions. *Psychological Science, 30*(5), 669-68.
11. Rafferty, J., & Committee on Psychosocial Aspects of Child and Family Health. (2018). Ensuring comprehensive care and support for transgender and gender-diverse children and adolescents. *Pediatrics, 142*(4).
12. Scheim, A. I., Perez-Brumer, A. G., & Bauer, G. R. (2020). Gender-concordant identity documents and mental health among transgender adults in the USA: a cross-sectional study. *The Lancet Public Health, 5*(4), e196-e203.
13. Travers, R., Bauer, G., & Pyne, J. (2012). Impacts of strong parental support for trans youth: A report prepared for Children's Aid Society of Toronto and Delisle Youth Services. Trans Pulse.
14. Turban JL, DeVries ALC, Zucker K. Gender Incongruence & Gender Dysphoria. In Martin A, Bloch MH, Volkmar FR (Editors): *Lewis's Child and Adolescent Psychiatry: A Comprehensive Textbook*, Fifth Edition. Philadelphia: Wolters Kluwer 2018.
15. Turban, J. L., & Ehrensaft, D. (2018). Research Review: Gender identity in youth: treatment paradigms and controversies. *Journal of Child Psychology and Psychiatry, 59*(12), 1228-1243.
16. Turban, J. L., Beckwith, N., Reisner, S. L., & Keuroghlian, A. S. (2020). Association between recalled exposure to gender identity conversion efforts and psychological distress and suicide attempts among transgender adults. *JAMA Psychiatry, 77*(1), 68-76.
17. Turban, J. L., King, D., Carswell, J. M., & Keuroghlian, A. S. (2020). Pubertal suppression for transgender youth and risk of suicidal ideation. *Pediatrics, 145*(2).
18. Wiepjes, C. M., Nota, N. M., de Blok, C. J., Klaver, M., de Vries, A. L., Wensing-Kruger, S. A., ... & Gooren, L. J. (2018). The Amsterdam cohort of gender dysphoria study (1972–2015): trends in prevalence, treatment, and regrets. *The Journal of Sexual Medicine, 15*(4), 582-590.

**Exhibit A to Affidavit of Dr.
Stephen Levine
(ECF No. 46-2)**

Stephen B. Levine, M.D.

Curriculum Vita

Brief Introduction

Dr. Levine is Clinical Professor of Psychiatry at Case Western Reserve University School of Medicine. He is the solo author of four books, *Sex Is Not Simple* in 1989 (translated to German in 1992 and reissued in English in 1997 as *Solving Common Sexual Problems*); *Sexual Life: A clinician's guide* in 1992; *Sexuality in Midlife* in 1998 and *Demystifying Love: Plain talk for the mental health professional* in 2006; *Barriers to Loving: A clinician's perspective* in October 2013. He is the Senior Editor of the first (2003), second (2010) and third (2016) editions of the *Handbook of Clinical Sexuality for Mental Health Professionals*. *Psychotherapeutic Approaches to Sexual Problems: An Essential Guide For Mental Health Professionals* will be published in the fall 2019. He has been teaching, providing clinical care, and writing since 1973 and has generated original research, invited papers, commentaries, chapters, and book reviews. He has served as a journal manuscript and book prospectus reviewer for many years. He was co-director of the Center for Marital and Sexual Health/ Levine, Risen & Associates, Inc. in Beachwood, Ohio from 1992-2017. He and two colleagues received a lifetime achievement Masters and Johnson's Award from the Society for Sex Therapy and Research in March 2005.

Personal Information

Date of birth 1/14/42

Medical license no. Ohio 35-03-0234-L

Board Certification 6/76 American Board of Neurology and Psychiatry

Education

1963 BA Washington and Jefferson College

1967 MD Case Western Reserve University School of Medicine

1967-68 internship in Internal Medicine University Hospitals of Cleveland

1968-70 Research associate, National Institute of Arthritis and Metabolic Diseases, Epidemiology Field Studies Unit, Phoenix, Arizona, United States Public Health Service

1970-73 Psychiatric Residency, University Hospitals of Cleveland

1974-77 Robert Wood Johnson Foundation Clinical Scholar

Appointments at Case Western Reserve University School of Medicine

1973 - Assistant Professor of Psychiatry

1979 - Associate Professor

1982 - Tenure

1985 - Full Professor

1993 - Clinical Professor

Honors

Summa Cum Laude, Washington & Jefferson

Teaching Excellence Award - 1990 and 2010 (residency program)

Visiting Professorships:

- Stanford University-Pfizer Professorship program (3 days) - 1995
- St. Elizabeth's Hospital, Washington, DC - 1998
- St. Elizabeth's Hospital, Washington, DC - 2002

Named to America's Top Doctors consecutively since 2001

Invitations to present various Grand Rounds at Departments of Psychiatry and Continuing Education Lectures and Workshops

Masters and Johnson Lifetime Achievement Award from the Society of Sex Therapy and Research, April 2005 along with Candace Risen and Stanley Althof

2006 SSTAR Book Award for The Handbook of Clinical Sexuality for Mental Health Professionals: Exceptional Merit

2018 - Albert Marquis Lifetime Achievement Award from Marquis Who's Who. (excelling in one's field for at least twenty years)

Professional Societies

1971 - American Psychiatric Association; fellow

2005 - American Psychiatric Association - **Distinguished Life Fellow**

1973 - Cleveland Psychiatric Society

1973 - Cleveland Medical Library Association

- 1985 - Life Fellow
- 2003 - Distinguished Life Fellow

1974 - Society for Sex Therapy and Research

- 1987-89 - President

1983 - International Academy of Sex Research

1983 - Harry Benjamin International Gender Dysphoria Association

- 1997-98 - Chairman, Standards of Care Committee

1994-99 - Society for Scientific Study of Sex

Community Boards

1999-2002 - Case Western Reserve University Medical Alumni Association

1996-2001 - Bellefaire Jewish Children's Bureau

1999-2001 - Physicians' Advisory Committee, The Gathering Place (cancer rehabilitation)

Editorial Boards

1978-80 Book Review Editor Journal Sex and Marital Therapy

Manuscript Reviewer for:

- Archives of Sexual Behavior
- Annals of Internal Medicine
- British Journal of Obstetrics and Gynecology
- JAMA
- Diabetes Care
- American Journal of Psychiatry
- Maturitas
- Psychosomatic Medicine
- Sexuality and Disability
- Journal of Nervous and Mental Diseases
- Journal of Neuropsychiatry and Clinical Neurosciences
- Neurology
- Journal Sex and Marital Therapy
- Journal Sex Education and Therapy
- Social Behavior and Personality: an international journal (New Zealand)
- International Journal of Psychoanalysis
- International Journal of Transgenderism
- Journal of Urology
- Journal of Sexual Medicine
- Current Psychiatry
- International Journal of Impotence Research
- Postgraduate medical journal
- Academic Psychiatry

Prospectus Reviewer for:

- Guilford
- Oxford University Press

- Brunner/Routledge
- Routledge

Administrative Responsibilities

Co-director, Center for Marital and Sexual Health/ Levine, Risen & Associates, Inc. until June 30, 2017

Principal Investigator of approximately 70 separate studies involving pharmacological interventions for sexual dysfunction since 1989.

Co-leader of case conferences at DELRLLC.com

Recent Expert Witness Appearances

US District Court, Judge Mark L. Wolf's witness in Michelle Kosilek vs. Massachusetts Dept of Corrections et al. case (transsexual issue) in Boston 2007

Deposition in the Battista vs. Massachusetts Dept of Corrections case (transsexual issue) in Cleveland October 2009

Witness for Massachusetts Dept. of Corrections in their defense of a lawsuit brought by prisoner Katheena Soneeya. March 22, 2011 Deposition in Boston and October 2018 in Cleveland

Witness for State of Florida vs. Reyne Keohane July 2017

Expert testimony by deposition and at trial in *In the Interests of the Younger Children*, Dallas, TX, 2019.

Consultancy

Massachusetts Department of Corrections - evaluation of 12 transsexual prisoners and the development of a Gender Identity Disorders Program for the state prison system. Monthly consultation with the GID treatment team since February 2009 and the GID policy committee since February 2010

California Department of Corrections and Rehabilitation; 2012-2015; education, inmate evaluation, commentary on inmate circumstances, suggestions on future policies

Virginia Department of Corrections - evaluation of an inmate

New Jersey Department of Corrections - evaluation of an inmate

Idaho Department of Corrections - workshop 2016

Grant Support/Research Studies

TAP - studies of Apomorphine sublingual in treatment of erectile dysfunction

Pfizer - Sertraline for premature ejaculation

Pfizer - Viagra and depression; Viagra and female sexual dysfunction; Viagra as a treatment for SSRI-induced erectile dysfunction

NIH - Systemic lupus erythematosus and sexuality in women

Sihler Mental Health Foundation

- Program for Professionals
- Setting up of Center for Marital and Sexual Health
- Clomipramine and Premature ejaculation
- Follow-up study of clergy accused of sexual impropriety
- Establishment of services for women with breast cancer

Alza - controlled study of a novel SSRI for rapid ejaculation

Pfizer - Viagra and self-esteem

Pfizer - double-blind placebo control studies of a compound for premature ejaculation

Johnson & Johnson - controlled studies of Dapoxetine for rapid ejaculation

Proctor and Gamble - multiple studies to test testosterone patch for post menopausal sexual dysfunction for women on and off estrogen replacement

Lilly-Icos - study of Cialis for erectile dysfunction

VIVUS - study for premenopausal women with FSAD

Palatin Technologies - studies of bremelanotide in female sexual dysfunction—first intranasal then subcutaneous administration

Medtap - interview validation questionnaire studies

HRA - quantitative debriefing study for Female partners of men with premature ejaculation, Validation of a New Distress Measure for FSD,

Boehringer-Ingelheim - double blind and open label studies of a prosexual agent for hypoactive female sexual desire disorder

Biosante - studies of testosterone gel administration for post menopausal women with HSDD

J&J - a single-blind, multi-center, in home use study to evaluate sexual enhancement effects of a product in females.

UBC - Content validity study of an electronic FSEP-R and FSDD-DAO and usability of study PRO measures in premenopausal women with FSAD, HSDD or Mixed FSAD/HSDD

National registry trial for women with HSDD

Endoceutics - two studies of DHEA for vaginal atrophy and dryness in post menopausal women

Palatin - study of SQ Bremelanotide for HSDD and FSAD

Trimel - a double-blind, placebo controlled study for women with acquired female orgasmic disorder.

S1 Biopharma - a phase 1-B non-blinded study of safety, tolerability and efficacy of Lorexys in premenopausal women with HSDD

HRA - qualitative and cognitive interview study for men experiencing PE

Publications

A) Books

- 1) Pariser SR, Levine SB, McDowell M (eds.), Clinical Sexuality, Marcel Dekker, New York, 1985
- 2) Sex Is Not Simple, Ohio Psychological Publishing Company, 1988; Reissued in paperback as: Solving Common Sexual Problems: Toward a Problem Free Sexual Life, Jason Aronson, Livingston, NJ. 1997
- 3) Sexual Life: A Clinician's Guide. Plenum Publishing Corporation. New York, 1992
- 4) Sexuality in Midlife. Plenum Publishing Corporation. New York, 1998
- 5) Editor. Clinical Sexuality. Psychiatric Clinics of North America, March, 1995.
- 6) Editor, (Candace Risen and Stanley Althof, associate editors) Handbook of Clinical Sexuality for Mental Health Professionals. Routledge, New York, 2003
 - (a) 2006 SSTAR Book Award: Exceptional Merit
- 7) Demystifying Love: Plain Talk For The Mental Health Professional. Routledge, New York, 2006
- 8) Senior editor, (Candace B. Risen and Stanley E. Althof, Associate editors), Handbook of Clinical Sexuality for Mental Health Professionals. 2nd edition Routledge, New York, 2010. See review by Pega Ren, JSex&Marital Therapy
- 9) Barriers to Loving: A Clinician's Perspective. Routledge, New York, 2014.
- 10) Senior editor (Candace B. Risen and Stanley E. Althof, Associate editors), Handbook of Clinical Sexuality for Mental Health Professionals. 3rd edition Routledge, New York, 2016

B) Research and Invited Papers

(When his name is not listed in a citation, Dr. Levine is either the solo or the senior author)

- 1) Sampliner R. Parotid enlargement in Pima Indians. Annals of Internal Medicine 1970; 73:571-73
- 2) Confrontation and residency activism: A technique for assisting residency change: World Journal of Psychosynthesis 1974; 6: 23-26
- 3) Activism and confrontation: A technique to spur reform. Resident and Intern Consultant 173; 2
- 4) Medicine and Sexuality. Case Western Reserve Medical Alumni Bulletin 1974:37:9-11.

- 5) Some thoughts on the pathogenesis of premature ejaculation. *J. Sex & Marital Therapy* 1975; 1:326-334
- 6) Marital Sexual Dysfunction: Introductory Concepts. *Annals of Internal Medicine* 1976;84:448-453
- 7) Marital Sexual Dysfunction: Ejaculation Disturbances 1976; 84:575-579
- 8) Yost MA: Frequency of female sexual dysfunction in a gynecology clinic: An epidemiological approach. *Archives of Sexual Behavior* 1976;5:229-238
- 9) Engel IM, Resnick PJ, Levine SB: Use of programmed patients and videotape in teaching medical students to take a sexual history. *Journal of Medical Education* 1976;51:425-427
- 10) Marital Sexual Dysfunction: Erectile dysfunction. *Annals of Internal Medicine* 1976;85:342-350
- 11) Articles in *Medical Aspects of Human Sexuality*
 - (a) Treating the single impotent male. 1976; 10:123, 137
 - (b) Do men enjoy being caressed during foreplay as much as women do? 1977; 11:9
 - (c) Do men like women to be sexually assertive? 1977;11:44
 - (d) Absence of sexual desire in women: Do some women never experience sexual desire? Is this possibility genetically determined? 1977; 11:31
 - (e) Barriers to the attainment of ejaculatory control. 1979; 13:32-56.
 - (f) Commentary on sexual revenge.1979;13:19-21
 - (g) Prosthesis for psychogenic impotence? 1979;13:7
 - (h) Habits that infuriate mates. 1980;14:8-19
 - (i) Greenberger-Englander, Levine SB. Is an enema an erotic equivalent?1981; 15:116
 - (j) Ford AB, Levine SB. Sexual Behavior and the Chronically Ill Patients. 1982; 16:138-150
 - (k) Preoccupation with wife's sexual behavior in previous marriage 1982; 16:172
 - (l) Co-existing organic and psychological impotence. 1985;19:187-8
 - (m) Althof SE, Turner LA, Kursh ED, Bodner D, Resnick MI, Risen CB. Benefits and Problems with Intracavernosal injections for the treatment of impotence. 1989;23(4):38-40
- 12) Male Sexual Problems. *Resident and Staff Physician* 1981:2:90-5
- 13) Female Sexual Problems. *Resident and Staff Physician* 1981:3:79-92
- 14) How can I determine whether a recent depression in a 40 year old married man is due to organic loss of erectile function or whether the depression is the source of the

- dysfunction? *Sexual Medicine Today* 1977;1:13
- 15) Corradi RB, Resnick PJ, Levine SB, Gold F. For chronic psychologic impotence: sex therapy or psychotherapy? I & II *Roche Reports*; 1977
 - 16) Marital Sexual Dysfunction: Female dysfunctions 1977; 86:588-597
 - 17) Current problems in the diagnosis and treatment of psychogenic impotence. *Journal of Sex & Marital Therapy* 1977; 3:177-186
 - 18) Resnick PJ, Engel IM. Sexuality curriculum for gynecology residents. *Journal of Medical Education* 1978; 53:510-15
 - 19) Agle DP. Effectiveness of sex therapy for chronic secondary psychological impotence *Journal of Sex & Marital Therapy* 1978; 4:235-258
 - 20) DePalma RG, Levine SB, Feldman S. Preservation of erectile function after aortoiliac reconstruction. *Archives of Surgery* 1978; 113:958-962
 - 21) Conceptual suggestions for outcome research in sex therapy *Journal of Sex & Marital Therapy* 1981; 6:102-108
 - 22) Lothstein LM. Transsexualism or the gender dysphoria syndrome. *Journal of Sex & Marital Therapy* 1982; 7:85-113
 - 23) Lothstein LM, Levine SB. Expressive psychotherapy with gender dysphoria patients *Archives General Psychiatry* 1981; 38:924-929
 - 24) Stern RG. Sexual function in cystic fibrosis. *Chest* 1982; 81:422-8
 - 25) Shumaker R. Increasingly Ruth: Towards understanding sex reassignment surgery *Archives of Sexual Behavior* 1983; 12:247-61
 - 26) Psychiatric diagnosis of patients requesting sex reassignment surgery. *Journal of Sex & Marital Therapy* 1980; 6:164-173
 - 27) Problem solving in sexual medicine I. *British Journal of Sexual Medicine* 1982; 9:21-28
 - 28) A modern perspective on nymphomania. *Journal of Sex & Marital Therapy* 1982; 8:316-324
 - 29) Nymphomania. *Female Patient* 1982;7:47-54
 - 30) Commentary on Beverly Mead's article: When your patient fears impotence. *Patient Care* 1982; 16:135-9
 - 31) Relation of sexual problems to sexual enlightenment. *Physician and Patient* 1983 2:62
 - 32) Clinical overview of impotence. *Physician and Patient* 1983; 8:52-55.
 - 33) An analytical approach to problem-solving in sexual medicine: a clinical introduction to the psychological sexual dysfunctions. II. *British Journal of Sexual Medicine*

- 34) Coffman CB, Levine SB, Althof SE, Stern RG Sexual Adaptation among single young adults with cystic fibrosis. *Chest* 1984; 86:412-418
- 35) Althof SE, Coffman CB, Levine SB. The effects of coronary bypass in female sexual, psychological, and vocational adaptation. *Journal of Sex & Marital Therapy* 1984; 10:176-184
- 36) Letter to the editor: Follow-up on Increasingly Ruth. *Archives of Sexual Behavior* 1984; 13:287-9
- 37) Essay on the nature of sexual desire *Journal of Sex & Marital Therapy* 1984; 10:83-96
- 38) Introduction to the sexual consequences of hemophilia. *Scandinavian Journal of Haemology* 1984; 33:(supplement 40).75-
- 39) Agle DP, Heine P. Hemophila and Acquired Immune Deficiency Syndrome: Intimacy and Sexual Behavior. National Hemophilia Foundation; July, 1985
- 40) Turner LA, Althof SE, Levine SB, Bodner DR, Kursh ED, Resnick MI. External vacuum devices in the treatment of erectile dysfunction: a one-year study of sexual and psychosocial impact. *Journal of Sex & Marital Therapy*
- 41) Schein M, Zyzanski SJ, Levine SB, Medalie JH, Dickman RL, Alemagno SA. The frequency of sexual problems among family practice patients. *Family Practice Research Journal* 1988; 7:122-134
- 42) More on the nature of sexual desire. *Journal of Sex & Marital Therapy* 1987; 13:35-44
- 43) Waltz G, Risen CB, Levine SB. Antiandrogen treatment of male sex offenders. *Health Matrix* 1987; V.51-55.
- 44) Lets talk about sex. National Hemophilia Foundation January, 1988
- 45) Sexuality, Intimacy, and Hemophilia: questions and answers . National Hemophilia Foundation January, 1988
- 46) Prevalence of sexual problems. *Journal Clinical Practice in Sexuality* 1988;4:14-16.
- 47) Kursh E, Bodner D, Resnick MI, Althof SE, Turner L, Risen CB, Levine SB. Injection Therapy for Impotence. *Urologic Clinics of North America* 1988; 15(4):625-630
- 48) Bradley SJ, Blanchard R, Coates S, Green R, Levine S, Meyer-Bahlburg H, Pauly I, Zucker KJ. Interim report of the DSM-IV Subcommittee for Gender Identity Disorders. *Archives of Sexual Behavior* 1991;;20(4):333-43.
- 49) Sexual passion in mid-life. *Journal of Clinical Practice in Sexuality* 1991 6(8):13-19
- 50) Althof SE, Turner LA, Levine SB, Risen CB, Bodner DR, Resnick MI. Intracavernosal injections in the treatment of impotence: A prospective study of sexual, psychological, and marital functioning. *Journal of Sex & Marital Therapy* 1987; 13:155-167

- 51) Althof SE, Turner LA, Risen CB, Bodner DR, Kursh ED, Resnick MI. Side effects of self-administration of intracavernosal injection of papaverine and phentolamine for treatment of impotence. *Journal of Urology* 1989; 141:54-7
- 52) Turner LA, Froman SL, Althof SE, Levine SB, Tobias TR, Kursh ED, Bodner DR. Intracavernous injection in the management of diabetic impotence. *Journal of Sexual Education and Therapy* 16(2):126-36, 1989
- 53) Is it time for sexual mental health centers? *Journal of Sex & Marital Therapy* 1989;
- 54) Althof SE, Turner LA, Levine SB, Risen CB, Bodner D, Kursh ED, Resnick MI. Sexual, psychological, and marital impact of self injection of papaverine and phentolamine: a long-term prospective study. *Journal of Sex & Marital Therapy*
- 55) Althof SE, Turner LA, Levine SB, Risen CB, Bodner D, Kursh ED, Resnick MI. Why do so many men drop out of intracavernosal treatment? *Journal of Sex & Marital Therapy*. 1989; 15:121-9
- 56) Turner LA, Althof SE, Levine SB, Risen CB, Bodner D, Kursh ED, Resnick MI. Self injection of papaverine and phentolamine in the treatment of psychogenic impotence. *Journal of Sex & Marital Therapy*. 1989; 15(3):163-78
- 57) Turner LA, Althof SE, Levine SB, Risen CB, Bodner D, Kursh ED, Resnick MI. Treating erectile dysfunction with external vacuum devices: impact upon sexual, psychological, and marital functioning. *Journal of Urology* 1990; 141(1):79-82
- 58) Risen CB, Althof SE. An essay on the diagnosis and nature of paraphilia *Journal of Sex & Marital Therapy* 1990; 16(2):89-102.
- 59) Althof SE, Turner LA, Levine SB, Risen CB, Bodner DB, Kursh ED, Resnick MI. Through the eyes of women: the sexual and psychological responses of women to their partners' treatment with self-injection or vacuum constriction therapy. *International Journal of Impotence Research (supplement 2)*1990; 346-7.
- 60) Althof SE, Turner LA, Levine SB, Risen CB, Bodner DB, Kursh ED, Resnick MI. A comparison of the effectiveness of two treatments for erectile dysfunction: self injection vs. external vacuum devices. . *International Journal of Impotence Research (supplement 2)*1990; 289-90
- 61) Kursh E, Turner L, Bodner D, Althof S, Levine S. A prospective study on the use of the vacuum pump for the treatment of impotence. *International Journal of Impotence Research (supplement 2)*1990; 340-1.
- 62) Althof SE, Turner LA, Levine SB, Risen CB, Bodner DB, Kursh ED, Resnick MI. Long term use of intracavernous therapy in the treatment of erectile dysfunction in *Journal of Sex & Marital Therapy* 1991; 17(2):101-112
- 63) Althof SE, Turner LA, Levine SB, Risen CB, Bodner DB, Kursh ED, Resnick MI. Long term use of vacuum pump devices in the treatment of erectile dysfunction in *Journal of Sex & Marital Therapy* 1991;17(2):81-93
- 64) Turner LA, Althof SE, Levine SB, Bodner DB, Kursh ED, Resnick MI. A 12-month

- comparison of the effectiveness of two treatments for erectile dysfunction: self injection vs. external vacuum devices. *Urology* 1992;39(2):139-44
- 65) Althof SE, The pathogenesis of psychogenic impotence. *J. Sex Education and Therapy*. 1991; 17(4):251-66
- 66) Mehta P, Bedell WH, Cumming W, Bussing R, Warner R, Levine SB. Letter to the editor. Reflections on hemophilia camp. *Clinical Pediatrics* 1991; 30(4):259-260
- 67) Successful Sexuality. *Belonging/Hemophilia*. (Caremark Therapeutic Services), Autumn, 1991
- 68) Psychological intimacy. *Journal of Sex & Marital Therapy* 1991; 17(4):259-68
- 69) Male sexual problems and the general physician, *Georgia State Medical Journal* 1992; 81(5): 211-6
- 70) Althof SE, Turner LA, Levine SB, Bodner DB, Kursh E, Resnick MI. Through the eyes of women: The sexual and psychological responses of women to their partner's treatment with self-injection or vacuum constriction devices. *Journal of Urology* 1992; 147(4):1024-7
- 71) Curry SL, Levine SB, Jones PK, Kurit DM. Medical and Psychosocial predictors of sexual outcome among women with systemic lupus erythematosus. *Arthritis Care and Research* 1993; 6:23-30
- 72) Althof SE, Levine SB. Clinical approach to sexuality of patients with spinal cord injury. *Urological Clinics of North America* 1993; 20(3):527-34
- 73) Gender-disturbed males. *Journal of Sex & Marital Therapy* 19(2):131-141, 1993
- 74) Curry SL, Levine SB, Jones PK, Kurit DM. The impact of systemic lupus erythematosus on women's sexual functioning. *Journal of Rheumatology* 1994; 21(12):2254-60
- 75) Althof SE, Levine SB, Corty E, Risen CB, Stern EB, Kurit D. Clomipramine as a treatment for rapid ejaculation: a double-blind crossover trial of 15 couples. *Journal of Clinical Psychiatry* 1995;56(9):402-7
- 76) Risen CB, Althof SE. Professionals who sexually offend: evaluation procedures and preliminary findings. *Journal of Sex & Marital Therapy* 1994; 20(4):288-302
- 77) On Love, *Journal of Sex & Marital Therapy* 1995; 21(3):183-191
- 78) What is clinical sexuality? *Psychiatric Clinics of North America* 1995; 18(1):1-6
- 79) "Love" and the mental health professions: Towards an understanding of adult love. *Journal of Sex & Marital Therapy* 1996; 22(3)191-20
- (a) Reprinted in *Issues in Human Sexuality: Current & Controversial Readings with Links to Relevant Web Sites*, 1998-9, Richard Blonna, Editor, Engelwood, Co. Morton Publishing Company, 1998
- 80) The role of Psychiatry in erectile dysfunction: a cautionary essay on the emerging

- treatments. *Medscape Mental Health* 2(8):1997 on the Internet. September, 1997.
- 81) Discussion of Dr. Derek Polonsky's SSTAR presentation on Countertransference. *Journal of Sex Education and Therapy* 1998; 22(3):13-17
- 82) Understanding the sexual consequences of the menopause. *Women's Health in Primary Care*, 1998
- (a) Reprinted in the *International Menopause Newsletter*
- 83) Fones CSL, Levine SB. Psychological aspects at the interface of diabetes and erectile dysfunction. *Diabetes Reviews* 1998; 6(1):1-8
- 84) Guay AT, Levine SB, Montague DK. New treatments for erectile dysfunction. *Patient Care* March 15, 1998
- 85) Extramarital Affairs. *Journal of Sex & Marital Therapy* 1998; 24(3):207-216
- 86) Levine SB (chairman), Brown G, Cohen-Kettenis P, Coleman E, Hage JJ, Petersen M, Pfäfflin F, Shaeffer L, vanMasdam J, Standards of Care of the Harry Benjamin International Gender Dysphoria Association, 5th revision, 1998. *International Journal of Transgenderism* at <http://www.symposion.com/ijt>
- (a) Reprinted by the Harry Benjamin International Gender Dysphoria Association, Minneapolis, Minnesota
- 87) Althof SE, Corty E, Levine SB, Levine F, Burnett A, McVary K, Stecher V, Seftel. The EDITS: the development of questionnaires for evaluating satisfaction with treatments for erectile dysfunction. *Urology* 1999;53:793-799
- 88) Fones CSL, Levine SB, Althof SE, Risen CB. The sexual struggles of 23 clergymen: a follow-up study. *Journal of Sex & Marital Therapy* 1999
- 89) The Newly Devised Standards of Care for Gender Identity Disorders. *Journal of Sex Education and Therapy* 24(3):1-11,1999
- 90) Levine, S. B. (1999). The newly revised standards of care for gender identity disorders. *Journal of Sex Education & Therapy*, 24, 117-127.
- 91) Melman A, Levine SB, Sachs B, Segraves RT, Van Driel MF. Psychological Issues in Diagnosis of Treatment (committee 11) in Erectile Dysfunction (A.Jarden, G.Wagner, S.Khoury, F. Guiliano, H.Padma-nathan, R. Rosen, eds.) Plymbridge Distributors Limited, London, 2000
- 92) Pallas J, Levine SB, Althof SE, Risen CB. A study using Viagra in a mental health practice. *J Sex&Marital Therapy*.26(1):41-50, 2000
- 93) Levine SB, Stagno S. Informed Consent for Case Reports: the ethical dilemma between right to privacy and pedagogical freedom. *Journal of Psychotherapy: Practice and Research*, 2001, 10 (3): 193-201.
- 94) Alloggiamento T., Zipp C., Raxwal VK, Ashley E, Dey S. Levine SB, Froelicher VF. Sex, the Heart, and Sildenafil. *Current Problems in Cardiology* 26 June 2001(6):381-416

- 95) Re-exploring The Nature of Sexual Desire. *Journal of Sex and Marital Therapy* 28(1):39-51, 2002.
- 96) Understanding Male Heterosexuality and Its Disorders in *Psychiatric Times* XIX(2):13-14, February, 2002
- 97) Erectile Dysfunction: Why drug therapy isn't always enough. (2003) *Cleveland Clinic Journal of Medicine*, 70(3): 241-246.
- 98) The Nature of Sexual Desire: A Clinician's Perspective. *Archives of Sexual Behavior* 32(3):279-286, 2003 .
- 99) Laura Davis. What I Did For Love: Temporary Returns to the Male Gender Role. *International Journal of Transgenderism*, 6(4), 2002 and <http://www.symposion.com/ijt>
- 100) Risen C.B., The Crisis in the Church: Dealing with the Many Faces of Cultural Hysteria in *The International Journal of Applied Psychoanalytic Studies*, 1(4):364-370, 2004
- 101) Althof SE, Leiblum SR (chairpersons), Chevert-Measson M, Hartman U., Levine SB, McCabe M., Plaut M, Rodrigues O, Wylie K., Psychological and Interpersonal Dimensions of Sexual Function and Dysfunction in World Health Organization Conference Proceedings on Sexual Dysfunctions, Paris, 2003. Published in a book issued in 2004.
- 102) Commentary on Ejaculatory Restrictions as a Factor in the Treatment of Haredi (Ultra-Orthodox) Jewish Couples: How Does Therapy Work? *Archives of Sexual Behavior*, 33(3):June 2004
- 103) What is love anyway? *J Sex & Marital Therapy* 31(2):143-152,2005.
- 104) A Slightly Different Idea, Commentary on Y.M.Binik's Should Dyspareunia Be Retained as a Sexual Dysfunction in DSM-V? A Painful Classification Decision. *Archives of Sexual Behavior* 34(1):38-39, 2005. <http://dx.doi.org/10.1007/s10508-005-7469-3>
- 105) Commentary. Pharmacologic Treatment of Erectile Dysfunction: Not always a simple matter. *BJM USA; Primary Care Medicine for the American Physician*, 4(6):325-326, July 2004
- 106) Leading Comment: A Clinical Perspective on Infidelity. *Journal of Sexual and Relationship Therapy*, 20(2):143-153, May 2005.
- 107) Multiple authors. Efficacy and safety of sildenafil citrate (Viagra) in men with serotonergic antidepressant-associated erectile dysfunction: Results from a randomized, double-blind, placebo-controlled trial. Submitted to *Journal of Clinical Psychiatry* Feb 2005
- 108) Althof SE, Leiblum SR, Chevert-Measson M, Hartman U, Levine SB, McCabe M, Plaut M, Rodrigues O, Wylie K. Psychological and Interpersonal Dimensions of Sexual Function and Dysfunction. *Journal of Sexual Medicine*, 2(6): 793-800,

November, 2005

- 109) Shifren JL, Davis SR, Moreau M, Waldbaum A, Bouchard C., DeRogatis L., Derzko C., Bearnson P., Kakos N., O'Neill S., Levine S., Wekselman K., Buch A., Rodenberg C., Kroll R. Testosterone Patch for the Treatment of Hypoactive Sexual Desire Disorder in Naturally Menopausal Women: Results for the INTIMATE NM1 Study. *Menopause: The Journal of the North American Menopause Society* 13(5) 2006.
- 110) Reintroduction to Clinical Sexuality. *Focus: A Journal of Lifelong Learning in Psychiatry* Fall 2005. III (4):526-531
- 111) PDE-5 Inhibitors and Psychiatry in *J Psychiatric Practice* 12 (1): 46-49, 2006.
- 112) Sexual Dysfunction: What does love have to do with it? *Current Psychiatry* 5(7):59-68, 2006.
- 113) How to take a Sexual History (Without Blushing), *Current Psychiatry* 5(8): August, 2006.
- 114) Linking Depression and ED: Impact on sexual function and relationships in Sexual Function and Men's Health Through the Life Cycle under the auspices of the Consortium for Improvement of Erectile Function (CIEF), 12-19, November, 2006.
- 115) The First Principle of Clinical Sexuality. Editorial. *Journal of Sexual Medicine*, 4:853-854, 2007
- 116) Commentary on David Rowland's editorial, "Will Medical Solutions to Sexual Problems Make Sexological Care and Science Obsolete?" *Journal of Sex and Marital Therapy*, 33(5), 2007 in press
- 117) Real-Life Test Experience: Recommendations for Revisions to the Standards of Care of the World Professional Association for Transgender Health International Journal of Transgenderism, Volume 11 Issue 3, 186-193, 2009
- 118) Sexual Disorders: Psychiatrists and Clinical Sexuality. *Psychiatric Times* XXIV (9), 42-43, August 2007
- 119) I am not a sex therapist! Commentary to I. Binik and M. Meana's article Sex Therapy: Is there a future in this outfit? *Archives of Sexual Behavior*, Volume 38, Issue 6 (2009), 1033-1034
- 120) Solomon A (2009) Meanings and Political Implications of "Psychopathology" in a Gender Identity Clinic: Report of 10 cases. *Journal of Sex and Marital Therapy* 35(1): 40-57.
- 121) Perelman, MA., Levine SB, Fischkoff SA. Randomized, Placebo-Controlled, Crossover Study to Evaluate the Effects of Intranasal Bremelanotide on Perceptions of Desire and Arousal in Postmenopausal Women with Sexual Arousal Disorder submitted to *Journal of Sexual Medicine* July 2009, rejected
- 122) What is Sexual Addiction? *Journal of Sex and Marital Therapy*. 2010

May;36(3):261-75

- 123) David Scott (2010) Sexual Education of Psychiatric Residents. *Academic Psychiatry*, 34(5) 349-352.
- 124) Chris G. McMahon, Stanley E. Althof, Joel M. Kaufman, Jacques Buvat, Stephen B. Levine, Joseph W. Aquilina, Fisseha Tesfaye, Margaret Rothman, David A. Rivas, Hartmut Porst. Efficacy and Safety of Dapoxetine for the Treatment of Premature Ejaculation: Integrated Analysis of Results From 5 Phase 3 Trials *Journal of Sexual Medicine* 2011 Feb;8(2):524-39.
- 125) Commentary on Consideration of Diagnostic Criteria for Erectile Dysfunction in DSM V. *Journal of Sexual Medicine* July 2010
- 126) Hypoactive Sexual Desire Disorder in Men: Basic types, causes, and treatment. *Psychiatric Times* 27(6)4-34. 2010
- 127) Male Sexual Dysfunctions, an audio lecture, American Physician Institute 2013
- 128) Fashions in Genital Fashion: Where is the line for physicians? Commentary on David Veale and Joe Daniels' Cosmetic Clitoridectomy in a 33-year-old woman. *Archives of Sexual Behavior*, epub ahead of print Sept 24, 2011. *Arch Sex Behav* (2012) 41:735–736 DOI 10.1007/s10508-011-9849-7
- 129) Review: Problematic Sexual Excess. *Neuropsychiatry* 2(1):1-12, 2012
- 130) The Essence of Psychotherapy. *Psychiatric Times* 28 (2): August 2, 2012 translated into Portuguese and republished in *Revista Latinoamericana de Psicopatologia Fundamental* (Latin-American Journal of Fundamental Psychopathology) in press 2012.
- 131) Parran TV, Pisman, AR, Youngner SJ, Levine SB. Evolution of remedial CME course in professionalism: Addressing learner needs, developing content, and evaluating outcomes. *Journal of Continuing Education in the Health Professions*, 33(3): 174-179, 2013.
- 132) Love and Psychiatry. *Psychiatric Times* November 2013
- 133) Orgasmic Disorders, Sexual Pain Disorders, and Sexual Dysfunction Due to a Medical Condition. Board Review Psychiatry 2013-2014 Audio Digest CD 27. Audio recording of a one-hour lecture available October 2013.
- 134) Towards a Compendium of the Psychopathologies of Love. *Archives of Sexual Behavior Online* First December 25, 2013 DOI 10.1007/s10508-013-0242-6 43(1)213-220.
- 135) Flibanserin. (editorial) *Archives of Sexual Behavior* 44 (8), 2015 November 2015. DOI: 10.1007/s10508-015-0617-y
- 136) Martel C, Labrie F, Archer DF, Ke Y, Gonthier R, Simard JN, Lavoie L, Vaillancourt M, Montesino M, Balsler J, Moyneur É; other participating members of the Prasterone Clinical Research Group. (2016) Serum steroid concentrations

remain within normal postmenopausal values in women receiving daily 6.5mg intravaginal prasterone for 12 weeks. *J Steroid Biochem Mol Biol.* 2016 May;159:142-53. doi: 10.1016/j.jsbmb.2016.03.016

- 137) Reflections of an Expert on the Legal Battles Over Prisoners with Gender Dysphoria. *J Am Acad Psychiatry Law* 44:236–45, 2016
- 138) Cooper E, McBride J, Levine SB. Does Flibanserin have a future? *Psychiatric Times* accepted October 23, 2015.
- 139) Levine SB, Sheridan DL, Cooper EB. The Quest for a Prosexual Medication for Women, *Current Sexual Health Reports* (2016) 8: 129. doi:10.1007/s11930-016-0085-y
- 140) Why Sex Is Important: Background for Helping Patients with Their Sexual Lives., *British Journal of Psychiatry Advances* (2017), vol. 23(5) 300-306; DOI: 10.1192/apt.bp.116.016428
- 141) Flibanserin: Offene Forschungsfragen , *Zeitschrift für Sexualforschung.* 29: 170-175, 2016. This is a translation of (134).
- 142) Commentary on "Asexuality: Orientation, paraphilia, dysfunction, or none of the above? *Archives Sexual Behavior*, [Archives of Sexual Behavior](#) April 2017, Volume 46, [Issue 3](#), pp 639–642 DOI: 10.1007/s10508-017-0947-z
- 143) Sexual Dysfunction in Clinical Psychiatry, *Psychiatric Times*, March 2017
- 144) Ethical Concerns About the Emerging Treatment of Gender Dysphoria. *Journal of Sex and Marital Therapy*, 44(1):29-44. 2017. DOI 10.1080/0092623X.2017.1309482
- 145) The Psychiatrist's Role in Managing Transgender Youth: Navigating Today's Politicized Terrain. *CMEtoGO® Audio Lecture Series*, May 2017
- 146) Transitioning Back to Maleness, *Archives of Sexual Behavior*, 2017 Dec 20. doi: 10.1007/s10508-017-1136-9. [Epub ahead of print]; 47(4), 1295-1300, May 2018
- 147) Informed Consent for Transgender Patients, *Journal of Sex and Marital Therapy*, 2018 Dec 22:1-12. doi: 10.1080/0092623X.2018.1518885. [Epub ahead of print]

C) Chapters

- 1) Overview of Sex Therapy. In Sholevar GP (ed) *The Handbook of Marriage and Marital Therapy*. New York. Spectrum Publications, 1981 pp417-41
- 2) Why study sexual functioning in diabetes? In Hamburg BA, Lipsett LF, Inoff GE, Drash A (eds) *Behavioral & Psychosocial Issues in Diabetes: Proceedings of a National conference*. Washington, DC. US Dept. of Health & Human Services. PHS NIH, Pub. #80-1933
- 3) Sexual Problems in the Diabetic in Bleicher SJ, Brodoff B (eds) *Diabetes Mellitus and Obesity*. Williams and Wilkins, 1992

- 4) Clinical Introduction to Human Sexual Dysfunction. In Pariser SF, Levine SB, McDowell M (eds) Clinical Sexuality. New York, Marcel Dekker Publisher, 1983.
- 5) Psychodynamically-oriented clinician's overview of psychogenic impotence. In RT Segraves (ed) Impotence. New York, Plenum, 1985
- 6) Origins of sexual preferences. In Shelp EE (ed) Sexuality and Medicine. D. Reidel Publishing co. 1987. Pp39-54.
- 7) Hypoactive Sexual Desire and Other Problems of Sexual Desire. In H. Lief (ed). The Treatment of Psychosexual Dysfunctions/ III. American Psychiatric Press, chapter 207.pp2264-79, 1989
- 8) Psychological Sexual Dysfunction. In Sudak H (ed) Clinical Psychiatry. Warren H. Green. St. Louis, 1985
- 9) Male sexual dysfunction. In Sudak H (ed) Clinical Psychiatry. Warren H. Green. St. Louis, 1985
- 10) Sexuality and Aging. In Sudak H (ed) Clinical Psychiatry. Warren H. Green. St. Louis, 1985
- 11) Homosexuality. In Sudak H (ed) Clinical Psychiatry. Warren H. Green. St. Louis, 1985
- 12) Individual and intrapsychic factors in sexual desire. In Leiblum SR, Rosen RC (eds). Clinical Perspectives on Sexual Desire Disorders. Guilford Press, New York, 1988, pp21-44
- 13) Gender Identity Disorders. In Sadock B, Kaplan H(eds). Comprehensive Textbook of Psychiatry, Baltimore, William and Wilkins, 1989, pp 1061-9
- 14) Intrapsychic and Interpersonal Aspects of Impotence: Psychogenic Erectile Dysfunction. In Leiblum SR, Rosen RC (eds). Erectile Disorders: Assessment and Treatment. Guilford Press, New York, 1992
- 15) Psychological Factors in Impotence. In Resnick MI, Kursh ED, (eds.) Current Therapy in Genitourinary Surgery, 2nd edition. BC Decker, 1991, pp549-51
- 16) The Vagaries of Sexual Desire. In Leiblum SR, Rosen RC (eds). In Case Studies in Sex Therapy. Guilford Press, New York, 1995
- 17) Rosenblatt EA. Sexual Disorders (chapter 62). In Tasman A, Kay J, Liberman JA (eds). Psychiatry Volume II, W.B.Saunders, Philadelphia. 1997, pp 1173-2000.
- 18) Althof SE. Psychological Evaluation and Sex Therapy. In Mulcahy JJ (ed) Diagnosis and Management of Male Sexual Dysfunction Igaku-Shoin, New York, 1996, pp74-88
- 19) Althof SE, Levine SB. Psychological Aspects of Erectile Dysfunction. In Hellstrum WJG (ed) Male Infertility and Dysfunction. Springer-Verlag, New York, 1997. pp 468-73
- 20) Paraphilias. In Comprehensive Textbook of Psychiatry/VII. Sadock BJ, Sadock VA

- (eds.) Lippincott Williams & Wilkins, Baltimore, 1999, pp1631-1645.
- 21) Women's Sexual Capacities at Mid-Life in The Menopause: Comprehensive Management B. Eskind (ed). Parthenon Publishing, Carnforth, UK, 2000.
 - 22) Male Heterosexuality in Masculinity and Sexuality: Selected Topics in the Psychology of Men, (Richard C. Friedman and Jennifer I. Downey, eds) Annual Review of Psychiatry, American Psychiatric Press, Washington, DC, W-18. pp29-54.
 - 23) R.T.Segraves. Introduction to section on Sexuality: Treatment of Psychiatric Disorders-III (G.O.Gabbard, ed), American Psychiatric Press, Washington, DC, 2001
 - 24) Sexual Disorders (2003) in Tasman A, Kay J, Liberman JA (eds). Psychiatry 2nd edition, Volume II, W.B.Saunders, Philadelphia. Chapter 74
 - 25) What Patients Mean by Love, Psychological Intimacy, and Sexual Desire (2003) in SB Levine, CB Risen, SE Althof (eds) Handbook of Clinical Sexuality for Mental Health Professionals, Brunner-Routledge, New York, pp.21-36.
 - 26) Infidelity (2003) in SB Levine, CB Risen, SE Althof (eds) Handbook of Clinical Sexuality for Mental Health Professionals, Brunner-Routledge, New York, pp57-74
 - 27) Preface (2003) in SB Levine, CB Risen, SE Althof (eds) Handbook of Clinical Sexuality for Mental Health Professionals, Brunner-Routledge, New York, pp xiii-xviii
 - 28) A Psychiatric Perspective on Psychogenic Erectile Dysfunction (2004) in T.F. Lue (ed) Atlas of Male Sexual Dysfunction, Current Medicine, Philadelphia Chapter 5
 - 29) Levine, SB., Seagraves, RT. Introduction to Sexuality Section, Treatment of Psychiatric Disorders, 3rd edition (Gabbard GO, editor), American Psychiatric Press, 2007
 - 30) Risen CB, (2009) Professionals Who Are Accused of Sexual Boundary Violations *In Sex Offenders: Identification, Risk Assessment, Treatment, and Legal Issues* edited by Fabian M. Saleh, Albert J. Grudzinskas, Jr., and John M. Bradford, Oxford University Press, 2009
 - 31) What Patients Mean by Love, Intimacy, and Sexual Desire, in Handbook of Clinical Sexuality for Mental Health Professionals edited by Levine SB, Risen, CB, and Althof, SE, Routledge, New York, 2010
 - 32) Infidelity in Handbook of Clinical Sexuality for Mental Health Professionals edited by Levine SB, Risen, CB, and Althof, SE, Routledge, New York, 2010
 - 33) Scott DL, Levine, SB. Understanding Gay and Lesbian Life in Handbook of Clinical Sexuality for Mental Health Professionals edited by Levine SB, Risen, CB, and Althof, SE, Routledge, New York, 2010
 - 34) Levine, SB, Hasan, S., Boraz M. (2009) Male Hypoactive Sexual Desire Disorder (HSDD) in Clinical Manual of Sexual Disorders (R. Balon and RT Segraves, eds), American Psychiatric Press, Washington, DC.

- 35) Levine, SB. Sexual Disorders in Fundamentals of Psychiatry (by Allan Tasman and Wanda Mohr, eds.) <http://eu.wiley.com/WileyCDA/WileyTitle/productCd-0470665777.html>
- 36) Infidelity in Principles and Practices of Sex Therapy (I Binik, K. Hall, editors), 5th edition, Guilford Press, New York, 2014.
- 37) Why is Sex Important? In Handbook of Clinical Sexuality for Mental Health Professionals 3rd ed. [SB Levine, CB Risen, SE Althof, eds] New York. Routledge, 2016, Chapter 1
- 38) The Rich Ambiguity of Key Terms: Making Distinctions. In Handbook of Clinical Sexuality for Mental Health Professionals 3rd ed. [SB Levine, CB Risen, SE Althof, eds] New York. Routledge, 2016. Chapter 4
- 39) The Mental Health Professional's Treatment of Erection Problems . In Handbook of Clinical Sexuality for Mental Health Professionals 3rd ed. [SB Levine, CB Risen, SE Althof, eds] New York. Routledge, 2016 Chapter 11
- 40) Why is Sex Important? In Sexual Health in the Couple: Management of Sexual Dysfunction in Men and Women [L Lipshultz, A Pastuszak, M Perelman, A Giraldi, J Buster, eds.] New York, Springer, 2016.
- 41) Sommers, B., Levine, S.B., Physician's Attitude Towards Sexuality; Psychiatry and Sexual Medicine: A Comprehensive Guide for Clinical Practitioners, in press 2019
- 42) Boundaries And The Ethics Of Professional Misconduct in A. Steinberg, J. L. Alpert, C A. Courtois(Eds.) Sexual Boundary Violations In Psychotherapy:Therapist Indiscretions, & Transgressions, & Misconduct American Psychological Association, In Press 2019

D) Book Reviews

- 1) Homosexualities: A Study of Diversity Among Men and Women by Alan P. Bell and Martin S. Weinberg, Simon and Schuster, New York, 1978. In Journal of Sex & Marital Therapy 1979; 5:
- 2) Marriage and Marital Therapies: Psychoanalytic, Behavioral & System Theory Perspectives by TJ Paolino and BS McCrady. Brunner/Mazel, New York, 1978. In Journal of Sex & Marital Therapy 1979; 5:
- 3) Management of Male Impotence. Volume 5 International Perspectives in Urology AH Bennett, (ed) Williams and Wilkins, Baltimore, 1992. In American Journal of Psychiatry, 1984
- 4) The Sexual Relationship by DE Scharff, Routledge & Kegan Paul, 1982 in Family Process 1983;22:556-8
- 5) Phenomenology and Treatment of Psychosexual Disorders, by WE Fann, I Karacan, AD Pokorny, RL Williams (eds). Spectrum Publications, New York, 1983. In American Journal of Psychiatry 1985;142:512-6

- 6) The Treatment of Sexual Disorders: Concepts and Techniques of Couple Therapy, G Arentewicz and G Schmidt. Basic Books, New York, 1983. In American Journal of Psychiatry 1985;142:983-5
- 7) Gender Dysphoria: Development, Research, Management. BN Steiner (ed). Plenum Press, 1985 in Journal of Clinical Psychiatry, 1986
- 8) Gender Dysphoria: Development, Research, Management. BN Steiner (ed). Plenum Press, 1985 in Contemporary Psychology 1986;31:421-2 [titled, The Limitations of Science, the Limitations of Understanding]
- 9) Psychopharmacology of Sexual Disorders by M Segal (ed) John Libbey & Co Ltd, London, 1987 in American Journal of Psychiatry 1987;144:1093
- 10) "The Sissy Boy Syndrome" and the Development of Homosexuality by R Green. Yale University Press, New Haven, 1987. In American Journal of Psychiatry 1988;145:1028
- 11) Male Homosexuality: A contemporary psychoanalytic perspective by RC Friedman, Yale University Press, New Haven, 1988 in Journal of Clinical Psychiatry 1989;50:4, 149
- 12) Sexual Landscapes: Why we are what we are, why we love whom we love. By JD Weinrich, Charles Schribner's Sons, New York, 1987 in Archives of Sexual Behavior 21 (3):323-26, 1991
- 13) How to Overcome Premature Ejaculation by HS Kaplan, Brunner/Mazel, New York, 1989 in Journal of Clinical Psychiatry 51(3):130, 1990
- 14) Clinical Management of Gender Identity Disorders in Children and Adults R. Blanchard, BN Steiner (eds) American Psychiatry Press, Washington, DC, 1990. In Journal of Clinical Psychiatry 52(6):283, 1991
- 15) Psychiatric Aspects of Modern Reproductive Technologies. NL Stotland (ed) American Psychiatric Press, Washington DC, 1990. In Journal of Clinical Psychiatry 1991;52(9):390
- 16) Homosexualities: Reality, Fantasy, and the Arts. CW Socarides, VD Volkan (eds). International Universities Press, Madison, Connecticut, 1990. In Journal of Clinical Psychiatry 1992;(10)
- 17) Reparative Therapy of Male Homosexuality: A New Clinical Approach. J Nicolosi, Jason Aronson, Northvale NJ, 1992. In Contemporary Psychology 38(2):165-6, 1993 [entitled Is Evidence Required?]
- 18) Male Victims of Sexual Assault, GC Mezey, MB King (eds) Oxford University Press, New York, 1992. In Journal of Clinical Psychiatry 1993;54(9):358,
- 19) AIDS and Sex: An Integrated Biomedical and Biobehavioral Approach. B Voeller, JM Reinisch, M Gottlieb, Oxford University Press, New York, 1990. In American Journal of Psychiatry

- 20) Porn: Myths for the Twentieth Century by RJ Stoller, Yale University Press, New Haven, 1991. In Archives of Sexual Behavior 1995;24(6):663-668
- 21) Sexual Dysfunction: Neurologic, Urologic, and Gynecologic Aspects. R Lechtenberg, DA Ohl (eds) Lea & Febiger, Philadelphia, 1994. In Neurology
- 22) The Sexual Desire Disorders: Dysfunctional Regulation of Sexual
- 23) Motivation. HS Kaplan Brunner/Mazel, New York, 1995. In Neurology 1996; 47:316
- 24) Femininities, Masculinities, Sexualities: Freud and Beyond. N. Chodorow. The University Press of Kentucky, Lexington, 1994. Archives of Sexual Behavior 28(5):397-400,1999
- 25) Sexual Function in People with Disability and Chronic Illness:A Health Professional's Guide by ML Sipski, CJ Alexander. Aspen Publishers, Gaithersburg, Md, 1997. In Journal of Sex Education and Therapy, 1998;23(2):171-2
- 26) Sexual Aggression by J Shaw (ed). American Psychiatric Press, Washington, DC, 1998. In American Journal of Psychiatry, May, 1999
- 27) The *Wounded Healer*: Addiction-Sensitive Approach to the Sexually Exploitative Professional by Richard Irons and Jennifer P. Schneider. Jason Aronson, Northvale, N.J., 1999 in American Journal of Psychiatry 157(5):8-9,2000.
- 28) Culture of the Internet by Sara Kiesler (editor), Lawrence Erlbaum Associates, Mahway, New Jersey, 1997. 463pp in Journal of Sex Research in press, 2001
- 29) Psychological Perspectives on Human Sexuality. Lenore T. Szuchman and Frank Muscarella (editors), Wiley and Sons, New York, American Journal of Psychiatry, April, 2002
- 30) "How Sexual Science Operates" a review of Sex, Love, and Health in America: Private Choices and Public Policies. EO Laumann and RT Michael, editors. Chicago, University of Chicago, 2001 in Second Opinion, The Park Ridge Center for the Study of Health, Faith, and Ethics, 11:82-3, April, 2004.
- 31) Sexual Orientation and Psychoanalysis: Sexual Science and Clinical Practice. R.C.Friedman and J.I. Downey (eds). New York. Columbia University Press. in Archives of Sexual Behavior (2003) 31(5):473-474
- 32) Prozac on the Couch: Prescribing Gender in the Era of Wonder Drugs, Jonathon Michel Metzl. Duke University Press, Durham, 2003 in American Journal of Psychiatry, November, 2004.
- 33) Sex and Gender by M. Diamond and A.Yates Child Psychiatric Clinics of North America W. B. Saunders, Philadelphia, Pennsylvania, 2004, 268 pp in Archives of Sexual Behavior April 2007 on line publication in Dec.2006 at <http://dx.doi.org/10.1007/s10508-006-9114-7>
- 34) Getting Past the Affair: A program to help you cope, heal, and move on—together or

- apart by Douglas K. Snyder, Ph.D, Donald H. Baucom, Ph.D, and Kristina Coop Gordon, Ph.D, New York, Guilford Press, 2007 in *Journal of Sex and Marital Therapy*, 34:1-3, 2007
- 35) *Dancing with Science, Ideology and Technique. A review of Sexual Desire Disorders: A casebook* Sandra R. Leiblum editor, Guilford Press, New York, 2010. In *Journal of Sex Research* 2011.
 - 36) *What is more bizarre: the transsexual or transsexual politics? A review of Men Trapped in Men's Bodies: Narratives of Autogynephilic Transsexualism* by Anne A. Lawrence, New York, Springer, 2014. In *Sex Roles: a Journal of Research*, 70, Issue 3 (2014), Page 158-160, 2014. DOI: 10.1007/s11199-013-0341-9
 - 37) *There Are Different Ways of Knowing. A review of: How Sexual Desire Works: The Enigmatic Urge* by Frederick Toates, Cambridge, UK, Cambridge University Press, in *Sexuality and Culture* (2015) 19:407–409 DOI 10.1007/s12119-015-9279-0
 - 38) *The Dynamics of Infidelity: Applying Relationship Science to Clinical Practice* by Lawrence Josephs, American Psychological Association, Washington, DC, 2018, pp. 287, \$69.95 in *Journal of Sex and Marital Therapy* 10.1080/0092623X.2018.1466954, 2018. For free access: <https://www.tandfonline.com/eprint/UgiIHbWbpdedsXWXpNf/full>
 - 39) *Transgender Mental Health* by Eric Yarbrough, American Psychiatric Association Publications, 2018, *Journal and Marital & Sexual Therapy*, <https://doi.org/10.1080/0092623X.2018.1563345> .

Nos. 20-35813, 20-35815

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

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

Defendants-Appellants,

and

MADISON KENYON; and MARY MARSHALL,

Intervenors-Appellants.

On Appeal from the United States District Court
for the District of Idaho
Civil Case No. 1:20-cv-00184-DCN
Hon. David C. Nye

**EXCERPTS OF RECORD
VOLUME 3 (ER 299–515)**

LAWRENCE G. WASDEN
Attorney General

STEVEN L. OLSEN
DAYTON P. REED
SCOTT ZANZIG
Deputy Attorneys General
954 W. Jefferson, 2nd Floor
P.O. Box 83720
Boise, ID 83720-0010
Telephone: (208) 334-2400
steven.olsen@ag.idaho.gov
dayton.reed@ag.idaho.gov
scott.zanzig@ag.idaho.gov

Counsel for Defendants-Appellants

KRISTEN K. WAGGONER
JOHN J. BURSCH
CHRISTIANA M. HOLCOMB
ALLIANCE DEFENDING FREEDOM
440 First Street, NW, Suite 600
Washington, DC 20001
Telephone: (202) 393-8690
kwaggoner@ADFlegal.org
jbursch@ADFlegal.org
cholcomb@ADFlegal.org

BRUCE D. SKAUG
RAUL R. LABRADOR
SKAUG LAW. P.C.
1226 E. Karcher Road
Nampa, ID 83687
Telephone: (208) 466-0030
bruce@skauglaw.com
raul@skauglaw.com

ROGER G. BROOKS
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260
Telephone: (480) 444-0020
rbrooks@ADFlegal.org

CHRISTOPHER P. SCHANDEVEL
ALLIANCE DEFENDING FREEDOM
20116 Ashbrook Place, Suite 250
Ashburn, VA 20147
Telephone: (571) 707-4655
cschandevel@ADFlegal.org

Counsel for Intervenors-Appellants

ECF No.	Document Description	Pages
VOLUME 1		
63	Memorandum decision and order granting motion to intervene, granting motion for preliminary injunction, and granting in part and denying in part motion to dismiss	1–87
VOLUME 2		
65	Intervenors’ notice of preliminary injunction appeal	88–91
64	Defendants’ notice of preliminary injunction appeal	92–94
62	Transcript of motion hearing on July 22, 2020	95–222
58-1	Supplemental declaration of Deanna Adkins, MD, in support of Plaintiffs’ motion for preliminary injunction	223–237
58-2	Supplemental declaration of Joshua D. Safer, MD, FACP, FACE, in support of plaintiffs’ motion for preliminary injunction	238–247
58-3	Expert declaration of Jack L. Turban, MD, MHS, in support of plaintiffs’ motion for preliminary injunction	248–275
57	Exhibit A to affidavit of Dr. Stephen Levine	276–298
VOLUME 3		
53	Department of Justice Statement of Interest	299–314
46-1	Declaration of Chelsea Mitchell in opposition to preliminary injunction	315–325
46-2	Expert affidavit of Stephen B. Levine, M.D.	326–370

ECF No.	Document Description	Pages
41 (excerpt)	Appendix 1 to defendants' response to motion for preliminary injunction (OCR decision)	371–416
41 (excerpt)	Appendix 2 to defendants' response to motion for preliminary injunction (IHSAA consent and physical examination forms)	417–419
41-1	Expert declaration of Gregory A. Brown, Ph.D. FACSM, with attachment	420–515
VOLUME 4		
40	Defendants' motion to dismiss	516–519
30	Motion to intervene	520–523
30-2	Declaration of Madison Kenyon in support of intervention	524–531
30-3	Declaration of Mary Marshall in support of intervention	532–537
30-4	Intervenors' answer to verified complaint	538–563
22	Plaintiffs' motion for a preliminary injunction	564–566
22-2	Expert declaration of Deanna Adkins, MD, in support of plaintiffs' motion for preliminary injunction	567–600
22-3	Declaration of Andrew Barr in support of plaintiffs' motion for preliminary injunction	601–612
22-4	Expert declaration of Helen Carroll in support of plaintiffs' motion for preliminary injunction	613–627
22-5	Expert declaration of Mary Fry, PHD, in support of plaintiffs' motion for preliminary injunction	628–676

ECF No.	Document Description	Pages
22-6	Declaration of plaintiff Lindsay Hecox in support of motion for preliminary injunction	677–686
VOLUME 5		
22-7	Declaration of plaintiff Jane Doe in support of motion for preliminary injunction	687–691
22-8	Declaration of Jean Doe in support of motion for preliminary injunction	692–695
22-9	Expert declaration of Joshua D. Safer, MD, FACP, FACE, in support of plaintiffs’ motion for preliminary injunction	696–743
22-10	Expert declaration of Sara Swoboda, MD, in support of plaintiffs’ motion for preliminary injunction	744–756
1	Complaint for declaratory and injunctive relief	757–816
	District Court Docket Sheet	817–835

ERIC S. DREIBAND, IL Bar No. 6210456
Assistant Attorney General
Civil Rights Division

BART M. DAVIS, ID Bar No. 2696
United States Attorney
District of Idaho

PETER L. WUCETICH, ID Bar No. 10557
Assistant United States Attorney
District of Idaho

MATTHEW J. DONNELLY, IL Bar No. 6281308
Attorney
United States Department of Justice
Civil Rights Division
950 Pennsylvania Avenue, NW
Washington, DC 20530
Telephone: (202) 616-2788
Email: matthew.donnelly@usdoj.gov

Attorneys for the United States

**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

STATEMENT OF INTEREST

The United States files this Statement of Interest pursuant to 28 U.S.C. § 517, which authorizes the Department of Justice “to attend to the interests of the United States in a suit pending in a court of the United States.” The United States enforces Title IX of the Civil Rights Act of 1964, 42 U.S.C. § 2000h-2, which authorizes the Attorney General to intervene in cases

of general public importance involving alleged denials of the “equal protection of the laws under the fourteenth amendment to the Constitution on account of . . . sex.” *See also United States v. Virginia*, 518 U.S. 515, 523 (1996) (lawsuit by United States pursuant to Title IV of the Civil Rights Act, 42 U.S.C. § 2000c-6, raising equal-protection challenge to Virginia Military Institute’s sex-based admission policy).

On March 30, 2020, Idaho enacted the Fairness in Women’s Sports Act (Fairness Act), Idaho Code Ann. § 33-6202 *et seq.*¹ Plaintiffs filed their Complaint on April 15, alleging that that the Fairness Act violates, among other things, the Equal Protection Clause. Compl. ¶¶ 138-51, ECF No. 1. Plaintiffs moved for a preliminary injunction on their equal-protection claim on April 30. Pls.’ Mem. in Support of Motion for Preliminary Inj. at 1, ECF No 22-1 (Br.). The United States submits this Statement to aid this Court in its application of the Equal Protection Clause in deciding the preliminary-injunction motion as well as in this case more generally.

INTRODUCTION

It is common ground that some sex-based classifications are constitutional because certain “differences between men and women” are “enduring.” *Virginia*, 518 U.S. at 533. Applying this principle, the Ninth Circuit has held that the Equal Protection Clause permits an athletics policy that “preclude[s] boys from playing on girls’ teams, even though girls are permitted to participate on boys’ athletic teams” in light of the real biological differences between men and women. *Clark ex rel. Clark v. Arizona Interscholastic Ass’n*, 695 F.2d 1126, 1127 (9th Cir. 1982) (*Clark I*); *see also Clark ex rel. Clark v. Arizona Interscholastic Ass’n*, 886 F.2d 1191, 1192 (9th Cir. 1989) (*Clark II*) (same).

¹ The Fairness Act does not go into effect until July 2020. The United States’ citations refer to where the Act will appear in the Idaho statutory code.

Plaintiffs neither challenge this precedent nor dispute that Idaho’s Fairness Act adopts the same framework. Instead, they appear to ask this Court to create an exception to this settled understanding of the Equal Protection Clause when the biological males who seek to participate on a female-specific team identify as transgender. But the Fairness Act is on all fours with the policy the Ninth Circuit upheld in the *Clark* decisions, and nothing about an athlete’s transgender status requires a different result here. The Equal Protection Clause does not require States to abandon their efforts to provide biological women with equal opportunity to compete for, and enjoy the life-long benefits that flow from, participation in school athletics in order to accommodate the team preferences of transgender athletes. Put differently, the Constitution does not require Idaho to provide the *special treatment* Plaintiffs request, under which biological males are allowed to compete against biological females if and only if the biological males are transgender.

STATUTORY BACKGROUND

Idaho’s Fairness Act contains two key substantive provisions. First, covered athletic teams “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 Ann. § 33-6203(1). Second, “[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 Fairness Act does not contain a comparable limitation for biological females who wish to participate on a team designated for biological males.

In codified legislative findings, the Idaho Legislature explained why it was adopting the Fairness Act. Idaho Code Ann. § 33-6202. Specifically, the Act explains: “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). In support of this conclusion, the Act cites authority establishing that inherent physiological differences between men and women generally include a difference in “strength, speed, and endurance” that results in “different athletic capabilities,” which generally give men a significant advantage in head-to-head competition. *Id.* § 33-6202(1)-(10) (citations omitted). In addition, the Act’s findings reference a 2019 study that concluded biological males retain their athletic performance advantage over biological females even after engaging in hormone treatments that attempt to diminish a biological male’s natural testosterone. *Id.* § 33-6202(11) (citing 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)).

DISCUSSION

Idaho’s Fairness Act Complies with the Equal Protection Clause.

A. **The Equal Protection Clause Does Not Prohibit States From Generally Requiring Separate Athletic Teams For Biological Females And Biological Males.**

The Equal Protection Clause allows Idaho to recognize the average physiological differences between the biological sexes in athletics. Because of these differences, the Fairness Act’s limiting of certain athletic teams to biological females provides equal protection because the limitation is based on the same exact interest that allows the creation of sex-segregated athletic teams in the first place—namely, the goal of ensuring that biological females have equal athletic opportunities. Plaintiffs’ arguments to the contrary directly conflict with Ninth Circuit precedent. Indeed, the Ninth Circuit’s *Clark* decisions upheld athletic policies that were materially indistinguishable from the Fairness Act.

1. The Equal Protection Clause provides that a State cannot “deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1. The Clause “is essentially a direction that all persons similarly situated should be treated alike.” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). The converse, of course, is that States may treat differently situated persons differently. And for sex-based classifications, the Supreme Court has recognized that “the sexes are not similarly situated in certain circumstances.” *Michael M. v. Superior Court*, 450 U.S. 464, 469 (1981) (plurality opinion). Notably, “[p]hysical differences between men and women . . . are enduring,” and the “two sexes are not fungible.” *Virginia*, 518 U.S. at 533 (citation omitted).

Accordingly, the Ninth Circuit has repeatedly rejected equal-protection challenges to an athletics policy that “preclude[d] boys from playing on girls’ teams, even though girls are permitted to participate on boys’ athletic teams.” *Clark I*, 695 F.2d at 1127; *see also Clark II*, 886 F.2d at 1192. In upholding one such policy that prohibited biological males from participating on volleyball teams limited to biological females, the Ninth Circuit explained that “due 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 (reaffirming this conclusion).

2. In light of this background, the substantive provisions of Idaho’s Fairness Act easily comply with the Equal Protection Clause. Even assuming *arguendo* that these provisions trigger intermediate scrutiny—on the theory that they permit only biological females (and not biological males) to participate on teams designated for the opposite sex, *see* Br. 16—they readily withstand this form of review. To survive this standard, Idaho must show only that the

alleged sex discrimination “serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.” *Virginia*, 518 U.S. at 524 (citation and quotation marks omitted). Plaintiffs’ Motion does not dispute that the objective of the Fairness Act—“promot[ing] sex equality” through “[s]ex-specific teams” that “provid[e] 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”—is an important governmental objective. Idaho Code Ann. § 33-6202(12); *see* Br. 17. Nor could it, given that the Ninth Circuit has already held that “[t]here is no question” that “promoting equality of athletic opportunity between the sexes” is an “important governmental interest.” *Clark I*, 695 F.2d at 1131; *see also Virginia*, 518 U.S. at 533 (“Sex classifications may be used to” promote “equal employment opportunity,” and “to advance full development of the talent and capacities of our Nation’s people.”) (citations omitted). Instead, Plaintiffs contend only that the Fairness Act’s alleged sex classification is “not substantially related” to this undeniably important goal. Br. 17. Each of their arguments lacks merit.

First, Plaintiffs contend that Idaho could use “circulating testosterone levels” as a better proxy for physical ability than biological sex. Br. 18. But even assuming that premise were true,² the Ninth Circuit has already held that biological sex is a constitutionally acceptable proxy

² Here, the Idaho Legislature found otherwise. In its findings, the Act explains: “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.” Idaho Code Ann. § 33-6202(11) (quoting 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)). Plaintiffs never address this study in their Motion.

that satisfies intermediate scrutiny’s “substantially related” requirement. In *Clark I*, the Ninth Circuit explained that with respect to “average physiological differences,” “there is no question that the Supreme Court allows for these average real differences between the sexes to be recognized or that they allow gender to be used as a proxy in this sense if it is an accurate proxy”—even if biological sex is not a *perfect* proxy in every case. 695 F.2d at 1131.

In fact, the Ninth Circuit expressly rejected the argument Plaintiffs advance here—namely, that the “substantially related” requirement demands that participation on athletic teams “be limited on the basis of specific physical characteristics other than sex.” *Id.* Although the court of appeals knew that a “sexual classification could be avoided by classifying directly on the basis of physical differences such as height or weight,” for example, *id.* at 1130, it explained that “[t]he existence of these alternatives shows only that the exclusion of boys is not *necessary* to achieve the desired goal.” *Id.* at 1131. And given that “absolute necessity is not required before a gender based classification can be sustained” under intermediate scrutiny, “even the existence of wiser alternatives than the one chosen does not serve to invalidate the policy here since it is substantially related to the goal.” *Id.* at 1131-32. Thus, even if Plaintiffs believe that the Fairness Act “may not maximize equality,” the Equal Protection Clause entitles Idaho to make “trade-offs between equality and practicality” under intermediate scrutiny. *Id.* Accordingly, Plaintiffs’ lengthy discussion of circulating testosterone levels (Br. 17-19) is beside the point.

Second, Plaintiffs assert (Br. 19-20) that the premise that biological males “are physically superior” to biological females is a “paternalistic” “sexual stereotype.” Again, *Clark I* forecloses this assertion. The Ninth Circuit specifically held that the exclusion of biological males from teams designated for biological females did not rest on “archaic and overbroad’ generalizations,” “sexual stereotypes,” “invidious discrimination against women,” “or stigmatization of women.”

695 F.2d at 1131 (citations omitted). Rather, that exclusion “simply recogniz[ed] the physiological fact that males would have an undue advantage competing against women.” *Id.* Indeed, the Supreme Court itself engaged in similar reasoning in *Virginia* when it observed that admitting women to a previously all-male military academy “would undoubtedly require” that institution “to adjust aspects of the physical training programs.” 518 U.S. at 550 n.19. And, the Fourth Circuit took the same approach in *Bauer v. Lynch*, 812 F.3d 340 (4th Cir. 2016), when it explained: “Men and women simply are not physiologically the same for the purposes of physical fitness programs. The Supreme Court recognized as much in its discussion of the physical training programs addressed in the [*Virginia*] litigation.” *Id.* at 350.

Moreover, if Plaintiffs were correct that the Equal Protection Clause prevented recognizing these physiological differences, then Idaho (and every other State) would be constitutionally compelled to maintain *only* co-ed teams and sports—a situation that would obviously harm women. Indeed, the Ninth Circuit considered and rejected the same assertion because such a scheme would diminish opportunities for girls and women: It is “clear” that “males would displace females to a substantial extent” and thus “athletic opportunities for women would be diminished.” *Clark I*, 695 F.2d at 1131.

Third, Plaintiffs urge (Br. 20-21) that the Fairness Act deprives biological males who wish to participate on female-only teams of various “benefits” associated with “school athletics”—namely, the availability of a forum for “students to develop skills, make friends, increase physical activity, and learn valuable life lessons.” That is simply false, however, as the Fairness Act in no way deprives biological males who are transgender of those benefits, but rather simply requires them to obtain those benefits on a male-only or co-ed team, just as biological males who are not transgender must do. Indeed, for that reason, this is a far *easier*

case than in *Clark*, where the male plaintiffs had no ability whatsoever “to participate on their high school volleyball teams” because “[t]heir schools only sponsor[ed] interscholastic volleyball teams for girls.” *Clark I*, 695 F.2d at 1127; *see also Clark II*, 886 F.2d at 1192 (same). The policy in the *Clark* cases obviously deprived those plaintiffs of the “benefits” associated with “school athletics” in the particular sport of their choice, but the Ninth Circuit still upheld the policy as substantially related to an important interest, given that those plaintiffs could participate in many other sports (including some not available to women). *See Clark II*, 886 F.2d at 1193 (noting that at the plaintiff’s school, biological females were not permitted to compete on the wrestling team); *Clark I*, 695 F.2d at 1131 (explaining that in the plaintiffs’ situation, “boys’ overall opportunity” for athletic participation was “not inferior to girls”). Plaintiffs here need not even choose a different sport; they simply must play on the team that corresponds to their biological sex, just like everyone else.

As the *Clark* cases confirm, the Equal Protection Clause permits Idaho to ensure equal athletic opportunities for girls and women by limiting some athletic competitions and teams to biological females. As part of ensuring equal opportunities, Idaho may prevent biological “males [from] displac[ing] females.” *Clark I*, 695 F.2d at 1131. Plaintiffs have not provided and cannot provide any explanation for why the Equal Protection Clause entitles transgender athletes to these benefits at the expense of their biological female peers.

B. An Athlete’s Transgender Status Does Not Change The Analysis.

Given the discussion above, Plaintiffs do not (and cannot) seriously maintain that every biological male has a constitutional right to participate on athletic teams limited to biological females. Instead, Plaintiffs appear to ask this Court to create an exception to equal-protection precedent for biological males who identify as transgender. But an athlete’s transgender status does not alter the equal-protection analysis here. Refusing to provide *a special exemption* for

biological males if and only if they are transgender is hardly a denial of *equal protection* on the basis of sex, especially when such an exemption would *harm* biological females. Rather, Plaintiffs’ requested special exemption would actually require Idaho to engage in discrimination on the basis of gender identity, by compelling the State to discriminate against biological males whose gender identity reflects their biological sex.

1. To start, Plaintiffs cannot evade the Ninth Circuit’s *Clark* decisions by claiming that it is “unlikely that significant numbers” of biologically male transgender individuals will “ever participate in athletics in Idaho, let alone displace” female athletes, particularly with respect to scholarship opportunities. Br. 23. Even assuming that this speculative assertion were true, it would get Plaintiffs nowhere. The equal-protection analysis in the *Clark* decisions does not turn on whether biological males displace biological females across the board or only at the margins. *Contra* Br. 20 n.15 (contending that under *Clark I*, female athletes must be displaced “to a substantial extent” for a policy to survive intermediate scrutiny). Notably, in *Clark II*, the Ninth Circuit upheld the exclusion of a single male from the women’s volleyball team on the ground that “[i]f 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.” 886 F.2d at 1193 (emphasis added). That holding was consistent with the analysis in *Clark I*, where the Ninth Circuit explained that even though schools could allow “boys’ participation . . . in limited numbers” while still preserving athletic opportunities for women, the Equal Protection Clause did not prohibit the categorical exclusion of biological males from teams limited to biological females. 695 F.2d at 1131.

Adopting Plaintiffs’ desired exception also would considerably weaken the justification—plainly viewed as legitimate by the Ninth Circuit—for excluding biological males

who identify as male from female-specific teams. After all, Plaintiffs have not identified any non-transgender biological male who wishes to participate on female-only teams. Nor have Plaintiffs provided any reason to believe that the population of non-transgender biological males who wish to participate on female-only teams, whether in Idaho or elsewhere, is a substantial one. Yet the displacement of even some biological females from school athletics, and from all of the educational benefits that flow from such participation, would have real consequences for those women and for the ability of government to remedy past discrimination against women in athletic educational opportunities and “to advance full development of” their talents and capacities. *Virginia*, 518 U.S. at 533.

Moreover, to create Plaintiffs’ proposed transgender exception, this Court would have to order Idaho to engage in discrimination on the basis of gender identity. Specifically, Plaintiffs would have this Court allow only those biological males who identify as female to participate on female-specific teams. Under those circumstances, Idaho would be denying non-transgender biological males (such as the *Clark* plaintiffs) the same opportunity solely because their gender identity reflected their biological sex. That penalty would be in addition to the penalty imposed on non-transgender biological females who are displaced from their teams by biological males.

2. Plaintiffs fare no better in repeatedly contending that the Fairness Act discriminates on the basis of transgender status. The Fairness Act’s substantive provisions do not even mention a student’s transgender status or gender identity, much less draw classifications on those bases. Idaho Code Ann. § 33-6203(1), (2). Indeed, Plaintiffs complain that the Act does “not permit consideration of gender identity.” Br. 4. Instead, the Fairness Act’s substantive provisions draw permissible classifications based on biological sex. Idaho Code Ann. § 33-6203(1), (2). The provisions prohibit *all* biological males from participating on a team

designated for biological females, regardless of whether those biological males are transgender or not. *Id.* Likewise, the provisions treat *all* biological females the same, regardless of whether those biological females are transgender or not. *Id.* An athlete's transgender status and gender identity are irrelevant.

The Fairness Act therefore does not, as Plaintiffs contend, exclude students from participating in sports “for no other reason than because they are transgender.” Br. 21. Despite Plaintiffs' repeated declaration (*e.g.*, Br. 1, 4, 10, 12) that the Act “categorically” “bars” all transgender athletes who identify as female from competing in any athletic activities, no such bar exists. Transgender athletes are permitted under the Act to compete in any athletic activities consistent with their biological sex. While the United States does not doubt the personal objection that some transgender athletes who identify as female may have to competing on male teams—though, under the Fairness Act, such teams are open to all biological males and all biological females—this personal objection does not transform the Fairness Act into a categorical bar. Transgender athletes retain the option of participating on teams that align with their biological sex or co-ed teams.

Even if the requirement that athletes participate on the teams that align with their biological sex were to have a disparate *impact* on transgender individuals, it is blackletter law that such an effect does not violate the Equal Protection Clause. As the Supreme Court has repeatedly explained, “the Fourteenth Amendment guarantees equal laws, not equal results.” *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 273 (1979). For this reason, the Supreme Court in *Washington v. Davis*, 426 U.S. 229 (1976), explained that “our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially

discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact.” *Id.* at 239.

Thus, while Plaintiffs may dislike that the Fairness Act does “not permit consideration of gender identity,” Br. 4—and thus does not exempt transgender athletes from the ordinary rule—the Equal Protection Clause guarantees *equal* treatment, not *special* treatment.

Contrary to Plaintiffs’ assertion, *Karnoski v. Trump*, 926 F.3d 1180 (9th Cir. 2019), did not unsettle that basic principle by holding that a “policy forcing people to serve in the military consistent with ‘biological sex’ amounted to discrimination based on transgender status.” Br. 14. Rather, the Ninth Circuit concluded only that the challenged policy “on its face treats transgender persons differently than other persons” based on its belief that the policy required only “[t]ransgender persons”—as opposed to all servicemembers—to “serve in their biological sex.” 926 F.3d at 1201 (ellipsis omitted). In fact, the court in *Karnoski* stated that “[b]ecause the 2018 Policy discriminates on the basis of transgender status on its face, we need not address whether” facial discrimination on the basis of “gender dysphoria and transition” “constitutes discrimination against transgender persons.” 926 F.3d at 1201 n.18. That express reservation would have been unnecessary if, as Plaintiffs maintain, *Karnoski* had held that any facially neutral requirement that all individuals adhere to the standards associated with their biological sex invariably constitutes discrimination based on transgender status.

Such a holding also would have put the Ninth Circuit at odds with the D.C. Circuit, which held that the same military policy did not constitute “a blanket transgender ban” simply because it required servicemembers “to serve in their biological sex.” *Doe 2 v. Shanahan*, 755 Fed. Appx. 19, 24 (D.C. Cir. 2019) (per curiam). As the D.C. Circuit explained, “not all transgender persons seek to transition to their preferred gender”; rather, the typical definition of

“transgender persons”—including the one offered by Plaintiffs—is simply those individuals who “‘identify[]’ with a gender other than their biological sex.” *Id.*; *see also* Br. 2 n.1 (“A transgender person has a gender identity that does not align with the sex they were assigned at birth.”). As multiple sources confirm, “the transgender community is not a monolith in which every person wants to take steps necessary to live in accord with his or her preferred gender (rather than his or her biological sex).” *Doe 2 v. Shanahan*, 917 F.3d 694, 722 (D.C. Cir. 2019) (Williams, J., concurring in result) (collecting evidence); *see also id.* at 701 (Wilkins, J., concurring) (noting “the term transgender is often defined to include persons who identify with another gender but who do not wish to live or work in accordance with that preferred gender”).

Nor does the Supreme Court’s recent decision in *Bostock v. Clayton Cty., Georgia*, No. 17-1618, 2020 WL 3146686 (U.S. June 15, 2020), alter the equal-protection analysis here. First, *Bostock* said nothing about and did not consider anything about the Constitution. *See id.* at *17 (warning that “[t]he only question before us is whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual ‘because of such individual’s sex’” as that term is used in a particular provision of Title VII). Second, nothing in the Fairness Act discriminates on the basis of transgender status, so even assuming *arguendo* that *Bostock* had any relevance in a constitutional case, it would not help Plaintiffs.

In sum, the Fairness Act neither bars transgender athletes from competing in school athletics nor draws distinctions based on transgender status or gender identity. Instead, it draws distinctions solely based on biological sex, restricting *all* biological males from participating on athletic teams designated for biological females. And it does so in the same way and for the same purpose the Ninth Circuit recognized as valid in *Clark I*—“to promot[e] equality of athletic

opportunity between the sexes.” 695 F.2d at 1131. Plaintiffs’ challenge to the Act under the Equal Protection Clause must fail.

CONCLUSION

This Court should find that the substantive provisions of Idaho’s Fairness Act comply with the Equal Protection Clause.

Respectfully submitted,

BART M. DAVIS, ID Bar No. 2696
United States Attorney
District of Idaho

ERIC S. DREIBAND, IL Bar No. 6210456
Assistant Attorney General
Civil Rights Division

/s/ Peter L. Wucetich
PETER L. WUCETICH, ID Bar No. 10557
Assistant United States Attorney
District of Idaho
1290 West Myrtle Street, Suite 500
Boise, ID 83702
Telephone: (208) 334-1211
Email: peter.wucetich@usdoj.gov

/s/ Matthew J. Donnelly -
MATTHEW J. DONNELLY, IL Bar No. 6281308
Attorney
United States Department of Justice
Civil Rights Division
950 Pennsylvania Avenue, NW
Washington, DC 20530
Telephone: (202) 616-2788
Email: matthew.donnelly@usdoj.gov

DATED: June 19, 2020

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19th day of June, 2020, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

FOR THE PLAINTIFFS:

Richard Eppink (REppink@acluidaho.org)

Gabriel Arkles (garkles@aclu.org)

Jame Esseks (jesseks@aclu.org)

Chase Strangio (cstrangio@aclu.org)

Kathleen Hartnett (khartnett@cooley.com)

Elizabeth Prelogar (eprelogar@cooley.com)

Andrew Barr (abarr@cooley.com)

Catherine West (cwest@legalvoice.org)

FOR THE PROPOSED INTERVENORS:

Bruce D. Skaug (bruce@skauglaw.com)

Raul R. Labrador (raul@skauglaw.com)

Roger G. Brooks (rbrooks@ADFlegal.org)

Jeffrey A. Shafer (jshafer@ADFlegal.org)

Kristen K. Waggoner (kwaggoner@ADFlegal.org)

Parker Douglas (pdouglas@ADFlegal.org)

Christiana M. Holcomb (cholcomb@ADFlegal.org)

FOR THE DEFENDANTS:

Stephen L. Olsen (steven.olsen@ag.idaho.gov)

W. Scott Zanzig (scott.zanzig@ag.idaho.gov)

Dayton P. Reed (dayton.reed@ag.idaho.gov)

Matthew K. Wilde (mattwilde@boisestae.edu)

Daniel J. Skinner (danskinner@cssklaw.com)

/s/ Matthew J. Donnelly
MATTHEW J. DONNELLY
Attorney for the United States

EXHIBIT A

Declaration of Chelsea Mitchell in Opposition to Preliminary Injunction

UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO

LINDSAY HECOX, and JANE DOE with her
next friends JEAN DOE and JOHN DOE,

Plaintiffs,

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; 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;
THE INDIVIDUAL MEMBERS OF THE
IDAHO CODE COMMISSION, in their
official capacities,

Defendants.

Case No. 1:20-cv-00184-DCN

**DECLARATION OF
CHELSEA MITCHELL IN OPPOSITION
TO PRELIMINARY INJUNCTION**

DECLARATION OF CHELSEA MITCHELL

I, Chelsea Mitchell, declare as follows:

1. I am a seventeen-year-old graduate of Canton High School in Canton, Connecticut.
2. I am an elite female athlete and competed in Connecticut Interscholastic Athletic Conference (CIAC) track and field events throughout all four years of high school.

3. A CIAC policy allows biological males who identify as girls to compete in the girls' category and on girls' athletic teams.

4. From the Spring 2017 outdoor track season through the Winter 2020 indoor track season¹—six track seasons—I competed against biological males in my track and field athletic events due to the CIAC policy.

5. I understand that some individuals in this case state that they are not aware of any biological girls being harmed by the presence of transgender athletes competing in their league.

6. I personally have been harmed by competing against male athletes in my league. In total, I have lost four state championship titles, two All New England awards, medals, points, and publicity due to the CIAC policy that permits males to compete in girls' athletic events in Connecticut.

2016-2017 Freshman Year

7. I first competed against a male in girls' track and field as a fourteen-year-old freshman at the Spring 2017 outdoor CIAC State Open Championship.

8. On the way to this meet, I was instructed by my coach to respond “no comment” if asked about the issue of males competing in the female category.

9. In the 100m final at the 2017 outdoor State Open, I placed 7th overall. The top six receive a medal and qualify to advance to the New England Regional Championship: one of those top six spots was taken by male athlete Andraya Yearwood:

¹ The Spring 2020 outdoor season was cancelled due to the global COVID-19 pandemic.

Table 1: 2017 CIAC State Open Women’s Outdoor Track 100m Results (June 5, 2017)²

Place	Grade	Sex	Name	Time	High School
1*	12	F	Caroline O’Neil	12.14s	Daniel Hand
2*	12	F	Kathryn Kelly	12.36s	Lauralton Hall
3*	9	M	Andraya Yearwood	12.41s	Cromwell
4*	11	F	Tia Marie Brown	12.44s	Windsor
5*	12	F	Kiara Smith	12.59s	Jonathan Law
6*	11	F	Kate Hall	12.62s	Stonington
7	9	F	Chelsea Mitchell	12.69s	Canton
8	12	F	Tiandra Robinson	FS	Weaver

* Qualified for the New England Championship.

2017-2018 Sophomore Year

10. During my sophomore year, I learned that Andraya Yearwood’s school was reclassified to the Class S division for indoor track events (the school remained a Class M for outdoor track events)—which was the same class as my school.

11. This news was upsetting for me because I would now be racing against a male competitor at both the Class S championship and the State Open championship.

12. At the February 10, 2018, indoor Class S Championship in the 300m, I was knocked out of advancing to the State Open by just one spot—a spot was taken by Andraya.

13. On April 27, 2018, at the first invitational race of the Spring 2018 outdoor season, I was seeded in the 100m in a lane beside not just one, but two male athletes: Terry Miller and Andraya Yearwood.

14. I distinctly remember seeing Terry look over to Andraya and say: “You and me, one and two.” At fifteen years old, I felt extremely intimidated to run against bigger, faster, and stronger male competitors.

² AthleticNet, <https://www.athletic.net/TrackAndField/meet/306453/results/f/1/100m>, last visited June 2, 2020.

15. But Terry was right. I should have won that 100m race; but instead, Terry and Andraya took first and second place, while I placed third.

16. Similarly, at the Spring 2018 outdoor State Open Championship, Terry won the women's 100m event by a wide margin, while Andraya finished second.

17. But for CIAC's policy, I would have won second place statewide:

Table 2: 2018 CIAC State Open Championship Women's Outdoor Track 100m Results (June 4, 2018)³

Place	Grade	Sex	Name	Time	High School
1*	10	M	Terry Miller	11.72s	Bulkeley
2*	10	M	Andraya Yearwood	12.29s	Cromwell
3*	11	F	Bridget Lalonde	12.36s	RHAM
4*	10	F	Chelsea Mitchell	12.39s	Canton
5*	11	F	Maya Mocarski	12.47s	Fairfield Ludlowe
6*	10	F	Selina Soule	12.67s	Glastonbury
7	12	F	Tia Marie Brown	12.71s	Windsor
8	11	F	Ayesha Nelson	12.80s	Hillhouse

* Qualified for the New England Championship.

18. Bridget Lalonde beat me by just three-hundredths of a second, but I was so relieved that she did. Emotionally, it was less of a loss to be denied runner-up status than to be denied a first place State Open Championship—a feat almost unheard of for a high school sophomore.

19. At the 2018 outdoor New England Regional Championship, I placed seventh in the 100m. Only the top six medal and receive the All New England award—one of those top six spots was taken by Terry.

20. Had I earned the title of All New England, I would have made Canton High School history as the first Canton female athlete to win this prestigious award.

³ AthleticNet, <https://www.athletic.net/TrackAndField/meet/334210/results/f/1/100m>, last visited June 2, 2020.

2018-2019 Junior Year

21. In the fall of my junior year, I learned that male athlete Terry Miller transferred to Bloomfield, another Class S school.

22. I was devastated, fearing that with two males competing in my division, my chances of ever winning a state championship in sprints were now over.

23. I trained harder than ever, spending countless hours to shave mere fractions of seconds off of my times. I never missed a practice, squeezed in extra workouts where I could, and saw my race times consistently drop.

24. But it was not enough. And my fears of losing championship after championship were realized in the Winter and Spring 2019 seasons.

25. At the February 7, 2019, indoor Class S State Championship, Terry finished first in the 55m. I placed second. But for the CIAC's policy, I would have been named the Class S State Champion in the 55m.

26. The February 16, 2019, indoor State Open Championship saw similar results and a similar impact. Terry and Andraya finished first and second respectively in both the preliminary and final Women's 55m races, each time defeating the fastest girl by a wide margin. I placed third in the final.

27. But for CIAC's policy, I would have won the 2019 State Open Championship in the 55m dash:

Table 3: 2019 CIAC State Open Championship Women's Indoor Track 55m Preliminary Results (February 16, 2019)⁴

Place	Grade	Sex	Name	Time	High School
1*	11	M	Terry Miller	7.00s	Bloomfield
2*	11	M	Andraya Yearwood	7.07s	Cromwell
3*	12	F	Cori Richardson	7.24s	Windsor
4*	11	F	Chelsea Mitchell	7.27s	Canton
5*	12	F	Kate Shaffer	7.27s	Conard
6*	12	F	Ayesha Nelson	7.29s	Hillhouse
7*	12	F	Maya Mocarski	7.34s	Fairfield Ludlowe
8	11	F	Selina Soule	7.37s	Glastonbury
9	10	F	Kisha Francois	7.41s	East Haven

* Qualified for the women's 55m final.

Table 4: 2019 CIAC State Open Championship Women's Indoor Track 55m Final Results (February 16, 2019)⁵

Place	Grade	Sex	Name	Time	High School
1*	11	M	Terry Miller	6.95s	Bloomfield
2*	11	M	Andraya Yearwood	7.01s	Cromwell
3*	11	F	Chelsea Mitchell	7.23s	Canton
4*	12	F	Kate Shaffer	7.24s	Conard
5*	12	F	Ayesha Nelson	7.26s	Hillhouse
6*	12	F	Maya Mocarski	7.33s	Fairfield Ludlowe
7	12	F	Cori Richardson	7.39s	Windsor

* Qualified for the New England Championship.

28. Instead, I was not named State Open Champion in the 55m, I received a bronze medal instead of a gold medal, and I did not make Canton High School history as the first ever Canton female athlete to be named a State Open Champion.

29. However, after the 55m race, I returned to the finals of the long jump, which had no males competing. While listening to them announce Terry as the winner and new meet record holder in the 55m, I won the long jump event to solidify my place in the Canton record books as the first Canton indoor track athlete—male or female—to be named a State Open Champion.

⁴ AthleticNet, <https://www.athletic.net/TrackAndField/meet/352707/results/f/1/55m>, last visited June 2, 2020.

⁵ *Id.*

30. State Champions are recognized as All-State Athletes, an award listed on college applications, scholarship applications, and college recruiting profiles. State Champions are invited to the All-State Banquet, and get their name celebrated on a banner in their high school gym. I did not receive any of these awards for the 55m. But I was able to receive these awards for my long jump championship.

31. After the State Open Championship, I was repeatedly referred to in the press as the “third-place competitor, who is not transgender.” I was the fastest biological girl in the 55m race at the State Open Championship, but the press did not mention my name—I felt invisible.

32. At the March 2, 2019, indoor New England Regional Championship, Terry took first and Andraya took third place in the 55m dash. I missed medaling and being named All New England Champion by just two spots—two spots that were taken by male competitors.

33. Following Terry Miller’s sweep of the CIAC’s Indoor Class S, State Open, and New England titles in the 55m dash and 300m, Terry was named “All-Courant girls indoor track and field athlete of the year” by the Hartford Courant newspaper. This felt like an injustice to my fellow female athletes.

34. In the Spring 2019 outdoor season, I competed against both Terry and Andraya in the Class S Championship. At this event, I ran the fastest biological female times in the 100m and 200m across all state class meets.

35. But because of the CIAC’s policy, being the fastest biological girl just was not good enough to experience the thrill of victory. Instead, at the 2019 Class S Championship, Terry placed first in the 100m and 200m, while I placed second in both events. I won the long jump and received a state title. But because of the CIAC’s policy, I took home only one state title instead of three.

36. The trend continued at the 2019 outdoor State Open Championship as Terry easily won the women's 200m race. But for CIAC's policy, Cori Richardson would have won the state championship, Alanna Smith would have finished runner-up, and Olivia D'Haiti would have advanced to the New England Championship:

Table 5: 2019 CIAC State Open Championship Women's Outdoor Track 200m Final Results (June 3, 2019)⁶

Place	Grade	Sex	Name	Time	High School
1*	11	M	Terry Miller	24.33s	Bloomfield
2*	12	F	Cori Richardson	24.75s	Windsor
3*	9	F	Alanna Smith	25.01s	Danbury
4*	11	F	Chelsea Mitchell	25.24s	Canton
5*	12	F	Nichele Smith	25.38s	East Hartford
6*	12	F	Bridget Lalonde	25.55s	RHAM
7	12	F	Olivia D'Haiti	25.63s	Kolbe-Cathedral

* Qualified for the New England Championship.

37. But I did receive one opportunity to compete on a more level playing field. At the Spring 2019 State Open Championship in the 100m, Terry, the top-seed in the race, false-started and was disqualified. This opened the door for me: I was able to relax, focus on my race, and win. I set a personal record of 11.67 seconds, made Canton High School history as the first sprinter to be a state open champion in any sprint event, medaled, received significant media publicity, and advanced to the New England Regional Championships.

38. I went on to win the New England Regional Championships in the 100m dash and was named All New-England. Here, too, I made Canton High School history as the first female to win a New England Championship.

⁶ AthleticNet, <https://www.athletic.net/TrackAndField/MeetResults.aspx?Meet=364088&show=all>, last visited June 2, 2020.

39. Thereafter, I was awarded Track Athlete of the Year by the Connecticut High School Coaches Association, and the Hartford Courant named me 2019 All-Courant Girls Outdoor Track and Field Athlete of the Year and the Bo Kolinsky Female Athlete of the Year (across all sports).

40. My new personal record, State Open Champion and All New-England awards put me in a much better recruiting position for college scholarships—all because a false start that prevented a male from competing against me in the women’s division leveled the playing field.

2019-2020 Senior Year

41. A similar scenario played out in the Winter 2020 season. At the indoor Class S Championship 55m race, Andraya Yearwood—the top seed in the race and the individual ranked number one in the state for the women’s 55m dash—false-started and was disqualified. That false start opened the door for me to not only win the CIAC Class S Championship in the 55m dash, but also to advance to the 2020 Connecticut State Open Championship in the 55m event and win.

42. To my disappointment, the 2020 Spring outdoor season was cancelled in light of the global COVID-19 pandemic.

43. I just completed my senior year of high school and the final track season of my high school athletic career.

44. It feels defeating to know that records at my high school, CIAC, AthleticNet, MySportsResults, CT.Milesplit.com, and others do not reflect the four state titles and two All New England awards I should have earned. It is upsetting to know that the meet records of many great female athletes before me have also been wiped from the books.

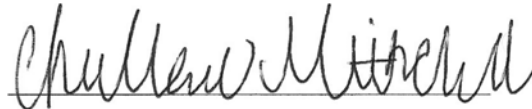
45. Competing against males makes me feel anxious and stressed. And stress has a direct, negative impact on my athletic performance.

46. I try to stay positive, to take support from family and friends, but it is hard when I know that I must compete against those who have a biological advantage because they were born male.

47. I hope that future female athletes will not have to endure the anxiety, stress, and performance losses that I have while competing under a policy that allows males to compete in the female category.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 2 day of June, 2020



Chelsea Mitchell

EXHIBIT B

**Expert Affidavit of
Dr. Stephen B. Levine, M.D.**

**EXPERT AFFIDAVIT OF
DR. STEPHEN B. LEVINE, M.D.**

June 4, 2020

TABLE OF CONTENTS

I. CREDENTIALS & SUMMARY	1
II. BACKGROUND ON THE FIELD	6
A. The biological baseline of sex	6
B. Definition and diagnosis of gender dysphoria.....	8
C. Impact of gender dysphoria on minority and vulnerable groups.....	10
D. Three competing conceptual models of gender dysphoria and transgender identity	11
E. Four competing models of therapy.....	14
F. Patients Differ Widely and Must Be Considered Individually.....	19
G. Understanding the WPATH and its “Standards of Care”.....	21
III. GENDER IDENTITY, GENDER DYSPHORIA, AND THERAPIES FOR GENDER DYSPHORIA IN YOUNGER CHILDREN	24
IV. THE AVAILABLE DATA DOES NOT SUPPORT THE CONTENTION THAT “AFFIRMATION” OF TRANSGENDER IDENTITY REDUCES SUICIDE OR RESULTS IN BETTER PHYSICAL OR MENTAL HEALTH OUTCOMES GENERALLY.	28
V. KNOWN, LIKELY, OR POSSIBLE DOWNSIDE RISKS ATTENDANT ON MOVING QUICKLY TO “AFFIRM” TRANSGENDER IDENTITY IN CHILDREN.	34
A. Physical risks associated with transition	35
B. Social risks associated with transition.....	38
C. Mental health costs or risks	39
D. Regret following transition is not an infrequent phenomenon.	41

I. CREDENTIALS & SUMMARY

1. I am Clinical Professor of Psychiatry at Case Western Reserve University School of Medicine, and maintain an active private clinical practice. I received my MD from Case Western Reserve University in 1967, and completed a psychiatric residency at the University Hospitals of Cleveland in 1973. I became an Assistant Professor of Psychiatry at Case Western in 1973, and became a Full Professor in 1985.

2. Since July 1973, my specialties have included psychological problems and conditions relating to individuals' sexuality and sexual relations, therapies for sexual problems, and the relationship between love, intimate relationships, and wider mental health. In 2005, I received the Masters and Johnson Lifetime Achievement Award from the Society of Sex Therapy and Research. I am a Distinguished Life Fellow of the American Psychiatric Association.

3. I have served as a book and manuscript reviewer for numerous professional publications. I have been the Senior Editor of the first (2003), second (2010), and third (2016) editions of the *Handbook of Clinical Sexuality for Mental Health Professionals*. In addition to five previously solo-authored books for professionals, I have recently published *Psychotherapeutic Approaches to Sexual Problems* (2020). The book has a chapter titled "The Gender Revolution."

4. I first encountered a patient suffering what we would now call gender dysphoria in July 1973. In 1974, I founded the Case Western Reserve University Gender Identity Clinic, and have served as Co-Director of that clinic since that time. Across the years, our Clinic treated hundreds of patients who were experiencing a transgender identity. An occasional child was seen during this era. I was the primary psychiatric care-giver for several dozen of our patients and

supervisor of the work of other therapists. I was an early member of the Harry Benjamin International Gender Dysphoria Association (later known as WPATH) and served as the Chairman of the committee that developed the 5th version of its Standards of Care. In 1993 the Gender Identity Clinic was renamed, moved to a new location, and became independent of Case Western Reserve University. I continue to serve as Co-Director.

5. In 2006, Judge Mark Wolf of the Eastern District of Massachusetts asked me to serve as an independent, court-appointed expert in a litigation involving the treatment of a transgender inmate within the Massachusetts prison system. I have been retained by the Massachusetts Department of Corrections as a consultant on the treatment of transgender inmates since 2007.

6. In 2019, I was qualified as an expert and testified concerning the diagnosis, understanding, developmental paths and outcomes, and therapeutic treatment of transgenderism and gender dysphoria, particularly as it relates to children, in the matter of *In the Interest of J.A.D.Y. and J.U.D.Y.*, Case No. DF-15-09887-S, 255th Judicial District, Dallas County, TX (the “*Younger* litigation”).

7. A fuller review of my professional experience, publications, and awards is provided in my curriculum vitae, a copy of which is attached hereto as Exhibit A.

8. I have reviewed the “Expert Declaration of Deanna Adkins, MD, in Support of Plaintiffs’ Motion for Preliminary Injunction,” dated April 27, 2020 (“Adkins”). In that declaration Dr. Adkins makes a variety of statements about gender dysphoria, therapies for gender dysphoria, and outcomes of therapies, which I believe to be inaccurate, or unsupported by scientific evidence. Dr. Adkins is a pediatric endocrinologist. I note with some concern that Dr. Adkins makes a number of sweeping and purportedly scientific assertions but cites almost no

peer-reviewed articles or studies that support her opinions, and I note also that Dr. Adkins herself has published only one peer-reviewed article relating to treatment of individuals suffering from gender dysphoria.

9. Based on her declaration, Dr. Adkins' practice is focused on children and adolescents; her CV and declaration do not suggest substantial experience in working with adults or older young adults who are living in a transgender identity, or who suffer from gender dysphoria. (This diagnosis requires distress). The wider lifecycle view that derives from experience with these adults (and familiarity with the literature concerning them) provides an important cautionary perspective. The psychiatrist or psychologist treating a trans child or adolescent, of course seeks to make the young patient happy, but the overriding consideration is the creation of a happy, highly functional, mentally healthy person for the next 50 to 70 years of life. I refer to treatment that keeps this goal in view as the "life course" perspective.

10. It is my opinion that a number of Dr. Adkins' assertions are inaccurate or unsupported, for reasons that I explain in this Declaration. I will provide citations to published, peer-reviewed articles that inform my judgments.

11. A summary of the key points that I explain in this statement is as follows:

a. Sex as defined by biology and reproductive function cannot be changed.

While hormonal and surgical procedures may enable some individuals to "pass" as the opposite gender during some or all of their lives, such procedures carry with them physical, psychological, and social risks, and no procedures can enable an individual to perform the reproductive role of the opposite sex. (Section II.A.)

b. The diagnosis of "gender dysphoria" encompasses a diverse array of conditions, with widely differing pathways and characteristics depending on age of onset,

biological sex, mental health, intelligence, motivations for gender transition, socioeconomic status, country of origin, etc. Data from one population (e.g., adults) cannot be assumed to be applicable to others (e.g., children). (Section II.B.)

Generalizations about the treatment children in one country (e.g., Holland) do not necessarily apply to another (e.g., United States).

c. Among psychiatrists and psychotherapists who practice in the area, there are currently widely varying views concerning both the causes of and appropriate therapeutic response to gender dysphoria in children. Existing studies do not provide a basis for a scientific conclusion as to which therapeutic response results in the best long-term outcomes for affected individuals. (Sections II.E, II.F.)

d. A majority of children (in several studies, a large majority) who are diagnosed with gender dysphoria “desist”—that is, their gender dysphoria does not persist—by puberty or adulthood. It is not currently known how to distinguish children who will persist from those who will not. (Section III.)

e. Some recent studies suggest that active affirmation of transgender identity in young children will substantially reduce the number of children “desisting” from transgender identity. This raises concern that this will increase the number of individuals who suffer the multiple long-term physical, mental, and social limitations that are strongly associated with living life as a transgender person. (Section III.)

f. Thus, social transition is itself an important intervention with profound implications for the long-term mental and physical health of the child. When a mental health professional evaluates a child or adolescent and then recommends social transition, presumably that professional is available to help with interpersonal, familial, and

psychological problems that may already exist and will likely arise after transition.

However, many adolescents are medically transitioned without a thorough, long-lasting mental health assessment and psychological ongoing care, leaving themselves and their families on their own to deal with ongoing and subsequent problems. (Section III.)

g. The knowledge-base concerning the cause and treatment of gender dysphoria available today has low scientific quality. (Section IV.)

h. There are no studies that show that affirmation of transgender identity in young children reduces suicide or suicidal ideation, or improves long-term outcomes as compared to other therapeutic approaches. Meanwhile, multiple studies show that adult individuals living transgender lives suffer much higher rates of suicidal ideation, completed suicide, and negative physical and mental health conditions than does the general population before and after transition, hormones, and surgery. (Section IV.)

i. In light of what is known and not known about the impact of affirmation on the incidence of suicide, suicidal ideation, and other indicators of mental and physical health, it is scientifically baseless, and therefore unethical, to assert that a child or adolescent who express an interest in a transgender identity will kill him- or herself unless adults and peers affirm that child in a transgender identity. (Section IV.)

j. Putting a child or adolescent on a pathway towards life as a transgender person puts that individual at risk of a wide range of long-term or even life-long harms, including: sterilization (first chemical, then surgical) and associated regret and sense of loss; inability to experience orgasm (for trans women); physical health risks associated with exposure to elevated levels of cross-sex hormones; surgical complications and life-long after-care; alienation of family relationships; inability to form lasting romantic

relationships and attract a desirable mate; elevated mental health risks of depression, anxiety, and substance abuse. (Section V.)

II. BACKGROUND ON THE FIELD

A. The biological baseline of sex

12. Dr. Adkins refers to the sex of an individual as “given at birth” or “designated at birth.” (Adkins 4, 5.) This phrasing is misleading. The sex of a human individual at its core structures the individual’s biological reproductive capabilities—to produce ova and bear children as a mother, or to produce semen and beget children as a father. As physicians know, sex determination occurs at the instant of conception, depending on whether a sperm’s X or Y chromosome fertilizes the egg. Medical technology can now be used to determine a fetus’s sex before birth almost as easily as after birth. It is thus not correct to assert that doctors “designate” or “assign” the sex of a child at birth. Instead, they simply recognize the existing fact of that child’s sex; barring rare disorders of sexual development, anyone can identify the sex of an infant by genital inspection. What the general public may not understand, however, is that every nucleated cell of an individual’s body is chromosomally identifiably male or female—XY or XX.

13. The self-perceived gender of a child, in contrast, arises in part from how others label the infant: “I love you, son (daughter).” This designation occurs thousands of times in the first two years of life when a child begins to show awareness of the two possibilities. As acceptance of the designated gender corresponding to the child’s sex is the outcome in >99% of children everywhere, anomalous gender identity formation begs for understanding. Is it biologically shaped? Is it biologically determined? Is it the product of how the child was privately regarded and treated? Does it stem from trauma-based rejection of maleness or

femaleness, and if so, flowing from what trauma? Does it derive from a tense, chaotic interpersonal parental relationship without physical or sexual abuse? Is it a symptom of another, as of yet unrevealed, emotional disturbance or neuropsychiatric condition (autism)? The answers to these relevant questions are not scientifically known.

14. Under the influence of hormones secreted by the testes or ovaries, numerous additional sex-specific differences between male and female bodies continuously develop post-natally, culminating in the dramatic maturation of the primary and secondary sex characteristics with puberty. These include differences in hormone levels, height, weight, bone mass, shape and development, musculature, body fat levels and distribution, and hair patterns, as well as physiological differences such as menstruation. These are genetically programmed biological consequences of sex, which also serve to influence the consolidation of gender identity during and after puberty.

15. Despite the increasing ability of hormones and various surgical procedures to reconfigure some male bodies to visually pass as female, or vice versa, the biology of the person remains as defined by his (XY) or her (XX) chromosomes, including cellular, anatomic, and physiologic characteristics and the particular disease vulnerabilities associated with that chromosomally-defined sex. For instance, the XX (genetically female) individual who takes testosterone to stimulate certain male secondary sex characteristics will nevertheless remain unable to produce sperm and father children. It is certainly true, as Dr. Adkins writes, that “[h]ormone therapy and social transition significantly change a person’s physical appearance.” (Adkins 9.) But in critical respects this change can only be “skin deep.” Contrary to assertions and hopes that medicine and society can fulfill the aspiration of the trans individual to become “a

complete man” or “a complete woman,” this is not biologically attainable.¹ It is possible for some adolescents and adults to pass unnoticed as the opposite gender that they aspire to be—but with limitations, costs, and risks, as I detail later. These risks include a continuing sense of inauthenticity as a member of the opposite “sex.”

B. Definition and diagnosis of gender dysphoria

16. Specialists have used a variety of terms over time, with somewhat shifting definitions, to identify and speak about a distressing incongruence between an individual’s sex as determined by their chromosomes and their thousands of genes, and the gender with which they eventually subjectively identify or to which they aspire. Today’s American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders* (“DSM-5”) employs the term Gender Dysphoria and defines it with separate sets of criteria for adolescents and adults on the one hand, and children on the other.

17. There are at least five distinct pathways to gender dysphoria: early childhood onset; onset near or after puberty with no prior cross gender patterns; onset after defining oneself as gay for several or more years and participating in a homosexual life style; adult onset after years of heterosexual transvestism; and onset in later adulthood with few or no prior indications of cross-gender tendencies or identity. The early childhood onset pathway and the more recently observed onset around puberty pathway are relevant to this matter.

18. Gender dysphoria has very different characteristics depending on age and sex at onset. Young children who are living a transgender identity commonly suffer materially fewer

¹ S. Levine (2018), *Informed Consent for Transgendered Patients*, J. OF SEX & MARITAL THERAPY, at 6, DOI: 10.1080/0092623X.2018.1518885 (“*Informed Consent*”); S. Levine (2016), *Reflections on the Legal Battles Over Prisoners with Gender Dysphoria*, J. AM. ACAD. PSYCHIATRY LAW 44, 236 at 238 (“*Reflections*”).

symptoms of concurrent mental distress than do older patients.² The developmental and mental health patterns for each of these groups are sufficiently different that data developed in connection with one of these populations cannot be assumed to be applicable to another.

19. The criteria used in DSM-5 to identify Gender Dysphoria include a number of signs of discomfort with one's natal sex and vary somewhat depending on the age of the patient, but in all cases require "clinically significant distress or impairment in . . . important areas of functioning" such as social, school, or occupational settings.

20. When these criteria in children (or adolescents, or adults) are not met, two other diagnoses may be given. These are: Other Specified Gender Dysphoria and Unspecified Gender Dysphoria. Specialists sometimes refer to children who do not meet criteria as being "subthreshold."

21. Children who conclude that they are transgender are often unaware of a vast array of adaptive possibilities for how to live life as a man or a woman—possibilities that become increasingly apparent over time to both males and females. A boy or a girl who claims or expresses interest in pursuing a transgender identity often does so based on stereotypical notions of femaleness and maleness that reflect constrictive notions of what men and women can be.³ A young child's—or even an adolescent's—understanding of this topic is quite limited. Nor can they grasp what it may mean for their future to be sterile. These children and adolescents consider themselves to be relatively unique; they do not realize that discomfort with the body

² K. Zucker (2018), *The Myth of Persistence: Response to "A Critical Commentary on Follow-Up Studies & 'Desistance' Theories about Transgender & Gender Non-Conforming Children" by Temple Newhook et al.*, INT'L J. OF TRANSGENDERISM at 10, DOI: 10.1080/15532739.2018.1468293 ("Myth of Persistence").

³ S. Levine (2017), *Ethical Concerns About Emerging Treatment Paradigms for Gender Dysphoria*, J. OF SEX & MARITAL THERAPY at 7, DOI: 10.1080/0092623X.2017.1309482 ("Ethical Concerns").

and perceived social role is neither rare nor new to civilization. What is new is that such discomfort is thought to indicate that they must be a trans person.

C. Impact of gender dysphoria on minority and vulnerable groups

22. In considering the appropriate response to gender dysphoria, it is important to know that certain groups of children and adolescents have an increased prevalence and incidence of trans identities. These include: children of color,⁴ children with mental developmental disabilities,⁵ including children on the autistic spectrum (at a rate more than 7x the general population),⁶ children residing in foster care homes, adopted children (at a rate more than 3x the general population),⁷ children with a prior history of psychiatric illness,⁸ and more recently adolescent girls (in a large recent study, at a rate more than 2x that of boys). (G. Rider at 4.)

⁴ G. Rider et al. (2018), *Health and Care Utilization of Transgender/Gender Non-Conforming Youth: A Population Based Study*, PEDIATRICS at 4, DOI: 10.1542/peds.2017-1683. (In a large sample, non-white youth made up 41% of the set who claimed a transgender or gender-nonconforming identity, but only 29% of the set who had a gender identity consistent with their sex.)

⁵ D. Shumer & A. Tishelman (2015), *The Role of Assent in the Treatment of Transgender Adolescents*, INT. J. TRANSGENDERISM at 1, DOI: 10.1080/15532739.2015.1075929.

⁶ D. Shumer et al. (2016), *Evaluation of Asperger Syndrome in Youth Presenting to a Gender Dysphoria Clinic*, LGBT HEALTH, 3(5) 387 at 387.

⁷ D. Shumer et al. (2017), *Overrepresentation of Adopted Adolescents at a Hospital-Based Gender Dysphoria Clinic*, TRANSGENDER HEALTH Vol. 2(1) 76 at 77.

⁸ L. Edwards-Leeper et al. (2017), *Psychological Profile of the First Sample of Transgender Youth Presenting for Medical Intervention in a U.S. Pediatric Gender Center*, PSYCHOLOGY OF SEXUAL ORIENTATION AND GENDER DIVERSITY, 4(3) 374 at 375 (“Psychological Profile”); R. Kaltiala-Heino et al. (2015), *Two Years of Gender Identity Service for Minors: Overrepresentation of Natal Girls with Severe Problems in Adolescent Development*, CHILD & ADOLESCENT PSYCHIATRY & MENTAL HEALTH 9(9) 1 at 5. (In 2015 Finland gender identity service statistics, 75% of adolescents assessed “had been or were currently undergoing child and adolescent psychiatric treatment for reasons other than gender dysphoria.”); L. Littman (2018), *Parent Reports of Adolescents & Young Adults Perceived to Show Signs of a Rapid Onset of Gender Dysphoria*, PLoS ONE 13(8): e0202330 at 13 (Parental survey concerning adolescents exhibiting Rapid Onset Gender Dysphoria reported that 62.5% of gender dysphoric adolescents had “a psychiatric disorder or neurodevelopmental disability preceding the onset of gender dysphoria.”)

23. The social transitioning, hormonal, and surgical paths often recommended and facilitated by gender clinics may lead to life-long sterilization by the time the patient reaches young adulthood. They may add a future source of despair in an already vulnerable person.

Caution, and time to reflect as one matures, are prudent.

D. Three competing conceptual models of gender dysphoria and transgender identity

24. Discussions about appropriate responses by mental health professionals ("MHPs") to actual or sub-threshold gender dysphoria are complicated by the fact that various speakers and advocates (or a single speaker at different times) view transgenderism through at least three very different paradigms, often without being aware of, or at least without acknowledging, the distinctions.

25. Gender dysphoria is **conceptualized and described by some professionals and laypersons as though it were a serious, physical medical illness that causes suffering**, comparable, for example, to prostate cancer, a disease that is curable before it spreads. Within this paradigm, whatever is causing distress associated with gender dysphoria—whether secondary sex characteristics such as facial hair, nose and jaw shape, presence or absence of breasts, or the primary anatomical sex organs of testes, ovaries, penis, or vagina—should be removed to alleviate the illness. The promise of these interventions is the cure of the gender dysphoria.

26. Dr. Adkins appears to endorse this perspective, asserting that gender dysphoria is a “medical condition.” (Adkins 5.) It should be noted, however, that gender dysphoria is a psychiatric, not a medical, diagnosis. Since its inception in DSM-III in 1983, it has always been specified in the psychiatric DSM manuals and is not specified in medical diagnostic manuals. Notably, gender dysphoria is the only psychiatric condition to be treated by surgery, even though

no endocrine or surgical intervention package corrects any identified biological abnormality. (Levine, *Reflections*, at 240.)

27. Gender dysphoria is alternatively **conceptualized in developmental terms**, as an adaptation to a psychological problem that was first manifested as a failure to establish a comfortable conventional sense of self in early childhood. This paradigm starts from the premise that all human lives are influenced by past processes and events. Trans lives are not exceptions to this axiom. (Levine, *Reflections*, at 238.) MHPs who think of gender dysphoria through this paradigm may work both to identify and address causes of the basic problem of the deeply uncomfortable self, and also to ameliorate suffering when the underlying problem cannot be solved. They work with the patient and (ideally) family to inquire what forces may have led to the trans person repudiating the gender associated with his sex. The developmental paradigm is mindful of temperamental, parental bonding, psychological, sexual, and physical trauma influences, and the fact that young children work out their psychological issues through fantasy and play.

28. In addition, the developmental paradigm recognizes that, with the important exception of genetic sex, essentially all aspects of an individual's identity evolve—often markedly—across the individual's lifetime. This includes gender. Some advocates assert that a transgender identity is biologically caused, fixed from early life, and eternally present in an unchanging manner. Taking this line, Dr. Adkins asserts that gender identity is “fixed.” (Adkins 5.) This assertion, however, is not supported by science.⁹ Although numerous studies have been undertaken to attempt to demonstrate a distinctive physical brain structure associated with transgender identity, as of yet there is no evidence that these patients have any defining

⁹ Even the advocacy organization The Human Rights Campaign asserts that a person can have “a fluid or unfixed gender identity.” <https://www.hrc.org/resources/glossary-of-terms>.

abnormality in brain structure that precedes the onset of gender dysphoria. The belief that gender dysphoria is the consequence of brain structure is challenged by the sudden increase in incidence of child and adolescent gender dysphoria over the last twenty years in North America and Europe. Meanwhile, multiple studies have documented rapid shifts in gender ratios of patients presenting for care with gender-related issues, pointing to cultural influences,¹⁰ while a recent study documented “clustering” of new presentations in specific schools and among specific friend groups, pointing to social influences (Littman). Both of these findings strongly suggest cultural factors. From the beginning of epidemiological research into this arena, there have always been some countries, Poland and Australia, for example, where the sex ratios were reversed as compared to North America and Europe, again demonstrating a powerful effect of cultural influences.

29. Further, as I detail later below, many studies and clinical observations confirm that gender identity can and does change or evolve over time for many individuals. And recent studies and anecdotal reports provide strong if preliminary evidence that therapeutic choices can have a powerful effect on whether and how gender identity does change, or gender dysphoria desists.

30. In recent years, for adolescent patients, intense involvement with online transgender communities or “friends” is the rule rather than the exception, and the MHP will also be alert to this as a potentially significant influence on the identity development of the patient.

31. The third paradigm through which gender dysphoria is alternatively conceptualized is from a **sexual minority rights perspective**. Under this paradigm, any response

¹⁰ Levine, *Ethical Concerns*, at 8 (citing M. Aitken, T. D. Steensma, et al. (2015), *Evidence for an Altered Sex Ratio in Clinic-Referred Adolescents with Gender Dysphoria*, J. OF SEXUAL MEDICINE 12(3) 756 at 756-63).

other than medical and societal affirmation and implementation of a patient’s claim to “be” the opposite gender is a violation of the individual’s civil right to self-expression. Any effort to ask “why” questions about the patient’s condition, or to address underlying causes, is viewed as a violation of autonomy and civil rights. In the last few years, this paradigm has been successful in influencing public policy and the education of pediatricians, endocrinologists, and many mental health professionals. Obviously, however, this is not a medical or psychiatric perspective.

E. Four competing models of therapy

32. Because of the complexity of the human psyche and the difficulty of running controlled experiments in this area, substantial disagreements among professionals about the causes of psychological disorders, and about the appropriate therapeutic responses, are not unusual. When we add to this the very different paradigms for understanding transgender phenomena discussed above, it is not surprising that such disagreements also exist with regard to appropriate therapies for patients experiencing gender-related distress. I summarize below the leading approaches, and offer certain observations and opinions concerning them.

(1) The “watchful waiting” therapy model

33. I review below the uniform finding of follow-up studies that the large majority of children who present with gender dysphoria will desist from desiring a transgender identity by adulthood if left untreated. (See *infra* ¶ 60.)

34. When a pre-adolescent child presents with gender dysphoria, a “watchful waiting” approach seeks to allow for the fluid nature of gender identity in children to naturally evolve—that is, take its course from forces within and surrounding the child. Watchful waiting has two versions:

- a. Treating any other psychological co-morbidities—that is, other mental illnesses as defined by DSM-5—that the child may exhibit (separation anxiety,

bedwetting, attention deficit disorder, obsessive-compulsive disorder) without a focus on gender (model #1); and

b. No treatment at all for anything but a regular follow-up appointment. This might be labeled a “hands off” approach (model #2).

(2) The psychotherapy model: Alleviate distress by identifying and addressing causes (model #3)

35. One of the foundational principles of psychotherapy has long been to work with a patient to identify the causes of observed psychological distress and then to address those causes as a means of alleviating the distress. The National Institute of Mental Health has promulgated the idea that 75% of adult psychopathology has its origins in childhood experience.

36. Many experienced practitioners in the field of gender dysphoria, including myself, have believed that it makes sense to employ these long-standing tools of psychotherapy for patients suffering gender dysphoria, asking the question as to what factors in the patient’s life are the determinants of the patient’s repudiation of his or her natal sex. (Levine, *Ethical Concerns*, at 8.) I and others have reported success in alleviating distress in this way for at least some patients, whether or not the patient’s sense of discomfort or incongruence with his or her natal sex entirely disappeared. Relieving accompanying psychological co-morbidities leaves the patient freer to consider the pros and cons of transition as he or she matures.

37. Among other things, the psychotherapist who is applying traditional methods of psychotherapy may help—for example—the male patient appreciate the wide range of masculine emotional and behavioral patterns as he grows older. He may discuss with his patient, for example, that one does not have to become a “woman” in order to be kind, compassionate,

caring, noncompetitive, and devoted to others' feelings and needs.¹¹ Many biologically male trans individuals, from childhood to older ages, speak of their perceptions of femaleness as enabling them to discuss their feelings openly, whereas they perceive boys and men to be constrained from emotional expression within the family and larger culture. Men, of course, can be emotionally expressive, just as they can wear pink. Converse examples can be given for girls and women. These types of ideas regularly arise during psychotherapies.

38. As I note above, many gender-nonconforming children and adolescents in recent years derive from minority and vulnerable groups who have reasons to feel isolated and have an uncomfortable sense of self. A trans identity may be a hopeful attempt to redefine the self in a manner that increases their comfort and decreases their anxiety. The clinician who uses traditional methods of psychotherapy may not focus on their gender identity, but instead work to help them to address the actual sources of their discomfort. Success in this effort may remove or reduce the desire for a redefined identity. This often involves a focus on disruptions in their attachment to parents in vulnerable children, for instance, those in the foster care system.

39. Because “watchful waiting” can include treatment of accompanying psychological co-morbidities, and the psychotherapist who hopes to relieve gender dysphoria may focus on potentially causal sources of psychological distress rather than on the gender dysphoria itself, there is no sharp line between “watchful waiting” and the psychotherapy model in the case of prepubescent children.

40. To my knowledge, there is no evidence beyond anecdotal reports that psychotherapy can enable a return to male identification for genetically male boys, adolescents, and men, or return to female identification for genetically female girls, adolescents, and women.

¹¹ S. Levine (2017), *Transitioning Back to Maleness*, ARCH. OF SEXUAL BEHAVIOR at 7, DOI: 10.1007/s10508-017-1136-9 (“*Transitioning*”).

On the other hand, anecdotal evidence of such outcomes does exist; I and other clinicians have witnessed reinvestment in the patient's biological sex in some individual patients who are undergoing psychotherapy. The Internet contains many such reports, and I have published a paper on a patient who sought my therapeutic assistance to reclaim his male gender identity after 30 years living as a woman and is in fact living as a man today. (Levine, *Transitioning*, at 1.) I have seen children desist even before puberty in response to thoughtful parental interactions and a few meetings of the child with a therapist.

(3) The affirmation therapy model (model #4)

41. While it is widely agreed that the therapist should not directly challenge a claimed transgender identity in a child, some advocates and practitioners go much further, and promote and recommend that any expression of transgender identity should be immediately accepted as decisive, and thoroughly affirmed by means of consistent use of clothing, toys, pronouns, etc., associated with transgender identity. As I understand it, this is asserted as a reason why male students who assert a female gender identity must be permitted to compete in girls' or women's athletic events. These advocates treat any question about the causes of the child's transgender identification as inappropriate, and assume that observed psychological co-morbidities in the children or their families are unrelated or will get better with transition, and need not be addressed by the MHP who is providing supportive guidance concerning the child's gender identity.

42. Some advocates, indeed, assert that unquestioning affirmation of any claim of transgender identity in children is essential, and that the child will otherwise face a high risk of suicide or severe psychological damage. Dr. Adkins appears to follow this line, asserting that "My clinical experience . . . has been that [patients] suffer and experience worse health outcomes" when they are not permitted to enter all spaces and participate in all activities in a

manner “consistent with gender identity.” (Adkins 11.) I address claims about suicide and health outcomes in Sections IV and V below.

43. Dr. Adkins asserts that fully supported social transition is the “only treatment for prepubertal children.” (Adkins 7.) As my discussion above indicates, this is not correct. On the contrary, one respected academic in the field has recently written that “almost all clinics and professional associations in the world” do not use “gender affirmation” for prepubescent children and instead “delay any transitions after the onset of puberty.”¹²

44. It is notable that even the Standards of Care published by WPATH, an organization which in general leans strongly towards affirmation in the case of adults, do not specify affirmation of transgender identity as the indicated therapeutic response for young children. Instead, the WPATH Standards of Care recognize that social transition in early childhood “is a controversial issue, and divergent views are held by health professionals”; state that “[t]he current evidence base is insufficient to predict the long-term outcomes of completing a gender role transition during early childhood”; and acknowledge that “previously described relatively low persistence rates of childhood gender dysphoria” are “relevant” to the wisdom of social transition in childhood. (WPATH SOC p. 17.)

45. Dr. Adkins cites a statement published by the American Academy of Pediatrics (Rafferty 2019) as asserting that “gender transition” “is safe, effective, and medically necessary treatment for the health and wellbeing of children and adolescents suffering from gender dysphoria.” (Adkins 7.) Dr. Adkins neglects to mention that a detailed and peer-reviewed review of that AAP statement by prominent researcher James Cantor concluded that “In its policy

¹² J. Cantor (2019), *Transgender and Gender Diverse Children and Adolescents: Fact-Checking of AAP Policy*, J. OF SEX & MARITAL THERAPY at 1, DOI: 10.1080.0092623X.2019.1698481.

statement, AAP told neither the truth nor the whole truth, committing sins both of commission and of omission, asserting claims easily falsified by anyone caring to do any fact-checking at all,” and described Rafferty 2019 as “a systematic exclusion and misrepresentation of entire literatures.” Based on my professional expertise and my review of the literature, I agree with Dr. Cantor’s evaluation of Rafferty 2019.

46. In fact, the DSM-5 added—for both children and adolescents—a requirement that a sense of incongruence between biological and felt gender must last at least six months as a precondition for a diagnosis of gender dysphoria, precisely because of the risk of “transitory” symptoms and “hasty” diagnosis that might lead to “inappropriate” treatments.¹³

47. I do not know what proportion of practitioners are using which model. However, in my opinion, in the case of young children, prompt and thorough affirmation of a transgender identity disregards the principles of child development and family dynamics and is not supported by science. Rather, the MHP must focus attention on the child’s underlying internal and familial issues. Ongoing relationships between the MHP and the parents, and the MHP and the child, are vital to help the parents, child, other family members, and the MHP to understand over time the issues that need to be dealt with over time by each of them.

48. Likewise, since the child’s sense of gender develops in interaction with his parents and their own gender roles and relationships, the responsible MHP will almost certainly need to delve into family and marital dynamics.

F. Patients Differ Widely and Must Be Considered Individually.

49. In my opinion, it is not possible to make a single, categorical statement about the proper treatment of children or adolescents presenting with gender dysphoria or other gender-

¹³ K. Zucker (2015), *The DSM-5 Diagnostic Criteria for Gender Dysphoria*, in C. Trombetta et al. (eds.), *MANAGEMENT OF GENDER DYSPHORIA: A MULTIDISCIPLINARY APPROACH*, DOI 10.1007/978-88-470-5696-1_4 (Springer-Verlag Italia 2015).

related issues. There is no single pathway of development and outcomes governing transgender identity, nor one that predominates over the large majority of cases. Instead, as individuals grow up and age, depending on their differing psychological, social, familial, and life experiences, their outcomes differ widely.

50. As to causes in children and adolescents, details about the onset of gender dysphoria may be found in an understanding of family relationship dynamics. In particular, the relationship between the parents and each of the parents and the child, and each of the siblings and the child, should be well known by the MHP. Further, a disturbingly large proportion of children and adolescents who seek professional care in connection with gender issues have a wider history of psychiatric co-morbidities. (*See supra* n. 9.) A 2017 study from the Boston Children’s Hospital Gender Management Service program reported that: “Consistent with the data reported from other sites, this investigation documented that 43.3% of patients presenting for services had significant psychiatric history, with 37.1% having been prescribed psychotropic medications, 20.6% with a history of self-injurious behavior, 9.3% with a prior psychiatric hospitalization, and 9.3% with a history of suicide attempts.” (L. Edwards-Leeper, *Psychological Profile*, at 375.) It seems likely that an even higher proportion will have had prior undiagnosed psychiatric conditions.

51. In the case of adolescents, as I have noted above, there is evidence that peer social influences through “friend groups” (Littman) or through the internet can increase the incidence of gender dysphoria or claims of transgender identity, so the responsible MHP will want to probe these potential influences to better understand what is truly deeply tied to the psychology of this particular individual, and what may instead be “tried on” by the youth as part of the adolescent process of self-exploration and self-definition.

G. Understanding the WPATH and its “Standards of Care”

52. Dr. Adkins notes that she is a member of the World Professional Association for Transgender Health (WPATH), invokes Standards of Care that that organization publishes, and asserts that the WPATH Standards of Care are “widely accepted.” (Adkins 3, 6.) Accordingly, I provide some context concerning that private organization and its Standards of Care.

53. I was a member of the Harry Benjamin International Gender Dysphoria Association from 1974 until 2001. From 1997 through 1998, I served as the Chairman of the eight-person International Standards of Care Committee that issued the fifth version of the Standards of Care. I resigned my membership in 2002 due to my regretful conclusion that the organization and its recommendations had become dominated by politics and ideology, rather than by scientific process, as it was years earlier. In approximately 2007, the Henry Benjamin International Gender Dysphoria Association changed its name to the World Professional Association for Transgender Health.

54. WPATH is a voluntary membership organization. Since at least 2002, attendance at its biennial meetings has been open to trans individuals who are not licensed professionals. While this ensures taking patients’ needs into consideration, it limits the ability for honest and scientific debate, and means that WPATH can no longer be considered a purely professional organization.

55. WPATH takes a decided view on issues as to which there is a wide range of opinion among professionals. WPATH explicitly views itself as not merely a scientific organization, but also as an advocacy organization. (Levine, *Reflections*, at 240.) WPATH is supportive to those who want sex reassignment surgery (“SRS”). Skepticism as to the benefits of SRS to patients, and strong alternate views, are not well tolerated in discussions within the organization or their educational outreach programs. Such views have been known to be shouted

down and effectively silenced by the large numbers of nonprofessional adults who attend the organization's biennial meetings.

56. The Standards of Care ("SOC") is the product of an enormous effort to be balanced, but it is not a politically neutral document. WPATH aspires to be both a scientific organization and an advocacy group for the transgendered. These aspirations sometimes conflict. The limitations of the Standards of Care, however, are not primarily political. They are caused by the lack of rigorous research in the field, which allows room for passionate convictions on how to care for the transgendered.

57. In recent years, WPATH has fully adopted some mix of the medical and civil rights paradigms. It has downgraded the role of counseling or psychotherapy as a requirement for these life-changing processes. WPATH no longer considers preoperative psychotherapy to be a requirement. It is important to WPATH that the person has gender dysphoria; the pathway to the development of this state is not. (Levine, *Reflections*, at 240.) The trans person is assumed to have thoughtfully considered his or her options before seeking hormones, for instance.

58. Most psychiatrists and psychologists who treat patients suffering sufficiently severe distress from gender dysphoria to seek inpatient psychiatric care are not members of WPATH. Many psychiatrists, psychologists, and pediatricians who treat some patients suffering gender dysphoria on an outpatient basis are not members of WPATH. WPATH represents a self-selected subset of the profession along with its many non-professional members; it does not capture the clinical experiences of others. WPATH claims to speak for the medical profession; however, it does not welcome skepticism and therefore, deviates from the philosophical core of medical science.

59. For example, in 2010 the WPATH Board of Directors issued a statement advocating that incongruence between sex and felt gender identity should cease to be identified in the DSM as a pathology.¹⁴ This position was debated but not adopted by the (much larger) American Psychiatric Association, which maintained the definitions and diagnoses of gender dysphoria as a pathology in the DSM-5 manual issued in 2013.

60. In my experience most current members of WPATH have little ongoing experience with the mentally ill, and many trans care facilities are staffed by MHPs who are not deeply experienced with recognizing and treating frequently associated psychiatric comorbidities. Because the 7th version of the WPATH SOC deleted the requirement for therapy, trans care facilities that consider these Standards sufficient are permitting patients to be counseled to transition by means of social presentation, hormones, and surgery by individuals with masters rather than medical degrees. As a result of the downgrading of the role of the psychiatric assessment of patients, new “gender affirming” clinics have arisen in many urban settings that quickly (sometimes within an hour’s time) recommend transition. Concerned parents who came wanting to know what is going on in their children are overwhelmed, and feel disoriented, fearful for the health and safety of their children, and dependent on the professional. It has been nine years since the Standards of Care were last revised. Much has changed in that interval. It is my understanding that the complex committee process that will generate an 8th version is underway.

¹⁴ WPATH *De-Psycho-pathologisation Statement* (May 26, 2010), available at wpath.org/policies (last accessed January 21, 2020).

III. GENDER IDENTITY, GENDER DYSPHORIA, AND THERAPIES FOR GENDER DYSPHORIA IN YOUNGER CHILDREN

61. A distinctive and critical characteristic of juvenile gender dysphoria is that multiple studies from separate groups and at different times have reported that in the large majority of patients, absent a substantial intervention such as social transition and/or hormone therapy, it does *not* persist through puberty. A recent article reviewed all existing follow-up studies that the author could identify of children diagnosed with gender dysphoria (11 studies), and reported that “every follow-up study of GD children, without exception, found the same thing: By puberty, the majority of GD children ceased to want to transition.” (Cantor at 1.) Another author reviewed the existing studies and reported that in “prepubertal boys with gender discordance . . . the cross gender wishes usually fade over time and do not persist into adulthood, with only 2.2% to 11.9% continuing to experience gender discordance.”¹⁵ A third summarized the existing data as showing that “Symptoms of GID at prepubertal ages decrease or disappear in a considerable percentage of children (estimates range from 80-95%).”¹⁶

62. It is not yet known how to distinguish those children who will desist from that small minority whose trans identity will persist. (Levine, *Ethical Concerns*, at 9.)¹⁷

63. Desistance within a relatively short period may also be a common outcome for post-pubertal youths who exhibit recently described “rapid onset gender disorder.” I observe an increasingly vocal online community of young women who have reclaimed a female identity

¹⁵ S. Adelson & American Academy of Child & Adolescent Psychiatry (2012), *Practice Parameter on Gay, Lesbian, or Bisexual Sexual Orientation, Gender Nonconformity, and Gender Discordance in Children and Adolescents*, J. AM. ACAD. CHILD ADOLESCENT PSYCHIATRY 51(9) 957 at 963 (“*Practice Parameter*”).

¹⁶ P. T. Cohen-Kettenis, H. A. Delemarre-van de Waal et al. (2008), *The Treatment of Adolescent Transsexuals: Changing Insights*, J. SEXUAL MEDICINE 5(8) 1892 at 1895.

¹⁷ It is also apparent in the adolescent phenomenon of rapid onset of gender dysphoria following a gender normative childhood that childhood gender identity is not inherently stable in either direction.

after claiming a male gender identity at some point during their teen years. However, data on outcomes for this age group with and without therapeutic interventions is not yet available to my knowledge.

64. In contrast, there is now data that suggests that a therapy that encourages social transition before or during puberty—which would include participation on athletic teams designated for the opposite sex—dramatically changes outcomes. A prominent group of authors has written that “The gender identity affirmed during puberty appears to predict the gender identity that will persist into adulthood.”¹⁸ Similarly, a comparison of recent and older studies suggests that when an “affirming” methodology is used with children, a substantial proportion of children who would otherwise have desisted by adolescence—that is, achieved comfort identifying with their natal sex—instead persist in a transgender identity. (Zucker, *Myth of Persistence*, at 7.)¹⁹

65. Indeed, a review of multiple studies of children treated for gender dysphoria across the last three decades found that early social transition to living as the opposite sex severely reduces the likelihood that the child will revert to identifying with the child’s natal sex, at least in the case of boys. That is, while, as I review above, studies conducted before the widespread use of social transition for young children reported desistance rates in the range of 80-98%, a more recent study reported that fewer than 20% of boys who engaged in a partial or complete social transition before puberty had desisted when surveyed at age 15 or older. (Zucker,

¹⁸ C. Guss et al. (2015), *Transgender and Gender Nonconforming Adolescent Care: Psychosocial and Medical Considerations*, CURR. OPIN. PEDIATR. 26(4) 421 at 421 (“TGN Adolescent Care”).

¹⁹ One study found that social transition by the child was found to be strongly correlated with persistence for natal boys, but not for girls. (Zucker, *Myth of Persistence*, at 5 (citing T.D. Steensma, J.K. McGuire et al. (2013), *Factors Associated with Desistance & Persistence of Childhood Gender Dysphoria: A Qualitative Follow-up Study*, J. OF THE AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY 52, 582.).)

Myth of Persistence, at 7; Steensma (2013).)²⁰ Some vocal practitioners of prompt affirmation and social transition even claim that essentially *no* children who come to their clinics exhibiting gender dysphoria or cross-gender identification desist in that identification and return to a gender identity consistent with their biological sex.²¹ This is a very large change as compared to the desistance rates documented apart from social transition. Some researchers who generally advocate prompt affirmation and social transition also acknowledge a causal connection between social transition and this change in outcomes.²²

66. Accordingly, I agree with a noted researcher in the field who has written that social transition in children must be considered “a form of psychosocial treatment.” (Zucker, *Debate*, at 1.)

67. Dr. Adkins speaks of the use of puberty blockers as though this major hormonal disruption of some of the most basic aspects of ordinary human development were a small thing, and entirely benign. (Adkins 8.) It should be understood that puberty blockers are usually administered to early-stage adolescents as part of a path that includes social transition. I address later medical, social, and mental health risks associated with the use of puberty blockers. Here, I note that the data reviewed above strongly suggests that the administration of puberty blockers,

²⁰ Only 2 (3.6%) of 56 of the male desisters observed by Steensma et al. had made a complete or partial transition prior to puberty, and of the twelve males who made a complete or partial transition prior to puberty, only two had desisted when surveyed at age 15 or older. Steensma (2013) at 584.

²¹ See, e.g., B. Ehrensaft (2015), *Listening and Learning from Gender-Nonconforming Children*, *THE PSYCHOANALYTIC STUDY OF THE CHILD* 68(1) 28 at 34: “In my own clinical practice . . . of those children who are carefully assessed as transgender and who are allowed to transition to their affirmed gender, we have no documentation of a child who has ‘desisted’ and asked to return to his or her assigned gender.”

²² See Guss, *TGN Adolescent Care*, at 2. “The gender identity affirmed during puberty appears to predict the gender identity that will persist into adulthood.” “Youth with persistent TNG [transgender, nonbinary, or gender-nonconforming] identity into adulthood . . . are more likely to have experienced social transition, such as using a different name . . . which is stereotypically associated with another gender at some point during childhood.”

too, must be considered to be a component of a “psychosocial treatment” with complex implications, and an experimental treatment at that.

68. So far as I am aware, no study yet reveals whether the life-course mental and physical health outcomes for this relatively new class of “persisters” are more similar to those of the general non-transgender population, or to the notably worse outcomes exhibited by the transgender population generally.

69. However, I agree with Zucker who has written, “...we cannot rule out the possibility that early successful treatment of childhood GID [Gender Identity Disorder] will diminish the role of a continuation of GID into adulthood. If so, successful treatment would also reduce the need for the long and difficult process of sex reassignment which includes hormonal and surgical procedures with substantial medical risks and complications.”²³ By the same token, a therapeutic methodology for children that *increases* the likelihood that the child will continue to identify as the opposite gender into adulthood will *increase* the need for the long and potentially problematic processes of hormonal and genital and cosmetic surgical procedures.

70. Not surprisingly, given these facts, encouraging social transition in children remains controversial. Supporters of such transition acknowledge that “Controversies among providers in the mental health and medical fields are abundant. . . . These include differing assumptions regarding . . . the age at which children . . . should be encouraged or permitted to

²³ Zucker, *Myth of Persistence*, at 8 (citing H. Meyer-Bahlburg (2002), *Gender Identity Disorder in Young Boys: A Parent- & Peer-Based Treatment Protocol*, CLINICAL CHILD PSYCHOLOGY & PSYCHIATRY 7, 360 at 362.).

socially transition These are complex and providers in the field continue to be at odds in their efforts to work in the best interests of the youth they serve.”²⁴

71. In sum, therapy for young children that encourages transition (including use of names, clothing and restrooms, and participating on athletic teams, associated with the opposite sex) cannot be considered to be neutral, but instead is an experimental procedure that has a high likelihood of changing the life path of the child, with highly unpredictable effects on mental and physical health, suicidality, and life expectancy. Claims that a civil right is at stake do not change the fact that what is proposed is a social and medical experiment. (Levine, *Reflections*, at 241.) Ethically, then, it should be undertaken only subject to standards, protocols, and reviews appropriate to such experimentation.

IV. THE AVAILABLE DATA DOES NOT SUPPORT THE CONTENTION THAT “AFFIRMATION” OF TRANSGENDER IDENTITY REDUCES SUICIDE OR RESULTS IN BETTER PHYSICAL OR MENTAL HEALTH OUTCOMES GENERALLY.

72. I am aware that organizations including The Academy of Pediatrics and Parents, Families and Friends of Lesbians and Gays (PFLAG) have published statements that suggest that all children who express a desire for a transgender identity should be promptly supported in that claimed identity. This position appears to rest on the belief—which is widely promulgated by certain advocacy organizations—that science has already established that prompt “affirmance” is best for all patients, including all children, who present indicia of transgender identity. As I discuss later below, this belief is scientifically incorrect, and ignores both what is known and what is unknown.

²⁴ A. Tishelman et al. (2015), *Serving Transgender Youth: Challenges, Dilemmas and Clinical Examples*, PROF. PSYCHOL. RES. PR. at 11, DOI: 10.1037/a0037490 (“*Serving TG Youth*”).

73. The knowledge-base concerning the causes and treatment of gender dysphoria has low scientific quality.

74. In evaluating claims of scientific or medical knowledge, it is important to understand that it is axiomatic in science that no knowledge is absolute, and to recognize the widely-accepted hierarchy of reliability when it comes to “knowledge” about medical or psychiatric phenomena and treatments. Unfortunately, in this field opinion is too often confused with knowledge, rather than clearly locating what exactly is scientifically known. In order of increasing confidence, such “knowledge” may be based upon data comprising:

a. Expert opinion—it is perhaps surprising to educated laypersons that expert opinion standing alone is the lowest form of knowledge, the least likely to be proven correct in the future, and therefore does not garner as much respect from professionals as what follows;

b. A single case or series of cases (what could be called anecdotal evidence) (Levine, *Reflections*, at 239.);

c. A series of cases with a control group;

d. A cohort study;

e. A randomized double-blind clinical trial;

f. A review of multiple trials;

g. A meta-analysis of multiple trials that maximizes the number of patients treated despite their methodological differences to detect trends from larger data sets.

75. Prominent voices in the field have emphasized the severe lack of scientific knowledge in this field. The American Academy of Child and Adolescent Psychiatry has recognized that “Different clinical approaches have been advocated for childhood gender

discordance. . . . There have been no randomized controlled trials of any treatment. . . . [T]he proposed benefits of treatment to eliminate gender discordance . . . must be carefully weighed against . . . possible deleterious effects.” (Adelson et al., *Practice Parameter*, at 968–69.)

Similarly, the American Psychological Association has stated, “because no approach to working with [transgender and gender nonconforming] children has been adequately, empirically validated, consensus does not exist regarding best practice with pre-pubertal children.”²⁵

76. Critically, “there are no randomized control trials with regard to treatment of children with gender dysphoria.” (Zucker, *Myth of Persistence*, at 8.) On numerous critical questions relating to cause, developmental path if untreated, and the effect of alternative treatments, the knowledge-base remains primarily at the level of the practitioner’s exposure to individual cases, or multiple individual cases. As a result, claims to certainty are not justifiable. (Levine, *Reflections*, at 239.)

77. Extending beyond treatment of children, a review of 28 studies of outcomes from hormonal therapy in connection with sex reassignment reported that these studies provided only “very low quality evidence” for a variety of reasons.²⁶ Large gaps exist in the medical community’s knowledge regarding the long-term effects of SRS and other gender identity disorder treatments in relation to their positive or negative correlation to suicidal ideation, attempts, and completion. What is known, however, is not encouraging.

²⁵ American Psychological Association, *Guidelines for Psychological Practice with Transgender & Gender Nonconforming People* (2015), AM. PSYCHOLOGIST 70(9) 832 at 842.

²⁶ H. Murad et al., *Hormonal therapy and sex reassignment: a systematic review and meta-analysis of quality of life and psychosocial outcomes*. CLINICAL ENDOCRINOLOGY 2010; 72(2): 214-231. See also R. D’Angelo, *Psychiatry’s ethical involvement in gender-affirming care*, AUSTRALASIAN PSYCHIATRY 2018, Vol 26(5) 460-463, noting the large number of non-responders in follow-up outcome studies, and observing that “it is generally not known whether they are alive or dead,” and that “it is . . . pure speculation to assume that none committed suicide.”

78. With respect to suicide, individuals with gender dysphoria are well known to commit suicide or otherwise suffer increased mortality before and after not only social transition, but also before and after SRS. (Levine, *Reflections*, at 242.) For example, in the United States, the death rates of trans veterans are comparable to those with schizophrenia and bipolar diagnoses—20 years earlier than expected. These crude death rates include significantly elevated suicide rates. (Levine, *Ethical Concerns*, at 10.) Similarly, researchers in Sweden and Denmark have reported on almost all individuals who underwent sex-reassignment surgery over a 30-year period.²⁷ The Swedish follow-up study found a suicide rate in the post-SRS population 19.1 times greater than that of the controls; both studies demonstrated elevated mortality rates from medical and psychiatric conditions. (Levine, *Ethical Concerns*, at 10.)

79. Advocates of immediate and unquestioning affirmation of social transition in children who indicate a desire for a transgender identity sometimes assert that any other course will result in a high risk of suicide in the affected children and young people. Dr. Adkins asserts that “Attempted suicide rates in the transgender community are over 40%,” and that “[t]he only treatment to avoid this serious harm is to . . . affirm gender identity.” (Adkins 6.) Contrary to these assertions, no studies show that affirmation of children (or anyone else) reduces suicide, prevents suicidal ideation, or improves long-term outcomes, as compared to either a “watchful waiting” or a psychotherapeutic model of response, as I have described above.²⁸ In considering

²⁷ C. Dhejne et al. (2011), *Long-Term Follow-Up of Transsexual Persons Undergoing Sex Reassignment Surgery: Cohort Study in Sweden*, PLOS ONE 6(2) e16885 (“*Long Term*”); R. K. Simonsen et al. (2016), *Long-Term Follow-Up of Individuals Undergoing Sex Reassignment Surgery: Psychiatric Morbidity & Mortality*, NORDIC J. OF PSYCHIATRY 70(4).

²⁸ A recent article, J. Turban et al. (2020), *Puberty Suppression for Transgender Youth and Risk of Suicidal Ideation*, PEDIATRICS 145(2), DOI: 10.1542/peds.2019-1725, has been described in press reports as demonstrating that administration of puberty suppressing hormones to transgender adolescents reduces suicide or suicidal ideation. The paper itself does not make that claim, nor permit that conclusion.

“suicide,” mental health professionals distinguish between suicidal thoughts (ideation), suicide gestures, suicide attempts with a lethal potential, and completed suicide. Dr. Atkins may be referring to numerous studies that have found suicidal ideation to have been present at some time in life in ~40-50%. This figure is approximately twice that in gay and lesbian communities. In the heteronormative communities it is approximately 4%. Mental health professionals distinguish clearly between gestures and potentially lethal attempts, which often result in hospitalization.

80. I will also note that any discussion of suicide when considering younger children involves very long-range and very uncertain prediction. Suicide in pre-pubescent children is rare and the existing studies of gender identity issues in pre-pubescent children do not report significant incidents of suicide. The estimated suicide rate of trans adolescents is the same as teenagers who are in treatment for serious mental illness. What trans teenagers do demonstrate is more suicidal ideation and attempts (however serious) than other teenagers.²⁹ Their completed suicide rates are not known.

81. In sum, claims that affirmation will reduce the risk of suicide for children are not based on science. Such claims overlook the lack of even short-term supporting data as well as the lack of studies of long-term outcomes resulting from the affirmation or lack of affirmation of transgender identity in children. They also overlook the other tools that the profession does have for addressing depression and suicidal thoughts in a patient once that risk is identified. (Levine, *Reflections*, at 242.)

²⁹ A. Perez-Brumer, J. K. Day et al. (2017), *Prevalence & Correlates of Suicidal Ideation Among Transgender Youth in Cal.: Findings from a Representative, Population-Based Sample of High Sch. Students*, J. AM. ACAD. CHILD ADOLESCENT PSYCHIATRY 56(9), 739 at 739.

82. A number of data sets have also indicated significant concerns about wider indicators of physical and mental health, including ongoing functional limitations;³⁰ substance abuse, depression, and psychiatric hospitalizations;³¹ and increased cardiovascular disease, cancer, asthma, and COPD.³² Worldwide estimates of HIV infection among transgendered individuals are up to 17-fold higher than the cisgender population. (Levine, *Informed Consent*, at 6.)

83. Meanwhile, no studies show that affirmation of pre-pubescent children or adolescents leads to more positive outcomes (mental, physical, social, or romantic) by, e.g., age 25 or older than does “watchful waiting” or ordinary therapy. Because affirmation and social transition for children and adolescents, and the use of puberty blockers for transgender children, are a recent phenomenon, it could hardly be otherwise.

84. Given what is known and what is not known about the incidence and causes of suicide attempts and suicide in children and adolescents who suffer from gender dysphoria, and what is known about the incidence of suicide attempts and suicide in individuals who have transitioned to live in a transgender identity, it is in my view unethical for a mental health professional to tell a young patient, or the parents of a young patient, that social transition, puberty blockers, or use of cross-sex hormones will reduce the likelihood that the young person will commit suicide.

³⁰ G. Zeluf, C. Dhejne et al. (2016), *Health, Disability and Quality of Life Among Trans People in Sweden—A Web-Based Survey*, BMC PUBLIC HEALTH 16(903), DOI: 10.1186/s12889-016-3560-5.

³¹ C. Dhejne, R. Van Vlerken et al. (2016), *Mental Health & Gender Dysphoria: A Review of the Literature*, INT’L REV. OF PSYCHIATRY 28(1) 44.

³² C. Dragon, P. Guerino, et al. (2017), *Transgender Medicare Beneficiaries & Chronic Conditions: Exploring Fee-for-Service Claims Data*, LGBT HEALTH 4(6) 404, DOI: 10.1089/lgbt.2016.0208.

85. Instead, transition of any sort must be justified, if at all, as a life-enhancing measure, not a lifesaving measure. (Levine, *Reflections*, at 242.) In my opinion, this is an important fact that patients, parents, and even many MHPs fail to understand.

V. KNOWN, LIKELY, OR POSSIBLE DOWNSIDE RISKS ATTENDANT ON MOVING QUICKLY TO “AFFIRM” TRANSGENDER IDENTITY IN CHILDREN.

86. As I have detailed above, enabling and affirming social transition in a prepubescent child appears to be highly likely to increase the odds that the child will in time pursue pubertal suppression and persist in a transgender identity into adulthood. This means that the MHP, patient, and in the case of minors, parents must consider long-term as well as short-term implications of life as a transgender individual when deciding whether to permit or encourage a child to socially transition.

87. Dr. Adkins asserts without citation to peer-reviewed literature that social transition and hormone therapy are “safe, effective and essential” for young people. (Adkins 6, 10.) A great deal of data point in the opposite direction. The multiple studies from different nations that have documented the increased vulnerability of the adult transgender population to substance abuse, mood and anxiety disorders, suicidal ideation, and other health problems warn us that assisting the child or adolescent down the road to becoming a transgender adult is a very serious decision, and stand as a reminder that a casual assumption that transition will improve the young person’s life is not justified based on numerous scientific snapshots of cohorts of trans adults and teenagers.

88. The possibility that steps along this pathway, while lessening the pain of gender dysphoria, could lead to additional sources of crippling emotional and psychological pain, are

too often not considered by advocates of social transition and not considered at all by the trans child. (Levine, *Reflections*, at 243.)

89. I detail below several classes of predictable, likely, or possible harms to the patient associated with transitioning to live as a transgender individual.

A. Physical risks associated with transition

90. Sterilization. Dr. Adkins rightly notes that many patients who begin down the path defined by puberty blockers and social transition end up feeling the need to undergo “surgical treatment” “to alleviate gender dysphoria.” (Adkins 10.) As I have noted above, there is not good scientific evidence that SRS results in better long-term mental health outcomes. What is certain, however, is that SRS that removes testes, ovaries, or the uterus is inevitably sterilizing. While by no means all transgender adults elect SRS, many patients do ultimately feel compelled to take this serious step in their effort to live fully as the opposite sex. More immediately, practitioners recognize that the administration of cross-sex hormones, which is often viewed as a less “radical” measure, and is now increasingly done to minors, creates at least a risk of irreversible sterility.³³ As a result, even when treating a child, the MHP, patient, and parents must consider loss of reproductive capacity—sterilization—to be one of the major risks of starting down the road. The risk that supporting social transition may put the child on a pathway that leads to intentional or unintentional permanent sterilization is particularly concerning given the disproportionate representation of minority and other vulnerable groups among children reporting a transgender or gender-nonconforming identity. (*See supra* ¶ 21.)

³³ *See* C. Guss et al., *TGN Adolescent Care* at 4 (“a side effect [of cross-sex hormones] may be infertility”) and 5 (“cross-sex hormones . . . may have irreversible effects”); Tishelman et al., *Serving TG Youth* at 8 (Cross-sex hormones are “irreversible interventions” with “significant ramifications for fertility”).

91. Loss of sexual response. Puberty blockers prevent maturation of the sexual organs and response. Some, and perhaps many, transgender individuals who transitioned as children and thus did not go through puberty consistent with their sex face significantly diminished sexual response as they enter adulthood and are unable ever to experience orgasm. Dr. Adkins acknowledges that those “who undergo hormone treatment before the end of puberty may experience some permanent changes that a person who transitions later in life would not” (Adkins 10), and this may be one of the irreversible effects to which she refers. She may also be referring to the social, psychological, and interpersonal impact of not being in puberty for 4-5 years while one’s peers are challenged by the normative processes of maturing bodies and minds. To my knowledge, data quantifying these impacts has not been published. In the case of males, the cross-sex administration of estrogen limits penile genital function. Much has been written about the negative psychological and relational consequences of anorgasmia among non-transgender individuals that is ultimately applicable to the transgendered. (Levine, *Informed Consent*, at 6.)

92. Other effects of hormone administration. While it is commonly said that the effects of puberty blockers are reversible after cessation (Dr. Adkins describes the effect of puberty blockers as just a “pause” (Adkins 8)), in fact controlled studies have not been done of how completely this is true. A more prudent assessment is that medicine does not know what the long-term health effects on bone, brain, and other organs are of a “pause” between ages 11-16, and psychology likewise does not know the long-term effects on coping skills, interpersonal comfort, and intimate relationships of this “pause” while one’s peers are undergoing their maturational gains in these vital arenas of future mental health. However, it is well known that many effects of cross-sex hormones cannot be reversed should the patient later regret his

transition. After puberty, the individual who wishes to live as the opposite sex will in most cases have to take cross-sex hormones for most of life.

93. The long-term health risks of this major alteration of hormonal levels have not yet been quantified in terms of exact risk.³⁴ However, a recent study found greatly elevated levels of strokes and other acute cardiovascular events among male-to-female transgender individuals taking estrogen. Those authors concluded, “it is critical to keep in mind that the risk for these cardiovascular events in this population must be weighed against the benefits of hormone treatment.”³⁵ Another group of authors similarly noted that administration of cross-sex hormones creates “an additional risk of thromboembolic events”—which is to say blood clots (Guss et al., *TGN Adolescent Care* at 5), which are associated with strokes, heart attacks, and lung and liver failure. Clinicians must distinguish the apparent short-term safety of hormones from likely or possible long-term consequences, and help the patient or parents understand these implications as well. The young patient may feel, “I don’t care if I die young, just as long I get to live as a woman.” The mature adult may take a different view.

94. Health risks inherent in complex surgery. Complications of surgery exist for each procedure,³⁶ and complications in surgery affecting the reproductive organs and urinary tract can have significant anatomical and functional complications for the patient’s quality of life.

³⁴ See Tishelman et al., *Serving TG Youth* at 6-7 (Long-term effect of cross-sex hormones “is an area where we currently have little research to guide us.”).

³⁵ D. Getahun et al. (2018), *Cross-Sex Hormones and Acute Cardiovascular Events in Transgender Persons: A Cohort Study*, ANNALS OF INTERNAL MEDICINE at 8, DOI:10.7326/M17-2785.

³⁶ Levine, *Informed Consent*, at 5 (citing T. van de Grift, G. Pigot et al. (2017), *A Longitudinal Study of Motivations Before & Psychosexual Outcomes After Genital Gender-Confirming Surgery in Transmen*, J. SEXUAL MEDICINE 14(12) 1621.).

95. Disease and mortality generally. The MHP, the patient, and in the case of a child, the parent must also be aware of the wide sweep of strongly negative health outcomes among transgender individuals, as I have detailed above.

B. Social risks associated with transition

96. Family and friendship relationships. Gender transition routinely leads to isolation from at least a significant portion of one's family in adulthood. In the case of a juvenile transition, this will be less dramatic while the child is young, but commonly increases over time as siblings who marry and have children of their own do not wish the transgender individual to be in contact with those children. By adulthood, the friendships of transgender individuals tend to be confined to other transgender individuals (often "virtual" friends known only online) and the generally limited set of others who are comfortable interacting with transgender individuals. (Levine, *Ethical Concerns*, at 5.)

97. Long term psychological and social impact of sterility. The life-long negative emotional impact of infertility on both men and women has been well studied. While this impact has not been studied specifically within the transgender population, the opportunity to be a parent is likely a human, emotional need, and so should be considered an important risk factor when considering gender transition for any patient. However, it is particularly difficult for parents of a young child to seriously contemplate that child's potential as a future parent and grandparent. This makes it all the more critical that the MHP spend substantial and repeated time with parents to help them see the implications of what they are considering.

98. Sexual-romantic risks associated with transition. After adolescence, transgender individuals find the pool of individuals willing to develop a romantic and intimate relationship with them to be greatly diminished. When a trans person who passes well reveals his or her natal sex, many potential cisgender mates lose interest. When a trans person does not pass well, he

discovers that the pool of those interested consists largely of individuals looking for exotic sexual experiences rather than genuinely loving relationships. (Levine, *Ethical Concerns*, at 5, 13.) Nor is the problem all on the other side; transgender individuals commonly become strongly narcissistic, unable to give the level of attention to the needs of another that is necessary to sustain a loving relationship.³⁷

99. Social risks associated with delayed puberty. The social and psychological impacts of remaining puerile for, e.g., three-to- five years while one's peers are undergoing pubertal transformations, and of undergoing puberty at a substantially older age, have not been systematically studied, although clinical mental health professionals often hear of distress and social awkwardness in those who naturally have a delayed onset of puberty. In my opinion, individuals in whom puberty is delayed multiple years are likely to suffer at least subtle negative psychosocial and self-confidence effects as they stand on the sidelines while their peers are developing the social relationships (and attendant painful social learning experiences) that come with adolescence. (Levine, *Informed Consent*, at 9.)

C. Mental health costs or risks

100. One would expect the negative physical and social impacts reviewed above to adversely affect the mental health of individuals who have transitioned. In addition, adult transitioned individuals find that living as the other (or, in a manner that is consistent with the stereotypes of the other as the individual perceives them) is a continual challenge and stressor, and many find that they continue to struggle with a sense of inauthenticity in their transgender identity. (Levine, *Informed Consent*, at 9.)

³⁷ S. Levine, *Barriers to Loving: A Clinician's Perspective*, at 40 (Routledge, New York 2013).

101. In addition, individuals often pin excessive hope in transition, believing that transition will solve what are in fact ordinary social stresses associated with maturation, or mental health co-morbidities. Thus, transition can result in deflection from mastering personal challenges at the appropriate time or addressing conditions that require treatment.

102. Whatever the reason, transgender individuals including transgender youth certainly experience greatly increased rates of mental health problems. I have detailed this above with respect to adults living under a transgender identity. Indeed, Swedish researchers in a long-term study (up to 30 years since SRS, with a median time since SRS of > 10 years) concluded that individuals who have SRS should have postoperative lifelong psychiatric care. (Dhejne, *Long Term*, at 6-7.) With respect to youths a cohort study found that transgender youth had an elevated risk of depression (50.6% vs. 20.6%) and anxiety (26.7% vs. 10.0%); a higher risk of suicidal ideation (31.1% vs. 11.1%), suicide attempts (17.2% vs. 6.1%), and self-harm without lethal intent (16.7% vs. 4.4%) relative to the matched controls; and a significantly greater proportion of transgender youth accessed inpatient mental health care (22.8% vs. 11.1%) and outpatient mental health care (45.6% vs. 16.1%) services.³⁸

103. Dr. Adkins asserts that when the “transition, affirmation, and hormones” therapy that she advocates is followed, “gender dysphoria is easily managed.” (Adkins 6.) I am not aware of any long-term studies that justify this assertion, and as I have explained above, the responsible MHP cannot focus narrowly on the short-term happiness of the patient, but must instead consider the happiness and health of the patient from a “life course” perspective. The many studies that I have cited here warn us that as we look ahead to the patient’s life as a young adult and adult, the

³⁸ S. Reisner et al. (2015), *Mental Health of Transgender Youth in Care at an Adolescent Urban Community Health Center: A Matched Retrospective Cohort Study*, J. OF ADOLESCENT HEALTH 56(3) at 6, DOI:10.1016/j.jadohealth.2014.10.264; see also *supra* ¶ 21.

prognosis for the physical health, mental health, and social well-being of the child or adolescent who transitions to live in a transgender identity is not good. Gender dysphoria is not “easily managed” except when it naturally desists. A recent study in the American Journal of Psychiatry reported the high mental health utilization patterns of adults for ten years after surgery for approximately 35% of patients.³⁹ This is not “easy” management.

D. Regret following transition is not an infrequent phenomenon.

104. The large numbers of children and young adults who have desisted as documented in both group and case studies each represent “regret” over the initial choice in some sense.

105. The phenomenon of desistance or regret experienced *later* than adolescence or young adulthood, or among older transgender individuals, has to my knowledge not been quantified or well-studied. However, it is a real phenomenon. I myself have worked with multiple individuals who have abandoned trans female identity after living in that identity for years, and who would describe their experiences as “regret.”

106. I have seen several Massachusetts inmates and trans individuals in the community abandon their [trans] female identity after several years. (Levine, *Reflections*, at 239.) In the gender clinic which I founded in 1974 and to this day, in a different location, continue to co-direct, we have seen many instances of individuals who claimed a transgender identity for a time, but ultimately changed their minds and reclaimed the gender identity congruent with their sex.

³⁹ Branstrom & Pachankis, (2019), *Reduction in Mental Health Treatment Utilization Among Transgender Individuals After Gender-Affirming Surgeries*, AM. J. OF PSYCHIATRY. 4:Appiajp201919010080. Doi: 10.1176/Appi.Ajp.2019.19010080.

107. More dramatically, a surgical group prominently active in the SRS field has published a report on a series of seven male-to-female patients requesting surgery to transform their surgically constructed female genitalia back to their original male form.⁴⁰

108. I noted above an increasingly visible online community of young women who have desisted after claiming a male gender identity at some point during their teen years. (*See supra* ¶ 62.) Given the rapid increase in the number of girls presenting to gender clinics within the last few years, the phenomena of regret and desistance by young women deserves careful attention and study by MHPs.

109. Thus, one cannot assert with any degree of certainty that once a transgendered person, always a transgendered person, whether referring to a child, adolescent, or adult, male or female.

I, Dr. Stephen B. Levine, swear that the statements in this affidavit are true and accurate to the best of my knowledge, and represent my professional opinions. Because of restrictions and health concerns relating to COVID-19, I am not readily able to subscribe this affidavit in the presence of a notary, but I am willing to do so if desired when it becomes practical to do so.

Dated: June 4, 2020.



Stephen B. Levine

⁴⁰ Djordjevic et al. (2016), *Reversal Surgery in Regretful Male-to-Female Transsexuals After Sex Reassignment Surgery*, J. Sex Med. 13(6) 1000, DOI: 10.1016/j.jsxm.2016.02.173.

APPENDIX 1
RESPONSE TO MOTION FOR
PRELIMINARY INJUNCTION (Dkt. 22)
Hecox, et al. v. Little, et al.
Case No. 1:20-cv-00184-DCN

ER371



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS
32 OLD SLIP, 26TH FLOOR
NEW YORK, NEW YORK 10005

TIMOTHY C. J. BLANCHARD
DIRECTOR
NEW YORK OFFICE

May 15, 2020

Sent via email only to:

MIZEL001@hartford.gov

Lori Mizerak
Assistant Corporation Counsel
City of Hartford
550 Main Street, Room 210
Hartford, Connecticut 06103
Attorney for Hartford Public Schools

dmonastersky@HL-Law.com

David S. Monastersky, Esq.
Howd & Ludorf, LLC
65 Wethersfield Avenue
Hartford, Connecticut 06114
Attorney for Glastonbury Public Schools
and Canton Public Schools

pjmurphy@goodwin.com &
lyoder@goodwin.com

Peter J. Murphy, Esq.
Linda L. Yoder, Esq.
Shipman & Goodwin, LLP
One Constitution Plaza
Hartford, Connecticut 06103-1919
Attorneys for Connecticut Interscholastic Athletic Conference
and Danbury Public Schools

jzelman@fordharrison.com

Johanna Zelman, Esq.
Ford Harrison
CityPlace II
185 Asylum Street, Suite 610
Hartford, Connecticut 06103
Attorney for Bloomfield Public Schools
and Cromwell Public Schools

Page 2 of 45 – Case Nos. 01-19-4025, 01-19-1252, 01-20-1003, 01-20-1004, 01-20-1005, 01-20-1006, and 01-20-1007

Re: Case No. 01-19-4025
Connecticut Interscholastic Athletic Conference

Case No. 01-19-1252
Glastonbury Public Schools

Case No. 01-20-1003
Bloomfield Public Schools

Case No. 01-20-1004
Canton Public Schools

Case No. 01-20-1005
Cromwell Public Schools

Case No. 01-20-1006
Danbury Public Schools

Case No. 01-20-1007
Hartford Public Schools

Dear Attorneys Mizerak, Monastersky, Murphy, Yoder, and Zelman:

The U.S. Department of Education, Office for Civil Rights (OCR) issues this Letter of Impending Enforcement Action¹ in the above-referenced cases. The Complainant filed complaints against the Connecticut Interscholastic Athletic Conference (CIAC) and the Glastonbury Board of Education (Glastonbury) on behalf of three high school student-athletes and their parents. The Complainant alleged that the CIAC’s policy permitting certain biologically male student-athletes to participate in interscholastic athletics (Article IX, Section B of the CIAC By-Laws, adopted May 9, 2013, and titled, “Transgender Participation” (hereinafter referred to as the Revised Transgender Participation Policy)) discriminated against female student-athletes competing in interscholastic girls’ track in the state of Connecticut on the basis of their sex.² Specifically, the Complainant alleged that the Revised Transgender Participation Policy denied girls opportunities to compete, including in state and regional meets, and to receive public recognition critical to college recruiting and scholarship opportunities. The Complainant further alleged that implementation of the Revised Transgender Participation Policy by Glastonbury, the school attended by one of the complainant student-athletes (Student 1), denied opportunities to girls competing in interscholastic girls’ track on the basis of their sex. In addition, the Complainant alleged that the CIAC retaliated against one of the complainant parents (Parent 1), after Parent 1 complained about the Revised

¹ Section 305 of OCR’s *Case Processing Manual* states as follows: “When following the expiration of the 10 calendar day period referenced in CPM subsection 303(g) . . . the recipient does not enter into a resolution agreement to resolve the identified areas of non-compliance, OCR will prepare a Letter of Impending Enforcement Action.”

² For the purposes of this letter, the terms “male” and “female” are defined by biological sex. *See Mem. from U.S. Attorney General to U.S. Attorneys Heads of Department Components* (Oct. 4, 2017), available at <https://www.justice.gov/ag/page/file/1006981/download>; and Brief for the Federal Respondent, *Harris Funeral Homes, Inc. v. EEOC, et al.*, No. 18-107, 2019 WL 3942898 (U.S.) (2019).

Page 3 of 45 – Case Nos. 01-19-4025, 01-19-1252, 01-20-1003, 01-20-1004, 01-20-1005, 01-20-1006, and 01-20-1007

Transgender Participation Policy; and that a Glastonbury track coach retaliated against Student 1 for her and her parent’s (Parent 2’s) advocacy against the Revised Transgender Participation Policy.

Pursuant to OCR’s *Case Processing Manual* (the *Manual*),³ Section 103, OCR also opened an investigation of Bloomfield Public Schools (Bloomfield) and Hartford Public Schools (Hartford), based on allegations that these school districts allowed a biologically male student-athlete (Student A) to participate on their girls’ track teams. OCR also opened an investigation of Cromwell Public Schools (Cromwell), based on allegations that this school district allowed a biologically male student-athlete (Student B) to participate on its girls’ track team. Additionally, OCR opened an investigation of Canton Public Schools (Canton) and Danbury Public Schools (Danbury), the school districts attended by the other two complainant student-athletes (Students 2 and 3, respectively), following a determination that these school districts may have been involved in alleged acts of discrimination related to the complaints filed against the CIAC and Glastonbury. OCR investigated whether these school districts denied athletic benefits and opportunities to female student-athletes competing in interscholastic girls’ track through implementation of the Revised Transgender Participation Policy, or limited the eligibility or participation of any female student-athletes competing in interscholastic girls’ track through implementation of the Revised Transgender Participation Policy.

Summary of Findings

As detailed below, the actions of the CIAC, Glastonbury, Bloomfield, Hartford, Cromwell, Canton, and Danbury resulted in the loss of athletic benefits and opportunities for female student-athletes. One complainant student-athlete explained to OCR that no matter how hard she trained, she felt that she could never be good enough to defeat Students A and B. She also stated that female student-athletes were missing out on great opportunities to succeed and felt that female student-athletes could be “completely eradicated from their own sports.” Another complainant student-athlete explained to OCR that she felt that she could not fairly compete against Students A and B, because they had a physical advantage over her. In this sense, they were denied the opportunities that Connecticut male student-athletes had of being able to compete, on a level playing field, for the benefits that flow from success in competitive athletics. OCR determined that the participation of Students A and B in girls’ track events resulted in lost benefits and opportunities for female student-athletes.

OCR determined that the CIAC, by permitting the participation of certain male student-athletes in girls’ interscholastic track in the state of Connecticut, pursuant to the Revised Transgender Participation Policy, denied female student-athletes athletic benefits and opportunities, including advancing to the finals in events, higher level competitions, awards, medals, recognition, and the possibility of greater visibility to colleges and other benefits. Accordingly, OCR determined that the CIAC denied athletic benefits and opportunities to female student-athletes competing in interscholastic girls’ track in the state of Connecticut through the Revised Transgender Participation Policy, in violation of the regulation implementing Title IX of the Education Amendments of 1972 (Title IX), at 34 C.F.R. § 106.41(a).

³ <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

Page 4 of 45 – Case Nos. 01-19-4025, 01-19-1252, 01-20-1003, 01-20-1004, 01-20-1005, 01-20-1006, and 01-20-1007

OCR determined that the participation of Glastonbury, Canton, and Danbury in athletic events sponsored by the CIAC, consistent with the CIAC's Revised Transgender Participation Policy, which resulted in Students 1, 2, and 3, and other female student-athletes competing against Students A and B, denied athletic benefits and opportunities to Students 1, 2, and 3, and other female student-athletes, in violation of the regulation implementing Title IX, at 34 C.F.R. § 106.41(a). Glastonbury, Canton, and Danbury placed female student-athletes in athletic events against male student-athletes, resulting in competitive disadvantages for female student-athletes. The athletic events in which the female student-athletes competed were coeducational; female student-athletes were denied the opportunity to compete in events that were exclusively female, whereas male student-athletes were able to compete in events that were exclusively male. Accordingly, the districts' participation in the athletic events sponsored by the CIAC denied female student-athletes athletic opportunities that were provided to male student-athletes. Glastonbury's, Canton's, and Danbury's obligations to comply with the regulation implementing Title IX are not obviated or alleviated by any rule or regulation of the CIAC. 34 C.F.R. § 106.6(c).

Student A participated in girls' outdoor track during school year 2017-2018 on the Bulkeley (Hartford) team; and participated in girls' indoor and outdoor track during school year 2018-2019 on Bloomfield's team. OCR determined that the participation of Hartford and Bloomfield in athletic events sponsored by the CIAC, consistent with the CIAC's Revised Transgender Participation Policy, which resulted in Student A's participating in events against Students 1, 2, and 3, and against other female student-athletes, denied athletic benefits and opportunities to Students 1, 2, and 3, and other female student-athletes, in violation of the regulation implementing Title IX, at 34 C.F.R. § 106.41(a). Student B participated in girls' indoor and outdoor track during school years 2017-2018 and 2018-2019 on Cromwell's team. OCR determined that the participation of Cromwell in athletic events sponsored by the CIAC, consistent with the CIAC's Revised Transgender Participation Policy, which resulted in Student B's participating in events against Students 1, 2, and 3, and against other female student-athletes, denied athletic benefits and opportunities to Students 1, 2, and 3, and other female student-athletes, in violation of the regulation implementing Title IX, at 34 C.F.R. § 106.41(a). Hartford's, Bloomfield's, and Cromwell's obligations to comply with the regulation implementing Title IX are not obviated or alleviated by any rule or regulation of the CIAC. 34 C.F.R. § 106.6(c).

For the aforementioned reasons, OCR also determined that the CIAC, Glastonbury, Bloomfield, Hartford, Cromwell, Canton, and Danbury treated student-athletes differently based on sex, by denying benefits and opportunities to female students that were available to male students.

With respect to the retaliation allegation filed against the CIAC, there was insufficient evidence to substantiate the Complainant's allegation that the CIAC retaliated against Parent 1 after Parent 1 complained about the Revised Transgender Participation Policy. With respect to the retaliation allegation filed against Glastonbury, there was insufficient evidence to substantiate the Complainant's allegation that Glastonbury retaliated against Student 1.

Nothing in this letter should be interpreted to impute misconduct on the part of any biologically male students who participated in these competitions.

Investigation and Issuance of Letter of Impending Enforcement Action

During the course of the investigation, OCR interviewed the Executive Director of the CIAC; administrators and staff from Glastonbury, Bloomfield, Hartford, Cromwell, Canton, and Danbury; and the students and parents on whose behalf the complaint was filed. In addition, OCR reviewed documentation that the Complainant, the CIAC, the school districts, and some of the students and parents submitted. OCR also reviewed publicly available information regarding the CIAC and its member school student-athletes.

At the conclusion of the investigations, OCR informed the CIAC, Glastonbury, Bloomfield, Hartford, Cromwell, Canton, and Danbury of its findings and determinations that the CIAC, Glastonbury, Bloomfield, Hartford, Cromwell, Canton, and Danbury had discriminated against female student-athletes. OCR requested that the CIAC, Glastonbury, Bloomfield, Hartford, Cromwell, Canton, and Danbury enter into resolution agreements to remedy the violations. Because the CIAC, Glastonbury, Bloomfield, Hartford, Cromwell, Canton, and Danbury did not enter into resolution agreements, OCR issued letters of impasse to the CIAC, Glastonbury, Bloomfield, Hartford, Cromwell, Canton, and Danbury on March 17, 2020, in which it advised the CIAC, Glastonbury, Bloomfield, Hartford, Cromwell, Canton, and Danbury that it would issue this letter if each did not reach an agreement with OCR within 10 calendar days of the date of its impasse letter.⁴ OCR issues this Letter of Impending Enforcement Action because the CIAC, Glastonbury, Bloomfield, Hartford, Cromwell, Canton, and Danbury have to date failed to voluntarily enter into resolution agreements to remedy the identified violations.

Jurisdiction

OCR is responsible for enforcing Title IX, as amended, 20 U.S.C. § 1681 *et seq.*, and its implementing regulation at 34 C.F.R. Part 106, which prohibit discrimination on the basis of sex in education programs and activities receiving financial assistance from the U.S. Department of Education (the Department).

OCR has jurisdiction over the CIAC as follows:

- a) The CIAC is a direct recipient of Federal funding from the Department through a grant awarded by the Department's Office of Special Education Programs (OSEP) to support the Special Olympics Unified Champion Schools program administered by the CIAC.
- b) The CIAC is also an indirect recipient of Federal funding. The CIAC is governed by member school representatives who devote official time and district resources to the CIAC (e.g., determine athletic eligibility, make rules for athletic competitions, run state boys' and girls' tournaments, and control state championships). In addition, the CIAC receives revenue through the sale of tickets to tournament contests—revenue that would otherwise go to the schools—and by the assessment of entry fees on schools for

⁴ In emails dated March 27, 2020, OCR informed the CIAC, Glastonbury, Bloomfield, Hartford, Cromwell, Canton, and Danbury that in view of their COVID-19-related duties and responsibilities, OCR was extending the 10-calendar-day deadline to respond to OCR's proposed resolution agreement for a period of 30 days, to April 27, 2020.

participation in various tournaments. The CIAC is also an indirect recipient of Departmental financial assistance through Special Olympics of Connecticut (which receives grant money from OSEP) because several employees of Special Olympics of Connecticut provide to the CIAC technical assistance in the administration of the Special Olympics Unified Champion Schools program.

- c) The CIAC’s member schools also have ceded controlling authority over Connecticut’s high school athletic program to the CIAC, whose purpose is to supervise, direct, and control interscholastic athletics in Connecticut. In addition to the CIAC’s governance by local school representatives (noted above), the Connecticut General Assembly’s Office of Legislative Research stated that school districts have the power to organize athletic programs and decide in what sports to compete, adding, “Boards have delegated authority over the organization of interscholastic high school athletics to [the CIAC]. CIAC regulates high school sports, promulgates eligibility and safety and health rules for teams, and organizes and controls games and championships.”

OCR has jurisdictional authority under Title IX to investigate Glastonbury, Bloomfield, Hartford, Cromwell, Canton, and Danbury, because each is a recipient of financial assistance from the Department.

I. ATHLETIC BENEFITS AND OPPORTUNITIES

Findings of Fact

The CIAC’s Organizational Structure

The CIAC is the only association governing interscholastic athletic programs for secondary schools in Connecticut.⁵ The CIAC is a division of the Connecticut Association of Schools (CAS). Any public or parochial school accredited by the Connecticut State Department of Education, as well as any private school or academy, and any private school holding associate institutional membership in the CAS can become a member of the CIAC. The CIAC currently has 188 member schools. Member schools sign an annual Membership Agreement, pay annual dues, and agree to abide by the CAS Constitution and the CIAC By-Laws and Eligibility Rules. During school year 2018-2019, the CIAC authorized its member schools to participate in 14 boys’ sports and 13 girls’ sports. The CIAC By-Laws allow female athletes to participate on boys’ teams, but do not permit male athletes to participate on girls’ teams. The CIAC administers its athletics programs by way of the CAS Constitution, by-laws, and tournament regulations.⁶

The CIAC has 27 committees corresponding to each of the CIAC-sanctioned sports. Each committee includes representatives from member schools, including principals, coaches, and

⁵ See CIAC Handbook 2019-2020, Section 2.2 (“The CIAC is the only Association which governs interscholastic athletic programs for secondary schools in Connecticut.”).

⁶ The by-laws constitute the general rules and policies for athletic administration and participation in the CIAC. Specific policies, such as the Revised Transgender Participation Policy, are contained within the by-laws. Further policies regarding sport-specific tournament participation (“tournament regulations”) are published each season in a sports information packet.

Page 7 of 45 – Case Nos. 01-19-4025, 01-19-1252, 01-20-1003, 01-20-1004, 01-20-1005, 01-20-1006, and 01-20-1007

athletic directors, as well as former coaches. These committees coordinate the activities of the sports, including game rules, playing conditions, tournament policies, and sportsmanship initiatives. The by-laws, along with the CAS constitution, are published every year as part of the CIAC Handbook, which is available on the CIAC website.⁷ The Handbook includes detailed rules and regulations governing athletic administration, scheduling, and eligibility, among other topics. The CAS Legislative Body is authorized to make changes to the CAS Constitution and the by-laws. The principals of the CIAC member schools are the voting delegates to the Legislative Body. The CAS Constitution states that any voting member school may submit a proposed change to the by-laws/regulations through its representative. The CIAC Board of Control is the governing body for high school interscholastic sports in Connecticut and has 14 voting and 3 non-voting members; the Board of Control has representatives from large, medium, and small schools, urban and rural schools, as well as public, parochial, and technical schools.⁸ The by-laws require that the Board of Control consider any proposed change to a by-law/regulation, act upon it, and submit any proposed by-law/regulation change to member schools for a vote at the annual meeting of the Legislative Body. The by-laws, including the rules, regulations, and policies contained therein, as well as the tournament regulations are binding on its member schools,⁹ and the CIAC has the authority to penalize schools for violation of the by-laws.¹⁰

During interviews, district staff members confirmed that the districts regarded the by-laws, rules, and regulations, including the Revised Transgender Participation Policy, as binding. The witnesses further stated that they regarded the CIAC as the only athletic association in Connecticut that could provide sufficient competitive opportunities for their students.¹¹ Witnesses told OCR that if their schools were to withdraw from the CIAC, they likely would encounter difficulties scheduling games against other schools and would be unable to participate in statewide competitions. An Athletic Director for one of the Districts advised OCR that a CIAC member school would not benefit from playing against a nonmember school because it would not add to

⁷ http://www.casciac.org/pdfs/ciachandbook_1920.pdf (site last visited on April 24, 2020).

⁸ The CIAC Board of Control is elected each year by the Legislative Body at the Annual Meeting of the CAS. The CIAC Board of Control meets monthly during the school year.

⁹ See the CIAC Handbook 2019-2020, Section 2.4 (“Each member school has the responsibility of knowing and adhering to all CIAC rules and regulations and administering its athletic programs according to those rules.”).

¹⁰ See the CIAC Handbook 2019-2020, Section 3.0, CIAC By-Laws, Article III, Section C (“The Board of Control shall have the power to assess and to enforce such penalties, including fines, against member schools, principals, athletic directors, coaches and/or members of the coaching staff, as it deems suitable for violations of its Bylaws, Regulations, Rules, Standards of Courtesy, Fair Play and Sportsmanship, Code of Ethics, or any other standard of conduct or any other provision of this Handbook.”). Witnesses OCR interviewed, including the CIAC Executive Director and administrators of member schools, stated that, in general, member schools are responsible for ensuring their own compliance with the CIAC’s rules and for self-reporting any violations of those rules. Member schools can also report other schools for potential violations. The CIAC Executive Director informed OCR that, to date, no member school has self-reported or reported another member school for a violation of the Revised Transgender Participation Policy.

¹¹ The CIAC Executive Director stated that there are private schools within Connecticut, such as Taft, Choate, and Kent, that do not belong to the CIAC. These schools belong to the Founders League, whose website describes the league as comprising “highly selective college preparatory schools.” The Founders League includes ten schools from Connecticut and one school from New York. The Founders League holds its Championship in 13 boys’ sports and 12 girls’ sports separately, and the CIAC precludes any Founders League schools from competing in any post-season events hosted by the CIAC. Witnesses opined that they did not know if the Founders League was a feasible alternative for a public school in lieu of becoming a member of the CIAC.

Page 8 of 45 – Case Nos. 01-19-4025, 01-19-1252, 01-20-1003, 01-20-1004, 01-20-1005, 01-20-1006, and 01-20-1007

the school’s record for purposes of qualifying for the state championship. The same Athletic Director also stated that having a state-wide association makes all of the athletics programs stronger and more consistent with set rules for play and eligibility.

The CIAC’s Adoption of its Revised Transgender Participation Policy

The CIAC stated that its Board of Control began discussions regarding transgender participation in athletics during school year 2007-2008. During its 56th Annual Meeting, held on May 8, 2008, the CIAC membership adopted a by-law change concerning the eligibility of transgender athletes, adding new language to Article IX of the CIAC by-laws (the 2008 policy). Specifically, the 2008 policy allowed transgender student-athlete participation only in accordance with the gender stated on the student’s birth certificate unless the student had undergone “sex reassignment.”¹² The 2008 policy set forth specific requirements for post-pubescent sex reassignment, including surgery; legal recognition of the reassignment by proper governmental authorities; hormonal therapy; and a two-year waiting period post-surgical and anatomical changes.¹³ The 2008 policy also provided that a student-athlete seeking participation as a result of a sex reassignment would be able to appeal eligibility determinations through the CIAC’s eligibility appeal process. The stated rationale for the 2008 policy was that “[w]hile the eligibility of transgendered students has not yet been a ‘live’ issue in Connecticut, the CIAC Board felt that it should be pro-active and have a policy in place for any future eventualities.”¹⁴ The 2008 policy remained in effect until 2013. The CIAC advised OCR that, during that time period, the CIAC did not receive any requests for a student-athlete to participate on a team that was different from the student’s “assigned gender at birth.”

The CIAC stated that in 2012, after the Connecticut Legislature passed Public Act 11-55, expanding the scope of Connecticut’s anti-discrimination laws to prohibit discrimination on the basis of “gender identity or expression,”¹⁵ the CIAC decided to review and revise the 2008 policy.

¹² https://www.casciac.org/pdfs/ciachandbook_1213.pdf (site last visited on April 24, 2020)

¹³ Under the 2008 policy, a student-athlete who had undergone sex reassignment before puberty was not subject to the requirements detailed above.

¹⁴ The CIAC Annual Meeting minutes. https://www.casciac.org/pdfs/adopted_bylaw_changes_CIAC.pdf (site last visited on April 24, 2020).

¹⁵ P.A. 11-55, which became effective on October 1, 2011, defines “gender identity or expression” as follows:

“Gender identity or expression” means a person’s gender-related identity, appearance or behavior, whether or not that gender-related identity, appearance or behavior is different from that traditionally associated with the person’s physiology or assigned sex at birth, which gender-related identity can be shown by providing evidence including, but not limited to, medical history, care or treatment of the gender-related identity, consistent and uniform assertion of the gender-related identity or any other evidence that the gender-related identity is sincerely held, part of a person’s core identity or not being asserted for an improper purpose.

See Conn. Gen. Stat. § 46a-51. Specifically, with respect to the public schools, P.A. 11-55 amended § 10-15c of the Connecticut General Statutes to prohibit discrimination on the basis of gender identity or expression, among other bases. The legislative history of P.A. 11-55 indicates that the topic of athletics was briefly raised during the Connecticut House proceedings on May 19, 2011, in a discussion between Rep. Fox (the bill’s proponent) and Rep. Shaban. In response to Rep. Shaban’s question concerning whether, under the bill, a high school boy who wanted to play on the school’s girls’ basketball team could not be prohibited from doing so, Rep. Fox indicated that he believed, but was not certain, that in that context the intent of the bill was to apply only to a male athlete who had undertaken

Page 9 of 45 – Case Nos. 01-19-4025, 01-19-1252, 01-20-1003, 01-20-1004, 01-20-1005, 01-20-1006, and 01-20-1007

The CIAC did so at its Annual Meeting, held on May 9, 2013, when the current Revised Transgender Participation Policy was enacted. This Policy states, in relevant part:

[T]his policy addresses eligibility determinations for students who have a gender identity that is different from the gender listed on their official birth certificates. . . . Therefore, for purposes of sports participation, the CIAC shall defer to the determination of the student and his or her local school regarding gender identification. In this regard, the school district shall determine a student’s eligibility to participate in a CIAC gender specific sports team based on the gender identification of that student in current school records and daily life activities in the school and community at the time that sports eligibility is determined for a particular season. Accordingly, when a school district submits a roster to the CIAC it is verifying that it has determined that the students listed on a gender specific sports team are entitled to participate on that team due to their gender identity and that the school district has determined that the expression of the student’s gender identity is bona fide and not for the purpose of gaining an unfair advantage in competitive athletics. . . . The CIAC has concluded that [these] criteria [are] sufficient to preclude the likelihood that a student will claim a particular gender identity for the purpose of gaining a perceived advantage in athletic competition.¹⁶

Thus, the Revised Transgender Participation Policy eliminated any requirement that transgender student-athletes provide any medical information or documentation to the CIAC or its member schools.

The Connecticut State Department of Education (CSDE) issued a document entitled, “Guidance on Civil Rights Protections and Supports for Transgender Students – Frequently Asked Questions,” dated September 2017 (the 2017 FAQs).¹⁷ The 2017 FAQs state, in relevant part:

what Rep. Shaban had described as “affirmative physical changes.” Conn. Gen. Assembly House Proceedings 2011, Vol. 54, Part 12 (May 19, 2011) at 4017-4022.

¹⁶ The CIAC informed OCR that the Revised Transgender Participation Policy has been in effect since its adoption on May 9, 2013. The CIAC stated to OCR that the policy contained in the revised by-law no longer required student-athletes to undergo medical treatment or sex reassignment surgery in order to participate in athletics consistent with their gender identity, nor would a student-athlete be required to seek permission from the CIAC in order to participate under the policy in accordance with the student’s gender identity; rather, the policy required member schools to submit rosters that reflected the gender identities of their students. The CIAC further stated that this decision was based on “a determination that a member school is in the best position to identify and confirm that a student-athlete’s gender is consistent with the student’s gender identity at school and to place the student on the correct team roster.” Accordingly, the Board of Control determined that students would not be required to disclose their transgender status to the CIAC.

¹⁷ https://portal.ct.gov/-/media/SDE/Title-IX/transgender_guidance_faq.pdf?la=en (site last visited on April 24, 2020). This guidance indicates that the CIAC is responsible for establishing statewide policies for transgender participation in interscholastic competitive sports.

Page 10 of 45 – Case Nos. 01-19-4025, 01-19-1252, 01-20-1003, 01-20-1004, 01-20-1005, 01-20-1006, and 01-20-1007

For issues concerning participation in interscholastic competitive sports, schools and districts should consult their counsel and the Connecticut Interscholastic Athletic Association (“CIAC”).¹⁸

On October 11, 2018, the CAS Board of Directors requested that an ad hoc committee examine all the CIAC rules and regulations that relate to gender. The meeting minutes of the CIAC stated that the purpose of the review was to ensure that the regulations were in alignment with state law.¹⁹ The CIAC established a Gender By-Law Subcommittee in December 2018 to review all of the by-laws relating to gender in order to confirm the current policies and practices or make recommendations for improvements. In its report to the CIAC Board of Control, dated April 4, 2019, the Subcommittee concluded that the by-laws reviewed were “in alignment with Connecticut law and the CAS-CIAC mission.”²⁰

The CIAC’s and School Districts’ Implementation of the Revised Transgender Participation Policy

School district witnesses interviewed stated that none of the districts had a specific written procedure or practice in place to implement the Revised Transgender Participation Policy, but that they followed or would follow the plain language of the policy. Districts that had not had a transgender student request to participate in athletics stated that should they receive a request from a transgender student to participate in athletics, they would look at the gender identity listed in the student’s current school records and then whether the gender identity the student is expressing during the day is consistent with the gender identity listed in the student’s school records; e.g., whether the student has requested to use a name and pronouns consistent with that sex. Witnesses stated that often this process would involve the student’s parents, particularly if the student were a minor and school records needed to be changed; but that once the student had established his or her gender identity, the school would place the student on the roster of the team associated with that gender. Witnesses from districts that have had transgender students request to participate in athletics detailed a similar internal process; namely, that upon a request from a transgender student, they would review the student’s records, speak with the student’s teachers/counselors, meet with the student’s parents, and if all was consistent, thereafter, place the student on the team roster associated with the student’s gender identity.

Every district confirmed to OCR that it believed that no specific documentation, medical or otherwise, was required in order for the district to comply with the policy. District administrators

¹⁸ 2017 FAQs, p. 7. See https://portal.ct.gov/-/media/SDE/Title-IX/transgender_guidance_faq.pdf?la=en (site last visited on April 24, 2020).

¹⁹ https://portal.ct.gov/-/media/SDE/Title-IX/transgender_guidance.pdf?la=en (site last visited on April 24, 2020).

²⁰ The CAS mission statement is as follows: “The Connecticut Association of Schools provides exemplary programs and services that promote excellence in the education of all children.” The CIAC mission statement is as follows: “The CIAC believes that interscholastic athletic programs and competition are an integral part of a student’s academic, social, emotional and physical development. The CIAC promotes the academic mission of schools and honorable competition. As such, the CIAC serves as the regulatory agency for high school interscholastic athletic programs and exists to assure quality experiences that reflect high ethical standards and expectations for fairness, equity and sportsmanship for all student-athletes and coaches. The CIAC provides leadership and support for member schools through the voluntary services of dedicated school administrators, athletic directors, coaches and consultants.”

Page 11 of 45 – Case Nos. 01-19-4025, 01-19-1252, 01-20-1003, 01-20-1004, 01-20-1005, 01-20-1006, and 01-20-1007

reported that they had not received specific training regarding implementation of the Revised Transgender Participation Policy, although some stated that they had attended workshops or presentations on the topic of transgender athletes generally. Principals and athletics directors interviewed by OCR indicated that transgender student-athlete participation had been discussed either formally or informally at annual professional development conferences, as well as during professional association meetings, and through their respective regional conferences. Witnesses from the districts stated, and the CIAC confirmed to OCR, that the CIAC has not questioned any decisions made by a member school under the policy, nor has it investigated any rosters submitted by member schools with respect to the policy. Glastonbury noted that, in the past, when it had a transgender student wish to participate in athletics, the student's parent offered to provide medical documentation to support their request under the Revised Transgender Policy; however, the CIAC advised Glastonbury that the information was not required.

Additionally, multiple district witnesses stated to OCR that, according to their understanding of the Revised Transgender Participation Policy, it is not the school's or district's role to determine a student's gender. Witnesses from Bloomfield, Danbury, Glastonbury, and Hartford stated that the student initiates the process and informs the district of the student's gender identity; and the district's role is to review the current school records, speak with school staff regarding the student's current gender expression during the school day, and then place the student on the appropriate roster. Witnesses from Bloomfield and Cromwell also stated that if a student were to initially register with the school under a gender identity that differed from the student's biological sex, the school would place the student on the roster of the gender identified in the school registration records; i.e., the district and student would not need to have a discussion or review the student's participation under the Revised Transgender Participation Policy. Both Cromwell and Bloomfield have used this process in their districts.

Concerns Raised by Parents and Others to the CIAC Regarding the Policy and the Participation of Biologically Male Students in Track Events

In 2019, the CIAC received several emails from parents of Connecticut high school students, in which the parents expressed concerns about the policy and specifically about the participation in female track events of biologically male students.

From January 2019 to March 2019, the CIAC received four emails from the father of a female student-athlete at Glastonbury High School (Parent 3). On January 29, 2019, Parent 3 sent an email to the CIAC stating that he and many parents of other female track athletes, as well many of the athletes themselves, believed that the policy was unfair to female track athletes²¹ and that the policy raised safety concerns as well, particularly with respect to sports involving physical contact.²² With respect to track, he suggested that a compromise could be reached whereby a boy

²¹ In part, Parent 3 stated as follows: "Should a boy who identifies as a girl with all of the physiological and anatomical advantages of a boy be able to compete in Connecticut Girls Indoor Track, obtain medals over other girls who have trained hard and care deeply about the results, eradicate existing girls event and state track records and push what would have been the final girl qualifier out of selection for All-Conference and All-State honors?"

²² In part, Parent 3 stated as follows: "Should safety be compromised in girls high school track or other girls sports such as basketball, soccer or lacrosse to accommodate a boy who identifies as a girl with all of the physiological and anatomical advantages of a boy?"

Page 12 of 45 – Case Nos. 01-19-4025, 01-19-1252, 01-20-1003, 01-20-1004, 01-20-1005, 01-20-1006, and 01-20-1007

identifying as a girl would be able to compete but would not have the results used for purposes of conference or state records or for all-conference or all-state selection. Parent 3 requested a meeting with the CIAC officials to discuss the topic.²³

On February 17, 2019, Parent 3 sent an email to the CIAC stating that the transgender policy affected the outcome of the CIAC State Open Girls Indoor Track Championship held on February 16, 2019. Specifically, he stated that the performance of a transgender athlete “with all the physiological and anatomical attributes of a male athlete” in the Championship had enabled Bloomfield High School to win the team championship over Glastonbury. Parent 3 again urged the CIAC to change the policy. On February 25, 2019, the Executive Director of the CIAC responded to Parent 3, stating that Parent 3’s correspondence would be provided to a CIAC subcommittee reviewing the policy.

On March 3, 2019, Parent 3 sent an email to the CIAC again urging the CIAC to change the policy. He further stated that at the New England Regional Indoor Track Championship, held on March 2, 2019, a biologically male athlete finished first in the 55-meter and 300-meter sprints and had helped Bloomfield win first place over Glastonbury in the girls’ 4 x 400 meter relay. On March 10, 2019, Parent 3 sent an email to the CIAC stating that the National Scholastic Athletic Foundation, an organization that hosts the New Balance National high school track and field competition, had established a policy whereby female transgender athletes are required to meet applicable rules established by the National Scholastic Athletics Foundation, USA Track & Field, and International Olympic Committee, which required such athletes to demonstrate that they had undergone hormone treatment. Parent 3 stated that when Bloomfield’s girls’ 4 x 400 team recently competed in the New Balance Nationals, it did so without the participation of its biologically male athlete, and that this resulted in a slower time than Bloomfield’s team had achieved at the New England championships, when the biologically male athlete had competed.

From February 2019 to March 2019, the CIAC received three emails from a parent (Parent 4). On February 25, 2019, Parent 4 sent an email to the CIAC expressing concerns about the fairness of the policy.²⁴ He stated that as a result of the participation of transgender girl track athletes, seven cisgender girl athletes had been deprived of the opportunity to compete at the New England Regional Championship and to gain additional exposure to college coaches and recruiters. He stated that “[a]t the heart of the competitive fairness issue regarding competition between transgender girls and cisgender girls is the abundance of testosterone present in young biological males.”

²³ In addition, Parent 3 attached a copy of an email dated January 27, 2019, that he had sent to officials from the Glastonbury District. In this email, Parent 3 expressed his concerns about the policy’s fairness and safety, and he described several recent track meets in which a transgender athlete had finished ahead of other athletes. Parent 3 asked the Glastonbury officials to make efforts to have the policy changed.

²⁴ Specifically, he stated that “there are many, myself included, who cannot begin to fathom the policy of the CIAC that has allowed the competitive record of Connecticut Girls High School Track and Field Competitions to be altered by the tabulation and classification of results that include transgender athletes that has now spread its impact to not only athletes that have competed directly in these events, but now also their teammates, especially 75 members of the Glastonbury Girls Indoor Track Team, when team records and scoring are impacted.”

Page 13 of 45 – Case Nos. 01-19-4025, 01-19-1252, 01-20-1003, 01-20-1004, 01-20-1005, 01-20-1006, and 01-20-1007

Further, Parent 4 stated that the CIAC maintains different qualifying standards for girls' and boys' track, which he contended was an acknowledgment that there was a measurable difference in the performance capabilities between genders. He requested that the CIAC adjust the results of the 2019 State Girls Open Competition so as not to include the results of the transgender athletes, and he requested that the policy be changed going forward. He offered several suggestions for a new policy (e.g., establishing a new competitive category for transgender athletes).

The Executive Director of the CIAC responded the same day, stating that Parent 4's correspondence would be shared with the subcommittee reviewing the Revised Transgender Participation Policy. On March 1, 2019, Parent 4 sent an email to the CIAC, stating that he would like to arrange a meeting with the members of the subcommittee reviewing the policy. On March 5, 2019, Parent 4 sent an email to the CIAC stating that, during the New England Indoor Regional Championships on March 2, 2019, spectators from other states had expressed "surprise and concern" that Connecticut permitted transgender athletes to participate.

On June 20, 2019, the CIAC received an email from the mother of a rising female high school student in Connecticut (Parent 5). Parent 5 expressed her concern that the policy was unfair to female athletes because it would allow "genetic males (no matter how they identify themselves) to usurp genetically female athletes in competition."

In a letter to the CIAC, dated April 11, 2017, a head track coach at a Connecticut high school stated that Student B was at a great advantage unless or until the student began taking hormone blockers. He also referred to average high school testosterone levels according to the Mayo Clinic. He then argued that Student B had gender characteristics that females cannot compete with, and that Student B was taking advantage of the CIAC's policies and rules. He requested that the CIAC find a solution that allowed Students A and B to compete but also protected female athletes.

The CIAC's Rules for Girls' Indoor and Outdoor Track Competition

The CIAC is organized into various boards and committees, including one committee for each CIAC-sanctioned sport. Each year, the CIAC committee for the respective sport publishes a "Sports Packet/Information Sheet" for the season. The Sports Packet/Information Sheets for girls' indoor and outdoor track set forth, among other things, the procedures for entering student-athletes in events; how many events a student-athlete may participate in;²⁵ submitting qualifying performances; entrance fees; rules regarding electronic devices; protest procedures; scrimmages; and, regular season score reporting.

²⁵ For both girls' indoor and outdoor track, the sport packets state that a competitor shall not compete in more than three events including relays, and any athlete on the tournament roster shall not be entered in more than three events excluding relays; e.g., an athlete may be entered in the 4 x 800, 1600, 3200, and 4 x 400 events, but can only run or be a competitor in three events. A contestant becomes a competitor when the contestant reports to the clerk of course. The rules also state that a competitor who competes in three events at any of the class meets cannot enter any other event at the State Open Championship. The stated rationale is that class championship meets and the State Open are really one meet because advancing to the State Open Championship is predicated on class meet performance. Athletes listed as alternates for relay events may only run if they ran two events or fewer at the class meet; i.e., they are still limited to three events.

Page 14 of 45 – Case Nos. 01-19-4025, 01-19-1252, 01-20-1003, 01-20-1004, 01-20-1005, 01-20-1006, and 01-20-1007

The CIAC sets the rules for athletic eligibility and competition across the state. Each sport is divided into divisions/classes, based on the size of the school. The CIAC sports committees determine the tournament or championship class divisions for each sport based on the grade 9-12 enrollments of each school as of October 1 of the past school year. A school can have different classes for each of its sports, and a school's class/division can change depending on the year. The Sports Packet/Information Sheet for each sport sets forth the class/divisions for the current year. For example, during school year 2018-2019, for girls' indoor track, the CIAC had the following classes, from smallest school enrollment to largest: Class S, Class M, Class L, and Class LL. For girls' outdoor track, the CIAC had the following classes: Class S, Class M, Class MM, Class L, and Class LL.

There are eleven conferences/leagues²⁶ that are based mostly on geographic location, which can include schools from the different CIAC classes. The CIAC does not set regular season competitive schedules; these are set by the individual member schools, individually or through conferences/leagues.²⁷ However, the CIAC does mandate certain "season limitations," including when the opening day of practice occurs, the minimum number of required practice days prior to the first contest, the maximum number of games or meets played per week, and the maximum number of contests scheduled per season.²⁸

For post-season competition, if they met qualifying standards,²⁹ participants in girls' indoor and outdoor track can participate in a conference/league championship; a class statewide championship; the State Open Championship; and the New England Regional Championship. Each of the eleven conferences/leagues holds a conference/league championship at the end of the indoor and outdoor seasons; and each class holds a class statewide championship at the end of the indoor and outdoor seasons. A student-athlete's eligibility to compete at the indoor and outdoor track State Open Championships is determined by the finish order at the respective class statewide championships as set forth in the Sports Packet/Information Sheet.³⁰ For example, for indoor track for school year 2018-2019, the top 14 finishers in all events in class statewide championships for Classes LL, L, M, and S were eligible to compete in the indoor State Open Championship. For outdoor track for school year 2018-2019, the top 5 finishers in each of the class statewide championships automatically qualified for the outdoor State Open Championship, as well as all athletes who obtained the special (automatic) standard for their event at the class statewide championship.³¹

²⁶ http://ciacsports.com/site/?page_id=131 (site last visited on April 24, 2020).

²⁷ See CIAC Handbook, Section 5.0 ("The CIAC has no jurisdiction over regular season interscholastic scheduling problems except as these relate to violation of CIAC policies. Schedul[ing] of interscholastic contests within CIAC season limitations is the responsibility of individual schools and/or leagues.")

²⁸ See *id.* at page 47.

²⁹ Schools may only enter athletes who meet the minimum requirements for the event as established by the sports committee for that year, as set forth in the sports information packet.

³⁰ The Sports Packet/Information Sheet provides information about the Class/Division Championships and the State Open Championship; including qualifying distances and times for entry into the class championships, as well as eligibility to compete in the State Open Championship.

³¹ From at least school years 2012-2013 through 2016-2017, the outdoor sports packet set a CIAC State Open Championship qualifying standard for each event. For the 100-meter dash, the qualifying standard was 12.60 for all years and for the 200-meter dash, the qualifying standard was 26.70 for all years except 2016-2017, when it was lowered to 26.14. The sports packets during those years stated that the automatic standard approximated the 8th place

Page 15 of 45 – Case Nos. 01-19-4025, 01-19-1252, 01-20-1003, 01-20-1004, 01-20-1005, 01-20-1006, and 01-20-1007

The CIAC awards medals to the top 6 competitors based on the order of finish in events at the State Open Championships (both indoor and outdoor), and the top 6 competitors also qualify for the New England Regional Championships.³² Thereafter, a student may go on to compete at the national championships, held by the National Scholastic Athletics Foundation (the New Balance Indoor and Outdoor Championships), based on the student’s qualifying time.³³

The CIAC uses a point system to award points by school to determine a school state champion for indoor and outdoor track. For indoor track, the CIAC uses team scoring based on six places (from first to sixth place, the CIAC awards 10, 8, 6, 4, 2 and 1 points, respectively) for all events. For outdoor track, the CIAC uses team scoring based on eight places (from first to eighth; 10, 8, 6, 5, 4, 3, 2 and 1 points) only when an eight lane track is used; otherwise the CIAC uses team scoring based on six places (from first to sixth; 10, 8, 6, 4, 2 and 1 points) for the event. The points earned by each school are then tallied, and the CIAC ranks schools in the order of points from highest to lowest to determine the state champion.³⁴

Complainant Students and Competition Against Students A and B

The complaint was filed on behalf of three high school female students competing in girls’ track in the state of Connecticut: Student 1, attending Glastonbury High School (School 1); Student 2, attending Canton High School (School 2); and Student 3, attending Danbury High School (School 3). The Complainant specifically complained about two students who participated in girls’ track in the state of Connecticut: Student A, who competed for Bulkeley High School in the Hartford School District (School A1) in the spring of school year 2017-2018, and Bloomfield High School (School A2) during school year 2018-2019 to the present; and Student B attending Cromwell High School (School B). The CIAC’s list of sanctioned sports includes boys’ track. Glastonbury, Bloomfield, Hartford, Cromwell, Canton, and Danbury each maintained boys’ track teams.

finish established in the prior year State Open. Starting in school year 2017-2018, and continuing in school year 2018-2019, per the Sports Packet, “The special standard will be set each year after the class meets have ended. The special standard will be determined by looking at the performance rankings for each event that includes the top five (5) qualifying performances from each of the class meets. The 12th place performance from the qualifiers will become the automatic standard for that year. All athletes who meet that standard during the current year’s class championship will advance to the open.”

³² For outdoor track, the 7th and 8th place finishers in the final for any event will be considered as alternates.

³³ The National Scholastic Athletics Foundation’s Transgender Participation Policy & Procedure, updated December 2019, allows for a transgender student-athlete to submit a qualified entry into a National Scholastic Athletics Foundation competition or make a written request for participation, which the National Scholastic Athletics Foundation then evaluates on a case-by-case basis, including evaluation by an Eligibility Committee comprising at least one medical professional, event director, active age-appropriate coach, and lawyer. The Eligibility Committee can request any information it believes relevant to the application, including but not limited to interviews with the athlete and/or parents/guardians and coaches, and a review of relevant medical and legal records. The policy states that a male-to-female athlete who is not taking hormone treatments related to gender transition may not compete in female competitions, but that a female-to-male athlete not taking testosterone related to gender transition may compete in male competitions.

³⁴ In the outdoor State Open Championship, seeding is done electronically based on an athlete’s performance at the Class meets. An athlete’s seed determines the athlete’s lane assignment; the athlete with the fastest projected time based on performance at the Class meets is assigned to a middle lane (usually lane 4) and athletes are then placed in lanes in order of seed, working towards the outside lanes.

Page 16 of 45 – Case Nos. 01-19-4025, 01-19-1252, 01-20-1003, 01-20-1004, 01-20-1005, 01-20-1006, and 01-20-1007

In order to determine the impact of the Revised Transgender Participation Policy on Students 1, 2, and 3, OCR reviewed the participation of Students 1, 2, 3, A, and B in post-season conference/league championships, class championships, State Open Championships, and the New England Regional Championships. OCR reviewed information for school years 2017-2018 and 2018-2019.

Student 1

OCR determined that Student 1 was enrolled at School 1 as a 10th grade student during school year 2017-2018, and as an 11th grade student during school year 2018-2019. Student 1 was a student-athlete on School 1's girls' varsity indoor and outdoor track teams. Regionally, School 1 participated in the Central Connecticut Conference (CCC). Statewide, School 1 participated in Class LL for indoor and outdoor track.

The Complainant asserted that pursuant to the Revised Transgender Participation Policy, and the resulting participation of Students A and B, the CIAC denied Student 1 opportunities to advance to the finals in an event, to advance to higher levels of competition, and/or win titles at events such as the CIAC Outdoor State Open Championship, held on June 4, 2018; the CIAC Indoor State Open Championship, held on February 16, 2019; and the Indoor New England Regional Championship, held on June 8, 2019.

During an interview with OCR, Student 1 stated that she and other female student-athletes with whom she had spoken found it very difficult to go into a race knowing that no matter what they do, they would never be good enough to win. In a video provided by the Complainant, Student 1 asserted that by permitting transgender athletes to participate in girls' track competitions, she and other athletes had lost opportunities to compete at track meets, to win titles, and to gain attention from college coaches. She further stated that women have fought hard for many years to have opportunities and a voice in sports; and that it is upsetting to realize that no matter how hard she and other female student-athletes train, they will never be good enough to compete against transgender athletes. Student 1 also stated: "I respect these transgender athletes, and I understand that they are just following CIAC policy. But at the same time, it is demoralizing and frustrating for me and for other girls."

The Athletic Director for School 1 acknowledged that some parents had complained that their children did not place at certain meets, but she stated that she was unaware of whether any female students had lost out on competitive opportunities, awards, or wins. School 1's Athletic Director denied that any of the female student-athletes on the girls' indoor or outdoor track teams were denied participation opportunities as a result of having transgender athletes participate in track events. She stated that student-athletes were eligible to participate in all meets that the District participated in if they met the requirements. School 1's Assistant Athletic Director stated that she is aware of Student 1's complaining that she felt she was deprived of an opportunity to advance to the New England Regional Championship due to the participation of transgender athletes.

Page 17 of 45 – Case Nos. 01-19-4025, 01-19-1252, 01-20-1003, 01-20-1004, 01-20-1005, 01-20-1006, and 01-20-1007

Student 2

Student 2 was enrolled at School 2 as a 10th grade student during school year 2017-2018, and as an 11th grade student during school year 2018-2019. During school years 2017-2018 and 2018-2019, Student 2 was a student-athlete on School 2's varsity girls' indoor and outdoor track teams. Regionally, School 2 participated in the North Central Connecticut Conference (NCCC). Statewide, School 2 participated in Class S for indoor and outdoor track.

The Complainant asserted that, pursuant to the Revised Transgender Participation Policy and the resulting participation of Students A and B, the CIAC denied Student 2 opportunities to advance to higher levels of competition and/or win titles at events such as the 2017 Outdoor State Open Championship, held on June 6, 2017; the New England Regional Championship, held on June 10, 2017; the Class S Indoor Championship held on February 10, 2018; the Outdoor State Open Championship, held on June 4, 2018; the Class S Indoor Championship, held on February 7, 2019; the Indoor State Open Championship, held on February 16, 2019; the Class S Outdoor Championship, held on May 30, 2019; and the Outdoor State Open Championship, held on June 3, 2019.

During an interview with OCR, Student 2 stated that, in addition to the impact the participation of Students A and B had on her and other female student-athletes' ability to win titles and awards, their participation also has had an impact on her and other female student-athletes' ability to obtain recognition from media and college coaches. Student 2's mother (Parent 1) noted that some biologically female track student-athletes had lost out on media recognition because the winner of an event at the state championships gets the opportunity to be interviewed by reporters, while the second and third place finishers do not. Specifically, Parent 1 stated that at the state championships there is a bank of reporters waiting to interview the winners and the winners' names are put in the local papers, and that student-athletes typically do not receive any media recognition when they come in second. Further, Student 2 stated that the participation of Student A, in particular, had an impact on her ability to set class records for the CIAC Class S 100-meter and 200-meter races.

School 2's principal stated that no student-athletes were prohibited from participating; student-athletes went to every meet that the school participated in, and all student-athletes who qualified for state tournaments had the opportunity to compete. However, the principal acknowledged that, at the state level, some people might argue that a transgender athlete defeated a District student (i.e., Student 2); therefore, that student lost out on an award.

Student 3

OCR determined that Student 3 was enrolled at School 3 as a 9th grade student during school year 2018-2019. Regionally, School 3 participated in the Fairfield County Interscholastic Athletic Conference (FCIAC). Statewide, School 3 participated in Class LL for indoor and outdoor track. During school year 2018-2019, Student 3 was a student-athlete on School 3's girls' varsity outdoor track team.

The Complainant asserted that, pursuant to the Revised Transgender Participation Policy and the resulting participation of Students A and B, the CIAC denied Student 3 opportunities to advance

Page 18 of 45 – Case Nos. 01-19-4025, 01-19-1252, 01-20-1003, 01-20-1004, 01-20-1005, 01-20-1006, and 01-20-1007

to higher levels of competition and/or win titles at events, such as the Outdoor State Open Championship, held on June 3, 2019. During an interview with OCR, Student 3 stated that when competing against transgender athletes, it was frustrating for her to know that she would not be able to do as well as she otherwise could do. In a video the Complainant provided, Student 3 asserted that even before she gets to the track, she already knows that she is not going to win first or second place if she races against transgender athletes; and that no matter how hard she works, she will not be able to win the top spot.

Competition Against Students A and B

Descriptions of some of the girls' track indoor and outdoor post-season events in which Students 1, 2, and/or 3 participated with Students A and/or B during school years 2017-2018 and 2018-2019 are set forth below.

1. During school year 2017-2018, in the Indoor State Open Championships, Student B participated in the 55-meter dash. In the preliminary for the 55-meter dash, Student B placed 2nd and Student 2 placed 16th. The top 8 finishers advanced to the finals; however, even though Student 2 would not have advanced to the finals even absent Student B's participation, Student B's finish in the top 8 in the preliminary denied an opportunity for the 9th place finisher to advance to the finals. See chart summarizing the results:

2017-2018 Indoor State Open Championships					
Girls 55-Meter Dash Preliminaries (Top 7 Advance to Finals)					
Place	Student	Time	School	Seed	Heat
1	*	7.26q	*	7.31	1
2	Student B	7.30q	School B	7.31	1
3	*	7.34q	*	7.39	3
4	*	7.35q	*	7.28	2
5	*	7.40q	*	7.39	3
6	*	7.42q	*	7.48	3
7	*	7.43q	*	7.38	2
8	*	7.44	*	7.44	1
9T	*	7.53	*	7.47	3
9T	*	7.53	*	7.40	2
...	
16	Student 2	7.78	School 2	7.46	2

2. During school year 2017-2018, in the Outdoor State Open Championships, Student A and Student B participated in the 100-meter dash. In the preliminary for the 100-meter dash, Student A placed 1st and Student B placed 4th. The top 8 finishers advanced to the finals, including Student 2 (who placed 2nd) and Student 1 (who placed 8th); however, Student A's and Student B's finishes in the top 8 in the preliminary denied an opportunity for two female student-athletes to advance to the finals. In the finals of the 100-meter dash, Student A placed 1st, Student B placed 2nd; Student 2 placed 4th;

and Student 1 placed 6th. The top six finishers were awarded medals and advanced to the New England Regional Championships, including Student 1 and Student 2; however, Student A’s and Student B’s finishes in 1st and 2nd place, respectively, denied an opportunity for two female student-athletes to advance to the New England Regional Championships, along with the benefit of receiving a medal for the Outdoor State Open Championships.³⁵ Student A placed 1st at the preliminaries of the 100-meter dash at New England Regional Championships. The top 8 finishers advanced to the finals, including Student 2 (who placed 7th);³⁶ however, Student A’s finish in the top 8 in the preliminary denied an opportunity for a female student-athlete to advance to the finals.³⁷ See charts summarizing the results below:

2017-2018 Outdoor State Open Championships Girls 100-Meter Dash Preliminaries (Top 8 Advance to Finals)					
Place	Student	Time	School	Seed	Heat
1	Student A	11.75q	School A1	11.77	3
2	Student 2	12.26q	School 2	12.61	2
3	*	12.38q	*	12.33	1
4	Student B	12.39q	School B	12.22	2
5	*	12.46q	*	12.57	3
6	*	12.52q	*	12.74	2
7	*	12.54q	*	12.34	1
8	Student 1	12.58q	School 1	12.91	3
9	*	12.63	*	12.73	3
10	*	12.64	*	12.68	2
...
25	*	13.17	*	12.98	

2017-2018 Outdoor State Open Championships Girls 100-Meter Dash Finals				
Place	Student	Time	School	Points
1	Student A	11.72#	School A1	10
2	Student B	12.29	School B	8
3	*	12.36	*	6
4	Student 2	12.39	School 2	5
5	*	12.47	*	4
6	Student 1	12.67	School 1	3
7	*	12.71	*	2
8	*	12.80	*	1

³⁵ Student A, Student B, and Student 2 also participated in the 200-meter dash, and finished 1st, 7th and 10th, respectively, in the final. Student A’s 1st place finish denied an opportunity for one female student-athlete to advance to the New England Regional Championships in the 200-meter dash, along with the benefit of receiving a medal for the Outdoor State Open Championships.

³⁶ Student 1 placed 25th.

³⁷ In the finals of the 100-meter dash, Student A placed 1st, while Student 2 placed 7th.

Page 20 of 45 – Case Nos. 01-19-4025, 01-19-1252, 01-20-1003, 01-20-1004, 01-20-1005, 01-20-1006, and 01-20-1007

2017-2018 Outdoor New England Regional Championships Girls 100-Meter Dash Preliminaries (Top 8 Advance to Finals)						
Place	Student	Time	School	Heat	Tie-breaker	State
1	Student A	12.46q	School A1	5		CT
2	*	12.59q	*	4		MA
3	*	12.64q	*	3		MA
4	*	12.65q	*	1		MA
5	*	12.81q	*	1	12.805	CT
6	*	12.81q	*	2	2.809	CT
7	Student 2	12.82q	School 2	2		CT
8	*	12.92q	*	5		RI
9	*	12.94	*	3		MA
10	*	12.95	*	5		MA
...
25	Student 1	13.5010	School 1	3	13.497	CT
33	*	13.84	*	1		RI

2017-2018 Outdoor New England Regional Championships 100-Meter Dash Finals					
Place	Student	Time	School	Tie breaker	State
1	Student A	11.97	School A1		CT
2	*	12.26	*		MA
3	*	12.31	*		MA
4	*	12.50	*		MA
5	*	12.56	*	12.554	CT
6	*	12.56	*	12.559	CT
7	Student 2	12.58	School 2		CT
8	*	12.69	*		RI

3. During school year 2018-2019, in the Indoor Class S Statewide Championships, Student A and Student B participated in the 55-meter dash. In the preliminary for the 55-meter dash, Student A placed 1st and Student B placed 2nd. The top 7 finishers advanced to the finals, including Student 2 (who placed 3rd); however, Student A's and Student B's finishes in the top 7 in the preliminary denied an opportunity for two female student-athletes to advance to the finals. In the finals of the 55-meter dash, Student A placed 1st, Student 2 placed 2nd, and Student B placed 3rd. The top 14 finishers advanced to the State Open Championship. While all three student-athletes advanced to the State Open Championship, Student A's and Student B's participation denied an opportunity to two female student-athletes to participate in the State Open Championship for the 55-meter dash.³⁸ See charts summarizing results below:

³⁸ Student A also placed 1st in the finals of the 300-meter dash, which denied an opportunity to one girl to participate in the State Open Championship for the 300-meter dash.

Page 21 of 45 – Case Nos. 01-19-4025, 01-19-1252, 01-20-1003, 01-20-1004, 01-20-1005, 01-20-1006, and 01-20-1007

2018-2019 Indoor Class S Statewide Championships Girls 55-Meter Dash Preliminaries (Top 7 Advance to Finals)				
Place	Athlete	Time	High School	Heat
1	Student A	7.16q	School A2	8
2	Student B	7.30q	School B	6
3	Student 2	7.38q	School 2	7
4	*	7.61q	*	1
5	*	7.63q	School A2	1
6	*	7.63q	*	5
7	*	7.68q	*	3
8	*	7.70	*	5
9	*	7.71	*	2
10	*	7.74	*	4
....
48	*	8.37	*	3

2018-2019 Indoor Class S Statewide Championships Girls 55-Meter Dash Finals				
Place	Athlete	Time	High School	Points
1	Student A	7.03	School A2	10
2	Student 2	7.27	School 2	8
3	Student B	7.33	School B	6
4	*	7.48	*	4
5	*	7.51	School A2	2
6	*	7.53	*	1
7	*	7.54	*	-

4. During school year 2018-2019, in the Indoor State Open Championship, Student A and Student B participated in the 55-meter dash. In the preliminary for the 55-meter dash, Student A placed 1st and Student B placed 2nd. The top 7 finishers advanced to the finals, including Student 2 (who placed 4th); however, Student A's and Student B's finishes in the top 7 in the preliminary would have denied an opportunity for two female student-athletes to advance to the finals, including Student 1 (who placed 8th). In the finals of the 55-meter dash, Student A placed 1st, Student B placed 2nd, and Student 2 placed 3rd. The top six finishers are awarded medals and advance to the New England Regional Championships; however, Student A's and Student B's finishes in 1st and 2nd place, respectively, denied an opportunity for two female student-athletes to advance to the New England Regional Championships, along with the benefit of receiving a medal for the Outdoor State Open Championships.³⁹ Further, since Student 2 placed 3rd, Student A's and Student B's participation denied an opportunity to Student 2 to place 1st in the 55-meter dash and receive the benefit of a 1st place medal. In the Indoor

³⁹ Student A also placed 1st in the finals of the 300 meter dash in the Indoor State Open Championships, which denied an opportunity to a female student-athlete to advance to the New England Regional Championships, along with the benefit of receiving a medal for the Indoor State Open Championships.

Page 22 of 45 – Case Nos. 01-19-4025, 01-19-1252, 01-20-1003, 01-20-1004, 01-20-1005, 01-20-1006, and 01-20-1007

New England Regional Championship, in the preliminaries for the 55-meter dash, Student A placed 2nd, Student B placed 3rd, and Student 2 placed 8th. The top 8 finishers advanced to the finals. Although all three advanced to the finals, Student A's and Student B's 2nd and 3rd place finishes, respectively, denied an opportunity to two female student-athletes to advance to the finals. In the finals of the 55-meter dash, Student A placed 1st, Student B placed 3rd, and Student 2 placed 8th. See charts summarizing results below:

2018-2019 Indoor State Open Championships				
Girls 55-Meter Dash Preliminaries (Top 7 Advance to Finals)				
Place	Athlete	Time	High School	Heat
1	Student A	7.00q	School A2	3
2	Student B	7.07q	School B	3
3	*	7.24q	*	2
4	Student 2	7.27q	School 2	1
5	*	7.27q	*	1
6	*	7.29q	*	2
7	*	7.34q	*	3
8	Student 1	7.37	School 1	2
9	*	7.41	*	3
10	*	7.45	*	2
....
16	*	7.85	School A2	2

2018-2019 Indoor State Open Championships				
Girls 55-Meter Dash Final				
Place	Athlete	Time	High School	Points
1	Student A	6.95	School A2	10
2	Student B	7.01	School B	8
3	Student 2	7.23	School 2	6
4	*	7.24	*	4
5	*	7.26	*	2
6	*	7.33	*	1
7	*	7.39	*	-

2018-2019 Indoor New England Regional Championships				
Girls 55-Meter Dash Preliminaries (Top 8 Advance to Finals)				
Place	Athlete	Time	High School	Heat
1	*	7.08q	* MA	2
2	Student A	7.09q	School A2- CT	4
3	Student B	7.24q	School B- CT	3
4	*	7.28q	*- MA	3
5	*	7.29q	*- MA	4
6	*	7.30q	* -CT	1

Page 23 of 45 – Case Nos. 01-19-4025, 01-19-1252, 01-20-1003, 01-20-1004, 01-20-1005, 01-20-1006, and 01-20-1007

2018-2019 Indoor New England Regional Championships Girls 55-Meter Dash Preliminaries (Top 8 Advance to Finals)				
Place	Athlete	Time	High School	Heat
7	*	7.30q	*- MA	1
8	Student 2	7.30q	School 2 - CT	1
9	*	7.39	*- MA	1
10	*	7.40	* - RI	4
....
30	*	7.92	* - VT	3

2018-2019 Indoor New England Regional Championships Girls 55-Meter Dash Finals			
Place	Athlete	Time	High School
1	Student A	6.94	School A2- CT
2	*	7.04	* - MA
3	Student B	7.17	School B- CT
4	*	7.23	* - MA
5	*	7.27	* - MA
6	*	7.27	* - CT
7	*	7.31	* - MA
8	Student 2	7.32	School 2 - CT

5. During school year 2018-2019, in the Outdoor Class S Statewide Championships, Student A participated in the 100-meter dash and the 200-meter dash; and Student B participated in the 100-meter dash. In the preliminary for the 100-meter dash, Student A placed 2nd and Student B placed 3rd. The top 8 finishers advanced to the finals, including Student 2 (who placed 1st); however, Student A's and Student B's finishes in the top 8 in the preliminary denied an opportunity for two female student-athletes to advance to the finals. In the finals of the 100-meter dash, Student A placed 1st, Student 2 placed 2nd, and Student B placed 3rd. While all three student-athletes advanced to the State Open Championship, Student A's participation denied Student 2 the benefit of a 1st place finish in the Class S Statewide Championship for the 100-meter dash. Similarly, in the finals of the 200-meter dash, Student A placed 1st and Student 2 placed 2nd.⁴⁰ While both students advanced to the State Open Championship, Student A's participation denied Student 2 the benefit of a 1st place finish in the Class S Statewide Championship for the 200-meter dash. See charts summarizing results below:

2018-2019 Outdoor Class S Statewide Championships Girls 100-Meter Dash Preliminaries (Top 8 Advance to Finals)				
Place	Student	Time	School	Heat
1	Student 2	12.14	School 2	4
2	Student A	12.18	School A2	5
3	Student B	12.50	School B	3

⁴⁰ Student B scratched.

Page 24 of 45 – Case Nos. 01-19-4025, 01-19-1252, 01-20-1003, 01-20-1004, 01-20-1005, 01-20-1006, and 01-20-1007

2018-2019 Outdoor Class S Statewide Championships Girls 100-Meter Dash Preliminaries (Top 8 Advance to Finals)				
Place	Student	Time	School	Heat
4	*	12.73	*	1
5	*	13.05	*	1
6	*	13.08	*	2
7	*	13.16	School A2	4
8	*	13.22	*	5
9	*	13.27	*	3
10	*	13.30	*	4
...
35	*	14.28	*	5

2018-2019 Outdoor Class S Statewide Championships Girls 100-Meter Dash Finals				
Place	Student	Time	School	Points
1	Student A	11.93#	School A2	10
2	Student 2	12.02	School 2	8
3	Student B	12.28	School B	6
4	*	12.82	*	5
5	*	12.86	*	4
6	*	13.13	*	3
7	*	13.14	*	2
8	*	13.31	School A2	1

2018-2019 Class S Statewide Championships Girls 200-Meter Dash Finals					
Place	Student	Time	School	Heat	Points
1	Student A	24.47#	School A2	6	10
2	Student 2	24.79	School 2	6	8
3	*	25.92	School A2	6	6
4	*	26.17	*	6	5
5	*	26.30	*	3	4
6	*	26.41	*	6	3
7	*	26.76	School A2	6	2
8	*	26.85	*	3	1
9	*	26.93	*	5	
10	*	27.02	*	6	
...
32	*	28.95	*	2	
...
--	Student B	SCR	School B		

Page 25 of 45 – Case Nos. 01-19-4025, 01-19-1252, 01-20-1003, 01-20-1004, 01-20-1005, 01-20-1006, and 01-20-1007

6. During school year 2018-2019, in the Outdoor State Open Championship, Student A and Student B participated in the 100-meter dash. In the preliminary for the 100-meter dash, Student A placed 1st and Student B placed 5th. The top 8 finishers advanced to the finals, including Student 2 (who placed 3rd) and Student 3 (who placed 4th)⁴¹; however, Student A's and Student B's finishes in the top 8 in the preliminary denied an opportunity for two female student-athletes to advance to the finals. In the finals of the 100-meter dash, Student 2 placed 1st, Student 3 placed 3rd, and Student B placed 4th.⁴² The top 6 finishers were awarded medals and advanced to the New England Regional Championships; however, Student B's finish in 4th place denied an opportunity for a female student-athlete to advance to the New England Regional Championships, along with the benefit of receiving a medal for the Outdoor State Open Championships. Student A, Student 2 and Student 3 also participated in the 200-meter dash and finished 1st, 4th, and 3rd, respectively, in the final. Student A's 1st place finish denied an opportunity for one female student-athlete to advance to the New England Regional Championships, along with the benefit of receiving a medal for the Outdoor State Open Championships. Student A placed 1st in the finals of the 200-meter dash at the Outdoor New England Regional Championships; Student 3 placed 3rd and Student 2 placed 5th. See charts summarizing results below:

2018-2019 Outdoor State Open Championships Girls 100-Meter Dash Preliminaries (Top 8 Advance to Finals)					
Place	Student	Time	School	Heat	Tie
1	Student A	11.64q	School A2	3	
2	*	11.98q	*	1	
3	Student 2	12.07q	School 2	2	
4	Student 3	12.11q	School 3	3	
5	Student B	12.20q	School B	1	
6	*	12.44q	*	2	12.433
7	*	12.44q	*	1	12.436
8	*	12.45q	*	3	
9	*	12.50	*	3	
10	*	12.56	*	1	

14	Student 1	12.79	School 1	3	

24	*	13.25	*	3	

2018-2019 Outdoor State Open Championships Girls 100-Meter Dash Finals					
Place	Student	Time	School	Points	Tie
1	Student 2	11.67	School 2	10	
2	*	11.92	*	8	

⁴¹ Student 1 placed 14th.

⁴² Student A had a false start and was disqualified.

Page 26 of 45 – Case Nos. 01-19-4025, 01-19-1252, 01-20-1003, 01-20-1004, 01-20-1005, 01-20-1006, and 01-20-1007

2018-2019 Outdoor State Open Championships					
Girls 100-Meter Dash Finals					
Place	Student	Time	School	Points	Tie
3	Student 3	12.04	School 3	6	
4	Student B	12.22	School B	5	
5	*	12.36	*	4	
6	*	12.38	*	3	12.375
7	*	12.38	*	2	12.378
--	Student A	FS	School A2		

2018-2019 Outdoor State Open Championships					
Girls 200 Meter Dash Finals					
Place	Student	Time	School	Heat	Points
1	Student A	24.33	School A2	3	10
2	*	24.75	*	3	8
3	Student 3	25.01	School 3	3	6
4	Student 2	25.24	School 2	3	5
5	*	25.38	*	3	4
6	*	25.55	*	3	3
7	*	25.63	*	2	2
8	*	25.79	*	2	1
9	*	26.28	*	2	
10	*	26.44	*	2	
...
--	Student 1	DNS	School 1	2	

Team School Championships Involving Students A and B

OCR reviewed the race results for the 2018-2019 Indoor State Open Championship and confirmed the following order of finish of schools for the state championship:

- School A2 – 54 points
- School 1 – 39 points
- School 3 – 34 points
- Hillhouse – 34 points
- Norwich Free Academy – 21 points

OCR further confirmed that School A2 earned 10 points for each of Student A's 1st place finishes. OCR determined that other School A2 student-athletes at the meet earned the team the following points:

- 2nd place in the 300-meter dash, earning School A2 8 points,
- 1st place in the 600-meter run, earning School A2 10 points;
- 5th place in the 4 x 200 relay, earning School A2 2 points; and

Page 27 of 45 – Case Nos. 01-19-4025, 01-19-1252, 01-20-1003, 01-20-1004, 01-20-1005, 01-20-1006, and 01-20-1007

- 3rd place in the shot put, earning School A2 6 points

OCR also reviewed the results for the 2018-2019 Outdoor State Open Championships, held on June 3, 2019. OCR determined that School A2 placed 3rd (38 points) in the team championship, a full 20 points behind School 2, which placed first (58 points) and Windsor, which placed 2nd (43 points). The top 5 finishers were as follows:

- School 3 – 58 points
- Windsor – 43 points
- School A2 – 38 points
- Norwich Free Academy – 32 points
- Immaculate – 30 points

Student A participated in the 100-meter dash, the 200-meter dash, and the 4 x 400 relay in the 2018-2019 Indoor State Open Championship, and earned 10 points for School A2 for Student A's first place finish in the 200-meter dash; and was also on School A2's 4 x 400 relay team, which placed 1st and also earned 10 points for School A2.

School Districts Investigated by OCR

Glastonbury:

Glastonbury advised OCR that as a CIAC member school, it must comply with all of the CIAC's by-laws, policies, rules, and regulations, including the Revised Transgender Participation Policy. Glastonbury reported that it does not currently have any transgender students of which it is aware participating in its athletics program. Glastonbury stated that it must allow students to participate on the athletics team consistent with their gender identity because of state law and the Revised Transgender Participation Policy. Glastonbury stated that it has not challenged the CIAC's Revised Transgender Participation Policy because it is consistent with the requirements of state law, with which Glastonbury already must comply.

Glastonbury's Athletic Director stated that no female athletes were denied participation on any of their athletic teams as a result of having transgender athletes participate, and that student-athletes were eligible to participate in all meets that the District participated in if they met the requirements (i.e., qualifying marks, selection for relay team which is a determination made at the coaching level). The Athletic Director stated that the complaint filed with OCR addresses what is perceived as an inability to win.

Glastonbury's Principal stated that some district parents complained that a female student was affected by having a transgender student from another team participate in track events. The principal advised OCR that she never verified the times or records brought to her attention, nor did she make a determination regarding the allegations.

In emails dated May 2-10, 2018, Parent 2 requested guidance from the Athletic Director regarding the participation of Student A in girls' track events and whether it was consistent with the CIAC'

Page 28 of 45 – Case Nos. 01-19-4025, 01-19-1252, 01-20-1003, 01-20-1004, 01-20-1005, 01-20-1006, and 01-20-1007

Revised Transgender Participation Policy. The Athletic Director stated that she had spoken with someone at the CIAC who indicated that Student A would have had to declare her gender identity prior to the start of the school year in August. Parent 2 stated that she informed the CIAC that Student A participated as a male during the indoor season and then as a female during the outdoor season in 2017-2018; and stated that the CIAC advised her that it would be following up with School A1. On May 10, 2018, the Athletic Director advised Parent 2 that she was following up and had placed a call to the CIAC. In an email dated May 11, 2018, the Athletic Director responded to Parent 2, advising her that based on her reading of the CIAC rule, as well as confirmation she received from the CIAC, Student A's participation was in compliance with the Revised Transgender Participation Policy. She noted that if Parent 2 had been told Student A had to declare prior to the start of the school year, that was misinformation, as that requirement is nowhere in the language of the policy. The Athletic Director advised Parent 2 that she also shared this information with the track coach.

On May 23, 2018, Parent 2 advised the Athletic Director via email that she had been discussing transgender eligibility with her legislative office and wanted to make the Athletic Director aware. In an email dated May 29, 2018, Parent 2 asked the Athletic Director if students declaring a gender identity are required to produce any supporting documentation, or if there is a waiting period. In an email dated June 6, 2018, Parent 2 advised the Athletic Director that she intended to request a meeting with the CIAC regarding the transgender policy; the Athletic Director acknowledged the email and stated that there had been articles and some troubling behavior around the issue, and advised that a letter to the CIAC was probably the best route for the parent to take.

In an email dated July 2, 2018, to the Athletic Director, Parent 2 stated that the CIAC had refused to entertain any policy changes in response to her correspondence with them; it was her understanding that member schools set policy; and she wanted to meet with the Athletic Director to share her research. The Athletic Director responded attempting to schedule a time to meet. Thereafter, in an email dated July 18, 2018, Parent 2 forwarded to the Athletic Director copies of responses she had received from the CIAC Executive Director. In the email, she stated that, although the CIAC stated that the state legislature needed to make a change, her state representatives informed her that athletics policies fall under the CIAC's jurisdiction.

In an email dated January 27, 2019, to School 1 administrators, Parent 3 alleged that Student A, whom Parent 3 identified as a boy who identifies as a girl, was participating in track and creating an unfair and unsafe environment in girls track. He provided, as an example, that during the 4 x 400 relay event on January 26, 2019, in the second leg, Student A "had physicality" with a runner from Windsor, resulting in a significant lead for Bloomfield. The student-athlete running the last leg of the relay for Windsor was unable to close the gap that Student A had created. He also provided an example that at the Yale Invitational held on January 12, 2019, a student-athlete came in second to Student A, despite having run a faster time than 182 other girls in the 300-meter sprint. He asked that the unsafe and unfair situation be addressed now before it affected other sports.

In response, on January 29, 2019, the District's school board chair emailed Parent 3 and thanked him for sharing his experiences and concerns; but noted that the CIAC handbook indicated that it would be contrary to state and federal law to preclude transgender students from participating. She

Page 29 of 45 – Case Nos. 01-19-4025, 01-19-1252, 01-20-1003, 01-20-1004, 01-20-1005, 01-20-1006, and 01-20-1007

stated that, accordingly, she did not believe that exclusion was an option; but advised that this was just her opinion.

In an email dated February 17, 2019, to School 1 administrators and the CIAC Executive Director, among others, Parent 3 asserted that the Revised Transgender Participation Policy directly affected the outcome of School 1's winning the 2018-2019 Indoor State Open Championship held on February 16, 2019. Specifically, Parent 3 stated that School A2 earned the highest number of points due to the participation of Student A, who earned 20 points for the team by herself. Parent 3 alleged that, but for Student A's participation, School 1 would have won the state title. Specifically, Parent 3 asserted that School A2 was only able to win because Student A placed first in two separate events, earning School A2's team 20 of its total 54 points. Parent 3 also noted that Student A participated on the 4 x 400 relay, which earned the school 8 points for second place. Parent 3 acknowledged in his email that it was possible that School A2 still would have placed 2nd in the 4 x 400 relay, even if another athlete had run in Student A's place.⁴³

In an email dated February 25, 2019, to School 1 administrators and the CIAC Executive Director, among others, Parent 4 questioned the inclusion of transgender athletes' competitive times in results, which he argued affected all of the other athletes competing. Parent 4 further stated that recognizing the transgender athletes' results insulted the current cisgender athlete record holders. Parent 4 also asserted that the potential to compete for a college scholarship was at stake because the participation of transgender athletes resulted in other athletes not being able to compete at the New England Regionals, expand their résumés, and gain additional exposure to college recruiters and coaches. Parent 4 alleged that the CIAC was violating its own rules by allowing transgender athletes to compete; and asked that the results of the State Open Championship be recalculated, and points redistributed, and that the Revised Transgender Participation Policy be changed for the outdoor 2019 season. Parent 4 also suggested potential solutions to continue to allow transgender athletes to compete but change the competitive categories or "which scores count."

In an email dated March 3, 2019, to School 1 administrators and the CIAC Executive Director, among others, Parent 3 followed up on his original request that the Revised Transgender Participation Policy be revised. Parent 3 alleged that the policy prevented deserving girls from qualifying for the New England Regionals. For example, Parent 3 stated that at the New England Regionals on March 2, 2019, a Bloomfield transgender athlete (Student A) placed first in the 55-meter and 300-meter dash events. He also stated that by participating in the 4 x 400-meter relay event, Student A provided Bloomfield with a .06 second lead over Glastonbury in the final results.

In an email dated March 5, 2019, to School 1 administrators and the CIAC Executive Director, among others, Parent 4 stated that no other states at the New England Regionals had transgender student-athletes participating, and many people were surprised and concerned that cisgender girls were forced to compete with transgender girls. In another email dated March 5, 2019, to School 1 administrators, Parent 4 requested a meeting to review the current policy regarding transgender

⁴³ Parent 3 further asked that the CIAC adopt the NCAA and IOC policy, whereby a transgender athlete must undergo hormone treatment for one year before being able to compete; allow transgender athletes to run in events as exhibition participants where their results do not count; or "another fair and safe solution."

Page 30 of 45 – Case Nos. 01-19-4025, 01-19-1252, 01-20-1003, 01-20-1004, 01-20-1005, 01-20-1006, and 01-20-1007

athletes and its impact on competitive fairness; and alleged that cisgender girls were being deprived of fair and equal opportunity.

In an email dated March 7, 2019, to the District Superintendent, a parent (Parent 5) stated her opinion that the CIAC should adopt NCAA standards regarding transgender participation. In an email dated March 10, 2019, to School 1 administrators and the CIAC Executive Director, Parent 3 advised that the National Scholastic Athletic Foundation (NSAF), which hosts the national championships, had released statements regarding its transgender policy, which required athletes to take gender affirming hormones. Parent 3 then stated that at the New England Regionals on March 2, 2019, Bloomfield beat Glastonbury in the 4 x 400 relay with Student A participating on Bloomfield's team. He then noted that at the New Balance National championships held over March 8-10, 2019, Glastonbury's 4 x 400 relay team came in 14th in the nation, while Bloomfield's came in 34th, running without Student A.

On March 15, 2019, Parent 2 and the Parent 4 met with the Athletic Director and the Principal. The Principal stated that Parent 2 wanted School 1 to put forth a request for the CIAC to change its policy, and she communicated to them that the school was comfortable with the CIAC's following the state law and was not willing to ask the CIAC to change their policy. The Athletic Director did not recall that Parent 2 and Parent 4 raised any specific concerns about the policy, other than that the policy set up an uneven playing field. The Athletic Director stated that it was difficult to keep Parent 2 focused on what was Parent 2's real issue, as Parent 2 had started talking about separate math classes. The Athletic Director stated that she did not leave the meeting with any clear understanding of what Parent 2 was saying. She noted that Parent 2 and Parent 4 also wanted to show them photos of other non-district students, which they refused to discuss due to Family and Educational Rights and Privacy Act of 1974 (FERPA). In an email dated March 18, 2019, following their meeting, Parent 2 summarized her continued concerns that the transgender policy may violate Title IX; included information from her state legislative office that there is no law to be changed and that any changes would be the responsibility of the CIAC and member schools; and provided examples of contradictions within the CIAC policies, relative to co-ed teams.

On March 18, 2019, Parent 3 requested a meeting with administrators at School 1 to discuss the transgender policy. In an email dated March 25, 2019, to School 1 administrators, Parent 3 stated that he learned that the CIAC had sent out a survey to member schools regarding the transgender policy. He included links to resources in his email and urged School 1 not to just "rubber stamp" the policy. In response to his request, on April 2, 2019, the principal and School 1's Athletic Director met with Parent 3. Both the principal and Athletic Director described the meeting as lasting thirty minutes, per Parent 3's request. The Athletic Director stated that, during the meeting, Parent 3 discussed biological differences and the challenges female athletes face, and what could happen when transgender athletes participate in other sports. The principal stated that Parent 3 was focused on the safety of his child with allowing a transgender student to participate in track. The principal stated that she communicated to Parent 3 that the district was not looking at asking the CIAC to change the transgender policy. On April 2, 2019, Parent 3 emailed the principal and Athletic Director thanking them for meeting with him; he emphasized two points relative to the fairness of the policy and the implications if an elite transgender athlete were ever to participate.

Page 31 of 45 – Case Nos. 01-19-4025, 01-19-1252, 01-20-1003, 01-20-1004, 01-20-1005, 01-20-1006, and 01-20-1007

He also included resources related to Oregon’s policy, as well an NSAF’s press release regarding transgender participation.

In an email dated April 12, 2019 to the District Director of Health and Physical Education, K-12 (the Director), Parent 2 acknowledged their recent conversation regarding Title IX; asked the Director for clarification regarding why the principal, as a voting CIAC member, could set different athletic expectations for girls and boys teams; and questioned why that did not violate Title IX. Parent 2 also questioned why the CIAC had separate competitions for boys and girls if the CIAC’s purpose was just participation, and whether the concept of gender fluidity would satisfy Title IX when there was no distinction between the sexes.

Canton:

Canton advised OCR that it was required to comply with the CIAC’s Revised Transgender Participation Policy because the CIAC is the governing body for interscholastic athletics. Canton also noted that the Revised Transgender Participation Policy follows state law. Canton reported that it does not currently have any transgender students of which it is aware participating in its athletics program, nor has it challenged the CIAC’s Revised Transgender Participation Policy.

Danbury:

Danbury stated that it was required to follow the Revised Transgender Participation Policy because the CIAC is the governing body of athletics for the state and it is required to follow all of the CIAC rules, regulations, and policies. Danbury reported that it does not currently have any transgender students of which it is aware participating in its athletics program. Danbury stated that it has not expressed concerns about the policy to the CIAC.

Hartford (School A1):

Student A was a 10th grade student who participated on School A1’s athletics program during school year 2017-2018.⁴⁴ During the indoor track season of school year 2017-2018, Student A was a student-athlete on School A1’s boys’ indoor track team. During the outdoor track season of school year 2017-2018, Student A was a student-athlete on School A1’s girls’ outdoor track team. School A1 staff stated that as a CIAC member, School A1 is required to follow the CIAC policy and is also required to follow state law.

Bloomfield:

Student A was enrolled in School A2 in Bloomfield as an 11th grade student during school year 2018-2019. Bloomfield stated that as a member of the CIAC, it is required to follow the CIAC rules regarding participation, eligibility, and other matters, including the Revised Transgender

⁴⁴ During school year 2017-2018, Student A attended another school in Hartford that does not have a sports program; as a result, Student A participated in athletics through School A1’s program.

Page 32 of 45 – Case Nos. 01-19-4025, 01-19-1252, 01-20-1003, 01-20-1004, 01-20-1005, 01-20-1006, and 01-20-1007

Participation Policy.⁴⁵ Bloomfield denied that Student A’s participation has had a negative impact on other female students in the district, as Bloomfield does not cut any students from the girls’ indoor or outdoor track teams; therefore, anyone who wishes to participate can. Bloomfield staff opined that while a student may have lost to a transgender student, overall, everyone’s performance has benefited from the participation of Student A; and that participation in athletics is not about winning.

Cromwell:

Student B was enrolled in School B in Cromwell as a 10th grade student during school year 2017-2018, and as an 11th grade student during school year 2018-2019. During school years 2017-2018 and 2018-2019, Student B was a student-athlete on School B’s varsity girls’ indoor and outdoor track teams.

Cromwell stated that it has one transgender student (Student B) participating in its interscholastic athletics program, and noted that Student B’s records since her enrollment at School B in school year 2016-2017 have indicated that she was female; accordingly, Student B was placed on female rosters. Cromwell staff stated that they are required to follow the Revised Transgender Participation Policy as it is set by the CIAC, which is their governing body. Cromwell staff stated that none of their district students have been affected negatively by Student B’s participation.

Legal Standards

Subpart D of the regulation implementing Title IX prohibits discrimination on the basis of sex in education programs and activities. 34 C.F.R. § 106.31(b)(7) of Subpart D states that in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex, limit any person in the enjoyment of any right, privilege, advantage, or opportunity. 34 C.F.R. § 106.41 of Subpart D specifically applies to athletics. The regulation implementing Title IX, at 34 C.F.R. § 106.41(a), states that 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 athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis. The regulation implementing Title IX, at 34 C.F.R. § 106.41(b), states that, notwithstanding the requirements of § 106.41(a), 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.⁴⁶ The regulation implementing Title IX, at 34 C.F.R. § 106.6(c), states that the obligation to comply with the regulation is not obviated or alleviated by

⁴⁵ Bloomfield denied that it has received any requests from students to participate in its interscholastic athletics program pursuant to the Revised Transgender Participation Policy. Bloomfield stated that it currently has a transgender student participating on its girls track team (Student A), but noted that the student registered and enrolled at School A2 as a female, i.e., the student’s school records indicated that she was female; therefore, Bloomfield was not required to make any determinations pursuant to the policy.

⁴⁶ 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. 34 C.F.R. § 106.41(b).

Page 33 of 45 – Case Nos. 01-19-4025, 01-19-1252, 01-20-1003, 01-20-1004, 01-20-1005, 01-20-1006, and 01-20-1007

any rule or regulation of any athletic or other league, which would render any student ineligible to participate or limit the eligibility or participation of any student, on the basis of sex, in any education program or activity operated by a recipient.⁴⁷

Analysis and Conclusions

The Complainant alleged that the CIAC's Revised Transgender Participation Policy discriminated against female student-athletes competing in interscholastic girls' track in the state of Connecticut on the basis of their sex. Specifically, the Complainant alleged that as a result of the CIAC's Revised Transgender Participation Policy, Students A and B were permitted to compete in girls' track athletic competitions, which resulted in female student-athletes being denied opportunities to participate in higher level and/or post-season competitions.

The CIAC:

OCR determined that the CIAC, by permitting the participation of biologically male students in girls' interscholastic track in the state of Connecticut, pursuant to the Revised Transgender Participation Policy, denied female student-athletes benefits and opportunities, including to advance to the finals in events; to advance to higher level competitions, such as the State Open Championship or the New England Regional Championship; to win individual and team state championships, along with the benefit of receiving medals for these events; to place higher in any of the above events; to receive awards and other recognition; and possibly to obtain greater visibility to colleges and other benefits. For these same reasons, OCR also determined that the CIAC treated students differently based on sex, by denying opportunities and benefits to female student-athletes that were available to male student-athletes.

With respect to the three student-athletes on whose behalf the complaint was filed (Student 1, Student 2, and Student 3), Student A's and Student B's 1st and 2nd place finishes, respectively, in the preliminaries of the 2018-2019 Indoor State Open Championship for the 55-meter dash, denied Student 1, who placed 8th, the opportunity of advancing to the finals in this event, since only the top 7 finishers advanced to the finals. Student A's and Student B's participation in girls' interscholastic track in the state of Connecticut, pursuant to the Revised Transgender Participation Policy had the most significant impact on Student 2. Specifically, Student A's 1st place finish, in the finals of the 2018-2019 Outdoor Class S Statewide Championship for the 100-meter dash and the 200-meter dash, denied Student 2, who placed 2nd in both events, the benefit of a 1st place finish; and Student A's and Student B's 1st and 2nd place finishes, in the 2018-2019 Indoor State Open Championship for the 55-meter dash, denied an opportunity for Student 2, who placed 3rd, to place 1st in the event and receive the benefit of a 1st place medal. Denying a female student a chance to win a championship is inconsistent with Title IX's mandate of equal opportunity for both sexes.⁴⁸ Accordingly, OCR determined that the CIAC denied athletic benefits and

⁴⁷ OCR understands that the CIAC and the individual school districts maintain that the Revised Transgender Participation Policy is consistent with, and required by, Connecticut state law. OCR takes no view on the requirements of Connecticut law except to note that the duty to comply with Title IX and its implementing regulation is independent of any such requirements.

⁴⁸ See *McCormick v. School District of Mamaroneck*, 370 F.3d 275, 294-95 (2d Cir. 2004) (“A primary purpose of competitive athletics is to strive to be the best. . . . Treating girls differently regarding a matter so fundamental to the

Page 34 of 45 – Case Nos. 01-19-4025, 01-19-1252, 01-20-1003, 01-20-1004, 01-20-1005, 01-20-1006, and 01-20-1007

opportunities to female student-athletes competing in interscholastic girls' track in the state of Connecticut through the Revised Transgender Participation Policy, in violation of the regulation implementing Title IX, at 34 C.F.R. § 106.41(a). OCR also has concerns that additional violations may have resulted from the Policy and from Student A's and B's participation in girls' track, including but not limited to losses or lowered placement in regular season meets; losses or lowered placement in conference championships; and an inability for some female student-athletes to participate generally in a race at any level (not just championship level).

With respect to the Team Championships for the 2018-2019 Indoor State Open Championship, absent Student A's participation, School A2 earned 26 points in 4 different events. Adding the 8 points for the 4 x 200 relay, in which School A2 may have placed and earned points even without Student A, School A2 would have earned 34 points, behind School 1, which had 39 points. Subtracting the 8 relay points would have also placed School A behind School 3. Thus, Student A's participation may have denied School 1 and its female student-athletes the benefit of a team championship, and may have denied School 3, and other schools, the benefit of a higher placement.⁴⁹

Glastonbury:

OCR determined that the participation of Glastonbury in athletic events sponsored by the CIAC, consistent with the CIAC's Revised Transgender Participation Policy, which resulted in Student 1, and other female student-athletes competing against Students A and B, denied athletic benefits and opportunities to Student 1 and other female student-athletes, in violation of the regulation implementing Title IX, at 34 C.F.R. Section 106.41(a). Glastonbury placed female student-athletes in athletic events against male student-athletes, resulting in competitive disadvantages for female student-athletes. The athletic events in which the female student-athletes competed were coeducational; female student athletes were denied the opportunity to compete in events that were exclusively female, whereas male students were able to compete in events that were exclusively male. Accordingly, the districts' participation in the athletic events sponsored by the CIAC denied female student-athletes athletic opportunities that were provided to male student-athletes. Glastonbury's obligation to comply with the regulation implementing Title IX is not obviated or alleviated by any rule or regulation of the CIAC. 34 C.F.R § 106.6(c).

The participation of Glastonbury in athletic events sponsored by the CIAC, consistent with the CIAC's Revised Transgender Participation Policy, which resulted in Student 1, and other female student-athletes competing against Students A and B, denied Student 1 the opportunity to place higher in events, such as the 100-meter dash at the 2017-2018 Outdoor State Championship and New England Regional Championship; the 55-meter dash at the 2018-2019 Indoor CCC Regional Championship; and the 200-meter dash at the 2018-2019 Outdoor State Championship. Student A's and Student B's 1st and 2nd place finishes, respectively, in the preliminaries of the 2018-2019

experience of sports—the chance to be champions—is inconsistent with Title IX's mandate of equal opportunity for both sexes.”).

⁴⁹ With respect to the 2018-2019 Outdoor State Open Championships, held on June 3, 2019. The top five finishers were as follows: School 3: 58 points; Windsor: 43 points; School A2: 38 points; Norwich Free Academy: 32 points; Immaculate: 30 points. Student A's participation earned school A2 an additional 10 to 20 points and a third-place finish when School A2 might otherwise have finished no better than 5th.

Page 35 of 45 – Case Nos. 01-19-4025, 01-19-1252, 01-20-1003, 01-20-1004, 01-20-1005, 01-20-1006, and 01-20-1007

Indoor State Open Championship for the 55-meter dash, denied Student 1, who placed 8th, the opportunity of advancing to the final in this event, since only the top 7 finishers advanced to the finals.

Canton:

OCR determined that the participation of Canton in athletic events sponsored by the CIAC, consistent with the CIAC's Revised Transgender Participation Policy, which resulted in Student 2, and other female student-athletes, competing against Students A and B, denied athletic benefits and opportunities to Student 2, and other female student-athletes, in violation of the regulation implementing Title IX, at 34 C.F.R. Section 106.41(a). Canton placed female student-athletes in athletic events against male student-athletes, resulting in competitive disadvantages for female student-athletes. The athletic events in which the female student-athletes competed were coeducational; female student athletes were denied the opportunity to compete in events that were exclusively female, whereas male students were able to compete in events that were exclusively male. Accordingly, the districts' participation in the athletic events sponsored by the CIAC denied female student-athletes athletic opportunities that were provided to male student-athletes. Canton's obligation to comply with the regulation implementing Title IX is not obviated or alleviated by any rule or regulation of the CIAC. 34 C.F.R § 106.6(c).

The participation of Canton in athletic events sponsored by the CIAC, consistent with the CIAC's Revised Transgender Participation Policy, which resulted in Student 2, and other female student-athletes competing against Students A and B, denied Student 2 the opportunity to place higher in events, such as the Class S Outdoor Championships; the Indoor and Outdoor State Open Championships; and the New England Regional Championships. Specifically, Student A's and Student B's 1st and 2nd place finishes respectively, in the 2018-2019 Indoor State Open Championship for the 55-meter dash, denied an opportunity for Student 2, who placed 3rd, to place 1st in the event and receive the benefit of a 1st place medal. Student A's 1st place finish, in the finals of the 2018-2019 Outdoor Class S Statewide Championship for the 100-meter dash and the 200-meter dash, denied Student 2, who placed 2nd in both events, the benefit of a 1st place finish. Student A's 1st place finish in the finals of the State Open Championship in the 200-meter dash denied Student 2, who finished 4th, the benefit of a top-three finish.

Danbury:

OCR determined that the participation of Danbury in athletic events sponsored by the CIAC, consistent with the CIAC's Revised Transgender Participation Policy, which resulted in Student 3, and other female student-athletes, competing against Students A and B, denied athletic benefits and opportunities to Student 3, and other female student-athletes, in violation of the regulation implementing Title IX, at 34 C.F.R. Section 106.41(a). Danbury placed female student-athletes in athletic events against male student-athletes, resulting in competitive disadvantages for female student-athletes. The athletic events in which the female student-athletes competed were coeducational; female student athletes were denied the opportunity to compete in events that were exclusively female, whereas male students were able to compete in events that were exclusively male. Accordingly, the districts' participation in the athletic events sponsored by the CIAC denied female student-athletes athletic opportunities that were provided to male student-athletes.

Page 36 of 45 – Case Nos. 01-19-4025, 01-19-1252, 01-20-1003, 01-20-1004, 01-20-1005, 01-20-1006, and 01-20-1007

Danbury's obligation to comply with the regulation implementing Title IX is not obviated or alleviated by any rule or regulation of the CIAC. 34 C.F.R. § 106.6(c).

The participation of Danbury in athletic events sponsored by the CIAC, consistent with the CIAC's Revised Transgender Participation Policy, which resulted in Student 3, and other female student-athletes competing against Students A and B, denied Student 3 the opportunity to place higher in events, such as at the Outdoor State Open Championships and the New England Regional Championships. Specifically, Student A's 1st place finish in the finals of the State Open Championship in the 200-meter dash denied Student 3, who finished 3rd, the benefit of placing 2nd in the event; and Student A's 1st place finish in the finals of the 200-meter dash at the Outdoor New England Regional Championships denied Student 3, who finished 3rd the benefit of placing 2nd in the event.

Hartford (School A1):

Student A participated in girls' outdoor track on School A1's team in Hartford during school year 2017-2018. OCR determined that the participation of School A1 in athletic events sponsored by the CIAC, consistent with the CIAC's Revised Transgender Participation Policy, which resulted in Student A's participating in events against Students 1, 2, and 3, and against other female student-athletes, denied athletic benefits and opportunities to Students 1, 2, and 3, and other female student-athletes, in violation of the regulation implementing Title IX, at 34 C.F.R. Section 106.41(a). Hartford's obligation to comply with the regulation implementing Title IX is not obviated or alleviated by any rule or regulation of the CIAC. 34 C.F.R. § 106.6(c).

Bloomfield:

Student A participated in girls' indoor and outdoor track for Bloomfield during school year 2018-2019. OCR determined that the participation of Bloomfield in athletic events sponsored by the CIAC, consistent with the CIAC's Revised Transgender Participation Policy, which resulted in Student A's participating in events against Students 1, 2, and 3, and against other female student-athletes, denied athletic benefits and opportunities to Students 1, 2, and 3, and other female student-athletes, in violation of the regulation implementing Title IX, at 34 C.F.R. Section 106.41(a). Bloomfield's obligation to comply with the regulation implementing Title IX is not obviated or alleviated by any rule or regulation of the CIAC. 34 C.F.R. § 106.6(c).

Cromwell:

Student B participated in girls' indoor and outdoor track for Cromwell during school years 2017-2018 and 2018-2019. OCR determined that the participation of Cromwell in athletic events sponsored by the CIAC, consistent with the CIAC's Revised Transgender Participation Policy, which resulted in Student B's participating in events against Students 1, 2, and 3, and against other female student-athletes, denied athletic benefits and opportunities to Students 1, 2, and 3, and other female student-athletes, in violation of the regulation implementing Title IX, at 34 C.F.R. Section 106.41(a). Cromwell's obligation to comply with the regulation implementing Title IX is not obviated or alleviated by any rule or regulation of the CIAC. 34 C.F.R. § 106.6(c).

Page 37 of 45 – Case Nos. 01-19-4025, 01-19-1252, 01-20-1003, 01-20-1004, 01-20-1005, 01-20-1006, and 01-20-1007

For the aforementioned reasons, OCR also determined that the CIAC, Glastonbury, Bloomfield, Hartford, Cromwell, Canton, and Danbury treated student-athletes differently based on sex, by denying opportunities and benefits to female student-athletes that were available to male student-athletes.

II. RETALIATION

The Complainant also alleged that (1) the CIAC retaliated against Parent 1, after Parent 1 complained about the Revised Transgender Participation Policy, by informing Parent 1, in March 2019, that the CIAC’s Executive Director would no longer accept communications from her; and (2) that Glastonbury’s track coach retaliated against Student 1, for her and Parent 2’s advocacy against the Revised Transgender Participation Policy, by (a) replacing Student 1 on the sprint medley relay team in February 2019; (b) telling Student 1 and her parents that he could not give a good report to college coaches about her in March and May 2019; (c) denying Student 1 a position as a team captain in March 2019; and (d) suggesting that Student 1 should leave the outdoor track team due to her schedule, in March and May 2019.

Findings of Fact

1. Allegation Regarding the CIAC’s Retaliation

OCR determined that the CIAC Handbook in effect during school year 2018-2019 sets forth the CIAC’s “Communication Protocol Rules, Regulations and Interpretations” (Communication Protocol). According to the Communication Protocol, the CIAC Board of Control is the official body charged with the responsibility of interpreting the CIAC’s rules and regulations. The Communication Protocol provides, in pertinent part, that “[i]nquiries to the CIAC office from parents, student-athletes, coaches and the public requesting an interpretation of the rules and regulations will be referred back to the member school principal or his/her designee.” In addition, Section 4.21 of the CIAC Handbook, “Regulation Interpretation/CIAC Protocol in Providing Decisions to School Personnel and Public (Effective July 1, 2006),” provides, in pertinent part, “The CIAC staff will not discuss CIAC rules and regulations with anyone other than school administrators and athletic directors. Telephone inquiries from parents and coaches will not be honored. **All calls from anyone other than the athletic director or school administrator will be referred back to the school.**” (Emphasis in original.)

OCR determined that Parent 1 initially contacted the CIAC about the policy when she sent a letter dated February 21, 2018, to the CIAC’s former Executive Director, in which she requested that the CIAC establish a rule to address transgender athletes’ participating in the girls’ state championship track competitions. In an email dated March 10, 2018, the former Executive Director responded by acknowledging that issues surrounding transgender student-athlete participation are complicated; advising Parent 1 that the CIAC’s policy is directly aligned with state anti-discrimination law, including the state’s definition of gender to include gender identity; and reminding Parent 1 that most high school athletes are minors and are therefore afforded a unique level of legal protection regarding their right to privacy.

Page 38 of 45 – Case Nos. 01-19-4025, 01-19-1252, 01-20-1003, 01-20-1004, 01-20-1005, 01-20-1006, and 01-20-1007

On January 24, 2019, Parent 1 sent an email to the CIAC’s current Executive Director, attaching a letter in which she again requested that the CIAC establish a rule for transgender athletes’ participating in state championship track competitions and setting forth her own proposal for the placement and scoring of transgender female athletes participating in state championships.⁵⁰ The Executive Director responded by email the same day, advising Parent 1 that the appropriate process for addressing her proposal would be to speak with the athletic director or principal at her child’s school, as policy or rule proposals “may be submitted through member leagues, sport committees, member principals, [the Connecticut Association of Athletic Directors], or the Connecticut High School Coaches Association.” Parent 1 replied to the director’s email that same day, January 24, 2019, stating that she would follow up with the principal and athletic director at her child’s school to see if they would be willing to submit her proposal.

OCR determined that on February 1, 2019, the principal and the Executive Director spoke by telephone, regarding Parent 1’s letter and proposal. The Executive Director memorialized the call in an email to the principal that same day, in which he stated that the CIAC would be convening a gender subcommittee meeting on February 7, 2019, with the task of reviewing all the CIAC bylaws, processes, procedures in which gender plays a role, including the Revised Transgender Participation Policy; and that he would share a redacted copy of Parent 1’s letter with the subcommittee members, in order “to provide all points of view to ensure a rich discussion among committee members.”

OCR determined that in response to Parent 1’s request, made through her building principal, for an in-person meeting with a CIAC representative, the Executive Director attended a meeting at the school with Parent 1 and the principal on February 28, 2019. The Executive Director stated that, at the meeting, he explained to Parent 1 why the CIAC believed that the Revised Transgender Participation Policy was in alignment with Title IX and Connecticut state law, and advised Parent 1 that he believed that Title IX did not apply to the parent’s concerns because Title IX does not address winning. Following the meeting, that same day, Parent 1 sent an email to the Executive Director, in which she thanked him for visiting the school and wrote that “[i]t was helpful to hear from you directly regarding the transgender policy and to understand what the CIAC process will be for reviewing this issue.”

OCR determined that on March 28, 2019, Parent 1 sent an email to the Executive Director, in which she attached a letter and included links to several websites concerning issues related to the Revised Transgender Participation Policy. The Executive Director responded by email that same day, stating that he had read her email, and cordially reminded her that any further correspondence to the CIAC should come through her principal. The Complainant did not provide, nor did OCR find, evidence of any further communications between Parent 1 and the Executive Director.

⁵⁰ Specifically, Parent 1 proposed the following: “Male-to-female transgender athletes who have not yet undergone hormone therapy should compete as exhibition athletes, with results not included for scoring and placing. This would ensure that the needs of both of these protected classes are met. The transgender athletes would still be able to **participate** on the team in which they identify and the female-born athletes would be afforded the opportunity to **compete** in a race that is not clouded by questions of unfair advantage.” (Emphasis in original.)

Page 39 of 45 – Case Nos. 01-19-4025, 01-19-1252, 01-20-1003, 01-20-1004, 01-20-1005, 01-20-1006, and 01-20-1007

The Executive Director denied that he banned Parent 1 from sending communications to him. Rather, the Executive Director stated that he treated Parent 1 in a manner consistent with how he treated other individuals in similar situations, by reminding her of the CIAC's policy that communications must go through the member school's representative. OCR determined that the Executive Director has responded in a similar manner to other parents who sought to communicate directly with him in a similar fashion. OCR determined that none of the similarly situated parents had engaged in protected activities.

2. Allegations Regarding Glastonbury Track Coach Retaliation

The Complainant also alleged that a Glastonbury track coach retaliated against Student 1, for her and Parent 2's advocacy against the Revised Transgender Participation Policy, by (a) replacing Student 1 on the sprint medley relay team in February 2019; (b) telling Student 1 and her parents that he could not give a good report to college coaches about her in March and May 2019; (c) denying Student 1 a position as a team captain in March 2019; and (d) suggesting that Student 1 should leave the outdoor track team due to her schedule, in March and May 2019.

Allegation (a):

OCR determined that a team made up of students from Glastonbury's girls' indoor track team competed at the 2019 New Balance Nationals Track and Field championships ("Nationals"). The track coach stated that the meet is not a CIAC or school-sanctioned meet; therefore, any student who participates does so on an individual basis, not on behalf of Glastonbury. The track coach stated that, accordingly, the Glastonbury coaches do not choose who may attend the meet or choose which athletes will participate in which events. Rather, the individual students choose, on their own, whether to compete in the meet, and who will compete in the events, including relays. The track coach further stated that it was his understanding that Student 1 was not selected to run in a relay at the meet, but he denied that he played a role in this decision. He further stated that his understanding was that the other athletes decided that Student 1 would not compete in the relay, but he did not know why they had made that decision.

Student 1 confirmed that it is each individual student-athlete's decision whether to attend Nationals, if she qualifies; however, she stated that for relay events, a track coach was responsible for signing up the various teams. Parent 2 indicated that this is to prevent students from different schools entering themselves as a single "power team." Student 1 stated that although she had a qualifying time for the sprint medley relay in December 2018,⁵¹ she was not asked to join the sprint medley relay team for Nationals in March 2019. Student 1 stated that, during the regular season, coaches pick the best athletes that are capable of running times that they would like to see for an overall split in the event, but that she was not fully aware of how the coaches make those determinations. Student 1 acknowledged that she was not sure which coach picked the sprint medley relay team for Nationals, but she assumed that a coach picked the team because that was what was done for all other meets during the season.

⁵¹ The records Glastonbury provided indicate that Student 1 participated on a sprint medley relay team during a meet held on December 22, 2018.

Allegation (b):

The Complainant stated that at the first practice of the outdoor season on March 16, 2019, the track coach told Parent 4 that he had nothing good to say about Student 1 to a college coach; and on or about May 1, 2019, the track coach told Student 1 that he could not give a good report of her to college coaches.

The track coach denied that he told either Student 1 or her parents that he could not give a good report to college coaches about Student 1. The track coach stated that it is his practice to be completely honest with college coaches, to ensure that college coaches continue to trust and rely on his recommendations of athletes. The track coach stated that because of this, on or about March 16, 2019, in the course of a discussion with Parent 4 about the Student 1's workouts and her college future, he told Parent 4 that he is "100% honest with a college coach when asked any questions about any of the athletes."⁵² The track coach stated that he had also told Student 1 that he would be 100% honest with college coaches, although he did not recall the date of this conversation or the specific context in which the subject was raised. The track coach also advised OCR that Student 1 has not requested that he give a recommendation or report to any college coach on her behalf, nor has any college coach requested information about Student 1.

Student 1 denied that the track coach told her that he would be honest with any college coaches, and instead maintained that the track coach told her, and Parent 4, that he did not have anything good to say about her and could not give a good report about her. Student 1 stated that the track coach made this statement to her one day when she was letting him know that she was leaving practice for work. Student 1 confirmed that she has not asked the track coach to speak with any coaches on her behalf.

Allegation (c):

The Complainant stated that the track coach told Student 1 that he did not select her as team captain because she departed early from practice on Fridays for work, despite her having served as team captain during the indoor season and not receiving any complaints about her as a captain. The track coach stated that students who wish to be considered for a team captain position are required to submit a written statement concerning their interest at the beginning of each season, indoor and outdoor. All of the coaches then select the team captains as a group. If there are any disagreements among the coaches, the track coach makes the final decision regarding the selection. The track coach stated that the qualifications for team captain are hard work, dedication, leadership, sportsmanship, and appropriately representing the high school. The track coach stated that the number of captains for the team typically ranges from three to seven for each season, depending on the size of the team and the number of qualified athletes who apply.

The track coach stated that in December 2018, Student 1 was selected as a captain for the indoor season 2018-2019; but that the decision was not unanimous because at least two coaches questioned Student 1's qualifications for a captain position, stating that they believed that she had

⁵² The track coach stated that in reply to his remark, Parent 4 stated that he understood.

Page 41 of 45 – Case Nos. 01-19-4025, 01-19-1252, 01-20-1003, 01-20-1004, 01-20-1005, 01-20-1006, and 01-20-1007

not shown enough leadership, dedication and maturity.⁵³ The track coach stated that despite the concerns raised by other coaches, he chose Student 1 to be a captain for that season because he had observed her helping new athletes on the team and he believed that she would step up to the challenge.

The track coach stated that in March 2019, Student 1 applied to be a captain for the outdoor season 2018-2019. He stated that after speaking with all of the coaches, it was unanimous that they would not select Student 1 to be a captain for a number of reasons. He stated that the main reason was that during the indoor season (December 2018 – January 2019), Student 1 had, on several occasions, displayed poor sportsmanship at meets by ripping off her headband and storming away at the conclusion of her race. In addition, the track coach stated, and another coach confirmed, that during the indoor season, Student 1 often skipped her sprint workouts in favor of spending more time doing her long jump workouts; or claimed that she had an injury and could not do her sprint workouts, despite being able to do her long jump workouts and being cleared by the trainer. An assistant coach confirmed that during the indoor season, Student 1 failed to follow his instructions during practice, often did not complete her workouts, and exhibited poor sportsmanship at meets. Both the assistant coach and another coach agreed that Student 1 should not be selected as a captain for the outdoor season. The track coach stated that during a prior school year, he declined to select a student as team captain because she similarly failed to demonstrate leadership qualities/maturity. Glastonbury stated that this student had not engaged in protected activities.

Allegation (d):

The Complainant alleged that on or about March 25, 2019, the track coach told Student 1 that she should consider leaving the team if she did not attend full practice every day. The Complainant alleged that the track coach had not asked other student-athletes to leave the team due to missing practices for work commitments. The Complainant also alleged that on or about May 1, 2019, the track coach complained to Student 1 about her missing Friday practices.

The track coach denied that he had an issue with Student 1's leaving practice early on Fridays and denied that he specifically told her that she should leave the team. The track coach stated that he and the other coaches emphasized the importance of practice during meetings held at the beginning of the season with the student-athletes and their parents; but he denied having told any students recently, including Student 1, that they should consider leaving the team if they did not attend full practice every day. The track coach further stated that he was aware that Student 1 left practice early on Fridays for work; and stated that he did not object to this, particularly because the team often ends practice early on Fridays during the winter when the gym is used for high school basketball games and because Friday practices are typically lighter prior to the track team competitions on the weekends.

⁵³ Specifically, an assistant track coach stated that he had concerns about Student 1's being selected as captain because he did not believe that Student 1 had the maturity to be a captain.

Page 42 of 45 – Case Nos. 01-19-4025, 01-19-1252, 01-20-1003, 01-20-1004, 01-20-1005, 01-20-1006, and 01-20-1007

Legal Standards

The regulation implementing Title IX, at 34 C.F.R. § 106.71, incorporates by reference 34 C.F.R. § 100.7(e) of the regulation implementing Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, which provides that no recipient or other person shall intimidate, threaten, coerce or discriminate against any individual for the purpose of interfering with any right or privilege secured by regulations enforced by OCR or because one has made a complaint, testified, assisted or participated in any manner in an investigation, proceeding, or hearing held in connection with a complaint. The following three elements must be satisfied to establish a prima facie case of retaliation: (1) an individual engaged in a protected activity; (2) an individual experienced an adverse action caused by the recipient; and (3) there is some evidence of a causal connection between the adverse action and the protected activity. When a prima facie case of retaliation has been established, OCR then determines whether there is a facially legitimate, non-retaliatory reason for the adverse action; and if so, whether the facially legitimate, non-retaliatory reason is a pretext for retaliation.

Analysis and Conclusions

1. Allegation Regarding the CIAC's Retaliation

The Complainant alleged that the CIAC retaliated against Parent 1, after Parent 1 complained about the Revised Transgender Participation Policy, by informing Parent 1, in March 2019, that the CIAC's Executive Director would no longer accept communications from her. OCR determined that Parent 1 engaged in protected activity on February 22, 2018, January 24, 2019, and March 28, 2019, when she sent emails expressing concern regarding the Revised Transgender Participation Policy to the CIAC's Executive Director;⁵⁴ and on February 28, 2019, when Parent 1 met with the Executive Director in person to discuss her concerns about the policy. OCR determined that the CIAC was aware of Parent 1's protected activity.

OCR determined, however, that the CIAC proffered a legitimate, non-retaliatory reason for the Executive Director's statement to Parent 1 that "further correspondence to CIAC has to come through your principal"; namely, that the CIAC staff typically did not communicate directly with parents and Parent 1 should have communicated her concerns with the athletic director or school administrator. OCR determined that the proffered reason was not a pretext for retaliation, as the Executive Director's instruction was consistent with the CIAC policy and the Executive Director's directives to other parents who had not engaged in protected activities. Therefore, OCR determined that there was insufficient evidence to substantiate the Complainant's allegation that the CIAC retaliated against Parent 1, after Parent 1 complained about the Revised Transgender Participation Policy, by informing Parent 1, in March 2019, that the Executive Director would no longer accept communications from her. Accordingly, OCR will take no further action with respect to this allegation.

⁵⁴ As discussed previously, Parent 1 communicated with the former the Executive Director in her email on February 22, 2018; and with the current Executive Director from January 24, 2019, onward.

2. Allegations Regarding Glastonbury Track Coach Retaliation

OCR determined that Parent 2 engaged in protected activity by sending emails to the Athletic Director in May, June, and July 2018, expressing her concerns that the Revised Transgender Participation Policy was unfair to cisgender female athletes; meeting with the Athletic Director, the principal, and the superintendent, on or about August 1, 2018, to discuss these concerns; meeting with the Athletic Director and Parent 4, on or about March 15, 2019, to again discuss these concerns; and telephoning and sending an email to the School's Title IX Coordinator in March and April 2019. OCR determined that Parent 2 also engaged in protected activity in May and June 2018, and in March 2019, when she sent emails to the track coach regarding her objections to the policy and a petition that she had initiated in opposition to the policy. OCR determined that the Glastonbury track coach was aware of the Parent 2's protected activity.

With respect to Allegation (a), OCR determined that neither the track coach nor any other Glastonbury employee denied Student 1 an opportunity to participate on a sprint medley relay team at the New Balance Nationals. Rather, the students themselves chose who would participate. Accordingly, OCR could not substantiate that the track coach or other Glastonbury employee subjected Student 1 to an adverse action. Absent an adverse action, OCR does not proceed further with retaliation analysis. Accordingly, OCR will take no further action regarding Allegation (a).

With respect to Allegation (b), OCR must often weigh conflicting evidence in light of the facts and circumstances of each case and determine whether the preponderance of evidence supports the allegation. Here, OCR did not find that the preponderance of the evidence supported the Complainant's assertion that the track coach told Parent 2 or Student 1 that he would not give a good report about Student 1 to college coaches. Based on the foregoing, OCR determined that there was insufficient evidence to substantiate that the track coach subjected Student 1 to the alleged adverse action. Absent an adverse action, OCR does not proceed further with a retaliation analysis. Accordingly, OCR will take no further action regarding Allegation (b).

With respect to Allegation (c), OCR determined that the Glastonbury proffered a legitimate, non-retaliatory reason for not selecting Student 1 as a captain for the spring 2019 outdoor season; namely, that track coaches had concerns about Student 1's maturity and dedication after the winter 2018 indoor season. Even assuming that the track coach also told Student 1 that the decision had to do with her leaving practice early on Fridays, OCR determined that would still be a legitimate, non-retaliatory reason for not selecting her. OCR determined that the proffered reasons were not a pretext for retaliation, as other coaches corroborated the reasons for the decision and the track coach gave an example of another student who had not been re-selected as captain based on similar behaviors, who had not engaged in protected activities. Additionally, OCR determined that there was no causal connection between the protected activity and the alleged adverse action, as the track coach selected Student 1 as a captain for the indoor season after she and Parent 2 had engaged in protected activities in 2018 and prior to their again engaging in protected activities in 2019. Therefore, OCR determined that there was insufficient evidence to substantiate the Complainant's allegation that the Glastonbury track coach retaliated against Student 1, for her and Parent 2's advocacy against the Revised Transgender Participation Policy, by denying Student 1 a position as a team captain in March 2019. Accordingly, OCR will take no further action regarding Allegation (c).

Page 44 of 45 – Case Nos. 01-19-4025, 01-19-1252, 01-20-1003, 01-20-1004, 01-20-1005, 01-20-1006, and 01-20-1007

With respect to Allegation (d), OCR must often weigh conflicting evidence in light of the facts and circumstances of each case and determine whether the preponderance of evidence supports the allegation. Here, OCR did not find that the preponderance of the evidence supported the Complainant's assertion that the track coach told Student 1 in March 2019 and May 2019, that she should consider leaving the team if she had to leave practice early. Based on the foregoing, OCR determined that there was insufficient evidence to substantiate that the track coach subjected Student 1 to the alleged adverse action. Absent an adverse action, OCR does not proceed further with a retaliation analysis. Accordingly, OCR will take no further action regarding Allegation (d).

Attempts to Resolve the Complaint

Via e-mail on February 12, 2020, OCR notified the CIAC, Glastonbury, Bloomfield, Hartford, Cromwell, Canton, and Danbury that it had determined that the CIAC, Glastonbury, Bloomfield, Hartford, Cromwell, Canton, and Danbury violated Title IX, and provided a proposed resolution agreement (the Agreement) to each that would resolve OCR's compliance concerns. During subsequent telephone calls with counsel for the CIAC, Glastonbury, Bloomfield, Hartford, Cromwell, Canton, and Danbury, held during the period of February 13, 2020, through March 13, 2020, OCR informed counsel for the CIAC, Glastonbury, Bloomfield, Hartford, Cromwell, Canton, and Danbury of the specific violation, and explained the nature of the violations and the basis of its findings. On multiple occasions during these communications, OCR informed counsel for the CIAC, Glastonbury, Bloomfield, Hartford, Cromwell, Canton, and Danbury of the 90-calendar day timeframe for negotiations as set forth in Section 303(f) of the *Manual*. OCR also informed counsel for the CIAC, Glastonbury, Bloomfield, Hartford, Cromwell, Canton, and Danbury that the *Manual* states that OCR may end the negotiation period at any time prior to the expiration of the 90-calendar day period when it is clear that agreement will not be reached. On March 12, 2020, counsel for Bloomfield, Hartford, and Cromwell, and on March 13, 2020, counsel for the CIAC, Glastonbury, Canton and Danbury, informed OCR that their clients would not sign the Agreements.

On March 17, 2020, OCR issued impasse letters to the CIAC, Glastonbury, Bloomfield, Hartford, Cromwell, Canton, and Danbury notifying the CIAC, Glastonbury, Bloomfield, Hartford, Cromwell, Canton, and Danbury that the negotiations had reached an impasse and a final agreement had not been reached. Further, the letter informed the CIAC, Glastonbury, Bloomfield, Hartford, Cromwell, Canton, and Danbury that in accordance with the *Manual*, Section 303(g), if an agreement was not reached within 10 calendar days of the date of the letter, i.e., by March 30, 2020, OCR would issue a Letter of Impending Enforcement Action indicating that the CIAC, Glastonbury, Bloomfield, Hartford, Cromwell, Canton, and Danbury are in violation of Title IX. OCR also referred the CIAC, Glastonbury, Bloomfield, Hartford, Cromwell, Canton, and Danbury to the *Manual*, at <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>, in particular, Sections 303-305 and 601-602, for more information.

In emails dated March 27, 2020, OCR informed the CIAC, Glastonbury, Bloomfield, Hartford, Cromwell, Canton, and Danbury that in view of their COVID-19-related duties and responsibilities, OCR was extending the ten-calendar day-deadline to respond to OCR's proposed resolution agreements for a period of 30 days, to April 27, 2020; and that if agreement was not reached by that date, OCR would issue a Letter of Impending Enforcement Action on April 28,

Page 45 of 45 – Case Nos. 01-19-4025, 01-19-1252, 01-20-1003, 01-20-1004, 01-20-1005, 01-20-1006, and 01-20-1007

2020, pursuant to Section 305 of the *Manual*. To date, the CIAC, Glastonbury, Bloomfield, Hartford, Cromwell, Canton, and Danbury have not entered into resolution agreements with OCR to remedy the violations.

Based on the failure of the CIAC, Glastonbury, Bloomfield, Hartford, Cromwell, Canton, and Danbury to resolve the identified areas of noncompliance, OCR will either initiate administrative proceedings to suspend, terminate, or refuse to grant or continue and defer financial assistance to the CIAC, Glastonbury, Bloomfield, Hartford, Cromwell, Canton, and Danbury, or refer the cases to the U.S. Department of Justice for judicial proceedings to enforce any rights of the United States under its laws. OCR will take further enforcement action after no fewer than 20 calendar days from the date of this letter if resolution of these complaints has not yet been reached.

This Letter of Impending Enforcement Action is not intended and should not be interpreted to address the compliance of the CIAC, Glastonbury, Bloomfield, Hartford, Cromwell, Canton, and Danbury with any other regulatory provision or to address any issues other than those addressed in this letter. This letter sets forth OCR's determination in these individual OCR cases; it is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public. The complainant may file a private suit in federal court whether or not OCR finds a violation.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, it will seek to protect, to the extent provided by law, personally identifiable information that, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

If you have any questions, please contact Nadja Allen Gill, Compliance Team Leader, at (646) 428-3801, or nadja.r.allen.gill@ed.gov.

Sincerely,



Timothy C. J. Blanchard

cc: Glenn Lungarini, CIAC Executive Director, via email only
Alan B. Bookman, Glastonbury Superintendent, via email only
Kevin D. Case, Canton Superintendent, via email only
Dr. Enza Macri, Cromwell Superintendent, via email only
Dr. Sal V. Pascarella, Danbury Superintendent, via email only
Dr. James Thompson, Jr., Bloomfield Superintendent, via email only
Dr. Leslie Torres-Rodriguez, Hartford Superintendent, via email only
Roger G. Brooks, Alliance Defending Freedom, Complainant, via email only

ER416

APPENDIX 2
RESPONSE TO MOTION FOR
PRELIMINARY INJUNCTION (Dkt. 22)
Hecox, et al. v. Little, et al.
Case No. 1:20-cv-00184-DCN



HEALTH EXAMINATION *and* CONSENT FORM

It is required all students complete a history and physical examination prior to his/her first 9th and 11th grade practice in the interscholastic (9-12) athletic program in the State of Idaho. The exam is at the expense of the student and may not be taken prior to May 1 of the 8th and 10th grade years. This examination is to be done by a licensed physician, physician's assistant or nurse practitioner under optimal conditions. Interim history forms are required during the 10th and 12th grade years and must be submitted to the school administration prior to the first practice.

Name: _____ Sex: M / F Date of birth: _____ Age: _____
 Address: _____ Phone: _____
 School: _____ Sports: _____ Participation Grade: _____

MEDICAL HISTORY

- Fill in details of "YES" answers in space below:
- | | Yes | No | | Yes | No |
|---|--------------------------|--------------------------|--|--------------------------|--------------------------|
| 1. Have you ever been hospitalized? | <input type="checkbox"/> | <input type="checkbox"/> | 6. Have you ever had a head injury? | <input type="checkbox"/> | <input type="checkbox"/> |
| Have you ever had surgery? | <input type="checkbox"/> | <input type="checkbox"/> | Have you ever been knocked out or unconscious? | <input type="checkbox"/> | <input type="checkbox"/> |
| 2. Are you presently taking any medication or pills? | <input type="checkbox"/> | <input type="checkbox"/> | Have you ever been diagnosed with a concussion? | <input type="checkbox"/> | <input type="checkbox"/> |
| 3. Do you have any allergies (medicine, bees, other insects)? | <input type="checkbox"/> | <input type="checkbox"/> | Have you ever had a seizure? | <input type="checkbox"/> | <input type="checkbox"/> |
| 4. Have you ever passed out during or after exercise? | <input type="checkbox"/> | <input type="checkbox"/> | Have you ever had a stinger, burned or pinched nerve? | <input type="checkbox"/> | <input type="checkbox"/> |
| Have you ever been dizzy during or after exercise? | <input type="checkbox"/> | <input type="checkbox"/> | 7. Have you ever had heat or muscle cramps? | <input type="checkbox"/> | <input type="checkbox"/> |
| Have you ever had chest pain during or after exercise? | <input type="checkbox"/> | <input type="checkbox"/> | Have you ever been dizzy or passed out in the heat? | <input type="checkbox"/> | <input type="checkbox"/> |
| Do you tire more quickly than your friends during exercise? | <input type="checkbox"/> | <input type="checkbox"/> | 8. Do you have trouble breathing or do you cough during or | | |
| Have you ever had high blood pressure? | <input type="checkbox"/> | <input type="checkbox"/> | after exercise? | <input type="checkbox"/> | <input type="checkbox"/> |
| Have you been told you have a heart murmur? | <input type="checkbox"/> | <input type="checkbox"/> | 9. Do you use special equipment (pads, braces, neck rolls, | | |
| Have you ever had racing of your heart or skipped heartbeats? | <input type="checkbox"/> | <input type="checkbox"/> | mouth guard or eye guards, etc.)? | <input type="checkbox"/> | <input type="checkbox"/> |
| Has anyone in your family died of heart problems or a sudden | | | 10. Have you ever had problems with your eyes or vision? | <input type="checkbox"/> | <input type="checkbox"/> |
| death before age 50? | <input type="checkbox"/> | <input type="checkbox"/> | Do you wear glasses, contacts or protective eyewear? | <input type="checkbox"/> | <input type="checkbox"/> |
| 5. Do you have any skin problems (itching, rash, acne)? | <input type="checkbox"/> | <input type="checkbox"/> | 11. Have you had any other medical problems (infectious | | |
| | | | mononucleosis, diabetes, ect.)? | <input type="checkbox"/> | <input type="checkbox"/> |
12. Have you had a medical problem or injury since your last evaluation? Yes No
13. Have you ever sprained/strained, dislocated, fractured, broken or had repeated swelling or other injuries of any of bones or joints?
 head back shoulder forearm hand hip knee ankle
 neck chest elbow wrist finger thigh shin foot
14. Were you born without a kidney, testicle, or any other organ? Yes No
15. When was your first menstrual period? _____
 When was your last menstrual period? _____
 What was the longest time between your periods last year? _____

Explain "YES" answers: _____

CONSENT FORM

(Parent or guardian and student permission and approval)

I herby consent to the above named student participating in the interscholastic athletic program at his/her school of attendance. This consent includes travel to and from athletic contests and practice sessions. I further consent to treatment deemed necessary by physicians designated school authorities for any illness or injury resulting from his/her athletic participation. I also consent to release of any information contained in this form to carry out treatment and healthcare operations for the above named student.

If the health care provider's exam will be performed without compensation as part of the school's health examination program for participation in high school activities, I agree to the waiver provisions as set forth in Idaho Code Section 39-7703 and agree that the health care provider shall be immune from liability as specified in said section.

PARENT OR GUARDIAN SIGNATURE _____ DATE: _____

This application to compete in interscholastic athletics for the above school is entirely voluntary on my part and is made with the understanding that I have not violated any of the eligibility rules and regulation of the State Association.

SIGNATURE OF STUDENT _____ DATE: _____

Idaho High School Activities Association Physical Examination Form

Name: _____ Date of Birth: _____

Height _____	Weight _____	BP _____ / _____	Pulse _____
Vision R 20 / _____ L 20 / _____		Corrected: Y N	
	Normal	Abnormal findings	
Medical			
Pulses			
Heart			
Lungs			
Skin			
Ears, nose, throat			
Pupils			
Abdomen			
Genitalia (males)			
Musculoskeletal			
Neck			
Shoulder			
Elbow			
Wrist			
Hand			
Back			
Knee			
Ankle			
Foot			
Other			

CLEARANCE / RECOMMENDATIONS

Clearance:

- A. Cleared for all sports and other school-sponsored activities.
- B. Cleared after completing evaluation/rehabilitation for:

- C. NOT cleared to participate in the following IHSAA sponsored sports /activities:
 baseball basketball cheer/dance cross country football golf
 soccer softball swimming tennis track volleyball wrestling
NOT cleared for other school-sponsored activities (*example: lacrosse*):

- D. Student is NOT permitted to participate in high school athletics.

Reason: _____

Recommendation:

Name of physician:

Address: _____ Phone: _____

Signature of physician/medical provider: _____ Date: _____

(This Physical Examination Form MUST be signed by a licensed physician, physician assistant or nurse practitioner)

LAWRENCE G. WASDEN
ATTORNEY GENERAL

STEVEN L. OLSEN, ISB #3586
W. SCOTT ZANZIG, ISB #9361
DAYTON P. REED, ISB #10775
Deputy Attorneys General
954 W Jefferson, 2nd Floor
P. O. Box 83720
Boise, ID 83720-0010
Telephone: (208) 334-2400
Facsimile: (208) 854-8073
steven.olsen@ag.idaho.gov
scott.zanzig@ag.idaho.gov
dayton.reed@ag.idaho.gov

Attorneys for Defendants

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO**

LINDSAY HECOX, and JANE DOE with
her next friends JEAN DOE and JOHN
DOE,

Plaintiffs,

v.

BRADLEY LITTLE, in his official
capacity as Governor of the State of Idaho,
et al.,

Defendants.

Case No. 1:20-cv-00184-DCN

**EXPERT DECLARATION OF
GREGORY A. BROWN, Ph.D. FACSM**

I, Dr. Gregory A. Brown, declare as follows:

Qualifications

1. I serve as Professor of Exercise Science in the Department of Kinesiology and Sport Sciences at the University of Nebraska Kearney. I have served as a tenured (and non-tenured) professor at universities since 2002.

2. I teach classes in Exercise Physiology and in Research Methods. I have previously taught courses in Human Anatomy & Physiology and in Sports Nutrition.

3. In August 2002, I received a Doctor of Philosophy degree from Iowa State University, where I majored in Health and Human Performance, with an emphasis in the Biological Bases of Physical Activity. In May 1999, I received a Master of Science degree from Iowa State University, where I majored in Exercise and Sport Science, with an emphasis in Exercise Physiology.

4. I have received many awards over the years, including the Mortar Board Faculty Excellence Honors Award, College of Education Outstanding Scholarship / Research Award, and the College of Education Award for Faculty Mentoring of Undergraduate Student Research.

5. I have authored more than 40 refereed publications and more than 50 refereed presentations in the field of Exercise Science. And I have served as a peer reviewer for over 25 professional journals, including The American Journal of Physiology, the International Journal of Exercise Science, the Journal of Strength and Conditioning Research, and The Journal of Applied Physiology.

6. My areas of research have included the endocrine response to testosterone prohormone supplements in men and women, the effects of testosterone prohormone supplements on health and the adaptations to strength training in men, the effects of energy drinks on the physiological response to exercise, and assessment of various athletic training modes in males and females. Articles that I have published that are closely related to topics that I discuss in this declaration, and to articles by other researchers that I cite and discuss in this declaration, include:

- a. Studies of the effect of ingestion of a testosterone precursor on circulating testosterone levels in young men. Douglas S. King, Rick L. Sharp, Matthew D. Vukovich, Gregory A. Brown, et al., *Effect of Oral Androstenedione on Serum Testosterone and Adaptations to Resistance Training in Young Men: A Randomized Controlled Trial*, JAMA 281: 2020-2028 (1999); G. A. Brown, M. A. Vukovich, et al., *Effects of Anabolic Precursors on Serum Testosterone Concentrations and Adaptations to Resistance Training in Young Men*, INT J SPORT NUTR EXERC METAB 10: 340-359 (2000).
- b. A study of the effect of ingestion of that same testosterone precursor on circulating testosterone levels in young women. G. A. Brown, J. C. Dewey, et al., *Changes in Serum Testosterone and Estradiol Concentrations Following Acute Androstenedione Ingestion in Young Women*, HORM METAB RES 36: 62-66 (2004).
- c. A study finding (among other things) that body height, body mass, vertical jump height, maximal oxygen consumption, and leg press maximal strength were higher in a group of physically active men than comparably active women, while the women had higher percent body fat. G. A. Brown, Michael W. Ray, et al., *Oxygen Consumption, Heart Rate, and Blood Lactate Responses to an Acute Bout of Plyometric Depth Jumps in College-Aged Men And Women*, J. STRENGTH COND RES 24: 2475-2482 (2010).
- d. A study finding (among other things) that height, body mass, and maximal oxygen consumption were higher in a group of male NCAA Division 2 distance runners, while women NCAA Division 2 distance runners had higher percent body fat. Furthermore, these male athletes had a faster mean competitive running speed (~3.44 min/km) than women (~3.88 km/min), even though the men ran 10 km while the women ran 6 km. Katherine Semin, Alvah C. Stahlnecker, Kate A. Heelan, G. A. Brown, et al,

Discrepancy Between Training, Competition and Laboratory Measures of Maximum Heart Rate in NCAA Division 2 Distance Runners, JOURNAL OF SPORTS SCIENCE AND MEDICINE 7: 455-460 (2008).

7. I attach a copy of my current Professional Vita, which lists my education, appointments, publications, research, and other professional experience. I am also currently providing expert information on a case similar to this one in the state of Connecticut.

8. I have been asked by counsel for defendants in the matter of *Hecox et al. v. Little et al.* to offer my opinions about whether males have inherent advantages in athletic performance over females, and if so the scale and physiological basis of those advantages, to the extent currently understood by science. I have also been asked to offer my opinion as to whether the sex-based performance advantage enjoyed by males is eliminated if feminizing hormones are administered to male athletes who identify as transgender.

9. The opinions in this declaration are my own, and do not necessarily reflect the opinions of my employer, the University of Nebraska.

10. I have been compensated for my time spent in preparing this declaration at the rate of \$150 per hour, and may be further compensated for time spent in subsequent testimony in this action.

Overview

11. Based on my professional familiarity with exercise physiology and my review of the currently available science, including that contained in the sources I cite in this declaration, and the competition results and records presented here, I offer three primary professional opinions:

a. At the level of elite, college, high school, and recreational competition, men or boys have an advantage over comparably aged women or girls, in almost all athletic contests;

b. Biological male physiology and anatomy is the basis for the performance advantage that men or boys have over women or girls, in almost all athletic contests; and

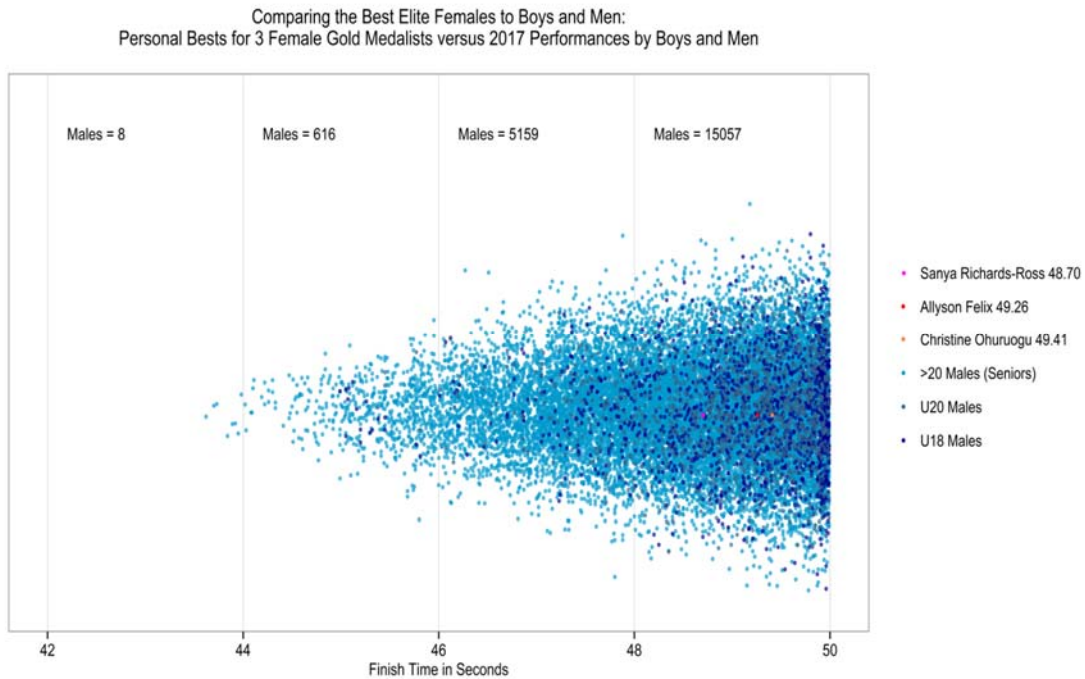
c. Administration of androgen inhibitors and cross-sex hormones to men, or adolescent boys, after male puberty, and administration of testosterone to women or adolescent girls, after female puberty, does not eliminate the performance advantage of men or adolescent boys over women or adolescent girls in almost all athletic contests.

In this declaration, I also provide supporting details, facts, and opinions relating to each of these primary opinions. Each of these opinions is based on my general professional expertise and experience, as well as on particular academic articles, and the competition results and records, that I refer to herein.

12. In short summary, men, and adolescent boys, perform better in almost all sports than women, and adolescent girls, because of their inherent physiological advantages that develop during male puberty. In general, men, and adolescent boys, can run faster, output more physical power, jump higher, and exercise greater physical endurance than women, and adolescent girls.

13. Indeed, while after the onset of puberty males are on average taller and heavier than females, a male performance advantage over females has been measured in weightlifting competitions even between males and females matched for body mass.

14. These performance advantages are also very substantial, such that large numbers of men and even adolescent boys are able to outperform the very top-performing women. To illustrate, Doriane Coleman, Jeff Wald, Wickliffe Shreve, and Richard Clark created the figure below (last accessed on Monday, December 23, 2019 at <https://bit.ly/35yOyS4>), which shows that the *lifetime best performances* of three female Olympic champions in the 400m event—including Team USA’s Sanya Richards-Ross and Allyson Felix—would not match the performances of literally thousands of boys and men, *just in 2017 alone*, including many who would not be considered top tier male performers:



15. Coleman and Shreve also created the table below (last accessed on Monday, December 23, 2019 at <https://bit.ly/37E1s2X>), which “compares the number of boys—males under the age of 18—whose results in each event in 2017 would rank them above the single very best elite [adult] woman that year:”

Event	Best Women’s Result	Best Boys’ Result	# of Boys Outperforming
100 Meters	10.71	10.15	124 ⁺
200 Meters	21.77	20.51	182
400 Meters	49.46	45.38	285
800 Meters	1:55.16*	1:46.3	201+
1500 Meters	3:56.14	3:37.43	101+
3000 Meters	8:23.14	7:38.90	30
5000 Meters	14:18.37	12:55.58	15
High Jump	2.06 meters	2.25 meters	28
Pole Vault	4.91 meters	5.31 meters	10
Long Jump	7.13 meters	7.88 meters	74
Triple Jump	14.96 meters	17.30 meters	47

16. Coleman and Shreve also created the table below (last accessed on Monday, December 23, 2019 at <https://bit.ly/37E1s2X>), which compares the number of men—males over 18—whose results in each event in 2017 would have ranked them above the very best elite woman that year.

Event	Best Women’s Result	Best Men’s Result	# of Men Outperforming
100 Meters	10.71	9.69	2,474
200 Meters	21.77	19.77	2,920
400 Meters	49.46	43.62	4,341
800 Meters	1:55.16*	1:43.10	3,992+
1500 Meters	3:56.14	3:28.80	3,216+
3000 Meters	8:23.14	7:28.73	1307+
5000 Meters	14:18.37	12:55.23	1,243
High Jump	2.06 meters	2.40 meters	777
Pole Vault	4.91 meters	6.00 meters	684
Long Jump	7.13 meters	8.65 meters	1,652
Triple Jump	14.96 meters	18.11 meters	969

17. These advantages result, in large part (but not exclusively), from higher testosterone concentrations in men, and adolescent boys, after the onset of male puberty. Higher testosterone levels cause men, and adolescent boys, to develop more muscle mass, greater muscle strength, less body fat, higher bone mineral density, greater bone strength, higher hemoglobin concentrations, larger hearts and larger coronary blood vessels, and larger overall statures than women, and adolescent girls. In addition, maximal oxygen consumption ($VO_2\max$), which correlates to ~30-40% of success in endurance sports, is higher in both elite and average men and boys than in comparable women and girls when measured in regards to absolute volume of oxygen consumed and when measured relative to body mass. Testosterone is also associated with increased aggressiveness, which may offer competitive advantages for men over women.

18. Although androgen deprivation may modestly decrease some physiological advantages that men and adolescent boys have over women and adolescent girls, it cannot fully eliminate those physiological advantages once an individual has passed through male puberty. For example, androgen deprivation does not reduce bone size, does not alter bone structure, and does not decrease lung volume or heart size. Nor does androgen deprivation in adult men completely reverse the increased muscle mass acquired during male puberty.

19. In this declaration, I present, in the headings marked with Roman numerals, certain of my opinions about sex-based differences in human physiology and the impact of those differences on the athletic performance of men and women. For each of these opinions, I then provide a brief overview, and a non-exhaustive summary of studies published in science journals or other respected sources that support and provide in part the basis of my opinion, also quoting relevant findings of each article.

20. In particular, in addition to the article by Coleman and Schreve that I discuss above, I cite twenty-two articles published in scientific journals. I provide capsule summaries of those articles below. These studies form part of the basis of the opinions I set forth in this declaration, which are also informed by my general professional expertise and experience. In support of the opinions I offer, I expect to explain and testify concerning the findings and conclusions of these articles that I detail in this declaration. I expect to use any or all of the tables and charts that I have reproduced in this declaration, as well as any other tables or charts contained in the articles I reference, to present and explain my opinions to the court.

a. The first resource I cite is David J. Handelsman, Angelica L. Hirschberg, et al., *Circulating Testosterone as the Hormonal Basis of Sex Differences in Athletic Performance*, 39:5 ENDOCRINE REVIEWS 803 (2018). This article correlates data about performance differences between males and females with data from over 15 liquid chromatography-mass spectrometry studies of circulating testosterone in adults, as a function of age. The authors conclude, among other things, that “[f]rom male puberty onward, the sex difference in athletic performance emerges as circulating concentrations rise as the testes produce 30 times more testosterone than before puberty, resulting in men having 15- to 20-fold greater circulating testosterone than children or women at any age.” (804)

b. The second resource I cite is Valérie Thibault, Marion Guillaume, et al., *Women & Men in Sport Performance: The Gender Gap Has Not Evolved Since 1983*, 9 J. OF SPORTS SCIENCE & MEDICINE 214 (2010). This article analyzes results from 82 athletic events since the beginning of the modern Olympic era, and concludes in part that while a wide sex-based performance gap existed before 1983, due to a likely combination

of physiological and non-physiological reasons, the sex-based performance gap stabilized in 1983, at a mean difference of $10.0\% \pm 2.94$ between men and women for all events.

(214)

c. The third resource I cite is Beat Knechtle, Pantelis T. Nikolaidis, et al., *World Single Age Records in Running from 5 km to Marathon*, 9 FRONTIERS IN PSYCHOLOGY 1 (2013). This article analyzes results from a study of the relationship between performance and age in races of several lengths, and reports in part that “[i]n all races [studied], women were significantly slower than men.” (7)

d. The fourth resource I cite is Romuald Lepers, Beat Knechtle, et al., *Trends in Triathlon Performance: Effects of Sex & Age*, 43 SPORTS MED 851 (2013). This article analyzes results from various triathlon events over the course of about 15 years, and reports in part a sex-based performance gap between the sexes of no less than 10% in every component event, with this sex-based performance gap increasing with age.

e. The fifth resource I cite is Espen Tønnessen, Ida Siobhan Svendsen, et al., *Performance Development in Adolescent Track & Field Athletes According to Age, Sex, and Sport Discipline*, 10:6 PLOS ONE 1 (2015). This article analyzes the 100 all-time best Norwegian male and female track and field results (in persons aged 11 to 18) from the 60m and 800m races, and the long jump and high jump events. The results show that sex-specific differences that arise during puberty significantly affect event results, with males regularly outperforming females after age 12.

f. The sixth resource I cite is David J. Handelsman, *Sex Differences in Athletic Performance Emerge Coinciding with the Onset of Male Puberty*, 87 CLINICAL ENDOCRINOLOGY 68 (2017). This article analyzes results from a secondary quantitative

analysis of four published sources that report performance measures in swimming meets, track and field events, and hand-grip strength. The results show in part that the onset and tempo of sex-based performance divergence were very similar for all performance measures, and that this divergence closely paralleled the rise of circulating testosterone in adolescent boys.

g. The seventh article I cite is Moran Gershoni & Shmuel Pietrokovski, *The landscape of sex-differential transcriptome and its consequent selection in human adults*, 15 BMC BIOL 7 (2017). This article details the results of an evaluation of the differences in genetic expression between men and women. The results show that in humans, out of 18,670 protein coding genes that were evaluated, over 6,500 are differentially expressed based on the sex of the person. The main relevance of this article to the case at hand is to help illustrate that the differences between males and females cannot be eliminated by reducing testosterone and increasing estrogen concentrations in a biological male.

h. The eighth article I cite is K. M. Haizlip, et al., *Sex-based differences in skeletal muscle kinetics and fiber-type composition*, 30 PHYSIOLOGY (BETHESDA) 30 (2015). This is a review article summarizing the findings of 56 other articles evaluating the differential expression of genes in skeletal muscles in males and females and how these differences in gene expression influence (among many things) muscle mass, muscle fiber type, and muscle function. The main relevance of this article to the case at hand is to help illustrate that the current scientific evidence indicates that the genetic differences in skeletal muscle size and function between males and females that give males an

athletic performance advantage cannot be eliminated by reducing testosterone and increasing estrogen concentrations in a biological male.

i. The ninth, tenth, and eleventh resources I cite are Konstantinos D. Tambalis, et al., *Physical fitness normative values for 6-18-year-old Greek boys and girls, using the empirical distribution and the lambda, mu, and sigma statistical method*, 16 EUR J SPORT SCI 736 (2016). Mark J. Catley & G. R. Tomkinson, *Normative health-related fitness values for children: analysis of 85347 test results on 9-17-year-old Australians since 1985*, 47 BR J SPORTS MED 98 (2013). Grant R. Tomkinson, et al., *European normative values for physical fitness in children and adolescents aged 9-17 years: results from 2 779 165 Eurofit performances representing 30 countries*, 52 BR J SPORTS MED 1445 (2018). Individually and combined these articles illustrate that boys as young as six years old perform better than comparable age matched girls in health related measures of physical fitness including strength, speed, endurance, and jumping ability. These advantages in health related measures of fitness translate to improved athletic performance in boys when compared to girls likely before and certainly during and after puberty.

j. The twelfth and thirteenth resources I cite are Daniel M. Fessler, et al., *Sexual dimorphism in foot length proportionate to stature*, 32 ANN HUM BIOL 44 (2005). Roshna E. Wunderlich & P. R. Cavanagh, *Gender differences in adult foot shape: implications for shoe design*, 33 MED SCI SPORTS EXERC 605 (2001). These articles evaluate and describe the differences in the feet of men and women, particularly noting that the differences between the sexes are not just a matter of stature but also include morphological traits that can influence runner performance.

k. The fourteenth, fifteenth, and sixteenth resources I cite are Daichi Tomita, et al., *A pilot study on the importance of forefoot bone length in male 400-m sprinters: is there a key morphological factor for superior long sprint performance?*, 11 BMC RES NOTES 583 (2018). Hiromasa Ueno, et al., *The Potential Relationship Between Leg Bone Length and Running Performance in Well-Trained Endurance Runners*, 70 J HUM KINET 165 (2019). Hiromasa Ueno, et al., *Association between Forefoot Bone Length and Performance in Male Endurance Runners*, 39 INT J SPORTS MED 275 (2018). Building upon the information from Fessler (2005) and Wunderlich (2001), these studies collectively illustrate that the length of the bones in the foot and lower leg can contribute to successful competitive running performance, which likely gives men a performance advantage over women in running due to the differences in lower limb sizes described by Fessler et al. (2005) and Wunderlich and Cavanaugh (2001).

l. The seventeenth resource I cite is Louis Gooren, *The Significance of Testosterone for Fair Participation of the Female Sex in Competitive Sports*, 13 ASIAN J. OF ANDROLOGY 653 (2011). This article highlights specific research that indicates pubertal testosterone increases result in significant physiological advantages for men and adolescent boys, compared to women and adolescent girls, after the onset of male puberty.

m. The eighteenth resource I cite is Taryn Knox, Lynley C. Anderson, et al., *Transwomen in Elite Sport: Scientific & Ethical Considerations*, 45 J. MED ETHICS 395 (2019). This article confirms from available science that higher testosterone levels provide an all-purpose benefit in sport, and that the current International Olympic Guidelines rule requiring males who identify as transgender to keep testosterone levels

under 10 nmol/L for one year does not eliminate (or even come close to eliminating) the performance advantage of their male physiology.

n. The nineteenth resource I cite is Louis J. G. Gooren & Mathijs C. M. Bunck, *Transsexuals & Competitive Sports*, 151 EUROPEAN J. OF ENDOCRINOLOGY 425 (2004). This article analyzes results from a study that compared pretreatment physiological measurements in 17 female-to-male transsexuals with the measurements after one year of cross-sexual treatment in 19 male-to-female transsexuals undergoing sex reassignment therapy. The results in part confirmed that androgen deprivation in male-to-female transsexuals decreases muscle mass to some extent but does not eliminate the male muscular advantage and does not reverse certain other effects of androgenization that had occurred during male puberty.

o. The twentieth resource I cite 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). This article analyzes the impact of (a) suppression of endogenous hormones and (b) hormone replacement therapy on metrics of transgender individuals including strength, muscle size, and radiological density. After 12 months, strength in male-to-female subjects did not decrease, and muscle volume remained higher in male-to-female subjects than in female-to-male subjects after the latter subjects had undergone 12 months of testosterone injections.

p. The twenty-first resource I cite is Miranda Scharff et al., *Change in Grip Strength in Trans People and Its Association with Lean Body Mass and Bone Density*, ENDOCRINE CONNECTIONS (2019) 8, 1020-1028. This article measured grip strength and multiple parameters of lean body mass and bone density in both male-to-female and

female-to-male populations across their first year of hormone therapy. After 12 months, “the median grip strength in [male-to-female] subjects still [fell] into the 95th percentile for age-matched females.”

q. The twenty-second resource I cite is Johanna Harper. *Race Times for Transgender Athletes*. *J Sporting Cultures and Identities* 6 (2019) 1. This article is oft cited as evidence supporting a lack of performance advantage for male-to-female transgender athletes. Herein I provide a critique of the methodological shortcomings of this study for the purpose of demonstrating the extreme lack of scientific validity or reliability of the results.

21. I explain my opinions and the results of these studies in more detail below.

Opinions

I. Biological men or boys have an advantage over women or girls, in almost all athletic contests.

22. As one team of researchers has recently written, “Virtually all elite sports are segregated into male and female competitions. The main justification is to allow women a chance to win, as women have major disadvantages against men who are, on average, taller, stronger, and faster and have greater endurance due to their larger, stronger, muscles and bones as well as a higher circulating hemoglobin level.” David J. Handelsman, Angelic L. Hirschberg, et al., *Circulating Testosterone as the Hormonal Basis of Sex Differences in Athletic Performance*, 39:5 *ENDOCRINE REVIEWS* 803 (2018).

23. In fact, biological men, and adolescent boys, substantially outperform comparably aged women, and adolescent girls, in competitions involving running speed, swimming speed, cycling speed, jumping height, jumping distance, and strength (to name a few, but not all, of the

performance differences). These performance advantages for men, and adolescent boys, are inherent to the biological differences between the sexes and are not due to social or cultural factors, as evidenced by minimal to no change in the percentage differences between males and females in world class and record setting performances in the past 40 years. In addition, a number of studies indicate that males' athletic advantages over females begin before puberty, and may be apparent as early as six years of age.

24. I highlight below key findings about male performance advantages from eighteen studies or datasets.

A. David J. Handelsman, Angelica L. Hirschberg, et al., *Circulating Testosterone as the Hormonal Basis of Sex Differences in Athletic Performance*, 39:5 ENDOCRINE REVIEWS 803 (2018):

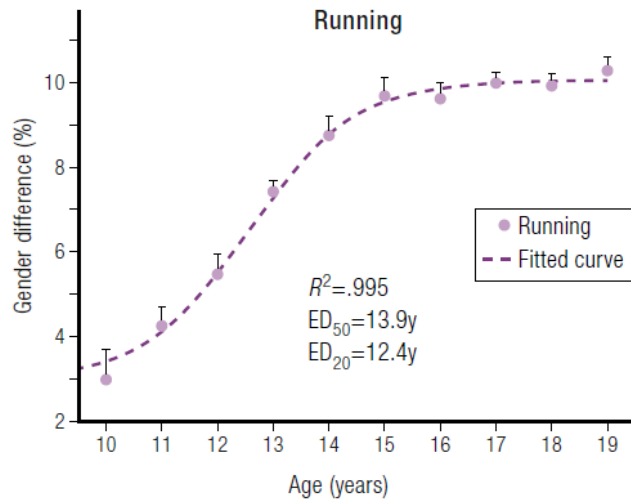
25. The Handelsman et al. (2018) authors demonstrate a consistent pattern of divergence of athletic performance, in favor of males, across the years of puberty and strongly correlating to increasing testosterone levels in adolescent males. The pattern is observed in events exercising a variety of muscle systems. In sum, the Handelsman et al. (2018) authors report: "Corresponding to the endogenous circulating testosterone increasing in males after puberty to 15 to 20 nmol/L (sharply diverging from the circulating levels that remain <2 nmol/L in females), male athletic performances go from being equal on average to those of age-matched females to 10% to 20% better in running and swimming events, and 20% better in jumping events." (812)

///

///

///

26. Taken from Handelsman’s Figure 1, the chart below indicates “sex differences in performance (in percentage) according to age (in years) in running events, including 50m to 2 miles.” (813)



27. Taken from Handelsman’s Figure 1, the chart below indicates “sex differences in performance (in percentage) according to age (in years) ... in jumping events, including high jump, pole vault, triple jump, long jump, and standing jump.” (813)

28. Taken from Handelsman’s Figure 1, the chart below indicates “a fitted sigmoidal curve plot of sex differences in performance (in percentage) according to age (in years) in running, jumping, and swimming events, as well as the rising serum testosterone concentrations from a large dataset of serum testosterone of males. Note that in the same dataset, female serum testosterone concentrations did not change over those ages, remaining the same as in prepubertal

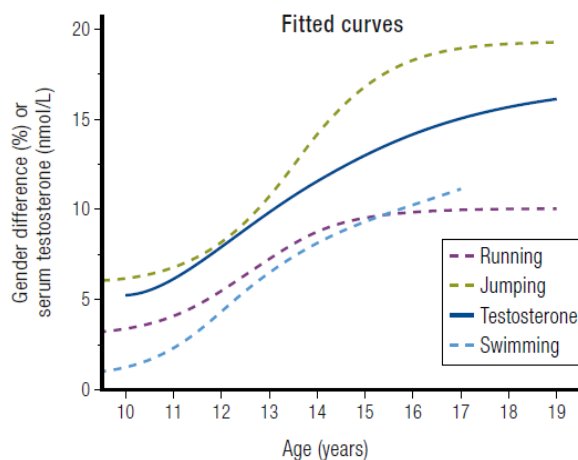
///

///

///

///

boys and girls. Data are shown as mean and SEM of the pooled sex differences by age.” (813)



29. These authors also note the significance, for athletic competition, of the subjective nature of “gender identity” in current understanding: “Prompted by biological, personal, and societal factors, volitional expression of gender can take on virtually any form limited only by the imagination, with some individuals asserting they have not just a single natal gender but two genders, none, a distinct third gender, or gender that varies (fluidly) from time to time....” For this reason, the authors conclude: “[I]f gender identity were the basis for eligibility for female sports, an athlete could conceivably be eligible to compete at the same Olympics in both female and male events. These features render the unassailable personal assertion of gender identity incapable of forming a fair, consistent sex classification in elite sports.” (804)

B. Valérie Thibault, Marion Guillaume, et al., *Women & Men in Sport Performance: The Gender Gap has not Evolved Since 1983*, 9 J. OF SPORTS SCIENCE & MEDICINE 214 (2010):

30. The Thibault et al. (2010) authors note that there was a large but narrowing sex-based performance gap between men’s and women’s Olympic athletic performances before 1983, which could hypothetically be attributed to a combination of social, political, or other non-physiological reasons, in addition to physiological reasons. However, “the gender gap in

Olympic sport performance has been stable since 1983” (219) “at a mean difference of $10.0\% \pm 2.94$ between men and women for all [Olympic] events.” (222)

31. Since then, even when performances improve, the “progressions are proportional for each gender.” (219-20)

32. The results of this study “suggest that women’s performances at the high level will never match those of men” (219) and that “women will not run, jump, swim or ride as fast as men.” (222) The authors conclude that this gap, now stable for 30+ years, is likely attributable to physiology, and thus that “[s]ex is a major factor influencing best performances and world records.” (222)

33. Breaking these performance advantages out by event, the authors report the following sex-based performance gaps in Olympic sport competitions since 1983:

a. “The gender gap ranges from 5.5% (800-m freestyle, swimming) to 36.8% (weightlifting).” (222)

b. Olympic world records in running events indicate that men perform “10.7% (± 1.85)” better than women since gender gap stabilization. (217)

c. Olympic world records in jumping events indicate that men perform “17.5% (± 1.11)” better than women since gender gap stabilization. (217)

d. Olympic world records in swimming events indicate that men perform “8.9 % (± 1.54)” better than women since gender gap stabilization. (218)

e. Olympic world records in cycling sprint events indicate that men perform “6.95% (± 0.16)” better than women since gender gap stabilization. (219)

f. Olympic world records in weightlifting events indicate that men perform “36.8% (± 6.2)” better than women since gender gap stabilization. Note that the

Olympics first introduced women’s weightlifting events in 1998, and “no breakpoint date has been detected yet.” (219)

34. “The top ten performers’ analysis reveals a similar gender gap trend with a stabilization in 1982 at 11.7%” when averaged across all events. (222)

C. Beat Knechtle, Pantelis T. Nikolaidis, et al., *World Single Age Records in Running from 5 km to Marathon*, 9 FRONTIERS IN PSYCHOLOGY 1 (2013):

35. A comparison of performances in races of a variety of distances showed that “[i]n all races, women were significantly slower than men. The estimated sex differences ... were increasing” as race distances increased from 8 km.¹

D. Romuald Lepers, Beat Knechtle, et al., *Trends in Triathlon Performance: Effects of Sex & Age*, 43 SPORTS MED 851 (2013):

36. Based on data from a variety of elite triathlon and ultra-triathlon events spanning 22 years, the Lepers et al. (2013) authors reported that “elite males appear to run approximately 10–12 % faster than elite females across all endurance running race distances up to marathon, with the sex difference narrowing as the race distance increases. However, at distances greater than 100 km, such as the 161-km ultramarathon, the difference seems even larger, with females 20–30 % slower than males.” (853)

///

///

///

///

///

¹ Throughout this declaration, in the interest of readability I have omitted internal citations from my quotations from the articles I cite. The sources cited by these authors may of course be found by reference to those articles.

37. Lepers and Knechtle Table 1 below shows the “[m]ean sex differences in time performance for swimming, cycling, running and total time at different national and international triathlons.” (854)

Event	Sex difference in time performance (%)			
	Swim	Cycle	Run	Total
Short distance (1.5–40–10 km): [30, 79]				
Zurich (Switzerland) from 2000 to 2010				
Top five elite overall	15.2	13.4	17.1	14.8
Top five AG, from 18 to 54 years	18.5	15.5	18.5	17.1
World Championship from 2009 to 2011				
Top ten AG, from 18 to 64 years	13.3	10.7	7.5	12.0
Half Ironman (1.9–90–21 km): [31, 79]				
Rapperswil (Switzerland) from 2007 to 2010				
Top five elite overall	14.1	12.3	12.5	12.6
Top five AG, from 18 to 54 years	22.3	16.4	19.2	17.6
World Championship from 2009 to 2011				
Top ten AG, from 18 to 64 years	12.4	11.2	14.5	12.6
Off-road triathlon (1.5–30–10 km): [9]				
World championship (Maui, USA) from 2007 to 2009				
Top ten elite overall	12.4	19.6	18.4	18.2
Ironman (3.8–180–42 km): [2, 32, 34]				
World championship (Kona, Hawaii, USA) from 1988 to 2007				
Top ten elite overall	9.8	12.7	13.3	12.6
Top ten AG, from 18 to 64 years	12.1	15.4	18.2	15.8
Zurich (Switzerland) from 1995 to 2010				
Top ten elite overall	14.0	13.2	18.2	14.9

38. “[F]or ultratriathlons, it has been shown that with increasing length of the event, the best females became relatively slower compared with the best males. Indeed, if the world’s best performances are considered, males were 19 % faster than the females in both Double and Triple Ironman distance, and 30 % faster in the Deca-Ironman distance.” (854)

39. “The average sex difference in swimming performance during triathlon for race distances between 1.5 and 3.8 km ranged between approximately 10 and 15 % for elite triathletes.” (854)

40. Lepers and Knechtle Table 2 below shows the “[m]ean percentage differences in times for swimming, cycling, running and total event between the top ten females and males ... in 2012 at four international triathlons:” (855)

Event	Sex difference in performance in top ten athletes in 2012 (mean \pm SD)			
	Swim	Cycle	Run	Total
Hawaii Ironman Triathlon (3.8–180–42 km)	14.1 \pm 7.9	13.1 \pm 2.3	7.3 \pm 2.9	11.3 \pm 0.5
Olympics Triathlon (1.5–40–10 km) with drafting	11.8 \pm 2.0	11.3 \pm 0.6	14.7 \pm 0.8	14.1 \pm 7.9
Hy-Vee Triathlon (1.5–40–10 km) without drafting	8.6 \pm 4.8	10.2 \pm 3.5	8.6 \pm 4.4	9.3 \pm 0.5
World Championship Off-Road Triathlon (1.5–30–10 km)	15.2 \pm 15.5	22.6 \pm 4.4	15.1 \pm 6.7	17.3 \pm 2.9

41. “[T]he sex difference in performance between the best male and female ultraswimmers is more generally close to 11–12 %, which corresponds to values observed for swimming in triathlon.” (855)

42. “Sex differences in triathlon cycling vary from 12 to 16% according to the level of expertise of participating triathletes for road-based triathlons.” (855)

43. “In track cycling, where females are generally weaker than males in terms of power/weight ratios, the performance gap between males and females appears to be constant (<11 %) and independent of the race distance from 200 to 1,000 m.” (855)

44. “In ultra-cycling events, such as the ‘Race Across America,’ sex difference in performance was around 15 % among top competitors. Greater muscle mass and aerobic capacity in males, even expressed relative to the lean body mass, may represent an advantage during long-distance cycling, especially on a relatively flat course such as Ironman cycling, where cycling approximates to a non-weight-bearing sport. Indeed, it has been shown that absolute power output (which is greater for males than for females) is associated with successful cycling

endurance performance because the primary force inhibiting forward motion on a flat course is air resistance.” (855-56)

45. “Interestingly, for elite triathletes, the sex difference in mountain bike cycling during off-road triathlon (<20 %) is greater than cycling sex differences in conventional road-based events. Mountain biking differs in many ways from road cycling. Factors other than aerobic power and capacity, such as off-road cycling economy, anaerobic power and capacity, and technical ability might influence off-road cycling performance. Bouts of high-intensity exercise frequently encountered during the mountain biking leg of off-road triathlon (lasting <1 h 30 min for elite males and <2 h for elite females) can result from (1) having to overcome the constraints of gravity associated with steep climbs, (2) variable terrain necessitating wider tires and thus greater rolling resistance, and (3) isometric muscle contractions associated with the needs of more skilled bike-handling skills, not so often encountered in road cycling. However, in particular, lower power-to-weight ratios for female than for male triathletes inevitably leave them at a disadvantage during steep climbs.” (856)

46. “During the 1988–2007 period, the top ten elite males have run the Hawaii Ironman marathon on average 13.3 % faster than the top ten females.” (856)

E. Espen Tønnessen, Ida Siobhan Svendsen, et al., *Performance Development in Adolescent Track & Field Athletes According to Age, Sex & Sport Discipline*, 10:6 PLoS ONE 1 (2015):

47. While both sexes increase performance across the teen years, the Tønnessen et al. (2015) authors found performance advantages for male athletes associated with the onset of puberty and becoming increasingly larger across the years of puberty, in a chronological progression that was closely similar across diverse track and field events.

48. “The current results indicate that the sex difference evolves from < 5% to 10–18% in all the analyzed disciplines from age 11 to 18 yr. The gap widens considerably during early adolescence before gradually stabilizing when approaching the age of 18. This evolution is practically identical for the running and jumping disciplines. The observed sex differences at the age of 18 are in line with previous studies of world-class athletes where a sex difference of 10–12% for running events and ~19% for jumping events has been reported.” (8)

49. “Male and female athletes perform almost equally in running and jumping events up to the age of 12. Beyond this age, males outperform females. Relative annual performance development in females gradually decreases throughout the analyzed age period. In males, annual relative performance development accelerates up to the age of 13 (for running events) or 14 (for jumping events) and then gradually declines when approaching 18 years of age. The relative improvement from age 11 to 18 was twice as high in jumping events compared to running events. For all of the analyzed disciplines, overall improvement rates were >50% higher for males than for females. The performance sex difference evolves from < 5% to 10-18% in all the analyzed disciplines from age 11 to 18 yr.” (1)

50. “Recent studies of world-class athletes indicate that the sex difference is 10–12% for running events and ~19% for jumping events.” (2)

///

///

///

///

///

///

51. Tønnessen and Svendsen’s Table 1 below shows the “[e]xpected progressions in running and jumping performance for 11-18 [year] old males and females,” as deduced from “[t]he 100 all-time best Norwegian male and female 60-m, 800-m, long jump and high jump athletes in each age category” (1, 4)

Table 1. Expected progressions in running and jumping performance for 11–18 yr old males and females.

Age (yr)	60 m		800 m		Long Jump		High Jump	
	Boys Progression (s and %)	Girls Progression (s and %)	Boys Progression (s and %)	Girls Progression (s and %)	Boys Progression m (%)	Girls Progression m (%)	Boys Progression m (%)	Girls Progression m (%)
11–12	-0.35 (4.1)	-0.35 (4.0)	-6.4 (4.4)	-7.3 (4.8)	+0.35 (7.4)	+0.36 (7.9)	+0.11 (7.4)	+0.10 (7.2)
12–13	-0.48 (5.8)	-0.25 (2.9)	-8.7 (6.2)	-5.5 (3.8)	+0.43 (8.6)	+0.30 (6.0)	+0.12 (7.9)	+0.09 (6.3)
13–14	-0.29 (3.7)	-0.16 (2.0)	-5.9 (4.5)	-3.6 (2.6)	+0.50 (9.0)	+0.21 (4.1)	+0.13 (8.1)	+0.06 (3.6)
14–15	-0.10 (1.3)	-0.02 (0.2)	-5.2 (4.1)	-2.2 (1.6)	+0.34 (5.6)	+0.13 (2.4)	+0.08 (4.3)	+0.04 (2.4)
15–16	-0.17 (2.3)	-0.08 (1.0)	-3.2 (2.7)	-1.6 (1.2)	+0.28 (4.4)	+0.10 (1.8)	+0.07 (3.6)	+0.03 (1.8)
16–17	-0.10 (1.4)	-0.07 (0.8)	-2.3 (1.9)	-1.5 (1.2)	+0.19 (2.9)	+0.06 (1.1)	+0.05 (2.5)	+0.01 (0.6)
17–18	-0.05 (0.7)	-0.02 (0.2)	-1.5 (1.4)	-0.6 (0.4)	+0.17 (2.5)	+0.02 (0.4)	+0.04 (1.9)	+0.01 (0.5)

Data are mean (standard deviation) for top 100 Norwegian male and female performers in each discipline.

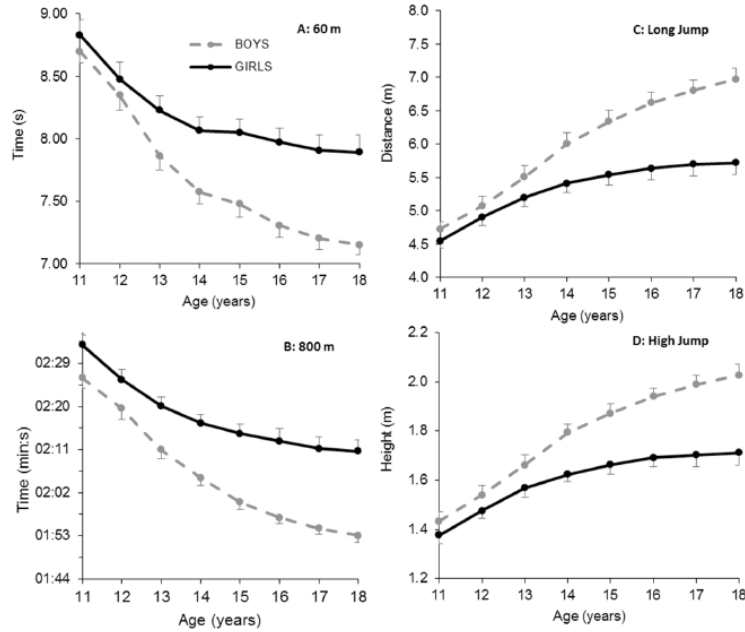
52. Tønnessen and Svendsen’s Table 2 below shows the “[s]ex ratio in running and jumping performance for 11-18 [year] old males and females,” as deduced from “[t]he 100 all-time best Norwegian male and female 60-m, 800-m, long jump and high jump athletes in each age category” (1, 6)

Table 2. Sex ratio in running and jumping performance for 11–18 yr old males and females.

	60 m	800 m	Long Jump	High Jump
11	0.99	0.95	0.96	0.97
12	0.98	0.96	0.97	0.96
13	0.96	0.93	0.94	0.95
14	0.94	0.92	0.90	0.90
15	0.93	0.89	0.87	0.89
16	0.92	0.88	0.85	0.87
17	0.91	0.87	0.84	0.85
18	0.91	0.86	0.82	0.84

Data are calculated from mean results of top 100 Norwegian male and female performers in each discipline.

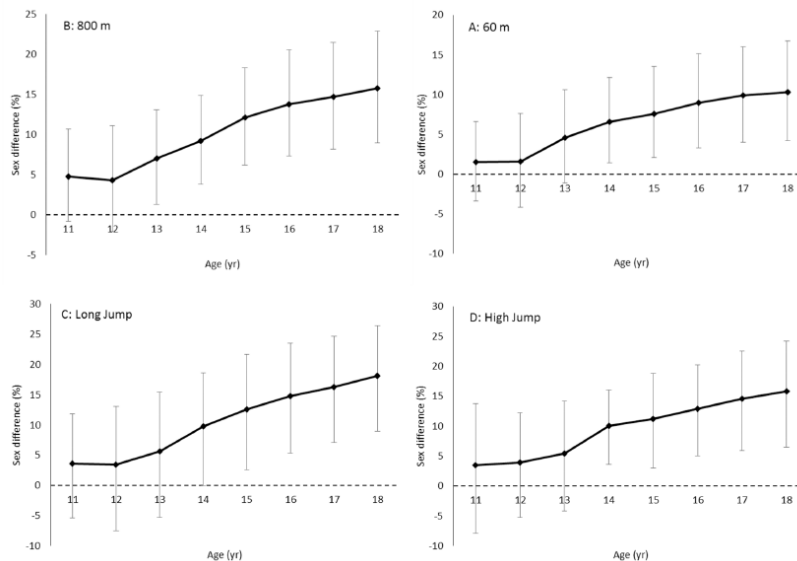
53. Tønnessen and Svendsen’s Figure 1 below shows “[p]erformance development from age 11 to 18 in running and jumping disciplines. Data are mean ± [standard deviation] for 60 m, 600 m, long jump, and high jump for top 100 Norwegian male and female performers in



each discipline:” (4)

///
 ///
 ///
 ///
 ///
 ///
 ///
 ///
 ///
 ///
 ///
 ///
 ///

54. Tønnessen and Svendsen’s Figure 3 below shows the “[s]ex difference for performance in running and jumping disciplines from age 11 to 18. Data are mean and 95% [confidence intervals] for 60 m, 600 m, long jump, and high jump for top 100 Norwegian male and female performers in each discipline.” (6)



55. As for the 60m race, the tables and charts above illustrate:

a. “[B]oys improve 0.3–0.5 [seconds] over 60 m sprint each year up to the age of 14 [years] (very large to nearly perfect annual effect), 0.1–0.2 [seconds] annually from 14 to 17 [years] (moderate to large annual effect), and 0.05 [seconds] from age 17 to 18 [years] (moderate effect). Relative annual improvement peaks between 12 and 13 [years] (5.8%; nearly perfect effect), and then gradually declines to 0.7% between age 17 and 18 [years] (moderate effect).” (3)

b. “On average, boys improve their 60 m performance by 18% from age 11 to 18 [years]. Girls improve 0.35 [seconds] over 60 m from age 11 to 12 [years] (4%; very large effect). Then, absolute and relative annual improvement gradually slows and almost plateaus between age 14 and 15 (0.02 s; 0.2%; trivial effect). From age 15 to 17,

annual improvement increases somewhat to 0.07–0.08 [seconds] (~1%; moderate effect) before plateauing again between age 17 and 18 (0.02 s; 0.2%; trivial effect). In total, girls improve their 60-m performance by 11% from age 11 to 18 [years].... [T]he sex difference for 60 m sprint evolves from 1.5% at age 11 to 10.3% at the age of 18.... [T]he sex ratio for 60 m running performance develops from 0.99 at age 11 to 0.91 at age 18.” (4-5)

56. As for the 800m race, the tables and charts above illustrate:

a. “[B]oys improve 6–9 [seconds] over 800 m each year up to age 14 [years] (very large to nearly perfect annual effect). Relative annual improvement peaks between age 12 and 13 (6.2%; nearly perfect effect), then gradually decreases to 1.5 [seconds] between age 17 and 18 (1.4%; moderate effect).” (5)

b. “On average, boys enhance their 800-m performance by 23% from age 11 to 18. For girls, both absolute and relative annual performance development gradually decreases across the analysed age stages. The improvement is slightly above 7 [seconds] between age 11 and 12 [years] (4.8%: very large effect), decreasing to only 0.6 [seconds] from age 17 to 18 (0.4%; small effect).... [G]irls enhance their 800-m performance by 15% from age 11 to 18. The 800 m performance sex difference evolves from 4.8% at the age of 11 to 15.7% at the age of 18.... [T]he sex ratio for 800 m running performance develops from 0.95 at age 11 to 0.86 at age 18.” (5)

57. As for the long jump, the tables and charts above illustrate:

a. “[A]nnual long jump improvement among boys gradually increases from 35 cm between age 11 and 12 [years] (7.4%; very large effect) to 50 cm between age 13

and 14 (9%; very large effect). Both absolute and relative annual development then gradually falls to 17 cm between age 17 and 18 (2.5%; moderate effect).” (5)

b. “[B]oys, on average, improve their long jump performance by 48% from age 11 to 18 yr. For girls, both absolute and relative annual performance enhancement gradually falls from age 11 to 12 [years] (36 cm; 7.9%; very large effect) until nearly plateauing between 17 and 18 [years] (2 cm; 0.4%; trivial effect). Overall, girls typically improve their long jump performance by 26% throughout the analysed age stages. The sex difference in long jump evolves from 3.6% at the age of 11 to 18% at the age of 18.... [T]he sex ratio for long jump performance develops from 0.96 at age 11 to 0.82 at age 18.” (5)

58. As for the high jump, the tables and charts above illustrate:

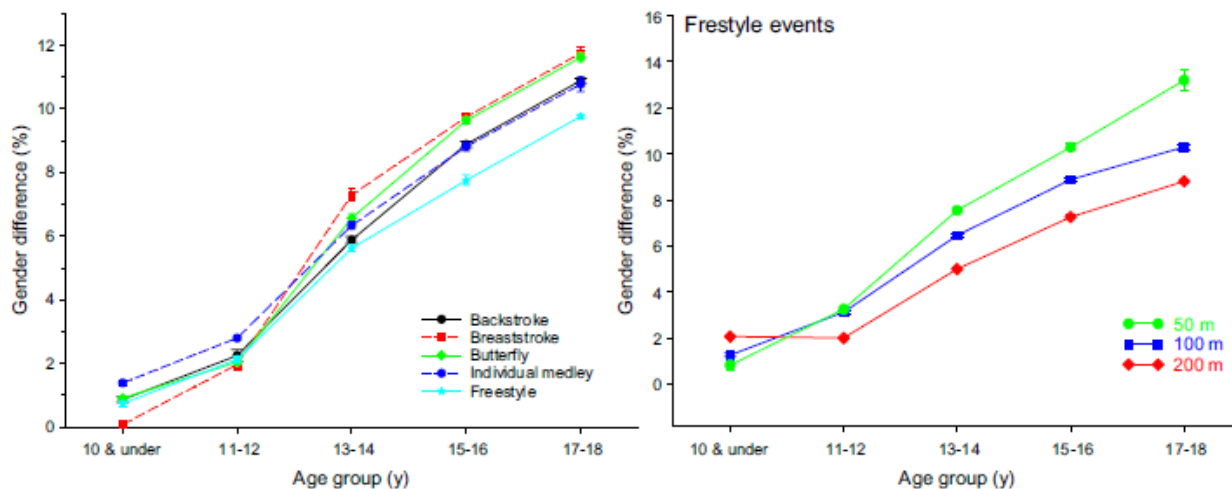
a. “[B]oys improve their high jump performance by 11–13 cm each year up to the age of 14 (7–8%; very large annual effects). Both absolute and relative annual improvement peaks between age 13 and 14 (13 cm; 8.1%; very large effect), then gradually decreases to 4 cm from age 17 to 18 (1.9%; moderate annual effect).” (6)

b. “Overall, boys improve their high jump performance by, on average, 41% from age 11 to 18. For girls, both absolute and relative annual improvement decreases from 10 cm from age 11 to 12 [years] (7.2%; very large effect) until it plateaus from age 16 (1 cm; ~0.5%; small annual effects). Overall, girls typically improve their high jump performance by 24% from age 11 to 18. The sex difference in high jump performance evolves from 3.5% at the age of 11 to 16% at the age of 18.... [T]he sex ratio for high jump performance develops from 0.97 at age 11 to 0.84 at age 18.” (6-7)

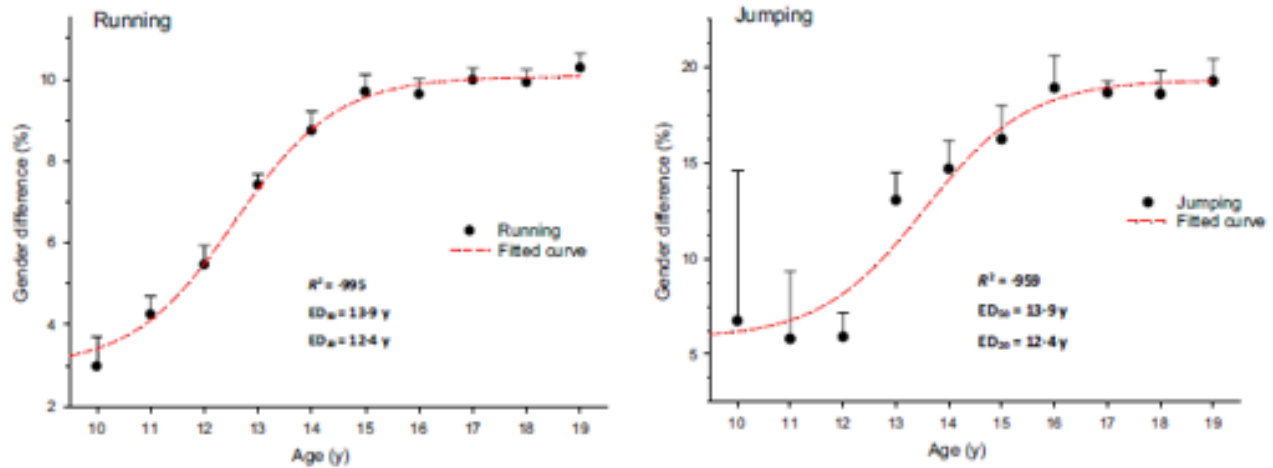
F. David J. Handelsman, *Sex Differences in Athletic Performance Emerge Coinciding with the Onset of Male Puberty*, 87 CLINICAL ENDOCRINOLOGY 68 (2017):

59. Analyzing four separate studies, Handelsman (2017) found very closely similar trajectories of divergence of athletic performance between the sexes across the adolescent years, in all measured events.

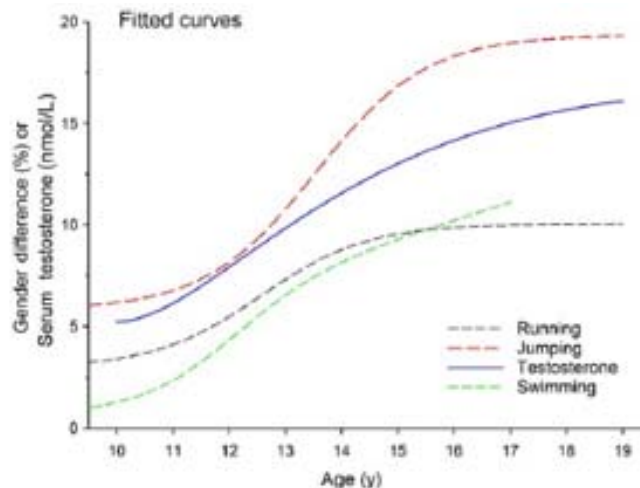
60. As illustrated by Figure 1 of Handelsman (2017) below, study results showed that “[i]n swimming performance, the overall gender differences were highly significant” (69)



61. As illustrated by Figure 2 of Handelsman (2017) below, “[i]n track and field athletics, the effects of age on running performance showed that the prepubertal differences of 3.0% increased to a plateau of 10.1% with an onset (ED₂₀) at 12.4 years and reaching midway (ED₅₀) at 13.9 years. For jumping, the prepubertal difference of 5.8% increased to 19.4% starting at 12.4 years and reaching midway at 13.9 years.” (70)



62. As also illustrated in Figure 2 of Handelsman (2017), the author found a strong correlation between the increasing male performance advantage and blood serum testosterone levels, and reported: “The timing of the male advantage in running, jumping and swimming was similar [across events] and corresponded to the increases in serum testosterone in males.” (70)



G. Moran Gershoni & Shmuel Pietrokovski, *The landscape of sex-differential transcriptome and its consequent selection in human adults*, 15 BMC BIOL 7 (2017):

63. The authors of this article evaluated “18,670 out of 19,644 informative protein-coding genes in men versus women” (2) and reported that “there are over 6500 protein-coding

genes with significant S[ex-]D[ifferential]E[xpression] in at least one tissue. Most of these genes have SDE in just one tissue, but about 650 have SDE in two or more tissues, 31 have SDE in more than five tissues, and 22 have SDE in nine or more tissues.” (2) Some examples of tissues identified by these authors that have SDE genes include breast mammary tissue, skeletal muscle, skin, thyroid gland, pituitary gland, subcutaneous adipose, lung, and heart left ventricle. Based on these observations the authors state “As expected, Y-linked genes that are normally carried only by men show SDE in many tissues.” (3) This evaluation of SDE in protein coding genes helps illustrate that the differences between men and women are intrinsically part of the chromosomal and genetic makeup of humans which can influence many tissues that are inherent to the athletic competitive advantages of men compared to women.

H. K. M. Haizlip, et al., Sex-based differences in skeletal muscle kinetics and fiber-type composition, 30 PHYSIOLOGY (BETHESDA) 30 (2015):

64. In a review of 56 articles on the topic of sex-based differences in skeletal muscle, the authors state that “More than 3,000 genes have been identified as being differentially expressed between male and female skeletal muscle [.]” (30) Furthermore, the authors state that “Overall, evidence to date suggests that skeletal muscle fiber-type composition is dependent on species, anatomical location/function, and sex.” (30) The differences in genetic expression between males and females influence the skeletal muscle fiber composition (i.e. fast twitch and fast twitch sub-type and slow twitch), the skeletal muscle fiber size, the muscle contractile rate, and other aspects of muscle function that influence athletic performance. As the authors review the differences in skeletal muscle between males and females they conclude “Additionally, all of the fibers measured in men have significantly larger cross-sectional areas (CSA) compared with women [.]” (31) The authors also explore the effects of thyroid hormone, estrogen, and

testosterone on gene expression and skeletal muscle function in males and females. One major conclusion by the authors is that “The complexity of skeletal muscle and the role of sex adding to that complexity cannot be overlooked.” (37).

- I. **Konstantinos D. Tambalis, et al., Physical fitness normative values for 6-18-year-old Greek boys and girls, using the empirical distribution and the lambda, mu, and sigma statistical method, 16 EUR J SPORT SCI 736 (2016). Mark J. Catley & G. R. Tomkinson, Normative health-related fitness values for children: analysis of 85347 test results on 9-17-year-old Australians since 1985, 47 BR J SPORTS MED 98 (2013). Grant R. Tomkinson, et al., *European normative values for physical fitness in children and adolescents aged 9-17 years: results from 2 779 165 Eurofit performances representing 30 countries.* 52 Br J Sports Med. 1445 (2018):**

65. The purpose in citing these sources is to illustrate that males possess physical fitness traits that likely provide an advantage in athletic performance, that these male advantages may be apparent in children starting as young as six years of age, and in agreement with previously cited sources the differences become more apparent at the onset of puberty.

66. Tambalis et al. (2016) states that “based on a large data set comprising 424,328 test performances” (736) using standing long jump to measure lower body explosive power, sit and reach to measure flexibility, timed 30 second sit ups to measure abdominal and hip flexor muscle endurance, 10 X 5 meter shuttle run to evaluate speed and agility, and multi-stage 20 meter shuttle run test to estimate aerobic performance (738) “For each of the fitness tests, performance was better in boys compared with girls ($p < 0.001$), except for the S[it and] R[each] test ($p < 0.001$).” (739) In order to illustrate that the findings of Tambalis (2016) are not unique to children in Greece, the authors state “Our findings are in accordance with recent studies from Latvia [] Portugal [] and Australia [Catley & Tomkinson (2013)].(744)

67. Catley & Tomkinson (2013) observed that “Boys consistently scored higher than girls on health-related fitness tests, except on the sit-and-reach test, with the magnitude of the

differences typically increasing with age and often accelerating from about 12 years of age. Overall, the magnitude of differences between boys and girls was large for the 1.6 km run, 20 m shuttle run, basketball throw and push-ups; moderate for the 50-m sprint, standing broad jump and sit-and-reach; and small for sit-ups and hand-grip strength.” (106)

68. Evaluating performance on the “Eurofit tests (measuring balance, muscular strength, muscular endurance, muscular power, flexibility, speed, speed-agility and cardiorespiratory fitness)” in “2,779,165 results on children and adolescents [ages 9-17 years] from 30 European countries” Tomkinson et al. (2018) observed that “On average, boys performed substantially better than girls at each age group on muscular strength (E[ffect]S[ize]: large), muscular power (E[ffect]S[ize]: large), muscular endurance (E[ffect]S[ize]: moderate to large), speed-agility (E[ffect]S[ize]: moderate) and C[ardio]R[espiratory]F[itness] (E[ffect]S[ize]: large) tests, with the magnitude of the sex-specific differences increasing with age and accelerating from about 12 years” (1451). Given the number of subjects analyzed and that the data represent 30 different European countries, these findings particularly highlight the sex related differences in athletic performance potential between boys and girls both before and during adolescence.

J. Daniel M. Fessler, et al., *Sexual dimorphism in foot length proportionate to stature*, 32 ANN HUM BIOL 44 (2005). Roshna E. Wunderlich & P. R. Cavanagh, *Gender differences in adult foot shape: implications for shoe design*, 33 MED SCI SPORTS EXERC (2001):

69. Combined, these two articles evaluate and demonstrate clear differences in the foot length and structure of men and women. Of relevance to the case at hand is that to the best of my knowledge, no data are available demonstrating that male-to-female transgender hormone or surgical treatment alters the inherent sex related difference in foot structure.

70. Fessler et al. (2005) observes that “female foot length is consistently smaller than male foot length” (44) and conclude that “proportionate foot length is smaller in women”(51) with an overall conclusion that “Our analyses of genetically disparate populations reveal a clear pattern of sexual dimorphism, with women consistently having smaller feet proportionate to stature than men.” (53)

71. Wunderlich & Cavanaugh (2001) observe that “a foot length of 257 mm represents a value that is ... approximately the 20th percentile men’s foot lengths and the 80th percentile women’s foot lengths.” (607) and “For a man and a woman, both with statures of 170 cm (5 feet 7 inches), the man would have a foot that was approximately 5 mm longer and 2 mm wider than the woman” (608). Based on these, and other analyses, they conclude that “female feet and legs are not simply scaled-down versions of male feet but rather differ in a number of shape characteristics, particularly at the arch, the lateral side of the foot, the first toe, and the ball of the foot.” (605)

K. Daichi. Tomita, et al., *A pilot study on the importance of forefoot bone length in male 400-m sprinters: is there a key morphological factor for superior long sprint performance?*, 11 BMC RES NOTES 583 (2018). Hiromasa Ueno, et al., *The Potential Relationship Between Leg Bone Length and Running Performance in Well-Trained Endurance Runners*, 70 J HUM KINET 165 (2019). Hiromasa Ueno, et al., *Association between Forefoot Bone Length and Performance in Male Endurance Runners*, 39 INT J SPORTS MED 275 (2018):

72. As men have longer feet and legs than women as part of their overall larger body stature, collectively these articles build upon the work of Fessler et al. (2005) and Wunderlich & Cavanaugh (2001) by providing some evidence that “morphological factors such as long forefoot bones may play an important role in achieving superior long sprinting performance” (Tomito, 583), “longer forefoot bones may be advantageous for achieving higher running performance in

endurance runners” (Ueno 2018, 275)” and “the leg bone length, especially of the tibia, may be a potential morphological factor for achieving superior running performance in well-trained endurance runners.” (Ueno 2019, 165)

L. International Weightlifting Federation “World Records”

73. I accessed weightlifting records as posted by the International Weightlifting Federation at <https://www.iwf.net/results/world-records/>. The records collected below are as of November 1, 2019.

74. As the chart below illustrates, junior men’s and women’s world records (age 15-20) for clean and jerk lifts indicate that boys or men perform better than girls or women even when they are matched for body mass. Similar sex differences can be found for the snatch event on the International Weightlifting Federation website.

Junior Men’s and Women’s World Records (ages 15-20) for Clean and Jerk			
Men’s weight (kg)	Record (kg)	Women’s weight (kg)	Record (kg)
56	171	58	142
62	183	63	147
69	198	69	157
77	214	75	164
85	220	90	160
94	233	+90	193

M. Selected Results from the 2019 NCAA Division 1 and Division 2 Track & Field Championships

75. I accessed the results for the NCAA 2019 Division 1 Track and Field Championships at <https://www.flotrack.org/results/6515701-2019-D1-ncaa-outdoor-championships/26635> on May 14, 2020. I also accessed the results for the NCAA Divisions 2 Track and Field Championships at <http://leonetiming.com/2019/Outdoor/NCAAD2/Results.htm> on May 14, 2020.

76. As shown in the table below, in this small sampling of Track & Field events at the elite collegiate level of Division 1, the men's eighth place finisher and often all 24 men's qualifiers, outperformed the first place women's athlete in the same event. Furthermore, at the Division 2 level, which is arguably a less elite level of performance than Division 1, in most (if not all) events, the top eight men's finishers outperformed the first place division 1 woman in the same event.

Comparison of selected performance in Men's and Women's events in the 2019 NCAA Division 1 and Division 2 Track and Field Championships.		
100 meter run (seconds)		
D1 Women	D1 Men	D2 Men
10.75	9.86	10.17
10.95	9.93	10.22
10.98	9.97	10.32
11.00	10.01	10.38
11.02	10.06	10.47
11.04	10.06	10.48
11.12	10.12	10.53
11.65	10.12	FS
D1 Men's slowest time in 100 m prelims: 10.67 (23 rd place; 24 th place DNS)		
D1 Women's fastest time in 100 m prelims: 10.99		
1500 m run (minutes: seconds)		
D1 Women	D1 Men	D2 Men
4:05.98	3:41.39	3:58.24
4:06.27	3:41.39	3:58.74
4:11.96	3:42.14	3:58.90
4:13.02	3:42.29	3:59.02
4:13.57	3:42.32	3:59.47
4:13.62	3:42.73	3:59.55
4:14.30	3:42.77	3:59.65
4:14.73	3:42.81	3:59.93
D1 Men's slowest time in 1500 m prelims: 3:53.53 (24 th place)		
D1 Women's fastest time in 1500 m prelims: 4:12.02		
10,000 m run (minutes: Seconds)		
D1 Women	D1 Men	D2 Men
33:10.84	29:16.60	30:12.3
33:11.56	29:18.10	30:59.78

33:17.81	29:19.85	31:05.87
33:20.68	29:19.93	31:07.37
33:20.70	29:20.73	31:11.07
33:25.91	29:25.35	31:13.39
33:32.80	29:26.34	31:14.69
33:34.20	29:30.88	31:18.75
D1 Men's slowest time in 10,000 m prelims: 31:20.16 (24 th place)		
Long Jump (meters)		
D1 Women	D1 Men	DII Men
6.84	8.2	8.16
6.71	8.18	8.08
6.63	8.12	7.96
6.55	8.05	7.86
6.49	8.00	7.79
6.44	7.88	7.72
6.43	7.87	7.72
6.40	7.83	7.71
D1 Men's 21 st place longest jump 7.38 m (22 nd foul, 23 rd & 24 th DNS)		
Shot Put (meters)		
Note that men use 7.26 kg (16 lbs.) shot, women use 4 kg (8.82 lbs.) shot		
D1 Women	D1 Men	D II Men
18.14	21.11	21.47
18.11	20.77	19.58
17.88	20.31	18.71
17.67	19.89	18.62
17.46	19.73	18.43
17.24	19.65	18.34
17.13	19.65	18.30
16.94	19.52	18.03
D1 Men's 23 rd place longest put 16.90 m (24 th Foul)		

II. Biological male physiology is the basis for the performance advantage that men, or adolescent boys, have over women, or adolescent girls, in almost all athletic contests.

77. Common observation and knowledge tell us that, across the years of puberty, boys experience distinctive physical developments that largely explain the performance advantages I have detailed above. These well-known physical developments have now also been the subject of scientific measurement and study.

78. At the onset of male puberty the testes begin to secrete greatly increased amounts of testosterone. Testosterone is the primary “androgenic” hormone. It causes the physical traits associated with males such as facial and body hair growth, deepening of the voice, enlargement of the genitalia, increased bone mineral density, increased bone length in the long bones, and enhanced muscle growth (to name just a few of testosterone’s effects). The enhanced muscle growth caused by testosterone is the “anabolic” effect often discussed when testosterone is called an anabolic steroid.

79. Women lack testes and instead have ovaries, so they do not experience similar increases in testosterone secretion. Instead, puberty in women is associated with the onset of menstruation and increased secretion of “estrogens.” Estrogens, most notably estradiol, cause the feminizing effects associated with puberty in women which include increased fat tissue growth in the hips, thighs, and buttocks, development of the mammary glands, and closure of the growth plates in long bones. The smaller amount of muscle growth typically seen in women during puberty explains in part the athletic performance gap between men, and boys after the onset of puberty, and women and girls.

A. Handelsman, Hirschberg, et al. (2018):

80. In addition to documenting objective performance advantages enjoyed by males as I have reviewed above, Handelsman and his co-authors also detail physiological differences caused by male puberty—and by developments during puberty under the influence of male levels of testosterone in particular—that account for those advantages. These authors state: “The striking male postpubertal increase in circulating testosterone provides a major, ongoing, cumulative, and durable physical advantage in sporting contests by creating larger and stronger bones, greater muscle mass and strength, and higher circulating hemoglobin as well as possible

psychological (behavioral) differences. In concert, these render women, on average, unable to compete effectively against men in power-based or endurance-based sports.” (805)

81. First, Handelsman et al. explain that all of these physiological differences appear to be driven by male levels of circulating testosterone. “The available, albeit incomplete, 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. This is based on the dose-response effects of circulating testosterone to increase muscle mass and strength, bone size and strength (density), and circulating hemoglobin, each of which alone increases athletic capacity, as well as other possible sex dichotomous, androgen-sensitive contributors such as mental effects (mood, motivation, aggression) and muscle myoglobin content. These facts explain the clear sex difference in athletic performance in most sports, on which basis it is commonly accepted that competition has to be divided into male and female categories.” (823)

82. “Prior to puberty, levels of circulating testosterone as determined by LC-MS are the same in boys and girls They remain lower than 2 nmol/L in women of all ages. However, from the onset of male puberty the testes secrete 20 times more testosterone resulting in circulating testosterone levels that are 15 times greater in healthy young men than in age-similar women.” (806) “[T]he circulating testosterone of most women never reaches consistently >5 nmol/L, a level that boys must sustain for some time to exhibit the masculinizing effects of male puberty.” (808)

83. “The characteristic clinical features of masculinization (e.g., muscle growth, increased height, increased hemoglobin, body hair distribution, voice change) appear only if and when circulating testosterone concentrations rise into the range of males at mid-puberty, which

are higher than in women at any age even after the rise in circulating testosterone in female puberty.” (810)

84. “[The] order-of-magnitude difference in circulating testosterone concentrations is the key factor in the sex difference in athletic performance due to androgen effects principally on muscle, bone, and hemoglobin.” (811)

85. “Modern knowledge of the molecular and cellular basis for androgen effects on skeletal muscle involves effects due to androgen (testosterone, DHT) binding to the AR that then releases chaperone proteins, dimerizes, and translocates into the nucleus to bind to androgen response elements in the promoter DNA of androgen-sensitive genes. This leads to increases in (1) muscle fiber numbers and size, (2) muscle satellite cell numbers, (3) numbers of myonuclei, and (4) size of motor neurons. Additionally, there is experimental evidence that testosterone increases skeletal muscle myostatin expression, mitochondrial biogenesis, myoglobin expression, and IGF-1 content, which may augment energetic and power generation of skeletal muscular activity.” (811)

86. **Muscle mass** is perhaps the most obvious driver of male athletic advantage. “On average, women have 50% to 60% of men’s upper arm muscle cross-sectional area and 65% to 70% of men’s thigh muscle cross-sectional area, and women have 50% to 60% of men’s upper limb strength and 60% to 80% of men’s leg strength. Young men have on average a skeletal muscle mass of >12 kg greater than age-matched women at any given body weight. Whereas numerous genes and environmental factors (including genetics, physical activity, and diet) may contribute to muscle mass, the major cause of the sex difference in muscle mass and strength is the sex difference in circulating testosterone.” (812)

87. “Dose-response studies show that in men whose endogenous testosterone is fully suppressed, add-back administration of increasing doses of testosterone that produce graded increases in circulating testosterone causes a dose-dependent (whether expressed according to testosterone dose or circulating levels) increase in muscle mass (measured as lean body mass) and strength. Taken together, these studies prove that testosterone doses leading to circulating concentrations from well below to well above the normal male range have unequivocal dose-dependent effects on muscle mass and strength. These data strongly and consistently suggest that the sex difference in lean body mass (muscle) is largely, if not exclusively, due to the differences in circulating testosterone between men and women. These findings have strong implications for power dependent sport performance and largely explain the potent efficacy of androgen doping in sports.” (813)

88. “Muscle growth, as well as the increase in strength and power it brings, has an obvious performance enhancing effect, in particular in sports that depend on strength and (explosive) power, such as track and field events. There is convincing evidence that the sex differences in muscle mass and strength are sufficient to account for the increased strength and aerobic performance of men compared with women and is in keeping with the differences in world records between the sexes.” (816)

89. Men and adolescent boys also have distinct athletic advantages in **bone size, strength, and configuration.**

90. “Sex differences in height have been the most thoroughly investigated measure of bone size, as adult height is a stable, easily quantified measure in large population samples. Extensive twin studies show that adult height is highly heritable with predominantly additive genetic effects that diverge in a sex-specific manner from the age of puberty onwards, the effects

of which are likely to be due to sex differences in adult circulating testosterone concentrations.”
“Men have distinctively greater bone size, strength, and density than do women of the same age. As with muscle, sex differences in bone are absent prior to puberty but then accrue progressively from the onset of male puberty due to the sex difference in exposure to adult male circulating testosterone concentrations.” (818)

91. “The earlier onset of puberty and the related growth spurt in girls as well as earlier estrogen-dependent epiphyseal fusion explains shorter stature of girls than boys. As a result, on average men are 7% to 8% taller with longer, denser, and stronger bones, whereas women have shorter humerus and femur cross-sectional areas being 65% to 75% and 85%, respectively, those of men. These changes create an advantage of greater bone strength and stronger fulcrum power from longer bones.” (818)

92. **Male bone geometry** also provides mechanical advantages. “The major effects of men’s larger and stronger bones would be manifest via their taller stature as well as the larger fulcrum with greater leverage for muscular limb power exerted in jumping, throwing, or other explosive power activities.” (818) Further, “the widening of the female pelvis during puberty, balancing the evolutionary demands of obstetrics and locomotion, retards the improvement in female physical performance, possibly driven by ovarian hormones rather than the absence of testosterone.” (818)

93. Beyond simple performance, the greater density and strength of male bones provides higher protection against stresses associated with extreme physical effort: “[S]tress fractures in athletes, mostly involving the legs, are more frequent in females with the male protection attributable to their larger and thicker bones.” (818)

94. In addition to advantages in muscle mass and strength, and bone size and strength, men and adolescent boys have **greater hemoglobin levels** in their blood as compared to women and girls, and thus a greater capability to transport oxygen within the blood, which then provides bioenergetic benefits. “It is well known that levels of circulating hemoglobin are androgen-dependent and consequently higher in men than in women by 12% on average.... Increasing the amount of hemoglobin in the blood has the biological effect of increasing oxygen transport from lungs to tissues, where the increased availability of oxygen enhances aerobic energy expenditure.” (816) “It may be estimated that as a result the average maximal oxygen transfer will be ~10% greater in men than in women, which has a direct impact on their respective athletic capacities.” (816)

B. Louis Gooren, *The Significance of Testosterone for Fair Participation of the Female Sex in Competitive Sports*, 13 Asian J. of Andrology 653 (2011):

95. Gooren et al. like Handelsman et al., link male advantages in height, bone size, muscle mass, strength, and oxygen carrying capacity to exposure to male testosterone levels: “Before puberty, boys and girls hardly differ in height, muscle and bone mass. Pubertal testosterone exposure leads to an ultimate average greater height in men of 12–15 centimeters, larger bones, greater muscle mass, increased strength and higher hemoglobin levels.” (653)

C. Thibault, Guillaume, et al. (2010):

96. In addition to the testosterone-linked advantages examined by Handelsman et al. (2018), Thibault et al. note sex-linked differences in body fat as impacting athletic performance: “Sex has been identified as a major determinant of athletic performance through the impact of height, weight, body fat, muscle mass, aerobic capacity or anaerobic threshold as a result of genetic and hormonal differences [].” (214)

D. Taryn Knox, Lynley C. Anderson, et al., *Transwomen in Elite Sport: Scientific & Ethical Considerations*, 45 J. MED ETHICS 395 (2019):

97. Knox et al. analyze specific testosterone-linked physiological differences between men and women that provide advantages in athletic capability, and conclude that “[E]lite male athletes have a performance advantage over their female counterparts due to physiological differences.” (395) “Combining all of this information, testosterone has profound effects on key physiological parameters that underlie athletic performance in men. There is substantial evidence regarding the effects on muscle gain, bone strength, and the cardiovascular and respiratory system, all of which drive enhanced strength, speed and recovery. Together the scientific data point to testosterone providing an all-purpose benefit across a range of body systems that contribute to athletic performance for almost all sports.” (397-98)

98. “It is well recognised that testosterone contributes to physiological factors including body composition, skeletal structure, and the cardiovascular and respiratory systems across the life span, with significant influence during the pubertal period. These physiological factors underpin strength, speed and recovery with all three elements required to be competitive in almost all sports. An exception is equestrian, and for this reason, elite equestrian competition is not gender-segregated. As testosterone underpins strength, speed and recovery, it follows that testosterone benefits athletic performance.” (397)

99. “High testosterone levels and prior male physiology provide an all-purpose benefit, and a substantial advantage. As the IAAF says, ‘To the best of our knowledge, there is no other genetic or biological trait encountered in female athletics that confers such a huge performance advantage.’” (399)

100. These authors, like others, describe sex-linked advantages relating to **bone size and muscle mass**. “Testosterone also has a strong influence on bone structure and strength. From puberty onwards, men have, on average, 10% more bone providing more surface area. The larger surface area of bone accommodates more skeletal muscle so, for example, men have broader shoulders allowing more muscle to build. This translates into 44% less upper body strength for women, providing men an advantage for sports like boxing, weightlifting and skiing. In similar fashion, muscle mass differences lead to decreased trunk and lower body strength by 64% and 72%, respectively in women. These differences in body strength can have a significant impact on athletic performance, and largely underwrite the significant differences in world record times and distances set by men and women.” (397)

101. Knox et al. also identify the relatively higher percentage of **body fat** in women as both inherently sex-linked, and a disadvantage with respect to athletic performance. “Oestrogens also affect body composition by influencing fat deposition. Women, on average, have higher percentage body fat, and this holds true even for highly trained healthy athletes (men 5%–10%, women 8%–15%). Fat is needed in women for normal reproduction and fertility, but it is not performance enhancing. This means men with higher muscle mass and less body fat will normally be stronger kilogram for kilogram than women.” (397)

102. Knox et al. detail the relative performance disadvantage arising from the oestrogen-linked **female pelvis shape**: “[T]he major female hormones, oestrogens, can have effects that disadvantage female athletic performance. For example, women have a wider pelvis changing the hip structure significantly between the sexes. Pelvis shape is established during puberty and is driven by oestrogen. The different angles resulting from the female pelvis leads to decreased joint rotation and muscle recruitment ultimately making them slower.” (397)

103. “In short, higher testosterone levels lead to larger and stronger bones as well as more muscle mass providing a body composition-related performance advantage for men for almost all sports. In contrast, higher oestrogen levels lead to changes in skeletal structure and more fat mass that can disadvantage female athletes, in sports in which speed, strength and recovery are important.” (397)

104. Knox et al. break out multiple sex-linked contributions to a male advantage in **oxygen intake and delivery**, and thus to energy delivery to muscles. “Testosterone also influences the cardiovascular and respiratory systems such that men have a more efficient system for delivering oxygen to active skeletal muscle. Three key components required for oxygen delivery include lungs, heart and blood haemoglobin levels. Inherent sex differences in the lung are apparent from early in life and throughout the life span with lung capacity larger in men because of a lower diaphragm placement due to Y-chromosome genetic determinants. The greater lung volume is complemented by testosterone-driven **enhanced alveolar multiplication rate** during the early years of life.” (397)

105. “Oxygen exchange takes place between the air we breathe and the bloodstream at the alveoli, so more alveoli allows more oxygen to pass into the bloodstream. Therefore, the greater lung capacity allows more air to be inhaled with each breath. This is coupled with an improved uptake system allowing men to absorb more oxygen. Once in the blood, oxygen is carried by haemoglobin. Haemoglobin concentrations are directly modulated by testosterone so men have higher levels and can carry more oxygen than women. Oxygenated blood is pumped to the active skeletal muscle by the heart. The left ventricle chamber of the heart is the reservoir from which blood is pumped to the body. The larger the left ventricle, the more blood it can hold, and therefore, the more blood can be pumped to the body with each heartbeat, a

physiological parameter called ‘stroke volume’. The female heart size is, on average, 85% that of a male resulting in the stroke volume of women being around 33% less. Putting all of this together, men have a much more efficient cardiovascular and respiratory system, with testosterone being a major driver of enhanced aerobic capacity.” (397)

E. Lepers, Knechtle, et al. (2013):

106. Lepers et al. point to some of these same physiological differences as explaining the large performance advantage they found for men in triathlon performance. “Current explanations for sex differences in [maximal oxygen uptake] among elite athletes, when expressed relative to body mass, provide two major findings. First, elite females have more (<13 vs. <5 %) body fat than males. Indeed, much of the difference in [maximal oxygen uptake] between males and females disappears when it is expressed relative to lean body mass. Second, the hemoglobin concentration of elite athletes is 5–10 % lower in females than in males.” (853)

107. “Males possess on average 7–9 % less percent body fat than females, which is likely an advantage for males. Therefore, it appears that sex differences in percentage body fat, oxygen-carrying capacity and muscle mass may be major factors for sex differences in overall triathlon performance. Menstrual cycle, and possibly pregnancy, may also impact training and racing in female athletes, factors that do not affect males.” (853)

F. Tønnessen, Svendsen, et al. (2015):

108. Tønnessen et al. likewise point to some of the same puberty and testosterone-triggered physiological differences discussed above to explain the increasing performance advantage of boys across the adolescent years, noting that “[T]here appears to be a strong mechanistic connection between the observed sex-specific performance developments and hormone-dependent changes in body composition during puberty.” (7) “Beyond [age 12], males

outperform females because maturation results in a shift in body composition. Our results are in line with previous investigations exploring physical capacities such as [maximal oxygen uptake] and isometric strength in non-competitive or non-specialized adolescents.” (7)

109. “[S]ex differences in physical capacities (assessed as [maximal oxygen uptake] or isometric strength in the majority of cases) are negligible prior to the onset of puberty. During the adolescent growth spurt, however, marked sex differences develop. This can primarily be explained by hormone dependent changes in body composition and increased red blood cell mass in boys.” (2)

110. “Sexual dimorphism during puberty is highly relevant for understanding sex-specific performance developments in sports. The initiation of the growth spurt in well-nourished girls occurs at about 9–10 yrs of age. Age at peak height velocity (PHV) and peak weight velocity (PWV) in girls is 11–12 and 12–13 yrs, respectively, with an average 7–9 cm and 6–9 kg annual increase. The growth spurt and PHV in girls occurs approximately 2 years earlier than for boys. However, the magnitude of the growth spurt is typically greater in boys, as they on average gain 8–10 cm and 9–10 kg annually at PHV and PWV, respectively. Girls experience an escalation in fat mass compared to boys. Fat free mass (FFM) (also termed lean muscle mass) is nearly identical in males and females up to the age of 12–13 yrs. FFM plateaus in females at 15–16 years of age, but continues increasing in males up to the age of 19–20 yrs. On average, boys and girls increase their FFM by 7.2 and 3.5 kg/year⁻¹, respectively, during the interval near peak height velocity. Corresponding estimates for changes in absolute fat mass are 0.7 and 1.4 kg/year⁻¹, while estimates for relative fatness are -0.5% and +0.9%/year⁻¹ in boys and girls, respectively.” (2)

111. “During puberty, boys begin to produce higher levels of circulating testosterone. This affects the production of muscle fibers through direct stimulation of protein synthesis. Higher testosterone levels result in more muscle mass, which in turn facilitates greater power production and more advantageous ground reaction forces during running and jumping. Adolescent weight gain in boys is principally due to increased height (skeletal tissue) and muscle mass, while fat mass remains relatively stable. In contrast, during puberty girls begin to produce higher levels of circulating estrogen and other female sex hormones. Compared to their male counterparts, they experience a less pronounced growth spurt and a smaller increase in muscle mass, but a continuous increase in fat mass, thereby lowering the critical ratio between muscular power and total body mass.” (7)

112. “The relatively greater progress in jumping exercises can also be explained by growth and increased body height during puberty. The increase in body height means that the center of gravity will be higher, providing better mechanical conditions for performance in jumping events.” (8)

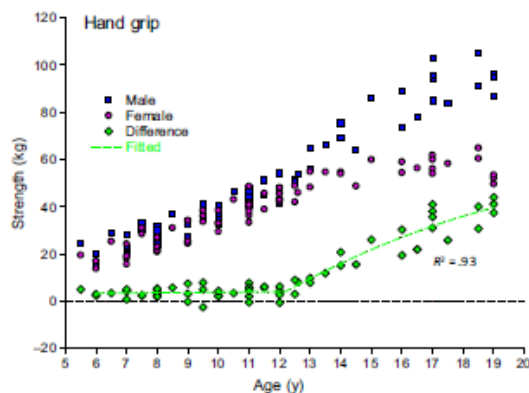
G. Louis J. G. Gooren & Mathijs C. M. Bunck, *Transsexuals & Competitive Sports*, 151 EUROPEAN J. OF ENDOCRINOLOGY 425 (2004):

113. In their study of performance of transsexual athletes, Louis et al. note that “[b]efore puberty, boys and girls do not differ in height, muscle and bone mass. Recent information shows convincingly that actual levels of circulating testosterone determine largely muscle mass and strength.” (425) “Testosterone exposure during puberty leads ultimately to an average greater height in men of 12–15 cm, larger bones and muscle mass, and greater strength.” (425)

H. Handelsman (2017):

114. Handelsman (2017) notes the existence of a “stable and robust” performance gap between males and females, with no narrowing “over more than three decades” (71), observing that “[i]t is well known that men’s athletic performance exceeds that of women especially in power sports because of men’s greater strength, speed and endurance. This biological physical advantage of mature males forms the basis for gender segregation in many competitive sports to allow females a realistic chance of winning events. 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. After completion of male puberty, circulating testosterone levels in men are consistently 10-15 times higher than in children or women at any age.” (68)

115. To illustrate, Figure 3 of Handelsman (2017) below indicates, “the age trends in hand-grip strength showed a difference in hand-grip strength commencing from the age of 12.8 years onwards (Figure 3). Prior to the age of 13 years, boys had a marginally significant greater grip strength than girls ($n=45$, $t=2.0$, $P=.026$), but after the age of 13 years, there was a strong significant relationship between age and difference in grip strength ($n=18$, $r=.89$, $P<.001$).” (70)



116. Handelsman (2017) in particular focuses on the correlation between the development of this performance gap and the progress of male adolescence and circulating testosterone levels in boys. “The strength of the present study is that it includes a wide range of swimming as well as track and field running and jumping events as well as strength for nonathletes for males and females across the ages spanning the onset of male puberty. The similar timing of the gender divergence in each of these settings to that of the rise in circulating testosterone to adult male levels strongly suggests that they all reflect the increase in muscular size and strength although the impact of other androgen-dependent effects on bone, haemoglobin and psychology may also contribute.” (71-72)

117. “In this study, the timing and tempo of male puberty effects on running and jumping performance were virtually identical and very similar to those in swimming events. Furthermore, these coincided with the timing of the rise in circulating testosterone due to male puberty. In addition to the strikingly similar timing and tempo, the magnitude of the effects on performance by the end of this study was 10.0% for running and 19.3% for jumping, both consistent with the gender differences in performance of adult athletes previously reported to be 10%-12% for running and 19% for jumping.” (71)

118. “In the swimming events, despite the continued progressive improvements in individual male and female event records, the stability of the gender difference over 35 years shown in this study suggests that the gender differences in performance are stable and robust.” (71)

119. “The similar time course of the rise in circulating testosterone with that of the gender divergences in swimming and track and field sports is strongly suggestive that these effects arise from the increase in circulating testosterone from the start of male puberty.” (71) “It

is concluded that the gender divergence in athletic performance begins at the age of 12-13 years and reaches adult plateau in the late teenage years. Although the magnitude of the divergence varies between athletic skills, the timing and tempo are closely parallel with each other and with the rise in circulating testosterone in boys during puberty to reach adult male levels.” (72)

120. Handelsman (2017) notes several specific physiological effects of male levels of circulating testosterone that are relevant to athletic performance:

a. “Adult male circulating testosterone also has marked effects on bone development leading to longer, stronger and denser bone than in age-matched females.” (71)

b. “A further biological advantage of adult male circulating testosterone concentrations is the increased circulating haemoglobin. Men have ~10 g/L greater haemoglobin than women with the gender differences also evident from the age of 13-14 years.” (71)

121. Handelsman (2017) also observes that “exposure to adult male testosterone concentrations is likely to produce some mental or psychological effects. However, the precise nature of these remains controversial and it is not clear whether, or to what extent, this contributes to the superior elite sporting performance of men in power sports compared with the predominant effects on muscle mass and function.” (71)

I. Centers for Disease Control & Prevention, “National Health Statistics Reports Number 122,” CDC (2018):

122. To obtain data on height, weight, and body mass differences between men and women, I accessed the “National Health Statistics Reports Number 122” published by the

Centers for Disease Control & Prevention, at <https://www.cdc.gov/nchs/data/nhsr/nhsr122-508.pdf>, which is based on data through 2016.

123. The average height for a U.S. adult man is 5 feet 9 inches and for a U.S. adult woman the average height is 5 feet 4 inches. (3)

124. The average weight for a U.S. adult man is 197.8 lbs. and for a U.S. adult woman the average weight is 170.5 lbs. (6)

125. The average body mass index for a U.S. adult man is 29.1 kg/m², and the average body mass index for a U.S. adult woman is 29.6 kg/m². (3)

III. Administration of cross-sex hormones to men, or adolescent boys, after male puberty does not eliminate their performance advantage over women, or adolescent girls, in almost all athletic contests.

126. At the collegiate level, the “NCAA Policy on Transgender Student-Athlete Participation” requires only that such males be on unspecified and unquantified “testosterone suppression treatment” for “one calendar year” prior to competing in women’s events.

127. Studies have demonstrated that hormone administration of testosterone suppression does not eliminate the physical advantages males have over females in athletics. Although such studies have not focused specifically on elite athletes, there is no scientific evidence or principle suggesting that the effects of hormone administration of testosterone suppression on elite athletes should be different than they are in the general population.

128. It is obvious that some effects of male puberty that confer advantages for athletic performance—in particular bone size and configuration—cannot be reversed once they have occurred.

129. In addition, some studies have now determined that other physiological advantages conferred by male puberty are also not fully reversed by later hormonal treatments

associated with gender transition. Specifically, studies have shown that the effects of puberty in males including increased muscle mass, increased bone mineral density, increased lung size, and increased heart size, are not completely reversed by suppressing testosterone secretion and administering estrogen during gender transition procedures in males.

130. For example, suppressing testosterone secretion and administering estrogen in post pubescent males does not shrink body height to that of a comparably aged female, nor does it reduce lung size or heart size. Indeed, while testosterone suppression and estrogen administration reduce the size and density of skeletal muscles, the muscles remain larger than would be expected in a typical female even when matched for body height or mass. A general tenet of exercise science is that larger muscles are stronger muscles due to larger muscles containing more contractile proteins. Thus, while gender transition procedures may impair a male's athletic potential, in my opinion it is still highly unlikely to be reduced to that of a comparably aged and trained female due to these physiological factors.

131. Supporting my opinion in this regard, at least two recent prospective studies involving substantial numbers of subjects have found that measured strength did not decrease, or decreased very little, in male-to-female subjects after a full year of hormone therapy including testosterone suppression, leaving these populations with a large strength advantage over baseline female strength.

132. I review relevant findings in more detail below.

A. Handelsman, Hirschberg, et al. (2018):

133. Handelsman et al. (2018) note that in “transgender individuals, the developmental effects of adult male circulating testosterone concentrations will have established the sex difference in muscle, hemoglobin, and bone, some of which is fixed and irreversible

(bone size) and some of which is maintained by the male circulating testosterone concentrations (muscle, hemoglobin).” (824)

134. “[D]evelopmental bone effects of androgens are likely to be irreversible.” (818)

135. With respect to muscle mass and strength, Handelsman et al. (2018) observe that suppression of testosterone in males to levels currently accepted for transgender qualification to compete in women’s events will still leave those males with a large strength advantage. “Based on the established dose-response relationships, suppression of circulating testosterone to <10 nmol/L would not eliminate all ergogenic benefits of testosterone for athletes competing in female events. For example, according to the Huang *et al.* [] study, reducing circulating testosterone to a mean of 7.3 nmol/L would still deliver a 4.4% increase in muscle size and a 12% to 26% increase in muscle strength compared with circulating testosterone at the normal female mean value of 0.9 nmol/L. Similarly, according to the Karunasena *et al.* [] study, reducing circulating testosterone concentration to 7 nmol/L would still deliver 7.8% more circulating hemoglobin than the normal female mean value. Hence, the magnitude of the athletic performance advantage in DSD athletes, which depends on the magnitude of elevated circulating testosterone concentrations, is considerably greater than the 5% to 9% difference observed in reducing levels to <10 nmol/L.” (821)

B. Gooren (2011):

136. In addition to noting that the length and diameter of bones is unchanged by post-pubertal suppression of androgens (including testosterone) (653), Gooren found that “[i]n spite of muscle surface area reduction induced by androgen deprivation, after 1 year the mean muscle surface area in male-to- female transsexuals remained significantly greater than in untreated

female-to-male transsexuals.” (653) “Untreated female-to-male transsexuals” refers to biological females, who will have hormonal levels ordinarily associated with women.

137. As I have explained above, greater muscle surface area translates into greater strength assuming comparable levels of fitness.

C. Knox, Anderson, et al. (2019):

138. In their recent article, Knox et al. reviewed the physiological effects of reducing circulating testosterone levels below 10nmol/L, the level current accepted by the International Olympic Committee (IOC) (2015) guidelines as adequate to permit males to enter as women in Olympic competition.

139. Knox et al. note the unarguable fact that 10nmol/L is a far higher level of circulating testosterone than occurs in women, including elite women athletes. “Transwomen [meet IOC guidelines] to compete with testosterone levels just under 10 nmol/L. This is more than five times the upper testosterone level (1.7 nmol/L) of healthy, premenopausal elite cis-women athletes. Given that testosterone (as well as other elements stemming from Y-chromosome-dependent male physiology) provides an all-purpose benefit in sport, suggests that transwomen have a performance advantage.” (398)

140. As to **bone strength**, Knox et al. report that a “recent meta-analysis shows that hormone therapy provided to transwomen over 2 years maintains bone density so bone strength is unlikely to fall to levels of cis-women, especially in an elite athlete competing and training at high intensity. Increased bone strength also translates into protection against trauma, helping with recovery and prevention of injury.” (398)

141. Based on a review of multiple studies, Knox et al. report that, in addition to bone size, configuration, and strength, “hormone therapy will not alter ... **lung volume or heart size**

of the transwoman athlete, especially if [that athlete] transitions postpuberty, so natural advantages including joint articulation, stroke volume and maximal oxygen uptake will be maintained.” (398)

142. With respect to **muscle mass and strength**, Knox et al. found that “healthy young men did not lose significant muscle mass (or power) when their circulating testosterone levels were reduced to 8.8 nmol/L (lower than the IOC guideline of 10 nmol/L) for 20 weeks. Moreover, retention of muscle mass could be compensated for by training or other ergogenic methods. In addition, the phenomenon of muscle memory means muscle mass and strength can be rebuilt with previous strength exercise making it easier to regain muscle mass later in life even after long intervening periods of inactivity and mass loss.” (398)

143. Indeed, Knox et al. observe that oestradiol—routinely administered as part of hormone therapy for transwomen—is actually known to *increase* muscle mass, potentially providing an *additional* advantage for these athletes over women. “While testosterone is the well-recognised stimulator of muscle mass gain, administration of oestradiol has also been shown to activate muscle gain via oestrogen receptor- β activation. The combination of oestradiol therapy and a baseline testosterone of 10 nmol/L arguably provides transwomen athletes with an added advantage of increased muscle mass, and therefore power.” (398)

144. Summing up these facts, Knox et al. observe: “A transwoman athlete with testosterone levels under 10 nmol/L for 1 year will retain at least some of the physiological parameters that underpin athletic performance. This, coupled with the fact that [under IOC rules] transwomen athletes are allowed to compete with more than five times the testosterone level of a cis-woman, suggests transwomen have a performance advantage.” (398) Indeed, considering the magnitude of the advantages involved, Knox et al. conclude that the physiological advantages

resulting from male puberty that are not negated by post-pubertal hormonal therapy “provide a strong argument that transwomen have an intolerable advantage over cis-women.” (399)

D. Gooren & Bunck (2004):

145. Measuring the concrete significance of the fact that bone size and configuration cannot be changed after puberty, Gooren and Bunck reported that “[Male-to-female transsexuals] were on average 10.7 cm taller (95% CI 5.4–16.0 cm) than [female-to-male transsexuals] (7).” (427)

146. With respect to muscle mass, Gooren and Bunck reported what other authors have since described in more detail: “After 1 year of androgen deprivation, mean muscle area in [male-to-female transsexuals] had decreased significantly but remained significantly greater than in [female-to-male transsexuals] before testosterone treatment.” (427) To be clear, female-to-male transsexuals “before testosterone treatment” are biological females with natural female hormone levels.

“The conclusion is that androgen deprivation in [male-to-female transsexuals] increases the overlap in muscle mass with women but does not reverse it, statistically.” (425) In other words, for the overall sample of 19 male-to female transsexuals, before (“ $306.9 \pm 46.5 \text{ cm}^2$ ”) and after (“ $277.8 \pm 37.0 \text{ cm}^2$ ”) 1 year of cross-sex hormone administration these subjects had statistically significantly more muscle mass than the 17 untreated females (“ $238.8 \pm 33.1 \text{ cm}^2$ ”) (427). Before treatment, an unstated number of male-to-female transsexuals on the low end of the range for muscle mass in this sample were similar to an unstated number of untreated females on the high end of the range for muscle mass. As the muscle mass decreased in male-to-female transsexuals due to cross-sex hormone treatment there were an unstated number of male-to-female subjects whose

muscle mass was similar to the untreated women on the high end of the range for muscle mass. But, the overlap in muscle mass between male-to-female and untreated female subjects was insufficient to alter the statistical analysis.

147. Gooren and Bunk provide an insightful conclusion regarding whether it is fair for male-to-female transgender individuals to compete with biological females “The question of whether reassigned M–F can fairly compete with [biological] women depends on what degree of arbitrariness one wishes to accept”. (425)

E. Wiik et al. (2020):

148. Taking measurements one month after start of testosterone-suppression in male-to-female subjects, and again 3 and 11 months after start of feminizing hormone replacement therapy in these subjects, Wiik et al. found that total lean tissue (i.e. primarily muscle) did not decrease significantly across the entire period. And even though they observed a small decrease in thigh muscle mass, they found that isometric strength levels measured at the knee “were maintained over the [study period].” (e808) “At T12 [the conclusion of the one-year study], the absolute levels of strength and muscle volume were greater in [male-to-female subjects] than in [female-to-male subjects] and CW [women who had not undergone any hormonal therapy].” (e808)

149. While female-to-male subjects “experienced robust changes in lower-limb muscle mass and strength” after 11 months of testosterone injection (e812), even after the female-to-male subjects had undergone testosterone injection, and the male-to-female subjects had undergone testosterone suppression and feminizing hormone replacement therapy, the male-to-female subjects “still had larger muscle volumes and quadriceps area” (e811).

150. In other words, biologically male subjects remained stronger than biologically female subjects after undergoing a year of testosterone suppression, and even remained stronger than biologically female subjects who had undergone 11 months of testosterone-driven “robust” increases in muscle mass and strength. I note that outside the context of transgender athletes, the testosterone-driven increase in strength enjoyed by these female-to-male subjects would constitute a disqualifying doping violation under all league anti-doping rules with which I am familiar.

F. Scharff et al. (2019):

151. Scharff et al. measured grip strength in a large cohort of male-to-female subjects from before the start of hormone therapy through one year of hormone therapy. The hormone therapy included suppression of testosterone to less than 2 nmol/L “in the majority of the transwomen,” (1024), as well as administration of estradiol (1021). These researchers observed a small decrease in grip strength in these subjects over that time, but mean grip strength of this group remained far higher than mean grip strength of females—specifically, “After 12 months, the median grip strength of transwomen [male-to-female subjects] still falls in the 95th percentile for age-matched females.” (1026)

152. As further evidence that male-to-female transgender treatment does not negate the inherent athletic performance advantages of a post-pubertal male, I present race times for the well-publicized sports performance of Cece Telfer. In 2016 and 2017 Cece Telfer competed as Craig Telfer on the Franklin Pierce University men’s track team being ranked 200th and 390th (respectively) against other NCAA Division 2 men and did not qualify for the National Championships in any events. Cece Telfer did not compete in the 2018 season while undergoing male-to-female transgender treatment (per NCAA policy). In 2019 Cece Telfer competed on the

Franklin Pierce University women's team, qualified for the NCAA Division 2 Track and Field National Championships, and placed 1st in the women's 400 meter hurdles and placed third in the women's 100 meter hurdles. (for examples of the media coverage of this please see

<https://www.washingtontimes.com/news/2019/jun/3/cece-telfer-franklin-pierce-transgender-hurdler-wi/> last accessed May 29, 2020.

<https://www.newshub.co.nz/home/sport/2019/06/athletics-transgender-woman-cece-telfer-who-previously-competed-as-a-man-wins-ncaa-track-championship.html> last accessed May 29, 2020.)

153. The table below shows the best collegiate performance times from the combined 2015 and 2016 seasons for Cece Telfer when competing as a man (Craig Telfer) in men's events, and the best collegiate performance times from the 2019 season when competing as a woman in women's event. Comparing the times for the running events (in which male and female athletes run the same distance) using a two tailed paired sample test there is no statistical difference (P=0.51) between the times. Calculating the difference in time between the male and female times for the best performances in the same running events and dividing that difference by the male performance times, as a female Cece Telfer performed an average of 0.22% *faster* as a female. (Comparing the performance for the hurdle events (marked with H) is of questionable validity due to differences between men's and women's events in hurdle heights and spacing, and distance for the 110m vs. 100 m.) While this is simply one example, and does not represent a controlled experimental analysis, this information provides some evidence that male-to-female transgender treatment does not negate the inherent athletic performance advantages of a post-pubertal male. (these times were obtained from

https://www.tfrs.org/athletes/6994616/Franklin_Pierce/CeCe_Telfer.html and <https://www.tfrs.org/athletes/5108308.html>, last accessed May 29, 2020)

As Craig Telfer (male athlete)		As Cece Telfer (female athlete)	
Event	Time (seconds)	Event	Time (seconds)
55	7.01	55	7.02
60	7.67	60	7.63
100	12.17	100	12.24
200	24.03	200	24.30
400	55.77	400	54.41
55 H †	7.98	55 H †	7.91
60 H †	8.52	60 H †	8.33
110 H †	15.17	100 H †	13.41*
400 H ‡	57.34	400 H ‡	57.53**

* women's 3rd place, NCAA Division 2 National Championships

** women's 1st place, NCAA Division I2 National Championships

† men's hurdle height is 42 inches with differences in hurdle spacing between men and women

‡ men's hurdle height is 36 inches, women's height is 30 inches with the same spacing between hurdles

G. Johanna Harper. (2015):

154. This article is oft cited as evidence supporting a lack of performance advantage for male-to-female transgender athletes (*for an example see the Expert Declaration by Joshua D. Safer, MD, FACP, FACE. Case 1:20-cv-00184-CWD Document 22-9, point 51*). This article purports to show that male-to-female transgender distance runners do not retain post-pubertal athletic advantages over biological females. However, this paper has numerous methodical shortcomings rendering the data and conclusions to be of little to no scientific validity. Herein I provide a detailed critique of a number of the methodical shortcomings of this paper.

155. Of major concern is that the paper does not mention any type of approval from a research ethics committee, documentation of informed consent from the participants, or otherwise state that the study was conducted in accordance with the ethical principles of the World Medical Association Declaration of Helsinki, which raises the specter of overall ethical concerns with this paper (This may simply be an oversight on the part of the journal in not

requiring such a statement, but such an oversight is very unusual given the publication date of 2015). As the data were gathered with the intent of contributing to the scientific knowledge, and there was interaction between the researcher and the subjects with exchange of identifiable and sensitive information, Institutional Review Board approval and documentation of consent are necessary for this type of project.

156. The author states that “The first problem is how to formulate a study to create a meaningful measurement of athletic performance, both before and after testosterone suppression. No methodology has been previously devised to make meaningful measurements.” (2) This statement is not correct as there are innumerable publications with validated methodology for comparing physical fitness and/or athletic performance between people of different ages, sexes (some of which have previously been discussed), medical conditions, and before and after medical treatment, any of which could easily have been used with minimal or no adaptation for the purposes of this study (many even before the initiation of the Harper study, which apparently started in 2006).

157. The overall methods as explained within the manuscript are of limited scientific validity and reliability, starting with subject recruitment. The author states “The collection process consisted of seeking out female transgender distance runners, mostly online, and then asking them to submit race times. Even in 2014 few people are open about being transgender, so the submission of race times represented a large leap of faith for the participants.” (3) There is no further information regarding how the subjects were recruited (i.e. sampling techniques). Furthermore, based on this description of sampling techniques there is no way to know if these 8 subjects are in any way representative of any population of men, women, or transgender individuals, and especially the overall transgender distance running population. For example,

what websites were used to identify possible subjects? How were the subjects solicited to participate? Was any compensation or coercion offered to the subjects? What inclusion or exclusion criteria were used in subject selection? How were the subjects who were not recruited online identified and enrolled into the research? How many were recruited online vs. not online? Furthermore, no indication is given if the subjects have undergone only hormone treatment, surgical treatment, or both. Furthermore, there is no indication of any verification of testosterone concentrations, compliance with hormone treatments, or other relevant endocrine or transgender treatment information. Lastly, no descriptive data are provided for the subjects' body height, body mass, or other relevant anthropometric characteristics.

158. Similar to the sampling techniques the methods for collecting race times are lacking in validity, reliability, or detailed description. The author states "Race times from eight transgender women runners were collected over a period of seven years and, when possible, verified." And "When possible, race times were then verified using online services listing race results. For six of the eight runners, online checking made it possible to verify approximately half of the submitted times. Two of the subjects, runners three and four, would only participate anonymously, creating an ethical dilemma over the use of their times, versus respect their privacy." (3) No further information regarding which race times were verified is presented, thus the verified race times could be only pre-transition, only post transition, all coming from 3 of the subjects, or some combination thereof. The validity and reliability of self-reported data are overall very questionable, which the author acknowledges by stating "The times submitted by the eight runners were self-selected and self-reported. The self-reporting by the subjects certainly affects the strength of the findings. As mentioned previously, almost half of the race times were double checked by the author for accuracy. None of the subjects incorrectly reported any result"

(6). However, verifying “almost half” of the race times does not validate the other “almost half.” The author does not state which race times the runners were asked to self-report (i.e. these could have been the slowest times as a man and the fastest times as a woman, or vice versa. Or the reported races time could be some form of non-representative sample of the subjects’ race times). As some of the data represent a span of 29 years between reported race times, and the mean time between reported race times is 7.3 ± 8.4 years the accuracy of the non-verified self-reported race times are very questionable [The means \pm sd are not presented in the paper; they were calculated by the author of this declaration]. The author further states that only three of the pairs of race times “were run over the same course within three years’ time and represent the best comparison points” (5) (i.e. Runner No. 4 provided one pair of pre-post transition 5K times, Runner No. 6 provided one pair of pre-post transition 10K times, and Runner No 6 provided one pair of pre-post transition Half-marathon times). Runner No 4 was one of the previously described “ethical dilemma” (3) subjects with no verified race times. Once again, it is not stated if any of “the best comparison points” (5) represents verified data. Furthermore, while the race may have been run over the same course, no mention of environmental conditions for the comparison performance is made. To put this in perspective, the 2018 Boston Marathon was run in rain and headwinds resulting in a men’s winning time of 2:15:54 (the slowest time since 1976) and a women’s winning time of 2:39:54 (the slowest time for a women's winner since 1978). To help further illustrate the challenges in year to year comparison of race time that may be exacerbated by weather, in 2017 the men’s winning time for the Boston Marathon was 2:09:37 and the women’s winning time was 2:21:52.

159. The author notes that “both runner two and runner six reported stable training patterns over this time range” (5), but once again, there is no indication of how these data were

collected or verified. Furthermore, what does a “stable training pattern mean”? Is it mileage, or pace, or combination of training techniques? This also further illustrates the methodological weaknesses in the study as runner two did not provide times for the “same course within three years’ time”, which, to quote the author “represent the best comparison points”.

160. There is no experimental control for, or mention of, habitual nutrition, pre-event or during-event nutrition, any which (especially hydration and carbohydrate intake) can have a major impact on the outcome of endurance competition.

161. The description of the statistical analysis is insufficient. The author states that “Two tailed t tests were run on both the mean and peak AGs.” (5) This is an ambiguous statement. Typically an author would report what kind of t-test was performed. Were these paired sample t-tests, independent sample t-tests, or one-sample t-tests?

162. Despite these methodological shortcomings, the author makes some insightful statements in the discussion. In the discussion section of the paper the author states “Transgender women are taller and larger, on average, than 46,XX women [], and these differences probably would result in performance advantages in events in which height and strength are obvious precursors to success” (7). The author further reasonably states that “It should be noted that this conclusion only applies to distance running and the author makes no claims as to the equality of performances, pre and post gender transition, in any other sport. As such, the study cannot, unequivocally, state that it is fair to allow transgender women to compete against 46,XX women in all sports...” to which the author adds “...although the study does make a powerful statement in favor of such a position.”(8) This latter statement cannot be supported based on the data contained in this paper or any presently known research.

Conclusion

163. Once again, based on my professional familiarity with exercise physiology and my review of the currently available science, including that contained in the sources I cite and summarize in this declaration, and the competition results and records presented here, I offer three primary professional opinions:

a. At the level of elite, sub elite, high school, and recreational competition, men or boys have an advantage over comparably aged women or girls, in almost all athletic contests;

b. Biological male physiology and anatomy is the basis for the performance advantage that men or boys have over women or girls, in almost all athletic contests; and

c. Administration of androgen inhibitors and cross-sex hormones to men, or adolescent boys, after male puberty, and administration of testosterone to women or adolescent girls, after female puberty, does not eliminate the performance advantage of men or adolescent boys over women or adolescent girls in almost all athletic contests.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 3rd day of June, 2020.

/s/ Gregory A. Brown
Professor Gregory A. Brown, Ph.D.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 4, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following persons:

Richard Eppink
AMERICAN CIVIL LIBERTIES UNION
OF IDAHO FOUNDATION
REppink@acluidaho.org

Gabriel Arkles
James Esseks
Chase Strangio
AMERICAN CIVIL LIBERTIES FOUNDATION
garkles@aclu.org
jesseks@aclu.org
cstrangio@aclu.org

Kathleen Hartnett
Elizabeth Prelogar
Andrew Barr
COOLEY LLP
khartnett@cooley.com
eprelogar@cooley.com
abarr@cooley.com

Catherine West
LEGAL VOICE
cwest@legalvoice.org

Attorneys for Plaintiffs

Matthew K. Wilde
BOISE STATE UNIVERSITY
OFFICE OF GENERAL COUNSEL
mattwilde@boisestae.edu

*Attorney for Defendants Boise State
University and Marlene Tromp*

Bruce D. Skaug
Raul R. Labrador
bruce@skauglaw.com
raul@skauglaw.com

Roger G. Brooks
Jeffrey A. Shafer
ALLIANCE DEFENDING FREEDOM
rbrooks@ADFlegal.org
jshafer@ADFlegal.org

Kristen K. Waggoner
Parker Douglas
Christiana M. Holcomb
ALLIANCE DEFENDING FREEDOM
kwaggoner@ADFlegal.org
pdouglas@ADFlegal.org
cholcomb@ADFlegal.org

Attorneys for Proposed Intervenors

/s/ W. Scott Zanzig

W. SCOTT ZANZIG
Deputy Attorney General

ATTACHMENT
EXPERT DECLARATION OF
GREGORY A. BROWN, Ph.D. FACSM
Hecox, et al. v. Little, et al.
Case No. 1:20-cv-00184-DCN

ER489

Gregory Allen Brown, Ph.D. FACSM

Wellness Center 221, Cushing Building
Department of Kinesiology & Sport Sciences
University of Nebraska Kearney
1410 W 26th St
Kearney, NE 68849
(308) 865 - 8333
brownnga@unk.edu

Academic Preparation

Doctor of Philosophy, Iowa State University. August 2002 -- Major in Health and Human Performance, Emphasis in the Biological Bases of Physical Activity, dissertation title: “Androgenic supplementation in men: Effects of age, herbal extracts, and mode of delivery.”

Master of Science, Iowa State University, May 1999 -- Major in Exercise and Sport Science, Emphasis in Exercise Physiology, thesis title: “Oral anabolic-androgenic supplements during resistance training: Effects on glucose tolerance, insulin action, and blood lipids.”

Bachelor of Science, Utah State University, June 1997 -- Major in Physical Education, Emphasis in Pre-physical Therapy.

Awards

College of Education Outstanding Faculty Teaching Award. University of Nebraska at Kearney 2019

Mortar Board Faculty Excellence Honors. Xi Phi Chapter, University of Nebraska at Kearney, Honored in 2006, 2007, 2008, 2012, 2013, 2015, and 2019

Profiled in New Frontiers, the University of Nebraska Kearney annual publication highlighting excellence in research, scholarship, and creative activity. 2009, 2017

College of Education Outstanding Scholarship / Research Award. University of Nebraska at Kearney 2009, 2014

College of Education Award for Faculty Mentoring of Undergraduate Student Research University of Nebraska at Kearney, 2007, 2010, & 2013

“Pink Tie” award from the Susan G. Komen Nebraska Affiliate, for outstanding service to the Central Nebraska Race for the Cure, 2013

Star Reviewer for the American Physiological Society and Advances in Physiology Education. 2010.

Fellow of the American College of Sports Medicine. Awarded April 23, 2008

UNK Senior Appreciation Program honoree, the University of Nebraska at Kearney

Iowa State University Research Excellence Award, Iowa State University, 2002

The Zaffarano Prize for Graduate Student Research, Iowa State University, 2002

Helen Hilton Lebaron Excellence in Research Award, Dept. of Health and Human Performance, Iowa State University, 2002

Best Paper Award, 2nd Annual Education Research Exchange. Iowa State University Education Research Exchange, 2001

Helen Hilton Lebaron Excellence in Research Award, Dept. of Health and Human Performance, Iowa State University, 2000

Professional Experience

Professor: University of Nebraska Kearney, Dept. of Kinesiology and Sport Sciences (2012-)

Associate Professor: University of Nebraska Kearney, HPERLS Dept. (2007-2012)

Assistant Professor: University of Nebraska Kearney, HPERLS Dept. (2004- 2007) Full Graduate Faculty status awarded on hire, 2004

Assistant Professor: Georgia Southern University, Jiann-Ping Hsu School of Public Health. (2002-2004) Full Graduate Faculty status awarded Nov. 26, 2002

Laboratory Director: Human Performance Laboratory, Georgia Southern University, Jiann-Ping Hsu School of Public Health. (2002-2004)

Research Assistant: Exercise Biochemistry and Physiology Laboratory, Iowa State University, Department of Health and Human Performance. (1997-2002)

Graduate Teaching Assistant: Iowa State University, Department of Health and Human Performance. (1997-2002)

Temporary Instructor: Iowa State University, Department of Health and Human Performance. (1999-2002)

Temporary Adjunct Faculty: Des Moines Area Community College. (2000)

Undergraduate Teaching Intern: Department of Biology, Utah State University. (1995-1996)

Refereed Publications

1. Schneider KM and Brown GA (as Faculty Mentor). What's at Stake: Is it a Vampire or a Virus? International Journal of Undergraduate Research and Creative Activities. 11, Article 4. 2019.
2. Christner C and Brown GA (as Faculty Mentor). Explaining the Vampire Legend through Disease. UNK Undergraduate Research Journal. 23(1), 2019. *this is an on campus publication
3. Schneckloth B and Brown GA. Comparison of Physical Activity during Zumba with a Human or Video Game Instructor. 11(4):1019-1030. International Journal of Exercise Science, 2018.
4. Bice MR, Hollman A, Bickford S, Bickford N, Ball JW, Wiedenman EM, Brown GA, Dinkel D, and Adkins M. Kinesiology in 360 Degrees. International Journal of Kinesiology in Higher Education, 1: 9-17, 2017

5. Shaw I, Shaw BS, Brown GA, and Shariat A. Review of the Role of Resistance Training and Musculoskeletal Injury Prevention and Rehabilitation. *Gavin Journal of Orthopedic Research and Therapy*. 1: 5-9, 2016
6. Kahle A, Brown GA, Shaw I, & Shaw BS. Mechanical and Physiological Analysis of Minimalist versus Traditionally Shod Running. *J Sports Med Phys Fitness*. 56(9):974-9, 2016
7. Bice MR, Carey J, Brown GA, Adkins M, and Ball JW. The Use of Mobile Applications to Enhance Learning of the Skeletal System in Introductory Anatomy & Physiology Students. *Int J Kines Higher Educ* 27(1) 16-22, 2016
8. Shaw BS, Shaw I, & Brown GA. Resistance Exercise is Medicine. *Int J Ther Rehab*. 22: 233-237, 2015.
9. Brown GA, Bice MR, Shaw BS, & Shaw I. Online Quizzes Promote Inconsistent Improvements on In-Class Test Performance in Introductory Anatomy & Physiology. *Adv. Physiol. Educ*. 39: 63-6, 2015
10. Brown GA, Heiserman K, Shaw BS, & Shaw I. Rectus abdominis and rectus femoris muscle activity while performing conventional unweighted and weighted seated abdominal trunk curls. *Medicina dello Sport*. 68: 9-18. 2015
11. Botha DM, Shaw BS, Shaw I & Brown GA. Role of hyperbaric oxygen therapy in the promotion of cardiopulmonary health and rehabilitation. *African Journal for Physical, Health Education, Recreation and Dance (AJPHERD)*. Supplement 2 (September), 20: 62-73, 2014
12. Abbey BA, Heelan KA, Brown, GA, & Bartee RT. Validity of HydraTrend™ Reagent Strips for the Assessment of Hydration Status. *J Strength Cond Res*. 28: 2634-9. 2014
13. Scheer KC, Siebrandt SM, Brown GA, Shaw BS, & Shaw I. Wii, Kinect, & Move. Heart Rate, Oxygen Consumption, Energy Expenditure, and Ventilation due to Different Physically Active Video Game Systems in College Students. *International Journal of Exercise Science*: 7: 22-32, 2014
14. Shaw BS, Shaw I, & Brown GA. Effect of concurrent aerobic and resistive breathing training on respiratory muscle length and spirometry in asthmatics. *African Journal for Physical, Health Education, Recreation and Dance (AJPHERD)*. Supplement 1 (November), 170-183, 2013
15. Adkins M, Brown GA, Heelan K, Ansonge C, Shaw BS & Shaw I. Can dance exergaming contribute to improving physical activity levels in elementary school children? *African Journal for Physical, Health Education, Recreation and Dance (AJPHERD)*. 19: 576-585, 2013
16. Jarvi MB, Brown GA, Shaw BS & Shaw I. Measurements of Heart Rate and Accelerometry to Determine the Physical Activity Level in Boys Playing Paintball. *International Journal of Exercise Science*: 6: 199-207, 2013
17. Brown GA, Krueger RD, Cook CM, Heelan KA, Shaw BS & Shaw I. A prediction equation for the estimation of cardiorespiratory fitness using an elliptical motion trainer. *West Indian Medical Journal*. 61: 114-117, 2013.

18. Shaw BS, Shaw I, & Brown GA. Body composition variation following diaphragmatic breathing. *African Journal for Physical, Health Education, Recreation and Dance (AJPHERD)*. 18: 787-794, 2012.
19. Shaw I, Shaw BS, & Brown GA. Concurrent Training and Pulmonary Function in Smokers. *Int J Sports Med*. 32:776-80, 2011
20. Nienhueser J, Brown, GA, Shaw BS & I Shaw. Effects of Energy Drinks on Metabolism at Rest and During Submaximal Treadmill Exercise in College Age Males. *Int J Exerc Sci* 4: 321-332, 2011
21. Shaw I, Shaw BS, & Brown GA. Relationship between Resistance Training and Self-Reported Habitual Nutrient Intake. *South African Journal for Research in Sport, Physical Education and Recreation*. 32: 109-116, 2010
22. Brown GA, Swendener AM, Shaw I, & Shaw BS. Comparison of anthropometric and metabolic responses to a short term carbohydrate restricted diet and exercise versus a traditional diet and exercise. *African Journal for Physical, Health Education, Recreation and Dance (AJPHERD)*. 16: 535-544, 2010
23. Brown GA, Ray M, Abbey BA, Shaw BS, & Shaw I. Oxygen Consumption, Heart Rate and Blood Lactate Responses to an Acute Bout of Plyometric Depth Jumps in College Aged Men and Women. *J Strength Cond Res*. 24:275-82. 2010
24. Shaw I, Shaw BS, Brown GA, & Cilliers JF. Concurrent Resistance and Aerobic Training as Protection against Heart Disease. *Cardiovasc J Afr* 21: 196-199, 2010
25. Brown GA, Cook CM, Krueger RD, & Heelan KA Comparison of energy expenditure on a treadmill vs. an elliptical device at a self-selected exercise intensity. *J Str Cond Res* 24:1643-9, 2010
26. Shaw I, Shaw BS, & Brown GA. Role of Diaphragmatic Breathing and Aerobic Exercise in Improving Maximal Oxygen Consumption in Asthmatics. *Science & Sports* 25:139-145, 2010
27. Shaw I, Shaw BS, & Brown GA. Comparison of Resistance and Concurrent Resistance and Endurance Training Regimes in the Development of Strength. *J Str Cond Res*. 23: 2507-2514, 2009
28. Castell LM, Burke LM, Stear SJ, Wolfe RR, Newsholme EA, Trudeau F, Curi R, Brown GA, Vukovich MD, and DS King. *BJSM reviews: A-Z of supplements: dietary supplements, sports nutrition foods and ergogenic aids for health and performance Part 2*. *Br. J. Sports Med*. 43:807-810. 2009
29. Shaw BS, Shaw I, & Brown GA. Resistance Training and its Effect on Total, Central and Abdominal Adiposity. *South African Journal for Research in Sport, Physical Education and Recreation*. 31: 97-108. 2009
30. Shaw I, Shaw BS, & Brown GA. Influence of Strength Training on Cardiac Risk Prevention in Individuals without Cardiovascular Disease. *African Journal for Physical, Health Education, Recreation and Dance (AJPHERD)*. 15: 424-432. 2009

31. Shaw BS, Shaw I, & Brown GA. Resistance Training and Predicted Risk of Coronary Heart Disease in Sedentary Males. *African Journal for Physical, Health Education, Recreation and Dance (AJPHERD)*. Supplement: 247-257. 2009
32. Stahlnecker IV AC, Brown GA, Shaw BS, & Shaw I. Acute Effects of a Weight Loss Supplement on Resting Metabolic Rate and Anaerobic Exercise Performance. *African Journal for Physical, Health Education, Recreation and Dance (AJPHERD)*. Supplement: 237-247. 2009
33. McWha JA, Horst S, Brown GA, Shaw I, & Shaw BS. Metabolic Changes Associated with Playing an Active Video Game Against a Human and Computer Opponent. *African Journal for Physical, Health Education, Recreation and Dance (AJPHERD)*. Supplement: 219-228. 2009
34. Semin K, Stahlnecker IV AC, Heelan KA, Brown GA, Shaw BS, & Shaw I. Discrepancy between Training, Competition and Laboratory Measures of Maximum Heart Rate in NCAA Division 2 Distance Runners. *J Sports Sci & Med*. 7: 455 – 460, 2008
35. Brown GA, Rebok MP, Scott ML, Harris III J, Colaluca MK, Shaw I, & Shaw BS. Physiological and Biomechanical Responses of Running with and Without a Stroller. *African Journal for Physical, Health Education, Recreation and Dance (AJPHERD)*. 14: 240-249, 2008
36. Brown GA, McFarland SP, Ray MW, Abbey BM, Shaw I, & Shaw BS. A Single Session of Brisk Walking Does Not Alter Blood Glucose Homeostasis in Overweight Young Men. *African Journal for Physical, Health Education, Recreation and Dance (AJPHERD)*. 14: 250-264, 2008
37. Brown GA, Lynott F, & Heelan KA. A Service Learning Model for Teaching Fitness Assessment and Research Techniques to Undergraduate Exercise Science Students. *Adv Physiol Educ*. 32: 212-218, 2008
38. Carstensen C, Brown GA, Shaw I, & Shaw BS. Freely-Paced Walking in Healthy Adults Does Not Meet Minimum Intensity Guidelines for Health Improvement. *African Journal for Physical, Health Education, Recreation and Dance (AJPHERD)*, 14: 178-187, 2008
39. Shaw BS, Shaw I, and Brown GA. Self-Reported Dietary Intake Following Endurance, Resistance And Concurrent Endurance And Resistance Training. *J Sports Sci & Med* 7: 255-259, 2008
40. Brown, GA. Teaching skeletal muscle adaptations to aerobic exercise using an APS classic paper by Dr. Philip Gollnick and colleagues. *Adv Physiol Educ*. 30: 113-118, 2006
41. Brown GA, Vukovich MD, & King DS. Testosterone Prohormone Supplements. *Med. Sci. Sports Exerc. Med Sci Sports Exerc*. 38: 1451-1461, 2006
42. Brown GA, & MacKenzie D. Resistance Exercise Does Not Change The Hormonal Response To Sublingual Androstenediol. *Eur J Appl Physiol*. 97:404-412, 2006
43. Brown GA, Vukovich MD, and King DS. Urinary excretion of steroid metabolites following chronic androstenedione ingestion. *J. Clin. Endocrinol. Metab*. 12:6235 – 6338, 2004

44. Brown GA, Dewey JC, Brunkhorst J, Vukovich MD, & King DS. Changes in serum testosterone and estradiol concentrations following acute androstenedione ingestion in young women. *Horm Metab Res.* 1:62-66, 2004
45. Kohut ML, Thompson JR, Campbell J, Brown GA, Vukovich MD, Jackson DA, & King DS. Ingestion of a Dietary Supplement Containing Dehydroepiandrosterone (DHEA) and Androstenedione Has Minimal Effect on Immune Function in Middle-Aged Men. *J Am Coll Nutr.* 22: 363-71, 2003
46. Brown GA, Martini ER, Roberts BS, Vukovich MD, & King DS. Acute hormonal responses to sublingual androstenediol intake in young men. *J Appl Physiol.* 92: 142-146, 2002.
47. Brown GA, Vukovich MD, Martini ER, Kohut ML, Franke WL, Jackson DA, & King DS. Effects of androstenedione-herbal supplements on serum sex hormone concentrations in 30-59 year old men. *Int J Vitam Nutr Res.* 71: 293-301, 2001
48. Brown GA, Vukovich MD, Martini ER, Kohut ML, Franke WL, Jackson DA, & King DS. Endocrine and lipid responses to chronic androstenediol-herbal supplementation in 30 to 58 year old men. *J Am Coll Nutr.* 20: 520-528, 2001.
49. Brown GA, Vukovich MD, Martini ER, Kohut ML, Franke ML, Jackson DA, & King DS. Endocrine response to chronic androstenedione intake in 30-56 year old men. *J Clin Endocrinol Metab.* 85: 4074-4080, 2000.
50. Brown GA, Vukovich MD, Reifenrath TA, Uhl NL, Parsons KA, Sharp RL, & King DS. Effects of anabolic precursors on serum testosterone concentrations and adaptations to resistance training in young men. *Int J Sport Nutr Exerc Metab.* 10: 342-362, 2000.
51. Brown GA, Vukovich MD, Sharp RL, Reifenrath TA, Parsons KA, & King DS. Effect of oral DHEA on serum testosterone and adaptations to resistance training in young men. *J Appl Physiol.* 87: 2274-2283, 1999.
52. King DS, Sharp RL, Vukovich MD, Brown GA, Reifenrath TA, Uhl NL, & Parsons KA. Effect of oral androstenedione on serum testosterone and adaptations to resistance training in young men: a randomized controlled trial. *JAMA.* 281: 2020-2028, 1999.

Refereed Presentations

1. Brown GA, Jackson B, Szekeley B, Schramm T, Shaw BS, Shaw I. A Pre-Workout Supplement Does Not Improve 400 M Sprint Running or Bicycle Wingate Test Performance in Recreationally Trained Individuals. *Med Sci Sport Exerc.* 50(5), 2932. 65th Annual Meeting of the American College of Sports Medicine. Minneapolis, MN. June 2018.
2. Paulsen SM, Brown GA. Neither Coffee Nor A Stimulant Containing “Pre-workout” Drink Alter Cardiovascular Drift During Walking In Young Men. *Med Sci Sport Exerc.* 50(5), 2409. 65th Annual Meeting of the American College of Sports Medicine. Minneapolis, MN. June 2018.
3. Adkins M, Bice M, Bickford N, Brown GA. Farm to Fresh! A Multidisciplinary Approach to Teaching Health and Physical Activity. 2018 spring SHAPE America central district conference. Sioux Falls, SD. January 2018.

4. Shaw I, Kinsey JE, Richards R, Shaw BS, and Brown GA. Effect Of Resistance Training During Nebulization In Adults With Cystic Fibrosis. *International Journal of Arts & Sciences' (IJAS)*. International Conference for Physical, Life and Health Sciences which will be held at FHWien University of Applied Sciences of WKW, at Währinger Gürtel 97, Vienna, Austria, from 25-29 June 2017.
5. Bongers M, Abbey BM, Heelan K, Steele JE, Brown GA. Nutrition Education Improves Nutrition Knowledge, Not Dietary Habits In Female Collegiate Distance Runners. *Med Sci Sport Exerc.* 49(5), 389. 64th Annual Meeting of the American College of Sports Medicine. Denver, CO. May 2017.
6. Brown GA, Steele JE, Shaw I, Shaw BS. Using Elisa to Enhance the Biochemistry Laboratory Experience for Exercise Science Students. *Med Sci Sport Exerc.* 49(5), 1108. 64th Annual Meeting of the American College of Sports Medicine. Denver, CO. May 2017.
7. Brown GA, Shaw BS, and Shaw I. Effects of a 6 Week Conditioning Program on Jumping, Sprinting, and Agility Performance In Youth. *Med Sci Sport Exerc.* 48(5), 3730. 63rd Annual Meeting of the American College of Sports Medicine. Boston, MA. June 2016.
8. Shaw I, Shaw BS, Boshoff VE, Coetzee S, and Brown GA. Kinanthropometric Responses To Callisthenic Strength Training In Children. *Med Sci Sport Exerc.* 48(5), 3221. 63rd Annual Meeting of the American College of Sports Medicine. Boston, MA. June 2016.
9. Shaw BS, Shaw I, Gouveia M, McIntyre S, and Brown GA. Kinanthropometric Responses To Moderate-intensity Resistance Training In Postmenopausal Women. *Med Sci Sport Exerc.* 48(5), 2127. 63rd Annual Meeting of the American College of Sports Medicine. Boston, MA. June 2016.
10. Bice MR, Cary JD, Brown GA, Adkins M, and Ball JW. The use of mobile applications to enhance introductory anatomy & physiology student performance on topic specific in-class tests. National Association for Kinesiology in Higher Education National Conference. January 8, 2016.
11. Shaw I, Shaw BS, Lawrence KE, Brown GA, and Shariat A. Concurrent Resistance and Aerobic Exercise Training Improves Hemodynamics in Normotensive Overweight and Obese Individuals. *Med Sci Sport Exerc.* 47(5), 559. 62nd Annual Meeting of the American College of Sports Medicine. San Diego, CA. May 2015.
12. Shaw BS, Shaw I, McCrorie C, Turner S., Schnetler A, and Brown GA. Concurrent Resistance and Aerobic Training in the Prevention of Overweight and Obesity in Young Adults. *Med Sci Sport Exerc.* 47(5), 223. 62nd Annual Meeting of the American College of Sports Medicine. San Diego, CA. May 2015.
13. Schneekloth B, Shaw I, Shaw BS, and Brown GA. Physical Activity Levels Using Kinect™ Zumba Fitness versus Zumba Fitness with a Human Instructor. *Med Sci Sport Exerc.* 46(5), 326. 61st Annual Meeting of the American College of Sports Medicine. Orlando, FL. June 2014.
14. Shaw I, Lawrence KE, Shaw BS, and Brown GA. Callisthenic Exercise-related Changes in Body Composition in Overweight and Obese Adults. *Med Sci Sport Exerc.* 46(5), 394. 61st Annual Meeting of the American College of Sports Medicine. Orlando, FL June 2014.

15. Shaw BS, Shaw I, Fourie M, Gildenhuis M, and Brown GA. Variances In The Body Composition Of Elderly Woman Following Progressive Mat Pilates. Med Sci Sport Exerc. 46(5), 558. 61st Annual Meeting of the American College of Sports Medicine. Orlando, FL June 2014.
16. Brown GA, Shaw I, Shaw BS, and Bice M. Online Quizzes Enhance Introductory Anatomy & Physiology Performance on Subsequent Tests, But Not Examinations. Med Sci Sport Exerc. 46(5), 1655. 61st Annual Meeting of the American College of Sports Medicine. Orlando, FL June 2014.
17. Kahle, A. and Brown, G.A. Electromyography in the Gastrocnemius and Tibialis Anterior, and Oxygen Consumption, Ventilation, and Heart Rate During Minimalist versus Traditionally Shod Running. 27th National Conference on Undergraduate Research (NCUR). La Crosse, Wisconsin USA. April 11-13, 2013
18. Shaw, I., Shaw, B.S., and Brown, G.A. Resistive Breathing Effects on Pulmonary Function, Aerobic Capacity and Medication Usage in Adult Asthmatics Med Sci Sports Exerc 45 (5). S1602 2013. 60th Annual Meeting of the American College of Sports Medicine, Indianapolis, IN USA, May 26-30 2013
19. Shaw, B.S. Gildenhuis, G.A., Fourie, M. Shaw I, and Brown, G.A. Function Changes In The Aged Following Pilates Exercise Training. Med Sci Sports Exerc 45 (5). S1566 60th Annual Meeting of the American College of Sports Medicine, Indianapolis, IN USA, May 26-30 2013
20. Brown, G.A., Abbey, B.M., Ray, M.W., Shaw B.S., & Shaw, I. Changes in Plasma Free Testosterone and Cortisol Concentrations During Plyometric Depth Jumps. Med Sci Sports Exerc 44 (5). S598, 2012. 59th Annual Meeting of the American College of Sports Medicine. May 29 - June 2, 2012; San Francisco, California
21. Shaw, I., Fourie, M., Gildenhuis, G.M., Shaw B.S., & Brown, G.A. Group Pilates Program and Muscular Strength and Endurance Among Elderly Woman. Med Sci Sports Exerc 44 (5). S1426. 59th Annual Meeting of the American College of Sports Medicine. May 29 - June 2, 2012; San Francisco, California
22. Shaw B.S., Shaw, I., & Brown, G.A. Concurrent Inspiratory-Expiratory and Aerobic Training Effects On Respiratory Muscle Strength In Asthmatics. Med Sci Sports Exerc 44 (5). S2163. 59th Annual Meeting of the American College of Sports Medicine. May 29 - June 2, 2012; San Francisco, California
23. Scheer, K., Siebrandt, S., Brown, G.A, Shaw B.S., & Shaw, I. Heart Rate, Oxygen Consumption, and Ventilation due to Different Physically Active Video Game Systems. Med Sci Sports Exerc 44 (5). S1763. 59th Annual Meeting of the American College of Sports Medicine. May 29 - June 2, 2012; San Francisco, California
24. Jarvi M.B., Shaw B.S., Shaw, I., & Brown, G.A. (2012) Paintball Is A Blast, But Is It Exercise? Heart Rate and Accelerometry In Boys Playing Paintball. Med Sci Sports Exerc 44 (5). S3503. 59th Annual Meeting of the American College of Sports Medicine. May 29 - June 2, 2012; San Francisco, California
25. Shaw, I., Shaw, B.S., and Brown G.A. Effort-dependent Pulmonary Variable Improvements Following A Novel Breathing Retraining Technique In Asthmatics. Med Sci Sports Exerc

- 43 (5). S617, 2011. 58th Annual Meeting of the American College of Sports Medicine. May 31-June 4, 2011 Denver, Colorado
26. Brown G.A. Shaw, B.S., and Shaw, I. Exercise and a Low Carbohydrate Diet Reduce Body Fat but Not PYY and Leptin Concentrations. *Med Sci Sports Exerc* 43 (5). S4627, 2011. 58th Annual Meeting of the American College of Sports Medicine. May 31-June 4, 2011 Denver, Colorado
27. Shaw, B.S., Shaw, I, and Brown G.A. Pulmonary Function Changes In Response To Combined Aerobic And Resistance Training In Sedentary Male Smokers. *Med Sci Sports Exerc* 43 (5). S492, 2011. 58th Annual Meeting of the American College of Sports Medicine. May 31-June 4, 2011 Denver, Colorado
28. Heiserman, K., Brown G.A., Shaw, I., and Shaw, B.S. Seated Weighted Abdominal Exercise Activates the Hip Flexors, But Not Abdominals, More Than Unweighted Crunches. *A Med Sci Sports Exerc* 43 (5). S277, 2011 58th Annual Meeting of the American College of Sports Medicine. May 31-June 4, 2011 Denver, Colorado
29. Brown, G.A., Nienhueser, J., Shaw, I., and Shaw, B.S. Energy Drinks Alter Metabolism at Rest but not During Submaximal Exercise in College Age Males. *Med Sci Sports Exerc.* 42 (5): S1930. 57th Annual Meeting American College of Sports Medicine, June 1-5, 2010. Baltimore, MD
30. Shaw, I, Shaw, B.S., and Brown G.A. Abdominal and Chest Wall Compliance in Asthmatics: Effects of Different Training Modes. *Med Sci Sports Exerc.* 42 (5): S1588. 57th Annual Meeting American College of Sports Medicine, June 1-5, 2010. Baltimore, MD.
31. Shaw, B.S., Shaw, I, and Brown G.A. Exercise Effects on Lipoprotein Lipids in the Prevention of Cardiovascular Disease in Sedentary Males Smokers. *Med Sci Sports Exerc.* 42 (5): S1586. 57th Annual Meeting American College of Sports Medicine, June 1-5, 2010. Baltimore, MD.
32. Brown, G.A. Collaborative Research at a Primarily Undergraduate University. *Med Sci Sports Exerc.* 42 (5): S424. 57th Annual Meeting American College of Sports Medicine, June 1-5, 2010. Baltimore, MD.
33. Nienhueser, J., Brown, G.A., Effects of Energy Drinks on Resting and Submaximal Metabolism in College Age Males. *NCUR 24 (24th National Conference on Undergraduate Research)*. Missoula, MT. April 15-17, 2010
34. Brown, G.A., N. Dickmeyer, A. Glidden, C. Smith, M. Beckman, B. Malicky, B.S. Shaw and I. Shaw. Relationship of Regional Adipose Tissue Distribution to Fasting Plasma PYY Concentrations in College Aged Females. 56th Annual Meeting American College of Sports Medicine, May 27-30, 2009. Seattle, WA. *Med Sci Sports Exerc.* 41 (5): S1333
35. Shaw, B.S., I. Shaw, and G.A. Brown. Contrasting Effects Of Exercise On Total And Intra-abdominal Visceral Fat. 56th Annual Meeting American College of Sports Medicine, May 27-30, 2009. Seattle, WA. *Med Sci Sports Exerc.* 41 (5): S1718
36. Shaw, I., B.S. Shaw, and G.A. Brown. Role of Endurance and Inspiratory Resistive Diaphragmatic Breathing Training In Improving Asthmatic Symptomology. 56th Annual

- Meeting American College of Sports Medicine, May 27-30, 2009. Seattle, WA. Med Sci Sports Exerc. 41 (5): S2713
37. McWha, J., S. Horst, G.A. Brown, B.S. Shaw, and I. Shaw. Energy Cost of Physically Active Video Gaming Against a Human or Computer Opponent. 56th Annual Meeting American College of Sports Medicine, May 27-30, 2009. Seattle, WA. Med Sci Sports Exerc. 41 (5): S3069
 38. Horst, S., J. McWha, G.A. Brown, B.S. Shaw, and I. Shaw. Salivary Cortisol and Blood Lactate Responses to Physically Active Video Gaming in Young Adults. 56th Annual Meeting American College of Sports Medicine, May 27-30, 2009. Seattle, WA. Med Sci Sports Exerc. 41 (5): S3070
 39. Glidden A., M. Beckman, B. Malciky, C. Smith, and G.A. Brown. Peptide YY Levels in Young Women: Correlations with Dietary Macronutrient Intake and Blood Glucose Levels. 55th Annual Meeting American College of Sports Medicine, May 28-31, 2008. Indianapolis, IN. Med Sci Sports Exerc. 40 (5): S741
 40. Smith C., Glidden A. M. Beckman, B. Malciky, and G.A. Brown. Peptide YY Levels in Young Women: Correlations with Aerobic Fitness & Resting Metabolic Rate. 55th Annual Meeting American College of Sports Medicine, May 28-31, 2008. Indianapolis, IN. Med Sci Sports Exerc. 40 (5): S742
 41. Brown, G.A. M. Holoubeck, B. Nylander, N. Watanabe, P. Janulewicz, M. Costello, K.A. Heelan, and B. Abbey. Energy Costs of Physically Active Video Gaming in Children: Wii Boxing, Wii tennis, and Dance Dance Revolution. 55th Annual Meeting American College of Sports Medicine, May 28-31, 2008. Indianapolis, IN. Med Sci Sports Exerc. 40 (5): S2243
 42. McFarland, S.P. and G.A. Brown. One Session of Brisk Walking Does Not Alter Blood Glucose Homeostasis In Overweight Young Men. 53rd annual meeting of the American College of Sports Medicine, Denver, CO. Med Sci Sports Exerc 38: S205, 2006
 43. Stahlnecker IV, A.C. and G.A. Brown Acute Effects of a Weight Loss Supplement on Resting Metabolic Rate and Anaerobic Exercise Performance. 53rd annual meeting of the American College of Sports Medicine, Denver, CO. Med Sci Sports Exerc 38: S403, 2006
 44. Brown, G.A. and A. Swendener. Effects of Exercise and a Low Carbohydrate Diet on Serum PYY Concentrations 53rd annual meeting of the American College of Sports Medicine, Denver, CO.. Med Sci Sports Exerc 38: s461, 2006
 45. Swendener, A.M. and G.A. Brown. Effects of Exercise Combined with a Low Carbohydrate Diet on Health. 53rd annual meeting of the American College of Sports Medicine, Denver, CO. Med Sci Sports Exerc 38: s460, 2006
 46. Swendener, A.M. and G.A. Brown. Effects Of Exercise Combined With A Low Carbohydrate Diet On Health. NCUR® 20, 2006
 47. Stahlnecker IV, A.C. and G.A. Brown. Acute Effects Of A Weight Loss Supplement On Resting Metabolic Rate And Anaerobic Exercise. NCUR® 20, 2006

48. Eck, L. M. and G.A. Brown. Preliminary Analysis of Physical Fitness Levels in Kinesiology Students. Southern Regional Undergraduate Honors Conference. March 31, 2005.
49. Brown, G.A., J.N. Drouin, and D. MacKenzie. Resistance Exercise Does Not Change The Hormonal Response To Sublingual Androstenediol. 52nd Annual Meeting of the American College of Sports Medicine, June 1-4, 2005, Nashville, TN. Med Sci Sports Exerc 37(5): S40, 2005
50. Brown, G.A., M.P Rebok, M.L. Scott, M.K. Colaluca, and J Harris III. Economy of Jogging Stroller Use During Running. 51st Annual Meeting of the American College of Sports Medicine, June 2-5, 2004, Indianapolis, IN. Med Sci Sports Exerc 36(5): S1714, 2004
51. M.P. Rebok, M.L. Scott, J. Harris III, M.K. Colaluca, and G.A. Brown. Economy of Jogging Stroller use During Running. Georgia Southern University Legislative Wild Game Supper, 2004.
52. M.P. Rebok, M.L. Scott, J. Harris III, M.K. Colaluca, and G.A. Brown. Energy cost of jogging stroller use during running. Annual Meeting of the Southeastern Chapter of the American College of Sports Medicine, 2004.
53. Brown, G.A., Effect of 8 weeks androstenedione supplementation and weight training on glucose tolerance and isokinetic strength. Annual Meeting of the Southeastern Chapter of the American College of Sports Medicine, 2004.
54. Brown, G.A., Vukovich, M.D., Kohut, M.L., Franke, W.D., Jackson, D.A., King, D.S., and Bowers, L.D. Urinary excretion of steroid metabolites following chronic androstenedione ingestion. 50th Annual Meeting of the American College of Sports Medicine, May 27-31 2003, San Francisco, CA. Med Sci Sports Exerc 35(5): S1835
55. Brown, G.A., E.R. Martini, B.S. Roberts, M.D. Vukovich, and D.S. King. Effects of Sublingual androstenediol-cyclodextrin on serum sex hormones in young men. 48th Annual Meeting American College of Sports Medicine, May 30 – June 2, 2001. Baltimore, MD. Med Sci Sports Exerc. 33(5): S1650
56. Kohut, M.L., J.R. Thompson, J. Campbell, G.A. Brown, and D.S. King. Ingestion of a dietary supplement containing androstenedione and dehydroepiandrosterone (DHEA) has a minimal effect on immune response. International Society of Exercise and Immunology, 3rd Annual Convention May 29-30, 2001. Baltimore, MD. Med. Sci. Sports Exerc. 33(5): SISE112
57. Brown, G.A., E.R. Martini, B.S. Roberts, and D.S. King. Effects of Sublingual androstenediol-cyclodextrin on serum sex hormones in young men. Iowa State University Educational Research Exchange, March 24, 2001. Ames, IA.
58. Martini, E.R., G.A. Brown, M.D. Vukovich, M.L. Kohut, W.D. Franke, D.A. Jackson, and D.S. King. Effects of androstenedione-herbal supplementation on serum sex hormone concentrations in 30-59 year old men. Iowa State University Educational Research Exchange, March 24, 2001. Ames, IA.

59. King, D.S., G.A. Brown, M.D. Vukovich, M.L. Kohut, W.D. Franke, and D.A. Jackson. Effects of Chronic Oral Androstenedione Intake in 30-58 year Old Men. 11th International Conference on the Biochemistry of Exercise. June 4-7, 2000. Little Rock, Arkansas
60. Brown, G.A., M.L. Kohut, W.D. Franke, D. Jackson, M.D. Vukovich, and D.S. King. Serum Hormonal and Lipid Responses to Androgenic supplementation in 30 –59 year old men. 47TH Annual Meeting American College of Sports Medicine, May 31-June 3, 2000. Indianapolis, IN. Med Sci Sports Exerc. 32(5): S486
61. Brown, G.A., T.A. Reifenrath, N.L. Uhl, R.L. Sharp, and D.S. King. Oral anabolic-androgenic supplements during resistance training: Effects on glucose tolerance, insulin action, and blood lipids. 1999 Annual Meeting American College of Sports Medicine, Seattle, WA. Med Sci Sports Exerc. 31(5): S1293
62. Reifenrath, T.A., R.L. Sharp, G.A. Brown, N.L. Uhl, and D.S. King. Oral anabolic-androgenic supplements during resistance training: Effects on body composition and muscle strength. 1999 Annual Meeting American College of Sports Medicine, Seattle, WA. Med Sci Sports Exerc. 31(5): S1292
63. King, D.S., R.L. Sharp, G.A. Brown, T.A. Reifenrath, and N.L. Uhl. Oral anabolic-androgenic supplements during resistance training: Effects on serum testosterone and estrogen concentrations. 1999 Annual Meeting American College of Sports Medicine, Seattle, WA. Med Sci Sports Exerc. 31(5): S1291
64. Parsons, K.A., R.L. Sharp, G.A. Brown, T.A. Reifenrath, N.L. Uhl, and D.S. King. Acute effects of oral anabolic-androgenic supplements on blood androgen and estrogen levels in man. 1999 Annual Meeting American College of Sports Medicine, Seattle, WA. Med Sci Sports Exerc. 31(5): S1290

Book Chapters

Brown, G.A. Chapters on Androstenedione and DHEA. In: Nutritional Supplements in Sport, Exercise and Health an A-Z Guide. edited by Linda M. Castell, Samantha J. Stear, Louise M. Burke. Routledge 2015.

Brown, G.A. Evaluating a Nutritional Supplement with SOAP Notes to Develop Critical Thinking Skills. In: Teaching Critical Thinking and Clinical Reasoning in the Health Sciences, edited by Facione NC and Facione PA. Millbrae, CA: California Academic Press 2008

Non Refereed Publications

Brown, G.A. and King, D.S. Sport Dietary Supplement Update on DHEA supplementation. Human Kinetics Publishers, Inc. October, 2000.

Brown, G.A. Getting in Shape for Paintball in the Winter. Paintball Sports International, January, 1999

Invited Presentations

Brown G.A. Collaborative experiences with researchers in South Africa. Africa Summit 2019 (March 28, 2019). Presented by the University of Nebraska and the University of Nebraska Medical Center.

Peer Reviewer for the Following Journals

Advances in Physiology Education. <http://www.the-aps.org/publications/advan/>

African Journal For Physical, Health Education, Recreation and Dance (AJPHERD). ISSN: 1117-4315 http://www.ajol.info/journal_index.php?jid=153

Anatomical Sciences Education. <http://www.asejournal.com>

Asian Journal of Sports Medicine. <http://asjasm.tums.ac.ir/index.php/asjasm>

CardioVascular Journal of Africa. <http://www.cvjsa.co.za/>

Complementary Therapies in Medicine. <http://ees.elsevier.com/ctim/>

European Journal of Sport Science. <http://www.tandf.co.uk/journals/titles/17461391.asp>

Games for Health Journal. <http://www.liebertpub.com/overview/games-for-health-journal/588/>

Global Journal of Health and Physical Education Pedagogy. <http://js.sagamorepub.com/gjhpep>

Interactive Learning Environments. <https://www.tandfonline.com/toc/nile20/current>

International Journal of Exercise Science. <http://digitalcommons.wku.edu/ijes/>

Journal of Sports Sciences. <http://www.tandf.co.uk/journals/titles/02640414.html>

Journal of Strength and Conditioning Research. <http://journals.lww.com/nsca-jscr/pages/default.aspx>

Lung. <http://www.springer.com/medicine/internal/journal/408>

Pediatrics. <http://pediatrics.aappublications.org/>

Scandinavian Journal of Medicine and Science in Sports.
<http://www.blackwellpublishing.com/journal.asp?ref=0905-7188>

South African Journal of Diabetes and Vascular Disease <http://www.diabetesjournal.co.za/>

The American Journal of Physiology - Endocrinology and Metabolism.
<http://ajpendo.physiology.org/>

The American Journal of Physiology - Heart and Circulatory Physiology.
<http://ajpheart.physiology.org/>

The American Journal of Physiology - Regulatory, Integrative and Comparative Physiology.
<http://ajpregu.physiology.org/>

The International Journal of Sport Nutrition & Exercise Metabolism.
<http://www.humankinetics.com/IJSNEM/journalAbout.cfm>

The Journal of Sports Science and Medicine (JSSM) <http://www.jssm.org/>

The International Journal of Nutrition and Metabolism www.academicjournals.org/IJNAM

The Open Sports Sciences Journal. <http://benthamscience.com/open/tossj/index.htm>

The Journal of Applied Physiology. <http://jap.physiology.org/>

African Health Sciences. <http://www.ajol.info/index.php/ahs>

Menopause. <http://journals.lww.com/menopausejournal/pages/default.aspx>

Membership in Professional Organizations

American College of Sports Medicine

American Physiological Society

National Strength and Conditioning Association

Graduate Student Advisement/Mentoring

Kourtney Woracek. MAEd Thesis Committee. in progress

Marissa Bongers. MAEd Thesis Committee Director. Dietary Habits and Nutrition Knowledge in Female Collegiate Distance Runners. Degree Awarded Spring 2016.

Justin Thiel. MAEd Advisor. Degree Awarded Spring 2016.

Mitchell Sasek. MAEd Advisor. Degree Awarded Summer 2015

Chad Keller. MAEd Advisor. Degree Awarded Summer 2014

Faron Klingehoffer. MAEd Advisor. Degree Awarded Summer 2014

Joe Scharfenkamp. MAEd Internship Advisor. Degree Awarded Summer 2014

Andrew Hudson. MAEd Thesis Committee. Thesis Title. valuation of Weight Loss in Parents Participating in a Pediatric Obesity Treatment Intervention Degree Awarded Fall 2012

Megan Adkins. Doctoral Dissertation Committee. An Examination of Changes in Sedentary Time with the Integration of Technology for Children Participating in a Morning Fitness Program. Degree Awarded Summer 2011

Christopher Campbell. MAEd Advisor. Degree Awarded Spring 2011

Logan Brodine. MAEd Advisor. Degree Awarded Spring 2010

Megan Costello. MAEd Thesis Committee. Changes in the Prevalence of at risk of overweight or overweight in children. Degree Awarded Spring 2009

Pamela Janulewicz, MAEd Thesis Committee. Effects of Exercise Balls as Chair Replacements in a Fourth Grade Classroom. Degree Awarded Spring 2008

Melissa Shelden. MAEd Advisor.

Michael Bell. MAEd Advisor.

Karen DeDonder. MAEd Thesis Committee. Confidence Levels of Certified Athletic Trainers Regarding Female Athlete Triad Syndrome. Degree Awarded Spring 2008

Benjamin Nylander. MAEd Comprehensive Project Director. Degree Awarded Summer 2007

Eme Ferro. MAEd advisor. Degree Awarded Summer 2007

Julie McAlpin. MAEd Thesis Committee. Children Escorted to School; effect on Parental Physical Activity Degree awarded fall 2006

Michael Ray. MAEd Comprehensive Project Director. Degree Awarded Summer 2006

Seth McFarland. MAEd Thesis Committee Director. The Effects of Exercise Duration on Glucose Tolerance and Insulin Sensitivity in Mildly Overweight Men. Degree Awarded Summer 2005

Drew McKenzie. MS Academic Advisor. Degree Awarded Spring 2005

Matthew Luckie. MS Academic Advisor. Degree Awarded Spring 2005

Todd Lane. MS Academic Advisor

Leilani Lowery. MS Internship committee, Degree Awarded Spring 2003

Johnna Ware. MS Internship committee, Degree Awarded Spring 2003

David Bass. MS Internship committee, Degree Awarded Spring 2003

Crystal Smith. MS Internship committee, Degree Awarded Summer 2003

Undergraduate Student Research Mentoring

Cassidy Johnson. Project to be determined. Undergraduate Research Fellowship (Fall 2019 -)

Taylor Wilson. A comparison of High Intensity Interval Exercise on a bicycle ergometer to a treadmill on Resting Metabolic Rate the next day. Undergraduate Research Fellowship (Fall 2018 -)

Dakota Waddell. The effect of yoga versus mindful meditation on stress in physically active and non-physically active female college-aged students Undergraduate Research Fellowship (Fall 2018 -)

Dakota Waddell. A case study of the effects of the *osteostromg* program on bone mineral density and lean body mass in a paraplegic male. Undergraduate Research Fellowship (Fall 2017 – Spring 2018)

Andrew Fields. The effects of retraining running cadence on oxygen consumption in experienced runners. Undergraduate Research Fellowship. (Fall 2017 – Spring 2019)

Logan Engel. The effects of Tart Cherry Juice on Delayed Onset Muscle Soreness following Eccentric Exercise. Undergraduate Research Fellowship. Fall 2017 -

Stephanie Paulsen. Comparing the effects of coffee to a pre-workout drink on cardiovascular drift. Summer Student Research Program. University of Nebraska Kearney. Summer 2017.

Stephanie Paulsen. Comparing the effects of coffee to a pre-workout drink on resting and exercise metabolic rate. Undergraduate Research Fellowship. Spring 2017 - .

Rachael Ernest. Comparing the effects of coffee to a pre-workout drink on resting and exercise metabolic rate. Undergraduate Research Fellowship. Fall 2016 - Spring 2017.

Aleesha Olena. Evaluating the role of body composition on abdominal muscle definition. Undergraduate Research Fellowship. University of Nebraska Kearney. Fall 2016 - Spring 2017.

Marco Escalera. Evaluating the role of body composition on abdominal muscle definition. Undergraduate Research Fellowship. University of Nebraska Kearney. Fall 2015 - Spring 2017.

Trevor Schramm. Effects of “pre-workout” drinks on 400 m sprint performance and salivary cortisol concentrations. Undergraduate Research Fellowship. University of Nebraska Kearney. Spring 2016.

Taylor Turek. Evaluating the role of body composition on abdominal muscle definition. Undergraduate Research Fellowship. University of Nebraska Kearney. Fall 2015 - Spring 2016.

Brian Szekely. Effects of “pre-workout” drinks on Wingate test performance and blood lactate concentrations. Undergraduate Research Fellowship. University of Nebraska Kearney. Fall 2014 - Spring 2016.

Brianna Jackson. Effects of “pre-workout” drinks on 400 m sprint performance and salivary cortisol concentrations. Undergraduate Research Fellowship. University of Nebraska Kearney. Fall 2014 – Fall 2015.

Ashley Pearson. Changes in resting metabolic rate over a semester in undergraduate students. Undergraduate Research Fellowship. University of Nebraska Kearney. Fall 2013 - Spring 2015.

Tricia Young. Changes in resting metabolic rate over a semester in undergraduate students. Undergraduate Research Fellowship. University of Nebraska Kearney. Fall 2013 - Spring 2014.

Gavin Schneider. Effects of “pre-workout” drinks on resistance training performance. Undergraduate Research Fellowship. University of Nebraska Kearney. Fall 2013 - Spring 2014.

Bridgette Schneekloth. Physical Activity while engaging in a Zumba dance class or Microsoft Kinect Zumba. Summer Student Research Program. University of Nebraska Kearney. Summer 2013.

Bridgette Schneekloth. Physical Activity while engaging in Microsoft Kinect Track & Field running vs. free running on an indoor track. Undergraduate Research Fellowship. University of Nebraska Kearney. Fall 2012 - Spring 2014.

Adam Kahle. Evaluating changes in running mechanics with “barefoot” footwear. Summer Student Research Program. University of Nebraska Kearney. Summer 2012

Michelle Jarvi. Quantifying paintball as a form of physical activity in Boys. Undergraduate Research Fellowship. University of Nebraska Kearney. Fall 2011 - Spring 2012.

Benjamin Lentz, Krista Scheer, & Sarah Siebrandt. Wii, Kinect, and Move for Physical Activity: Analysis of Energy Expenditure, Heart Rate, and Ventilation. Undergraduate Research Fellowship. University of Nebraska Kearney. Fall 2010 - Spring 2012.

Katlyn Heiserman. Comparison of EMG activity in the rectus abdominis and rectus femoris during supine un-weighted abdominal crunch exercise and a seated abdominal crunch exercise weight machine. Summer Student Research Program. University of Nebraska Kearney. Summer 2010

Janae Nienhueser. Effects of Energy drink on resting and submaximal exercise metabolism in college age men. Summer Student Research Program. University of Nebraska Kearney. Summer 2009

Jessica McWha. Metabolic changes while playing active video gaming against a human and computer opponent. Summer Student Research Program and Undergraduate Research Fellowship. University of Nebraska Kearney. Summer 2008 – Spring 2009

Sarah Horst. Changes in blood lactate and salivary cortisol concentrations while “exergaming” against a human or computer opponent. Summer Student Research Program. University of Nebraska Kearney. Summer 2008

Craig Carstensen. Differences in the Physiological Response to Treadmill versus Freely Paced Walking. Summer Student Research Program. University of Nebraska Kearney. Summer 2006

Alvah Stahlnecker. Acute effects of a weight loss supplement on resting metabolic rate and anaerobic exercise performance. Summer Student Research Program. University of Nebraska Kearney. Summer 2005

Allison Swendener. Effects of exercise combined with a low carbohydrate diet on health. Summer Student Research Program. University of Nebraska Kearney. Summer 2005

Kamilah Whipple. A measurement of the physical activity and fitness of undergraduate Georgia Southern University students. Ronald E. McNair Post-Baccalaureate Achievement Program. Georgia Southern University. Summer 2004.

Lindsey Eck. Preliminary Analysis of Physical Fitness Levels in Kinesiology Students. Independent undergraduate research project. Georgia Southern University. Summer 2004.

Description of Graduate Courses Taught

PE 870: Advanced Exercise Physiology Course presumes a student has had a basic course in exercise physiology. The content of cardiorespiratory fitness, body composition, muscular strength/flexibility, body fluids and metabolism is presented beyond the introductory level. (University of Nebraska at Kearney)

PE 866P: Nutrition for Health and Sport. (Dual listed/taught with PE 469) Metabolism and metabolic regulation, the influence of dietary practices on health and human performance, and mechanisms and consequences of weight loss and gain.. (University of Nebraska Kearney)

PE 861P: Physiology of Exercise. (Dual listed/taught with PE 461) Physiological processes of body as pertain to physical activity. How trained and untrained individuals differ, and importance of training. (University of Nebraska at Kearney)

TE 800: Education Research. This introductory web-based course in educational research focuses on evaluating and interpreting educational research and applying its findings to educational practice. (University of Nebraska at Kearney)

KINS 7230: Exercise Physiology. Focuses on the study of the effects of exercise on the physiological functions of the human organism with emphasis on theoretical orientations. (Georgia Southern University)

KINS 7231: Laboratory Techniques in Exercise Physiology. Acquaints the student with the use of typical laboratory equipment used in exercise physiology. (Georgia Southern University)

KINS 7238: Human Performance and Nutrition. Examines the interaction between nutrition and physical activity, including exercise and athletic performance. (Georgia Southern University)

KINS 7431: Applied Sport Physiology. Focuses on the study of exercise physiology principles applied to developing training and conditioning programs for enhancing health related fitness and performance (Georgia Southern University)

KINS 7899: Directed Independent Study. Provides the student with an opportunity to investigate an area of interest under the direction of faculty mentor (Georgia Southern University)

EXSP 551: Advanced Exercise Physiology 2. Analysis of factors affecting work capacity and performance. Human energy metabolism concepts and measurement. (Iowa State University)

Description of Undergraduate Courses Taught

PE 498: Special Topics. (University of Nebraska at Kearney)

PE 475: Research Methods in Exercise Science. This course is designed to introduce advanced undergraduate students to the processes of research in the field of Exercise Science including the processes of finding, reading and understanding Exercise Science research; data collection; data analysis; and data interpretation. (University of Nebraska at Kearney)

PE 469: Sports Nutrition. Metabolism and metabolic regulation, the influence of dietary practices on human performance. (University of Nebraska at Kearney)

PE 461: Physiology of Exercise. Physiological processes of body as pertain to physical activity. How trained and untrained individuals differ, and importance of training. (University of Nebraska at Kearney)

PE 388: General Studies Capstone - The Living Dead in Fact & Fiction. The Living Dead, such as Zombies and Vampires, are pervasive in fictional literature, television, and movies. During this course, novels, television episodes, and movies will be used to identify disease symptoms displayed by the living dead, and these symptoms will then be evaluated regarding what type of medical condition might cause the symptoms.

PE 310: Introduction to Exercise Physiology. Provides a foundation of scientific basis for understanding the body's anatomical structures and physiologic responses to acute exercise, as well as its adaptations to chronic exercise. (University of Nebraska at Kearney)

PE 107. This course is designed to introduce students to the field of Exercise Science as an area of academic study and as a professional career. Students majoring in Exercise Science should take this course in their first year. (University of Nebraska at Kearney)

KINS 4231: Fitness Evaluation and Exercise Prescription. Provides the student with an in-depth study of fitness appraisal and exercise prescription and the development, interpretation, implementation and management of fitness programs (with laboratory). (Georgia Southern University)

KINS 3133: Physiological Aspects of Exercise. Provides an in-depth perspective of physiological and biochemical responses of the human body when subjected to exercise (with laboratory). (Georgia Southern University)

GSU 1210: University Orientation 1. Designed to help first year students understand the purpose of a college education, learn about college requirements, explore values and interests, learn to make decisions and realistic choices, explore career objectives and programs of study, and establish supportive relationships with faculty and staff. Required of all new students during their first semester. (Georgia Southern University)

EX SP 462: Medical Aspect of Exercise. The role of exercise in preventive medicine. Impact of exercise on various diseases, and the effect of various medical conditions on the ability to participate in vigorous exercise and competitive sports. Principles of exercise testing and prescription for individuals with these conditions. Environmental and nutritional aspects of exercise. (Iowa State University)

EX SP 458: Principles of Exercise Testing and Prescription. Physiological principles of physical fitness; design and administration of fitness programs; testing, evaluation, and prescription; cardiac risk factor modification. (Iowa State University)

EX SP 455 (Renumbered as EX SP 358 for Fall 2001). Physiology of Exercise. Physiological basis of human performance; effects of physical activity on body functions (with laboratory). (Iowa State University)

EX SP 355: Biomechanics (Laboratory). Mechanical basis of human performance; application of mechanical principles to exercise, sport and other physical activities. (Iowa State University)

EX SP 258: Physical Fitness and Conditioning. Development of personal fitness using a variety of conditioning and exercise techniques such as aerobics, weight training, and aquatic fitness. Introduction to acute and chronic responses to exercise, and the role of exercise in health promotion and weight management. (Iowa State University)

EX SP 236: Fundamentals of Archery, Badminton, Bowling (Archery Segment). (Iowa State University)

EX SP 119: Archery 1. (Iowa State University)

EX SP 220: Physical Fitness and Conditioning. Development of personal fitness using a variety of conditioning and exercise techniques such as aerobics, weight training, and aquatic fitness. Introduction to acute and chronic responses to exercise, and the role of exercise in health promotion and weight management. (Des Moines Area Community College)

PE 157: Introduction to Athletic training. Introduction to methods of prevention and immediate care of athletic injuries. Basic information concerning health supervision of athletes, and some basic wrapping and strapping techniques for common injuries. (Des Moines Area Community College)

PE 144: Introduction to Physical Education. History and development of physical education as an academic discipline. Principles and current practices of teaching physical education. (Des Moines Area Community College)

PHYSL 130: Human Physiology. Principles of the regulation and maintenance of human physiology. (Utah State University; Volunteer Undergraduate TA)

PHYSL 103 Human Anatomy. Introduction to the structure and location of bones, muscles, and organs in the human body. (Utah State University; Volunteer Undergraduate TA)

Service

Service to the Profession

Associate Editor, Asian Journal of Sports Medicine (2019-).

Director, North American Chapter, International Physical Activity Projects (IPAP) (2009-)

Fellow, American College of Sports Medicine (2008-)

National Research Foundation (South Africa) peer evaluator for grant applicants

National Research Foundation (South Africa) evaluator of applications for funding in Thuthuka Programme

External Evaluator for Master's Theses and Doctoral Dissertations, University of Johannesburg, Johannesburg South Africa.

Grant proposal reviewer for NASPE/ING Run for Something Better School Awards Program.

Session Chair. Special Event. Undergraduate Research Experiences in Exercise Science. ACSM Annual Meeting, 2010

Session Chair. 2nd Annual Education Research Exchange. Iowa State University Education Research Exchange, 2001

Current Service at the University of Nebraska at Kearney

University Wide

Faculty Senate Parliamentarian (April 2019 – April 2022)

Faculty Senate Oversight Committee Chair (April 2019 – April 2022)

Faculty Senate Executive Committee (April 2019 – April 2022)

Faculty Senate, At Large representative (Fall 2018-)

University Student Conduct Appeals Board (Fall 2019 - May 2020)

General Studies Council (fall 2013-)

University Safety Committee (Fall 2018 -)

University Student Travel Policy Committee (Fall 2019-)

University Retention Council (Fall 2019 -)

External Evaluator, Promotion Committee, Department of Social Work & Criminal Justice (Fall 2019-)

College of Education Dean Search Committee Member (Fall 2019 -)

College of Education

College of Education Promotion and Tenure Committee, Chair (Fall 2012 – present) Member (fall 2008 – spring 2012)

Department of Kinesiology and Sport Sciences

Kinesiology Lecturer Search Committee Member (Fall 2019 -)

Nebraska Kids Fitness and Nutrition Day, volunteer educator and student coordinator. (fall 2005-present)

Academic Advisor for Undergraduate exercise Science Students (Fall 2005 - present)

Previous Service at the University of Nebraska at Kearney

Recreation Faculty Search Committee Member (Spring 2019)

University Student Conduct Board (Fall 2016- May 2017, Fall 2018 – May 2019)

Faculty Senate Athletic Committee (Fall 2018-May 2019)

External Evaluator, Promotion & Tenure, Department of Social Work & Criminal Justice (Fall 2018)

External Evaluator, Faculty Annual Performance Reviews, Department of Social Work & Criminal Justice (Spring 2018)

University Graduate Council. (Fall 2014 – spring 2017)

University Graduate Council Standing Committee I: Policy & Planning Committee (fall 2014 – spring 2017)

Faculty Senate (April 2012- April 2016)

Faculty Senate Executive Council, (April 2014 – April 2016)

Faculty Senate representative to the Oversight Committee (September 2014 – April 2016)

Faculty Senate representative to the Grievance Committee (September 2014 – April 2016)

Faculty Senate representative to the Professional Conduct committee (September 2013 - April 2016)

Youth Agility Speed & Quickness program director (2011-2015)

Faculty Senate ad-hoc committee on best practices in peer evaluation (2013-2014)

Director of General Studies search committee, committee member (2013-2014)

Director of the Office of Sponsored Programs search committee member (2012-2013; 2013-2014)

College peer mentor for implementing Critical Thinking in the classroom (2013-2014)

Chair, Ad-hoc committee for the evaluation of a new Student Evaluation of Instruction survey (2012-2014 academic years)

Ad-hoc committee to enhance communication effectiveness within department faculty and staff (2013-2014)

Exercise Science faculty search (2012-2013)

Undergraduate Research and Creative Activity program review team (2011-2012)

Institutional Review Board for the protection of Human Research Subjects. (Service period 2006 - 2011)

Undergraduate Research Committee (Service fall 2008 – spring 2011)

University Graduate Council. (Service period 2006 - 2010)

Homecoming Hustle (HPERLS Fun Run) Race Director and Coordinator (Service period beginning Fall 2007 – fall 2009)

Ad-hoc Committee on Enhancing Enrollment and Course Offerings in PE 110 Dept. of HPERLS (Service period beginning fall 2006)

Graduate Council Standing Committee 1: Policy and Planning Committee. (Service period beginning fall 2006; Chair in 2007 – 2008 and 2009-2010)

General Studies Roundtable 2 (spring 2006-spring 2007)

Academic Affairs Committee on Teaching Continuity (Service period beginning fall 2006)

Health Science Program Assistant Director Search Committee, University of Nebraska at Kearney. (Service period summer 2006)

Graduate Program Chair, HPERLS Department, University of Nebraska at Kearney (Service period beginning summer 2006 - 2010)

Graduate Dean Search Committee. University of Nebraska at Kearney (Service period 2005 – 2006 academic year)

Assistant HPERLS Department Graduate Coordinator. (Service period 2005 – 2006 academic year)

University of Nebraska at Kearney Centennial Run committee. (Service period fall 2005)

Senior College of Central Nebraska, Fit after 50 course coordinator. (Service period 2005 – 2006 academic year)

Health Science Program Assistant Advisor Search Committee. (Service period summer 2005)

HPERLS Furniture Committee (Service period spring 2005)

Academic Advisor for Undergraduate exercise Science Students (Service period Beginning Fall 2005 academic year; ongoing)

Other Prior University Service

Institutional Review Board, Georgia Southern University (2003- 2004)

GSU Exercise Science undergraduate student advisor (2002 – 2004)

GSU Jiann-Ping Hsu School of Public Health extramural funding task force (2003-2004)

GSU Jiann-Ping Hsu School of Public Health Curriculum Committee (2003-2004)

GSU Jiann-Ping Hsu School of Public Health Assistant Graduate program director (2003-2004)

GSU Jiann-Ping Hsu School of Public Health Laboratory Director's Committee (2002-2004)

GSU Jiann-Ping Hsu School of Public Health Exercise Science Graduate program coordinator (2003-2004)

GSU Recreation and Athletic Center advisor to the personal training program (2003-2004)

Institutional Biosafety Committee, Georgia Southern University (2003-2004)

Kinesiology Cluster Area, Georgia Southern University, Jiann-Ping Hsu School of Public Health (2002-2004)

Biostatistics Faculty Search Committee. Georgia Southern University, Jiann-Ping Hsu School of Public Health (2002-2003, 2003-2004)

Computer Advisory Committee, Iowa State University, University-Wide, College of Education, and Dept. of Health and Human Performance (2000-2002)

Computer Fee Allocation Committee, Iowa State University (2000-2001)

Dept. of Health and Human Performance Graduate Student Association (Founding Officer and 1st President; 2001-2002)

Sport Management Faculty Search Committee, Iowa State University Dept. of Health and Human Performance (2001-2002)

Previous Community Involvement

Race Director, Central Nebraska Susan G. Komen Race for the Cure (2011, 2012, 2013 events)

Webelos Den Leader, Boy Scouts of America Pack 132, Kearney, NE. Chartered to the Church of Jesus Christ of Latter Day Saints

Scoutmaster, Boy Scouts of America Troop 132, Kearney, NE. Chartered to the Church of Jesus Christ of Latter Day Saints

Tiger Den Coach, Boy Scouts of America Pack 135, Kearney, NE. Chartered to Faith United Methodist Church.

Personal Fitness Merit Badge Counselor. Boy Scouts of America, Overland Trails Council Covered wagon District.

Certifications

American College of Sports Medicine: ACSM Certified Exercise Physiologist (05/21/1998 - 12/31/2021)

USA Track and Field: Level One Coach

American Red Cross: Community First Aid and CPR

Funding

Research Funding

Brown GA, Bice MR, Abbey BM, Shaw I, Shaw BS. Effects of aerobic exercise, resistance exercise, and combined aerobic & resistance exercise on food choices and endocrine signals of satiety in middle aged adults. Submitted 6/26/2017 to National Institutes of Health [PA16-200] - Academic Research Enhancement Award (Parent R15) (Application #1R15DK117436-01). Total Amount Requested: \$367,708. (Resubmission of revised proposal; Pending Review.)

Brown GA, Bice MR, Abbey BM, Shaw I, Shaw BS. Effects of aerobic exercise, resistance exercise, and combined aerobic & resistance exercise on food choices and endocrine signals of satiety in middle aged adults. Submitted 6/26/2017 to National Institutes of Health [PA16-200] - Academic Research Enhancement Award (Parent R15) (Application #1R15DK117436-01). Total Amount Requested: \$351,708. Pending Review.

Brown GA, Bice MR, Adkins MM, Hollman A, Bickford S, Bickford N, Ranglack D. HEAT it up (Health, Exercise, Aquaponics, Technology) summer camps to grow future health professionals in Rural Nebraska. Submitted 5/25/2017 to National Institutes of Health [PAR17-183] - NICHD Research Education Programs (R25) (Application # 1R25 HD094673-01) Total Amount Requested: \$777,006. Pending Review.

Brown GA, Bice MR, Adkins MM, Hollman A, Bickford S, Bickford N, Ranglack D. Teaching Health, Exercise, Technology, & Aquaponics (THETA) Day Camps to Grow Future Health Professionals. University of Nebraska Rural Futures Institutes (RFI) \$20,000 – Funded (July 1, 2017 – June 30, 2019)

Brown GA, Bice MR, Adkins MM, Hollman A, Bickford S, Bickford N, Ranglack D. Teaching Health, Exercise, Technology, & Aquaponics (THETA) Day Camps to Grow Future Health Professionals. University of Nebraska Rural Futures Institutes (RFI) and McCook Economic Development Council \$11,400 – Funded (May 1, 2017 – August 30, 2017)

Brown GA, Abbey BM, Bice MR. “Is milk an effective rehydration beverage during repeated days of dehydrating exercise?” to the Dairy Research Institute® (DRI) \$125,560 – Not funded.

Brown GA & Steele J. “Biochemistry Laboratory Experiences for Exercise Science Students” to the Kelly Fund, University of Nebraska. \$23,947. Funded. August 2014- June 2016

Brown GA. “Horizon After School Quickness Program” to Blue Cross & Blue Shield of Nebraska for a Community Wellness grant. \$14,106. Not funded

Brown GA. “Effects of chocolate milk taken immediately post exercise on the adaptations to strength training in men” to the Dairy Research Institute® (DRI) \$123,192 – not funded.

Brown GA., Heelan KA, Bartee RT, & Maughan S. “Active Video Games as an Alternative to Traditional Group Exercise Classes” to the Robert Wood Johnson Health Games Research program. \$297,201 – not funded

Brown GA., Nylander B, Heelan KA. Energy Expenditure for Active Video Game Systems: Dance Dance Revolution and Nintendo Wii. University of Nebraska at Kearney Research Services Council. \$3,432. Funded

Brown G.A. Effects of green tea extract on fasting plasma insulin, glucose, leptin, and PYY concentrations in humans. University of Nebraska at Kearney Research Services Council. \$3,822. Funded

Brown G.A. Dose response relationship between resistance exercise and changes in the hormonal regulation of blood glucose homeostasis. American Diabetes Association Junior faculty Award. \$443,293. Not Funded.

Brown G.A., and K. Heelan. Health benefits of green tea extract in women. NIH NCCAM Exploratory/Developmental Grant for Clinical Studies (R21), PAR-03-153. \$485,163. Not Funded.

Brown, G.A. Changes In Biomarkers Of Satiety, Aerobic Fitness, And Body Composition While On A Low Fat Or Low Carbohydrate Diet. University of Nebraska at Kearney Research Services Council. \$3,750. Funded

Lynott, F., **Brown, G.A.**, and K. Heelan. Health and Fitness of HPERLS Students. University of Nebraska at Kearney Research Services Council. \$4,000. Funded

Brown G.A., K. Heelan and D.S. King. Pharmacokinetics & Efficacy of Sublingual Androstenediol for Treating Andropause. NIH NCCAM Exploratory/Developmental Grant for Clinical Studies (R21), PAR-03-153. \$477,000. Not Funded.

Maughan S.L., D.P.Snider, and **G.A. Brown**, Physical Health and Social Factors Influencing Educational Success Among Hispanic Immigrant Children, University of Nebraska at Kearney Research Services Council. \$4,214.60. Funded

McFarland S.P. and **G.A. Brown**, Effects of Exercise Duration on Glucose Tolerance In Mildly Overweight Men, University of Nebraska at Kearney Research Services Council. \$750. Funded

Brown, G.A. Effects of Exercise Duration on Insulin Sensitivity In Mildly Overweight Men, University of Nebraska at Kearney Research Services Council. \$2,000. Funded

McFarland S.P. and **G.A. Brown**, Effects of Exercise Duration on Glucose Tolerance In Mildly Overweight Men, Gatorade Sports Sciences Institute. \$1,500. Not Funded

Brown, G.A. Effects of Exercise Duration on Glucose Tolerance and Insulin Sensitivity in Mildly Overweight Men. Life fitness Academy. \$5,000. not funded

Brown, G.A. American College of Sports Medicine Foundation Grant. Endocrinology of weight lifting & androgen supplementation, \$10,000. Not Funded.

Brown, G.A. and J.L. McMillan. Experimental and Applied Sciences. Effects of Green Tea Extract on Insulin Sensitivity and Adaptations to Exercise. \$71,075. Not Funded.

Brown, G.A. American College of Sports Medicine Foundation Grant. Endocrinology of weight training & androgen supplementation, \$10,000. Not Funded.

Brown, G.A. and J. Drouin. Georgia Southern University Faculty Research Grant. Effects of Resistance Training on the Hormonal response to Sublingual Androstenediol Intake. \$5,000. Funded

King D.S. and **G.A. Brown**. *World Anti Doping Agency*. Effects of Testosterone Precursors on the Muscular and Hormonal Response to Resistance Training in Men. \$464,634. Not Funded.

Brown, G.A. *American College of Sports Medicine* Foundation Grant. Effect of Raisin Ingestion on Substrate Use During Exercise. \$5,000. Not Funded.

King D.S. and **G.A. Brown**. *California Raisin Marketing Board*. The Glycemic Index Of Raisins Fed To Normal People And Non-Insulin Dependent Diabetics. \$110,869. Not Funded.

King D.S. and **G.A. Brown**. *California Raisin Marketing Board*. The Effects Of Raisin Ingestion On Substrate Utilization and Endurance Exercise Performance In Trained Cyclists. \$84,258. Not Funded.

Brown, G.A., E.R. Martini, and B.S. Roberts. Effect of Androstenediol on Serum Sex Hormone Concentrations. Iowa State University Professional Advancement Grant. Graduate Student Senate and Iowa State University Dept. of Health and Human Performance. \$700. Funded

Instructional Development Funding

Brown G.A. and K.A. Heelan. University of Nebraska at Kearney. Proposal for the purchase of upgraded resistance exercise equipment in the Human Performance Laboratory. \$21,100. Funded.

Brown G.A. and K.A. Heelan. University of Nebraska at Kearney. Proposal for the purchase of a new metabolic cart for the Human Performance Laboratory. \$24,560. Funded

Brown, G.A. Georgia Southern University, Center for Excellence in Teaching Instructional Development Grant. Proposal for purchase of heart rate monitors, manual sphygmomanometers, and automated sphygmomanometers. \$2,820. Funded.

Brown, G.A. Georgia Southern University, Center for Excellence in Teaching Innovative Teaching Strategies Retreat. Provides \$2,000 in instructional technology funds to the participant. Funded.

Brown, G.A. Georgia Southern University, Center for Excellence in Teaching Travel Grant. \$750. Funded.

Brown, G.A. Georgia Southern University student technology fee proposal. Proposal for purchase of Molecular Devices SpectraMax 250 plate reader. \$17,000. Funded

Brown, G.A. Georgia Southern University student technology fee proposal. Proposal for purchase of Lode Excalibur Sport Bicycle Ergometer and Physiodyne Max 2 Metabolic Cart. \$29,577. Funded

Brown, G.A. Georgia Southern University student technology fee proposal. Proposal for purchase of Packard Cobra 2 Automated Gamma Counter. \$14,000. Not funded

References

Dr. Ina Shaw
+27 12 671 8810
ina.shaw@momentum.co.za
MMI Client Engagement Solutions
Visiting Professor - University of Johannesburg
Adjunct Professor - University of Venda
President: International Physical Activity Projects (IPAP)

Dr. Kenya Taylor
(308) 865-8843
taylorks@unk.edu
Dean, Graduate Studies & Research
University of Nebraska Kearney

Dr. Matthew R. Bice
(308) 865-8052
bicemr@unk.edu
Assistant Professor, Dept of Kinesiology & Sports Sciences
University of Nebraska Kearney

Nos. 20-35813, 20-35815

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

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

Defendants-Appellants,

and

MADISON KENYON; and MARY MARSHALL,

Intervenors-Appellants.

On Appeal from the United States District Court
for the District of Idaho
Civil Case No. 1:20-cv-00184-DCN
Hon. David C. Nye

**EXCERPTS OF RECORD
VOLUME 4 (ER 516-686)**

LAWRENCE G. WASDEN
Attorney General

STEVEN L. OLSEN
DAYTON P. REED
SCOTT ZANZIG
Deputy Attorneys General
954 W. Jefferson, 2nd Floor
P.O. Box 83720
Boise, ID 83720-0010
Telephone: (208) 334-2400
steven.olsen@ag.idaho.gov
dayton.reed@ag.idaho.gov
scott.zanzig@ag.idaho.gov

Counsel for Defendants-Appellants

KRISTEN K. WAGGONER
JOHN J. BURSCHE
CHRISTIANA M. HOLCOMB
ALLIANCE DEFENDING FREEDOM
440 First Street, NW, Suite 600
Washington, DC 20001
Telephone: (202) 393-8690
kwaggoner@ADFlegal.org
jbursch@ADFlegal.org
cholcomb@ADFlegal.org

BRUCE D. SKAUG
RAUL R. LABRADOR
SKAUG LAW. P.C.
1226 E. Karcher Road
Nampa, ID 83687
Telephone: (208) 466-0030
bruce@skauglaw.com
raul@skauglaw.com

ROGER G. BROOKS
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260
Telephone: (480) 444-0020
rbrooks@ADFlegal.org

CHRISTOPHER P. SCHANDEVEL
ALLIANCE DEFENDING FREEDOM
20116 Ashbrook Place, Suite 250
Ashburn, VA 20147
Telephone: (571) 707-4655
cschandlevel@ADFlegal.org

Counsel for Intervenors-Appellants

ECF No.	Document Description	Pages
VOLUME 1		
63	Memorandum decision and order granting motion to intervene, granting motion for preliminary injunction, and granting in part and denying in part motion to dismiss	1–87
VOLUME 2		
65	Intervenors’ notice of preliminary injunction appeal	88–91
64	Defendants’ notice of preliminary injunction appeal	92–94
62	Transcript of motion hearing on July 22, 2020	95–222
58-1	Supplemental declaration of Deanna Adkins, MD, in support of Plaintiffs’ motion for preliminary injunction	223–237
58-2	Supplemental declaration of Joshua D. Safer, MD, FACP, FACE, in support of plaintiffs’ motion for preliminary injunction	238–247
58-3	Expert declaration of Jack L. Turban, MD, MHS, in support of plaintiffs’ motion for preliminary injunction	248–275
57	Exhibit A to affidavit of Dr. Stephen Levine	276–298
VOLUME 3		
53	Department of Justice Statement of Interest	299–314
46-1	Declaration of Chelsea Mitchell in opposition to preliminary injunction	315–325
46-2	Expert affidavit of Stephen B. Levine, M.D.	326–370

ECF No.	Document Description	Pages
41 (excerpt)	Appendix 1 to defendants' response to motion for preliminary injunction (OCR decision)	371–416
41 (excerpt)	Appendix 2 to defendants' response to motion for preliminary injunction (IHSAA consent and physical examination forms)	417–419
41-1	Expert declaration of Gregory A. Brown, Ph.D. FACSM, with attachment	420–515
VOLUME 4		
40	Defendants' motion to dismiss	516–519
30	Motion to intervene	520–523
30-2	Declaration of Madison Kenyon in support of intervention	524–531
30-3	Declaration of Mary Marshall in support of intervention	532–537
30-4	Intervenors' answer to verified complaint	538–563
22	Plaintiffs' motion for a preliminary injunction	564–566
22-2	Expert declaration of Deanna Adkins, MD, in support of plaintiffs' motion for preliminary injunction	567–600
22-3	Declaration of Andrew Barr in support of plaintiffs' motion for preliminary injunction	601–612
22-4	Expert declaration of Helen Carroll in support of plaintiffs' motion for preliminary injunction	613–627
22-5	Expert declaration of Mary Fry, PHD, in support of plaintiffs' motion for preliminary injunction	628–676

ECF No.	Document Description	Pages
22-6	Declaration of plaintiff Lindsay Hecox in support of motion for preliminary injunction	677–686
VOLUME 5		
22-7	Declaration of plaintiff Jane Doe in support of motion for preliminary injunction	687–691
22-8	Declaration of Jean Doe in support of motion for preliminary injunction	692–695
22-9	Expert declaration of Joshua D. Safer, MD, FACP, FACE, in support of plaintiffs’ motion for preliminary injunction	696–743
22-10	Expert declaration of Sara Swoboda, MD, in support of plaintiffs’ motion for preliminary injunction	744–756
1	Complaint for declaratory and injunctive relief	757–816
	District Court Docket Sheet	817–835

LAWRENCE G. WASDEN
ATTORNEY GENERAL

STEVEN L. OLSEN, ISB #3586
DAYTON P. REED, ISB #10775
SCOTT ZANZIG, ISB #9361
Deputy Attorneys General
954 W Jefferson, 2nd Floor
P.O. Box 83720
Boise, ID 83720-0010
Telephone: (208) 334-2400
Facsimile: (208) 854-8073
steven.olsen@ag.idaho.gov
dayton.reed@ag.idaho.gov
scott.zanzig@ag.idaho.gov

Attorneys for Defendants

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO**

LINDSAY HECOX, and JANE DOE with
her next friends JEAN DOE and JOHN
DOE,

Plaintiffs,

v.

BRADLEY LITTLE, in his official capacity
as Governor of the State of Idaho; SHERRI
YBARRA, in her official capacity 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

Case No. 1:20-cv-00184-DCN

MOTION TO DISMISS

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

Defendants.

Defendants, by and through their attorneys, move the Court to dismiss Plaintiffs' complaint [Dkt. 1] under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). This motion is supported by Plaintiffs' complaint [Dkt. 1] and the accompanying memorandum.

DATED this 1st day of June, 2020.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By: /s/ Dayton P. Reed
DAYTON P. REED
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 1, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following persons:

Richard Eppink
AMERICAN CIVIL LIBERTIES UNION
OF IDAHO FOUNDATION
REppink@acluidaho.org

Elizabeth Prelogar
COOLEY LLP
eprelogar@cooley.com

Gabriel Arkles
James Esseks
Chase Strangio
AMERICAN CIVIL LIBERTIES FOUNDATION
garkles@aclu.org
jesseks@aclu.org
cstrangio@aclu.org

Andrew Barr
COOLEY LLP
abarr@cooley.com

Catherine West
cwest@legalvoice.org

Kathleen Hartnett
COOLEY LLP
khartnett@cooley.com

Attorneys for Plaintiffs

Matthew K. Wilde
Boise State University
Office of General Counsel
mattwilde@boisestae.edu

Attorney for Defendants Boise State University
and Marlene Tromp

Daniel J. Skinner
Cantril Skinner
danskinner@cssklaw.com

Attorney for Defendants Independent School
District of Boise City #1, Coby Dennis, and
the Individual Members of the Board of
Trustees of the Independent School District of
Boise City #1

Bruce D. Skaug
bruce@skauglaw.com
Raul R. Labrador
raul@skauglaw.com

Roger G. Brooks
rbrooks@ADFlegal.org
Jeffrey A. Shafer
jshafer@ADFlegal.org
ALLIANCE DEFENDING FREEDOM 15100

Kristen K. Waggoner
kwaggoner@ADFlegal.org
Parker Douglas*
pdouglas@ADFlegal.org
Christiana M. Holcomb
cholcomb@ADFlegal.org
ALLIANCE DEFENDING FREEDOM

Attorneys for Proposed Intervenors

/s/ Dayton P. Reed

DAYTON P. REED

Bruce D. Skaug
bruce@skauglaw.com
ID Bar No. 3904
Raul R. Labrador
raul@skauglaw.com
ID Bar No. 5469
SKAUG LAW, P.C.
1226 E. Karcher Road
Nampa, ID 83687
(208) 466-0030
(208) 466-8903 Fax

Roger G. Brooks*
rbrooks@ADFlegal.org
NC Bar No. 16317
Jeffrey A. Shafer*
jshafer@ADFlegal.org
IL Bar No. 6230713
ALLIANCE DEFENDING FREEDOM
15100 N. 90th St.
Scottsdale, AZ 85260
(480) 444-0020
(480) 444-0028 Fax

Kristen K. Waggoner*
kwaggoner@ADFlegal.org
D.C. Bar No. 242069
Parker Douglas*
pdouglas@ADFlegal.org
MI Bar No. P83242
Christiana M. Holcomb*
cholcomb@ADFlegal.org
D.C. Bar No. 176922
ALLIANCE DEFENDING FREEDOM
440 First St. NW, Suite 600
Washington, D.C. 20001
(202) 393-8690
(202) 347-3622 Fax

*Applications for admission *pro hac vice* forthcoming

Attorneys for Proposed Intervenors

**UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO**

LINDSAY HECOX, and JANE DOE with her
next friends JEAN DOE and JOHN DOE,

Plaintiffs,

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; 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;

Case No. 1:20-cv-00184-DCN

MOTION TO INTERVENE

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;
THE INDIVIDUAL MEMBERS OF THE
IDAHO CODE COMMISSION, in their
official capacities,

Defendants.

Pursuant to Federal Rule of Civil Procedure 24(a) and (b), Madison Kenyon and Mary Marshall hereby move this Court to authorize their intervention as parties in this case. In conformity with Local Rule 7(b)(1), a memorandum of law accompanies this motion.

As set forth in the accompanying memorandum, proposed intervenors satisfy the requirements for intervention as of right under Rule 24(a). Their motion is timely, they have a significantly protectable interest in the subject matter of this case, the outcome of this case may impair their interests, and their interests may not be adequately represented by the named parties.

Proposed intervenors also satisfy the criteria for permissive intervention under Rule 24(b). Their filing is timely, their participation will cause no undue delay or prejudice to the original parties, and their legal position “shares with the main action a common question of law or fact.” Fed. R. Civ. P. 24(b)(1).

Respectfully submitted this 26th day of May, 2020.

Roger G. Brooks*
rbrooks@ADFlegal.org
NC Bar No. 16317
Jeffrey A. Shafer*
jshafer@ADFlegal.org
IL Bar No. 6230713
ALLIANCE DEFENDING FREEDOM
15100 N. 90th St.
Scottsdale, AZ 85260
(480) 444-0020
(480) 444-0028 Fax

Kristen K. Waggoner*
kwaggoner@ADFlegal.org
D.C. Bar No. 242069
Parker Douglas*
pdouglas@ADFlegal.org
MI Bar No. P83242
Christiana M. Holcomb*
cholcomb@ADFlegal.org
D.C. Bar No. 176922
ALLIANCE DEFENDING FREEDOM
440 First St. NW, Suite 600
Washington, D.C. 20001
(202) 393-8690
(202) 347-3622 Fax

By: /s/ Bruce D. Skaug
Bruce D. Skaug
bruce@skauglaw.com
ID Bar No. 3904
Raul R. Labrador
raul@skauglaw.com
ID Bar No. 5469
SKAUG LAW, P.C.
1226 E. Karcher Road
Nampa, ID 83687
(208) 466-0030
(208) 466-8903 Fax

*Applications for admission *pro hac vice*
forthcoming

Attorneys for Proposed Intervenors

CERTIFICATE OF SERVICE

I hereby certify that on May 26, 2020, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected in the Notice of Electronic Filing:

Andrew Barr
abarr@cooley.com

Catherine West
cwest@legalvoice.org

Chase Strangio
cstrangio@aclu.org

Elizabeth Prelogar
eprelogar@cooley.com

Gabriel Arkles
garkles@aclu.org

James Esseks
jesseks@aclu.org

Kathleen Hartnett
khartnett@cooley.com

Richard Eppink
reppink@acluidaho.org

Attorneys for Plaintiffs

Dayton Reed
dayton.reed@ag.idaho.gov

Steven Olsen
steven.olsen@ag.idaho.gov

W. Scott Zanzig
scott.zanzig@ag.idaho.gov

Attorneys for Defendants

Matthew Wilde
mattwilde@boisestate.edu

*Attorney for Defendants Boise State
University and Marlene Tromp*

s/ Bruce D. Skaug _____
Attorney for Proposed Intervenors

EXHIBIT A

Declaration of Madison Kenyon In Support of Intervention

UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO

LINDSAY HECOX, and JANE DOE with her
next friends JEAN DOE and JOHN DOE,

Plaintiffs,

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; 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;
THE INDIVIDUAL MEMBERS OF THE
IDAHO CODE COMMISSION, in their
official capacities,

Defendants.

Case No. 1:20-cv-00184-DCN

**DECLARATION OF
MADISON KENYON
IN SUPPORT OF INTERVENTION**

I, Madison Kenyon, declare as follows:

1. I am a nineteen-year-old resident of Johnstown, Colorado.
2. I am a rising sophomore and female athlete at Idaho State University in Pocatello,

Idaho, where I compete in women’s cross-country and track competitions. Running is my
passion.

Athletics Background

3. Athletics has been my world from a very young age. Both of my parents were high school athletes and my mom even competed at the collegiate level, so my first encounter with sports was at a young age. At three years old I kicked my first soccer ball which lead to 15 years of competition on various school and club soccer teams.

4. Through soccer, I learned that I love to compete and play sports. In 6th grade, I introduced myself to cross-country where I fell in love with running, and I have not stopped competing since. That love of running caused me to join the track team my freshman year of high school.

5. Running is my happy place. I love being able to push my body to its limits, to explore the great outdoors on foot, and to do it all with a sense of camaraderie and fun with my teammates who are not only my closest friends but are my family.

Competing in Women's Collegiate Athletics

6. I decided to attend college at Idaho State University (ISU) because it is a big university nestled in a small town with lots of opportunity for both outdoor activity and track competition. The track scholarship I received has not only helped finance my athletic career, but to finance my dream of becoming a doctor someday. I am currently pursuing a degree in biomedicine.

7. As an ISU freshman in the 2019-2020 academic year, I made the cross-country team and competed in the 4k (2.49-mile), 3-mile, 5k (3.12-mile), and 6k (3.73-mile) events.

8. Going into the fall 2019 cross-country season, I was informed that I would be competing against a male who identifies as female on the University of Montana cross-country

team. At first, I was incredulous at the idea that any biological male would be permitted to compete in the women's category.

9. I did some research concerning this student—June Eastwood—a biological male who competed on the UM male cross-country team for three years before identifying as June and competing in the women's division. I learned that while competing in the men's division, Eastwood had recorded times in several events faster than the college women's national record.

10. These facts were discouraging, and my heart sank when I began attending cross-country meets and watched Eastwood placing and medaling in the women's cross-country races. I not only watched Eastwood beat other women, Eastwood bested me in competition, too.

11. In cross-country, I competed against Eastwood in these races:

- a. 2019 Montana State Cross-Country Classic in the 3-mile event.
- b. 2019 Big Sky Cross-Country Championships in the 5k event.
- c. 2019 NCAA Division I Mountain Region XC Championships in the 6k event.

12. In all three races, Eastwood beat me by a significant margin and bumped me down to a lower placement than I would have received had I only competed against other women. That may not seem like a big deal to some, but placements matter to athletes. I want to know that I earned my placement fair and square. A one place difference can be the deciding factor on if my team takes second or third, fourth or fifth place, etc. Fair competition pushes me to better myself and try harder; unfair competition leaves me feeling frustrated and defeated.

13. Cross-country athletes like me usually also compete in indoor and outdoor track. So, during the winter 2020 indoor track season, I competed in the 3k (1.86-mile), the mile, and the distance medley relay events.

14. In the indoor track season, again I raced Eastwood. At the 2020 Stacy Dragila Open Women's Indoor Mile, Eastwood took 2nd place and I took 8th. Eighth place is nothing to be ashamed of if won fairly, especially as a freshman competing in a race dominated by juniors and seniors, but the competition is not fair when one of the athletes in the women's category is a male with the strength and speed advantages that come from male physiology.

15. And at the 2020 Indoor Big Sky Championship, I along with three other ISU teammates competed in the distance medley relay against Eastwood's relay team. A distance medley relay is made up of a 1200-meter leg, a 400-meter leg, an 800-meter leg, and a 1600-meter leg. Montana State's relay team was in 6th place before Eastwood began the final 1600-meter leg of the race. During Eastwood's leg, Eastwood advanced the Montana team not one or two, but *four* positions to finish in 2nd place. My team took 5th, though we would have placed 4th if not for Eastwood's participation. We lost not only a placement, but team points as well.

16. Also, at the Big Sky Championship, I watched as one of my teammates lost her bronze medal and spot on the championship podium because Eastwood took first place in my teammate's event, bumping her to fourth place. It was heartbreaking and frustrating to witness.

17. Sadly, the spring 2020 outdoor track season was canceled due to the COVID-19 pandemic, but I was training to compete in the 1500m, steeplechase, 5k, and distance medley relay. I intend to compete in these events next outdoor season.

18. I have four years of NCAA eligibility left. In the near-term, I intend to compete in fall 2020 cross-country, winter 2021 indoor track, and spring 2021 outdoor track competitions.

Fairness in Women's Sports

19. When I first heard that the Idaho legislature was considering H.B. 500, the Fairness in Women's Sports Act, I read the bill for myself to better understand how it would

impact me and my athletic career. I knew from personal experience how it feels to compete against—and lose to—a male athlete in women’s sports. And I researched how female athletes in other states and other sports were losing out to males who identify as female. This, to me, looked like an increasing problem. I am convinced that H.B. 500 is necessary to keep fairness in female sports and protect the broader interests of girls and women.

20. I believe that allowing males to enter women’s sports defeats an entire aspect of sports: it eliminates the connection between an athlete’s effort and her success (which is often the reason athletes love to compete in the first place). Sex separation in sports helps ensure that males and females each enjoy opportunities for fair competition and victory. It helps ensure that if women like me work hard that hard work pays off and we have a shot at winning.

21. I am a biology major. Scientifically, the biological differences between male and female are not matters of personal opinion, or features that can be changed or chosen. I *am* female, not because I chose to be female, or identify as female, but because every nucleated cell in my body is genetically marked female and my entire body developed in alignment with those female markers.

22. But you do not need to be a biology major to understand this, or to understand that males and females are different in essential ways. I’m in this world because I have a mom and a dad. And with respect to sports, I know from everyday experience that males around me are generally bigger, faster, and stronger than the females. The rules of sport implicitly acknowledge this. For example, men’s cross-country races are often longer than women’s cross-country races.

23. I fear that if we are no longer allowed by law to recognize the objective existence of women, that it will be a huge loss to women’s rights. In researching the Fairness in Women’s

Sports Act, I also spent some time looking into how Title IX benefited women. From my perspective, it was a big turning point that helped women flourish. After Title IX passed in 1972, historic numbers of women began competing in the Olympics, in the World Cup, and receiving athletic scholarships. I benefit from Title IX's legacy. But putting men in women's sports dials back that progress and threatens to eliminate it.

24. Also, when sports authorities or the law permit males to compete under the name of female, it sends a disturbing message about who we are as women. I don't agree with what this says about myself and my fellow female competitors. Women are unique. But if men can be women, it doesn't really mean anything to be a woman.

25. When male athletes are classified as "women" and allowed to compete in women's sports, we real female athletes lose not only opportunities for success, we also lose the words we need to protest this change in our sports. Those of us who really are females lose our name along with our fair competitions.

26. I strongly support the Fairness in Women's Sport Act. I want my races to be fair and a test of skill and hard work. I do not want to wonder whether I am training countless hours for inevitable losses or a lower race placement, or whether I will miss out on even the opportunity to win because I face physically advantaged male athletes.

27. Sports was the air I breathed growing up, and the air I breath now. I want my future daughters and other young girls to be able to have the same experiences and opportunities that I had. I want my teammates' and my hard work to pay off. I work to be competitive, I do not want to see women's sports fade away as a separate category because males who identify as females are allowed to compete in women's divisions as if they were women. Under the

NCAA's current rules, I fear that we will soon effectively have men's sports and co-ed sports, but no dedicated category for females only.

28. I do not want to see women lose their legal protection and progress under the law because we can no longer identify what a woman is.

29. To my knowledge, Eastwood has graduated. But I have now learned through this lawsuit that another biological male, Lindsay Hecox, wants to compete on the women's team at Boise State University. Idaho State and Boise State occasionally compete at the same invitationals. For example, in the indoor 2020 track season, both universities competed at the UW Invitational in Seattle, Washington on January 31, 2020. Both universities were scheduled to compete at the Long beach Invitational in Long Beach, CA on April 18, 2020 (an event that was cancelled due to the COVID-19 pandemic). So, if the Fairness in Women's Sports Act is not upheld, it is possible that my teammates and I would compete against Hecox at future cross country or track events. And because NCAA rules do not promise female athletes any advance notice if a male is registered to compete on the women's team, it is entirely possible that I and other female runners could face competition from other male athletes in the upcoming season.

30. I believe everyone should be able to compete, but it must be done fairly. It is not fair for women's competitions to be open to biological male athletes. Women's sport itself will lose its meaning, and its specialness, if males can be redefined as females.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.



Madison Kenyon
Signed May 20, 2020

EXHIBIT B

Declaration of Mary Marshall In Support of Intervention

UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO

LINDSAY HECOX, and JANE DOE with her
next friends JEAN DOE and JOHN DOE,

Plaintiffs,

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; 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;
THE INDIVIDUAL MEMBERS OF THE
IDAHO CODE COMMISSION, in their
official capacities,

Defendants.

Case No. 1:20-cv-00184-DCN

**DECLARATION OF MARY MARSHALL
IN SUPPORT OF INTERVENTION**

I, Mary Marshall, declare as follows:

1. I am a twenty-year old resident of Twin Falls, Idaho.
2. I am a rising junior and female athlete at Idaho State University in Pocatello,

Idaho, where I compete in cross-country and track and field athletic competitions.

Athletics Background

3. I first started playing basketball at seven or eight years old, and I continued through my sophomore year of high school. I enjoyed the competition, the adrenaline rush, and the sheer fun of the game.

4. In 8th grade, I started running track. And in my sophomore year of high school, I also took up cross-country to get in shape for basketball. But to my surprise, I realized that I loved running *more* than playing basketball! So, I kept running cross-country and track, and dropped basketball my junior year.

5. I discovered that I am good at running. In two back-to-back years, my high school medley relay team won the State championship in our division. And in my senior year of high school, I won the State championship in the 800-meter for my division.

6. I love to run. It gives me confidence, improves my mood, and allows me to better myself while also taking in the sights of our beautiful state. But being a competitive female athlete is about more than just running long distances. It is about community. My teammates have become my closest friends. We push each other to be our best, help one another through disappointments and losses, and cheer one another on as we celebrate victories. We travel together for sporting events and share hotel rooms. It's like a sisterhood! We enjoy one another so much that we even spend our free time together. Through running competitively, I have made some of my closest friends.

Competing in Women's Collegiate Athletics

7. I chose to attend college at Idaho State University (ISU) because it is close to home and I really liked my track coaches. I am grateful to be one of the lucky ones to benefit from a women's track scholarship.

8. In college, I am primarily a mid-distance track athlete, focusing on shorter distances like the 800-meter and the mile. But I also compete in cross-country to stay in shape. In cross-country, I generally compete in the 5k.

9. Training is hard work. On Tuesdays and Thursday, I usually have a two-hour workout with my team. On the alternate days, my teammates and I get together for a five-to-six mile run. Additionally, we have an hour-long weightlifting session on Mondays and Wednesdays.

10. But in the fall of my sophomore year of college, I learned that I would be racing against a male who identifies as female, who was competing on the University of Montana women's team. I was appalled. I do not know how anyone could think this is fair to female athletes. Male runners are naturally faster than females.

11. I raced against male athlete June Eastwood not once, but twice. The first was in the Montana State Cross-Country Classic 3-mile event in the fall of 2019. The second was in January 2020 at the Stacy Dragila Indoor mile event. I lost both times.

12. When I lose to another woman, I assume that she must train harder than I do and it drives me to work harder. If I lose to a man, it feels completely different. It's deflating. I wonder whether he has to work as hard as I do, whether he was even trying, or was that an easy race for him. It makes me think that no matter how hard I try, my hard work and effort will not matter.

13. Members of the men's track team sometimes do easy runs with me and my teammates on the women's track team. But we women are under no illusion that we would be competitive in a race against these men. Even our easy runs are at different paces. For example, an easy run for women is usually at an 8:30 pace, while an easy pace for men is around 7:30.

14. I have previously competed against Boise State University's women's track team. I now understand through this litigation that male athlete Lindsay Hecox intends to try out for the Boise State women's track team this fall. Without legal protections for the female category, I fear this will continue.

15. I have three more years of track and cross country NCAA eligibility, and I intend to compete in cross-country during fall 2020, and track during winter and spring 2021. I plan to use all remaining years of my NCAA eligibility.

Fairness in Women's Sports

16. I first heard about Idaho's H.B. 500 Fairness in Women's Sports Act over Christmas break in 2019. I was really excited and wanted it to pass.

17. I have personally seen the negative impact on women when Eastwood was allowed to compete against them, and I fear that if men only need to "identify" as women in order to compete in the women's category, it will have many harmful effects on women's sports, and on women in general. I want to stop this before it becomes popular. I enthusiastically support Idaho's Fairness in Women's Sport Act.

18. I want to preserve the camaraderie and sisterhood that comes from competing with and against females only. I want to see our sports hold on to the real category of girls and women, and to specially protect those who are in that group. Having males in our teams and competitions will change the whole experience and meaning of women's sports.

19. I want other young women to benefit from sports as I did. I did well in high school sports. But if a boy had decided to compete against me in basketball, or track, or cross-country, I am not sure that I would have kept on competing. The hope for success drives effort. If

I knew that I could not win, or would have to compete against boys, I might have dropped out of sports altogether. I'm certain that many female athletes would feel the same.

20. That idea concerns me. Sports have played such an important role in my life. It taught me how to work in groups and as a team. It taught me how to persist through disappointment. It taught me that if I put in the work, I will get the results. It taught me to respect rules and see the importance of them. It has taught me how to interact with people I do not know, and how to respond to those in authority over me. It has given me the confidence to pursue business and economics studies at ISU, to think I can succeed as an entrepreneur and business owner someday, and to make plans to do so. These are the benefits that I want to preserve for the next generation of women. These are the benefits that I think will not be available in the way they were for me if females are demoralized by having their sports altered by opening them to male athletes.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.



Mary Marshall
Signed May 20, 2020

EXHIBIT C

Intervenors' Answer to Verified Complaint

Bruce D. Skaug
bruce@skauglaw.com
ID Bar No. 3904
Raul R. Labrador
raul@skauglaw.com
ID Bar No. 5469
SKAUG LAW, P.C.
1226 E. Karcher Road
Nampa, ID 83687
(208) 466-0030
(208) 466-8903 Fax

Roger G. Brooks*
rbrooks@ADFlegal.org
NC Bar No. 16317
Jeffrey A. Shafer*
jshafer@ADFlegal.org
IL Bar No. 6230713
ALLIANCE DEFENDING FREEDOM
15100 N. 90th St.
Scottsdale, AZ 85260
(480) 444-0020
(480) 444-0028 Fax

Kristen K. Waggoner*
kwaggoner@ADFlegal.org
D.C. Bar No. 242069
Parker Douglas*
pdouglas@ADFlegal.org
MI Bar No. P83242
Christiana M. Holcomb*
cholcomb@ADFlegal.org
D.C. Bar No. 176922
ALLIANCE DEFENDING FREEDOM
440 First St. NW, Suite 600
Washington, D.C. 20001
(202) 393-8690
(202) 347-3622 Fax

*Applications for admission *pro hac vice*
forthcoming

Attorneys for Proposed Intervenors

**UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO**

LINDSAY HECOX, and JANE DOE with her
next friends JEAN DOE and JOHN DOE,

Plaintiffs,

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; 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

Case No. 1:20-cv-00184-DCN

**INTERVENORS' ANSWER TO
VERIFIED COMPLAINT**

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; THE INDIVIDUAL
MEMBERS OF THE IDAHO CODE
COMMISSION, in their official capacities,

Defendants.

INTERVENORS' ANSWER TO VERIFIED COMPLAINT

Pursuant to Federal Rule of Civil Procedure 24(c), Intervenor-Defendants respond to the numbered paragraphs in Plaintiffs' Complaint as follows:

1. The allegations in paragraph 1 constitute legal conclusions and general commentary to which no response is required. To the extent a response is deemed necessary, the allegations in paragraph 1 are denied.

2. Allegations in paragraph 2 regarding H.B. 500 constitute legal conclusions and general commentary to which no response is required. Intervenor-Defendants lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in paragraph 2 and they are therefore denied.

3. Allegations in paragraph 3 regarding H.B. 500 constitute legal conclusions and general commentary to which no response is required. Intervenor-Defendants deny that persons of the male sex are women or girls. Intervenor-Defendants deny the third sentence of paragraph 3. Intervenor-Defendants deny that "unfounded stereotypes and false scientific claims led to the passage of H.B. 500 and are embodied within" [H.B. 500]" Intervenor-Defendants lack knowledge or information sufficient to form a belief about the truth of reported issues with the administration of prior rules in Idaho and

therefore this allegation is denied. Intervenor denies the remainder of the allegations this paragraph.

4. Allegations in paragraph 4 regarding H.B. 500 constitute legal conclusions to which no response is required. To the extent a response is deemed necessary, Intervenor deny the allegations in Paragraph 4 in their entirety.

5. Allegations in paragraph 5 regarding H.B. 500 constitute legal conclusions and general commentary to which no response is necessary. To the extent a response is deemed necessary, Intervenor deny the allegations in Paragraph 5 in their entirety.

6. Intervenor deny that Lindsay Hecox is an “adult woman.” Intervenor lack knowledge or information sufficient to form a belief about the truth of the remainder of the allegations in paragraph 6 and they are therefore denied.

7. Intervenor lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 7 and they are therefore denied.

8. Intervenor admit that Bradley Little is Governor of the State of Idaho. Allegations in paragraph 8 regarding H.B. 500, the Constitution of Idaho, the Idaho Code, and 42 U.S.C. § 1983, constitute legal conclusions to which no response is required. Intervenor lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in paragraph 8 and they are therefore denied.

9. Intervenor admit that Sherri Ybarra is Superintendent of Public Instruction in Idaho. Allegations in paragraph 9 regarding 42 U.S.C. § 1983 constitute legal conclusions to which no response is required. Intervenor lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in paragraph 9 and they are therefore denied.

10. Allegations in paragraph 10 regarding H.B. 500, 42 U.S.C. § 1983, and the Idaho Code, constitute legal conclusions to which no response is required. Intervenor admits that Idaho's state educational institutions receive Federal financial assistance. Intervenor lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations in paragraph 10 and they are therefore denied.

11. Intervenor admits allegations in paragraph 11.

12. Intervenor admits that Dr. Marlene Tromp is the President of Boise State University. Allegations in paragraph 12 regarding 42 U.S.C. § 1983 constitute legal conclusions to which no response is required. Intervenor lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations in paragraph 12 and they are therefore denied.

13. Intervenor admits allegations in paragraph 13.

14. Intervenor admits that Coby Dennis is the superintendent of the Boise School District. Allegations in paragraph 14 regarding 42 U.S.C. § 1983 constitute legal conclusions to which no response is required. Intervenor lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations in paragraph 14 and they are therefore denied.

15. Allegations in paragraph 15 regarding 42 U.S.C. § 1983 and the Idaho Code constitute legal conclusions to which no response is required. Intervenor admits that the Boise School District and Boise High School receive Federal financial assistance. Intervenor lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations in this paragraph and they are therefore denied.

16. Allegations in paragraph 16 regarding 42 U.S.C. § 1983 and the Idaho Code constitute legal conclusions to which no response is required. Intervenor lacks knowledge or

information sufficient to form a belief about the truth of the remaining allegations in this paragraph and they are therefore denied.

17. Allegations in paragraph 17 constitute legal conclusions to which no response is necessary. To the extent a response is deemed necessary, Intervenors deny the allegations of paragraph 17 in their entirety.

18. Allegations in paragraph 18 constitute legal conclusions to which no response is required. To the extent a response is deemed necessary, Intervenors deny the allegations.

19. Allegations in paragraph 19 constitute legal conclusions to which no response is required. Intervenors admit that a substantial part of the events giving rise to the alleged claims occurred in the District, and that the institutional defendants exist in the District. Intervenors lack knowledge or information sufficient to form a belief about the residence of the individual defendants.

20. Intervenors admit that this Court has authority to enter declaratory judgments and to provide injunctive relief, but deny that such relief is proper in this case.

21. Allegations in paragraph 21 constitute legal conclusions regarding personal jurisdiction to which no response is required. Intervenors lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in paragraph 21 and they are therefore denied.

22. Intervenors deny that Lindsay Hecox is a woman. Intervenors lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in paragraph 22 and they are therefore denied.

23. Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegation implied in paragraph 23 and it is therefore denied.

24. Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 24 and they are therefore denied.

25. Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 25 and they are therefore denied.

26. Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 26 and they are therefore denied.

27. Intervenors deny that a person of the male sex is or can become a woman. Intervenors deny that an individual's sex is "assigned at birth," as it is in fact determined at conception. Intervenors lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in paragraph 27 and they are therefore denied.

28. Intervenors deny that a person of the male sex is or can become a woman. Intervenors lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in paragraph 28.

29. Intervenors deny that gender dysphoria is a medical condition, and deny that sex is "assigned at birth." Intervenors lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in paragraph 29 and they are therefore denied.

30. Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 30 and they are therefore denied.

31. Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 31 and they are therefore denied.

32. Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 32 and they are therefore denied.

33. Intervenor lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 33 and they are therefore denied.

34. Intervenor admit that collegiate athletes have five potential years to compete under NCAA eligibility rules. Intervenor lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in paragraph 34 and they are therefore denied.

35. Intervenor deny that a person of the male sex is female. Intervenor deny that the tests for “biological sex” set out in H.B. 500 would bar a female from competing on a female team in Idaho. Intervenor lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in paragraph 35 and they are therefore denied.

36. Intervenor deny that it is not an option for a male student to participate on a male sports team. Intervenor deny that a person of the male sex is a woman. Intervenor lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in paragraph 36 and they are therefore denied.

37. Intervenor lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 37 and they are therefore denied.

38. Intervenor deny that H.B. 500 impedes Plaintiff’s participation in college athletics, deny that a person of the male sex is a woman, and deny that H.B. 500 would exclude any woman from women’s sports competition. Intervenor lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in paragraph 38 and they are therefore denied.

39. Intervenor lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 39 and they are therefore denied.

40. Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 40 and they are therefore denied.

41. Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 41 and they are therefore denied.

42. Intervenors deny that an individual's sex is "assigned at birth." Intervenors lack knowledge or information sufficient to form a belief about the truth of the remainder or the allegations in paragraph 42 and they are therefore denied.

43. Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 43 and they are therefore denied.

44. Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 44 and they are therefore denied.

45. Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 45 and they are therefore denied.

46. Intervenors deny that H.B. 500 has created a system that could be used to bully or harass female athletes. Intervenors lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in paragraph 46 and they are therefore denied.

47. Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 47 and they are therefore denied.

48. Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 48 and they are therefore denied.

49. Intervenors deny that H.B. 500 requires any invasive or uncomfortable tests or any ultrasound test. Intervenors lack knowledge or information sufficient to form a belief about the truth of the remainder of the allegations in paragraph 49 and they are therefore denied.

50. Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 50 and they are therefore denied.

51. Intervenors deny that H.B. 500 requires any discredited sex verification practices. Intervenors lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in paragraph 51 and they are therefore denied.

52. Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 52 and they are therefore denied.

53. Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 53 and they are therefore denied.

54. Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 54 and they are therefore denied.

55. Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 55 and they are therefore denied.

56. Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 56 and they are therefore denied.

57. Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 57 and they are therefore denied.

58. Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 58 and they are therefore denied.

59. Intervenors deny that persons of the male sex are women. Intervenors admit that IOC and World Athletics regulations permit men to compete in women's competitions in certain circumstances.

60. Intervenors admit that paragraph 60 accurately quotes from the document it cites

in footnote 7. Intervenor deny the remainder of the allegation in paragraph 60.

61. Intervenor deny that persons of the male sex are women. Intervenor admit that current IOC rules allow men to compete in women's sports competitions upon proof of their testosterone suppression for a year to a level under 10nMol/L—a level multiple times higher than the normal range of testosterone levels for women.

62. Intervenor lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 62 and they are therefore denied.

63. Intervenor deny that persons of the male sex are women. The form of the allegations in paragraph 63 are not sufficiently specific to permit certainty as to its claims and they are therefore denied.

64. Intervenor deny the allegations of paragraph 64.

65. Intervenor deny that H.B. 500 would bar competition in women's sports to any woman, and deny that H.B. 500's standards are restrictive. The form of the allegations in paragraph 65 are not sufficiently specific to permit certainty as to the remainder of its claims, and they are therefore denied.

66. Intervenor admit that in the United States high school athletics are generally governed by state interscholastic associations.

67. Intervenor deny the allegations of paragraph 67.

68. Intervenor lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 68 and they are therefore denied.

69. Intervenor lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 69 and they are therefore denied.

70. Intervenor deny the allegation of paragraph 70.

71. Intervenors lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in paragraph 71 and they are therefore denied.

72. Intervenors admit that the provision quoted in paragraph 71 does not mention “intersex traits.” Intervenors lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in paragraph 72 and they are therefore denied.

73. Intervenors lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in paragraph 73 and they are therefore denied.

74. Intervenors deny that persons of the male sex are women or girls. Intervenors lack knowledge or information sufficient to form a belief about the truth of the remainder of the allegations in paragraph 74 and they are therefore denied.

75. Intervenors deny that persons of the male sex are women. Intervenors admit that the current NCAA policy was adopted in 2011 and has been in effect since that time. Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 75 and they are therefore denied.

76. Intervenors deny that there have been “no reported disturbance to women’s sports” as a result of competition of males in women’s divisions. Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 76 and they are therefore denied.

77. Intervenors admit that H.B. 550 was introduced on February 13, 2020 by Rep. Barbara Ehardt. Intervenors deny that H.B. 500 would exclude any women or girls from participation in women’s sports.

78. Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 78 and they are therefore denied.

79. Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 79 and they are therefore denied.

80. Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 80 and they are therefore denied.

81. Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 81 and they are therefore denied.

82. Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 82 and they are therefore denied.

83. Intervenors deny that paragraph 83 accurately characterizes the contents of the referenced letter.

84. Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 84 and they are therefore denied.

85. Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 85 and they are therefore denied.

86. Intervenors deny that the amended version of H.B. 500 excludes any women or girls from women's sports participation. Intervenors deny that H.B. 500 requires any "invasive testing." Intervenors lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in paragraph 86 and they are therefore denied.

87. Intervenors admit that the paragraph accurately reproduces the text of H.B. 500 as signed into law.

88. Intervenors admit that the text of H.B. 500 leaves latitude to the health care provider who undertakes to verify a student's biological sex.

89. Intervenors lack knowledge or information sufficient to form a belief about the

truth of the allegations in paragraph 89 and they are therefore denied.

90. Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 90 and they are therefore denied.

91. Intervenors deny that Doriane Lambelet Coleman’s work was misleadingly cited in the H.B. 500 legislative findings. Intervenors lack knowledge or information sufficient to form a belief about the truth of the remainder of the allegations in paragraph 91 and they are therefore denied.

92. Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 92 and they are therefore denied.

93. Intervenors admit that Governor Little signed H.B. 500 into law and that it becomes effective on July 1, 2020.

94. Paragraph 94 contains legal conclusions to which no response is required. The text of H.B. 500 speaks for itself, as does the content of the court’s decision in *F.V. v. Barron*, 286 F. Supp. 3d 1131 (D. Idaho 2018). To the extent a response is deemed necessary, Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 94 and they are therefore denied.

95. Intervenors deny that “gender identity” is a medical term, and otherwise deny that the definition alleged in paragraph 95 constitutes an authoritative or reliable definition of this new and variously used term.

96. Intervenors deny the allegations in paragraph 96.

97. Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 97, particularly because one cannot know and accurately describe what “everyone” experiences, and they are therefore denied.

98. Intervenors deny that the term “biological sex” is imprecise. Intervenors further deny that gender identity is a biological attribute, or a feature of sex. Intervenors admit that a person’s sex is manifest in several different biological attributes, and admit that in some circumstances when a person suffers from a disorder of sexual development (DSD) anomalous physical attributes can make discernment of sex more difficult. Due to their imprecision, Intervenors deny the remainder of the allegations in this paragraph.

99. Intervenors admit that sex is recognized at birth and customarily recorded on a child’s birth certificate in the United States. Intervenors lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in paragraph 99 and they are therefore denied.

100. Intervenors deny the allegations of paragraph 100.

101. Intervenors deny that the paragraph accurately states the contents of the DSM-V.

102. Intervenors deny that gender dysphoria is a medical condition. Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 101 that gender dysphoria causes (rather than coexists with) anxiety, depression, self-harm, and suicidal actions, and therefore denies those allegations.

103. Intervenors admit that suicide rates among those identifying as transgender are far higher than in the popular at large both before and after “social transition” or “gender affirmation.” Intervenors deny the remainder of the allegations in paragraph 103.

104. Intervenors admit that the advocacy organization World Professional Association for Transgender Health has published what it identifies as standards of care for treating individuals with gender dysphoria, but deny that they are widely accepted. Intervenors deny that the Endocrine Society has published standards of care for treating individuals with gender

dysphoria. Intervenors lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in paragraph 104 and they are therefore denied.

105. As the allegations in paragraph 105 are insufficiently specific to permit a certain conclusion about their meaning, Intervenors deny them.

106. Intervenors deny that there are generally accepted standards of care for gender dysphoria. As the remaining allegations in paragraph 106 are insufficiently specific to permit a certain conclusion about their meaning, Intervenors deny them.

107. Intervenors deny the allegations in paragraph 107.

108. Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 108 that endogenous puberty causes extreme distress for many adolescents who assert a transgender identity, rather than endogenous puberty being a condition or context in which other troubles cause the distress felt by those adolescents. As a result, Intervenors deny that allegation. Intervenors admit that puberty blocking drugs interfere with endogenous puberty. Intervenors deny the remaining allegations in paragraph 108.

109. Intervenors deny that a person of the male sex is a girl. Intervenors admit that puberty-blocking drugs interfere with endogenous puberty and limit the influence of endogenous hormones on the body. Intervenors lack knowledge or information sufficient to form a belief about the remaining allegations in paragraph 109 and they are therefore denied.

110. Intervenors admit that the overwhelming majority of youth who are treated with puberty blockers go on to take cross-sex hormones. Intervenors deny that cross-sex hormone infusions are medically necessary. Intervenors deny that any person can experience the puberty of the opposite sex by taking cross-sex hormones. Intervenors deny that persons of the male sex are girls, and deny that persons of the female sex are boys. Intervenors admit that it is a standard

regimen for boys who wish to have a more feminine physical appearance to take synthetic estrogen while also administering testosterone-suppressing drugs, and that girls who wish to have a more masculine appearance administer testosterone.

111. Intervenors lack knowledge or information about the protocols to which Plaintiffs allude in paragraph 111 sufficient to form a belief about the truth of that allegation and it is therefore denied. Intervenors deny that “gender-affirming therapy” is medically necessary.

112. Intervenors admit that hormone therapy may change a person’s physical appearance and affect certain bodily systems. Because of the imprecision of the allegation and its uncertain import, Intervenors deny the remaining allegations in paragraph 112.

113. Intervenors admit that minors and adults subject themselves to surgeries in hope of approximating the appearances of the opposite sex and to alter hormone production. Intervenors admit that persons who identify as transgender do not need surgical treatment to alleviate their dysphoria. Intervenors deny the remainder of the allegations in paragraph 113.

114. Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 114 and they are therefore denied.

115. Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 115 and they are therefore denied.

116. Intervenors deny the allegations in paragraph 116.

117. Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 117 and they are therefore denied.

118. Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 118 and they are therefore denied.

119. Intervenors lack knowledge or information sufficient to form a belief about the

truth of the allegations in paragraph 119 and they are therefore denied.

120. Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 120 and they are therefore denied.

121. Intervenors deny that H.B. 500 bars women and girls from participation in athletic activities for women and girls. Intervenors admit that H.B. 500 will preclude males from qualifying to compete in athletic activities for women and girls. Paragraph 121 contains legal conclusions for which no response is required. Intervenors lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in paragraph 121 and they are therefore denied.

122. Intervenors deny that H.B. 500 bars any women and girls from participation in athletic activities for women and girls. Intervenors deny that H.B. requires any invasive and traumatizing examinations. Paragraph 122 contains legal conclusions for which no response is required. Intervenors lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in paragraph 122 and they are therefore denied.

123. Paragraph 123 contains legal conclusions for which no response is required. To the extent a response is deemed necessary, Intervenors deny the allegations in paragraph 123.

124. Paragraph 124 contains legal conclusions for which no response is required. To the extent a response is deemed necessary, Intervenors deny the allegations in paragraph 124.

125. Intervenors admit the allegations in paragraph 125.

126. Intervenors deny the allegations of paragraph 126.

127. Intervenors deny that tests mentioned in H.B. 500 are very expensive. Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 127 and they are therefore denied.

128. Intervenors deny that H.B. 500 requires disclosure of any private medical information. Intervenors lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in paragraph 128 and they are therefore denied.

129. Intervenors lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 129 and they are therefore denied.

130. Intervenors deny that H.B. 500 requires the disclosure of results of medical tests to school officials. Intervenors admit that H.B. 500 does not impose confidentiality obligations on medical providers or school officials beyond the extensive confidentiality obligations already imposed by state and federal laws.

131. Intervenors deny the allegations of paragraph 131.

132. Intervenors admit the allegations in paragraph 132.

133. Intervenors admit the allegations of paragraph 133.

134. Intervenors deny that H.B. 500 bars any women or girls from participation in athletic competition or limits the benefit of athletics for any women or girls, or that H.B. 500 will discourage any participation in athletics.

135. Intervenors deny that persons of the male sex are women or girls. Intervenors lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in paragraph 135 and they are therefore denied.

136. Intervenors deny the allegations of paragraph 136.

137. Intervenors deny that persons of the male sex are girls or women. Intervenors deny the remaining allegations of paragraph 137.

138. Paragraph 138 merely incorporates Plaintiffs' allegations to which Intervenors have already responded, and thus requires no response here.

139. Intervenors admit the allegations in paragraph 139.

140. Intervenors admit that paragraph 140 accurately quotes a portion of the Fourteenth Amendment in paragraph 140. The remainder of paragraph 140 constitutes a legal conclusion as to which no response is required.

141. Paragraph 141 contains legal conclusions for which no response is required. To the extent an additional response is deemed necessary, Intervenors deny the allegations in paragraph 141.

142. Paragraph 142 contains legal conclusions for which no response is required. To the extent an additional response is deemed necessary, Intervenors deny the allegations in paragraph 142.

143. Intervenors deny the allegations in paragraph 143.

144. Intervenors deny that H.B. 500 requires “invasive testing.” The remainder of paragraph 144 contains legal conclusions for which no response is required. To the extent an additional response is deemed necessary, Intervenors deny the allegations in paragraph 144.

145. Paragraph 145 contains legal conclusions for which no response is required. To the extent an additional response is deemed necessary, Intervenors deny that persons of the male sex are girls or women. Intervenors deny that high school and collegiate athletic competition in Idaho is organized in terms of gender identity, and so deny that H.B. 500 excludes any students from athletic competition based on their gender identity. Intervenors deny the remaining allegations in paragraph 145.

146. Intervenors deny the allegations in paragraph 146.

147. Intervenors deny the allegations in paragraph 147.

148. Intervenors deny the allegations in paragraph 148.

149. Intervenors deny the allegations in paragraph 149.

150. Intervenors deny the allegations in paragraph 150.

151. Intervenors deny the allegations in paragraph 151.

152. Paragraph 152 merely incorporates Plaintiffs' allegations to which Intervenors have already responded, and thus requires no response here.

153. Intervenors admit the allegations in paragraph 153.

154. Paragraph 154 contains legal conclusions for which no response is required.

155. Paragraph 155 contains legal conclusions for which no response is required. To the extent an additional response is deemed necessary, Intervenors deny the allegations in this paragraph.

156. Paragraph 156 contains legal conclusions for which no response is required. To the extent an additional response is required, Intervenors deny the allegations in this paragraph.

157. Intervenors deny that H.B. 500 requires invasive examinations, and deny that H.B. 500 requires any person to turn over sensitive information to government officials. Paragraph 157 contains legal conclusions for which no response is required. To the extent an additional response is required, Intervenors deny the allegations in this paragraph.

158. Paragraph 158 contains legal conclusions for which no response is required. To the extent an additional response is deemed necessary, Intervenors deny the allegations in this paragraph.

159. Intervenors deny that H.B. 500 requires forced disclosure by any person of information including genetic information or information about genital or reproductive anatomy. The additional allegations of Paragraph 159 comprise legal conclusions for which no response is required. To the extent an additional response is deemed necessary, Intervenors deny the

allegations in this paragraph.

160. Paragraph 160 contains legal conclusions for which no response is required. To the extent an additional response is deemed necessary, Intervenors deny the allegations in this paragraph.

161. Intervenors deny that H.B. 500 requires “intrusive and offensive testing” or authorizes disclosure of “sensitive information.” The additional allegations of paragraph 161 comprise legal conclusions for which no response is required. To the extent an additional response is deemed necessary, Intervenors deny the allegations in this paragraph.

162. Paragraph 162 merely incorporates Plaintiffs’ allegations to which Intervenors have already responded, and thus requires no response here.

163. Intervenors admit the allegations in paragraph 163.

164. Intervenors admit that paragraph 164 accurately quotes from the Fourth Amendment to the United States Constitution in this paragraph.

165. Paragraph 165 contains legal conclusions for which no response is required. To the extent an additional response is deemed necessary, Intervenors deny the allegations in this paragraph.

166. Paragraph 166 contains legal conclusions for which no response is required. To the extent an additional response is deemed necessary, Intervenors deny the allegations in this paragraph.

167. Paragraph 167 contains legal conclusions for which no response is required. To the extent an additional response is deemed necessary, Intervenors deny the allegations in this paragraph.

168. Paragraph 168 contains legal conclusions for which no response is required. To

the extent an additional response is deemed necessary, Intervenor deny the allegations in this paragraph.

169. Intervenor deny that H.B. 500 requires disclosure of any private medical information. The additional allegations of paragraph 169 comprise legal conclusions for which no response is required. To the extent an additional response is deemed necessary, Intervenor deny the allegations in this paragraph.

170. Intervenor deny the allegations in paragraph 170.

171. Intervenor deny that H.B. 500 requires disclosure to school officials of information about genetics, hormones, or genitals. The additional allegations of paragraph 171 comprise legal conclusions for which no response is required. To the extent an additional response is deemed necessary, Intervenor deny the allegations in this paragraph.

172. Paragraph 172 merely incorporates Plaintiffs' allegations to which Intervenor have already responded, and thus requires no response here.

173. Intervenor admit the allegations in paragraph 173.

174. Intervenor admit that Plaintiffs have accurately quoted text from 20 U.S.C. § 1681(a) in paragraph 174.

175. Paragraph 175 contains legal conclusions for which no response is required. To the extent an additional response is deemed necessary, Intervenor deny the allegations in this paragraph.

176. Paragraph 176 contains legal conclusions for which no response is required. To the extent an additional response is deemed necessary, Intervenor admit the first sentence of paragraph 176, and deny the second sentence including because in some circumstances compliance with Title IX may require the separation of sports teams by sex.

177. Paragraph 177 contains legal conclusions for which no response is required. To the extent an additional response is deemed necessary, Intervenors deny the allegations in this paragraph.

178. Paragraph 178 contains legal conclusions for which no response is required. To the extent an additional response is deemed necessary, Intervenors deny the allegations in this paragraph, except admit that the quoted language appears in H.B. 500.

179. Intervenors deny that H.B. 500 acts to exclude any person from participation in sports, and therefore deny the allegations of paragraph 179.

180. Paragraph 180 contains legal conclusions for which no response is required. To the extent an additional response is deemed necessary, Intervenors state that they lack knowledge or information sufficient to form a belief about the truth of Defendants barring Plaintiff Hecox from girls and women's athletic teams, and therefore deny that allegation. Intervenors further deny that a person of the male sex is a girl or woman. Intervenors deny the remaining allegations in paragraph 180.

181. Intervenors deny the allegations or paragraph 181.

182. Paragraph 182 merely incorporates Plaintiffs' allegations to which Intervenors have already responded, and thus requires no response here.

183. Intervenors admit the allegations in paragraph 183.

184. Paragraph 184 contains legal conclusions for which no response is required. To the extent an additional response is deemed necessary, Intervenors deny the allegations in this paragraph.

185. Paragraph 185 contains legal conclusions for which no response is required. To the extent an additional response is deemed necessary, Intervenors deny the allegations in this

paragraph.

186. Paragraph 186 contains legal conclusions for which no response is required. To the extent an additional response is deemed necessary, Intervenor deny the allegations in this paragraph.

187. Paragraph 187 contains legal conclusions for which no response is required. To the extent an additional response is deemed necessary, Intervenor deny the allegations in this paragraph.

ANSWER TO PLAINTIFFS' PRAYER FOR RELIEF

Intervenor deny that Plaintiffs are entitled to any relief.

AFFIRMATIVE DEFENSES

1. Plaintiffs lack standing to bring the claims asserted.
2. Plaintiffs fail to state a claim upon which relief can be granted.
3. The relief requested by Plaintiffs would violate Intervenor's rights under Title IX, 20 U.S.C. § 1681, et seq. and its interpreting regulations.

PRAYER FOR RELIEF

WHEREFORE, having answered Plaintiffs' Complaint, Defendants pray that the Complaint be dismissed, with prejudice.

Respectfully submitted this 26th day of May, 2020.

Roger G. Brooks*
rbrooks@ADFlegal.org
NC Bar No. 16317
Jeffrey A. Shafer*
jshafer@ADFlegal.org
IL Bar No. 6230713
ALLIANCE DEFENDING FREEDOM
15100 N. 90th St.
Scottsdale, AZ 85260
(480) 444-0020
(480) 444-0028 Fax

Kristen K. Waggoner*
kwaggoner@ADFlegal.org
D.C. Bar No. 242069
Parker Douglas*
pdouglas@ADFlegal.org
MI Bar No. P83242
Christiana M. Holcomb*
cholcomb@ADFlegal.org
D.C. Bar No. 176922
ALLIANCE DEFENDING FREEDOM
440 First St. NW, Suite 600
Washington, D.C. 20001
(202) 393-8690
(202) 347-3622 Fax

By: /s/Bruce D. Skaug

Bruce D. Skaug
bruce@skauglaw.com
Idaho Bar No. 3904
Raul R. Labrador
raul@skauglaw.com
Idaho Bar. No. 5469
SKAUG LAW, P.C.
1226 E. Karcher Road
Nampa, ID 83687
(208) 466-0030
(208) 466-8903 Fax

*Applications for admission *pro hac vice*
forthcoming

Attorneys for Proposed Intervenors

Richard Eppink (Bar No. 7503)
AMERICAN CIVIL LIBERTIES UNION OF
IDAHO FOUNDATION
P. O. Box 1897
Boise, ID 83701
T: (208) 344-9750 ext. 1202
REppink@acluidaho.org

Elizabeth Prelogar*
COOLEY LLP
1299 Pennsylvania Avenue, NW Suite 700
Washington D.C. 20004-2400
T: (202) 842-7800
F: (202) 842-7899
eprelogar@cooley.com

Gabriel Arkles*
James Esseks*
Chase Strangio*
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
125 Broad St.,
New York, NY 10004
T: (212) 549-2569
garkles@aclu.org
jesseks@aclu.org
cstrangio@aclu.org

Andrew Barr*
COOLEY LLP
380 Interlocken Crescent, Ste. 900
Broomfield, CO 80021-8023
T: (720) 566-4000
F: (720) 566-4099
abarr@cooley.com

Kathleen Hartnett*
COOLEY LLP
101 California Street 5th Floor
San Francisco, CA 94111-5800
T: (415) 693-2000
F: (415) 693-2222
khartnett@cooley.com

Catherine West*
LEGAL VOICE
907 Pine Street, Unit 500
Seattle, WA 98101
T: (206) 682-9552
F: (206) 682-9556
cwest@legalvoice.org

* Admitted *Pro Hac Vice*

Attorneys for Plaintiffs

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO**

LINDSAY HECOX, et al.,

Plaintiffs,

v.

BRADLEY LITTLE, et al.,

Defendants.

No. 1:20-cv-184-CWD

**MOTION FOR A
PRELIMINARY INJUNCTION
(EQUAL PROTECTION
CLAIM)**

The plaintiffs move this Court, under Federal Rule of Civil Procedure 65, for a preliminary injunction prohibiting the defendants, as well as their officers, agents, employees, attorneys, and any person who is in active concert or participation with them, from enforcing any of the provisions of House Bill 500, as passed by the Sixty-fifth Idaho Legislature in its Second Regular Session and enacted on March 30, 2020. The bill is to be codified as Idaho Code §§ 33-6201 through 33-6206 and is also found at 2020 Idaho Session Laws ch. 333. A copy of the bill is attached as Exhibit A to the Complaint in this case (Dkt. 1 at 57). The plaintiffs also move this Court for an order waiving the requirement for bond or security from the plaintiffs.

This motion is based on the brief in its support and the declarations filed with it, as well as the Complaint (Dkt. 1). The plaintiffs make this motion on the grounds that the bill violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, as set out in their brief.

Dated: April 30, 2020.

/s/ Richard Eppink

Richard Eppink
AMERICAN CIVIL LIBERTIES
UNION OF IDAHO
FOUNDATION

Kathleen Hartnett
Elizabeth Prelogar
Andrew Barr
COOLEY LLP

Gabriel Arkles
James Esseks
Chase Strangio
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

Catherine West
LEGAL VOICE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of April, 2020, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

Dan Skinner

danskinner@cssklaw.com

cssklaw@cssklaw.com

Attorney for Boise School District,

Individual members of the Board of Trustees of Boise School District,

Coby Dennis

Steven L. Olsen

steven.olsen@ag.idaho.gov

W. Scott Zanzig

scott.zanzig@ag.idaho.gov

Dayton P. Reed

dayton.reed@ag.idaho.gov

Attorneys for Bradley Little,

Sherri Ybarra,

Individual members of the State Board of Education,

Boise State University,

Marlene Tromp,

Individual members of the Idaho Code Commission

DATED this 30th day of April, 2020.

/s/ Richard Eppink

Richard Eppink (Bar No. 7503)
AMERICAN CIVIL LIBERTIES UNION
OF IDAHO FOUNDATION
P. O. Box 1897
Boise, ID 83701
T: (208) 344-9750 ext. 1202
REppink@acluidaho.org

Elizabeth Prelogar*
COOLEY LLP
1299 Pennsylvania Avenue, NW Suite 700
Washington D.C. 20004-2400
T: (202) 842-7800
F: (202) 842-7899
eprelogar@cooley.com

Gabriel Arkles*
James Esseks*
Chase Strangio*
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
125 Broad St.,
New York, NY 10004
T: (212) 549-2569
garkles@aclu.org
jesseks@aclu.org
cstrangio@aclu.org

Andrew Barr*
COOLEY LLP
380 Interlocken Crescent, Ste. 900
Broomfield, CO 80021-8023
T: (720) 566-4000
F: (720) 566-4099
abarr@cooley.com

Kathleen Hartnett*
COOLEY LLP
101 California Street 5th Floor
San Francisco, CA 94111-5800
T: (415) 693-2000
F: (415) 693-2222
khartnett@cooley.com

Catherine West*
LEGAL VOICE
907 Pine Street, Unit 500
Seattle, WA 98101
T: (206) 682-9552
F: (206) 682-9556
cwest@legalvoice.org

* Admitted *Pro Hac Vice*

Attorneys for Plaintiffs

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO**

LINDSAY HECOX, et al.,

Plaintiffs,

v.

BRADLEY LITTLE, et al.,

Defendants.

No. 1:20-cv-184-CWD

**EXPERT DECLARATION OF
DEANNA ADKINS, MD,
IN SUPPORT OF PLAINTIFFS'
MOTION
FOR PRELIMINARY
INJUNCTION**

I, Deanna Adkins, MD, have been retained by counsel for Plaintiffs Lindsay Hecox and Jane Doe, with her next friends, Jean Doe and John Doe, as an expert in connection with the above-captioned litigation.

1. The purpose of this declaration is to provide my expert opinion on: (1) the nature and impact of treatment protocols for transgender youth; and (2) the different biological characteristics of sex and the ways in which they may not align in the same direction within an individual.

2. I have knowledge of the matters stated in this declaration and have collected and cite to relevant literature concerning the issues that arise in this litigation in the body of this declaration.

3. In preparing this declaration, I reviewed the legislative findings for H.B. 500, as enacted, and the sources cited therein. I also relied on my scientific education and training, my research experience, and my knowledge of the scientific literature in the pertinent fields. The materials I have relied upon in preparing this declaration are the same types of materials that experts in my field of study regularly rely upon when forming opinions on these subjects. I may wish to supplement these opinions or the bases for them as a result of new scientific research or publications or in response to statements and issues that may arise in my area of expertise.

BACKGROUND AND QUALIFICATIONS

4. I received my medical degree from the Medical College of Georgia in 1997. I served as the Fellowship Program Director of Pediatric Endocrinology at Duke University School of Medicine for fourteen years and am currently the Director of the Duke Center for Child and Adolescent Gender Care.

5. I have been licensed to practice medicine in the state of North Carolina since 2001.

6. I have extensive experience working with children with endocrine disorders and I am an expert in the treatment of children with differences or disorders of sex development and in the treatment of children with gender dysphoria.

7. I am a member of the American Academy of Pediatrics, the North Carolina Pediatric Society, the Pediatric Endocrine Society, and The Endocrine Society. I am also a member of the World Professional Association for Transgender Health (“WPATH”), the leading association of medical and mental health professionals in the treatment of transgender individuals.

8. I am the founder of the Duke Center for Child and Adolescent Gender Care (“Gender Care Clinic”), which opened in 2015. I currently serve as the director of the clinic. The Gender Care clinic treats children and adolescents age 7 through 22 with gender dysphoria and/or differences or disorders of sex development. I have been caring for these individuals in my routine practice for many years prior to opening the clinic.

9. I currently treat approximately 400 transgender and intersex young people from North Carolina and across the Southeast at the Gender Care clinic. I have treated approximately 500 transgender and intersex young people in my career.

10. As part of my practice, I stay familiar with the latest medical science and treatment protocols related to differences or disorders of sex development and gender dysphoria.

11. I am regularly called upon by colleagues to assist with the sex assignment of infants who cannot be classified as male or female at birth due to a range of variables in which sex-related characteristics are not completely aligned as male or female.

12. I have testified twice as an expert at trial or deposition in the past four years.

TREATMENT PROTOCOLS FOR TRANSGENDER INDIVIDUALS

13. A transgender individual is an individual who has a gender identity that differs from the person's sex designated at birth.

14. A person's gender identity refers to a person's inner sense of belonging to a particular gender, such as male or female.

15. Everyone has a gender identity.

16. Children usually become aware of their gender identity early in life.

17. Most people have a gender identity that aligns with the sex they are designated at birth. However, for some people, their gender identity does not align

with the sex they are given at birth. This lack of alignment can create significant distress for individuals with this experience and can be felt in children as young as 2 years old.

18. A person's gender identity (regardless of whether that identity matches other sex-related characteristics) is fixed, is not subject to voluntary control, cannot be voluntarily changed, and is not undermined or altered by the existence of other sex-related characteristics that do not align with it.

19. According to the American Psychiatric Association's Diagnostic & Statistical Manual of Mental Disorders ("DSM V"), "gender dysphoria" is the diagnostic term for the condition where clinically significant distress results from the lack of congruence between a person's gender identity and the sex they are designated at birth. 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.

20. Gender dysphoria is a serious medical condition that, if left untreated, can result in severe anxiety and depression, self-harm, and suicidality. Spack NP, Edwards-Leeper L, Feldman HA, et al. Children and adolescents with gender identity disorder referred to a pediatric medical center. *Pediatrics*. 2012; 129(3):418-425. Olson KR, Durwood L, DeMeules M, McLaughlin KA. Mental health of transgender children who are supported in their identities. *Pediatrics*. 2016; 137:1-8.

21. Before receiving treatment, many individuals with gender dysphoria have high rates of anxiety, depression and suicidal ideation. I have seen in my patients that without appropriate treatment this distress impacts every aspect of life.

22. Attempted suicide rates in the transgender community are over 40%. The only treatment to avoid this serious harm is to recognize the gender identity of patients with gender dysphoria and follow appropriate treatment protocols to affirm gender identity and alleviate distress.

23. When appropriately treated, gender dysphoria is easily managed. I currently treat hundreds of transgender patients. All of my patients have suffered from persistent gender dysphoria, which has been alleviated through clinically appropriate treatment.

24. The Endocrine Society and the World Professional Association for Transgender Health have published widely accepted standards of care for treating gender dysphoria. Hembree WC, et al. Endocrine treatment of gender-dysphoria/gender incongruent persons: An Endocrine Society clinical practice guideline. *J Clin Endocrinol Metab* 2017; 102: 3869–3903; World Prof'l Ass'n for Transgender Health, Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People (7th Version, 2011), http://www.wpath.org/site_page.cfm?pk_association_webpage_menu=1351&pk_association_webpage=4655.

25. The medical treatment for gender dysphoria is to eliminate the clinically significant distress by helping a transgender person live in alignment with their gender identity. This treatment is sometimes referred to as “gender transition,” “transition related care,” or “gender affirming care.” The American Academy of Pediatrics agrees that this care is safe, effective, and medically necessary treatment for the health and wellbeing of children and adolescents suffering from gender dysphoria. Rafferty J, Committee on Psychosocial Aspects of Child and Family Health, Committee on Adolescence and Section on Lesbian, Gay, Bisexual, and Transgender Health and Wellness, *Pediatrics* October 2018; 142(4): 2018-2162.

26. The precise treatment for gender dysphoria depends on each person’s individualized need, and the medical standards of care differ depending on whether the treatment is for a pre-pubertal child, an adolescent, or an adult.

27. Before puberty, treatment does not include any drug or surgical intervention. For this group of patients, treatment is limited to “social transition,” which means allowing a transgender child to live and be socially recognized in accordance with their gender identity. This can include allowing children to wear clothing, to cut or grow their hair, to use names and pronouns, and to access restrooms and other sex-separated facilities and activities in line with their gender identity instead of the sex assigned to them at birth. Social transition is a critical part of treatment of patients with gender dysphoria of all ages and it is the only treatment for pre-pubertal children.

28. It undermines social transition – a critical part of gender dysphoria treatment – to force a person with gender dysphoria to live in a manner that does not align with the person’s gender identity. Requiring a girl who is transgender, for example, to use facilities or participate in single-sex activities for boys can be deeply harmful and disruptive to treatment. In the context of activities like athletics, which are typically separated by sex, I know from experience with my patients that it can be extremely harmful for a transgender young person to be excluded from the team consistent with their gender identity.

29. For many transgender adolescents, going through endogenous puberty can cause extreme distress. Puberty blocking treatment allows transgender youth to avoid going through their endogenous puberty thereby avoiding the heightened gender dysphoria and permanent physical changes that puberty would cause.

30. Puberty blocking treatment works by pausing endogenous puberty at whatever stage it is at when the treatment begins. This has the impact of limiting the influence of a person’s endogenous hormones on the body. For example, after the initiation of puberty blocking treatment, a girl who is transgender will experience none of the impacts of testosterone that would be typical if she underwent her full endogenous puberty.

31. When treating a transgender young person, when medically indicated, I prescribe puberty blocking treatment at the Tanner 2 stage of puberty. For girls who are transgender, this means that puberty is put on pause usually around the time that the patient has circulating testosterone at a level of 50 ng/dL or 1.735

nMol/L. A patient that undergoes puberty blocking treatment at this stage and then proceeds to gender-affirming hormone therapy will never have circulating testosterone above what is typical of non-transgender girls.

32. Under the Endocrine Society Clinical Guidelines, once a transgender adolescent establishes further maturity and competence to make decisions about additional treatment, it may then be medically necessary and appropriate to provide gender-affirming hormone therapy to initiate puberty consistent with gender identity. For girls who are transgender this means administering both testosterone suppressing treatment as well as estrogen to initiate hormonal puberty consistent with the patient's female gender identity. For boys who are transgender this means administering testosterone.

33. Hormone therapy and social transition significantly change a person's physical appearance. For example, boys who are transgender treated with puberty blockers and gender affirming hormones will receive the same amount of testosterone during puberty that non-transgender boys generate with their testes. They will grow darker and thicker facial and body hair, experience fat distribution away from the hips, have decreased breast growth, and develop lower vocal pitch. Likewise, girls who are transgender and treated with puberty blockers and gender affirming hormones will receive the same amount of estrogen during puberty that non-transgender girls generate endogenously. They will develop breast tissue, fat will be distributed to their hips, their skin will soften and their vocal pitch will not deepen further.

34. Adolescents who undergo hormone treatment before the end of puberty may experience some permanent physical changes that a person who transitions later in life would not.

35. Treatment for transgender youth and adolescents is safe, effective and essential for the well-being of transgender young people. My patients who receive medically appropriate hormone therapy and who are treated consistent with their gender identity in all aspects of life experience significant improvement in their health.

36. For many patients, social transition and hormone therapy are sufficient forms of treatment for gender dysphoria. Others also need one or more forms of surgical treatment to alleviate gender dysphoria. Transgender boys may receive chest reconstruction surgery as young as 16. Genital surgery for transgender women and men is not performed until the person has reached the age of at least 18. Genital surgery for transgender women can result in a vulva and vagina—external genitalia typical of women—as well as removal of the testes, which eliminates the need for medical testosterone suppression. Because surgery does not produce ovaries, transgender women who have had this form of surgery typically continue to need estrogen therapy. I do not perform surgery, but I refer my older patients for surgery when clinically appropriate. In my experience, some young adults who would benefit from one or more forms of surgical treatment for gender dysphoria face financial and insurance barriers that prevent them from accessing this care.

37. My clinical experience with my patients, which has also been documented extensively in research, has been that they suffer and experience worse health outcomes when they are ostracized from their peers through policies that exclude them from spaces and activities that other boys and girls are able to participate in consistent with gender identity.

SEX ASSIGNMENT AND BIOLOGICAL SEX CHARACTERISTICS

38. When a child is born, a sex designation usually occurs at birth based on the infant's genitals. This designation is then recorded and usually becomes the sex designation listed on the infant's birth certificate.

39. Usually, though not always, a person's gender identity aligns with the sex designated based on the person's genitals at birth.

40. For transgender people and people with differences of sex development (DSDs), however, there is not complete alignment among sex-related characteristics.

41. Differences of sex development or DSDs refer to the range of variations in which a person's sex-related characteristics don't all align in one direction. Some describe people with these variations as "intersex."

42. Sex-related characteristics include external genitalia, internal reproductive organs, gender identity, chromosomes, and secondary sex characteristics. These biological sex-related characteristics do not always align as completely male or completely female in a single individual. And none of these characteristics exists in a binary.

43. Although we generally label infants as “male” or “female” based on observing their external genitalia at birth, external genitalia are not always clearly identifiable as typically male or typically female. External genitalia do not account for the full spectrum of sex-related characteristics nor are they alone a proxy for how we understand sex.

44. In one out of every 1,000 live births, the infant’s genitals are not typically male or female.

45. For individuals with DSDs, sex assignment at birth can involve the evaluation of the chromosomes, the external genitalia, the internal genitalia, hormonal levels, and sometimes, specific genes. There are also cases in which the appearance of the external genitalia can change at puberty as well as variations in the appearance of secondary sex characteristics that may signal a difference in sex development in a person.

46. When designation of sex of an infant with a DSD is made at birth, that assignment is temporary until the individual can express their gender identity. In cases where the initial designation was incorrect, appropriate medical protocols instruct that the sex should be updated to align with the individual’s gender identity. Similarly, if the sex designation of an infant without a DSD turns out to be inconsistent with the individual’s gender identity, as for transgender people, the sex should be updated to align with the individual’s gender identity.

47. Where surgery has been done on children with DSDs prior the child’s understanding and expression of their gender identity, significant distress can

result. Many of these children have had to endure further surgeries to reverse earlier surgical intervention because their gender identity did not match the initial sex designation.

48. Out of every 300 people in the world, at least one has an intersex variation meaning that the person's sex characteristics do not all align as typically male or typically female.

49. Some examples of these variations include:

- a. Individuals with Complete Androgen Insensitivity (CAIS) have 46,XY chromosomes and internal testes that produce testosterone, but do not have the tissue receptors that respond to testosterone or other androgens. The body, therefore, does not develop a penis, thicker facial hair and other secondary sex characteristics more commonly associated with men. At birth, based on the appearance of the external genitalia, individuals with CAIS are generally assigned female. If their testes are left in place, the body will convert the hormones into estrogen. Many do not find out they have XY chromosomes or testes until they do not start menstruating at the expected age.
- b. Androgen Insensitivity can also be partial (known as PAIS). Individuals with PAIS have XY chromosomes, testes, and some (but still lower than typical) response to testosterone. They may be born with genitals that appear like a typical penis, a typical vulva, or somewhere in between.

- c. Individuals with Swyer Syndrome have XY chromosomes and “streak” gonads (gonadal tissue that did not develop into testes or ovaries). Externally, a child with Swyer Syndrome usually develops a vulva. Because their gonads do not produce hormones, they will not develop most secondary sex characteristics without hormone treatment.
- d. Individuals with Klinefelter Syndrome have 47,XXY chromosomes and internal and external genitalia typically associated with males, however, their testicles may have reduced testosterone production. This may lead to breast development, low muscle mass and body hair, and infertility.
- e. Individuals with Turner Syndrome have 45,XO chromosomes, which means they have one fewer copy of the X chromosome than expected. In utero, these individuals form sex characteristics typically associated with females, including internal structures like a uterus and fallopian tubes, but the ovaries may degenerate before birth (or in some cases, not until young adulthood), leading to an inability to make estrogen. Many individuals with Turner Syndrome will not go through puberty without hormone therapy.
- f. Individuals with Mosaicism have different sets of chromosomes in different cells. Mosaic karyotypes happen as a result of atypical cell division early in embryonic development and could involve various combinations among XX, XY, XO, XXY, and other chromosome

patterns. Configuration of gonadal tissue, genitals, and hormone production and response can all vary.

- g. Individuals with ovotestes (sometimes known as Ovotesticular DSD) have gonads that contain both ovarian and testicular tissue. Their chromosomes may be XX, XY, or Mosaic. Genital appearance at birth can be male-typical, female-typical, or something else.
- h. Congenital Adrenal Hyperplasia (CAH) can occur in individuals with XX or XY chromosomes. Individuals with CAH and 46,XX chromosomes have ovaries, a uterus, and a higher-than-typical production of androgens in utero that can lead to the development of genital differences at birth – such as an enlarged clitoris that may look like a penis, or the lack of a vaginal opening. CAH can also cause the development of typically masculine features like increased muscle mass and body hair. Most individuals with CAH and XX chromosomes are assigned female at birth, but many eventually have a male or non-binary gender identity.
- i. Individuals with 5-alpha reductase deficiency (5-ARD) have XY chromosomes, but they have an enzyme deficiency that inhibits conversion of testosterone to dihydrotestosterone (the active form of testosterone) to varying degrees. This can impact genital development, and at birth, individuals with 5-ARD may have genitals that appear female-typical, neither male-typical nor female-typical, or mostly male-


typical with differences like hypospadias (where the urethra is located somewhere other than the tip of the penis). During puberty, hormonal changes allow them to make more dihydrotestosterone, causing the development of some secondary sex characteristics typically associated with males, as well as genital masculinization. Many of those who were assigned female based on the appearance of their genitals at birth have a male gender identity and live as males beginning in adolescence or early adulthood.

50. As the examples above underscore, from a medical perspective, chromosomes, reproductive anatomy and endogenous testosterone alone do not determine a person's sex, nor does a single sex-related characteristic.

51. Idaho's new law instructs physicians to "verify" an individual's sex based on chromosomes, reproductive anatomy or endogenous testosterone but none of these characteristics alone or in any combination can "verify" sex.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on April 27, 2020



Deanna Adkins, MD

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of April, 2020, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

Dan Skinner
danskinner@cssklaw.com
cssklaw.com
*Attorney for Boise School District,
Individual members of the Board of Trustees of Boise School District,
Coby Dennis*

Steven L. Olsen
steven.olsen@ag.idaho.gov
W. Scott Zanzig
scott.zanzig@ag.idaho.gov
Dayton P. Reed
dayton.reed@ag.idaho.gov
*Attorneys for Bradley Little,
Sherri Ybarra,
Individual members of the State Board of Education,
Boise State University,
Marlene Tromp,
Individual members of the Idaho Code Commission*

DATED this 30th day of April, 2020.

/s/ Richard Eppink

EXHIBIT A

DUKE UNIVERSITY MEDICAL CENTER

CURRICULUM VITAE

for
Permanent Record
and the
Appointments and Promotions Committee

Date Prepared: April 27, 2020

Name:	Deanna W. Adkins, MD
Primary Academic Appointment:	Assistant Professor Track IV
Primary Academic Department :	Pediatrics
Secondary Appointment	<u>None</u>
Present Academic Rank and Title	Associate Professor of Pediatrics
Date and Rank of First Duke Faculty Appointment:	July 1, 2004 Clinical Associate
Medical Licensure:	North Carolina
License #:	200100207
Date :	March 15, 2001
Specialty Certification(s) and Dates:	10/16/2001-2018 General Pediatrics 8/18/2003 and current-Pediatric Endocrinology
Date of Birth:	██████ 1970
Place :	Albany, GA USA
Citizen of:	USA
Visa Status :	N/A

Education	Institution	Date (Year)	Degree
High School	Tift County High School	1988	Graduated with High Honors
College	Georgia Institute of Technology	1993	BS Applied Biology/Genetics High Honors
Graduate or Professional School	Medical College of Georgia	1997	MD

Professional Training and Academic Career

Institution	Position/Title	Dates
University of North Carolina Hospitals, Chapel Hill, North Carolina	Pediatrics Resident	1997-2000
University of North Carolina Hospitals, Chapel Hill, North Carolina	Pediatric Endocrine Fellow	2000-2004
Duke University Medical Center, Durham, North Carolina	Clinical Associate/Medical Instructor	2004-2008
Duke University Medical Center, Durham, North Carolina	Assistant Professor	2008-2020
Duke University Medical Center, Durham, North Carolina	Fellowship Program Director Pediatric Endocrinology	2008-2010
Duke University Medical Center, Durham, North Carolina	Associate Fellowship Program Director Pediatric Endocrinology	2010-2014
Duke University Medical Center, Durham, North Carolina	Fellowship Program Director Pediatric Endocrinology	2014-12/2019
Duke University Medical Center, Durham, North Carolina	Director Duke Child and Adolescent Gender Care	3/2015-present
Duke University Medical Center, Durham, North Carolina	Medical Director-Duke Children's Specialty of Raleigh	3/2017-present
Duke University Medical Center, Durham, North Carolina	Associate Professor Pediatric	1/2020-present

Deanna W. Adkins, MD

April 27, 2020

Publications

Refereed Journals

1. Zeger M, **Adkins D**, Fordham LA, White KE, Schoenau E, Rauch F, Loechner KJ. "Hypophosphatemic rickets in opsismodysplasia," J Pediatr Endocrinol Metab. 2007 Jan;20(1):79-86. PMID: 17315533
2. Worley G, Crissman BG, Cadogan E, Milleson C, **Adkins DW**, Kishnani PS "Down Syndrome Disintegrative Disorder: New-Onset Autistic Regression, Dementia, and Insomnia in Older Children and Adolescents With Down Syndrome". J Child Neurol. 2015 Aug;30(9):1147-52. doi: 10.1177/0883073814554654. Epub 2014 Nov 3. PMID:25367918
3. Tejawani R, Jiang R, Wolf S, **Adkins DW**, Young BJ, Alkazemi M, Wiener JS, Pomann GM, Purves JT, Routh JC," Contemporary Demographic, Treatment, and Geographic Distribution Patterns for Disorders of Sex Development". Clin Pediatr (Phila). 2017 Jul 1:9922817722013. doi: 10.1177/0009922817722013. PMID:28758411
4. Lapinski J1, Covas T2, Perkins JM3, Russell K4, **Adkins D** 5, Coffigny MC6, Hull S7. "Best Practices in Transgender Health: A Clinician's Guide Prim Care". 2018 Dec;45(4):687-703. doi: 10.1016/j.pop.2018.07.007. Epub 2018 Oct 5. PMID: 30401350 DOI: 10.1016/j.pop.2018.07.007
5. Paula Trief, Nicole Foster, Naomi Chaytor, Marisa Hilliard, Julie Kittelsrud, Sarah Jaser, Shideh Majidi, Sarah Corathers, Suzan Bzdick, **Adkins DW**, Ruth Weinstock; "Longitudinal Changes in Depression Symptoms and Glycemia in Adults with Type 1 Diabetes", Diabetes Care; 2019 Jul;42(7):1194-1201. doi: 10.2337/dc18-2441. Epub 2019 May; PMID: 31221694
6. M. Hassan Alkazemi, MD, MS, Leigh Nicholl, MS, Ashley W. Johnston, MD, Steven Wolf, MS, Gina-Maria Pomann, PhD, Diane Meglin, MSW, **Deanna Adkins, MD**, Jonathan C. Routh, MD, MPH; "Community Perspectives on Difference of Sex Development (DSD) Diagnoses: a Crowdsourced Survey", Journal of Pediatric Urology accepted April 2, 2020

Study Group publications

1. Turner DA, Curran ML, Myers A, Hsu DC, Kesselheim JC, Carraccio CL and the Steering Committee of the Subspecialty Pediatrics Investigator Network (SPIN). Validity of Level of Supervision Scales for Assessing Pediatric Fellows on the Common Pediatric Subspecialty Entrustable Professional Activities. *Acad Med.* 2017 Jul 11. doi: 10.1097/ACM.0000000000001820. PMID:28700462
2. Mink R, Carraccio C, High P, Dammann C, McGann K, Kesselheim J, Herman B. Creating the Subspecialty Pediatrics Investigator Network (SPIN). Creating the Subspecialty Pediatrics Investigator Network Richard Mink, MD, MACM1, Alan Schwartz, PhD2, Carol Carraccio, MD, MA3, Pamela High, MD4, Christiane Dammann, MD5, Kathleen A. McGann, MD6, Jennifer Kesselheim, MD, EdM7, *J Peds* 2018 Jan;192:3-4.e2. PMID: 29246355 DOI: 10.1016/j.jpeds.2017.09.079
3. Erratum 2018. PMID: 29246355 DOI: [10.1016/j.jpeds.2017.09.079](https://doi.org/10.1016/j.jpeds.2017.09.079)
4. Mink RB¹, Myers AL, Turner DA, Carraccio CL. Competencies, Milestones, and a Level of Supervision Scale for Entrustable Professional Activities for Scholarship. *Acad Med.* 2018 Jul 10. doi: 10.1097/ACM.0000000000002353. [Epub ahead of print] PMID: 29995669
DOI:[10.1097/ACM.0000000000002353](https://doi.org/10.1097/ACM.0000000000002353) Mink RB, Schwartz A, Herman BE,

Editorials

- a. Editorial Charlotte News and Observer-“**NC pediatric specialists say HB2 ‘flawed’ and ‘harmful,’ call for repeal**”; April 18, 2016; authors: Deanna Adkins, Ali Calikoglu, Nina Jain, Michael Freemark, Nancie MacIver, Robert Benjamin, Beth Sandberg, etc.
- b. Editorial Raleigh News and Observer-“**Beverly Gray: Repeal HB2**” May 2016: authors Beverly Gray, Deanna Adkins, Judy Sidenstein, Jonathan Routh, Haywood Brown, Clayton Afonso, William Meyer, Kristen Russell, Caroline Duke, Nancy Zucker, Kevin Weinfurt, Jennifer St. Claire, Angela Annas, Katherine Keitcher

Chapters in Books

1. Endocrinology Chapter writer and editor in **Fetal and Neonatal Physiology for the Advanced Practice Nurse**; Editors: Amy Jnah DNP, NNP-BC, Andrea Nicole Trembath MD, MPH, FAAP. December 21, 2018 ISBN-10 0826157319

Selected Abstracts:

1. Redding-Lallinger RC, **Adkins DW**, Gray N: The use of diaries in the study of priapism in sickle cell disease. Poster Abstract in Blood November 2003
2. **Adkins, D.W.** and Calikoglu, A.S.: Delayed puberty due to isolated FSH deficiency in a male. Pediatric Research Suppl. 51: Abstract #690. page 118A, 2004
3. Zeger, M.P.D., **Adkins, D.W.**, White, K., Loechner, K.L.: Opsismodysplasia and Hypophosphatemic Rickets. Pediatric Research Suppl.-from PAS 2005
4. Kellee M. Miller¹, David M. Maahs², **Deanna W. Adkins**³, Sureka Bollepalli⁴, Larry A. Fox⁵, Joanne M. Hathway⁶, Andrea K. Steck², Roy W. Beck¹ and Maria J. Redondo⁷ for the T1D Exchange Clinic Network; Twins Concordant for Type 1 Diabetes in the T1D Exchange -poster at ADA scientific sessions 6/2014
5. Laura Page, MD; Benjamin Mouser, MD; Kelly Mason, MD; Richard L. Auten, MD; **Deanna Adkins, MD** CHOLESTEROL SUPPLEMENTATION IN SMITH-LEMLI-OPITZ: A Case of Treatment During Neonatal Critical Illness; - poster 06/2014
6. Lydia Snyder, **MD, Deanna Adkins, MD**, Ali Calikoglu, MD; Celiac Disease and Type 1 Diabetes: Evening of Scholarship UNC Chapel Hill 3/2015 poster
7. **Deanna W. Adkins, MD**, Kristen Russell, LCSW, Dane Whicker, PhD, Nancy Zucker, Ph. D: Departments of Pediatrics and Psychiatry, Duke University Medical Center; Evaluation of Eating Disturbance and Body Image Disturbance in the Trans Youth Population; WPATH International Scientific Meeting June 2016; Amsterdam, The Netherlands
8. Rohit Tejwani, **Deanna Adkins**, Brian J. Young, Muhammad H. Alkazemi, Steven Wolf³, John S. Wiener, J. Todd Purves, and Jonathan C. Routh; Contemporary Demographic and Treatment Patterns for Newborns Diagnosed with Disorders of Sex Development; Poster presentation at AUA meeting 2016
9. S.A. Johnson, **D.W. Adkins**, Case Report: The Co-diagnosis of Hypopituitarism with Klinefelter in a patient with short stature; Pediatric Academic Society Meeting 2018
10. Lapinski J, Dooley R, Russell K, Whicker D, Gray, B, **Adkins DW**; **Title:** Developing a Pediatric Gender Care Clinic at a Major Medical Setting in the South; Workshop Philadelphia Trans Wellness Conference 2018
11. Jessica Lapinski, DO, Deanna Adkins, MD, Tiffany Covas, MD, MPH, Kristen Russell, MSW, LCSW; An Interdisciplinary Approach to Full Spectrum Transgender Care; WPATH Conference Buenos Aires, Argentina, November 3, 2018
12. Leigh Spivey, MS, Nancy Zucker, PhD, Erik Severiede, B.S., Kristen Russell, LCSW, Deanna Adkins, MD; USPATH Washington, DC Sept. 2019. Platform presentation;

“Psychological Distress Among Clinically Referred Transgender Adolescents: A latent Profile Analysis”

Non-Refereed Publications

- i. Print
 - i. Editorial Charlotte News and Observer-“**NC pediatric specialists say HB2 ‘flawed’ and ‘harmful,’ call for repeal**”; April 18, 2016
 - ii. Editorial News and Observer-HB2 May 2016 -“**Beverly Gray: Repeal HB2**” May 2016
- ii. Digital
 - i. Supporting and Caring for Transgender Children-HRC guide 2017
 - ii. Initial endocrine workup and referral guidelines for primary care Providers- Pediatric Endocrine Society Education Committee Website Publication
 - iii. Only Human Podcast August 2, 2016;
<https://www.wnystudios.org/podcasts/onlyhuman/episodes/id-rather-have-living-son-dead-daughter>
- iii. Media and Community Interviews
 - i. Greensboro News and Record Community Forum October 2017-*Transgender Panel Moderator*
 - ii. Playmakers Repertory Company-Chapel Hill: *Draw the Circle* Transgender Community Panel 2017
 - iii. Duke Alumni Magazine
 - iv. Duke Stories
 - v. DukeMed Alumni Magazine
 - vi. NPR Podcast Only Human piece on caring for transgender youth and follow up piece 1 year later
 - vii. ABC11, WRAL, WNCN News Coverage
 - viii. News and Observer: Charlotte and Raleigh
 - ix. Duke Chronicle and Daily Tarheel Article
 - x. Huffington Post Article

Published Scientific Reviews for Mass Distribution

- c. Lapinski J1, Covas T2, Perkins JM3, Russell K4, **Adkins D** 5, Coffigny MC6, Hull S7. Best Practices in Transgender Health: A Clinician's Guide Prim Care. 2018 Dec;45(4):687-703. doi: 10.1016/j.pop.2018.07.007. Epub 2018 Oct 5. PMID: 30401350 DOI: 10.1016/j.pop.2018.07.007

Position and Background Papers

Non-authored Publications

Other

Deanna W. Adkins, MD

April 27, 2020

Consultant Appointments:

North Carolina Newborn Screening Committee,
Human Rights Campaign Transgender Youth Advisory Board

Scholarly Societies: None

Professional Awards and Special Recognitions

ESPE Fellows Summer School, 2001
NIH Loan Repayment Program Recipient
Lawson Wilkins AstraZeneca Research Fellow,
2003-2004
HEI 2017 Leaders in LGBTQ Healthcare
Equality
Inside Out Durham Appreciation Award
Duke Health System Diversity and Inclusion
Award January 2018

Editorial Experience

Editorial Boards
Ad Hoc scientific review journals:
Hormone Research, Lancet, NC Medical journal, Journal of Pediatrics, Pediatrics,
Transgender Health, International Journal of Pediatric Endocrinology

Organizations and Participation

American Academy of Pediatrics
Council on Information Technology
Member
Reviewer COCIT AAP Annual Meeting
presentations
Member Section on Endocrinology

NC Pediatric Society
The Endocrine Society
Member Education Committee
Writer Web Publication for Pediatrician
WPATH-International Transgender Society

External Support

<u>Approximate Duration</u>	<u>PI</u>	<u>% Effort</u>	<u>Purpose</u>	<u>Amount Duration</u>
<u>Past</u>	<u>JAEB Center- Deanna Adkins</u>	0.5%	<u>Type 1 diabetes research</u>	<u>\$ 5yr</u>

<u>Approximate Duration</u>	<u>PI</u>	<u>% Effort</u>	<u>Purpose</u>	<u>Amount Duration</u>
<u>Past</u>	<u>Josiah Trent Foundation Grant-Deanna Adkins</u>	0.5%	<u>Transgender and eating disorder research</u>	<u>\$5000 3 yr</u>
<u>Pending: Submitted</u>	<u>NIH-Kate Whetten</u>	0.1%	<u>Analysis of Transgender Health in Adolescents in Rural Africa, India, and Thailand</u>	<u>Consultant</u>
<u>submitted</u>	<u>NIH Deanna Adkins</u>	2%	<u>Development of New Gender Dysphoria Measures in Youth</u>	<u>Co PI</u>

Mentoring Activities

Faculty	
Fellows, Doctoral, Post docs	Nancie MacIver-fellow Dorothee Newbern-fellow Krystal Irizarry-fellow Kelly Mason-fellow Laura Page-fellow Elizabeth Sandberg fellow UNC Dane Whicker-psychology post doc
Residents	Yung-Ping Chin-mentor Kristen Moryan-mentor Jessica Lapinski-mentor Kathryn Blew-research mentor Matthew Pizzuto, Breana Scott-Coach
Medical students	
Undergraduates	Erik Severeide-Duke University Lindsay Carey-Dickinson College Jeremy Gottleib-Duke University Jay Zussman-Duke University

Deanna W. Adkins, MD

April 27, 2020

High School Students	Aeryn Colton-Intern Apex High School
Graduate Student MBS program	Nicholas Hastings

Educational Activities:

Didactic classes

Undergraduate

1. Duke School of Nursing Course on Sexual and Gender Health guest lecturer: fall 2017, spring 2018, fall 2018, spring 2019, fall 2019, spring 2020
2. Duke School of Nursing Lecture on Transgender Care-recorded for reuse
3. Duke Physician Assistant Program guest lecturer; fall 2017, spring 2018
4. Duke Global Health Course guest lecturer fall 2016
5. Duke Neuroscience course on Gender and Sex guest lecturer fall 2016
6. Duke Ethics Interest group guest lecturer fall 2018
7. Duke Med Pediatrics Interest Group lecture fall 2018
8. Duke EMS group lecture fall 2018

UME:

1. Cultural Determinants of Health and Health Disparities Course: Facilitator and developed one class; 2017-18 and 2018-19 and 2019-2020; Steering Committee member for course development
2. UNC School of Medicine Lecturer for LGBTQ Health series 2016-recorded for reuse

Graduate School Courses:

1. Master of Biomedical Science Program-guest lecturer on Transgender Medicine fall 2016
2. School of Nursing Graduate Intensive Course Lecturer on Sexual and Gender Health; fall 2017, spring 2018, fall 2018, spring 2019
3. Fuqua School of Business Med Pride Panel and presentation fall 2017
4. Master of Biomedical Science Program Mentor 2019-2020

DUHS Employee Education

1. Annual Duke Human Resources Lunch and Learn on Gender Diversity 2016, 2017, 2018
2. Over 40 lectures across the institution on gender including CHC front desk/nursing staff, hospital wide social work/case management, radiology, PDC clinic front desk/nursing staff
3. Steering Committee for Sexual and Gender Identity Epic Module development and Educational module development
4. DCRI Pride invited speaker

GME:

1. Adult Endocrinology Fellows every year on growth and/or gender
2. Pediatric Residency Noon conferences on Growth and Gender-yearly
3. Reproductive Endocrinology Noon Conferences every 2 to 3 years
4. Psychiatry Noon Conferences periodically
5. Family Practice Noon Conference periodically
6. Pediatric Endocrine Fellow lectures twice a year or more
7. Pediatrics grand rounds: Vitamin D, Type 2 diabetes, Pubertal Development, Gender Diverse Youth

Development of Courses Educational programs

1. Pituitary Day October 2019-full day multispecialty seminar for caregivers of patients with hypopituitarism-Organized and developed the curriculum
2. Development of Gender Diversity Education for Health System education
3. Steering Committee for Cultural Determinants and Health Disparities Course
4. Helping to Adapt Resident Coaching Program to Pediatric Fellowships
5. Developed half day course for Duke Student Health on Care of the Gender Diverse Student with multiple disciplines included
6. Course Director: American Diabetes Association Camp Carolina Trails rotation for fellows and residents: 2009, 2011 – 2019
7. Medical Education for Camp Morris 2019

Development of Assessment Tools and Methods

1. Currently under development with Population Health Sciences-method to assess gender dysphoria; received Brief High Intensity Production (BHIP) grant for this collaboration; NIH grant Submitted March 2020; I am writing the portion of grant giving background on the population and the need for better measures.
2. Collaborating with the Duke Chaplain group to develop a spiritual assessment tool for gender diverse children and their families. completed

Educational leadership roles

1. Fellowship Program Director Pediatric Endocrinology 2008-2019
2. Course Director: American Diabetes Association Camp Carolina Trails rotation for fellows and residents: 2009, 2011 to present

Educational Research

1. -Working with national group on SPIN to analyze new EPA's and Milestones Efficacy in Fellow Education
2. -Working with Boston Children's on a Journal Club Curriculum for Pediatric Endocrinology fellows with pre and post assessments
3. -Working with coaching program for residents modified and applied in pediatric fellows

Invited Lectures and Presentations

1. Trent Center for Ethics Lecture May 2017: Transgender Medicine: a Wealth of Ethical Issues
2. Visiting Professorship: ECU Brody School of Medicine Invited Professor October 2017
3. College of Diplomates-pediatric dentistry society-Webinar on transgender care 4/1/2020

International Meetings

1. WPATH Amsterdam 2016
2. WPATH Buenos Aires 2018

National Scientific Meetings (invited)

1. Transgender SIG Developing a Patient Registry
2. Patient Advocacy for Transgender Youth Philadelphia 2018

Instructional Courses, Workshops, Symposiums (National)

1. Time to Thrive Arkansas Children's Hospital April 2018
2. National Transgender Health Summit UCSF Jan 2018: Providers as Advocates Workshop
3. Magic Foundation-Chicago, IL Annual Speaker on Precocious Puberty at National Conference 2016, 2017, 2019
4. The Seminar-Fort Lauderdale, FL Invited Speaker on Care of Transgender Youth 2017

Posters (National and International meetings)

1. WPATH 2018 Meeting Buenos Aires: Building a Multidisciplinary Gender Care Team at an Academic Center; Lapinski, J, Adkins DW
2. Lapinski J, Dooley R, Russell K, Whicker D, Gray, B, Adkins DW; Title: Developing a Pediatric Gender Care Clinic at a Major Medical Setting in the South; Workshop Philadelphia Trans Wellness Conference 2018
3. S.A. Johnson, D.W. Adkins, Case Report: The Co-diagnosis of Hypopituitarism with Klinefelter in a patient with short stature; Pediatric Academic Society Meeting 2018
4. Rohit Tejwani, Deanna Adkins, Brian J. Young, Muhammad H. Alkazemi, Steven Wolf3, John S. Wiener, J. Todd Purves, and Jonathan C. Routh; Contemporary Demographic and Treatment Patterns for Newborns Diagnosed with Disorders of Sex Development; Poster presentation at AUA meeting 2016
5. Deanna W. Adkins, MD, Kristen Russell, LCSW, Dane Whicker, PhD, Nancy Zucker, Ph. D: Departments of Pediatrics and Psychiatry, Duke University Medical Center; Evaluation of Eating Disturbance and Body Image Disturbance in the Trans Youth Population; WPATH International Scientific Meeting June 2016; Amsterdam, The Netherlands

Regional Presentations and Posters

- a. North Carolina Pediatric Society: Pubertal Development Presentation–Pinehurst, NC 2017

- b. North Carolina Psychiatric Association: Caring for Transgender Children Presentation and Workshop on key concepts in care of transgender child-Asheville, NC 2017
- c. ECU Campus Health Presentation Caring for Transgender Patients 2018
- d. Radiology Technology Symposium Presentation on Caring for Transgender Patients 2018
- e. Duke CME in Wake County-Update on Type 2 Diabetes Treatments Feb 2019
- f. Hilton Head Pediatric CME Course-Update on Type 2 Diabetes, Short Stature, and Caring for Transgender Patients June 2019 as well at 2020 discussion lipid disorders and type 2 diabetes

Local Presentations

- 1. Grand Rounds: 2016 to present-Duke Pediatrics twice, Moses Cones Pediatrics, ECU Ob/Gyn, Duke Ob/Gyn, Duke Psychiatry, Duke Urology, Duke Adult Endocrinology
- 2. Prior to 2016-Rex Grand rounds: Salt and Water balance, New treatments in Pediatric Diabetes, Adrenal Insufficiency, Duke peds grand rounds Bone Health, Type 2 Diabetes Mellitus
- 3. Duke Women's Weekend 2018 hosted by Duke Alumni Association
- 4. NCCAN Social Work Training 2016
- 5. NAPNAP lecture 2016
- 6. Profiles in Sexuality Research Presentation at Duke Center for Sexual and Gender Diversity 2017
- 7. Duke LGBTQ Alumni Weekend Presentation 2017
- 8. UNC Chapel Hill Campus Health Presentation 2018
- 9. Duke Student Health Presentation 2017 and 2018

Clinical Activity

- 1. Duke Consultative Services of Raleigh-2.5 days per week in endocrinology and diabetes
- 2. Duke Child and Adolescent Gender Care Clinic 1 day per week at the CHC
- 3. Inpatient Consult Service Pediatric Endocrinology 1 week per month

Clinical Projects:

- 1. Epic module key stakeholder and steering committee on Sexual Orientation and Gender Identity Module 2018
- 2. Incorporation of Glooko system to Duke adult and pediatric diabetes clinics to download diabetes data from insulin pumps and continuous glucose sensors for analysis
- 3. Helped develop the pediatric endocrinology dashboard for Epic/Maestro
- 4. Helped develop a community advisory board for LGBTQ care at Duke and continue to help run this group which meets quarterly
- 5. Collaborating with the Duke Chaplain group to develop a spiritual assessment tool for gender diverse children and their families.

Participation in academic and administrative activities of the University and Medical Center

Administrative and Leadership Positions

1. Medical Director Duke Children's and WakeMed Consultative Services of Raleigh
2. Director Duke Child and Adolescent Gender Care Clinic
3. Pediatric Endocrinology Fellowship Program Director 2008-2019

Committees

1. Graduate Medical Education Committee-2008-2019
2. School of Medicine Sexual and Gender Diversity Council
3. Pediatrics Clinical Practice Committee
4. Pediatric Diversity and Inclusion Committee
5. Pediatrics Advocacy Committee

Community

1. Test proctor local schools
2. Guest lecture GSA multiple years
3. Diabetes Camp
4. 100 Women who give a hoot
5. Collaborated to bring "Becoming Johanna" to Duke along with multiple screenings with the director and the lead actor
6. Teddy Bear Hospital volunteer

Signature of Chair

Date

Personal Information

Faculty Member's Preferred Familiar Name:	Deanna
Home Address	[REDACTED]
	Apex, NC [REDACTED]
Telephone Number:	919-363-5706
Email Address:	Deanna.adkins@duke.edu

Richard Eppink (Bar No. 7503)
AMERICAN CIVIL LIBERTIES UNION
OF IDAHO FOUNDATION
P. O. Box 1897
Boise, ID 83701
T: (208) 344-9750 ext. 1202
REppink@acluidaho.org

Elizabeth Prelogar*
COOLEY LLP
1299 Pennsylvania Avenue, NW Suite 700
Washington D.C. 20004-2400
T: (202) 842-7800
F: (202) 842-7899
eprelogar@cooley.com

Gabriel Arkles*
James Esseks*
Chase Strangio*
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
125 Broad St.,
New York, NY 10004
T: (212) 549-2569
garkles@aclu.org
jesseks@aclu.org
cstrangio@aclu.org

Andrew Barr*
COOLEY LLP
380 Interlocken Crescent, Ste. 900
Broomfield, CO 80021-8023
T: (720) 566-4000
F: (720) 566-4099
abarr@cooley.com

Catherine West*
LEGAL VOICE
907 Pine Street, Unit 500
Seattle, WA 98101
T: (206) 682-9552
F: (206) 682-9556
cwest@legalvoice.org

Kathleen Hartnett*
COOLEY LLP
101 California Street 5th Floor
San Francisco, CA 94111-5800
T: (415) 693-2000
F: (415) 693-2222
khartnett@cooley.com

* Admitted *Pro Hac Vice*

Attorneys for Plaintiffs

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO**

LINDSAY HECOX, et al.,

Plaintiffs,

v.

BRADLEY LITTLE, et al.,

Defendants.

No. 1:20-cv-184-CWD

**DECLARATION OF ANDREW
BARR IN SUPPORT OF
PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

I, Andrew Barr, declare under penalty of perjury of the laws of the United States of America that the following is true and correct, and state:

1. I am an attorney with the law firm Cooley LLP, counsel of record for Plaintiffs Lindsay Hecox and Jane Doe, with her next friends, Jean Doe and John Doe. I have been admitted *pro hac vice* in this Court for this action. The following is true of my own personal knowledge, and, if called as a witness, I would and could testify competently thereto.

2. As set forth below, I have transcribed excerpts of the Idaho Legislature's testimony regarding H.B. 500 as accurately as possible. Each excerpt that I transcribed is described in the respective Exhibit using the timestamp of testimony as available on the Idaho Legislature's public recordings. I have also provided a hyperlink to the Idaho Legislature's website where the recordings are available for public review. As of the date of this filing, each of the hyperlinks is in working order. I have also saved copies of recordings for each of the excerpts of testimony set forth in the Exhibits and am happy to provide that to the Court or opposing counsel upon request.


3. Attached hereto as Exhibit A is a true and correct transcription of excerpts from testimony heard during the House State of Affairs Committee Meeting on February 19, 2020. A recording of the testimony is available at: http://164.165.67.41/IIS/2020/House/Committee/State%20Affairs/200219_hsta_0900AM-Meeting.mp4 (last accessed April 29, 2020).

4. Attached hereto as Exhibit B is a true and correct transcription of excerpts from testimony heard during the House State of Affairs Committee Meeting on February 20, 2020. A recording of the testimony is available at: http://164.165.67.41/IIS/2020/House/Committee/State%20Affairs/200220_hsta_0800AM-Meeting.mp4 (last accessed April 29, 2020).

5. Attached hereto as Exhibit C is a true and correct transcription of excerpts from testimony heard during the House Floor Meeting and Vote on February 26, 2020. A recording of the testimony is available at: <http://164.165.67.41/IIS/2020/House/Chambers/HouseChambers02-26-2020.mp4> (last accessed April 29, 2020).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: April 29, 2020



Andrew Barr, Esq.

EXHIBIT A

House Senate Affairs Committee

DATE: Wednesday, February 19, 2020
TIME: 9:00 A.M.
PLACE: Room EW42
MEMBERS: Chairman Harris, Vice Chairman Armstrong, Representatives Crane, Palmer, Barbieri, Holtzclaw, Monks, Zito, Scott, Andrus, Hartgen, Young, Smith, Gannon, Green, Ehardt

Excerpts of testimony on House Bill 500:

Time Stamp	Testimony
18:42 - 19:14	[Representative Ehardt]: I come to you today with this piece of legislation, with this legislation designed to do one thing. This legislation is designed to continue to protect opportunities for girls and women in sports. Every girl deserves a chance to pursue her dreams to compete and excel in athletic opportunities. Forcing girls and women to compete against biological boys and men has too often made us spectators in our own sports.
41:35 – 43:06	[Representative Ehardt]: Mr. Chairman, Representative Green. I believe that if you read what is listed in the Idaho High School Activities Association, and if you read the actual policy of the NCAA that you will see that these are actually not similar, the Idaho High School Activities Association provides for a means for a transgender student athlete to start a process with a doctor for a year before competing, ironically, there’s no follow-up. It literally could start with one shot. But aside from that, the NCAA’s policy is a permissive policy and that permissive policy states that a trans female student athlete being treated with testosterone suppression medication for gender identity disorder or gender dysphoria and transsexualism for the purposes of NCAA competition may continue to compete on a man’s team, but may not compete on a women’s team without changing it to a mixed team status until completing one year of testosterone suppressant treatment. This is a permissive statement. It is not required by the NCAA, but it allows for a path forward should a team decide to allow for a biological man to compete with their team. That is the policy of the NCAA.

Time Stamp	Testimony
49:27 – 50:31	<p>[Representative Green]: I want to go back and revisit this non-discrimination policy and if I can look in the audience, I suspect the director of the Idaho High School Athletic Association is in attendance. And so I [could] be asking similar questions but to Representative as it pertains to the current statute or the current rule in place for students. Can you tell us the time where in Idaho that we have had an appeal process where a student felt that they were being harmed by the current rule in place.</p> <p>[Chairman Harris]: I'll let you answer that question as it applies to the current bill before us.</p> <p>[Representative Ehardt]: Mr. Chairman, Representative Green.</p> <p>I think it's important to answer this-this way. Obviously, there's a clause in place that was preemptive.</p> <p>And we are going to replace it with something that's preempted because it's happening all over the country. When is the time to deal with an issue like this when we have a student athlete who's already on the team and now we're asking to remove them and replace them with the young gal that should have been on the team.</p>

EXHIBIT B

House Senate Affairs Committee

DATE: Thursday, February 20, 2020
TIME: 8:00 A.M.
PLACE: Room EW42
MEMBERS: Chairman Harris, Vice Chairman Armstrong, Representatives Crane, Palmer, Barbieri, Holtzclaw, Monks, Zito, Scott, Andrus, Hartgen, Young, Smith, Gannon, Green, Ehardt

Excerpt of testimony on House Bill 500:

Time Stamp	Testimony
1:26:10 - 1:27:18	[Representative Ehardt]: There will be lawsuits and they will be coming from the parents of girls whose spots were taken by biological boys. Connecticut, the Connecticut story is not the only story out there, but it is a story that Idaho should pay very much attention to. Three fantastic young women, who are talented, have had their opportunities taken away by two biological boys that had competed on the boys' side and now identify as girls and have broken and hold [] 15 state championships that nine other girls had held prior to the last two years. This will happen quickly. The discrimination factor is that these girls are no longer allowed to compete for that Championship because the determination is basically being outlined by the inherent advantages that boys and men have.

EXHIBIT C

House of Representatives

Fifty-Second Legislative Day
 Second Regular Session
 Sixty-Fifth Legislature

DATE: Wednesday, February 26, 2020

TIME: 10:30 A.M.

Excerpts of debate on House Bill 500:

Time Stamp	Testimony
41:29 – 42:44	<p>[Representative Ehardt]: This bill does not prevent biological boys and men from competing in sports. It doesn't. Make no mistake. They are allowed to identify as whatever they want because this is not about identification or how we feel. This is about competing in the biological sex in which we were born. They would just have to compete on the side of those biological boys and men with whom they look or, about whom they look alike.</p> <p>Now, let me briefly also take you through a couple of things. Remember there are physical advantages the boys and men have. They have bigger body size, longer limbs, stronger base that is designed for mass power movement. They have denser, stronger bones, tendons, ligaments. They have a larger and stronger heart, larger lungs with a greater lung volume per mass. Higher red blood count, higher hemoglobin. They also have natural higher levels of testosterone. These help with things with muscle fiber carbohydrates, on and on and on, but particularly the ability to generate higher speed and power during physical activity. No amount of hormone will eliminate those advantages. No amount of hormone will ever eliminate those advantages. Make no mistake.</p>
1:36:56 - 1:40:43	<p>[Representative Ehardt]: Mr. Speaker. Thank you. Yes, let me remind you first and foremost that this bill is about preserving opportunities for girls and women. The opportunities that first came to light in 1972 with a federal law called Title IX. I would like to take just a moment and address a couple -- a couple things, but I do feel like I've answered it and answered it very clearly though things are continually brought back up the clear answers are there.</p> <p>In regards to the three options when it comes to tests testing, aside from the medical form, it does if you read before it does say may not shall and let me just address a couple of the things mentioned. First, in regards to the Idaho High School Activities Association and their current policy. The current policy is, I had spoken with the executive director Ty Jones on this actually about a year and a half ago as we discussed the current policy. It's fairly vague. It allows for a young man who wants to compete on the women's side on the girl's side to start to</p>

Time Stamp	Testimony
	<p>start the process with the drugs and that's all they have to do with the doctor's notification is start and then wait a year. They may take shots or whatever is required once a week, once a month, or once. That's it. Let me also share with you what also would come within the last two and a half three years, before the Idaho High School Activities Association, according to the Human Rights Campaign our policy is not enough. And what they're wanting to do is just be able to identify however they want with nothing required. So, just in addressing that which was brought up in regards to the policies of the Idaho High School Activities Association, let me address if I may the Commerce Clause and how this would affect that.</p> <p>It doesn't. This is -- this would be Idaho's policy. It would only affect Idaho's student athletes. Currently, there is a biological runner at the University of Montana who had competed very well on the men's side in track and he [] is now competing on the women's side had decided to compete on the women's side and has done very well. He competes in the Big Sky [Conference].</p> <p>This does not, when they come here to Idaho, when they go to Pocatello to compete at my alma mater Idaho State they get to. We don't get to dictate that. We only get to say that for Idaho our student athletes have to be got biological girls and women. Again, let me remind you that the NCAA policy is a permissive policy and it allows for us to determine this.</p> <p>When it comes to this kind of legislation. Guess what? Currently, it's being introduced in 13 states and another seven are on board to introduce it. Because this is happening throughout the United States. So I found out last night it's come to Idaho which we knew it was going to be here within the next year or two anyway.</p> <p>Again, this is about opportunities for girls and women in preserving that which we hold so dear. It has been mentioned that they'll be lawsuits. My friends, there will be lawsuits and guess from where they're coming. Just like the three young women in Connecticut. These lawsuits will be coming from the parents of those girls whose opportunities have been displaced by biological boys and men. Make no mistake about it.</p>

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of April, 2020, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

Dan Skinner

danskinner@cssklaw.com

cssklaw@cssklaw.com

Attorney for Boise School District,

Individual members of the Board of Trustees of Boise School District,

Coby Dennis

Steven L. Olsen

steven.olsen@ag.idaho.gov

W. Scott Zanzig

scott.zanzig@ag.idaho.gov

Dayton P. Reed

dayton.reed@ag.idaho.gov

Attorneys for Bradley Little,

Sherri Ybarra,

Individual members of the State Board of Education,

Boise State University,

Marlene Tromp,

Individual members of the Idaho Code Commission

DATED this 30th day of April, 2020.

/s/ Richard Eppink

Richard Eppink (Bar No. 7503)
AMERICAN CIVIL LIBERTIES UNION
OF IDAHO FOUNDATION
P. O. Box 1897
Boise, ID 83701
T: (208) 344-9750 ext. 1202
REppink@acluidaho.org

Elizabeth Prelogar*
COOLEY LLP
1299 Pennsylvania Avenue, NW Suite 700
Washington D.C. 20004-2400
T: (202) 842-7800
F: (202) 842-7899
eprelogar@cooley.com

Gabriel Arkles*
James Esseks*
Chase Strangio*
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
125 Broad St.,
New York, NY 10004
T: (212) 549-2569
garkles@aclu.org
jesseks@aclu.org
cstrangio@aclu.org

Andrew Barr*
COOLEY LLP
380 Interlocken Crescent, Ste. 900
Broomfield, CO 80021-8023
T: (720) 566-4000
F: (720) 566-4099
abarr@cooley.com

Kathleen Hartnett*
COOLEY LLP
101 California Street 5th Floor
San Francisco, CA 94111-5800
T: (415) 693-2000
F: (415) 693-2222
khartnett@cooley.com

Catherine West*
LEGAL VOICE
907 Pine Street, Unit 500
Seattle, WA 98101
T: (206) 682-9552
F: (206) 682-9556
cwest@legalvoice.org

* Admitted *Pro Hac Vice*

Attorneys for Plaintiffs

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO**

LINDSAY HECOX, et al.,

Plaintiffs,

v.

BRADLEY LITTLE, et al.,

Defendants.

No. 1:20-CV-184-CWD

**EXPERT DECLARATION OF
HELEN CARROLL
IN SUPPORT OF
PLAINTIFFS' MOTION
FOR PRELIMINARY
INJUNCTION**

I, Helen Carroll, have been retained by counsel for Plaintiffs Lindsay Hecox and Jane Doe, with her next friends, Jean Doe and John Doe, as an expert in connection with the above-captioned litigation.

1. The purpose of this declaration is to offer my expert opinion on policies for transgender inclusion in athletics at the high school and collegiate levels in the United States.

2. In preparing this report, I reviewed the legislative findings for H.B. 500, as enacted, and the sources cited therein.

3. I have knowledge of the matters stated in this declaration and have collected and cite to relevant literature concerning the issues that arise in this litigation in the body of this declaration.

PROFESSIONAL BACKGROUND

4. I received a Bachelor of Science in Physical Education in 1974 from Middle Tennessee State University, located in Murfreesboro, Tennessee, and a Masters of Science in 1976 from Appalachian State University, located in Boone, North Carolina. A current copy of my resume is attached as Exhibit A.

5. I was the Head Women's Basketball Coach of the 1984 National Championship Team at the University of North Carolina-Asheville from 1980-1984, and Associate Athletic Director from 1985-1988.

6. I was a National Collegiate Athletic Association ("NCAA") and National Association of Intercollegiate Athletics ("NAIA") Athletic Director at Mills College located in Oakland, California, from 1988-2000.

7. My responsibilities as a coach included athlete recruitment, ensuring my athletes' privacy and safety, and creating team cohesion. These responsibilities also included developing and implementing guidelines that covered, among other things, an atmosphere of inclusion and respect within the team.

8. My responsibility as athletic director included ensuring that all coaches and all teams followed school policies regarding privacy, safety, and inclusion; supporting coaches in implementing policies; and in athlete recruitment and team development. I was also responsible for ensuring that facilities met the needs of teams and visiting teams. My responsibilities also included Title IX compliance, general athletic department budgets, and developing and implementing nondiscrimination policies designed to ensure the inclusion and safety of all student athletes.

9. I joined National Center for Lesbian Rights ("NCLR") as the Director of the Sports Project in 2001 after spending 30 years as an athlete, coach, and collegiate athletic director. I devoted my efforts at NCLR to helping athletes, athletic programs, and institutions recognize that the inclusion of people who are lesbian, gay, bisexual, and/or transgender or intersex, diversifies and strengthens the sport experience.

10. I have personally assisted at least ten (10) NCAA collegiate institutions develop and adopt policies for the inclusion of transgender student athletes. I have assisted at least seven (7) state high school athletic associations in developing and adopting policies for the inclusion of their transgender student athletes.

11. I am the co-author of the 2011 NCAA Guide for Transgender Athlete Inclusion.

12. I have worked closely with major national sports organizations including the Women’s Sports Foundation and the NCAA. I have also been a featured speaker on panels with Nike, ESPN’s “Outside the Lines,” and The New York Times. I am featured in Dr. Pat Griffin’s book, “Strong Women, Deep Closets and The Outsports Revolution” by authors Jim Buzinski and Cyd Ziegler Jr.

13. I originally became familiar with transgender student athletes after the International Olympic Committee announced a policy in 2005 that included the participation of transgender athletes. After this policy was announced, I worked with several institutions and individuals, including the Professional Golf Association, United States Track and Field Association, Ladies Professional Golf Association, and transgender athletes, to determine the best practices for sports organizations for the inclusion of transgender athletes.

14. In October 2010, I co-authored a report with Dr. Pat Griffin entitled “On the Team: Equal Opportunity for Transgender Student Athletes” (“Report”). The Report was co-sponsored by the Women’s Sports Foundation and NCLR, and was the result of a 2009 national think tank entitled “Equal Opportunities for Transgender student athletes,” hosted by the NCAA. Think Tank participants included leaders from the NCAA and the National High School Federation, transgender student athletes, and an array of experts on transgender issues from a range of disciplines — law, medicine, advocacy, and athletics. The goals of the initiative were to develop model policies and identify best practices for high school and collegiate athletic

programs to ensure the full inclusion of transgender student athletes. The Report also led to the 2011 NCAA Guide for Transgender Athlete Inclusion.

SCHOOL ATHLETIC POLICIES ON TRANSGENDER INCLUSION

15. School athletic programs are widely accepted as integral parts of the high school and college experience. The benefits of school athletic participation include many positive effects on physical, social, and emotional well-being. Playing sports can provide student athletes with important lessons about self-discipline, teamwork, success, and failure—as well as the joy and shared excitement that being a member of a sports team can bring.

16. Participation in high school athletics shows that a student is well-rounded and can improve a student's chances of acceptance into college. For some students, playing on high school teams leads to future careers in athletics as competitors, coaches, administrators, and athletic trainers. It can also lead to scholarship opportunities at the collegiate level. All students, including those who are transgender, deserve access to these benefits.

17. Through my work, I have experience developing policies governing the inclusion of transgender student athletes with high schools and athletic associations to ensure that transgender athletes have access to athletic opportunities as children, adolescents, and young adults. I have also worked with coaches learning how to accommodate transgender students who want to play on sports teams. These policies often address the standard under which transgender athletes are able to participate as well as basic accommodations, such as knowing what pronouns or names to use

when referring to a transgender student, where a transgender student should change clothes for practice or competition, and what restroom or locker room that student should use.

18. Many state athletic associations have developed policies that allow transgender student-athletes to participate in athletics consistent with their gender identity without any proof of medical treatment. This is best practice for K-12 athletics.

19. Other states have policies that permit participation based on gender identity after certification of different aspects of medical transition.

20. Only a very small number of states require proof of hormone therapy before permitting girls who are transgender to participate in high school athletics for women and girls. Before enactment of H.B. 500, Idaho was one of these states.

21. Idaho's new policy under H.B. 500, as enacted, is a complete outlier. No state, college, or athletic association in the United States has such a restrictive and exclusionary policy. Prior to the enactment of H.B. 500, no state or athletic association completely barred transgender student athletes from participating in athletics consistent with gender identity. Likewise no state or university imposed a verification process for all competitors in women's athletics whose sex is disputed.

22. Athletic leaders who are charged with policy development need guidance to avoid inscribing misconceptions and misinformation in policies that create problems rather than solve them. Idaho's new law is counter to the prevailing

standards of inclusion in high school athletics and perpetuates misconceptions and misinformation.

23. Failure to adopt inclusive participation policies also hurts cisgender students by conveying a message that the values of non-discrimination and inclusion are not important. This can undermine team unity and also encourage divisiveness by policing who is “really” a girl. Laws like Idaho’s newly enacted law can also put transgender athletes at risk of bullying and harassment within the school or community by singling them out for discrimination.

24. When a school or athletic organization denies transgender students the ability to participate equally in athletics because they are transgender, that condones, reinforces and affirms the transgender students’ social status as outsiders or misfits who deserve the hostility they experience from peers.

25. I am not aware of any cisgender girls being harmed by the presence of a transgender student-athlete participating on their team or in their league. I am likewise not aware of cisgender students losing scholarship opportunities as a result of transgender athletes participating on their team or in their league. Athletic scholarship opportunities are awarded based on a range of factors. Coaches look at the entire athlete not just on what place a person or team comes in at a given race or tournament.

NCAA POLICY FOR TRANSGENDER INCLUSION

26. In 2011, the NCAA published the Guide for Transgender Athlete Inclusion, which is a guide to colleges and universities on how to adopt inclusive

policies and practices for transgender student-athletes. I am a co-author of the NCAA Guide for Transgender Athlete Inclusion.

27. The guide includes the operative NCAA policy for inclusion of transgender women athletes on women's teams for schools to follow for maintaining eligibility in NCAA-sponsored events (such as conference and league tournaments). The NCAA's policy allows women who are transgender to compete on women's teams in women's sporting events after completion of one year of testosterone suppression hormone therapy as part of gender transition.

28. The NCAA policy was developed with the expertise of sports administrators, doctors, athletes, and other experts in collegiate sports. Experts involved in developing the NCAA policy included, amongst others, the NCAA's the NCAA Committee on Competitive Safeguards and Medical Aspects of Sports.

29. The purpose of NCAA policy requiring transgender athletes to undergo one-year of hormone therapy prior to being eligible to play on a team consistent with their gender identity was to ensure that all women had the opportunity to participate consistent with gender identity after minimizing potential impact of testosterone on the body. The length of the therapy that must be shown (one year) was chosen intentionally for multiple reasons: first, after consultation with medical providers, including experts that had consulted on elite, international policies for transgender inclusion in athletics, it was determined that one year was more than sufficient to minimize any advantage resulting from circulating testosterone; and second, because under NCAA athletic eligibility rules, all student-athletes are able to maintain four

years of athletic eligibility out of five years of collegiate attendance. This one-year rule ensured that by taking a year off to undergo hormone therapy, transgender athletes could still compete consistent with gender identity for four years or however many years of eligibility remained for them. The NCAA policy therefore mirrors the hormone suppression rules for Olympic competition in duration of testosterone. Unlike the Olympic rules, however, the NCAA policy does not require athletes to certify hormone suppression to a certain level. The policy is aimed at making the process easier for the student-athlete and institutions to comply with and therefore only requires certification by a medical provider that testosterone suppression has been ongoing for a period of one year rather than ongoing monitoring of testosterone and disclosure of lab results.

30. The NCAA policy does not require schools to report the number of transgender students participating in athletics unless and until the team with a transgender athlete seeks to participate in an NCAA-sponsored event (e.g., conference or league tournaments).

31. For the past nine years, transgender athletes have been able to compete on teams at NCAA member colleges and universities consistent with their gender identity like all other student-athletes with no disruption to women's collegiate sports.

32. The NCAA policy was carefully designed by experts in the field and has been successfully implemented for nearly a decade. H.B. 500 is the only state-level

policy to contradict the NCAA policy and is an outlier in excluding transgender and many intersex athletes.

33. Prior to the passage of H.B. 500, no state had separately regulated collegiate participation of transgender athletes and the NCAA policy was the standard for inclusion across the United States. Idaho stands alone in undermining NCAA's longstanding policy for collegiate athletes in the state and risks harming collegiate athletes not only in Idaho but across the country who may seek to compete in Idaho.

34. Like for high school athletics, collegiate athletics provide important opportunities for social, emotional and physical well-being, confidence and other positive impacts for student-athletes. Creating a statewide ban on the participation of transgender young women in collegiate athletics will disrupt existing policies and harm transgender and cisgender student-athletes.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 28 day of April 2020.



Helen Carroll

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of April, 2020, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

Dan Skinner
danskinner@cssklaw.com
cssklaw.com
*Attorney for Boise School District,
Individual members of the Board of Trustees of Boise School District,
Coby Dennis*

Steven L. Olsen
steven.olsen@ag.idaho.gov
W. Scott Zanzig
scott.zanzig@ag.idaho.gov
Dayton P. Reed
dayton.reed@ag.idaho.gov
*Attorneys for Bradley Little,
Sherri Ybarra,
Individual members of the State Board of Education,
Boise State University,
Marlene Tromp,
Individual members of the Idaho Code Commission*

DATED this 30th day of April, 2020.

/s/ Richard Eppink

EXHIBIT A

Helen J. Carroll
Sports Diversity Consultant

Mountain View, CA 94043

hcarroll@nclrights.org

(415) 595-2123

SUMMARY

Over 40 years of leadership in women’s sports including:

- Developing National Think Tank series for LGBT concerns in athletics
- Coaching a team to an NAIA National Championship title.
- Directing, coaching and teaching in NCAA I, II, and III athletic programs.
- Maintaining strong, ongoing relationships with coaches, players, AD’s and media at all levels from junior high school through WNBA.
- Marketing university sports programs to alumni and corporate donors.
- Nationally recognized spokesperson for women’s sports issues.
- Nationally recognized spokesperson for LGBT issues in sport
- Nationally recognized expert for Transgender nclusion in all sport levels
- Demonstrated ability to recognize and leverage trends impacting women’s sports

EXPERIENCE

National Center For Lesbian Rights, San Francisco, CA

2001 - 2016

Sports Project Director Maintain relationships at all levels of women’s basketball, from high school to the WNBA. Consult with coaches, athletic directors and academic/administrative staff on sexual orientation and transgender issues that impact women’s sports programs. Provide expert commentary for media. Attend NCAA Basketball Finals, WBNA games and playoffs, and other key competitions.

- Created National Think Tank series for issues pertaining to LGBT student athletes, coaches and Administrators with the NCAA

- Co-authored the 2011 NCAA Guide for Transgender Athlete Inclusion.

- co-authored the 2010 “On the Team: Equal Opportunity for Transgender Student Athletes” The

Report was co-sponsored by the Women’s Sports Foundation and NCLR, and was the result of a 2009

national think tank entitled “Equal Opportunities for Transgender student athletes,” hosted by the

NCAA with participation including the National Federation of High Schools

- Worked closely with major national sports organizations including the Women's Sports Foundation and the NCAA. Featured speaker on panels with Nike, ESPN's "Outside the Lines," and The New York Times
- Featured in Dr. Pat Griffin's book, "Strong Women, Deep Closets and The Outsports Revolution" by authors Jim Buzinski and Cyd Ziegler Jr.
- presented "The Gay/Lesbian Athlete's Place in the Corporate World" at Nike main campus.
- Developed an innovative education program to help entering NCAA LGBT athletes be included in sports in a positive way
- Worked with high visibility coaches and administrators to address unethical recruiting practices that negatively impact women's basketball's image.
- Working with the NCAA Director of Inclusion, on diversity issues affecting student athletes resulting in policy changes at national level.

Mills College, Oakland, CA

1988 – 2000

Director of Athletics, Physical Education and Recreation

Directed NCAA intercollegiate sports programs. Developed and implemented department vision and strategic plan. Oversaw department budget. Hired, trained and evaluated coaches, lecturers, recreation and support staff. Negotiated contracts and salaries. Oversaw NCAA compliance, eligibility and financial aid for student-athletes. Managed sports information, promotion and marketing. Co-partnered with college president to raise funds for sports.

- Guided programs of inclusion including combatting racism, classism, homophobia and transphobia
- Helped maintain academic excellence of student athletes including two Rhodes Scholar fellowships and Academic All America Teams.
- Directed construction of new athletic facilities including aquatic center, soccer fields and cross country trail by working to increase funds commitments from supporters.

University of North Carolina – Asheville, Asheville, NC

1981 – 1988

Interim Athletic Director and Associate Athletic Director (1984 – 1988)

Led athletic program including strategic vision, budget, recruiting, hiring. Managed transition from NAIA affiliation to NCAA Division I Big South Conference.

Head Women's Basketball Coach (1981 – 1984)

Responsible for total program including player development, hiring/supervising staff, recruiting, budget management and maintaining visibility with alumni and media. Coordinated strategy, and provided leadership during games.

- Within four years, built team that won 1984 NAIA National Championship title by setting a strategic vision, recruiting key players, developing innovative game plan, and providing environment for athletes to excel.
- Named NAIA National Coach of year for outstanding achievement in leading a team to national championship within four years.

Basketball and Tennis Coach, University of Tennessee, Martin, TN 1976 – 1978

Basketball, Track and Field Coach, Wayne State College, Wayne, NE 1979 – 1981

EDUCATION

M.A., Athletic Administration, Appalachian State University

- Emphasis in Athletic Administration, Coaching, Recreational Administration

B. S., Health, Physical Education and Recreation, Middle Tennessee University

- Minor in Psychology

PROFESSIONAL AFFILIATIONS

National Association of Collegiate Women Athletic directors (NACWAA)

National Association of Collegiate Directors of America (NACDA)

American Alliance of Health, Physical Education and Recreation

National Association of Girls and Women in Sport

Women's Sports Foundation

Women's Basketball Coaches Association

Richard Eppink (Bar No. 7503)
AMERICAN CIVIL LIBERTIES UNION
OF IDAHO FOUNDATION
P. O. Box 1897
Boise, ID 83701
T: (208) 344-9750 ext. 1202
REppink@acluidaho.org

Elizabeth Prelogar*
COOLEY LLP
1299 Pennsylvania Avenue, NW Suite 700
Washington D.C. 20004-2400
T: (202) 842-7800
F: (202) 842-7899
eprelogar@cooley.com

Gabriel Arkles*
James Esseks*
Chase Strangio*
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
125 Broad St.,
New York, NY 10004
T: (212) 549-2569
garkles@aclu.org
jesseks@aclu.org
cstrangio@aclu.org

Andrew Barr*
COOLEY LLP
380 Interlocken Crescent, Ste. 900
Broomfield, CO 80021-8023
T: (720) 566-4000
F: (720) 566-4099
abarr@cooley.com

Kathleen Hartnett*
COOLEY LLP
101 California Street 5th Floor
San Francisco, CA 94111-5800
T: (415) 693-2000
F: (415) 693-2222
khartnett@cooley.com

Catherine West*
LEGAL VOICE
907 Pine Street, Unit 500
Seattle, WA 98101
T: (206) 682-9552
F: (206) 682-9556
cwest@legalvoice.org

* Admitted *Pro Hac Vice*

Attorneys for Plaintiffs

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO**

LINDSAY HECOX, et al.,

Plaintiffs,

v.

BRADLEY LITTLE, et al.,

Defendants.

No. 1:20-CV-184-CWD

**EXPERT DECLARATION OF
MARY FRY, PHD,
IN SUPPORT OF
PLAINTIFFS' MOTION
FOR PRELIMINARY
INJUNCTION**

I, Professor Mary D. Fry, PhD, have been retained by counsel for Plaintiffs Lindsay Hecox and Jane Doe, with her next friends Jean Doe and John Doe, as an expert in connection with the above-captioned litigation.

1. The purpose of this declaration is to offer my expert opinion on: (1) the psychological and behavioral benefits of sports for youth and young adults; and (2) the conditions that lend themselves to youth and young adults participating in athletics and accessing those benefits when they do participate.

2. I have knowledge of the matters stated in this declaration. I have collected and cite to relevant literature concerning the issues that arise in this litigation in the body of this declaration and in the attached bibliography.

3. In preparing this declaration, I reviewed the legislative findings for H.B. 500, as enacted.

4. In preparing this declaration, I relied on my education and training, my professional and research experience, and my knowledge of the literature in the pertinent fields. The materials I have relied upon in preparing this declaration are the same types of materials that experts in my field of study regularly rely upon when forming opinions on the subject. I may wish to supplement these opinions or the bases for them as a result of new research or publications or in response to statements and issues that may arise in my area of expertise.

PROFESSIONAL BACKGROUND

5. I am a Professor in the Department of Health, Sport & Exercise Sciences at the University of Kansas in Lawrence, Kansas. A true and correct copy of my CV is attached hereto as Exhibit A.

6. In 1984, I graduated from Texas Wesleyan University in Fort Worth, Texas with a Bachelor of Science in Physical Education. After graduating, I spent about five years teaching physical education and coaching tennis at schools and summer camps in Texas and North Carolina.

7. I graduated with a Master of Science in Sport Psychology/Pedagogy from the University of North Carolina in Greensboro in 1990. Then, in 1994, I graduated with a doctorate in Sport & Exercise Psychology from Purdue University. From 1994 to 1999, I served as an Assistant Professor in the University of Memphis's Department of Human Movement Sciences and Education. I continued at the same institution from 1999 to 2007 as an Associate Professor in the Department of Human & Sport Sciences. I joined the faculty of the University of Kansas in 2007, where I continue to teach and research as a Professor today.

8. I have authored or coauthored 63 papers in peer-reviewed journals, including many studies in sport psychology and youth athlete motivation. I have coauthored five book chapters and one book, titled *A Coach's Guide to Maximizing the Youth Sport Experience: Work Hard and Be Kind*. I have also given 116 presentations on my research at both international and national conferences, as well as dozens of local and regional presentations.

9. I have taught and/or developed six undergraduate level courses and 12 graduate level courses in sport and exercise psychology. The courses I developed include Psychosocial Aspects of Sport, Applied Sport Psychology, Developmental Perspectives in Youth Sport, and Special Course: Sport Psychology Within Youth Sport.

10. On a national level, I have served with the Association of Applied Sport Psychology (“AASP”) as a member of the Program Review Committee (2008-present), a Subject Matter Expert for the Certification Exam Committee (2018), and a member of the Ad-Hoc Future of AASP Committee (2012-2015). For the AASP, I have served as an Executive Board Member (2004-2006), two three-year terms as a member of the Social Psychology Section Committee (1996-99; 2001-2003), and as a member of the Dissertation Award Committee (1998 & 2002). I have also served on the Editorial Board for *Physical Activity Today* (1997-2001) and on the Program Review Committee for the American Alliance of Health, Physical Education, Recreation & Dance (2009-2017), in addition to chairing the Committee in 2010. I also serve on the National Advisory Board for the Positive Coaching Alliance.

11. I have undertaken editorial roles on professional journals within my field, including as Associate Editor (2009-2012) and Editorial Board Member (2000-2009; 2013-present) for the *Journal of Applied Sport Psychology*; Associate Editor (2008-present) for the *Journal of Sport Psychology in Action*; Section Editor (2003-2006) and Reviewer (1994-present) for the *Research Quarterly for Exercise and*

Sport; and Editorial Board Member (2011-present) for *Sport, Exercise, and Performance Psychology*.

12. I have served on the Kansas University Certificate in Sport Committee (2017-2018), and the Kansas University Center for Undergraduate Research, Advisory Board (2016-2018), among other roles at the University.

13. I am, or have been, a member of several professional organizations, including the AASP, the American Psychological Association (2017-present), the Kansas Alliance for Health, Physical Education, Recreation, & Dance (2008-present), the American Alliance for Health, Physical Education, Recreation, and Dance (1988-2017), and the North American Society for the Psychology of Sport and Physical Activity (1988-2000).

14. I also have experience applying sport psychology in the field, which include mental skills interventions for various athletes and teams, including with high school and university athletes (2018-present), a high school baseball team (2013-2018), a youth baseball team (2009-2011), a Division I collegiate volleyball team (2008-2010), a high school basketball team (2006-2007), and a Division I cross country team (2006).

15. I have not previously testified as an expert witness in either deposition or at trial.

16. I am being compensated at an hourly rate of \$250 per hour. My compensation does not depend on the outcome of this litigation, the opinions I express, or the testimony I provide.

MOTIVATION AND ATHLETICS

17. There are many benefits to young people from participating in athletic activities, discussed further below. But understanding what motivates youth and young adults to participate in athletics in the first place is essential for understanding how youth and young adults can access these benefits. One critical way to increase participation in athletics is to understand the factors that motivate individuals to stay engaged at different ages and in different contexts. Understanding motivation also helps to explain how the benefits athletes derive from participating in sport translate to other aspects of their lives.

18. In simple terms, motivation is the desire to do activities. More formally, it is defined as “the process that influences initiation, direction, magnitude, perseverance, continuation, and quality of goal-directed behavior” (Maehr & Zusho, 2009). Motivation is about why, how, when, and in what circumstances people employ their resources.

19. One of the most-researched motivational theories in the field of sport psychology is achievement goal perspective theory (“AGPT”), which was developed to address how motivation could be heightened and sustained over time (Nicholls 1984, 1989). AGPT includes three components that together can work to optimize motivation among all individuals, including youth participating in sports.

20. First, is the developmental component of AGPT. Young children are incapable of accurately comparing their ability to others, overestimate their ability, and are naturally focused on their effort as a marker of success. By the time they

enter adolescence, however, they are able to distinguish the concepts of effort, luck, and ability.

21. Second, around 12 years of age, children achieve a mature understanding of the concept of ability and at that time adopt their own personal definitions of success, or “goal orientations.” The primary goal orientations are task and ego. Individuals with a “high task orientation” define success based on their effort, improvement, and mastery of tasks over time. In contrast, a high ego orientation occurs when individuals define success in normative terms, only feeling successful when they outperform others. Individuals are to some degree both task- and ego-oriented; in fact, they can be high and/or low in both orientations.

22. Third, motivations are shaped by outside factors, which can reinforce a task orientation as opposed to an ego orientation. Specifically, athletes’ perceptions of the environment that is created by coaches (but can also be influenced by parents and teammates) (Ames, 1992a, 1992b; Nicholls, 1984, 1989) can be a caring and task-involving or ego-involving climate. A caring climate is one where athletes feel safe and welcome, comfortable, valued, and are treated with kindness and respect by all in the sport setting (Newton et al. 2007).

23. With the goal of increasing opportunities for participation in mind, AGPT provides important guidance about how to help each athlete maximize their sport experience and to increase opportunities within athletics for youth and young adults.

**BENEFITS OF SPORT FOR ATHLETES FROM YOUTH SPORT
THROUGH COLLEGE ATHLETICS**

24. For youth and young adult student-athletes, athletics serve a different purpose than for athletes who participate in professional athletics or world elite competition. The National Collegiate Athletic Association (NCAA) estimates that there are 7.3 million high school student-athletes in the United States. Of those millions of athletes, only about 6% go on to compete at the college level in any division (with only about 2% earning an athletic scholarship).¹ By the numbers alone, the primary purpose of high school sports is not about preparing youth for college sports. For the 94% of high school athletes who do not compete in college as well as for those who do, youth sport creates a myriad of benefits.

25. Then for collegiate athletics, most athletes do not go on to have athletic careers beyond college in an elite sports context. According to the NCAA: “Fewer than two percent of NCAA student-athletes go on to be professional athletes.”² That percentage does not include National Association of Intercollegiate Athletics (for small college sports) and junior college student-athletes, who are less likely to have professional sports careers. So among total numbers of collegiate athletes in the United States, the total percentage of athletes who go on to participate in elite, professional athletics after college is even lower than two percent.

¹ NCAA Recruiting Facts (March 2018), <https://www.ncaa.org/sites/default/files/Recruiting%20Fact%20Sheet%20WEB.pdf>.

² *Id.*

A. Athletes' Type of Goal Orientation Determines What Benefits They Derive from Athletics.

26. A high task orientation, described above in Paragraph 21, is the key to optimizing motivation over time, because effort and improvement – the keys to task orientation – are variables individuals can more easily control. In contrast, individuals high in ego orientation define success based on performance relative to others. High task orientation results in athletes' being more likely to seek challenge, exert high effort, and persist over time (Maehr & Zusho, 2009).

27. Perhaps the strongest finding within the goal orientation research links a task orientation with high enjoyment. Throughout childhood and adolescence, and across a range of sports, athletes who define success based on their personal effort and improvement have more fun playing their sport than those high in ego orientation (Schneider, Harrington, & Tobar, 2017; Seifriz, Duda, & Chi, 1992; Stephens, 1998; Stuntz & Weiss, 2009; van de Pol & Kavussanu, 2011). Importantly, goal orientations are also associated with the sources of enjoyment athletes identify. For example, youth athletes with a high task orientation report experiencing enjoyment from learning and having positive team interactions. In contrast, athletes high in ego orientation report experiencing enjoyment as a result of winning and having high perceived competence (Lochbaum & Roberts, 1993).

28. Another benefit of high task orientation in youth athletes is the strong and positive association with interpersonal and team dynamics (Balaguer, Duda, & Crespo, 1999; Ommundsen, Roberts, Lemyre, & Miller, 2005). Task orientation is

positively correlated with peer acceptance, less conflict with peers, and greater satisfaction with the coach.

29. Athletes high in ego orientation report lower companionship and greater conflict with teammates (Balaguer et al., 1999), and there is no evidence to suggest they reap the benefits of enhanced social relationships that athletes with high task orientation do (Ommundsen et al., 2005).

30. Athletes high in task orientation also report greater confidence and perceived ability, and task orientation has been correlated with both self and team efficacy and greater perceived competence (Magyar & Feltz, 2003; Seifriz et al., 1992; Stuntz & Weiss, 2009). Further, athletes high in task orientation report utilizing more adaptive coping strategies (Kim, Duda, & Gano-Overway, 2011; McCarthy 2011). These adaptive outcomes have been found for middle school, high school, and collegiate athletes.

31. Ego orientation, in contrast, is not correlated with perceived ability in general. Confidence of athletes high in ego orientation was more often based on their perceptions of ability and having a strong physical presence, whereas athletes high in task orientation based their perceptions of confidence on their sense of feeling well prepared and mentally strong (Magyar and Feltz, 2003). There is also a consistently significant relationship between ego orientation and anxiety (Lochbaum et al., 2016). Young athletes with high ego orientation participating in a variety of sports have reported higher trait and state cognitive and somatic anxiety, as well as greater concentration disruption, maladaptive perfectionism, and concern

over making mistakes (Grossbard, Cumming, Standage, Smith, & Smoll, 2007; Hall, Kerr, & Matthews, 1998; Ommundsen & Pedersen, 1999; Ommundsen et al., 2005; White & Zellner, 1996).

B. Structuring Sport with a Caring and Task-Involving Climate Fosters High Task Orientation, Which Optimizes Benefits for Youth and Young Adult Athletes.

32. A large body of research in sport psychology identifies how sport can be structured to help young athletes reap many physical, psychological, and social benefits from their participation in sport and physical activities (Duda, 2013; Fry & Hogue, 2018; Fry & Moore, 2019; Harwood, Keegan, Smith, & Raine, 2015; Roberts, 2013).

33. In youth sports, the climate created on individual athletes' teams, more than the identity of their opponents, determines whether and to what extent young athletes are deriving optimal benefits from sport and maintaining motivation to participate in sport. Overall, the best way to get youth athletes to participate in sports is to create a caring and task-motivated climate, which reinforces high task orientation and leads to the benefits described above. These outcomes help athletes have a sport experience that makes them want to keep playing sport.

34. A caring and task-involving climate is one in which coaches do the following: recognize and reward effort and improvement; foster cooperation among teammates; make everyone feel they play an important role on the team; treat mistakes as part of the learning process; and encourage an approach where everyone is treated with mutual kindness and respect.

35. When athletes perceive a caring and task-involving climate on their teams, they are more likely to have fun, exert high effort, experience intrinsic motivation, have better interpersonal relationships with coaches and athletes, display better sportsperson-like values and behaviors, have better psychological well-being, and perform better (Duda & Nicholls, 1992; Fry & Hogue, 2018; Iwasaki & Fry, 2013; Newton, Duda, & Yin, 2000; McDonald, Cote, Eys, & Deakin, 2011). Strengthened relationships were also found among collegiate athletes where their perceptions of a task-involving climate were associated with feeling greater closeness and commitment to their coach, and vice-versa (perceiving their coach feels close and committed to the athlete) as well as closeness with teammates (Boyd, Kim, Ensari, & Yin, 2014; Olympiou, Jowett, & Duda, 2008). In addition, there are positive and significant associations between perceptions of a caring climate in sport settings and the hope and happiness of youth, and negative relationships with depression and sadness (Fry et al., 2012), as well as the ability of youth athletes to monitor and control their affective responses. This self-regulation was found to contribute to athlete empathy, indicating that fostering more caring climates in sport settings may facilitate positive social interactions and character development (Gano-Overway et al., 2009). Elite adult athletes who are task-oriented and/or who perceive a task-involving climate are also significantly more likely to report not using performance-enhancing drugs (Allen, et al., 2015).

36. Youth involved in positive and supportive sport environments experience greater self-esteem, psychological well-being, and hope, with less

depression, sadness, and burnout than those in less supportive environments. They have better emotional self-regulation, meaning they are more able to manage negative emotions, to keep things in perspective, and to feel and express joy when good things happen (Fry et al, 2012; Gano-Overway et al, 2009). Further, college athletes' perceptions of a task-involving climate have been linked to more adaptive patterns of coping with challenges (Kim, Duda, & Gano-Overway, 2011).

37. In contrast, where coaches reward only ability and performance outcome, foster rivalry among teammates, punish mistakes, and give most of the recognition to a few "stars," they contribute to an ego-focused climate that can lead to athletes' experiencing fewer adaptive and positive motivational outcomes and greater negative outcomes. Ego-focused environments create greater acceptance of rough play, cheating, and aggressive behaviors in their sport (Boixados, Cruz, Torregrosa, & Valiente, 2004), and are less likely to lead to appropriate, desirable, and respectful behaviors within sport (Fry & Newton, 2003).

38. Athletes' perceptions of a caring and task-involving climate may also be linked to higher quality training and better performance outcomes, as researchers report more effective practice strategies in sport and physical education settings (Boyce, Gano-Overway, & Campbell, 2009; Iwasaki & Fry, 2016; Lochbaum et al., 2016). A limited number of studies have revealed a direct association between perceptions of a task-involving climate to objective performance (Hogue, Fry, & Fry, 2017; Theeboom, De Knop, & Weiss, 1995; Xiang, Bruene, & McBride, 2004). Interestingly, Division I college athletes who perceived a caring and task-involving

climate on their teams reported having stronger mental skills including their use of goal setting; ability to concentrate, remain worry free, cope with adversity and peak under pressure; act with confidence; and be open to receiving feedback from coaches (Fry, Iwasaki, & Hogue; 2020). These findings would suggest that athletes with strong mental skills might also perform better. Further, perceptions of an ego-involving climate have been linked to higher salivary cortisol responses (Hogue, Fry & Fry, 2017). Cortisol is an important and necessary hormone, but in excess it can break down muscle tissue and interfere with the immune system.

39. Young athletes have also had higher winning percentages on their teams and performed better on tasks when they perceived a task-involving (rather than ego-involving) climate (Cumming et al., 2007; Sarrazin, Roberts, Cury, Biddle, & Famose, 2002). In addition, college athletes have described being task-involved as they reflect back on their best performances (Jackson & Roberts, 1992).

40. Athletes' perceptions of a task-involving climate were associated with less performance worry and escapism thoughts (Hatzigeorgiadis & Biddle, 2002). Often, mistakes and facing challenges present opportunities to learn and succeed in different ways (by improving oneself, for example). And in sport, much is unpredictable: An opponent's unexpected performance, the weather, and an illness, can drastically change a competition day. Being adaptive and focused on giving one's best effort can help athletes' overcome disappointment (Fry, et al., 2020; Fry & Moore, 2019).

41. College athletes who perceived a caring and task-involving climate on their teams reported higher confidence that they can do the activities necessary and make decisions that support their career exploration and engagement (Poux & Fry, 2015). Further, college athletes perceiving a task-involving climate on their teams reported experiencing greater academic satisfaction (Tudor & Ridpath, 2018).

42. Despite the ego-involving climate's emphasis on performance outcomes, results across studies suggest that the benefits of a task-involving climate may have a direct impact on athletic performance and ultimately improve performance outcomes (Jackson & Roberts, 1992; McDonald, Cote, & Deakin, 2011). By contrast, no evidence currently points to an ego-involving climate leading to greater performance outcomes with young athletes.

43. Even for athletes who are themselves highly ego-oriented, and who prioritize winning and external rewards, a task-involving and caring climate is preferable. Such a climate encourages young athletes to orient themselves toward a task-involved model for motivation and away from the stress-inducing ego-orientation, which will in turn garner the young person the benefits associated with a task-orientation.

44. If the athletes are in a climate that emphasizes winning and comparison to other athletes—which is already built into sports and does not need to be further emphasized by coaches, teammates, and parents—it will result in more athletes leaving sport and possibly taking with them bad memories of that involvement.

**EXCLUDING GROUPS FROM PARTICIPATING IN
HIGH SCHOOL AND COLLEGIATE ATHLETICS WOULD DEPRIVE THEM
OF A WIDE RANGE OF EDUCATIONAL BENEFITS**

45. A goal of youth sport is to help young athletes have positive experiences across sport. This includes creating space for athletes to have fun, develop skills, make friends, increase their levels of physical activity, continue their participation over time, and learn valuable life lessons (Thompson, 2010). If athletes are arbitrarily excluded from youth sports, they are, in turn, deprived of those positive experiences and outcomes and their teammates are deprived of a task-involving and caring sports climate.

46. Athletes who participate in high school sport are more likely to finish college, and more likely to be actively engaged in planning for their future after their sport career ends (Chamberlin & Fry, 2020; Troutman & Defur, 2007). Many of the benefits to youth who participate in athletics are documented throughout life. For example, women who participated in high school sport see greater success in the business world (ESPNW & EY, 2017; Sasaki, 2020).

47. All youth benefit from a sport environment that is task-involving, which results in athletes' taking on more challenging tasks (Stuntz & Weiss, 2009; van de Pol & Kavussanu, 2011), building stronger interpersonal dynamics (Balaguer, Duda, & Crespo, 1999; Ommundsen, Roberts, Lemyre, & Miller, 2005), reducing antisocial behavior (Kavussanu & Roberts, 2001; Stephens & Kavanagh, 2003), and acquiring greater confidence (Magyar & Feltz, 2003; Seifriz et al., 1992; Stuntz & Weiss, 2009).

48. Coaches and others involved in youth sport have a responsibility for creating the climate that is most conducive to encouraging athletes to adopt a high task-orientation. Arbitrarily excluding athletes from their teams undermines a caring climate, which, in turn, diminishes the positive outcomes for all youth and collegiate athletes. The negative outcomes apply not only to the athletes who are excluded, but to the other athletes on the team.

49. Excluding groups of athletes can also undermine the benefits of a high task-involving climate, as such a climate should help athletes develop strong interpersonal and team dynamics (Balaguer, Duda, & Crespo, 1999; Ommundsen, Roberts, Lemyre, & Miller, 2005). Fostering task orientation positively correlates with peer acceptance, less conflict with peers, and greater satisfaction with the coach. These outcomes help athletes have a sport experience that make them want to keep playing sport.

50. When athletes are excluded from participating in youth sport, or are in a climate where they do not feel accepted or respected, they do not have the opportunity to reap these benefits.

**FOCUSING SOLELY ON PERFORMANCE OUTCOMES
UNDERMINES THE BENEFITS OF SPORT FOR YOUTH SPORTS
THROUGH COLLEGE**

51. When a team, league, or organization adopts an ego-promoting philosophy, and cares only about performance outcomes, the broader benefits of sport are diminished for all involved (both with regard to their future athletic careers and lives outside of sport). The overwhelming majority of high school

athletes will never go on to compete in college, and the overwhelming majority of college athletes will never go on to compete on professional teams. Focusing only on the highest-performing athletes or post-graduate elite athletics compromises the other critical benefits of sports for youth and young adults.

52. Such a focus is stress-inducing and undermines the experience of the rest of the athletes who may train hard, improve, but may not be on the podium to receive a medal. The climate of youth sport must be geared to include everyone, including those who are not as skilled, so that teams are more likely to help every athlete maximize their potential. From an educational perspective, it is optimal to encourage all athletes to do the best that they can, and to help all athletes enjoy the sport that they love. Even among Division I collegiate athletes, athletes who perceived a task-involving climate on their teams reported higher academic and athletic satisfaction (Tudor & Ridpath, 2018).

53. Athletes are more likely to reap the positive benefits associated with sports if they are task-involved, which places greater emphasis on effort, than if they are ego-involved, which would put greater emphasis on those trappings of individual success.

54. For coaches of youth athletes, one important message is that, for the overwhelming majority of people, the period of time that a person participates in organized athletics is short and maximizing the benefits of that participation is essential. As Jim Thompson, Founder and CEO of the Positive Coaching Alliance notes: “Here’s the bottom line for parents. Your child’s experience with youth sports

will come to an end, and it may happen suddenly. If you are like me, you will look back and think, 'I wish I had enjoyed it more. I wish I hadn't obsessed so much about how well my child was performing, or the team's record, or whether he or she was playing as much as I wanted, or why the coach didn't play him or her in the right position. I wish I had just enjoyed the experience more.' Because the youth sports experience is so intense, we tend to forget how short it is and what a small amount of time parents and children get to spend together over the course of life."

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated April 28, 2020



Professor Mary D. Fry, PhD

BIBLIOGRAPHY

- Allen, J., Taylor, J., Dimeo, P., Dixon, S., & Robinson, L. (2015). Predicting elite Scottish athletes' attitudes towards doping: Examining the contribution of achievement goals and motivational climate. *Journal of Sports Sciences*, 33, 899-906.
- Ames, C. (1992a). Achievement goals, motivational climate, and motivational processes. In *Motivation in sport and exercise* (pp. 161–176). Champaign, IL: Human Kinetics.
- Ames, C. (1992b). Classrooms: Goals, Structures, and Student Motivation. *Journal of Educational Psychology*, 84(3), 261–271. <https://doi.org/10.1037/0022-0663.84.3.261>
- Balaguer, I., Duda, J. L., & Crespe, M. (1999). Motivational climate and goal orientations as predictors of perceptions of improvement, satisfaction, and coach ratings among tennis players. *Scandinavian Journal of Medicine and Science in Sports*, 9, 381-388.
- Boixadós, M., Cruz, J., Torregrosa, M., & Valiente, L. (2004). Relationships among motivational climate, satisfaction, perceived ability, and fair play attitudes in young soccer players. *Journal of Applied Sport Psychology*, 16(4), 301–317. <https://doi.org/10.1080/10413200490517977>
- Boyce, B. A., Gano-Overway, L. a., & Campbell, A. L. (2009). Perceived motivational climate's influence on goal orientations, perceived competence, and practice strategies across the athletic season. *Journal of Applied Sport Psychology*, 21(January), 381–394. <https://doi.org/10.1080/10413200903204887>
- Boyd, M., Kim, M., Ensari, N. & Yin, Z. (2014). Perceived motivational team climate in relation to task and social cohesion among male college athletes. *Journal of Applied Social Psychology*, 44, 115-123.
- Cumming, S. P., Smoll, F. L., Smith, R. E., & Grossbard, J. R. (2007). Is winning everything? The relative contributions of motivational climate and won-lost percentage in youth sports. *Journal of Applied Sport Psychology*, 19(3), 322–336. <https://doi.org/10.1080/10413200701342640>
- Duda, J. L. (2013). The conceptual and empirical foundations of Empowering Coaching TM: Setting the stage for the PAPA project. *International Journal of Sport and Exercise Psychology*, 11(4), 311–318. <https://doi.org/10.1080/1612197X.2013.839414>

- Duda, J. L., & Nicholls, J. G. (1992). Dimensions of achievement motivation in schoolwork and sport. *Journal of Educational Psychology, 84*(3), 290–299. <https://doi.org/10.1037/0022-0663.84.3.290>
- Fry, M. D., & Hogue, C. M. (2018). Psychological considerations for children and adolescents in sport and performance. Oxford Research Encyclopedia of Psychology.
- Fry, M., & Moore, E. (2018). Motivation in sport: Theory and application. In M. H. Anshel (Ed.), T. Petrie, E. Labbe, S. Petruzello, & J. Steinfeldt (Assoc. Eds.), *APA Handbook of Sport and Exercise Psychology. Vol 1. Sport Psychology* (pp. 273-299). Sport psychology. Washington DC: American Psychological Association.
- Fry, M. D., & Newton, M. (2003). Application of Achievement Goal Theory in an urban youth tennis setting. *Journal of Applied Sport Psychology, 15*(1), 50–66. <https://doi.org/10.1080/10413200305399>
- Fry, M. D., Gano-Overway, L., Guivernau, M., Kim, M., & Newton, M. (2020). A coach's guide to maximizing the youth sport experience: Work hard, be kind. New York: Routledge.
- Fry, M. D., Iwasaki, S., & Hogue, C. (2020). The relationship between the perceived motivational climate in elite collegiate sport and athlete psychological coping skills. *Journal of Clinical Sport Psychology* (paper under revision).
- Gano-Overway, L. A., Newton, M., Magyar, T. M., Fry, M. D., Kim, M.-S., & Guivernau, M. R. (2009). Influence of caring youth sport contexts on efficacy-related beliefs and social behaviors. *Developmental Psychology, 45*(2), 329–340. <https://doi.org/10.1037/a0014067>
- Grossbard, J. R., Cumming, S. P., Standage, M., Smith, R. E., & Smoll, F. L. (2007). Social desirability and relations between goal orientations and competitive trait anxiety in young athletes. *Psychology of Sport and Exercise, 8*(4), 491-505. <https://doi.org/10.1016/j.psychsport.2006.07.009>
- Hall, H. K., Kerr, A. W., & Matthews, J. (1998). Precompetitive anxiety in sport: The contribution of achievement goals and perfectionism. *Journal of Sport & Exercise Psychology, 20*(2), 194–217.
- Harwood, C. G., Keegan, R. J., Smith, J. M. J., & Raine, A. S. (2015). A systematic review of the intrapersonal correlates of motivational climate perceptions in sport and physical activity. *Psychology of Sport and Exercise, 18*, 9–25. <https://doi.org/10.1016/j.psychsport.2014.11.005>

- Hogue, C. M., Fry, M. D., & Fry, A. C. (2017). The differential impact of motivational climate on adolescents' psychological and physiological stress responses. *Psychology of Sport and Exercise, 30*, 118–127. <https://doi.org/10.1016/j.psychsport.2017.02.004>
- Iwasaki, S., & Fry, M. D. (2016). Female adolescent soccer players' perceived motivational climate, goal orientations, and mindful engagement. *Psychology of Sport and Exercise, 27*, 222–231. <https://doi.org/10.1016/j.psychsport.2016.09.002>
- Jackson, S. A., & Roberts, G. C. (1992). Positive performance states of athletes: Toward a conceptual understanding of peak performance. *Sport Psychologist, 6*(2), 156-171.
- Kavussanu, M., & Roberts, G. C. (2001). Moral functioning in sport: An achievement goal perspective. *Journal of Sport & Exercise Psychology, 23*(1), 37–54.
- Kim, M., Duda, J. L., & Gano-Overway (2011). Predicting occurrence of and responses to psychological difficulties: The interplay between achievement goals, perceived ability and motivational climates among Korean athletes. *International Journal of Sport and Exercise Psychology, 9*, 31-47.
- Lochbaum, M., Cetinkalp, Z. K., Graham, K., Wright, T., & Zazo, R. (2016). Task and ego goal orientations in competitive sport: A quantitative review of the literature from 1989 to 2016. *Kinesiology, 48*, 3-29.
- Maehr, M. L., & Zusho, A. (2009). Achievement goal theory: The past, present, and future. In K.R. Wentzel & A. Wigfield (Eds.), *Handbook of motivation at school* (pp. 77-104). New York, NY: Routledge.
- Magyar & Feltz (2003). The influence of dispositional and situational tendencies on adolescent girls' sport confidence sources. *Psychology of Sport and Exercise, 4*, 175-190.
- McCarthy, J. J. (2011). Exploring the Relationship Between Goal Achievement Orientation and Mindfulness in Collegiate Athletics. *Journal of Clinical Sport Psychology, 5*(1), 44-57.
- MacDonald, D. J., Cote, J., Eys, M., Deakin, J. (2011). The role of enjoyment and motivational climate in relation to the personal development of team sport athletes. *Sport Psychologist, 25*, 32-46.
- Newton, M., Duda, J. L., & Yin, Z. (2000). Examination of the psychometric properties of the perceived motivational climate in sport questionnaire-2 in a sample of female athletes. *Journal of Sports Sciences, 18*(4), 275–290.

<https://doi.org/10.1080/026404100365018>

- Newton, M., Fry, M. D., Watson, D. L., Gano-Overway, L. A., Kim, M., Magyar, T. M., & Guivernau, M. R. (2007). Psychometric properties of the Caring Climate Scale in a physical activity setting. *Revista de Psicología Del Deporte, 16*, 67–84. Retrieved from <file:///C:/Users/zar4559/Downloads/22-22-1-PB.pdf>
- Nicholls, J. G. (1984). Achievement motivation: Conceptions of ability, subjective experience, task choice, and performance. *Psychological Review, 91*(3), 328–346. <https://doi.org/10.1037/0033-295X.91.3.328>
- Nicholls, J. G. (1989). *The competitive ethos and democratic education*. Cambridge, MA: Harvard University Press.
- Olympiou, A., Jowett, S., & Duda, J. L. (2008). The psychological interface between the coach-created motivational Climate and the coach-athlete relationship in team sports. *Sport Psychologist, 22*(4), 423–438. Retrieved from <http://search.ebscohost.com/login.aspx?direct=true&db=s3h&AN=35719365&lang=es&site=ehost-live&scope=site>
- Ommundsen, Y & Petersen, B.H. (1999). The role of achievement goal orientations and perceived ability upon somatic and cognitive indices of sport competition trait and anxiety. *Scandinavian Journal of Medicine and Science in Sports, 9*, 333-343.
- Ommundsen, Y., Roberts, G. C., Lemyre, P.-N., & Miller, B. W. (2006). Parental and coach support or pressure on psychosocial outcomes of pediatric athletes in soccer. *Clinical Journal of Sport Medicine: Official Journal of the Canadian Academy of Sport Medicine, 16*(6), 522–526. <https://doi.org/10.1097/01.jsm.0000248845.39498.56>
- Poux, K. N., & Fry, M. D. (2015). Athletes' perceptions of their team motivational climate, career exploration and engagement, and athletic identity. *Journal of Clinical Sport Psychology, 9*(4), 360–372. <https://doi.org/10.1123/jcsp.2014-0050>
- Roberts, G. C. (2013). Advances in motivation and sport exercise. In D. C. Roberts, G. C. & Treasure (Ed.), *Advances in motivation in sport and exercise* (3rd Ed), pp. 5–58. Champaign, IL: Human Kinetics.
- Sarrazin, P., Roberts, G. C., Cury, F., Biddle, S., & Famose, J.-P. (2002). Exerted effort and performance in climbing among boys: The influence. *Research Quarterly for Exercise and Sport, 73*(4).

- Sasaki, J. (2020). How can winning on the playing field prepare you for success in the boardroom? EY: Building a better world. https://www.ey.com/en_gl/women-fast-forward/how-can-winning-on-the-playing-field-prepare-you-for-success-in-the-boardroom
- Schneider, R. A. Y., Harrington, M., & Tobar, D. (2017). Goal orientation and how a task or ego mentality can affect the enjoyment for college hockey players. *College Student Journal*, 51(1), 57-62.
- Seifriz, J. J., Duda, J. L., & Chi, L. (1992). The relationship of perceived motivational climate to intrinsic motivation and beliefs about success in basketball. *Journal of Sport & Exercise Psychology*, 14, 375–391.
- Stephens, D. E., & Kavanagh, B. (2003). Aggression in Canadian youth ice hockey: The role of moral atmosphere. *International Sports Journal*, 7, 109-119.
- Stuntz & Weiss (2009). Achievement goal orientations and motivational outcomes in youth sport: The role of social orientations. *Psychology of Sport and Exercise*, 10, 255-262.
- Theeboom, M., Knop, P. De, & Weiss, M. R. (1995). Motivational climate, psychological responses, and motor skill development in children's sport: A field-based intervention study. *Journal of Sport & Exercise*, 17, 294–311.
- Thompson, J. (2010). Positive coaching: Building character and self-esteem through sports. New York: Brown & Benchmark.
- Troutman, K., & Dufur, M. (2007). From high school jocks to college grads: Assessing the long-term effects of high school sport participation on females' educational attainment. *Youth & Society*, 38(4), 443-462.
doi:10.1177/0044118X06290651
- Tudor, M. L., & Ridpath, B. D. (2018). Does the perceived motivational climate significantly predict academic and/or athletic motivation among NCAA Division I college athletes. *Journal of Contemporary Athletics*, 12(4), 291-307.
- van De Pol, P. K. C., Kavussanu, M., (2011). Achievement goals and motivational responses in tennis: Does the context matter? *Psychology of Sport & Exercise*, 12, 176-183.
- White, S., & Zellner (1996). The relationship between goal orientation, beliefs about the causes of sport success, and trait anxiety among high school, intercollegiate, and recreational sport participants. *Sport Psychologist*, 10, 58-72.

Xiang, P., Bruene, A., & McBride, R. E. (2004). Using achievement goal theory to assess an elementary physical education running program. *Journal of School Health, 74*, 220-225.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of April, 2020, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

Dan Skinner

danskinner@cssklaw.com

cssklaw.com

Attorney for Boise School District,

Individual members of the Board of Trustees of Boise School District,

Coby Dennis

Steven L. Olsen

steven.olsen@ag.idaho.gov

W. Scott Zanzig

scott.zanzig@ag.idaho.gov

Dayton P. Reed

dayton.reed@ag.idaho.gov

Attorneys for Bradley Little,

Sherri Ybarra,

Individual members of the State Board of Education,

Boise State University,

Marlene Tromp,

Individual members of the Idaho Code Commission

DATED this 30th day of April, 2020.

/s/ Richard Eppink

EXHIBIT A

CURRICULUM VITAE

NAME: Mary D. Fry (Previously Mary D. Walling before 8/95)
DEPARTMENT: Health, Sport & Exercise Sciences
RANK: Professor

DEPARTMENT ADDRESS:

Department, of Health, Sport & Exercise Sciences
 Robinson Center, Room 161F
 1301 Sunnyside Ave.
 University of Kansas
 Lawrence, KS 66045
 (785) 864-1862(O); mfry@ku.edu (email)

EDUCATION

DEGREE	DISCIPLINE	INSTITUTION	YEAR
BS	Physical Education	Texas Wesleyan University	1984
MS	Sport Psychology/Pedagogy	University of North Carolina- Greensboro	1990
PhD	Sport & Exercise Psychology	Purdue University	1994

EXPERIENCE

RANK/POSITION	DEPARTMENT/DIVISION	INSTITUTION/ORG.	PERIOD
Professor	Health, Sport & Exercise Sci	University of Kansas	2019
Associate Professor	Health, Sport & Exercise Sci	University of Kansas	2007-2019
Associate Professor	Human & Sport Sciences	University of Memphis	1999-2007
Assistant Professor	Human Movement Sciences & Education	University of Memphis	1994-1999
Editorial Assistant	Journal of Applied Sport Psychology		1992-1994
Associate Investigator	Indiana Youth Risk Behavior Study for Disease Control	Indiana Dept. of Education/Centers	1992
Research Consultant	Grant to Study Youth Sports	National Institute for Fitness & Sport Indianapolis, IN	1991
Teaching Assistant	Health, Kinesiology & Leisure Studies	Purdue University	1990-1992
Teaching Assistant	Sport & Exercise Science	U. North Carolina-Greensboro	1989-1990

RANK/POSITION	DEPARTMENT/DIVISION.	INSTITUTION/ORG.	PERIOD
Middle School Teacher	Physical Education	Allen Middle School Greensboro, NC	1988-89
High School Teacher	Physical Education/English & Head Tennis Coach	Martin High School Arlington, TX	1987- 88
High School Teacher	Physical Education/English & Head Tennis Coach	Richland High School Fort Worth, TX	1984-87
Instructor	University of Texas-Austin	Summer Tennis Camps	1988 & 1989

Certification. Secondary Teacher Certification in English and Physical Education in the State of Texas, 1984.

HONORS/AWARDS:

Del Shankel Teaching Excellence Award Finalist (2018; 2019)
 Budig Teaching Professorship, University of Kansas (2018)
 Outstanding Mentor, McNair Scholars Program (2017)
 KU Woman of Distinction, (2014-2015)
 Joyce Elaine Pauls Morgan HSES Teaching Award (2013)
 Budig Teaching Professorship, Nominee (2012)
 Bird Outstanding Mentor Award, Nominee (2011)
 Service Award, School of Education, University of Kansas, Nominee (2011)
 KU Keeler Professorship, University of Kansas (2010).
 Fellow, Association of Applied Sport Psychology (2009).
 Outstanding Research Article published in *Research Quarterly for Exercise & Sport* (1997).
 Presented by the Research Consortium of the American Alliance of Health, Physical Education, Recreation, & Dance.
 Outstanding Doctoral Dissertation, North American Society for the Psychology of Physical Activity (1994).
 Student Representative, CIC Big Ten Conference "Capstone of Knowledge" hosted by Michigan University, December, 1992.

RESEARCH PUBLICATIONS

Refereed Journal Publications

Hogue, C. M., **Fry, M. D.**, & Fry, A. C. (in press). The protective impact of learning to juggle in a caring, task-involving climate versus and ego-involving climate on participants' inflammation, cortisol, and psychological responses. *International Journal of Sport and Exercise Psychology*.

Brown, T. C., **Fry, M. D.**, Breske, M., Iwasaki, S., & Wilkinson, T. (2019). Motivational climate and athletes' likelihood of reporting concussions in a youth competitive soccer league. *Journal of Sport Behavior*, 42(1), 29-47.

Fry, M. D., Reid, C., Iwasaki, S., & Thompson, J. (2019). Bridging theory, research, and practice in youth sports: Sport Psychology's Partnership with Positive Coaching Alliance to enhance youth sport. *Journal of Sport Psychology in Action*, 10, 1-10.

Hogue, C. M. **Fry, M. D.**, & Iwasaki, S. (2019). The impact of the perceived motivational climate in physical education on adolescent greater life stress, coping appraisals, and experience of shame. *Sport, Exercise, & Performance Psychology*, 8, 273-289.

Glover, K., & **Fry, M. D.** (2018). Helping WIN provide a winning environment for girls in their summer camps. *Journal of Sport Psychology in Action*, 9, 1-12.

Miller, S., & **Fry, M. D.** (2018). Relationship between climate to body esteem and social physique anxiety within college physical activity classes. *Journal of Clinical Sport Psychology*, 12, 525-543.

Wineinger, T. O. & **Fry, M. D.** (2018). The power of a caring/task-involving climate to help students find their life's passion. *Kansas Association for Health, Physical Education, Recreation, & Dance Journal*, 90 (1), 49-56.

- Breske, M. P., **Fry, M. D.**, Fry, A. C., & Hogue, C. M. (2017). The effects of goal priming on cortisol responses in an ego-involving climate. *Psychology of Sport and Exercise, 32*, 74-82.
- Brown, T. C., **Fry, M. D.**, & Moore, E. W. G. (2017). A motivational climate intervention and exercise-related outcomes: A longitudinal perspective. *Motivation Science, 3*, 337-353
- Chamberlin, J. & **Fry, M. D.** (2017). High school athletes' perceptions of the motivational climate in their off-season training programs. *Journal of Strength and Conditioning Research, 31*, 736-742.
- Fontana, M. S., & **Fry, M. D.** (2017). Creating and validating the shame in sport questionnaire. *Journal of Sport Behavior, 40*, 278-296.
- Hogue, C. M., **Fry, M. D.**, & Fry, A. C. (2017). The differential impact of motivational climates on adolescents' psychological and physiological stress responses. *Psychology of Sport and Exercise, 30*, 118-127. <http://dx.doi.org/10.1016/j.psychsport.2017.02.004>
- Fontana, M. S., **Fry, M. D.**, & Cramer, E. (2017). Exploring the relationship between athletes' perceptions of the motivational climate to their compassion, self-compassion, shame, and pride in adult recreational sport. *Measurement in Physical Education and Exercise Science, 21*, 101-111.
- Moore, E. W., G., & **Fry, M. D.** (2017). National franchise members' perceptions of the exercise psychosocial environment, ownership, and satisfaction. *Sport, Exercise, & Performance Psychology, 6*, 188-198.
- Moore, E. G. W., & **Fry, M. D.** (2017). Physical education students' ownership, empowerment, and satisfaction with PE and physical activity. *Research Quarterly for Exercise and Sport, 88*, 468-478. <https://doi.org/10.1080/02701367.2017.1372557>
- Iwasaki, S., & **Fry, M. D.** (2016). Female adolescent soccer players' perceived motivational climate, goal orientations, and mindful engagement. *Psychology of Sport & Exercise, 27*, 222-231. <http://dx.doi.org/10.1016/j.psychsport.2016.09.002>
- Claunch, J., & **Fry, M. D.** (2016). Native American football coaches' experience of a a motivational climate collaboration with sport psychology researchers. *International Journal of Sport Science & Coaching, 11*, 482-495. DOI: 10.1177/1747954116655047
- Brown, T. C., & **Fry, M. D.** (2015). Effects of an intervention with recreation center staff to foster a caring, task-involving climate. *Journal of Clinical Sport Psychology, 9*, 41-51.
- Fontana, M., Bass, J., & **Fry, M. D.** (2015). From Smith Center to Coney Island: Examining the coaching climate in the United States sporting culture. *Journal of Contemporary Athletics, 9*, 211-226.
- Fry, M. D.**, & Brown, T. C. (2015). A caring/task-involving climate intervention for youth sport camp leaders. *Kansas Association for Health, Physical Education, and Recreation Journal.*
- Moore, E. W. G., Brown, T. C., & **Fry, M. D.** (2015). Psychometric Properties of the Abbreviated Perceived Motivational Climate in Exercise Questionnaire. *Measurement in Physical Education and Exercise Science, 19*(4), 186-199.
- Poux, K., & **Fry, M. D.** (2015). Athletes' perceptions of their team motivational climate, career exploration and engagement, and athletic identity. *Journal of Clinical Sport Psychology, 9*, 360-372. <http://dx.doi.org/10.1123/jcsp.2014-0050>
- Brown, T. C. & **Fry, M. D.** (2014). College exercise class climates, physical self concept, and psychological well-being. *Journal of Clinical Sport Psychology, 8*, 299-313.

- Brown, T. C. & Fry, M. D. (2014). Motivational climate, staff and members' behaviors, and members' psychological well-being at a large national fitness franchise. *Research Quarterly for Exercise and Sport*, 85, 208-217.
- Moore, W. E. G. & Fry, M. D. (2014). Psychometric support for the Ownership in Exercise and Empowerment in Exercise Scales. *Measurement in Physical Education and exercise Science*, 18, 1-17.
- Brown, T. C., & Fry, M. D. (2014). Evaluating the pilot of Strong Girls: A life skills/physical activity program for third and fourth grade girls. *Journal of Applied Sport Psychology*, 26, 52-65.
- Brown, T. C. & Fry, M. D. (2013). Association between females' perceptions of college aerobic class motivational climates and their responses. *Women & Health*, 58, 843-857.
- Brown, T. C., Fry, M. D., & Little, T. (2013). The psychometric properties of the Perceived Motivational Climate in Exercise Questionnaire. *Measurement in Physical Education and Exercise Science* 17(1), 17-39.
- Hogue, C. M., Pornprasertmanit, S., Fry, M. D., Rhemtulla, M., & Little, T. (2013). Planned missing data designs for spline growth models in salivary cortisol research. *Measurement in Physical Education and Exercise Science*, 17, 310-325.
- Iwasaki, S., & Fry, M. D. (2013). Evaluations of youth sport programs requested by sport administrators. *The Sport Psychologist*, 27, 360-371.
- Hogue, C.M., Fry, M. D., Fry, A.C., Pressman, S. D. (2013). The influence of a motivational climate intervention on participants' salivary cortisol and psychological responses. *Journal of Sport and Exercise Psychology*, 35, 85-97.
- Fry, M. D., Guivernau, M., Kim, M., Newton, M., Gano-Overway, L., & Magyar, M. (2012). Youth perceptions of a caring climate, emotional regulation, and psychological well-being. *Sport, Exercise, & Performance Psychology*, 1(1), 44-57.
- Huddleston, H., Fry, M. D., & Brown, T. C. (2012). Corporate fitness members' perceptions of the environment and their intrinsic motivation. *Ravista de Psicología del Deporte*, 21(1),15-23.
- Brown, T.C., & Fry, M. D. (2011). Helping members commit to exercise: Specific strategies to impact the climate at fitness centers. *Journal of Sport Psychology in Action*, 2, 70-80.
- Brown, T. C., & Fry, M. D. (2011). Strong Girls: A physical activity/life skills intervention for girls transitioning to junior high. *Journal of Sport Psychology in Action*, 2, 57-69.
- Fry, M. D. (2010). Creating a positive climate for young athletes from day 1. *Journal of Sport Psychology in Action*, 1(1), 33-41.
- Fry, M. D., & Gano-Overway, L. (2010). Exploring the contribution of the caring climate to the youth sport experience. *Journal of Applied Sport Psychology*, 22(3), 294-304.
- Dodd, R., Brown, T., & Fry, M. D. (2010). Young athlete's perceptions of their coaches' and teammates' caring and uncaring behaviors. *Kansas Association of Health Physical Education Recreation and Dance Journal*, 83(1), 38-45.
- Binkley, S. E., Fry, M. D., & Brown, T.C. (2009). The relationship of college students' perceptions of their BMI and weight status to their physical self-concept. *American Journal of Health Education*, 40, 139-145.
- Gano-Overway, L. A., Magyar, T. M., Kim, M., Newton, M., Fry, M. D., & Guivernau, M. R. (2009). Influence of caring youth sport contexts on efficacy-related beliefs and social behaviors. *Developmental Psychology*, 45, 329-340.
- Newton, M., Fry, M.D., Gano-Overway, L., Kim, M., Watson, D., & Givernau, M.

- (2007). Psychometric properties of the Contextual Caring Scale in a physical activity setting. *Revista de Psicología del Deporte*, 16, 67-84.
- Newton, M., Watson, D., **Fry, M.**, Gano-Overway, L., Kim, M., & Givernau, M. (2007). The impact of caring in physical activity. *Urban Review*, 39, 281-299.
- Haneishi, K., Fry A.C., Moore C.A., Schilling B.K., Li Y., and **Fry M.D.** (2007). Cortisol and stress responses during a game and practice in female collegiate soccer players". *Journal of Strength and Conditioning Research*, 21, 583-588.
- Magyar, M., Kim, M., Givernau, M., Gano-Overway, L., Newton, M., & **Fry, M.** (2007). The influence of leader efficacy and emotional intelligence on personal caring. *Journal of Teaching in Physical Education*, 26, 310-319.
- Bone, J., & **Fry, M.D.** (2006). The influence of injured athletes' perceptions of social support from ATCs on athletes' beliefs about rehabilitation. *Journal of Sport Rehabilitation*, 15, 156-167.
- Fry, A.C., Ciroslan D., **Fry M.D.**, LeRoux C.D., Schilling B.K., and Chiu L.Z.F. (2006), Anthropometric and performance variables discriminating elite junior weightlifters. *Journal of Strength and Conditioning Research*, 20, 861-866.
- Smith, S., **Fry, M. D.**, Ethington, C., & Li, Y. (2005). The effects of athletes' perceptions of their coaching behaviors on their perceptions of the motivational climate. *Journal of Applied Sport Psychology*, 17, 1-8.
- Fry, M. D.**, & Newton, M. (2003). Application of achievement goal theory in an urban youth tennis setting. *Journal of Applied Sport Psychology* 15, 50-66.
- Abma, C. L., **Fry, M. D.**, Li, Y., & Relyea, G. (2002). Differences in imagery content and imagery ability between high and low confident track and field athletes. *Journal of Applied Sport Psychology*, 13, 341-349.
- Walling, M. D.**, Duda, J. L., & Crawford, T. (2002). Goal orientations, outcome, and responses to youth sport competition among high/low perceived ability athletes. *International Journal of Sport Psychology*, 14, 140-156.
- Fry, M. D.** [2000]. A developmental examination of children's understanding of task difficulty in the physical domain. *Journal of Applied Sport Psychology*, 12, 180-202.
- Fry, M. D.** (2000). A developmental analysis of children's and adolescents' understanding of luck and ability in the physical domain. *Journal of Sport and Exercise Psychology*, 22, 145-166.
- Fry, A.C., Webber, J. M., Weiss, L.W., **Fry, M. D.**, & Li, Y. (2000). Impaired performances with excessive high-intensity free-weight training. *Journal of Strength and Conditioning Research*, 14, 54-61.
- Fry, M. D.**, & Lattimore, D. (2000). Fostering a positive motivational climate in physical education. *Tennessee Educational Leadership Journal*, 27, 39-43.
- Fry, M. D.**, & Fry, A. C. (1999). Goal perspectives and motivational responses of elite junior weightlifters. *Journal of Strength and Conditioning Research*, 13, 311-317.
- Newton, M., & **Fry, M. D.** (1998). Senior Olympians achievement goals and beliefs concerning success. *Journal of Aging and Physical Activity*, 6, 256-270.
- Fry, M. D.** (1998). Al Oerter: An Olympian's views as seen from a sport psychology perspective. *Strength and Conditioning*, 20, 7-14.
- Fry, M. D.** & Duda, J. L. (1997). A developmental examination of children's understanding of effort and ability in the physical and academic domains. *Research Quarterly for Exercise and Sport*, 66, 331-344.

- Walling, M. D., & Duda, J. L. (1995).** Goals and their associations with beliefs about success in and perceptions of the purpose of physical education. *Journal of Teaching in Physical Education, 14*, 140-156.
- Walling, M. D., & Duda, J. L. (1995).** Motivating kids: Balance learning and fun. *Sport Psychology Training Bulletin, 4*, 1-8.
- Duda, J. L., Chi, L., Newton, M. L., **Walling, M. D., & Catley, D. (1995).** Task and ego orientation and intrinsic motivation in sport. *International Journal of Sport Psychology, 26*, 40-63.
- Walling, M. D., & Martinek, T. (1995).** Learned helplessness in a sixth grade physical education student: A case study. *Journal of Teaching in Physical Education, 14*, 454-466.
- Walling, M. D., Duda, J. L., & Chi, L. (1993).** The perceived motivational climate in sport questionnaire: Construct and predictive validity. *Journal of Sport and Exercise Psychology, 15*, 172-183.

Invited Book Chapters

- Fry, M. D., & Hogue, C. M. (in press).** Foundational psychological theories, models, and constructs. *Certified Mental Performance Consultant Essentials Resource Guide*. Association for Applied Sport Psychology.
- Fry, M. D., & Moore, E. W. G. (2019).** *Motivation in sport: Theory to Application*. In M. H. Anshel (Ed.), T. Petrie, E. Labbe, S. Petruzello, & J. Steinfeldt (Assoc. Eds.), *APA handbook of sport and exercise psychology: Vol. 1. Sport psychology*. Washington DC: American Psychological Association.
- Fry, M. D., & Hogue, C. M. (2018).** Psychological considerations for children in sport and performance. In Oliver Braddick (Ed.), *Oxford Research Encyclopedia of Psychology*. New York: Oxford University Press.
- Fry, M. D. (2014).** Sport and Exercise Psychology as a Venue to Develop “Difference Makers”. In K. Vaidya (Ed.), *Exercise and Sports for the Curious: Why Study Exercise and Sports*.
- Fry, M. D. (2001).** The development of motivation in children. In G. Roberts (Ed.), *Motivation in sport and exercise (2nd Ed.)*, pp. 51-78, Champaign, IL: Human Kinetics.

Book

- Fry, M. D., Gano-Overway, L., Guivernau, M., Kim, M., & Newton, M. (2020).** *A Coach’s Guide to Maximizing the Youth Sport Experience: Work Hard and Be Kind*. NY: Routledge.

PRESENTATIONS

Invited International Presentations

- Fry, M. D. (2019).** *Achievement goal perspective theory as a framework for interventions in sport and physical activity*. Autonomous University of Baja California; Ensenada, Mexico.
- Fry, M. D. (2019).** *Utilizing goal orientations as a lens to optimize athletes’ motivation*. Autonomous University of Baja California; Ensenada, Mexico.

- Fry, M. D. (2019).** *Building a caring and task-involving climate in sport through words, activities, and core values.* Autonomous University of Baja California; Ensenada, Mexico.
- Fry, M. D. (2019).** *Team building to foster positive relationships on sport teams.* Autonomous University of Baja California; Ensenada, Mexico.
- Fry, M. D. (2016).** *The power of a caring and task-involving climate in sport.* Children International; Guatemala City, Guatemala.
- Fry, M. D. (2005, March).** *Creating a positive motivational climate in physical activity settings.* Sao Paulo, Brazil.
- Duda, J. L., & **Walling, M. D. (1993, November).** *Toward a developmental theory of motivation in sport.* University of Barcelona, Barcelona, Spain.
- Walling, M. D. (1993, November).** *The examination of Nicholls' developmental theory of motivation in the physical domain.* University of Valencia, Valencia, Spain.
- Walling, M. D. (1993, November).** *Motivational aspects in physical education for school-age Children.* National Physical Education Institute, Lleida, Spain.
- Duda, J. L., & **Walling, M. D. (1993, November).** *A conceptual and empirical examination of the motivational climate created by coaches.* University of Barcelona, Barcelona, Spain.

Refereed Presentations at National Conferences

- Fry, M. D.,** Claunch, J., Hogue, C. M., Iwasaki, S., & Peynetsa, I. (2019). *Indian youth sport coaches on the Zuni reservation.* Association for Applied Sport Psychology
- Moore, E. W. G., & **Fry, M. D. (2018).** *Elementary physical education students' motivational climate perceptions predict goal orientations and physical education satisfaction.* International Society of Behavioral Nutrition and Physical Activity. Hong Kong.
- Pan, T. Y., Davis, A. M., Atchley, R. A., Forbush, K. T., Wallace, D. P., Savage, C. R., & **Fry, M.D. (2018).** *The longitudinal relationship between obesity and depression in children.* American Psychological Association, San Francisco, CA.
- Warlick, C., Krieshok, T., Frey, B., Kerr, B., . . . & **Fry, M. D. (2018).** *Does hope matter? Examining a popular positive psychology construct in a DBT intensive-outpatient community health population.* Association for Behavioral and Cognitive Therapies.
- Breske, M., **Fry, M. D.,** A., & Hogue, C. M. (2017). *The effects of goal priming on cortisol responses in an ego-involving climate.* Association for Applied Sport Psychology, Orlando, FL.
- Chamberlin, J., **Fry, M. D.,** & Iwasaki, S. (2017). *The influence of high school athletes' perceptions of the motivational climate on athletic identity and academic endeavors.* Association for Applied Sport Psychology, Orlando, FL.
- Easton, L., **Fry, M. D.,** & Iwasaki, S. (2017). *The relationship of fitness center members' goal orientations and perceptions of the motivational climate to variables related to well-being and motivational responses.* Association for Applied Sport Psychology, Orlando, FL.
- Fontana, M. & **Fry, M. D. (2017).** *Exploring the relationship between motivational climate and shame.* Association for Applied Sport Psychology, Orlando, FL.
- Fry, M. D.,** Thompson, J., Iwasaki, S., & Reid, C. (2017). *Bridging theory, research, and practice in youth sports: sport psychology's partnership with positive coaching alliance to enhance youth sport.* Association for Applied Sport Psychology, Orlando, FL.

- Glover, K., **Fry, M. D.**, & Weingartner, H. (2017). *Helping a women's intersport network provide a winning experience for girls in their summer sport camps*, Association for Applied Sport Psychology, Orlando, FL.
- Iwasaki, S., & **Fry, M. D.** (2017). *An exploration of the relationship among female adolescent athletes' perceptions of the motivational climate, goal orientation, refocusing, and peak ability*. International Society of Sport Psychology 14th World Congress, Sevilla, Spain.
- Tyler, E., Warlick, C., Cole, B., & **Fry, M. D.** (2017). *Collegiate student-athletes' perceptions of their sport team climate and level of hope*. Association for Applied Sport Psychology, Orlando, FL.
- Tyler, E., Warlick, C., Cole, B., & **Fry, M. D.** (2017). *Relationship among student-athletes' perceptions of the climate, locker room talk, and sexual behaviors*. Association for Applied Sport Psychology, Orlando, FL.
- Hogue, C. M., **Fry, M. D.**, & Fry, A. C. (2017). *Adolescents' Physiological Stress Responses to Motivational Climate in a Physical Education Setting*. Society for Physical Education and Health, Boston, MA.
- Claunch, J. & **Fry, M. D.** (2016). *Setting the stage for a motivational climate collaboration*. Association for Applied Sport Psychology, Phoenix, AZ.
- Chamberlin, J., **Fry, M. D.**, & Iwasaki, S. (2016). *High school athletes' perceptions of the motivational climate in their off-season Training Programs*. Association for Applied Sport Psychology, Phoenix, AZ.
- Easton, L., Iwasaki, S., & **Fry, M. D.** (2016). *The relationship of members' perceptions of the motivational climate to their Psychological well-being at a university medical center fitness facility*. Association for Applied Sport Psychology, Phoenix, AZ.
- Fry, M. D.**, Iwasaki, S., Vanorsby, H., & Breske, M. (2016). *Masters' swimmers' perceptions of the climate in their training facilities and their motivational responses*. Association for Applied Sport Psychology, Phoenix, AZ.
- Fry, M. D.**, Solomon, G., Iwasaki, S., Madeson, M., Vanorsby, H., Meisinger, R., & Haberer, J. (2016). *Division I athletes' perceptions of their team climate, mental skills, and mindfulness*. Association for Applied Sport Psychology, Phoenix, AZ.
- Hogue, C. M., **Fry, M. D.**, & Fry, A. C. (2016). *Physiological and psychological stress responses to a motivational climate intervention*. Association for Applied Sport Psychology, Phoenix, AZ.
- Fontana, M., & **Fry, M. D.** (2016). *Creating and validating the Shame in Sport Questionnaire*. Association for Applied Sport Psychology, Phoenix, AZ.
- Hogue, C. M., & **Fry, M. D.** (2016). *Leader observations of participant behaviors during a motivational climate intervention: A qualitative investigation*. Association for Applied Sport Psychology, Phoenix, AZ.
- Iwasaki, S., & **Fry, M. D.** (2016). *Male High School Athletes' Perceptions of Their Team Climate and Mindful Engagement*. Association for Applied Sport Psychology, Phoenix, AZ.
- Iwasaki, S., **Fry, M. D.**, Vanorsby, H., Breske, M. (2016). *Master swimmers' perceptions of the climate in their training facilities and their motivational responses*. Association for Applied Sport Psychology, Phoenix, AZ.
- Brown, T. C., M. S., **Fry, M. D.**, Breske, M., Iwasaki, S., & Wilkinson, T. (2015). *High school athletes' perceptions of their sport team climate and their willingness to report concussion symptoms*. Association for Applied Sport Psychology, Indianapolis, IN.

- Fry, M. D.,** Brown, T. C., Iwasaki, S., Breske, M., & Wilkinson, T. (2015). *Middle school athletes' perceptions of their sport team climate and their willingness to report concussion symptoms*. Association for Applied Sport Psychology, Indianapolis, IN.
- Fry, M. D.,** & Easton, L. (2015). *Health in Action: Helping students design creative interventions onsite*. Kansas Alliance for Physical Education, Health, Recreation, & Dance, Wichita, KS.
- Fontana, M. S., Iwasaki, S., Hogue, C., Claunch, J., Poux, K., & **Fry, M. D.** (2014). *Initiating mental skills training with a high school freshman baseball*. Association for Applied Sport Psychology, Las Vegas, NE.
- Fry, A.C., **Fry, M. D.,** Sterczala, A. J., Chiu, L. Z. F., Schilling, B., & Weiss, L. W. (2014). *High power resistance exercise overreaching can be monitored with a training questionnaire*. National Strength and Conditioning Association, Las Vegas, NE.
- Medina, R, **Fry, M. D.,** & Iwasaki, S. (2014). *Youngsters' perceptions of the climate and their experiences in recreational exercise classes*. Association for Applied Sport Psychology, Las Vegas, NE.
- Rosen, D., & **Fry, M. D.** (2014). *Motivational climate and seniors' experiences in group exercise classes*. Association for Applied Sport Psychology, Las Vegas, NE.
- Hogue, C. M., & **Fry, M. D.** (2013). *A qualitative examination of participant reactions to a motivational climate intervention*. Association for Applied Sport Psychology, New Orleans, LA.
- Kwon, S., & **Fry, M. D.** (2013). *Mediational role of interest and intrinsic motivation between perceived caring climate and satisfaction and attitudes among physical education students*. Association for Applied Sport Psychology, New Orleans, LA.
- Moore, E. W. G., & **Fry, M. D.** (2013). *PE teachers' perspective on a motivational climate professional development session*. Association for Applied Sport Psychology, New Orleans, LA.
- Claunch, J. & **Fry, M. D.** (2013). *Transformative learning experience: Collegiate football coaches' perceptions of participating in a motivational climate intervention*. Association for Applied Sport Psychology, New Orleans, LA.
- Moore, E. W. G., & **Fry, M. D.** (2012). *Goal orientations, motivational climate, and outcomes in physical education across one semester*. Association for Applied Sport Psychology to held in Atlanta, GA.
- Kwon, S., & **Fry, M. D.** (2012). *The change of physical educators' enjoyment and intrinsic motivation of track and field through PST*. Association for Applied Sport Psychology, Atlanta, GA.
- Iwasaki, S., & **Fry, M. D.** (2012). *Physical education students' perceptions of the climate and their psychological well-being*. Association for Applied Sport Psychology, Atlanta, GA.
- Hogue, CM., **Fry, M.D.,** Fry, A.C., & Pressman, S. D. (2012). *Participant salivary cortisol and psychological responses to a motivational climate intervention*. Association for Applied Sport Psychology, Atlanta, GA.
- Fry, M. D.,** Brown, T. C., & Iwasaki, S. (2012). *Girls' self perceptions after participating in a positive life skills/physical activity program*. Association for Applied Sport Psychology, Atlanta, GA.
- Brown, T. C., & **Fry, M. D.** (2012). *Results of a caring, task-involving climate intervention at a recreation center*. Association for Applied Sport Psychology, Atlanta, GA.
- Kwon, S., & **Fry, M. D.** (2011). *The effects of athletes' self-management on their self-*

- confidence*. Association for Applied Sport Psychology, Honolulu, HI.
- Andre, M. J., Fry, A.C., Gallagher, P. M., Vardiman, P., Fry, M. D., Kudrna, B., Gandy-Moody, N., & McCartney, M. (2011). *The effects of a pre-workout caffeine supplement on endogenous growth hormone levels*. A presentation made at the meeting of the National Strength and Conditioning Association, Las Vegas, NE.
- Hogue, C. M., Iwasaki, S., & Fry, M. D. (2011). *A case study of a physical activity/mental skills training intervention with a young athlete*. Association for Applied Sport Psychology, Honolulu, HI.
- Iwasaki, S., & Fry, M. D. (2011). *The exploration of motivational climate in a youth sport basketball camp*. Association for Applied Sport Psychology, Honolulu, HI.
- Fry, M. D. (2011). *From the Strong Girls' viewpoints: Research results from semester 1*. Association for Applied Sport Psychology, Honolulu, HI.
- Fry, M. D. (2011). *The exercise climate: An introduction to the research on examining task-involving and caring climates in the exercise domain*. Association for Applied Sport Psychology, Honolulu, HI.
- Fry, M. D., Hogue, C. M., Sauer, S. (2011). *Using digital storytelling as a creative tool in health*. American Alliance of Health, Physical Education, Recreation, & Dance, San Diego, CA.
- Kwon, S., & Fry, M. D. (2010). *Relationship of exercisers' perceptions of the motivational climate to their flow experience*. Association of Applied Sport Psychology, Providence, RI.
- Iwasaki, S., Merczek, K., & Fry, M. D. (2010). *Young athletes' experiences in a volleyball camp*. Association of Applied Sport Psychology, Providence, RI.
- Iwasaki, S., Sogabe, A., Fry, M. D., & Christensen, E. (2010, June). *Differences in aggression and social skills among judo and non-judo practitioners*. American College of Sports Medicine, Baltimore, MD.
- Hogue, C. M., Fry, M. D., & Brown, T. C. (2010). *Incorporating team building activities in a summer day camp for children: Lessons learned*. Association of Applied Sport Psychology, Providence, RI.
- Brown, T. C., & Fry, M. D. (2010). *Caring climate intervention for sport skills and fitness camp leaders*. Association of Applied Sport Psychology, Providence, RI.
- Brown, T. C., & Fry, M. D. (2010). *Teaching life skills in a physical activity after-school program*. American School Health Association, Kansas City, MO.
- Moore, E. W., & Fry, M. D. (2009). *The effect of a caring and task-involving climate on student empowerment and ownership in physical activity classes*. Association for Applied Sport Psychology, Salt Lake City, UT.
- Kwon, S., & Fry, M. D. (2009). *Members' perceptions of their fitness club climate and their exercise flow*. Association for Applied Sport Psychology, Salt Lake City, UT.
- Hogue, C. M., Fry, M. D., & Dodd, R. (2009). *Athletes' perceptions of the climate at their training centers and their motivational responses*. Association for Applied Sport Psychology, Salt Lake City, UT.
- Fry, M. D. (2009). *From theory to practice: Creating positive and caring environments in the real world*. Association for Applied Sport Psychology, Salt Lake City, UT.
- Brown, T. C., & Fry, M. D. (2009). *Students' perceptions of their exercise class environment and their psychological well-being*. Association for Applied Sport Psychology, Salt Lake City, UT.

- Marshall, K., Stephens, L., Grindle, V., **Fry, M. D.**, & Li, Y. (2009). *Mental imagery and EEG activity in elite and novice collegiate soccer players*. Association for Applied Sport Psychology to be, Tampa, FL.
- Brown, T. C., & **Fry, M. D.** (2009). *Participants' perceptions of a caring and positive climate in their exercise classes*. American Alliance of Health, Physical Education, Recreation, & Dance, Tampa, FL.
- Fry, M. D.**, Dodd, R. K., & Brown, T. C. (2008). *Young athletes' perceptions of their coaches' and teammates' caring and uncaring behaviors*. Association for Applied Sport Psychology, St. Louis, MO.
- Binkley, S.E., & **Fry, M. D.** (2007). *The relationship of college students' perceptions of their BMI and weight status to their physical self-concept*. Association for Applied Sport Psychology, Louisville, KY.
- Smith, H., **Fry, M.D.**, Li, Y., & Weiss, L. (2006). *The relationship of anxiety and self-confidence to treadmill exercise tolerance tests performance by sedentary obese women*. Association for the Advancement of Applied Sport Psychology, Miami, FL.
- McCarty, L., **Fry, M.D.**, & Curly, C. (2006). *The relationship of a caring climate to motivational responses and psychological well-being in youth baseball*. Association for the Advancement of Applied Sport Psychology, Miami, FL.
- Gano-Overway, L. A., Newton, M., Magyar, AM., **Fry, M. D.**, Kim, M., & Guivernau, M. (2006). *Caring, self-regulatory efficacy, empathic efficacy, and prosocial/antisocial behaviors in a physical activity setting*. Association for the Advancement of Applied Sport Psychology, Miami, FL.
- Fry, A.C., Haneishi, K., Moore, C.A., Schilling, B.K., Li, Y., & **Fry, M.D.** (2006). *Cortisol and stress responses during a game and practice in female collegiate soccer players*. National Conference on Student Assessment, Washington, D.C.
- Bricker, J. B., & **Fry, M. D.** (2005). *The influence of injured athletes' perceptions of social support from their certified athletic trainers on athletes' beliefs about rehabilitation*. Association for the Advancement of Applied Sport Psychology, Vancouver, British Columbia, Canada.
- Magyar, M., Guivernau, M., Gano-Overway, L., Newton, M., **Fry, M.D.**, Kim, M., & Watson, D. (2005). *Exploring the relationship between the caring climate and achievement goal theory among underserved youth in physical activity*. American Alliance of Health, Physical Education, Recreation & Dance, Chicago, IL.
- Fry, M.D.**, & Newton, M. (2004, September). *The development of the Caring Climate Questionnaire*. Association for the Advancement of Applied Sport Psychology, Minneapolis, MN.
- Smith, S., **Fry, M.D.**, & Ethington, C. (2004, September). *The effect of female athletes' perceptions of their coaches' behaviors on their perceptions of the motivational climate*. Association for the Advancement of Applied Sport Psychology, Minneapolis, MN.
- McCay, K., & **Fry, MD.** (2004, September). *The examination of goal perspective theory in relationship to measures of psychological well-being*. Association for the Advancement of Applied Sport Psychology, Minneapolis, MN.
- McCay, K., & **Fry, M.D.** (2004, March). *Predictors of adolescent depression: The role of physical activity and body image*. Society of Behavioral Medicine, Baltimore, MD.
- Henry, H., & **Fry, M.D.** (2003, October). *Corporate fitness members' perceptions of the*

- motivational climate, their intrinsic motivation, and perceptions of being valued by their employer.* Association for the Advancement of Applied Sport Psychology, Philadelphia, PA.
- Fry, M.D.,** Pittman, L., McCay, K., & Wendell, M. (2003, October). *A qualitative examination of underserved 4th grade girls' views about physical education.* Association for the Advancement of Applied Sport Psychology, Philadelphia, PA.
- Fry, M. D.,** Abma, C., Wood, J., & Melland, B. (2002, October). *The effects of an after-school physical activity and life skills program on 4th graders' self concept, motivational perspectives, and fitness levels.* Association for the Advancement of Applied Sport Psychology, Tucson, AZ.
- Abma, C., & **Fry, M. D.** (2002, October). *The effects of an imagery intervention on the trait confidence levels of female college volleyball players.* Association for the Advancement of Applied Sport Psychology, Tucson, AZ.
- Duda, J.L., Smith, M., & **Fry, M. D.** (2002, June). *An examination of learned helpless responses among young children engaged in physical tasks.* North American Society for the Psychology of Sport and Physical Activity, Baltimore, MD.
- Newton, M., **Fry, M.D.,** & Bernhardt, P. (2001, October). *Examination of the interactive relationship of goal orientations, perceptions of the motivational climate, and perceived ability in youth tennis players.* Association for the Advancement of Applied Sport Psychology, Orlando, FL.
- Abma, C. & **Fry, M. D.** (2001, May). *A qualitative examination of underserved 8th grade female students' attitudes about physical education.* 10th World Congress of Sport Psychology held in Skiathos, Greece.
- Lattimore, D., **Fry, M. D.,** & Balas, C. (2000, October). *Students' perceptions of the motivational climate and their motivational responses in physical education.* Association for the Advancement of Applied Sport Psychology, Nashville, TN.
- Fry, M. D.,** Lattimore, D., & Balas, C. (2000, October). *A developmental examination of children's accuracy in judging their physical ability in physical education.* Association for the Advancement of Applied Sport Psychology, Nashville, TN.
- Fry, M.D.,** & Newton, M. (1999, September). *Goal orientations, perceptions of the motivational climate, and motivational responses of urban youth tennis players.* Association for the Advancement of Applied Sport Psychology, Banff, Canada.
- Fry, M. D.,** Lattimore, D., & Balas, C. (1999, September). *A developmental analysis of conceptions of effort and physical ability among underserved youth.* Association for the Advancement of Applied Sport Psychology, Banff, Canada.
- Harber, M. P., **Fry, M. D.,** & Fry, A. C. (1998). *Sources of stress identified by elite collegiate weightlifters.* A paper presented at the annual meeting of the National Strength and Conditioning Association, Nashville, TN.
- Fry, M. D.,** Fry, A. C., & Newton, M. (1997, September). *Sources of stress identified by elite junior weightlifters.* Association for the Advancement of Applied Sport Psychology, San Diego, CA.
- Newton, M., **Fry, M. D.,** & Sandberg, J. (1997). *Goal orientations and purposes of sport and beliefs concerning success among senior Olympians.* North American Society for the Psychology of Sport and Physical Activity, Denver, CO.
- Fry, M. D.** (1997, March). *Symposium: Goal perspectives in physical education and sport:*

- Theory into practice*. American Alliance for Health, Physical Education, Recreation, and Dance, St. Louis, MO.
- Fry, M. D.** (1996, October). *Children's understanding of luck and ability: A developmental analysis*. Association for the Advancement of Applied Sport Psychology, Williamsburg, VA.
- Fry, M. D.** (1996, October). *The motivational climate in sport and physical education: An introduction to theory and research*. Association for the Advancement of Applied Sport Psychology, Williamsburg, VA.
- Fry, M. D., & Fry, A. C.** (1996, June). *Goal perspectives and motivational responses of elite junior weightlifters*. National Strength and Conditioning Association, Atlanta, GA.
- Fry, M. D., & Alexander, C.** (1996, June). *Children's understanding of task difficulty: A developmental analysis*. North American Society for the Psychology of Sport and Physical Activity, Cleveland's House, Canada.
- Duda, J. L., & Walling, M. D.** (1995, October). *Views about the Motivational climate and their self perceptions/affective correlates: The case for young elite female gymnasts*. Association for the Advancement of Applied Sport Psychology, New Orleans, LA.
- Newton, M. L., & Walling, M. D.** (1995, October). Goal orientations and beliefs about the causes of success among senior Olympic games participants. North American Society for the Psychology of Sport and Physical Activity, Asilomar, CA.
- Walling, M. D.** (1994, October). *Developmental differences in children's views regarding physical competence*. Association for the Advancement of Applied Sport Psychology, Lake Tahoe, NV.
- Walling, M. D., & Duda, J. L.** (1994, June). *Children's understanding of effort and ability in the physical domain*. North American Society for the Psychology of Sport and Physical Activity, Clearwater Beach, FL.
- Walling, M. D., Duda, J. L., Newton, M., & White, S.** (1993, October). *The Task and Ego Orientation in Sport Questionnaire: Further analysis with youth sport participants*. Association for the Advancement of Applied Sport Psychology, Montreal, CANADA.
- Walling, M. D., & Duda, J. L.** (1993, March). *Goals and their associations with beliefs about success in and perceptions of the purpose of physical education*. American Alliance for Health, Physical Education, Recreation, and Dance, Washington, DC.
- Walling, M. D.** (1993, February). *Children's conceptions of effort and ability in the physical domain: A dissertation in progress*. Midwest Sport Psychology Symposium, Miami University, Oxford, OH.
- Walling, M. D., Duda, J. L., & Crawford, T.** (1992, October). *The relationship between goal orientations and positive attitudes toward sport and exercise among young athletes*. Association for the Advancement of Applied Sport Psychology, Colorado Springs, CO.
- Walling, M. D., Duda, J. L., & Crawford, T.** (1992, June). *The psychometric properties of the perceived motivational climate in sport questionnaire: Further investigation*. North American Society for the Psychology of Sport and Physical Activity, Pittsburgh, PA.
- Walling, M. D., Crawford, T., Duda, J. L., & Wigglesworth, J.** (1992, April). *Are we having fun yet and will we want to play again?: The interrelationships between goal perspectives and other motivational variables in youth sport athletes*. American Alliance for Health, Physical Education, Recreation, and Dance, Indianapolis, IN.
- Walling, M. D., & Catley, D.** (1992, April). *Jack and Jill in physical education class: Do they*

think their instructor treats them differently? American Alliance for Health, Physical Education, Recreation, and Dance, Indianapolis, IN.

- Walling, M. D., & Catley, D.** (1992, February). *Sex role stereotyping among college instructors and students' perceptions of instructor gender bias.* Midwest Sport Psychology Symposium, Purdue University, West Lafayette, IN.
- Walling, M. D., Catley, D., & Taylor, A.** (1991, June). *The interrelationships between goal perspectives, perceived competence, and indices of intrinsic motivation.* North American Society for the Psychology of Sport and Physical Activity, Asilomar, CA.
- Walling, M. D.** (1991, April). *Learned helplessness: A case study of a sixth-grade physical education student.* American Alliance for Health, Physical Education, Recreation and Dance, San Francisco, CA.

Webinar

- Fry, M. D., & Hogue, C. M. (2019). *Theories and Models in Sport Psychology: A Review.* Association for the Advancement of Applied Sport Psychology.

State/Regional Presentations

- Gray, R., & Fry, M. D. (2020). *Employing a buddy system to foster physical activity among college students with a physical disability.* Midwest Sport Psychology Symposium, Illinois State University.
- Wineinger, T., & Fry, M. D. (2020). A collaboration between a sport psychology lab with a youth sport organization: Helping WIN create an optimal sport experience. Midwest Sport Psychology Symposium, Illinois State University.
- Fry, M. D.** (2018). *Three ideas for incorporating sport psychology into practice and competition.* Greenbush Coaches' Workshop.
- Fry, M. D.** (2018). *Three more ideas for incorporating sport psychology into practice and competition.* Greenbush Coaches' Workshop.
- Fry, M. D.** (2017). *Sport Psychology: Setting a Positive Tone for the Team* (Sessions A & B, repeated). Greenbush Fall Coaches' Workshop.
- Fry, M. D.** (2016). *KU Graduate Programs in Health, Sport & Exercise Science.* Morehouse College Graduate Program Fair (February, 2016).
- Fry, M. D.** (2016, Fall). *Keys to Helping Athletes Develop Strong Mental Skills: The Role of Sport Psychology.* Keynote for Greenbush Coaching Conference, Eudora, KS.
- Fry, M. D.** (2016, Spring). *Working with and bringing out the best in difficult athletes.* Greenbush Coaching Conference, Eudora, KS.
- Fry, M. D.** (2015). *Bringing out the Best in Every Swimmer: The Contribution of Sport Psychology.* Keynote delivered to US Master Swim at their National Conference; Kansas City, KS.
- Fry, M. D.** (2015). *Caring Climates for Physical Activity Settings.* University of Milwaukee, Wisconsin.
- Fry, M. D.** (2015). *Creating a Caring Climate to Maximize Athletes' Potential On and Off the Field.* Keynote presented at the Positive Coaching Alliance Trainers' Institute.
- Fry, M. D.** (2015). *Maximizing Athletes' Potential On and Off the Field.* Keynote delivered to X's and O's Coaching Education Workshop, Emporia State University, Emporia, KS.
- Fry, M. D.** (2015). *Setting the Stage for Coaches to Optimize Athletes' Motivation.* Big XII invited lecture at Texas Christian University; Fort Worth, TX.

- Fry, M. D.,** Moore, E., W., G., Iwasaki, S., Fontana, M., Hogue, C., Claunch, J., & McGhee, R. (2012). *Building Mentally Strong Athletes: Ideas for Incorporating Mental Skills Training with Sport Teams*. Kansas Alliance for Health, Physical Education, Recreation, & Dance in Lawrence, KS.
- Fry, M. D.** (2012). *Strong Girls: Hearing About the Benefits of a Physical Activity/Positive Life Skills Program from the Leaders and Kids*. Kansas Alliance for Health, Physical Education, Recreation, & Dance in Lawrence, KS.
- Moore, E. W., & **Fry, M. D.** (2010). *Kids don't care what you know until they know that you care: Tips for building caring environments*. Kansas Alliance for Health, Physical Education, Recreation & Dance, Wichita, KS.
- Brown, T., **Fry, M. D.**, & Hogue, C. (2010). *Positive life skills for every walk of life*. Kansas Alliance for Health, Physical Education, Recreation & Dance, Wichita, KS.
- Fry, M. D.**, Brown, T., Moore, E. W., Hogue, C., Sauer, S., & Beyer, J. (2010). *Team time: Team building activities for any group to use and process*. Kansas Alliance for Health, Physical Education, Recreation & Dance, Wichita, KS.
- Williamson, K., & **Fry, M. D.** (2009). *Bringing out the best in your athletes: Making sport fun again while enhancing your team's competitive edge*. Kansas Alliance for Health, Physical Education, Recreation & Dance, Pittsburg, KS.
- Moore, W. E., & **Fry, M. D.** (2009). *Are we building character or characters?: Strategies for promoting integrity among young athletes*. Kansas Alliance for Health, Physical Education, Recreation & Dance held in Pittsburg, KS.
- Brown, T. C., & **Fry, M. D.** (2009). *Ideas to implement in a youth physical activity life skills program*. Kansas Alliance for Health, Physical Education, Recreation and Dance held in Pittsburg, KS.
- Fry, M. D.**, Dodd, R., Brown, T. C. (2008). *Getting them interested and coming back: Creating a positive and caring environment in exercise settings*. Kansas Association of Health, Physical Education, Recreation and Dance, Emporia, KS.
- Fry, M. D.** (2005). *Creating a Positive Climate and Optimizing Motivation in Physical Education & on Sport Teams*. An invited presentation for the Lutheran Schools Midsouthern Regional Conference held in Memphis, TN.

SUPPORT

EXTERNAL FUNDING	AGENCY/SOURCE	AMOUNT	PERIOD
Rock Chalk, Zuni	Running Strong for American Indian Youth	\$5000	2017-2018
KU PCA Initiative	Positive Coaching Alliance/ David and Margaret Shirk Physical Education Programs Fund	\$25,000	2017-2018
Strong Girls: A positive life skills intervention for 3 rd -5 th girls	Kohl's Cares for Kids	\$4000	2011
Students' salivary stress responses when juggling in two distinct	Association of Applied Sport Psychology	\$2800	2010-11

motivational climates

Effects of resistance exercise and a Pre-workout dietary supplement on Physiological adaptations	Labrada	\$5000	2010
Strong Girls: A positive life skills physical activity intervention for elementary school girls	Association of Applied Sport Psychology	\$3220	2009-10
Fostering & maintaining motivation among urban youth tennis players	United States Tennis Association	\$10,000	1997-98

EXTERNAL PROPOSALS NOT FUNDED

	AGENCY/SOURCE	AMOUNT	PERIOD
Children’s International Guatemala & US Collaboration	ASportsUnited: International Sports Programming Initiative	\$224,953	2012
Dare to Care: Tackling Childhood Obesity	Albert Foundation	\$46,000	2013
Strong Girls: A positive life skills/physical activity program	Live-Well Lawrence-Kansas Health Foundation	\$5000	2011
Strong Girls: A positive life skills/physical activity program for girls	Payless Foundation	\$15, 000	2011
Strong Girls: A positive life skills/ Physical activity program for children	Sprint Foundation	\$168, 000	2011

SUPPORT

INTERNAL FUNDING	AGENCY/SOURCE	AMOUNT	PERIOD
Research Excellence Initiative” A Collaboration to Train Biology Lab Instructors to Create a Caring & Task Involving Climate	University of Kansas; College of Liberal Arts & Sciences	\$30, 000 (under review)	2019-2020
Strong Girls: A community life skills/physical activity research and service project for elementary girls in Lawrence.	University of Kansas KU SOE Academic Year Research Support	\$8000	2011
Examining the motivational climate in a national fitness company.	University of Kansas Faculty Research Grant	\$5000	2010

Strong Girls: A physical activity and life skills intervention for faculty adolescent girls.	University of Kansas Research Grant	\$6000	2009
A team building/mental skills intervention for children enrolled in a summer camp.	University of Kansas New Faculty Research Grant	\$8000	2008
The relationship between young athletes' perceptions of a caring climate on their sport teams to their motivational responses	University of Memphis Faculty Research Grant	\$6000	2005
Effect of a strength training intervention for underserved elementary students	University of Memphis Faculty Research Grant	\$4000	2000-02
An examination of black females' perceptions of physical activity	Center for Research on Educational Policy, University of Memphis	\$5000	2000
Children's perceptions of ability and their motivational responses in physical education class.	Center for Research on Educational Policy, University of Memphis	\$3800	1999
The motivational implications of students' understanding of effort and ability in the physical domain.	University of Memphis Faculty Research Grant	\$4000	1995
Children's understanding of luck and ability, and task difficulty.	University of Memphis Faculty Research Grant	\$3000	1994
Developmental differences in children's conceptions of ability, effort, and task difficulty in the physical domain.	Purdue Foundation Grant	\$9,900 (per year for 2 years)	1992-94

Memberships in Professional Organizations

American Psychological Association (2017-present)

American Alliance for Health, Physical Education, Recreation, and Dance (1988-2017).

Association for Applied Sport Psychology, Member (1991-present).

Kansas Alliance for Health, Physical Education, Recreation, & Dance (2008-present).

North American Society for the Psychology of Sport and Physical Activity, Member (1988-2000).

Indiana Association for Health, Physical Education, Recreation, and Dance, Member (1993-

1994).

Tennessee Association for Health, Physical Education, Recreation, and Dance, Member (1994-2000).

Teaching Responsibilities:

Undergraduate

- EXSS 3307 Psychosocial Aspects of Sport [UMemphis]
- EXSS 3450 Psychological Aspects of Exercise [UMemphis]*
- EXSS 4605 Internship in Exercise & Sport Science [UMemphis]
- EXSS 4999 Senior Project in Health, Physical Education, & Recreation [UMemphis]*
- HSES 385 Psychological Aspects of Exercise [KansasU]*
- HSES 440 Applied Sport Psychology [KansasU]*

Graduate

- EXSS 7173 Sport and Exercise Psychology [UMemphis]*
- EXSS 6903 Developmental Perspectives in Youth Sport [UMemphis]*
- EXSS 7133 Current Readings: Motivation in Physical Activity Settings [UMemphis]*
- EXSS 7907 Special Topics: Applied Sport Psychology [UMemphis]*
- HSES 798 Special Course: Creating a Positive Environment in Physical Activity Settings [KansasU]*
- HSES 798 Special Course: Sport Psychology Within Youth Sport [KansasU]*
- HSES 798 Special Course: Advanced Sport Psychology [KansasU]**
- HSES 804 Sport Psychology [KansasU]**
- HSES 806 Stress Management [KansasU]*
- HSES 823 Behavior Modification [KansasU]
- HSES 892 Psychological Foundations of Sport and Physical Activity [KansasU] *
- HSES 982 Research Ethics [KansasU]

*Courses I developed.

Community Presentations

Fry, M. D. (November, 2017). *Lead campus participation in celebration of World Kindness Day.*

Fry, M. D. (June, 2016). *Mental Skills: A Key Ingredient for Excellence in Cross Country.* Workshop for Eudora High School Cross Country Team; Eudora, KS.

Fry, M. D. (2016). *Creating a Caring and Task-Involving Climate in CI's Game On Program.* A presentation for CI Employees at the International Headquarters Office in Kansas City, KS.

Fry, M. D. (2016). *Team Building: The Potential for Children International.* Workshop for Children International Employees at the National Headquarters office in Kansas City, KS.

Fry, M. D. (2015). *Activities and Strategies to Help Children and Adolescents Thrive in Physical Activity Settings.* Topeka Parks and Recreation Conference; Topeka, KS.

Fry, M. D. (2015). *Fostering Wellness at the Worksite.* Live Well Lawrence; Lawrence, KS.

Fry, M. D. (2011, Nov.). Guest panelist for KU Alternative Breaks, University of KS

Fry, M. D. (2011, Nov.). Guest speaker for Multicultural Education, University of KS.

Fry, M. D. (2011, Nov.). Guest speaker for Coaching Football Class, University of KS.

Fry, M. D. (2011, Oct.). Guest speaker for KU Bowling Team, University of KS.

- Fry, M. D.** (2011, April). Guest speaker for Positive Psychology Class, University of KS.
- Fry, M. D.** (2011, March). Guest speaker for Coaching Softball Class, University of KS.
- Fry, M.D.** (2011, Feb.). Guest speaker for Coaches Meeting for Sunflower Soccer Association, Topeka, KS.
- Fry, M. D.** (2010). Guest speaker for Healthy Musicians Class (2-hour workshop), University of KS.
- Fry, M. D.** (2009). Guest speaker for Life Skills Class at Atchison Community High School, KS.
- Fry, M. D.** (2005, Feb.). Caring communities within physical activity settings. An invited presentation to a Memphis Chapter of the Philanthropic Educational Organization.
- Fry, M. D.** (2001-present). Coordinate mental skills and physical activities for youngsters (i.e., cancer patients & their siblings) at Target House in Memphis, TN. Have conducted approximately 12 1.5-2 hour sessions.
- Fry, M. D.** (2002, July 17th). The role of sport psychology in the prevention of and rehabilitation after injury. A presentation for coaches attending the Memphis Interscholastic Athletic Association Conference.
- Fry, M. D.** (May, 2002). Presented stress management session for Cancer Support Group at Pentecostal Church in Memphis, TN.
- Fry, M. D.** (2001-present). Coordinate mental skills and physical activities for youngsters (i.e., cancer patients & their siblings).
- Fry, M. D.** (2000 & 2001, March-April). Coordinator for Short Putts to Spring Workshops for the MidSouth Junior Golf Association. Presenter for 2 of the 5 workshops on team building skills.
- Fry, M. D.** (1996). Optimizing arousal levels in tennis. A presentation to the Women's tennis team at The University of Memphis.
- Fry, M. D.** (1995, October). *Mental skills training in track and field*. A presentation to the Women's track and cross country teams at The University of Memphis.
- Walling, M. D.** (1995, February). *Maximizing your children's motivation in swimming: An educational sport psychology perspective*. A presentation to the Booster Club parents of the University of Memphis Swim Club.
- Walling, M. D.** (1995, February). *Fostering effort and enjoyment with your tennis players: A sport psychology perspective*. An invited talk which was part of a workshop sponsored by the USTA, the National Umpires Association and the Memphis City Schools for high school tennis coaches.
- Walling, M. D.** (1994). *Sport psychology with a developmental twist*. An invited presentation to the Sport Psychology Colloquium, Department of Psychology, University of Memphis.
- Walling, M. D.** (1993, October). *The influence of parents on young gymnasts' levels of stress and motivation*. An invited presentation sponsored by the United States Gymnastics Federation, Indianapolis, IN.
- Walling, M. D.** (1992, October). *The mechanics of sport psychology: What we do and how it impacts you and your family*. Presentation to the Purdue Mechanical Engineering Advisory Board Spouses.
- Walling, M. D.** (1991, July). *Stress Management*. Invited presentation sponsored by the National Institute for Fitness and Sport.
- Walling, M. D., & Newton, M.** (1991, October). *Sport Psychology for the Weekend Athlete*. Invited presentation sponsored by the Eli Lilly Corporation, Indianapolis, IN.

Departmental/University Service

Kansas Women's Leadership Institute, Net-Walk Mentor Participant (2016-2017).
 KU Certificate in Sport Committee (2017-2018).
 KU Center for Undergraduate Research, Advisory Board (2016-2018).
 KU Calendar Committee (2016-2018; Chair, 2017-2019).
 SOE Scholarship & Awards Committee (2013-2019).
 SOE Convocation Volunteer (2009-present).
 HSES Faculty Search Committees (2009, 2010, 2012, 2013, 2014, 2015).
 HSES Scholarship & Awards Committee (2010-2013), University of Kansas.
 HSES Personnel Committee (2011-present), University of Kansas.
 HSES Graduate Curriculum Committee (2008-2014), University of Kansas.
 SOE Diversity Committee (2013-2016), University of Kansas.
 SOE Technology Committee (2011-2013), University of Kansas.
 SOE Governance Committee (2011-2013), University of Kansas.
 SOE Personnel Committee (2007-2010), University of Kansas.
 University of Kansas, Dean of the School of Education 5-year Review Committee (2014).
 President's Tenure & Promotions Appeal Committee. (2007-2009). The University of Memphis.
 HSS Community Affairs Committee (2004-2006). The University of Memphis.
 Coordinator of Achievement Motivation Seminar (2003). The University of Memphis, Dept. HMSE.
 PETE Unit Head, Dept. of HMSE, University of Memphis (2001-2003).
 HMSE Tenure and Promotion Committee (1999-2000; Chair 2000-2001), The University of Memphis.
 HMSE Coordinator for the Science Olympiad sponsored by The University of Memphis for high school honor science students in the Western portion of TN (1995-1999).
 Dean's Council for Teacher Education (1994-1995), University of Memphis.
 HMSE Material Resources Committee (1994-1995; 1998-2000, 2002; 2000-2001, Chair), University of Memphis.
 HMSE Ad Hoc Committee on Internships (1994-1995), University of Memphis.
 HMSE Recruitment Committee (1995-1996).
 HMSE Physical Education Teacher Education Unit (1994-present; Unit Head-2001-2002), University of Memphis.
 HMSE Ad Hoc Committee on Proposing a PhD Program (1995-1997).
 HMSE Undergraduate Council (1994-95 & 1997-1998)
 HMSE Academic Council (1996-1998).
 HMSE Graduate Studies and Research Council (1995-2001; chair from 1996-1998)
 College of Education Graduate Council (1996-1998).
 Graduate Coordinator for the Department of Human Movement Sciences and Education, (1996-1998).

Service to National Organizations

Subject Matter Expert for the Certification Exam Committee, Association of Applied Sport Psychology (2018).
 Member of Ad-Hoc Committee to Study Future of AASP, Association of Applied Sport Psychology (2012-2015).
 Member of the Social Psychology Section Committee, Association for the Advancement of

Applied Sport Psychology (AAASP). Appointed for a 3-year-term, 1996-99; 2001-2003. Member of AAASP Dissertation Award Committee (1998 & 2002). Member of Editorial Board for *Physical Activity Today* (American Alliance for Health, Physical Education, Recreation and Dance publication), 1997-2001. Member of Sport Psychology Program Area Review Committee for the 1996 Annual Meeting of the North American Society for the Psychology of Sport and Physical Activity (NASPSPA). Executive Board Member, Association for the Advancement of Applied Sport Psychology, (2004-2006). Member of Program Review Committee, American Alliance of Health, Physical Education, Recreation & Dance (2009- 2017); Chaired committee in 2010. Member of Program Review Committee, Association for Applied Sport Psychology (2008-present).

Reviewing/Editing Responsibilities

Associate Editor (2009-2012); Editorial Board Member (2000-2009; 2013-present) and Reviewer (1992-1999). *Journal of Applied Sport Psychology*. Associate Editor. *Sport Psychology in Action* (2008-present). Editorial Board Member. *Sport, Exercise, and Performance Psychology* (2011-present; American Psychological Association Journal). Sport & Exercise Psychology Section Editor (2003-2006) and Reviewer (1994-present). *Research Quarterly for Exercise and Sport*. Co-editor with David R. Black of Abstracts Column. *Peer Facilitator Quarterly* (1993-1994). Reviewer. *Education and Treatment of Children* (1993-1995). Reviewer. *Journal of Health Education* (1993-1995). Reviewer. *The Sports Psychologist* (1997-present). Reviewer. *International Journal of Sport Psychology*. (1997-present). Reviewer. *Journal of Sport and Exercise Psychology* (1993-present). Reviewer. *Journal of Strength and Conditioning* (1998-present). Reviewer & Editorial Board Member. *Journal of Strength and Conditioning Research* (Reviewer, 1996-present; Editorial Board Member, 1996-1998).

Contributor to Community/National Forum

Fry, M. D. (Fall, 2017). *Participating in a Positive Sport Climate Reaps Many Benefits for Young People*. Column written for the National Dropout Prevention Coalition-Newsletter.

Fry, M. D. (2017). *The Power of the Positive*. Contributor to the Positive Coaching Alliance Video.

DeAngelis, T. (2016) *Psychologists' research points ways to keep youth athletes in sports*. American Psychological Association Monitor Newsletter [KU Sport & Exercise Psychology Lab featured]

Fry, M.D. (2003). *Coaches' rant can bench kids for life*. Invited guest column in the Viewpoint Section of the Commercial Appeal, April 7, 2003.

Fry, M.D. (2003, March). *Strategies for creating a task-involving climate with underserved youth*. An invited presentation to the Dept. of EXSS at the University of Mississippi.

Fry, M.D. (2002). Presenter of workshop entitled: *The Climate Counts: Techniques and*

Strategies for Fostering a Task-Involving Motivational Climate.

Fry, M. D., & Newton, M. L. (1997, December). *TARGETing success in volleyball: Creating a positive motivational climate.* Invited speaker at the American Volleyball Coaches Association (AVCA) National Convention preceding the NCAA Final Four Tournament in Spokane, WA.

Fry, M. D. (1996, April). Invited speaker at Colonial Junior High's Career Day.

Fry, M. D. (February, 1995 & October, 1996). Invited guest on Eddie Cantler's talk-show, "The Trainer's Corner" seen on the Library Channel, Memphis, TN.

Walling, M. D. (1995). Choosing quality youth sport programs for children: The critical role of parents. *Journal of Kinetic Arts, 1* (5).

Applied Sport Psychology Experiences

Fry, M. D. (2018-present). Mental Skills Interventions with high school & university athletes.

Fry, M. D. (2013-2018). Mental Skills Intervention with a high school baseball team.

Fry, M. D. (2009-2011). Mental Skills Intervention with a youth baseball team.

Fry, M. D. (2008-2010). Mental Skills Intervention with a Division 1 collegiate volleyball team.

Fry, M.D. (2006-2007). Mental Skills Intervention with a high school basketball team.

Fry, M. D. (2006). Mental Skills Intervention with a Division 1 cross country team.

Fry, M.D. (2005-2006). Mental Skills activities with a high school golfer.

Fry, M.D. (2003). Mental Skills Activities provided to the Dolphins, a youth synchronized swim program in Memphis.

Fry, M.D. (2001-2007). Mental Skills Games and Activities Sessions provided to residents of Target House (i.e., long-term treatment patients at St. Jude Hospital).

Fry, M. D. (2001, Spring). The Strength Club. An after-school mental skills training program for elementary-aged children.

Fry, M. D. (1996, Spring). Consultation with members of a Division 1 collegiate Track and Field Team.

Walling, M. D. (1994, December). Member of Sport Psychology Coaching Staff for the Talent Opportunity Program (TOP) Camp sponsored by the United States Gymnastics Federation (USGF). Tulsa, OK

Walling, M. D. (1992, October). *Effective Goal Setting in Volleyball.* Presentation to the West Lafayette High School Volleyball Team.

Walling, M. D. (1992, April). *Stress Management in Sport.* Presentation to the Women's Crew Team, Purdue University.

Walling, M. D. (1992). Consultation with High School Tennis Player Over a Season.

Chair, Graduate Student Advisory Council, Department of Health, Kinesiology, and Leisure Studies at Purdue University, 1991-1992.

Richard Eppink (Bar No. 7503)
AMERICAN CIVIL LIBERTIES UNION
OF IDAHO FOUNDATION
P. O. Box 1897
Boise, ID 83701
T: (208) 344-9750 ext. 1202
REppink@acluidaho.org

Elizabeth Prelogar*
COOLEY LLP
1299 Pennsylvania Avenue, NW Suite 700
Washington D.C. 20004-2400
T: (202) 842-7800
F: (202) 842-7899
eprelogar@cooley.com

Gabriel Arkles*
James Esseks*
Chase Strangio*
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
125 Broad St.,
New York, NY 10004
T: (212) 549-2569
garkles@aclu.org
jesseks@aclu.org
cstrangio@aclu.org

Andrew Barr*
COOLEY LLP
380 Interlocken Crescent, Ste. 900
Broomfield, CO 80021-8023
T: (720) 566-4000
F: (720) 566-4099
abarr@cooley.com

Catherine West*
LEGAL VOICE
907 Pine Street, Unit 500
Seattle, WA 98101
T: (206) 682-9552
F: (206) 682-9556
cwest@legalvoice.org

Kathleen Hartnett*
COOLEY LLP
101 California Street 5th Floor
San Francisco, CA 94111-5800
T: (415) 693-2000
F: (415) 693-2222
khartnett@cooley.com

* Admitted *Pro Hac Vice*

Attorneys for Plaintiffs

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO**

LINDSAY HECOX, et al.,

Plaintiffs,

v.

BRADLEY LITTLE, et al.,

Defendants.

No. 1:20-cv-00184-CWD

**DECLARATION OF PLAINTIFF
LINDSAY HECOX IN SUPPORT
OF MOTION FOR PRELIMINARY
INJUNCTION**

I, Lindsay Hecox, depose and say as follows:

1. I have personal knowledge of the facts herein. I am one of the plaintiffs in this case. I am nineteen years old and a freshman at Boise State University. I am a woman who is transgender.

2. I have a passion for running. I want to have the opportunity to be on a women's team and compete.

Experience running before college

3. I have always been a good runner. Even in grade school, I was noticed for my running ability and began to receive compliments. In middle school, I became more passionate about running. I wasn't on a team yet, but I was running as much as I could. It was my daily exercise. It has been a huge part of my life since then. Running has also helped my mental health.

4. My first experience running on a team was in high school, when I joined the track team my freshman year and the cross-country team my sophomore year. The experience was life changing. That's when I realized how much I like running with others and competing.

5. Running became my trademark thing in high school. I was the "runner person." I was known for doing it.

6. I had poor grades my freshman year of high school, but once I started running on a team and competing, my grades improved. I felt more competent and had a better sense of my identity.

7. I've found the positive energy of team competition bleeds over to other areas of my life. I remember in high school, at first I didn't feel like doing homework. But I found that when I put all my internal motivation into an upcoming race, it would increase my ability to complete my homework on time. The only way I can describe it is that the positive energy passes on to other areas of my life.

8. The team aspect of sports was really great for me. My teammates and I would hang out together after running or after meets. Those activities really brightened my life. I really enjoy forming relationships with my teammates.

9. I'm more motivated on a team because I don't want to let my team down. I always run better when I have someone running with me – it makes me want to run faster. In high school, I always wanted to do my best for my coaches and teammates. I wanted to show my team that I tried my best during the meet.

Starting college and transition

10. When I was thinking about college, Boise State appealed to me partly because of its beautiful campus and running trails.

11. Since I have been in college, I have been able to publicly express myself and live as the woman that I am and to begin my medical transition. I have been taking hormone therapy and my peers see me as just one of the girls.

12. Since I came to college and started my transition, I have developed greater independence, self-discipline, and self-motivation.

13. I was assigned the sex of male at birth but knew from grade school that something was different about me. I did not have the words at the time, but I was experiencing gender dysphoria. I actively started feeling unhappy in my gender in middle or high school. I remember wishing I could wear girls' clothes to school around 8th or 9th grade.

14. I did not start receiving professional treatment for gender dysphoria until after I had fully accepted and come out to myself as transgender. That was during May 2019, after graduating high school. I have been taking medically prescribed hormone replacement treatment since September 2019. Before I began taking hormones, I was not looking forward to my future at all. I felt empty and directionless.

15. Taking hormones has drastically improved my body image and has made me feel better in other ways. I am calmer, feel more at peace with my identity, and can see a bright future ahead.

16. My body has changed, including breast development, skin softening, fat redistribution – mostly in the face, and decreased body hair and muscle mass. I am very happy about all of these changes.

17. My treatment for gender dysphoria means that my testosterone levels have decreased. I regularly have those levels tested. My hormone levels are almost compliant with the rules for women in the Olympics. I have

less than five more months of hormone therapy to be compliant with the NCAA rule.

Running times

18. In high school, my personal track records were 2:09 for 800 meters, 4:51 for the 1600 meters and 10:48 for two miles. In cross-country, my best time on a 2.91-mile course was sixteen minutes flat.

19. Since I began hormone therapy, my times have gotten five to ten percent slower. My body is still changing from hormone therapy, but I'm training hard and trying to maintain or improve my times as much as possible. I'm pretty consistently doing my eight mile runs in sixty minutes, and I recently got 6 minutes and ten seconds in a time trial for a mile. I would expect to do a bit better in competition because of the motivation from running with other people. My goal is to run a mile in five minutes thirty seconds.

Running in college

20. I want to try out for the women's cross-country team at Boise State this fall and the women's track team at Boise State in the spring of 2021. My understanding is that the first tryout session for cross-country is during the first week of school in late August.

21. I did not compete on any Boise State teams during my freshman year because I was focused on keeping my grades up, acclimating to college

life, and making sure I met the NCAA eligibility rules for women who are transgender.

22. I did organize a running club where students get together to run for fun and exercise. I enjoyed it, but it is not the same as being on a team and competing. There isn't the same camaraderie or chance to really push myself to improve.

23. In preparation for trying out in the 2020-2021 school year, over the last year I have trained consistently, maintained a balanced diet, and mentally prepared to try out.

24. In order to be ready to try out for the Boise State teams, I've been using my high school trainings to inform my running plan this year. During the week, I usually run five miles per day.

25. On Mondays, Wednesdays and Fridays, I do a solid five-mile run, but it's more of a recovery run where I'm not trying to go as fast.

26. My training plan for Tuesdays and Thursdays alternates every other week. One week on Tuesdays, I do one-mile intervals, and on Thursdays, I do tempo runs for three-miles with a one-mile cooldown and one-mile warm up. The following week, on Tuesday I do five 1000-meter intervals instead of 3-4 one-mile intervals. The following Thursday, I do a five-mile tempo run with 400-meter intervals and a break in between.

27. On Saturday, I do a long distance run of eight miles. The long runs are good for endurance and stamina. On Sunday I do a three-mile run.

28. I've been in touch with the Boise State coaches about the dates and process to try out for the teams.

29. The coaches said students come together to do paperwork in the first week of the semester and have time trials a few weeks later.

30. Being a part of a team is an essential part of the running experience for me. Competing on a team helps to motivate me and push me to do my best. It also helps me socially.

31. I think running cross country and track competitively in college is going to make me more motivated in life in general. Like in high school, I expect that motivation from pushing to do well on a team will also push me in other areas of my life –like getting a college degree or getting a job. If I push myself to do really well at a meet, I'll push myself to do well in other areas of my life.

32. NCAA-level running will be competitive and push me physically and mentally, as well as provide me with teamwork and connection that will help me grow as a person.

33. Training to prepare to try out for and compete on the Boise State teams is a substantial commitment of my time and my mental and physical work and energy throughout the summer.

34. I want to see how fast I could get with a college team to help me train. Being in a non-competitive college running club is not at all be the

same as being on a college team. It would be a big honor to represent my school in athletics.

35. If I was not able to try out for the women’s cross-country and track teams, it would feel like I have a hole in my heart from wanting to do something so badly that I have worked towards for so long – not only in my physical training, but in my mental planning. Being on a women’s team would affirm who I am as a woman—I don’t want that to be taken away.

36. My identity does not hinge on competing on a women’s team – *I am a woman.*

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.

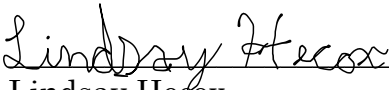
38. As a college athlete, you usually get four seasons of eligibility for each sport within a five-year period. I have four more years of eligibility left. If I miss this fall, I cannot get that period of eligibility back.

39. I just want to run. I want to compete. I want to be on a team. I have looked at the rules for the NCAA, trained hard and am really excited for an opportunity to join the women’s teams.

40. I would be devastated if I were excluded from trying out for women’s cross-country and track teams at Boise State.

I certify under penalty of perjury pursuant to the laws of the United States that the foregoing is true and correct.

Executed this 29 day of April, 2020.


Lindsay Hecox

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of April, 2020, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

Dan Skinner

danskinner@cssklaw.com

cssklaw@cssklaw.com

Attorney for Boise School District,

Individual members of the Board of Trustees of Boise School District,

Coby Dennis

Steven L. Olsen

steven.olsen@ag.idaho.gov

W. Scott Zanzig

scott.zanzig@ag.idaho.gov

Dayton P. Reed

dayton.reed@ag.idaho.gov

Attorneys for Bradley Little,

Sherri Ybarra,

Individual members of the State Board of Education,

Boise State University,

Marlene Tromp,

Individual members of the Idaho Code Commission

DATED this 30th day of April, 2020.

/s/ Richard Eppink

Nos. 20-35813, 20-35815

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

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

Defendants-Appellants,

and

MADISON KENYON; and MARY MARSHALL,

Intervenors-Appellants.

On Appeal from the United States District Court
for the District of Idaho
Civil Case No. 1:20-cv-00184-DCN
Hon. David C. Nye

**EXCERPTS OF RECORD
VOLUME 5 (ER 687-835)**

LAWRENCE G. WASDEN
Attorney General

STEVEN L. OLSEN
DAYTON P. REED
SCOTT ZANZIG
Deputy Attorneys General
954 W. Jefferson, 2nd Floor
P.O. Box 83720
Boise, ID 83720-0010
Telephone: (208) 334-2400
steven.olsen@ag.idaho.gov
dayton.reed@ag.idaho.gov
scott.zanzig@ag.idaho.gov

Counsel for Defendants-Appellants

KRISTEN K. WAGGONER
JOHN J. BURSCH
CHRISTIANA M. HOLCOMB
ALLIANCE DEFENDING FREEDOM
440 First Street, NW, Suite 600
Washington, DC 20001
Telephone: (202) 393-8690
kwaggoner@ADFlegal.org
jbursch@ADFlegal.org
cholcomb@ADFlegal.org

BRUCE D. SKAUG
RAUL R. LABRADOR
SKAUG LAW. P.C.
1226 E. Karcher Road
Nampa, ID 83687
Telephone: (208) 466-0030
bruce@skauglaw.com
raul@skauglaw.com

ROGER G. BROOKS
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260
Telephone: (480) 444-0020
rbrooks@ADFlegal.org

CHRISTOPHER P. SCHANDEVEL
ALLIANCE DEFENDING FREEDOM
20116 Ashbrook Place, Suite 250
Ashburn, VA 20147
Telephone: (571) 707-4655
cschandevel@ADFlegal.org

Counsel for Intervenors-Appellants

ECF No.	Document Description	Pages
VOLUME 1		
63	Memorandum decision and order granting motion to intervene, granting motion for preliminary injunction, and granting in part and denying in part motion to dismiss	1–87
VOLUME 2		
65	Intervenors’ notice of preliminary injunction appeal	88–91
64	Defendants’ notice of preliminary injunction appeal	92–94
62	Transcript of motion hearing on July 22, 2020	95–222
58-1	Supplemental declaration of Deanna Adkins, MD, in support of Plaintiffs’ motion for preliminary injunction	223–237
58-2	Supplemental declaration of Joshua D. Safer, MD, FACP, FACE, in support of plaintiffs’ motion for preliminary injunction	238–247
58-3	Expert declaration of Jack L. Turban, MD, MHS, in support of plaintiffs’ motion for preliminary injunction	248–275
57	Exhibit A to affidavit of Dr. Stephen Levine	276–298
VOLUME 3		
53	Department of Justice Statement of Interest	299–314
46-1	Declaration of Chelsea Mitchell in opposition to preliminary injunction	315–325
46-2	Expert affidavit of Stephen B. Levine, M.D.	326–370

ECF No.	Document Description	Pages
41 (excerpt)	Appendix 1 to defendants' response to motion for preliminary injunction (OCR decision)	371–416
41 (excerpt)	Appendix 2 to defendants' response to motion for preliminary injunction (IHSAA consent and physical examination forms)	417–419
41-1	Expert declaration of Gregory A. Brown, Ph.D. FACSM, with attachment	420–515
VOLUME 4		
40	Defendants' motion to dismiss	516–519
30	Motion to intervene	520–523
30-2	Declaration of Madison Kenyon in support of intervention	524–531
30-3	Declaration of Mary Marshall in support of intervention	532–537
30-4	Intervenors' answer to verified complaint	538–563
22	Plaintiffs' motion for a preliminary injunction	564–566
22-2	Expert declaration of Deanna Adkins, MD, in support of plaintiffs' motion for preliminary injunction	567–600
22-3	Declaration of Andrew Barr in support of plaintiffs' motion for preliminary injunction	601–612
22-4	Expert declaration of Helen Carroll in support of plaintiffs' motion for preliminary injunction	613–627
22-5	Expert declaration of Mary Fry, PHD, in support of plaintiffs' motion for preliminary injunction	628–676

ECF No.	Document Description	Pages
22-6	Declaration of plaintiff Lindsay Hecox in support of motion for preliminary injunction	677–686
VOLUME 5		
22-7	Declaration of plaintiff Jane Doe in support of motion for preliminary injunction	687–691
22-8	Declaration of Jean Doe in support of motion for preliminary injunction	692–695
22-9	Expert declaration of Joshua D. Safer, MD, FACP, FACE, in support of plaintiffs' motion for preliminary injunction	696–743
22-10	Expert declaration of Sara Swoboda, MD, in support of plaintiffs' motion for preliminary injunction	744–756
1	Complaint for declaratory and injunctive relief	757–816
	District Court Docket Sheet	817–835

Richard Eppink (Bar No. 7503)
AMERICAN CIVIL LIBERTIES UNION
OF IDAHO FOUNDATION
P. O. Box 1897
Boise, ID 83701
T: (208) 344-9750 ext. 1202
REppink@acluidaho.org

Elizabeth Prelogar*
COOLEY LLP
1299 Pennsylvania Avenue, NW Suite 700
Washington D.C. 20004-2400
T: (202) 842-7800
F: (202) 842-7899
eprelogar@cooley.com

Gabriel Arkles*
James Esseks*
Chase Strangio*
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
125 Broad St.,
New York, NY 10004
T: (212) 549-2569
garkles@aclu.org
jesseks@aclu.org
cstrangio@aclu.org

Andrew Barr*
COOLEY LLP
380 Interlocken Crescent, Ste. 900
Broomfield, CO 80021-8023
T: (720) 566-4000
F: (720) 566-4099
abarr@cooley.com

Kathleen Hartnett*
COOLEY LLP
101 California Street 5th Floor
San Francisco, CA 94111-5800
T: (415) 693-2000
F: (415) 693-2222
khartnett@cooley.com

Catherine West*
LEGAL VOICE
907 Pine Street, Unit 500
Seattle, WA 98101
T: (206) 682-9552
F: (206) 682-9556
cwest@legalvoice.org

* Admitted *Pro Hac Vice*

Attorneys for Plaintiffs

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO**

LINDSAY HECOX, et al.,

Plaintiffs,

v.

BRADLEY LITTLE, et al.,

Defendants.

No. 1:20-cv-00184-CWD

**DECLARATION OF PLAINTIFF
JANE DOE IN SUPPORT OF
MOTION FOR PRELIMINARY
INJUNCTION**

I, Jane Doe, depose and say as follows:

1. I am seventeen years old and have personal knowledge of the facts herein.

2. I will be entering my senior year at Boise High School.

3. I have played sports since I was four years old. Being a member of an athletic team and competing at my highest level has been, and is, a big part of my identity.

4. I am a very competitive athlete and compete on the Varsity soccer and track teams.

5. I plan on competing on my high school soccer and track teams during the 2020-2021 school year.

6. My soccer team competes in the fall season (Fall 2020) and my track team competes in the spring season (Spring 2021).

7. Competing on my high school soccer and track teams has helped me develop social skills that reach beyond the playing field. I am a more confident person due to my athletic achievements and friendships made on the various teams of which I've been a member.

8. I am hoping to compete as an athlete in college, which will require that I have a strong upcoming senior season at Boise High School.

9. It is possible that I will earn scholarship funds as an athlete that will help with my college tuition and costs. It is very important to me to have the best chance of obtaining a scholarship and earning a chance to compete at the collegiate level.

10. I have never had to endure blood tests, genetic tests, or genital tests in order to participate in sports.

11. In the past, I have had a physical examination, but the doctor did test my blood or hormone levels or examine my vagina. I've never had a genetic test, hormone test, or transvaginal pelvic ultrasound at all.

12. It is my understanding that Idaho's new law may require me to get these sorts of tests to prove that I am a girl, and that if I refuse, I could be kept from participating on my high school soccer or track team.

13. I am a girl. I have an athletic build, and in the past others have jokingly referred to me as a boy. I don't often wear skirts or dresses, and most of my friends are boys. I am concerned that someone will use Idaho's new law to dispute my gender because of these qualities.

14. I do not want to undergo any sort of medical procedures or tests I don't need for a medical reason.

15. I think it is unfair that my ability to compete on my high school soccer or track team—something I love to do and am hoping helps pave a way for me to attend college—could be taken away if I am not willing to undergo invasive tests.

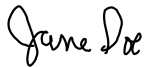
16. I am already concerned that Idaho's new law will require me to make a choice between competing with my friends and teammates as I have always done and consenting to invasive medical tests.

17. I also think it is unfair that my ability to compete with my teammates is based on these medical tests, when the boys in my class do not have to go through similar testing.

18. I am entering my last year of high school athletics. It is very frustrating that I am no longer able to focus on training for the season due to this unfair law that only impacts girls.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 28th day of April, 2020.



Jane Doe

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of April, 2020, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

Dan Skinner

danskinner@cssklaw.com

cssklaw@cssklaw.com

Attorney for Boise School District,

Individual members of the Board of Trustees of Boise School District,

Coby Dennis

Steven L. Olsen

steven.olsen@ag.idaho.gov

W. Scott Zanzig

scott.zanzig@ag.idaho.gov

Dayton P. Reed

dayton.reed@ag.idaho.gov

Attorneys for Bradley Little,

Sherri Ybarra,

Individual members of the State Board of Education,

Boise State University,

Marlene Tromp,

Individual members of the Idaho Code Commission

DATED this 30th day of April, 2020.

/s/ Richard Eppink

Richard Eppink (Bar No. 7503)
AMERICAN CIVIL LIBERTIES UNION
OF IDAHO FOUNDATION
P. O. Box 1897
Boise, ID 83701
T: (208) 344-9750 ext. 1202
REppink@acluidaho.org

Elizabeth Prelogar*
COOLEY LLP
1299 Pennsylvania Avenue, NW Suite 700
Washington D.C. 20004-2400
T: (202) 842-7800
F: (202) 842-7899
eprelogar@cooley.com

Gabriel Arkles*
James Esseks*
Chase Strangio*
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
125 Broad St.,
New York, NY 10004
T: (212) 549-2569
garkles@aclu.org
jesseks@aclu.org
cstrangio@aclu.org

Andrew Barr*
COOLEY LLP
380 Interlocken Crescent, Ste. 900
Broomfield, CO 80021-8023
T: (720) 566-4000
F: (720) 566-4099
abarr@cooley.com

Kathleen Hartnett*
COOLEY LLP
101 California Street 5th Floor
San Francisco, CA 94111-5800
T: (415) 693-2000
F: (415) 693-2222
khartnett@cooley.com

Catherine West*
LEGAL VOICE
907 Pine Street, Unit 500
Seattle, WA 98101
T: (206) 682-9552
F: (206) 682-9556
cwest@legalvoice.org

* Admitted *Pro Hac Vice*

Attorneys for Plaintiffs

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO**

LINDSAY HECOX, et al.,

Plaintiffs,

v.

BRADLEY LITTLE, et al.,

Defendants.

No. 1:20-cv-00184-CWD

**DECLARATION OF JEAN DOE
IN SUPPORT OF MOTION FOR
PRELIMINARY INJUNCTION**

I, Jean Doe, depose and say as follows:

1. I am over the age of eighteen and have personal knowledge of the facts herein.

2. My daughter, Jane Doe, is seventeen years old and she will be a senior at Boise High School in Fall 2020.

3. Since she was a young child, Jane has participated in athletic activities. Jane has a natural athleticism and has always excelled at sports.

4. Jane's involvement with sports has allowed her to develop as a young woman. She has taken the confidence and work ethic she developed on the playing field into the classroom. It is hard to imagine where Jane would be in her life if she didn't have the many positive experiences of playing and competing on teams.

5. Jane is a member of Boise High School's girls' soccer and track teams. In Idaho, the soccer season is in the fall and the track season is in the spring.

6. Jane is currently training to be ready for the fall soccer season.

7. In order to be ready to play soccer, Jane does the following:

- cardiovascular conditioning five days per week to improve her fitness level for games;
- private coaching two to three days per week to prepare her technical abilities;
- attends open plays and optional practices three days per week throughout the summer, which also helps to bond with her team and coaches;
- weight training three days per week in the off- and pre-season to increase her physical strength; and
- regular correspondence with college coaches as part of the college soccer recruiting process.

8. Jane's life is largely dominated by sports, her teammates, and competing. She derives great enjoyment from being on a team and competing.

9. Jane has pushed herself physically and been rewarded by what she has achieved athletically.

10. Jane has an athletic, masculine build.

11. At one point, in middle school, other students jokingly referred to her as a boy.

12. With her athletic build and performance in sports, I am concerned that someone will use Idaho's new law to dispute her gender. I am concerned this could be done simply to discourage Jane from playing even though the challenger knows that Jane is a girl.

13. As Jane's mother, I am concerned that she would be put in the position of getting invasive medical procedures and blood tests she doesn't need to play the sports she loves.

14. Jane is currently being recruited to play soccer in college. If she is unable to play her senior season, it is unlikely college coaches would offer her a position on their team, which could mean she would lose out on scholarship opportunities otherwise available to her.

15. It is very frustrating to me that Jane's ability to compete could be questioned or even prevented by anyone who wants to "verify" her "biological sex."

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 28th day of April, 2020.



Jean Doe

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of April, 2020, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

Dan Skinner
danskinner@cssklaw.com
cssklaw@cssklaw.com
*Attorney for Boise School District,
Individual members of the Board of Trustees of Boise School District,
Coby Dennis*

Steven L. Olsen
steven.olsen@ag.idaho.gov
W. Scott Zanzig
scott.zanzig@ag.idaho.gov
Dayton P. Reed
dayton.reed@ag.idaho.gov
*Attorneys for Bradley Little,
Sherri Ybarra,
Individual members of the State Board of Education,
Boise State University,
Marlene Tromp,
Individual members of the Idaho Code Commission*

DATED this 30th day of April, 2020.

/s/ Richard Eppink

Richard Eppink (Bar No. 7503)
AMERICAN CIVIL LIBERTIES UNION OF
IDAHO FOUNDATION
P. O. Box 1897
Boise, ID 83701
T: (208) 344-9750 ext. 1202
REppink@acluidaho.org

Elizabeth Prelogar*
COOLEY LLP
1299 Pennsylvania Avenue, NW Suite 700
Washington D.C. 20004-2400
T: (202) 842-7800
F: (202) 842-7899
eprelogar@cooley.com

Gabriel Arkles*
James Esseks*
Chase Strangio*
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
125 Broad St.,
New York, NY 10004
T: (212) 549-2569
garkles@aclu.org
jesseks@aclu.org
cstrangio@aclu.org

Andrew Barr*
COOLEY LLP
380 Interlocken Crescent, Ste. 900
Broomfield, CO 80021-8023
T: (720) 566-4000
F: (720) 566-4099
abarr@cooley.com

Kathleen Hartnett*
COOLEY LLP
101 California Street 5th Floor
San Francisco, CA 94111-5800
T: (415) 693-2000
F: (415) 693-2222
khartnett@cooley.com

Catherine West*
LEGAL VOICE
907 Pine Street, Unit 500
Seattle, WA 98101
T: (206) 682-9552
F: (206) 682-9556
cwest@legalvoice.org

* Admitted *Pro Hac Vice*

Attorneys for Plaintiffs

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO**

LINDSAY HECOX, et al.,

Plaintiffs,

v.

BRADLEY LITTLE, et al.,

Defendants.

No. 1:20-cv-184-CWD

**EXPERT DECLARATION OF
JOSHUA D. SAFER, MD,
FACP, FACE, IN SUPPORT
OF PLAINTIFFS' MOTION
FOR PRELIMINARY
INJUNCTION**

I, Joshua D. Safer, MD, FACP, FACE, have been retained by counsel for Plaintiffs Lindsay Hecox and Jane Doe, with her next friends, Jean Doe and John Doe, as an expert in connection with the above-captioned litigation.

1. The purpose of this declaration is to offer my expert opinion on: (1) medical and scientific concepts relevant to the attempted regulation of transgender and intersex girls and women playing sports; (2) policies of elite athletic organizations in limiting eligibility to compete in women’s sports, including based on serum testosterone levels; (3) policies in non-elite contexts regarding eligibility to compete in women’s sports; (4) the questions that have arisen when entities have attempted to define a person’s sex for purposes of competing in women’s sports; and (5) whether the available scientific evidence supports the assertion that transgender girls and women have an unfair “athletic advantage” if they compete in girls’ and women’s athletics in different contexts.

2. In preparing this declaration, I reviewed the legislative findings for H.B. 500, as enacted, and the sources cited therein.

3. I have knowledge of the matters stated in this declaration and have collected and cite to relevant literature concerning the issues that arise in this litigation in the body of this declaration and in the attached bibliography.

4. In preparing this declaration, I relied on my scientific education and training, my research experience, and my knowledge of the scientific literature in the pertinent fields. The materials I have relied upon in preparing this declaration are the same types of materials that experts in my field of study regularly rely upon

when forming opinions on the subject. I may wish to supplement these opinions or the bases for them as a result of new scientific research or publications or in response to statements and issues that may arise in my area of expertise.

PROFESSIONAL BACKGROUND

5. I am a Staff Physician in the Endocrinology Division of the Department of Medicine at the Mount Sinai Hospital and Mount Sinai Beth Israel Medical Center in New York, NY. I serve as Executive Director of the Center for Transgender Medicine and Surgery at Mount Sinai. I also hold an academic appointment as Professor of Medicine in Mount Sinai's Icahn School of Medicine. A true and correct copy of my CV is attached hereto as Exhibit A.

6. I have been Board Certified in Endocrinology, Diabetes and Metabolism by the American Board of Internal Medicine since 1997.

7. I graduated from the University of Wisconsin in Madison with a Bachelor of Science degree in 1986. I earned my Doctor of Medicine degree from the University of Wisconsin in 1990. I completed intern and resident training at Mount Sinai School of Medicine, Beth Israel Medical Center in New York, New York from 1990 to 1993. From 1993 to 1994, I was a Clinical Fellow in Endocrinology at Harvard Medical School and Beth Israel Deaconess Medical Center in Boston, Massachusetts. I stayed at the same institution, serving as a Clinical and Research Fellow in Endocrinology under Fredric Wondisford, from 1994 to 1996.

8. Since 1997, I have evaluated and treated patients along with conducting research in endocrinology. Since 2004, my patient care and research has

been focused on the medicine/science specific to transgender individuals. I have led several other programs either in transgender medicine or in general endocrinology. In particular, I served as the Medical Director of the Center for Transgender Medicine and Surgery, Boston Medical Center, Boston, MA (2016-2018); as the Director of Medical Education, Endocrinology Section, Boston University School of Medicine, Boston, MA (2007-2018); as the Program Director for Endocrinology Fellowship Training, Boston University Medical Center, Boston, MA (2007-2018); and as Director of the Thyroid Clinic, Boston Medical Center, Boston, MA (1999-2003).

9. I have authored or coauthored over 100 peer-reviewed papers including many critical reviews; textbook chapters; and case reports in endocrinology and transgender medicine.

10. Among my publications are the latest review of transgender medicine in the *New England Journal of Medicine* and the latest review of transgender medicine in the *Annals of Internal Medicine*. See Safer JD, Tangpricha V. Care of transgender persons. *N Engl J Med* 2019; 381:2451-2460; Safer JD, Tangpricha V. Care of the transgender patient. *Ann Intern Med* 2019; 171:ITC1-ITC16. I am also a co-author of the sections of UpToDate which relate to gender-affirming hormone treatment for transgender people. UpToDate is an evidence-based, physician authored on-line medical guide and is currently the most widely used such guide among medical providers.

11. I was the inaugural President of the United States Professional Association for Transgender Health (“USPATH”). I am also Secretary and Co-Chair of the Steering Committee of TransNet, the International Consortium for Transgender Medicine and Health Research. I have served in several other leadership roles in professional societies related to endocrinology and transgender health. These societies include the Alliance of Academic Internal Medicine, the American College of Physicians Council of Subspecialty Societies, the American Board of Internal Medicine, the Association of Program Directors in Endocrinology and Metabolism, and the American Thyroid Association.

12. Since 2014, I have held various roles as a member of the World Professional Association for Transgender Health (“WPATH”), the leading international organization focused on transgender health care. WPATH has approximately 2,000 members throughout the world and is comprised of physicians, psychiatrists, psychologists, social workers, surgeons, and other health professionals who specialize in health care for transgender individuals. From 2016 to the present I have served on the Writing Committee for Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People.

13. I have served in various roles as a member of the Endocrine Society since 2014. I served as a Task Force member to develop the Endocrine Treatment of Transgender Persons Clinical Practice Guideline from 2014 to 2017. As part of this task force of nine experts, a methodologist, and a medical writer, I co-authored the “Endocrine Treatment of Gender-Dysphoria/Gender Incongruent Persons: An

Endocrine Society Clinical Practice Guideline,” (“Endocrine Society Guidelines”), available at <https://academic.oup.com/jcem/article/102/11/3869/4157558>.

14. I have served as a Transgender Medicine Guidelines Drafting Group Member for the International Olympic Committee (“IOC”) since 2017.

15. I have also served since 2019 as a drafting group member of the transgender medical guidelines of World Athletics, formerly known as the International Amateur Athletic Federation (“IAAF”).

16. I have not previously testified as an expert witness in either deposition or at trial. I am being compensated at an hourly rate of \$250 per hour for preparation of expert declarations and reports, and \$400 per hour for time spent preparing for or giving deposition or trial testimony. My compensation does not depend on the outcome of this litigation, the opinions I express, or the testimony I provide.

RELEVANT MEDICAL AND SCIENTIFIC BACKGROUND

17. “Gender identity” is the medical term for a person’s internal, innate sense of belonging to a particular sex/gender. *See* Endocrine Society Guidelines, Tbl.1 *and* Safer JD, Tangpricha V. Care of transgender persons. *N Engl J Med* 2019; 381:2451-2460, Tbl.1.

18. Although the detailed mechanisms are unknown, there is a medical consensus that there is a significant biologic component underlying gender identity. Safer JD, Tangpricha V. Care of transgender persons. *N Engl J Med* 2019; 381:2451-2460; Safer JD, Tangpricha V. Care of the transgender patient. *Ann*

Intern Med 2019; 171:ITC1-ITC16. An individual's gender identity is durable and cannot be changed by medical intervention.

19. "Gender" is an imprecise term that can cause confusion and should be avoided for the sake of clarity. The term "gender" is sometimes used interchangeably with the term "sex." In addition, the term "gender" is sometimes used as shorthand for "gender identity" and sometimes used as shorthand for "gender roles" and "gender expression." But "gender identity," "gender roles" and "gender expression" are different things.

20. Gender roles are behaviors, attitudes, and personality traits that a society (in a given culture and historical period) designates as masculine or feminine and/or that society associates with or considers typical of the social role of men or women. See Endocrine Society Guidelines Tbl.1. The convention that girls wear pink and have longer hair, or that boys wear blue and have shorter hair, are examples of socially constructed gender roles.

21. By contrast, "gender identity" does not refer to a set of socially contingent behaviors, attitudes or personality traits that a society designates as masculine or feminine. It is largely a biological phenomenon.

22. Gender expression is how a person communicates gender identity to others. See Safer JD, Tangpricha V. Care of transgender persons. *N Engl J Med* 2019; 381:2451-2460, Tbl.1. For example, a person with a female gender identity might express her identity through typically feminine outward expressions of gender like by wearing longer hair or more typically feminine clothing.

23. The phrase “biological sex” is an imprecise term that can cause confusion. A person’s sex encompasses the sum of several different biological attributes, including sex chromosomes, certain genes, gonads, sex hormone levels, internal and external genitalia, other secondary sex characteristics, and gender identity. Those attributes are not always aligned in the same direction. *See* Endocrine Society Guidelines; Safer JD, Tangpricha V. Care of transgender persons. *N Engl J Med* 2019; 381:2451-2460.

24. Before puberty, boys and girls have the same levels of circulating testosterone. After puberty, the typical range of circulating testosterone for non-transgender women is similar to before puberty (<1.7 nmol/L), and the typical range of circulating testosterone for non-transgender men is 9.4-35 nmol/L. *See* Endocrine Society Guidelines (p 3888) *and* Safer JD, Tangpricha V. Care of transgender persons. *N Engl J Med* 2019.

25. Based on research comparing non-transgender pubertal and post-pubertal boys and men with non-transgender pubertal and post-pubertal girls and women, 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. *See* Handelsman DJ, et al. Circulating testosterone as the hormonal basis of sex differences in athletic performance. *Endocrine Reviews* 2018; 39:803-829, (p 803).

26. Even though there are ranges of testosterone that are considered typical for non-transgender men and women, many non-transgender women have testosterone outside the typical range.

a. Approximately 6% to 10% of women have a condition called polycystic ovary syndrome (PCOS), which can raise women's testosterone levels up to 4.8 nmol/L.

b. Some women have "46,XY DSDs," a group of conditions where individuals have XY chromosomes but are born with typically female external genitalia and assigned a female sex at birth. Among individuals with 46,XY DSD some may have inactive testosterone receptors (a syndrome called "complete androgen insensitivity syndrome, CAIS") which means they don't respond to testosterone despite very high levels. Typically, these individuals have female gender identity and have external genitalia that are typically female. They do not develop the physical characteristics associated with typical male puberty.

c. Other individuals with 46,XY DSD may have responsive testosterone receptors. These individuals may have female gender identity but at puberty they may start to develop higher levels of testosterone along with secondary sex characteristics that are typically masculine.

WORLD ATHLETICS AND IOC POLICIES FOR WOMEN WITH HYPERANDROGENISM

27. Beginning in 2011, World Athletics (then known as IAAF) began requiring that women with elevated levels of circulating testosterone lower their

levels of testosterone below a threshold amount in order to compete in women's sports. Under the 2011 regulations, women with hyperandrogenemia (defined as serum testosterone levels above the normal range) were allowed to compete only if they demonstrated that they had testosterone levels below 10 nmol/L or that they had CAIS, preventing their bodies from responding to testosterone.

28. In 2014, the Court of Arbitration for Sport (CAS) suspended the IAAF regulations. CAS accepted the IAAF position that testosterone is a key factor for competitive athletic advantage but asked the IAAF to provide additional evidence to demonstrate that differences were relevant at the levels of testosterone being considered for determination of eligibility in the women's category of competition.

29. The IAAF then issued revised regulations in 2018 after a study that showed a significant improvement in athletic performance among women with higher testosterone levels for some sports. *See* Bermon S, Garnier P-Y. Serum androgen levels and their relation to performance in track and field: mass-spectrometry results from 2127 observations in male and female elite athlete. *Br J Sports Med* 2017; 51:1309-1314.

30. The regulations also lowered the maximum testosterone threshold to 5 nmol/L.

31. The revised regulations were upheld by the Court of Arbitration for Sport in 2019.

WORLD ATHLETICS AND IOC POLICIES FOR TRANSGENDER WOMEN

32. Formal eligibility rules for the participation of transgender women in the Olympics were published in 2003. The rules required that transgender women athletes could compete in women's events only if they had genital surgery, a gonadectomy, and legal documentation of sex.

33. However, many transgender women are treated with medicines alone and don't have gonadectomy. As well, many jurisdictions do not have systems to document the sex of transgender people. In some jurisdictions, being transgender is illegal, and revelation that someone is transgender can be unsafe.

34. Therefore, in 2015, the IOC adopted new guidance modeled after the IAAF's 2011 regulations for non-transgender women with hyperandrogenism. Under the new IOC guidance, transgender women must demonstrate that their total testosterone level in serum has been below 10 nmol/L for at least one year prior to competition. The 10 nmol/L threshold was the same threshold set by the IAAF's 2011 regulations.

35. In 2019, the IAAF adopted regulations based on the IOC guidance except that the testosterone threshold level was lowered to 5 nmol/L, which was the same threshold set by the IAAF's 2018 regulations for non-transgender women with hyperandrogenism that had been upheld by the CAS when contested.

36. The IOC and IAAF rules are consistent with the Endocrine Society Guidelines for the treatment of transgender women, which recommend that transgender women treated with hormone therapy target circulating testosterone

levels to a typical female range at or below 1.7 nmol/L (Endocrine Society Guidelines, p 3887) and with the study of testosterone levels achieved by medically treated transgender women in practice (Liang JJ, et al. Testosterone levels achieved by medically treated transgender women in a United States endocrinology clinic cohort. *Endocrine Practice* 2018; 24:135-142).

TRANSGENDER AND INTERSEX ATHLETES IN NON-ELITE CONTEXTS

37. The policies developed by World Athletics and the IOC for transgender athletes were based on the particular context of elite international competition. Not all of the same considerations apply in other contexts.

38. Most of the athletes competing in elite international competitions have already completed puberty. But in high school, athletes' ages could typically range from 14-18, with different athletes in different stages of pubertal development. Increased testosterone begins to affect athletic performance at the beginning of puberty, but those effects continue to increase each year of puberty until about age 18, with the full impact of puberty resulting from the cumulative effect of each year. As a result, testosterone provides less of an impact for a 14, 15, or 16-year old than it does for a 17 or 18-year old. The concerns that animated the World Athletics and IOC policies are more attenuated at the high school or junior high school level.

39. The NCAA allows transgender women to participate on the same teams as other women after one year of testosterone suppression as part of gender transition. The NCAA policy does not require ongoing testosterone testing, which is required at the elite levels. Under the NCAA policy, which has been in effect since

2011, transgender student-athletes certify that they have been on hormone therapy for a period of one year.

40. Unlike in scholastic contexts in the United States, World Athletics and the IOC have to develop policies that cannot be manipulated by different governments that are not bound by the rule of law. For example, there have been many well-known examples of state-sponsored doping scandals. The Russian Olympic team is currently banned from international competition due to an organized doping effort.

IDAHO'S EFFORTS TO BAR ATHLETIC COMPETITION BY TRANSGENDER WOMEN AND GIRLS

41. Under the newly passed Idaho law, an individual whose sex is disputed for purposes of competing in athletic activities for women and girls is instructed to “verify the student’s biological sex” by providing a signed physician statement after an examination relying only on one or more of the following: the student’s reproductive anatomy, genetic makeup, or normal endogenously produced levels of testosterone. None of these physiological characteristics alone or in any combination can “verify” sex, nor are any of them alone or in any combination accurate proxies for athletic advantage.

42. As noted above, one does not verify sex by a examining these characteristics, alone or in combination. A person’s sex is made up of multiple biological characteristics and they may not all align as typically male or female in a given person.

43. 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.

44. A blood test is generally used to test circulating testosterone. The blood test does not distinguish between exogenous and endogenous testosterone. Exogenously administered testosterone can be identified with a urine test. However, the urine test will only determine that there is current use of exogenous testosterone. The urine test is not relevant when the person is not taking exogenous testosterone. The urine test will not measure what endogenous testosterone levels would be absent suppression. For a person suppressing testosterone as part of a medically prescribed treatment plan for gender dysphoria, neither blood testing nor urine testing would specify testosterone levels without suppression. There is no way to test for "normally produced" endogenous testosterone without taking people off of prescribed medication, which would be dangerous.

45. Though the IOC, World Athletics, and the NCAA require certain athletes with higher levels of endogenous testosterone to suppress their levels or at least undergo testosterone suppression treatment in order to compete in women's athletics, Idaho's new rule creates an outright bar based on endogenous testosterone without even specifying the endogenous serum testosterone level that one would need to demonstrate to "verify" sex. Under the Idaho rule, no amount of reduction of one's testosterone level could ever be adequate. Further, as noted above, people without active testosterone receptors experience none of the athletic

impact of the hormone despite having high levels of circulating testosterone. They too would appear to be disqualified under Idaho's rule.

46. The legislative findings for H.B. 500 contend that even after receiving gender-affirming hormone therapy, women and girls who are transgender have "an absolute advantage" over non-transgender girls. This assertion is based on speculation and inferences that have not been borne out by any evidence.

47. First, these arguments overlook the population of transgender girls and women 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. These girls never experience the effects of high levels of testosterone and accompanying physiological changes. They go through puberty with the same levels of hormones as other girls and develop typically female physiological characteristics, including muscle and bone structure. Idaho's law would bar them from participation in female athletics with absolutely no medical or scientific basis even based on the standards set forth in the legislative findings.

48. A transgender woman who has not gone through a typical male puberty is similarly situated to a woman with XY chromosomes who has complete androgen insensitivity syndrome, and it has long-been recognized that women with CAIS have no athletic advantage simply by virtue of having XY chromosomes. *See also* Handelsman DJ, et al. Circulating testosterone as the hormonal basis of sex differences in athletic performance. *Endocrine Reviews* 2018; 39:803-29, (p 820,

summarizing evidence rejecting hypothesis that physiological characteristics are driven by Y chromosome).

49. The legislative findings also state that “benefits that natural testosterone provides to male athletes is not diminished through the use of puberty blockers and cross-sex hormones.” This is not true. As noted above, puberty blocking treatment completely blocks the production of testosterone and someone who has undergone both puberty blocking treatment and then gender affirming hormone therapy to initiate puberty consistent with gender identity would have none of the impacts of testosterone on the body that would be typical for a non-transgender male. It is also not true that gender-affirming therapy – even for those who have not undergone puberty blocking treatment – does nothing to minimize the impact of testosterone on the body. In fact, consistent use of testosterone blockers and estrogen has a significant impact on the body.

50. The legislative findings also note that “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 hemoglobin” and suggest that such characteristics lead to athletic advantage and cannot be altered by sustained gender-affirming hormone therapy. However, the noted higher red blood cell count and higher hemoglobin are both testosterone dependent. They are both reduced as part of sustained gender-affirming hormone therapy. And there is currently no evidence that the remaining noted physiological characteristics actually are

advantages when not accompanied by high levels of testosterone and corresponding skeletal muscle.

51. The only study examining the effects of gender-affirming hormone therapy on the athletic performance of transgender female athletes is a small study of eight long-distance runners. The study showed that after undergoing gender-affirming interventions, which included lowering their testosterone levels, the athletes' performance had reduced so that relative to non-transgender women their performance was now proportionally the same as it had been relative to non-transgender men prior to any medical treatment. In other words, a transgender woman who performed at about 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. See Harper J. Race times for transgender athletes. *Journal of Sporting Cultures and Identities* 2015; 6:1-9.

52. In fact, it may be that some of the body changes from endogenous puberty result in poorer net performance for transgender women relative to cisgender women.

53. For example, the fact that transgender women who go through typically male puberty will tend to have larger bones than non-transgender women may actually be a *disadvantage*. Having larger bones without corresponding levels of testosterone and muscle mass would mean that a runner has a bigger body to propel with less power to propel it.

54. Similarly, in a sport where athletes compete in different weight classes (e.g. weight lifting), the fact that a transgender woman has bigger bones may be a disadvantage because her ratio of muscle-to-bone will be much lower than the ratio for other women in her weight class who have smaller bones.

55. Even if it could be demonstrated that larger bones or lungs can slightly enhance the athletic performance of transgender women even after they lower their level of testosterone, that finding would have to be placed in context. Larger lungs and hearts generally correlate to a person's size, so there are significant intra-sex variations of heart and lung size even among women who are not transgender.

56. There are also myriad genetic variations among athletes that can enhance athletic performance. In the academic literature these are referred to as "performance enhancing polymorphisms" or "PEPs." A PEP is a variation in the DNA sequence that is associated with improved athletic performance. For example, variations in mitochondrial DNA have been associated with greater endurance capacity and greater mitochondrial density in muscles. Other PEPs are associated with blood flow or muscle structure. See Ostrander EA, et al. Genetics of athletic performance. *Annu Rev Genomics Hum Genet* 2009; 10:407-429. These variations have proven to have a significant impact on athletic ability, unlike bone or lung size in transgender women.

57. After a transgender woman lowers her level of testosterone, there is no inherent reason why her physiological characteristics related to athletic

performance should be treated differently from the physiological characteristics of a non-transgender woman.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

A handwritten signature in blue ink, appearing to read "J. Safer", with a stylized flourish at the end.

Executed on April 24, 2020

Joshua D. Safer, MD, FACP, FACE

BIBLIOGRAPHY

- Bermon S, Garnier P-Y. Serum androgen levels and their relation to performance in track and field: mass-spectrometry results from 2127 observations in male and female elite athlete. *Br J Sports Med* 2017; 51:1309-1314.
- Bhasin S, et al. Testosterone dose-response relationships in healthy young men. *Am J Physiol Endocrinol Metab* 2001; 281:E1172-E1181.
- Hagmar M, et al. Hyperandrogenism may explain reproductive dysfunction in Olympic athletes. *Med Sci Sports Exercise* 2009; 41:1241-1248.
- Handelsman DJ, et al. Circulating testosterone as the hormonal basis of sex differences in athletic performance. *Endocrine Reviews* 2018; 39:803-829.
- Harper J. Race times for transgender athletes. *Journal of Sporting Cultures and Identities* 2015; 6:1-9.
- Hembree WC, et al. Endocrine treatment of gender-dysphoria/gender incongruent persons: An Endocrine Society clinical practice guideline. *J Clin Endocrinol Metab* 2017; 102: 3869–3903.
- Liang JJ, et al. Testosterone levels achieved by medically treated transgender women in a United States endocrinology clinic cohort. *Endocrine Practice* 2018; 24:135-142.
- Ostrander EA, et al. Genetics of athletic performance. *Annu Rev Genomics Hum Genet* 2009; 10:407-429.
- Rogol AD, Pieper LP. The interconnected histories of endocrinology and eligibility in women's sports. *Horm Res Paediatr* 2018; 90:213–220.
- Safer JD, Tangpricha V. Care of the transgender patient. *Ann Intern Med* 2019; 171:ITC1-ITC16.
- Safer JD, Tangpricha V. Care of transgender persons. *N Engl J Med* 2019; 381:2451-2460.
- Wiik A, et al. Muscle strength, size and composition following 12 months of gender-affirming treatment in transgender individuals. *J Clin Endocrinol Metab* 2020; 105:1-9.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of April, 2020, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

Dan Skinner

danskinner@cssklaw.com

cssklaw@cssklaw.com

Attorney for Boise School District,

Individual members of the Board of Trustees of Boise School District,

Coby Dennis

Steven L. Olsen

steven.olsen@ag.idaho.gov

W. Scott Zanzig

scott.zanzig@ag.idaho.gov

Dayton P. Reed

dayton.reed@ag.idaho.gov

Attorneys for Bradley Little,

Sherri Ybarra,

Individual members of the State Board of Education,

Boise State University,

Marlene Tromp,

Individual members of the Idaho Code Commission

DATED this 30th day of April, 2020.

/s/ Richard Eppink

EXHIBIT A

CURRICULUM VITAE

Joshua D. Safer, MD, FACP, FACE

March 26, 2020

Office Address: 17 East 102nd Street, Room D-240

New York, NY 10029

Tel: (212) 604-1790

E-mail: jsafer0115@gmail.com

Academic Training

1990 MD University of Wisconsin School of Medicine, Madison, WI

1986 BS University of Wisconsin, Madison, WI, Economics

Postdoctoral Training

1994 - 1996 Clinical and Research Fellow, Endocrinology, under Fredric Wondisford, Harvard Medical School - Beth Israel Deaconess Medical Center, Boston, MA

1993 - 1994 Clinical Fellow, Endocrinology, Harvard Medical School and Beth Israel Deaconess Medical Center, Boston, MA

1990 - 1993 Intern and Resident, Department of Medicine, The Mount Sinai School of Medicine, Beth Israel Medical Center, New York City, NY

Academic Appointments

2019 - present Professor of Medicine, Icahn School of Medicine at Mount Sinai, New York, NY

2006 - 2018 Associate Professor of Medicine and Molecular Medicine, Boston University School of Medicine

1999 - 2005 Assistant Professor of Medicine, Boston University School of Medicine

1996 - 1999 Instructor in Medicine, Harvard Medical School

1993 - 1996 Fellow in Medicine, Harvard Medical School

Hospital Appointments

2018 - present Staff Physician, The Mount Sinai Hospital, New York City, NY

2018 - present Staff Physician, Mount Sinai Beth Israel Medical Center, New York City, NY

1999 - 2018 Staff Physician, Boston University Medical Center, Boston, MA

2001 - 2006 Staff Physician, Veterans Administration Boston Health Care, Boston, MA

1996 - 1999 Staff Physician, Beth Israel Deaconess Medical Center, Boston, MA

1990 - 1993 House Staff, Beth Israel Medical Center, New York City, NY

Other Medical Staff Appointments

2004 - 2013 Staff Physician, Massachusetts Institute of Technology Medical, Cambridge, MA

1994 - 1999 Physician, Harvard Vanguard Medical Associates, Boston, MA

1987 - 1996 Captain, United States Army Reserve, Medical Corps

Joshua D. Safer, MD, FACP, FACE**Honors:**

2019	Fellow, American College of Endocrinology
2019	Preaw Hanseree Memorial Lecture, University of Wisconsin-Madison
2017	Lesbian, Gay, Bisexual and Transgender Health Award, Massachusetts Medical Society
2012	Outstanding Service Award, Association of Program Directors in Endocrinology and Metabolism
2007	Fellow, American College of Physicians
2004	Boston University School of Medicine Outstanding Student Mentor Award
2001	Abbott Thyroid Research Advisory Council Award
1996	Knoll Thyroid Research Clinical Fellowship Award, Endocrine Society
1995	Trainee Investigator Award for Excellence in Scientific Research, American Federation for Clinical Research (AFCR)
1994	Trainee Investigator Award for Excellence in Scientific Research, AFRCR
1990	The University of Wisconsin Medical Alumni Association Award
1988-1990	Senior Class President, University of Wisconsin, School of Medicine

Licensure and Certification

1997	Board Certification in Endocrinology, Diabetes and Metabolism, American Board of Internal Medicine, recertified 2007, 2017
1994	Board Certification in Internal Medicine, American Board of Internal Medicine, recertified 2007
1993	Massachusetts License Registration #77459, inactive
1990	New York License Registration #187263-1

Departmental and University Committees***Boston Medical Center***

2016-2018	Physician Satisfaction Task Force, Department of Medicine
2016-2018	Transgender Patient Task Force
2006-2017	Pharmacy and Therapeutics Committee, Health Net Plan

Boston University School of Medicine

2009-2018	Admissions Committee
2005	Review Committee, Department of Medicine Pilot Project Grants
2000	Residency and Fellowship Core Curriculum Committee,
2000-2018	Internship Selection Committee, Residency Program in Medicine

Boston University Goldman School of Dental Medicine

2003-2018	Course Directors Committee, Goldman School of Dental Medicine
-----------	---

Joshua D. Safer, MD, FACP, FACE

Teaching Experience and Responsibilities

Icahn School of Medicine at Mount Sinai

2019-present Lecturer in Endocrinology, Second-year Pathophysiology Course

Tufts University School of Medicine

2016-2018 Lecturer in Endocrinology, Second-year Pathophysiology Course

Boston University School of Medicine

2003-2018 Course Director, Disease and Therapy - Endocrinology Section

1999-2018 Regular lectures to medical students, residents, and fellows on thyroid disease, diabetes insipidus, and transgender medicine

Boston University Goldman School of Dental Medicine

2002-2018 Course Director, General Medicine and Dental Correlations

2002-2018 Course Director, Medical Concerns in the Dental Patient

Joshua D. Safer, MD, FACP, FACE**Major Administrative Responsibilities**

2018-present	Executive Director, Center for Transgender Medicine and Surgery, Mount Sinai Health System, New York City, NY
2016-2018	Medical Director, Center for Transgender Medicine and Surgery, Boston Medical Center, Boston, MA
2007-2018	Director, Medical Education, Endocrinology Section, Boston University School of Medicine, Boston, MA
2007-2018	Program Director, Endocrinology Fellowship Training, Boston University Medical Center, Boston, MA
1999-2003	Director, Thyroid Clinic, Boston Medical Center, Boston, MA

Other Professional Activities**Professional Societies: Memberships**

2016-present	United States Professional Association for Transgender Health (USPATH)
2014-present	World Professional Association for Transgender Health (WPATH)
2007-present	Association of Program Directors in Endocrinology and Metabolism (APDEM)
2007-present	Association of Specialty Professors (ASP), Alliance of Academic Internal Medicine (AAIM)
1999-present	American Association of Clinical Endocrinologists
1998-2018	American Thyroid Association
1995-present	Endocrine Society
1994-present	American College of Physicians
1994-1996	American Federation for Medical Research
1993-2018	Massachusetts Medical Society

Professional Societies: Offices Held and Committee Assignments**International*****International Olympic Committee (IOC)***

2017-present	Drafting Group Member, Medical Guidelines, International Olympic Committee
--------------	--

World Professional Association for Transgender Health (WPATH)

2016-present	Writing Committee Member, Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People
2016-2018	Co-Chair, Scientific Committee, International Meeting, Buenos Aires - 2018
2015-2016	Chair, Scientific Committee, International Meeting, Amsterdam - 2016
2015-present	Task Force Member, Global Education Initiative
2015-present	Media Liaison

TransNet – International Consortium for Transgender Medicine and Health Research

2014-present	Secretary and Co-Chair, Steering Committee
--------------	--

Joshua D. Safer, MD, FACP, FACE**National*****United States Professional Association for Transgender Health (USPATH)***

2018-2019 President

Alliance of Academic Internal Medicine

2016-2019 Chair, Compliance Committee

2016-2017 Committee member, Compensation

2015-2016 President, Association of Specialty Professors (ASP)

2014-2017 Council member

2014-2019 Task Force member, Program Planning

2014-2019 Work Group member, Survey Center

2013-2015 Chair, Program Planning Committee, ASP

2012-2017 Council member, ASP

2012-2013 Chair, Membership Services Committee, ASP

2010-2015 Chair, Program Directors Site Visit Training Seminar, ASP

2007-2013 Committee member, Membership Services, ASP

American College of Physicians

2016-2018 Council of Subspecialty Societies member

Endocrine Society

2017-present Advisory Board member, Transgender/Disorders of Sex Development

2017-present Committee member, Clinical Endocrine Education

2014-present Media Liaison for Transgender Medicine

2014-2017 Task Force member, Endocrine Treatment of Transgender Persons Clinical Practice Guideline

American Board of Internal Medicine

2013-2018 Task Force member, Endocrinology Procedures

2013 Task Force member, ASP/AAIM/ACGME/ABIM Joint Next Accreditation System Internal Medicine Subspecialty Milestones

Association of Program Directors in Endocrinology and Metabolism

2017-2018 Secretary-Treasurer

2012-2018 Task Force member, Next Accreditation System Endocrinology Milestones

2011-2012 Task Force member, Procedures Accreditation

2010-2012 Council member

2009-2016 Chair, Site Visit/Curriculum Web-Toolbox Committee

American Thyroid Association

2006-2009 Publications Committee member

2004 Program Committee member

Editorships and Editorial Boards2018-present Associate Editor, *Transgender Health*2017-present Editorial Advisory Board, *Endocrine News*2016-present Transgender Section Co-Editor, *UpToDate*

Joshua D. Safer, MD, FACP, FACE

2015-present Editorial Board, *Transgender Health*
 2015-present Editorial Board, *International Journal of Transgender Health*
 2013-2018 Associate Editor, *Journal of Clinical & Translational Endocrinology*
 2007-present Editorial Board, *Endocrine Practice*

External Medical Advising and Consulting**International**

2016-present International transgender athlete guidelines, Medical and Scientific Commission, International Olympic Committee

National

2017 Transgender medical and surgical treatment, National Collegiate Athletic Association,
 2017 Safety for transgender medical treatment, Food and Drug Administration, United States
 2015-present Transgender workforce and military readiness, Department of Defense, United States
 2014 Transgender prison population health, Federal Bureau of Prisons, United States

Regional

2011-2018 Transgender prison population health, Massachusetts Department of Correction

Past Other Support

2018-2020 Keith Haring Foundation, **PI: Joshua D. Safer**, Pilot Program to Develop Clinical Program in Transgender Medicine for Children and Adolescents
 2015-2016 R13 HD084267, **Multi-PI: Joshua D. Safer**, TransNet: Developing a Research Agenda in Transgender Health and Medicine
 2014-2015 Boston Foundation, Equality Fund, **PI: Joshua D. Safer**, Pilot Program to Educate Physicians in Transgender Medicine
 2013-2014 Evans Foundation, **PI: Joshua D. Safer**, A Pilot Curriculum in Transgender Medicine
 2001-2003 Thyroid Research Advisory Council, **PI: Joshua D. Safer**, Thyroid Hormone Action on Skin
 2001-2002 Evans Foundation, **PI: Joshua D. Safer**, Thyroid Hormone Action on Skin
 1996-2001 K08 DK02423, **PI: Joshua D. Safer**, Characterization of Central Resistance to Thyroid Hormone

Joshua D. Safer, MD, FACP, FACE

Conferences Organized

International Conferences

World Professional Association for Transgender Health

November, 2020 Bi-annual meeting, Planning Committee, Hong Kong (scheduled)

November, 2018 Bi-annual meeting, Scientific Co-Chair, Buenos Aires, Argentina

June, 2016 Bi-annual meeting, Scientific Co-Chair, Amsterdam, Netherlands

November, 2015 Global Education Initiative, inaugural conference, Chicago, IL

TransNet – International Consortium for Transgender Health and Medicine Research

May, 2016 International meeting to set transgender medicine research priorities, Amsterdam, Netherlands

May, 2015 NIH conference to set transgender medicine research priorities, Bethesda, MD

June, 2014 Inaugural meeting, Chicago, IL

National Conferences

May, 2020 Topics in Surgery Course for Gender Affirmation Procedures, Mount Sinai Hospital and WPATH, New York City, NY (scheduled)

February, 2019 Live Surgery Course for Gender Affirmation Procedures, Mount Sinai Hospital and WPATH, New York City, NY

April, 2018 Live Surgery Course for Gender Affirmation Procedures, Mount Sinai Hospital and WPATH, New York City, NY

January, 2017 United States Professional Association for Transgender Health (USPATH) bi-annual meeting, Los Angeles, CA

November, 2015 NIH/Alliance for Academic Internal Medicine - Physician Researcher Workforce Taskforce Meeting, Washington, DC

October, 2015 National Internal Medicine Subspecialty Summit, Atlanta, GA

June, 2013 Special Symposium: “Transgender Medicine – What Every Physician Should Know” Annual Meeting of the Endocrine Society, San Francisco, CA

April, 2011 2011 ASP Accreditation Seminar "Meeting the ACGME and RRC-IM Standards for Successful Fellowship Programs" Arlington, VA

Alliance for Academic Internal Medicine

April, 2015 2015 ASP Accreditation Seminar “Moving Your Fellowship Program Forward” Spring Meeting, Houston, TX

March 26, 2020

Joshua D. Safer, MD, FACP, FACE

- April, 2014 2014 ASP Accreditation Seminar “NAS for Medical Subspecialties Is Almost Here” Spring Meeting, Nashville, TN
- May, 2013 2013 ASP Accreditation Seminar “A Changing Landscape in Subspecialty Fellowship Education” Spring Meeting, Lake Buena Vista, FL
- April, 2012 2012 ASP Accreditation Seminar “Meeting ACGME and RRC-IM Standards for Successful Fellowship Programs” Spring Meeting, Atlanta, GA

Invited Lectures and Presentations

International

- January, 2020 “Transgender Medicine”, World Professional Association for Transgender Health Global Education Initiative, Hanoi, Vietnam
- September, 2019 “Transgender Women” International Association of Athletics Federations (IAAF), Lausanne, Switzerland
- November, 2018 “Transgender Medicine”, World Professional Association for Transgender Health Annual Meeting, Buenos Aires, Argentina
- October, 2018 “Transgender Medicine”, Canadian Endocrine Diabetes Meeting, Halifax, NS, Canada
- June, 2018 “21st-Century Strategies: Transgender Hormone Care” CMIN Summit 2018, Porto, Portugal
- February, 2017 “A 21st-Century Framework to for Transgender Medical Care” Sheba Hospital, Tel Aviv, Israel
- October, 2016 “A 21st-Century Approach to Hormone Treatment of Transgender Individuals” EndoBridge, Antalya, Turkey
- May, 2016 “Transgender Women” International Olympic Committee Headquarters, Lausanne, Switzerland
- October, 2015 “Workshop on Guidelines for Transgender Health Care” Canadian Professional Association for Transgender Health, Halifax, NS
- March, 2015 “Endocrinology - Hormone Induced Changes” Transgender Health Care in Europe, European Professional Association for Transgender Health, Ghent, Belgium
- June, 2014 “What to Know to Feel Safe Providing Hormone Therapy for Transgender Patients” International Congress of Endocrinology, Chicago, IL
- September, 2011 “Transgender Therapy – The Endocrine Society Guidelines” World Professional Association for Transgender Health, Atlanta, GA

March 26, 2020

Joshua D. Safer, MD, FACP, FACE

- February, 2007 “Treating skin disease by manipulating thyroid hormone action” Grand Rounds, Meier Hospital, Kfar Saba, Israel
- March, 2004 “New Directions in Thyroid Hormone Action: Skin and Hair” Grand Rounds, Meier Hospital, Kfar Saba, Israel

National

- June, 2020 “Transgender Medicine”, Inova Fairfax Medicine Grand Rounds, Fairfax, VA (scheduled)
- June, 2020 “Transgender Medicine”, Mount Sinai Hospital Internal Medicine CME, New York, NY (scheduled)
- May, 2020 “Transgender Medicine”, Mount Sinai/World Professional Association for Transgender Health Special Topics in Surgical Care CME, New York, NY (scheduled)
- March, 2020 “Transgender Medicine”, Science Hub lecture, Endocrine Society Annual Meeting, San Francisco, CA (scheduled)
- December, 2019 “Transgender Medicine”, Vanderbilt University Surgery Grand Rounds, Nashville, TN
- November, 2019 “Transgender Medicine”, Medical College of Wisconsin CME, Milwaukee, WI
- September, 2019 “Transgender Medicine”, Beth Israel Deaconess Medicine Grand Rounds, Boston, MA
- September, 2019 “Transgender Medicine”, United States Professional Association for Transgender Health Annual Meeting, Washington, DC
- June, 2019 “Transgender Medicine”, Mount Sinai Hospital Internal Medicine CME, New York, NY
- April, 2019 “A 21st-Century Strategy for Hormone Treatment of Transgender Individuals” National Transgender Health Summit, Oakland, CA
- March, 2019 “Transgender Medicine” National Eating Disorders Meeting, New York, NY
- January, 2019 “Transgender Medicine” Yale School of Medicine Obstetrics and Gynecology Grand Rounds, New Haven, CT
- January, 2019 “Transgender Medicine” Yale School of Medicine Endocrinology Grand Rounds, New Haven, CT
- January, 2019 “Transgender Medicine” Drexel School of Medicine Medicine Grand Rounds, Philadelphia, PA
- September, 2018 “Current Guidelines and Strategy for Hormone Treatment of Transgender Individuals” Minnesota-Midwest Chapter - American Association of Clinical Endocrinologists Annual Meeting, Minneapolis, MN

March 26, 2020

Joshua D. Safer, MD, FACP, FACE

- July, 2018 “21st-Century Strategies for Transgender Hormone Care” Ohio River Valley Chapter - American Association of Clinical Endocrinologists Meeting, Indianapolis, IN
- June, 2018 “21^s-Century Strategies: Transgender Hormone Care” University of Connecticut School of Medicine, Hartford, CT
- May, 2018 “A 21st-Century Strategy for Hormone Treatment of Transgender Individuals” American Association of Clinical Endocrinologists Annual Meeting, Boston, MA
- March, 2018 “21st-Century Strategies for Transgender Hormone Care” New Jersey Chapter - American Association of Clinical Endocrinologists Meeting, Morristown, NJ
- February, 2018 “A Strategy for the Medical Care of Transgender Individuals” Keynote Address for the International Society for Clinical Densitometry Annual Meeting, Boston, MA
- November, 2017 “A 21st-Century Strategy for Hormone Treatment of Transgender Individuals” National Transgender Health Summit, Oakland, CA
- September, 2017 “Transgender Therapy – The Endocrine Society Guidelines” Endocrine Society: Clinical Endocrinology Update, Chicago, IL
- May, 2017 “Transgender Medicine – a 21st Century Strategy for Patient Care” University of Arizona College of Medicine, Tucson, AR
- April, 2017 “Transgender Care Across the Age Continuum” Annual Meeting of the Endocrine Society, Orlando, FL
- March, 2017 “A 21st-Century Approach to Hormone Treatment of Transgender Individuals” Brown University School of Medicine, Providence, RI
- March, 2017 “What to Know: A 21st-Century Approach to Transgender Medical Care” United States Food and Drug Administration (FDA), Washington, DC
- February, 2017 “A 21st-Century Approach to Transgender Medical Care” United States Professional Association for Transgender Health, Los Angeles, CA
- February, 2017 “A 21st-Century Approach to Hormone Treatment of Transgender Individuals” Southern States American Association of Clinical Endocrinologists Annual Meeting, Memphis, TN
- December, 2016 “Transgender Medical Care in the United States Armed Forces” Global Education Initiative, World Professional Association for Transgender Health, Arlington, VA
- December, 2016 “Foundations in Hormone Treatment” Global Education Initiative, World Professional Association for Transgender Health, Arlington, VA
- November, 2016 “Developing a Transgender/Gender-Identity Curriculum for Medical Students” Association of American Medical Colleges National Meeting, Seattle, WA
- September, 2016 “A 21st-Century Approach to Hormone Treatment of Transgender Individuals” Endocrine Society: Clinical Endocrinology Update, Seattle, WA

March 26, 2020

Joshua D. Safer, MD, FACP, FACE

- August, 2016 “A 21st-Century Approach to Hormone Treatment of Transgender Individuals” Oregon Health and Science University Ashland Endocrine Conference, Ashland, OR
- March, 2016 “State-of-the-Art: Use of Hormones in Transgender Individuals” Annual Meeting of the Endocrine Society, Boston, MA
- October, 2015 “What Every Endocrinologist Should Know to Feel Safe Providing Hormone Therapy for Transgender Patients” University of Utah School of Medicine, Salt Lake City, UT
- April, 2015 “What to Know –to Feel Safe Providing Hormone Therapy for Transgender Patients” Pritzker School of Medicine, University of Chicago, Chicago, IL
- March, 2015 “What to Know –to Feel Safe with Hormone Therapy for Transgender Patients” Annual Transgender Health Symposium, Medical College of Wisconsin, Milwaukee, WI
- May, 2014 “Transgynecrology” Annual Meeting of the American Association of Clinical Endocrinologists, Las Vegas, NV
- May, 2013 “Transgender Therapy – Hormone Action and Nuance” National Transgender Health Summit, Oakland, CA
- April, 2013 “Transgender Therapy – What Every Provider Needs to Know” Empire Conference: Transgender Health and Wellness, Albany, NY
- April, 2013 “Transgender Therapy – What Every Endocrinologist Needs to Know” University of Maryland School of Medicine, Baltimore, MD
- November, 2012 “Transgender Therapy – What Every Endocrinologist Should Know” New York University School of Medicine, New York, NY
- May, 2010 “Transgender Treatment: What Every Endocrinologist Needs to Know” Brown University School of Medicine, Providence, RI
- November, 2009 “New Directions in Thyroid Hormone Action: Skin and Hair” Emory University School of Medicine, Atlanta, GA
- November, 2009 “Primary Care Update in the Treatment of Thyroid Disorders” Emory University School of Medicine, Atlanta, GA
- October, 2008 “Topical Iopanoic Acid Stimulates Epidermal Proliferation through Inhibition of the Type 3 Thyroid Hormone Deiodinase” Annual Meeting of the American Thyroid Association, Chicago, IL
- February, 2005 “New Directions in Thyroid Hormone Action: Skin and Hair” Endocrinology Grand Rounds, University of Minnesota, Minneapolis, MN
- February, 2005 “Thyroid Hormone Action on Skin and Hair: What We Thought We Knew” Dermatology Grand Rounds, University of Minnesota, Minneapolis, MN

March 26, 2020

Joshua D. Safer, MD, FACP, FACE

- December, 2004 “Transgender Therapy: The Role of the Endocrinologist” Endocrinology Grand Rounds, Brown Medical Center, Providence, RI
- November, 2003 “New Directions in Thyroid Hormone Action: Skin and Hair” Endocrinology Grand Rounds, Dartmouth Medical Center, Hanover, NH

Regional

- April, 2020 “Transgender Medicine”, New York University Endocrinology CME, New York, NY (scheduled)
- February, 2020 “Transgender Medicine”, Englewood Hospital Medicine Grand Rounds, Englewood, NJ
- February, 2020 “Transgender Medicine”, Endocrinology Grand Rounds, Columbia College of Physicians and Surgeons, New York, NY
- January, 2020 “Transgender Medicine”, CEI, Lake Placid, NY
- November, 2019 “Transgender Medicine”, Weill Cornell Reproductive Endocrine Grand Rounds, New York, NY
- November, 2019 “Transgender Medicine”, Acacia Network Grand Rounds, New York, NY
- October, 2019 “Transgender Medicine”, American Association of Clinical Endocrinologists - New Jersey, annual meeting, Morristown, NJ
- October, 2019 “Transgender Medicine”, Community Health Network annual conference, New York, NY
- October, 2019 “Transgender Medicine”, Westchester Medical Center Medicine Grand Rounds, Valhalla, NY
- September, 2019 “Transgender Medicine”, Weill Cornell Reproductive Endocrine CME, New York, NY
- September, 2019 “Transgender Competency for Medical Providers”, Working Group on Gender, Columbia College of Physicians and Surgeons, New York, NY
- April, 2019 “Transgender Medicine”, Weill Cornell Urology Grand Rounds, New York, NY
- June, 2018 “21st-Century Strategies: Transgender Hormone Care” Medicine Grand Rounds, Staten Island University Hospital, Staten Island, NY
- February, 2018 “Transgender Medicine – 21st Century Strategies for Patient Care” Medicine Rounds, Newton-Wellesley Hospital, Newton, MA
- October, 2017 “Transgender Medicine – 21st Century Strategies for Patient Care” Medicine Rounds, Beth Israel-Milton Hospital, Milton, MA
- September, 2017 “Transgender Medicine – 21st Century Strategies for Patient Care” Obstetrics-Gynecology Grand Rounds, Brigham and Women’s Hospital, Boston, MA

March 26, 2020

Joshua D. Safer, MD, FACP, FACE

- June, 2017 “State-of-the-Art: Hormone Therapy for Transgender Patients” Reproductive Endocrinology Rounds, Massachusetts General Hospital, Boston, MA
- May, 2017 “A 21st-Century Strategy for Medical Treatment of Transgender Individuals” Boston Medical Center and Boston University School of Medicine, Boston, MA
- March, 2017 “A 21st-Century Strategy for Medical Treatment of Transgender Individuals” Tufts Medicine Grand Rounds, Boston, MA
- January, 2017 “What to Know: A 21st-Century Approach to Transgender Medical Care” Internal Medicine Rounds, Brigham and Women’s Hospital, Boston, MA
- March, 2016 “State-of-the-Art: Hormone Therapy for Transgender Patients” Obstetrics-Gynecology Rounds, Brigham and Women’s Hospital, Boston, MA
- November, 2015 “What Every Endocrinologist Should Know to Feel Safe Providing Hormone Therapy for Transgender Patients” Endocrinology Rounds, Tufts Medical Center, Boston, MA
- May, 2015 “What Every Endocrinologist Should Know to Feel Safe Providing Hormone Therapy for Transgender Patients” Endocrinology Rounds, Massachusetts General Hospital, Boston, MA
- December, 2014 “What to Know to Feel Safe Providing Hormone Therapy for Transgender Patients” Endocrinology Rounds, Beth Israel Deaconess Medical Center, Boston, MA
- November, 2013 “Transgender Therapy – What Every Physician Should Know” Medicine Grand Rounds, Boston Veterans Administration Hospital, Boston, MA
- May, 2005 “Transgender Therapy: The Role of the Endocrinologist”, Endocrinology Rounds, Tufts-New England Medical Center, Boston, MA
- January, 2004 “New Directions in Thyroid Hormone Action: Skin and Hair”, Endocrinology Rounds, Brigham and Women’s Hospital, Boston, MA
- October, 1999 “The Many Faces of Hypothyroidism”, Medicine Grand Rounds, Bedford Veterans Administration Hospital, Bedford, MA

Institutional, Icahn School of Medicine at Mount Sinai, New York, NY

- April, 2020 “21st-Century Strategies for Transgender Hormone Care”, Colorectal Medicine CME (scheduled)
- March, 2020 “Transgender Medicine”, Frontiers in Science (scheduled)
- October, 2019 “Transgender Medicine”, East Harlem HOP rounds, New York, NY
- October, 2019 “Transgender Medicine”, Mount Sinai HIV rounds, New York, NY
- August, 2019 “Transgender Medicine”, Mount Sinai Endocrinology Fellows Conference, New York, NY

March 26, 2020

Joshua D. Safer, MD, FACP, FACE

February, 2019 “Transgender Medicine”, Mount Sinai Endocrinology Grand Rounds, New York, NY

February, 2019 “Transgender Medicine”, Mount Sinai Ob-Gyn Grand Rounds, New York, NY

April, 2018 “21st-Century Strategies for Transgender Hormone Care”, HIV Grand Rounds

Institutional, Boston University School of Medicine, Boston, MA

March, 2017 “State of the Art Hormone Therapy for Transgender Patients”, Section of Infectious Disease

January, 2017 “What you need to know – to supervise care for our transgender patients at BMC”,
Section of Endocrinology

February, 2016 “State of the Art Hormone Therapy for Transgender Patients”, Department of Medicine

November, 2015 “What the Family Medicine Physician Should Know to Feel Safe Providing Hormone
Therapy for Transgender Patients”, Department of Family Medicine

November, 2014 “What the Anesthesiologist Should Know to Feel Safe Providing Hormone Therapy for
Transgender Patients”, Department of Anesthesia

January, 2014 “Update on the Current Guidelines for Transgender Hormone Therapy”, Section of
Endocrinology

October, 2011 “Transgender Therapy – What Every Physician Should Know”, Department of Medicine

February, 2011 “Current Guidelines for Transgender Hormone Therapy: What Every Endocrinologist Should
Know”, Section of Endocrinology

November, 2005 “Thyroiditis and Other Insults to Thyroid Function” Core Curriculum in Adult Primary Care
Medicine

November, 2005 “Interpretation of Thyroid Function Tests Made Easy” Core Curriculum in Adult Primary
Care Medicine

January, 2005 “Transgender Therapy: The Role of the Endocrinologist” Endocrinology Grand Rounds

December, 2004 "Update in Endocrinology: Thyroid" Medicine Grand Rounds

January, 2004 “New Directions in Thyroid Hormone Action: Skin and Hair” Medicine Grand Rounds

March, 2003 “Thyroid Hormone Action on Hair and Skin” Endocrinology Grand Rounds

November, 1999 “Central Resistance to Thyroid Hormone – From Bedside to Bench” Endocrinology Grand
Rounds

March 26, 2020

Joshua D. Safer, MD, FACP, FACE

Curriculum development with external dissemination

2014-present Web site for Association of Program Directors of Endocrinology and Metabolism (APDEM), which serves as *the primary resource for endocrinology fellowship program directors throughout the United States and Canada.*

- Sample curricula
- Streaming lectures to support specific curricular needs to fill programmatic gaps at certain programs
- New assessment forms that map skills to milestones that conform to Next Accreditation System (NAS) standards of the Accreditation Council for Graduate Medical Education (ACGME)

2013-present Dissemination of Transgender Medicine Curriculum with local modification to institutions in the United States and Canada

Curriculum adopted

Johns Hopkins School of Nursing (sample video:
<http://vimeo.com/jhunursing/review/97477269/abbcf6d33a>)

Ohio State University College of Medicine
University of British Columbia, Faculty of Medicine
University of Central Florida College of Medicine
Tufts University School of Medicine

Curriculum in development

Dartmouth School of Medicine
University of Vermont College of Medicine

Work in progress in preparation for sharing transgender curriculum

Albany Medical College
Emory School of Medicine
George Washington University Medical School
Hofstra School of Medicine
University of California – San Diego School of Medicine
University of Kentucky College of Medicine
University of Louisville School of Medicine
University of Michigan Medical School
University of Minnesota Medical School
University of Nebraska School of Medicine
University of Pennsylvania School of Medicine
Washington University School of Medicine

Joshua D. Safer, MD, FACP, FACE

2013-2015 Co-author of the *Medical Subspecialty Reporting Milestones used for evaluation of Internal Medicine subspecialty medicine fellowship programs throughout the United States* by the Accreditation Council for Graduate Medical Education (ACGME).

<https://www.acgme.org/acgmeweb/Portals/0/PDFs/Milestones/InternalMedicineSubspecialtyMilestones.pdf>

2011-2014 Web site content expert for APDEM, which served as *the primary resource for endocrinology fellowship Program directors throughout the United States and Canada*. Materials included sample curricula, streaming lectures to support specific curricular needs to fill programmatic gaps at certain programs, and guidance dealing with ACGME site-visits

Other curriculum development

2019-present Massive Open On-line Course (MOOC) curricular content. Transgender Medicine for General Medical Providers, Icahn School of Medicine at Mount Sinai
(<https://www.coursera.org/courses?query=transgender%20medicine%20for%20general%20medical%20providers&>)

2016-2018 Curricular Content to teach transgender hormone therapy in the LGBT elective at Harvard Medical School

2016-2018 Curricular Content to teach transgender hormone therapy at Tufts University School of Medicine.

2011-2018 Fully revised curriculum for the Boston University Medical Center Fellowship Training Program in Endocrinology, Diabetes and Nutrition.

2010-2018 Curricula to teach transgender hormone therapy at Boston University School of Medicine.

2006-2014 Written examination in endocrinology to complement the multiple-choice examination for medical students — validation relative to success later in medical school is in progress.

Joshua D. Safer, MD, FACP, FACE**Bibliography: (ORCID  # 0000 0003 2497 8401)**Names of mentees are underlined throughout the bibliography section

** currently most influential papers are noted with double asterisks

Original, Peer-Reviewed Articles

1. **Safer JD**, Langlois MF, Cohen R, Monden T, John-Hope D, Madura J, Hollenberg AN, Wondisford FE. Isoform variable action among thyroid hormone receptor mutants provides insight into pituitary resistance to thyroid hormone. *Mol Endocrinol* 1997;11(1):16-26. PMID 8994184
2. Langlois MF, Zanger K, Monden T, **Safer JD**, Hollenberg AN, Wondisford FE. A unique role of the beta-2 thyroid hormone receptor isoform in negative regulation by thyroid hormone - mapping of a novel amino-terminal domain important for ligand-independent activation. *J Biol Chem* 1997;272(40):24927-24933. PMID 9312095
3. **Safer JD**, Cohen RN, Hollenberg AN, Wondisford, FE. Defective release of corepressor by hinge mutants of the thyroid hormone receptor found in patients with resistance to thyroid hormone. *J Biol Chem* 1998;273(46):30175-30182. PMID 9804773
4. **Safer JD**, O'Connor MG, Colan SD, Srinivasan S, Tollin SR, Wondisford FE. The TR-beta gene mutation R383H is associated with isolated central resistance to thyroid hormone. *J Clin Endocrinol Metab* 1999;84(9):3099-3109. PMID 10487671
5. **Safer JD**, Fraser LM, Ray S, Holick MF. Topically applied triiodothyronine stimulates epidermal proliferation, dermal thickening, and hair growth in mice and rats. *Thyroid* 2001;1(8):717-724. PMID 11525263
6. Tangpricha V, Chen BJ, Swan NC, Sweeney AT, de las Morenas A, **Safer JD**. Twenty-one gauge needles provide more cellular samples than twenty-five gauge needles in fine needle aspiration biopsy of the thyroid. *Thyroid* 2001;11(10):973-976. PMID 11716046
7. **Safer JD**, Crawford TM, Fraser LM, Hoa M, Ray S, Chen TC, Persons K, Holick MF. Thyroid hormone action on skin: diverging effects of topical versus intraperitoneal administration. *Thyroid* 2003;13(2):159-165. PMID 12699590
8. Santini F, Ceccarini G, Montanelli L, Rosellini V, Mammoli C, Macchia P, Gatti G, Pucci E, Marsili A, Chopra IJ, Chiovato L, Vitto P, **Safer JD**, Braverman LE, Martino E, Pinchera A. Role for inner ring deiodination preventing transcutaneous passage of thyroxine. *J Clin Endocrinol Metab* 2003;88(6):2825-2830. PMID 12788895
9. **Safer JD**, Crawford TM, Holick MF. A role for thyroid hormone in wound healing through keratin gene expression. *Endocrinology* 2004;145(5):2357-2361. PMID 14736740
10. **Safer JD**, Crawford TM, Holick MF. Topical thyroid hormone accelerates wound healing in mice. *Endocrinology* 2005;146(10):4425-4430. PMID 15976059

Joshua D. Safer, MD, FACP, FACE

11. Saha AK, Persons K, **Safer JD**, Luo Z, Holick MF, Ruderman NB. AMPK regulation of the growth of cultured human keratinocytes. *Biochem Biophys Res Co* 2006;349(2):519-24. PMID 16949049
12. **Safer JD**, Ray S, Holick MF. A topical PTH/PTHrP receptor antagonist stimulates hair growth in mice. *Endocrinology* 2007;148(3):1167-1170. PMID 17170098
13. **Safer JD**, Persons K, Holick MF. A thyroid hormone deiodinase inhibitor can decrease cutaneous cell proliferation in vitro. *Thyroid* 2009;19(2):181-185. PMID 19191748
14. Ariza MA, Loken WM, Pearce EN, **Safer JD**. Male sex, African-American race/ethnicity, and T3 levels at diagnosis are predictors of weight gain following medication and radioactive iodine treatment for hyperthyroidism. *Endocr Pract* 2010;16(4):609-616. PMID 20350916
15. Abraham TM, de las Morenas A, Lee SL, **Safer JD**. In thyroid fine needle aspiration, use of bedside-prepared slides significantly increased diagnostic adequacy and specimen cellularity relative to solution-based samples. *Thyroid* 2011;21(3):237-242. PMID 21323589
16. Huang MP, Rodgers KA, O'Mara R, Mehta M, Abuzahra HS, Tannenbaum AD, Persons K, Holick MF, **Safer JD**. The thyroid hormone degrading Dio3 is the primary deiodinase active in murine epidermis. *Thyroid* 2011;21(11):1263-1268. PMID 21936673
17. Torraldo G, Bhasin S, Bakhit M, Guo W, Serra C, S, **Safer JD**, Bhawan J, Jasuja R. Topical androgen antagonism promotes cutaneous wound healing without systemic androgen deprivation by blocking beta-catenin nuclear translocation and cross-talk with TGF-beta signaling in keratinocytes. *Wound Repair Regen* 2012;20:61-73. PMID 22276587
- 18**. **Safer JD**, Pearce EN. A simple curriculum content change increased medical student comfort with transgender medicine. *Endocr Pract* 2013;19(4):633-637. PMID 23425656
- First ever demonstration of the effectiveness of an evidence-based approach to teaching transgender medicine to medical students
19. Thomas DD, **Safer JD**. A simple intervention raised resident-physician willingness to assist transgender patients seeking hormone therapy. *Endocr Pract* 2015;21(10):1134-42. PMID 26151424
20. Mundluru SN, **Safer JD**, Larson, AR. Unforeseen ethical challenges for isotretinoin treatment in transgender patients. *Int J of Womens Dermatol* 2016;2(2):46-48. PMID 28492004
21. Eriksson SES, **Safer JD**. Evidence-based curricular content improves student knowledge and changes attitudes towards transgender medicine. *Endocr Pract* 2016;22(7):837-841. PMID 27042742
22. Chan B, Skocylas R, **Safer JD**. Gaps in transgender medicine content identified among Canadian medical school curricula. *Transgender Health* 2016;1(1):142-150. PMID 29159305
23. Myers SC, **Safer JD**. Increased rates of smoking cessation observed among transgender women receiving hormone treatment. *Endocr Pract* 2017;23(1):32-36. PMID 27682351

Joshua D. Safer, MD, FACP, FACE

24. Berli J, Knudson G, Fraser L, Tangpricha V, Ettner R, Ettner F, **Safer JD**, Graham j, Monstrey S, Schechter L. Gender confirmation surgery: What surgeons need to know when providing care for transgender individuals. *JAMA Surgery* 2017;152(4):394-400. PMID 28196182
25. Kailas M, Lu HMS, Rothman EF, **Safer JD**. Prevalence and types of gender-affirming surgery among a sample of transgender endocrinology patients prior to state expansion of insurance coverage. *Endocr Pract* 2017;23(7):780-786. PMID 28448757
26. Liang JJ, Gardner IH, Walker JA, **Safer JD**. Observed deficiencies in medical student knowledge of transgender and intersex health. *Endocr Pract* 2017;23(8):897-906. PMID 28534684
27. Park JA, **Safer JD**. Clinical exposure to transgender medicine improves students' preparedness above levels seen with didactic teaching alone: A key addition to the Boston University model for teaching transgender health care. *Transgender Health* 2018;3(1),10-16. PMID 29344576
28. Liang JJ, Jolly D, Chan KJ, **Safer JD**. Testosterone levels achieved by medically treated transgender women in a United States endocrinology clinic cohort. *Endocr Pract* 2018; 24(2):135-142. PMID 29144822
29. Chan KJ, Jolly D, Liang JJ, Weinand JD, **Safer JD**. Estrogen levels do not rise with testosterone treatment for transgender men. *Endocr Pract* 2018; 24(4):329-333. PMID 29561193
30. Chan KJ, Liang JJ, Jolly D, Weinand JD, **Safer JD**. Exogenous testosterone does not induce or exacerbate the metabolic features associated with PCOS among transgender men. *Endocr Pract* 2018; 24(6):565-572. PMID 29624102
31. Bisson JR, Chan KJ, **Safer JD**. Prolactin levels do not rise among transgender women treated with estradiol and spironolactone. *Endocr Pract* 2018; 24(7):646-651. PMID 29708436
32. Getahun D, Nash R, Flanders D, Baird TC, Becerra-Culqui TA, Cromwell L, Hunkler E, Lash TL, Millman A, Quinn VP, Robinson B, Roblin D, Silverberg MJ, **Safer J**, Slovis J, Tangpricha V, Goodman M. Cross-sex hormones and acute cardiovascular events in transgender persons: A cohort study. *Ann Intern Med* 2018; 169(4):205-213. PMID 29987313
33. Martinson TG, Ramachandran S, Lindner R, Reisman T, **Safer JD**. High body-mass index is a significant barrier to gender confirmation surgery for transgender and gender-nonbinary individuals. *Endocr Pract* 2020; 26(1):6-15. PMID 31461357
34. Goldstein Z, Martinson TG, Ramachandran S, Lindner R, **Safer JD**. Improved rates of cervical cancer screening among transmasculine patients through self-collected swabs for high-risk human papillomavirus DNA testing. *Transgender Health* 2020; 5(1):10-17. PMID
35. Lichtenstein M, Stein L, Connolly E, Goldstein ZG, Martinson TG, Tiersten L, Shin SJ, Pang JH, **Safer JD**. The Mount Sinai patient-centered preoperative criteria meant to optimize outcomes are less of a barrier to care than WPATH SOC 7 criteria before transgender-specific surgery. *Transgender Health* 2020; In Press. PMID

Joshua D. Safer, MD, FACP, FACE**Case Reports, Reviews, Chapters:****Editorials and Critical Reviews:**

36. **Safer JD**, Colan SD, Fraser LM, Wondisford FE. A pituitary tumor in a patient with thyroid hormone resistance: A diagnostic dilemma. *Thyroid* 2001;11(3):281-291. PMID 11327621
37. **Safer JD**, Hennessey JV, Braverman LE. Substituting brand name levothyroxine preparations with generics would increase treatment cost. *Ann Intern Med* 2005; on-line available at <http://www.annals.org/cgi/eletters/142/11/891#1882>
38. Pietras SM, **Safer JD**. A spurious elevation of both total thyroid hormone and thyroid hormone uptake measurements in the setting of autoantibodies may result in diagnostic confusion: A case report and review of the related literature. *Endocr Pract* 2008;14(6):738-742. PMID 18996795
39. **Safer JD**, Tangpricha V. Out of the Shadows: It is time to mainstream treatment for transgender patients. *Endocr Pract* 2008;14(2):248-50. PMID 18308667
40. Feldman J, **Safer JD**, Hormone therapy in adults: Suggested revisions to the sixth version of the Standards of Care. *Int J Transgenderism* 2009;11(3):146-182.
41. Bhasin S, **Safer JD**, Tangpricha V. The Hormone Foundation's patient guide to the endocrine treatment of transsexual persons. *J Clin Endocrinol Metab* 2009;94(9).
42. **Safer JD**. Thyroid hormone action on skin. *Dermatoendocrinol* 2011;3(3):1-5. PMID 22110782
43. Kannan S, **Safer JD**. Finding the right balance between resistance & sensitivity -- A case report and brief review of the cardiac manifestations of the syndrome of resistance to thyroid hormone and the implications for treatment. *Endocr Pract* 2012; 18(2):252-255. PMID 22068246
44. **Safer JD**. Thyroid hormone action on skin. *Curr Opin Endocrinol Diabetes Obes* 2012;19(5):388-293. PMID 22914563
45. **Safer JD**. Thyroid hormone and wound healing. *J Thyroid Res* 2013;doi:10.1155/2013/124538. PMID 23577275
46. **Safer JD**. Transgender medical research, provider education, and patient access are overdue. *Endocr Pract* 2013;19(4):575-6. PMID 23337168
47. Gardner IH, **Safer JD**. Progress on the road to better medical care for transgender patients. *Curr Opin Endocrinol Diabetes Obes* 2013;20(6):553-558. PMID 24468757

Joshua D. Safer, MD, FACP, FACE

48. Gitlin SD, Flaherty J, Arrighi J, Swing S, Vasilius J, Brater DC, Breida M, Caverzagie K, Kane GC, Nelson Grier C, Parsons P, Smith B, Morrison L, Radwany S, Quill T, Kapur V, Roberts B, Silber M, DiBisceglie A, Fix O, Koteish A, Palumbo P, Trence D, Berkowitz L, Holmboe E, Hood S, Iobst W, Levin S, Yaich S, Foster J, Jackson M, Juvin J, Williams E, Addrizzo-Harris D, Buckley J, Markowitz P, Sessler C, Torrington K, Richter S, Szyjowski R, Alguire P, Cooke M, Bolster M, Brown C, Jones T, Marks L, Pardi D, Rose Z, Shah B, Busby-Whitehead J, Granville L, Leipzig R, Collichio F, Raymond M, Von Roenn J, Albertson D, Coyle W, Sedlack R, Abbott B, Fessler H, Balasubramanian A, Danoff A, Gopalakrishnan G, Piquette C, Schulman D, Geraci M, Rockey D, **Safer J**, Armstrong W, Havlichek Jr D, Helmy T, Kolansky D, Patores S, Spevetz A, Biller B, Cantelmi A. The Internal Medicine Subspecialty Milestone Project, a joint initiative of the Accreditation Council for Graduate Medical Education and the American Board of Internal Medicine, in collaboration with the Alliance for Academic Internal Medicine. 2014; online available at <https://www.acgme.org/acgmeweb/Portals/0/PDFs/Milestones/InternalMedicineSubspecialtyMilestones.pdf>
- 49**. **Saraswat A, Weinand JD, Safer JD**. Evidence supporting the biological nature of gender identity. *Endocr Pract* 2015; 21(2):199-204. PMID 25667367
- Review of the biological nature of transgender identity most referenced by popular media (Google)
- 50**. **Weinand JD, Safer JD**. Hormone therapy in transgender adults is safe with provider supervision; A review of hormone therapy sequelae for transgender individuals. *J Clin Transl Endocr* 2015; 2:55-60. PMID 28090436
- The most comprehensive review of the relative safety of transgender hormone therapy
51. **Boh B, Safer JD**. State-of-the-art: Use of hormones in transgender individuals. *Endocrine Society* 2016; on-line available at <http://dx.doi.org/10.1210/MTP5.9781943550043.ch55>
52. **Safer JD, Coleman E, Hembree, W**. There is reason for optimism: an introduction to the special issue on research needs in transgender health and medicine. *Curr Opin Endocrinol Diabetes Obes* 2016; 23(2):165-167. PMID 26702853
- 53**. **Safer JD, Coleman E, Feldman J, Garofalo R, Hembree W, Radix A, Sevelius J**. Barriers to healthcare for transgender individuals. *Curr Opin Endocrinol Diabetes Obes* 2016; 23(2):168-171. PMID 26910276
- The most cited review of barriers to delivery of transgender healthcare in the United States in the medical system, medical curriculum, and medical culture
54. **Feldman J, Brown GR, Deutsch MB, Hembree W, Meyer W, Meyer-Bahlburg HFL, Tangpricha V, T'Sjoen G, Safer JD**. Priorities for transgender medical and healthcare research. *Curr Opin Endocrinol Diabetes Obes* 2016; 23(2):180-187. PMID 26825469
55. **Reisner SL, Deutsch MB, Bhasin S, Bockting W, Brown GR, Feldman J, Garofalo R, Kreukels B, Radix A, Safer JD, Tangpricha V, T'Sjoen G, Goodman M**. Advancing Methods for U.S. Transgender Health Research. *Curr Opin Endocrinol Diabetes Obes* 2016; 23(2):198-207. PMID 26845331
56. **Safer JD**. The large gaps in transgender medical knowledge among providers must be measured and addressed. *Endocr Pract* 2016;22(7):902-903. PMID 27214166

Joshua D. Safer, MD, FACP, FACE

57. Bouman WP, Suess Schwend A, Motmans J, Smiley A, **Safer JD**, Deutsch MB, Adams NJ, Winter S. Language and trans health. *Int J Transgenderism* 2017;18(1):1-6.
58. **Safer JD**. The recognition that gender identity is biological complicates some previously settled clinical decision making. *AACE Clinical Case Rep* 2017;3(3):e289-e290. PMID 27967232
- 59**. Hembree WC, Cohen-Kettenis P, Gooren L, Hannema SE, Meyer WJ, Murad M, Rosenthal S, **Safer JD**, Tangpricha V, T'Sjoen G. Endocrine treatment of gender-dysphoric/gender-incongruent persons: an endocrine society clinical practice guideline. *J Clin Endocrinol Metab* 2017; 102(11):1–35. PMID 28945902
- The most respected guideline for hormone treatment of transgender individuals
60. **Safer JD**. Transgender patients and health care providers. *Health Affairs* 2017;36(12):2213. PMID 29200359
61. Tangpricha V, Hannema SE, Irwig M, Meyer WJ, **Safer JD**, Hembree WC. 2017 American Association of Clinical Endocrinologists/Endocrine Society update on transgender medicine: case discussions. *Endocr Pract* 2017;23(12):1430-1436. PMID 29320643
62. **Safer JD**. Managing intersex and transgender health across the globe requires more than just understanding the science. *AACE Clinical Case Rep* 2018;4(3):e267-e268.
63. Narasimhan S, **Safer JD**. Hormone therapy for transgender men. *Clin Plast Surg* 2018;45(3):319-322. PMID 29908619
64. Korpaisarn S, **Safer JD**. Gaps in transgender medical education among health care providers: A major barrier to care for transgender persons. *Reviews in Endocrine and Metabolic Disorders* 2018;19(3):271-275. PMID 29922962
65. Klein P, Narasimhan S, **Safer JD**. The Boston Medical Center experience: An achievable model for the delivery of transgender medical care at an academic medical center. *Transgender Health* 2018;3(1),136-140. PMID 30065961
66. **Safer JD**. Continuing gaps in transgender medicine education among health care providers. *Endocr Pract* 2018; 24(12):1106-1107. PMID 30715908
67. Goodman M, Getahun D, Silverberg MJ, **Safer J**, Tangpricha V. Reply to letter to the editor: Cross-sex hormones and acute cardiovascular events in transgender persons. *Ann Intern Med* 2019; 170(2):142-143. PMID 30641565
68. Iwamoto SJ, T'Sjoen G, **Safer JD**, Davidge-Pitts CJ, Wierman ME, Glodowski MB, Rothman MS. Letter to the editor: Progesterone is important for transgender women's therapy – Applying evidence for the benefits of progesterone in ciswomen. *J Clin Endocrinol Metab* 2019; 104(8):3127-3128. PMID 30860591
69. Rosenthal SM, Hembree WC, Cohen-Kettenis PT, Gooren L, Hannema SE, Meyer WJ, Murad MH, **Safer JD**, Tangpricha V, T'Sjoen GG. Reply to letter to the editor: Endocrine treatment of gender dysphoric/gender incongruent persons: An Endocrine Society* clinical practice guideline. *J Clin Endocrinol Metab* 2019; 104(11):5102-5103. PMID 31046093

Joshua D. Safer, MD, FACP, FACE

70. Moser SW, Schechter LS, Facque AR, Berli JU, Agarwal C, Satterwhite T, Bluebond-Langner R, Kuzon WM, Ganor O, **Safer JD**, Knudson G. Nipple areolar complex reconstruction is an integral component of chest reconstruction in the treatment of transgender and gender diverse people. *International J Transgenderism* 2019; In Press. PMID
71. Korpaisarn S, **Safer JD**. Etiology of gender identity. *Endocrinol Metab Clin N Am* 2019; 48(2):323-329. PMID 31027542
- 72**. **Safer JD**, Tangpricha V. Care of the transgender patient. *Ann Intern Med* 2019; 171(1):ITC1-ITC6. PMID 31261405
- The highest profile review of transgender medicine oriented to primary care providers
73. Goldstein Z, Khan M, Reisman T, **Safer JD**. Managing the risk of venous thromboembolism in transgender adults undergoing hormone therapy. *J Blood Med* 2019; 10:209-216. PMID 31372078
74. Rosen HN, Hamnvik OPR, Unnop J, Malabanan AO, **Safer JD**, Tangpricha V, Wattanachanya L, Yeap SS. Bone densitometry in transgender and gender non-conforming (TGNC) individuals: The 2019 ISCD official positions. *J Clin Densitometry* 2019; 22(4):544-553. PMID 31327665
75. **Safer JD**. Hurdles to health care access for transgender individuals. *Nat Hum Behav* 2019; 3:1132-1133. PMID 31406336
76. **Safer JD**. Greater rigor studying the incidence of sexually transmissible infections among transgender individuals. *Med J Aust* 2019; 211(9):401. PMID 31595513
77. **Safer JD**. Advancing knowledge of transgender medical intervention effects. *Nat Rev Urol* 2019; 16(11):642-643. PMID 31399706
78. Reisman T, Goldstein Z, **Safer JD**. A review of breast development in cisgender women and implications for transgender women. *Endocr Pract* 2019; 25:1338-1345. PMID 31412232
- 79**. **Safer JD**, Tangpricha V. Care of transgender persons. *N Engl J Med* 2019; 381(25):2451-2460. PMID 31851801
- The highest profile review of transgender medicine
80. Libman H, **Safer JD**, Siegel JR, Reynolds EE. Caring for the transgender patient: Grand rounds discussion from Beth Israel Deaconess Medical Center. *Ann Intern Med* 2020; 172(3):202-209. PMID 32016334
81. Pang JH, **Safer JD**. A beginning in the investigation of the metabolic consequences of transgender hormone treatment on young people. *J Clin Endocrinol Metab* 2020; 105(3):1-2. PMID 31803926
82. Hassett MJ, Somerfield MR, Baker ER, Cardoso F, Kansal KJ, Kwait DC, Plichta JK, Ricker C, Roshal A, Ruddy KJ, **Safer JD**, Van Poznak C, Yung RL, Giordano SH. Management of Male Breast Cancer: ASCO Guideline. *J Clin Oncol* 2020; In Press. PMID 32058842

Joshua D. Safer, MD, FACP, FACE**Textbook Chapters:**

83. **Safer JD**, Wondisford, FE. 1997 TSH, normal physiology, *Contemporary Endocrinology: Diseases of the Pituitary*, Wierman ME, ed., Humana Press Inc., Totowa, NJ, 283-293
84. **Safer JD**. 2003 Resistance to thyroid hormone, *Contemporary Endocrinology: Diseases of the Thyroid*, 2nd Edition, Braverman LE, ed., Humana Press Inc., Totowa, NJ, 199-216
85. **Safer JD**. 2005 The skin in thyrotoxicosis, *Werner and Ingbar's The Thyroid*, 9th Edition, Braverman LE and Utiger RD, eds., Lippincott Williams and Williams, Philadelphia, PA, 553-558
86. **Safer JD**. 2005 The skin and connective tissue in hypothyroidism, *Werner and Ingbar's The Thyroid*, 9th Edition, Braverman LE and Utiger RD, eds., Lippincott Williams and Williams, Philadelphia, PA, 769-773
87. **Safer JD**, Holick MF. 2008 Potential therapeutic uses of thyroid hormone, *Thyroid Disorders with Cutaneous Manifestations*, Heymann WR, ed., Springer-Verlag, London, UK, 181-186
88. Leung AM, **Safer JD**. 2012 Thyrotoxicosis of extra thyroid origin, *Werner and Ingbar's The Thyroid*, 10th Edition, Braverman LE and Cooper D, eds., Lippincott Williams and Williams, Philadelphia, PA, 429-433
89. Kurani PN, Goldberg LJ, **Safer JD**. 2017 Evaluation and management of hirsutism in postmenopausal women, *Essentials of Menopause Management: A Case-Based Approach*, Pal L and Sayegh RA, eds., Springer, London, UK, 209-221
90. Sloan CA, **Safer JD**. 2017 The high risk client: Comorbid conditions that affect care, *Adult Transgender Care: An Interdisciplinary Approach for Training Mental Health Professionals*, Kauth MR and Shepherd JC, eds., Routledge, Taylor and Francis, London, UK, 101-122
91. Webb R, **Safer JD**. 2018 Transgender hormonal treatment, *Yen and Jaffe's Reproductive Endocrinology, edition 8*, Strauss JS and Barbieri JL, eds., Elsevier, Maryland Heights, MO, 709-716
92. Myers SC, **Safer JD**. 2019 Hormone therapy in transgender adults, *Manual of Endocrinology and Metabolism, 5th Edition*, Lavin N, ed., Walters Kluwer, Philadelphia, PA, 893-899
93. **Safer JD**, Chan KJ. 2019 Review of medical, socioeconomic, and systemic barriers to transgender care. *Transgender Medicine, A Multidisciplinary Approach*, Poretsky L and Hembree WC, eds., Humana Press, Cham, Switzerland, 25-38
94. Qian R, **Safer JD**. 2019 Hormone treatment for the adult transgender patient. *Comprehensive Care of the Transgender Patient*, Ferrando CA, ed., Elsevier, Maryland Heights, MO, 34-96
95. Tangpricha V, **Safer JD**. 2020 Hormone therapy for transgender women. *Gender Confirmation Surgery*, Schechter LS, ed. Springer, Cham, Switzerland, 59-63
96. **Safer JD**, Tangpricha V. 2020 Hormone therapy for transgender men. *Gender Confirmation Surgery*, Schechter LS, ed. Springer, Cham, Switzerland, 65-67

Joshua D. Safer, MD, FACP, FACE

Case Reports:

97. Koutkia P, **Safer JD**. Adrenal metastasis secondary to papillary thyroid carcinoma. *Thyroid* 2001;11(11):1077-1079. PMID 11762719
98. Choong K, **Safer JD**. Graves disease and gynecomastia in two roommates. *Endocr Pract* 2011;17(4):647-650. PMID 21613048
99. Safer DL, Bullock KD, **Safer JD**. Obsessive-compulsive disorder presenting as gender dysphoria/gender incongruence: a case report and literature review. *AACE Clinical Case Rep* 2016;2:e268–e271.
100. Stevenson MO, Wixon N, **Safer JD**. Scalp Hair Regrowth in Hormone-Treated Transgender Woman. *Transgender Health* 2017;1(1):202-204. PMID 28861534
101. Sullivan CA, Hoffman JD, **Safer JD**. 17- β -hydroxysteroid dehydrogenase type 3 deficiency: Identifying a rare cause of 46, XY female phenotype in adulthood. *J Clin Transl Endocr Case Reports* 2018; 7:5-7.

Dissemination Through Lay Press and Social Media

Mass Audience Programming:

“Transgender Health AMA” Reddit. July 24, 2017. Expert responses to questions about transgender medicine. https://www.reddit.com/r/science/comments/6p7uhb/transgender_health_ama_series_im_joshua_safer/ over 150,000 views, over 4200 comments

“Gender Revolution with Katie Couric” National Geographic Channel. Couric, Katie. February 6, 2017. Extended interview with Katie Couric threaded into a 2-hour television special. Trailer: <https://www.youtube.com/watch?v=y93MsRaC6Zw> broadcast in 143 countries

“Is gender identity biologically hard-wired?” Judd, Jackie. PBS NewsHour. May 13, 2015. Extended interview for Jackie Judd <http://www.pbs.org/newshour/bb/biology-gender-identity-children/> estimated just over 1,000,000 viewers per Nielsen

Joshua D. Safer, MD, FACP, FACE

Innovation	Significance/impact
<i>Development and leadership of the Transgender Medicine Clinical Center, Mount Sinai Health System and Icahn School of Medicine at Mount Sinai</i>	<ul style="list-style-type: none"> • The Center for Transgender Medicine and Surgery at Mount Sinai is the first comprehensive center for transgender medical care in New York and the most comprehensive program in the United States • The Center is one of only several such centers in North America that are housed in academic teaching hospitals where care can be integrated • The Center is a model for such care delivery in North America.
<i>Development and leadership of the Transgender Medicine Clinical Center at Boston Medical Center</i>	<ul style="list-style-type: none"> • The Center for Transgender Medicine and Surgery at BMC is the first comprehensive center for transgender medical care in New England • The Center is one of only several such centers in North America that are housed in academic teaching hospitals where care can be integrated • The Center is a model for such care delivery in North America.
<i>Development and dissemination of the seminal reviews that are most widely cited in the lay press that explain the concept that gender identity is a biological phenomenon (see bibliography section above, e.g. PMID: 25667367).</i>	<ul style="list-style-type: none"> • The concept that gender identity is a biological phenomenon has been a key component of the recent culture change in favor of mainstream medical care for transgender individuals (see media section above)
<i>Development and dissemination of new and influential curricular content to teach the biology of gender identity in conventional medical education (see curriculum section above)</i>	<p>The teaching of evidence-based approaches to transgender medical care to:</p> <ul style="list-style-type: none"> • Medical students (see bibliography section above, e.g. PMID 23425656 and PMID 27042742) • Physician trainees (see bibliography section above, e.g. PMID 26151424) • Practicing physicians (see invited lectures section above) serves as a crucial component to the gained credence given to care for transgender individuals in conventional medical settings.
<i>Development and dissemination of seminal reviews supporting the safety of transgender hormone treatment regimens (see invited lectures section above)</i>	<ul style="list-style-type: none"> • Once mainstream medical providers learn of the biology underlying gender identity, their biggest concern is the relative safety of the medical interventions relative to the benefit. • The development and dissemination of the seminal reviews and lectures supporting the safety of current treatment regimens serves as a further crucial component to the culture change among conventional medical providers in favor of routine medical care for transgender individuals

Richard Eppink (Bar No. 7503)
AMERICAN CIVIL LIBERTIES UNION
OF IDAHO FOUNDATION
P. O. Box 1897
Boise, ID 83701
T: (208) 344-9750 ext. 1202
REppink@acluidaho.org

Elizabeth Prelogar*
COOLEY LLP
1299 Pennsylvania Avenue, NW Suite 700
Washington D.C. 20004-2400
T: (202) 842-7800
F: (202) 842-7899
eprelogar@cooley.com

Gabriel Arkles*
James Esseks*
Chase Strangio*
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
125 Broad St.,
New York, NY 10004
T: (212) 549-2569
garkles@aclu.org
jesseks@aclu.org
cstrangio@aclu.org

Andrew Barr*
COOLEY LLP
380 Interlocken Crescent, Ste. 900
Broomfield, CO 80021-8023
T: (720) 566-4000
F: (720) 566-4099
abarr@cooley.com

Kathleen Hartnett*
COOLEY LLP
101 California Street 5th Floor
San Francisco, CA 94111-5800
T: (415) 693-2000
F: (415) 693-2222
khartnett@cooley.com

Catherine West*
LEGAL VOICE
907 Pine Street, Unit 500
Seattle, WA 98101
T: (206) 682-9552
F: (206) 682-9556
cwest@legalvoice.org

* Admitted *Pro Hac Vice*

Attorneys for Plaintiffs

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO**

LINDSAY HECOX, et al.,

Plaintiffs,

v.

BRADLEY LITTLE, et al.,

Defendants.

No. 1:20-CV-184-CWD

**EXPERT DECLARATION OF
SARA SWOBODA, MD,
IN SUPPORT OF
PLAINTIFFS' MOTION
FOR PRELIMINARY
INJUNCTION**

I, Sara Swoboda, MD, have been retained by counsel for Plaintiffs Lindsay Hecox and Jane Doe, with her next friends, Jean Doe and John Doe, as an expert in connection with the above-captioned litigation.

1. The purpose of this declaration is to offer my expert opinion on: (1) typical sports physicals for high school athletes in Idaho; (2) the impact of H.B. 500 on the sports physical process; and (3) the potential harms of H.B. 500 to student-athletes through the imposition of a “biological sex” verification procedure.

2. In preparing this report, I reviewed the legislative findings for H.B. 500, as enacted, and the sources cited therein.

3. I have knowledge of the matters stated in this declaration and have collected and cite to relevant literature concerning the issues that arise in this litigation in the body of this declaration and in the attached bibliography.

4. In preparing this report, I relied on my education and training, my clinical experience and my knowledge of the scientific literature in the pertinent fields. The materials I have relied upon in preparing this report are the same types of materials that experts in my field of study regularly rely upon when forming opinions on the subject. I may wish to supplement these opinions or the bases for them as a result of new scientific research or publications or in response to statements and issues that may arise in my area of expertise.

PROFESSIONAL BACKGROUND

5. I am a general practice pediatrician in the St. Luke’s Health System, Treasure Valley Pediatrics, in Boise, ID. A true and correct copy of my CV is attached

hereto as Exhibit A.

6. I am licensed to practice medicine in the state of Idaho. I am an American Board of Pediatrics certified pediatrician and a Fellow with the American Academy of Pediatrics.

7. I graduated from the Washington State University in Pullman, WA with a Bachelor of Art degree in Political Science in 2005. I earned my Doctor of Medicine degree from the University of Washington School of Medicine in 2010. I completed intern and resident training in Pediatrics at University of Washington School of Medicine/Seattle Children's Hospital in 2013. From 2013-2016, I was a general pediatrician with the Indian Health Services, Navajo Nation, in Chinle, Arizona. Since 2017, I have been a general practice pediatrician with the St. Luke's Health System, Treasure Valley Pediatrics, in Boise, ID.

8. Between 2014 and 2016, I served as a medical consultant to the Chinle area Suspected Child Abuse and Neglect (SCAN) Team during which time I worked closely with tribal child protective services, law enforcement, and medical providers to provide medical consultation and follow-up for children suspected to be victims of abuse and neglect.

9. Since 2018 I have served as a Board Member for Idaho Voices for Children, a policy organization that focuses on expanding healthcare access for families, foster care advocacy and early childhood advocacy, and literacy.

10. In my current practice, I have approximately 1,500 patients between the ages of 0 and 18 across Idaho.

11. I have not previously testified as an expert witness in either deposition or at trial. I am being compensated at an hourly rate of \$250 per hour for preparation of expert declarations and reports, and \$400 per hour for time spent preparing for or giving deposition or trial testimony. My compensation does not depend on the outcome of this litigation, the opinions I express, or the testimony I provide.

GENERAL PEDIATRIC PRACTICE

12. As a pediatrician, my job is focused on caring for the health and well-being of infants, children, adolescents, and young adults. Working with children and their families, I provide well child care and health surveillance, preventative care, management and treatment of complex chronic medical conditions, and urgent treatment of acute illness in children and adolescents.

13. General principals of pediatric medicine instruct that we do no harm and focus on the best interests of the child. As a general practice, we also conduct patient history taking and examinations of adolescents and young adults outside of the presence of their parents to ensure appropriate privacy and confidentiality and to increase accuracy of assessments.

SPORTS PHYSICAL PROCESS

14. As part of my regular pediatric practice, I conduct sports physicals for Idaho student-athletes. I conduct approximately 100 sports physicals per year.

During July and August, my practice regularly includes these sports physicals to ensure that my patients are ready to participate in athletics in the fall.

15. The American Academy of Pediatrics (AAP) has clear guidelines on the purpose and testing that makes up a sports physical.

16. Under AAP guidelines, the sole purposes of the physical are to check for health conditions that could result in serious injury or death while a young person is participating in athletics, look for conditions that predispose to injury, provide an opportunity to discuss health, determine general health, and create an entry point into the health care system. These include obscure heart conditions, severe asthma, seizure disorders, a single kidney, and other serious medical conditions. The AAP instructs that the physical is intended to encourage participation not exclusion from athletics. American Academy of Pediatrics, Preparticipation Physical Evaluation 3 (5th ed. 2019) (“The purpose of the [Preparticipation Physical Evaluation] PPE is to facilitate and encourage safe participation, not to exclude athletes from participation”).

17. A typical sports physical lasts 30 minutes, during which time I do the following: review a patient’s personal and family medical history, verbally screen for history or symptoms that could indicate a life-threatening medical condition, complete a physical exam looking for signs of medical conditions that could cause morbidity and mortality, and discuss and encourage general principals of wellness. This exam would be conducted with the patient clothed and would involve very little

contact directly with the patient's body beyond listening to the person's heart and lungs and palpating the abdomen.

18. Sports physicals do not include blood tests for hormone levels or any other purpose. Sports physicals do not include genetic tests for chromosomes or any other purpose. It is also not part of a sports physical to conduct a genital or pelvic examination.

19. A sports physical does include a general question about whether a person has only one testicle, but that information can be collected through asking the patient. As part of an annual exam, testicular exams are more often conducted, but can also be done by history. Pediatricians are moving in this direction as we become more thoughtful as a profession about the necessity/utility of genital exams. Under the AAP guidelines for sports physicals, the purpose of the inquiry is to protect youth from the possibility of losing a remaining functional testicle for the purpose of sperm production where relevant. *Preparticipation Physical Evaluation* at 119.

IMPACT OF H.B. 500 ON SPORTS PHYSICALS

20. The language of Idaho's newly passed law requires that student-athletes who have their sex disputed obtain verification of their sex from a physician. As a pediatrician who regularly conducts sports physicals and who has a large number of student-athlete patients, I would likely be called upon under the terms of the law to write sex verification statements for my patients.

21. The law instructs physicians to verify a 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." None of these physiological characteristics would be tested for in any routine sports physical examination. There is also no procedure in medicine to verify an individual's "biological sex" by looking at a single physiological characteristic. I could not, as the law instructs, "verify biological sex" by examining a patient's genetic makeup, normal endogenously produced testosterone levels, or reproductive anatomy, either alone or in any combination. This would not be consistent with medical science.

22. Even if I were to certify a patient's sex characteristics related to their genes, hormones or reproductive anatomy, none of that testing is straightforward or ethical without a clear medical indication.

23. Genetic testing is complicated and personal as it reveals a significant amount of information. It is done by a specialist.

24. If a patient were to come to me and ask for genetic testing or endogenous testosterone testing, I would have to refer them to a pediatric endocrinologist. For patients in rural areas, it might be difficult to find and travel to a pediatric endocrinologist.

25. Where a patient presents with a constellation of medical concerns that indicate a need for genetic testing, I would refer to a pediatric endocrinologist and order 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 other combination of sex chromosomes. In ordering genetic testing of this kind, a range of genetic conditions could be revealed to a patient and patient's family. I do not do genetic testing as a routine part of any medical evaluation and am 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 pre-authorization.

26. Likewise, if a patient were presenting with certain medical concerns I might refer that person to a pediatric endocrinologist for hormone testing. I do not test a patient's hormone levels as a routine part of any medical evaluation and am not aware of any pediatric practice where hormone testing would be done (outside of specific medical concerns).

27. I do not as a general practice conduct internal pelvic examinations on patients. Pelvic examinations in pediatric patients are limited to patients with specific concerns such as acute trauma or infection. In young patients, such an exam would often be done with sedation and appropriate comfort measures to limit psychological trauma. Routine pap smears are currently not indicated in pediatric populations, including adolescents. 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.

28. If a patient came to my office and asked me to examine their “reproductive anatomy,” from a medical perspective, it would not be clear what such an examination would entail. “Reproductive anatomy” is not a medical term. That could include internal reproductive organs, external genitalia, or other body systems.

29. A medically unnecessary pelvic examination would be incredibly intrusive and traumatic for a patient. I would not conduct such an examination.

30. Determining whether an individual has ovaries may, in some circumstances, 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.

31. Subjecting a pediatric patient to any unnecessary testing is against medical guidelines. 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.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.



Executed on April 29, 2020

Sara Swoboda, MD

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of April, 2020, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

Dan Skinner
danskinner@cssklaw.com
cssklaw@cssklaw.com
Attorney for Boise School District,
Individual members of the Board of Trustees of Boise School District,
Coby Dennis

Steven L. Olsen
steven.olsen@ag.idaho.gov
W. Scott Zanzig
scott.zanzig@ag.idaho.gov
Dayton P. Reed
dayton.reed@ag.idaho.gov
Attorneys for Bradley Little,
Sherri Ybarra,
Individual members of the State Board of Education,
Boise State University,
Marlene Tromp,
Individual members of the Idaho Code Commission

DATED this 30th day of April, 2020.

/s/ Richard Eppink

EXHIBIT A

Sara Swoboda, MD

Education

2010 – 2013 Pediatrics Residency
University of Washington School of Medicine/Seattle Children’s Hospital, Seattle, WA

2006 – 2010 M.D.
University of Washington School of Medicine, Seattle, WA

2001 – 2005 B.A., Political Science (with emphasis on global politics); *Summa Cum Laude*
Washington State University, Pullman, WA

Clinical Experience

2017-current
General Pediatrician
St. Luke’s Health System, Treasure Valley Pediatrics
Boise, ID

2013-2016
General Pediatrician, inpatient and outpatient services
Indian Health Services, Navajo Nation
Chinle, AZ

2010–2013
Pediatric resident
University of Washington
Seattle, WA

Community and Advocacy

2018-current
Board member, Idaho Voices for Children
Idaho Voices for Children serves as the voice for children and families to ensure their needs are met in lawmaker’s decisions and state policy. Advocacy and legislative lobbying focus areas include expanding healthcare access for families, foster care advocacy and early childhood advocacy, and literacy.

2014-2016
Medical consultant, Chinle area Suspected Child Abuse and Neglect (SCAN) Team
Worked closely with tribal child protective services, law enforcement and medical providers to provide medical consultation and follow-up for children suspected to be victims of abuse and neglect.

Sara Swoboda, MD

2015-2016

R.I.S.E.: Respond, Intervene, Support, Educate

Co-author and pediatric program advisor for IHS Domestic Violence Prevention Initiative grant award to increase sexual assault response resources to pediatric populations in Chinle, AZ.

Funding for \$220,000/year for clinical programs

2015-2016

Hooghan Be' Adhií noo glí: A Home with Dignity

Co-author of IHS Domestic Violence Prevention Initiative grant award to implement ACEs screening and trauma-informed care into healthcare services in Chinle, AZ.

Funding for \$170,700/year for community and clinical programs

Publications

Cantey, P., Weeks, J., Edwards, M., Rao, S., Ostovar, A., Dehority, W., Alzona, M., **Swoboda, S.**, et al. The Emergence of Zoonotic Onchocerca Lupi Infection in the United States--A Case Series. Clinical Infectious Diseases. Nov 2015, 62(6):778-83.

Cantey, P., Eberhard, M., Weeks, J., **Swoboda, S.** and Ostovar, A. Letter to the Editor: Onchocerca lupi infection. Journal of Neurosurgery: Pediatrics. Published online Oct 2015.

Swoboda, S. and Feldman, K. Skeletal Trauma in Child Abuse. Pediatric Annals. Nov 2013, 42(11):458.

Awards

Chinle Medical Staff "Above and Beyond" Award, 2016.

Navajo Area IHS Director's Award for Outstanding Health Care Provider, 2015.

Licensure/Certifications

- State of Idaho Medical License
- American Board of Pediatrics certified pediatrician
- Fellow, American Academy of Pediatrics

References available upon request

Richard Eppink (Bar No. 7503)
AMERICAN CIVIL LIBERTIES UNION
OF IDAHO FOUNDATION
P. O. Box 1897
Boise, ID 83701
United States
T: (208) 344-9750 ext. 1202
REppink@acluidaho.org

Elizabeth Prelogar*
COOLEY LLP
1299 Pennsylvania Avenue, NW
Suite 700
Washington D.C. 20004-2400
T: (202) 842-7800
F: (202) 842-7899
eprelogar@cooley.com

Gabriel Arkles*
James Esseks*
Chase Strangio*
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
125 Broad St.,
New York, NY 10004
T: (212) 549-2569
garkles@aclu.org
jesseks@aclu.org
cstrangio@aclu.org

Andrew Barr*
COOLEY LLP
380 Interlocken Crescent, Ste. 900
Broomfield, CO 80021-8023
T: (720) 566-4000
F: (720) 566-4099
abarr@cooley.com

Kathleen Hartnett*
COOLEY LLP
101 California Street 5th Floor
San Francisco, CA 94111-5800
T: (415) 693-2000
F: (415) 693-2222
khartnett@cooley.com

Catherine West*
LEGAL VOICE
907 Pine Street, Unit 500
Seattle, WA 98101
T: (206) 682-9552
F: (206) 682-9556
cwest@legalvoice.org

* *Pro hac vice* motion to be filed

Attorneys for Plaintiffs

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO**

LINDSAY HECOX, and JANE DOE
with her next friends JEAN DOE and
JOHN DOE,

Plaintiffs,

v.

No.

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

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; THE INDIVIDUAL MEMBERS OF THE IDAHO CODE COMMISSION, in their official capacities,

Defendants.

NATURE OF ACTION

1. Idaho's recently enacted H.B. 500a, to be codified at Idaho Code, Title 33, Chapter 62 ("H.B. 500"), categorically bars women and girls who

are transgender,¹ and many who are intersex,² from participation in school sports consistent with their gender identity. It does so by requiring proof of “biological sex” based on criteria that intentionally disqualify all women and girls who are transgender and many who are intersex, and which threaten to intrude upon the privacy and bodily autonomy of all women and girls engaged in student athletics. This law is not just out of step with science and prevailing norms of inclusion adopted by athletic associations across the country and around the world, it is unconstitutional and violates federal law.

2. Idaho is the first and only state in the United States to categorically bar the participation of a subset of women in women’s student athletics because they are transgender and/or intersex. Not only does no other state have a categorical bar to girls and women who are transgender playing sports, but also no elite athletic body regulating sports nationally or globally – such as the National Collegiate Athletic Association (“NCAA”) or the Olympics – has such a categorical bar. Nor do any arbitrarily restrict the participation of women and girls with intersex traits to the same extent as H.B. 500. Likewise, no other state or sports regulatory body with a policy addressing the participation of transgender and intersex athletes utilizes (as

¹ A transgender individual is someone who has a gender identity that does not align with the sex they were assigned at birth.

² Intersex is an umbrella term for unique variations in a person’s chromosomes, genitals, hormone function, or internal organs like testes or ovaries. Some intersex traits are identified at birth, while others may not be discovered until puberty or later in life, if ever.

Idaho now will) intrusive genital examinations or chromosomal testing to restrict participation in women's sports. Idaho now stands alone in imposing the threat of unwanted, medically unnecessary invasions to bar and chill participation in women's and girls' athletics.

3. Excluding women and girls who are transgender from participation in women's athletics is not just the *result* of H.B. 500: it was the very purpose of the law. According to bill sponsors, it was written to prevent even girls with female-typical hormone levels from participating in girls' sports if they are transgender. Prior to the passage of H.B. 500, the existing rules in Idaho already required girls who are transgender to "complete one year of hormone treatment related to the gender transition before competing on a girls team." There were no reported issues with the administration of that rule or its effect on athletics in Idaho. In fact, no transgender athlete had even availed herself of Idaho's preexisting rule.³ Unfounded stereotypes and false scientific claims led to the passage of H.B. 500 and are embodied within it. Idaho also enacted H.B. 500 amidst a global pandemic, in conjunction with a law barring the state from accurately reflecting the sex of transgender and some intersex individuals on birth certificates (after such a policy in Idaho had already been adjudicated unconstitutional). In short, H.B.

³ Scott McIntosh, *Idaho is about to join national debate over transgender student-athletes*, Idaho Statesman (Jan. 12, 2020, 6:00 AM), <https://www.idahostatesman.com/opinion/from-the-opinion-editor/article239121313.html>.

500 is entirely unnecessary, was prompted by a campaign targeting transgender and intersex persons, and can be explained only as impermissible and baseless discrimination.

4. In addition to precluding women and girls who are transgender and many who are intersex from participating in women's sports, H.B. 500 opens the door to severe privacy violations and the forced disclosure of women's and girls' sensitive medical information (including those who are neither transgender nor intersex, among others). H.B. 500 requires women and girls, upon a "dispute regarding" their sex, to submit to invasive physical examinations and genetic testing in order to "verify" a vague and indeterminate notion of "biological sex." Idaho Code § 33-6203(3) (engrossment), attached as Exhibit A.

5. By barring women and girls who are transgender, and many who are intersex, from student athletic participation, H.B. 500 impermissibly discriminates on the basis of sex and transgender status and invades fundamental privacy rights. It will cause severe and entirely unnecessary harms and distress, including to a subset of women and girls who already face exceedingly high rates of suicidality due to ongoing societal inequities caused by discrimination of the sort H.B. 500 perpetuates.

PARTIES

Plaintiffs

6. Lindsay Hecox is an adult woman and athlete in Idaho. She will soon finish her freshman year at Boise State University, and she plans to try out for the Boise State cross country team in August 2020. Lindsay is transgender.

7. Jane Doe is a 17-year old girl and athlete in Idaho. She appears in this case through her mother and next friend, Jean Doe, and her father and next friend, John Doe. She will soon finish her junior year at Boise High School, and she plans to try out for soccer in August 2020. Jane is not transgender.

Defendants

8. Defendant Bradley Little (“Governor Little”) is Governor of the State of Idaho. Article VI, section 5 of the Idaho Constitution states: “The supreme executive power of the state is vested in the governor, who shall see that the laws are faithfully executed.” Idaho Const. art. IV, § 5. Governor Little is responsible for upholding and ensuring compliance with state statutes prescribed by the legislature, including H.B. 500. He also bears the authority and responsibility for the formulation and implementation of policies of the executive branch. In addition, he appoints all members of the eight-person State Board of Education other than the Superintendent of Public Instruction. Idaho Code § 33-102. The Governor’s appointees serve for

five-year terms. *Id.* Governor Little is a person within the meaning of 42 U.S.C. § 1983 and acts under color of state law as to the allegations in this complaint. Governor Little's official residence is in Ada County, Idaho, within the District of Idaho. He is sued in his official capacity.

9. Defendant Sherri Ybarra is Superintendent of Public Instruction in Idaho. She is responsible for carrying out policies, procedures, and duties authorized by law regarding secondary school matters. She is also a member of the Idaho State Board of Education. She is a person within the meaning of 42 U.S.C. § 1983 and acts under color of state law as to the allegations in this complaint. Superintendent Ybarra resides in Idaho. She is sued in her official capacity.

10. The individual members of the Idaho State Board of Education (Defendants Debbie Critchfield, David Hill, Emma Atchley, Linda Clark, Shawn Keough, Kurt Liebich, and Andrew Scoggin) have responsibility for the general supervision of Idaho's state educational institutions and its public school system. The Board of Education is required, under H.B. 500, to promulgate rules for schools and institutions to follow to comply with the law. Idaho Code § 33-6203(3) (engrossment). The Board of Education also acts as the board of trustees for Boise State University, and is responsible for the university's supervision, government, and control. Idaho Code § 33-4002. As the university's board of trustees, the Board of Education is responsible for supervising students at the university, including Plaintiff Hecox. Idaho Code

§ 33-4005. The Board of Education’s members are each persons within the meaning of 42 U.S.C. § 1983 and act under color of state law as to the allegations in this complaint. All reside in Idaho. They are sued in their official capacities. Idaho’s state educational institutions, including Boise State University, and Idaho’s public school system are education programs receiving Federal financial assistance. These Defendants are referred to in this Complaint collectively as the “State Board of Education Defendants.”

11. Defendant Boise State University is a public research university located in Boise, Idaho. Its intercollegiate athletic teams are classified as NCAA Division 1. Boise State University is an education program receiving Federal financial assistance.

12. Defendant Dr. Marlene Tromp is the President of Boise State University. She is responsible for carrying out the policies of Boise State University and reports to the State Board of Education. She is a person within the meaning of 42 U.S.C. § 1983 and acts under color of state law as to the allegations in this complaint. She resides in Idaho and is sued in her official capacity.

13. Defendant Independent School District of Boise City #1 (“Boise School District”) is a public school district located in Boise, Idaho. It is an education program receiving Federal financial assistance.

14. Defendant Coby Dennis is the superintendent of the Boise School District. He is responsible for carrying out the policies of the Boise

School District, recommending policies to the District's board of trustees, and making decisions for the District when the board of trustees is in recess. He is a person within the meaning of 42 U.S.C. § 1983 and acts under color of state law as to the allegations in this complaint. He resides in Idaho and is sued in his official capacity.

15. The individual members of the Boise School District's board of trustees (Defendants Nancy Gregory, Maria Greeley, Dennis Doan, Alicia Estey, Dave Wagers, Troy Rohn, and Beth Oppenheimer) are responsible for governing the District in compliance with state law and rules of the State Board of Education. Idaho Code § 33-512(13). The District's board of trustees adopts and oversees the District's policies regarding student athletics and students' participation in interscholastic athletic programs. The board of trustees' members are each persons within the meaning of 42 U.S.C. § 1983 and act under color of state law as to the allegations in this complaint. The board of trustees' members all reside in Idaho and they are all sued in their official capacity. Boise High School, where Plaintiff Jane Doe is a student, is a part of the Boise School District. The Boise School District and Boise High School are education programs receiving Federal financial assistance. Defendant Dennis and the individual members of the Boise School District's board of trustees are referred to in this Complaint collectively as the "Boise School District Defendants."

16. The individual members of the Idaho Code Commission (Defendants Daniel Bowen, Andrew Doman, and Jill Holinka) are also sued in their official capacity and all reside in Idaho. The Code Commission's members are each persons within the meaning of 42 U.S.C. § 1983 and act under color of state law as to the allegations in this complaint. The Idaho Code Commission is an office of the Secretary of State established by statute. Idaho Code §§ 73-201–73-221. The Commission's purpose is to keep the Idaho Code up to date by indicating changes to laws, including constitutional changes, and providing annotations, and the Commission has all power and authority necessary to accomplish that purpose. It has the specific power to keep the Idaho Code up to date, to provide annotations to the Code, and to provide references in the Code to decisions of the federal courts. Idaho Code § 73-205. These Defendants are referred to in this Complaint collectively as the "Idaho Code Commission Defendants."

JURISDICTION AND VENUE

17. This action arises under 42 U.S.C. § 1983 to redress the deprivation under color of state law of rights secured by the United States Constitution and under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.* ("Title IX").

18. This Court has original jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1343 because the matters in controversy arise under laws of the United States, including laws providing

for the protection of civil rights, and because this suit seeks redress for the deprivation, under color of state law, for rights secured by the United States Constitution.

19. Venue is proper in the District of Idaho under 28 U.S.C. § 1391(b)(1) and (2) because the Defendants reside in the District and because a substantial part of the events or omissions giving rise to the claims occurred in the District.

20. This Court has the authority to enter a declaratory judgment and to provide preliminary and permanent injunctive relief pursuant to Rules 57 and 65 of the Federal Rules of Civil Procedure and 28 U.S.C. §§ 2201 and 2202.

21. This Court has personal jurisdiction over Defendants because they are domiciled in Idaho and because their denial of Plaintiffs' rights under the United States Constitution and the laws of the United States occurred within Idaho.

FACTUAL ALLEGATIONS

A. Plaintiffs' Participation in Student Athletics

Lindsay Hecox

22. Lindsay Hecox is a nineteen-year-old woman currently attending Boise State University.

23. A recent photo of Lindsay:



24. Lindsay loves to run. It helps her stay fit and motivated. It helps her feel alive.

25. Lindsay ran track and cross-country on co-ed teams in high school. She loved being on the teams. She is shy, and being on sports teams gave her a way to make friends. She bonded with her teammates.

26. Lindsay chose to go to Boise State University because she fell in love with the running trails and natural beauty around Boise State. She also

knew Boise State had strong track and cross country teams. She was excited at the idea of participating in college athletics.

27. Lindsay is transgender. She is a woman who was assigned the sex of male at birth.

28. Lindsay didn't join the track or cross-country teams her first year at Boise State because she wanted to focus on her medical gender transition.

29. As part of her treatment for gender dysphoria, a medical condition caused by the disconnect between her assigned sex at birth and her female gender identity, Lindsay is treated with both testosterone suppression and estrogen. This treatment lowers her circulating testosterone levels and affects her bodily systems and secondary sex characteristics. For example, her hormone treatment redistributes fat to her hips and breasts, softens her skin, and decreases her muscle mass and size.

30. Lindsay's health and well-being depends on being able to live and express herself as a woman.

31. While beginning her hormone treatment, Lindsay started a co-ed running club at Boise State. The club was just for people to run together for fun and exercise. The club has not participated in competitions. She enjoyed the club experience, but she really missed the camaraderie and motivation that comes with being on a team. Running with people every now and then is not the same feeling as competing together as a team with

regular practices, uniforms, and a coach. Being an athlete and on a sports team is important to Lindsay.

32. Under existing NCAA rules for inclusion of transgender athletes, Lindsay will be eligible to compete in women's sports this fall.

33. Lindsay has been training, and she intends to train all summer. She plans to try out for the women's cross-country team at Boise State in fall 2020. She also plans to try out for track in the spring.

34. Under NCAA eligibility rules, Lindsay only has five potential years to participate in athletics. If she is barred by H.B. 500 from competing in the Fall 2020 season, she will lose a season of NCAA eligibility, which she will never be able to get back.

35. Lindsay was crushed when she learned about H.B. 500 and how it could impact her. The tests for "biological sex" set out in H.B. 500 would exclude her from joining a team with other women. Idaho Code § 33-6203(3) (engrossment).

36. Running on a men's team is not an option for Lindsay. She is not a man, and as a woman who is transgender, it would be painful and humiliating to be forced to be the only woman on a men's team. It would also be contrary to her medical treatment plan for her gender dysphoria, which requires that she live her life in all respects as the woman she is. She is also worried that she would face harassment from other members of the men's team or people who attend meets. In the past, she has seen runners

physically jostle or push each other at meets. She has not met any other women athletes at Boise State who are transgender.

37. Lindsay also feels that H.B. 500, particularly combined with the other bills targeting transgender people that were introduced and passed, has sent a message that it is okay to discriminate against transgender people. She is afraid that she will face more harassment, discrimination, or even violence because of it in her daily life.

38. If H.B. 500 were in effect at the start of the Fall 2020 athletic season, Lindsay would not be able to participate in college athletics at all. She would miss the opportunities to make friends with other women running on the team, and the motivation, challenge, camaraderie, and joy that sport has brought her in the past.

Jane Doe

39. Jane Doe is a 17-year-old girl currently attending Boise High School as a junior.

40. Jane has played sports since she was four years old. She plays soccer and runs track.

41. Jane believes sports have shaped her into the person she is today. She has learned about pushing her limits and tolerating discomfort from challenging track events. She has learned grace and found perseverance from losing to the same team over and over again in soccer. She has felt the satisfaction of her hard work and effort paying off from winning tournaments

at the national level with her club soccer team. She has learned what community and family are from her high school soccer team, where they not only share their love for the game but their love for uniting the school.

42. Jane is cisgender.⁴ She is a girl who was assigned the sex of female at birth.

43. Jane has never had any problems with girls who are transgender or intersex being allowed to play sports. She would welcome the opportunity to compete against girls who are transgender or intersex in the future.

44. In fact, a big part of what Jane loves about sport is the way that sport brings people together and helps a diverse group of young people learn to support each other and work toward a common goal as teammates. She wants everyone to have access to the joy sport brings, including girls who are transgender or intersex.

45. Jane wants to play soccer in the fall of her senior year of high school, like usual. Practice would start on or around August 10.

46. With H.B. 500 becoming law, Jane fears for her privacy and security, both emotionally and physically, if she continues to play sports. She worries that one of her competitors might decide to “dispute” her sex just to

⁴ A cisgender individual is someone who has a gender identity that aligns with the sex they were assigned at birth.

try to keep her from playing. H.B. 500 has created a system that other people could use to bully or harass her.

47. Jane does not commonly wear skirts or dresses, and most of her closest friends are boys. She also has an athletic build. Because of these things, people sometimes think of her as masculine. She worries that people might use that as an excuse to “dispute” her gender.

48. Jane has had to get a physical once every two years in high school to play school sports. Those physicals usually take less than ten to fifteen minutes. Jane and her family fill out a questionnaire. The healthcare provider asks her a few questions and performs a short physical exam that involves listening to her heart and lungs and looking at her spine. She does not get any other tests or exams as part of her sports physical, and her medical providers have never taken her blood or looked at her fully undressed as part of this exam. Her family has not had to pay for her sports physicals because one was covered by insurance and the other was provided free of charge. While she has not gone herself, she knows that some students go to an annual event where health care providers complete the regular sports physical exam for many students on the same day. She thinks those physicals cost around \$20.

49. Jane does not want to have to go through an invasive or uncomfortable test just to prove that she meets the state’s new criteria for being deemed a girl. She finds it horrifying that a doctor might have to

examine her genitals just so she can play sports. She has never had a genetic test, hormone test, or transvaginal pelvic ultrasound (insertion and manipulation of a probe with a camera several inches into the vagina), and her pediatrician has never told her that she needs one. She does not want any of those tests or a pelvic examination unless she needs one for her health. She thinks it is unfair that girls will potentially have to go through invasive physical examinations to play sports, when boys will not.

50. If H.B. 500 is in effect during the Fall 2020 athletic season, Jane would worry about whether she might be seen as “too good” or “too masculine,” and so have her sex disputed. She would fear the invasion of her privacy, and she would be subject to different treatment than boys.

B. Background of Sex Testing in Sport

51. As women and girls gained greater access to athletic competition throughout the twentieth century, their participation led to accusations that successful female athletes were not “really” women. This led to various unfounded, invasive, and destructive so-called “sex verification” practices directed at female athletes, which, over time, became obsolete after informed scientific, medical, ethical, and public consideration. H.B. 500 would retrench such discredited practices.

52. For example, beginning in the 1960s, international competition organizations required female athletes to parade naked in front of a panel of three female doctors to “prove” that they were women. After ethicists and scientists, in addition to the athletes themselves, protested this humiliating,

unscientific, and inhumane practice, it was abandoned and replaced (for a time) with chromosomal testing.⁵

53. Until the 1990s, the buccal (cheek/mouth) swab was used to test for chromosomes and regulate women's competition by the International Olympic Committee ("IOC") and the International Association of Athletics Federations ("IAAF"), now known as World Athletics. However, these organizations abandoned this practice after the case of a female Spanish pole vaulter named María José Martínez-Patiño.

54. Martínez-Patiño had an intersex variation known as Complete Androgen Insensitivity Syndrome ("CAIS"), in which a person has XY chromosomes and internal testes producing high levels of testosterone, but androgen receptors that are unable to process the testosterone. As such, testosterone has none of its usual effects on the person's body. Individuals with CAIS typically have a vulva and are assigned female at birth. Absent intervention, they develop secondary sex characteristics like breasts and hips consistent with a typical puberty without the impact of high levels of testosterone on the body. Most identify as girls and women.

55. In 1985, Martínez-Patiño "failed" the buccal swab because it revealed, unbeknownst to her, that she had XY chromosomes. As a result of that revelation, she was disqualified from women's international competition.

⁵ Vanessa Heggie, *Testing sex and gender in sports; reinventing, reimagining and reconstructing histories*, 34(4) *Endeavour* 157, 160 (2010), <https://doi.org/10.1016/j.endeavour.2010.09.005>

When she tried to participate the 1986 Spanish national championships, she was publicly shamed, her sports scholarship was revoked, and her times were removed from the country's athletic records. Ultimately, she successfully fought her disqualification from women's international competition, obtained her IAAF license, and was permitted to attempt to qualify for the 1992 Olympics in Barcelona, Spain. She failed to do so by ten hundredths of a second, ending her athletic career.

56. Martínez-Patiño faced great personal and professional harm as a result of the misguided belief that she was unfit to participate in women's sports due to her intersex variation. As Martínez-Patiño explains, "I paid a high price for my license—my story was told, dissected, and discussed in a very public way— and my victory was bittersweet."⁶

C. Current Policies of International Sports Bodies

57. Currently, no international sports body regulates sport (as Idaho now would) through chromosomal testing, endogenous hormone levels (intrinsic levels without medical intervention), or genital and internal reproductive organ examinations. These methods have been determined by geneticists, other scientists and medical professionals, as well as human rights experts and international athletic regulatory bodies, to be neither accurate nor ethical proxies for sex or athletic ability.

⁶ María José Martínez-Patiño, *Personal Account: A women tried and tested*, 366 *The Lancet* (Special Issue) S38 (2005), [https://doi.org/10.1016/S0140-6736\(05\)67841-5](https://doi.org/10.1016/S0140-6736(05)67841-5).

58. There are myriad genetic variations among athletes that can enhance athletic performance that are not related to sex characteristics – and have not been targeted for intrusive scrutiny or regulation. As just one example, variations in mitochondrial DNA have been associated with greater endurance capacity and greater mitochondrial density in muscles.

59. Under current IOC regulations and World Athletics regulations, transgender athletes are eligible to compete consistent with their gender identity. This means that women who are transgender are able to compete in women’s sports in the Olympics and other international elite competitions.

60. The IOC recognizes that “[i]t is necessary to ensure insofar as possible that trans athletes are not excluded from the opportunity to participate in sporting competition.”⁷

61. IOC rules allow women who are transgender to compete in the women’s category with proof that they have declared a female gender identity and can establish testosterone suppression under 10 nMol/L for a period of one year.

62. World Athletics has a similar rule to the IOC for women who are transgender to compete in women’s events, but has set the testosterone suppression to 5 nMol/L. Similarly, World Athletics does not bar

⁷ IOC Consensus Meeting on Sex Reassignment and Hyperandrogenism (November 2015), https://stillmed.olympic.org/Documents/Commissions_PDFfiles/Medical_commission/2015-11_ioc_consensus_meeting_on_sex_reassignment_and_hyperandrogenism-en.pdf.

participation by women with intersex traits in women's events. Under guidance issued in 2018, for certain track events, women with elevated testosterone who are androgen sensitive must suppress testosterone to a level below 5 nMol/L in order to compete in the women's category.

63. Eligibility to participate in international elite athletics for women who are transgender and intersex is not determined based on an athlete's chromosomes, reproductive anatomy, or endogenous hormone levels.

64. After substantial research and consultation, experts in endocrinology, ethics, athletics, genetics, and other specialties determined that the standards set by the IOC and World Athletics are consistent with treatment guidelines for transgender individuals and consistent with the broader goals of elite international athletic competition.

65. H.B. 500, which would bar competition in women's sports by all women who are transgender and many women with intersex traits, is far more restrictive than the policies of the most elite athletic regulatory bodies in the world.

D. State and NCAA Policies Prior to H.B. 500

66. 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").

67. The NCAA sets policies for member colleges and universities, including Boise State University and other member colleges and universities in Idaho.

68. Each state and the NCAA set their own standards, if any, for inclusion of transgender individuals in athletic activities.

69. The policies developed by World Athletics and the IOC for participation of transgender athletes, described above, derived from the particular context of elite international competition. Because of that unique context, most interscholastic bodies have *less* stringent rules for participation in high school competition.

70. Prior to the passage of H.B. 500, no state had ever passed a law categorically excluding all women and girls who are transgender from participating in high school or collegiate athletic competition consistent with their gender identity.

71. Prior to the passage of H.B. 500, the policy for transgender inclusion in K-12 athletics in Idaho was set by the IHSAA. Under the 2019-20 IHSAA Rules and Regulations, the policy governing athletes who are transgender allowed participation as follows:

11-3 TRANSGENDER STUDENT PARTICIPATION

A transgender student, defined as a student whose gender identity differs from the student's assigned birth gender, shall be eligible to participate in interscholastic athletics that is consistent with the student's gender identity, under the following conditions:

- a. A female-to-male transgender student athlete who is taking a medically prescribed hormone treatment under a physician's care for the purposes of gender transition may participate only on a boys team.
- b. A male-to-female transgender student athlete who is not taking hormone treatment related to gender transition may participate only on a boys team.
- c. A male-to-female transgender student athlete who is taking medically prescribed hormone treatment under a physician's care for the purposes of gender transition may participate on a boys team at any time, but must complete one year of hormone treatment related to the gender transition before competing on a girls team.
- d. Process: A student athlete who has completed, plans to initiate, or is in the process of taking hormones under a physician's care as part of a gender transition shall submit the request to participate on a sports team to the administration of the student's school and to the IHSAA. The request shall include a letter from the student's physician documenting the student's intention to transition or the student's transition status if the process has already been initiated. This letter shall identify the prescribed hormonal treatment for the student's gender transition and the date the hormone treatment was initiated. The Executive Director shall make a determination whether the student is eligible to compete under the above criteria.
- e. Once the transgender student has been granted eligibility to participate in the sport consistent with his/her gender identity, the eligibility is granted for the duration of the student's participation and does not need to be renewed every sports season or school year.
- f. Once the transgender student selects the gender or the team on which the student wishes to participate, the student thereafter must consistently participate on teams of that gender in all sports for the duration of their high school career.
- g. Appeals: The decision of the Executive Director may be appealed to the Eligibility Committee. The decision of the Eligibility Committee may be appealed to the IHSAA Board of Directors for a review and hearing.
- h. Confidentiality: All discussions among involved parties and the required written supporting documentation shall be kept confidential.

Idaho High School Activities Association, Rules and Regulations, 2019-20,
Rule 11-3.

72. The policy does not reference athletes with intersex traits. Most high school athletic associations do not have policies restricting participation for intersex athletes.

73. The IHSAA policy for transgender athletes was among the most restrictive policies in the country even prior to the passage of H.B. 500. In order to compete in girls' athletics under IHSAA Rule 11-3, a girl who is transgender must have undergone one year of prescribed hormone therapy under the care of a physician for the purposes of gender transition. Many transgender high school students are likely unable to meet that criterion due to limited access to health care providers in rural areas, cost of care not covered by insurance, and potentially unsupportive parents or guardians unwilling to consent to treatment.

74. In contrast to IHSAA Rule 11-3, at least 17 states and the District of Columbia permit individuals to participate in athletics consistent with gender identity without any proof of medical transition. A small minority of states with policies on participation of athletes who are transgender have policies comparable to IHSAA Rule 11-3. Prior to H.B. 500, no state categorically barred the participation of women and girls who are transgender from women's sports. Nor did any state restrict athletic competition based on a physician's evaluation of chromosomes, endogenous hormones, or reproductive anatomy.

75. Like the IHSAA policy, the NCAA policy governing athletes who are transgender allows a woman who is transgender to participate in women's sports after one year of hormone therapy suppressing testosterone.

This NCAA policy was implemented in 2011 after consultation with medical, legal, and sports experts and has been in effect since that time.

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. The NCAA reports that 460,000 student-athletes compete in 24 sports each year.⁸ This likely includes only a handful of athletes who are transgender.

E. The Enactment of H.B. 500

77. On February 13, 2020, H.B. 500, titled “Fairness In Women’s Sport Act,” was introduced in the Idaho House by Rep. Barbara Ehardt (“Rep. Ehardt”). The only aspect of “women’s sport” regulated by the Act concerned the exclusion of women and girls from women’s sports teams if their sex was “dispute[d]” and they could not “verify” their “biological sex” based on enumerated criteria that categorically exclude participation by all women and girls who are transgender and many who are intersex. Idaho Code § 33-6203(3) (engrossment).

78. The genesis of this legislation during a time of growing national pandemic was a “national campaign backed by the Scottsdale-based Alliance Defending Freedom [“ADF”].”⁹ Idaho Rep. Ehardt “received assistance with

⁸ NCAA, Student-Athletes, <http://www.ncaa.org/student-athletes> (last visited Apr. 12, 2020).

⁹ Bob Christie, *Arizona bill would ban transgender girls, women from sports teams*, PBS News Hour (Jan. 24, 2020, 9:27 PM), <https://www.pbs.org/newshour/education/arizona-bill-would-ban-transgender-girls-women-from-teams>, archived at <https://perma.cc/N2XK-DMRM>.

the bill’s language” from ADF, which “has been involved in similar legislative efforts across the country.”¹⁰ Pervasively referring to women and girls who are transgender as male, ADF claims that “Coronavirus Is Not the Only Thing Threatening to Cancel Women’s Sports,”¹¹ which, according to ADF, are “facing a potentially fatal risk” from transgender athletes that “may mean the end of women’s sports.”¹²

79. The operative language of H.B. 500 as introduced provided:

¹⁰ Dan Levin, A Clash Across America Over Transgender Rights, N.Y. Times (Mar. 12, 2020), <https://www.nytimes.com/2020/03/12/us/transgender-youth-legislation.html>, archived at <https://perma.cc/L8EA-KS2H> (reporting interview with Ms. Ehardt).

¹¹ Maureen Collins, *Coronavirus Is Not the Only Thing Threatening to Cancel Women’s Sports*, Blog, Alliance Defending Freedom (Mar. 26, 2020), <https://www.adflegal.org/detailspages/blog-details/allianceedge/2020/03/26/coronavirus-is-not-the-only-thing-threatening-to-cancel-women-s-sports>, archived at <https://perma.cc/9W32-RRRP>.

¹² Maureen Collins, *Idaho Governor Signs Landmark Bill to Save Women’s Sports*, Blog, Alliance Defending Freedom (Apr. 7, 2020), <https://www.adflegal.org/detailspages/blog-details/allianceedge/2020/04/07/idaho-governor-signs-landmark-bill-to-save-women-s-sports>, archived at <https://perma.cc/3WVE-6XWQ>.

33-6203. DESIGNATION OF ATHLETIC TEAMS. (1) Interscholastic, intercollegiate, intramural, or club athletic teams or sports that are sponsored by a public school or any school that is a member of the Idaho high school activities association or a public institution of higher education or any higher education institution that is a member of the national collegiate athletic association (NCAA), national association of intercollegiate athletics (NAIA), or national junior college athletic association (NJCAA) 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) 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.

Idaho Code § 33-6203.

80. On February 19, 2020, the House State Affairs Committee heard testimony on H.B. 500. When asked at that hearing whether any person in Idaho had ever challenged an athlete's eligibility based on gender, Rep. Ehardt admitted that this had never occurred, but speculated that "it is just around the corner."¹³

81. Ty Jones, Executive Director of the IHSAA, answered questions at the hearing and noted that no student had ever complained of participation by transgender athletes, and no transgender athlete had ever competed under the existing policy regulating inclusion of transgender athletes.

¹³ Idaho Education News, *Lawmakers hear emotional testimony but take no action on transgender bill*, Idaho News 6 (Feb. 20, 2020, 9:46 AM), <https://www.kivitv.com/news/education/making-the-grade/lawmakers-hear-emotional-testimony-but-take-no-action-on-transgender>.

82. On February 21, 2020, H.B. 500 was passed out of the House committee.

83. On February 25, 2020, the Idaho Office of the Attorney General warned in a written opinion letter that H.B. 500 raised serious constitutional and other legal concerns due to the disparate treatment and impact that both transgender and intersex athletes would face, as well as the potential privacy intrusion all student-athletes would face.¹⁴

84. On February 26, 2020, the House debated the bill. Rep. Ehardt, the bill sponsor, referred to two girls in high school and one woman in college who are transgender and participating on teams for women and girls. She claimed that the mere fact of the athletes' participation exemplified the "threat" the bill sought to address. Remarks of Rep. Ehardt, House Floor Debate, Feb. 26, 2020 at 43:30. The bill passed the House floor.

85. 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.

86. The next day, on March 10, 2020, the bill was sent to the Committee of the Whole Senate for amendment, where minor amendments were made. The amended version retained the categorical exclusion of transgender women and girls and many intersex athletes and allowed invasive testing upon a "dispute regarding a student's sex," requiring

¹⁴ Letter from Attorney General Lawrence Wadsen to Representative Ilana Rubel (Feb. 25, 2020), https://www.idahopress.com/attorney-generals-opinion-hb-500/pdf_4ebb604a-83eb-5bd4-a232-b13a64f4be47.html.

examination of “the student’s reproductive anatomy, genetic makeup, or normal endogenously produced testosterone levels.” H.B. 500, S. amend., 65th Leg., 2d Regular Sess. – 2020 (Idaho 2020).

87. The engrossed version of H.B. 500 as amended that went to the Senate floor (and that ultimately was signed into law) read, in relevant part:

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 § 33-6203(3) (engrossment).

88. The bill does not specify what reproductive anatomy, genetic makeup, or normal endogenously produced testosterone levels would need to be identified to “verify” a student’s “biological sex.” Idaho Code § 33-6203(3) (engrossment).

89. The day after the bill was sent to the Committee of the Whole Senate, on March 11, 2020, the World Health Organization declared COVID-

19 a pandemic.¹⁵ Many states adjourned state legislative sessions indefinitely or adjourned sine die to protect lawmakers and constituents from the spread of the virus.

90. In contrast, the Idaho Senate remained in session and passed H.B. 500 as amended on March 16, 2020. The House concurred in the Senate amendments on March 18, 2020. The next day, the bill was delivered to Defendant Governor Brad Little.

91. Professor Doriane Lambelet Coleman, whose work was misleadingly cited in the H.B. 500 legislative findings, urged Governor Little to veto the bill, explaining that her work was misused and “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.” Professor Coleman endorsed the existing NCAA rule, which mirrors IHSAA Rule 11-3, and stated: “No other state has enacted such a flat prohibition against transgender athletes, and Idaho shouldn’t either.”¹⁶

¹⁵ World Health Organization, WHO Timeline – COVID-19, <https://www.who.int/news-room/detail/08-04-2020-who-timeline---covid-19> (Last visited Apr. 13, 2020).

¹⁶ Betsy Russell, *Professor whose work is cited in HB 500a, the transgender athletes bill, says bill misuses her research and urges veto*, Idaho Press (Mar. 19, 2020), https://www.idahopress.com/eyeonboise/professor-whose-work-is-cited-in-hb-a-the-transgender/article_0e800202-cac1-5721-a769-3268665316a8.html, archived at <https://perma.cc/NTA7-NJP5>.

92. Five former Idaho Attorneys General likewise urged Governor Little to veto the bill “to keep a legally infirm statute off the books.”¹⁷ They observed that their successor, the incumbent Idaho Attorney General Lawrence Wasden, had identified a “number of legal infirmities” in the statute, including an “apparent conflict with the Equal Protection Clause,” making the law “subject to invalidation in federal court proceedings.” 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.”

93. On March 30, 2020, Governor Little signed H.B. 500 into law. It becomes effective on July 1, 2020.

94. Also signed into law by Governor Little on March 30, 2020 was H.B. 509, a law barring the state from accurately reflecting the sex of transgender and some intersex individuals on Idaho-issued birth certificates. This Court had already ruled that Idaho’s previous policy for restricting updates to the sex designation on birth certificates was unconstitutionally discriminatory, with State of Idaho defendant officials admitting its irrationality. *See F.V. v. Barron*, 286 F. Supp. 3d 1131, 1145 (D. Idaho 2018). Yet, H.B. 509’s supporters urged reenactment of the policy deemed

¹⁷ Tony Park, Wayne Kidwell, David Leroy, Jim Jones, and Al Lance, 5 *former Idaho attorneys general urge transgender bill veto*, Idaho Statesman (Mar. 17, 2020), <https://www.idahostatesman.com/opinion/readers-opinion/article241267071.html>.

unconstitutional because, according to supporters of the bill, “Boys are boys and girls are girls, and no doctor, no judge, no Health & Welfare Department is going to change that reality.”¹⁸

F. Transgender Individuals and Appropriate Medical Treatment

95. “Gender identity” is the medical term for a person’s internal, innate sense of belonging to a particular sex.

96. Medical consensus supports that there is a significant biologic component underlying gender identity.

97. Everyone has a gender identity. An individual’s gender identity is durable and cannot be changed by medical intervention.

98. The term “biological sex” is imprecise. A person’s sex encompasses several different biological attributes, including certain chromosomes, certain genes, gonads, the body’s production of and response to certain hormones, internal and external genitalia, secondary sex characteristics, and gender identity. Those attributes are not always aligned in typical ways.

99. When a child is born, a sex designation usually occurs at birth based on the infant child’s genitals. This designation is then recorded and usually becomes the designation listed on the infant’s birth certificate. Most

¹⁸ Betsy Russell, *Senate votes 27-6 in favor of HB 509, the transgender birth certificate bill, sending it to Gov. Little*, Idaho Press: Eye on Boise, Mar. 17, 2020, https://www.idahopress.com/eyeonboise/senate-votes-27-6-in-favor-of-hb-509-the-transgender-birth-certificate-bill-sending/article_1d9fad0f-3f4d-5b79-abef-3fe56f2cc1bf.html, archived at <https://perma.cc/9ZPL-7WRW> (quoting Idaho Sen. Lee Heider).

people have a gender identity that aligns with the sex they are assigned at birth.

100. A transgender individual is someone who has a gender identity that does not align with the sex they are assigned at birth. This lack of alignment experienced by transgender individuals can create significant distress that is felt by children as young as two years old.

101. According to the American Psychiatric Association's Diagnostic & Statistical Manual of Mental Disorders ("DSM-V"), "gender dysphoria" is the diagnostic term for the condition where clinically significant distress results from the lack of congruence between a person's gender identity and the sex they are designated at birth.

102. Gender dysphoria is a serious medical condition that, if left untreated, can result in severe anxiety and depression, self-harm, and suicidality.

103. Attempted suicide rates in the transgender community are over 40%. The only treatment to avoid this serious harm is to recognize the gender identity of patients with gender dysphoria and follow appropriate treatment protocols to affirm gender identity and alleviate distress.

104. The Endocrine Society and the World Professional Association for Transgender Health have published widely accepted standards of care for treating individuals with gender dysphoria. The goal of medical treatment for

gender dysphoria is to eliminate the clinically significant distress by helping a transgender person live in alignment with their gender identity.

105. Every major medical association in the United States agrees that the medically necessary treatment for gender dysphoria is safe, necessary, and effective.

106. The precise treatment for gender dysphoria depends on each person's individualized need, and the medical standards of care differ depending on whether the treatment is for a pre-pubertal child, an adolescent, or an adult.

107. For transgender individuals of all ages, a critical part of treatment is affirming "social transition": the process by which a person expresses themselves consistent with gender identity. It undermines social transition to force a person with gender dysphoria to live in a manner that does not align with the person's gender identity. For example, requiring a girl who is transgender to use facilities or participate in single-sex activities for boys can be deeply harmful and disruptive to treatment. In the context of activities like athletics, forcing a girl who is transgender out of spaces designated for girls is extremely harmful and can result in serious health consequences.

108. For many transgender adolescents, going through endogenous puberty can cause extreme distress. Puberty-blocking treatment allows transgender youth to avoid going through their endogenous puberty, thereby

avoiding the heightened gender dysphoria and permanent physical changes that puberty would cause.

109. Puberty-blocking treatment pauses endogenous puberty at whatever stage it is at when the treatment begins. This has the impact of limiting the influence of a person's endogenous hormones on the body. For example, a girl who is transgender who undergoes puberty-blocking treatment will experience none of the impacts of testosterone that would be typical if she underwent her endogenous puberty.

110. The overwhelming majority of youth who are treated with puberty-blocking treatment continue treatment and initiate medically necessary, gender-affirming hormone therapy to initiate puberty consistent with gender identity. For girls who are transgender this means administering both testosterone-suppressing treatment as well as estrogen to initiate hormonal puberty consistent with gender identity and preventing the impacts of testosterone that would result from their endogenous puberty. For boys who are transgender this means administering testosterone.

111. Treatment protocols for adults also recommend gender-affirming therapy for patients to alleviate distress when deemed medically necessary.

112. Hormone therapy and social transition significantly change a person's physical appearance and bodily systems.

113. After the age of majority, and in some cases beginning around the age of 16, transgender individuals may be treated with surgery to bring

their body into further alignment with their gender identity. Some surgical treatment alters hormone production and reduces or eliminates the need for patients to administer exogenous hormones as part of treatment of gender dysphoria. Not all transgender people need surgical treatment to alleviate their dysphoria.

G. Intersex Individuals

114. Intersex people, who comprise up to 2% of the population, are born with variations in physiological characteristics associated with sex. These variations may appear in a person's chromosomes, genitals, internal organs like testes or ovaries, secondary sex characteristics, or hormone production or response.

115. Not all intersex traits are discovered at birth. Some might become apparent at puberty, later in adulthood, or never. In cases where there are clear variations among sex attributes, experts may disagree on the "correct" sex to designate an intersex child in infancy.

116. However, medical experts agree that when an individual's sex attributes conflict, the attribute that should be determinative is their self-attested gender identity once it is known. Therefore, if a sex designation in infancy is made that later conflicts with a person's gender identity, the appropriate course of action is to re-designate the individual's sex in line with gender identity.

117. Often, children discovered to be intersex in infancy are subjected to nonconsensual, harmful, and irreversible "normalizing" surgical

interventions, including reducing the size of the clitoris, creating a vaginal opening, and removing hormone-producing gonads in an attempt to erase their intersex differences based on notions of what is “normal” for boys’ or girls’ bodies. These interventions, when performed without the consent of the affected individual, have been condemned by every human rights organization to have considered the issue. Though the practice is increasingly under question by authorities, many intersex individuals, including youth, have extreme medical trauma related to nonconsensual genital interventions.

118. There are roughly forty variations in which a person’s sex characteristics (such as chromosomes, genitalia, hormones) do not all align in typical male or female ways. In addition to CAIS (described above with respect to María Martínez-Patiño), these variations include Partial Androgen Insensitivity Syndrome (PAIS), Swyer Syndrome, Turner Syndrome, Mosaicism, Ovotesticular DSD, Congenital Adrenal Hyperplasia (CAH), and 5-Alpha Reductase Deficiency (5-ARD), among others.

119. In an estimated one out of every 1,000 to 2,000 live births, the infant’s genitals do not appear typically male or female. Many intersex traits are not visible at birth. Given that approximately 2% of the population has an intersex variation, in any given school district, there are likely to be multiple students with intersex traits.

120. The type of sex verification testing that H.B. 500 requires could reveal intersex traits, in some instances for the first time. For example, a

genetic test could reveal that someone had XY chromosomes despite having been assigned female at birth (as for María Martínez-Patiño). It could also reveal that a person had less common chromosomal combinations, like XO, XXY, or mosaicism (a different chromosome combination in different cells of the body). An examination of internal reproductive anatomy could reveal that someone did not have a uterus or ovaries, despite having been born with female-typical external anatomy. A hormone test could reveal an unexpected level of one or more hormones associated with sex. Because any one test required under H.B. 500 might produce atypical results for an intersex girl or woman, she might have to undergo additional tests in an attempt to prove her sex under the law.

H. H.B. 500 Is Directed at and Harms Only Women and Girls, Including Women and Girls Who Are Transgender and Intersex

121. Under H.B. 500, all women and girls who are transgender are barred from athletic activities for women and girls. This is so because transgender women will not be able to establish a “biological sex” of female based on the deliberately limited bases of “proof” available under H.B. 500: internal and external reproductive anatomy, chromosomes, or endogenous testosterone levels (intrinsic levels without medical intervention). Even women who have had gender-affirming genital surgery to treat gender dysphoria, and therefore may meet the test imposed by H.B. 500 as to external reproductive anatomy, would not have a uterus or ovaries, and so would not meet it as to internal reproductive anatomy. The vast majority of

women who are transgender have XY chromosomes. And even women who are transgender whose circulating testosterone levels are within a range typical of non-transgender women would be disqualified because those testosterone levels are influenced by treatment for gender dysphoria, and thus not “endogenous.”

122. Under H.B. 500, some women and girls with intersex traits will be completely barred from athletics consistent with their gender identity as well, because they will likewise be unable to establish a “biological sex” of female based on reproductive anatomy, chromosomes, or endogenous testosterone levels. Intersex girls with congenital adrenal hyperplasia, for example, may be judged to have genitals that appear “too masculine.” Intersex girls with CAIS (like María Martínez-Patiño) could be disqualified on the basis of their XY chromosomes, testosterone levels, or internal testes, despite the fact that their bodies are not responsive to the testosterone they produce. Other women and girls with intersex traits might be permitted to participate on women’s teams, but only after enduring invasive and traumatizing examinations to assess their sex characteristics, and after sharing information from those examinations with school officials.

123. H.B. 500 is expressly directed at only women’s and girls’ sports; it does not restrict participation in men’s and boys’ sports. It states that “[a]thletic teams or sports designated for females, women, or girls shall not be open to students of the male sex,” with no comparable provision for men’s

and boys' sports, and then sets out the only criteria that may be used to determine "sex" for this purpose. Idaho Code § 33-6203(2).

124. H.B. 500 authorizes, and includes no mechanisms to protect athletes from, unwarranted intrusion into their bodies and disclosure of private medical information. Nor does H.B. 500 protect against further disclosure of private medical information by school officials to others.

125. The language of H.B. 500 does not limit who may "dispute" an individual's sex as not being "biological[ly]" female.

126. Female athletes who are successful, who have features that are considered masculine, or who simply become someone's target, may have their sex "dispute[d]" and may then be subjected to invasive medical testing.

127. The purpose of a sports physical is to make sure that a student-athlete does not have an underlying health condition that could result in serious injury or death while participating in athletics. Genetic tests, internal and external reproductive anatomy exams, and blood tests for endogenous hormone levels – the exclusive means of testing for "biological sex" as required by H.B. 500 – are not part of any standard athletic physical or other examination that women and girls typically undergo. In addition, the tests laid out in H.B. 500 can be very expensive, and a student-athlete and her family may be forced to bear the costs of the testing.

128. Genetic testing, pelvic examinations, transvaginal pelvic ultrasounds, and blood tests can and do reveal a significant amount of extremely private personal information.

129. Genetic testing, pelvic examinations, transvaginal pelvic ultrasounds, and blood tests can cause trauma and trigger past sexual and other types of trauma.

130. The language of H.B. 500 does not impose any limits on school officials disclosing information they receive about these tests to others.

131. Fear of being subject to such invasive testing will deter female athletes, including but not limited to women and girls who are transgender and intersex, from participating in athletics.

132. Athletics offer a range of benefits to children and young adults that are experienced throughout life. For example, athletes who participate in high school sport are more likely to finish college and more likely to be actively engaged in planning for their future after their sport career ends. One study found that women who participated in high school sport enjoyed greater success in the business world.

133. Athletics offer students in school a range of physical and emotional health benefits, including an opportunity to gain confidence, to develop important social and coping skills, and to build social connections.

134. Policies that bar subsets of women and girls from athletic competition for women and girls limit the benefits of athletics for *all* women

and girls. Such policies also discourage, rather than encourage, participation in athletics.

135. Excluding girls who are transgender and intersex from athletics alongside their peers increases shame and stigma and contributes to negative physical and emotional health outcomes for those who are excluded.

136. Often young girls who are transgender or intersex are not known to be transgender or intersex in their schools and by their peers. H.B. 500 thus could force them to either abandon participation in sports or disclose this private information. Both options risk stigma, shame, isolation, and physical and emotional harm.

137. Policies that exclude girls and women who are transgender from activities for girls and women interfere with treatment for gender dysphoria, increase risk of suicide, and contribute to negative health outcomes.

CLAIMS FOR RELIEF

COUNT I

Deprivation of Equal Protection

U.S. Const. Amend. XIV

Plaintiff Hecox against Defendant Little, State Board of Education
Defendants, and Defendant Tromp

Plaintiff Doe against Defendant Little, Defendant Ybarra, State Board of
Education Defendants, and Boise School District Defendants

138. Plaintiffs incorporate paragraphs 1 through 137 as though fully set forth herein.

139. Plaintiffs bring this Count against Defendant Little and the State Board of Education Defendants. Plaintiff Hecox also brings this Count

against Defendant Tromp. Plaintiff Doe also brings this Count against Defendant Ybarra and the Boise School District Defendants.

140. The Equal Protection Clause of the Fourteenth Amendment, enforceable pursuant to 42 U.S.C. § 1983, provides that no state shall “deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1.

141. Under the Equal Protection Clause, discrimination by the government based both on sex and transgender status is tested under heightened scrutiny and is therefore presumptively unconstitutional absent a showing by the government that the discrimination is substantially related to an important state interest.

142. Transgender individuals as a group possess all the indicia of a suspect class that have been identified by the Supreme Court as triggering heightened scrutiny, including: (1) transgender people have experienced a history of discrimination; (2) transgender people are a discrete and insular minority who lack the political power to protect themselves through the legislative process; (3) being transgender does not limit or affect one’s ability to contribute to society; and (4) being transgender is a core part of one’s identity so fundamental to one’s identity and conscience that a person cannot be required to abandon it as a condition of equal treatment.

143. H.B. 500 singles out women, individuals who depart from sex stereotypes, transgender people, and intersex people for discriminatory treatment.

144. Under H.B. 500, only those competing in women's sports are subject to being excluded if their sex is "disputed" and they do not submit to invasive treatment in order to "verify" they are women; those competing in men's sports may participate without having to undergo invasive testing under the new law.

145. Under H.B. 500, girls and women who are transgender and intersex girls and women deemed insufficiently female or insufficiently feminine are barred from athletic competition consistent with their gender identity.

146. H.B. 500 is an extreme departure from athletic policy anywhere in the world.

147. H.B. 500 was passed in the midst of a global pandemic, along with another bill targeting transgender people.

148. H.B. 500 was passed based on unfounded stereotypes and false scientific claims.

149. H.B. 500 was passed even though Idaho had a preexisting policy regarding transgender athletes that was consistent with the most stringent standards in national and international athletic competition. H.B. 500 was passed even though there were no reported issues of people misusing Idaho's

preexisting policy; in fact, there was no record of any athletes using that policy at all.

150. H.B. 500 is not substantially related to any important state interest.

151. H.B. 500 is not rationally related to any legitimate state interest.

COUNT II

Deprivation of Substantive Due Process
Infringement Upon Right to Informational Privacy
U.S. Const. Amend. XIV

Plaintiff Hecox against Defendant Little, State Board of Education
Defendants, and Defendant Tromp
Plaintiff Doe against Defendant Little, Defendant Ybarra, State Board of
Education Defendants, and Boise School District Defendants

152. Plaintiffs incorporate paragraphs 1 through 151 as though fully set forth herein.

153. Plaintiffs bring this Count against Defendant Little and the State Board of Education Defendants. Plaintiff Hecox also brings this Count against Defendant Tromp. Plaintiff Doe also brings this Count against Defendant Ybarra and the Boise School District Defendants.

154. The Due Process Clause of the Fourteenth Amendment places limitations on state action that deprives individuals of life, liberty, or property.

155. Substantive protections of the Due Process Clause include the right to avoid disclosure of sensitive, personal information.

156. There is a fundamental right of privacy in preventing the release of, and in deciding in what circumstances to release: (1) personal information that, if disclosed, could subject an individual to bodily harm; and (2) information of a highly personal and intimate nature, including medical information.

157. By forcing women and girls to undergo invasive internal and external reproductive examinations and turn over sensitive information to the government to participate in athletic activities, H.B. 500 infringes Plaintiffs' right to privacy.

158. There is no compelling state interest that is furthered by H.B. 500, nor is H.B. 500 narrowly tailored or the least restrictive alternative for promoting a state interest. H.B. 500 is not even rationally related to a legitimate state interest.

159. In addition, the privacy interests of women and girls subjected to the forced disclosure of sensitive information, including genetic information and information about their genital and reproductive anatomy, outweigh any purported interest the government could assert.

160. Because the government lacks a sufficient interest in subjecting women and girls to intrusive and offensive testing and learning the privacy-invasive results of those tests, H.B. 500 violates Plaintiffs' right to privacy.

161. H.B. 500 further violates Plaintiffs' right to privacy because it lacks safeguards to prevent unauthorized disclosure by school officials of the sensitive information learned through this intrusive and offensive testing.

COUNT III

Unconstitutional Search & Seizure

U.S. Const. Amend. IV

**Plaintiff Hecox against Defendant Little, State Board of Education
Defendants, and Defendant Tromp**

**Plaintiff Doe against Defendant Little, Defendant Ybarra, State Board of
Education Defendants, and Boise School District Defendants**

162. Plaintiffs incorporate paragraphs 1 through 161 as though fully set forth herein.

163. Plaintiffs bring this Count against Defendant Little and the State Board of Education Defendants. Plaintiff Hecox also brings this Count against Defendant Tromp. Plaintiff Doe also brings this Count against Defendant Ybarra and the Boise School District Defendants.

164. The Fourth Amendment to the United States Constitution, enforceable pursuant to 42 U.S.C. § 1983, provides that “[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . .” U.S. Const. amend. IV.

165. A government-compelled medical test is a search under the Fourth Amendment.

166. Government-compelled and medically unnecessary pelvic examinations, transvaginal pelvic ultrasounds, blood tests, and genetic tests are searches under the Fourth Amendment.

167. A government-compelled disclosure of private medical information is a search under the Fourth Amendment.

168. Subjecting women and girls to invasive medical testing that is not medically necessary or appropriate, and forcing them to disclose the results of this testing to the government, is unreasonable.

169. The government has no legitimate basis for the forced testing or disclosure of private medical information of girls and women.

170. The searches involve invasive and offensive intrusions on the bodies of girls and women, and obtain information that is highly sensitive and private.

171. By forcing athletes subjected to a “dispute” over their sex to disclose to their school private medical information, including information about their genetics, hormones, and/or genitals, H.B. 500 subjects female athletes in Idaho to unreasonable searches in violation of the Fourth Amendment.

COUNT IV

Violation of Title IX

20 U.S.C. § 1681, *et seq.*

Plaintiff Hecox against Defendant Boise State University

Plaintiff Doe against Boise School District

172. Plaintiff incorporates paragraphs 1 through 171 as though fully set forth herein.

173. Plaintiff Hecox brings this Count against Boise State University. Plaintiff Doe brings this Count against Defendant Boise School District.

174. Title IX provides that “[n]o 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.” 20 U.S.C. § 1681(a).

175. Under Title IX, discrimination “on the basis of sex” encompasses discrimination against individuals because they are transgender, because they are women and girls (whether cisgender or transgender), and because they depart from stereotypes associated with sex (which can include stereotypes about sex characteristics that are or are not typically associated with being male or female).

176. The statutory language of Title IX does not exempt athletic programs from the broad prohibition on discrimination. The implementing regulations for Title IX permit sports teams to be separated by sex but do not mandate such separation.

177. Neither Title IX, its regulations, nor its guidance purports to define “sex” based on endogenous hormone levels, internal or external reproductive anatomy, or chromosomes, nor do they specify what constitutes separation of sex for purposes of athletic activities, should a school choose to separate certain sports teams by sex.

178. Pursuant to H.B. 500, Defendants Boise State University and the Boise School District are required to obtain from a student athlete whose sex is “disputed”: “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.” Idaho Code § 33-6203(3) (engrossment).

179. Only girls and women can be excluded from participation in sports under H.B. 500.

180. By barring Plaintiff Hecox from girls’ and women’s athletic teams, Defendants exclude her from, deny her the benefits of, and subject her to discrimination in educational programs and activities “on the basis of sex,” in violation of her rights under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.*

181. By subjecting Plaintiff Doe to potential “dispute” over her sex and exposing her to invasive, expensive, and unnecessary medical testing, Defendants deny her the benefits of, and subject her to discrimination in educational programs and activities “on the basis of sex,” in violation of her

rights under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.*

COUNT V
Lack of Fair Notice
U.S. Const. Amend. XIV
Plaintiffs against the Idaho Code Commission Defendants

182. Plaintiff incorporates paragraphs 1 through 181 as though fully set forth herein.

183. Plaintiffs bring this Count against the members of the Idaho Code Commission in their official capacities.

184. Because H.B. 500 is unconstitutional, the Idaho Code misleads and deceives school officials, other government actors, students, and the general public about the requirements of the law. The publication of H.B. 500's provisions in the official Idaho Code without clear notice stating that the law is unconstitutional and unenforceable coerces compliance with the law despite its unconstitutionality and illegality, chills women and girls from participating in student sports, and promotes unconstitutional and illegal enforcement of the law by school officials and other government actors.

185. The lack of fair notice of the unconstitutionality and unenforceability of H.B. 500 in the Idaho Code violates the due process clause of the Fourteenth Amendment to the U.S. Constitution.

186. Under 42 U.S.C. § 1983, Plaintiffs are entitled to injunctive relief requiring defendants to publish clear notice in the official Idaho Code of the Act's unconstitutionality and unenforceability.

187. Plaintiffs are also entitled under 28 U.S.C. §§ 2201–2202 to a declaratory judgment declaring that official publication of Idaho Code §§ 33-6201–6206 without clear notice of those provisions’ unconstitutionality and unenforceability is unconstitutional.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court enter orders and judgment:

A. Declaring that the provisions of and enforcement by Defendants of H.B. 500 as discussed above violate Plaintiffs’ rights under the Equal Protection and Due Process Clauses of the Fourteenth Amendment and the Fourth Amendment to the United States Constitution;

B. Declaring that the provisions of and enforcement by Defendants of H.B. 500 as discussed above violate Plaintiffs’ rights under Title IX;

C. Declaring that official publication of Idaho Code §§ 33-6201–6206 without clear notice of those provisions’ unconstitutionality and unenforceability is unconstitutional;

D. Preliminarily and permanently enjoining enforcement or any threat of enforcement by Defendants and their employees, agents, appointees, or successors of H.B. 500 as discussed above;

E. Preliminarily and permanently enjoining the individual members of the Idaho Code Commission and their employees, agents,

appointees, and successors to publish clear notice that Idaho Code §§ 33-6201–6206 are unconstitutional, unenforceable, null, and void;

F. Waiving the requirement for the posting of a bond as security for entry of temporary or preliminary injunctive relief;

G. Awarding Plaintiffs their costs, expenses, and reasonable attorneys’ fees pursuant to 42 U.S.C. § 1988 and other applicable laws; and

H. Granting such other and further relief as the Court deems just and proper.

Dated: April 15, 2020

Respectfully submitted,

/s/ Richard Eppink

Richard Eppink (Bar No. 7503)
AMERICAN CIVIL LIBERTIES UNION
OF IDAHO
FOUNDATION
P. O. Box 1897
Boise, ID 83701
United States
T: (208) 344-9750 ext. 1202
REppink@acluidaho.org

Gabriel Arkles*
James Esseks*
Chase Strangio*
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
125 Broad St.,
New York, NY 10004
T: (212) 549-2569
garkles@aclu.org
jesseks@aclu.org
cstrangio@aclu.org

Kathleen Hartnett*
COOLEY LLP
101 California Street 5th Floor
San Francisco, CA 94111-5800
T: (415) 693-2000
F: (415) 693-2222
khartnett@cooley.com

Elizabeth Prelogar*
COOLEY LLP
1299 Pennsylvania Avenue, NW
Suite 700
Washington D.C. 20004-2400
T: (202) 842-7800
F: (202) 842-7899
eprelogar@cooley.com

Andrew Barr*
COOLEY LLP
380 Interlocken Crescent, Ste. 900
Broomfield, CO 80021-8023
T: (720) 566-4000
F: (720) 566-4099
abarr@cooley.com

Catherine West*
LEGAL VOICE
907 Pine Street, Unit 500
Seattle, WA 98101
T: (206) 682-9552
F: (206) 682-9556
cwest@legalvoice.org

**Pro Hac Vice Motion To Be Filed*

EXHIBIT A

LEGISLATURE OF THE STATE OF IDAHO
Sixty-fifth Legislature Second Regular Session - 2020

IN THE HOUSE OF REPRESENTATIVES

HOUSE BILL NO. 500, As Amended in the Senate

BY EDUCATION COMMITTEE

AN ACT

RELATING TO THE FAIRNESS IN WOMEN'S SPORTS ACT; AMENDING TITLE 33, IDAHO CODE, BY THE ADDITION OF A NEW CHAPTER 62, TITLE 33, IDAHO CODE, TO PROVIDE A SHORT TITLE, TO PROVIDE LEGISLATIVE FINDINGS AND PURPOSE, TO PROVIDE FOR THE DESIGNATION OF ATHLETIC TEAMS, TO PROVIDE PROTECTION FOR EDUCATIONAL INSTITUTIONS, TO PROVIDE FOR A CAUSE OF ACTION, AND TO PROVIDE SEVERABILITY.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Title 33, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW CHAPTER, to be known and designated as Chapter 62, Title 33, Idaho Code, and to read as follows:

CHAPTER 62
FAIRNESS IN WOMEN'S SPORTS ACT

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

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 life-long 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;

1 (6) While classifications based on sex are generally disfavored, the
2 Supreme Court has recognized that "sex classifications may be used to com-
3 pensate women for particular economic disabilities [they have] suffered, to
4 promote equal employment opportunity, [and] to advance full development of
5 the talent and capacities of our Nation's people," *United States v. Vir-*
6 *ginia*, 518 U.S. 515, 533 (1996);

7 (7) One place where sex classifications allow for the "full develop-
8 ment of the talent and capacities of our Nation's people" is in the context of
9 sports and athletics;

10 (8) Courts have recognized that the inherent, physiological differ-
11 ences between males and females result in different athletic capabilities.
12 See e.g. *Kleczek v. Rhode Island Interscholastic League, Inc.*, 612 A.2d
13 734, 738 (R.I. 1992) ("Because of innate physiological differences, boys
14 and girls are not similarly situated as they enter athletic competition.");
15 *Petrie v. Ill. High Sch. Ass'n*, 394 N.E.2d 855, 861 (Ill. App. Ct. 1979)
16 (noting that "high school boys [generally possess physiological advantages
17 over] their girl counterparts" and that those advantages give them an unfair
18 lead over girls in some sports like "high school track");

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

26 (10) As Duke Law professor and All-American track athlete Doriane Cole-
27 man, tennis champion Martina Navratilova, and Olympic track gold medalist
28 Sanya Richards-Ross recently wrote: "The evidence is unequivocal that
29 starting in puberty, in every sport except sailing, shooting, and riding,
30 there will always be significant numbers of boys and men who would beat the
31 best girls and women in head-to-head competition. Claims to the contrary are
32 simply a denial of science," Doriane Coleman, Martina Navratilova, et al.,
33 *Pass the Equality Act, But Don't Abandon Title IX*, *Washington Post* (Apr. 29,
34 2019);

35 (11) The benefits that natural testosterone provides to male athletes
36 is not diminished through the use of puberty blockers and cross-sex hor-
37 mones. A recent study on the impact of such treatments found that even "after
38 12 months of hormonal therapy," a man who identifies as a woman and is taking
39 cross-sex hormones "had an absolute advantage" over female athletes and
40 "will still likely have performance benefits" over women, Tommy Lundberg
41 et al., "Muscle strength, size and composition following 12 months of gen-
42 der-affirming treatment in transgender individuals: retained advantage for
43 the transwomen," *Karolinksa Institutet* (Sept. 26, 2019); and

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

1 33-6203. DESIGNATION OF ATHLETIC TEAMS. (1) Interscholastic, inter-
2 collegiate, intramural, or club athletic teams or sports that are sponsored
3 by a public primary or secondary school, a public institution of higher edu-
4 cation, or any school or institution whose students or teams compete against
5 a public school or institution of higher education shall be expressly desig-
6 nated as one (1) of the following based on biological sex:

- 7 (a) Males, men, or boys;
8 (b) Females, women, or girls; or
9 (c) Coed or mixed.

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

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

22 33-6204. PROTECTION FOR EDUCATIONAL INSTITUTIONS. A government
23 entity, any licensing or accrediting organization, or any athletic associa-
24 tion or organization shall not entertain a complaint, open an investigation,
25 or take any other adverse action against a school or an institution of higher
26 education for maintaining separate interscholastic, intercollegiate, in-
27 tramural, or club athletic teams or sports for students of the female sex.

28 33-6205. CAUSE OF ACTION. (1) Any student who is deprived of an ath-
29 letic opportunity or suffers any direct or indirect harm as a result of a vi-
30 olation of this chapter shall have a private cause of action for injunctive
31 relief, damages, and any other relief available under law against the school
32 or institution of higher education.

33 (2) Any student who is subject to retaliation or other adverse action by
34 a school, institution of higher education, or athletic association or organ-
35 ization as a result of reporting a violation of this chapter to an employee
36 or representative of the school, institution, or athletic association or or-
37 ganization, or to any state or federal agency with oversight of schools or
38 institutions of higher education in the state, shall have a private cause of
39 action for injunctive relief, damages, and any other relief available under
40 law against the school, institution, or athletic association or organiza-
41 tion.

42 (3) Any school or institution of higher education that suffers any di-
43 rect or indirect harm as a result of a violation of this chapter shall have a
44 private cause of action for injunctive relief, damages, and any other relief
45 available under law against the government entity, licensing or accrediting
46 organization, or athletic association or organization.

47 (4) All civil actions must be initiated within two (2) years after the
48 harm occurred. Persons or organizations who prevail on a claim brought pur-

1 suant to this section shall be entitled to monetary damages, including for
2 any psychological, emotional, and physical harm suffered, reasonable attor-
3 ney's fees and costs, and any other appropriate relief.

4 33-6206. SEVERABILITY. The provisions of this chapter are hereby de-
5 clared to be severable and if any provision of this chapter or the applica-
6 tion of such provision to any person or circumstance is declared invalid for
7 any reason, such declaration shall not affect the validity of the remaining
8 portions of this chapter.

APPEAL,LC20

U.S. District Court
District of Idaho (LIVE Database)Version 6.3 (Boise - Southern)
CIVIL DOCKET FOR CASE #: 1:20-cv-00184-DCN

Hecox, et al. v. Little, et al.
Assigned to: Judge David C. Nye
Case in other court: USCA, 20-35813
USCA, 20-35815
Cause: 42:1983 Civil Rights Act

Date Filed: 04/15/2020
Jury Demand: None
Nature of Suit: 950 Constitutional -
State Statute
Jurisdiction: Federal Question

Plaintiff

Lindsay Hecox

represented by **Andrew Barr**

Cooley, LLP
380 Interlocken Crescent, Suite 900
Broomfield, CO 80022-8023
(720) 566-4121
Fax: 720-566-4099
Email: abarr@cooley.com
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Catherine Ann West
Legal Voice
907 Pine Street, Suite 500
Seattle, WA 98101
206-375-6285
Email: cwest@legalvoice.org
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Chase Strangio
American Civil Liberties Union
Foundation
125 Broad Street, 18th Floor
New York, NY 10004
212-284-7320
Email: cstrangio@aclu.org
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Elizabeth Prelogar
Cooley, LLP

ER817

9/30/2020

1299 Pennsylvania Avenue NW
Suite 700
Washington, DC 20004-2400
202-842-7800
Email: eprelogar@cooley.com
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Gabriel Arkles
American Civil Liberties Union
Foundation
125 Broad Street, 18th Floor
New York, NY 10004
212-549-2569
Email: garkles@aclu.org
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

James Esseks
American Civil Liberties Union
Foundation
125 Broad Street, 18th Floor
New York, NY 10004
212-549-2623
Email: jesseks@aclu.org
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Kathleen Hartnett
Cooley, LLP
101 California Street, 5th Floor
San Francisco, CA 94111-5800
415-693-2000
Email: khartnett@cooley.com
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Richard Alan Eppink
American Civil Liberties Union of
Idaho Foundation
P.O. Box 1897
Boise, ID 83701
208-344-9750 ext. 1202
Fax: 208-344-7201
Email: reppink@acluidaho.org

ER818

9/30/2020

*LEAD ATTORNEY
ATTORNEY TO BE NOTICED*

Plaintiff

Jane Doe

*with her next friends Jean Doe and
John Doe*

represented by **Andrew Barr**

(See above for address)
*LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED*

Catherine Ann West

(See above for address)
*LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED*

Chase Strangio

(See above for address)
*LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED*

Elizabeth Prelogar

(See above for address)
*LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED*

Gabriel Arkles

(See above for address)
*LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED*

James Esseks

(See above for address)
*LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED*

Kathleen Hartnett

(See above for address)
*LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED*

Richard Alan Eppink

(See above for address)

*LEAD ATTORNEY
ATTORNEY TO BE NOTICED*

V.

Defendant

Bradley Little

*in his official capacity as Governor of
the State of Idaho*

represented by **Dayton Patrick Reed**

Office of the Attorney General
PO Box 83720

Boise, ID 83720-0010
208-334-2400

Email: dayton.reed@ag.idaho.gov

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Steven Lamar Olsen

OFFICE OF THE ATTORNEY
GENERAL

POB 83720

Boise, ID 83720-0010
(208) 334-2400

Fax: (208) 854-8073

Email: steven.olsen@ag.idaho.gov

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

W Scott Zanzig

Office of the Idaho Attorney General,
Civil Litigation

POB 83720

Boise, ID 83720-0010
208-332-3556

Email: scott.zanzig@ag.idaho.gov

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Defendant

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*

represented by **Dayton Patrick Reed**

(See above for address)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Steven Lamar Olsen

(See above for address)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

W Scott Zanzig

ER820

(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

**Individual Members of the State
Board of Education**
in their official capacities

represented by **Dayton Patrick Reed**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Steven Lamar Olsen
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

W Scott Zanzig
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

Boise State University

represented by **Dayton Patrick Reed**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Matthew K Wilde
208-426-1203
Email: mattwilde@boisestate.edu
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Steven Lamar Olsen
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

W Scott Zanzig
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

Marlene Tromp
*in her official capacity as President of
Boise State University*

represented by **Dayton Patrick Reed**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Matthew K Wilde

(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Steven Lamar Olsen
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

W Scott Zanzig
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

**Independent School District of Boise
City #1**

represented by **Dayton Patrick Reed**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Steven Lamar Olsen
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

W Scott Zanzig
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

Coby Dennis
*in his official capacity as
superintendent of the Independent
School District of Boise City #1*

represented by **Dayton Patrick Reed**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Steven Lamar Olsen
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

W Scott Zanzig
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

**Individual Members of the Board of
Trustees of the Independent School**

represented by **Dayton Patrick Reed**
(See above for address)

District of Boise City #1
in thier official capacities

LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Steven Lamar Olsen
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

W Scott Zanzig
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

**Individual Members of the Idaho
Code Commission**
in their official capacities

represented by **Dayton Patrick Reed**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Steven Lamar Olsen
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

W Scott Zanzig
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Intervenor

Madison Kenyon
*Proposed Intervener (pending motion to
intervene Dkt. 30)*

represented by **Bruce David Skaug**
Goicoechea Law office - Nampa LLP
1226 E. Karcher Rd
Nampa, ID 83687
(208) 364-2121
Fax: (208) 364-2121
Email: bruce@skauglaw.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Christiana Holcomb
Alliance Defending Freedom
440 First Street NW, Suite 600
Washington, DC 20001
202-393-8690
Email: cholcomb@ADFlegal.org
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

ER823

Jeffrey A. Shafer

Alliance Defending Freedom
15100 N. 90th Street
Scottsdale, AZ 85260
480-444-0020

Email: jshafer@ADFlegal.org

LEAD ATTORNEY

PRO HAC VICE

ATTORNEY TO BE NOTICED

Kristen K. Waggoner

Alliance Defending Freedom
15100 N. 90th Street
Scottsdale, AZ 85260
480-444-0020

Email: kwaggoner@ADFlegal.org

LEAD ATTORNEY

PRO HAC VICE

ATTORNEY TO BE NOTICED

Parker Douglas

Alliance Defending Freedom
440 First Street NW, Suite 600
Washington, DC 20001
202-393-8690

Email: pdouglas@ADFlegal.org

LEAD ATTORNEY

PRO HAC VICE

ATTORNEY TO BE NOTICED

Raul Rafael Labrador

5700 E Franklin #100
Nampa, ID 83687
(208) 465-9988
Fax: 1-208-465-9893

Email: raul@skauglaw.com

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Roger G. Brooks

Alliance Defending Freedom
15100 N. 90th Street
Scottsdale, AZ 85260
480-444-0020

Email: rbrooks@ADFlegal.org

LEAD ATTORNEY

PRO HAC VICE

ATTORNEY TO BE NOTICED

ER824

9/30/2020

Intervenor**Mary Marshall***Proposed Intervener (pending motion to intervene Dkt. 30)*represented by **Bruce David Skaug**

(See above for address)

*LEAD ATTORNEY**ATTORNEY TO BE NOTICED***Christiana Holcomb**

(See above for address)

*LEAD ATTORNEY**PRO HAC VICE**ATTORNEY TO BE NOTICED***Jeffrey A. Shafer**

(See above for address)

*LEAD ATTORNEY**PRO HAC VICE**ATTORNEY TO BE NOTICED***Kristen K. Waggoner**

(See above for address)

*LEAD ATTORNEY**PRO HAC VICE**ATTORNEY TO BE NOTICED***Parker Douglas**

(See above for address)

*LEAD ATTORNEY**PRO HAC VICE**ATTORNEY TO BE NOTICED***Raul Rafael Labrador**

(See above for address)

*LEAD ATTORNEY**ATTORNEY TO BE NOTICED***Roger G. Brooks**

(See above for address)

*LEAD ATTORNEY**PRO HAC VICE**ATTORNEY TO BE NOTICED*

Date Filed	#	Docket Text
04/15/2020	<u>1</u>	COMPLAINT <i>for Declaratory and Injunctive Relief</i> against Boise State University, Coby Dennis, Independent School District of Boise City #1, Individual Members of the Board of Trustees of the Independent School District of Boise City #1, Individual Members of the Idaho Code Commission, Individual Members of the State Board of Education, Bradley Little, Marlene

ER825

9/30/2020

		Tromp, Sherri Ybarra (Filing fee \$ 400 receipt number 0976-2036759.), filed by Jane Doe, Lindsay Hecox. (Attachments: # 1 Cover Sheet, # 2 Summons Governor Brad Little, # 3 Summons Superintendent Sherri Ybarra, # 4 Summons State Board of Education members, # 5 Summons Boise State University, # 6 Summons Marlene Tromp, # 7 Summons Independent School District of Boise City #1, # 8 Summons Coby Dennis, # 9 Summons Board of Trustees of Independent School District of Boise City #1 members, # 10 Summons Idaho Code Commission members)(Eppink, Richard)
04/15/2020	2	MOTION FOR PRO HAC VICE APPEARANCE by Gabriel Arkles. (Filing fee \$ 250 receipt number 0976-2036765.)Richard Alan Eppink appearing for Plaintiffs Jane Doe, Lindsay Hecox. Responses due by 5/6/2020 (Eppink, Richard)
04/15/2020	3	MOTION FOR PRO HAC VICE APPEARANCE by Andrew Barr. (Filing fee \$ 250 receipt number 0976-2036766.)Richard Alan Eppink appearing for Plaintiffs Jane Doe, Lindsay Hecox. Responses due by 5/6/2020 (Eppink, Richard)
04/15/2020	4	MOTION FOR PRO HAC VICE APPEARANCE by James Esseks. (Filing fee \$ 250 receipt number 0976-2036768.)Richard Alan Eppink appearing for Plaintiffs Jane Doe, Lindsay Hecox. Responses due by 5/6/2020 (Eppink, Richard)
04/15/2020	5	MOTION FOR PRO HAC VICE APPEARANCE by Kathleen Hartnett. (Filing fee \$ 250 receipt number 0976-2036773.)Richard Alan Eppink appearing for Plaintiffs Jane Doe, Lindsay Hecox. Responses due by 5/6/2020 (Eppink, Richard)
04/15/2020	6	MOTION FOR PRO HAC VICE APPEARANCE by Elizabeth Prelogar. (Filing fee \$ 250 receipt number 0976-2036779.)Richard Alan Eppink appearing for Plaintiffs Jane Doe, Lindsay Hecox. Responses due by 5/6/2020 (Eppink, Richard)
04/15/2020	7	MOTION FOR PRO HAC VICE APPEARANCE by Chase Strangio. (Filing fee \$ 250 receipt number 0976-2036782.)Richard Alan Eppink appearing for Plaintiffs Jane Doe, Lindsay Hecox. Responses due by 5/6/2020 (Eppink, Richard)
04/15/2020	8	MOTION FOR PRO HAC VICE APPEARANCE by Catherine West. (Filing fee \$ 250 receipt number 0976-2036783.)Richard Alan Eppink appearing for Plaintiffs Jane Doe, Lindsay Hecox. Responses due by 5/6/2020 (Eppink, Richard)
04/15/2020	9	MOTION <i>for Minor and Her Next Friends to Proceed Under Pseudonyms</i> Richard Alan Eppink appearing for Plaintiffs Jane Doe, Lindsay Hecox. Responses due by 5/6/2020 (Attachments: # 1 Memorandum in Support, # 2 Declaration of Jane Doe's Next Friend and Mother Jean Doe, # 3 Declaration of Jane Doe's Next Friend and Father John Doe)(Eppink, Richard)
04/16/2020	10	DOCKET ENTRY ORDER approving 2 , 3 , 4 , 5 , 6 , 7 and 8 Motion for Pro Hac Vice Appearance of attorney Elizabeth Prelogar,Kathleen Hartnett,James Esseks,Andrew Barr,Gabriel Arkles,Chase Strangio and Catherine Ann West for

ER826

		Jane Doe and Lindsay Hecox Per Local Rule 83.4(e), out-of-state counsel shall immediately register for ECF. (Notice sent to CM/ECF Registration Clerk). Signed by Judge Candy W. Dale. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (jd)
04/16/2020	11	Summons Issued as to All Defendants. (Print attached Summons for service.) (Attachments: # 1 Board of Trustees, # 2 Boise State, # 3 Bradley Little, # 4 Coby Dennis, # 5 Idaho Code Commission, # 6 Independent School District, # 7 Marlene Tromp, # 8 Sherri Ybarra)(jd)
04/20/2020	12	WAIVER OF SERVICE Returned Executed by Coby Dennis, Individual Members of the Board of Trustees of the Independent School District of Boise City #1, Independent School District of Boise City #1. Coby Dennis waiver sent on 4/17/2020, answer due 6/16/2020; Individual Members of the Board of Trustees of the Independent School District of Boise City #1 waiver sent on 4/17/2020, answer due 6/16/2020; Independent School District of Boise City #1 waiver sent on 4/17/2020, answer due 6/16/2020. (Skinner, Daniel)
04/20/2020	13	LITIGATION ORDER AND NOTICE OF TELEPHONIC SCHEDULING CONFERENCE - On or before June 11, 2020, the parties must file with the Court the joint Litigation Plan and Discovery Plan. Telephonic Scheduling Conference set for 6/18/2020 11:30 AM in Telephonic Hearing - Boise Courtroom 6 before Judge Candy W. Dale. Signed by Judge Candy W. Dale. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (jd)
04/23/2020	14	NOTICE of Appearance by Steven Lamar Olsen on behalf of Boise State University, Individual Members of the Idaho Code Commission, Individual Members of the State Board of Education, Bradley Little, Marlene Tromp, Sherri Ybarra (Olsen, Steven)
04/23/2020	15	WAIVER OF SERVICE Returned Executed by Sherri Ybarra, Individual Members of the State Board of Education, Marlene Tromp, Boise State University, Individual Members of the Idaho Code Commission, Bradley Little. Sherri Ybarra waiver sent on 4/16/2020, answer due 6/15/2020; Individual Members of the State Board of Education waiver sent on 4/16/2020, answer due 6/15/2020; Marlene Tromp waiver sent on 4/16/2020, answer due 6/15/2020; Boise State University waiver sent on 4/16/2020, answer due 6/15/2020; Individual Members of the Idaho Code Commission waiver sent on 4/16/2020, answer due 6/15/2020; Bradley Little waiver sent on 4/16/2020, answer due 6/15/2020. (Olsen, Steven)
04/24/2020	16	NOTICE of Assignment to Magistrate Judge and Requirement for Consent sent to counsel for Boise State University, Individual Members of the Idaho Code Commission, Individual Members of the State Board of Education, Bradley Little, Marlene Tromp, Sherri Ybarra and counsel for Lindsay Hecox re 14 Notice of Appearance and the 1 Complaint. Consent/Objection to Magistrate due by 6/23/2020. (jd)
04/25/2020	17	Docket entry only - CONSENT to Magistrate Judge filed. (jd) (Entered: 04/27/2020)

ER827

9/30/2020

04/27/2020	18	MOTION for Leave to File Excess Pages <i>Unopposed Motion for Leave to File a 30-Page Brief</i> Richard Alan Eppink appearing for Plaintiffs Jane Doe, Lindsay Hecox. Responses due by 5/18/2020 (Eppink, Richard)
04/28/2020	19	ORDER RE: MOTION TO EXCEED PAGE LIMIT (DKT 18) - Plaintiffs Motion for Leave to File a 30-Page Brief (Dkt. 18) is GRANTED. Plaintiffs may file a brief of up to thirty (30) pages in support of their forthcoming motion for preliminary injunction. Defendants response to Plaintiffs motion for preliminary injunction may be up to thirty (30) pages and any reply brief may be up to fifteen (15) pages. Signed by Judge Candy W. Dale. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (jd)
04/28/2020	20	RESPONSE to Motion re 18 MOTION for Leave to File Excess Pages <i>Unopposed Motion for Leave to File a 30-Page Brief</i> , 9 MOTION for Minor and Her Next Friends to Proceed Under Pseudonyms filed by Boise State University, Individual Members of the Idaho Code Commission, Individual Members of the State Board of Education, Bradley Little, Marlene Tromp, Sherri Ybarra. Replies due by 5/12/2020.(Reed, Dayton)
04/28/2020	21	RESPONSE to Motion re 9 MOTION for Minor and Her Next Friends to Proceed Under Pseudonyms Non- Opposition filed by Boise State University, Individual Members of the Idaho Code Commission, Individual Members of the State Board of Education, Bradley Little, Marlene Tromp, Sherri Ybarra. Replies due by 5/12/2020.(Reed, Dayton)
04/30/2020	22	MOTION for Preliminary Injunction (<i>Equal Protection Claim</i>) Richard Alan Eppink appearing for Plaintiffs Jane Doe, Lindsay Hecox. Responses due by 5/21/2020 (Attachments: # 1 Memorandum in Support, # 2 Adkins Declaration, # 3 Barr Declaration, # 4 Carroll Declaration, # 5 Fry Declaration, # 6 Hecox Declaration, # 7 Jane Doe Declaration, # 8 Jean Doe Declaration, # 9 Safer Declaration, # 10 Swoboda Declaration)(Eppink, Richard)
05/05/2020	23	NOTICE of Appearance by Matthew K Wilde on behalf of Boise State University, Marlene Tromp (Wilde, Matthew)
05/06/2020	24	A REQUEST FOR REASSIGNMENT TO A DISTRICT JUDGE HAS BEEN FILED IN THIS CASE(jd)
05/06/2020		DOCKET ENTRY NOTICE of Case Number Change, Case reassigned to Judge David C. Nye for all further proceedings. Judge Candy W. Dale no longer assigned to case. Please use this case number on all future pleadings, 1:20-cv-00184-DCN. (jd)
05/06/2020	25	DOCKET ENTRY NOTICE VACATING HEARING - Due to reassignment of this matter, the Telephonic Scheduling Conference currently set for 6/18/2020 11:30 AM Telephonic Hearing - Boise Courtroom 6 before Judge Candy W. Dale is hereby VACATED. (at)
05/07/2020	26	LITIGATION ORDER AND NOTICE OF TELEPHONIC SCHEDULING CONFERENCE - On or before June 11, 2020, the parties must file with the Court the joint Litigation Plan and Discovery Plan. Telephonic Scheduling Conference set for 6/18/2020 11:30 AM in Telephonic Hearing - Boise

ER828

		Chambers before Judge David C. Nye. Signed by Judge David C. Nye. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (jd)
05/15/2020	27	STIPULATION re 22 MOTION for Preliminary Injunction (<i>Equal Protection Claim</i>) by Boise State University, Individual Members of the Idaho Code Commission, Individual Members of the State Board of Education, Bradley Little, Marlene Tromp, Sherri Ybarra. (Olsen, Steven)
05/18/2020	28	ORDER GRANTING STIPULATED MOTION RE: BRIEFING SCHEDULE ON MOTIONS - IT IS HEREBY ORDERED that the briefing schedule shall be amended as follows: Defendants shall file their motion to dismiss on or before June 1, 2020. Plaintiffs shall file their response to Defendants motion to dismiss on or before June 22, 2020. Defendants shall file their reply in support of their motion to dismiss on or before July 6, 2020. Defendants shall file their response to Plaintiffs preliminary injunction motion on or before June 4, 2020. Plaintiffs shall file their reply in support of their preliminary injunction motion on or before June 25, 2020. Signed by Judge David C. Nye. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (jd)
05/18/2020		Set/Reset Deadlines as to 22 MOTION for Preliminary Injunction (<i>Equal Protection Claim</i>). Responses due by 6/4/2020. Replies due by 6/25/2020. (jd)
05/18/2020		Set/Reset Deadlines as to motion to dismiss. Responses due by 6/22/2020. Replies due by 7/6/2020. (jd)
05/19/2020	29	DOCKET ENTRY NOTICE of Hearing: A hearing on the 22 MOTION for Preliminary Injunction (<i>Equal Protection Claim</i>) is set for 7/22/2020 at 09:00 AM in Boise - Courtroom 2 before Judge David C. Nye. Counsel to receive video link via separate notification. Members of the public may use the following to attend this matter via Audio ONLY: 1-669-254-5252, Meeting ID: 160 072 3098, Meeting Password: 364023. Persons granted remote access to proceedings are reminded of the general prohibition under federal law and Local Rule 83.1 against photographing, recording, and rebroadcasting of court proceedings. (ab) Modified on 7/10/2020 to include Zoom information (st).
05/26/2020	30	MOTION to Intervene Bruce David Skaug appearing for Intervenor Parties Madison Kenyon, Mary Marshall. Responses due by 6/16/2020 (Attachments: # 1 Memorandum in Support of Motion to Intervene, # 2 Exhibit A- Declaration of Madison Kenyon, # 3 Exhibit B- Declaration of Mary Marshall, # 4 Exhibit C- Intervenor's Answer to Verified Complaint)(Skaug, Bruce)
05/26/2020	31	MOTION FOR PRO HAC VICE APPEARANCE by Jeffrey A. Shafer. (Filing fee \$ 250 receipt number 0976-2051969.)Bruce David Skaug appearing for Intervenor Parties Madison Kenyon, Mary Marshall. Responses due by 6/16/2020 (Skaug, Bruce)
05/26/2020	32	MOTION FOR PRO HAC VICE APPEARANCE by Roger G. Brooks. (Filing fee \$ 250 receipt number 0976-2052005.)Bruce David Skaug appearing for Intervenor Parties Madison Kenyon, Mary Marshall. Responses due by 6/16/2020 (Skaug, Bruce)

05/26/2020	33	MOTION FOR PRO HAC VICE APPEARANCE by Kristen K. Waggoner. (Filing fee \$ 250 receipt number 0976-2052012.)Bruce David Skaug appearing for Intervenor Parties Madison Kenyon, Mary Marshall. Responses due by 6/16/2020 (Skaug, Bruce)
05/26/2020	34	MOTION FOR PRO HAC VICE APPEARANCE by Christiana M. Holcomb. (Filing fee \$ 250 receipt number 0976-2052017.)Bruce David Skaug appearing for Intervenor Parties Madison Kenyon, Mary Marshall. Responses due by 6/16/2020 (Skaug, Bruce)
05/26/2020	35	MOTION FOR PRO HAC VICE APPEARANCE by Parker Douglas. (Filing fee \$ 250 receipt number 0976-2052026.)Bruce David Skaug appearing for Intervenor Parties Madison Kenyon, Mary Marshall. Responses due by 6/16/2020 (Skaug, Bruce)
05/26/2020	36	NOTICE of Appearance by Raul Rafael Labrador on behalf of Madison Kenyon, Mary Marshall (Labrador, Raul)
05/27/2020	37	DOCKET ENTRY ORDER approving 31 , 32 , 33 , 34 and 35 Motion for Pro Hac Vice Appearance of attorney Parker Douglas, Christiana Holcomb, Kristen K. Waggoner, Roger G. Brooks and Jeffrey A. Shafer for Madison Kenyon and for Mary Marshall Per Local Rule 83.4(e), out-of-state counsel shall immediately register for ECF. (Notice sent to CM/ECF Registration Clerk). Signed by Judge David C. Nye. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (jd)
05/29/2020	38	NOTICE of Appearance by Steven Lamar Olsen on behalf of Boise State University, Individual Members of the Board of Trustees of the Independent School District of Boise City #1, Individual Members of the Idaho Code Commission, Individual Members of the State Board of Education, Bradley Little, Marlene Tromp, Sherri Ybarra (Olsen, Steven)
06/01/2020	39	DOCKET ENTRY ORDER: Responses to 30 MOTION to Intervene are due by 6/9/2020. Replies are due by 6/16/2020. Signed by Judge David C. Nye. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (mt)
06/01/2020		Set/Reset Deadlines as to 30 MOTION to Intervene . Responses due by 6/9/2020. Replies due by 6/16/2020. (jd)
06/01/2020	40	MOTION to Dismiss for Lack of Jurisdiction <i>Subject Matter</i> Dayton Patrick Reed appearing for Defendants Boise State University, Coby Dennis, Independent School District of Boise City #1, Individual Members of the Board of Trustees of the Independent School District of Boise City #1, Individual Members of the Idaho Code Commission, Individual Members of the State Board of Education, Bradley Little, Marlene Tromp, Sherri Ybarra. Responses due by 6/22/2020 (Attachments: # 1 Memorandum in Support Motion to Dismiss)(Reed, Dayton)
06/04/2020	41	RESPONSE to Motion re 22 MOTION for Preliminary Injunction (<i>Equal Protection Claim</i>) filed by Boise State University, Coby Dennis, Independent School District of Boise City #1, Individual Members of the Board of Trustees

		of the Independent School District of Boise City #1, Individual Members of the Idaho Code Commission, Individual Members of the State Board of Education, Bradley Little, Marlene Tromp, Sherri Ybarra. Replies due by 6/18/2020. (Attachments: # 1 Expert Declaration of Gregory A. Brown, Ph.D. FACSM) (Zanzig, W)
06/04/2020	42	MOTION for Leave to File <i>Conditional Memorandum in Response to Plaintiffs' Motion for Preliminary Injunction</i> Jeffrey A. Shafer appearing for Intervenor Parties Madison Kenyon, Mary Marshall. Responses due by 6/25/2020 (Shafer, Jeffrey)
06/05/2020	43	RESPONSE to Motion re 42 MOTION for Leave to File <i>Conditional Memorandum in Response to Plaintiffs' Motion for Preliminary Injunction</i> filed by Jane Doe, Lindsay Hecox. Replies due by 6/19/2020.(Eppink, Richard)
06/08/2020	44	RESPONSE to Motion re 42 MOTION for Leave to File <i>Conditional Memorandum in Response to Plaintiffs' Motion for Preliminary Injunction</i> , 30 MOTION to Intervene filed by Boise State University, Coby Dennis, Independent School District of Boise City #1, Individual Members of the Board of Trustees of the Independent School District of Boise City #1, Individual Members of the Idaho Code Commission, Individual Members of the State Board of Education, Bradley Little, Marlene Tromp, Sherri Ybarra. Replies due by 6/22/2020.(Zanzig, W)
06/09/2020	45	MEMORANDUM in Opposition re 30 MOTION to Intervene <i>Plaintiffs' Opposition to Motion to Intervene</i> filed by Jane Doe, Lindsay Hecox. Replies due by 6/23/2020.(Eppink, Richard)
06/09/2020	46	SUPPLEMENT by Intervenor Parties Madison Kenyon, Mary Marshall re 42 MOTION for Leave to File <i>Conditional Memorandum in Response to Plaintiffs' Motion for Preliminary Injunction (Proposed Memorandum)</i> . (Attachments: # 1 Exhibit A- Declaration of Chelsea Mitchell, # 2 Exhibit B- Expert Affidavit of Dr. Stephen Levine)(Brooks, Roger)
06/12/2020	47	DOCKET ENTRY ORDER re 42 MOTION for Leave to File <i>Conditional Memorandum in Response to Plaintiffs' Motion for Preliminary Injunction</i> filed by Mary Marshall, Madison Kenyon. Having considered the parties' briefing, and good cause appearing, the Court GRANTS the proposed intervenors' Motion for Leave to File a Conditional Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction. The proposed intervenors filed a proposed memorandum in opposition on June 9, 2020. The Court accepts this memorandum as the proposed intervenors' opposition to Plaintiffs' Motion for Preliminary Injunction. Plaintiffs' reply, if any, shall be filed on or before June 29, 2020. In issuing this Order, the Court is not granting the Motion to Intervene. The Court will rule on the Motion to Intervene after the hearing on July 22, 2020. Signed by Judge David C. Nye. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (nt)
06/12/2020	48	ORDER ON PLAINTIFF'S MOTION FOR MINOR AND HER NEXT FRIENDS TO PROCEED UNDER PSEUDONYMS (DKT 9) - The Doe Plaintiffs have established good cause for proceeding under pseudonyms and

ER831

9/30/2020

		their Motion to Proceed Under Pseudonyms (Dkt. 9) is GRANTED. Signed by Judge David C. Nye. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (jd)
06/12/2020	49	DOCKET ENTRY NOTICE OF HEARING: A hearing on the 40 MOTION to Dismiss for Lack of Jurisdiction <i>Subject Matter</i> , and the 30 MOTION to Intervene will be held on 7/22/2020 at 09:00 AM in Boise - Courtroom 2 before Judge David C. Nye. Counsel to receive video link via separate notification. Members of the public may use the following to attend this matter via Audio ONLY: 1-669-254-5252, Meeting ID: 160 072 3098, Meeting Password: 364023. Persons granted remote access to proceedings are reminded of the general prohibition under federal law and Local Rule 83.1 against photographing, recording, and rebroadcasting of court proceedings.(ab) Modified on 7/10/2020 to include Zoom information (st).
06/15/2020	50	DOCKET ENTRY ORDER: IT IS HEREBY ORDERED that the Telephonic Scheduling Conference set for 6/18/2020 at 11:30 AM is VACATED and will be rescheduled to a later date. The requirement for the parties to submit their Joint Litigation and Discovery Plans is also vacated. Signed by Judge David C. Nye. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (ab)
06/15/2020	51	MOTION for Leave to File <i>Supplemental Opposition to Motion to Intervene (Dkt. 30)</i> Richard Alan Eppink appearing for Plaintiffs Jane Doe, Lindsay Hecox. Responses due by 7/6/2020 (Attachments: # 1 Plaintiffs' [Proposed] Supplemental Response to Motion to Intervene (Dkt. 30))(Eppink, Richard)
06/16/2020	52	REPLY to Response to Motion re 30 MOTION to Intervene filed by Madison Kenyon, Mary Marshall.Motion Ripe Deadline set for 6/17/2020.(Skaug, Bruce)
06/19/2020	53	NOTICE by United States of <i>Statement of Interest</i> (Donnelly, Matthew)
06/22/2020	54	MOTION for Leave to File <i>Unopposed Motion for Leave to File a Consolidated Reply in Support of Motion for Preliminary Injunction</i> Richard Alan Eppink appearing for Plaintiffs Jane Doe, Lindsay Hecox. Responses due by 7/13/2020 (Eppink, Richard)
06/22/2020	55	RESPONSE to Motion re 40 MOTION to Dismiss for Lack of Jurisdiction <i>Subject Matter</i> filed by Jane Doe, Lindsay Hecox. Replies due by 7/6/2020. (Eppink, Richard)
06/23/2020	56	ORDER ON PLAINTIFFS' MOTION FOR LEAVE TO FILE A CONSOLIDATED REPLY BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION. IT IS HEREBY ORDERED that Plaintiffs' Motion for Leave to File a Consolidated Reply Brief In Support of Motion for Preliminary Injunction (Dkt. 54) is GRANTED. Plaintiffs may file a consolidated reply brief of up to twenty-five (25) pages in support of their motion for preliminary injunction. IT IS FURTHER ORDERED that Plaintiffs' consolidated reply brief is due on or before June 29, 2020. Signed by Judge David C. Nye. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (ckh)
06/23/2020		

ER832

9/30/2020

		Set/Reset Deadlines as to 22 MOTION for Preliminary Injunction (<i>Equal Protection Claim</i>). Replies due by 6/29/2020, per docket 56 . (ckh)
06/25/2020	57	SUPPLEMENT by Intervenor Parties Madison Kenyon, Mary Marshall re 46 Supplement, <i>Attachment to Expert Affidavit of Stephen Levine, MD.</i> (Brooks, Roger)
06/29/2020	58	REPLY to Response to Motion re 22 MOTION for Preliminary Injunction (<i>Equal Protection Claim</i>) filed by Jane Doe, Lindsay Hecox.Motion Ripe Deadline set for 6/30/2020. (Attachments: # 1 Supplemental Declaration of Adkins, # 2 Supplemental Declaration of Safer, # 3 Declaration of Turban) (Eppink, Richard)
07/06/2020	59	REPLY to Response to Motion re 40 MOTION to Dismiss for Lack of Jurisdiction <i>Subject Matter</i> filed by Boise State University, Coby Dennis, Independent School District of Boise City #1, Individual Members of the Board of Trustees of the Independent School District of Boise City #1, Individual Members of the Idaho Code Commission, Individual Members of the State Board of Education, Bradley Little, Marlene Tromp, Sherri Ybarra.Motion Ripe Deadline set for 7/7/2020.(Reed, Dayton)
07/10/2020	60	DOCKET ENTRY ORDER re 51 MOTION for Leave to File <i>Supplemental Opposition to Motion to Intervene (Dkt. 30)</i> filed by Jane Doe, Lindsay Hecox. Having considered the parties' briefing, and good cause appearing, the Court GRANTS Plaintiffs' Motion for Leave to File Supplemental Opposition to Motion to Intervene. Plaintiffs filed a proposed supplemental memorandum in opposition on June 15, 2020. The Court accepts this memorandum as Plaintiffs' Supplemental Opposition to the Motion to Intervene. The proposed intervenors filed a Reply on June 16, 2020, in which they addressed both Plaintiffs' Opposition, and Supplemental Opposition, to the Motion to Intervene. The Court will not consider any further briefing on the Motion to Intervene.. Signed by Judge David C. Nye. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (nt)
07/22/2020	61	Minute Entry for proceedings held before Judge David C. Nye: Motion Hearing held on 7/22/2020 re 30 MOTION to Intervene filed by Mary Marshall, Madison Kenyon, 22 MOTION for Preliminary Injunction (<i>Equal Protection Claim</i>) filed by Jane Doe, Lindsay Hecox, and 40 MOTION to Dismiss for Lack of Jurisdiction <i>Subject Matter</i> filed by Bradley Little, Coby Dennis, Sherri Ybarra, Individual Members of the Board of Trustees of the Independent School District of Boise City #1, Boise State University, Marlene Tromp, Independent School District of Boise City #1, Individual Members of the Idaho Code Commission, Individual Members of the State Board of Education. Motions taken under advisement. Written decision forthcoming. (Court Reporter: Anne Bowline.) (st)
07/31/2020	62	Notice of Filing of Official Transcript of Proceedings held on 7/22/2020 before Judge David C. Nye. Court Reporter/Transcriber Anne Bowline, Email anne_bowline@id.uscourts.gov . Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. This transcript is not available to the general public and as

ER833

		such is sealed until release of transcript restriction. Redaction Request due 8/21/2020. Redacted Transcript Deadline set for 8/31/2020. Release of Transcript Restriction set for 10/29/2020. (amb)
08/17/2020	63	MEMORANDUM DECISION AND ORDER - The Motion to Intervene (Dkt. 30) is GRANTED; 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; The Motion for Preliminary Injunction (Dkt. 22) is GRANTED. Signed by Judge David C. Nye. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (jd)
09/16/2020	64	NOTICE OF APPEAL 20-35813 by Boise State University, Coby Dennis, Independent School District of Boise City #1, Individual Members of the Board of Trustees of the Independent School District of Boise City #1, Individual Members of the Idaho Code Commission, Individual Members of the State Board of Education, Bradley Little, Marlene Tromp, Sherri Ybarra. Filing fee \$ 505, receipt number 0976-2102074. (Notice sent to Court Reporter & 9th Cir) (Attachments: # 1 Representation Statement)(Zanzig, W) Modified on 9/21/2020, to add USCA case number (jd).
09/16/2020	65	NOTICE OF APPEAL 20-35815 as to 63 Order on Motion for Preliminary Injunction, Order on Motion to Intervene, Order on Motion to Dismiss/Lack of Jurisdiction, by Madison Kenyon, Mary Marshall. Filing fee \$ 505, receipt number 0976-2102144. (Notice sent to Court Reporter & 9th Cir) (Attachments: # 1 Representation Statement)(Brooks, Roger) Modified on 9/21/2020, to add USCA case number (jd).
09/17/2020	66	USCA Case Number 20-35813 for 64 Notice of Appeal,, filed by Bradley Little, Coby Dennis, Sherri Ybarra, Individual Members of the Board of Trustees of the Independent School District of Boise City #1, Boise State University, Marlene Tromp, Independent School District of Boise City #1, Individual Members of the Idaho Code Commission, Individual Members of the State Board of Education. (jd) (Entered: 09/21/2020)
09/17/2020	67	ORDER of USCA 20-35813 as to 64 Notice of Appeal,, filed by Bradley Little, Coby Dennis, Sherri Ybarra, Individual Members of the Board of Trustees of the Independent School District of Boise City #1, Boise State University, Marlene Tromp, Independent School District of Boise City #1, Individual Members of the Idaho Code Commission, Individual Members of the State Board of Education (Attachments: # 1 USCA Guide, # 2 Mediation Questionnaire, # 3 Cover letter)(jd) (Additional attachment(s) added on 9/21/2020: # 4 Notice) (jd). (Entered: 09/21/2020)
09/17/2020	68	USCA Case Number 20-35815 for 65 Notice of Appeal, filed by Mary Marshall, Madison Kenyon. (jd) (Entered: 09/21/2020)
09/17/2020	69	Notice of USCA 20-35815 as to 65 Notice of Appeal, filed by Mary Marshall, Madison Kenyon (Attachments: # 1 Mediation Questionnaire, # 2 Cover Letter, # 3 USCA Guide)(jd) (Entered: 09/21/2020)

PACER Service Center			
Transaction Receipt			
09/30/2020 14:57:57			
PACER Login:	cindyeville:4994713:0	Client Code:	
Description:	Docket Report	Search Criteria:	1:20-cv-00184-DCN
Billable Pages:	15	Cost:	1.50