Nos. 20-35813, 20-35815

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LINDSAY HECOX; JANE DOE,
with her next friends Jean Doe and John Doe,
Plaintiffs-Appellees
v.
BRADLEY LITTLE,
in his official capacity as Governor of the State of Idaho; *et al.*,
Defendants-Appellants
and
MADISON KENYON; MARY MARSHALL,
Intervenors-Appellants

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

BRIEF OF THE LINCOLN LGBTQ+ RIGHTS CLINIC AS AMICUS CURIAE SUPPORTING APPELLEES AND URGING AFFIRMANCE

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Statement of Interest

The Lincoln LGBTQ+ Rights Clinic ("Lincoln Clinic")[1] is a non-profit law firm and Clinical Legal Program within the Center for Civil and Human Rights at Gonzaga University School of Law. The Lincoln Clinic works to protect and advance the equal rights and dignity of individuals who identify as LGBTQ+. Through education, programing, advocacy, research, and legal representation, the Lincoln Clinic focuses on promoting reforms that support people who are marginalized and underserved because of their sexual orientation, gender identity, or gender expression.

The Lincoln Clinic has a strong interest in ensuring equal protection of the law for transgender individuals. This interest and the equal rights of transgender athletes are threatened by the Fairness in Women's Sports Act, Idaho Code § 33-6201 *et seq*. (the "Act"). Untrue to its name, the Act denies equal protection to transgender women. The District Court recognized this and granted the preliminary injunction. On appeal, this case presents issues not squarely addressed by Ninth

[1] Pursuant to Fed. R. App. P. 26.1, Amicus Lincoln Clinic states that it does not issue stock or have a parent corporation.

Circuit precedent. Accordingly, the Lincoln Clinic submits this brief explaining why transgender persons are protected by the Fourteenth Amendment's guarantee of equal protection and why Plaintiffs are likely to succeed on the merits of their Equal Protection Clause claim.[2]

In accordance with Fed. R. App. P. 29(c)(5), no counsel for a party authored this brief in whole or in part or contributed any money to fund preparing or submitting this brief.

Introduction

The District Court correctly determined that Idaho's Fairness in Women's Sports Act (the "Act") is likely unconstitutional. In reaching this conclusion, the District Court held that transgender persons are protected under the Fourteenth Amendment's Equal Protection Clause and that classifications based on transgender status are subject to heightened scrutiny. Accordingly, the District Court held that the Act is not substantially related to achieving important government interests, rendering the Act unconstitutional. This Court should affirm the

[2] This brief only addresses Plaintiff Lindsay Hecox's challenge under the Equal Protection Clause. This brief does not address Plaintiff Jane Doe's challenge about the sex "dispute" provision.

District Court's order granting Plaintiff's motion for a preliminary injunction.

Amicus Lincoln Clinic is submitting this brief to address three points. First, the Fairness in Women's Sports Act contains two facial classifications: one based on sex and another based on transgender status. Second, both facial classifications trigger heightened scrutiny. Third, the Act is not substantially related to its interests because its definition of sex is not an accurate proxy. To the contrary, the Act harms Idaho's interest in redressing past discrimination and protecting female athletes—athletes like Lindsay Hecox.

Argument

I. The Fairness in Women's Sports Act discriminates on the basis of sex and on the basis of transgender status.

The Fairness in Women's Sports Act (the "Act") contains two facial classifications. First, the Act creates a facial classification on the basis of sex. Section 33-6203(2) provides that athletic teams "designated for females, women, or girls shall not be open to students of the male sex." Idaho Code § 33-6203(2). This is a clear sex classification since it places

people into two categories, male or female, and provides that only females may participate on female designated athletic teams.

A. The Act facially discriminates against transgender women.

Second, and more narrowly, the Act creates a classification on the basis of transgender status—specifically status as a transgender woman. This is because transgender women[3] do not fit within the Act's nebulous definition of female, as determined by "biological sex," and are thereby categorically barred from participating in athletics and sports designated for females.[4]

Identifying this second classification is difficult because section 33-6203 is vague. This vagueness stems from the fact that the section lacks definitions. Terms like "male," "female," and "biological sex" are

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[3] Transgender women are individuals who were assigned the male sex at birth but now identify as female.

[4] In response, the State and Intervenors claim that transgender women can still compete on male athletic teams. This is a Hobson's choice, forcing transgender women to choose between competing on a team that conflicts with their gender identity or not competing at all. As the Eleventh Circuit noted in the context of single-sex restroom policies, forcing a transgender student to use the restroom that does not match their gender identity "causes them humiliation and insult." *Adams by & through Kasper v. Sch. Bd. of St. Johns Cty.*, 968 F.3d 1286, 1296 (11th Cir. 2020).

not clearly defined. Despite providing no express definition, the Act contains fractions that can be pieced together to complete a definitional puzzle.

Starting with the first piece, section 33-6203(1) provides that all scholastic athletic teams shall be designated as one of the three categories based on "biological sex." These categories are "(a) Males, men, or boys; (b) Females, women, or girls; or (c) Coed or mixed." Idaho Code § 33-6203(1). This means that whether a person is male or female is determined by biological sex. But what does biological sex mean? Biological sex is not defined in subsection one. Therefore, one must jump to subsection three for the next piece of the puzzle.

Section 33-6203(3) provides that if a student's sex is questioned, their health care provider can verify the student's "biological sex" on one or more of the following bases: "the student's reproductive anatomy, genetic makeup, or normal endogenously produced testosterone levels." In effect, these three factors define biological sex. And biological sex, in turn, appears to define "female" under the Act. Thus, to be considered a female under the Act, a person must either have female reproductive anatomy, female genetic makeup, or normal endogenously produced

testosterone levels for a person assigned female at birth. *See* Idaho Code § 33-6203(3). Finally, one must turn to section two, the last piece of the puzzle.

Subsection two provides that "[a]thletic teams or sports designated for females, women, or girls shall not be open to students of the male sex." Idaho Code § 33-6203(2). Putting the pieces together, the Act prohibits a person from participating on a female designated athletic team unless they have female reproductive anatomy, female genetic makeup, or normal endogenously produced testosterone levels for a person assigned female at birth. These requirements necessarily create a second classification, transgender status, because it is impossible for a transgender woman to satisfy any of these three requirements. Accordingly, the Act splits female-identifying individuals into two categories: cisgender women who may compete on female designated teams and transgender women who are excluded.

What do Idaho and the Intervenors say in response? They claim that the Act has nothing to do with transgender status and only classifies on the basis of "biological sex." Repeatedly, Idaho and the Intervenors stress that the Act does not contain the words

"transgender" or "gender identity." On top of this, they point to the fact that transgender men can still join either male or female designated teams. Combined, these facts supposedly prove that there is no classification based on gender identity. This is not true. At best, this shows there is not a clear facial classification. But the Act still discriminates through the use of a proxy.

B. The Act uses sex as a proxy to discriminate on the basis of transgender status.

Alternatively, if the Court determines that there is no clear second classification, the Act still uses "sex" as a proxy to discriminate both on the grounds of sex and gender identity. As other courts have recognized, "discrimination is not always obvious." *Kadel v. Folwell*, 446 F. Supp. 3d 1, 17 (M.D.N.C. 2020). So, while the Act may not be obvious in how it discriminates, it discriminates, nonetheless. It does so by using sex as a proxy for gender identity. This tactic does not vindicate Idaho. To the contrary, courts have developed a "proxy theory" of discrimination, recognizing that laws cannot use "a technically neutral classification" as a proxy to discriminate. *Cmty. Servs. v. Wind Gap Mun. Auth.*, 421 F.3d

170, 177–78 (3d Cir. 2005) (citing *McWright v. Alexander*, 982 F.2d 222, 228 (7th Cir. 1992).

This Court has fully embraced the proxy theory, noting that "proxy discrimination is a form of facial discrimination." *Davis v. Guam*, 932 F.3d 822, 837–38 (9th Cir. 2019), *cert. denied sub nom. Territory of Guam v. Davis*, 140 S. Ct. 2739, 206 L. Ed. 2d 917 (2020) (quoting *Pac. Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142, 1160 n.23 (9th Cir. 2013)). Proxy discrimination "arises when the defendant enacts a law or policy that treats individuals differently on the basis of seemingly neutral criteria that are so closely associated with the disfavored group that discrimination on the basis of such criteria is, constructively, facial discrimination against the disfavored group." *Id.*

In a similar context, the Supreme Court has recognized that ancestry can be a proxy for race. *See Rice v. Cayetano*, 528 U.S. 495, 514 (2000). This is because race and ancestry are often intertwined. Indeed, "[r]acial categories often incorporate biological descent, as the mechanism through which present day individuals viewed as a distinct group are thought to be connected to an earlier set of individuals with

identifiable physical, ethnic, or cultural characteristics." *Davis*, 932 F.2d at 836. In other words, race and ancestry often "overlap." *Id.*

Like race and ancestry, sex and gender identity overlap and are intertwined. The Supreme Court has acknowledged this, stating that both "homosexuality and transgender status are inextricably bound up with sex." *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1742, 207 L. Ed. 2d 218 (2020). This is because a person's sex is part of the calculus in determining their gender identity. In other words, a person's sex informs their gender identity (and vice versa).

Still, sex and gender identity can be viewed as distinct concepts, but this is no barrier to proxy discrimination. As this Court has noted with racial and ancestry proxies, "proxy discrimination does not require an exact match between the proxy category and the racial classification for which it is a proxy." *Davis*, 932 F.3d at 838. "Simply because a class…does not include all members of the race does not suffice to make the classification race neutral." *Rice*, 528 U.S. at 516–17. To the contrary, a statute's purpose and "actual effects" can show that it is not neutral. *See id.* at 517.

These principles equally apply to gender identity. A law is not gender identity neutral just because not all transgender people are affected by the classification. Such is the case here. Because the Act only defines "female" and places a bar on female teams, transgender men are not affected. But this does not make the classification gender identity neutral. The Act still classifies on the basis of gender identity and has a discriminatory effect: cisgender women are allowed to play on female designated teams and transgender women are excluded.

II. Both facial classifications trigger heightened scrutiny.

As explained above, the Act draws two classifications: sex and gender identity. Both facial classifications warrant applying heightened scrutiny.

A. Sex classifications warrant heightened scrutiny.

A longstanding principle of the Supreme Court's equal protection jurisprudence is that laws that discriminate on the basis of sex must withstand heightened scrutiny. *Craig v. Boren*, 429 U.S. 190, 197 (1976); *United States v. Virginia*, 518 U.S. 515, 533 (1996); *see Clark, By & Through Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126, 1129 (9th Cir. 1982) (citing *Craig*, 429 U.S. at 197).

Against this backdrop, new principles have emerged. Just this year, the Supreme Court held that discriminating against a person for being transgender constitutes sex discrimination under Title VII. *See Bostock* 140 S. Ct. at 1741 ("it is impossible to discriminate against a person for being...transgender without discriminating against that individual based on sex."). The rationale behind this is that "homosexuality and transgender status are inextricably bound up with sex" and that neither can be determined without accounting for an individual's sex. *Bostock*, 140 S. Ct. at 1742. This logic applies in full force in the equal protection context. That is why circuit courts before and after *Bostock* have held that transgender classifications are a form of sex discrimination, triggering heightened scrutiny.

B. Transgender classifications warrant heightened scrutiny.

Every circuit court to consider the issue has agreed that transgender classifications are sex-based. *See Adams*, 968 F.3d at 1296; *Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017); *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 608–09 (4th Cir. 2020), *as amended* (Aug. 28, 2020). This means that discrimination on the basis of a person's transgender status

warrants heightened scrutiny since it is a form of sex discrimination. *Adams*, 968 F.3d at 1296; *Whitaker*, 858 F.3d at 1051; *Grimm*, 972 F.3d at 608–09.

Specifically, discrimination against transgender people involves impermissible sex stereotypes. *See Grimm*, 972 F.3d at 608; *Whitaker*, 858 F.3d at 1051. The common stereotype is that a person must self-identify and act a certain way because of the sex they were assigned at birth. Such stereotypes are the primary evil the Supreme Court has sought to root out in applying heighted scrutiny to sex-based classifications. *See Glenn v. Brumby*, 663 F.3d 1312, 1319 (11th Cir. 2011) ("[e]ver since the Supreme Court began to apply heightened scrutiny to sex-based classifications, its consistent purpose has been to eliminate discrimination on the basis of gender stereotypes.").

Beyond being a form of sex discrimination, transgender status warrants heightened scrutiny as its own quasi-suspect class. *Grimm*, 972 F.3d at 610; *see F.V. v. Barron*, 286 F. Supp. 3d 1131, 1143–1145 (D. Idaho 2018) (holding that transgender people constitute a quasi-suspect class); *Evancho v. Pine–Richland Sch. Dist.*, 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017) (same); *Adkins v. City of New York*, 143 F.

Supp. 3d 134, 139 (S.D.N.Y. 2015) (same); *Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep't of Educ.*, 208 F. Supp. 3d 850, 873 (S.D. Ohio 2016) (same); *M.A.B. v. Bd. of Educ. of Talbot Cty.*, 286 F. Supp. 3d 704, 718–19 (D. Md. 2018) (same); *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015) (same); *Flack v. Wis. Dep't of Health Servs.*, 328 F. Supp. 3d 931, 951–53 (W.D. Wis. 2018).

This Court has already opened the door to acknowledging that transgender status is a quasi-suspect class. *See Karnoski v. Trump*, 926 F.3d 1180, 1201 (9th Cir. 2019). In *Karnoski*, this Court held that a level of scrutiny higher than rational basis applies to laws that treat transgender persons in a less favorable way. *Id.* While *Karnoski* lacks a substantive heightened scrutiny analysis, these other cases firmly establish that transgender status is its own quasi-suspect class. Accordingly, this Court should join its sister circuits and hold that transgender status is its own quasi-suspect class.

In determining whether a new classification constitutes a quasi-suspect class, the Supreme Court uses four factors: (1) whether the class has been historically subjected to discrimination; (2) whether the class has a defining characteristic that frequently bears a relation to

ability to perform or contribute to society; (3) whether the class exhibits obvious, immutable, or distinguishing characteristics that define that as a discrete group; and (4) whether the class is a minority or politically powerless. *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987); *City of Cleburne v. Cleburne Living Ctr*, 473 U.S. 432, 440–41 (1985). Applying these factors, courts have consistently concluded that transgender status meets all four requirements, constituting a quasi-suspect class. *See Grimm*, 972 F.3d at 611; *M.A.B.*, 286 F. Supp. 3d at 720; *Adkins*, 143 F. Supp. 3d at 139.

First, transgender persons have been historically discriminated against. Indeed, "[t]here is no denying that transgender individuals face discrimination, harassment, and violence because of their gender identity." *Whitaker*, 858 F.3d at 1051.

Regarding violence against transgender persons, one report provides that 78% of transgender and gender non-conforming students report being harassed while in grades K–12. *Id.* (citing Jaime M. Grant et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, Nat'l Center for Transgender Equality, at 33

(2011).[5] And of these individuals, 35% report being physically assaulted and 12% report being sexually assaulted. *Id.* Another survey showed that 9% of transgender individuals reported they were physically attacked in the past year because of their transgender status. *M.A.B.*, 286 F. Supp. 3d at 720 (citing Sandy E. James et al., Nat'l Ctr. for Transgender Equal., *The Report of the 2015 U.S. Transgender Survey* 198 (2016)[6]).

In addition to experiencing high rates of violence, "the transgender community also suffers from high rates of employment discrimination, economic instability, and homelessness." *Grimm*, 972 F.3d at 611. According to the National Discrimination Survey, people who are transgender are twice as likely as the general population to be unemployed. *Id.* (citing Kevin M. Barry et al., *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, 57 B.C. L. Rev. 507, 552 (2016)). And even when transgender persons are employed,

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[5] Available at http://www.transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf

[6] Available at https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf

97% report experiencing some form of mistreatment at work or hiding their gender identity to avoid such treatment. *Id.* While these numbers only scratch the surface, they demonstrate the longstanding history of discrimination against transgender persons.

Second, a person's transgender status has no bearing on their ability to perform or contribute to society. *Grimm*, 972 F.3d at 612. As the Fourth Circuit noted, "Seventeen of our foremost medical, mental health, and public health organizations agree that being transgender 'implies no impairment in judgment, stability, reliability, or general social or vocational capabilities.'" *Id.* (citing Am. Psychiatric Ass'n, *Position Statement on Discrimination Against Transgender and Gender Variant Individuals* 1 (2012)). Indeed, no case analyzing whether transgender persons constitute a quasi-suspect class has ever held to the contrary. *See M.A.B.*, 286 F. Supp. 3d at 720 (citing cases).

Third, transgender status is an immutable characteristic. Indeed, "gender identity is formulated for most people at a very early age, and…being transgender is not a choice." *Grimm*, 972 F.3d at 612–13. Just like cisgender status, transgender status is "natural and immutable." *Id.*

Fourth, transgender persons are a minority group that has been politically powerless. Comprising approximately 0.6% of the United States' adult population, transgender persons are "certainly a minority." *Grimm*, 972 F.3d at 613. This minority status equates to little to no political power. As the Fourth Circuit noted, in 2017, nine transgender individuals were elected to office, doubling the total number of transgender individuals in *any* elected office across the country. *Id.* (citing Brooke Sopelsa, *Meet 2017's Newly Elected Transgender Officials*, NBC News (Dec. 28, 2017, 9:06 AM EST), https://www.nbcnews.com/feature/nbc-out/meet-2017-s-newly-elected-transgender-officials-n832826). This fact, coupled with the history of discrimination against transgender persons, affirms that transgender people are a minority that has been unable to meaningfully vindicate their rights through the political process. *Grimm*, 972 F.3d at 613.

Together, these factors establish that transgender status constitutes a distinct quasi-suspect class, warranting heightened scrutiny. Even if the Court were to diverge from the broad consensus that transgender status is a quasi-suspect class, *Bostock*, *Grimm*, *Whitaker*, and *Adams* make clear that transgender discrimination is a

form of sex discrimination, warranting heightened scrutiny. Therefore, heightened scrutiny applies, and Idaho must provide an exceedingly persuasive justification, which it fails to do.

III. The Act cannot pass heightened scrutiny because it relies on stereotypes and is not substantially related to the State's objectives.

The Act is subject to heightened scrutiny because it facially discriminates on the basis of sex and transgender status. Passing heightened scrutiny requires the state to offer an "exceedingly persuasive justification." *Virginia*, 518 U.S. at 534. This means that the classification "must serve important governmental objectives and must be substantially related to achievement of those objectives." *Craig*, 429 U.S. at 197.

There is no dispute that the State's objective meets the first prong. Idaho's claimed interest behind the Act is to redress past discrimination against women in athletics and promote equality of athletic opportunity. *See* Idaho Code § 33-6202 (12). *Clark* makes clear that this is a legitimate and important governmental interest. 695 F.2d at 1131.

The remaining question is whether the Act's ban on transgender women is substantially related to this interest. It is not.

A. The Act relies on impermissible sex and gender stereotypes.

Generally, stereotypes cannot justify State action that discriminates on the basis of gender. *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 730 (2003) (quoting *Virginia*, 518 U.S. at 533). This prohibition against gender stereotypes applies equally to transgender persons. *See Glenn*, 663 F.3d at 1318 ("All persons, whether transgender or not, are protected from discrimination on the basis of gender stereotype."). But "inherent differences" between the biological sexes may justify such distinctions. *See Virginia*, 518 U.S. at 534.

Where a state discriminates on the basis of sex or gender, the justification "must be genuine, not hypothesized or invented *post hoc* in response to litigation." *Virginia*, 518 U.S. at 533. And the state's justification "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." *Id.*

Indeed, "[c]are must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions." *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724–25 (1982). If a court determines that a statute's objective is "to exclude or 'protect'

members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate." *Id.*

Here, Idaho relies on sex and gender stereotypes. First, Idaho tacitly assumes that a person's sex assigned at birth is enduring—if a person is assigned the male sex at birth, they will always be a male. Second, Idaho assumes that if a person is assigned the male sex at birth, they will have the same testosterone levels as other males throughout adolescence and adulthood. But hormone therapy can lower a person's circulating testosterone levels, which in turn impacts their athletic capabilities. Third, Idaho assumes that all persons assigned the male sex at birth are similarly situated. But this is far from the case. Cisgender men and transgender women are not similarly situated by definition. In sum, the Act assumes that a person assigned the male sex at birth will look and perform a certain way and that they must play male designated sports. In effect, this punishes transgender women because of their gender-nonconformity. *See Glenn*, 663 F.3d at 1319 (under the Equal Protection Clause, "[a]n individual cannot be punished because of his or her perceived gender-nonconformity.").

The State claims it relies on inherent differences between the biological sexes—that males have a physiological advantage over females. *See* Idaho Code § 33-6202. But this claim is widely refuted by the medical field and the Plaintiff's expert witnesses. This reveals that the State is relying on overbroad generalizations to exclude transgender women and girls.

B. The State's definition of sex is not an accurate proxy under *Clark*.

The State tries to sidestep its reliance on stereotypes and overbroad generalizations by arguing that *Clark* permits sex classifications in sports. But the State misinterprets *Clark* in two critical ways.

First, *Clark* only permits sex or gender classifications when they are an accurate proxy for "average real differences between the sexes." *Clark*, 695 F.2d at 1131. This is a limited principle because the sex or gender classification used must be an "accurate proxy." *Id.* The Intervenors assume that sex is always an accurate proxy. But that assumption is wrong because sex can be defined dozens of ways. Depending on how it is defined, sex may or may not be an accurate proxy for the real differences between the sexes. This makes applying

Clark a challenge as *Clark* did not define what it meant when it used the term "sex." But *Clark* provides a north star: regardless of how "sex" or "gender" is defined in the classification, it must be an accurate proxy for average real differences between the sexes. *Id.* The State fails to follow this north star, charting a course into unconstitutional waters.

Here, "sex," as the State defines it, is not an accurate proxy. The way the State crudely defines sex transforms its meaning into sex assigned at birth.

A person's sex assigned at birth is not an accurate proxy for physiological differences between men and women because it fails to account for a person's current physiology, including circulating testosterone levels. For instance, a person who was designated as a male at birth may have received hormone therapy that drastically changed their circulating testosterone levels. That person's sex assigned at birth would no longer be an accurate reflection of their current physiology and athletic capabilities.

This demonstrates that circulating testosterone levels, unlike a person's reproductive anatomy or endogenous testosterone levels, are an

accurate proxy for physiological differences and a person's physical strength and speed.

Indeed, the Plaintiffs' experts noted the differences between these aspects of sex and how circulating testosterone is the defining characteristic for one's physical and athletic capabilities. As Dr. Adkins noted in her supplemental declaration, sex at birth can be incorrectly designated. ER 225. When this happens, the protocol is to update a person's sex "once the person is old enough to articulate their gender identity and re-assign consistent with [their] gender identity." ER 225. This is just one example of how sex assigned at birth does not reflect a person's current physical attributes.

Conversely, circulating testosterone levels explain differing athletic capabilities. As Dr. Safer noted in his supplemental declaration, the State's expert, Dr. Brown, relies on studies that 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." ER 240. Specifically, Dr. Brown cited the Handelsman study that states "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." ER 240–41. And as Dr. Safer aptly described, "[t]he proven impact of circulating testosterone on the body is the reason why the Olympics, World Athletics, and the National Collegiate Athletic Association (NCAA)[7] focus on testosterone suppression for transgender and intersex inclusion in women's sports." ER 242.

Because the State's definition of "sex" ignores a person's circulating testosterone, it is not an accurate proxy for the average real differences between the sexes. Indeed, the sex Lindsay Hecox was assigned at birth does not relate to her current athletic capacity as it ignores her circulating testosterone levels. Accordingly, the Act fails to meet *Clark's* standard.

Second, the State and Intervenors also misinterpret *Clark's* displacement concern. *Clark* looked to more than just the average physiological differences between men and women. *Clark* looked to the

[7] Though NCAA policies do not bind the Idaho legislature, they represent expert views on collegiate athletics. Based on medical expertise, the NCAA allows transgender women to compete in women's athletic events after completing one year of testosterone suppression treatment. ER 473, 620–21, 707–08, 781–82. The underlying science the NCAA relies on demonstrates that Idaho's definition of "sex" is not an accurate proxy for determining a person's athletic capabilities.

effect that these supposed differences would have on women's athletics. Specifically, the court looked to whether males would displace females to a substantial extent if they were allowed to compete for positions on female teams. *Clark*, 695 F.2d at 1131. Based on the average differences the court perceived, it determined that males would displace females to a substantial extent. *Id.* While not explicit, the *Clark* court was likely stating that cisgender males would displace cisgender females. While that may be true, the same is not true for transgender women displacing cisgender women.

Here, the State and Intervenors present insufficient evidence that transgender women would displace cisgender women to a substantial extent. Indeed, Lindsay Hecox is the only named transgender woman competing in Idaho athletics in this litigation. The three transgender women athletes the Intervenors cite in their brief, June Eastwood, Terry Miller, and Andraya Yearwood, do not attend Idaho schools. And of these three, Eastwood is the only one who has competed against Idaho athletes. *See* Intervenor's Brief at 5–8. This shows a lack of any legitimate threat of displacement.

Still, the Intervenors cling to *Clark's* proposition that "if males are permitted to displace females on the school volleyball team even to the extent of one player like Clark, the goal of equal participation by females in interscholastic athletics is set back, not advanced." *Clark By & Through Clark v. Arizona Interscholastic Ass'n*, 886 F.2d 1191, 1193 (9th Cir. 1989) ("*Clark II*"). But the Intervenors take this quote out of context. The court noted that at the time, interscholastic sports in Arizona were far from equal; males outnumbered females by two to one. *Id.* The State makes no comparable showing on appeal. Thus, the one person displacement theory is inapposite. Further, the State's logic is again tainted by the idea that transgender women are not women.

In short, sex assigned at birth is not an accurate proxy for the physical differences between men and women. Indeed, when a person has a new sex and has gone through hormone therapy, their birth sex becomes irrelevant. Additionally, the State has made no showing that transgender women would displace cisgender women to a substantial extent. Accordingly, the Act fails to meet *Clark's* standards and is not substantially related to its interests in promoting sex equality and protecting fair opportunities for female athletes. Ultimately, the State

citing to *Clark* is like Drizella trying to wedge her foot into the glass slipper—it does not fit.

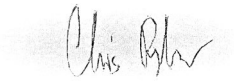
Conclusion

The State and Intervenors misunderstand transgender athletes like Lindsay Hecox. Transgender women do not compete to disrespect the idea of women's sports. Rather, they respect women's sports and seek to find its fulfillment for themselves. Yet, through wordplay and antiquated stereotypes, the Fairness in Women's Sports Act denies transgender women the benefits of participating in scholastic sports. While Idaho supports such discrimination, the Constitution does not. Transgender discrimination has no place in Idaho or anywhere else where equal protection under the law is guaranteed.

We urge this Court to affirm the district court's decision.

Respectfully submitted this 14th day of December, 2020.

Lincoln LGBTQ+ Rights Clinic



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Certificate of Compliance

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,289 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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Certificate of Service

On December 14th, 2020, this brief was electronically filed with the Clerk of this Court using the CM/ECF system, which will send a copy of this brief to all registered counsel.

December 14, 2020.

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