Appeal Nos. 20-35813, 20-35815

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, *et al.*,
Defendants-Appellants,

and

MADISON KENYON and MARY MARSHALL,
Intervenors-Appellants.

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

BRIEF FOR APPELLEES LINDSAY HECOX AND JANE DOE

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

Richard Eppink
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 Ave., Suite 700
Washington, DC 20004
Telephone: (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

Attorneys for Plaintiffs-Appellees Lindsay Hecox and Jane Doe

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INTRODUCTION

This case is not about men and boys playing on sports teams for women and girls. Nor is it about protecting women's athletic competitions from men. Rather, this case is about a sweeping Idaho law that changes the long-standing status quo to ban a subset of women and girls from school sports on the basis of their transgender status, implemented by imposing an unequal and unfair burden on all women and girl athletes. The new law is more extreme than any rule governing women's athletics anywhere in the world, and was passed in the middle of a global pandemic without any evidence of an existing problem under the prior Idaho rules.

Specifically, in March 2020, the Idaho Legislature enacted House Bill 500a ("H.B. 500" or the "Act") to categorically bar all women and girls who are transgender, and many who are intersex, from playing school sports on girls' teams in Idaho at any level—from kindergarten to college, from intramural to Division 1 athletics. To enforce that ban, H.B. 500 subjects all women and girl athletes to invasive and medically unnecessary testing if anyone "disputes" their sex using criteria—reproductive anatomy, genetic makeup (chromosomes), and endogenous testosterone levels—that were chosen

because they ensure women and girls who are transgender cannot qualify to participate on women's teams.

Idaho stands alone in creating this categorical exclusion and corresponding testing regime. All states have sex separation in school sports—including Idaho before H.B. 500's enactment. But no other state wholly prevents girls who are transgender from playing on girls' teams, and no other state enforces a sex-separation rule with invasive examinations of reproductive anatomy, chromosomes, and endogenous testosterone. Indeed, even the most elite athletic competitions worldwide—including the Olympics and World Athletics—permit women who are transgender to compete in women's events. H.B. 500 overrides Idaho's previous policy that allowed inclusion of transgender women and girls on girls' teams following testosterone suppression and contradicts the National Collegiate Athletic Association ("NCAA") rules governing college athletics across the country. The Idaho Legislature adopted this first-of-its-kind categorical bar without any evidence that any problems had arisen under the State's prior rules, enacting H.B. 500 as part of a package of bills targeting transgender individuals in Idaho for discriminatory treatment.

In a carefully reasoned 87-page opinion, the District Court preliminarily enjoined H.B. 500, finding that the law likely violates the Equal Protection Clause and that its enforcement would irreparably harm all women and girl athletes in Idaho, including those who are transgender. (1-ER-1-87.) The District Court found it "inescapable" that H.B. 500 "discriminates on the basis of transgender status" and sex. (1-ER-61, 79-80.) Applying heightened scrutiny, the District Court further found that the State had failed to carry its burden to show that the Act is substantially related to the asserted interest of providing opportunities for women athletes. The Court emphasized "the absence of any empirical evidence" that this interest is "threatened by transgender women athletes in Idaho" and credited the "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"—the standard that had governed in Idaho prior to the passage of the Act. (1-ER-69 (emphasis in original).) Nor could the State justify the sex-verification process, which "subject[s] women and girls to unequal treatment, excluding some from participating in sports at all, incentivizing harassment and exclusionary behavior, and authorizing invasive bodily examination." (1-ER-83.)

In seeking to reverse the preliminary injunction, the State and Intervenors (collectively, "Appellants") principally defend H.B. 500 on the ground that sex separation in sport is permissible under this Court's decision in *Clark, ex rel. Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126 (9th Cir. 1982) ("*Clark*"). But their various arguments—which all hinge on their claim that women and girls who are transgender are indistinguishable from men and boys—are wrong as a matter of law, science, and basic dignity. As the District Court properly recognized based on the extensive record, this case is not about a general sex-separation rule, and *Clark* does not control the entirely different question of whether girls who are transgender may be categorically excluded from girls' teams. (1-ER-62-66.) Indeed, the District Court's order *retains* the general rule of sex separation in sport, which no party challenged, by restoring "the status quo in Idaho"—where "[e]xisting rules already prevented boys from playing on girls' teams" but allowed "transgender girls to play on girls' teams after one year of hormone suppression." (1-ER-73-74.)

Appellants fail to identify any reversible error in the District Court's conclusion that H.B. 500 discriminates based on both transgender status and sex. Nor did the District Court err in evaluating the scientific and medical

evidence to conclude that H.B. 500 likely cannot survive heightened scrutiny. Against Appellants' arguments that girls who are transgender can be categorically excluded from school sports, backed up by an enforcement mechanism that threatens all girl athletes with invasive examinations, the District Court correctly recognized that "the Constitution must always prevail." (1-ER-86.) The preliminary injunction should be affirmed.

STATEMENT OF JURISDICTION

The District Court had jurisdiction under 28 U.S.C. §§ 1331 and 1343. After the District Court granted a preliminary injunction, Appellants appealed. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUE

Whether the District Court abused its discretion in granting a preliminary injunction enjoining a law that categorically bars women and girls who are transgender from playing school sports on girls' teams and subjects all women and girl athletes, but not men or boy athletes, to the threat of invasive sex-verification testing to enforce that exclusionary policy.

STATEMENT OF THE CASE

A. Transgender Status And Transgender Participation In Sports

This case involves a categorical ban on allowing women and girls who are transgender to play school sports, using a test to verify sex based on reproductive anatomy, chromosomes, and endogenous testosterone, *i.e.*, hormone levels the body produces without medical intervention. Those limited factors ignore that "[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"—and all these attributes "are not always aligned in the same direction." (5-ER-703; *see* 1-ER-4 ("[S]uch seemingly familiar terms as 'sex' and 'gender' can be misleading." (internal citations omitted)).)

"'Gender identity' is a medical term for a person's internal, innate sense of belonging to a particular sex." (5-ER-701 (citation omitted).) Everyone has a gender identity, and it is a key component of sex that is durable and cannot be changed by medical intervention. (4-ER-570-71.) "Although the detailed mechanisms are unknown, there is a medical consensus that there is a

significant biologic component underlying gender identity." (1-ER-5; *see* 5-ER-702 (gender identity is "largely a biologic phenomenon").)

A "transgender" person has a gender identity that does not align with the sex they were assigned at birth. (1-ER-5.)[1] The lack of alignment can cause "gender dysphoria," which is a serious medical condition involving "clinically significant distress or impairment in social, occupational, or other important areas of functioning." (1-ER-6 (citation omitted).) If left untreated, gender dysphoria can result in "severe anxiety and depression, suicidality, and other serious mental health issues." (1-ER-6.) Gender dysphoria is treated by recognizing the patient's gender identity, having the person live consistently with that gender identity in all aspects of life, and following appropriate treatment protocols to affirm gender identity, which alleviates distress. (4-ER-573; *see* Br. of Amici Curiae American Medical Association, et al., Point I.)

With respect to athletic competition, elite athletic regulatory bodies around the world, including World Athletics, the International Olympic

[1] A "cisgender" person has a gender identity that aligns with the sex they were assigned at birth. (1-ER-5.) An "intersex" person has variations in certain physiological characteristics associated with sex, such as chromosomes, genitals, internal organs like testes or ovaries, secondary sex characteristics, and/or hormone production or response. (4-ER-577.)

Committee ("IOC"), and the NCAA, have policies that allow women and girls who are transgender to participate on women's teams. (1-ER-72-73.) World Athletics allows women who are transgender to compete as long as their circulating testosterone levels are below a threshold level. (5-ER-704-05.) The IOC follows a similar rule, recognizing that "[i]t is necessary to ensure insofar as possible that trans athletes are not excluded from the opportunity to participate in sporting competition." (5-ER-777.) And the NCAA, which sets policies for member colleges and universities across the United States, likewise allows women and girls who are transgender to compete in women's athletics after one year of testosterone suppression as part of gender transition. (1-ER-72-73; 5-ER-707-08.) The NCAA's policy was implemented after consultation with medical, legal, and sports experts, (5-ER-781-82), and "millions of student-athletes have competed" under the policy "with no reported examples of any disturbance to women's sports as a result of transgender inclusion." (1-ER-73.)

With respect to school sports, "every other state in the nation [except Idaho following H.B. 500's enactment] permits women and girls who are transgender to participate under varying rules, including some which require hormone suppression prior to participation." (1-ER-73.) That was the rule in

Idaho, too, before H.B. 500: Girls who are transgender were eligible to participate on girls' teams after one year of testosterone suppression pursuant to rules set by the Idaho High School Activities Association ("IHSAA"). (1-ER-73-74.) The IHSAA provides for separate sports teams for boys and girls, which is not challenged here. (1-ER-73.) In other words, "general sex separation on athletic teams for men and women . . . preexisted [H.B. 500] and has long been the status quo in Idaho. Existing rules already prevented boys from playing on girls' teams before the Act." (1-ER-73 (citing IHSAA Non-Discrimination Policy).) The preliminary injunction returns Idaho to this status quo, with Appellants able to "rely on the NCAA policy for college athletes and the IHSAA policy for high school athletes, as they did for nearly a decade prior to [H.B. 500]." (1-ER-85.)

B. Idaho Enacts H.B. 500 To Bar Women And Girls Who Are Transgender From Playing School Sports

On March 16, 2020, the Idaho Legislature passed H.B. 500, which altered the existing rules by categorically barring women and girls who are transgender from playing school sports on girls' teams at any level and creating a sex-dispute mechanism that applies only to players on girls' teams. H.B. 500 was passed at the height of the initial COVID-19 outbreak when many states had adjourned their legislative sessions indefinitely in response

to the pandemic. (1-ER-78.) The Idaho Legislature, however, stayed in session to pass H.B. 500 and another bill that targets transgender individuals by preventing them from changing the gender marker on their birth certificates to match their gender identity. (1-ER-78.)[2]

H.B. 500 requires school sports in Idaho to be "expressly designated" as male, female, or co-ed "based on biological sex." Idaho Code § 33-6203(1). The Act further provides that girls' teams "shall not be open to students of the male sex," with no parallel provision for boys' teams. *Id.* § 33-6203(2). H.B. 500 additionally "creates a dispute process for an undefined class of individuals who may wish to 'dispute' any transgender or cisgender female athlete's sex." (1-ER-12 (citing Idaho Code § 33-6203(3).) That provision states:

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

[2] Idaho's implementation of the gender-marker bill has been enjoined in a separate case. *F.V. v. Jeppesen*, ___ F. Supp. 3d ___, No. 1:17-cv-00170, 2020 WL 4726274 (D. Idaho Aug. 7, 2020).

> follow regarding the receipt and timely resolution of such disputes consistent with this subsection.

Id. § 33-6203(3). Finally, H.B. 500 includes an "enforcement mechanism to ensure compliance with its provisions[,]" creating a private cause of action against schools for any student who claims to be "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 woman's team." (1-ER-3, 1-ER-12 (citing Idaho Code § 33-6205(1)) (internal quotation marks omitted).)

The three criteria H.B. 500 enumerates as the "only" bases for verifying "biological sex"—reproductive anatomy, genetic makeup, and endogenous testosterone levels—intentionally exclude women and girls who are transgender. (*See* 1-ER-77.)[3] Because many transgender girls cannot obtain gender-affirming genital surgery to treat gender dysphoria—either because it is not consistent with their individualized treatment plan or because they cannot afford it—these girls will not have external "reproductive anatomy" typical of women and girls. (1-ER-77.) And even after surgery, women who are transgender will not have ovaries. (4-ER-576.) Likewise, because the

[3] H.B. 500 also excludes many women and girls with intersex traits who would not be considered "biological" women based on the listed sex-verification criteria. (1-ER-77.)

"overwhelming majority of women who are transgender have XY chromosomes, they cannot meet the second criteria" of "genetic makeup." (1-ER-77-78.) Finally, by focusing on "endogenous" testosterone levels, H.B. 500 ensures that women who are transgender cannot qualify to play sports even if they are undergoing medical treatment and have "circulating testosterone levels [that] are within the range typical for cisgender women." (1-ER-77-78.)

None of the criteria H.B. 500 specifies to verify a student's sex "are tested for in any routine sports' physical examination." (1-ER-81.) Student sports physicals are brief examinations designed to ensure students have no health conditions that could result in serious injury or death. (5-ER-748-49.) "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 intervention." (1-ER-81.) Nor would any of the three criteria actually "verify biological sex, either alone or in any combination, as this would not be consistent with medical science." (1-ER-81 (internal quotations omitted).)

The Idaho Legislature adopted H.B. 500's categorical bar and sex-verification mechanism for the express purpose of barring girls who are transgender from being eligible to play school sports. The lead sponsor of the

bill, Representative Barbara Ehardt, described the "threat" that H.B. 500 was designed to address as two transgender high school girls who ran track in Connecticut and one transgender college woman who ran track in Montana. (1-ER-10.) Legislators discussing the bill repeatedly described women and girls who are transgender as "biological male[s]" and "biological boys." (4-ER-601-12.) One of H.B. 500's legislative findings specifically referred to "a man [sic] who identifies as a woman and is taking cross-sex hormones." Idaho Code § 33-6202(11). The entirety of H.B. 500's hearings and legislative debates focused on women and girls who are transgender and not cisgender men and boys.

Despite the asserted "threat" posed by transgender athletes, the legislative debates did not actually identify any transgender athletes in Idaho competing in women's sports at all. During the hearings, the IHSAA's Executive Director observed 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." (1-ER-9.) Representative Ehardt "admitted during the hearing that she had no evidence any person in Idaho had ever challenged an athlete's eligibility based on gender." (1-ER-9.) Indeed, "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 [wa]s required in order to promote 'sex equality' or to 'protect athletic opportunities for females.'" (1-ER-67 (citing Idaho Code § 33-6202(12)).)

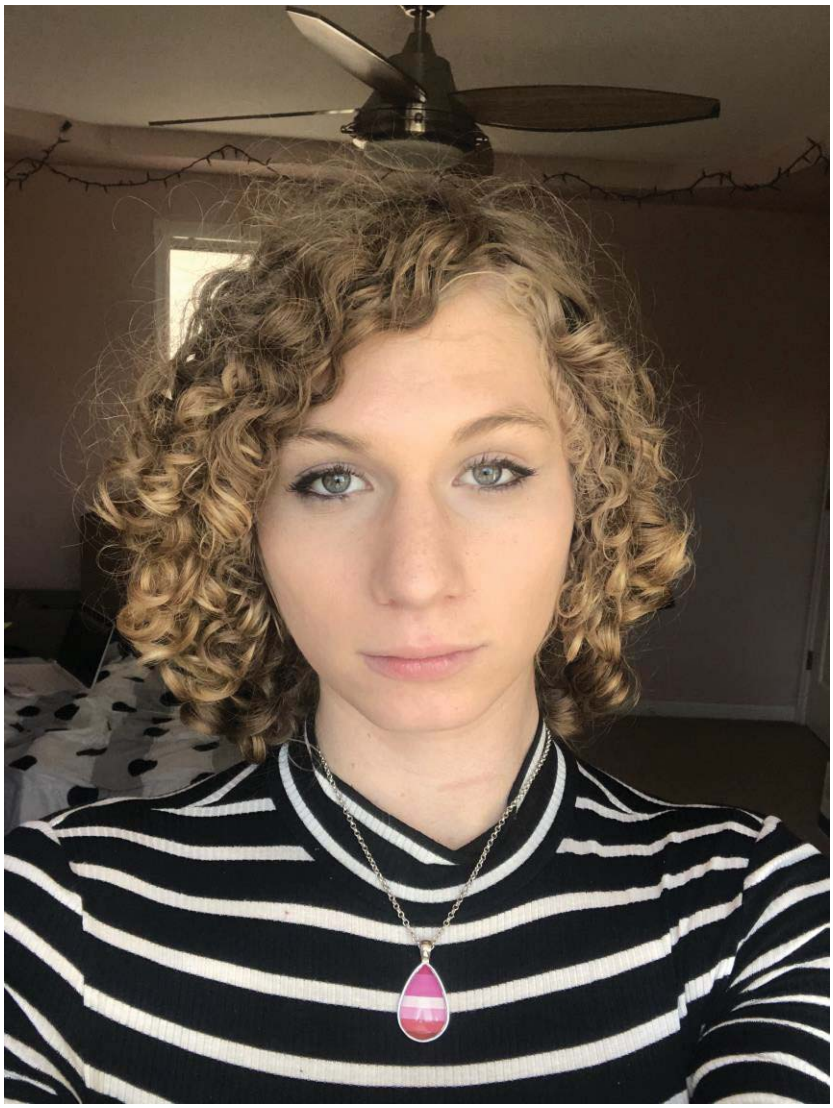
Prior to H.B. 500's enactment, the Idaho Attorney General wrote an opinion warning that the bill "raised serious constitutional and other legal concerns due to the disparate treatment and impact it would have on both transgender and intersex athletes, as well as its potential privacy intrusion on all female student athletes." (1-ER-9-10); (Letter from Attorney General Lawrence Wadsen to Representative Ilana Rubel (Feb. 25, 2020), at 4, https://www.idahopress.com/attorney-generals-opinion-hb-500/pdf_4ebb604a-83eb-5bd4-a232-b13a64f4be47.html ("AG Letter").) In addition, the opinion letter noted that "[t]he 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." (*Id.*) Former Idaho Attorneys General likewise urged Idaho Governor Little to veto the bill "to keep a legally infirm statute off the books." (1-ER-11; *see* Br. *Amicus*

Curiae of Three Former Idaho Attorneys General.) And "Professor [Doriane] Lambelet Coleman, whose work was cited in the H.B. 500 legislative findings," similarly "urged Governor Little to veto the bill, explaining that her research was misused" and did not support a categorical bar. (1-ER-10.) Despite these warnings, H.B. 500 was enacted and signed into law on March 30, 2020. (1-ER-11.)

C. Plaintiffs Lindsay Hecox And Jane Doe Sue To Prevent H.B. 500 From Harming Them And All Women And Girl Athletes In Idaho

Plaintiffs Lindsay Hecox and Jane Doe, like most avid athletes, love participating and competing on teams and have gained immense benefits from those experiences. Facing irreparable harm from H.B. 500, they filed this suit alleging that the law violates their constitutional and statutory rights.

Lindsay is a woman athlete living in Idaho who is transgender. (4-ER-678.) Lindsay loves running, and she ran track and cross-country on co-ed teams in high school. (4-ER-678.) At the time this lawsuit was filed, Lindsay was a freshman at Boise State University ("BSU") who wished to run on the women's cross-country and track teams. (4-ER-681.) A picture of Lindsay is below. (5-ER-768.)



Since September 2019, as part of her treatment for gender dysphoria, Lindsay has been treated with testosterone suppression and estrogen, which lowers her circulating testosterone levels and affects her bodily systems and secondary sex characteristics. (4-ER-680-81.) Lindsay's health and well-being depend on being able to live and express herself as a woman; running on a men's team is not an option for her and would be contrary to her medical

treatment for gender dysphoria. (4-ER-684.) Lindsay is eligible to compete in women's sports under existing NCAA rules, but is barred by H.B. 500. (*See* 1-ER-37.)[4]

Jane Doe is a 17-year-old cisgender girl attending Boise High School who competes on the varsity soccer and track teams. (5-ER-688-89.) "Because most of [Jane's] 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." (1-ER-7; *see* 5-ER-689.) Under H.B. 500, Jane could be subject to a "sex" dispute at any time and have to undergo invasive testing to verify her eligibility, with her athletic career on the line if she fails to comply.

D. The District Court Grants A Preliminary Injunction Enjoining H.B. 500

On August 17, 2020, the District Court granted a preliminary injunction, finding that H.B. 500 is likely unconstitutional and would irreparably harm

[4] With H.B. 500 enjoined, Lindsay was permitted to try out for BSU's women's cross country and track teams in fall 2020, but did not make the team. Lindsay has subsequently taken a temporary leave of absence from BSU to work full time, establish her Idaho residency, and save money for school. She will remain in Idaho and will return to BSU next school year. She continues to train in order to try out again for the track team, and she remains eligible to compete under NCAA rules.

Lindsay, Jane, and all women and girl athletes in Idaho if it were not enjoined. The Court first determined that H.B. 500 discriminates on the basis of transgender status and sex and so is subject to heightened scrutiny. (1-ER-59-62.) Although H.B. 500 does not "expressly use the term 'transgender,'" the Court recognized based on the law's text, purpose, and effect that it is "directed at excluding women and girls who are transgender[.]" (1-ER-60-61, 77.) And by "creat[ing] a different, more onerous set of rules for women's sports when compared to men's sports," H.B. 500 further discriminates based on sex. (1-ER-80.)

Applying heightened scrutiny, the District Court found that Appellants failed to show that H.B. 500 substantially serves an important state interest. The Court rejected Appellants' reliance on *Clark*—involving a policy preventing cisgender boys from playing volleyball on girls' teams—because *Clark*'s analysis of the justifications for the general rule of sex separation in sport "do not appear to be implicated by allowing transgender women to participate on women's teams." (1-ER-63.) Specifically, in contrast to the policy in *Clark*, H.B. 500's categorical exclusion of girls who are transgender "discriminates against a historically disadvantaged group" and "entirely eliminates their opportunity to participate in school sports" with no evidence

that "allowing transgender women to compete on women's teams would substantially displace female athletes." (1-ER-64-66.)

Nor could Appellants establish any "'exceedingly persuasive' justification" for H.B. 500. (1-ER-68.) The District Court emphasized the "absence of any empirical evidence" that "athletic opportunities are threatened by transgender women athletes in Idaho," citing the "compelling evidence" that "physiological advantages are not present when a transgender woman undergoes hormone therapy and testosterone suppression." (1-ER-69.) The Court found a medical consensus that the performance advantage typical of men over women in sport principally results from circulating testosterone—which H.B. 500 "intentionally excludes" from consideration. (1-ER-69-70, 78.) The Court further emphasized that the prior rules governing transgender inclusion had not resulted in any displacement of women athletes in Idaho, other states, or elite athletic organizations like the IOC. (1-ER-67-69, 72-73, 78.) Nor could Appellants justify H.B. 500's sex-verification provision, which inflicts "injury and indignity" on all women and girl athletes and "hinders" the benefits of school sports "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." (1-ER-83.) Because Appellants did not "identif[y] 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," and enforced through a "humiliating" sex-dispute verification process, the District Court found that H.B. 500 likely violates the Constitution. (1-ER-79-80.)

All other factors likewise supported a preliminary injunction. The District Court found that "Lindsay and Jane both face irreparable harm due to violations of their rights under the Equal Protection Clause." (1-ER-83.) Lindsay further would face a categorical exclusion from being eligible to play school sports and Jane would be "subject to the possibility of embarrassment, harassment, and invasion of privacy through having to verify her sex." (1-ER-84.) On the other side of the balance, the Court found an injunction "would not harm [Appellants] because it would merely maintain the status quo," with Appellants able 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." (1-ER-85.) And given the "likelihood that the Act violates the Constitution," the Court concluded that "both the public interest and the balance of the

equities favor a preliminary injunction." (1-ER-86 (internal quotation marks and citation omitted).) That injunction, the Court emphasized, would vindicate "the constitutional rights of every girl and woman athlete in Idaho," including those who are transgender. (1-ER-87.)

SUMMARY OF THE ARGUMENT

The District Court correctly found that H.B. 500 likely violates the Equal Protection Clause, runs counter to the public interest, and would irreparably harm Lindsay, Jane, and all woman and girl athletes in Idaho. The preliminary injunction should be affirmed.

H.B. 500 discriminates on the basis of transgender status and sex, thus triggering heightened equal protection scrutiny. Appellants' suggestion that H.B. 500 does not classify based on transgender status but simply creates a general rule of sex separation in sport cannot be reconciled with the statute's text, purpose, and effect. H.B. 500 departs from the existing system of sex separation in sport in Idaho, which allowed the participation of transgender athletes, to create a sweeping categorical exclusion of girls who are transgender based on an intentionally narrow definition of "biological sex." And H.B. 500 enforces that exclusionary policy with a novel sex-verification regime that subjects all women and girl athletes to differential and worse

treatment compared to men and boy athletes. Appellants' mischaracterization of H.B. 500 cannot obscure the Act's discriminatory classifications or eliminate the State's burden to demonstrate an exceedingly persuasive justification for that discrimination.

The State cannot satisfy that burden: completely banning girls who are transgender from school sports and threatening all girls with invasive and humiliating exams of their reproductive anatomy, chromosomes, and endogenous testosterone does not substantially serve any important governmental interest. Appellants erroneously contend that *Clark* supports H.B. 500's discriminatory classifications, but the sex separation in sport upheld in *Clark* preexisted H.B. 500, remains the status quo under the preliminary injunction, and is not challenged here. *Clark* concerns the exclusion of cisgender men and boys from women's sports and does not govern this wholly different context involving discrimination against a subset of women and girls.

Appellants therefore must—but cannot—justify H.B. 500's specific targeting of girls who are transgender for a categorical rule of exclusion. As the District Court found after reviewing the medical and scientific evidence, no basis exists to conclude that the statute's sweeping ban is necessary to

protect opportunities for women in sports. To the contrary, H.B. 500 intentionally excludes consideration of the one factor with a documented effect on general performance differences between men and women in sports: circulating testosterone. The Act's invasive sex-verification regime likewise serves no purpose other than to implement unwarranted discrimination by subjecting all women and girls to examination in order to identify, isolate, and exclude those who are transgender. Whether reflecting irrational prejudice or fear of those who are different, H.B. 500's discrimination against girls who are transgender—implemented through provisions that harm all girls—cannot be justified under any equal protection standard.

Nor can Appellants establish that the District Court erred in finding irreparable harm and concluding that the balance of the equities and the public interest weigh strongly in favor of the preliminary injunction—as Appellants effectively concede by failing to brief those factors. For all of these reasons, the District Court correctly granted a preliminary injunction enjoining H.B. 500 in full.

STANDARD OF REVIEW

This Court reviews the District Court's grant of a preliminary injunction for an abuse of discretion. This review is "limited and deferential." *Padilla v.*

Immigr. & Customs Enf't, 953 F.3d 1134, 1141 (9th Cir. 2020) (citation omitted). A district court has "considerable discretion in fashioning suitable relief and defining the terms of an injunction," and "[a]ppellate review of those terms is correspondingly narrow." *Lamb-Weston, Inc. v. McCain Foods, Ltd.*, 941 F.2d 970, 974 (9th Cir. 1991) (internal quotation marks and citations omitted).

While a district court's legal conclusions are reviewed de novo, factual findings are reviewed for clear error. *Armstrong v. Brown*, 768 F.3d 975, 979 (9th Cir. 2014); *see Index Newspapers LLC v. United States Marshals Serv.*, 977 F.3d 817, 834 (9th Cir. 2020) ("It is not our role to second-guess the district court's factual findings"). A mere showing of conflicting evidence is insufficient to disturb the district court's findings. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 422 F.3d 782, 795 (9th Cir. 2005); *see Fyock v. Sunnyvale*, 779 F.3d 991, 1000 (9th Cir. 2015) (rejecting appellants' request to "re-weigh the evidence and overturn the district court's evidentiary determinations"). Thus, as long as the district court's findings "are plausible in light of the record viewed in its entirety, a reviewing court may not reverse even if convinced it would have reached a different result." *Nat'l Wildlife*, 422 F.3d at 795 (citations omitted).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT H.B. 500 LIKELY VIOLATES EQUAL PROTECTION

As the District Court recognized, Plaintiffs are likely to succeed on their claim that H.B. 500's categorical exclusion of women and girls who are transgender from playing school sports and its sex verification regime designed to implement that discriminatory rule are unconstitutional. The Act discriminates based on both transgender status and sex and therefore must be tested under heighted scrutiny. But Appellants cannot carry their burden to show that H.B. 500 substantially serves the important governmental interest in protecting opportunities for women in sports. As the District Court found, the Act's changes to Idaho's preexisting rules governing sex separation in sport cannot be justified based on the legislative record, scientific evidence about performance differentials in sport, or the experience of athletes in Idaho or anywhere else in the world—including in the most elite competitions. Because Appellants cannot identify an exceedingly persuasive justification for H.B. 500—or *any* justification beyond "ensuring exclusion of transgender women athletes," (1-ER-78)—the law fails under any standard of review.

A. H.B. 500 Must Be Tested Under Heightened Scrutiny Because It Discriminates On The Basis Of Transgender Status And Sex

By barring all women and girls who are transgender from women's sports and subjecting all women and girl athletes—but not men and boy athletes—to a sex-verification procedure, H.B. 500 discriminates based on transgender status and sex. Appellants contend the law merely codifies a general rule of separate boys' and girls' teams based on "biological sex," rather than classifying based on "transgender status," but those arguments ignore H.B. 500's text, context, history, purpose, and effect.

Prior to H.B. 500's enactment, "[e]xisting rules [in Idaho] already prevented boys from playing on girls teams[.]" (1-ER-73.) H.B. 500 changes the law by adopting new "criteria" that are "designed to exclude transgender women and girls" from girls' teams "and to reverse the prior IHSAA and NCAA rules that implemented sex separation in sports while permitting transgender women to compete" following one year of testosterone suppression. (1-ER-77.) Appellants' arguments thus "do not overcome the inescapable conclusion that the Act discriminates on the basis of transgender status" and sex, triggering heightened scrutiny. (1-ER-61); *United States v. Virginia*, 518 U.S. 515, 533, 555 (1996) (internal quotation marks omitted)

("*VMI*") ("[A]ll gender-based classifications today warrant heightened scrutiny."); *Karnoski v. Trump*, 926 F.3d 1180, 1201 (9th Cir. 2019) (holding that a law classifying based on transgender status is evaluated under "a standard of review that is more than rational basis but less than strict scrutiny").[5]

1. H.B. 500's Categorical Exclusion Of Women And Girls Who Are Transgender Discriminates Based On Transgender Status And Sex

By design, purpose, and effect, H.B. 500 singles out women and girls who are transgender to categorically exclude them from participating in school sports on the basis of both their transgender status and sex.

Discrimination Based on Transgender Status. H.B. 500 defines "biological sex" to deliberately exclude women and girls who are transgender from being eligible to participate in women's sports. The Act requires that women's teams be restricted based on "biological sex" verified by criteria that women who are transgender cannot meet: "reproductive anatomy, genetic

[5] The Intervenors briefly contend that classifications based on transgender status should not trigger intermediate scrutiny and that this Court's decision in *Karnoski* was "wrongly decided." (Intervenors Br. at 27-28 & n.10.) That argument lacks merit, ignores the District Court's analysis of the factors warranting heightened scrutiny, (1-ER-57-58), and disregards the reality that a panel cannot overrule circuit precedent.

makeup, or normal endogenously produced testosterone levels." Idaho Code § 33-6203(3). Those criteria have no documented correlation to athletic performance and in fact "intentionally exclude" consideration of circulating testosterone, which is the "one [sex-related] factor that a consensus of the medical community appears to agree" affects athletic performance. (1-ER-78.) Instead of correlating to characteristics associated with athletic performance, H.B. 500's narrow definition of "biological sex" is perfectly correlated to whether a woman athlete was assigned the sex of male at birth—and women who were assigned male at birth are, by definition, transgender. (5-ER-570.) H.B. 500's restrictive definition of "biological sex," is thus "designed to exclude transgender women and girls" by ensuring they are categorically ineligible to play on women's teams. (1-ER-77.) As such, it constitutes discrimination based on transgender status. *See Christian Legal Soc. Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 689 (2010) ("A tax on wearing yarmulkes is a tax on Jews.") (citation omitted); *Lawrence v. Texas*, 539 U.S. 558, 583 (2003) (O'Connor, J., concurring in judgment) ("While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such

circumstances, [the] law is targeted at more than conduct. It is instead directed toward gay persons as a class.").

H.B. 500's context and history confirm that the law discriminates based on transgender status. The Legislature's findings expressly refer to "a man [sic] who identifies as a woman and is taking cross-sex hormones." Idaho Code § 33-6202(11). The bill sponsors repeatedly described the goal of the statute as excluding women and girls who are transgender from participating in women's sports, characterizing three transgender women who ran track in Connecticut and Montana as the "threat" that H.B. 500 was designed to address. (1-ER-10; *see* 4-ER-601-12.) The entirety of the legislative debates focused on whether women who are transgender should be barred from women's sports, and not whether cisgender men should be barred (as they already were under the preexisting rules governing sex separation in sport in Idaho, 1-ER-73). And the Legislature enacted H.B. 500 as part of a package of bills targeting transgender individuals in Idaho. (1-ER-78.) As the State's counsel previously acknowledged in advising the Legislature that H.B. 500 is likely unconstitutional, the law is "targeted toward transgender and intersex athletes." (AG Letter at 6.)

Appellants now seek to avoid that conclusion by observing that H.B. 500 does not use the term "transgender" and instead refers only to "biological sex." That argument ignores the definitional exclusion written into the law, which specifically defines "biological sex" to exclude girls who are transgender even though they often possess many biological characteristics typical of cisgender women. *See, e.g.*, *Morris v. Pompeo*, No. 2:19-cv-00569, 2020 WL 6875208, *7 (D. Nev. Nov. 23, 2020) (recognizing that policy that did "not use the term 'transgender'" used criteria that "by definition" would apply only to individuals who are transgender and accordingly "discriminate[d] . . . on the basis of . . . transgender status"). Although Appellants appear to assume that sex assigned at birth (usually based on external genitalia) is the sole determinant of a person's "biological sex," "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." (4-ER-582.) And as the District Court found, "there is a medical consensus that there is a significant biologic component underlying gender identity." (1-ER-5.) By restricting the definition of "biological sex" to purposefully exclude girls who are transgender, H.B. 500 classifies on that basis.

In this respect, H.B. 500's intentionally restrictive definition of "biological sex" functions as a form of "[p]roxy discrimination," which exists when "a law or policy that treats individuals differently on the basis of seemingly neutral criteria . . . are so closely associated with the disfavored group that discrimination on the basis of such criteria is, constructively, facial discrimination against the disfavored group." *Pac. Shores Properties, LLC v. City of Newport Beach*, 730 F.3d 1142, 1160 n.23 (9th Cir. 2013). "For example, discriminating against individuals with gray hair is a proxy for age discrimination because "the 'fit' between age and gray hair is sufficiently close." *Id.* (citing *McWright v. Alexander*, 982 F.2d 222, 228 (7th Cir. 1992)). Likewise here, H.B. 500's definition of "biological sex" is so closely associated with girls who were assigned the sex of male at birth that it amounts to a transgender-status classification.

Indeed, H.B. 500's definition of "biological sex" has no purpose *other* than to exclude women who are transgender from playing on women's teams. Sex-separation in sport is not maintained through "biological sex" definitions because cisgender boys do not assert themselves to be "girls" or "women" (even if they might assert a legal right for boys to play on girls' teams, as occurred in *Clark*). Long before H.B. 500, Idaho had separate teams for boys and girls

with no "biological sex" definition and no record of problems implementing those rules. The sole function of H.B. 500's "biological sex" definition is to force women and girl players to go through a sex-verification process in order to identify and exclude those who were assigned the sex of male at birth—that is, those who are transgender. Appellants err in suggesting that "biological sex" is a well-established legal concept and not one crafted in Idaho for the first time in 2020 to discriminate against transgender people. *Cf. Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 626 (4th Cir. 2020) (Wynn, J., concurring) (observing that the defendant adopted "ends-driven definitions of 'biological gender'" to "guarantee[] a particular outcome: that one student would be unable to use the boys' restroom" based on his transgender status).

This Court notably rejected an argument similar to Appellants' in *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014), which held that a same-sex marriage ban discriminated on the basis of sexual orientation even though it did not explicitly refer to that classification. *Id.* at 467-68. The defendants contended the laws classified based on "procreative capacity" rather than sexual orientation, with "differential treatment [on the basis of] sexual orientation" constituting only an "incidental effect" of the law. *Id.* But this Court recognized that the bans "discriminate[d] on the basis of sexual orientation"

without express reference to people who are gay and lesbian because the prohibited conduct—entering into a marriage with a person of the same sex—is closely correlated with that status. *Id.* at 468. So too here, H.B. 500's definition of "biological sex" discriminates based on transgender status even without using that specific term.[6] As with the "procreative capacity" arguments raised in *Latta*, the District Court properly held that whatever "physiological differences" the State may use to attempt to justify the "biological sex" definition go only to whether the Act survives heightened scrutiny and "do not overcome the inescapable conclusion that the Act discriminates on the basis of transgender status" triggering such scrutiny in the first place. (1-ER-61.)

Appellants further err in contending that objections to H.B. 500's discriminatory classifications amount to a request for a special exception from sex-separation rules for girls who are transgender. That argument ignores

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[6] Intervenors miss the point in contending that *Latta* is distinguishable because the same-sex marriage bans did not expressly refer to procreative capacity. Neither did the laws expressly refer to sexual orientation. But because gay and lesbian people form intimate relationships with members of the same sex, this Court recognized that a ban on same-sex marriage in fact classifies based on sexual orientation—just as H.B. 500's test of "biological sex" classifies based on transgender status in purposefully excluding women who are transgender by definition and design.

that H.B. 500 was designed to, and does, exclude only transgender women and girls, who seek only what every cisgender student already has: an opportunity to play school sports. Under Appellants' argument, transgender individuals could never vindicate their rights because it would always be permissible to insist that they act contrary to their gender identity or to claim that laws merely draw permissible lines based on selective definitions of "biological sex." The Supreme Court rejected such arguments in *Bostock*, and this Court likewise should reject them here. *Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1738, 1754 (2020) (holding that firing transgender woman was a form of sex discrimination, notwithstanding her employer's argument that she was instead fired for failing to follow a "biological sex" dress code and could simply have come to work dressed as a man like all "biological males").

Contrary to Appellants' arguments (Intervenors Br. at 24, 26; State Br. at 14-15), the fact that H.B. 500 does not bar transgender boys from playing school sports does not erase or excuse the discrimination against women and girls who are transgender. Where the law draws a line based on a protected status, the fact that not all members of the class are targeted by the discrimination does not insulate the law from heightened scrutiny review; instead, the subset affected by the law may challenge the classification. *See*

Phillips v. Martin Marietta Corp., 400 U.S. 542, 543-44 (1971) (per curiam) (discriminating against women with children is sex discrimination even if women without children were not discriminated against); *Rice v. Cayetano*, 528 U.S. 495, 516-17 (2000) ("Simply because a class . . . does not include all members of [a] race does not suffice to make the classification race neutral."); *Nyquist v. Mauclet*, 432 U.S. 1, 7-9 (1977) (singling out some but not all aliens for discrimination constituted a "classification based on alienage" because even though not all aliens were equally affected, "[t]he important points are that [the law] is directed at aliens and that only aliens are harmed by it"); *Mathews v. Lucas*, 427 U.S. 495, 504 n.11 (1976) (fact that statutory classifications "discriminate[d] among illegitimate children does not mean, of course, that they are not also properly described as discriminating between legitimate and illegitimate children").

Appellants' argument further ignores the unique intersectional discrimination girls who are transgender may face, perversely depriving them of protection because they are discriminated against based on the confluence of two different protected traits—their transgender status and their sex. *Cf. B.K.B. v. Maui Police Dep't*, 276 F.3d 1091, 1101 (9th Cir. 2002) (citation omitted) (describing "the intersectional relationship between discrimination

on the basis of" two characteristics such as "race and gender"); *Sewell v. Monroe City Sch. Bd.*, 974 F.3d 577, 584 (5th Cir. 2020) (holding that Black boys could bring Title VI race discrimination claim based on school's hair policy even though Black girls and white boys were not targeted by the policy).

Nor can Appellants avoid H.B. 500's transgender-status classification by relying on *Geduldig v. Aiello*, 417 U.S. 484 (1974). The Intervenors cite *Geduldig* for the proposition that a particular "distinction involving pregnancy did not distinguish based on sex[.]" (Intervenors Br. at 25.) But all *Geduldig* held is that exclusion of pregnancy from a disability benefits program with no showing of "pretext" is *not necessarily* "invidious discrimination against the members of one sex." *Geduldig*, 417 U.S. at 496 n.20.[7] In other words, even under *Geduldig*, "the pregnancy line" *may be* a sex-discrimination line even if not all women are affected so long as "discrimination has occurred." *deLaurier v. San Diego Unified Sch. Dist.*, 588

[7] Notably, *Geduldig* also predates the Supreme Court's modern equal protection jurisprudence and has not been cited by a majority opinion in an equal protection case since the mid-70s. *See* Reva B. Siegel, *The Pregnant Citizen, from Suffrage to the Present*, 108 Georgetown L.J. 167, 208 n.229 (2020). And since *Geduldig*, the Court has recognized that the differential treatment of pregnancy in insurance and employee-leave policies resting on "the pervasive sex-role stereotype that caring for family members is women's work" is impermissible sex discrimination. *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 731 (2003).

F.2d 674, 677 (9th Cir. 1978) (holding sex discrimination had occurred when an employer required teachers to take mandatory leave in their ninth month of pregnancy and thus "restrict[ed] . . . pregnant women's employment opportunities"). Here, H.B. 500's intentionally narrow definition of "biological sex," which was specifically designed to categorically exclude girls who are transgender from school sports, is precisely what *Geduldig* prohibits: a pretextual classification designed to effectuate discrimination. The fact that not all transgender people are affected does not erase that discriminatory classification.

Discrimination Based on Sex. Because H.B. 500 discriminates based on transgender status, it also necessarily discriminates based on sex and independently triggers heightened scrutiny on that basis. As the Supreme Court held in *Bostock*, "it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex." *Bostock*, 140 S. Ct. at 1741.

Appellants embrace the fact that H.B. 500 "discriminates based on sex" in an effort to argue that it does not "discriminate[] more narrowly based on transgender status[.]" (Intervenors Br. at 14 n.6.) But sex and transgender status are not mutually exclusive: that the statute facially discriminates

based on sex does not mean it cannot also facially discriminate based on transgender status. *See Latta*, 771 F.3d at 479 (Berzon, J., concurring) (noting that same-sex marriage bans facially discriminate based on both sexual orientation and sex). The Act triggers heightened scrutiny by classifying on each of those bases.

2. H.B. 500's Sex-Verification Dispute Provision Discriminates Against All Women And Girl Athletes Based On Sex

H.B. 500 treats all women and girl athletes differently and worse than all men and boy athletes by subjecting them to the threat of sex-verification disputes, thereby facially discriminating based on sex for this additional reason. As the District Court recognized, "the Act creates a different, more onerous set of rules for women's sports when compared to men's sports" by "singling out members of girls' and women's teams for sex verification." (1-ER-79-80.) Only players on girls' teams face the threat of having to undergo "humiliating" and "invasive medical tests" to establish their "biological sex" relying on reproductive anatomy, chromosomes, or endogenous testosterone levels. (1-ER-80-81.) Appellants acknowledge the point, accepting that H.B. 500 creates a sex-based line. (*See* State Br. at 34.) H.B. 500's sex-verification provision accordingly independently triggers heightened scrutiny. (1-ER-80

("Where spaces and activities for women are 'different in kind . . . and unequal in tangible and intangible ways from those for men, they are subject to heightened scrutiny.'" (quoting *VMI*, 518 U.S. at 540)).)

B. H.B. 500's Categorical Bar On Transgender Women Participating In Women's Sports Fails Heightened Scrutiny

The District Court properly held that Appellants had not justified H.B. 500 under heightened scrutiny. Appellants defend H.B. 500 by arguing that sex separation in sports is constitutional under *Clark*. But that general rule is not at issue here, and its constitutionality does not resolve the separate question of whether girls who are transgender can be categorically barred from girls' sports. Prior to H.B. 500's enactment, "[e]xisting rules [in Idaho] already prevented boys from playing on girls' teams." (1-ER-73.) The preliminary injunction maintains that status quo. The only relevant way H.B. 500 changes Idaho law is by, for the first time anywhere, singling out and excluding girls who are transgender from playing school sports altogether—a different classification and restriction than this Court considered in *Clark*. (1-ER-66 (recognizing that *Clark* analyzed "sex separation in sport generally" and thus is not "determinative here").)

Appellants accordingly must—but cannot—show that H.B. 500's categorical exclusion of women and girls who are transgender from women's

sport substantially advances an important state interest. As the District Court found after evaluating all evidence, none of the interests offered to defend H.B. 500 are advanced by the law and Plaintiffs are likely to succeed on their equal protection claims.

1. Heightened Scrutiny Is A Demanding Standard And Applies To All Sex-Based Classifications

Heightened scrutiny imposes a "demanding" standard, with the burden "rest[ing] entirely on the State" to demonstrate an "exceedingly persuasive" justification for its differential treatment. *VMI*, 518 U.S. at 533. The government "must show at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Id.* at 516 (internal quotation marks and citations omitted). A court must assess the law'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." (1-ER-62 (citation omitted).)

The State misstates the constitutional inquiry in arguing that "laws that recognize real differences between the sexes do not violate the Equal Protection Clause simply because they treat the sexes differently." (State Br. at 31.) Laws that differentiate based on asserted "real differences" between

men and women are not presumptively constitutional, as the State claims, but instead must still be tested under heightened scrutiny. *VMI*, 518 U.S. at 533 (recognizing that "'inherent differences' between men and women" cannot be used to "artificially constrain[] . . . an individual's opportunity").

2. H.B. 500's Discrimination Is Not Constitutional Under The Analysis In *Clark*

Appellants err in contending that H.B. 500's categorical exclusion of girls who are transgender from girls' sports is constitutional under *Clark*. (State Br. at 10-12, 18-31; Intervenors Br. at 19-22, 28-39.) *Clark* upheld a policy prohibiting cisgender boys from playing on the girls' volleyball team in a school district that did not sponsor a boys' volleyball team but provided "overall [athletic] opportunit[ies]" to boys that were "not inferior" to those provided to girls. *Clark*, 695 F.2d at 1131, 1132. The parties had stipulated that boys would "on average be potentially better volleyball players than girls" and would "dominate" particular "skills in volleyball," thus creating an "undue advantage" in competition with girls. *Id.* at 1127, 1131. Based on those stipulated facts, this Court found that "due to average physiological differences, males would displace females to a substantial extent if they were allowed to compete for positions on the volleyball team." *Id.* at 1131. The Court concluded that the exclusion of boys was substantially related to the

important interests in "redressing past discrimination against women in athletics and promoting equality of athletic opportunity between the sexes." *Id.*[8]

As the District Court recognized, the general rule of sex separation in sport upheld in *Clark* presents different issues than H.B. 500's categorical exclusion of girls who are transgender from girls' sports. (1-ER-63 (analyzing *Clark* and concluding that "the justifications" for preventing cisgender boys from playing on girls' teams "do not appear to be implicated by allowing transgender women to participate on women's teams").) In advising the Idaho Legislature of H.B. 500's constitutional infirmities, counsel for the State likewise previously acknowledged that "[t]he 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." (AG Letter at 4.) Appellants' effort to resist that conclusion now and their assertion that there is no relevant difference between cisgender boys

[8] This Court reiterated this same analysis when the plaintiff's brother challenged a school policy preventing boys from playing on the girls' volleyball team. *Clark v. Arizona Interscholastic Ass'n*, 886 F.2d 1191, 1192 (9th Cir. 1989) ("*Clark II*"). The Court observed that "Clark d[id] not dispute" the prior conclusion that men would displace women "to a substantial extent" if allowed to compete on women's teams. *Id.* at 1193. The Court adopted the findings in *Clark* and again upheld the policy. *Id.* at 1194.

and girls who are transgender runs counter to common sense, medical consensus, and prevailing law.

At the outset, the State grossly misstates the record and wholly ignores what it means to be transgender in contending that "[t]he only difference between [Plaintiff Lindsay] Hecox and the Clark brothers is gender identity, which does not change the universally recognized sex-based physiological advantages male-sexed athletes have to out-compete and displace female-sexed athletes." (State Br. at 8-9.) As discussed more fully below, that argument entirely ignores the District Court's finding that transgender women who have suppressed their testosterone—as Lindsay has—have no substantial physiological advantages over cisgender women. (1-ER-65-66); *see* pp. 47-48, *infra*. Appellants' insistence, in the face of the District Court's findings, that Lindsay is identical to a cisgender man hinges on their "own misconceptions, which themselves reflect 'stereotypic notions.'" *Grimm*, 972 F.3d 586, 610 (4th Cir. 2020), *as amended* (August 28, 2020) (holding that a boy who is transgender was "similarly situated to other boys" and the defendants' decision to "exclude[] [him] from using the boys restroom facilities" was based on misconceptions and stereotypes).

Courts have likewise recognized the extreme social, psychological, and emotional harms that arise from misgendering individuals who are transgender, excluding them from activities their peers participate in, or forcing them into single-sex spaces inconsistent with their gender identity. *See, e.g.*, *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 294 (W.D. Pa. 2017) (describing how exclusion of transgender students from restrooms that matched their gender identity "caus[ed] them genuine distress, anxiety, discomfort and humiliation"); *see* (4-ER-577 (describing how transgender students "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").) Here, as the District Court explained, "[n]ot only would being forced onto a men's team be contrary to Lindsay's medical treatment for her gender dysphoria, it would also be painful and humiliating, and potentially subject her to harassment and further discrimination." (1-ER-10.) The State's false claim that transgender girls are identically situated to cisgender boys—*i.e.*, that Lindsay is a man—contravenes science and basic decency, and should be given no weight.

Moreover, as the District Court recognized, all three factors that supported the constitutionality of the policy in *Clark* are absent here. First, while *Clark* recognized that states have an interest in remediating past inequalities in athletic opportunities available to women as compared to men, that interest is not served by further discriminating against a subset of women by categorically excluding those who are transgender from playing school sports. "[L]ike women generally"—and unlike cisgender men—"women who are transgender have historically been discriminated against, not favored." (1-ER-64.) *Clark*'s finding that there "clearly" is a "substantial relationship between the exclusion of all males from the team and the goal of redressing past discrimination" against women has no application to the different lines H.B. 500 draws. 695 F.2d at 1131. Far from serving that interest, the District Court recognized that H.B. 500 "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." (1-ER-64.)

Second, "under [H.B. 500], 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" despite being excluded from

volleyball. (1-ER-64.) As *Clark* recognized, "a lack of overall equality of athletic opportunity certainly raises its own problems," 695 F.2d at 1130-31—which *Clark* had no occasion to address but which H.B. 500 squarely presents by "entirely eliminat[ing]" the ability of girls who are transgender to play any school sports. (1-ER-64-65.)

Indeed, the State's counsel previously acknowledged that "[i]n order to defend this legislation, [the State] would need evidence showing that transgender women—who may undergo treatment to reduce testosterone and may consequently experience a change in athletic ability—would have a meaningful opportunity to participate on men's or coed teams." (AG Letter at 4.) But coed teams "are not common at the school level." (*Id.*) And as the District Court observed, playing on men's teams is not a viable option for women who are transgender. (1-ER-64-65.) Indeed, forcing "[p]articipati[on] 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.'" (1-ER-65 (citation omitted).)[9] *Clark*

[9] As Lindsay explained: "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.'" (4-ER-684.) The District Court properly recognized that the suggestion that "Lindsay and other transgender women are not excluded from

emphasized that "[w]hile equality in specific sports is a worthwhile ideal, it should not be purchased at the expense of ultimate equality of opportunity to participate in sports" overall. 695 F.2d at 1132. H.B. 500's categorical exclusion of girls who are transgender from playing school sports on girls' teams in *any* sport at *any* level denies the very equality of athletic opportunity that *Clark* found critically important.

Third, in contrast to the record in *Clark* establishing that average physiological differences between cisgender boys and girls would result in boys "dominat[ing]" over girls in volleyball, no evidence supports the notion that girls who are transgender would "displace" cisgender girls in athletics "to a substantial extent." *Clark*, 695 F.2d at 1127, 1131. The District Court evaluated the extensive evidence submitted by all parties and found no basis to conclude that "transgender women who suppress their testosterone have significant physiological advantages over cisgender women." (1-ER-66.) That finding accords with practical experience: transgender inclusion is the norm

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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." (1-ER-79.)

for elite athletic organizations such as the IOC and NCAA, with no evidence that cisgender women lack athletic opportunity based on those policies. Nor was there evidence of displacement under the prior Idaho policy permitting girls who are transgender to participate on girls' teams after testosterone suppression. Against all this, the State errs in contending (State Br. at 11) that "[t]he district court disregarded the physiological differences *Clark* found determinative"; rather, the District Court considered Appellants' evidence about purported physiological differences and found it wholly insufficient to justify H.B. 500's discriminatory exclusion of transgender girls from school sports.

Appellants further misread *Clark II* as suggesting that participation by just one cisgender boy on a girls' volleyball team can be barred because it would "set back" the "goal of equal participation by females in interscholastic athletics[.]" 886 F.2d at 1193. (*See* State Br. at 24 n.10; Intervenors Br. at 2, 22.) The Court in *Clark* had already observed that a viable alternative to a categorical ban on allowing boys to play on girls' teams would be to allow "boys' participation . . . but only in limited numbers." 695 F.2d at 1131. The Court in *Clark II* did not disagree; instead, as the District Court observed, the part of *Clark II* on which Appellants rely responded to the boy's "'mystifying'

argument" that the school association "had been 'wholly deficient in its efforts to overcome the effects of past discrimination against women.'" (1-ER-66 n.34 (quoting *Clark II*, 886 F.2d at 1193).) "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." (1-ER-66 n.34 (quoting *Clark II*, 886 F.2d at 1193).) But "[t]he *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." (1-ER-66 n.34 (quoting *Clark II*, 886 F.2d at 1193) (emphasis added).)

And that analysis about cisgender boys is simply inapplicable here. As the District Court observed, because "less than one percent of the population is transgender. . . . [i]t 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." (1-ER-65; *see also* AG Letter at 4 (recognizing that *Clark*'s concern with substantial displacement is not implicated by "transgender students," who "are a very small minority of the population").)

For all of these reasons, the District Court correctly held that *Clark*'s analysis is not "determinative" of H.B. 500's constitutionality. (1-ER-66.)

3. H.B. 500 Does Not Substantially Advance Any Important Governmental Interest

Beyond their misplaced reliance on *Clark,* Appellants cannot justify H.B. 500 under heightened scrutiny: H.B. 500's categorical bar on women and girls who are transgender from women's sports does not serve to protect cisgender women athletes or ensure success or benefits for women in sport generally.

a. H.B. 500 Does Not Protect Cisgender Women

Appellants cannot establish that excluding women and girls who are transgender from women's sports advances a state interest in "protecting" cisgender women athletes. Appellants' argument erroneously presumes that transgender women automatically have a competitive advantage in sport even after a year of testosterone suppression and that—contrary to this Court's precedent—cisgender women are harmed by sharing spaces with transgender women.[10]

[10] This Court has recognized that the desire of some cisgender women to avoid competing against or sharing space with transgender women is not a legally cognizable harm. *Parents for Priv. v. Barr*, 949 F.3d 1210, 1228 (9th Cir. 2020), *cert. denied*, No. 20-62, 2020 WL 7132263 (U.S. Dec. 7, 2020) (rejecting

Appellants' arguments—and the legislative findings—ignore that the only physical characteristic with a documented effect on athletic performance is circulating (not endogenous) testosterone. That is why elite athletic organizations such as the IOC, World Athletics, and the NCAA—as well as the IHSAA prior to H.B. 500's enactment—addressed concerns about potential physiological advantages by regulating transgender women's participation through policies based on circulating testosterone. (5-ER-709-10.)[11] Indeed, every study cited by both Plaintiffs' and Appellants' experts concluded that the driving force behind performance differences between men and women after puberty is their level of circulating testosterone. (1-ER-69-70.) But H.B.

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claim by cisgender individuals that they are harmed by policies that include transgender people in single-sex environments consistent with gender identity).

[11] Appellants reference a new World Rugby policy that prevents transgender women from competing in women's rugby if they transition after puberty. (Intervenors Br. at 42; State Br. at 22-23.) USA Rugby and other national associations have declined to follow the policy and will continue to allow women and girls who are transgender to compete in women's rugby events regardless of when they transition. https://www.usa.rugby/2020/10/usa-rugby-response-to-updated-world-rugby-transgender-athlete-policy/. Given that rugby is a high-contact sport that is generally not part of scholastic competition in the United States, the policy governing adult world competition is not a rational guide for a state law governing all school sports. But it is notable that even the World Rugby policy is considerably less restrictive than H.B. 500, as it allows women who are transgender and who transitioned pre-puberty to compete in women's events while H.B. 500 does not.

500 *prohibits* consideration of circulating testosterone levels and instead requires consideration of reproductive anatomy, genetic makeup, and endogenous hormones, even though none of these characteristics has any documented effect on athletic performance independent of circulating testosterone levels. (5-ER-708-09.)

Many women and girls who are transgender do not have circulating testosterone levels typical of cisgender men. Some women and girls who are transgender never go through their endogenous puberty, and therefore their bodies experience none of the impacts of testosterone at puberty and beyond. (4-ER-574; 5-ER-710-11.) Others suppress testosterone through prescribed hormone therapy as part of their treatment for gender dysphoria after puberty, thereby minimizing the impact of testosterone on the body. (5-ER-711-12.) And separate from circulating testosterone, many women and girls who are transgender—like many who are cisgender—are simply not that good at sports but still love to play. H.B. 500 ignores all these realities in creating its rule of categorical exclusion.

As Plaintiffs' expert explained—and as the District Court credited in evaluating the evidence presented by all parties—no scientific or medical evidence supports the Idaho Legislature's finding that girls who are

transgender "have 'an absolute advantage' over non-transgender girls" following gender-affirming hormone therapy. (5-ER-710; *see* 1-ER-70-71.) Indeed, "the study cited in support of this proposition" had been altered following peer review before H.B. 500 was enacted to remove the "conclusions the legislature relied upon"—specifically including the "absolute advantage" language. (1-ER-71.) That study in any event "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." (1-ER-71.) By contrast, a "study examining the effects of gender-affirming hormone therapy on the athletic performance of transgender female athletes" found that, after treatment had lowered 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." (5-ER-712.)

The District Court further observed that the State's expert had principally relied on studies that "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." (1-ER-70.) And even the legal scholar cited in H.B. 500's legislative findings "urged Governor Little to veto H.B. 500 because her work was misused" and "endorsed the NCAA's rule of allowing transgender women to participate after one year of hormone and testosterone suppression." (1-ER-72.) All of this evidence amply supported the District Court's finding 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." (1-ER-69.)[12]

Nor could the State demonstrate that there was any actual "problem" that H.B. 500 was needed to solve. No evidence suggested that any issues had arisen under Idaho's prior rules permitting transgender women to compete on women's teams or that any women who are transgender had ever dominated in any sport, at any level, anywhere in the world. "Millions of student-athletes

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[12] Intervenors cannot establish that the District Court's finding was clearly erroneous. (Intervenors Br. at 43-44.) They cite a study of non-athlete adults with a median age of 41 who experienced a range in testosterone levels following hormone therapy, but that study made *no* findings that the variance resulted in any physiological advantages in sport following one year of testosterone suppression. That all transgender women may not achieve identical hormone levels after suppression does not establish that H.B. 500's wholesale ban on participation at all levels of sport no matter the circumstances is constitutional.

have competed in the NCAA . . . with no reported examples of any disturbance to women's sports as a result of transgender inclusion." (1-ER-73.) After scouring the entire country, H.B. 500's proponents identified a total of four women athletes who are transgender who had experienced some success in sport—and "at least three of [them] ha[d] notably lost to cisgender women." (1-ER-73.) "[T]he absence of any credible showing that the [challenged law] addressed a particularly acute problem" demonstrates that H.B. 500's discriminatory classifications cannot be justified. *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 784 (9th Cir. 2014).

While Appellants argue that the Legislature need not have "empirical" evidence to protect citizens from future harm, none of the cases they cite are relevant here or could justify H.B. 500's sweeping ban on transgender girls participating in school sports. In *King v. Governor of the State of New Jersey*, 767 F.3d 216, 239 (3d Cir. 2014), the Third Circuit upheld New Jersey's ban on sexual orientation conversion efforts, concluding that the legislature's "empirical judgment" about the nature of the harm to the public was "highly plausible" based on the "the substantial evidence" presented in support of the law. By contrast, H.B. 500 was passed without any evidence to support a categorical ban on all girls who are transgender in all circumstances.

Contrary to the State's assertion (State Br. at 23), the District Court did not "constitutionalize" the NCAA policy permitting women who are transgender to compete following one year of hormone suppression. Because that policy and the comparable IHSAA policy constituted the status quo ante in Idaho, the District Court properly considered H.B. 500 against those background rules and found no justification for the new categorical exclusion of girls who are transgender that was not already served by existing law in Idaho. The District Court did not mandate that Idaho legislate in any particular way; instead, it simply evaluated the constitutionality of the Legislature's chosen path and determined that H.B. 500's categorical exclusion of girls who are transgender cannot survive heightened scrutiny.

b. H.B. 500 Does Not Ensure Success Or Benefits For Women In Sports

Nor does H.B. 500 advance the goal of ensuring success for women in sports. Just the opposite: the law singles out a subset of women—those who are transgender—and bars them from playing school sports at all. In creating that categorical exclusion, H.B. 500 harms *all* women. A principal goal of school athletics (as opposed to elite athletics) is for students to develop skills, make friends, increase physical activity, and learn valuable life lessons—which can contribute to greater success in college and throughout life. (4-ER-

643.) Encouraging student-athletes to focus on improving their own performance and cooperation with teammates maximizes the benefits of athletics for all women. (4-ER-636, 39-40, 43.) Excluding students for no other reason than because they are transgender eliminates the benefits of sports for them and diminishes those benefits for all women and girls. (4-ER-644; *see* Br. *Amicus Curiae* of Athletes in Women's Sports (noting that all women are harmed by excluding women who are transgender from sport).)

Even if "success" in sport were limited to winning championships and coming in first place, there is no evidence that permitting women and girls who are transgender to compete results in "substantial displacement" of cisgender women at any level of competition anywhere in the world. *See* p. 49*, supra.* While the Intervenors have been awarded athletic scholarships like numerous cisgender women in Idaho, there is not a *single* example of a transgender high school student in Idaho—or anywhere else—ever receiving an athletic scholarship, let alone receiving one at the expense of a cisgender athlete. (1-ER-75.)

In the absence of any evidence of lost scholarships, lost championships, or substantial displacement by women and girls who are transgender, the Intervenors contend they have an interest in preventing men who "'identify'

as women" from "becom[ing] popular" because "[w]omen's sport itself will lose its meaning, and its specialness, if males can be redefined as females." (4-ER-536; 4-ER-531.) Though some athletes may prefer not to share women's spaces with women and girls who are transgender, those are precisely the kind of biases that the law cannot validate. "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

C. H.B. 500's Sex-Verification Provision Fails Heightened Scrutiny

1. The State Cannot Provide An Exceedingly Persuasive Justification For The Sex-Verification Dispute Process

The State also has no "exceedingly persuasive justification," *VMI*, 518 U.S. at 534, for subjecting only women and girl student athletes to the constant threat of having to undergo humiliating, invasive, and medically unnecessary exams to prove their "biological sex" when challenged. To remain eligible to play, the sex-verification provision forces women and girls to disclose information about their reproductive anatomy, genetics, or endogenous hormones if their sex is "dispute[d]." Idaho Code § 33-6203(3). Anyone—a competitor, an opposing coach, a parent, or even outside organizations and individuals—might dispute an athlete's eligibility under

this provision. *Id.*; (1-ER-2.) As Appellants acknowledge, the provision facially discriminates based on sex: men and boy athletes face no similar risk of a sex dispute and no corresponding requirement to undergo H.B. 500's invasive verification process. (1-ER-3.)

No important government interest justifies H.B. 500's sex-verification regime. The sex-verification process bears no connection to the general rule of sex separation in sport because cisgender men do not assert themselves to be women, making a dispute process unnecessary. That Idaho had no prior sex-verification process for student athletes before H.B. 500, despite its longstanding sex separation in sport, makes that point plain. In fact, *all* states separate athletes by sex, but Idaho can point to no other state with any invasive sex-verification rule like H.B. 500's. Indeed, there is no reason to invasively verify the sex of any student athletes except to exclude transgender women from women's teams. The only purpose served by subjecting all girls to the threat of examination of their reproductive anatomy, endogenous hormones, and genetics is to identify and ban girls who are transgender from playing on women's teams. But a purpose simply to disadvantage one group of people—here, transgender girls—is not a legitimate government interest, much less an important one. *Romer v. Evans*, 517 U.S. 620, 634 (1996) ("[I]f

the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.") (citation omitted). And here, this illegitimate purpose comes at the expense of all women and girls. (*See* Br. *Amicus Curiae* of National Women's Law Center et al. (describing how H.B. 500's sex-verification provision harms all women and girls).)

Appellants fare no better with their argument that the burden imposed by H.B. 500's sex-verification provision is minimal. In apparent recognition that invasive bodily examinations of reproductive anatomy, endogenous testosterone levels, and chromosomes cannot be justified, Appellants assert that a regular sports physical that does not examine any of those factors will suffice—at least for girls who are not transgender. (State Br. at 35-38 (arguing that students who rely on "(1) a health examination and consent form or (2) other statement signed by the student's personal health care provider" are not "subject to the three criteria" listed in H.B. 500); Intervenors Br. at 52 (arguing that girls who obtain a statement from their personal health care provider need not verify sex based on the three enumerated factors).)

But that interpretation of the statute makes no sense. If H.B. 500 does not require girls to verify sex "relying only on" the enumerated factors in the statute, Idaho Code § 33-6302(3), and instead permits verification through a statement signed by a doctor, then girls who are transgender would not be excluded from girls' sports at all. (2-ER-164 at lines 5-11 ("THE COURT: . . . Based on what [State's counsel] just said, is it possible for your clients to get a letter from a health care provider saying they're female? [PLAINTIFFS' COUNSEL]: Absolutely, Your Honor. Lindsay's doctor would certainly certify that she's a woman[.]").) But Appellants argue at length that H.B. 500 can and does exclude transgender women, without even acknowledging—let alone explaining—how their statutory interpretation argument squares with their theory that the Idaho Legislature permissibly barred girls who are transgender from playing school sports. If Appellants are right that Lindsay or any other transgender woman athlete can play if she simply obtains a doctor's note confirming she's a woman, then there was no reason to appeal the preliminary injunction and spend dozens of pages defending the Act's discrimination against women who are transgender.

But Appellants' interpretation is not right. By its plain terms, H.B. 500 permits a health care provider to verify "biological sex" by "relying *only* on one

(1) or more of the following: the student's reproductive anatomy, genetic makeup, or normal endogenously produced testosterone levels." Idaho Code § 33-6203(3) (emphasis added). As the District Court found, Appellants' interpretation "is impossible to reconcile with the rest of the Act's provisions" and would "render[] meaningless" the "entire legislative findings and purpose section of the Act." (1-ER-41.)

In the end, Appellants' faulty interpretation of H.B. 500 reveals their discomfort with the statutory requirement that all women and girls in Idaho must face the threat of invasive testing to play sports, but their construction cannot save the statute. The District Court correctly found that instead of "promoting sex equality" or "providing opportunities for female athletes," the sex-verification provision "subject[s] women and girls to unequal treatment, excluding some from participating in sports at all, incentivizing harassment and exclusionary behavior, and authorizing invasive bodily examinations." (1-ER-83.) The provision accordingly cannot survive heightened scrutiny.

2. The District Court Did Not Err In Concluding That Jane Has Standing To Challenge The Discriminatory Provision

Though the State abandons its standing arguments in this Court, the Intervenors argue for the first time on appeal that Jane lacks standing. That

argument lacks merit. This Court and the Supreme Court have held time and again that "equal treatment under law is a judicially cognizable interest" sufficient to establish standing when impinged. *Davis v. Guam*, 785 F.3d 1311, 1315 (9th Cir. 2015) (citing *Heckler v. Mathews*, 465 U.S. 728, 739 (1984)); *Harrison v. Kernan*, 971 F.3d 1069, 1074 (9th Cir. 2020). Even if a lawsuit will not "result[] in any tangible benefit" to the plaintiff, standing exists to "vindicate the 'right to equal treatment.'" *Davis*, 785 F.3d at 1315 (quoting *Heckler*, 465 U.S. at 739). The injury in fact in equal protection cases like this one is the simple existence of unequal treatment that a legal barrier imposes. *Id.* (quoting *Ne. Florida Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993)). The District Court correctly found that "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." (1-ER-43.)

In addition, H.B. 500 inflicts an injury on Jane by subjecting her to the constant threat of a sex-verification dispute simply because she is a girl. So long as she participates in school sports, her sex could be disputed at any time, by anyone. Because Jane "alleges a credible threat of being forced to undergo a sex verification process" and has identified specific facts that make her

"more likely" to "be subjected to the dispute process," the District Court found she suffers cognizable injury for this additional reason. (1-ER-43-44.)

The Intervenors err in relying on *Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d 646 (9th Cir. 2002). The students in *Scott* feared that their school district would impose lottery admission based on race and gender in the future, but the district had never subjected the students to a lottery based on those classifications, record evidence suggested that those classifications would *not* be used going forward, and the students had not shown any threat to their school admission. *Id.* at 651, 657, 660-61. Because the government had never actually erected any legal barrier of unequal treatment, the plaintiffs lacked standing. *Id.* at 661. Here, in contrast, the legal barrier that subjects Jane to discriminatory treatment was erected when H.B. 500 became law, empowering anyone to dispute her sex and subject her to invasive testing as long as she plays school sports. Unlike the plaintiffs in *Scott*, Jane is currently affected by H.B. 500, which prevents her from participating in school sports "on an equal basis." *Id.* at 658.

Nor did the District Court err in relying on this Court's decision in *Krottner v. Starbucks Corp.*, 628 F.3d 1139 (9th Cir. 2010), which held that Starbucks employees whose personal data was contained on a laptop stolen

from the company had standing to sue based on their fear of identity theft. *Id.* at 1143. The Intervenors contend that Jane has established only "that laptop thieves *may exist*," (Intervenors Br. at 50 (emphasis in original))—but here, the laptop has already been stolen by H.B. 500's enactment, which gave the go-ahead to "essentially anyone" to challenge Jane's gender. (1-ER-44.) Jane, like Lindsay, has standing to challenge the discrimination H.B. 500 authorizes.

D. H.B. 500 Fails Any Standard of Review

The enduring purpose of the Equal Protection Clause is to closely scrutinize laws singling out certain classes of people for disfavored treatment. Though H.B. 500's discrimination based on transgender status and sex triggers heightened scrutiny, the law fails under any standard of review. The Act imposes a sweeping, categorical ban on participation in any sport at any grade level for all women and girls who are transgender. It applies to women regardless of the age at which they transition, the level of their circulating testosterone, the level and sport they wish to compete in, and any alleged physical advantages they may possess—with the result that "[t]he breadth of the [law] is so far removed from [the] particular justifications" offered that it is "impossible to credit them." *Romer*, 517 U.S. at 635.

The context surrounding H.B. 500's enactment makes clear that it was passed out of fear of and confusion about transgender people and not for any legitimate purpose. As the District Court noted, "[t]hat the Idaho government stayed in session amidst an unprecedented national shut down [during the COVID pandemic] to pass two laws which dramatically limit the rights of transgender individuals suggests the Act was motivated by a desire for transgender exclusion." (1-ER-78.)

Indeed, while the Legislature claimed to be seeking to equalize athletic opportunities, the physical characteristics that H.B. 500 focuses on have no correlation to athletic performance and deny athletic opportunities by banning girls who are transgender from participation altogether. As the District Court found, the fact that H.B. 500 "bars consideration of circulating testosterone"—which is "the one factor that a consensus of the medical community appears to agree drives the physiological differences between male and female athletic performance"—"illustrates the Legislature appeared less concerned with ensuring equality in athletics than it was with ensuring exclusion of transgender women athletes." (1-ER-78.)

The Legislature's decision to "singl[e] out" transgender students for disfavored treatment reveals the "irrational prejudice" on which H.B. 500

actually rests. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985). The Act's enactment itself communicates the State's moral disapproval of Lindsay's identity, which the Constitution prohibits. *Lawrence*, 539 U.S. at 582-83. This Court need not find "animus" to determine that the law was impermissibly motivated by "insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves." *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J. concurring). It was precisely a fear of transgender girls and the sense that they "appear to be different in some respects" that led to Idaho's rushed, sweeping, and unsupportable ban on their participation in sports. *Id.* Under any standard of scrutiny, the Legislature's generalized fear, discomfort, or moral disapproval of a group of people cannot justify H.B. 500. *Cleburne*, 473 U.S. at 448.

II. THE DISTRICT COURT CORRECTLY HELD THAT ALL OTHER PRELIMINARY INJUNCTION FACTORS SUPPORTED ENJOINING H.B. 500

In addition to finding likely success on the merits, the District Court correctly found that Plaintiffs had established irreparable harm and that the balance of the equities and the public interest favored a preliminary

injunction—findings that Appellants do not even attempt to dispute on appeal.

H.B. 500 irreparably harms Lindsay and Jane by violating their constitutional rights, threatening Lindsay with complete exclusion from school sports, and subjecting Jane to the constant risk that someone will dispute her sex and require her to undergo invasive testing to confirm her eligibility. (1-ER-83-84 ("[T]he deprivation of constitutional rights unquestionably constitutes irreparable injury." (citation omitted).)

On the other side of the balance, the State faces no harm from a return to the status quo during the pendency of this suit and "it is 'always in the public interest to prevent the violation of a party's constitutional rights.'" (1-ER-86 (quoting *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012)).) As the District Court observed, "[i]n stark contrast to the deeply personal and irreparable harms [Lindsay and Jane] face[d], a preliminary injunction would not harm [Appellants] because it would merely maintain the status quo" in Idaho that had been in place for "nearly a decade" and produced no problems or any evidence at all that "transgender women threatened equality in sports." (1-ER-85.) This Court has explained that the preliminary injunction factors are evaluated on a "sliding scale," where a "stronger showing of one element

may offset a weaker showing of another." *hiQ Labs, Inc. v. LinkedIn Corp.*, 938 F.3d 985, 992 (9th Cir. 2019) (citing *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011)). In this case, all factors strongly support the injunction: as Appellants have effectively conceded, there is no basis to challenge the District Court's conclusion that the risk of irreparable harm, the balance of equities, and the public interest weigh in favor of protecting Lindsay and Jane—and all women and girl athletes in Idaho—from discriminatory treatment, invasive testing, and potential exclusion from women's sports.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN THE SCOPE OF THE PRELIMINARY INJUNCTION

The Intervenors' attack on the scope of the preliminary injunction fails as well. (Intervenors Br. at 55-60.) "A district court has considerable discretion in fashioning suitable relief and defining the terms of an injunction," and the Intervenors provide no basis to overturn the District Court's exercise of that discretion here. *Lamb-Weston,* 941 F.2d at 974; *see United States v. Supreme Court of New Mexico*, 839 F.3d 888, 928 (10th Cir.

2016) (citation omitted) (reversing only where the injunction embodies an "arbitrary, capricious, whimsical, or manifestly unreasonable judgment").

Contrary to the Intervenors' claims (Intervenors Br. at 55), the preliminary injunction is sufficiently specific under Rule 65(d). "Injunctions are not set aside under Rule 65(d) . . . unless they are so vague that they have no reasonably specific meaning." *Portland Feminist Women's Health Ctr. v. Advocs. for Life, Inc.*, 859 F.2d 681, 685 (9th Cir. 1988) (citation omitted). But here, the scope of the injunction is perfectly clear: the District Court granted Plaintiffs' motion for a preliminary injunction in full, (1-ER-87), thus enjoining Appellants "from enforcing any of the provisions of House Bill 500." (4-ER-564-66).

The District Court further made clear that the injunction would reinstate the preexisting rules in Idaho providing for sex separation in sport but permitting women and girls who are transgender to play on women's teams following one year of testosterone suppression: "[Appellants] can continue to rely on the NCAA policy for college athletics and IHSAA policy for high school athletes, as they did for nearly a decade prior to [H.B. 500]." (1-ER-85.) The Intervenors' suggestion that the injunction erases the general rule that boys cannot play on girls' teams and overturns the rule governing

transgender inclusion following hormone therapy contradicts the District Court's repeated statements that these "[e]xisting rules" had "long been the status quo in Idaho" and would remain in place while H.B. 500 is enjoined. (1-ER-73; *see* 1-ER-55-56 (observing that injunctive relief would "preserve the status quo pending trial on the merits").) This injunction is wholly dissimilar from the injunction in *Schmidt v. Lessard*, 414 U.S. 473 (1974), where the court issued a general command to not "enforce the present Wisconsin scheme," without specifying what rules would be in effect. *Id.* at 476 (internal quotations omitted). Here, the District Court described the statute it was enjoining, the parties affected by the injunction, and the effect of the injunction in specifically restoring the prior rules that constitute the status quo.

The Intervenors further err in contending that the District Court's findings do not support the injunction's scope. The court found that Plaintiffs were likely to succeed on their claims that H.B. 500 discriminates based on transgender status and sex and does not substantially serve the State's asserted interests. Those findings amply supported the District Court's conclusion that H.B. 500—as a whole—is likely "unconstitutional as currently written." (1-ER-87.) Nor did any part of that analysis hinge on characteristics

unique to Lindsay and Jane: to the contrary, the Court found that "the constitutional rights of every girl and woman athlete in Idaho," including "the constitutional rights of transgender girls and women athletes" were "at issue" and harmed by H.B. 500. (1-ER-86-87.) And because the State had "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," (1-ER-79) (emphasis added), the District Court correctly concluded that H.B. 500 must be enjoined in full. (1-ER-87.)

Nor does the scope of the injunction conflict with the District Court's holding that Lindsay and Jane must pursue as-applied claims. In *John Doe No. 1 v. Reed*, 561 U.S. 186 (2010), the Supreme Court recognized that a challenge to a *category* of applications of a statute may be characterized as an as-applied challenge. *Id.* at 194. There, the Court observed that a challenge to a statute "as applied to [all] referendum petitions" was "'as applied' in the sense that it did not seek to strike [the statute] in all its applications, but only to the extent it cover[ed] referendum petitions," yet was "'facial' in that it [wa]s not limited to the plaintiffs' particular case, but challenge[d] application of the law more broadly to all referendum petitions." *Id.* at 194. The Court

explained that "[t]he label is not what matters" and that the plaintiffs could obtain an injunction barring the statute's application to all referendum petitions if the plaintiffs could satisfy the "standards for a facial challenge *to the extent of that reach*." *Id.* (emphasis added); *see also, e.g.*, *Supreme Court of New Mexico*, 839 F.3d at 914 (recognizing the "duality" of a claim that a statute cannot lawfully be applied to a category of applications, and observing that under Supreme Court precedent "facial standards are applied *but only to the universe of applications contemplated by plaintiffs' claims, not to all conceivable applications contemplated by the challenged provision*") (emphasis added). Because the District Court recognized a likelihood of success on the claim that H.B. 500 is unconstitutional as applied to *all* women and girl athletes, including those who are transgender, it correctly granted a preliminary injunction covering that category of applications under the standard Intervenors invoke. (Intervenors Br. at 59 (asserting that there must be "*no set of circumstances* . . . under which the Act would be valid") (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987) (emphasis in original)).)[13]

[13] Notably, Appellants do not contend that H.B. 500 could constitutionally be applied to some, but not all, women and girl athletes, or to some, but not all, women and girl athletes who are transgender.

The cases cited by Intervenors are inapposite. In *Italian Colors Rest. v. Becerra*, 878 F.3d 1165 (9th Cir. 2018), a statute had several non-infringing applications and was deemed unconstitutional *only* when coupled with the plaintiffs' intended commercial speech; indeed, the plaintiffs raised an as-applied challenge to the statute's effect on a specific pricing practice they sought to employ. *Id.* at 1174-75. This Court accordingly found that the injunction should "apply only to plaintiffs, and only with respect to the specific pricing practice that plaintiffs, by express declaration, seek to employ." *Id.* at 1179. Here, in contrast, the District Court's analysis demonstrates the propriety of a challenge to H.B. 500's application to all women and girl athletes, as the law's invalidity as applied to that category of individuals does not turn on circumstances specific to Lindsay and Jane.

Intervenors' remaining cases do not support their argument. Most fail to deal with as-applied challenges at all and instead discuss the propriety of issuing nationwide injunctions. Even if those cases had some bearing on the distinct issue here, they expressly recognize that an injunction is "not necessarily made overbroad by extending benefit or protection to persons other than prevailing parties in the lawsuit . . . *if such breadth is necessary to give prevailing parties the relief to which they are entitled*." *Easyriders*

Freedom F.I.G.H.T. v. Hannigan, 92 F.3d 1486, 1501-02 (9th Cir. 1996) (emphasis in original) (applying injunction's effects to all affected motorcyclists rather than just the named plaintiffs). Because H.B. 500 has been found "likely unconstitutional" as applied to Lindsay, Jane, and every other woman and girl athlete in Idaho, the District Court did not err in granting an injunction preventing the Act's enforcement against all who are harmed by the Act's discriminatory provisions. (1-ER-86-87 ("[T]he Constitution must always prevail.").)

CONCLUSION

For the foregoing reasons, the preliminary injunction should be affirmed.

Dated: December 14, 2020

Respectfully submitted,

/s/ *Elizabeth Prelogar*

Chase Strangio
James Esseks
AMERICAN CIVIL LIBERTIES UNION FOUNDATION

Richard Eppink
AMERICAN CIVIL LIBERTIES UNION OF IDAHO FOUNDATION

Elizabeth Prelogar
Andrew Barr
COOLEY LLP

Catherine West
LEGAL VOICE

STATEMENT OF RELATED CASES

Under this Court's rule 28-2.6, Plaintiffs are not aware of any related cases.

CERTIFICATE OF SERVICE

I hereby certify that on December 14, 2020, I electronically filed the foregoing Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the CM/ECF system, which will accomplish service on counsel for all parties through the Court's electronic filing system.

/s/ Elizabeth Prelogar
Counsel for Plaintiffs-Appellees
December 14, 2020

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) 20-35813, 20-35815

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- ○ complies with the word limit of Cir. R. 32-1.
- ○ is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.
- ○ is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).
- ○ is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.
- ◉ complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one):*
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- ○ is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature s/Elizabeth Prelogar **Date** 12/14/2020

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