

Nos. 20-35813, 20-35815

---

---

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

---

LINDSAY HECOX, JANE DOE, with her next friends Jean Doe and John Doe,  
*Defendants-Appellants,*

v.

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

*Defendants-Appellees,*

AND

MADISON KENYON; MARY MARSHALL,

*Intervenors.*

---

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

---

**BRIEF FOR AMICI CURIAE TEAMMATES, COACHES, AND  
ALLIES OF TRANSGENDER ATHLETES IN SUPPORT OF  
PLAINTIFFS-APPELLEES AND AFFIRMANCE**

---

December 21, 2020

*COUNSEL LISTED ON INSIDE COVER*

---

---

ADAM M. CAMBIER  
ALISON BURTON  
WILMER CUTLER PICKERING  
HALE AND DORR LLP  
60 State Street  
Boston, MA 02109  
(617) 526-6000

MATTHEW D. BENEDETTO  
THOMAS F. COSTELLO  
WILMER CUTLER PICKERING  
HALE AND DORR LLP  
350 South Grand Avenue, Suite 2400  
Los Angeles, CA 90071  
(213) 443-5300  
Matthew.Benedetto@wilmerhale.com

*Counsel for Amici Curiae  
Teammates, Coaches, and Allies of  
Transgender Athletes*

## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	iii
INTEREST OF AMICI CURIAE.....	1
SUMMARY OF THE ARGUMENT .....	2
ARGUMENT .....	5
I. LONGSTANDING PRECEDENT RECOGNIZES THE IMPORTANCE OF EQUALITY UNDER THE LAW.....	5
II. THE EXPERIENCES OF COACHES, TEAMMATES, AND OTHER ALLIES OF TRANS ATHLETES DEMONSTRATE THAT THE PARTICIPATION OF TRANS WOMEN ATHLETES IN WOMEN’S SPORTS BENEFITS ALL ATHLETES .....	11
A. Running—Diana Fitzpatrick, Amy Rusiecki, and David Roche.....	12
B. Rugby—Emma McKay and Meghan Flanigan.....	17
C. Cycling—Erin Ayala and Rosy Metcalfe .....	21
CONCLUSION.....	25
STATEMENT OF RELATED CASES .....	27
CERTIFICATE OF COMPLIANCE	
CERTIFICATE OF SERVICE	

**TABLE OF AUTHORITIES**

**CASES**

	Page(s)
<i>Adams by &amp; through Kasper v. School Board of St. Johns County</i> , 968 F.3d 1286 (11th Cir. 2020) .....	9
<i>Austin v. University of Oregon</i> , 925 F.3d 1133 (9th Cir. 2019) .....	7
<i>Bostock v. Clayton County, Georgia</i> , 140 S. Ct. 1731 (2020).....	4, 8
<i>Craig v. Boren</i> , 429 U.S. 190 (1976).....	5
<i>Cruz by Cruz v. Alhambra School District</i> , 2012 WL 13167767 (C.D. Cal. Aug. 3, 2012),.....	10
<i>Cruzan v. Special School District, No. 1</i> , 294 F.3d 981 (8th Cir. 2002).....	10
<i>Doe by &amp; through Doe v. Boyertown Area School District</i> , 897 F.3d 518 (3d Cir. 2018).....	10
<i>Emeldi v. University of Oregon</i> , 673 F.3d 1218 (9th Cir. 2012),.....	7
<i>Franklin v. Gwinnett County Public School</i> , 503 U.S. 60 (1992) .....	7
<i>Glenn v. Brumby</i> , 663 F.3d 1312 (11th Cir. 2011) .....	3, 6, 9
<i>Grimm v. Gloucester County School Board</i> , 972 F.3d 586 (4th Cir. 2020) .....	8, 9
<i>Haffer v. Temple University of Commonwealth System of Higher Education</i> , 524 F. Supp. 531 (E.D. Pa. 1981) .....	10
<i>Karnoski v. Trump</i> , 926 F.3d 1180 (9th Cir. 2019) .....	3, 6
<i>Olmstead v. L.C. ex rel. Zimring</i> , 527 U.S. 581 (1999).....	4, 7
<i>Parents for Privacy v. Barr</i> , 949 F.3d 1210 (9th Cir. 2020) .....	10
<i>Parker v. Franklin County Community School Corp.</i> , 667 F.3d 910 (7th Cir. 2012) .....	11
<i>Price Waterhouse v. Hopkins</i> , 490 U.S. 228 (1989).....	8

*United States v. Virginia*, 518 U.S. 515 (1996) .....3, 6, 9

*Whitaker By Whitaker v. Kenosha Unified School District No. 1 Board of Education*, 858 F.3d 1034 (7th Cir. 2017) .....9

**STATUTES, RULES, AND REGULATIONS**

20 U.S.C. § 1681 .....4, 7

42 U.S.C. § 2000e-2 .....4, 7

Federal Rule of Appellate Procedure 29 .....1

Idaho Code Ann. § 33-6201–6206 .....2

**OTHER AUTHORITIES**

International Olympic Committee, *IOC Approves Consensus With Regard to Athletes Who Have Changed Sex* (May 18, 2004), <https://www.olympic.org/news/ioc-approves-consensus-with-regard-to-athletes-who-have-changed-sex-1> .....13

International Olympic Committee, *IOC Consensus Meeting on Sex Reassignment and Hyperandrogenism* (Nov. 2015), [https://s3.amazonaws.com/usac-craft-uploads-production/documents/Rules-Policies/IOCPolicy\\_TransgenderAthletes20170609.pdf](https://s3.amazonaws.com/usac-craft-uploads-production/documents/Rules-Policies/IOCPolicy_TransgenderAthletes20170609.pdf) .....15

NCAA Office of Inclusion, *NCAA Inclusion of Transgender-Student Athletes* (Aug. 2011), [http://www.ncaa.org/sites/default/files/Transgender\\_Handbook\\_2011\\_Final.pdf](http://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf) .....13

U.S.A. Track & Field, *USATF Statement Regarding Transgender/Transsexual Policy*, <https://www.usatf.org/governance/policies/usatf-statement-regarding-transgender-transsexual-> (last visited Dec. 21, 2020).....13, 15

## INTEREST OF AMICI CURIAE<sup>1</sup>

Amici are teammates, coaches, and allies of trans athletes who have directly coached or participated alongside trans athletes throughout their athletic careers. Their personal experiences allow them to see firsthand how laws excluding trans women from participating in women's sports teams have an impact not only on trans athletes, but also on the many other individuals who are involved in those sports. Moreover, they view bans at the youth, scholastic, and collegiate levels to have far-reaching consequences on the development of sports as a whole and the role of sports in educational settings.

As demonstrated by the personal stories of the amici set forth below, the participation of trans women in sports is a benefit to everyone involved, and the alleged harms of participation by trans athletes in sports are unfounded. Contrary to Appellants' contentions in the district court and now on appeal, allowing trans women to participate in women's sports neither poses safety concerns nor gives trans women an unfair competitive advantage. Rather, trans women's participation in sports promotes understanding, acceptance, and inclusivity for trans athletes,

---

<sup>1</sup> Amici Teammates, Coaches, and Allies of Transgender Athletes submit this brief pursuant to Federal Rule of Appellate Procedure 29(a)(2) and state that all parties have consented to its timely filing. Amici further state, pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), that no counsel for a party authored this brief in whole or in part, and no person other than the amici curiae or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

their teammates, and their coaches. The amici, whether involved in individual sports, team sports, or full-contact sports, have come to these conclusions after decades of combined experience in their respective sports. Amici therefore have a direct interest in the Court interpreting the Constitution of the United States and Title IX of the Education Amendments of 1972 to prohibit discrimination against trans athletes, which they believe will have a significant, positive impact on each of their sports.

### **SUMMARY OF THE ARGUMENT**

Trans individuals across the United States, especially trans women, routinely face discrimination and harassment. Idaho’s so-called Fairness in Women’s Sports Act (the “Act”), Idaho Code Ann. § 33-6201–6206, is just one example of this discrimination manifesting itself as law. The Act bans trans women from participating in sports “designated for females, women, or girls,” *id.* § 33-6203(2); provides a dispute process by which others may challenge a female athlete’s eligibility to participate in women’s or girls’ sports, *id.* § 33-6203(3); and provides a private cause of action for students supposedly harmed by violations of the Act, *id.* § 33-6205. The Idaho ban is particularly harmful because it takes aim at an activity—namely participation in school sports—which is often pursued by trans girls and women in order to feel accepted. It also harms the teammates and coaches of trans athletes—and all those involved in their sports—who are robbed

of valuable teammates and competitors and are denied the ability to benefit from a diversity of experiences and perspectives (athletic and non-athletic alike). As set forth below, Idaho's ban is not only harmful to sports generally, but is also contrary to the actual experiences of individuals who coach, compete, and play alongside trans women athletes.

To fulfill the Constitution's guarantee of equal protection, courts subject sex-based classifications to heightened scrutiny. *See, e.g., United States v. Virginia*, 518 U.S. 515, 516 (1996) (stating that sex-based classifications must serve "important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives" (internal quotation marks and citations omitted)). Courts, including the Ninth Circuit, also have held that classifications based on transgender status are subject to the same heightened scrutiny that applies to classifications based on sex. *See, e.g., Karnoski v. Trump*, 926 F.3d 1180, 1199-201 (9th Cir. 2019) ("[T]he level of constitutional scrutiny applicable to the equal protection or substantive due process rights of transgender persons ... is more than rational basis but less than strict scrutiny."); *Glenn v. Brumby*, 663 F.3d 1312, 1319 (11th Cir. 2011) (holding that discrimination against a trans individual "because of his or her perceived gender-nonconformity ... is a form of sex-based discrimination that is subject to heightened scrutiny under the Equal Protection Clause").

Courts have also held that discrimination based on transgender status is prohibited under Title VII and Title IX, *see infra* pp. 7-11, which safeguard against discrimination based on sex in the workplace and in schools, respectively. 42 U.S.C. § 2000e-2; 20 U.S.C. § 1681. The Supreme Court “has ... looked to its Title VII interpretations of discrimination in illuminating Title IX,” *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 616 n.1 (1999), and recently held that the prohibition on sex discrimination under Title VII extends to discrimination based on sexual orientation and gender identity, *see Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1737 (2020) (“An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.”). Moreover, as described in more detail below, *see infra* pp. 10-11, equal opportunity to participate in sports—regardless of one’s transgender status—is a vital part of Title IX’s promise.

As amici have recounted, Idaho’s ban deprives transgender and cisgender students alike, not to mention athletic communities as a whole, of the many benefits generated by a sporting environment that is inclusive of trans women and girls. All amici reported positive experiences with trans women athletes—and found competition with these athletes to be not only fair but welcomed. *See infra* Section II. As multiple amici explained, trans women pose no threat to fair

competition, including because, as amici’s experiences demonstrate, success in sports is determined by a multitude of factors (such as natural talent and the amount of effort dedicated to learning and practicing a sport). Transgender status is simply inconsequential to competitive outcomes.

Many amici also share that they have grown personally as a result of their experiences with trans women in their sport. Several note that the inclusion of trans individuals on a team fosters a sense of community; teammates learn about different experiences and perspectives and often ultimately support the inclusion of all players, regardless of their backgrounds, to enjoy something they have in common—the sport. Multiple amici also observe that working with trans athletes enabled them to overcome their own biases and fostered an ability to treat all players (and all people) equally. Ultimately, amici’s experiences demonstrate that trans women are just like other women—and should be afforded the same opportunities to participate in women’s sports.

## **ARGUMENT**

### **I. LONGSTANDING PRECEDENT RECOGNIZES THE IMPORTANCE OF EQUALITY UNDER THE LAW**

To fulfill the Constitution’s guarantee of equal protection, courts subject sex-based classifications to heightened scrutiny. *See, e.g., Craig v. Boren*, 429 U.S. 190, 197 (1976) (“To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental

objectives and must be substantially related to achievement of those objectives.”). In *United States v. Virginia*, the Court considered whether the collegiate admissions policy at the Virginia Military Institute, which limited admission to men, violated the Equal Protection Clause. 518 U.S. 515, 519 (1996). The Court found that, when classifications based on gender result in “differential treatment for denial of opportunity . . . , the reviewing court must determine whether the proffered justification is ‘exceedingly persuasive.’” *Id.* at 533. The Court observed that, when heightened scrutiny based on gender classifications is applied, “[t]he burden of justification is demanding and it rests entirely on the state.” *Id.*

Courts have since held that distinctions based on transgender status are also subject to heightened equal protection scrutiny. The Ninth Circuit, for example, has held that classifications based on transgender status are subject to the same heightened scrutiny that applies to classifications based on gender. *Karnoski*, 926 F.3d at 1199-201 (holding that “something more than rational basis” review is required where a policy “on its face treats transgender persons differently than other persons”). Other courts have similarly applied heightened scrutiny to classifications based on transgender status. *See, e.g., Glenn*, 663 F.3d at 1316-20 (applying heightened scrutiny and “conclud[ing] that a government agent violates the Equal Protection Clause’s prohibition of sex-based discrimination when he or

she fires a transgender or transsexual employee because of his or her gender non-conformity”).

Protection against discrimination based on gender—and transgender status—is also provided statutorily by Title VII of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972. 42 U.S.C. § 2000e-2; 20 U.S.C. § 1681. Title VII protects against, among other things, sex-based discrimination in the workplace. 42 U.S.C. § 2000e-2. Title IX mandates that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” 20 U.S.C. § 1681. Like the Supreme Court, the Ninth Circuit looks to Title VII to interpret Title IX claims. *See, e.g., Austin v. Univ. of Oregon*, 925 F.3d 1133, 1136 n.3 (9th Cir. 2019) (“We apply the principles of Title VII cases to Title IX claims.” (citing *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 75 (1992))); *Emeldi v. Univ. of Oregon*, 673 F.3d 1218, 1224 (9th Cir. 2012) (“[T]he Supreme Court has often ‘looked to its Title VII interpretations of discrimination in illuminating Title IX.’” (quoting *Olmstead*, 527 U.S. at 616 n. 1)), *republished as amended* at 698 F.3d 715 (9th Cir. 2012).

In *Price Waterhouse v. Hopkins*, the Supreme Court held that Title VII prohibits sex discrimination based on sex stereotypes, explaining that:

we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for [i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.

490 U.S. 228, 251 (1989) (internal quotation marks omitted). The Supreme Court recently concluded that these same Title VII principles prohibit discrimination based on transgender status, which is inherently discrimination based on sex. *Bostock*, 140 S. Ct. at 1741, 1754. The Court thus held that “[a]n employer who fires an individual merely for being gay or transgender defies the law,” and reasoned that “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.” *Id.*

Courts also have held that discrimination based on transgender status is “sex” discrimination, triggering protection under Title IX and requiring heightened scrutiny under the Equal Protection Clause. For example, in *Grimm v. Gloucester County School Board*, the Fourth Circuit evaluated a school board policy that limited male and female restroom use to individuals with the corresponding gender assigned at birth—therefore preventing trans individuals from accessing the restroom that conformed with their gender identity. 972 F.3d 586, 608-09 (4th Cir. 2020), *as amended* (Aug. 28, 2020). The Fourth Circuit held that “the Board’s policy constitutes sex-based discrimination as to Grimm and is subject to

intermediate scrutiny.” *Id.* It found that the policy violated both the Equal Protection Clause and Title IX. *Id.* at 616-17. The Eleventh and Sixth Circuits have similarly concluded that heightened scrutiny applies to school policies aimed at preventing trans individuals from accessing the restroom that conforms to their gender identity and that Title IX prohibits such policies. *Adams by & through Kasper v. Sch. Bd. of St. Johns Cty.*, 968 F.3d 1286, 1296, 1304 (11th Cir. 2020) (“[D]iscrimination against a transgender individual because of [his or] her gender-nonconformity is sex discrimination, whether it’s described as being on the basis of sex or gender.’ ... We therefore apply heightened scrutiny to the School Board bathroom policy.” (quoting *Glenn*, 663 F.3d at 1317) (second alteration in original)); *Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1050-52 (7th Cir. 2017) (school restroom policy that disciplined trans students if they used a restroom that conformed to their gender identity triggered a “burden on the School District to demonstrate that its justification for its bathroom policy is not only genuine, but also ‘exceedingly persuasive,’” and the burden was not met (quoting *Virginia*, 518 U.S. at 533)).

The Ninth Circuit has further held that trans-inclusive restroom policies do not violate Title IX. In *Parents for Privacy v. Barr*, the Ninth Circuit concluded that “the normal use of privacy facilities does not constitute actionable sexual harassment under Title IX just because a person is transgender,” affirming the

district court’s refusal to enjoin the school district’s policy. 949 F.3d 1210, 1217 (9th Cir. 2020), *cert. denied*, No. 20-62, 2020 WL 7132263 (U.S. Dec. 7, 2020); *see also Doe by & through Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 536 (3d Cir. 2018), *cert. denied sub nom. Doe v. Boyertown Area Sch. Dist.*, 139 S. Ct. 2636 (2019) (school district policy allowing trans students to use restroom corresponding to their gender identity “is not the type of conduct that supports a Title IX hostile environment claim”); *Cruzan v. Special Sch. Dist, No. 1*, 294 F.3d 981, 984 (8th Cir. 2002) (“We agree with the district court that Cruzan [a female teacher] failed to show the school district’s policy allowing Davis [a trans woman] to use the women’s faculty restroom created a working environment that rose to this level.”).

Equal opportunity to participate in school athletic programs is a vital part of Title IX. *Haffer v. Temple Univ. of Com. Sys. of Higher Ed.*, 524 F. Supp. 531, 541 (E.D. Pa. 1981), *aff’d and remanded sub nom. Haffer v. Temple Univ.*, 688 F.2d 14 (3d Cir. 1982); *see also, e.g., Cruz by Cruz v. Alhambra Sch. Dist.*, 2012 WL 13167767, at \*1 (C.D. Cal. Aug. 3, 2012) (“Even though Title IX does not specifically reference sports, courts have recognized that athletics is a vital and important part of the educational experience[.]” (internal quotations omitted)), *modified on reconsideration sub nom. Cruz v. Alhambra Sch. Dist.*, 2012 WL 13167766 (C.D. Cal. Sept. 25, 2012). As the Seventh Circuit has recognized,

“[t]he impact of Title IX on student athletes is significant and extends long beyond high school and college; in fact, numerous studies have shown that the benefits of participating in team sports can have life-long positive effects on women.” *Parker v. Franklin Cty. Cmty. Sch. Corp.*, 667 F.3d 910, 916 (7th Cir. 2012).

In sum, like other student athletes, trans women are entitled to equal treatment that enables them to experience the benefits of scholastic sports. Both Title IX and the Constitution demand it.

## **II. THE EXPERIENCES OF COACHES, TEAMMATES, AND OTHER ALLIES OF TRANS ATHLETES DEMONSTRATE THAT THE PARTICIPATION OF TRANS WOMEN ATHLETES IN WOMEN’S SPORTS BENEFITS ALL ATHLETES**

Many coaches, teammates, and other allies of trans athletes who are involved in sports have come to understand the importance of trans women’s participation in women’s sports, both for the trans athletes themselves and for sports as a whole. The amici, who are geographically diverse, also come from a variety of sporting backgrounds, including running, rugby, and cycling. As the amici recount below, trans women neither pose a threat to the safety of cisgender women nor take competitive opportunities away from them. To the contrary, amici’s personal experiences with trans athletes demonstrate that trans women’s participation in sports promotes understanding, acceptance, and inclusivity not only for trans athletes, but also for their coaches, teammates, and everyone involved in those sports—transgender and cisgender alike.

**A. Running—Diana Fitzpatrick, Amy Rusiecki, and David Roche**

Amici Diana Fitzpatrick, Amy Rusiecki, and David Roche all work and compete in the world of professional trail running. In addition to being runners themselves, Fitzpatrick and Rusiecki are administrators of some of the sport's leading races: Fitzpatrick is the president of the Western States Endurance Run Foundation ("Western States"), the sponsor of the country's first 100-mile race, which has thrived for the last forty years. Western States now receives more than 6,000 entrants in a lottery for 369 race slots. Rusiecki directs two of the Northeast's most important trail runs, the Vermont 100 and the Seven Sisters Trail Race. She also coaches the running team at Hampshire College and is herself a three-time member of the U.S. trail running team.

Roche is an elite running coach based in Boulder who has coached clients—both male and female—all over the world through a company he founded in 2014. One of Roche's clients is Grace Fisher, an elite trail runner and trans woman. After undergoing hormone treatments, Fisher began competing in women's categories in 2015. The first time she ran in the women's race at the Vermont 100 came shortly after her transition, and she finished in second place. In 2019, Western States, of which Fitzpatrick was at the time a member of the board, learned that Fisher intended to participate in that race as a woman.

Before Fisher ran the race, Western States sought to develop its own trans-inclusive policy. It looked to the policies of other sporting bodies like the International Olympic Committee, U.S. Track and Field, and the National Collegiate Athletic Association (“NCAA”)—all of which permit trans women to participate in sports, subject to certain science-based guidelines. The NCAA policy, for example, requires that trans women “complet[e] one calendar year of testosterone suppression treatment” before competing on women’s teams. NCAA Office of Inclusion, *NCAA Inclusion of Transgender-Student Athletes*, at 13 (Aug. 2011), [http://www.ncaa.org/sites/default/files/Transgender\\_Handbook\\_2011\\_Final.pdf](http://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf); *see also* International Olympic Committee, *IOC Approves Consensus With Regard to Athletes Who Have Changed Sex* (May 18, 2004), <https://www.olympic.org/news/ioc-approves-consensus-with-regard-to-athletes-who-have-changed-sex-1>; U.S.A. Track & Field, *USATF Statement Regarding Transgender/Transsexual Policy*, <https://www.usatf.org/governance/policies/usatf-statement-regarding-transgender-transsexual-> (last visited Dec. 21, 2020).

Western States adopted a similar policy. Under its policy, athletes can register and run in whichever gender category they like. If a runner places in the top 10 overall or wins her age-group category, she may be asked after the race to provide a doctor’s certificate demonstrating one year of hormone therapy—and

even if she receives such a request and does not provide this certificate, she still is allowed to retain the buckle awarded to all finishers. Although Fisher did not place in the top 10 of the 2019 Western States race, the Western States policy ensured that she was permitted to compete in the women's category, in accordance with her gender identity.

All three running-focused amici believe that permitting trans women to compete in women's sports is fundamentally fair—and that there is nothing to substantiate concerns that trans women have a competitive advantage. Roche points out that no simple model can capture the thousands of variables that bear on individual running performance. One trans athlete Roche knows would regularly place on the podium in men's races, but after her transition, she would place only in the top 30 among women. Based on his experience as an elite running coach, Roche believes that rules that categorically ban trans women from competing in women's sports make judgments about performance “in a way that is 100% wrong in terms of science and exercise physiology.”

Rusiecki concurs in this judgment. Noting that she is a competitor herself, she says that, by recognizing Fisher's eligibility to compete in women's races, it means Rusiecki might lose to her in another race at some point in the future—so she really had to believe that the process was fair to support Fisher and other trans athletes competing in women's sports. Rusiecki trusts that the clear guidelines

issued by U.S. Track and Field for when people may compete in men's and women's categories ensure that competition is fair.<sup>2</sup> In any event, Rusiecki observes, because the rewards for amateur sports are so small, "people are being so silly by saying that people are trying to cheat the system" rather than simply trying to express who they are.

Further, all three running-focused amici say that running is a sport that is less about competition between runners and is more about competition with oneself over time—such that inclusion of trans runners helps rather than hinders the broader running community. "The running community is pretty accepting of people being different because people that choose to run have different things motivating them, especially long term. A lot of runners feel like outcasts at different times," explains Roche. This means that, even when runners are

---

<sup>2</sup> U.S. Track and Field has adopted the International Olympic Committee's (IOC) policy for competition by trans athletes, which was last updated in November of 2015. U.S.A. Track and Field, *USATF Statement Regarding Transgender/Transsexual Policy*, <https://www.usatf.org/governance/policies/usatf-statement-regarding-transgender-transsexual-> (last visited Dec. 21, 2020). The IOC's November 2015 policy permits trans women to compete in the female category if (i) the trans athlete has declared her gender identity is female, (ii) the athlete has demonstrated that her testosterone is below a certain level for 12 months prior to the competition, and (iii) the athlete's testosterone level remains below the threshold throughout her participation in the female category. International Olympic Committee, *IOC Consensus Meeting on Sex Reassignment and Hyperandrogenism* (Nov. 2015) at 2-3, [https://s3.amazonaws.com/usac-craft-uploads-production/documents/Rules-Policies/IOCPolicy\\_TransgenderAthletes20170609.pdf](https://s3.amazonaws.com/usac-craft-uploads-production/documents/Rules-Policies/IOCPolicy_TransgenderAthletes20170609.pdf).

competing as individuals, they embrace their competitors. Speaking about Fisher's 2019 participation in Western States, Roche says that the other runners were fully supportive of Fisher's participation; he says that his other female clients (including the woman who won Western States the year Fisher raced) all welcome the prospect of being beaten in a fair race someday by Fisher or another trans athlete. Fitzpatrick says that, at all levels of Western States—whether runners are contending for a top 10 spot or not—runners are “all in it together,” running as a pack and encouraging each other in order to help as many people as possible complete the daunting 100-mile race in under 30 hours. And Rusiecki says that “especially in the trail and ultrarunning community, everyone is very accepting of who you are. People care about the sport and experience, not who you are and what baggage you bring to the race.”

Fitzpatrick, Roche, and Rusiecki also all agree that inclusion of trans athletes has key benefits for the trans athletes themselves. Rusiecki, speaking from her experience as a coach, says that running is a sport where putting in the work can lead directly to a positive result. “It is a great sport for someone who needs to build confidence because your hard work results in measurable improvement,” she says. Permitting trans athletes to compete as their authentic selves is key to their personal development. “Why would anyone become a runner by choice? Because you're getting to know yourself,” explains Roche. Thus, according to Roche,

“athletics is just a part of expression of themselves [for trans athletes], and it’s so tied together with everything else that makes them a human,” regardless of whether the runner is on the podium or at the back of the pack. And in Fitzpatrick’s words, “so much of running is about a personal journey for everybody who is out there.” The goal of the trans-inclusive Western States policy—and trans-inclusive policies more broadly—is thus “to make sure that a transgender person could follow their personal journey just like everybody else.”

**B. Rugby—Emma McKay and Meghan Flanigan**

Amici Emma McKay and Meghan Flanigan both work professionally in the sport of rugby. Each played rugby for her university and then played upper-level rugby following graduation—McKay in Vancouver and Flanigan in Minneapolis. Each then shifted to coaching: In 2014, McKay began coaching a Division II women’s club team at San Francisco Golden Gate Rugby. Her team includes athletes ranging in age from 18 to 38 years old. In 2016, Flanigan left her team in Minneapolis to become the coach of the women’s rugby team at the University of Northern Iowa, her alma mater. Both McKay and Flanigan have competed against and coached trans athletes, and both agree that it is fair for trans women to participate in women’s sports and that the inclusion of trans women benefits the overall rugby community as well as the trans women themselves.

Like the running-focused amici, McKay and Flanigan believe that purported fairness-based justifications for prohibiting trans women from participating in women's sports are unfounded. "This is a solution to a problem that doesn't exist," says Flanigan. "When someone says 'trans athletes might weigh 280 pounds and can squat 240 pounds,' I can do that too. There's all different body shapes and variations in strength with females, and I've played with some females who are stronger than male athletes I've seen." McKay, who has a very successful trans female athlete on her team, emphasizes that this athlete's success did not result from her trans identity but rather because of her hard work. "I've known a lot of cis women like that," she says. "You work hard, ask questions, are curious, and you learn. That learning curve is about how much effort you put in as an athlete. People have an ability physically and naturally and will hone it. I don't see that the fact of transition made it that way."

Given that rugby is a rough, full-contact sport, advocates of laws like Idaho's have also attempted to base exclusion of trans athletes on safety concerns—and indeed, earlier this year, World Rugby (a governing body for the sport) announced a controversial ban on trans women who transitioned after puberty participating in global women's competitions based on purported safety concerns. Flanigan says that this concern is belied by her personal experience, as she has felt unsafe in rugby only when playing in poor conditions provided to

women's teams (for instance, playing at a venue with a concrete slab in the middle of the pitch). Flanigan says she has never once felt unsafe due solely to playing against trans women. "So to the extent there are safety issues," she says, "it's not anything caused by trans athletes at all."

Flanigan and McKay also both emphasized the positive effect that trans athletes have had on their cisgender teammates. "Having more trans athletes around helps the sport be more inclusive and helps open people's eyes and hearts," says Flanigan. "The benefit of having people who are going through that on your team is that it fosters a different sense of community, because all of a sudden your community is changing," McKay concurs. "But everybody has that one thing in common—the sport. It's all about rugby and the people first. Everything else is secondary."

Indeed, both women say that they have benefited personally from the presence of trans athletes on their teams. Each says that working with trans athletes helped them overcome her own biases, and Flanigan emphasizes that the experience has helped her focus even more on treating all her players equally and being more protective of her players and team. And each underscores that playing with, or coaching, trans athletes taught them and their players that trans athletes are just like everyone else—including because they did not know at first that they were playing with trans individuals. McKay says that she did not know that one of the

women on her team was trans until after she had been on the team for six months; Flanigan says that her college team had played against a trans athlete, but none of her players knew that fact until Flanigan told them in connection with a discussion about the World Rugby ban.

The rugby-focused amici also emphasize the benefits that inclusion has for trans players themselves. McKay says that a trans woman on her team had never played rugby before but joined the club looking for community and connection. Within a year of joining the team, that player had joined the team's board and had taken on "a massive leadership role"; she is now in charge of organizing social events and fundraising. And Flanigan emphasizes that her team is a "safe place where people aren't treated differently and where they can go to feel normal." She reports that the trans athletes on her team have confided in her that they feel welcome and safe as members of the team.

Both Flanigan and McKay point to the harmful effects of a ban on trans women competing in women's sports. Flanigan says that a ban could harm both trans and cis athletes alike. "The moment you put a ban on someone in a certain community, it stunts the growth of the sport because that turns those athletes away and turns away athletes who aren't trans as well, since they want to stand up for their trans teammates," she says. McKay agrees, saying "I take my experiences with trans athletes and apply it to my workplace on a daily basis." Banning trans

women from competing in women's sports thus deprives all women in sports of key opportunities for learning and personal growth.

**C. Cycling—Erin Ayala and Rosy Metcalfe**

Amici Erin Ayala and Rosy Metcalfe are cyclists with years of experience both competing and coaching. Ayala, a sport psychologist who began cycling competitively in 2016, is the co-founder of a nine-member team of cis and trans women and nonbinary individuals who all race in the women's peloton. Metcalfe has raced mountain bikes competitively at the regional level on and off for the last fifteen years; she also coaches biking for individuals—including children as young as five years old—at Stowe Mountain Bike Academy in Vermont. She also has a master's degree in clinical social work and worked in public schools for six years as a social worker, counselor, and behavior interventionist.

Both Ayala and Metcalfe have significant experience racing alongside (and against) trans women athletes. Ayala recalls racing against a trans athlete in 2018 at a national series event in Milwaukee. Her competitor was particularly skilled at “taking lines”—a skill where a racer whips around a competitor quickly, and where biking at the right angle is key—and Ayala remembers being impressed both by the woman's skill and by how much fun she had racing against her. After the trans competitor beat Ayala in 2018, the two raced against each other the next year, with Ayala prevailing. “She was racing at the same level as me and belonged at that

level,” Ayala says. “She’s like any other woman racing with me and mentoring me, and she’s been racing longer than me.”

Metcalfé is on the same racing team as a trans female athlete, although the two ride and compete in different disciplines. She also has worked to provide informal coaching to a friend who came out as a trans woman just six months ago and is now working on her skills while she waits for her hormone levels to come into compliance with governing competitive standards.

Like the other amici, Ayala and Metcalfé stress the benefit that participating in sports can have for trans individuals. “Sport has been so important in my life for mental and physical health, like competing alongside friends,” Metcalfé says. “Access to sport is a human right, both in the education setting and outside it. With the camaraderie and the community, to see someone denied that isn’t right.” Similarly, in her work as a sport psychologist, Ayala has seen that trans and gender-nonconforming individuals are often subject to microaggressions that “eat away at them over time.” Trans individuals may seek to combat these harms by finding community in sport—but “for them to come out publicly and say ‘I want to race or compete because that’s who I am,’ and to have people say ‘no you can’t’ because of who you are, takes away a huge piece of their identity and discounts all the work they’ve done behind the scenes” to develop their identity and sense of

self, Ayala says. Like Metcalfe, Ayala says that “sport is a human right, and everyone deserves to do it, and everyone deserves to belong.”

Ayala and Metcalfe also both say that they experienced personal growth after competing alongside and against trans women. Ayala reports that her relationships with trans teammates and competitors have helped her “learn little things that show up in day-to-day conversations that have nothing to do with cycling,” such as being more likely to wait before speaking in meetings at work in order to give more space to others to speak. Metcalfe, meanwhile, says that “I used to feel like trans women didn’t belong in women’s sports, but that didn’t sit right, so I did the work and learned that I was wrong.” Because she loves and respects her trans friends, even if she initially felt discomfort with trans women participating in women’s sports, “I need to do my work because I care about them and want them to have a good life and have the same freedoms I have.” Indeed, competing alongside trans women helped Metcalfe better understand her own identity: Doing the work of understanding what it means to be trans helped Metcalfe realize that she herself identifies as nonbinary.

Both Ayala and Metcalfe also agree that inclusion of trans women can have significant benefits for the sport of cycling overall. Cycling is a very elite sport where 85% of licensed riders are men, Ayala says, and she has had numerous negative experiences where she was subjected to microaggressions, harassment,

sexism, unsolicited advice, and condescension because she is a woman. Given the paucity of women in the sport, there is significant pressure for women to compete more frequently and to fight for more equal racing opportunities. Having more women and gender-nonconforming people participate in cycling makes the sport more inclusive, and Ayala reports that many women are excited about inclusion of trans riders and welcome more people joining them in the field. “If anything, it’s reassuring and validating because we know we aren’t ‘the only’—we can be ‘the onlies’ together. We can share the same moments and awkward situations and mistakes that other racers experience,” she says. “Seeing people with different backgrounds brings us closer because we have that common experience of not being” part of the groups that dominate the sport.

The two cycling-focused amici also concur that inclusion has special benefits for children and teenagers—a critical concern here, given that Idaho’s ban targets scholastic and collegiate sports. Ayala works as a psychologist with children and adolescents, and she says that this generation is generally more open to questions about gender. Where there are problems, they are often grounded in confusion or fear of asking questions, and exposure to trans individuals through sports can help children overcome those issues, she says. Metcalfe’s work as a coach for young children has led her to the same belief. “Especially with children, dialogue around gender impacts the rest of their life,” she says, “so we have an

opportunity to teach them about gender in a way that is more based in science and more human, so people can be who they are and belong in sports.”

### **CONCLUSION**

Amici’s experiences demonstrate that banning trans women from participating in sports at any level is unfounded and harmful to everyone. This is true regardless of whether the sport is a high-contact sport like rugby, a traditionally male-dominated sport like cycling, or an individually focused sport like running. Far from posing a threat to safety or fair competition, the participation of trans women in these sports is welcomed by those who have actually coached and participated alongside them. Participation in sports, especially at the school level, promotes self and personal development of many individuals, as well as an opportunity to foster camaraderie, friendship, and understanding with peers. A ban such as Idaho’s denies these benefits not only to trans women, but to all who would otherwise benefit from their perspectives.

For these reasons, amici respectfully urge the Court to affirm the decision of the district court (Dkt. 63) with respect to the Motion for Preliminary Injunction (Dkt. 22).

Respectfully submitted,

ADAM M. CAMBIER  
ALISON BURTON  
WILMER CUTLER PICKERING  
HALE AND DORR LLP  
60 State Street  
Boston, MA 02109  
(617) 526-6000

/s/ Matthew D. Benedetto  
MATTHEW D. BENEDETTO  
THOMAS F. COSTELLO  
WILMER CUTLER PICKERING  
HALE AND DORR LLP  
350 South Grand Avenue, Suite 2400  
Los Angeles, CA 90071  
(213) 443-5300  
Matthew.Benedetto@wilmerhale.com

*Counsel for Amici Curiae  
Teammates, Coaches, and Allies of  
Transgender Athletes*

December 21, 2020

**STATEMENT OF RELATED CASES**

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

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT  
Form 8. Certificate of Compliance for Briefs**

*Instructions for this form: <http://www.ca9.uscourts.gov/forms/form08instructions.pdf>*

**9th Cir. Case Number(s)**

I am the attorney or self-represented party.

**This brief contains**  **words**, excluding the items exempted

by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief (*select only one*):

- 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*):
  - it is a joint brief submitted by separately represented parties;
  - a party or parties are filing a single brief in response to multiple briefs; or
  - a party or parties are filing a single brief in response to a longer joint brief.
- complies with the length limit designated by court order dated
- is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

**Signature**

**Date**

(use "s/[typed name]" to sign electronically-filed documents)

*Feedback or questions about this form? Email us at [forms@ca9.uscourts.gov](mailto:forms@ca9.uscourts.gov)*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 21st day of December, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Matthew D. Benedetto  
MATTHEW D. BENEDETTO  
WILMER CUTLER PICKERING  
HALE AND DORR LLP  
350 South Grand Avenue,  
Suite 2400  
Los Angeles, CA 90071  
(213) 443-5300