

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

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

Plaintiffs,

vs.

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

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

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

Defendants.

*Proceedings recorded by
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TRANSCRIPT OF MOTION HEARING PROCEEDINGS

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

APPEARANCES:

For the Plaintiffs:

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

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

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

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

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

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

For the Defendants:

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

For the Proposed
Intervenors:

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

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

Court Reporter:

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

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

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

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

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

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

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

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

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

19 THE COURT: And in the jury box.

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

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

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

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

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

5 THE COURT: Okay. Thank you.

6 And then on video, who do we have?

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

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

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

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

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

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

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

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

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

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

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

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

1 inside the courthouse if they would like.

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

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

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

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

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

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

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

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

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

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

24 THE COURT: Okay.

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

1 rebuttal.

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

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

7 THE COURT: Thank you.

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

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

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

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

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

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

1 opportunity they said is an important interest.

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

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

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

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

1 Well, that's the one hand.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3 THE COURT: Yes.

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

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

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

18 THE COURT: Not yet.

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

20 THE COURT: Thank you.

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

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

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

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

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

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

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

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

4 MR. ZANZIG: Thank you.

5 THE COURT: Thank you.

6 I think the plaintiffs are opposed to the motion.

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

10 THE COURT: It happens.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 such an interest.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

10 THE COURT: I do not.

11 MR. EPPINK: Thank you, Your Honor.

12 THE COURT: You do have five minutes.

13 MR. BROOKS: Thank you, Your Honor.

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

16 MR. EPPINK: Yes, Your Honor.

17 THE COURT: Thank you.

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

25 Now, of course, the plaintiffs oppose intervention

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

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

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

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

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

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

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

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

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

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

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

4 THE COURT: Thank you.

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

13 MR. BROOKS: Thank you, Your Honor.

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

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

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

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

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

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

1 to do that.

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

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

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

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

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

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

25 Neither plaintiff can satisfy this pre-enforcement

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

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

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

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

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

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

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

11 THE COURT: Then why have the law?

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

13 THE COURT: I understand that.

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

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

4 Have I answered --

5 THE COURT: I understand your argument.

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

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

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

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

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

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

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

1 THE COURT: Because of Title IX?

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

12 THE COURT: Okay.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

9 THE COURT: I do not. Thank you.

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

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

14 THE COURT: And how about the federal government?

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

17 THE COURT: Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 The way the statute is written --

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

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

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

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

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

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

23 THE COURT: So could that be your counselor?

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

1 someone licensed in health care.

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

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

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

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

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

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

18 THE COURT: Okay. Thank you.

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

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

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

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

14 THE COURT: Please be seated.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 Now I want to respond directly to legislative

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

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

14 THE COURT: W-I-C?

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

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

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

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

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

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

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

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

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

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

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

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

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

1 the criteria that the legislature was using.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5 THE COURT: Do you know when in August?

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

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

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

20 THE COURT: Thank you.

21 Counsel.

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

1 30 minutes apiece.

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

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

6 THE COURT: Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 look at it.

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

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

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

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

11 MR. BROOKS: Thank you.

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

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

15 THE COURT: Oh, I have.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 from experience on that.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

18 THE COURT: I do not. Thank you.

19 MR. BROOKS: Thank you, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 benefit.

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

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

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

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

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

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

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

22 THE COURT: No, I do not.

23 MS. PRELOGAR: Thank you, Your Honor.

24 THE COURT: Thank you.

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

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

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

7 THE COURT: Plaintiffs?

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

9 MR. BROOKS: Yes, Your Honor.

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

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

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

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

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

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C E R T I F I C A T E

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

Dated this 29th day of July, 2020.

/s/ Anne Bowline

ANNE BOWLINE
Registered Merit Reporter
Certified Realtime Reporter