

1 Colin Proksel (034133)
2 OSBORN MALEDON, P.A.
3 2929 North Central Avenue, 21st Floor
4 Phoenix, Arizona 85012-2793
5 State Bar No. 034133
6 Telephone: (602) 640-9000
7 Facsimile: (602) 640-9050
8 Email: cproksel@omlaw.com
9 *Attorney for Plaintiffs*
10 *Additional counsel listed in signature block*

11 **UNITED STATES DISTRICT COURT**
12 **FOR THE DISTRICT OF ARIZONA**
13 **TUCSON DIVISION**

14 Jane Doe, by her next friend and parents
15 Helen Doe and James Doe; and Megan Roe,
16 by her next friend and parents, Kate Roe and
17 Robert Roe,

18 Plaintiffs,

19 v.

20 Thomas C. Horne, in his official capacity as
21 State Superintendent of Public Instruction;
22 Laura Toenjes, in her official capacity as
23 Superintendent of the Kyrene School
24 District; Kyrene School District; The
25 Gregory School; and Arizona Interscholastic
26 Association Inc.,

27 Defendants.

Case No. 4:23-cv-00185-JGZ

**PLAINTIFFS' OPPOSITION TO THE
GREGORY SCHOOL'S MOTION TO
DISMISS AND PROPOSED
INTERVENORS' PROPOSED MOTION TO
DISMISS**

28

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

INTRODUCTION 1

FACTUAL BACKGROUND 2

LEGAL STANDARD 3

ARGUMENT 4

I. Defendant TGS’s Motion to Dismiss Should Be Denied..... 4

 A. Defendant TGS Receives Federal Financial Assistance. 4

 1. Defendant TGS’s Tax-Exempt Status Qualifies as Federal
 Financial Assistance. 4

 2. Defendant TGS’s Receipt of a PPP Loan Independently
 Qualifies as Federal Financial Assistance..... 6

 B. Defendant TGS Is Liable Under the ADA. 7

II. The Proposed Intervenors’ Proposed Motion to Dismiss Should Also Be
 Denied. 9

 A. Plaintiffs Have Plausibly Alleged That the Ban Violates the
 Constitution and Title IX. 9

 B. Plaintiffs Have Stated a Claim Under the ADA. 9

 1. Gender Dysphoria Is a Disability Under the ADA. 9

 2. Plaintiffs Have Alleged That Their Gender Dysphoria Results
 from “Physical Impairments.” 11

 3. Plaintiffs Have Alleged that Playing Sports Qualifies as a
 “Major Life Activity” in Their Particular Circumstances..... 11

CONCLUSION 13

TABLE OF AUTHORITIES

Cases

Armstrong v. Davis,
275 F.3d 849 (9th Cir. 2001) 8

Ashcroft v. Iqbal,
556 U.S. 662 (2009)..... 3

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007)..... 3

Brooke v. Airport Hotel, LLC,
2015 WL 5444286 (D. Ariz. Sept. 16, 2015) 8

Buettner-Hartsoe v. Balt. Lutheran High Sch. Ass’n,
2022 WL 2869041 (D. Md. July 21, 2022) 4, 5, 6

Buettner-Hartsoe v. Balt. Lutheran High Sch. Ass’n,
2022 WL 4080294 (D. Md. Sept. 6, 2022) 5, 6

Campen v. Portland Adventist Med. Ctr.,
2016 WL 5853736 (D. Or. Sept. 2, 2016) 4

Castle v. Eurofresh, Inc.,
731 F.3d 901 (9th Cir. 2013) 8

Doe v. Abington Friends Sch.,
2022 WL 16722322 (E.D. Pa. Nov. 4, 2022) 6

E.H. by & through Herrera v. Valley Christian Acad.,
616 F. Supp. 3d 1040 (C.D. Cal. 2022) 4, 6

Edmo v. Corizon, Inc.,
935 F.3d 757 (9th Cir. 2019) 10

Fernandez v. Bruno Northfleet, Inc.,
568 F. Supp. 3d 1294 (S.D. Fla. 2021) 6

Fulani v. League of Women Voters Educ. Fund,
684 F. Supp. 1185 (S.D.N.Y. 1988) 5

Griffith v. El Paso Cnty.,
2023 WL 2242503 (D. Colo. Feb. 27, 2023)..... 10

1 *Henry A. v. Willden,*
 2 678 F.3d 991 (9th Cir. 2012) 13

3 *Husbands v. Fin. Mgmt. Sols., LLC,*
 4 2021 WL 4339436 (D. Md. Sept. 23, 2021)..... 6

5 *Jacobson v. Delta Airlines,*
 6 742 F.2d 1202 (9th Cir. 1984) 5

7 *James Erickson Fam. P’ship v. Transamerica Life Ins. Co.,*
 8 2019 WL 1755858 (D. Ariz. Apr. 19, 2021) 7

9 *Johnny’s Icehouse, Inc. v. Amateur Hockey Ass’n Ill.,*
 10 134 F. Supp. 2d 965 (N.D. Ill. 2001) 5, 6

11 *Karanik v. Cape Fear Acad., Inc.,*
 12 608 F. Supp. 3d 268 (E.D.N.C. 2022) 6

13 *Khoja v. Orexigen Therapeutics, Inc.,*
 14 899 F.3d 988 (9th Cir. 2018) 7

15 *Lee v. City of L.A.,*
 16 250 F.3d 668 (9th Cir. 2001) 7

17 *Lentini v. Cal. Ctr. for the Arts,*
 18 370 F.3d 837 (9th Cir. 2004) 8

19 *Lesofki v. Lash,*
 20 2012 WL 4711909 (D. Ariz. Oct. 3, 2012)..... 8

21 *Marsh v. Terra Int’l (Okla.), Inc.,*
 22 122 F. Supp. 3d 1267 (N.D. Okla. 2015)..... 12

23 *McGlotten v. Connally,*
 24 338 F. Supp. 448 (D.D.C. 1972)..... 5

25 *McPherson v. Mich. High Sch. Athletic Ass’n,*
 26 119 F.3d 453 (6th Cir. 1997) (en banc) 8

27 *OSU Student All. v. Ray,*
 28 699 F.3d 1053 (9th Cir. 2012) 3

Pahulu v. Univ. of Kansas,
 897 F. Supp. 1387 (D. Kan. 1995)..... 12

Pritchard v. Fla. High Sch. Athletic Ass’n, Inc.,
 2020 WL 3542652 (M.D. Fla. June 30, 2020)..... 12

1	<i>Regan v. Taxation with Representation,</i>	
2	461 U.S. 540 (1983).....	5
3	<i>Swarm Tech. LLC v. Amazon.com Inc.,</i>	
4	2022 WL 3585835 (D. Ariz. Aug. 22, 2022).....	7
5	<i>Venson v. Gregson,</i>	
6	2021 WL 673371 (S.D. Ill. Feb. 22, 2021).....	10
7	<i>Walter v. Birdville Indep. Sch. Dist.,</i>	
8	2018 WL 3974714 (N.D. Tex. Aug. 20, 2018).....	12
9	<i>Williams v. Kincaid,</i>	
10	45 F.4th 759 (4th Cir. 2022)	10, 11
11	Statutes	
12	20 U.S.C. § 1681(a).....	4
13	29 U.S.C. § 794(a).....	4
14	42 U.S.C. § 12101 <i>et seq.</i>	8
15	42 U.S.C. § 12102(2)(A).....	12
16	42 U.S.C. § 12132	8
17	42 U.S.C. § 12181(7)(J)	8
18	42 U.S.C. § 12182	8
19	42 U.S.C. § 12211(b)(1).....	9, 11
20	Ariz. Rev. Stat. § 15-120.02.....	1
21	Other Authorities	
22	34 C.F.R. § 106.2(g)(5).....	5
23		
24		
25		
26		
27		
28		

INTRODUCTION

1
2 Defendant The Gregory School’s (“TGS”) motion to dismiss should be denied for
3 two reasons. *First*, Defendant TGS receives federal financial assistance and so it must
4 comply with Title IX and the Rehabilitation Act. For over five decades, courts across the
5 country, including in this Circuit, have concluded that 501(c)(3) tax-exempt status—which
6 TGS enjoys—constitutes a significant source of federal financial assistance. Moreover,
7 TGS does not dispute that it received a PPP loan from the federal government or that such
8 a loan qualifies as federal financial assistance; it argues only that the loan was forgiven
9 before the conduct in this case. But Plaintiffs are entitled to test that assertion in discovery.
10 *Second*, Defendant TGS misconstrues the scope of Plaintiffs’ claims under the Americans
11 with Disabilities Act (“ADA”). Plaintiffs have properly alleged that TGS violated Title III
12 of the ADA, which applies to TGS irrespective of whether it received federal financial
13 assistance.

14 Proposed Intervenors—who are not parties to the case—have also filed a proposed
15 motion to dismiss, arguing that Ariz. Rev. Stat. § 15-120.02 (the “Ban”) does not violate
16 the Constitution, Title IX, or the ADA.¹ While Plaintiffs have moved to strike Proposed
17 Intervenors’ proposed motion for violating the Local Rules and an order of this Court,
18 Proposed Intervenors’ arguments also fail on the merits. As explained in more detail in
19 Plaintiffs’ Reply in Support of their Motion for Preliminary Injunction, the facts alleged in
20 Plaintiffs’ Complaint are more than sufficient to state Equal Protection and Title IX claims.
21 As for the ADA claim, this Court should follow the well-reasoned decision of the Fourth
22 Circuit concluding that gender dysphoria is a cognizable disability under the ADA; indeed,
23 Proposed Intervenors cite no circuit authority to the contrary. Likewise, excluding
24 Plaintiffs from playing on the sports teams consistent with their gender identity is a
25 qualifying injury under the ADA, particularly given the many academic and social benefits
26 that Plaintiffs allege that playing sports provides them.

27
28

¹ Proposed Intervenors do not move to dismiss Plaintiffs’ Rehabilitation Act claim.

1 For these reasons, this Court should deny Defendant TGS’s motion to dismiss. In
2 the event the Court permits Proposed Intervenors to intervene—and does not strike their
3 proposed motion for failure to comply with the rules—the Court should deny their motion
4 to dismiss as well.

5 FACTUAL BACKGROUND

6 Jane Doe and Megan Roe are transgender girls who want nothing more than to play
7 on the sports teams consistent with their gender identity as other girls are able to do.
8 (Compl. ¶ 2.) Their friends, families, teammates, and schools have accepted them as the
9 girls that they are. (*Id.* ¶¶ 45, 61.) Yet the Ban requires that Arizona schools exclude
10 transgender girls like Jane and Megan from competing on girls’ sports teams simply
11 because they are transgender. (*Id.* ¶ 25.) Unless enjoined by this Court, the Ban will
12 prohibit Jane—an 11-year-old girl—from trying out for and competing in her public middle
13 school’s soccer, basketball, and cross-country teams in the coming school year. (*Id.* ¶¶ 49–
14 50.) The Ban will also prohibit Megan, a 15-year-old girl, from competing on the girls’
15 volleyball team at TGS, a private educational institution. (*Id.* ¶¶ 12, 63–64.) Plaintiffs
16 allege that TGS receives federal financial assistance. (*Id.* ¶ 12.)

17 Both Jane and Megan have been diagnosed with gender dysphoria, which is “the
18 distress caused by incongruence between a person’s gender identity and their designated
19 sex at birth.” (*Id.* ¶¶ 32, 45, 57.) Gender dysphoria “results from physical impairments”
20 and is recognized by the American Psychiatric Association and the Diagnostic and
21 Statistical Manual. (*Id.* ¶ 32.) Gender dysphoria in adolescents is highly treatable by
22 permitting them to live consistent with their gender identity in all aspects of their lives.
23 (*Id.* ¶ 33.)

24 Jane has not yet begun puberty, and thus has not experienced any of the
25 physiological changes associated with male puberty. (*Id.* ¶ 46.) Her doctors are carefully
26 monitoring her for signs of the onset of puberty. (*Id.*) Megan began taking puberty-
27 blocking medications when she was 11 years old, which prevented her from undergoing
28 male puberty. (*Id.* ¶ 59.) Megan has also received hormone therapy that has caused her to

1 develop many of the physiological changes associated with female puberty. (*Id.*)
2 Transgender girls like Jane and Megan—who have not undergone male puberty and who
3 have taken or intend to take female hormones—do not have any athletic advantage over
4 non-transgender girls. (*Id.* ¶¶ 34–36.)

5 Athletic programs are a central part of education, and both Jane and Megan would
6 benefit significantly from playing on sports teams. Like all student athletes, playing school
7 sports would give them an opportunity to develop social bonds with their teammates and
8 become part of an important school community. (*Id.* ¶ 39.) Playing sports also has a well-
9 documented positive effect on academic performance. (*Id.* ¶ 38.) And school sports
10 provide an opportunity to make friends, work as a team, and improve student athletes’
11 physical and emotional health. (*Id.* ¶¶ 40–43.) Excluding Jane and Megan—who live as
12 girls in all aspects of their lives—would only cause them to suffer without any benefit to
13 their teammates or competitors, who have always welcomed them as the girls that they are.
14 (*Id.* ¶¶ 45, 61.) Playing on the boys’ teams is not an option for Jane or Megan, as doing so
15 would exacerbate their gender dysphoria and directly conflict with their medically
16 supervised transitions. (*Id.* ¶¶ 52, 65.) But for the Ban, Jane’s and Megan’s schools would
17 permit them to play on the girls’ teams, as would the interscholastic sports league that
18 regulates inter-school competition. (*Id.* ¶¶ 21, 54, 64.)

19 LEGAL STANDARD

20 A complaint survives a motion to dismiss so long as it contains “enough facts to
21 state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S.
22 544, 570 (2007). “A claim has facial plausibility when the plaintiff pleads factual content
23 that allows the court to draw the reasonable inference that the defendant is liable for the
24 misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). “All that matters at this
25 stage is that the allegations nudge this inference ‘across the line from conceivable to
26 plausible.’” *OSU Student All. v. Ray*, 699 F.3d 1053, 1078 (9th Cir. 2012) (quoting *Iqbal*,
27 556 U.S. at 680).

28

ARGUMENT

I. DEFENDANT TGS’S MOTION TO DISMISS SHOULD BE DENIED.

Defendant TGS’s motion to dismiss should be denied for two simple reasons. *First*, Plaintiffs have adequately alleged that TGS receives federal financial assistance, such that Title IX and the Rehabilitation Act apply to it. *Second*, Plaintiffs have alleged that TGS is subject to and has violated Title III of the ADA, which applies whether or not TGS receives federal financial assistance.

A. Defendant TGS Receives Federal Financial Assistance.

Plaintiffs allege that Defendant TGS receives federal financial assistance, which is all that is required to conclude that it must comply with Title IX and the Rehabilitation Act. (Compl. ¶ 12.) “[C]ourts have held that a complaint simply alleging, as [Plaintiff] does, that a defendant receives ‘federal financial assistance’ is sufficient.” *Campen v. Portland Adventist Med. Ctr.*, 2016 WL 5853736, at *4 (D. Or. Sept. 2, 2016) (collecting cases), *report & recommendation adopted*, 2016 WL 5858670 (D. Or. Oct. 5, 2016). Even if more were required, TGS concedes that it receives federal tax-exempt status as a 501(c)(3) organization and that it accepted federal financial assistance in the form of a PPP loan. (Dkt. 37 at 2.) Both are sufficient to trigger the application of Title IX and the Rehabilitation Act to TGS. *See* 20 U.S.C. § 1681(a) (Title IX applies to “any education program or activity receiving Federal financial assistance”); 29 U.S.C. § 794(a) (Section 504 of the Rehabilitation Act applies to “any program or activity receiving Federal financial assistance”).

1. **Defendant TGS’s Tax-Exempt Status Qualifies as Federal Financial Assistance.**

Courts, including in this Circuit, have repeatedly held that a defendant’s “tax-exempt status confers a federal financial benefit that obligates compliance with Title IX.” *E.H. by & through Herrera v. Valley Christian Acad.*, 616 F. Supp. 3d 1040, 1050 (C.D. Cal. 2022); *see also Buettner-Hartsoe v. Balt. Lutheran High Sch. Ass’n*, 2022 WL 2869041, at *5 (D. Md. July 21, 2022) (“[T]his Court holds that § 501(c)(3) tax exemption

1 constitutes federal financial assistance for the purposes of Title IX.”), *adhered to on*
2 *reconsideration*, 2022 WL 4080294 (D. Md. Sept. 6, 2022); *Fulani v. League of Women*
3 *Voters Educ. Fund*, 684 F. Supp. 1185, 1192 (S.D.N.Y. 1988) (noting that an entity was
4 subject to Title IX because it “receive[d] federal assistance indirectly through its tax
5 exemption”); *McGlotten v. Connally*, 338 F. Supp. 448, 462 (D.D.C. 1972) (“We think
6 there is little question that the provision of a tax deduction for charitable contributions is a
7 grant of federal financial assistance within the scope of the 1964 Civil Rights Act.”).²
8 These courts have correctly recognized that even “indirect” sources of aid constitute federal
9 financial assistance, and that the Supreme Court has found that tax exemptions are “a form
10 of Congressional subsidy and the equivalent of a cash grant.” *Buettner-Hartsoe*, 2022 WL
11 2869041, at *4 (citing *Regan v. Taxation with Representation*, 461 U.S. 540, 544 (1983)).

12 Defendant TGS does not engage with any of these cases, even though they have
13 held for more than five decades that tax-exempt status qualifies as federal financial
14 assistance. TGS instead relies on a single outlier case which reasoned that tax exemption
15 did not qualify as federal financial assistance because tax exemption did not appear in a
16 regulation defining such assistance. See *Johnny’s Icehouse, Inc. v. Amateur Hockey Ass’n*
17 *Ill.*, 134 F. Supp. 2d 965, 971 (N.D. Ill. 2001). But that case ignored that the relevant
18 regulation includes a catchall provision, defining federal financial assistance to include
19 “[a]ny other contract, agreement, or arrangement which has as one of its purposes the
20 provision of assistance to any education program or activity,” 34 C.F.R. § 106.2(g)(5).
21 Providing tax-exempt status serves as a federal “subsidy” and thus is an “arrangement” that
22 provides federal financial assistance to schools like TGS. *Buettner-Hartsoe*, 2022 WL
23 2869041, at *5 n.9. And in any event, even if the regulation were read more narrowly, “[i]t
24 is questionable that the DOJ regulations may interpret the statute to narrow the scope of
25 the term ‘federal financial assistance’ in a manner that is inconsistent with its purpose: to

26
27 ² The reasoning of these cases applies equally to Plaintiffs’ Rehabilitation Act claim.
28 See *Jacobson v. Delta Airlines*, 742 F.2d 1202, 1212 (9th Cir. 1984) (“Congress intended that the terms ‘program or activity receiving Federal financial assistance’ in the Rehabilitation Act be given the same interpretation as the identical language in Title IX.”).

1 eliminate discrimination in programs or activities benefiting from federal financial
2 assistance.” *Buettner-Hartsoe*, 2022 WL 4080294, at *3 (internal quotation marks
3 omitted). *Johnny’s Icehouse* is thus an outlier that has been explicitly rejected by the
4 weight of authority. *See id.*; *Buettner-Hartsoe*, 2022 WL 2869041, at *5; *E.H.*, 616 F.
5 Supp. 3d at 1050.

6 Thus, Defendant TGS’s tax-exempt status qualifies as a form of “federal financial
7 assistance” such that it is subject to Title IX and the Rehabilitation Act.

8 2. **Defendant TGS’s Receipt of a PPP Loan Independently**
9 **Qualifies as Federal Financial Assistance.**

10 Defendant TGS does not dispute that, as courts around the country have concluded,
11 its receipt of federal loans from the pandemic Paycheck Protection Program (“PPP”)
12 qualifies as federal financial assistance. *See, e.g., E.H.*, 616 F. Supp. 3d at 1049 (agreeing
13 with the “numerous district courts [that] have held that PPP loans constitute federal
14 financial assistance”); *Karanik v. Cape Fear Acad., Inc.*, 608 F. Supp. 3d 268, 281
15 (E.D.N.C. 2022) (concluding that “[a] PPP loan is ‘federal financial assistance’ subject to
16 Title IX”); *Doe v. Abington Friends Sch.*, 2022 WL 16722322, at *7 (E.D. Pa. Nov. 4,
17 2022) (finding that receipt of PPP loan was sufficient to find that school had received
18 federal financial assistance under Rehabilitation Act).

19 Defendant TGS instead asserts that its PPP loan expired at the end of 2020 and it is
20 therefore no longer subject to federal antidiscrimination laws, citing a declaration from its
21 Head of School. (Dkt. 37 at 5; Dkt. 37-1.) But Plaintiffs are entitled to test TGS’s assertion
22 about when precisely its PPP loan was forgiven, which is a factual issue not suited to
23 resolution on a motion to dismiss. *See Husbands v. Fin. Mgmt. Sols., LLC*, 2021 WL
24 4339436, at *8 (D. Md. Sept. 23, 2021) (concluding that plaintiff had “sufficiently stated a
25 claim” that receipt of PPP loan triggered Rehabilitation Act, and that defendant’s argument
26 that it received the PPP loan after the discriminatory conduct would be better addressed
27 “after discovery is completed”); *Fernandez v. Bruno Northfleet, Inc.*, 568 F. Supp. 3d 1294,
28 1300 (S.D. Fla. 2021) (concluding that “[a]ny doubts as to whether the federal funding

1 Defendant received qualifies as ‘federal financial assistance’ for purposes of Rehabilitation
2 Act coverage are better addressed after discovery”).

3 Moreover, the Court should not consider Dr. Sherrill’s declaration, attached to
4 Defendant TGS’s motion, in deciding TGS’s motion to dismiss. “It is hornbook law that
5 ‘a district court may not consider any material beyond the pleadings in ruling on a 12(b)(6)
6 motion.’” *Swarm Tech. LLC v. Amazon.com Inc.*, 2022 WL 3585835, at *7 (D. Ariz. Aug.
7 22, 2022) (quoting *Lee v. City of L.A.*, 250 F.3d 668, 688 (9th Cir. 2001)). Dr. Sherill’s
8 conclusory declaration seeks to introduce facts that are not mentioned—and thus not
9 incorporated by reference—anywhere in Plaintiffs’ complaint. *See Lee*, 250 F.3d at 689
10 (concluding that district court erred in considering defendants’ declarations on motion to
11 dismiss); *Swarm Tech. LLC*, 2022 WL 3585835, at *7 (holding that declarations were not
12 incorporated by reference or subject to judicial notice). Nor does Defendant TGS provide
13 any official or public source regarding the expiration of the PPP funds from which this
14 Court could take judicial notice. *See Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988,
15 999 (9th Cir. 2018) (explaining that courts may not take judicial notice of “disputed facts”
16 even if they are contained in public records); *James Erickson Fam. P’ship v. Transamerica*
17 *Life Ins. Co.*, 2019 WL 1755858, at *3 (D. Ariz. Apr. 19, 2021) (concluding that
18 defendant’s declaration containing “factual representations” was not subject to judicial
19 notice and “must be ignored at the current stage”). This Court therefore should not consider
20 Dr. Sherill’s declaration and should permit Plaintiffs to take discovery on this issue.

21 ***

22 In sum, Plaintiffs have adequately alleged that TGS receives federal financial
23 assistance, such that it is subject to Title IX and the Rehabilitation Act.

24 **B. Defendant TGS Is Liable Under the ADA.**

25 Defendant TGS argues that it is not liable under the ADA because it is a private
26 entity. (Dkt. 37 at 7.) Not so. Private schools like TGS are subject to Title III of the ADA,
27 which requires that “[n]o individual shall be discriminated against on the basis of disability
28 in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or

1 accommodations of any place of public accommodation[.]” 42 U.S.C. § 12182(a); *see* 42
2 U.S.C. § 12181(7)(J) (defining a place of public accommodation to include an “elementary,
3 secondary, undergraduate, or postgraduate private school, or other place of education”).
4 Thus, “as a private school,” TGS “qualifies as a ‘public accommodation’ subject to Title
5 III of the ADA.” *Lesofki v. Lash*, 2012 WL 4711909, at *3 (D. Ariz. Oct. 3, 2012).
6 Moreover, unlike Plaintiffs’ other causes of action against TGS, the ADA applies
7 regardless of whether TGS receives federal financing. *See Armstrong v. Davis*, 275 F.3d
8 849, 862 n.17 (9th Cir. 2001) (explaining that “the Rehabilitation Act is materially identical
9 to and the model for the ADA, except that it is limited to programs that receive federal
10 financial assistance”); *McPherson v. Mich. High Sch. Athletic Ass’n*, 119 F.3d 453, 460
11 (6th Cir. 1997) (en banc) (explaining that “coverage under the Rehabilitation Act is limited
12 to entities receiving federal financial assistance, while the ADA’s reach extends to purely
13 private entities”).

14 Defendant TGS suggests that Plaintiffs assert only a claim under Title II of the
15 ADA, but that is incorrect. (Dkt. 37 at 7.) Count III of Plaintiffs’ Complaint asserts a
16 claim under 42 U.S.C. § 12101 *et seq.*, which includes Title II of the ADA for public entity
17 defendants (42 U.S.C. § 12132) and Title III for defendants operating public
18 accommodations (42 U.S.C. § 12182). *See Castle v. Eurofresh, Inc.*, 731 F.3d 901, 909
19 (9th Cir. 2013) (explaining that “plaintiffs often sue multiple defendants under separate
20 titles of the ADA”). Indeed, courts frequently cite to Title III of the ADA in exactly this
21 way. *See Lentini v. Cal. Ctr. for the Arts*, 370 F.3d 837, 841 (9th Cir. 2004) (explaining
22 that plaintiff’s “complaint included claims under Title III of the Americans with
23 Disabilities Act, 42 U.S.C. § 12101 *et seq.*”); *Brooke v. Airport Hotel, LLC*, 2015 WL
24 5444286, at *1 (D. Ariz. Sept. 16, 2015) (“Plaintiff’s verified complaint is founded upon
25 Title III of the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.*”). Plaintiffs’
26 Complaint was therefore sufficient to place Defendant TGS on notice of the ADA claim
27 against it, and its motion to dismiss should be denied.

28

1 **II. PROPOSED INTERVENORS' PROPOSED MOTION TO DISMISS**
2 **SHOULD ALSO BE DENIED.**

3 If this Court permits Proposed Intervenors to intervene, and declines to strike their
4 proposed motion, the Court should nonetheless deny their motion to dismiss because
5 Plaintiffs have adequately alleged that the Ban violates the Equal Protection Clause, Title
6 IX, and the ADA.³

7 **A. Plaintiffs Have Plausibly Alleged That the Ban Violates the**
8 **Constitution and Title IX.**

9 Proposed Intervenors offer no new or separate arguments for dismissal of Plaintiffs'
10 constitutional and Title IX claims, other than incorporating by reference the arguments
11 asserted in their preliminary injunction briefing. Thus, Plaintiffs respond to those
12 arguments in their reply in support of their motion for a preliminary injunction, and
13 incorporate by reference their responses here. *See* LRCiv 7.1(d)(2).

14 **B. Plaintiffs Have Stated a Claim Under the ADA.**

15 Plaintiffs have plausibly alleged a claim under the ADA because their gender
16 dysphoria is a qualifying disability and, contrary to Proposed Intervenors' argument, does
17 not fall within any statutory exclusion under the ADA. Proposed Intervenors are also
18 incorrect to argue that playing sports does not fall within the ambit of the ADA, particularly
19 given Plaintiffs' allegations that playing sports offers significant academic and social
20 benefits for them.

21 1. *Gender Dysphoria Is a Disability Under the ADA.*

22 Proposed Intervenors' principal argument is that gender dysphoria cannot qualify as
23 a disability under the ADA because of the statutory exclusion for "transvestism,
24 transsexualism, pedophilia, exhibitionism, gender identity disorders not resulting from
25 physical impairments, or other sexual behavior disorders." 42 U.S.C. § 12211(b)(1). But
26 as Proposed Intervenors acknowledge (Dkt. 38-1 at 6), the Fourth Circuit has held in a
27 well-reasoned decision that "gender dysphoria" is distinct from "gender identity disorders"

28

³ As noted above, Proposed Intervenors have not sought dismissal of Plaintiffs' Rehabilitation Act claim.

1 and that gender dysphoria qualifies as a disability under the ADA. *Williams v. Kincaid*, 45
2 F.4th 759, 767–70 (4th Cir. 2022).

3 As the Fourth Circuit correctly explained, the medical condition of “gender
4 dysphoria,” as defined in the Diagnostic and Statistical Manual (“DSM”), focuses on the
5 “‘clinically significant distress’ felt by some of those who experience ‘an incongruence
6 between their gender identity and their assigned sex.’” *Id.* at 767; *see also Edmo v. Corizon,*
7 *Inc.*, 935 F.3d 757, 769 (9th Cir. 2019) (explaining that gender dysphoria “must be
8 associated with ‘clinically significant distress’”). By contrast, the term “gender identity
9 disorder”—which is no longer in clinical use—referred only to the “incongruence between
10 assigned sex (i.e., the sex that is recorded on the birth certificate) and gender identity.”
11 *Williams*, 45 F.4th at 767 (internal quotation marks omitted). “In short, being trans alone
12 cannot sustain a diagnosis of gender dysphoria under the DSM-5, as it could for a diagnosis
13 of gender identity disorder under earlier versions of the DSM.” *Id.* at 768 (internal
14 quotation marks and alterations omitted); *see Edmo*, 935 F.3d at 769 (“Not every
15 transgender person has gender dysphoria[.]”). The Fourth Circuit was thus correct to
16 conclude—in the only appellate decision to address this issue—that “as a matter of
17 statutory construction, gender dysphoria is not a gender identity disorder.” *Williams*, 45
18 F.4th at 769; *see also, e.g., Griffith v. El Paso Cnty.*, 2023 WL 2242503, at *17 (D. Colo.
19 Feb. 27, 2023) (“[T]he Court finds persuasive a recent thorough and closely-reasoned
20 decision issued by the Fourth Circuit in *Williams v. Kincaid*. . . . [T]he Court is likewise
21 convinced that gender dysphoria is a disability included in the ADA’s protections.”);
22 *Venson v. Gregson*, 2021 WL 673371, at *2 & n.2 (S.D. Ill. Feb. 22, 2021) (collecting
23 cases holding that gender dysphoria qualifies as a disability under the ADA).

24 2. *Plaintiffs Have Alleged That Their Gender Dysphoria Results from*
25 *“Physical Impairments.”*

26 Proposed Intervenors’ argument fails for an additional, independent reason.
27 Plaintiffs have alleged that their gender dysphoria “results from physical impairments,”
28 (Compl. ¶¶ 32, 84), and the ADA excludes only “gender identity disorders not resulting

1 from physical impairments[.]” 42 U.S.C. § 12211(b)(1). As the Fourth Circuit correctly
2 held, that is an independent basis to conclude that the statutory exclusion does not apply to
3 gender dysphoria. *Williams*, 45 F.4th at 770–72. As in *Williams*, the Plaintiffs here have
4 alleged that their identification as female is longstanding and reflects an innate biological
5 condition that has been manifest since they were very young. (Compl. ¶¶ 29, 45, 57.) In
6 addition, as Plaintiffs’ Complaint explains, gender dysphoria can be treated by, among
7 other things, “puberty blocking medication and, for older adolescents, hormone therapy.”
8 (*Id.* ¶ 33; *see id.* ¶¶ 34–36.) That Plaintiffs receive or will receive puberty blockers and
9 hormone therapy to treat their gender dysphoria “indicate[s] that [their] gender dysphoria
10 has some physical basis.” *Williams*, 45 F.4th at 771; (*see* Compl. ¶¶ 46, 59.) Thus,
11 Plaintiffs have plausibly alleged that their gender dysphoria results from physical
12 impairments, such that they have a qualifying disability under the ADA.

13 3. *Plaintiffs Have Alleged That Playing Sports Qualifies as a “Major*
14 *Life Activity” in Their Particular Circumstances.*

15 Finally, Plaintiffs have adequately alleged that the Ban violates the ADA because it
16 affects a “major life activity”—namely, their ability to play on scholastic sports teams and
17 to gain the numerous academic, developmental, and social benefits associated with playing
18 on such teams. Plaintiffs allege not only that playing team sports is important in its own
19 right, but also that it provides academic benefits (Compl. ¶ 38), improves social skills and
20 students’ ability to regulate their emotions (*id.* ¶ 39), fosters discipline and teamwork (*id.*
21 ¶ 40), and improves physical and mental health (*id.* ¶ 43). A “major life activity” is defined
22 to “include” (but is “not limited to”), among other things, “learning, reading, concentrating,
23 thinking, communicating, and working.” 42 U.S.C. § 12102(2)(A).⁴ Because Plaintiffs
24 allege that excluding them from scholastic sports teams affects their ability to learn,
25 concentrate, communicate, and work together with classmates, they have sufficiently
26

27 ⁴ In response to court decisions that too narrowly construed the ADA, Congress
28 amended the ADA in 2008, instructing that the definition of “disability” “shall be
construed in favor of broad coverage of individuals under this chapter, to the maximum
extent permitted by the [ADA’s] terms.” *Id.* § 12102(4)(A).

1 alleged that the Ban affects a “major life activity.” *See Pahulu v. Univ. of Kansas*, 897 F.
2 Supp. 1387, 1391–93 (D. Kan. 1995) (collecting cases concluding that playing scholastic
3 sports is a “major life activity” and finding that the plaintiff had demonstrated that playing
4 sports was a “major life activity” because it was “an important component of learning”).

5 Proposed Intervenors’ cases, by contrast, focus only on the narrow question of
6 whether playing sports, standing alone, is a qualifying “major life activity,” without
7 considering the role of sports in fostering academic and social success. (*See* Dkt. 38 at 5–
8 6 (citing *Marsh v. Terra Int’l (Okla.), Inc.*, 122 F. Supp. 3d 1267, 1279 (N.D. Okla. 2015)
9 (concluding that horse riding was not a major life activity for a 34-year-old)); *Walter v.*
10 *Birdville Indep. Sch. Dist.*, 2018 WL 3974714, at *4 (N.D. Tex. Aug. 20, 2018) (finding
11 that brief inability to play sports was not a “major life activity” and that plaintiff had failed
12 to “plead[] sufficient facts to show that the impairment substantially affected” any other
13 major life activity); *Pritchard v. Fla. High Sch. Athletic Ass’n*, 2020 WL 3542652, at *4
14 (M.D. Fla. June 30, 2020) (concluding that an inability to play sports, without more, is not
15 a major life activity but without discussing the academic or social benefits from playing
16 such sports)). These cases simply do not address whether excluding middle and high
17 school students from sports triggers the ADA when the exclusion will negatively affect
18 *other* major life activities. This Court should instead follow *Pahulu* (and the cases it cites),
19 which properly concluded that scholastic sports are a major life activity, especially when,
20 as here, there are sufficient allegations that the exclusion will negatively affect other major
21 life activities.

22 The Court should thus reject Proposed Intervenors’ motion to dismiss Plaintiffs’
23 ADA claim.

24 CONCLUSION

25 For the reasons stated above, the Court should deny Defendant TGS’s motion to
26 dismiss. If the Court permits the Proposed Intervenors to intervene, and does not strike
27
28

1 their proposed motion to dismiss for failure to comply with this Court’s rules, the Court
2 should deny their proposed motion to dismiss on the merits.⁵

3 Respectfully submitted this 1st day of June,
4 2023.

5 /s/ Colin M. Proksel

6 Colin M. Proksel (034133)
7 OSBORN MALEDON, P.A.
8 2929 North Central Avenue, 21st Floor
9 Phoenix, Arizona 85012-2793
10 Telephone: (602) 640-9000
11 Facsimile: (602) 640-9050
12 Email: cproksel@omlaw.com

13 Jyotin Hamid*
14 Justin R. Rassi*
15 Amy C. Zimmerman*
16 DEBEVOISE & PLIMPTON LLP
17 66 Hudson Boulevard
18 New York, New York 10001
19 Telephone: (212) 909-6000
20 Facsimile: (212) 909-6836
21 Email: jhamid@debevoise.com
22 Email: jrassi@debevoise.com
23 Email: azimmerman@debevoise.com

24 Amy Whelan*
25 Rachel Berg*
26 NATIONAL CENTER FOR LESBIAN RIGHTS
27 870 Market Street, Suite 370
28 San Francisco, California 94102
Telephone: (415) 343-7679
Facsimile: (415) 392-8442
Email: awhelan@nclrights.org
Email: rberg@nclrights.org

*Admitted pro hac vice.

5 If this Court finds the Complaint deficient in any respect, Plaintiffs respectfully request leave to amend. See *Henry A. v. Willden*, 678 F.3d 991, 1005 (9th Cir. 2012) (explaining that “a district court should grant leave to amend” if any deficiencies can be “cured by amending the complaint”).