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9 **IN THE UNITED STATES DISTRICT COURT**
10 **FOR THE DISTRICT OF ARIZONA**
11 **TUCSON DIVISION**

12 Jane Doe, *et al.*,

13 Plaintiffs,

14 v.

15
16
17 Thomas C. Horne, in his official capacity
18 as State Superintendent of Public
19 Instruction, *et al.*,

20 Defendants.
21

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

22 **Notice of Filing Proposed Intervenor-Defendants’**
23 **Proposed Reply Brief**

24 Pursuant to Rule 24(c) and consistent with the briefing schedule (Doc. 25), Proposed
25 Intervenor-Defendants Senator Warren Petersen, President of the Arizona State Senate, and
26 Representative Ben Toma, Speaker of the Arizona House of Representatives, file their
27 proposed reply in support of their proposed motion to dismiss (Doc. 38-1). The proposed
28 reply is attached as Exhibit 1 to this notice.

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Dated: June 8, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on June 8, 2023, I caused a true and correct copy of the foregoing to be filed by the Court’s electronic filing system, to be served by operation of the Court’s electronic filing system on counsel for all parties who have entered in the case.

/s/ Justin D. Smith

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**[Intervenors' Proposed] Reply in
Support of Motion to Dismiss**

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INTRODUCTION

1
2 Plaintiffs’ claims fail as a matter of law. Rational-basis scrutiny applies to
3 Plaintiffs’ equal protection claims because Plaintiffs are bringing an underinclusiveness
4 challenge to redefine Arizona’s sports classifications and because biological girls and
5 biological boys are not similarly situated with respect to athletic performance. Applying
6 this appropriate level of scrutiny, Plaintiffs fail to satisfy their burden to negative every
7 conceivable basis which might support the Save Women’s Sports Act, which is supported
8 by legislative findings making clear its purpose to protect women’s equality and the
9 integrity of women’s sports.

10 Intermediate scrutiny does not apply because the Act is “transgender-neutral” and
11 applies equally to all biological males, regardless of their transgender status. But even if
12 intermediate scrutiny applies, the State has shown that the Act’s classification as a whole
13 serves important governmental interests to redress past discrimination against women in
14 athletics and promote equality of athletic opportunity between the sexes. There is a
15 substantial relationship between the exclusion of biological boys from biological girls’
16 sports teams and these important governmental interests.

17 For similar reasons, Plaintiffs’ Title IX claims fail as a matter of law. Title IX
18 permits sex-specific athletic teams for girls and women on the basis of biological sex. The
19 Act promotes the core purpose of Title IX.

20 Finally, Plaintiffs’ disability claims fail as a matter of law. Gender dysphoria is
21 excluded from the definition of “disability” based on the meaning at the time the statute
22 was enacted. Plaintiffs also have not alleged sufficient facts regarding a physical
23 impairment nor identified an impairment consistent with contemporaneous materials at the
24 time the statute was enacted. In addition, Plaintiffs have not shown that a major life activity
25 is substantially limited because sports is not such an activity and other educational and
26 sports opportunities are available to them.

27 Because Plaintiffs’ claims fail as a matter of law, they should be dismissed.
28

ARGUMENT

I. Plaintiffs’ Equal Protection and Title IX Claims Fail as a Matter of Law.

Arizona is one of 22 States that have enacted laws reserving girls’ and women’s sports for biological females.¹ Plaintiffs ignore the fundamental values of fairness, safety, equality, and opportunity that these laws advance. Their arguments lack merit.

A. The Act is subject to rational-basis scrutiny.

Plaintiffs concede that “they do not challenge the existence of sex-segregated sports at all.” Doc. 65, at 12. Thus, they concede that, as a general matter, Arizona may classify on the basis of sex and exclude boys from girls’ sports teams. *See id.*; *Clark, By & Through Clark v. Arizona Interscholastic Ass’n*, 695 F.2d 1126, 1127 (9th Cir. 1982) (“*Clark I*”); *Clark By & Through Clark v. Arizona Interscholastic Ass’n*, 886 F.2d 1191, 1193 (9th Cir. 1989) (“*Clark II*”). Instead, Plaintiffs contend that Arizona’s protected class—biological females—should be *redefined* to include “transgender girls,” *i.e.*, biological males who identify as female. Doc. 65, at 1.

This claim is subject to rational-basis scrutiny. In *Jana-Rock Construction*, the plaintiffs, Spanish-born contractors, challenged their exclusion from a racial preference program that included only Latin American Hispanics. *Jana-Rock Const., Inc. v. New York State Dep’t of Econ. Dev.*, 438 F.3d 195, 205 (2d Cir. 2006). The contractors conceded that the preference program was valid but argued that it was “fatally underinclusive” in excluding Spanish-born Hispanics. *Id.* at 205. Like Plaintiffs here, the contractors accepted the state’s classification in general, but sought to redefine it to include an additional subclass. *See id.* Citing *Katzenbach v. Morgan*, 384 U.S. 641 (1966), the Second Circuit rejected this argument, holding that New York’s choice of an allegedly “underinclusive” definition of its protected class was subject to rational-basis scrutiny.

¹ *See* [Bans on Transgender Youth Participation in Sports](https://www.lgbtmap.org/equality-maps/youth/sports_participation_bans), at https://www.lgbtmap.org/equality-maps/youth/sports_participation_bans (identifying such laws in Alabama, Arizona, Arkansas, Florida, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, and Wyoming).

1 *Jana-Rock*, 438 F.3d at 212-14. So also here—Plaintiffs admit that Arizona can classify
2 on the basis of sex in sports teams, but contend that the definition of the protected class
3 Arizona has adopted—*i.e.*, biological girls and women—is underinclusive and must be
4 broadened to include “transgender girls.” Doc. 65, at 1. This claim fails unless Arizona’s
5 “definition lacks a rational basis.” *Jana-Rock*, 438 F.3d at 200.

6 Rational-basis scrutiny also applies because biological girls and biological boys are
7 not similarly situated with respect to athletic performance. As the Arizona Legislature
8 found: “Courts have recognized that the inherent, physiological differences between males
9 and females result in different athletic capabilities.” S.B. 1165 (2022), § 2(12) (citing
10 *Kleczek v. Rhode Island Interscholastic League, Inc.*, 612 A.2d 734, 738 (R.I. 1992)
11 (“Because of innate physiological differences, boys and girls are not similarly situated as
12 they enter athletic competition.”)). “[T]ransgender girls are biologically male,” and
13 “biological males are not similarly situated to biological females for purposes of athletics.”
14 *B.P.J. v. W. Virginia State Bd. of Educ.*, -- F. Supp. 3d --, No. 2:21-CV-00316, 2023 WL
15 111875, at *9 (S.D.W. Va. Jan. 5, 2023). For this reason as well, the Act is subject to
16 rational-basis scrutiny at most.

17 **B. The Act satisfies rational-basis review.**

18 Under rational-basis review, the Act “is not subject to courtroom factfinding and
19 may be based on rational speculation unsupported by evidence or empirical data,” and
20 Plaintiffs “have the burden to negative every conceivable basis which might support it,”
21 *F.C.C. v. Beach Commc’ns, Inc.*, 508 U.S. 307, 315 (1993)—which they fail even to attempt
22 to do. The Act serves the obvious rational basis of promoting fairness and opportunity for
23 women and girls in sports. In arguing the contrary, Plaintiffs accuse Arizona “a bare ...
24 desire to harm a politically unpopular group.” Doc. 65, at 10 (quoting *Romer v. Evans*,
25 517 U.S. 620, 635 (1996)). But Plaintiffs allege no facts providing any objective basis for
26 this accusation of animus. On the contrary, the Act’s legislative findings make its purpose
27 clear—to protect women’s equality and the integrity of women’s sports: “Having separate
28 sex-specific teams furthers efforts to promote sex equality by providing opportunities for

1 female athletes to demonstrate their skill, strength and athletic abilities while also providing
2 them with opportunities to obtain recognition, accolades, college scholarships and the
3 numerous other long-term benefits that flow from success in athletic endeavors.” S.B.
4 1165 (2022), § 2(14). This conclusion is supported by a series of specific findings that cite
5 published studies, including (among others) that (1) “there are inherent differences between
6 men and women,” *id.* § 2(5); that “[i]n studies of large cohorts of children from six years
7 old, boys typically scored higher than girls on cardiovascular endurance, muscular strength,
8 muscular endurance, and speed/agility,” *id.* § 2(6); that “there is a sports performance gap
9 between males and females,” *id.* § 2(9); and that “[t]he benefits that natural testosterone
10 provides to male athletes is not diminished through the use of testosterone suppression,”
11 *id.* § 2(13) (cleaned up). Thus, the statute reflects a strong objective justification—not a
12 “bare desire to harm” as Plaintiffs contend, without any factual support. *See B.P.J. v. W.*
13 *Virginia State Bd. of Educ.*, -- F.3d --, No. 2:21-CV-00316, 2023 WL 111875, at *4
14 (S.D.W. Va. Jan. 5, 2023) (rejecting the claim that a similar West Virginia statute was
15 based on a “bare desire to harm” because the record “does not contain evidence of that type
16 of animus more broadly throughout the state legislature”).

17 **C. Intermediate scrutiny does not apply to the Act.**

18 Plaintiffs err in arguing that the statute is subject to intermediate or “heightened”
19 scrutiny. Doc. 65, at 4-6. First, Plaintiffs argue that “laws that exclude transgender
20 individuals are subject to heightened scrutiny in the Ninth Circuit.” *Id.* at 4. But the cases
21 they cite involve laws that were specifically applicable *only* to transgender individuals—
22 not laws that excluded all biological males and happened to include transgender individuals
23 among them. *See Karnoski v. Trump*, 926 F.3d 1180, 1186 (9th Cir. 2019) (addressing a
24 policy “that transgender individuals would not be allowed to serve in the military”); *D.T.*
25 *v. Christ*, 552 F. Supp. 3d 888, 894 (D. Ariz. 2021) (challenging a law that allows only “a
26 person who has undergone a sex change operation” to change their sex on their birth
27 certificate). The policies at issue in *Kanoski* and *D.T.* had no conceivable application to
28 non-transgender males. Here, the Act’s exclusion of biological males from women’s sports

1 is “transgender-neutral”—it applies equally to *all* biological males, regardless of their
2 transgender status. *See* A.R.S. § 15-120.02(B).² Moreover, all the statute’s recited
3 justifications apply to biological males who are not transgender, just as they do to
4 biological males who are transgender. *See* S.B. 1165, § 2(1)-(14).

5 Plaintiffs argue that the Act “discriminates ‘between cisgender athletes, who may
6 compete on athletic teams consistent with their gender identity, and transgender women
7 athletes, who may not compete on athletic teams consistent with their gender identity.’”
8 Doc. 65, at 5 (quoting *Hecox v. Little*, 479 F. Supp. 3d 930, 975 (D. Idaho 2020)). That is
9 incorrect. “Cisgender athletes” and “transgender athletes” are treated equally by the Act—
10 both are allowed to compete on teams consistent with their biological sex, and both are
11 excluded from teams inconsistent with their biological sex. The statute discriminates on
12 the basis of biological sex, not transgender status.

13 Next, Plaintiffs contend that “there is no doubt that the purpose of SB 1165 was to
14 exclude transgender girls from girls’ sports teams.” Doc. 65, at 6. On the contrary, the
15 “purpose” of SB 1165, as reflected both in the plain text of the statute and its legislative
16 findings, was to exclude *biological males* from girls’ sports teams. *See Oncale v.*
17 *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) (“[I]t is ultimately the provisions
18 of our laws rather than the principal concerns of our legislators by which we are
19 governed.”). The statute’s text excludes “students of the male sex,” A.R.S. § 15-120.02(B),
20 regardless of transgender status. And its findings uniformly address the competitive
21 advantages of *biological males*, regardless of transgender status. S.B. 1165, § 2(1)-(13).
22 Further, the statements of two individual legislators cited by Plaintiffs, Doc. 65, at 6, do
23 not reflect animus at all, and they fall far short of showing “evidence of ... animus more
24 broadly throughout the state legislature.” *B.P.J.*, 2023 WL 111875, at *4.

25 Finally, Plaintiffs resort to a policy argument, that a facially transgender-neutral
26 statute *must* be deemed to “discriminate against transgender individuals” because the

27
28 ² As *Clark I* and *Clark II* demonstrate, Arizona has a history of non-transgender boys seeking access to girls’ sports teams, and the Act excludes them from doing so.

1 opposite holding would “all but eradicate lawsuits based on discrimination against
2 transgender individuals.” Doc. 65, at 6. On the contrary, lawsuits challenging policies that
3 actually single out transgender individuals for disfavored treatment—such as, arguably,
4 *Karnoski* and *D.T.*—continue to trigger heightened scrutiny in the Ninth Circuit. Laws
5 that treat transgender individuals equally, like S.B. 1165, do not.

6 **D. The Act withstands intermediate scrutiny, even if it applies.**

7 Plaintiffs argue that the statute “does not withstand heightened scrutiny when
8 applied to Plaintiffs.” Doc. 65, at 7. This argument goes astray right off the bat. Plaintiffs
9 assume that, under intermediate scrutiny, the State must show a compelling justification to
10 exclude *these particular Plaintiffs* from participating in girls’ sports. *Id.* That is not the
11 law. Under intermediate scrutiny, the state need only show that the *classification as whole*
12 serves important governmental interests and is substantially related to the achievement of
13 those interests. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982). This
14 scrutiny is “intermediate” precisely because, unlike strict scrutiny, it does *not* require exact
15 precision. “Sex-based classifications fall under intermediate scrutiny and therefore do not
16 have a ‘narrowly-tailored’ requirement.” *B.P.J.*, 2023 WL 111875, at *8. For this reason,
17 Plaintiff miss the mark when they attempt to dismiss the overwhelming evidence of male
18 competitive advantage, on the ground that most studies address individuals who have
19 undergone male puberty.³ Doc. 65, at 7. Those studies demonstrate that Arizona’s *policy*
20 *as a whole* advances important governmental objectives and is substantially related to those

21
22 ³ Moreover, Plaintiffs’ claim that “Plaintiffs, who have not experienced male
23 puberty, have no physiological advantage over other girls,” Doc. 65, at 9, is plainly
24 incorrect. The Arizona legislature found the opposite, citing specific studies. *See* S.B.
25 1165, § 2(6) (citing studies of “large cohorts of children from six years old” that
26 demonstrate that “boys typically scored higher than girls on cardiovascular endurance,
27 muscular strength, muscular endurance, and speed/agility”). This finding is supported by
28 extensive empirical evidence. *See* Doc. 38-3, at 33-53 (Brown Decl. ¶¶ 77-125) (citing
numerous studies to establish that “significant physiological differences, and significant
male athletic performance advantages in certain areas, exist before significant
developmental changes associated with male puberty have occurred”); Doc. 38-5, at 37
(Carlson Decl. ¶ 83) (“[T]he available evidence strongly indicates that no amount of
testosterone suppression can eliminate male physiological advantages relevant to
performance and safety.”).

1 objectives. *Hogan*, 458 U.S. at 724 (requiring a “close relationship” between means and
2 ends, not exact precision). “The legislature’s definition of ‘girl’ as being based on
3 ‘biological sex’ is substantially related to the important government interest of providing
4 equal athletic opportunities for females.” *B.P.J.*, 2023 WL 111875, at *8.

5 Here, “the governmental interest claimed is redressing past discrimination against
6 women in athletics and promoting equality of athletic opportunity between the sexes. There
7 is no question that this is a legitimate and important governmental interest.” *Clark I*, 695
8 F.2d at 1131. And “there is clearly a substantial relationship between the exclusion of
9 males from the team and the goal of redressing past discrimination and providing equal
10 opportunities for women.” *Id.* Further, “the existence of ... alternatives ... does not mean
11 that the required substantial relationship does not exist.” *Id.* “[A]bsolute necessity is not
12 required before a gender based classification can be sustained.” *Id.* “[E]ven the existence
13 of wiser alternatives than the one chosen does not serve to invalidate the policy here since
14 it is substantially related to the goal.” *Id.* at 1132.

15 **E. Plaintiffs’ Title IX claim fails as a matter of law.**

16 For similar reasons, Plaintiffs’ Title IX claim also fails as a matter of law. The Act
17 provides for sex-specific athletic teams for girls and women on the basis of biological sex.
18 “Title IX permits sex-separate athletic teams ‘where selection for such teams is based upon
19 competitive skill or the activity involved is a contact sport.’” *B.P.J.*, 2023 WL 111875, at
20 *9 (quoting 34 C.F.R. § 106.41(b)). That is exactly what Arizona requires. Arizona “does
21 not violate Title IX because it does not exclude” Plaintiffs “from school athletics.” *Id.*
22 “Title IX authorizes sex separate sports in the same manner as” the Act, “so long as overall
23 athletic opportunities for each sex are equal.” *Id.* “[I]t would require blinders to ignore
24 that the motivation for the promulgation of the regulation was to increase opportunities for
25 women and girls in athletics.” *Id.* (quoting *Williams v. Sch. Dist. of Bethlehem, Pa.*, 998
26 F.2d 168, 175 (3d Cir. 1993)). The Act promotes the core purpose of Title IX: “Having
27 separate sex-specific teams furthers efforts to promote sex equality by providing
28 opportunities for female athletes to demonstrate their skill, strength and athletic abilities

1 while also providing them with opportunities to obtain recognition, accolades, college
2 scholarships and the numerous other long-term benefits that flow from success in athletic
3 endeavors.” S.B. 1165, § 2(14). SB 1165, “which largely mirrors Title IX,” does not
4 violate Title IX. *B.P.J.*, 2023 WL 111875, at *10.

5 In arguing that the Act violates Title IX, Plaintiffs rely heavily on *Bostock v. Clayton*
6 *County*, 140 S. Ct. 1731, 1741 (2020). Doc. 65, at 10. But *Bostock* addressed Title VII,
7 not Title IX. *See id.* at 1737. And *Bostock* addressed discrimination specifically targeted
8 at individuals on the basis of their transgender status—*i.e.*, “[a]n employer who fires an
9 individual for being ... transgender.” *Id.* Here, the statute classifies solely on the basis of
10 biological sex and is transgender-neutral.

11 Plaintiffs argue that *Bostock* stated that “it is impossible to discriminate against a
12 person for being homosexual or transgender without discriminating against that individual
13 based on sex.” Doc. 65, at 10 (quoting *Bostock*, 140 S. Ct. at 1741). But *Bostock* stated
14 this because “[a]n individual’s homosexuality or transgender status is not relevant to
15 employment decisions.” *Id.* Here, by contrast, one’s status as a biological male *is* relevant
16 to athletic performance. *See B.P.J.*, 2023 WL 111875, at *7 (“[O]ne’s sex ... dictates
17 physical characteristics that are relevant to athletics.”). Further, *Bostock* itself emphasized
18 that it was not considering “other federal or state laws that prohibit sex discrimination,”
19 and that it was not addressing “sex-segregated bathrooms, locker rooms, and dress codes.”
20 *Id.* at 1753. *Bostock* thus did not address Title IX or “sex-segregated” sports teams. *Id.*
21 Title IX is radically different from Title VII in this context, because sports teams segregated
22 by biological sex advance the fundamental purpose of Title IX, *see Williams*, 998 F.2d at
23 175, while employment discrimination against transgender individuals violates the purpose
24 of Title VII. Title IX, unlike Title VII, has an implementing regulation that explicitly
25 authorizes sports teams segregated by biological sex. 34 C.F.R. § 106.41(b). “If males are
26 permitted to displace females on the school volleyball team even to the extent of one player
27 like Clark, the goal of equal participation by females in interscholastic athletics is set back,
28 not advanced.” *Clark II*, 886 F.2d at 1193.

1 **II. Plaintiffs’ Disability Discrimination Claim Fails as a Matter of Law.**

2 **A. Plaintiffs pled a single claim, and courts review the statutes together.**

3 Plaintiffs suggest that the Proposed Intervenors did not move to dismiss their entire
4 Count III. Doc. 64, 1 n.1, 9 n.7. Not true. The Proposed Intervenors moved to dismiss
5 Plaintiffs’ disability claim and entire Complaint. *See* Doc. 38-1, pp. 1, 6.

6 Plaintiffs should have pleaded separate counts if they believed their ADA and
7 Rehabilitation Act claims operated independently. *See* Fed. R. Civ. P. 10(b); *see also*
8 *Bautista v. Los Angeles Cnty.*, 216 F.3d 837, 840–41 (9th Cir. 2000) (“Courts have required
9 separate counts where multiple claims are asserted, . . .”). But Plaintiffs’ Count III does
10 not contain any material differences between their ADA and Rehabilitation Act allegations,
11 and as Plaintiffs’ lead ADA case explains, “plaintiffs’ ADA and Rehabilitation Act claims
12 rise and fall together, and so for simplicity our opinion combines them and principally
13 analyzes the ADA claim.” *Williams v. Kincaid*, 45 F.4th 759, 766 n.1 (4th Cir. 2022)
14 (internal citation and quotation omitted); *accord Csutoras v. Paradise High Sch.*, 12 F.4th
15 960, 969 n.11 (9th Cir. 2021).

16 Plaintiffs’ Count III should be dismissed both because it impermissibly combines
17 multiple claims and because the ADA and Rehabilitation Act claims “fall together.”

18 **B. Plaintiffs’ claims under Count III are excluded.**

19 Plaintiffs do not grapple with the serious statutory interpretation questions raised by
20 six of the 14 active Fourth Circuit judges in the case on which Plaintiffs heavily rely.
21 *Williams v. Kincaid*, 50 F.4th 429, 431-32 (4th Cir. 2022) (Quattlebaum, J., dissenting from
22 denial of rehearing en banc). Courts interpret statutes based on the meaning of terms at the
23 time of enactment. *Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1738 (2020);
24 *Gollehon v. Mahoney*, 626 F.3d 1019, 1023 (9th Cir. 2010). Thus, the definitions of
25 “gender identity disorders” and “transsexualism” were “fixed at the time the ADA was
26 enacted.” *Williams*, 45 F.4th at 785 (Quattlebaum, J., dissenting). Contrary to Plaintiffs’
27 suggestion, statutory interpretation is not affected by a non-governmental organization’s
28 replacement of a definition more than 20 years after Congress enacted the statute.

1 The operative DSM-III-R definitions of “gender identity disorder of childhood,”
 2 “gender identity disorder of adolescence or adulthood,” “gender identity disorder not
 3 otherwise specified,” and “transsexualism” in 1990 were far broader than Plaintiffs admit
 4 and encompass Plaintiffs’ gender dysphoria.⁴ See Am. Psych. Ass’n, Diagnostic and
 5 Statistical Manual 71-78 (3d ed., rev. 1987) (DSM-III-R), attached as Exhibit 1; see also
 6 *Williams*, 45 F.4th at 781-84 (Quattlebaum, J., dissenting). Plaintiffs claim that gender
 7 dysphoria “is the distress caused by incongruence between a person’s gender identity and
 8 their designated sex at birth.” Doc. 1, ¶ 32. In DSM-III-R, for example, the “essential
 9 features” of “Gender Identity Disorder of Childhood” are “persistent and intense distress
 10 in a child about his or her assigned sex and the desire to be, or insistence that he or she is,
 11 of the other sex.” DSM-III-R, at 71. Indeed, “persistent and intense distress” is the first
 12 diagnostic criterion. *Id.* at 73. Plaintiffs allege that untreated gender dysphoria can lead to
 13 “anxiety, depression, eating disorders, substance abuse, self-harm, and suicide.” Doc. 1,
 14 ¶ 32. In DSM-III-R, “associated features” of “Gender Identity Disorder of Childhood”
 15 include “social withdrawal, separation anxiety, or depression.” DSM-III-R, at 72. In
 16 “transsexualism,” “[d]epression is common, and can lead to suicide attempts.” *Id.* at 75.

17 Plaintiffs’ disability claim is excluded as demonstrated by DSM-III-R.

18 **C. Plaintiffs do not sufficiently allege their disability claims result from**
 19 **physical impairment.**

20 Plaintiffs do not identify any specific physical impairment that would cause their
 21 gender dysphoria. Instead, Plaintiffs speculate that some physical impairment must exist
 22 since they have an “innate biological condition” and “receive or will receive puberty
 23 blockers and hormone therapy.” Doc. 64, 11. This is insufficient. *Ashcroft v. Iqbal*, 556
 24 U.S. 662, 678 (2009).

25
 26 ⁴ The exclusion’s terms are not defined. See 42 U.S.C. § 12211(b); 29 U.S.C. § 705(20)(F).
 27 Legislative history indicates the exclusion’s sponsors used terms from DSM-III-R. 135
 28 CONG. REC. 19,871, 19,884-885 (1989). For purposes of this brief, the Proposed
 Intervenor assume DSM-III-R provides interpretive guidance. The Court may take
 judicial notice of DSM-III-R. *Hoffmann v. Life Ins. Co. of N. Am.*, 669 F. App’x 399, 400
 (9th Cir. 2016).

1 DSM-III-R provides insight into the meaning for “gender identity disorders not
2 resulting from physical impairments.” As set forth in the DSM-III-R “gender identity
3 disorder” sections, “[p]hysical abnormalities of the sex organs are rarely associated with
4 Gender Identity Disorder of Childhood; when they are present, the physical disorder should
5 be noted on Axis III.” DSM-III-R, at 73. Similarly, in “transsexualism,” [i]n the rare cases
6 in which physical intersexuality or a genetic abnormality is present, such a condition should
7 be noted on Axis III.” *Id.* at 74. DSM-III-R addressed an actual physical impairment, not
8 an “innate biological condition” or a need for medication. Plaintiffs’ disability claim thus
9 fails because they do not allege a physical impairment.

10 **D. Plaintiffs do not allege a substantial limitation to a “major life activity.”**

11 In response to numerous cases cited by Proposed Intervenors holding that playing
12 sports is not a major life activity, Plaintiffs argue that not playing sports affects their
13 academic and social success. Doc. 64, at 12. Courts have rejected this argument as well.
14 *See Knapp v. Nw. Univ.*, 101 F.3d 473, 481 (7th Cir. 1996) (“Because learning through
15 playing intercollegiate basketball is only one part of the education available to Knapp at
16 Northwestern, even under a subjective standard, Knapp’s ability to learn is not substantially
17 limited.”); *Pahulu v. Univ. of Kansas*, 897 F. Supp. 1387, 1393 (D. Kan. 1995).

18 The only case cited by Plaintiffs actually supports Proposed Intervenors. In that
19 case, the court concluded that no disability existed when a college prohibited a player from
20 playing due to injury risk because it was “not a substantial limitation upon the plaintiff’s
21 opportunity to learn.” *Pahulu*, 897 F. Supp. at 1393. Like *Pahulu*, Plaintiffs have “access
22 to all academic services available before [their] disqualification from competition.” *Id.* In
23 addition, “there are a myriad of other educational opportunities available to” Plaintiffs at
24 their schools. *Id.* Thus, even without considering the fact that Plaintiffs could participate
25 in school sports by playing on boys’ teams, *but see B.P.J.*, 2023 WL 111873, at *9,
26 Plaintiffs have failed to allege a major life activity is substantially limited.

27 **CONCLUSION**

28 The Court should dismiss Plaintiffs’ Complaint.

1 Dated: June 8, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on June 8, 2023, I caused a true and correct copy of the foregoing to be filed by the Court’s electronic filing system, to be served by operation of the Court’s electronic filing system on counsel for all parties who have entered in the case.

/s/ Justin D. Smith

DIAGNOSTIC AND STATISTICAL
MANUAL OF
MENTAL DISORDERS
(THIRD EDITION - REVISED)

DSM-III-R

AMERICAN PSYCHIATRIC ASSOCIATION

EXHIBIT

1

DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS

(THIRD EDITION - REVISED)

DSM-III-R



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1987

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307.50 Eating Disorder Not Otherwise Specified

Disorders of eating that do not meet the criteria for a specific Eating Disorder.

Examples:

- (1) a person of average weight who does not have binge eating episodes, but frequently engages in self-induced vomiting for fear of gaining weight
- (2) all of the features of Anorexia Nervosa in a female except absence of menses
- (3) all of the features of Bulimia Nervosa except the frequency of binge eating episodes

GENDER IDENTITY DISORDERS

The essential feature of the disorders included in this subclass is an incongruence between assigned sex (i.e., the sex that is recorded on the birth certificate) and gender identity. Gender identity is the sense of knowing to which sex one belongs, that is, the awareness that "I am a male," or "I am a female." Gender identity is the private experience of gender role, and gender role is the public expression of gender identity. Gender role can be defined as everything that one says and does to indicate to others or to oneself the degree to which one is male or female.

Some forms of gender identity disturbance are on a continuum, whereas others may be discrete. When gender identity disturbance is mild, the person is aware that he is a male or that she is a female, but discomfort and a sense of inappropriateness about the assigned sex are experienced. When severe, as in Transsexualism, the person not only is uncomfortable with the assigned sex but has the sense of belonging to the opposite sex.

Disturbance in gender identity is rare, and should not be confused with the far more common phenomena of feelings of inadequacy in fulfilling the expectations associated with one's gender role. An example of the latter would be a person who perceives himself or herself as being sexually unattractive yet experiences himself or herself unambiguously as a man or a woman in accordance with his or her assigned sex.

Although people who first present clinically with gender identity problems may be of any age, in the vast majority of cases the onset of the disorder can be traced back to childhood. In rare cases, however, an adult will present clinically for the first time with a gender identity problem and report that the first signs of the disturbance were in adult life.

302.60 Gender Identity Disorder of Childhood

The essential features of this disorder are persistent and intense distress in a child about his or her assigned sex and the desire to be, or insistence that he or she is, of the other sex. (This disorder is not merely a child's nonconformity to stereotypic sex-role behavior as, for example, in "tomboyishness" in girls or "sissyish" behavior in boys; but rather a profound disturbance of the normal sense of maleness or femaleness.) In addition, in a girl there is either persistent marked aversion to normative feminine clothing and insistence on wearing stereotypic masculine clothing, or persistent repudiation of her female anatomic characteristics. In a boy, there is either preoccupation with female stereotypic activities, or persistent repudiation of his male anatomic characteristics. This diagnosis is not given after the onset of puberty.

Girls with this disorder regularly have male companions and an avid interest in sports and rough-and-tumble play; they show no interest in dolls or playing "house" (unless they play the father or another male role). More rarely, a girl with this disorder refuses to urinate in a sitting position, claims that she has, or will grow, a penis, does not

want to grow breasts or menstruate, or asserts that she will grow up to become a man (not merely in role).

Boys with this disorder usually are preoccupied with female stereotypic activities. They may have a preference for dressing in girls' or women's clothes, or may improvise such items from available material when genuine articles are unavailable. (The cross-dressing typically does not cause sexual excitement, as in Transvestic Fetishism.) They often have a compelling desire to participate in the games and pastimes of girls. Female dolls are often their favorite toy, and girls are regularly their preferred playmates. When playing "house," the role of a female is typically adopted. Rough-and-tumble play or sports are generally avoided. Gestures and actions are often judged against a cultural stereotype of femininity, and the boy is usually subjected to male peer group teasing and rejection, whereas the same rarely occurs among girls until adolescence. Boys with this disorder may assert that they will grow up to become women (not merely in role). In rare cases a boy with this disorder claims that his penis or testes are disgusting or will disappear, or that it would be better not to have a penis or testes.

Some children refuse to attend school because of teasing or pressure to dress in attire stereotypical of their assigned sex. Most children with this disorder deny being disturbed by it, except that it brings them into conflict with the expectations of their family or peers.

Associated features. Some of these children, particularly girls, show no other signs of psychopathology. Others may display serious signs of disturbance, such as social withdrawal, separation anxiety, or depression.

Age at onset and course. The majority of the boys with this disorder begin to develop it before their fourth birthday. Social ostracism increases during the early grades of school, and social conflict is significant at about age seven or eight. During the later grade-school years, grossly feminine behavior may lessen. Studies indicate that from one-third to two-thirds or more of boys with the disorder develop a homosexual orientation during adolescence.

For females the age at onset is also early, but most give up an exaggerated insistence on male activities and attire during late childhood or adolescence. A minority retain a masculine identification, and some of these develop a homosexual orientation.

Whereas most adult people with Transsexualism report having had a gender identity problem during childhood, prospective studies of children with Gender Identity Disorder of Childhood indicate that very few develop Transsexualism in adolescence or adulthood.

Complications. In a small number of cases, the disorder becomes continuous with Transsexualism or Gender Identity Disorder of Adolescence or Adulthood, Nontranssexual Type.

Impairment. Positive peer relations with members of the same sex are absent or difficult to establish. The amount of impairment varies from none to extreme, and is related to the degree of associated psychopathology and the reaction of peers and family to the person's behavior.

Prevalence. The disorder is apparently uncommon.

Sex ratio. In clinic samples there are many more boys with this disorder than girls. The sex ratio in the general population is unknown.

Familial pattern. No information.

Predisposing factors. Studies indicate that characteristics of the child, the parents, or of other social agents, such as parental substitutes and siblings, may be predisposing factors for the development of the disorder. In boys, the characteristics may include "feminine" physical features, an aversion to rough-and-tumble play, separation anxiety, and a history of early hospitalization. The relevant characteristics of parents and other influential people in the child's environment may include weak reinforcement of normative gender-role behavior, absence or unavailability of a father, and encouragement of extreme physical and psychological closeness with her son by a mother. In girls, a strong interest in rough-and-tumble play on the part of the child and weak reinforcement of normative gender-role behavior by the parents may contribute to the development of the disorder.

Differential diagnosis. Children whose behavior merely does not fit the cultural stereotype of masculinity or femininity should not be given this diagnosis unless the full syndrome is present. Physical abnormalities of the sex organs are rarely associated with Gender Identity Disorder of Childhood; when they are present, the physical disorder should be noted on Axis III.

Diagnostic criteria for 302.60 Gender Identity Disorder of Childhood

For Females:

- A. Persistent and intense distress about being a girl, and a stated desire to be a boy (not merely a desire for any perceived cultural advantages from being a boy), or insistence that she is a boy.
- B. Either (1) or (2):
 - (1) persistent marked aversion to normative feminine clothing and insistence on wearing stereotypical masculine clothing, e.g., boys' underwear and other accessories
 - (2) persistent repudiation of female anatomic structures, as evidenced by at least one of the following:
 - (a) an assertion that she has, or will grow, a penis
 - (b) rejection of urinating in a sitting position
 - (c) assertion that she does not want to grow breasts or menstruate
- C. The girl has not yet reached puberty.

For Males:

- A. Persistent and intense distress about being a boy and an intense desire to be a girl or, more rarely, insistence that he is a girl.
- B. Either (1) or (2):
 - (1) preoccupation with female stereotypical activities, as shown by a preference for either cross-dressing or simulating female attire, or by an intense desire to participate in the games and pastimes of girls and rejection of male stereotypical toys, games, and activities

(continued)

Diagnostic criteria for 302.60 Gender Identity Disorder of Childhood
continued

- (2) persistent repudiation of male anatomic structures, as indicated by at least one of the following repeated assertions:
 - (a) that he will grow up to become a woman (not merely in role)
 - (b) that his penis or testes are disgusting or will disappear
 - (c) that it would be better not to have a penis or testes
- C. The boy has not yet reached puberty.

302.50 Transsexualism

The essential features of this disorder are a persistent discomfort and sense of inappropriateness about one's assigned sex in a person who has reached puberty. In addition, there is persistent preoccupation, for at least two years, with getting rid of one's primary and secondary sex characteristics and acquiring the sex characteristics of the other sex. Therefore, the diagnosis is not made if the disturbance is limited to brief periods of stress. Invariably there is the wish to live as a member of the other sex. In the rare cases in which physical intersexuality or a genetic abnormality is present, such a condition should be noted on Axis III.

People with this disorder usually complain that they are uncomfortable wearing the clothes of their assigned sex and therefore dress in clothes of the other sex. Often they engage in activities that in our culture tend to be associated with the other sex. These people often find their genitals repugnant, which may lead to persistent requests for sex reassignment by hormonal and surgical means.

To varying degrees, the behavior, dress, and mannerisms become those of the other sex. With cross-dressing and hormonal treatment (and for males, electrolysis), some males and some females with the disorder will appear relatively indistinguishable from members of the other sex. However, even after sex reassignment, many people still have some physical features of their originally assigned sex that the alert observer can recognize.

Cross-culturally, the Hijra of India and the corresponding group in Burma may have conditions that, according to this manual, would be diagnosed as male-to-female Transsexualism. The Hijra, however, traditionally undergo castration, not hormonal and surgical feminization (creation of a vagina).

Associated features. Generally there is a moderate to severe coexisting personality disturbance. Frequently the person experiences considerable anxiety and depression, which he or she may attribute to the inability to live in the role of the desired sex.

Course. Without treatment, the course of the disorder is chronic, but cases with apparently spontaneous remission do occur. The long-term outcome of combined psychiatric, hormonal, and surgical sex-reassignment treatment is not well known. Many people function better for years after such treatment, but a number of cases in which re-assignment has been desired have also been reported.

People who have female-to-male Transsexualism appear to represent a more homogeneous group than those who have male-to-female Transsexualism in that they are more likely to have a history of homosexuality and a more stable course, with or without treatment.

Age at onset. People who develop Transsexualism almost invariably report having had a gender identity problem in childhood. Some assert that they were secretly aware of their gender problem, but that it was not evident to their family and friends. Although onset of the full syndrome is most often in late adolescence or early adult life, in some cases the disorder has a later onset.

Impairment and complications. Frequently, social and occupational functioning are markedly impaired, partly because of associated psychopathology and partly because of problems encountered in attempting to live in the desired gender role. Depression is common, and can lead to suicide attempts. In rare instances, males may mutilate their genitals.

Predisposing factors. Extensive, pervasive childhood femininity in a boy or childhood masculinity in a girl increases the likelihood of Transsexualism. It seems usually to develop within the context of a disturbed relationship with one or both parents. Some cases of Gender Identity Disorder of Adolescence or Adulthood, Nontranssexual Type, evolve into Transsexualism.

Prevalence. The estimated prevalence is one per 30,000 for males and one per 100,000 for females.

Sex ratio. Males seek help at clinics specializing in the treatment of this disorder more commonly than do females. The ratio varies from as high as 8:1 to as low as 1:1.

Familial pattern. No information.

Differential diagnosis. Some people with disturbed gender identity may, in isolated periods of stress, wish to belong to the other sex and to be rid of their own genitals. In such cases a diagnosis of **Gender Identity Disorder Not Otherwise Specified** should be considered, since the diagnosis of Transsexualism is made only when the disturbance has been continuous for at least two years. In **Schizophrenia** there may be delusions of belonging to the other sex, but this is rare. The insistence by a person with Transsexualism that he or she is of the other sex is, strictly speaking, not a delusion, since what is invariably meant is that the person *feels like* a member of the other sex rather than truly believes that he or she *is* a member of the other sex. In very rare cases, however, Schizophrenia and Transsexualism may coexist.

In both **Transvestic Fetishism** and **Gender Identity Disorder of Adolescence or Adulthood, Nontranssexual Type**, there may be cross-dressing. But unless these disorders evolve into Transsexualism, there is no wish to be rid of one's own genitals.

Types. The disorder is subdivided according to the history of sexual orientation, as asexual, homosexual (toward same sex), heterosexual (toward opposite sex), or unspecified. In the first, "asexual," the person reports never having had strong sexual feelings. Often there is an additional history of little or no sexual activity or pleasure derived from the genitals. In the second group, "homosexual," a predominantly homosexual arousal pattern preceding the onset of the Transsexualism is acknowledged, although often such people deny that the orientation is homosexual because of their conviction that they are "really" of the other sex. In the third group, "heterosexual," the person claims to have had a heterosexual orientation.

Diagnostic criteria for 302.50 Transsexualism

- A. Persistent discomfort and sense of inappropriateness about one's assigned sex.
- B. Persistent preoccupation for at least two years with getting rid of one's primary and secondary sex characteristics and acquiring the sex characteristics of the other sex.
- C. The person has reached puberty.

Specify history of sexual orientation: asexual, homosexual, heterosexual, or unspecified.

302.85 Gender Identity Disorder of Adolescence or Adulthood, Nontranssexual Type (GIDAANT)

The essential features of this disorder are a persistent or recurrent discomfort and sense of inappropriateness about one's assigned sex, and persistent or recurrent cross-dressing in the role of the other sex, either in fantasy or in actuality, in a person who has reached puberty. This disorder differs from Transvestic Fetishism in that the cross-dressing is not for the purpose of sexual excitement; it differs from Transsexualism in that there is no persistent preoccupation (for at least two years) with getting rid of one's primary and secondary sex characteristics and acquiring the sex characteristics of the other sex.

Some people with this disorder once had Transvestic Fetishism, but no longer experience sexual arousal with cross-dressing. Other people with this disorder are homosexuals who cross-dress. This disorder is common among female impersonators.

Cross-dressing phenomena range from occasional solitary wearing of female clothes to extensive feminine identification in males and masculine identification in females, and involvement in a transvestic subculture. More than one article of clothing of the other sex is involved, and the person may dress entirely as a member of the opposite sex. The degree to which the cross-dressed person appears as a member of the other sex varies, depending on mannerisms, body habitus, and cross-dressing skill. When not cross-dressed, the person usually appears as an unremarkable member of his or her assigned sex.

Associated features. Anxiety and depression are common, but are often attenuated when the person is cross-dressing.

Age at onset and course. Age at onset and course are variable. In most cases, before puberty there was a history of some or all of the features of Gender Identity Disorder of Childhood. However, by definition, GIDAANT is diagnosed only once puberty has been reached. The initial experience may involve partial or total cross-dressing; when it is partial, it often progresses to total. Cross-dressing, although intermittent in the beginning, often becomes more frequent, and may become habitual. A small number of people with GIDAANT, as the years pass, want to dress and live permanently as the other sex, and the disorder may evolve into Transsexualism.

Impairment. Unless there is another diagnosis in addition to GIDAANT, the impairment is generally restricted to conflicts with family members and other people regarding the cross-dressing.

Complications. The major complication is Transsexualism.

Predisposing factors. As noted above, both Gender Identity Disorder of Childhood and Transvestic Fetishism sometimes evolve into GIDAANT.

Prevalence. Although its prevalence is unknown, the disorder is probably more common than Transsexualism.

Sex ratio. The disorder is more common in males.

Familial pattern. No information.

Differential diagnosis. In **Transvestic Fetishism**, the cross-dressing is for the purpose of sexual excitement. In **Transsexualism**, there is a persistent (for more than two years) wish to get rid of one's primary and secondary sex characteristics and acquire the sex characteristics of the other sex. In those rare instances in which a person with GIDAANT develops Transsexualism, the diagnosis of GIDAANT is changed accordingly.

Subtypes. The disorder is subdivided according to the history of sexual orientation, as asexual, homosexual (toward same sex), heterosexual (toward opposite sex), or unspecified. In the first, "asexual," the person reports never having had strong sexual feelings. Often there is an additional history of little or no sexual activity or pleasure derived from the genitals. In the second group, "homosexual," a predominantly homosexual arousal pattern preceding the onset of the GIDAANT is acknowledged. In the third group, "heterosexual," the person claims to have had a heterosexual orientation.

Diagnostic criteria for 302.85 Gender Identity Disorder of Adolescence or Adulthood, Nontranssexual Type (GIDAANT)

- A. Persistent or recurrent discomfort and sense of inappropriateness about one's assigned sex.
- B. Persistent or recurrent cross-dressing in the role of the other sex, either in fantasy or actuality, but not for the purpose of sexual excitement (as in Transvestic Fetishism).
- C. No persistent preoccupation (for at least two years) with getting rid of one's primary and secondary sex characteristics and acquiring the sex characteristics of the other sex (as in Transsexualism).
- D. The person has reached puberty.

Specify history of sexual orientation: asexual, homosexual, heterosexual, or unspecified.

302.85 Gender Identity Disorder Not Otherwise Specified

Disorders in gender identity that are not classifiable as a specific Gender Identity Disorder.

78 Disorders Usually First Evident in Infancy, Childhood, or Adolescence

Examples:

- (1) children with persistent cross-dressing without the other criteria for Gender Identity Disorder of Childhood
- (2) adults with transient, stress-related cross-dressing behavior
- (3) adults with the clinical features of Transsexualism of less than two years' duration
- (4) people who have a persistent preoccupation with castration or peotomy without a desire to acquire the sex characteristics of the other sex

TIC DISORDERS

Tics are the essential feature of the three disorders in this subclass: Tourette's Disorder, Chronic Motor or Vocal Tic Disorder, and Transient Tic Disorder. There is evidence from genetic and other studies that Tourette's Disorder and Chronic Motor or Vocal Tic Disorder represent different symptomatic expressions of the same underlying disorder. However, they are included in this manual as separate disorders because they generally involve different degrees of impairment (the former being more disabling) and they have different treatment implications.

A tic is an involuntary, sudden, rapid, recurrent, nonrhythmic, stereotyped, motor movement or vocalization. It is experienced as irresistible, but can be suppressed for varying lengths of time. All forms of tics are often exacerbated by stress and usually are markedly diminished during sleep. They may become attenuated during some absorbing activities, such as reading or sewing.

Both *motor* and *vocal tics* may be classified as either *simple* or *complex*, although the boundaries are not well defined. Common *simple motor tics* are eye-blinking, neck-jerking, shoulder-shrugging, and facial grimacing. Common *simple vocal tics* are coughing, throat-clearing, grunting, sniffing, snorting, and barking. Common *complex motor tics* are facial gestures, grooming behaviors, hitting or biting self, jumping, touching, stamping, and smelling an object. Common *complex vocal tics* are repeating words or phrases out of context, coprolalia (use of socially unacceptable words, frequently obscene), palilalia (repeating one's own sounds or words), and echolalia (repeating the last-heard sound, word, or phrase of another person, or a last-heard sound). Other complex tics include echokinesis (imitation of the movements of someone who is being observed).

Associated features. Discomfort in social situations, shame, self-consciousness, and depressed mood are common, especially with Tourette's Disorder.

Predisposing factors. A controversy exists as to whether or not the onset of some cases of Tic Disorders is precipitated by exposure to phenothiazines, head trauma, or the administration of central nervous system stimulants. It is estimated that in one-third of cases of Tourette's Disorder, the severity of the tics is exacerbated by administration of central nervous system stimulants, which may be a dose-related phenomenon.

Impairment. Social, academic, and occupational functioning may be impaired because of rejection by others or anxiety about having tics in social situations. In addition, in severe cases of Tourette's Disorder, the tics themselves may interfere with daily activities, such as reading or writing. Although most people with Tourette's Disorder do not have marked impairment, in general the impairment is more severe than in Chronic Motor or Vocal Tic Disorder. Impairment in Transient Tic Disorder rarely is marked.