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8 *Attorneys for Intervenor-Defendants President Petersen and Speaker Toma*

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

**Intervenor-Defendants' Response to  
Plaintiffs' Notice of Supplemental  
Authority**

22  
23 Plaintiffs' Notice of Supplemental Authority claims *Grabowski v. Arizona Bd. of*  
24 *Regents*, -- F.4th --, No. 22-15714, 2023 WL 3961123 (9th Cir. June 13, 2023), supports  
25 their position. Doc. 81, at 1. Plaintiffs are incorrect.

26 *First*, Plaintiffs argue *Grabowski's* holding that "Title IX bars sexual harassment on  
27 the basis of perceived sexual orientation," 2023 WL 3961123, at \*2, entails that Title IX  
28 prohibits separating sports teams by biological sex. Doc. 81, at 2. This does not follow.

1 As *Bostock* recognized, “sexual orientation” and “gender identity” (including transgender  
2 status) are distinct concepts. See *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1746-47  
3 (2020). Pervasive harassment based on perceived sexual orientation violates Title IX under  
4 *Grabowski*, see 2023 WL 3961123, at \*2, but neither *Bostock* nor *Grabowski* addressed  
5 whether separating sports teams based on biological sex violates Title IX. See *id.* Title IX  
6 and its implementing regulations provide that sports teams separated by biological sex are  
7 permissible, see 34 C.F.R. § 106.41(b), and binding Ninth Circuit precedent holds the  
8 same. *Clark, By & Through Clark v. Arizona Interscholastic Ass’n*, 695 F.2d 1126, 1127  
9 (9th Cir. 1982). Nothing in *Grabowski* purports to overrule *Clark*.

10 Second, Plaintiffs argue that “*Grabowski* holds that exclusion from athletics is a  
11 cognizable harm under Title IX,” Doc. 81, at 2, but the cited discussion in *Grabowski* held  
12 only that the plaintiff’s alleged removal from his college track team constituted an “adverse  
13 action” for purposes of a Title IX retaliation claim. *Grabowski*, No. 22-15714, at \*22.  
14 Earlier in the opinion, *Grabowski* held that the plaintiff had *not* sufficiently alleged loss of  
15 “educational opportunities” under Title IX. *Id.* at \*7.

16  
17 Dated: June 23, 2023

Respectfully submitted,

18  
19 JAMES OTIS LAW GROUP, LLC

20 /s/ Justin D. Smith

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**CERTIFICATE OF SERVICE**

I hereby certify that, on June 23, 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