No. 23-16026

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HELEN DOE, parent and next friend of Jane Doe; et al.,

Plaintiffs-Appellees,

v.

THOMAS C. HORNE, in his official capacity as State Superintendent of Public Instruction; et al.,

Defendants-Appellants,

and

WARREN PETERSEN, Senator, President of the Arizona State Senate; BEN TOMA, Representative, Speaker of the Arizona House of Representatives,

Intervenor-Defendants-Appellants.

On Appeal from the United States District Court
for the District of Arizona

INTERVENOR-DEFENDANTS-APPELLANTS' REPLY IN SUPPORT OF EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR A STAY PENDING APPEAL

RELIEF REQUESTED BY: August 14, 2023

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INTRODUCTION

Plaintiffs' response to Movants' stay motion is a whirlwind of unsupported assertions, purposeful blindness, and irrelevant tangents. As to the merits, Plaintiffs' only response is to repeat the district court's tailoring errors and improper reading of the record. As to tailoring, they continue to insist that a law subject to intermediate scrutiny must fulfill its purposes in every application. Only then can they escape the fact that the Act advances Arizona's compelling interest in ensuring equal and safe female sports competition. As to the district court's factual errors, Plaintiffs say that under clear error review, what the district court said must be so. That is tautology masquerading as reasoning.

Plaintiffs also have no cogent response to the fact the Act is subject to, and passes, rational basis scrutiny and that Title IX expressly permits sex-segregated sports—that is, it *authorizes* the Act. Their cursory claims otherwise—which ignore contrary authority—can be rejected out-of-hand.

As for the equities, the crux of Plaintiffs' argument is that the Act is unlawful. Since it is not, it follows that the equities favor Movants.

ARGUMENT

I Plaintiffs have no answer to Movants' strong case on the merits.

A. Plaintiffs do not undermine Movants' equal protection arguments.

1. Plaintiffs' analysis, like the district court's, ignores the tailoring requirements for intermediate scrutiny.

Assuming that intermediate scrutiny applies, *but see*, *e.g.*, Mot. 11–13, Plaintiffs do nothing to undermine the fact the district court's tailoring analysis is wrong, *see id.* at 4–8. The crux of the district court's analysis is that "banning all transgender girls from playing girls' sports" is overbroad because permitting transgender girls "who have not experienced male puberty," and will not do so, is not "substantially related to the legitimate goals of ensuring equal opportunities for girls to play sports and to prevent safety risks." A37–A38. Plaintiffs defend that reasoning by simply repeating it. *See* Resp. 7.

Even accepting the district court's conclusion that prepubescent boys and girls are athletically fungible, *see* A37, it is undisputed that, post-puberty, males have a significant athletic advantage. As the district court said (citing Plaintiffs' evidence), "After puberty, adolescent boys begin to produce higher levels of testosterone, which over time causes them to become, on average, stronger and faster than adolescent girls." A29 (citations and paragraphs omitted).[1] And that, per the district court, is the "driver of average group differences in athletic performance between adolescent boys and girls . . . ." *Id.* For those students, the Act is plainly not "based on generalizations and stereotypes that erroneously equate transgender status with athletic ability, unsupported by empirical evidence, and based on a hypothesized

[1] That—contra Plaintiffs, *see* Resp. 9 n.5—is a factual finding.

problem." Resp. 7 (quotations omitted). Its application to this large class of boys and girls (*all* adolescent student athletes) thus advances the Act's purposes.

By contrast, the exclusion of transgender girls who have not gone through puberty is rare. Over "the past 10 to 12 years," according to the district court, there has been at most only seven transgender girls (who may or may not have experienced male puberty) playing in girls' sports. A19; *see also id.* ("Less than one percent of the population is transgender."). That is a vanishingly small number in absolute and relative terms—"'roughly 170,000 students play sports in Arizona'" per year. A19 & n.3. Setting aside the expert evidence showing pre-puberty differences between boys and girls, Mot. 8-11, at most, that means the Act would not have advanced its purposes (under Plaintiffs' theory of the case) only *seven* times in the last decade. That in no way renders it invalid. Intermediate scrutiny does not "require[] that the statute under consideration [be] capable of achieving its ultimate objective in every instance." *Nguyen v. INS*, 533 U.S. 53, 70 (2001); *see Clark ex rel. Clark v. Ariz. Interscholastic Ass'n (Clark I)*, 695 F.2d 1126, 1131–32 (9th Cir. 1989).[2,3]

[2] Plaintiffs do not explain why letting biological girls choose to play on men's teams is relevant to the analysis. *See* Resp. 7. It is not; the law in *Clark I* operated similarly without affecting its validity. *See* 695 F.2d at 1127, 1131–32.

[3] Plaintiffs object to looking at First Amendment cases applying intermediate scrutiny. *See id.* at 9 & n.4. But "[i]ntermediate scrutiny has its genesis in the Supreme Court's equal protection *and* free speech jurisprudence." *Heller v. District of Columbia*, 801 F.3d 264, 281 (D.C. Cir. 2015) (emphasis added) (Henderson, J., concurring in part and dissenting in part). There is no reason to view the tests as

When "consider[ing] the as-applied implications as to the plaintiffs" of the Act, Resp. 7–9, 9 n.4, the court could not then do what it did here—let those rare circumstances override the fact the Act fulfills its purpose in almost every application. That this is an as-applied challenge does not change that fact. That affects the "breadth of the remedy," *Citizens United v. FEC*, 558 U.S. 310, 331 (2010), not "the substantive rule of law necessary to establish a constitutional violation," *Bucklew v. Precythe*, 139 S. Ct. 1112, 1127 (2019).[4]

2. Plaintiffs provide no defense of the district court's erroneous factual findings.

Plaintiffs also have no response to the Movants' extensive citations to the record demonstrating that the district court's factual finding that prepubescent males have no competitive advantage over females is clearly erroneous. *See* Mot. 8–11. All Plaintiffs do is describe the district court's factual findings without demonstrating how the record supports them. That reduces analysis to tautology.

3. Plaintiffs do not undermine the fact the Act is subject to, and passes, rational basis scrutiny.

1. While the Act passes intermediate scrutiny, it is actually not subject to heightened scrutiny; it is subject to rational-basis review and passes it. *See* Mot. 11–

materially different. *See First Choice Chiropractic, LLC v. DeWine*, 969 F.3d 675, 684–85 (6th Cir. 2020) (equating the two).

[4] Plaintiffs provide no reason why the Court's broad language in *Bucklew* should not apply to other constitutional challenges. Resp. 9 n.4.

13. To start, the facial discrimination and exclusion Plaintiffs complain about, *see* Resp. 12, is not an express statement that transgender girls cannot play on female sports teams; it stems from the legislature's choice to define "females," "women" or "girls" by reference to their "biological sex." Ariz. Rev. Stat. §15-120.02(A); *see also* Mot. 11–12 (discussing that fact). So, using Plaintiffs' framing of the issue, the law operates precisely by leaving "transgender [girls] off a list of" those who may play female sports. *Contra* Resp. 12. That is, Plaintiffs say the broad category of "female" or "girl" includes biological women *and* transgender women. *See* Resp. 15 ("Plaintiffs … are girls."). So the Act works by saying one category of "female" (biological females) can play women's sports, but not both.

That is how the law in *Jana-Rock Construction, Inc. v. New York State Department of Economic Development*, 438 F.3d 195 (2d Cir. 2006), worked. That case involved a law that "include[d] in its definition of minorities 'Hispanic persons of Mexican, Puerto Rican, Dominican, Cuban, Central or South American of either Indian or Hispanic origin, regardless of race[,]' … [but did] not include all persons from, or descendants of persons from, Spain or Portugal." *Id.* (quoting the law). That is, it included some subgroups of Hispanics but not others.

That leaves Plaintiffs to attempt to distinguish *Jana-Rock* by claiming that the Act "is not an affirmative action program … ." Resp. 12. That distinguishing misses the mark. One of the stated purposes of the Act is to address past sex discrimination

in sports. *See* A48. Its definition of "females," "women," and "girls" is therefore a "classification to remedy discrimination" just like the law in *Jana-Rock*. *See* 438 F.3d at 205; *see Clark I*, 695 F.2d at 1131 (noting that laws like the Act redress "past discrimination against women in athletics and promot[e] equality of athletic opportunity between the sexes"). That definition is subject to rational basis review. 438 F.3d at 212; *see also Katzenbach v. Morgan*, 384 U.S. 641, 657 (1966).

2. The legislature's decision to exclude biological males from women's sports—thus excluding transgender females—plainly survives rational basis scrutiny. *See* Mot. 12–13. Plaintiffs' assertion that the Act does not serve its stated purposes, *see* Resp. 12–14, is unsupported and does not "negative every conceivable basis which might support it," *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993) (quotations omitted).

To the extent Plaintiffs argue that animus or a desire to harm transgender girls motivated the legislature, *see* Mot. 12, 14 n.7, that, too, is unsupported. To start, the district court made no actual finding of animus. The closest is its statement that "[t]he Act was adopted for the purpose of excluding transgender girls from playing on girls' sports teams." A21. But that was only because transgender girls are biological males, and so threaten the legislature's goal of remedying past sex discrimination, ensuring equal opportunity for women, and protecting their safety.

Nor do the three pieces of legislative history the district court pointed to show animus. To start, "statements of a handful of lawmakers may not be probative of the intent of the legislature as a whole." *United States v. Carrillo-Lopez*, 68 F.4th 1133, 1140 (9th Cir. 2023). And only two statements mention transgender people at all. One does so in flagging the concern that transgender females who are biological males will reduce biological female participation in athletics. *See* A21–A22. That is indisputably a legitimate concern—even the Plaintiffs must concede that fact, in light of the evidence they put in the record, as to transgender females who experience male puberty. The other statement referenced "having just a trans league," A22, which does not show animus. To the contrary, the legislature was clearly asking about a way to accommodate transgender women without risking the ability of biological girls to participate fully and safely in sports. The last statement—by the governor—is innocuous on its face and says nothing about the legislature's intent.

B. Plaintiffs do not respond to Movants' Title IX arguments.

That the Act passes Equal Protection muster resolves the Title IX question as well. "Title IX prohibit[s] almost no conduct beyond what the Equal Protection Clause itself prohibits." *Hibbs v. Dep't of Human Res.*, 273 F.3d 844, 854 (9th Cir. 2001); *see Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 257 (2009) (noting how Title IX's exemptions make the law's scope narrower than the Equal Protection Clause's scope). In all events, Plaintiffs' Title IX arguments miss the point. Title IX

permits biologically sex-segregated sports teams—which is what the Act does. *See* Mot. 13–14. "There is no serious debate that Title IX's endorsement of sex separation in sports refers to biological sex," *B.P.J. v. W. Va. State Bd. of Educ.*, 2023 WL 111875, at *9 (S.D. W. Va. Jan 5, 2023); Mot. 13–14, including no debate from Plaintiffs, *see* Resp. 14–15 (containing no argument that biologically sex-separated sports comply with Title IX). It follows that in doing that which Title IX permits, Arizona did not violate Title IX. *See* Mot. 14.

In response, Plaintiffs claim that discrimination on "transgender status … is sex based discrimination." Resp. 14–15. That is a bold claim; if true, then Title IX's exception for sex separation in sports is vulnerable to an equal protection challenge under *Karnoski v. Trump*, 926 F.3d 1180, 1201 (9th Cir. 2019) (per curiam). Regardless, the Act does not discriminate on transgender status; it categorizes on biological sex. And because "transgender status [is a] distinct concept[ ] from sex," *Bostock v. Clayton County*, 140 S. Ct. 1731, 1746–47 (2020), classification on the basis of a person's biological sex is not automatically discrimination on the basis of gender identity.

II The equities justify a stay.

Irreparable Harm: Before reaching the merits of Plaintiffs' irreparable harm claims, *see* Resp. 4–5, the Movants have plainly made "a commensurately strong

showing of a likelihood of success on the merits to prevail under the sliding scale approach." *Al Otro Lado v. Wolf*, 952 F.3d 999, 1010 (9th Cir. 2020).

In addition, a key premise of Plaintiffs' irreparable harm argument is that the Act is unlawful. *See* Resp. 4–5. Since it is not, Arizona would suffer irreparable harm absent a stay. *See* Mot. 19. As for Plaintiffs' assertion that there is no risk of displacement to other female competitors, *see* Resp. 5, the record shows that the sports in which Plaintiffs wish to compete involve try-outs and competition, *see* Mot. 18 (citing the record). The former is evidence "that the schools limit the number of girls who participate in any of the sports at issue." *Contra* Resp. 5 (quotations omitted). The latter shows that Plaintiffs will take up playing time and potential accolades that properly belong to biological girls.

Harm to Plaintiffs: To start, Plaintiffs' dignitary harms, *see* Resp. 16–17, turn on whether the Act discriminates against them based on transgender status. Again, it does not; the Act turns solely on the biological sex of students and is indifferent to any student's gender identity. This harm thus merges into the merits analysis.

So, too, for Plaintiffs' harms stemming from their claimed exclusion for school sports. *See* Resp. 15–16, 17. If, as here, the exclusion is lawful, there is no irreparable harm from enforcing it. *See Walsh v. La. High Sch. Athletic Ass'n*, 616 F.2d 152, 159 (5th Cir. 1980) ("A student's interest in participating in a single year of interscholastic athletics amounts to a mere expectation rather than a

constitutionally protected claim of entitlement."). Indeed, Plaintiffs' claimed harm does not follow from any transgender identity discrimination—it follows from their gender dysphoria diagnosis, which is separate from transgender status. *See* A12–A13; Mot. 15.[5] But many student-athletes contend with a medical condition that makes participating in athletics more difficult. *See* Mot. 15. This claimed harm is thus a normal incidence of student-athlete life.

Nor do Plaintiffs meaningfully dispute that they delayed in seeking relief. They say they needed time to make the "weighty decision to file a constitutional action against the State." Resp. 18. That concedes they delayed for "almost a year," Mot. 16, and the Ninth Circuit has said a delay of "months … undercut[s] [a] claim of irreparable harm." *Garcia v. Google, Inc.*, 786 F.3d 733, 746 (9th Cir. 2015).

Public Interest: Finally, Plaintiffs' argument as to the public interest boils down to the question of whether the Act violates Plaintiffs' rights. *See* Resp. 18. For the reasons set forth here and in the opening motion, it does not.

CONCLUSION

The Court should stay the district court's injunction pending appeal.

[5] Plaintiffs claim Movants waived this argument. But "[a]s the Supreme Court has made clear, it is claims that are deemed waived or forfeited, not arguments." *United States v. Blackstone*, 903 F.3d 1020, 1025 n.2 (9th Cir. 2018). Movants have consistently claimed Plaintiffs will not suffer irreparable harm from the Act.

Dated: August 10, 2023

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on August 10, 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/ D. John Sauer

CERTIFICATE OF COMPLIANCE

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/s/ D. John Sauer
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Dated: August 10, 2023