No. 23-16026 c/w No. 23-16030

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

EXCERPTS OF RECORD – VOLUME 4

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
TUCSON DIVISION

Jane Doe, *et al.*, Plaintiffs, v. Thomas C. Horne, in his official capacity as State Superintendent of Public Instruction, *et al.*, Defendants.	Case No. 4:23-cv-00185-JGZ **NOTICE OF APPEAL** **PRELIMINARY INJUNCTION APPEAL**

Pursuant to Federal Rule of Appellate Procedure 3(a), Defendant-Intervenors President Warren Petersen and Speaker Ben Toma hereby appeal, to the U.S. Court of Appeals for the Ninth Circuit, the Court's July 20, 2023 Order on Motion for Preliminary Injunction and Findings of Fact and Conclusions of Law, ECF No. 127.

Dated: July 21, 2023

Respectfully submitted,

JAMES OTIS LAW GROUP, LLC

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Attorneys for Defendants-Intervenors

CERTIFICATE OF SERVICE

I hereby certify that, on July 21, 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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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Jane Doe, *et al.*, **Plaintiffs,** **v.** **Thomas C. Horne, in his official capacity as State Superintendent of Public Instruction, *et al.*,** **Defendants.**	**Case No. 4:23-cv-00185-JGZ** **NOTICE OF APPEAL**

Pursuant to Federal Rule of Appellate Procedure 3(a), Defendant Thomas C. Horne, in his capacity as Superintendent of Public Instruction, hereby appeals to the U.S. Court of Appeals for the Ninth Circuit, the Court's July 20, 2023, Order on Motion for Preliminary Injunction and Findings of Fact and Conclusions of Law, ECF No. 127.

RESPECTFULLY SUBMITTED on July 24, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on July 24, 2023, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the CM/ECF registrants.

By:/s/ Hilary Myers

APPEAL,STD

U.S. District Court
DISTRICT OF ARIZONA (Tucson Division)
CIVIL DOCKET FOR CASE #: 4:23-cv-00185-JGZ

Doe et al v. Horne et al
Assigned to: Judge Jennifer G Zipps
Case in other court: Ninth Circuit, 23-16026
Ninth Circuit, 23-16030
Ninth Circuit, 23-70111- Order 06/29/23
Cause: 42:12101 Americans with Disabilities Act

Date Filed: 04/17/2023
Jury Demand: Defendant
Nature of Suit: 440 Civil Rights: Other
Jurisdiction: Federal Question

Plaintiff

Helen Doe
parent and
next friend of
Jane Doe

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Plaintiff

James Doe
parent and
next friend of
Jane Doe

represented by **Amy E Whelan**
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Plaintiff

Kate Roe
parent and
next friend of
Megan Roe

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Plaintiff

Robert Roe
parent and
next friend of
Megan Roe

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V.

Defendant

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in his official capacity as State Superintendent of Public Instruction

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Defendant

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Defendant

Gregory School

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Defendant

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Movant

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doing business as
Arizona Women of Action

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Movant

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Movant

Mark Marvin

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Intervenor

Warren Petersen
Senator, President of the Arizona State Senate

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Intervenor

Ben Toma
Representative, Speaker of the Arizona House of Representatives

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Justin D Smith
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Date Filed	#	Docket Text
04/17/2023	1	COMPLAINT. Filing fee received: $ 402.00, receipt number AAZDC-21815575 filed by Kate Roe, James Doe, Helen Doe, Robert Roe. (Proksel, Colin) (Attachments: # 1 Civil Cover Sheet)(JAM) (Entered: 04/18/2023)
04/17/2023	2	MOTION to Proceed Via Pseudonym by Helen Doe, James Doe, Kate Roe, Robert Roe. (Proksel, Colin) (Attachments: # 1 Proposed Order)(JAM) (Entered: 04/18/2023)
04/17/2023	3	MOTION for Preliminary Injunction and MEMORANDUM OF LAW in Support Thereof by Helen Doe, James Doe, Kate Roe, Robert Roe. (Proksel, Colin) (Attachments: # 1 Proposed Order)(JAM) (Entered: 04/18/2023)
04/17/2023	4	DECLARATION of Dr. Stephanie Budge, Ph.D. in Support of 3 MOTION for Preliminary Injunction and 2 MOTION to Proceed Via Pseudonym by Plaintiffs Helen Doe, James Doe, Kate Roe, Robert Roe. (Proksel, Colin) (JAM) (Entered: 04/18/2023)
04/17/2023	5	DECLARATION of Dr. Daniel Shumer, M.D. in Support of 3 MOTION for Preliminary Injunction, 2 MOTION to Proceed Via Pseudonym by Plaintiffs Helen Doe, James Doe, Kate Roe, Robert Roe. (Proksel, Colin) (JAM) (Entered: 04/18/2023)
04/17/2023	6	DECLARATION of Jane Doe in Support of 3 MOTION for Preliminary Injunction, 2 MOTION to Proceed Via Pseudonym by Plaintiffs Helen Doe, James Doe, Kate Roe, Robert Roe. (Proksel, Colin) (JAM) (Entered: 04/18/2023)
04/17/2023	7	DECLARATION of Helen Doe in Support of 3 MOTION for Preliminary Injunction, 2 MOTION to Proceed Via Pseudonym by Plaintiffs Helen Doe, James Doe, Kate Roe, Robert Roe. (Proksel, Colin) (JAM) (Entered: 04/18/2023)
04/17/2023	8	DECLARATION of Megan Roe in Support of 3 MOTION for Preliminary Injunction, 2 MOTION to Proceed Via Pseudonym by Plaintiffs Helen Doe, James Doe, Kate Roe, Robert Roe. (Proksel, Colin) (JAM) (Entered: 04/18/2023)

04/17/2023	9	DECLARATION of Kate Roe in Support of 3 MOTION for Preliminary Injunction, 2 MOTION to Proceed Via Pseudonym by Plaintiffs Helen Doe, James Doe, Kate Roe, Robert Roe. (Proksel, Colin) (JAM) (Entered: 04/18/2023)
04/17/2023	10	SUMMONS Submitted by James Doe, Kate Roe, Robert Roe. (Proksel, Colin) (Attachments: # 1 Summons, # 2 Summons, # 3 Summons, # 4 Summons)(JAM) (Entered: 04/18/2023)
04/17/2023	11	Filing fee paid, receipt number AAZDC-21815575. This case has been assigned to the Honorable Jennifer G Zipps. All future pleadings or documents should bear the correct case number: CV-23-185-TUC-JGZ. Notice of Availability of Magistrate Judge to Exercise Jurisdiction form attached. (JAM) (Entered: 04/18/2023)
04/18/2023	12	Summons Issued as to Arizona Interscholastic Association Incorporated, Gregory School, Thomas C Horne, Kyrene School District, Laura Toenjes. (Attachments: # 1 Summons, # 2 Summons, # 3 Summons, # 4 Summons)(JAM). *** IMPORTANT: When printing the summons, select "Document and stamps" or "Document and comments" for the seal to appear on the document. (Entered: 04/18/2023)
04/18/2023		Remark: Pro hac vice motion(s) granted for Rachel Berg on behalf of Plaintiffs Helen Doe, James Doe, Kate Roe, Robert Roe. This is a TEXT ENTRY ONLY. There is no PDF document associated with this entry. (BAS) (Entered: 04/18/2023)
04/19/2023		Remark: Pro hac vice motion(s) granted for Justin R Rassi on behalf of Plaintiffs Helen Doe, James Doe, Kate Roe, Robert Roe. This is a TEXT ENTRY ONLY. There is no PDF document associated with this entry. (BAS) (Entered: 04/19/2023)
04/19/2023	13	NOTICE TO THE PARTIES: THE PARTIES ARE ADVISED that motions pursuant to Fed. R. Civ. P. 12(b) are discouraged if the defect can be cured by filing an amended pleading. The parties must meet and confer prior to the filing of such motions to determine whether it can be avoided. FURTHER ORDERED that Plaintiff(s) serve a copy of this Order upon Defendant(s) and file a notice of service. See attached Order for complete details. Signed by Judge Jennifer G Zipps on 4/18/23. (MYE) (Entered: 04/19/2023)
04/19/2023		Remark: Pro hac vice motion(s) granted for Amy E Whelan on behalf of Plaintiffs Helen Doe, James Doe, Kate Roe, Robert Roe. This is a TEXT ENTRY ONLY. There is no PDF document associated with this entry. (BAS) (Entered: 04/19/2023)
04/21/2023		Remark: Pro hac vice motion(s) granted for Jyotin Hamid on behalf of Plaintiffs Helen Doe, James Doe, Kate Roe, Robert Roe. This is a TEXT ENTRY ONLY. There is no PDF document associated with this entry. (BAS) (Entered: 04/21/2023)
04/25/2023	14	SERVICE EXECUTED filed by Helen Doe, James Doe, Kate Roe, Robert Roe: Return of Service re: Summons in a Civil Action, Complaint, Civil Cover Sheet, Plaintiffs' Motion to Proceed via Pseudonym, (Proposed) Order Granting Plaintiffs' Motion to Proceed via Pseudonym, Notice of Availability of a United States Magistrate Judge to Exercise Jurisdiction, Declaration of Kate Roe, Declaration of Megan Roe, Declaration of Helen Doe, Declaration of Jane Doe, Declaration of Dr. Daniel Shumer, Declaration of Dr. Stephanie Budge, Plaintiffs' Motion for a Preliminary Injunction and Memorandum of Law in Support Thereof, (Proposed) Order Granting Plaintiffs' Motion for Preliminary Injunction, Notice to the Parties upon The Gregory School on 4/20/2023. (Proksel, Colin) (Entered: 04/25/2023)
04/26/2023	15	SERVICE EXECUTED filed by Helen Doe, James Doe, Kate Roe, Robert Roe: Rule 4 Waiver of Service of Summons. Waiver sent on 4/20/2023 to Kyrene School District . (Proksel, Colin) (Entered: 04/26/2023)

04/26/2023	16	SERVICE EXECUTED filed by Helen Doe, James Doe, Kate Roe, Robert Roe: Rule 4 Waiver of Service of Summons. Waiver sent on 4/20/2023 to Laura Toenjes *(in her official capacity)*. (Proksel, Colin) (Entered: 04/26/2023)
04/26/2023	17	SERVICE EXECUTED filed by Helen Doe, James Doe, Kate Roe, Robert Roe: Affidavit of Service re: Summons in a Civil Action, Complaint, Civil Cover Sheet, Plaintiffs' Motion to Proceed via Pseudonym, (Proposed) Order Granting Plaintiffs' Motion to Proceed via Pseudonym, Notice of Availability of a United States Magistrate Judge to Exercise Jurisdiction, Declaration of Kate Roe, Declaration of Megan Roe, Declaration of Helen Doe, Declaration of Jane Doe, Declaration of Dr. Daniel Shumer, Declaration of Dr. Stephanie Budge, Plaintiffs' Motion for a Preliminary Injunction and Memorandum of Law in Support Thereof, (Proposed) Order Granting Plaintiffs' Motion for Preliminary Injunction, and Notice to the Parties upon Thomas C. Horne, in his Official Capacity as the State Superintendent of Public Instruction on 4/20/2023. (Proksel, Colin) (Entered: 04/26/2023)
04/26/2023	18	SERVICE EXECUTED filed by Helen Doe, James Doe, Kate Roe, Robert Roe: Affidavit of Service re: Summons in a Civil Action, Complaint, Civil Cover Sheet, Plaintiffs' Motion to Proceed via Pseudonym, (Proposed) Order Granting Plaintiffs' Motion to Proceed via Pseudonym, Notice of Availability of a United States Magistrate Judge to Exercise Jurisdiction, Declaration of Kate Roe, Declaration of Megan Roe, Declaration of Helen Doe, Declaration of Jane Doe, Declaration of Dr. Daniel Shumer, Declaration of Dr. Stephanie Budge, Plaintiffs' Motion for a Preliminary Injunction and Memorandum of Law in Support Thereof, (Proposed) Order Granting Plaintiffs' Motion for Preliminary Injunction, and Notice to the Parties upon Arizona Interscholastic Association, Inc. on 4/20/2023. (Proksel, Colin) (Entered: 04/26/2023)
04/28/2023		Remark: Pro hac vice motion(s) granted for Amy Zimmerman on behalf of Plaintiffs Helen Doe, James Doe, Kate Roe, Robert Roe. This is a TEXT ENTRY ONLY. There is no PDF document associated with this entry. (BAS) (Entered: 04/28/2023)
05/01/2023		Remark: Pro hac vice motion(s) granted for Dean John Sauer, Justin D Smith on behalf of Movants Unknown Petersen, Unknown Toma. This is a TEXT ENTRY ONLY. There is no PDF document associated with this entry. (BAS) (Entered: 05/01/2023)
05/01/2023	19	*MOTION to Intervene by Warren Petersen and Unknown Toma. (Attachments: # 1 Exhibit A, # 2 Proposed Order)(Smith, Justin) *Modified to correct filers on 5/3/2023 (MYE). (Entered: 05/01/2023)
05/02/2023	20	STIPULATION by Thomas C Horne. (Attachments: # 1 Proposed Order Order Granting Stipulated Motion for Extension and Briefing Schedule on Plaintiffs' Motion for Preliminary Injunction and Answer/Response to Complaint)(Wilenchik, Dennis) (Entered: 05/02/2023)
05/02/2023	21	MOTION to Change Venue/Transfer Case to Phoenix Division by Thomas C Horne. (Wilenchik, Dennis) (Entered: 05/02/2023)
05/04/2023	22	STIPULATION FOR EXTENSION OF TIME TO ANSWER COMPLAINT by Gregory School. (Attachments: # 1 Proposed Order Proposed Order)(Potts, David) (Entered: 05/04/2023)
05/04/2023	23	NOTICE re: No Objection by Gregory School re: 2 MOTION to Proceed Via Pseudonym . (Potts, David) (Entered: 05/04/2023)
05/04/2023	24	*MOTION to Expedite Expedited Briefing and Consideration of Defendant Horne's Motion to Transfer (Doc. 21) by Thomas C Horne. (Attachments: # 1 Proposed Order

		Proposed Order)(Wilenchik, Dennis) *Modified to add link to related document on 5/5/2023 (MYE). (Entered: 05/04/2023)
05/05/2023	25	ORDER that the 20 Stipulated Motion for Extension and 22 Stipulation to Extend Time are GRANTED. IT IS FURTHER ORDERED that Defendants Horne and The Gregory School must respond to the Complaint and to Plaintiff's 3 Motion for Preliminary Injunction on or before May 18, 2023. Plaintiffs' reply in support of the Motion for Preliminary Injunction is due on or before June 1, 2023. Signed by Judge Jennifer G Zipps on 5/4/23. (See attached Order for complete details)(JAM) (Entered: 05/05/2023)
05/05/2023	26	RESPONSE to Motion re: 24 MOTION to Expedite Expedited Briefing and Consideration of Defendant Horne's Motion to Transfer filed by Helen Doe, James Doe, Kate Roe, Robert Roe. (Proksel, Colin) (Entered: 05/05/2023)
05/08/2023	27	RESPONSE in Opposition re: 21 MOTION to Change Venue/Transfer Case to Phoenix Division filed by Gregory School. (Potts, David) (Entered: 05/08/2023)
05/08/2023	28	First MOTION for Extension of Time to File Answer re: 1 Complaint by Arizona Interscholastic Association Incorporated. (Attachments: # 1 Proposed Order)(Nelson, Kristian) (Entered: 05/08/2023)
05/10/2023	29	ORDERED that Defendant Horne's Motion for Expedited Briefing (Doc. 24) is DENIED. In accordance with the Local Rules of Civil Procedure, Plaintiffs' response to the Motion to Transfer is due on or before May 16, 2023. Defendant Horne's reply, if any, is due on or before May 23, 2023. Signed by Judge Jennifer G Zipps on 5/9/23. (MYE) (Entered: 05/10/2023)
05/10/2023	30	ORDER: The parties' Stipulation (Doc. 28) is GRANTED. Defendant AIA must respond to the Complaint and Plaintiffs' Motion for Preliminary Injunction on or before May 25, 2023. Plaintiffs' reply to AIA's opposition to the Motion for Preliminary Injunction is due on or before June 6, 2023. In the event that AIA files a motion in response to the Complaint, Plaintiffs' response is due on or before June 6, 2023. AIA's reply to any such opposition is due on or before June 8, 2023. Signed by Judge Jennifer G Zipps on 5/9/23. (MYE) (Entered: 05/10/2023)
05/10/2023	31	*Second MOTION for Extension of Time to File Response/Reply and Motion for Extension of Time to File Answer by Thomas C Horne. (Attachments: # 1 Proposed Order)(Wilenchik, Dennis). *Modified to add Motion for Extension of Time to File Answer on 5/11/2023 (MYE). (Entered: 05/10/2023)
05/11/2023	32	NOTICE re: Service by Helen Doe, James Doe, Kate Roe, Robert Roe re: 13 Order re Rule 12(b) Motions, . (Proksel, Colin) (Entered: 05/11/2023)
05/11/2023	33	RESPONSE to Motion re: 31 Second MOTION for Extension of Time to File Response/Reply *re Motion for Preliminary Injunction and Answer/Response to Complaint* filed by Helen Doe, James Doe, Kate Roe, Robert Roe. (Proksel, Colin) (Entered: 05/11/2023)
05/11/2023	34	RESPONSE in Opposition re: 21 MOTION to Change Venue/Transfer Case to Phoenix Division filed by Helen Doe, James Doe, Kate Roe, Robert Roe. (Proksel, Colin) (Entered: 05/11/2023)
05/15/2023	35	RESPONSE in Opposition re: 19 MOTION to Intervene filed by Helen Doe, James Doe, Kate Roe, Robert Roe. (Proksel, Colin) (Entered: 05/15/2023)
05/18/2023	36	RESPONSE in Opposition re: 3 MOTION for Preliminary Injunction filed by Gregory School. (Attachments: # 1 Exhibit Exhibit 1 - Declaration of Dr. Julie Sherrill)(Potts, David) (Entered: 05/18/2023)

05/18/2023	37	MOTION to Dismiss Case by Gregory School. (Attachments: # 1 Exhibit Exhibit 1 - Declaration of Dr. Julie Sherrill)(Potts, David) (Entered: 05/18/2023)
05/18/2023	38	NOTICE re: Notice of Filing Proposed Intervenors' Proposed Pleadings in Intervention by Warren Petersen, Ben Toma . (Attachments: # 1 [Intervenors' Proposed] Motion to Dismiss, # 2 [Intervenors' Proposed] Opposition to Plaintiffs' Motion for a Preliminary Injunction and Memorandum of Law in Support Thereof, # 3 Declaration of Dr. Gregory A. Brown, Ph.D., FACSM, in Support of [Intervenors' Proposed] Opposition to Plaintiffs' Motion for a Preliminary Injunction, # 4 Declaration of James M. Cantor, Ph.D., in Support of [Intervenors' Proposed] Opposition to Plaintiffs' Motion for a Preliminary Injunction, # 5 Declaration of Dr. Chad Thomas Carlson, M.D., FACSM in Support of [Intervenors' Proposed] Opposition to Plaintiffs' Motion for a Preliminary Injunction) (Smith, Justin) (Entered: 05/18/2023)
05/18/2023	39	ANSWER to Complaint by Thomas C Horne. (Attachments: # 1 Exhibit Exhibit A) (Wilenchik, Dennis) (Entered: 05/18/2023)
05/18/2023	40	RESPONSE to Motion re: 3 MOTION for Preliminary Injunction filed by Thomas C Horne. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H, # 9 Exhibit I, # 10 Exhibit J, # 11 Exhibit K, # 12 Exhibit L, # 13 Exhibit M, # 14 Exhibit N, # 15 Exhibit O, # 16 Exhibit P)(Wilenchik, Dennis) (Entered: 05/18/2023)
05/19/2023	41	MOTION for Leave to File Excess Pages by Helen Doe, James Doe, Kate Roe, Robert Roe. (Attachments: # 1 Proposed Order)(Proksel, Colin) (Entered: 05/19/2023)
05/19/2023	42	SUPPLEMENT re: 40 Response to Motion, by Defendant Thomas C Horne. (Attachments: # 1 Exhibit A)(Wilenchik, Dennis) (Entered: 05/19/2023)
05/22/2023	43	REPLY to Response to Motion re: 19 MOTION to Intervene filed by Warren Petersen, Ben Toma. (Smith, Justin) (Entered: 05/22/2023)
05/23/2023	44	ORDER granting 2 Motion to Proceed Via Pseudonym. Plaintiffs Jane Doe and Megan Roe, and their parents and next friends, Helen Doe, James Doe, Kate Roe, and Robert Roe, may proceed using pseudonyms in this matter. Signed by Judge Jennifer G Zipps on 5/23/23. (MYE) (Entered: 05/23/2023)
05/23/2023	45	NOTICE TO PARTY OF DEFICIENCY RE: CORPORATE DISCLOSURE STATEMENT: Pursuant to FRCiv 7.1 and LRCiv 7.1.1 the attached Corporate Disclosure Statement form must be filed by all nongovernmental corporate parties with their first appearance. A supplemental statement must be filed upon any change in the information. In addition, if not already filed, the Corporate Disclosure Statement should be filed within 14 days. Corporate Disclosure Statement Deadline set as to **Arizona Interscholastic Association Incorporated** and **Gregory School**. (SVC) (Entered: 05/23/2023)
05/23/2023	46	NOTICE of Appearance by Lisa Anne Smith on behalf of Gregory School. (Smith, Lisa) (Entered: 05/23/2023)
05/23/2023	47	REPLY to Response to Motion re: 21 MOTION to Change Venue/Transfer Case to Phoenix Division filed by Thomas C Horne. (Wilenchik, Dennis) (Entered: 05/23/2023)
05/24/2023	48	ORDERED that Defendant Horne's Request for Extension (Doc. 31) is DENIED as moot. Signed by Judge Jennifer G Zipps on 5/24/23. (MYE) (Entered: 05/24/2023)
05/24/2023	49	ORDERED that Plaintiffs' Motion (Doc. 41) is GRANTED. Plaintiffs' Reply may consist of no more than 25 pages exclusive of cover, signature pages, and attachments. Signed by

		Judge Jennifer G Zipps on 5/24/23. (MYE) (Entered: 05/24/2023)
05/25/2023	50	ANSWER to 1 Complaint by Arizona Interscholastic Association Incorporated.(Nelson, Kristian) (Entered: 05/25/2023)
05/25/2023	51	RESPONSE to Motion re: 3 MOTION for Preliminary Injunction filed by Arizona Interscholastic Association Incorporated. (Attachments: # 1 Exhibit 1)(Nelson, Kristian) (Entered: 05/25/2023)
05/26/2023	52	ORDERED that Defendant Horne's Motion to Transfer (Doc. 21) is DENIED. Signed by Judge Jennifer G Zipps on 5/25/23. (MYE) (Entered: 05/26/2023)
05/26/2023	53	ORDERED setting a hearing on Plaintiffs' Motion for Preliminary Injunction (Doc. 3 .) on June 26, 2023 at 9:00 a.m. in Courtroom 5D, 405 West Congress Street, Tucson, Arizona 85701 before the Honorable Jennifer G. Zipps. IT IS FURTHER ORDERED that the parties shall jointly prepare and file a joint pre-hearing statement on or before June 16, 2023. Signed by Judge Jennifer G Zipps on 5/25/23. (See attached Order for complete details.)(MYE) (Entered: 05/26/2023)
05/26/2023	54	Corporate Disclosure Statement by Arizona Interscholastic Association Incorporated. (Nelson, Kristian) (Entered: 05/26/2023)
05/30/2023	55	Corporate Disclosure Statement by Gregory School. (Smith, Lisa) (Entered: 05/30/2023)
05/30/2023	56	DEFENDANT'S DEMAND for Jury Trial by Thomas C Horne. (Wilenchik, Dennis) (Entered: 05/30/2023)
05/30/2023	57	*MOTION for Hearing or Conference re: Preliminary Injunction *(REQUEST TO RESCHEDULE)* by Thomas C Horne. (Attachments: # 1 Proposed Order)(Wilenchik, Dennis) *Modified to correct event type on 5/31/2023 (JAM). (Entered: 05/30/2023)
05/30/2023	58	*SECOND SUPPLEMENT re: 40 RESPONSE to 3 MOTION for Preliminary Injunction filed by Thomas C Horne. (Wilenchik, Dennis) *Modified to correct event type on 5/31/2023 (JAM). (Entered: 05/30/2023)
05/30/2023	59	STIPULATION re: 1 Complaint *(STIPULATION IN LIEU OF ANSWER BY DEFENDANTS KYRENE SCHOOL DISTRICT AND LAURA TOENJES)* by Helen Doe, James Doe, Kate Roe, Robert Roe. (Proksel, Colin) (Entered: 05/30/2023)
05/31/2023	60	*NOTICE of Supplemental Authority in Support of Motion to Intervene re: 19 MOTION to Intervene by Intervenor Defendants Warren Petersen, Ben Toma. (Attachments: # 1 Exhibit Ninth Circuit Order in Isaacson, # 2 Exhibit Legislative Leaders' Motion to Intervene in Isaacson, # 3 Exhibit Isaacson Plaintiffs' Opposition to Intervention)(Smith, Justin) *Modified to correct event type on 6/1/2023 (JAM). (Entered: 05/31/2023)
06/01/2023	61	RESPONSE to Motion re: 57 MOTION to Continue filed by Helen Doe, James Doe, Kate Roe, Robert Roe. (Proksel, Colin) (Entered: 06/01/2023)
06/01/2023	62	REPLY to Response to Motion re: 3 MOTION for Preliminary Injunction *[Plaintiffs' Reply to Defendant The Gregory School in Support of Plaintiffs' Motion for Preliminary Injunction]* filed by Helen Doe, James Doe, Kate Roe, Robert Roe. (Proksel, Colin) (Entered: 06/01/2023)
06/01/2023	63	MOTION to Strike 38 Notice (Other),,, *[Proposed Intervenors' Proposed Motion to Dismiss]* by Helen Doe, James Doe, Kate Roe, Robert Roe. (Proksel, Colin) (Entered: 06/01/2023)
06/01/2023	64	RESPONSE in Opposition re: 37 MOTION to Dismiss Case *of The Gregory School and Proposed Intervenors' Proposed Motion to Dismiss* filed by Helen Doe, James Doe, Kate

		Roe, Robert Roe. (Proksel, Colin) (Entered: 06/01/2023)
06/01/2023	65	REPLY to Response to Motion re: 3 MOTION for Preliminary Injunction *[Plaintiffs' Reply to Defendant Horne and the Proposed Intervenors in Support of Plaintiffs' Motion for Preliminary Injunction]* filed by Helen Doe, James Doe, Kate Roe, Robert Roe. (Attachments: # 1 Exhibit Rebuttal Declaration of Dr. Stephanie Budge, Ph.D., # 2 Exhibit Rebuttal Declaration of Daniel Shumer, M.D.)(Proksel, Colin) (Entered: 06/01/2023)
06/02/2023	66	*Amended MOTION to Reschedule Hearing re: 57 MOTION to Continue by Thomas C Horne. (Wilenchik, Dennis) *Modified to correct motion type on 6/6/2023 (MYE). (Entered: 06/02/2023)
06/02/2023	67	MOTION for Reconsideration re: 52 Order on Motion to Change Venue by Thomas C Horne. (Attachments: # 1 Proposed Order)(Wilenchik, Dennis) (Entered: 06/02/2023)
06/05/2023	68	ORDERED setting a telephonic Scheduling Conference set for 6/12/2023 at 02:00 PM before Judge Jennifer G Zipps. Signed by Judge Jennifer G Zipps on 6/2/23. (MYE) (Entered: 06/05/2023)
06/05/2023	69	ORDERED that Defendant Horne's Motion for Reconsideration (Doc. 67) is DENIED. Signed by Judge Jennifer G Zipps on 6/2/23. (MYE) (Entered: 06/05/2023)
06/06/2023	70	REPLY to Response to Motion re: 3 MOTION for Preliminary Injunction *[Plaintiffs' Reply to Defendant Arizona Interscholastic Association Inc. in Support of Plaintiffs' Motion for Preliminary Injunction]* filed by Helen Doe, James Doe, Kate Roe, Robert Roe. (Proksel, Colin) (Entered: 06/06/2023)
06/07/2023	71	NOTICE of Appearance by Dennis Ira Wilenchik on behalf of Thomas C Horne. (Wilenchik, Dennis) (Entered: 06/07/2023)
06/07/2023	72	SUPPLEMENT THIRD SUPPLEMENT TO DEFENDANT HORNES RESPONSE TO PLAINTIFFS MOTION FOR A PRELIMINARY INJUNCTION re: 3 MOTION for Preliminary Injunction by Defendant Thomas C Horne. (Wilenchik, Dennis) (Entered: 06/07/2023)
06/07/2023	73	NOTICE re: DEFENDANT HORNES RULE 10(c) NOTICE OF ADOPTION BY REFERENCE OF EXPERT DECLARATIONS SUBMITTED BY THE PROPOSED INTERVENORS by Thomas C Horne . (Attachments: # 1 EXHIBIT A, # 2 EXHIBIT B, # 3 EXHIBIT C)(Wilenchik, Dennis) (Entered: 06/07/2023)
06/08/2023	74	RESPONSE in Opposition re: 63 MOTION to Strike 38 Notice (Other),,, *[Proposed Intervenors' Proposed Motion to Dismiss]* filed by Warren Petersen, Ben Toma. (Attachments: # 1 Exhibit [Intervenors' Proposed] Motion to Dismiss)(Smith, Justin) (Entered: 06/08/2023)
06/08/2023	75	NOTICE re: Notice of Filing Proposed Intervenors' Proposed Reply Brief by Warren Petersen, Ben Toma re: 38 Notice (Other),,, . (Attachments: # 1 Exhibit [Intervenors' Proposed] Reply in Support of Motion to Dismiss, # 2 Exhibit 1 -- DSM-III-R)(Smith, Justin) (Entered: 06/08/2023)
06/08/2023	76	NOTICE re: Plaintiffs' Partial Withdrawal of Argument Against Defendant The Gregory School by Helen Doe, James Doe, Kate Roe, Robert Roe re: 62 Reply to Response to Motion, 64 Response in Opposition to Motion . (Proksel, Colin) (Entered: 06/08/2023)
06/08/2023	77	REPLY to Response to Motion re: 37 MOTION to Dismiss Case filed by Gregory School. (Attachments: # 1 Exhibit Exhibit 1 - Email Exchange)(Potts, David) (Entered: 06/08/2023)

06/11/2023	78	DECLARATION of HELEN DOE IN SUPPORT OF JANE DOESMOTION FOR A PRELIMINARY INJUNCTION re: 3 MOTION for Preliminary Injunction, 7 Declaration *(SECOND DECLARATION of HELEN DOE)* by Plaintiffs Helen Doe, James Doe, Kate Roe, Robert Roe. (Proksel, Colin) (Entered: 06/11/2023)
06/12/2023	79	ORDER: Proposed Intervenors the Legislators' Motion to Intervene (Doc. 19) is GRANTED in part and DENIED in part. The Legislators are directed to file a clean copy of their Opposition to Plaintiffs' Motion for a Preliminary Injunction, (filed at Doc. 38-2), along with supporting declarations. Plaintiffs' Motion to Strike the Proposed Intervenors' Proposed Motion to Dismiss (Doc. 63) is DENIED as moot. Signed by Judge Jennifer G Zipps on 6/12/23. (MYE) (Entered: 06/12/2023)
06/12/2023	80	MINUTE ENTRY for proceedings held before Judge Jennifer G Zipps: Scheduling Conference held on 6/12/2023.Parties heard regarding rescheduling of the motion hearing for preliminary injunction. Parties agree the hearing should last no more than 3 hours. For reasons set forth on the record, the Amended Motion to Reschedule Hearing by Defendant Horne 66 is granted. The motion hearing on Plaintiffs' Motion for Preliminary Injunction 3 is reset for **July 10, 2023 at 1:30 p.m.** in Courtroom 5D, 405 West Congress Street, Tucson, Arizona 85701 before the Honorable Jennifer G. Zipps. Additionally, the Court will hear argument on the Defendant Gregory School's Motion to Dismiss 37 at the July 10 hearing. 90 minutes will be allocated to Plaintiffs and 90 minutes will be allocated to Defendants and Intervenors. In light of the parties' decision to present declarations in lieu of witness testimony, each party is directed to submit a statement identifying the documentary exhibits and declarations that the party intends to rely on for purposes of the hearing by close of business on **June 29, 2023**. If those documents are already in the record, they need not be re-filed but the party must specifically identify where each document may be found. Any exhibit or declaration that is not yet in the record must be filed on or before **June 29, 2023**. Proposed findings of fact and conclusions of law are due on or before **July 5, 2023**. Parties are relieved of the obligation to submit a joint pre-hearing statement. APPEARANCES: Telephonic appearance by Colin Matthew Proksel, Justin R. Rassi, and Rachel Berg for Plaintiffs; Karl McKay Worthington and Maria Syms for Defendant Horne; David Calvin Potts for defendant Gregory School; Kristian Eric Nelson and Greg Clifton for defendant Arizona Interscholastic Association Incorporated; Dean John Sauer and Justin D. Smith for Intervenors. (Court Reporter Aaron LaDuke.) Hearing held 2:04 pm to 2:36 pm. This is a TEXT ENTRY ONLY. There is no PDF document associated with this entry. (SVC) (Entered: 06/14/2023)
06/14/2023	81	NOTICE re: Supplemental Authority by Helen Doe, James Doe, Kate Roe, Robert Roe . (Proksel, Colin) (Entered: 06/14/2023)
06/20/2023	82	RESPONSE in Opposition re: 3 MOTION for Preliminary Injunction filed by Warren Petersen, Ben Toma. (Attachments: # 1 Declaration of Dr. Gregory A. Brown, Ph.D., FACSM, in Support of Intervenors' Opposition to Plaintiffs' Motion for a Preliminary Injunction, # 2 Declaration of James M. Cantor, Ph.D., in Support of Intervenors' Opposition to Plaintiffs' Motion for a Preliminary Injunction, # 3 Declaration of Dr. Chad Thomas Carlson, M.D., FACSM in Support of Intervenors' Opposition to Plaintiffs' Motion for a Preliminary Injunction)(Smith, Justin) (Entered: 06/20/2023)
06/20/2023	83	PETITION re: EMERGENCY PETITION FOR WRIT OF MANDAMUS UNDER CIRCUIT RULE 27-3 -- RELIEF NEEDED BY JULY 7, 2023 by Defendant Thomas C Horne. (Attachments: # 1 Appendix)(Wilenchik, Dennis) (Entered: 06/20/2023)

06/20/2023	85	ORDER: USCA Case Number re: 83 Emergency Petition for Writ of Mandamus. Case number 23-70111, Ninth Circuit. (BAC) (Entered: 06/22/2023)
06/21/2023	84	NOTICE of Appearance by Jordan Todd Ellel on behalf of Kyrene School District, Laura Toenjes. (Ellel, Jordan) (Entered: 06/21/2023)
06/23/2023	86	*RESPONSE re: Intervenor-Defendants' Response to Plaintiffs' Notice of Supplemental Authority by Warren Petersen, Ben Toma re: 81 Notice (Other) . (Smith, Justin) *Modified to correct event type on 6/26/2023 (MYE). (Entered: 06/23/2023)
06/29/2023	87	NOTICE re: Intervenors Statement of Exhibits by Warren Petersen, Ben Toma . (Attachments: # 1 Exhibit 4-Supplemental Declaration of Dr Brown, # 2 Exhibit 5-Supplemental Declaration of Dr Cantor, # 3 Exhibit 6-Supplemental Declaration of Dr Carlson, # 4 Exhibit 7-Catley et al, # 5 Exhibit 8-Davis et al, # 6 Exhibit 9-De Miguel Etayo et al, # 7 Exhibit 10-Dohrmann, # 8 Exhibit 11-Eiberg et al, # 9 Exhibit 12-Gulias Gonzalez et al, # 10 Exhibit 13-Kasovic et al, # 11 Exhibit 14-Kirchengast et al, # 12 Exhibit 15-Lombardo et al, # 13 Exhibit 16-Moreland et al, # 14 Exhibit 17-Sauka et al, # 15 Exhibit 18-Tambalis et al, # 16 Exhibit 19-Taylor et al-1997, # 17 Exhibit 20-Taylor et al-2010, # 18 Exhibit 21-Thomas et al, # 19 Exhibit 22-Tonnessen et al, # 20 Exhibit 23-UK Sports Council, # 21 Exhibit 24-Woll et al, # 22 Exhibit 25-Zheng et al, # 23 Exhibit 26-DSM-V-TR, # 24 Exhibit 27-Barrera et al, # 25 Exhibit 28-Handelsman et al 2018, # 26 Exhibit 29-Handelsman 2017, # 27 Exhibit 30-Hughes et al, # 28 Exhibit 31-McManus et al, # 29 Exhibit 32-Klaver et al, # 30 Exhibit 33-Tack et al, # 31 Exhibit 34-Riley Gaines Testimony)(Smith, Justin) (Entered: 06/29/2023)
06/29/2023	88	NOTICE re: PLAINTIFFS EXHIBIT LIST FOR PLAINTIFFS MOTION FOR PRELIMINARY INJUNCTION by Helen Doe, James Doe, Kate Roe, Robert Roe . (Attachments: # 1 Exhibit Exhibits 11-17, # 2 Exhibit Exhibits 18-21, # 3 Exhibit Exhibits 22-25)(Proksel, Colin) (Entered: 06/29/2023)
06/29/2023	89	MOTION to Seal Document *(CERTAIN OF PLAINTIFFS PRELIMINARY INJUNCTION EXHIBITS)* by Helen Doe, James Doe, Kate Roe, Robert Roe. (Attachments: # 1 Proposed Order Granting Motion to File Exhibit Under Seal)(Proksel, Colin) (Entered: 06/29/2023)
06/29/2023	90	FILED AT DOC. 108 PURSUANT TO ORDER DOC. 107 ---SEALED LODGED Proposed CERTAIN OF PLAINTIFFS PRELIMINARY INJUNCTION EXHIBITS re: 89 MOTION to Seal Document *(CERTAIN OF PLAINTIFFS PRELIMINARY INJUNCTION EXHIBITS)*. Document to be filed by Clerk if Motion or Stipulation to Seal is granted. Filed by Helen Doe, James Doe, Kate Roe, Robert Roe. (Attachments: # 1 Exhibit 11-13, # 2 Exhibit 14, # 3 Exhibit 15, # 4 Exhibit 16)(Proksel, Colin) Modified on 7/6/2023 (DLC). (Entered: 06/29/2023)
06/29/2023	91	MOTION for Leave to File Non-Electronic Exhibit by Helen Doe, James Doe, Kate Roe, Robert Roe. (Attachments: # 1 Proposed Order)(Proksel, Colin) (Entered: 06/29/2023)
06/29/2023	92	NOTICE re: DEFENDANT HORNES EXPERT REPORTS AND EXHIBITS FOR PRELIMINARY INJUNCTION HEARING by Thomas C Horne . (Attachments: # 1 Exhibit 1, # 2 Exhibit 2 (1 of 5), # 3 Exhibit 2 (2 of 5), # 4 Exhibit 2 (3 of 5), # 5 Exhibit 2 (4 of 5), # 6 Exhibit 2 (5of 5), # 7 Exhibit 3, # 8 Exhibit 4, # 9 Exhibit 5, # 10 Exhibit 6, # 11 Exhibit 7, # 12 Exhibit 8, # 13 Exhibit 9, # 14 Exhibit 10, # 15 Exhibit 11, # 16 Exhibit 12, # 17 Exhibit 13, # 18 Exhibit 14, # 19 Exhibit 15, # 20 Exhibit 16, # 21 Exhibit 17, # 22 Exhibit 18, # 23 Exhibit 19, # 24 Exhibit 20, # 25 Exhibit 21, # 26 Exhibit 22, # 27 Exhibit 23, # 28 Exhibit 24, # 29 Exhibit 25, # 30 Exhibit 26, # 31 Exhibit 27, # 32 Exhibit 28, # 33 Exhibit 29, # 34 Exhibit 30, # 35 Exhibit 31, # 36 Exhibit 32, # 37 Exhibit 33)(Wilenchik, Dennis) (Entered: 06/29/2023)

06/29/2023	93	Exhibit List *for the Hearing on the Motion for a Preliminary Injunction* by Gregory School. (Potts, David) (Entered: 06/29/2023)
06/29/2023	101	ORDER: USCA Case Number re: 85 Emergency Petition for Writ of Mandamus. Petitioner has not demonstrated a clear and indisputable right to the extraordinary remedy of mandamus, or any other relief. The petition is denied. DENIED. (BAC) (Entered: 07/03/2023)
06/30/2023	94	NOTICE TO FILER OF DEFICIENCY re: 92 Notice (Other) filed by Thomas C Horne. Document not in compliance with LRCiv 5.5(g) - Documents signed by an attorney shall be filed using that attorney's ECF log-in and password and shall not be filed using a log-in and password belonging to another attorney. Document(s) signed by attorney Karl Worthington but submitted using the log-in and password belonging to attorney Dennis Wilenchik. ***No further action is required***. This is a TEXT ENTRY ONLY. There is no PDF document associated with this entry. (MYE) (Entered: 06/30/2023)
06/30/2023	95	NOTICE of Appearance by Ashley E Caballero-Daltrey on behalf of Gregory School. (Caballero-Daltrey, Ashley) (Entered: 06/30/2023)
06/30/2023	96	*MOTION *RE OBJECTION TO DEFENDANT HORNES AND PERMISSIVE INTERVENORS NEW EXPERT DECLARATIONS AND MOTION FOR LEAVE TO FILE SUPPLEMENTAL EXHIBITS AND AMENDED PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW* by Helen Doe, James Doe, Kate Roe, Robert Roe. (Attachments: # 1 Proposed Order)(Proksel, Colin) *Modified to correct motion type on 7/3/2023 (MYE). (Entered: 06/30/2023)
06/30/2023	97	MOTION to Supplement *PLAINTIFFS EXHIBIT LIST FOR PLAINTIFFS MOTION FOR PRELIMINARY INJUNCTION* re 88 Notice (Other), by Helen Doe, James Doe, Kate Roe, Robert Roe. (Attachments: # 1 Exhibit 26, # 2 Proposed Order)(Proksel, Colin) (Entered: 06/30/2023)
06/30/2023	98	MOTION to Intervene by Arizona Women of Action, Anna Van Hoek, Lisa Fink, Amber Zenczak. (Attachments: # 1 Exhibit, # 2 Exhibit, # 3 Exhibit, # 4 Exhibit, # 5 Exhibit, # 6 Proposed Order)(Rogers, James) (Entered: 06/30/2023)
07/03/2023	99	RESPONSE in Opposition re: 96 MOTION *RE OBJECTION TO DEFENDANT HORNES AND PERMISSIVE INTERVENORS NEW EXPERT DECLARATIONS AND MOTION FOR LEAVE TO FILE SUPPLEMENTAL EXHIBITS AND AMENDED PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW* filed by Warren Petersen, Ben Toma. (Smith, Justin) (Entered: 07/03/2023)
07/03/2023	100	RESPONSE to Motion re: 96 MOTION *RE OBJECTION TO DEFENDANT HORNES AND PERMISSIVE INTERVENORS NEW EXPERT DECLARATIONS AND MOTION FOR LEAVE TO FILE SUPPLEMENTAL EXHIBITS AND AMENDED PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW* filed by Thomas C Horne. (Wilenchik, Dennis) (Entered: 07/03/2023)
07/05/2023	102	*PROPOSED FINDINGS OF FACT *AND CONCLUSIONS OF LAW* by Plaintiffs Helen Doe, James Doe, Kate Roe, Robert Roe. (Proksel, Colin) *Modified to reflect PDF has no signature of filing attorney on 7/6/2023 (MYE). (Entered: 07/05/2023)
07/05/2023	103	ORDER granting 96 Motion for Leave to File Supplemental Exhibits and Amended Proposed Findings of Fact and Conclusions of Law is GRANTED. Plaintiffs must submit their response to the newly submitted evidence and their amended proposed findings of fact and conclusions of law on or before July 7, 2023. IT IS FURTHER ORDERED Defendant Horne and Permissive Intervenors may file an amended proposed findings of

		fact and conclusions of law on or before July 11, 2023. Signed by Judge Jennifer G Zipps on 7/5/23. (See attached Order for complete details) (JAM) (Entered: 07/05/2023)
07/05/2023	104	PROPOSED FINDINGS OF FACT *AND CONCLUSIONS OF LAW* by Defendant Thomas C Horne, Intervenor Parties Warren Petersen, Ben Toma. (Wilenchik, Dennis) (Entered: 07/05/2023)
07/06/2023	105	ORDERED that Plaintiffs' Unopposed Motion for Leave to File Non-Electronic Exhibit in Support of Motion for Preliminary Injunction (Doc. 91) is GRANTED. Consistent with the procedure set forth in Section II(N)(2) of the Electronic Case Filing Administrative Policies and Procedures Manual for the District of Arizona, Plaintiffs are permitted to file, in non-electronic form, Exhibit 17 in support of Plaintiffs' Motion for a Preliminary Injunction and provide a copy of the DVD or thumb drive for the Court. Signed by Judge Jennifer G Zipps on 7/5/23. (MYE) (Entered: 07/06/2023)
07/06/2023	106	ORDERED that Plaintiffs' Motion to File Supplemental Exhibit to Plaintiffs' Exhibit List for Plaintiffs' Motion for Preliminary Injunction (Doc. 97) is GRANTED. Plaintiffs may file the Third Declaration of Helen Roe as Exhibit 26 to Plaintiffs' Exhibit List for Plaintiffs' Motion for Preliminary Injunction not later than July 7, 2023. Signed by Judge Jennifer G Zipps on 7/5/23. (MYE) (Entered: 07/06/2023)
07/06/2023	107	ORDER granting 89 MOTION to Seal Document *(CERTAIN OF PLAINTIFFS PRELIMINARY INJUNCTION EXHIBITS)*. The Clerk of Court is directed to file under seal Exhibits 11-16 to Plaintiffs' Exhibit list. Signed by Judge Jennifer G Zipps on 7/5/2023. (DLC) (Entered: 07/06/2023)
07/06/2023	108	Sealed Document: Plaintiff's Exhibit List for Plaintiff's Motion for Preliminary Injunction by Helen Doe, James Doe, Kate Roe, Robert Roe. (Attachments: # 1 Exhibit 11-13, # 2 Exhibit 14, # 3 Exhibit 15, # 4 Exhibit 16)(DLC) (Entered: 07/06/2023)
07/06/2023	109	NOTICE by Helen Doe, James Doe, Kate Roe, Robert Roe re: 88 Notice (Other), *PLAINTIFFS UPDATED EXHIBIT LIST FOR PLAINTIFFS MOTION FOR PRELIMINARY INJUNCTION INCLUDING EXHIBIT 26*. (Proksel, Colin) (Entered: 07/06/2023)
07/06/2023	110	NOTICE by Helen Doe, James Doe, Kate Roe, Robert Roe re: 105 Order on Motion for Leave to File,, *PLAINTIFFS NOTICE OF FILING NON-ELECTRONIC EXHIBIT*. (Proksel, Colin) (Entered: 07/06/2023)
07/07/2023	111	ORDER: IT IS ORDERED that within 14 days of the filing date of this Order, the Plaintiffs shall file a Response to the AWA Motion to Intervene (Doc. 98). AWA shall file a Reply pursuant to LRCiv. 7.2(d) and (e)(2). IT IS FURTHER ORDERED that the Reply shall address the scope of intervention, if granted, for the purpose of briefing the Court regarding issues arising in this action, including jointly filed Intervenor Defendant briefs, limited in total to the same page lengths as the Plaintiffs briefs, subject to requests for extended pages if necessary. The parties are not precluded from seeking leave to file over-length briefs, pursuant to a stipulation. Signed by Judge Jennifer G Zipps on 7/7/2023. (See attached Order for complete information.)(SCA) (Entered: 07/07/2023)
07/07/2023	112	PROPOSED FINDINGS OF FACT *AND CONCLUSIONS OF LAW (AMENDED)* by Plaintiffs Helen Doe, James Doe, Kate Roe, Robert Roe. (Attachments: # 1 Attachment Redline from 2023-07-05 Filing)(Proksel, Colin) (Entered: 07/07/2023)
07/07/2023	113	NOTICE by Helen Doe, James Doe, Kate Roe, Robert Roe re: 88 Notice (Other), 109 Notice (Other) *PLAINTIFFS UPDATED EXHIBIT LIST FOR PLAINTIFFS MOTION FOR PRELIMINARY INJUNCTION INCLUDING EXHIBIT 27*. (Proksel, Colin) (Entered: 07/07/2023)

07/10/2023	114	NOTICE re: Notice of Supplemental Authority by Warren Petersen, Ben Toma . (Attachments: # 1 Attachment Sixth Circuit opinion in L.W. et al. v. Skrmetti et al.) (Smith, Justin) (Entered: 07/10/2023)
07/10/2023	115	MINUTE ENTRY for proceedings held before Judge Jennifer G. Zipps: Motion Hearing held on 7/10/2023. Parties present their arguments to the Court. As set forth on the record, Plaintiffs' Motion for a Preliminary Injunction and Memorandum of Law in Support Thereof (Doc. 3) and Defendant The Gregory School's Motion to Dismiss (Doc. 37) are taken under advisement. Parties are to meet and confer regarding setting deadlines for resolution of the cases outside of these motions. Formal scheduling order to follow. APPEARANCES: Amy Whelan, Amy Zimmerman, Colin Proksel and Justin Rassi for Plaintiffs. Dennis Wilenchik, Karl Worthington and Maria Syms for Defendant Thomas C. Horne. David Potts and Lisa Smith for Defendant Gregory School. Kristian Nelson for Arizona Interscholastic Association Incorporated. Dean Sauer and Justin Smith for Intervenors. (Court Reporter Aaron LaDuke.) Hearing held 1:32 pm to 4:43 pm. This is a TEXT ENTRY ONLY. There is no PDF document associated with this entry. (SVC) (Entered: 07/11/2023)
07/11/2023	116	PROPOSED FINDINGS OF FACT *(AMENDED)* by Defendant Thomas C Horne, Intervenor Parties Warren Petersen, Ben Toma. (Wilenchik, Dennis) (Entered: 07/11/2023)
07/12/2023	117	MINUTE ORDER: On July 11, 2023, Defendants Horne, Petersen, and Toma filed Amended Proposed Findings of Fact and Conclusions of Law. Defendants failed to seek leave of Court prior to filing this document. More importantly, the Amended Findings are not redlined and do not indicate how the Amended Findings are different. Accordingly, IT IS HEREBY ORDERED that Defendants may file Amended Proposed Findings of Fact and Law, but they must do so before **12:00 pm on July 13**. Ordered by Judge Jennifer G. Zipps. This is a TEXT ENTRY ONLY. There is no PDF document associated with this entry. (SVC) (Entered: 07/12/2023)
07/13/2023	118	NOTICE of Filing Amended Pleading pursuant to LRCiv 15.1(b) by Thomas C Horne, Warren Petersen, Ben Toma . (Attachments: # 1 Attachment)(Wilenchik, Dennis) (Entered: 07/13/2023)
07/13/2023	119	PROPOSED FINDINGS OF FACT *(AMENDED/CORRECTED)* by Defendant Thomas C Horne, Intervenor Parties Warren Petersen, Ben Toma. (Attachments: # 1 Attachment) (Wilenchik, Dennis) (Entered: 07/13/2023)
07/13/2023	120	First MOTION for Extension of Time to File Response/Reply as to 98 MOTION to Intervene by Lisa Fink, USA Women of Action, Anna Van Hoek, Amber Zenczak. (Attachments: # 1 Proposed Order)(Rogers, James) (Entered: 07/13/2023)
07/14/2023	121	TRANSCRIPT REQUEST by Helen Doe, James Doe, Kate Roe, Robert Roe for proceedings held on 7/10/2023, Judge Jennifer G Zipps hearing judge(s). (Proksel, Colin) (Entered: 07/14/2023)
07/14/2023	122	ORDER: Pursuant to Rules 1 and 16 of the Federal Rules of Civil Procedure, a telephonic Scheduling Conference is set for August 25, 2023, at 3:00 p.m., before the Honorable Jennifer G. Zipps. The parties are directed to confer at least fourteen (14) days before the conference. Counsel shall file with the Court, at least four (4) days before the scheduled conference, a Joint Report reflecting the results of their meeting and outlining the

		discovery plan. Signed by Judge Jennifer G Zipps on 7/14/23. (See attached Order for complete details.)(MYE) (Entered: 07/14/2023)
07/18/2023	123	TRANSCRIPT REQUEST by Warren Petersen, Ben Toma for proceedings held on 07/10/2023, Judge Jennifer G Zipps hearing judge(s). (Smith, Justin) (Entered: 07/18/2023)
07/18/2023	124	NOTICE TO FILER OF DEFICIENCY re: AO435 123 Transcript Request filed by Warren Petersen, Ben Toma. Item 18 - ORDER: E-mail address not provided where e-mail copy should be sent. ***FOLLOW-UP ACTION REQUIRED:*** Please refile and provide an email address for delivery. Deficiency must be corrected within one business day of this notice. This is a TEXT ENTRY ONLY. There is no PDF document associated with this entry. (RAP) (Entered: 07/18/2023)
07/18/2023	125	AMENDED TRANSCRIPT REQUEST pursuant to 124 Notice of Deficiency by Warren Petersen, Ben Toma for proceedings held on 07/10/2023, Judge Jennifer G Zipps hearing judge(s). (Smith, Justin) (Entered: 07/18/2023)
07/19/2023	126	ORDERED Proposed Intervenors Parent Representatives' Unopposed Motion for Extension of Time to File Reply in Support [of] Motion to Intervene (Doc. 120) is GRANTED. Proposed Intervenors shall have up to and including August 4, 2023, to file their reply in support of motion to intervene. Signed by Judge Jennifer G Zipps on 7/14/23. (MYE) (Entered: 07/19/2023)
07/19/2023	131	NOTICE OF FILING OF OFFICIAL TRANSCRIPT of MOTION HEARING proceedings held on 07/10/2023 before Judge JENNIFER G. ZIPPS. [Court Reporter: Aaron H. LaDuke, RMR, CRR, Telephone number (520) 205-4264]. The ordering party receives the transcript directly from the Court Reporter. Therefore, transcripts should not be viewed through Pacer. A non-ordering party may view a transcript at the court's public terminal or purchased through the Court Reporter/Transcriber by filing a Transcript Order Form on the docket before the deadline for Release of Transcript Restriction. After that date it may be obtained through Pacer. Redaction Request due 8/11/2023. Redacted Transcript Deadline set for 8/21/2023. Release of Transcript Restriction set for 10/19/2023. (RAP) (Entered: 07/21/2023)
07/20/2023	127	ORDER granting 3 Motion for Preliminary Injunction. IT IS FURTHER ORDERED that Defendant Horne is enjoined from enforcing A.R.S. § 15-120.02 as to Plaintiffs. IT IS FURTHER ORDERED that the Act shall not prevent Plaintiffs from participating in girls' sports and, as agreed by Kyrene School District and Laura Toenjes, in her official capacity, pursuant to the Stipulation in Lieu of an Answer (Doc. 59), and by TGS in open Court at the hearing for the Preliminary Injunction, the Plaintiffs shall be allowed to play girls' sports at their respective schools. IT IS FURTHER ORDERED that the AIA transgender policy, § 41.9, complies with the terms of this preliminary injunction. Signed by Judge Jennifer G Zipps on 7/20/23. (MYE) (Entered: 07/20/2023)
07/21/2023	128	ORDERED that the parties' Stipulation in Lieu of Answer By Defendants Kyrene School District and Laura Toenjes (Doc. 59) is GRANTED. Signed by Judge Jennifer G Zipps on 7/20/23. (MYE) (Entered: 07/21/2023)
07/21/2023	129	NOTICE OF APPEAL to 9th Circuit Court of Appeals re: 127 Order on Motion for Preliminary Injunction,,, by Warren Petersen, Ben Toma. Filing fee received: $ 505.00, receipt number AAZDC-22130132. (Attachments: # 1 Attachment Ninth Circuit Forms 1 and 6)(Smith, Justin) (Entered: 07/21/2023)
07/21/2023	130	RESPONSE in Opposition re: 98 MOTION to Intervene *Filed by Anna Van Hoek, Lisa Fink, Amber Zenczak, and Arizona Women of Action* filed by Helen Doe, James Doe, Kate Roe, Robert Roe. (Proksel, Colin) (Entered: 07/21/2023)

07/24/2023	132	MOTION to Stay re: 127 Order on Motion for Preliminary Injunction,,, by Warren Petersen, Ben Toma. (Attachments: # 1 Proposed Order Proposed Order)(Smith, Justin) (Entered: 07/24/2023)
07/24/2023	133	NOTICE OF APPEAL to 9th Circuit Court of Appeals re: 127 Order on Motion for Preliminary Injunction,,, by Thomas C Horne. Filing fee received: $ 505.00, receipt number AAZDC-22137309. (Wilenchik, Dennis) (Entered: 07/24/2023)
07/24/2023	134	USCA Case Number re: 129 Notice of Appeal. Case number 23-16026, Ninth Circuit. (Distributed by the 9th Circuit) (BAC) (Entered: 07/26/2023)
07/25/2023	135	USCA Case Number re: 133 Notice of Appeal. Case number 23-16030, Ninth Circuit. (Distributed by the 9th Circuit) (BAC) (Entered: 07/26/2023)
07/31/2023	136	ORDER DENYING Intervenor-Defendants' 132 Motion for Stay Pending Appeal and Request for Administrative Stay. Signed by Judge Jennifer G Zipps on 7/31/23. (BAC) (Entered: 07/31/2023)
08/01/2023	137	*MOTION (Titled as: PETITION for a Writ of Habeas Corpus) by Mark Marvin. (Attachments: # 1 Memorandum, # 2 Envelope)(MYE) *Modified to add motion type per chambers on 8/4/2023 (MYE). (Entered: 08/03/2023)
08/04/2023	138	REPLY to Response to Motion re: 98 MOTION to Intervene filed by Lisa Fink, USA Women of Action, Anna Van Hoek, Amber Zenczak. (Rogers, James) (Entered: 08/04/2023)

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No. 23-16026 c/w No. 23-16030

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

EXCERPTS OF RECORD – VOLUME 5
HEARING TRANSCRIPT

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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Helen Doe, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	4:23-cv-00185-JGZ
	)	
Thomas C. Horne, et al.,	)	
	)	Tucson, Arizona
Defendants.	)	July 10, 2023
	)	1:32 p.m.

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE JENNIFER G. ZIPPS
UNITED STATES DISTRICT JUDGE

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* * * * *

P R O C E E D I N G S

THE CLERK: In civil matter 23-185, Helen Doe, et al. versus Thomas C. Horne, et al., on for motion hearing.

Counsel, please state your appearances.

MS. WHELAN: This is Amy Whelan for plaintiffs.

MR. RASSI: Justin Rassi for plaintiffs, Your Honor.

MS. ZIMMERMAN: Amy Zimmerman for plaintiffs.

MR. PROKSEL: Colin Proksel as well for plaintiffs.

THE COURT: Good afternoon.

MS. WHELAN: Good afternoon, Your Honor.

THE COURT: Who is going to be speaking today for plaintiffs?

MS. WHELAN: Your Honor, all three of us, if that's okay. Ms. Zimmerman is going to do the motion to dismiss, and Mr. Rassi and I will do the preliminary injunction.

THE COURT: All right. Thank you.

All right. On the defense side.

MR. WILENCHIK: Good afternoon, Your Honor. Dennis Wilenchik for Superintendent Horne.

THE COURT: Good afternoon.

MR. SMITH: Good afternoon, Your Honor. Justin Smith for the intervenor legislator defendants.

THE COURT: Good afternoon.

MR. SAUER: Good afternoon. John Sauer also for the intervenor legislative leaders.

THE COURT: Good afternoon.

MS. SYMS: Good afternoon, Your Honor. Maria Syms for Superintendent Horne.

THE COURT: Good afternoon.

MR. WORTHINGTON: Karl Worthington for Superintendent Horne.

THE COURT: Good afternoon.

All right. So as far as the defendants, who will be speaking on behalf of the defendants?

MR. WILENCHIK: Your Honor, Dennis Wilenchik and Justin Smith. Mr. Smith will go first.

MR. NELSON: Good afternoon, Your Honor. Kristian Nelson on behalf of the Arizona Interscholastic Association.

THE COURT: I'm sorry. Could you come to a microphone. Thank you.

MR. NELSON: Kristian Nelson on behalf of defendant Arizona Interscholastic Association.

THE COURT: Thank you. Good afternoon.

MR. POTTS: Good afternoon, Your Honor. David Potts on behalf of The Gregory School. Lisa Anne Smith is here as well, but I don't want to make her walk to a mike. And I will be arguing the motion to dismiss and response to the motion for preliminary injunction.

THE COURT: All right. Thank you. Good afternoon.

THE CLERK: I would like to advise the audience that

electronic note-taking is allowed, but any recording of the proceeding is prohibited.

THE COURT: All right. So as far as how we will proceed today, I would like to hear the motion to dismiss filed by The Gregory School first. It's a discrete issue. I'll hear argument on that. I'm imagining that each party could present their arguments in 15 minutes, and then I'll likely take that motion under advisement. Then I'll turn to the motion for preliminary injunction and hear from the plaintiffs and defendants on that.

At the last scheduling conference, I indicated that the defendants and defendant intervenors could split their time, so I imagine that you've made efforts to figure out how to do that.

I'm interested in hearing from the parties, in addition to your arguments regarding the merits of the motion, what you expect would happen after the motion, if you expect that we're going to have discovery or just an evidentiary hearing, so that I can think going forward how the case is going to go. I would like to hear everyone's position on that.

All right. So why don't we go ahead and start with the motion to dismiss filed by The Gregory School.

MR. POTTS: Good afternoon, Your Honor.

The Gregory School moves to dismiss plaintiffs' complaint and asks that this Court deny the motion for preliminary

injunction with respect to The Gregory School. The two issues are intertwined, so I figure I'll cover both now.

As the complaint alleges, The Gregory School's been highly supportive of Megan Roe's transgender identity and would welcome her participation on the girls' volleyball team. But in filing this complaint, Megan and her parents have brought two causes of action, Title IX and Section 504 of The Rehabilitation Act that don't apply to The Gregory School because it doesn't receive federal funding. To get around this, they have alleged that tax exempt status, which The Gregory School has, constitutes federal financial assistance. It doesn't. Holding that it would would vastly increase the coverage of Title IX and The Rehabilitation Act beyond what Congress intended and what courts have held. So as a result, Megan's complaint as to The Gregory School, those two issues, Title IX and The Rehab Act, should be dismissed.

Now we talk about the ADA in our motion to dismiss too. I don't think it merits much time here because I think our disagreement is whether or not they need to amend their complaint; but we agree that, regardless, they can bring a Title III ADA claim as a public accommodation rather than a Title II ADA claim against a public entity. So regardless of what happens here today and regardless of what your ruling is, we're going to be in this case afterward because the ADA claim is going to survive in some fashion.

So primary issues are Title IX and The Rehabilitation Act. Both were passed pursuant to Congress's spending power whereby Congress can attach conditions to federal funding to get some policy goals achieved in order to require that an entity comply with certain regulations. The only alleged federal financial assistance that The Gregory School receives here is tax exempt status.

Now both the Supreme Court and Ninth Circuit have explained at length that because both these statutes are passed pursuant to The Spending Clause, the legislation is -- the language is much in the nature of a contract; and if Congress intends to impose a condition on the grant of federal monies, it must do so unambiguously. So that's from *Pennhurst*.

To that end, in every instance where the Ninth Circuit or Supreme Court has talked about federal financial assistance, they've conflated it with federal funds, with federal funding, with financial aid, things that are the affirmative grant of money to an institution.

This is consistent with the relevant regulatory guidance which says that, you know, federal financial assistance can be a grant or a loan; it can be a grant of property; it can be the provision of services of federal personnel; it can be a sale or lease for nominal consideration, the idea being that's actually, you know, giving you a benefit; or any other

contract for purpose of provision of assistance. And it's in that catch-all that they try to argue that federal financial assistance applies.

So the question, again going back to *Pennhurst*, is did Congress unambiguously condition tax exempt status upon compliance with Title IX and Section 504 of The Rehabilitation Act, and the answer is no. The Supreme Court and Ninth Circuit have never held that federal financial assistance includes tax exempt status.

There are at least two opportunities where they had that and could have ruled on it and declined. *NCAA versus Smith* directly involved whether the NCAA was subject to Title IX. The court said no. The NCAA is a nonprofit. They could have gotten around the entire analysis of whether they received federal funds through dues to member institutions. They ultimately said that didn't constitute federal financial assistance. It's a nonprofit organization. They could have short-circuited the whole thing if that were the case.

Same goes for *Grove City*, which was about whether a college that receives grants in the form of their students receiving grants to pay for tuition, whether that constituted federal financial assistance. It's indirect, but the court said yes. But again if Grove City College were a nonprofit, which it is, they could have skipped that issue entirely.

So it's important to note that in other contexts the

Supreme Court has differentiated between these affirmative payments and tax deductions or other tax relief. Different context, but *Arizona Christian School Tuition Organization versus Winn* was a challenge to the Arizona program where you can get tax -- donate to an organization, you get tax credits. That was challenged on the basis that, you know, that was spending, and the court ultimately differentiated tax credits like that from actual expenditure.

Again, the relevant regulations don't say anything about tax exempt status at all. If that were the case, if it were federal financial assistance, that would be a baffling omission. I mean, tax exempt status would cover a whole swath of organizations and would be larger than many of the categories that are already outlined in the regulatory guidance. So it doesn't make sense that that would suddenly, in that catch-all category, be far and beyond all those other categories.

We do have to deal with a couple district court cases, but it's a little closer of an issue than I think has been made out to be. Obviously, there's the *E.H.* case that plaintiffs cite, which was out of California. That involved a school that also received a PPP loan, so the tax exempt status being federal financial assistance wasn't a decisive issue because the school also received a PPP loan that had not been forgiven, so as a result, that was federal financial

assistance.

The case that we really have to deal with is *Buettner-Hartsoe*, which is the one out of Maryland, and that one does, you know, ultimately go against us. But I think if you look at all the district courts that have dealt with this issue, whether in the Title IX context, The Rehabilitation Act, or Title VI, ultimately the weight of authority is on the fact that federal financial assistance does not include tax exempt status.

We cite *Johnny's Icehouse*, which is kind of the seminal case on the issue, but there are a few other cases out there. There's one called *Zimmerman versus Poly Prep Country Day School*, which is an Eastern District of New York case that specifically said that tax exempt status does not constitute federal financial assistance within the meaning of Title IX. The cite is 888 F. Supp. 2d 317.

There's *Martin versus Delaware Widener University*, which is 625 F. Supp. 1288, which was The Rehabilitation Act, saying that assistance connotes the transfer of funds. It doesn't just include tax exempt status.

There's a case called *Bockman*, which is out of the District of New Jersey, that held that plaintiff's tax exempt status didn't constitute federal financial assistance for purposes of The Rehabilitation Act.

The weight of authority in the district court cases

ultimately is on our side, and again it gets back to whether or not Congress, in exercising spending power, unambiguously conditioned compliance with Title IX and The Rehabilitation Act for the receipt of federal funds, here being tax exempt status, and there is just nothing there. There's no evidence of that. So these two district court cases aside, we ask that the Court grant our motion to dismiss.

Are there any questions that you have?

THE COURT: Did you want to address the allegations in the complaint that relate to the Section 3 versus Section 2 or Title III claims?

MR. POTTS: Oh, no. I think ultimately, you know, I believe they need to amend their complaint. They believe they don't need to amend their complaint. Regardless, whether they do that or not, we're going to be sitting here with a Title III claim at the end of the day and we're still going to be in the case. So I think that's a -- we believe they should amend, but it doesn't really matter.

THE COURT: All right. Thank you.

MR. POTTS: Thank you, Your Honor.

THE COURT: Ms. Zimmerman.

MS. ZIMMERMAN: Good afternoon, Your Honor. Amy Zimmerman for the plaintiffs.

I would like to make one critical point, and then I'll turn directly to some of the points that defendant made. The

Supreme Court has been clear that Title IX must be broadly interpreted that direct or indirect funding suffices and that we should not read limitations into Title IX that are not present on its face. And there is no limitation regarding tax exemptions either in the statute of Title IX or The Rehabilitation Act or in the regulations interpreting it, so that answers the question before the Court.

We disagree with defendant's point that The Spending Clause cases dictate the result that they're advancing. The cases that TGS has cited having to do with The Spending Clause say nothing about whether tax exempt status constitutes federal financial assistance.

I would like to bring the Court's attention instead to some of the other things the Supreme Court has said about Title IX. In the *Grove City College* case, which defendant referenced, the court said that Title IX needs to be read broadly and emphasized that limitations not apparent on its face should not be read into it. That's also the case in which the Supreme Court said that indirect or direct financial assistance could constitute federal financial assistance, as defendant stated.

In the same case, Congress -- the court said that Congress did not mean to elevate form over substance by making the application of the nondiscrimination principle dependent on the manner in which a program receives federal financial

assistance.

In a separate Supreme Court case, the *Regan* case, the court has said that tax exemptions have much the same effect as a cash grant. So despite defendant's argument, nothing in subsequent case law has walked back any of these essential ideas that indirect funding is enough and that courts shouldn't be reading in limitations that aren't on the face of Title IX.

The cases that defendant cited, the court was looking at a different question, not the form that the federal financial assistance could take but rather how many steps removed from federal funding the organization in question was. And in both cases that they cited in their brief and referenced today, the *Paralyzed Veterans* case and the *NCAA* case, the court found that if an organization is just benefiting from another organization's federal funding, that's too attenuated to make it subject to either the Rehabilitation Act or Title IX. The same is true with the Ninth Circuit case the defendant referred to.

But this is very different. There is no organization standing between the federal government and TGS. Instead, every single dollar that TGS has is impacted by its tax exempt status. It's TGS alone by virtue of the exemption that receives the assistance.

THE COURT: So that would be pretty broad, as far as

its application, if it applies to every 501(c)(3), right?

MS. ZIMMERMAN: Well, it could be, although many 501(c)(3)s incorporate as 501(c)(3)s just for one of the many benefits, which is the ability to receive federal grants. So I think in many cases 501(c)(3)s have federal funding in other areas as well, but many district courts, contrary to what defendant said, many district courts have found precisely this.

So there's four cases that I would like to -- we referenced in pages 4 to 5 of our opposition, the *McGlotten* case, the *Fulani* case, the *E.H.* case, and the *Buettner-Hartsoe* case. All of them looked directly at this question, and each one -- two of them were, in fact, in the context of private schools. One of them was over 50 years ago. Each of them looked at the fact that federal financial assistance wasn't defined in Title IX or in the regulation. They looked at the fact there was no legislative history and then the purpose of Title IX and found 501(c)(3) status was enough.

So the single case that defendant cited in his brief, the *Johnny's Icehouse* case, which he called seminal, is anything but seminal. It's wrongly decided. It reaches the contrary result. But it doesn't look at any of the Supreme Court precedent in *Regan*, *Grove City College*, *NCAA*, and it incorrectly finds indirect funding, by virtue of the funding being indirect, that there's not enough there to constitute

federal financial assistance. And that's a proposition, as I mentioned, that the Supreme Court rejected nearly 40 years ago.

The other cases that defendant raised today, none of those are persuasive here. The *Zimmerman* case that he mentioned is just dicta. The *Bockman* case was decided 40 years before *Grove City* and before the Supreme Court had spoken about indirect financial assistance.

If we look at the language of the regulation itself, a tax exemption is fully consistent with the regulations the Department of Education has promulgated. It's not far and beyond. It's not a different category at all. The plain language is very broad, and it already contains an exclusion, demonstrating that the drafters knew how to exclude from assistance if they wanted to.

The definition of federal financial assistance in the Department of Education regulations --

THE COURT: Could you slow down just a little bit.

MS. ZIMMERMAN: Sorry.

THE COURT: Thank you.

MS. ZIMMERMAN: -- is any other contract, agreement, or arrangement which has as one of its purposes the provision of assistance to any education program or activity except a contract of insurance or guarantee. It's clear it contains an exclusion and it encompasses a tax exemption.

Tax exemptions also fit within the rest of the enumerated forms of assistance. As a specific example, the fourth part of the Department of Education definition includes the sale or lease of federal property at either a nominal, a reduced consideration, or even the ability to use federal property for no consideration at all.

And that's very similar to a tax exemption. In essence, the organization is being assisted by the federal government by virtue of not having to pay for something. In that case it's rent, but in this case it's taxes. So it operates in a very similar manner, and we submit that the best reading of it, of the regulations generally, is that it should include tax exemptions.

To defendant's point about the unambiguous nature that The Spending Clause cases talk about, there's nothing ambiguous about the catch-all. It's clear. It contains exclusions. And the cases that defendant references as really digging into the question about ambiguity are really answering a different question. As I mentioned before, in the *Paralyzed Veterans* case, one is getting into the question of how far away from the federal government, how many sort of steps in the chain there are between the funding and the organization.

Another one of the cases that's looking at the ambiguity of the liability is looking at whether the entity in question

was on actual notice of the alleged Title IX violation. That's quite different from what we have in front of us today.

In sum, the Supreme Court has been clear, the statutory language and regulatory language is clear, and the purposes of Title IX are best served by reading them to include a tax exemption.

I'll move on very quickly to the ADA point unless Your Honor has some questions about what I've said so far.

THE COURT: No. Please proceed.

MS. ZIMMERMAN: Just very briefly, as defendant said, they don't oppose our amendment. We believe we correctly stated a claim under Title III of the ADA, but, of course, if Your Honor disagrees, we would ask leave to amend.

Plaintiffs have properly stated the Title IX, Rehabilitation Act, and ADA claims, and the Court should deny TGS's motion. Thank you.

THE COURT: All right. Thank you.

Mr. Potts, any rebuttal?

MR. POTTS: Brief.

"In stating that exemptions and deductions, on the one hand, are like cash subsidies, on the other, we of course do not mean to assert that they are in all respects identical." That's the Supreme Court in *Regan*.

Regan dealt with a very different issue than we dealt with here, which is whether the IRS could condition an

organization's 501(c)(3) status upon not engaging in lobbying efforts, the idea being that there's a potential First Amendment issue there. The Court ultimately said that was okay.

So that little nugget of, you know, trying to conflate tax exempt status and funding is being expanded very much by *Buettner-Hartsoe* -- that's the main case they're relying on -- into this thing that the Supreme Court even expressly said is, look, you know, even when we're drawing this comparison, that doesn't mean we're drawing it for all purposes. We're doing it in this context.

And again, the more recent Supreme Court cases dealing with that type of issue would be like *Winn*, which dealt with the fact that tax credits are not the same as direct funding so that there was no standing to challenge there.

Beyond that, I have no other points. Thank you, Your Honor.

THE COURT: All right. Thank you.

All right. I'll take the motion to dismiss under advisement.

Turning to the motion for preliminary injunction.

MS. WHELAN: Good afternoon, Your Honor. May it please the Court. My name is Amy Whelan, and I along with my colleague Mr. Rassi will argue our motion for preliminary injunction. I will address our likelihood of success on the

merits, and Mr. Rassi will address the irreparable harms caused by the ban and the balance of equities in favor of the injunction.

As Mr. Rassi will explain in more detail, evidence we have presented shows that the harms Jane and Megan are experiencing because of the ban are serious and irreparable. This is one reason why courts across the country, including in this circuit, have granted preliminary injunctions in similar cases. These include courts in Idaho, Utah, West Virginia, and Indiana, and we urge this Court to do the same.

I want to focus first on why we will succeed under our equal protection claim. I won't address our other claims in the case since those are not part of our motion, but I will address our Title IX claim as well.

Our clients are two girls who want to continue playing the sports they love and try new sports at their schools and with their friends. They seek only a return to the status quo in Arizona, where girls who are transgender are not categorically barred from participating in school sports.

THE COURT: Let me ask you about the status quo. Is it the status quo? I mean, the law was passed in March or April of 2022. What happened in the sports season for fall of 2022?

MS. WHELAN: Well, Your Honor, Jane Doe has not had the opportunity to play sports yet because she's just entering

middle school, so this will be the first time that she will be eligible for that. They didn't have school sports in her elementary school.

Megan Roe was on the volleyball team but wasn't able to compete because of this law, so she has decided that she would like to play this season, and so her season begins this upcoming school year as well.

Generally, though, if you're asking about the status quo, you look to what the situation was between the parties before the issue that arose in the case came to be. So it's appropriate to look at the situation before the ban was passed versus now and how it affects Jane and Megan.

By its plain terms, the ban discriminates based on transgender status and sex, and so it triggers heightened scrutiny under the Equal Protection Clause. As the Supreme Court held in *Bostock*, it is impossible to discriminate against a person for being transgender without discriminating against that individual based on sex.

More specifically, the ban discriminates against plaintiffs based on their status as transgender girls by providing that: For purposes of school sports, all teams must be designated for boys only, girls only, or mixed based on biological sex. The law then specifies that teams for girls may not be open to students of the male sex.

By classifying all transgender girls as male, the ban

intentionally excludes plaintiffs from girls' teams, depriving them of the well-known benefits of sports programs and activities that are available to other girls. And the law does this despite the fact that Jane and Megan live as girls in all aspects of their lives, including in their communities and in their schools, and despite the fact that they have legally changed their names and their genders.

Because the law creates a classification based on transgender status and sex, the burden here is entirely on the state to justify its categorical exclusion of transgender girls in all grades, kindergarten through 12th, and in all institutions of higher education, from competing on every girls' team.

THE COURT: So as far as you just mentioned, that the state has the burden to justify its categorical exclusion, do I look at that, or do I look at only the exclusion of these plaintiffs given that it's an as-applied challenge?

MS. WHELAN: Well, Your Honor, under heightened scrutiny for laws that categorize based on sex, as this law expressly does -- it categorizes based on biological sex -- you look to whether there's a substantial relationship between the goals or the interests that the state has asserted and the effect of the ban on these girls.

THE COURT: Generally. Generally and then specifically?

MS. WHELAN: Specifically to these girls who are here before you in the court. But also, because the law is using transgender status as a proxy for athletic advantage, it's not really -- that's an improper classification.

THE COURT: All right.

MS. WHELAN: Both the Supreme Court and the Ninth Circuit have held that laws that discriminate based on sex are subject to heightened scrutiny, and the Ninth Circuit has also specifically held that laws that discriminate against transgender people are sex-based classifications subject to heightened scrutiny. And under this standard, the defendants must show an exceedingly persuasive justification for the ban.

They must also show, at a minimum, that categorically excluding all transgender girls from girls' teams is substantially related to that exceedingly persuasive justification, and defendants' justifications for the ban cannot be based on generalizations or stereotypes about the roles and abilities of boys and girls. Defendants have not and cannot satisfy heightened scrutiny here, and indeed they cannot even satisfy any level of constitutional review.

I want to first address defendants' argument that transgender girls, who they repeatedly refer to as biological boys, are similarly situated to boys and not girls. And because the Equal Protection Clause only protects people who are similarly situated, defendants claim that there is no

equal protection violation here.

This Court should reject this argument just as the courts in *Hecox*, *B.P.J.*, and *Utah* did, first, because transgender girls are similarly situated to other girls. As I mentioned before, plaintiffs have lived their lives for years as girls in all aspects, at school and in their communities. Indeed, they've changed their names and their genders. They are thus also legally female, yet the law treats them differently from other persons who are also legally female.

Second, plaintiffs have not and will not experience male puberty. Until very recently, Jane was not experiencing puberty at all but has now been approved for puberty-blocking medication. Megan has been on that medication for some time and also takes estrogen medication, which means that she is currently experiencing female puberty. Just as the judge in *Utah* found, plaintiffs are thus similarly situated to girls. They identify and live as girls, interact with others as girls, and are taking medication to prevent them from going through male puberty.

Moving on to the justifications for the ban, defendants claim the ban is necessary to achieve safety and fairness in girls' sports, and the intervenors argue that the ban is needed to redress past discrimination against women in athletics and to promote equality of athletic opportunity between the sexes.

While these can be important state interests and have been recognized as such in other cases, they are not substantially related or even related at all to Arizona's categorical ban of all transgender girls from girls' teams. And again every court that has considered these equal protection issues at the preliminary injunction phase agrees.

In their attempt to show a substantial relationship between the ban and these interests, defendants argue that because transgender girls always have an athletic advantage over other girls, it is both unfair and unsafe for transgender girls to play on girls' teams. The problem here is that that is false. As plaintiffs' expert evidence shows and as the vast majority of defendants' expert reports confirm, there are no significant differences in athletic performance between boys and girls before puberty.

During puberty, boys begin to produce much higher levels of testosterone than girls. This prolonged exposure to higher levels of testosterone is why postpubertal boys, over time and as a group, generally have an athletic advantage over girls as a group. And when I say time, I mean the number of years boys experience this higher level of testosterone. This is why, for instance, there are significant differences between the physiology of a 15-year-old boy and a 25-year-old man, because the 25-year-old has experienced these higher levels of testosterone for a much longer period of time.

The ban ignores these scientific facts and completely bars all transgender girls from playing sports, regardless of whether they have experienced male puberty and regardless of their medical treatment. In fact, by treating all transgender girls as if they are boys, the ban actually precludes reliance on the one factor that does have some correlation and relationship with the asserted state interests in this case, and that's hormone levels. For this reason alone, the law cannot satisfy heightened scrutiny. Many transgender girls, including the plaintiffs, do not experience male puberty, and in fact they experience female puberty, yet the ban prohibits consideration of hormone levels, the sole factor pertinent to athletic advantage. That's not even rational.

Simply put, Your Honor, being transgender in itself is not a reliable or accurate proxy for athletic advantage or performance. If all you know about a girl is that she is transgender, that doesn't tell you anything at all about her athletic ability or performance. This is fatal to defendants' ability to show that banning all transgender girls from girls' sports is substantially related to safety or fairness in girls' sports, or related at all.

Defendants might also argue that you shouldn't worry too much about the ban since transgender girls can still be on teams with other girls; they just can't compete. And this, for instance, was Megan's situation last year. But this

further undermines defendants' ability to show a substantial relationship between the ban and their purported concerns about safety or fairness. If defendants were really concerned about safety or fairness, they would not allow transgender girls to even participate in practices, which arguably create even more opportunities for unfairness or injury than competitions do because they're much more frequent.

This is similar to the situation in *Mississippi University for Women versus Hogan*, where men were allowed to audit nursing school classes but were barred from admission to the school. The Supreme Court found that these facts further undermined any showing of a substantial relationship between the state interests and the law's effect. Nor is there any relationship to the intervenors' claim that the law is needed to redress past discrimination. As the *Hecox* court found, like women generally, women who are transgender have also been discriminated against, not favored.

So while this was a valid justification in the *Clark* case, which involved boys who wanted to play on the girls' volleyball team, it is not a purpose that substantially relates or relates at all to the categorical ban of transgender girls here.

In short, Your Honor, defendants have not even come close to meeting their burden under heightened scrutiny. There is a very substantial body of case law holding that laws that

discriminate against transgender people cannot withstand heightened scrutiny, and this case falls squarely under those precedents. These include the other cases addressing sports bans that I've already mentioned. But in addition to those, there are recent decisions around the country enjoining laws that ban healthcare for transgender minors under heightened scrutiny, including from district courts in Alabama, Kentucky, Arkansas, and Florida. And there are also decisions, including in this circuit, enjoining the former policy prohibiting transgender people from serving openly in the military under heightened scrutiny -- that's the *Karnoski* case -- and similar decisions in cases involving policies barring transgender people from correcting their birth certificates or barring a transgender boy from the boys' restroom. Each of these cases finds that laws or policies that target transgender people are subject to and don't withstand heightened scrutiny review.

I also want to talk just a little bit more about the classification here, the discrimination based on transgender status and sex, that is inherent in the ban. Both defendant Horne and the intervenor defendants largely concede that intermediate scrutiny applies to classifications based on sex. They argue that the ban meets this standard, though, because it simply allows Arizona to have separate sports teams for boys and girls, something that *Clark* and other cases have

upheld.

This argument is wrong for several reasons, as other courts have also found. First, the text of the law is expressly based on biological sex, which by its very definition targets transgender girls. As *Bostock* explained, a transgender woman is a woman whose current sex does not match her birth sex. So that's the point of this law. It creates a fixed sex-based definition that every transgender girl is now categorically unable to satisfy.

Second, as cases like *Hecox* have recognized, this case does not challenge any policies separating boys and girls' sports teams. Plaintiffs agree there should be separate teams for boys and girls, and prior to the ban there were already statewide rules in place prohibiting boys from playing on girls' teams, and vice versa, from the Arizona Interscholastic Association, and that was coupled with a rule permitting girls who are transgender to compete on a case-by-case basis.

The purpose of the ban is thus to create a new categorical exclusion that completely bars transgender girls from competing on girls' teams. And if defendants' objection here is that the ban doesn't actually use the term "transgender" or that it just has some incidental effect on transgender girls, those arguments are inconsistent with decades of federal precedent. There is nothing incidental about being barred from school sports from kindergarten

through college.

It is also well-established that when laws target a class of people using criteria that correlates with a protected group, it's reasonable to infer that the law is targeted at and aimed at that class.

And I want to just give one example, Your Honor. The Ninth Circuit, in the *Latta versus Otter* case, considered an argument similar to the one defendants make here, namely that Idaho's law banning marriages of same-sex couples didn't target people based on sexual orientation since it didn't use those words. The Ninth Circuit rejected that argument, noting that the law distinguished on its face between same-sex and opposite-sex couples and therefore did classify people based on sexual orientation.

Here too the ban, by specifying that teams must be separated by biological sex, targets girls based on their transgender status. The first three legislative findings refer to biological sex and to articles purporting to show that biological sex is determined at fertilization or even in utero. This is also why the focus of legislative debate on the bill related to transgender girls.

Senator Vince Leach, for instance, argued that females won't participate in sports if lawmakers allow transgender girls to take over female sports. And intervenor Senator Petersen asked whether those opposing the bill would be

opposed to just having a trans league.

So from every aspect, if you look at the text of the law, the purpose, the legislative hearings, and the intended effect, the ban classifies and discriminates against girls who are transgender on the basis of that status.

THE COURT: I understand your argument that the plaintiffs here would not be interested in participating on a boys' team. The defendants have argued that they're not precluded from participating in sports because that is an option for them.

What's the response to that argument?

MS. WHELAN: Yes, Your Honor. And my colleague, Mr. Rassi, will address that in the context of whether or not that's a harm, but what I will say is that that is not how courts look at this issue. And also in the *Latta versus Otter* case, in fact, there was an argument that these same-sex couples weren't really harmed by the law because they could just marry people of the opposite sex. Well, in the Ninth Circuit, in that case, there is a recognition that sexual orientation and gender identity are immutable, and what that means is they're so core to a person's identity that someone should not be forced to forgo it when being subjected to laws.

The last thing I just want to say about the equal protection claim is that under heightened scrutiny, defendants have to show that the specific biological trait it has

selected for this law, which is biological sex, is substantially related to the purposes, which it says is to protect fairness and safety. That is their burden, but they have completely failed to meet it because it can't be done. As plaintiffs' expert Dr. Shumer explained, there is no inherent relationship between a person's anatomy and genes at birth and their future athletic performance.

Turning to Title IX, Your Honor, the ban also violates plaintiffs' rights under that statute. Title IX mandates that no person on the basis of sex can be excluded from participation in, denied the benefits of, or be subjected to discrimination under any educational program or activity.

As I explained previously, the ban discriminates against plaintiffs based on their transgender status and sex. This is precisely the conduct Title IX prohibits. Indeed, the Ninth Circuit already decided in *Doe versus Snyder* that discrimination based on transgender status is impermissible discrimination under Title IX, citing *Bostock*.

Defendants argue that because the ban merely categorizes athletes based on biological sex, this case is really just about whether schools can have separate teams for girls and boys, something that has already been established as lawful under Title IX.

Again, Your Honor, other courts that have ruled on similar bans have correctly rejected this argument. The court

in *Hecox* expressly recognized and accepted the principles outlined in *Clark's* holding regarding the general sex separation in sport as well as the justifications for that separation. It held, however, that those issues do not appear to be implicated by allowing transgender women to participate on women's teams. Here too, plaintiffs do not challenge Arizona's longstanding practice of separating boys and girls' teams, and those issues are not implicated in this case.

Defendants also urge this Court to follow out-of-circuit precedent, the *Adams* case, finding that schools do not violate Title IX when they require transgender students to use bathrooms that correspond with their biological sex. Again, *Hecox* expressly rejected this argument specifically within the sports context; but even if *Hecox* did not exist, Ninth Circuit cases, including *Doe versus Snyder*, have already clearly held that laws that discriminate against transgender students violate Title IX. I'll also note, Your Honor, that *Adams* is an outlier decision that contradicts holdings in the Seventh, Sixth, and Fourth Circuits.

One final point, Your Honor, before I stop and reserve some time to respond to defendants' arguments, and that is that it's important to look at real-world experience here. Many states have permitted transgender girls to play on girls' teams for well more than a decade now, even in the most populous states. And if you look at the experience under

those other policies, there is no indication of any kind of problem, and there certainly has been none here in Arizona.

As AIA officials reported during the legislative hearings, in the last ten to 12 years, there were only 12 requests by transgender athletes to play on teams that aligned with their gender identity, seven of which were approved. This means that out of the roughly 170,000 students who play sports in Arizona, about one transgender child per year made this request in the entire state. The idea that those students are somehow making girls' sports unsafe or unfair or that those athletes are depriving other girls of opportunities to play defies any kind of logic or reason, as the Idaho, West Virginia, and Utah courts have already found. Yet despite this, Arizona's law is incredibly sweeping. It's a categorical ban. It applies to all levels of school, it applies to all school sports, and it applies to all girls who are transgender, no matter their individual circumstances. That includes girls like the plaintiffs, who will never go through male puberty, and even girls like Megan, who are experiencing female puberty. All of this makes it very likely that plaintiffs will prevail on the merits of their Title IX and their equal protection claims.

And unless the Court has questions, I will turn this over to my colleague to discuss the harms and the balancing of the equities.

THE COURT: All right. Thank you.

Mr. Rassi.

MR. RASSI: Good afternoon, Your Honor, and may it please the Court. I'll address the Court on the remaining three factors which each warrant a preliminary injunction in this case.

Turning first to the irreparable harm, the starting point is the dispositive presumption of irreparable harm to Jane and to Megan because the ban violates the Equal Protection Clause and Title IX. The Ninth Circuit and courts across this country have held that where a violation of the Constitution or a civil rights statute is likely, a presumption of irreparable harm arises. The defendants have not disputed that presumption in their briefing and have not cited any cases to the contrary. And I refer Your Honor, as an example, to *Hernandez versus Sessions*, a 2017 decision of the Ninth Circuit upholding that presumption.

Beyond that, though, Your Honor, it is clear on the face of the record that plaintiffs are likely to suffer several forms of irreparable harm. The ban has put them into a class of girls that categorically will be ineligible to compete on girls' teams, not now, not ever; and Megan and Jane, they both know it. Adolescence is a time where children are incredibly sensitive to how they appear to others, where they're learning how they fit in or don't fit in, where they're hopefully

developing a sense of self-esteem and self-confidence, and for transgender children to be directly targeted by such an overtly discriminatory and stigmatizing law is more than likely to cause them irreparable harm. That cannot be understated.

I would like to start first with my client Jane Doe. Jane is 11. She's been diagnosed with gender dysphoria and will start puberty-blocking medication shortly. Jane loves sports and sports are very important to Jane's family, and she especially loves soccer. As Jane testified in her declaration, "Playing soccer has helped me make friends, and being part of a team makes me feel like I belong."

Through soccer, Jane has gained the obvious physical benefits, the physical fitness benefits, but she's also gained friends and developed a sense of belonging. But this ban has made Jane, quote, "really afraid" she won't have equal opportunity to try out for and play sports, afraid that the ban encourages people to treat transgender girls differently and to harass them, and hurt to know that some people want to keep her away from sports and her friends.

And we also have Megan. Megan is 15. She's also been diagnosed with gender dysphoria and takes both puberty-blocking and hormone replacement medications. Sports have also been an important part of Megan's life. She has swam, she has danced, and now she wants to play on the school

volleyball team with her friends. And as Megan has said in her declaration, she's excited to play on the volleyball team with her friends and is excited to make new friends. And at The Gregory School, volleyball is a really important part of the school community. A lot of people attend the games, and Megan wants to be a part of that. She doesn't want to just practice. She wants to compete and she wants to play. Megan too, though, is afraid, afraid that she will not be able to play on the girls' team and afraid that this law makes people, quote, "think it is okay to target transgender people."

Now I do not need to spend much time, Your Honor, addressing the many benefits that school sports provide and which the ban will deprive Megan and Jane both of. I think we can all agree on those, making friends, physical fitness, working on a team, developing a sense of belonging. There are lower incidents of anxiety and depression, improved academic performance, learning how to regulate emotions, learning how to deal with losing. All of these benefits are described in the declaration of Dr. Budge, Plaintiffs' Exhibit 6. Plaintiffs will be deprived of all of these benefits if the ban is not enjoined as to them because they will not be able to play sports at all.

But in addition to being deprived of these benefits, being deprived of all of those benefits, which alone is sufficient to constitute irreparable harm, the ban also

inflicts other harms on Megan and Jane of being stigmatized, ostracized, and labeled by the law as outsiders who can be treated differently over an immutable characteristic over which they have no control.

Dr. Budge has testified, again Plaintiffs' Exhibit 6, that discriminating against transgender youth athletes leads to an increase in youth anxiety, depression, trauma, and suicidal ideation/attempts, as well as an increase in physical health concerns for transgender youth. And that is based upon expert studies.

Your Honor, affronts to human dignity are real and they are irreparable. The Supreme Court has recognized this in *Obergefell*. In 2016 -- 2015, Your Honor, the Supreme Court said, "Dignitary wounds cannot always be healed with the stroke of a pen."

Instead, and coming back to Your Honor's earlier question, defendants' only suggestion is that Megan and Jane can play on the boys' teams; but this is not an option. Megan and Jane are not boys, and Ms. Whelan has already referred the Court to *Latta versus Otter*, which has held that sexual orientation and sexual identity, gender identity is immutable and, quote, "so fundamental to one's identity that a person should not be required to abandon it."

Where the defendants' argument leads on this point, the logical conclusion is that there could never be impermissible

discrimination against transgender people because transgender people could always be forced to act in a way that is inconsistent with their gender identity. Here, that would be asking my clients to be boys, and they are not boys.

In addition, Your Honor, it would be contrary to both Megan and Jane's medical treatment for gender dysphoria. Gender dysphoria is a serious condition, but it is highly treatable, and the way that it can be treated is with social transition. That is one way to treat it. And social transition, as Dr. Budge has testified, means outwardly living as a girl in all aspects of your life so that these girls do not feel shame for who they are and they can live and function in accordance with their gender identity.

But the only way that social transition is clinically effective -- and this is in the record -- is that it must be respected consistently across all aspects of a transgender individual's life, and playing on a boys' sports team would therefore directly contradict that medical treatment; and their mental health, both my clients' mental health depends upon living as girls.

It would also be painful and it would be humiliating and likely to cause both Megan and Jane to internalize the shame and the stigma of being excluded from the girls' teams simply for being the transgender girls that they are. It would be like hanging a sign around their neck that they're not girls

and will never qualify as girls, and it could very potentially subject them to the risk of further discrimination and harassment.

Megan has testified that she would, quote, "feel embarrassed and humiliated if I had to play on a team where I know I do not belong." And Jane has also testified that she would, quote, "feel embarrassed" if she had to play on a boys' team because "everyone at school knows I'm a girl. The last thing I want to do is draw attention to myself. I just want to go to school like the other kids." The net result, Your Honor, is that this ban would exclude Megan and Jane from playing sports altogether, deprive them of the benefits of playing sport, and inflict those additional harms on them.

And unless there are further questions on irreparable harm, I will turn to the remaining factors.

Your Honor, both the balance of equities and the public interest tip in plaintiffs' favor. In this case, those factors merge because the government is a party, and both plaintiffs and defendants are joined on that.

Plaintiffs have brought this case as an as-applied challenge, seeking a preliminary injunction only as to them. All that plaintiffs ask is that the status quo be restored pending a final judgment of this Court. That is a narrow, limited form of relief that will not cause even the slightest harm to a single defendant and certainly not the parade of

horribles that defendants cite in their briefing.

In that context, in the context of the narrow and specific relief that my clients actually seek, I'll make four specific points. First, the Ninth Circuit was clear in *Melendres versus Arpaio* that it is always in the public interest to prevent a violation of a party's constitutional rights. And the Ninth Circuit was also clear in *Rodriguez versus Robbins* that the government cannot suffer harm from an injunction that merely ends an unlawful practice or reads a statute as required to avoid constitutional concerns. The defendants have cited no authority overruling those binding precedents.

Second, the Arizona Interscholastic Association, The Gregory School, the Kyrene Aprende Middle School, and Superintendent Toenjes would all allow Megan and Jane to try out for and participate on the girls' teams. These defendants are much more closely attuned to Megan and Jane's individual circumstances and the lack of any real-world impact that allowing my clients to participate on girls' teams will have.

Third, the Court should reject the rampant speculation of harms that defendant Horne and permissive intervenors allege. This case is not about women of Arizona in the abstract whom defendant Horne purports to speak for. This case is not about Olympic athletes. It's not about professional or elite athletes. This is an as-applied challenge for my two clients,

two girls who are children. If these two girls are given an equal opportunity to try out for and participate on girls' teams, there is simply no basis to conclude that doing so will somehow displace women and girls across Arizona, cause injuries, or otherwise make any of the defendants' imagined harms a reality.

The defendants' mere social discomfort with transgender people is not a valid interest to protect. And even if we do take a step back, even if we do look at the bigger picture and the numbers, Ms. Whelan has already referred to the evidence of the AIA, and the AIA testified before the Senate, on SB 1165, that in the last ten to 12 years, there have only ever been 12 applications by transgender athletes to play consistently with their gender identity, only seven of which were granted. That is seven in the context of hundreds of thousands of student athletes. Those numbers are incredibly tiny and completely undermine the defendants' arguments of widespread disruption.

Finally, the Court should reject defendants' arguments relying on cases like the Sixth Circuit recent decision in *L.W. versus Skrmetti* that the state is irreparably injured simply because it cannot enforce a ban as passed by its legislature.

Accepting the defendants' argument on this point would mean that even if a law was grossly unconstitutional or

violated a civil rights statute in the most extreme and offensive way that the state would still suffer a per se irreparable harm that trumps all other harms simply if its laws were enjoined. That cannot be the law, that is not the law in this circuit, and in fact that argument was squarely rejected by the Ninth Circuit in *Independent Living Center of Southern California versus Maxwell-Jolly*, 572 F.3d 644 at 658.

And I'll note, Your Honor, that even if that were a principle that some sort of abstract harm were to arise from a state's enjoinment of its laws, each of the three cases relied upon by defendants, *Maryland v. King* of the Supreme Court decision of Chief Justice Roberts in chambers; the *Coal. for Economic Equity* in the Ninth Circuit; and the recent Sixth Circuit decision in *L.W. Skrmetti*, each of those cases were facial challenges. They were not as-applied challenges like this. We are only asking for the law to be enjoined as to my clients.

Ultimately, Your Honor, the ban rests on the premise that women who are not transgender need protection from girls who are and that girls who are transgender need and deserve no protection at all. That betrays the promise and the premise of the Equal Protection Clause. And so in weighing up the irreparable harm that Jane and Megan will suffer against the absence of any credible harm that defendants can show, it's clear that the equities and the public interest tip sharply in

plaintiffs' favor and an injunction should issue.

Your Honor, before I sit down, I just want to very briefly address the discrete argument that the Arizona Interscholastic Association has raised, which is that it's not a proper party to be enjoined in this case.

And I'll just make two short points on that, Your Honor. It is a proper party. First, the AIA has admitted that it is required to enforce the ban and has no discretion to ignore it. That is dispositive because the Supreme Court has held that equitable relief is authorized against any entity that possesses authority to enforce a challenge to state law.

Second, the AIA has very substantial connections to this ban. This ban was enacted to overturn the Arizona Interscholastic Association's policy. The Arizona Interscholastic Association is restrained from taking adverse action against schools that comply with the ban. And there is a private right of action against the AIA in the event that it does not comply with the ban. Under Ninth Circuit law, the Ninth Circuit standard in *Moore versus Urquhart*, that is more than a sufficient connection to enforcement of the ban in order to enjoin the AIA.

And finally I'll say that the AIA's refusal to defend the merits of the ban or even its agreement with plaintiffs' challenge is legally irrelevant because whether or not the AIA intends to, it must enforce the ban. For these reasons, the

AIA is a proper party to be enjoined.

And unless Your Honor has any further questions, we'll reserve our remaining time for rebuttal.

THE COURT: All right. Thank you.

MR. SMITH: Thank you, Your Honor. Justin Smith again for the intervenor legislator defendants.

Counsel for defendant Horne and I have agreed on a division of issues, and we're going to divide it a little differently than the plaintiffs. I'm going to handle the legal issues, and counsel for defendant Horne, Mr. Wilenchik, is going to handle the science and factual issues. Counsel for AIA has asked for five minutes at the end, and so we'll save time for him.

THE COURT: All right. Thank you.

MR. SMITH: May it please the Court.

Your Honor, I would like to begin by going straight to a question you asked plaintiffs' counsel in the first presentation about the burden here, about whether it's a burden to justify the statute as to the whole class or just to these individual plaintiffs. I think this is a really important issue, and that's why I want to lead off with it and then get into the notes that I prepared, because there are a couple of important points to make here.

In the briefing, we pointed to the *Mississippi University for Women* case to say that the classification has to be

justified as a whole, not as to individual plaintiffs, and that's because this case is not a strict scrutiny case. The state and the defendants don't have to show a constitutional application in every single situation. The scrutiny is less than that. Intervenor defendants contend that it's a rational basis test, but if plaintiffs are right and it's an intermediate test, even then the classification just has to be as to the group as a whole whether there's a substantial fit between the law that's passed and the important governmental interest. It doesn't have to be perfect in every case.

And that's, like I said, from the *Mississippi University for Women* case. That's the West Virginia *B.P.J.* case on the merits. And there are a couple of other citations I would point the Court to. The *Bucklew v. Precythe* case that came down from the United States Supreme Court a few years ago made the statement that the facial or as-applied label does not speak to the substantive rule of law. Instead, we would look to cases that come, for example, the *Ward versus Rock Against Racism* case or the *United States versus Edge Broadcasting Company* case. Those citations are 491 U.S. 781 and 509 U.S. 418.

And in the *Ward versus Rock Against Racism* case, there is some very important language that goes directly to the heart of the question that the Court asked. It says that the statute's validity always turns on how it relates, quote, "to

the overall problem the government seeks to correct, not on the extent to which it furthers the government's interest in an individual case."

Now that case involved a rock bandstand in central park, and there was a city ordinance dealing with sound because there was a band that got too loud, and the band tried to challenge that rule and said that, as to us, this isn't fair, that it's unconstitutional application to our freedom of speech. And even under a strict scrutiny analysis, the Supreme Court upheld the regulation that the city promoted, and it had this statement at page 801: The regulation's effectiveness must be judged by considering all the varied groups that use the band shell, and it is valid so long as the city could reasonably have determined that its interest overall would be served less effectively without the sound amplification guidance than with it.

And there was a very similar finding in the *Edge Broadcasting Company* case where the court said that even if there were no advancement as applied to this plaintiff, there would remain the matter of the regulation's general application to others, and that's at page 427 of that case.

This goes directly to the question that the Court asked, that the state doesn't have to justify this statute for every single student in the state of Arizona. All statutes will have different applications to different individuals in a

state of millions of people. The state and the defendants here only have to show that there's a substantial relationship between the law passed and the important governmental interest if intermediate scrutiny applies. And if, as we contend, rational basis applies, the burden is on the plaintiffs to negate every conceivable basis by which the statute might be justified. They don't have to show that there is an improper application in one instance. They have to show that there is no possible constitutional application, and they haven't done that here. That's why I wanted to start with that.

The other thing I will say off the top is that the burden of proof is important because the burden is on the plaintiffs here. They have a burden to show by a clear showing all four of the preliminary injunction elements. We cited these cases in our papers, but the cases that the Ninth Circuit has held, in cases such as *Lopez versus Brewer* and the *Norbert versus the City and County of San Francisco* cases, say that the plaintiffs have the burden as to all four elements, and the failure of the plaintiffs to establish any one of the four elements defeats the request for a preliminary injunction.

The one nuance that I will agree with plaintiffs is if intermediate scrutiny applies, then the state does have a burden of justification within the likelihood of success element to show that there is an important governmental interest and a substantial relationship of the law to that

interest. But I think it's important to clarify with whom the burden lies in this proceeding.

With that being said, I would like to turn to six important points that are uncontroverted in this proceeding and that are important to frame the issues and that we believe will be important to decide those issues.

The first comes from some of the papers as well as the admissions today from opposing counsel that everyone here agrees that Arizona can exclude boys from girls' sports. Opposing counsel said in their opening argument that they agree that Arizona can have sex-segregated sports. That's important for a couple reasons. The first is it affects the level of scrutiny that the Court applies. If plaintiffs were challenging the sex-based classifications, then intermediate scrutiny would apply, but they're not. They're challenging how Arizona determined to define the sex in this case. That's a different challenge.

We argued this in our papers. It's actually an underinclusiveness challenge, that particularly in the affirmative action context, there are some cases like the *Jana-Rock Construction* case and the *Hoohuli* case out of Hawaii in which the court looked to -- they applied strict scrutiny to see if the affirmative action program itself was constitutional. And then as to challenges on whether the definitions of Hispanic or Hawaiian were appropriate as

applied to those plaintiffs, the court applied rational basis review, because it said: We don't apply strict scrutiny twice, even though it's a racial program. We did that once. Because it satisfied that level of scrutiny, we then apply rational basis review.

THE COURT: The *Clark* case is the one that held that boys can be excluded from girls' sports.

MR. SMITH: That's exactly right.

THE COURT: What level of scrutiny did the *Clark* court apply?

MR. SMITH: Yeah. It applied intermediate scrutiny, Your Honor, because there was a challenge to the sex-based classification in that case. A boy said: I don't agree with Arizona's policy and --

THE COURT: To the extent that you refer to the plaintiffs as biological boys, isn't that the same situation as *Clark*?

MR. SMITH: Yeah. And to be clear, you know, we say biological boys. Opposing counsel says transgender girls. It means the same thing, just to be clear for the record. But the difference is not in who is bringing the challenge. It's what the challenge is against. In the *Clark* case, it was a challenge against a sex-based classification itself, and here plaintiffs have said that that is not their challenge. They've said that they don't challenge that Arizona can

segregate boys from girls in sports, which was the issue in *Clark*. But assuming that even *Clark* and intermediate scrutiny applies, we think that the *Clark* cases substantially assist and are, in fact, dispositive on the issues in favor of the defendants here.

And so I'll turn to that as my second point of the important uncontroverted points is that Arizona has a history of boys trying to compete in girls' sports, and the Ninth Circuit has repeatedly upheld Arizona policies that prohibited boys from competing in girls' sports. In those *Clark* cases that Your Honor was just referencing, we had an Arizona policy from the AIA that was at issue. You had a biological boy plaintiff saying: I want to play volleyball in high school, and my school doesn't offer a boys' volleyball team. The only way I can play volleyball is if I can play on the girls' team.

And in both *Clark I* and *Clark II*, the court rejected that argument on equal protection and Title IX claims because the court found that there was an important governmental interest. Specifically the court in *Clark I* said there was no question that redressing past discrimination against women in athletics and promoting equality of athletic opportunity between the sexes is a legitimate and important governmental interest.

Now if I understood opposing counsel correctly, they listed that and said that remedying past discrimination can be an important state interest, and instead they just argued that

the law at issue here is not substantially related to that interest.

THE COURT: Well, I think they also said that in this instance it would be remedying discrimination against transgender females, so it's not the same as the *Clark* case, which didn't involve boys who had been historically discriminated against. I don't know if you have a response to that argument.

MR. SMITH: I do, Your Honor. I appreciate you asking that.

The first response would be that the law at issue here, the Save Women's Sports Act, applies equally to all biological boys. Whether they're transgender or not, they can't cross over and play into biological girls' sports. There's no discrimination against transgender boys because if a boy has low testosterone but still identifies as a boy, that boy can't play in biological girls' sports. If a boy has a disability, be it physical, mental, or emotional, and still identifies as a boy, that boy can't play in biological girls' sports.

So there's no discrimination against only transgender girls. The statute doesn't say biological boys who identify as boys can play in girls' sports, but transgender girls cannot. It applies equally to every biological boy in the state and says that none of them, be they the plaintiffs in *Clark*, be they the plaintiffs here, be they the plaintiffs in

some other situation, if they were biologically born male at birth, they're not able to participate in biological girls' sports.

And that's why the *Clark* case is still good law here, because the application is the same. You have a biological boy. You have findings in the record in *Clark* showing that there was a physiological difference, and the court found an important governmental interest that was at issue.

And on the important governmental interest point, I would like to also say that plaintiffs' second rebuttal expert declaration also explains some of the important governmental interests at issue in the Save Women's Sports Act. If you look at paragraph 57 and paragraph 60 of Dr. Shumer's second rebuttal declaration, there's a whole host of statements relating to the different advantages that boys have over girls when it comes to athletics. For example, Dr. Shumer says that across the board, girls have far fewer opportunities to play sports and therefore far less coaching and skills training than boys in every age group.

And Dr. Shumer also says that during the 2018 to '19 year, 57 percent of high school athletic participation opportunities went to boys, with only 43 percent going to girls, translating into over 1 million more opportunities for boys than girls.

So even the expert evidence presented by plaintiffs shows

that there is an important governmental interest here in trying to protect opportunities and redress past discrimination for girls in the state of Arizona and school athletics. And so that's point number two, that there is a history of boys trying to compete in girls' sports in Arizona, and the Ninth Circuit cases in *Clark* upheld those policies.

Point number three that I would like to cover, and Mr. Wilenchik will cover it in more detail, but just at a high level, the parties agree that at some point adolescent boys have biological and have physiological advantages over girls. Let me be clear, we disagree over when that point arrives. I don't mean to suggest otherwise. But you've heard opposing counsel in opening comments say that there was a difference in puberty, that postpubertal boys generally have advantage over girls as a group. And they said the same thing in their papers. Their PI motion, at page 3, said that boys after they proceed through puberty are stronger and faster than adolescent girls. Again, that was page 3 of their motion. At page 11, they said that increased testosterone equals increased muscle mass and muscle strength. In Dr. Shumer's rebuttal declaration, paragraph 15, his second rebuttal, he said that postpuberty boys are taller on average than postpuberty girls.

So just taking this piece by piece, the parties agree that, absent medical intervention, adolescent boys postpuberty

are stronger, taller, and faster than postpuberty girls. And that's important for this reason: The West Virginia case *B.P.J.* that was handed down in January of this year involved a similar admission, and in that case the plaintiffs, like the plaintiffs here, had admitted that circulating testosterone in males created a biological difference in the athletic performance. That's at page 7 of the *B.P.J.* opinion. And because of that concession, the court found that the state's classification based in biological sex was substantially related to an important governmental interest. The court specifically points to that.

And the court does so again at page 9 and says, quote, "The fact is, however, that a transgender girl is biologically male and, barring medical intervention, would undergo male puberty like other biological males, and biological males generally outperform females athletically. The state is permitted to legislate sports rules on this basis because sex and the physical characteristics that flow from it are substantially related to athletic performance and fairness in sports."

So a court that had a very similar admission before it in West Virginia and passed a very similar law to the law that Arizona has passed and is at issue here, the court on the merits, after summary judgment briefing, upheld the state statute.

And that was point number four that I was going to address here at the outset. Plaintiffs' counsel mentioned a number of courts around the country that have been ruling on these laws. The only court that has reached the merits of a statute similar to what Arizona passed was that West Virginia federal court, and it upheld the statute on the merits.

And I would like to talk briefly, the West Virginia court did issue a preliminary injunction based on its determination early in the case that the plaintiffs were likely to succeed on the merits. There was no appeal of that PI. The case proceeded through normal discovery. There was a summary judgment briefing, and after a full record and after the full briefing, the court reversed itself and said that after seeing everything, the admissions that plaintiff had made during discovery, the court determined that on the merits the state statute satisfied both equal protection and Title IX.

Of the cases that opposing counsel mentioned, the Idaho *Hecox* case, the Indiana case, the Utah case, the West Virginia case was the only one to reach the merits. I believe it was the only one that dealt both with Title IX and the equal protection within the same opinion. The *Hecox* case only deals with equal protection. The Indiana case *A.M.* deals only with Title IX. The Utah case is under the state constitutional equivalent of the Equal Protection Clause. It doesn't deal with Title IX. It appears to apply an even higher level of

scrutiny than what plaintiffs asked for here because it's looking at the least restrictive means to accomplish the law. So the Utah case we don't think is even a very good application here. So when you look at that West Virginia case, which we think strongly supports the state's position as the only case that's reached the merits after full briefing, the state statute was upheld.

And before plaintiffs get up and say this, I'll just say it myself. That decision which dissolved the injunction was stayed pending appeal, and a one-sentence order from the Fourth Circuit -- a two-to-one panel, so we don't know exactly why they stayed it -- the Supreme Court declined to intervene. Two justices, Alito and Thomas, said they would have taken it. Alito hinted that the state's failure to appeal the PI may have been a factor, but we don't know. The merits briefing is ongoing in the Fourth Circuit, but we still think that the merits decision from January in that case is really important for the Court here.

Before I leave the physiological advantage point, I'll also say that there were -- as I said earlier, we don't have to show application as to each individual plaintiff in the whole state of Arizona is substantially related and satisfies an important governmental interest. That being said, there are some important things to point out in Dr. Shumer's rebuttal declaration and second rebuttal declaration in which

there are admissions about small differences between prepubescent boys and prepubescent girls before puberty blockers or puberty are even an issue. And before I identify those, I'll also say, in sports, small differences can make a big difference. You know, Olympic races can be decided by a thousandth of a second, which is hard to even fathom, faster than the blink of an eye. And so even small differences are really important here.

And so when you look at Dr. Shumer's rebuttal declaration, in paragraphs 10 and 13, he admits that some studies found small differences between performance of boys and girls. He explains his two explanations in his rebuttal declaration. The first is he says that there are factors to control for, age, location, socioeconomic status, and that if those were simply controlled for that the differences would evaporate. The other explanation he gives is that there is a failure to find any cause for why boys do better on physical fitness tests than girls. That's in paragraph 13.

He gives the same explanation in his second rebuttal declaration, at paragraph 21 and 24, that there is no cause determined for the differences that defense experts have brought to you and that Mr. Wilenchik will explain. But I want to highlight one explanation that Dr. Shumer gives in paragraph 21 and 24, where he says that the differences -- he's speculating -- could be due to greater societal

engagement and encouragement of athleticism in boys, greater opportunities for boys to play sports, or different preferences of the boys and girls surveyed.

Now that's an important speculation because it shows that there would be societal reasons, prepuberty, that would result in a difference between boys and girls, things that might be present in this case, might be present in many other cases of why boys might perform better than girls.

The fifth important point that I want to mention here off the top is that the only objective standard for separating boys and girls in sports is the one that the legislature selected here, separating based on biological sex at birth. Now you can say it's based on assigned at birth, like some of the plaintiffs' experts do. You can say that it's biological, as defense experts do. But however you say it, at birth, every child is a boy or a girl. The plaintiffs in this case say that they were assigned the male sex at birth and later identified as female.

This is really important because any criteria to accommodate transgender athletes will inherently rely on a subjective standard: When did puberty occur? When did puberty blockers be administered? Did the person identify? Did they change their name? Did they go through the process to formally change names? It's a subjective standard because every transition is unique. It's unique in time, it's unique

in manner, it's unique to the individual.

And this Sixth Circuit case, *L.W.*, that was handed down on Saturday and we notified the Court about this morning, that case said that those types of lines to be drawn are properly within the province of a legislature. It's the party closest to the people. They're democratically elected.

Opposing counsel, when they were talking about the equitable balancing factors, said that, well, some of the other defendants here are closer to the plaintiffs than the rest of us and so they should be given deference. Well, the AIA is an administrative body of these schools, you know, have administrators. But the people's body under the Constitution is the legislature, and that legislature made a democratic decision to weigh the pros and cons, as the Sixth Circuit talks about, and to reach the conclusion here that the best way for the people of Arizona is for the line to be drawn based on the objective standard of sex at birth. And that's what the Sixth Circuit discusses at length in the opinion from Saturday. It's a separation of powers point that this is a body that the people can replace if they disagree with those lines being drawn, whereas they might not be able to with a group like the AIA or a school administrator.

And the sixth and final point that I'll just note here up front is that even small numbers of transgender athletes can affect biological girls. We heard discussion that there's no

possible way for one or two plaintiffs to harm any of the other biological girls in the state of Arizona, but that's just not the case. One biological boy, transgender girl, who makes a team with limited roster spots is displacing a girl from that team. One boy who makes a starting lineup is displacing a biological girl from the field or from the court. One boy who wins a competition is displacing a girl from that achievement and possibly from scholarship.

There was discussion about, well, practices are okay, games aren't, that should be important. But colleges don't award scholarships based on practice. It's important, sure. That's how you get to achieve. But it's the competition, it's the results in the games, that's where the head-to-head competition occurs and where it's most important.

And these aren't just abstract concerns or abstract concepts that the defendants are raising here. There's lots of evidence that the defendants presented in the record about displacement of girls from teams and from competitions. You look at Exhibit 34 that the intervenor submitted, the Riley Gaines congressional testimony from just a couple weeks ago, where she talks about college athletes who missed being All-American by one place due to the presence of a transgender athlete.

There's evidence that we've put in the record about the safety issues from even one individual about the situation

from a North Carolina high school volleyball player, a biological girl who was hit in the face by a spike served by a transgender athlete and who will have lifetime brain injuries and all sorts of other mental and emotional harm.

THE COURT: I really struggled with that example, mostly because I'm thinking if that caused that effect on the recipient of that spiked volleyball, wouldn't that be true for a male recipient of that spiked ball as well?

MR. SMITH: You know, so if you look at the expert testimony that Dr. Carlson has, women are more susceptible to concussions. There are lots of reasons for that. There is some disagreement between the parties on why that's the case, but there is a statistical distinction that women are more at risk of a concussion than a man.

THE COURT: But is that risk -- are they more at risk when subjected to the exact same infliction of force?

MR. SMITH: That's what the defense expert science shows. Again, I acknowledge that there is a dispute between the parties about who is right on that issue.

THE COURT: I imagine there's not a lot of studies about inflicting the same amount of force on people to see if it has the same effect.

MR. SMITH: That's fair, Your Honor. These are studies, in one sense, looking at force and, in another sense, looking at concussion risk, and so I acknowledge that there's

probably not much on the exact scenario that Your Honor is talking about.

But returning to the point I made right off the top, the individual circumstances are not important for whether the statute satisfies an important governmental interest and is substantially related to that interest. Again, we're looking at the fit as a whole, the class as a whole. These are just specific examples to show that the legislature wasn't operating in a vacuum. They had specific examples.

You see it in the findings of the studies that they cited in Section 2 of the statute or of the bill. We have declarations in evidence in this case that it's not just a nationwide phenomenon, that some of the declarations submitted by mothers in Arizona as attachments to Document 98 have some case-specific examples in Arizona. These all provide that substantial justification and substantial relationship for the decision that the legislature made.

Moving quickly then just to the equal protection claim as a whole, the important governmental interest is found in the legislative findings. The best place to look for that is paragraph 14 of Section 2 of Senate Bill 1165, where it talks about promoting sex equality, providing opportunities for women. I won't read it here because it's quoted in our papers, but there is an important governmental interest, and again that was the same interest that *Clark* upheld in the

1980s. The *Clark II* case, I'll also note while I'm on the issue of *Clark*, found that displacing even one biological female could be a harm that Arizona was justified in attempting to avoid.

On the substantial relationship fit, there is a substantial relationship between trying to exclude biological boys from girls in order to promote those athletic opportunities and redress historic discrimination against women. That's the *Clark I* case. That's the *B.P.J.* case in West Virginia. The legislature has made that determination that all biological boys will be treated the same, and there is a substantial relationship in that decision and the law that the legislature passed.

I'll also mention quickly on *Hecox*, the Idaho case that plaintiffs talked about at length in their opening statement, Idaho had the very first law that was passed of this genre in 2020. That court had a very different record than the Court here has. The court said that there was no evidence of any female ever being displaced, and the court said that there's no evidence of any physiological differences between men and women after testosterone suppression. So it had a very different record than the record that the Court has, with multiple experts submitting evidence from the defendants. I think that's an important point when it comes to the impact of that case.

And again I'll just note that because this is an underinclusiveness challenge and because they aren't similarly situated, biological boys and biological girls, that's why the intervenors contend that rational basis scrutiny should apply. But I won't dwell on that since that's argued in our response in the motion to dismiss.

On Title IX, quickly a couple points I would like to make here is that Title IX addresses biological sex, not gender identity. The court holding of *Bostock*, when you read it, it assumed that sex in Title IX meant biological sex and then proceeded to conduct its analysis after that. It does not hold that gender identity or transgender status is equivalent to sex. It says to discriminate against a man or a woman, in those three cases that went up in *Bostock*, you were discriminating because you thought a man wasn't acting like a man or a woman wasn't acting like a woman, and that's where the transgender or homosexual element came into play. But it was a clear finding by Justice Gorsuch in the majority opinion that sex meant biological sex, and that's why that case is inapplicable here, because all boys are treated the same. You don't know -- there is no difference in application or discrimination against transgender girls based on how the statute works versus other biological boys. The outcome is the same. And that's why *Bostock* and even the *Doe v. Snyder* case that opposing counsel mentioned in the opening just

simply don't apply here.

Title IX is also different than Title VII because Title IX has an express carve-out for sex-segregated sports. That was one of the points of Title IX was to help advance women and provide additional athletic opportunities. And so the Title VII decision in *Bostock* doesn't apply when you're dealing with a sex-segregated sport that Title IX expressly contemplated, so that's why the *Bostock* case and the cases that plaintiffs have relied on since just don't really work here. Title IX had a goal of helping women overcome historic discrimination, especially in sports, and that's the same goal that the Arizona Legislature had in the Save Women's Sports Act.

As I round out my time, I'll just briefly touch on the final factors for the preliminary injunction. Irreparable harm, a few points here: The first is the state hasn't attempted to distinguish any of the cases plaintiffs cited on a constitutional violation because the defendants don't believe that there is a constitutional violation. And if there is no constitutional violation, a lot of the irreparable harm arguments from plaintiffs fall away and, as we'll talk about under the balancing factors, instead favor the state. Again, you look at the whole picture when you're dealing with one of these statutes, not just as applied to individual basis.

Two other things that came up in questioning: The status quo, I think plaintiffs' counsel admitted on the opening statement that plaintiff Roe had the opportunity and need to challenge the statute last year in order to play sports and did not. So the status quo as it relates to plaintiff Roe would be the law in effect, and there was no timely challenge to that law before it went into effect and it affected plaintiff Roe's ability to compete in sports.

I would point the Court to the Alito dissent in the case of the West Virginia transgender sports law. Justice Alito said that it is a wise rule in general that a litigant whose claim of urgency is belied by its own conduct should not expect discretionary emergency relief from a court. I think that would apply based on the facts we heard earlier on plaintiff Roe.

I think there was also a mischaracterization of the defense position as to what sports the plaintiffs can play. I think the statement was made that defense position is that they can only play with boys, and that's not true. That's not consistent with the statute. The statute says that biological boys can play with either biological boys or on coed teams. That's specifically contemplated in the statute. The statute also wouldn't apply to private or club teams.

And on the balancing factors --

THE COURT: If they play on coed teams, I mean, what

happens to all of those dangers and concerns about protecting girls from playing with boys?

MR. SMITH: On a coed team, that's part of the whole concept, that boys and girls are playing together. It would be a risk, if a girl chose to play on a coed team, that they understand. There could be many reasons that a girl wants to play on a coed team. And what the state has said is that some girls might want to take that on and they can voluntarily do so in a coed team, but for those girls who don't, who want to be in a girls-only sport, the legislature determined that that would be a safe haven for them. And that is something that was important again with the declaration submitted by the Arizona Women for Action group. Those mothers talk about how important that is to their girls and why they would not be a fan of coed teams in many respects.

On the balancing of the irreparable harm, we heard discussion that this is just a dozen cases out of hundreds of thousands of athletes, but we have hundreds of thousands of girls who have an interest in athletic opportunities, who want to be in sports, who want to have the opportunity to achieve, get scholarships, recognition, the different interests the legislature laid out in the legislative findings, also the safety issues. Those are all important to those hundreds of thousands of girls. That needs to be weighed when the Court weighs the equities in the third and fourth factors, and that

also goes to the public interest.

The people of Arizona, under the *Video Gaming Techs* case, have an interest in the effectiveness of their laws. That's also something that the intervenor defendants pointed to in the *Maryland v. King* case. Chief Justice Roberts said the state suffers a form of irreparable injury anytime one of its laws is enjoined. And that's not to say that that applies with an unconstitutional law, but if the law is constitutional, if the defendants are correct that plaintiffs are not likely to succeed on the merits, then the state and the people do suffer a form of irreparable injury that the Court has to take into account, and those equities favor the state. The plaintiffs have failed to meet their burden.

And unless the Court has any questions, I'll turn it over to Mr. Wilenchik at this point.

THE COURT: All right. Thank you.

MR. SMITH: Thank you, Your Honor.

THE COURT: All right. I know we're in the middle of the defense presentation, but we've been in session here for over an hour and a half. So let's go ahead and take a ten-minute break, and then we'll start again at 20 after 3:00. Thank you.

MR. WILENCHIK: Thank you.

(Court recessed from 3:09 p.m. to 3:22 p.m.)

THE COURT: Mr. Wilenchik, whenever you're ready.

MR. WILENCHIK: Thank you, Your Honor.

I'm not going to try to repeat what you just heard as was stated. My goal here, as best I can in the time given, is to simply go through some facts with some slides of what we presented and what the other side has presented on this preliminary injunction hearing, if the Court will allow me.

THE COURT: All right.

MR. WILENCHIK: And I want to start, though, by saying that despite having clearly the burden here in a preliminary injunction hearing, which I don't think there's any doubt about that, putting aside the ultimate issue in the case to be heard, the merits of that require the plaintiffs to have shown clearly, by a clear showing that I'll show the Court, that prepuberty males have no inherent physiological or other advantage over cisgender girls of their age, and therefore the statute in question had no rational basis or substantial purpose, depending on the test the Court chooses to use.

And simply put, I want to show that the plaintiffs have failed to do this. Other than in broad statements, conclusory statements and the like, they have not presented the science. In spite of saying that it's clear that it exists, it doesn't. And protecting biological girls' sports from participation by biological boys and leveling the playing field for such girls to participate fairly, in fairness to those girls, plaintiffs

have failed to show here an entitlement to any injunctive relief pending the ultimate outcome of this case.

And it's critical, plaintiffs and their experts -- and I'll repeat this perhaps more than once -- in our judgment, do not cite to a single clinical study or data research paper of any kind on a critical point, on a critical point, let alone one that has been generally accepted by their peers, demonstrating clearly that puberty blockers given at the onset of puberty clearly eliminate the natural physiological advantages of prepubertal boys over girls. And that advantage exists, is admitted to.

The Dr. Shumer report I want to touch on briefly. I'll come back to it. Dr. Shumer obviously has a reason for his opinions. We respect that. Dr. Shumer administers these drugs to these children. What Dr. Shumer does not do is really fully appreciate or understand the effect of those drugs over time. And one wouldn't really expect him to, frankly, given what he does for a living. But the fact is we have provided people that, we contend and submit to the Court, are far more relevant to determine the actual effect of what we're talking about on the playing field.

I, for example, think it's very important that the Court review people like Dr. Linda Blade as an example because Dr. Blade is closer to reality, on the playing field itself and how these things work out in reality, in the practical

world.

And I think, you know, we can disagree or respectfully disagree, but the fact is I think the Sixth Circuit case is important in this regard, although a different matter at issue, because I think it's not clear what the effects of these drugs are going to be. And administering them freely and taking the position that testosterone is the only single factor that would level that playing field, we disagree with. Our experts, more importantly, disagree with it.

The genetics are dispositive on various factors affecting sporting advantages. Sports is different than the rest of life in a lot of ways, and there are numerous examples we cite in our briefs that I'll go over as quickly as I can with the Court in slides. But it's important that in the real world the effect of these drugs is not fully known. And there are other factors, genetic factors, et cetera, that our experts go into that also affect the advantage.

It can be stated by the plaintiffs' expert, well, it's a slight advantage, perhaps. I think my co-counsel stated this, but I really want to emphasize it to the Court, in sports, everyone who's played sports knows that slight advantages are important. They're not to be discounted like Dr. Shumer so freely does, because a slight advantage that continues on into puberty -- and obviously through testosterone treatment it may be mitigated, but it's not removed.

That's the whole point of what I'm going to talk about, because that advantage, albeit slight, is what separates in many instances in the sporting field the great from the near great, the Michael Jordans from the Scottie Pippens, et cetera. There are numerous millions of examples I could probably go into, but that slight advantage is very critical in terms of making a great athlete and making one that maybe doesn't even make the team.

So seconds -- it's said football is a game of inches. Seconds in sports, one point in sports can make a major difference, and I don't think that should be discounted by anyone. It's important. And Dr. Shumer doesn't know that because Dr. Shumer, with all due respect, is not on the playing field. But some of our experts are and are involved in that, and I think it's important to give them credit for that reality dose.

So we submit that our experts and their data studies, as shown in Dr. Brown's rebuttal, which I won't have the time to go into point by point -- I would like to, but of course I don't, but I'm sure the Court's read all this. And Dr. Brown's rebutted and gone over again relating to Dr. Shumer -- of course, he hasn't rebutted the last report because there wasn't time to do so, but we will submit something to the Court. But his rebuttal really applies even to the supplemental reports just received from Dr. Shumer.

And we believe it's far more significant than the mere conclusory statements of people like Dr. Shumer, who do not rely on anything but their own experiential values, which is fine. It's fine as far as it goes, but it's very limited. It doesn't deal with the actual clinical peer-reviewed studies that our experts went into in detail as opposed to mere conclusions. And all, frankly, Dr. Shumer does, in my humble opinion, is criticize what we submitted without presenting anything affirmative really on his own to support the key issue, as I said, that we've identified in the case.

So our experts, on the other hand, have conducted a thorough review of the literature and the studies and data and found no study or data that actually supports the plaintiffs' expert view that prepuberty advantages in males do not exist or continue to not provide the advantages in competition, despite alleged simple puberty hormone treatment to mitigate those, and the science just isn't there yet. On the contrary, however, whatever science does exist shows from our experts that the prepubertal boys do have a distinct physical advantage in various factors that are critical with respect to the kinds of sports that the plaintiffs want to participate in and that are relevant.

So let's take a quick look at defendants' experts versus plaintiffs' experts, and I'll note again that I'm not looking at all of them, don't have the time to, but I want to focus on

I think what's the important distinctions, and I believe that to be Dr. Shumer, Dr. Brown, and Dr. Hilton for the defendants.

So Dr. Shumer cites exactly one purported research paper in his original declaration in support of his position and a bunch of things in his surrebuttal, again not actual studies on the critical issue, as I said, but things to try to mitigate our experts. He cites zero data compilations, however, that support the ultimate issue the Court needs to be concerned with that I identified. He doesn't even discuss that there is a consensus in the scientific community. All he does is try to knock what our experts say, and I believe unsuccessfully.

And by comparison, in his initial declaration, Dr. Brown provided you with more than 80 pages of research papers, data sets, statistical analyses he's reviewed and considered in rendering his opinion. And in his rebuttal, you see a very detailed account of how his opinion differs from Dr. Shumer and how Dr. Shumer has, according to Brown, misstated his report and all the studies that he has submitted as well as the other experts.

Dr. Brown cites studies --

THE COURT: Let me stop you for a moment to get a clarification that would help me as far as hearing your description of the evidence. You're saying that the defense

experts aren't offering a position, they're only criticizing the experts that the state --

MR. WILENCHIK: Plaintiffs, yeah.

THE COURT: I'm sorry. That plaintiffs' experts are only criticizing the state defendants' experts.

MR. WILENCHIK: The studies and the data compilations.

THE COURT: Well, and the expert's opinion regarding those studies.

MR. WILENCHIK: Sure.

THE COURT: And that they're not offering their own opinion.

MR. WILENCHIK: No, that's not what I'm saying. I want to be clear, because I don't want to go off and misstate because I don't want to be misunderstood. I'm not saying they're not offering opinions. They certainly are, and those opinions are directly contrary. What I'm saying is on the critical issue of whether or not prepubertal boys -- you know, and again we've defined that. Prepubertal boys have a distinctive advantage that does not go away -- I'll add that to it -- even after puberty that they've developed, grip strength, height, things of that nature. That's the point.

THE COURT: All right. And that's something that the defendants, the state wants to show because that would show the necessary fit between the legislative intent and the act.

MR. WILENCHIK: Exactly.

THE COURT: So in challenging the validity of the scientific research that would support the conclusions that were the basis for the act, then I should be analyzing those, as far as what that fit is, and then evaluating the criticisms of the state's experts to determine if there is the appropriate basis for the level of scrutiny --

MR. WILENCHIK: Yes.

THE COURT: -- that I'm applying.

MR. WILENCHIK: And I want to be clear on this too, Judge, because I could probably simplify a lot of this. I don't see anything -- and if you do, that's fine. I don't. I don't see anything where their expert, their main expert, Dr. Shumer -- let's stick to him for the moment because he's the one really rendering a lot of that -- where Dr. Shumer really criticizes the only studies, and I'll get into it, that we provided. He doesn't do that. Instead, he attacks it peripherally, as was stated by my colleague. He talks about things like, well, you know, they haven't proven their point to a certainty, which is not our burden, because there are other factors and things like that that could weigh into these studies.

Well, of course there are other factors, but I think all those inure to our benefit, as was stated by my colleague, for example, the point that he made, which is that boys are

brought up differently in some societal areas, differently than girls in terms of liking sports and participating and so forth. That's another reason why to level the playing field, to assist girls to participate.

So one can take his criticisms and fight about them in front of a jury, whomever hears this case ultimately here in court, all day long. But what doesn't change here, and this is the whole point before I sit down, the whole point is he doesn't ever provide any clinical data studies, you know, accepted peer-review things that establish statistics to support his position at all. We do. Our experts do that. There isn't a whole lot of it, but they do it, and I'll get into it.

THE COURT: So the question is then, if I understand your argument correctly, is if the defense experts' scientific evidence and opinions regarding that scientific evidence is sufficient such that it would be clinically peer-reviewed and appropriate for somebody to rely on as a basis to reach the conclusions that the legislature did in enacting that act.

MR. WILENCHIK: Yeah, yeah. And then there would be a substantial purpose in leveling that playing field, given the inherent male -- and I don't want to sound sexist here, but it's based on science as opposed to what they say science is. They don't back it up. Our experts do.

The science is that boys from birth retain a certain

degree of advantage physically, height and grip strength and so forth that has been shown, and these are important in contact sports. Those are not eliminated. You don't reduce someone's height by providing testosterone blockers. I mean, that's a perfect example of what I'm saying. There are others. But that doesn't change. That advantage, it's as built in, in general -- not all boys are taller, et cetera, of course, but statistically they are.

And so the statistics are what we're relying on. What they're relying upon I'm not sure other than just criticisms and finding ways to get around the statistics that are unique and kind of creative that I've read in the surrebuttal and then calling that science.

All right. I think I made the point.

THE COURT: All right.

MR. WILENCHIK: Okay. Let me just go into this, though.

So Dr. Brown cites studies to demonstrate that transgender girls have a definite size, body mass, height advantage, as we talked about, over cisgender girls that cannot be denied. And Dr. Hilton provides about 25 pages of substantive factual conclusions and 119 footnote citations to dozens of studies and data sets that support her opinion.

I want to point out again, I think Dr. Blade's opinion should not be discounted. It should be elevated, frankly,

because she is a coach. Most coaches deal with students on the field, and they see the overall effects of these things. And so her opinions about the inherent advantages that males have, the fear that certain girls have in trying out and participating because they don't want to compete against boys is the problem.

Now I know that plaintiffs define these plaintiffs as girls. I understand that. That's a difference perhaps of opinion because we don't know much more about that at the moment. So I'm not going to be critical of that per se, but what I'm saying is we don't have really all the information about that. If one just simply identifies as a girl and applies for a team, what is the standard to be used in that regard? You know, frankly, I don't know. I don't think there is one, and that's part of the problem.

THE COURT: Let me have you pause just a moment.

Do we have a technical issue?

(Discussion off the record between the Court and Courtroom Technology Specialist Lyn Wilson.)

THE COURT: Okay. Thank you.

And you haven't started showing the slides yet, correct?

MR. WILENCHIK: I think we have one up, but --

THE COURT: Just the introductory one. The only thing I'm seeing is what's on that back screen, the preliminary injunction hearing.

MR. WILENCHIK: Did you put the fact one on, the initial fact one on?

UNIDENTIFED FEMALE: We're not on No. 2 yet. We're just on Doe, the front page.

MR. WILENCHIK: Did you put 1 on, the fact?

MS. WHELAN: Your Honor, if I could just interject for a second. Is this an exhibit that was produced?

MR. WILENCHIK: No, it's not an exhibit. It's a demonstrative.

MS. WHELAN: Okay. It was never provided to plaintiffs, so I just want to state -- I'm talking to the Judge, not you.

MR. WILENCHIK: Oh, fine.

MS. WHELAN: I want to state for the record that we've never received this, we've never seen what it said, and so we just are stating an objection to the use of this without it ever being shown to plaintiffs' counsel.

THE COURT: All right. Thank you.

Do you have a printout of the --

MR. WILENCHIK: I don't know if I have one of just the slides. The slides are basically a demonstrative of what we provided already.

THE COURT: I understand.

MR. WORTHINGTON: Your Honor, may I take this to plaintiffs' table?

THE COURT: Is it a printout?
MR. WORTHINGTON: Yes.
THE COURT: I would like a copy. So if you only have one, then we'll make a copy here, and we'll provide a copy to the plaintiffs as well so that we all have it.
MR. WORTHINGTON: May I approach?
THE COURT: Yes. Thank you.
Is our technical issue resolved?
MS. WILSON: Yes.
THE COURT: Yes. Okay. Thank you for your help.
MR. WILENCHIK: Okay.
THE COURT: And wait just one moment.
MR. WILENCHIK: Sure.
THE COURT: I'll have a copy, and that way I can make notes on the slides.
MR. WILENCHIK: Sorry.
THE COURT: It's okay. Thank you.
MR. WORTHINGTON: Your Honor, I'm informed the set that we gave you to copy, there's one slide missing from that set, but we don't have a printout of it to provide to the Court.
THE COURT: Okay. Thank you for alerting me to that.
MR. WILENCHIK: Perhaps after the hearing, Your Honor, when we get back, we could send everybody a copy.
THE COURT: Thank you. And if you would just send a

copy to everyone.

MR. WILENCHIK: All right. May I proceed, Your Honor?

THE COURT: I'm going to wait until I get this copy.

MR. WILENCHIK: Oh, I'm sorry again.

THE COURT: Thank you.

All right. If you'll please continue. Thank you.

MR. WILENCHIK: Thank you, Judge.

Well, let me just say this: The plain fact is, I'll repeat, that the plaintiffs, we contend, have failed to provide any substantive evidence from which this Court could clearly conclude that biological males undergoing prepuberty treatment as a class have no unfair or unsafe advantage over girls in sports so as to sustain the preliminary injunction.

As I said, I want to spend a few minutes showing you the extensive evidence that males do have an advantage even prior to puberty that does not go away based on hormonal treatment, and then we'll discuss how that advantage remains despite these vague hormonal treatments. But I need to emphasize again to the Court, this is not our burden, it is theirs, contrary to what they've stated, in a preliminary injunction.

So let's look at Slide 3.

THE COURT: If there's heightened scrutiny, though, then the government would have some burden there as far as showing that.

MR. WILENCHIK: On the ultimate issue.

THE COURT: Showing fit as far as the statute itself, right?

MR. WILENCHIK: Yeah, yeah, right. We're in agreement on that. It's just that on a preliminary injunction my point is that --

THE COURT: I understand.

MR. WILENCHIK: Yeah. Okay.

THE COURT: Thank you.

MR. WILENCHIK: Prepubertal boys demonstrate measurable consistent performance advantage over girls. And just look at this, and I'll go over it as quickly as I can, but it's important to go through it.

Our expert's testimony: Australia and Greece studies from as young as six years old, males can run faster, jump further, complete more pushups and shuttle runs, and have higher grip strength than girls.

The Hilton Declaration: USA Track & Field, a very renowned organization, boys eight years old and younger had the advantage over girls in the 100 meters, 200 meters, 400 meters, 800, and 1500-meter events under the Brown Declaration. Dr. Shumer passes all this off, saying, well, those are track and field events. They don't mean anything. Well, they do. They are a great harbinger, as one can commonly understand, of strength and endurance.

The Presidential Fitness Test can't be assailed, I hope. Six to 12-year-old boys have the advantage over girls in curl-ups, shuttle run, one-mile run, and pullups. Females of any of these ages had no advantage in any of these tests.

THE COURT: I don't have my notes for that one. Wasn't that a couple decade ago? What was the year of the Presidential Fitness Test that you're citing?

MR. WILENCHIK: Yeah, I don't recall off the top of my head. Maybe somebody can remind me.

THE COURT: I was curious on the last one that said in 10 of the 11 events, a boy had the best result. Isn't the one that the boy didn't have the best result in shotput?

MR. WILENCHIK: Discus, I think.

THE COURT: Discus?

MR. WILENCHIK: It could be shotput too, yeah.

Look, I want to be clear, there may be exceptions, certainly. There are always exceptions. I think, you know, quite frankly, one could argue Martina Navratilova would have beat probably a top tennis player in her time. I don't think that's the point. I think we're talking about general purposes and general statements, that these clearly support the legislature in terms of having a substantial purpose. There are always going to be certain exceptions, I agree.

But as far as the age of this, I'm not sure, with all due respect, Your Honor, again that that is necessarily important.

There are no new tests that they have provided, that I recall, showing the fallacy of this test, and I don't know why over time it would change, but it hasn't, to my knowledge.

So international records, looking only at ages 5 through 12, in a wide range of international racing events, boys held the best record in 52 events. Girls again held the best record in four events. So there are exceptions, I agree.

Kyrene School District junior high competition was looked at. In 2023, some of these children had started puberty. Others had not. Dr. Hilton looked at races of various lengths, high jump, long jump, and shotput. There was a clear male advantage in each of those sports. I do agree with you. I think, if I recall correctly, shotput, there was some exception on that -- I know what you're referring to -- and I think in discus, in one of these studies as well. Why, I don't know, but that is true.

Junior high in Kyrene School District competition, 2022 events included various footraces, high jump, long jump, shotput again, and discus. In 10 of the 11 events, a boy had the best result.

Slide 4 again summarizes some more of our evidence. European studies: Boys between 6 and 9 jumped further than girls. Of 400,000 Greek children, 6-year-old boys could complete 16.6 percent more shuttle runs and could jump 9.7 percent further than girls.

Silverman Study: Boys age 7 or younger had a strength advantage of between 13 and 28 percent over girls in eight of nine strength events, had an advantage of 4 percent in one outlier category. And again this is passed off as being, well, there is some advantage, but it's not significant. Well, it is significant. It is significant.

Colombia and England Studies: Prepubertal boys from Colombia and from East England jumped higher than girls of the same age. These are not coincidences.

International records: In every running event, the single best time came from boys at 5, 6, 7, 8, 9, and 12. At ages 10 and 11, girls won three events. Boys won the remaining 11. Overwhelming, despite the fact that there are certain events, and there always will be, where girls will do better than boys in certain limited situations, but overall it's clear that boys maintain an advantage.

And in the interest of time, these are just a sampling of the studies and collections from all over the world that our experts did. Dr. Brown discusses them in his rebuttal. They are referenced by our other experts. They show again there's significant and unfair performance advantages in that age group in athletic contests. These are not coincidental. These advantages do not cease after puberty despite treatments, and there's no evidence that they do. And if there were any clear studies showing otherwise, plaintiffs

surely would have provided them for the Court front and center, but they have not done so.

Since we're looking at international studies, I would note that several European countries, Your Honor -- and anyone can scan the Internet to see this -- that liberally initially allowed such transgender females to compete with biological females have now reconsidered that. Some of the Scandinavian countries, for example, that adopted these policies that are being advocated are trending away now from their prior allowance of such head-on competitions because they're unfair.

So we presented data from around the entire world, compiled over decades. When Dr. Shumer attempts to rebut this data, he cited to only three outside sources for his claim that prepubertal boys do not have a physical advantage. Dr. Shumer first referred to an article written for a network of nonprofit media outlets. Again, I don't believe this is a peer-reviewed clinical study, and it was never published in any medical journal. It is not the type of source that scientists typically would rely on, in our view. But even that media article was not focused on children. It included people all the way up to 101 years of age. It is not something this Court should rely on. It placed all the participants between ages 3 and 19 in the same group, which again is just not relevant. But many of the people in this

group would have gone through puberty, many others would not have gone through puberty, so the data is skewed and not able to be shown to be any kind of distinction relevant to this case.

His second source that prepubertal boys do not have any physical advantage over girls was a study that was limited to a single sport of swimming, and that report acknowledged they had no data for children under 10 years old, as pointed out by Dr. Brown in his rebuttal. And he goes into that point, which I won't delve further into because it's not really relevant to our case in particular. But that report acknowledged that swimming was one of the only examples of prepubertal girls being able to fairly compete against prepubertal boys. And again we're not dealing with that sport here, as far as I know, today.

So that report confirms the fact, even that report, that in all the track and field and strength studies we listed, prepubertal boys in all have an advantage that's clear to anyone over girls. While Shumer now says track and field is not involved here with plaintiffs, the fact, as I said, it's a harbinger and certainly an indicator of the important things that are important in contact sports for soccer, basketball, cross-country, which is not a contact sport but a sport that deals with endurance and strength.

Dr. Shumer cites the Handelsman Study, but as Dr. Brown

showed when he responded to that, the Handelsman Study itself shows very clearly that prepubertal boys do have an advantage in running and jumping over girls at ages 10, 11, and 12. And in response to these sources cited by Dr. Shumer, Dr. Brown cited 15 studies or data sets he identified in his original report and an additional six studies showing that prepubertal boys do have a physical advantage over prepubertal girls in sports and that that continues into puberty. Your Honor, if you look at the reports from Dr. Brown and Dr. Hilton, you will see evidence that there is clearly an advantage, and it seems overwhelming.

The next slide I would like to show shows Slide 5. Males ages 6 to 7, our reports show and the testimony before the Court, have higher absolute, plus-11 percent in relative, plus-8 percent oxygen uptake. That's important for these kinds of sports, the ability to process more oxygen.

Males are consistently 1 to 2 centimeters taller than females also between zero to 10 years old as a general standard. Males age 3 to 8 years have significantly less body fat, lower percentage of body fat and higher bone-free lean tissue, which is again important, according to our experts, not just doctors but people in sport, to compete unfairly. So there are clearly physiological advantages. No doubt these physiological advantages, we submit, are related to and drive performance advantages.

So in light of these established facts, we contend there is no basis for a court to find anything other than that prepubertal boys do have a physical advantage over prepubertal girls. Thus the statute has not only a rational basis, if that's the test, but an important government purpose, even if intermediate scrutiny is applied, in leveling the playing field, which was the legislators' goal, between biological boys and girls as distinguished from birth, and those don't go away.

So we presented three studies showing that even when beginning puberty-blocking at the onset of puberty or early puberty, it does not eliminate the inherent male physical advantages, height, muscle mass, et cetera. Even in Dr. Shumer's rebuttal report, when he had every incentive, as I said, to rebut our evidence, Dr. Shumer could not affirmatively cite a single study finding that puberty-blocked males have no continuing physical advantage over girls in sports, regardless of hormone therapy. They have given you no clear factual basis on which to make a dispositive finding of fact, to find that they've carried their burden here on a preliminary injunction.

Our experts cited all of the research related to puberty-blocked males that they could find and that is available, and they did their work and found every published research paper addressing the issue, and none of it can be

said to clearly support Dr. Shumer's thesis. And Dr. Hilton and Brown have shown that such individuals retain, as I said, that advantage going into puberty and from then. So there is scientific evidence to the contrary of plaintiff clearly showing that this is an advantage, and Dr. Hilton and Brown cited those studies.

Let's take another look at Slide 6. Puberty-suppressed males have physiological advantages. One, from the reports that we submitted and testimony, puberty-suppressed males grow taller than females, in the Hilton Declaration; two, puberty-suppressed males have higher lean body mass, as I said, than females; and, three, puberty-suppressed males have higher grip strength.

So we have, first, a 46-year study of males who received puberty blockers around 13 years of age and then cross-sex hormones at 16 years of age. That study showed that those puberty-blocked males still reached an average height right at the average of males who did not suppress their puberty, which is higher than average girls. In that study, the puberty-blocked males reached an average height of 180.1 to 185.3 centimeters. The average height for males is at 183.8, and for females it is 13 centimeters shorter than even the puberty-blocked males.

THE COURT: I think I lost your reference here. Is that No. 1 on this chart?

MR. WILENCHIK: I believe so.

THE COURT: All right. Thank you.

MR. WILENCHIK: So Dr. Hilton was showing that when puberty arrives and is blocked, males still reach the upshot of that, about the same height they would have reached even if they had not suppressed their puberty. Basically Dr. Shumer is talking apples. Hilton is talking oranges.

So the next study listed is the Klaver Study, and it shows that where male puberty was partially blocked, those individuals still had greater lean body mass into their adulthood. Being leaner and more muscular is clearly a competitive advantage in sports. The evidence is that blocking puberty does not eliminate that very significant advantage.

And the last study listed is a Tack Study, also involved participants who had their male puberty partially suppressed, but their grip strength nonetheless still remained higher than a matched set of biological females who had actually transitioned to being boys. And as Dr. Brown explained, grip strength is a good proxy for physical strength in general, but puberty-blocked males continued to have a strength advantage even over girls who are transitioning to become more like boys.

Now I want to show Slide 7. I'll go through this all as quickly as I can to come to my conclusion. This is a

response, Your Honor, that we -- and I hope you give me a little leeway because we prepared this just based on the thing that we just received from Dr. Shumer, his surrebuttal I'll call it. And I just want to make these points for the Court since we didn't have an opportunity to really do it.

Shumer is not a developmental biologist.

MS. WHELAN: Your Honor, I'm so sorry, but I just want to object that this is an improper surreply. This isn't even in the documents that they just provided to us.

THE COURT: Well, let me ask you this, Ms. Whelan: I allowed the plaintiffs to submit the additional declarations to respond to the defense experts that were new. Don't they get an opportunity to argue what's wrong with the challenges that they have to the new evidence?

MS. WHELAN: Your Honor, I want to be really clear that I will address all of this information directly, but what I am objecting to is that it's true that this is our motion, so that means we get the reply, so defendants' attempts to just continue filing surreplies after our own experts is not proper.

So I just want to be clear, I will address this information to the extent I can, having seen it for the first time today, but our objection is that this is our motion. Normally we move, we get a reply, but defendants keep insisting that no, no, no, they get the last word.

THE COURT: Is your objection to the defense filing a surreply to the written briefed motion or to the defense making arguments about the evidence that the plaintiff has submitted?

MS. WHELAN: Well, Your Honor --

THE COURT: Because aren't they entitled to make argument about the evidence that's been submitted?

MS. WHELAN: Yes, they are entitled to make that argument. But I would just say, Your Honor, that my only point is that if they keep filing documents with the Court, then we would like the opportunity to review them and to move before you for the opportunity to respond.

THE COURT: All right. Well, I haven't given permission to file a surreply, so I appreciate your point.

MS. WHELAN: Okay. I appreciate it. Thank you.

THE COURT: If you'll please continue.

MR. WILENCHIK: Thank you, Judge. I appreciate that. As I said, I want to make this clear, because Dr. Shumer is very critical and says, well, I am a medical doctor and these people aren't medical doctors, as if that had some great bearing, but it doesn't. He's not a developmental biologist either, and experts on our side are. And he's not a Kinesiologist Ph.D. like some of our experts are. He doesn't have a clue what's going on in the real world, on the field, and he doesn't purport to. I don't say that to be cruel. I

just say it because it's a fact. He demonstrates very little understanding of how hormones can regulate development beyond acute effects, that is, by genetic programming, which he doesn't even consider genetic programming. He ignores evidence for sex-specific genetic effects on growth entirely because he has no expertise in it.

Shumer ignores multiple strands of evidence of small but consistent physical differences, quote-unquote, between boys and girls at prepuberty ages. But as was stated, and I'll repeat again because it's important, small but consistent is important in sports, not something to be discounted. And where he acknowledges physical differences, growth charts, he dismisses them as simply negligible, as a conclusory matter. He ignores the extensive primary data that evidences these small but consistent differences, as he puts it, in athletic performance between boys and girls at prepuberty ages.

He relies on two published sources, Handelsman, which actually supports our position I believe in many important respects, that both present small but consistent differences in performance, and he just simply ignores it. Shumer provides no evidence that transgender girls even with puberty block aid, as he puts it, are physically equivalent to females. There is no published data showing that transgender girls who block puberty are physically equivalent to females, and that's been my whole premise here. His claims are nothing

but conjecture, speculation, and just an attack on our experts. Shumer completely ignores evidence that puberty blockers do not significantly affect height, and as I said, height is very important in sports. So dismissing genes out of hand, saying hormone blockers are the only thing that makes a difference, is his opinion, I get it, but it's just not scientific fact.

I've talked about the burden, Your Honor. I just want to point out quickly so I can get to my conclusion that a preliminary injunction should not be granted unless the movant, by clear showing, carries the burden of persuasion.

And the *Winter v. Natural Resources Defense Council* case, which talks about correcting the Ninth Circuit's too lenient standard for a preliminary injunction holding, that a preliminary injunction is an extraordinary remedy that may only be awarded upon a clear showing the plaintiff is entitled to such relief, we submit respectfully they have not met that burden and haven't even begun to talk about it.

So let me now, if I may, conclude. In closing, Your Honor, having shown the statistics, the studies that they don't have and we have, I want to emphasize, until very recently, everyone agreed that sports could be separated by sex. As the Supreme Court has recognized, quote, "the two sexes are not fungible," closed quote, despite plaintiffs' position, and there are, quote, "inherent differences," closed

quote, between the sexes that are, quote, "enduring." *United States versus Virginia*, 1996.

Nowhere are these differences more evident than in the sports context where biological boys do have a clear advantage over girls, even into puberty, that remains and is not blocked by hormones. As the Ninth Circuit has held, due to average physiological differences, males would displace females to a substantial extent if they were allowed to compete together.

That's precisely why Title IX, in our opinion, was enacted 51 years ago, to create that level playing field where girls would have their own teams, where they could compete fairly and safely and feel free to join those teams, without the discouragement of having biological males compete with them, to become champions, to have that pride. Title IX has been transformative for females and with many having educational and career opportunities previously denied to them.

It is only in recent years where biological boys seek to compete on girls' teams that the separation of sex and sports was upended along with the hard-fought benefits of Title IX. As a result, the Arizona Legislature, in our judgment, appropriately stepped in to provide clarity on the issue through the Save Women's Sports Act, codifying the longstanding and important interests of separating sex in sports.

For the reasons stated earlier, we believe the Court should apply the rational basis test. But even if the Court applies intermediate level of scrutiny for the sex-based distinction in sports -- and I'll adopt my colleague's statements that it is not based on that -- the Supreme Court nevertheless has clearly stated, and I think this is critical, that a perfect fit is not required for all people, only a substantial fit. There's always going to be some inequities, and that's the *Tuan Anh Nguyen versus INS* case in 2001.

In applying this test, the Ninth Circuit held: The alternative chosen may not maximize equality and practicality, but even the existence of wiser alternatives than the one chosen does not serve to invalidate a policy that is substantially related to the goal. And that's from the *Clark* case.

We urge the Court here to not disregard the legislative debate and the policy considerations that went into enactment of this act and the fairness to girls. We heard a lot about the unfairness to plaintiffs, but I would like the Court, with all due respect, to think about the equal if not greater disappointment in girls that may be denied places on teams because of the advantage that biological boys have because they identify as girls.

Just last Saturday, the Sixth Circuit cautioned against such judicial action in a similar context, in a discrimination

case. In overturning a district court's preliminary injunction precluding enforcement of a state law banning puberty blockers for minors, the Sixth Circuit noted the danger of the judiciary usurping the power of the people to make such policy decisions.

The court questioned, quote, "whether the people of this country ever agreed to remove debates of this sort about the use of new drug treatments on minors from the conventional place for dealing with new norms, new drugs, new technologies, the democratic process. Life-tenured federal judges," it said, "should be weary of removing a vexing and novel topic of medical debate from the ebbs and flows of democracy by construing a largely unamendable federal Constitution to occupy the field," closed quote.

And perhaps most relevant for our purposes here, the court held, quote, "The burden of establishing an imperative for constitutionalizing new areas of American life is not and should not be a light one, particularly when the states are currently engaged in serious, thoughtful debates about the issue," citing *Washington versus Glucksberg*.

And in that regard, the Sixth Circuit held on Saturday that transgender status does not constitute a suspect class. It said, and we urge the Court to consider this, quote, "The plaintiffs separately claim that the act amounts to transgender-based discrimination, violating the rights of a

quasi-suspect class, but neither the Supreme Court nor this court has recognized transgender status as a quasi-suspect class. Until that changes, rational basis review applies to transgender-based classifications. In the context of a preliminary injunction and the need to establish a likelihood of success on the merits, that should be nearly dispositive given the requirement of showing a 'clear right to relief.'"

In this case, Your Honor, the people of Arizona debated the merits of this act and determined it serves an important governmental interest. This need is further evidenced by the numerous studies and statistical data we produced showing what I have indicated here in the time I've had.

In contrast, the evidence we have presented demonstrates to the plaintiffs the clear harm girls will face with competition unfairly skewed against them from the start. We already see women withdrawing from sports rather than face the unfairness of losing to a biological man. With championship and record-setting prospects eliminated by biological males claiming that they're females, not to mention the increased physical risks, girls will also be discouraged, ultimately perhaps quit, leaving behind all the educational, leadership, and mental health benefits that come with a level playing field that Title IX for many years has served.

Finally, the Save Women's Sports Act does not have to be perfect. As I said, it doesn't have to be a perfect fit to

withstand intermediate scrutiny. It simply has to further the important government interest at hand in most situations, which it does clearly here.

So finally, Your Honor, almost all of life is integrated between males and females, but sport is an exception precisely because biological boys do have an advantage over girls. It's been recognized. It's not something new. And so girls need their own teams to be able to compete fairly and safely in sports despite perhaps a setback for a few.

And finally let me say that there are opportunities for the plaintiffs, as I said before, or we said, to play on coeducational teams. Is that equal to being on a boys' team? Of course not, I agree, but it is an opportunity for them to participate. And they can also participate on a male team.

To the contrary, irreparable harm here, irreparable harm would be caused, in our judgment, to the biological girls forced to compete with potential safety issues and be excluded from competing perhaps on teams with biological boys, who have inherent physical advantages that did not get erased simply by Dr. Shumer's testosterone-blocking drug.

Thank you for the time, Your Honor.

THE COURT: All right. Thank you.

MR. NELSON: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. NELSON: Kristian Nelson on behalf of the Arizona

Interscholastic Association.

Our opposition to the motion is solely focused on a very discrete issue, which is simply the fact that there is no evidence of any discriminatory action by my client against these particular plaintiffs in the past or that we have taken any action, so that there is no likelihood of success on the merits on any violation of Title IX or in equal opportunity.

In this situation, furthermore, the policies of the AIA are very clear it is the principals of the school that decide whether or not students are eligible to participate. Our policies regarding transgender individuals have always been neutral, whether it be transgender boys or girls, also neutral with respect to males or females.

And so while we don't control --

THE COURT: Does that policy remain in place?

MR. NELSON: It does remain in place.

THE COURT: Despite the ban?

MR. NELSON: Correct. Now whether the principals have to decide whether or not the ban precludes them from allowing a transgender individual, a transgender female from participating in the sport is a separate issue, but our policy has not changed. We've not done anything that has adversely impacted them and have not restricted them from participating in any interscholastic competition.

And so just for the record to be clear here as far as

this, this is really a constitutional debate over that statute, not regarding any act that has been taken by the AIA against these particular plaintiffs.

THE COURT: All right. That was brief. Thank you.

All right. So I know that the defense in total took more than the hour allocated, so I want to make sure the plaintiffs -- I know you've saved time for rebuttal, but if you need a little extra time, that's fine.

MS. WHELAN: Thank you.

THE COURT: Who is going to do the rebuttal?

MS. WHELAN: I will, Your Honor.

THE COURT: All right.

MS. WHELAN: At the outset, Your Honor, I just want to address defense counsel's interchangeable use of "transgender girls" with "biological boys." It's clear to me that in using that language, they do not actually believe that transgender children exist, and this Court should not credit that view. It's contrary to what doctors have known about children with gender dysphoria. It's contrary to the fact that transgender people have existed throughout history.

So I just want to point out that it's also based, this concept that transgender girls are just biological boys for purposes of sports is based on the same impermissible generalizations and stereotypes about the roles and abilities of boys and girls that the Supreme Court has repeatedly

rejected. By banning all transgender girls, the law falsely assumes that they are always a danger to nontransgender girls and that their mere presence on teams is unfair to other girls.

One of the very purposes of heightened scrutiny -- and I'm going to get to the scrutiny point that defendants are making -- is to ensure that defendants provide real evidence-based reasons for the law rather than generalizations or stereotypes. And these sort of sound like stereotypes and generalizations that have been rejected by the Supreme Court repeatedly in sex discrimination cases, including that the presence of women will somehow ruin law schools or ruin medical schools. Those are just not true, and they've been struck down by courts repeatedly.

I also want to address the suggestion that the constitutional violation here is just with respect to groups generally. That's simply not true, and *Bostock* actually talks about this. In *Bostock*, the Supreme Court, for instance, said that the focus of Title VII, which it was addressing in that case, is on individuals, not groups, and that's shown by the language of the law. It protects, for instance, Title VII protects individuals from discrimination, not groups of people. And in the same respect, the Equal Protection Clause guarantees that no person will be discriminated against based on sex or be denied the equal protection of the laws.

And *Bostock* also said and acknowledged expressly in its opinion that a rule that appears evenhanded at the group level can prove discriminatory at the level of individuals, citing the Supreme Court decision of *Manhart*. And *Bostock* also said that states cannot escape liability by showing that they treat men and women comparable as groups.

Defendants also argue, while it's true that we have the burden on our motion for preliminary injunction, that somehow, based on Ninth Circuit precedent, they don't have the burden of proof on heightened scrutiny. That's not true. Whereas here the burden to justify the ban under the Equal Protection Clause rests entirely on the state, and that's from the *U.S. versus Virginia* case, the burden to show a likelihood of success shifts to defendants at the preliminary injunction stage for the equal protection claim, and that's directly from *Gonzalez versus O Centro Espirita Beneficente*, which is cited in our papers.

I'm going to get to the science issues in a minute, but I first want to address the other ones. I want to also address the blatant conflict between defendants' claim that the ban doesn't have anything to do with transgender people, on the one hand, and their conflicting arguments throughout their briefs and during this argument that the mere presence of transgender girls on girls' teams is unfair and unsafe.

If this law really did only go to whether or not the

state can separate boys and girls' teams, then defendants AIA, The Gregory School, and the Kyrene School District would do precisely what they did prior to this law being passed. In other words, they would allow plaintiffs to play. That's not the situation, and the defendants' claims otherwise are disingenuous, to say the least.

I also want to respond to the point that what we're seeking here is some kind of special exception to the generally applicable sex-segregated sports scheme that exists in Arizona. We are seeking for this Court to validate the principle of equal protection that says that when the state chooses to act and it chooses to classify and it chooses to discriminate, it has to carry its burden to justify that law. The state says this is just a policy choice, and, of course, the Arizona Legislature has discretion to make policy choices within the bounds of the Constitution, but it exceeded those bounds here. And this does not mean, like defendants suggest, that states have to sort sports by performance capability or height or other measurements. We are not suggesting Arizona has to adopt any particular policy here. What we're doing is responding to the lines that defendants decided to draw and the distinctions and the classifications that they instituted. That's what creates the relevant legal inquiry.

So this is not about trying to tie the state's hands and impose some version of equality. This is about measuring

Arizona by its own actions and taking a look at the line it has drawn to determine whether the ban can be justified and whether this discrimination on the basis of a protected status can satisfy heightened scrutiny.

There was also a suggestion that defendants made that really what we're trying to do is ask the Court to discriminate on the basis of gender identity itself, but this gets things backward. Under this kind of theory, there would be no such thing as transgender discrimination, because defendants seem to be saying that since there is only an incidental effect on transgender girls, the administrative convenience of having a biological sex rule is permissible. This is contrary to decades of constitutional law holding that administrative convenience cannot survive heightened scrutiny for classifications based on gender.

I also wanted to share this passage from *Bostock* which I think is directly responsive to defendants' point that somehow finding that the state can't separate sports based on girls and boys would extend protections far beyond what the equal protection allows or sex discrimination laws allow. And that decision said that applying protected laws to groups that were politically unpopular at the time of the law's passage, whether prisoners in the 1990s or gay and transgender employees in the 1960s, often may be seen as unexpected. But to refuse enforcement just because of that, because the

parties before us happen to be unpopular at the time of the law's passage, would not only require us to abandon our role as interpreters of statutes and in this case constitutions, it would tilt the scales of justice in favor of the strong or popular and neglect the promise that all persons are entitled to the benefit of the law's terms.

Defendants also make a suggestion that because this law is based on biological sex, it somehow deserves a more relaxed level of constitutional scrutiny. There is no basis for that in federal law. I don't want to go over again that laws that categorize by sex and transgender status are subject to heightened scrutiny. I think we've covered that, but I just want to really briefly say that there is no exception for laws based on biology in terms of getting some lower level of review. There's no exception for laws based on tradition. They certainly don't get a lower level of review. And there's no exception for laws that purport to protect women. Those also don't get some lower level of review. If a law classifies based on sex, it is presumed to be unconstitutional unless defendants can satisfy heightened scrutiny. To do that, defendants have to directly connect the criteria used, biological sex, to the purpose of the law, and they have not done that.

Defense counsel just mentioned the *Nguyen versus INS* case as well. That case is actually not in the briefs, I don't

think, but I want to address it briefly. That case was about an immigration law that treated children differently depending on whether they were born to U.S. citizen mothers or fathers. Defendants suggest that this case held that if a law is based on biological differences between men and women, it's generally permissible, and even that such a law can be justified based on administrative convenience. That is not the case, and the Supreme Court in this case was very clear that it was applying heightened scrutiny.

The court has never held that the mere invocation of biological differences is a reason to apply a lower level of review. In fact, the court has held very squarely that all gender-based classifications today warrant heightened scrutiny. That's the *U.S. versus Virginia* case. The court has said that in some cases biological differences may justify a law under heightened scrutiny. That includes the *Clark* case, and I'll get to that in a minute, and that was also the case in this *Nguyen* case, but only when there is a very direct and close relationship between the biological characteristics being used in the law and the purpose of the law. Under heightened scrutiny, that fit has to be close.

The court held in the *Nguyen* case that based on the biology of childbirth, women are physically connected to a child when that child is born and men are not. But the court looks at these laws very carefully and recently struck down

another immigration law that treated children born to U.S. citizens differently depending on whether they were born to a U.S. citizen mother or father. That's *Sessions versus Morales versus Santana*. In that case, the court held that biological differences between maternity and paternity did not justify disparate treatment of unmarried mothers and fathers because it wasn't close enough, closely enough tied to the purpose of the law.

Defendants also put a lot of stock and have mentioned several times this Sixth Circuit decision in *L.W. versus Skrmetti* that was issued this past weekend. That was a split decision by the Sixth Circuit that granted a stay of an order enjoining Tennessee from enforcing its medical ban related to transgender children. It did so based on its holding that neither the Sixth Circuit nor the Supreme Court has recognized transgender status as a suspect classification. That, of course, is not true in the Ninth Circuit. That's the *Karnoski versus Trump* case. It's also a temporary ruling in which the majority says that they might actually be getting this wrong, and they rely on reasoning expressly rejected by the Supreme Court in *Bostock* that a facially discriminatory law is not discriminatory if it applies to both sexes. That is not consistent with Supreme Court precedent, and, as the dissent points out, it's contrary to *Bostock's* reasoning.

I also want to address the *B.P.J.* case, which defendants

have brought up several times. It's true that there was a second ruling in *B.P.J.* on the motion for summary judgment which did not address the as-applied challenge related to B.P.J. specifically. That's the issue that is on appeal. The ruling in *B.P.J.* that did address the as-applied challenge, which is the preliminary injunction ruling, ruled in B.P.J.'s favor, and that injunction remains in place pending appeal. It was reinstated by the Fourth Circuit, and B.P.J. is actually able right now to play sports in West Virginia.

THE COURT: Could you turn to the evidence issue.

MS. WHELAN: Yes.

THE COURT: Thank you.

MS. WHELAN: The medical evidence?

THE COURT: The medical evidence, please.

MS. WHELAN: Yes.

Again, the burden is on defendants here, but I will say that plaintiffs have shown that with respect to the science, there really is not a dispute about the key factor that explains the eventual performance advantage in sports, and that is the divergence in testosterone levels that begin during puberty. The state has proffered experts who largely acknowledge this fact but also offer theories about mini-puberty, differences in gene expression, or small differences that appear in growth charts and physical fitness tests that they claim show that boys are better than girls at sports even

before puberty. Most of their cited articles either include postpuberty kids, or they talk about differences that are not linked to athletic ability, or they cite articles that focus on discrete differences in discrete activities but do not account in any way for social factors or even physical factors like obesity.

And defendants' counsel have suggested that these social factors actually cut in their favor. That is not true. The social factors are relevant because they show that the differences between boys and girls are likely not at all related to innate differences but rather in the differences in encouragement or emphasis that is placed on sports for boys in our society versus girls, and that is true and remains true today.

As Dr. Shumer explains in detail in his declarations, none of this information affects this overwhelming scientific consensus that the biological cause of average differences in athletic performance is the circulating levels of testosterone that begin -- the differences in those circulating levels that begin during male puberty. There are no studies that link Dr. Hilton's theory about mini-puberty to any lasting physiological impact, much less athletic advantage. This theory is so out there that one of defendants' other experts, Dr. Brown, makes clear that it is not a basis for any of his opinions.

Indeed, many of the studies defendants' experts cite acknowledge that circulating testosterone is the key. That's the principal driver of physiological differences that become apparent between boys and girls starting in puberty, and that is therefore the key to understanding why you see the disparity eventually in sport. In addition, if you look at the studies that defendants' experts cite, none of them establish a causal connection based on reproductive anatomy or genes alone, separate and apart from circulating testosterone.

Defendants' experts also claim that the differences between men and women are due to biological male physiology and anatomy, which they suggest all transgender women have. They also claim there are differences in athletic ability between boys and girls even before puberty. And Dr. Shumer explains why these opinions are untrue, and I urge you to review his reports. I'll just give a couple of examples here.

He notes, for instance, that Dr. Brown misrepresents Handelman's findings by omitting key portions of that study that contradict Dr. Brown's opinions, including the study's finding that, quote, "the basis for the sex difference in muscle mass and strength is the sex difference in circulating testosterone." And contrary to defendants' experts' claims, studies have repeatedly found that there is no statistical difference in the athletic capabilities of boys and girls until about the age of 12 or 13 years, which is the onset of

puberty. Dr. Shumer attaches, for instance, growth charts from the CDC in his most recent declaration. If you look at those growth charts, you can't detect any difference, really, between boys and girls between the ages of zero to 12, and then you start, you begin to see this disparity, and that is because that is when puberty starts.

As to defendants' use of demographic data from physical fitness tests, these do not show what they claim they show, namely that boys have an athletic advantage over girls even before puberty. As Dr. Shumer explains, there is no reliable basis for Dr. Brown or Dr. Blade to attribute those small differences in physiology or anatomy instead to other factors, such as greater societal encouragement of athleticism in boys, greater opportunities for boys to play sports, or different preferences of the boys and girls surveyed.

With respect to Dr. Brown's claim that puberty-suppressing medications do not eliminate athletic advantage, that's also untrue. First, for transgender girls who take this medication just as puberty is beginning, like the plaintiffs in this case, they never even experience the testosterone influx in the first place. For this reason, studies on transgender women who undergo testosterone suppression as adults are irrelevant to transgender girls. Even so, these studies, in fact, show that testosterone suppression in adult transgender women resulted in significant

mitigation of muscle mass and development.

Dr. Brown also discounts basic facts about transgender girls and puberty suppression which he admits is, quote, "outside his area of expertise." He does not understand, for instance, that many transgender girls, including the plaintiffs, begin puberty suppression medication well before the development of increased muscle mass and strength that accompanies later stages of puberty. Transgender girls also then receive hormone replacement medication which allows them to experience female puberty, not male puberty, and as such they develop the physiology of typical females, not males.

Now defendants have disparaged Dr. Shumer or somehow said that you should not put much weight on his opinions. I'm not sure how that's possible to say about Dr. Shumer, but I'll let the Court decide. He's a medical doctor. He's an endocrinologist. They suggest that he doesn't know the effect of the medication that he prescribes for his own patients, which doesn't make any sense. He has treated more than 600 transgender girls. Literally his specialty is understanding the endocrinology systems, understanding hormones. That is his specialty. That's what he does. To suggest he doesn't understand that is baffling.

I also want to point out that even if defendants' experts' theories were medically sound, which they are not, they don't survive heightened scrutiny. It's not just any

differences between men and women or girls and boys. They have to be differences that have a direct demonstrable connection to athletic ability. That's the problem with defendants' experts and their theories. At most, they prove only that small and variable differences between prepuberty boys and girls exist, but they say nothing about any athletic advantage that may result. This is also the analysis that the *Hecox* court engaged in.

To take just one example, even transgender girls who receive hormone medication at a later stage of puberty might not have any height advantage whatsoever over other girls. In short, simply knowing a girl is transgender tells you absolutely nothing about that girl's athletic performance or ability. And the fact that the ban sweeps so broadly is evidence of its intent. It wasn't to try to tailor this rule to fair play or safety in sport. It was intended to target all girls who are transgender in this state on that status alone and make sure that they were excluded.

Defendants have the burden here. Arizona is the actor that has erected this categorical ban and drawn these classifications, and that means defendants have to come forward and show an exceedingly persuasive justification for this law. So even if there were some relevant debate about the science or even if there weren't total consensus on the role of testosterone during puberty, that means the state

loses and can't carry its burden.

The last thing I want to address, Your Honor, is the claim that somehow transgender girls playing on coed teams means that they aren't harmed here. First of all, that's not practical. We are aware of only a very few coed teams that are available in Arizona, if any. The vast majority of sports competitions are between teams that are separated into boys and girls' teams. Legally, we also would never accept this sort of separate but equal logic in any other discrimination context, and we urge the Court to reject it in this case as well, just as the Fourth Circuit did in *Grimm*.

If I could just have a minute to double-check my notes, Your Honor.

THE COURT: You may.

MS. WHELAN: Sorry. I just want to address the point about *Doe versus Snyder*.

The defendants claim that the holding in *Doe versus Snyder* was dicta, but in any event, even if that were true, which we do not agree with, the subsequent decision in *Grabowski versus Arizona Board of Regents* later affirmed this holding.

Regarding the *Clark* case, Your Honor, in that case, which defendants claim is identical here -- I won't rehash why we don't agree. But in that case, the parties stipulated that due to the average physiological differences, males would

displace females to a substantial extent and athletic opportunities for women would be diminished if boys were allowed to play on the girls' volleyball team. That is not true here. Later, the court found that males still outnumber females two to one in sports, so allowing Clark to play on the volleyball team would actually make this problem worse, not better. And the court said: It's clear that a state can evoke a compensatory purpose to justify an otherwise discriminatory classification if members benefited by the classification actually suffer a disadvantage related to the classification.

Again, that is not true here where transgender girls will not displace other girls in sports. I think that it's safe to say that the court would have reached a different result if there was not that stipulation about the average differences being at play and if the displacement would not exist. Indeed, that's the *Hecox* decision.

Just briefly, Your Honor, the suggestion that the evidence that existed in *Hecox* somehow is so different from the evidence here and therefore you shouldn't rely on that decision, that's not true. The consensus, the medical consensus about what causes the differences that will emerge beginning in puberty and later between girls and boys is testosterone. That medical consensus has not changed. The only thing that has changed is that defendants are now

proffering additional theories about the attempt to undermine that, but none of those theories work here, and none of them survive heightened scrutiny, and none of them show that there is just some innate difference between boys and girls that make boys always and forevermore better than girls at sports.

That's all I have, Your Honor.

THE COURT: Thank you.

I would like counsel for Superintendent Horne and for the intervenor legislators, if you could just address briefly, at the beginning of her rebuttal argument, Ms. Whelan referred to the difference in the language that the parties are using. So as far as the defendants here, I just want to be clear, I didn't see anything, but there's not a challenge, is there, to the diagnosis of gender dysphoria?

MR. SMITH: No, Your Honor.

THE COURT: And on behalf of defendant Horne?

MR. WILENCHIK: Well, I think in general that would be correct. I just don't know specifically here that there's enough evidence for me to agree to that as it relates to these two, but, yes, in general.

THE COURT: But as a general matter.

MR. WILENCHIK: Yes.

THE COURT: All right. Thank you.

So I'll take the motion for preliminary injunction under advisement. As far as -- and I realize that there's a request

that there be a ruling in the near future, and I'll do my best to do that.

As far as going forward with the case and presenting the case for a trial, have the parties discussed how you might want to do that?

MR. WILENCHIK: Not really.

THE COURT: Do you expect evidence? Do you need discovery?

MR. WILENCHIK: I think the answer is yes from our standpoint.

THE COURT: All right. So maybe what I should do then is I'll just issue an order directing the parties to meet and confer and make a proposal as to how to resolve the case outside of this motion.

MR. WILENCHIK: Okay.

THE COURT: Then the parties can meet and you can give me your positions, and I'll make a ruling --

MR. WILENCHIK: Thank you, Judge.

THE COURT: -- based on what you submit.

All right. Thank you for your arguments.

MR. WILENCHIK: Thank you.

THE COURT: Have a good rest of your afternoon.

MR. WILENCHIK: You too. Thank you.

MS. WHELAN: Thank you, Your Honor.

(Court adjourned at 4:43 a.m.)

C E R T I F I C A T E

I, Aaron H. LaDuke, do hereby certify that I reported the foregoing proceedings to the best of my skill and ability, and that the same was transcribed by me via computer-aided transcription, and that the foregoing pages of typewritten matter are a true, correct, and complete transcript of all the proceedings had, as set forth in the title page hereto.

Dated this 19th day of July, 2023.

_____s/Aaron H. LaDuke_____
Aaron H. LaDuke, RMR, CRR
Official Court Reporter