No. 23-16026 & 23-16030 (consolidated)

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,

Defendant-Appellant,

and

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

Intervenors-Defendants-Appellants.

On Appeal from the United States District Court for the District of Arizona, Phoenix Cause No. 4:23-cv-00185-JGZ

PLAINTIFFS-APPELLEES' SUPPLEMENTAL EXCERPTS OF RECORD

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Helen Doe, et al.,

Plaintiffs,

v.

Thomas C Horne, et al.,

Defendants.

No. CV-23-00185-TUC-JGZ

ORDER ON MOTION FOR STAY PENDING APPEAL AND REQUEST FOR ADMINISTRATIVE STAY

Before the Court is Intervenor-Defendants' Motion for Stay Pending Appeal and Request for Administrative Stay. (Doc. 132.) Intervenor-Defendants request that the Court stay its July 20, 2023 preliminary injunction. In the alternative, they request an administrative stay of the injunction for seven days to allow time for the United States Court of Appeals for the Ninth Circuit to consider an emergency motion to stay and request for administrative stay.[1] The preliminary injunction at hand enjoins Defendant Horne from enforcing A.R.S. § 15-120.02 (Save Women's Sports Act) as to 11-year-old Jane Doe and 15-year-old Megan Roe. The injunction allows Plaintiffs to participate in girls' sports at their schools when athletics begin in July 2023. Neither school opposes the injunction.

"The bar for obtaining a stay of a preliminary injunction is higher than the *Winter* standard for obtaining injunctive relief." *Index Newspapers LLC v. U.S. Marshals Serv.*, 977 F.3d 817, 824 (9th Cir. 2020). In deciding whether to grant a stay, "a court considers

[1] Intervenor-Defendants request a ruling on their Motion by Monday, July 31, 2023, to allow them time to seek prompt appellate relief, if necessary. (Doc. 132 at 15.)

four factors: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 426 (2009) (cleaned up). "The first two factors are the most critical; the last two are reached only once an applicant satisfies the first two factors." *Al Otro Lado v. Wolf*, 952 F.3d 999, 1007 (9th Cir. 2020) (cleaned up). Applying the *Nken* factors here, the Court denies Intervenor-Defendants' Motion for Stay.

Failure to Demonstrate Strong Showing of Success on Merits

Applicants for a stay pending appeal must make a strong showing that they are likely to succeed on the merits. *Al Otro Lado*, 952 F.3d at 1010. Under the Ninth Circuit's sliding scale approach to preliminary injunctions, "the elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of another." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). For example, where there is a weak irreparable harm showing, the applicant must make a strong showing of a likelihood of success on the merits. *Al Otro Lado*, 952 F.3d at 1010. This sliding scale approach also applies to stays pending appeal. *Id*. at 1007. It is insufficient that the chance of success is better than negligible; the applicant must demonstrate "more than a mere possibility of relief." *Nken*, 556 U.S. at 434. Intervenor-Defendants fail to make the required showing.

Intervenor-Defendants argue they are likely to succeed on the merits for four reasons. (Doc. 132 at 2.) They argue that the Act is subject to rational basis review "[f]or the reasons stated" in their prior briefing. *Id*. at 9. But binding precedent holds that laws that discriminate against transgender persons are sex-based classifications subject to heightened scrutiny. *See Karnoski v Trump*, 926 F.3d 1180, 1201 (9th Cir. 2019) ("We conclude that the 2018 Policy on its face treats transgender persons differently than other persons, and consequently something more than rational basis but less than strict scrutiny applies."). Therefore, rational-basis review does not apply.

Intervenor-Defendants assert that the Court's finding that transgender females who do not undergo male puberty have no competitive advantage over female athletes is clearly erroneous because "all the competent evidence in the record suggests the opposite." (Doc. 132 at 7.) They also argue that "[t]he evidence of male competitive advantage pre-puberty is overwhelming and effectively uncontradicted." (*Id.*) These arguments misstate the record and the evidence. Experts cited by both parties agree that male physiological advantages are largely the result of circulating testosterone levels in men post-puberty. (Doc. 127 at ¶¶ 97, 100, 112-117.) In addition, Plaintiffs' expert provided persuasive evidence that any prepubertal differences between boys and girls in various athletic measurements are minimal or nonexistent. (*Id.* at ¶¶ 109-110.) Defendants' data regarding differences in prepubescent girls' and boys' physical fitness performance was not credited because the data is observational, does not determine a cause for what is observed, and fails to account for other factors which could explain the data. (*Id.* at ¶¶ 101, 103-106, 109-110.)

Intervenor-Defendants argue that the Court misapplied heightened scrutiny. (Doc. 132 at 3-7.) To withstand heightened scrutiny, a classification by sex "must serve important governmental objectives and must be substantially related to achievement of those objectives." (Doc. 127 at ¶ 145) (quoting *Craig v. Boren*, 429 U.S. 190, 197 (1976)). According to Intervenor-Defendants, the Court required perfect tailoring of the Act to Plaintiffs rather than assessing the validity of the classification as a whole. (Doc. 132 at 5-7.) Intervenor-Defendants argue that the Court disregarded extensive evidence of the competitive advantages for the large majority of transgender–female athletes, *i.e.*, those that transition after undergoing male puberty, simply because the individual Plaintiffs claim they did not, or will not, undergo male puberty.[2] (*Id.* at 4.)

This argument is unpersuasive. First, it imagines facts that were not presented. Intervenor-Defendants did not introduce any evidence, let alone extensive evidence, that

[2] Although Intervenor-Defendants disparage Plaintiffs' "claims" that they have not, and will not, undergo male puberty, Plaintiffs provide evidentiary support for their statements. *See* Doc. 127 at ¶¶ 24-27, 48-51.

the majority of transgender-female athletes have undergone male puberty. The evidence at the hearing showed only that in the past ten to twelve years, the Arizona Interscholastic Association (AIA) fielded twelve requests and approved seven students to play on a team consistent with their gender identity. (Doc. 127 at ¶ 66.) No evidence was presented as to whether any of those seven students were transgender females, and no evidence was presented as to whether any of those seven students had undergone puberty. This lack of evidence suggests that the Act's categorical bar against transgender female athletes is unrelated to the purpose of the Act.

In addition, Intervenor-Defendants' argument disregards much of the Court's heightened scrutiny analysis. In applying heightened scrutiny, the Court examined the Act's "actual purposes and carefully consider[ed] the resulting inequality." *SmithKline Beecham Corp. v. Abbott Lab'ys*, 740 F.3d 471, 483 (9th Cir. 2014). The Court found that Defendant Horne and Intervenors failed to produce "persuasive evidence at the preliminary injunction stage to show that the Act is substantially related to the legitimate goals of ensuring equal opportunity for girls to play sports and to prevent safety risks," and cited the breadth of the Act and its effect on individuals other than Plaintiffs as support. (*Id.* at ¶¶ 158-161.) Intervenor-Defendants claim in their Motion for Stay that the State's purpose is to regulate unfair advantages caused by transgender-female athletes who have undergone male puberty, but the Act broadly and categorically prohibits all transgender athletes, including prepubescent transgender athletes. The Act bans all education levels of transgender athletes—from kindergarten through college—although there is no evidence of injuries or unfair competitive advantages occurring at the kindergarten level. And despite the State's claim that the Act is intended to protect girls, the Act only bans "biological boys" from girls' teams, without prohibiting "biological girls" from playing on boys' teams, including teams made up of boys who have undergone puberty. (Doc. 127 at ¶¶ 157-160.) Given the Act's overbreadth, it cannot be said that the Court required a "perfect fit." Rather, the State failed to show "an exceedingly persuasive justification" for its discriminatory treatment, *United States v. Virginia*, 518 U.S. 515, 531 (1996), or a

justification that is genuine and not reliant on overbroad generalizations, *id.* at 533.

Finally, Intervenor-Defendants argue that the Court's conclusion that the Act violates Title IX is unlikely to be upheld on appeal because Title IX specifically authorizes separation of sports teams based on biological sex which *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), and *Grabowski v. Arizona Board of Regents*, 69 F.4th 1110 (9th Cir. 2023), do not change. (Doc. 132 at 10.) Whether legislation that prohibits all transgender athletes from participating in competitive sports violates Title IX is currently subject to debate. A mere "possibility of relief," however, fails to demonstrate a strong showing of likely success on the merits, particularly in light of Plaintiffs' equal protection claim.

The Court concludes that Intervenor-Defendants fail to make a strong showing that they are likely to succeed on the merits of their claim. This failure is particularly detrimental because, as discussed below, Intervenor-Defendants' showing of irreparable harm is weak. *See Al Otro Lado*, 952 F.3d at 1010 (where there is a weak irreparable harm showing, the applicant must make a strong showing of a likelihood of success on the merits). Thus, the first *Nken* factor favors Plaintiffs.

Intervenor-Defendants Will Not Suffer Irreparable Harm Absent Stay

An applicant for stay pending appeal must demonstrate that a stay is necessary to avoid likely irreparable injury to the applicant while an appeal is pending. *Al Otro Lado*, 952 F.3d at 1007. Showing a possibility of irreparable injury is insufficient. *Id.* The applicant is required to show that irreparable harm is likely to occur before the appeal is decided. *Id.* The applicant's irreparable harm burden "is higher than it is on the likelihood of success prong, as [it] must show that an irreparable injury is the more probable or likely outcome." *Id.*

In its Order granting the preliminary injunction, the Court concluded, "There is no evidence that any Defendant will be harmed by allowing Plaintiffs to continuing playing with their peers as they have done until now." (Doc. 127 at ¶ 184.) Intervenor-Defendants advance little argument as to their irreparable harm, citing only "the sovereign interest of the State of Arizona in enforcing its valid statutes." (Doc. 132 at 14.). Clearly, however,

there is no irreparable harm if the statute is not valid. Intervenor-Defendants "cannot suffer harm from an injunction that merely ends an unlawful practice." *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013). The second *Nken* factor favors Plaintiffs.

Substantial Injury to Other Parties

Because Intervenor-Defendants fail to establish the first two *Nken* factors, the Court need not address the last two factors. *See Al Otro Lado*, 952 F.3d at 1007 ("The first two factors are the most critical; the last two are reached only once an applicant satisfies the first two factors.") (cleaned up). However, factors three and four also do not support Intervenor-Defendants' request for stay.

The third factor, "whether issuance of the stay will substantially injure the other parties interested in the proceeding," weighs against granting a stay. Plaintiffs will suffer injury in the absence of a stay. Prior to the Act, there were no bars to Plaintiffs participating in girls' sports at their schools. If a stay is granted, Plaintiffs will suffer severe and irreparable mental, physical, and emotional harm if the Act applies to them because they cannot play on boys' sports teams; the Act will effectively exclude Plaintiffs from school sports and deprive them of the social, educational, physical, and emotional health benefits that both sides acknowledge come from school sports; and Plaintiffs will suffer the shame and humiliation of being unable to participate in a school activity simply because they are transgender—a personal characteristic over which they have no control. (Doc. 127 at ¶¶ 174-176.) The school year has started, and Plaintiffs want to participate in girls' sports. The issuance of a stay would deprive Plaintiffs the opportunity to participate in girls' first quarter sports—which are currently in progress—including the first cross-country meet scheduled for August 14, 2023. (Doc. 127 at ¶¶ 32, 35, 38, 41, 55, 57-60.)

Intervenor-Defendants argue that the preliminary injunction imposes irreparable harm on other interested parties. (Doc. 132 at 12-14.) They argue that, absent a stay, "biological girls" will be unfairly displaced from participation in girls' sports by Plaintiffs, whose involvement will necessarily exclude "biological girls" who try out for the team, and that Plaintiffs' involvement will reduce the other girls' playing time and success. (*Id.*

at 12-13.) However, there is no evidence that Plaintiffs' participation will cause such harms to other participants. There is no evidence that the schools limit the number of girls who participate in any of the sports at issue and there is no evidence that either Plaintiff would present an advantage, let alone an unfair advantage, if allowed to participate.

Public Interest Lies in Plaintiffs' Favor

Intervenor-Defendants argue that the public interest favors a stay because the public has an interest in upholding the laws passed by their elected officials. (Doc. 132 at 15.) However, as discussed above, a state cannot suffer harm from an injunction that merely ends a discriminatory practice. *Rodriguez*, 715 F.3d at 1145. Thus, it follows that, "it is always in the public interest to prevent the violation of a party's constitutional rights." (Doc. 127 at ¶ 180) (quoting *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012)). The fourth *Nken* factor supports denial of the Motion for Stay.

Administrative Stay Would Disrupt Status Quo

As an alternative to their request for a stay pending appeal, Intervenor-Defendants request a seven-day administrative stay to allow the Circuit Court of Appeals time to consider their emergency motion to stay the preliminary injunction order. (Doc. 132 at 15.) An administrative stay "is only intended to preserve the status quo until the substantive motion for a stay pending appeal can be considered on the merits." *Doe #1 v. Trump*, 944 F.3d 1222, 1223 (9th Cir. 2019). The *Nken* factors do not support imposition of an administrative stay. Moreover, prohibiting Plaintiffs from participating in girls' athletics would disrupt the status quo. Accordingly,

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IT IS ORDERED that Intervenor-Defendants' Motion for Stay Pending Appeal and Request for Administrative Stay (Doc. 132) is DENIED.

Dated this 31st day of July, 2023.

Honorable Jennifer G. Zipps
United States District Judge

Exhibit 25

STATE OF ARIZONA
OFFICE OF THE GOVERNOR

DOUGLAS A. DUCEY
GOVERNOR

EXECUTIVE OFFICE

March 30, 2022

The Honorable Katie Hobbs
Secretary of State
1700 W. Washington, 7th Floor
Phoenix, AZ 85007

RE: Senate Bill 1138 irreversible gender reassignment surgery; minors & Senate Bill 1165 interscholastic; intramural athletics; biological sex

Dear Secretary Hobbs,

Today I signed S.B. 1138 and S.B. 1165, legislation to protect participation and fairness for female athletes, and to ensure that individuals undergoing irreversible gender reassignment surgery are of adult age. This legislation is common-sense and narrowly-targeted to address these two specific issues — while ensuring that transgender individuals continue to receive the same dignity, respect and kindness as every individual in our society.

S.B. 1138 delays any irreversible gender reassignment surgery until the age of 18. The reason is simple, and common sense – this is a decision that will dramatically affect the rest of an individual's life, including the ability of that individual to become a biological parent later in life.

Distinguishing between an adult and a child in law, as this bill does, is not unique. Throughout law, children are protected from making irreversible decisions, including buying certain products or participating in activities that can have lifelong health implications. These decisions should be made when an individual reaches adulthood. Further, many doctors who perform these procedures on adults agree it is not within the standards of care to perform these procedures on children.

The irreversible nature of these procedures underscores why such a decision should be made as an adult, not as a child, and further supports the importance of this legislation.

S.B. 1165 creates a statewide policy to ensure that biologically female athletes at Arizona public schools, colleges, and universities have a level playing field to compete. This bill does not deny student-athletes the eligibility to play on teams not designated as "female," and it doesn't impact club sports leagues offered outside of schools. Every young Arizona athlete should have the

opportunity to participate in extracurricular activities that give them a sense of belonging and allow them to grow and thrive.

This legislation simply ensures that the girls and young women who have dedicated themselves to their sport do not miss out on hard-earned opportunities including their titles, standings and scholarships due to unfair competition. This bill strikes the right balance of respecting all students while still acknowledging that there are inherent biological distinctions that merit separate categories to ensure fairness for all.

Sincerely,

Douglas A. Ducey
Governor
State of Arizona

cc: The Honorable Karen Fann
The Honorable Rusty Bowers
The Honorable Warren Petersen
The Honorable Nancy Barto

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Attorney for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE STATE OF ARIZONA
TUCSON DIVISION

Jane Doe, by her next friends and parents Helen Doe and James Doe; and Megan Roe, by her next friends and parents, Kate Roe and Robert Roe,

Plaintiffs,

vs.

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

Defendants.

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

STIPULATION IN LIEU OF ANSWER BY DEFENDANTS KYRENE SCHOOL DISTRICT AND LAURA TOENJES

In lieu of a formal answer to the Complaint, Defendants Kyrene School District and Laura Toenjes, together with Plaintiffs Jane Doe and Megan Roe, stipulate as follows:

1. As noted in Paragraph 54 of the Complaint, but for the ban enacted by the Arizona Legislature codified as Ariz. Rev. Stat. § 15-120.02, the Kyrene School District would permit Plaintiff Jane Doe to play on girls' sports teams. Defendants Kyrene School District and Superintendent Toenjes are obligated, under Arizona law, to apply the statutory ban against transgender girls' participation on girls' sports teams unless and until the courts determine that to do so would be unlawful; in that event, Defendants would apply the law as interpreted by this

Court. Defendants further assert that they are not adverse to Plaintiffs except as required by a law they have no intention to defend, and that they take no position concerning the merits of the legal issues raised by the Complaint and to be decided by this Court.

2. Accordingly: (1) Defendants Kyrene School District and Laura Toenjes will not be an active participant in this case, including filing any response to Motions currently pending before the Court; (2) Defendants Kyrene School District and Laura Toenjes will fully abide by, and take all appropriate actions to implement, the decisions of the Court regarding the declaratory and injunctive relief sought by Plaintiffs; and (3) If Plaintiffs prevail in this action, Plaintiffs agree not to seek a separate attorneys' fee award against Defendants Kyrene School District and Laura Toenjes pursuant to 42 U.S.C. § 1988. Defendants Kyrene School District and Superintendent Toenjes and Plaintiffs acknowledge, however, that the Court will decide Plaintiffs' fee application, including if or how to allocate a fee award among all of the Defendants. In their fee application, Plaintiffs will highlight the lack of resources expended in prosecuting this case against Defendants Kyrene School District and Laura Toenjes to the Court.

DATED this 30th day of May, 2023.

By: /s/ Jordan T. Ellel (with permission)
Jordan T. Ellel, Esq.
Attorney for Defendants Kyrene School District and Laura Toenjes, in her official capacity.

By: /s/ Colin M. Proksel
Colin M. Proksel (034133)
Attorney for Plaintiffs

AIA™

2022-2023

CONSTITUTION, BYLAWS, POLICIES AND PROCEDURES

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41.9 TRANSGENDER POLICY

GENDER IDENTITY PARTICIPATION – all students should have the opportunity to participate in Arizona Interscholastic Association (AIA) activities in a manner that is consistent with their gender identity, irrespective of the sex listed on a student's eligibility for participation in interscholastic athletics or in a gender that does not match the sex at birth, via the following procedure below. Once the student has been granted eligibility to participate in interscholastic athletics consistent with the athlete's gender identity, the eligibility is granted for the duration of the student's participation and does not need to be renewed every sport season or school year. All discussion and documentation will be kept confidential, and the proceedings will be sealed unless the student and family make a specific request.

41.9.1 **NOTICE TO THE SCHOOL**: the student and/or parents shall contact the school administrator or athletic director indicating that the student has a consistent gender identity different than the sex listed on the student's school registration records, and that the student desires to participate in activities in a manner consistent with the student's gender identity.

41.9.2 **NOTICE TO THE AIA**: The school administrator shall contact the AIA office, which will assign a facilitator who will assist the school and student in preparation and completion of the AIA Gender Identity eligibility appeal process.

41.9.3 **FIRST LEVEL OF REVIEW**

The appealing student should provide the AIA with a form that includes the following:

a) A student request to participate on an athletic team(s) that differs from their sex assigned at birth:
b) Support from the student's parent or guardian.
c) Support from a school administrator
d) A copy of the PPE, signed by a qualified health care provider

The AIA shall schedule a meeting with the Gender Identity Eligibility Committee, a subcommittee of the AIA Sports Medicine Advisory Committee as expeditiously as possible after receipt of all required documentation. The committee may request an in person meeting with the student and parents and/or guardian if there are any additional questions or concerns by the committee after review of above documentation. If the Gender Identity Eligibility Committee, upon review of the above documentation, finds that the student's request is appropriate and is not motivated by an improper purpose and there are no adverse health risks to the athlete, then a supportive recommendation shall be made by the committee to the AIA Executive Board for the athlete's participation in sex-segregated activities consistent with the student's gender identity.

41.9.4 **SECOND LEVEL OF APPEAL**

Per AIA Bylaws 15.13.2 in all other cases, a member school may appeal on behalf of a student his/her ineligibility by notifying the Executive Board of the appeal in writing, setting out fully and completely the basis for the appeal. The Executive Board, utilizing the authority under AIA Bylaw 7.2.3.7, shall respond in writing within a reasonable time.

DECLARATION OF DR. JULIE SHERRILL

STATE OF ARIZONA)
) ss.
County of Pima)

I, Dr. Julie Sherrill, declare as follows:

1. I am over the age of 18 years and competent to testify to the matters set forth in this Declaration.

2. I am the Head of School at The Gregory School, a private, independent school in Tucson, Arizona. I have held that position since 2013.

3. The Gregory School is organized as a non-profit corporation. It has 501(c)(3) tax-exempt status.

4. The Gregory School does not, as a general rule, accept any federal funding, loans, or grants. It did, during the COVID-19 pandemic, apply for and receive a loan from the Small Business Administration pursuant to the Paycheck Protection Program. That PPP loan was forgiven as of December 31, 2020.

5. With respect to Megan Roe, while The Gregory School permits Megan to participate and practice with the girls' volleyball team, she is not currently able to participate in interscholastic competition due to A.R.S. § 15-120.02.

I declare under the penalty of perjury that the foregoing is true and correct.

Date: 5/18/23

Julie Sherrill
Dr. Julie Sherrill