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

12 Jane Doe, *et al.*,

13 Plaintiffs,

14 v.

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

20 Defendants.
21

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

**Motion for Stay Pending Appeal and
Request for Administrative Stay**

22 Pursuant to Rule 8(a)(1)(A) of the Federal Rules of Appellate Procedure and Rule
23 62(c) of the Federal Rules of Civil Procedure, Intervenor-Defendants Arizona Senate
24 President Warren Petersen and Arizona House Speaker Ben Toma (“Movants”)
25 respectfully move this Court for a stay pending appeal of the preliminary injunction granted
26 on July 20, 2023. Movants conferred with Plaintiffs regarding this Motion. Plaintiffs
27 oppose a stay of the preliminary injunction and do not consent to this Motion. In support
28 of the Motion, Movants state as follows:

INTRODUCTION

1
2 A stay pending appeal of the preliminary injunction should be entered because all
3 four stay factors favor Movants.

4 First, Movants are likely to prevail on appeal. The Court misapplied intermediate
5 scrutiny by not assessing the validity of the classification that Plaintiffs challenge as a
6 whole and instead requiring perfect tailoring as to these Plaintiffs. The Court’s finding that
7 there is no competitive advantage for biological boys over girls pre-puberty also is clearly
8 erroneous and against the overwhelming weight of evidence in this case. Rational basis
9 review should have been applied, and the Act satisfies this level of scrutiny because there
10 is a clear justification based on extensive scientific evidence. Finally, the Act does not
11 violate Title IX because Title IX authorizes separation of sports teams based on biological
12 sex, which *Bostock* and *Grabowski* did not change.

13 Second, issuing a stay will impose no cognizable harm on Plaintiffs. Plaintiffs
14 would have an unfair competitive advantage if they played on girls’ teams. Their exclusion
15 from girls’ teams is due to a medical condition, not the States’ sex-based separation of
16 sports teams. Plaintiffs’ long delay before seeking judicial relief also strongly undercuts
17 their claim of irreparable injury.

18 Third, the injunction imposes irreparable harm on other interested parties and on the
19 State. The Court erred by overlooking the injuries to displaced biological girls. Any
20 success by Plaintiffs in try-outs and meets will displace biological girls in making a team,
21 getting playing time, and succeeding in final results. The Court also gave no weight to the
22 irreparable injury to the State of Arizona in enforcing its valid statutes.

23 Fourth and finally, the public interest strongly favors a stay. The public has an
24 interest in upholding the law passed by their elected officials. Girls in Arizona also have
25 an interest in not competing against, being injured by, or being displaced by, biological boys
26 in women’s sports.

27 For these reasons, the Court should enter a stay pending appeal of the preliminary
28 injunction.

ARGUMENT

1
2 In considering whether to grant a stay pending appeal, “a court considers four
3 factors: ‘(1) whether the stay applicant has made a strong showing that he is likely to
4 succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay;
5 (3) whether issuance of the stay will substantially injure the other parties interested in the
6 proceeding; and (4) where the public interest lies.’” *Nken v. Holder*, 556 U.S. 418, 426
7 (2009). These factors favor Movants here.

8 Moreover, as the Court acknowledged, a mandatory injunction that changes the
9 status quo “requires a heightened burden of proof and is particularly disfavored.” Doc.
10 127, at 24 (citing *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d
11 873, 879 (9th Cir. 2009)). The Court held that its injunction is prohibitory, not mandatory,
12 *id.* at 24-25, but this holding is incorrect. The Act went into effect on September 24, 2022,
13 *id.* at 2, and neither Plaintiff brought a challenge at that time. Instead, both Plaintiffs
14 complied with the Act for many months, encompassing multiple sports seasons, before
15 challenging it. *See id.* at 12. The “status quo” is that the Act was continuously in effect
16 before the injunction, and the injunction is thus a “particularly disfavored” *mandatory*
17 *injunction* that required a “heightened burden of proof,” which the Court did not apply. *Id.*
18 at 24.

I. Movants Are Likely to Prevail on Appeal.

19
20 The first factor, likelihood of success on the merits, favors Movants here, for at least
21 four reasons.

A. The Court misapprehended and misapplied intermediate scrutiny.

22
23 First, the Court’s formulation and application of intermediate scrutiny contradicts
24 precedent from the U.S. Supreme Court. The Act provides that sports teams shall be
25 designated “based on the biological sex of the students who participate on the team or in
26 the sport,” and that “[a]thletic teams or sports designated for ‘females,’ ‘women’ or ‘girls’
27 may not be open to students of the male sex.” A.R.S. § 15-120-02. As the Court notes,
28 the act classifies by biological sex for student-athletes of all ages: “The Act applies equally

1 to kindergarten through college teams....” Doc. 127, at 13. The Court does not dispute
2 that the Act advances the State’s interests in fairness, equality of opportunity, and safety
3 for female student-athletes at least at the older age ranges; the Court states, “the problems
4 identified as being addressed by the act—opportunity and safety—are limited to high
5 school and college sports.” *Id.* In addition, the Court finds biological males who have
6 gone through male puberty *do* have a significant competitive advantage in sports. *See id.*
7 at 16. Thus, the exclusion of such athletes from girls’ and women’s teams significantly
8 advances the Act’s interests of fairness, safety, and equality of opportunity for biologically
9 female athletes.

10 Nevertheless, the Court concludes that this substantial body of undisputed evidence
11 establishing the competitive advantage of biological male athletes who transition after
12 going through puberty is “not relevant to the question before the Court: whether
13 transgender girls *like Plaintiffs, who have not experienced male puberty*, have performance
14 advantages that place other girls at a competitive disadvantage or at risk of injury.” *Id.* at
15 16 (emphasis added). The Court thus disregards the extensive, highly probative evidence
16 of competitive advantages for the large majority of transgender-female athletes, *i.e.*, those
17 who transition *after* undergoing male puberty, simply because the two individual Plaintiffs
18 *in this case* claim that they did not or will not undergo male puberty. *Id.* As the Court
19 states, evidence of male competitive advantage after puberty “is not relevant because the
20 Plaintiffs have not and never will experience male puberty.” *Id.* at 17.

21 This is error. Under intermediate scrutiny, which the Court applies, the validity of
22 the classification that Plaintiffs challenge must be assessed by considering *the*
23 *classification as a whole*, not by considering only the narrow *application of that*
24 *classification* to the individual Plaintiffs in their unique circumstances. By reasoning
25 otherwise, the Court effectively applied strict scrutiny by requiring perfect tailoring as to
26 these Plaintiffs—which is not required.

27 The Supreme Court’s precedent makes this clear. Under intermediate scrutiny, the
28 question whether the Act advances the government’s asserted interests “cannot be

1 answered by limiting the inquiry to whether the governmental interest is directly advanced
2 *as applied to a single person or entity*. Even if there were no advancement as applied in
3 that manner ... there would remain the matter of the regulation’s general application to
4 others” *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 427 (1993) (emphasis
5 added). Thus, by focusing solely on whether the Act advances its fairness, safety, and
6 opportunity interests *solely when it applies to Plaintiffs*—to the point of treating extensive
7 evidence of the Act’s success in advancing its interests as to others as “not relevant,” Doc.
8 127, at 16—the Court “thus asked the wrong question.” *Edge Broadcasting*, 509 U.S. at
9 472.

10 Even if the Act did not substantially advance the State’s interests by excluding *these*
11 *specific Plaintiffs* from girls’ teams (which, in fact, it does, *see infra*), “that fact is beside
12 the point, for the validity of the regulation depends on the relation it bears to the overall
13 problem the government seeks to correct, not on the extent to which it furthers the
14 government’s interests in an individual case.” *Ward v. Rock Against Racism*, 491 U.S.
15 781, 801 (1989). “Here, the regulation’s effectiveness must be judged by considering all
16 the varied groups” that it affects—including biological males who transition post-
17 puberty—“and it is valid so long as [Arizona] could reasonably have determined that its
18 interests overall would be served less effectively without the ... guideline than with it.” *Id.*
19 “Considering [the State’s] proffered justifications together,” under intermediate scrutiny
20 the Act is valid if it “directly furthers the [State’s] legitimate government interests and ...
21 those interests would have been less well served in the absence of the ... guideline.” *Id.*

22 Indeed, this requirement of considering the Act as a whole under intermediate
23 scrutiny—instead of requiring the State to provide a case-specific justification *for each*
24 *individual excluded*—is inherent in the very concept of intermediate scrutiny. Intermediate
25 scrutiny for sex- and gender-based classifications does not require perfect tailoring. On
26 the contrary, to justify a sex-based classification, the State need only show an important
27 governmental interest and a “substantial relationship” between the classification and that
28 interest: “The State must show at least that the challenged classification serves important

1 governmental objectives and that the discriminatory means employed are *substantially*
2 *related* to the achievement of those objectives.” *United States v. Virginia*, 518 U.S. 515,
3 533 (1996) (emphasis added) (cleaned up); *see also, e.g., Mississippi Univ. for Women v.*
4 *Hogan*, 458 U.S. 718, 724 (1982) (“The burden is met only by showing at least that the
5 classification serves important governmental objectives and that the discriminatory means
6 employed are substantially related to the achievement of those objectives.”) (quotation
7 marks omitted). As the West Virginia district court concisely observed in its merits ruling:
8 “Sex-based classifications fall under intermediate scrutiny and therefore do not have a
9 ‘narrowly-tailored’ requirement.” *B.P.J.*, 2023 WL 111875, at *8.

10 By considering only the Act *as applied* to the individual Plaintiffs, and disregarding
11 how the Act serves its purposes when applied to the large majority of transgender-female
12 athletes who transition after undergoing male puberty, the Court incorrectly conflated the
13 nature of Plaintiffs’ challenge with the substantive standard governing the Act’s validity.
14 As the Supreme Court has held, “classifying a lawsuit as facial or as-applied affects the
15 extent to which the invalidity of the challenged law must be demonstrated and the
16 corresponding breadth of the remedy, but it does not speak at all *to the substantive rule of*
17 *law necessary to establish a constitutional violation.*” *Bucklew v. Precythe*, 139 S. Ct.
18 1112, 1127 (2019) (emphasis added).

19 When the correct “substantive rule of law” is applied, *id.*, it is clear that the Act
20 substantially advances its important government interests in fairness, safety, and equality
21 of opportunity for female athletes. The Court agrees that these are important government
22 interests, Doc. 127, at 28; *see also Clark, By & Through Clark v. Arizona Interscholastic*
23 *Ass’n* (“*Clark I*”), 695 F.2d 1126, 1131 (9th Cir. 1982), and the Court’s own findings
24 demonstrate that the large majority of transgender-female athletes—*i.e.*, those who
25 transition *after* undergoing male puberty—have a significant athletic advantage over
26 biological-female athletes. *See, e.g.*, Doc. 127, at 17. For example, the Court notes
27 “specific male physiological advantages” that “are a result of testosterone levels in men
28 post-puberty,” and does not dispute that “such advantages are not reversed by testosterone

1 suppression after puberty or are reduced only modestly, leaving a large advantage over
2 female athletes.” *Id.* at 17. These facts alone demonstrate that the Act is “substantially
3 related” to the interests it advances. *Virginia*, 458 U.S. at 724.

4 **B. The Court’s finding that biological males who do not undergo male puberty**
5 **have no competitive disadvantage over female athletes is clearly erroneous.**

6 Second, even if the State were required to provide a case-specific justification for
7 its exclusion of these particular Plaintiffs instead of justifying *the Act as a whole*—which
8 it is not—the injunction is still unlikely to be upheld on appeal. The Court’s key factual
9 findings used to undermine the Act’s justification—*i.e.*, that there is no competitive
10 advantage for biological boys over girls *pre-puberty*, and thus no competitive advantage
11 for transgender-female athletes who suppress male puberty—are clearly erroneous. All the
12 competent evidence in the record points in the opposite direction. As virtually any
13 elementary-school sports coach can attest, there *is* a competitive advantage for boys over
14 girls in sports before puberty, and there is not a scintilla of evidence that puberty blockers
15 and hormone therapy eliminate this advantage.

16 As for the competitive advantage for biological boys before puberty, the Court itself
17 acknowledged some of this evidence:

18 50% of 6-year-old boys completed more laps in the 20-meter shuttle (14)
19 than girls (12). (Brown Decl. (Doc. 82-1; 92-1) ¶ 84.) Other fitness data
20 reflects differences between 9 through 17-year-old boys and girls, with 9-
21 year-old boys always exceeding girls’ running times by various percentages
22 ranging from 11.1-15.2%, *id.* ¶ 89; arm hang fitness scores (7.48 boys, 5.14
23 girls), *id.* ¶ 92; standing broad jump (128.3 boys, 118.0 girls), *id.* ¶ 99. (*See*
24 *also* Brown Decl. (Doc. 82-1; 92-1) ¶106 (quoting Thomas 1985 study at
266) (“Boys exceed girls in throwing velocity by 1.5 standard deviation units
as early as 4 to 7 years of age . . .” and throwing distance by 1.5 standard
deviation units as early as 2 to 4 years of age).)

25 Doc. 127, at 17-18. And there is much more. The evidence of male competitive advantage
26 pre-puberty is overwhelming and effectively uncontradicted. Declaration of Dr. Gregory
27 A. Brown (“Brown Decl.”), Doc. 82-1, ¶¶ 77-115; Rebuttal Declaration of Dr. Gregory A.
28 Brown (“Brown Rebuttal Decl.”), Doc. 87-1, ¶¶ 6-15, 20, 23, 25, 31-32; Declaration of Dr.

1 Emma Hilton (“Hilton Decl.”), Doc. 92-8, ¶¶ 7.1-7.22; Declaration of Dr. Linda Blade,
2 Doc. 92-9, at 6-11.

3 Plaintiffs’ experts contend, and the Court holds, that this overwhelming evidence of
4 pre-puberty male competitive advantage should be discounted entirely because it
5 supposedly arises from “other factors such as greater societal encouragement of athleticism
6 in boys, greater opportunities for boys to play sports, *or* differences in the preferences of
7 the boys and girls surveyed.” Doc. 127, at 19 (emphasis added). Notably, by stating “or,”
8 the Court declines to specify *which* of these three “other factors” (or combination thereof)
9 causes the observed pre-pubescent male advantages—*i.e.*, the Court holds that *some* other
10 factor(s) must cause the competitive advantages, but does not determine what. This is
11 based on speculation, not evidence. And indeed, Plaintiffs’ experts offered only speculation
12 and conjecture—not hard evidence—for their conclusion that other “social” factors cause
13 this discrepancy. Second Rebuttal Declaration of Dr. Daniel Shumer, Doc. 113, ¶¶ 21, 24,
14 46. Based on the record evidence before the Court, therefore, the only credible conclusion
15 is that biological males have a significant competitive advantage pre-puberty. The Court’s
16 conclusion to the contrary contradicts the overwhelming weight of the evidence and
17 common sense.

18 The Court also cited three studies by Handelsman, Senefeld, and McKay. But all
19 three studies found that in children younger than Plaintiffs, boys had competitive
20 advantages over girls. Handelsman reported a pre-pubertal difference between boys and
21 girls in swimming, running, and jumping. Brown Decl., Doc. 82-1, ¶ 127; Brown Rebuttal
22 Dec., Doc. 87-1, ¶ 20 (“This figure demonstrates an average male performance advantage
23 of ~3% in running at age 10, ~4% at age 11, and ~5% at age 12, and this figure also
24 demonstrates an ~6% male advantage in jumping at age 10, and ~5% at ages 11 and 12.”).
25 Senefeld reported that the top 100 boy swimmers had greater swim velocity than the top
26 100 girl swimmers beginning around age 8 (Figure 1), and “beginning at age 10, boys had
27 faster swimming performance than girls.” Jonathon W. Senefeld et al., *Sex Differences in*
28 *Youth Elite Swimming*, (Doc. 88-2), at 39, 41. And McKay’s data showed males were

1 stronger in 11 of 12 tests from ages 3-9 years (Table 1), and that from 10 years of age
2 “males are significantly stronger in all measures.” M.J. McKay, *Normative reference*
3 *values for strength and flexibility of 1000 children and adults* (Doc. 88-3) at 12, 14

4 Likewise, no evidence supports the Plaintiffs’ contention that puberty blockers and
5 hormone treatment eliminate the competitive advantage enjoyed by pre-pubescent males.
6 Brown Decl., Doc. 82-1, ¶¶ 116-125; Brown Rebuttal Decl., Doc. 87-1, ¶ 33; Hilton Decl.,
7 Doc. 92-8, ¶¶ 11.1-11.4.

8 **C. The Act easily satisfies rational-basis review.**

9 For the reasons stated in Intervenor-Defendants’ prior briefing, the Act is subject to
10 rational-basis review. The Court’s alternative holding that the Act fails rational-basis
11 review, Doc. 127, at 30-31, is not likely to be upheld on appeal. The Act satisfies rational-
12 basis scrutiny “if there is any reasonably conceivable state of facts that could provide a
13 rational basis for the classification.” *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307,
14 313, 113 S. Ct. 2096, 2101, 124 L. Ed. 2d 211 (1993). Here, there is not just a
15 “conceivable” justification, but an overwhelming one based on extensive scientific
16 evidence, discussed above. *See supra*.

17 The Court nevertheless holds that the Act fails rational-basis scrutiny because it
18 reflects a “bare ... desire to harm a politically unpopular group.” Doc. 127, at 30-31
19 (quoting *USDA v. Moreno*, 413 U.S. 528, 534 (1973)). This conclusion is insupportable.
20 No competent evidence supports it, and the Court cited none. As *Moreno* makes clear, this
21 conclusion applies only when “[t]he challenged statutory classification ... is clearly
22 irrelevant to the stated purposes of the Act.” *Id.* Here, the separation of sports based on
23 biological sex is *not* “clearly irrelevant to the stated purposed of the Act,” *id.*, as the Ninth
24 Circuit’s case law demonstrates. *Clark I*, 695 F.2d at 1131. Separating sports teams by
25 biological sex “simply recogniz[es] the physiological fact that males would have an undue
26 advantage competing against women,” and “there is clearly a substantial relationship
27 between the exclusion of males from the team and the goal of redressing past
28 discrimination and providing equal opportunities for women.” *Id.* Furthermore, because

1 the Act does not involve a traditionally suspect class, Plaintiffs’ animus claim cannot
2 succeed if the Act serves a legitimate government interest, which the Act does. *Boardman*
3 *v. Inslee*, 978 F.3d 1092, 1119 (9th Cir. 2020); *Animal Legal Def. Fund v. Wasden*, 878
4 F.3d 1184, 1201 (9th Cir. 2018).

5 **D. The Act does not violate Title IX.**

6 The Court’s brief discussion of Title IX, Doc. 127, at 31-32, is unlikely to be upheld
7 on appeal. The Act is valid under Title IX for many of the same reasons that it is valid
8 under the Equal Protection Clause.

9 The Court ignores and does not cite evidence that Title IX, from its inception, is
10 understood to specifically *authorize* the separation of sports teams based on biological
11 sex—exactly what the Act does. Title IX’s contemporaneous implementing regulation, 34
12 C.F.R. § 106.41(b) (entitled “Separate teams”)—which the Court does not acknowledge or
13 cite—makes this point very clear: “Notwithstanding the requirements of paragraph (a) of
14 this section, a recipient may operate or sponsor separate teams for members of each sex
15 where selection for such teams is based upon competitive skill or the activity involved is a
16 contact sport.” *Id.* “Title IX permits sex-separate athletic teams ‘where selection for such
17 teams is based upon competitive skill or the activity involved is a contact sport.’” *B.P.J.*,
18 2023 WL 111875, at *9 (quoting 34 C.F.R. § 106.41(b)). “[I]t would require blinders to
19 ignore that the motivation for the promulgation of the regulation was to increase
20 opportunities for women and girls in athletics.” *Williams v. Sch. Dist. of Bethlehem, Pa.*,
21 998 F.2d 168, 175 (3d Cir. 1993). The Act, “which largely mirrors Title IX,” does not
22 violate Title IX. *B.P.J.*, 2023 WL 111875, at *10.

23 In holding to the contrary, the Court relies heavily on *Grabowski v. Arizona Board*
24 *of Regents*, 69 F.4th 1110, 1116 (9th Cir. 2023), and its discussion of *Bostock v. Clayton*
25 *County*, 140 S. Ct. 1731, 1746-47 (2020). Doc. 127, at 31-32. This was error. *Bostock*
26 explicitly recognized that “sexual orientation” and “gender identity” (including
27 transgender status) are distinct concepts. *Bostock*, 140 S. Ct. at 1746-47. Pervasive
28 harassment based on perceived sexual orientation violates Title IX under *Grabowski*, see

1 2023 WL 3961123, at *2, just as employment discrimination based on sexual orientation
2 may violate Title VI under *Bostock*, but neither *Bostock* nor *Grabowski* addressed whether
3 separating sports teams based on biological sex violates Title IX. *See id.* Title IX and its
4 implementing regulations provide that sports teams separated by biological sex are
5 permissible, see 34 C.F.R. § 106.41(b), and binding Ninth Circuit precedent holds the
6 same. *Clark I*, 695 F.2d at 1127. Nothing in *Grabowski* purports to overrule *Clark I* or
7 *Clark II*—nor could it.

8 **II. Issuing a Stay Will Impose No Cognizable Harm on Plaintiffs.**

9 Because the Act is valid, it imposes no cognizable harm on Plaintiffs. As discussed
10 above, as biological males, Plaintiffs would have an unfair competitive advantage if they
11 played on girls’ teams and forced biological girls to compete against them. Being required
12 to compete on an even biological footing is not a cognizable harm, while forcing girls to
13 compete on an uneven footing against biological boys *is* a cognizable harm—which the
14 Court ignores. *See infra.*

15 To be sure, as the Court held, Plaintiffs contend that they have a medical condition—
16 gender dysphoria—that prevents them from competing on boys’ sports teams. *See Doc.*
17 *127*, at 22-24. But it is not uncommon for biological males to have medical conditions that
18 prevent them from participating on male sports teams, and those males suffer the same
19 injury of being unable to participate in sports. Ultimately, that exclusion is due to their
20 medical condition, not due to the States’ sex-based separation of sports teams.

21 Likewise, Plaintiffs’ assertions of dignitary harms, “shame,” and “humiliation,”
22 *Doc. 127*, at 33, fail to identify cognizable injuries. Requiring Plaintiffs to participate on
23 a competitively even footing presents no objective affront to their dignity and provides no
24 objective basis to experience shame or humiliation. And merely *subjective* feelings of
25 anger, shame, or embarrassment as a result of a government policy, however sincerely felt,
26 do not constitute cognizable irreparable harm—otherwise, every government policy would
27 be subject to an “emotional heckler’s veto.” *See, e.g., Mungia v. Judson Indep. Sch. Dist.*,
28 No. CIV.A SA-09-CV-395-X, 2009 WL 3431397, at *2 (W.D. Tex. Oct. 19, 2009)

1 (“[Plaintiff] has not provided, nor can this Court locate, any authority in which a Court
2 found irreparable harm based on ‘humiliation’ or ‘embarrassment.’”); *Sharon City Sch.*
3 *Dist. v. Pennsylvania Interscholastic Athletic Ass’n, Inc.*, No. CIV.A. 9-213, 2009 WL
4 427373, at *2 (W.D. Pa. Feb. 20, 2009) (rejecting Plaintiff’s argument claiming irreparable
5 harm based on “embarrassment and humiliation”); *United Steelworkers Of Am. Loc. 13792*
6 *v. Mikochem Corp. Cemeteries*, No. 05-73184, 2005 WL 2090884, at *4 (E.D. Mich. Aug.
7 30, 2005) (finding “stigmatization and humiliation” not sufficient to establish irreparable
8 harm”).

9 Finally, Plaintiffs’ long delay before seeking judicial relief strongly undercuts their
10 claim of irreparable injury. As the Court held, Plaintiffs delayed through three sports
11 seasons—almost a year—before challenging the Act. Plaintiff Roe participated in sports
12 in accordance with the Act for many months before challenging the Act. Doc. 127, at 12.
13 This significant delay strongly undercuts the urgency of Plaintiffs’ asserted injuries. *See,*
14 *e.g., Oakland Trib., Inc. v. Chron. Pub. Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985)
15 (“Plaintiff’s long delay before seeking a preliminary injunction implies a lack of urgency
16 and irreparable harm.”); *see also Charlesbank Equity Fund II v. Blinds To Go, Inc.*, 370
17 F.3d 151, 163 (1st Cir. 2004) (“[D]elay between the institution of an action and the filing
18 of a motion for preliminary injunction, not attributable to intervening events, detracts from
19 the movant’s claim of irreparable harm.”); *Ty, Inc. v. Jones Group, Inc.*, 237 F.3d 891, 903
20 (7th Cir. 2001) (“Delay in pursuing a preliminary injunction may raise questions regarding
21 the plaintiff’s claim that he or she will face irreparable harm if a preliminary injunction is
22 not entered.”); *Young v. Motion Picture Ass’n of Am., Inc.*, 299 F.2d 119, 121 (D.C. Cir.
23 1962) (“The delay in filing this action negatives any finding of urgency necessary to justify
24 the interlocutory relief sought.”).

25 **III. The Injunction Imposes Irreparable Harm on Other Parties Interested in** 26 **the Proceeding and on the State.**

27 The Court’s analysis emphasizes the injury to Plaintiffs from exclusion in sports,
28 but it disregards the greater injury to the biological girls unfairly displaced by Plaintiffs’

1 participation in girls' sports. Doc. 127, at 32-34. In the Court's discussion of the last three
2 equitable factors, this critical issue is not mentioned at all. *Id.* Overlooking the
3 commensurate injuries to the displaced biological *girls* is error.

4 The Court's finding of irreparable injury to Plaintiffs rests heavily on the Court's
5 findings of social, emotional, and physical benefits from participation in sports:

6 School sports offer social, emotional, physical, and mental health benefits.
7 The social benefits of school sports include the opportunity to make friends
8 and become part of a supportive community of teammates and peers. School
9 sports provide an opportunity for youth to gain confidence and reduce the
10 effects of risk factors that lead to increases in depression. Students who play
11 school sports have fewer physical and mental health concerns than those that
12 do not. Students who participate in high school sports are more likely to
finish college and participation in high school sports has a positive impact on
academic achievement.

13 Doc. 127, at 15 (citations and paragraph divisions omitted). Needless to say, these same
14 benefits of participating in competitive sports—"social, emotional, physical, and mental
15 health benefits," *id.*—are just as applicable to biological girls as transgender girls. *See*
16 *Clark I*, 695 F.2d at 1131.

17 Here, the Court's own findings demonstrate that Plaintiffs' participation in sports
18 threatens to displace biological girls from limited places on sports teams and competitions.
19 The teams on which Doe and Roe wish to compete have competitive try-outs and
20 competitive meets. Doc. 127, at 7 (Doe "intends to ... try out for the girls' soccer and
21 basketball teams"); *id.* at 8 ("the first cross-country competitive meet will occur the week
22 of August 14, 2023"); *id.* at 9 (Roe "intends to try out for the girls' volleyball team"). This
23 means that Doe and Roe, to the extent that they succeed in try-outs and meets, *ipso facto*
24 will displace biological girls. In every competitive try-out, a Plaintiff making the team
25 displaces a biological girl who otherwise would have made the team. In every volleyball
26 and basketball game, a Plaintiff getting coveted playing time displaces a biological girl
27 who thus does not get that playing time. Cross-country meets are scored by ordering *all*
28 runners who participate from first to last. That means that a transgender runner who takes

1 any place but last displaces *every* biological girl who finishes after the transgender runner
2 by at least one place. Competitive sports are zero-sum by their very nature. The Court’s
3 analysis ignores the injuries to the biological girls unfairly displaced by biological boys,
4 and it thus relegates them to the status of anonymous, voiceless victims.

5 The Court holds that there will not be much impact on Arizona girls because there
6 are relatively few transgender athletes in Arizona, reasoning as follows: “Less than one
7 percent of the population is transgender, with male and female transgender people being
8 roughly the same in number.... It appears untenable that allowing transgender women to
9 compete on women’s teams would substantially displace female athletes.” Doc. 127, at 11
10 (quoting *Hecox v. Little*, 479 F. Supp. 3d at 977-78). This holding contradicts the Ninth
11 Circuit’s reasoning in *Clark II*, which emphasized the displacement injury that occurs
12 “even to the extent of one player.” *Clark By & Through Clark v. Arizona Interscholastic*
13 *Ass’n*, 886 F.2d 1191, 1193 (9th Cir. 1989) (“*Clark I*”). “If males are permitted to displace
14 females on the school volleyball team *even to the extent of one player* like Clark, the goal
15 of equal participation by females in interscholastic athletics is set back, not advanced.” *Id.*
16 (emphasis added).

17 The Court also errs by giving no weight to the irreparable injury to the sovereign
18 interest of the State of Arizona in enforcing its valid statutes, which is a considerable injury
19 under our system of federalism. “[A]ny time a State is enjoined by a court from
20 effectuating statutes enacted by representatives of its people, it suffers a form of irreparable
21 injury.” *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers)
22 (internal quotation omitted); *see also Coalition for Economic Equity v. Wilson*, 122 F.3d
23 718, 719 (9th Cir. 1997) (“[I]t is clear that a state suffers irreparable injury whenever an
24 enactment of its people or their representatives is enjoined”); *L.W., et al. v. Skrmetti, et al.*,
25 No. 23-5600 at 14 (6th Cir. July 8, 2023) (holding that a State faces irreparable harm if its
26 law is enjoined, including the inability “to enforce the will of its legislature”).

27 **IV. The Public Interest Strongly Favors a Stay.**

28 The final factor—public interest—“merge[s]” with the injury to the State and its

1 citizens. *Nken v. Holder*, 556 U.S. 418, 435 (2009) (“[T]he harm to the opposing party and
2 weighing the public interest ... merge when the Government is the opposing party.”). As
3 noted, the Court holds that there are relatively few transgender athletes who have sought
4 access to girls’ and women’s teams in Arizona so far, and thus it concludes that the
5 injunction will have little impact on the public interest. Doc. 127, at 11. This is error.
6 *Nken* held that “courts must be mindful that the Government’s role as the respondent in
7 every removal proceeding does not make the public interest in each individual one
8 negligible, as some courts have concluded.” *Nken*, 556 U.S. at 435. The fact that such
9 proceedings apply to a single person does not undermine the strong public interest in
10 upholding the law. Permitting a single transgender-female athlete to participate on girls’
11 teams “permits and prolongs a continuing violation of ... law.” *Id.* (square brackets
12 omitted). The Act, as a duly enacted law adopted by Arizona’s elected representatives, is
13 itself a clear and authoritative declaration of the public interest in Arizona. *See, e.g.*,
14 *Virginian Ry. Co. v. Sys. Fed’n No. 40*, 300 U.S. 515, 552 (1937) (holding that a policy
15 enacted in a statute “is in itself a declaration of public interest and policy which should be
16 persuasive in inducing courts to give relief”). The Court errs by disregarding these public
17 interests.

18 CONCLUSION

19 Intervenor-Defendants respectfully request that the Court grant this Motion to Stay.
20 In the alternative, should the Court deny this Motion, Intervenor-Defendants respectfully
21 request an administrative stay of the preliminary injunction for seven days to allow time
22 for the Ninth Circuit to consider an emergency motion to stay and request for
23 administrative stay. Intervenor-Defendants respectfully request a ruling by this Court on
24 this Motion by Monday, July 31, 2023, to allow Intervenor-Defendants time to seek prompt
25 appellate relief, if necessary.
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28

1 Dated: July 24, 2023

Respectfully submitted,

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11 * *pro hac vice*

12 *Attorneys for Proposed Intervenor-Defendants*

13 **CERTIFICATE OF SERVICE**

14 I hereby certify that, on July 24, 2023, I caused a true and correct copy of the
15 foregoing to be filed by the Court's electronic filing system, to be served by operation of
16 the Court's electronic filing system on counsel for all parties who have entered in the case.

17 /s/ Justin D. Smith

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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

**[PROPOSED] ORDER ON MOTION
FOR STAY PENDING APPEAL AND
REQUEST FOR ADMINISTRATIVE
STAY**

Before the Court is a Motion for Stay Pending Appeal and Request for Administrative Stay filed by Intervenor-Defendants.

IT IS ORDERED that the Motion is **GRANTED**. The Preliminary Injunction (Doc. 127) is **STAYED** pending the Ninth Circuit’s resolution of Intervenor-Defendants’ appeal.

Dated this ___ day of July, 2023.