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11  
12 **UNITED STATES DISTRICT COURT**  
13 **FOR THE DISTRICT OF ARIZONA**  
14 **TUCSON DIVISION**

15 Jane Doe, by her next friend and parents  
16 Helen Doe and James Doe; and Megan Roe,  
17 by her next friend and parents, Kate Roe and  
18 Robert Roe,

19 Plaintiffs,

20 v.

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

28 Defendants.

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

**[AMENDED PROPOSED]**  
**CASE MANAGEMENT PLAN**

**AMENDED CASE MANAGEMENT PLAN<sup>1</sup>**

**1. Nature of the Case**

Plaintiffs are two transgender girls who want to play on girls' volleyball, basketball, cross-country, and soccer teams at their schools. Ariz. Rev. Stat. § 15-120.02 (the "Act") categorically bars all transgender girls in all grades from playing on girls sports teams regardless of their individual circumstances. Plaintiffs allege that this exclusion, as applied to Plaintiffs, violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 ("Title IX"), the Americans with Disabilities Act, 42 U.S.C. § 12101 ("ADA"), and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 ("Rehabilitation Act"). Plaintiffs seek declaratory and injunctive relief to permanently enjoin the Act's enforcement as applied to them.

Defendant Horne alleges that the Act does not violate Title IX because Title IX exists in large part to protect women's and girls' rights to fairness and equality in sports competition, and because the regulations under Title IX expressly permit separation of athletes by sex. Defendant Horne alleges that the Act does not violate the Equal Protection Clause because the sex-based classifications in the Act are permissible because they serve important government purposes and are substantially related to those purposes, and because the Act treats all males identically regardless of their gender identity. Defendant Horne alleges that the Act does not violate the ADA or the Rehabilitation Act because the ADA and the Rehabilitation Act excludes gender identity disorders not resulting from physical impairments.

Defendant AIA denies that it applied or enforced the Act in any way that prevented Plaintiffs from participating on sports teams designated as being for females. The responsibility for determining whether students are eligible to participate on a team designated as being for females lies with the principals of each respective school.

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<sup>1</sup> The parties' Case Management Plan has been amended to include the position of the Intervenor-Defendant Legislative Leaders, pursuant to the Court's order of August 22, 2023, Doc. 142.

1 Defendant AIA denies that any act by the AIA violated the Fourteenth Amendment to the  
2 Constitution, Title IX, the ADA, or the Rehabilitation Act. Defendant AIA seeks recovery  
3 of its attorneys' fees and costs incurred in defending against Plaintiffs' claims.

4 Intervenor-Defendants Legislative Leaders allege that the Act does not violate the  
5 Equal Protection Clause because the Act's exclusion of biological males from female  
6 school and college sports teams is rationally related to a legitimate government interest,  
7 including redressing past discrimination against women in athletics, promoting equality of  
8 athletic opportunity, and protecting women. In the alternative, these are important  
9 government objectives that are substantially related to the Act's provisions. Intervenor-  
10 Defendants also allege that the Act does not violate Title IX because that law authorizes  
11 separation of sports teams based on biological sex. Finally, Intervenor-Defendants allege  
12 that the Act does not violate the ADA or the Rehabilitation Act because Plaintiffs' gender  
13 dysphoria is excluded from the definition of "disability," Plaintiffs' gender dysphoria is  
14 not the result of a physical impairment, and Plaintiffs have not been substantially limited  
15 in a major life activity.

## 16 17 **2. Elements of the Claims**

### 18 *A. Plaintiffs' Claims*

#### 19 Equal Protection

- 20 (a) The challenged law discriminates against individuals on the basis of  
21 sex, *see Craig v. Boren*, 429 U.S. 190, 197 (1976)—including  
22 transgender identity, *see Karnoski v. Trump*, 926 F.3d 1180, 1201 (9th  
23 Cir. 2019).
- 24 (b) Defendants must demonstrate that the law "serve[s] important  
25 governmental objectives." *Craig*, 429 U.S. at 197.
- 26 (c) Defendants must demonstrate that the law is "substantially related to  
27 [the] achievement of those objectives." *Craig*, 429 U.S. at 197; *see*  
28 *also Latta v. Otter*, 771 F.3d 456, (9th Cir. 2014) ("The burden of

1 justification the state shoulders under this intermediate level of  
2 scrutiny is demanding: the state must convince the reviewing court  
3 that the law’s proffered justification for the gender classification is  
4 exceedingly persuasive.” (quoting *United States v. Virginia*, 518 U.S.  
5 515, 533 (1996) (cleaned up)).

- 6 (d) The burden of justification rests entirely on the State. *See Mississippi*  
7 *Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) The State must  
8 show “at least that the [challenged] classification serves important  
9 governmental objectives and that the discriminatory means employed  
10 are substantially related to the achievement of those objectives.”  
11 *United States v. Virginia*, 518 U.S. at 533.

12 Title IX

- 13 (a) Defendants receive federal financial assistance. *Schwake v. Ariz. Bd.*  
14 *of Regents*, 967 F.3d 940, 946 (9th Cir. 2020); *see also* 20 U.S.C. §  
15 1681(a).
- 16 (b) Plaintiffs are excluded from participation in, denied the benefits of, or  
17 subjected to discrimination under an education program. *Schwake*,  
18 967 F.3d at 946; 20 U.S.C. § 1681(a).
- 19 (c) This exclusion, denial, or discrimination is on the basis of sex, *see* 20  
20 U.S.C. § 1681(a); *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1741  
21 (2020); *Grabowski v. Ariz. Bd. of Regents*, 69 F.4th 1110, 1116 (9th  
22 Cir. 2023); *Doe v Snyder*, 28 F.4th 103, 114 (9th Cir. 2022); *Schwake*,  
23 967 F.3d at 946.

24 ADA

- 25 (a) The plaintiff is an individual with a disability. *O’Guinn v. Lovelock*  
26 *Correctional Ctr.*, 502 F.3d 1056, 1060 (9th Cir. 2007).

- 1 (b) The plaintiff is “otherwise qualified to participate in or receive the  
2 benefit of some public entity’s services, programs, or activities.”  
3 *O’Guinn*, 502 F.3d at 1060 (cleaned up).
- 4 (c) The plaintiff was “excluded from participation in or denied the  
5 benefits of the public entity’s services, programs, or activities, or was  
6 otherwise discriminated against by the public entity.” *O’Guinn*, 502  
7 F.3d at 1060 (cleaned up); *see also* 42 U.S.C. § 12132.
- 8 (d) The exclusion, denial, or discrimination was “by reason of” the  
9 plaintiff’s disability. *O’Guinn*, 502 F.3d at 1060 (cleaned up); *K.M.*  
10 *ex rel. Bright v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1099 (9th  
11 Cir. 2013) (explaining that the ADA “establishes a ‘motivating factor’  
12 causal standard of liability”); *see also* 42 U.S.C. § 12132.

13

14 ADA – Title III

- 15 (a) The plaintiff is an individual with a disability, within the meaning of  
16 the ADA. *Molski v. M.J. Cable, Inc.*, 481 F.3d 724, 730 (9th Cir.  
17 2007).
- 18 (b) The defendant “is a private entity that owns, leases, or operates a place  
19 of public accommodation.” *Molski*, 481 F.3d at 730.
- 20 (c) The plaintiff was denied public accommodations by the defendant  
21 because of her disability.” *Molski*, 481 F.3d at 730.

22 Rehabilitation Act

- 23 (a) The plaintiff is an individual with a disability. *O’Guinn*, 502 F.3d at  
24 1060 (9th Cir. 2007).
- 25 (b) The plaintiff is “otherwise qualified” to participate in or receive the  
26 benefit of some public entity’s programs or activities. *O’Guinn*, 502  
27 F.3d at 1060; 29 U.S.C. § 794.

28

1 (c) The plaintiff was denied participation or benefit “solely by reason of  
2 [her] disability.” *O’Guinn*, 502 F.3d at 1060 (cleaned up); *see also* 29  
3 U.S.C. § 794.

4 (d) The program or activity receives federal financial assistance.  
5 *O’Guinn*, 502 F.3d at 1060; *see also* 29 U.S.C. § 794.

6  
7 *B. Defendants’ Affirmative Defenses*<sup>2</sup>

8 Defendant Horne

9 Defendant Horne does not intend to pursue affirmative defenses, but will defend the  
10 claims on the bases he generally describes *supra* in the Nature of the Case section.

11 AIA

12 No denial of access to, participation in or benefit of playing sports. Defendant AIA  
13 never prevented or otherwise denied Plaintiffs access to, or otherwise prevented Plaintiffs  
14 from participating in or receiving the benefits of, any school sport that is designated for  
15 females. Accordingly, all of Plaintiffs’ claims against the AIA fail as a matter of law.

16 No ownership, lease or operation of a place of public accommodation. Defendant  
17 AIA did not (and still does not) own, lease or operate a place of public accommodation that  
18 denied Plaintiffs from participating in, or receiving the benefits of, playing female sports,  
19 so Plaintiffs’ claims for breach of title III of the ADA fail as a matter of law.

20 Intervenor-Defendants Legislative Leaders

21 No denial of access to, participation in or benefit of playing sports. The Act does  
22 not prevent Plaintiffs from playing school sports. Accordingly, all of Plaintiffs’ claims fail  
23 as a matter of law.

24 The complaint fails to state a plausible claim for relief and all Plaintiffs’ claims fail  
25 as a matter of law for the reasons summarized in Intervenor’s statement in the Nature of  
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<sup>2</sup> Defendant The Gregory School (“TGS”) reserves the right to supplement or amend its  
defenses when it files its Answer, which it will do after the Court’s decision on its partial  
Motion to Dismiss. TGS also reserves the right to supplement the discovery section below  
following the Court’s decision on TGS’s Motion to Dismiss.

1 the Case above, and as set forth in the Proposed Motion to Dismiss filed by Intervenors,  
2 Doc. 38-1, and their Response to the Motion for Preliminary Injunction, Doc. 38-2.

3  
4 **3. The factual and legal issues genuinely in dispute**

5 Plaintiffs believe that there are few, if any, factual and legal issues genuinely in  
6 dispute and that the Court will be able to resolve the case on summary judgment at the  
7 close of discovery.

8 Defendant Horne asserts that there are fundamental factual disputes regarding  
9 whether prepubertal biological males have a competitive advantage over biological females  
10 in sports competition, and whether puberty-blocking medication and cross-hormone  
11 therapies reverse those pre-existing competitive advantages, and whether biological males  
12 undergoing puberty suppression and cross-sex hormone therapy nevertheless continue to  
13 develop physiological male advantages such as height and lean muscle mass. The parties  
14 dispute whether participation of transgender females against natal females places the natal  
15 females at an unfair competitive disadvantage, and poses an unfair risk of physical injury  
16 to the natal females. Regarding legal issues in dispute, Defendant Horne also disputes that  
17 the Act violates the Equal Protection Clause, Title IX, the ADA, or the Rehabilitation Act.

18 Defendant AIA agrees that there are no factual disputes as to Plaintiffs' claims  
19 against the AIA, such that summary judgment should resolve such claims.

20 Intervenor-Defendant Legislative Leaders assert that there are genuine legal  
21 disputes to Plaintiffs' Equal Protection claim relating to the appropriate level and  
22 application of scrutiny, to Plaintiffs' Title IX claim relating to the definition of "sex" and  
23 application of the Supreme Court's decision in *Bostock v. Clayton County*, 140 S. Ct. 1731  
24 (2020), and to Plaintiffs' ADA and Rehabilitation Act claims relating to whether Plaintiffs  
25 are "disabled" due to statutory exclusions and the interpretations of "substantially  
26 impaired" and "major life activity." Intervenor-Defendant Legislative Leaders also assert  
27 that there are genuine factual disputes relating to the competitive advantage of biological  
28 boys over biological girls before, during, and after puberty, as well as the competitive

1 advantage of biological boys over biological girls after the administration of puberty  
2 blockers or hormone treatments. There are further genuine factual disputes about issues  
3 relating to the safety and fairness of biological male athletes competing against biologically  
4 female athletes, as well as the scientific basis and efficacy of certain treatments for gender  
5 dysphoria. Additional genuine factual disputes may emerge in discovery, including facts  
6 relating to the competitive advantage and treatment status of the individual Plaintiffs,  
7 which have not yet been subject to any discovery.

8  
9 **4. The jurisdictional basis for the case**

10 This Court has original jurisdiction over the subject matter of this action pursuant  
11 to 28 U.S.C. §§ 1331 and 1343 because the controversy arises under the laws of the United  
12 States, including laws providing for the protection of civil rights, and because this suit  
13 seeks redress for the deprivation, under color of state law, of rights secured by the United  
14 States Constitution.

15 The parties agree that there are no issues regarding jurisdiction.

16  
17 **5. Parties that have not been served and/or not appeared**

18 All parties have been served. The Intervenor-Defendants Legislative Leaders wish  
19 to file their answer or other responsive pleading by **September 12, 2023**.

20 Plaintiffs do not disagree with this deadline. However, it is their position that  
21 pursuant to the Court's prior Order (*see* ECF. No. 79 at 9), Intervenor-Defendants  
22 are not allowed to file a motion to dismiss at this stage of the case. Intervenor-  
23 Defendants disagree with Plaintiffs position and contend that, now that they have  
24 been granted leave to participate in the merits proceeding, they may file either an  
25 answer or a motion to dismiss under Rule 12(b) as their responsive pleading.

26  
27 **6. The names of parties not subject to the Court's jurisdiction**

28 There are no parties not subject to Court's jurisdiction.

1 **7. Dispositive or partially dispositive issues to be decided by pretrial motions**

2 There is a pending motion to dismiss by TGS on whether TGS is subject to Title IX  
3 and Section 504 of the Rehabilitation Act.

4 Plaintiffs currently intend to file for summary judgment at the close of discovery on  
5 all of their claims, which would be dispositive of the issues to be determined in this case.

6 Defendant Horne and the Intervenor-Defendants Legislative Leaders currently  
7 intend to file a motion for summary judgment that would dispose of all claims in the lawsuit  
8 after the close of discovery.

9  
10 **8. Cross-motions for Summary Judgment**

11 The parties would prefer simultaneous briefing. The parties propose 30 pages for  
12 the initial briefs and opposition briefs and 15 pages for the reply briefs. Briefs will be filed  
13 according to the attached schedule:

- 14 a. Summary Judgment Motions: **August 16, 2024**  
15 b. Oppositions: **September 16, 2024**  
16 c. Replies: **October 15, 2024**

17  
18 **9. Deadline for Initial Disclosures**

19 Per Rule 26(a)(1), the parties stipulate to provide initial disclosures by  
20 **September 29, 2023.**

21  
22 **10. Changes in the limitations on discovery imposed by Rule 26(b)(2)**

23 The parties do not have any suggested changes/limitations on discovery at this time.

24  
25 **11. Scope of Discovery**

26 *A. Plaintiffs*

27 Plaintiffs will need to conduct discovery on all defenses raised by Defendant. For  
28 example, Plaintiffs will need to conduct discovery on the origins of, as well as any

1 justifications or governmental interests, for the Ban and Defendants’ enforcement of the  
2 Ban. Plaintiffs also plan to disclose expert witnesses. Because Plaintiffs anticipate  
3 substantial expert discovery (potentially involving at least seven expert witnesses between  
4 the parties), Plaintiffs believe it is most efficient for discovery to be broken down into two  
5 phases: (1) Fact Discovery; and (2) Expert Discovery. Fact Discovery will conclude on  
6 **March 8, 2024** and Expert Discovery will conclude on **July 19, 2024**.

7 *B. Defendants*

8 Defendant Horne currently intends to disclose expert witnesses and take expert  
9 discovery, including depositions. Defendant Horne currently intends to take discovery  
10 related to the harms resulting from biological males competing in sports against biological  
11 females. Defendant Horne agrees that discovery should be separated into fact and expert  
12 discovery phases and agrees with the discovery cut-off dates identified by Plaintiffs above.

13 Defendant AIA agrees with Plaintiffs’ proposal to split discovery between fact and  
14 expert discovery. Defendant AIA anticipates propounding some written discovery and  
15 attending the aforementioned depositions.

16 Intervenor-Defendants Legislative Leaders agree with the position of Defendant  
17 Horne. Intervenor-Defendants anticipate seeking factual discovery, including factual  
18 discovery from Plaintiffs, in addition to expert discovery.

19  
20 **12. A discussion of any issues relating to disclosure or discovery of electronically**  
21 **stored information**

22 The Parties will negotiate an ESI Protocol no later than **September 15, 2023**.

23  
24 **13. A discussion of any issues relating to claims of privilege or work product**

25 The Parties will negotiate a Protective Order that addresses the issues of inadvertent  
26 disclosure of confidential or privileged information by **September 15, 2023**. The parties  
27 will produce a privilege log 30 days after the substantial completion of a document  
28 production.

1 **14. Proposed deadlines**

2 The parties agree on the following deadlines:

- 3 a. Initial disclosures required by Rule 26(a)(1), Fed. R. Civ. P. (*see*  
4 paragraph A.6. of this Order) – **September 29, 2023**
- 5 b. Addition of parties or amending complaint – **October 23, 2023**
- 6 c. Disclosure of witnesses pursuant to Rule 26(a)(3)(A)(i), Fed. R. Civ. P. –  
7 Parties will disclose the names of trial witnesses **at least 30 days before**  
8 **trial** in accordance with Rule 26(a)(3)(B).
- 9 d. Disclosure of initial expert testimony and rebuttal expert testimony  
10 pursuant to Rule 26(a)(2), Fed. R. Civ. P.:
- 11 i. Plaintiffs’ Expert Disclosures and Reports: **March 1, 2024**
- 12 ii. Defendants’ Expert Disclosures and Rebuttal Reports: **April 1, 2024**
- 13 iii. Plaintiffs’ Expert Rebuttal Reports: **May 15, 2024**
- 14 e. Discovery deadlines:
- 15 i. Fact discovery: **March 8, 2024**
- 16 ii. Expert discovery: **July 19, 2024**
- 17 f. Filing dispositive motions: **August 16, 2024.**
- 18 g. Filing of the joint proposed pretrial order:  
19 Deadline to be set following decision on the motion for summary judgment.
- 20 h. Filing of joint settlement status reports: **January 22, 2024**

21

22 **15. Evidentiary Hearings**

23 The parties anticipate filing fully dispositive motions for summary judgment and  
24 defer any pre-trial evidentiary motions until after the Court’s decision on summary  
25 judgment. To the extent that the parties intend to submit *Daubert* or other evidentiary  
26 motions with their motions for summary judgment, the deadline for such motions would  
27 be **August 16, 2024.**

28

1 **16. Estimated Date and Length of Trial**

2 At this time, Plaintiffs believe a trial will not be necessary as they believe the case  
3 can be resolved at summary judgment. However, if the case is not resolved on summary  
4 judgment, then Plaintiffs will be in a better position to determine an estimated length and  
5 any suggestions for shortening the trial at that time. The date for the trial can also be  
6 determined after the Court rules on summary judgment motion(s).

7 Defendant Horne agrees the parties will be in a better position to anticipate the  
8 length of trial after discovery and rulings on dispositive motions. Based on Defendant  
9 Horne's current knowledge and the current status of that case, Defendant Horne estimates  
10 that a four or five-day trial would be appropriate.

11 Defendant AIA believes a trial will not be necessary with respect to the claims  
12 asserted against the AIA because summary judgment should resolve the same.

13 Intervenor-Defendants Legislative Leaders agree with the position of Defendant  
14 Horne.

15  
16 **17. Whether a jury trial has been requested and whether the request for jury trial**  
17 **is contested**

18 Although Defendant Horne has filed a request for jury trial, Plaintiffs believe there  
19 is no right to a jury trial in this case because Plaintiffs do not seek damages and instead  
20 seek only equitable relief. *See City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526  
21 U.S. 687, 719 (1999). Accordingly, Plaintiffs contest the request.

22  
23 **18. Prospects for Settlement**

24 At this time, the Parties do not believe that settlement of this matter is likely and  
25 therefore do not believe a settlement conference would be a prudent use of the parties' time  
26 and resources.

27  
28

1 **19. Placement on the Complex Track for Case Management Purposes**

2 This case does not involve any unusual, difficult, or complex problems that require  
3 placement on the complex track for case management purposes.

4  
5 **20. Any Suggestions to Expedite the Disposition of this Matter**

6 No.

7  
8 Respectfully submitted this 25th day of August, 2023.

9  
10 */s/ Colin M. Proksel*

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**CERTIFICATE OF SERVICE**

I hereby certify that on August 25, 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 all CM/ECF registrants.

I hereby certify that on August 25, 2023, I transmitted the attached document via U.S. mail to the following CM/ECF non-registrants:

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