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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

**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,

v.

**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

**DEFENDANT HORNE'S REPLY
IN SUPPORT OF RULE 39(C)
CROSS-MOTION FOR
ADVISORY JURY**

1 Defendant Thomas C. Horne, in his capacity as State Superintendent of Public Instruction
2 (“Defendant Horne”) hereby Replies in Support of his Cross-Motion for an Advisory Jury in this
3 matter under Fed. R. Civ. P. 39(c), [Dkt 159].

4 **I. ADVISORY JURIES ARE WELL POSITIONED TO MAKE FACT FINDINGS.**

5 On Plaintiffs’ Motion for Preliminary Injunction, the Court made preliminary findings of
6 fact—findings which may be reconsidered on a more complete record in connection with
7 Plaintiffs’ request for a permanent injunction. Defendant Horne believes those preliminary
8 findings of fact were erroneous in light of the extensive, worldwide performance data from widely
9 diverse cultures over a period of many decades that prove—conclusively and beyond good-faith
10 debate—that prepubertal males have a physical performance advantage over prepubertal females.
11 Defendant Horne similarly believes the Court erred in finding that puberty-blocking medications
12 and cross-hormone therapies fully reverse those prepubertal male competitive performance
13 advantages: the existing evidence is to the contrary. Defendant Horne also believes the Court
14 erred in failing to find that biological males who block their puberty nevertheless thereafter
15 develop further, additional competitive advantages over biological females (such as greater height
16 and muscle mass). Defendant Horne does not believe a jury would make these same factual errors,
17 and intends to prove these facts through extensive evidence.

18 Advisory juries exist to provide the Court with a sense of how a group of Arizona citizens
19 would find facts on these dispositive issues. *Kane v. PaCap Aviation Finance, LLC*, 2023 WL
20 5499994, * 3 (D. Hawaii) (“Advisory juries are also useful to ‘allow[] the judge to get some
21 appreciation for the common sense or standard of the community[.]’”) (quoting 9 Wright & Miller,
22 Federal Practice and Procedure: Civil 3d § 2335 (4th ed.) (collecting cases)).¹

23
24 ¹ *National Ass’n For Advancement of Colored People v. Acusport Corp.*, 226 F.Supp.2d 391, 398-
25 99 (E.D.N.Y. 2002) (advisory jury permitted community participation, incorporated public’s view
26 of morality, and provided guidance on an important question of public policy: courts have the
27 right to convene an advisory jury “‘to have its ‘conscience enlightened.’ . . . advisory juries
28 constitute a fundamental elements of the American legal system . . . advisory juries permit
community participation and may incorporate the public’s views of morality . . . Views on
important issues impinging on national public policy may be obtained from advisory juries.”)
(citations omitted).

1 Plaintiffs first respond to Defendant Horne’s request for an advisory jury by asserting—
2 but failing to present any supporting argument—that “the Court is best positioned to make
3 findings of fact in this case.” *See* Response at 3:1 [Dkt. 161] Plaintiffs do not even attempt to
4 explain why this would be true. Plaintiffs simply make the circular argument that, because the
5 Court has already made fact findings, that therefore the Court is best positioned to make fact
6 findings. *Id.* at 3:1-13 [Dkt. 161] Plaintiffs’ conclusion does not follow from the premise.

7 Juries are regularly tasked with finding dispositive facts in the face of hotly-disputed
8 scientific evidence presented by expert witnesses. The American system of justice trusts that task
9 to juries precisely to avoid a situation where only judges who—when compared to a diverse jury
10 of citizens from the community—are relatively isolated and non-representative of the community
11 in which they serve. Fact finding is not withdrawn from the jury simply because a judge is
12 available to find facts. Plaintiffs first assertion, which is not an argument, therefore fails.

13 **II. ADVISORY JURIES ARE APPROPRIATE IN CASES INVOLVING CLAIMS OF**
14 **DISCRIMINATION.**

15 Plaintiffs next argue the Court should assume that an advisory jury would rely on prejudice
16 to reach its findings. *See* Response at 3:14-26 [Dkt. 161] Again, Plaintiffs simply make the
17 assertion with no supporting evidence. Plaintiffs’ assertion is wrong.

18 In the first place, as in any trial, Plaintiffs’ counsel may conduct voir dire to avoid the
19 seating of a jury prejudiced against their clients.

20 Second, if the Court concludes on the basis of reliable evidence that the advisory jury in
21 fact based its findings on prejudice, the Court would reject such findings.

22 These powerful safeguards reduce or eliminate the risk of prejudice cited by Plaintiffs.

23 Third, extensive caselaw demonstrates that advisory juries are regularly used in cases
24 where the risk of prejudice exists. But the possibility of prejudice exists in many cases and does
25 not require abandonment of the jury system. To the contrary, because individual jurors have their
26 own unique life experiences, the risk of strong prejudice prevailing among a group of several
27 diverse individuals is lower than in a single individual. As these cases demonstrate, cynically
28 assuming the worst regarding jury prejudice is not a basis for denying a party the opportunity to

1 have an advisory jury assist in factfinding. *See, e.g., National Ass'n For Advancement of Colored*
 2 *People v. Acusport Corp.*, 226 F.Supp.2d 391, 398-99 (E.D.N.Y. 2002) (affirming use of advisory
 3 jury: "Views on important issues impinging on national public policy may be obtained from
 4 advisory juries."); *Kolstad v. American Dental Ass'n*, 108 F.3d 1431, 1440 (D.C. Cir. 1997) *reh'g*
 5 *en banc granted in part and opinion vacated in part on other grounds, aff'd*, 139 F.3d 958 (D.C.
 6 Cir. 1998), *decision vacated on other grounds*, 527 U.S. 526 (1999) (affirming use of advisory
 7 jury in Title VII action for intentional gender discrimination); *McCue v. State of Kan., Dept. of*
 8 *Human Resources*, 948 F.Supp. 965, 968 (D. Kan 1996) (advisory jury in Title VII retaliatory
 9 discharge action), *rev'd on other grounds* 165 F.3d 784 (10th Cir. 1999); *Neal v. Second Sole of*
 10 *Youngstown, Inc.*, 2018 WL 1740140, *13 (N.D. Ohio 2018) (advisory jury on ADA claim);
 11 *Bozeman v. Sloss Industries Corp.*, 138 F.R.D. 590, 592-93 (N.D. Ala. 1991) (in Title VII action,
 12 evidence belied the suggestion that juries generally were prejudiced against employers).²

13 **III. ADVISORY JURIES ARE PERMITTED UNDER THE FEDERAL RULES.**

14 Finally, Plaintiffs argue that the Court should not empanel an advisory jury because doing
 15 so would impose additional burdens on the Court and on the jurors. But the argument proves too
 16 much. If advisory juries were only permissible if their use imposed zero expense or burden on
 17 the court or the jurors, no advisory jury would ever be empaneled because there is some expense
 18 and burden associated with using a jury. But the Federal Rules expressly provide for advisory
 19 juries (as do the rules of almost every state court system) and "advisory juries constitute a
 20 fundamental element of the American legal system." *National Ass'n For Advancement of Colored*
 21 *People v. Acusport Corp.*, 226 F.Supp.2d at 398-99.

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 23
 24 ² Plaintiffs' reference to a non-binding District Court order does not compel or even persuasively
 25 recommend a different result. *Ollier v. Sweetwater Union High School Dist.*, 267 F.R.D. 338, 339
 26 (S.D. Cal. 2010). And Plaintiffs' citation to another case for the same proposition similarly fails.
 27 In that 50-year-old case the Fourth Circuit held that the use of an advisory jury in a case involving
 28 a claim for employment discrimination caused "no prejudice" to the plaintiff. *Moss v. Lane Co.,*
Inc., 471 F.2d 853, 854 (4th Cir. 1973). And the *Ollier* dicta that advisory juries are disfavored in
 discrimination cases has been criticized as a relic of a different era that is no longer persuasive
 (let alone controlling on this Court). *Bozeman v. Sloss Industries Corp.*, 138 F.R.D. at 592-93.

1 **CONCLUSION**

2 If the Court does not empanel a jury as of right, the Court should empanel an advisory jury
3 in this action.

4 **RESPECTFULLY SUBMITTED** on October 30, 2023.

5 **WILENCHIK & BARTNESS, P.C.**

6
7 */s/ Dennis I. Wilenchik* _____

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21 **CERTIFICATE OF SERVICE**

22 I hereby certify that on October 30, 2023, I electronically transmitted the attached
23 document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice
24 of Electronic Filing to the CM/ECF registrants.

25
26 *By: /s/ Christine M. Ferreira* _____