APPEAL NOS. 20-35813, 20-35815

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LINDSAY HECOX and JANE DOE, with her
next friends Jean Doe and John Doe,

Plaintiffs-Appellees,

v.

BRADLEY LITTLE, in his official capacity as Governor of the State of Idaho, et al.,

Defendants-Appellants,

and

MADISON KENYON and MARY MARSHALL,

Intervenors-Appellants.

On Appeal from the United States District Court
for the District of Idaho
Case No. 1:20-cv-00184-DCN
Hon. David C. Nye

INTERVENORS-APPELLANTS' PETITION FOR REHEARING EN BANC

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INTRODUCTION AND STATEMENT

Women and girls have overcome decades of discrimination to achieve a more equal playing field in many arenas of American life—including sports. Yet across the nation, female athletes have become bystanders in their own sports, as men identifying as women have entered women's competitions and displaced female competitors.

The Idaho Legislature responded to that injustice by enacting the Fairness in Women's Sports Act, which ensures that girls do not have to compete against boys no matter how they identify. The Act—one of 22 passed by states around the country—is consistent with laws excluding male athletes from female sports that this Court has upheld against equal-protection challenges due to the "average real differences" between the sexes. *Clark, By & Through Clark v. Ariz. Interscholastic Ass'n*, 695 F.2d 1126, 1131 (9th Cir. 1982) (*Clark I*). If male athletes can displace females "even to the extent of one player," then "equal participation by females … is set back." *Clark By & Through Clark v. Ariz. Interscholastic Ass'n*, 886 F.2d 1191, 1193 (9th Cir. 1989) (*Clark II*).

In conflict with those precedents, other circuit decisions, and biology, the panel here invoked the Equal Protection Clause to strike down the Act because it prevents "transgender women and girls,"—i.e., males who identify as women—from competing in "women's student athletics." 8/17/23 SlipOp.12 (Ex.A). It is the first circuit decision holding that men may compete in women's sports based on their identity.

Rehearing en banc is warranted for multiple reasons. To begin, the decision conflicts directly with *Clark I* and *Clark II*, and it does so based on a historical analysis of the Equal Protection Clause that diverges sharply with the Supreme Court's commands in *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111, 2130 (2022), and *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022). Consideration by the full Court is necessary to secure and maintain uniformity of its decisions. Fed. R. App. P. 35(b)(1)(A).

The panel decision also conflicts with decisions from other circuits in its application of intermediate scrutiny. Those circuits recognize that sex is not a stereotype, and defining sex based on biology is not a proxy for transgender discrimination. Indeed, if taken to its logical conclusion, the panel's holding here will prevent states in this Circuit from *ever* classifying on the basis of biological sex. This question of exceptional importance, and the circuit split the panel has created, independently warrant this Court's review. Fed. R. App. P. 35(b)(1)(B).

Time is of the essence. The next women's sports season will begin in a matter of days, and competitors like Intervenors may be forced to compete against males, as has happened in the past. The Court should act quickly on this petition for rehearing en banc, either granting it and ordering expedited briefing and argument, or denying it so that Intervenors can take this important issue to the Supreme Court without delay. Women are entitled to a fair chance to compete.

BACKGROUND[1]

Intervenor Madison Kenyon is a student at Idaho State University, where she runs on the women's track and cross-country teams. Before the fall 2019 cross-country season, she learned she would be competing against a University of Montana male athlete who identifies as female.[2] Competing on the men's team, that student recorded times in multiple events that would have broken national women's records. Unsurprisingly, Kenyon lost to the male athlete by a significant margin every time they competed. Indeed, male athletes identifying as females have won medals and displaced women across the country.

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[1] As recognized in Intervenors' opening brief at 5–14, ECF No. 33. Intervenor Mary Marshall recently graduated from Idaho State University.

[2] A person's sex (male or female) is not "misleading" nor "assigned at birth." *Contra* SlipOp.13. Sex is the "biological indication of male and female (understood in the context of reproductive capacity), such as sex chromosomes, gonads, sex hormones, and nonambiguous internal and external genitalia." Am. Psychiatric Ass'n, *Diagnostic & Statistical Manual of Mental Disorders* 829 (5th ed. 2013). While "gender dysphoria" is a recognized mental-health issue, a person's subjective feelings do not change their sex. There is no scientific basis to believe that men who identify as women *are* women "trapped" in men's bodies. J. Michael Bailey & Kiira Triea, *What Many Transgender Activists Don't Want You to Know: And Why You Should Know it Anyway*, 50 Perspectives in Biology and Medicine 521–34 (Fall 2007); *contra* SlipOp.13–14, 28–30. And the fact that 1 in 5,000 births involves a disorder of sexual development, Peter A. Lee et al., *Global Disorders of Sex Development Update since 2006: Perceptions, Approach and Care*, 85 Hormone Research in Pediatrics 158, 159 (2016); *contra* SlipOp.14, 29 (wrongly claiming 2% of babies—1 in 50—are "intersex"), does not change that. A disordered organ is not a new and different organ altogether.

Against this backdrop, Idaho enacted the Fairness in Women's Sports Act. Under the Act, sports are designated "based on biological sex." Idaho Code § 33-6203(1). The Act does not differentiate between students based on gender identity. In the event of a dispute about an athlete's sex, schools are to ask the student to provide "a health examination and consent form or other statement signed by the student's personal health care provider that shall verify the student's biological sex." Idaho Code § 33-6203(3). The provider can do this based on the provider's knowledge of the patient or a routine sports physical. *Id.*

The Act contains 12 legislative fact findings. These include data about inherent biological and physiological differences between men and women, how those differences affect equal opportunities in sports, and why hormone therapy does not eliminate the physical advantages a male athlete obtains by going through puberty. The panel second-guessed that last point, declaring that lowering "circulating testosterone levels" places men and women on equal athletic footing. SlipOp.40. But as World Rugby concluded after extensive analysis, the evidence consistently shows that, "given the size of the biological differences" between men and women, the "comparatively small effect of testosterone reduction" over 12 months still "allows substantial and meaningful differences to remain." World Rugby, *Transgender Guidelines*, https://perma.cc/R6SN-BWY9; *accord* Opening Br.40–44, ECF No. 33.

PROCEEDINGS

Two plaintiffs filed suit to invalidate the Act immediately after its passage. Lindsay Hecox is a male who identifies as a woman and planned to try out for the women's cross-country team at Boise State University. After the district court issued a preliminary injunction, Hecox tried out and failed to make the women's track team. SlipOp.22 n.7. Hecox withdrew from school, then reenrolled, never completing enough credits to meet NCAA eligibility requirements. Still, the panel determined the case was not moot because Hecox (1) intended to try again, and (2) desired to play women's club soccer, and the Act allegedly prevented that, *Hecox v. Little*, 2023 WL 1097255, at *1-2 (9th Cir. Jan. 30, 2023)—even though the latter was not alleged in the Complaint.

Jane Doe is a female who identifies as a woman and speculates that her sex might someday be "disputed" by a competitor, subjecting her to the Act's verification process. SlipOp.20–21. Neither she nor Hecox showed an "imminent" or "immediate[]" danger of suffering such a verification injury. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013); *Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d 646, 656 (9th Cir. 2002). Yet the district court and the panel decided the challenge to the Act's sex classifications *and* the verification challenge.

The district court dismissed Hecox's facial challenge, then enjoined the Act's enforcement. Idaho and Intervenors appealed. A panel of this Court affirmed in every respect.

ARGUMENT

I. *Clark I* and *Clark II* should have controlled this case, so the panel decision creates a direct intra-circuit conflict.

This Court has already held—twice—that excluding male athletes from female sports teams is substantially related to important government interests and satisfies intermediate scrutiny under the Equal Protection Clause. *Clark I*, 695 F.2d at 1131–32; *Clark II*, 886 F.2d at 1194. In *Clark I*, this Court reviewed an appeal brought by male high-school athletes arguing that a policy prohibiting them from playing on the girls' volleyball team violated the Equal Protection Clause. 695 F.2d at 1127. Under the policy, girls could play on boys' athletic teams. *Id.* And the boys' schools did not have boys' volleyball teams—leaving the girls' teams as their only available option, but for the challenged policy. *Id.*

The district court dismissed the boys' equal-protection claim, and this Court affirmed. *Id.* Applying intermediate scrutiny, this Court framed the issue as "whether the [challenged] policy regarding boys not playing volleyball on the girls' team fails substantially to further an important governmental objective." *Id.* at 1129.

In answering that question, this Court recognized that the Supreme Court has "take[n] into account actual differences between the sexes, including physical ones." *Id.* For example, in *Michael M. v. Sonoma County Superior Court*, Justice Rehnquist, writing for a plurality, observed that the "Court has consistently upheld statutes where the

gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances." *Id.* (quoting *Michael M.*, 450 U.S. 464, 469 (1981)). In that case, the Court had "upheld a statutory rape statute that applied only to males, recognizing that since only women were subject to pregnancy and preventing teenage pregnancy was a legitimate purpose of the statute, [it] could apply differently to the different sexes." *Id.* The Court also rejected the petitioner's argument that the statute was "impermissibly overbroad because it [made] unlawful sexual intercourse with prepubescent females, who are, by definition, incapable of becoming pregnant," calling that a "ludicrous" suggestion. *Michael M.*, 450 U.S. at 475.

Against that backdrop, this Court held that the policy prohibiting boys from playing on girls' sports teams substantially furthered the government's important interest in "redressing past discrimination against women in athletics and promoting equality of athletic opportunity between the sexes." *Clark I*, 695 F.2d at 1131. "[D]ue to average physiological differences, males would displace females to a substantial extent if they were allowed to compete for positions on the volleyball team." *Id.* And there was "no question that the Supreme Court allows for these average real differences between the sexes to be recognized or that they allow gender to be used as a proxy in this sense if it is an accurate proxy." *Id.*

Seven years later, this Court reaffirmed that position in an appeal brought by the brother of one of the *Clark I* plaintiffs. *Clark II*, 886 F.2d at 1192. In *Clark II*, this Court rejected the younger brother's attempt to force his way onto his school's girls' volleyball team. *Id.* at 1193–94. "If males are permitted to displace females on the school volleyball team *even to the extent of one player* like Clark, the goal of equal participation by females in interscholastic athletics is set back, not advanced." *Id.* at 1193 (emphasis added). "While equality in specific sports is a worth-while ideal, it should not be purchased at the expense of ultimate equality of opportunity to participate in sports." *Id.* (quoting *Clark I*, 695 F.2d at 1132). And that included the expense to "ultimate equality" caused by a single male athlete competing on the girls' volleyball team. *Id.* "As common sense would advise against this, neither does the Constitution demand it." *Id.* (quoting *Clark I*, 695 F.2d at 1132).

Until now. Following the district court's lead, the panel deemed the *Clark* cases "inapposite" on two main bases. SlipOp.39–40. First, it was "not clear" that biologically male athletes "who suppress their test-osterone have significant physiological advantages" over biologically female athletes, "unlike the cisgender boys at issue in *Clark I* and *Clark II*." *Id.* at 40 (cleaned up). And second, biological males who identify as female, "like women generally," have "historically been discriminated against, not favored." *Id.* (cleaned up).

That reasoning doesn't distinguish the *Clark* cases; it rewrites them. Both endorsed laws recognizing the "*average* real differences between the sexes." *Clark I*, 695 F.2d at 1131 (emphasis added); *accord Clark II*, 886 F.2d at 1192. And in *Clark I*, it was enough that boys would "on average be *potentially* better volleyball players than girls." *Clark I*, 695 F.2d at 1127 (emphasis added). The Court did *not* suggest in either case that a male athlete can bring a successful claim simply by asserting countervailing interests in addressing past discrimination or by obtaining a court assessment that he lacks "significant physiological advantages" over female athletes. SlipOp.40 (cleaned up).

Quite the opposite, *Clark I* rejected the idea that the existence of "wiser alternatives" might invalidate girls-only policies. 695 F.2d at 1132. True, "specific athletic opportunities could be equalized more fully in a number of ways." *Id.* at 1131. "[P]articipation could be limited on the basis of specific physical characteristics other than sex." *Id.* Or boys could participate "only in limited numbers." *Id.* But the "existence of these alternatives shows only that the exclusion of boys is not *necessary* to achieve the desired goal." *Id.* Under intermediate scrutiny, "absolute necessity is not required before a gender based classification can be sustained." *Id.* Thus, even when "the alternative chosen may not maximize equality" and may instead "represent trade-offs between equality and practicality," the "existence of wiser alternatives" will not invalidate a policy that is "substantially related to the goal." *Id.* at 1131–32.

Intervenor's briefing highlighted that *Clark I* holding. Opening Br.21–22, 31–32, 38, ECF No. 33; Reply Br.15, ECF No. 111. But it featured nowhere in the panel majority's 60-page opinion. And the two opinions are impossible to reconcile. If the panel is right, then *any* laws or policies that distinguish based on sex must be enjoined in their entirety if a single plaintiff can show that it is "not clear," SlipOp.40, that the distinction is an "absolute necessity," *Clark I*, 695 F.2d at 1131.

That cannot be the law. And until now, it wasn't. The panel's decision here gives a green light to *other* subsets of male athletes seeking to challenge girls-only teams. A male athlete with a disability could argue it is "not clear" he has an advantage over female athletes. SlipOp.40. And he would be a member of a class of people who, "like women," have "historically been discriminated against." *Id.* (cleaned up).

Or take *Michael M.* Applying the panel's reasoning, the petitioner there should have *prevailed* on his argument that the law was overbroad because it criminalized "sexual intercourse with prepubescent females, who are, by definition, incapable of becoming pregnant." *Michael M.*, 450 U.S. at 475. After all, it is "not clear" that applying the law to men who target girls who cannot become pregnant advances an interest in preventing teenage pregnancy. The same goes for men who are infertile. Until now, such arguments were "ludicrous." *Id.* Until now, "absolute necessity [was] not the standard." *Clark I*, 695 F.2d at 1132. If allowed to stand, though, the panel's decision changes all that.

II. The panel's claim that the Act discriminates by proxy based on transgender status misapplies this Court's and the Supreme Court's precedent and creates a circuit split.

Also meriting en banc review is the panel's holding that "the Act's use of 'biological sex'" is "'proxy discrimination'" for transgender status. SlipOp.31 (quoting *Pac. Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142, 1160 n.23 (9th Cir. 2013)). *Pacific Shores* defines "proxy discrimination" as discrimination based on "criteria that are almost exclusively indicators of membership in the disfavored group." 730 F.3d at 1160 n.23. "For example, discriminating against individuals with gray hair is a proxy for age discrimination because the fit between age and gray hair is sufficiently close." *Id.* (cleaned up).

The Act does not do that. The Act's biological criteria are not "closely" or "almost exclusively" associated with "membership in the [transgender] group," *id.*; those criteria encompass the much larger group the law actually excludes from girls' sports teams: *all* biological males, no matter their identity. *Accord, e.g.*, *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 275 (1979) (holding veteran hiring preferences are not a "pretext" for sex discrimination because "all nonveterans—male as well as female—are placed at a disadvantage"). And the panel's holding places this circuit directly at odds with the Eleventh Circuit's recent holding that "discrimination based on biological sex" does *not* necessarily entail "discrimination based on transgender status." *Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 809 (11th Cir. 2022) (en banc).

III. In treating transgender status as a quasi-suspect class, the panel decision conflicts with three other circuits.

The bar for recognizing a new quasi-suspect class for purposes of an Equal Protection Clause analysis is "high." *L.W. ex rel. Williams v. Skrmetti*, 73 F.4th 408, 420 (6th Cir. 2023). And the Supreme Court has never recognized gender identity as such a class. Indeed, the Court has only recognized two such classes—and that was "over four decades" ago. *Id.* (citing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441 (1985) (gender and illegitimacy)).

Both the Sixth and the Eleventh Circuits have expressly declined to treat transgender status as a quasi-suspect class. *Skrmetti*, 73 F.4th at 420; *Adams*, 57 F.4th at 803 n.5. So has the Tenth Circuit, following this Court's decision in *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659 (9th Cir. 1977). *Brown v. Zavaras*, 63 F.3d 967, 971 (10th Cir. 1995) (citing *Holloway*, 566 F.2d at 663). *But see Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 611 (4th Cir. 2020) (treating transgender status as a quasi-suspect class).

The panel here said that this Court recognized gender identity as a quasi-suspect class in *Karnoski v. Trump*, 926 F.3d 1180, 1200–01 (9th Cir. 2019). SlipOp.34. But that's not quite right. The Court did instruct the district court there to apply "something more than rational basis but less than strict scrutiny," but it did *not* recognize transgender identity as a suspect or quasi-suspect class. 926 F.3d at 1201.

Karnoski involved a challenge to a policy prohibiting military service by openly transgender individuals, thus regulating based on that status "[o]n its face." *Id.* The district court applied strict scrutiny. *Id.* at 1199. And this Court reversed, directing that "[a]mong the factors to be considered on remand are the level of constitutional scrutiny applicable to the equal protection or substantive due process rights of transgender persons." *Id.* To guide that consideration, the Court did not apply "the factors ordinarily used to determine whether a classification affects a suspect or quasi-suspect class," *id.* at 1200, instead suggesting that "the district court should apply a standard of review that is more than rational basis but less than strict scrutiny." *Id.* at 1201. And the Court was clear that this analysis should be made "as-applied rather than facial," *id.* at 1200 (citation omitted)—the opposite of what the panel did here.

Idaho's Act does not classify based on transgender status—on its face or otherwise. If two boys show up for women's track tryouts, one who identifies as a woman and one as a man, both will be told to attend the men's track tryouts instead. So the full Court should clarify that the Act does not distinguish based on transgender status. After all, "[t]he burden of establishing an imperative for constitutionalizing new areas of American life is not—and should not be—a light one, particularly when the States are currently engaged in serious, thoughtful debates about the issue." *Skrmetti*, 73 F.4th at 415–16 (cleaned up).

IV. The panel decision violates the original public meaning of the Equal Protection Clause.

In declaring that it violates equal protection for a state to ensure equal opportunities for female athletes, the panel made no attempt to justify its holding in accord with "the original fixed meaning" of the "equal protection guarantee." *Skrmetti*, 73 F.4th at 415. "Life-tenured federal judges should be wary of removing a vexing and novel topic of medical debate" about the best way to give women and girls a chance to be champions "from the ebbs and flows of democracy by construing a largely unamendable federal constitution to occupy the field." *Id.*

Both *Bruen* and *Dobbs* affirmed that no matter the constitutional provision at issue, courts "begin with the language of the instrument," *Dobbs*, 142 S. Ct. at 2244–45 (cleaned up), informed by careful "historical analysis," *Bruen*, 142 S. Ct. at 2130. That makes this case easy. Nothing in the Equal Protection Clause's text suggests that states cannot protect women athletes from male competitors simply because a man identifies as a woman. And in the years leading up to and immediately after the Equal Protection Clause's ratification in 1868, there is not a single law, regulation, or case that Appellees can point to where a court circumscribed the government's power to separate sports teams by sex. If three historical firearm regulations did not carry the day in *Bruen*, then *zero* examples cannot show a "broad tradition" of laws prohibiting sex-separated athletics regardless of identity. *Id.* at 2156.

The panel defended its contrary conclusion by asserting that the Fourteenth Amendment's Framers would not have understood "biological sex" in the scientific terms that Idaho used to define it. SlipOp.28 & n.8. But that's irrelevant. What matters is what the public in 1868 would have understood by equal protection of the laws. And no party has presented evidence showing that the public understood equal protection to mean "states cannot classify women's sports based on sex." It is also insulting to say that the public in 1868 had no grasp of "sex" because the science was lacking. *See id.*

Contradicting itself, the panel observes that "transgender people have existed since ancient times." SlipOp.28 n.8. That's not the relevant question. Officials in 1868 did not include "gender identity" in the Fourteenth Amendment's text, nor did they enact any other laws giving men who identify as women the right to participate in women's sports. That silence is dispositive in Appellants' favor.

V. The panel's broad remedy exceeds the judicial power under Article III.

The district court enjoined the Act in all its applications—even the unintrusive act of asking a doctor to certify that a student is a boy or girl. The panel affirmed that broad injunction. But Article III confines courts to cases and controversies. That means courts should not "issue relief that extends further than necessary to remedy the plaintiff's injury." *Commonwealth v. Biden*, 57 F.4th 545, 556 (6th Cir. 2023).

Hecox did not seek class certification and thus can, at most, seek to remedy only Hecox's injury. As the Sixth Circuit recently queried in upholding a state law prohibiting the use of medicines to effect a so-called gender transition on minors: "absent a properly certified class action, why" should one transgender athlete "represent … million[s]?" *Skrmetti*, 73 F.4th at 415. A "rising chorus" suggests that Article III does not allow such sweeping relief. *Id.* (collecting cases).

The panel here held that injunctive relief was proper because the Act is "unconstitutional as currently written." SlipOp.57. But courts decide discrete cases and controversies before them. They restrain applications *to particular persons*; they do not answer "questions for everyone." Samuel Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 417, 421 (2017).

John Doe No. 1 v. Reed, 561 U.S. 186, 194 (2010), is inapposite. *Contra* SlipOp.58 & n.22. There, certain plaintiffs wanted to bar a secretary of state "from making referendum petitions available to the public." *Reed*, 561 U.S. at 194. Enjoining the secretary from doing so would have "reach[ed] beyond the particular circumstances of [the] plaintiffs," so the Court treated the case as facial, even though the plaintiffs brought an as-applied challenge. *Id.* It was not possible to fashion relief only for the plaintiffs; the secretary either could or could not release the petitions.

The opposite is true here. Hecox sought an injunction stopping the Act from applying based on Hecox receiving certain medical interventions, and Doe sought an injunction stopping the Act's verification provisions from applying to her. That does not necessitate an application beyond their "particular circumstances." *Id.* If other male athletes in Idaho identify as women and receive different or no medical intervention yet want to compete in women's sports, nothing stops them from seeking injunctive relief. Unlike in *Doe*, there is no reason for this Court to take Plaintiffs' as-applied challenges and fashion injunctive relief to non-parties.

Finally, the injunction the panel affirmed is especially overbroad regarding the verification provision. The panel characterized the verification process as "invasive," "intrusive," and "humiliating." SlipOp.49–53. But in most instances, that process will require only that a doctor say whether a long-time patient is male or female. Yet the panel still enjoined *all* means of verifying a student's sex, not just those means the panel condemned as intrusive. That, too, exceeded the scope of the panel's jurisdiction.

CONCLUSION

To protect women and girls in sports, time is of the essence. The Court should expeditiously grant or deny the petition for rehearing en banc.

Respectfully submitted,

Dated: August 31, 2023

By: */s/ John J. Bursch*

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CERTIFICATE OF SERVICE

I hereby certify that on August 31, 2023, I electronically filed the foregoing Petition for Rehearing En Banc with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the CM/ECF system, which will accomplish service on counsel for all parties through the Court's electronic filing system.

/s/ John J. Bursch
Counsel for Intervenors-Appellants

August 31, 2023