

Case Nos. 20-35813, 20-35815

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

LINDSAY HECOX, et al.,
Plaintiffs-Appellees,

vs.

BRADLEY LITTLE, et al.,
Defendants-Appellants.

and

MADISON KENYON, et al., Intervenor-Appellants.

On Appeal from the United States District Court for the District of Idaho
D.C. No. 1:20-cv-00184-DCN
(Honorable David C. Nye, Presiding)

APPELLANTS' REPLY BRIEF

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I.

Introduction

The district court preliminarily enjoined Idaho’s Fairness in Women’s Sports Act. This appeal from that injunction presents two primary issues.

First, does the Constitution permit states to decide whether to exclude members of the male sex from female sports to protect fair opportunities for female athletes, as this Court established in *Clark*¹; or instead, does the Constitution require all states to adopt a policy favoring inclusion of male-sexed transgender athletes in female sports, regardless of their sex-based advantages?

The tension between fairness in female sports and transgender inclusion presents a difficult policy choice that athletic organizations are struggling with throughout the world. *See, e.g., Amicus Curiae* Brief of Sandra Bucha, et al. (“Bucha Br.”) (Dkt. 46) at 15-20, 23-25 (discussing tension between fairness and inclusion that is causing organizations such as World Rugby and the International Olympic Committee to reevaluate their policies regarding transgender participation in female sports); Appellants’ Opening Br. (Dkt. 28) at 22-23 & nn. 8-9 (discussing differing and evolving policies). The district court held that the Constitution resolves this policy choice in favor of inclusion: states must allow transgender athletes to

¹ *Clark ex rel. Clark v. Arizona Interscholastic Ass’n*, 695 F.2d 1126 (9th Cir. 1982) (“*Clark I*”); *Clark ex rel. Clark v. Arizona Interscholastic Ass’n*, 886 F.2d 1191 (9th Cir. 1989) (“*Clark II*”).

participate in female sports in spite of this Court's sex-based precedent in *Clark* that allows states to develop their own rules about excluding male athletes from female sports. This Court should not modify that precedent to impose a constitutional requirement that favors inclusion over fairness. Rather, it should continue to provide legislatures the flexibility to develop and refine their approaches and balance the competing interests.

Women's rugby provides an excellent example of the decisions being made in this arena and the benefits of flexibility. World Rugby previously allowed transgender women to participate in women's competition at all levels, but it recently tailored its rules to reflect growing scientific findings. *Bucha Br.* at 15 n.14. Because members of the male sex enjoy physiological advantages that no hormone therapy can erase, World Rugby chose to exclude all members of the male sex, including those who identify as female, from competition at the highest levels, unless they did not experience male puberty. *Id.* at 15-19. But World Rugby did not want to tie the hands of all its members with one hard-and-fast rule.² It instead trusted them to experiment, make policy choices, and implement their own rules. Some leagues may choose to try rules geared toward hormone therapies that may diminish

² See *World Rugby Transgender Guideline*, WORLD RUGBY (Oct. 9, 2020), <https://playerwelfare.worldrugby.org/?documentid=231>; *Summary of Transgender Biology and Performance Research*, WORLD RUGBY (Oct. 9, 2020), <https://playerwelfare.worldrugby.org/?documentid=232>. World Rugby encourages national and local unions to formulate their own policies.

sex-based advantages. Others may choose to favor inclusion regardless of hormone therapy or levels, at the expense of fairness, safety, and sex-based advantages. The wisdom of World Rugby's approach is that it did not mandate a worldwide policy choice.

World Rugby's approach is consistent with this Court's precedent. Neither the Equal Protection Clause nor any other provision of the Constitution says all states must prefer transgender inclusion over biological differences when formulating policies designed to promote fairness in female sports. Nor does the Constitution say states must abide by changing hormone therapy protocols established by sports organizations who are experimenting with policy choices designed to promote inclusion of transgender athletes in female sports. This Court should reverse the district court and refrain from creating a nationwide, constitutionally imposed policy choice that favors inclusion of transgender female athletes over fairness in female sports.

Second, if, as this Court has said, states may exclude males from female sports due to males' sex-based advantages, may states implement a means to verify eligibility in female sports without offending the Equal Protection Clause?

It is self-evident that the greater power to exclude males implies the lesser power to enforce that rule. But the district court disagreed. It held that Idaho violated female athletes' equal protection rights by imposing eligibility rules

reasonably designed to exclude members of the male sex from female sports. This Court should reverse the district court and recognize, as logic requires, that eligibility rules go constitutionally hand-in-hand with permissible sex-based restrictions in female sports.

II.

The District Court Erred by Holding the Act Likely Violates Hecox’s Equal Protection Rights Because Transgender Females and Cisgender Females Have Physiological Differences that are Relevant in Athletics

The Equal Protection Clause “simply keeps governmental decision-makers from treating differently persons who are in all relevant respects alike.” *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (citation omitted). Even accepting, *arguendo*, Plaintiffs’ misframing of the issues here,³ the Act is constitutional because transgender females (*i.e.*, members of the male sex whose gender identity is female), on the one hand, and cisgender females (*i.e.*, members of the female sex who identify as female), on the other, are not “in all relevant respects alike” when it comes to athletics. There are undeniable physiological differences between the two groups. In some circumstances, such as employment, those physiological differences may be irrelevant. *See, e.g., Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020). But in athletics, the physiological differences between the sexes are relevant.

³ *See, e.g.,* Reply Brief of Intervenors-Appellants (explaining that despite Plaintiffs-Appellees’ framing, the proper distinction for analysis here is between biological males and biological females).

This Court and others have long recognized the relevance of sex-based physiological differences in athletics. *See, e.g., Clark I*, 695 F.2d at 1131 (recognizing “the physiological fact that males would have an undue advantage competing against women for positions on the volleyball team” (citation omitted)). Put succinctly, “[b]ecause of innate physiological differences, boys and girls are not similarly situated as they enter athletic competition.” *Kleczek v. Rhode Island Interscholastic League, Inc.*, 612 A.2d 734, 738 (R.I. 1992). “[M]en are taller than women, stronger than women by reason of a greater muscle mass; have larger hearts than women and a deeper breathing capacity, enabling them to utilize oxygen more efficiently than women, run faster, based upon the construction of the pelvic area, which, when women reach puberty, widens, causing the femur to bend outward, rendering the female incapable of running as efficiently as a male. These physiological differences may, on the average, prevent a great majority of women from competing on an equal level with the great majority of males.” *Ritacco v. Norwin Sch. Dist.*, 361 F. Supp. 930, 932 (W.D. Pa. 1973) (quoting *Brenden v. Independent Sch. Dist.* 742, 342 F. Supp. 1224, 1233 (D. Minn. 1972)).

The record here amply supports that legal precedent. As Defendants’ expert explains, due to physiological differences between the sexes, “men or boys have an advantage over comparably aged women or girls, in almost all athletic contests.”

3-ER-424. Male puberty confers “inherent physiological advantages.” *Id.*⁴ Plaintiffs’ own expert admits that this is “not a controversial statement.” 2-ER-240.

Plaintiffs attempt to obscure the relevant physiological differences between the sexes that support the Fairness in Women’s Sports Act by blurring the line between sex and gender identity. But sex and gender identity are not the same. “[H]omosexuality and transgender status are distinct concepts from sex.” *Bostock*, 140 S. Ct. at 1746-47.

[E]ven today, the word ‘sex’ continues to be defined based on the physiological distinctions between males and females. *See, e.g., Webster’s New World College Dictionary* 1331 (5th ed. 2014) (“either of the two divisions, male or female, into which persons, animals, or plants are divided, with reference to their reproductive functions”); *The American Heritage Dictionary* 1605 (5th ed. 2011) (“Either of the two divisions, designated female and male, by which most organisms are classified on the basis of their reproductive organs and functions”); *Merriam-Webster’s Collegiate Dictionary* 1140 (11th ed. 2011) (“either of the two major forms of individuals that occur in many species and that are distinguished respectively as female or male esp. on the basis of their reproductive organs and structures”).

Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 633 (4th Cir. 2020) (Niemeyer, J., dissenting); *see also Doe ex. rel. Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 522 (3d Cir. 2018) (explaining the distinction between sex—which is based on “anatomical and physiological” differences between males and females—and gender identity—which is a “subjective, deep-core sense of self as being a particular

⁴ *See also* 3-ER-434-73 (detailed discussion of sex-based advantages males enjoy based on review of relevant scientific studies).

gender”). Simply because a transgender person’s gender identity differs from their biological sex does not change their physiological characteristics. Nothing in the record suggests otherwise.⁵

The issue in *Bostock* was “whether an employer can fire someone simply for being homosexual or transgender.” 140 S. Ct. at 1737. Under Title VII, the answer is “no.” Even if *Bostock*’s reasoning were extended to the Equal Protection Clause, Idaho’s Fairness in Women’s Sports Act does not treat anyone less favorably “simply for being . . . transgender.” The Act instead recognizes real physiological differences between the sexes, which gender identity does not alter, and classifies solely on the basis of sex to determine who may participate in female sports. All members of the male sex, regardless of gender identity, are excluded from female

⁵ Plaintiffs criticize Defendants for “grossly misstat[ing] the record” and relying on stereotypes about transgender persons for making the point that gender identity alone does not change physiology. Answering Br. (Dkt. 65) at 43. To support these unfair criticisms, Plaintiffs argue that the district court made a “finding that transgender women who have suppressed their testosterone—as Lindsay has—have no substantial physiological advantages over cisgender women. (1-ER-65-66).” *Id.* Plaintiffs’ criticisms are flawed for two reasons. First, Defendants’ point has nothing to do with individual treatments such as hormone therapy some transgender persons may undergo. *Clark I* makes clear that heightened scrutiny does not require states to delve into differing abilities of individual athletes. *See* 695 F.2d at 1131 (rejecting argument that a policy was unconstitutional because participation in athletics could “be limited on the basis of specific physical characteristics other than sex”). Second, Plaintiffs distort the record to prop up their unwarranted attack. The district court did not make the conclusive finding Plaintiffs claim. Instead, it said “it is not clear that transgender women who suppress their testosterone have significant physiological advantages” 1-ER-66.

sports. Because their sex is male, transgender females are among the members of the male sex excluded from female sports. Conversely, because their sex is female, and because male sports are open to both sexes, transgender males may participate in all sports, be they designated male, female, or co-ed. The Act recognizes sex only. It does not do anything to any person “simply for being . . . transgender.”⁶

Because males have sex-based physiological advantages, this Court held in *Clark I* that the Equal Protection Clause permits states to exclude males from female sports. 695 F.2d at 1131 (holding that “average physiological differences” between the sexes justify rules excluding males from female sports). *Clark I* controls the outcome here.

But Plaintiffs ask this Court to modify its precedent. They say Idaho and all other states must consider gender identity as well as sex in their athletic regulations and make an exception for members of the male sex whose gender identity is female. Plaintiffs correctly note that *Clark I* did not directly address whether its holding

⁶ Defendants concede that the Fairness in Women’s Sports Act treats the sexes differently, because it excludes males from female sports. But the Act does not constitute facial discrimination against transgender persons. Plaintiffs’ reliance on *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014), is misplaced. There, lesbians challenged laws banning same-sex marriage. Those laws discriminated on the basis of sexual orientation because only lesbians and gays sought to marry same-sex partners. In contrast, the Act is applicable to both cisgender and transgender persons. As *Clark I* and *II* and other cases demonstrate, some cisgender males wish to play female sports.

would require an exception based on gender identity.⁷ But that shouldn't matter, because there is no evidence to suggest that gender identity alone changes the physiological differences that justify excluding members of the male sex from female sports.

Plaintiffs rely on arguments *Clark I* expressly rejected. They suggest that Defendants cannot rely on sex as a proxy. Instead, they argue, Defendants must prove that a subset of the male sex who are transgender will displace females. *See* Answering Br. (Dkt. 65) at 47-48. But *Clark* held that, in athletics, sex is a fair proxy that satisfies heightened scrutiny. *See* 695 F.2d at 1131 (acknowledging that “average real differences between the sexes” can allow sex “to be used as a proxy” and that sex is an appropriate proxy in athletics). And it rejected the notion that government must look beyond sex and classify “on the basis of specific physical characteristics other than sex,” even if such classifications might more precisely equalize athletic opportunities. *Id.* Plaintiffs ask the Court to break from these principles by arguing that Idaho's classification must be more precise than sex and consider other individual characteristics such as gender identity or hormone therapy.

Plaintiffs also rely on an argument *Clark I* implicitly rejected. They suggest that Defendants must prove that Idaho females have already been displaced from

⁷ Plaintiffs also invoke advice the Idaho Attorney General's office provided to the Idaho legislature. That advice speaks for itself, and it did not conclude that the bill at issue here is unconstitutional.

sports in order to justify a statute excluding members of the male sex from female sports. *See* Answering Br. (Dkt. 65) at 47-48. But there was no evidence in *Clark* that males had already displaced females, and this Court did not suggest such evidence was necessary to justify the Arizona rule it upheld under heightened scrutiny.

At bottom, the most important issue in this case is no different than the policy issue athletic organizations around the world are wrestling with and trying to decide. What is the proper balance between fairness and inclusion? Is there one correct answer to this question that should be imposed on all? Does the Constitution require states to ignore real, relevant differences between the sexes and value a policy of gender identity inclusiveness above sex-based fairness? Because the Constitution does not answer this policy question, state legislatures, not courts, should resolve it.

A number of arguments made by Plaintiffs and their supporting amici indicate this is a policy choice, not a constitutionally-mandated one. Plaintiffs argue that Defendants lack “basic decency” for pointing out the reality that gender identity alone does not alter physiology. Answering Br. (Dkt. 65) at 44. Their amici advocate for “[i]nclusive and supportive policies.” Br. of Transgender Women Athletes as *Amicus Curiae* (Dkt. 74) at 32.

Defendants do not question that these criticisms and appeals are based on sincerely held moral opinions or public policy choices. But they should be viewed

for what they reveal. The tough choice between fairness and inclusion is a value-laden policy decision that the Constitution does not resolve.

Plaintiffs, on the other hand, leave no room for consideration or debate. They would have the Court believe that only a legislature infected by animus and bigotry would make a policy choice that prefers fairness in female sports over the policy of including transgender persons in those sports. Before accepting Plaintiffs' ideological litmus test as truth, the Court should consider several questions:

- Why did World Rugby decide to exclude transgender women, even though it espouses a desire to include transgender women?
- Was World Rugby's decision based on animus against transgender women and irrational stereotypes, or was it based on rational consideration of science and real differences between the sexes?
- Why has World Rugby rejected Plaintiffs' argument that hormone therapy eliminates sex-based male advantages?
- And why can't other organizations who espouse a policy choice of inclusion agree on a valid hormone therapy regime that "levels the playing field"?

The fair, objective answer is that there is no single "right" choice in this arena, morally or otherwise. Sex and gender identity are not the same. Gender identity does not eliminate all sex-based advantages, even when coupled with hormone

therapy. A policy choice to compensate for disadvantages may cause a state or organization to choose fairness in female sports, or to choose transgender inclusion, but that choice shouldn't be converted to an ultimatum. It's a policy choice that should be left to the states under our Constitution.

III.

The District Court Erred by Holding the Act Likely Violates Doe's Equal Protection Rights Because if the Constitution Allows States to Exclude Males from Female Sports, It also Allows Rules to Enforce this Sex-Based Exclusion

Because states, under *Clark I*, may exclude members of the male sex from female sports, it necessarily follows that states may institute rules to enforce this exclusion. That's precisely what the Fairness in Women's Sports Act does. If there's a dispute about a person's eligibility to participate in female sports, the Act requires the person's health care provider to verify that the person's biological sex is female.

Due to males' physiological advantages, the Act need not exclude members of the female sex from male sports. Nor does the Act exclude either sex from co-ed sports. Because there are no sex-based eligibility requirements for male and co-ed sports, the Act provides no sex verification procedures for participants in those sports.

Nevertheless, Plaintiffs argue that the Act violates Jane Doe's equal protection rights against sex discrimination because it creates eligibility rules for female sports

that do not apply to male or co-ed sports. Aside from logic, Plaintiffs' argument has two fundamental flaws.

First, Plaintiffs' argument is infected by an erroneous interpretation of the Act. They mistakenly assume all female sports participants are subject to the risk of invasive examinations. The Act requires no such thing. *See* Appellants' Br. (Dkt. 28) at 35-39. The Act specifically allows a female sports participant to verify biological sex through "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). Plaintiffs' analysis completely ignores this language and effectively writes it out of the statute. And even if the statutory language is viewed as ambiguous and could be interpreted to require use of the three allegedly invasive criteria, proper application of rules of statutory construction require this Court to interpret the statute in a way to avoid any constitutional concern posed by allegedly invasive examinations. *See* Appellants' Br. (Dkt. 28) at 36-39.

Properly construed, the Act's sex verification procedures for eligibility in female sports do not require any invasive examination. Rather, the Act rationally requires a person's health care provider to confirm biological sex, and permits such confirmation in a variety of ways, including the simple processes of referring to a student-athlete's IHSAA-required health examination and consent form or obtaining a written statement from the student's health care provider. The Act's verification

process is both rationally and substantially related to the important government interest of protecting female sports opportunities by excluding males from those sports.

Second, Plaintiffs improperly assume that the Act's dispute process constitutes facial discrimination against females because it subjects only females to a sex verification requirement. But the Act does not say only females are subject to dispute regarding eligibility for female sports. To the contrary, all female sports participants, regardless of their sex, are subject to such a dispute. Similarly, females and males are treated identically for participation in co-ed and male sports. Neither females nor males are subject to dispute. This differing treatment is based not on sex, but on participation in specific sports.

Plaintiffs might argue that females could be disparately impacted by this process, based on the assumption that most who desire to participate in female sports will be female, and based on the further hypothetical assumption that some might erroneously dispute female athletes' sex. But these assumptions are not supported by the record or any other evidence. It is just as likely, if not more likely, that any disputes will focus on males who are ineligible for female sports. The record does not establish any disparate impact on females, because no eligibility dispute was ever raised before the district court enjoined the Act's enforcement.

Even assuming Plaintiffs had established a disparate impact on females such as Jane Doe, there would be no constitutional violation, because there is no indication that the legislature acted with an inappropriate intent to harm females. Disparate impact alone cannot establish an Equal Protection violation; there must be purposeful discrimination against the impacted group. *See Pers. Adm’r of Massachusetts v. Feeney*, 442 U.S. 256, 274 (1979). The district court concluded just the opposite was true here, finding that it was “beyond dispute” that “Idaho passed the Act to protect cisgender female athletes.” 1-ER-18. There cannot be an invidious purpose to harm female athletes such as Jane Doe when the Act’s purpose was to protect athletes like her.

IV.

Conclusion

There are physical differences between cisgender females and transgender females. Those differences are relevant in athletics. Accordingly, states have discretion to implement sex-based policies in athletics. This Court should enforce its precedent and refrain from constitutionalizing a policy choice between fairness and inclusion in female sports.

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For these reasons, this Court should reverse the district court and vacate the preliminary injunction.

Respectfully submitted,

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on January 8, 2021.

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