**APPEAL NOS. 20-35813, 20-35815**

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

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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.*

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

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# INTERVENORS-APPELLANTS MADISON KENYON AND MARY MARSHALL'S REPLY BRIEF

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## REPLY ARGUMENT

In their opening brief, Intervenors Mary Marshall and Madison Kenyon demonstrated that the Fairness in Women's Sports Act enshrines into law the same policy this Court approved in *Clark v. Arizona Interscholastic Association*, 695 F.2d 1126, 1131 (9th Cir. 1982) (*Clark I*), and *Clark v. Arizona Interscholastic Association*, 886 F.2d 1191, 1193 (9th Cir. 1989) (*Clark II*), requiring that "teams or sports designated for females, women, or girls shall not be open to students of the male sex." IDAHO CODE § 33-6203(2).

Those cases foreclose any sex-based Equal Protection challenge. So Appellees Hecox and Doe try to recast the Act as something else—discrimination based on transgender status. But mere repetition cannot change the Act's text, purpose, and effect. It bars all biologically male athletes from women's sports with an even hand and for a consistent reason, without regard to gender identity.

Doe's attempt to characterize the Act as threatening all female athletes with humiliating and invasive exams fails for similar reasons. The Act's sex-verification provision is flexible and permissive. Doe and the district court cannot rewrite it to defeat it. And the speculative nature of Doe's claim precludes Article III jurisdiction anyway. The Court should reverse the district court's legally wrong and overbroad preliminary injunction and remand for further proceedings.

## I. The Fairness in Women's Sports Act survives intermediate scrutiny because it treats male and female athletes differently based solely on sex—not gender identity.

### A. The Act excludes *all* biologically male athletes from female sports teams for legitimate and important reasons.

Two decisive facts remain undisputed. First, Hecox is biologically male. Hecox does not even claim to have taken so-called "puberty blockers" to avoid the physical changes that accompany male puberty. Second, the Act excludes *all* biological males from female athletic competition—authorizing a test (in the unlikely event of dispute) that "perfectly" identifies those who were born male. Appellees' Br. 28.

The Act does nothing else. And it draws that line based on amply substantiated biological facts and to promote equal opportunity for female athletes. As Intervenors and the State already explained, that policy choice is supported by common sense, science, and the law—namely, this Court's *Clark* decisions. State's Br. 12–17; Intervenors' Br. 22–27. In contrast, the Act draws no lines based on gender identity because "[g]ender identity . . . does not correlate to physiological differences between the sexes relevant to athletics." State's Br. 13–14.

Unable to rebut this, Hecox argues the Act's "text, purpose, and effect" prove the Act nevertheless invidiously discriminates based on transgender status. Appellees' Br. 21. It does not. All Hecox can show is that the "categorical exclusion" of biological males *includes* biologically male athletes who identify as female. *Id.* at 25–37. That is true. But it

is equally true that the exclusion includes biologically male athletes who identify as male or nonbinary. Nothing in the Act "singles out" biologically male athletes who identify as female. *Id.* at 27.

### 1. The Act excludes all biological males from female athletics for legitimate reasons.

Hecox accuses the Act of "targeting" transgender individuals, Appellees' Br. 2, 22, motivated by "irrational prejudice" and "moral disapproval," *id.* at 66–67. None of that is true. The Act is based on legitimate considerations, not motivated by moral disapproval or "disfavor," and it does not target transgender individuals.

For the reasons this Court detailed in *Clark I*, and as discussed further in the opening briefs and below, State's Br. 18–23; Intervenors' Br. 18–22; *infra* section I.C., prohibiting biologically male athletes from playing women's sports is not irrational. It furthers "legitimate and important governmental interest[s]." *Clark I*, 695 F.2d at 1131. Hecox's own amicus concedes there is "no dispute" that "*Clark* makes [this] clear." Br. of *Amicus Curiae* LGBTQ+ Rights Clinic 18.

The scope of the Act itself rebuts any hypothesis that it was motivated by "moral disapproval," because the Act does not exclude females who identify as male from male sports. This is *consistent* with the Act's legitimate purpose of protecting girls from unfair competition, and *inconsistent* with a desire to "target" transgender individuals because of "moral disapproval." *See* Appellees' Br. 67; 1-ER-76.

Further, allowing biologically male athletes to compete against female athletes is not "such an irrational object of disfavor that . . . an intent to disfavor [transgender athletes] can readily be presumed." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993). "Whatever one thinks" of the issue, "it cannot be denied that there are common and respectable reasons for opposing it." *Id.* Accordingly, this Court should reject Hecox's argument that to prevent all biologically male athletes from competing against female athletes "is *ipso facto* to discriminate invidiously" against the subset of biologically male athletes who identify as female "as a class." *Id.* at 271.

Most fundamentally, the Act does not "target" transgender people at all. It draws a biological line for biological reasons. It is not true that the Act's definition of "sex" is "perfectly correlated" to identifying and excluding transgender individuals from women's sports. Appellees' Br. 28. It is "perfectly correlated" to identifying and excluding *all* biological males—no matter their gender identity. Indeed, the Act enshrines in law a longstanding and consistent policy that arose long before transgender identity became an issue in athletics or the wider culture.

No doubt, as Hecox suggests, some male students who are "simply not that good at sports," Appellees' Br. 52, and unable to qualify for the boys' team might wish to try out for the girls' team, where they could gain experience, the joy of competition, and camaraderie. But school and league policies have consistently said, "No," to protect equal

athletic opportunities for girls. Or, as the Clark brothers illustrate, boys who have invested years of training to achieve excellence in a sport not offered for boys by their school have claimed that equal opportunity requires they be allowed on the girls' team. Again, longstanding practice, league rules, and this Court in *Clark I* and *Clark II* have all rejected such demands to protect equal athletic opportunities for girls. Intervenors' Br. 19–22.

In a new cultural development, a small subset of biological males—those who identify as female—now similarly claim that fairness requires they be allowed to compete against girls. Certainly, the Act was prompted in part by this new iteration of an old question. But all the Act does is put the force of law behind a consistent answer to this repeated question. It says, "No," to *all* biological males for that same consistent reason—to ensure equal athletic opportunities for girls and women. Intervenors' Br. 24 n.8. Thus, the Act is not "directed at excluding women and girls who are transgender." Appellees' Br. 18. It is directed at preserving the line that excludes *all* biological males from female sports to protect equal opportunities for *all* biological females.

This stands in sharp contrast to *Morris v. Pompeo*, No. 2:19-cv-569, 2020 WL 6875208 (D. Nev. Nov. 23, 2020). There, the district court enjoined a policy that imposed more onerous burdens on individuals who wished to show a different gender on their passport than recorded on their birth certificate following a gender transition than it imposed

on individuals who were not transgender but wished to correct a birth-certificate error. As Hecox concedes, while that policy "did not use the term transgender," it did use "criteria that by definition would apply only to individuals who are transgender." Appellees' Br. 30 (cleaned up). The opposite is true here. The Fairness in Women's Sports Act imposes an identical restriction on *all* biological males: regardless of gender identity, they may not compete in women's athletics.

**2. The Act's focus on biology is neither a pretext nor a proxy for discrimination against transgender individuals.**

Hecox's efforts to analogize the Act's biology-based line to cases that have discussed criteria amounting to "pretext" or "proxy" for prohibited discrimination fail for the same reason.

1. Hecox cites *Pacific Shores Properties, LLC v. City of Newport Beach*, 730 F.3d 1142 (9th Cir. 2013), to argue that the Act's "intentionally restrictive definition of 'biological sex' functions as a form of '[p]roxy discrimination' against transgender athletes." Appellees' Br. 31. It does not. In *Pacific Shores*, this Court explained that "proxy discrimination" is discrimination based on "criteria that are *almost exclusively* indicators of membership in the disfavored group." 730 F.3d at 1160 n.23 (emphasis added). For example, "discriminating against individuals with gray hair is a proxy for age discrimination." *Pacific Shores*, 730 F.3d at 1160 n.23 (citing *McWright v. Alexander*, 982 F.2d

222 (7th Cir. 1992)). That makes sense: "the 'fit' between age and gray hair is sufficiently close that they would form the same basis for invidious classification." *McWright*, 982 F.2d at 228.

By contrast, the Act's biological criteria are not "closely" or "almost exclusively" associated with "membership in the [transgender] group." *Pacific Shores*, 730 F.3d at 1160 n.23. Instead, those criteria are a "perfect" fit for the vast group the law actually excludes: all biological males, no matter their gender identity.

2. In *Christian Legal Society v. Martinez*, 561 U.S. 661, 689 (2010), the Supreme Court quoted *Bray* to illustrate the same point with hats instead of hair, reasoning that "a tax on wearing yarmulkes is a tax on Jews" because wearing yarmulkes is "engaged in exclusively or predominantly" by Jews. *Bray*, 506 U.S. at 270. Not so here. As history and the Clark brothers show, biological males trying to play women's sports is not an activity "engaged in exclusively or predominately by [transgender individuals]." *Id*. Like the policy at issue in the *Clark* cases, the Fairness in Women's Sports Act is more like a neutral and generally applicable ban on all hats than a tax on yarmulkes.

3. Justice O'Connor's concurring opinion in *Lawrence v. Texas* is no more helpful to Hecox. Appellees' Br. at 28–29. Justice O'Connor based her vote to strike down "Texas' statute banning same-sex sodomy . . . on the Fourteenth Amendment's Equal Protection Clause." *Lawrence*, 539 U.S. 558, 579 (2003) (O'Connor, J., concurring in the

judgment). Hecox quotes her conclusion that the law was "directed towards gay persons as a class" because it targeted "conduct that is closely correlated with being homosexual." Appellees' Br. 28–29 (quoting *Lawrence*, 539 U.S. at 583). But Hecox omits O'Connor's reasoning: "When a State makes homosexual conduct criminal, *and not 'deviate sexual intercourse' committed by persons of different sexes*," that declaration in and of itself is an invitation to subject homosexual persons to discrimination . . . ." *Lawrence*, 539 U.S. at 583 (emphasis added) (cleaned up).

The facts here are precisely the opposite: biologically male athletes who do not identify as female—such as the Clark brothers—are treated the same as those who do. If anything, Justice O'Connor's analysis shows that the Act *satisfies* the Equal Protection Clause.

4. As Intervenors have explained, Intervenors' Br. 26–27, this Court's analysis in *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014), likewise casts no doubt on the Act's validity. Hecox says that the laws there were infirm because they prohibited conduct ("entering into a marriage with a person of the same sex") which "is closely correlated with [the] status" of being gay or lesbian. Appellees' Br. 33. Here, the immense group the legislature excluded from female athletics—biological males—is not "closely correlated" with being transgender. And as noted above, neither is the set of biological males who wish to compete in female athletics limited to transgender people.

5. Intervenors cited *Gedulig v. Aiello*, in which the Supreme Court held that, absent a showing that an otherwise reasonable line drawn by legislation is "mere pretext[]" for "invidious discrimination," there is no Equal Protection violation even if a protected group is disproportionately impacted. 417 U.S. 484, 496 n.20 (1974); Intervenors' Br. 25. Hecox's only response is to assert again that the Act's allegedly "intentionally narrow definition of 'biological sex' . . . is precisely what *Gedulig* prohibits: a pretextual classification designed to effectuate discrimination." Appellees' Br. 37. But Hecox labels the Act's definition of "biological sex" as "narrow" simply because it excludes *all* who are biologically male from the set of biological females. Appellees' Br. 37. In other words, the definition is "narrow" only so far as the objective facts of biology are "narrow."

In fact, because the line the Act draws is time-honored, objectively justified by the "average real differences" between males and females, and "substantially related" to the important governmental purpose of "promoting equality of athletic opportunity between the sexes," *Clark I*, 695 F.2d at 1131, it cannot be dismissed as "pretext." When, as here, any foreseeable impact on a subgroup "is essentially an unavoidable consequence of a legislative policy that has in itself always been deemed to be legitimate," any inference of discriminatory intent "fails to ripen into proof." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 n.25 (1979).

For this reason, in *Feeney* the Supreme Court rejected a similar "pretext" challenge to a law giving hiring preferences to veterans despite that it disproportionately disadvantaged women (who were 2% of eligible veterans). That law could not "rationally be explained" as a "pretext" for sex-based discrimination because "[v]eteran status is not uniquely male" and "[t]oo many men" were adversely affected to allow any "inference that the statute [was] but a pretext for preferring men over women." *Id.* at 270, 275. Likewise, wanting to play women's sports is not unique to athletes who identify as transgender. And too many biological males—all of them—are affected by the Act to support the inference that the Act is but a "pretext" for discriminating against athletes who identify as transgender.

### 3. *Bostock* provides no support for treating the Act's sex-based distinction as discrimination based on gender identity.

Hecox makes the inverted argument that the Supreme Court in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), "rejected" any argument that it would "always be permissible to insist" that transgender individuals "act contrary to their gender identity" or to defend laws on the grounds that they "merely draw permissible lines based on selective definitions of 'biological sex.'" Appellees' Br. 34. But the *Bostock* Court was at pains *not* to endorse claims of the sort Hecox asks this Court to accept. *Id.* at 1753. Nor did it do so implicitly.

Addressing a claim under Title VII, *Bostock* concludes "it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex" because "transgender" cannot be defined without reference to biological sex. *Id.* at 1741. But the Court intentionally did *not* reach the argument that an employer could legitimately fire a transgender employee "for failing to follow a 'biological sex' dress code." Appellees' Br. 34. Rather, the Court found it unnecessary to answer that question in *Bostock* given the allegation that the employee was fired "for no reason other than the employee's . . . transgender status." *Bostock*, 140 S. Ct. at 1737.

Thus, *Bostock* does *not* mean that every policy or law that differentiates based on biological "sex" is suddenly invalidated by Title VII, much less by the Equal Protection Clause. If it meant that, then sex-separated "bathrooms, locker rooms, [and] anything else of the kind"—even overnight facilities at battered-women's shelters—would be abruptly illegal. That would work precisely the sea change in this country's Title VII and Equal Protection law that *Bostock* declined to endorse. *Id.* at 1753. And this Court should reject Hecox's invitation to impose it upon the nation now.

### B. The district court applied intermediate scrutiny incorrectly in multiple respects.

Because the Act separates athletic competition exclusively along biological lines consistent with its purpose, *Clark I* and *Clark II* control the proper application of intermediate scrutiny. The fact that some biological males are less athletic than some biological females and the suggestions of other possible solutions are irrelevant so long as the "substantial relationship" test is met. Intervenors' Br. 21–22. The district court tried to distinguish the *Clark* decisions, but it erred in multiple ways. Hecox's attempts to defend those errors all fall short.

#### 1. Hecox errs by focusing on the demanded *exception* rather than the Act as a whole.

In their opening brief, Intervenors explained how the district court fell into what could be called a "framing" error: narrowing the inquiry to ask whether the law *as applied to the party or class seeking an exception* is "substantially related" to the governmental interest, instead of asking whether the law considered as a whole is "substantially related" to that interest. Intervenors' Br. 31–32. Hecox repeats that error persistently. But the *substantial* relationship test by its very terms implies that the legislature is not obliged to craft a perfect fit—that there will be *exceptions* where, as applied to an individual or a subset of the affected class, the law may *not* materially advance the government's interest. *Clark I*, 695 F.2d at 1131. If courts narrow the framing by focusing only on the *exceptions*, then every law will fail the test, and the "substantial

relationship" test will become just as exacting as the "least restrictive means" test of strict scrutiny—or even more so.

In a well-reasoned recent dissent in a case involving the different context of bathroom privacy, Judge Pryor aptly described the majority as committing a similar error by "gerrymander[ing]" its analysis of the "substantial relationship" test to arrive at "an opinion on sex discrimination that looks nothing like an intermediate-scrutiny inquiry into whether a sex-based classification satisfies the Equal Protection Clause." *Adams v. Sch. Bd. of St. Johns Cnty.*, 968 F.3d 1286, 1316, 1319 (11th Cir. 2020) (Pryor, J., dissenting). Quoting the Supreme Court, Judge Pryor observed that "intermediate scrutiny does not require" the government to "'elect one particular mechanism . . . even if that mechanism arguably might be the most scientifically advanced method.'" *Id.* at 1317 (quoting *Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53, 63 (2001)). Judge Pryor is correct, and a petition for rehearing *en banc* is pending in that case.

Briefing is now completed here, and neither the district court nor Hecox nor Hecox's *amici* dispute the central conclusion of *Clark I*: a law that excludes biological males from female athletics is substantially related to the important governmental interest in providing equal athletic opportunities to girls and women. The Fairness in Women's Sports Act is that law.

### 2. Hecox errs by trying to import a balancing test into an intermediate scrutiny analysis.

Hecox discusses alleged harms suffered by individuals who express a transgender identity. Appellees' Br. 17–18, 45–46. But such concerns are not relevant to the analysis under Equal Protection—the only basis for the injunction entered below.

A legislature seeking to further an important governmental interest is not required to address or even consider all social and individual ills. State's Br. 20. The *Clark* courts performed no balancing analysis, and Hecox cites no precedent authorizing courts to introduce a balancing test into the intermediate scrutiny analysis. That it is not proper for a court to do so was powerfully illustrated in *Feeney*. There, once the Court concluded that the law's preference for veterans was not pretextual, it did *not* balance the law's benefits for its intended beneficiaries against the harms it might inflict on women. And this was so despite the Court's recognition that women have historically suffered "pervasive and often subtle discrimination," *Feeney*, 442 U.S. at 273, and that the law would have a "severe" negative impact on women, *id.* at 271. Instead, the Court held that while the law "may reflect unwise policy," "the Fourteenth Amendment cannot be made a refuge from ill-advised . . . laws." *Id.* at 281 (cleaned up).

This Court held similarly in *Clark I* that even when "the alternative chosen may not maximize equality," and may instead "represent trade-offs between equality and practicality," the "existence of wiser alternatives . . . does not serve to invalidate [a] policy [that] is substantially related to the goal." 695 F.2d at 1131–32. The legislature—not the courts—is the appropriate place for conversations about balancing tradeoffs. *See also* Br. of *Amicus Curiae* United States 15–16 (discussing *Washington v. Davis*, 426 U.S. 229, 239 (1976)). Under intermediate scrutiny, "adverse impact" discussions have no place in an Equal Protection analysis.

### C. The district court's legal conclusions rest on clearly erroneous factual findings.

Despite the district court's assertion that the biological and fairness considerations underpinning the *Clark* decisions are "not . . . implicated by allowing transgender women to participate" in women's sports, 1-ER-63; Appellees' Br. 47, neither Hecox nor the court below disputes *Clark's* premise—that because of basic biological realities, biological sex represents an "accurate proxy" for athletic capability. *See Clark I*, 695 F.2d at 1131. Nor does either contend that gender identity *per se* represents an "accurate proxy" for athletic capability.

Hecox does, however, rely heavily on the district court's "finding" that there was "compelling evidence" that males retain "no substantial physiological advantages" *after undergoing testosterone suppression*,

Appellees' Br. 19, 43, *see* 1-ER-69, albeit omitting the court's important limitation: "for one year." 1-ER-66, 1-ER-69. To reach this conclusion, Hecox asserts that the district court "considered Appellants' evidence about purported [irreversible] physiological differences and found it wholly insufficient." Appellees' Br. 48. But that is not what happened. Instead, the district court arrived at this (scientifically false) conclusion only by means of a series of legally erroneous logical leaps. These are Potemkin findings with no substance behind them.

### 1. The district court erred both by demanding "empirical evidence" to support Idaho's policy choice and by ignoring uncontradicted evidence before the court.

The district court erred at the threshold by demanding "empirical evidence" that allowing competition from biological males after testosterone suppression would deprive girls and women of equal athletic opportunities. A legislature can satisfy the moderate demands of intermediate scrutiny by reference to a "wide range of sources," including "common sense." *United States v. Carter*, 669 F.3d 411, 418 (4th Cir. 2012); *see generally* State's Br. 24–27; Br. of *Amicus Curiae* United States 26. Absent exceptional circumstances, a court errs when it fails to defer to legislative findings "in areas fraught with medical and scientific uncertainties." *Kansas v. Hendricks*, 521 U.S. 346, 360 n.3

(1997); *see also Gonzales v. Carhart*, 550 U.S. 124, 163 (2007) (deferring to legislative judgment "when . . . medical uncertainty persists").[1]

The Idaho legislature, in deciding to enact the Act, cited a scientific study to find that after 12 months of hormonal therapy, a biological male still retains a significant performance advantage over female athletes. 5-ER-814. As the State has explained, textual revisions to the final published version of that paper did not alter this substantive finding. State's Br. 29 n.12. Further, the district court had no evidence before it (and did not find) that hormonal therapy can in the slightest degree *reverse* male advantages in height and bone strength once a person has gone through male puberty. Both the cited study and "common sense" adequately support the legislature's finding that irreversible average advantages exist.

But more empirical evidence was submitted, and the district court further erred by ignoring that evidence rather than weighing it. While a court must weigh competing evidence, it is not free to simply *ignore* it. *See Myers v. United States*, 652 F.3d 1021, 1036 (9th Cir. 2011) (district court erred when it "simply ignored" record evidence inconsistent with

[1] There is disagreement within this Circuit concerning the degree of deference owed to legislative findings under intermediate scrutiny. *See Duncan v. Becerra*, 970 F.3d 1133, 1166–67, 1150 n.10 (9th Cir. 2020). But that disagreement does not appear to extend to the deference owed in "areas fraught with medical and scientific uncertainties." *Hendricks*, 521 U.S. at 360 n.3.

its finding concerning foreseeability); *Stone Creek v. Omnia Italian Design*, 875 F.3d 426, 433 (9th Cir. 2017) (in a trademark case, evidence of confusion "cannot be dismissed out of hand but must be considered in context and in light of the other evidence").

Intervenors introduced "empirical evidence" concerning the remarkable records of biological males CeCe Telfer and June Eastwood even *after* testosterone suppression—at the expense of many biological females. Intervenors' Br. 7–9, 43. The court excluded these facts from its analysis because they did not happen "in Idaho," 1-ER-68—a legally irrelevant consideration, *see* State's Br. 27. Hecox does not explain or defend the district court's evidentiary gerrymandering.

Intervenors and the State also introduced evidence that the IOC and World Athletics (a prominent international track federation) require testosterone suppression to specific (but differing) *levels* based on concerns that a vague suppression requirement like the NCAA's cannot ensure fairness. And the World Rugby organization excludes transgender competitors who have gone through male puberty from Women's Rugby *entirely* based on safety concerns flowing from the irreversible advantages of size and strength in the male body. Intervenors' Br. 42–43; State's Br. 22–23. Hecox does not deny any of these facts.

Finally, a group of elite women athlete *amici* add extensive additional scientific detail—including from a very recent peer-reviewed paper—about the failure of testosterone suppression to reverse athletic advantages enjoyed by biologically male athletes and about ongoing debates concerning appropriate policies within athletic organizations. Br. of *Amici* Sandra Bucha et al. 15–25.

And just last December, a new paper was published reporting a controlled study performed on 46 "transwomen" (biological males) in the U.S. military. That study found that "transwomen still had a 9% faster mean run[ning] speed" "over their female counterparts" in a comparable military population "after [a] 1 year period of testosterone suppression," and that "the pretreatment differences between transgender and cis gender women persist beyond the 12 month time requirement [for testosterone suppression] currently being proposed for athletic competition by the World Athletics and the IOC."[2] That 9% advantage would mean that a comparably gifted and trained biological male, after one year of testosterone suppression, would beat the NCAA women's collegiate record holder's time in the 5000-meter race (15 minutes, 12 seconds) by more than 1 minute, 22 seconds—a devastating feat.

[2] Thomas Roberts, et al., *Effect of gender affirming hormones on athletic performance in transwomen and transmen: implications for sporting organisations and legislators*, BR. J. SPORTS MED, December 7, 2020, article available for purchase at perma.cc/AHS2-AX57.

Given these enduring advantages, last December Democratic Representative Tulsi Gabbard introduced the "Protect Women's Sports Act of 2020" in the United States Congress to provide that Title IX's protection of opportunities for girls and women would be defined by biological sex, not by gender identity.[3]

In the face of these facts, the Idaho legislature acted well within its authority to decide that the NCAA's and IHSAA's lax policies are not enough to protect equal opportunities for girls and women. The legislature was entitled to make a different choice from among the range of policy alternatives currently adopted by respected sporting bodies and advocated for by informed voices in the athletic community. And it was legal error for the district court to second-guess the Idaho legislature's factual findings and to substitute its own policy choice.

### 2. Hecox concedes that no record evidence establishes that testosterone suppression *per se* eliminates male athletic advantage.

There is also no evidence in the record that males who suppress testosterone for one year consistently or even usually achieve female levels. Intervenors' Br. 57–58. And that gap in the evidence is crucial. As Hecox concedes, *at most* Hecox's "experts concluded that the driving force behind performance differences between men and women after puberty is their *level* of circulating testosterone," not mere length of

[3] H.R. 8932, 116th Cong. (2020), perma.cc/Z8KP-S2M8.

treatment. Appellees' Br. 51 (emphasis added). So the district court's casual conflation of those two categories was clear error.

Indeed, Hecox now back-handedly concedes that a study relied on by Dr. Safer—one of Hecox's experts—found that *three out of four* biological males who underwent testosterone suppression *failed to achieve normal female testosterone levels*. *See* Intervenors' Br. 44; Appellees' Br. 52, 54 n.12. Equally, Hecox submitted no evidence—and the district court made no finding—that suppression of testosterone to levels *above* healthy female levels eliminates the athletic advantage ordinarily possessed by males. Intervenors' Br. 57–58. The district court's core factual finding rests on a leap of logic that is unsupported by the record, and thus it is clearly erroneous. *See Pierce v. Cnty. of Orange*, 526 F.3d 1190, 1218–19 (9th Cir. 2008) (district court erred when it went beyond evidence and "inexplicably made further findings which are unsupported by and contrary to the record"); *Brock v. City of Cincinnati*, 236 F.3d 793, 802 n.4 (6th Cir. 2001) (district court committed "clear error" when it "took a series of logical leaps" to reach factual finding that had "uncertain support in the record").

In fact, the *only* affirmative evidence the district court cited as showing that testosterone suppression eliminates physiological advantages under *any* circumstances was a single "study" referenced by Hecox's expert Dr. Safer, and that study did not even ask its eight self-selected respondents how *long* they had suppressed testosterone or to

what *level* they had suppressed it—much less make any effort to verify the truth of the responses or to identify a control group. Intervenors' Br. 41 n.13. Thus, that study does not address whether males retain "no substantial physiological advantages" after undergoing a mere 12 months of testosterone suppression. 1-ER-69–70; Appellees' Br. 19, 43.

Finally, the district court's assertions that there have been "no reported examples of any disturbance to women's sports as a result of transgender inclusion," 1-ER-9; Appellees' Br. 57–58, is also clearly erroneous. Intervenors documented numerous undisputed instances of championships and opportunities lost to girls and women "as a result of transgender inclusion." 3-ER-317; Intervenors' Br. 8–9 (citing 3-ER-404), 43 (citing 3-ER-480–82). These indeed represent dream-shattering disturbances to women's sports.

### D. Hecox cannot justify the sweeping scope of the injunction granted in this as-applied challenge.

Hecox provides no response to the logical and legal disconnect between the district court's (unsupported) finding about the effect of testosterone suppression and its blanket injunction of enforcement of the Act. Hecox did not seek—and the district court did not enter—an injunction limited to male athletes who have medically negated all male biological advantages (if that were possible), or even to male athletes who have suppressed circulating testosterone to ordinary female levels. Rule 65(b) requires a court to set forth reasons for every injunction. But

the court below articulated no reason at all for enjoining the Act as it applies to biological males who have *not* suppressed testosterone to female levels, or who have not done so at all. Intervenors' Br. 55–58. There was no claim, evidence, or finding below that gender identity itself has any relevance *at all* to physiological athletic capability.

Hecox's only response is to import limitations into the injunction that do not appear in it. *See* Appellees' Br. 70. The district court did *not* order the NCAA or the IHSAA to retain their policies in their present form (one year of suppression, but with no maximum level of circulating testosterone required), nor to enforce those policies effectively. The court did *not* authorize the State to enforce the Act against individuals who may—whether because of a change in league policy or as a result of lax enforcement—seek to compete in female athletics *without* satisfying the current league rules. In short, much of the scope of this sweeping injunction is unsupported by the district court's reasoning and factual findings for all the reasons Intervenors have explained, and thus the injunction violates Rule 65(b).

Trying to justify this overreach, Hecox focuses again on potential harm to transgender individuals. Appellees' Br. 11, 16, 44. But in so doing, Hecox seeks to hijack the biologically justified structure of sex-separated sports to serve a goal unrelated to athletic competition. Instead, Hecox (and the district court) would render that structure merely a subordinate tool for social affirmation of gender identities, or

even for psychotherapeutic treatment of individuals suffering from gender dysphoria.[4]

Intervenors also noted that the preliminary injunction reaches far beyond any scope that could be proper for this as-applied challenge brought by a biologically male athlete who claims to have suppressed testosterone for one year and who seeks to compete in track rather than in a contact sport in which safety for biologically female participants could be an issue. Intervenors' Br. 59–60. Hecox's response as much as admits that the district court undertook a facial invalidity analysis while skipping over the "no set of circumstances" requirement that constrains such challenges. *See United States v. Salerno*, 481 U.S. 739, 745 (1987). Indeed, Hecox flips that requirement to argue that the district court was right to strike the Act "as a whole" because (in the court's view) its analysis revealed the Act would be unconstitutional as applied to that small subset of biological males *who have suppressed testosterone to female levels*. Appellees' Br. 71.

[4] The incoherence of mandating identity-based separation of athletics is magnified by purported experts on gender identity who assert that gender identity is emphatically nonbinary, but rather a "spectrum" which includes a wide range of "genders." *See* Br. of *Amici Curiae* Medical Professionals 12; Br. of *Amicus Curiae* Women's Liberation Front 14 (citing sources).

But Hecox does not claim to have achieved "female levels," so this question has no place in this as-applied challenge. Meanwhile, the district court did not attempt an analysis "as applied" to biological males who have *not* suppressed testosterone for at least a year. Nor could it have after dismissing Hecox's facial challenge since no such plaintiff was before it. In short, neither the court's analysis nor its injunction were proper for this as-applied challenge.

The cases Hecox cites do not support the injunction. *John Doe No. 1 v. Reed*, 561 U.S. 186 (2010), concerned a First Amendment claim, where the requirements for a facial challenge are uniquely lax. *See Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244 (2002). But even there the Court held that a plaintiff must meet the requirements for a facial challenge to the extent that a requested injunction reaches "beyond the particular circumstances of these plaintiffs." *Reed,* 561 U.S. at 194.

The Tenth Circuit in *United States v. Supreme Court of New Mexico*, 839 F.3d 888 (10th Cir. 2016), closely followed *Reed*. It held that where a plaintiff seeks an injunction barring application of a law to any category of settings, the plaintiff must meet the facial standard (*i.e.*, "no conceivable set of circumstances") with regard to *all* applications falling within the affected category. *Id.* at 914. Here, of course, Hecox sought an injunction barring *all* applications of the Act.

And finally, in *Easyriders Freedom F.I.G.H.T v. Hannigan*, 92 F.3d 1486, 1501 (9th Cir. 1996), this Court emphasized that "injunctive relief generally should be limited to apply only to named plaintiffs." It enjoined all stops of motorcyclists under the challenged policy only because this was necessary to give the plaintiffs relief given that an officer could not know a rider's identity until after pulling him over. *Id.* at 1501–02. No such problem of identification exists here.

## II. Doe lacks standing to bring her challenge to the Act's sex-verification provision, and her claim is without merit.

### A. Doe does not have standing to challenge the Act's mere existence.

Jane Doe's lack of standing is jurisdictional. *Plains Com. Bank v. Long Fam. Land & Cattle Co.*, 554 U.S. 316, 324 (2008). On appeal, Doe offers no response to the problem that Doe's alleged "fear" of having her sex challenged is speculative rather than "imminent," which is required to create standing. "The mere existence of a statute . . . is not sufficient." *San Diego Cnty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1126 (9th Cir. 1996). Doe simply ignores the governing precedents cited by Intervenors and instead echoes the district court's erroneous reading of *Heckler v. Mathews*, 465 U.S. 728 (1984), and *Davis v. Guam*, 785 F.3d 1311 (9th Cir. 2015). *See* Intervenors' Br. 45–48.

But the district court confused distinct elements of standing and failed to address the "imminence" requirement. The court cited *Davis* and *Heckler* to say that "unequal treatment solely because of . . . gender" can itself be injury to a judicially cognizable interest even if it is not tied to a "tangible benefit." 1-ER-42. This is true, but it is a separate question from whether that unequal treatment is "imminent" or "conjectural or hypothetical."

In *Davis v. Guam*, *at the time Mr. Davis filed his lawsuit*, he was barred by Guam law, based on his race, from participating in a then-ongoing voter registration process. *Davis*, 785 F.3d at 1313–14. Similarly, while the question of whether the plaintiff's alleged injury could be "redressed by a favorable decision" was disputed in *Heckler*, the *immediacy* of that injury was not: at the time the plaintiff filed his suit, his claim for spousal social security benefits had already been denied. *Heckler*, 465 U.S. at 735, 737–38.

Jane Doe, by contrast, has never had her female sex challenged, and there is not the slightest reason beyond mere "conjecture" to suppose she ever will—much less that any challenge was "imminent" when she filed her suit. "At present, this case is riddled with contingencies and speculation that impede judicial review." *Trump v. New York*, 141 S. Ct. 530 (2020) (per curiam). Such conjectural allegations of injury are insufficient to support standing, and the district court erred by overlooking the requirement of "imminence."

### B. Doe repeats the district court's multiple errors in analyzing Doe's Equal Protection claim.

Because the Fairness in Women's Sports Act satisfies intermediate scrutiny, it was error for the district court to weigh possible policy alternatives and to weigh the possible disparate impact on any class. *Supra* I.B.2; Intervenors' Br. 38–39. Doe did not seek a preliminary injunction based on a Due Process "privacy" claim, nor a Fourth Amendment "unreasonable searches" claim. The district court's excursus on the supposed negative impact of these provisions on girls and women, 1-ER-81–83, is irrelevant as a matter of law.

Further, the district court's exaggerated portrayal of the Act's impact is wrong as a matter of law because the court ignored the rule of construction requiring courts to construe statutes in favor of constitutionality. Intervenors' Br. 53. The Defendants responsible for enforcing the law read the word "may" permissively (its ordinary sense) and offer a reasonable construction that allows a student's primary health care provider to verify an athlete's biological sex based on his or her prior knowledge—without any physical examination at all. State's Br. 37–39; Intervenors' Br. 51–52. The district court erred by adopting an "antagonistic" construction of the Act only to declare that construction unconstitutional. *Carhart*, 550 U.S. at 153.

Doe's only response is a rhetorical game based on the State's counsel's representation in court that Hecox's physician might certify that Hecox is "female." Appellees' Br. 61. But Hecox has not offered a physician's certification that Hecox is *biologically* female, as the Act's text and purpose plainly require. Hecox continues to press this lawsuit because no physician could make that certification consistent with the Act's definition of biological sex.

In fact, this debate over how those responsible for enforcement (and the Idaho courts) *might* interpret the Act's sex-verification provision is untethered precisely because Doe has not been threatened with enforcement "imminently," or ever. As the Supreme Court recently advised, "[l]etting the Executive Branch's decisionmaking process run its course" with regard to the interpretation and enforcement of a policy "not only brings 'more manageable proportions' to the scope of the parties' dispute, but [it] also 'ensures that [courts] act as judges, and do not engage in policymaking properly left to elected representatives." *Trump v. New York*, 141 S. Ct. at 536.

### C. The district court erred by enjoining all the sex-verification options the Act provides.

Doe has no answer to the separate defect that the scope of the injunction entered is improper in this as-applied challenge based on the legal principles reviewed above. *Supra* I.2.D. If the district court believed that the three-criteria test provided by the Act would impose

unconstitutional burdens under some conditions or applications, a focused injunction that would "afford the plaintiff[ ] . . . relief," *Easyriders*, 92 F.3d at 1502, and "remedy [her] alleged harm," *East Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026, 1029 (9th Cir. 2019), was easy to craft. Intervenors' Br. 59–60. All that was required was to enjoin requiring any girl or woman to submit to the specific examinations deemed "intrusive," "traumatic," or "humiliating." Doe offers no argument (other than a broad attack on sex-separated sports) to justify the court's categorical injunction of *all* means of verifying an athlete's biological sex, even including a mere verification from the athlete's physician based on prior knowledge. For this additional reason, the injunction should be vacated.

## CONCLUSION

The Fairness in Women's Sports Act treats male and female athletes differently based solely on sex—not gender identity. Accordingly, this Court's decisions in *Clark I* and *Clark II* control, and the district court erred in enjoining the Act in its entirety.

For all the reasons set forth above and in the parties' opening briefs, Intervenor Defendants respectfully request that this Court reverse the decision below and hold that the Fairness in Women's Sports Act does not violate the Equal Protection Clause, or in the alternative vacate the preliminary injunction and remand the case for further consideration consistent with this Court's instructions.

Respectfully submitted,

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Dated: January 8, 2021

By: */s/ Roger G. Brooks*

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## CERTIFICATE OF SERVICE

I hereby certify that on January 8, 2021, I electronically filed the foregoing Reply Brief 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.

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January 8, 2021

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

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