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; SHERRI YBARRA, in her official capacity as the Superintendent of Public Instruction of the State of Idaho and as a member of the Idaho State Board of Education; INDIVIDUAL MEMBERS OF THE STATE BOARD OF EDUCATION, in their official capacities; BOISE STATE UNIVERSITY; MARLENE TROMP, in her official capacity as President of Boise State University; INDEPENDENT SCHOOL DISTRICT OF BOISE CITY #1; COBY DENNIS, in his official capacity as Superintendent of the Independent School District of Boise City #1; INDIVIDUAL MEMBERS OF THE BOARD OF TRUSTEES OF THE INDEPENDENT SCHOOL DISTRICT OF BOISE CITY #1, in their official capacities; and INDIVIDUAL MEMBERS OF THE IDAHO CODE COMMISSION, in their official capacities,

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 MADISON KENYON AND MARY MARSHALL'S OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

As private individuals, Madison Kenyon and Mary Marshall have no parent corporation and no stockholders.

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JURISDICTIONAL STATEMENT

Lindsay Hecox and Jane Doe sued Defendants in the United States District Court for the District of Idaho under 42 U.S.C. § 1983 alleging violations of the Fourth and Fourteenth Amendments to the United States Constitution, and under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq*. The district court exercised federal-question jurisdiction under 28 U.S.C. §§ 1331 and 1343 and has authority to grant injunctive relief under 28 U.S.C. § 1343, declaratory relief under 28 U.S.C. §§ 2201 and 2202, and costs and attorney fees under 42 U.S.C. § 1988.

The district court entered a preliminary injunction based on Hecox's and Doe's as-applied Equal Protection claims, and this Court has jurisdiction to review under 28 U.S.C. § 1292(a)(1). *Aleman Gonzalez v. Barr*, 955 F.3d 762, 768 (9th Cir. 2020). The district court entered the order on August 17, 2020, ER87,[1] and Defendants and Intervenors timely filed their notices of appeal on September 16, 2020, ER88–94, within the 30-day period set by 28 U.S.C. § 2107(a) and Federal Rule of Appellate Procedure 4(a)(1)(A).

[1] Defendants and Intervenors prepared joint excerpts of record. All citations refer to the joint excerpts filed by Defendants.

STATEMENT OF THE ISSUES

This Court already has approved excluding male athletes from female sports teams based on the "average real differences" between the two sexes.[2] *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 the "goal of equal participation by females . . . is set back, not advanced." *Clark By & Through Clark v. Ariz. Interscholastic Ass'n*, 886 F.2d 1191, 1193 (9th Cir. 1989) (*Clark II*). This appeal raises three issues:

1. Whether the district court misapplied that caselaw and intermediate scrutiny when it held that the Fairness in Women's Sports Act—which excludes male athletes from female sports teams—likely violates the Equal Protection Clause.
2. Whether the district court erred by refusing to dismiss Doe's claim for lack of standing and by granting her an injunction based on a misreading of the statute.
3. Whether the district court erred by failing to explicitly state and limit the terms of its preliminary injunction to instances implicated by Plaintiffs' as-applied challenge.

[2] This brief uses "biological sex," "male," and "female" in the same way the Fairness in Women's Sports Act does: "biological sex," male or female, is based on a person's "reproductive anatomy, genetic makeup," and "normal endogenously produced testosterone levels," assuming those traits support the same conclusion. IDAHO CODE § 33-6203(3). Plaintiffs' as-applied challenges do not implicate "intersex" athletes. So this case does not require the Court to decide how the statute would define "biological sex" for those athletes.

PERTINENT STATUTES AND REGULATIONS

The relevant federal constitutional provisions and state statutory provisions are attached as an addendum to this brief. The challenged statute is also reproduced—in bill form and with the accompanying legislative findings—in the Appellants' Excerpts of Record. ER813–16.

INTRODUCTION

Women and girls have overcome decades of discrimination to achieve a more equal playing field in many arenas of American life—in schools, in the workplace, and in government. With that more equal playing field has come great success and countless benefits for women, girls, and society. The literal playing field is no different. In sports, women have battled the effects of past discrimination to secure equal opportunities to showcase their skill, strength, speed, and athleticism. To that end, this Court has repeatedly upheld policies that exclude men and boys from female sports teams—securing for women and girls an equal opportunity to compete and to be champions.

Recently, though, women and girls have become bystanders in their own sports as biologically male athletes who identify as female demand to be able to compete against women and girls. The Idaho Legislature responded with the Fairness in Women's Sports Act, enshrining into law the exact policy this Court has long upheld: biologically male athletes may not play women's sports.

But before the Act took effect, the district court enjoined its enforcement, refusing to follow this Court's precedent, misapplying intermediate scrutiny, and misinterpreting the Act itself. That result harms female athletes across the state. And it undermines fundamental legal doctrines the United States Supreme Court and this Court have long applied to ensure equal opportunities for women.

STATEMENT OF THE CASE

I. Rule changes force female student athletes to compete against—and lose to—biologically male athletes.

A. Idaho State University women's track and cross-country runners Madison Kenyon and Mary Marshall

Intervenor Madison Kenyon is a sophomore at Idaho State University, where she runs on the women's track and cross-country teams. ER525. Kenyon received a scholarship to run track at Idaho State, and she is using that scholarship to finance her dream of becoming a doctor by pursuing a degree in biomedicine. ER526.

Intervenor Mary Marshall is a junior at Idaho State University and competes on the women's track and cross-country teams. ER533. In high school, Marshall won the 800-meter State championship. ER534. Marshall also received a track scholarship from Idaho State. *Id.*

Before their fall 2019 cross-country season, Kenyon and Marshall learned that they and their teammates would be competing against a biologically male athlete on the University of Montana's cross-country team who identifies as female. ER526–27, ER535. The student, June Eastwood, had previously competed on the men's cross-country team—recording times in multiple events that would have broken national records in women's events. ER527.

B. NCAA and IHSAA one-year hormone-therapy policies

Eastwood's switch from the men's team to the women's team was made possible by a 2011 change to the National Collegiate Athletic Association (NCAA) rules, which now allow biologically male athletes to compete in women's events after they have completed "one calendar year" of some form of unspecified and unquantified "testosterone suppression treatment." ER473, ER620–21, ER707–08, ER781–82.[3]

The NCAA chose one year after various "experts in collegiate sports" convinced it that one would be "more than sufficient to minimize any advantage resulting from circulating testosterone." ER620. The NCAA also chose one year because it allows athletes to "tak[e] a year off to undergo hormone therapy" without jeopardizing any of their four years of eligibility (which can be spread over five years). ER620–21. Unlike the rules for transgender Olympians, "the NCAA policy does not require athletes to certify hormone suppression to a certain level." ER621. Instead, the NCAA's policy is "aimed at making the process easier for the student-athlete and institutions to comply with." *Id.* As a result, "ongoing monitoring of testosterone and disclosure of lab results" is not required. *Id.* Athletes merely "certify that they have been on hormone therapy for a period of one year." ER708.

[3] The NCAA's "Inclusion of Transgender Student-Athletes" policy is available online: perma.cc/KD9K-WLCA. The one-year hormone-therapy policy is on page 13.

Idaho's High School Activities Association (IHSAA) sets policies for interscholastic high school sports at schools across the state. ER778. Similar to the NCAA, the IHSAA's relevant policy allows biologically male athletes who identify as girls to compete on girls' teams after "one year of hormone treatment related to [their] gender transition." ER780. Like the NCAA's policy, the IHSAA's one-year hormone-therapy policy does not require biologically male athletes to reduce their testosterone below a certain level before competing against girls. *Id.*

C. Kenyon, Marshall, and their teammates race against and repeatedly lose to biologically male athlete competing under NCAA's policy.

In the 2019 cross-country season, Kenyon and her teammates competed against Eastwood three times. ER527. Eastwood beat Kenyon in all three races by a significant margin. *Id.* Losing to Eastwood left Kenyon feeling "frustrated and defeated." *Id.* During the 2020 indoor track season, Kenyon raced Eastwood in a one-mile race, finishing six places behind Eastwood. ER528.

At the conference championships, Kenyon and three teammates raced against Eastwood in a distance medley relay. *Id.* Eastwood's team was in sixth place when Eastwood began the final 1600-meter leg of the race. *Id.* But Eastwood quickly advanced from sixth to second place—finishing three spots ahead of Kenyon's team. *Id.*

At the same championships, Kenyon watched one teammate lose a bronze medal because Eastwood took first place, bumping Kenyon's teammate to fourth. ER528. Another teammate, Mary Marshall, raced against Eastwood twice in the 2019-2020 cross-country and track seasons. ER535. Marshall lost to Eastwood both times. *Id.*

For Marshall, losing to another woman is different from losing to a biological male. ER535. When she loses to another woman, she assumes her competitor must train harder than she does, which drives her to work harder. *Id.* When she loses to an athlete like Eastwood, "it feels completely different." *Id.* "It's deflating." *Id.* "It makes [her] think that no matter how hard" she tries, her "hard work and effort will not matter." *Id.*

D. Two biologically male high school track athletes set records and win championships in women's events.

Intervenors' experience is not unique to Idaho and the NCAA's Big Sky League. For example, the Connecticut Interscholastic Athletic Conference (CIAC) allows biologically male students to play on female teams based solely on gender identification. ER380. Under that policy, two biologically male athletes—Terry Miller and Andraya Yearwood—competed on girls' track teams starting in 2017, ER317–18, ER404, taking 15 state titles.

According to the U.S. Department of Justice's Office for Civil Rights, over the course of six indoor and outdoor track seasons, the two athletes repeatedly "denied female student-athletes benefits and opportunities" to:

- advance to the finals in events;
- to advance to higher level competitions, such as the State Open Championship or the New England Regional Championship;
- to win individual and team state championships, along with the benefit of receiving medals for these events;
- to place higher in any of the above events;
- to receive awards and other recognition;
- and possibly to obtain greater visibility to colleges and other benefits.

ER404. Based on these findings, the Office of Civil Rights concluded that the CIAC policy violated Title IX because it denied "opportunities and benefits to female student-athletes that were available to male student-athletes." *Id.*

Allowing these two biologically male athletes to compete against female athletes had a "significant impact" on Chelsea Mitchell, ER404, costing her "four state championship titles, two All New England awards, medals, points, and publicity," ER317. "At fifteen years old, [Mitchell] felt extremely intimidated to run against bigger, faster, and stronger male competitors." ER318.

Even countless hours of training were "not enough." ER320. In the Indoor Class S State Championship, Terry Miller took first place in the 55-meter dash. *Id.* Mitchell finished second. *Id.* In the Indoor State Open Championship, Miller and Andraya Yearwood took first and second in the 55-meter dash. *Id.* Mitchell came in third. ER320–21. Following that "loss," the media repeatedly referred to Mitchell as the "third-place competitor, who is not transgender." ER322. Instead of being celebrated, Mitchell "felt invisible." *Id.* Mitchell missed out on two more championships in the outdoor season, finishing second in the women's 100-meter race and in the 200-meter race. *Id.*

II. Idaho enacts Fairness in Women's Sports Act to promote and maintain a level playing field for female athletes.

Against this backdrop, Idaho enacted the Fairness in Women's Sports Act. ER813–16. Under the Act, school sports "shall be expressly designated" as one of three options "based on biological sex." IDAHO CODE § 33-6203(1). Those options are:

(a) Males, men, or boys;

(b) Females, women, or girls; or

(c) Coed or mixed.

IDAHO CODE § 33-6203(1)(a)–(c). Sports "designated for females, women, or girls shall not be open to students of the male sex." IDAHO CODE § 33-6203(2). The Act does not exclude female students from male sports. Nor does it differentiate between students based on gender identity.

Finally, the Act creates a process for resolving disputes about a student's sex. IDAHO CODE § 33-6203(3). Schools are to resolve disputes "by requesting that the student 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." *Id.* The Act states a provider "may verify the student's biological sex as part of a routine sports physical" exam, relying only on one or more of the student's "reproductive anatomy, genetic makeup, or normal endogenously produced testosterone levels." *Id.*

In support of the Act, Idaho included 12 legislative findings. ER813–14 (IDAHO CODE § 33-6202). The first ten focus on the inherent biological and physiological differences between men and women—and how those differences affect equal opportunities in sports. ER813–14. The eleventh explains why the legislature chose not to create an exception for biological males who identify as female and have undergone hormone therapy for at least 12 months, citing a study that concluded such athletes would "still likely have performance benefits over women." ER814 (citation omitted). The twelfth addresses the benefits of dividing sports based on biological sex: promoting sex equality by "providing opportunities for female athletes to demonstrate their skill, strength, and athletic abilities" while reaping the benefits of their success. *Id.*

III. Two athletes sue to invalidate the new law, two athletes intervene to defend it, and the district court preliminarily enjoins its enforcement under the Equal Protection Clause.

Sixteen days after Idaho's governor signed the Fairness in Women's Sports Act into law, two Idaho athletes filed a lawsuit seeking to invalidate it. ER757, ER809–10. Lindsay Hecox was a college freshman at Boise State University. ER762. Hecox's biological sex is male, but Hecox identifies as female and planned to try out for the women's cross-country team the upcoming school year. ER762, ER769. Based on that intention, Hecox testified against the Fairness in Women's Sports Act in the state senate before its passage.[4] Hecox opposed the bill while expressing understanding about the potential "unfairness" it was designed to prevent. Digital media audio at 1:41:53–58.

The second plaintiff, Jane Doe, was a 17-year-old female athlete at Boise High School. ER762.[5] In the complaint, Doe alleged that she planned to try out for her soccer team in the upcoming school year. *Id.* Doe is not transgender. *Id.*

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[4] Minutes, Senate State Affairs Committee, Friday, March 06, 2020, at 3 (Idaho 2020), perma.cc/3QCC-DNF9. Audio of Hecox's testimony begins at 1:39:00 at the following link, which is available through the Idaho Legislature's official digital media archive: http://insession.idaho.gov/IIS/2020/Senate/Committee/State%20Affairs/200306_ssta_0800AM-Meeting.mp4.

[5] Doe filed suit through her parents, Jean and John Doe. ER762. All three were granted permission to proceed under pseudonyms. ER6 n.3.

Both plaintiffs challenged the Act on constitutional and statutory grounds. ER799–809. In their preliminary injunction motion, Plaintiffs relied solely on their Equal Protection claim. ER565. On that basis, they asked the district court to stop Defendants and their associates "from enforcing *any* of the [Act's] provisions." *Id.* (emphasis added).

Idaho female athletes Madison Kenyon and Mary Marshall moved to intervene to defend the Act. ER520–21. Defendants moved to dismiss for lack of subject matter jurisdiction and for failure to state a claim. ER516–19, ER830. And Defendants and Intervenors filed responses to Plaintiffs' preliminary injunction motion. ER315–515, ER830–31.

The district court entered an order that (1) dismissed Plaintiffs' facial Fourteenth Amendment claims, (2) declined to dismiss Plaintiffs' as-applied claims, and (3) granted a preliminary injunction on Plaintiffs' as-applied claims, though without limiting its scope, ER1, ER87.

In granting the motion to dismiss Plaintiffs' facial challenge, the court accepted Defendants' argument the Act can be constitutionally applied against biological males who identify *as male* based on this Court's holding that "excluding boys from playing on girls' sports teams [is] constitutionally permissible." ER50 (citing *Clark I*, 695 F.2d at 1131). In denying the motion to dismiss Jane Doe's as-applied claims for lack of standing, though, the court held that Doe had "alleged an injury in fact because, by virtue of the Act's passage, she is now subject to disparate, and less favorable, treatment based on sex." ER41.

Finally, in granting Plaintiffs' motion for a preliminary injunction, the district court analyzed each Plaintiff 's likelihood of success on the merits. ER60–79 (Hecox), ER79–83 (Jane Doe). Applying "heightened" or "intermediate" scrutiny—which the court described as "slightly less stringent" than strict scrutiny, ER58—the court held that the Fairness in Women's Sports Act likely discriminates against athletes like Hecox *based on their gender identity* in violation of the Equal Protection Clause, ER79.[6] Next, analyzing Doe's claim, the court held that the Act's dispute-resolution process likely violates the Equal Protection Clause because of the "significant burden" it "places on all women athletes," and given the absence of "evidence that the Act is substantially related to its purported goals." ER83.

[6] In its opinion, the district court barely referenced *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020), ER38, ER58–59, ER79, and rightly so. That case answered a different question in a different context: whether under Title VII discrimination based on homosexual or transgender status is discrimination at least "in part because of sex." *Bostock*, 140 S. Ct. at 1743. This case involves the opposite question: whether under the Equal Protection Clause a statute that on its face discriminates based on sex actually only discriminates more narrowly based on transgender status—and not based on sex. *Bostock*'s interpretation of the phrase "because of sex" in Title VII is irrelevant here.

SUMMARY OF ARGUMENT

This Court's decisions in *Clark I* and *Clark II* control the outcome here. In those cases, this Court held that the "exclusion of males" from female sports teams does not violate the Equal Protection Clause. *Clark I*, 695 F.2d at 1131–32; *Clark II*, 886 F.2d at 1194. That result holds even assuming that male athletes' "participation could be limited on the basis of specific physical characteristics other than sex," or that their "participation could be allowed but only in limited numbers." *Clark I*, 695 F.2d at 1131. "The existence of these alternatives shows only that the exclusion of boys is not *necessary* to achieve the desired goal." *Id.* Under intermediate scrutiny, it "does *not* mean that the required substantial relationship does not exist." *Id.* (emphasis added).

So too here. The Fairness in Women's Sports Act excludes all biologically male athletes from female sports teams to "promote sex equality" in sports. ER814. "Sex-specific teams accomplish this by providing opportunities for female athletes to demonstrate their skill, strength, and athletic abilities," thus allowing them "to obtain recognition and accolades, college scholarships, and the numerous other long-term benefits that flow from success in athletic endeavors." ER814. "There is no question that this is a legitimate and important governmental interest." *Clark I*, 695 F.2d at 1131.

The district court enjoined the Act, though, mainly because it misread the Act as discriminating "on its face" based on "transgender status." ER61. The court further erred by accepting arguments this Court already rejected in *Clark I*: that "participation could be limited on the basis of specific physical characteristics other than sex," *Clark I*, 695 F.2d at 1131, here testosterone suppression, ER66, and that biologically male athletes could compete against female athletes "in limited numbers," *Clark I*, 695 F.2d at 1131, here biologically male athletes who identify as female, ER65. These errors misapplied the two *Clark* cases and intermediate scrutiny by focusing on exceptions rather than the "substantial relationship" between the sex-based rule actually established by the Act and the state's important interests.

The district court also enjoined the Act based on Jane Doe's as-applied Equal Protection claim. But the Act has never been applied to Doe, nor has she alleged any threat of immediate danger of direct harm. And the Act's mere existence does not give her standing to challenge it. On the merits, Doe's claim is based on a fundamental misreading of the Act's plain language, and this Court's *Clark* cases establish that the specific provisions Doe challenges survive intermediate scrutiny.

Finally, the district court erred by failing to state the specific terms of its injunction, and by entering an apparently unlimited injunction not supported by the court's findings and far surpassing the permissible scope of relief in this as-applied case.

ARGUMENT

Standard of review

This Court reviews a district court's "preliminary injunction for an abuse of discretion." *California by & through Becerra v. Azar*, 950 F.3d 1067, 1082 (9th Cir. 2020) (en banc) (cleaned up). "[L]egal issues underlying the injunction are reviewed de novo because a district court would necessarily abuse its discretion if it based its ruling on an erroneous view of law." *Id.* (cleaned up). This Court also will reverse if the court "based its decision . . . on clearly erroneous findings of fact." *Does 1-5 v. Chandler*, 83 F.3d 1150, 1152 (9th Cir. 1996).

A preliminary injunction is an "extraordinary remedy" requiring "a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). A movant must show "[1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Azar*, 950 F.3d at 1082 (quoting *Winter*, 555 U.S. at 20). "The first factor—likelihood of success on the merits—is the most important." *Id.* at 1083 (cleaned up). If the movant "fails to establish likelihood of success," this Court "need not consider the other factors." *Id.* Finally, "when an issue of law is key to resolving a motion for injunctive relief, the reviewing court has the power to examine the merits of the case and resolve the legal issue." *Id.* (cleaned up).

I. This Court has repeatedly upheld policies excluding male athletes from female sports teams, and the Fairness in Women's Sports Act is equally constitutional.

The Equal Protection Clause to the Fourteenth Amendment "command[s] that no State deny the equal protection of the laws to any person within its jurisdiction." *Reed v. Reed*, 404 U.S. 71, 74 (1971). But the Supreme Court "has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat *different* classes of persons in different ways." *Id.* at 75 (emphasis added). And sex-based classifications are constitutional where they "realistically reflect[] the fact that the sexes are not similarly situated in certain circumstances." *Clark I*, 695 F.2d at 1129.

Specifically, the Supreme Court recognizes that "[p]hysical" and "'[i]nherent differences' between men and women" exist and that those differences are "enduring." *United States v. Virginia*, 518 U.S. 515, 533 (1996). So once the state demonstrates that a sex-based classification based on those differences (1) "serve[s] important governmental objectives," and (2) is "substantially related to achievement of those objectives," *Craig v. Boren*, 429 U.S. 190, 197 (1976), the state has carried its "burden of showing an exceedingly persuasive justification for [the] classification," *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982) (cleaned up).

A. In *Clark I* and *Clark II*, this Court correctly held that male and female athletes are *not* similarly situated for purposes of competing against each other in sports.

In *Clark I*, this Court reviewed an appeal brought by male high school athletes who had been kept off the girls' volleyball teams despite the boys' prior success on national championship teams. 695 F.2d at 1127. The schools did not have boys' volleyball teams. *Id.* And a policy "preclude[d] boys from playing on [the] girls' teams." *Id.* The boys sued, arguing that "precluding [them] from playing on girls' interscholastic volleyball teams . . . violate[d] the equal protection clause." *Id.*

The district court dismissed that claim, and this Court affirmed. *Id.* Under the "intermediate level of scrutiny . . . set forth in *Craig v. Boren*," the question was whether the policy "fail[ed] substantially to further an important government objective." *Id.* at 1129. To answer that question, this Court analyzed the differences between the sexes and the impact of those differences on the state interests. *Id.* at 1129–32.

1. Average physiological differences between the sexes justify single-sex teams.

At the outset, the Court noted that the Supreme Court had often taken "into account actual differences between the sexes, including physical ones." *Id.* And two state courts recently had "upheld the exclusion of boys from girls' [sports] teams" against Equal Protection challenges. *Id.* at 1130. One of those state courts had acknowledged that a sex-based "classification could be avoided by classifying directly

on the basis of physical differences." *Id.* (citing *Petrie v. Illinois High Sch. Ass'n*, 394 N.E.2d 855, 862 (Ill. App. Ct. 1979)). But classifications based directly on those differences would have been impractical and difficult to devise, so the more general sex-based classifications survived intermediate scrutiny. *Clark I*, 695 F.2d at 1130.

Against this backdrop, this Court first held that "redressing past discrimination against women in athletics and promoting equality of athletic opportunity between the sexes" is a "legitimate and important governmental interest." *Id.* at 1131. Next, the Court asked "whether the exclusion of boys is substantially related to [that] interest," or "whether any real differences exist between boys and girls which justify the exclusion," meaning "differences which would prevent realization of the goal if the exclusion were not allowed." *Id.*

The Court found that there are. "[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.* The parties had stipulated that, "[g]enerally, high school males are taller, can jump higher and are stronger than high school females." *Id.* at 1127. This left "no question . . . that boys [would] *on average* be potentially better volleyball players than girls." *Id.* (emphasis added). *Accord Petrie*, 394 N.E.2d at 863 ("Both because of past disparity of opportunity and because of innate differences, boys and girls are not similarly situated as they enter into most athletic endeavors.").

Under intermediate scrutiny, this was enough. The Supreme Court has repeatedly allowed recognition of "these average real differences between the sexes." *Id.* at 1131. And because the challenged policy "simply recogniz[ed] the physiological fact that males would have an undue advantage competing against women for positions on the volleyball team," there was "clearly a substantial relationship between the exclusion of males from the team and the goal of redressing past discrimination and providing equal opportunities for women." *Id.*

2. Absolute necessity is not the test, and tradeoffs between equality and practicality are permissible.

This Court also considered and rejected the theory that the existence of "wiser alternatives" might invalidate the schools' girls-only team policies under the Equal Protection Clause. *Id.* at 1132. Indeed, the Court "recognize[d] that specific athletic opportunities could be equalized more fully in a number of ways." *Id.* at 1131. For example, "participation could be limited on the basis of specific physical characteristics other than sex." *Id.* Or boys could be allowed to participate "but only in limited numbers." *Id.* Still, the "existence of these alternatives show[ed] only that the exclusion of boys [was] not *necessary* to achieve the desired goal." *Id.* And under intermediate scrutiny, "absolute necessity is not required before a gender based classification can be sustained." *Id.*

Indeed, 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." *Id.* at 1131–32. "[A]ll the standard demands" is a "substantial" relationship. *Id.* And "absolute necessity is not the standard." *Id.* at 1132.

3. Each male competitor undermines the goal of equal participation for female athletes.

Seven years later, this Court considered a similar appeal brought by the brother of one of the plaintiffs in the first *Clark* case. *Clark II*, 886 F.2d at 1192. The Court rejected each of the younger Clark's attempts to distinguish *Clark I* to force his way onto his school's girls' volleyball team. *Id.* at 1193–94. Rebuffing that attempt, this Court correctly observed, "If males are permitted to displace females . . . *even to the extent of one player* like Clark, the goal of equal participation by females . . . is set back, not advanced." *Id.* (emphasis added).

B. The *Clark* decisions control here.

1. The Fairness in Women's Sports Act discriminates based on the average real differences between the biological sexes, not gender identity.

Just like the girls-only team policies this Court upheld in *Clark I* and *Clark II*, the Fairness in Women's Sports Act provides 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).

Despite that clear statement, the district court erroneously believed that "the Act on its face discriminates between cisgender athletes, who may compete on athletic teams consistent with their gender identity, and transgender women athletes, who may not compete on athletic teams consistent with their gender identity." ER61. From there, the court concluded that the Act "discriminates on the basis of transgender status." *Id.* It does not.

First, nowhere "on its face" does the Act distinguish between "cisgender" and "transgender" athletes, nor does it say anything about who may "compete on athletic teams consistent with their gender identity." ER61. The Act draws a clear line based on biology, not identity: biological females may compete on sports teams "designated for females, women, or girls;" biological males may not. IDAHO CODE § 33-6203(2). If two biologically male athletes—one identifying as male and the other as female—approach a registration desk to join the girls' basketball team, both will be denied. The Act is indifferent to their gender identities because those are irrelevant to the Act's objectives. Sex-based differences in biology and physiology produce "life-long effects, including those most important for success in sport: categorically different strength, speed, and endurance." ER813. Thus, "sex-specific teams further[] efforts to promote sex equality." ER814.

Second, any claims that the Act discriminates based on gender identity—or that it was motivated by animus toward people who identify differently than their biological sex, ER78—are disproven decisively by the fact that the Act does *not* prohibit biologically female athletes who identify as male from competing on male sports teams consistent with their gender identity. IDAHO CODE § 33-6203(1)(a) and (2). This is because the Act is crafted to address exactly the concern it purports to address: the average real athletic advantages possessed by people who are biologically male.[7] The goal is to level the playing field for biologically female athletes by allowing them to compete against each other without forcing them at the same time to compete against biological males.[8]

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[7] *Cf. Doe 2 v. Shanahan*, 755 F. App'x 19, 23–24 (D.C. Cir. 2019) (per curiam) (rejecting the district court's "erroneous finding" that the challenged policy "was the equivalent of a blanket ban on transgender service" given that the policy "allow[ed] some transgender persons" who had previously been barred "to join and serve in the military").

[8] The mere fact that NCAA and IHSAA policies already purported to exclude males from female athletics unless they have undergone one year of testosterone suppression, *supra* pp. 6–7, in no way changes this conclusion. The Legislature was not required to leave protecting equal opportunities for women and girls to rules that could be easily amended, specify no required testosterone levels, and are enforced with unknown consistency. The Legislature was entitled to provide more clearly defined protections backed by the force of law, private rights of action, and a clear dispute resolution process.

The Act accomplishes this objective by placing all athletes into one of two groups: those who can only play male sports (biological males), and those who can choose to play male or female sports (biological females). Both groups include athletes who are transgender. In short, the Act—both "on its face" and in operation—discriminates based on sex, not transgender status. *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974) (distinction involving pregnancy did not distinguish based on sex because it "divide[d] potential recipients into two groups—pregnant women and nonpregnant persons," and "[w]hile the first group is exclusively female, the second includes members of both sexes").

Third, only one of the Act's twelve legislative findings mentions the small subset of biological males who identify as female. ER813–14. The first ten all focus on the broad problem of unequal athletic abilities relevant to "success in sport" resulting from "inherent differences between men and women." ER813. The eleventh explains why the legislature chose not to create an exception for biological males who identify as female: evidence proves that biological males retain advantages over biological females even "after 12 months of hormonal therapy." ER814. And then the twelfth finding concludes by discussing the specific "opportunities for female athletes" that sex-specific teams provide. *Id.*

The Supreme Court has instructed "that the State's asserted reason for the enactment of a statute may be rejected," but only "if it could not have been a goal of the legislation." *Michael M. v. Sonoma Cnty. Super. Ct.*, 450 U.S. 464, 470 (1981) (plurality) (cleaned up). No such conclusion is possible here. Given the Act's plain language, its inapplicability to biologically female transgender athletes, and the clear focus of its legislative findings on the "inherent [physiological] differences between men and women," the district court's conclusion that the Act discriminates based on transgender status is clear error.

To support its contrary conclusion, the district court quoted *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014) (*Latta II*), which rejected the argument that "same-sex marriage bans did not discriminate on the basis of sexual orientation, but rather on the basis of procreative capacity." ER61. But those laws *did* on their face distinguish between opposite-sex and same-sex couples—*not* between couples that could procreate and couples that could not (the latter set including couples too old to conceive or infertile for any reason). *Latta II*, 771 F.3d at 467.[9] In contrast, the Fairness in Women's Sports Act is neutral as to gender identity—both on its face and in its effects.

[9] *Karnoski v. Trump* similarly concerned a law that "[o]n its face . . . regulates on the basis of transgender status." 926 F.3d 1180, 1201 (9th Cir. 2019). Conversely, under the Fairness Act, transgender status is entirely irrelevant to eligibility for female athletics.

If anything, *Latta II* demonstrates that the Fairness in Women's Sports Act discriminates *based on sex*, not gender identity. In *Latta II*, the Court distinguished between the *justification* for a law and the actual lines that the law draws. There, "while the procreative capacity distinction" could have been "a *justification* for the discrimination worked by the laws," it could not "overcome the inescapable conclusion" that the laws "discriminate[d] on the basis of sexual orientation." *Id.* at 468. Likewise here, while the advantages biologically male athletes who identify as female have over biologically female athletes could be "a *justification* for the [sex-based] discrimination worked by the laws," that does not "overcome the inescapable conclusion" that the Act discriminates more broadly on the basis of biological sex. *Id.*

Finally, if this Court were to conclude that the Act classifies based on gender identity—contrary to the Act's plain language, its effects, and its legislative findings—that would not change the result. Neither the Supreme Court nor this Court has recognized gender identity as a suspect class,[10] and the Supreme Court has strongly cautioned against creating new suspect categories. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 441 (1985) (noting that "respect for the separation

[10] In *Karnoski*, this Court did instruct the district court to apply "something more than rational basis but less than strict scrutiny," but it did not recognize transgender identity as a suspect class. 926 F.3d at 1201. If *Karnoski* were read to create a new suspect class, then it was wrongly decided on that point in light of *City of Cleburne*'s instruction.

of powers" should make courts "very reluctant" to create new suspect classes). Thus, the district court erred by subjecting that alleged classification to intermediate scrutiny. And even under intermediate scrutiny, the Act survives for all the reasons described below.

2. The district court's attempts to distinguish *Clark I* misapply intermediate scrutiny by focusing on a small subset of the wrong group.

The district court's conclusion that the Act "discriminates on the basis of transgender status," ER61, forms the erroneous foundation for the rest of the court's analysis. According to the court, *Clark I* does not control because the interests there "pertained to sex separation in sport generally," and thus they "are not necessarily determinative here." ER66. That error—viewing the Act as if it discriminates based on transgender status and not sex—invalidates each of the court's attempts to distinguish *Clark I*.

i. Past and present disadvantages suffered by transgendered people are regrettable, but they are not relevant here.

First, the district court erred by distinguishing *Clark I* on the ground that—unlike biological males who identify as male—biological males who identify as female "have historically been discriminated against." ER63–64. *Clark I* involved a "general separation between a historically advantaged group," non-transgender males, "and a historically disadvantaged group," non-transgender females. ER64.

But the Fairness in Women's Sports Act establishes the very same "general separation" between males and females in female sports. Under the Equal Protection Clause, the only relevant question is whether that separation "fails substantially to further an important government objective." *Clark I*, 695 F.2d at 1129. *Clark I* establishes that "there is clearly a substantial relationship between the exclusion of males from [female sports] team[s] and the goal of redressing past discrimination and providing equal opportunities for women." *Id.* at 1131. And that is all intermediate scrutiny requires. *Id.* at 1129; *Craig*, 429 U.S. at 197. The Act may not alleviate past and present disadvantages suffered by some percentage of one small fraction of biologically male athletes. ER64.[11] But alleviating those disadvantages is not the Act's intent. ER813–14. And failing to alleviate them does not undermine the Act's substantial relation to its actual intent: ensuring equal opportunities for women in women's sports.

[11] The district court also quoted a sentence in Plaintiffs' reply brief for the extreme proposition that "[p]articipating in sports on teams that contradict one's gender identity 'is equivalent to gender identity conversion efforts, which every major medical association has found to be dangerous and unethical.'" ER65 (quoting Plaintiffs' Reply to Opposition to Motion for Preliminary Injunction, ECF No. 58, at 11). But the expert cited in Plaintiffs' reply brief never equated sex-specific sports teams with "gender identity conversion efforts," nor could he based on the record. ER261–64.

ii. Any alleged overall inequality for biologically male athletes who identify as female is a distinction without a difference.

Second, the district court erred by distinguishing *Clark I* based on the court's belief that "the boys in *Clark* . . . generally had equal athletic opportunities," whereas biologically male athletes who identify as female "will not be able to participate in any school sports." ER64. But *Clark I* explicitly says that its holding is *not* based on the equality of the boys' athletic opportunities. *Clark I*, 695 F.2d at 1130–1131. The *Clark I* court noted that one state court had "held that if overall athletic opportunities for males were equal, the equal protection clause was not violated by exclusion of boys from any particular team." *Id.* at 1130 (citing *Mularadelis v. Haldane Cent. Sch. Bd.*, 427 N.Y.S.2d 458, 463–64 (N.Y. App. Div. 1980)). But "most cases" had concluded "that the denial of an opportunity in a specific sport, *even when overall opportunities are equal*, can be a violation of the equal protection clause." *Id.* (emphasis added). In other words, the demands of Equal Protection do not turn on boys' "overall opportunities," but on the specific opportunity denied based on sex. This Court adopted that majority approach. *See id.* at 1131. So any alleged overall *inequality* in athletic opportunities for biologically male athletes who identify as female does not make *Clark I* distinguishable here.

Under intermediate scrutiny, the only relevant question is whether there is a "substantial relationship" between excluding males from female sports teams and "redressing past discrimination and providing equal opportunities for women." *Id.* at 1131. And *Clark I* held that there "clearly" is. *Id.* Whether the Fairness in Women's Sports Act leaves biologically male athletes who identify as female with equal opportunities to participate in sports is a disputed question. But it is not a *relevant* question to the Equal Protection analysis.

iii. Asking whether a small subset of biologically male athletes would take the place of a "substantial" number of female athletes misses the point—twice.

Third, the district court erred by distinguishing *Clark I* on the ground that "it appears" to the court that biologically male athletes who identify as female "have not and could not displace" biologically female athletes "to a substantial extent." ER65 (cleaned up). That is not the right question. Even if it were, the answer the court gives disregards the true meaning of equal opportunity to participate in sports.

Again, the Fairness in Women's Sports Act discriminates on the basis of biological sex, not transgender status. So the correct question remains whether there is "a substantial relationship between the exclusion" of *all* biological males from female sports teams and "the goal of redressing past discrimination and providing equal opportunities for women." *Clark I*, 695 F.2d at 1131.

Importantly, proving "a substantial relationship" *does not* require proving that granting exceptions—or any particular exception—would undermine "the desired goal." *Id.* For the girls-only team policy challenged in *Clark I*, this Court speculated that "specific athletic opportunities could be equalized more fully in a number of ways," including by letting boys compete on girls' teams "in limited numbers." *Id.* Still, all that proved was "that the exclusion of boys [was] not *necessary* to achieve the desired goal." *Id.* It did "not mean that the required *substantial* relationship does not exist." *Id.* (emphasis added).

So too here. The district court thought it "untenable" that allowing "approximately one half of one percent of the population . . . to compete on women's teams would substantially displace female athletes." ER65–66. But even if that were true (and it is not), all that would prove is that the exclusion of all biologically male athletes "is not *necessary* to achieve the desired goal." *Clark I*, 695 F.2d at 1131. Even if "specific athletic opportunities could be equalized more fully" by opening female sports teams to the "limited numbers" of biologically male athletes who identify as female, that does "not mean that the required substantial relationship does not exist." *Id.* Here, as in *Clark I*, "absolute necessity is not the standard," so "even the existence of wiser alternatives than the one chosen does not serve to invalidate the [Act] since it is substantially related to the goal." *Id.* at 1132.

In addition to misapplying intermediate scrutiny's "substantial relationship" test by requiring something closer to "absolute necessity," the district court erred by adopting an overly restrictive view of the state interests that the Act advances. Drawing from the Act's twelfth legislative finding, the court recognized that the Act "suggests [that] it fulfills the interests of promoting sex equality, providing opportunities for female athletes to demonstrate their skill, strength, and athletic abilities, and . . . providing female athletes with opportunities to obtain college scholarships and other accolades." ER66–67. And the court recognized that "Plaintiffs do not dispute that these are important governmental objectives." ER67.

But the court omitted an integral part of that twelfth legislative finding: "opportunities to obtain recognition and accolades, college scholarships," and "numerous other long-term benefits" all "flow from *success* in athletic endeavors." ER814 (emphasis added). If you take away opportunities for women and girls to achieve success in their own sports, you take away everything that flows from that success. Providing equal opportunities for women to participate in sports is about more than the opportunity to make the team or to be on the field—it's about the opportunity to win.

The Second Circuit recognized this in the Title IX context. "A primary purpose of competitive athletics is to strive to be the best." *McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 294–95 (2d Cir. 2004). And the "greater the potential victory, the greater the motivation to the athletes." *Id.* at 294. Thus, "[t]reating girls differently regarding a matter so fundamental to the experience of sports—the chance to be champions—is inconsistent with Title IX's mandate of equal opportunity for both sexes." *Id.* at 295.

The same is equally true in the Equal Protection context. And both Intervenors detailed how they and their teammates had been denied opportunities to place higher and achieve greater success when forced to compete against a biologically male athlete under the NCAA's one-year hormone-therapy policy. ER527–28, ER535. Similarly, Connecticut athlete Chelsea Mitchell described how competing against two biologically male athletes cost her "four state championship titles, two All New England awards, medals, points, and publicity." ER317. As the Office for Civil Rights concluded, allowing biologically male athletes to compete against and defeat female athletes like Mitchell "treated students differently based on sex, by denying opportunities and benefits to female student-athletes that were available to male student-athletes." ER404.

None of that mattered to the district court. ER67–68. To the court, it was enough that biologically female athletes had sometimes defeated biologically male athletes. ER67. As to the Intervenors, "although [they had] lost to Eastwood," Eastwood had been "ultimately defeated" by a biologically female teammate. ER68. *Accord* ER73 (dismissing evidence that Eastwood and three other biologically male athletes had deprived female athletes of an equal opportunity to succeed in sports because "at least three" of the four biologically male athletes had "notably lost" to female athletes). "And, losing to Eastwood at one race did not deprive the Intervenors from the opportunity to compete in Division I sports, as both continue to compete on the women's cross-country and track teams" at Idaho State. ER68.

To the district court, depriving these girls of the "chance to be champions," *McCormick*, 370 F.3d at 295, made no difference if the girls had the bare opportunity to "compete." Biologically male athletes have every opportunity to succeed in their sports; biologically female athletes have to settle for just being on the team. Under the district court's holding here, the Equal Protection Clause *requires* that fundamentally unequal result. It does not.

iv. Assessing whether the Act is a perfect fit as applied to athletes on hormone therapy misapplies intermediate scrutiny.

Fourth, the district court erred by narrowing the question even further—distinguishing *Clark I* based on the court's finding that it was "not clear" that biologically male athletes who (1) identify as female and (2) suppress their testosterone have any "significant physiological advantages" over biological women. ER66. Again, the district court asked the wrong question (discussed in this section) and gave the wrong answer (discussed in the next).

Under *Clark I*, the proper question is a broad one: whether a "substantial relationship" exists between excluding *all* biological males from female sports teams and providing "equal opportunities for women." *Clark I*, 695 F.2d at 1131. But the district court ignored that question—and the clear answer that *Clark I* supplied—choosing instead to focus on the Plaintiffs' allegedly "compelling evidence that equality in sports is *not* jeopardized by allowing" biologically male athletes who identify as female and "have suppressed their testosterone for one year to compete on women's teams." ER69. This was error.

A "substantial relationship" requirement implies that exceptions will exist. Narrowing the frame to focus *only* on the exceptions will by definition eliminate any match between the law and the state's interests in that narrow set of cases. Intermediate scrutiny authorizes no such dissection; it directs courts to consider a law's entire scope.

The fact that Hecox brought an as-applied challenge does not change the analysis. "[C]lassifying a lawsuit as facial or as-applied affects the extent to which the invalidity of the challenged law must be demonstrated and the corresponding breadth of the remedy, but it does not speak at all to the substantive rule of law necessary to establish a constitutional violation." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1127 (2019) (cleaned up). "Surely it would be strange for the same words of the Constitution to bear entirely different meanings depending only on how broad a remedy the plaintiff chooses to seek." *Id.* at 1127–28. *Accord Legal Aid Servs. of Or. v. Legal Servs. Corp.*, 608 F.3d 1084, 1096 (9th Cir. 2010) (in an as-applied First Amendment case, observing that the "underlying constitutional standard" was "no different [than] in a facial challenge"); *Smith v. City of Chi.*, 457 F.3d 643, 652 (7th Cir. 2006) (the same "basic formulation" under the Equal Protection Clause "applies whether the plaintiff challenges a statute on its face" or "as applied"). So the two *Clark* cases apply with full force here.

And that is especially true given that the district court apparently enjoined the Act's enforcement not just to biologically male athletes who have undergone hormone therapy, but to *all* biologically male athletes, period. That order violates the rules limiting the scope of injunctions, as explained in Part III below. Even more than that, though, the order undermines any suggestion that this case is really about hormone therapy and whether it equalizes athletic differences between the sexes.

Regardless, the court enjoined the Act because, in the words of *Clark I*, the court believed that "specific athletic opportunities could be equalized more fully" by limiting participation in women's sports "on the basis of specific physical characteristics other than sex," 695 F.2d at 1131, namely the specific physical changes that Plaintiffs argue can be achieved through one year of hormone therapy. Under intermediate scrutiny, though, that is beside the point. "The existence of these alternatives shows only that the exclusion of boys is not *necessary* to achieve the desired goal. It does not mean that the required substantial relationship does not exist." *Id.*

Viewed solely from the perspective of biologically male athletes who identify as female, "the alternative chosen" by the Act "may not maximize equality" for transgendered athletes, and it "may represent trade-offs between equality and practicality." *Id.* at 1131–32. "But since absolute necessity is not the standard," even the district court's belief that "wiser alternatives than the one chosen" exist "does not serve to invalidate the policy here since it is substantially related to the goal." *Id.* at 1132. "None of [the Supreme Court's] gender-based classification equal protection cases have required that the statute under consideration must be capable of achieving its ultimate objective in every instance." *Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53, 70 (2001). A "substantial relationship" is "all the standard demands." *Clark I*, 695 F.2d at 1131–32.

The Seventh Circuit's decision in *O'Connor v. Board of Education of School District No. 23*, 645 F.2d 578 (7th Cir. 1981), illustrates that point in an analogous context. In that "equal protection case," the district court had "granted a preliminary injunction restraining [the defendants] from refusing to permit [the female plaintiff] to try out for the boys' sixth grade basketball team." *Id.* at 579. The Seventh Circuit granted a stay and then reversed, holding the district court had "abused its discretion in issuing [the] preliminary injunction." *Id.* at 579–80.

Applying intermediate scrutiny, the Seventh Circuit held that the defendants had "demonstrated that their program"—which required sex-specific sports teams for both sexes—"substantially serve[d] the objective of increasing girls' participation in sports." *Id.* at 581. Regardless of the individual impact on the plaintiff, "[i]f the classification is reasonable in substantially all of its applications," then the "general rule" cannot "be said to be unconstitutional simply because it appears arbitrary in an individual case." *Id.* (quoting *O'Connor v. Bd. of Educ. of Sch. Dist. 23*, 449 U.S. 1301, 1306 (1980) (Stevens, J., denying application to vacate stay of preliminary injunction)). And that much is equally true here.

v. The district court's conclusion that compelling evidence undermined the Act's relationship to the government's interests is clearly erroneous.

Finally, the district court's conclusion—that Defendants and Intervenors failed to show that participation in women's sports by biologically male athletes who identify as female "threatened sexual equality in sports or opportunities for women," ER74—fails because it is based on a clearly erroneous reading of the available evidence.

This Court will reverse a preliminary injunction based "on clearly erroneous findings of fact." *Does 1-5*, 83 F.3d at 1152. Here, it is not clear whether the district court made findings of fact or merely found defendants had not carried a burden they do not have.[12] Either way, the court based its decision on a clearly erroneous reading of the evidence. In short, it conflated evidence attempting to measure the effects of natural levels of circulating testosterone in maturing males with "evidence" measuring the effects of one year of testosterone suppression. Specifically, it cited the "medical consensus" that the "difference in testosterone is generally the primary driver of differences in athletic performance between elite male athletes and elite female athletes." ER69 (quoting ER703). But the court confused two different things.

[12] *Compare* ER69 (asserting Plaintiffs "presented compelling evidence that equality in sports is *not* jeopardized" by opening women's teams to biologically male athletes who identify as female and "suppress[] their testosterone for one year") *with* ER74 (noting a "significant dispute" as to whether such individuals "actually have physiological advantages").

Multiple studies have found that escalating circulating levels of testosterone drive, or at least coincide with, the physical bodily changes and associated increases in athletic performance that are characteristic of male puberty. ER427. However, to conclude from this evidence that reducing circulating testosterone levels *after* male puberty has occurred will somehow un-ring that bell is a logical fallacy. *Id.* Contrary to the court's apparent belief, ER70, none of the multiple studies Dr. Brown reviewed reached the conclusion that a single year of testosterone suppression *after* male puberty can eliminate entirely the average male advantage, ER428–86.[13]

[13] The one "small study" in Dr. Safer's declaration that the district court claims examined "the effects of gender-affirming hormone therapy on the athletic performance of transgender athletes," ER69, contains "numerous" methodological "shortcomings rendering the data and conclusions to be of little to no scientific validity," ER482. Most relevant here, the "study" contains "no indication" whether the eight subjects had "undergone only hormone treatment, surgical treatment, or both." ER484. Nor does it contain "any verification of testosterone concentrations, compliance with hormone treatments, or other relevant endocrine or transgender treatment information." ER484. And "some of the data represent a span of *29 years* between reported race times." ER485 (emphasis added). Thus, whatever else the "study" might be useful for, it does not assert or support the conclusion that a single year of hormone therapy, by itself, has any discernable impact on athletic performance.

Further, the court's discourse about testosterone levels is irrelevant because the NCAA and IHSAA rules—which control while the district court's injunction stands—contain no testosterone-level requirements at all. Not so for other elite athletic bodies. International Olympic Committee ("IOC") rules allow biologically male athletes who identify as female "to compete in the women's category with proof that they have declared a female gender identity and can establish testosterone suppression under 10 nMol/L [nanomoles per liter] for a period of one year." ER777. "World Athletics has a similar rule to the IOC . . . but has set the testosterone suppression to 5 nMol/L." *Id.*[14]

[14] World Rugby, the global governing body for rugby, recently concluded that even these limitations are not enough. That decision followed "a comprehensive and inclusive process . . . to understand whether it was possible to balance inclusivity with safety and fairness in light of growing evidence that the testosterone suppression required by previous transgender regulations does not significantly impact muscle mass, strength or power." World Rugby, *Media Releases: World Rugby approves updated transgender participation guidelines*, perma.cc/4FT9-ZX5Q. "As a result of this process and based on the available evidence, it was concluded that a balance between safety, fairness and inclusion could not be provided" while allowing biologically male athletes who identify as female and have gone through male puberty to "play[] women's contact rugby." *Id.* That evidence consistently shows that, "given the size of the biological differences" between men and women, the "comparatively small effect of testosterone reduction" over a 12-month period still "allows substantial and meaningful differences to remain." World Rugby, *Transgender Guideline*, at 2, available for download at playerwelfare.worldrugby.org/?documentid=231. And those differences have "significant implications for the risk of injury" to female players, thus justifying the new policy. *Id.*

In stark contrast, the IHSAA and NCAA policies allow biologically male athletes who identify as female to compete on women's and girls' sports teams following one year of hormone treatment *without requiring them to suppress their testosterone below a certain level*. ER73–74, ER621, ER780. At least one biologically male athlete described in the record, Cece Telfer, continued to achieve the same race times after transitioning and completing the required one year of hormone therapy. ER480–82. The district court (erroneously) dismissed that evidence as "anecdotal." ER73 n.38. But even Plaintiffs' evidence demonstrates that the bare fact of undergoing testosterone suppression therapy does not guarantee low levels of testosterone.

For example, Dr. Safer refers to "Endocrine Society Guidelines" for treating biological males who identify as female, which recommend targeting "circulating testosterone levels to a typical female range at or below 1.7 nmol/L." ER706–07. Dr. Safer claims that such levels are "consistent with" the "testosterone levels achieved by medically treated" biological males who identify as female "in practice." *Id.* But Dr. Safer leaves the phrase "consistent with" undefined, and the study he cites does not show that biological males who identify as female can consistently lower their testosterone levels to within the targeted female range through hormone therapy.

Instead, that study concluded that, "[w]hereas patients from the highest suppressing quartile could reliably achieve [the targeted level] on average, the *other three quartiles* would unlikely be able to achieve this level." Jennifer J. Liang et al., *Testosterone Levels Achieved by Medically Treated Transgender Women in a United States Endocrinology Clinic Cohort*, 24(2) ENDOCRINE PRACTICE 14 (2018) (emphasis added). Significantly, *one quarter* of the participants were "unable to achieve *any* significant testosterone suppression" over a 12-month period. *Id.* (emphasis added). And the study's authors theorized these participants "may have had a different physiologic response to treatment than other patients." *Id.*

On this record, it was clearly erroneous for the district court to conclude that studies measuring the effects of circulating testosterone levels constitute "compelling evidence that equality in sports is *not* jeopardized" if one-year hormone-therapy policies are followed. ER69. In effect, the IHSAA and the NCAA use one year of hormone therapy as a proxy for athletic ability. But Plaintiffs' own evidence refutes the conclusion that it is an accurate proxy. And under intermediate scrutiny, the Idaho Legislature's decision to use biological sex instead is constitutionally permissible. *Clark I*, 695 F.2d at 1131 ("[T]here is 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.").

II. Jane Doe's Equal Protection claim is entirely speculative and misinterprets the Fairness in Women's Sports Act.

A. The Act's mere existence does not give Doe standing to challenge it.

"To establish Article III standing, an injury must be concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (cleaned up). And the "party invoking federal jurisdiction bears the burden of establishing these elements." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). To satisfy the injury-in-fact requirement, a plaintiff "may allege a future injury," but "only if he or she is *immediately* in danger of sustaining some *direct* injury as the result of the challenged official conduct and the injury or threat of injury is both real and immediate, not conjectural or hypothetical." *Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d 646, 656 (9th Cir. 2002) (cleaned up).

In the Equal Protection context, the "hypothetical existence of a racial or gender barrier is [not] enough" absent "a plaintiff's showing that she has been, or is genuinely threatened with the *likelihood* of being, subjected to such a barrier." *Id.* at 657 (cleaned up) (emphasis added). A plaintiff cannot establish standing "without demonstrating a genuine threat of adverse treatment due to the [challenged] policy's *imminent* enforcement." *Id.* (cleaned up) (emphasis added).

"Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is *certainly* impending." *Clapper*, 568 U.S. at 409 (cleaned up). Thus, the Supreme Court has "repeatedly reiterated that threatened injury must be *certainly impending* to constitute injury in fact, and that allegations of *possible* future injury are not sufficient." *Id.* (cleaned up).

To decide whether an "alleged injury is too imaginary or speculative to support jurisdiction," this Court considers the facts "at the time the complaint was filed." *Scott*, 306 F.3d at 655 (cleaned up). Doe alleged that she "fears for her privacy and security . . . if she continues to play sports." ER772. She "worries" one of her competitors "might decide to 'dispute' her sex just to try to keep her from playing." ER772–73. She "does not commonly wear skirts or dresses," she "has an athletic build," and "most of her closest friends are boys." ER773. So "people sometimes think of her as masculine." *Id.* And Doe "worries that people might use that as an excuse to 'dispute' her gender." *Id.* Notably, Doe does *not* allege that a single person has ever mistaken her for a boy. If the Fairness in Women's Sports Act were not struck down, though, she "would worry" someone might dispute her sex, thinking her "'too good' or 'too masculine.'" ER774. Thus, she would "fear the invasion of her privacy." *Id.* And she "thinks it is unfair that girls will potentially have to go through invasive physical examinations to play sports." *Id.*

This Court has "repeatedly admonished" that "'[t]he mere existence of a statute, which may or may not ever be applied to plaintiffs, is not sufficient to create a case or controversy within the meaning of Article III.'" *San Diego Cnty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1126 (9th Cir. 1996) (quoting *Stoianoff v. Montana*, 695 F.2d 1214, 1223 (9th Cir. 1983), and citing *W. Mining Council v. Watt*, 643 F.2d 618, 627 (9th Cir. 1981), for the "same language"). It is not enough to claim that "the enactment of the Act itself" has caused an injury. *Id.* Nor is it enough for a plaintiff to make a "generalized claim that the statute's very existence has an inhibiting effect on her exercise of her right[s]." *Del Percio v. Thornsley*, 877 F.2d 785, 787 (9th Cir. 1989). And this is especially true when the challenged statute "at most *authorizes*—but does not *mandate* or *direct*—the [government conduct] that" the plaintiff fears. *Clapper*, 568 U.S. at 412.

All of this applies here. Doe worries an unidentified competitor might dispute her sex at some unidentified point in the future, and she fears her privacy might be invaded if the Act is applied to require her to prove her sex. ER773–74. That "generalized claim" is insufficient. *Del Percio*, 877 F.2d at 787. "The problem with [Doe's] attempt to rely upon this sort of harm to establish standing in the present case is that [she has] not adequately averred that any specific action is threatened or even contemplated against [her]." *United Presbyterian Church in the U.S.A. v. Reagan*, 738 F.2d 1375, 1380 (D.C. Cir. 1984) (Scalia, J.).

And Doe's claim that she is "more likely than the populace at large to be subjected to the unlawful activities which the [Act] allegedly permits . . . fall[s] short of the 'genuine threat' required to support this theory of standing." *Id. Accord, e.g.*, *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1205 (9th Cir. 2007) ("It is not sufficient for Al–Haramain to speculate that it might be subject to surveillance under the TSP simply because it has been designated a 'Specially Designated Global Terrorist.'").

Moreover, the Act merely authorizes independent third parties to dispute an athlete's sex—it "does not *mandate* or *direct*" them to. *Clapper*, 568 U.S. at 412. And the Supreme Court has been especially reluctant "to endorse standing theories that rest on speculation about the decisions of independent actors." *Clapper*, 568 U.S. at 414.

And even if some unnamed competitor *did* challenge Doe's sex at some unidentified future time, the Act does not mandate or direct Doe's school to require her "to go through [the] invasive or uncomfortable test" that Doe fears. ER773. The Act *authorizes* that Doe's health care provider "*may* verify" Doe's "biological sex as part of a *routine sports physical examination* relying only on one (1) or more" of three factors. IDAHO CODE § 33-6203(3) (emphasis added). And Doe fears that having to prove one of those factors would be "invasive or uncomfortable." ER773.

But the Act also provides that schools can resolve disputes by requesting "a health examination and consent form or other statement signed by the student's personal health care provider" to "verify the student's biological sex." IDAHO CODE § 33-6203(3). And Defendants here—including the various school officials responsible for resolving any disputes that might arise about Doe's sex—have explained that they interpret these separate provisions as allowing students to verify their biological sex by submitting a form *without* undergoing "an exam relying on one of [the three] factors." ER158–59.

Doe's "misinterpretation of the law," ER159—which apparently arises from her reading of the original version of the bill, not the one that passed, ER158, ER784—"gives rise to [her] alleged fear and harm," ER159. The Act "may or may not ever be applied" to her—certainly not in the manner she fears—so Doe's claim is insufficient to "create a case or controversy" under Article III. *San Diego Cnty.*, 98 F.3d at 1126.

In concluding otherwise, the district court cited the Act's mere existence and its *possible* future application to Doe—nothing more. It said that Doe "risks being subject to" the Act's "dispute process," ER41, she "may have to verify that she is female," ER45, she is "more likely than other female athletes to be subjected to the dispute process," ER44, that process could "potentially" involve certain harms, ER41, and thus Doe faces a "risk of being forced to undergo an invasion of privacy," ER45, making her "subject to" less favorable rules than boys, ER43.

"The court's use of conditional language is a tacit acknowledgment that the injury alleged here is far too speculative to satisfy the injury-in-fact requirement of Article III standing." *Scott*, 306 F.3d at 658. *Accord Al-Owhali v. Ashcroft*, 279 F. Supp. 2d 13, 27 (D.D.C. 2003) (plaintiff could not establish standing because he "merely assert[ed] that he is within the class of persons subject to monitoring, not that he [had] actually been the subject of such monitoring") (cleaned up).

Finally, the court's misplaced reliance on *Krottner v. Starbucks Corp.*, 628 F.3d 1139, 1143 (9th Cir. 2010), only *bolsters* the conclusion that the court erred. ER443–44. In *Krottner*, this Court held that the plaintiffs had "alleged a credible threat of real and immediate harm stemming from the theft of a laptop containing their unencrypted personal data." 628 F.3d at 1143. Importantly, though, the Court added that if the plaintiffs' allegations had been "more conjectural or hypothetical—for example, if no laptop had been stolen, and Plaintiffs had sued based on the risk that it would be stolen at some point in the future—[the Court] would find the threat *far less credible*." *Id.* (emphasis added).

That is exactly the situation here. Doe may have established that she owns a laptop. And she may have established that laptop thieves *may exist*. But that is all she has established. And that is not enough to confer Article III standing. This Court should reverse.

B. Doe's claim fails on the merits because Doe misreads the Act, and the Act survives intermediate scrutiny.

For similar reasons, Doe's Equal Protection claim fails on the merits. As described above, the Act provides multiple pathways for resolving disputes about a student's sex. IDAHO CODE § 33-6203(3). The first two options include having the student "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." *Id.* Nothing in that part of the statute limits how the provider may gather information to make that verification. And that makes sense. Given the many sex-specific aspects of healthcare, a student's "personal health care provider" almost always will already know her patient's biological sex based on experience with the patient, and if needed she can obtain additional information simply by asking.[15]

Separately, the Act states that a provider "may verify the student's biological sex as part of a routine sports physical" exam, relying only on one or more of "reproductive anatomy, genetic makeup, or normal endogenously produced testosterone levels." *Id.*

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[15] Plaintiffs' expert described how doctors routinely obtain personal information about a student's reproductive anatomy by asking questions—without any "intrusive and traumatic" examinations. ER749 (noting that sports physicals include a "question about whether a person has only one testicle" because that "information can be collected through asking the patient"). The IHSAA health examination and consent form contains the same question, along with questions about the student's "menstrual period." ER418.

Doe appears to believe that these provisions all require each student whose sex is disputed to "go through invasive physical examinations to play sports." ER774. But the Act merely provides that a student's "health care provider *may* verify the student's biological sex as part of a routine sports physical examination," IDAHO CODE § 33-6203(3) (emphasis added), relying on one of the three factors that Doe fears would require "an invasive or uncomfortable test," ER773. It does not say that the provider must. And the "normal reading of 'may' is permissive, not mandatory." *Patterson v. Wagner*, 785 F.3d 1277, 1281 (9th Cir. 2015). The word "implies discretion." *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1977 (2016). And this Court "will construe it [as] discretionary . . . absent a clear indication from the context that Congress used the word in a mandatory sense." *Fernandez v. Brock*, 840 F.2d 622, 632 (9th Cir. 1988).

No such clear indication exists here. Thus, the Act *allows* a student to provide her school with a statement verifying her sex following "a routine sports physical examination" based on one of the three factors in that sentence. IDAHO CODE § 33-6203(3). But it *also* allows her to "provide a health examination and consent form or other statement signed by [her] personal health care provider." *Id.* So the Act *does not* require every student whose sex is disputed to "go through invasive physical examinations to play sports." ER774.

If the district court believed Doe's contrary interpretation made the Act more susceptible to constitutional challenge, then it should have accepted Defendants' reasonable alternative interpretation. It is an "elementary rule" of statutory construction "that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Gonzales v. Carhart*, 550 U.S. 124, 153 (2007). That rule should not be allowed to "fall[] by the wayside" in favor of an "antagonistic canon of construction" in cases involving controversial issues. *Id.* at 153–54 (cleaned up). That is especially true here given that the Defendants themselves proposed a more reasonable interpretation of the Act. ER158–59.

Properly construed, the Act's sex-dispute provisions survive intermediate scrutiny for all the same reasons that the Act's exclusion of male athletes from female sports teams survives: "there is clearly a substantial relationship between the exclusion of males from [female sports] team[s] and the goal of redressing past discrimination and providing equal opportunities for women." *Clark I*, 695 F.2d at 1131. "There is no question that this is a legitimate and important governmental interest." *Id.* And it is "almost axiomatic that a policy which seeks to foster the opportunity" to further those interests "has a close and substantial bearing" on the interests themselves. *Nguyen*, 533 U.S. at 70.

As the Swiss Supreme Court recently observed in a similar context considering the difficult case of Caster Semenya, "The separation [of sports] into the two categories of female and male *implies the necessity of fixing a boundary and criteria of distinction*."[16] Or as one scientific article cited by the district court, ER70, put it, "It is widely accepted that elite athletic competitions should have separate male and female events." David J. Handelsman et al., *Circulating Testosterone as the Hormonal Basis of Sex Differences in Athletic Performance*, 39 ENDOCRINE REVIEWS 803, 804 (2018). "The main justification is that men's physical advantages in strength, speed, and endurance mean that a protected female category, *with objective entry criteria*, is required." *Id.* (emphasis added). This is all that the Act's sex-dispute provisions accomplish. Because they advance the same interests advanced by the broader Act, they are equally constitutional. *Clark I*, 695 F.2d at 1131.

[16] Decision of the Swiss Supreme Court (Tribunal Federal) dated August 25, 2020, in the matter of *Athletics South Africa v. International Association of Athletics Federations* (cases 4A_248/2019 and 4A_398/2019), § 9.8.3.3, perma.cc/N2YT-YQY8 ("La séparation en deux catégories féminine et masculine implique cependant de devoir fixer une limite et des critères de distinction.").

III. The district court's undefined and apparently unlimited preliminary injunction is improper as a matter of law.

A. The injunction entered by the court fails to provide the specificity required by Rule 65.

Rule 65(d) requires that every injunctive order "shall set forth the reasons for its issuance; shall be specific in terms; [and] shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained." *Schmidt v. Lessard*, 414 U.S. 473, 475 (1974) (quoting F.R.C.P 65(d)). The rule "was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood." *Id.* at 476. And this Court has read "the rule and its policy to require" that injunctions be "reasonably clear so that ordinary persons will know precisely what action is proscribed." *Portland Feminist Women's Health Ctr. v. Advocates for Life, Inc.*, 859 F.2d 681, 685 (9th Cir. 1988) (cleaned up).

In *Schmidt*, the Supreme Court held that an injunction "against further enforcement of the [statutory] scheme against [plaintiffs]" failed to satisfy that rule. *Schmidt*, 414 U.S. at 474, 476. Likewise here, the district court failed to state "specifically" the terms of the injunction or to "describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required." F.R.C.P. 65(d)(1)(B), (C). Instead, the court merely ordered that the "Motion for Preliminary Injunction (Dkt. 22) is GRANTED." ER87. This was error.

B. The scope of the injunction far exceeds any reasons and findings set forth in the district court's opinion.

In addition to the specificity Rule 65(b) requires, the district court had an obligation to articulate findings of fact and conclusions of law to support the injunction's scope, F.R.C.P. 52(a)(2), and reasons justifying that scope, F.R.C.P. 65(d)(1)(A). "[A] trial court abuses its discretion by fashioning an injunction which is overly broad." *L.A. Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 654 (9th Cir. 2011).

In their motion, Plaintiffs requested a preliminary injunction "prohibiting the defendants, as well as their officers, agents, employees, attorneys, and any person who is in active concert or participation with them, from enforcing *any of the provisions* of House Bill 500." ER565 (emphasis added).

The Fairness in Women's Sports Act is broad in reach and contains several distinct provisions. It *categorically* prohibits biologically male athletes from participating in female sports. IDAHO CODE § 33-6203(2). It thus excludes biologically male athletes who identify as male (such as the Clark brothers). And it equally excludes biologically male athletes who identify as female—regardless of whether they have chosen to take testosterone-suppressing hormones, and, for those who are, regardless of how long or consistently they have been taking them.

The Act also includes a sex-dispute resolution process in the event a student's biological is disputed. IDAHO CODE § 33-6203(3). As described above, that subsection contains multiple avenues by which an athlete may verify her sex. *Id.* The Act further provides a private right of action for students who suffer loss of opportunities or other harms "as a result of a violation" of the Act or who are "subject to retaliation or other adverse action" for reporting a violation. IDAHO CODE § 33-6205(1) and (2). It likewise provides a private right of action for schools and institutions of higher education that suffer harm because of a violation of the Act. IDAHO CODE § 33-6205(3). And it provides protection from retaliation by other entities for schools because of their compliance with the Act. IDAHO CODE § 33-6204.

The district court articulated reasons why it believed the Act does not bear a "substantial relationship" to the important government interest of ensuring equal opportunities in athletics for women, as applied to males who "have undergone hormone suppression" for at least a year. ER74. By contrast, the court did not (and could not) make any finding that males who have *not* suppressed testosterone, or who have done so for less than a year or intermittently, do not possess "average physiological differences" giving them an athletic advantage over women. *Clark I*, 695 F.2d at 1131. On the contrary, the court accepted the *Clark* cases' conclusions on that point. ER63. Thus, the court's opinion provides no justification for an injunction prohibiting

enforcement of the Act's provisions to exclude biologically male athletes who identify as female and who *have not* suppressed their testosterone for at least one year.

Similarly, the district court's findings do not support an injunction prohibiting enforcement of the Act's sex-dispute resolution provisions that allow for an entirely *non-intrusive* verification—for example, through a simple representation by a student's primary care physician that the student is biologically female based on that physician's personal knowledge or existing records. IDAHO CODE § 33-6203(3).

Finally, the court likewise made no findings and offered no reasons that would justify an injunction prohibiting enforcement of Sections 33-6205(1) and (2) (providing protection against retaliation and a private right of action to women or girls who suffer actual injury as a result of violations), or 33-6204 and 33-6205(3) (protecting schools from retaliation and providing them their own private rights of action). Absent such findings, the court abused "its discretion by fashioning an injunction which is overly broad." *L.A. Haven Hospice,* 638 F.3d at 654.

C. The apparent scope of the injunction far surpasses the scope supported by Plaintiffs' as-applied challenge.

As reviewed above, the district court dismissed Plaintiffs' facial challenge and proceeded only on their as-applied claims. But in granting a sweeping injunction, the court lost that critical distinction. By categorically enjoining enforcement of the Act, the court in effect *granted* a facial challenge while erasing *Salerno*'s key requirement for a categorical invalidation of a statute—that the plaintiff "establish that *no set of circumstances exists* under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987) (emphasis added).

In *Italian Colors Restaurant v. Becerra*, this Court noted that the distinction between facial and as-applied claims "affects the proper scope of injunctive relief." 878 F.3d 1165, 1175 (9th Cir. 2018). There, the plaintiffs had pressed as-applied claims, but the district court had "enjoined the law in its entirety," *id.* at 1175, so this Court modified the injunction to bar enforcement only against the plaintiffs, *id.* at 1179.

The Eleventh Circuit did the same in *American Federation of State, County and Municipal Employees Council 79 v. Scott*, 717 F.3d 851 (11th Cir. 2013). There, the court of appeals held that an as-applied challenge could not support an injunction categorically prohibiting enforcement of an executive order against all state employees. *Id.* at 873. So the court vacated the injunction and remanded for the district court to craft a more narrowly tailored injunction. *Id.*

More broadly, injunctive relief should extend no further than "necessary to remedy Plaintiffs' alleged harm." *East Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026, 1029 (9th Cir. 2019) (narrowing injunction). *Accord E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1297 (9th Cir. 1992) (holding that injunctions must be "tailored to eliminate only the specific harm alleged," and striking overbroad portions of injunction); *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1501 (9th Cir. 1996) (holding that "injunctive relief generally should be limited to apply only to named plaintiffs where there is no class certification," and vacating the issued injunction in part).

Here too, the "trial court abuse[d] its discretion by fashioning an injunction [that] is overly broad." *L.A. Haven Hospice*, 638 F.3d at 654 (narrowing issued injunction). And as the cases cited above illustrate, this Court routinely redresses such error by vacating or narrowing overbroad district-court injunctions.

For these reasons, even if this Court ultimately rules against Defendants and Intervenors on the merits, the Court still should vacate the preliminary injunction and "remand to the district court for a statement of the precise conduct prohibited." *Fed. Election Comm'n v. Furgatch*, 869 F.2d 1256, 1264 (9th Cir. 1989). And for the reasons described above, this Court should make clear that any such injunction must be properly limited in scope, consistent with Plaintiffs' as-applied challenge.

CONCLUSION

In recent decades, our society and our laws have taken great strides toward securing a more equal playing field for women and girls. In sports as in other areas of life and law where the physical and enduring differences between men and women make them not similarly situated, courts have long recognized that our laws may treat men and women differently to redress past discrimination and ensure equal opportunities for women.

The Fairness in Women's Sports Act does just that. And this Court has already twice held that there is a substantial relationship between single-sex sports teams and the goal of redressing past discrimination and providing equal opportunities for women. Because that is all that intermediate scrutiny requires, this Court's binding precedent establishes that the Fairness in Women's Sports Act is constitutional.

The district court erred by misapplying that precedent and intermediate scrutiny, by misreading the plain language of the Act, and by entering an injunction that far surpassed the permissible scope in this as-applied challenge. This Court should reverse that decision and hold that the Fairness in Women's Sports Act does not violate the Equal Protection Clause. In the alternative, the Court should vacate the district court's injunction and remand with instructions to the court to narrow the scope of its injunction to better fit the court's findings and Plaintiffs' narrow as-applied claims.

Respectfully submitted,

Madison Kenyon and
Mary Marshall,
Intervenors-Appellants

Dated: November 12, 2020 By: */s/ Roger G. Brooks*

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STATEMENT OF RELATED CASES

Under this Court's Rule 28-2.6, Intervenors are not aware of any related cases.

CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2020, I electronically filed the foregoing Opening 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.

/s/ Roger G. Brooks
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November 12, 2020

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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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; SHERRI YBARRA, in her official capacity as the Superintendent of Public Instruction of the State of Idaho and as a member of the Idaho State Board of Education; INDIVIDUAL MEMBERS OF THE STATE BOARD OF EDUCATION, in their official capacities; BOISE STATE UNIVERSITY; MARLENE TROMP, in her official capacity as President of Boise State University; INDEPENDENT SCHOOL DISTRICT OF BOISE CITY #1; COBY DENNIS, in his official capacity as Superintendent of the Independent School District of Boise City #1; INDIVIDUAL MEMBERS OF THE BOARD OF TRUSTEES OF THE INDEPENDENT SCHOOL DISTRICT OF BOISE CITY #1, in their official capacities; and INDIVIDUAL MEMBERS OF THE IDAHO CODE COMMISSION, in their official capacities,

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

ADDENDUM TO INTERVENORS-APPELLANTS' OPENING BRIEF

ADDENDUM TABLE OF CONTENTS

U.S. CONST. amend. XIV, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

IDAHO CODE § 33-6201
Short title

This chapter shall be known and may be cited as the "Fairness in Women's Sports Act."

IDAHO CODE § 33-6202
Legislative findings and purpose

(1) The legislature finds that there are "inherent differences between men and women," and that these differences "remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity," United States v. Virginia, 518 U.S. 515, 533 (1996);

(2) These "inherent differences" range from chromosomal and hormonal differences to physiological differences;

(3) Men generally have "denser, stronger bones, tendons, and ligaments" and "larger hearts, greater lung volume per body mass, a

higher red blood cell count, and higher haemoglobin," Neel Burton, The Battle of the Sexes, Psychology Today (July 2, 2012);

(4) Men also have higher natural levels of testosterone, which affects traits such as hemoglobin levels, body fat content, the storage and use of carbohydrates, and the development of type 2 muscle fibers, all of which result in men being able to generate higher speed and power during physical activity, Doriane Lambelet Coleman, Sex in Sport, 80 Law and Contemporary Problems 63, 74 (2017) (quoting Gina Kolata, Men, Women and Speed. 2 Words: Got Testosterone?, N.Y. Times (Aug. 21, 2008));

(5) The biological differences between females and males, especially as it relates to natural levels of testosterone, "explain the male and female secondary sex characteristics which develop during puberty and have lifelong effects, including those most important for success in sport: categorically different strength, speed, and endurance," Doriane Lambelet Coleman and Wickliffe Shreve, "Comparing Athletic Performances: The Best Elite Women to Boys and Men," Duke Law Center for Sports Law and Policy;

(6) While classifications based on sex are generally disfavored, the Supreme Court has recognized that "sex classifications may be used to compensate women for particular economic disabilities [they have] suffered, to promote equal employment opportunity, [and] to advance

full development of the talent and capacities of our Nation's people," United States v. Virginia, 518 U.S. 515, 533 (1996);

(7) One place where sex classifications allow for the "full development of the talent and capacities of our Nation's people" is in the context of sports and athletics;

(8) Courts have recognized that the inherent, physiological differences between males and females result in different athletic capabilities. See e.g. Kleczek v. Rhode Island Interscholastic League, Inc., 612 A.2d 734, 738 (R.I. 1992) ("Because of innate physiological differences, boys and girls are not similarly situated as they enter athletic competition."); Petrie v. Ill. High Sch. Ass'n, 394 N.E.2d 855, 861 (Ill. App. Ct. 1979) (noting that "high school boys [generally possess physiological advantages over] their girl counterparts" and that those advantages give them an unfair lead over girls in some sports like "high school track");

(9) A recent study of female and male Olympic performances since 1983 found that, although athletes from both sexes improved over the time span, the "gender gap" between female and male performances remained stable. "These suggest that women's performances at the high level will never match those of men." Valerie Thibault et al., Women and men in sport performance: The gender gap has not evolved since 1983, 9 Journal of Sports Science and Medicine 214, 219 (2010);

(10) As Duke Law professor and All-American track athlete Doriane Coleman, tennis champion Martina Navratilova, and Olympic track gold medalist Sanya Richards-Ross recently wrote: "The evidence is unequivocal that starting in puberty, in every sport except sailing, shooting, and riding, there will always be significant numbers of boys and men who would beat the best girls and women in head-to-head competition. Claims to the contrary are simply a denial of science," Doriane Coleman, Martina Navratilova, et al., Pass the Equality Act, But Don't Abandon Title IX, Washington Post (Apr. 29, 2019);

(11) The benefits that natural testosterone provides to male athletes is not diminished through the use of puberty blockers and cross-sex hormones. A recent study on the impact of such treatments found that even "after 12 months of hormonal therapy," a man who identifies as a woman and is taking cross-sex hormones "had an absolute advantage" over female athletes and "will still likely have performance benefits" over women, Tommy Lundberg et al., "Muscle strength, size and composition following 12 months of gender-affirming treatment in transgender individuals: retained advantage for the transwomen," Karolinksa Institutet (Sept. 26, 2019); and

(12) Having separate sex-specific teams furthers efforts to promote sex equality. Sex-specific teams accomplish this by providing opportunities for female athletes to demonstrate their skill, strength, and athletic abilities while also providing them with opportunities to

obtain recognition and accolades, college scholarships, and the numerous other long-term benefits that flow from success in athletic endeavors.

IDAHO CODE § 33-6203
Designation of athletic teams

(1) Interscholastic, intercollegiate, intramural, or club athletic teams or sports that are sponsored by a public primary or secondary school, a public institution of higher education, or any school or institution whose students or teams compete against a public school or institution of higher education shall be expressly designated as one (1) of the following based on biological sex:

(a) Males, men, or boys;

(b) Females, women, or girls; or

(c) Coed or mixed.

(2) Athletic teams or sports designated for females, women, or girls shall not be open to students of the male sex.

(3) A dispute regarding a student's sex shall be resolved by the school or institution by requesting that the student 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. The health care provider may verify the student's biological sex as part of a routine sports physical examination relying only on one (1) or more of the following: the student's reproductive

anatomy, genetic makeup, or normal endogenously produced testosterone levels. The state board of education shall promulgate rules for schools and institutions to follow regarding the receipt and timely resolution of such disputes consistent with this subsection.

IDAHO CODE § 33-6204
Protection for educational institutions

A government entity, any licensing or accrediting organization, or any athletic association or organization shall not entertain a complaint, open an investigation, or take any other adverse action against a school or an institution of higher education for maintaining separate interscholastic, intercollegiate, intramural, or club athletic teams or sports for students of the female sex.

IDAHO CODE § 33-6205
Cause of action

(1) Any student who is deprived of an athletic opportunity or suffers any direct or indirect harm as a result of a violation of this chapter shall have a private cause of action for injunctive relief, damages, and any other relief available under law against the school or institution of higher education.

(2) Any student who is subject to retaliation or other adverse action by a school, institution of higher education, or athletic association or organization as a result of reporting a violation of this chapter to an employee or representative of the school, institution, or

athletic association or organization, or to any state or federal agency with oversight of schools or institutions of higher education in the state, shall have a private cause of action for injunctive relief, damages, and any other relief available under law against the school, institution, or athletic association or organization.

(3) Any school or institution of higher education that suffers any direct or indirect harm as a result of a violation of this chapter shall have a private cause of action for injunctive relief, damages, and any other relief available under law against the government entity, licensing or accrediting organization, or athletic association or organization.

(4) All civil actions must be initiated within two (2) years after the harm occurred. Persons or organizations who prevail on a claim brought pursuant to this section shall be entitled to monetary damages, including for any psychological, emotional, and physical harm suffered, reasonable attorney's fees and costs, and any other appropriate relief.

IDAHO CODE § 33-6206
Severability

The provisions of this chapter are hereby declared to be severable and if any provision of this chapter or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of the remaining portions of this chapter.