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UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO

LINDSAY HECOX et al.,

Plaintiffs,

v.

BRADLEY LITTLE et al.,

Defendants.

Case No. 1:20-cv-00184-DCN

INTERVENORS' [PROPOSED] MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION [Dkt. 22]

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PRELIMINARY STATEMENT

The State of Idaho has addressed multiple reasons why Plaintiffs' motion for preliminary injunction should be denied. Proposed Intervenor-Defendants Madison (Madi) Kenyon and Mary (MK) Marshall will not reiterate the legal authorities, standards, and arguments well covered by the State. Instead, Proposed Intervenors submit this brief to bring to the Court's attention additional facts that bear importantly on the "balance of the equities," and to unpack some basic flaws in the very foundations of Plaintiffs' Equal Protection claim.

As to the balance of the equities, Plaintiffs' depiction is wrong on both sides of the scale.

An injunction that blocks Idaho's Fairness in Women's Sports Act will inflict real harms on women and girls such as Intervenors. The Court does not face merely a balance between an abstract policy of the State and the tangible interests of individual plaintiffs. On the contrary, unfair competition in women's college athletics by male athletes *before* passage of the Fairness Act directly harmed Intervenors Madi and MK, who were denied equal athletic opportunities as a result.

The assertion by Plaintiffs' putative expert Helen Carroll that "I am not aware of any cisgender girls being harmed by the presence of a transgender student-athlete participating . . .in their league" (Carroll Declaration ¶ 25), reflects Ms. Carroll's ideological blinders, not facts. Recognizing what is really happening on the track to girls and young women like Intervenors, the Department of Education Office for Civil Rights has recently ruled that permitting males to compete in girls' and women's track competitions denies equal opportunities in athletics to girls and women and so violates Title IX. *See* Dep't of Educ. Office for Civil Rights, Letter of Impending Enforcement Action dated May 15, 2020 ("OCR Letter of Impending Enforcement Action"), attached as Appendix 1 to ECF No. 41, at 33-45. If the Fairness Act is enjoined,

Intervenors and other girls and young women will suffer concrete and irreparable harm in the coming fall season. *See* Section I.A below; *see also* Madison Kenyon Declaration, ECF No. 30-2, Mary Marshall Declaration, ECF No. 30-3, and Declaration of Chelsea Mitchell, submitted as Exhibit A hereto.

On the other side of the "balance of harms" scale, Plaintiffs cannot establish (as Plaintiffs' expert Dr. Deanna Adkins would have the Court believe) that Hecox will suffer severe psychological harm—and may commit suicide—unless permitted to compete in the women's division. On the contrary, in a detailed expert affidavit substantiated by extensive citations to the scientific literature, psychiatrist and expert in treatment of gender dysphoria Dr. Stephen Levine explains that there is no consensus among professionals that "social transition" (treating an individual as if he were of the opposite sex for all purposes, including athletic participation) is the only or most effective approach for young people who suffer from gender dysphoria. And there is no scientific basis at all to assert that "social transition" and "affirmation" lead to better long-term mental and physical health outcomes than other therapies. Instead, many studies document that those who persist in living in a transgender identity into adulthood suffer severely poor mental and physical health throughout their lifetimes, even after "transition," "affirmation," and cross-sex hormones, and even after so-called "sex-reassignment" surgery. *See* Section I.B below, and the expert affidavit of Dr. Stephen Levine attached as Exhibit B hereto. As a result, Hecox can show no likelihood of tangible harm absent an injunction.

As to the law, Plaintiffs' Equal Protection theory is defective at every turn. They do not complain because the Fairness Act protects separation of athletic competitions based on sex (which it does); rather they complain because it does *not* separate athletic competitions based on gender identity. They seek to invoke a novel category—gender identity—to declare

unconstitutional separation based on sex, which the Supreme Court and other courts have expressly sanctioned in circumstances that similarly turn on physical strength and capability. They ask this Court to invoke equal protection to *require* discrimination based on a category (gender identity) as a matter of Constitutional law, rather than to prohibit discrimination—an order that would be without precedent. And they seek to hijack a categorization that is justified only because of the physiological differences between the sexes, and convert it into a platform for a personal declaration of identity. In short, while Plaintiffs invoke the language of Equal Protection, their arguments and the remedy they seek have nothing to do with that body of law.

I. The "balance of the equities" tips decidedly against enjoining operation of the Fairness in Women's Sports Act.

To obtain a preliminary injunction, a plaintiff must establish that "he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (collecting cases). Plaintiffs bear the burden of showing that each element weighs clearly and unequivocally in their favor. *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012). The Court "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter*, 555 U.S. at 24; *see also Univ. of Haw. Prof'l Assembly v. Cayetano*, 183 F.3d 1096, 1108 (9th Cir. 1999) ("To determine which way the balance of the hardships tips, a court must identify the possible harm caused by the preliminary injunction against the possibility of the harm caused by not issuing it.").

In addition to the severe legal defects in Plaintiffs' arguments discussed in the State's opposition and in Section II below, Plaintiffs misdescribe both sides of the "balance of the equities" facing this Court.

A. Intervenor-Defendants and other women and girls will suffer immediate, identifiable harm and loss of rights if the Fairness in Women's Sports Act is enjoined.

Plaintiffs' putative expert Helen Carroll states that "I am not aware of any cisgender girls being harmed by the presence of a transgender student athlete participating . . . in their league" (Carroll Declaration ¶ 25), and Plaintiffs assert that enjoining the protections of the Fairness Act "would not harm Defendants," and that "Defendants . . . face no harm." Pls.' Mem. in Supp. of Prelim. Inj. ("Pl. PI Mem.") 28, ECF No. 22-1. This is mere say-so. In fact, as detailed in their declarations previously submitted in support of their motion to intervene (*see* Kenyon Decl., ECF No. 30-2; Marshall Decl., ECF No. 30-3), Intervenors themselves have already experienced harm from competition by males in women's and girls' athletics. And they and other girls and women in Idaho face further, direct harm if the Fairness Act's protection of women and girls from this unfair and unequal competition is enjoined. The State has a powerful interest in preventing this harm to its female citizens.

Madi and MK each have personally faced the disturbing and demoralizing experience of encountering male participation in their sport competitions, and must expect to compete against Plaintiff Hecox in the coming season if the Fairness in Women's Sports Act is enjoined. Kenyon Decl. ¶¶ 12, 14, 15, 29; Marshall Decl. ¶ 11, 14. As a result of this unfair competition, each of these young women lost placement opportunities and was denied a "level field" competitive experience in which effort and success enjoy a correlation. Kenyon Decl. ¶ 20. Madi found that "Fair competition pushes me to better myself and try harder; unfair competition [from a male] leaves me feeling frustrated and defeated"; watching a teammate lose her position on the championship podium because a male took first place was "heartbreaking." Kenyon Decl. ¶¶ 12, 16. MK similarly reports that while losing to another woman "drives me to work harder," losing to a male "feels completely different," "deflating." "It makes me think that no matter how hard I

try, my hard work and effort will not matter." Marshall Decl. ¶ 12. The experiences of Madi and MK closely echo the type of deprivation that the Second Circuit denounced when it wrote, in *McCormick v. School District of Mamaroneck*, 370 F.3d 275, 295 (2d Cir. 2004), that "[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." And a subtler but perhaps deeper harm was the disturbing message implied by allowing male athletes to compete as "female"—a message that the Intervenors' distinctive identities as women are unrecognized and unimportant, to be casually brushed aside in favor of other priorities. Kenyon Decl. ¶ 24.

The experiences of Madi and MK are by no means unique. If Ms. Carroll is "unaware" of girls who have been "harmed by the presence of a transgender student athlete participating . . . in their league," it is because she chooses to be unaware. Nationwide attention has recently been given to the U.S. Department of Education Office for Civil Rights investigation and litigation in Connecticut, where opportunities for participation, advancement, victory opportunities, and public recognition have been taken from many girls as a result of the participation of just two male athletes in Connecticut girls' track competitions. *See* OCR Letter of Impending Enforcement Action, ECF No. 41 App'x 1 at 18-27. Chelsea Mitchell, one of the girls harmed in this way, and one of the complainants to the Office for Civil Rights, details the harms that she personally suffered in a declaration submitted as Exhibit A to this brief. Those harms included being denied "four state championship titles, two All New England awards, medals, points, and publicity"—all as a result of the state athletic conference policy that grants male athletes entrance to female competitions. Mitchell Decl. ¶6. And when a male athlete swept several female state championships and titles and was named "girls . . . athlete of the year" by the local

paper, Chelsea understandably felt the injustice this implied against those who are in fact female athletes. *Id.* at ¶ 33. She hopes that future female athletes may be spared the "anxiety, stress, and performance losses" that she suffered due to male competition in female events. *Id.* at ¶ 47. Chelsea's narrative documents the very real harm that is both predictable and experienced when males compete in girls' or women's leagues based on claims of gender identity.

Indeed, it was the harms that Chelsea describes that caused the Office for Civil Rights to conclude recently that "by permitting the participation of biologically male students in girls' interscholastic track in the state of Connecticut, [the Connecticut league and member schools] denied female student-athletes benefits and opportunities" including equal opportunities "to place higher in . . . events; to receive awards and other recognition; and possibly to obtain greater visibility to colleges and other benefits," and so violated Title IX. OCR Letter of Impending Enforcement Action, ECF No. 41 App'x 1 at 33.

B. Plaintiff Hecox's claims of psychological harm are speculative and unsupported by science. [1]

Plaintiffs have alleged that "[t]he only treatment to avoid [suicide among transgender individuals] is . . . to affirm gender identity." (Compl. ¶ 103.) Plaintiffs' putative expert Dr. Adkins repeats this assertion verbatim (Adkins Decl. ¶ 22, ECF No. 22-2), and in their preliminary injunction brief Plaintiffs repeat this theme (Pl. PI Mem. 5, 28). Somewhat mysteriously, Plaintiffs do *not* include the purported risk that Hecox will commit suicide in their list of purported "irreparable injury" (Pl. PI Mem. 26-27), but then work it back into their cursory discussion of the "balance of equities" (*id.* at 27-28).

[1] Plaintiffs do not assert that Plaintiff Jane Doe, a female who lives under a gender identity consistent with her sex, is subject to any of the risks attributed to individuals who suffer from gender dysphoria. The State has amply highlighted the wildly speculative nature of Jane Doe's supposedly anticipated "injuries," and Intervenors will not take the Court's time repeating those points.

Any claim of likely psychological harm or suicide risk with respect to Plaintiff Hecox is entirely speculative and unsupported by any facts in the record. More broadly, the claim that permitting males who identify as female to compete in female athletics will reduce suicide and reduce psychological damage among that group is unsupported by science. On this point, Intervenor-Defendants bring essential information and expertise to this litigation through the accompanying expert affidavit of Dr. Stephen B. Levine, Clinical Professor of Psychiatry at Case Western Reserve University School of Medicine, who has worked with individuals suffering from gender dysphoria for over 45 years.

Plaintiffs' expert Dr. Deanna Akins has, essentially, opined that fairness in athletic opportunities to girls and women including Intervenors must take a back seat to the interests of males who identify as female, because (she claims) the only accepted therapy for individuals suffering from gender dysphoria demands "social transition"—treating those individuals in all circumstances as if they were in fact of the opposite sex. Dr. Adkins suggests that those individuals are likely to commit suicide or suffer severe psychological distress unless they are permitted to compete on girls' teams. Adkins Decl. 6-8.

Dr. Adkins cites almost no scientific literature to support her opinions. Dr. Levine, by contrast, cites extensive literature in his affidavit to explain that "social transition" is by no means universally accepted as the only correct therapy by practitioners in the field. Levine Aff. 11-21. He explains that there are no studies whatsoever that demonstrate that "social transition"—including participation in girls' or women's athletics—decreases suicide or suicide attempts in children, adolescents, or young adults who suffer from gender dysphoria, or will produce better physical or mental health outcomes for these individuals over the long run as compared to other therapeutic approaches. Levine Aff. 28-34. Instead, multiple studies from

respected centers have shown that individuals who persist in living in a transgender identity experience severely worse mental and physical health outcomes as adolescents and adults—including severely worse incidence of suicide and suicide attempts—than the general population, even after administration of cross-sex hormones and even "sex-reassignment surgery." Levine Aff. 34-42. Meanwhile, multiple studies suggest that a very large majority of children who suffer from gender dysphoria will "desist" from experiencing that dysphoria, and will revert to comfort with their biological sex by the time they reach young adulthood, so long as they are *not* subjected to "gender affirming" social transition such as participating in opposite-sex athletics. "Social transition and affirmation," however, may radically reduce the percentage of young people who revert to comfort with their biological sex. Levine Aff. 24-28.

Dr. Levine's expert affidavit is extensive, detailed, and thoroughly documented. But a key take-away is that there is good reason to believe, based on extensive peer-reviewed literature in the field, that social transition and "affirmation" of transgender identity in children and adolescents—which Plaintiffs would have this Court mandate in the context of athletics as a matter of law—steers those young people on a path that leads to severely negative mental and physical health outcomes. Of course, the opinions of Dr. Levine like those of Dr. Adkins will have to be tested by cross-examination at trial. But meanwhile, an awareness of this science will be critical to this Court's evaluation of Plaintiff Hecox's baseless claim that the "balance of the equities" requires that this Court enjoin the Fairness Act's requirement that only females play in athletics designated for girls or women.

II. Plaintiffs' invocation of "equal protection" turns the law and logic of equal protection on its head, and would deny equal protection to Intervenors and similarly situated women and girls.

A. Basic principles of Equal Protection law relative to classifications by sex

In most contexts, the Equal Protection Clause prohibits governmental action that treats one class of individuals differently, unless that classification and distinction is "rationally related to a legitimate state interest." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985). "The Equal Protection Clause does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). The Court's "traditional view of the core concern of the Equal Protection Clause" is "as a shield against arbitrary classifications." *Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591, 598 (2008). Legislation is presumed valid against an Equal Protection challenge. *Cleburne*, 473 U.S. at 440.

Some classifications, however—and in particular "race, alienage, or national origin"—are so seldom relevant to the capabilities of individuals and any state interest that they are deemed "suspect," and laws that turn on these classifications are subject to "strict scrutiny." They are constitutional "only if they are suitably tailored to serve a compelling state interest," *Cleburne*, 473 U.S. at 440. The Supreme Court has strongly cautioned lower courts against creating new "suspect categories." *Id.* at 441 (noting that "respect for the separation of powers" should make courts reluctant to establish new suspect classes). Neither the Supreme Court nor the Ninth Circuit has recognized "gender identity" as a "suspect class."

Classification and separate treatment based on sex falls somewhere in the middle. While the Supreme Court has cautioned that sex "frequently bears no relation to ability to perform or contribute to society," *Cleburne*, 473 U.S. at 440, quoting *Frontiero v. Richardson*, 411 U.S.

677, 686 (1973), it remains true that "[g]ender has never been rejected as an impermissible classification in all instances." *Kahn v. Shevin*, 416 U.S. 351, 356 n.10 (1974). Instead, the Supreme Court has recognized that that "the sexes are not similarly situated in certain circumstances," *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 469 (1981), and that "[p]hysical differences between men and women … are enduring: '[T]he two sexes are not fungible; a community made up exclusively of one is different from a community composed of both.'" *United States v. Virginia*, 518 U.S. 515, 533 (1996) ("*VMI*"). In *Nguyen v. INS*, 533 U.S. 53, 73 (2001), the Court condemned an artificial and blinkered analysis that would "fail to acknowledge even our most basic biological differences—such as the fact that a mother must be present at birth but the father need not be," while in the *VMI* case the Court volunteered that the admission of women to VMI "would undoubtedly require" adjustments to VMI's physical training program. *VMI*, 518 U.S. at 550 n.19.

The biological and physiological differences between men and women are real, relevant, and "enduring," and as a result sex-separated teams and competition have been the rule in most sports since competitive women's athletics became accepted, and have repeatedly been approved by courts. Thus, the Ninth Circuit approved a state policy that forbade male student participation on female high school sports teams, concluding that there is "no question that the Supreme Court allows for these average real differences between the sexes to be recognized" in the context of athletics. *Clark ex rel. Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126, 1131 (9th Cir. 1982). For the same reason, the Fourth Circuit recently upheld—against a Title VII challenge brought by a male applicant—the FBI's "gender normed" physical fitness benchmarks that set different requirements for "male and female Trainees" (with males facing more rigorous requirements) "in order to account for their innate physiological differences." *Bauer v. Lynch*,

812 F.3d 340, 343 (4th Cir. 2016). That court's reasoning was clear; the fact that it comports with common sense is not a mark against it: "Men and women simply are not physiologically the same for the purposes of physical fitness programs. . . . [T]he physiological differences between men and women impact their relative abilities to demonstrate the same levels of physical fitness. In other words, equally fit men and women demonstrate their fitness differently." *Id.* at 350, 351.

B. What the Fairness in Women's Sports Act does

Against the background of universal practice since the advent of women's sports and this legal precedent, Idaho's Fairness in Women's Sports Act is hardly a novelty. What it does is to ensure that in Idaho, if sports teams and competitions are separated by sex, then those teams and competitions designated for females are in fact reserved for females. The law protects women and girls such as Intervenors from competition that is both unfair and insuperable, and thus helps ensure equal opportunities in athletic experiences for girls and boys, women and men, in Idaho. *See* legislative purpose set forth in Idaho Code § 33-6202.

The justification for this law is simple and physical—it is "because of physiological differences between male and female individuals." *VMI*, 518 U.S. at 550 n.19. As reviewed above, courts as well as common sense recognize these differences. The Legislature made well-supported legislative findings concerning some of these "physiological differences." Idaho Code § 33-6202. If anything further were necessary, Dr. Gregory Brown has extensively detailed physiological differences between the sexes that impact athletic performance in his declaration submitted by the State. Expert Decl. of Dr. Gregory Brown, ECF 41-1. As to the real-world impact of these differences when males compete in female divisions, Dr. Brown—like the legislative findings—references the published work of Duke Law School Professor Doriane Lambelet Coleman who concluded, based on an extensive review of performance times in running events:

> [D]epending on the sport and event, the gap between the best male and female performances remains somewhere between 7 to 14 percent; and even the best female is consistently surpassed by many elite and non-elite males, including both boys and men. If elite sport were co-ed or competition were open, even the best female would be rendered invisible by the sea of men and boys who would surpass her.[2]

In other sports, physiological differences are respected by different equipment height or weight for men and women.[3] These biological and physiological realities provide an "exceedingly persuasive justification," *VMI*, 518 U.S. at 531, for protecting female athletes from dominating competition from males. Indeed, because of these same considerations, the Department of Education, in a 1979 Policy Interpretation regarding Title IX that has been held to be "both persuasive and not unreasonable" and so entitled to judicial deference, *McCormick*, 370 F.3d at 289-91, has declared that Title IX may not only permit but *require* provision of single-sex athletic teams when "[m]embers of the excluded sex [almost always women] do not possess

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[2] Doriane Lambelet Coleman et al., *Re-Affirming the Value of the Sports Exception to Title IX's General Non-Discrimination Rule*, 27 DUKE JOURNAL OF GENDER LAW & POLICY 69, 88-89 (2020), https://scholarship.law.duke.edu/djglp/vol27/iss1/7. Professor Coleman has publicly disagreed with the Fairness Act as it applies to males who have undergone puberty blocking since the very beginning of puberty (a category that neither Plaintiff claims to occupy), but she has not disavowed any of the extensive data or detailed findings contained in this very recent publication.

[3] Publicly available official sport standards, for example, show that:

• The net height used for women's volleyball is more than 7 inches lower than that used for men's volleyball. Federation Internationale de Volleyball (FIVB), *Official Volleyball Rules* 2017-2020, https://www.fivb.org/EN/Refereeing-Rules/documents/FIVB-Volleyball_Rules_2017-2020-EN-v06.pdf (last visited June 3, 2020).

• The hurdle height used for the high school girls' 100-meter hurdle event is 33 inches, while the standard height used for boys' high school 110-meter hurdle is 39 inches. USA Track and Field (USATF) *2020 Competition Rules*, https://www.usatf.org/governance/rule-books, (last visited June 3, 2020).

• The standard women's basketball has a circumference of 28.5 to 29 inches and a weight of between 18 and 20 oz, while a standard basketball used in a men's game has a circumference between 29.5 to 30 inches and a weight of between 20 and 22 oz. International Basketball Federation (FIBA) *2018 Official Basketball Rules*, http://www.fiba.basketball/OBR-2018-Basketball-Equipment-Yellow-Version-2.pdf (last visited June 8, 2020); *Women's National Basketball Association, Official Rules 2020*, https://ak-static.cms.nba.com/wp-content/uploads/sites/27/2020/05/2020-WNBA-Rule-Book-Final.pdf (last visited June 8, 2020).

sufficient skill to be selected for a single integrated team, or to compete actively on such a team if selected." 44 Fed. Reg. 71,413, 71,418 (Dec. 11, 1979).

Thus, while sex is not a suspect classification, the Fairness Act could easily meet the requirement applicable to such classifications: it is "narrowly tailored to serve a compelling state interest," *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). The Fairness Act draws the line exactly where both logic and these precedents require: based on biology. The Act defines no categories, asks no questions, draws no lines, and excludes no individuals based on subjective or non-physical criteria such as sexual orientation or gender identity. Indeed, to divide individuals into separate athletic competitions according to such non-physical, psychological criteria—as Plaintiffs demand—would itself likely violate the Equal Protection clause (as the OCR has held that it violates Title IX), because such divisions would *lack* precisely those clear "biological" and "physiological" foundations which provide the legal justification for sex-separated sports.

The only other thing the Fairness in Women's Sports Act does is to establish a method of resolving disputes about eligibility to compete in girls' or women's leagues. *See* Idaho Code § 33-6203(3). Such disputes did not arise in an earlier generation; now they do. As the facts of the *Bauer* case illustrate, if a female category faces less strenuous physical standards or competition, today there is a possibility that a male will wish to compete subject to the female standards. As the recent experience in Connecticut illustrates, just one or two males who choose for any reason to compete in girls' or women's leagues can have a devastating effect on athletic opportunities and experiences for girls and women. (*Supra* pp. 4-6.) If the law is permitted to draw a line defined by sexual biology for purposes of athletics (and it is), then there must be a way to determine which side of that line an individual falls on, if that is disputed. The State in its

Memorandum has well explained how minimally intrusive the verification provision of the Fairness Act really is.

So long as we stay grounded in the realities of the "physiological differences between male and female individuals," *VMI*, 518 U.S. at 550 n.19, it is hardly necessary to explain why the Fairness Act does not *pari passu* bar females from competing in competitions designated for boys or men. The athletic performance capabilities of women are not merely "different" as compared to men: they are consistently lower across a wide range of sports and measures. Brown Decl. If a girl chooses to compete in a boys' team or league, she subjects no boy to inherently unfair competition, and is exceedingly unlikely to take honors that would otherwise have gone to a boy. Given the long history of *lesser* athletic opportunities available to girls and women, and the absence of any unfairness to males if females compete against them, it was reasonable and appropriate for the legislature to leave open to individuals, schools, and leagues to decide whether or when females may compete in athletics otherwise designated for boys or men.

C. Plaintiffs' Equal Protection challenges are based on word games, and are without merit.

Plaintiff Hecox's invocation of equal protection relies on a verbal game of "three card Monte," with words being substituted and shuffled so rapidly that one loses track of meaning. Plaintiffs seek to avail themselves of law they do not really invoke, and of categories they do not occupy.

Importantly, neither plaintiff claims that the time-honored division of athletics into separate male and female competitions violates equal protection. That would be a coherent challenge, if a misguided one. On the contrary, it appears that Plaintiff Hecox, at least, affirmatively *desires* the existence of separate "women's" sports, as a means by which to publicly declare and experience his "female gender identity." Pl. PI Mem. 10.

But this requires that Plaintiffs identify some other "class" supposedly discriminated against, and it is here that the sleight-of-hand occurs. The "victim category," according to Plaintiffs, is "Women . . . who are transgender." Pl. PI Mem. 13. But what this means, is "Women who are male," given that the very definition of "*trans*gender" means to have a gender identity the opposite of one's sex. Or to translate this even more completely into unambiguous English: "Individuals who assert a gender identity as a woman, but who are male."

The hand may be quicker than the eye, but if we subject the phrase "Women who are transgender" to slow scrutiny, we will see the moves.

- We see that Plaintiffs are attempting to create a novel class for Equal Protection purposes by rendering incoherent the words *man* and *woman*, *male* and *female*. But these words have been used since time immemorial, and in the Supreme Court and other precedents discussed above, *precisely* to signify exactly the binary differences of reproductive biology, and associated differences of physiology, with which the Fairness Act is concerned.
- We see that Plaintiffs are asking this Court to invert the meaning of words and thereby to declare unconstitutional the division of athletics into separate competitions for male and female that is both permitted and explained by the precedents discussed above.
- We see that Plaintiff Hecox is insisting—and asking this Court to rule as a matter of law—that his subjective and interior choice or experience of "gender identity" is in some sense more real than—and must override—the hard, objective facts of biological sex in our sexually dimorphic species.

- We see that Plaintiff Hecox seeks to highjack "women's athletics" to serve as a platform for personal expression, although that division *exists* to serve the different capabilities and needs founded on physiology, not for reasons of expression or therapy of *any* individual, male or female.
- And finally, we see that Plaintiff Hecox demands to participate in the lower-performance women's category even though Hecox does not possess the biological and physiological criteria that are the reason and justification for the very existence of that separate category.

But if we turn all the cards face up on the table, these moves do not work. Separation of athletics by sex is reasonable and serves the important governmental interest of providing equal athletic opportunities to girls and women *because* of the biological and related physiological differences between males and females. Idaho's Fairness in Women's Sports Act separates athletics by sex, *and on no other criteria*, so it cannot be guilty of "discriminating" based on any other criterion. All who are male must participate only in male sports, and no other questions are asked. And if an individual's eligibility to participate in girls' or women's athletics is challenged, then that individual must provide the verification called for by the Fairness Act, regardless of her or his sex, so there is no discrimination by sex at this point, either.

Instead, it is Plaintiffs who ask this Court to discriminate based on a novel class or division without justification. Plaintiffs do not seek (and indeed would repudiate) a ruling that *all* males may compete in women's divisions if they wish. Rather, Plaintiffs seek an order that only *some* males may compete in women's divisions: males who claim a female gender identity. That is, Plaintiffs ask this Court to order, as a matter of constitutional law, that some males are entitled to participate in female athletic competitions while other males are not, classifying and so

discriminating based on gender identity. But it cannot be correct that a sex-based "discrimination" in access to female athletic competition—justified by what the Supreme Court has recognized as "physical differences," "biological differences," and "physiological differences" (*supra* p. 9)—is unconstitutional, while discrimination based on gender identity—which by its definition has no relationship to biology or physiology—is not only permitted but constitutionally *required*.

For that matter, Plaintiffs cite no case in which equal protection has been held to *require* discrimination based on any criterion whatsoever. Yet that is what Plaintiffs ask this Court to order—discrimination based on gender identity. This type of radical inversion of the law is hardly a proper basis for a preliminary injunction.

III. Plaintiffs' extended discussions of disorders of sexual development are red herrings.

Plaintiffs devote many pages of expert declarations, and a considerable portion of their brief, to discussions of so-called "intersex conditions"—extremely rare "disorders of sexual development," or "DSDs"—in an effort to argue that categorization by sex is neither possible nor rational. But these extended meanderings are a meritless smokescreen designed to distract from the fatal flaws in Plaintiffs' facts and theories as explained in the State's opposition and above. The Court should spend no time on these detours for multiple reasons:

1. Neither Plaintiff claims to suffer from any DSD or "intersex condition," so they have no standing to raise concerns about how the Fairness Act might hypothetically be applied to other, unidentified individuals who do.

2. Plaintiffs make no record that it has *ever* occurred in Idaho that an individual who is genetically male but suffers from any DSD has wished to compete in girls' or women's athletics in Idaho. Hypothetical fringe cases do not provide a basis to strike down an otherwise valid law as violating Due Process. "[F]ew statutory classifications are entirely free from the

criticism that they sometimes produce inequitable results." *Lalli v. Lalli*, 439 U.S. 259, 273 (1978). The law need only be "substantially related" to an important government interest. *See Craig v. Boren*, 429 U.S. 190, 197 (1976); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982). The Fairness in Women's Sports Act clears that hurdle with room to spare.

3. The Plaintiffs are implicitly inverting the standard that governs facial challenges to a law. They argue that the law should be enjoined because in some rare and speculative situations, it might produce an inequitable result. But on the contrary, in the facial challenge here, the law must be upheld if there are any circumstances in which its application is constitutional. *See Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008); *see also United States v. Kaczynski*, 551 F.3d 1120, 1124 (9th Cir. 2009) ("A facial challenge to a statute is the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the statute would be valid.") (cleaned up). The Plaintiffs have it just wrong.

4. Given the many laws (by no means limited to Title IX) and many Supreme Court and lower court precedents that recognize that when it comes to reproductive biology, ours is a sexually dimorphic species, it is far too late in the day—and far beyond anything a lower court should consider in the context of a preliminary injunction motion—to brush biology and timeless human experience and legal precedent aside to conclude (as one misguided district court did) that "the terms 'biological male or female' should be avoided," *Grimm v. Gloucester County School Board*, 302 F. supp. 3d 730, 743 (E.D. Va. 2018), or that "male" and "female" are not real and legitimate categories for a legislature to address. The tragic fact that developmental and genetic disorders do in rare cases occur takes nothing away from the reality that we are a sexually dimorphic species, that we exist as male and female, that "a community made up of one sex is

different from a community composed of both," *VMI*, 518 U.S. at 533 (cleaned up), and that legislation must therefore sometimes take the biological reality of sex and sex-linked physical and physiological differences into account.

CONCLUSION

For the foregoing reasons, this Court should deny Plaintiffs' motion for a preliminary injunction.

Respectfully submitted this 9th day of June, 2020.

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