Nos. 20-35813, 20-35815

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellees

v.

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

Defendants-Appellants

and

MADISON KENYON; MARY MARSHALL,

Intervenors-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANTS AND URGING REVERSAL

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STATEMENT OF THE ISSUE

Whether Idaho's Fairness in Women's Sports Act, Idaho Code Ann. § 33-6202 *et seq.* (Fairness Act) (West 2020), which requires that public school sports teams designated solely for biological females shall not be open to biological

males, discriminates against biological males who identify as female in violation of the Equal Protection Clause of the Fourteenth Amendment.

INTRODUCTION

This case raises an important issue concerning whether a State, consistent with the United States Constitution's Equal Protection Clause, may limit its female athletic teams to biological females so that their equal opportunity to participate in sports will not be displaced by biological males who identify as females and who have innate physiological advantages resulting from their biological sex. As explained below, the district court erred in concluding that Idaho's Fairness Act, which mandates that athletic teams designated solely for biological females shall not be open to biological males, violates the Equal Protection Clause.

Plaintiffs do not and cannot dispute that schools may create separate sports teams for males and females. Some sex-based distinctions comply with the Equal Protection Clause because certain "differences between men and women" are "enduring." *United States* v. *Virginia*, 518 U.S. 515, 533 (1996). Thus, this Court has recognized that, due to biological differences between biological males and biological females, an athletics policy that "preclude[s] boys from playing on girls' teams" does not run afoul of the Equal Protection Clause, and that this is so "*even* [when] girls are permitted to participate on boys' athletic teams." *Clark ex rel. Clark* v. *Arizona Interscholastic Ass'n*, 695 F.2d 1126, 1127 (9th Cir. 1982)

(*Clark I*) (emphasis added); see *Clark ex rel. Clark* v. *Arizona Interscholastic Ass'n*, 886 F.2d 1191, 1192 (9th Cir. 1989) (*Clark II*) (same).

Idaho's Fairness Act is materially indistinguishable from the athletics policies this Court upheld in *Clark I* and *Clark II*. Although the district court concluded that this case was different on the theory that the Fairness Act discriminates on the basis of transgender status, the Act does not even mention transgender status, much less classify or distinguish any individual on that basis. Under the Act, every individual may participate in sports according to the individual's biological status as male or female, without regard for the individual's transgender status. Rather, it is the district court's injunction that erroneously requires Idaho to give biological males who identify as female differential treatment over biological males who identify as males when it comes to participation on female-designated teams. The injunction's standard thus mandates discrimination on the basis of transgender status. The injunction also harms biological females by depriving them of equal athletic opportunities by forcing them to compete on unequal footing against biological males.

The Equal Protection Clause does not require States to abandon their efforts to provide biological women with equal opportunity to participate in—and enjoy the life-long benefits that flow from—school athletics in order to accommodate the team preferences of transgender athletes. Indeed, the district court's decision

harms the women that Congress desired to protect when it enacted Title IX of the Education Amendments of 1972, 20 U.S.C. 1681, which prohibits sex discrimination by federal funding recipients. See *Cohen* v. *Brown Univ.*, 991 F.2d 888, 897 (1st Cir. 1993) (observing "the core of Title IX's purpose" was to ensure that women have an "[e]qual opportunity to participate" in educational programs and activities at covered institutions). This Court should reverse the district court and uphold the Fairness Act for the same reasons it upheld the materially indistinguishable policies in the *Clark* cases.

INTEREST OF THE UNITED STATES

The United States enforces Title IX of the Civil Rights Act of 1964, which authorizes the Attorney General to intervene in cases of general public importance involving alleged denials of the "equal protection of the laws under the fourteenth amendment to the Constitution on account of * * * sex." 42 U.S.C. 2000h-2; see also *Virginia*, 518 U.S. at 523 (lawsuit by United States pursuant to Title IV of the Civil Rights Act, 42 U.S.C. 2000c-6, raising equal-protection challenge to Virginia Military Institute's sex-based admission policy). Pursuant to Federal Rule of Appellate Procedure 29(a)(2), the United States respectfully submits this brief.

STATEMENT OF THE CASE

1. On March 30, 2020, Idaho enacted the Fairness Act, Idaho Code Ann. § 33-6202 *et seq.* (West 2020). The Fairness Act contains two substantive

provisions. First, covered athletic teams "shall be expressly designated as one * * * of the following based on biological sex: (a) Males, men, or boys; (b) Females, women, or girls; or (c) Coed or mixed." *Id.* § 33-6203(1). Second, "[a]thletic teams or sports designated for females, women, or girls shall not be open to students of the male sex." *Id.* § 33-6203(2). The Act does not contain a comparable limitation for biological females who wish to participate on a team designated for biological males. Accordingly, while all biological males must play on male-designated (or coed) athletic teams, biological females may play on female-designated athletic teams, male-designated athletic teams, or coed teams.

In its legislative findings, Idaho explained why it was adopting the Fairness Act. Idaho Code Ann. § 33-6202. Specifically, the Act explains: "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." *Id.* § 33-6202(12). The Act cites authority establishing that inherent physiological differences between the sexes generally include a difference in "strength, speed, and endurance" that results in "different athletic capabilities," which generally give men a significant advantage in head-to-head competition. *Id.*

§ 33-6202(1)-(10) (citations omitted). The Act's findings also reference a 2019 study that concluded biological males retain their athletic advantage over biological females even after engaging in hormone treatments that attempt to diminish a biological male's natural testosterone. *Id.* § 33-6202(11).

2. On April 15, 2020, plaintiffs filed this action alleging that the Fairness Act violates, among other things, the Equal Protection Clause because it "singles out" transgender persons "for discriminatory treatment." E.R.013, 801. Plaintiffs include Lindsay Hecox, a biological male who identifies as female and wants to participate on the women's cross-country team at Boise State University. E.R.006-007.[1]

On April 30, 2020, before tryouts began, plaintiffs moved for a preliminary injunction on their Equal Protection Clause claim. E.R.013. They argued that the Fairness Act discriminates against transgender individuals and is subject to heightened scrutiny. Plaintiffs acknowledged Idaho's interest in preserving female athletic opportunities, but urged that the Fairness Act lacks a substantial relationship to that interest. E.R.066-067. Noting that the legislative history reflects three justifications—protecting biological females from competing against those with superior "strength, speed, and endurance"; promoting the benefits of

[1] Plaintiff Jane Doe challenged the Fairness Act's procedure for determining an athlete's biological sex. The United States does not address that issue.

sports for women; and ensuring access to athletic scholarships for women—plaintiffs asserted that even if Idaho could establish that these interests are important, the Fairness Act "is not substantially related to any of them and so [it] fails intermediate scrutiny." Doc. 22-1, at 17.

On May 26, 2020, two biological females who run for Idaho State University women's teams moved to intervene, claiming a protected interest in having and maintaining "female-only competitions and a competitive environment shielded from physiologically advantaged male participants to whom they stand to lose." E.R.017 (citation omitted).

On June 1, 2020, Idaho filed a motion to dismiss, arguing that plaintiffs lacked standing and all their claims were unripe. E.R.013, 029.

3. On August 17, 2020, the court ruled on the motion to intervene, the motion to dismiss, and the motion for a preliminary injunction. E.R.001-087. The court granted intervention to the two biological females who run for Idaho State University, E.R.029; rejected Idaho's standing and ripeness arguments; E.R.054, and preliminarily enjoined Idaho from enforcing the Fairness Act, E.R.079.

The district court ruled that the Fairness Act facially discriminates against transgender athletes, and that classifications based on transgender status trigger intermediate scrutiny, E.R.058-061. The court then determined that assuming the Act furthers important interests—namely, (1) providing opportunities for female

athletes, and (2) ensuring women's access to athletic scholarships—the Act lacked a substantial relationship to those interests. E.R.067-079. As to the first, the court concluded that there was no evidence that women's athletic opportunities were threatened by transgender athletes in Idaho. E.R.069. Relying on the purportedly small number of transgender athletes and the asserted possibility that testosterone-suppression therapy could reduce their natural athletic advantages, the court ruled that the statute's "categorical exclusion of transgender women athletes has no relationship to ensuring equality and opportunities for female athletes in Idaho." E.R.074. For the second, the court concluded that there was no evidence that the Fairness Act would increase scholarships for females. E.R.075.

The district court then determined that the other preliminary-injunction factors favored plaintiffs and preliminarily enjoined the Act. E.R.083-087.

SUMMARY OF ARGUMENT

1. The Fairness Act does not draw a facial classification on the basis of transgender status. Rather, in light of the physiological differences between the biological sexes, the Act draws distinctions based on biological sex for purposes of public-school athletics. In previous Equal Protection Clause challenges, this Court has recognized that the sexes are dissimilarly situated in athletics "due to average physiological differences" and that "males would displace females to a substantial extent if they were allowed to compete for positions on the [female] team," thereby

"diminish[ing]" the "athletic opportunities for women." *Clark I*, 695 F.2d at 1131; see *Clark II*, 886 F.2d at 1192 (reaffirming this conclusion). The Fairness Act accordingly precludes biological males from competing on female teams.

The Fairness Act's operative provision does not even mention transgender status, and it applies the same criteria to transgender and non-transgender athletes. Even assuming that the statute results in a disparate impact on biological male athletes who identify as female, a disparate impact alone does not violate the Equal Protection Clause.

Nevertheless, the district court's injunction requires Idaho to create an exception for biological males who identify as female to the otherwise categorical rule that biological males cannot compete on female teams. If anything, it is this special treatment, not the Fairness Act, that constitutes discrimination on the basis of transgender status: this injunction facially disfavors biological males who identify with their biological sex. So insofar as plaintiffs claim that the Equal Protection Clause prohibits such discrimination, their claim is self-defeating.

2. Even if the Fairness Act drew a classification on the basis of transgender status, the Act would still comply with the Equal Protection Clause. Assuming *arguendo* that such a classification triggers intermediate scrutiny, the Fairness Act is substantially related to the important interest of ensuring that biological females in Idaho have equal opportunities to participate in sports. Separating sports by

biological sex ensures that biological females are not forced to compete against biological males, who have inherent athletic advantages.

Moreover, the Fairness Act is materially indistinguishable from the athletics policies that the *Clark* cases upheld under intermediate scrutiny. Nothing about an athlete's transgender status changes the analysis. Whether challenged on the basis of sex discrimination or transgender-status discrimination, the Fairness Act's exclusion of *all* biological males, including those who are transgender, from female-designated athletics teams is substantially related to ensuring equal opportunities for female athletes.

The district court disregarded this controlling *Clark* precedent and applied a standard of review resembling strict scrutiny's "least restrictive means" requirement. Specifically, the court required Idaho to produce empirical evidence of preexisting harm caused by transgender athletes *in Idaho*. But intermediate scrutiny does not require that Idaho sit idly by until female athletes in the State are foreseeably harmed. Nor does it require a more restrictive "limit[ation] on the basis of specific physical characteristics other than sex," such as a policy that turns on testosterone suppression. *Clark I,* 695 F.2d at 1131. Rather, the Equal Protection Clause allows Idaho to rely on biological sex, because this Court has already found that considering biological sex, in light of physical differences

concerning athletic ability, is substantially related to the legitimate state interest in "equality of athletic opportunity between the sexes." *Ibid.*

ARGUMENT

I

THE FAIRNESS ACT DOES NOT DISCRIMINATE ON THE BASIS OF TRANSGENDER STATUS

The Fairness Act does not facially discriminate on the basis of transgender status. The district court reached the contrary conclusion based on the Act's *effect* on some transgender athletes, but a disparate impact alone does not violate the Equal Protection Clause. Indeed, it is the district court's injunction—which creates a special exception allowing biological males to compete on female sports teams if and only if they are transgender—that discriminates on the basis of transgender status. Because the Fairness Act does not discriminate against transgender athletes, this Court should reverse the district court's injunction.

A. States May Require Separate Athletic Teams For Biological Females And Biological Males Because The Sexes Are Dissimilarly Situated In Athletics.

The Equal Protection Clause provides that a State cannot "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 1. The Clause "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). This directive does not, however, require that individuals

differently situated be treated alike, and the Supreme Court has recognized that "the sexes are not similarly situated in certain circumstances." *Michael M.* v. *Superior Court of Sonoma Cnty.*, 450 U.S. 464, 469 (1981) (plurality opinion). Notably, "[p]hysical differences between men and women * * * are enduring," and the "two sexes are not fungible." *United States* v. *Virginia*, 518 U.S. 515, 533 (1996) (citation omitted). Thus, much as the Equal Protection Clause permits sex-specific bathrooms, dress codes, and physical fitness standards, the Clause permits Idaho to recognize the innate physiological differences between the biological sexes in athletics and accordingly to separate sports by biological sex.

In its two *Clark* decisions, this Court recognized that the sexes are not similarly situated in athletics. In *Clark I*, this Court held that biological sex is a constitutionally acceptable proxy for athletic advantage—even if biological sex is not a *perfect* proxy in every case. 695 F.2d at 1131. The Court explained that "there is no question that the Supreme Court allows for the[] average real differences between the sexes to be recognized * * * [and] allow[s] gender to be used as a proxy in this sense if it is an accurate proxy." *Ibid.* The Supreme Court, too, recognized the physiological dissimilarity of the sexes in *Virginia*, when it observed that admitting women to a previously all-male military academy "would undoubtedly require" that institution "to adjust aspects of the physical training programs." 518 U.S. at 550 n.19; see *Bauer* v. *Lynch*, 812 F.3d 340, 350 (4th Cir.

2016) (*Virginia* recognized that "[m]en and women simply are not physiologically the same for the purposes of physical fitness programs."). This Court also recognized in *Clark I* that "due to average physiological differences" between the sexes, "males would displace females to a substantial extent if they were allowed to compete for positions on the [female] team" and "athletic opportunities for women would be diminished." *Clark I*, 695 F.2d at 1131; accord *Clark II*, 886 F.2d at 1192. As a result, the Court rejected equal-protection challenges to policies that "preclude[d] boys from playing on girls' teams, even though girls are permitted to participate on boys' athletic teams." *Clark I*, 695 F.2d at 1127; see also *Clark II,* 886 F.2d at 1192.

Accordingly, the Fairness Act does not violate the Equal Protection Clause by separating athletics teams on the basis of biological sex and prohibiting biological males from participating on female teams. The Act simply separates teams based on average physiological differences associated with biological sex. Indeed, neither plaintiffs nor the district court challenged the Fairness Act's general rule that biological males cannot compete on female sports teams, as applied to males who are not transgender.

B. The Fairness Act Does Not Discriminate On The Basis Of Transgender Status.

The district court concluded that the Fairness Act's accounting for the physiological differences between the biological sexes—despite being entirely

permissible as applied to non-transgender athletes—facially discriminated against transgender athletes. E.R.060-061. The Act's substantive provisions, however, do not even mention a student's transgender status, much less draw classifications on that basis. Idaho Code Ann. § 33-6203(1)-(2). Instead, those provisions turn on an athlete's biological sex. *Ibid*. Those provisions merely direct that (i) covered athletic teams "shall be expressly designated as one * * * of the following based on biological sex: (a) Males, men, or boys; (b) Females, women, or girls; or (c) Coed or mixed," *id.* § 33-6203(1); and (ii) "[a]thletic teams or sports designated for females, women, or girls shall not be open to students of the male sex," *id.* § 33-6203(2). Accordingly, the Act prohibits *all* biological males from participating on a team designated for biological females, regardless of whether those biological males are transgender or not. *Ibid.* Likewise, the Act treats *all* biological females the same, regardless of whether those biological females are transgender or not. *Id.* An athlete's transgender status or gender identity are simply irrelevant. Indeed, plaintiffs' chief complaint is that the Fairness Act's sole focus on biological sex does "not permit consideration of gender identity." Doc. 22-1, at 4. But that leaves plaintiffs solely with a claim of disparate impact against certain transgender athletes, and disparate impact alone does not violate the Equal Protection Clause. Plaintiffs may dislike that the Act does "not permit consideration of gender identity," Doc. 22-1, at 4, but Idaho indisputably complies

with the *Equal* Protection Clause by treating all biological males *equally*, without regard to their transgender status.

1. The district court erroneously concluded 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." E.R.061. No such facial discrimination exists. The district court's reasoning focuses on the potential *effects* of the Act, not its text—namely, that biological males who are transgender may be less willing than biological males who are not transgender to play on the men's team. But all biological males, regardless of transgender status, are equally subject to the requirement that biological males may not play on the female team.

Even if that requirement were to have a disparate *effect* on some transgender individuals, such an effect alone would not violate the Equal Protection Clause. As the Supreme Court has repeatedly explained, "the Fourteenth Amendment guarantees equal laws, not equal results." *Personnel Adm'r of Mass.* v. *Feeney*, 442 U.S. 256, 273 (1979). For this reason, the Court, explained that "our [Equal Protection Clause] cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact."

Washington v. *Davis*, 426 U.S. 229, 239 (1976). And the Supreme Court has applied the same rule to disparate impact on the basis of other characteristics. See, *e.g.*, *Feeney*, 442 U.S. at 273 (sex).

Nor did this Court depart from that fundamental principle of equal-protection law in *Latta* v. *Otter*, 771 F.3d 456 (9th Cir. 2014). See E.R.061. *Latta* addressed an equal-protection challenge to state laws limiting state recognition of marriages to those between a man and a woman. It rejected the argument that those laws "do not discriminate on the basis of sexual orientation, but rather on the basis of procreative capacity," based on its determination that the laws "distinguish[ed] on their face between opposite-sex couples, who are permitted to marry * * *, and same-sex couples, who are not permitted to marry." 771 F.3d at 467-468.; see *id.* at 464 n.2. By contrast, the Fairness Act does is facially non-discriminatory with respect to transgender status: males, regardless of transgender status, are permitted to participate in athletic competitions only on the teams corresponding to their biological sex. The fact that transgender individuals may disproportionately not *wish* to do so does not mean that they are *prohibited* from doing so. Nothing about *Latta* reaches that objection or suggests that this Court departed from the blackletter rule that a disparate impact alone cannot violate the

Equal Protection Clause.[2] Still less does *Latta* speak to whether distinctions based on sex or transgender status are permitted or required in the very different context of athletics, in which, as noted above, the sexes are not similarly situated.

2. The district court also erred in suggesting that the Fairness Act's legislative history indicates animus towards transgender athletes. See E.R.078. Rather than show that Idaho passed the Fairness Act for the purpose of harming transgender athletes, the legislative history indicates, if anything, that the State passed the Act to ensure that physiological advantages of biological males do not decrease athletic opportunities for biological females. See Idaho Code Ann. § 33-6202. The Fairness Act specifically lists its purpose of "promot[ing] sex equality" through "[h]aving separate sex specific teams" because the biological sexes generally have "different athletic capabilities." *Ibid.* (citations omitted). Thus, as even the district court acknowledged, it "seems beyond dispute [that] Idaho passed the Act to protect cisgender female student athletes like [the Intervenors]." E.R.018.

Indeed, had Idaho intended to single out transgender athletes for disfavored treatment, it presumably would not have allowed one set of transgender athletes—

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[2] Moreover, *Obergefell* v. *Hodges*, 576 U.S. 644 (2015) did not adopt the theory of *Latta*, but rather held that the laws were unconstitutional because they "infring[ed]" on "the fundamental right to marry." *Id.* at 675. Plaintiffs wisely do not contend that there is a fundamental right to participate on the athletics team of one's choice.

biological females who identify as males—to participate on teams consistent with their gender identity, which the State effectively allows by permitting all biological females to participate on male teams. That the Act restricts the opportunities of all biological males (and only biological males), rather than of all transgender athletes, to play on opposite-sex teams reveals not a "bare" "desire to harm" transgender athletes, *Romer* v. *Evans*, 517 U.S. 620, 634 (1996) (citation omitted), but a constitutionally permissible consideration of the innate physiological differences between the biological sexes.

C. It Is The District Court's Injunction, Not The Fairness Act, That Requires Idaho To Discriminate On The Basis Of Transgender Status.

While the district court enjoined the Fairness Act in order to prevent discrimination based on transgender status, it is actually the district court's own order that mandates such discrimination. As a result of the district court's order, Idaho may prohibit biological males from competing on female teams if but only if they are not transgender. In other words, the court required Idaho to grant biological males who are transgender an exemption from the Fairness Act's transgender-neutral rule. This Court should reverse this judicially imposed exception, which requires Idaho to discriminate on the basis of transgender status to the detriment of both biological males who identify as male as well as female athletes more generally.

1. States may permissibly separate athletics by sex because, given their physiology, biological males and biological females are not similarly situated in athletics. That remains true regardless of the athletes' transgender status. Put differently, those biological males who identify as female do not automatically lose their inherent athletic advantage over biological females merely because they identify as female.

The district court's injunction, however, requires Idaho to distinguish between biological males on the basis of their transgender status. Under the injunction, biological males who identify as male may not play on female teams, but biological males who identify as female may do so, even though these two sub-classes of biological males are similarly situated when it comes to athletics. This exception thus requires Idaho to engage in discrimination on the basis of transgender status. By contrast, Idaho's Fairness Act engages in no such discrimination, making only a permissible distinction based on sex rooted in physiological differences that both the Supreme Court and this Court have long recognized.

To be sure, Idaho could require all of its athletic teams to be co-ed to comply with the court's injunction and avoid discrimination on the basis of transgender status. But nothing in the Equal Protection Clause puts States to the choice of

either discriminating on the basis of transgender status or ending women's-only athletics entirely.

2. The district court offered two justifications for enjoining Idaho to discriminate on the basis of transgender status. E.R.078-079. Neither withstands scrutiny.

First, the district court stated that "the status quo prior to the Act's passage" permitted schools to allow biological males who identify as female the ability to compete on female-designated teams while denying biological males who identify as male the same opportunity. E.R.079. Even if true, that characterization would not explain why this status quo did not give rise to discrimination on the basis of transgender status by any school that chose to differentiate in this manner.

Second, the district court incorrectly determined that the Fairness Act completely "excludes" biological males who identify as female from competing in all sports. E.R.079; see E.R.065. No such categorical ban exists. The Fairness Act permits all transgender individuals to compete in any athletic activities consistent with their biological sex. While some biological males who identify as female may object to competing on "male teams"—which the Fairness Act already technically makes co-ed because all male teams are open to all biological females—that does not mean they are categorically excluded from school athletics.

The district court's contrary conclusion appears to rest on the implicit stereotype that *all* transgender individuals choose to live in accord with their gender identity, and specifically that they always choose to play on the team matching their gender identity. But that stereotype is inaccurate. "[N]ot all transgender persons seek to transition to their preferred gender"; rather, the typical definition of "transgender persons"—including the one offered by plaintiffs—is simply those individuals who "'identify[]' with a gender other than their biological sex." *Doe 2* v. *Shanahan*, 755 F. App'x 19, 24 (D.C. Cir. 2019) (per curiam); see Doc. 22-1 at 2 n.1. As multiple sources confirm, "the transgender community is not a monolith in which every person wants to take steps necessary to live in accord with his or her preferred gender." *Doe 2* v. *Shanahan*, 917 F.3d 694, 722 (D.C. Cir. 2019) (Williams, J., concurring in result) (collecting evidence); see also *id.* at 701 (Wilkins, J., concurring) (noting "the term transgender is often defined to include persons who identify with another gender but who do not wish to live or work in accordance with that preferred gender").

Consistent with this misguided assumption, the district court analogized the argument that transgender individuals may participate in athletics under the Fairness Act to the claim that gay or lesbian individuals retain the option to marry the opposite sex under marriage laws limiting state recognition to opposite-sex unions. E.R.079. In the court's view, *Latta* and the Supreme Court's decision in

Bostock v. *Clayton County, Georgia*, 140 S. Ct. 1731 (2020) rejected such arguments. E.R.079. But as already discussed, *Latta* has no bearing on this case. See *supra* Part I.B.1. *Bostock* too addressed only the question whether an employer under Title VII may fire an employee "simply for being homosexual or transgender" and "allegedly for no reason other than the employee's homosexuality or transgender status." 140 S. Ct. at 1737; see also *id.* at 1753 ("[N]one of these other [federal laws prohibiting sex discrimination] are before us * * * we do not prejudge any such question today. Under Title VII, too, we do not purport to address bathrooms, locker rooms, or anything else of the kind."). And of course, Title VII has a different text, history, and body of precedent interpreting it than does the Equal Protection Clause, *e.g.*, *Washington* v. *Davis*, 426 U.S. at 238-248, and for that matter, Title IX, *e.g.*, *Jackson* v. *Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005). Insofar as that opinion is relevant at all in this case, it calls into question the district court's order, not the Fairness Act—it is the district court's order, not the Fairness Act, that differentiates among biological males "simply" based on transgender status and "for no reason other than" that.

3. Beyond requiring discrimination on the basis of transgender status, the district court's injunction would considerably weaken the justification—which the Court viewed as legitimate in *Clark I* and *II*—for excluding *all* biological males who identify as male from female-specific teams. In the *Clark* cases, this Court

upheld a policy excluding all biological males from female teams on the theory that any exception would cause "athletic opportunities for women [to] be diminished." *Clark I*, 695 F.2d at 1131; *see also Clark II*, 886 F.2d at 1192. Thus, the court's injunction harms the ability of States to ensure equal athletic opportunities for biological women.

II

EVEN IF THE FAIRNESS ACT DISCRIMINATED AGAINST TRANSGENDER ATHLETES, THE ACT WOULD STILL COMPLY WITH THE EQUAL PROTECTION CLAUSE.

After erroneously finding that the Fairness Act discriminates against transgender athletes, the district court concluded that the statute did not survive intermediate scrutiny. Assuming *arguendo* that intermediate scrutiny applies,[3] the Act satisfies it because the Act is substantially related to the important governmental interest of ensuring that females in Idaho have equal opportunities to participate in sports. In this regard the Fairness Act is materially indistinguishable

[3] This Court has suggested that intermediate scrutiny might apply to a law or policy that facially treats transgender individuals less favorably than all others. See *Karnoski* v. *Trump*, 926 F.3d 1180, 1201 (9th Cir. 2019). The Supreme Court, however, has cautioned against recognizing new classes or classifications subject to heightened scrutiny, *e.g.*, *Cleburne* 473 U.S. at 441, and has not itself done so in over four decades. Indeed, the Supreme Court has repeatedly declined to recognize sexual orientation as a suspect class. See, *e.g.*, *Obergefell* v. *Hodges*, 576 U.S. 644 (2015); *United States* v. *Windsor*, 570 U.S. 744 (2013); *Lawrence* v. *Texas*, 539 U.S. 558 (2003); *Romer* v. *Evans*, 517 U.S. 620 (1996).

from an athletics policy that this Court twice upheld under intermediate scrutiny in the *Clark* cases.

Despite these controlling cases, the court found the Fairness Act lacked sufficient tailoring. But the court effectively applied a level of scrutiny resembling strict scrutiny's "least restrictive means" requirement, not intermediate scrutiny's less demanding "substantially related" requirement.

A. The Clark *Cases Upheld Materially Indistinguishable Policies.*

This Court's decisions in *Clark I* and *Clark II* control the outcome here. In those cases, this Court rejected equal-protection challenges to materially indistinguishable athletics policies that "preclude[d] boys from playing on girls' teams, even though girls are permitted to participate on boys' athletic teams." *Clark I*, 695 F.2d at 1127; see also *Clark II,* 886 F.2d at 1192. "There is no question" that "promoting equality of athletic opportunity between the sexes" is an "important governmental interest." *Clark I*, 695 F.2d at 1131. And this Court held that a policy prohibiting biological males from participating on a female volleyball team was substantially related to that important interest because, "due to average physiological differences" between the sexes, "males would displace females to a substantial extent if they were allowed to compete for positions on the [female] team" and "athletic opportunities for women would be diminished." *Ibid.*; accord *Clark II*, 886 F.2d at 1192.

The Fairness Act stands on all fours with the policies this Court upheld. Nothing about an athlete's transgender status changes the analysis. An individual's self-identification as transgender does not negate the "average physiological differences" between the sexes. *Clark I*, 695 F.2d at 1131. Whether challenged as sex discrimination or transgender-status discrimination, the Fairness Act's exclusion of *all* biological males, including those who are transgender, is substantially related to ensuring equal athletic opportunities for females.

B. The District Court's Application Of Intermediate Scrutiny Was Flawed In Multiple Respects.

The district court brushed off the *Clark* cases and performed its own new analysis of whether excluding all biological males was substantially related to ensuring equal athletic opportunities for females. But the court's new analysis resembled strict scrutiny, rather than intermediate scrutiny, in at least two respects.

1. To start, the district court erroneously concluded that the "Act's *categorical bar* against transgender women athletes' participation appears unrelated to the interests the Act purportedly advances" because of an "absence of any *empirical evidence* that sex inequality or access to athletic opportunities are threatened by transgender women athletes *in Idaho*." E.R.069 (emphasis added); accord E.R.067. This finding contains at least three flaws.

First, as explained above, the Fairness Act imposes no "categorical bar." Rather, transgender athletes retain the viable option of participating on teams that align with their biological sex or on co-ed teams. See *supra* Part I.C.

Second, intermediate scrutiny does not require "empirical evidence" to establish that a law is "substantially related" to an important government interest. Instead, "to establish the fit between a regulation and a governmental interest," Idaho "may resort to a wide range of sources, such as legislative text and history, empirical evidence, case law, and common sense, as circumstances and context require." *United States* v. *Carter*, 669 F.3d 411, 418 (4th Cir. 2012); see also *Nixon* v. *Shrink Missouri Gov't PAC*, 528 U.S. 377, 391 (2000) ("The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised."). Here the *Clark* decisions and "common sense" establish that the inherent physiological differences between biological males and biological females generally include a difference in "strength, speed, and endurance" that results in "different athletic capabilities," which generally give males a significant advantage in head-to-head competition. Idaho Code Ann. § 33-6202(1)-(10).

Beyond this, Idaho also relied on actual instances of transgender athletes decreasing female athletic opportunities. Two biological males competing in high school girls' track in Connecticut have taken 15 girls' state championship titles in

the 2017, 2018, and 2019 seasons alone. See E.R.317-324, 389-398, 404-405. In 2016, nine different female athletes held these same titles. But two biological males have taken many more opportunities to participate in higher level competitions from female track athletes in the 2017-2019 seasons. E.R.317-324, 389-398, 404-405.[4] Idaho also relied on Intervenors Kenyon and Marshall, who compete as Idaho State University athletes. They detailed "feeling frustrated and defeated," Doc. 30-2, at 3, and "deflated" Doc. 30-3, at 3, after losing to a biological male. This evidence is even more compelling in this "as applied" challenge by plaintiff Hecox, who wants to run cross-country. E.R.033, 053.

This evidence more than satisfies intermediate scrutiny. The equal-protection analysis in the *Clark* decisions did not turn on whether biological males displace biological females across the board or only at the margins. Notably, in *Clark II*, the Ninth Circuit upheld the exclusion of a single male from the women's volleyball team based in part on the ground that "[i]f males are permitted to

[4] Although the Connecticut Interscholastic Athletic Conference (CIAC) has attempted to defend these lost opportunities as required by Title IX, policies allowing biological males who identify as females to compete on teams designated for biological females are not required by Title IX and may in fact violate it. See U.S. Br., *Soule* v. *Connecticut Ass'n of Schs*., 3:20-cv-00201 (D. Conn.), Doc. 75; Letter from Kimberly M. Richey, Acting Asst. Secretary for Civil Rights, U.S. Dep't of Educ., to Conn. Interscholastic Athletic Conference, et al., 36 (Aug. 31, 2020), https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/01194025-a2.pdf (concluding that CIAC's policy violates Title IX).

displace females on the school volleyball team *even to the extent of one player like Clark*, the goal of equal participation by females in interscholastic athletics is set back." 886 F.2d at 1193 (emphasis added). The district court dismissed this language on the theory that *Clark II* focused more on the potential harm from allowing other boys beyond the plaintiff there to participate on the girls' team, E.R.064 n.34, but never reconciled that characterization with this Court's emphasis that an exception "even to the extent of one player like Clark," would harm female equal opportunities. Indeed, *Clark II*'s holding was that the Equal Protection Clause did not require an exception for plaintiff Clark alone. 886 F.2d at 1191 &1194. That holding lines up with *Clark I*, which explained that even if schools could allow "boys' participation * * * in limited numbers" while still preserving athletic opportunities for women, the Equal Protection Clause did not prohibit the categorical exclusion of biological males from teams limited to biological females. 695 F.2d at 1131.

Third, the district court erroneously required not only evidence of preexisting harm but also preexisting harm specifically "in Idaho." Even when applying heightened scrutiny, the Supreme Court has acknowledged that "[s]ound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable." *Turner Broad. Sys., Inc.* v.

F.C.C., 512 U.S. 622, 665 (1994). Equal-protection doctrine therefore does not require Idaho to sit idle until a readily foreseeable harm to athletic opportunities for biological females reaches the State. As this lawsuit illustrates, there is at least one biological male who wishes to participate on a female team in Idaho. And there is no reason to believe that Idaho's experience will be any different than that of other jurisdictions where transgender athletes have decreased opportunities for biological females.

2. The district court also appeared to conclude that "sex" is not "a legitimate accurate proxy" when it comes to athletic advantage, but rather is an "archaic and overbroad generalization[]." E.R.074 (citation omitted). Instead, the court suggested that Idaho should have used "testosterone levels" as a proxy for athletic ability. E.R.069; see also E.R.069-074. But even assuming the premise that testosterone levels are in fact a better proxy here, that would not render the Fairness Act unconstitutional.[5]

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[5] The Idaho Legislature found otherwise. The Act explains: "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." Idaho Code Ann. § 33-6202(11) (quoting Tommy Lundberg et al., *Muscle strength, size and composition following 12 months of gender-affirming treatment in transgender individuals: retained advantage for the transwomen*,

(continued...)

In fact, this Court in *Clark I* expressly rejected the argument that intermediate scrutiny requires that participation on athletic teams "be limited on the basis of specific physical characteristics other than sex"—even if using those characteristics would ensure that "specific athletic opportunities" are "equalized more fully." 695 F.2d at 1131. This Court recognized that "participation could be limited on the basis of specific physical characteristics other than sex"—"such as height or weight"—or that "boys' participation could be allowed but only in limited numbers." *Id.* at 1130-1131. But, as this Court explained, "[t]he existence of these alternatives shows only that the exclusion of boys is not *necessary* to achieve the desired goal." *Id.* at 1131. And given that "absolute necessity is not required before a gender based classification can be sustained" under intermediate scrutiny, "even the existence of wiser alternatives than the one chosen does not serve to invalidate the policy here since it is substantially related to the goal." *Id.* at 1131-1132. In effectively requiring Idaho to use the least restrictive means, the district court replaced intermediate scrutiny with strict scrutiny.

Karolinksa Institutet (Sept. 26, 2019)). The district court intimated that the authors later drastically revised this study, E.R.071, but the revision made only minor changes and retained the relevant central conclusion, see Anna Wiik et al., *Muscle Strength, Size, and Composition Following 12 Months of Gender-affirming Treatment in Transgender Individuals*, J. Clinical Endocrinology & Metabolism, 105(3): e805, e811 ("[T]he [transgender athletes] were still stronger following 12 months of gender-affirming hormone treatment, both in absolute and height adjusted values.").

Finally, if, as the district court suggested, the use of "sex" as a proxy for athletic ability is an impermissibly "overbroad generalization[]," E.R.074, then Idaho (and every other State in the Union) would be constitutionally compelled to maintain *only* co-ed teams and sports—a situation that would obviously harm women. The district court offered no reason for why its reasoning would be limited to transgender athletes and testosterone levels, and not extend to non-transgender males who contend that teams would be better structured based on "height or weight" than on sex, or that "boys' participation" on female teams "could be allowed but only in limited numbers." *Clark I*, 695 F.2d at 1130-1131. This Court considered and rejected the notion that sex is an impermissible stereotype in this area because such a scheme would diminish opportunities for girls and women. See *id.* at 1131 (explaining that "[t]his is not a situation where the classification rests on archaic and overbroad generalizations," but a recognition of the fact that "due to average physiological differences, males would displace females to a substantial extent if they were allowed to compete for positions"). It should do so again here.

CONCLUSION

This Court should reverse the district court's granting of the preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(g):

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Date: November 19, 2020

CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2020, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANTS AND URGING REVERSAL with the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. All participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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