NOS. 23-16026, 23-16030

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HELEN DOE, parent and next friend of Jane Doe, et al.,

Plaintiffs-Appellees,

v.

THOMAS C. HORNE, in his official capacity as State Superintendent of Public Instruction, et al.,

Defendants,

and

WARREN PETERSEN, Senator, President of the Arizona State Senate; BEN TOMA, Representative, Speaker of the Arizona House of Representatives,

Intervenor-Defendants-Appellants.

[Additional caption on following page]

On Appeal from the United States District Court
for the District of Arizona
Case No. 4:23-cv-00185-JGZ

BRIEF OF ALLIANCE DEFENDING FREEDOM AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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HELEN DOE, parent and next friend of Jane Doe, et al.,

Plaintiffs-Appellees,

v.

THOMAS C. HORNE, in his official capacity as State Superintendent of Public Instruction,

Defendant-Appellant,

and

LAURA TOENJES, in her official capacity as Superintendent of the Kyrene School District, et al.,

Defendants,

WARREN PETERSEN, Senator, President of the Arizona State Senate; BEN TOMA, Representative, Speaker of the Arizona House of Representatives,

Intervenor-Defendants.

CORPORATE DISCLOSURE STATEMENT

Alliance Defending Freedom is a nonprofit organization with no parent corporation and no stockholders.

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Alliance Defending Freedom is the world's largest law firm dedicated to religious freedom, free speech, the sanctity of life, parental rights, and marriage and family. Because the law should respect that men and women are equal but different, ADF advocates for laws that recognize relevant differences between the sexes—including laws that ensure safe and equal athletic opportunities for female athletes.

In recent years, male athletes who identify as female have increasingly competed against and dominated women and girls in female sports. Girls have been sidelined in their own sport. This trend risks erasing athletic participation, scholarship, and career opportunities that women have long worked to achieve. When government denies the relevant differences between men and women, women are disadvantaged.

ADF routinely defends state laws that ensure equal athletic opportunities for women and girls, *e.g.*, *B.P.J. v. W. Va. State Bd. of Educ.*, No. 2:21-cv-00316, 2023 WL 111875 (S.D. W. Va. Jan. 5, 2023), and submits this brief supporting Arizona's Save Women's Sports Act, A.R.S. § 15-120.02 (the "Act").

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amicus and its counsel made any monetary contribution intended to fund the preparation or submission of this brief. Counsel were timely notified of this brief as required by Fed. R. App. P. 29, and all parties consented to its filing.

INTRODUCTION AND SUMMARY

Arizona passed its Save Women's Sports Act to ensure equal opportunities and fair play for female athletes. In recent years, males who identify as female have increasingly competed against—and beat—females in women's sports events. In Connecticut, two high school males took 15 women's track titles that would have belonged to nine different girls. Elsewhere, two college males switched to compete in women's track and won NCAA titles. Then male swimmer Lia Thomas set two women's records and became an NCAA champion by beating two female Olympic champions in the same race. Arizona passed its Act so women can fairly and safely compete in athletics. The Act does this by requiring males to compete on teams consistent with their sex. This path is legal, logical, and longstanding.

Plaintiffs cannot succeed on the merits. The Act designates sports teams based on sex, not gender identity. No male—whether identifying as male, female, nonbinary, fluid, or anything else—can compete in female sports. Nowhere does the Act distinguish based on gender identity. Government may draw such sex-based distinctions that advance an important goal using substantially related means. A perfect fit is not required. The Act satisfies this standard. It promotes equal athletic opportunities for women and girls. The Supreme Court has consistently upheld statutes when the sex distinction reflects the fact that the sexes are not similarly situated in certain circumstances. In sports, the difference

between men and women is a real one. As this Court has held, "due to average physiological differences, males would displace females to a substantial extent if they were allowed to compete" together. *Clark, By & Through Clark v. Ariz. Interscholastic Ass'n*, 695 F.2d 1126, 1131 (9th Cir. 1982) (*Clark I*). The Act rightly respects these differences.

To rebut this, Plaintiffs claim to be similarly situated to girls after identifying as female and taking puberty-suppressing drugs. They do not contest that Arizona can exclude males from female sports—if they identify as male. But Plaintiffs then demand a distinction based on gender identity *instead of* sex. That theory requires males to compete on female teams no matter their hormone levels; excludes males who identify as men from these teams; and forces females to compete against generally bigger, faster, and stronger males anytime they identify as female. More broadly, this legal theory will require courts to engage in an athlete-by-athlete adjudication whenever anyone alleges to have the same athletic ability or hormone levels as females. Far from ensuring fairness for female athletes, this will end women's sports as we know it.

The panel decision in *Hecox v. Little*, No. 20-35815, 2023 WL 5283127 (9th Cir. Aug. 17, 2023), which enjoined a similar Idaho law protecting equal athletic opportunities for women, does not control here. It's under consideration for en banc review, and its logic would nix all sex-based distinctions. In addition, this Court has already held—twice—that designating sex-specific sports teams is constitutional. Those prior

rulings upheld laws designating sex-specific sports, recognizing the *average* real differences between the sexes. It was enough that boys would *on average* be potentially better athletes than girls. The Court did not suggest in either case that a male athlete can bring a successful claim simply by obtaining a court assessment that he lacks significant physiological advantages over female peers. That logic—set forth in binding precedent that pre-dates *Hecox*—controls here.

Arizona women and girls deserve a fair shot. Elsewhere males who identify as women have been beating girls for years. Their harms should not be forgotten, discounted, or dismissed. It has happened too often in our history. As shown by the examples above, when males displace females—even one—the goal of equal participation by females in athletics is set back. The injunction below perpetuates this harm. What's more, it spurns Arizona voters who deserve to have their laws enforced and not to have them enjoined for no reason. This Court should vacate the injunction below and allow the Act to continue protecting Arizona women and girls.

ARGUMENT

An injunction "is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). It "may only be awarded upon a *clear showing* that the plaintiff" deserves it. *Id.* at 22 (emphasis added). This is especially true when plaintiffs seek to enjoin the "enforcement of a presumptively valid state statute," *Brown v. Gilmore*, 122 S. Ct. 1, 2 (2001) (Rehnquist, C.J., in chambers), which "demands" unusually strong "justification," *Lux v. Rodrigues*, 561 U.S. 1306, 1307 (2010) (Roberts, C.J., in chambers). To obtain a preliminary injunction, Plaintiffs must at least prove they are "likely to succeed on the merits." *Winter*, 555 U.S. at 20. Plaintiffs have not done so here because the Act reasonably ensures equal opportunities for female athletes.

I. *Hecox* should not control this case.

This Court has already held—twice—that designating sex-specific sports teams is substantially related to important government interests and satisfies intermediate scrutiny under the Equal Protection Clause. *Clark I*, 695 F.2d at 1131–32; *Clark By & Through Clark v. Ariz. Interscholastic Ass'n*, 886 F.2d 1191, 1194 (9th Cir. 1989) (*Clark II*). In *Clark I*, this Court reviewed an appeal brought by male high-school athletes arguing that a policy prohibiting them from playing on the girls' volleyball team violated the Equal Protection Clause. 695 F.2d at 1127. Under the policy, girls could play on boys' athletic teams. *Id.* And the boys'

schools did not have boys' volleyball teams—leaving the girls' teams as their only available option, but for the challenged policy. *Id.*

The district court dismissed the boys' equal-protection claim, and this Court affirmed. *Id.* Applying intermediate scrutiny, this Court upheld the policy because it reflected "actual [physical] differences between the sexes." *Id.* at 1129. Such differences show that men and women "are not similarly situated in certain circumstances." *Id.* (quoting *Michael M. v. Super. Ct. of Sonoma Cnty.*, 450 U.S. 464, 469 (1981)). Indeed, "due to average physiological differences, males would displace females to a substantial extent if they were allowed to compete for [the same] positions." *Id.* at 1131. Fairness required the sex distinction, which also helped redress "past discrimination against women in athletics." *Id.*

Seven years later, this Court reaffirmed that position. *Clark II*, 886 F.2d at 1192. In *Clark II*, this Court rejected another male's attempt to force his way onto his school's girls' volleyball team. *Id.* at 1193–94. "If males are permitted to 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, not advanced." *Id.* at 1193 (emphasis added). Equality requires "ultimate equality of opportunity to participate in sports," not ensuring individual male athletes can compete on girls' teams of their choice. *Id.* (quoting *Clark I*, 695 F.2d at 1132). "As common sense would advise against this, neither does the Constitution demand it." *Id.* (quoting *Clark I*, 695 F.2d at 1132).

Hecox disagreed, ruling that the Equal Protection Clause forces Idaho to designate women's sports for women—and males who identify as female. 2023 WL 5283127, at *18. It deemed the *Clark* cases "inapposite" on two main bases. First, it was "not clear" that male athletes "who suppress their testosterone have significant physiological advantages" over female athletes, "unlike the cisgender boys at issue in *Clark I* and *Clark II*." *Id.* at *14 (cleaned up). And second, biological males who identify as female, "like women generally," have "historically been discriminated against, not favored." *Id.* (cleaned up).

That reasoning doesn't distinguish the *Clark* cases; it rewrites them. Those cases endorsed laws recognizing the "*average* real differences between the sexes." *Clark I*, 695 F.2d at 1131 (emphasis added); *accord Clark II*, 886 F.2d at 1192. And in *Clark I*, it was enough that boys would "on average be *potentially* better volleyball players than girls." 695 F.2d at 1127 (emphasis added). The Court did *not* suggest in either case that a male athlete can bring a successful claim simply by asserting countervailing interests in addressing past discrimination or by obtaining a court assessment that he lacks "significant physiological advantages" over female athletes. *Hecox*, 2023 WL 5283127, at *14.

Quite the opposite, *Clark I* rejected that the existence of "wiser alternatives" might invalidate girls-only policies. 695 F.2d at 1132. True, "specific athletic opportunities could be equalized more fully in a number of ways." *Id.* at 1131. "[P]articipation could be limited on the basis of

specific physical characteristics other than sex." *Id.* Or boys could participate "only in limited numbers." *Id.* But the "existence of these alternatives shows only that the exclusion of boys is not *necessary* to achieve the desired goal." *Id.* Under intermediate scrutiny, "absolute necessity is not required before a [sex-based] classification can be sustained." *Id.* Thus, even when "the alternative chosen may not maximize equality" and may instead "represent trade-offs between equality and practicality," the "existence of wiser alternatives" will not invalidate a policy that is "substantially related to the goal." *Id.* at 1131–32.

Hecox and *Clark I* cannot be reconciled. If *Hecox* is right, then *any* laws that distinguish based on biological sex must be enjoined in their entirety if a single plaintiff can show that it is "not clear," 2023 WL 5283127, at *14, that the distinction is an "absolute necessity," *Clark I*, 695 F.2d at 1131. That exchanges intermediate scrutiny for strict scrutiny.

Hecox in turn green-lights *other* subsets of male athletes seeking to challenge girls-only teams. A male athlete with a disability could argue it is "not clear" he has an advantage over female athletes. *Hecox*, 2023 WL 5283127, at *14. And he would be a member of a class of people who, "like women," have "historically been discriminated against." *Id.* The same goes for males with naturally occurring low hormones or physical ability who are members of a religious minority or other minority group.

Or take *Michael M.* Applying *Hecox*' reasoning, the petitioner there should have *prevailed* on his argument that the law was overbroad because it criminalized "sexual intercourse with prepubescent females, who are, by definition, incapable of becoming pregnant." *Michael M.*, 450 U.S. at 475. After all, it is "not clear" that applying the law to men who target girls who cannot become pregnant advances an interest in preventing teenage pregnancy. The same goes for men who are infertile.

Such arguments are "ludicrous." *Id.* "[A]bsolute necessity is not the standard." *Clark I*, 695 F.2d at 1132. *Hecox* is currently under consideration for en banc review. It should not control here. This panel should faithfully apply *Clark I* and *Clark II*'s reasoning instead.

II. The Act satisfies equal protection.

The court below held that the Act violates equal protection because it "discriminate[s] based on transgender status." *Doe v. Horne*, No. CV-23-00185-TUC-JGZ, 2023 WL 4661831, at *16 (D. Ariz. July 20, 2023). It doesn't. The Act distinguishes based on sex; this distinction is valid because it reflects the "inherent differences between men and women." *United States v. Virginia*, 518 U.S. 515, 533 (1996) (cleaned up); *accord Clark I*, 695 F.2d at 1131 (upholding law protecting female sports because it respected the "average real differences between the sexes").

A. The Act designates sports teams based on sex.

To decide equal-protection claims, courts "begin with the statutory classification itself." *Califano v. Boles*, 443 U.S. 282, 293–94 (1979). The Act designates athletic teams "based on … biological sex." A.R.S. § 15-120.02(A). Under the Act, no male—whether identifying as male, female, nonbinary, fluid, or anything else—can compete in female sports. Teams for males may be open to females, but not vice versa. *Id.* § 15-120.02(C). This keeps sports safe and competitive for women and girls. Nowhere does the Act distinguish based on gender identity.

A law can classify based on sex without unlawfully discriminating based on transgender status. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1746–47 (2020) (noting "transgender status" is "distinct … from sex"). While the Act may *affect* some transgender athletes, that does not mean it classifies based on gender identity. *See Eknes-Tucker v. Gov'r of Ala.*, No. 22-11707, 2023 WL 5344981, at *17 (11th Cir. Aug. 21, 2023) (regulating treatment affecting "only gender nonconforming individuals" does "not trigger heightened scrutiny."). Many laws "affect certain groups unevenly, even though the law itself treats them no differently from all other members of the class described." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 271–72 (1979). A law that favors veterans isn't sex-based even if veterans are 98% male. *Id.* at 270, 274. Nor does regulating "a medical procedure" that affects only one sex trigger heightened scrutiny. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2245–46 (2022).

Because the Act affects all males, there is a stark "lack of identity" between its sex distinction and transgender persons. *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 809 (11th Cir. 2022).

At most, Plaintiffs' challenge amounts to a claim that the Act "has a disparate impact" on transgender athletes. *Feeney*, 442 U.S. at 273. But any disparate impact is "plausibly explained on a neutral ground." *Id.* at 275. Sex distinctions often overlap or contradict a person's gender identity. That's "an unavoidable consequence of a legislative policy that has … always been deemed to be legitimate." *Id.* at 279 n.25. The Act keeps all males from competing in female sports, no matter how they identify. "Too many men are affected … to [say] that the [law] is but a pretext" for disfavoring transgender people. *Id.* at 275; *see Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974) ("nonpregnant" category "includes members of both sexes"); *Dobbs*, 142 S. Ct. at 2245–46.

B. The Act validly distinguishes based on sex because biological differences matter in athletics.

The Equal Protection Clause does not eliminate the State's power to classify, but instead "measure[s] the basic validity of the legislative classification." *Feeney*, 442 U.S. at 271–72. Sex-based distinctions trigger intermediate scrutiny. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). But sex is not "a proscribed classification." *Virginia*, 518 U.S. at 533. Government may draw such distinctions when advancing an "important" goal using "substantially related" means. *Tuan Anh Nguyen*

v. INS, 533 U.S. 53, 60 (2001). A perfect fit is not required. *Id.* at 70; *see Michael M.* 450 U.S. at 473 (relevant inquiry "not whether the statute is drawn as precisely as it might have been, but whether the line … is within constitutional limit[s]."). The Act satisfies this standard.

To start, the Act promotes equal athletic opportunities for females. Designating sex-specific sports to promote this goal is allowed "to advance full development of the talent and capacities" of women and girls. *Virginia*, 518 U.S. at 533; *accord Clark I*, 695 F.2d at 1131. In this way, the Act tracks Title IX, which "paved the way for significant increases in athletic participation for girls and women." *Adams*, 57 F.4th at 818 (Lagoa, J., specially concurring) (quoting Deborah Brake, *The Struggle for Sex Equality in Sport and the Theory Behind Title IX*, 34 U. Mich. J.L. Reform 13, 15 (2000)). "There is no question that" advancing opportunities for women in sports serves an "important governmental interest." *Clark I*, 695 F.2d at 1131 (rejecting equal-protection challenge to sex-specific sports for this reason).

The Act tightly fits this interest. *See B.P.J.*, 2023 WL 111875, at *8 (holding a similar law validly distinguishes based on sex because "the physical characteristics that flow from it[ ] are substantially related to athletic performance and fairness in sports"). The Supreme Court "has consistently upheld statutes" when the sex distinction "reflects the fact that the sexes are not similarly situated in certain circumstances." *Michael M.*, 450 U.S. at 469. Laws may treat males who have sex with

underage females differently than the females because of pregnancy risks. *Id.* at 471–73. And laws may impose sex-specific rules to prove parenthood because of "the unique relationship of the mother to … birth." *Nguyen*, 533 U.S. at 63–64. In fact, "biological sex … is the driving force behind the Supreme Court's sex-discrimination" cases. *Adams*, 57 F.4th at 803 n.6.

In sports, "[t]he difference between men and women … is a real one." *Nguyen*, 533 U.S. at 73. Athletics is "distinctly different" from "admissions," or "employment,"—each of which "requires" different analysis. *Cohen v. Brown Univ.*, 101 F.3d 155, 177 (1st Cir. 1996). Unlike in those settings, athletics "*requires* gender-conscious" designations to ensure equal opportunities for female athletes. *Neal v. Bd. of Trs. of Cal. State Univs.*, 198 F.3d 763, 772 n.8 (9th Cir. 1999). As every Circuit to address this issue has held (including this one), males and females are not "the same for the purposes of physical" activities. *Bauer v. Lynch*, 812 F.3d 340, 350 (4th Cir. 2016). "[D]ue to average physiological differences, males would displace females to a substantial extent if they were allowed to compete" together. *Clark I*, 695 F.2d at 1131. And most "females would quickly be eliminated from participation and denied any meaningful opportunity for athletic involvement" without distinct teams. *Cape v. Tenn. Secondary Sch. Athletic Ass'n*, 563 F.2d 793, 795 (6th Cir. 1977) (per curiam).

To rebut this, Plaintiffs claim to be similarly situated to girls after (1) identifying as female and (2) taking drugs to mitigate male puberty. *Doe*, 2023 WL 4661831, at *4–5, *13. But anyone can take these drugs—including males who identify as boys. And biological sex "is not a stereotype." *Nguyen*, 533 U.S. at 68; *accord Adams*, 57 F.4th at 809; *see id.* at 819 (Lagoa, J., specially concurring) ("[I]t is neither myth nor outdated stereotype that there are inherent differences between … male[s] and … female[s] and that those born male … have physiological advantages in many sports."). The physiological differences between the sexes are real and "enduring." *Virginia*, 518 U.S. at 533. And because Plaintiffs' theory would exclude from female sports disabled males, males with weak athleticism, and males with naturally low testosterone, it would have the perverse effect of *requiring Arizona to discriminate based on gender identity*—a classification that does not dictate athletic performance.

Plaintiffs' premise is flawed anyway. Not only has Arizona provided science suggesting that drugs cannot fully mitigate male physiological advantages, competition results confirm it. In West Virginia, one 12-year-old male who identifies as female is denying girls critical athletic opportunities. Mot. to Suspend Inj. at 8–12, *B.P.J. v. W. Va. State Bd. of Educ.*, No. 23-1078 (4th Cir. July 11, 2023), ECF No. 142-1. Like Plaintiffs, this male identifies as female and takes puberty-suppressing drugs. *B.P.J.*, 2023 WL 111875, at *1. And after underwhelming in track and field events last year, this male exploded up the charts this year—

displacing *over 100 different girls over 280 times* and consistently denying girls a top-10 finish. Mot. to Suspend Inj. at 11, *B.P.J. v. W. Va. State Bd. of Educ.*, No. 23-1078 (4th Cir. July 11, 2023). This male's year-over-year performance skyrocketed compared to similarly trained female peers, and deserving girls lost irreplaceable athletic opportunities as a result. *Id.* at 12. Such evidence suggests drugs will not fully mitigate a male's physiological athletic advantages.

The Act accommodates the physiological differences between the sexes, which are rooted in biology. *O'Connor v. Bd. of Educ. of Sch. Dist. 23*, 449 U.S. 1301, 1306–08 (1980) (Stevens, J., in chambers) (without sex distinctions, "there would be a substantial risk that boys would dominate the girls' programs and deny them an equal opportunity to compete."); *Nguyen*, 533 U.S. at 68. Plaintiffs accept that laws designating sex-specific sports teams are generally legal because it would be unfair for most males to compete in female sports because of their physiological advantages. Yet at the same time, Plaintiffs argue that any biology-based distinction is per se illegal and must be replaced by an identity-based one—which has nothing to do with physiology. Plaintiffs can't have it both ways. If designating sex-specific sports is valid to accommodate the average physiological differences between males and females (and it is), the designation cannot be invalid because it draws a biology-based distinction.

Plaintiffs' theory would overthrow 40 years of equal-protection analysis, requiring all laws that draw sex distinctions to be a perfect fit in "every instance," converting intermediate scrutiny into strict. *Nguyen*, 533 U.S. at 70. But while the Act must have an "exceedingly persuasive justification," that means the State need show only that its "classification serves important [state] objectives" and "substantially relate[s]" to "those objectives." *Id.* (cleaned up). The Act easily passes this intermediate test.

C. Gender identity is not a suspect class.

Plaintiffs' arguments fail for another reason. The Supreme Court and the Ninth Circuit have not held that gender identity is a suspect or quasi-suspect class.

The bar for recognizing a new quasi-suspect class for purposes of an Equal Protection Clause analysis is "high." *L.W. ex rel. Williams v. Skrmetti*, 73 F.4th 408, 420 (6th Cir. 2023). And the Supreme Court has never recognized gender identity as such a class. Indeed, the Court has only recognized two such classes—and that was "over four decades" ago. *Id.* (citing *Cleburne*, 473 U.S. at 441 (gender and illegitimacy)).

Both the Sixth and the Eleventh Circuits have declined to treat gender identity as a quasi-suspect class. *Skrmetti*, 73 F.4th at 420; *Adams*, 57 F.4th at 803 n.5. So has the Tenth Circuit, following this Court's decision in *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659 (9th Cir. 1977). *Brown v. Zavaras*, 63 F.3d 967, 971 (10th Cir. 1995) (citing *Holloway*, 566 F.2d at 663). *But see Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586,

611 (4th Cir. 2020) (treating gender identity as quasi-suspect class). This Court should avoid creating a circuit-split on this issue.

Hecox mistakenly says this Court recognized gender identity as a quasi-suspect class in *Karnoski v. Trump*, 926 F.3d 1180, 1200–01 (9th Cir. 2019). *Hecox*, 2023 WL 5283127, at *11. That is incorrect. While *Karnoski* instructed the district court to apply "something more than rational basis but less than strict scrutiny," it did *not* recognize transgender identity as a suspect or quasi-suspect class. 926 F.3d at 1201.

Karnoski involved a challenge to a policy prohibiting military service by openly transgender individuals, thus regulating based on that status "[o]n its face." *Id.* The district court applied strict scrutiny. *Id.* at 1199. But this Court reversed, directing that "[a]mong the factors to be considered on remand are the level of constitutional scrutiny applicable to the equal protection or substantive due process rights of transgender persons." *Id.* To guide that consideration, the Court did not apply "the factors ordinarily used to determine whether a classification affects a suspect or quasi-suspect class," *id.* at 1200, instead suggesting that "the district court should apply a standard of review that is more than rational basis but less than strict scrutiny." *Id.* at 1201. And the Court was clear that this analysis should be made "as-applied rather than facial," *id.* at 1200 (citation omitted)—the opposite of what the *Hecox* panel did.

Arizona's Act does not classify based on transgender status—on its face or otherwise. If two boys show up for girls' track tryouts, one who

identifies as a girl and one as a boy, both will be told to attend the boys' track tryouts instead. So this Court should hold that the Act does not distinguish based on transgender status. § II.A, *supra*. After all, "[t]he burden of establishing an imperative for constitutionalizing new areas of American life is not—and should not be—a light one, particularly when the States are currently engaged in serious, thoughtful debates about the issue." *Skrmetti*, 73 F.4th at 415–16 (cleaned up).

III. The Act also satisfies Title IX.

Title IX forbids schools from treating individuals "worse than others who are similarly situated" based on sex. *Bostock*, 140 S. Ct. at 1740. Plaintiffs' claim to be similarly situated to females fails. That alone dooms their claim. § II, *supra*. So does Title IX's text.

A. Title IX concerns sex, not gender identity.

Title IX prohibits "discrimination" in educational programs and activities "on the basis of sex." 20 U.S.C. § 1681(a). But Title IX does not define "sex," so we "look to the ordinary meaning of the word when it was enacted in 1972." *Adams*, 57 F.4th at 812. And this ordinary meaning in 1972 was "biological sex." *Id* (collecting sources); *accord Neese v. Becerra*, 2022 WL 1265925, at *12 (N.D. Tex. Apr. 26, 2022) (*Neese I*). As the U.S. Supreme Court has put it, "sex" is "an immutable characteristic" determined solely by "birth." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

Throughout Title IX, "sex" is used as a binary concept, referring to male and female. 20 U.S.C. § 1681 *et seq*; *see Neese I*, 2022 WL 1265925, at *12 (Title IX "presumes sexual dimorphism"). For example, Title IX allows schools to change from admitting "only students of *one sex*" to admitting "students of *both sexes*." 20 U.S.C. § 1681(a)(2) (emphases added). Title IX also exempts "father-son or mother-daughter activities … but if such activities are provided for students of *one sex*, opportunities for reasonably comparable activities shall be provided for students of *the other sex*." *Id*. at § 1681(a)(8) (emphases added). Not only does this provision say "the" other sex—rather than "another" sex—but also it uses biology-linked terms like "father-son" and "mother-daughter." In contemporary dictionaries, mother was defined as "a female parent," Webster's New International Dictionary 1474 (3d ed. 1968); "father" as "a male parent," *id*. at 828; "son" as a "male offspring," *id*. at 2172; and "daughter" as "a human female," *id*. at 577. None of this would make sense if "sex" included the non-binary, fluid concept of gender identity.

If sex *did* include gender identity, then Title IX exemptions would be illogical. For example, Title IX exempts institutions "traditionally" limiting their admissions to "only students of one sex," 20 U.S.C. § 1681(5); sororities and fraternities "limited to persons of one sex," § 1681(6); "living facilities for the different sexes," § 1686; "separation of students by sex within physical education classes" for contact sports, 34 C.F.R. § 106.34(a)(1); and human sexuality classes separated by "sex," 34

C.F.R. § 106.34(a)(3)–(4). If sex includes gender identity, transgender individuals would be preferred under these laws because they "would be able to live in both living facilities associated with their biological sex and living facilities associated with their gender identity." *Adams*, 57 F.4th at 813. Transgender (but not other) individuals could move between living facilities because (unlike sex) gender identity can change. That's nonsensical. Title IX's exemptions only make sense if sex means biological sex.

Title IX's purpose bolsters this. This purpose, "which is 'evident in the text' itself, is to prohibit the discriminatory practice of treating women worse than men." *Neese v. Becerra*, 640 F. Supp. 3d 668, 681 (N.D. Tex. 2022) (*Neese II*) (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011)). After all, Title IX was "enacted in response to evidence of pervasive discrimination against women with respect to educational opportunities." *McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 286 (2d Cir. 2004); *see N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 523 n.13 (1982). Title IX's statutory context and purpose account for biology, not gender identity—a distinction the Supreme Court has rightly affirmed. *Bostock*, 140 S. Ct. at 1746–47 (noting "transgender status" is "distinct … from sex").

B. Title IX sometimes allows sex distinctions.

Title IX doesn't forbid schools from noticing sex but says no person "shall, on the basis of sex, be excluded from participation in [or] be denied

the benefits of … any education program or activity." 20 U.S.C. § 1681(a). To "exclude" means "to shut out," "hinder the entrance of," or "bar from participation, enjoyment, consideration, or inclusion." Webster's Third New International Dictionary 793 (1966). To "deny" means "to turn down or give a negative answer to." *Id.* at 603. And these words must be understood as applying to an "education program or activity," including sports. Together, these words forbid schools from shutting out or hindering females from enjoying, participating in, or reaping *educational* benefits.

Enjoying these *educational* benefits sometimes requires noticing sex. After all, an educational program "made up exclusively of one sex is different from a community composed of both." *Virginia*, 518 U.S. at 533 (cleaned up). When both sexes are present, recognizing sex differences can be necessary for students to fully enjoy educational programs and activities. The Supreme Court acknowledged that when it said admitting women to the Virginia Military Institute "would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements." *Virginia*, 518 U.S. at 550 n.19. As Justice Ginsburg explained before taking the bench, "[s]eparate places to disrobe, sleep, [and] perform personal bodily functions are permitted, in some situations required [to respect] privacy." Ruth Bader Ginsburg, *The Fear of the Equal Rights Amendment*, Wash. Post, Apr. 7, 1975. Or as Title IX's principal sponsor put it, sometimes sex separation is "absolutely necessary to the success of the program—such as in classes for pregnant girls

or emotionally disturbed students, in sports facilities or other instances where personal privacy must be preserved." 118 Cong. Rec. 5,807 (1972). In sports specifically, sex designation is necessary to give females "the chance to be champions." *McCormick*, 370 F.3d at 295. "[D]ue to average physiological differences, males would displace females to a substantial extent if they were allowed to compete" together. *Clark I*, 695 F.2d at 1131.

Accommodating the "enduring" differences between males and females is written repeatedly into Title IX. *Virginia*, 518 U.S. at 533. Indeed, as discussed above, Title IX "explicitly permit[s] differentiating between the sexes in certain instances," *Adams*, 57 F.4th at 814—from some single-sex educational institutions and organizations, 20 U.S.C. § 1681(a)(1)-(9) to "separate living facilities for the different sexes," *id.* § 1686. Title IX's regulations likewise allow for "separate [sports] teams for members of each sex," 34 C.F.R. § 106.41(b), and direct schools to "provide equal athletic opportunity for … both sexes" to "effectively accommodate the interests and abilities of members of both sexes," *id.* § 106.41(c). This confirms Title IX cannot require sex-blindness.

Title IX's education-focused text and directive to consider sex in many instances distinguishes it from Title VII. *Adams*, 57 F.4th at 811 ("Title IX, unlike Title VII, includes express statutory and regulatory carve-outs for differentiating between the sexes."); *see Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005) ("Title VII … is a vastly

different statute" than Title IX). An employee's sex is "not relevant to the selection, evaluation, or compensation of employees." *Bostock*, 140 S. Ct. at 1741 (cleaned up). But sex is highly relevant "in the athletics context." *Cohen*, 101 F.3d at 178; *accord Neal,* 198 F.3d at 773 (requiring "gender-conscious" policies); *Kelley v. Bd. of Trs.*, 35 F.3d 265, 270 (7th Cir. 1994); *Sex Discrimination Regulations, Hearings Before the Subcommittee on Post Secondary Education of the Committee on Education and Labor*, 94th Cong. 1st Sess. at 46, 54, 125, 129, 152, 177, 299–300 (1975); 118 Cong. Rec. 5,807 (1972); 117 Cong. Rec. 30,407 (1971). Title IX allows sex-specific sports to fairly "allocate opportunities … for male and female students" to accommodate their relevant physiological differences. *Cohen*, 101 F.3d at 177.

Title IX's context confirms this. Although courts start with the words themselves, *Neese I*, 2022 WL 1265925, at *14, a text "cannot be divorced from the circumstances existing at the time [the statute] was passed, and from the evil which Congress sought to correct and prevent," *United States v. Champlin Refin. Co.*, 341 U.S. 290, 297 (1951). "[A] textually permissible interpretation that furthers rather than obstructs the document's purpose should be favored." A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 63 (2012). Many courts have recognized that "Title IX was enacted in response to evidence of pervasive discrimination against women with respect to educational opportunities." *McCormick*, 370 F.3d at 286; *Cannon v. Univ. of Chi.*, 441 U.S. 677, 704

& n.36 (1979). "The circumstances and the evil" that motivated Title IX "are well-known." *Champlin*, 341 U.S. at 297. It had nothing to do with gender identity, and everything to do with sex.

No one seriously disputes that Title IX allows educational institutions to consider sex in some instances—athletics being case-in-point. It is almost universally understood that Title IX allows sex-specific sports. But to interpret Title IX as requiring sex-blindness would make sex-specific sports illegal. Schools could no longer use "biology-based classifications to separate physical education classes involving contact sports like boxing or rugby." *Neese II*, 640 F. Supp. 3d at 683. Yet as 34 C.F.R. § 106.41(b) and longstanding history confirms, Congress never intended Title IX to require sex-blindness in the first place.

Shortly after Title IX, Congress passed the Javits Amendments, directing the Health, Education, and Welfare Department (the Department of Education's predecessor) to publish athletics regulations. Pub. L. No. 93-380, § 844, 88 Stat. 484, 612 (Aug. 21, 1974). HEW proposed regulations that included provisions identical to the sports exception now codified at 34 C.F.R. § 106.41(b). *Compare* Nondiscrimination on the Basis of Sex Under Federally Assisted Education Programs and Activities, 40 Fed. Reg. 24128, 24142–43 (1975), *with* 34 C.F.R. § 106.41. Congress then allowed the regulations to take effect. *See McCormick*, 370 F.3d at 287. Thus, Congress ratified the regulation's understanding of Title IX—an understanding that allows educational institutions to recognize

biological sex (and the corresponding physiological differences that result from it) when necessary to ensure equal access in education, such as in sports. Congress endorsed this understanding again in 1987, defining Title IX's educational programs to cover *all education programs*, including sports. *See* 20 U.S.C. § 1687(2)(A); *Cohen v. Brown Univ.*, 991 F.2d 888, 894 (1st Cir. 1993) (explaining import of Restoration Act to sports). In all these ways, Congress reaffirmed that Title IX allows for sex-specific sports. *See* Scalia & Garner, *supra*, at 322–26.

Plaintiffs do not contest that Title IX allows for this distinction, at least sometimes. *See Doe*, 2023 WL 4661831, at *12 ("Plaintiffs do not challenge the existence of separate teams for girls and boys."). The only question is what distinction Title IX allows "for members of each sex" in sports. The answer is biological sex. § III.A, *supra*. This makes sense in athletics, where biological differences matter most. The Act accounts for this by giving space for women to compete fairly. So it cannot violate Title IX when Title IX contemplates this precise distinction. Otherwise, any male who identifies as female could play female sports, even without taking drugs—something no major sports organization allows.

C. *Bostock* does not forbid the Act.

Bostock does not require that Title IX be interpreted to force Arizona to allow males to compete in female sports.

First, *Bostock* limited its ruling to Title VII employment. 140 S. Ct. at 1753. Title VII is "vastly different" from Title IX. *Jackson*, 544 U.S. at

175; *see Neese II*, 640 F. Supp. 3d at 680. And *Bostock*'s logic does not work when applied to sex-specific sports. Whereas *Bostock* interpreted Title VII to forbid considering sex when hiring and firing, Title IX often allows sex distinctions to respect physiological differences between males and females. § III.B. Plaintiffs concede this. Thus, Title VII principles do not "automatically apply" to Title IX. *Meriwether v. Hartop*, 992 F.3d 492, 510 n.4 (6th Cir. 2021); *see Eknes-Tucker*, 2023 WL 5344981, at *16 ("Because *Bostock* … concerned a different law (with materially different language), … it bears minimal relevance."); *Skrmetti*, 73 F.4th at 420 (finding *Bostock* "applies only to Title VII").

Indeed, there is a stark difference between firing employees because of their gender identity and allowing sex-specific sports. Sex is "not relevant to the selection, evaluation, or compensation of employees." *Bostock*, 140 S. Ct. at 1741 (cleaned up). But in athletics, "gender is not an irrelevant characteristic." *Cohen*, 101 F.3d at 176–78. In fact, to achieve Title IX's purpose of giving women equal athletic opportunities, this Court and others have said Title IX *must* treat the sexes differently by designating specific teams for females. *See Clark II,* 886 F.2d at 1193. Title VII requirements should not be read into Title IX's athletic context. *See Cohen*, 101 F.3d at 177 (refusing to do this because "athletics presents a distinctly different situation from admissions and employment").

If Title IX prohibits schools from noticing sex, then Title IX would forbid *any* sex distinction in sports—even excluding men who identify as

men from a women's team. And Title IX surely does not forbid this, as both caselaw and Plaintiffs concede. *See Doe*, 2023 WL 4661831, at *12 ("Plaintiffs do not challenge the existence of separate teams for girls and boys."); § III.B, *supra*. This proves that *Bostock* cannot be applied to Title IX without undermining the statute's entire purpose. *See* Scalia & Garner, *supra*, at 63–65 (favoring reads that further, not obstruct, document's purpose).

Second, *Bostock* did not conflate gender identity and biological sex. It said that gender-identity discrimination necessarily considers sex, and this constitutes sex discrimination under Title VII. *Bostock*, 140 S. Ct. at 1748. But *Bostock* did not consider the converse—whether considering sex is always gender-identity discrimination. The Act *only* considers biological sex, not gender identity. § II.A. This does not treat Plaintiffs "worse than others who are similarly situated." *Bostock*, 140 S. Ct. at 1740. Like all males, Plaintiffs can participate on male teams. Like all males, Plaintiffs cannot play on female teams. That way, females have an equal opportunity to compete. That's what Title IX is all about.

CONCLUSION

This Court should vacate the injunction below and uphold Arizona's right to promote equal athletic opportunities for women and girls.

Respectfully submitted,

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FOR THE NINTH CIRCUIT

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I hereby certify that on September 15, 2023 I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system, which will accomplish service on counsel for all parties through the Court's electronic filing system.

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