20-35813(L), 20-35815(CON)

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, et al.,

Defendants-Appellants,

and

MADISON KENYON, et al.,

Intervenors-Appellants.

On Appeal from the United States District Court for the District of Idaho

BRIEF FOR THE STATES OF NEW YORK, HAWAI'I, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, ILLINOIS, MAINE, MARYLAND, MASSACHUSETTS, MINNESOTA, NEVADA, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, OREGON, PENNSYLVANIA, RHODE ISLAND, VERMONT, VIRGINIA, AND WASHINGTON, AND THE DISTRICT OF COLUMBIA, AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

State Laws

California

State Laws **Page(s)**

State Laws **Page(s)**

State Laws **Page(s)**

Maryland

Massachusetts

Minnesota

Nevada

State Laws **Page(s)**

State Laws **Page(s)**

State Laws **Page(s)**

Miscellaneous Authorities

Miscellaneous Authorities **Page(s)**

Miscellaneous Authorities **Page(s)**

Miscellaneous Authorities **Page(s)**

Miscellaneous Authorities **Page(s)**

INTRODUCTION AND INTERESTS OF AMICI

Pursuant to Federal Rule of Appellate Procedure 29, the States of New York, Hawai'i, California, Colorado, Connecticut, Delaware, Illinois, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, and Washington, and the District of Columbia, submit this brief in support of plaintiffs-appellees Lindsay Hecox and Jane Doe. Plaintiffs challenge Idaho's Fairness in Women's Sports Act (the Act), which categorically bars transgender female students from participating in gender-segregated sports programs as females, and provides that any female student athlete may be required to verify her biological sex through, among other things, a physical examination of her reproductive anatomy or genetic testing.

The district court granted a preliminary injunction against enforcement of the Act, finding that it fails to advance any legitimate governmental interest and likely denies plaintiffs equal protection. Amici States file this brief to explain that in their experience, allowing transgender female students to participate in women's sports does not

compromise fairness or reduce opportunities for cisgender (i.e., non-transgender) athletes.

Amici States strongly support the right of transgender people to live with dignity, be free from discrimination, and have equal access to education, government-sponsored opportunities, and other incidents of life, including student athletic programs. Discrimination against transgender people has no legitimate basis and serves only to injure a group that is perceived as different. Such discrimination harms transgender people, causing tangible economic, educational, emotional, and health consequences.

To prevent these harms, many of the amici States have adopted policies to protect transgender people from discrimination. The amici States' shared experience in administering their antidiscrimination policies demonstrates that permitting transgender students to participate in athletic programs consistent with their gender identity benefits all students and does not compromise opportunities for cisgender students. Because the sole function of the Act is to exclude and stigmatize transgender students like Hecox, the Act violates equal protection under any level of scrutiny.

ARGUMENT

POINT I

PROTECTING TRANSGENDER PEOPLE FROM DISCRIMINATION CONFERS SIGNIFICANT INDIVIDUAL AND SOCIETAL BENEFITS WITHOUT REDUCING OPPORTUNITIES FOR OTHERS

About 1.5 million people in the United States—including approximately 150,000 teenagers[1]—identify as transgender.[2] Transgender people have been part of cultures worldwide from "antiquity to the present day,"[3] and they serve our communities in myriad ways, including as students, teachers, essential workers, firefighters, police officers, lawyers, nurses, and doctors. Being transgender does not inhibit a person's ability to contribute to society.

Unfortunately, transgender individuals often experience severe discrimination that limits their ability to realize their potential. To

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[1] Jody L. Herman et al., *Age of Individuals Who Identify as Transgender in the United States* 2 (Williams Inst. Jan. 2017) (internet). (For authorities available on the internet, full URLs appear in the Table of Authorities.)

[2] Andrew R. Flores et al., *How Many Adults Identify as Transgender in the United States?* 3-4 (Williams Inst. June 2016) (internet).

[3] Am. Psychol. Ass'n, *Answers to Your Questions About Transgender People, Gender Identity, and Gender Expression* 1 (3d ed. 2014) (internet).

combat such discrimination, States began providing civil rights protections for transgender people nearly a quarter century ago. Today, at least twenty-two States and the District of Columbia,[4] and 225 local

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[4] **California**: Cal. Civ. Code § 51(b), (e)(5) (public accommodations); Cal. Educ. Code §§ 220 (education), 221.5(f) (education and school athletic participation); Cal. Gov't Code §§ 12926(o), (r)(2), 12940(a), 12949 (employment); *id.* § 12955 (housing); Cal. Penal Code §§ 422.55, 422.56(c) (hate crimes). **Colorado**: Colo. Rev. Stat. § 24-34-301(7) (definition); *id.* § 24-34-402 (employment); *id.* § 24-34-502 (housing); *id.* § 24-34-601 (public accommodations). **Connecticut**: Conn. Gen. Stat. § 10-15c (schools); *id.* § 46a-51(21) (definition); *id.* § 46a-60 (employment); *id.* § 46a-64 (public accommodations); *id.* § 46a-64c (housing). **Delaware**: Del. Code tit. 6, § 4501 (public accommodations); *id.* tit. 6, § 4603(b) (housing); *id.* tit. 19, § 711 (employment). **Hawai'i**: Haw. Rev. Stat. § 489-2 (definition); *id.* § 489-3 (public accommodations); *id.* § 515-2 (definition); *id.* § 515-3 (housing). **Illinois**: 775 Ill. Comp. Stat. 5/1-102(A) (housing, employment, access to financial credit, public accommodations); *id.* 5/1-103(O-1) (definition). **Iowa**: Iowa Code § 216.2(10) (definition); *id.* § 216.6 (employment); *id.* § 216.7 (public accommodations); *id.* § 216.8 (housing); *id.* § 216.9 (education). **Kansas**: Kan. Hum. Rights Comm'n, *Kansas Human Rights Commission Concurs with the U.S. Supreme Court's Bostock Decision* (Aug. 21, 2020) (internet) (advising that Kansas laws prohibiting discrimination based on "sex" in "employment, housing, and public accommodation" contexts "are inclusive of LGBTQ and all derivates of 'sex'"). **Maine**: Me. Rev. Stat. tit. 5, § 4553(9-C) (definition); *id.* § 4571 (employment); *id.* § 4581 (housing); *id.* § 4591 (public accommodations); *id.* § 4601 (education). **Maryland**: Md. Code, State Gov't § 20-304 (public accommodations); *id.* § 20-606 (employment); *id.* § 20-705 (housing). **Massachusetts**: Mass. Gen. Laws ch. 4, § 7, fifty-ninth (definition); *id.* ch. 76, § 5 (education); *id.* ch. 151B, § 4 (employment, housing, credit); *id.* ch. 272, §§ 92A, 98 (public accommodations) (as amended by Mass. Acts ch. 134 (2016)). **Minnesota**: Minn. Stat. § 363A.03(44) (definition); *id.* § 363A.08 (employment); *id.* § 363A.09

(housing); *id.* § 363A.11 (public accommodations); *id.* § 363A.13 (education). **Nevada**: Nev. Rev. Stat. §§ 118.075, 118.100 (housing); *id.* §§ 613.310(4), 613.330 (employment); *id.* §§ 651.050(2), 651.070 (public accommodations). **New Hampshire**: N.H. Rev. Stat. Ann. § 354-A:2(XIV-e) (definition); *id.* § 354-A:6 (employment); *id.* § 354-A:8 (housing); *id.* § 354-A:16 (public accommodations); *id.* § 354-A:27 (education). **New Jersey**: N.J. Stat. Ann. § 10:5-12 (public accommodations, housing, employment); *id.* § 10:5-5(rr) (definition); *id.* § 18A:36-41 (directing issuance of guidance to school districts permitting transgender students "to participate in gender-segregated school activities in accordance with the student's gender identity"). **New Mexico**: N.M. Stat. Ann. § 28-1-2(Q) (definition); *id.* § 28-1-7(A) (employment); *id.* § 28-1-7(F) (public accommodations); *id.* § 28-1-7(G) (housing). **New York**: N.Y. Exec. Law § 291 (education, employment, public accommodations, housing); N.Y. Comp. Codes R. & Regs. tit. 9, § 466.13 (interpreting the N.Y. Exec. Law § 296 (Human Rights Law) definition of "sex" to include gender identity). **Oregon**: Or. Rev. Stat. § 174.100(7) (definition); *id.* § 659.850 (education); *id.* § 659A.006 (employment, housing, public accommodations). **Rhode Island**: 11 R.I. Gen. Laws § 11-24-2 (public accommodations); 28 R.I. Gen. Laws §§ 28-5-6(11), 28-5-7 (employment); 34 R.I. Gen. Laws §§ 34-37-3(9), 34-37-4 (housing). **Utah**: Utah Code Ann. § 34A-5-106 (employment); *id.* § 57-21-5 (housing). **Vermont**: Vt. Stat. Ann. tit. 1, § 144 (definition); *id.* tit. 9, § 4502 (public accommodations); *id.* tit. 9, § 4503 (housing); *id.* tit. 21, § 495 (employment). **Washington**: Wash. Rev. Code § 28A.642.010 (education); *id.* § 49.60.040(27) (definition); *id.* § 49.60.180 (employment); *id.* § 49.60.215 (public accommodations); *id.* § 49.60.222 (housing). **District of Columbia**: D.C. Code § 2-1401.02(12A) (definition); *id.* § 2-1402.11 (employment); *id.* § 2-1402.21 (housing); *id.* § 2-1402.31 (public accommodations); *id.* § 2-1402.41 (education).

governments,[5] offer express protections against discrimination based on gender identity in areas such as education, housing, public accommodations, and employment.[6] As the experience of these jurisdictions shows, policies ensuring equal treatment of transgender people—including policies permitting young people to participate in the single-sex sports teams consistent with their gender identity—promote safe and inclusive communities, workplaces, and schools: a benefit to all.

A. Transgender Youth Face Pervasive and Harmful Discrimination That Causes Them Serious Health and Academic Harms.

Transgender youth experience levels of discrimination, violence, and harassment that exceed those experienced by their cisgender counterparts.[7] In the 2015 U.S. Transgender Survey (USTS), the largest

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[5] Hum. Rights Campaign, *Cities and Counties with Non-Discrimination Ordinances that Include Gender Identity* (Jan. 28, 2018) (internet).

[6] The U.S. Supreme Court recently clarified that longstanding federal law similarly prohibits employment discrimination based on gender identity. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1742-43 (2020).

[7] Joseph G. Kosciw et al., *The 2019 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools* xxvii, 93 (GLSEN 2020) (internet); *see also*

survey of transgender people to date, 77% of respondents who were known or perceived as transgender in grades K-12 reported negative experiences at school, including being harassed or attacked.[8] More than half of transgender students (54%) reported verbal harassment, almost a quarter (24%) reported suffering a physical attack, and more than one eighth (13%) reported being sexually assaulted.[9] Another 2015 survey showed that three-fourths of transgender students felt unsafe at school because of their gender expression.[10] More than a quarter of transgender respondents to a survey of LGBT teenagers in December 2016 and January 2017 reported being bullied or harassed within the past thirty days.[11] Given the hostile climate transgender students face, it is not surprising that transgender students surveyed in 2019 reported feeling

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Emily A. Greytak et al., *Harsh Realities: The Experiences of Transgender Youth in Our Nation's Schools* xi (GLSEN 2009) (internet).

[8] Sandy E. James et al., *The Report of the 2015 U.S. Transgender Survey* 132-35 (Nat'l Ctr. for Transgender Equal. Dec. 2016) (internet).

[9] *Id.* at 132-34.

[10] Joseph G. Kosciw et al., *The 2015 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools* 84-85 (GLSEN 2016) (internet).

[11] Hum. Rights Campaign Found., *Human Rights Campaign Post-Election Survey of Youth* 8 (2017) (internet).

less connected to their school, and less of a sense of belonging, than other students.[12]

Discrimination against transgender youth—including denying them the opportunity to participate in extracurricular activities consistent with their gender identity—can have serious health and academic consequences. LGBTQ students who experienced discriminatory policies or practices in school were found to have lower self-esteem and higher levels of depression than students who had not encountered such discrimination.[13] Respondents to the 2015 USTS who reported negative experiences in K-12 were more likely than other respondents to be under serious psychological distress, to have experienced homelessness, and to have attempted suicide.[14] Transgender people attempt suicide at a rate nearly nine times that of the general population.[15]

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[12] Kosciw et al., *The 2019 National School Climate Survey*, *supra*, at 95.

[13] *Id.* at 52, 54.

[14] James et al., *2015 U.S. Transgender Survey*, *supra*, at 132.

[15] *Id.* at 114.

Discrimination in school settings also negatively affects educational outcomes. A 2019 survey showed that LGBTQ students who had experienced discriminatory policies and practices had lower levels of educational achievement, lower grade point averages, and lower levels of educational aspiration than other students.[16] Discriminatory school climates have also been found to exacerbate absenteeism: "LGBTQ students were almost three times as likely to have missed school in the past month because they felt unsafe or uncomfortable if they had experienced LGBTQ-related discrimination in their school (44.1% vs. 16.4%)."[17]

Policies that prevent transgender students from accessing facilities and activities consistent with their gender identity create hostile and discriminatory school climates that harm students' well-being and

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[16] Kosciw et al., *The 2019 National School Climate Survey*, *supra*, at 45, 48; *see also* Greytak et al., *Harsh Realities*, *supra*, at 25, 27 fig. 15 (showing that more-frequently harassed transgender students had significantly lower grade point averages than other transgender students).

[17] Kosciw et al., *The 2019 National School Climate Survey*, *supra*, at 49.

interfere with their ability to learn.[18] These harms adversely affect society as a whole because education advances not only the private interests of students, but also prepares them to contribute to society—socially, culturally, and economically. *See, e.g.*, *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).

B. Protecting Transgender Youth from Discrimination Yields Broad Benefits Without Limiting Opportunities for Cisgender Students.

Supportive educational and extracurricular environments foster success for transgender students. Transgender students permitted to live consistently with their gender identities, for example, have mental health outcomes comparable to their cisgender peers.[19]

A number of the amici States have thus enacted laws or issued guidance to ensure equal opportunities and nondiscriminatory treatment for transgender students—including with regard to school activities and

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[18] *See, e.g.,* Br. of Amici Curiae Sch. Adm'rs from Thirty-One States and the District of Columbia in Supp. of Resp't, *Gloucester Cty. Sch. Bd. v. G.G.*, No. 16-273, 2017 WL 930055, at *3-4 (S. Ct. Mar. 2, 2017).

[19] *Id.* at *4.

sports programs.[20] For example, both California and Massachusetts have long mandated that transgender students be permitted to participate in school programs and activities—including sports—consistent with their gender identity. *See* Cal. Educ. Code § 221.5(f) (2013); Mass. Gen. Laws ch. 76, § 5 (2012); 603 Mass. Code Regs. § 26.06(5). Likewise, New York law expressly prohibits discrimination and harassment of students "on school property or at a school function" on the basis of gender identity, *see* N.Y. Educ. Law §§ 11(6), 12(1), and the State Education Department has made clear that transgender students should be allowed to access school facilities, and participate in activities, consistent with their gender identity, N.Y. State Educ. Dep't, *Guidance to School Districts for Creating*

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[20] **Connecticut**: Conn. Gen. Stat. § 10-15c (prohibiting discrimination on basis of gender identity in student access to public school activities and programs). **Minnesota**: Minn. Dep't of Educ., *A Toolkit for Ensuring Safe and Supportive Schools for Transgender and Gender Nonconforming Students* 8 (Sept. 25, 2017) (internet) (same). **New Jersey**: State of N.J. Dep't of Educ., *Transgender Student Guidance for School Districts* 6 (internet) (same, as to "gender-segregated classes or athletic activities, including intramural and interscholastic athletics"). **Washington**: Wash. Rev. Code § 28A.642.010 (prohibiting discrimination based on gender identity in public schools); Wash. Off. of Superintendent of Pub. Instruction, *Gender-Inclusive Schools* (internet) (transgender students must be permitted to participate in "physical education and athletics" consistent with their gender identity). **District of Columbia**: D.C. Code § 2-1402.41 (prohibiting gender identity discrimination by educational institutions).

a Safe and Supportive School Environment For Transgender and Gender Nonconforming Students 9-10 (July 2015) (internet).

With respect to athletics specifically, barring transgender students from participating in sports teams consistent with their gender identity deprives them of the important benefits of such activities. Athletic participation has been linked to academic achievement and improved academic performance.[21] Participants in interscholastic sports "have higher grades, spend more time on homework, have higher educational aspirations, and are more likely to attend college than are their counterparts."[22] Young women who participate in high school athletics, in particular, are more likely on average to complete college.[23]

There are also many health benefits to sports participation. Regular physical activity "decreases the risk of developing diabetes, hypertension,

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[21] Alison R. Snyder et al., *Health-Related Quality of Life Differs Between Adolescent Athletes and Adolescent Nonathletes*, 19 J. of Sport Rehab. 237, 238 (2010) (internet); Kelly P. Troutman & Mikaela J. Dufur, *From High School Jocks to College Grads: Assessing the Long-Term Effects of High School Sport Participation on Females' Educational Attainment*, 38 Youth & Soc'y 443, 444 (June 2007) (internet).

[22] Troutman & Dufur, *supra*, at 444.

[23] *Id.* at 454.

cancer, and obesity, as well as cardiovascular and bone and joint diseases."[24] Sports participation can also have a positive effect on self-esteem and mental health.[25] And all students stand to benefit from an inclusive, supportive environment.[26] This is especially true of sports, given the importance of teamwork and cooperation in athletic competition. (*See, e.g.*, Excerpts of Record (E.R.) 644.) The United Nations has recognized the integral role that sports play in the "promotion of tolerance and respect" and "the empowerment of women and of young people, individuals and communities."[27]

In recognition of these myriad benefits, interscholastic sports organizations, local school districts, and individual colleges and

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[24] Snyder et al., *Health-Related Quality of Life*, *supra*, at 237-38; *see also* Troutman & Dufur, *supra*, at 444.

[25] Richard Bailey, *Physical Education and Sport in Schools: A Review of Benefits and Outcomes*, 76 J. of Sch. Health 397, 398 (Oct. 2006) (internet); Snyder et al., *Health-Related Quality of Life*, *supra*, at 238, 244.

[26] *See* Br. of Amici Curiae Sch. Adm'rs, *Gloucester Cnty. Sch. Bd.*, 2017 WL 930055, at *2 ("[I]nclusive policies not only fully support the reality of transgender students' circumstances, but also foster a safer and more welcoming learning environment for all students.").

[27] United Nations, *Transforming Our World: The 2030 Agenda for Sustainable Development* 13 (2015) (internet).

universities in the amici States have adopted policies to ensure that transgender students will have equal access to sports participation.[28] Since 2009, the New Jersey State Interscholastic Athletic Association, a

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[28] *See, e.g.*, **California**: Cal. Interscholastic Fed'n, *2020-21 Constitution & Bylaws* 96 (internet) (transgender students must be afforded opportunity to participate in sports in manner consistent with their gender identity); Fresno Unified Sch. Dist., Administrative Regulation 5145.3, *Nondiscrimination/Harassment* (2019) (internet) (same). **Colorado**: Colo. High Sch. Activities Ass'n, *CHSAA Transgender Inclusion Bylaw & Policy* 2 (internet) (same). **Connecticut**: Conn. Interscholastic Athletic Conf., *2020-2021 Handbook* 55 (internet) (same). **Maryland**: Md. Pub. Secondary Schs. Athletic Ass'n, *MPSSAA Guidance for Participation of Transgender Youth in Interscholastic Athletics* 2 (Aug. 2016) (internet) (same, for interscholastic sports); **Massachusetts**: Mass. Interscholastic Athletic Ass'n, *MIAA Handbook* (2019-2021) § 43.1 (internet) (same). **Minnesota**: Minn. State High Sch. League, *2020-2021 MSHSL Official Handbook, 300.00: Administration of Student Eligibility Bylaws* 51 (internet) (same); Univ. of Minn., *Equity and Access: Gender Identity, Gender Expression, Names and Pronouns* (Dec. 11, 2019) (internet) (same, for all university programs and activities). **Nevada**: Nev. Interscholastic Activities Ass'n, *NIAA Transgender Participation Position Statement and Policy* (Apr. 6, 2016) (internet) (same, for "gender specific sports team[s]"). **New York**: N.Y. State Pub. High Sch. Athletic Ass'n, *NYSPHSAA Handbook* 51 (Nov. 2020) (internet) (equal participation by transgender students in all interscholastic sports activities consistent with their gender identity). **Oregon**: Or. Sch. Activities Ass'n, *2020-2021 Handbook*, Exec. Bd. Policy No. 39(B)(2) (internet). **Rhode Island**: R.I. Interscholastic League, *Rules and Regulations*, art. 3 § 3 (Sept. 28, 2020) (internet) (same). **Washington:** Wash. Interscholastic Activities Ass'n, *2020-21 Official Handbook* 35-36 (Oct. 27, 2020) (internet) (same).

voluntary organization that administers interscholastic athletics in the state, has permitted transgender students to participate in gender-segregated competitive sports consistent with their gender identity.[29] The Albuquerque School District—the largest school district in New Mexico—mandates that transgender students have equal access to recreational and competitive sports programs "in a manner consistent with their gender identity."[30] And the Los Angeles Unified School District—one of the largest school districts in the country—has implemented a transgender-inclusive sports policy for many years "without problems."[31] Indeed, district officials there reported that the district's policy has led to a positive "transformation" in their schools—an experience that "stands in stark contrast" to "expressed concerns that students will abuse the policy."[32]

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[29] N.J. State Interscholastic Athletic Ass'n, *NJSIAA & NJSCA Coaches Handbook: 2020-2021* 28-30 (internet)

[30] Albuquerque Pub. Schs., *Non-Discrimination for Students: Gender Identity and Expression* (May 2016) (internet).

[31] Patrick McGreevy, *California transgender students given access to opposite-sex programs*, L.A. Times (Aug. 12, 2013) (internet).

[32] Judy Chiasson, *Success and Opportunity for Transgender Students*, HuffPost (Feb. 2, 2016) (internet).

Moreover, as permitted by National Collegiate Athletic Association (NCAA) policies, transgender students in the amici States have been competing in intercollegiate sports teams consistent with their gender identities for nearly a decade, with no reports of disruption to women's sports or dominance by transgender athletes.[33] (*See* E.R. 72-73, 242, 621.) Idaho's concerns about compromising fair competition and opportunities for female athletes to "obtain recognition and accolades, [and] college scholarships," *see* Idaho Code § 33-6202(12), have not materialized in the amici States. Rather, the experience of the amici States confirms the baselessness of the assumptions and generalizations underlying the Act's discriminatory treatment of transgender female athletes.[34]

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[33] NCAA, *NCAA Inclusion of Transgender Athletes* 13 (Aug. 2011) (internet).

[34] *See also id.* at 7-8 (explaining that assumptions that transgender women will have an "unfair advantage when competing against cisgender women" are "not well founded").

POINT II

THE EQUAL PROTECTION CLAUSE PROHIBITS THE GENDER-IDENTITY DISCRIMINATION IN THIS CASE

As the Supreme Court has long recognized, the Constitution's guarantee of equal protection prohibits government policies that serve only to express "negative attitudes, or fear," toward people viewed as "different." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985). "[V]ague, undifferentiated fears" about a class of persons further no legitimate state interest and cannot be used to "validate" a policy of different treatment. *Id.* at 449. Classifications based on "archaic and overbroad generalizations" similarly do not pass constitutional muster. *See Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126, 1131 (9th Cir. 1982) (quotation marks omitted).

The Idaho Fairness in Women's Sports Act is just such a policy. The Act's categorical prohibition on the participation of transgender female students in school-sponsored female-only sports activities serves only to stigmatize and exclude transgender students, and furthers no legitimate governmental interests in promoting equity in sports. The Act's gender dispute process fails to advance the Act's claimed goals of protecting female athletes from unfair competition because it excludes people on the

basis of criteria that have no demonstrated connection to performance advantage. Reproductive anatomy or genetic makeup alone has no such connection to athletic performance, and testosterone levels measured in the absence of hormone therapy, as required by the Act, provide no information about the performance of a transgender person who is in fact taking hormone therapy. The district court thus correctly concluded that the challenged statute likely violated equal protection.[35]

The experiences of the amici States support the district court's conclusion that permitting transgender students like Hecox to participate in female athletics will not compromise fairness or reduce opportunities for cisgender athletes. The Act's contrary assumption is based on "archaic and overbroad generalizations" rather than fact. (*See* E.R. 71-76.) *See Clark*, 695 F.2d at 1131 (quotation marks omitted); *see also Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1052 (7th Cir. 2017) (invalidating transgender bathroom policy where privacy concerns advanced in support of policy were "based upon sheer conjecture

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[35] Although this brief focuses on Hecox's claims, the amici States agree with plaintiffs that the Act also likely violates Doe's equal protection rights, for the reasons set forth in plaintiffs' brief and the district court's written decision. *See* Br. of Pls.-Appellees at 58-62. (*See also* E.R. 79-83.)

and abstraction"). Courts are not required to accept legislative findings offered in support of a law where those findings are entirely without empirical support. *See Latta v. Otter*, 771 F.3d 456, 469-71 (9th Cir. 2014).

Here, the central legislative finding supporting the Act's categorical bar is that transgender female athletes have "an absolute advantage" over cisgender female athletes, *even after hormone suppression therapy*. *See* Idaho Code § 33-6202(11) (quotation marks omitted). But this finding was not supported by the sources the legislature cited, as defendants do not dispute. Instead, as the record shows, the legislature relied on preliminary conclusions set forth in a draft research study that the study's authors withdrew prior to publication, following peer-review. (*See* E.R. 71-72.)

The experiences of the amici States similarly do not bear out the Act's key assumption: that permitting transgender female students to participate in athletics consistent with their gender identity will unfairly deny opportunities to cisgender athletes. See *supra* at 13-16. Transgender students in the amici States have competed in intercollegiate athletics under NCAA rules for more than a decade, and many amici States have similarly implemented inclusive policies permitting transgender athletes to participate in sports consistent with their gender identity for many

years. Notwithstanding this lengthy history, amici States are not aware of evidence that transgender athletes have dominated any sport or competition, or have caused scholarship opportunities to be unfairly denied to cisgender competitors.

As the district court found—and as amici States have experienced—transgender students have long been permitted to participate in single-sex sports in a manner consistent with their gender identity in "most every other state in the nation," and under longstanding NCAA policies, without "any disturbance to women's sports." (*See* E.R. 72-73; *see also* E.R. 242, 618 ("Idaho's new policy . . . is a complete outlier.").) A handful of isolated anecdotal accounts that cisgender students have *sometimes* lost to transgender competitors does not support the legislative finding of an immutable and absolute physiological advantage on the part of transgender female athletes.[36]

[36] The record shows that one of the cisgender athletes who complained about losing to a transgender competitor later went on to defeat that same transgender competitor. (*See* E.R. 67-68.) The record also shows that the transgender female athletes who are the subjects of the unfair competition claims were also bested by other cisgender competitors. (*See* E.R. 318, 528.)

The Act's broad exclusionary scope casts further doubt on the claim that its actual purpose is to protect opportunities for athletic "recognition and accolades, [and] college scholarships" for female students, *see* Idaho Code § 33-6202(12). Contrary to the focus on scholarships, the Act categorically bars transgender female students from participating in all school-sponsored female-only sports activities or teams—including recreational and intramural teams that have no bearing on scholarship opportunities. And although the Act's legislative findings are limited to athletic differences between boys and girls "starting in puberty" and the claimed benefits to athletic performance from "natural testosterone," *id.* § 33-6202(10)-(11) (quotation marks omitted), the Act's prohibition extends to all transgender female students: including those who are prepubescent and those who, as a result of puberty blockers and hormone therapy, have never experienced typical male puberty or the physiological changes associated therewith. (*See* E.R. 70-71.)

There is thus no rational connection between the Act's stated concerns and its "incredibly broad sweep" (E.R. 75). To the contrary, as the district court found, the breadth of the Act's exclusionary scope seemingly "belies any genuine concern with an impact on athletic

scholarships." (E.R. 75.) *See also SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 478-79 & n.4 (9th Cir. 2014) (inference of pretext may arise where factual record undermined counsel's proffered reasons for striking gay juror).

The Act is also irrational in imposing a highly intrusive, scientifically flawed, and medically harmful sex verification process (*see* E.R. 749-752) on all female student athletes. (*See* E.R. 81-83.) Under the Act, "[i]f the sex of any female student athlete—whether transgender or not—is disputed, the student must undergo a potentially invasive sex verification process."[37] (*See* E.R. 3.) But notwithstanding the legislature's stated concerns with ensuring equality in athletics, the Act's sex dispute process "bars consideration" of the one factor that both parties' experts agreed was a key driver of gender-based athletic performance differences

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[37] Defendants are not helped by the fact that cisgender female students like Doe are also potentially subject to the Act's sex-verification process and the extremely intrusive medical examinations that process entails. "A willingness to inflict collateral damage by harming some, or even all, individuals from a favored group in order to successfully harm members of a disfavored class does not cleanse the taint of discrimination." *Pacific Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142, 1159-60 (9th Cir. 2013).

between men and women: "circulating testosterone." (*See* E.R. 78, 240-241, 458-459, 461, 469.)

Rather, the Act's exclusive methods of resolving "[a] dispute regarding a student's sex" focus on a student's "reproductive anatomy," "genetic makeup," and "normal endogenously produced testosterone levels."[38] *See* Idaho Code § 33-6203(3). But these criteria have no demonstrated connection to any physiological advantage of transgender female athletes, especially those like Hecox who are suppressing their natural hormone levels as part of their treatment protocols. (*See* E.R. 239-241, 708-709.) Moreover, the hormone tests that the Act contemplates are medically harmful for transgender individuals who, like Hecox, are undergoing hormone therapy. Uncontroverted record evidence demonstrated that there is no way to test for "endogenous testosterone levels," as the Act requires, without stopping a person's hormone treatment—an action that can have harmful and potentially dangerous consequences. (*See* E.R. 709.)

[38] This refers to "the level of testosterone the body produces without medical intervention." (*See* E.R. 77, 709 (distinguishing exogenous and endogenous hormone levels).)

Contrary to defendants' and intervenors' assertions (Br. of Defs.-Appellants at 10-12; Br. of Intervenor-Appellants at 22-26), this Court's holding in *Clark* does not validate the Act's categorical discrimination. *Clark*, which concerned a rule banning high school boys from competing on girls' volleyball teams, held that gender-based classifications may be used, consistent with equal protection, where gender serves as "an accurate proxy" justifying the differential treatment. 695 F.2d at 1131. The parties in *Clark* stipulated that gender was such "an accurate proxy": namely, that high school boys and girls had "physiologically-derived differences in athletic potential" and those agreed-upon differences had a "real impact on the game of volleyball." *Id.* at 1127, 1131. In light of that stipulation, this Court concluded that such "real differences" in athletic abilities between high school boys and girls justified excluding high school boys from girls' volleyball teams in order to ensure that girls would not be displaced from athletic opportunities. *See id.* at 1131.

Here, as discussed above, the factual record did not show that transgender females who are receiving hormone treatment possess an absolute physiological advantage over cisgender females. (*See* E.R. 74.) See *supra* at 19. And whereas the ban upheld in *Clark* did not deprive

boys of an equal "overall opportunity" to participate in sports, *see* 695 F.2d at 1131, the ban at issue in this case effectively denies transgender female students *any* opportunity to participate in gender-segregated sports consistent with their gender identity.[39] (*See* E.R. 64-65.) *Clark* thus provides no support for defendants' arguments here.[40]

[39] As the record demonstrates, forcing transgender persons to participate in single-sex activities corresponding to their gender assigned at birth violates medical treatment protocols and can be "extremely harmful." (*See* E.R. 573-574.)

[40] *Clark* is distinguishable for another reason: the Act does not simply treat males and females differently; it also discriminates against transgender females relative to cisgender females. The Act allows cisgender female students to participate in the single-sex sports teams consistent with their gender identity while denying the same opportunity to transgender female students.

CONCLUSION

This Court should affirm the preliminary injunction.

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