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9 **IN THE UNITED STATES DISTRICT COURT**
10 **FOR THE DISTRICT OF ARIZONA**
11 **TUCSON DIVISION**

12 Jane Doe, *et al.*,

13 Plaintiffs,

14 v.

15
16
17
18 Thomas C. Horne, in his official capacity
19 as State Superintendent of Public
20 Instruction, *et al.*,

21 Defendants.
22

Case No. 4:23-cv-00185-JGZ

**[Intervenors' Proposed] Opposition to
Plaintiffs' Motion for a Preliminary
Injunction and Memorandum of Law in
Support Thereof**

TABLE OF CONTENTS

1

2 TABLE OF AUTHORITIES..... iii

3 INTRODUCTION 1

4 STATEMENT OF FACTS..... 2

5 I. Humans are biologically male or female. 2

6 II. Biological males have large performance advantages over females. 2

7 III. Biological males have large physiological differences over females. 3

8 IV. Puberty blockers and testosterone suppression do not even the playing field..... 4

9 V. Male physiological advantages increase risk of physical injury to females..... 5

10 VI. Arizona enacted the Save Women’s Sports Act to protect female athletes..... 7

11 LEGAL STANDARD 7

12 ARGUMENT 8

13 I. Plaintiffs have failed to show they are likely to succeed on the merits. 8

14 A. Plaintiffs are not likely to succeed on their equal protection claim. 8

15 i. The Save Women’s Sports Act designates sports teams based on biological sex,

16 not gender identity..... 9

17 ii. The Ninth Circuit has rejected equal protection challenges to Arizona policies

18 preventing boys from playing in girls’ sports. 10

19 iii. The Save Women’s Sports Act serves important government objectives. 11

20 iv. The Save Women’s Sports Act is substantially related to achievement of

21 important government objectives. 12

22 B. Plaintiffs are not likely to succeed on their Title IX claim. 13

23 i. Title IX addresses biological sex, not gender identity. 14

24 ii. Title IX allows for sex-based distinctions for sports teams. 15

25 II. The Plaintiffs have not shown they are irreparably harmed. 17

26 III. The public interest and balance of equities disfavors a preliminary injunction. . 17

27 CONCLUSION 17

28 CERTIFICATE OF SERVICE..... 19

TABLE OF AUTHORITIES

Cases

Adams by & through Kasper v. Sch. Bd. of St. Johns Cnty., 57 F.4th 791 (11th Cir. 2022)
 9, 10, 14, 15

B. P. J. v. W. Virginia State Bd. of Educ., No. 2:21-CV-00316, 2023 WL 111875 (S.D. W. Va. Jan. 5, 2023)..... 12, 13

Bostock v. Clayton Cnty., Georgia, 140 S. Ct. 1731 (2020) 14

California v. Azar, 911 F.3d 558 (9th Cir. 2018)..... 8

Clark By & Through Clark v. Arizona Interscholastic Ass’n, 886 F.2d 1191 (9th Cir. 1989)
 11

Clark, By & Through Clark v. Arizona Interscholastic Ass’n, 695 F.2d 1126 (9th Cir. 1982)
 8, 10, 11, 12, 13

Coal. for Econ. Equity v. Wilson, 122 F.3d 718 (9th Cir. 1997)..... 17

Country Classic Dairies, Inc. v. State of Mont., Dep’t of Com. Milk Control Bureau, 847 F.2d 593 (9th Cir. 1988)..... 9

D.T. v. Chris, 552 F. Supp. 3d 888 (D. Ariz. 2021) 9

Doe v. Snyder, 28 F.4th 103, 113 (9th Cir. 2022) 15

Exp. Grp. v. Reef Indus., Inc., 54 F.3d 1466 (9th Cir. 1995) 15

Frontiero v. Richardson, 411 U.S. 677 (1973) 8, 14

Gollehon v. Mahoney, 626 F.3d 1019 (9th Cir. 2010) 14

Jana-Rock Constr., Inc. v. New York Dep’t of Econ. Dev., 438 F.3d 195 (2d Cir. 2006) 10

Karnoski v. Trump, 926 F.3d 1180 (9th Cir. 2019)..... 9

Lopez v. Brewer, 680 F.3d 1068 (9th Cir. 2012)..... 8

Maryland v. King, 567 U.S. 1301 (2012)..... 17

Mazurek v. Armstrong, 520 U.S. 968 (1997) (per curiam) 8

Neal v. Bd. of Trustees of California State Universities, 198 F.3d 763 (9th Cir. 1999) .. 11,
 13, 16

Norbert v. City & Cnty. of San Francisco, 10 F.4th 918 (9th Cir. 2021)..... 7

1 *Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843 (9th Cir. 2014) 13

2 *Parents for Priv. v. Barr*, 949 F.3d 1210 (9th Cir. 2020) 16

3 *Pers. Adm’r of Massachusetts v. Feeney*, 442 U.S. 256 (1979)..... 9

4 *Stand Up for California! v. U.S. Dep’t of the Interior*, 959 F.3d 1154 (9th Cir. 2020).... 14

5 *United States v. Virginia*, 518 U.S. 515 (1996)..... 8, 9, 11

6 *Video Gaming Techs., Inc. v. Bureau of Gambling Control*, 356 F. App’x 89 (9th Cir. 2009)

7 7

8 *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7 (2008) 7

9 **Statutes**

10 20 U.S.C. § 1681 13, 14, 16

11 A.R.S. § 15-120.02(B)..... 7, 9

12 **Other Authorities**

13 S.B. 1165 (2022)..... 7, 9, 12

14 WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 793 (1966)..... 16

15 **Regulations**

16 34 C.F.R. § 106.34..... 14

17 34 C.F.R. § 106.41..... 13, 15

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INTRODUCTION

1
2 Arizona enacted the Save Women’s Sports Act to promote sex equality and protect
3 women. Arizona’s legislature passed the Save Women’s Sports Act because it recognized
4 a “sports performance gap” existed because of physiological differences that gave
5 biological males an advantage in athletic competition against biological females.

6 The performance gap is real. Athletic organizations, experts, and peer-reviewed
7 studies have determined that biological males are stronger, faster, jump higher, throw
8 harder, and kick farther than biological females. These physiological differences exist
9 before, during, and after puberty, and they continue to exist even with puberty blockers or
10 testosterone suppression. These differences place biological females at a competitive
11 disadvantage and an increased risk of injury when competing against biological males.

12 Plaintiffs are not likely to succeed on their claims. Plaintiffs’ equal protection claim
13 fails because the Save Women’s Sports Act designates sports teams based on biological
14 sex, not gender identity. The Ninth Circuit already has rejected equal protection challenges
15 to Arizona policies preventing boys from playing in girls’ sports. Providing female athletes
16 with fair competition and protecting them from injury is an important government
17 objective, and excluding biological males from women’s sports is substantially related to
18 achieving that objective.

19 Plaintiffs’ Title IX claim also fails. Title IX addresses biological sex, not gender
20 identity, and it expressly allows schools to take sex into account in sports. In fact, Title IX
21 allows for sex-based distinctions for sports teams because it sought to even the playing
22 field for female athletes. So, too, does the Save Women’s Sports Act.

23 Plaintiffs are not irreparably harmed because they remain able to compete on school
24 sports teams, as they admit that their schools have male teams for all the sports in which
25 they seek to participate. The public interest and balance of the equities favor the state law’s
26 protections for female athletes so that they may continue to enjoy the opportunities Title
27 IX sought to deliver.

28 The Court should deny Plaintiffs’ motion for preliminary injunction.

STATEMENT OF FACTS

I. Humans are biologically male or female.

Sex is an objective feature that is determined at the moment of conception. (Cantor Decl. ¶¶ 105-107; Brown Decl. ¶ 1.) In science, only objective factors matter to a valid definition. (Cantor Decl. ¶ 105.) Infants are born male or female, which can be ascertained by chromosomal analysis or visual inspection. (*Id.* ¶¶ 105, 107.) More than 6,500 protein-coding genes have significant Sex Differential Expression in at least one gene. (Brown Decl. ¶ 5.)

Gender identity, on the other hand, is subjective. (Cantor Decl. ¶ 105.) A person's declaration of their gender identity cannot be falsified or verified. (*Id.*) Gender identity also can change: "it has been the unanimous conclusion of every follow-up study of gender dysphoric children ever conducted, not only that gender identity does change, but also that it changes in the large majority of cases." (*Id.* ¶ 146.)

II. Biological males have large performance advantages over females.

Males have physiological differences from females that cause males to "substantially outperform comparably aged, gifted, and trained" females in athletic competition. (Brown Decl. ¶ 9.)

Men are stronger. Men have 60%-100% greater arm strength than women, 57% greater grip strength, and 25%-60% greater leg strength. (*Id.* ¶¶ 15-16, 20.) As an example of this difference, an under 20-year-old female who ranks in the 95th percentile for upper body strength can bench press 0.88 kg for every kg of body mass; an under 20-year-old male with the same bench press would be between the 15th and 20th percentile for males. (*Id.* ¶ 19.)

Men run faster. Men have a speed advantage of 10%-13% over women for both short sprints and longer distances. (*Id.* ¶ 25.) In just 2017, thousands of boys and men ran faster 400-meter times than three female Olympic champions' personal bests at that distance. (*Id.* ¶ 26.) Boys 15 years old and under have beaten female world records in running, jumping, and throwing events. (*Id.* ¶ 28.) Plaintiff Doe wants to try out for the

1 girls' cross-country team. (J. Doe Decl. ¶ 9.) Last year in Arizona 6th grade track and
2 field races, the first-place boy was faster than the first-place girl in all races except one,
3 and the average performance of the top 10 boys was consistently faster than the average
4 performance of the top 10 girls. (Brown Decl. ¶ 110.)

5 Men jump higher and farther. High school male high jumpers jumped an average
6 of 18% higher than females. (*Id.* ¶ 33.) High school male long jumpers jumped an average
7 of 24% farther than females. (*Id.*) Plaintiff Roe wants to try out for the girls' volleyball
8 team. (M. Roe Decl. ¶ 7.) Research on elite volleyball players found that males jumped
9 an average 50% higher than females during an "attack" at the net and spiked volleyballs
10 29%-34% harder. (Brown Decl. ¶ 32.)

11 Men throw, hit, and kick faster and farther. By 12 years old, boys' throwing velocity
12 is between 3.5 and 4 standard deviations higher than girls'. (*Id.* ¶ 36.) The average 17-
13 year-old male can throw a ball farther than 99% of 17-year-old females. (*Id.*) Plaintiff
14 Doe wants to try out for the girls' soccer team. (J. Doe Decl. ¶ 9.) College males kick
15 soccer balls with an average 20% greater velocity than females. (Brown Decl. ¶ 41.)

16 This research shows that "[a]t the level of (a) elite, (b) collegiate, (c) scholastic, and
17 (d) recreational competition, men, adolescent boys, or male children, have an advantage
18 over equally gifted, aged and trained women, adolescent girls, or female children in almost
19 all athletic events." (*Id.* ¶ p. 67.)

20 **III. Biological males have large physiological differences from females.**

21 Scientists have identified and measured a number of physiological differences
22 between biological males and females. (Brown Decl. ¶ 46.) These physiological
23 differences lead to athletic performance differences. (*Id.*)

24 Men are taller. Based on data from 20 countries, the 50th percentile for body height
25 for women is five inches shorter than the 50th percentile for body height for men.
26 (*Id.* ¶ 47.). Viewed another way, a woman in the 95th percentile for body height would be
27 less than a quarter-inch taller than a man in the 50th percentile. (*Id.*)

28 Men have larger, longer, and stronger bones. Men are 7% to 8% taller than women,

1 with an average of 10% more bone. (*Id.* ¶¶ 51, 53.) Research has found that men have
2 “distinctively greater bone size, strength, and density than do women of the same age.”
3 (*Id.* ¶ 50.)

4 Men have much larger muscle mass. In the arms, women have 50%-60% of men’s
5 upper arm muscle cross-sectional area and 50%-60% of men’s upper limb strength.
6 (*Id.* ¶ 58.) In the legs, women have 65%-70% of men’s thigh muscle cross-sectional area
7 and 60%-80% of men’s leg strength. (*Id.*) Young men average a skeletal muscle mass that
8 is >12kg greater than age-matched women at any given body weight. (*Id.*)

9 Men also have other physiological advantages that manifest in sports. Men have a
10 larger lung capacity and a greater cross-sectional area of the trachea. (*Id.* ¶ 68.) Men also
11 can absorb more oxygen in the blood and have a 10% greater average maximal oxygen
12 transfer. (*Id.* ¶¶ 69-70.) The average female heart size is 85% that of a male, resulting in
13 men pumping 30% more blood through their circulatory system. (*Id.* ¶ 71.)

14 This research shows that “[b]iological male physiology is the basis for the
15 performance advantage that men, adolescent boys, or male children have over women,
16 adolescent girls, or female children in almost all athletic events.” (*Id.* p. 67.)

17 **IV. Puberty blockers and testosterone suppression do not even the playing field.**

18 Before puberty even begins, boys have physiological advantages over girls. These
19 advantages begin at birth: infant boys at birth and at five months have larger total body
20 mass, body length, and fat-free mass and lower-percent body fat than infant girls. (Brown
21 Decl. ¶ 79.) Boys ages 3-8 years old have significantly less fat, lower percentage body fat,
22 and higher bone-free lean tissue. (*Id.*) From ages 7 to 17, boys have a higher aerobic
23 power output based on heart rate, allowing boys to run, bike, or swim faster than similarly
24 aged girls. (*Id.* ¶ 80.)

25 These physiological differences result in competitive advantages before, during, and
26 after puberty. Boys ages 8 and under have faster record times than girls at all track and
27 field distances. (*Id.* ¶ 107.) According to another study, a nine-year-old boy in the 50th
28 percentile will run faster in the final stage of a 20 m shuttle run than a 17-year-old girl in

1 the 50th percentile. (*Id.* ¶ 95.) Boys ages 11 to 15 in the 50th percentile also ran the mile
2 14.7% and 24.2% faster, respectively, than girls of the same age in the 50th percentile.
3 (*Id.* ¶ 89.) Boys throw harder than girls by 1.5 standard deviations as young as ages four
4 to seven, meaning the average four- to seven-year-old boy can out-throw 87% of girls his
5 age. (*Id.* ¶ 106.) Boys also jump higher and farther than girls their age and girls older than
6 their age. (*Id.* ¶¶ 99, 103-104.)

7 Puberty blockers and testosterone suppression do not eliminate these pre-existing
8 advantages.¹ Puberty blockers and cross-sex hormone use did not decrease muscle
9 strength, eliminate differences in lean body mass, or change growth rates in biological
10 males. (*Id.* ¶¶ 117-125.) Biological males undergoing testosterone suppression still had
11 greater hand grip strength, arm strength, leg strength, and faster running and swimming
12 speed. (*Id.* ¶¶ 135-162.) The testosterone suppression also did not reverse the
13 physiological advantages like longer and larger bones, lung and heart size, and muscle
14 mass. (*Id.* ¶¶ 163-178.)

15 Because of this research, “many sports organizations have revised their policies [on
16 transgender athletes] or are in the process of doing so.” (*Id.* p. 69.)

17 **V. Male physiological advantages increase risk of physical injury to females.**

18 The physiological differences between men and women are relevant to safety for
19 female athletes. Because men are taller and heavier, they bring more force to bear in a
20 collision. (Carlson Decl. ¶ 43.) Because men are faster, they will be moving at faster speed
21 at impact, causing a greater impact force. (*Id.* ¶ 46.) Because men are stronger, they can
22 generate larger forces with their arms and upper body in the form of ball velocity, pushing
23 power, or punching power. (*Id.* ¶¶ 50-56.)

24 The greater force generated by males will strike female athletes with more energy
25 than normal. For example, men spike volleyballs 29%-34% harder than females and can
26

27 ¹ In addition, there are known and potential harms associated with administration of
28 puberty blockers and cross-sex hormones to children and adolescents. (*See* Cantor Decl.
¶¶ 125-140.)

1 serve volleyballs 30% harder. (*Id.* ¶ 52.) A volleyball traveling 35% faster will deliver
2 82% more energy to a head upon impact. (*Id.* ¶ 53.) Because men have a 50% greater
3 vertical jump during a volleyball “attack,” female athletes “will likely be exposed to higher
4 ball velocities that are outside the range of what is typically seen in women’s volleyball.”
5 (*Id.* ¶¶ 54-55.) Similarly, males kick soccer balls 20% harder, which will deliver 44% more
6 energy on head impact. (*Id.* ¶ 56.)

7 The increased force increases concussion injury risk. (*Id.* ¶¶ 58-69.) Females
8 already are more likely than males to suffer concussions in sports: 79% higher in soccer,
9 31% higher in basketball, and 320% higher in softball/baseball. (*Id.* ¶¶ 58, 61.) On
10 average, females also suffer more severe and longer lasting disability once a concussion
11 does occur. (*Id.* ¶ 58.) Females who suffered concussions had a 170% higher frequency
12 of cognitive impairment following the concussion than males. (*Id.* ¶ 64.) “The addition of
13 biologically male athletes into women’s contact sports will inevitably increase the risk of
14 concussive injury to girls and women, . . .” (*Id.* ¶ 69.)

15 Male participation in female sports also increases the risk to female athletes of an
16 Anterior Cruciate Ligament (ACL) tear. (*Id.* ¶¶ 70-78.) Female athletes have a 150%-
17 300% increased risk for ACL injury compared to male athletes. (*Id.* ¶ 72.) Contact causes
18 20%-36% of all female ACL injuries. (*Id.* ¶ 77.) “Thus, as participation in the female
19 category based on identity rather than biology becomes more common (entailing the
20 introduction of athletes with characteristics such as greater speed and lean muscle mass),
21 and as collision forces suffered by girls and women across the knee increase accordingly,
22 the risk for orthopedic injury and in particular ACL tears among impacted girls and women
23 will inevitably rise.” (*Id.*)

24 This research demonstrates that “[i]n contact or collision sports, sports involving
25 projectiles, or sports where a stick is used to strike something, the physics and physiology
26 reviewed above tell us that permitting male-bodied athletes to compete against, or on the
27 same team as females—even when undergoing testosterone suppression—must be
28 expected to create predictable, identifiable, substantially increased, and unequal risks of

1 injuries to the participating women.” (*Id.* p. 52.)

2 **VI. Arizona enacted the Save Women’s Sports Act to protect female athletes.**

3 Arizona enacted S.B. 1165, the “Save Women’s Sports Act,” on March 30, 2022.
4 The Act provides: “Athletic teams or sports designated for ‘females,’ ‘women’ or ‘girls’
5 may not be open to students of the male sex.” A.R.S. § 15-120.02(B). The Act applies to
6 all public schools or private schools whose students or teams compete against a public
7 school. *Id.* at § 15-120.02(A). The Act covers all educational age levels, applying from
8 kindergarten through grade twelve and to all institutions of higher education. *Id.* at § 15-
9 120.02(I).

10 When the law passed S.B. 1165, the Arizona legislature made a series of legislative
11 findings consistent with the research presented above: that inherent, physiological
12 differences between biological males and females create a “sports performance gap”
13 between males and females. *See* S.B. 1165, § 2(1), (5), (7), and (9) (2022). The legislature
14 further found that “[h]aving separate sex-specific teams furthers efforts to promote sex
15 equality by providing opportunities for female athletes to demonstrate their skill, strength
16 and athletic abilities while also providing them with opportunities to obtain recognition,
17 accolades, college scholarships and the numerous other long-term benefits that flow from
18 success in athletic endeavors.” *Id.* at § 2(14).

19 **LEGAL STANDARD**

20 “A plaintiff seeking a preliminary injunction must establish [1] that he is likely to
21 succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of
22 preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction
23 is in the public interest.” *Norbert v. City & Cnty. of San Francisco*, 10 F.4th 918, 927 (9th
24 Cir. 2021) (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). “[W]here
25 the party seeking a preliminary injunction fails to satisfy any one of the *Winter* factors, the
26 preliminary injunction must be denied.” *Video Gaming Techs., Inc. v. Bureau of Gambling*
27 *Control*, 356 F. App’x 89, 92 (9th Cir. 2009) (internal citation omitted). A preliminary
28 injunction is “an extraordinary and drastic remedy, one that should not be granted unless

1 the movant, *by a clear showing*, carries the burden of persuasion.” *Lopez v. Brewer*, 680
2 F.3d 1068, 1072 (9th Cir. 2012) (quoting *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997)
3 (per curiam)) (emphasis original).

4 ARGUMENT

5 I. Plaintiffs have failed to show they are likely to succeed on the merits.

6 “Likelihood of success on the merits is the most important factor; if a movant fails
7 to meet this threshold inquiry, [the court] need not consider the other factors.” *California*
8 *v. Azar*, 911 F.3d 558, 575 (9th Cir. 2018) (internal quotations omitted). Because Plaintiffs
9 have failed to show that they are likely to succeed on either their Equal Protection Clause
10 or Title IX claims, no other factor needs to be considered.

11 A. Plaintiffs are not likely to succeed on their equal protection claim.

12 Plaintiffs argue that the Save Women’s Sports Act “discriminates against Plaintiffs
13 based on their transgender status.” Pls.’ Mot. for Prelim. Inj. at 1. But the Act does not
14 even mention transgender status. Instead, the Act classifies athletes based on biological
15 sex, a distinction that acknowledges “inherent differences between men and women.”
16 *United States v. Virginia*, 518 U.S. 515, 533 (1996); *see also Frontiero v. Richardson*, 411
17 U.S. 677, 686 (1973) (“sex, like race and national origin, is an immutable characteristic
18 determined solely by the accident of birth”). Classifying by biological sex to protect girls
19 playing school sports is constitutional.

20 The Equal Protection Clause is “implicated only when a classification treats persons
21 similarly situated in different ways.” *Clark, By & Through Clark v. Arizona Interscholastic*
22 *Ass’n*, 695 F.2d 1126, 1128 (9th Cir. 1982) (“*Clark I*”). For the reasons noted above,
23 biological males are not similarly situated to females when it comes to competitiveness and
24 safety in sports. Intermediate scrutiny is given to gender classifications on an as-applied
25 basis. *Id.* at 1129. “To withstand constitutional challenge, previous cases establish that
26 classification by gender must serve important governmental objectives and must be
27 substantially related to achievement of those objectives.” *Id.* at 1129 (internal citation
28 omitted).

1 **i. The Save Women’s Sports Act designates sports teams based on**
2 **biological sex, not gender identity.**

3 “The first step in equal protection analysis is to identify the state’s classification of
4 groups.” *Country Classic Dairies, Inc. v. State of Mont., Dep’t of Com. Milk Control*
5 *Bureau*, 847 F.2d 593, 596 (9th Cir. 1988). The Save Women’s Sports Act classifies based
6 on biological sex, not gender identity, by providing that school athletic teams “shall be
7 expressly designated . . . based on the biological sex of the students who participate on the
8 team or in the sport” Ariz. Rev. Stat. § 15-120.02(A). “Athletic teams or sports
9 designated for ‘females’, ‘women’ or ‘girls’ may not be open to students of the male sex.”
10 *Id.* at § 15-120.02(B). Transgender status is not mentioned. *See id.* The Act thus classifies
11 students by biological sex, not gender identity.

12 This is consistent with the Act’s legislative findings. The Arizona legislature made
13 14 separate findings when it passed the Save Women’s Sports Act. *See* S.B. 1165, § 2
14 (2022). These findings relate to biological sex and physiological differences between men
15 and women, not transgender status. *See id.* The Act is thus different from the cases relied
16 upon by Plaintiffs in which courts found transgender individuals were singled out. *See*
17 *Karnoski v. Trump*, 926 F.3d 1180 (9th Cir. 2019) (challenge to exclusion of transgender
18 individuals from the military); *D.T. v. Chris*, 552 F. Supp. 3d 888 (D. Ariz. 2021)
19 (challenge to sex change operation requirement to obtain a different gender birth
20 certificate).

21 States have the ability to classify without violating the Equal Protection Clause.
22 *Pers. Adm’r of Massachusetts v. Feeney*, 442 U.S. 256, 271 (1979). “Most laws classify,
23 and many affect certain groups unevenly, even though the law itself treats them no
24 differently from all other members of the class described by the law.” *Id.* at 271-72. Sex
25 is not a “proscribed classification.” *United States v. Virginia*, 518 U.S. 515, 533 (1996).
26 And “a policy can lawfully classify on the basis of biological sex without unlawfully
27 discriminating on the basis of transgender status.” *Adams by & through Kasper v. Sch. Bd.*
28 *of St. Johns Cnty.*, 57 F.4th 791, 809 (11th Cir. 2022) (rejecting equal protection and Title

1 IX claims to school policy requiring students to use bathroom based on biological sex).

2 Importantly, the Save Women’s Sports Act does not facially discriminate on the
3 basis of transgender status. Because the Act classifies athletes on the basis of biological
4 sex, both of which can inherently contain transgender students, “there is a ‘lack of identity’
5 between the policy and transgender status,” since sports options are “equivalent to those
6 provided to all students of the same biological sex.” *Id.* (internal quotation and citations
7 omitted). By not challenging the division on sex, but instead how Arizona defines sex,
8 Plaintiffs are actually bringing an underinclusiveness challenge. Such a challenge is
9 subject to rational basis scrutiny and fails to violate equal protection. *See, e.g., Jana-Rock*
10 *Constr., Inc. v. New York Dep’t of Econ. Dev.*, 438 F.3d 195 (2d Cir. 2006) (affirming a
11 statute that did not include Spanish or Portuguese descent in the definition of “Hispanic”).

12 **ii. The Ninth Circuit has rejected equal protection challenges to**
13 **Arizona policies preventing boys from playing in girls’ sports.**

14 Even if this were not an underinclusiveness challenge, it would be meritless. The
15 Ninth Circuit already has resolved a strikingly similar challenge by holding an Arizona
16 policy that excluded boys from playing on girls’ volleyball teams did not violate the Equal
17 Protection Clause. *See Clark I*, 695 F.2d 1126, 1131-32 (9th Cir. 1982). The Ninth Circuit
18 found “[t]here is no question” that “redressing past discrimination against women in
19 athletics and promoting equality of athletic opportunity between the sexes . . . is a legitimate
20 and important governmental interest.” *Id.* at 1131. The Ninth Circuit then found that
21 excluding boys from girls’ sports was substantially related to this interest because “[t]he
22 record makes clear that due to average physiological differences, males would displace
23 females to a substantial extent if they were allowed to compete for positions on the
24 volleyball team.” *Id.* The state policy excluding boys from girls’ volleyball “is simply
25 recognizing the physiological fact that males would have an undue advantage competing
26 against women for positions on the volleyball team.” *Id.*

27 The Ninth Circuit reaffirmed this decision a few years later in a case involving the
28 *Clark I* plaintiff’s brother. *Clark By & Through Clark v. Arizona Interscholastic Ass’n*,

1 886 F.2d 1191, 1193-94 (9th Cir. 1989) (“*Clark II*”). The *Clark II* plaintiff also brought
2 an equal protection challenge to the Arizona policy prohibiting boys from participating on
3 girls’ volleyball teams because his school did not have a boys’ volleyball team. *Id.* at 1192.
4 The Ninth Circuit rejected this challenge as well, reasoning that “[i]f males are permitted
5 to displace females on the school volleyball team even to the extent of one player like
6 Clark, the goal of equal participation by females in interscholastic athletics is set back, not
7 advanced.” *Id.* at 1193.

8 The *Clark I* and *II* decisions control here. Similar to the Arizona policy challenged
9 in the *Clark* cases preventing boys from playing girls’ volleyball, Ariz. Rev. Stat. § 15-
10 120.02 prohibits biological boys from playing on teams or sports designated for biological
11 girls. Like the Clark brothers, Plaintiffs may dislike this result, and they may believe other
12 alternatives are preferable. But “the existence of wiser alternatives than the one chosen
13 does not serve to invalidate the policy here since it is substantially related to the goal.”
14 *Clark I*, 695 F.2d at 1132.

15 **iii. The Save Women’s Sports Act serves important government**
16 **objectives, and thus it passes rational-basis or intermediate scrutiny.**

17 Sex classifications can serve important government objectives because of the
18 physiological differences between women and the discrimination against women
19 historically. “Sex classifications may be used to compensate women for particular
20 economic disabilities [they have] suffered, to promot[e] equal employment opportunity, to
21 advance full development of the talent and capacities of our Nation’s people.” *United*
22 *States v. Virginia*, 518 U.S. 515, 533 (1996). In fact, “Title IX was Congress’s response to
23 significant concerns about discrimination against women in education.” *Neal v. Bd. of*
24 *Trustees of California State Universities*, 198 F.3d 763, 766 (9th Cir. 1999) (internal
25 citation omitted). In determining whether a challenged classification serves an important
26 governmental objective, “the Supreme Court is willing to take into account actual
27 differences between the sexes, including physical ones.” *Clark I*, 695 F.2d 1126, 1129 (9th
28 Cir. 1982).

1 The Ninth Circuit has specifically held that sex classification in sports serves an
2 important governmental interest: “the governmental interest claimed is redressing past
3 discrimination against women in athletics and promoting equality of athletic opportunity
4 between the sexes. There is no question that this is a legitimate and important governmental
5 interest.” *Id.* at 1131. Other courts have reached the same conclusion. *See, e.g., B. P. J.*
6 *v. W. Virginia State Bd. of Educ.*, No. 2:21-CV-00316, 2023 WL 111875, at *8 (S.D. W.
7 Va. Jan. 5, 2023) (rejecting equal protection and Title IX claims to uphold, on the merits,
8 state law prohibiting biological boys from playing in girls’ sports).

9 The Save Women’s Sports Act serves the same government interest the Ninth
10 Circuit upheld in *Clark I*: to redress past discrimination against women in athletics and
11 promote equality of athletic opportunity between the sexes. In the Save Women’s Sports
12 Act, the legislature found a “sports performance gap between males and females, such that
13 the physiological advantages conferred by biological sex appear, on assessment of
14 performance data, insurmountable.” S.B. 1165, § 2(9) (2022) (internal quotation omitted).
15 The legislature also cited court decisions and studies finding that the physiological
16 difference between males and females resulted in different athletic capabilities. *Id.* at
17 § 2(4)-(13). Based on this evidence, the legislature concluded: “Having separate sex-
18 specific teams furthers efforts to promote sex equality by providing opportunities for
19 female athletes to demonstrate their skill, strength and athletic abilities while also providing
20 them with opportunities to obtain recognition, accolades, college scholarships and the
21 numerous other long-term benefits that flow from success in athletic endeavors.” *Id.* at
22 § 2(14). The Save Women’s Sports Act serves important government objectives.

23 **iv. The Save Women’s Sports Act is substantially related to achievement**
24 **of important government objectives.**

25 Prohibiting biological boys from playing in girls’ sports is substantially related to
26 the important government objectives of redressing past discrimination against women in
27 athletics and promoting equality of athletic opportunity between the sexes. As the Ninth
28 Circuit found in *Clark I*, the Arizona policy was “simply recognizing the physiological fact

1 that males would have an undue advantage competing against women for positions on the
2 volleyball team.” *Clark I*, 695 F.2d 1126, 1131 (9th Cir. 1982). This policy clearly
3 provided “a substantial relationship between the exclusion of males from the team and the
4 goal of redressing past discrimination and providing equal opportunities for women.” *Id.*

5 Likewise, the Save Women’s Sports Act recognizes the physiological fact that
6 biological males will have an undue advantage competing against women. As the Ninth
7 Circuit held in *Clark I*, excluding males from women’s sports is substantially related to the
8 important government objectives of redressing past discrimination and providing equal
9 opportunities for women.

10 For these reasons, Plaintiffs are not likely to succeed on their equal protection claim.

11 **B. Plaintiffs are not likely to succeed on their Title IX claim.**

12 “Title IX levels the playing fields for female athletes.” *Ollier v. Sweetwater Union*
13 *High Sch. Dist.*, 768 F.3d 843, 871 (9th Cir. 2014). Title IX provides that “[n]o person in
14 the United States shall, on the basis of sex, be excluded from participation in, be denied
15 the benefits of, or be subjected to discrimination under any education program or activity
16 receiving Federal financial assistance.” 20 U.S.C. § 1681(a). Title IX’s regulations require
17 schools to “provide equal athletic opportunity for members of both sexes.” 34 C.F.R.
18 § 106.41(c).

19 “[A] central aspect of Title IX’s purpose was to *encourage* women to participate in
20 sports.” *Neal v. Bd. of Trustees of California State Universities*, 198 F.3d 763, 768 (9th
21 Cir. 1999) (emphasis original). Although Title IX “applies equally to boys as well as girls,
22 it would require blinders to ignore that the motivation for the promulgation of the
23 regulation was to increase opportunities for women and girls in athletics.” *B. P. J. v. W.*
24 *Virginia State Bd. of Educ.*, No. 2:21-CV-00316, 2023 WL 111875, at *9 (S.D. W. Va.
25 Jan. 5, 2023). “Title IX has enhanced, and will continue to enhance, women’s opportunities
26 to enjoy the thrill of victory, the agony of defeat, and the many tangible benefits that flow
27 from just being given a chance to participate in intercollegiate athletics.” *Neal*, 198 F.3d
28 at 773.

1 Plaintiffs seek to reverse the gains that Title IX achieved for female athletes. But
2 Plaintiffs' argument directly contradicts the statutory text of Title IX. Arizona's law does
3 not discriminate against Plaintiffs based on sex.

4 **i. Title IX addresses biological sex, not gender identity.**

5 Title IX prohibits discrimination in school activities like sports "on the basis of sex."
6 20 U.S.C. § 1681(a). Since Title IX does not define "sex," courts interpret statutory terms
7 "in accord with the ordinary public meaning . . . at the time of its enactment." *Bostock v.*
8 *Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1738 (2020). "To determine the plain meaning
9 of a statute, we traditionally refer to dictionaries in use at the time of the statute's
10 enactment." *Gollehon v. Mahoney*, 626 F.3d 1019, 1023 (9th Cir. 2010) (citation omitted).

11 Dictionary definitions demonstrate that Congress' use of "sex" meant "biological
12 sex." "Reputable dictionary definitions of 'sex' from the time of Title IX's enactment
13 show that when Congress prohibited discrimination on the basis of 'sex' in education, it
14 meant biological sex, *i.e.*, discrimination between males and females." *Adams by &*
15 *through Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 812 (11th Cir. 2022) (quoting
16 contemporaneous dictionary definitions). The Supreme Court confirmed this
17 understanding contemporaneously just one year after Congress passed Title IX: "sex, like
18 race and national origin, is an immutable characteristic determined solely by the accident
19 of birth . . ." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

20 Interpreting "sex" as something other than biological sex would be illogical. A
21 statute "should be construed so that effect is given to all its provisions, so that no part will
22 be inoperative or superfluous, void or insignificant." *Stand Up for California! v. U.S. Dep't*
23 *of the Interior*, 959 F.3d 1154, 1159 (9th Cir. 2020) (internal quotation omitted). Title IX
24 repeatedly discusses sex as a binary concept. *See, e.g.*, 20 U.S.C. § 1681(a)(5) ("only
25 students of one sex"); 20 U.S.C. § 1681(a)(6) ("limited to persons of one sex"); 20 U.S.C.
26 § 1686 ("living facilities for the different sexes"); 34 C.F.R. § 106.34(a)(1) ("separation of
27 students by sex within physical education classes"). Title IX's sports regulations also
28 contemplate two sexes: "separate teams for members of each sex" and "provide equal

1 athletic opportunity for . . . both sexes” to “effectively accommodate the interests and
2 abilities of members of both sexes.” 34 C.F.R. § 106.41(b), (c). Title IX’s provisions only
3 make sense if sex means biological sex.

4 Plaintiffs misstate the Ninth Circuit’s decision in *Doe v. Snyder*. First, *Doe*
5 discussed *Bostock* only in dicta. *Doe v. Snyder*, 28 F.4th 103, 113 (9th Cir. 2022). Dicta
6 is not binding precedent. See *Exp. Grp. v. Reef Indus., Inc.*, 54 F.3d 1466, 1472 (9th Cir.
7 1995) (“[T]hese statements were not necessary to the decision and thus have no binding or
8 precedential impact in the present case”). Second, the *Doe* dicta narrowly disagreed with
9 the district court that *Bostock* did not need to be considered in a Title IX claim simply by
10 noting that *Bostock* only involved Title VII. *Doe*, 28 F.4th at 114. Third, the *Doe* dicta
11 did not resolve whether a law precluding coverage for gender reassignment surgeries
12 discriminated based on sex because the district court had not yet addressed it.² *Id.* at 114.
13 Thus, Plaintiffs are not correct in saying that “the Ninth Circuit has held that discrimination
14 based on transgender status also constitutes impermissible discrimination under Title IX.”
15 Pls.’ Mot. for Prelim. Inj. at 9.

16 Title IX prohibits discrimination based on biological sex. Plaintiffs’ Title IX claim
17 thus fails.

18 **ii. Title IX allows for sex-based distinctions for sports teams.**

19 Title IX’s structure also works against Plaintiffs. Unlike the Supreme Court in
20 *Bostock*, which only decided under Title VII “whether discrimination based on transgender
21 status necessarily equates to discrimination on the basis of sex,” Title IX “includes express
22 statutory and regulatory carve-outs for differentiating between the sexes” *Adams by*
23 *& through Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 811 (11th Cir. 2022). For
24 example, Title IX allows schools to “operate or sponsor separate teams for members of
25 each sex where selection for such teams is based upon competitive skill or the activity
26 involved is a contact sport.” 34 C.F.R. § 106.41(b). Title IX expressly allows schools to

27
28 ² The plaintiff dismissed the case before the district court conducted this analysis. See
Stipulation of Dismissal, Doc. 162, No. 4:20-cv-00335-SHR (D. Ariz. July 25, 2022).

1 take sex into account in creating sports teams.

2 Title IX does not prohibit consideration of sex, but instead prohibits “exclusion from
3 participation,” “denial of benefits,” or “discrimination” “on the basis of sex.” 20 U.S.C.
4 § 1681(a). To “exclude” meant “to shut out,” “hinder the entrance of,” or “bar from
5 participation, enjoyment, consideration, or inclusion.” WEBSTER’S THIRD NEW
6 INTERNATIONAL DICTIONARY 793 (1966). To “deny” meant “to turn down or give a
7 negative answer to.” *Id.* at 603. Through these provisions, Congress sought to prevent
8 female students from being shut out, barred, or turned down from educational benefits,
9 including activities such as sports. That is what Arizona’s law does.

10 Plaintiffs admit that separate teams are available to both sexes on the sports at issue.
11 Plaintiff Doe’s school has soccer, basketball, and cross-country teams for both boys and
12 girls. (Decl. of J. Doe, Doc. 6, ¶ 9.) Plaintiff Roe’s school has volleyball teams for both
13 boys and girls. (Decl. of M. Roe, Doc. 8, ¶¶ 7, 9). Plaintiffs thus are not being excluded
14 from participation, denied benefits, or discriminated “on the basis of sex.”

15 Title IX does not require states or schools to eliminate sex-separated teams or
16 change the criteria for participating in sex-separated teams, to allow students to compete
17 on a team that is different from their biological sex. The Ninth Circuit recognized the
18 converse of this point by holding that Title IX authorizes, but does not require, sex-
19 segregated facilities that exclude transgender students. *Parents for Priv. v. Barr*, 949 F.3d
20 1210, 1227 (9th Cir. 2020). The Ninth Circuit did not say, however, that Title IX *requires*
21 a state or school to ignore biological sex in favor of a transgender student. *See id.* Forcing
22 girls to compete against boys is antithetical to Title IX’s purpose and threatens to reverse
23 Title IX’s progress. *See, e.g., Neal v. Bd. of Trustees of California State Universities*, 198
24 F.3d 763, 769 (9th Cir. 1999) (“Title IX has altered women’s preferences, making them
25 more interested in sports, and more likely to become student athletes. Adopting Appellees’
26 interest-based test for Title IX compliance would hinder, and quite possibly reverse, the
27 steady increases in women’s participation and interest in sports that have followed Title
28 IX’s enactment.”) (internal citation omitted).

1 For these reasons, Plaintiffs are not likely to succeed on their Title IX claim.

2 **II. The Plaintiffs have not shown they are irreparably harmed.**

3 Plaintiffs rely heavily on the argument that violation of the law and deprivation of
4 their rights constitute irreparable harm. Pls.’ Mot. for Prelim. Inj. at 12. But as previously
5 set forth, the Arizona law does not violate the law or deprive Plaintiffs of their rights. This
6 refutes the central pillar of Plaintiffs’ irreparable harm argument.

7 The Court also must consider the irreparable harm Arizona would suffer if the Save
8 Women’s Sports Act is enjoined. “[A]ny time a State is enjoined by a court from
9 effectuating statutes enacted by representatives of its people, it suffers a form of irreparable
10 injury.” *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers)
11 (internal quotation omitted); *see also Coal. for Econ. Equity v. Wilson*, 122 F.3d 718, 719
12 (9th Cir. 1997) (“it is clear that a state suffers irreparable injury whenever an enactment of
13 its people or their representatives is enjoined”). Arizona and its citizens will be irreparably
14 harmed if the Save Women’s Sports Act is enjoined.

15 **III. The public interest and balance of equities disfavors a preliminary injunction.**

16 The people of Arizona have an interest in the effectiveness of laws passed by their
17 elected officials. Women in Arizona also have an interest in not competing against, or
18 being displaced by, men in women’s sports. Accordingly, the public interest and balance
19 of equities favor a preliminary injunction.

20 **CONCLUSION**

21 The Court should deny Plaintiffs’ motion for preliminary injunction. Plaintiffs are
22 not likely to succeed on their equal protection claim because the Save Women’s Sports Act
23 relates to an important government interest and is substantially related to achieving that
24 interest. Plaintiffs also are not likely to succeed on their Title IX claim because Title IX
25 addresses biological sex and expressly allows schools to take it into account. Plaintiffs are
26 not irreparably harmed, and the public interest and balance of the equities favor the state
27 law’s protections for female athletes. Accordingly, Plaintiffs’ motion for preliminary
28 injunction should be denied.

1 Dated: May 18, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on May 18, 2023, I caused a true and correct copy of the foregoing to be filed by the Court’s electronic filing system, to be served by operation of the Court’s electronic filing system on counsel for all parties who have entered in the case.

/s/ Justin D. Smith