20-35813; 20-35815

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellees,

—v.—

BRADLEY LITTLE, in his official capacity as Governor of the State of Idaho; SHERRI YBARRA, in her official capapcity as the Superintendent of Public Instruction of the State of Idaho and as a member of the Idaho State Board of Education; INDIVIDUAL MEMBERS OF THE STATE BOARD OF EDUCATION, in their official capacities; BOISE STATE UNIVERSITY; MARLENE TROMP, in her official capacity as President of Boise State University; INDEPENDENT SCHOOL DISTRICT OF BOISE CITY, # 1; COBY DENNIS, in his official capacity as superintendent of the Independent School District of Boise City #1; INDIVIDUAL MEMBERS OF THE BOARD OF TRUSTEES OF THE INDEPENDENT SCHOOL DISTRICT OF BOISE CITY, # 1; in their official capacities; INDIVIDUAL MEMBERS OF THE IDAHO CODE COMMISSION, in their official capacities,

Defendants-Appellants,

—and—

MADISON KENYON; MARY MARSHALL,

Intervenors.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO (BOISE)

BRIEF FOR *AMICUS CURIAE* interACT: ADVOCATES FOR INTERSEX YOUTH IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* states as follows:

interACT: Advocates for Intersex Youth is a nonprofit organization. It has no parent corporation and no corporation or publicly held entity owns 10% or more of its stock.

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*

Amicus interACT: Advocates for Intersex Youth files this brief in support of Plaintiffs-Appellees Lindsay Hecox and Jane Doe.[1]

interACT is a nonprofit organization that employs legal and policy advocacy to protect the rights of children born with variations in their sex characteristics, often called "intersex." It is the largest and oldest organization in the country exclusively dedicated to this purpose. Founded in 2006 as Advocates for Informed Choice, its mission initially focused on ending harmful, nonconsensual medical interventions on intersex children. Since then, interACT has expanded its mission to include awareness-raising to end the shame and stigma faced by intersex youth and overseeing the largest cohort of intersex young people advocating on their own behalf, interACT Youth.

Plaintiffs-Appellees successfully demonstrated below that Idaho's so-called "Fairness in Women's Sports Act," Idaho Code Ann. § 33-6201-

[1] *Amicus* certifies that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus*, its employees, or its counsel made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief.

06 (the "Act"), unconstitutionally discriminates on the basis of sex and transgender status. *Amicus* is uniquely well situated to explain why that result is correct. Like Plaintiff Hecox, who is transgender, the intersex youth for whom *amicus* advocates are direct victims of the Act, subjected to discriminatory and humiliating treatment by virtue of their natural differences in sex anatomy and physiology. *Amicus* has a strong interest in ensuring that the Act's inaccurate and stereotyped assumptions about "biological sex" are not enshrined in law, where they would demean and degrade the lives of intersex Idahoans.

The balance of this brief is divided into three parts. In Part I, *amicus* introduces the Court to the broad spectrum of natural intersex variations, which do not fit the rigid "male"/"female" binary on which the Act is premised. In Part II, *amicus* explains how intersex people suffer from severe mistreatment and discrimination as a result of their natural sex variations, including medical interventions that human rights organizations have deemed a form of torture.

Finally, in Part III, *amicus* explains how the Act discriminates against intersex students in Idaho based on their sex, in violation of the

Equal Protection Clause and Title IX. First, the Act's definition of "biological sex" is incoherent and scientifically inaccurate, creating a situation where thousands of intersex students cannot play scholastic sports *at all* without a credible fear of violating the Act. Second, the Act's Orwellian sex verification regime inflicts severe trauma and invasions of privacy on students whose sex is subject to the statutory "dispute" procedure—a concern that is greatly heightened for intersex students. And third, there is no "exceedingly persuasive"—or even *legitimate*—basis for imposing these discriminations and indignities on intersex students.

Amicus urges the Court to affirm the District Court's decision to preliminarily enjoin the Act.

ARGUMENT

I. INTERSEX PEOPLE'S BODIES DO NOT FIT THE ACT'S "MALE"/"FEMALE" BINARY

Idaho contends that the Act's definition of "biological sex" tracks a "physiologically-based dichotomy" between "male" and "female" that exists in nature. State Br. 34-35. Not so.

Each year, tens of thousands of children are born intersex. "Intersex" is an umbrella term describing a wide range of natural variations in

physical traits—including external genitals, internal sex organs, chromosomes, and hormones—that do not fit typical binary notions of male and female bodies. Each year, as many as 2% of all babies are born with these variations.[2] This incidence rate is similar to the percentage of the U.S. population that is Jewish (about 1.9%) or Mormon (about 1.6%).[3]

Intersex traits originate from variations in the embryonic sex development process. A fertilized egg usually (but not always) has two sex chromosomes: XX or XY. For the first few weeks of gestation, XX and XY embryos look the same, but they later develop in different ways depending on genetic and hormonal factors. In male-typical development, the gonads become testes; the genital tubercle becomes a penis; and the labioscrotal folds fuse and form a scrotum. In female-typical development, the gonads become ovaries; the genital tubercle becomes a clitoris; and the labioscrotal folds develop into the outer labia. Later, at puberty,

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[2] Anne Fausto-Sterling, SEXING THE BODY: GENDER POLITICS AND THE CONSTRUCTION OF SEXUALITY 51 (2000); Melanie Blackless et al., *How Sexually Dimorphic Are We? Review and Synthesis*, 12 Am. J. Human Biol. 151 (2000).

[3] Pew Research Center, Religious Landscape Study, https://www.pewforum.org/religious-landscape-study/ (visited Dec. 11, 2020).

hormones secreted by the testes or ovaries cause expression of male-typical or female-typical secondary sex characteristics, such as breast development, body hair, musculature, and depth of voice.[4]

There are many ways in which this "typical" process can vary.[5] Such variations may present at different ages. For example, variations in external genitalia may mean a child's intersex condition is recognized at birth, but variations in internal organs or sex chromosomes may not become apparent until puberty or later.[6]

Intersex children are usually "assigned" a binary (male/female) sex at birth based on some combination of their genitalia, internal organs,

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[4] I.A. Hughes et al., *Consensus Statement on Management of Intersex Disorders*, 118 Pediatrics 488, 491 (2006); Bruce E. Wilson & William G. Reiner, *Management of Intersex: A Shifting Paradigm*, in INTERSEX IN THE AGE OF ETHICS 119 (1999); *SRY gene*, National Institutes of Health, https://ghr.nlm.nih.gov/gene/SRY.

[5] Hughes, *supra* note 4, at 488; Laura Hermer, *Paradigms Revised: Intersex Children, Bioethics & The Law*, 11 Ann. Health L. 195, 204 (2002); Carla Murphy et al., *Ambiguous Genitalia in the Newborn: An Overview and Teaching Tool*, 24 J. Pediatric Adolescent Gynecology 236, 236-37 (2011).

[6] *Clinical Guidelines for the Management of Disorders of Sexual Development in Childhood* 2-5 (2006), Consortium on the Management of Disorders of Sex Development, https://goo.gl/bKQcES (hereinafter "Clinical Guidelines").

and chromosomes.[7] This is a largely subjective process, and experts may disagree on the "correct" sex to assign to an intersex child.[8] Often, children discovered to be intersex in infancy may be subjected to nonconsensual, harmful, and irreversible "normalizing" surgical procedures in an attempt to erase their intersex differences.[9] *See* Point II, *infra*.

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[7] Hughes, *supra* note 4, at 491. The emphasis on which characteristic should prevail in determining a person's sex has changed over time. For a history of intersex management, *see generally* Elizabeth Reis, BODIES IN DOUBT: AN AMERICAN HISTORY OF INTERSEX (2009).

[8] *See, e.g.*, Anne Tamar-Mattis, Report to the Inter-American Commission on Human Rights: Medical Treatment of People with Intersex Conditions as a Human Rights Violation, Advocates for Informed Choice (March 2013) at 5, https://goo.gl/Nf7Xt7, ("There is still controversy and uncertainty about gender assignment in [cases of partial AIS], and it can go either way, depending largely on the doctor's judgment."); David A. Diamond et al., *Gender Assignment for Newborns with 46XY Cloacal Exstrophy: A 6-Year Followup Survey of Pediatric Urologists*, 186 J. Urol. 1642, 1643 (2011) (reporting that only 79 percent of surveyed clinicians agreed on a male gender assignment in 46XY cloacal exstrophy).

[9] Jeremy Toler, *Medical and Surgical Intervention of Patients with Differences in Sex Development* 1, Gay & Les. Med. Ass'n (Oct. 3, 2016); Katrina Karkazis, FIXING SEX: INTERSEX, MEDICAL AUTHORITY, AND LIVED EXPERIENCE 57-58, 60-61 (2008); Martin Kaefer & Richard C. Rink, *Treatment of the Enlarged Clitoris*, Frontiers in Pediatrics (Aug. 2017); Jennifer Yang, et al., *Nerve Sparing Ventral Clitoroplasty: Analysis of Clitoral Sensitivity and Viability*, J. UROL., Vol. 178, 1598-1601 (Oct. 2007); Sarah Creighton, et al., *Timing and Nature of Reconstructive Surgery for Disorders of Sex Development – Introduction*, J. PEDIATRIC UROL. 602 (2012).

Some intersex people continue to identify with their originally assigned binary sex throughout their lives, but others do not.[10] For most major intersex diagnoses, 5% to 29% do not identify with their originally assigned sex.[11] In other cases, the rate of sex-assignment rejection can reach higher than 60%.[12]

The (now-defunct) Intersex Society of North America ("ISNA") recognized approximately twenty different intersex diagnoses,[13] including:

a. ***Congenital Adrenal Hyperplasia (CAH)*:** CAH can occur in babies with XX or XY chromosomes, but is only considered an intersex variation in XX babies. In CAH, a variant form of an enzyme leads to heightened production of androgenic hormones *in*

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[10] interACT, *Understanding Intersex and Transgender Communities* at 1, interACT, https://goo.gl/CY53ZZ.

[11] Julie A. Greenberg, INTERSEXUALITY AND THE LAW 20 (2012); Hughes et al., *supra* note 4, at 491; P.S. Furtado et al., *Gender Dysphoria Associated with Disorders of Sex Development*, 9 Nat. Rev. Urol. 620 (Nov. 2012) (reporting average rates of gender dysphoria at 5% for Complete Androgen Insensitivity Syndrome, 10% for Congenital Adrenal Hyperplasia, 12.5% for Ovotesticular DSD, 20% for Partial Androgen Insensitivity Syndrome, and 29% for Mixed Gonadal Dysgenesis).

[12] P.S. Furtado et al., *Gender Dysphoria Associated with Disorders of Sex Development*, 9 Nat. Rev. Urol. 620 (Nov. 2012) (reporting average rates of gender dysphoria at 57% for 17-beta-HSD3 deficiency and 63% for 5-alpha-RD2 deficiency).

[13] Clinical Guidelines, *supra* note 6, at 5-7.

utero. This can cause development to varying degrees of typically "male" physical characteristics. XX individuals with CAH may have female-typical internal organs and masculinized external genitalia, such as an enlarged clitoris and/or the lack of a vaginal opening. CAH can also cause development of male-typical secondary sex characteristics like body hair, deep voice, and muscles.[14]

b. ***5-Alpha Reductase (5-AR) Deficiency*:** People with 5-AR deficiency have XY chromosomes and testes, but their bodies produce lower-than-typical levels of the hormone dihydrotestosterone (DHT), which impacts formation of the external genitalia. Many are born with external genitalia that appear typically female. In other cases, they are neither male-typical nor female-typical. Still other affected infants have genitalia that appear predominantly

[14] Walter L. Miller & Selma Feldman Witchel, *Prenatal Treatment of Congenital Adrenal Hyperplasia: Risks Outweigh Benefits,* 208 Am. J. Obstetrics & Gynaecology 354, 354 (2013); Phyllis W. Speiser, et al., *Congenital Adrenal Hyperplasia Due to Steroid 21-Hydroxylase Deficiency: An Endocrine Society Clinical Practice Guideline*, 95 J. Clin. Endocrinology & Metabolism 4133-60 (2010); Blackless et al., *supra* note 2, at 154-55; *Congenital Adrenal Hyperplasia (CAH)*, ISNA, https://goo.gl/8Ki1FH; Fausto-Sterling, *supra* note 2, at 51-53 & tbl. 3.2; Clinical Guidelines, *supra* note 6, at 6.

male, often with a small penis (micropenis) and the urethral opening on the underside of the penis (hypospadias). During puberty, people with 5-AR deficiency develop some typically male secondary sex characteristics, such as increased musculature and a deep voice, but do not develop much facial or body hair. Children with 5-AR deficiency are often raised as girls. However, about half have a male gender identity and live as male beginning in adolescence or early adulthood.[15]

c. ***Androgen Insensitivity Syndrome (AIS)*:** People with AIS have XY chromosomes, but their cells have a reduced or absent response to testosterone and other androgens. As a result, they do not form typically male genitalia. In "complete" AIS, babies are usually born with a vaginal opening and clitoris indistinguishable from those seen in typical female babies. The diagnosis is ordinarily not suspected until puberty, when menstruation does not occur. Investigation then reveals that these individuals are XY, that they have undescended testicles, and that neither a uterus nor ovaries are present. In "partial" AIS, the body's cells have

[15] Hermer, *supra* note 5, at 207.

some (limited) response to androgens, and as a result, the external genitalia fall somewhere between typically male and typically female. While individuals with complete AIS often have a female gender identity, individuals with partial AIS are divided approximately evenly between female and male gender identity.[16]

d. ***Swyer Syndrome*:** In this variation, an XY child is born with "gonadal streaks" (minimally developed gonadal tissue) instead of testes or ovaries. Externally, a child with Swyer Syndrome usually appears female-typical; however, because streak gonads do not produce the sex hormones that bring about puberty, the child will not develop most secondary sex characteristics without hormone treatment.[17]

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[16] Blackless et al., *supra* note 2 at 153; Fausto-Sterling, *supra* note 2, at 52; Hughes, *supra* note 4, at 491; *Androgen Insensitivity Syndrome*, ISNA, https://goo.gl/GJziJL.

[17] L. Michala, et al., *Swyer syndrome: presentation and outcomes*, 115 BJOG 115(6):737-41 (2008); Georgiann Davis, CONTESTING INTERSEX: THE DUBIOUS DIAGNOSIS 2 (2015); Fausto-Sterling, *supra* note 2, at 52 & tbl. 3.1; Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 Ariz. L. Rev. 265, 284 (1999).

e. ***Kallman Syndrome*:** This variation occurs in both XX and XY children, characterized by delayed or absent puberty and an impaired sense of smell. It is a form of hypogonadotropic hypogonadism, or absence of certain hormones that direct sexual development. XY children with Kallman syndrome often have a small penis (micropenis) and undescended testes. At puberty, most affected individuals do not develop typical secondary sex characteristics, such as facial hair and deepening of the voice in XY adolescents, or menstruation and breast development in XX adolescents.

f. ***Klinefelter Syndrome*:** A child with Klinefelter syndrome has XXY chromosomes, as opposed to the typical patterns XX or XY. This occurs when one parent's sperm or egg has an extra X chromosome from atypical cell division. The testes and penis may be smaller than typical. Klinefelter syndrome occurs in about 1 in 500 children, and is not ordinarily diagnosed before puberty.[18]

[18] Blackless et al., *supra* note 2, at 152; Greenberg, *supra* note 17, at 283; Albert de la Chapelle, *The Use and Misuse of Sex Chromatin Screening for Gender Identification of Female Athletes*, 256 J. Am. Med. Ass'n 1920, 1922 (1986).

g. ***Turner Syndrome*:** A child with Turner syndrome has the chromosome pattern X (also referred to as XO), instead of the typical XX or XY. This occurs when one parent's sperm or egg is lacking an X chromosome due to atypical cell division. Children with Turner syndrome may have underdeveloped ovaries; their external genitalia generally appear female-typical, but may be less developed. They generally will not develop menstrual periods or breasts without hormone treatment. Turner syndrome affects between 1 in 2,500 and 1 in 5,000 newborns.[19]

h. ***Persistent Müllerian Duct Syndrome (PMDS)*:** Persons with PMDS have XY chromosomes and male-typical reproductive organs and external genitalia, but also have a uterus and Fallopian tubes. This condition occurs when the Müllerian ducts—internal structures that ordinarily break down in an XY fetus—remain and develop as they would in an XX fetus. PMDS is ordinarily not

[19] Kutluk Oktay, et al., *Fertility Preservation in Women with Turner Syndrome: A Comprehensive Review and Practical Guidelines*, 29 J. Pediatric & Adolescent Gynecology 29(5):409-16 (2016); Blackless et al., *supra* note 2, at 152; Greenberg, *supra* note 17, at 284.

diagnosed at birth, and individuals with this variation often have a male gender identity.[20]

i. ***Ovotestes*:** Ovotestes are gonads that contain both ovarian and testicular tissue. People with ovotestes are predominantly XX, but some are XY or have different chromosomal patterns in different cells (*see* "Mosaicism," *infra*). Some people with ovotestes have external genitalia that look typically male; others have external genitalia that look typically female; and still others have genitalia that do not look typically male or female.[21]

j. ***Mosaicism*:** As a result of atypical cell division in early embryonic development, some people are born with a mosaic karyotype—*i.e.*, their sex-chromosome pattern varies from cell to cell. A person with mosaicism may have an XX chromosomal pattern in some cells and an XY pattern in others, or combinations that include the other patterns discussed above (such as XO or XXY).[22]

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[20] Greenberg, *supra* note 17, at 285.

[21] Hughes, *supra* note 4, at 492; Fausto-Sterling, *supra* note 2, at 21.

[22] Wilson & Reiner, *supra* note 4, at 122; Clinical Guidelines, *supra* note 6, at 7; L. Sax, *How Common is Intersex? A Response to Anne Fausto-Sterling*, 39 J. Sex. Res. 174, 175 (2002).

II. INTERSEX PEOPLE EXPERIENCE SEVERE MISTREATMENT AND DISCRIMINATION

Despite the longstanding recognition of intersex variations, intersex people in the United States suffer from severe mistreatment and discrimination. The Court must assess the Act's impact on intersex students in light of this pervasive mistreatment.

Since the 1960s, intersex children have often faced nonconsensual surgical intervention, including the mutilation and removal of internal and external sex organs (*e.g.*, clitoral reductions and vaginoplasties).[23] Almost always, these surgeries are performed not for any valid medical

[23] Toler, *supra*, note 9, at 1; Katrina Karkazis, *supra*, note 9 at 57–58, 60–61 (2008); Martin Kaefer & Richard C. Rink, *Treatment of the Enlarged Clitoris*, Frontiers in Pediatrics (August 2017); Jennifer Yang, et al., *Nerve Sparing Ventral Clitoroplasty: Analysis of Clitoral Sensitivity and Viability*, J. Urol., Vol. 178, 1598-1601 (October 2007); Sarah Creighton, et al., *Timing and Nature of Reconstructive Surgery for Disorders of Sex Development – Introduction*, J. PEDIATRIC UROL. 602 (2012).

reason, but for cosmetic purposes or to ease parents' or doctors' discomfort with the child's difference.[24] These surgeries are commonly performed when the child is too young to understand what is taking place, let alone provide informed consent.[25]

The consequences are dire and permanent. The child may be rendered sterile; may suffer a lifelong diminution or loss of sexual sensation and function; and may experience scarring and incontinence.[26] Children

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[24] Toler, *supra*, note 9, at 1; Tamar-Mattis, *supra* note 8, at 2–3, 9; Hermer, *supra* note 5, at 207.

[25] Karkazis, *supra*, note 9, at 57–58; Tamar-Mattis, *supra* note 8, at 2; Daniela Truffer, "It's a Human Rights Issue!" *in* VOICES: PERSONAL STORIES FROM THE PAGES OF NIB – NORMALIZING INTERSEX 26–29 (James M. DuBois & Ana S. Iltis, eds., 2016) (describing a gonadectomy performed at 2 months of age); Lily C. Wang & Dix P. Poppas, *Surgical Outcomes and Complications of Reconstructive Surgery in the Female Congenital Adrenal Hyperplasia Patient: What Every Endocrinologist Should Know*, J. Steroid Biochem. & Molecular Biol. (2016):137-144; Natalie Nokoff, et al., *Prospective Assessment of Cosmesis Before and After Genital Surgery*, 13 J. Pediatric Urol. (2017): 28.e1-28.e6.

[26] Toler, *supra* note 9, at 1; *Recommendations from interACT: Advocates for Intersex Youth Regarding the List of Issues for the United States for the 59th Session of the Committee Against Torture* at 2, interACT (June 2016); Tamar-Mattis, *supra* note 8, at 3–5; Peter Lee et al., *Review of Recent Outcome Data of Disorders of Sex Development (DSD): Emphasis on Surgical and Sexual Outcomes*, 8 J. Pediatric Urol. 611 (Dec. 2012); Sarah Creighton et al., *Objective Cosmetic and Anatomical Outcomes at Adolescence of Feminising Surgery for Ambiguous Genitalia Done in Childhood*, 358 Lancet 124 (2001); *"I Want To Be Like Nature Made Me":*

who undergo these procedures are often subjected to repeated examination, catheterization, manipulation, and photography of their genitals, which they may experience as shameful and exploitative.[27] The pain and suffering experienced by children subjected to these procedures is comparable to that of child survivors of rape or sexual abuse.[28] There is no persuasive evidence that these surgeries provide any benefit to the child when performed without consent.[29]

Today, these surgeries are widely condemned by the intersex community, and have been decried as a form of torture by human rights

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Medically Unnecessary Surgeries on Intersex Children in the U.S. 58, Human Rights Watch & interACT (2017), https://bit.ly/2Y1N6DZ.

[27] Hughes, *supra* note 4 at 493; *Recommendations from interACT*, *supra* note 8, at 2, 5-6, 12; TamarMattis, *supra* note 8 at 2, 5-6, 12; Konrad Blair, "When Doctors Get it Wrong," in VOICES, supra note 25 at 5-7; Laura Inter, "Finding my Compass," in VOICES, supra note 25 at 10-13.

[28] *A Human Rights Investigation into the Medical "Normalization" of Intersex People* 17-18, S.F. Human Rights Comm'n (2005), https://goo.gl/trBnGT; Tamara Alexander, *The Medical Management of Intersexed Children: An Analogue for Childhood Sexual Abuse*, ISNA (1997), https://goo.gl/fy9jae; Karsten Schützmann, et al., *Psychological Distress, Self-Harming Behavior, and Suicidal Tendencies in Adults with Disorders of Sex Development*, Arch. Sex. Behav. (2009): 16-33.

[29] Sarah Creighton et al., *Timing and Nature of Reconstructive Surgery for Disorders of Sex Development — Introduction*, 8 J. Pediatric Urol. 602 (2012); Hughes, *supra* note 4, at 493; S.F. Human Rights Comm'n, *supra* note 28, at 19; Toler, *supra* note 9, at 1; Tamar-Mattis, *supra* note 8, at 3.

groups including the United Nations, the World Health Organization, and Amnesty International.[30] Fortunately, an increasing number of parents are choosing to leave the decision to the child once they are able to participate in the decision themselves. And earlier this year, two leading pediatric hospitals announced that they would no longer perform certain "normalizing" surgeries on intersex children too young to consent.[31] Yet families continue to have unnecessary genital surgery pressed upon their intersex children.[32]

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[30] Juan E. Méndez, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 77, UN Doc. A/HRC/22/53 (Feb. 1, 2013); Toler, *supra* note 9, at 1; *Eliminating forced, coercive and otherwise involuntary sterilization: An interagency statement*, World Health Organization, et al. (2014), https://goo.gl/nzXm6f; *Policy Statement on the Rights of Intersex Individuals*, Amnesty International (2013); *Recommendations from interACT*, *supra* note 26, at 1; Tamar-Mattis, *supra* note 8, at 7-9, https://goo.gl/Nf7Xt7.

[31] Shefali Luthra, *Boston Children's Hospital will no longer perform two types of intersex surgery on children*, USA Today, Oct. 22, 2020, https://www.usatoday.com/story/news/health/2020/10/22/intersex-surgery-boston-childrens-hospitals-decision-watershed-moment-rights/3721096001/; *Intersex Care at Lurie Children's and Our Sex Development Clinic*, July 28, 2020, https://www.luriechildrens.org/en/blog/intersex-care-at-lurie-childrens-and-our-sex-development-clinic/.

[32] Toler, *supra* note 9, at 1; Eric Lohman and Stephani Lohman, RAISING ROSIE: OUR STORY OF PARENTING AN INTERSEX CHILD (UBCPress 2018).

The mistreatment of intersex people does not end with childhood surgery. They may be denied medical treatment in adulthood by physicians who are unfamiliar with or who stigmatize intersex variations.[33] Even when doctors are willing and able to treat them, some intersex people report trauma and fear of doctors that causes them to avoid necessary care.[34] Intersex people may be denied identification documents, such as passports, impeding their ability to travel or participate in civil society. *See, e.g.*, *Zzyym v. Pompeo*, 958 F.3d 1014, 1018 (10th Cir. 2020) (finding the State Department's denial of a U.S. passport to an intersex person "arbitrary and capricious"). They also experience discrimination in education, public services, employment, and—relevant here—sports.[35]

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[33] Tamar-Mattis, *supra* note 8, at 2, 7; *Fact Sheet: Intersex* at 2, Free & Equal: United Nations for LGBT Equality (2015), https://www.unfe.org/system/unfe-65-Intersex_Factsheet_ENGLISH.pdf.

[34] S.F. Human Rights Comm'n, *supra* note 28, at 23; Tamar-Mattis, *supra* note 8, at 12; Davis, *supra note* 17, at 109-10 (quoting an intersex adult: "I don't like doctors. I don't go to the doctor very often. I don't trust doctors. That's a very triggering environment for me.").

[35] *Fact Sheet: Intersex*, *supra* note 33, at 1.

III. THE ACT DISCRIMINATES AGAINST AND TRAUMATIZES INTERSEX STUDENTS WITHOUT JUSTIFICATION

A. The Act's Incoherent Conception Of "Biological Sex" Discriminates Against Intersex Students

The Act prohibits students from competing on athletic teams that do not correspond to their so-called "biological sex." Idaho Code § 33-6203. The statute does not define this key term, however, beyond noting that a student's "biological sex" must be determined based on "one (1) or more of the following: the student's reproductive anatomy, genetic makeup, or normal endogenously produced testosterone levels." *Id.* The Act offers no explanation of how these three factors are to be applied—let alone in scenarios where one or more of them is ambiguous, or where the three factors point in inconsistent directions.

For example, consider "Jane," a hypothetical student with complete AIS. *Supra* at 9. Jane was assigned female sex at birth and has always identified as a girl. Jane has typically female external genitalia and secondary sex characteristics, such as breasts, but also has internal testes and an XY chromosome pattern. What is Jane's "biological sex" under the Act? Her "reproductive anatomy" is neither male-typical nor female-

typical. Her "genetic makeup" is male-typical. And while her "endogenously produced testosterone levels" are in the male-typical range, her body's cells cannot detect or respond to testosterone—so functionally speaking, it is as if she has none. What is Jane to do if she wishes to play school sports without violating Idaho law?

Now consider "Frank," a student with CAH. *Supra* at 7. Frank was assigned male sex at birth and has always identified as a boy. He has external genitalia that are neither male-typical nor female-typical (*e.g.*, an enlarged clitoris and no vaginal opening). He has male-typical secondary sex characteristics, such as a deep voice, body hair, and developed muscles. But he has female-typical internal organs, such as a uterus and ovaries, and a female-typical XX chromosomal pattern. And his "endogenously produced testosterone levels" are not known, because he has received hormone treatment for years, and he cannot safely stop the treatment to measure his "but-for" testosterone levels.[36] What is Frank to do if he wishes to play school sports lawfully?

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[36] As Appellees' expert explains, the only way to determine the "normal [sic] endogenously produced testosterone level" of someone receiving testosterone therapy or hormone blockers "is [to take them] off of prescribed medication, which would be dangerous." Expert Declaration of Joshua D. Safer, MD, FACP, FACE ¶ 17 (D. Ct. Dkt. No. 22-9).

Finally, consider "Kelly," a student with ovotestes and mosaicism. *Supra* at 13. Their external genitalia are neither male-typical nor female-typical, and their gonads contain both testicular and ovarian tissue. They have certain sex characteristics that are female-typical (*e.g.*, some breast development) but others that are male-typical (*e.g.*, some body hair). Chromosomally, some of their cells are XX and others are XY. And their "endogenously produced testosterone levels" lie in the overlapping range that could be low for a typical male or high for a typical female.[37] What is Kelly to do if they wish to play school sports lawfully?

The Act provides these students no answer. Rather, it simply *assumes* that each of the three traits it mentions—reproductive anatomy, chromosomes, and hormone levels—is binary, and that all three always point in the same direction. As *amicus* has shown, these assumptions are false. Because the Act's central concept, "biological sex," is defined in such a vague and incoherent manner, the Act places students like Jane,

[37] *See* Nicola Davis, *Testosterone limits for female athletes not backed by science, say academics*, THE GUARDIAN, Mar. 20, 2019, https://www.theguardian.com/sport/2019/mar/20/testosterone-limits-for-female-athletes-not-backed-by-science-say-academics (noting that "there can be overlap between blood levels of testosterone in some men and women," and that there are "no clear lines in the sand about what a 'male' or 'female' level of testosterone [is]").

Frank, and Kelly in an untenable bind, prohibiting them from playing school sports *at all* under pain of being branded lawbreakers. This is not just unfair; it violates the Equal Protection Clause and Title IX. *See* Appellees' Br. at 14 (citing the Idaho Attorney General's opinion that the Act "raise[s] serious constitutional and other legal concerns due to the disparate treatment and impact it would have on . . . intersex athletes").

Idaho's own medical *amici* recognize—as they must—that the existence of intersex students is inconsistent with the assumptions about human biology at the heart of the Act. *Amicus* Br. of Medical Professionals (ECF 44) at 36. Yet they attempt to brush this problem aside by claiming that intersex variations are "exceedingly rare." *Id.* As discussed above, that is simply untrue: intersex people are a minority, of course, but they are a significant one, on the order of 2% of the population. *Supra* at 4. In any event, there is no *de minimis* exception to the Equal Protection Clause or Title IX that permits discrimination against a disfavored group as long as its membership is small enough.

As this discussion makes clear, any attempt to police participation in sex-segregated athletic activities on the basis of particular physical traits is doomed to fail, because "biological sex" is not binary and cannot

be assessed in a purely objective manner. *See Zzyym*, 958 F.3d at 1024-25 (noting that "[the intersex plaintiff's] experience illustratems the inevitable inaccuracies of a binary sex policy"). As long as there are sex-segregated sports teams, the only workable way to regulate their membership is on the basis of the student's own deeply held gender identity. This is precisely how sex-separated scholastic sports are regulated across the country without any detriment to girls' and women's sports programs.

B. The Act's "Sex Verification" Regime Will Inflict Severe Trauma On Students, Especially Intersex Students

As a separate matter, the Act's Orwellian "sex verification" regime will inflict severe and unacceptable trauma on student athletes—especially intersex student athletes—who are swept up in its machinery.

Under the Act's framework, all that is necessary to put the sex verification process in motion is for someone—a teammate, a parent, a school bully, a rival team member, or just a local busybody—to "dispute" a student's sex.[38] Idaho Code § 33-6203(3). Once that happens, the student is forced to undergo an invasive battery of tests. Namely, they must submit

[38] Incredibly, Idaho immunizes those who report a "suspicious female" from any and all disciplinary action—"regardless of whether the report was made in good faith or simply to harass a competitor." *Hecox v. Little,* 2020 WL 4760138, at *2 (D. Idaho Aug. 17, 2020).

to have their genitalia and other reproductive organs touched, manipulated, and documented; their personal genetic material taken and tested; or their blood drawn to gauge their hormone levels. *Id.*

This gauntlet of indignities would be difficult for any person—particularly a student—to endure. The International Olympic Committee and International Amateur Athletics Federation abandoned nude inspections and genital examinations as "demeaning" and "[un]dignified" as early as 1968.[39] And the U.S. Supreme Court has held that far lesser impositions on students' modesty violate "reasonable societal expectations of personal privacy." *Safford Unified Sch. Dist. v. Redding*, 557 U.S. 364, 369, 374-75 (2009) (finding that school officials violated an adolescent student's constitutional rights by forcing her to "'pull out' her bra and the elastic band on her underpants").

For intersex students, however, these bodily invasions pose a threat of a different order. As discussed above, intersex students may suffer from trauma, depression, or suicidality as a result of years of forced medical examination of their genitals, as well as nonconsensual surgeries

[39] Louis J. Elsas, et al. *Gender verification of female athletes*, Genet. In Med., 2000:2(4), 247-54 at 253.

that are widely deemed a form of torture. For students who have suffered these traumas for much of their lives, undergoing Idaho's forced sex-verification regime in the adversarial and highly public context of a sex "dispute" under the Act would be truly horrendous.

Consider, in addition, that not all intersex variations are diagnosed at birth or in early childhood. Some people do not learn that they are intersex until late puberty or even adulthood (*e.g.*, when they cannot conceive). Imagine the experience of a student athlete who learns of their intersex status for the first time in the context of a sex "dispute" under the Act. The student could suffer deep psychological harm—or worse—from such an experience. That goes double if they are "outed" to their family, their teammates, or their community under such circumstances.

The Court need not take *amicus*'s word for it. Sex-verification procedures in athletics have a documented history of inflicting significant emotional trauma on intersex athletes.[40] Indeed, an empirical study

[40] *See* Claudia Wiesemann, *Is There A Right Not to Know One's Sex? The Ethics of 'Gender Verification' in Women's Sports Competition*, 1–3 J. Med. Ethics (2010); Erin E. Buzuvis, *Transsexual and Intersex Athletes, in* SEXUAL MINORITIES IN SPORTS: PREJUDICE AT PLAY 59–67 (Melanie L. Sartore-Baldwin, ed. 2013); Robert Ritchie *et al.*, *Intersex and the Olympic Games*, J. Royal Soc. Med. 2008 Aug 1; 101(8): 395-399.

found that the emotional pain caused by these procedures is comparable to that from sexual abuse.[41] The results of such tests are routinely leaked to the public, compounding the athletes' trauma.[42]

For example, in 2001, Pratima Gaonkar, an 18-year-old female sprinter, died by suicide after sex testing revealed her intersex status to her and her community, leading to "description[s] of her private parts … [on] the front pages of [local] newspapers."[43] In 2006, Santhi Soundarajan, a 25-year-old female runner, attempted suicide after learning of her intersex variation through a failed "gender test" and being publicly stripped of her medals, likening the experience to "mental torture."[44]

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[41] Karsten Schützmann et al., *Psychological Distress, Self-Harming Behavior, and Suicidal Tendencies in Adults with Disorders of Sex Development*, Arch. Sex. Behav. (2009):16-33

[42] Human Rights Watch, *They're Chasing Us Away from Sport": Human Rights Violations in Sex Testing of Elite Women Athletes* at 7, 46-48, Dec. 4, 2020, https://www.hrw.org/sites/default/files/media_2020/12/lgbt_athletes1120_web.pdf (quoting Associated Press, *Caster Semenya's Comeback Statement in Full*, The Guardian, Mar. 30, 2010).

[43] Nihal Koshie, *The rising star who ended her life much before Dutee Chand challenged the rules*, Indian Express, Sept. 9, 2018, https://indianexpress.com/article/sports/sport-others/the-girl-before-dutee-chand-pratima-gaonkar-5346699/.

[44] Harmeet Shah Singh, *India athlete makes plea for Semenya*, CNN, Sept. 14, 2009, http://www.cnn.com/2009/WORLD/asiapcf/09/14/Semenya.India.Athlete/.

More recently, intersex runner Caster Semenya explained: "I have been subjected to unwarranted and invasive scrutiny of the most intimate and private details of my being … [which has] infringed … my rights to dignity and privacy."[45]

As if that weren't enough, sex-verification regimes in sport have led to "a number of" intersex athletes being "forced or coerced" into risky and medically unwarranted "treatment[s]" such as "gonadectomy (removal of reproductive organs) and partial clitoridectomy (a form of female genital mutilation)."[46] As described above, such surgeries are almost always medically unnecessary and can have horrific lifelong consequences, including incontinence, sterility, and sexual dysfunction.

To give just one example, Annet Negesa, an intersex runner and former Olympic hopeful, has female-typical external genitalia but was born with internal testes. Negesa was advised to undergo a medically

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[45] Human Rights Watch, *supra* note 42, at 7 (quoting Associated Press, *Caster Semenya's Comeback Statement in Full*, The Guardian, Mar. 30, 2010).

[46] U.N. GEN. ASSEMBLY, HUM. RTS. COUNCIL, 32 Sess. *Report of The Special Rapporteur on The Right of Everyone to The Enjoyment of The Highest Attainable Standard Of Physical And Mental Health*, 14 (2016); *see also* Human Rights Watch, *supra* note 42, at 27, 44-45.

unnecessary gonadectomy to qualify for competition as a female, the sex she has lived her entire life and always identified as. As a result of the procedure, Negesa suffered career-ending physical pain and depression.[47] If the Act stands, young intersex athletes in Idaho may feel the same pressure to modify their bodies in order to compete, with the same tragic consequences.

C. There Is No Justification For The Act's Discriminatory Treatment Of Intersex Student Athletes

Because the Act discriminates against intersex students on the basis of their sex characteristics, Idaho bears the burden of (1) "demonstrat[ing] an 'exceedingly persuasive justification'" for the Act and (2) showing "that the discriminatory means employed are substantially related to the achievement" of that objective. *United States v. Virginia*, 518 U.S. 515, 531-33 (1996). Idaho has done neither. Indeed, the Act cannot pass muster under *any* standard of review.

Idaho's purported justification for the Act is to ensure "fairness" in girls' and women's sports. But the record is devoid of evidence that the

[47] Geneva Abdul, *This Intersex Runner Had Surgery to Compete. It Has Not Gone Well*, N.Y. Times (Dec. 16, 2019) https://www.nytimes.com/2019/12/16/sports/intersex-runner-surgery-track-and-field.html.

presence of intersex students (or transgender students, for that matter) on girls' and women's scholastic sports teams has ever caused "unfairness," in Idaho or elsewhere. *See* Appellees' Br. at 13-14, 54-58. That is hardly surprising, as researchers have found "no evidence that female [identifying] athletes with [intersex variations] have displayed any sports-relevant physical attributes which have not been seen in … female athletes" without intersex variations.[48] Last year, the United Nations Human Rights Council noted "the absence of legitimate and justifiable evidence" supporting sex-verification regimes in sport, and the lack of any "clear relationship of proportionality between the aim of the regulations and the proposed measures and their impact."[49]

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[48] Ritchie et al., *supra* note 40, at 598; *see also* Katrina Karkazis and Rebecca M. Jordan-Young, *The Myth of Testosterone*, N.Y. Times, May 3, 2019, https://www.nytimes.com/2019/05/03/opinion/testosterone-caster-semenya.html

[49] United Nations Human Rights Council, *Elimination of Discrimination Against Women and Girls in Sport* (Resolution 40/5), May 5, 2019, *quoted in* Rachel McKinnon, *Participation in sport is a human right, even for trans women*, Sports Integrity Initiative, June 17, 2019, https://www.sportsintegrityinitiative.com/participation-in-sport-is-a-human-right-even-for-trans-women/.

But even assuming, *arguendo*, that some intersex variations confer an athletic "advantage" on female athletes, that would not justify the severe discriminations and indignities that the Act imposes on intersex students. After all, sports has never been, and cannot ever be, a completely "level playing field." In particular, many elite athletes are genetically, anatomically, and physiologically blessed in ways that average people—or even other accomplished athletes—are not.

Consider Michael Phelps, the most-decorated Olympic athlete of all time. He boasts an unrivaled wingspan and "flipper"-like legs and feet, and his body "produces half the lactic acid of his competitors."[50] How is that "fair"—as proponents of the Act define fairness—to the many other swimmers who cannot hope to equal Phelps's achievements with any amount of training? Likewise, consider cross-country skier and seven-time Olympic medalist Eero Mäntyranta, who was born with a genetic mutation that lets his blood carry 50% more oxygen than his competitors'. As one writer asked, "[w]hat does 'a level playing field' mean for skiers

[50] Colleen De Bellefonds, *Why Michael Phelps Has the Perfect Body for Swimming*, Biography.com (June 26, 2019) https://www.biography.com/news/michael-phelp-perfect-body-swimming.

who trained just as hard as Mäntyranta but were left behind him, gasping for air as he won the Olympic 15K race by 40 seconds, a margin never equaled at the Games before or since?"[51]

Tellingly, Idaho doesn't call for genetic anomalies like Phelps and Mäntyranta to be excluded from competition in order to "eliminate" unfair "performance advantages." State Br. at 36. Instead, Idaho singles out just one category of physical differences as posing a threat to "fairness" in sports: those with a connection to sex. And through the Act, Idaho polices those physical differences—and no others—through a draconian regime of discrimination and humiliation.

As an attempt to ensure "fairness" in sports, therefore, the Act is vastly underinclusive. That "[u]nderinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes." *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 802 (2011). Indeed,

[51] David Epstein, *Magic Blood and Carbon-Fiber Legs at the Brave New Olympics*, Scientific American, Aug. 5, 2016, https://www.scientificamerican.com/article/magic-blood-and-carbon-fiber-legs-at-the-brave-new-olympics/; Ruth McKernan, *A skier with gold medals in his blood*, The Independent, Aug. 1, 1993, https://www.independent.co.uk/news/science/science-a-skier-with-gold-medals-in-his-blood-in-endurance-sports-a-plentiful-supply-of-oxygen-to-the-muscles-is-vital-to-success-ruth-mckernan-on-a-family-blessed-by-a-mutant-gene-1458723.html

Idaho's laser-like focus on female students' genitalia, sex chromosomes, and hormones, to the exclusion of all else, reveals the Act for what it truly is: an irrational expression of animus against students who do not fit the State's stereotyped and scientifically inaccurate notions of sex. *See* Appellees' Br. at 66 (explaining that "[t]he context surrounding H.B. 500's enactment makes clear that it was passed out of fear and confusion about transgender [and intersex] people"). Such a law is invalid under any standard of review.

CONCLUSION

This has been framed primarily as a case about transgender athletes. But the Court's decision will also profoundly affect thousands of intersex persons in Idaho. Their dignity and humanity must not be overlooked. The District Court's preliminary injunction should be affirmed.

Dated: New York, New York
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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Fed. R. App. P. 32(g), that the attached brief is proportionally spaced; complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B); and contains 6,501 words (excluding portions exempted by Fed. R. App. P. 32(f), as counted by Microsoft Office Word 2019, which was used to produce this brief.

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CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2020 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 appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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