Exhibit 1

James K. Rogers (No. 027287)
Senior Counsel
AMERICA FIRST LEGAL FOUNDATION
611 Pennsylvania Ave., SE #231
Washington, D.C. 20003
Phone: (202) 964-3721
James.Rogers@aflegal.org
Attorney for Proposed Defendant-Intervenors Anna Van Hoek, Lisa Fink, Amber Zenczak, and Arizona Women of Action

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA
TUCSON DIVISION

Jane Doe, *et al.*,

Plaintiffs,

v.

Thomas C. Horne, in his official capacity as State Superintendent of Public Instruction, *et al.*.

Defendants.

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

[Proposed] Motion to Dismiss of Anna Van Hoek, Lisa Fink, Amber Zenczak, and Arizona Women of Action

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Introduction

Neither the U.S. Constitution nor any statute confers on biological males the right to play on girls' sports teams. Arizona's Save Women's Sports Act, A.R.S. § 15-120.02, is constitutional, and it is lawful. The Complaint (Doc. 1) should be dismissed.

The Plaintiffs assert three claims for relief, all of which fail as a matter of law. Count I alleges a violation of the Equal Protection Clause of the Fourteenth Amendment, but under well-established precedent, States may restrict membership in athletic teams based on biological sex. Count II alleges a violation of Title IX, but Title IX and its implementing regulations expressly permit facilities and sports teams to be separated based on sex. Count III alleges a violation of the Americans with Disabilities Act (ADA) and the Rehabilitation Act, but both statutes specifically except trans persons from their ambit.

Accordingly, Proposed Intervenors Anna Van Hoek, Amber Zenczak, Lisa Fink, and USA Women of Action (d/b/a "Arizona Women of Action") (collectively, the "Parent Representatives") move that the Plaintiffs' Complaint be dismissed under Federal Rule of Civil Procedure 12(b)(6).

Legal Standard

A complaint should be dismissed under Rule 12(b)(6) if it fails "to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988) (internal citation omitted). "Conclusory allegations of law . . . are insufficient to defeat a motion to dismiss." *Lee v. City of Los Angeles*, 250 F.3d 668, 679 (9th Cir. 2001). "On a motion to dismiss, the court accepts the facts alleged in the complaint as true." *Balistreri*, 901 F.2d at 699.

Argument

I. The Save Women's Sports Act Complies with the Equal Protection Clause.

The Equal Protection Clause of the Fourteenth Amendment states that "[n]o State shall make or enforce any law which shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. The Save Women's Sports Act does not violate the Equal Protection Clause. Rather, the Act upholds the principles of the Fourteenth Amendment by ensuring that all students in Arizona are treated equally based on their biological sex. The Plaintiffs' Equal Protection Clause claim should be dismissed.

A. The Save Women's Sports Act Is Subject to Rational Basis Review

Plaintiffs argue that the Save Women's Sports Act "is subject to heightened scrutiny because it discriminates against transgender individuals." (Doc. 65 at 4.) However, while the Supreme Court has held that "[s]tatutory classifications that distinguish between males and females are subject to heightened scrutiny," it has never held that this standard also applies to transgender individuals. *Nevada Dep't of Hum. Res. v. Hibbs*, 538 U.S. 721, 722 (2003).

Heightened scrutiny does not apply simply because individuals affected by a law are disproportionately (or even uniformly) members of a suspect class. *Vacco v. Quill*, 521 U.S. 793, 800 (1997). Furthermore, individuals who identify as transgender do not constitute a suspect class that receives heightened scrutiny. Aside from the obvious—race, sex, national origin, religion, etc.—the Supreme Court rarely designates suspect or quasi-suspect classes. *See, e.g.*, *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442-46 (1985). Indeed, the Court has rejected suspect classification for disability, age, and poverty. *Id.*; *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976); *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973). The fact that so few classifications rise to the level of "suspect" itself casts "grave doubt" on the assertion that transgender identity does. *Adams by & through Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 803 n.5 (11th Cir. 2022) (en banc).

Precedent explains why. Classifications are suspect when they single out "distinguishing characteristics" that have been historically divorced from "the interests the State has the authority to implement." *Cleburne*, 473 U.S. at 441 (noting that classifications attain suspect status when they have historically "provided no sensible ground for differential treatment"). Sex classifications, for example, are suspect because they often "reflect outmoded notions of the relative capabilities of men and women," rather than real differences. *Id.* at 441. Same for racial classifications. *Murgia*, 427 U.S. at 313-14. Thus, to rise to the level of suspect, a classification must single out a so-called "immutable characteristic" that has historically been the basis for deep discrimination. *See Lyng v. Castillo*, 477 U.S. 635, 638 (1986) (looking for (1) immutable characteristics that define (2) a discrete group, (3) historical discrimination, and (4) political powerlessness).

Transgender identity does not check these boxes. For one, it is not "an immutable characteristic determined solely by the accident of birth." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). To the contrary, according to the Plaintiffs, individuals identify as transgender when their internal perception of who they are departs from the immutable characteristic that is their biological sex at birth. (Doc. 1 ¶¶ 31-33.) That necessarily takes place sometime *after* birth. And the DSM-V, which the Plaintiffs have incorporated by reference into their complaint (Doc. 1 ¶ 32 n.7), acknowledges that many individuals who identify as transgender are "gender fluid," or alternate between gender identifications. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, Text Revision* at 511 (DSM-5-TR) (2022). Fluidity is the exact opposite of immutability. That fluidity means that transgender identity cannot form a protected class.

Transgender identity falls short on the other suspect-classification factors too. Individuals identifying as transgender as a class look quite "unlike" those individuals who were long denied equal protection because of their race, national origin, or gender. *Murgia*, 427 U.S. at 313-14 (rejecting age as a suspect class because the elderly have

not faced discrimination "akin to [suspect] classifications"). States enshrined purposeful race and sex discrimination into their laws for decades; conversely, as the Supreme Court has explained, transgender individuals have been protected by a "major piece of federal civil rights legislation" for nearly a half-century. *Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1753 (2020).

Because the Save Women's Sports Act is thus subject to rational-basis review, it "is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993). Because the Plaintiffs have not met their "burden to negative every conceivable basis which might support it, their Equal Protection Claim must be dismissed.

B. The Save Women's Sports Act Also Survives Under Heightened Scrutiny Review.

Even if the Save Women's Sports Act is subject to heightened scrutiny, there is still no equal protection problem. The Equal Protection Clause commands that "all persons *similarly situated* . . . be treated alike." *Cleburne*, 473 U.S. at 439 (emphasis added). Thus, "[t]he equal protection clause ... is implicated only when a classification treats persons similarly situated in different ways." *Clark, By & Through Clark v. AIA* ("*Clark I*"), 695 F.2d 1126, 1128-29 (9th Cir. 1982). Biological males and females are not similarly situated. Thus, State legislatures do not have to ignore those biological realities, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2245-46 (2022), nor does the Constitution require them to. To the contrary, "fail[ing] to acknowledge ... basic biological differences ... risks making the guarantee of equal protection superficial, and so disserving it." *Nguyen v. INS*, 533 U.S. 53, 73 (2001); *Ballard v. United States*, 329 U.S. 187, 193 (1946).

Biological differences are "the driving force behind the Supreme Court's sex-discrimination jurisprudence." *Adams*, 57 F.4th at 803 n.6. Indeed, "the biological differences between males and females are the reasons intermediate scrutiny," not

strict, "applies in sex-discrimination cases in the first place." *Id.* at 809. Thus, "due to average physiological differences [between the sexes].... there is no question that the Supreme Court allows for these average real differences between the sexes to be recognized or that they allow gender to be used as a proxy." *Clark I*, 695 F.2d at 1131. In adopting the Save Women's Sports Act, the Arizona Legislature was "simply recognizing the physiological fact that males would have an undue advantage competing against women for positions on" sports teams. *Id.*

Biological "males would displace females to a substantial extent if they were allowed to compete for positions on [a sports] team," and "athletic opportunities for women would be diminished." *Id.*; *see also Adams*, 57 F.4th at 819 (Lagoa, J., concurring) ("[A] commingling of the biological sexes in the female athletics arena would significantly undermine the benefits afforded to female student-athletes under Title IX[]."). Thus, "[t]here is no question that" "redressing past discrimination against women in athletics and promoting equality of athletic opportunity between the sexes ... is a legitimate and important governmental interest." *Clark I*, 695 F.2d at 1131.

The Arizona Legislature's intent in adopting the Save Women's Sports Act was to "further[] efforts to promote sex equality by providing opportunities for [biological] female athletes to demonstrate their skill, strength and athletic abilities while also providing them with opportunities to obtain recognition, accolades, college scholarships and the numerous other long-term benefits that flow from success in athletic endeavor." S.B. 1165, § 2(14) (2022). This purpose is laudable, and lawful. It easily passes heightened scrutiny review.

Intermediate scrutiny prevents States from legislating based on "overbroad generalizations about the different talents, capacities, or preferences or males or females"—generalizations with no basis in biology. *United States v. Virginia*, 518 U.S. 515, 533 (1996). For instance, States cannot presume that women do not like competition, that they have less skill in managing or distributing property, or that they mature faster. *See, e.g.*, *id.* at 541; *Kirchberg v. Feenstra*, 450 U.S. 455, 459-60 (1981);

Reed v. Reed, 404 U.S. 71, 74 (1971); *Craig v. Boren*, 429 U.S. 190, 192 (1976); *Stanton v. Stanton*, 421 U.S. 7, 14 (1975). *Adams*, 57 F.4th at 812-15.

But applying intermediate scrutiny, rather than strict, ensures that distinctions based on "enduring" and "[i]nherent differences" between the sexes survive. *Virginia*, 518 U.S. at 533 (internal quotation marks omitted). Indeed, such distinctions are, by their nature, substantially related to the relevant governmental interest and have thus been upheld time and time again. Thus, a statutory-rape statute that only prohibited sex with a minor female was constitutional because "young men and young women are not similarly situated with respect to the problems and the risks of sexual intercourse. Only women may become pregnant." *Michael M. v. Superior Court*. 450 U.S. 464, 466, 471 (1981). *accord Nguyen*, 533 U.S. at 58.

In short, biology matters, and legislatures are not required to ignore differences rooted in biology. Rather, when preventing harms unique to one sex, legislatures can and should take sex differences into account.

Thus, in *B.P.J. v. West Virginia Board of Education*, a district court upheld West Virginia's law prohibiting biological males from playing girls' sports, even if they identify as transgender. --- F.Supp. 3d ----, 2023 WL 111875 at *7 (S.D.W. Va. Jan. 5, 2023). This was because "[w]hether a person has male or female sex chromosomes," not what gender he or she identifies as, "determines many of the physical characteristics relevant to athletic performance." *Id.* And "males [generally] outperform females because of inherent physical differences between the sexes." *Id.* To further its "interest in providing equal athletic opportunities for females," the State could "legislate sports rules" based on biological sex. *Id.* at *7-8. So too can Arizona.

Because the Save Women's Sports Act passes rational basis and heightened scrutiny review under the Equal Protection Clause, Count I of the Plaintiffs' Complaint should be dismissed.

II. Title IX Permits Separating School Sports Teams By Biological Sex

The Plaintiffs' Title IX claim must be dismissed because Title IX specifically authorizes separating students based on biological sex. Because Title IX specifically contemplates sex-based treatment, it is not a violation of Title IX for schools to act accordingly. In other words, if Title IX allows schools to separate sports, living facilities, and bathrooms based on biological sex, then it could not simultaneously make it unlawful to exclude opposite-sex individuals, no matter how they identify.

As an initial matter, and dispositive here, the Ninth Circuit has held that "Title IX authorizes sex-segregated facilities." *Parents for Priv. v. Barr*, 949 F.3d 1210, 1227 (9th Cir. 2020). Indeed, Congress was crystal clear in its intent that Title IX not be used to force schools to mix students of different sexes: "[n]otwithstanding anything to the contrary contained in [Title IX], nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes." 20 U.S.C. § 1686 (West)

The federal government's Title IX regulations make this even clearer: schools "may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex." 34 C.F.R. § 106.33. And with specific regard to sports teams, schools "may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport." 34 C.F.R. § 106.41.

Shortly after enacting Title IX, Congress passed the Javits Amendment, instructing the Secretary of Health, Education, and Welfare to publish regulations implementing the provisions of Title IX, "which shall include with respect to intercollegiate activities reasonable provisions considering the nature of the particular sports." Public Law 93–380 (HR 69), § 844, 88 Stat 484, 612 (Aug. 21, 1974). Congress reserved the right to review the regulations following publication to determine whether they were "inconsistent with the Act from which they derive their

authority." *Id.* (cleaned up). The Secretary of Health, Education, and Welfare subsequently published the Title IX regulations, including regulatory text identical to the current text of the Department's athletics regulations. *Compare Nondiscrimination on the Basis of Sex Under Federally Assisted Education Programs and Activities*, 40 Fed. Reg. 24,128, 21,142–43 (June 4, 1975) with 34 C.F.R. § 106.41. After Congressional review, including over six days of hearings, Congress allowed the regulations to go into effect. *See McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 287 (2d Cir. 2004) (laying out the history of the Javits Amendment and the response from Congress to the regulations promulgated thereunder).

Congress thus confirmed that the Title IX regulations were "consistent with the law and with the intent of the Congress in enacting the law." *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 532 (1982) (citation omitted). Those regulations have stood for nearly 50 years without substantive change. Indeed, "[w]here an agency's statutory construction has been fully brought to the attention of the public and the Congress, and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned." *Id.* at 535 (cleaned up).

The meaning of "sex" under Title IX and its regulations is not left up to the Plaintiffs. Instead, what matters is the word's "ordinary public meaning" at the time of Title IX's enactment. *Bostock*, 140 S. Ct. at 1738. And no one can dispute that Title IX's reference to sex means biological sex, just as *Bostock* did not deny—indeed, based its decision on—the premise that Title VII's reference to sex means biological sex. *See B.P.J.*, 2023 WL 111875, at *9 ("There is no serious debate that Title IX's endorsement of sex separation . . . refers to biological sex.").

Consequently, current Title IX regulations validly and authoritatively clarify Congress's view of a recipient's non-discrimination duties under Title IX in the case of sex-specific athletic teams, prohibiting discriminating based on sex with respect to

providing athletic programs or activities, permitting sex-segregated teams for competitive activities or contact sports, and obligating provision of equal athletic opportunity for members of both biological sexes, male and female. 34 C.F.R. § 106.41. Statutory text and regulatory history make it clear that if a school chooses to provide "separate teams for members of each sex" under 34 C.F.R. § 106.41(b), then it must separate those teams solely based on biological sex and not based on gender identity.

At the time of Title IX's adoption, "sex" meant biological sex. *See Adams*, 57 F.4th at 811–12; *see* 20 U.S.C. § 1681(a)(2) (referring to "both sexes"); *id.* § 1681(a)(6)(B) (referring to "men's" and "women's" associations as well as organizations for "boys" and "girls" in the context of organizations "the membership of which has traditionally been limited to persons of one sex"); *id.* § 1681(a)(8) (referring to "students of one sex" and "students of the other sex"); *see also Bostock*, 140 S. Ct. at 1738–39 ("we proceed on the assumption that 'sex' [in Title VII] signified ... biological distinctions between male and female").

The Supreme Court emphasized in *Bostock* that "the same judicial humility that requires [courts] to refrain from adding to statutes requires [courts] to refrain from diminishing them." 140 S. Ct. at 1753. Title IX and federal regulation explicitly approve of sex-segregated school facilities and sports teams. *Bostock* requires that these statutes and regulations not be "diminish[ed]." Plaintiffs ask the Court to diminish Title IX when even the *Bostock* court itself explained that doing so would be improper. Here, Congress and the Department of Education have expressly addressed Plaintiffs' situation in the plain terms of the statute and regulation. And that "should be the end of the analysis." *Id.* at 1743 (citation omitted).

Sex is real. It "is not a stereotype." *Adams*, 57 F.4th at 813. *Bostock* itself "proceed[ed] on the assumption" that the term "sex," as used in Title VII, "refer[ed] only to biological distinctions between male and female." 140 S. Ct. at 1739. Not only did *Bostock* proceed on that assumption, it *depends* on the understanding that gender identity is a "distinct concept[] from sex." *Id.* at 1746–47. *Bostock* provided the

hypothetical of "an employer who fires a transgender person" who is biologically male, explaining that "[i]f the employer retains an otherwise identical employee who" is biologically female, "the employer intentionally penalizes a [male] person . . . for traits or actions that it tolerates in a[female] employee" and thus engages in sex discrimination. *Id.* at 1741. This hypothetical in *Bostock* only makes sense if the meaning of "sex" under Title VII refers to biological sex and not gender identity.

As the Eleventh Circuit recently explained, if "sex" includes gender identity, then "the various carveouts" for sex-separated activities like living facilities and sports teams "would be rendered meaningless." *Adams*, 57 F.4th at 813. "[R]eading 'sex' to include 'gender identity'" "would result in situations where an entity would be prohibited from installing or enforcing the otherwise permissible sex-based carve-outs when the carve-outs come into conflict with a transgender person's gender identity"—even though the text of the statute permits *sex*-based carveouts, not "gender identity"-based ones. *Id.* at 814. Living facilities, locker rooms, bathrooms, and sports teams could no longer be separated based on sex; instead, men could enter women's locker rooms, men could compete against women in sports, and men could take women's scholarships. *See Meriwether v. Hartop*, 992 F.3d 492, 510 n.4 (6th Cir. 2021) ("under Title IX, universities must consider sex in allocating athletic scholarships, 34 C.F.R. § 106.37(c)").

Among other things, Congress enacted Title IX to provide and protect athletic opportunities for women and girls by allowing sex-segregated athletics. *See* 34 C.F.R. § 106.41(b); *accord Virginia*, 518 U.S. at 551 n.19 (emphasizing "physiological differences between male and female individuals"); *B.P.J.*, 2023 WL 111875, at *9 ("[B]iological males are not similarly situated to biological females for purposes of athletics."). "It takes little imagination to realize that were play and competition not separated by sex, the great bulk of the females would quickly be eliminated from participation and denied any meaningful opportunity for athletic involvement." *Cape v. Tennessee Secondary Sch. Athletic Ass'n*, 563 F.2d 793, 795 (6th Cir. 1977).

The Supreme Court's precedents confirm the point and emphasize the relevance of sex to Title IX issues. As these precedents explain, sex is an immutable characteristic that implicates enduring, often relevant differences between males and females. *See Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion) ("[S]ex, like race and national origin, is an immutable characteristic determined solely by the accident of birth."); *United States v. Virginia*, 518 U.S. 515, 533 (1996) (Ginsburg, J.) ("Physical differences between men and women, however, are enduring: The two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both." (cleaned up)); *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 73 (2001) ("The difference between men and women in relation to the birth process is a real one."). [1]

The Supreme Court has likewise recognized that governmental policies can and often should recognize the inherent differences between the sexes. "To fail to acknowledge even our most basic biological differences—such as the fact that a mother must be present at birth but the father need not be—risks making the guarantee of equal protection superficial, and so disserving it." *Id.*; *see also, e.g.*, *Virginia*, 518 U.S. at 550 n.19 (explaining that admitting women to VMI "would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements, and to adjust aspects of the physical training programs"); *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 468–69 (1985) (Marshall, J., concurring in the judgment in part and dissenting in part) ("A sign that says 'men only' looks very different on a bathroom door than a courthouse door.").

Where sex provides an appropriate basis for the government to make a distinction—like sports, facilities, and single-sex groups expressly protected by Title

[1]Additional evidence that the federal government historically considered the term "sex" and human biology inextricably linked may be found in the Department of Education's regulations expressly prohibiting discrimination related to pregnancy. 34 C.F.R. § 106.40(b)(1). Discrimination on the basis of pregnancy is necessarily unlawful discrimination on the basis of female physiology and therefore prohibited under Title IX. *See Conley v. Nw. Fla. State College*, 145 F. Supp. 3d 1073, 1077 (N.D. Fl. 2015). Biological males, regardless of their "gender identity" or surgical procedures, forever have one X and one Y chromosome and cannot ovulate or carry and bear children.

IX—a person is not excluded "because of" or "based on" gender identity. Instead, a person is excluded based on sex. Biological males excluded from a girls' sports team are excluded for one reason: because of their biological sex. Their gender identity matters no more than the color of their shoes.

Under both general equal protection and Title IX principles, a plaintiff alleging discrimination must show that he "was treated differently than a similarly situated" person. *Kuhn v. Washtenaw Cnty.*, 709 F.3d 612, 624 (6th Cir. 2013); *see Cleburne*, 473 U.S. at 439 ("The Equal Protection Clause" is "essentially a direction that all persons similarly situated should be treated alike."). Anti-discrimination laws "keep[] governmental decisionmakers from treating differently persons who are in all relevant respects alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992); *cf. Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) ("[W]hether two activities are comparable . . . must be judged against the asserted government interest that justifies the regulation at issue."). Thus, biological males are similarly situated to each other for purposes of these policies. Prohibiting a biological male from participating in girls' sports does not treat similarly situated people differently.

Nor does *Doe v. Snyder* compel a different result. 28 F.4th 103, 114 (9th Cir. 2022). In *Doe*, the Ninth Circuit stated that *Bostock*'s holding about Title VII applied to Title IX. *Doe*, however, is not controlling here for three reasons.

First, *Doe* was not about participation in sports, or even about schools at all. Rather, it was about "coverage for gender reassignment surgeries" under "the Arizona Health Care Cost Containment System (AHCCCS), Arizona's Medicaid program." *Id.* at 106. The only reason Title IX even came up in *Doe* was because the Affordable Care Act (ACA) incorporates Title IX's standards related to discrimination. *Id.* at 114 (quoting "Section 1557 of the ACA," which "provides that 'an individual shall not, on the ground prohibited under ... title IX of the Education Amendments of 1972 ... be excluded from ... any health program of activity"). Title IX and its implementing

regulations specifically allow for sex-segregated sports teams and facilities, while the ACA does not. *Doe* thus has no applicability here,

Second, *Doe* is not controlling precedent. Rather, *Doe* was an interlocutory appeal of a preliminary injunction, and it was decided by a motions panel. The Ninth Circuit was thus only making a preliminary analysis of the plaintiff's likelihood of success, not elucidating controlling precedent.

The Supreme Court has warned that courts should not "improperly equate[] 'likelihood of success' with 'success.'" *Univ. of Texas v. Camenisch*, 451 U.S. 390, 394 (1981). For this reason, in the Ninth Circuit, a motions panel's analysis of the likelihood of success is only a "predictive analysis" that "should not, and does not, forever decide the merits." *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 661 (9th Cir. 2021). "Put differently, the motions panel is forecasting how the merits panel might rule, and its reasoning is 'an additional step removed from the underlying merits.'" *Doe v. San Diego Unified Sch. Dist.*, 19 F.4th 1173, 1177 n.4 (9th Cir. 2021) (quoting *E. Bay*, 993 F.3d at 660-1). Thus, "to the extent that any language in [a] motions-panel's decision could be read as an assessment of the actual merits of the plaintiff's claim, as opposed to his likelihood of success on the merits, such language [is] dicta." *Fish v. Schwab*, 957 F.3d 1105, 1140 (10th Cir. 2020) (cleaned up) (quoting *Homans v. City of Albuquerque*, 366 F.3d 900, 904 n.5 (10th Cir. 2004); *see also United States v. Henderson*, 536 F.3d 776, 778 (7th Cir. 2008) ("Often a motions panel must decide an issue 'on a scanty record,' and its ruling is 'not entitled to the weight of a decision made after plenary submission.'" (quoting *Johnson v. Burken*, 930 F.2d 1202, 1205 (7th Cir.1991)). For this reason, Chief Judge Sutton of the Sixth Circuit recently warned that an appellate decision about a party's likelihood of success on the merits "should be taken with a grain of adjudicative salt. Imperatives of speed in decisionmaking ... do not always translate into accuracy in decisionmaking." *Arizona v. Biden*, 31 F.4th 469, 483 (6th Cir. 2022) (Sutton, C.J., concurring).

Third, even on its face, the *Doe* court's statements about Title IX were not necessary to resolve the case. Those statements were therefore dicta and would not have been controlling even if *Doe* had been a controlling final decision on the merits.

Title IX does not prohibit excluding biological males from girls' sports teams. Rather, it specifically authorizes this practice. The Plaintiffs' Title IX claim must therefore be dismissed.

III. Congress Specifically Excluded Gender Dysphoria from the Protections of the ADA and the Rehabilitation Act

In their third claim, the Plaintiffs claim that gender dysphoria qualifies as a disability under the ADA and the Rehabilitation Act. (Doc. 1 ¶¶ 32-33, 37, 45-46, 52, 57, 59, 81-85.)

But the ADA and the Rehabilitation Act specifically exclude (the "Trans Exclusion") from their definitions of "disability" "transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders." 42 U.S.C. § 12211(b)(1); 29 U.S.C. § 705(20)(F)(i).

The Trans Exclusion originated in a floor amendment proposed by Senators William Armstrong and Orrin Hatch and adopted by consent. 135 Cong. Rec. S10765-01, S10785 (Sep. 7, 1989). When he presented the floor amendment, Senator Armstrong explained it was "a product of a [bipartisan] compromise which we have been working on through the evening." 135 Cong. Rec. at S10785. Senator Armstrong further explained that the Trans Exclusion was meant to be interpreted broadly: "no one should assume that because we have failed to mention something that it is necessarily covered by this admittedly broad bill." *Id.* The original amendment contained a limitation that stated that the exclusions were "as defined by DSM-III-R which are not the result of medical treatment." *Id.*; 135 Cong. Rec. S10954-01, S10961 (Sep. 12, 1989) (ADA as passed by Senate, including "as defined by DSM-III-R").

The House version of the bill did not include the reference to the DSM-III, and the final version adopted by Congress also omitted it. *E.g.,* H.R. Rep. 101-558 ¶ 79 (1990) (Conf. Rep.) (conference report removing DSM-III language); H.R. Rep. 101-596 at 88 (1990) (Conf. Rep.); 136 Cong. Rec. H4582-02, H4605-6 (Jul. 12, 1990); 136 Cong. Rec. H4169-04, H4192 (June 26, 1990).

The Plaintiffs' Complaint and other briefing in this case focus on the definitions of gender identity disorders contained in the latest edition of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders ("DSM" or "DSM-5-TR"). (*E.g.,* Doc. 1 ¶ 32; Doc. 64 at 10.) But such discussion of the DSM obfuscates more than it illuminates and is, in the end, irrelevant, as Congress specifically chose *not* to incorporate the DSM's criteria in the Trans Exclusion. Rather, Congress adopted an intentionally broad definition that includes the Plaintiffs' condition.

Statutory interpretation begins with the text, *Ross v. Blake*, 578 U.S. 632, 638 (2016), and plain text should be enforced "according to its terms." *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010); *see also Bostock*, 140 S. Ct. at 1738. Because the DSM does not form a basis for construing the meaning of the Trans Exclusion, this Court must look to the actual meaning of the words Congress wrote in the Trans Exclusion and not to the DSM.

Much ink has been spilled in recent years analyzing whether a diagnosis of gender dysphoria under the DSM-V-TR fits within the meaning of "gender identity disorders" as stated in the Trans Exclusion. Such analysis is unnecessary, however, because the Trans Exclusion also lists "transsexualism," and that term, as it was understood at the time, is synonymous with "gender dysphoria."

The terms "transsexualism" and "gender identity disorder" are two different terms that were commonly in use in 1990 that both refer to the same thing: gender dysphoria. In "1980 ... the APA, in DSM–III, recognized two main psychiatric diagnoses related to [gender gysphoria], 'Gender Identity Disorder of Childhood' and

'Transsexualism' in adolescents and adults. *Bostock*, 140 S. Ct. 1731, 1773 (2020) (Alito, J., dissenting); *see also Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 661 (9th Cir. 1977) (using "transsexual" to refer to a biological male who was "receiv[ing] female hormone treatments" and had not yet had "anatomical sex change surgery").

This same usage persisted for decades. In 2000, the Ninth Circuit used the term "transsexualism" as a synonym for "gender dysphoria" in no less than three opinions: "gender dysphoria [is] the technical diagnosis for transsexuality," *Schwenk v. Hartford*, 204 F.3d 1187, 1193 (9th Cir. 2000); "gender dysphoria" is "more commonly known as transsexualism," *South v. Gomez*, 211 F.3d 1275 (9th Cir. 2000); and, in referring to a plaintiff who was "a biologically male employee who suffered from gender dysphoria (transsexualism)," *Schumacher v. Gen. Sec. Servs. Corp.*, 230 F.3d 1367 (9th Cir. 2000); *see also Meriwether v. Faulkner*, 821 F.2d 408, 410 (7th Cir. 1987) (referring to the plaintiff as "a pre-operative transsexual suffering from gender dysphoria, a medically recognized psychological disorder," explaining that the plaintiff "has been chemically (although not surgically) castrated as a result of approximately nine years of estrogen therapy"); *Maggert v. Hanks*, 131 F.3d 670, 670 (7th Cir. 1997) (rejecting prisoner's claim that "prison's failure to give him estrogen therapy for a psychiatric condition known technically as gender dysphoria and more popularly as transsexualism is a form of cruel and unusual punishment")

Indeed, that same usage continues to the present. As recently as January of this year, the Ninth Circuit used the terms as synonyms, explaining that a plaintiff "was diagnosed with 'severe and persistent gender dysphoria/transsexualism' in 2012." *Hundley v. Aranas*, No. 21-15757, 2023 WL 166421, at *1 (9th Cir. Jan. 12, 2023).

Furthermore, the Ninth Circuit has already held that the DSM-V's diagnosis of "gender dysphoria" is equivalent to and "replaces the now-obsolete "gender identity disorder" used in the previous edition." *Edmo v. Corizon, Inc.*, 949 F.3d 489, 491 n.2 (9th Cir. 2020).

Circuit precedent binding on this Court has thus already established two times over that the Trans Exclusion applies: first, by making clear that "gender dysphoria" and "transsexualism" are synonyms, and second, by holding that a diagnosis of "gender dysphoria" is equivalent to "gender identity disorder." The Trans Exclusion therefore applies, and the Plaintiffs' third claim for relief must therefore be dismissed.

Conclusion

Accordingly, for the foregoing reasons, the Parent Representatives' motion to dismiss should be granted.

Respectfully submitted this 30th of June, 2023.

America First Legal Foundation

By: /s/ *James K. Rogers*

James K. Rogers (No. 027287)
611 Pennsylvania Ave., SE #231
Washington, D.C. 20003
Attorney for Proposed Defendant-Intervenors Anna Van Hoek, Lisa Fink, Amber Zenczak, and Arizona Women of Action

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of June, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the District of Arizona using the CM/ECF filing system. Counsel for all Defendants who have appeared are registered CM/ECF users and will be served by the CM/ECF system pursuant to the notice of electronic filing.

/s/ *James K. Rogers*
Attorney for Proposed Defendant-Intervenors Anna Van Hoek, Lisa Fink, Amber Zenczak, and Arizona Women of Action