No. 23-16026 c/w No. 23-16030

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellees,

v.

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

Defendants-Appellants,

and

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

Intervenor-Defendants-Appellants.

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

BRIEF OF ANNA VAN HOEK, LISA FINK, AMBER ZENCZAK, AND ARIZONA WOMEN OF ACTION AS AMICI CURIAE IN SUPPORT OF APPELLANTS AND REVERSAL

Gene P. Hamilton
James K. Rogers
America First Legal Foundation
611 Pennsylvania Ave., SE #231
Washington, D.C. 20003
Phone: (202) 964-3721
Gene.Hamilton@aflegal.org
James.Rogers@aflegal.org

Attorneys for Amici Anna Van Hoek, Lisa Fink, Amber Zenczak, and Arizona Women of Action

Corporate Disclosure Statement

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, amicus curiae USA Women of Action (d/b/a "Arizona Women of Action") states that it is a non-profit 501(c)(3) organization. Amicus curiae USA Women of Action has no corporate parent and is not owned in whole or in part by any publicly held corporation.

The remaining amici curiae are individuals.

Table of Contents

TABLE OF AUTHORITIES

CASES

STATUTES

FEDERAL RULES

OTHER AUTHORITIES

Pursuant to Federal Rule of Appellate Procedure 29 and Ninth Circuit Local Rule 29-2, Anna Van Hoek, Amber Zenczak, Lisa Fink, and USA Women of Action (d/b/a "Arizona Women of Action") respectfully submit this brief as *amici curiae* in support of Defendants-Appellants and Intervenor-Defendants-Appellants. All parties have consented to this filing.

Introduction and Interest of Amici Curiae[1]

The amici curiae (collectively, the "Parent Representatives") have a strong interest in defending Arizona's Save Women's Sports Act, A.R.S. § 15-120.02. They offer a critical and unique perspective: that of Arizona parents and their student-athlete daughters who support the Save Women's Sports Act and are directly affected by the presence of biological males on girls' sports teams. The Parent Representatives are not yet parties to this case, but they filed on June 30, 2023, a motion to intervene that is still pending before the district court. (*See* Doc. 98 and 138.)

[1] Per Fed. R. App. P. 29(a)(4)(E), no counsel for any party authored this brief in whole or in part, and no person or entity, other than amici and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

Amicus curiae Anna Van Hoek is a resident of Gilbert, Arizona. She has one 13-year-old daughter who is still a minor and another daughter who is 18. 2-ER-92-94, Decl. of Anna Van Hoek ("Van Hoek Decl.") ¶¶ 1-2, 6.[2] This school year, her daughter will attend high school in the Chandler Unified School District and play softball on the school team, which participates in the Arizona Interscholastic Association (AIA). She attended middle school in the Higley Unified School District and played softball on a team that also participates in the AIA. She has played on girls' sports teams since she was nine and on school teams since seventh grade. *Id.* ¶ 3.

Amicus curiae Lisa Fink is a resident of Glendale, Arizona and is the mother of five daughters. 2-ER-87-90, Decl. of Lisa Fink ("Fink Decl.") ¶ 1. Her 17-year-old daughter plays volleyball on a girls' team at a publicly funded charter school in Phoenix, Arizona. *Id.* ¶ 2. Mrs. Fink is the coach of the team. *Id.* ¶ 4. Her daughter has played volleyball since

[2] This declaration, and the following three declarations were all originally filed with the district court in conjunction with the Parent Representatives' Motion to Intervene in the District Court. (*see* 2-ER-69-94.)

she was 11. *Id.* ¶ 4. Mrs. Fink's daughter's school is "a member of the Canyon Athletic Association (CAA), an Arizona non-profit that organizes and facilitates interscholastic activities among its members. CAA member schools include charter schools [and] public schools." *Id.* ¶ 3.

Amicus curiae Amber Zenczak is a resident of Maricopa, Arizona and is the mother of three daughters, two of whom are still minors. 2-ER-78-85, Decl. of Amber Zenczak ("Zenczak Decl.") ¶¶ 1-2. Her "middle daughter is 14 years old and will enter ninth grade this school year. She has played on girls' sports teams in school since she was 11. She plays on her school's teams for soccer and basketball and is also considering adding tennis and track this year." *Id.* ¶ 4. Her "youngest daughter is 13 years old and will enter eighth grade this school year. She has played on girls' sports teams in school since she was nine years old.... She plays on her school's basketball, softball, and soccer teams and plans to do track and field in high school." *Id.* ¶ 5. The girls' school is a member of the CAA.

All three mothers have long supported the Save Women's Sports Act. 2-ER-89-90, Fink Decl. ¶¶ 10-11; 2-ER-81-82, Zenczak Decl. ¶ 16; 2-ER-94, Van Hoek Decl. ¶ 10. For example, Mrs. Fink "believe[s] that it is

very important for maintaining the integrity and value of girls' sports in our state." 2-ER-90, Fink Decl. ¶ 11. Mrs. Fink has "advocated for [the Act] since the Arizona Legislature first started considering it as a bill." *Id*. Her advocacy included seeking "witnesses to testify in support of the bill" and "coordinat[ing] support for the bill by, among other things, encouraging members of the community to ... submit comments in support of the bill and also to email and call legislators in support of the bill." *Id.* Ms. Zenczak "gave a speech to an Arizona Senate committee in favor of the Act." 2-ER-81, Zenczak Decl. ¶ 16.[3] Ms. Van Hoek has "spoken out in favor of [the Act] since the legislature first started considering it." 2-ER-94, Van Hoek Decl. ¶ 10.

All three mothers "know many parents in [their] communit[ies] who feel the same way" in supporting the Act "but are reluctant to come

[3] Consideration of Bills: Hearing on S.B. 1165 Before S. Comm. on Judiciary, Jan. 20, 2022, 55th Leg., 2d Reg. Sess., 18:05-20:15 (Ariz. 2022), https://www.azleg.gov/videoplayer/?eventID=2022011057. (testimony of Ms. Zenczak before Arizona Senate Judiciary Committee); *Anderson v. Holder*, 673 F.3d 1089, 1094 n.1 (9th Cir. 2012) (stating that "[l]egislative history is properly a subject of judicial notice" and that courts "may take judicial notice of records and reports of administrative bodies" (cleaned up)).

forward because they are scared of the potential backlash, both online and in the real world, from activists who oppose the law." 2-ER-94, Van Hoek Decl. ¶ 10; *see also* 2-ER-89, Fink Decl. ¶ 10; 2-ER-81-82, Zenczak Decl. ¶ 16.

Amicus USA Women of Action "started in October 2020 as a text chain of 8 action-oriented women with a shared love of America and a passion for reviving communities and protecting families. It formally organized a political action committee on March 24, 2021 and then formally incorporated as a domestic nonprofit corporation on November 8, 2021." 2-ER-70-76, Decl. of Kimberly J. Miller (Miller Decl.) ¶ 2. It conducts business under the name Arizona Women of Action ("AZWOA"), which it has registered with the Arizona Secretary of State's Office as a trade name. *Id.* ¶¶ 3-4.

"AZWOA has grown into one of the largest and most effective grassroots organizations in the State of Arizona. AZWOA maintains an active email list with over 2,700 subscribers," who have a very high engagement level. *Id.* ¶ 5. "AZWOA also has about 13,700 followers

across its social media platforms.... [T]he PAC and the 501(c)(4) have collectively received donations from 645 individuals and entities." *Id.*

AZWOA's "donors, subscribers, and followers ... view AZWOA as the public voice for their concerns" because they "feel unable to express their views in private discussions, let alone in public debates, because of the risk of online and real-world backlash, including the threat of violence" caused by "the contentious and polarized nature of modern public discourse." *Id.* ¶ 6. "As an organization that speaks for Arizona women and mothers, AZWOA has a particular focus on improving education and on helping children, and one of its three main purposes is to revive the American dream of thriving kids." *Id.* ¶ 7. AZWOA established itself as "an important and prominent voice in challenging policies that it views as harmful to biological girls." *Id.* ¶ 8. "AZWOA has always been a vocal supporter of the Save Women's Sports Act," using "email newsletter and social media platforms to encourage ... donors, subscribers, and followers to contact their legislators" and then-Governor Ducey to support it. *Id.* ¶ 12.

Argument

I. The Arizona Legislature's Findings Were Entitled to Deference.

When applying intermediate scrutiny to a statute adopted by a state legislature, this Circuit will not "substitute our own policy judgment for that of the legislature. When policy disagreements exist in the form of conflicting legislative 'evidence,' we 'owe the legislature's findings deference in part because the institution is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions.'" *Pena v. Lindley*, 898 F.3d 969, 979 (9th Cir. 2018) (cleaned up) (quoting *Turner Broad. Sys., Inc. v. F.C.C.*, 520 U.S. 180, 195; *see also Hecox v. Little*, --- F.4th ----, 2023 WL 5283127, at *17 (9th Cir. Aug. 17, 2023) ("Of course, when applying heightened scrutiny, we 'must accord substantial deference to the predictive judgments' of legislative bodies." (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665 (1994)).

"It is not [courts'] function to appraise the wisdom of [a state's] decision ... instead, the state must be allowed a reasonable opportunity

to experiment with solutions to admittedly serious problems." *Pena*, 898 F.3d at 980 (cleaned up).

The district court applied intermediate scrutiny to the Save Women's Sports Act. 1-ER-27-28 ("Heightened scrutiny is an intermediate scrutiny.... [T]he Court applies heightened scrutiny to the Act.) The district court went on to conclude that because it was applying intermediate scrutiny, "[t]herefore, the Court ... does not defer to legislative judgment." 1-ER-28. However, the district court only cited one authority in support of that proposition, *SmithKline Beecham Corp. v. Abbott Lab'ys*, and that case never actually says that courts applying intermediate scrutiny should not defer to legislatures. 740 F.3d 471, 483 (9th Cir. 2014). Rather, *SmithKline Beecham* merely says that laws analyzed under intermediate scrutiny review are not accorded the "strong presumption" of constitutionality and the "'extremely deferential' posture" that they would receive under rational basis review. *Id.*

The district court failed to accord the proper deference to the Arizona legislature required by this Court's precedents and by the Supreme Court. Indeed, the only place where the Supreme Court has said

that such deference is *not* required is in the context of the Second Amendment: "[b]ut while that judicial deference to legislative interest balancing is understandable—*and, elsewhere, appropriate*—it is not deference that the Constitution demands here [in the Second Amendment context]." *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2131 (2022).

Rather, in this case, the district court did exactly what this Court commanded *not* be done—it "substitute[d] [its] own policy judgment for that of the legislature" and, in the face of "conflicting legislative evidence," it gave no deference at all to the "the legislature's findings," even though the legislature "is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions.'" *Pena*, 898 F.3d at 979 (cleaned up).

"[I]n the face of policy disagreements, or even conflicting legislative evidence," the district court was required to "'allow the government to select among reasonable alternatives in its policy decisions.'" *Id.* at 980 (quoting *Peruta v. Cty. of San Diego*, 824 F.3d 919, 944 (9th Cir. 2016) (en banc) (Graber, J., concurring)). The district court utterly failed to do

so. Because the Arizona legislature's "evidence fairly supported its conclusions," the district court erred when it held that the plaintiffs were likely to succeed on the merits. *Id.* (cleaned up). Indeed, the district court's failure to accord the proper deference to the Arizona legislature is by itself reason enough to reverse and remand.

A. The Arizona Legislature's Findings Were Thorough and Based on Sound Evidence.

In adopting the Save Women's Sports Act, the Arizona legislature made comprehensive findings supported by extensive citations to peer-reviewed academic literature. Those findings included the following legislative determinations:

> 1. "With respect to biological sex, one is either male or female." Arnold De Loof, Only Two Sex Forms but Multiple Gender Variants: How to Explain?, 11(1) COMMUNICATIVE & INTEGRATIVE BIOLOGY (2018), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5824932.
>
> 2. A person's "sex is determined at [fertilization] and revealed at birth or, increasingly, in utero." Lucy Griffin et al., Sex, gender and gender identity: a re-evaluation of the evidence, 45(5) BJPSYCH BULLETIN 291 (2021), https://www.cambridge.org/core/journals/bjpsych–bulletin/article/sex–gender–and–gender–identity–a–reevaluation–of–the–evidence/76A3DC54F3BD91E8D631B93397698B1A.
>
> 3. "[B]iological differences between males and females are determined genetically during embryonic development." Stefanie

Eggers & Andrew Sinclair, Mammalian sex determination—insights from humans and mice, 20(1) CHROMOSOME RES. 215 (2012), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3279640....

5. There are "'[i]nherent differences' between men and women," and that these differences "remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity." United States v. Virginia, 518 U.S. 515, 533 (1996).

6. In studies of large cohorts of children from six years old, "[b]oys typically scored higher than girls on cardiovascular endurance, muscular strength, muscular endurance, and speed/agility, but lower on flexibility." Konstantinos Tambalis et al., Physical fitness normative values for 6–18–year–old Greek boys and girls, using the empirical distribution and the lambda, mu, and sigma statistical method, 16(6) EUR J. SPORT SCI. 736 (2016), https://pubmed.ncbi.nlm.nih.gov/26402318. See also, Mark J Catley & Grant R Tomkinson, Normative Health-related fitness values for children: analysis of 85347 test results on 9–17 year old Australians since 1985, 47(2) BRIT. J. SPORTS MED. 98 (2013), https://pubmed.ncbi.nlm.nih.gov/22021354.

7. Physiological differences between males and females relevant to sports performance "include a larger body size with more skeletal-muscle mass, a lower percentage of body fat, and greater maximal delivery of anaerobic and aerobic energy." Øyvind Sandbakk et al., Sex Differences in World–Record Performance: The Influence of Sport Discipline and Competition Duration, 13(1) INT'L J. SPORTS PHYSIOLOGY & PERFORMANCE 2 (2018), https://pubmed.ncbi.nlm.nih.gov/28488921....

9. There is a sports performance gap between males and females, such that "the physiological advantages conferred by biological sex appear, on assessment of performance data, insurmountable." [Emma N. Hilton & Tommy R. Lundberg, Transgender Women in

> the Female Category of Sport: Perspectives on Testosterone Suppression and Performance Advantage, 51 SPORTS MED. 199 (2021), https://doi.org/10.1007/s40279–020–01389–3.] at 200.
>
> 10. While classifications based on sex are generally disfavored, the Supreme Court has recognized that "sex classifications may be used to compensate women for particular economic disabilities [they have] suffered, ... to promote equal employment opportunity, ... [and] to advance full development of the talent and capacities of our Nation's people." United States v. Virginia, 518 U.S. 515, 533 (1996) (internal citations and quotation marks omitted).
>
> 11. One place where sex classifications allow for the "full development of the talent and capacities of our Nation's people" is in the context of sports and athletics….
>
> 14. Having separate sex-specific teams furthers efforts to promote sex equality by providing opportunities for 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 endeavors.

(2-ER-98 to 100 (text of the Save Arizona Women's Sports Act).

Key to the district court's decision was its claim that there are only "small differences" in the athletic performance between pre-pubertal biological boys and girls and that there are only "minor differences in physical fitness scores for prepuberty boys compared to girls." 1-ER-19-20. These statements by the district court completely mischaracterized

the evidence before it and ignored the Arizona legislature's factual findings, which were entitled to deference.

For example, one of the peer-reviewed academic papers on which the Arizona legislature heavily relied in making its legislative findings (cited in three of its 14 paragraphs of findings) provides the following facts about the relative athletic performance of pre-pubertal boys and girls:

> An extensive review of fitness data from over 85,000 Australian children aged 9–17 years old showed that, compared with 9-year-old females, **9-year-old males were faster over short sprints (9.8%) and 1 mile (16.6%), could jump 9.5% further from a standing start (a test of explosive power), could complete 33% more push-ups in 30 s and had 13.8% stronger grip.** Male advantage of a similar magnitude was detected in a study of Greek children, where, compared with 6-year-old females, **6-year-old males completed 16.6% more shuttle runs in a given time and could jump 9.7% further from a standing position.** In terms of aerobic capacity, 6- to 7-year-old males have been shown to have a higher absolute and relative (to body mass) VO2max than 6- to 7-year-old females.[4]

[4] Emma N. Hilton & Tommy R. Lundberg, *Transgender Women in the Female Category of Sport: Perspectives on Testosterone Suppression and Performance Advantage*, 51 Sports Med. 199 at 200-201 (2021), https://doi.org/10.1007/s40279–020–01389–3.

Thus, pre-pubertal biological males have an athletic performance advantage that, at its best, is 33% higher than pre-pubertal biological females and, even at its worst, is nearly 10% higher.

The Hilton paper relied upon by the legislature even provides specific explanations about the biological mechanism of action that explains these pre-puberty differences between the athletic performance of biological boys and girls:

> [P]re-puberty performance differences are not unequivocally negligible, and could be mediated, to some extent, by genetic factors and/or activation of the hypothalamic–pituitary–gonadal axis during the neonatal period, sometimes referred to as "minipuberty". For example, some 6500 genes are differentially expressed between males and females with an estimated 3000 sex-specific differences in skeletal muscle likely to influence composition and function beyond the effects of androgenisation, while increased testosterone during minipuberty in males aged 1–6 months may be correlated with higher growth velocity and an "imprinting effect" on BMI and bodyweight.[5]

The same studies cited in the paper that the Arizona legislature considered in adopting the Save Women's Sports Act were part of the record for the preliminary injunction briefing and were before the district court. *See, e.g.*, 2-ER-127-130, 3-ER-381, 386. It defies credulity for the

[5] *Id.*

district court to characterize these major, measurable advantages as "small" or "minor."

There is nothing "small" or "minor" about a one-third performance advantage. Even just based on a neutral evaluation of the evidence before the district court, it would have been an abuse of discretion for the court to find that there were no meaningful differences in the average athletic performance of pre-pubertal biological girls and boys. Yet, because the district court was obligated to weigh the evidence starting from a point of deference to the Arizona legislature, the error is even greater.

The district court ignored its obligation to accord deference to the Arizona legislature's findings. Because it was bound by the requirement to show deference to the legislature, the district court's factual findings are entirely untenable, and the preliminary injunction order should be reversed.

1. The Experience of the Parent Representatives Confirms the Legislature's Factual Findings

The Parent Representatives and their daughters collectively have many years of experience at all levels of athletic competition, and their experience confirms the legislature's factual findings.

Mrs. Fink coaches her daughter's school volleyball team. 2-ER-87-88, Fink Decl. ¶ 2. Mrs. Fink "also played sports as a student." *Id.* ¶ 7. She and her daughter have had years of opportunities "to closely observe both pre- and post-pubescent biological males playing ... sport[s] ... and have been able to observe and compare biological males and females in athletic situations." *Id.* Ms. Van Hoek and Ms. Zenczak, and their daughters, have had similar opportunities to observe the differences between the athletic performance of biological males and females. 2-ER-93-94, Van Hoek Decl. ¶ 8; 2-ER-81, Zenczak Decl. ¶ 13. All three mothers, and their daughters, believe that "biological boys have an innate athletic advantage that would give them an unfair advantage in girls' sports. Because of [their] daughters' longstanding participation in athletics, [they] have been able to observe and compare the athletic performance of biological girls and boys, and [their] observation is that boys enjoy an athletic advantage over girls at all ages, including before puberty." 2-ER-93-94, Van Hoek Decl. ¶ 8; *see also* 2-ER-89, Fink Decl. ¶ 9; 2-ER-81, Zenczak Decl. ¶ 13.

Based on their extensive experience and observation, Mrs. Fink and her daughter "believe that a biological male on their team would have an unfair advantage to be able to get a starting position on the team and achieve other similar benefits and advantages. This would create an environment on the team of disunity and corrosive rivalry. Furthermore, if biological males were allowed to play on" competing teams, "those teams would have an unfair advantage. It would create a strong sense that the competition was not on a level playing field." 2-ER-88, Fink Decl. ¶ 7.

Ms. Zenczak and her daughter believe that "allowing biological males to compete on female teams discriminates against biological females" because "when biological males participate in girls-only sports teams, they have obvious natural advantages that degrade the integrity of the sport and make a fair and level playing field for the biological females impossible." 2-ER-81, Zenczak Decl. ¶ 14. Thus, they see their support of the Save Women's Sports Act "as a fight against discrimination, the same fight women have been fighting since before President Nixon signed Title IX into law in 1972. Allowing biological

males who identify as female to compete in girls' and women's sports will reverse more than 50 years' worth of progress." *Id*.

II. The Arizona Legislature Enacted the Save Women's Sports Act for a Legitimate Purpose and to Address a Real Problem.

A. The Purpose of the Save Women's Sports Act is to Protect Biological Females.

The Save Women's Sports Act is focused entirely on protecting biological females. It was error for the district court to find otherwise. *E.g.,* 1-ER-14 (claiming that "[t]he Act was adopted for the purpose of excluding transgender girls from playing on girls' sports teams").

The plain text of the Save Women's Sports Act is focused entirely on protecting biological females. For example, it specifically creates a private right of action for "[a]ny student who is deprived of an athletic opportunity or suffers any direct or indirect harm as a result of a school knowingly violating this section" or "who is subject to retaliation ... by a school or an athletic association or organization." A.R.S. § 15-120.02(E)-(F).

The legislative history confirms that protecting biological girls was the purpose of the Save Women's Sports Act. In the Senate Judiciary Committee, Senator Warren Peterson explained that he was voting "yes"

because the Act's intent was to protect girls: "kids will be harmed if we don't prevent this.... This bill protects our daughters and our granddaughters."[6]

Senator Nancy Barto, the bill's sponsor, explained to the Arizona House Judiciary Committee that the Save Women's Sports Act "protects opportunities for women and girls in athletics by ensuring them a level playing field. That's the goal of the bill. Ignoring biological realities hurts girls and women.... [The bill] provides a scientifically based way to ensure all students have the opportunity to play sports—all girls."[7] The Save Women's Sports Act was focused on *inclusion*, and not exclusion, to "ensure girls have a fair, level playing field."[8]

---

[6] Consideration of Bills: Hearing on S.B. 1165 Before S. Comm. on Judiciary, Jan. 20, 2022, 55th Leg., 2d Reg. Sess., 1:28:39-1:29:20 (Ariz. 2022), https://www.azleg.gov/videoplayer/?eventID=2022011057.

[7] Consideration of Bills: Hearing on S.B. 1165 Before House Comm. on Judiciary, Mar. 9, 2022, 55th Leg., 2d Reg. Sess., 1:03:12-1:05:00 (Ariz. 2022), https://www.azleg.gov/videoplayer/?eventID=2022031027.

[8] *Id.*

B. The Save Women's Sports Act Addresses a Real Problem that Predated Passage of the Act

The Save Women's Sports Act was enacted to address a problem that already existed before the Act and that the Arizona legislature reasonably anticipated would grow.

The district court thus erred when it stated that "[t]he proponents of the Act fail to provide persuasive evidence of any genuine, not hypothesized problem." 1-ER-22. It also erred when it stated that "the record does not support a finding that prior to the Act's enactment, there was a problem in Arizona related to transgender girls replacing non-transgender girls on sports teams." 1-ER-16.

Rather, the legislative history tells a different story. Senator Barto specifically explained that the legislature felt compelled to act because opportunities for girls were threatened: "Recently, biological males identifying as females have denied girls and women [Title IX] opportunities by competing on women's and girls' sports teams. Female athletes have been denied spots on teams, denied victories, titles, and

potential scholarships because they are being forced to compete against men who have an undeniable physiological advantage."[9]

Senator Barto explained that the bill was in part prompted by policies of the Canyon Athletic Association and the Defendant Arizona Interscholastic Association that "opened the door to this type of unfair play by allowing biological males to play on girls and women's sports teams."[10]

Senator Barto also specifically addressed the scope of the issue: "How widespread is this? The Save Women's Sports website lists at least 75 recorded examples of unfair play. Many athletic associations do not disclose transgender athletes, so there is no way of knowing exactly how many biological males are displacing female athletes overall, but there are examples every day in the news...."[11]

Senator Barto also pointed out that, further compounding the problem, the AIA and CAA had policies allowing biological males to play

---

[9] Consideration of Bills: Hearing on S.B. 1165 Before House Comm. on Judiciary, Mar. 9, 2022, 55th Leg., 2d Reg. Sess., 1:03:12-1:05:00 (Ariz. 2022), https://www.azleg.gov/videoplayer/?eventID=2022031027.
[10] *Id.* at 1:05:00-1:05:38.
[11] *Id.* at 1:05:00-1:05:38.

on girls' teams, but that the two organizations "do not make that information public [about the identities of biological males playing on girls' teams] so that leaves players powerless to address an unfair situation."[12] Thus, without the Save Women's Sports Act, biological girls lacked any means even to address problems of such unfair competition.

As Senator Barto explained, "[t]hey truly are in limbo, so it sets up the horrible situation of inadvertently misidentifying a player. These athletic associations' policies are actually causing these problems and the only way to avoid them is to ensure that only biological females are competing against biological females."[13]

III. The District Court Improperly Ignored the Harm to Biological Females When Biological Males Participate in Girls' Sports.

In addition to the legislative history, the record before the district court also demonstrated that biological males participating in girls' sports was a problem before the Arizona legislature enacted the Save Women's Sports Act and that this was causing harm to biological girls. It was therefore incorrect for the district court to claim that "the record does

[12] *Id.*at 1:18:45-1:19:14.
[13] *Id.*at 1:18:45-1:19:14.

not support a finding that prior to the Act's enactment, there was a problem in Arizona related to transgender girls replacing non-transgender girls on sports teams." 1-ER-16.

The Parent Representatives filed their Motion to Intervene on June 30, 2023. Attached to the motion were declarations from each of the Parent Representatives, some of which detailed specific incidents of harm caused to female student-athletes. Ten days later—on July 10—the district court held its hearing on the PI motion. During that hearing, counsel for the Legislative Leaders expressly referred twice to the Parent Representatives' declarations and their descriptions of problems caused by the participation of biological males in girls' sports.

The first time, counsel stated that "[w]e have declarations in evidence in this case that it's not just a nationwide phenomenon, that some of the declarations submitted by mothers in Arizona as attachments to Document 98 have some case-specific examples in Arizona. These all provide that substantial justification and substantial relationship for the decision that the legislature made." 5-ER-702.

Later, counsel said the following: "And that is something that was important again with the declaration submitted by the Arizona Women for Action group. Those mothers talk about how important that is to their girls and why they would not be a fan of coed teams in many respects." 5-ER-707.

No party objected to these references to the Parent Representatives' declarations. Thus, even though those declarations were not filed as part of the PI motion briefing, they were incorporated into the PI record and were before the district court.

The declarations of Mrs. Fink and Ms. Zenczak demonstrate that biological males playing on girls' teams was already a problem before the Arizona legislature enacted the Save Women's Sports Act.

For Mrs. Fink's daughter, "in 2020, an opposing team had a player who very clearly appeared to be a biological male. The girls on the team came to [Mrs. Fink] as their coach and told [her] that they were very upset about having to compete against a biological male because they felt that this made the game unfair." 2-ER-89, Fink Decl. ¶ 7.

Similarly, last school year, Ms. Zenczak's "youngest daughter's girls' basketball team played a game against another school's girls' team that had one player who was transgender—in other words, this player was a biological male. This transgender player played in a style very different from the norm for girls' basketball. The player was more aggressive than the other players and unnecessarily touched the other players all over the court." 2-ER-80, Zenczak Decl. ¶ 9. This transgender player violently fouled Ms. Zenczak's daughter, but "[t]he referees did not make any calls on this obvious foul," evidently "because of fear of accusations of discrimination and to avoid retaliation from trans activists." *Id.* ¶ 9. "The game was unfair because this player had an obvious inherent advantage—the player ran considerably faster, was noticeably taller, and had a thicker build. All these intrinsic advantages made it hard even for this player's own teammates to keep up… The presence of this player caused noticeable distress and anguish to the biological girls on [Ms. Zenczak's] daughter's team, and even to the other members of the player's own team. It also caused considerable distress and anguish to [Ms. Zenczak] and the other parents at the game." *Id.*

The experience of Ms. Zencak's daughter "permanently changed [her] outlook and approach to sports. She has a persistent fear that she will one day have to compete against biological males for the limited number of spots on her girls' sports team or the limited number of college scholarship opportunities for female athletes." *Id.* ¶ 10. This experience has even affected Ms. Zenczak's older daughter, who has decided "she would refuse to ever play against a team with a biological male on it because of the much greater risk of suffering severe injury that may cause lifelong damage and chronic pain." *Id.* ¶ 11.

Similarly, Ms. Van Hoek's 18-year-old daughter played on girls' soccer teams since she was three and "had realistic hopes that she would get a college soccer scholarship." 2-ER-93, Van Hoek Decl. ¶ 6. However, her local city league did not have girls-only teams for girls older than 15, and she was forced to play on co-ed teams. *Id.* "On her girls' teams, she had been a star player who scored most of the goals as a center striker. On the co-ed team, she was rarely ever even able to touch the ball because the boys dominated the games. She became so discouraged that she ended

up quitting soccer.... Unfortunately, playing with the boys ruined her love for the game and ended her soccer career prematurely." *Id.*

These experiences are not just isolated incidents. A survey of AZWOA email subscribers showed that "[o]ut of the 272 persons who completed the survey.... [t]welve individuals, or 4% of respondents, reported that their daughters had ever played on a sports team with a biological male, and nine respondents, or 3% of respondents, reported having a daughter forced to compete against a team with a member who was a biological male." 2-ER-72-73, Miller Decl. ¶ 9.

Because the district court's decision relied on its (false) premise that there had been no problems with biological males competing against females, it should be reversed.

A. The District Court Committed Error When It Concluded that the Participation of Biological Males on Girls' Sports Teams Does Not Harm Biological Girls.

Beyond just these specific incidents, the harm to biological girls of being forced to compete against and with biological males is not just hypothetical, and the district court improperly ignored those harms. The district court claimed that "[t]he record does not support a finding that

during the 10 to 12 years prior to passage of the Act there was a risk of any physical injury to or missed athletic opportunity by any girl as a result of allowing seven transgender girls to play on sports teams consistent with their gender identity." 1-ER-16.

This statement by the district court is erroneous and misses the mark for three reasons.

First, as explained above, the Parent Representatives *did* provide evidence in the record of biological girls being harmed by the participation of biological males in girls' sports.

Second, the claimed figure of seven transgender students participating in high school sports is likely a significant underestimate of the scope of the issue.

Arizona has two different interscholastic athletic associations—the AIA and the CAA. 2-ER-87, Fink Decl. ¶ 3. The cited figure of seven transgender students only takes into account students in the AIA and thus misses one-half of the major interscholastic sports associations in Arizona. Furthermore, that figure is likely a significant underestimate of the number of transgender students who were playing sports in Arizona

before the passage of the Save Women's Sports Act. At the PI oral argument, Plaintiffs cited that figure as something "AIA officials reported during the legislative hearings." 5-ER-673.

However, the AIA does not appear to have accurate figures about the number of student-athletes playing on a team different than their biological sex because school principals, and not the AIA, make final eligibility decisions for student-athletes. In its response to the Plaintiffs' PI motion, the AIA affirmed that the "AIA does not have control over which students participate in sports or what designations are given to teams" and that "it is the principal of each school that is ultimately responsible in all matters pertaining to interscholastic activities of each school, including student eligibility." (Doc. 51 at 1-2.)

Third, the district court artificially limited its consideration of potential negative consequences only to "physical injury" or "missed athletic opportunity." 1-ER-16.

The Arizona legislature, however, was far broader in the harms it considered. For example, the legislature cited as one justification for the Save Women's Sports Act the fact that "sex classifications allow for the

'full development of the talent and capacities of our Nation's people.'" 2-ER-99 ¶ 11 (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996).

The legislature further explained that its legislative purpose in enacting the Save Women's Sports Act was to "promote sex equality by providing opportunities for 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 endeavors." 2-ER-100 ¶ 14.

The district court completely ignored these other benefits of female athletic participation on which the Save Women's Sports Act was focused. The district court also completely ignored the evidence in the record from the Parent Representatives' declarations demonstrating how this purpose is achieved by separating sports teams based on biological sex.

For all three mothers, "[p]articipating in girls' team sports has dramatically benefited [their] daughters' personal and social development. Their experiences have built their self-confidence and allowed them to experience a type of camaraderie and friendship that

could not be replicated anywhere else. If their teams also included persons born as biological males, virtually all those benefits would evaporate." 2-ER-79-80, Zenczak Decl. ¶ 8; *see also* 2-ER-93, Van Hoek Decl. ¶ 4; 2-ER-88, Fink Decl. ¶ 5.

For example, Ms. Van Hoek explained that the benefits of girls' sports would disappear because "the presence of biological boys creates a significant obstacle to girls achieving their best performance." 2-ER-93, Van Hoek Decl. ¶ 5. Her two daughters have experienced these obstacles firsthand, and her "younger daughter would give up on softball if she were forced to play on a team with biological boys, or to compete against biological boys." *Id.* ¶¶ 5-7.

Mrs. Fink and her daughter "believe that biological females have a right to have their own spaces for socialization and collaboration. Adolescence for biological females is a period of significant physical and mental change" that "can cause significant stress and anxiety for biological females. One of the most important ways that biological girls deal with that stress and anxiety is by supporting each other." 2-ER-89, Fink Decl. ¶ 8. "A biological male on the team would not be able to relate

in the same way with the biological females," however, because "[a] biological male who has been taking puberty blockers or hormones does not go through the exact same process of change and development as a biological female." *Id.* They thus support the Save Women's Sports Act because "[t]he presence of a biological male will destroy the value of the team as a female-only space for girls to socialize and support each other. It will eliminate much of the benefit of having girls-only sports teams." *Id.*

Additionally, for all three mothers, "the prospect of having biological males in female-only spaces, such as locker rooms, makes [their] daughters very uncomfortable. They would feel self-conscious and frustrated by having to change clothes or shower in the presence of a teammate having male genitalia in the locker room." 2-ER-81, Zenczak Decl. ¶ 15; 2-ER-88, Fink Decl. ¶ 6; 2-ER-94, Van Hoek Decl. ¶ 9.

Large numbers of parents have observed the same thing. In AZWOA's survey of email subscribers, 72% said they "would ... consider removing [their] daughter from an all-girls' sports team/league if a biological male participated." 2-ER-72-75, Miller Decl. ¶ 9. The survey

allowed respondents to write additional comments and to express their "thoughts about biological males participating in girls' sports." A number of comments described benefits of girls-only sports that go beyond just injuries or lost athletic opportunities, including the following:

- "enjoyment of sport"
- "Allowing boys to participate in girls' sports reinforces the fallacy that there's nothing unique or special about either gender, and that both are interchangeable."
- "I think many girls will be demoralized and drop out instead of continuing if competing against boys. The sport has prepared my daughter for life and the work force so much, by supporting others on a team to performing under stress."
- "[T]here is no circumstance where male genitalia should ever be present in a locker room, bathroom/restroom, spa or massage area."

Id. ¶ 10.

Conclusion

For the preceding reasons, the amici Parent Representatives urge this Court to reverse the district court's decision.

Dated: September 15, 2023

Respectfully submitted

America First Legal Foundation

By: /s/ *James K. Rogers* .
Gene P. Hamilton
James K. Rogers*
611 Pennsylvania Ave., SE #231
Washington, D.C. 20003
Attorneys for Amici Curiae Anna Van Hoek, Lisa Fink, Amber Zenczak, and Arizona Women of Action

*Application for admission forthcoming, pending approval of Ninth Circuit PACER registration.

Certificate of Compliance for Briefs

9th Cir. Case Number(s): 23-16026 c/w 23-16030

I am the attorney or self-represented party.

This brief contains 6296 words, including 0 words manually counted in any visual images, and excluding the items exempted by FRAP 32(f). The brief's type size and typeface comply with FRAP 32(a)(5) and (6).

I certify that this brief *(select only one)*:

[ ] complies with the word limit of Cir. R. 32-1.

[ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

[X] is an **amicus** brief and complies with the word limit of FRAP 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

[ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

[ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:

[ ] it is a joint brief submitted by separately represented parties.

[ ] a party or parties are filing a single brief in response to multiple briefs.

[ ] a party or parties are filing a single brief in response to a longer joint brief.

[ ] complies with the length limit designated by court order dated _____.

[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature s/*James Rogers* **Date** **September 15, 2023**