

Questions from
Senate Education Committee
Members

On **SB208**-Creating the fairness in women's sports act to require that female student athletic teams only include members who are biologically female.

Does this bill disallow a biological male from participating in men's sports?

From Matt Sharp - No. Under this bill, biological males—regardless of whether they identify as male, female, or non-binary—will continue to be allowed to participate on men's teams and on coed teams. The bill simply limits biological males from participating on female teams.

From Tom Witt- First, this bill bans transgender and gender-nonconforming students from participating in sports as the gender by which they identify. Second, "biological male" is not a term that has a clear medical or physiological definition (see below).

From Kendall Hawkins- This bill would force transgender girls to play in men's sports, leading to further harassment and bullying against them. If their only choice is between being bullied and harassed or not participating in athletics, then there is really no choice at all. The outcome would be that transgender girls would be discouraged from joining sports due to the hostile climates they would face, thus depriving them of all the benefits of participation in athletics.

If you look in my written testimony, you will find the following information and accompanying cited sources:

" GLSEN found in its research that "on a 4.0 scale, LGBTQ+ student athletes have a GPA that is 0.2 points higher than students who did not participate in athletics. LGBTQ+ team leaders have a GPA that is 0.4 points higher than their peers who did not participate in athletics. Further, 56% of LGBTQ+ team members and 66% of LGBTQ+ team leaders competing in high school sports report feeling a positive sense of belonging at school."

This legislation, and other legislation like it, would also lead to higher rates of suicide among transgender students.

"...over 90% of LGBTQ youth said that recent politics negatively influenced their well-being..."

"...52% of transgender and non-binary students reported having seriously considered suicide in the last 12 months."

"...a peer-reviewed study...found that transgender and nonbinary youth who reported experiencing discrimination based on their gender identity had more than double the odds of attempting suicide in the past year compared to transgender and nonbinary youth who did not experience gender identity-based discrimination."

While policies such as this proposed bill have been shown to increase suicide risk among LGBTQ students, gender affirming policies at the state level have the opposite effect and actually reduce suicide risk among transgender students.

"...a recent study conducted by researchers at Wichita State University showed that state-level policies supporting LGBTQ equality are associated with a reduced risk of suicide among LGBTQ youth."

From Idaho Representative Barbara Ehardt- No. It clearly delineates for whom sports are designated. Boys & men // Girls & women // Coed

This bill does, however, continue to follow Title IX precedent, as intended, over the last 48 years. This allows girls to try out for boy's teams when a similar option is not offered for girls. For example, a girl could not continue to play baseball in high school if that high school offered a softball team. BUT, if football were offered for the boys and not for the girls, then she could try out for football. In the same vein, a boy could not try out for the volleyball team BECAUSE of his physiological advantages. This has previously been recognized in the courts.

From Kyle Velte- The term "biological" sex is vague and open to several definitions. Its vagueness is one of the problems it will face when challenged in court. Please see my response to the next question for more on this issue. However, to the extent that the question suggests that transgender girls are "biological males" that is incorrect. Trans girls are girls. So, asking what the bill does vis-à-vis "biological males" is not relevant.

Kansas schools already have separate teams for boys and girls in some contexts, like high school sports. This bill does nothing to change that.

How does the state define a woman or girl?

From Matt Sharp - First, SB 208 focuses specifically on "biological sex" as the determining factor of whether a student is eligible to participate on female sports teams. No one disputes the meaning or common understanding of biological sex. As Section 2(b) of SB 208 explains, whether a person's biological sex is male or female is determined by "chromosomal and hormonal differences" and "physiological differences."

Second, there are other instances in Kansas state law where special protections are given to members of the female sex. For example, K.S.A. § 21-5431 outlaws performing any female genital mutilation procedure on "a female under 18 years of age." The meaning of "female" for purposes of § 21-5431 is the same as the meaning of "female, women or girl" for purposes of SB 208—both instances are referring to members of female biological sex.

From Tom Witt- I don't believe there is a statutory definition.

From Idaho Representative Barbara Ehardt- **Idaho has slightly different language where we specify the three areas that determine one's sex. These include physiological, chromosomal and hormonal and any option would work. This could include a blood & urine test which are common and not invasive. A genetic swab of the cheek is not invasive either and none of these costs very much. The physiological determination can literally be done by a doctor during a high school physical while simply asking questions that are already on the form. These questions include:**

IDHSAA Medical Form: this form essentially asks six questions that would require a doctor to know certain things about a biological girl or boy. This would be done without even listening to the athlete's heartbeat. The first question requests that the athlete state their sex. Then the rest of the questions are listed.

1) on the top line, sex – Male / Female?

- 2) Q#1 – have you ever been hospitalized or had surgery?
- 3) Q#2 – are you taking any medication or pills?
- 4) Q#14 – were you born without a kidney, testicle, or any other organ?
- 5) Q#15 – when was your first, last & longest time between menstrual cycle?
- 6) On the 2nd page is the proverbial male “cough” test.

From Kyle Velte- The state is not, and should not, be in the business to be defining who is a girl, woman, boy or man. Medicine and science decide that. The legal definition of “sex” should then be informed by what medicine and science teach us.

Here is an excerpt from one of my law review articles, titled Mitigating the “LGBT Disconnect”: Title IX’s Protection of Transgender Students, Birth Certificate Correction Statutes, and the Transformative Potential of Connecting the Two, 27 AM. U. J. GENDER SOC. POL’Y & L. 29 (2019) (I have omitted the footnotes from this for ease of reading, but will include the entire article in my response to the email that transmitted these questions):

Sex is most often determined at birth and is based on biology, often solely using external indicators, particularly, genitalia: people born with a penis are assigned “male” as their sex and people born with a vagina are assigned “female” as their sex. Sex based on genitalia is the basis for “legal sex”--the “M” or “F” on a person’s birth certificate. The essentialism of legal sex--boiling sex down to one factor (external genitalia at birth)--stands in stark contrast to the determination of sex by medical professionals, who consider a variety of factors before declaring someone’s biological sex. In medicine, “there is no simple or singular test for biological sex[,]” rendering law’s construction of legal sex incorrect as a matter of fact and thus flawed as a matter of law and policy. The flawed construction of legal sex is exacerbated by the fact that it fails to recognize that one’s legal sex may not align with one’s gender identity.

...

Recent scientific research reveals that gender identity is informed by a myriad of factors, not just a person’s genitalia. One scholar describes the advances that modern science has made in understanding sex and its connection to gender identity:

It is in the brain that individual identity lies, and indeed, gender identity. Scientists aided by powerful imaging technologies have discovered that there are slight, but noticeable differences in brain structure between the male and female brain. Scientists have also discovered that transgender individuals, both before and after hormone therapy, have brains that correspond more to their identified gender than to their genetic or anatomic sex ... Gender is truly between the ears, not between the legs.

Sometimes referred to as “brain sex,” it is beyond dispute that gender identity is fixed at birth and has a biological basis. The most recent research suggests that the biological underpinnings of gender identity are strongly influenced by the prenatal environment--specifically the exposure of the developing brain to particular hormones. This research has transformative potential:

The significance of these studies is hard to understate: if neurological structures in the brain are sexually dimorphic, and if transgender individuals have neurological structures in their brain that correspond to the opposite sex, then transgender individuals are arguably ... neurologically intersex. Phrased as “neurological intersexuality,” transgenderism is removed from the realm of mental health completely, and placed into the purview of pure physical medicine. Further, a

neurological basis for gender identity establishes it as an innate trait, which would then facilitate greater legal protection for transgender individuals.

The conclusion to be drawn from these studies is that “sex” should be defined and determined by one’s gender identity. Thus, for all people, including transgender people, gender identity must carry the day in determining someone’s sex, rather than sex assigned at birth based on external genitalia. Relying on gender identity rather than sex assigned at birth is critical for people to live integrated, whole, and psychologically healthy lives, and, for children, to academic success. In short, gender identity is what constitutes a person’s sex, whether you are a transgender person or a cisgender person, and the law should reflect that reality.

The fact that medicine considers a myriad of factors means that the phrase “biological sex” is both a term of art and is multifaceted. The bill as written narrows the definition to only three aspects, contrary to medicine. The forgoing passage, moreover, suggests that gender identity should be the lodestar for defining legal sex. Legislators should thus proceed with caution when using the phrase “biological sex” in statutes, especially when what they are referring to is gender identity.

Would a young female athlete be disadvantaged in receiving an athletic scholarship if she who would otherwise have won races, been a top scorer in a sport or played more minutes in a game were it not for a biological male or males competing?

From Matt Sharp- Yes, in at least three ways. First, college scouts watching a sporting event are going to focus on who has the fastest time or demonstrates the greatest athletic ability. In most sports, a comparably fit and trained biological male competing on a female team is almost certainly going to have the fastest time and superior athletic ability. The scout is going to be more focused on that male’s performance—and naturally more likely to recruit the male and offer him a scholarship—than the other females competing.

Second, college scouts rarely attend every local track competition. Rather, they attend the state or regional championships where the best of the best compete. Unfortunately, the presence of biological males in female sports means that some girls will be denied the opportunity to advance to state or regional championships and be seen by the college scouts who attend those events. Those girls will never have the chance to demonstrate their abilities to those college scouts, much less be considered for the scholarships they award.

Finally, allowing biological males in female sports means that some girls will never even get a spot on the team. Most sport teams limit the number of participants on the team itself, and they also put limits on the number of competitors that can be on the field or compete in a given competition. Every male that takes a spot on a female team is going to mean that some girl doesn’t make the team or get the chance to compete in a game. She will never even be seen by a college scout.

From Brittany Jones- Yes, as we have seen across the country, when biological females are forced to compete against biological men in events like powerlifting, basketball, and track field girls lose. They have lost scholarships, championships, and future athletic opportunities.

From Tom Witt- According to KSHSAA, there are only five transgender high school athletes in Kansas out of the 115-120K student athletes in the state. These students COULD be on quiz bowl or forensics teams, as those are also governed by KSHSAA. Fewer than 0.00004% of student athletes in Kansas are

transgender – a number which would include transgender boys as well as transgender girls. The statistical likelihood of trans girls dominating girls' sports and taking away scholarship opportunities from cisgender girls is improbable. You can add to that the understanding of the biological effects of puberty blockers and/or estrogen therapy that prevents trans girls from having any physical advantage that comes from testosterone. In addition, the historical data shows us that trans girls just don't dominate in sports like people fear they might.

From Idaho Representative Barbara Ehardt- Absolutely yes! One need only to see that which has occurred in Connecticut and the female girls that were forced to run against the 2 biological male athletes. In less than 18 months, the 2 biological male athletes won 85 championships and 15 state titles that had previously been held by 9 gals achieved over years. These biological males prevented the gals from competing on a fair playing field and took spots and opportunities away from the girls and thus the chance to be seen and compete for scholarships.

The same thing occurred in Idaho when a biological male athlete who competed for the University of Montana for 3 years decided to compete on the Women's team his last year as June. During the Big Sky Championships, June Eastwood absolutely annihilated our women in the mile. June also helped the Grizz win the distance medley relay. June brought her team back from ninth to a second-place finish. This is not fair, and girls and women simply cannot compete against the inherent physiological advantages that biological boys and men possess.

Furthermore, too many people look at the addition of one biological male athlete on the girl's team myopically. They falsely reason that 'it's just one boy and he's only displacing the worst girl on the team. She'll probably be cut next year.'

Though this may be true, depriving a girl of her opportunity and the lessons that she would learn that would benefit her the rest of her life is not a price worth paying. But some are thinking that the argument ends here. Except it doesn't.

The addition of that biological male athlete now systematically changed the entire dynamics of the team. The gal who might have been the leading scorer or most valuable player now will be regulated to a supporting role – just as everyone else will get bumped down to a new role. But it still doesn't stop there. Every team that they now play will be forced to forego the plans that they normally use when facing girls of equal physiological and chromosomal ability.

All of this is still thinking myopically because only one biological male athlete is being considered. If you are willing to allow one biological male on a girl's team then if 12 biological males were to try out for the 12 spots on a girl's team, then one would absolutely have to be willing to allow all 12 biological males to make the girls team.

One may say, well, that's not going to happen, but that's not the point; it could, and one must be willing to allow this to occur. The question then is, where do all of the girls go? This is no better than where we were before Title IX in 1972.

From Kyle Velte- As an initial matter, "biological males" will not be competing on girls' teams because transgender girls are not "biological males." Please refer to my response in the previous set of questions that addresses the vagueness of the term "biological sex" and explains in more depth why transgender girls are not "biological males." Moreover, including trans girls on girls' sports teams does not harm cisgender girls. Rather, it includes all girls in sports, thereby extending the benefits of sports participation

to all girls. Trans girls do not have automatic advantages in competition or in college scholarship opportunities just because they are transgender girls. Rather, transgender girls, like cisgender girls, vary in athletic ability. One's genes and reproductive anatomy (both internal or external) are not helpful indicators to predict athletic performance.

Are there instances in which this occurred?

From Matt Sharp - Yes. Our firm represents several female athletes in Connecticut who lost opportunities to advance in competitions and win because of a policy that allowed biological males to compete in female sports. One of those female athletes is Selina Soule. One season, she likely would have qualified for the New England Regional Championships if two male runners hadn't been allowed to compete in her event. While the two male athletes took first and second, Selina was just one spot away from competing in the state championship finals and two spots away from qualifying for the New England Regional Championships, where college scouts from all over the country attend. So, instead of racing in front of college scouts, Selina had to sit on the sidelines.

From Brittany Jones- There are clear examples of biological women being pushed out by biological males in Connecticut and several other states. In these states third place becomes the new first. In Kansas, we know that at least five individuals are taking advantage of KSSHA's policy that allows males into female sports.

From Tom Witt- Not in Kansas. Again, only 0.00004% of student athletes in Kansas are transgender, a number that includes transgender boys as well as transgender girls.

What would be your recommendation to allow biological males to participate in sports without harming biological females or hurting their chances to excel in sports?

From Matt Sharp - Under SB 208, biological males—regardless of how they identify—will continue to be allowed to participate on male teams and on co-ed teams.

From Brittany Jones- This law does nothing to effect mixed co-ed sports or men's athletics. This bill is written and designed to protect women's sports exclusively. No one is prevented from thinking of creative solutions that do not take opportunities away from Kansas girls.

From Tom Witt- By what standard are we defining "biological male?" Is it genitalia? Is it chromosomes? Is it genetics? Is it hormones? Is it heart size, or brain anatomy, or brain activity? All of those things can contradict each other in one human body. Quite simply, there's not a simple definition for a biological male or biological female.

Using an average performance to deny access to particular groups is based on false assumptions. It would be similar to denying taller students from participating with shorter students on the same time. What if particular racial or ethnic groups have an average performance higher than another racial or ethnic group? Would the Kansas legislature suggest those groups not be allowed to compete on the same team?

From Asher Wickell- On the basis of existing data, the full and unrestricted inclusion of transgender girls and women in girls' and women's athletics is, precisely, the best way to protect opportunities for all girls and women, including those assigned female at birth. In states where transgender students are allowed

to participate fully and freely, on the teams that correspond to their gender of identity, overall participation in girls' and women's sports teams has remained stable or, in some cases, increased notably. In states where transgender students are forced to meet additional and cumbersome requirements, in order to play on the teams that match their genders—or are excluded from these teams, altogether—overall participation, including by non-transgender girls and women, has declined. Notwithstanding the participation, since 2004, of transgender athletes in the Olympic games, no transgender athletes have won medals at the Olympics, while competing in their genders of identity. SB208 focuses intently on the supposed risks posed by transgender girls and women in athletics, but only a single transgender athlete in the United States has ever even qualified for a US National Team, competing in a world championship—Chris Mosier, a transgender man. Despite the inclusion of transgender athletes in a growing number of amateur and professional athletic associations, and the ability of transgender athletes to participate in NCAA sporting events, on teams consistent with their gender of identity, since 2011, the number of transgender athletes winning in elite competitions has remained negligible. These data, taken together, sharply contradict SB208's proposition that transgender women are universally and profoundly advantaged in athletic competition.

There is no evidence to support the idea that transgender girls and women pose a risk to the safety of non-transgender girls and women—in athletic contexts or elsewhere. There is, however, abundant research data to confirm the risk to transgender children, adolescents, and adults, when they are excluded from the contexts appropriate to their genders. Whether transgender or not, this bill does not maintain the safety of girls and women. It injures and excludes transgender children and young adults, and places their safety at risk—and, indeed, so highly prioritizes the harm enforced upon the persons of transgender youth in Kansas, that it disregards the additional harm perpetuated against the non-transgender girls and women whose safety it uses as a justification and excuse.

From Idaho Representative Barbara Ehardt- This legislation allows one to identify however they would want to. It just clarifies that one must compete on the team of one's biological sex. By making this clear, it allows a biological male to fully understand that if he is desirous to play sports in school, then he must do so on the boys & men's team. Having this clear direction will only aid in the decisions that he will make as to whether or not he will continue playing sports.

From Kyle Velte- Again, because "biological males" is a vague term, it is not useful in this context. Moreover, because trans girls are not "biological males" this particular question isn't relevant to the question of how to include trans girls in sports (that answer to that question is: allow them to play on girls' teams).

It was stated in testimony that a handful of females have participated in male sports. Could not a transgender female participate in male sports as these groundbreaking young women have done?

From Matt Sharp - Yes. Under SB 208, a transgender female (i.e., a biological male who identifies as a female) would be allowed to compete on male teams and on co-ed teams.

From Brittany Jones- The Fairness in Women's Sports Act does nothing to change men's athletics, but only ensures that girls are not forced to surrender hard earned victories to biological males. There are still many places for individuals who are not biological females to compete.

From Tom Witt- Our position is that children should participate as the gender by which they identify, so long as that participation is consistent with the KSHSAA policy I have attached to this document.

From Asher Wickell- In short, no. The risks facing transgender girls and women, relative to gender-specific spaces, are different and in some regards more acute than those encountered by non-transgender girls and women. For transgender youth, being placed in gender-specific contexts that are different from or in opposition to their genders of identity is, in and of itself, profoundly harmful. Transgender individuals who experience dismissal of their gender as real, valid, and accepted by others, encounter increased risk for depression and anxiety, substance abuse, running away from home, exchanging sex for survival necessities, contracting HIV, and suicide. This is true both in the case of overt dismissal or mis-gendering, and when the negation of a trans person's gender is implicit or indirect, as when telling a transgender girl or woman that she may only compete on a male team, thereby implying that her gender is less real and meaningful than that of the other girls or young women in her peer group.

Transgender girls and women also encounter increased risk as a result of external factors, when required to participate in settings that are not consistent with their gender. This is a concern within the space itself—specifically when competing or training for an athletic event, for example. Even outside athletic contexts, however, the extent to which an educational institution sends the message that transgender individuals are not “real,” or are “less male” or “less female” than non-transgender individuals, is directly predictive of the level of bullying, social exclusion, and related adverse mental health outcomes transgender young people experience. This is to say: even transgender students who choose not to play sports will be placed at elevated risk by a policy that would exclude them from playing on a team corresponding to their gender of identity.

When a non-transgender girl or woman plays on a boys' or men's team, because a particular sport does not offer a team or league designated to their gender, it is clear to all parties that this is a decision rooted in her wish to participate in that specific athletic endeavor. It does not represent a statement about the realness or validity of her gender. It is not coerced—indeed, in many instances, such requests are initially resisted or refused by a school, district, or athletic association.

For a school to inform a transgender young person that she may play sports, but only if she plays on a team that does not correspond to her gender is intrinsically a statement about her gender. As such, it is directly harmful in its own right, and it establishes a precedent that has led repeatedly and consistently to secondary harms in the form of bullying and social isolation. Negating the gender of transgender students is an act of violence, and is highly predictive of emotional and physical harm and loss of life.

From Idaho Representative Barbara Ehardt- Yes. Again, this legislation allows one to identify however they would want to. It just clarifies that one must compete on the team of one's biological sex. By making this clear, it allows a biological male to fully understand that if he is desirous to play sports in school, then he must do so on the boys & men's team. Having this clear direction will only aid in the decisions that he will make as to whether or not he will continue playing sports.

From Kyle Velte- While a transgender girl might choose to try out for a boys' team, just as some cisgender girls do, she should not be forced by law to do so.

Representative Barbara Ehardt of Idaho

What fiscal impacts has your legislation had on your state?

From Idaho Representative Barbara Ehardt- Idaho is thriving! During the proceedings of this legislation, Idaho was threatened by many large corporations. They worried that businesses and people would not move to Idaho because we would be viewed as being “discriminatory.” But such couldn’t be farther from the truth. Not only is Idaho STILL the fastest growing state in the Nation but those who are moving to Idaho are making it clear that they are coming here so that they can raise their children in a state that still believes in freedom and family values.

Also:

Idaho is #1 state for economic momentum (FFIS index)

Idaho is #1 state for financial solvency (Barron’s report)

Idaho is #1 state in personal income growth over past year (PEW)

Idaho is #3 state for best employment rate (US Bureau of Labor Statistics)

Idaho is in the top 10 states for unemployment trust fund balance (US Dept of Labor)

Idaho is in the top 10 states for rainy day fund balance (NASBO)

Idaho is in the top 10 states for Business (Forbes Magazine)

Have events been cancelled at your universities or within your state due to your legislation?

No events have been canceled. After the ACLU pushed the NCAA to cancel championship events in Idaho, our conversations with the NCAA actually lead them to review their transgender policy. At this point nothing has changed. But the NCAA is keenly aware that 24 states, the US Senate and Congress have all brought legislation designed to protect both Title IX and opportunities for girls and women in sports. There is great strength in numbers and if a state values the contributions of its women, then their opportunities should be protected.

From Kyle Velte- The Idaho bill was signed into law on March 30, 2020. Just five months later, on August 17, 2020, a federal court enjoined enforcement of the law. The court stated: “Because the Court finds Plaintiffs are likely to succeed in establishing the Act is unconstitutional as currently written, it must issue a preliminary injunction at this time pending trial on the merits.” *Hecox v. Little*, 479 F. Supp. 3d 930, 988 (D. Idaho 2020). This means that it has not been in operation in Idaho, so there is no data on which to answer this question.

What changes did your school athletic association make for all students—were coed team sports added?

Our Idaho High School Activities Association did not end up acquiescing to the ‘Dear Colleague’ letter that was sent out by the Obama administration in 2016. This letter told Idaho that we would be required to allow biological males who ***‘identified only’*** (no hormones / no surgeries) as females to participate in our girl’s division. This is disturbing on so many levels. This is another reason why it was important for our legislative body to act and make clear that we support and protect opportunities for our girls and women in sports.

Mark Desetti - you stated this was a KSHSAA issue. What KSHSAA changes are appropriate?

From Mark Desetti - I am not qualified to answer this question - KSHSAA is made up of representatives of school districts and school athletics/activities charged with regulated competition in our schools. The members of the KSHSAA board would consider many factors; not just if there is an impact on competition but also, based upon the advice of medical professionals, psychologists and psychiatrists, parents and coaches, and students, the impact on the social and emotional well-being of transgender youth. I am not an athlete, a psychologist, or a psychiatrist. I am not a mental health professional. And

have never been a coach so I don't feel I'm qualified to determine what changes, if any, are appropriate.

I do know that the Kansas NEA opposes bullying and any efforts by any individual to marginalize or stigmatize others.

From Tom Witt- Although I understand this question was directed to Mr. Desetti, I have attached the KSHSAA policy to this document. (See Attachment 1)

Matt Sharp – what about the Equal Protection Claims made by Opponents?

From Matt Sharp - Summary: Federal courts have long recognized that it is constitutional under the Equal Protection Clause to provide separate programs and opportunities based on biological sex—whether it is sports teams, locker rooms, or even single-sex schools—as long as the separate programs are substantially related to accomplishing an important government interest. By limiting female teams to biological females, SB 208 accomplishes the important governmental interest of preserving equal opportunities for females in sports. And courts have upheld such policies, finding that there is “clearly a substantial relationship between the exclusion of males from [a female sports] team and the goal of redressing past discrimination and providing equal opportunities for women.” *Clark, By & Through Clark v. Ariz. Interscholastic Ass’n*, 695 F.2d 1126, 1131 (9th Cir. 1982).

Detailed Answer:

The Equal Protection Clause to the Fourteenth Amendment “command[s] that no State deny the equal protection of the laws to any person within its jurisdiction.” *Reed v. Reed*, 404 U.S. 71, 74 (1971). But the Supreme Court “has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways.” *Id.* at 75 (emphasis added). And sex-based classifications are constitutional where they “realistically reflect[] the fact that the sexes are not similarly situated in certain circumstances.” *Clark*, 695 F.2d at 1129.

Specifically, the Supreme Court recognizes that “[p]hysical” and “[i]nherent differences” between men and women exist and that those differences are “enduring.” *United States v. Virginia*, 518 U.S. 515, 533 (1996). So once the state demonstrates that a sex-based classification based on those differences (1) “serve[s] important governmental objectives,” and (2) is “substantially related to achievement of those objectives,” *Craig v. Boren*, 429 U.S. 190, 197 (1976), the state has carried its “burden of showing an exceedingly persuasive justification for [the] classification,” *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982) (cleaned up).

Based on this, federal courts have held 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*, 695 F.2d at 1131.

In *Clark*, the U.S. Court of Appeals for the Ninth Circuit reviewed an appeal brought by male high school athletes who had been kept off the girls’ volleyball teams despite the boys’ prior success on national championship teams. *Id.* at 1127. The schools did not have boys’ volleyball teams. *Id.* And a policy “preclude[d] boys from playing on [the] girls’ teams.” *Id.* The boys sued, arguing that “precluding [them] from playing on girls’ interscholastic volleyball teams . . . violate[d] the equal protection clause.” *Id.*

The Court asked “whether the exclusion of boys is substantially related to [that] interest,” or “whether any real differences exist between boys and girls which justify the exclusion,” meaning “differences which would prevent realization of the goal if the exclusion were not allowed.” *Id.*

The Court found that there are. “[D]ue to average physiological differences, males would displace females to a substantial extent if they were allowed to compete for positions on the volleyball team.” *Id.* The parties had stipulated that, “[g]enerally, high school males are taller, can jump higher and are stronger than high school females.” *Id.* at 1127. This left “no question . . . that boys [would] on average be potentially better volleyball players than girls.” *Id.* (emphasis added). Accord *Petrie*, 394 N.E.2d at 863 (“Both because of past disparity of opportunity and because of innate differences, boys and girls are not similarly situated as they enter into most athletic endeavors.”).

Under intermediate scrutiny, this was enough. The Supreme Court has repeatedly allowed recognition of “these average real differences between the sexes.” *Id.* at 1131. And because the challenged policy “simply recogniz[ed] the physiological fact that males would have an undue advantage competing against women for positions on the volleyball team,” there was “clearly a substantial relationship between the exclusion of males from the team and the goal of redressing past discrimination and providing equal opportunities for women.” *Id.*

From Kyle Velte- Because the bill classifies based on sex, it is subject to an Equal Protection inquiry known as the intermediate scrutiny test. Under that test, the State has the burden of showing that the sex-based classification is substantially related to an important government interest. The State’s justification must be “exceedingly persuasive.” Moreover, the State’s justification must be genuine, not hypothesized.

Here, the State’s interest in this bill purports to be sex equality and “fairness” to cisgender girls. Even assuming that these are important, exceedingly persuasive reasons for the bill, that is not the end of the inquiry. The next question is: is the State’s interest (here, sex equality and fairness to cisgender girls) substantially related to the how the bill would serve those interest. In other words, does the bill “fit” the State interests of sex equality and fairness to cisgender girls? The answer is “no.”

First, the bill is based on a hypothetical problem that has not been shown to exist. There are no legislative findings, for example, of cisgender girls being excluded from girls’ sports team, or of not receiving a college scholarship because a transgender girl received the scholarship instead.¹ Courts do not allow hypothetical harms to support a state interest. The bill is based on a faulty assumption, namely that excluding transgender girls from girls’ sports teams will benefit cisgender girls. This is not true. After nearly two decades of inclusion of transgender athletes at national and international levels of sport, there has been no categorical dominance by transgender women or girls at any level. In fact, no female transgender athlete has qualified for a women’s event at the Olympics, despite being eligible. As a result, the “unfairness”² that the bill seeks to redress has not been shown to exist. Because it is hypothetical, it cannot be the basis for a finding that the bill is substantially related to the asserted state interest.

Because no actual harms can be shown from the inclusion of transgender girls on girls’ sports teams, that leaves only one genuine reason for this bill: animus against transgender people. The U.S. Supreme Court has held that animus is not a legitimate, let alone important, state interest under the Equal Protection Clause. See *Romer v. Evans*, 517 U.S. 620 (1996).

Finally, a federal court has held that the Idaho Fairness in Women's Sports Act, which is similar to SB 208, is likely unconstitutional under the Equal Protection Clause. See *Hecox v. Little*, 479 F. Supp. 3d 930 (D.

Idaho 2020). The court held that the opponents of that law were likely to succeed on the merits of their Equal Protection Clause claims—were likely to win that claim—and, as a result, enjoined enforcement of the Idaho law until there is a full trial on the merits of the claim. The Ninth Circuit Court of Appeals is currently considering that decision.

1 Even if the latter was found as a factual matter, that still does not indicate causation between the transgender status of the girl who received the scholarship and receipt of the scholarship. 2 The argument that transgender athletes have an unfair advantage over cisgender athletes, even at the highest levels of sports, is a myth. See, e.g., *Four Myths About Trans Athletes, Debunked*, ACLU (April 30, 2020), available at <https://www.aclu.org/news/lgbt-rights/four-myths-about-trans-athletes-debunked/>. As a result, I do not accept the argument made by proponents of the bill that such unfairness exists when transgender girls play on girls' sports teams. Rather, I use the term "unfairness" in this sentence for the sake of argument to address one of proponents' positions.

The Hecox court held the following with regard to the opponent's Equal Protection Claim (internal citations omitted):

"Similarly, the Act on its face discriminates between cisgender athletes, who may compete on athletic teams consistent with their gender identity, and transgender women athletes, who may not compete on athletic teams consistent with their gender identity. Hence, while the physiological differences the Defendants suggest support the categorical bar on transgender women's participation in women's sports may justify the Act, they do not overcome the inescapable conclusion that the Act discriminates on the basis of transgender status. . . .

[F]our principles guide the Court's equal protection analysis. The Court: (1) looks to the Defendants to justify the Act; (2) must consider the Act's actual purposes; (3) need not accept hypothetical, post hoc justifications for the Act; and (4) must decide whether Defendants' proffered justifications overcome the injury and indignity inflicted on Plaintiffs and others like them. When applying heightened scrutiny, the Court does not adopt the strong presumption in favor of constitutionality or heavy deference to legislative judgments characteristic of rational basis review. Further, under heightened scrutiny review, the Court must examine the Act's 'actual purposes and carefully consider the resulting inequality to ensure that our most fundamental institutions neither send nor reinforce messages of stigma or second class status.' ...

While the Court recognizes and accepts the principals outlined in *Clark v. Clark, ex rel. Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126, 1131 (9th Cir. 1982)], Clark's holding regarding general sex separation in sport, as well as the justifications for such separation, do not appear to be implicated by allowing transgender women to participate on women's teams. In *Clark*, the Ninth Circuit held that it was lawful to exclude cisgender boys from playing on a girls' volleyball team because: (1) women had historically been deprived of athletic opportunities in favor of men; (2) as a general matter, men had equal athletic opportunities to women; and (3) according to stipulated facts, average physiological differences meant that "males would displace females to a substantial extent" if permitted to play on women's volleyball teams. These principals do not appear to hold true for women and girls who are transgender.

First, like women generally, women who are transgender have historically been discriminated against, not favored. In a large national study, 86% of those perceived as transgender in a K–12 school experienced some form of harassment, and for 12%, the harassment was severe enough for them to leave school. According to the same study, 48% of transgender people in Idaho have experienced homelessness in their lifetime, and 25% were living in poverty. *Id.* Rather than a general separation between a historically advantaged group (cisgender males) and a historically disadvantaged group (cisgender women), the Act

excludes a historically disadvantaged group (transgender women) from participation in sports, and further discriminates against a historically disadvantaged group (cisgender women) by subjecting them to the sex dispute process. The first justification for the Arizona policy at issue in Clark is not present here.

Second, under the Act, women and girls who are transgender will not be able to participate in any school sports, unlike the boys in Clark, who generally had equal athletic opportunities. As such, the Act's categorical exclusion of transgender women and girls entirely eliminates their opportunity to participate in school sports—and also subjects all cisgender women to unequal treatment simply to play sports—while the men in Clark had generally equal athletic opportunities. 5

Third, it appears transgender women have not and could not “displace” cisgender women in athletics “to a substantial extent.” Although the ratio of males to females is roughly one to one, less than one percent of the population is transgender. Presumably, this means approximately one half of one percent of the population is made up of transgender females. It is inapposite to compare the potential displacement allowing approximately half of the population (cisgender men) to compete with cisgender women, with any potential displacement one half of one percent of the population (transgender women) could cause cisgender women. It appears untenable that allowing transgender women to compete on women's teams would substantially displace female athletes.

And fourth, it is not clear that transgender women who suppress their testosterone have significant physiological advantages over cisgender women. The Court discusses the distinction between physical differences between men and women in general, and physical differences between transgender women who have suppressed their testosterone for one year and women below. However, the interests at issue in Clark—Defendants’ central authority—pertained to sex separation in sport generally and are not necessarily determinative here.

iii. The Act's justifications the legislative findings and purpose portion of the Act suggests it fulfills the interests of promoting sex equality, providing opportunities for female athletes to demonstrate their skill, strength, and athletic abilities, and by providing female athletes with opportunities to obtain college scholarship and other accolades. Plaintiffs do not dispute that these are important governmental objectives. They instead argue that the Act is not substantially related to such important governmental interests. At this stage of the litigation, and without further development of the record, the Court is inclined to agree.

(1) Promoting Sex Equality and Providing Opportunities for Female Athletes [T]he legislative record reveals no history of transgender athletes ever competing in sports in Idaho, no evidence that Idaho female athletes have been displaced by Idaho transgender female athletes, and no evidence to suggest a categorical bar against transgender female athlete's participation in sports is required in order to promote “sex equality” or to “protect athletic opportunities for females” in Idaho. Rather than presenting empirical evidence that transgender inclusion will hinder sex equality in sports or athletic opportunities for women, both the Act itself and Proponents’ rely exclusively on three transgender athletes who have competed successfully in women's sports.

Specifically, during the entire legislative debate over the Act, the only transgender women athletes referenced were two high school runners who compete in Connecticut, and who were, notably, also defeated by cisgender girls in recent races. Notably, unlike the IHSAA and NCAA rules in place in Idaho before the Act, Connecticut does not require a transgender woman athlete to suppress her testosterone for any time prior to competing on women's teams.

The Intervenor identifies a third transgender athlete, June Eastwood, and argues that their athletic opportunities were limited by Eastwood's participation in women's sports. The State also highlights this example. However, Eastwood was not an Idaho athlete and the competition at issue took place at the University of Montana. So, the Idaho statute would have no impact on Eastwood. More importantly, although the Intervenor lost to Eastwood, Eastwood was also ultimately defeated by her cisgender teammate. And, losing to Eastwood at one race did not deprive the Intervenor from the opportunity to compete in Division I sports, as both continue to compete on the women's cross-country and track teams with ISU.

The evidence cited during the House Debate on H.B. 500 and in the briefing by the Proponents regarding three transgender women athletes who have each lost to cisgender women athletes does not provide an "exceedingly persuasive" justification for the Act. Heightened scrutiny requires that a law solves an actual problem and that the "justification must be genuine, not hypothesized." In the absence of any empirical evidence that sex inequality or access to athletic opportunities are threatened by transgender women athletes in Idaho, the Act's categorical bar against transgender women athletes' participation appears unrelated to the interests the Act purportedly advances.

Plaintiffs have also presented compelling evidence that equality in sports is not jeopardized by allowing transgender women who have suppressed their testosterone for one year to compete on women's teams. Plaintiffs' medical expert, Dr. Joshua Safer, suggests that physiological advantages are not present when a transgender woman undergoes hormone therapy and testosterone suppression. Before puberty, boys and girls have the same levels of circulating testosterone. After puberty, the typical range of circulating testosterone for cisgender women is similar to before puberty, and the circulating testosterone for cisgender men is substantially higher.

Dr. Safer contends there "is a medical consensus that the difference in testosterone is generally the primary known driver of differences in athletic performance between elite male athletes and elite female athletes." Dr. Safer highlights the only study examining the effects of gender-affirming hormone therapy on the athletic performance of transgender athletes. The small study showed that after undergoing gender affirming intervention, which included lowering their testosterone levels, the athletes' performance was reduced so that relative to cisgender women, their performance was proportionally the same as it had been relative to cisgender men prior to any medical treatment. *Id.* In other words, a transgender woman who performed 80% as well as the best performer among men of that age before transition would also perform at about 80% as well as the best performer among women of that age after transition.

Defendants' medical expert, Dr. Gregory Brown, also confirms that male's performance advantages "result, in large part (but not exclusively), from higher testosterone concentrations in men, and adolescent boys, after the onset of male puberty." While Dr. Brown maintains that hormone and testosterone suppression cannot fully eliminate physiological advantages once an individual has passed through male puberty, the Court notes some of the studies Dr. Brown relies upon actually held the opposite. Further, the majority of the evidence Dr. Brown cites, and most of his declaration, involve the differences between male and female athletes in general, and contain no reference to, or information about, the difference between cisgender women athletes and transgender women athletes who have suppressed their testosterone.

Yet, the legislative findings for the Act contend that even after receiving hormone and testosterone suppression therapy, transgender women and girls have “an absolute advantage” over non-transgender girls. In addition to the evidence cited above, several factors undermine this conclusion. For instance, there is a population of transgender girls who, as a result of puberty blockers at the start of puberty and gender affirming hormone therapy afterward, never go through a typical male puberty at all. These transgender girls never experience the high levels of testosterone and accompanying physical changes associated with male puberty, and instead go through puberty with the same levels of hormones as other girls. *Id.* As such, they develop typically female physiological characteristics, including muscle and bone structure, and do not have an ascertainable advantage over cisgender female athletes. *Id.* Defendants do not address how transgender girls who never undergo male puberty can have “an absolute advantage” over cisgender girls. Nor do Defendants address why transgender athletes who have never undergone puberty should be categorically excluded from playing women's sports in order to protect sexual equality and access to opportunities in women's sports.

The Act's legislative findings do claim the “benefits that natural testosterone provides to male athletes is not diminished through the use of puberty blockers and cross-sex hormones.” However, the study cited in support of this proposition was later altered after peer review, and the conclusions the legislature relied upon were removed. Defendants provide no explanation as to why the Legislators relied on the pre-peer review version of the article or why Defendants did not correct this fact in their briefing after the peer reviewed version was published. In fact, the study did not involve transgender athletes at all, but instead considered the differences between transgender men who increased strength and muscle mass with testosterone treatment, and transgender women who lost some strength and muscle mass with testosterone suppression. The study also explicitly stated it “is important to recognize that we only assessed proxies for athletic performance ... it is still uncertain how the findings would translate to transgender athletes.” . . .

The policies of elite athletic regulatory bodies across the world, and athletic policies of most every other state in the country, also undermine Defendants' claim that transgender women have an “absolute advantage” over other female athletes. Specifically, the International Olympic Committee and the NCAA require transgender women to suppress their testosterone levels in order to compete in women's athletics. The NCAA policy was implemented in 2011 after consultation with medical, legal, and sports experts, and has been in effect since that time. Millions of student-athletes have competed in the NCAA since 2011, with no reported examples of any disturbance to women's sports as a result of transgender inclusion.³⁸ *Id.* Similarly, every other state in the nation permits women and girls who are transgender to participate under varying rules, including some which require hormone suppression prior to participation. The Proponents' failure to identify any evidence of transgender women causing purported sexual inequality other than four athletes (at least three of whom who have notably lost to cisgender women) is striking in light of the international and national policy of transgender inclusion.

Finally, while general sex separation on athletic teams for men and women may promote sex equality and provide athletic opportunities for females, that separation preexisted the Act and has long been the status quo in Idaho. Existing rules already prevented boys from playing on girls' teams before the Act. However, the IHSA policy also allows transgender girls to participate on girls' teams after one year of hormone suppression. Similarly, the existing NCAA rules also preclude men from playing on women's teams but allow transgender women to compete after one year of testosterone suppression. Because Proponents fail to show that participation by transgender women athletes threatened sexual equality in sports or opportunities for women under these pre-existing policies, the Act's proffered justifications do not appear to overcome the inequality it inflicts on transgender women athletes.

The Ninth Circuit in *Clark* ruled that sex classification can be upheld only if sex represents “a legitimate accurate proxy.” The *Clark* Court further explained the Supreme Court has soundly disapproved of classifications that reflect “archaic and overbroad generalizations,” and has struck down gender-based policies when the policy's proposed compensatory objective was without factual justification. *Id.* Given the evidence highlighted above, it appears the “absolute advantage” between transgender and cisgender women athletes is based on overbroad generalizations without factual justification.

Ultimately, the Court must hear testimony from the experts at trial and weigh both their credibility and the extent of the scientific evidence. However, the incredibly small percentage of transgender women athletes in general, coupled with the significant dispute regarding whether such athletes actually have 8 physiological advantages over cisgender women when they have undergone hormone suppression in particular, suggest the Act's categorical exclusion of transgender women athletes has no relationship to ensuring equality and opportunities for female athletes in Idaho.

(2) Ensuring Access to Athletic Scholarships The Act also identifies an interest in advancing access to athletic scholarships for women. Yet, there is no evidence in the record to suggest that the Act will increase scholarship opportunities for girls. Just as the head of the IHSAA testified during the legislative debate on H.B. 500 that he was not aware of any transgender girl ever playing high school girls' sports in Idaho, there is also no evidence of a transgender person ever receiving any athletic scholarship in Idaho. Nor have the scholarships of the Intervenor— the only identified Idaho athletes who have purportedly been harmed by competing against a transgender woman athlete—been jeopardized. Both Intervenor continue to run track and cross country on scholarship with ISU, despite their loss to a transgender woman athlete at the University of Montana.

The Act's incredibly broad sweep also belies any genuine concern with an impact on athletic scholarships. The Act broadly applies to interscholastic, intercollegiate, intramural, or club athletic teams or sports that are sponsored by a public primary or secondary school, or a public institution of higher education, or any school or institution whose students or teams compete against a public school or institution of higher education. Thus, any female athlete, from kindergarten through college, is generally subject to the Act's provisions. Clearly, the need for athletic scholarships is not implicated in primary school and intramural sports in the same way that it may be for high school and college athletes. As such, “the breadth of the [law] is so far removed from [the] particular justifications” put forth in support of it, that it is “impossible to credit them.”

Based on the dearth of evidence in the record to show excluding transgender women from women's sports supports sex equality, provides opportunities for women, or increases access to college scholarships, Lindsay is likely to succeed in establishing the Act violates her right to equal protection. This likelihood is further enhanced by Defendants' implausible argument that the Act does not actually ban transgender women, but instead only requires a health care provider's verification stating that a transgender woman athlete is female.

Defense counsel confirmed during oral argument that if Lindsay's health care provider signs a health form stating that she is female, Lindsay can play women's sports. In turn, Plaintiffs' counsel affirmed that Lindsay's health care provider will sign a form verifying Lindsay is female. If this is indeed the case, then each of the Proponents' arguments claiming that the Act ensures equality for female athletes by disallowing males on female teams falls away. Under this interpretation, the Act does not ensure sex specific teams at all and is instead simply a means for the Idaho legislature to express its disapproval of

transgender individuals. If “equal protection of the laws means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”

(3) The Act's Actual Purpose The Act's legislative findings reinforce the idea that the law is directed at excluding women and girls who are transgender, rather than on promoting sex equality and opportunities for women. For instance, the Act's criteria for determining “biological sex” appear designed to exclude transgender women and girls and to reverse the prior IHSAA and NCAA rules that implemented sex-separation in sports while permitting transgender women to compete.

Specifically, an athlete subject to the Act's dispute process may “verify” their sex using three criteria: (1) reproductive anatomy, (2) genetic makeup, or (3) endogenous testosterone, i.e., the level of testosterone the body produces without medical intervention. This excludes some girls with intersex traits because they cannot establish a “biological sex” of female based on these verification metrics. It also completely excludes transgender girls.

Girls under eighteen generally cannot obtain gender-affirming genital surgery to treat gender dysphoria, and therefore will not have female reproductive anatomy. Many transgender women over the age of eighteen also have not had genital surgery, either because it is not consistent with their individualized treatment plan for gender dysphoria or because they cannot afford it. Id. With respect to genetic makeup, the overwhelming majority of women who are transgender have XY chromosomes, so they cannot meet the second criteria. And, by focusing on “endogenous” testosterone levels, rather than actual testosterone levels after hormone suppression, the Act excludes transgender women whose circulating testosterone levels are within the range typical for cisgender women.

Thus, the Act's definition of “biological sex” intentionally excludes the one factor that a consensus of the medical community appears to agree drives the physiological differences between male and female athletic performance. Significantly, the preexisting Idaho and current NCAA rules instead focus on that factor. That the Act essentially bars consideration of circulating testosterone illustrates the Legislature appeared less concerned with ensuring equality in athletics than it was with ensuring exclusion of transgender women athletes.

In addition, it is difficult to ignore the circumstances under which the Act was passed. As COVID-19 was declared a pandemic and many states adjourned state legislative session indefinitely, the Idaho Legislature stayed in session to pass H.B. 500 and become the first and only state to bar all women and girls who are transgender from participating in school sports. At the same time, the Legislature also passed another bill, H.B. 509, which essentially bans transgender individuals from changing their gender marker on their birth certificates to match their gender identity. Governor Little signed H.B. 500 and H.B. 509 into law on the same day. That the Idaho government stayed in session amidst an unprecedented national shut down to pass two laws which dramatically limit the rights of transgender individuals suggests the Act was motivated by a desire for transgender exclusion, rather than equality for women athletes, particularly when the national shutdown preempted school athletic events, making the rush to the pass the law unnecessary.

Finally, the Proponents turn the Act on its head by arguing that transgender people seek “special” treatment by challenging the Act. This argument ignores that the Act excludes only transgender women and girls from participating in sports, and that Lindsay simply seeks the status quo prior to the Act's passage, rather than special treatment. Further, the Proponents' argument that Lindsay and other transgender women are not excluded from school sports because they can simply play on the men's team

is analogous to claiming homosexual individuals are not prevented from marrying under statutes preventing same-sex marriage because lesbians and gays could marry someone of a different sex. The Ninth Circuit rejected such arguments in *Latta II*, as did the Supreme Court in *Bostock*.

In short, the State has not identified a legitimate interest served by the Act that the preexisting rules in Idaho did not already address, other than an invalid interest of excluding transgender women and girls from women's sports entirely, regardless of their physiological characteristics. As such, Lindsay is likely to succeed on the merits of her equal protection claim. Again, at this stage, the Court only discusses the 10 "likelihood" of success based on the information currently in the record. Actual success—or failure—on the merits will be determined at a later stage." This analysis applies with equal force to SB 208.