

NOTES

Heightened Scrutiny in Female Athletics: *Hecox v. Little* and Gender-Identity Discrimination Under the Fourteenth Amendment

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I. OVERVIEW

In March 2020, Idaho enacted the Fairness in Women’s Sports Act (the “Act”), becoming the first state to ban transgender women and girls from participating in public school female athletics.¹ More than twenty states have since enacted similar restrictions on transgender students’ participation in school sports.² The Idaho Act bans students of “the male sex” from participating in or trying out for teams “designated for females, women, or girls.”³ It prohibits transgender girls and women from participating in any female athletic competition at any grade level, from

1. See Fairness in Women’s Sports Act, IDAHO CODE §§ 33-6201-06; *see also* *Hecox v. Little*, 79 F.4th 1009, 1015 (9th Cir. 2023).

2. *Hecox*, 79 F.4th at 1017; *see e.g.*, ALA. CODE § 16-1-52 (2021); ARIZ. REV. STAT. ANN. § 15-120.02 (2022); ARK. CODE ANN. § 6-1-107 (West 2021); FLA. STAT. § 1006.205 (West 2023); KAN. STAT. ANN. § 60-5601 (2023); MISS. CODE. ANN. § 37-97-1 (West 2021); OKLA. STAT. § 70-27-106 (2023); S.C. CODE. ANN. § 59-1-500 (2022); S.D. CODIFIED LAWS § 13-67-1 (2022); WYO. STAT. ANN. § 21-25-102 (2023).

3. IDAHO CODE § 33-6203(2).

primary school through college.⁴ The Act also establishes a process for resolving “disputes” regarding the sex of students, requiring any student thus challenged to undergo a “health examination” performed by a personal care provider.⁵ Any individual may challenge the sex of any student participating in female athletics, requiring the student to submit to this invasive sex-verification process.⁶ Students participating in male sports are not subject to a similar dispute process.⁷ The Act provides for only three methods of sex verification, requiring the health provider to examine either the student’s reproductive anatomy, their chromosomal makeup, or their endogenously produced testosterone levels.⁸ Finally, the Act establishes a private cause 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 violation of [the Act].”⁹

In April 2020, two women challenged the lawfulness of the Act in a lawsuit against the governor of Idaho, the Idaho Superintendent of Public Instruction, and various school officials in *Hecox v. Little*.¹⁰ Plaintiff Lindsay Hecox was a transgender college student who hoped to try out for the Boise State University women’s track and cross-country teams.¹¹ Her co-plaintiff, Jane Doe, was a cisgender female high school athlete who feared that her sex would be challenged and she would be subjected to the Act’s sex-verification provision.¹² The plaintiffs sought a declaratory judgment stating the Act violated Title IX and the U.S. Constitution, including the Equal Protection Clause.¹³ On April 30, 2020, the plaintiffs requested preliminary injunctive relief solely for their Equal Protection claims, which the district court granted in August 2020.¹⁴ In May 2020, two other women intervened in the case; both of them were cisgender collegiate track-and-field athletes who had competed against and lost to a transgender competitor.¹⁵ The district court granted

4. *Id.* at § 33-6203(1).

5. *Id.* at § 33-6203(3).

6. *Id.*; see also *Hecox*, 79 F.4th at 1015.

7. See IDAHO CODE § 33-6203(2)-(3).

8. *Id.* at § 33-6203(3).

9. *Id.* at § 33-6205(1).

10. 79 F.4th 1009, 1019 (9th Cir. 2023).

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at 1020; see also *Hecox v. Little*, 479 F. Supp. 3d 930, 989 (D. Idaho 2020), *aff’d*, No. 20-35813, 2023 WL 1097255 (9th Cir. Jan. 30, 2023), and *aff’d in part, vacated in part, remanded*, No. 20-35813, 2023 WL 11804896 (9th Cir. Aug. 17, 2023), and *aff’d*, 79 F.4th 1009 (9th Cir. 2023).

15. *Hecox*, 79 F.4th at 1019.

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preliminary injunctive relief in August 2020, holding the plaintiffs “were likely to succeed on the merits of their Equal Protection claims and would suffer irreparable harm if the injunction was not granted.”¹⁶ Idaho and the intervenors timely appealed, and in June 2021, the United States Court of Appeals for the Ninth Circuit remanded the case to the district court for further factual findings as to whether Ms. Hecox’s claim was moot.¹⁷ Following the district court’s decision in July 2022 that her claim was not moot, the Ninth Circuit affirmed that ruling.¹⁸ The parties agreed the only issue remaining on appeal was whether the district court had abused its discretion in issuing the preliminary injunction.¹⁹ After hearing arguments in November 2022 and issuing an opinion in August 2023, the Ninth Circuit *held* the Act likely violated the Equal Protection Clause of the Fourteenth Amendment and determined the district court had not abused its discretion in issuing the preliminary injunction.²⁰ *Hecox v. Little*, 79 F.4th 1009, 1016, 1035, 1039 (9th Cir. 2023).

II. BACKGROUND

The Fourteenth Amendment to the United States Constitution provides that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”²¹ This constitutional guarantee coexists “with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons.”²² To resolve this tension between principle and reality, the Supreme Court has developed three tiers of scrutiny for reviewing equal protection challenges.²³

The most stringent level of review, “strict scrutiny,” applies to fundamental rights and “suspect classifications” based on race, national

16. *Id.* at 1020.

17. *Id.*

18. *Id.*

19. *Id.*

20. In June 2024, the Ninth Circuit’s opinion in *Hecox v. Little* was amended and superseded by a new opinion. *See Hecox v. Little*, 104 F.4th 1061 (9th Cir. 2024). In the new opinion, the Ninth Circuit remands the case to the district court to clarify the scope of the injunction, specifically whether the Act’s enforcement is enjoined in whole or in part and whether the injunction extends to nonparties. *Id.* at 1089-90. Because this Case Note was written before the new opinion and the new opinion closely conforms to the Ninth Circuit’s 2023 opinion, citations to the court’s 2023 opinion have been preserved.

21. U.S. CONST. amend. XIV, § 1.

22. *Romer v. Evans*, 517 U.S. 620, 631 (1996) (citing *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 271–272 (1979)).

23. *See id.*; *Students for Fair Admissions v. Harvard*, 600 U.S. 181, 308-09 (2023).

origin, religion, or alienage, and the law must be “narrowly tailored” to “further compelling governmental interests.”²⁴ Laws that discriminate based on a “quasi-suspect classification,” such as sex or illegitimacy, must withstand the slightly less stringent standard of “heightened scrutiny.”²⁵ Under “heightened scrutiny,” the law must further “important governmental objectives” and employ means “substantially related to the achievement of those objectives.”²⁶ In sex discrimination cases, like in *Hecox*, the government must demonstrate an “exceedingly persuasive justification” for the classification.²⁷ Finally, the least stringent standard of review, “rational-basis review,” applies where a law does not target a suspect or “quasi-suspect” classification, and the law will be upheld if it is rationally related to a legitimate legislative end.²⁸

A. *Transgender Identity as a “Quasi-Suspect” Classification*

In *Bostock v. Clayton County*, the Supreme Court held that “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex,” thereby equating gender-identity and sex-based discrimination.²⁹ The Court issued this ruling in the context of an employment discrimination claim under Title VII, finding that an individual’s sexual orientation or gender identity “is not relevant to employment decisions.”³⁰ Proceeding on the assumption that “sex” referred to differences in reproductive biology, the Court found that employment actions targeting transgender employees constitute sex-based discrimination under Title VII.³¹ The Court reasoned that such actions penalize transgender individuals for traits or actions the employer would tolerate in a cisgender employee.³²

Though the *Bostock* Court explicitly confined its holding to the Title VII context,³³ many courts have since relied on the decision to extend heightened scrutiny to gender-identity classifications that are challenged

24. See *Students for Fair Admissions*, 600 U.S. at 206.

25. See *United States v. Virginia* [hereinafter *VMI*], 518 U.S. 515, 532-33 (1996); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440-41 (1985).

26. *Id.* at 524 (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)).

27. *Id.* at 531.

28. See *Romer*, 517 U.S. at 631.

29. 590 U.S. 644, 660 (2020).

30. *Id.*

31. *Id.* at 655, 684.

32. *Id.* at 660.

33. *Id.* at 681.

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on constitutional grounds.³⁴ Even before *Bostock*, the Ninth Circuit concluded transgender people are at least a “quasi-suspect” class for Equal Protection purposes.³⁵ In *Karnoski v. Trump*, plaintiffs challenged the constitutionality of a presidential memorandum banning openly transgender individuals from military service.³⁶ Defendants argued that heightened scrutiny did not apply because the policy excluded individuals who experienced gender dysphoria rather than targeting transgender individuals.³⁷ The court rejected this argument, however, holding the ban did not target gender dysphoria, but instead targeted transgender individuals with a history of experiencing gender dysphoria.³⁸ In other words, the court found the policies did not target an “incongruence” between gender identity and assigned biological sex. Instead, the ban targeted a group of *individuals* who typically experience such an incongruence.³⁹

In determining whether to establish a new “quasi-suspect” class for Equal Protection purposes, courts consider whether members of the group in question (1) have historically been subject to discrimination; (2) are defined by a characteristic unrelated to their ability to contribute to society; (3) exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; and (4) constitute a minority lacking political power.⁴⁰ In *Karnoski*, the Ninth Circuit affirmed the district court’s finding that transgender individuals possess all four of these characteristics.⁴¹ Likewise, the Fourth Circuit concluded transgender

34. See *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 608, 616 (4th Cir. 2020) (holding heightened scrutiny applies to school policies dictating which bathroom a student may use based on “biological gender”); see also *Brandt ex rel. Brandt v. Rutledge*, 47 F.4th 661, 670-71 (8th Cir. 2022) (holding a statute prohibiting gender transition treatments for minors discriminates on the basis of biological sex); but see *Eknes-Tucker v. Governor of Ala.*, 80 F.4th 1205, 1227 (11th Cir. 2023) (holding a statute restricting gender transition treatments for minors classified on bases of age and procedure, not sex or gender nonconformity).

35. *Karnoski v. Trump*, 926 F.3d 1180, 1200-01 (9th Cir. 2019).

36. *Id.* at 1186.

37. *Id.* at 1187.

38. *Id.* at 1201.

39. The American Psychiatric Association defines gender dysphoria as “psychological distress that results from an incongruence between one’s sex assigned at birth and one’s gender identity.” *What Is Gender Dysphoria?*, AM. PSYCHIATRIC ASS’N (Aug. 2022), <https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria>.

40. See *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 611 (4th Cir. 2020) (first citing *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987); and then citing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440-41 (1985)).

41. 926 F.3d at 1192, 1200.

individuals “easily” satisfy this definition in *Grimm v. Gloucester County School Board*.⁴²

Grimm concerned an Equal Protection challenge to a school policy requiring students to use the bathrooms according to the sex listed on their birth certificates.⁴³ Because the policy punished students for gender nonconformity, the court held it was rooted in gender stereotypes and, therefore, failed to survive heightened scrutiny.⁴⁴ The School Board, however, argued that the policy treated all students equally, regardless of sex, since it required all students to use the bathrooms corresponding to their “biological genders.”⁴⁵ The court rejected this gender-neutral characterization of the policy, recognizing that any policy enforcing conformity with sex assigned at birth necessarily targets transgender individuals.⁴⁶ The Board urged the court to consider transgender boys affected by the policy as “biological” females, an argument that “privilege[d] sex-assigned-at-birth over [transgender students’] medically confirmed, persistent and consistent gender identit[ies].”⁴⁷ The court concluded that gender-identity classifications warrant intermediate scrutiny as sex-based policies and expressed doubt that the Board could determine transgender status without reference to “biological gender.”⁴⁸

B. Facially-Neutral Classifications as Covert Gender-Identity Discrimination

The language of statutory classifications does not need to explicitly refer to a protected class of individuals to command heightened scrutiny. For instance, *Personnel Administrator of Massachusetts v. Feeney* demonstrates that facially neutral statutes can still receive heightened scrutiny.⁴⁹ The *Feeney* court recognized that any state law covertly or overtly discriminating against women requires an “exceedingly persuasive” justification to survive an equal protection challenge.⁵⁰

42. 972 F.3d at 611-13.

43. *Id.* at 593.

44. *Id.* at 608.

45. *Id.* at 609.

46. *Id.* at 609-10 (analogizing the school’s bathroom policy to racial segregation and implying that the policy “stigmatiz[es]” transgender students by requiring them to use separate, single-stall restrooms).

47. *Id.* at 610.

48. *Id.* at 609, 610.

49. *See* 442 U.S. 256, 273 (1979).

50. *Id.* at 273.

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Statutes perpetuate covert discrimination by relying on seemingly neutral classifications to effect a discriminatory purpose.⁵¹ In *Pacific Shores, LLC v. City of Newport Beach*, the Ninth Circuit explained that proxy discrimination is a form of facial discrimination, “aris[ing] when the defendant enacts a law or policy that treats individuals differently on the basis of seemingly neutral criteria that are so closely associated with the disfavored group. . . .”⁵²

Latta v. Otter exemplifies the use of a sex-based classification as a proxy for gender-identity discrimination.⁵³ In *Latta*, the Ninth Circuit evaluated a constitutional challenge to state laws that prohibited same-sex marriage on the basis of “procreative capacity.”⁵⁴ The laws used a physiological distinction as a proxy for discrimination against same-sex couples, premising marriage eligibility on “seemingly neutral criteria that are . . . closely associated with [sexual orientation].”⁵⁵ The court determined that heightened scrutiny applied because the statutes “effectively if not explicitly” discriminated against same-sex couples.⁵⁶

C. Sex-Based Classifications and “Inherent Differences”

Heightened scrutiny is a “demanding” standard, requiring a State to provide an “exceedingly persuasive” justification for its gender-based differential treatment.⁵⁷ A sex-based statutory classification may survive heightened scrutiny when it accurately reflects “inherent differences” between the sexes.⁵⁸ The proponent of the challenged classification must demonstrate that it “is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances.”⁵⁹ In *Clark ex rel. Clark v. Arizona Interscholastic Association* (“*Clark I*”), for example, the Ninth Circuit upheld an Arizona policy mandating binary sex-segregation of school athletic teams.⁶⁰ The proponents of sex-segregated teams successfully invoked “physiologically-derived differences in athletic potential” between males and females, particularly

51. *See id.*

52. 730 F.3d 1142, 1160 n. 23 (9th Cir. 2013).

53. *See* 771 F.3d 456, 467-68 (9th Cir. 2014).

54. *Id.* at 464, 467.

55. *Pac. Shores*, 730 F.3d at 1160 n.23; *see Latta*, 771 F.3d at 468.

56. *Latta*, 771 F.3d 456 at 467-68.

57. *VMI*, 518 U.S. 515, 532-33 (1996).

58. *See id.* at 533.

59. *Michael M. v. Super. Ct. of Sonoma Cnty.*, 450 U.S. 464, 469 (1981) (citing *Califano v. Webster*, 430 U.S. 313 (1977)).

60. *Clark ex rel. Clark v. Ariz. Interscholastic Ass’n* [hereinafter *Clark I*], 695 F.2d 1126, 1131-32 (9th Cir. 1982).

differences in physical size.⁶¹ The court noted the Supreme Court's willingness to uphold sex classifications when sex represents a "'legitimate accurate proxy' in a regulatory scheme."⁶² The court concluded that sex-segregated teams accurately reflected gender-based differences in athletic ability, maintaining that such teams were necessary to secure equal athletic opportunities for female students.⁶³

While sex-based classifications rooted in actual physical differences are permitted under heightened scrutiny, those that reflect "'archaic and overbroad' generalizations" are not.⁶⁴ The Supreme Court has expressed disapproval of measures that classify "unnecessarily and overbroadly by gender when more accurate and impartial lines can be drawn."⁶⁵ For example, in *Sessions v. Morales-Santana*, the Court held unconstitutional a law that applied differentially to noncitizen, unmarried parents based on gender, requiring fathers to remain longer in the United States before allowing them to confer citizenship status on their children.⁶⁶ The Court identified the law's basis in archaic notions of the relative parental responsibilities of fathers and mothers.⁶⁷ It noted that a statutory objective to "exclude or protect" members of one gender is illegitimate when it relies on "fixed notions [of the] roles and abilities" of men and women.⁶⁸

III. COURT'S DECISION

In the noted case, the Ninth Circuit concluded Lindsay Hecox was substantially likely to succeed on the merits of her Equal Protection challenge.⁶⁹ The court first addressed the appropriate level of scrutiny, determining heightened scrutiny applied because the Act engaged in both sex-based and gender-identity discrimination.⁷⁰ The court then concluded that the Act likely would not survive heightened scrutiny since the state officials failed to offer an "exceedingly persuasive justification" for its overbroad classifications based on gender identity and for perpetuating gender stereotypes.⁷¹ Additionally, the court found the Act did not

61. *Id.* at 1127.

62. *Id.* at 1129 (quoting *Craig v. Boren*, 429 U.S. 190, 204 (1976)).

63. *Id.* at 1131-32.

64. *Id.* at 1129 (quoting *Califano v. Goldfarb*, 430 U.S. 199, 207 (1977)).

65. *Sessions v. Morales-Santana*, 582 U.S. 47, 63 n.13 (2017) (citing *J.E.B. v. Alabama ex rel. T. B.*, 511 U.S. 127, 139 n.11 (1994)).

66. *Id.* at 51, 76-77.

67. *Id.* at 62-63.

68. *Id.* at 62 (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982)).

69. *Hecox v. Little*, 79 F.4th 1009, 1039 (9th Cir. 2023).

70. *Id.* at 1021.

71. *Id.* at 1033, 1035.

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promote its stated purpose of advancing women's equality in sports but, in fact, undermined this objective.⁷² The unlawful discrimination by the Act included both the ban on participation in women's athletics and the invasive sex verification procedure.⁷³

First, the court established the Act indeed discriminated against transgender students, rather than legislating on the sole basis of biological sex, as alleged by state officials.⁷⁴ Proponents of the Act asserted that it did not engage in gender-identity discrimination since it applied to any individual possessing certain physiological traits, regardless of that individual's sex.⁷⁵ The court determined, however, that the Act's sex verification process explicitly targeted transgender individuals.⁷⁶ That process was based on examining a student's reproductive anatomy, chromosomal makeup, or endogenously produced testosterone levels.⁷⁷ Because most gender-affirming medical care will not alter these traits, the Act effectively banned transgender female athletes from female sports teams.⁷⁸ Although the state officials asserted that biological sex is a "neutral and well-established medical and legal concept," the court characterized the Act's definition of sex as "designed precisely by the Idaho legislature to exclude transgender and intersex people."⁷⁹

Next, the court determined heightened scrutiny applies because the Act discriminates based on transgender status.⁸⁰ For instance, in *Karnoski*, the Ninth Circuit previously held that "gender identity is at least a 'quasi-suspect class,'" triggering intermediate scrutiny.⁸¹ The Ninth Circuit also noted that gender-identity discrimination itself constitutes sex-based discrimination.⁸² In support of this conclusion, the court cited the Supreme Court's holding in *Bostock* that gender-identity discrimination necessarily constitutes sex-based discrimination in the Title VII context.⁸³ Additionally, the Act, in *Hecox*, not only discriminated based on transgender status but also against all women and girls who might wish to

72. *Id.* at 1035.

73. *Id.* at 1033, 35.

74. *Id.* at 1022.

75. *Id.*

76. *Id.*

77. *Id.*; see also IDAHO CODE § 33-6203(3).

78. *Hecox*, 79 F.4th at 1022.

79. *Id.* at 1023.

80. *Id.* at 1026.

81. 926 F.3d 1180, 1200-01 (9th Cir. 2019).

82. *Hecox*, 79 F.4th at 1026.

83. *Id.* at 1026 (citing *Bostock v. Clayton Cnty.*, 590 U.S. 644, 660 (2020)).

compete on school athletic teams.⁸⁴ The court noted that the Act subjected only women and girls “to the risk and humiliation of having their sex ‘disputed,’” thus imposing separate requirements on female athletes for access to the same athletic opportunities enjoyed by male students.⁸⁵

After determining the appropriate standard of review, the court affirmed the district court’s holding that the Act likely did not survive heightened scrutiny, concluding no substantial relationship existed between the discriminatory means employed by the Act and its purported governmental objective.⁸⁶ The Idaho legislature asserted the Act was necessary to preserve the benefits of sex-segregated sports teams while allowing female athletes to demonstrate their athletic abilities and earn recognition, accolades, and college scholarships.⁸⁷ In *Clark I*, the court had previously recognized an important governmental interest in “furthering women’s equality and promoting fairness in female athletic teams” and in prohibiting male athletes from competing on female sports teams “[to redress] past discrimination against women in athletics and [promote] equality of opportunity between the sexes.”⁸⁸ But, in *Hecox*, the court concluded that “the discriminatory means employed” by the Act were not “substantially related to the achievement” of those objectives.⁸⁹ First, the district court determined transgender women and girls who had medically suppressed their testosterone levels likely did not have a physiological advantage over their cisgender female peers, unlike the cisgender boys in *Clark I*.⁹⁰ Second, that court concluded that transgender women “have historically been discriminated against, not favored.”⁹¹ Cisgender men and boys had historically enjoyed equal or greater athletic opportunities than female students, while transgender individuals had not.⁹² Rather than redressing the historical discrimination against women and girls, the Act perpetuated unequal treatment of female students by subjecting both transgender and cisgender women and girls to a humiliating sex dispute verification process.⁹³

Under heightened scrutiny, courts must reject measures that “classify unnecessarily and overbroadly by gender when more accurate

84. *Id.* at 1027.

85. *Id.* at 1027, 1030, 1033, 1035.

86. *Id.*

87. *Id.* at 1018.

88. *Id.* at 1028 (quoting *Clark I*, 695 F.2d 1126, 1131 (9th Cir. 1982)).

89. *Id.* at 1028, 1033, 1035 (quoting *VMI*, 518 U.S. 515, 516 (1996)).

90. *Id.* (citing *Hecox v. Little*, 479 F. Supp.3d 930, 978 (D. Idaho 2020)).

91. *Id.* at 1029 (quoting *Hecox*, 479 F. Supp.3d at 977).

92. *See id.* (citing *Hecox*, 479 F. Supp. 3d at 977).

93. *Id.*

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and impartial lines can be drawn.”⁹⁴ As such, the court determined the Act excluding transgender women from athletics likely violates the Equal Protection Clause because it “serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes.”⁹⁵ The court also concluded that the criteria prescribed by the Act for verifying a student’s sex did not closely correlate with athletic advantages.⁹⁶ Moreover, the Act’s sweeping prohibition included students in primary school despite the minimal effect of gender on athletic performance at that age level.⁹⁷ For these reasons, the court concluded the Act did not advance its stated objective of promoting equality in women’s athletics.⁹⁸

Finally, the court determined the sex-verification provision of the Act would likely fail to survive heightened scrutiny.⁹⁹ That provision established a process for challenging a student’s sex, thereby requiring the student to submit to a medical examination performed by a healthcare provider.¹⁰⁰ The Act provided for only three methods of verifying the disputed sex of an athlete, each of which the court characterized as “unconscionably invasive.”¹⁰¹ As the court noted, Idaho failed to offer an “exceedingly persuasive justification” to impose such an “objectively degrading and disturbing process on young women and girls.”¹⁰² Because this process would likely discourage participation in sports by female athletes, thereby undermining the purported objective of the Act, the Ninth Circuit concluded the district court had not abused its discretion in finding that the sex verification provision likely would not survive heightened scrutiny.¹⁰³

IV. ANALYSIS

In *Hecox*, the Ninth Circuit applied the reasoning of *Bostock* to the constitutional context of gender-identity discrimination under the Equal Protection clause, concluding gender-identity and sex-based

94. *Id.* at 1033 (quoting *Sessions v. Morales-Santana*, 137 582 U.S. 47, 63 n.13 (2017)).

95. *Id.* (quoting *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 131 (1994)).

96. *Id.* at 1030-31.

97. *Id.*

98. *Id.* at 1033.

99. *Id.* at 1033-35.

100. *Id.* at 1034; *see also* IDAHO CODE § 33-6203(3) (2020).

101. *Hecox*, 79 F.4th at 1034.

102. *Id.* at 1035.

103. *Id.*

classifications should receive the same level of scrutiny.¹⁰⁴ Defining transgender individuals as a suspect class for Equal Protection purposes recognizes the full scope of the harm inflicted by gender-identity discrimination.¹⁰⁵ The court acknowledged that gender-identity discrimination perpetuates invasive scrutiny of women's bodies and punishment for atypical sexual development.¹⁰⁶ By recognizing transgender individuals as a suspect class for Equal Protection purposes, the court identified an avenue for redressing historical discrimination against both cisgender and transgender girls and women.

A. Sex-Based Classifications as Proxies for Transgender Status

The Ninth Circuit found it necessary to address an issue in *Hecox* that the *Bostock* Court declined to consider, namely the relationship between biological sex and gender identity.¹⁰⁷ The Act purported to advance an important governmental interest in promoting equal athletic opportunity for girls and women.¹⁰⁸ Proponents of the Act relied on the Ninth Circuit's precedent in which the court upheld sex-segregated teams

104. *Hecox*, 79 F.4th at 1026. In *Bostock*, the Supreme Court explained that “discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex.” *Bostock v. Clayton Cnty.*, 590 U.S. 664, 669 (2020). The Court observed that sexual orientation and gender identity are not merely “related to sex in some vague sense” but that “to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex.” *Id.* at 661. The Court issued this opinion in the context of an employment discrimination claim under Title VII and based its reasoning on statutory interpretation rather than constitutional doctrine. *Id.* at 659-660. For cases extending the *Bostock* reasoning to the Title IX context and invalidating anti-transgender policies in schools, see e.g., *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616, 619 (4th Cir. 2020) (holding that a school policy precluding transgender students from using the appropriate restrooms violated Title IX and the Equal Protection Clause in light of the Supreme Court's decision in *Bostock*); *Whitman-Walker Clinic, Inc. v. U.S. Dep't of Health and Hum. Servs.*, 485 F.Supp.3d 1, 39-40, 64 (D.D.C. 2020) (holding that repeal of a DHHS rule defining gender identity discrimination as sex-based discrimination likely violated Title IX under *Bostock*).

105. See *Hecox*, 79 F.4th at 1035 (noting that the “psychological burden” imposed by the Act's sex dispute verification provision falls on all women and girls).

106. *Id.* at 1023-24 (explaining that “two percent of all babies are born ‘intersex,’ or ‘with a wide range of natural variations in physical traits . . . that do not fit typical binary notions of male and female bodies,’” and that the Act also discriminates against these individuals).

107. See *Hecox*, 79 F.4th at 1023-24 (concluding the Act's definition of “sex” constitutes an “oversimplification of the complicated biological reality of sex and gender”); *Bostock*, 590 U.S. at 655 (concluding that the Court's approach does not turn on the meaning of “sex” under the 1964 Civil Rights Act, and assuming, for the sake of argument, that sex refers to “biological distinctions between male and female”).

108. *Hecox*, 79 F.4th at 1028; see *id.* at 1035 (noting that the “psychological burden” imposed by the Act's sex dispute verification provision falls on all women and girls).

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as necessary to redress historical discrimination against female athletes.¹⁰⁹ In other words, the Act purported to advance the interests of a group shaped by historical discrimination and exclusion.¹¹⁰ The Act's sex-verification provision, however, classified students on the basis of narrow physiological criteria, regardless of their historical level of access to athletic opportunity.¹¹¹ The *Hecox* court identified two principal problems with this approach.¹¹² First, the State failed to demonstrate a strong correlation between the physiological traits used in the Act and athletic ability.¹¹³ Second, the ban on athletic participation undermined its supposed objective of redressing historical inequity by targeting transgender students, who have themselves faced historical discrimination in schools.¹¹⁴ Furthermore, the Act's narrow definition of biological sex invited invasive scrutiny of women and girls perceived or suspected by anyone to deviate from its definition of biological sex.¹¹⁵ Rather than redressing discrimination against women athletes, the statute perpetuated a history of institutionalized scrutiny of women's bodies.¹¹⁶

The *Hecox* court's decision also focused on the alleged purpose of the sex-based distinction drawn by the Act. The State argued the classification served as an accurate proxy for sex-based differences in athletic ability.¹¹⁷ The court, however, characterized the classification as a proxy for gender-identity discrimination.¹¹⁸ Not only has the Ninth Circuit recognized a compelling interest in maintaining sex-segregated school athletic teams,¹¹⁹ but Equal Protection jurisprudence also supports

109. *Id.* at 1028 (describing *Clark I*, 695 F.2d 1126, 1127, 1131 (9th Cir. 1982)); see generally Elizabeth Kristen, *Reflections on Progress Without Equity: Title IX K-12 Athletics at Fifty*, 30 AM. U. J. GENDER SOC. POL'Y & L. 227, 228-29 (2022) (finding that schools provide girls with fewer athletic opportunities than boys, while also providing female athletes with inferior facilities, equipment, uniforms, and less publicity than their male peers).

110. See *Hecox*, 79 F.4th at 1028-30 (holding that the Act perpetuates historical discrimination against transgender and cisgender women and that appellants misrelied on the court's decision in *Clark I*, upholding sex-segregated teams on the basis that men and boys have historically enjoyed superior access to athletic opportunity).

111. See Fairness in Women's Sports Act, IDAHO CODE § 33-6203(3).

112. *Hecox*, 79 F.4th at 1029.

113. See *id.*

114. See *id.*

115. *Id.* at 1034.

116. See discussion *infra* subpart IV.B.

117. See *Hecox*, 79 F.4th at 1022.

118. See *id.*

119. *Clark I*, 695 F.2d 1126, 1131-32 (9th Cir. 1982) (holding that public high schools could ban male athletes from women's teams to further the governmental interest of "redressing past discrimination against women in athletics and promoting equality of opportunity between the sexes").

statutory classifications that accurately reflect sex-based differences.¹²⁰ The State argued the Act differentiated between male and female students on the permissible basis of sex-based differences in athletic ability.¹²¹ Relying on expert medical testimony, the court rejected this argument, concluding the physiological criteria used in the Act did not sufficiently correspond to athletic ability.¹²² The court found athletic ability to more accurately correlate with circulating levels of testosterone, which transgender women and girls can suppress through hormonal therapy.¹²³ The Act instead narrowly targeted physiological traits most gender-affirming medical care cannot alter, bolstering the Court's conclusion that the law covertly but intentionally discriminated against transgender students.¹²⁴

In recognizing the Act's sex-based classification as covert gender-identity discrimination, the court acted consistently with the precedent it established in *Latta*.¹²⁵ *Latta* was similarly concerned about the constitutionality of state laws that used sex-based classifications to target LGBTQ+ individuals.¹²⁶ Plaintiffs in *Latta* alleged that Idaho and Nevada statutes banning same-sex marriage discriminated on the basis of sexual orientation, thus triggering heightened scrutiny.¹²⁷ Defendants argued that heightened scrutiny did not apply because the statutes targeted same-sex couples not on the basis of their sexual orientation but rather on their alleged lack of procreative capacity.¹²⁸ The *Latta* court, however, rejected this argument because it reduced the institution of marriage to a mere mechanism of biological reproduction.¹²⁹ In *Hecox*, the state officials launched a similar argument about the Act that restricted transgender students' participation in sports, claiming that it targeted the physiological differences that confer athletic advantages on certain individuals over

120. See, e.g., *VMI*, 518 U.S. 515, 533-34 (1996) (holding that heightened review does not preclude sex-based classifications due to the "enduring" physical differences between men and women).

121. *Hecox*, 79 F.4th at 1022.

122. *Id.* at 1022-23.

123. *Id.*

124. *Id.*

125. *Id.*; see *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014).

126. *Latta*, 771 F.3d at 464.

127. *Id.*

128. *Id.* at 467.

129. *Id.* at 467, 471 ("[M]arriage is not simply about procreation, but as much about expressions of emotional support and public commitment.") (quoting *Turner v. Safley*, 482 U.S. 78, 95-96 (1987)).

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others.¹³⁰ The state officials claimed the ban did not engage in proscribed gender-identity discrimination since it classified only on the basis of physiological characteristics.¹³¹ But this argument, like the one advanced by state officials in *Latta*, ignored the complex and intimate relationship between biological sex and gender identity.¹³² School sports provide students with a forum for developing social skills, honing athletic ability, and competing for scholarships, among other social and educational benefits.¹³³ Though state officials claimed the Act targeted physiological criteria, the statute's sex-verification provision employed a definition of biological sex designed precisely to target transgender women and girls, barring these students from school athletics and denying them the athletic, educational, and social benefits the Act purported to safeguard for female athletes.¹³⁴

B. Sex-Based Classifications and Gender Discrimination

The *Hecox* court recognized the use of a sex-based classification as a covert form of gender-identity discrimination.¹³⁵ The court also understood how this kind of covert discrimination has been complicit in perpetuating historical sex-based discrimination against women.¹³⁶ The Act's sex-verification process involved an invasive examination of students' reproductive anatomy, hormone levels, or chromosomal makeup.¹³⁷ The court contextualized this provision as only the latest example to appear in the extensive history of scrutiny and violation of female athletes' bodies.¹³⁸ This institutionalized scrutiny has been perpetuated most robustly in elite athletic leagues. From the 1960s until the 1990s, the International Olympic Committee used chromosomal

130. See *Hecox*, 79 F.4th at 1018, 1022 (citing the Idaho legislature's finding that men's higher levels of testosterone "have lifelong effects, including those most important for success in sport").

131. *Id.* at 1022.

132. See *id.* at 1022-26.

133. See Kevin Kniffin, *High School Athletes Gain Lifetime Benefits*, N.Y. TIMES (Oct. 22, 2014, 10:18 AM), <https://www.nytimes.com/roomfordebate/2014/10/21/taking-sports-out-of-school-2/high-school-athletes-gain-lifetime-benefits>.

134. See *Hecox*, 79 F.4th at 1030.

135. See *id.* at 1035 (detailing the potential psychological harms of subjecting students to a sex verification process).

136. *Id.* (discussing the "checkered" history of the use of sex verification procedures in women's sports).

137. *Id.* at 1034.

138. *Id.*

testing to disqualify intersex women from competition.¹³⁹ Also, in that era, the IOC required female athletes to appear naked before doctors to verify their sex.¹⁴⁰ World Athletics, the governing body for running competitions, still disqualifies female athletes from international competitions if their testosterone levels exceed a certain threshold.¹⁴¹ This policy penalizes not only transgender athletes but also intersex and cisgender women whose atypical sexual development may result in elevated endogenous levels of testosterone.¹⁴² The Act, in *Hecox*, would have perpetuated this practice of chromosomal and hormonal scrutiny, subjecting female students to invasive medical examinations similar to those professional athletes have decried.¹⁴³

Lawmakers have used sex-based classifications to target transgender individuals in other ways. For example, courts have recently evaluated Equal Protection challenges to laws restricting the access of transgender minors to gender-affirming medical care.¹⁴⁴ These laws often provide that minors may not undergo medical treatment in order to alter the sex designated on their birth certificates.¹⁴⁵ Transgender plaintiffs have also brought Equal Protection challenges to policies requiring students to use bathrooms inappropriate to their gender identities.¹⁴⁶ Some courts have upheld such policies on the ground that these laws classify solely on the basis of biological sex rather than gender identity.¹⁴⁷ For example, the Eleventh Circuit adopted this reasoning in *Adams v. School Board of St. John's County*, which upheld a school policy separating its bathrooms based on biological sex because it divided students into two sex-based

139. Grace Huckins, *Hormone Levels are Being Used to Discriminate Against Female Athletes*, SCI. AM. (Feb. 1, 2021), <https://www.scientificamerican.com/article/hormone-levels-are-being-used-to-discriminate-against-female-athletes/>.

140. *Hecox*, 79 F.4th at 1035.

141. Rodrigo Pérez Ortega, *World Athletics Banned Transgender Women from Competing. Does Science Support the Rule?*, SCI. (Apr. 4, 2023, 5:50 PM), <https://www.science.org/content/article/world-athletics-banned-transgender-women-competing-does-science-support-rule>.

142. *Id.*

143. See Caster Semenya, *Running in a Body That's My Own*, N.Y. TIMES, (Oct. 21, 2023), <https://www.nytimes.com/2023/10/21/opinion/running-body-semenya.html>.

144. See e.g., *Eknes-Tucker v. Governor of Ala.*, 80 F.4th 1205, 1227 (11th Cir. 2023) (holding that statute restricting gender transition treatments for minors did not classify on basis of sex, and therefore was not subject to intermediate scrutiny).

145. See *id.* at 1210.

146. See *Adams ex rel. Kasper v. Sch. Bd. of St. John's Cnty.*, 57 F.4th 791, 809, 811 (11th Cir. 2022) (rejecting an equal protection challenge to a school bathroom policy requiring students to use bathrooms corresponding with their biological sex); *D.H. ex rel. A.H. v. Williamson Cnty. Bd. of Educ.*, 638 F.Supp.3d 821, 834 (M.D. Tenn. 2022) (holding plaintiffs not substantially likely to succeed on Equal Protection challenge to school's sex-segregated bathroom policy).

147. See *Adams*, 57 F.4th at 803, 808, 810-11.

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groups, both of which included transgender students.¹⁴⁸ By contrast, in *Grimm*, the Fourth Circuit recognized the unique harms such policies impose on transgender students.¹⁴⁹ That court criticized the school board's privileging of students' assigned sexes (as listed on their birth certificates) over their innate "consistent and persistent" sense of gender identity.¹⁵⁰

Recent cases concerning the access of transgender minors to gender-affirming medical care, appropriate school restrooms, and athletic opportunities take a different approach. They discredit the notion of biological sex as a "neutral and well-established medical and legal concept. . . ."¹⁵¹ Rather than serving as a simple medical category, biological sex has become the terrain on which courts and legislatures negotiate the rights of transgender individuals.¹⁵² The *Hecox* case illustrates the perils of relying on biological sex as an immutable, uncontested category.¹⁵³ The Ninth Circuit recognized the Fairness in Women's Sports Act's reliance on seemingly gender-neutral, sex-based classifications to obscure the law's implications for the rights of transgender students.¹⁵⁴ The court also recognized that legislative reliance on such categories can devalue essential aspects of students' identities.¹⁵⁵ At trial, the State characterized the interests of transgender and cisgender students as irreconcilable, and it maintained that permitting transgender women and girls to compete in female athletics would displace cisgender female athletes from these teams.¹⁵⁶ As *Hecox* observed, however, the interests of cisgender and transgender athletes aligned because each group had an important interest in resisting the legislative conflation of gender identity with narrow physiological criteria.¹⁵⁷ The Ninth Circuit agreed with the Supreme Court's recognition in *Bostock* that gender-identity discrimination necessarily implies discrimination based on sex.¹⁵⁸

148. *Id.* at 801, 808.

149. *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 608-16 (4th Cir. 2020).

150. *Id.* at 610, 619.

151. *Hecox v. Little*, 79 F.4th 1009, 1023 (2023).

152. See generally Joe Brucker, *Beyond Bostock: Title IX Protections for Transgender Athletes*, 29 JEFFREY S. MOORAD SPORTS L.J. 327, 356-58 (2022) (discussing sex-based Equal Protection claims as a vehicle for challenging gender-identity discrimination).

153. See *Hecox*, 79 F.4th at 1023-24.

154. *Id.*

155. *Id.* at 1030 (noting that requiring transgender students to express themselves as cisgender would adversely affect students' mental health).

156. *Id.*

157. *Id.* at 1035 (discussing the "psychological burden" the Act would impose on cisgender and transgender women and girls).

158. See *Bostock v. Clayton Cnty.*, 590 U.S. 644, 662 (2020).

Extending this holding to the Equal Protection context allowed the court to invalidate sex-based discrimination against transgender women and girls, as well as their cisgender peers.

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