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IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

JENNY ROE, a minor, by and through parent DEBBIE ROE; JANE NOE, a minor, by and through parents JEAN NOE and JOHN NOE; and JILL POE, a minor, by and through parents SARA POE and DAVID POE,

Plaintiffs,

v.

UTAH HIGH SCHOOL ACTIVITIES ASSOCIATION; GRANITE SCHOOL DISTRICT; JORDAN SCHOOL DISTRICT, and SUPERINTENDENTS RICH K. NYE and ANTHONY GODFREY, in their official capacities,

Defendants.

DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM ON WHICH RELIEF CAN BE GRANTED

(HEARING REQUESTED)

Case No.: 220903262

Judge Keith Kelly

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Defendants move this Court to dismiss the Second Amended Complaint (Complaint) with prejudice under Utah R. Civ. P. 12(b)(6) because Plaintiffs have failed to state a claim on which relief can be granted. Defendants have also filed a Motion to Dismiss pursuant to Rule 12(b)(1) simultaneously with this motion.

INTRODUCTION

This case arises at the intersection of an emerging social challenge confronting policymakers worldwide: how to best preserve fair competition and safety in women's sports while also accommodating the interests of transgender persons in social interactions (here, high school sports) that align with their gender identity. Policymakers are currently developing a range of policy approaches to this problem.

In the 2022 session, our state legislature enacted a law (HB11) establishing a Utah standard for balancing these interests. HB11 reinforces a longstanding standard for competition in girls' high school sports in the interests of fair competition and safety for biological girls. It allows only biological girls to engage in interscholastic competition in girls' leagues, but also seeks to accommodate the interests of transgender persons by allowing transgender girls to try out for and practice with a girls' team.

Plaintiffs challenge the balance struck by the legislature in HB11. They do so through claims arising under three provisions of the Utah Constitution: (1) the Uniform Operation of Laws clause (art. I § 24); (2) the Equal Political Rights Clause (art. IV § 1); and (3) the Due Process Clause (art. I § 7). D24:19-23. It is well established that the Utah Constitution is interpreted in accordance with its original public meaning. Yet the Plaintiffs are asserting that these three provisions should be interpreted, as originally understood, to direct the Court to put an end to an

emergent, evolving debate over the best way to balance the interests of girls in competing safely in their own sports leagues with the interests of transgender girls in competing in a league that aligns with their gender identity.

Under each of their three claims, Plaintiffs seek a declaration that HB11 is unconstitutional and ask for preliminary and permanent injunctions against its enforcement. D24:19-23.[1] This is a facial challenge to the law. Plaintiffs are not in a position to allege any particularized harm arising from the application of HB11 to them, or to identify any particularized manner in which the law is alleged to infringe their constitutional rights. In fact, Plaintiffs are precluded from doing so—under the Court's July 12 order in limine, which prohibits Plaintiffs from presenting any evidence on the particular effects of HB11 on the Plaintiffs. So their case involves a facial challenge, which requires a showing that the law is unconstitutional in all of its applications.

Plaintiffs have failed "to state a claim on which relief can be granted." Utah R. Civ. P. 12(b)(6). Defendants hereby move that the Complaint be dismissed with prejudice. Even assuming the truth of the allegations of the Complaint, Plaintiffs are not entitled to relief. Each of their claims fails as a matter of law. And their facial challenge to the statute fails because they have not alleged and cannot demonstrate that HB11 is unconstitutional in all of its applications.

PLAINTIFFS' CLAIMS

In relevant part, Plaintiffs allege:

1. They are three transgender girls who are in public school and want to compete on their schools' girls' volleyball, track/cross-country, and swim teams, either this school year or the year after. D24:3-4.

[1] Defendants refer to filings as [docket number]:[page number].

2. “If the Ban goes into effect, Plaintiffs will be denied an equal opportunity to participate in school sports on the same terms as other girls. The Ban stigmatizes and discriminates against Plaintiffs because they are transgender girls, singles them out for less favorable treatment than other girls, denies them equal educational opportunities, and subjects them to serious adverse effects on their physical and mental health.” D24:2.

3. HB11 “denies transgender girls the equal opportunity to participate and compete on girls’ teams in interscholastic athletic activities because they are transgender.” *Id.* at 16.

4. “The Ban arbitrarily excludes girls who are transgender from interscholastic athletic competitions based solely on their presumed genetics and anatomy at birth, not on considerations reasonably related to interscholastic sports. Under the Ban, transgender girls in all grades are barred from competing on any girls’ team, in any sport, regardless of any individual circumstance.” *Id.* at 16.

5. “The Ban includes no mechanism for how the discriminatory policy will be monitored or enforced and no mechanism that would protect athletes from unwarranted intrusion into their bodies or disclosure of private medical information. Nor does the Ban protect against school officials disclosing students’ private medical information to others.” *Id.*

First claim: Uniform Operation of Laws Clause

6. “Plaintiffs bring this claim against all Defendants for purposes of seeking declaratory and injunctive relief, and they challenge the Ban’s categorical exclusion of girls who are transgender from competing on girls’ teams.” *Id.* at 19.

7. “Article I, Section 24 of the Utah Constitution provides: “All laws of a general nature shall have uniform operation.” Utah Const. art. I, § 24.” *Id.* at 20.

8. "The Ban singles out and categorically bars Plaintiffs from competing on girls' teams because they are transgender girls. In so doing, the Ban impermissibly discriminates based on Plaintiffs' transgender status and, because being transgender is sex-based, it also discriminates against Plaintiffs based on sex." *Id.*

9. "Under the uniform operation of laws clause, discriminatory government classifications based on sex are subject to heightened scrutiny and are not afforded a presumption of constitutionality." *Id.*

10. "The Ban fails heightened scrutiny because it is not reasonable, does not actually and substantially further a valid legislative objective, and is not reasonably necessary to further a legitimate legislative goal. It is easy to conceive of a less restrictive, burdensome, and nondiscriminatory method for promoting fairness in girls' sports. H.B. 11 itself establishes an alternative, less restrictive approach based on an individualized assessment, which would apply if the Ban is struck down by a court. See Part 10, H.B. 11." *Id.*

11. "The Ban cannot survive even rational basis review because it lacks any rational basis, rests on stereotypes and misconceptions, and undermines rather than advances its stated purpose of promoting fairness in girls' sports." *Id.*

12. "The Ban fails any level of review because it classifies girls based on a single trait—being transgender—and then categorically excludes them from competing in every sport, at every grade level." *Id.*

Second claim: Equal Rights Clause

13. "Plaintiffs bring this claim against all Defendants for purposes of seeking declaratory and injunctive relief, and they challenge the Ban's categorical exclusion of

transgender girls from competing on girls' teams." *Id.* at 21.

14. "Article IV, Section 1 of the Utah Constitution provides: "The rights of citizens of the State of Utah to vote and hold office shall not be denied or abridged on account of sex. Both male and female citizens of this State shall enjoy equally all civil, political and religious rights and privileges." *Id.*

15. "The Ban singles out and categorically bars Plaintiffs from competing on girls' teams because they are transgender girls. In so doing, the Ban impermissibly discriminates on the basis of Plaintiffs' transgender status and, because being transgender is sex-based, it also discriminates on account of sex." *Id.*

16. "Under Utah's equal rights clause, government classifications based on sex are subject to heightened scrutiny and are presumptively unconstitutional." *Id.*

17. "Moreover, for the same reasons stated in the first claim for relief, the Ban fails heightened scrutiny and cannot survive even rational basis review because it is not reasonable, does not actually and substantially further a valid legislative objective, is not reasonably necessary to further a legitimate legislative goal, and undermines rather than advances its stated goal of promoting fairness." *Id.*

Third claim: Due Process

18. "Plaintiffs bring this claim against all Defendants for purposes of seeking declaratory and injunctive relief, and they challenge the Ban's categorical exclusion of transgender girls from competing on girls' teams." *Id.* at 22.

19. "Article I, Section 7 of the Utah Constitution provides: "No person shall be

deprived of life, liberty or property, without due process of law." Additionally, as stated above, Article IV, Section I of the Utah Constitution provides: "Both male and female citizens of this State shall enjoy equally all civil, political and religious rights and privileges." *Id.*

20. "The Ban deprives Plaintiffs of their procedural and substantive due process rights to be free from discrimination based on sex by categorically barring them from competing on girls' teams because they are transgender girls. The procedural and substantive due process rights to be free from discrimination based on sex are enshrined in the Utah Constitution under the equal rights clause, which ensures equal enjoyment of rights by "[b]oth male and female citizens." Rights enshrined in the Constitution are considered fundamental rights under the Utah Constitution." *Id.*

21. "Under Article I, Section 7 of the Utah Constitution, state action that infringes or forecloses on a fundamental right is subject to strict scrutiny and is presumptively unconstitutional." *Id.*

22. "Moreover, for the same reasons stated in the first and second claims for relief, the Ban fails heightened scrutiny and cannot survive even rational basis review because it is not reasonable, does not actually and substantially further a valid legislative objective, is not reasonably necessary to further a legitimate legislative goal, and undermines rather than advances its stated goal of promoting fairness." *Id.* at 23.

23. "Additionally, the Ban does not provide Plaintiffs with any procedural safeguards to protect them from the deprivation of this constitutional right. Rather than providing Plaintiffs due process, the Ban provides them no process at all—no opportunity to be heard, no individual review, no exceptions, and no avenue for appeal. Plaintiffs have a significant interest in being

free from sex-based discrimination, which clearly outweighs the Legislature's interest in categorically banning them." *Id.*

Relief sought

24. Based on all this, Plaintiffs ask this Court to "Declare that the Ban's categorical exclusion of Plaintiffs and other transgender girls from competing on girls' teams is unconstitutional and invalid because it violates their rights under the Utah Constitution[.]" *Id.* at 23.

25. And "[t]emporarily, preliminarily, and permanently enjoin Defendants and their officers, employees, servants, agents, appointees, or successors from administering, preparing for, and enforcing the Ban's categorical exclusion of Plaintiffs and other transgender girls from competing on girls' teams[.]" *Id.* at 23.

ARGUMENT

Plaintiffs' Complaint falls short both in its claims and requested relief. Most fundamentally, the injunctive relief requested here is unavailable as a matter of law where the Plaintiffs have failed to allege that the statute has no applications that would withstand constitutional scrutiny. And even accepting the allegations as true for purposes of this motion, they fail to state a claim under the law governing each claim. The Complaint fails to state a claim under the Uniform Operation Clause because the Plaintiffs have not addressed—as they must—the actual classification that the legislature created (biological sex). Plaintiffs do not satisfy any, let alone all three of the steps used to analyze a Uniform Operation of Laws claim. The Complaint fails to state a claim under the Equal Political Rights Clause because no political rights are at issue. And it fails to state a claim under the Due Process Clause because the Plaintiffs have not alleged a basis for

infringement of a fundamental right, and any process due is political, not judicial. This Court should dismiss all claims with prejudice.

I. Plaintiffs have failed to state valid claims on all of their three asserted constitutional bases

A trial court should grant a motion to dismiss for failure to state a claim on which relief may be granted when it is clear that the plaintiffs are not entitled to relief even assuming the truth of the plaintiffs' allegations. Utah R. Civ. P. 12(b)(6). *S. Utah Wilderness Alliance v. Kane Cty. Comm'n*, 2021 UT 7, ¶ 37, 484 P.3d 1146 ("A rule 12(b)(6) motion to dismiss admits the facts alleged in the complaint but challenges the plaintiff's right to relief based on those facts."). That standard is met here.

A. Plaintiffs have not shown—as they must under a facial challenge—that no set of circumstances exist under which the HB11 is valid

Plaintiffs seek a declaration that HB11 is unconstitutional and an injunction against its enforcement. D26:19-23. This is a facial challenge—a request that it be struck down in all its applications (and not just as applied to the Plaintiffs). *See Doe v. Reed*, 561 U.S. 186, 194 (2010) (establishing that a "claim is 'facial' in that it is not limited to plaintiff's particular case, but challenges application of the law more broadly to all"); *Citizens United v. FEC*, 558 U.S. 310, 331 (2010) (explaining that breadth of remedy determines nature of constitutional challenge). A facial attack is "the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exist under which the [statute] would be valid." *State v. Herrera*, 1999 UT 64, ¶ 4 n.2, 993 P.2d 854, 857 (quoting *United States v. Solerno*, 481 U.S. 739, 745 (1987)).

Even if the Complaint could be generously read to lead with some semblance of an as-applied challenge, *see* D24:19 (challenging "the Ban's categorical exclusion of girls who are

transgender from competing on girls' teams"), that cannot be the case after this Court's July 12 order. Once Plaintiffs chose to assert their privilege not to disclose their mental health records, this Court ruled that they were "precluded from introducing evidence that Part 9 of H.B. 11 has caused them to be diagnosed with mental health conditions or has exacerbated any pre-existing mental health conditions" as well as "precluded from introducing any evidence about any such mental health impacts." *Id.* at 2. Instead, they are "limited to presenting evidence about the generalized type of psychological damage that would impact transgender high school girls in general as a result of not being able to compete on girls' school sports teams." *Id.* at 2-3. That is, their privilege choice means that they cannot present evidence of particularized harm. And without that evidence, Plaintiffs are left to assert the kind of generalized harms that characterize a facial challenge—a claim they lack standing to assert, as set forth in Defendants' 12(b)(1) motion, filed simultaneously with this motion.

Plaintiffs make no mention of the governing standard and advance no basis for a claim under its terms. In fact, they actively undermine their case by effectively conceding in their Motion for Preliminary Injunction the validity of some of the grounds for maintaining sports divisions based on biological sex. *See* D26:26-27. And those concessions, supported by ample case law, *see id.*, make clear that at least some biological boys may reasonably be precluded from participating in leagues designed for girls—those boys who reached puberty without any puberty blockers, or who otherwise enjoy significant competitive advantages over biological girls. This renders their pleading insufficient and establishes a basis for dismissal of the Complaint with prejudice.

B. Plaintiffs have not stated a Uniform Operation Clause claim because they do not challenge the classification that HB11 actually makes, but instead claim that the Legislature should have made an additional sub-classification

The Uniform Operation of Laws Clause requires that "[a]ll laws of a general nature shall have uniform operation." UTAH CONST. art. I, § 24. Plaintiffs have failed to state a claim under this clause because they have not challenged the classification—biological sex—set forth on the face of HB11. Instead, they have alleged that HB11 ought to have made an additional sub-classification for transgender girls. D24:20. That does not suffice.

A court examining a uniform operation claim looks to the statute's actual classification, not the classification that the claimant thinks it should have made. *State v. Canton*, 2013 UT 44, ¶ 39, 308 P.3d 517 (holding that a plaintiff raising a uniform operation claim who asserts that "the legislature has impermissibly grouped them into a category with other dissimilar individuals" has a burden to "demonstrate that *the classification that put them there* fails constitutional muster" (emphasis added)). HB11's plain language classifies on the basis of biological sex—establishing high school sports leagues for "student[s] of the male sex" and "students of the female sex." UTAH CODE § 53G-6-902(b) *see also id.* § 53G-6-901(3) (defining "Sex" as the "biological, physical condition of being male or female, determined by an individual's genetics and anatomy at birth"). So Plaintiffs must allege that it was unconstitutional for the legislature to distinguish between biological males and females when regulating athlete safety and promoting fair competition in school sports. The Complaint nowhere challenges this classification. And that is fatal to the viability of this claim.

HB11 could be said to facially discriminate on the basis of gender identity or transgender status only if there were perfect correlation between sex and gender (or being transgender). By the

Plaintiffs' own admissions, there is not. *See* D27:5-7 (explaining that sex and gender are separate concepts); D28:5 (same); *see also* Shumer Deposition at 59-60, 62, 111 (explaining that gender identity can change over time). And the statute on its face does not discriminate against people who gender-identify as girls. Thus, the challenged classification—the distinction between "transgender girls" and "other girls"—is a subclassification that is foreign to the statute. Plaintiffs are not complaining about the classification made on the face of the statute—the preservation of girls' sports leagues based on biological sex. D24:19-20. They are complaining about a failure to further sub-classify within that category—to declare some biological boys ineligible (those who identify as boys) and other biological boys eligible (those who identify as girls). And that is not a failure that is cognizable under controlling case law.

Canton is instructive here. Canton claimed that a criminal tolling statute excluding all elapsed time when a defendant is "out of the state" violated uniform operation because he was "legally present" through in-state defense counsel, which should have put him in the same position as someone actually present. 2013 UT 44, ¶ 2. The Utah Supreme Court disagreed, explaining that the alleged "legally present" status was a "further sub-classification[]" of out-of-state defendants that the "legislature might have made" in the tolling statute, but did not. *Id.* at ¶¶ 2, 38-39. With this in mind, the court considered the tolling statute's actual classification, and held that the failure to make a further sub-classification "is not a viable, standalone basis for a uniform operation challenge." *Id.* at ¶ 39.

The same analysis is appropriate here. HB11 does bar "'student[s] of the male sex' who gender identify as girls" from competing on girls' school sports teams. But this is not facial discrimination against transgender girls any more than the tolling statute in *Canton* facially

discriminated between "a 'legally present' defendant under the personal jurisdiction of Utah courts" and "other defendants under the personal jurisdiction of the courts." *Id*. at ¶¶ 2, 38-39. Under the first step of the uniform operation test, Plaintiffs must demonstrate that HB11's facial classification between biological males and females runs afoul of the state constitution. *See id.* at ¶ 39.

They have not even tried to do that. By focusing on HB11's treatment of transgender girls, Plaintiffs have failed to allege facts that the law's *actual* facial classification between biological males and females violates uniform operation, and an assertion that "the legislature fail[ed] to subclassify—to draw further distinctions [within the facial classification]" is "not a viable, standalone basis" for such a claim. *Id.* at ¶¶ 38–39. "[C]oncerns of over-inclusiveness . . . are relevant only insofar as they bear on the question whether the classification that was made clears the applicable standard of scrutiny [in step three of the uniform operation test]." *Id.* ¶ 39.

In sum, Utah's Uniform Operation Clause is "focused on examining the rationality of the classifications that *were made* by the legislature." *Id.* at ¶ 39 (cleaned up). The legislature's classification is between biologically male and biologically female students. UTAH CODE § 53G-6-902(b); *id.* § 53G-6-901(3). Plaintiffs have not alleged that *this* classification "fails constitutional muster." *Canton*, 2013 UT 44, ¶ 39. So they have failed to allege sufficient facts to show a Uniform Operation violation.

But even if this Court were to proceed with further analysis under the Uniform Operation of Law Clause, Plaintiffs' claims still fail. Under controlling case law, there are (potentially) three steps in the analysis. First, the court asks "whether the statute creates any classifications." *Salt Lake City Corp. v. Utah Inland Port Auth.*, 2022 UT 27, ¶ 14, __ P.3d __ (cleaned up). Second,

the court asks "whether the classifications impose any disparate treatment on persons similarly situated. If the answer to either of those questions is "no," then the analysis ends and the law does not violate uniform operation. *See id.* Only if there is "disparate treatment on persons similarly situated" does a court consider the third and final step: "whether the legislature had any reasonable objective that warrants the disparity." *Id.*

For reasons set forth above, Plaintiffs fail to appropriately perform the first step of the analysis. Plaintiffs' uniform operation claim also fails at the second step. At this step, the court asks whether the law "imposes any disparate treatment on persons similarly situated." *Utah Inland Port Auth.*, 2022 UT 27, ¶ 14. And the similarity assessment is made at the level of the "identifiable group of persons *who were singled out* for treatment different from that to which other identifiable groups were made subject." *State v. Angilau*, 2011 UT 3, ¶ 23, 245 P.3d 745. Here, the groups "singled out" for different treatment by the statute are biological boys. And as noted above, there is no question that biological boys are not similarly situated with biological girls in the context addressed by the statute—athletic competition. Plaintiffs do not contend otherwise; in fact, they openly concede the point. D26:26-27, 29, 37**.** Their claim fails on that basis as well.

Even if Plaintiffs could somehow clear steps one and two, their claim still would fail at step three. This step asks "whether the legislature had any reasonable objective that warrants the disparity." *Mitchell*, 2020 UT 26, ¶ 37 (cleaned up). This "last step incorporates varying standards of scrutiny." *Id.* (cleaned up). If the classification "draws a distinction based on a 'suspect class' such as race or gender," then heightened scrutiny applies. *Id.* (cleaned up). Because the law here facially draws a distinction based on biological sex by prohibiting biological boys from competing in biological girls' sports, intermediate scrutiny applies to that classification. HB11 holds up under

it.

Intermediate scrutiny "requir[es] only an important governmental interest that is substantially advanced by the legislation." *In re Adoption of J.S.*, 2014 UT 51, ¶ 69, 358 P.3d 1009. This standard may easily be met where a classification is made on the basis of "[p]hysical differences between men and women" that are "enduring." *United States v. Virginia*, 518 U.S. 515, 533 (1996). "To fail to acknowledge even our most basic biological differences … risks making the guarantee of equal protection superficial, and disserving it." *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 73 (2001). Such classifications pass constitutional muster when "sex represents a legitimate, accurate proxy." *Craig v. Boren*, 429 U.S. 190, 204 (1976). And under intermediate scrutiny, the State is free to choose an "easily administered scheme" that substantially promotes its important interest. *Nguyen*, 533 U.S. at 69. So "the existence of wiser alternatives than the one chosen does not serve to invalidate" a legislative classification under heightened scrutiny. *Clark*, 695 F.2d at 1132.

With that understanding, courts around the country have repeatedly applied intermediate scrutiny to uphold state laws prohibiting biological boys from competing in high school sports leagues designed for biological girls. In so doing, courts generally have focused on important governmental interests that are substantially advanced by such laws, including

- equalizing athletic opportunities for women;[2]
- providing and promoting athletic opportunities for girls;[3]
- redressing past discrimination against women in athletics;[4] and
- ensuring safety and sports integrity due to inherent physiological differences

[2] *Cumberland*, 531 A.2d at 1065.
[3] *Petrie*, 394 N.E.2d at 862.
[4] *Clark*, 696 F.2d at 1131.

between the sexes.[5]

HB11 advances these interests in important ways. Plaintiffs object that it falls short because there is a "less restrictive" alternative, D26:26, 29, or "is far from the least restrictive method of furthering the law's stated purpose," D26:28. But such a tight fit between means and ends is not required under intermediate scrutiny. *See In re Adoption of J.S.*, 2014 UT 51, ¶ 71 (stating that the "intermediate standard of scrutiny … does not require proof that the official action adopted by government is the 'least restrictive means' of accomplishing the government's objectives," or even that a less restrictive alternative exists—"[a] simple 'substantial' relation will do").[6]

Transgender girls are not "outright ban[ned]," D26:11, from competing in high school sports. They can fully compete in the sports that match their biological sex or participate with a girls team in everything but games or competitions. And the differing treatment of biological girls and transgender girls is "rooted in inherent differences between the sexes." *In re Adoption of J.S.*, 2014 UT 52, ¶ 70 (cleaned up). Biological girls were not born boys. Transgender girls were. And even if transgender girls have undergone puberty blocking or hormone therapy, they still maintain

[5] *See* Renee Forseth & Walter Toliver, *The Unequal Playing Field-Exclusion of Male Athletes from Single-Sex Teams*: Williams v. School District of Bethlehem, Pa., 2 Vill. Sports & Ent. L.F. 99, 108 (1995) (citing cases); Polly S. Woods, *Boys Muscling in on Girls' Sports*, 53 Ohio St. L.J. 891, 906 (1992) (discussing cases).

[6] Plaintiffs also point to *Gallivan v. Walker*, 2002 UT 89, ¶ 49, 54 P.3d 1069, to argue that intermediate scrutiny under uniform operations analysis requires courts to consider "whether a 'less restrictive, burdensome, or nondiscriminatory' alternative exists. D26:25-26. But "the *Gallivan* plurality invoked *Moore v. Ogilvie*, 394 U.S. 814 (1969) in support of a 'fundamental' right to vote for an initiative, and thus a strict standard of scrutiny for laws impinging on that right." *Count My Vote, Inc. v. Cox*, 2019 UT 60, ¶ 69, 452 P.3d 1109 (citing *Gallivan*, 2002 UT 89, ¶ 26). Plaintiffs have asserted no basis for a fundamental right at issue here, as demonstrated below. *See* section D. And they are thus in no position to rely on *Gallivan* to switch out intermediate scrutiny for strict scrutiny in their uniform operation analysis.

and develop biological differences that are an advantage on the playing field. *See* Pike Declaration at 2, 5-6; Hilton Declaration at 6, 8, 10-11, 20-23 & fig. 4, 5. Try as one might, human beings cannot entirely shake their biology. Thus, because "[t]his is not a statute that closes a door or denies opportunity to [transgender girls] outright," because "this provision preserves meaningful opportunities for both [transgender girls and biological girls]," and because "the threshold basis for its differential treatment of [transgender girls] and [biological girls] stems initially not from an outmoded stereotype but from a straightforward matter of biology," heightened scrutiny poses no threat to the law. *In re Adoption of J.S.*, 2014 UT 51, ¶ 73.

Plaintiffs appear to concede that laws prohibiting biological boys from competing on biological girls' high school athletic teams generally pass constitutional muster. *See* D26:26 (implying that "the reasons for providing separate teams for boys and girls" are "valid" and "courts generally have found to withstand constitutional scrutiny"). And that concession is sufficient to justify HB11 under intermediate scrutiny. The reasons listed above are common-sense and important government objectives: providing equality for girls, protecting them from the increased risk of physical harm, correcting past discrimination,[7] providing them meaningful opportunities, and maintaining the integrity of girls' high school sports. And prohibiting biological boys from competing in girls' athletics substantially advances these interests. *See B.C. v. Bd. of Educ.*,

[7] Plaintiffs argue that HB11 cannot be viewed as redressing historical discrimination against women because transgender women have also been discriminated against. *See* D26:27. This is a non-sequitur. Historically, transgender women have not been seen as women. So any discrimination against biological females was not discrimination against transgender females. Plaintiffs' logic also fails if one takes the recent minority view that has emerged in the past decade, as Plaintiffs do, that transgender women are a subset of biological women. Even if true, it does not logically follow that seeking to correct discrimination against an entire class is problematic because discrimination (of a different kind) has also occurred against a subset of that class.

Cumberland Reg'l Sch. Dist., 531 A.2d 1059, 1065 (N.J. App. Div. 1987).

This Court should dismiss this claim with prejudice.

C. Plaintiffs' fail to state any basis—apart from their inadequate uniform-operation arguments—to support their claim under the Equal Political Rights Clause

Plaintiffs next allege that HB11 violates Article IV Section 1 for the same reasons that it purportedly violates the Uniform Operation Clause. D24:21. This is pure bootstrap. Because this claim is premised entirely on the uniform operation analysis, it also—for reasons just discussed—fails to state a claim under the Equal Political Rights Clause. Further, an analysis of the adoption of the Equal Political Rights Clause confirms that Plaintiffs have failed to state a claim under it.

Article IV is entitled "Elections and Right of Suffrage." Section 1 in that article is entitled "Equal Political Rights." Section 1 contains two sentences: "The rights of citizens of the State of Utah to vote and hold office shall not be denied or abridged on account of sex. Both male and female citizens of this State shall enjoy equally all civil, political and religious rights and privileges." Art. IV, §1. Without question, the general public understood this forward-looking provision adopted in 1896 to ensure equality in "all civil, political and religious rights and privileges" between men and women. Also without question, in 1896 the general public did not understand discrimination based on gender identity to violate one of those "civil, political, and religious rights and privileges."

We begin with the provision's plain text. *Haik*, 2020 UT 29, ¶15. The text here does not expressly protect a right against discrimination based on gender identity—no wonder, given that the concept did not exist at the time that the people ratified the State Constitution. So if Article IV, §1 protects gender identity, it must do so by implication, through its guarantees either of equal

rights to vote and hold office or to equal enjoyment of "all civil, political and religious rights and privileges." Plaintiffs do not claim that the rights of suffrage or office-holding include an implied right against discrimination based on gender identity, so if Article VI, §1 implies this right, it must do so under its second sentence.

But the Convention debates refute the notion that this sort of protection was anywhere on the framer's or public's radar as a "civil," "political," or "religious" right or privilege. Rather, the Convention debates focused overwhelmingly on this provision as guaranteeing equal suffrage. *See* Official Report of the Proceedings and Debates of the Convention at Salt Lake City to Adopt a Constitution for the State of Utah, Twenty-Fifth Day, at 438 (statement of Franklin Snyder Richards) (describing Article IV, §1 as "relating to residence, property, and education qualification, registration, and other minor matters governing the exercise of the franchise" and arguing that "equal suffrage for men and women should be provided in the Constitution"); statement of Orson Ferguson Whitney, Twenty-Seventh Day, at 508 (responding to "arguments against woman suffrage"). Newspapers at the time also reflect an understanding of Article IV, §1 as a voting-rights provision. *See* Test Vote on Equal Suffrage, Salt Lake Herald, Mar. 26, 1895, at 1 ("A second test vote has been made on woman suffrage in the constitutional convention"), https://bit.ly/3nIe5n4; Women and the Ballot, Salt Lake Herald, Mar. 29, 1895, at 1 (recounting that "the suffrage provision was the all-absorbing topic of debate"), https://bit.ly/3nFLS03. And suffrage was top-of-mind for the public during the convention, as no fewer than 17 convention days started with noting petitions from hundreds of members of the public imploring the delegates to provide for women's suffrage in the State Constitution. *See* Days 11, 12, 15, 16, 38-41, 43-48, 50, 52, 55, available at https://le.utah.gov/documents/conconv/utconstconv.htm.

When the Delegates did mention Article IV, §1's second sentence, their statements suggest that they understood that the guarantee of equal voting and office-holding rights in the first sentence would result in men and women participating equally in the political process—and on that basis, both sexes would equally use that process to specify what further "civil," "political," or "religious" rights men and women would equally enjoy. *See, e.g.,* Statement of Franklin Snyder Richards, in Official Report of the Proceedings and Debates of the Convention at Salt Lake City to Adopt a Constitution for the State of Utah, Twenty-Fifth Day at 451 ("civil and political rights and privileges as set forth in this discussion, are incidents and phases of government" and "can only be given through the customary channels of representation") (emphasis added); *see also* Statement of Samuel R Thurman, *id.* Fifty-Seventh Day at 1641 ("[H]ere we undertake to say in this Constitution that political distinctions are abolished, both as to suffrage and as to the right to hold office. We place women in the Constitution upon an absolute equality with men in those respects[.]").

However, even if the second sentence of Article IV, Section 1 was separated from the first, and guards against discrimination in contexts other than voting and office-holding, it does not help Plaintiffs. The proper framing of Plaintiffs' claims under the Equal Political Rights Clause is whether that clause encompasses a right to compete in inter-scholastic high school sports on a team that aligns with one's gender identity as opposed to one's biological sex. Civil rights of the Nineteenth Century were well-defined and did not include such a right. For example, when Congress passed the Civil Rights Act of 1866 "[t]o protect all Persons in … their Civil Rights," what it protected was the right of citizens "to make and enforce contracts, to sue, be parties, and give evidence, inherit, purchase, lease, sell, hold, and convey real and personal property, and to

full and equal benefit of all laws and proceedings for the security of person and property." Civil Rights Act of 1866, § 1. How that original understanding could invalidate a law prohibiting biological males from playing on biological girls' school sports teams is hard to imagine. The Equal Political Rights Clause does not apply here, and Plaintiffs are left without a constitutionally enumerated right to hang their fundamental rights hat on.

The remaining original-public-meaning inquiries further undercut this claim. Laws from the dawn of statehood to now show that the ratifiers understood that distinguishing between men and women was often proper. The earliest Utah Supreme Court decision citing Article IV, §1—and the law it examined—supports the view that this provision did not prohibit distinctions based on biological sex so long as the distinction was not arbitrary. In *Salt Lake City v. Wilson*, 148 P. 1104 (1915), the Court held that an infrastructure tax (for roads) on men but not on women did not violate Article IV, §1 because, among other reasons, "[t]o perform labor on the public roads or streets, or to pay the sum of $2 for the purpose of improving them, is neither a political, religious, or other civil right or privilege," and it did not "fall within the right or privilege of exercising the franchise or of holding an office." *Id.* at 1107. The Court also explained why distinguishing between men and women was justified based on physical differences: "Why should not women be exempt from the performance of some duties which are imposed on men? Surely one need not at this day and age point out the physical differences that exist between the sexes, . . ." *Id.*

This is not to say that the Equal Political Rights Provision froze in place a particular understanding of gender roles—it has clearly not prevented a great deal of progress on that score, as evidenced by how some of the language of these early cases strikes the modern reader. But neither did it mandate precisely the same treatment for men and women under all circumstances—

to say nothing of treatment based on more recent notions of gender identity. *Cf. Estate of Scheller v. Pessetto*, 783 P.2d 70,72-73 (Utah Ct. App. 1989) (explaining that federal equal protection clause does not require treating people differently based on real differences, as under circumstances where "males and females are not similarly situated").

D. Plaintiffs fail to state a claim for a substantive Due Process Clause violation because they premise it entirely on their other insufficient claims, and they have failed to state a procedural Due Process claim because procedural due process does not apply to general legislative classifications

Plaintiffs finally allege two due process violations—one substantive, one procedural. Their substantive due process claim is a bootstrap. They claim a substantive due process right to be free from discrimination. D24:22. This claim is premised on their Equal Political Rights Clause Claim, which in turn is premised on the uniform operation claim. D24:20-23. Because the Plaintiffs have failed to state a claim on those other provisions, they necessarily have failed to state a claim under this one. Further analysis also reveals why Plaintiffs fail to state a claim under the substantive component of the Due Process Clause.

"[T]he Due Process Clause is not a license for the judicial fabrication of rights that [Plaintiffs] might prefer, on reflection, to have been enshrined in the constitution." *In re Adoption of J.S.*, 2014 UT 51, ¶ 30, 358 P.3d 1009. So courts must avoid "the problematic realm of making due process innovations dictated by abstract formulae and without any effective limiting principle." *Id*. at ¶ 61 (cleaned up). Plaintiffs thus fail if they "frame [the substantive due process right] at too high a level of generality, anticipating that a more general statement of [their] interest might persuade [a court] to embrace it." *Id*. at ¶ 59 n.22. To succeed, then, a plaintiff must "do more than establish a generic interest"—a plaintiff "would have to establish the precise interest that he advocates for." *Id*. Plaintiffs do not even attempt such specificity here, but merely argue

discrimination generally. And for that reason as well, their substantive due process claim fails. Plaintiffs' substantive due process argument could only be framed as whether the right to participate in inter-scholastic high school sports competitions on teams that align with one's gender identity is "deeply rooted in our history." Plaintiffs cannot meet their burden to show that it is.

The procedural due process claim is rooted in the allegation that HB11 provides no "procedural safeguards to protect them from the deprivation of this constitutional right," "no opportunity to be heard, no individual review, no exceptions, and no avenue for appeal." D24:23 This claim also fails as a matter of law. It misapprehends the object of the right to procedural due process—it does not apply to classifications in a generally applicable law.

As the United States Supreme Court recognized over a century ago, when "[g]eneral statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard," "[t]heir rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule." *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915). The Utah Supreme Court explicitly recognized the same thing a decade ago. "Governing bodies may enact generally applicable laws, that is, they may legislate, without affording affected parties so much as notice and an opportunity to be heard." *Carter v. Lehi City*, 2012 UT 2, 269 P.3d 141, 153 n.28 (*quoting Pro–Eco, Inc. v. Bd. of Comm'rs*, 57 F.3d 505, 513 (7th Cir. 1995)). And courts far and wide have reiterated the point. *See, e.g., Pirtle v. Legislative Council Comm. of New Mexico Legislature*, 2021-NMSC-026, ¶ 41, 492 P.3d 586, 599; *Grand River Enterprises Six Nations, Ltd. v. Pryor*, 425 F.3d 158, 174 (2d Cir. 2005)).

The process due in this situation is the political process—voting and persuasion. *See Pirtle*,

492 P.3d at 599 ("[T]he Supreme Court has made clear that the appropriate relief for those who disagree with a governmental … adoption of a legislative-type decision lies not in a due process challenge to the decision itself, but in the democratic political process."); *Grand River*, 425 F.3d at 174 ("Appellants challenge the states' legislative, not adjudicative, actions, and '[o]fficial action that is legislative in nature is not subject to the notice and hearing requirements of the due process clause.'") (quoting *Interport Pilots Agency, Inc. v. Sammis*, 14 F.3d 133, 142 (2d Cir. 1994)).

A person may always challenge the constitutionality of a general law in the particular circumstances of her case, but the court process itself constitutes the due process there. And as explained above, Plaintiffs do not make an as-applied claim here. Because they have not alleged a valid basis for a procedural due process claim, the court should dismiss it.

***

CONCLUSION

In sum, Plaintiffs have failed to state a valid claim for each of their constitutional claims for relief. This court should thus dismiss them with prejudice.

DATED: July 13, 2022.

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A lawsuit has been filed against you. You must respond in writing by the deadline for the court to consider your side. The written response is called an Answer.	Se ha presentado una demanda en su contra. Si desea que el juez considere su lado, deberá presentar una respuesta por escrito dentro del periodo de tiempo establecido. La respuesta por escrito es conocida como la Respuesta.
Deadline! Your Answer must be filed with the court and served on the other party **within 21 days** of the date you were served with this Summons. If you do not file and serve your Answer by the deadline, the other party can ask the court for a default judgment. A default judgment means the other party can get what they asked for, and you do not get the chance to tell your side of the story.	**¡Fecha límite para contestar!** Su Respuesta debe ser presentada en el tribunal y también con la debida entrega formal a la otra parte **dentro de 21 días** a partir de la fecha en que usted recibió la entrega formal del Citatorio. Si usted no presenta una respuesta ni hace la entrega formal dentro del plazo establecido, la otra parte podrá pedirle al juez que asiente un fallo por incumplimiento. Un fallo por incumplimiento significa que la otra parte recibe lo que pidió, y usted no tendrá la oportunidad de decir su versión de los hechos.
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ELECTRONIC FILING CERTIFICATE

I certify that on this 13th day of July 2022, I caused to be served via electronic court filing a true and correct copy of the foregoing **DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM ON WHICH RELIEF CAN BE GRANTED** to the following:

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