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This motion requires you to respond. Please see the Notice to Responding Party.

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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' 12(b)(1) MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT

Case No.: 220903262

Judge Keith Kelly

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Pursuant to Utah R. Civ. P. 12(b)(1), Defendants Utah High School Activities Association ("UHSAA"), Granite School District, Jordan School District and Superintendents Rich K. Nye and Anthony Godfrey bring this Motion to Dismiss Plaintiffs' Second Amended Complaint (the "Complaint"). Defendants are filing simultaneously with this Motion a motion to dismiss pursuant to Rule 12(b)(6).

INTRODUCTION

Defendants seek dismissal of the claims because the Court lacks subject matter jurisdiction. Plaintiffs seek to enjoin Defendants' enforcement of Part 9 of House Bill 11 ("HB11") which prohibits a student of the male sex from competing against another school on a team designated for students of the female sex. *See* UTAH CODE § 53G-6-902(1)(b). Based on (1) Plaintiffs' objection to production of their mental health records, and (2) Plaintiffs' stipulation that they would not assert individualized harms, this Court ruled that Plaintiffs' claims are limited to the purported psychological damage that transgender girls *in general* might suffer due to HB11. Order in Limine dated July 12, 2022.

Plaintiffs' choice not to assert individualized harm is fatal to their lawsuit. Without particularized harms, Plaintiffs cannot establish traditional standing under Utah law. Further, Plaintiffs have not alleged "public interest" standing, but even if they had, they would not be able to satisfy the requirements for this alternative to traditional standing for two reasons. First, Plaintiffs cannot make the required showing that these claims are unlikely to be raised in the future if they are denied standing because, as Plaintiffs allege, these issues impact all transgender girl athletes. Second, public interest standing is inappropriate because the Utah Supreme Court has warned against using public interest standing to litigate nonjusticiable political questions. These

issues are difficult political questions—governing bodies around the world struggle to find manageable standards to answer these difficult policy questions which should be left to the Legislature.

Even if Plaintiffs had not strategically painted themselves into a corner, the claims of Plaintiffs Jenny Roe and Jane Noe should still be dismissed. Plaintiff Jenny Roe will be a senior in high school this fall and intends to join and compete on the volleyball team. But Jenny is not academically eligible to play volleyball on any Utah high school team in August 2022 because Jenny failed more than one subject this past school year. Thus, the requested relief cannot redress Jenny's ability to play volleyball. And Jenny's statement that she "may want" to try out for basketball is too speculative—it does not satisfy the showing of a reasonable probability of future injury. Similarly, Plaintiff Jane Noe she does not intend to try out for her high school swim team until August 2023. With over 13 months until tryouts, there are many unknowns including eligibility, athletic abilities, and even whether Jane will continue to want to join and compete on the swim team. Thus, Jane also cannot show a reasonable probability of future injury and her claims should be dismissed.

FACTS

1. HB11 does not allow "a student of the male sex [to] compete . . . with a team designated for students of the female sex in an interscholastic athletic activity." *See* UTAH CODE § 53G-6-902(1)(b).

2. "'Interscholastic athletic activity' means that a student represents the student's school or LEA in competition against another school or LEA in an athletic or sporting activity." *See* UTAH CODE § 53G-6-901(2).

3. "'Sex' means the biological, physical condition of being male or female, determined by an individual's genetics and anatomy at birth." *See* UTAH CODE § 53G-6-901(3).

4. Jenny "is a 16-year-old girl who will be a senior in high school this fall in the Granite School District." Second Amend. Compl. ¶ 5. "Jenny is a transgender girl who plans to join and compete on the girls' varsity volleyball team in August 2022." *Id*.

5. Jenny further contends the HB11 "puts a target on her back by sending a message that it is okay to discriminate against transgender people. *Id*. ¶ 48. Jenny "believes she will face more harassment, discrimination, or even violence because of this law in her daily life." *Id.* When Jenny was in junior high school, another student threatened her with violence because she is transgender. *Id.* Jenny "believes that if [HB11] is allowed to go into effect, it will encourage people to harass and threaten her even more." *Id*.

6. Jenny "worries that if she cannot play volleyball with her teammates, she will feel isolated and depressed and perform poorly at school. Jenny has felt the most healthy and happy and achieved her best grades while playing volleyball." *Id*.

7. Jenny alleges that "[i]f the Ban goes into effect, it will cause Jenny to suffer irreparable emotional, psychological, and developmental harm and will irreparably and negatively affect her educational and social experience." *Id*. ¶ 49.

8. Jenny is not eligible to compete on any Utah high school volleyball team during the fall trimester because she received two failing grades last trimester. *See* Transcript (attached as Exhibit 1).

9. USHAA administers and supervises interscholastic activities among Utah high schools. *See* 2022-2023 USHAA Handbook Mission Statement, p. 9.[1]

10. "To be eligible to participate in Association sanctioned activities, a student: 'Cannot fail more than one subject in the preceding grading period….'" *Id.*, SECTION 8: Scholastic Rule A, p. 31. "A student who has failed to meet the minimum requirements set forth shall be ineligible for participation in UHSAA activities throughout the next grading period…." *Id*.

11. In Jenny's Declaration filed in support of the Motion for Preliminary Injunction, Jenny stated: "I may also want to play on the girls' basketball team in the winter season of my senior year." Declaration of Jenny Roe in Support of Motion for Preliminary Injunction ("Jenny Decl."), ¶ 12.

12. "Plaintiff Jane Noe is a 13-year-old girl who will be in eighth grade this fall and will attend high school in the Granite School District in 2023." *Id*. ¶ 6. "Jane is a transgender girl who plans to join and compete on her high school girls' swim team in August 2023." *Id*.

13. Jane alleges that her "health and well-being depend on being able to follow her medically prescribed treatment, including living as a girl in all aspects of her life." *Id*. ¶ 54.

14. Jane further alleges that "[i]t would be painful and humiliating for Jane to be forced to be on a boys' team and would also contradict her medical care. The Ban thus effectively denies Jane the opportunity to participate in school sports at all. She will be prohibited from participating in school sports and will be denied the numerous social, educational, and physical and emotional health benefits that school sports provide." *Id*. ¶ 58.

[1] Available at https://uhsaa.org/Publications/Handbook/Handbook.pdf

15. Jane alleges that "the Ban has undermined her confidence and made her fear for her future." *Id*. ¶ 60. She further alleges that "Jane knows she is banned from competing on the girls' swim team when she starts high school, she may not attend school in person at all because the stigma and inequality will be too painful." *Id.*

16. Jane alleges that "[i]f the Ban goes into effect, it will cause Jane to suffer irreparable emotional, psychological, and developmental harm and will irreparably and negatively affect her educational and social experience." *Id*. ¶ 61.

17. "Plaintiff Jill Poe is a 14-year-old girl who will be in ninth grade this fall and will attend high school in the Jordan School District." *Id*. ¶ 7. "Jill is a transgender girl who plans to join and compete on her high school girls' cross-country team in June 2022 and girls' track team in February or March 2023." *Id.*

18. Jill alleges that "[i]f the Ban goes into effect, it will cause Jill to suffer irreparable emotional, psychological, and developmental harm and will irreparably and negatively affect her educational and social experience." *Id*. ¶ 61.

ARGUMENT

I. Motion to Dismiss Standard

Because the Defendants challenge Plaintiffs' standing to bring this lawsuit, this motion arises under Utah Rule of Civil Procedure 12(b)(1) as a motion to dismiss for lack of jurisdiction. *See, e.g., Gregory v. Shurtleff*, 2013 UT 18, ¶ 9 (noting that "standing is a jurisdictional requirement . . . ."). "As a procedural matter, a motion to dismiss under rule 12(b)(1) of the Utah Rules of Civil Procedure is governed by the same standard of review as a rule 12(b)(6) motion. Specifically, factual allegations are accepted as true and all reasonable inferences to be drawn from those facts are considered in a light most favorable to the plaintiff." *Mallory v. Brigham Young*

Univ., 2014 UT 27, ¶ 33 n. 1 (Stone, J., dissenting) (citations omitted). Based on this Court's July 12 Order limiting evidence to the purported psychological damage that transgender girls *in general* might suffer due to HB11, Defendants have filed simultaneously with this Motion, a motion to strike the individualized allegations of harm from the Second Amended Complaint. Defendants understand Plaintiffs' objection to be against the production of *any* mental health records at *any* point in this case and that the Order in Limine accordingly governs the presentation of evidence at all stages of this lawsuit, including trial. Thus, the factual allegations to be considered for purposes of this Motion are limited by the Court's Order in Limine.[2] *See Butler v. Mediaport Ent. Inc*., 2022 UT App 37, ¶ ⁋ 49, 57, 508 P.3d 619, 633, 634 (affirming order in limine excluding all damages evidence based on Rule 26 disclosure inadequacy: "given that [defendant] therefore had no evidence to support those counterclaims, we perceive no error in the court's decision to dismiss them summarily" and subsequently finding no error in granting summary judgment on that basis). Accordingly, for purposes of this Motion to Dismiss, the Court should not consider the individualized allegations of harm in the Second Amended Complaint.

II. Plaintiffs Do Not Satisfy Traditional Standing

In order for this Court to have jurisdiction, Plaintiffs must have standing. *Utah Chapter of Sierra Club v. Utah Air Quality Bd*., 2006 UT 74, ⁋ 17. This requirement "ensures 'that courts confine themselves to the resolution of those disputes most effectively resolved through the judicial process'" and "prevents the 'significant inroad on the representative form of government' that would occur if courts cast themselves 'in the role of supervising the coordinate branches of

[2] Out of an abundance of caution, Defendants filed their Motion to Strike to ensure that the Second Amended Complaint, which the Court reviews when deciding this Motion, conforms with the developing nature of Plaintiffs' claims.

government.'" *Id*. (quoting *Terracor v. Utah Bd. of State Lands and Forestry*, 716 P.2d 796, 798-99 (Utah 1986)). There are two ways to establish standing under Utah law – "the traditional test and an alternative test." *Id*. ⁋ 18.

The threshold requirement of traditional standing requires a plaintiff to "show that he has suffered a distinct and palpable injury that gives him a personal stake in the outcome of the legal dispute." *Jenkins v. Swan*, 675 P.2d 1145, 1148-49 (Utah 1983) (citations omitted). Plaintiffs initially alleged that HB11 would cause Jenny, Jane, and Jill "to suffer irreparable emotional, psychological, and developmental harm and will irreparably and negatively affect [their] educational and social experience." Second Amend. Compl. ¶¶ 49, 61, 73. However, because Plaintiffs object to producing medical records that would speak to their individual emotional, psychological, and developmental harm, they stipulated, and the Court ordered, that Plaintiffs are precluded from introducing evidence that would establish a "distinct and palpable injury" that would give them a personal stake in the outcome of the legal dispute. *See* Order in Limine dated July 12, 2022.[3] Rather, they may only introduce evidence of the general harms that any transgender girl might experience by being precluded from playing sports on girls' teams. Without evidence of a distinct and palpable injury, they cannot meet the elements of traditional standing.

Plaintiffs may respond by asserting that they are also alleging academic, social, and physical harms. Those concepts do appear in the Complaint. D24:17-19. But Plaintiffs do not assert and cannot establish that these alleged injuries are *traceable to HB11*. *See Provo City*

[3] The Plaintiffs so stipulated, and the Court entered the Order in Limine, in the context of a discovery dispute regarding Plaintiffs' medical records. Thus, the parties in that short hearing did not prepare or present any arguments to the Court on the implications Plaintiffs' stipulation has on Plaintiffs' standing, but they do so now in the context of this Motion to Dismiss.

Corp. v Thompson, 2004 UT 14, ⁋ 9, 86 P.3d 735, 738 ("In order to meet the basic requirements of standing, a party must allege that he or she has suffered or will imminently suffer an injury that is fairly traceable to the conduct at issue . . ."). Without evidence of a psychological or emotional effect of HB11, any academic, social, or physical harms are harms that would flow from any person's personal decision not to compete in sports.

Plaintiff's allegations appear to flow as follows: (1) HB11 causes them psychological and emotional harm by prohibiting them from competing in inter-scholastic games in girls' leagues; (2) in light of that, they will choose to participate in neither a boys' nor a girls' league; (3) as a result, they will suffer academic, social, and physical harms.

The July 12 order removes link (1) of this chain. And without proof of psychological and emotional harm from HB11's bar, Plaintiffs are on the same footing as any other biological boy who chooses not to compete in sports—they may suffer academic, social, or physical harms from a loss of competition in sports, but these effects trace to personal decision, not HB11.

The Plaintiffs' lack of standing could be viewed alternatively as a mootness problem. A case may become moot even where "the parties appear to have had standing and a ripe controversy when the case was filed in the district court." *Utah Transit Authority v. Local 382 of Almalgamated Transit Union*, 2012 UT 75, ¶ 14, 289 P.3d 582. A subsequent event moots the case where "'circumstances change so that the controversy is limited,'" as with acts occurring "'during the pendency of the proceedings'" that render the case "non-justiciable." *Id*. (quoting *Navajo Nation v. State* (*In re Adoption of L.O.*), 2012 UT 23, ¶ 8, 282 P.3d 977). That is another way of looking at the justiciability problem here. Even if the Plaintiffs had standing when they filed the case, they lost it as a result of the July 12 order—or, alternatively, their case was

mooted because "the relief requested" was rendered "impossible" because they could no longer assert the particularized injuries they once alleged. *Id*.

III. Plaintiffs Cannot Show Public Interest Standing

Because Plaintiffs are limited to arguing general harm to all transgender girls and thus cannot meet the traditional standing requirement, the only possible means for Plaintiffs to meet the threshold standing requirement is to demonstrate public interest standing. Plaintiffs have not alleged public interest standing, and it is not the Defendants' role to speculate on whether and on what grounds Plaintiffs may wish to do so. Under the rules of civil procedure, it is the Plaintiffs' responsibility to plead the grounds for their claims against the Defendants—including the jurisdictional basis for them. *See* Utah R. Civ. P. 8(a) (requiring plaintiff to plead a "statement of the claim showing that *the party* is entitled to relief"); *see also Warth v. Seldin*, 422 U.S. 490 (1975) (stating that a plaintiff must "clearly . . . allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute"). Defendants thus cannot be given the responsibility of pleading a basis for Plaintiffs' claims, or to guess at what that basis may be in deciding how to respond. The Court should not reach public interest standing for that reason. It should dismiss the Complaint on the basis of the Plaintiffs' inability to plead the particularized injury foreclosed by the Order in Limine.

The Court should also dismiss even if it were to evaluate public interest standing because Plaintiffs cannot meet the elements of public interest standing. Although "it is the usual rule that one must be personally adversely affected before he has standing to prosecute an action . . . it is also true this Court may grant standing where matters of great public interest and societal impact are concerned." *Gregory*, 2013 UT 18, ¶ 12, 299 P.3d at 1102–03 (quoting *Jenkins v. State*, 585 P.2d 442, 443). Utah courts rarely invoke public interest standing, however, and "will not readily

relieve a plaintiff of the salutary requirement of showing a real and personal interest in the dispute." *Id.* ¶ 13 (quoting *Jenkins*, 675 P.2d at 1150). Public interest standing is a two-part inquiry: "(1) is the plaintiff an appropriate party; and (2) does the dispute raise an issue of significant public importance[?]" *Id.* ¶ 15 (quoting *Cedar Mountain Envtl., Inc. v. Tooele Cnty. ex rel. Tooele Cnty. Comm'n,* 2009 UT 48, ¶ 15, 214 P.3d 95, 100). It is Plaintiffs' burden to satisfy this alternative basis of standing. *State v. Roberts*, 2015 UT 24, ¶ 50, 345 P.3d 1226, 1241 (citation omitted). Plaintiffs cannot satisfy either element: Plaintiffs are not appropriate parties because they cannot show that these issues will not likely be raised if Plaintiffs are denied standing, and Plaintiffs cannot show that these issues are important in and of themselves because the issues involve nonjusticiable political questions.

A. Plaintiffs are not appropriate parties because their argument of generalized harm to all transgender girls undermines the required showing that these issues will not likely be litigated in the future

To demonstrate that a plaintiff is an appropriate party under public interest standing, a plaintiff must show an "interest necessary to effectively assist the court in developing and reviewing all relevant legal and factual questions" and "that the issues are unlikely to be raised if the party is denied standing." *Gregory*, 2013 UT 18, ¶ 28 (quoting *Sierra Club v*, 2006 UT 74, ¶ 36, 148 P.3d at 972). Regardless of whether Plaintiffs have sufficient interest to litigate these issues, Plaintiffs are unable to demonstrate that these issues are unlikely to be raised in the future if Plaintiffs are denied standing.

Plaintiffs allege that HB11 will cause harm to all transgender girls that participate in athletics by "contribut[ing] to negative physical and emotional health outcomes" and HB11 "directly conflicts with and interferes with their medical treatment for gender dysphoria, thereby

increasing their risk of suicide and other negative health outcomes." Second Amend. Compl. ¶ 84. As Plaintiffs allege, these harms affect *all* transgender girls that play sports. Such allegations of general harm directly undermine the notion that these issues will not be raised if Plaintiffs do not have standing. In other words, if HB11 harms all transgender girl athletes, then Plaintiffs cannot show that another transgender student will not likely challenge the law in the future.

"Even if the statutory scheme is susceptible to unconstitutional application, it is more appropriate for [the Court] to await a litigant who may actually [allege] harm[] by such application." *State v. Mace*, 921 P.2d 1372, 1379 (Utah 1996). For example, in *ACLU of Utah v. State*, the Utah Supreme Court denied public interest standing to advocacy organizations who sought relief for prisoners who were at risk of contracting COVID-19. 2020 UT 31, ¶ 4, 467 P.3d 832, 833. No individual inmate was a plaintiff and the Court found that the advocacy organizations failed to show that the issues would not likely be raised if they were denied standing. *Id*. While the Court found public interest standing in *Gregory*, the Court reasoned that it was unlikely the issues would be raised because "no other plaintiff ha[d] emerged in the *years* since the Bill's passage." 2013 UT 18, ¶ 30 (emphasis added). By contrast, Plaintiffs here filed the action a month *before* the law went into effect. *See* Amend. Compl. As the law has only been in effect for several weeks, it is more appropriate for the Court to wait for a transgender student in the future who can argue a personal injury and satisfy traditional standing.

Public interest standing is particularly inappropriate here because traditional standing is lacking merely as a result of Plaintiffs' strategic decisions. Public interest standing is not an alternative for those who *could* but choose not to satisfy traditional criteria. Plaintiffs seek relief for all transgender girls based on general harm to all transgender girls, but Plaintiffs have not

brought this case as a class action on behalf of all similarly situated transgender girls. *See* Second Amended Compl. Of course, even in class actions, named plaintiffs must still satisfy requirements of individual harm. *Cf. Lewis v. Casey*, 518 U.S. 343, 357 (1996) ("[E]ven named plaintiffs who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent." (cleaned up)). Plaintiffs are in effect litigating this case as a class action without the substantive and procedural protections afforded to class actions. *See* Utah R. Civ. P. 23.

Indeed, allowing Plaintiffs to circumvent traditional standing offends the constitutional limits of judicial power. Article VIII of the Utah Constitution confers on Utah courts the "judicial power" to issue "writs" and to decide "cases." UTAH CONST. art. VIII, §§ 1, 3, 5. The historical understanding of that judicial power limited "private plaintiffs" to vindicate "private rights" while "public rights" were left to "government representatives suing for the public in court." *Gregory*, 2013 UT 18, ¶¶ 70, 90, 299 P.3d at 1126 (Lee, J., concurring in part and dissenting in part) (concluding that "public interest standing" is incompatible with original understanding of judicial power). "The requirement that a plaintiff have a personal stake in the outcome of a dispute is intended to confine the courts to a role consistent with the separation of powers, and to limit the jurisdiction of the courts to those disputes which are most efficiently and effectively resolved through the judicial process." *See Jenkins*, 675 P.2d at 1149 (citation omitted). Thus, public interest standing was meant as a *rare* exception where a private plaintiff was *unable* to show traditional standing and no other litigants would likely raise the important public issues. *See id.* at 1150. But Plaintiffs' inability to demonstrate traditional standing here is based on their own strategic

decision. Giving Plaintiffs the option to simply *choose* between traditional or public interest standing eliminates any private-public distinction and the limitations of judicial power afforded by the Constitution.

B. Public interest standing is inappropriate because this case involves nonjusticiable political questions

Even if Plaintiffs could demonstrate that they were appropriate parties to the litigation, they must also demonstrate that the issues "are of sufficient public importance in and of themselves." *Sierra Club*, 2006 UT 74, ¶ 39. "This requires the court to determine not only that the issues are of a sufficient weight but also that *they are not more appropriately addressed by another branch of government pursuant to the political process*." *Id*. (emphasis added). This means that public interest standing "should not be used by courts to engage in review of nonjusticiable political questions." *Gregory*, 2013 UT 18, ¶ 39.

Utah courts rely extensively on federal case law when interpreting and applying the political question doctrine. *See Skokos v. Corradini*, 900 P.2d 539, 542 (Utah Ct. App. 1995). In *Baker v. Carr*, 369 U.S. 186, 217 (1962), the United States Supreme Court outlined a six-prong test for determining when the doctrine applies:

> Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

These determining factors are separated by the word "or." Thus, "[t]o find a political question, [Courts] need only conclude that one [of these] factor[s] is present, not all." *Schneider v. Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005).

The *Baker* criteria are informed by "prudential concerns calling for mutual respect among the three branches of Government." *Goldwater v. Carter*, 444 U.S. 996, 1000 (1979) (Powell, J., concurring); *see also Nixon v. United States*, 506 U.S. 224, 252–53 (1993) (Souter, J., concurring) (noting that applying the political question doctrine requires case-by-case attention to "prudential concerns"). "The Utah Constitution explicitly establishes separation of powers between the legislative, judicial, and executive branches at the state level." *Skokos*, 900 P.2d at 542. Indeed, the Constitution provides that none of the branches "shall exercise any functions appertaining to either of the others, *except in the cases herein expressly directed or permitted*." UTAH CONST., art. V § 1 (emphasis added). "Courts must hold 'strictly to an exercise and expression of [their] delegated or innate power to interpret and adjudicate.'" *Skokos*, 900 P.2d at 541-42. Accordingly, prudential concerns are particularly salient given the Utah Constitution's strict demands that no branch of government exercise another branch's powers unless *expressly* permitted.

The present case involves both the welfare of transgender girls and the protection of women's sports for natal girls. This encompasses a myriad of policy considerations and political issues that have just recently come to light with varying standards and policies developing. As Plaintiffs' expert witness wrote, "We live in a time of dramatic change; LGBT (Lesbian Gay Bisexual Transsexual) rights have become the civil rights issue of our day." Daniel E. Shumer & Norman P. Spack, *Paediatrics: Transgender Medicine: Long Term Outcomes from "the Dutch Model*," 12(1) Nat'l R. Urol. 12, 13 (Jan. 2015). Following the *Baker* factors, these emerging issues

are political questions that should not serve as the basis for public interest standing: (1) there are no manageable judicial standards to resolve these issues; (2) these issues demand specific policy determinations; and (3) any determination disrespects the policy decisions of the Legislature.

1. Plaintiffs have not identified manageable judicial standards

Plaintiffs cannot satisfy the second factor of the *Baker* test, which requires "judicially discoverable and manageable standards for resolving" the issues before the Court. 369 U.S. at 217. To adjudicate these issues, "the Court's inquiry necessarily proceeds to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded." *Id*. at 198. Where there are "no judicially discernible and manageable standards for adjudicating," the question is non-justiciable. *Vieth v. Jubelirer*, 541 U.S. 267, 281 (2004).

It is unsurprising that there are no judicially manageable standards here. Experts in these fields—including governing legislative bodies and sports' governing bodies—struggle to find answers to these difficult issues. Varying responses and standards have emerged. For example, the International Olympic Committee ("IOC") enacted a "new, nonbinding framework encouraging federations across Olympic sports to include trans athletes in their own regulations" after the 2022 Beijing Winter Games.[4] This moved the IOC away from its prior focus on measuring athletes'

[4] *See* Matt Lavietes, *International Olympic Committee issues new guidelines on transgender athletes*, N.B.C. (Nov. 16, 2021), https://www.nbcnews.com/nbc-out/out-news/international-olympic-committee-issues-new-guidelines-transgender-athl-rcna5775; *see also* IOC Framework on Fairness, Inclusion and Non-discrimination on the Basis of Gender Identity and Sex Variations, INT'L OLYMPIC COMM., https://stillmed.olympics.com/media/Documents/News/2021/11/IOC-Framework-Fairness-Inclusion-Non-discrimination-2021.pdf?_ga=2.61680430.346029375.1656697307-328362936.1656697307.

testosterone levels to determine eligibility to participate in women's sports. The International Swimming Federation ("FINA"), which the IOC recognizes for administering international competitions in aquatics, adopted a new policy in 2022 that prohibits transgender women from competing alongside cisgender women unless they "have transitioned before age 12 and maintained their testosterone levels under 2.5 nanomoles/liter—'unrealistic' expectations for athletes, according to the Human Rights Campaign[.]"[5] The International Cycling Union ("UCI") similarly released new restrictions on transgender women's participation in women's sports, adopting a similar 2.5 nanomoles/liter requirement to FINA's.[6] The International Rugby League announced a total ban on transgender women's participation in women's rugby in June 2022.[7] The British Triathlon Federation stated, "Beginning in 2023, this federation will no longer allow transgender women to participate in women's sports; instead, there will be a Female category of competition and an Open category, in which cisgender men, transgender women, and nonbinary competitors may participate."[8] It is unlikely that the courts can develop manageable standards when experts around the world can't agree.

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[5] *See* Jere Longman, *Sport is Again Divided Over Inclusiveness and a Level Playing Field*, N.Y. TIMES (June 22, 2022), https://www.nytimes.com/2022/06/22/sports/olympics/transgender-athletes-fina.html; Julie Kliegman, *Understanding the Different Rules and Policies for Transgender Athletes*, SPORTS ILLUSTRATED (July 6, 2022), https://www.si.com/more-sports/2022/07/06/transgender-athletes-bans-policies-ioc-ncaa; *see also* Policy on Eligibility for the Men's and Women's Competition Categories, FINA (July 19, 2022),.

[6] *Id.*; *see also* Memorandum on Eligibility Regulations for Transgender Athletes, UNION CYCLISTE INTERNATIONALE (June 22, 2022), https://assets.ctfassets.net/761l7gh5x5an/Et9v6Fyux9fWPDpKRGpY9/96949e5f7bbc8e34d536731c504ac96f/Modification_Transgender_Regulation_22_Juin_2022_ENG.pdf

[7] *Id.*; *see also* statement on Transgender Participation in Women's International Rugby League, INT'L RUGBY LEAGUE (June 21, 2022), https://www.intrl.sport/news/statement-on-transgender-participtionin-women-s-international-rugby-league/.

[8] Darreonna Davis, *British Triathlon Latest to Limit Trans Atheltes—Here are the Major Sports Enacting Similar Bans*, FORBES (June 22, 2022),

The Utah Supreme Court urges "deference to existing remedies" fashioned by legislative bodies, rather than judicially created remedies, out of "respect for separation of powers' principles." *Spackman ex rel. Spackman v. Bd. of Educ. of Box Elder Cnty. Sch. Dist*., 2000 UT 87, ¶ 24, 16 P.3d 533, 539. In the present case, Plaintiffs ask the judiciary to fashion a remedy that holds legislative action unconstitutional, thereby instituting a government commission to evaluate and adjudicate whether natal males should be permitted to play on girls' sports teams. Pls. Motion for Prelim. Inj. at 29. But policies and standards vary significantly and are still developing around the world; there are no judicially manageable standards to answer these questions.

Last year, the Utah Supreme Court extended its common law authority to adjudicate name changes to cases involving sex changes. *Matter of Childers-Gray*, 2021 UT 13, ¶ 66, 487 P.3d 96, 115. The Court did so, however, within its limited authority to adjudicate in cases where common law applies. "The money line here is this: The exercise of common-law authority, when not abrogated by statute, neither runs afoul of the political question doctrine nor violates the separation-of-powers requirements of article V, section 1." *Id*. ¶ 68. There is no common law principle permitting natal males to participate in girls' sports or allowing courts to adjudicate eligibility requirements. It would be imprudent for the Court to answer these political questions and intrude on the legislative branch's prerogative.

2. Plaintiffs demand specific policy outcomes

The third factor in the *Baker* test deems it imprudent for courts to adjudicate where there is an "impossibility of deciding without an initial policy determination of a kind clearly for

https://www.forbes.com/sites/darreonnadavis/2022/06/22/cycling-swimming-and-now-rugbyhere-are-the-sports-that-imposed-bans-or-restrictions-on-transgender-competitors/?sh=61394a9aa105.

nonjudicial discretion[.]" 369 U.S. at 217. The policy judgments presented in this case include how to balance the welfare of transgender girls against the welfare of natal girls, student mental health, and personal freedom. The Utah Supreme Court urges "caution" where "myriad policy considerations" are at issue. *Spackman*, 2000 UT 87, ¶ 24, 16 P.3d at 539. "Because it is axiomatic that the Constitution contemplates that democracy is the appropriate process for change, some questions—even those existential in nature—are the province of the political branches.*" Juliana v. United States*, 947 F.3d 1159, 1173 (9th Cir. 2020) (cleaned up). The Court is not well positioned to determine which policies will be most effective in supporting natal girls and transgender girls, without creating unintended harmful outcomes such as impairment of education and mental health issues.

3. Plaintiffs' requested relief disrespects the Legislature's judgment

The fourth *Baker* factor cautions against "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government[.]"369 U.S. at 217. Fundamentally, Plaintiffs' argument is that the Utah Legislature made the wrong policy decision when it allowed only natal girls to compete on girls' school sports teams. It is imprudent for Courts to step in to reverse legislative decisions on matters of special public concern. "Public interest or importance may often cut against the propriety of the exercise of judicial power. The matters of greatest societal interest—involving a grand, overarching balance of important public policies—are beyond the capacity of the courts to resolve." *Gregory*, 299 P.3d at 1132 n.29 (Lee, J., concurring in part and dissenting in part). Issues surrounding transgender athletes are hotly debated in the media and within our governing legislative bodies and a plethora of sports' governing bodies.

The United States Supreme Court explained that "[t]he political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations[.]" *Japan Whaling Ass'n v. Am. Cetacean Soc*., 478 U.S. 221, 230 (1986). The issues here similarly involve important policy and value judgments regarding the treatment of gender dysphoria, protecting girls' sports from natal males, and fairness and integrity of female sports. Utah's Constitution does not answer the question of how to properly balance these important interests; but it clearly defines the roles of the three branches of government, leaving these types of policy decisions in the capable hands of the legislative and executive branches.

Striking down the Legislature's regulation of school sports would disrespect the Legislature's constitutional role. "[T]here is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator." Montesquieu, *The Spirit of Laws*, Loc. 2378 (Halcyon Press Ltd. Kindle Edition) (1752) (emphasis added). "The purpose behind the separation of powers is to preserve the independence of each of the branches of government so that no one branch becomes a depository for a concentration of governmental powers." *Matheson v. Ferry*, 641 P.2d 674, 681 (Utah 1982) (Howe, J., concurring). Courts must be vigilant to exercise appropriate restraint and defer to the Legislature to prevent the erosion of liberty.

In sum, Plaintiffs cannot establish public interest standing because these nonjusticiable political questions should not be answered in these proceedings.

IV. Jenny and Jane's Claims Should Be Dismissed Because Their Alleged Injuries Are Speculative

Even if Plaintiffs were not limited from arguing individualized harms, Jenny and Jane's claims should be dismissed because their alleged injuries are speculative. To have standing to challenge the constitutionality of legislation a party must "(1) assert that it has been or will be adversely affected by the [challenged] actions; (2) allege a causal relationship between the injury to the party, the [challenged] actions and the relief requested; and, (3) request relief that is substantially likely to redress the injury claimed." *Cedar*, 2009 UT 48, ¶ 8 (cleaned up). Jenny and Jane's alleged injuries, however, are too speculative to satisfy standing.

A. Jenny is ineligible to play volleyball and her claim that she may want to try out for basketball is too speculative to satisfy standing

Jenny's claimed harms result from not being to compete on the girls' volleyball team at her high school. *See* Second Amend. Compl. ¶¶ 44-47. But Jenny is academically ineligible to play volleyball on her high school team this fall. To be eligible to play sports, a student "[c]annot fail more than one subject in the preceding grading period . . . ." *See* 2022-2023 USHAA Handbook, SECTION 8: Scholastic Rule, p. 31.[9] This last spring, Jenny failed more than one class. *See* Transcript (attached at Exhibit 1). Thus, even if the Court strikes down HB11 as unconstitutional, any alleged harms related to not being able to compete on the volleyball team will remain. Because Jenny's requested relief is not substantially likely to redress her alleged injury, the Court does not have subject matter jurisdiction and her claims should be dismissed. *See Alpine Homes, Inc. v. City of W. Jordan*, 2017 UT 45, ¶ 34, 424 P.3d 95, 106-07.

[9] Available at https://uhsaa.org/Publications/Handbook/Handbook.pdf.

In Jenny's declaration, she claims that she "*may* also want to play on the girls' basketball team in the winter season of [her] senior year." *See* Jenny Decl. ¶ 12 (emphasis added). But this allegation is too speculative to satisfy the demands of standing. "To invoke judicial power to determine the validity of executive or legislative action, claimant must show that he has sustained or is immediately in danger of sustaining a direct injury as a result of that action." *Baird v. State*, 574 P.2d 713, 716. Jenny "must, at a minimum, set forth allegations establishing that a ***reasonable probability***, as opposed to a mere possibility, of future injury exists." *Brown v. Div. of Water Rights of Dept. of Natural Resources*, 2010 UT 14, at ¶ 19 (emphasis added).

Jenny does not allege in the Second Amended Complaint that she will be harmed by her inability to play basketball. *See* Second Amend. Compl. Indeed, in her declaration, she does not discuss basketball, but that she is simply *considering* playing her senior year. *See* Jenny Decl. ¶ 12. This is not sufficient to show that there is a reasonable probability that she will actually tryout for the team, that she will make the team, and that she is likely to compete. There is also reason to question whether she will become eligible to play basketball given her ineligibility to play volleyball. In her declaration, she stated: "If I cannot play with my [volleyball] team, I am worried that I will not even want to go to classes or to school." *Id.* Jenny's claims must be dismissed because she has failed to show that there is a reasonable probability that she will be harmed by an inability to compete for her high school basketball team.

B. Jane has not shown a reasonable probability of a future injury because she could not compete for her high school team until August 2023

To establish standing based on allegations of a future injury, a plaintiff "must, at a minimum, set forth allegations establishing that a reasonable probability, as opposed to a mere possibility, of future injury exists." *Brown*, 2010 UT 14, ¶ 19. Where, as here, plaintiff fails to

allege a reasonable probability of future injury, "the court must determine whether the plaintiff's allegations establish that a reasonable probability of future injury exists." *Id.* Jane will not try out for her high school swim team until August 2023. *See* Second Amend. Compl. ¶ 6. While the Complaint states that Jane "loves competing in swim meets" and that "she is one of the smallest girls on the team," nowhere does it discuss Jane's success at those meets and whether there is a reasonable probability that she would actually make the high school team and compete for the high school team on meets. *Id.* Indeed, with over 13 months before tryouts, even if she continued to want to try out for the team, it is difficult to predict what her athletic abilities will be at that time, including the probability that she will both be able to make and compete for her high school team, and that she would meet any other eligibility requirements. *Id.* Jane's claims must be dismissed because she has not demonstrated a reasonable probability of a future injury based on an ability to compete for her high school swim team in August 2023.

CONCLUSION

For the reasons stated above, the Court should dismiss Plaintiffs' claims with prejudice.

DATED: July 13, 2022.

/s/ Thomas R. Lee
Thomas R. Lee
LEE | NIELSEN
Attorney for Defendants

/s/ Melissa A. Holyoak
Melissa A. Holyoak
UTAH SOLICITOR GENERAL
Attorney for Defendants

Bilingual Notice to Responding Party for In-State Summons (for compliance with URCP 4)

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.
Read the complaint/petition The Complaint or Petition has been filed with the court and explains what the other party is asking for in their lawsuit. Read it carefully.	**Lea la demanda o petición** La demanda o petición fue presentada en el tribunal y ésta explica lo que la otra parte pide. Léala cuidadosamente.
Answer the complaint/petition You must file your Answer in writing with the court **within 21 days** of the date you were served with this Summons. You can find an Answer form on the court's website: utcourts.gov/ans Scan QR code to visit page	**Cómo responder a la demanda o petición** Usted debe presentar su Respuesta por escrito en el tribunal **dentro de 21 días** a partir de la fecha en que usted recibió la entrega formal del Citatorio. Puede encontrar el formulario para la presentación de la Respuesta en la página del tribunal: utcourts.gov/ans-span Para accesar esta página escanee el código QR

Bilingual Notice to Responding Party for In-State Summons (for compliance with URCP 4)

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You must email, mail or hand deliver a copy of your Answer to the other party (or their attorney or licensed paralegal practitioner, if they have one) at the address shown at the top left corner of the first page of this Summons.

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The court's Finding Legal Help web page (utcourts.gov/help) provides information about the ways you can get legal help, including the Self-Help Center, reduced-fee attorneys, limited legal help and free legal clinics.

Scan QR code to visit page

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Usted deberá enviar por correo electrónico, correo o entregar personalmente una copia de su Respuesta a la otra parte (o a su abogado o asistente legal, si tiene) a la dirección localizada en la esquina izquierda superior de la primera hoja del citatorio.

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Para información sobre maneras de obtener ayuda legal, vea nuestra página de Internet Cómo Encontrar Ayuda Legal. (utcourts.gov/help-span) Algunas maneras de obtener ayuda legal son por medio de una visita a un taller jurídico gratuito, o mediante el Centro de Ayuda. También hay ayuda legal a precios de descuento y consejo legal breve.

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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' 12(b)(1) MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT** to the following:

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vdefex@acluutah.org

Attorneys for Plaintiffs

*Served via email

/s/ Jenelle Daley

EXHIBIT 1

OFFICIAL TRANSCRIPT

Granite SCHOOL DISTRICT

SCHOOL FULLY ACCREDITED BY NORTHWEST ASSOCIATION OF SCHOOLS AND COLLEGES

[redacted]

[redacted]

ID: [redacted]
SSID: [redacted]
Grade: 11 Gender: M
Birthdate: [redacted]
Entry Date: 08/19/2019
Exit Date:
Graduation Date:

Cum. Academic GPA: 2.4827
Cum. Citizenship GPA: 2.4264

Transcript Generated By:
[redacted]

Year: 19-20 Grade: 09 School: [redacted]

Course ID	Course Title	Q1	Q2	Q3	Q4	TR1	TR2	Credit
[redacted]	[redacted]	A-	A					.50
[redacted]	[redacted]	A	D+					.50
[redacted]	[redacted]	B+	C+					.50
[redacted]	[redacted]	B	B-					.50
[redacted]	[redacted]	B+	B					.50
[redacted]	[redacted]	A-	B					.50
[redacted]	[redacted]	A-	B-					.50
[redacted]	[redacted]	A	B+					.50
[redacted]	[redacted]	A	A					.50
[redacted]	[redacted]	P	P					.50
				GPA: 3.1190				Total: 5.00

Year: 19-20 Grade: 09 School: [redacted]

Course ID	Course Title	Q1	Q2	Q3	Q4	TR1	TR2	Credit
[redacted]	[redacted]						P	.25
[redacted]	[redacted]						B+	.25
[redacted]	[redacted]						B+	.25
[redacted]	[redacted]						A-	.25
[redacted]	[redacted]						C	.25
[redacted]	[redacted]						B	.25
[redacted]	[redacted]						B+	.25
[redacted]	[redacted]						C	.25
[redacted]	[redacted]						P	.25
[redacted]	[redacted]						B-	.25
[redacted]	[redacted]						C-	.25
[redacted]	[redacted]						B+	.25
[redacted]	[redacted]						P	.25
[redacted]	[redacted]						P	.25
[redacted]	[redacted]						P	.25
				GPA: 3.1190				Total: 3.75

Year: 20-21 Grade: 10 School: [redacted]

Course ID	Course Title	Q1	Q2	Q3	Q4	TR1	TR2	Credit
[redacted]	[redacted]					A		.50
[redacted]	[redacted]					A		.50
[redacted]	[redacted]					A		.50
[redacted]	[redacted]					A-		.50
[redacted]	[redacted]					F		.00
[redacted]	[redacted]					B		.50
				GPA: 2.7500				Total: 2.50

Year: 20-21 Grade: 10 School: [redacted]

Course ID	Course Title	Q1	Q2	Q3	Q4	TR1	TR2	Credit
[redacted]	[redacted]			B	B+			.50
[redacted]	[redacted]			C+	D			.50
[redacted]	[redacted]			C	C+			.50
[redacted]	[redacted]			C-	D-			.50
[redacted]	[redacted]			F	B			.25
[redacted]	[redacted]			C	A-			.50
[redacted]	[redacted]			B	A-			.50

GPA/Credit by Year		
09	3.1190	8.75
10	2.7500	6.25
11	1.6667	5.50

GRADE POINT KEY

ACADEMIC

A	SUPERIOR	4.0000
A-	SUPERIOR	3.6667
B+	GOOD	3.3333
B	GOOD	3.0000
B-	GOOD	2.6667
C+	AVERAGE	2.3333
C	AVERAGE	2.0000
C-	AVERAGE	1.6667
D+	POOR	1.3333
D	POOR	1.0000
D-	POOR	0.6667
F	FAILURE	0.0000
I	INCOMPLETE	0.0000
IN	IN	0.0000
P	PASS	0.0000
W	WITHDRAW	0.0000

[redacted] [redacted] [redacted]

REGISTRAR

DATE

NOT OFFICIAL UNLESS SIGNED BY SCHOOL OFFICIAL AND SEALED WITH SCHOOL STAMP

Total Academic Credit Earned:	20.5
Cumulative Academic GPA:	2.4827
Cumulative Citizenship GPA:	2.4264

OFFICIAL TRANSCRIPT

Granite SCHOOL DISTRICT

SCHOOL FULLY ACCREDITED BY NORTHWEST ASSOCIATION OF SCHOOLS AND COLLEGES

[redacted]

[redacted]

ID: [redacted]
SSID: [redacted]
Grade: 11 Gender: M
Birthdate: [redacted]
Entry Date: 08/19/2019
Exit Date:
Graduation Date:

Cum. Academic GPA: 2.4827
Cum. Citizenship GPA: 2.4264

Transcript Generated By:
[redacted]

Year: 20-21 Grade: 10 School: [redacted]

Course ID	Course Title	Q1	Q2	Q3	Q4	TR1	TR2	Credit
[redacted]				A	A			.50
				GPA: 2.7500				**Total: 3.75**

Year: 21-22 Grade: 11 School: [redacted]

Course ID	Course Title	Q1	Q2	Q3	Q4	TR1	TR2	Credit
[redacted]		D	F	F	D			.50
		B	D-					.50
				F	C			.25
		A	C-	F	A			.75
		D+	D-	F	F			.50
		A	A					.50
		A	A-					.50
		B+	D+					.50
				D	B+			.50
		A	D-					.50
				F	B			.25
				GPA: 1.6667				**Total: 5.25**

Year: 21-22 Grade: 11 School: [redacted]

Course ID	Course Title	Q1	Q2	Q3	Q4	TR1	TR2	Credit
[redacted]				F	F			.00
				P	F			.25
				GPA: 1.6667				**Total: .25**

[redacted]

REGISTRAR

DATE

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Total Academic Credit Earned:	20.5
Cumulative Academic GPA:	2.4827
Cumulative Citizenship GPA:	2.4264

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Granite SCHOOL DISTRICT

SCHOOL FULLY ACCREDITED BY NORTHWEST ASSOCIATION OF SCHOOLS AND COLLEGES

[redacted]

[redacted]

ID: [redacted]
ST.ID: [redacted]
Grade: 11 Gender: M
Birthdate: [redacted]
Entry Date: 08/19/2019
Exit Date:
Graduation Date:

Cum. Academic GPA: 2.4827
Cum. Citizenship GPA: 2.4264

Transcript Generated By:
[redacted]

ACT Assessment Test

1	[redacted]						[redacted]	
Sequence	Name of Student						Date of Birth	
ACT Assessment Test						COMB. ENG WRITING	WRITING (SCORE RANGE 2-12)	ACT TEST DATE
ENGLISH	MATH	READING	SCIENCE	COMP				
15	16	16	17	16	ACT		0	03/22

Basic Civics Test

BASIC CIVICS TEST (BCT)			
DATE:	02/01/2019	**STATUS:**	PASS

SAT Test

REGISTRAR

DATE

NOT OFFICIAL UNLESS SIGNED BY SCHOOL OFFICIAL AND SEALED WITH SCHOOL STAMP

[redacted]

Total Academic Credit Earned:	20.5
Cumulative Academic GPA:	2.4827
Cumulative Citizenship GPA:	2.4264