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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' MEMORANDUM OPPOSING MOTION FOR PRELIMINARY INJUNCTION** (HEARING REQUESTED) Case No.: 220903262 Judge Keith Kelly

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INTRODUCTION

At the heart of this case is an emerging social challenge confronting policymakers worldwide: how to ensure fair competition and safety in women's sports while also accommodating transgender persons' interests in social interactions aligning with their gender identity. Different regulators have weighed these interests differently. And an evolving range of policy responses is unfolding.

At issue here is the Utah legislature's latest attempt to balance the competing interests: HB11, which allows transgender girls (biological boys who identify as girls) to try out for and practice with high school girls' teams, but not to compete in inter-school games. This law preserves longstanding societal conventions aimed at safety and competition in women's sports while opening the door to an accommodation for transgender girls to participate to some degree. This is a compromise approach that resides somewhere in the middle of a spectrum of standards being debated around the world.

Plaintiffs ask this Court to declare an abrupt end to this debate in Utah, by constitutionalizing a field long left to legislative regulation. They claim that the state constitution prescribes a standard that forecloses the legislature's approach. And they ask the Court to enter a preliminary injunction blocking HB11 before this case can be litigated on the merits.

Plaintiffs' motion should be denied. The Utah Constitution provides no basis for judicial second-guessing of the legislature's policy decision in this evolving field. As the Utah Supreme Court has emphasized, the constitution is not a vessel for judicial policymaking; it is a historical charter that memorializes the fixed limits established by the original public meaning of its text. The Constitution, as originally understood, did not speak to the emerging, novel questions

presented in this case. And the court cannot rule in Plaintiffs' favor without jeopardizing longstanding societal conventions favoring the preservation of women's sports—and setting precedent that would call into question a broad range of our laws and institutions aimed at protecting women (such as women's shelters).

A preliminary injunction is also the wrong procedural mechanism for resolving this dispute. Plaintiffs have not shown that *they* will suffer irreparable harm, as required under the law. In fact, Plaintiffs barred themselves from making such showing by the assertion of a privilege that resulted in a July 12 order precluding them from introducing evidence that HB11 "has caused them to be diagnosed with mental health conditions or has exacerbated any preexisting mental health conditions." D89. These are the precise harms that Plaintiffs identified in their motion for preliminary injunction. Now that they are foreclosed from presenting this evidence, their motion is a dead letter.

There are other barriers to the request for a preliminary injunction. An injunction would jeopardize the interests of biological girls in safety and fair competition. The public interest is served by honoring the considered judgment of the people through their legislative representatives. And Plaintiffs have failed to establish a likelihood of success on the merits of any of their constitutional claims.

The legislature, in time, may decide to revisit its current policy. That is what legislatures do. Unlike courts, they have the institutional competence to gather information and the constitutional prerogative to make policy judgments on difficult, emerging social problems. It is wisdom and duty alike that counsel against a judicial decision to cut that process short. The Court should deny Plaintiffs' request for a preliminary injunction.

BACKGROUND

The issue of transgender women competing in women's sports has come to the fore through prominent examples like Lia Thomas.[1] The sports world has not yet reached a consensus on how to address this issue.[2] The public is divided,[3] particularly along partisan lines.[4] Experts are

[1] *See* Will Martin and Meredith Cash, *Swimmer Lia Thomas beat 2 Olympic medalists amid protests to make history as the first trans athlete to win an NCAA title*, Insider.com, https://bit.ly/3AyUiy5.

[2] For example, last month the regulating body for international swimming voted overwhelmingly (71.5% in favor) to allow transgender swimmers to compete in women's events only if they transitioned before age 12—to avoid an "unfair" advantage. Ciaran Fahey, *World Swimming Bans Transgender Athletes from Women's Events*, AP News (June 22, 2022), https://bit.ly/3c4WWS5. Additionally, a new "open competition category" was proposed to enable transgender athletes to compete. *Id.*

Also last month, the International Rugby League banned transgender athletes from participating in sanctioned women's rugby matches, as did the British Triathlon. Darreonna Davis, *British Triathlon Latest To Limit Trans Athletes—Here Are The Major Sports Enacting Similar Bans*, Forbes (June 22, 2022), https://bit.ly/3AxzW8q.

[3] As of late May 2022 , 6 in 10 Americans favor policies like Utah's. Fewer than 1 in 5 oppose them. "58% say they would favor policies that require that transgender athletes compete on teams that match the sex they were assigned at birth rather than the gender they identify with." Only 17 percent oppose. 24 percent neither favor nor oppose. *Americans Complex Views on Gender Identity and Transgender Issues*, Pew Research Center (June 28, 2022), https://www.pewresearch.org/social-trends/2022/06/28/americans-complex-views-on-gender-identity-and-transgender-issues/.

A majority of Utahns likewise support HB 11. Marjorie Cortez, *54% of Utahns back ban on transgender girls competing in female school sports*, Deseret News (April 20, 2022), https://www.deseret.com/utah/2022/4/20/23032177/transgender-sports-utah-poll-54-utahns-back-ban-on-trans-girls-competing-school. And women are equally divided on the law, with 47% supporting HB 11 and 46% opposing it.

[4] 8 in 10 Republicans favor policies like Utah's. "Conversely, by margins of about 40 percentage points or more, Republicans are more likely than Democrats to express support for laws or policies that would do each of the following: require trans athletes to compete on teams that match the sex they were assigned at birth (85% of Republicans vs. 37% of Democrats favor)." *Id.*

divided.[5] And States are experimenting with how to address it.[6]

The Utah legislature's first attempt to address this issue came during the 2021 legislative session. In early February 2021, Representative Kera Birkeland and Senator Curtis S. Bramble introduced House Bill 302, "Preserving Sports For Female Students." https://le.utah.gov/~2021/bills/static/HB0302.html. Had it passed, it would have forbidden any biological males—including transgender females—from participating at all on female sports teams. *Id.* That bill did not pass.

Between then and the 2022 session, Representative Birkeland spent hundreds of hours meeting with many organizations, groups, and stakeholders on all sides of the issue and trying to craft an approach that balanced female competition, transgender inclusion, and female safety. House Floor Debate on H.B. 11 (second amended), 2022 General Session, Day 30 (2/16/22), 1:35:00 (Representative Birkeland discussing her own efforts); 1:48:13–1:48:52 (Representative Candice B. Pierucci lauding Representative Birkeland for the hundreds of hours she put into crafting the legislation); available at https://le.utah.gov/av/floorArchive.jsp?markerID=118017.

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[5] *Compare* D27, 28, *with* Cantor Decl., at ¶¶ 9, 11-13, 15-17, 23, 25, 28 (criticizing Plaintiffs' experts as cherry-picking evidence, citing no evidence, and making conclusions that are the opposite of the scientific literature). Plaintiffs have also attached their own and their parents' declarations, D29–34, but those are inadmissible under this Court's ruling of July 10. Order at 2–3 ("Plaintiffs shall be 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 preexisting mental health conditions and are precluded from introducing evidence about any such mental health impacts. Plaintiffs will be 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.").

[6] As of last month, a total of 18 states (Utah, Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kentucky, Louisiana, Mississippi, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, and West Virginia) have passed laws on transgender participation. *See* Davis, note 2 above.

The result of all that work was House Bill 11 (HB11).

HB11 went through five different versions and consumed hours of debate. *See* https://le.utah.gov/~2022/bills/static/HB0011.html (click on "Bill Text" versions and floor debates under "Hearings/Debate").

After all that, the legislature enacted an approach that permitted transgender girls to practice and participate with girls' teams in everything but competition in an "interscholastic athletic activity"—games or competitions between different schools. Utah Code §§ 53G-6-901 to -902.[7]

The governor vetoed the bill. In his view, HB11 imposed a complete ban that was not sufficiently debated, was based on concerns that applied to adults in collegiate sports, and imposed a potentially lethal burden on a small minority of students prone to suicide. Letter from Spencer Cox, Utah Gov., on Veto of H.B. 11 to the Utah House and Utah Senate (Mar. 22, 2022), https://governor.utah.gov/2022/03/24/gov-cox-why-im-vetoing-hb11/.

Both houses of the legislature overrode the veto by supermajority votes a few days later. https://le.utah.gov/~2022/bills/static/HB0011.html (click on "Status").

Plaintiffs are three transgender girls (Jenny Roe, Jean Noe, and Jill Poe) who wish to play on their respective schools' girls' volleyball, swimming, and cross-country teams. D24:3-4.[8] They assert that HB11—which permits them to play on the teams but not participate in interscholastic

[7] The legislature also passed a springing provision that, should sections 901 and 902 be struck, would become law. *Id.* §§ -1001 to -1006. Under this version, a commission composed of various appointees would evaluate, on an individual basis, a given transgender girl's ability to play in games with the girls' teams. *Id.*

[8] Defendants refer to filings and other record documents as D[document number]:[page number].

games—violates their state constitutional rights under (1) the Uniform Operation of Laws clause (art. I § 24); (2) the Equal Rights Clause (art. IV § 1); and (3) the Due Process Clause (art. I § 7). D24:19-23.

To support their claims, Plaintiffs have presented declarations from two experts, Daniel Shumer (D27) and Linda Hawkins (D28), as well as their own declarations. And Defendants have responded by introducing declarations from three experts of their own. The expert declarations seek to speak to (a) the basis for a rule that "bans" transgender girls from participating in sports with biological girls; and (b) the effect of such a rule on transgender girls in general. And Plaintiffs themselves seek to speak to (c) the particularized effects of such a rule on Plaintiffs individually.

The latter category is the focus of the motion for preliminary injunction, which requires proof that the "applicant" for such injunction "will suffer irreparable harm unless the . . . injunction issues." Utah R. Civ. P. 65A(f)(1). But Plaintiffs have foreclosed their right to present any such evidence as a result of a motion in limine aimed at protecting a privilege—a motion that led to a July 12 order stating that "Plaintiffs shall be precluded from introducing evidence that . . . H.B. 11 has caused them to be diagnosed with mental health conditions or has exacerbated any pre-existing mental health conditions and are precluded from introducing evidence about such mental health impacts." July 12 Order at 2. Under this order, Plaintiffs 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.

Expert Declarations

Dr. Shumer. Shumer is a pediatric endocrinologist whose "major focus" "pertains to transgender adolescents." D27:2. He has not met or spoken with the Plaintiffs or their parents.

D27:5. He opines that a "person's gender identity has a strong basis, although the precise causal mechanism is not yet known." D27:5; *see also* Shumer Deposition at 18. *See Exhibit 1*. It is "sort of an internal sense" that has no external measure. Shumer Deposition at 17-18. Gender identity, he continues, is "innate and cannot be changed by medical or psychological intervention." D27:6. But he also admits that it is possible for children to identify as one gender and later desist. Shumer Deposition at 59–60, 62, 111.

When gender identity—one's internal sense of gender—conflicts with a person's biology, they have gender dysphoria. D27:6-7. The best treatment for gender dysphoria, he asserts, is "[l]iving consistently with one's gender identity," which helps prevent "severe anxiety and depression, eating disorders, substance abuse, self-harm, and suicidality." D27:6–7.

For transgender adolescents, living consistently with gender identity involves two sorts of "transition": (1) "social transition, including adopting a new name, pronouns, appearance, . . . clothing, and correcting identity documents"; and (2) "medical transition, including puberty-delaying medication and hormone-replacement therapy."[9] In transgender girls, medical transition stops the progression of physical changes brought on by increased testosterone levels. D27:8. But whatever physiological changes have occurred at the time the child starts taking medication and hormones are permanent. Shumer Deposition at 39-40, 42-45, 55. Without the testosterone differential brought on by puberty, he asserts, "there are no significant differences in athletic performance between boys and girls." D27:9. Social transition for a transgender girl could include playing on girls' sports teams. Shumer Deposition at 20-21. But Shumer has no knowledge of any

[9] A third form of transition includes genital and other surgeries, but it is "rarely indicated" for minors. D27:8.

of the Plaintiffs. D27:5.

Counselor Hawkins. Hawkins is a counselor who works with transgender youth. D28:2. She has never met or spoken with Plaintiffs or their parents. D28:4–5; Hawkins Deposition vol. 1:32–33. *See Exhibit 2*. She, like Shumer, opines that gender identity and sex are separate concepts. Hawkins Deposition vol. 1:37–38. She also opines that gender identity "cannot be changed through psychological or medical treatments," that it is not externally influenced, and that the best treatment for gender dysphoria is, among other things, social accommodation. D28:5–7; Hawkins Declaration vol. 1:44–45, 55. This accommodation should include, she says, permitting transgender youth to play on sports teams matching their gender identity. D28:13. This, she says, will prevent the increased incidence of anxiety, depression, and suicidality that accompany exclusion from those things and promote the mental and physical benefits that playing sports confers. D28:8–13. But she admits not having any knowledge of how body chemistry differences between males and females affect performance and injuries in sports. Hawkins Deposition vol. 1:30–31. And she has no knowledge of any of the Plaintiffs. D28:4-5.

Dr. Cantor. Dr. Cantor is one of three experts retained by the state. He is a neurologist specializing in the "development of human sexuality and atypical sexualities." Cantor Decl., at ¶ 1. *See Exhibit 3*. He has been treating patients with gender dysphoria since 1998. *Id.* at ¶ 4.

He reports—based on the only 11 studies conducted—that the majority of children with gender dysphoria (61–88%) "cease to feel dysphoric by puberty, reporting being gay or lesbian instead." *Id.* at ¶¶ 7, 11, 37. Some de-transition and even re-transition later. *Id.* at ¶ 23. Based on those same studies, he reports that the mental health benefits of puberty blockers and hormone treatments were mixed: in four of them, "mental health failed to improve and even deteriorated on

several variables"; in five of them, "some mental health variables improved, but because psychotherapy and medical interventions were provided together, it cannot be known which treatment caused which changes"; and in the remaining two—which did distinguish between psychotherapeutic and medical treatments—neither found medical intervention "to be superior to psychotherapy [] only." *Id.* at ¶¶ 7, 46–60.

For suicidality, he explains that the "evidence is very strongly consistent with the hypothesis that other mental health issues, such as Borderline Personality Disorder (BPD), cause suicidality and unstable identities, including gender identity confusion." *Id.* at ¶ 7.

Regarding Counselor Hawkins's assertions, he asserts that she "shared only a vanishingly small and misrepresentative selection of the relevant research, which, when described in full, supports the very opposite conclusions." *Id.* at ¶ 9. And Hawkins ignored the 11 available cohort studies on the subject. *Id.* at ¶ 11.

Regarding Shumer's assertions, Dr. Cantor explains that he has provided no peer-reviewed support for his conclusions. *Id.* at ¶ 12. And both Shumer and Hawkins rely on anecdotal experience rather than clinical studies. *Id.* at ¶ 13.

Cantor explains that social transition can actually cause the persistence of gender identity, rather than simply supporting it. *Id.* at ¶ 61. And many other countries and organizations caution against various forms of transition for minors. *Id.* at ¶¶ 112–121.

Professor Jon Pike. Professor Pike is a philosopher and lecturer specializing in sports ethics and fairness. Pike Decl., at 2. *See Exhibit 4*. He observes that "[s]ports are constituted by their rules, and fair sport is constituted by fair rules." *Id*. at 2. Thus, "[j]ustified sex exclusion is the exclusion of a set of physiological advantages, and all those who possess them. It has nothing to

do with Gender Identity or trans status and cannot reasonably be argued to constitute discrimination on either basis." *Id.* Rather, "[i]t does have to do with justified discriminations on the basis of sex. The exclusion of male advantage from female sport is fair." *Id*.

Pike also explains that the concept of gender identity is not scientifically falsifiable, but is at bottom an assertion of faith. *Id.* at 7. He notes that the claim for transgender girls, who are "necessarily[] biologically male," to play girls sports "relies on a crucial ambiguity in the term 'girl' between sex and gender . . . . But it is the biological sex understanding of 'girl' that counts for sport, since sport is about bodies." *Id*. at 6. Further, he notes that "[t]he justification of sex classes in sport is that Females are unable to access Male physiological advantages," advantages that cannot be completely eliminated by later treatment because of mini-puberty that occurs in utero and when a baby, as well as the start of conventional puberty. *Id.* at 7–8. "This does not mean that trans identified females will dominate at sport," but "[i]t does mean that they will have an unfair advantage." *Id.* at 9. Hence, "[s]ince fairness in sports is best thought of in procedural terms, dominating results are not necessary for unfair competition." *Id*.

Finally, he says that there are physiological reasons that biological males are excluded from competition with biological females, but not vice versa: "male bodies in a female sport pose a competitive threat, whereas female bodies in a male sport do not[.]" *Id.* at 13. So, "[f]air which exclude male advantage in female sport, are justified to ensure fair equality of opportunity for female athletes. Such rules will hit hardest those who want to be female but are not. But this fact, in itself, is not a sufficient reason for withdrawing such rules, which would seem to constitute discrimination against females on the basis of sex." *Id.* at 14.

Professor Hilton. Emma Hilton is PhD in developmental biology. Hilton Decl., at 2, 25.

See Exhibit 5. She has advised several sports governing bodies on transgender issues. *Id.* at 4–5. In her opinion, Plaintiffs' complaint conflates sex and gender identity. *Id.* at 7. The key is developmental differences that confer athletic advantage on biological males.

"Performance gaps between males and females in almost all sports"—including those at issue in this case—"are detectable during childhood and cemented during puberty." *Id.* at 6. Because males, even before puberty, have greater skeletal proportions and denser muscle mass due to very early development, suppressing testosterone during puberty does not negate the advantage. *Id.* at 6, 8, 10–11.

Males are exposed to testosterone at three stages of development—in utero, in "minipuberty" after birth, and in puberty. *Id.* at 10–11, fig. 1. The "minipuberty" exposure "seems to underpin the well-established structural differences between males and females in childhood." *Id.* at 11–12.

Males have a "class-level advantage" in athletics over females due to "greater muscular strength, skeletal levers and proportions, force application, upper to lower body strength, and cardiovascular and respiratory function." *Id.* at 13. These competitive advantages apply to the sports in this case. *Id.* Some of those advantages are evident in children as young as six. *Id.* at 15.

As children get older, the differences become more pronounced, with males gaining and females losing advantages. Male athletic advantage becomes particularly evident during puberty, as 15-year-old males' records "batter[] those of elite adult females." *Id.* at 12, 14 & fig. 3.

On the other side, menstruation negatively affects females' "training capacity and performance." *Id.* at 13–14. And females are more susceptible to impact injuries due to "lower impact resistance in their neck muscles and more delicate brain structures." *Id.* at 15.

Because of all these differences, separating the sexes helps to protect fairness in girls' and women's sports because "the advantages of being male . . . transcend the differences in athletes that result from talent, strategy, training and dedication." *Id.* at 6, 17. "The ineligibility of those with *any* male advantage is necessary to maintain the integrity of the female sports category." *Id.* at 18.

Testosterone suppression reduces, but does not negate, development of advantageous physiological characteristics, particularly height and bone length. *Id.* at 20–23 & fig. 4, 5. And strength and muscle mass gaps persist, putting transgender females within the "male range" of those things. *Id.* at 21–22.

Given all this, Dr. Hilton explains that Utah is justified in excluding transgender competitors from female sports, including girls', because they "will have acquired male athletic advantage" through biological development even before puberty, and neither puberty blockers nor testosterone suppression entirely remove that advantage. *Id.* at 25. All the Plaintiffs would have been in the early stages of puberty at the time of medically delayed puberty, so they have acquired advantage already. *Id.*

July 12 Order. The State sought mental health records from Plaintiffs. They chose to assert their privilege to not disclose their mental health records, but that choice had a consequence to their case. On July 12, 2022, this Court ruled that Plaintiffs 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.

Plaintiffs' Declarations

Plaintiffs' declarations are largely foreclosed by the July 12 order on the motion in limine. Under that order, the sole means for Plaintiffs to present any specific evidence is through "a letter from each of Plaintiff's medical provider or providers confirming their diagnosis of gender dysphoria, listing the medications they have received to treat their gender dysphoria (including relevant dosages and relevant dates), providing their current height and weight, and providing the Tanner stage reached at the time puberty blocking medication was prescribed and the current Tanner stage." *Id.* at 2.

Plaintiffs may take the view that their declarations are permitted to the extent they just echo the letters they anticipate from their medical providers. But Defendants have no way to know whether that is true, as the permitted "letters" are not in the record. In any event, the Plaintiffs' declarations seek to go well beyond the permitted terms of the provider letters—to make allegations about the effects of HB11 on them. And those allegations are foreclosed by the July 12 order.

Jenny Roe asserts that she needs to be able to play volleyball on her school girls' team to further her "medical care" and that HB11 would deny her "the numerous social, educational, physical, and emotional benefits that school sports provide," and even provoke "harassment." D24:11. Jane Noe says that HB 11 "would contradict her medical care" makes her "fear for the future," and makes her feel like some people "wish she did not even exist." D24:13; D31:3. And Jill Poe states that the Ban "sends the message that it is better for her, and for students like her, not

to participate in school activities," and she "feels like [she is] not welcome there at all." D24:15; D33:3.

These excluded statements are the premises of Plaintiffs' allegation of irreparable harm in support of their motion for preliminary injunction. But these allegations are expressly foreclosed by the July 12 order. Defendants accordingly object to the consideration of the Plaintiffs' declarations on this motion—or at least the terms of those declarations that speak to the particularized effects of HB11 on Plaintiffs.

ARGUMENT

Plaintiffs' motion fails on every element of Rule 65A. Plaintiffs do not and cannot establish that they will suffer "irreparable harm." Utah R. Civ. P. 65A(e)(1). They have not shown that any such injury outweighs the effect of an injunction on the defendants, or that an injunction "would not be adverse to the public interest." *Id.* at (e)(2), (3). And they have not carried their burden of demonstrating a "substantial likelihood of success on the merits" on any of their claims—whether under an originalist analysis or under the framework established in Utah Supreme Court precedent. *Id.* at (e)(4).

The legislature is best suited to the kind of "nimble reformulation and revision" that will be required to tackle the delicate balance presented by this case. *State v. Lujan*, 2020 UT 5, ¶ 28, 459 P.3d 992, 999. That is not a function easily performed by a court. And it is not the domain of judicial decisionmaking under the Constitution—a charter that sets "a fixed set of limits on the operation of our government," "interpreted in accordance with the public understanding of the constitution when it was originally established." *Id.* ¶ 5.

I. Plaintiffs are barred—by their own choice and under this Court's order--from establishing that they will suffer irreparable harm and they cannot show such harm because no constitutional rights hang in the balance

Plaintiffs assert that HB11 will harm them in (1) violating their constitutional rights; and (2) causing them "mental, physical, emotional, and dignitary harms" based on a lack of "social transition" and the accompanying "scrutiny and stigma" that would ensue if they could practice but not compete (or alternatively, compete instead with those of their biological sex). D26:14–18. But the first point fails because (a) Plaintiffs are no longer in a position to establish a violation of *their* constitutional rights, and (b) their cited authority does not establish a basis for a presumption of irreparable harm for the constitutional violations they allege.[10] And the second point falters on

[10] Contrary to Plaintiffs' assertion, D26:14–15, there is not a "well-established" presumption that an allegation of infringement of any constitutional right is sufficient to show irreparable harm. *See* 11A Fed. Prac. & Proc. Civ. § 2948.1, n.26 (citing cases declining to conclude there was irreparable harm when the plaintiff alleged a violation of a constitutional right).

Plaintiffs rely on the plurality opinion in *Elrod v. Burns*, 427 U.S. 347 (1976), to support their claim that an alleged constitutional violation establishes irreparable injury. D26:14–15. But more recent Supreme Court cases align against a broad reading of *Elrod*. The Court has emphasized that presumptions of irreparable harm are altogether disfavored in injunctive relief, *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 391 (2006), and that preliminary injunctions should be grounded in historical practice (the presumption Plaintiffs allege did not exist prior to 1976), *id.* at 394. And the Court has reinforced that injunctive relief should be rare. *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 22 (2008). In fact, the Supreme Court has never cited *Elrod* for the broad presumption Plaintiffs claim, only the narrow presumption of irreparable harm for a First Amendment claim. *See Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020).

Plaintiffs have cited no authority that supports their view that irreparable harm is presumed from allegations of infringement of the purported constitutional rights at issue here. Instead, their argument for irreparable harm relies substantially on *Whitaker v. Kenosha Unified School Dist.*, 858 F.3d 1034, 1045 (7th Cir. 2017). D26:15. But *Whitaker* did not find irreparable harm on the basis of a presumption arising from an allegation of an infringement of the Equal Protection Clause. It rooted its finding on particularized testimony from plaintiff's experts that the use of the boy's restroom was "integral" to the plaintiff's "transition and well-being" and that the treatment by his school

similar grounds: their allegations of impact on their social transition and mental and emotional health are now nothing more than extra-record conjecture.

Those allegations were fair game when this case was initiated by three individual Plaintiffs who made such allegations in support of their standing to challenge HB11 and in support of their Motion for Preliminary Injunction. But once Plaintiffs chose to block discovery of their mental health records and this Court ruled that this choice precluded them from presenting evidence of personal harm, the game changed.

The July 12 ruling forecloses the Plaintiffs' motion for preliminary injunction at the threshold. A plaintiff who is unable to present evidence on the particularized effects of a challenged law cannot establish that the plaintiff is an "applicant" for preliminary injunction that "will suffer irreparable harm" without entry of "such relief." Utah R. Civ. P. 65A(e)(1). This is a prerequisite for entering a preliminary injunction. In litigation under the parallel federal rule, it has been described as "the single most important prerequisite for the issuance of a preliminary injunction." *Bell & Howell: Mamiya Co. v. Masel Supply Co.*, 719 F.2d 42, 45 (2d Cir. 1983) (quoting 11 C. Wright & A. Miller, *Federal Practice and Procedure*, § 2948 at 431 (1st ed. 1973)).[11]

This defect is especially problematic in a case involving a claim for an injunction against a governmental entity's enforcement of its laws or policies. In such cases, the established harm

"significantly and negatively impacted his mental health and overall well-being." *Id.* at 1045. No such evidence is available to the Plaintiffs here. And *Whitaker* thus does not support the Plaintiffs' motion.

[11] Utah's rule 65A(e) is based on federal rule 65 and associated caselaw. Utah R. Civ. P. 65A, advisory committee note. So federal caselaw on points of similarity can be helpful to understanding the meaning of Utah's rule. *See, e.g., State v. Rothlisberger*, 2006 UT 49, ¶ 28, 147 P.3d 1176.

must be "great and immediate," *City of Los Angeles v. Lyons*, 461 U.S. 95, 113 (1983),[12] not conjectural, abstract, or hypothetical. *Timber Lakes Property Owners Association v. Cowan*, 2019 UT App 160, ¶ 26, 451 P.3d 277 (quoting *InnoSys, Inc. v. Mercer*, 2015 UT 80, ¶ 79, 364 P.3d 1013 (Durham, J., dissenting). "For this reason, a court will not exercise its power to grant injunctive relief to allay a mere apprehension of injury at an indefinite future time." *Id.* (quoting 42 Am.Jur.2d *Injunctions* § 34 (2010)). And Plaintiffs have no more than that general apprehension. That is insufficient. Under the rule's plain text, "[a] restraining order or preliminary injunction may issue only upon a showing by the applicant that … [t]he applicant will suffer irreparable harm." URCP 65A(e)(1) (emphasis added). Thus, "plaintiffs must present individualized proof of irreparable harm," *LaForest v. Former Clean Air Holding Co.*, 376 F.3d 48, 57 (2d Cir. 2004), not proof that they might suffer generalized harm or that others will suffer harm. And because Plaintiffs "lack third-party standing, the Court considers only whether the [Plaintiffs] themselves have made a sufficient showing of irreparable harm." *E. Bay Sanctuary Covenant v. Trump*, 354 F. Supp. 3d 1094, 1115 (N.D. Cal. 2018); *see also Olson v. Thompson*, 992 F.2d 1223, 1223 (10th Cir. 1993) ("Olson must assert his own legal rights and cannot rest his constitutional claim on injury to others. . . . Therefore, we need not consider Olson's allegations of injury to other Kansas prisoners.") (citation omitted); *In re Melbourne Beach, LLC*, 2019 U.S. Dist. LEXIS 242615, *15 (M.D. Fla., Nov. 5, 2019) (speculation about harm to "hypothetical third parties" is insufficient to sustain a preliminary injunction).

Plaintiffs may point to the language of the July 12 order stating that they are "limited to

[12] *Lyons* involved the additional wrinkle of comity when federal courts are enjoining state entities. 461 U.S. at 113. But it remains helpful to show the caution necessary when considering enjoining the government.

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' sports teams." July 12 Order at 2–3. But the order in limine must be viewed in its context—of sustaining the Plaintiffs' objection to Defendants' discovery requests in light of the Plaintiffs' privacy concerns. In this context, the Court was not faced with and thus was not deciding whether or to what extent Plaintiffs were in a position to present evidence of the "generalized type of psychological damage" that could ensue to other transgender persons. It was just stating that such evidence was not precluded by its disposition of the only objection that was presented to it—Plaintiffs' objection based on privacy concerns.

The July 12 order cannot be interpreted to foreclose objections that have not yet been raised. And Defendants hereby object to the Plaintiffs' right to present evidence of the "generalized type of psychological damage" that could be caused to transgender persons generally under HB11. Plaintiffs are not expert witnesses. And they lack foundation or qualifications necessary to testify from that perspective. *See generally* Utah R. Evid. 702. Plaintiffs are also not class representatives,[13] or an entity in a position to assert "group standing" to represent the interests of a group's members. They also have failed to establish any foundation for this sort of evidence—any indication of a basis in their personal knowledge for presenting this evidence. And for these reasons, the Plaintiffs also lack any capacity to present competent, admissible evidence on the effects of HB11 on transgender persons in general.

[13] Plaintiffs are entitled to "sue . . . as representative parties on behalf of all only if" they allege and establish the prerequisites in rule 23 (numerosity, typicality, etc.). Utah R. Civ. P. 23(a). And they of course have not done that.

Plaintiffs have proffered testimony from their two experts. But neither of them has presented any competent, reliable evidence of the effects of a law like HB11 on the Plaintiffs individually. *See* D26:15–17 (citing to experts Hawkins and Shumer, among other sources, to support harm to transgender girls in general, but not providing evidence about the Plaintiffs here). Neither of the experts has examined or even spoken with any of the Plaintiffs. D27:5; D28:4. And they are thus in no position to establish what the Plaintiffs themselves are foreclosed from presenting—evidence of the impact of HB11 on the "applicant[s]" for the preliminary injunction.

Plaintiffs' experts' testimony falls short even if we assume the relevance of generalized effects on transgender persons not before the Court. Plaintiffs' experts lack any foundation or competent basis for testifying on the effects of a law banning transgender girls from participating in high school sports. They are clinicians with a perspective based on the individuals they have treated. And their assertions about impacts on transgender girls generally lack any foundation in scholarly research. *See* Cantor Decl., at ¶¶ 9, 11–13, 15-17, 19, 23, 25, 28 (observing that Hawkins and Shumer "are incorrect," "misrepresent the research literature," make claims that have no basis in the literature, violate the principle that correlation is not causation, cherry-picked evidence, and ignored studies that contradict their claims).

Finally, Plaintiffs' experts principally address their assertions of general harm to flat "bans" on participation in girls' sports. Such assertions are immaterial here, where the question goes to the effect of HB11—a compromise position that accommodates transgender girls by allowing them to try out for and participate in practice with girls' teams.

One of Plaintiffs' experts (Dr. Hawkins) concludes her declaration with her personal disdain for HB11—a charge that it is "cruel" and "abusive" to allow a transgender girl to practice

but not play in games. D28:13. But her conclusory views about the effects of HB11 are utterly without foundation, much less any connection to scholarly literature. And these opinions thus also fall short.

Plaintiffs may claim that they are alleging academic or physical harms that are not foreclosed by the July 12 order. But those harms are traceable to Plaintiffs' personal choice—not to HB11. That removes them from the calculus, since a plaintiff's injury is cognizable in our law only if it is traceable to a challenged act of a defendant—as developed in more detail in the motion to dismiss for lack of standing. *Provo City Corp. v. Thompson*, 2004 UT 14, ¶ 9, 86 P.3d 735 (describing three "basic requirements of standing": a plaintiff must allege "she has suffered or will imminently suffer an injury that is fairly traceable to the conduct at issue such that a favorable decision is likely to redress the injury") (citing *Jenkins v. Swan*, 675 P.2d 1145, 1150–51 (Utah 1983)); *see also Est. of Faucheaux v. City of Provo*, 2019 UT 41, ¶ 26 n.7 (citing *Jenkins* for "establishing traceability and redressability as elements of standing").

II. Plaintiffs have not shown that an injunction would comport with the public interest

Rule 65A requires an applicant to prove that an injunction "would not be adverse to the public interest." Utah R. Civ. P. 65A(e)(3). When a government agency or officer is the respondent to an injunction request, some courts say that the harm-balancing and public-interest factors "merge." *See, e.g., Aposhian v. Barr*, 958 F.3d 969, 978 (10th Cir. 2020) (citing *Nken v. Holder*, 556 U.S. 418, 435 (2009) (discussing stay applications and likening them to preliminary injunctions)). That may be true to some extent practically, as the government respondents will usually represent the public interest in enforcing the law—*see, e.g., Nken*, 556 U.S. at 436 ("There

is always a public interest in prompt execution of removal orders[.]")—and the overall test is one of equitable balancing. But an independent analysis of the elements of the rule helps courts guard against the temptation to assume that the public interest in enforcing valid laws is negligeable—it is not. *See, e.g., id*. (explaining that harm to individuals "is no basis for the blithe assertion of an 'absence of any injury to the public interest' when a stay is granted") (citation omitted). It is an indispensable part of any preliminary injunction showing. *See* Utah R. Civ. P. 65A(e) (requiring party seeking preliminary injunction to show all four factors).

There are two strong structural interests. First, there is a strong public interest in the enforcement of valid state statutes. *State In re Schreuder*, 649 P.2d 19, 25 (Utah 1982) (recognizing "the public interest in the enforcement of the criminal laws and the punishment and rehabilitation of offenders"); *see also Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) ("[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.").

Second, there is an equally strong interest in preserving our constitutional form of government by honoring the right of the people, through their elected representatives, to make policy in fields not affecting fundamental rights. *See, e.g., Dobbs v. Jackson Women's Health Organization* (2022), slip opinion at 65-66, available at https://www.supremecourt.gov/opinions/slipopinion/2 (overruling *Roe v. Wade* and returning abortion regulation to state legislatures); *see also* Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. Rev. 375, 381-82 (1985) (opining that *Roe* "ventured too far in the change it ordered," cut off legislative debate and innovation, and "presented an incomplete justification" for its ruling). The Utah Constitution does not speak to the

rights asserted by Plaintiffs. It leaves the matter to the people to sort out through the political process. *See, e.g., Lujan*, 2020 UT 5, ¶¶ 5, 50 (explaining that constitutional provisions "are not a license for common-law policymaking," but a set of limits determined by reference to "the public understanding of the constitution when it was originally established," and that the "principal" basis for change is through amendment). And that is a further basis for denying the plaintiffs' motion.

III. Enjoining HB11 causes greater harm than letting it stand

Plaintiffs must also show that the "threatened injury to [them] outweighs whatever damage the proposed order or injunction may cause" the Defendants. Utah R. Civ. P. 65A(e)(2). This is an equity question, and equity is about balancing interests. When the party opposing a motion for preliminary injunction is a political branch of government, the standard for issuing an injunction is particularly strict in light of public policy considerations, as "the court must consider that all judicial interference with a public program has the cost of diminishing the scope of democratic governance." *Ill. Bell Tel. Co. v. WorldCom Tech., Inc.*, 157 F.3d 500, 503 (7th Cir. 1998).

An injunction here threatens to impose harm on others.[14] And there are strong, more specific public interests here in protecting girls and girls' sports. During the floor debates on HB11, the sponsor and others discussed two interests that the law sought to protect: athlete safety and competitive integrity. *See* House Floor Debate on H.B. 11 (second amended), 2022 General Session, Day 30 (2/16/22), available at https://le.utah.gov/av/floorArchive.jsp?markerID=118017, at 1:27:38-1:29:35 (Representative Kera Birkeland (sponsor) discussing need to "make sure that you don't have somebody that comes in and dominates women's sports," citing example of Lia

[14] *See* Pike Decl., at 13 ("In the matter of the inclusion of trans-identifying males with male advantage in female sport, the harms will fall, albeit in a diffuse way, on female athletes competing in sport. I can see nothing to justify liability to harm to those female athletes in this case.").

Thomas at the University of Pennsylvania); 1:40:00-1:42:00 (Representative Kera Birkeland discussing need to preserve athlete safety and female competition); 1:43:25-1:44:28 (Representative Raymond Ward, "It's important that in girls' sports there is competition fair to the girls that are competing there[.]"); 1:48:13-52 (Representative Candice B. Pierucci saying the bill balanced competition, inclusion, and safety); Senate Floor Debate, H.B. 11 (second and fourth amended), 3/4/22 (Day 45), available at https://le.utah.gov/av/floorArchive.jsp?markerID=119744 at 0:58:50-0:59:03 (Senator Daniel McCay explaining that bill deals with two important components of school sports for women: safety and integrity of competition); 1:06:45-1:07:05 (Senator Kurt Bramble discussing competitive differences between men and women using example of top-three- finisher female triathlete who trains with males and that if she competed against the males she trains with, she would lose by about 45 minutes). Those are valid goals, and ones that the public has a strong interest in furthering.

That is not to say that concern over the mental health and safety of transgender children is unimportant—far from it. Defendants share Governor Cox's desire for these children to live and thrive. *See* Letter from Spencer Cox, Utah Gov., on Veto of H.B. 11 to the Utah House and Utah Senate (Mar. 22, 2022), https://governor.utah.gov/2022 /03/24/gov-cox-why-im-vetoing-hb11/. At the same time, however, Defendants recognize that other important interests are at stake, including the mental and physical health of biological girls who have an established right to compete in a safe environment and on an even playing field. *See* House Floor Debate on H.B. 11 (second amended), 2022 General Session, Day 30 (2/16/22), available at https://le.utah.gov/av/floorArchive .jsp?markerID =118017, 1:26:55-1:27:57 (opening statement of Representative Birkeland discussing these issues).

Plaintiffs dismiss any effects on biological girls or others as "nonsensical," "hypothetical harm" that is easily discounted. D26:19. But this hand-waving flies in the face of evidence in the record. In contrast to Plaintiffs, who are precluded from presenting evidence of harm to them, Defendants have proffered substantial evidence of the likely adverse effects of an injunction against HB11 on the integrity of girls' sports and on the safety and opportunities available to biological girls who would end up competing with biological boys.

According to Dr. Hilton, keeping sports separate for natal females is necessary for their safety because females are more susceptible to impact injuries due to "lower impact resistance in their neck muscles and more delicate brain structures." Hilton Declaration at 15. And it is necessary to competitiveness because transgender girls maintain male athletic advantages such as greater height and skeletal length, even despite puberty blockers and testosterone suppression in their teens. Hilton Declaration at 6, 8, 10–11. It is also necessary due to biological female *dis*advantages stemming from menstruation. *Id.* at 15. *See also id.* at 25 (explaining why Utah is justified in excluding transgender females due to athletic advantages in order to preserve integrity of female sports).

And according to Dr. Pike, "equality of opportunity for females is precisely the justification of female sport." Pike Decl., at 9. "Directly by reducing the opportunities for young female humans, and indirectly by undermining female sport in a way that male sport is not undermined, then, trans inclusive policies for sex categories of sport constitute sex discrimination against females." *Id*. Thus, "[f]air rules, which exclude male advantage in female sport, are justified to ensure fair equality of opportunity for female athletes." *Id*. at 14.

IV. Plaintiffs have failed to demonstrate a likelihood of success on the merits of their constitutional claims

Next, Plaintiffs must show a substantial likelihood of success on their constitutional claims. Utah R. Civ. P. 65A(e)(4). D26:20. They allege infringement of three provisions of the Utah Constitution: (1) the Uniform Operation of Laws clause (art. I § 24); (2) the Equal Rights Clause (art. IV § 1); and (3) the Due Process Clause (art. I § 7). D24:19–23. But they have no likelihood of success on any of these claims.

The defects in Plaintiffs' case are highlighted in specific sections analyzing each separate claim below. But before addressing each claim on its merits, Defendants begin with some background on the proper approach to analyzing claims like these as they arise on a motion for preliminary injunction, and by highlighting some general, high-level defects in the Plaintiffs' case.

A. Background Principles and Threshold Defects

Injunctions are—and should be—rare. *System Concepts, Inc. v. Dixon*, 699 P.2d 421, 425 (Utah 1983) ("An injunction, being an extraordinary remedy, should not be lightly granted"). "[A]t the very least," a movant must establish "a prima facie showing that the elements of [an] underlying claim can be proved." *Water & Energy Sys. Tech. Inc. v. Keil*, 1999 UT 16, ¶ 8, 974 P.2d 821. Close calls or sporting chances do not suffice. *See, e.g., First Nat'l Bank & Trust Co. v. Federal Reserve Bank*, 495 F. Supp. 154, 157 (W.D. Mich. 1980) (refusing to find likelihood of success "where there exist complex issues of law, the resolution of which [is] not free from doubt"). The likelihood of success must be reasonable. *Tuxworth v. Froehlke*, 449 F.2d 763, 764 (1st Cir. 1971). And the "burden of showing . . . probable success is even greater where"—as here—"the preliminary relief sought would in effect grant plaintiff a substantial part of the relief it would obtain after full litigation on the merits." *Bailey v. Romney*, 359 F. Supp. 596, 600 (D.C.

Dist. 1972).

When a party challenges a law's constitutionality, the Court should make "every reasonable presumption in favor of constitutionality and . . . not nullify a legislative enactment unless it is *clearly and expressly* prohibited by the Constitution." *Utah Farm Bureau Ins. Co. v. Utah Ins. Guaranty Ass'n*, 564 P.2d 751, 753 (Utah 1977) (emphasis added); *see also South Salt Lake City v. Maese*, 2019 UT 58, ¶ 10, 450 P.3d 1092 (similar). This presumption helps prevent judicial trespass onto legislative turf. *State v. Herrera*, 1999 UT 64, ¶ 18, 993 P.2d 854. This is doubly true for laws affecting schools, since the State possesses "custodial and tutelary" power over minor students when at school, "permitting a degree of supervision and control that could not be exercised over free adults." *See Veronia School Dist. 47J v. Acton*, 515 U.S. 646, 655 (1995); *see also Ingraham v. Wright*, 430 U.S. 651, 682 (1977) (holding that the State has "comprehensive authority" to "prescribe and control conduct in [its] schools") (quoting *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 507 (1969)).

Utah courts interpreting the Utah Constitution "seek to ascertain and give power to the meaning of the text as it was understood by the people who validly enacted it as constitutional law." *Richards v. Cox*, 2019 UT 57, ¶ 13, 450 P.3d 1074; *see also Neese v. Utah Bd. of Pardons & Parole*, 2017 UT 89, ¶ 95, 416 P.3d 663 (holding that Utah constitutional analysis is an "originalist inquiry" that aims to "ascertain[] the 'original public meaning' of the constitutional text"). This inquiry's "focus is on the objective original public meaning of the text, not the intent of those who wrote it." *Maese*, 2019 UT 58, ¶ 19 n.6. That is, a court's interpretive "task is to understand what" a constitutional provision "meant to those who voted to approve the Utah Constitution"—to discern "what the general public understanding was at the time of statehood."

Id. ¶ 21 & n.7; *see also Neese*, 2017 UT 89, ¶ 96 (original public meaning inquiry asks "what principles a fluent speaker of the framers' English would have understood a particular constitutional provision to embody").

Constitutional interpretation involves discerning textual meaning, not substituting policy preferences. Whether any given statute "is good public policy" is not a question for courts but rather "a question for the citizens of Utah, speaking through their duly elected representatives." *Richards*, 2019 UT 57, ¶ 1 & n.2. Instead, a statute's validity depends solely on "constitutional limits and restraints." *Block v. Schwartz*, 76 P. 22, 23 (Utah 1904). "Whenever, as to any subject within the jurisdiction of the state, the Constitutions of the state and of the United States are silent, the Legislature may speak; and when it does speak its enactment will not be declared void simply because, in the opinion of the court, it is unwise, or opposed to justice and equity." *Id.; see also Lujan*, 2020 UT 5, ¶¶ 5, 50 (similar).

Finally, judicial deference is at its peak where—as here—the applicant challenges a statute as unconstitutional on its face. Plaintiffs are effectively foreclosed from asserting an as-applied challenge, since the July 12 order precludes them from presenting evidence of HB11's specific effect on them. And the relief they seek includes an injunction broadly precluding enforcement of HB11 in all of its applications. D24:23 (seeking declaration that act is unconstitutional and enjoining its enforcement). In these circumstances, Plaintiffs can only be understood to be asserting a *facial* challenge to the law. *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"). Yet they have not briefed the required grounds for succeeding on such a challenge. And their motion for preliminary injunction also fails on that

global basis.

A facial attack is "the most difficult challenge to mount successfully." *United States v. Solerno*, 481 U.S. 739, 745 (1987). It can succeed only where the applicant can "establish that no set of circumstances exist under which the [statute] would be valid." *Id.*; *State v. Herrera*, 1999 UT 64, ¶ 4 n.2, 993 P.2d 854, 857 (quoting *id.*); *see also Citizens United v. FEC*, 558 U.S. 310, 331 (2010) (explaining that breadth of remedy determines nature of constitutional challenge).

Yet plaintiffs make no mention of the governing standard, and advance no argument under its terms. In fact, the plaintiffs actively undermine their case by effectively conceding the validity of some of the grounds for maintaining sports divisions based on biological sex. *See* D26:26–28. And those concessions make clear that at least some transgender girls may reasonably be precluded from participating in leagues designed for girls—those who reached puberty without any puberty blockers, or who otherwise enjoy significant competitive advantages over biological girls. This is fatal to the success of Plaintiffs' facial challenge to HB11. And it defeats the request for a preliminary injunction at the threshold.

Plaintiffs' case also falters on the merits of each individual claim.

B. Plaintiffs have not shown any likelihood that HB11 violates the Uniform Operation of Laws Clause under either its original meaning or in its modern formulation

The Uniform Operation of Laws Clause requires that "[a]ll laws of a general nature shall have uniform operation." UTAH CONST. art. I, § 24. This provision has been understood to bear an original understanding and a more modern extension. Plaintiffs have failed to even brief the original meaning of this provision—a significant shortfall given the Utah Supreme Court's above-

noted insistence on the primacy of this form of analysis.[15] And their analysis also falls short under the modern formulation. Instead of briefing the elements prescribed in Utah's case law, the Plaintiffs turn instead to federal cases under the Equal Protection Clause of the United States Constitution. Yet the cited federal cases run contrary to our state law under the Utah Constitution, and are easily distinguished on that ground. And Plaintiffs have accordingly failed to establish a likelihood of success on either an originalist or modern view of the uniform operation of laws.

1. Plaintiffs have not analyzed this claim under an originalist approach, and their claim fails under that approach because Plaintiffs are not challenging executive action.

Plaintiffs seek to establish a new suspect class and a novel constitutional right for transgender girls to compete on high school teams designated for biological girls. Before establishing such a novel right, binding Utah case law requires a court to begin with an analysis of the original public meaning of the constitution. *Zimmerman v. Univ. of Utah*, 2018 UT 1, ¶ 25, 417 P.3d 78 (holding that to "establish the elements" of a novel state constitutional claim, the court "would need to start, at a minimum, with a careful analysis of the text of the Utah Constitution, as understood when it was adopted in the late nineteenth century."); *see also State v. Stewart*, 2019 UT 39, ¶ 47, 449 P.3d 59 (citing *Zimmerman*, 2019 UT 39, ¶ 19) (concluding the court was "in no

[15] This shortfall is particularly problematic in a case like this one, in which the plaintiffs are seeking the establishment of a brand-new category of quasi-suspect classification under Utah law. Presumably, Plaintiffs could succeed without any originalist analysis if they were simply asking for the application of a suspect classification already established in our case law—like a classification based on race or sex. But for reasons highlighted below, the plaintiffs here are asking for something much more ambitious. They are complaining about the legislature's failure to make a further sub-classification within a classification based on sex. That is a request for a departure from established precedent. And it highlights the need for an analysis of the original public meaning of the language of the Utah Constitution. *See Zimmerman v. University of Utah*, 2018 UT 1, ¶ 25, 417 P.3d 78.

position to establish a new constitutional right" when the appellant failed to present a basis in the original meaning of the constitution).

At the time the clause was adopted, uniform operation provisions "were understood to be aimed 'not at legislative *classification* but at practical *operation*.'" *Bolden v. Doe* (*In re Adoption of J.S.*), 2014 UT 51, ¶ 66, 358 P.3d 1009 (quoting *State v. Canton*, 2013 UT 44, ¶ 34 & n.7, 308 P.3d 517). "Thus, under this historical approach, the uniform operation guarantee is 'not viewed as a limit on the sorts of classifications that a legislative body could draw in the first instance, but as a rule of uniformity in the actual application of such classifications.'" *In re Adoption of J.S.*, 2014 UT 51, ¶ 66 (quoting *Canton*, 2013 UT 44, ¶ 34). As a practical matter, classifications drawn by the legislature were "viewed as permissible as long as no one was exempted from them" by the executive. *Salt Lake City Corp. v. Utah Inland Port Auth.*, 2022 UT 27, ¶ 13, __ P.3d __ (citing *Canton*, 2013 UT 44, ¶ 34 & n.7). Uniform-operation clauses were thus "meant to protect against the 'creation of special privileges or exemptions' instead of functioning as 'miniature equal protection clauses.'" *Utah Inland Port Auth.*, 2022 UT 27, ¶ 13 (quoting *Canton*, 2013 UT 44, ¶ 34 & n.7).

Plaintiffs assert "no tenable infringement" of the Uniform Operation of Laws Clause under its original meaning—as a limit on executive discretion in enforcement of the laws. *See In re Adoption of J.S.*, 2014 UT 51, ¶ 66. They do not claim that the executive has granted exemptions to some biological males in violation of the clause's original protection "against the 'creation of special privileges or exemptions.'" *Utah Inland Port Auth.*, 2022 UT 27, ¶ 13 (citing *Canton*, 2013 UT 44, ¶ 34 & n.7). Instead, Plaintiffs challenge the law's different treatment of transgender girls and "other"—that is, biological—girls. But the original meaning of the Uniform Operation Clause

did not contemplate a challenge to legislative classification. *Id.* Plaintiffs' claim of a novel constitutional right thus lacks a basis in the original meaning of the Uniform Operation Clause—the understanding of the constitution that matters for such claims. *Zimmerman*, 2018 UT 1, ¶ 25; *Stewart*, 2019 UT 39, ¶ 47. If anything, HB11 advances and protects the interests guaranteed by the principle of uniform operation by establishing a general category that forecloses individualized exemptions at the executive level. Plaintiffs have shown no violation under the historical understanding of the Uniform Operation Clause.

2. Plaintiffs have also failed to show a violation under the clause's modern formulation because classifying students on the basis of biological sex is a valid basis

Plaintiffs' claim likewise fails under more modern formulations of the clause. 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.*

This third step "incorporates varying standards of scrutiny." *Taylorsville City v. Mitchell*, 2020 UT 26, ¶ 37, 466 P.3d 148. But "most classifications are presumptively permissible, and thus subject only to rational basis review." *Id.* The established exceptions to this general rule are limited and circumscribed. *State v. Chettero*, 2013 UT 9, ¶ 20, 297 P.3d 582. The Utah Supreme Court has established only a discrete set of classifications that it treats as "suspect." *Id.* And that set of

classifications is limited to those that are "so generally problematic" and so "likely unreasonable" that they trigger heightened scrutiny—a more searching basis for judicial review of distinctions made by the legislature. *Id.*

Plaintiffs' uniform-operation claim has no likelihood of success under these standards. Plaintiffs fail to address the statute's actual classification (biological sex), and they have not shown that the law treats similarly situated persons differently. They also have not shown that distinguishing on the basis of biological sex fails either rational basis or intermediate scrutiny.

a. Plaintiffs do not challenge the classification that HB11 actually makes: biological sex

Plaintiffs' arguments rest on the assertion that the law distinguishes between transgender girls and "other girls." *See, e.g.*, D26:1, 24, 26. But that is not what HB11 does on its face, and a court examining a uniform-operation claim must look at the statute's actual classification, not the classification that the claimant thinks it should have made. *Canton*, 2013 UT 44, ¶ 39 (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 or distinguishes between "student[s] of the male sex" and "students of the female sex." UTAH CODE § 53G-6-902(b). The classification is on the basis of biological sex. *See 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 show that it was unconstitutional for the legislature to distinguish between biological males and females in regulating athlete safety and promoting fair competition in school sports.

HB11 could be said to facially discriminate on the basis of gender identity or transgender status only if there were a perfect correlation between sex and gender identity (or being transgender). But by the Plaintiffs' own expert's assertions, 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); Pike Decl., at 10–11 (excluding "male bodied athletes from female competition" does not discriminate on the basis of gender identity or "trans status" because "it does not take [either] into account: the decision does not vary with [either]"). And the statute on its face does not discriminate against biologically male students who identify as girls. Thus, their complained-of classification—the distinction between "transgender girls" and "other girls"—is a subclassification that is foreign to the statute.

And the failure to subclassify within a given category is not a failure that is cognizable under controlling case law. *Canton* is instructive. Canton claimed that a criminal tolling statute excluding periods of 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, and explained 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 effectively prohibits "'student[s] of the male sex' who gender identify as girls" from competing in games against other schools in leagues

designated for biological girls. 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." *Canton*, 2013 UT 44, ¶¶ 2, 38–39. Under the first step of the uniform operation test, Plaintiffs must demonstrate that HB11's facial classification of biological males and females runs afoul of the state constitution. *See id.* at ¶ 39.

Plaintiffs claim that any subclassification that is in some sense "based on" biological sex would count as a sex-based facial classification. D26:22. But that would expand the classification well beyond the statute—in a manner that would read the first step of the uniform operation test out of Utah case law. If Plaintiffs' logic held, then HB11 would be facially discriminating on the basis of sex by precluding any biological boy—not just transgender girls—from competing on the girls' team. Consider a gay male student who prefers to play on the girls' team to avoid homophobic locker room talk, or a heterosexual male student who prefers competing with girls because that allows him to use his strength and size differential to impress his female teammates. Both of these students have an interest in playing on the girls' team that is in some sense "based on" biological sex. But there is not credible argument that these sex-based subclassifications exist on the face of the statute.

Plaintiffs cite two federal district court decisions preliminarily enjoining laws establishing sex-based divisions in athletics. But neither of these cases supports Plaintiffs' uniform operation challenge. D26:2, 31–32, citing *Hecox v. Little*, 479 F. Supp. 3d 930 (D. Idaho 2020); *B.P.J. v. W. Va. State Bd. of Educ.*, 550 F. Supp. 3d 347 (S.D. W. Va. 2021). *Hecox* actively cuts against the

Plaintiffs' claim, since it dismissed a facial equal protection challenge for failure to show that the law had no constitutional applications. 479 F. Supp. 3d at 969, 971.

And while *Hecox* and *B.P.J.* each found merit in the plaintiffs' as-applied challenges, they did not examine—as this Court must under Utah law—whether the law on its face discriminated on the basis of biological sex. *Hecox*, 479 F. Supp. 3d at 974; *B.P.J.*, 550 F. Supp. 3d at 352; *State v. Canton*, 2013 UT 44, ¶ 39. These cases are thus unhelpful here. Ultimately, they mostly serve to highlight the Plaintiffs' misstep in seeking to federalize their uniform operation claim, on a point that cannot be endorsed without overruling established Utah cases.

b. HB11 does not treat similarly situated persons differently because transgender girls are not biologically similar to biological girls

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. The similarity must lie 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 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.

Plaintiffs acknowledge that "courts generally have found" that the preservation of separate sports leagues for biological males and females "withstand[s] constitutional scrutiny." D26:26. For good reason. The record in this case is replete with expert evidence of the equal opportunity and safety concerns advanced by the establishment of athletic leagues for biological girls. *See* section

IV.B.2.c, below. And there is a wealth of authority upholding the basis for the establishment and preservation of sports divisions based on biological sex. D26:26–27 (citing *Clark v. Ariz. Interscholastic Ass'n.*, 695 F.2d 1126, 1131 (9th Cir. 1982) and *Israel ex rel. Israel v. W. Va. Secondary Schs. Activities Comm'n*, 388 S.E.2d 480, 485 (W. Va. 1989) (collecting cases)).

Plaintiffs assert that a subgroup of biological boys (those who identify as girls) are being "singled out" for differential treatment. This is not the relevant classification under the statute, for reasons explained above. But even accepting this framing for the sake of argument, Plaintiffs' claim still fails on the second element, since Plaintiffs have not alleged and cannot establish that biological boys (including those who identify as girls) are "similarly situated" to biological girls.

Two groups are not "similarly situated" if the court can identify "rational grounds for distinguishing [them]." *Count My Vote*, 2019 UT 60, ¶ 35. And "the existence of a legitimate ground that 'can be reasonably imputed to the legislative body' is enough to justify the legislative distinction." *Id.* (cleaned up). It is "rational" for the legislature to make a distinction when there is a difference that is material to the legislative purpose. *Blue Cross & Blue Shield of Utah v. State*, 779 P.2d 634, 637 (Utah 1989) (referring to "the purpose of a law" in assessing whether there is a rational basis for finding a difference). *See also* Pike Decl., at 7, 14 (concluding it is "reasonable for differentials between biological males and biological females to determine the treatment of trans athletes," and that "[f]air rules, which exclude male advantage in female sport, are justified to ensure fair equality of opportunity for female athletes").

This is another ground for distinguishing both *Hecox* and *B.P.J.*: the courts there second-guessed the reasonableness of distinguishing between biological girls and transgender girls. *Hecox*, 479 F. Supp. 3d at 975 (noting that "the physiological differences" between biological males and

females "may justify the Act"); *B.P.J.*, 550 F. Supp. 3d at 353–54 (quoting the same from *Hecox*). But the Utah standard is different. It asks only whether it would be rational for the legislature to conclude otherwise. *Count My Vote, Inc.*, 2019 UT 60, ¶ 35.

Plaintiffs themselves acknowledge material differences between biological girls and transgender girls. They refer approvingly to the School Activity Eligibility Commission that will go into effect if HB11 is declared unconstitutional. *See* D26:29, 37; UTAH CODE §§ 53G-6-1002 to 1004. The commission would conduct an "individual eligibility inquiry" as to whether a transgender girl would "present a substantial safety risk" or have "a material competitive advantage." D26:29 (quoting UTAH CODE § 53G-6-1004(3)(a)(i)–(ii)). Plaintiffs describe the commission as a "less restrictive method for achieving the Legislature's [unchallenged] stated goals." *Id.* And they go so far as to present the commission as constitutionally adequate process for "determining eligibility" for a transgender girl to play on girls' sports teams. D26:37. Such a review process would not be necessary if there were no material differences (discussed in greater detail below) between transgender girls and biological girls that could "present a substantial safety risk" or "give the student a material competitive advantage." This defect in Plaintiffs' argument is thus fatal to their uniform operation claim. Because HB11 does not treat disparately persons similarly situated, Plaintiffs' claim fails at step two. *Utah Inland Port Auth.*, 2022 UT 27, ¶ 14; *see also Count My Vote, Inc.*, 2019 UT 60, ¶¶ 11, 30, 36, 40–41.

c. HB11's classification based on biological sex easily passes intermediate scrutiny because it substantially furthers State interests in safety and integrity of competition for girls' sports

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. The "existence of wiser alternatives than the one chosen does not serve to invalidate" a legislative classification under intermediate 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. The government interests they have focused on include:

- equalizing athletic opportunities for women;[16]
- providing and promoting athletic opportunities for girls;[17]
- redressing past discrimination against women in athletics;[18] and
- ensuring safety and sports integrity due to inherent physiological differences between the sexes.[19]

The State's experts have spelled out the scientific research and observations underpinning these interests. Cantor Declaration at ¶ 28; Hilton Declaration at 10–25; Pike Decl., at 2, 4, 6–14.

By premising the ability to play in games between schools on biological sex, HB11 substantially advances these interests. Plaintiffs object that the legislature could have used a "less restrictive" alternative, if not the "least restrictive alternative. D26:26, 28–29. But intermediate scrutiny does not require such a tight fit between means and ends. *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"). That is the language of strict scrutiny, which does not apply under any formulation of Plaintiffs' claims.[20] And a statute where only three of 75,000 are assigned to

[16] *B.C. v. Board of Educ., Cumberland Regional School Dist.*, 531 A.2d 1059, 1065 (N.J. Super. Ct. 1987).

[17] *Petrie v. Illinois High School Ass'n.*, 394 N.E.2d 855, 862 (Ill. Ct. App. 1979).

[18] *Clark*, 695 F.2d at 1131.

[19] *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).

[20] 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

the "wrong" sports league would still be 99.996 percent accurate in assigning students to the right league. *See* Letter from Spencer Cox, Utah Gov., on Veto of HB11, to the Utah House and Senate (Mar. 22, 2022), https://governor.utah.gov/2022/03/24/gov-cox-why-im-vetoing-hb11/. That easily passes intermediate scrutiny.

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. Biological girls were not born boys. Transgender girls were. And even if transgender girls have undergone puberty blocking or hormone therapy, they still maintain biological differences that are an advantage on the playing field. *See* Hilton Decl., at 20–23 & fig. 4, 5. Try as one might, human beings cannot entirely shake their biology.

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 competitions between schools. 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.

d. If this Court were to agree with Plaintiffs that HB11's classification is between transgender and non-transgender students, rational basis should apply

Gallivan, 2002 UT 89, ¶ 26). Plaintiffs have asserted no basis for a fundamental right at issue here, as demonstrated below. *See* Part IV.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.

Instead of challenging the statute's facial classifications on the basis of biological sex, Plaintiffs instead assert that the law discriminates based on transgender status. D26:24–25. This is not the relevant classification, for reasons noted above. But even if we accept the Plaintiffs' premise for the sake of argument, any supposed classification on the basis of transgender status would trigger only rational basis scrutiny. And HB11 easily meets that standard.

"Most classifications are presumptively permissible, and thus subject only to rational basis review." *Canton*, 2013 UT 44, ¶ 36. So when "there is no suspect classification at work and no apparent fundamental right,"[21] the "governing standard of review is rational basis." *Id.* at ¶ 40; *see also Mitchell*, 2020 UT 26, ¶ 37.[22] As the Utah Supreme Court has noted, "[c]lassifications are regularly made in the creation and enforcement of the law," and "[m]ost such classifications are permissible, and thus are subject only to minimal scrutiny under the Equal Protection Clause (i.e., rational basis review)." *State v. Chettero*, 2013 UT 9, ¶ 20.

[21] Plaintiffs have vaguely alleged the existence of a "fundamental" right. But the argument fails, for reasons addressed in response to Plaintiffs' substantive due process claim.

[22] Many cases across the country have applied this standard to these types of claims. *See, e.g.*, *Kaeo-Tomaselli v. Butts*, No. CIV. 11-00670 LEK, 2013 WL 399184, at *5 (D. Haw. Jan. 31, 2013) ("Plaintiff puts forth no evidence that her status as a … transgender female, qualifies her as a member of a protected class. Nor has this court discovered any cases in which transgendered individuals constitute a 'suspect' class."); *Casillas v. Daines*, 580 F. Supp. 2d 235, 246–47 (S.D.N.Y. 2008) (refusing to recognize transgender status as a suspect class and applying rational basis to plaintiff's equal protection claim); *Doe v. U.S. Postal Serv.*, No. CIV.A. 84-3296, 1985 WL 9446, at *4 (D.D.C. June 12, 1985) ("[W]e agree that transsexuals do not comprise a suspect class."); *Rush v. Johnson*, 565 F. Supp. 856, 868–69 (N.D. Ga. 1983) ("Examining the traditional indicia of suspect classification, the court finds that transsexuals are not necessarily a discrete and insular minority, nor has it been established that transsexuality is an immutable characteristic determined solely by accident of birth like race or national origin," and so applying rational basis to an equal protection claim) (cleaned up); *Doe v. Alexander*, 510 F. Supp. 900, 904 (D. Minn. 1981) ("Nor do transsexuals constitute a suspect class."); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 663 (9th Cir. 1977) ("This court cannot conclude that transsexuals are a suspect class.").

Intermediate scrutiny involves a more searching judicial review of the "fit" between legislature's means and ends. And Utah cases reserve such review for classifications that are "suspect." Only a few such classifications have been established in Utah. To date, the Utah Supreme Court has limited suspect (and quasi-suspect) classes to two classifications widely viewed as "generally problematic" and thus deserving of searching judicial review: race and biological sex. *See Mitchell*, 2020 UT 26, ¶ 37; *State v. Robinson*, 2011 UT 30, ¶ 22, 254 P.3d 183. U.S. Supreme Court precedent is similar. It has established race and national origin as a suspect classification and has recognized only two quasi-suspect classifications: sex, *Craig v. Boren*, 429 U.S. 190, 197 (1976), and illegitimacy, *Matthews v. Lucas*, 427 U.S. 495, 505–06 (1976).

This court should not break new ground by recognizing transgender status as a quasi-suspect class. This is an evolving area raising important questions that a few short years ago were not questions at all. *See, e.g.*, House Floor Debate on H.B. 11 (second amended), 2022 General Session, Day 30 (2/16/22), available at https://le.utah.gov/av/floorArchive.jsp?markerID=118017 at 1:51:12–1:52:05 (Representative Birkeland discussing "plethora" of issues to balance in crafting this policy). Responses to the phenomenon are changing rapidly.[23] To constitutionalize current

[23] Whether team or individual, contact or non-contact sports, athletic regulatory bodies are divided on allowing transgender female athletes to compete. The approaches in the swimming world vary *See* Dan D'Addona, *NCAA NCAA Won't Adopt USA Swimming Guidelines For Transgender Participation; Door Open For Lia Thomas*, Swimming World Magazine (Feb. 10, 2022), https://www.swimmingworldmagazine.com/news/ncaa-wont-adopt-usa-swimming-guidelines-for-transgender-participation-door-open-for-lia-thomas/; Ciaran Fahey, *World Swimming Bans Transgender Athletes from Women's Events*, AP (June 22, 2022), https://bit.ly/3uza34n. The International Rugby League recentlybanned transgender athletes from participating in sanctioned women's rugby matches. Darreonna Davis, *Cycling, Swimming and Now Rugby—Here are the Sports that Imposed Bans or Restrictions on Transgender Competitors*, Forbes (June 22, 2022), https://bit.ly/3uzi895. Cycling bodies have done likewise. *Id. Fahey, supra.* And the British Triathlon Federation created an "open" category.for those born male, including transgender and nonbinary people. Darreona Davis, *British Triathlon Latest To Limit*

proposed answers to new and evolving questions would intrude on legislative prerogative and possibly cut off policy responses that have yet to be tried but may well be the best.

Under Utah law, a classification is suspect only if it implicates discrimination that is widely viewed as "so *generally problematic* (and so *unlikely reasonable*)" that the usual presumption—that classifications are generally permissible—is rebutted. *Chettero* 2013 UT 9, ¶ 20 (emphasis added). Race, for example, qualifies because it is widely viewed as "'too pernicious to permit any but the most exact connection between justification and classification.'" *Id.* at ¶ 20 n.4 (quoting *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1,* 551 U.S. 701, 720 (2007)).

Plaintiffs have cited no persuasive authority—and certainly no Utah Supreme Court authority—for extending this standard to a classification on the basis of transgender status. And the standard cannot be so extended. HB11 was enacted in the midst of a developing policy debate about how best to balance the interests of transgender women against the longstanding, important interest of preserving safety and competition in women's sports leagues. This is not the time or place for searching judicial review for the ideal fit between these competing interests.

Plaintiffs rely principally on federal cases in support of their argument for intermediate scrutiny. D26:21–22 But in so doing, they disregard the framework of Utah law and skirt its requirements.

The linchpin of Plaintiffs' argument is *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020). *See* D26:21, 25. But *Bostock* says nothing about quasi-suspect classification or even about

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Trans Athletes—Here Are The Major Sports Enacting Similar Bans, Forbes (updated July 6, 2022), 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=6d679225a105.

constitutional law. It doesn't even interpret the term "sex" to mean "gender identity." To the extent the court defines that word alone, it concedes that it means biological sex. 140 S. Ct. at 1739.

Bostock is unhelpful to Plaintiffs' case for this and other reasons. Far from a constitutional precedent (much less *state* constitutional precedent), *Bostock* is merely interpreting Title VII of the Civil Rights Act of 1964—in particular, the phrase "discrimination because of sex" in that statute. The holding derives from the legal term-of-art "context" of that statutory phrase—the body of case law holding that "discrimination because of sex" extends to any decision having a "but for" relation to biological sex. *Id.* at 1739–40 (starting from the principle that "[t]he question isn't just what 'sex' meant, but what Title VII says about it"). From that premise, the *Bostock* majority proceeded to the conclusion that discrimination on the basis of transgender status is encompassed by the Title VII prohibition because such status is in some sense "based on" biological sex, in that "it is impossible to discriminate against a person for being . . . transgender" without reference to the person's biological sex. *Id.* at 1741.

None of these contextual nuances in Title VII has anything to do with the inquiry into whether transgender status qualifies as a quasi-suspect classification under Utah law. And accordingly, nothing in *Bostock* is helpful to Plaintiffs.

Much of the federal case law cited by Plaintiffs fails on this same ground. Plaintiffs assert that "[m]any . . . federal courts" have held that laws that "discriminate against transgender people" trigger intermediate scrutiny. D26:22 But two of the cited cases are simply Title VII cases either following or anticipating the analysis in *Bostock*.[24] And none of these or any of the Plaintiffs'

[24] *Tudor v. Se. Okla. State Univ.*, 13 F.4th 1019, 1028 (10th Cir. 2021) (noting that "[i]n the wake of *Bostock*" discrimination based on transgender status "is discrimination 'because of sex' *prohibited under Title VII*." (emphasis added)); *Smith v. City of Salem*, 378 F. 3d 566, 571 (6th

other federal cases advances the ball under the Uniform Operation Clause, as none of them comes close to engaging in the analysis called for under Utah law.

Plaintiffs also point to *In re Childers-Gray*, 2021 UT 13, 87 P.3d 96. *See* D26:22–23. But *Childers-Gray* gets them nowhere closer to intermediate scrutiny. Like *Bostock*, this is a statutory decision turning on the particular context of the statute in question. And it has nothing to say about standards of scrutiny under the Utah Constitution.

Childers-Gray bears another point of parallelism to *Bostock*. It also expressly concedes that the term "sex" alone could ordinarily be understood as a reference to biological sex in the context of the statute—there, a designation of "sex" on a birth certificate. *Id.* at ¶ 85. Ultimately, the majority in *Childers-Gray* held that this statutory term must also be viewed to extend to a person's "gender identity." *Id.* at ¶¶ 87, 91. But again, this was no sweeping conclusion that "sex" should always be understood to encompass "gender identity," much less that it should do so under a doctrine of state constitutional law. Instead, the court was adopting an interpretation based on a perceived need to develop a "common law" extension of the notion of an "amendment" to a person's "sex" designation on a birth certificate, under a statute that the court viewed as bearing a "gap" to be filled in this manner. *Id.* at ¶¶ 87, 91. And as with *Bostock*, this unique, context-driven statutory holding tells us nothing about the scope of our categories of "quasi-suspect classification" under the Uniform Operation of Laws Clause.

e. HB11 easily passes rational basis review

Under the rational basis inquiry, "a 'classification is reasonably related to its legitimate

Cir. 2004) (holding that transgender firefighter was discriminated against on the basis of sex because she did not conform to gender stereotypes).

objectives' if 'the classification is reasonable,' 'the objectives of the legislative action are legitimate,' and 'there is a reasonable relationship between the classification and the legislative purpose.'" *Mitchell*, 2020 UT 26, ¶ 43 (cleaned up). The courts "give substantial deference to the legislature in making these assessments." *Id.* at ¶ 44. And the courts "are not limited to an actual purpose identified by the government." *Id.* They "can judge enactments on the basis of reasonable legislative purposes under the plain text of the legislation at issue." *Id.* (cleaned up). HB11 easily clears this low bar.

The important government objectives noted above that satisfy heightened scrutiny for sex classifications necessarily satisfy the lower rational basis standard for transgender status. Biological boys who identify as girls are part of the class of biological boys—and that class has consistently been held out of girls' sports for reasons of equality, opportunity, safety, past discrimination, and sports integrity. True, not every person in that class of biological boys implicates every objective just outlined. Some may not be very athletic or have significant physical advantages. But the classification and the relationship between it and the legislative purpose need only be "reasonable," not perfect.

Plaintiffs insist that they are not like other biological boys because they have taken puberty blockers or hormone therapy, and thus do not have a physical advantage over biological girls. But that does not alter the calculus under rational basis review.

Plaintiffs point to *Romer v. Evans*, 517 U.S. 620 (1996), to argue that HB11 fails rational basis because HB11, like the law in *Romer*, purportedly "identifies persons by a single trait and then denies them protection." D26:33 (quoting 517 U.S. at 633). But that mischaracterizes both HB11 and the law at issue in *Romer*. The law in *Romer* was a constitutional amendment that flatly

prohibited the state or any other political entity adopting or enforcing any law recognizing "homosexual, lesbian or bisexual orientation, conduct, practices or relationships" as a basis for a claim of "any minority status, quota preferences, protected status or claim of discrimination." *Id.* at 624. The law did much more than "deny" a right asserted by these groups. It went out of its way to single out the listed groups for a "broad and undifferentiated disability" not imposed on others—forbidding them, but no others, "from the right" even "to seek "specific legal protection" under the law. *Id.* at 625–32. The *Romer* court's rational-basis holding focused on these features of the law in question. The court held that the law failed to demonstrate "a rational relationship to an independent and legitimate legislative end," because the law was both "too narrow and too broad" in that "[i]t identifies persons by a single trait and then denies them protection across the board." *Id.* at 633. Additionally, the court found that the law was "unprecedent in our jurisprudence." *Id.*

HB11 is different. It does not identify anyone by transgender status. And it certainly doesn't deny transgender persons the right to "seek specific legal protection" under law. HB11 leaves the political process open. It is a statute, not a constitutional amendment. And it leaves transgender persons open to seeking a different accommodation of their interests going forward. *Romer* accordingly has no sway here.

C. Plaintiffs' perfunctory Equal Political Rights Clause claim is premised entirely on their Uniform Operation claim and fails for the same reasons

Plaintiffs next contend—in four conclusory sentences—that HB11 violates Article IV Section 1 for the same reasons it purportedly violates the Uniform Operation Clause. D26:34. This is pure bootstrapping—the equal rights analysis is entirely derivative of the uniform operation analysis. And the equal rights claim accordingly fails for all of the reasons set forth above in the uniform operation analysis.

V. Plaintiffs' substantive Due Process Clause claim fails because it is derivative of Plaintiffs' other failed constitutional claims; and procedural due process does not apply to legislative classifications

Plaintiffs next contend that HB11 violates the State Due Process Clause, article I, section 7, both substantively and procedurally. D26:34–37. Both claims fall short.

Substantive Due Process. Plaintiffs assert that the right to be free from discrimination based on transgender status is somehow "fundamental" under the Equal Political Rights Clause. D26:35. This is a bootstrap on top of a bootstrap. The Equal Political Rights Clause claim is derivative of the uniform operation claim. And the substantive due process claim is derivative of the equal political rights claim. All of the Plaintiffs' claims trace back to their uniform operation claim, and they all fail under the faulty foundation of their uniform operation analysis.

Procedural Due Process. Plaintiffs also claim that the biologically based legislative classification violates their procedural due process rights because they have a "private interest in being free from improper sex-based classifications," which HB11 purportedly deprives them of "without providing any procedures whatsoever"—"no opportunity to be heard, no individualized review of each student, no considerations of exceptions, and no avenue for appeal." D26:36–37 (citing *Matthews v. Eldridge*, 424 U.S. 319, 339–50 (1976) and Utah cases relying on it). But procedural due process does not require any of those things for 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 principle a decade ago. *Carter v. Lehi City*, 2012 UT 2, 269 P.3d 141, 153 n.28 ("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.") (*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)).

A plaintiff may 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 Plaintiffs do not make an as-applied claim. So they have no viable due process claim to assert.

VI. Plaintiffs are wrong about the standard to waive the security requirement, but Defendants are not opposed to the waiver in this case

A brief coda about the Plaintiff's bond-waiver request: A party seeking a preliminary injunction generally must post a bond. Utah R. Civ. P. 65A(c)(1). But a court may waive it if "it appears that none of the parties will incur or suffer costs, attorney fees[,] or damage as the result of any wrongful . . . injunction, or unless there exists some other substantial reason for dispensing" with it. Utah R. Civ. P. 65A(c)(1).

Plaintiffs ask this Court to waive the bond requirement on the ground that the legislature indemnified the Defendants and the springing provision will fill any gap left by enjoining HB11 as is. D26:37–38. These are not valid grounds for waiver of the bond requirement, since the Defendants are incurring "costs" and "attorney fees" in defending HB11—as evidenced by this very response—and will suffer damage to the public interests discussed above if the injunction is

later held unlawful. *See, e.g., Free Speech Coalition v. Gonzales*, 406 F.Supp.2d 1196, 1212 (D. Colo. 2005) (imposing $10,000 bond where federal official would be entitled to at least costs of litigation if injunction unlawful). Indemnification from the State for the entities here does not mean that the Defendants are not bearing any costs—a reimbursed cost is still a cost. And the State is on the financial hook, even if by choice in the case of the UHSAA.

Though Plaintiffs are wrong in their reasoning, the State does not object to the waiver of the bond requirement for these Plaintiffs.

CONCLUSION

Balancing transgender inclusion with biological girls' interests in safe and competitive sports is a difficult emerging question. Because the Utah Constitution does not speak to how the legislature resolves it (beyond positing a rational basis for it), this Court is duty-bound to let HB11 operate. Other states and the federal government may balance the interests differently. But that is a feature—not a bug—of our federal system, which permits policy experimentation in the laboratories of democracy and allows for innovative approaches to new and old problems. This Court should deny Plaintiffs' request for a preliminary injunction.

DATED: July 13, 2022.

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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' MEMORANDUM OPPOSING MOTION FOR PRELIMINARY INJUNCTION** to the following:

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