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<b>IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH</b>	
<p>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,</p> <p>Plaintiffs,</p> <p>v.</p> <p>UTAH HIGH SCHOOL ACTIVITIES ASSOCIATION; GRANITE SCHOOL DISTRICT; JORDAN SCHOOL DISTRICT; and SUPERINTENDENTS BEN HORSLEY and ANTHONY GODFREY, in their official capacities,</p> <p>Defendants.</p>	<p><b>PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT</b></p> <p><b>(Hearing Requested)</b></p> <p>Case No: 220903262</p> <p>Judge Keith Kelly</p>

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## **STATEMENT OF RELIEF REQUESTED AND GROUNDS FOR RELIEF**

Plaintiffs Jane Noe, by and through her parents Jean Noe and John Noe, and Jill Poe, by and through her parents Sara Poe and David Poe (collectively “Plaintiffs”), respectfully move for summary judgment in their favor and an order entering the following relief: (1) a judgment declaring that Part 9 of House Bill (H.B.) 11 is unlawful under the uniform operation of laws clause (“UOL”), Article I, Section 24 of the Utah Constitution, and; (2) a permanent injunction restraining Defendants, their employees, agents, and successors in office, and all others acting in concert with them from enforcing Part 9 of H.B. 11. The basis for this motion is that there is no genuine dispute as to any material fact and Plaintiffs are entitled to judgment as a matter of law. Utah R. Civ. P. 56(a). Plaintiffs respectfully request a hearing under Rule 7(h) of the Utah Rules of Civil Procedure.

## INTRODUCTION AND BACKGROUND

Plaintiffs are two teenage girls who, like all transgender girls in Utah, have been categorically barred from competing on girls' school sports teams solely because they are transgender. In 2022, the Utah Legislature, over the Governor's veto, banned transgender girls from competing on girls' sports teams in kindergarten through the 12th grade. Part 9 of House Bill 11, Utah Code §§ 53G-6-901 to -903 ("Part 9" or the "Ban"). The Ban is absolute, barring all transgender girls from every sport regardless of their individual circumstances. On August 19, 2022, this Court granted Plaintiffs' motion to preliminarily enjoin enforcement of the Ban. Order Granting Motion for Preliminary Injunction, Dkt. 249, Aug. 19, 2022 (attached hereto as Exhibit 1, hereinafter "PI Order"). The Court found that Plaintiffs had demonstrated a substantial likelihood of success on their UOL constitutional claim<sup>1</sup> by showing "the text, effect, and purpose of the Ban . . . creates a classification based on transgender status," the "Ban treats the Plaintiffs as transgender girls less favorably than other girls," "heightened scrutiny applies to blanket exclusions of transgender girls from competing on girls' teams," and "the Ban does not withstand such heightened scrutiny." Ex. 1, PI Order at 7, 9.

Defendants did not appeal the preliminary injunction. The parties have completed discovery, and the undisputed material facts confirm the correctness of the Court's preliminary injunction order. Plaintiffs now move for summary judgment on their UOL claim and respectfully request that the Court order declaratory relief and permanently enjoin the Ban. The Ban violates the UOL clause because discrimination based on transgender status, and therefore sex, triggers heightened scrutiny, and Defendants cannot meet their demanding burden to satisfy that scrutiny. They come nowhere close because no evidence demonstrates that categorically excluding all

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<sup>1</sup> On December 5, 2023, this Court granted the parties' stipulated dismissal of Plaintiffs' second and third claims, leaving only the UOL claim at issue in this suit. *See* Dkt. 455.

transgender girls from all school sports teams actually and substantially furthers any valid legislative interest. Defendants offer only the unsupported rationales that the Ban relates to a purported need to prevent transgender girls from having a competitive advantage over, or posing a purported safety risk to, non-transgender girls competing in interscholastic girls' sports. Courts around the country have ruled that similar bans in other states do not further these stated objectives—let alone that a categorical ban is reasonably necessary to achieve them. Because the Ban fails heightened scrutiny, a permanent injunction is warranted.

### **STATEMENT OF FACTS**

Plaintiffs set forth the following material facts not genuinely disputed under Rule 56(a)(1) of the Utah Rules of Civil Procedure:

1. When a child is born, a health care provider designates the child's sex to be marked on the child's birth certificate based on the child's observable anatomy. In the great majority of cases, that initial designation turns out to be consistent with the individual's gender identity. Defendants' Answer to Plaintiffs' Third Amended Complaint, Dkt. 278 (attached hereto as Exhibit 2, hereinafter "Answer"), ¶ 33; Expert Report of Dan H. Karasic, M.D. (attached hereto as Exhibit 3, hereinafter "Karasic Report") ¶ 21; Rebuttal Expert Report of Daniel Shumer, M.D. (attached hereto as Exhibit 4, hereinafter "Shumer Rebuttal") ¶ 75.

2. The American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition ("DSM-V") recognizes "Gender Dysphoria in Childhood" (DSM Diagnostic Code F64.2) and "Gender Dysphoria in Adolescents and Adults" (DSM Diagnostic Code F64.9). American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (5th ed. 2013) (attached hereto as Exhibit 5, hereinafter "DSM-V") at 452; Ex. 3, Karasic Report ¶ 24; Ex. 4, Shumer Rebuttal ¶ 76.

3. When a child with gender dysphoria begins puberty, doctors may prescribe puberty-blocking medication to block their endogenous puberty. Later, a doctor may also prescribe hormone medications. Ex. 3, Karasic Report ¶ 28; Ex. 4, Shumer Rebuttal ¶¶ 83-84.

4. Transgender girls who are treated with puberty-blocking medication and hormone therapy will typically have the same levels of circulating hormones as non-transgender girls. Deposition of Daniel Shumer, M.D. (attached hereto as Exhibit 6, hereinafter “Shumer Depo.”) at 30:9-22; Ex. 4, Shumer Rebuttal ¶ 84.

5. “[C]ertain characteristic male changes including boys’ increase in muscle mass do not begin at all until ‘circulating testosterone concentrations rise into the range of males at mid-puberty, which are higher than in women at any age.’ (Handelsman 2018 at 810.)” Expert Report of Gregory A. Brown, Ph.D., FACSM (attached hereto as Exhibit 7, hereinafter “Brown Report”) ¶ 195.

6. “The continued growth of muscle mass and strength continues well into adulthood because of continued exposure to testosterone. Accordingly, a 25-year-old man will have a significantly greater athletic advantage than a 15-year-old boy, despite having the same testosterone levels.” Ex. 4, Shumer Rebuttal ¶ 31.

7. Defendant Utah High School Activities Association (UHSAA) is a Utah nonprofit corporation registered and doing business in the State of Utah. UHSAA’s membership is comprised of private, public, and charter schools in Utah that serve high school students. UHSAA sanctions and administers interscholastic sports and fine arts activities throughout the state. Ex. 2, Answer ¶ 8.

8. Defendant Granite School District is a local education agency<sup>2</sup> in Salt Lake County, Utah, operating eight high schools that offer interscholastic athletic programs to their students. Ex. 2, Answer ¶ 9.

9. Defendant Jordan School District is a local education agency in Salt Lake County, Utah, operating several high schools that offer interscholastic athletic programs to their students. Ex. 2, Answer ¶ 11.

10. All UHSAA member schools must follow UHSAA rules and regulations when conducting interscholastic athletics and when determining whether a student is eligible to play secondary school sports. 30(b)(6) Deposition of UHSAA (attached hereto as Exhibit 8, hereinafter “UHSAA Depo.”) at 23:19-24:1; 25:12-17.

11. Plaintiffs are transgender girls. Defendants’ Responses to Plaintiffs’ First Set of Requests for Admission (attached hereto as Exhibit 9, hereinafter “Defendants’ RFA Responses”), at Response to RFA 1; Declaration of Jane Noe, June 16, 2022, Dkt. 31 (attached hereto as Exhibit A<sup>3</sup>, hereinafter “Jane Noe Dec.”) ¶ 3; Declaration of Jill Poe, June 16, 2022, Dkt. 33 (attached hereto as Exhibit B, hereinafter “Jill Poe Dec.”) ¶ 3.

12. Plaintiffs identify as girls, interact with others as girls, and generally live their lives as girls. Ex. A, Jane Noe Dec. ¶ 4; Declaration of Jean Noe, June 16, 2022, Dkt. 32 (attached hereto as Exhibit C, hereinafter “Jean Noe Dec.”) ¶¶ 5-6, Ex. B, Jill Poe Dec. ¶ 3; Declaration of David Poe, June 16, 2022, Dkt. 34 (attached hereto as Exhibit D, hereinafter “David Poe Dec.”) ¶ 4; Deposition of Jill Poe (attached hereto as Exhibit E, hereinafter “Jill Poe Depo.”) at 19:4-14.

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<sup>2</sup> Utah State Board of Education Rule R277-100-2(16) defines a “local education agency” as “a school district or charter school.”

<sup>3</sup> Exhibits A through J are filed concurrently with a motion to classify these exhibits as non-public.

13. Plaintiff Jane Noe is a high school student in the Granite School District. Ex. A, Jane Noe Dec. ¶¶ 2, 3; Ex. C, Jean Noe Dec. ¶¶ 2, 3.

14. Jane has been treated as a girl at school and everywhere else for several years. Ex. A, Jane Noe Dec. ¶ 3; Ex. C, Jean Noe Dec. ¶¶ 3-4.

15. Jane legally changed her gender marker and legally changed her first and middle name. ROE\_000935-36 (attached hereto as Exhibit F, hereinafter “ROE\_000935-36”); ROE\_000937-39 (attached hereto as Exhibit G, hereinafter “ROE\_000937-39”); Ex. C, Jean Noe Dec. ¶ 6.

16. Jane was diagnosed with gender dysphoria. Ex. C, Jean Noe Dec. ¶ 5.

17. Jane takes prescription puberty-blocking medication and hormone (estrogen) medication. Ex. A, Jane Noe Dec. ¶ 4; Ex. C, Jean Noe Dec. ¶ 5.

18. Jane is a swimmer who wants to compete on her high school swim team. Ex. A, Jane Noe Dec. ¶ 5; Ex. C, Jean Noe Dec. ¶¶ 8-10.

19. Plaintiff Jill Poe is a high school student in the Jordan School District. Ex. B, Jill Poe Dec. ¶¶ 2, 3; Ex. D, David Poe Dec. ¶ 2.

20. Jill came out to her family as transgender when she was 14 years old. Ex. B, Jill Poe Dec. ¶ 3; Deposition of David Poe (attached hereto as Exhibit H, hereinafter “David Poe Depo.”) at 13:14-14:7; Ex. E, Jill Poe Depo. at 8:13-14.

21. After that time, Jill began to be treated as a girl at school and everywhere else. Ex. H, David Poe Depo. at 25:12-30:2; Ex. E, Jill Poe Depo. at 11:5-25.

22. Jill was diagnosed with gender dysphoria. Ex. D, David Poe Dec. ¶ 4.

23. Jill’s gender dysphoria-related anxiety was significantly alleviated when Jill began to be recognized as a girl at school. Ex. B, Jill Poe Dec. ¶ 4; Ex. D, David Poe Dec. ¶¶ 3, 4.

24. Jill began puberty-blocking medication and hormone (estrogen) medication in May of 2022. Jill Poe Dec. ¶ 3; David Poe Dec. ¶ 4; David Poe Depo. at 80:15-25.

25. Jill legally changed her gender marker and legally changed her first name. ROE\_001286-89 (attached hereto as Exhibit I, hereinafter “ROE\_001286-89”).

26. Jill is a runner who wants to run and compete with her high school girls’ cross-country and track teams. Ex. B, Jill Poe Dec. ¶ 5; Ex. D, David Poe Dec. ¶ 6; Ex. H, David Poe Depo. at 54:8-13.

27. H.B. 11 was introduced on the House floor on January 18, 2022, at the 2022 General Session. Ex. 2, Answer ¶ 19.

28. In March 2022, the Utah state legislature passed H.B. 11. Ex. 2, Answer ¶ 25.

29. Part 9 of H.B. 11 applies to any “public school or LEA, or a private school that competes against a public school or LEA.” Utah Code § 53G-6-902(1)(a).

30. Part 9 of H.B. 11 defines “sex” as “the biological, physical condition of being male or female, determined by an individual’s genetics and anatomy at birth.” Utah Code § 53G-6-901(3).

31. Pursuant to this definition of sex, Part 9 of H.B. 11 prohibits transgender girls from “compet[ing]” on girls’ school sports teams, Utah Code § 53G-6-902.

32. Part 10 of H.B. 11 establishes a “School Activity Eligibility Commission” (the “Commission”) to determine the eligibility of transgender students to participate in school sports on an individualized basis if “a court of competent jurisdiction invalidates or enjoins” Part 9. Utah Code §§ 53G-6-903, -1002, -1003(8)(a), -1004(2).

33. Part 10 of H.B. 11 explicitly references students undergoing “gender transition” and students whose sex does not “correspond with the sex designation on the student’s birth certificate.” Utah Code § 53G-6-1004(1)(a)-(b), (2)(a)(i).

34. Governor Spencer J. Cox vetoed H.B. 11 on March 22, 2022, citing its “broad misunderstanding around the current rules regarding transgender participation in sports.” ROE000001-05 Statement from Governor Spencer J. Cox Regarding His Veto of H.B. 11, (attached hereto as Exhibit 10, hereinafter “Governor Cox Statement”) at ROE000004; Ex. 2, Answer ¶ 27 (admitting that “the Governor vetoed HB 11 and made the quoted statements”).

35. Governor Cox’s veto message provided details about the legislative process around H.B. 11, *including that “the negotiations centered around the potential compromise of a commission of experts that would help decide on an individual basis which kids would be able to participate.* The concept is fairly simple. For the very small number of transgender kids who are looking to find a sense of connection and community—without posing any threat to women’s sports—the commission would allow participation. However, the committee would prohibit participation in the rare circumstance of an outlier who could pose a safety threat or dominate a sport in a way that would eliminate competitive opportunities for biological females.” Ex. 10, Governor Cox Statement at ROE000002 (emphasis added).

36. Governor Cox’s veto message also provided details about the passage of the bill: “On the last day of the legislative session we began hearing rumors of a 4th substitute of the bill that would implement an all-out ban, with the new commission only coming into play if a court prohibited the ban. While it is not unusual to have legislators propose changes to bills, it is unusual to have major overhauls proposed at the last minute on significant policy issue that had been the subject of so much negotiation. It is even rarer to have these pass, especially with no

communication with those who had been negotiating the issue. So, you can imagine my surprise when the 4th substitute was revealed late on the last day of the session and debated and passed just a few hours before midnight. . . . This was a complete reversal of every discussion, public or private. Every article written by the media on this issue was about the commission and a compromise. Every answer given during press availability was about the commission and a compromise.” Ex. 10, Governor Cox Statement at ROE000002.

37. Governor Cox’s veto message also mentions discussions Utah legislators had about a “trans swimmer at the University of Pennsylvania . . . . However, there are a few problems with this example being a reason for a complete ban in Utah. First, this bill will do nothing to prevent that example, as HB 11 only applies to high school and middle school and does not impact collegiate athletics. And second, if there was a similar example in a Utah high school, the proposed commission would prevent it from happening. Indeed, that is the very purpose of the commission: it would attempt to both protect women’s sports and allow our most vulnerable an opportunity to participate. *Interestingly, the very legislator who introduced the 4th substitute of the bill called the commission concept ‘brilliant.’*” Ex. 10, Governor Cox Statement at ROE000004 (emphasis added).

38. Governor Cox’s veto message pointed out that out of 75,000 high school athletes in Utah, three were transgender boys playing on boys’ teams and one was a transgender girl playing on a girls’ team. “Four kids and only one of them playing girl sports. That’s what this is all about. Four kids who aren’t dominating or winning trophies or taking scholarships. Four kids who are just trying to find some friends and feel like they are a part of something. Four kids trying to get through each day. Rarely has so much fear and anger been directed at so few.” Ex. 10, Governor Cox Statement at ROE000005; Ex. 2, Answer ¶ 27; Defendants’ Responses to Plaintiffs’ Second

Set of Interrogatories, (attached hereto as Exhibit 11, hereinafter “Responses to 2nd ROGs”), at Response to Interrogatory 14 (stating that “there have been 4 transgender girls that have sought to play on UHSAA sanctioned girls’ sports teams since 2015,” only one of whom was competing in girls’ sports at the time the Ban was passed).

39. The Governor also referenced the high rates of suicidality for transgender youth: “I don’t understand what they are going through or why they feel the way they do. But I want them to live. And all the research shows that even a little acceptance and connection can reduce suicidality significantly. For that reason, as much as any other, I have taken this action in the hope that we can continue to work together and find a better way.” Ex. 10, Governor Cox Statement at ROE000005; Ex. 2, Answer ¶ 28.

40. Three days later, the Utah Legislature voted to override Governor Cox’s veto. Ex. 2, Answer ¶ 29.

41. H.B. 11 went into effect on July 1, 2022. Ex. 2, Answer ¶ 76.

42. On May 24, 2022, President Stuart Adams and Representative Kera Birkeland, who sponsored H.B. 11, participated in a panel discussion about the Ban. Oxford Law Faculty, *OCRN-Bonavero: The Path to Inclusion of Transgender Athletes – Guided by Children’s Rights*, YouTube (May 24, 2022), <https://www.youtube.com/watch?v=MVi9pLEN0Fs>.

43. During the presentation, President Adams stated: “*The ban is probably not the way forward so we wanted to find something that was balanced and again, in a fairness for all approach, and Professor Wilson suggested the idea of a commission and uh Representative Birkeland will talk more about it but the things that I liked about the commission were a couple of things. One is again that it didn’t require the use of chemicals or those type of things to determine whether somebody would play but it also used a data-driven approach and the data-driven*

*approach has a couple of, again, of great advantages.* First of all it's fair . . . but second of all those on the commission—they want to be able to, they're going to determine who plays and who doesn't play. We don't want that to be a political decision-an arbitrary decision-but we want that to be a decision that is actually driven by data . . . I think we found, again, a way forward that not only is fair, I think [the commission] will be upheld by the courts and it helps everyone to be able to be represented." *Id.* at 29:13-30:41.

44. During the presentation, Representative Birkeland stated: "If you have an athlete who has a disability and they have a special need and they want to stay and play sports for a fifth season, they go before a commission that kind of talks about why they should be allowed this extra season when everybody else just gets the four years. And so it wasn't a totally new concept here in our state for athletics but in this context, it was very new. And it basically says—a very similar model—it basically says if you are a transgender athlete and you want to participate on a team that differs from your identity at birth, then you need to come before this commission. And they would consider, you know, what your height is, what is the average speed, what is the average, you know, wingspan, like all these things that the student or the student's parents felt comfortable in sharing and wanted to share. It gives the commissioners, who are made up of doctors, therapists, coaches, athletic trainers—they would be considering all these different elements so that when that athlete is given the eligibility status, the girls and their families know that this individual went through a process. And this process is what helps make it fair. And that doesn't answer everybody's questions or concerns but it's a starting point and it's a starting point that we currently have not had in our state and I want to reiterate again how important it is that people feel a sense of confidence and can then be more empathetic when they know that there has been a process in which someone went through before showing up. If it's to be believed that they have some sort of

competitive advantage based on their biology at birth. And so from there, they come to the commission, they take all these things into consideration . . . I love how professor Wilson has helped us define this baseline of what is appropriate on the bell curve for each of these student athletes based on their age, their sport—because obviously running track is very different than swimming, soccer is very different from football—everything is very different when you’re talking about competition in athleticism.” *Id.* at 35:53-38:30.

45. Representative Birkeland also stated: “I’m grateful to be able to have worked with Professor Wilson and President Adams and all those who helped craft this commission because I really think in the long run it will provide the strength and give people the courage to see outside of themselves which would not have happened if we had tried to go about this any other way.” *Id.* at 42:24-42:41.

46. On August 19, 2022, this Court preliminarily enjoined Part 9 of H.B. 11. Ex. 1, PI Order.

47. Pursuant to Part 10 of H.B. 11, the Commission determines whether a student’s eligibility would “present a substantial safety risk to the student or others that is significantly greater than the inherent risks of the given activity; or likely give the student a material competitive advantage when compared to students of the same age competing in the relevant gender-designated activity.” Utah Code § 53G-6-1004(3)(a)(i).

48. The Commission’s eligibility determination also includes an analysis of “whether the student’s assertion of a gender identity is consistent with the statutory definition of gender identity as that term is defined in Section 34A-5-102. Utah Code § 53G-6-1004(3)(a). Section 34A-5-102(1)(o) provides in relevant part: “A person’s gender identity can be shown by providing evidence, including, but not limited to, medical history, care or treatment of the gender identity,

consistent and uniform assertion of the gender identity, or other evidence that the gender identity is sincerely held, part of a person's core identity, and not being asserted for an improper purpose."

49. Prior to H.B. 11's enactment, Defendant UHSAA did not permit cisgender boys to compete on UHSAA sanctioned girls' sports teams. Ex. 9, Defendants' RFA Responses, at Response to RFA 7; UHSAA-000922 (attached hereto as Exhibit 12, hereinafter "UHSAA Handbook 2015-2016") at UHSAA-000973; UHSAA-008499 (attached hereto as Exhibit 13, hereinafter "UHSAA Handbook 2021-2022") at UHSAA-008524.

50. Prior to the enactment of H.B. 11, Defendant UHSAA's "Transgender Participation Policy" permitted transgender girls to seek eligibility to compete on UHSAA sanctioned girls' sports teams on a case-by-case basis. Ex. 9, Defendants' RFA Responses, at Response to RFA 6; Ex. 13, UHSAA Handbook 2021-22 at UHSAA-008524; UHSAA-000903 (attached hereto as Exhibit 14, hereinafter "UHSAA Transgender Participation Policy").

51. Defendant UHSAA stated in its "Transgender Participation Policy," that it was "[f]or the protection of competitive balance and the integrity of women's sports." Ex. 14, UHSAA Transgender Participation Policy.

52. Defendant UHSAA believed its pre-H.B. 11 policy was "fair and equitable and attempt[ed] to allow student participation appropriately" (UHSAA-00739, March 8, 2022 email between UHSAA and David Spatafore (attached hereto as Exhibit 15, hereinafter "UHSAA Spatafore email") at UHSAA-00741), by protecting the competitive balance and the integrity of girls' sports and ensuring that a student's gender identity was not asserted for an athletic advantage. Ex. 8, UHSAA Depo. at 37:8-18, 44:17-45:2.

53. Between 2015 and H.B. 11's enactment in 2022, one transgender girl was approved to play on a UHSAA sanctioned girls' sport team. Ex. 9, Defendants' RFA Responses, at Response

to RFA 13; Ex. 8, UHSAA Depo. at 35:20-24, 42:24-43:5, 53:6-11; DS00053, UHSAA Transgender Athletes Bullet Points for Presentation, (attached hereto as Exhibit 16, hereinafter “UHSAA Bullet Points”).

54. The UHSAA has never received a complaint about a transgender athlete participating in high school sports. Ex. 8, UHSAA Depo. at 65:1-14; Deposition of Jan H. Whittaker (attached hereto as Exhibit 17, hereinafter “Whittaker Depo.”) at 36:16-20; 61:21-62:5; 66:14-17; 94:8-16.

55. Defendants have received several complaints from the public that have falsely accused non-transgender girls of being transgender. Ex. 8, UHSAA Depo. at 49:1-11, 50:12-51:1, 83:10-86:21, 89:14-90:4; Ex. 17, Whittaker Depo. at 41:10-19, 105:7-11.

56. Defendants are not aware of any documented instances of non-transgender girls being denied a spot on a UHSAA-sanctioned girls’ sports team because of the participation of a transgender athlete. Ex. 9, Defendants’ RFA Responses, at Response to RFA 11.

57. Defendants are not aware of any documented instances of a transgender girl physically injuring another girl in UHSAA-sanctioned girls’ sports in Utah. Ex. 9, Defendants’ RFA Responses, at Response to RFA 12; Ex. 17, Whittaker Depo. at 61:21-62:11.

58. There are no separate divisions or teams for UHSAA sanctioned girls’ sports in Utah based on height. Ex. 9, Defendants’ RFA Responses, at Response to RFA 8.

59. Other than girls’ wrestling, there are no separate divisions or teams for UHSAA sanctioned girls’ sports in Utah based on weight. Ex. 9, Defendants’ RFA Responses, at Response to RFA 9.

60. There are no separate divisions or teams for UHSAA sanctioned girls’ sports in Utah based on muscle mass. Ex. 9, Defendants’ RFA Responses, at Response to RFA 10.

61. In general, students derive physical benefits from competing in school sports. Ex. 9, Defendants' RFA Responses, at Response to RFA 3.

62. In general, students derive social benefits from competing in school sports. Ex. 9, Defendants' RFA Responses, at Response to RFA 4.

63. In general, students derive emotional benefits from competing in school sports. Ex. 9, Defendants' RFA Responses, at Response to RFA 5.

64. In general, students derive other benefits from competing in school sports. Ex. 8, UHSAA Depo. at 26:8-18, 26:25-27:4 (referencing studies showing lower drop-out rates and higher grades among student-athletes); Ex. 17, Whittaker Depo. at 11:3-9, 122:13-21 (referencing life skills, teamwork, dedication, hard work, commitment, unity, and compassion as benefits of participating in high school sports).

65. Part 9 of H.B. 11 prohibits transgender girls from competing in girls' school sports, and permits transgender girls only to "participat[e] with a team designated for students of the female sex, consistent with school policy, outside of competition in an interscholastic athletic activity." Utah Code § 53G-6-902(2).

66. Jane would not participate on a girls' team without being able to compete. Ex. A, Jane Noe Dec. ¶ 8; Ex. C, Jean Noe Dec. ¶ 12.

67. Jill would not participate in "cross country if I cannot participate in meets. It would be embarrassing to put in all the work with my team only to be told that I cannot be with them when it matters the most. That is not being part of the team. It is more like being a cheerleader or a water girl." Ex. B, Jill Poe Dec. ¶ 7; Ex. D, David Poe Dec. ¶ 8; Ex. H, David Poe Depo. at 62:23-25; Ex. E, Jill Poe Depo. at 39:7-14.

68. Practicing does not provide the same benefits to student athletes as competing in high school sports. Ex. 8, UHSAA Depo. at 29:1-20, 70:16-71:1.

69. Forcing Jane to compete on the boys' team would be painful and humiliating for her and would contradict the medical care she is receiving. Ex. A, Jane Noe Dec. ¶ 8 ("I would never [be on the boys' team]. It would be embarrassing to be a girl on the boys' team."); Ex. C, Jean Noe Dec. ¶ 13; Deposition of Jean Noe (attached hereto as Exhibit J, hereinafter "Jean Noe Depo.") at 98:5-17.

70. Jill Poe's mental health has improved significantly since she began receiving treatment for gender dysphoria. Ex. D, David Poe Dec. ¶ 4.

71. Running on a boys' team is not an option for Jill because it would undo all that progress and subject Jill to pain and humiliation. Ex. B, Jill Poe Dec. ¶ 8 ("I also understand that I could try out for the boys' team, but I would never do that. It took me two years to come out to my family and because of that, I finally feel comfortable in my body. Being on the boys' team would be embarrassing and stressful."). Ex. D, David Poe Dec. ¶ 9; Ex. H, David Poe Depo. at 38:1-17.

72. Jill's father has testified that even if Jill wanted to compete on a boys' team (which she has said that she does not), he would discourage her out of concern for her safety. Ex. H, David Poe Depo. at 85:20-86:6, 89:14-90:3.

73. The American Academy of Pediatrics ("AAP") issued a statement in March 2021 that "[f]orcing transgender children to play on teams according to their sex assigned at birth, rather than the gender they live in, . . . puts their physical and mental health at risk." ROE000765, American Academy of Pediatrics News Release, March 16, 2021, (attached hereto as Exhibit 18, hereinafter "AAP News Release") at ROE000766.

74. The American Medical Association (“AMA”) stated that “*barring transgender females from participating in school-sponsored organized sports consistent with their gender identity frustrates the treatment of gender dysphoria by preventing transgender females from living openly in accordance with their true gender . . . [which] in turn, increases the rate of negative mental health outcomes, substance abuse and suicide.*” ROE000769, American Medical Association State Advocacy Update, March 26, 2021, (attached hereto as Exhibit 19, hereinafter “AMA Update”) at ROE000770 (emphasis added).

75. In 2023, more than 500 pieces of legislation restricting the rights of LGBTQ people were introduced in state legislatures around the country. A substantial percentage of these bills targeted transgender youth, such as by limiting access to gender-affirming care, forbidding participation in sports and school programs, limiting access to bathrooms and other facilities, or discouraging the use of gender-affirming pronouns. *See* Redfield, E., et al., *The Impact of 2024 Anti-Transgender Legislation on Youth*, Williams Institute, April 2024; available at <https://williamsinstitute.law.ucla.edu/wp-content/uploads/2024-Anti-Trans-Legislation-Apr-2024.pdf>.

76. There are policies of U.S. and international sporting groups for adult competitions that do not ban transgender female athletes. Ex. 4, Shumer Rebuttal ¶ 70; Ex. 7, Brown Report ¶¶ 290, 291, 293, 294, 296, 297, 299.

77. The World Rugby guidelines state, “[t]ransgender women who transitioned pre-puberty and have not experienced the biological effects of testosterone during puberty and adolescence can play women’s rugby.” Ex. 4, Shumer Rebuttal ¶ 70.

78. The National Collegiate Athletic Association (NCAA), which governs college sports, calls for each sport to set criteria for transgender athlete participation. Ex. 4, Shumer Rebuttal ¶ 71; Ex. 7, Brown Report ¶ 289.

79. “No NCAA sport categorically bans transgender women athletes.” Ex. 4, Shumer Rebuttal ¶ 71.

80. USA Swimming, FINA, England’s Rugby Football Union and Rugby Football League, Irish Rugby Football Union, Welsh Rugby Union, and World Triathlon do not categorically ban transgender female athletes from competition. Ex. 4, Shumer Rebuttal ¶ 72; Ex. 7, Brown Report ¶¶ 290, 291, 294, 296.

81. The International Olympic Committee (IOC) issued a “Framework on Fairness, Inclusion and Non-Discrimination on the Basis of Gender Identity and Sex Variations.” RvU003069, (attached hereto as Exhibit 20, hereinafter “IOC Framework”).

82. “The IOC recognizes that it must be in the remit of each sport and its governing body to determine how an athlete may be at a disproportionate advantage against their peers, taking into consideration the nature of each sport.” Ex. 20, IOC Framework at RvU003069.

83. While the Ban categorically prohibits all transgender girls from competing in any girls’ school sports, the Commission considers the specifics of each sport, such as whether a sport is contact or no-contact. Ex. 17, Whittaker Depo. 89:16-90:4.

84. The IOC framework also states, “[e]ligibility criteria should be established and implemented fairly and in a manner that does not systematically exclude athletes from competition based on their gender identity, physical appearance and/or sex variations.” Ex. 20, IOC Framework at RvU003071.

## LEGAL STANDARDS

“The court shall grant summary judgment if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law.” Utah R. Civ. P. 56(a). “[S]ummary judgment is not precluded simply whenever some fact remains in dispute. Rather, the factual dispute must be material to [the] resolution of the underlying legal issue.” *Mingolello v. Megaplex Theaters*, 2017 UT App 4, ¶ 8, 391 P.3d 361 (citations omitted) (internal quotation marks omitted). A disputed fact is material if it “affects the rights or liabilities of the parties.” *Alliant Techsystems, Inc. v. Salt Lake Cnty. Bd. of Equalization*, 2012 UT 4, ¶ 31, 270 P.3d 441 (citation omitted).

The burden of proof “shifts between the party moving for summary judgment and the nonmoving party.” *Jones & Trevor Mktg., Inc. v. Lowry*, 2012 UT 39, ¶ 29, 284 P.3d 630; *see also* Utah R. Civ. P. 56. Once the moving party produces “affirmative evidence” demonstrating “an absence of a genuine issue of material fact,” the burden then shifts to the nonmoving party, who must offer “more than a mere scintilla of evidence” of a genuine issue of material fact. *Vanderwood v. Woodward*, 2019 UT App 140, ¶ 32, 449 P.3d 983 (citation omitted); *see also id.* (nonmoving party’s proffered evidence “must contain more than just conclusory assertions that an issue of material fact exists” (citation omitted) (internal quotation marks omitted)).

In addition to declaratory relief, permanent injunctions are warranted when legal remedies are inadequate, meaning a party “is unlikely to be made whole by an award of monetary damages or some other legal . . . remedy, or the legal remedy is not as practicable and efficient toward the ends of justice as an injunction.” *Mack v. Utah State Dep’t of Commerce*, 2009 UT 47, ¶ 23, 221 P.3d 194 (citations omitted) (internal quotation marks omitted).

## ARGUMENT

The Ban violates the uniform operation of laws clause of the Utah Constitution, which provides: “All laws of a general nature shall have uniform operation.” Utah Const. art. I, § 24. This clause is a “state-law counterpart to the federal Equal Protection Clause,” *State v. Canton*, 2013 UT 44, ¶ 35, 308 P.3d 517, and is “at least as exacting and, in some circumstances, more rigorous than the standard applied under the federal constitution.” *Gallivan v. Walker*, 2002 UT 89, ¶ 33, 54 P.3d 1069 (citation omitted). The purpose of the UOL clause is to restrain the legislature “from the fundamentally unfair practice of classifying persons in such a manner that those who are similarly situated with respect to the purpose of the law are treated differently by that law to the detriment of some of those so classified.” *Id.* ¶ 36 (citations omitted) (internal quotation marks omitted). “[I]t is not enough that [a law] be uniform on its face. What is critical is that the operation of the law be uniform.” *Id.* ¶ 37 (citation omitted).

In addressing UOL claims, Utah courts apply a “three-step inquiry,” which asks “(1) whether the statute creates any classifications; (2) whether the classifications impose any disparate treatment on persons similarly situated; and (3) if there is disparate treatment, whether the legislature had any reasonable objective that warrants the disparity.” *Count My Vote, Inc. v. Cox*, 2019 UT 60, ¶ 29, 452 P.3d 1109 (quoting *State v. Robinson*, 2011 UT 30, ¶ 17, 254 P.3d 183). The third and final step “incorporates varying standards of scrutiny.” *Canton*, 2013 UT 44, ¶ 36. Relevant here, where a statute discriminates based on a “‘suspect class’ (e.g., race or gender),” heightened scrutiny applies. *DIRECTV v. Utah State Tax Comm’n*, 2015 UT 93, ¶ 50, 364 P.3d 1036; *see also State v. Chettero*, 2013 UT 9, ¶ 20, 297 P.3d 582 (noting that classifications triggering heightened scrutiny “include race and gender” (footnotes omitted)). Under the heightened scrutiny framework, a statute must be “reasonably necessary to further, and in fact must actually and substantially further, a legitimate legislative purpose.” *Gallivan*, 2002 UT 89, ¶ 42.

This Court correctly held that Plaintiffs demonstrated a clear likelihood of success on the merits of their UOL claims (Ex. 1, PI Order at 14-15), and discovery has confirmed that summary judgment is now appropriate. The Ban is unconstitutional because it discriminates against every transgender girl—and therefore against Plaintiffs—by providing that for purposes of school sports, a student’s sex is “fixed at birth,” and then by excluding all transgender girls from girls’ teams. This categorical exclusion of transgender girls constitutes discrimination based on sex because “it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex.” *Bostock v. Clayton Cnty.*, 590 U.S. 644, 660 (2020). Because the Ban discriminates based on sex, it is presumed to be unconstitutional, and the burden to justify it rests entirely on the Defendants. Defendants did not meet this burden at the preliminary injunction stage, and they cannot meet it now. Accordingly, Plaintiffs are entitled to summary judgment on their UOL claim.

**I. The Ban is Subject to Heightened Scrutiny**

**A. The Ban Classifies Individuals Based on Transgender Status and, Therefore, Creates a Sex-Based Classification Subject to Heightened Scrutiny**

As this Court previously ruled, “[b]oth a plain reading of the Ban and relevant case law demonstrate that the legislation classifies individuals based on transgender status and, therefore, on sex.” Ex. 1, PI Order at 6 (citing *Bostock*, 590 U.S. at 660); *accord* Order Denying, in Part, Defendants’ Motion to Dismiss for Failure to State a Claim, Dkt. 287, at 10. It also held that “the text, effect, and purpose of the Ban unmistakably support a finding that the statute creates a classification based on transgender status,” and “[t]hus, the statute classifies based upon sex.” Ex. 1, PI Order at 7. There has been no intervening development that would cause the Court to revisit that determination. To the contrary, as detailed below, subsequent decisions from federal courts have further confirmed that the Court’s analysis was correct.

By its text, the Ban defines “sex” as “the biological, physical condition of being male or female, *determined by an individual’s genetics and anatomy at birth,*” Utah Code § 53G-6-901(3) (emphasis added), and then limits competition on girls’ teams to those designated female at birth. By design, the Ban excludes all transgender girls, including Jane and Jill, from competing on girls’ teams in all school sports, and at all grade levels. The Ban’s classification based on transgender status is further confirmed by Part 10 of H.B. 11, which explicitly references students undergoing “gender transition” and students whose sex does not “correspond with the sex designation on the student’s birth certificate” and sets out an alternative scheme if the Ban is invalidated. Statement of Material Undisputed Facts (“SUMF”) at ¶ 33.

For these reasons, the Ban’s text classifies students based on transgender status, which is inherently a sex-based classification.<sup>4</sup> *See Bostock*, 590 U.S. at 660; *Tudor v. Se. Okla. State Univ.*, 13 F.4th 1019, 1028 (10th Cir. 2021) (“In the wake of *Bostock*, it is now clear that transgender discrimination . . . is discrimination ‘because of sex[.]’”); *Fowler v. Stitt*, 104 F.4th 770, 793 (10th Cir. 2024) (holding that executive order barring transgender people from changing their birth certificates discriminates based on transgender status and thus “necessarily intends to discriminate

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<sup>4</sup> That transgender girls are the only group targeted by the Ban is also made clear by the status quo before the law was enacted. Sex separation in sports already existed in Utah as a matter of regulation and longstanding practice prior to the enactment of the Ban. *See* Ex. 9, Defendants’ RFA Responses, Response to RFA 7; Ex. 12, UHSAA Handbook 2015-2016 at UHSAA-000973. Also prior to the Ban, UHSAA rules permitted transgender girls to seek eligibility to compete on sanctioned girls’ teams on a case-by-case basis. *See* Ex. 9, Defendants’ RFA Responses, at Response to RFA 6; Ex. 13, UHSAA Handbook 2021-22 at UHSAA-008524. In overriding this existing rule, the sole effect of the Ban was to create a classification that only affects transgender girls. *See B.P.J.*, 98 F.4th at 556 (finding sports ban unconstitutional in part since its “undisputed purpose [] and the only effect” was to exclude transgender girls from girls’ teams); *Hecox*, 104 F.4th at 1077 (finding discrimination clear where sports ban’s “*only* contribution to Idaho’s student-athletic landscape is to entirely exclude transgender women and girls from participating on female sports teams”).

based in part on sex”). In sum, the categorical exclusion of transgender girls from girls’ sports based on their transgender status constitutes disparate treatment based on sex.

*Federal courts around the country have repeatedly ruled that laws targeting transgender people discriminate based on sex and are thus subject to heightened scrutiny, including with respect to laws similar or identical to the Ban.* In *Hecox v. Little*, for example, the Ninth Circuit held Idaho’s materially identical law, “[i]n addition to having a discriminatory purpose and effect,” was also “facially discriminatory against transgender female athletes.” 104 F.4th 1061, 1077 (9th Cir. 2024), *petition for cert. filed*, No. 24-38 (U.S. July 11, 2024). The Court expressly rejected the defendants’ argument that Idaho’s law failed to target transgender girls since it referred only to “biological sex” and did not use the word “transgender.” *Id.* The question of “[w]hether facial discrimination exists ‘does not depend on why’ a policy discriminates, ‘but rather on the explicit terms of the discrimination.’” *Id.* (quoting *Latta v. Otter*, 771 F.3d 456, 467-68 (9th Cir. 2014)). Idaho’s ban is “carefully drawn to target transgender women and girls, even if it does not use the word ‘transgender.’” *Id.* at 1078.

The Ninth Circuit reiterated these holdings when it recently affirmed a preliminary injunction against Arizona’s ban on transgender girls playing sports. *Doe v. Horne*, 115 F.4th 1083, 1104-05 (9th Cir. 2024), *petition for cert. filed*, No. 24-449 (U.S. Oct. 17, 2024). And courts in the Fourth, Sixth, and First circuits agree. In *B.P.J. ex rel. Jackson v. West Va. State Bd. of Educ.*, the Fourth Circuit held that heightened scrutiny applied to West Virginia’s ban on transgender girls playing sports. 98 F.4th 542, 555-56 (4th Cir. 2024); *accord L.E. ex rel. Esquivel v. Lee*, — F. Supp. 3d —, 2024 WL 1349031, at \*15 (M.D. Tenn. Mar. 29, 2024) (holding that Tennessee’s ban on transgender children playing sports “target[s] transgender student-athletes”); *Tirrell v. Edelblut*, — F. Supp. 3d —, 2024 WL 4132435, at \*6-12 (D.N.H. Sept. 10, 2024) (holding “the plain text”

of New Hampshire’s ban on transgender girls playing sports “targets transgender girls”); *cf. A.M. ex rel. E.M. v. Indianapolis Pub. Schs.*, 617 F. Supp. 3d 950, 965-66 (S.D. Ind. 2022) (finding materially identical law discriminated on basis of transgender status for purposes of Title IX claim).

These decisions align with other courts around the country that have repeatedly held that discrimination based on transgender status constitutes discrimination based on sex for purposes of the Equal Protection Clause. *See, e.g., Kadel v. Folwell*, 100 F.4th 122, 153-54 (4th Cir. 2024), *petition for cert. filed*, No. 24-99 (U.S. July 26, 2024); *Bos. All. Of Gay, Lesbian, Bisexual, & Transgender Youth v. U.S. Dep’t of Health & Hum. Servs.*, 557 F. Supp. 3d 224, 244 (D. Mass. 2021); *LeTray v. City of Watertown*, 718 F. Supp. 3d 192, 204 (N.D.N.Y. 2024); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 608 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 2878 (2021); *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051-52 (7th Cir. 2017), *abrogated on other grounds by Ill. Republican Party v. Pritzker*, 973 F.3d 760 (7th Cir. 2020); *Brandt ex rel. Brandt v. Rutledge*, 47 F.4th 661, 670-71 & n.4 (8th Cir. 2022); *Karnoski v. Trump*, 926 F.3d 1180, 1200 (9th Cir. 2019); *Fowler*, 104 F.4th at 793.

Because Utah’s UOL clause is “at least as exacting” as the federal equal protection counterpart, *Gallivan* 2002 UT 89, ¶ 33, this Court should affirm its prior determination that heightened scrutiny applies. Like the federal courts, the Utah Supreme Court recognizes that statutes create a classification for purposes of a UOL claim if that classification “result[s] from the application and operation of the statute.” *Gallivan*, 2002 UT 89, ¶ 44. Similarly pertinent, the Utah Supreme Court has also recognized that the term “sex” has a broader meaning than sex assigned at birth. “[E]ven if we were to concede that ‘sex’ means ‘biological sex,’ the concept very likely extends beyond what a cursory physical examination of an infant can reveal.” *In re Childers-Gray*,

2021 UT 13, ¶ 85, 487 P.3d 96. The Court went on, “a standard of ‘biological sex’ would [not necessarily] preclude the adopted sex of transgender individuals.” *Id.* ¶ 86. These precedents lead to the inescapable conclusion that under the Utah Constitution, just as under the federal Constitution, the Ban classifies people based on transgender status, and thus based on sex.

Utah’s Ban also *expressly* targets transgender girls in Part 10, which details an alternative process for determining transgender girls’ eligibility that took effect when the Ban was preliminarily enjoined as unconstitutional. *See* Utah Code § 53G-6-1004. Part 10 explicitly references students undergoing “gender transition” and students whose sex does not “correspond with the sex designation on the student’s birth certificate.” *See id.* § 53G-6-1004(1)(a)-(b), (2)(a)(i).

For these reasons, as this Court previously held, the Ban classifies people based on transgender status and sex and is thus subject to heightened scrutiny.

**B. The Ban Also Triggers Heightened Scrutiny Because Transgender People Are a Quasi-Suspect Class**

While this Court need not reach the issue here because the Ban discriminates based on sex, discrimination because a person is transgender warrants heightened scrutiny even when it is considered as an independent classification. As this Court previously determined, “transgender people meet all four elements” under the federal test for determining whether a classification is subject to heightened scrutiny, a test which “the Utah Supreme Court would likely apply” here.<sup>5</sup>

Ex. 1, PI Order at 8-9. Numerous courts around the country have recognized that discrimination

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<sup>5</sup> The federal four-factor test is as follows: (1) whether the class has historically experienced discrimination; (2) whether it has a defining characteristic that “frequently bears no relation to ability to perform or contribute to society,” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440-41 (1985) (citation omitted); (3) whether the class can be defined as a discrete group through “obvious, immutable, or distinguishing characteristics”; and (4) whether the class is “a minority or politically powerless,” *Lyng v. Castillo*, 477 U.S. 635, 638 (1986). Ex. 1, PI Order at 8-9.

based on a person’s transgender status bears all the hallmarks of discrimination based on other suspect and quasi-suspect classifications. *See, e.g., Grimm*, 972 F.3d at 610-12; *Karnoski*, 926 F.3d at 1200-01; *Hecox*, 104 F.4th at 1079. “The purpose of this heightened level of scrutiny is to ensure quasi-suspect classifications do not perpetuate unfounded stereotypes or second-class treatment.” *Latta v. Otter*, 19 F. Supp. 3d 1054, 1073 (D. Idaho 2014) (citation omitted).

*First*, courts consider whether the targeted group has, “[a]s a historical matter . . . been subjected to discrimination.” *Lyng*, 477 U.S. at 638. Empirically, “[t]here is no doubt that transgender individuals historically have been subjected to discrimination on the basis of their gender identity, including high rates of violence and discrimination in education, employment, housing, and healthcare access.” *Grimm*, 972 F.3d at 611-12 (citation omitted) (referencing extensive data showing anti-transgender discrimination); *Whitaker*, 858 F.3d at 1051 (“[t]here is no denying that transgender individuals face discrimination, harassment, and violence because of their gender identity”).

*Second*, courts ask whether the classification “bears ‘[any] relation to the individual’s ability to participate in and contribute to society.’” *Cleburne*, 473 U.S. at 441. Transgender status does not hinder a person’s ability to contribute to society. As the Fourth Circuit explained: “Seventeen of our foremost medical, mental health, and public health organizations agree that being transgender implies no impairment in judgment, stability, reliability, or general social or vocational capabilities.” *Grimm*, 972 F.3d at 612 (internal quotation marks omitted).

*Third*, courts look to whether the group in question “exhibit[s] obvious, immutable, or distinguishing characteristics that define them as a discrete group.” *Lyng*, 477 U.S. at 638. As the Fourth Circuit recognized, transgender people satisfy this factor because “being transgender is not a choice.” *Grimm*, 972 F.3d at 612. Further, transgender people share a distinguishing

characteristic—that their identified sex at birth does not align with their gender identity. *See, e.g., M.A.B. v. Bd. of Educ. of Talbot Cnty.*, 286 F. Supp. 3d 704, 721 (D. Md. 2018); *Bd. of Educ. of Highland Local Sch. Dist. v. U.S. Dep’t of Educ.*, 208 F. Supp. 3d 850, 874 (S.D. Ohio 2016).

*Fourth*, courts examine whether the class is “a minority or politically powerless.” *Lyng*, 477 U.S. at 638. Transgender adults comprise less than one percent of the population and, even given their small numbers, are “underrepresented in every branch of government.” *Grimm*, 972 F.3d at 613-14. Moreover, transgender people have recently faced a wave of legislation targeting them for unequal treatment, including the Ban. SUMF at ¶ 75. This longstanding history of discrimination and lack of political power confirm that “[t]ransgender people . . . ha[ve] not yet been able to meaningfully vindicate their rights through the political process.” *Grimm*, 972 F.3d at 613.

## **II. The Ban Subjects Transgender Girls to Disparate Treatment**

Having determined that the Ban creates a classification, the second step of the analysis considers “whether th[e] classification is discriminatory, that is, whether it treats the members of the class . . . disparately.” *Gallivan*, 2002 UT 89, ¶ 43; *accord Count My Vote*, 2019 UT 60, ¶ 29. Here, as the Court has previously recognized, the Ban runs afoul of the UOL clause because the Ban treats transgender girls less favorably than other girls by categorically preventing transgender girls from competing on girls’ teams. Ex. 1, PI Order at 7. “Disparate treatment exists when the statutory scheme ‘work[s] a discriminatory hardship on an identifiable group of persons who were singled out for treatment different from that to which other identifiable groups were made subject.’” *State v. Drej*, 2010 UT 35, ¶ 36, 233 P.3d 476 (citation omitted); *see also State v. Outzen*, 2017 UT 30, ¶ 19, 408 P.3d 334. The disparate treatment here is plain: Where other girls are eligible to try out for and compete on girls’ teams, transgender girls are not. The Ban singles them out from

the larger class of all girls “on the basis of a tenuous justification”—their transgender status—“that has little or no merit.” *Outzen*, 2017 UT 30, ¶ 19.

As the Court previously found, the Plaintiffs identify as girls, interact with others as girls, and generally live their lives as girls, including obtaining court orders changing their names and legal sex to female. Ex. F, ROE\_000935-36, Ex. G, ROE\_000937-39 (Orders changing Jane’s name and gender marker); Ex. I, ROE\_001286-89 (Order changing Jill’s name and gender marker); Ex. A, Jane Noe Dec. ¶ 4; Ex. C, Jean Noe Dec. ¶¶ 5-6, Ex. B, Jill Poe Dec. ¶ 3; Ex. D, David Poe Dec. ¶ 4; Ex. E, Jill Poe Depo. at 19:4-14 (“Q: Can you tell me what it means, from your perspective, to be a girl or to be female? A: To be happy. . . . Q: [] What makes you happy with respect to being a girl? A: It feels like being in my own skin and being at home.”) Plaintiffs also take prescribed medication. *See* Ex. A, Jane Noe Dec. ¶ 4; Ex. C, Jean Noe Dec. ¶ 5; Ex. B, Jill Poe Dec. ¶ 3; Ex. D, David Poe Dec. ¶ 4; Ex. H, David Poe Depo. at 80:15-25; *see also* Ex. 6, Shumer Depo. at 30:9-22; Ex. 4, Shumer Rebuttal ¶ 84.

The undisputed evidence confirms this Court’s prior ruling that Plaintiffs are similarly situated to other girls and experience, like all transgender girls under the Ban, the disparate treatment of being “categorically bar[red] . . . from competing on girls’ sports teams” while “other girls are free to compete.” PI Order at 7-8; *see also Grimm*, 972 F.3d at 610; *Esquivel*, 2024 WL 1349031, at \*16.

### **III. The Ban Cannot Withstand Heightened Scrutiny**

Because the Ban discriminates based on sex, it is presumed to be unconstitutional, and the burden to justify it rests entirely on Defendants. *See Chettero*, 2013 UT 9, ¶ 20; *Utah Safe to Learn-Safe to Worship Coal., Inc. v. State*, 2004 UT 32, ¶ 24, 94 P.3d 217 (under heightened scrutiny, “the burden of proof shifts to the State”).

For a discriminatory classification to pass constitutional muster under heightened scrutiny, it must meet all three of the following requirements: (1) The law must be “reasonably necessary to further a legitimate legislative goal,” (2) the law must have “more than a speculative tendency to further the legislative objective and, in fact, actually and substantially further[] a valid legislative purpose,” and (3) the law must be reasonable. *Gallivan*, 2002 UT 89, ¶ 42 (citation omitted). “In examining whether a law is ‘reasonably necessary’ to further a legislative purpose, the court must consider whether a ‘less restrictive, burdensome, or nondiscriminatory’ alternative exists.” PI Order at 9 (citing *Gallivan*, 2002 UT 89, ¶ 49).

As this Court found at the preliminary injunction phase, and as remains true today, the Ban cannot withstand heightened scrutiny. PI Order at 9. Defendants contend that the Ban is necessary to “advance[] the important governmental interests of preserving fair competition and safety.” Dkt. 380, Defendants’ Response to Plaintiffs’ Opening Brief Regarding Scope of the Case.<sup>6</sup> But Defendants have not met their burden of proving that the Ban’s sweeping, categorical exclusion of all transgender girls from school sports is reasonably necessary to, and actually and substantially furthers, these state interests. In addition, there are less restrictive alternatives, including in the statute itself, i.e., the Commission, underscoring that Defendants do not satisfy heightened scrutiny.

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<sup>6</sup> In their discovery responses, Defendants identified three state interests served by the Ban: “(1) preserving competitive fairness in girls’ sports by eliminating male advantage; (2) reducing the risk of injury presented by male advantage in female sports; and (3) preserving opportunities to compete in sports.” Defendants’ Responses to Plaintiffs’ First Set of Interrogatories and First Set of Requests for Production of Documents, (attached hereto as Exhibit 21), at Response to Interrogatory 9. Defendants did not mention the third interest by the time the parties provided briefing to this Court regarding the overall scope of the case. Nevertheless, Plaintiffs address this interest in this section.

**A. The Ban is not reasonably necessary to, and does not actually and substantially further, the purported interests of preserving fairness and opportunities in girls' sports.**

To survive heightened scrutiny, Defendants must show that banning all *transgender girls* from girls' sports, regardless of their individual circumstances, actually and substantially furthers the state's interest in preserving fairness and opportunities in girls' sports, and that it has "more than a speculative tendency" to do that. *Gallivan*, 2002 UT 89, ¶ 42. Utah law requires this close nexus between the discriminatory effect and the asserted state interests because some types of discrimination—race and gender in particular—are "so generally problematic" that they are "unlikely [to be] reasonable." *Chettero*, 2013 UT 9, ¶ 20. This demanding standard is ingrained in federal precedent as well, which requires that Defendants' justifications "must be genuine, not hypothesized or invented post hoc in response to litigation." *United States v. Virginia*, 518 U.S. 515, 533 (1996); *see also H.B. Rowe Co. v. Tippett*, 615 F.3d 233, 242 (4th Cir. 2010) (requiring the government to produce "sufficient probative evidence in support of its stated rationale for enacting a gender preference" (quoting *Eng'g Contractors Ass'n of S. Fla. v. Metro. Dade Cnty.*, 122 F.3d 895, 910 (11th Cir. 1997))). In short, there must be a real problem that the legislation is addressing, and it is Defendants' burden to show that was the case here.

The uncontested evidence shows, however, that transgender girls are not now and have not ever been a threat to girls' sports, despite being permitted to play sports for many years under Defendants' own policies. *See* Ex. 8, UHSAA Depo. at 30:10-17; Ex. 17, Whittaker Depo. at 22:15-25 (indicating that UHSAA had a transgender policy as early as 2015). As this Court previously noted, "transgender athletes represent an extremely small minority of high school athletes in Utah." Ex. 1, PI Order at 10; *see also Hecox v. Little*, 479 F. Supp. 3d 930, 977 (D. Idaho 2020) ("Although the ratio of males to females is roughly one to one, less than one percent of the population is transgender."). At the time the Ban was enacted, only one transgender girl in the

entire state had sought to participate on a girls' team out of more than 100,000 high school student athletes. *See* Ex. 9, Defendants' RFA Responses, at Response to RFA 13; Ex. 8, UHSAA Depo. at 35:20-24, 42:24-43:5, 53:6-11; Ex. 16, UHSAA Bullet Points; Ex. 17, Whittaker Depo. at 94:8-11. There were also three transgender boys playing on boys' teams, for a total of four transgender student athletes in the entire state. *See* Ex. 10, Governor Cox Statement at ROE000005. As Governor Cox stated in his veto message, "Four kids and only one of them playing girls sports. That's what all this is about. Four kids who aren't dominating or winning trophies or taking scholarships. Four kids who are just trying to find some friends and feel like they are part of something. Four kids trying to get through each day. Rarely has so much fear and anger been directed at so few." Ex. 10, Governor Cox Statement at ROE000005.

The undisputed fact that UHSAA has never received a complaint about a transgender athlete participating in high school sports also prevents Defendants from being able to establish that the Ban actually and substantially furthers the state's interest in preserving fairness and opportunities in girls' sports. *See* Ex. 17, Whittaker Depo. at 94:8-16; Ex. 8, UHSAA Depo. at 65:1-14. Instead, the only girls who have been the target of complaints are non-transgender girls who were falsely accused of being transgender. *See, e.g.,* Ex. 8, UHSAA Depo. at 49:1-11, 50:12-51:1, 83:10-86:21, 89:14-90:4; Ex. 17, Whittaker Depo. at 41:10-19, 105:7-11.<sup>7</sup> Rather than protecting girls' sports, the Ban has done the opposite—it created an environment in which non-transgender girls are targeted for physical attributes or behaviors that are insufficiently "feminine" in the eyes of their accusers. *See* Ex. 8, UHSAA Depo. at 74:19-22, 75:3-7; 73:15-75:7 ("What did you mean by 'people now feel empowered'? A: That they can now become the police of who is

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<sup>7</sup> Defendants believe these complaints targeting non-transgender girls are a result of the passage of H.B. 11. Ex. 8, UHSAA Depo. at 73:15-75:7.

transgender and who is not without knowing the person. . . . Q: [ ] Did you feel that people feel empowered now more so than in the past? A: Yes. Q: The past being before HB 11? A: Yes.”).

Defendants may respond that the Legislature can proactively seek to legislate issues, but this argument does not relieve Defendants of their burden to prove that the Ban, as the means chosen for the law, actually and substantially furthers legitimate interests. As the U.S. Supreme Court has stated, courts must “reject measures that classify unnecessarily and overbroadly by gender when more accurate and impartial lines can be drawn.” *Sessions v. Morales-Santana*, 582 U.S. 47, 63 n.13 (2017); *see also Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 784 (9th Cir. 2014) (en banc) (“[T]he absence of any credible showing that the [challenged law] addressed a particularly acute problem” is “quite relevant” to a showing that the law did not survive heightened scrutiny.). It is not an impartial or accurate line to categorically bar every transgender girl from competing on girls’ teams despite a longstanding policy of allowing their participation with no issues whatsoever. “A vague, unsubstantiated concern that transgender women might one day dominate women’s athletics is insufficient to satisfy heightened scrutiny.” *Hecox*, 104 F.4th at 1086.

**B. Less-restrictive alternatives demonstrate that the Ban is not reasonably necessary and thus fails heightened scrutiny.**

“In examining whether a law is ‘reasonably necessary’ to further a legislative purpose, the court must consider whether a ‘less restrictive, burdensome, or nondiscriminatory’ alternative exists.” PI Order at 9 (citing *Gallivan*, 2002 UT 89, ¶ 49).

*Here, the existence of the Commission process is fatal to Defendants’ case.* Under Part 10 of H.B. 11, should a court “invalidate[ ] or enjoin[ ]” the Ban, then a School Activity Eligibility Commission will be created. Utah Code §§ 53G-6-1002, -1003. That Commission must make an individualized determination as to whether a student’s eligibility would “present a substantial

safety risk to the student or others that is significantly greater than the inherent risks of the given activity; or likely give the student a material competitive advantage when compared to students of the same age competing in the relevant gender-designed activity.” *Id.* § 53G-6-1004(3)(a)(i).<sup>8</sup> That individualized eligibility inquiry regarding safety and fairness is inherently less restrictive than the Ban. Because a less restrictive method for achieving the Legislature’s stated goal exists—and has already been written into the law as an alternative—the Ban cannot satisfy heightened scrutiny under the UOL clause. *See Gallivan*, 2002 UT 89, ¶ 49 (holding that a Utah law violated the UOL provision where “less restrictive, burdensome, or nondiscriminatory mechanism[s]” were available to address the proffered state interest).

The UHSAA’s longstanding policy regarding the participation of transgender students in school sports is a second “less restrictive, burdensome, or nondiscriminatory” alternative to the Ban. As Defendants’ witnesses testified, the UHSAA policy was “fair and equitable” for all student athletes. Ex. 15, UHSAA Spatafore email at UHSAA-00741; *see also* Ex. 8, UHSAA Depo. at 44:17-45:2 (policy was adequate and there was no need to revise it). Indeed, the express purpose of the UHSAA policy was “[f]or the protection of competitive balance and the integrity of women’s sports.” Ex. 14, UHSAA Transgender Participation Policy.

Finally, the policies of countless sporting associations, both internationally and in the United States, are also less restrictive alternatives to the Ban. This includes sporting policies that relate to *adult and elite* competitions—not middle and high school sports—and high contact sports

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<sup>8</sup> The Commission’s eligibility determination also includes an analysis of “whether the student’s assertion of a gender identity is consistent with the statutory definition of gender identity as that term is defined in Section 34A-5-102. *Id.* § 53G-6-1004(3)(a). Section 34A-5-102(1)(o) provides in relevant part: “A person’s gender identity can be shown by providing evidence, including, but not limited to, medical history, care or treatment of the gender identity, consistent and uniform assertion of the gender identity, or other evidence that the gender identity is sincerely held, part of a person’s core identity, and not being asserted for an improper purpose.”

like rugby. Ex. 4, Shumer Rebuttal ¶ 70. The World Rugby guidelines, for instance, state, “[t]ransgender women who transitioned pre-puberty and have not experienced the biological effects of testosterone during puberty and adolescence can play women’s rugby.” *Id.* The National Collegiate Athletic Association (NCAA), which governs college sports, calls for each sport to set criteria for transgender women athlete inclusion. *Id.* ¶ 71. “No NCAA sport categorically bans transgender women athletes.” *Id.* USA Swimming, FINA, England’s Rugby Football Union and Rugby Football League, Irish Rugby Football Union, Welsh Rugby Union, and World Triathlon do not categorically ban transgender female athletes from competition. *Id.* ¶ 72. The International Olympic Committee (IOC) issued a “Framework on Fairness, Inclusion and Non-Discrimination on the Basis of Gender Identity and Sex Variations. Ex. 20, IOC Framework. “The IOC recognizes that it must be in the remit of each sport and its governing body to determine how an athlete may be at a disproportionate advantage against their peers, taking into consideration the nature of each sport.” *Id.* at RvU003069. It also states, “[e]ligibility criteria should be established and implemented fairly and in a manner that does not systematically exclude athletes from competition based on their gender identity, physical appearance and/or sex variations.”). *Id.* at RvU003071.

Indeed, while Defendants claim the Ban is necessary to ensure fairness and opportunity, the focus of the Ban suggests otherwise. The Ban is entirely targeted toward transgender *children*—in public schools or “local education agencies”<sup>9</sup>—while excluding college and university athletics. As even Defendants’ experts acknowledge, the differences that will eventually emerge in athletic advantage between boys and girls become much larger as boys undergo puberty and become men. Plaintiff’s expert, Dr. Shumer, explains: “The continued growth of muscle mass

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<sup>9</sup> A local education agency is “a school district or charter school” Utah State Board of Education Rule R277-100-2(16).

and strength continues well into adulthood because of continued exposure to testosterone. Accordingly, a 25-year-old man will have a significantly greater athletic advantage than a 15-year-old boy, despite having the same testosterone levels.” Ex. 4, Shumer Rebuttal ¶ 31. Any purported interests in maintaining fairness or opportunities in women’s sports are thus heightened at the collegiate level—not lessened. Despite this, the State has taken no action in that realm, deeply undermining the sincerity of these purported interests in the first place. Ex. 10, Governor Cox Statement at ROE000004 (the Ban does “nothing to prevent that example [of a college swimmer], as HB 11 only applies to high school and middle school and does not impact collegiate athletics.”); *Cf. Hecox*, 104 F.4th at 1086 (noting that the lack of evidence that “transgender women and girls threatened to dominate female student athletics” suggests Idaho “may have wished ‘to convey a message of disfavor’ toward transgender women and girls;” a message the state “‘simply may not send’ through unjustifiable discrimination” (quoting *Latta*, 771 F.3d at 476)).

**C. The Ban is not reasonably necessary to, and does not actually and substantially, further the purported interest of “reduc[ing] the risk of injury presented by male advantage in female sports.”**

Defendants’ second purported state interest—safety or reducing risk of injury—fares no better under heightened scrutiny. As an initial matter, the existence of less-restrictive alternatives demonstrate the Ban is not reasonably necessary to Defendants’ purported interest in safety just as it was not reasonably necessary to the State’s interests regarding fairness and opportunities. *See supra* pp. 32-35.

Regardless, the Ban is not reasonably necessary to further—nor does it actually and substantially further—the State’s avowed interest in safety. Defendants have not met their burden of proving that transgender girls’ participation in girls’ sports competitions—contact or non-contact—creates any safety risk, much less one justifying a categorical ban. “[B]enign’ justifications proffered in defense of categorical exclusions [based on sex] *will not be accepted*

*automatically*; a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded.” *Virginia*, 518 U.S. at 535-36 (emphasis added); *see also Gallivan*, 2002 UT 89, ¶ 37 (“[I]t is unconstitutional to single out one person or group of persons from among the larger class on the basis of a tenuous justification that has little or no merit.” (citation omitted)).

Similar to the lack of evidence regarding fairness and opportunities, Defendants have provided no evidence that even a single transgender girl has ever posed a safety risk to other girls competing in girls’ sports in Utah. *See* Ex. 9, Defendants’ RFA Responses, at Response to RFA 12; Ex. 17, Whittaker Depo. at 61:21-62:11.

By its operation, the Ban is also simultaneously underinclusive and overinclusive in a way that is fatal to Defendants’ burden. For example, the Ban permits transgender girls to practice—but not compete—on girls’ teams. Utah Code § 53G-6-902(2); Ex. 8, UHSAA Depo. at 70:16-19. Yet the same purported concerns about physical safety would arise in practice as well as in competition. Moreover, the Ban does not operate only to exclude transgender girls who purportedly present safety risks. Instead, it excludes *all* transgender girls, regardless of whether they pose any risk to safety, and regardless of whether their participation involves a contact sport. On the flip side, the Ban does not prevent non-transgender girls who may pose a safety risk from competing on girls’ teams. *See, e.g.*, Ex. 9, Defendants’ RFA Responses, at Responses to RFAs 8-10 (the UHSAA does not have separate divisions or teams based on height, muscle mass, or weight (other than girls’ wrestling)). Instead, every non-transgender girl is allowed to compete, regardless of whether they pose a risk to safety. Moreover, many sports—including the sports played by Plaintiffs (running and swimming)—involve no physical contact. As a result, the Ban’s exclusion of transgender girls from non-contact sports has no relationship whatsoever to the goal of

protecting physical safety. *Horne*, 115 F.4th at 110; *Esquivel*, 2024 WL1349031, at \*18; cf. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 730 (1982) (“The policy is invalid also because it fails the second part of the equal protection test, for the State has made no showing that the gender-based classification is substantially and directly related to its proposed compensatory objective. To the contrary, MUW’s policy of permitting men to attend classes as auditors fatally undermines its claim that women, at least those in the School of Nursing, are adversely affected by the presence of men.”).

For all these reasons, the Ban is not reasonably necessary to further, nor does it actually further (substantially or otherwise) the legislative goal of reducing the risk of injury in girls’ sports.

#### **IV. The Ban Fails Even Rational Basis Review**

The undisputed evidence shows that there is no rational connection between banning all transgender girls from girls’ teams and promoting fairness or safety; as such, the Ban does not survive even rational basis review. Even under rational basis, the scrutiny required “is not a toothless one.” *Mathews v. Lucas*, 427 U.S. 495, 510 (1976). The government “may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.” *Cleburne*, 473 U.S. at 446; see, e.g., *Ray v. McCloud*, 507 F. Supp. 3d 925, 939 (S.D. Ohio 2020) (rejecting Ohio’s justifications for preventing transgender people from changing sex marker on birth certificate under rational basis review “because there is no logical connection between the Policy and proffered justifications”). Instead, there must be a “rational relationship between the disparity of treatment and some legitimate governmental purpose.” *Heller v. Doe*, 509 U.S. 312, 320 (1993).

As set forth above, see *supra* pp. 29-32; 35-37, there is no “logical connection” between the Ban and the purported justifications. Because athletic ability depends on a variety of factors and circumstances, banning all transgender girls from girls’ teams does not promote fairness.

Instead, the Ban has caused harm, exposing non-transgender girls to questioning and harassment based on a perception that they are not sufficiently “feminine.” Similarly, the Ban does not promote safety, as the inconsistencies and simultaneous under and over-inclusivity of the law also shows. Permitting transgender girls to practice with non-transgender girls would raise the same concerns about safety, yet the Ban does not preclude this. And many sports are non-contact, yet the Ban applies arbitrarily to all. To pass muster even under rational basis review, a law “must find some footing in the realities of the subject addressed by the legislation.” *Heller*, 509 U.S. at 321. The Ban does not.

The context surrounding the Ban’s last-minute enactment also underscores the disconnect between its broad sweep and its asserted justifications. Whereas all prior iterations of H.B. 11 focused on the Commission process, the “all-out ban” was not introduced until “the last day of the legislative session.” Ex. 10, Governor Cox Statement, at ROE000002. As the Governor explained, “it is unusual to have major overhauls proposed at the last minute on a significant policy issue” and “even rarer to have these pass, especially with no communication with those who had been negotiating the issue.” *Id.* The Ban, in fact, was “revealed last on the last day of the session and debated and passed just a few hours before midnight.” *Id.* “This was a complete reversal of every discussion, public or private. Every article written by the media on this issue was about the commission and a compromise. Every answer given during press availability was about the commission and a compromise.” *Id.*

In addition, even the legislators who sponsored and enacted the Ban acknowledge the Ban is not necessary. Before the Ban was challenged, President of the Utah Senate, Stuart Adams, and Utah Representative Kera Birkeland, who sponsored the Ban, participated in a panel discussion about H.B. 11. SUMF ¶ 42. President Adams stated, “[t]he ban is probably not the way forward so we

wanted to find something that was balanced and again, in a fairness for all approach, and Professor Wilson suggested the idea of a commission. . . . First of all [the commission is] fair . . . but second of all those on the commission—they want to be able to, they’re going to determine who plays and who doesn’t play. We don’t want that to be a political decision and an arbitrary decision-but we want that to be a decision that is actually driven by data . . . I think we found, again, a way forward that not only is fair. I think [the commission] will be upheld by the courts and it helps everyone to be able to be represented.” *Id.* at 29:13-30:41. Representative Birkeland similarly praised the Commission: “[I]t basically says if you are a transgender athlete and you want to participate on a team that differs from your identity at birth, then you need to come before this commission. And they would consider, you know, what your height is, what is the average speed, what is the average, you know, wingspan, like all these things that the student or the student’s parents felt comfortable in sharing and wanted to share. It gives the commissioners, who are made up of doctors, therapists, coaches, athletic trainers—they would be considering all these different elements so that when that athlete is given the eligibility status, the girls and their families know that this individual went through a process. And this process is what helps make it fair.” *Id.* at 36:19-37:21. Representative Birkeland continued, “I love how Professor Wilson has helped us define this baseline of what is appropriate on the bell curve for each of these student athletes based on their age, their sport—because obviously running track is very different than swimming, soccer is very different from football—everything is very different when you’re talking about competition in athleticism.” *Id.* at 37:58-38:29.

In sum, because the Ban sweeps so broadly—banning all transgender girls regardless of their circumstances, age, or the nature of the sport—and inflicts such serious harms, it lacks even a rational basis. Like the law struck down in *Romer v. Evans*, the Ban “has the peculiar property

of imposing a broad and undifferentiated disability on a single named group”—in this case, on transgender girls. 517 U.S. 620, 632 (1996). In addition, “its sheer breadth”—banning all transgender girls rather than, for example, assessing them individually—“is so discontinuous with the reasons offered for it” that it is difficult to credit them. *Id.* The Ban thus fails under any standard of review. Instead of furthering an important governmental interest, the Ban advances only an “invalid interest of excluding transgender women and girls from women’s sports entirely, regardless of their physiological characteristics.” *Hecox*, 479 F. Supp. 3d at 984-85.

**V. Plaintiffs Are Entitled to Declaratory and Permanent Injunctive Relief**

In addition to issuing a declaratory judgment pursuant to Utah Code § 78B-6-401 that the Ban violates the UOL clause, this Court should also permanently enjoin Defendants from enforcing the Ban. Permanent injunctions are warranted when legal remedies are inadequate. *See Mack*, 2009 UT 47, ¶ 23. A legal remedy is inadequate when a party “is unlikely to be made whole by an award of monetary damages or some other legal . . . remedy, or the legal remedy is not as practicable and efficient toward the ends of justice as an injunction.” *Id.* (citations omitted) (internal quotation marks omitted).

As this Court correctly found earlier in the case, there is no question that Plaintiffs have suffered and will suffer irreparable harm in the absence of an injunction. (Ex. 1, PI Order at 12, 13). First, Plaintiffs face irreparable harm due to violations of their rights under the UOL clause. It is well established that “[w]hen an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.” *Awad v. Ziriya*, 670 F.3d 1111, 1131 (10th Cir. 2012) (citation omitted). As the Tenth Circuit has explained, “[w]hat makes an injury ‘irreparable’ is the inadequacy of, and the difficulty of calculating, a monetary remedy after a full trial. Any deprivation of any constitutional right fits that bill.” *Free the Nipple-Fort Collins v. City of Fort Collins*, 916 F.3d 792, 806 (10th Cir. 2019) (internal citation omitted); *see also Elrod v.*

*Burns*, 427 U.S. 347, 373 (1976) (loss of First Amendment “freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury”); *Hecox v. Little*, 79 F.4th 1009, 1035-36 (9th Cir. 2023) (finding that a constitutional violation establishes irreparable harm); *Hecox*, 104 F.4th at 1088 (same). This injury to Plaintiffs’ constitutional rights alone is sufficient to establish irreparable harm.

Plaintiffs have also suffered, and will continue to suffer, additional types of irreparable harm. Most directly, transgender girls, including Plaintiffs, will be excluded from school sports and denied the social, educational, physical, and emotional health benefits that both sides acknowledge stem from sports. *See, e.g.*, Ex. 9, Defendants’ RFA Responses, at Responses to RFAs 3-5; Ex. 8, UHSAA Depo. at 26:8-18, 26:25-27:4 (referencing studies showing lower drop-out rates and higher grades among student-athletes); Ex. 17, Whittaker Depo. at 11:3-9, 122:13-21 (referencing life skills, teamwork, dedication, hard work, commitment, unity, and compassion as benefits of participating in high school sports); *see also Horne*, 115 F.4th at 1111 n.18 (recognizing irreparable harm of transgender girl being “barred from playing in games”); *Hecox*, 79 F.4th at 1036 (holding that transgender plaintiff was harmed by being excluded from female sports teams and being deprived of “the camaraderie of being on a team” (citation omitted)).

Transgender girls, including Plaintiffs, will also suffer dignitary harms because of the Ban. *Whitaker* 858 F.3d at 1045 (because the school district’s policy subjected plaintiff to disparate treatment and stigmatized him for being a transgender boy, plaintiff suffered—and would continue to suffer—irreparable harm); *Grimm*, 972 F.3d at 618 (explaining that stigma of exclusion that “publicly brand[s] all transgender students with a scarlet ‘T’” constitutes cognizable harm); *Hecox*, 479 F. Supp. 3d at 987 (dignitary wounds of embarrassment and harassment constitute irreparable injury); *Doe v. Horne*, 683 F. Supp. 3d 950, 975 (D. Ariz. 2023) (“Plaintiffs will also suffer the

shame and humiliation of being unable to participate in a school activity simply because they are transgender—a personal characteristic over which they have no control.”), *aff’d*, 115 F.4th 1083 (9th Cir. 2024); *B.P.J.*, 98 F.4th at 563-64 (“[I]t requires no feat of imagination to appreciate ‘[t]he stigma of being’ unable to participate on a team with one’s friends and peers.” (internal citation omitted)); *Tirrell*, 2024 WL 4132435, at \*18; *cf. Obergefell v. Hodges*, 576 U.S. 644, 678 (2015) (“Dignitary wounds cannot always be healed with the stroke of a pen.”); *B.M. ex rel. Xiong v. Minn. State High Sch. League*, 917 F.3d 994, 1003 (8th Cir. 2019) (monetary damages insufficient to address unlawful denial of opportunity to participate in the unique, “temporally isolated opportunities” of school sports).

Additionally, forcing Plaintiffs to occupy an officially inferior status, whereby they can “participate” but not “compete,” inflicts irreparable harm by subjecting Plaintiffs and other transgender girls to unwanted scrutiny and stigma. *Compare* Utah Code § 53G-6-902(1)(b), *with id.* § 53G-6-902(2). Ex. 8, UHSAA Depo. at 29:1-20 (“meaningful difference” between only being able to practice and being able to compete), 70:16-71:1 (“Q: [T]o your understanding, under the ban a female transgender student athlete can practice but not compete. Correct? A: That’s my understanding. Q: Do you feel that this provides the student athlete with the optimal experience? A: No. Q: Why not? A: Though practice can be fun, it’s not the end goal for students when they want to be on the team. They want to compete.”). These provisions send a clear message to Plaintiffs, to other students and staff, to parents, and to the public that Plaintiffs are not equal and respected members of the team, but second-class “others” whose presence is tolerated only so long as they accept their inferior status. *See* Ex. B, Jill Poe Dec. ¶ 7 (“I will not do cross-country if I cannot participate in meets. It would be embarrassing to put in all the work with my team only to be told that I cannot be with them when it matters the most. That is not being part of the team. It

is more like being a cheerleader or a water girl.”); Ex. A, Jane Noe Dec. ¶ 8; Ex. J, Jean Noe Depo. at 105:6-19. No monetary award could ever compensate for the psychological and social harm inflicted by such an overtly discriminatory law.

Similarly, the irreparable harm is amplified, not mitigated, by classifying Plaintiffs as “males” for purposes of school sports and “permitting” them to play on boys’ teams. Forcing a transgender girl to be treated as male would undermine a transgender girl’s medical care and, depending on the sport, potentially jeopardize a transgender girl’s safety. The Fourth Circuit’s findings on this issue are apt:

[O]ffering B.P.J. a “choice” between not participating in sports and participating only on boys teams is no real choice at all. The defendants cannot expect that B.P.J. will countermand her social transition, her medical treatment, and all the work she has done with her schools, teachers, and coaches for nearly half her life by introducing herself to teammates, coaches, and even opponents as a boy. The defendants do not dispute that doing so would directly contradict the treatment protocols for gender dysphoria. It also would expose B.P.J. to the same risk of unfair competition—and, in some sports, physical danger—from which the defendants claim to be shielding cisgender girls. By participating on boys teams, B.P.J. would be sharing the field with boys who are larger, stronger, and faster than her because of the elevated levels of circulating testosterone she lacks.

*B.P.J.*, 98 F.4th at 564.

Plaintiffs also detail in their own words the harms that they have suffered and will continue to suffer due to the Ban. Forcing Jane to compete on the boys’ team would be painful and humiliating for her and would contradict the medical care she is receiving. Ex. C, Jean Noe Dec. ¶ 13; Ex. A, Jane Noe Dec. ¶ 8 (“I would never [be on the boys’ team]. It would be embarrassing to be a girl on the boys’ team.”).

Jill Poe, too, will face significant irreparable harm due to the Ban. Her mental health has improved significantly since she began receiving treatment for gender dysphoria. Ex. D, David Poe Dec. ¶ 4. Running on a boys’ team is not an option because it would undo all that progress and

subject Jill to pain and humiliation. *Id.*; Ex. H, David Poe Depo. at 38:1-17. Requiring Jill to participate only in practice would also stigmatize Jill and send the message that she is not actually a part of the team. Ex. B, Jill Poe Dec. ¶ 7. Further, even if Jill wanted to compete on a boys' team (which she has said that she does not), her parents would discourage her out of concern for her safety. Ex. H, David Poe Depo. at 89:14-90:3; *see also* Ex. B, Jill Poe Dec. ¶ 8 (“I also understand that I could try out for the boys' team, but I would never do that. It took me two years to come out to my family and because of that, I finally feel comfortable in my body. Being on the boys' team would be embarrassing and stressful.”); Ex. H, David Poe Depo. at 84:22-85:19.

Medical and mental health associations across the country have opposed laws like the Ban because they endanger transgender youth. The American Academy of Pediatrics (“AAP”) issued a statement in March 2021 that “[f]orcing transgender children to play on teams according to their sex assigned at birth, rather than the gender they live in, . . . puts their physical and mental health at risk.” Ex. 18, AAP News Release at ROE000766. The American Medical Association (“AMA”) has similarly explained that “barring transgender females from participating in school-sponsored organized sports consistent with their gender identity frustrates the treatment of gender dysphoria by preventing transgender females from living openly in accordance with their true gender . . . [which] in turn, increases the rate of negative mental health outcomes, substance abuse and suicide.” Ex. 19, AMA Update at ROE000770; *see also* Ex. 6, Shumer Depo. at 19:21-20:13; Ex. 3, Karasic Report ¶¶ 22, 46 (“Denying transgender youth the ability to participate in sports teams that reflect their gender identity interferes with their medical treatment (of which social transition is one component) and is likely to worsen the distress associated with their gender dysphoria. In addition, discriminating against transgender youth leads to an increase in anxiety, depression, suicidal ideation, and suicide attempts, as well as an increase in physical health problems.” (citing

Landon D. Hughes et al., *Pediatric Provider Perspectives on Laws and Policies Impacting Sports Participation for Transgender Youth*, 9(4) LGBT Health 247-53 (2022)).

In sum, the Ban subjects transgender girls to stigma, isolation, and demeaning treatment and “is an invitation to subject” Plaintiffs and other transgender girls to further “discrimination both in the public and in the private spheres.” *Lawrence v. Texas*, 539 U.S. 558, 575 (2003). No monetary damages can remedy the harm Plaintiffs will experience if barred from competing with their teams and stripped of their rights under the Utah Constitution, and there is no countervailing harm to the Defendants or the public interest that could justify denial of permanent equitable relief. As a matter of law, protecting constitutional freedoms is always in the public interest. *See G & V Lounge, Inc. v. Mich. Liquor Control Comm’n*, 23 F.3d 1071, 1079 (6th Cir. 1994); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 140 (1994).

### CONCLUSION

For all these reasons, the Court should grant Plaintiffs’ motion for summary judgment on their UOL claim, declare the Ban unconstitutional, and permanently enjoin Defendants from enforcing the Ban.

Dated: November 1, 2024

WILSON SONSINI GOODRICH & ROSATI, P.C.

/s/ Tamara C. Lemmon

TAMARA C. LEMMON

*Attorney for Plaintiffs*

**ELECTRONIC FILING CERTIFICATE**

I hereby certify that on November 1, 2024, I caused a true and correct copy of the foregoing document to be filed with the Court's electronic filing system, which will provide notice on all counsel deemed to have consented to electronic service. All other counsel of record not deemed to have consented to electronic service were served with a true and correct copy of the foregoing document by email on this day.

WILSON SONSINI GOODRICH & ROSATI, P.C.

/s/ TAMARA C. LEMMON  
TAMARA C. LEMMON  
*Attorney for Plaintiffs*

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You have a limited amount of time to respond to this motion. In most cases, you must file a written response with the court and provide a copy to the other party:

- within 14 days of this motion being filed, if the motion will be decided by a judge, or
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- dentro de 14 días del día que se presenta la moción, si la misma será resuelta por un juez, o
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