The Order of the Court is stated below:
Dated: August 19, 2022 08:26:29 AM
/s/ KEITH KELLY
District Court Judge

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH	
JENNY ROE, a minor, by and through parent DEBBIE ROE; JANE NOE, a minor, by and through parents JEAN NOE and JOHN NOE; and JILL POE, a minor, by and through parents SARA POE and DAVID POE, Plaintiffs, v. UTAH HIGH SCHOOL ACTIVITIES ASSOCIATION; GRANITE SCHOOL DISTRICT; JORDAN SCHOOL DISTRICT; and SUPERINTENDENTS RICH K. NYE and ANTHONY GODFREY, in their official capacities, Defendants.	**ORDER GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** Case No. 220903262 Judge Keith A. Kelly

This matter came before the Court on the Motion for Preliminary Injunction ("Motion") filed by plaintiffs Jenny Roe, by and through her parent Debbie Roe; 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 (together, "Plaintiffs"). Plaintiffs seek a preliminary injunction enjoining Defendants Utah High School Activities Association, Granite School District, Jordan School District and Superintendents Rich K. Nye and Anthony Godfrey (together, "Defendants") from enforcing Part 9 of House Bill 11 ("H.B. 11"), Utah Code §§ 53G-6-901 through 903 (2022) ("Part 9" or the "Ban").

The Court has carefully considered (i) Plaintiffs' Motion and supporting papers, (ii) Defendants' memorandum opposing Plaintiffs' Motion and supporting papers, (iii) Plaintiffs' reply in support of the Motion and supporting papers, and (iv) the arguments presented during the hearings held on August 10–11, 2022. For good cause shown, the Court hereby GRANTS the Motion as discussed below.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. A Preliminary Injunction Will Allow Transgender Girls to Compete on Girls' Teams Only When It Is Fair, as Confidentially Determined by a Legislature-Created Commission.

Governor Spencer J. Cox has explained that "[t]he transgender sports participation issue is one of the most divisive of our time." *See* Letter from Spencer J. Cox, Utah Gov., on Veto of H.B. 11 to the Utah House and Utah Senate at 1 (Mar. 22, 2022) ("Gov. Cox Veto Letter").[1] Given the divisive nature of the issues raised in this case, it is important at the outset to clarify the effect of this Order.

As discussed above, the Plaintiffs seek to enjoin the Defendants from enforcing Part 9 of House Bill 11 ("H.B. 11"), Utah Code §§ 53G-6-901 through 903 ("Part 9" or the "Ban"), which effectively bans transgender girls from competing in pre-college school-related girls sports.

Notably, Plaintiffs do not object to enforcement of Part 10 of H.B. 11, Utah Code §§ 53G-6-1001 through 1007 (2022) ("Part 10"). Part 10 provides that – in the event that the Part 9 Ban is enjoined – a commission will be established to consider confidentially, for each transgender girl who seeks to compete in school athletics, whether it would fair to permit that transgender girl to compete on girls' teams. *Id.*

Thus, the effect of this preliminary injunction will *not* mean that transgender girls will automatically be eligible to compete on their school's girls' teams. Rather, it will allow them to compete only upon the commission's determination that their being able to compete is fair under all of the circumstances.

B. Utah Law Permits Transgender Minors to Legally Change Their Genders.

Utah law has long permitted a transgender person to petition a Utah state district court for a legal gender marker change. The Utah Supreme Court has explained:

> A person has a common-law right to change facets of their personal legal status, including their sex designation. In recognition of this right, the Utah legislature has statutorily declared that, as a matter of the public policy of this state, when "a person born in this state has a name change or sex change approved by an order of a Utah district court," they can file such order with the state registrar with an application to change their birth certificate. Utah Code § 26-2-11(1).

Matter of Childers-Gray, 2021 UT 13, ¶ 2, 487 P.3d 96 (citations omitted).

[1] The Gov. Cox Veto Letter is found at https://governor.utah.gov/2022/03/24/gov-cox-why-im-vetoing-hb11/). Note that, on March 25, 2022, the Utah Legislature overrode Governor Cox's veto. *See* https://senate.utah.gov/legislature-overrides-veto-on-h-b-11/.

In order to obtain a sex-marker change order, the transgender person must show the following:

> We conclude that, as a general rule, sex-change petitions should be granted if (1) they are not "sought for a wrongful or fraudulent purpose," . . . and (2) they are supported by objective evidence of a sex change, which includes, at minimum, evidence of appropriate clinical care or treatment for gender transitioning or change by a licensed medical professional.

Id. at ¶ 74 (citation omitted).

Neither the gender change statute, section 26-2-11(1), nor the governing Utah Supreme Court decision, *Matter of Childers-Gray*, 2021 UT 13, sets a minimum age for a legal gender change order. Thus, in Utah a transgender minor can obtain a legal gender marker change upon receiving medical gender transition treatment.

C. The Plaintiffs Are Transgender Girls Undergoing Medically Indicated Gender Transition Treatment Who Seek to Compete with Other Girls on Their High School Teams.

Plaintiffs have presented evidence that they are each being treated for gender dysphoria by medical professionals and have transitioned from their male birth sex to their female gender identities. Their treatments have followed the standard of care developed by the World Professional Association for Transgender Health ("WPATH").

1. Under WPATH Guidelines, Gender Change Treatment for Minors Involves Medical Care and Social Transition.

According to Plaintiffs' evidence, the standard of care for the treatment of gender dysphoria in minors consists of social transition and medical care that allows a transgender youth to live comfortably consistent with their gender identity. A young person's social transition involves allowing children to live all aspects of their lives in accordance with their gender identity, which can include adopting a new name and pronouns, changing clothes and physical appearance, and correcting identity documents. Medical care involves the use of puberty-blocking medication, and for older adolescents, hormone therapy. Although transgender adults may pursue surgical treatment, surgery is rarely indicated for transgender minors.

After the onset of puberty, minors diagnosed with gender dysphoria may be prescribed puberty-blocking medication to prevent them from continuing to undergo puberty in their birth sex, which will cause them to develop permanent physical characteristics that conflict with their gender identity. Puberty-blocking medication works by stopping endogenous puberty, limiting the influence of a person's endogenous hormones on their physical development. For example, a transgender girl on puberty-blocking medication would not experience the physical changes caused by high levels of testosterone, such as male muscular development. A transgender boy on

puberty blocking medication would not experience breast development, menstruation, or widening of the hips.

Later in adolescence, a transgender young person may be prescribed hormone therapy when doing so is medically indicated. With this treatment, a minor transgender girl would have levels of testosterone and estrogen that fall within the same range as other girls.

2. The Plaintiffs Are Transgender Girls Affected by the Ban.

The following transgender girls (named with pseudonyms to protect their identities) are Plaintiffs in this case:

Jennie Roe. Jenny Roe is a 16-year-old transgender girl. She will be a senior at a public high school in the Granite School District in the fall of 2022. Jenny considered herself to be a girl by the time she turned 11 and was diagnosed with gender dysphoria when she was 12 years old. After learning more about transgender children, Jenny's family helped her pick a more traditionally feminine name and took her shopping for more feminine clothes – both of which had a positive impact on Jenny's mental health. Her family also found a medical doctor with experience treating transgender patients, who prescribed Jenny puberty-blocking medication when she was 13. That medication has stopped Jenny from experiencing male puberty. Jenny wishes to compete with her high school girls' volleyball team in the fall of 2022, and she did so prior to the Ban.

Jane Noe. Jane Noe is a 13-year-old transgender girl who will be in eighth grade the fall of 2022. Jane has considered herself to be a girl since she was three years old. Right before she started the third grade, Jane told her parents that she wanted her teachers and classmates to know that she is a girl. Her parents contacted the school, and many of the administrators, teachers, and staff members were extremely supportive. Since then, Jane has lived as a girl in all aspects of her life. Jane was diagnosed with gender dysphoria when she was about 10 years old. When she was 12, her doctor prescribed puberty blocking medication, which has prevented Jane from experiencing male puberty. Jane's parents also obtained a legal name change and gender marker change on her birth certificate. Jane has competed in swimming and wishes to compete with her girls' high school swim team in the fall of 2023.

Jill Poe. Jill Poe is a 14-year-old who will be in ninth grade in the fall of 2022. She is transgender and has considered herself to be a girl for several years. Jill came out to her family during Thanksgiving 2021 and was diagnosed with gender dysphoria in December 2021. She considered herself to be a girl several years before that, but she could not muster the courage to tell her parents. Her parents had noticed she was more withdrawn and unhappy, but they assumed Jill was struggling with the changes the COVID-19 pandemic brought to her life. They felt relief when they learned the cause of her distress, because it allowed them to address how to best support their child. As part of her medical treatment, Jill received puberty-blocking medication in early May 2022 and estrogen medication later the same month. Since Jill came out and began receiving treatment for her gender dysphoria, she has been noticeably happier, less withdrawn, and more excited to spend time

with family and friends. Even Jill's extended family who do not live nearby have noticed these positive changes. Jill wishes to compete in cross-country and track in high school.

These three transgender girls seek to enjoin the Ban.

D. Rule 65A(e) Establishes a Four-Part Test for Obtaining a Preliminary Injunction.

The Utah Supreme Court has explained: "An injunction, being an extraordinary remedy, should not be lightly granted." *System Concepts, Inc. v. Dixon*, 669 P.2d 421, 425 (Utah 1983). Thus, under Utah Rule of Civil Procedure 65A(e), a preliminary injunction may only issue upon a showing of four factors:

> (1) The applicant will suffer irreparable harm unless the order or injunction issues;
>
> (2) The threatened injury to the applicant outweighs whatever damage the proposed order or injunction may cause the party restrained or enjoined;
>
> (3) The order or injunction, if issued, would not be adverse to the public interest; and
>
> (4) There is a substantial likelihood that the applicant will prevail on the merits of the underlying claim, or the case presents serious issues on the merits which should be the subject of further litigation.

The Court will consider the 4th factor first, and then will discuss the first three factors. The Court makes its findings and reaches its legal conclusions only for purposes of determining whether Plaintiffs are entitled to a preliminary injunction.

E. The Plaintiffs Have Shown a Substantial Likelihood of Success in Showing that the Ban Violates the Uniform Operation of Laws Clause of the Utah Constitution.

The Court finds that Plaintiffs have shown a substantial likelihood that the Ban violates the uniform operation of laws ("UOL") clause of the Utah Constitution, which provides: "All laws of a general nature shall have a 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 may offer more protection than the federal Equal Protection Clause, *State v. Angilau*, 2011 UT 3, ¶ 20, 245 P. 3d 745.

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 "on the basis of 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. 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 v. Walker*, 2002 UT 89, ¶ 42, 54 P.3d 1069.

The Court finds that Plaintiffs have shown a substantial likelihood of meeting the three-part inquiry of the UOL clause.

1. The Ban Creates a Sex-Based Classification Discriminating Against the Plaintiffs as Transgender Girls.

The first step of the uniform operation analysis considers "whether the statute creates any classifications." *Count My Vote, Inc*, 2019 UT 60, ¶ 29.

Both a plain reading of the Ban and relevant case law demonstrate that the legislation classifies individuals based on transgender status and, therefore, on sex. The bill discriminates against transgender girls by providing that for purposes of school sports, a student's sex is based on an "individual's genetics and anatomy at birth." Utah Code § 53G-6-901(3). By design, that provision defines every transgender girl as "male." Because the statute prohibits "a student of the male sex" from "compet[ing] . . . with a team designated for students of the female sex in an interscholastic athletic activity," *id.* § 53G-6-902(1)(b), the law excludes all transgender girls from competing on girls' teams in all sports, at all grade levels.

This is a sex-based classification. By definition, a transgender person is one whose sex differs from that listed on the person's original birth certificate, which is based on their anatomy at birth. The United States Supreme Court has explained that "it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1741 (2020). The United States Tenth Circuit has added: "In the wake of *Bostock*, it is now clear that transgender discrimination . . . is discrimination 'because of sex[.]'" *Tudor v. Southeastern Okla. State Univ*., 13 F.4th 1019, 1028 (10th Cir. 2021) (quoting *Bostock*).[2]

The three other courts that have addressed this transgender sports issue agree that bans defining school team participation based on birth status made classifications based on transgender status. *See B.P.J. v. West Virginia State Board of Education*, 550 F. Supp. 3d 347, 353–54 (S.D. W. Va. 2021) (exclusion of transgender girls from girls' teams based upon biological birth sex created a transgender exclusion); *Hecox v. Little*, 479 F. Supp. 3d 930, 975 (D. Idaho 2020) (rejecting the argument that Idaho law did not "ban athletes on the basis of transgender status, but rather on the basis of the innate physiological advantages males generally have over females"); *A.M. v. Indianapolis Public Schools*, No. 1:22-cv-01075-JMS-DLP, 2022 WL

[2] *See also* Utah Code §34A-5-106(1)(a)(i)(C), (I) & (J) (barring employment discrimination in Utah based upon sex, sexual orientation, and gender identity); accord *Williams v. Kincaid*, __ F.4th __, 2022 WL 3364824 at *6 (4th Cir. Aug. 16, 2022) (reversing dismissal of Americans with Disability Act claims based upon gender dysphoria and noting that a "transgender person's medical needs are just as deserving of treatment and protection as anyone else's").

2951430, slip op. at 1, 21 (S.D. Ind. July 26, 2022) (preliminarily enjoining Indiana law that "prohibits a male, based on an individual's sex at birth, from participating on an athletic team that is designated as being a female, women's, or girls' athletic team," in part, because the law will "force" defendants to "discriminate against [plaintiff] based on her sex").

Statutes must be read in their entirety, and the Ban, read as a whole, makes clear that its overriding purpose is to regulate transgender girls' participation on school sports teams. In determining whether the text of the Ban creates a classification based on transgender status, the Court must "determine the meaning of the text given the relevant context of the statute (including, particularly, the structure and language of the statutory scheme)." *Olsen v. Eagle Mountain City*, 2011 UT 10, ¶ 12, 248 P.3d 465. Here, the Legislature made it clear that the Ban's purpose is to exclude transgender girls from competition by creating the Commission in Part 10 of H.B. 11, an alternative process for determining transgender girls' eligibility that will take effect if the Ban is declared unconstitutional. *See* Utah Code § 53G-6-1004(2)(a)(i). Part 10 establishes that "a student who has undergone or is undergoing a gender transition shall notify the athletic association of the student's transition and the need for the commission's eligibility approval as described in Subsection (1)(b)." *Id.* Part 10's explicit references to students undergoing gender transition or whose sex does not match the designation on their birth certificates confirms that the whole statute – both the Ban and the commission – are intended to regulate transgender students' competition on sports teams.

In sum, the text, effect, and purpose of the Ban unmistakably support a finding that the statute creates a classification based on transgender status. Thus, the statute classifies based upon sex.

2. The Ban Treats the Plaintiffs as Transgender Girls Less Favorably Than Other Girls.

The second step of the uniform operation of laws analysis considers "whether the classifications impose any disparate treatment on persons similarly situated." *Count My Vote*, 2019 UT 60, ¶ 29. The Ban singles out transgender girls and categorically bars them from competing on girls' sports teams. At the same time, other girls are free to compete. This is plainly unfavorable treatment.

Defendants argue that there is no disparate treatment among persons similarly situated because "biological boys" are the group "singled out" by the statute, and "biological boys" are not "similarly situated" to biological girls. *See* Defendants' Memorandum Opposing Motion for Preliminary Injunction at 35. But as discussed above, it is clear that transgender girls were indeed "singled out for treatment different from that to which other identifiable groups were made subject." *State v. Angilau*, 2011 UT 3, ¶ 23.

The evidence shows that Plaintiffs have all received puberty blocking medication (and Jill Poe has begun hormone therapy), which has prevented Plaintiffs from experiencing the same

male puberty as other "biological boys." Jenny Roe Dec. ¶ 6; Debbie Roe Dec. ¶ 4; Jane Noe Dec. ¶ 4; Jean Noe Dec. ¶ 5; Jill Poe Dec. ¶ 3. Thus, Plaintiffs identify and live as girls, interact with others as girls, and are taking medication to prevent them from going through male puberty. But the Ban does not treat them as girls.

Beyond this, at least one of the Plaintiffs – Jane Noe – has legally obtained a sex-change order under Utah Code § 26-2-11(1), pursuant to the governing Utah Supreme Court decision, *Matter of Childers-Gray*, 2021 UT 13. *See* Jean Noe Dec. at ¶6. So Jane is legally a female. But the Ban treats her less favorably than other persons who are legally females.

3. The Ban Creates a Sex-Based Classification that Does Not Withstand Heightened Scrutiny.

The third step of the uniform operation analysis considers "if there is disparate treatment, whether the legislature had any reasonable objective that warrants the disparity." *Count My Vote, Inc.*, 2019 UT 60, ¶ 29. This question must be analyzed based upon the type of disparity at issue.

a. The Ban Creates a Sex-Based Classification that Is Subject to Heightened Scrutiny.

When a law discriminates based on sex, as the Ban does, heightened scrutiny applies. The Utah Supreme Court has explained that "[o]nly a handful of classifications are generally so problematic (and so unlikely reasonable) that they trigger heightened scrutiny. Such problematic classifications include race and gender." *State v. Chettero*, 2013 UT 9, ¶ 20, 297 P.3d 582 (footnotes omitted)); *see also Pusey v. Pusey*, 728 P.2d 117, 119 (Utah 1986) (explaining that the equal rights clause in Article IV, Section 1 of the Utah Constitution "would preclude [the Court] from relying on gender as a determining factor" in a custody dispute).

The Utah Supreme Court has held that the heightened scrutiny analysis for uniform operation claims requires courts to consider whether a "less restrictive, burdensome, or nondiscriminatory" alternative exists. *Gallivan*, 2002 UT 89, ¶ 49. The statute itself, H.B. 11, provides the less restrictive alternative in this case: It is included in Part 10, which creates a commission to determine whether petitioning transgender girls can fairly compete on girls' teams.

Federal courts have repeatedly held that transgender status – even if considered as a classification separate and apart from sex – is one that requires application of heightened scrutiny under the Equal Protection Clause. The Utah Supreme Court has held that the uniform operation of laws clause is "at least as exacting" as the federal constitution's Equal Protection Clause. *See, e.g.*, *Gallivan*, 2002 UT 89, ¶ 33 (citation omitted); *Blue Cross & Blue Shield v. State*, 779 P.2d 634, 637 (Utah 1989).

Consequently, the Utah Supreme Court would likely apply the four-factor test that federal courts have developed for determining whether a classification is suspect: (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). Transgender people meet all four elements. *See, e.g.*, *Hecox*, 479 F. Supp. 3d at 974; *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 289 (W.D. Pa. 2017); *Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep't of Educ.*, 208 F. Supp. 3d 850, 873–74 (S.D. Ohio 2016); *Adkins v. City of New York*, 143 F. Supp. 3d 134, 139 (S.D.N.Y. 2015).

Consistent with these cases, the federal district courts addressing the issue have reached the same conclusion and determined that heightened scrutiny applies to blanket exclusions of transgender girls from competing on girls' teams. *See B.P.J. v. West Virginia State Board of Education*, 550 F. Supp. 3d at 353-54 (applying heightened scrutiny to transgender sports ban); *Hecox*, 479 F. Supp. 3d at 973-75 (same).

b. The Ban Does Not Withstand Heightened Scrutiny because It Is Not Reasonably Necessary to Further a Legitimate Legislative Goal.

Since the Ban is subject to heightened scrutiny, the Utah Supreme Court has explained the Court should apply the following analytical model:

> "[A] statutory classification that discriminates against a person's constitutionally protected [fundamental or critical] right ... is constitutional only if it (1) is reasonable, (2) has more than a speculative tendency to further the legislative objective and, in fact, actually and substantially furthers a valid legislative purpose, and (3) is reasonably necessary to further a legitimate legislative goal."

Gallivan v. Walker, 2002 UT 89, ¶ 42, 54 P.3d 1069 (brackets in original) (quoting *Lee v. Gaufin*, 867 P.2d 572, 582-83 (Utah 1993)). 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. *Gallivan*, 2002 UT 89, ¶ 49. The Ban does not withstand such heightened scrutiny.

Proponents of the Ban claimed that it is necessary to protect girls' sports. But unlike the reasons for providing separate teams for boys and girls, which courts generally have found to withstand constitutional scrutiny, the Defendants do not offer persuasive reasons to categorically ban all transgender girls from competing on girls' teams. From a medical perspective, the reason that boys, on average, have an athletic advantage over girls stems from the increased testosterone associated with male puberty, which results in increased muscle mass and muscle strength. (Shumer Dec. ¶ 39.) This physical difference, together with a recognition that girls have been often enjoyed fewer athletic opportunities than boys, is why courts presented with the issue have concluded that schools may lawfully provide separate teams for boys and girls. *See, e.g.*, *Clark v.*

Ariz. Interscholastic Ass'n, 695 F.2d 1126, 1131 (9th Cir. 1982); *Israel ex rel. Israel v. W. Va. Secondary Schs. Activities Comm'n*, 388 S.E.2d 480, 485 (W. Va. 1989) (collecting cases). But these justifications do not support the Ban.

For example, in *Clark*, the Ninth Circuit held that sex-specific teams may be justified as a means of "redressing past discrimination against women in athletics and promoting equality of athletic opportunity between the sexes." 695 F.2d at 1131. Specifically, it held that a school could exclude boys from a girls' volleyball team because: (1) women had suffered a history of discrimination in sports, often being denied athletic opportunities in favor of men; (2) men had equal athletic opportunities to women; and (3) due to "physiological differences" between boys and girls, "males would displace females to a substantial extent" if permitted to play on women's volleyball teams. *Id.* None of these justifications apply here.

First, the Act does not redress historical discrimination against women and girls in sports. To the contrary, as noted by the federal district court that enjoined Idaho's ban, "like women generally, women who are transgender have historically been discriminated against, not favored." *Hecox*, 479 F. Supp. 3d at 977. That finding is in line with similar findings by many other courts. *See*, *e.g.*, *Grimm*, 972 F.3d at 611; *Whitaker*, 858 F.3d at 1051; *Flack*, 328 F. Supp. 3d at 953; *F.V. v. Barron*, 286 F. Supp. 3d 1131, 1145 (D. Idaho 2018).

Second, unlike boys, transgender girls do not have many opportunities to play school sports. Under the Ban, they have none. If they are not eligible to play on girls' teams, they have no meaningful opportunity to play at all. *Hecox*, 479 F. Supp. 3d at 977.

Third, excluding transgender girls from girls' teams does not promote equality of athletic opportunity between boys and girls. In *Clark*, the court upheld a policy preventing boys from playing on a girls' volleyball team based in part on a concern that, absent that policy, "males would displace females to a substantial extent," because there are roughly equal numbers of males and females and that, on average, males have a physiological advantage over females. *Clark*, 695 F.2d at 1131. But those considerations are not persuasive here. In Utah, transgender girls would not substantially displace cisgender girls. Transgender athletes represent an extremely small minority of high school athletes in Utah. During the 2021-22 school year, only four of the 75,000 students that played high school sports in Utah were transgender. Of those four, only one student played on a girls' team. *See* Gov. Cox Veto Letter at 11. There is no support for a claim "that allowing transgender women to compete on women's teams would substantially displace female athletes." *Hecox*, 479 F. Supp. 3d at 977-78.

Similarly, Plaintiffs' evidence suggests that there is no basis to assume that transgender girls have an automatic physiological advantage over other girls. Before puberty, boys have no significant athletic advantage over girls. (Shumer Dec. ¶ 42.) Many transgender girls – including two of the plaintiffs in this case – medically transition at the onset of puberty, thereby never gaining any potential advantages that the increased production of testosterone during male puberty may create. (*Id.* ¶ 35.) Other transgender girls may mitigate any potential advantages by

receiving hormone therapy. (*Id.* ¶ 36.) And still others may simply have no discernable advantage in any case, depending on the student's age, level of ability, and the sport in which they wish to participate. The evidence suggests that being transgender is not "a legitimate accurate proxy" for athletic performance. *Clark*, 695 F.2d at 1129.

Moreover, the Ban is not the least restrictive method of furthering the law's stated purpose. *See Gallivan*, 2002 UT 89, ¶ 49. The statute prevents *all* transgender girls from competing on *all* girls' teams, regardless of any potentially relevant factors, such as whether the student is receiving or has received puberty-blocking medication or hormone therapy, the nature of the particular sport, the student's age or the student's athletic ability or history of success in the sport. For example, Plaintiff Jane Noe has been on puberty-blocking medication since she was 12, which has prevented her from going through male puberty. (Jean Noe Dec. ¶ 5.) Jane is one of the smallest girls on her private swim team. (*Id.*) While other girls on her team have qualified for regional swimming events, Jane has not. (*Id.*) Assuming these facts are true, allowing Jane to compete on a school swim team with other girls does not pose unfairness.

The Legislature effectively concedes that a less restrictive alternative is available and has provided that alternative in H.B. 11. Under Part 10 of the statute, should a court "invalidate[] or enjoin[]" the Ban, then a School Activity Eligibility Commission will be created. Utah Code §§ 53G-6-1002, 53G-6-1003. That Commission must make a confidential 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)-(ii). That individualized eligibility inquiry is inherently less restrictive than Part 9's categorical 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 is unconstitutional under the UOL clause. *See Gallivan*, 2002 UT 89, ¶ 49.

Because the Court has concluded that Plaintiffs have shown a likelihood of success under the UOL clause, the Court will not address their alternative claims under the Utah Constitution.

F. Plaintiffs Have Shown Irreparable Harm from the Ban.

1. Plaintiffs Face Irreparable Harm from the Ban's Violation of the Uniform Operation of Law Clause of the Utah Constitution.

Generally, irreparable injury is "that which cannot be adequately compensated in damages or for which damages cannot be compensable in money." *System Concepts, Inc. v. Dixon*, 669 P.2d 421, 427–28 (Utah 1983), *see also Hunsaker v. Kersh*, 1999 UT 106, ¶ 9, 991 P.2d 67.

Utah's standard for preliminary injunctions is derived from the federal test, and Utah courts may look to federal case law in analyzing these factors. *See, e.g.*, *Zagg, Inc. v. Harmer*,

2015 UT App 52, ¶¶ 8–9; 345 P.3d 1273 (applying federal law to reverse a district court's denial of a preliminary injunction where there was "no Utah authority squarely on point"); *see also* Advisory Committee Notes to Rule 65A(e) ("[The] substantial body of federal case authority in this area should assist the Utah courts in developing the [preliminary injunction standard].").

Looking to persuasive federal authority, the Court concludes that the Plaintiffs face irreparable harm due to violations of their rights under Utah's uniform operation of law clause. The United States Tenth Circuit has explained that "[w]hen an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." *Awad v. Ziriax*, 670 F.3d 1111, 1131 (10th Cir. 2012) (citation omitted). The United States Supreme Court has explained that the loss of First Amendment "freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *accord ACLU of Ky. v. McCreary County*, 354 F.3d 438, 445 (6th Cir. 2003) (citing *Elrod* for the principle that "if it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated"). Applying this standard, the Ban causes irreparable harm to the Plaintiffs simply by violating their constitutional rights.

2. The Plaintiffs Provide Evidence Showing Irreparable Harm from the Ban.

In addition, Plaintiffs have provided persuasive evidence that they have suffered, and will continue to suffer irreparable harm due to the Ban. Their evidence illustrates why federal courts have presumed irreparable harm from a constitutional violation. The Ban has caused each of the Plaintiffs significant distress by singling them out for unfavorable treatment as transgender girls.

Jenny Roe states that, before last year's volleyball season, she felt isolated at school. (Jenny Roe Dec. ¶ 8.) During her volleyball season, she was the happiest she had been in a long time and got the best grades of her high school career. (Debbie Roe Dec. ¶ 5; Jenny Roe Dec. ¶ 8.) When her parents were asked to provide paperwork relating to Jenny's transition during her season last year, Jenny cried for hours in fear of not being allowed to play. (Jenny Roe Dec. ¶ 9.) Jenny's ability to follow her medically prescribed treatment for gender dysphoria, which includes living as a girl, is deemed a key to her physical and mental health. Jenny has already been stigmatized due to being a transgender girl. In junior high school, another student threatened her life because she is transgender. (*Id.* ¶ 16.) She fears that the Ban will undo much of the progress she has made in being accepted and supported at school and make the stigma and discrimination worse.

Evidence shows that Jane Noe faces similar harm to her mental and physical health if the Ban cuts off her ability to swim on the girls' team in high school. Forcing Jane to compete on the boys' team would be painful and humiliating for her and would contradict the medical care she is receiving. (Jean Noe Dec. ¶ 13.) Jane's parents fear that Jane will not want to attend school in person if she cannot swim on the girls' team, and that she will miss out on all the benefits of in-person schooling. (*Id.* ¶ 17.) Jane has already been harmed by the public discussions around

the Ban. She will not watch any news coverage related to the legislation, and it is painful for her to know that others do not think of her as a girl. (*Id.* ¶ 18.)

Jill Poe also provides evidence of irreparable harm due to the Ban. Her outlook has improved significantly since she began receiving treatment for gender dysphoria. (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.*) 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. (Jill Poe Dec. ¶ 7.) The cross-country team begins its meets in August 2022, so Jill will not be able to compete with her team absent a preliminary injunction. (David Poe Dec. ¶¶ 7–8.)

The Defendants argue that, due to timing issues, the harms to Plaintiffs are not immediate. Perhaps each of the Plaintiffs will not be able to immediately participate in their school's girls' teams. But, by Plaintiffs' evidence, the stigma caused by the Ban has been immediate.

In sum, both the violation of constitutional rights and evidence of resulting effects support the Court's finding of irreparable harm to Plaintiffs from the Ban.

G. THE INJUNCTION IS NOT ADVERSE TO THE PUBLIC INTEREST, AND THE BAN'S INJURY TO PLAINTIFFS OUTWEIGHS ANY ALLEGED DAMAGE TO DEFENDANTS FROM AN INJUNCTION.

Further, the Plaintiffs must meet the 2nd and 3rd prongs of Rule 65A(e), as follows:

> (2) The threatened injury to the applicant outweighs whatever damage the proposed order or injunction may cause the party restrained or enjoined;
>
> (3) The order or injunction, if issued, would not be adverse to the public interest

Utah R. Civ. P. 65A(e).

The Plaintiffs seek to enjoin state action, so the second and third preliminary injunction factors merge. *See, e.g.*, *Aposhian v. Barr*, 958 F.3d 969, 978 (10th Cir. 2020) (citations omitted). Both the law and the facts weigh in favor of enjoining the Ban while this litigation proceeds.

As a matter of law, protecting constitutional freedoms is in the public interest. *See G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights."); *see also J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 140 (1994) ("The community is harmed by the State's participation in the perpetuation of invidious group stereotypes[.]").

In addition, the facts here show that the serious and continuing injuries imposed on Plaintiffs and other transgender girls by enforcement of this Ban outweigh any hypothetical harm

to the public that might arise from enjoining it. As discussed above, transgender student athletes represent an extremely small minority in Utah. During the last school year, only four of 75,000 high school athletes in Utah were transgender – and only one transgender girl played on a girls' team. *See* Gov. Cox Veto Letter at 11.

The Court is not persuaded that giving Plaintiffs and other transgender girls a chance to participate in school sports on an equal footing with other girls poses any threat to the public interest. That is particularly clear given that enjoining the Ban will not mean that Plaintiffs must be permitted to compete on girls' teams, but only that they may seek permission from a commission to do so. An injunction will trigger Part 10, which establishes a commission to assess each student's eligibility based on their individual circumstances. Utah Code §§ 53G-6-1002, 53G-6-1004(2). Enjoining the ban will cause no harm to the public.

In sum, the Plaintiffs meet each of the four elements of Utah R. Civ. P. 65A(e), and thus they are entitled to the extraordinary remedy of a preliminary injunction in this matter.

II. SUMMARY OF FINDINGS AND CONCLUSIONS

The Court finds that Plaintiffs have shown:

(1) Plaintiffs will suffer irreparable harm unless Defendants are enjoined from enforcing Part 9 against Plaintiffs;

(2) The threatened injury to Plaintiffs outweighs whatever damage Defendants may suffer as a result of an order preliminarily enjoining enforcement of Part 9 against Plaintiffs;

(3) The issuance of a preliminary injunction is in the public interest; and

(4) The Court finds that there is a substantial likelihood that the Plaintiffs will prevail on the merits of their claim under Article I, section 24 of the Utah Constitution. In more detail, Plaintiffs have shown a substantial likelihood that:

a) Part 9 creates a discriminatory classification based on transgender status;

i) Part 9's text discriminates against transgender girl athletes by defining "sex" to "mean[] 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), and then barring "male sex" students from competing on "a team designated for students of the female sex." *Id.* This language precisely excludes transgender girls, whose sex differs from their sex as determined by genetics and anatomy at birth;

ii) Part 9's classification based on transgender status is further confirmed by another part of H.B. 11, Utah Code §§ 53G-6-1001 through

1006 (“Part 10”), which sets out an alternative scheme if the ban is invalidated and specifically refers to students who have “undergone or [are] undergoing a gender transition,” Utah Code § 53G-6-1004(1)(b);

iii) In addition to the classifications in the text, the operation and effect of Part 9 are to single out transgender girl athletes;

b) A classification based on transgender status is a classification based on sex because it is impossible to discriminate against a person based on transgender status without discriminating against that person based on sex;

c) Part 9 imposes disparate treatment on Plaintiffs, who are transgender girls, by singling out transgender girls and categorically barring them from competing on girls’ sports teams while other girls remain free to compete;

d) Sex-based classifications, including classifications based on transgender status, are subject to heightened scrutiny;

e) Under heightened scrutiny, Part 9 must actually and substantially further a valid legislative purpose and be reasonably necessary to further a legitimate legislative goal; and

f) On the record presently before the Court, Part 9 is *not* reasonably necessary to further a legitimate legislative goal.

III. PRELIMINARY INJUNCTION

Based on the foregoing, and the entire record before the Court, the Court hereby GRANTS Plaintiffs’ Motion for Preliminary Injunction under Utah Rule of Civil Procedure 65A.

The Court hereby ENJOINS AND RESTRAINS Defendants and their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them who receive notice, in person or through counsel, or otherwise, of this order, from enforcing Part 9, Utah Code §§ 53G-6-901 through 903 (2022), against Plaintiffs because they are transgender girls.

IT IS FURTHER ORDERED that the security requirement of Utah Rule of Civil Procedure 65A is waived, because Plaintiffs have shown that there is a substantial reason for dispensing with it and because the Defendants do not object to the waiver.

This Preliminary Injunction is effective immediately upon entry and shall remain in effect pending the final resolution of this case, unless earlier extended or dissolved by the Court.

THIS ORDER IS SIGNED BY THE COURT AT THE TOP OF PAGE 1.

End of Order