

September 15, 2022

VIA CM/ECF

Catherine O'Hagan Wolfe
Clerk of the Court
United States Court of Appeals for the Second Circuit
Thurgood Marshall United States Courthouse
40 Foley Square
New York, New York 10007

RE: Notice of Supplemental Authority:



***A.M. v. Indianapolis Public Schools*, No. 1:22-cv-01075-JMS-DLP
2022 WL 2951430 (S.D. Ind. July 26, 2022);**

***Roe v. Utah High School Activities Ass'n*, No. 220903262, 2022 WL
3907182 (Utah Dist. Ct. Aug. 19, 2022)**

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Dear Ms. Wolfe:

Pursuant to Federal Rule of Appellate Procedure 28(j), Intervenor-Defendants Andraya Yearwood and Terry Miller respectfully submit the recent decisions in *A.M. v. Indianapolis Public Schools*, No. 1:22-cv-01075-JMS-DLP, 2022 WL 2951430 (S.D. Ind. July 26, 2022), and *Roe v. Utah High School Activities Ass'n*, No. 220903262, 2022 WL 3907182 (Utah Dist. Ct. Aug. 19, 2022), as supplemental authority in this case.

When Intervenor-Defendants filed their brief on October 7, 2021, two federal courts had already issued preliminary injunctions barring enforcement of state laws in Idaho and West Virginia categorically banning girls who are transgender from participating on girls' sports teams. *See* Intervenor-Defendants' Br. 10, 29. Since then, another federal court has issued a preliminary injunction—based on Title IX—against a similar Indiana law, *see A.M.*, 2022 WL 2951430, and a Utah state court has issued a preliminary injunction—based on the Utah constitution—against a similar Utah law, *see Roe*, 2022 WL 3907182.

Respectfully submitted,

/s/ Joshua A. Block

Joshua A. Block
Counsel for Intervenor Defendants-Appellees

Word count: 158

2022 WL 2951430

Only the Westlaw citation is currently available.

United States District Court, S.D.
Indiana, Indianapolis Division.

A.M., BY her mother and next friend, E.M., Plaintiff,

v.

INDIANAPOLIS PUBLIC SCHOOLS and
Superintendent, Indianapolis Public Schools, Defendants.

No. 1:22-cv-01075-JMS-DLP

|

Signed July 26, 2022

Attorneys and Law Firms

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ORDER

Jane Magnus-Stinson, Judge

*1 Indiana Code § 20-33-13-4, which took effect just a few weeks ago on July 1, 2022, explicitly 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. Plaintiff A.M. is a ten-year-old transgender girl whose birth-assigned sex was male. Since informing her family before she was four years old that she was a girl, she has been living as a girl and has consistently used her preferred female first name and dressed and appeared as a girl. A.M. has been diagnosed with gender dysphoria,¹ receives medical treatment, and is currently taking a puberty blocker. In 2021, an Indiana state court entered an order changing the gender marker on A.M.'s birth certificate to female and changing her legal first name to her preferred female first name. A.M. is a rising fifth grader at one of

the elementary schools within Defendant Indianapolis Public Schools ("IPS"), and her classmates know her only as a girl. Last school year, she played on an IPS girls' softball team, but IPS has informed A.M.'s mother that because of Indiana Code § 20-33-13-4, A.M. will not be able to play on the girls' softball team this year.

A.M., by her mother and next friend, E.M., initiated this litigation against IPS and the Superintendent of IPS ("the Superintendent"), alleging that § 20-33-13-4 violates Title IX, 20 U.S.C. § 1681(a), and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution by discriminating against A.M. and all transgender-female students. [Filing No. 1.] She has filed a Motion for Preliminary Injunction, seeking to enjoin the enforcement of § 20-33-13-4 so that she can play on the girls' softball team beginning in mid-August. [Filing No. 8.] IPS and the Superintendent take no position regarding whether the Court should issue a preliminary injunction, [Filing No. 35], but the State of Indiana ("the State") has intervened in this case and opposes A.M.'s motion, [Filing No. 27; Filing No. 36]. Additionally, both A.M. and the State have filed motions to exclude expert opinions offered by the other in connection with the Motion for Preliminary Injunction, [Filing No. 38; Filing No. 47], and five female athletes have filed a Motion for Leave to File Brief of Amici Curiae in support of the State's opposition to the issuance of a preliminary injunction ("the Amici Curiae Motion"), [Filing No. 31]. All of these motions are now ripe for the Court's adjudication.

I.

EVIDENTIARY MOTIONS

Before addressing A.M.'s Motion for Preliminary Injunction, the Court considers the Amici Curiae Motion, [Filing No. 31], the State's Motion to Exclude Opinions of Fortenberry, [Filing No. 38], and A.M.'s Motion to Exclude Expert Testimony, [Filing No. 47]. All of these motions bear on what evidence the Court will consider in ruling on the Motion for Preliminary Injunction.

A. The Amici Curiae Motion

*2 In its Amici Curiae Motion, the State seeks leave to file a Brief of Amici Curiae on behalf of five female athletes who, the State argues, "bring a unique perspective to this case and to the public discourse more generally." [Filing No. 31 at

2.] The State asserts that: (1) several of the proposed amici are female athletes who are materially interested in this case because they are involved in cases pending elsewhere; (2) all of the proposed amici offer a unique perspective on how § 20-33-13-4 will affect biological females; and (3) the amicus brief will assist the Court by offering “ideas, arguments, theories, insights, facts, or data that are not to be found in the parties’ briefs.” [Filing No. 31 at 2-4 (quotation and citation omitted).] A.M. did not file a response to the Amici Curiae Motion.

The Seventh Circuit “has held that whether to allow the filing of an amicus curiae brief is a matter of ‘judicial grace.’ ” *Voices for Choices v. Illinois Bell Tel. Co.*, 339 F.3d 542, 544 (7th Cir. 2003) (quoting *National Organization for Women, Inc. v. Scheidler*, 223 F.3d 615, 616 (7th Cir. 2000)). In deciding whether to permit such a brief, courts should consider “whether the brief will assist the judges by presenting ideas, arguments, theories, insights, facts, or data that are not to be found in the parties’ briefs.” *Voices for Choices*, 339 F.3d at 545. “The criterion is more likely to be satisfied in a case in which a party is inadequately represented; or in which the would-be amicus has a direct interest in another case that may be materially affected by a decision in this case; or in which the amicus has a unique perspective or specific information that can assist the court beyond what the parties can provide.” *Id.* (citing *Scheidler*, 223 F.3d at 616-17).

The five women who seek to file the amicus brief all wish to bring to the Court’s attention their experiences either participating in athletics before and after the enactment of Title IX, competing against transgender female athletes, or observing others competing against transgender female athletes. They include Debbie Powers, who played basketball in Indiana before Title IX was enacted and then coached volleyball after its enactment; Selina Soule, a Connecticut track and field athlete who lost to two transgender female athletes in her preliminary race at the state championship and did not qualify for the finals in her event by two spots; Chelsea Mitchell, a runner who lost to two transgender female athletes more than twenty times; Cynthia Monteleone, a track coach, athlete, and mother, who watched her daughter lose to a transgender female athlete at her first high school track meet; and Madison Kenyon, a collegiate track athlete who has competed against transgender female athletes and who watched her teammate be bumped from placing in a race by a transgender female athlete. The Court acknowledges these experiences, and discusses them generally below in

connection with its consideration of the public interest involved in the grant or denial of A.M.’s Motion for Preliminary Injunction. But the Court’s duty in deciding A.M.’s Motion for Preliminary Injunction is to consider the effect of an injunction on the parties to this litigation – A.M. on the one hand, and IPS and the Superintendent on the other – and not on the five amici or other hypothetical individuals. The Court finds that the proposed amicus brief will not aid the Court and does not alter its analysis. Accordingly, the Amici Curiae Motion, [Filing No. 31], is **DENIED**.

B. Motions to Exclude

1. The State’s Motion to Exclude Opinions of Fortenberry

In its Motion to Exclude Opinions of Fortenberry, the State asks the Court to exclude Dr. James Fortenberry’s opinions on “athletic performance, competitiveness, and transgender athletes” from consideration in connection with A.M.’s Motion for Preliminary Injunction. [Filing No. 39 at 8.] The State contends that A.M. did not adequately disclose all of the information underlying Dr. Fortenberry’s opinions. [Filing No. 39 at 3-5.] It argues further that Dr. Fortenberry is not an expert on those issues and that his opinions are not reliable because he has not pointed to any studies or data that support his opinions. [Filing No. 39 at 5-8.]

*3 In her response, A.M. outlines Dr. Fortenberry’s experience and argues that his report adequately identifies the source of his opinions, that his opinions are the same types that are set forth by the State’s experts, and that he is qualified to testify regarding the physical effects of testosterone-induced puberty on athletic advantage. [Filing No. 49 at 6-14.] A.M. also asserts that the fact that the State’s expert disagrees with Dr. Fortenberry’s opinions does not make those opinions unreliable. [Filing No. 49 at 14-17.]

The State replies that Dr. Fortenberry was obligated to disclose all materials he reviewed, not only those he actually relied upon. [Filing No. 54 at 3-4.] It also reiterates its arguments that Dr. Fortenberry is not an expert regarding athletic performance and that his opinions are not reliable. [Filing No. 54 at 8-14.]

As will be addressed below, the Court relies on the Declaration of Dr. Fortenberry only to set forth basic background information regarding gender identity and gender **dysphoria** – information with which the State’s expert does

not appear to disagree. [See Filing No. 8-1.] Because the State does not seek to exclude the only information Dr. Fortenberry provides that is relied upon by the Court, the State's Motion to Exclude Opinions of Fortenberry is **DENIED AS MOOT**. [Filing No. 38.]

2. A.M.'s Motion to Exclude Expert Testimony

A.M. seeks to exclude the expert testimony of Dr. James Cantor and Dr. Emma Hilton in its entirety, and the expert testimony of Dr. Tommy Lundberg to a certain extent. The Court considers each expert's testimony in turn.

a. Dr. Cantor

A.M. seeks to exclude the opinions of Dr. Cantor, who opines that gender **dysphoria** in adults is not the same as in children or adolescents, that many children who experience gender **dysphoria** cease to do so during puberty, that there is little evidence that social transition improves the mental health of gender dysphoric children, and that suicide in transgender individuals is rare. [See Filing No. 36 at 12-14.] A.M. argues that Dr. Cantor does not discuss any facts or circumstances specific to her or the facts of this case, but instead that he opines generally regarding the diagnosis of gender **dysphoria** and the standard of care. [Filing No. 48 at 8.] She also contends that Dr. Cantor's opinions are not relevant to the State's purported interests in connection with § 20-33-13-4 – to foster separate athletic opportunities for girls and boys, to promote the safety of student athletes, and to maintain the integrity of sports – that he is not qualified to offer his opinions, and that his opinions are unreliable because they conflict with applicable standards of care and legal precedent. [Filing No. 48 at 8-18.]

In its response, the State argues that Dr. Cantor's opinions are relevant because A.M. asserts that § 20-33-13-4 is overbroad and does not set forth an as-applied challenge, so Dr. Cantor need not address A.M.'s medical situation specifically. [Filing No. 57 at 14.] It asserts that Dr. Cantor is qualified even though he has not treated anyone under the age of 16 because he only seeks to “provide an overview of the scientific literature relevant to this case.” [Filing No. 57 at 15.] The State highlights Dr. Cantor's qualifications as a “neuroscientist and sex researcher” who completed “a clinical internship assessing and treating people with a wide range of sexual and gender identity issues.” [Filing No. 57

at 15 (quotation and citation omitted).] The State also takes issue with A.M.'s assertion that Dr. Cantor's methodology is flawed, noting that he relied on numerous studies for his opinions and that A.M. does not point to additional studies he should have considered but did not. [Filing No. 57 at 16-18.]

*4 A.M. reiterates many of her arguments in her reply brief. [Filing No. 58.]

The Court can make short shrift of A.M.'s request to exclude Dr. Cantor's opinions. The main disagreements Dr. Cantor has with Dr. Fortenberry relate to the effects of gender **dysphoria** generally and the appropriate treatment. Here, the Court is concerned with the effects of gender **dysphoria** on A.M. and the treatment she has had and hopes to receive, and A.M.'s mother has provided sufficient evidence such that the Court need not and will not look to the dueling testimony of Dr. Cantor and Dr. Fortenberry on those issues. Consequently, the Court **DENIES AS MOOT** A.M.'s Motion to Exclude as it applies to Dr. Cantor's testimony. [Filing No. 47.]

b. Dr. Hilton

A.M. seeks to exclude the opinions of Dr. Hilton, upon whom the State relies for testimony regarding “sex differences in development and how they affect sporting performance, ... [and] performance gaps between males and females in sports,” and for her proposition that puberty blockers do not completely negate “male athletic advantage.” [Filing No. 36 at 14-15.] A.M. argues that Dr. Hilton is not qualified to opine regarding differences in athletic performance between transgender women and cisgender women, or on the nature, treatment, or “reversibility” of gender **dysphoria**. [Filing No. 48 at 22-26.]

The State argues in its response that Dr. Hilton is qualified because she has a Ph.D. in developmental biology and extensive “experience in the field,” that her research with animals is applicable to humans, and that she can opine regarding “how biology affects sports performance.” [Filing No. 57 at 6-13.]

In her reply, A.M. argues that Dr. Hilton's general experience does not make her qualified to opine on the specific issues in this case. [Filing No. 58 at 10-15.]

As discussed above, the Court need not, and will not, consider expert evidence regarding the general effects of or appropriate

treatment for gender *dysphoria*. Additionally, the issue here is whether A.M. has met her burden of showing that the requirements for the issuance of a preliminary injunction are present under the circumstances of this case, and the Court – as discussed more fully below – need not, and will not, consider expert evidence regarding the athletic performance of transgender athletes in order to resolve that issue. Accordingly, A.M.’s Motion to Exclude is **DENIED AS MOOT** as it applies to Dr. Hilton’s testimony. [Filing No. 47.]

c. Dr. Lundberg

Finally, A.M. seeks to exclude Dr. Lundberg’s opinion that “biological differences between birth males and birth females affect [athletic] performance before the onset of puberty.” [Filing No. 48 at 31.] A.M. argues that Dr. Lundberg’s opinion is flawed for various reasons and “is not good science.” [Filing No. 48 at 26-31.] The state responds that Dr. Lundberg’s opinion is supported by available literature and data, and is consistent with his deposition testimony. [Filing No. 57 at 2-6.] A.M. argues in her reply that Dr. Lundberg’s opinion that males have an athletic advantage over females even before puberty due to biological differences is based on speculation. [Filing No. 58 at 16-18.]

*5 Consistent with the Court’s findings regarding the testimony of Dr. Fortenberry and Dr. Hilton, the Court need not consider opinions regarding whether differences between the sexes in athletic performance exist before the onset of puberty in order to decide A.M.’s Motion for Preliminary Injunction. The Court **DENIES AS MOOT** A.M.’s Motion to Exclude to the extent that Dr. Lundberg opines regarding that issue. [Filing No. 47.]²

II.

MOTION FOR PRELIMINARY INJUNCTION

A. Factual Background

1. Gender Identity and Gender Dysphoria

Gender identity refers to one’s sense of oneself as being a particular gender. [Filing No. 8-1 at 4.] Individuals whose gender identities are congruent with the sex that they were

assigned at birth are referred to as “cisgender.” [Filing No. 8-1 at 4.] Conversely, transgender and nonbinary individuals have gender identities that are not the same as their sex as assigned at birth. [Filing No. 8-1 at 4.] Studies indicate that up to 0.6% of adolescent and adult individuals in Indiana identify as transgender, but no studies provide reliable estimates of the population proportion of pre-pubertal children with gender *dysphoria*. [Filing No. 8-1 at 4.] Gender *dysphoria* is a recognized condition – codified in the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders and the World Health Organization’s International Classification of Diseases – that occurs when a transgender person experiences a constant sense of distress because of the incongruence between their experienced gender and their birth-assigned sex. [Filing No. 8-1 at 4.]

2. *A.M.*

A.M. is ten years old and finished fourth grade at an IPS elementary school in the spring of 2022. [Filing No. 23 at 1.] She will be attending the same elementary school for her fifth grade year. [Filing No. 23 at 1.] A.M.’s birth-assigned sex was male, but before she was four years old she informed her mother and other family members that she was a girl. [Filing No. 23 at 1.] At that time, A.M. informed her mother that she was having thoughts of mutilating herself to get rid of her penis. [Filing No. 23 at 1.] Since that time, A.M. has been living as a girl. [Filing No. 23 at 2.] She consistently uses her preferred female first name and consistently dresses and appears as a girl, both at home and in public. [Filing No. 23 at 2.] Very few people outside of A.M.’s immediate family know that A.M.’s sex assigned at birth was male. [Filing No. 23 at 2.]

A.M.’s mother has informed A.M.’s teachers and administrators at her school that A.M.’s sex assigned at birth was male, but her classmates know her only as a girl. [Filing No. 23 at 2.] The teachers and administrators at her school refer to her by her female first name and allow her to use the girls’ restrooms at the school. [Filing No. 23 at 2.]

A.M. was diagnosed with gender *dysphoria* by the Riley Gender Clinic when she was six years old. [Filing No. 23 at 2.] Gender *dysphoria* has caused A.M. to be suicidal, depressed, anxious, angry about her body, and afraid that she will not be able to be a girl. [Filing No. 23 at 2.] A.M. has been receiving care at the Gender Health Clinic at Riley Hospital in Indianapolis since 2018. [Filing No. 23 at 2.] Since August

2021, she has been taking a puberty blocker, Leuprorelin, to prevent her from going through puberty. [Filing No. 23 at 2.] A.M. is not experiencing any of the physiological changes that an adolescent male would experience during puberty. [Filing No. 23 at 3.] A.M. and her mother would like for her to be given estrogen, or some other appropriate feminizing hormone, when she is old enough so that she can develop female physical characteristics. [Filing No. 23 at 3.]

*6 In the fall of 2021, a Marion County court entered an order changing the gender marker on A.M.'s birth certificate from male to female and changing her first name to her preferred female first name. [Filing No. 23 at 3.] Also in 2021, A.M. played on her elementary school's girls' softball team, which plays in the late summer and fall. [Filing No. 23 at 3.] At that time, her team played against another IPS school that also had a girls' softball team. [Filing No. 23 at 3.] A.M. has enjoyed playing softball and did not appear to have a competitive advantage over the other girls on the team. [Filing No. 23 at 3.] In fact, she was one of the weaker athletes on the team. [Filing No. 23 at 3.] Playing softball helps to lessen the distressing symptoms of gender dysphoria that A.M. suffers from and has allowed her to experience her life more fully as a girl. [Filing No. 23 at 3.] Softball participation has resulted in a better self-image and confidence for A.M. [Filing No. 23 at 3.]

3. *Indiana Code § 20-33-13-4*

On May 24, 2022, both houses of the Indiana General Assembly approved House Enrolled Act 1041 over the veto of Governor Eric Holcomb, and it became law as codified at [Indiana Code § 20-33-13-4](#). [Section 20-33-13-4](#) applies to the following:

- (1) An athletic team or sport that is organized, sanctioned, or sponsored by a school corporation or public school in which the students participating on the athletic team or in the sport compete against students participating on an athletic team or in a sport that is organized, sanctioned, or sponsored by another school corporation, public school, or nonpublic school.
- (2) An athletic team or sport that is organized, sanctioned, or sponsored by a nonpublic school that voluntarily competes against an athletic team or sport that is organized, sanctioned, or sponsored by a school corporation or public school.

- (3) An athletic team or sport approved or sanctioned by an association for purposes of participation in a high school interscholastic event.

[Ind. Code § 20-33-13-1](#).

[Section 20-33-13-4](#) provides that:

- (a) A school corporation, public school, nonpublic school, or association that organizes, sanctions, or sponsors an athletic team or sport described in section 1 of this chapter shall expressly designate the athletic team or sport as one (1) of the following:

- (1) A male, men's, or boys' team or sport.
- (2) A female, women's, or girls' team or sport.
- (3) A coeducational or mixed team or sport.

- (b) *A male, based on a student's biological sex at birth in accordance with the student's genetics and reproductive biology*, may not participate on an athletic team or sport designated under this section as being a female, women's, or girls' athletic team or sport.

[Ind. Code § 20-33-13-4](#) (emphasis added).

[Section 20-33-13-5](#) provides a grievance procedure for students and parents, stating:

- (a) A student or parent of a student may submit a grievance to a school corporation, public school, nonpublic school, or association for a violation of section 4 of this chapter.

- (b) Each school corporation, public school, nonpublic school, and association described in section 4 of this chapter shall:

- (1) establish and maintain a grievance procedure; or
- (2) maintain a grievance or protest procedure that the school corporation, public school, nonpublic school, or association established before July 1, 2022;

for the resolution of a grievance submitted under this section.

[Ind. Code § 20-33-13-5](#).

4. *The Effect of Indiana Code § 20-33-13-4 on A.M.*

In 2022, there will be four elementary schools, including the elementary school A.M. attends, that will field girls’ softball teams that will compete against each other. [Filing No. 23 at 3.] IPS staff have informed A.M.’s mother that because of § 20-33-13-4, A.M. will not be able to play on the girls’ softball team. [Filing No. 23 at 4.] A.M.’s school has a boys’ baseball team, but she cannot play on it because she is not a boy and no one at school recognizes her as anything but a girl. [Filing No. 23 at 4.] A.M.’s mother believes that forcing A.M. to play on the boys’ team would undermine her core identity as a girl and her social transition that is essential to moderate the symptoms of her gender dysphoria, and would be so traumatic that she would not play on the boys’ team. [Filing No. 23 at 4.] Additionally, denying her the opportunity to participate on the girls’ team will “out” her to her classmates as someone who is not “really” a girl, which would be extremely traumatic for her, would undermine her social transition, and would injure her. [Filing No. 23 at 4.] A.M. would like to be able to play girls’ team sports as she progresses through school. [Filing No. 23 at 4.]

B. Standard of Review

*7 “A preliminary injunction is an extraordinary remedy.” *Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1044 (7th Cir. 2017). It is “ ‘an exercise of a very far-reaching power, never to be indulged in except in a case clearly demanding it.’ ” *Cassell v. Snyders*, 990 F.3d 539, 544 (7th Cir. 2021) (quoting *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S. of Am., Inc.*, 549 F.3d 1079, 1085 (7th Cir. 2008)). “[A] party requesting a preliminary injunction must generally show reasonable diligence.” *Benisek v. Lamone*, — U.S. —, 138 S. Ct. 1942, 1944, 201 L.Ed.2d 398 (2018) (holding that “plaintiffs’ unnecessary, years-long delay in asking for preliminary injunctive relief weighed against their request”).

The purpose of a preliminary injunction is to preserve the parties’ positions until a trial on the merits can be held. *GEFT Outdoors, LLC v. City of Westfield*, 922 F.3d 357, 371 (7th Cir. 2019). “To determine whether a situation warrants such a remedy, a district court engages in an analysis that proceeds in two distinct phases: a threshold phase and a balancing phase.” *Valencia v. City of Springfield, Ill.*, 883 F.3d 959, 965 (7th Cir. 2018) (quotation and citation omitted).

In the “threshold phase,” a party seeking a preliminary injunction must show that: “(1) it will suffer irreparable harm in the period before the resolution of its claim; (2) traditional legal remedies are inadequate; and (3) there is some likelihood of success on the merits of the claim.” *HH-Indianapolis, LLC v. Consol. City of Indianapolis & Cnty. of Marion, Ind.*, 889 F.3d 432, 437 (7th Cir. 2018) (citation omitted). “If the plaintiff fails to meet any of these threshold requirements, the court must deny the injunction.” *GEFT Outdoors, LLC*, 922 F.3d at 364 (quotation and citation omitted). “However, if the plaintiff passes that threshold ‘the court must weigh the harm that the plaintiff will suffer absent an injunction against the harm to the defendant from an injunction, and consider whether an injunction is in the public interest.’ ” *Id.* (quoting *Planned Parenthood of Ind. & Ky., Inc. v. Comm’r of Ind. State Dep’t of Health*, 896 F.3d 809, 816 (7th Cir. 2018)).

C. Discussion

A.M. argues that § 20-33-13-4 violates both Title IX and the Equal Protection Clause of the Fourteenth Amendment. The Court first considers whether A.M. has met the standard for the issuance of a preliminary injunction as to her Title IX claim.

1. *Title IX Claim*

a. Likelihood of Success on the Merits

In support of her Motion for Preliminary Injunction, A.M. argues that she will succeed on the merits of her Title IX claim because discrimination on the basis of a student’s transgender status constitutes discrimination on the basis of sex under Title IX. [Filing No. 24 at 17.] A.M. points to *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017), and *Bostock v. Clayton Cnty., Ga.*, — U.S. —, 140 S. Ct. 1731, 207 L.Ed.2d 218 (2020), to support her argument. [Filing No. 24 at 17-19.] A.M. asserts that, under § 20-33-13-4, she is being treated differently than her cisgender classmates because they can play on the girls’ softball team and she cannot, based solely on the fact that she is a transgender girl. [Filing No. 24 at 20.] A.M. points to the fact that the State of Indiana changed the gender marker on her birth certificate and recognizes that she is a girl, and that because she is taking puberty blockers, she “is indistinguishable from other girls her age and she has no competitive or physiological advantages over her teammates or opponents” and “is not particularly accomplished at the

sport.” [Filing No. 24 at 20.] A.M. asserts that because she, as a transgender female, is being subjected to different rules, sanctions, and treatment than non-transgender students, § 20-33-13-4 violates Title IX. [Filing No. 24 at 21.]

*8 In its response, the State argues that “[t]he statutory context of Title IX confirms that its drafters understood sex as a binary concept.” [Filing No. 36 at 19.] It asserts that *Whitaker* is distinguishable because the Seventh Circuit applied the wrong standard to the likelihood of success on the merits analysis, determining that the plaintiff had a “better than negligible” chance of succeeding rather than requiring a “strong showing” of success on the merits. [Filing No. 36 at 20-21.] The State also argues that the Seventh Circuit in *Whitaker* did not address “the interplay between Title IX’s ban on sex discrimination and its requirement that schools provide equal opportunities to girls.” [Filing No. 36 at 21.] It further contends that *Bostock* involved Title VII, and that the Supreme Court expressly refused to “prejudge any ... question” about what “other federal or state laws” addressing “sex discrimination” require. [Filing No. 36 at 22 (quotation and citation omitted).] The State asserts that § 20-33-13-4 actually promotes the same goals as Title IX by providing equal opportunities to both sexes. [Filing No. 36 at 22.] It further argues that § 20-33-13-4 restricts a male, based on a student’s biological sex at birth, from participating in a girls’ athletic sport, but A.M. claims discrimination based on her status as transgender – a status that, it argues, Title IX does not govern. [Filing No. 36 at 22.] The State argues that changing A.M.’s birth certificate does not change her biological sex at birth, “which is [§ 20-33-13-4’s] only concern.” [Filing No. 36 at 23.] It contends that A.M. is then left with a claim of discrimination based on gender identity, which Title IX does not address. [Filing No. 36 at 23.] The State also asserts that Title IX does not govern opportunities for “high and low testosterone individuals, however that might be defined,” and that A.M.’s individual athletic performance “says nothing about Title IX.” [Filing No. 36 at 24.] Finally, the State argues that A.M.’s position creates an untenable situation for schools because Title IX requires schools to create equal opportunities for girls in athletics, but “[a]ccess of biological males to girls’ sports threatens those opportunities and places Title IX in tension with itself.” [Filing No. 36 at 24-25.]

In her reply, A.M. argues that *Whitaker* remains good law, and that the Seventh Circuit’s application of the “better than negligible” standard does not affect its holding that discriminating against a transgender student based on his or her transgender status is discrimination on the basis of sex

and is prohibited by Title IX. [Filing No. 50 at 5-7.] She asserts that although the Supreme Court in *Bostock* did not address the propriety of sex-segregated athletics under Title IX, it did hold that discriminating against an individual for being transgender constitutes sex discrimination. [Filing No. 50 at 8.] A.M. argues that the State asks the Court to ignore the Seventh Circuit’s holding in *Whitaker*, and that Title IX “does not purport to define transgender students by their sex assigned at birth or by other physiological characteristics” in any event. [Filing No. 50 at 10.] A.M. takes issue with the State’s argument that she wants participation in girls’ sports to be determined by self-identification, testosterone, and athletic skill, arguing that “it is insulting to A.M. and other transgender persons to imply that persons will casually choose or switch gender identities,” and that “the State presents no evidence that such a practice is an actual problem in need of [a] solution.” [Filing No. 50 at 11.] A.M. notes that IPS does not claim that allowing A.M. to play on the girls’ softball team would place it in a difficult position and that, instead, IPS has no issue with letting her play. [Filing No. 50 at 11.] Finally, A.M. points to “numerous athletic organizations that have found ways to accommodate transgender persons and that would allow A.M. to participate if she had the athletic ability,” including the Indiana High School Athletic Association’s (“IHSAA”) policy that allows transgender athletes to play sports consistent with their gender identities if certain standards are met, such as completing one year of hormone treatment for transgender females. [Filing No. 50 at 12-13.]

“The likelihood of success on the merits is an early measurement of the quality of the underlying lawsuit.” *Michigan v. U.S. Army Corps of Eng’rs*, 667 F.3d 765, 788 (7th Cir. 2011). “A plaintiff need not prove beyond a preponderance of the evidence that it will win on the merits, but it must at least make a ‘strong’ showing of likelihood of success.” *Protect Our Parks, Inc. v. Buttigieg*, 39 F.4th 389, 397 (7th Cir. 2022) (citing *Ill. Republican Party v. Pritzker*, 973 F.3d 760, 762-63 (7th Cir. 2020)).

Title IX provides that no person “shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance.” 20 U.S.C. § 1681(a). Among other things, an institution covered by Title IX may not:

- *9 (1) Treat one person differently from another in determining whether such person satisfies any requirement

or condition for the provision of such aid, benefit, or service;

(2) Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;

(3) Deny any person such aid, benefit, or service; [or]

(4) Subject any person to separate or different rules of behavior, sanctions, or other treatment.

34 C.F.R. § 106.31(b). The parties do not dispute that IPS receives federal funds and is an institution covered by Title IX. The question is whether A.M. has a strong likelihood of showing that IPS's and the Superintendent's application of § 20-33-13-4 to prohibit A.M. from playing on the girls' softball team constitutes discrimination against A.M. based on her sex.

The United States Supreme Court has not yet considered whether "sex" for purposes of Title IX means just an individual's biological sex at birth, or also includes their gender identity. In *Bostock*, however, it considered the meaning of "sex" in the Title VII context, a context that the Seventh Circuit has found instructive when defining "sex" under Title IX. See *Whitaker*, 858 F.3d at 1047 ("[T]his court has looked to Title VII when construing Title IX."); *Smith v. Metro. Sch. Dist. Perry Twp.*, 128 F.3d 1014, 1023 (7th Cir. 1997) ("[I]t is helpful to look to Title VII to determine whether the alleged sexual harassment is severe and pervasive enough to constitute illegal discrimination on the basis of sex for purposes of Title IX."). In *Bostock*, the Supreme Court found that an employer violates Title VII by firing an employee based on their status as homosexual or transgender. In doing so, the Supreme Court stated:

[H]omosexuality and transgender status are inextricably bound up with sex. Not because homosexuality or transgender status are related to sex in some vague sense or because discrimination on these bases has some disparate impact on one sex or another, but because to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex....

At bottom, these cases involve no more than the straightforward application of legal terms with plain and settled meanings. For an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against

individual men and women in part because of sex. That has always been prohibited by Title VII's plain terms.

Bostock, 140 S. Ct. at 1742-43. As to the fact that Title VII does not mention homosexuality or transgender status as a protected characteristic, the Supreme Court "agree[d] that homosexuality and transgender status are distinct concepts from sex," but found that:

[D]iscrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second. Nor is there any such thing as a 'canon of donut holes,' in which Congress's failure to speak directly to a specific case that falls within a more general statutory rule creates a tacit exception. Instead, when Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule.... As enacted, Title VII prohibits all forms of discrimination because of sex, however they may manifest themselves or whatever other labels might attach to them.

*10 *Id.* at 1746-47.

The Supreme Court has not similarly considered whether discrimination based on an individual's transgender status constitutes discrimination on the basis of sex in the Title IX context, and the Court acknowledges the Supreme Court's caveat in *Bostock* that no "other federal or state laws that prohibit sex discrimination" were before it. 140 S. Ct. at 1753. But the Supreme Court also did not foreclose the application of its holding to the Title IX context, and the Court finds it appropriate to look to *Bostock* for guidance here. Moreover, the Seventh Circuit has considered whether discrimination based on one's status as transgender constitutes discrimination based on sex under Title IX. In *Whitaker*, decided more than three years before *Bostock*, the Seventh Circuit found that a school's unwritten policy barring a transgender boy from using the boys' bathroom violated Title IX. The Seventh Circuit stated:

By definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth.... A policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX. The School District's policy also subjects [plaintiff], as a transgender student, to different rules, sanctions, and treatment than non-transgender students, in violation of Title IX.

Whitaker, 858 F.3d at 1048-49. As to the School District's argument in *Whitaker* that the plaintiff could not “unilaterally declare” his gender, the Seventh Circuit noted that “[t]his is not a case where a student has merely announced that he is a different gender. Rather, [plaintiff] has a medically diagnosed and documented condition. Since his diagnosis, he has consistently lived in accordance with his gender identity.” *Id.* at 1050.

Courts within this district have followed *Whitaker* and *Bostock*, finding that it is a violation of Title IX for a public institution to discriminate against an individual on the basis of their transgender status in the context of prohibiting a transgender student from using the bathroom of the sex with which he or she identifies. *See, e.g., B.E. v. Vigo Cnty. Sch. Corp.*, — F. Supp. 3d —, 2022 WL 2291763 (S.D. Ind. June 24, 2022) (granting motion for preliminary injunction filed by transgender male students who were undergoing gender-affirming testosterone therapy, and who have been prohibited from using male bathrooms at school); *A.C. by M.C. v. Metro. Sch. Dist. of Martinsville*, — F. Supp. 3d —, 2022 WL 1289352 (S.D. Ind. April 29, 2022) (holding that transgender male student had established a likelihood of success on the merits of his claim that school district violated Title IX when it prohibited him from using male bathrooms). The court in *B.E.* specifically noted that the fact that the Seventh Circuit applied the “better than negligible” standard in *Whitaker* to the issue of whether there was a likelihood of success on the merits does not affect *Whitaker*'s ultimate holding. *B.E.*, — F.Supp.3d at —, 2022 WL

2291763 at *4 (“[I]t makes sense intuitively that a court's view is not rendered meaningless merely because it looked through the wrong lens.... That seems particularly true here, where the *Whitaker* court never indicated that the issue was a close one or hinted that the low threshold it applied was determinative.”). And the court in *A.C. by M.C.* stated that *Whitaker* “remains good law and thus is binding on this court.” — F.Supp.3d at —, 2022 WL 1289352, at *6.

*11 Applying *Bostock* and *Whitaker* – both of which are binding on this Court – to the facts of this case leads to a result that is not even a close call: A.M. has established a strong likelihood that she will succeed on the merits of her Title IX claim. IPS and the Superintendent cannot discriminate against A.M. based on her sex, and § 20-33-13-4 will force them to do just that. A law that prohibits an individual from playing on a sports team that does not conform to his or her gender identity “punishes that individual for his or her gender non-conformance,” *Whitaker*, 858 F.3d at 1049, which violates the clear language of Title IX. *See also B.P.J. v. West Virginia St. Bd. of Educ.*, 550 F. Supp. 3d 347, 356 (S.D. W. Va. 2021) (granting preliminary injunction in favor of transgender female who wished to join girls’ cross country and track teams but was prohibited by West Virginia law from doing so, and noting “[a]ll other students in West Virginia secondary schools – cisgender girls, cisgender boys, transgender boys, and students falling outside of any of these definitions trying to play on the boys’ teams – are permitted to play on sports teams that best fit their gender identity. Under this law, B.P.J. would be the only girl at her school ... that is forbidden from playing on a girls’ team and must join the boys’ team.... [T]his law both stigmatizes and isolates B.P.J.”). And, notably, § 20-33-13-4 does not prohibit all transgender athletes from playing with the team of the sex with which they identify – it only prohibits transgender females from doing so. The singling out of transgender females is unequivocally discrimination on the basis of sex, regardless of the policy argument as to why that choice was made. The Court finds that A.M. has established a strong likelihood that she will succeed on the merits of her Title IX claim.

b. Adequacy of Traditional Legal Remedies

A.M. argues that she has no adequate remedy at law because “the emotional harm identified by [A.M.] could not be fully rectified by an award of damages.” [Filing No. 24 at 29 (quotation and citation omitted).] The State does not address the adequacy of traditional legal remedies requirement in its

response brief, [see Filing No. 36], nor does A.M. address it in her reply brief, [Filing No. 50].

A.M.'s mother has identified significant emotional harm that she believes A.M. will suffer if she cannot play on the girls' softball team, including that it will undermine her social transition and potentially cause her the trauma of being "outed" as not "really" a girl. [Filing No. 23 at 4.] The Court finds that this emotional harm could not be addressed adequately through a remedy at law. See *Whitaker*, 858 F.3d at 1046 (holding there was no adequate remedy at law where transgender male had shown that he would suffer prospective emotional harm absent an injunction allowing him to use male restrooms at school). A.M. has sustained her burden of showing that there is no adequate remedy at law for the harm she would suffer absent a preliminary injunction.

c. Likelihood of Suffering Irreparable Harm Absent an Injunction

A.M. argues that a violation of Title IX constitutes irreparable harm *per se*. [Filing No. 24 at 28.] She also asserts that she will suffer the irreparable harm of having her social transition disrupted and being "outed" as a transgender girl. [Filing No. 24 at 28-29.]

The State responds that there are many activities that "enable social transition," and relies on its expert witness, Dr. Cantor, for the proposition that "there is little evidence that transition improves the mental well-being of children." [Filing No. 36 at 36 (quotation and citation omitted).]

In her reply, A.M. reiterates her argument that denying an injunction would force her to disclose that she is a transgender girl, which would be "an irreparable event that would be extremely traumatizing for her." [Filing No. 50 at 19-20.]

"A finding of irreparable harm to the moving party, if the injunction is denied, is 'a threshold requirement for granting a preliminary injunction.'" *DM Trans, LLC v. Scott*, 38 F.4th 608, 617 (7th Cir. 2022) (quoting *Life Spine, Inc. v. Aegis Spine, Inc.*, 8 F.4th 531, 539 (7th Cir. 2021)). Establishing a likelihood of irreparable harm "requires more than a mere possibility of harm. It does not, however, require that the harm actually occur before injunctive relief is warranted. Nor does it require that the harm be certain to occur before a court may grant relief on the merits." *Whitaker*, 858 F.3d at 1045 (quotations and citations omitted). The Seventh Circuit

has instructed that "[h]arm is irreparable if legal remedies available to the movant are inadequate, meaning they are seriously deficient as compared to the harm suffered." *DM Trans, LLC*, 38 F.4th at 618.

*12 As discussed above, A.M.'s mother has explained that although teachers and administrators at A.M.'s school know that A.M.'s sex at birth was male, she is known at school only as a female, is referred to by her female first name, and uses the girls' restrooms at school. [Filing No. 23 at 2.] She explains further that A.M.'s gender dysphoria has caused A.M. to be suicidal, depressed, anxious, and angry. [Filing No. 23 at 2.] A.M.'s mother believes that playing softball helped "to lessen the distressing symptoms of [A.M.'s] gender dysphoria and allowed her to experience her life more fully as a girl," which has "resulted in a better self-image and confidence." [Filing No. 23 at 4.] A.M.'s mother notes that prohibiting A.M. from playing on the girls' softball team will "out" her to her classmates as someone who is not "really" a girl, and "[t]his will be extremely traumatic for her and will also undermine her social transition and will injure her." [Filing No. 23 at 4.] The Court finds that A.M. has sustained her burden of showing that she would suffer irreparable harm absent an injunction.

d. Balance of Harms

A.M. argues that the balance of harms favors entering a preliminary injunction, stating that "[i]t is difficult to theorize what possible harm can occur in maintaining the status quo so that A.M. may continue to play with the other girls on the softball team." [Filing No. 24 at 29.] She asserts that an injunction will only force IPS to conform its conduct to Title IX, which it cannot claim is harmful. [Filing No. 24 at 29.]

In response, the State argues that issuing an injunction would "inflict harm to the governance process" and also "could force biological girls to compete against students who identify as girls but retain all the biological advantages of boys." [Filing No. 36 at 37.]

A.M. asserts in her reply that "no harm has occurred by allowing A.M. to play on her softball team and this is all that will occur when the preliminary injunction is granted." [Filing No. 50 at 20.]

Once the plaintiff has met her burden of showing that she has a likelihood of success on the merits, that she has no adequate

remedy at law, and that she will suffer irreparable harm absent an injunction, “the court must weigh the harm that the plaintiff will suffer absent an injunction against the harm to the defendant from an injunction, and consider whether an injunction is in the public interest.” *Planned Parenthood of Ind. and Ky., Inc.*, 896 F.3d at 816. The Seventh Circuit “employs a sliding scale approach,” where “[t]he more likely the plaintiff is to win, the less heavily need the balance of harms weigh in [her] favor; the less likely [she] is to win, the more need it weigh in [her] favor.” *Id.* (quoting *Valencia*, 883 F.3d at 966).

As the Court has already recognized, A.M. has presented evidence that the harm she would face absent an injunction is substantial. On the other side of the scale, there is no evidence of concrete harm to IPS or the State that would occur if an injunction issues. The harm the State suggests could occur – that biological girls will be forced to compete against transgender girls who allegedly have an athletic advantage – is speculative, and there is no evidence in the record that allowing A.M. to play on the girls’ softball team will make this harm a reality. Indeed, A.M. played on the girls’ softball team last season, and the State has not set forth any evidence that this harmed anyone. There is no evidence that other players complained about A.M. being on the team due to an athletic advantage, or that she actually has an athletic advantage. Given the strong likelihood that A.M. will succeed on the merits of her Title IX claim, the State would need to show that the balance of harms significantly weighs in IPS’s or the State’s favor. *Planned Parenthood of Ind. and Ky., Inc.*, 896 F.3d at 816. It has not done so, and the Court finds that the balance of harms weighs in favor of issuing a preliminary injunction.

e. Public Interest

Finally, A.M. argues that the public interest would be furthered by issuing an injunction because “an injunction in favor of ... the rights secured by Title IX is always in the public interest.” [Filing No. 24 at 29-30.]

*13 The State reiterates its balance-of-harms arguments – that an injunction would harm the governance process and could harm others by “forc[ing] biological girls to compete against students who identify as girls but retain all the biological advantages of boys.” [Filing No. 36 at 37.]

In her reply, A.M. also relies on her balance-of-harms arguments, noting that no harm has occurred from A.M. playing on the girls’ softball team thus far. [Filing No. 50 at 20.]

After finding that the plaintiff has satisfied the threshold requirements for a preliminary injunction, the Court must also consider “whether an injunction is in the public interest.” *Planned Parenthood of Ind. and Ky.*, 896 F.3d at 816. Again, the State has not presented any tangible evidence that the public will be harmed by the issuance of an injunction in this case. The State relies on situations where high school female athletes in other states have had to compete against transgender females, to the detriment of their athletic goals. The State warns of dire consequences if an injunction issues that “reaches beyond A.M. alone.” [Filing No. 36 at 37.] The Supreme Court in *Bostock* acknowledged similar “policy appeals” set forth by employers arguing that Title VII should not be applied to protect homosexual and transgender employees, noting:

[T]he employers are left to abandon their concern for expected applications and fall back to the last line of defense for all failing statutory interpretation arguments: naked policy appeals. If we were to apply the statute’s plain language, they complain, any number of undesirable policy consequences would follow.... Gone here is any pretense of statutory interpretation; all that’s left is a suggestion we should proceed without the law’s guidance to do as we think best. But that’s an invitation no court should ever take up. The place to make new legislation, or address unwanted consequences of old legislation, lies in Congress.

Bostock, 140 S. Ct. at 1753.

Following the Supreme Court’s lead, the Court declines the State’s invitation to delve into the “what ifs.” Here, in this case, the public interest lies in enjoining IPS and the Superintendent from applying a statute that discriminates against A.M. based on her status as a transgender female in violation of Title IX. *See B.E.*, — F.Supp.3d at —,

2022 WL 2291763, at *7 (finding it was in the public interest to issue injunction prohibiting school district from implementing policy requiring transgender boys to use girls' restrooms). The State has not presented any countervailing legal right that should outweigh A.M.'s right to be protected by Title IX.

f. Security

A.M. argues in support of her Motion for Preliminary Injunction that the Court should not require a bond because the issuance of a preliminary injunction "will not impose any monetary injuries on IPS." [Filing No. 24 at 30.] IPS and the Superintendent do not discuss the bond requirement in their response brief.

Federal Rule of Civil Procedure 65(c) provides that a court may issue a preliminary injunction "only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined." But if "there's no danger that the opposing party will incur any damages from the injunction," a court may choose not to require a bond. *Habitat Educ. Ctr. v. U.S. Forest Serv.*, 607 F.3d 453, 458 (7th Cir. 2010). Because IPS and the Superintendent do not address A.M.'s argument in their response, the Court presumes that they do not object to A.M.'s request that the Court not require a bond. *See Sojka v. Bovis Lend Lease, Inc.*, 686 F.3d 394, 395 (7th Cir. 2012) (noting that a party concedes a point by failing to respond to it in their response brief). Consequently, and because IPS and the Superintendent have not shown that they will incur any damages if an injunction issues in any event, the Court will not require A.M. to post a bond.

*14 In sum, A.M. has established that she has a strong likelihood of succeeding on the merits of her claim that IPS's and the Superintendent's application of § 20-33-13-4 to prohibit her from playing on the girls' softball team violates Title IX. She has also established that she would suffer irreparable harm for which there is no adequate legal remedy, and that both the balance of harms and the public interest favor issuing an injunction. Consequently, A.M.'s Motion for Preliminary Injunction, [Filing No. 8], is **GRANTED** and the Court will not require A.M. to post a bond.

2. *Equal Protection Claim*

A.M. also alleges that prohibiting her from playing on the girls' softball team pursuant to § 20-33-13-4 violates her rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. [Filing No. 1 at 13.] "[F]ederal courts are supposed to do what they can to avoid making constitutional decisions, and strive doubly to avoid making unnecessary constitutional decisions." *ISI Int'l, Inc. v. Borden Ladner Gervais LLP*, 256 F.3d 548, 552 (7th Cir. 2001). Because the Court has found that A.M. is entitled to a preliminary injunction on her Title IX claim, it will not consider whether she is entitled to a preliminary injunction on her Equal Protection claim.

III.

CONCLUSION

A.M.'s challenge to the lawfulness of § 20-33-13-4 raises controversial issues regarding the boundaries of Title IX and whether and how those boundaries should stretch and shift in an ever-changing world. But "the limits of the drafters' imagination supply no reason to ignore the law's demand. When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit." *Bostock*, 140 S. Ct. at 1737. A.M. has shown – along with satisfying the other requirements for the issuance of a preliminary injunction – that she has a likelihood of succeeding on the merits of her claim that § 20-33-13-4 violates Title IX. Accordingly, the Court **GRANTS** A.M.'s Motion for Preliminary Injunction, [8]. The Court also **DENIES** the Motion for Leave to File Brief of Amici Curiae From Five Female Athletes in Support of Defendant-Intervenor the State of Indiana, [31], **DENIES AS MOOT** the State's Motion to Exclude Opinions of Fortenberry, [38], **DENIES AS MOOT** A.M.'s Motion to Exclude Expert Testimony, [47], and **DENIES AS MOOT** the State's Motion for Leave to File Surreply in Opposition to Plaintiff's Motion to Exclude Expert Testimony, [59]. IPS and the Superintendent are **PRELIMINARILY ENJOINED** until further order of this Court from applying *Indiana Code § 20-33-13-4* to prohibit A.M. from playing on the girls' softball team. The injunction shall issue in a separate Order.

All Citations

--- F.Supp.3d ----, 2022 WL 2951430

Footnotes

- 1 As discussed more fully below, gender [dysphoria](#) occurs when a transgender person experiences a constant sense of distress because of the incongruence between their experienced gender and their birth-assigned sex. [Filing No. 8-1 at 4.]
- 2 The State has filed a Motion for Leave to File Surreply in Opposition to Plaintiff's Motion to Exclude Expert Testimony. [Filing No. 59.] Because the Court denies as moot A.M.'s Motion to Exclude, it also **DENIES AS MOOT** the State's Motion for Leave to File Surreply. [Filing No. 59.]

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2022 WL 3907182 (Utah Dist.Ct.) (Trial Order)
District Court of Utah,
Third Judicial District.
Salt Lake County

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.

No. 220903262.
August 19, 2022.

West Codenotes

Validity Called into Doubt

Utah Code Ann. §§ 53G-6-901, 53G-6-902, 53G-6-903

Order Granting Plaintiffs' Motion for Preliminary Injunction

Keith Kelly, Judge.

*1 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:

*2 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).

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.

*3 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.

*4 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.

*5 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 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.

*6 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.

*7 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. Dept 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. (Simmer 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.

*8 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. (Simmer 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.

*9 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 65 A(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. Ziriakx*, 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.

*10 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.

***11** 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.

*12 IT IS FURTHER ORDERED that the security requirement of Utah Rule of Civil Procedure 65 A 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.

End of Order

The Order of the Court is stated below:

Dated: August 19, 2022

08:26:29 AM

/s/ KEITH KELLY District

Court Judge

Footnotes

- 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/>.
- 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”).

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