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Salt Lake County Judge Keith I. Kelly issued a preliminary injunction partially preventing the implementation of a law banning trans student-athletes in Utah.

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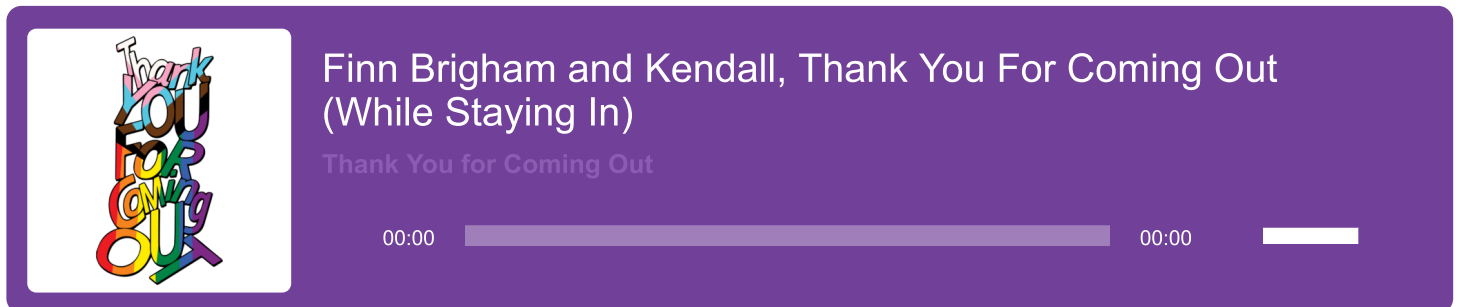
The Utah State Legislature's second attempt to exclude all transgender girls from school sports teams encountered a roadblock on August 19 when Salt Lake County Judge Keith I. Kelly issued a preliminary injunction partially preventing its implementation.

H.B. 2 was enacted by the legislature last winter over the veto of Governor Spencer Cox. Cox had also vetoed an earlier bill that was passed over his veto, which was subsequently declared unconstitutional by a federal judge. A federal magistrate has already ruled that H.B. 2 is not consistent with the prior decision.

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The legislature tried to evade the earlier ruling by including a conditional provision in the bill under which a court ruling striking down the total exclusion of transgender girls would result in the formation of a state commission that would decide on a case-by-case basis whether any transgender girl who sought to play on a girls' team should be allowed to do so. This decision would turn on two factors: whether the girl's participation would threaten health and safety, and whether her participation would give her an unfair advantage over cisgender girls with whom she would be playing or competing.



The image shows a YouTube video player interface. On the left is a thumbnail with the text 'Thank YOU FOR COMING OUT' in colorful, stylized letters. To the right of the thumbnail, the video title 'Finn Brigham and Kendall, Thank You For Coming Out (While Staying In)' is displayed in white text on a purple background. Below the title is the subtitle 'Thank You for Coming Out' in a smaller font. At the bottom of the player, there is a progress bar showing '00:00' on both ends, indicating the video has not yet started.

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Three parents of transgender girls sued on their behalf to get rid of the categorical ban. Each of the girls was diagnosed with gender dysphoria prior to the onset of puberty, and they all began treatment with puberty blockers, so they have not experienced male puberty. One of them has

advanced to treatment with female hormones, and one of the girls has already obtained a legal name change and new birth certificate identifying her as female. They range in age from 13 to 16, and wish to compete in volleyball, track and field, and swimming.

Judge Kelly began his opinion by explaining that the plaintiffs were only seeking to enjoin the part of the law that excludes all transgender girls. They are not attacking the conditional provision to establish the state commission to make case-by-case determinations, presumably because they are reasonably confident that these girls who have not experienced male puberty will likely be allowed to play on girls' teams under a fair process.

The judge's legal analysis begins by explaining the Utah law permitting transgender minors to legally change the gender designations on their birth certificates, which requires "evidence of appropriate clinical care or treatment for gender transitioning or change by a licensed medical professional" but does not specifically require surgical transition, which is generally not available to minors under professional standards established by the World Professional Association for Transgender Health (WPATH).

Focusing on the most important criteria for issuing a preliminary injunction, the judge found that the plaintiffs had shown "a substantial likelihood of success in showing that the ban violates the uniform operation of laws clause of the Utah Constitution." This clause is the equivalent of the Equal Protection Clause in the 14th Amendment of the federal Constitution. The judge found that the ban on transgender girls playing on girls' sports teams creates a sex-based classification that discriminates against the plaintiffs as transgender girls. Following the reasoning of the US Supreme Court's 2020 decision in *Bostock v. Clayton County*, a federal employment discrimination case under Title VII of the Civil Rights Act of 1964, Judge Kelly agreed that "it is impossible to discriminate against a person for being transgender without discriminating against that individual based on sex," quoting from Justice Neil Gorsuch's opinion for the Supreme Court in that case. And, of course, he noted that on its face, the ban creates a sex classification by banning transgender girls but not transgender boys from playing on teams with whose gender they identify.

Under Utah Constitutional law, discriminating based on sex is subject to heightened judicial scrutiny, requiring the government to show that the challenged provision is reasonably necessary to further a legitimate legislative goal. "Proponents of the ban claimed that it is necessary to protect girls' sports," wrote Kelly. "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. This physical difference, together with a recognition that girls have 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." But, he concluded, "these justifications do not support the ban."

He found that H.B. 2 "does not redress historical discrimination against women and girls in sports" and, unlike boys, "transgender girls do not have many opportunities to play school sports," and under the ban they would have none. But perhaps most convincingly, the record showed that there are only four transgender girls who have participated in sports during the past season in the entire state, and only one of them was competing on a women's team, so, he concluded, "in Utah, transgender girls would not substantially displace cisgender girls" because the numbers just are not there.

He also found that the evidence offered by the plaintiffs showed that “there is no basis to assume that transgender girls have an automatic physiological advantage over other girls” when they have taken puberty blockers and thus have not experienced the testosterone infusion that boys experience during puberty.

A complete ban is too broad, as equal protection doctrine requires “narrow tailoring” of laws that discriminate based on prohibited grounds. The court pointed out that the legislature has conceded that narrow tailoring is possible on this issue by setting up the alternative of a case-by-case decision by a state commission to determine whether any individual transgender girl should be allowed to play. Such an individualized process would achieve the purported legislative goal of “protecting girls’ sports” from unfair or dangerous competition without having to automatically disqualify all transgender girls.

Turning to the other requirements for preliminary relief, the judge found that the plaintiffs had shown irreparable harm if the ban went into effect, as all three of them hoped to play on women’s teams in the school year beginning next month, and monetary damages issued after a trial could not compensate for having lost the opportunity to participate on the girls’ sports teams. Courts generally hold that any deprivation of a constitutional right is an irreparable harm in any event. The court also found that it is always in the public interest to prevent a violation of constitutional rights, and that the injury to plaintiffs from allowing the ban to go into effect far outweighed any hypothetical injury to the defendants — who in this case are the Utah High School Activities Association, two local school districts in which the plaintiffs are enrolled as students, and the school superintendents in those districts.

“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,” Kelly concluded. “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,” since his preliminary injunction would trigger the conditional provision to establish the commission to do a case-by-case analysis. The preliminary injunction will remain in effect while the remainder of the case proceeds through the Utah state courts.

By relying solely on the state constitution to make their case, the plaintiffs have insulated it against being removed by the defendants to federal court.

The plaintiffs are represented by the ACLU of Utah, the National Center for Lesbian Rights, and attorneys from Wilson Sonsini Goodrich & Rosati, whose litigation team for this case includes two retired justices of the Utah Supreme Court. One of these, former Justice Christine Durham, commenting on Judge Kelly’s decision, said: “Thus far, every court to rule on a similar ban has barred it from taking effect, due in part to the serious harms caused by excluding an entire group of students from such an important school activity. We read today’s decision as recognizing that the law is not only discriminatory but puts Utah children at needless risk of lifelong harm. We look forward to moving forward with the case and securing a permanent decision blocking the law from taking effect.