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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

EQUALITY UTAH; JANET DOE, as next friend and parent of JOHN DOE; JUSTINE DOE, as next friend and parent of JAMES DOE; and JESSIE DOE, as next friend and parent of JANE DOE, *Plaintiffs*, v. UTAH STATE BOARD OF EDUCATION; SYDNEE DICKSON, in her official capacity as State Superintendent of Public Instruction of the State of Utah; BOARD OF EDUCATION OF CACHE COUNTY SCHOOL DISTRICT; CACHE COUNTY SCHOOL DISTRICT; BOARD OF EDUCATION OF JORDAN SCHOOL DISTRICT; JORDAN SCHOOL DISTRICT; BOARD OF EDUCATION OF WEBER SCHOOL DISTRICT; and WEBER SCHOOL DISTRICT, *Defendants*.	Civil Action No. 2:16-cv-01081-DVB **PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR PRELIMINARY INJUNCTION**

PLEASE TAKE NOTICE that Plaintiffs Equality Utah *et al.* hereby move the Court for a preliminary injunction enjoining Defendants [1] from enforcing the facially discriminatory provisions of Utah Code Ann. § 53A-13-101; *id.* §§ 53A-11-1201–53A-11-1214; Utah Admin. Code r. 277-474-3; and *id.* r. 277-113-6(9) (hereinafter the "School Laws"). As set forth in detail in the Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction filed herewith, Plaintiffs have established that they are likely to succeed on the merits of their claims that the facially discriminatory provisions of the School Laws violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and the First Amendment to the United States Constitution; that Plaintiffs will suffer irreparable harm if the Court does not enjoin the facially discriminatory provisions of the School Laws; that Defendants will suffer no harm if the Court were to enjoin those facially discriminatory provisions; that the balance of hardships tips strongly in Plaintiffs' favor; and that a preliminary injunction in this case advances the public interest.

[1] For purposes of this motion only, "Defendants" refers to Utah State Board of Education, Sydnee Dickson (in her official capacity as State Superintendent of Public Instruction of the State of Utah), Board of Education of Cache County School District, Cache County School District, Board of Education of Jordan School District, and Jordan School District.

Dated: January 25, 2017

Respectfully submitted,

/s/ Douglas H. Hallward-Driemeier

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EQUALITY UTAH; JANET DOE, as next friend and parent of JOHN DOE; JUSTINE DOE, as next friend and parent of JAMES DOE; and JESSIE DOE, as next friend and parent of JANE DOE, *Plaintiffs*, v. UTAH STATE BOARD OF EDUCATION; SYDNEE DICKSON, in her official capacity as State Superintendent of Public Instruction of the State of Utah; BOARD OF EDUCATION OF CACHE COUNTY SCHOOL DISTRICT; CACHE COUNTY SCHOOL DISTRICT; BOARD OF EDUCATION OF JORDAN SCHOOL DISTRICT; JORDAN SCHOOL DISTRICT; BOARD OF EDUCATION OF WEBER SCHOOL DISTRICT; and WEBER SCHOOL DISTRICT, *Defendants*.	Civil Action No. 2:16-cv-01081-DVB **MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

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STATEMENT OF RELIEF SOUGHT AND GROUNDS THEREFOR

Plaintiffs seek a preliminary injunction prohibiting enforcement of the prohibitions on instruction that involves the "advocacy of homosexuality" in Utah Code Ann. § 53A-13-101 and Utah Admin. Code r. 277-474-3, on the ground that those provisions violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and the restrictions on student clubs that involve the "advocacy of homosexuality" in Utah Code Ann. §§ 53A-11-1201–53A-11-1214 and Utah Admin. Code r. 277-113-6(9), on the ground that those provisions violate both the Equal Protection Clause and the First Amendment to the United States Constitution. Plaintiffs also seek a preliminary injunction prohibiting enforcement of the above-cited laws' incorporation of unconstitutional provisions of the Utah Constitution and the Utah Code, to the extent that they use the term "marriage" to exclude marriage between two persons of the same sex, and to the extent that they use the terms "criminal conduct," "the violation of any state or federal criminal law by a minor or an adult," and "sexual activity . . . forbidden by state law" to include private, adult, consensual relationships between persons of the same sex.

INTRODUCTION

This action challenges two categories of state laws and regulations that expressly prohibit speech that "advocat[es] homosexuality" in Utah public schools: the "Curriculum Laws," which restrict classroom instruction, and the "Student Club Laws," which restrict student speech in student clubs (collectively the "School Laws"). The School Laws facially discriminate against gay students and students with gay parents, and against speech supporting such individuals, in

violation of the Fourteenth Amendment's Equal Protection Clause and the First Amendment.[2]

The Curriculum Laws facially discriminate on the basis of sexual orientation in violation of the Equal Protection Clause. By prohibiting classroom instruction that includes "the advocacy of homosexuality," the Curriculum Laws expressly single out a class of "homosexual" persons for negative treatment. The prohibition uniquely restricts supportive classroom instruction about "homosexual" persons while making no comparable restrictions on instruction about heterosexual persons.

The Student Club Laws violate both the requirement of equal protection and the Free Speech Clause of the First Amendment. The Student Club Laws incorporate the facially discriminatory prohibition on the "advocacy of homosexuality" from the Curriculum Laws, and apply that prohibition to student clubs. By doing so, the Student Club Laws specifically restrict gay-supportive student clubs, while permitting student clubs that advocate heterosexuality or express negative viewpoints about "homosexuality." That prohibition violates the Equal Protection Clause and impermissibly deprives students of well-established First Amendment rights by impermissibly discriminating based on the viewpoint of student speech, censoring student speech that is entitled to heightened protection under the standard in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), imposing an overbroad restriction that sweeps up a great deal of protected speech, and imposing an impermissibly vague restriction on student speech.

[2] The parties stipulated to limiting this motion to legal issues (Dkt. No. 46). Plaintiffs' Amended Complaint for Declaratory and Injunctive Relief (Dkt. No. 32) also alleges claims under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1688, and the Equal Access Act, 20 U.S.C. §§ 4071–4074. These claims, and other claims that rely on factual assertions that might be contested, are not part of the instant Motion for Preliminary Injunction.

Plaintiffs have sustained and continue to sustain severe and irreparable harm due to the School Laws, which facially single out a particular group of persons for official disfavor and impose facially discriminatory restrictions on students' ability to associate with each other and express their ideas and views in student clubs. Enjoining enforcement of the School Laws would serve the public interest by eliminating the facial inequality imposed by these extraordinary measures and ensuring that any restrictions on student clubs are viewpoint neutral and imposed in an evenhanded manner that does not selectively silence only gay-supportive views.

For the reasons summarized above and stated below, Plaintiffs respectfully request that this Court enjoin all Defendants[3] from enforcing the School Laws.

STATEMENT OF FACTS

I. THE CHALLENGED UTAH SCHOOL LAWS

The challenged School Laws fall into two categories: (1) the Curriculum Laws, codified at Utah Code Ann. § 53A-13-101 and Utah Admin. Code r. 277-474-3; and (2) the Student Club Laws, codified at Utah Code Ann. § 53A-11-1201 – 53A-11-1214 and Utah Admin. Code r. 277-113-6(9). To be clear, Plaintiffs challenge only the provisions of those laws that: (1) facially discriminate based on sexual orientation by prohibiting the "advocacy of homosexuality," (2) incorporate the unconstitutional exclusion of same-sex couples from Utah's marriage laws, and (3) incorporate the unconstitutional prohibition of private, adult consensual intimacy between persons of the same sex in Utah's criminal laws.

[3] For purposes of this motion only, "Defendants" refers to Utah State Board of Education, Sydnee Dickson (in her official capacity as State Superintendent of Public Instruction of the State of Utah), Board of Education of Cache County School District, Cache County School District, Board of Education of Jordan School District, and Jordan School District.

A. Legislative History

The School Laws were originally proposed in February and enacted in April 1996, shortly after the Salt Lake City School Board barred all non-curricular clubs rather than allow the formation of a gay-straight alliance ("GSA") student club at East High School in Salt Lake City. *See* 1996 Utah Laws, 2d Spec. Sess., c. 10, § 2, eff. June 18, 1996; Louis Sahagun, *Utah Board Bans All School Clubs in Anti-Gay Move*, L.A. Times, Feb. 22, 1996, at 1.

The original enactment, Senate Bill 1003, amended the sections of the Utah Code governing the health curriculum in public schools and enacted rules for student clubs to prohibit any advocacy of criminal conduct—a reference to the provisions of the Utah Criminal Code making same-sex intimacy unlawful—and to bar student clubs "involv[ing] human sexuality." *See* 1996 Utah Laws, 2d Spec. Sess., c. 10, § 2, eff. June 18, 1996 (amending Utah Code Ann. §§ 53A-13-101 and 53A-13-101.2; enacting *id.* § 53A-3-419). [4] Specifically, the health curriculum law was amended to prohibit school employees and volunteers from "support[ing] or encourag[ing] criminal conduct," or "the violation of any state or federal criminal law by a minor or an adult"—even when school employees and volunteers are "acting outside of their official capacities." *Id.* The new "limitations regarding access for student clubs and organizations" required local school boards to deny access to clubs that would "encourage criminal or delinquent conduct; promote bigotry; or involve human sexuality." *Id.* As the sponsor of S.B. 1003 explained, these provisions were "aimed at keeping avowed homosexuals out of public

[4] In 2001, Section 53A-13-101 was amended to add the language in subsection (1)(iii)(A) expressly barring "advocacy of homosexuality." 2001 Utah Laws, Gen. Sess., c. 105, § 1, eff. Apr. 30, 2001. In 2007, the sections of the Utah Code governing student clubs were moved from Chapter 3 of Title 53A to their current location in Chapter 11. *See* 2007 Utah Laws, Gen. Sess., c. 114, § 2, eff. Apr. 30, 2007.

schools." James Brooke, *To Be Young, Gay and Going to High School in Utah*, N.Y. Times, Feb. 29, 1996, at A1, B8 ("Last week, the Senate easily approved a bill forbidding teachers from 'encouraging, condoning or supporting illegal conduct.' . . . With sodomy a misdemeanor in Utah, the bill's sponsor said the measure was aimed at keeping avowed homosexuals out of public schools. 'Young people reach their teen-age years, and their sexuality starts developing,' said State Senator Craig Taylor, the sponsor. 'And I believe they can be led down that road to homosexuality.'").

In the opening statement of the Senate floor debate, the bill's sponsor referred to "homosexuality" as "unhealthy," "dangerous," and "destructive." *Senate Bill 1003—Responsibility of School Employees and Limitations Regarding Student Clubs: Senate Floor Debate*, 51st Leg., 2d Spec. Sess. (Utah Apr. 17, 1996), *available at* http://le.utah.gov/asp/audio/index.asp ?Sess=1996S2&Day=0&Bill=SB1003&House=S# ("*Floor Debate*") (statement of Senator Craig Taylor). *The Legislative History and Intent Language for S.B. 1003*, S.J., 51st Leg., 2d Spec. Sess. 1243 (Utah Apr. 17, 1996) ("*Legislative Intent*"), described the intent of the statute as "encourag[ing] individual citizens to choose to live those fundamental values and attributes" embodied in the statute. *Id.* at 1245. The *Legislative Intent*, which was formally adopted by the Utah Senate, cited the goals of "reducing the risk that children will become homosexual" and protecting "waverers" who "might succumb to the temptations of homosexuality" as reasons for barring GSAs and other "gay-affirmative" speech in public schools. *Id.* at 1243–45.[5]

[5] One senator cited concerns about "whether the gay clubs will be areas of enlistment or encouragement or recruitment for homosexuality" as his reason for voting for the bill. *Floor Debate* (statement of Senator Robert F. Montgomery).

The *Legislative Intent* referred to "home-taught values" and "moral environment" as being protected by this statute. *Id.* at 1248. In his opening statement, the bill's sponsor indicated that these moral values excluded groups that view being gay as a "normal orientation":

> [G]roups whose very existence implies that homosexuality is a genuine—indeed definitive—element of personal identity will in the short run and the long run inadvertently harm the young people they wish to help. The feeling of relief such groups engender—by re-labeling homosexuality as a normal orientation or as "not a problem"—is not a genuine solution to the very genuine stress these young people are in. As with other types of misguided treatment, false solutions, however well-intended often diverts [*sic*] the sufferer away from the real solutions.

Floor Debate; *see also Legislative Intent* at 1249 (Letter from Jeffrey B. Satinover).[6] The *Legislative Intent* called "heterosexual expression" the "'desired' outcome of 'normal' psycho-sexual development." *Legislative Intent* at 1238. In addition, it referred to "homosexual expression" as "a compromise," which occurs only when an individual's normal heterosexual development is interfered with. *Id.* An opponent of S.B. 1003 deemed the bill "yet another moral witch hunt." *Floor Debate* (statement of Senator George Mantes).

B. The Curriculum Laws

The Curriculum Laws provide that educational materials adopted by local school boards must "prohibit[] instruction in . . . the advocacy of homosexuality." Utah Code Ann. § 53A-13-101(1)(c)(iii)(A)(II). The Curriculum Laws separately prohibit instruction in "the intricacies of intercourse, sexual stimulation, or erotic behavior," *id.* § 53A-13-101(1)(c)(iii)(A)(I), a prohibition that plaintiffs do not challenge. Thus, the Curriculum Laws' prohibition on the

[6] The *Legislative Intent* includes other letters of support that express concern about the "indoctrination of our youth into the false idea that homosexuality is 'as normal as apple pie,'" *Legislative Intent* at 1259 (Letter from Charles W. Socarides), and declare that the statute is necessary to protect heterosexual students from being "draw[n] . . . into homosexuality," *id.* at 1263 (Letter from David Richardson).

"advocacy of homosexuality" extends beyond discussion of specific sexual acts to preclude the support of "homosexual" persons and relationships more broadly.

The Curriculum Laws also reference Utah's unconstitutional marriage laws, requiring local school boards to adopt instructional materials "emphasizing abstinence before *marriage* and fidelity after *marriage*," *id*. § 53A-13-101(1)(c)(iii)(A) (emphasis added), while "prohibiting instruction in . . . the advocacy of sexual activity outside of *marriage*," *id*. § 53A-13-101(1)(c)(iii)(A)(IV) (emphasis added). The Utah Constitution states that "Marriage consists only of the legal union between a man and a woman," Utah Const. art. I, § 29, while a Utah statute holds that a marriage between two "persons of the same sex" is "prohibited and declared void," Utah Code Ann. § 30-1-2(5). These statutes remain on the books, even though the provisions of Utah law that exclude same-sex couples from the definition of "marriage" have been declared unconstitutional. *See Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir.), *cert. denied*, 135 S. Ct. 265 (2014); *cf. Roe v. Patton*, No. 2:15-cv-00253 DB, 2015 WL 4476734, at *3 (D. Utah July 22, 2015) (unpublished) ("[N]ow that the U.S. Supreme Court has established that States must allow same-sex couples to marry 'on the same terms and conditions as opposite-sex couples,' the question becomes whether the statu[t]es as written comport with the Equal Protection and Due Process Clauses of the Fourteenth Amendment." (citation omitted)). Because the Utah Legislature has not repealed the state's unconstitutional definition of marriage, the Curriculum Laws, by incorporating that definition, continue to facially restrict teachers and students from speaking supportively about married same-sex couples in Utah public schools.[7]

[7] Plaintiffs do not challenge the Curriculum Laws' prohibitions against "the advocacy of sexual activity outside of marriage," but rather seek an injunction requiring the term "marriage" to be interpreted and applied in a manner that does not exclude two persons of the same sex, consistent

The Curriculum Laws also prohibit school employees, volunteers, local school boards, and the State Board of Education from doing anything that might be construed to "support or encourage *criminal conduct* by students, teachers, or volunteers," Utah Code Ann. § 53A-13-101(4) (emphasis added), or "facilitate or encourage the violation of any state or federal criminal law by a minor or an adult." *Id.* § 53A-13-101(1)(b)(ii)(A). Under Utah law, "criminal conduct" includes private, adult, consensual relationships between two persons of the same sex. *See id.* §§ 76-5-403(1), 76-5-403(3), 76-3-301(1)(d). Even though these prohibitions are unconstitutional under *Lawrence v. Texas*, 539 U.S. 558 (2003), they have not been repealed. As a result, the Curriculum Laws continue to facially restrict school employees, volunteers, local school boards, and the State Board of Education from doing anything that might be construed to "support or encourage" private, adult, consensual relationships between two persons of the same sex—even within the context of marriage. Utah Code Ann. § 53A-13-101(4). This restriction applies to "responses to spontaneous questions from students," *id.* § 53A-13-101(1)(b)(ii)(A), "training of school employees or volunteers," *id.* § 53A-13-101(4)(c), and in specified circumstances, "to school employees or volunteers acting *outside* of their official capacities." *Id.* § 53A-13-101(4)(b) (emphasis added).

Lastly, in the Utah Code, the Curriculum Laws appear under a section in the Utah Code titled "Instruction in health." Utah Code Ann. § 53A-13-101. However, in the Utah Administrative Code, Defendant Utah State Board of Education has promulgated a rule extending the Curriculum Laws to "any course or class." Utah Admin. Code r. 277-474-1(D). In this rule, the State Board of Education has explicitly provided: "The following may not be

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with the decisions in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), and *Kitchen*, 755 F.3d 1193.

taught in Utah public schools through the use of instructional materials, direct instruction, or online instruction: . . . the advocacy of homosexuality; . . . or . . . the advocacy of sexual activity outside of marriage." *Id.* r. 277-474-3(A). By promulgating these rules, Defendant Utah State Board of Education has broadly prohibited speech that expresses a supportive view about "homosexuality" in "any course or class." *Id.* r. 277-474-1(D), r. 277-474-3(A)(2).

Under Utah Admin. Code r. 277-474-5(5), teachers who violate the prohibitions in rule 277-474-3—including the prohibition of the "advocacy of homosexuality"—must be reported by the superintendent and may be subjected to "discipline" by the Utah Instructional Materials Commission. This Commission is appointed by and reports to Defendant Utah State Board of Education. *Id.* r. 277-469-2.

C. The Student Club Laws

The Student Club Laws apply to "any student organization that meets during noninstructional time." Utah Code Ann. § 53A-11-1202(2). These laws require that: "A school shall limit or deny authorization or school facilities use to a club . . . if a club's proposed charter and proposed activities indicate students or advisors in club related activities would as a substantial, material, or significant part of their conduct or means of expression: (i) encourage criminal or delinquent conduct; [or] . . . (iii) involve human sexuality[.]" *Id.* § 53A-11-1206(1)(b)(i) and (iii). In defining the phrase "involve human sexuality," the Student Club Laws incorporate the same prohibition on "the advocacy of homosexuality" found in Section 53A-13-101(1)(c)(iii)(A)(II) of the Curriculum Laws, as well as prohibitions that closely track the Curriculum Laws' prohibitions against "the advocacy of sexual activity outside of marriage" or support or encouragement for "criminal conduct." *Id.* §§ 53A-13-101(1)(c)(iii)(A)(IV); 53A-13-

101(4)(a). Specifically, the Student Club Laws define the term "[i]nvolve human sexuality" to include "(a) presenting information in violation of laws governing sex education, including Section[] 53A-13-101 . . . (b) advocating or engaging in sexual activity outside of legally recognized marriage or forbidden by state law; or (c) presenting or discussing information relating to the use of contraceptive devices or substances, regardless of whether the use is for purposes of contraception or personal health." *Id*. § 53A-11-1202(8).[8]

Another section requires schools to annually approve a "faculty supervisor" for all student clubs, who "shall provide oversight to ensure compliance with the approved club purposes, goals, and activities and with the provisions of this part and other applicable laws, rules, and policies." *Id*. § 53A-11-1207(3)(b). In addition, Defendant Utah State Board of Education has promulgated a rule requiring local school boards and public charter schools to ensure compliance with the Student Club Laws. Utah Admin. Code r. 277-113-6(9).

II. PLAINTIFFS

Plaintiff James Doe is a gay male who currently attends a Utah public high school. Declaration of James Doe attached hereto as Ex. A ("James Doe Decl.") ¶ 1–2. Plaintiff Jane Doe is a lesbian who currently attends a Utah public high school. Declaration of Jane Doe, attached hereto as Ex. B ("Jane Doe Decl.") ¶ 1–2. In the Amended Complaint, James Doe and Jane Doe have alleged that they are treated unequally by the School Laws and have been injured and stigmatized by the Defendants' enforcement of the School Laws. *See* Dkt. No. 32.

Plaintiff Equality Utah, based in Salt Lake City, is a nonprofit, public interest

[8] Plaintiffs do not challenge the Student Club Laws' prohibitions against "the advocacy of sexual activity outside of marriage," but rather seek an injunction requiring the term "marriage" to be interpreted and applied in a manner that does not exclude two persons of the same sex, consistent with the decisions in *Obergefell*, 135 S. Ct. 2584, and *Kitchen*, 755 F.3d 1193.

organization whose goal is to secure equal rights and protections for the lesbian, gay, bisexual, and transgender ("LGBT") community in Utah. Declaration of Troy Williams, attached hereto as Ex. C ("Williams Decl.") ¶ 2. Equality Utah's membership includes Utah public school teachers, some of whom are gay or lesbian; LGBT parents whose children attend Utah public schools; and LGBT students who attend Utah public schools. *Id.* ¶ 3. In the Amended Complaint, Plaintiff Equality Utah has alleged that its members have been injured and stigmatized by the Defendants' enforcement of the School Laws. *See* Dkt. No. 32. Defendant Utah State Board of Education has acknowledged that gay youth, such as the members of Equality Utah, face "an increased risk," including even of suicide, and further acknowledge that "[t]his risk can be increased further when these kids are not supported by parents, peers and *schools*." *See Bullying Prevention,* Utah State Board of Education, http://www.schools.utah.gov/prevention/Bullying-Prevention/Risk-Factors.aspx (emphasis added).

We incorporate these allegations here for the limited purpose of showing that the plaintiffs have established standing under Article III.

LEGAL STANDARD

To obtain a preliminary injunction, Plaintiffs must demonstrate that (1) their claims are "likely to succeed on the merits"; (2) they would "suffer irreparable harm" without the injunction; (3) the "balance of equities" between the injury threatening Plaintiffs and any harm to Defendants "tips in [Plaintiffs'] favor"; and (4) the injunction would be "in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *see also E. High Sch. Prism Club v. Seidel*, 95 F. Supp. 2d 1239, 1243 (D. Utah 2000). In the Tenth Circuit, the plaintiffs' required showing of likelihood of success on the merits is "less strict" where the other prongs are

satisfied. *See, e.g.*, *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1246–47 (10th Cir. 2001). In that case, the movant must simply show that the "questions going to the merits [are] so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation." *Id.*

ARGUMENT

I. PLAINTIFFS WILL LIKELY SUCCEED ON THE MERITS

Plaintiffs' Complaint includes fourteen claims challenging the School Laws, including claims that all of these laws violate the First and Fourteenth Amendments, a claim that the Student Club Laws violate the Equal Access Act, and a damages claim for violations of Title IX brought on behalf of Plaintiff John Doe. This motion for preliminary injunction seeks interim relief based on a subset of those claims: those claims as to which the Court may determine, based solely on well-established law, that Plaintiffs have established a likelihood of success on the merits. Specifically, Plaintiffs base this motion on their claims that: (1) the Curriculum Laws violate the Equal Protection Clause by facially discriminating on the basis of sexual orientation; (2) the Student Club Laws violate both the Equal Protection Clause and the First Amendment by facially restricting gay-supportive student clubs; and (3) the School Laws are unconstitutional and may not be enforced to the extent they incorporate Utah's unconstitutional definition of "marriage" to exclude lawfully married persons of the same sex, and Utah's unconstitutional definition of private, adult, consensual relationships between persons of the same sex as "criminal conduct." Plaintiffs are likely to prevail on each of these claims as a matter of law, and preliminary injunctive relief is warranted in light of the serious and irreparable injury to Plaintiffs' constitutional rights.

A. The Curriculum Laws Violate the Equal Protection Clause of the Fourteenth Amendment

The Fourteenth Amendment's Equal Protection Clause ensures that the law "neither knows nor tolerates classes among citizens." *Romer v. Evans*, 517 U.S. 620, 623 (1996) (*quoting Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)). Equal protection "requires the democratic majority to accept for themselves and their loved ones what they impose on you and me." *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 300 (1990).

The Curriculum Laws violate the Equal Protection Clause by prohibiting "advocacy of homosexuality," while imposing no such restriction with respect to heterosexuality. The word "advocacy" means "the act or process of advocating or supporting a cause or proposal," *Merriam-Webster's Collegiate Dictionary* (11th ed. 2014); or "[t]he art of pleading for or actively supporting a cause or proposal," *Black's Law Dictionary* (10th ed. 2014). On its face, therefore, the ban precludes "support for" gay persons, singling them out as the only group whose existence is deemed so shameful, immoral, or controversial that any supportive discussion of this group must be expressly barred. Although laws that discriminate on the basis of sexual orientation warrant heightened scrutiny, the Curriculum Laws' facially discriminatory provision violates the Equal Protection Clause for an even more basic reason: the prohibition has no rational connection to any legitimate state interest. Indeed, its only purpose is to express the State's moral disapproval of "homosexuality" and codify the views of those within the community who harbor such disapproval. Neither of these is a legitimate aim of government that can justify unequal treatment of citizens.

1. The Curriculum Laws Facially Discriminate on the Basis of Sexual Orientation

The Curriculum Laws facially discriminate based on "homosexuality." *See* Utah Code Ann. § 53A-13-101(1)(c)(iii)(A); Utah Admin. Code r. 277-474-3(A). They prohibit any supportive classroom discussions of gay identity, while imposing no such restrictions on classroom discussions of heterosexual identity. The law makes no exception to that categorical rule. It bars support for "homosexuality" under any circumstances, even when directly relevant to a curricular topic. For example, on its face, the law would preclude a teacher or student from acknowledging that "same-sex couples may exercise the fundamental right to marry," or that "psychiatrists and others [have] recognized that sexual orientation is both a normal expression of human sexuality and immutable." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2596 (2015). This broad prohibition discriminates against gay persons, subjecting them to facially disparate treatment and placing them in a uniquely disfavored class.

The negative impact of that discriminatory treatment is profound, communicating to gay students and others that there is something so undesirable, shameful, or controversial about "homosexuality" that any support for gay people or same-sex relationships must be affirmatively and expressly barred. The prohibition tells gay students that their sexual orientation is less valid than that of heterosexual students, and, thus, that they themselves are less valued. Such laws "impose a disadvantage, a separate status, and so a stigma upon" gay persons and are particularly damaging for gay students. *See United States v. Windsor*, 133 S. Ct. 2675, 2681 (2013); *see also Kitchen*, 755 F.3d at 1207. Like Utah's prior exclusion of same-sex couples from marriage, the prohibition "injures the children . . . who themselves are gay or lesbian, and who will grow up with the knowledge that the State does not believe they are as capable of creating a family as

their heterosexual friends." *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1213 (D. Utah 2013). The prohibition also "humiliates . . . children now being raised by same-sex couples" by "mak[ing] it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Windsor*, 133 S. Ct. at 2694. Because of the prohibition, these "children suffer the stigma of knowing their families are somehow lesser." *Obergefell*, 135 S. Ct. at 2590. As the Supreme Court has observed, public education is "perhaps the most important function of state and local governments," "the very foundation of good citizenship," and "a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954). Barring students or teachers from expressing any support for gay persons in Utah's public schools inflicts serious harms. The ban inculcates in gay students and the children of gay parents the same stigma of knowing that they and their families are somehow lesser, as did the bans on marriage by same-sex couples.

The facial discrimination against "homosexuality" in the Curriculum Laws persists today as a remnant of a relatively recent time when overt governmental hostility and official discrimination toward gay persons was widespread. At the time the Curriculum Laws were enacted, states were constitutionally permitted to criminalize same-sex intimate relationships; no state allowed same-sex couples to marry; the federal government and states denied any official recognition to same-sex couples' relationships; and openly gay persons were barred from military service.[9] Like those now unlawful policies, the curricular ban was enacted to express

[9] *See Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (upholding constitutionality of criminal

moral disapproval of "homosexuality." As in those other areas, laws that officially and facially single out gay persons for disparate treatment in public education inflict serious harms and violate the requirement of equal protection.

2. The Curriculum Laws Cannot Withstand Any Level of Scrutiny Because They Are Not Rationally Related to Any Legitimate State Purpose

Neither the Supreme Court nor the Tenth Circuit has yet expressly held whether laws that classify on the basis of sexual orientation, as the Curriculum Laws do, are subject to heightened scrutiny under the Equal Protection Clause.[10] Over the past twenty years, however, the Supreme Court has consistently held that the Fourteenth Amendment protects citizens from government-sponsored discrimination on the basis of sexual orientation, and these decisions show that such discrimination is subject to something more than rational basis review. *See Windsor*, 133 S. Ct. at 2692 (holding that such discriminatory laws require "careful consideration" (citing *Romer*, 517 U.S. at 633)). *Obergefell*, in particular, makes clear that sexual orientation satisfies all of the factors the Court traditionally has considered in determining whether to apply heightened scrutiny. The Court recognized that gay persons have faced a long history of discrimination, that sexual orientation is not relevant to a person's ability to participate in social institutions such as marriage, that "sexual orientation is both a normal expression of human sexuality and immutable," and that gay people have been unable to secure full equality through the legislative

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anti-sodomy laws, not overturned until 2003); the federal Defense of Marriage Act (enacted in 1996, declared unconstitutional by *Windsor*, 133 S. Ct. 2675); 10 U.S.C. § 654 (1993 defense appropriations bill commonly called "Don't Ask Don't Tell," not repealed until 2011).

[10] The only Tenth Circuit cases to have addressed the scrutiny applicable to discrimination on the basis of sexual orientation ruled that strict scrutiny does not apply, but did not address and do not foreclose an intermediate level of review. *See Nat'l Gay Task Force v. Bd. of Educ.*, 729 F.2d 1270 (10th Cir. 1984), *aff'd by an equally divided court*, 470 U.S. 903 (1985); *Rich v. Sec'y of Army*, 735 F.2d 1220 (10th Cir. 1984).

process. *See Obergefell*, 135 S. Ct. at 2596–605.

But the Court need not resolve whether heightened scrutiny applies here, because the prohibition against the "advocacy of homosexuality" in the Curriculum Laws is unconstitutional under any level of review. That prohibition violates equal protection because its unequal treatment of "homosexuality" does not have even "a rational relationship to legitimate state interests." *Romer*, 517 U.S. at 632; *see also Coal. for Equal Rights, Inc. v. Ritter*, 517 F.3d 1195, 1199 (10th Cir. 2008).

The prohibition on "advocacy of homosexuality" serves no legitimate educational or other purpose. Instead, the purpose that emerges from the text and legislative history of its enactment is a constitutionally impermissible one: to express moral disapproval of gay people. In *Lawrence*, the State of Texas had argued that the state's sodomy law was rationally related to "the State's long-standing moral disapproval of homosexual conduct," Br. of Resp. at 41, *Lawrence v. Texas*, No. 02-102 (Feb. 17, 2003). The Court squarely rejected the State's moral justifications for the Texas sodomy law's infringement upon constitutionally protected liberty interests: "Our obligation is to define the liberty of all, not to mandate our own moral code." *Lawrence*, 539 U.S. at 571 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850 (1992)).

In *Windsor*, the Court reaffirmed its rejection of moral disapproval of homosexuality as a sufficient justification for laws that facially discriminate against same-sex couples. 133 S. Ct. at 2675. Striking down the federal Defense of Marriage Act, which barred any federal recognition of same-sex couples' marriages, the Court observed that Congress had offered moral justifications for the law—"moral disapproval of homosexuality," "a moral conviction that

heterosexuality better comports with traditional (especially Judeo-Christian) morality," and "an interest in protecting the traditional moral teachings reflected in heterosexual-only marriage laws." *Id.* at 2693 (quoting H.R. Rep. 104-664 (1996)). In the Court's view, these statements were evidence of the law's improper "purpose . . . to impose a disadvantage, a separate status, and so a stigma upon" married gay persons. *Id.*

The legislative history of Senate Bill 1003 demonstrates that the prohibition on the "advocacy of homosexuality" in the Curriculum Laws was enacted for the purpose of expressing disapproval of gay persons. The bill's sponsor specifically referred to "homosexuality" as "unhealthy," "dangerous," and "destructive." *Floor Debate* (statement of Senator Craig Taylor). In addition, the Utah Legislature expressly "affirm[ed] its intent" that the state's schools "encourage individual citizens to choose to live those fundamental values and attributes that are outlined in this statute and are deemed to be necessary for the preservation of a free society." *Legislative Intent* at 1245. The laws embody a belief that people, and students in particular, should be discouraged from identifying as gay because homosexuality is an abnormal, unnatural, and undesirable trait. While those supporting the Bill may have considered their negative moral views of gay people to be valid, especially in light of Utah's then-existing criminalization of same-sex intimacy, that is not a legitimate basis for official action that singles out a disfavored group for adverse treatment.

Nor can the prohibition be justified as an accommodation for community members who may have moral objections to their children participating in classroom discussions about gay persons. Just as it is not a legitimate governmental purpose for the State to enact discriminatory legislation to express its own moral disapproval of gay people, it also is not a legitimate purpose

for the State to enact discriminatory legislation to facilitate or accommodate the moral disapproval of members of the public. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) ("[M]ere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable" do not satisfy rational basis review under the Equal Protection Clause, because "the [government] may not avoid the strictures of that Clause by deferring to the wishes or objections of some fraction of the body politic."). "Simply put, the private antipathy of some members of a community cannot validate state discrimination." *Weaver v. Nebo Sch. Dist.*, 29 F. Supp. 2d 1279, 1289 (D. Utah 1998).

By restricting curricular discussions of gay people while allowing curricular discussions of heterosexual people, the Curriculum Laws make gay students into "strangers" within the state's public education system. *See Romer*, 517 U.S. at 635. Rather than serving any legitimate educational or other purpose, this is "a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit." *Id.*

B. The Student Club Laws Violate the Equal Protection Clause and the First Amendment

The Student Club Laws incorporate by reference the same facially discriminatory prohibition found in the Curriculum Laws. The Student Club Laws require schools to "limit or deny authorization or school facilities use to" clubs whose "proposed charter and proposed activities indicate students or advisors in club related activities would as a substantial, material, or significant part of their conduct or means of expression: (i) encourage criminal or delinquent conduct [or] . . . (iii) involve human sexuality." Utah Code Ann. § 53A-11-1206(1). The Laws define the term "involve human sexuality" by referring to Section 53A-13-101 of the Curriculum Laws, including its prohibition on "the advocacy of homosexuality," and by adding similar

prohibitions against "advocating or engaging in sexual activity outside of legally recognized marriage or forbidden by state law." *See id.* § 53A-11-1202(8). Through that definition, the Student Club Laws bar student clubs that engage in the "advocacy of homosexuality," while imposing no such restrictions on student clubs that advocate heterosexuality or advocate against homosexuality.

That selective restriction violates settled Equal Protection and First Amendment law. By barring only gay-supportive student speech while permitting student speech that encourages heterosexuality or discourages homosexuality, the Student Club Laws discriminate based on viewpoint. The Supreme Court has expressly held such viewpoint restrictions impermissible in a limited public forum such as a school-sponsored student club program. Similarly, by censoring protected student speech without any showing that such a restriction is necessary to maintain school discipline, the prohibition also violates the standard in *Tinker*. 393 U.S. 503 (1969). Moreover, the prohibition is facially unconstitutional because it is overbroad, sweeping in a substantial amount of protected speech, and because its failure to define or place any clear limits on the ambiguous phrase "advocacy of homosexuality" renders its prohibition of such speech unconstitutionally vague.

1. Restricting Gay-Supportive Student Clubs Violates the Equal Protection Clause

The Student Club Laws violate the Equal Protection Clause by distinguishing between prohibited and permitted student clubs on a facially discriminatory basis, barring only clubs that engage in "advocacy of homosexuality." While heterosexual students are free to form clubs to provide each other support, gay students are not. Moreover, both the plain language and the legislative history of the Student Club Laws show that this restriction on gay-supportive student

clubs was enacted to express moral disapproval of gay persons, to discourage and silence gay-supportive speech by students or others, and to banish "gay-affirmative" groups from Utah's public schools. *See Legislative History* at 1245. As previously discussed, such moral disapproval is not a permissible basis for facially discriminating based on sexual orientation in violation of the Fourteenth Amendment. *See supra* Part I.A.2.

2. Restricting Gay-Supportive Student Clubs Violates the First Amendment

The First Amendment, as applied to the states through the Fourteenth Amendment, prohibits state governments from making laws "abridging the freedom of speech." U.S. Const. amend. I. The Supreme Court has recognized that students and teachers do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker*, 393 U.S. at 506. Barring gay-supportive student clubs violates those First Amendment rights (1) because it constitutes impermissible viewpoint discrimination, (2) because it censors student speech that is protected under *Tinker*, (3) because it is unconstitutionally overbroad, and (4) because it is impermissibly vague.

i. Restricting Gay-Supportive Student Clubs Constitutes Unconstitutional Viewpoint Discrimination

"If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). "When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995). On its face, the prohibition in the Student Club Laws on student clubs that engage in "advocacy of homosexuality," while permitting clubs that engage in the advocacy of

heterosexuality or advocacy against homosexuality, violates this well settled law.

In *Rosenberger* and other First Amendment cases involving student clubs, the Supreme Court has applied forum analysis, including the foundational principle that the government may not discriminate based on a speaker's viewpoint in any forum. *See id.* at 829–30; *see also Healy v. James*, 408 U.S. 169, 187 (1972). In particular, when the government creates a limited public forum for student groups, it must establish and follow clear criteria for recognizing such groups, and cannot reject groups based on the viewpoints they wish to express. *See Rosenberger*, 515 U.S. at 829.

The Student Club Laws violate this settled law. The Laws create a limited public forum for student speech by permitting schools to recognize student-initiated clubs, in which students may express their own views. *See id*. (schools create limited public forums by providing facilities "for certain groups or for the discussion of certain topics"); *see also E. High Gay/Straight All. v. Bd. of Educ. of Salt Lake City Sch. Dist.*, 81 F. Supp. 2d 1166, 1172 (D. Utah 1999) ("*East High GSA*"). In such a forum, the government may place reasonable limits on the scope of the forum, but it may not permit only certain favored viewpoints while barring others. *Id.* Here, as the definition in Utah Code Ann. § 53A-11-1202(8)(a) makes clear, the Student Club Laws expressly define clubs that "involve human sexuality" in a facially discriminatory manner that bars only certain viewpoints on that topic. Specifically, the Laws prohibit the expression of viewpoints that advocate in favor of "homosexuality," while permitting the expression of viewpoints that advocate in favor of heterosexuality, or advocate against homosexuality. For example, a student club could advocate marriage for heterosexual couples or oppose marriage for gay couples without violating the Student Club Laws, but it could not

advocate marriage for gay couples. Similarly, a religious student club could discuss religious teachings that encourage heterosexual relationships or that discourage same-sex relationships, but it could not discuss religious teachings that support gay people and their relationships or the equal value and worth of "homosexuality."

Under settled law, such a selective prohibition on student speech, based on governmental disapproval of the viewpoint expressed, violates the First Amendment.

ii. Restricting Gay-Supportive Student Clubs Violates *Tinker* By Censoring Protected Student Speech

Barring student clubs that engage in the "advocacy of homosexuality" also violates the First Amendment because it censors protected student speech under the standard established by the Supreme Court in *Tinker*, which held that a student's private speech on social or political issues is protected by the First Amendment. 393 U.S. at 505–06. As the Supreme Court explained: "When [a student] is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects . . . , if he does so without 'materially and substantially interfer(ing) with the requirements of appropriate discipline in the operation of the school' and without colliding with the rights of others." *Id*. at 512–13 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)). Gay-supportive student clubs fall squarely within the realm of student speech entitled to heightened First Amendment protection under *Tinker*.[11] As such, and because such speech does not "materially and

[11] Student clubs are initiated by students and involve private student speech, not "school-sponsored" speech; accordingly, restrictions on student clubs are governed by *Tinker*, not *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988); *see also East High GSA*, 81 F. Supp. 2d at 1194 (holding that schools may control the content of school-sponsored speech, such as "publishing a school newspaper or producing a school play as part of the school's language arts curriculum.").

substantially interfere[e] with the requirements of appropriate [school] discipline" or impinge upon "the rights of others," the restriction on gay-supportive student clubs violates the First Amendment and should be enjoined. *Tinker*, 393 U.S. at 513.

Students who wish to express support for gay people in student clubs are engaging in protected political speech. In *National Gay Task Force*, the Tenth Circuit held that a law punishing public school teachers "advocating . . . public or private homosexual activity" violated the First Amendment because it would reach speech "aimed at legal and social change [that is] at the core of First Amendment protections," such as "urg[ing] the repeal of the Oklahoma anti-sodomy statute" or arguing that "it is psychologically damaging for people with homosexual desires to suppress those desires." 729 F.2d at 1274.

Like the statute struck down in *National Gay Task Force*, Utah's law barring student clubs engaged in the "advocacy of homosexuality" censors speech that lies at the very heart of First Amendment concerns. Just as the Oklahoma law would prohibit a teacher from "urg[ing] the repeal of the Oklahoma anti-sodomy statute," or similar statements "aimed at legal and social change," *id.*, Utah's restriction facially prohibits student clubs from advocating for federal laws that would bar discrimination against gay persons, for recognition of gay identity as a normal variation of human sexuality, or for equal marriage rights for gay couples. Indeed, it would restrict any student club from supporting the cause of gay equality or gay rights or advocating for gay people in any manner.

Tinker allows the regulation of such protected student speech only if it "materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school." 393 U.S. at 509 (quoting *Burnside*, 363 F.2d at 744). As previously discussed, the

legislative history of the ban on student clubs engaged in the "advocacy of homosexuality" demonstrates that its express purpose was to prevent constitutionally-protected, gay-affirmative speech in Gay-Straight Alliances and other gay-supportive student clubs, and to enforce moral disapproval of homosexuality in the school environment. *See supra* Part I.A.2. While the 1996 *Legislative Intent* regarding Senate Bill 1003 contains fleeting references to "order and discipline on school premises," *Legislative Intent* at 1232–35, 1245, the mere *pro forma* recitations of that phrase, especially without linking such concerns to gay-supportive clubs or providing any foundation for such a concern, are insufficient to establish that a student club whose purpose is the creation of a safe and affirming space for gay students could possibly pose a threat to school order or discipline. *See Boyd Cnty. High Sch. Gay Straight All. v. Bd. of Educ.*, 258 F. Supp. 2d 667, 690 (E.D. Ky. 2003) (holding that gay-supportive student club does not disrupt school discipline under *Tinker* standard); *Colin ex rel. Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135, 1146 (C.D. Cal. 2000) (same). Barring gay-supportive student clubs restricts protected student speech and is unrelated to any legitimate concern over school discipline; as such, it violates *Tinker*.

The Tenth Circuit, in *National Gay Task Force*, has already squarely held that a law prohibiting public teachers from "advocating . . . public or private homosexual activity" could not be justified under the *Tinker* standard. 729 F.2d at 1274–75. That holding is controlling here and applies with even greater force today. At the time *National Gay Task Force* was decided, state laws criminalizing same-sex intimacy had not yet been declared unconstitutional. Surely if a law prohibiting teachers from "advocating . . . homosexual activity" could not pass muster under *Tinker* in 1984, a law barring students from "advocacy of homosexuality" in student clubs

cannot do so in 2017, when the Supreme Court has held that gay persons have a constitutionally protected right to equal protection under the laws, to engage in private consensual intimate adult relationships, and to marry on equal terms with opposite-sex couples.[12]

Moreover, because this case involves core political speech, it is not governed by *Morse v. Frederick*, which recognized school administrators' authority to restrict speech "promoting illegal drug use." 551 U.S. 393, 408 (2007). *Morse* stressed that the student plaintiff in that case did not seek to "convey[] any sort of political or religious message," *id.* at 403, and further emphasized the "serious and palpable" threat to schools' educational mission posed by illegal drug use, *id.* at 408–09. Neither of those considerations would save the Student Club Laws. There can be no question, after *Romer*, *Lawrence*, *Windsor*, and *Obergefell*, that the state has no legitimate basis to denigrate gay persons or their relationships, or that same-sex relationships are constitutionally entitled to the same legal status and protection as opposite-sex relationships.[13]

In sum, under the binding Tenth Circuit and Supreme Court precedent that governs this case, Utah's restriction of gay-supportive student clubs impermissibly censors private student

[12] As courts across the country have uniformly held, the speech involved in Gay Straight Alliances and other gay-supportive clubs is protected student speech, like that at issue in *Tinker*, and attempts to censor that expression violate the First Amendment. *See, e.g.*, *Gay Lesbian Bisexual All. v. Pryor*, 110 F.3d 1543, 1547–48 (11th Cir. 1997); *Gay Lib v. Univ. of Mo.*, 558 F.2d 848, 854–56 (8th Cir. 1977), *cert. denied*, 434 U.S. 1080 (1978); *Gay Student Servs. v. Tex. A & M Univ.*, 737 F.2d 1317, 1324–33 (5th Cir. 1984); *Gay All. of Students v. Matthews*, 544 F.2d 162, 165–67 (4th Cir. 1976); *Gay Students Org. of the Univ. of N.H. v. Bonner*, 509 F.2d 652, 662 (1st Cir. 1974); *Gay Activists All. v. Bd. of Regents of Univ. of Okla.*, 638 P.2d 1116, 1121–23 (Okla. 1981); *E. High GSA*, 81 F. Supp. 2d at 1194–95; *Gonzalez v. Sch. Bd. of Okeechobee Cnty.*, 571 F. Supp. 2d 1257, 1269 (S.D. Fla. 2008); *Gillman v. Sch. Bd. for Holmes Cnty.*, 567 F. Supp. 2d 1359, 1370, 1373–75 (N.D. Fla. 2008).

[13] *Bethel Sch. District v. Fraser* also offers no support for the Student Club Laws, as that case held only that a school may prohibit "offensively lewd and indecent speech . . . unrelated to any political viewpoint." 478 U.S. 675, 685 (1986). By contrast, the Student Club Laws, as discussed above, on their face discriminate against speech precisely because of its viewpoint.

speech and cannot be justified based on concerns about disrupting school activities or any other grounds.

iii. Restricting Gay-Supportive Student Clubs Is Unconstitutionally Overbroad

Under controlling Tenth Circuit precedent, restricting student clubs that engage in the "advocacy of homosexuality" is also unconstitutionally overbroad because, like the Oklahoma provision prohibiting teachers from "advocating . . . public or private homosexual activity" that was struck down in *National Gay Task Force*, it chills speech that lies "at the core of First Amendment protections." 729 F.2d at 1274. The prohibition's key terms—"advocacy" and "homosexuality"—sweep in a wide range of constitutionally protected speech that far exceeds any possibly legitimate restriction on student speech. Because the prohibition sweeps so broadly and cannot be justified by the need to protect students or prevent disruption of school activities, it violates the First Amendment and should be enjoined.

A law is overbroad and violates the First Amendment if it reaches "a 'substantial' amount of protected free speech." *Virginia v. Hicks*, 539 U.S. 113, 118–19 (2003) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)). Invalidation is warranted when the law, fairly construed, has a "deterrent effect on legitimate expression [that] is both real and substantial." *National Gay Task Force*, 729 F.2d at 1274 (quoting *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975)); *see also Jordan v. Pugh*, 425 F.3d 820, 828 (10th Cir. 2005) ("[A] facial overbreadth challenge requires that 'the overbreadth of a statute . . . not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.'" (quoting *Broadrick*, 413 U.S. at 615). Moreover, a court "must be especially willing to invalidate a statute for facial overbreadth when, as here, the statute regulates 'pure speech.'" *Nat'l Gay Task Force*, 729 F.2d at 1274

(quoting *New York v. Ferber*, 458 U.S. 747, 772–73 (1982)).

"The first step in overbreadth analysis is to construe the challenged statute . . . ." *United States v. Williams*, 553 U.S. 285, 293 (2008). As described above, the Tenth Circuit specifically held in *National Gay Task Force* that a law barring teachers from "advocating . . . homosexual activity" was overbroad because it encompassed core political speech, including the advocacy of "legal and social change" supporting gay people. 729 F.2d at 1274.

The restriction in Utah's Student Club Laws is even broader than the provision struck down in *National Gay Task Force* because it applies broadly to the advocacy of "homosexuality," not just to the advocacy of "homosexual activity." Unlike "homosexual activity," the word "homosexuality" refers not only to specific sexual acts, but also to "the quality or state of being homosexual." *Merriam-Webster's Collegiate Dictionary* (11th ed. 2014). Thus, far from barring only speech about specific sexual acts, the restriction on the "advocacy of homosexuality" plainly encompasses student speech that is supportive of "the quality or state of being homosexual"—*i.e.*, that advocates for gay people or gay relationships. That conclusion is reinforced by the fact that the School Laws include a separate provision that prohibits instruction in "the intricacies of intercourse, sexual stimulation, or erotic behavior." Utah Code Ann. § 53A-13-101(1)(c)(iii)(A)(I). Under settled Utah and Tenth Circuit law, there is a strong presumption against construing statutory language to be mere surplusage. *See Rapela v. Green (In re Estate of Kampros)*, 289 P.3d 428, 432 (Utah 2012) (recognizing strong presumption that legislature uses "each word advisedly" and against construction rendering any part "inoperative or superfluous, void or insignificant"); *United States. v. Smith*, 756 F.3d 1179, 1187 (10th Cir. 2014) ("It is our duty to give effect, if possible, to every clause and word of a

statute,' and we should be 'reluctant to treat statutory terms as surplusage in any setting." (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)). Here, unless the term "advocacy of homosexuality" is to be rendered mere surplusage, it must encompass more than speech about sexual acts, or else it would simply duplicate the prohibition in Section 53A-13-101(1)(c)(iii)(A)(I).[14]

Thus, even more clearly than the statute struck down in *National Gay Task Force*, Utah's restriction on "advocacy of homosexuality" in student clubs sweeps in a broad range of political speech. Under the current law, schools must restrict any student club that seeks to support the cause of gay equality or gay rights or to advocate for social or legal change for gay people in any manner. The deterrent effect of such a sweeping restriction on protected student speech is plainly "both real and substantial." *Jordan*, 425 F.3d at 828 (quoting *Erznoznik*, 422 U.S. at 216).

iv. Restricting Gay-Supportive Student Speech Is Unconstitutionally Vague

A statute is impermissibly vague if it fails to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited," if it fails to provide "explicit standards" that prevent "arbitrary and discriminatory enforcement," or if "it 'operates to inhibit the exercise'" of "sensitive areas of basic First Amendment freedoms." *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972) (footnotes omitted). When a regulation is aimed at the content of speech, concerns regarding vagueness are heightened because of the potential "chilling effect," *FCC v. Fox TV Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012) (quoting *Reno v. ACLU*, 521 U.S. 844, 870–

[14] The restriction on "advocacy of homosexuality" also contains nothing limiting its scope to speech that is unprotected because it is lewd or obscene, *cf. Fraser*, 478 U.S. at 685, nor would there be any reasonable basis for limiting the term "homosexuality" to such unprotected speech.

71 (1997)); *see also Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 266 (3d Cir. 2002), and "a more stringent vagueness test should apply," *Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982). Thus, "standards of permissible statutory vagueness are strict in the area of free expression. . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *Keyishian v. Bd. of Regents*, 385 U.S. 589, 604 (1967) (quoting *N.A.A.C.P. v. Button*, 371 U.S. 415, 432–33 (1963)).

The Student Club Laws' prohibition on the "advocacy of homosexuality" does not "provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits." *Taylor v. Roswell Indep. Sch. Dist.*, 713 F.3d 25, 50 (10th Cir. 2013) (quoting *Jordan*, 425 F.3d at 824–25). The Laws fail to define either "homosexuality" or "advocacy," terms that generally encompass a wide range of meanings including both gay relationships and identity and any expression of support for gay people or relationships, including support for gay rights. *See supra* pp. 13, 28. As a result, Utah students, teachers, and school officials are forced to decide for themselves, without any clear guidance, whether a student proposal to form a gay-supportive club meets the requirements of the Student Club Laws. Likewise, students who are allowed to meet must decide for themselves what the permissible boundaries of student speech about "homosexuality" might be—knowing that if they cross this undefined line, the school will bar them from using school facilities or revoke their permission to meet altogether. Teachers who supervise these student clubs must make similar decisions, under the threat of being reported by the superintendent and disciplined by the State Board of Education. *See* Utah Admin. Code r. 277-474-5. In short, the vagueness of the Student Club Laws virtually

guarantees that they will be arbitrarily enforced, and thus runs afoul of the Supreme Court's admonition against enforcing statutes in an arbitrary and discriminatory manner. *See, e.g.*, *Smith v. Goguen*, 415 U.S. 566, 572–73 (1974).

C. The School Laws Incorporate and Enforce Unconstitutional Definitions of Marriage and Criminal Conduct

The School Laws are also unconstitutional to the extent they incorporate Utah's unconstitutional laws regarding marriage and the criminalization of private, adult, consensual same-sex relationships. Utah Constitution Article I, § 29 defines marriage as being "only . . . the legal union between a man and a woman." Utah Code Ann. § 30-1-2(5) provides that a marriage between two "persons of the same sex" is "prohibited and declared void." Under the Tenth Circuit's decision in *Kitchen* and the Supreme Court's decision in *Obergefell*, such a restrictive definition of marriage is itself unconstitutional. *See Kitchen*, 755 F.3d at 1199; *Obergefell*, 135 S. Ct. at 2607. Likewise, "criminal conduct" includes private, adult, consensual relationships between two persons of the same sex under Utah law, *see* Utah Code Ann. §§ 76-5-403(1), 76-5-403(3), 76-3-301(1)(d), even though this prohibition is unconstitutional under the Supreme Court's decision in *Lawrence*. *See Lawrence*, 539 U.S. at 578 (holding that state laws criminalizing private, adult, consensual relationships between two persons of the same sex are unconstitutional).

When the Utah Legislature enacted prohibitions on gay-supportive instruction and gay-supportive student clubs, those restrictions were part of a web of state laws relating to marriage and the criminal law that treated gay people unequally and expressed the State's moral disapproval of them. The School Laws incorporated those other statutes by reference. The discriminatory provisions in those other laws—excluding same-sex couples from marriage and

criminalizing consensual adult same-sex intimacy—have been held unconstitutional. This Court should therefore hold that the incorporation of those discriminatory provisions by reference into the School Laws is also unconstitutional insofar as the School Laws use the term "marriage" to exclude marriage between two persons of the same sex, and the terms "criminal conduct," "the violation of any state or federal criminal law by a minor or an adult," and "sexual activity forbidden by state law" to include private, adult, consensual relationships between persons of the same sex.

II. PLAINTIFFS WILL SUFFER IRREPARABLE HARM IF THIS COURT DOES NOT GRANT THE PRELIMINARY INJUNCTION

Plaintiffs will suffer irreparable harm because the facially discriminatory provisions in the School Laws violate Plaintiffs' constitutional rights and single them out for disfavored treatment in a stigmatizing and harmful way. Plaintiffs seeking preliminary injunctions "must establish . . . that [they are] likely to suffer irreparable harm in the absence of preliminary relief." *Winter*, 555 U.S. at 20. "Irreparable harm" is an injury that cannot be remedied with monetary compensation after the fact because such damages would be "inadequate or difficult to ascertain." *Awad v. Ziriax*, 670 F. 3d 1111, 1131 (10th Cir. 2012) (quoting *Dominion Video Satellite, Inc. v. EchoStar Satellite Corp.*, 269 F.3d 1149, 1156 (10th Cir. 2001)). Plaintiffs easily satisfy this standard. Each and every day, the discriminatory provisions of the School Laws deny Plaintiffs equal protection of the laws and infringe on their First Amendment right to freedom of speech. "Damages would be inadequate or difficult to ascertain for a claim of government condemnation" of Plaintiffs' sexual orientation because no monetary relief could undo that harm once it has been done. *Id.*

A. The Violation of Plaintiffs' Constitutional Rights Merits a Presumption of Irreparable Harm

The Supreme Court has held that the "[l]oss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Pac. Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1235 (10th Cir. 2005) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). The same analysis applies to the deprivation of other constitutional rights. *Fish v. Kobach*, 840 F.3d 710, 752 (10th Cir. 2016) (addressing claimed infringement of right to vote); *see also Evans v. Utah*, 21 F. Supp. 3d 1192, 1210 (D. Utah 2014) (addressing denial of due process). Although a court "must nonetheless engage in our traditional equitable inquiry" into irreparable harm, "the violation of a constitutional right must weigh heavily in that analysis." *Fish*, 840 F.3d at 752. Here, Plaintiffs have shown that, under settled law, the facially disparate treatment of "homosexuality" under the School Laws violates their constitutional rights to free speech and equal protection. As such, Plaintiffs have demonstrated irreparable harm.

B. The School Laws Inflict Pervasive Injury on Gay Students, Gay Teachers, and Students with Gay Parents

In addition to the irreparable harm caused by the deprivation of constitutional rights, the School Laws continuously harm and stigmatize gay persons by communicating to the school community that they are less worthy than their heterosexual peers. *See Windsor*, 133 S. Ct. at 2696 (finding the Defense of Marriage Act "instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others"); *Kitchen*, 961 F. Supp. 2d at 1213 (finding that Utah's exclusion of same-sex couples from marriage "injures the children . . . who themselves are gay or lesbian, and who will grow up with the knowledge that the State does not believe they are as

capable of creating a family as their heterosexual friends"). The Supreme Court has found that laws that facially classify based on "homosexuality" injure and stigmatize gay people. *See Romer*, 517 U.S. at 634–35 (finding challenged law "inflicts on [gay persons] immediate, continuing, and real injuries," and "classifies homosexuals . . . to make them unequal to everyone else."); *see also Lawrence*, 539 U.S. at 575; *Windsor*, 133 S. Ct. at 2696; *Obergefell*, 135 S. Ct. at 2602. Similar injuries and stigma are inflicted by the School Laws, which send a clear message that gay persons are "unequal to everyone else," *Romer*, 517 U.S. at 635, and invite discrimination against them. These harms are particularly acute for the individual Plaintiffs and other students like them, since gay youth are already more likely than their peers to struggle with bullying, isolation, and suicidal thoughts. *See Bullying Prevention*, Utah State Board of Education, http://www.schools.utah.gov/prevention/Bullying-Prevention/Risk-Factors.aspx.

III. THE IRREPARABLE HARMS THREATENING PLAINTIFFS OUTWEIGH ANY PURPORTED HARM TO DEFENDANTS

"A plaintiff seeking a preliminary injunction must establish . . . that the balance of equities tips in his favor." *Winter*, 555 U.S. at 20. Where a plaintiff has shown a likelihood that a challenged law is unconstitutional, courts generally presume that the balance of harms weighs in favor of a preliminary injunction. *Awad*, 670 F.3d at 1131 ("[W]hen the law that voters wish to enact is likely unconstitutional, their interests do not outweigh [an individual's interest] in having his constitutional rights protected."); *see also Evans*, 21 F. Supp. 3d at 1210 ("[A] State has no legitimate interest in depriving Plaintiffs of their constitutional rights."). Even without such a presumption, the State's interest in expressing moral disapproval of "homosexuality" cannot outweigh the interests of individual citizens in being granted equal treatment in public schools. "[T]he violation of a constitutional right must weigh heavily in" a court's balancing,

Fish, 840 F.3d at 752; *see also Seidel*, 95 F. Supp. 2d at 1251 ("[on] the Plaintiffs' side is an injury of the highest magnitude"), while the injunction Plaintiffs seek would impose no harm on Defendants. This balancing factor, then, strongly supports issuance of the requested injunction.

IV. ENTERING A PRELIMINARY INJUNCTION AGAINST ENFORCEMENT OF THE SCHOOL LAWS FURTHERS THE PUBLIC INTEREST

The public interest factor of the preliminary injunction analysis likewise counsels in favor of granting the injunction, since "it is always in the public interest to prevent the violation of a party's constitutional rights." *Awad*, 670 F.3d at 1132 (quotation marks and citation omitted); *see also Pac. Frontier*, 414 F.3d at 1237. This challenge serves the public interest of all of Utah's students, teachers, and families, because, even where the public might have an interest in seeing a law enforced, "the public has a more profound and long-term interest in upholding an individual's constitutional rights." *Awad*, 670 F.3d at 1132 (quotation marks and citation omitted); *see also Seidel*, 95 F. Supp. 2d at 1251 ("[L]itigation of this kind . . . [goes] far beyond the individual parties" and "promotes every citizen's fundamental right[s]." (citation omitted)).

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that this Court grant their Motion for a Preliminary Injunction:

(1) Enjoining Defendants from enforcing the prohibitions on classroom instruction that involves the "advocacy of homosexuality" in Utah Code Ann. § 53A-13-101 and Utah Admin. Code r. 277-474-3, on the ground that they violate the Equal Protection Clause of the United States Constitution;

(2) Enjoining Defendants from enforcing the prohibitions of student clubs that involve the "advocacy of homosexuality" in Utah Code Ann. §§ 53A-11-1201 – 53A-11-1214

and Utah Admin. Code r. 277-113-6(9), on the ground that they violate both the Equal Protection Clause and First Amendment of the United States Constitution;

(3) Enjoining Defendants from enforcing Utah Code Ann. §§ 53A-13-101, 53A-11-1201 – 53A-11-1214 and Utah Admin. Code r. 277-474-3, r. 277-113-6(9) to the extent that they use the term "marriage" to exclude marriage between two persons of the same sex, and to the extent that they use the terms "criminal conduct," "the violation of any state or federal criminal law by a minor or an adult," and "sexual activity forbidden by state law" to include private, adult, consensual relationships between persons of the same sex, pursuant to unconstitutional provisions of the Utah Constitution and the Utah Code.

Dated: January 25, 2017

Respectfully submitted,

/s/ Douglas H. Hallward-Driemeier

Douglas H. Hallward-Driemeier (admitted *pro hac vice*)
Jeremiah L. Williams (admitted *pro hac vice*)
Michelle H. Behrens (admitted *pro hac vice*)
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Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I, Douglas H. Hallward-Driemeier, hereby certify that on this 25th day of January, 2017, I electronically filed the foregoing PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR PRELIMINARY INJUNCTION and MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION with the Clerk of the Court using the CM/ECF system, which sent notification to the following:

Parker Douglas, Chief Federal Deputy Attorney General
Joni J. Jones, Assistant Utah Attorney General
Kyle J. Kaiser, Assistant Utah Attorney General
Greg Soderberg, Assistant Utah Attorney General
David Thomas, Assistant Utah Attorney General
David N. Wolf, Assistant Utah Attorney General
OFFICE OF THE UTAH ATTORNEY GENERAL
160 East 300 South, Sixth Floor
P.O. Box 140856
Salt Lake City, Utah 84114-0856

Dated: January 25, 2017 By: */s/ Douglas H. Hallward-Driemeier*

Exhibit A

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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

EQUALITY UTAH; JANET DOE, as next friend and parent of JOHN DOE; JUSTINE DOE, as next friend and parent of JAMES DOE; and JESSIE DOE, as next friend and parent of JANE DOE, Plaintiffs, v. UTAH STATE BOARD OF EDUCATION; SYDNEE DICKSON, in her official capacity as State Superintendent of Public Instruction of the State of Utah; BOARD OF EDUCATION OF CACHE COUNTY SCHOOL DISTRICT; CACHE COUNTY SCHOOL DISTRICT; BOARD OF EDUCATION OF JORDAN SCHOOL DISTRICT; JORDAN SCHOOL DISTRICT; BOARD OF EDUCATION OF WEBER SCHOOL DISTRICT; and WEBER SCHOOL DISTRICT, Defendants.	Civil Action No. 2:16-cv-01081-BCW **DECLARATION OF JAMES DOE**

I, James Doe, declare as follows:

1. I attend a public high school in the Cache County School District. I formerly attended a public primary school and a public middle school in the Cache County School District.

2. I reside with my family in Cache County, Utah. I am a gay male.

3. I would like to be able to have supportive discussions about gay people, identity, and issues in the classroom and in student clubs such as Gay-Straight Alliances ("GSAs"), just as other students are able to have supportive discussions about heterosexual people, family members, identity, and issues in the classroom and in student clubs. Specifically, I would like to discuss issues that I face related to being gay, just as heterosexual students are permitted to discuss issues related to being heterosexual. I would like to share my sexual orientation if I wish to, just as heterosexual students are permitted to share their sexual orientation if they wish to. I would like to discuss gay historical figures or issues or contemporary gay people and issues, just as students are able to discuss heterosexual historical figures and issues and contemporary heterosexual people and issues. I would like to be able to discuss the availability of marriage for same-sex couples in a supportive manner, just as students are able to discuss the availability of marriage for heterosexual couples in a supportive manner. I would also like to be able to participate in a student club that permits the free expression of supportive viewpoints about gay people and gay issues, that advocates for equal rights for gay people, that is open to all, and that allows openly gay people to develop leadership skills.

4. In health class, I was given a form that parents are required to sign in order for a student to attend the class. The form states that "advocacy of homosexuality" is prohibited in class. My mother and I objected to the restrictions on discussions concerning sexual orientation,

but she signed the form since it was required to take the class. The form that my mother signed is substantially similar to that posted on the Utah State Board of Education website at: http://www.schools.utah.gov/CURR/healthpe/Law-Policy/English.aspx. *See* Exhibit 1.

5. I am harmed by being treated unequally and stigmatized by the enforcement of Utah's prohibition on the "advocacy of homosexuality" in classroom discussions and student clubs. I would stop experiencing the harms caused by these prohibitions if they were abolished.

This declaration was executed this 25th day of January, 2017 in Cache County, Utah.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and accurate.

James Doe

James Doe

Exhibit 1

Utah State Board of Education

Parent/Guardian Consent Form
Human Sexuality Instruction

Name of Student _____

Parents must receive this form no later than two weeks prior to the beginning of instruction.

Course:_____	Teacher(s):_____
School:_____	Telephone Number: _____

Dear Parent/Guardian:

As part of your child's education, he/she has enrolled in a course that includes instruction on topics related to human sexuality. You are receiving this consent form because instruction and/or discussion of human sexuality topics are controlled by state law and/or Utah State Board of Education rule. Please read the form carefully, select **one option**, sign, and return to the teacher identified above. Your student will not be allowed to participate in class activities without this completed and signed form on file. Thank you.

INFORMATION

All instruction related to human sexuality and/or sexual activity will take place within the context of Utah State Law (53A-13-101) and Utah State Board of Education rule (R277-474) as follows:

- The public schools will teach sexual abstinence before marriage and fidelity after marriage.
- There will be prior parental consent before teaching any aspect of contraception and/or condoms.
- Students will learn about communicable diseases, including those transmitted sexually, and HIV/AIDS.

Program materials and guest speakers supporting instruction on these topics have been reviewed and approved by the local district review committee.

The following are NOT approved by the State Board of Education for instruction and may not be taught:

- The intricacies of intercourse, sexual stimulation or erotic behavior;
- The advocacy of homosexuality;
- The advocacy or encouragement of the use of contraceptive methods or devices;
- The advocacy of sexual activity outside of marriage.

In accordance with Utah State Board of Education Rule R277-474-6-D, teachers may respond to spontaneous student questions for the purposes of providing accurate data or correcting inaccurate or misleading information or comments made by students in class regarding human sexuality.

Please choose *one* option for instruction listed on the reverse side of this page.

DISCLOSURE:

The curriculum for this course includes instructions and/or discussions about the topics checked in this box:

Teacher Use Only

- ☐ reproductive anatomy and health
- ☐ human reproduction
- ☐ information on self-exams
- ☐ date rape
- ☐ contraception, including condoms*
- ☐ HIV and AIDS (including modes of transmission)
- ☐ sexually transmitted diseases

(terms of a sensitive/explicit nature may be defined)

*Factual, unbiased information about contraception and condoms may be presented as part of this course (only if the box above is checked). Demonstrations on how to use condoms or any contraceptive means, methods, or devices are **prohibited** and are **NOT** authorized.

Name of Student: _____

OPTIONS: ***Please read and check only one of the following:***

Option 1

_____I GRANT permission for my child to participate in the scheduled activities/discussions as described above.

Option 2

_____I GRANT permission for my child to participate in the scheduled activities/discussions as described above, *with the exception of* _____. I understand that my child will receive an alternative assignment of equal value and will not attend the regularly scheduled class on the day of this instruction.

My child will be provided a safe, supervised place within the school during the class period(s). It will be his/her responsibility to report to the pre-arranged location, check in with the teacher or supervisor, and submit the completed assignment to the appropriate person.

Option 3

_____Prior to making a decision, I will contact you at the school within the next two weeks to arrange a time to discuss the planned curriculum and/or review the materials.

Option 4

_____I DENY permission for my child to participate in any of the scheduled activities/discussions as checked in the above box.

I understand that while my child is not involved in the exempted portion of the curriculum, he/she will be provided a safe, supervised place within the school during the class periods and will receive an alternative assignment related to other elements of the course. I shall take responsibility, in cooperation with the teacher and the school, for the student learning the required course material identified on this form (State Board of Education Rule 277-474-5-D).

This consent form may be sent to parents within 2 weeks after the beginning of the course, but not less than 2 weeks prior to instruction of the identified topics. Under state law, your child cannot participate in the scheduled instructional activity specified above unless and until this signed letter of permission is returned to the teacher identified on this form. Signed forms will be kept on file at the school for a minimum of one year.

PLEASE SIGN AND RETURN

I have read this form and have chosen **one option** from the preceding list.

Parent/Guardian Signature: _____

Telephone Number: _____ Date: _____

Curriculum or Board Rules may be read at, or printed from, at: www.schools.utah.gov/curr/healthpe

Exhibit B

Kathryn Kendell (Utah Bar No. 5398)
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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

EQUALITY UTAH; JANET DOE, as next friend and parent of JOHN DOE; JUSTINE DOE, as next friend and parent of JAMES DOE; and JESSIE DOE, as next friend and parent of JANE DOE, Plaintiffs, v. UTAH STATE BOARD OF EDUCATION; SYDNEE DICKSON, in her official capacity as State Superintendent of Public Instruction of the State of Utah; BOARD OF EDUCATION OF CACHE COUNTY SCHOOL DISTRICT; CACHE COUNTY SCHOOL DISTRICT; BOARD OF EDUCATION OF JORDAN SCHOOL DISTRICT; JORDAN SCHOOL DISTRICT; BOARD OF EDUCATION OF WEBER SCHOOL DISTRICT; and WEBER SCHOOL DISTRICT, Defendants.	Civil Action No. 2:16-cv-01081-BCW **DECLARATION OF JANE DOE**

I, Jane Doe, declare as follows:

1. I attend a public high school in the Jordan School District. I formerly attended a public middle school in the Jordan School District.

2. I reside with my family in Salt Lake County, Utah. I am a lesbian.

3. I would like to be able to have supportive discussions about gay people, identity, and issues in the classroom and in student clubs such as Gay-Straight Alliances ("GSAs"), just as other students are able to have supportive discussions about heterosexual people, family members, identity, and issues in the classroom and in student clubs. Specifically, I would like to discuss issues that I face related to being a lesbian, just as heterosexual students are permitted to discuss issues related to being heterosexual. I would like to share my sexual orientation if I wish to, just as heterosexual students are permitted to share their sexual orientation if they wish to. I would like to discuss gay historical figures or issues or contemporary gay people and issues, just as students are able to discuss heterosexual historical figures and issues and contemporary heterosexual people and issues. I would like to be able to discuss the availability of marriage for same-sex couples in a supportive manner, just as students are able to discuss the availability of marriage for heterosexual couples in a supportive manner. I would also like to be able to participate in a student club that permits the free expression of supportive viewpoints about gay people and gay issues, that advocates for equal rights for gay people, that is open to all, and that allows openly gay people to develop leadership skills.

4. In health class, I was given a form that parents are required to sign in order for

a student to attend the class. The form states that "advocacy of homosexuality" is prohibited in class. My mother and I objected to the restrictions on discussions concerning sexual orientation, but she signed the form since it was required to take the class. The form that my mother signed is substantially similar to that posted on the Utah State Board of Education website at: http://www.schools.utah.gov/CURR/healthpe/Law-Policy/English.aspx. *See* Exhibit 1.

- I am harmed by being treated unequally and stigmatized by the enforcement of Utah's prohibition on the "advocacy of homosexuality" in classroom discussions and student clubs. I would stop experiencing the harms caused by these prohibitions if they could not be enforced.

- This declaration was executed this 25 day of January, 2017 in Salt Lake County, Utah.

- Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and accurate.

-

- Jane Doe

Jane Doe

Exhibit 1

Utah State Board of Education

Parent/Guardian Consent Form
Human Sexuality Instruction

Name of Student _____

Parents must receive this form no later than two weeks prior to the beginning of instruction.

Course:_____	Teacher(s):_____
School:_____	Telephone Number: _____

Dear Parent/Guardian:

As part of your child's education, he/she has enrolled in a course that includes instruction on topics related to human sexuality. You are receiving this consent form because instruction and/or discussion of human sexuality topics are controlled by state law and/or Utah State Board of Education rule. Please read the form carefully, select **one option**, sign, and return to the teacher identified above. Your student will not be allowed to participate in class activities without this completed and signed form on file. Thank you.

INFORMATION

All instruction related to human sexuality and/or sexual activity will take place within the context of Utah State Law (53A-13-101) and Utah State Board of Education rule (R277-474) as follows:

- The public schools will teach sexual abstinence before marriage and fidelity after marriage.
- There will be prior parental consent before teaching any aspect of contraception and/or condoms.
- Students will learn about communicable diseases, including those transmitted sexually, and HIV/AIDS.

Program materials and guest speakers supporting instruction on these topics have been reviewed and approved by the local district review committee.

The following are NOT approved by the State Board of Education for instruction and may not be taught:

- The intricacies of intercourse, sexual stimulation or erotic behavior;
- The advocacy of homosexuality;
- The advocacy or encouragement of the use of contraceptive methods or devices;
- The advocacy of sexual activity outside of marriage.

In accordance with Utah State Board of Education Rule R277-474-6-D, teachers may respond to spontaneous student questions for the purposes of providing accurate data or correcting inaccurate or misleading information or comments made by students in class regarding human sexuality.

Please choose *one* option for instruction listed on the reverse side of this page.

DISCLOSURE:

The curriculum for this course includes instructions and/or discussions about the topics checked in this box:

Teacher Use Only

- ☐ reproductive anatomy and health
- ☐ human reproduction
- ☐ information on self-exams
- ☐ date rape
- ☐ contraception, including condoms*
- ☐ HIV and AIDS (including modes of transmission)
- ☐ sexually transmitted diseases (terms of a sensitive/explicit nature may be defined)

*Factual, unbiased information about contraception and condoms may be presented as part of this course (only if the box above is checked). Demonstrations on how to use condoms or any contraceptive means, methods, or devices are **prohibited** and are **NOT** authorized.

Name of Student: _____

OPTIONS: ***Please read and check only one of the following:***

Option 1

_____I GRANT permission for my child to participate in the scheduled activities/discussions as described above.

Option 2

_____I GRANT permission for my child to participate in the scheduled activities/discussions as described above, *with the exception of* _____. I understand that my child will receive an alternative assignment of equal value and will not attend the regularly scheduled class on the day of this instruction.

My child will be provided a safe, supervised place within the school during the class period(s). It will be his/her responsibility to report to the pre-arranged location, check in with the teacher or supervisor, and submit the completed assignment to the appropriate person.

Option 3

_____Prior to making a decision, I will contact you at the school within the next two weeks to arrange a time to discuss the planned curriculum and/or review the materials.

Option 4

_____I DENY permission for my child to participate in any of the scheduled activities/discussions as checked in the above box.

I understand that while my child is not involved in the exempted portion of the curriculum, he/she will be provided a safe, supervised place within the school during the class periods and will receive an alternative assignment related to other elements of the course. I shall take responsibility, in cooperation with the teacher and the school, for the student learning the required course material identified on this form (State Board of Education Rule 277-474-5-D).

This consent form may be sent to parents within 2 weeks after the beginning of the course, but not less than 2 weeks prior to instruction of the identified topics. Under state law, your child cannot participate in the scheduled instructional activity specified above unless and until this signed letter of permission is returned to the teacher identified on this form. Signed forms will be kept on file at the school for a minimum of one year.

PLEASE SIGN AND RETURN

I have read this form and have chosen **one option** from the preceding list.

Parent/Guardian Signature: _____

Telephone Number: _____ Date: _____

Curriculum or Board Rules may be read at, or printed from, at: www.schools.utah.gov/curr/healthpe

Exhibit C

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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

EQUALITY UTAH; JANET DOE, as next friend and parent of JOHN DOE; JUSTINE DOE, as next friend and parent of JAMES DOE; and JESSIE DOE, as next friend and parent of JANE DOE, Plaintiffs, v. UTAH STATE BOARD OF EDUCATION; SYDNEE DICKSON, in her official capacity as State Superintendent of Public Instruction of the State of Utah; BOARD OF EDUCATION OF CACHE COUNTY SCHOOL DISTRICT; CACHE COUNTY SCHOOL DISTRICT; BOARD OF EDUCATION OF JORDAN SCHOOL DISTRICT; JORDAN SCHOOL DISTRICT; BOARD OF EDUCATION OF WEBER SCHOOL DISTRICT; and WEBER SCHOOL DISTRICT, Defendants.	Civil Action No. 2:16-cv-01081-DB **DECLARATION OF TROY WILLIAMS**

I, Troy Williams, declare as follows:

1. I am the Executive Director of Plaintiff Equality Utah. As Executive Director, I have ultimate responsibility for managing Equality Utah, and I am authorized to act and speak on its behalf. I have over a decade of experience as a leader in Utah's lesbian, gay, bisexual and transgender ("LGBT") community.

2. Equality Utah is a nonprofit, public interest organization whose goal is to secure equal rights and protections for the LGBT community in Utah. It is based in Salt Lake City. The organization was founded in 2001 as "Unity Utah" and took its present name in 2004. Equality Utah is the state's largest LGBT rights advocacy group, with more than ten thousand members throughout the state.

3. Equality Utah's membership includes students and teachers in Utah public schools who want to have supportive discussions about gay people, identity, and issues in the classroom and in student clubs such as Gay-Straight Alliances ("GSAs"), just as other students are able to have supportive discussions about heterosexual people, identity, and issues in the classroom and in student clubs. Some of these students and teachers are gay or lesbian themselves and wish to be able to identify themselves as such in a manner that is positive and supportive of gay people and same-sex relationships, just as heterosexual students and teachers are able to identify themselves as such in a way that is positive and supportive of heterosexual people and heterosexual relationships. The membership also includes LGBT parents whose children attend Utah public schools and who wish their children to be able to have supportive classroom discussions about gay people, family members, identity, and issues in the classroom and in student clubs, including discussions about their own parents, just as students with heterosexual parents are able to have supportive discussions about heterosexual people, family

members, identity, and issues in the classroom and in student clubs. Equality Utah's membership also includes teachers who want to support LGBT students by serving as faculty advisers to GSAs and other gay-supportive student clubs in which students are freely able to express supportive views about gay people and gay issues and advocate for equal rights for gay people.

4. These members of Equality Utah are harmed by being treated unequally and stigmatized by the enforcement of Utah's prohibition on the "advocacy of homosexuality" in classroom discussions and student clubs. They would stop experiencing the harms caused by these prohibitions if they could not be enforced.

This declaration was executed this 25 day of January, 2017 in Salt Lake County, Utah.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and accurate.

Troy Williams