INSTITUTE FOR JUSTICE
WASHINGTON

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Via Email and Overnight Mail

Mr. Rob Cuff
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Mr. Mark Van Wagoner
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Dear Messrs. Cuff and Van Wagoner:

The Institute for Justice is writing to you concerning a proposed amendment to Interpretation and Guideline 1.9.3 of the Utah High School Activities Association (USHAA) bylaws that would prohibit teams that have international (F-1 visa) students playing at the varsity level from participating in post-season competition (hereinafter, "the proposed amendment"). We learned of the proposed amendment from the leadership of the Utah Private Schools Association, which is understandably concerned about the consequences that the proposed amendment would have on the Association's members and, more importantly, the families and students whom those member schools serve.

The Institute for Justice is a national nonprofit, public interest law firm that litigates to end widespread abuses of government power and secure the constitutional rights that allow Americans to pursue their dreams. Among the areas in which the Institute litigates is in defense of the right of parents to direct the education of their children; in fact, at the U.S. Supreme Court alone, we have prevailed four times in such cases. *See Carson v. Makin*, 596 U.S. 767 (2022); *Espinoza v. Mont. Dep't of Revenue*, 591 U.S. 464 (2020); *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125 (2011); *Zelman v. Simmons-Harris*,

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536 U.S. 639 (2002). The Institute also litigates in defense of the economic liberty of entrepreneurs, including education entrepreneurs.

Because the UHSAA is a state actor, as it has previously conceded in litigation, *Gordon v. Jordan Sch. Dist.*, 522 F. Supp. 3d 1060, 1063 (D. Utah 2021), *aff'd*, No. 21-4044, 2023 WL 34105 (10th Cir. Jan. 4, 2023),[1] it is obligated to respect the constitutional rights of students, parents, and schools. The proposed amendment, however, would violate those rights.

For a century, the U.S. Supreme Court has protected, through the Due Process Clause of the Fourteenth Amendment, the right of parents to direct the education of their children. In *Meyer v. Nebraska*, 262 U.S. 390 (1923), the Court held that the "liberty" protected by the Due Process Clause "denotes," among other things, the right of parents "to control the education of their own," including their right "to engage [a private teacher] so to instruct their children." *Id.* at 399, 400, 401. Just two years later, in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), the Court again recognized "the liberty of parents and guardians to direct the upbringing and education of children under their control," including, specifically, by choosing a private school for their education. *Id.* at 534–35. The Court has repeatedly reaffirmed this right in the century since *Meyer* and *Pierce* were decided. *See, e.g.*, *Farrington v. Tokushige*, 273 U.S. 284, 298–99 (1927); *Wisconsin v. Yoder*, 406 U.S. 205, 213–14 (1972); *Emp. Div. v. Smith*, 494 U.S. 872, 881 (1990); *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 256 (2022).

At the same time, the Supreme Court has recognized the right of private schools to provide their services to families who desire them. For example, in *Meyer*, the Court struck down a law that prohibited the teaching of foreign languages not only because the law abridged the right of parents to direct their children's education, but also because it violated the right of a private school teacher (the plaintiff, Robert Meyer) "to contract" with families for his services and his "right thus to teach . . . their children." *Meyer*, 262 U.S. at 399, 400. In *Pierce*, similarly, the Court invalidated a compulsory public-school attendance law because, in addition to infringing parental liberty interests, it violated the rights of private schools. As the Court noted, private schools "ha[d] business and property" that were "threatened" by the challenged law and the control that it "exercis[ed] over present and prospective patrons of the[] schools." *Pierce*, 268 U.S. at 535; *see also id.* at 531 ("[W]ithout doubt enforcement of the statute would seriously impair, perhaps destroy, the

[1] *See also Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288 (2001) (holding Tennessee high school athletic association's regulatory enforcement to be state action).

profitable features of appellees' business and greatly diminish the value of their property."). The "successful conduct of" the schools "require[d] long time contracts with teachers and parents," and the law had "caused the withdrawal . . . of children who would otherwise continue" at the school. *Id.* at 532. "[P]rotection against [this] arbitrary, unreasonable, and unlawful interference with [the schools'] patrons and the consequent destruction of their business and property" was therefore necessary. *Id.* at 536; *see also Farrington*, 273 U.S. at 298 (invalidating regulatory scheme governing foreign language schools because it "probably would destroy most, if not all," of the schools, and "deprive parents of fair opportunity to procure for their children instruction which they think important").

Needless to say, many parents choose schools for their children in part because of the schools' athletic programs. As the UHSAA's own handbook correctly recognizes, student activities, including "sports teams," are "supportive [of] the instructional program"—indeed, "frequently an extension of the academic program." UHSAA HANDBOOK, 2023–24, at 10. Interscholastic athletics, in the words of the UHSAA's mission statement, "are a significant educational force in the development of skills needed to become a contributing member of society," *id.* at 9, and "[t]hose involved in student activities generally achieve better grades, attendance, citizenship and personal discipline than do nonparticipants." *Id.* at 10. As General Douglas MacArthur (a high school and West Point athlete, later president of the American Olympic Committee) put it in only slightly different terms, "On the fields of friendly strife are sown the seeds that on other days, on other fields, will bear the fruits of victory."

Should the UHSAA adopt the proposed amendment, however, the fields of friendly strife will be closed to countless students and schools. Schools will be forced to choose between two state-imposed bans: the first, a ban on international (F-1 visa) student participation in varsity athletics; the second, a ban on school participation in post-season varsity competition. Both bans would be unconstitutional, violating the rights of (1) parents who send their children to schools, in part, because of the schools' athletic programs; (2) schools that provide athletic programs as "an extension of the[ir] academic program," *id.* at 10; and, most importantly, (3) student athletes.

Both bans, moreover, would violate the rights of international *and domestic* student-athletes alike. After all, the ban on international student participation in varsity athletics would deprive those international students of their full educational experience and deprive domestic students of the educational benefits, growth, and camaraderie that flow from competing alongside students from other backgrounds and cultures. The ban on post-season play, meanwhile, would deprive international and domestic student-

athletes of the rewards that flow from a successful regular season, as well as the competitive (and collegiate recruiting) benefits that flow from tournament or playoff competition.

The fact that the UHSAA would be giving member schools a choice of which of these two bans to incur, rather than making the choice for them, is of no moment. After all, the Supreme Court has squarely held that "[a] choice between two unconstitutionally coercive regulatory techniques is no choice at all." *New York v. United States*, 505 U.S. 144, 176 (1992).

The economic harm to schools that will result from the proposed amendment, meanwhile, cannot be overstated. As noted above, the Supreme Court has recognized the right of parents "to engage" private schools "to instruct their children" and the right of schools to "contract" with parents for such instruction and "thus to teach . . . their children." *Meyer*, 262 U.S. at 399, 400. The proposed amendment would impermissibly interfere with these freedoms. The ban on international (F-1 visa) student participation in varsity athletics would "deprive [the] parents of" such students of a "fair opportunity to procure for their children instruction which they think important," *Farrington*, 273 U.S. at 298, and it would almost certainly "cause[] the withdrawal . . . of children who would otherwise continue" at their respective schools, as well as a significant decline in future enrollment at the affected schools. *Pierce*, 268 U.S. at 532. This is the very type of "arbitrary, unreasonable, and unlawful interference with [the schools'] patrons and the consequent destruction of [the schools'] business and property" that the Supreme Court held unconstitutional in *Pierce*. *Id.* at 536.

The same decline in enrollment, meanwhile, will result as well under the alternative ban: the ban on post-season play. Many student-athletes, international and domestic alike, will be unwilling to attend a school where there is no reward for their hard work and the success they achieve during the regular season. And students with prospects of playing at the collegiate level will not be willing to forgo the significant recruiting exposure that comes along with post-season tournament play. As in *Pierce*, the resulting loss of students "would seriously impair . . . the profitable features of [a school's] business and greatly diminish the value of [its] property." *Pierce*, 268 U.S. at 531.

Finally, it is important to recognize that the proposed amendment is targeted at a particular class of students, and that class is defined by their alienage. The ban applies only to international students in the United States on an F-1 nonimmigrant visa; it does not apply to other nonimmigrant visa holders (*e.g.*, J-1 exchange students), nor does it apply to undocumented foreign students. "[T]he Fourteenth Amendment," by contrast, "applies to *all* aliens," *Dandamudi v. Tisch*, 686 F.3d 66, 72 (2d Cir. 2012) (citing *Plyler v. Doe,* 457

U.S. 202, 215 (1982)), and the proposed amendment's irrational and arbitrary targeting of certain foreign students would not satisfy even rational basis review, much less the heightened scrutiny that typically accompanies alienage-based classifications.

In this light, the Institute for Justice strongly urges the UHSAA to abandon the proposed amendment and respect the constitutional rights of students, parents, and schools.

Sincerely,

Michael Bindas
Senior Attorney
INSTITUTE FOR JUSTICE

cc:
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