

Chair Weizz, Vice Chair Ruby, and Committee members:

The ACLU of North Dakota opposes both HB 1249 and HB 1489. There is virtually no difference between these bills other than applying the first applying to high school and the second to college and universities thus we enter joint testimony of opposition. This legislation is deeply harmful to transgender students in our state and violates both the Constitution and federal law. If passed, HB 1249 and HB 1489 will likely entrench North Dakota in a drawn out, costly legal battles. We urge you to vote **do not pass** on this legislation for the following reasons:



**HB 1249 and HB 1489 will harm transgender students.**

Trans youth, just like all youth, simply want to participate in the activities they love, including athletics. This is no different for college age transgender students. Trans students participate in sports for the same reasons other young people do: to challenge themselves, improve fitness, and be part of a team. This bill would deprive a subset of students and young people of the opportunities available to their peers and, if passed, would send a message to vulnerable transgender youth that they are not welcome or accepted in their communities.

**HB 1249 and HB 1489 Violates the Constitution and Title IX of the Civil Rights Act**

By singling out transgender young people and enacting a sweeping ban on participation in athletics, HB 1249 violates both the United States Constitution and Title IX of the Civil Rights Act.

Where a law singles out people based on the fact that they have a gender identity that does not match the sex assigned to them at birth, it necessarily discriminates on the basis of sex and trans status, thus triggering heightened equal protection scrutiny under the Constitution. “[I]t is impossible to discriminate against a person for being ... transgender without discriminating against that individual based on sex.”<sup>1</sup> As the U.S. Supreme Court has explained, “[a]ll gender-based classifications today warrant heightened scrutiny.”<sup>2</sup> There is no exception to heightened scrutiny for gender discrimination based on physiological or biological sex-based characteristics.<sup>3</sup> The bill, if passed, would separately trigger heightened scrutiny for discriminating against individuals based on transgender status.

In 2020 an Idaho court enjoined a similar ban on transgender women and girls participating in women’s athletics and reached the “inescapable conclusion that the Act discriminates on the basis of transgender status” and thus triggered heightened scrutiny.<sup>4</sup> The court reasoned, “the Act on its face discriminates between cisgender athletes, who may compete on athletic teams consistent with their gender identity, and transgender women athletes, who may not compete on athletic teams consistent with their gender identity.”<sup>5</sup> The federal court’s order granting the motion for preliminary injunction (which is still in effect today) is attached to this document in full for your review.

<sup>1</sup> See, e.g., *Hecox v. Little*, No. 1:20-CV-00184-DCN, 2020 WL 4760138, at \*31 (D. Idaho Aug. 17, 2020)(finding that “there is a population of transgender girls who, as a result of puberty blockers at the start of puberty and gender affirming hormone therapy afterward, never go through a typical male puberty at all”).

<sup>2</sup> *Bostock v. Clayton Cty., Ga.*, — U.S. —, 140 S. Ct. 1731, 1741, — L.Ed.2d — (2020).

<sup>3</sup> *United States v. Virginia*, 518 U.S. 515, 555 (1996).

<sup>4</sup> See *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 70, 73 (2001).

<sup>5</sup> *Hecox*, 2021 WL 4760138 at \*27.



P.O. Box 1190  
Fargo, ND 58107  
701-404-7269  
northdakota@aclu.org  
aclund.org

Parties who seek to defend gender-based and trans-status based government action must demonstrate an “exceedingly persuasive justification” for that action.” Under this standard, “the burden of justification is demanding and it rests entirely on the State.”<sup>6</sup> The bill sponsors have so far offered no justification for 1249 and HB 1489 except for hypothetical future problems that have not arisen. But under heightened scrutiny, justifications “must be genuine, not hypothesized or invented post hoc in response to litigation.”<sup>7</sup> This demanding standard leaves no room for a state to hypothesize harm and impose a categorical exclusion far exceeding anything utilized even at the most elite levels of competition. Applying this standard, the *Hecox* court enjoined Idaho’s ban on women and girls participating in women’s sports solely because they are transgender, finding the state’s proffered justifications wholly insufficient.<sup>8</sup> Idaho, like North Dakota, already had regulations in place governing the participation of transgender athletes in student athletics and could not justify the additional ban.

Likewise, if passed, HB 1249 and HB 1489 would violate Title IX of the Civil Rights Act of 1964. Title IX protects all students—including students who are transgender—from discrimination based on sex. Title IX states that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”<sup>9</sup> The overwhelming majority of courts to consider the issue have held that discrimination against transgender students in schools is prohibited sex discrimination under Title IX.<sup>10</sup> Since the Supreme Court’s decision in *Bostock*, two federal appeals courts have affirmed that Title IX’s prohibition on sex discrimination likewise prohibits discrimination against transgender students when accessing single-sex spaces and activities.<sup>11</sup>

### **HB 1249 and HB 1489 Risks the Loss of Significant Amounts of Education Funding and Will Result in High Litigation Costs**

The current presidential administration has made clear that it intends to enforce federal civil rights statutes, including Title IX, consistent with the Supreme Court’s holding in *Bostock*.<sup>12</sup> This means that should North Dakota pass 1249 and HB 1489 or bills like it that target transgender students for discrimination, it will not only likely face litigation by private parties but also by the federal government. And such a violation of Title IX will not only cost the state substantially in litigation costs but will also put the state’s federal education funding at risk. For North Dakota in FY 2021, the estimated federal funding for primary and secondary education was over \$132 million and total funding for education, over \$407 million.<sup>13</sup>

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<sup>6</sup> *Id.*

<sup>7</sup> *B. P. J. v. W. Virginia State Bd. of Educ.*, No. 2:21-CV-00316, 2021 WL 3081883, at \*7 (S.D.W. Va. July 21, 2021).

<sup>8</sup> *Virginia*, 518 U.S. at 531.

<sup>9</sup> *Id.* at 533.

<sup>10</sup> *Hecox*, 2020 WL 4760138, at \*31-\*35.

<sup>11</sup> 20 U.S.C. § 1681(a).

<sup>12</sup> *See, e.g., Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017); *M.A.B. v. Bd. of Educ. of Talbot Cty.*, 286 F. Supp. 3d 704, 719-722(D. Md. 2018).

<sup>13</sup> *See, e.g., Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020), as amended (Aug. 28, 2020)(applying *Bostock* and holding that school policy of excluding boy from restroom solely because he was transgender violated Title IX).

Additionally, litigation costs that would arise out of the passage of 1249 and HB 1489 are likely to be extremely high. As a chapter of ACLU National, the ACLU of North Dakota has consulted with litigators on the Idaho case to get a sense of the costs North Dakota can anticipate should 1249 and HB 1489 pass and end up in court and will result in high costs that will be carried by North Dakota taxpayers.

In conclusion, extreme policies such as HB 1249 and HB 1489 are out-of-step with prevailing international and national norms of athletic competition, violate the United States Constitution and federal civil rights law, and put North Dakota at risk of losing hundreds of millions of dollars in federal funding. This bill will harm transgender youth and do so in an attempt to solve a problem that plainly does not exist.

Transgender students already live and go to school in North Dakota, they play sports and enjoy time with their friends, and they deserve the chance to succeed and thrive like any other student.

For these reasons, we strongly urge your do not pass vote on HB 1249 and HB 1489.

Cody J. Schuler  
Advocacy Manager  
ACLU of North Dakota  
cschuler@aclu.org

