

Testimony in Opposition of HB 2238
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House Education Committee
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My name is Kyle C. Velte and I am the associate dean for faculty and a professor at the University of Kansas School of Law. My research and scholarship focus on LGBTQ civil rights, including the rights of transgender individuals under state and federal antidiscrimination laws and the U.S. Constitution. In addition, I teach a law school course on sexual orientation, gender identity, and the law, which includes materials on transgender rights. My testimony is offered in my personal capacity as an expert in the field of LGBTQ antidiscrimination law and LGBTQ constitutional law. I do not represent the University of Kansas in my testimony.

I testify today to vigorously oppose HB 2238. Transgender and cisgender (i.e., non-transgender) youth participate in sports for the same reasons, such as maintaining physical fitness, meeting the physical and mental challenges presented by sports, gaining life skills (leadership, compromise, resilience, teamwork, work ethic), experiencing the mutual camaraderie that is unique to sports teams, and maintaining mental health (to name a few). If this bill were to become law, it would exclude young transgender athletes from these important opportunities for physical, cognitive, and emotional growth, as well as stigmatize these youth in the eyes of the entire community by sending the message that “you don’t belong.”

Moreover, this bill is misinformed as a matter of psychology and medicine, unlawful under established law, misguided as a matter of public policy, and harmful to the most vulnerable among our Kansan youth. It is a solution looking for a problem; that problem simply does not exist. It is grounded in fearmongering, stereotypes, and unsupported claims about transgender girls and women. I strongly urge you to reject this bill.

Psychology & Medicine

The underlying purported premise of the bill is that if transgender girls are included on girls’ sports team, they will have a competitive advantage that is unfair to cisgender girls. This premise is faulty and is based on stereotypes and bias. Transgender athletes have been competing in sports at all levels without fanfare, controversy, or unfair advantage for many years. In 2004, the International Olympic Committee began allowing transgender athletes to participate on teams consistent with their gender identity. The NCAA followed suit in 2011. Nearly two decades of trans-inclusive sports have shown that transgender athletes do not enjoy distinct or categorical advantages over their cisgender teammates or opponents.

The bill also rests on the flawed conception that transgender girls are not “real” girls. In contrast, psychology and medicine support just one conclusion: transgender girls are girls, and transgender boys are boys.¹ Bills like HB 2238 are thus contrary to both psychology and medicine, leaving the only basis for such bills to be fear or dislike of transgender people. Put another way, once the purported reasons for this bill are set aside, as they should be, as contrary to medical and psychological consensus about gender identity, the only remaining justification for the bill is a desire to discriminate. Such discrimination is unlawful.

Law & Policy

Should this bill become law, it likely will be challenged in a lawsuit. Challengers of the law likely will succeed under well-established statutory and constitutional sex discrimination law.

Title IX is the federal law that directs “[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.”² HB 2238’s singling out of transgender individuals for discriminatory treatment is thus an unlawful exclusion “on the basis of sex” that is prohibited by Title IX. This conclusion is supported by the recent U.S. Supreme Court decision in *Bostock v. Clayton County, Georgia*, that discrimination because of one’s transgender status is, by definition, discrimination because of sex.³ Although the *Bostock* Court was interpreting Title VII, a federal statute prohibiting sex discrimination in employment, its rationale applies equally to Title IX.⁴ The conclusion that HB 2238 violates Title IX is supported by a number of courts that have determined Title IX’s protections extend to transgender students.⁵

¹ See generally Kyle C. Velte, *Mitigating the “LGBT Disconnect”: Title IX’s Protection of Transgender Students, Birth Certificate Correction Statutes, and the Transformative Potential of Connecting the Two*, 27 AM. U. J. GENDER SOC. POL’Y & L. 29, 36-40 (2019); Brief of Amici Curiae American Academy of Pediatrics, American Medical Association, American Psychiatric Association, and 10 Additional Health Care Organizations in Support of Appellees, *Hecox v. Little*, Nos. 20-35813, 20-35815, at 9-10 (9th Cir. Dec. 21, 2020), available at https://www.aclu.org/sites/default/files/field_document/ama_aap_and_medical_groups.pdf.

² 20 U.S.C. § 1681(a).

³ See *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731, 1741 (2020) (holding that “it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex”).

⁴ See *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020), as amended (Aug. 28, 2020) (applying *Bostock* to a Title IX claim to hold that discrimination against a transgender student is discrimination on the basis of sex).

⁵ Most courts presented with the question of whether discrimination against transgender students violates Title IX have answered “yes.” See, e.g., *A.M. by E.M. v. Indianapolis Public Schools*, No. 1:22-cv-01075-JMS-DLP, --- F.Supp.3d ---, 2022 WL 2951430 (July 26, 2022); *B.E. v. Bigo Cty. Sch. Corp.*, No. 2:21-cv-00415-JRS-MG, --- F.Supp.3d ---, 2022 WL 2291763 (S.D. Ind. June 24, 2022); *A.C. by M.C. v. Metropolitan Sch. Dist. of Martinsville*, 601 F. Supp. 3d 345 (S.D. Ind. 2022); *Clark County Sch. Dist. v. Bryan*, 478 P.3d 344, 354 (Nev. 2020); *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586,

Consequences of a Title IX violation include the loss of federal funding for schools. For fiscal year 2023, federal funding for Kansas primary and secondary schools is estimated to be more than \$504 million.⁶

Moreover, by singling out transgender people for discriminatory treatment, HB 2238 violates the U.S. Constitution. Because discrimination based on transgender status *is* sex discrimination, the legal framework for analyzing HB 2238 under the Equal Protection Clause of the Fourteenth Amendment is the one that the U.S. Supreme Court has articulated for sex discrimination. That framework, known as the “intermediate” or “heightened” scrutiny test, requires that the State demonstrate that HB 2238 serves an important government interest and that the law operates in a way that is substantially related to that government interest.⁷ The Court has described this burden as one that requires an “exceedingly persuasive justification” for the challenged law.⁸ Here, Kansas will not be able to provide even a legitimate state interest in support of HB 2238, let alone one that is “exceedingly persuasive” because HB 2238 purports to address a problem that it has not shown to exist. A federal court considering a similar state law in Idaho struck it down as unconstitutional under the Equal Protection Clause.⁹ HB 2238 likely will meet a similar fate if it becomes law.

In addition to being unlawful, this bill is bad public policy for at least two reasons. First, setting the State up to have to defend inevitable lawsuits is bad public policy because litigation requires significant resources in the form of money from state coffers, the human capital it takes to staff such suits, and the consumption of scarce judicial time. Those State resources are not well spent defending a clearly unlawful statute that addresses a nonexistent problem while simultaneously harming transgender Kansans. Those resources would be much better spent solving the real problems facing Kansans today, such as economic precarity brought on by inflation, funding K-12 schools and universities, and ensuring access to high quality, affordable health care for all Kansans. *These* are the pressing issues facing Kansas today, not

616 (4th Cir. 2020); *Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017), *abrogated on other grounds* by *Illinois Republican Party v. Pritzker*, 973 F.3d 760 (7th Cir. 2020); *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); *Adams by and through Kasper v. School Bd. of St. Johns Cty.*, 57 F.4th 791 (11th Cir. 2022); *B.P.J. et al. v. West Va. Bd. Of Educ.*, 2023 WL 111875 (S.D. W. Va. Jan. 5, 2023).

⁶ See U.S. Dep’t of Education, Fiscal Years 2021-2023 State Tables for the U.S. Department of Education, available at <https://www2.ed.gov/about/overview/budget/statetables/index.html>.

⁷ See *United States v. Virginia*, 518, U.S. 515, 533 (1996).

⁸ *Id.* at 531.

⁹ See *Hecox v. Little*, 479 F. Supp. 3d 930, 984-985 (D. Idaho 2020) (“In short, the State has not identified a legitimate interest served by the Act that the preexisting rules in Idaho did not already address, other than an invalid interest of excluding transgender women and girls from women’s sports entirely, regardless of their physiological characteristics.”).

transphobic attempts to exclude transgender girls from sports teams dressed up as a concern for cisgender girls.

Second, this bill is bad public policy because it puts Kansas at risk of boycotts by businesses and the NCAA. Such boycotts could cost the State millions, if not billions, of dollars in future revenue.¹⁰

Harm to Transgender Kansans

There can be no reasonable dispute concerning the vulnerability of transgender youth. The risks of adverse mental health outcomes, including an outsized risk of suicidal ideation and attempted suicide, are well documented; so too is the likelihood that transgender youth will be subjected to harassment, violence, bullying, and rejection in school and, sometimes, at home.¹¹ The corollary has also been established beyond any reasonable doubt: trans-affirming policies and practices—including inclusive sports—save lives, improve mental health, and dramatically decrease the risk of adverse outcomes along all axes. In particular, participation in sports has been shown to counteract the harms suffered from bullying, rejection, and discrimination; thus, transgender youth have more to gain from participating in sports than many of their cisgender peers.¹² These data lead to one conclusion: HB 2238 will harm transgender Kansans. That harm alone is sufficient to reject this bill. The fact that the bill will also not protect cisgender girls in sports—because there is nothing to protect them *from*—is yet another reason to reject it.

Conclusion

The bill is nothing more than a means of discrimination, plain and simple. Discrimination has consequences. Here, those consequences will include harm to transgender Kansans and the exposure of the State to the real risk of costly litigation and the loss of corporate revenue—all in the name of a “problem” that does not exist. I urge you to vote “no” on HB 2238. Thank you.

¹⁰ See, e.g., ‘Bathroom bill’ to cost North Carolina \$3.76 billion, *NCAA Ends Boycott of North Carolina After Repeal, Replacement of Bathroom Law*, CNBC (April 4, 2017) (noting that North Carolina’s then-current anti-transgender bathroom law “will cost the state more than \$3.76 billion in lost business over a dozen years” including losses from businesses and the NCAA pulling out of the state), available at <https://www.cnbc.com/2017/03/27/bathroom-bill-to-cost-north-carolina-376-billion.html>

¹¹ See generally Sandy E. James and others, “The Report of the 2015 U.S. Transgender Survey” (Washington: Center for Transgender Equality, 2016), available at <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>.; Centers for Disease Control and Prevention, “YRBSS Data & Documentation,” available at <https://www.cdc.gov/healthyyouth/data/yrbs/data.htm>; The Trevor Project, “2020 National Survey on LGBTQ Youth Mental Health” (New York: 2020), available at <https://www.thetrevorproject.org/survey-2020/>.

¹² See Shoshana K. Goldberg, *Fair Play*, Center for American Progress (Feb. 8, 2021), available at <https://www.americanprogress.org/issues/lgbtq-rights/reports/2021/02/08/495502/fair-play/>