

April 16, 2021

The Honorable Doug Burgum  
Office of the Governor  
State of North Dakota  
600 East Boulevard Avenue  
Bismarck, ND 58505

Dear Governor Burgum:

I write today on behalf of the ACLU of North Dakota to express our strong opposition to HB 1298, legislation that is deeply harmful to transgender youth in our state and violates both the Constitution and federal law. If enacted, HB 1298 will likely entrench North Dakota in a drawn out, costly legal battle.

We urge you to veto HB 1298 for the following reasons:

**1. HB 1298 Will Harm Transgender Youth**

Transgender youth, just like all youth, simply want to participate in the activities they love, including athletics. Transgender 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 enacted, would send a message to vulnerable transgender youth that they are not welcome or accepted in their communities.

**2. HB 1298 Violates the Constitution and Title IX of the Civil Rights Act**

By singling out transgender young people in public elementary and secondary schools and enacting a sweeping ban on participation in athletics, HB 1298 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 transgender 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 enacted, would separately trigger heightened scrutiny for discriminating against individuals based on transgender status.

Last summer, a federal court in Idaho 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

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<sup>1</sup> *Bostock v. Clayton Cty., Ga.*, — U.S. —, 140 S. Ct. 1731, 1741, — L.Ed.2d — (2020).

<sup>2</sup> *United States v. Virginia*, 518 U.S. 515, 555 (1996).

<sup>3</sup> See *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 70, 73 (2001).



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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 is still in effect today.

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 North Dakota legislature has offered no justification for HB 1298 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 enacted, HB 1298 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>

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<sup>4</sup> *Hecox*, 2021 WL 4760138 at \*27.

<sup>5</sup> *Id.*

<sup>6</sup> *Virginia*, 518 U.S. at 531.

<sup>7</sup> *Id.* at 533.

<sup>8</sup> *Hecox*, 2020 WL 4760138, at \*31-\*35.

<sup>9</sup> 20 U.S.C. § 1681(a).

<sup>10</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>11</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); accord *Adams ex. rel. Kasper v. Sch. Bd. of St. Johns Cty.*, No. 18-13592, 968 F.3d 1286 (11th Cir. Aug. 7, 2020).



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A March 26, 2021 memorandum<sup>12</sup> from Principal Deputy Assistant Attorney General Pamela S. Karlan of the U.S. Department of Justice’s Civil Rights Division concluded the same, noting that “[a]fter considering the text of Title IX, Supreme Court caselaw, and developing jurisprudence in this area, the Division has determined that the best reading of Title IX’s prohibition on discrimination ‘on the basis of sex’ is that it includes discrimination on the basis of gender identity and sexual orientation. Before reaching this conclusion, the Division considered whether Title IX ‘contain[s] sufficient indications’ that would merit a contrary conclusion. The Division carefully considered, among other things, the dissenting opinions in *Gloucester* and *Adams*, and the concerns raised in the dissents in *Bostock*. Like the majority opinions in those cases, however, the Division ultimately found nothing persuasive in the statutory text, legislative history, or caselaw to justify a departure from *Bostock*’s textual analysis and the Supreme Court’s longstanding directive to interpret Title IX’s text broadly.”

### **3. HB 1298 Risks the Loss of Significant Amounts of Education Funding and Will Result in High Litigation Costs**

The current presidential administration and the Department of Justice have made clear that they intend to enforce federal civil rights statutes, including Title IX, consistent with the Supreme Court’s holding in *Bostock*.<sup>13</sup> This means that should North Dakota enact HB 1298 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>14</sup>

Additionally, litigation costs that would arise out of the passage of HB 1298 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 HB 1298 be enacted and end up in court. Thus far, the case in Idaho – which centers on a bill very similar to HB 1298 – is becoming one of the most expensive transgender rights cases litigated to date.

As of February 2021, the Idaho case has required 10 expert declarations total (including both plaintiffs and defendants) and includes a number of ACLU National attorneys, partners at prominent private law firms, and several associates at prominent private law firms. The Idaho law has been enjoined on Equal Protection Clause grounds and is currently pending in front of the Court of Appeals. The Title IX

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<sup>12</sup> Application of *Bostock v. Clayton County* to Title IX of the Education Amendments of 1972, Memorandum, U.S. Department of Justice Civil Rights Division (March 26, 2021), <https://www.justice.gov/crt/page/file/1383026/download>.

<sup>13</sup> Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-preventing-and-combating-discrimination-on-basis-of-gender-identity-or-sexual-orientation/>.

<sup>14</sup> United States Dep’t of Education, Fiscal Years 2019-2021 State Tables for the U.S. Department of Education, <https://www2.ed.gov/about/overview/budget/statetables/index.html>.

claim and privacy claims are yet to be resolved. Should the case go to the Supreme Court and back to the district court for resolution of the pending claims it is estimated that the litigation costs will reach \$10 million dollars. This is astronomically expensive and is so in part due to the necessity of expert declarations and witnesses. By comparison, same sex marriage cases resulted in approximately \$1.5 million dollars in fees for states in which marriage bans were litigated. It is without question that bills like HB 1298 will result in substantially higher costs that will be carried by North Dakota taxpayers.

In conclusion, extreme policies such as HB 1298 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 you to veto HB 1298.

Sincerely,



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