



OPPOSITION TESTIMONY RE SB 208 – Creating the fairness in women's sports act to require that female student athletic teams only include members who are biologically female.

**Testimony of Nadine Johnson, Executive Director, American Civil Liberties Union of Kansas
Senate Education Committee – February 23, 2021**

Chairwoman Baumgardner and Members of this Committee,

Thank you for the opportunity to present testimony today. My name is Nadine Johnson, and I am the Executive Director of the ACLU of Kansas. We are a nonpartisan, non-profit organization that works to preserve and strengthen the constitutional liberties of all Kansans. We testify today in strong opposition to SB 208.

Our lawyers are currently counsel for Plaintiffs in litigation challenging a similar bill passed by the State of Idaho in 2020, *Hecox v. Little*, and for Intervenor-Defendants Andraya Yearwood and Terry Miller, in *Soule v. CIAC* in Connecticut, defending the rights of transgender student-athletes to compete in high school athletics consistent with their gender identity. As such, we are familiar with the prevailing doctrine governing litigation in this area of law and have direct knowledge of the costs and fees associated with litigation of this kind.

By imposing a wholesale ban on girls and young women who are transgender participating in athletics consistent with their gender identity, this bill discriminates based on transgender status and sex in violation of the United States Constitution and Title IX of the Civil Rights Act. SB 208 would impact youth of all ages who wish to participate in sports on any level in Kansas, from elementary school to college, recreational sports to University teams. Trans youth, just like all youth, simply want to participate in the activities they love, including athletics. 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.

This bill is based on the flawed premise that exclusion of girls and young women who are transgender benefits non-transgender girls and women. But in reality, transgender people of all ages have been participating in sports consistent with their gender at all levels for years including at the Olympics since 2004 and in the NCAA since at least 2011. With years of inclusion, there has been absolutely no categorical dominance by women and girls who are transgender at any level. Despite being eligible, no transgender female athlete has ever qualified for, let alone medaled in, a women's event at the Olympics. Athletic success is based on many factors that vary sport to sport. Trans athletes, like other athletes, do not have a single body type; there is absolutely no merit to the claim that women and girls who are transgender automatically have advantages in sport. In fact, particularly when referring to young people, many trans athletes have physiological

characteristics that are typical of peers with their gender identity and not their assigned sex. This means that a girl who is transgender may have more physiological characteristics typical of non-transgender girls than non-transgender boys.¹ Thus, any data purporting to compare the relative athletic abilities typical of non-transgender girls and non-transgender boys simply do not apply to most transgender youth.

Existing state and national rules govern transgender participation in athletics. Kansas already has rules mandating the separation of girls' and boys' sports teams and the Kansas State High School Athletic Association has already set forth policy governing the inclusion of transgender student-athletes based on its best judgement and expertise. Likewise at the collegiate level, since 2011 the NCAA has a transgender inclusion policy, governing colleges and universities around the country.² The NCAA policy requires that women and girls who are transgender undergo one year of testosterone suppression before competing in women's athletic competition.³ SB 208 would simultaneously undermine the authority of the very athletic bodies charged with governing youth and collegiate athletics and would create requirements that far exceed even the strictest rules governing the most elite levels of sports around the world, applicable to girls as young as elementary school.

By singling out transgender women and girls and enacting a sweeping ban on participation in athletics, SB 208 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.”⁴ As the U.S. Supreme Court has explained, “[a]ll gender-based classifications today warrant heightened scrutiny.”⁵ There is no exception to heightened scrutiny for gender discrimination based on physiological or biological sex-based characteristics.⁶ The bill, if passed, would separately trigger heightened scrutiny for discriminating against individuals based on transgender status. Last summer, 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 status⁷ and thus triggered heightened scrutiny.⁷ 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.”⁸

¹ 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”).

² NCAA Office of Inclusion, NCAA Inclusion of Transgender Student-Athletes (August 2011), available at https://13248aea-16f8-fc0a-cf26-a9339dd2a3f0.filesusr.com/ugd/2bc3fc_4a135824fab462183c71357c93a99b4.pdf.

³ *Id.*

⁴ *Bostock v. Clayton Cty., Ga.*, — U.S. —, 140 S. Ct. 1731, 1741, — L.Ed.2d — (2020).

⁵ *United States v. Virginia*, 518 U.S. 515, 555 (1996).

⁶ See *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 70, 73 (2001).

⁷ *Hecox*, 2021 WL 4760138 at *27.

⁸ *Id.*

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.”⁹ The Kansas legislature has so far has offered no justification for SB 208 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.”¹⁰ 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. Put simply, fear of or animus towards transgender people is not a legitimate justification for this legislation. Applying the heightened scrutiny 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.¹¹ Idaho, like Kansas, already had regulations in place governing the participation of transgender athletes in student athletics and could not justify the additional ban – particularly in the absence of any examples of any transgender athletes even competing in state.

Likewise, if passed, SB 208 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.”¹² 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.¹³ Since the Supreme Court’s decision in *Bostock*, two federal appeals courts, including the Eleventh Circuit, have affirmed that Title IX’s prohibition on sex discrimination likewise prohibits discrimination against transgender students when accessing single-sex spaces and activities.¹⁴

The Biden-Harris 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*.¹⁵ This means that should Kansas pass SB 208 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 FY 2021, the estimated federal funding for

⁹ *Virginia*, 518 U.S. at 531.

¹⁰ *Id.* at 533.

¹¹ *Hecox*, 2020 WL 4760138, at *31-*35.

¹² 20 U.S.C. § 1681(a).

¹³ 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).

¹⁴ 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).

¹⁵ 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/>.

primary and secondary education was over \$329 million and total funding for education, over \$1.4 billion.¹⁶

Other than the state of Idaho, which enacted a similar law that has since been enjoined, no state, national or international athletic body has implemented an outright ban on transgender individuals competing in athletics consistent with their gender identity. Such an extreme policy is out-of-step with prevailing international and national norms of athletic competition, violates the United States Constitution and federal civil rights law, puts Kansas at risk of losing hundreds of millions of dollars in federal funding, and harms transgender youth, all to solve a problem that plainly does not exist. Transgender students already live and go to school in Kansas, 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 urge your “no” vote. Thank you.

¹⁶ 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>.