

April 10, 2021

Hon. Jim Justice  
Office of the Governor  
State Capitol, 1900 Kanawha Blvd. E  
Charleston, WV 25305

Re: House Bill 3293

Dear Governor Justice:



National Office  
125 Broad Street, 18th floor  
New York NY 10004  
(212) 549-2500  
aclu.org

We write at this time on behalf of the American Civil Liberties Union and the American Civil Liberties Union of West Virginia to urge you to veto House Bill 3293 (“HB 3293”). By imposing wholesale bans 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. It is opposed by leaders in women’s sports, civil rights advocates, and the medical and business communities. We hope that you will veto this harmful piece of legislation and spare West Virginia costly litigation and lost business and sports opportunities.

By singling out transgender athletes for discrimination, HB 3293 discriminates on the basis of both transgender status and sex in violation of the Constitution and Title IX of the Civil Rights Act. Though proponents of the bill claim that it merely codifies distinctions between “biological” male and “biological” female athletes, as a matter of both law and science this is incorrect. The very same argument was raised in defense of Idaho’s similar law, HB500. The State of Idaho claimed that it was merely a law separating sports by sex. The court rejected this argument reaching the “inescapable conclusion that the Act discriminates on the basis of transgender status.”<sup>1</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>2</sup> After reviewing nine expert declarations on both sides, the court also concluded that women and girls who are transgender are not similarly situated to non-transgender boys.<sup>3</sup>

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<sup>1</sup> *Hecox*, 2021 WL 4760138 at \*27.

<sup>2</sup> *Id.*

<sup>3</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”).

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The *Hecox* Court in Idaho offered a detailed analysis of why cases upholding the exclusion of boys from girls’ sports teams do not apply to laws and policies that bar women and girls who are transgender from girls’ teams. As a threshold matter, the court explained that, “like women generally, women who are transgender have historically been discriminated against, not favored.”<sup>4</sup> Additionally, unlike non-transgender boys who will have ample opportunity to participate in sports, if passed, HB 3293 would entirely eliminate the ability of girls and women who are transgender to participate in athletics. The court further held that given the small percentage of people who are transgender and the extensive discrimination that transgender people face, “it appears untenable that allowing transgender women to compete on women’s teams would substantially displace female athletes.”<sup>5</sup> Finally, reviewing the science and the current global landscape, the court noted “policies of elite athletic regulatory bodies across the world, and athletic policies of most every other state in the country, also undermine Defendants’ claim that transgender women have an ‘absolute advantage’ over other female athletes.”<sup>6</sup> The court ultimately held that Ninth Circuit law permitting sex separation in sport did not permit Idaho’s version of HB 3293 and that the law likely violated the Constitution.

Likewise, under controlling Fourth Circuit law, policies that exclude students from single-sex spaces consistent with their gender identity violate both the Equal Protection Clause and Title IX.<sup>7</sup> Every court to consider this question since the Supreme Court’s decision in *Bostock* has held that where a policy treats students who are transgender differently from and worse than students who are not, it violates both Title IX and the Equal Protection Clause.<sup>8</sup> The Department of Justice also recently clarified that “[a]fter considering the text of Title IX, Supreme Court caselaw, and developing jurisprudence in this area, the [DOJ] 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.”<sup>9</sup>

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<sup>4</sup> *Hecox v. Little*, 2020 WL 4760138.

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

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

<sup>7</sup> *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 and the Constitution).

<sup>8</sup> See, e.g., *Grimm*, 972 F.3d 586, 616 (4th Cir. 2020), as amended (Aug. 28, 2020); accord *Adams ex. rel. Kasper v. Sch. Bd. of St. Johns Cty.*, No. 18-13592, 968 F.3d 1286 (11th Cir. Aug. 7, 2020); see also *Hecox*, 2021 WL 4760138 (enjoining law that excluded women and girls who are transgender from women’s sports)

<sup>9</sup> Memorandum, <https://www.justice.gov/crt/page/file/1383026/download>.



Ultimately, if passed, this bill will be challenged in court and will not pass scrutiny.<sup>10</sup> Though lawmakers have claimed that the prospect of transgender athletes competing in sport poses a significant threat to women’s sport. It does not. As the *Hecox* court emphasized, “the only transgender women athletes referenced were two high school runners who compete in Connecticut, and who were, notably, also defeated by cisgender girls in recent races.”<sup>11</sup> There were a grand total of four athletes identified in the *Hecox* litigation at all levels of competition – none of whom continue to compete and all of whom were defeated by cisgender athletes – as constituting the hypothetical threat to women’s sports. But under heightened scrutiny, justifications offered for a law “must be genuine, not hypothesized or invented post hoc in response to litigation.”<sup>12</sup> Because West Virginia has no genuine justification for this kind of categorical exclusion, it will inevitably fail.

The bill also violates NCAA policy and could cause West Virginia to forfeit future opportunities to host championship events. NCAA President Mark Emmert explained that the NCAA is “concerned with the numerous bills that have been filed across our country related to sport participation.” Emmert went on to explain “As we have previously stated in situations such as Idaho’s House Bill 500 and its resulting law, this legislation is harmful to transgender student-athletes and conflicts with the NCAA’s core values of inclusivity, respect and the equitable treatment of all individuals. The NCAA Board of Governors policy requires championship host sites to demonstrate how they will provide an environment that is safe, healthy, and free of discrimination.”<sup>13</sup> In addition to lost NCAA championship opportunities, signing this bill into law could risk substantial lost business opportunities for the state.<sup>14</sup>

Though proponents of this bill claim that it is designed to protect women’s rights and women’s sports, every major women’s rights and women’s sports organization opposes legislation of this kind. In Idaho, the Women’s Sports Foundation, National Women’s Law Center and hundreds of athletes in women’s sports, including Billie Jean King and

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<sup>10</sup> All sex-based classifications triggered heightened scrutiny and as the Supreme Court has made clear “[I]t is impossible to discriminate against a person for being ... transgender without discriminating against that individual based on sex.” *Bostock v. Clayton Cty., Ga.*, — U.S. —, 140 S. Ct. 1731, 1741, — L.Ed.2d — (2020).

<sup>11</sup> *Hecox v. Little*, 2020 WL 4760138.

<sup>12</sup> *Id.* at 533.

<sup>13</sup> Wyatt Ronan, On the Eve of Final Four Tournament, NCAA President Mark Emmert Speaks Out Against Anti-Trans Sports Bills In States, Reinforces NCAA Will Hold Championship In Locations “Free of Discrimination” (April 2, 2021), <https://www.hrc.org/press-releases/on-the-eve-of-final-four-tournament-ncaa-president-mark-emmert-speaks-out-against-anti-trans-sports-bills-in-states-reinforces-ncaa-will-hold-championship-in-locations-free-of-discrimination>

<sup>14</sup> Business Statement on Anti-LGBTQ State Legislation, <https://www.hrc.org/resources/business-statement-on-anti-lgbtq-state-legislation>

Megan Rapinoe, spoke out against the state’s comparable law.<sup>15</sup> Megan Rapinoe, longtime player with the US Women’s National Soccer team, recently penned an op-ed in the *Washington Post* explaining:

These bills are attempting to solve a problem that doesn’t exist. Transgender kids want the opportunity to play sports for the same reasons other kids do: to be a part of a team where they feel like they belong. Proponents of these bills argue that they are protecting women. As a woman who has played sports my whole life, I know that the threats to women’s and girls’ sports are lack of funding, resources and media coverage; sexual harassment; and unequal pay.<sup>16</sup>



This bill serves no purpose and will cost the state and West Virginia taxpayers tremendously. And as the American Academy of Pediatrics (AAP) explains, legislation of this kind greatly harms transgender young people: “Forcing transgender children to play on teams according to their sex assigned at birth, rather than the gender they live in, also puts their physical and mental health at risk.”<sup>17</sup> The AAP notes that at a time of significant mental health crises for all young people because of the COVID-19 pandemic it is particularly undermining of pediatric care to force transgender young people, a group of youth particularly vulnerable to suicidal ideation, anxiety and depression, onto the wrong sports teams.<sup>18</sup>

If HB 3593 becomes law, it will send a message to transgender young people that they do not belong in their communities. It will be challenged in court and likely cost the state not only millions of dollars in litigation costs and fees but also potentially the loss of hundreds of millions of federal dollars, which will be put at risk if the state knowingly passes a bill that violates Title IX. And for what? A hypothetical problem, with not even a single identifiable transgender athlete in the state of West Virginia. It is our hope that you veto this bill before anyone has to resort to litigation over the matter.

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<sup>15</sup> Women’s and Civil Rights Groups, Athletes, Coaches, Corporations and Legal and Medical Experts Tell Federal Appeals Court to Strike Down Idaho Anti-Trans Law, ACLU Press Release (Dec. 21, 2020), <https://www.aclu.org/press-releases/womens-and-civil-rights-groups-athletes-coaches-corporations-and-legal-and-medical>.

<sup>16</sup> Megan Rapinoe, Bills to ban transgender kids from sports try to solve a problem that doesn’t exist, *Washington Post* (March 28, 2021), <https://www.washingtonpost.com/opinions/2021/03/28/megan-rapinoe-transgender-kids-sports-ban/>.

<sup>17</sup> Lee Savio Beers, American Academy of Pediatrics Speaks Out Against Bills Harming Transgender Youth (March 16, 2021), <https://services.aap.org/en/news-room/news-releases/aap/2021/american-academy-of-pediatrics-speaks-out-against-bills-harming-transgender-youth/>.

<sup>18</sup> *Id.*

Sincerely,



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Deputy Director for Transgender Justice  
American Civil Liberties Union



Joseph Cohen  
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American Civil Liberties Union of West Virginia