

March 14, 2023

Governor Laura Kelly
300 SW 10th Ave., Ste. 241S
Topeka, KS 66612-1590

RE: HB 2238, the “Fairness in Women’s Sports Act”

Dear Governor Kelly,

The ACLU of Kansas is asking, once again, for a veto of the “Fairness in Women’s Sports Act.” This bill amounts to nothing more than state-sponsored bullying of trans children. Additionally, by singling out transgender women and girls and enacting a sweeping ban on participation in athletics, HB 2238 violates both the United States Constitution and Title IX of the Civil Rights Act.

Where a law singles out people because their gender identity does not match the sex assigned to them at birth, it necessarily discriminates on the basis of sex and trans status. This triggers heightened equal protection scrutiny under the Constitution. The U.S. Supreme Court is clear that “[a]ll gender-based classifications today warrant heightened scrutiny.” And there is no exception to heightened scrutiny for gender discrimination based on physiological or biological sex-based characteristics.

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.” The State, i.e. the legislature, has so far offered no justification for this bill 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.” This demanding standard leaves no room for a state to hypothesize harm. Put simply, fear of or animus towards transgender people is not a legitimate justification for this legislation.

Likewise, if it became law, HB 2238 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.” The overwhelming majority of courts to consider the issue have



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held that discrimination against transgender students in schools is prohibited sex discrimination under Title IX.

This bill, based in transphobia and medical misinformation, has no place in our state. We are asking you to stand with trans Kansans and allies by vetoing this bill.

Sincerely,

Micah Kubic

ACLU

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