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Opponent Testimony for HB 2238

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House Education Committee
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Committee Chair and Members of the Committee,

I appreciate the opportunity to present testimony here today on behalf of the American Civil Liberties Union of Kansas. I'm D.C. Hiegert, a lawyer, and the LGBTQ+ legal fellow with the ACLU of Kansas. We are a nonpartisan, non-profit organization that works to preserve and strengthen the civil rights and liberties of every person in our state.

The ACLU of Kansas stands strongly opposed to HB 2238 and urges you to not vote this bill out of committee. While this bill purports to be about protecting women's sports, its adoption would have the opposite effect—opening girls and women up to unnecessary scrutiny and potentially invasive examinations just to be able to play sports¹ and banning transgender girls and young women from participating in sports as their true selves. Proponents of HB 2238 will say that this bill is about fairness, alleging it will protect cisgender (i.e., non-transgender) girls and women from losing out on trophies, titles, and athletic scholarships—but in the three years since the Kansas legislature first introduced a bill similar to HB 2238, there has been *no evidence* of trans girls or women dominating in any Kansas sports.

HB 2238 is a bill that attempts to solve a problem that has been shown to not exist. And while there is no evidence of trans athletes causing any harm in Kansas athletics, there is clear evidence that bills like HB 2238 cause harm—to transgender youth in our state and to all girls and women who play sports. These policies result in decreased participation by girls in sports and negatively impact trans youth' mental health.² Every Kansas kid deserves the chance to play sports to challenge themselves, improve their fitness, and be a part of a team. Telling trans girls and young women that they can't participate as who they really are amounts to excluding them from sports entirely—sending the message to those young people that they are not welcome or accepted here, and that they are not worthy of the same opportunities as their peers. In addition to these social harms, HB 2238 clearly discriminates against transgender people in violation of their civil rights under the United States Constitution and federal antidiscrimination law.

¹ See, e.g., Anisha Kohli, *Florida May Force High School Athletes to Disclose Their Menstrual History*, Time (Feb. 1, 2023), https://time.com/6252147/florida_student_athletes_menstrual_history/.

² See, e.g., Transgender Athletes: A Research-Informed Fact Sheet, KU School of Social Welfare, <https://socwel.ku.edu/sites/socwel/files/documents/Transgender-Sports-Youth-FactSheet.pdf>.

Because this bill singles out transgender girls and young women for different treatment based on sex and transgender status, it violates the Fourteenth Amendment to the United States Constitution and Title IX of the Civil Rights Act of 1964.

When 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 transgender status and triggers heightened equal protection scrutiny under the Constitution.³ As the U.S. Supreme Court has explained, “[a]ll gender-based classifications today warrant heightened scrutiny.”⁴ There is no exception to heightened scrutiny for gender discrimination based on physiological or biological sex-based characteristics.⁵ This bill, if passed, would also separately trigger heightened scrutiny for discriminating against individuals based on trans status. In 2020, an Idaho court enjoined a similar bill after it reached the inescapable conclusion that the bill discriminated on the basis of transgender status and thus triggered heightened scrutiny.⁶ 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.”⁷

States who seek to defend gender-based and trans-status-based government action must demonstrate an exceedingly persuasive justification for that action.⁸ The Kansas legislature so far has offered no justification for HB 2238 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.”⁹ 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 girls and women 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 the state.

Likewise, if passed, 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.”¹⁰ The overwhelming

³ See *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731, 207 L. Ed. 2d 218 (2020).

⁴ *United States v. Virginia*, 518 U.S. 515, 555 (1996).

⁵ See *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 70, 73 (2001).

⁶ *Hecox v. Little*, No. 1:20-CV-00184-DCN, 2020 WL 4760138, at *27 (D. Idaho Aug. 17, 2020).

⁷ *Id.*

⁸ *Virginia*, 518 U.S. at 531.

⁹ *Id.* at 533.

¹⁰ 20 U.S.C. § 1681(a).

majority of courts to consider the issue have held that discrimination against transgender students in schools is prohibited sex discrimination under Title IX.¹¹

Moreover, 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*.¹² This means that should Kansas pass HB 2238 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 2023, the estimated federal funding for primary and secondary education was over \$504 million and total funding for education, over \$1.6 billion.¹³

Not only is this bill discriminatory and will likely open the state up to costly litigation and the potential to lose millions of dollars in federal funding, but it is rooted in falsehoods, stereotypes, and animus toward transgender people. HB 2238 is based on the flawed premise that exclusion of girls and young women who are transgender benefits cisgender girls and women in sports. 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 2011.¹⁴ And in the many years since trans girls and women have been competing, there has been absolutely no categorical dominance by these athletes at any level. For example, despite being eligible for nearly two decades, no transgender woman has ever medaled in a women’s event at the Olympics.

HB 2238 is an extreme policy that is out-of-step with the prevailing international and national norms of athletic competition. It 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 and all girls and women who play sports in Kansas—just 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 you to vote no.

Thank you.

¹¹ See, e.g., *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 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); *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); *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).

¹² 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...order-preventing-and-combating-discrimination-on-basis-of-gender-identity-or-sexual-orientation/>.

¹³ United States Dep’t of Education, Fiscal Years 2021-2023 State Tables for the U.S. Department of Education, <https://www2.ed.gov/about/overview/budget/statetables/index.html>.

¹⁴ See, e.g., NCAA Office of Inclusion, NCAA Inclusion of Transgender Student-Athletes (August 2011), available at https://13248aea-16f8-fc0a-cf26-a9339dd2a3f0.filesusr.com/ugd/2bc3fc_4a1....