

May 3, 2022

Via U.S. Mail and Email to [bill.lee@tn.gov](mailto:bill.lee@tn.gov)

The Honorable Bill Lee  
Governor of the State of Tennessee  
Tennessee State Capitol, 1<sup>st</sup> Floor  
600 Dr. Martin Luther King Jr. Blvd.  
Nashville, TN 37243

**Re: SB 2153/HB 2316**

Dear Governor Lee,

On behalf of the ACLU of Tennessee and its thousands of members throughout the state, I write to urge you to veto SB 2153/HB 2316, which would exclude transgender women from participating on college sports teams consistent with their gender identity. Every young person deserves the opportunity to participate in sports to challenge themselves, improve fitness, and be part of a team. Telling transgender students that they can't participate as who they really are amounts to excluding them from sports entirely – depriving them of opportunities available to their peers and sending the message that they are not worthy of a full life. This bill does not protect women's sports, but instead discriminates against and directly harms trans students attending Tennessee's universities.

Last year, we challenged Tenn. Code § 49-6-310, which bans trans kids enrolled in middle and high school from competing on sports teams consistent with their gender identity. We challenged this law in federal court, as it violates the United States Constitution's equal protection clause and Title IX.<sup>1</sup> This law raises the same constitutional concerns: by extending that ban to college athletics, Tennessee violates both federal anti-discrimination law and the Constitution. Further, SB 2153/HB 2316 conflicts with existing NCAA rules and may jeopardize Tennessee schools' standing in national athletic conferences in the future. Trans students are already more at risk of absenteeism, depression, suicide, and violent victimization than their cisgender counterparts. Instead of providing trans students the support and resources they need, SB 2153/HB 2316 adds sex discrimination in sports to the long list of challenges trans students already face in Tennessee.

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<sup>1</sup> Complaint, *L.E. v Lee*, Case No. 3:21-cv-00835 (M.D. Tenn. Nov. 4, 2021).



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Excluding transgender students from playing sports is unduly harmful to trans students.

Transgender students endure prejudice and discrimination in nearly every facet of their lives. They must contend with people who deny their very existence as transgender, and many lack reliable access to crucial gender-affirming healthcare. To improve life for Tennessee’s transgender students, the state should seek to destigmatize being transgender and provide schools and communities with resources to support trans students. This bill does the opposite, harming and discriminating against trans women by excluding them from and denying them the benefit of college athletics.

A trans man is a man and a trans woman is a woman.<sup>2</sup> Transgender people have a gender identity – an internal sense of their own gender – that is incongruent with the sex they were assigned at birth. According to an amicus brief filed by the American Academy of Pediatrics and a dozen other major medical organizations in *Hecox vs. Little*, “every person has a gender identity, which cannot be altered voluntarily or necessarily ascertained immediately after birth.”<sup>3</sup> The healthcare community recognizes that “being transgender ‘implies no impairment in judgment, stability, reliability, or general social or vocational capabilities.’”<sup>4</sup>

Transgender people may experience clinical distress resulting from the incongruence between their gender identity and the sex they were assigned at birth. The American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders (DSM-5) identifies this distress as “gender dysphoria.” If left untreated, it can result in serious anxiety, depression, self-harm, and suicidality. And, as outlined in our complaint challenging last year’s anti-trans sports ban, “for people with gender dysphoria, being able to live consistently with their gender identity is essential to their health and well-being. When they are forced to live in a manner inconsistent with their gender identity, it undermines their ability to socially transition and, thus, exacerbates their gender dysphoria.”<sup>5</sup>

Further, by preventing trans kids from participating in sports consistent with their gender identity, these laws stigmatize these students, suggesting to

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<sup>2</sup> Brief of Amici Curiae American Academy of Pediatrics, American Medical Association, American Psychiatric Association, and 10 Additional Health Care Organizations in Support of Appellees. *Hecox vs. Little*. <https://www.aclu.org/legal-document/medical-and-mental-health-associations-amicus-brief>

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Complaint, *L.E. v Lee*, Case No. 3:21-cv-00835 (M.D. Tenn. Nov. 4, 2021).



other students a trans woman, for example, is not “really” a woman. Studies increasingly show how stigma and discrimination can have negative consequences for a person’s health, “including striking effects on [their] daily functioning and emotional and physical health.”<sup>6</sup>

Finally, excluding trans students from participating in sports deprives them from the mental, social, and physical benefits students derive from athletic competition.<sup>7</sup> “Interscholastic athletics offer students not only the opportunity to develop their athletic skills and participate in competition, but also a range of academic, social, emotional, and health benefits and life skills that provide a foundation for success throughout their lives.”<sup>8</sup> Excluding trans students from developing these skills and receiving these benefits because they are trans is harmful and discriminatory.



SB 2153/HB 2316 is a solution in search of a problem.

Lawmakers are concerned that trans girls – girls who were assigned male at birth – have a particular competitive advantage in girls’ sports. But advocates for this legislation have not identified a single Tennessee case wherein a trans woman has demonstrated an undue advantage over a non-trans woman (or even participated in women’s sports at the collegiate level in Tennessee). If trans women do compete in college athletics in Tennessee, they will not have an unfair advantage over cis women. Trans athletes vary in athletic ability just as cis athletes do. “One high jumper could be taller and have longer legs than another, but the other could have perfect form, and then do better,” explains Andraya Yearwood, a student track athlete, trans woman, and ACLU client.<sup>9</sup>

Major sports organizations endorse this view and promote transgender athletes’ right to play. There has been much debate of late as to how best to both uphold the rights of trans students and ensure competitive fairness in elite sports. But both the International Olympic Committee (IOC) and the

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

<sup>7</sup> Excluding trans students from participating in sports functionally excludes from them from playing sports at all. The Idaho District Court’s opinion in *Hecox v. Little* explains: “The... argument that... transgender women are not excluded from school sports because they can simply play on the men’s team is analogous to claiming homosexual individuals are not prevented from marrying under statutes preventing same-sex marriage because lesbians and gays could marry someone of a different sex.” *Hecox v. Little*, Case No. 1:20-cv-00184-DCN (D. Idaho Aug. 17, 2020).

<sup>8</sup> Complaint, *L.E. v. Lee*, Case No. 3:21-cv-00835 (M.D. Tenn. Nov. 4, 2021).

<sup>9</sup> <https://www.aclu.org/news/lgbtq-rights/four-myths-about-trans-athletes-debunked>

National Collegiate Athletic Association (NCAA) permit trans women to compete with cis women.

The IOC recognizes “the need to ensure that everyone, irrespective of their gender identity or sex variations, can practice sport in a safe, harassment-free environment that recognizes and respects their needs and identities.”<sup>10</sup> The framework seeks to “ensure competition in each of these categories is fair and safe and that athletes are not excluded solely on the basis of their transgender identity or sex variations.”<sup>11</sup> To this end, the IOC sets out a policy to permit participation by trans athletes at the most elite level of sport, and the NCAA has recently committed to “align transgender student-athlete participation for college sports” with IOC policy.<sup>12</sup> These policies are developed and published by experts, tasked with apolitically upholding fairness in sport when stakes are highest. Tennessee need not interfere – and is not equipped to interfere – with the efforts of these bodies to protect competition and the rights of athletes.



Numerous colleges and universities in Tennessee, including Tennessee State University, the University of Tennessee, Middle Tennessee State University, and Tennessee Tech, are members of the NCAA. In 2011, in consultation with medical, legal, and athletic experts, the NCAA issued a policy allowing the participation of transgender athletes in collegiate athletics.<sup>13</sup> Almost half a million student-athletes compete in 24 NCAA sports every year.<sup>14</sup> Since the 2011 policy was established, millions of student athletes have competed without any reported disturbances to collegiate athletics as a result of the inclusion of transgender people. If SB 2153/HB 2316 becomes law, these schools will be forced out of step with NCAA rules. Tennessee could lose revenue if the NCAA chooses not to hold events in a state that violates its rules.

Discriminating based on gender identity violates federal law and is unconstitutional.

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<sup>10</sup> <https://stillmed.olympics.com/media/Documents/News/2021/11/IOC-Framework-Fairness-Inclusion-Non-discrimination-2021.pdf>

<sup>11</sup> *Id.*

<sup>12</sup> <https://www.ncaa.org/news/2022/1/19/media-center-board-of-governors-updates-transgender-participation-policy.aspx>

<sup>13</sup> NCAA Office of Inclusion, *NCAA Inclusion of Transgender Student-Athletes* (Aug. 2011), [https://ncaaorg.s3.amazonaws.com/inclusion/lgbtq/INC\\_TransgenderHandbook.pdf](https://ncaaorg.s3.amazonaws.com/inclusion/lgbtq/INC_TransgenderHandbook.pdf).

<sup>14</sup> NCAA, Student-Athletes, <https://www.ncaa.org/sports/2021/7/22/student-athletes.aspx>.



SB 2153/HB 2316 violates both federal law and the Constitution’s equal protection clause, as it wrongfully discriminates against students on the basis of transgender status. As was the case with last year’s discriminatory legislation, if SB 2153/HB 2316 is signed, the state will face expensive legal challenges that will cost taxpayers millions and lead to the law being struck down.

Last year, a similar law in Idaho was enjoined by a federal district court due to the “inescapable conclusion that the Act discriminates on the basis of transgender status,” despite the state’s insistence the law only separated sports by sex.<sup>15</sup> The *Hecox* court explains that “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>16</sup>

Lawmakers have also suggested that even if the bill discriminates against trans students, this discrimination may be permissible. Such a statement ignores the Supreme Court’s holding in *Bostock*, which is crystal clear on this issue: “[I]t is impossible to discriminate against a person for being ... transgender without discriminating against that individual based on sex.”<sup>17</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>18</sup>

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>19</sup> Additionally, unlike cis males, who will have ample opportunity to participate in sports, if signed into law, this bill would entirely eliminate the

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<sup>15</sup> *Hecox*, 2021 WL 4760138 at \*27.

<sup>16</sup> *Id.*

<sup>17</sup> *Bostock v. Clayton Cty., Ga.*, — U.S. —, 140 S. Ct. 1731, 1741 (2020).

<sup>18</sup> See *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); see also *Hecox*, 2021 WL 4760138 (enjoining law that excluded women and girls who are transgender from women’s sports).

<sup>19</sup> *Hecox v. Little*, 2020 WL 4760138.

ability of 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>20</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>21</sup> The court ultimately held that Ninth Circuit law permitting sex separation in sport did not permit Idaho’s discriminatory law and that it likely violated the Constitution.



Ultimately, if passed, SB 2153/HB 2316 will be challenged in court and will not pass constitutional scrutiny.<sup>22</sup> As discussed above, Tennessee lawmakers have admitted that they are not aware of any current transgender athletes at the collegiate level in Tennessee. (There are only “about 50” trans athletes playing women’s sports nationwide.<sup>23</sup>) But under heightened scrutiny, justifications offered for a law “must be genuine, not hypothesized or invented post hoc in response to litigation.”<sup>24</sup> Because Tennessee has no genuine justification for this kind of categorical exclusion, it will inevitably fail.

If SB 2153/HB 2316 becomes law, the state will be sued, and Tennessee’s taxpayers will be on the hook for millions of dollars. The ACLU acts as counsel for plaintiffs challenging anti-trans laws across the country – including in the *Hecox* case – and can speak to the high costs of defending statutes like SB 2153/HB 2316.

Further, a law so blatantly in violation of Title IX risks federal funding for Tennessee’s schools. The Biden administration has made clear its commitment enforcing Title IX. In an executive order, President Biden wrote “children should be able to learn without worrying about whether they will be

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<sup>20</sup> *Id*

<sup>21</sup> *Id.*

<sup>22</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>23</sup> <https://www.cnn.com/2022/01/22/sport/ncaa-lia-thomas-transgender-policy/index.html>

<sup>24</sup> *Id.* at 533.

denied access to ... school sports.”<sup>25</sup> The order explains that “under Bostock’s reasoning, laws that prohibit sex discrimination – including Title IX of the Education Amendments of 1972 ... prohibit discrimination on the basis of gender identity.”<sup>26</sup> The Tennessee General Assembly’s fiscal review committee recognizes the significant impact this legislation could have on federal funding availability for schools. The fiscal note attached to the bill reads: “If DOE is found to be in violation of federal civil rights laws, up to **\$5,385,248,493** in federal funding ... could be jeopardized.”

SB 2153/HB 2316 is cruel, unnecessary, and unconstitutional. It tells trans students they are not allowed to be themselves and that they do not belong in their communities. In Utah, Republican Governor Spencer Cox received a similar bill from the legislature, which banned trans women from participating in athletics. He vetoed the bill. In his public letter explaining his decision, he explained:

*“I don’t understand what they are going through or why they feel the way they do. But I want them to live. And all the research shows that even a little acceptance and connection can reduce suicidality significantly. For that reason, as much as any other, I have taken this action in the hope that we can continue to work together and find a better way.”*

We hope in Tennessee, too, we can find a better way forward than this legislation. **Please veto SB 2153/HB 2316.**

Sincerely,



Hedy Weinberg  
Executive Director



Stella Yarbrough  
Legal Director



Henry Seaton  
Transgender Justice Advocate



Jack Seigenthaler  
Policy Strategist

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<sup>25</sup> Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation. <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>26</sup> *Id.*