

February 7, 2022

Re: ACLU of South Dakota Urges Opposition to HB 1005

Dear members of the Senate Judiciary Committee,

The American Civil Liberties Union and the American Civil Liberties Union of South Dakota stand in strong opposition to House Bill 1005. The ACLU was counsel in *Carcaño et al. v. Cooper et al.*, the legal challenge to North Carolina’s similar “bathroom ban” bills, HB 2 and HB 142. Additionally, The ACLU is currently counsel for Plaintiffs in litigation challenging anti-trans bills that have passed across the country over the past two years.

By singling out transgender students for discrimination and excluding them from restrooms, locker rooms and other sex-segregated facilities that match their gender identity, House Bill 1005 discriminates based on transgender status and sex in violation of the United States Constitution and Title IX of the Civil Rights Act. If passed, this bill would send a message to vulnerable transgender youth that they are not welcome or accepted in their communities. It would expose school districts and the state to costly litigation and the potential loss of federal funding for education.

The Supreme Court has already declined to review a federal appeals court decision holding that policies like the one proposed here violate the constitutional and statutory rights of transgender students.¹ That is because the law is clear on this issue.

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.”² As the U.S. Supreme Court has explained, “[a]ll gender-based classifications today warrant heightened scrutiny.”³ There is no exception to heightened scrutiny for gender discrimination based on physiological or biological sex-based characteristics.⁴ This bill, if passed, would separately trigger heightened scrutiny for discriminating against individuals based on transgender status.⁵

Parties who seek to defend gender-based and trans-status based discrimination must demonstrate an “‘exceedingly persuasive justification’ for that action.” Under this

¹ *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 594 (4th Cir. 2020), as amended (Aug. 28, 2020), cert. denied, 141 S. Ct. 2878, 210 L. Ed. 2d 977 (2021).

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

³ *United States v. Virginia*, 518 U.S. 515, 555 (1996).

⁴ See *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 70, 73 (2001).

⁵ See, e.g., *Grimm*, 972 F.3d at 611 (“Engaging with the suspect class test, it is apparent that transgender persons constitute a quasi-suspect class.”).



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standard, “the burden of justification is demanding and it rests entirely on the State.”⁶ The South Dakota legislature has so far offered no justification for House Bill 1005 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.”⁷ This demanding standard leaves no room for a state to hypothesize harms that have not come to pass in the many years that transgender students have used appropriate restrooms and locker rooms.

Likewise, if passed, House Bill 1005 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.”⁸ 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.⁹ Since the Supreme Court’s decision in *Bostock*, at least one federal appeals court has affirmed that Title IX’s prohibition on sex discrimination likewise prohibits discrimination against transgender students when accessing single-sex spaces and activities.¹⁰

The federal government has made clear that it intends to enforce federal civil rights statutes, including Title IX, consistent with the Supreme Court’s holding in *Bostock*.¹¹ This means that should South Dakota pass House Bill 1005 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 2022, the estimated federal funding for primary and secondary education was over \$225 million and total funding for education, over \$573 million.¹²

Even just considering lawsuits by private individuals, these cases are extremely costly. A Virginia school district paid \$1.3 million in attorneys’ fees after spending years unsuccessfully defending its policy of banning transgender students from restrooms that

⁶ *Virginia*, 518 U.S. at 531.

⁷ *Id.* at 533.

⁸ 20 U.S.C. § 1681(a).

⁹ 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).

¹⁰ 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).

¹¹ 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/>.

¹² United States Dep’t of Education, Fiscal Years 2020-2022 State Tables for the U.S. Department of Education, <https://www2.ed.gov/about/overview/budget/statetables/index.html>.

align with their gender identity.¹³ If passed, this bill will put school districts in the untenable position of facing huge liability if forced to comply with state law.

Because this bill violates the United States Constitution and federal civil rights law, it puts South Dakota 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 South Dakota, they go to the restroom just like everyone else and their presence harms no one. But if passed, this bill would cause severe harms to transgender students who are just trying to live their lives and go to school alongside their peers.



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For these reasons, we urge your “no” vote. Thank you.

Sincerely,

A handwritten signature in black ink that reads "Jett Jonelis". The signature is written in a cursive style.

Jett Jonelis
Advocacy Manager
ACLU of South Dakota
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¹³ <https://www.cnn.com/2021/08/27/us/gavin-grimmtrans-student-legal-fees/index.html>