

March 10, 2021

The Honorable Kristi L. Noem
Governor of South Dakota
South Dakota State Capitol
Pierre, SD 57501

RE: Request to Veto HB 1217 regarding Transgender Students in Sports

Dear Governor Noem:

We, the undersigned organizations committed to women's rights and gender justice, urge you to veto House Bill 1217. This bill would harm both cisgender and transgender girls and women, particularly Black and brown girls and women, and is likely to violate both the U.S. Constitution and Title IX, putting South Dakota's federal educational funding in jeopardy. Our organizations have a long history of advocating for fairness in sports and opportunities for all girls and women to benefit from athletic participation and competition. Inclusion of transgender girls and women in girls' and women's sports advances those goals. As organizations that care deeply about ending sex-based discrimination and ensuring equal access to athletics for girls and women, we support laws and policies that protect transgender people from discrimination, including in participation in sports, and reject the suggestion that cisgender girls and women benefit from the exclusion of girls and women who happen to be transgender.

Rejecting the harmful and misguided invocation of "women's rights" as a justification for sex discrimination against transgender athletes, women's rights organizations and elite athletes have in recent years repeatedly voiced their unequivocal support of transgender inclusion in athletics. In April 2019, 23 national women's rights and gender justice organizations issued a public letter in support of "Full and Equal Access to Participation in Athletics for Transgender People," including the National Organization for Women, Women Leaders in College Sports, and the Women's Sports Foundation.¹ In December 2020, Billie Jean King, Megan Rapinoe, and Candace Parker joined nearly 200 athletes in an amicus brief opposing the Idaho anti-transgender sports ban.² In February 2021, the National Coalition for Women and Girls in Education—which includes organizations like American Association of University Women (AAUW), Girls Inc., and YWCA USA—issued a statement announcing the coalition's support of transgender and nonbinary students' "full and equal access to sex-separated activities and facilities consistent with their gender identity, including athletics teams."³

¹ *Statement of Women's Rights and Gender Justice Organizations in Support of Full and Equal Access to Participation in Athletics for Transgender People* (Apr. 9, 2019), <https://nwlc.org/wp-content/uploads/2019/04/Womens-Groups-Sign-on-Letter-Trans-Sports-4.9.19.pdf>.

² Lambda Legal, *Billie Jean King, Megan Rapinoe, and Candace Parker Join Nearly 200 Athletes Supporting Trans Youth Participation in Sports* (Dec. 21, 2020), https://www.lambdalegal.org/news/id_20201221_billie-jean-king-megan-rapinoe-and-candace-parker.

³ National Coalition for Women and Girls in Education, *NCWGE Supports Transgender and Nonbinary Students' Full and Equal Participation in All Education Programs and Activities* (Feb. 12, 2021), <https://www.ncwge.org/activities.html>.

Because H.B. 1217 is a far cry from ensuring gender equity in athletics and schools, we strongly urge you to veto it. This bill would impose an extremist ban on transgender girls as young as 5—far more restrictive than even the strictest rules that govern the most elite levels of sports around the world. Transgender students already face disproportionately high rates of sex discrimination, including sexual assault, in school.⁴ H.B. 1217 would further deprive transgender students of educational access and could place them at greater risk of sexual assault.⁵

Moreover, H.B. 1217 would force schools to violate both the U.S. Constitution and Title IX, which would, in turn, jeopardize South Dakota's federal funding. An Idaho bill similar to H.B. 1217 has already been found to likely violate the U.S. Constitution's Equal Protection Clause.⁶ In addition, numerous federal courts, including the U.S. Supreme Court,⁷ have long held that discrimination on the basis of gender identity and transgender status is a form of sex discrimination, including when it occurs in gender-separated education programs.⁸ The Biden-Harris administration has made clear that it intends to enforce Title IX consistent with the Supreme Court's holding in *Bostock*.⁹ This means that if H.B. 1217 were to be enacted, South Dakota would likely face litigation not only by private parties but also by the federal government, putting at risk South Dakota's \$744 million in federal educational funding.¹⁰

H.B. 1217 is a false solution in search of a nonexistent problem. Transgender students already live and go to school in South Dakota, where the current trans-inclusive policies have benefited all students, including cisgender girls and women.¹¹ There has been *no* dominance by transgender girls and women in sports in South Dakota or in other states with trans-inclusive

⁴ National Center for Transgender Equality, *The Report of the 2015 U.S. Transgender Survey* 4, 11 (2017) [hereinafter USTS Report], available at <http://www.ustranssurvey.org>.

⁵ Diane Ehrensaft & Stephen M. Rosenthal, *Sexual Assault Risk and School Facility Restrictions in Gender Minority Youth*, 143 PEDIATRICS 1 (May 6, 2019), <https://pubmed.ncbi.nlm.nih.gov/31061221>.

⁶ *Hecox v. Little*, 479 F. Supp. 3d 930, 979, 984-85 (D. Id. Aug. 17, 2020).

⁷ *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1747 (2020); *Adams by & through Kasper v. Sch. Bd. of St. Johns Cnty.*, 968 F.3d 1286, 1296 (11th Cir. 2020); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020), as amended (Aug. 28, 2020).

⁸ See, e.g., *Schwenk v. Hartford*, 204 F.3d 1187, 1200-01 (9th Cir. 2000) (interpreting Gender Motivated Violence Act); *Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1047 (7th Cir. 2017) (Title IX); *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 Cnty.*, 286 F. Supp. 3d 704, 719 (D. Md. 2018) (Title IX). See also *Parents for Privacy v. Barr*, 949 F.3d 1210, 1239-40 (9th Cir. 2020) (Title IX); *Doe by & through Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 535 (3d Cir. 2018) (Title IX).

⁹ Exec. Order No. 13988, 86 Fed. Reg. 7023 (2021).

¹⁰ U.S. Department of Education, *Fiscal Years 2019-2021 State Tables for the U.S. Department of Education*, available at <https://www2.ed.gov/about/overview/budget/statetables/index.html>.

¹¹ Center for American Progress, *Fair Play: The Importance of Sports Participation for Transgender Youth* 13-16 (Feb. 8, 2021), available at <https://www.americanprogress.org/issues/lgbtq-rights/reports/2021/02/08/495502/fair-play>.

policies.¹² Yet H.B. 1217 would not only exclude transgender students from sports but would also harm cisgender girls and women who fall outside stereotypical notions of femininity, simply because they are very tall or muscular, have short hair, wear masculine clothing, or otherwise choose to present in more traditionally masculine ways. Under H.B. 1217, a cisgender girl or woman could be removed from sports participation because a school official believes that she submitted “false or misleading” documentation about her sex assigned at birth, or simply because she is unable to afford the cost of obtaining a birth certificate or other legal document.¹³ Black and brown girls and women—who are routinely targeted for not conforming to society’s expectations of white femininity—would be especially vulnerable to the gender scrutiny invited by H.B. 1217.¹⁴

There are numerous examples of sex discrimination that continues to harm girls and women in sports—including fewer athletic opportunities,¹⁵ second-class facilities and equipment,¹⁶ and sexual abuse by coaches, doctors, and other students¹⁷—but banning transgender girls and women from participating in sports would not solve any of these problems. H.B. 1217 claims to protect girls and women in sports, but it does the exact opposite by using “fairness in women’s sports” as a cudgel against transgender girls and women while harming cisgender girls and women as well. South Dakotans who care about women’s sports should reject this bill and instead focus on closing the gender and racial disparities in athletics opportunities and participation and on protecting student athletes from sexual abuse.

The undersigned organizations support the full inclusion of transgender girls and women in sports because we recognize, as courts and scientists overwhelmingly have stated, that

¹² David Crary & Lindsay Whitehurst, *Lawmakers can’t cite local examples of trans girls in sports*, ASSOCIATED PRESS (Mar. 3, 2021), <https://apnews.com/article/lawmakers-unable-to-cite-local-trans-girls-sports-914a982545e943ecc1e265e8c41042e7>.

¹³ Teresa Wiltz, *Without ID, Homeless Trapped in Vicious Cycle* (May 15, 2017), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/05/15/without-id-homeless-trapped-in-vicious-cycle>.

¹⁴ Cassandra Mensah, *NWLC Leads Amicus Brief Against Idaho Law That Targets Trans Women and Girls and Harms All Female Students*, National Women’s Law Center (Dec. 21, 2020), <https://nwlc.org/blog/nwlc-leads-amicus-brief-against-idaho-law-that-targets-trans-women-and-girls-and-harms-all-female-students>.

¹⁵ Women’s Sports Foundation, *Chasing Equity: The Triumphs, Challenges, and Opportunities in Sports for Girls and Women* (2020), https://www.womenssportsfoundation.org/articles_and_report/chasing-equity-the-triumphs-challenges-and-opportunities-in-sports-for-girls-and-women; National Women’s Law Center, *Finishing Last: Girls of Color and School Sports Opportunities* 1 (2015), <https://nwlc.org/resources/finishing-last>.

¹⁶ United Nations Women, *COVID-19, Women, Girls and Sport: Build Back Better*, (2020), <https://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2020/brief-covid-19-women-girls-and-sport-en.pdf>.

¹⁷ See, e.g., Aaron Slone Jeckell *et al.*, *The Spectrum of Hazing and Peer Sexual Abuse in Sports: A Current Perspective*, 10(6) SPORTS HEALTH 558, 560 (Dec. 2018), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6204631> (estimating that up to 48% of athletes experience some kind of sexual mistreatment); Julie Mack & Emily Lawler, *MSU doctor’s alleged victims talked for 20 years. Was anyone listening?*, MLIVE (Feb. 8, 2017), https://www.mlive.com/news/index.ssf/page/msu_doctor_alleged_sexual_assault.html.

transgender girls and women *are* girls and women. Youth who are transgender join sports for the same reasons that all young people do: to have fun, challenge themselves, and be part of a team where they feel included and accepted. And in the handful of instances where a transgender girl or woman is a champion in her sport, we celebrate her victory as a victory for all girls and women.

Students who are transgender deserve the chance to succeed and thrive like any other student. We urge you to veto H.B. 1217.

If you have any questions, please reach out to Shiwali Patel (spatel@nwlc.org) and Elizabeth Tang (etang@nwlc.org).

Thank you,
National Women's Law Center

Joined by:

ACLU of South Dakota
ADL Midwest
Center for American Progress
Clearinghouse on Women's Issues
End Rape On Campus
Equal Rights Advocates
Equality South Dakota
Every Voice Coalition
Faculty Against Rape (FAR)
Feminist Majority Foundation
Gender Justice
GLSEN
Harvard Law School Gender Violence Program
Human Rights Watch
Japanese American Citizens League
Know Your IX
Legal Momentum, the Women's Legal Defense and Education Fund
Legal Voice
National Black Justice Coalition
National Center for Youth Law
National Council of Jewish Women
National Women's Political Caucus
Public Justice
Transformation Project Advocacy Network