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April 14, 2022

Gov. Bill Lee
State Capitol, 1st Floor
6000 Dr. Martin L. King Jr. Blvd.
Nashville, TN 37243

RE: Request to Veto SB 1861 regarding Sports Participation for Transgender Students

Dear Governor Lee:

The National Women's Law Center (NWLC) urges you to veto Senate Bill 1861. This bill would harm girls and women in Tennessee—both cisgender and transgender girls, and particularly Black and brown girls. It will also harm girls and young women born with intersex traits. The bill is likely to violate both the U.S. Constitution and Title IX, putting Tennessee's federal educational funding in jeopardy. That is why Governor Holcomb of Indiana, Governor Cox of Utah, and Governor Beshear of Kentucky all recently vetoed similar bills. Our organization has 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 in girls' sports advances those goals. As an organization devoted to ending sex-based discrimination and ensuring equal access to athletic opportunities for girls and women, we support laws and policies that protect transgender students and all students from discrimination, including in athletics. We firmly reject the suggestion that girls and women who are not transgender benefit in any way from the exclusion of girls and women who are.

NWLC has fought for decades to address the real and serious barriers girls and women face to equal access to the benefits of sports. As Olympic swimming medalist Erica Sullivan recently wrote: "I can tell you that I know what the real threats to women's sports are: sexual abuse and harassment, unequal pay and resources and a lack of women in leadership. Transgender girls and women are nowhere on this list. Women's sports are stronger when all women—including trans women—are protected from discrimination, and free to be their true selves."¹ Women's rights organizations and elite athletes have in recent years repeatedly voiced their unequivocal opposition to bills like SB 1861. 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

¹ Erica Sullivan, Why I'm Proud to Support Trans Athletes like Lia Thomas, Newsweek (Mar. 18, 2022), <https://www.newsweek.com/why-im-proud-support-trans-athletes-like-lia-thomas-opinion-1689192>.

Women, Women Leaders in College Sports, and the Women’s Sports Foundation.² 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.³ 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.”⁴

Because SB 1861 is a far cry from meaningful action to advance athletic opportunities for girls, we strongly urge you to veto it. This bill would impose strict penalties on schools that do not scrutinize the assigned birth sex of children as young as age 5—far more invasive and medically, developmentally, and educationally inappropriate than, for example, processes governing Olympic athletes. If this law is enacted, Tennessee would become unique for devoting a new law specifically to scrutinizing assigned birth sex of children under age 10 and focusing arbitrary harms upon the youngest, most vulnerable transgender, nonbinary, and intersex children. K-5 sports exist primarily to allow young children to experience fun and a sense of belonging. Despite the best efforts of many educators, girls who are transgender already face widespread and well-documented discrimination in public schools, including harassment and sexual abuse and assault.⁵ SB 1861 would further deprive transgender girls of educational access and could place them at greater risk of such discrimination.⁶

Moreover, SB 1861 would coerce schools to violate both the U.S. Constitution and Title IX, inviting costly litigation and jeopardizing their federal funding. An Idaho bill similar to SB 1861 has already been found to likely violate the U.S. Constitution’s Equal Protection Clause.⁷ In addition, numerous federal courts, including the U.S. Supreme Court,⁸ have long held that discrimination on the basis of gender identity and transgender status is a form of sex

² *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>.

³ 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.

⁴ 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>.

⁵ 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>.

⁶ 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>.

⁷ *Hecox v. Little*, 479 F. Supp. 3d 930, 979, 984-85 (D. Id. Aug. 17, 2020).

⁸ *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).

discrimination, including when it occurs in gender-separated education programs.⁹ Every federal court to address the question, as well as the U.S. Department of Education, has understood the Supreme Court’s ruling that discrimination on the basis of gender identity and transgender status is a form of sex discrimination as applying fully to Title IX.¹⁰ This means that if SB 1861 were to be enacted, Tennessee would likely face litigation not only by private parties but also by the federal government, putting at risk Tennessee’s over \$755 million educational funding.¹¹

SB 1861 is a false solution in search of a problem. Transgender students already live and go to school in Tennessee, and have been recently harmed by the May 2021 anti-trans athletics ban affecting students in grades 5-12.¹² There has never been *any* dominance by transgender girls and women in sports in Tennessee, or in states with trans-inclusive policies.¹³ Yet SB 1861 would not only exclude transgender students from sports but would also harm cisgender girls 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 SB 1861, a cisgender girl 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.¹⁴ Black and brown girls—who are routinely targeted for not conforming to society’s expectations of white femininity—would be especially vulnerable to the gender scrutiny invited by SB 2.¹⁵

⁹ 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).

¹⁰ Exec. Order No. 13988, 86 Fed. Reg. 7023 (2021).

¹¹ U.S. Department of Education, *Fiscal Years 2020-2022 State Tables for the U.S. Department of Education*, available at <https://www2.ed.gov/about/overview/budget/statetables/index.html>.

¹² 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>.

¹³ 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>.

¹⁴ 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>.

¹⁵ 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>.

There are numerous examples of sex discrimination that continues to harm girls and women in sports—including fewer athletic opportunities,¹⁶ second-class facilities and equipment,¹⁷ and sexual abuse by coaches, doctors, and other students¹⁸—but banning transgender girls and women from participating in sports would not solve any of these problems. SB 1861 claims to protect girls in sports, but it does the exact opposite by using “fairness in girls’ sports” as a cudgel against transgender girls, while ultimately harming all girls. Tennesseans who care about girls’ 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.

NWLC supports the full inclusion of transgender girls and women in sports because we recognize, as courts and scientists overwhelmingly have stated, that transgender girls and women *are* girls and women. Transgender students play sports for the same reasons that all students 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 works hard and excels in her sport, we celebrate her victory as a victory for all girls and women.

We hope you’ll consider the words of Utah Governor Spencer Cox when he spoke about the small number of transgender students participating in team sports in his state: “That’s what all of this is about. Four kids who aren’t dominating or winning trophies or taking scholarships. Four kids who are just trying to find some friends and feel like they are a part of something. Four kids trying to get through each day. Rarely has so much fear and anger been directed at so few. 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.”¹⁹ All students, including transgender girls, deserve the chance to succeed and thrive like any of their peers. We urge you to veto SB 1861.

¹⁶ 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>.

¹⁷ 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>.

¹⁸ 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.

¹⁹ Gov. Spencer J. Cox, Veto Message for H.B. 11 (Mar. 22, 2022), <https://www.sltrib.com/news/politics/2022/03/22/gov-spencer-coxs/>.

Thank you,

A handwritten signature in black ink, appearing to read "Auden J. Perino". The signature is fluid and cursive, with the first name "Auden" and last name "Perino" clearly distinguishable.

Auden J. Perino
Senior Counsel for Education and Workplace Justice
National Women's Law Center