

May 10, 2021

The Honorable Bill Lee
Office of the Governor
1st Floor, State Capitol
Nashville, TN 37243

Re: Request to veto SB 1367/HB 1223 and SB 1224/HB 1182

Dear Governor Lee:

On behalf of the American Civil Liberties Union of Tennessee and the tens of thousands of ACLU supporters in Tennessee, we urge you to veto both SB 1367/HB 1223 and SB 1224/HB 1182. These two unconstitutional bills target transgender people yet again and further stigmatize a marginalized community for political expedience. These harmful bills target trans children and adults and send the wrong message to a community in need of this administration's support, not ostracization.

SB 1367/HB 1223 authorizes lawsuits against a public school or LEA by any student or employee who believes they have been in a restroom or locker room at the same time as a transgender student or employee if the school has a policy allowing transgender students or staff to use the bathroom that aligns with the gender that they know themselves to be.

The inevitable result of this bill will be schools barring transgender students or staff from using the appropriate restroom to avoid liability under this bill. While the bill purports to allow a "reasonable accommodation" for any students who seek additional privacy in multi-user restrooms, it explicitly prohibits any "accommodation" that allows students who are transgender to use the bathroom that aligns with their gender. This requirement for privacy accommodations for non-transgender students only creates confusion and burdens for Tennessee schools, students, and staff. Such discrimination violates the United States Constitution, as well as Title VII and Title IX of the Civil Rights Act.

Federal courts of appeal have recognized that both Title IX of the Civil Rights Act of 1964, and the constitutional guarantees of equal protection forbid schools from singling out trans students and excluding them from the appropriate restroom.¹ These decisions are in accord with the United States Supreme Court's holding in *Bostock v. Clayton County Georgia* that

¹ 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 and the Constitution); *Adams ex. rel. Kasper v. Sch. Bd. of St. Johns Cty.*, 968 F.3d 1286 (11th Cir. 2020); *Whitaker v. Kenosha Unified Sch. Dist. No. 1*, 858 F.3d 1034 (7th Cir. 2017).



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discrimination based on transgender status is a form of impermissible sex discrimination.² The Department of Justice (DOJ) also recently clarified that “[a]fter considering the text of Title IX, Supreme Court caselaw, and developing jurisprudence in this area, the [DOJ] has determined that the best reading of Title IX’s prohibition on discrimination ‘on the basis of sex’ is that it includes discrimination on the basis of gender identity and sexual orientation.”³

Ultimately, if signed into law, this bill will be challenged. There is no legitimate justification offered for imposing this stigmatizing burden on transgender students and staff, and it cannot withstand legal scrutiny. We anticipate litigation when transgender students are discriminated against due to this legislation.⁴

SB 1224/HB 1182, as amended, requires businesses that, “as a matter of formal or informal policy, [allow] a member of either biological sex to use any public restroom within the building or facility” to post a government-prescribed sign at the entrance of each public restroom in the building with a red and yellow “NOTICE” text, and boldface black block letters stating that “THIS FACILITY MAINTAINS A POLICY OF ALLOWING THE USE OF RESTROOMS BY EITHER BIOLOGICAL SEX, REGARDLESS OF THE DESIGNATION ON THE RESTROOM.”

If this bill becomes law, it will require businesses and other entities that open their facilities to the public and that have gender neutral restrooms, or even that have gendered restrooms and allow transgender people to use the restroom that aligns with their gender, to post a government-prescribed message. It will create confusion and potential enforcement issues for businesses that don’t want to be forced to exclude transgender people from the appropriate restroom. SB 1224 is impermissible compelled speech, in violation of the First Amendment, and raises substantial due process and equal protection concerns.

The First Amendment’s constitutional guarantee of freedom of speech applies not only when government restricts speech, but also when it compels speech, *see, e.g., National Institute of Family & Life Advocates v. Becerra*, 138 S.Ct. 2361 (2018) (“*NIFLA*”). When laws, including laws compelling the content of private speech, “target speech based on its communicative content,” they generally “are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.” *NIFLA*, 138 S.Ct. at 2371. In *NIFLA*, the Court held that a California law that required licensed and unlicensed facilities that provided pregnancy related care to post certain government-

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

³ Memorandum, <https://www.justice.gov/crt/page/file/1383026/download>.

⁴ 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*, 140 S. Ct. 1731, 1741.



mandated notices was unconstitutional compelled speech. It did not fall within the exceptions for required disclosure “of factual, noncontroversial information.” *Cf. Zauderer v. Office of Disciplinary Council of Supreme Ct. of Ohio*, 471 U.S. 626, 651 (1985).

Here too, requiring businesses and other private entities to post government-mandated signage regarding their restroom policies constitutes compelled speech, rather than disclosure of factual noncontroversial information. By mandating a specific, stigmatizing “warning” notice text, the state has weighed in and compels the content of speech, overriding the interests of businesses in communicating as they choose on matters of gender identity. As the U.S. Supreme Court has recognized, gender identity is a political topic that is “undoubtedly [a] matter[] of profound ‘value and concern to the public.’” *Janus v. Am. Fed. of State, County & Mun. Employees*, 138 S.Ct. 2248, 2476 (2018). “We have often recognized that such speech occupies the highest rung of the hierarchy of First Amendment values and merits special protection.” *Id.* (citations omitted). SB 1224 therefore falls outside the narrow exceptions for compelled speech subject to lesser scrutiny than the Supreme Court outlined in *NIFLA* and *Zauderer*.

Both SB 1367/HB 1223 and SB 1224/HB 1182 represent a consistent trend in this state and across the country – legislating around restrooms to exclude trans children and adults from daily life. Five years ago, North Carolina passed HB 2, which banned transgender people from using the appropriate facilities in schools and government buildings. A national uproar followed, and the state lost millions in business investment.

To date, 95 companies have signed a statement opposing legislation nationally that harms LGBTQ people⁵ – particularly transgender youth – and 217 Tennessee corporations and small businesses have signed onto an open letter opposing discrimination against LGBTQ Tennesseans and warning of the impact on business and the economy from such legislation.⁶ Signatories include companies with a significant presence or anticipated presence in Tennessee, including Alliance Bernstein; Amazon; Dell Technologies; Hyatt; Lyft, Inc.; Nissan North America, Inc.; Oracle Corporation; Pilot, Unilever; and many others.

ACLU-TN joins with our many partners and urges you to embrace and protect all Tennesseans by vetoing SB 1367/HB 1223 and HB 1182/SB 1224.

Sincerely,



Hedy Weinberg
Executive Director

⁵ <https://www.hrc.org/resources/business-statement-on-anti-lgbtq-state-legislation>

⁶ <https://nashvillelgbtchamber.org/tn-businesses-against-discrimination/>

