Opponent Testimony Regarding HB 183
Ohio House Higher Education Committee
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Robert S. Chaloupka

Chair Young, Vice Chair Manning, Ranking Member Miller, and Members of the House Higher Education Committee,

My name is Robert Chaloupka, and I'm an attorney based in Cleveland, Ohio. I am here today to testify in strong opposition to HB 183, which would require all schools in Ohio, from kindergarten through post-graduate programs, to maintain separate restrooms, locker rooms, changing rooms, and shower rooms for male and female students, and would prohibit people assigned male at birth from "using" a facility designated for people assigned female at birth, and vice versa. As currently drafted, this statute is not only discriminatory and unfair, but it is in violation of both federal statutes and the U.S. Constitution itself. It flies in the face of numerous appellate court rulings, including at least one that was upheld by the U.S. Supreme Court. The bill raises countless legal issues for school boards and university administrators throughout the state, as it essentially would require them to violate federal law in order to satisfy state law. This can only end in lengthy, drawn-out litigation and great expense to the taxpayers.

In 2016, the Departments of Education and Justice released guidance advising that, "A school may provide separate facilities on the basis of sex, but must allow transgender students access to such facilities consistent with their gender identity." The guidance further stated that "[a] school may not require transgender students to use facilities inconsistent with their gender identity or to use individual-user facilities when other students are not required to do so. A school may, however, make individual-user options available to all students who voluntarily seek additional privacy." That guidance was later revoked by the Trump administration without apparent legal justification. However, in the meantime, school districts' legal counsels have consistently advised that, in order to continue receiving federal funding, schools have to follow the federal rules – including accommodating transgender students, in line with federal statutes, regulations, and case law.

While the actions taken by the Obama administration, and then re-set by President Biden, were regulatory in nature, numerous federal courts from around the country have acknowledged that Title IX requires schools to accommodate transgender students, and discrimination on the basis of gender identity is the same as discrimination "on the basis of sex." While the Supreme Court's 2020 ruling in *Bostock v. Clayton County* specifically dealt with protections against employment discrimination under Title VII, several courts (and the Biden administration) have extended the court's reasoning to discrimination under Title IX. These courts have consistently held that discrimination based on transgender status is a form of sex discrimination. Furthermore, in 2021, the Supreme Court (including all of the justices appointed by President Trump) let stand a ruling from the Fourth Circuit that denying access to bathrooms in accordance with one's gender identity can violate both Title IX and the Equal Protection clause of the Fourteenth Amendment.

Federal courts in Pennsylvania, Wisconsin, Indiana, Oregon, Virginia and other states have consistently ruled that the question in litigation around laws like HB 183 is not whether or not bathrooms and other facilities can be segregated by sex, but rather who is permitted to use which facility. The vast majority of courts have ruled that excluding transgender students from using facilities consistent with their gender identities is, in fact, unlawful discrimination. Closer to home, the Sixth Circuit Court of Appeals has interpreted both federal anti-discrimination laws and Ohio statutes to prohibit discrimination based on gender identity, considering this as a subset of sex discrimination. In a 2004 case, the court applied a similar standard as the Supreme Court later used in Bostock, holding that "employers who discriminate against men because they do wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination." In a 2016 case out of Medina County, *Dodds v. Board of Education*, the circuit court

ruled that an eleven-year-old transgender female student would "suffer irreparable harm if prohibited from using the girls' restroom."

However, even if the Ohio Legislature were to embrace the controversy and ignore the mountain of law opposing the enactment of this bill as a threshold matter, HB 183 as currently drafted would create several severe legal issues if enacted:

- The definition of the term "biological sex" in sections 3319.90(A)(1) and 3345.90(A)(1) as "the condition of being either female or male," leaving wide open the question of how this would apply to intersex individuals.

- That same section raises an enormous question of how this provision would be enforced, should it become law. The definition suggests that a person's birth certificate "may be relied upon if … issued at the time of the person's birth." Pursuant to a 2020 federal court ruling, Ohio updated its rules on correcting gender markers on birth certificates to allow updates pursuant to an order from a county probate court. Once amended, an individual's birth certificate becomes the state's official record of that person's birth. Yet, this bill would only recognize birth certificates as issued at the time of a person's birth. This would create a second-class status for people holding birth certificate corrections that would apply not only to transgender individuals, but to anyone who needed to have their birth record corrected for any reason, from clerical error to an error by the doctor delivering the child, to an intersex condition.

    - It should also be noted that this assumption that a court-ordered correction to a birth certificate is somehow inferior to the record issued at the time of birth indulges the assumption that transgender people "aren't real" or, more specifically, that one's transgender status stems from a mental illness, rather than being an actual lived reality for the person. Several courts have rejected this presumption.

- According to section 3319.90(B)(1), a school would be required to designate separate restroom facilities for males and females, even for off-campus locations "used by the school for a school-sponsored activity." This would appear to make the school liable for the bathroom policies of any museums, libraries, or other venues that could be visited by a class on a field trip. The huge potential for liability here would likely lead to a severe decrease in the number of such trips, as school administrators would have to scout out the bathroom situation at various locations before authorizing a school trip.

- Under sections 3319.90(D) and 3345.90(C), the bill would allow (but not require) schools to provide accommodations, such as single-occupancy facilities or use of faculty facilities. If there's one point that has been made clear in the overwhelming majority of cases, it's that any student may be offered single-occupancy/unisex options, but no student can be ***required*** to use those facilities. Doing so creates exactly the kind of stigma and second-class status – not to mention forced outing of a student's transgender status – that has long been prohibited in the race and sex contexts, and which formed the basis of the Supreme Court's *Obergefell* ruling.

- Requiring sex-segregated facilities in the college and university setting to designate student facilities as exclusively for the use of male or female persons, as would be the case under section 3345.90(B)(1), ignores the reality of facilities on a college campus. With limited exceptions, the vast majority of restrooms on college campuses, both public and private, are used by students, faculty, staff, and visitors alike. While framed as an attempt to "protect" students, this provision would create a de facto ban on ANY transgender individual using a communal restroom on ANY college campus. If this is the legislature's intention, then it should perhaps be made clearer.

- With regard to this bill's application to institutions of higher education, it is important to remember that the vast majority of students in the college/university setting are over 18 years old. Some may even be in their 50s, 60s, or older. Just about all of the case law on bathroom regulations like this has dealt with primary and secondary schools, and even the few courts that have upheld such policies or found fault with permissive bathroom policies have primarily focused on the school's interest in protecting children – here, it would be the state's interest. Aside from the state of Florida, which recently enacted a law making it a criminal offense to occupy a bathroom not aligned one's sex assigned at birth, no other state has gone so far as to regulate the conduct of adults based on their transgender status.

In the face of this substantial body of law supporting the idea that transgender individuals should just be left alone to use the bathroom aligned with their gender identity, one is left to wonder why we are here. During sponsor testimony for this bill last week, we heard that the intention is to "protect our children from exposure to the opposite sex while in a private place." And much of the testimony referred to situations where school principals were "expected to know what's on students' birth certificates." And yet, this bill would also apply to colleges and universities, where the vast majority of the students are adults, and where it would be completely unrealistic to expect university administrators to keep track of whether students' bathroom use was in line with the birth certificate they might have submitted when they enrolled in the school.

While it was made clear in the previous hearing that this bill would not require anyone to carry around a birth certificate, would not require school officials to "check genitals, or anything of that matter." However, the stated intent of this bill is to "ensure that boys go to the boys' bathroom, and girls go to the girls' bathroom." So, the question of enforcement seems pertinent at the very least. And, to be honest, in the absence of any clear provisions as to how this would be enforced, another potential avenue for litigation is opened up – striking the law down for vagueness. Similarly, it was made clear that the bill "does not refer to anything in regards to federal law or state law in regards to transgender." Yet, the testimony of one of the bill's co-sponsors was laser focused on statements such as "no one can change their sex" and that the transgender movement was a by-product of the sexual revolution. So, if this bill is not about transgender students, whom is it about?

We also heard that "it is time for the legislative branch to weigh in on this issue," implying that the actions taken by the executive and judicial branches are somehow lesser in nature. The reality is that the United States Congress took action decades ago (over a century ago, in the case of the Fourteenth Amendment). The legislative branch of the federal government has "weighed in" on the issue. If Ohio seeks to contravene federal law, so be it.

I would just like to make one last point that really gets to the heart of everything we're talking about here. In this matter, as well as all of the other issues this body is addressing regarding transgender Ohioans, there are legitimate interests on all sides. In the case of bathrooms, perhaps the most intimate spaces, no one doubts that everyone enjoys a right to privacy. However, the courts have consistently held that people do not have a constitutional right to avoid interacting with transgender people. Even if you personally have never met, let along interacted with, a single trans person – highly doubtful, given the context of this hearing – they exist. They are our neighbors, our friends, our co-workers, our family members, our children. They are Ohioans. And they deserve all the same rights and protections as every single other Ohioan.

Thank you for your time.