



Written Testimony Against House Bill 668
Submitted To The Idaho Senate Judiciary, Rules & Administration Committee
March 14, 2024
American Civil Liberties Union Of Idaho

Chairman and Committee Members:

I am submitting this testimony on behalf of the ACLU of Idaho in strong **opposition to HB 668**, one of the most extensive bills targeting transgender people of all ages that we have seen introduced anywhere in the country. We urge you to oppose this bill not only because it violates the constitutional rights of Idahoans of all ages but also because of the unprecedented threat it poses to transgender adults and adolescents and the families and communities who love and care for them.

HB 668 is a sweeping assault on access to medical treatment for transgender people. It bans government funding for necessary healthcare for transgender adults and adolescents. The bill's broad funding restrictions could prohibit access to evidence-based medical treatment at a majority of hospitals and health centers across the state. The bill also categorically bans Medicaid coverage for gender-affirming medical treatment, singling out low-income Idahoans for significant harm. The impact of these restrictions will be far-reaching and devastating.

GENDER AFFIRMING CARE IS WIDELY ACCEPTED IN THE PRACTICE OF MEDICINE

American Medical Association (2021)

"The AMA opposes the dangerous intrusion of government into the practice of medicine and the criminalization of health care decision-making," said AMA Board Member Michael Suk, MD, JD, MPH, MBA. "Gender-affirming care is medically-necessary, evidence-based care that improves the physical and mental health of transgender and gender-diverse people."

American Academy of Child & Adolescent Psychiatry (Nov. 2019)

The American Academy of Child and Adolescent Psychiatry (AACAP) supports the use of current evidence-based clinical care with minors. AACAP strongly opposes any efforts – legal, legislative, and otherwise – to block access to these recognized interventions. Blocking access to timely care has been shown to increase youths’ risk for suicidal ideation and other negative mental health outcomes. Consistent with AACAP’s policy against conversion therapy, AACAP recommends that youth and their families formulate an individualized treatment plan with their clinician that addresses the youth’s unique mental health needs under the premise that all gender identities and expressions are not inherently pathological.

American Academy of Pediatrics (Aug. 2023)

Policy Statement on standards of care for transgender and gender diverse youth, and reiterating that AAP supported standards of care including puberty blockers and hormone therapy. Also see article, Taking a toll: Pediatricians highlight how bans on gender-affirming care harm patients, families.

WPATH Standards of Care 8

World Professional Association for Transgender Health (Statement in Opposition to UK Tavistock Decision, 2020)

“Responding to decision from UK high court limiting care for transgender minors – WPATH and all national PATHs oppose decision and explain the importance of care for transgender youth. “WPATH, EPATH, USPATH, AsiaPATH, CPATH, AusPATH, and PATHA recommend that capacity to consent is evaluated on a case-by-case basis by the treating clinician and not by a court of law. We do not agree that transgender healthcare is so different in kind to that provided to cisgender people as to warrant separate legal provision. We consider puberty blocking treatment and treatment with gender affirming hormones as two separate treatment steps each requiring informed consent at the time such treatment is to be started.

We support the provision of healthcare to gender diverse people in a timely manner such that they can live their best lives. We are gravely concerned that the ruling will have a significantly adverse impact upon gender diverse youth and their families by imposing barriers to care that are costly, needlessly intimidating, and inherently discriminatory.”

Endocrine Society (Clinical Practice Guidelines, 2017)

Recognizes that puberty blockers and gender-affirming hormone treatment are appropriate treatment for some transgender adolescents.

Endocrine Society (Transgender Health Position Statement 2020)

There is a durable biological underpinning to gender identity that should be considered in policy determinations.

Medical intervention for transgender youth and adults (including puberty suppression, hormone therapy and medically indicated surgery) is effective, relatively safe (when appropriately monitored), and has been established as the standard of care. Federal and private insurers should cover such interventions as prescribed by a physician as well as the appropriate medical screenings that are recommended for all body tissues that a person may have.

Increased funding for national pediatric and adult transgender health research programs is needed to close the gaps in knowledge regarding transgender medical care and should be made a priority.

Endocrine Society (Transgender Health: Supporting Gender Diverse Youth to Improve Their Health, Well-Being, and Safety, 2020)

Re-affirms importance of gender-affirming care including puberty blockers and hormone therapy.

TRANSGENDER INDIVIDUALS RECEIVING GENDER AFFIRMING CARE REPORT VERY HIGH RATES OF SATISFACTION WITH TREATMENT

The 2022 U.S. Transgender Survey submitted with this testimony gathered inputs from 92,329 transgender individuals. **94% of respondents** who lived at least some of the time in a different gender than the one they were assigned at birth (“gender transition”) reported that they were either **“a lot more satisfied” (79%)** or **“a little more satisfied” (15%) with their life.** Life satisfaction

with hormone treatment was reported by 98% of recipients to improve life satisfaction, with *less than 2%* reporting neutral and negative satisfaction post treatment. Life satisfaction with surgical treatment was reported by 97% of recipients to be improved, with less than 2% reporting a little or a lot less satisfied.

TO ENFORCE HB 668 AND AVOID PERSONAL CRIMINAL LIABILITY, STATE EMPLOYEES WOULD HAVE TO VIOLATE FERPA AND HIPAA

The Family Educational Rights and Privacy Act (FERPA) is a federal law that affords parents the right to have access to their children's education records, the right to seek to have the records amended, and the right to have some control over the disclosure of personally identifiable information from the education records. When a student turns 18 years old, or enters a postsecondary institution at any age, the rights under FERPA transfer from the parents to the student ("eligible student"). The Health Insurance Portability and Accountability Act of 1996 (HIPAA) is a federal law that required the creation of national standards to protect sensitive patient health information from being disclosed without the patient's consent or knowledge. The US Department of Health and Human Services (HHS) issued the HIPAA Privacy Rule to implement the requirements of HIPAA. The HIPAA Security Rule protects a subset of information covered by the Privacy Rule. To investigate whether gender affirming care medications were being consumed in State properties, any State employee would have to violate the privacy of an individual, which would violate both HIPAA and, if that person was a student, FERPA as well.

U.S. CONSTITUTIONAL VIOLATIONS

In addition to the severe material harm that would flow from HB 668, the bill also violates the equal protection rights of transgender Idahoans.

Because HB 668 singles out treatment if and only if it "alter[s] the appearance of an individual in order to affirm the individual's perception of the individual's sex in a way that is inconsistent with the individual's biological sex," it facially classifies based on a person's sex and transgender status. It also has the intent and impact of enforcing sex stereotypes because whether or not treatment is permitted depends on whether it is deemed "consistent" with a person's "biological sex".

Laws that classify based on transgender status and sex trigger heightened scrutiny under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. See *United States v.*

Virginia, 518 U.S. 515, 555, (1996) (“all gender-based classifications today warrant heightened scrutiny”); *Karnoski v. Trump*, 926 F.3d 1180, 1200-01 (9th Cir. 2019) (holding that transgender status qualifies as a quasi-suspect classification). Under heightened scrutiny it is the government’s burden to show that the disparate treatment substantially advances an important government interest. Most recently, when this state acted to categorically prohibit the same treatment for minors, a federal court held that the law likely could not survive constitutional scrutiny and enjoined it in its entirety. *Poe ex rel. Poe v. Labrador*, No. 1:23-CV-00269-BLW, 2023 WL 8935065, at *12, *13-19 (D. Idaho Dec. 26, 2023). The Ninth Circuit denied Idaho’s motion for a stay pending appeal, *see Poe v. Labrador*, No. 24-142, ECF 24 (9th Cir. Jan. 30, 2024), and also denied the State’s request for en banc review of that denial, ECF 31.1 (9th Cir. Feb. 9, 2024).

Under heightened scrutiny, it is not enough to come forward with *post hoc* justifications for a law or a bare desire to harm a politically unpopular group. Instead, Idaho needs an exceedingly persuasive justification why this treatment alone will be subject to a de facto ban across Idaho. No such justification exists.

FEDERAL LAW VIOLATIONS

In addition to violating the constitutional rights of transgender Idahoans, the law likely violates multiple federal laws including the Affordable Care Act and the Medicaid Act. *See, e.g., Boyden v. Conlin*, 341 F. Supp. 3d 979 (W.D. Wis. 2018); *Tovar v. Essentia Health*, 42 F. Supp. 3d 947 (D. Minn. 2018); *Flack v. Wis. Dep’t of Health Servs.*, 328 F. Supp. 3d 931 (W.D. Wis. 2018). Advancing such a patently illegal measure could cost Idaho greatly in both litigation costs and threats to federal funding.

SOCIAL IMPACT

And beyond the many legal problems with HB 668, the human cost is devastating. Transgender people live in and call Idaho home. By cutting off their health care – care that people may have been relying on for years, if not decades – the state is subjecting them to predictable and dire harm. As the American Medical Association has explained, “Gender-affirming care is medically necessary, evidence-based care that improves the physical and mental health of transgender and gender-diverse people.” Taking away this care increases anxiety, depression, and suicidality, needlessly harming a stigmatized minority and taking away their ability to live full lives.

We urge you to oppose this measure and give the transgender community an opportunity to continue to live in Idaho and contribute to our beautiful state.

Respectfully,

Julianne Donnelly Tzul

Advocacy Director

ACLU of Idaho