



Written Testimony against House Bill 421  
Submitted to the Idaho Senate State Affairs Committee on  
March 29, 2024 on behalf of the  
American Civil Liberties Union of Idaho

Mr. Chair and Members of the Committee:

I submit this testimony on behalf of the ACLU of Idaho and in strong opposition to House Bill 421. If passed, HB 421 would revise two definitions in Idaho Code. First, it would redefine “sex” as either *male* or *female*, based on an individual’s sex assigned at birth. Second, it would redefine “gender” to be exclusively synonymous with “sex,” and decouple “gender” from its current meaning (e.g., gender identity, gender expression). The bill stipulates all persons are *either* male or female, that sexual development disorders do not disrupt the male-female binary, and that sex-based distinctions are observable at or before birth and such distinctions are immutable.

The legislative intent statement (Section 1, Page 1, Lines 11-36) asserts that “increasing confusion” about the relationship between sex and gender, coupled with definitional “[c]onfusion and ambiguities” can threaten certain civil liberties, including equal protections under the law. However, we see clear flaws in this bill that, rather than alleviate such issues, may create or exacerbate ongoing threats to the rights of certain Idahoans.

In particular, the ACLU of Idaho opposes HB 421 because (1) the bill adopts a very restrictive and essentializing definition of the terms “sex” and “gender” in the Idaho code, (2) it applies these restrictive definitions across all laws, rules and policies of the state of Idaho, (3) the bill violates the Idaho constitution, (4) the bill codifies definitions of “gender” and “sex” that depart from their

ordinary and standard meanings,<sup>1</sup> (5) would have devastating consequences for trans, nonbinary and intersex people in Idaho. The bill might also have additional, unintended or unstated consequences, including infringement on certain Idahoans' parental rights, privacy protections, and due process rights.

## **HB 421 MAY VIOLATE THE IDAHO CONSTITUTION**

### *Constitutional Violation 1: "Single Subject" Requirement*

HB 421 violates the Idaho Constitution's requirement that "every act shall embrace but one subject and matters properly connected therein [...]."<sup>2</sup> HB 421 violates this "single subject" requirement because it would amend several Titles, Chapters, and Sections in the Idaho Code.<sup>3</sup> In fact, HB 421 amends **134** total code sections.

### *Constitutional Violation 2: Separation of Powers Requirement*

HB 421 also violates the Idaho Constitution's separation of powers provision, which states "[t]he legislature shall have no power to deprive the judicial department of any power or jurisdiction which rightly pertains to it as a coordinate department of the government."<sup>4</sup> This separation of powers requirement provides that the Courts - not the Legislature - are empowered to interpret the provisions of Idaho's Constitution.

### *Constitutional Violation 3: Discriminatory language*

HB 421 would violate Idaho's Constitution because it appears to be based on negative attitudes toward and disapproval of transgender people. These negative attitudes are reflected in the bill language, which states "there is increasing *confusion* about the definition of sex as a biological truth, ... physical differences between males and females are enduring, and the two sexes are not

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<sup>1</sup> See: World Health Organization, 2024. Gender and Health. Accessed online. [https://www.who.int/health-topics/gender#tab=tab\\_1](https://www.who.int/health-topics/gender#tab=tab_1); Psychology Today, 2024. Gender. Accessed online. <https://www.psychologytoday.com/us/basics/gender>; Merriam Webster, 2024. Gender; Usage Guide. Accessed online. <https://www.merriam-webster.com/dictionary/gender>

<sup>2</sup> Constitution of the State of Idaho, Article III, § 16.

<sup>3</sup> On "sex," see: Title 18 Chapter 15 sec. 18-1506b [defining sex]; Title 32 Chapter 2 sec. 32-209; Title 18 Chapter 11 sec. 18-1101, 18-1102, 18-1104 [on marriage]; Title 18 Chapter 66 [defining sex crimes and referencing "same" and "opposite" sex]; Title 18 Chapter 73 sec. 18-7303 [civil rights protections, "sex"]; Title 33 Chapter 66 [regarding student privacy, civil rights, and referencing "sex"]; On "mother" and "father," see footnote 8.

<sup>4</sup> Article V, Idaho Constitution, § 16; for enumeration of Judicial Powers see Article V, Idaho Constitution, § 2

fungible.”<sup>5</sup> This blatantly discriminatory language is ill conceived and dangerous. It is also exclusionary; if passed, HB 421 would deny legal recognition and protection to two-spirit, gender non-conforming, intersex, and transgender people.

As the U.S. Supreme Court has found, over and over, laws that prohibit sex discrimination also protect against gender identity discrimination. That is, "it is impossible to discriminate against a person for being [...] transgender without discriminating against that individual based on sex.”<sup>6</sup> HB 421 would place discriminatory burdens on transgender Idahoans, rob them of legal recognition, and, despite the bill language, could infringe on – rather than protect against – fundamental rights of equal protections, impartial governance, and freedom from discrimination.

In addition to “sex” and “gender,” HB 421 redefines “mother” and “father.”<sup>7</sup> The narrow statutory definitions of “mother” and “father” may also strip same-sex couples raising children of specific parental rights. That is, the multiple Chapters and Titles of Idaho Code that reference those terms<sup>8</sup> would not be able to be interpreted to include same-sex couples raising children together.

## **HB 421 VIOLATES FEDERAL LAW, SPECIFICALLY TITLE IX AND TITLE VII GENDER DISCRIMINATION PROHIBITIONS**

Though Idaho is among states who have an injunction against applying recent Biden administration rules interpreting Title IX, Idaho must still follow Title IX generally, and still prohibit harassment against transgender and gender diverse students. The Supreme Court, in *Bostock v. Clayton Cty, Georgia*, held that employers violate Title VII when they fire an individual based on their sexuality or gender identity because “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.” *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1741 (2020). Prior to this decision, the Circuits were split on whether firing LGBTQ+ employees based on their sexuality or gender identity qualified as discrimination based on sex. [The Broad Implications of the Bostock Decision](#), Georgetown Journal on Poverty Law and Policy. Following *Bostock*, LGBTQ+ employees are protected from

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<sup>5</sup> House Bill 421, Section 1, 2024.

<sup>6</sup> *Bostock v. Clayton County*

<sup>7</sup> House Bill 421, 2024. Section 2 (b); (i).

<sup>8</sup> *See*: Title 32 Chapter 10 sec. 32-1107, sec. 32-1010, Idaho Code; Title 39 Chapter 2 sec. 39-255, Idaho Code; Title 16 Chapter 20 sec. 16-2002, Idaho Code; Title 7 Chapter 11 sec. 7-1103, Idaho Code, and etc.

employment discrimination based on their gender identity or sexuality under Title VII. The Bostock decision states that discrimination based on gender identity and sexual orientation is discrimination “because of sex.” **Over 100 federal statutes prohibit discrimination because of sex**, as Justice Alito helpfully pointed out. *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1791 (2020) (Alito, J., dissenting). These federal statutes include prohibitions of discrimination because of sex in “[housing, education, credit, health care](#)” and more. Idaho cannot by fiat, simply declare that there is no gender identity, and therefore the gender discrimination prohibitions under federal law simply don’t apply here.

### **COURTS ROUTINELY REJECT SIMILAR LEGISLATION**

The novel and narrow statutory definitions included in HB 421 are markedly similar to legislation across the United States. In December 2023, the ACLU of Montana filed a legal challenge<sup>9</sup> to law that defined “sex” and “gender” in ways similar to HB 421; the lawsuit alleges such narrow and inaccurate definitions violate Montana’s constitution. Earlier this month, the ACLU of Kansas filed a legal challenge to Kansas’s Attorney General for weaponizing a state law that defines “sex” as male or female, according to sex assigned at birth and reproductive capacity against the civil rights of transgender people in Kansas.<sup>10</sup>

### **UNDISCLOSED OR UNANTICIPATED COSTS**

The similarities between laws in Kansas, Montana, and now Idaho’s HB 421 may offer insight into how courts view the legal issues at hand. That is, we have seen courts, time and again, reject efforts by states to deny the rights and dignity of transgender people.

Furthermore, it is noteworthy that, despite the striking similarities between HB 421 and other states’ legal battles over similar bills, the fiscal note does not disclose anticipated costs. Complex civil litigation is lengthy and expensive. The Idaho legislature has a duty to be transparent about the likelihood of legal challenges; Idaho taxpayers deserve honest and transparent fiscal analyses of bills, like HB 421, that may be vulnerable to lawsuits.

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<sup>9</sup> *Dandilion Cloverdale et al. vs. Austin Knudsen et al.* (2023)

<sup>10</sup> *Kansas v. Harper* (2023)

By forcing Idahoans into two specific boxes and by narrowing or ignoring standard medical definitions, the bill before you appears to be both scientifically inaccurate and discriminatory. The bill falls short of numerous Idaho legislative requirements, including accurate bill titles, specificity of legislative focus, and violation of due process. In addition to legal challenges, legislation like HB 421 may have unintended consequences that amount to blatant constitutional violations, including the right to privacy, the denial of equal protection of the law, and the protections against government compelled speech.

We respectfully urge you to vote against HB 421.

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