

# ANYA A. MARINO

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The Hon. Vanessa E. Atterbeary, Chair  
Ways & Means Committee  
Maryland General Assembly  
House Office Building, Room 131  
6 Bladen St., Annapolis, MD 21401

Re: Opposition to House Bill 757

Dear Chairperson Atterbeary:

My name is Anya A. Marino. I am a graduate of the Johns Hopkins University Krieger School of Arts and Sciences and the University of Maryland Francis King Carey School of Law. I called the State of Maryland my home for approximately sixteen years before leaving the state in 2019 to serve as a staff attorney and deputy legal director for the American Civil Liberties Union of Florida. I now teach at Harvard Law School as a clinical instructor for the school's LGBTQ+ Advocacy Clinic, which engages in impact litigation, legislative and policy advocacy, and public education on behalf of the LGBTQ+ community.

Additionally, I am a transgender woman. Indeed, I am the first transgender woman of color to be employed by and teach at Harvard Law School. My scholarly and practical interests involve gender discrimination, queer and gender theory, statutory and constitutional construction, and applications of the First and Fourteenth Amendments to the United States Constitution. Thus, I maintain both professional and personal interests in the subjects House Bill 757 (hereafter "HB 757" or the "Bill") covers.

I submit this testimony to you and the members of the House Ways and Means Committee, urging the Committee to oppose HB 757. Members of this Committee should cast unfavorable votes against HB 757 for at least three reasons.

First, HB 757 would harm women and girls, even though its sponsors colloquially refer to it as the "Save Women's Sports Act." Adoption of the bill would lead to an absurd result that categorically bars an entire class of women and girls from participating in scholastic athletic programs. It also mandates an entire class of men and boys' participation in women's athletic programs, which undermines the bill's stated purpose to save women's sports. HB 757 lacks any exceedingly persuasive justification for passage and enforcement, is not substantially related to a sufficiently important government interest, and runs contrary to the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, U.S. Const. Amend. XIV, and Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681 et seq. ("Title IX").

Second, HB 757's intended application singles out an entire class of people by treating them disparately on the basis of sex and transgender status. Were it to pass, HB 757 would deny transgender children equal access and opportunity to the many social, education, physical, and emotional health benefits that participation in interscholastic sports provides. Depriving

transgender children access to scholastic sports programming would result in real and lasting consequences that would impact them throughout their lives.

Third, expressly codifying the disparate treatment of transgender children into Maryland law only contributes to discrimination against, and the stigmatization of, transgender people. HB 757 would only increase the unfortunate mental health outcomes experienced by transgender children because of this different treatment. I therefore ask you to vote this Bill down.

#### A. HB 757 Fails Its Stated Purpose and Violates Federal Law.

Contrary to the assertions of the Bill’s sponsors, HB 757 does not save women’s sports by mandating sex-specific teams. Instead, the Bill’s application would undermine its stated purpose of “promot[ing] sex equality” and providing women and girls opportunities “to demonstrate their skill, strength, and athletic abilities while also providing them with opportunities to obtain recognition and accolades, college scholarships, and the numerous other long-term benefits that flow from success in athletic endeavors,”<sup>1</sup> in two ways.

First, HB 757 would categorically bar a class of women and girls from participating in programs aligning with their genders. Second, HB 757’s application and enforcement would mandate the forced participation of a class of men and boys in athletic programming intended to provide equal access and opportunity to women and girls. Thus, undertaking a cursory analysis of the Bill’s effect demonstrates a complete absence of any resemblance between HB 757’s stated objective and “the actual purpose underlying the discriminatory classification.” *See U.S. v. Virginia* (“*VMP*”), 518 U.S. 515, 536 (1996) (quoting *Mississippi Univ. For Women v. Hogan*, 458 U.S. 718, 727 (1982)) (punctuation omitted). Instead, the Bill’s sweeping exclusion of all transgender students from participation on any athletic teams consistent with their gender identities, regardless of circumstances, merely targets the most vulnerable among the LGBTQ+ community for disapproval and exclusion from full participation in society. The Bill’s intended application would violate the Equal Protection Clause of the Fourteenth Amendment and Title IX of the Education Amendments Act of 1972.

As an initial matter, women and girls come in all different shapes and sizes. We have different histories, and we are entitled to the same basic dignity so many others take for granted. Reducing womanhood to the presence of external genitalia at the time of birth, *see, e.g.*, H.B. 0757, 444th Sess., at 1 (Md. 2022), constitutes overt misogyny and exemplifies yet another example of improperly using generalizations and stereotyped characterizations of the sexes. Yet, HB 757 continues to rely on improper generalizations and stereotyped characteristics of the sexes by fallaciously contending that people assigned one sex at birth incongruent with their affirmed sex and gender identity maintain certain strengths that the Bill claims cisgender girls and women lack, therefore necessitating transgender students’ categorical exclusion. *See, e.g., id.* at 2–3.

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<sup>1</sup> H.B. 0757, 444th Sess., at 3 (Md. 2022), <https://mgaleg.maryland.gov/2022RS/bills/hb/hb0757F.pdf>.

And were a cisgender woman or girl to maintain the same alleged physical attributes or performance enhancement HB 757 claims transgender women and girls do, she would not be deprived an opportunity to participate under the Bill. Thus, the Bill's sponsors seem to imply transgender women and girls are neither women nor girls. HB 757's Sponsors cannot support the Bill's legality based on their own discriminatory notions of what sex means. *See Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 618 (4th Cir. 2020).

Aside from the absence of overwhelming evidence to support the Sponsor's purported reasons for HB 757, the Supreme Court of the United States has cautioned government actors that they may not "control[] [the] gates to opportunity" and "exclude qualified individuals based on 'fixed notions concerning the roles and abilities of males and females.'" *VMI*, 518 U.S. at 541–42. To this end, the Court has concluded it is impermissible sex stereotyping to: (1) rely on generalizations about different aptitudes of males and females to support the exclusion of women from a state institution of higher learning, *id.* at 542; (2) to use "fixed notions concerning the roles and abilities of males and females," *Hogan*, 458 U.S. at 725; (3) to treat an individual differently because they fail to act and appear according to expectations defined by gender, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250–51 (1989); (4) to differentiate by assuming a husband's income is always more important to the wife than the wife's to the husband, *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); and (5) to treat people disparately based on assumptions that one's views would correspond to their sex. *J.E.B. v. Alabama*, 511 U.S. 127, 128 (1994).

All these cases clarify that discrimination on the basis of sex covers discrimination that takes sex into account in any manner. That is consistent with the Court's most recent decision in *Bostock v. Clayton Cnty.*, which concluded that discrimination on the basis of sexual orientation or gender identity constitutes sex discrimination because "homosexuality and transgender status are inextricably bound up with sex. Not because homosexuality or transgender status are related to sex in some vague sense or because discrimination on these bases has some disparate impact on one sex or another, but because to discriminate on these grounds requires [the government] to treat individual[s] [] differently because of their sex." 140 S. Ct. 1731, (2020). That is why the United States Court of Appeals for the Fourth Circuit had "little difficulty holding that a bathroom policy precluding [a student] from using the boy's restrooms discriminated against him 'on the basis of sex.'" *Grimm*, 972 F.3d at 616.

And if denying a transgender student access to use the bathroom aligning with his gender identity constituted sex discrimination, it seems almost axiomatic that denying transgender children the ability to participate in sports aligning with their affirmed sexes and gender identities is also sex discrimination. HB 757's sponsors do not deny the Bill discriminates on the basis of sex. Indeed, they acknowledge HB 757 discriminates on the basis of sex on the proposed legislation's face.<sup>2</sup> Instead, they simply attempt to argue HB 757 maintains an exceedingly persuasive justification. It does not.

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<sup>2</sup> H.B. 0757, 444th Sess., at 2–3 (Md. 2022), <https://mgaleg.maryland.gov/2022RS/bills/hb/hb0757F.pdf>.

In addition to prohibiting a class of women and girls from participating in scholastic sports programs on the basis of their assigned sex, it also mandates the participation of a class of boys and men in athletic programs intended for women and girls. HB 757's absurd result would force teenage boys like Mack Beggs to compete in girls' wrestling, where many of his competitors refused to wrestle with him because he is transgender.<sup>3</sup> This undermines the bill's stated purpose to save women's sports, and it demonstrates HB 757's discriminatory means lacks even a rationale relationship to its stated purpose. *VMI*, 518 U.S. at 535–40.

B. HB 757 Would Deprive Transgender Children Physical and Emotional Health Benefits Solely Because of Their Sex.

HB 757 threatens to gut transgender and non-binary youths' ability to participate in a core institution and endeavors to deprive transgender and non-binary children of the same programming and benefits afforded to their cisgender counterparts. HB 757 does this solely because of transgender and non-binary students' assigned and affirmed sexes, *contra* 20 U.S.C. § 1681(a),<sup>4</sup> and by adopting perniciously "fixed notions concerning the roles and abilities of males and females,"<sup>5</sup> contrary to the Fourteenth Amendment's Equal Protection Guarantee. *See* Part A, *supra*.

But including transgender and non-binary youth in sports is vital to establish the equality of LGBTQ+ people in American society. Like marriage, sports are a core institution in civic life. Sports do more than offer students the opportunity to develop their athletic skills and participate competitively. They also develop a range of academic, social, emotional, and health benefits and life skills that enable children to succeed throughout their lives. For example, participation in athletics programs positively impacts academic achievement, with student athletes experiencing better academic outcomes than students who do not participate.<sup>6</sup>

Additionally, interscholastic sports programs help students learn to manage social pressures. They provide students opportunities to make friends and become part of supportive

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<sup>3</sup> *See, e.g.,* Cindy Boren, *Transgender wrestler Mack Beggs wins second Texas state girls' championship*, *The Washington Post* (Feb. 25, 2018), <https://www.washingtonpost.com/news/early-lead/wp/2018/02/25/transgender-wrestler-mack-beggs-wins-second-texas-state-girls-championship/>.

<sup>4</sup> *See also, e.g., Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 618 (4th Cir. 2020) (rejecting school board's reliance on its own discriminatory notions of what "sex" means and concluding its restroom policy against a transgender student violated Title IX of the Education Amendments Act of 1972)

<sup>5</sup> *Compare, e.g., U.S. v. Virginia*, 518 U.S. 515, 541–42 (1996) with H.B. 0757, 444th Sess., at 2 (Md. 2022), <https://mgaleg.maryland.gov/2022RS/bills/hb/hb0757F.pdf>.

<sup>6</sup> *See, e.g.,* Angela Lumpkin & Judy Favor, *Comparing the Academic Performance of High School Athletes and Non-Athletes in Kansas in 2008–2009*, 4 *J. Sport Admin & Supervision* 41 (2012), <http://hdl.handle.net/2027/spo.6776111.0004.108>.

communities of their peers, thereby easing certain social pressures children face to “fit in.”<sup>7</sup> Sports also enable students to develop teamwork skills by emphasizing the importance of working as part of a larger group to achieve a common goal, and by stressing the essential role each teammate plays to achieving success. Moreover, sports teach students discipline and lead them to understand that the success and personal fulfillment they experience and achieve is through innumerable hours of practice, hard work, dedication, and perseverance. Students also have access to meaningful mentorship and guidance through the relationships they build with their coaches.<sup>8</sup>

Finally, the mental health and physical benefits sports provide students are indisputable. Generally, students who participate in their school’s athletic programs have fewer mental and physical health problems than those who do not participate.<sup>9</sup> Participation in sports helps students balance their emotions, and by encouraging continued participation through adulthood, it reduces the morbidity and mortality of medical conditions arising later in life.<sup>10</sup> Thus, the benefits school athletic programs provide to students—cisgender, transgender, and non-binary alike—establish a strong foundation for people to experience healthier and more fulfilling lives.

Yet HB 757’s application and enforcement would erase transgender and non-binary students’ abilities to enjoy the benefits sports participation provides their cisgender classmates. For transgender and non-binary children suffering with gender dysphoria,<sup>11</sup> being able to live consistently with their gender identity is essential to their health and well-being. When they are forced to live in a manner inconsistent with their gender identity, it undermines their ability to socially transition, thereby exacerbating their gender dysphoria. HB 757’s exclusion of transgender girls from activities designated for girls, exclusion of transgender boys from activities designated for boys, and requirement that transgender children participate in single-sex activities incongruent with their gender identity and affirmed sex is extremely harmful and can create serious health repercussions.

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<sup>7</sup> See Erin M. Boone & Bonnie J. Leadbeater, Game On: Diminishing Risks for Depressive Symptoms in Early Adolescence Through Positive Involvement in Team Sports, 16 *J. Res. Adolesc.* (2006), <https://doi.org/10.1111/j.1532-7795.2006.00122.x>.

<sup>8</sup> See Nicholas L. Holt et al., Benefits and Challenges Associated with Sport Participation by Children and Parents from Low-Income Families, 12 *Psychol. Sport Exercise* 490 (2011), <https://doi.org/10.1016/j.psychsport.2011.05.007>.

<sup>9</sup> See Hans Steiner et al., Adolescents and Sports: Risks or Benefit?, 39 *Clinical Pediatrics* 161, 164 (2000), <https://doi.org/10.1177/000992280003900304>.

<sup>10</sup> See Christer Malm et al., Physical Activity and Sports—Real Health Benefits: A review with Insight into the Public Health of Sweden, 7 *Sports* 1, 13–14 (2019), <https://doi.org/10.3390/sports7050127>.

<sup>11</sup> See Part C, *infra*.

C. HB 757 Would Lead to Further Discrimination and Stigmatization of Transgender People and Encourages the Mistreatment of the Most Vulnerable Among the LGBTQ+ Communities.

HB 757 poses a substantial risk that will encourage bullying and harassment against transgender and non-binary students, because its express language communicates to others that it is acceptable to treat transgender people differently because they are transgender. Indeed, the Bill risks harming all LGBTQ+ youth.

LGBTQ+ youth already hear the message they are unwelcome in sports clearly. A 2019 GLSEN survey revealed more than one in ten LGBTQ+ youth were barred or discouraged from participating in interscholastic athletic programs by their teachers or coaches.<sup>12</sup> Moreover, the Trevor Project's 2021 National Survey results comprehensively identify how HB 757, and legislation like it, contradicts the best interest and welfare of trans and non-binary youth aged thirteen to fourteen. For example, the Trevor Project reports 23% of transgender and non-binary youth without affirming school spaces attempt suicide.<sup>13</sup> Additionally, 52% of transgender and non-binary youth contemplate suicide.<sup>14</sup>

In addition to the startling rate of suicidality among trans and non-binary youth, the survey's results demonstrated 77% of trans and non-binary youth suffer from generalized anxiety disorder, and 70% suffer from major depressive disorder.<sup>15</sup> Approximately 48% of LGBTQ+ youth sought mental health care but were denied it,<sup>16</sup> and 49% of trans and non-binary youth struggled to have their family, peers, and educators respect their pronouns.<sup>17</sup> Moreover, 24% of transgender and non-binary youth attempted suicide when no one respected their pronouns.<sup>18</sup>

What is more, 2021 proved to be the deadliest year on record for transgender, non-binary, and gender nonconforming people, with approximately 51 deaths due to violent means in the United States<sup>19</sup> and 375 deaths around the world.<sup>20</sup> Overt discrimination and violence against

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<sup>12</sup> GLSEN, *The 2019 Nat'l Sch. Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schs.* at xx, [https://www.glsen.org/sites/default/files/2021-04/NSCS19-FullReport-032421-Web\\_0.pdf](https://www.glsen.org/sites/default/files/2021-04/NSCS19-FullReport-032421-Web_0.pdf); *see also id.* at 40.

<sup>13</sup> THE TREVOR PROJECT, *Nat'l Survey on LGBTQ Youth Mental Health 2021* at 14, <https://www.thetrevorproject.org/wp-content/uploads/2021/05/The-Trevor-Project-National-Survey-Results-2021.pdf>.

<sup>14</sup> *Id.* at 3 (Stressing 52% of all transgender and non-binary youth in the United States have seriously contemplated suicide in 2020).

<sup>15</sup> *Id.* at 4.

<sup>16</sup> *Id.* at 5.

<sup>17</sup> *Id.* at 10.

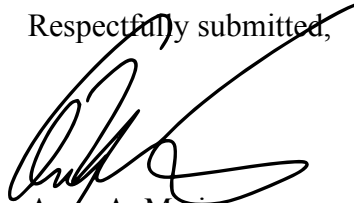
<sup>18</sup> *Id.*

<sup>19</sup> HUMAN RIGHTS CAMPAIGN, *Fatal Violence Against the Transgender and Gender Non-Conforming Community in 2021*, <https://www.hrc.org/resources/fatal-violence-against-the-transgender-and-gender-non-conforming-community-in-2021> ("Sadly, 2021 has already seen at

transgender and non-binary people remain an epidemic across this country and around the world. Protecting children in schools remains especially important during this period of heightened animus against those seeking equal access and opportunity, notwithstanding their continuing struggles to remain alive.

Were HB 757's intent to single out transgender students to become law in Maryland, it would perpetuate discrimination against and stigmatization of transgender youth, and will exacerbate the already poor mental health outcomes experienced by transgender and non-binary youth. Please cast unfavorable votes against this Bill.

Respectfully submitted,



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least 51 transgender or gender non-conforming people fatally shot or killed by other violent means.”).

<sup>20</sup> Jamie Wareham, *375 Transgender People Murdered in 2021—‘Deadliest Year’ Since Records Began*, FORBES (Nov. 11, 2021 4:00 am), <https://www.forbes.com/sites/jamiewareham/2021/11/11/375-transgender-people-murdered-in-2021-deadliest-year-since-records-began/?sh=41498108321c>.