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To the Texas Senate Committee on State Affairs:

Hon. Joan Huffman, Chair
Hon. Bryan Hughes, Vice-chair
Hon. Brian Birdwell
Hon. Brandon Creighton
Hon. Craig Estes
Hon. Eddie Lucio, Jr.
Hon. Jane Nelson
Hon. Charles Schwertner
Hon. Judith Zaffirini

Re: Senate Bills 3 and 91

I submit this testimony on behalf of the American Civil Liberties Union of Texas, and its tens of thousands of members and supporters around the state, to oppose Senate Bills 3 and 91 (which are substantially the same) because they target transgender Texans for discrimination. The proponents of these bills attempt to hide behind privacy and safety, but make no mistake—these measures serve neither end, and instead amount to unlawful discrimination against an already vulnerable group of Texans. If these measures advance, they will risk hundreds of millions of dollars in lost revenue to Texas's economy, protracted and expensive litigation, and of greatest concern, the lives of transgender and gender non-conforming Texans.

Barring transgender people from using public restrooms that match who they are and the gender they live every day, as SB 3 and 91 seek to do, prevents them from participating in public life. Every one of us needs access to restrooms throughout the day in order to do our jobs, attend school, or spend the day at the State Capitol participating in the democratic process. For transgender Texans, SB 3 and 91 would mean having to choose between personal safety and dignity, on the one hand, and breaking the law on the other. This is no choice at all but, in fact, a mandate of expulsion from public life. The result is that many will effectively be barred from public buildings, including the

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schools and jobs they have been participating in for years, and unable to access the services provided there.

For transgender school children, the effects are particularly harmful. At the ACLU of Texas, we get calls every fall from parents concerned about whether their transgender children will have access to a safe and fair learning environment when they start school. We meet kids locked out of the formative experiences of youth that many of us take for granted, like attending school dances or participating in band or cheerleading. And we hear from kids who put their health at risk daily rather than endure the humiliation and stigma of using a restroom that doesn't correspond to their gender identity or being the only child in the school required to use a separate facility as if they were somehow unfit to be with their peers. Experts agree that transgender children who are discriminated against in this way suffer academically and socially and are at higher risk of depression and self-harm, including suicide. These bills put young Texans at risk and place the families who love and support them in a perpetual state of fear that their government will be the very force that pushes their children to self-harm and even suicide.

These measures invite private and public discrimination against transgender people and those who are perceived as transgender. No one carries their birth certificate while going about their daily life, which means that the practical effect of these measures is to encourage the profiling of people in single-sex spaces—a reality that harms all of us, transgender and not. And even if people did carry around their birth certificates, there is no guarantee that the gender marker listed would be consistent with a person's gender identity. Because the standards for correcting gender markers on birth certificates vary by state, there is no uniform rule governing the medical treatment necessary to correct a gender marker. For example, in some states, a transgender person can never update the gender marker on the person's birth certificate; in others, that update can happen irrespective of medical treatment. Moreover, corrections to the gender on a birth certificate can be practically impossible because of the costs required or lack of access to the medical care necessary to update that document under the applicable state law.

Like North Carolina's now repealed HB2, which similarly barred transgender people from public space by barring access to facilities, SB 3 and 91 also plainly violate federal law. Both Title VII and Title IX of our federal civil rights laws expressly prohibit discrimination on the basis of sex. As the U.S. Supreme Court held nearly 30 years ago, that prohibition on sex discrimination encompasses any harmful differential treatment on the basis of "sex-based considerations," including a person's failure to conform to societal gender norms of what it means to be a man or a woman. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241-42, 251 (1989). Following *Price Waterhouse*, virtually every federal appeals court to consider the issue has recognized that discrimination on the basis of transgender status is sex discrimination. See *Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034, 1048-1050 (7th Cir. 2017); *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011); *Smith v. City of*

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Salem, 378 F.3d 566, 575 (6th Cir. 2004); *Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000).

Federal agencies such as the U.S. Equal Employment Opportunity Commission and the Occupational Safety and Health Administration follow this case law in enforcement actions against employers across the country, including government employers. Although the U.S. Department of Education and Department of Justice have withdrawn guidance to public schools about how to interpret an implementing regulation under Title IX, that action changes neither Title IX's express prohibition on sex discrimination nor the extensive case law, cited above, interpreting sex discrimination to include discrimination because the person is transgender. Indeed, in withdrawing the guidance, the Education and Justice Departments took no position on how to interpret Title IX's prohibition on sex discrimination and left in place other guidance documents making plain that Title IX's broad prohibition encompasses prohibitions on discrimination based on a person's transgender status or failure to conform to sex stereotypes.

SB 3 and 91 impose different treatment on transgender Texans because of two "sex-based considerations." The first is an individual's perceived nonconformity to gender stereotypes and expectations of what it means to be a man or woman. The second is an individual's transgender status itself, which is by definition based on the fact that the sex the person was assigned at birth does not correspond to the person's gender identity. Transgender people take legal, medical, and social steps to live their lives in conformity with their gender identity. SB 3 and 91 would discriminate against them simply because that gender identity does not align with the sex they were assigned at birth as identified on their birth certificate. As a result, these bills run afoul of federal laws prohibiting sex discrimination.

SB 3 and 91 also conflict with the Constitution's guarantee of equal protection to every one of us. "[The] Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance." *Romer v. Evans*, 517 U.S. 620, 632 (1996). As such, sex stereotyping is impermissible under the Equal Protection Clause. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 139 n.11 (1994); *see also Whitaker*, 858 F.3d at 1053-54. Because these bills discriminate on the basis of sex, they deny transgender Texans equal protection under the law.

SB 3 and 91 expose school districts and other government entities to litigation and liability. Because these bills cannot be reconciled with federal civil rights laws or the equal protection guarantee of the U.S. Constitution, they would put school districts, municipalities, and other governmental entities in Texas in an untenable position. If they comply with the requirements of these bills, they face litigation by the transgender Texans against whom they discriminate. And if they follow federal law and uphold the U.S. Constitution, they face litigation by the state's attorney general.

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Access to public restrooms and changing facilities has been central to civil rights battles for centuries. For example, white southerners objected to having to share such facilities with people of color. Women were excluded from traditionally male-dominated jobs on the theory that their access to bathrooms and changing rooms was an insurmountable obstacle. Then, as now, these arguments are not only used to exclude people from equal access, but to stigmatize and to deprive people of the dignity to which all of us are entitled. It is our hope that the committee will not repeat this shameful history by targeting transgender Texans for discrimination by denying them access to public facilities.

We urge the committee to vote “no” on SB 3 and 91.

Respectfully submitted,



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