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Written Testimony against House Bill 1399
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Dear Chair Klick and Members of the House Public Health Committee:

We write on behalf of the American Civil Liberties Union Foundation of Texas to express serious concerns about House Bill 1399 and ask that you oppose this harmful, unconstitutional, and discriminatory bill.

This bill is a cruel attack on transgender young people at a time when our state is facing multiple overlapping crises—the ongoing failure of the state’s power grid, an estimated 200 Texans dead from the winter storm, a global pandemic, and hundreds of thousands of Texans facing unemployment, eviction, and economic despair. Instead of addressing any of these critical and pressing issues, HB 1399 would create serious financial liability for doctors, health care providers, and the State of Texas, and it threatens to harm many Texas children—both transgender and non-transgender kids—by stripping away liability insurance for medical providers prescribing medication that is needed for both gender-affirming care and for treating precocious puberty.

When the Texas Legislature considers discriminatory bills that deny transgender people’s humanity, it causes immense psychological harm and emotional distress to kids across the state. When a similar ban on gender-affirming health care was recently debated in Arkansas, a pediatric doctor reported an increase in visits to the emergency room by transgender young people attempting suicide.¹ Passing HB 1399 out of your committee could similarly exacerbate the already far-too-high rates of depression, suicidal ideation, and suicide attempts by transgender young people.²

HB 1399 Is a Dangerous Attempt to Deny Transgender People the Right to Exist

HB 1399 is one of a number of bills this legislative session that seeks to ban gender-affirming medical care for transgender young people. This bill would amend the Texas Health and Safety Code to prohibit physicians and health providers from prescribing certain drugs or performing various procedures “for the purpose of transitioning a child’s

¹ Michele Hutchison, Arkansas Senate Hearing on HB 1570 (March 22, 2021), <https://twitter.com/aclu/status/1375462270243909635>.

² If you or someone you know is in need of mental health resources, please visit: https://www.txtranskids.org/additional_resources.

biological sex . . . or affirming the child’s perception of the child’s sex if that perception is inconsistent with the child’s biological sex.”

The bill intends to prohibit a number of surgical procedures and the use of puberty blockers, testosterone, and estrogen from being provided for the purpose of transition-related or gender-affirming care. However, this bill would still allow the same interventions to be used on intersex kids if there is “a medically verifiable genetic disorder of sex development.”

HB 1399 would also amend the Texas Insurance Code to prohibit professional liability insurers from covering “child gender transitioning or gender reassignment procedures or treatments” that are prohibited by the bill. And the bill would amend the Texas Occupations Code to prevent physicians and applicants from providing gender-affirming care, while still allowing the exact same treatments for “normalizing puberty for a minor experiencing precocious puberty.”

This Bill Is Contrary to Medical Standards of Care and Would Harm Texas Children

Every major medical association recognizes that gender-affirming care is life-saving care. Moreover, **these medical decisions belong to transgender young people, their parents and guardians, and doctors and health care providers—not politicians or the government.** By categorically banning all treatments and prescriptions for transgender youth, HB 1399 robs them of the right to live their lives as who they truly are and sends an alarming and dangerous message that these young people are not welcome in the state of Texas.

The American Academy of Pediatrics³ and the Endocrine Society⁴ have both published clear protocols advocating for gender-affirming care for transgender young people. The American Medical Association “views these bills as a dangerous legislative intrusion into the practice of medicine and has been working closely with state medical associations to vigorously oppose them.”⁵ In a 2020 letter to the South Dakota House State Affairs Committee, the American Medical Association stated that they have “grave concerns about the legislature interfering in the patient-physician relationship” and furthermore, “compromising physician’s ability to use their medical judgement as to the treatment that

³ Jason Rafferty, *Ensuring Comprehensive Care and Support for Transgender and Gender-Diverse Children and Adolescent*, Pediatrics (October 2018), <https://pediatrics.aappublications.org/content/142/4/e20182162>

⁴ Wylie C Hembree, et al., *Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent Persons: An Endocrine Society* Clinical Practice Guideline*, The Journal of Clinical Endocrinology & Metabolism (Nov. 1, 2017), <https://academic.oup.com/jcem/article/102/11/3869/4157558>

⁵ *AMA fights to protect health care for transgender patients*, American Medical Association (March 26, 2021), <https://www.ama-assn.org/health-care-advocacy/advocacy-update/march-26-2021-state-advocacy-update>

is in the best interest of their patients.”⁶ The American Academy of Child & Adolescent Psychiatry also released a statement condemning similar bills.⁷

By going against medical best practices and long-established standards of care, HB 1399 threatens to inflict immediate and irreversible harm to young people who are already receiving gender-affirming care. **Any transgender young person who is already receiving medical care could be stripped of this treatment under this bill and immediately face irreversible and devastating effects.** HB 1399 makes no exceptions for people to continue gender-affirming care that they have already started, and the medical consequences of suddenly stopping such treatment are likely disastrous.

This Bill Could Impede Medical Care for Many Texas Young People, Including Those Who Are Not Transgender

HB 1399 specifically allows for the exact same treatments to be provided to intersex youth and those experiencing precocious or early-onset puberty, which is commonly treated by puberty blockers. But the fact that the bill strips away insurance coverage for these treatments when used for gender-affirming care would make it harder for doctors and clinics to provide these treatments to all Texas youth. If a provider is not able to obtain insurance for these prescriptions and treatments for gender-affirming care, they might stop prescribing them altogether for other young people who need them for precocious puberty. And if a provider gives this treatment for young Texans experiencing precocious puberty, they might not want to risk the legal liability that could ensue from being accused of violating HB 1399.

This bill is therefore very likely to harm many young Texans, particularly transgender youth, but also other young people who need these treatments and are not transgender.

This Bill Is Unconstitutional and Would Be Struck Down if Challenged in Court

The U.S. and Texas Constitutions guarantee every person the right to life, due process, and equal protection under the law, but this bill violates these rights for several reasons. First, HB 1399 is an explicit attack on transgender people that single them out for unfavorable treatment, which violates longstanding principles of equal protection. This bill also violates transgender people’s fundamental rights to bodily autonomy and essential health care. HB 1399 also seeks to curtail the rights of medical providers to deliver care

⁶ James L. Madara, *AMA Opposition to HB 1057* (Jan. 21, 2020), <https://searchlf.ama-assn.org/undefined/documentDownload?uri=%2Funstructured%2Fbinary%2Fletter%2FLETTERS%2F2020-1-21-Letter-opposing-SD-HB-1057-FINAL.pdf>

⁷ American Academy of Child & Adolescent Psychiatry, *AACAP Statement Responding to Efforts to ban Evidence-Based Care for Transgender and Gender Diverse Youth* (Nov. 8, 2019), [https://www.aacap.org/AACAP/Latest News/AACAP Statement Responding to Efforts to ban Evidence-Based Care for Transgender and Gender Diverse.aspx](https://www.aacap.org/AACAP/Latest%20News/AACAP%20Statement%20Responding%20to%20Efforts%20to%20ban%20Evidence-Based%20Care%20for%20Transgender%20and%20Gender%20Diverse.aspx)

based on medically accepted best practices, and it impedes parents and guardians' right to make medical decisions in the best interests of their children.

a. By Singling Out Transgender Individuals and Preventing them from Receiving Treatment, HB 1399 Violates the Equal Protection Clause

The Equal Protection Clause has long prohibited any government from passing legislation solely to curtail the rights of a specific group of people.⁸ Here, HB 1399 is written in such a way as to deprive transgender individuals of medication and treatment that would still remain available to other groups of people. **By banning medical treatments only for transgender individuals, this bill is unconstitutional for specifically discriminating against transgender people.**⁹

Discrimination against transgender people is also sex discrimination under federal law, which further violates the Equal Protection Clause.¹⁰ **Last summer, the U.S. Supreme Court found held in a 6-3 decision that transgender people are fully protected from discrimination under Title VII, which is often used to interpret sex discrimination in federal civil rights laws.**¹¹ Where a law singles out a group of people based on the fact that they have an identity that does not match the gender assigned to them at birth, that is impermissible sex discrimination. HB 1399 impermissibly targets and attacks transgender young people, and would very likely be struck down as unconstitutional sex discrimination if challenged in court.¹²

b. HB 1399 Would Impermissibly Deny People's Due Process Right to Bodily Autonomy and Gender-Affirming Care

By seeking to categorically prohibit gender-affirming care for transgender youth, HB 1399 aims to bar people from medically necessary and life-saving treatment. The Supreme Court has long recognized that the Due Process Clause prevents any government entity from dictating the most private and fundamental decisions of someone's life.¹³

⁸ *Romer v. Evans*, 517 U.S. 620, 632 (1996) (declaring unconstitutional a Colorado law designed solely to curtail the rights of LGBTQ people).

⁹ *See Carcano v. Cooper*, 350 F. Supp. 3d 388, 420 (M.D.N.C. 2018) (finding that HB2 in North Carolina was enacted with discriminatory intent against transgender people).

¹⁰ *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011) ("A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes.").

¹¹ *See Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731, 1749 (2020).

¹² *See Karnoski v. Trump*, 926 F.3d 1180 (9th Cir. 2019); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 287 (W.D. Pa. 2017); *M.A.B. v. Bd. of Educ. of Talbot Cty.*, 286 F. Supp. 3d 704 (D. Md. 2018); *Bd. of Educ. of the Highland Local Sch. Dist. v. United States Dep't of Educ.*, 208 F. Supp. 3d 850 (S.D. Ohio 2016); *Adkins v. City of New York*, 143 F. Supp. 3d 134 (S.D.N.Y. 2015).

¹³ *See, e.g., Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992) ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."); *Lawrence v. Texas*, U.S. 558, 574-78 (2003) ("The

The U.S. Supreme Court recently affirmed that transgender people are protected by federal nondiscrimination laws, and it violates fundamental due process rights to deny someone essential and critical medical care. In *Bostock v. Clayton County, Georgia*, the Court decided that transgender people are protected from discrimination by Title VII, and there was no suggestion in the case that Aimee Stephens could have been denied the right to transition in the first place.¹⁴ **Across the country, federal courts of appeal and district courts have found that transgender people have a right to receive gender-affirming care and that their deeply held sense of gender identity must be respected.**¹⁵

c. HB 1399 Would Infringe on Parents and Guardians' Rights to Control the Care and Wellbeing of their Children

Along with infringing on the constitutional rights of transgender youth directly, HB 1399 also likely violates the rights of parents and guardians to care for their children without undue interference from the state. "The liberty interest...of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests" recognized by the Supreme Court.¹⁶

Several federal courts have found that "[p]arents possess a fundamental right to make decisions concerning the medical care of their children."¹⁷ Although this right is not absolute, parental control of medical treatment of children is considered a fundamental right, and any state intervention in this area must satisfy strict scrutiny and be narrowly tailored to a compelling government interest.

In *Parham v. J. R.*, the Supreme Court held that parents "retain plenary authority to seek [medical] care for their children, subject to a physician's independent examination and medical judgment."¹⁸ **Under current law, parents and doctors work together to make medical judgments in the best interests of the child. But HB 1399 seeks to disrupt this status quo and take critical decisions out of the hands of parents and doctors.**

petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny"); *Obergefell v. Hodges*, 576 U.S. 644, 651–52 (2015) ("The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity.").

¹⁴ See 140 S. Ct. 1731, 1749 (2020).

¹⁵ See *Love v. Johnson*, 146 F. Supp. 3d 848, 855 (E.D. Mich. 2015) (acknowledging that gender identity goes to the "very essence of personhood protected under the substantive component of the Due Process Clause"); see also *Edmo v. Corizon, Inc.*, 935 F.3d 757, 766 (9th Cir. 2019) (one of many cases finding that the Eighth Amendment requires states to provide gender-affirming care to transgender people in prison).

¹⁶ *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

¹⁷ *Kanuszewski v. Michigan Dep't of Health & Human Servs.*, 927 F.3d 396, 418 (6th Cir. 2019).

¹⁸ 442 U.S. 584, 604, (1979),

d. HB 1399 Would Also Curtail the Rights of Medical Professionals to Provide Life-Saving Care

This bill also seeks to strip away the ability of doctors, therapists, and other health care professionals to provide appropriate care and treatment to their patients. The doctor-patient relationship is given First Amendment constitutional protection, and “needlessly broad” regulations that intrude on this relationship are deemed unconstitutional.¹⁹ While the government has long reserved the right to regulate professional conduct, individuals do not abandon their First Amendment rights when they begin practicing a profession that is subject to state regulation.²⁰

HB 1399 would force doctors and other health care providers to choose between violating their Hippocratic Oath and denying care to their patients, or facing significant legal liability. Importantly, the bill would still allow doctors to prescribe the same medications and perform the same procedures for other patients. But this forces health care providers to engage in discrimination and implicates doctors’ due process and First Amendment rights.

HB 1399 seeks to write into law the biases and prejudices of Texas lawmakers while usurping the decision-making power of Texas doctors, parents, and transgender young people. We urge you to reject this harmful and discriminatory bill, to stop attacking trans youth, and to focus instead on confronting the real and urgent problems facing us in Texas.

Sincerely,



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¹⁹ *Whalen v. Roe*, 429 U.S. 589, 596 (1977).

²⁰ *Stuart v. Cannitz*, 774 F.3d 238, 247 (4th Cir. 2014); *Conant v. Walters*, 309 F.3d 629, 637 (9th Cir. 2002); *Carter v. Inslee*, No. C16-0809-JCC, 2016 WL 8738675, at *8 (W.D. Wash. Aug. 25, 2016).