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## **Dramatic Rise in State Bills Targeting Transgender Student Athletes**

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# Dramatic Rise in State Bills Targeting Transgender Student Athletes

BY [CECILY D'AMORE](#)/ ON MARCH 22, 2021



*Photo by Daydreamerboy on Wikimedia*

2021 has brought a dramatic increase in the number of states proposing bills to regulate the participation of transgender athletes in school sports.<sup>1</sup> More specifically, these bills target transgender women's participation in women's athletics, with proponents stating that they are seeking to "protect . . . female sports from being destroyed."<sup>2</sup> The American Civil Liberties Union ("ACLU") noted that in 2020, legislation was introduced to this effect in eighteen states.<sup>3</sup> Just in the first two months of 2021, however, twenty-four states had introduced similar legislation.<sup>4</sup> Sports Illustrated, on March 12, 2021, noted that that number is now up to twenty-six.<sup>5</sup>

These bills come in the wake of, and possibly in response to, one of President Biden's Executive Orders ("EO"), signed on his first day in office.<sup>6</sup> The EO states that "[a]ll persons

should receive equal treatment under the law, no matter their gender identity or sexual orientation” and specifically addresses transgender students in sports as early as the EO’s second sentence: “[c]hildren should be able to learn without worrying about whether they will be denied access to the restroom, the locker room, or *school sports*.”<sup>7</sup> It goes on to explicitly state that under the 2020 U.S. Supreme Court case of *Bostock v. Clayton County*,<sup>8</sup> laws that prohibit sex discrimination generally also prohibit discrimination on the basis of gender identity or sexual orientation.<sup>9</sup>

The status of state legislation on this issue varies widely across the country. Thus far, only two states have signed such a trans athlete ban into law. Idaho was the first to do so in March 2020.<sup>10</sup> The law, named the Fairness in Women’s Sports Act, categorically bars the participation of transgender women in women’s student athletics and allows for a “dispute” process that potentially involves an invasive sex verification process.<sup>11</sup> In *Hecox v. Little*, plaintiffs challenged the constitutionality of the law and were granted a preliminary injunction preventing its enforcement while the case is on appeal.<sup>12</sup> It is still awaiting review by the Ninth Circuit, but amicus briefs have been filed on behalf of transgender women athletes, the National Women’s Law Center, and athletes in women’s sports, to name a few.<sup>13</sup>

Mississippi became the second state to sign such an anti-trans bill into law. On March 11, 2021, the Governor signed the Mississippi Fairness Act into law,<sup>14</sup> which is set to take effect on July 1, 2021.<sup>15</sup> The law prescribes that athletic teams “shall be expressly designated . . . based on biological sex” and goes on to note, separately, that “[a]thletic teams or sports designated for ‘females,’ ‘women’ or ‘girls’ shall not be open to students of the male sex.”<sup>16</sup> In a tweet dated a week before the Governor signed the bill into law, he wrote that he planned to sign it “to protect young girls from being forced to compete with biological males for athletic opportunities” and noted that the Biden EO “forced” the state legislature to address the issue.<sup>17</sup> On March 8, 2021, the Governor of South Dakota indicated that she intends to sign a similar bill into law “very soon.”<sup>18</sup>

Countless other bills across the country, similarly seeking to prevent young transgender women from participating in women’s sports, are in the earlier stages of this process, but may see a similar fate.<sup>19</sup> In Arkansas, for example, the “Fairness in Women’s Sports Act” was introduced in late February 2021 and was referred to the Committee on Education on March 10, 2021.<sup>20</sup> The Act would ban transgender athletes from participating in sports in elementary and secondary schools, two- and four-year colleges, and would allow lawsuits for damages in the event a trans athlete played.<sup>21</sup> Georgia has introduced multiple bills since February 2021 seeking to prevent trans youth athletes from participating in sports.<sup>22</sup> One of such bills, named the “Save Girls Sports Act” was introduced on February 25, 2021 and has been in committee since March 3, 2021.<sup>23</sup> The bill defines “gender” as “biological sex” and prevents “a person whose gender is male to participate in . . . athletics that are designated for females.”<sup>24</sup> The list goes on.

Even federally, a bill was introduced in January 2021, named the “Protection of Women and Girls in Sports Act of 2021.”<sup>25</sup> The bill is cosponsored by twenty-four Republican representatives and was referred to the House Committee on Education and Labor on January 21, 2021.<sup>26</sup> Much like many of the proposed state bills, it defines “sex” as “a person’s reproductive biology and genetics at birth” and “makes it a violation of federal law for a recipient of federal funds who operates, sponsors, or facilitates athletic programs or activities to permit a person whose sex is male to participate in an athletic program or activity that is designated for women or girls.”<sup>27</sup> An identical bill was also introduced in the Senate and referred to Committee on February 4, 2021.<sup>28</sup>

White House Press Secretary Jen Psaki recently reiterated that the President believes that “trans rights are human rights and that no one should be discriminated against on the basis of sex,” adding that it is not only “the law of the land” but also President Biden’s “deeply held view.”<sup>29</sup> This statement seems to indicate that the administration believes laws such as those being proposed in so many states, and even passed, are unconstitutional.<sup>30</sup> The policies of the National Collegiate Athletic Association (“NCAA”) and the International Olympic Committee (“IOC”), as noted by the court in *Hecox v. Little*, stand “in stark contrast” to the categorical bar proposed in bills in so many states, allowing transgender women to participate on women’s teams upon meeting certain criteria.<sup>31</sup> On March 10, 2021, however, over five hundred NCAA student athletes sent a letter to the NCAA President and Board of Governors, addressing the NCAA’s “silen[ce] in the face of hateful legislation” by states close to passing anti-transgender laws who are also slated to host championships.<sup>32</sup> The student athletes call for the NCAA to “speak out” against these bills, which “directly affect their student athlete population.”<sup>33</sup> They urge the NCAA to make a “firm statement” that they will continue to uphold their Anti-Discrimination Policy and “only operate championships and events in states that promote an inclusive atmosphere.”<sup>34</sup>

Pushback against the anti-trans legislation that will inevitably affect student athletes across the country does not end here. Over fifty-five major U.S. corporations, including, for example, Amazon, Nike, Google, and Uber, have spoken out to oppose states’ proposed anti-transgender legislation.<sup>35</sup> The ACLU, as recently as March 9, 2021, tweeted that “[a] record number of discriminatory state bills across the country are attacking trans youth” and noted that they have “never seen anything like this.”<sup>36</sup> Despite supporters of these bills stating that they are protecting women’s sports, transgender rights activists argue that no true threat exists in transgender youth participation in women’s sports.<sup>37</sup> The Associated Press reached out to two dozen state lawmakers sponsoring anti-trans bills, as well as conservative groups supporting them, and found that the vast majority could not identify a single instance in their state or region in which trans participation in women’s sports has caused problems.<sup>38</sup> Some sponsors stated that they were seeking to be “proactive” and prevent potential future problems, and others merely brushed the question aside.<sup>39</sup> Organizations such as the Women’s Sports Foundation and the National Coalition for Women and Girls in Education,

and famous athletes such as Billie Jean King and Megan Rapinoe have also spoken out in support of transgender student athletes.<sup>40</sup>

The proposed bills are deliberately transphobic and discriminatory. Not only do they aim to “invalidat[e] transgender identity,” as stated by Kate Oakley, state legislative director and senior counsel for the Human Rights Campaign, but they further isolate trans youth—some of the “most vulnerable members of the LGBTQ community.”<sup>41</sup> Chase Strangio, deputy director for transgender justice at the ACLU, noted that even if these bills are not enacted, “the damage is done” because of how harmful the state of the rhetoric has been on the transgender community.<sup>42</sup> Further, as the Women’s Sports Foundation noted, this false rhetoric is a distraction to the real threats to girls and women in sports: inequities in compensation, lack of Title IX understanding and compliance, harassment and abuse of female athletes and women working in sports, and much more.<sup>43</sup> The extensive legislative activity by states seeking to prevent transgender women from participating on women’s sports teams only appears to be picking up as 2021 trudges on, and will have significant, even damaging, effects on student athletes and the transgender community across the country.

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1. Legislative Tracker: Anti-Transgender Student Athletics, Freedom for All Americans, <https://freedomforallamericans.org/legislative-tracker/student-athletics/> (last visited Mar. 13, 2021) [hereinafter Legislative Tracker]. See also Meredith Deliso, ‘Catastrophic’ Number of State Bills Target Transgender Youth, Advocates Say, ABC News (Mar. 7, 2021), [https://abcnews.go.com/US/catastrophic-number-state-bills-target-transgender-youth-advocates/story?id=76138305&cid=clicksource\\_4380645\\_17\\_big\\_feature\\_bf\\_hed](https://abcnews.go.com/US/catastrophic-number-state-bills-target-transgender-youth-advocates/story?id=76138305&cid=clicksource_4380645_17_big_feature_bf_hed); The Coordinated Attack on Trans Student Athletes, ACLU (Feb. 26, 2021), <https://www.aclu.org/news/lgbt-rights/the-coordinated-attack-on-trans-student-athletes/>.
  2. Deliso, *supra* note 1 (quoting the sponsor of the Mississippi bill, Republican state Sen. Angela Hill).
  3. The Coordinated Attack on Trans Student Athletes, ACLU (Feb. 26, 2021), <https://www.aclu.org/news/lgbt-rights/the-coordinated-attack-on-trans-student-athletes/>.
  4. *Id.*

5. Julie Kliegman, *The Next Cultural Battle: States Take Aim at Trans Athletes*, Sports Illustrated (Mar. 12, 2021), <https://www.si.com/college/2021/03/12/states-take-aim-at-trans-athletes>.
6. Exec. Order No. 13988, 86 FR 7023, 7023 (Jan. 20, 2021).
7. *Id.* (emphasis added).
8. *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020).
9. *Supra* note 6.
10. *Hecox v. Little*, No. 1:20-cv-00184-DCN, 2020 U.S. Dist. LEXIS 149442, at \*5, \*7 (D. Idaho Aug. 17, 2020).
11. *Id.* at \*5-6.
12. *Id.*
13. *Hecox v. Little*, ACLU, <https://www.aclu.org/cases/hecox-v-little> (updated Nov. 19, 2020).
14. MS SB2536, BillTrack50, <https://www.billtrack50.com/BillDetail/1275985> (last visited Mar. 13, 2021) (linked to Legislative Tracker).
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16. *Id.*
17. Tate Reeves (@tatereeves), Twitter (Mar. 4, 2021, 12:51 PM), <https://twitter.com/tatereeves/status/1367533188147519488>.
18. Kristi Noem (@govkristinoem), Twitter (Mar. 8, 2021, 3:11 PM), <https://twitter.com/govkristinoem/status/1369017886514311180>.
19. See Legislative Tracker; Take Action! Current Winter 2021 Bills: Sports Bills, Transathlete.com, <https://www.transathlete.com/take-action> (updated Mar. 9, 2021) (tracking and updating the status of these bills across the country).
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21. Current Winter 2021 Bills: Sports Bills, Transathlete.com, <https://www.transathlete.com/take-action> (updated Mar. 9, 2021) (describing the Arkansas bill).
22. Legislative Tracker (providing an interactive map that lists the number of bills with respect to anti-transgender student athletes by state).
23. GA SB266, BillTrack50, <https://www.billtrack50.com/billdetail/1331234> (last visited Mar. 13, 2021) (linked to Legislative Tracker).
24. *Id.* (under a tab on the webpage titled "Bill Text").
25. Protection of Women and Girls in Sports Act of 2021, H.R. 426, 117th Cong. (2021).
26. *Id.*
27. *Id.* (providing a "Latest Summary" for H.R. 426).
28. Protection of Women and Girls in Sports Act of 2021, S.251, 117th Cong. (2021).
29. Dan Avery, Mississippi Governor Signs Bill Banning Trans Athletes from School Sports, NBC News (Mar. 11, 2021), <https://www.nbcnews.com/feature/nbc-out/mississippi-governor-signs-bill-banning-trans-athletes-school-sports-n1260709> (quoting Psaki from a news briefing on Mar. 5, 2021).



30.Id.

31.Hecox v. Little, No. 1:20-cv-00184-DCN, 2020 U.S. Dist. LEXIS 149442, at \*5 (D. Idaho Aug. 17, 2020).

32.Joanna Hoffman, 500+ Student Athletes to NCAA Leadership: Speak Out for Trans Athletes, Athlete Ally (Mar. 10, 2021), <https://www.athleteally.org/student-letter-ncaa-hb500/> (quoting the letter directly, which is included in full in the article).

33.Id.

34.Id.

35.Wyatt Ronan, Breaking: 2021 Becomes Record Year for Anti-Transgender Legislation, Human Rights Campaign (Mar. 13, 2021), <https://www.hrc.org/press-releases/breaking-2021-becomes-record-year-for-anti-transgender-legislation>.

36.ACLU (@ACLU), Twitter (Mar. 9, 2021, 5:54 PM), <https://twitter.com/ACLU/status/1369421239111086085>.

37.David Crary & Lindsay Whitehurst, Lawmakers Can't Cite Local Examples of Trans Girls in Sports, Associated Press News (Mar. 3, 2021), <https://apnews.com/article/lawmakers-unable-to-cite-local-trans-girls-sports-914a982545e943ecc1e265e8c41042e7> (quoting Shannon Minter, legal director of the National Center for Lesbian Rights and a prominent trans-rights attorney).

38.Id.

39.Id.

40.The Coordinated Attack on Trans Student Athletes, ACLU (Feb. 26, 2021), <https://www.aclu.org/news/lgbt-rights/the-coordinated-attack-on-trans-student-athletes/>.

41.Deliso, supra note 1.

42.Id.

43.Supra note 40.