

WRITTEN TESTIMONY AGAINST HOUSE BILL 538  
SUBMITTED TO THE IDAHO  
SENATE STATE AFFAIRS COMMITTEE  
MARCH 29, 2024  
ON BEHALF OF THE AMERICAN CIVIL LIBERTIES UNION OF IDAHO

Chairman Guthrie and Committee Members:

The ACLU and ACLU of Idaho is strongly opposed to HB 538, a bill that would allow government officials and employees, including public school teachers and staff, to intentionally and persistently misgender transgender people and refuse to address them by their preferred name and pronouns. Should HB 538 pass, no public official would be required to honor the name or pronoun of an individual. To be clear: using the correct pronouns and name when addressing an individual is not compelled speech. Rather, properly addressing fellow Idahoans is merely a sign of respect.

HB 538 would also incentivize intentional and persistent mistreatment of transgender Idahoans in particular. The bill would provide a private cause of action to public employees that object to using the appropriate name or pronouns for any transgender person. And because HB 538 applies to public schools, this stipulation would also mean teachers could consistently misgender public school students – and sue for money damages, attorney’s fees, and other relief if they object to using the students’ preferred name or pronouns, up to two years after purported “harm.”

The civil cause of action component of HB 538 appears overly broad. That is, the bill language states that a person “harmed” by using the proper name and pronoun of any person has legal standing for compensatory damages. Without defining such harm – which HB 538 fails to do – we could anticipate multiple, frivolous, and/or retaliatory lawsuits. The bill also provides a generous window for individuals to bring legal claims (up to two years after the purported incident), increasing the chances such legal challenges are filed. It’s reasonable to assume lawsuits brought under HB 538 will be expensive, time consuming and will further burden Idaho courts. In our estimation, such legal claims will do little to serve, let alone benefit, the general Idaho public.

Finally, it is unclear from the bill language whether the *mere ask* from a parent to refer to a transgender student by their proper name and pronoun would give standing for a legal challenge. Again, we are concerned that the bill as written fails to provide clarity or specificity about the kind or level of “harm” that would validate a lawsuit.

## CONSTITUTIONAL ISSUES

HB 538 would require students to provide written parental permission to use the students’ name and pronouns – but only when a students’ name is not derived from their given or “legal” name. This stipulation appears to violate privacy rights of students. The stipulation would also disproportionately impact transgender people. And because of its narrow application, HB 538 would likely violate a number of constitutional rights and federal anti-discrimination laws. The Equal Protection clause of the 14<sup>th</sup> Amendment, for

instance, prohibits the government from denying equal protection under the law. Title IX and Title VII, meanwhile, protect against discrimination and afford privacy protections. Additional federal privacy laws protect the rights of all Idahoans, including students, to not have intimate facts about their lives disclosed.

Privacy protections apply to a suite of personal information, including a person's gender or transgender status. Importantly, these protections apply to adults and children alike; students do not give up their constitutional right to privacy simply by enrolling in public school.

HB 538 distorts the meaning of the Constitution and inappropriately invokes First Amendment protections. Troublingly, the bill pits equal treatment and privacy protections against speech; it would in fact allow public employees to weaponize speech protections against others' fundamental right to equal treatment. In practice, it's reasonable to assume the bill would result in the exclusion of transgender Idahoans, including students, from basic rights and dignity. The discriminatory nature of the bill, coupled with its application to federally-funded (and therefore governed) entities like schools make HB 538 vulnerable to legal challenge – and heightened legal scrutiny.

## **STUDENT SAFETY AND PARENTAL RIGHTS**

We are deeply troubled that not only would HB 538 threaten the right of transgender Idahoans to be treated the same as their peers, but also that the bill would likely foster unsafe learning environments. The bill seems to encourage harassment – at the hands of teachers – against transgender students. Idaho public schools should be a place where all students are able to get a quality education – not be singled out, harassed, or mistreated.

In fact, public schools are required by law to create safe learning environments to all students. However, because HB 538 would allow teachers to misgender students, it raises serious questions about the increased likelihood of harassment and harm the bill would cause transgender students. It's reasonable that, if passed, HB 538 would foster learning environments where transgender students are forced to reveal their transgender status to their peers and, potentially, to unsupportive parents. This kind of forced outing could very likely harm transgender youth across Idaho.

Troublingly, HB 538 would undermine the primacy of parental rights, including the rights of parents to ensure their transgender students' pronouns are respected. That's because HB 538 would require parental permission for a student to use their appropriate name and pronouns at school.

Crucially, HB 538 would also allow school officials to refuse to address students by their appropriate name and pronouns, *even with express parental permission*. In practice, HB 538's provision for parental "permission slips" do little to protect parental rights. That's because even with express, written parental permission to use a student's appropriate name and pronouns, school officials could simply refuse to implement parents' instruction about how to address their children.

In this way, HB 538 sharply departs from the *equal application* of parental rights. It would create limiting barriers around which parents have full access and enjoyment of

their rights. This departure, in practice, would mean the crucial and fundamental rights of parents to decide what is best for their children are rights are in fact only applicable to *certain* parents.

Beyond the many legal problems with HB 538, the human cost of the bill would be devastating. Transgender people live in and call Idaho home. By creating exclusionary public work and school environments, the state is subjecting them to predictable and dire harm. We urge you to oppose HB 538 and give the transgender community an opportunity to continue to live in Idaho and contribute to our beautiful state.

Respectfully,

Amy Dundon, Legislative Strategist

ACLU of Idaho