Testimony of GLBTQ Legal Advocates & Defenders (GLAD Law)
Before the Senate Judiciary Committee
in opposition to SB 459
An Act Relative to Biological Sex in Student Athletics and Prisons
and in opposition to SB 552
An Act Permitting Classification of Individuals Based on Biological Sex
Under Certain Limited Circumstances

Dear Chair Gannon, Vice Chair Abbas, and members of the Committee:

As attorneys with GLBTQ Legal Advocates & Defenders (GLAD Law), we ask this Committee to oppose SB 459 and SB 552 for the following reasons:

<u>1. These bills are not materially different from bills vetoed by Governor Ayotte and Governor Sununu before her</u>. SB 459 and SB 552 follow a growing number of virtually identical bills that were appropriately vetoed. In 2024, Governor Sununu vetoed HB 396, noting that it "seeks to solve problems that have not presented themselves in New Hampshire, and in doing so invites unnecessary discord." In 2025, Governor Ayotte vetoed HB 148, noting that it was "overly broad and impractical to enforce, potentially creating an exclusionary environment for some of our citizens." Then, just last month, she vetoed SB 268, pointing out that it failed to address the issues it dealt with "in a thoughtful, narrow way that protects the privacy, safety, and rights of all Granite Staters." SB 459 and SB 552 do nothing to mitigate these concerns and, instead, recycle the same language that has already been rejected by two governors.

<u>2. These bills endorse unlawful sex discrimination</u>. Whenever programs or facilities are separated by sex, the act of excluding a transgender woman from women's spaces or a transgender man from men's spaces is sex discrimination. This conclusion is based on the principle affirmed in the Supreme Court's decision in *Bostock v. Clayton County*, that an employer who fires a transgender woman because she is transgender violates Title VII's prohibition against sex discrimination. 140 S. Ct. 1731, 1741 (2020) ("[Title VII's] message

for our cases is equally simple and momentous: An individual's homosexuality or transgender status is not relevant to employment decisions."). Courts have applied this principle to policies preventing transgender people from using the appropriate bathroom and have held that such policies discriminate based on sex.

Since *Bostock* was decided in 2020, three federal courts of appeals have considered allegations of sex discrimination based on excluding transgender students from bathrooms. The Fourth Circuit was the first to apply *Bostock* in the context of school bathrooms, and a panel of judges from that court held that the exclusion violated the rights of a transgender student under Title IX and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020), *pet'n for reh'g en banc denied*, 976 F.3d 399 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 2878 (2021). The Fourth Circuit declined to review the panel's decision, which means the case is binding precedent in North and South Carolina, Virginia, West Virginia, and Maryland. The United States Supreme Court also declined to review the decision. Under this analysis, bills like SB 459 and SB 552 would carve out an exception to the law against discrimination, but that exception could not be extended to federal laws like Title IX. Nor could it undermine the protections afforded by the New Hampshire and United States Constitutions, which both prohibit sex discrimination.

In a more recent case, a panel of the Seventh Circuit reaffirmed an earlier decision from that same court, upholding a preliminary injunction against a school district that excluded a transgender boy from the boys' bathroom. The court held that this exclusion violated that student's rights on the same basis as the Fourth Circuit in *Grimm*, and once again the Supreme Court declined to review the decision. *A.C. v. Metropolitan Sch. Dist. of Martinsville*, 75 F.4th 760 (7th Cir. 2023), *cert. denied*, 144 S. Ct. 683 (2024); *see also Doe v. South Carolina*, CA No. 2:24-6420, 2025 U.S. Dist. LEXIS 161125 (S.C. Jul. 8, 2025), *stay denied by* 2025 U.S. App. LEXIS 21723, *stay denial aff'd* 222 L. Ed. 2d 1231.

These decisions faithfully applied the analysis in *Bostock* to reach the inescapable conclusion that excluding transgender students from bathrooms is unlawful discrimination. But these outcomes are consistent with what courts had found in almost all similar cases in the ten years prior to *Bostock*. *See, e.g., Dodds v. United States Dep't of Educ.*, 845 F.3d 217, 220 (6th Cir. 2016) (per curiam) (denying stay of preliminary

injunction); *John Doe v. Regional School Unit 26*, 86 A.3d 600 (Maine 2014); *N.H. v. Anoka-Hennepin Sch. Dist. No. 11*, 950 N.W.2d 553 (Minn. Ct. App. 2020); *M.A.B. v. Bd. of Educ.*, 286 F. Supp. 3d 704 (D. Md. 2018); *J.A.W. v. Evansville Vanderburgh School Corp.*, 323 F. Supp. 3d 1030 (S.D. Ind. 2018), 396 F. Supp. 3d 833 (S.D. Ind. 2019); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267 (W.D. Penn. 2017).

The one outlier decision conflicting with these cases arose in the Eleventh Circuit, governing Florida, Alabama, and Georgia, in which the court ruled against the weight of authority and found that a policy excluding a transgender boy from the boys' bathroom is not *per se* unlawful sex discrimination. *Adams v. Sch. Bd. of St. Johns County*, 57 F.4th 791 (11th Cir. 2022) (en banc). While this decision would tolerate bills like SB 459 and SB 552, it is controlling only in three states, and it flies in the face of what other federal and state courts across the nation have decided.

3. SB 552 sets up a conflict between federal and state employment law. The New Hampshire Commission for Human Rights (HRC) has a contract with the United States Equal Employment Opportunity Commission (EEOC) in which the HRC is charged with investigating and enforcing Title VII in New Hampshire. *See Contract #EECCN130011 The New Hampshire Commission for Human Rights Sections C-J*, https://www.eeoc.gov/contract-eeccn130011-new-hampshire-commission-human-rights-sections-c-j.

As noted above, the United States Supreme Court interprets Title VII to protect the rights of transgender people in the workplace. SB 552 would change state law to create a safe haven for employers who discriminate in this manner. It is unclear how the HRC will comply with its obligations under the workshare agreement with the EEOC if SB 552 directs the HRC not to investigate claims of discrimination based on bathroom access in the workplace.

4. No court has recognized a right to sex-separated spaces without transgender people. In two prominent cases, students and their parents have brought claims against school districts alleging that their rights were violated because of bathroom and locker room policies that allow transgender boys to use boys' facilities and transgender girls to use girls' facilities. In both cases, the courts have held that no such right exists in law. *See Parents for Privacy v. Barr*, 949 F.3d 1210 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 894 (2020);

Doe v. Boyertown Area Sch. Dist., 897 F.3d 518 (3d Cir. 2018), *cert. denied*, 139 S. Ct. 2636 (2019). Both federal courts of appeals found that student privacy rights are not implicated by policies that ensure transgender students have the right to use the restroom. The United States Supreme Court declined to review both decisions.

5. Categorical prison housing policies based solely on birth sex conflict with federal law. Transgender women are among the most vulnerable people in our nation's prisons, far too frequently subjected to harassment and violence, including sexual violence, and unable to access necessary medication and treatments. *See* Richard Saenz, *A Crisis Behind Bars: Legal Issues Impacting Transgender People in Prisons*, American Bar Association (Jan. 22, 2024), https://www.americanbar.org/groups/criminal_justice/publications/criminal-justice-magazine/2024/winter/crisis-behind-bars-legal-issues-impacting-transgender-people-prisons/.

In the few instances where claims have been brought against prisons for improperly housing a transgender woman in a men's facility, those claims were decided based on federal law, not state law, meaning that SB 459 and SB 552 would have no impact. *See, e.g.*, *Doe v. Dep't of Correction*, Civ. No. 17-12255, 2018 U.S. Dist. LEXIS 35022 (D. Mass. Mar. 15, 2018); *see also, e.g.*, *Williams v. Kincaid*, 45 F. 4th 759 (4th Cir. 2022) (allowing transgender woman housed in men's prison to proceed with case seeking transfer to women's prison under the Americans with Disabilities Act, the Rehabilitation Act, and the 8th Amendment to the U.S. Constitution).

Without any basis in fact or law, it makes little sense for this Legislature to undermine the policymaking authority of the New Hampshire Department of Corrections.

5. By endorsing discrimination in school sports programs, HB 552 and SB 459 set up a conflict with federal law. Nearly two years ago, New Hampshire passed HB 1205. The U.S. District Court for the District of New Hampshire quickly blocked enforcement of the law, allowing the two transgender girls who challenged it to continue to play on girls' sports teams, as they had done without incident for years. *See Tirrell and Turmelle v. Edelblut*, 748 F. Supp. 3d 19 (2024). The court found that HB 1205 likely violates Title IX and the Equal Protection Clause of the U.S. Constitution. *Id*. at 41, 45.

Courts across the country have reached similar conclusions about other states' efforts to categorically exclude transgender girls from sports. *See B.P.J. v. West Virginia Bd. of Educ.*, 98 F. 4th 542 (4th Cir. 2024); *Hecox v. Little*, 104 F. 4th 1061 (9th Cir. 2023). The U.S. Supreme Court has accepted an appeal of these two cases and is likely to issue an opinion in June. It makes little sense for the legislature to move forward with additional restrictions on transgender girls' participation in girls' sports without knowing what the Supreme Court will decide and why it will decide it. Moreover, where the legislature already passed HB 1205 in 2024, SB 459 and SB 552 are duplicative and accomplish nothing.

SB 459 does differ from HB 125 in that it also applies to universities. Courts in other states have found that it violates separation of powers principles for the legislature to prescribe an athletics policy for the state university system. *Barrett v. Montana*, 547 P.3d 630 (Mont. 2024). Like Montana, New Hampshire law establishes the independence of the University System of New Hampshire as a "body corporate and politic" not subject to the same legislative control as other parts of the state government. *See, e.g.*, *State Employees' Ass'n of N.H. v. State*, 161 N.H. 558 (2011); *State Employees' Ass'n v. Mills*, 115 N.H. 473 (1975).

For these reasons, this Committee should reject SB 459 and SB 552 and vote ITL.

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