

Testimony Against HB 2899
Before the Texas House Committee on
State Affairs
April 19, 2017

Hello Mister Chair and House Committee Members. My name is Omar Narvaez and I am Law and Policy Advocate for Lambda Legal Defense and Education Fund (“Lambda Legal”). Lambda Legal is the Nation’s oldest and largest nonprofit legal organization making the case for equality for lesbian, gay, bisexual and transgender (“LGBT”) people for more than forty years. Lambda Legal has served our Texas LGBT community from its South Central Regional office in Dallas for more than twenty years. Our work has included cases such as *Lawrence v. Texas*, in which the U.S. Supreme Court struck down the Texas “Homosexual Conduct” law and all of the remaining state laws that criminalized same-sex intimate relationships.¹

I am a proud born and raised Texan from Houston, now living in Dallas, and I am honored to appear before you. My message is simple: Say “no” to House Bill 2899 and/or Committee Substitute House Bill 2899.

As time has passed since the Houston vote to repeal the Houston Equal Right Ordinance (“HERO”) in November, 2015, this issue has been in the spotlight. Despite all the public attention, there is not even one example of a non-transgender person anywhere attempting to hide behind civil rights protections to perpetrate harm where our existing criminal laws were inadequate. The fact is that our laws against predatory behavior are working just fine. What’s not fine is the persistent, pervasive discrimination against transgender people in our state.

Rep. Simmons and some House lawmakers are framing HB 2899 as a watered-down, more acceptable “compromise” version of SB 6. But, make no mistake: this bill is all about facilitating discrimination. It is dangerous to LGBT Texans and it is dangerous to our state’s reputation and our economy.

The committee substitute for HB 2899 would strip away the ability of cities, schools, and other local entities to pass or enforce nondiscrimination protections in multiple-occupancy bathrooms, showers, and changing facilities, for attributes other than those covered under state or federal law. It therefore applies to all categories of discrimination protection left unmentioned, including existing or future protection from discrimination on the basis of military status, familial status, marital status, sexual orientation, and gender identity. It would also nullify all non-discrimination ordinances that provide those protections. HB 2899 will put LGB people and especially transgender people into impossible situations when it comes to everyday life.

Stripping away local control from our cities and school boards is inconsistent with our often-touted Texas values of respect for local independence. Some have enacted protections that are not yet covered by federal or state laws and others have not. We the people who have selected representatives to make policies for our communities at the local level should not be disenfranchised.

This legislation strips protections that some Texas cities have had for LGBTQ people for more than a decade: Dallas since 2002, Austin since 2004, and Fort Worth since 2000. Voters in Dallas approved a charter amendment in 2014 that included protections against discrimination based on sexual orientation, gender identity or expression, and veteran status by a vote of 76% to 24%. HB 2899 would override the will of those voters simply because some members of this body favor a different policy.

I’m here to emphasize to you that Dallas voters were right and that this kind of nondiscrimination policy is overdue for all of Texas. Transgender people face discrimination in every area of life, some on a daily basis. The 2015 U.S. Transgender Discrimination Survey showed that 26% of transgender people reported losing a job due to bias, 50% reported harassment on the job, 20% reported having been evicted or denied housing, and 78% of transgender students reported

¹ *Lawrence v. Texas*, 539 U.S. 558 (2003).

having been harassed or assaulted. Transgender persons of color report even greater rates of discrimination.²

Clear non-discrimination laws covering gender identity and expression are an important part of the solution because they can help stop the discrimination before it happens. Clear laws often cause businesses to adopt policies against discrimination and to train employees to follow those policies.

Instead, without any showing of actual need, HB 2899 would work a power grab and counterproductively would block those local nondiscrimination laws that provide a measure of safety for some of our state's most vulnerable young people — transgender students. If enacted, it would inflict further stigma and pain on students who are simply trying to make it through the school day, get an education, and survive the mean-spirited accusations of some adults who should be seeking to understand and support them — and all students in our great state of Texas — rather than stripping away the minimal protections some now have.

Please let me stress: transgender students are not a threat to anyone. That is why HB 2899 is a misguided non-solution looking for a problem. And, if enacted, it would surely lead to even more confusion, discrimination, and costly litigation — all with only detrimental effects for our great state.

I am confident in predicting that HB 2899 would increase confusion, discrimination and costly litigation because numerous courts already have spoken to these issues, and their condemnation of this kind of gender discrimination is piling up. For more than fifteen years, our federal courts have been recognizing that discrimination against transgender individuals is unlawful sex discrimination.³ This includes our federal courts here in Texas, for example in a case Lambda Legal won on behalf of a transgender woman nearly a decade ago.⁴

² S.E. James, *et al.*, *The Report of the 2015 U.S. Transgender Survey* (National Center for Transgender Equality, 2016), <http://www.transequality.org/sites/default/files/docs/usts/USTS%20Full%20Report%20-%20FINAL%201.6.17.pdf>.

³ *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000). *See also, e.g., Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004); *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008).

⁴ *Lopez v. River Oaks Imaging & Diagnostic Grp., Inc.*, 542 F. Supp. 2d 653 (S.D. Tex. 2008).

More recently, a series of federal court cases have challenged discrimination against transgender students and the decisions confirm that HB 2899 would cause a significant waste of taxpayer dollars trying to defend mistreatment of students that is indefensible.⁵

The most recent of these court decisions came less than two months ago in Lambda Legal's case against the Pine-Richland School District in Western Pennsylvania.⁶ In that case, federal district Judge Mark Hornak ruled in favor of our clients, three transgender students at Pine-Richland High School. Judge Hornak ordered the school district to allow these students to use the restrooms that match who they are and to stop enforcing the discriminatory policy the District adopted last fall.

Judge Hornak's order explains that the school district violated the U.S. Constitution by ordering the students either to use the wrong restrooms or to use single-user facilities, separate from other students. Judge Hornak ruled that we are likely to win on our claim that the District's exclusion of our clients from "common school restrooms does not afford them equal protection of the law as guaranteed to them by the Fourteenth Amendment."

Basically, the federal court told the school district to let transgender students use the bathroom they identify with — consistent with the gender they live every day in every aspect of their lives.

In addition to the U.S. Constitution, transgender students also are protected by Title IX, the federal law protecting students from sex discrimination in school. Numerous courts have concluded that this federal law does not allow schools to limit bathroom access based solely on birth-assigned sex or according to sex stereotypes,

⁵ *See, e.g., Bd. of Educ. of Highland S.D. v. U.S. Dept. of Educ.*, No. 16-524, 2016 WL 5372349 (S.D. Ohio Sept. 26, 2016), *stay denied pending appeal, Dodds v. U.S. Dept. of Educ.*, 845 F.3d 217 (6th Cir. 2016) ("*Highland*"); *Whitaker v. Kenosha Unified Sch. Dist. No. 1*, No. 16-943, 2016 WL 5239829 (E. D. Wisc. Sept. 22, 2016) ("*Whitaker*"); *Carcano v. McCrory*, No. 16-cv-236, 2016 WL 4508192 (M.D. N.C. Aug. 26, 2016) ("*Carcano*").

⁶ *Evancho v. Pine-Richland School District*, Case 2:16-cv-01537-MRH (W.D. Pa. Feb. 27, 2017). Court decision and more information are at http://www.lambdalegal.org/blog/20170227_pine-richland-preliminary-injunction.

including the stereotype that a student's gender identity must correspond to birth-assigned sex.⁷

In addition to the fact that HB 2899 is fatally flawed as a legal matter, it also would be devastating for our Texas economy. We know this from studies of the business climate here in Texas. For example, the Texas Association of Business's analysis predicts up to \$8.5 billion in GDP losses and up to 185,000 lost jobs.⁸

But the most concrete evidence comes from North Carolina, where that state's targeting of transgender people has brought terrible consequences to the Tar Heel state.⁹ This is because targeting transgender people sends a powerfully negative message that a state is not open and welcoming to everyone. In addition to massive corporate opposition to North Carolina's HB 2,¹⁰ major

⁷ See, e.g., *Highland*, 2016 WL 5372349; *Whitaker*, 2016 WL 5239829; *Carcano*, 2016 WL 4508192. See also *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 718 (4th Cir. 2016) ("We look to case law interpreting Title VII of the Civil Rights Act of 1964 for guidance in evaluating a claim brought under Title IX."), *cert. granted in part*, 137 S. Ct. 369 (2016), *vacated on other grounds and remanded*, *Gloucester Cty. Sch. Bd. v. G.G.*, Case No. 16-273, March 6, 2017 Order List, 580 U.S. __ (March 6, 2017).

⁸ Keep Texas Open for Business, *New Study Finds Up to \$8.5 Billion GDP Loss, 185,000 Jobs at Risk if Texas Passes So-Called "Religious Freedom" and "Bathroom Bills"* (Dec. 6, 2016), available at <http://www.keeptxopen.org/launch-release/>; Texas Association of Business, *The Economic Impact of Discriminatory Legislation on the State of Texas* (Dec. 2016) (analysis concluding that SB6 would cause economic losses in Texas' GDP ranging from \$964 million to \$8.5 billion, up to 185,000 lost jobs, and other substantial economic impacts), available at <http://www.keeptxopen.org/wp-content/uploads/2016/12/KTOB-Economic-Study.pdf>.

⁹ See, e.g., Christy Mallory and Brad Sears, *Discrimination, Diversity and Development: The Legal and Economic Implications of North Carolina's HB 2* at 32, n. 184 (May 2016) (estimating that anti-LGBT law could cost state \$5 billion annually), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Discrimination-Diversity-and-Development-The-Legal-and-Economic-Implications-of-North-Carolinas-HB2.pdf>.

¹⁰ Ryan Bort, *A Comprehensive Timeline of Public Figures Boycotting North Carolina Over the HB2 'Bathroom Bill'*, NEWSWEEK (Sept. 14, 2016) (chronicling boycotts by entities such as the NCAA, NBA, ACC and 68 leading national businesses) ("*Timeline of Boycotts*"), available at <http://www.newsweek.com/north-carolina-hb2-bathroom-bill-timeline-498052>; Emma Grey Ellis, *Guess How Much That Anti-LGBTQ Law Is Costing North Carolina*, WIRED (Sept.

entertainers, sports leagues, and consumers all have expressed outrage, including through boycotts with huge, negative economic effects.¹¹

And even though North Carolina just modified its laws somewhat to try to appease its critics without actually protecting LGBT people, the states and cities that had banned non-essential travel to North Carolina generally have retained those policies; these include: California; Minnesota; New York; Washington State; Atlanta, GA; Baltimore, MD; Burlington, VT; Chicago, IL; Cincinnati, OH; Los Angeles, CA; New York City, NY; Oakland, CA; Palm Springs, CA; Portland, ME; Portland, OR; San Francisco, CA; Santa Fe, NM; Seattle; Washington, DC; Salt Lake City, UT; West Palm Beach, FL; and Wilton Manors, FL.

The economies in El Paso, Austin, San Antonio, Dallas, Fort Worth and Plano are thriving in notable part because businesses have an added incentive to relocate and/or to stay in these cities. Simply, both visitor and talent are more apt to come where they feel welcome. In 2013, Toyota moved to Plano and supported the non-discrimination ordinance approved by the Plano City Council that coincide with the same protections Toyota offers its employees to foster its dynamic, productive workforce.

But HB 2899 takes the exact opposite approach. It aims to strip away the rights of local communities to make progress, and instead would move the law and our state backwards. It would create confusion about the law — as we see now in North Carolina — but no confusion about the unwelcoming, discriminatory message it would send.

Texas is known as the "Friendship" state and HB 2899 is simply un-Texan. Honorable Representatives, please do the right thing — the Texan thing — and reject House Bill 2899. Keep Texas known as the "Friendship" State, with a growing, thriving economy and a bright future for all of us.

18, 2016) (estimating that NC has lost \$395 million due to HB2-related boycotts), available at <https://www.wired.com/2016/09/guess-much-anti-lgbtq-law-costing-north-carolina/>.

¹¹ Ryan Bort, *Timeline of Boycotts* (itemizing boycotts by entertainment figures including Bruce Springsteen, Ringo Starr, Itzhak Perlman, Maroon 5, Pearl Jam, Demi Lovato and Nick Jonas well as production studio Lionsgate, *Wicked* composer Stephen Schwartz, Cirque du Soleil, and 269 children's book authors and illustrators).