ALLIANCE DEFENDING
FREEDOM
FOR FAITH. FOR JUSTICE

TESTIMONY OF MICHAEL J. NORTON
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Regarding House Bill 15-1081 Concerning the Protection of
Physical Privacy in Sex-Segregated Locker Rooms

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My name is Michael J. Norton. I am an attorney with Alliance Defending Freedom, an alliance-building, non-profit legal organization that promotes religious liberty and marriage and the family. I have also had the privilege of serving as the United States Attorney for the District of Colorado.

Most of my work with Alliance Defending Freedom is in civil litigation, including advocating for the right of people to freely live out their faith in the area of religious liberties and conscience rights. I am currently involved in a number of lawsuits in federal and state courts concerning the conscience rights of private business owners to be free from being required by the government to violate their sincerely held religious beliefs by providing contraceptives and abortifacients as part of their employee health insurance plan.

I am privileged to testify today on House Bill 15-1081 which permits places of public accommodation to restrict access to a sex-segregated locker room on the basis of an individual's actual, biological sex without being charged with discrimination in violation of these public accommodation provisions.

When Colorado's public accommodations statute was expanded by the General Assembly in 2008, one result has been a draconian burden on religious liberties.

Another perhaps unintended result has been a significantly increased public safety risk primarily to women and to children by prohibiting "sexual orientation

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discrimination," which includes discrimination based on "transgender status,"[1] in bathrooms, locker-rooms, and other gender- restricted areas in private and public businesses and in places of public accommodation.

In the first place, this requirement has enormous reach. According to the Colorado Department of Regulatory Agencies website,[2] a place of public accommodation can be a bar; restaurant; financial institution; school or educational institution; health club; theater; hospital; museum or zoo; hotel or motel; public club; retail store; medical clinic; public transportation; nursing home; recreational facility or park; and library.

These places of public accommodation are, because of this 2008 law, required to permit access to locker rooms and rest rooms by members of the opposite sex based on that person's "transgender status."

This requirement is dangerous to our children and to adults, particularly women. Indeed, the Colorado Bureau of Investigation's website relates that "[t]he way sex offenders select victims is often more influenced by opportunity and access than by preference in victim type."[3]

Not only do most children and adults not want members of the opposite biological sex to be in a locker room or rest room with them, the parents of these children do not want that either. Parents are concerned about the safety and privacy of their children, and they justifiably expect the General Assembly to protect their children. Likewise, husbands are justifiably concerned about the safety and privacy of their spouses.

No man, woman or child should be forced into an intimate setting – like a bathroom or a locker room – with a person of the opposite sex. No school or other place of public accommodation should impose a policy like this against the will of so many Coloradans.

Parents have the right to protect their children. Adults, both women and men, also need to be protected. We have the right to expect that the members of the General Assembly will listen to the people they are paid to serve. As a husband and a father, I am concerned for my wife, my daughter, my grandchildren and other children and women who might suffer as a result of this current law. I expect you to protect our citizens as well.

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[1] "Sexual orientation" is defined as "an individual's orientation toward heterosexuality, homosexuality, bisexuality, or transgender status or another individual's perception thereof." C.R.S. § 24-34-301(7).

[2] http://cdn.colorado.gov/cs/Satellite/DORA-DCR/CBON/DORA/1. Last visited February 2, 2015.

[3] https://www.colorado.gov/apps/cdps/sor/faq.jsf. Last visited February 2, 2015.

Allowing biological males into the locker rooms used by biological females will likely violate constitutional privacy rights. The United States Court of Appeals for the Tenth Circuit has explained that a person's constitutional right to privacy is violated where a government policy or conduct allows a member of the opposite sex to view him or her while "engag[ing] in personal activities, such as undressing, using toilet facilities, or showering."[4] The United States Court of Appeals for the Ninth Circuit explained with great clarity that "[w]e cannot conceive of a more basic subject of privacy than the naked body. The desire to shield one's unclothed figure from . . . strangers of the opposite sex[] is impelled by elementary self-respect and personal dignity."[5] Thus, enacting HB 15-1081 will allow places of public accommodation to respect the dignity and constitutional privacy interests of their customers and minimize the potential of litigation.

In a public school setting, every student has a right to privacy and safety. And every parent has the right to not only expect, but to know that places of public accommodation, particularly public schools, will keep their children safe in intimate settings. But forcing children to share restrooms, showers, *and locker rooms* with the members of the opposite sex is a radical invasion of privacy for children and young adults who deserve to feel safe in such intimate settings.

It makes common sense to authorize places of public accommodation, including public schools, to craft policies that are respectful of the privacy concerns of children and their parents. As House Bill 15-1081 states in section 2, children and young adults have natural and normal concerns about physical privacy when they are in various states of undress in locker rooms.

Places of public accommodation, including public schools, restaurants, financial institutions, health clubs, theaters, hospitals, museums, the zoo, hotels, nursing homes, and the library, should honor the wishes of most children and their parents and respect the Constitution's protection for privacy rights. To do otherwise exposes a place of public accommodation to lawsuits from students and their parents whose privacy and safety are jeopardized by such misguided policies.

House Bill 15-1081 is a good first step by the General Assembly that will assure single sex access to locker rooms in places of public accommodation where children and young adults in various states of undress require privacy.

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[4] *Cumbey v. Meachum*, 684 F.2d 712, 714 (10th Cir. 1982). *See also Lee v. Downs*, 641 F.2d 1117, 1119-20 (4th Cir. 1981) (noting that men are "entitled to judicial protection of their right of privacy denied by the presence of female[s] . . . in positions to observe the men while undressed or using toilets").

[5] *York v. Story*, 324 F.2d 450, 455 (9th Cir. 1963).

I have attached a copy of Alliance Defending Freedom's model Student Physical Privacy Act which addresses these problems relating to students on a broader basis. We urge its consideration as well.

Thank you.