



The American Unity Fund and Freedom for All Americans' Recent Ad Hominem Attacks Are Misleading as to HB 1510, SB 974, SB 1306 and SB 1307.

The *American Unity Fund* and *Freedom for All Americans'* attempt to mask their goal of mandating that biological men who identify as women can use women's restrooms, locker rooms and showers to the exact same extent as biological women. They also attempt to create confusion about how these bills will eliminate the rights of religious organizations to make employment decisions on the basis of religious beliefs about marriage, human sexuality, and gender. Finally, they overlook the fact that the advocates for this legislation will not be satisfied with addressing employment in SB 1306 and housing in SB 1307, but are demanding extensive and invasive legislation like HB 1510 and SB 974.

Privacy

The Claim: They say that the Pennsylvania Family Council is lying about the privacy violations that these bills cause. Why? They tell you that if gender identity and gender expression is added to employment non-discrimination laws, "employers can [still] require gender-specific bathroom usage." "Provided", they say, "you don't discriminate on the basis of gender identity". Note carefully their terms: "gender-specific bathrooms" would be permitted if these laws were to pass, "provided that they do not discriminate on the basis of gender identity."

The Truth: These bills would make it illegal to treat men who identify as women any different than biological women. It means employers (employment), stores and even churches on Sunday morning when open to the public (places of public accommodation), or a dormitory and other shared housing situations like camps (housing) can still have two different bathrooms and locker rooms or shared rooming for "men" and "women," but only if the terms *men* and *women* are defined by an individual's subjective gender, as opposed to biological sex.

The truth is, as the Pennsylvania Family Council explained and as they agree once you cut through their muddy terminology, all of these bills would make it illegal to treat a biological man who expresses as a woman any differently than a biological woman with regard to all of the "terms, conditions or privileges of employment," terms everyone agrees includes use of restrooms, locker rooms and even overnight accommodations on work or school trips where people are roomed together.

Instead of putting the issues on the table clearly, they hide their real position to fool as many people as they can, hoping that many legislators still view the words "gender" and "sex" as being synonymous and vote to pass these bills thinking men won't be permitted to use women's facilities under this law. However, when we all use clear language meaning the same thing, we understand these bills open restrooms, locker rooms and showers in places of employment, in places of public accommodation, and in overnight shared housing contexts to members of the opposite sex.



The Claim: They say current shared rooming arrangements, retirement homes, or an elderly woman renting out space in her personal residence would still be able to use the current exemptions in the law that permit distinctions based on sex in those shared rooming contexts.

The Truth: They stopped short, again relying on their premise that a man who identifies as a woman is no man at all to avoid explaining how the law would really work when a man identifies as a woman.

A housing accommodation, by statutory definition, includes shared sleeping locations:

Housing accommodations includes ... a sleeping place of one or more individuals, groups or families whether or not living independently of each other.

As the Pennsylvania Family Council explained, the law currently recognizes the necessity of privacy and safety rights by permitting “sex” specific housing in shared rooming situations:

Nor shall it apply to the rental of rooms in a landlord-occupied rooming house with a common entrance, nor with respect to discrimination based on sex, the advertising, rental or leasing of housing accommodations in single-sex dormitory or rooms in one’s personal residence in which common living areas are shared.

As such, the law currently and wisely permits sex distinctions in shared housing contexts. And there the memo stops without mentioning how it would be illegal to treat a man who identifies as a woman any differently than a biological woman when “furnishing facilities, services or privileges in connection with the ownership, occupancy or use of any housing accommodation.” It’s telling that the bills do not add the word “gender identity and expression” to the exemption for shared housing situations. As such, biological men identifying as women would be entitled to sleep in the women’s dorms and be paired with a female roommate at college, sleep in the girls’ cabin at camp, be paired with a woman in shared retirement community housing, sleep in the women’s homeless shelter, or use the shared shower in any of those settings.

The Claim: There are some protections for religious groups regarding housing.

The Truth: Privacy is not an issue that only religious colleges or camps are concerned about. For example, current law rightly exempts sex for all shared housing, not just religious entities’ housing. But that protection will be eliminated by these bills that treat biological men as women. In employment, both religious and secular employers need the right to protect privacy between the biological sexes. Furthermore, under the public accommodations section of the bills, even religious corporations and associations are not exempt from opening restrooms and locker rooms to members of the opposite sex.

What is the solution?

We don’t have separate bathrooms, locker rooms or shared rooming situations based on what we wear, who we are attracted to, or even what we believe about ourselves. These are all subjective considerations. The only reason to have two separate private facilities in the first place is based on biological sex. We can and should continue to respect everyone in these private spaces without eliminating the privacy rights of anyone.

It is absolutely true that these laws will make it easier for predators and voyeurs to abuse the law. It will make it much harder to identify people using the facilities with improper motives. By no means does this mean that all transgender persons have improper motives. But the right to bodily privacy and the violation of that right does not depend on another person's motives. This is why businesses and schools forbid male maintenance employees from working in women's locker rooms or restrooms while women are using it. It is not because they believe all maintenance employees are perverts, voyeurs or potential rapists. It is because a biological women's right to privacy is violated by a biological man's presence, even if he doesn't have bad motives for being in that private women's space.

The solution is for all biological men to respect each other when using those intimate spaces, regardless of what they wear or what pronoun they use, and for all biological women to respect each other in those few private spaces where biological sex is all that really matters.

Employment

The Claim: Religious groups will not lose their religious liberties because they can hire persons who share their religious beliefs based on what's called a "ministerial exception."

The Truth: It's only true that the "ministerial exception" protects the ability of churches to choose their ministerial employees. But it doesn't apply to all church employees or employees of non-church run institutions. In *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S.Ct. 694 (2012), the Supreme Court recognized that such a right existed for a church "to select its ministers." *Id.* at 705.

The members of a religious group put their faith in the hands of their ministers. Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so ... interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs.

Id. at 706. While the "ministerial exception is not limited to the head of a religious congregation," its scope is not clear. *Id.* at 707. To find out how it requires expensive and time consuming litigation. It is determined on a case-by-case factual determination by courts using multi-factor tests during the course of litigation.

It was extended to a teacher at a school run by a church where the teacher was considered to be a minister of the church. *See id.* at 707-08 (stating that she was commissioned as a "Minister of Religion" by a vote of the church members and that she taught religion and led the students in prayer). To suggest that this right covers all religious institutions looking to employ those who model their religious values is incorrect. For instance, in *Barrett v. Fontbonne Academy*, No. CV 2014-751 (Mass. Dist. Ct., Dec. 16, 2015), the court held that even though the food services director, like all employees of the Fontbonne Academy, was "regarded as a 'minister of the mission'" and was "expected to model Catholic teaching and values," *id.* at 2, the court, utilizing a law like the bills being considered here in Pennsylvania, determined that the school was not permitted to suspend the food services

director's employment even though he was in a same-sex marriage contrary to Catholic teaching, *see id.* at 4. The court explicitly rejected the ministerial exception in this instance. *See id.* at 20.

Freedom for All Americans and the *American Unity Fund* are out-of-state groups — targeting Pennsylvania — that are attempting to mask their efforts to eliminate important rights of religious organizations, who currently may hire all their employees on the basis of whether they believe and act in accordance with the religious teachings of the organization, without being subject to litigation to determine whether a judge thinks the particular employee “really” needs to hold consistent beliefs. Laws like this clearly burden the freedom of religious organizations to hire employees who conform to the organization's religious teaching.

The Claim: Threats to personal privacy in employment are baseless because of the experience of other states that have prohibited gender identity discrimination in employment.

The Truth: Their claim is false; in fact the exact opposite is true. Other states, at least one local government body in our own state, as well as recent attempts by the Federal Government to do so even without the legislature inserting the words gender identity into federal law, **prove** that when the words “gender identity and expression” are placed into non-discrimination statutes, the result is that courts, regulatory agencies, and executive branches interpret it as requiring entities to treat biological men who identify or express themselves as female, as if they were a biological woman for all purposes, including restrooms, locker rooms and in shared overnight accommodations. Just a few examples include:

- **Philadelphia** - Philadelphia's Human Relations Commission notified employers after passage of their gender identity employment ordinance that they were required to open the bathrooms and showers to employees of the opposite anatomical sex.
 - The guidance from Philadelphia's Commission on Human Relations states that the “ordinance does require, however, that employers permit employees to access those restrooms in accordance with their gender identity, rather than their chromosomal sex.” *See* page 4, question 4. In answer to the question, “Must transgender employees also be allowed to use gender-identity appropriate locker and shower facilities?” the guidance answers, “Yes.” *See* page 4, question 5.
 - The proposed law in Pennsylvania would have the same effect. Compare Pennsylvania's proposed employment provision with that of Philadelphia. Both use the same key phrase, “terms, conditions or privileges of employment.”
- **Washington State** - regulations implementing the inclusion of gender identity in discrimination laws state that “all covered entities shall allow individuals the use of gender segregated facilities, such as restrooms, locker rooms, dressing rooms, and

homeless or emergency shelters, that are consistent with that individual's gender expression or gender identity." "In facilities where undressing in the presence of others occurs, covered entities shall allow access to and use of a facility consistent with that individual's gender expression or gender identity." It bans the "deliberate misuse of a gender-related pronoun", and bans a covered entity from "request[ing] or require[ing] an individual to use a gender-segregated facility that is inconsistent with that individual's gender expression or gender identity, or request of require an individual to use a separate or gender-neutral facility." WAC 162-32-040 and 060.

- **Maine** - The Maine State Supreme Court, in their ruling that fined a school \$75,000 and forced the school district to permit a biological boy to use the girl's locker room and bathrooms stated that: "the Court has concluded, **as it must based on the statutes**, that discrimination in the public accommodation of communal bathrooms is prohibited based on sexual orientation."
- **Federal Directives** - The EEOC's recent Title VII guidance claims that withholding personal facilities like bathrooms and showers amounts to employment discrimination. OSHA workplace guidance also directs employers to open restrooms to men identifying as women. Despite this guidance, they have no legal authority in this regard, but passing SB 1306, SB 974, or HB 1510 gives the force and effect of Pennsylvania law to what the Obama administration can't do alone.
 - In fact, the Federal Dept. Of Labor Office of Federal Contract Compliance just published a final rule, **on June 15, 2016** stating the same. The DOL Fact sheet states:

"The rule makes clear that sex discrimination includes discrimination because of an employee's gender identity. Also, the rule requires contractors to allow workers to use bathrooms, changing rooms, showers, and similar facilities consistent with the gender with which the workers identify."
https://www.dol.gov/ofccp/SexDiscrimination/SexDiscrimFinalRuleFactSheet_JRFQA508c.pdf

Conclusion

Advocates for this legislation have stated that they will not be satisfied with simply addressing employment in SB 1306 and housing in SB 1307, but are demanding extensive and invasive legislation like HB 1510 and SB 974. Even in the context of employment alone, advocates will not support a bill which does not open bathrooms and locker rooms in places of employment; or an employment bill that permits religious organizations to make their employment decisions on the basis of whether the employee agrees with and acts consistent with the organization's religious beliefs about marriage, human sexuality, and gender.



On June 14, 2016 both the *American Civil Liberties Union of Pennsylvania* and *Equality Pennsylvania* released statements advocating for amending the entire Pennsylvania Human Relations Act, including public accommodations - HB 1510 or SB 974.

Andy Hoover, Legislative Director, ACLU of Pennsylvania in June 14th Legislative Memo on SB 1307:

Unfortunately, by excluding protections in employment and public accommodations, SB 1307 falls short. Thus, the ACLU of Pennsylvania does not support the legislation and encourages the committee to amend it to include employment and public accommodations protections.

Without comprehensive language that includes protection from discrimination in public accommodations for gay and transgender Pennsylvanians, the legislature will nearly duplicate coverage that is currently available under federal law.

Ted Martin, Executive Director, Equality Pennsylvania on Pennlive.com on June 14th:

"Our approach is to fight for everything," Martin said. "We want to make sure that everything is included. There's no issue, procedurally, with the way," the legislation is advancing.

"It is movement - so we are cautiously moving it forward this way," he said. "We want employment and public accommodation just as much. This is just a way to move progress forward."