

Notice and Testimony on SB 268 – Foreseeable Harm and Constitutional Conflict

To the Members of the New Hampshire House Judiciary Committee:

This serves as formal legal notice that SB 268 poses a foreseeable and substantial risk of harm to transgender, nonbinary, intersex, and gender nonconforming individuals, and exposes the State of New Hampshire, its subdivisions, and its legislators to legal, constitutional, and civil liability.

Lawmakers must also be aware that public officials can be held personally liable—particularly when they support legislation that violates constitutional rights after being placed on formal notice. Qualified immunity does not extend to actions rooted in discriminatory intent or willful disregard of such warnings.

I. Unclear Standards and the Danger of “Classification”

SB 268 gives legal cover to public and private institutions to 'classify' individuals by so-called 'biological sex,' claiming this serves a compelling state interest—privacy and safety—in restrooms, locker rooms, sports, and even correctional facilities. Yet the bill fails to define what 'biological sex' means or how it should be verified.

There are no standards. No process. No enforcement guidelines. Who decides what someone's sex is? What documents will count? Could someone be questioned? Denied access based on appearance alone? Are we talking about ID checks, genital inspections? What exactly are facilities supposed to do? There is no guidance.

The bill requires no public notice. No signage. That means a person could be denied access to a facility they've used safely for years—without warning, without explanation, and with no legal recourse. Not only that, when entering an establishment, they'll have no way of knowing whether they'll be subject to 'classification'—and therefore, discrimination.

This bill could also impact cisgender people who are incorrectly 'classified' or misgendered. But make no mistake—it specifically targets gender-diverse people under the guise of neutrality. It opens the door to profiling, harassment, misclassification, and confrontation—against a group that already faces some of the highest rates of bullying, isolation, and suicide.

And like the segregation laws of the past, this bill uses classification to justify exclusion. That kind of legislation has no place in a free society.

II. No Documented Threat – Manufactured Fear, Real Harm

This bill doesn't protect anyone—it targets transgender and gender-diverse individuals. It doesn't create safety—it creates confusion, discrimination, and harm. That's not protection. That's prejudice, repackaged as policy.

There are zero recorded cases in New Hampshire of a transgender person assaulting anyone in a public restroom, school, or locker room. None. This bill offers a solution to a problem that does not exist—while amplifying real harm that does.

Courts have ruled that laws based on unfounded fear, cultural bias, or political sentiment—rather than a compelling government interest—violate the Constitution. This bill does exactly that. It targets an already vulnerable group, with no credible justification, and in doing so, may be considered legally arbitrary, malicious, and unconstitutional.

III. Legal Risk and Liability

This bill creates significant legal exposure under multiple federal protections. Title IX and Title VII prohibit discrimination based on sex—including gender identity. Under the Americans with Disabilities Act (ADA), gender dysphoria may qualify as a protected condition. The 14th Amendment's Equal Protection Clause prohibits state-sponsored discrimination, and under 42 U.S.C. § 1983, individuals may bring civil lawsuits against government actors who violate their constitutional rights.

The vague language and foreseeable discriminatory outcomes of SB 268 will be used in court to demonstrate discriminatory intent. Courts have consistently held that laws lacking clear definitions or standards—especially those that disproportionately harm a specific group—can be struck down as unconstitutional. This bill's ambiguity, coupled with its disproportionate impact on gender-diverse individuals, strengthens the case for legal challenge. And courts are not siding with legislation like this.

Some may argue that SB 268 simply aligns with federal executive orders. But executive orders do not override the Constitution or civil rights law. This bill doesn't require discrimination—it permits it. But in civil rights law, permission is endorsement. And endorsement of discrimination is unconstitutional.

If those executive orders are overturned—as many expect—New Hampshire will still be liable for the harm done in the meantime. Legal authority may shift. Civil harm is permanent.

IV. Due Process and Constitutional Clarity

This bill also fails under the 'void-for-vagueness' doctrine. It contains no legal definition of 'biological sex,' no clear enforcement mechanism, and no requirement for signage or public notice. A law that cannot be understood, followed, or applied consistently is not just irresponsible—it is unconstitutional.

The lack of clarity leaves enforcement entirely open to misinterpretation, selective application, and abuse. This isn't regulation—it's unfettered discretion.

Under constitutional law, unfettered discretion is exactly what due process is designed to prevent. That's why the U.S. Supreme Court has repeatedly struck down vague statutes that enable arbitrary or discriminatory enforcement.

V. Loopholes and Legislative Hypocrisy

There is no law in New Hampshire requiring cisgender men or women to use any particular restroom or locker room. SB 268 does not change that.

So if a transgender woman is reclassified as a 'biological male,' what stops her—or any cisgender male—from entering a women's restroom? Likewise, what stops a transgender man—or any biological female—from entering a men's room?

And where do nonbinary, intersex, or gender-nonconforming people go—those who don't fit into either box? This bill offers them no guidance, no protection, and no place.

If this bill is enforced at the State House, any transgender legislators—your colleagues—would be classified and required to use the restroom of their biological sex. Are you prepared to confront and discipline them for using the 'wrong' restroom? Are you prepared to post signs and assign someone to monitor who goes in and out?

If that sounds absurd, it's because it is.

If that sounds invasive, discriminatory, and dangerous, it's because it is. And if the very thought of enforcing this bill at the State House makes you uncomfortable, then you already know what you need to do.

VI. Economic and Social Costs

We don't just lose rights with this bill—we lose dollars.

Businesses will choose to go elsewhere. Tourists will avoid the state. Events will relocate. Schools will suffer. Lawsuits will follow. Taxpayers will pay.

And all those individuals this bill seeks to 'classify'—transgender, nonbinary, intersex, and gender-nonconforming people—they will pay the most. With their safety, their dignity, and in some cases, their lives.

VII. Public Opposition and Constitutional Duty

Out of 538 public statements submitted on this bill, 437 were in opposition. Only 101 were in support—and most focused solely on transgender girls in sports.

Discrimination in any area, including athletics, is still discrimination. And to date, no court in New Hampshire has ruled against transgender participation in school sports. Legal precedent supports inclusion.

New Hampshire is known as the “Live Free or Die” state. Is this the freedom we’re offering? The freedom to be excluded? The freedom to be humiliated in public spaces? This is not what your constituents want and not what they deserve.

If you pass this bill despite the facts, legal precedent, and overwhelming public opposition, it may become part of the official record that your decision was not grounded in law or public interest, but in personal ideology.

VIII. Final Appeal

From the New Hampshire Constitution, Part I, Article 1: “In a free government, the rights of the people are secured by recognizing that all power resides originally in, and is derived from, the people.”

You were elected to represent the people—not a party, not a president, not a political movement, and not your own personal ideologies.

You each took an oath to faithfully and impartially discharge your duties according to the Constitution and laws of this state. SB 268 violates both.

It is vague. It is discriminatory. It is legally indefensible. It does not solve a problem—it creates harm. It does not uphold the law—it undermines it. And it does not reflect the will of the people—it defies it.

If your vote is to honor your oath—to serve the people of New Hampshire, to uphold the Constitution, and to govern with fairness and integrity—then there is only one course of action. Vote Inexpedient to Legislate. And let the record show that New Hampshire stands for liberty, equality, and justice—for everyone who calls this state home.

If the committee cannot support a recommendation of Inexpedient to Legislate, then at a minimum, SB 268 must be referred to interim study, where its full legal, fiscal, and human impacts can be properly evaluated before this state takes a single step down a path that cannot be undone.