

THE BATHROOM STALL: HOW LEGAL INDECISION REGARDING TRANSGENDER BATHROOM ACCESS HAS LED TO DISCRIMINATION

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I. INTRODUCTION

In the last century, the United States has seen progress in the fight for homosexual and transgender equality. Since the early 1960s, the following have taken place, among other things: the first state decriminalized homosexuality; the first national legal organization for gay and lesbian equality was created; the first openly LGBTQ+¹ American was elected to public office; the Supreme Court decriminalized same-sex sexual conduct and eventually legalized same-sex marriage; the first openly gay politician was elected to the United States Senate; and the ban on transgender military service was lifted.² However, this progress was not without its share of setbacks and downfalls: the “Don’t Ask, Don’t Tell” policy; the banning of same-sex marriage in most states; a new ban on transgender military service; and more.³ Steps forward in this civil rights movement are nearly always accompanied by steps backwards.⁴

One of the more recent forward steps, and the basis for this Note, was the 2020 Supreme Court’s decision in *Bostock v. Clayton County*.⁵ This case reviewed three separate instances of employees who were terminated from longtime employment shortly after notifying their employers that they

* She/Her. J.D. Candidate, May 2023, University of Louisville Brandeis School of Law; Bachelor of Music, 2019, University of Colorado Boulder. I want to thank several people: Professor Leslie Abramson, for his insight and edits on this Note; Andrew Chandler, for his assistance in coming up with a clever title; and my parents, for listening to me complain about the difficulties of the note writing process and reminding me that I was perfectly capable of doing it. I have never experienced, and will never be able to fully understand, the injustice and discrimination discussed in this Note. I am incredibly honored to use my voice to advocate for those who have suffered such discrimination and continue to experience it every day. To the transgender community: your resilience in a legal system that is so determined to knock you down is inspiring. Please know that you are not alone in this battle.

¹ *Glossary of Terms*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/glossary-of-terms> [<https://perma.cc/KH8V-QGM7>] (last visited Dec. 20, 2021) (providing that LGBTQ+ is “an acronym for ‘lesbian, gay, bisexual, transgender and queer’ with a ‘+’ sign to recognize the limitless sexual orientations and gender identities...”).

² *LGBTQ Rights Milestones Fast Facts*, CNN (Oct. 31, 2021, 8:04 AM), <https://www.cnn.com/2015/06/19/us/lgbt-rights-milestones-fast-facts/index.html> [<https://perma.cc/BDX3-9HW9>].

³ *Id.*

⁴ *Id.*

⁵ *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1731 (2020).

were homosexual or transgender.⁶ Each employee brought claims of sex discrimination under Title VII of the Civil Rights Act of 1964,⁷ and the Court determined that the term “sex,” as used in Title VII, includes homosexual and transgender people.⁸ As such, discrimination by an employer against any such person for simply being homosexual or transgender violates Title VII.⁹ However, the Court declined to address the issue of transgender bathroom access.¹⁰ This is understandable as this was not the express issue before the Court,¹¹ but the lack of discussion surrounding transgender bathroom access has created a controversial loophole for employer discrimination against transgender employees.

While *Bostock* is a massive step forward for the LGBTQ+ community, transgender bathroom access is an issue that desperately needs a resolution, and it will likely attract the attention of the Court in the near future.¹² This Note will analyze different approaches taken on the issue, specifically with the application of *Bostock*.¹³ Part II of this Note sets forth vital definitions and explains the existing law relevant to the analysis of this issue. Section III walks through examples of how this discriminatory loophole is used, works to debunk bathroom-related myths, explains the dangers that accompany this issue, and examines different approaches taken when attempting to solve this issue. Section IV argues that the Supreme Court should find that refusing bathroom access to a person simply because they are transgender constitutes discrimination under Title VII of the Civil Rights Act of 1964. Ultimately, this Note advocates for transgender bathroom access, not just in the workplace, but in all settings, and it proposes that federal legislation be enacted to extend this basic right to transgender people.

⁶ *Id.*

⁷ 42 U.S.C. § 2000e-2.

⁸ *Bostock*, 140 S. Ct. at 1731.

⁹ *Id.*

¹⁰ *Id.* at 1753.

¹¹ *Edward Hines Yellow Pine Trustees v. Martin*, 268 U.S. 458, 465 (1925) (stating that “[the United States Supreme Court] is a court of review and it will not consider questions not raised or disclosed by the record brought to it for a review and which were not considered by the courts below.”); *see also* *EEOC v. Federal Labor Relations Authority*, 476 U.S. 19, 24 (1986) (explaining that “[the Supreme Court’s] normal practice... is to refrain from addressing issues not raised in the Court of Appeals.”).

¹² *LGBTQ Rights Milestones Fast Facts*, *supra* note 2.

¹³ *Hobby Lobby Stores, Inc. v. Sommerville*, 186 N.E.3d 67 (Ill. App. Ct. 2021), *appeal denied*, 183 N.E.3d 880 (Ill. 2021).

II. BACKGROUND

A. Definitions

The meanings of the key terms listed below are incredibly important, not just for the purpose of understanding the issues addressed in this Note, but because knowledge of these terms allows understanding and respectful communication with and about the very people that are at the heart of this Note.

Assigned Sex: refers to the sex (male or female) that is assigned to a child at birth based on their external anatomy.¹⁴

Gender Binary: the system in which gender is strictly placed in one of two categories: male or female.¹⁵ This term is especially relevant regarding the bathroom system historically used throughout the United States.¹⁶

Gender Identity: an individual's concept of self in relation to gender, which can be male, female, both, or neither.¹⁷ Gender identity encompasses how a person perceives themselves and what they call themselves.¹⁸ Gender identity may or may not align with a person's assigned sex, and it is important to remember that every person, whether or not they are transgender, has a gender identity.¹⁹

Gender Expression: similar to gender identity but focuses more on the external appearance of one's gender rather than their internal concept of gender.²⁰

Transgender Person: a person whose gender identity or gender expression is different from their assigned sex at birth.²¹

B. Title VII of the Civil Rights Act of 1964

At its core, the Civil Rights Act of 1964 stems from the struggle experienced by African Americans to obtain basic rights, specifically

¹⁴ *LGBTQ Inclusion: Glossary*, UNIV. OF WASH. MED., <https://www.uwmedicine.org/provider-resource/lgbtq/lgbtq-inclusion-glossary> [<https://perma.cc/TWH4-2JZ5>] (last visited Dec. 20, 2021).

¹⁵ See *Glossary of Terms*, *supra* note 1.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Sexual Orientation and Gender Identity Definitions*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/sexual-orientation-and-gender-identity-terminology-and-definitions> [<https://perma.cc/9PZJ-G6PQ>] (last visited Dec. 20, 2021).

¹⁹ *Frequently Asked Questions about Transgender People*, NAT'L CTR. FOR TRANSGENDER EQUAL. (July 9, 2016), <https://transequality.org/issues/resources/frequently-asked-questions-about-transgender-people> [<https://perma.cc/K657-327C>].

²⁰ See *Sexual Orientation and Gender Identity Definitions*, *supra* note 18.

²¹ See *LGBTQ Inclusion: Glossary*, *supra* note 14.

following the Civil War.²² The legal fight against slavery and segregation catapulted the United States into the Civil Rights Era in the 1950s, which was punctuated with hate crimes, protests, and riots.²³ These actions gained national attention and ultimately had to be addressed at the federal level.²⁴ In June of 1963, President John F. Kennedy sent a civil rights bill to Congress, but the bill was still pending when he was assassinated in November of that year.²⁵ In part as a memorial to President Kennedy, the bill was passed the following year and became known as the Civil Rights Act of 1964.²⁶ Broadly, the Act prohibits discrimination based on religion, sex, race, color, or national origin, outlining specific acts of discriminatory conduct that are illegal.²⁷

This Note concerns Title VII of the Act, which discusses unlawful employment practices.²⁸ In relevant part, it states that it is an unlawful employment practice for an employer to:

fail or refuse to hire or to discharge any individual, or to otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.²⁹

Since its enactment more than a half century ago, the particular wording of Title VII of the Act has been significant. Specifically, in *Bostock v. Clayton County*, the definition of “sex” became the crux of both the petitioners’ and respondents’ arguments, the focus of the Court’s analysis, and ultimately, the

²² *The Civil Rights Act of 1964: A Long Struggle for Freedom*, LIBR. OF CONG., <https://www.loc.gov/exhibits/civil-rights-act/civil-rights-era.html> [<https://perma.cc/D7L6-QKLF>] (last visited Dec. 20, 2021).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Legal Highlight: The Civil Rights Act of 1964*, U.S. DEP’T OF LAB., <https://www.dol.gov/agencies/oasam/civil-rights-center/statutes/civil-rights-act-of-1964> [<https://perma.cc/ZB7W-DZPB>] (last visited Dec. 20, 2021).

²⁸ 42 U.S.C. § 2000e-2.

²⁹ *Id.*

basis for its decision.³⁰

C. A New Interpretation: *Bostock v. Clayton County*

1. The Circuit Split

In *Bostock v. Clayton County*,³¹ the United States Supreme Court reviewed three examples of unlawful employment discrimination.³² Each case involved a longtime employee who, after coming out as homosexual or transgender to their employer, was subsequently terminated.³³ In the first case, Donald Zarda worked as an instructor for a skydiving company called Altitude Express.³⁴ Despite working for the company for several seasons with no issue, he was fired shortly after mentioning he was gay.³⁵ When Zarda filed suit, the Second Circuit overruled its prior case law on the issue, holding that sexual orientation is inherently tied to sex, and claims of sexual orientation discrimination are thus included within Title VII.³⁶ Relying on the Equal Opportunity Employment Commission's ("EEOC") 2015 decision in *Baldwin v. Foxx*, the court analyzed sexual orientation discrimination through the lenses of gender stereotyping and associational discrimination.³⁷ The United States Supreme Court had previously held that adverse employment actions based on an employee not satisfying the stereotypes of their sex constituted impermissible sex discrimination.³⁸ The circuit court applied this reasoning to sexual orientation, finding that an employer acting on the belief that men cannot or should not be attracted to men, or women to women, is clearly action based on the failure to conform to sex stereotypes.³⁹ As such, this sexual orientation discrimination is inherently sex discrimination.⁴⁰

In the second case reviewed by the *Bostock* Court, Aimee Stephens, a transgender woman, worked at R.G. & G.R. Harris Funeral Homes, but Stephens presented as a male when she began her employment.⁴¹ After six

³⁰ See *supra* notes 5–9 and accompanying text.

³¹ *Bostock*, 140 S. Ct. 1731.

³² *Zarda v. Altitude Express Inc.*, 883 F.3d 100 (2nd Cir. 2018); *EEOC v. R.G.*, 884 F.3d 560 (6th Cir. 2018); *Bostock v. Clayton Cnty. Bd. of Comm'rs*, 723 Fed. App'x 964 (11th Cir. 2018).

³³ *Zarda*, 883 F.3d at 100; *EEOC*, 884 F.3d at 560; *Bostock*, 723 Fed. App'x at 964.

³⁴ *Zarda*, 883 F.3d at 108.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 107 (citing *Baldwin v. Foxx*, 2015 EEOPUB LEXIS 1905 at *5 (E.E.O.C. July 16, 2015)).

³⁸ *Id.* at 120 (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250–52 (1989) (plurality)).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *EEOC*, 884 F.3d at 567.

years of working for the company, she informed her employer that she planned to live and work full-time as a woman, and was fired thereafter.⁴² The Sixth Circuit's reasoning in Stephens's case closely followed that of the Second Circuit in *Zarda*.⁴³ The Sixth Circuit also addressed sex stereotype discrimination, finding that adverse action taken against a transgender employee for not conforming to sex-based norms was impermissible discrimination under Title VII.⁴⁴ The court noted that an employer cannot discriminate on the basis of transgender status without also discriminating on the basis of sex because transgender discrimination is based entirely on the gender non-conformity of the transgender person, thus constituting sex stereotype discrimination.⁴⁵

In the third case, Gerald Bostock worked as a child welfare advocate in Clayton County, Georgia for more than a decade.⁴⁶ Shortly after joining a gay recreational softball league, Bostock was fired for conduct "unbecoming" of a county employee.⁴⁷ However, in Bostock's case, the Eleventh Circuit held that it was not a violation of Title VII to fire an employee for being gay.⁴⁸ In its incredibly brief opinion, the Court merely explains that the precedent of the Eleventh Circuit is that homosexuality is not protected under Title VII, and as such, Bostock's claim could not stand.⁴⁹

The United States Supreme Court granted certiorari to resolve the circuit courts' inconsistent rulings on whether Title VII protects homosexual and transgender people. Ultimately, the Court agreed with the Second and Sixth Circuits on this issue, holding that sexual orientation and transgender discrimination are inextricably linked with sex discrimination.⁵⁰

2. The Supreme Court's Analysis of *Bostock*

The key to the Supreme Court's analysis of *Bostock* was statutory interpretation, specifically of two terms in Title VII: "sex" and "discrimination."⁵¹ The Court stated that in cases of statutory interpretation, it considers the ordinary public meaning of the terms at the time of the statute's enactment, which, in this case, meant the ordinary public meaning

⁴² *Id.* at 569.

⁴³ *EEOC*, 884 F.3d at 572; *Zarda*, 883 F.3d at 100.

⁴⁴ *EEOC*, 884 F.3d at 572.

⁴⁵ *Id.* at 576–577.

⁴⁶ *Bostock v. Clayton Cnty. Bd. of Comm'rs*, 723 Fed. App'x 964 (11th Cir. 2018).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Bostock*, 140 S. Ct. at 1731.

⁵¹ 42 U.S.C. § 2000e-2.

of “sex” and of “discrimination” in 1964.⁵²

The Court analyzed the meaning of the term “sex” both as a stand-alone term and within the context of Title VII.⁵³ The employers argued that, standing alone, “sex” refers to a person’s status as male or female based on their reproductive biology.⁵⁴ The employees conceded this point, but they claimed that the scope of the term was much broader in 1964 than referring solely to anatomy.⁵⁵ The Court proceeded under the assumption that “sex” simply refers to the biological differences between females and males, but the opinion ultimately did not turn on this argument.⁵⁶ While the term may be construed more broadly in actual use than in a black letter definition, the Court’s interpretation was appropriate.⁵⁷ Though often referred to as “sex assigned at birth,” “assigned sex,” or “biological sex,” sex is defined by many LGBTQ+ organizations as the assignment given to a child at birth—male or female—based on their external anatomy.⁵⁸

Despite declining to construe the term “sex” as encompassing sexual orientation or transgender status, the Court concluded that “homosexuality and transgender status are inextricably bound up with sex,” and “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”⁵⁹ In the majority opinion, Justice Gorsuch provided clear examples of how sex is intertwined with homosexuality and transgender status.⁶⁰ For example, consider an employer that has two employees, both of whom are attracted to men.⁶¹ If one employee is a woman and the other is a man, sex is the differentiating factor between them.⁶² So, if the employer fires the male employee because of his attraction to men but does not fire the female employee for her attraction to men, the male employee is being discriminated against for being homosexual.⁶³ Thus, the discrimination is inherently related to sex, given that the female employee was not fired for the same conduct.⁶⁴ As another example, consider a transgender employee whose assigned sex at birth was male, but who now identifies as a female, and an employee who

⁵² *Bostock*, 140 S. Ct. at 1738.

⁵³ *Id.* at 1739.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ See *LGBTQ Inclusion: Glossary*, *supra* note 14.

⁵⁹ *Bostock*, 140 S. Ct. at 1741–1742.

⁶⁰ *Id.* at 1741.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 1741–42.

was assigned female at birth and is otherwise identical to the transgender employee.⁶⁵ The difference between them is their assigned sex at birth, so any discrimination based on their status as a transgender person is inherently intertwined with sex.⁶⁶ Additionally, the Court noted that Title VII prohibits discrimination “because of” sex, which can be equated to “but-for” causation.⁶⁷ Even if there were multiple reasons for an employment decision, if any one of those reasons is based on the employee’s sex, Title VII is triggered.⁶⁸

The Court also briefly addressed the meaning of “discrimination” in 1964 and in the context of Title VII.⁶⁹ Two possible definitions of “discrimination” were considered: one having to do with an *individual* receiving worse treatment than other similarly situated individuals, and the other having to do with *categorical* unfair treatment of a group.⁷⁰ The Court found that the language of Title VII resolves this, as it refers specifically to discrimination “against any *individual*.”⁷¹ Further, the Court noted that Congress had the opportunity to write the law differently if it wished for Title VII to address only categorical discrimination of groups, but it chose not to do so.⁷² Thus, Title VII holds employers accountable for treating any individual differently because of their sex, race, color, religion, or national origin.⁷³

3. The Bathroom Issue

After concluding that homosexual and transgender employees are protected by Title VII, the Court responded to the employer’s policy arguments against the new interpretation.⁷⁴ Specifically, the employers claimed that the new interpretation would sweep too broadly and would lead to the demise of sex-segregated bathrooms, locker rooms, and dress codes.⁷⁵ In response, the Court stated that its responsibility falls squarely in statutory interpretation, and any need for new or different legislation due to unwanted policy consequences lies with Congress.⁷⁶ Additionally, the Court stated that it did not purport to address the issue of bathrooms or locker rooms with the

⁶⁵ *Id.* at 1741.

⁶⁶ *Id.*

⁶⁷ *Id.* at 1742.

⁶⁸ *Id.*

⁶⁹ *Id.* at 1740.

⁷⁰ *Id.*

⁷¹ *Id.* (citing 42 U.S.C. § 2000e-2(a)(1) (emphasis added)).

⁷² *Id.* at 1740–41.

⁷³ *Id.* at 1754.

⁷⁴ *Id.* at 1753.

⁷⁵ *Id.*

⁷⁶ *Id.*

new interpretation, only whether firing an employee for being homosexual or transgender constituted discrimination under Title VII.⁷⁷

It is understandable that the Court would not discuss bathroom access in a case where it was not presented as an issue.⁷⁸ However, termination is not the only form of employment discrimination that Title VII is intended to protect against.⁷⁹ By its very terms, Title VII is meant to protect individuals from discrimination in the form of termination, failure or refusal to hire, unfair compensation, unfair terms or conditions of employment, and deprivation of privileges of employment.⁸⁰ Denial of bathroom access to transgender employees is one such discriminatory practice, and in 2021, the Illinois Court of Appeals heard a case where such discrimination took place.⁸¹

D. Applying Bostock: Hobby Lobby v. Sommerville

Meggan Sommerville, a transgender woman, began working for Hobby Lobby as a male in 1998.⁸² She began her transition from male to female in 2007, and in 2010, she legally changed her name and began using her female name at work.⁸³ After she informed Hobby Lobby of her transition, the store changed her employee records and information to reflect her female identity, but the store expressly prohibited her from using the women's restroom in the store unless she provided "legal authority" that required them to do so.⁸⁴ Sommerville provided her employer with medical records, her new driver's license and social security card, and a court order with an official name change, and still she was not permitted to use the women's restroom.⁸⁵ In fact, other employees were told to report Sommerville if they saw her in the women's restroom, and Sommerville was met with disciplinary action when she used the women's restroom.⁸⁶

In 2013, Hobby Lobby installed a unisex bathroom, allowing customers and employees to use either the unisex bathroom or the bathroom matching their sex.⁸⁷ Sommerville, however, was only permitted to use either the unisex bathroom or the men's bathroom, which was inconsistent with her

⁷⁷ *Id.*

⁷⁸ See cases cited *supra* note 11.

⁷⁹ 42 U.S.C. § 2000e-2.

⁸⁰ *Id.*

⁸¹ *Hobby Lobby Stores, Inc. v. Sommerville*, 186 N.E.3d 67 (Ill. App. Ct. 2021), *appeal denied*, 183 N.E.3d 880 (Ill. 2021).

⁸² *Id.* at 75.

⁸³ *Id.* at 76.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

gender identity.⁸⁸ Feeling singled out by the unisex bathroom and fearing for her safety in the men's bathroom, Sommerville would often leave the store to use the women's restrooms in other businesses nearby; she would punch out from her shift and walk approximately ten minutes each way.⁸⁹ Eventually, she began refraining from using the restroom until her lunch break and limiting her intake of food and fluids in order to avoid having to use the bathroom multiple times in a day.⁹⁰

Sommerville brought a claim against Hobby Lobby in state court claiming that the denial of access to the women's bathroom was discrimination based on gender identity, and thus a violation of the Illinois Human Rights Act.⁹¹ Before *Bostock* was decided, the judge found that Hobby Lobby's actions were in violation of the Act and granted Sommerville's motion for summary judgment, awarding her damages for emotional distress and attorney's fees.⁹² Hobby Lobby appealed, and the Appellate Court of Illinois affirmed the trial court's decision.⁹³

In the opinion, the Illinois Court of Appeals considered the Illinois Human Rights Act, which provides that it is the public policy of the state to:

secure for all individuals within Illinois the freedom from discrimination against any individual because of his or her race, color, sex, national origin, ancestry, age, order of protection status, marital status, physical or mental disability, military status, sexual orientation, pregnancy, or unfavorable discharge from military service in connection with employment. . .⁹⁴

The next section of the Act goes on to define "sex" as the status of being male or female, and "sexual orientation" as "actual or perceived heterosexuality, homosexuality, bisexuality, or *gender-related identity*" (emphasis added).⁹⁵ From its text, the Illinois Human Rights Act explicitly provides protection to a wider array of people than Title VII of the Civil Rights Act of 1964.⁹⁶ However, even if the Illinois Human Rights Act did not explicitly provide protection based on sexual orientation and gender identity, the court would use the same logic as *Bostock*, interpreting the term "sex" as encompassing

⁸⁸ *Id.*

⁸⁹ *Id.* at 77.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ 775 Ill. Comp. Stat. Ann. 5/1-102(A) (LexisNexis 2021).

⁹⁵ 775 Ill. Comp. Stat. Ann. 5/1-103(O)-(O-1) (LexisNexis 2022) (emphasis added).

⁹⁶ *Id.*; cf. 42 U.S.C. § 2000e-2 (1964).

homosexual and transgender people.⁹⁷

In *Hobby Lobby*, the Illinois Court of Appeals addressed the interrelationship between sex and gender identity, finding that Illinois law clearly demonstrated their correlation to each other.⁹⁸ Even before the Illinois Human Rights Act was amended to include sexual orientation and gender identity within the definition of sex, the state provided various ways for a person to correct their “sex” in legal documents to match their gender identity.⁹⁹ The court also cited to *Bostock* and its holding that “sex” encompasses transgender status.¹⁰⁰

Given these findings, the Court of Appeals determined that Sommerville is unquestionably a female, and as such, denying her access to the women’s restroom while other female employees were permitted to use the women’s restroom constituted discrimination and violated the Illinois Human Rights Act.¹⁰¹ After the Appellate Court’s decision, Hobby Lobby petitioned for leave to appeal; the Illinois Supreme Court denied appeal in November of 2021.¹⁰²

III. THE DISCRIMINATORY EFFECT OF DECIDING NOT TO DECIDE: HOW AVOIDANCE OF THE “BATHROOM ISSUE” CAUSES HARM AND DISCRIMINATION

A. *Bostock Did Not Flush Transgender Workplace Discrimination*

Transgender discrimination happens frequently, and bathrooms are at the center of such discrimination.¹⁰³ Meggan Sommerville’s story is the perfect example of such discrimination.¹⁰⁴ Though her workplace recognized her as a woman, the bathroom was used as a tool to discriminate against her by singling her out, causing her to be excluded from her peers, and inducing emotional and physical damage.¹⁰⁵ Sommerville’s experience with bathroom discrimination is only one of many.¹⁰⁶ In *Grimm v. Gloucester County School Board*, a transgender male high school student’s bathroom access was limited to certain bathrooms, but *which* bathroom it was changed repeatedly. At first,

⁹⁷ *Id.*

⁹⁸ *Hobby Lobby*, 186 N.E.3d at 79.

⁹⁹ *Id.* at 79–80.

¹⁰⁰ *Id.* at 80.

¹⁰¹ *Id.* at 78–80.

¹⁰² *Id.* at 85.

¹⁰³ *Id.* at 81.

¹⁰⁴ *Id.* at 75.

¹⁰⁵ *Id.*

¹⁰⁶ See *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020); *Doe v. Clenchy*, 2011 Me. Super. LEXIS 70; *Roberts v. Clark Cnty. Sch. Dist.*, 215 F. Supp. 3d 1001 (D. Nev. 2016).

he was only allowed to use the nurse's office bathroom. Then, he was granted permission to use the men's bathroom. Finally, he was denied access to the men's bathroom because community members were concerned about "protecting the majority."¹⁰⁷ When school board meetings were held to discuss creating a private, single-stall bathroom in the school, community members again lashed out against Grimm, calling him a "freak" and likening him to a dog by asking, "must we use tax dollars to install fire hydrants where you can publicly relieve yourselves?"¹⁰⁸

From forcing a transgender elementary school student to use the faculty bathroom,¹⁰⁹ to banning a school district employee from using either the men's or the women's bathroom,¹¹⁰ it is clear that bathrooms are weaponized against transgender people. The issue of transgender bathroom access is rampant, and the lack of both guidance and legislation increases the victimization of transgender people and creates opportunity for transgender discrimination in all contexts.¹¹¹ While the Court purports to say that Title VII protects transgender people from discrimination in the workplace, this protection is inaccessible without a resolution on the bathroom issue.¹¹² *Hobby Lobby* confirms that transgender workplace discrimination is still occurring despite the *Bostock* holding that it is unlawful for employers to discriminate against transgender employees.¹¹³ The *Bostock* decision is an empty gesture until courts definitively grant transgender bathroom access and denial of that access is deemed illegal.

B. Separate, But Equal: Why Unisex Bathrooms Are Not the Solution

Bathrooms distinguished by sex and gender have existed in the United States since the late 1800s.¹¹⁴ In fact, the first regulation of restrooms was applied in the employment context, requiring businesses to provide plainly designated bathrooms for men and women, and prohibiting either from using the bathroom of the opposite gender.¹¹⁵ This separation is still the

¹⁰⁷ *Grimm*, 972 F.3d at 586.

¹⁰⁸ *Id.* at 599.

¹⁰⁹ *Clenchy*, 2011 Me. Super. LEXIS 70.

¹¹⁰ *Roberts*, 215 F. Supp. 3d at 1005.

¹¹¹ *See generally Hobby Lobby*, 186 N.E.3d 67.

¹¹² *Id.* at 80.

¹¹³ *Id.* at 80–85; *cf. Bostock*, 140 S. Ct. 1731 (holding discrimination against transgender individuals is unlawful).

¹¹⁴ Maya Rhodan, *Why Do We Have Men's and Women's Bathrooms Anyway?*, TIME (May 16, 2016, 6:28 PM), <https://time.com/4337761/history-sex-segregated-bathrooms/> [<https://perma.cc/M9NR-M3V5>].

¹¹⁵ *Id.*

norm today, with major plumbing codes specifying that men's and women's bathrooms should be separate.¹¹⁶ While distinguishing bathrooms based on gender may seem vital to some and unnecessary to others, the separation of men's and women's bathrooms is not as relevant as one might think in regard to the issue of transgender bathroom access.¹¹⁷

Unisex or gender-neutral bathrooms are commonly used in an attempt to resolve transgender bathroom access.¹¹⁸ But, offering these types of facilities to transgender employees still displaces them from bathrooms that align with their gender identities, and in doing so, continues to promote transgender discrimination in the workplace.¹¹⁹ The use of gender-neutral bathrooms is often analogized to the "separate, but equal" approach that was rejected in the *Brown v. Board of Education* case.¹²⁰ In *Brown*, the Court concluded that separate is inherently unequal, and the "separate, but equal" doctrine, when applied in the context of segregation in public schools, deprives separated people from their Fourteenth Amendment equal protection rights.¹²¹ The same logic can be applied here: though gender-neutral bathrooms are equal accommodations, transgender people are separated by having to use a different, "special" bathroom rather than the gender binary bathroom consistent with their gender identity and accessible to their non-transgender peers.¹²² The only factor driving the use of a gender-neutral bathroom is transgender status, thus creating discrimination and deprivation of equal protection of the law for transgender people.¹²³ When a female employee has the option of using either the unisex bathroom or the women's bathroom, but a transgender female employee is limited to the unisex bathroom, transgender discrimination is still occurring.¹²⁴

Though a gender-neutral bathroom is a better option than being required to use a bathroom that does not align with one's gender identity at all, these bathrooms are often used in conjunction with gender-binary bathrooms, which still singles out transgender employees.¹²⁵ If there is only

¹¹⁶ *Id.*; see also 29 C.F.R. §1910.141 (c)(1)(i) (2022) (specifying the required numbers of facilities "in toilet rooms separate for each sex...")

¹¹⁷ Rhodan, *supra* note 114.

¹¹⁸ *Id.*

¹¹⁹ See *Hobby Lobby*, 186 N.E.3d 67.

¹²⁰ *Hobby Lobby*, 186 N.E.3d at 82 (citing *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954), and discussing the "separate but equal" argument in the context of bathroom discrimination).

¹²¹ *Brown*, 347 U.S. at 495.

¹²² Adam Winkler, *Bathrooms Are Not Separate-But-Equal*, UCLA NEWSROOM (June 14, 2013), <https://newsroom.ucla.edu/stories/bathrooms-are-not-separate-but-246842> [https://perma.cc/732L-X6YR].

¹²³ *Id.*

¹²⁴ See generally *Hobby Lobby*, 186 N.E.3d at 67.

¹²⁵ See Winkler, *supra* note 122.

a gender-neutral bathroom, being used by everyone—regardless of whether they are transgender—then these facilities are acceptable.¹²⁶ However, when men’s and women’s bathrooms are available and unisex bathrooms are added as a way to corral transgender people away from the bathroom matching their gender identity, unisex facilities become yet another tool used to discriminate against transgender people.¹²⁷

The solution to this problem does not call for the elimination of gender-specific bathrooms, or for the creation of various other types of bathrooms to accommodate transgender people.¹²⁸ The simplest and most practical solution is to allow transgender people to use the bathroom that aligns with their current gender identity.¹²⁹

C. *Danger and Discomfort or Peeing in Peace?*

One of the most frequently cited arguments in opposition to allowing transgender people to use the bathroom consistent with their gender identity is the potential for danger or discomfort, especially for women in women’s restrooms.¹³⁰ The idea that women need protection in a “dangerous public realm” like a bathroom even fueled the first regulation requiring separate men’s and women’s bathrooms.¹³¹ This logic and the danger and discomfort argument are without merit. Whether the fear is one of attack by transgender people or of predators taking advantage of non-discrimination laws allowing transgender people to use the women’s bathroom, there is significant evidence that transgender bathroom access does not increase crimes and violence against non-transgender users of the same bathroom.¹³² A 2018 study conducted on Massachusetts localities that had gender identity inclusive nondiscrimination ordinances found that there was no relationship between the passage of such laws and the frequency of criminal activity in bathrooms and other public facilities.¹³³

Further, in 2016, upwards of 250 leading sexual assault and domestic violence organizations in the United States cosigned a statement condemning anti-transgender laws.¹³⁴ The statement explicitly noted that the idea that

¹²⁶ See generally *Hobby Lobby*, 186 N.E.3d at 67.

¹²⁷ *Id.*

¹²⁸ Winkler, *supra* note 122.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ Rhodan, *supra* note 114 and accompanying text.

¹³² Andrew R. Flores et al., *Gender Identity Nondiscrimination Laws in Public Accommodations: A Review of Evidence Regarding Safety and Privacy in Public Restrooms, Locker Rooms, and Changing Rooms*, 16 *SEXUALITY RSCH. AND SOC. POL’Y* 70, 74 (2019).

¹³³ *Id.*

¹³⁴ *Sexual Assault Prevention Experts: Protecting Transgender People Does Not Compromise Safety*

people are endangered by allowing transgender people to use the bathroom is a myth that is being propagated by anti-transgender laws.¹³⁵ Among the organizations supporting this statement, which span 44 states and multiple U.S. territories, is the National Alliance to End Sexual Violence.¹³⁶ Its president, Monika Johnson Hostler, stated:

As the largest sexual assault organization in the country, with member organizations throughout the entire country, we can tell you that laws that give transgender people the right to use the correct restroom do not put women and children at additional risk of assault. If they did, we would scream from the rooftops! Instead, we see that there are no increases in incidents in places that pass these laws.¹³⁷

Despite direct evidence that transgender bathroom access does not increase crime in bathrooms, the argument is still presented often.¹³⁸ In fact, in the *Hobby Lobby* case, Hobby Lobby argued that banning Sommerville from using the women's restroom was necessary for the protection of other women.¹³⁹ Hobby Lobby cited alleged misconduct by Sommerville and reports from two female employees that they would be uncomfortable with Sommerville using the women's restroom.¹⁴⁰ However, the court rejected these arguments, and its reasoning perfectly states why, in any context, the danger and discomfort argument is without merit.¹⁴¹ The court noted that this type of argument attempts to give weight to fear and discomfort, but such things are not a sufficient basis for discrimination, and it is not appropriate for the law to give effect to a person's personal biases.¹⁴² Additionally, regarding Sommerville's alleged misconduct in the workplace, the court stated that preventing access to the bathroom is not the appropriate device for employee discipline.¹⁴³ Should an employer need to discipline an employee for inappropriate conduct, the employer can do so in a variety of ways, which do not include disguising discrimination as discipline.¹⁴⁴

Discomfort and danger arguments against allowing transgender

in Restrooms, NAT'L CTR. FOR TRANSGENDER EQUAL., <https://transequality.org/sexual-assault-prevention-experts> [https://perma.cc/9ASN-5DLK] (last visited Nov. 7, 2021).

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Hobby Lobby*, 186 N.E.3d at 83.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 84.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

people to use bathrooms that align with their gender identity not only lack support, but they turn the danger of transgender bathroom use on its head.¹⁴⁵ A 2015 survey by the National Center of Transgender Equality found that out of 27,715 transgender respondents, 60% avoided using public restrooms for fear of being harassed or physically assaulted, 12% had been verbally harassed in the last year, and 1% had been physically attacked.¹⁴⁶ In fact, this kind of harassment is so common that databases of safe restrooms have been created for transgender and gender non-conforming people to use when trying to locate public bathrooms.¹⁴⁷ One such database is REFUGE Restrooms, a website and mobile app that allows users to search an area and find safe bathrooms nearby.¹⁴⁸ Users can add and rate restrooms at specific locations and can leave comments and directions on how to find the bathroom within the building.¹⁴⁹ In addressing the importance of a resource like this, the creators of REFUGE noted that bathrooms are “one of the biggest battlefields upon which the fight for transgender rights is taking place...”¹⁵⁰

D. *The Health Hazards of “Holding It”*

The harm experienced by transgender people when trying to access bathrooms does not end with verbal and physical harassment.¹⁵¹ In the same 2015 survey conducted by the National Center for Transgender Equality, 32% of respondents stated that they limited their food and water intake to avoid having to use public restrooms.¹⁵² Meggan Sommerville was unfortunately driven to the same action, deciding to limit how much she was eating and drinking in order to be able to “hold it” until she could clock out and walk to a nearby business to use a women’s bathroom.¹⁵³ This took a physical toll on Sommerville, causing headaches, cramps, fatigue, and severe dehydration.¹⁵⁴ More serious consequences of holding in urine can include kidney failure, urinary tract infections, incontinence, and even bladder

¹⁴⁵ See generally *supra* notes 134-137.

¹⁴⁶ Daniel Trotta, *U.S. Transgender People Harassed in Public Restrooms: Landmark Survey*, THOMSON REUTERS (Dec. 8, 2016, 12:09 AM), <https://www.reuters.com/article/us-usa-lgbt-survey/u-s-transgender-people-harassed-in-public-restrooms-landmark-survey-idUSKBN13X0BK> [<https://perma.cc/BVW7-Q6ZY>].

¹⁴⁷ *Id.*

¹⁴⁸ *About Refuge*, REFUGE RESTROOMS, <https://www.refugerestrooms.org/about> [<https://perma.cc/9M6C-3HJH>] (last visited Mar. 2, 2022).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ Trotta, *supra* note 146.

¹⁵² *Id.*

¹⁵³ See *supra* notes 88-90 and accompanying text.

¹⁵⁴ *Id.*

rupture.¹⁵⁵ But, beyond that, these actions took a very serious mental toll on Sommerville.¹⁵⁶ She experienced nightmares and anxiety, as well as feelings of embarrassment and humiliation.¹⁵⁷ Sommerville testified that she had to “structure [her] life around how often [she] would be able to use the restroom.”¹⁵⁸

Meggan Sommerville is only one of an incredible number of transgender people who have experienced bathroom-induced trauma.¹⁵⁹ However, unlike Sommerville, the toll that this trauma takes on some is fatal.¹⁶⁰ The rate of suicide attempts by transgender individuals is already much higher than that of non-transgender people, with a shocking 41% of transgender people reporting a suicide attempt at some point in their life.¹⁶¹ Studies have shown that negative bathroom experiences exacerbate this issue.¹⁶² When transgender individuals were asked about bathroom experiences within the previous year, the rate of attempted suicide was nearly double in individuals who had been told that they were in the wrong bathroom, had been denied access to a bathroom, or had been harassed or assaulted in a bathroom, as opposed to those who had not experienced these things.¹⁶³ These bleak statistics only further support the immediate need for complete and safe access to bathrooms for transgender people.

E. Standing Up for Transgender Bathroom Rights

1. State Legislation

While there is currently no federal legislation on the issue of transgender bathroom access, states have not sat idly by waiting for it.¹⁶⁴ Many states have enacted nondiscrimination laws, both in the workplace and in places of public accommodation, that explicitly prohibit discrimination on

¹⁵⁵ Piedmont Healthcare, *How Long Is It Safe to Hold Your Urine?*, LIVING BETTER, <https://www.piedmont.org/living-better/how-long-is-it-safe-to-hold-your-urine> [https://perma.cc/EX6L-8ZD9] (last visited Mar. 2, 2022).

¹⁵⁶ *See Hobby Lobby*, 186 N.E.3d at 75.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *See* Jody L. Herman et al., *Suicide Thoughts and Attempts Among Transgender Adults: Findings from the 2015 U.S. Transgender Survey*, UCLA WILLIAMS INST. 1, 25–26 (Sept. 2019), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Suicidality-Transgender-Sep-2019.pdf>.

¹⁶⁰ *See id.*

¹⁶¹ *Id.* at 5.

¹⁶² *Id.* at 25–26.

¹⁶³ *Id.*

¹⁶⁴ *Know Your Rights: Public Accommodations*, NAT’L CTR. FOR TRANSGENDER EQUAL., <https://transequality.org/know-your-rights/public-accommodations> [https://perma.cc/ZHZ8-WSBY] (last visited Mar. 2, 2022).

the basis of gender identity.¹⁶⁵ Though not all of these nondiscrimination laws specifically address bathroom access, they do encompass the facilities within the workplace or public accommodations.¹⁶⁶ As such, courts can logically and reasonably interpret these laws as protecting transgender bathroom access and can find that denial of such access is discrimination based on gender identity.¹⁶⁷

As of 2021, twenty-four states¹⁶⁸ have laws that provide public accommodation protections based on gender identity.¹⁶⁹ California is one example, providing that business establishments, nonprofits, and public-serving government agencies cannot prevent transgender people from using sex-segregated facilities that align with their gender identity, and are not permitted to ask for identification for bathroom access to be granted.¹⁷⁰ Colorado takes a different approach and also includes schools, with its anti-discrimination law stating that it is an unlawful practice for schools and places of public accommodation to prohibit access to facilities based on gender identity or gender expression.¹⁷¹ Massachusetts has an anti-discrimination statute that states that, in sex-segregated public accommodations, people must be granted access to the part of the accommodation that is consistent with their gender identity.¹⁷² In New Jersey, the law provides that when facilities are sex-segregated, whether they be bath houses, schools, dressing rooms, etc., admission to such facilities must be based on a person's gender identity or gender expression.¹⁷³ The state of Washington lists public washrooms as one of many public accommodations where it is unlawful to discriminate based on gender identity.¹⁷⁴ These states are only a few examples, and while they vary in their specific terms, they all provide what is desperately needed by so many: a clear prohibition on preventing bathroom use because of gender identity.

¹⁶⁵ *See id.*

¹⁶⁶ *See id.*

¹⁶⁷ *Id.*

¹⁶⁸ The following states have public accommodation protections: California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, and Wisconsin.

¹⁶⁹ *State Public Accommodation Laws*, NAT'L CONF. OF STATE LEGS. (June 25, 2021), <https://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx> <https://perma.cc/2CUA-GAG6>; *see also In Your State*, LAMBDA LEGAL, <https://www.lambdalegal.org/states-regions/in-your-state> [<https://perma.cc/M78L-8FPS>] (last visited Mar. 2, 2022) (describing legal protections for LGBTQ+ people and their families by state).

¹⁷⁰ CAL. CIV. CODE § 51(b) (Deering 2022).

¹⁷¹ COLO. REV. STAT. § 24-34-601 (2021).

¹⁷² MASS. ANN. LAWS ch. 272, § 92A (LexisNexis 2021).

¹⁷³ N.J. REV. STAT. § 10:5-12(f)(1) (2021).

¹⁷⁴ WASH. REV. CODE ANN. § 49.60.030-40 (LexisNexis 2022).

While roughly half of the states have anti-discrimination laws based on gender identity, all but five states have anti-discrimination laws based on sex.¹⁷⁵ If the logic from *Bostock* is applied and states begin to treat transgender status as inherently linked to sex, rather than treating the two as separate categories, almost all states would provide gender identity protections via their non-discrimination laws. In turn, the number of laws across the United States providing bathroom access to transgender people would increase greatly.

2. Caselaw

Though the Illinois Appellate Court decision in *Hobby Lobby v. Sommerville* is only persuasive authority, that state court is not the only one that has found in favor of transgender bathroom access.¹⁷⁶ Numerous other courts have shown support for granting bathroom access to transgender people in various contexts.¹⁷⁷

For example, in *Grimm v. Gloucester County School Board*, the United States Court of Appeals for the Fourth Circuit held that a school policy prohibiting a transgender student from using the bathroom aligning with their gender identity violated equal protection.¹⁷⁸ In *Parents for Privacy v. Barr*, the Ninth Circuit Court of Appeals found that a school policy allowing transgender students to use the bathroom and locker room matching their gender identity was valid, and rejected claims by the plaintiffs that allowing such access violated the right to privacy, the parental right to direct the upbringing and education of one's children, and the right to exercise religion.¹⁷⁹ In *Roberts v. Clark County School District*, the Nevada District Court granted partial summary judgment in favor of a transgender school district employee who was discriminated against when his employer school district effectively banned him from using the men's restroom and only allowed him access to a separate, unisex bathroom.¹⁸⁰ In *Whitaker v. Kenosha Unified School District Number 1 Board of Education*, the Seventh Circuit Court of Appeals granted preliminary injunctive relief to a transgender student with an order allowing him to access the men's restroom. The court also found that cases of transgender discrimination are cases of sex

¹⁷⁵ *State Public Accommodation Laws*, *supra* note 169.

¹⁷⁶ *See infra* notes 177–182 and accompanying text.

¹⁷⁷ *Id.*; *See also* *A.H. v. Minersville Area Sch. Dist.*, 408 F. Supp. 3d 536 (M.D. Pa. 2019); *Bd. of Educ. v. U.S. Dep't of Educ.*, 208 F. Supp. 3d 850 (S.D. Ohio 2016); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267 (W.D. Pa. 2017); *M.A.B. v. Bd. of Educ.*, 286 F. Supp. 3d 704 (D. Md. 2018).

¹⁷⁸ *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020).

¹⁷⁹ *Parents for Privacy v. Barr*, 949 F.3d 1210 (9th Cir. 2020).

¹⁸⁰ *Roberts v. Clark Cnty. Sch. Dist.*, 215 F. Supp. 3d 1001 (D. Nev. 2016).

discrimination and thus are granted heightened scrutiny upon review.¹⁸¹ In *J.A.W. v. Evansville Vanderburgh School Corporation*, the District Court for the Southern District of Indiana granted partial summary judgment to a transgender student on his Fourteenth Amendment equal protection claim, finding that transgender discrimination is inherently sex discrimination and that gender-neutral bathroom alternatives are not sufficient.¹⁸²

While many of these cases take place in the context of schools, they establish that transgender discrimination *is* sex discrimination.¹⁸³ This is true in all contexts, and if this logic is applied consistently, heightened scrutiny would be used in all cases of transgender discrimination, thereby making it more difficult for discriminatory practices to prevail in courts of law.¹⁸⁴

IV. RESOLUTION: A DEFINITIVE DECISION

A. *The Supreme Court*

Bostock v. Clayton County addressed one type of employment discrimination based on homosexuality or transgender status: employment termination.¹⁸⁵ Termination was the specific issue presented to and resolved by the Court.¹⁸⁶ However, Title VII encompasses more than termination of employment; the statute lists termination of employment *and* discrimination with respect to compensation, terms, conditions, or privileges of employment.¹⁸⁷ In determining that “sex” includes homosexuality and transgender status, the Court is creating space for Title VII to provide protection against all of the listed types of discrimination based on homosexuality or transgender status—not solely termination of employment.¹⁸⁸ Because the Court addressed only one type of discrimination, it is likely that other cases of discrimination will be brought before the Court. This is especially likely for issues regarding bathroom access, given that the subject is so controversial and there is no clear decision or guidance.¹⁸⁹

¹⁸¹ *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017).

¹⁸² *J.A.W. v. Evansville Vanderburgh Sch. Corp.*, 369 F. Supp. 3d 833 (S.D. Ind. 2019).

¹⁸³ *Bostock*, 140 S. Ct. 1731.

¹⁸⁴ See *United States v. Virginia*, 116 S. Ct. 2264 (1996); *J. E. B. v. Alabama ex rel. T. B.*, 114 S. Ct. 1419 (1994); *Craig v. Boren*, 97 S. Ct. 451 (1976); *Reed v. Reed*, 92 S. Ct. 251 (1971).

¹⁸⁵ *Bostock*, 140 S. Ct. at 1754.

¹⁸⁶ *Id.*

¹⁸⁷ 42 U.S.C. § 2000e-2.

¹⁸⁸ *Id.*

¹⁸⁹ See *Hobby Lobby*, 186 N.E.3d 67 (holding that denying transgender employee access to women’s bathroom violated Illinois’s Human Rights Act); *Goins v. W. Grp.*, 635 N.W.2d 717 (Minn. 2001) (holding that an employer’s designation of employee restroom use based on biological gender did not violate the Minnesota’s Human Rights Act).

Upon the arrival of transgender bathroom access at the Supreme Court, the Court should find that denying a transgender employee access to the bathroom matching his or her gender identity qualifies as discrimination based on sex under Title VII of the Civil Rights Act of 1964. Access to a bathroom is one of the privileges of employment.¹⁹⁰ To deny a transgender employee such access, or to require the use of a unisex bathroom where others are not required to do the same, is discrimination. The Illinois Court of Appeals analyzed this discrimination firsthand and correctly ruled that it constituted discrimination based on sex.¹⁹¹ The Court's statutory interpretation in *Bostock* cannot be construed differently simply because a bathroom is involved; the Court would be highly inconsistent by ruling otherwise.¹⁹²

B. Federal Legislation

The ability to use a bathroom without fear or dilemma about which facility to use is a basic right granted to every person, not only in the workplace but also in schools and places of public accommodation.¹⁹³ The passage of federal legislation explicitly mandating that transgender people have access to a bathroom consistent with their gender identity is the most direct path to resolve this issue. The Civil Rights Act should be amended to include the following:

Any business, workplace, school, or other entity providing public accommodation must make its restrooms freely available to transgender persons, who must have access to gender-binary restrooms regardless of that transgender person's assigned sex at birth. Transgender persons are permitted to use gender-binary restrooms and facilities consistent with their gender identity. The refusal or denial of access to such restrooms to transgender persons constitutes unlawful discrimination. The use of unisex facilities may replace gender-binary facilities but must be used by all persons regardless of transgender status.

This legislation begins by listing places where transgender people should be granted bathroom rights: everywhere. Denial of bathroom access to transgender people, no matter what the context, is illogical and unfair. Non-transgender people use bathrooms every day without discrimination, likely

¹⁹⁰ 29 C.F.R. §1910 (2022).

¹⁹¹ *Hobby Lobby*, 186 N.E.3d at 82.

¹⁹² *Bostock*, 140 S. Ct. 1731.

¹⁹³ See ME. REV. STAT. ANN. tit. 20-A, § 6501 (2003).

not realizing that it is a privilege currently unavailable to transgender people. There is no reason for the same right not to be afforded to transgender people.

This legislation also addresses both gender-binary and unisex facilities. The issue with unisex bathrooms comes into play when they exist in conjunction with gender-binary bathrooms as a way to single out transgender people. With *only* unisex bathrooms, every person is treated equally regarding unisex bathroom use; these facilities are an acceptable, reasonable solution to the issue of transgender bathroom access. However, if gender-binary restrooms are available for use, transgender people must be permitted to use the restroom that aligns with their gender identity.

Federal legislation is crucial in providing transgender people with this basic human right. Federal action would prevent numerous transphobic and discriminatory state proposals from potentially having the force of law, such as a Tennessee law that would require businesses to post signage outside of their restrooms on whether they allow transgender people to choose which bathroom to use,¹⁹⁴ or an Alabama bill allowing transgender students to use gender-neutral bathrooms only if the bathroom was being watched by an attendant to “prevent crimes from being committed.”¹⁹⁵

V. CONCLUSION

Hobby Lobby precisely identifies the flaw in *Bostock*'s lack of guidance on bathroom access for transgender employees.¹⁹⁶ Simply put, the holding of *Bostock* is undermined until the United States Supreme Court definitively holds that bathroom discrimination *is* unlawful discrimination under Title VII of the Civil Rights Act of 1964.¹⁹⁷ Employers must permit female employees to use the women's restroom and male employees to use the men's restroom, regardless of whether those employees are transgender. Denial of such access is a clear violation of Title VII.¹⁹⁸

Transgender people already face frightening adversity because they are transgender. Something as simple as using a bathroom should not contribute to the already stressful and dangerous daily experiences that transgender people encounter. This is a major issue and one that is talked about—or perhaps more accurately, argued about—frequently, but one that currently lacks clear legal guidance. Whether it be through a clarifying opinion by the Supreme Court or through federal legislation, or preferably

¹⁹⁴ 2021 Tenn. Pub. Ch. 453 § 1(a).

¹⁹⁵ S.B. 1, 2017 Gen. Assemb., Reg. Sess. (Ala. 2017).

¹⁹⁶ *Hobby Lobby*, 186 N.E.3d 67.

¹⁹⁷ *Bostock*, 140 S. Ct. 1731.

¹⁹⁸ 42 U.S.C.A. § 2000e-2.

both, it is time to implement a legal solution. Refusing to allow a transgender person to use the bathroom matching their gender identity or forcing them to use separate unisex bathrooms *is* discrimination, and it must be ended.