



The Pennsylvania Interbranch Commission for Gender, Racial and Ethnic Fairness

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September 29, 2021

The Honorable Seth M. Grove
Chair, House State Government Committee
7 East Wing
PO Box 202196
Harrisburg, PA 17120-2196

RE: Support for House Bill ("HB") 300, the "Fairness Act"

Dear Chairman Grove,

On behalf of the Pennsylvania Interbranch Commission for Gender, Racial and Ethnic Fairness, we write to convey our strong support for HB 300. As you know, if passed, this bill would prevent LGBTQ Pennsylvanians from being denied housing, employment, or access to public accommodations simply because of their sexual orientation or gender identity. Since June 11, 2021, HB 300 has been in the State Government Committee for consideration. However, to date, the Committee has neither convened a hearing on nor reported on this bill. For the reasons that follow, we respectfully urge the State Government Committee to consider HB 300 and take the appropriate measures to move it through Committee, facilitating its passage.

By way of introduction, the Interbranch Commission was established in 2005 by the three branches of Pennsylvania's government to implement the recommendations from a 2003 Pennsylvania Supreme Court study on racial and gender bias in the justice system.¹ The Commission has since expanded its areas of focus to include ending discrimination against LGBTQ Pennsylvanians in our courts and throughout the Commonwealth. To that end, the Commission, through its LGBTQ Rights Committee, has been actively involved in conducting training sessions to educate Pennsylvania attorneys and judges on anti-LGBTQ bias in jury selection; working with the PA Department of Health and various LGBTQ-centered organizations to assess and address the unique needs of LGBTQ individuals during the COVID-19 pandemic; and updating the PA Department of Human Services' regulations to include non-discrimination protections for LGBTQ foster youth in out-of-home placements. Consistent with the Committee's other initiatives to ensure that LGBTQ Pennsylvanians receive equal protection under the law, we now advocate for the passage of HB 300, a bill that would update the Pennsylvania Human Relations Act (the "PHRA") to

¹ See Final Report of the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System, available at http://www.pa-interbranchcommission.com/_pdfs/FinalReport.pdf.

include sexual orientation and gender identity within its protected classes in the contexts of employment, housing, and public accommodations.

As you are likely aware, the Supreme Court issued a landmark decision in 2020, holding in Bostock v. Clayton County that the prohibition on sex discrimination in Title VII of the Civil Rights Act of 1964 extends to discrimination based on one's sexual orientation or gender identity.² Considering that Title VII's provisions set forth the legal framework within which most employers must make their employment-based decisions, Bostock represented a crucial outcome for LGBTQ individuals who have long faced barriers to and in the workplace. Given the Court's broad holding that "[i]t is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex,"³ it would not be difficult to conclude that the employment burdens borne by the LGBTQ community were extinguished by the dictates of one Supreme Court holding. It would be equally easy to assume that because other federal laws contain sex-based protections in the contexts of education, housing, and healthcare, Bostock's rationale extends without delay into these areas as well.

Unfortunately, this is not the case. It is true that Title IX of the Education Amendments Act of 1972 prohibits discrimination "on the basis of sex" in federally-funded education programs, just as the Fair Housing Act makes it unlawful to refuse to sell, rent, or otherwise deny a dwelling to individuals because of their sex.⁴ Section 1557 of the Affordable Care Act also prohibits discrimination based on numerous statutes' protected characteristics, including Title IX's provisions regarding sex discrimination.⁵ It would be erroneous, however, to presume that Bostock will immediately be interpreted by all relevant stakeholders as bringing the sex-based mandates of each of these federal laws into conformity with its broad holding. To the contrary, while the case law strongly supports extending these protections to other federal statutes, opponents of LGBTQ equality have already initiated legal attempts to stall the full and proper implementation of Bostock beyond the federal employment context.⁶ The consequence of these strategies is straightforward: each application of Bostock to prohibitions on sex discrimination in other federal statutes will require a piecemeal process likely characterized by years of protracted litigation.

Therefore, the inevitable delay in Bostock's full application makes one thing clear: state governments like the Pennsylvania General Assembly have the opportunity to sidestep opponents

² 590 U.S. 1, 9 (2020).

³ Id.

⁴ Sharita Gruberg, "Beyond Bostock: The Future of LGBTQ Civil Rights," Center for American Progress (Aug. 26, 2020, <https://www.americanprogress.org/issues/lgbtq-rights/reports/2020/08/26/489772/beyond-bostock-future-lgbtq-civil-rights/>).

⁵ Id.

⁶ "Despite Landmark Supreme Court Ruling in Bostock, Municipalities Must Continue to Advance Explicitly LGBTQ-Inclusive Non-Discrimination Laws and Policies," Human Rights Campaign Foundation (2020, <https://hrc-prod-requests.s3-us-west-2.amazonaws.com/MEI2020-issuebrief-1.pdf?mtime=20201203090705&focal=none>).

of LGBTQ equality by immediately expanding state-based protections for LGBTQ individuals into the areas of education, housing, and public accommodations. This opportunity is especially important because even once fully updated, federal protections as they exist do not outlaw discrimination on the basis of sex in public spaces or for federally-funded services.⁷ Stated another way, even when the dust has settled on the fight to correctly apply Bostock's holding to all relevant federal civil rights laws, Bostock is only capable of impacting those laws in which sex discrimination is *already* explicitly prohibited. The remaining gaps in these federal laws - particularly those involving protections in public accommodations - cannot be remedied through Bostock; rather, they require the intervention of state legislators committed to promoting equality in a holistic fashion.

Key to that commitment is also understanding that even where federal protections already exist, state non-discrimination laws offer the opportunity to provide even more expansive protections for members of the LGBTQ community. For instance, even though Bostock prohibits employers that come within Title VII's sweep from discriminating against individuals based on their sexual orientation or gender identity, Title VII only defines an "employer" as a person who has fifteen or more employees.⁸ The PHRA, on the other hand, provides broader employment protections for Pennsylvanians by defining an "employer" as any person employing *four* or more persons.⁹ Accordingly, by updating the PHRA to explicitly include sexual orientation and gender identity among the Act's protected classes, HB 300 offers state lawmakers the meaningful opportunity to provide LGBTQ people with more comprehensive protections. Absent this change, the ability of LGBTQ Pennsylvanians to invoke legal protections counter-intuitively turns on the number of co-workers they either already work with or are applying to join. Relatedly, failing to update the PHRA allows smaller, anti-equality employers to pass under the radar, even though it is precisely in these smaller, more insular environments that LGBTQ individuals feel less comfortable standing up for themselves.

Here, it is important to note that despite the progress our Commonwealth has made toward accepting and caring for LGBTQ individuals, these intolerant environments persist. According to a 2017 study, "[a]t least one in five LGBTQ people report being personally discriminated against . . . when applying for jobs (20%), when being paid equally or considered for promotion (22%)[.] . . . when trying to rent a room or apartment or buy a house (22%)," or when applying to or attending college (20%).¹⁰ The report also found that roughly one in six LGBTQ people have

⁷ Id.

⁸ 42 U.S.C. § 2000e(b) (1964).

⁹ 43 P.S. § 954(b) (1955).

¹⁰ NPR, Robert Wood Johnson Foundation & Harvard T.H. Chan School of Public Health, "Discrimination in America: Experiences and Views of LGBTQ Americans" (Nov. 2017, <https://legacy.npr.org/documents/2017/nov/npr-discrimination-lgbtq-final.pdf>).

avoided medical care (18%) or have been personally discriminated against when going to a doctor or health clinic (16%).¹¹

Unfortunately, more recent studies prove that the passage of time alone does not mitigate prejudice and its harmful consequences. According to a report published by the Center for American Progress, more than one in three LGBTQ Americans faced discrimination of some kind in 2020, including more than three in five (62% of) transgender Americans and 43% of LGBTQ people of color.¹² When asked where these instances of discrimination occurred, “more than half . . . of LGBTQ respondents . . . said they experienced harassment or discrimination in a public place” such as a store, restroom, or mode of public transit; 36% responded that they were discriminated against in the workplace; 21% indicated discrimination in a school environment; and 20% reported discrimination in an apartment community.¹³

Whether occurring in a place of learning or at the grocery store, discrimination unavoidably takes a toll on the mental well-being of LGBTQ Americans. Predictably, one in two LGBTQ individuals report moderate or significant negative psychological impacts as a result of discrimination based on their sexual orientation or gender identity.¹⁴ Passing HB 300, which extends non-discrimination protections into the very spaces referenced above, gives legislators the chance to have an immediate impact on the emotional safety of Pennsylvania’s LGBTQ citizens.

Further, by memorializing these protections in Pennsylvania law, legislators also make our Commonwealth a more attractive place to live. At present, *more than half* of LGBTQ students live in states without statutory protections against sexual orientation and gender identity discrimination in education.¹⁵ Similarly, half of LGBTQ individuals live in states that do not statutorily prohibit such discrimination in public accommodations, while nearly half of LGBTQ adults live in states lacking statutory safeguards in the context of housing.¹⁶ By enacting fully-inclusive state non-discrimination laws, Pennsylvania signals to potential residents, visitors, and businesses that it values diversity and equity in a serious way. In so doing, the Commonwealth promotes good policy *and* economic strength.

Taken together, we believe that these considerations merit the State Government Committee’s consideration of and support for HB 300. Ever since its central location among the original 13 colonies, Pennsylvania has been known as the Keystone State - the stone on which the associated

¹¹ *Id.*

¹² Sharita Gruberg et al., “The State of the LGBTQ Community in 2020” (Oct. 6, 2020), <https://www.americanprogress.org/issues/lgbtq-rights/reports/2020/10/06/491052/state-lgbtq-community-2020/>.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Kerith J. Conron & Shoshana K. Goldberg, “LGBT People in the U.S. Not Protected by State Non-Discrimination Statutes,” UCLA School of Law Williams Institute (April 2020, <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-ND-Protections-Update-Apr-2020.pdf>).

¹⁶ *Id.*

stones depend for support. As Pennsylvanians, we must recognize that like our Commonwealth, LGBTQ individuals are the keystone of an advancing society, representing the colorful array of diverse perspectives that animate our forward progress and challenge existing notions of what is possible.

Thank you for your time and consideration. We would welcome the opportunity to provide testimony on HB 300 should the State Government Committee convene a hearing thereon. If you have any questions concerning this matter, we would be happy to discuss them with you at your convenience.

Respectfully,



Donald MacLeod
Chair, LGBTQ Rights Committee



Lisette McCormick, Esq.
Executive Director

cc: Members of the House State Government Committee
The Honorable Dan Frankel, Primary Sponsor of HB 300
Pennsylvania Interbranch Commission Members
LGBTQ Rights Committee Members