



## The Pennsylvania Interbranch Commission for Gender, Racial, and Ethnic Fairness

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September 15, 2023

The Honorable Cris Dush  
Chair, Senate State Government Committee  
Senate Box 203025  
Harrisburg, PA 17120-3025  
Room: 9 East Wing

RE: Support for House Bill (“HB”) 300, “The Fairness Act”

Dear Chair Dush,

On behalf of the Pennsylvania Interbranch Commission for Gender, Racial, and Ethnic Fairness, we write to convey our strong support for HB 300. If passed, this bill would prevent LGBTQ+ Pennsylvanians from being denied access to housing, employment, or public accommodations based on their sexual orientation or gender identity. The PA House of Representatives passed HB 300 in a bipartisan fashion on May 2, 2023 and referred the bill to the State Government Committee the following day. Since the bill’s referral, however, the Committee has neither convened a hearing nor reported on HB 300.

We respectfully urge the State Government Committee to consider HB 300 and take the appropriate measures to move it through Committee, facilitating its passage. Preliminarily, we acknowledge that our letter today is more robust in length than our typical position letters to the legislature. However, we believe that the considerable importance of HB 300 necessitates a thorough explanation of the necessary protections the legislation’s provisions would secure.

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.<sup>1</sup> The Commission has since expanded its areas of focus to include ending discrimination against LGBTQ+ Pennsylvanians in our courts and throughout the Commonwealth. The Commission, through its LGBTQ+ Rights Committee, has therefore been involved, among other things, in conducting training sessions to educate Pennsylvania attorneys and judges on anti-LGBTQ+ bias in jury selection and updating the PA

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<sup>1</sup> 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>.

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, which would update the Pennsylvania Human Relations Act (the “PHRA”) to 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.<sup>2</sup> 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. In its opinion, the Court held that, “[i]t is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”<sup>3</sup> Based on this broad holding, one might be tempted to conclude that the employment burdens experienced by the LGBTQ+ community were extinguished by the dictates of one Supreme Court verdict. It would be equally tempting to assume that because other federal laws contain sex-based protections in the contexts of education, housing, and healthcare, the Court’s rationale in Bostock should apply immediately to these others laws, too.

Unfortunately, this is not the case. 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.<sup>4</sup> Section 1557 of the Affordable Care Act also prohibits discrimination based on numerous statutes’ protected characteristics, including Title IX’s provisions regarding sex discrimination.<sup>5</sup> 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.<sup>6</sup> The consequence of these strategies is straightforward: each application of

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<sup>2</sup> 590 U.S. 1, 9 (2020).

<sup>3</sup> Id.

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

<sup>5</sup> Id.

<sup>6</sup> *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), available at <https://hrc-prod-requests.s3-us-west-2.amazonaws.com/MEI2020-issuebrief-1.pdf?mtime=20201203090705&focal=none>.

Bostock to prohibitions on sex discrimination in other federal statutes will require a piecemeal process likely characterized by years of protracted litigation.

The delay in Bostock's full application makes one thing clear: state governments like the Pennsylvania General Assembly have the opportunity to sidestep opponents 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.<sup>7</sup> 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 could 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.<sup>8</sup> The PHRA, on the other hand, provides broader employment protections for Pennsylvanians by defining an "employer" as any person employing *four* or more persons.<sup>9</sup> 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 fly under the radar, even though it is precisely in these smaller, more insular environments that LGBTQ+ individuals may require the most protection.

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 national 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.<sup>10</sup> When asked where these instances of

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<sup>7</sup> Id.

<sup>8</sup> 42 U.S.C. § 2000e(b) (1964).

<sup>9</sup> 43 P.S. § 954(b) (1955).

<sup>10</sup> Sharita Gruberg et al., *The State of the LGBTQ Community in 2020* (Oct. 6, 2020) [hereinafter *2020 State of the LGBTQ Community*], available at <https://www.americanprogress.org/issues/lgbtq-rights/reports/2020/10/06/491052/state-lgbtq-community-2020/>.

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.<sup>11</sup>

A recent snapshot of LGBTQ+ Pennsylvanians’ health needs illustrates the ongoing reality of discrimination here in our own Commonwealth, too. Among the approximately 4,200 respondents who self-identified as LGBTQ+ in the survey, almost a third have experienced a negative reaction from a healthcare provider when that provider learned they were LGBTQ+.<sup>12</sup> The survey also found that more than six out of ten respondents have experienced discrimination in their lives based on their LGBTQ+ identity.<sup>13</sup> While these figures are troubling in themselves, the survey does not illustrate the full extent to which LGBTQ+ Pennsylvanians face barriers, given its almost exclusive focus on LGBTQ+ Pennsylvanians’ experiences with healthcare systems alone.

Whether occurring in a place of learning or at the doctor’s office, 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.<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup> 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.

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<sup>11</sup> Id.

<sup>12</sup> Res. & Evaluation Group at Pub. Health Mgmt. Corp. and Bradbury-Sullivan LGBT Community Ctr., *2022 Pennsylvania LGBTQ Health Needs Assessment* 1, 2 (Jan. 2023), available at [https://assets.nationbuilder.com/bradburysullivancenter/pages/2872/attachments/original/1673023325/2022\\_PA\\_LGBTQ\\_HNA\\_Report\\_Final\\_approved.pdf?1673023325](https://assets.nationbuilder.com/bradburysullivancenter/pages/2872/attachments/original/1673023325/2022_PA_LGBTQ_HNA_Report_Final_approved.pdf?1673023325)

<sup>13</sup> Id. at 3.


<sup>14</sup> *2020 State of the LGBTQ Community*, *supra* note 10.


<sup>15</sup> 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), available at <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-ND-Protections-Update-Apr-2020.pdf>.

<sup>16</sup> Id.

Based on the foregoing, it is imperative that the State Government Committee consider and support HB 300. 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,

  
Kaitlyn Burns, Esq.  
Chair, LGBTQ+ Rights Committee

  
Maraleen Shields, Esq.  
Executive Director

  
Brendan Bertig, Esq.  
Staff Attorney

cc: The Hon. Amanda M. Cappelletti, Minority Chair, Senate State Government Committee  
The Hon. Malcolm Kenyatta, Primary Sponsor of HB 300  
Members of the State Government Committee  
Pennsylvania Interbranch Commission Members  
Interbranch Commission's LGBTQ+ Rights Committee Members