U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, DC 20507

[redacted]
Selina S.,[1]
Complainant,

v.

Daniel Driscoll,
Secretary,
Department of the Army,
Agency.

Appeal No. 2025003976

Agency No. ARRILEY25JUL000171

DECISION

It is the policy of the United States that "intimate spaces [in federal workplaces] . . . are designated by sex and not identity." Exec. Order 14168, § 4(d), 90 Fed. Reg. 8615 (Jan. 20, 2025). This policy most typically applies to workplace bathrooms, but it also includes locker rooms, changing areas, sleeping quarters, etc. A trans-identifying federal employee claims the policy is unlawful sex-based discrimination in violation of Title VII of the Civil Rights Act of 1964. The Equal Employment Opportunity Commission takes up this employee's appeal in our quasi-

[1] This case has been randomly assigned a pseudonym which will replace Complainant's name when the decision is published to non-parties and the Commission's website.

judicial capacity. *See* 42 U.S.C. § 2000e-16(c) (providing for E.E.O.C. to act "upon an appeal" from a federal employee alleging unlawful employment discrimination).

In a typical Title VII case, discharging our quasi-judicial responsibility is a relatively straightforward exercise. The statute has old roots, and the scope of its meaning has been thoroughly tilled by the federal courts over the decades. For our part, we recognize the special "province and duty of the judicial department to say what the law is." *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 384 (2024) (quoting *Marbury v. Madison*, 1 Cranch 137, 177 (1803)). This means that in most complaints and appeals arising under Title VII, all we need to do is apply longstanding precedent, often from the Supreme Court, to the facts before us.

This appeal presents a rare exception. No federal court has yet authoritatively addressed whether Title VII permits single-sex bathrooms and other intimate spaces in the workplace. Nor has any federal court yet authoritatively addressed whether Title VII requires employers to permit trans-identifying employees to access bathrooms and other intimate spaces otherwise reserved for the opposite sex.

To be sure, the Supreme Court in *Bostock v. Clayton County* recently held that under Title VII a covered employer's decision to discharge or refuse to hire "someone simply for being . . . transgender" constitutes discrimination "because of . . . sex." 590 U.S. 644, 681 (2020). But the Court took care to emphasize, "[W]e do not purport to address bathrooms, locker rooms, or anything else of the kind." *Id.*

And in the handful of years since—a blink of an eye in judicial time—no other federal court has yet authoritatively addressed whether single-sex bathrooms are lawful under the general principles announced in *Bostock*. In the absence of guiding precedent, we have no choice but to undertake our own interpretation of the statute in order to adjudicate this appeal.

That said, we do not view the absence of authoritative precedent as an invitation to act without restraint. Our aim must be to accurately predict how a responsible court would interpret the statute on this issue. Accordingly, we will use "the traditional tools of statutory construction, not individual policy preferences." *Loper Bright*, 603 U.S. at 374. Along those lines, we expect that a responsible court would turn first to the ordinary meaning of the statute's text. And we expect that a responsible court would take care to ensure that its holding is further anchored by the Supreme Court's other precedents in analogous areas of law.

When we follow this path to its logical conclusion—and as applied to the facts presented before us—we find that Title VII permits a federal agency employer to maintain single-sex bathrooms and similar intimate spaces. And it permits a federal agency employer to exclude employees, including trans-identifying employees, from opposite-sex facilities.

Before embarking on that analysis, we again stress the limited reach of our quasi-judicial authority. In the run of federal sector complaints and appeals, the

E.E.O.C. does not interpret the statute: we only apply established precedent to facts. We undertake our own interpretation of the statute here only because circumstances dictate we must. There is an active controversy before us, and we cannot simply press the pause button to await authoritative guidance from the courts. The appeal must be decided, one way or the other.

Our decision, however, applies only to federal agencies subject to the E.E.O.C.'s administrative complaint process for federal employees. It does not apply to any other type of employer, including private sector employers. And our decision does not bind any federal court.

I

The underlying facts to this appeal are basic and undisputed. The Complainant has worked for the Army for some time as a civilian IT specialist at Fort Riley, Kansas. Complainant is male, and for most of his tenure Complainant voluntarily used the Army's male-designated bathrooms and locker rooms without incident. In summer 2025, Complainant informed his local management he now identified as a woman, and he requested to use female-designated bathrooms and locker rooms. Management denied the request, relying on recent instructions from the President to ensure that "intimate spaces . . . are designated by sex and not identity." Exec. Order 14168, § 4(d).

Complainant filed a formal EEO complaint which the Army dismissed for failure to state a claim. Complainant appeals. We review de novo. *See* 29 C.F.R. § 1614.405(a).

II

We do not write on a blank slate. In 2015, a majority of the E.E.O.C.'s then-Commissioners held federal agencies "must allow [trans-identifying employees] access to the . . . [opposite sex] restroom." *Lusardi v. Dep't of the Army*, EEOC Appeal No. 0120133395, 2015 WL 1607756, at *8 (Apr. 1, 2015).

On bathrooms, *Lusardi's* reasoning was concerningly threadbare. No analysis allegedly was needed because, in the then-Commissioners' view, the core conclusion was undisputed: "the [Agency] acknowledges that Complainant's transgender status was *the* motivation for its decision to prevent Complainant from using the common women's restroom." *Lusardi*, 2015 WL 1607756, at *7 (emphasis in original). To sustain this conclusion, however, the Commissioners simply quoted the responsible management official, who explained that female employees would be uncomfortable with the Complainant using the women's bathroom because "despite the fact that [the Complainant] is conducting herself as a female, [the Complainant] is still basically a male, physically." *Id*. No other evidence was discussed.

As a basic matter of evidence, we cannot connect the dots to see how this statement would tend to "make it more or less probable," Fed R. Evid. 401(a), that

the Complainant's "transgender status" motivated the decision to exclude him from the women's bathroom. Quite the opposite. The preposition "despite" does a lot of work here. It is not, as the *Lusardi* Commissioners apparently believed, a synonym for because. By leading with "despite," the responsible management official averred that the Complainant's "transgender status" and conduct did *not* figure into the decision. Nor was the Complainant's "transgender status" and conduct the source of his female coworkers' discomfort. Rather it was the Complainant's sex, which was still immutably male, that was the sole reason his female coworkers did not want him in the women's bathroom.[2]

What the *Lusardi* Commissioners viewed as a smoking-gun was no more than a commonsense acknowledgment that changing one's conduct does not, and cannot, change one's sex. Not only is this too slender a reed to sustain the decision, it is no reed at all. We now undertake the fulsome analysis the *Lusardi* Commissioners eschewed.

III

For the sixty-plus years of Title VII's existence, it has been unerringly accepted that employers and other public-facing entities may lawfully maintain

[2] We have no occasion here to revisit whether it is unlawful to exclude a trans-identifying employee from the bathroom corresponding to their sex. Executive Order 14168 does not permit agencies to do so and the Agency in the instant appeal has not done so. We revisit *Lusardi* only insofar as it held it unlawful for an employer to exclude a trans-identifying employee from the *opposite-sex* bathroom.

single-sex bathrooms.[3] However, in recent years, it has been observed, prospectively, that if Title VII is eventually held to forbid employers from excluding trans-identifying employees from opposite-sex bathrooms, it must necessarily also forbid employers from excluding *non*-trans-identifying employees from opposite-sex bathrooms. *Wittmer v. Phillips 66 Co.*, 915 F.3d 328, 334 (5th Cir. 2019) (Ho, J., concurring) (predicting that single-sex bathrooms in the workplace are likely altogether unlawful if a court adopts a "[sex] blindness approach to Title VII"). In other words, it would be unlawful to even have men's and women's bathrooms in the first place. All bathrooms would be mixed-sex by law, and every employee would be required to perform bodily and other private functions in the presence of the opposite-sex.

But we think the contrapositive is also true, that if Title VII does *not* forbid an employer from excluding non-trans-identifying employees from opposite-sex bathrooms, then Title VII also does *not* forbid an employer from excluding trans-

[3] While no federal court has yet authoritatively addressed this issue under Title VII, a number of courts have acknowledged this assumption, in both cases involving Title VII and in cases addressing other statutes and Constitutional provisions. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 550 n.19 (1996) (noting that admitting women to a previously all-male military academy "would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements") (Equal Protection Clause challenge); *Chaney v. Plainfield Healthcare Ctr.*, 612 F.3d 908, 913 (7th Cir. 2010) ("[T]he law tolerates same-sex restrooms or same-sex dressing rooms, but not white-only rooms, to accommodate privacy needs.") (analyzing Title VII race discrimination claim); *Faulkner v. Jones*, 10 F.3d 226, 232 (4th Cir. 1993) ("[Society has given its] undisputed approval of separate public rest rooms for men and women based on privacy concerns.") (Equal Protection Clause challenge).

identifying employees from opposite-sex bathrooms. Put another way, if an employer can lawfully bar some men from using the women's bathroom (or some women from using the men's bathroom), then an employer can lawfully bar *all* men from using the women's bathroom (and *all* women from using the men's bathroom). A particular man's or woman's "self-identification" would be irrelevant. A man who identifies as a "transwoman" is still a man; a woman who identifies as a "transman" is still a woman. Both may be excluded from opposite-sex bathrooms as such.

Our task then is to thoroughly explain why a responsible federal court, if asked, would agree with our conclusion that under Title VII, federal agency employers may lawfully exclude men from the women's bathroom, and women from the men's bathroom. And once this is established, it follows that a responsible federal court would agree with our conclusion that under Title VII, federal agency employers may lawfully maintain the same rule—and equal treatment—for their trans-identifying employees.

IV

Title VII itself is silent on the topic of single-sex bathrooms, as it is silent on most of the more prosaic details of the workplace. Congress instead spoke in more general and arguably grander terms to target a wide gamut of workplace "discriminat[ion] . . . based on . . . sex." 42 U.S.C. § 2000e-2(a); *see also* § 2000e-16 (extending coverage to federal agency employers). Before we can even begin to

discuss bathrooms and intimate spaces specifically, we need to ascertain what "discrimination based on sex" actually means.

We start with the bedrock principle "that a legislature says in a statute what it means and means in a statute what it says[.]" *Conn. Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992). And the most natural and accurate way to understand what a statute says is to apply "the ordinary public meaning of its terms at the time of its enactment." *Bostock*, 590 U.S. at 654. The key terms here are "sex" and "discriminate."

Sex defined

Title VII does not define the word sex. And the Supreme Court has yet to fix its meaning under Title VII. In *Bostock*, the Court did encounter parties disputing the definition of sex under Title VII. 590 U.S. at 655. But the Court declined to resolve the dispute, concluding that "nothing in our approach . . . turns on the outcome of the parties' debate [over the definition of sex]." *Id*. To advance its decision, the Court assumed for the sake of argument that sex in Title VII "refer[red] only to the biological distinctions between male and female." *Id*.[4]

[4] The *Bostock* Court's assumption about the definition of "sex" under Title VII was consistent with the Supreme Court's view of "sex" in other contexts. *See, e.g.*, *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) ("[S]ex, like race and national origin, is an immutable characteristic determined solely by the accident of birth.") (Equal Protection Clause challenge).

The appeal we face cannot advance on assumptions alone and requires that we fix the definition of sex under Title VII. What the Court assumed in *Bostock*, we think is conclusive: sex, as the term is used in Title VII, "refer[s] to an individual's immutable biological classification as either male or female." Exec. Order 14168, § 2(a).

We base our conclusion on ordinary public meaning. The word sex is common in everyday English, and definitions from reputable dictionaries—contemporaneous with Title VII's passage—provide probative insight. The Eleventh Circuit, looking for the ordinary public meaning of the word circa 1972, has helpfully collected numerous entries. *Adams by & through Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 812 (11th Cir. 2022) (citing *Sex*, American Heritage Dictionary of the English Language (1976) ("The property or quality by which organisms are classified according to their reproductive functions."); *Sex*, American Heritage Dictionary of the English Language (1979) (same); *Sex, Female, Male,* Oxford English Dictionary (re-issue ed. 1978) (defining "sex" as "[e]ither of the two divisions of organic beings distinguished as male and female respectively," "female" as "[b]elonging to the sex which bears offspring," and "male" as "[o]f or belonging to the sex which begets offspring, or performs the fecundating function of generation"); *Sex,* Webster's New World Dictionary (1972) ("[E]ither of the two divisions, male or female, into which persons, animals, or plants are divided, with

reference to their reproductive functions."); *Sex, Female, Male,* Webster's Seventh New Collegiate Dictionary (1969) (defining "sex" as "either of two divisions of organisms distinguished respectively as male or female," "female" as "an individual that bears young or produces eggs as distinguished from one that begets young," and "male" as "of, relating to, or being the sex that begets young by performing the fertilizing function"); *Sex*, Random House College Dictionary (rev. ed. 1980) ("[E]ither the male or female division of a species, esp. as differentiated with reference to the reproductive functions.")).[5]

These entries unambiguously and unanimously acknowledge two sexes, male and female, each defined by its unique reproductive role and related innate physical characteristics.[6] We cannot find any contemporaneous definition to establish otherwise, let alone that sex is defined by non-biological distinctions such as self-identity or personal preference. Nor could we independently find any persuasive alternative usage in the contemporaneous English corpus to contradict the

[5] Dictionaries are not authoritative just because they say so. A given dictionary's persuasiveness rests on its methodology. The best dictionaries, we think, will infer meaning, including ordinary public meanings and non-ordinary specialized meanings, by surveying usage throughout the English corpus. Naturally some dictionaries will be better at this than others, and "courts must take care [when relying on dictionaries]." Antonin Scalia, Bryan A. Garner, *A Note on the Use of Dictionaries*, 16 Green Bag 2d 419, 422 (2013). The Eleventh Circuit's foray demonstrates adequate care by surveying multiple reputable dictionaries that define sex at its core, not its periphery.

[6] We do not here have occasion to apply Title VII to intersex individuals born with both male and female sex characteristics. We anticipate that these rare and unique circumstances can be evaluated on a case-by-case basis.

established dictionary definition. Under this definition, Complainant's sex is male, from the moment of his conception and continuing even after he began to identify as transgender.[7]

Discrimination defined

As with the word sex, Title VII does not define the word discrimination or any derivative. Thankfully, we do not need to peel back layers of dictionary definitions to arrive at a fixed meaning.[8] Per one of the Supreme Court's most recent decisions on Title VII, "The words 'discriminate against,' . . . refer to 'differences in treatment that injure' employees." *Muldrow v. City of St. Louis, Mo.*, 601 U.S. 346, 354 (2024) (quoting *Bostock*, 590 U.S. at 681). In other words, "[an anti-discrimination] statute targets practices that 'treat[] a person worse' because of sex or other protected trait.'" *Id.* (quoting *Bostock* at 658).

---

[7] Previously, the *Lusardi* Commissioners held, "[T]here is no cause to question that [someone]—who was assigned the sex of male at birth but identifies as female—*is* female." 2015 WL 1607756, at *8 (emphasis in original). The *Lusardi* Commissioners did not explain how they came to this paradoxical conclusion; they simply floated it as a self-evident axiom untethered from the statute's text and structure. In the absence of rigorous analysis, the *Lusardi* Commissioners gave the impression that they were simply foisting their personal policy preference as an ukase on the rest of the federal government. To ignore the ordinary public meaning of Title VII's text is not just wrong, it is deeply disrespectful both to Congress, who chose the text, and the President, who signed it. Our approach, in stark contrast, rests on Title VII's text. We reaffirm our role as Congress's and the President's instrument, bound to apply the law as it was passed and as it is interpreted by the courts. Until newly enacted law or authoritative court decision says otherwise, we must conclude that one's sex, under Title VII, is immutable and enduring.

[8] Dictionaries are most useful when defining literal concepts like sex, *supra*; less when applied to abstractions, like the concept of discrimination.

To determine whether "differences in treatment" have occurred, and whether they leave employees "worse" off, naturally invites a comparison of similarly situated employees. Indeed, similarly-situatedness has always been the keystone of the Court's discrimination jurisprudence. It figures in time-tested cases like *Yick Wo v. Hopkins*, where the Court addressed "unjust and illegal [race] discrimination between persons in similar circumstances." 118 U.S. 356, 374 (1886). And it continues to ground decisions of more recent vintage leading up to *Bostock*. *See, e.g., Alabama Dept. of Revenue v. CSX Transp., Inc.* (*CSX II*), 575 U.S. 21, 26 (2015) ("[A] tax discriminates . . . when it treats groups [that] are similarly situated differently without sufficient justification for the difference in treatment.") (quotations omitted); *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298 (1997) (noting that "[c]onceptually, of course, any notion of discrimination assumes a comparison of substantially similar entities") (footnote omitted).

And the focus on similarly-situatedness has proved essential to every substantive type of discrimination under federal law. *See, e.g., Flowers v. Mississippi*, 588 U.S. 284, 311–13 (2019) (criminal defendant deprived of right to a fair trial when state strikes jurors of one race but not similarly situated jurors of another); *Dawson v. Steager*, 586 U.S. 171, 175 (2019) (unlawful tax discrimination occurs when state favors state employees over similarly situated federal employees); *CSX II*, 575 U.S. at 26 (unlawful tax discrimination occurs when state favors water

carriers over similarly situated railroad); *Bank of Am. Corp. v. City of Miami, Fla.*, 581 U.S. 189, 194 (2017) (unlawful housing discrimination occurs when bank favors borrowers of one race over similarly situated borrowers of others); *Califano v. Goldfarb*, 430 U.S. 199, 204 (1977) (unlawful sex discrimination occurs when state favors female widows over similarly situated male widowers); *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 70 (1963) (dormant Commerce Clause violated when state favors in-state taxpayers over similarly situated out-of-state taxpayers); *L. T. Barringer & Co. v. United States*, 319 U.S. 1, 6 (1943) (in setting interstate tariffs, United States may not discriminate between similarly situated shippers). It follows then that discrimination under Title VII traces the same arc; it means to treat an employee less favorably than other similarly situated employees.

V

With these definitions in hand, we can more fully flesh out what is meant by Title VII's proscription of discrimination based on sex. It means that sex is determined by reproductive and related innate physical traits. And it means that discrimination based on sex occurs when "members of one sex are exposed to disadvantageous terms or conditions of employment to which [similarly situated] members of the other sex are not exposed." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) (quotations omitted).

On bathrooms, undoubtedly single-sex facilities differentiate between the sexes, at least in a literal sense. But the Supreme Court has long understood that Title VII "does not require either asexuality or androgyny in the workplace." *Oncale*, 523 U.S. at 80. And sex-based differences in treatment in the workplace are not disadvantageous or discriminatory when they reflect the "genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex." *Id.*

More fundamentally, men and women are not *similarly situated* when it comes to bathrooms and other intimate spaces, including locker rooms, changing facilities, showers, sleeping quarters, etc. To start, we need not exhaustively list all the circumstances when men and women *are* similarly situated, either in life generally or in the workplace. In the run of cases, they are. Today, it is the rule, not the exception, that "the sex characteristic . . . bears no relation to [an individual's] ability to perform or contribute to society." *Frontiero*, 411 U.S. at 686; *see also Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989) (plurality opinion) ("Sex . . . [is] not relevant to the selection, evaluation, or compensation of employees."). The market no longer broadly operates in terms of women's work or jobs suited only to men.[9] No more may employers make "overbroad generalizations based on sex which

[9] Except in the "extremely narrow" case where sex is a "bona fide occupational qualification." *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977) (applying 42 U.S.C. § 2000e-2(e)).

are entirely unrelated to any differences between men and women or which demean the ability or social status of [one sex over the other].” *Parham v. Hughes*, 441 U.S. 347, 354 (1979) (considering sex-discrimination under the Equal Protection Clause).

But *often* similarly situated is not *always* similarly situated. “Physical differences between men and women . . . are enduring: The two sexes are not fungible.” *United States v. Virginia*, 518 U.S. 515, 533 (1996) (Ginsburg, J.). And separating men and women is not invidious or discriminatory when it “realistically reflects the fact that the sexes are not similarly situated in certain circumstances.” *Michael M. v. Superior Ct. of Sonoma Cnty.*, 450 U.S. 464, 469 (1981). Those “certain circumstances” very often depend on the innate physical differences between men and women. *C.f.*, *Virginia*, 518 U.S. at 533.

In *Michael M.*, for instance, the Court relied on those innate physical differences to uphold a statutory rape law that exclusively protected young women. The Court observed, “We need not be medical doctors to discern that young men and young women are not similarly situated with respect to the problems and the risks of sexual intercourse. Only women may become pregnant, and they suffer disproportionately the profound physical, emotional and psychological consequences of [underage] sexual activity.” *Id.* at 471–72.

In another example, the Court found, “Fathers and mothers are not similarly situated with regard to the proof of biological parenthood.” *Tuan Anh Nguyen v.*

I.N.S., 533 U.S. 53, 63 (2001). Only a mother can bear a child, and the act alone establishes the fact of her biological parenthood. *Lehr v. Robertson*, 463 U.S. 248, 260 n.16 (1983). A father, because of his different reproductive role, must necessarily resort to different means to prove his biological parenthood. *Id*. Differential treatment that follows from these different biological functions would not be discrimination within the ordinary meaning of the word.

In this vein, we restate the obvious: because of their innate physical differences, men and women are not similarly situated when it comes to using bathrooms and other intimate spaces in the workplace.

Those physical differences don't just functionally impact how men and women use these spaces, they also establish a powerful expectation that those functions be undertaken in private without the opposite sex present. It should go without saying that "[t]he desire to shield one's unclothed figure from view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity." *York v. Story*, 324 F.2d 450, 455 (9th Cir. 1963); *see also Doe v. Luzerne Cnty.*, 660 F.3d 169, 177 (3d Cir. 2011) ("[Female deputy sheriff] had a reasonable expectation of privacy [when disrobed], particularly while in the presence of members of the opposite sex."); *Fortner v. Thomas*, 983 F.2d 1024, 1030 (11th Cir. 1993) (recognizing a "constitutional right to bodily privacy because most people have 'a special sense of privacy in their genitals, and

involuntary exposure of them in the presence of people of the other sex may be especially demeaning and humiliating'" (quoting *Lee v. Downs*, 641 F.2d 1117, 1119 (4th Cir. 1981))).[10]

This vital privacy interest did not evaporate in the wake of Title VII's passage. Rather, "[t]he lower federal courts . . . have consistently recognized that privacy interests may justify sex-based requirements [in the workplace]." *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 219 n.8 (1991) (White, J., concurring) (collecting cases). On bathrooms, for instance, Title VII does not disturb the commonsense expectation that a washroom attendant should be of the same sex as the customers and employees using the washroom they are attending. *Norwood v. Dale Maint. Sys., Inc.*, 590 F. Supp. 1410, 1421 (N.D. Ill. 1984).

As a rejoinder, it has been argued that these privacy interests are immaterial when it comes to bathrooms because of lockable stalls. Outside the Title VII context, the Fourth Circuit, for one, believes a lockable stall is all it takes to cancel out the

[10] Courts have even acknowledged that prisoners, who generally have more limited privacy expectations, still have a legitimate interest in not being exposed to members of the opposite sex in intimate circumstances. *See Robino v. Iranon*, 145 F.3d 1109, 1111 (9th Cir. 1998) (Title VII did not prohibit state prison from excluding male prison guards from posts monitoring female inmates in bathrooms, showers, and other intimate spaces); *Jordan v. Gardner*, 986 F.2d 1521, 1530–31 (9th Cir. 1993) (en banc) (clothed searches of prisoners, when performed by guards of the opposite sex, constituted cruel and unusual punishment); *Cornwell v. Dahlberg,* 963 F.2d 912, 916–17 (6th Cir. 1992) (male inmate strip-searched before female guards raised a valid fourth amendment privacy claim).

government's normally compelling interest in protecting the privacy of school-age students. *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 613–14 (4th Cir. 2020), *as amended* (Aug. 28, 2020) (holding that when bathrooms are equipped with lockable stalls, schools are required to allow trans-identifying boys to use girl's bathroom). This is a narrow and mechanical view, and what a court thinks about schools is not a reliable indicator of what matters in the workplace. This view is not compatible with Title VII or with the realities of the modern workplace.

For starters, we are not just looking at bathrooms. The claim before us also includes shared spaces like locker rooms, where lockable stalls are not prevalent. And in any event, bathrooms are not used exclusively for excretory functions performed behind a stall door. Workplace bathrooms often provide employees a space to change clothes, address medical needs, or undertake other personal hygiene. The interest in single-sex privacy is especially heightened for women attending to hygiene related to menstruation, pregnancy, or lactation. No man will ever experience a period, bear a child, or nurse an infant, and we do not think it improper that female employees would expect to manage their unique needs in a space accessible only to other women.

The weight of this analogous precedent unquestionably shows that women have a vital privacy interest in using a workplace bathroom or similar intimate space outside the presence of men. And men have a vital privacy interest in using a

workplace bathroom or similar intimate space outside the presence of women. Because their interests have different polarities, men and women cannot be similarly situated in this instance. To separate men and women in the workplace under these circumstances is not discriminatory under Title VII.[11]

VI

Having established that under Title VII employers may in general maintain single-sex bathrooms and similar intimate spaces, we ask whether the statute would compel them to make a specific exception for trans-identifying employees. We think no.

Bostock is the natural starting point for this part of the analysis. As already noted, under *Bostock*, it is now established that a Title VII-covered employer may not fire or refuse to hire someone because they are trans-identifying. 590 U.S. at 681. Under *Bostock*, this constitutes "discrimination . . . because of sex." *Id.* Crucially, the rule announced in *Bostock* is one of equal treatment. The rule is violated "if changing the employee's sex would have yielded a different choice by the

[11] We have assumed, and Complainant has given us no reason to think otherwise, that the single-sex bathrooms provided by the Agency here are of substantially equal quality. It remains the case that the intimate facilities offered to one sex cannot be of such material inferiority that they impose an "unequal burden" on the members of the sex using those facilities. *Accord Jespersen v. Harrah's Operating Co., Inc.*, 444 F.3d 1104, 1110 (9th Cir. 2006) (en banc) (upholding employer's sex-specific dress and grooming code that did not impose unequal burdens); *see also Carroll v. Talman Fed. Sav. & Loan Ass'n of Chi.*, 604 F.2d 1032 (7th Cir. 1979) (Title VII violated when female employees were required to wear "clearly identifiable uniform[s]" while male employees were allowed to wear "normal business attire").

employer." *Id.* at 659–60. The *Bostock* test, when applied to Complainant's circumstances, does not advance his case. The employer in *Bostock* treated its trans-identifying employees *differently* than non-trans-identifying employees. The Agency here treats Complainant and other trans-identifying employees *the same* as non-trans-identifying employees. Changing Complainant's sex from male to female would not change the result; if Complainant were a woman asking to use the opposite-sex bathroom, the Agency still would have said no. And the same result follows if Complainant's trans-identifying status is the only variable changed. If a non-trans-identifying man asked to use the women's bathroom, the Agency surely would have rebuffed the request. That the Agency gives the same answer to male and female employees alike, and to trans-identifying and non-trans-identifying employees alike, only goes to show its evenhandedness.

At bottom, Complainant seeks an interpretation of Title VII granting most-favored status to trans-identifying employees. He claims entitlement to more-than-equal treatment compared to his coworkers. He asserts that they must continue to follow the established rules of workplace conduct by using bathrooms corresponding to their sex while he is exempted. We can find no support for such special treatment anywhere in the text of Title VII or in any precedential court decision.

It is not as if Congress does not know how to grant most-favored status under Title VII and similar statutes; it has for religion and pregnancy. *See E.E.O.C. v.*

Abercrombie & Fitch Stores, Inc., 575 U.S. 768, 775 (2015) ("Title VII does not demand mere neutrality with regard to religious practices—that they be treated no worse than other practices. Rather, it gives them favored treatment[.]"); 42 U.S.C. § 2000e(j) (entitling religious employees to reasonable accommodation for their beliefs and practices); 42 U.S.C. § 2000gg-1 (entitling female employees to reasonable accommodation for pregnancy and related conditions). That Congress has declined to bestow most-favored treatment for trans-identifying employees under Title VII is not an open invitation for us to usurp the legislative function and manufacture it. Under *Bostock*, the Court made it clear that trans-identifying employees are entitled to equal treatment in the workplace, no more and no less. This means still following workplace rules that are applicable to all employees, including a rule to use the bathroom corresponding to one's sex.

VII

Critics of today's opinion may attempt to argue that excluding trans-identifying individuals from opposite-sex bathrooms would turn the civil rights clock back to a time when whites-only signs were ubiquitous on bathroom doors. *See, e.g., Adams*, 57 F.4th at 860 (Pryor, J., dissenting) (equating single-sex bathrooms in schools to race-segregated bathrooms). However, that an employer is permitted to maintain single-sex bathrooms in no way opens the door to segregated bathrooms based on other protected characteristics, including race. As we have

carefully explained, single-sex bathrooms are permissible only because the sexes are not similarly situated in this specific context. Again, this is because "[p]hysical differences between men and women . . . are enduring." *Virginia*, 518 U.S. at 533. In contrast, physical distinctions between individuals of different races are not enduring; they are literally skin-deep. When it comes to bathrooms, there can be no doubt that members of different races *are* similarly situated. To separate bathrooms by race would serve "no legitimate overriding purpose independent of invidious racial discrimination." *Loving v. Virginia*, 388 U.S. 1, 11 (1967). But the same cannot be said for separating bathrooms by sex: "[a] sign that says 'men only' looks very different on a bathroom door than a courthouse door." *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 468–69(1985) (Marshall, J., concurring in part). Whereas race-segregated bathrooms promote naked favoritism for one race over another, single-sex bathrooms do "not . . . favor one sex over another, but [rather] . . . protect the privacy of *both* sexes." *Wittmer*, 915 F.3d at 334 (Ho, J., concurring) (emphasis added). Single-sex bathrooms continue to provide trans-identifying employees with the same benefits and privacy protections as their non-trans-identifying coworkers. This is equality, not bigotry.

VIII

Accordingly, we affirm the Agency's dismissal. Within the EEOC's administrative complaint process, that an employee is excluded from an opposite-

sex bathroom or similar intimate space does not by itself state a plausible claim for relief under Title VII.

STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (M1125)

The Commission may, in its discretion, reconsider this appellate decision if Complainant or the Agency submits a written request that contains arguments or evidence that tend to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or
2. The appellate decision will have a substantial impact on the policies, practices, or operations of the agency.

Requests for reconsideration must be filed with EEOC's Office of Federal Sector (OFS) **within thirty (30) calendar days** of receipt of this decision. If the party requesting reconsideration elects to file a statement or brief in support of the request, **that statement or brief must be filed together with the request for reconsideration**. A party shall have **twenty (20) calendar days** from receipt of another party's request for reconsideration within which to submit a brief or statement in opposition. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B (Aug. 5, 2015).

Complainant should submit their request for reconsideration, and any statement or brief in support of their request, via the EEOC Public Portal, which can be found at https://publicportal.eeoc.gov/Portal/Login.aspx. Alternatively, Complainant can submit their request and arguments to the Director, Office of Federal Sector, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, a complainant's request to reconsider shall be deemed timely filed if OFS receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

An agency's request for reconsideration must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Either party's request and/or statement or brief in opposition must also include proof

of service on the other party, unless Complainant files their request via the EEOC Public Portal, in which case no proof of service is required.

Failure to file within the 30-day time period will result in dismissal of the party's request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. **Any supporting documentation must be submitted together with the request for reconsideration.** The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(f).

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0124)

You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by their full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. If you file a request to reconsider and also file a civil action, **filing a civil action will terminate the administrative processing of your complaint**.

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:

RAYMOND WINDMILLER

Digitally signed by RAYMOND WINDMILLER
Date: 2026.02.26 13:53:34 -05'00'

Raymond Windmiller
Executive Officer
Executive Secretariat

February 26, 2026
Date