

The Shower's Return: A Serial Essay on the LGBT Title VII Sex Discrimination Cases, Part III

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I. THE SHOWER TODAY: A CLOSER LOOK¹

In important respects, the bookended versions of the shower and locker room scene that John Bursch sketches for the Supreme Court give and receive meaning from one another.² Read together, Bursch's audience is supposed to know that "[g]ender identity," which is a "broad concept," includes not only men who "identif[y] as . . . wom[e]n" and who look and dress like women, but also "male employee[s]" who "identif[y] as . . . wom[e]n," but do not dress or look like them.³ It's these trans women, described by Bursch as not "dress[ing]

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¹ Earlier parts of this work have been published separately as Marc Spindelman, *The Shower's Return: A Serial Essay on the LGBT Title VII Sex Discrimination Cases, Part I*, 81 OHIO ST. L.J. ONLINE 81 (2020), and Marc Spindelman, *The Shower's Return: A Serial Essay on the LGBT Title VII Sex Discrimination Cases, Part II*, 81 OHIO ST. L.J. ONLINE 87 (2020) [hereinafter Spindelman, *The Shower's Return: Part II*].

² For description, see Spindelman, *The Shower's Return: Part II*, *supra* note 1, at 97–99.

³ Transcript of Oral Argument at 45, *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, No. 18-107 (Oct. 8, 2019), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/18-107_4gcj.pdf [<https://perma.cc/8X32-Y5GT>] [hereinafter Harris Funeral Homes Transcript].

as . . . wom[e]n, [but] look[ing] like . . . m[e]n,” who Bursch is going to be talking about.⁴

In context, Bursch’s references to a trans woman looking like a man function in a way that enables a subtle allusion to the fact that Aimee Stephens was only “intend[ing] to have sex reassignment surgery” at the time she was fired.⁵ Bursch’s audience cannot possibly miss or fail to understand the point. Stated directly, Bursch’s sketches involve a trans woman who has not had “sex reassignment surgery” who is “showing up in the shower and the locker room” not “dress[ed] as a woman,” indeed, not dressed at all, but “look[ing] like a man.”⁶ “Looking like a man” in this setting carries double meaning. It’s about being “male” in appearance or in “look,” as well as being capable of casting a “male” gaze. The leading meaning helps Bursch’s normative audience, itself predominantly, if not exclusively, non-trans, not to mistake that this “man” Bursch is describing, “who identifies as a woman,” is still “a man” in an embodied sense—with a penis. From a pro-trans point of view, this kind of focus on the trans body is itself a sure sign that a very serious problem is afoot.

A larger narrative involving this “male employee who identifies as a woman” who shows up naked in the shower and locker room emerges from situational clues that Bursch’s minimalist sketching provides. Starting with the “overnight shelter,” Bursch identifies a place where women who have just been “raped, trafficked and abused” seek sanctuary.⁷ The women arrive at the “overnight shelter” post-trauma, likely post-traumatically, with injuries presumably inflicted by men, but only to find themselves meeting a counselor described by Bursch as a “man who identifies as a woman” but who “doesn’t

⁴ *Id.* This presentation of “the bathroom scenario” only involves these trans women using the ladies’ shower and locker room. It does not engage the alternative prospect of them being forced to use the men’s shower and locker room. For some related reflections focused on bathrooms, see TRANSGENDER LAW CTR., *PEEING IN PEACE: A RESOURCE GUIDE FOR TRANSGENDER ACTIVISTS AND ALLIES* 3 (2005), <http://transgenderlawcenter.org/wp-content/uploads/2012/05/94930982-PIP-Resource-Guide.pdf> [<https://perma.cc/MK35-LZSV>] (“Safe bathroom access is not a luxury or a special right. Without safe access to public bathrooms, transgender people are denied full participation in public life. . . . For many transgender people, finding a safe place to use the bathroom is a daily struggle. Even in cities or towns that are generally considered good places to be transgender, . . . many transgender people are harassed, beaten and questioned by authorities in both women’s and men’s rooms.”); *id.* at 4 (“Of course, some transgender people are able to use the bathroom of their own choosing pre- or post-transition with relative ease. . . . For other transgender people this is not the case for a variety of reasons. Some people do not ‘pass’ well. . . . Others do not necessarily identify as male or female and are harassed in both the men’s and the women’s bathroom.”).

⁵ *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 568 (6th Cir. 2018), *cert. granted in part*, 139 S. Ct. 1599 (2019) (mem.) (citation omitted).

⁶ *Id.*; Harris Funeral Homes Transcript, *supra* note 3, at 45.

⁷ *Id.* at 29.

dress as a woman,” but “looks like a man.”⁸ Within this fictional story, crossing the shelter’s threshold means these women will be under this “man’s” authority. Under the circumstances, submission to “male” authority like this might be painful, even traumatizing, if these women are fleeing from abuses of socially male power that has injured them. Worse is in store: For this person Bursch represents as a “man” is about to abuse “his” authority and these women when “he” exercises the employment discrimination rights involved in the case, which, according to Bursch, would afford the counselor the legal right to share the facilities—bathroom, shower, and locker room—with these recently injured women.

If, in this narrative, it is unexceptionable that a trans counselor might wish to relieve herself during the workday, it is not at all apparent why she would want or ever need to be showering or in a locker room in a state of undress with her and the shelter’s clients. How this conduct, if it ever were to come to pass, would synch with relevant licensure rules governing interactions between overnight shelter counselors, when duly professionally licensed, and shelter clients is not, of course, discussed.⁹ Nor did any Justice inquire about it. In this story what is important—and what is mentioned—is only that this counselor is

⁸ *Id.* at 29, 45. For perspective on who perpetrates their injuries, see Brief for Military Spouses United as Amici Curiae Supporting Petitioner at 4, R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC (Aug. 23, 2019) (No. 18-107) (citing *The Downtown Soup Kitchen D/b/a Downtown Hope Ctr. v. Municipality of Anchorage*, Anchorage Equal Rights Comm’n, No. 3:18-CV-00190-SLG, 2019 WL 3769623, at *1 (D. Alaska Aug. 9, 2019) (noting that “[m]ost of the women at the Hope Center shelters have escaped from sex trafficking or been abused or battered, primarily at the hands of men”)). Although Bursch’s depiction involves a trans counselor at the “overnight shelter,” nothing he tells the Supreme Court flags the rates of anti-trans violence and injury, particularly how regularly trans people are victims and survivors of rape, trafficking, and abuse. Indications are found in SANDY E. JAMES ET AL., NAT’L CTR. FOR TRANSGENDER EQUALITY, *THE REPORT OF THE 2015 TRANSGENDER SURVEY* 14–17, 133–34, 153–55, 176, 186, 191–93, 197–209 (Dec. 2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf> [<https://perma.cc/MH4C-824N>] [hereinafter 2015 TRANSGENDER SURVEY REPORT] (tracking various aspects of sex-based injuries); Anne E. Fehrenbacher, *Transgender People and Human Trafficking: Intersectional Exclusion of Transgender Migrants and People of Color from Anti-Trafficking Protection in the United States*, 6 J. HUM. TRAFFICKING 182, 186–91 (2020) (discussing trans people and human trafficking); and Sarah M. Peitzmeier et al., *Development of a Novel Tool to Assess Intimate Partner Violence Against Transgender Individuals*, 34 J. INTERPERSONAL VIOLENCE 2376, 2387 (2019) (noting statistics showing comparative rates of intimate partner violence). See also *Responding to Transgender Victims of Sexual Assault*, OFF. FOR VICTIMS CRIME, https://www.ovc.gov/pubs/forgel/sexual_numbers.html [<https://perma.cc/L9NN-HTTP>].

⁹ For preliminaries on pro-LGBT, including pro-trans, practices for domestic violence programs, see generally THE NETWORK/LA RED, *OPEN MINDS OPEN DOORS: TRANSFORMING DOMESTIC VIOLENCE PROGRAMS TO INCLUDE LGBTQ SURVIVORS* (2011), http://www.ncdsv.org/images/TheNetworkLaRed_OpenMindsOpenDoors_2010.pdf [<https://perma.cc/7H7Z-7QWF>] [hereinafter, THE NETWORK/LA RED, OPEN MINDS OPEN DOORS]. Thanks to Aaron Eckhardt for introducing me to this resource.

there in the shower and locker room. Presumably the counselor is there as a matter of legal entitlement under federal antidiscrimination law.

So there this counselor is, this person Bursch describes as a “man” who “identifies as a woman,” naked in the shower and locker room “look[ing] like a man” while the women in that space with “him,” are naked, too.¹⁰ If the counselor’s professional authority is coded male, as it may be, given how hierarchically arranged professional authority can and regularly does work, the central point here is that the counselor’s authority is distinctively embodied. This authority isn’t simply gendered male, it is also vitally sexualized that way, not least because of what is figured as the likeness of the counselor’s body to the reasonably presumably male body or bodies that sexually harmed the women in the shelter through acts of rape, trafficking, and maybe abuse, itself regularly, though not necessarily definitionally, sexualized.¹¹ These sexually injured women’s bodies facing the traumatic sight of what Bursch portrays as their “male” counselor and “his” body in the shower and locker room makes this a scene of sexual injury from which the cis-women are figured as hostage-like, powerless to escape.¹²

¹⁰ Harris Funeral Homes Transcript, *supra* note 3, at 29, 45; *see also infra* note 12. To be very clear, “naked” is not a term that Bursch uses. It is, rather, the understanding that emerges from the larger narrative his argument unfolds, with its account of bodies in showers and locker rooms.

¹¹ The locution in the sentence recognizes that not everyone understands gender to be sexual. For that view, see, for example, CATHARINE A. MACKINNON, *Desire and Power* (1983), in *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 46, 50 (1987) (“[G]ender is sexualized. . . . [T]he eroticization of dominance and submission creates gender . . .”). On the relation between domestic violence and sexual violence, see Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 *SIGNS* 635, 651 n.36 (1983) (“Battery of wives has been legally separated from marital rape not because assault by a man’s fist is so different from assault by a penis. Both seem clearly violent. I am suggesting that both are also sexual.”).

¹² For thinking in the briefing that helps frame the scene as involving sexual injury, see Brief for Ryan T. Anderson as Amicus Curiae Supporting Employers at 37, *Altitude Express, Inc. v. Zarda*; and R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, Nos. 17-1623, 18-107 (Aug. 23, 2019) [hereinafter *Anderson Amicus Brief*] (“This privacy concern is particularly acute for victims of sexual assault, who testify that seeing nude male bodies can function as a trigger.”). *Accord* Brief for Defend My Privacy et al. as Amici Curiae Supporting Employers at 6–8, *Bostock v. Clayton Cty.*; *Altitude Express, Inc. v. Zarda*; and R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, Nos. 17-1618, 17-1623, 18-107 (Aug. 21, 2019) [hereinafter *Defend My Privacy Amicus Brief*] (noting effects of trauma and the importance of “safe spaces,” before observing that “[s]urvivors report that seeing a person of the same sex as their assailant is a common trigger”). In a detectably escalated register, see Brief for Professor W. Burlette Carter as Amicus Curiae Supporting Petitioner at 26, R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, No. 18-107 (Aug. 22, 2019) (“And sometimes trans people *are* perpetrators. I will offer only one example although there are others. A group of women are suing a shelter in Fresno for making them group shower with a trans woman with male genitalia who, they allege, repeatedly leered at and harassed them.”). *See generally* *McGee v. Poverello House*, No. 1:18-cv-00768-LJO-SAB, 2019 WL

This account of the shower and locker room scene is clarified and extended in that “other point on the restroom scenario” Bursch offers to the Court at the end of his oral argument.¹³ In this setting, the trans woman’s “male” authority has nothing to do with any professionalized authority she may have, but is attributable strictly to how Bursch characterizes her as a “female-identified” “male,” who has turned up, once again, in the ladies’ shower and locker room. This “male” authority functions here in classic male-dominant form, just like in the “overnight shelter’s” shower and locker room scene: “He” is situated over and above the women “he” finds there, women who, in this retelling, are not expressly identified as victims or survivors of rape, trafficking, or abuse.¹⁴ Indeed, in producing this rendering of the “restroom scenario,” Bursch doesn’t even quite get to saying cis-women are in the shower or locker room with the trans woman he’s describing being there.

The toxic logic of this moment only partially corresponds to the notions of sex that the public originally understood back in 1964, though sex here is in one sense basically binaristic: men and women are the only two sexes and everyone properly belongs either to one or the other, even if trans women are somehow figured as wishing to be on the other side of the sex divide and so in a distinctive sense “straddling” it. Sex is also biologicistic in this scene in the sense that where anyone sits in relation to the sex-difference divide is finally a matter of “natural” morphology, and nothing else. At the same time, sex here is bound up with understandings of it that echo various ideologies of male dominance.¹⁵ It’s the person identified as the “man” in this setting who possesses full control over the scene. It’s the person identified as the “man” in this setting who’s sexually dominating the women under “his” control. It’s the person identified as the “man” in this setting who wills and decides what does or does not happen to those women. “Man” and “woman” here are both nouns as well as the effects of embodied relational dynamics: they are who they are because of their bodies, and they become who they are because of who here is doing what to whom.¹⁶

5596875 (E.D. Cal. Oct. 30, 2019); Defendants Motion for Summary Judgment, *McGee v. Poverello House*, No. 1:18-cv-00768-LJO-SAB, 2019 WL 5596875 (E.D. Cal. Oct. 30, 2019). Importantly, Justice Sonia Sotomayor’s comments during oral argument spotlight the prospects of seeing this scene as a kind of prison and prison guard situation. *See Harris Funeral Homes Transcript*, *supra* note 3, at 36 (describing Bursch’s example of the overnight shelter as “very powerful” and asking whether it “isn’t . . . exactly like *Dothard* [*v. Rawlinson*, 433 U.S. 321 (1997)]?”).

¹³ *Harris Funeral Homes Transcript*, *supra* note 3, at 45.

¹⁴ *Id.* at 29, 45.

¹⁵ *See, e.g., Obergefell v. Hodges*, 576 U.S. 644, 659–60 (2015) (mentioning male dominance in relation to the doctrine of coverture); *Kirchberg v. Feenstra*, 450 U.S. 455, 456 (1981) (upholding Louisiana’s “Head and Master” law); WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND: A FACSIMILE OF THE FIRST EDITION OF 1765–1769, at 421–33 (1979) (discussing coverture, including the relation of “baron” and “feme”).

¹⁶ This helps explain the otherwise perhaps curious-seeming way that conjugal sexuality at times surfaced in the briefing in relation to notions of “sex,” where sex was both

These elements of male dominance inscribed on the trans female body are transphobic in no small part in virtue of their unmistakable and persistent misgenderings. They are also significantly transphobic in the related, dramatic sense that the scenes—which entail a moral lesson about who trans women, or these trans women anyway, are—portray trans women who have not had sex reassignment surgery as villains akin to rapists, traffickers, and abusers, if distinctive from other “men” who do those bad things because they are sexual-injuring hostage-takers who, consistent with Bursch’s understanding of sex, are themselves hostage to their own biological sex, from which they wish to, but cannot ever escape.¹⁷

Formally operating as part of the defense against the claim that anti-trans discrimination is sex discrimination, this transphobia is itself wholly sex-dependent. It involves a straightforward case of “but-for” sex discrimination, making it a spectacular failure as a valid, non-sex-discriminatory argument ventured in the context of a Title VII sex discrimination proceeding.¹⁸ Recognize that this person depicted as a “*man* who identifies as a woman” is a “*woman* who identifies as a woman,” and the shower and locker room scene collapses entirely as a problematic.¹⁹ The scene then becomes what, outside of its repeated representation as an inevitable scene of sexual abuse, it otherwise might have been imagined to be: just another uneventful day in the ladies’ shower and locker room where women, cis and trans, shower and change and go on their way. Bursch’s alternative offers a peephole into a sex-based, anti-trans dystopian nightmare that some cis-men and cis-women especially may

a description of certain types of persons and a specific type of erotic action. *See, e.g.*, Anderson Amicus Brief, *supra* note 12, at 9 (“conjugal marriage”); *id.* at 19–20 (“conjugal sexuality,” “conjugal union,” and “conjugal marital union”); *id.* at 20 (“one-flesh union”); *id.* at 21 (“a man and a woman’s ability to unite as one flesh”); *id.* at 23 (“marital sexuality”); *id.* at 24–25 (“conjugal marriage”); *id.* at 30 (“conjugal marriage”); *id.* at 32 (“conjugal understanding of marriage,” and “conjugal marriage”); *id.* at 33 (“conjugal union of husband and wife,” and “the capacity that a man and a woman have to unite as one flesh”); *id.* at 35 (“conjugal marriage”); *id.* at 36 (“conjugal marriages,” and “conjugal understanding of marriage”). The logic of grammar like this is famously captured by Catharine A. MacKinnon: “Man fucks woman; subject verb object.” Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS 515, 541 (1982).

¹⁷ For a point of reflection on some of these nefarious social meanings and Title VII, see Robin Dembroff et al., Essay, *What Taylor Swift and Beyoncé Teach Us About Sex and Causes*, 169 U. PA. L. REV. ONLINE 1, 8 (2020) (“The tangle of counterfactual thought experiments is not mysterious at all once we recognize that the statuses that Title VII forbids from being the basis of discrimination . . . consist in memberships in social categories—categories brimming with often nefarious social meanings. It is, in fact, the *purpose* of antidiscrimination law to revise these nefarious meanings, and to protect individuals from discrimination on the basis of these meanings.”).

¹⁸ *City of L.A., Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978) (“Such a practice does not pass the simple test of whether the evidence shows ‘treatment of a person in a manner which but for that person’s sex would be different.’”) (citation omitted).

¹⁹ Harris Funeral Homes Transcript, *supra* note 3, at 29 (emphasis added); *see also id.* at 45.

find irresistibly and inalterably vexing, a call to arms in opposition to what is portrayed as trans criminality.

Seen for what it is, the shower and locker room scene, its own normativities bound up with certain pornographic conventions, raises elemental questions about whose sexual investments it conforms to and satisfies. At the same time, and equally significantly, it is also deeply and conventionally sexist in its depictions of cis-women. These women and their bodies exist in this imaginary space as helpless, just like the women and their bodies recently arrived at the “overnight shelter” after having been raped, trafficked, and abused by men.²⁰ All cis-women in this setting are eggshell vulnerable in a nonnegotiable way insofar as they’re inevitably harmed by being in the inescapable presence of this trans woman, misgendered as a “man.”²¹ Women here are imaginary figures with no independent interiority or subjectivity.²² Their bodies are conjured in this scene as fawnlike and pawnlike, strategically and fictively placed in close and confined proximity to a naked trans woman in the shower or locker room. In this fantasy, these hapless cis-women witness the trans female body, and the way Bursch’s depiction works is that the witnessing—itself perhaps suggestive of other, more horrific sexual possibilities that are also not directly spoken of—is itself so awful it constitutes its own phallically oriented sexual harm: rape-like, trafficking-like, abuse-like. Bursch’s normatively cis audience—first the Supreme Court Justices, then others—is invited to make of these women their own marionettes, revealing them to be pure objects of individual and collective mental projection, serving as figures in a game in which trans rights and cis-women’s rights, trans desires and cis-women’s needs, are set up as naturally antagonistic to one another, trans women being fictionalized as cis-women’s sexual enemies.

The structure of this imaginary scene is, unsurprisingly, designed to turn at least the five conservative male Justices against the pro-trans sex discrimination claim before the Court, in ways that may make the representation, however inaccurately, seem conventionally homosocial: one man (Bursch) triangulating with other men (the five conservative male Justices) about what another person, figured by Bursch as a “man who identifies as a woman,” might do.²³ The stakes here involve who will get and keep control over the bodies of vulnerable

²⁰ *Id.* at 29.

²¹ *Id.* at 29–30, 45.

²² This perspective has a history that the Supreme Court’s wider sex equality doctrine responds to, and it thus reinforces the idea that the argument being advanced against trans sex discrimination rights is but another attempt that lines up with political and legal projects that, denying women’s subjectivities, agency, autonomy, and power, is against the very women the argument claims to protect. The point is discussed more fully below, *infra* text accompanying notes 24–27, 42.

²³ Harris Funeral Homes Transcript, *supra* note 3, at 29, 45. On homosociality, EVE KOSOFSKY SEDGWICK, *BETWEEN MEN: ENGLISH LITERATURE AND MALE HOMOSOCIAL DESIRE* (1985), remains fundamental.

women.²⁴ The impulses the scene is thus suited to trigger are romantic, chauvinistic, and protectionist.²⁵ It offers cis-men the chance to be the white knights who save these imaginary women in need of valiant men to save them from that other “man’s” criminal acts. Bursch is arguing, of course, that that act of heroism can and should come in the nick of time—in the form of an anti-trans ruling in the case by the U.S. Supreme Court.²⁶

Nor is that all. The salvific impulses associated with romantic paternalism, readily mobilized against trans and gay interests, are also subject to being satisfied by a return to now-widely-discredited chauvinistic, sex-protectionist logics that would counsel removing women from possible public zones of workplace danger altogether. Here, the sensibilities of the shower and locker room scene, although specifically a fantasy nightmare of trans female sex abuses of cis-women, converge with the logics of separate spheres ideology that long and broadly kept women from coming under the authority of the wrong men in public and private spaces, barring them unfettered access to the public world of work on the same basic terms as men.²⁷

Needless to say, a call for the reconstitution of separate spheres ideology—either in whole or only in part—is not a tenable argument in a case involving the meaning of Title VII’s sex discrimination ban, itself a nail in separate spheres ideology’s coffin. Unremarkably, Bursch—having generated this thinking about the shower and locker room scene—declines to draw out its logic in ways that make the point overtly, which saves Bursch from having to square it with the pro-cis-woman protectionist vision of Title VII’s sex discrimination ban that his position maintains it involves.

Just so, the logic of separate spheres that travels with the shower and locker room scene remains available as a rough template for a range of interpretive moves that would drain Title VII’s sex discrimination ban of its present-day content. It could do this maximally, by making Title VII into the “joke” its

²⁴ Harris Funeral Homes Transcript, *supra* note 3, at 29–30, 45.

²⁵ See Brief for Appellant at 20–21, *Reed v. Reed*, 404 U.S. 71 (1971) (No. 70-4) (quoting *Sail’er Inn, Inc. v. Kirby*, 485 P.2d 529, 541 (Cal. 1971)) (“The pedestal upon which women have been placed has all too often, upon closer inspection, been revealed as a cage.”); see also *Muller v. Oregon*, 208 U.S. 412, 422 (1908) (noting, in the context of a play to arguments from sex difference and separate spheres ideology, the justifications for legislation regarded as legitimately paternalistically protecting women from “the greed as well as the passion of man” “not merely [for] her own health, but [also] the well-being of the race”). Ruth Colker takes this “reference to the ‘well-being of the race’ . . . to refer to the white race.” Ruth Colker, *Public Restrooms: Flipping the Default Rules*, 78 OHIO ST. L.J. 145, 155 (2017).

²⁶ See Spindelman, *The Shower’s Return: Part II*, *supra* note 1, at 95 n.28 (“In a stylized way, this may go some distance toward helping to explain the way Bursch’s oral argument focused on the women’s shower and locker room and not on the presence of trans men in the men’s.”).

²⁷ For discussion of separate spheres, including some sources that complicate the standard picture, see JUDITH AREEN ET AL., *FAMILY LAW: CASES AND MATERIALS* 173–76 (7th ed. 2019).

House sponsors once had in mind for it to be, or more modestly, as Bursch's argument indicates, by tabbing the statutory prohibition on sex discrimination to the "natural" or "biological" differences between the sexes in ways that might soon take aim at sex-neutral workplace rules that themselves deny the distinctive "natures" of women and men rather than affirming them.²⁸ A "family values" understanding of Title VII sex discrimination—its contours, and its relation to a new vision of "home" and "work-life balance" elsewhere incipiently sketched—may thus be waiting in the wings.²⁹ To be sure, for any of these changes to be viable, firmly established constitutional sex discrimination rules widely favoring and requiring sex-equal and sex-neutral treatment of women and men would have to be revisited.³⁰ Without raising needless alarms, a Supreme Court decision embracing the shower and locker room scene as the basis for rejecting trans sex discrimination rights in Stephens's case would not "plunge us straightaway" back into a new version of the old world of separate

²⁸ "Sponsors" is used here in a non-technical sense. For details of the "Smith Amendment on sex," "offered . . . in a spirit of satire and ironic cajolery," see Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431, 441–42 (1966). This "satire and ironic cajolery" took on a different cast and life as debate on the measure proceeded in the House, as generally traced, among other sources, in Robert C. Bird, *More Than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act*, 3 WM. & MARY J. WOMEN & L. 137 (1997). See also *infra* note 29.

²⁹ Thus, Ryan Anderson, after imagining re-imagining what home life could be, including for women, goes on to explain when talking about "work-life balance":

This resetting of priorities requires changing the workplace to make it more hospitable to women. We'll need to begin by acknowledging that men and women really are different, and taking those differences seriously in how we structure the workplace, rather than promoting a policy of sameness. . . . "Preferential treatment of women is justified even if one considers only the requirements of pregnancy, childbirth, and breastfeeding. It would certainly be reasonable to grant only female professors a semester of paid leave after the birth of a child. Male professors in highly unusual situations could petition for exceptions to this general policy." This policy would respect the bodily nature of women and their unique capacity to bear life.

Workplace policies should also recognize that a mother is not interchangeable with other adults, especially when children are young. . . . A healthy society would recognize a mother's preference to care for her child not only as her personal wish but as what's best for her child and for society.

RYAN T. ANDERSON, *WHEN HARRY BECAME SALLY: RESPONDING TO THE TRANSGENDER MOVEMENT* 171–72 (2018) (quoting Steven Rhoads). For the more comprehensive argument, see *id.* at 167–72.

³⁰ See, e.g., *United States v. Virginia*, 518 U.S. 515, 531–34 (1996) (offering an account of the Supreme Court's modern sex equality doctrine and some of the "volumes of history" to which it responds). The possibility of revisiting constitutional sex discrimination norms is not new. See, e.g., *id.* at 574–76 (Scalia, J., dissenting) (pointing out prospects of traditional rational basis review of sex-based classifications consistent with pre-1970's sex discrimination caselaw and *United States v. Carolene Products Co.*, 304 U.S. 144, 152–53 n.4 (1938)).

spheres ideology, but then it would “at least [be] a step in that wrong direction.”³¹

Turning the sexist urgency of the shower and locker room scene around and onto itself like this means to throw a wrench into how it otherwise leverages progressive, especially feminist and pro-feminist, sensibilities as part of an effort to forge a conservative-liberal-progressive alliance in an anti-trans cause.³² In its different iterations, the scene may initially seem deeply pro-feminist: witness all the care, concern, and solicitude lavished on the needs of women who have been raped, trafficked, and abused—needs that are then set in opposition to the actions of trans women represented as peculiar “men” who are criminal sexual injurers. Exposed as part of a regressive, sexist project that targets both trans women and cis-women, it provides no real occasion on which, as it implies, good, decent, right, upstanding people must identify and pick sides. A pro-trans, pro-cis-women, *and* anti-sexual violence politics is yet possible: People do it in different ways all the time. It’s just not available from within the logics of the shower and locker room scene as presented in the case.³³

³¹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 653 (1952) (Jackson, J., concurring in the judgment and opinion of the Court).

³² For one example, see Spindelman, *The Shower’s Return: Part II*, *supra* note 1, at 98 n.36 (noting the alliance of the Women’s Liberation Front and the Family Policy Alliance in the form of an amicus brief in *Gloucester County School Board v. G.G. ex rel Grimm*, 137 S. Ct. 1239 (2017)). A strong press-back (there are many) is in Robin Dembroff, *Trans Women Are Victims of Misogyny, Too – And All Feminists Must Recognize This*, *GUARDIAN* (May 19, 2019), <https://www.theguardian.com/commentisfree/2019/may/19/valerie-jackson-trans-women-misogyny-feminism> [<https://perma.cc/S3T5-UYFG>] (taking the point on directly and in a more general way). The parallels to debates over women’s reproductive rights are noteworthy. *Compare* *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007) (speculating about women’s “regret” about abortion decisions as a reason to constrain women’s reproductive choices), *with id.* at 183–85 (Ginsburg, J., dissenting) (noting how the majority opinion’s “thinking reflects ancient notions about women’s place in the family and under the Constitution—ideas that have long since been discredited”). For reflections on “women-protective rationales” for restricting women’s rights in the reproductive justice context, see, for example, Reva B. Siegel, *The Right’s Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 *DUKE L.J.* 1641, 1642 (2008) (discussing the “woman-protective rationale for restricting abortion”), and Mary Ziegler, *Women’s Rights on the Right: The History and Stakes of Modern Pro-Life Feminism*, 28 *BERKELEY J. GENDER L. & JUST.* 232, 232–33 (2013) (engaging “the complexity [and] diversity of the pro-life feminist movement,” while keeping an eye on “woman-protective arguments, such as those endorsed in *Gonzales v. Carhart*”) (citation omitted).

³³ *THE NETWORK/LA RED, OPEN MINDS OPEN DOORS*, *supra* note 9, generally illustrates this. So do, powerfully, from different directions, Dean Spade & Craig Willse, *Norms and Normalization*, in *THE OXFORD HANDBOOK OF FEMINIST THEORY* 551, 557, 562, 566 (Lisa Disch & Mary Hawkesworth eds., 2016) (variously noting the realities and impacts of sexual violence, including its “central[ity] to the system of racial chattel slavery,” discussing how “endemic” “sexual violence and intimate-partner violence remain,” within the context of a critical abolitionist project), and Dean Spade, *Law as Tactics*, 21 *COLUM. J. GENDER & L.* 40, 63 (2011) (“[G]iven the rapid and massive racialized expansion of

Still, the shower and locker room scene has real pull, including the power to generate a sense of dysphoria. This is Justice Sonia Sotomayor during an early exchange with David Cole—even before Bursch’s argument, though it comes after the briefing for Harris Funeral Homes that includes discussion of showers and locker rooms. At this moment, Justice Sotomayor is directing Cole’s attention to the force of the bathroom scene in its conventional sense:

Mr. Cole, let’s not avoid the difficult issue, okay? You have a transgender person who rightly is identifying as a woman and wants to use the women’s bedroom, rightly, wrongly, not a moral choice, but this is what they identify with. Their need is genuine. I’m accepting all of that -- . . . and they want to use the women’s bathroom. But there are other women who are made uncomfortable, and not merely uncomfortable, but who would feel intruded upon if someone who still had male characteristics walked into their bathroom. That’s why we have different bathrooms. . . . And what in the law will guide judges in balancing those things? That’s really what I think the question is about.³⁴

When a Supreme Court Justice, “accepting” that the “need[s]” of trans women are “genuine,” lets loose a reference describing “the women’s bathroom” as “the women’s *bedroom*,” it may be time to ask if it is really only “*other* women who are made uncomfortable, and not merely uncomfortable” but “would feel intruded upon” if someone with “male characteristics” were to walk in on them in “*their* bathroom.”³⁵ How would this point on “the question [the case] is about” look, how might it be expressed, if instead of thinking about the women’s bathroom, the point had been made in the intensified way that Bursch would later make it, where the bathroom scenario is about women’s shower and locker rooms?³⁶ How would these “other women” Justice Sotomayor is talking about feel about a trans woman with what she refers to as

imprisonment in the United States and the disproportionate imprisonment and severe violence faced by trans people in prisons due to the fact that gender and sexual violence are foundational to imprisonment, demanding increased resources for criminalization is likely to further rather than reduce trans vulnerability to violence.”). Lori Watson, *The Woman Question*, 3 TSQ: TRANSGENDER STUD. Q. 246 (2016), also offers a stirring analysis showing how these politics can move together.

³⁴ Harris Funeral Homes Transcript, *supra* note 3, at 10–11. The audio record confirms Justice Sotomayor’s use of “the women’s bedroom.” Oral Argument at 7:29, R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, No. 18-107 (Oct. 8, 2019), https://apps.oyez.org/player/#/roberts10/oral_argument_audio/24839 [<https://perma.cc/9QV7-CB6D>] (“the women’s bedroom”).

³⁵ Harris Funeral Homes Transcript, *supra* note 3, at 10–11 (emphasis added).

³⁶ *Id.* at 11. Cole disputed this was “the question” thus: “Well, that is -- that is -- that is a question, Justice Sotomayor. It is not *the* question in this case.” *Id.* (emphasis added). To which she replied: “Mr. Cole, that’s -- yes . . . -- because the -- once we decide the case in your favor, then that question is inevitable.” *Id.* Immediately after this, Justice Sotomayor put “locker rooms” into view. *Id.* at 11–12.

“male characteristics walk[ing] into their” shower and locker room?³⁷ Would they find Bursch’s depiction of the shower and locker room scene “very powerful,” as Justice Sotomayor described his depiction of the “overnight shelter” after hearing him express it?³⁸ Will the shower and locker room scene yet function for these women as a basis for favoring excluding trans women from certain jobs in certain workplaces?³⁹

Critical perspective on the shower and locker room scene is imperative if one is to apprehend—and, bearing witness, perhaps to seek to manage if not overcome—its triggering powers.⁴⁰ Achieving this stance should also help

³⁷ *Id.* at 10–11.

³⁸ *Id.* at 36. As this exchange continued, Justice Sotomayor’s comments moved in directions that seemed to suggest that a women’s shelter that wished to deny a trans woman a job as a counselor might under some circumstances perhaps have a valid bona fide occupational qualification (BFOQ) defense. See *id.* (describing Bursch’s example of the overnight shelter as “very powerful” and asking whether it “isn’t . . . exactly like *Dothard* [v. *Rawlinson*, 433 U.S. 321 (1997)]?”); *id.* (underscoring that *Dothard* “found that it was a BFOQ to make only men guard men and women only guard women” and suggesting that the results Bursch worried about in relation to the overnight shelter wouldn’t obtain via the subtle indication that: “I’m not quite sure that I understand your parade of horrors”); *id.* at 37 (correcting Bursch’s position by describing the pro-trans argument in the case as being that, “if there is an independent reason why a man who’s transgendered [*sic*, it’s “why a trans woman”] can’t have a job that a woman has, then that reason is good enough, you don’t have to hire them”). For another moment earlier in the oral arguments when Justice Sotomayor spoke to the power of what can happen in locker rooms, see *id.* at 12 (pointing to a situation involving “two locker rooms, men and women, girls and boys and who walks in is something you can’t control”).

³⁹ See *supra* note 38.

⁴⁰ Not that this is always or ever simple or simply a matter of rational choice or an exercise of agency or will. From one vantage point, see Defend My Privacy Amicus Brief, *supra* note 12, at 8–14 (recounting survivors’ experiences). For a view in which trans-inclusive operating rules in the face of realities like these are discussed, see THE NETWORK/LA RED, OPEN MINDS OPEN DOORS, *supra* note 9, at 61–76, 83–88. See generally JULIE DARKE & ALLISON COPE, TRANS ALL. SOC’Y, TRANS INCLUSION POLICY MANUAL FOR WOMEN’S ORGANIZATIONS (2002), <https://static1.squarespace.com/static/566c7f0c2399a3bdabb57553/t/566ca8ca0e4c116bdc06d599/1449961674575/2002-Trans-Inclusion-Policy-Manual-for-Womens-Organizations.pdf> [https://perma.cc/WJ7A-UG8C]. For an important national consensus statement of anti-sexual assault and domestic violence organizations supporting trans inclusiveness, see *National Consensus Statement of Anti-Sexual Assault and Domestic Violence Organizations in Support of Full and Equal Access for the Transgender Community*, NTF (Apr. 13, 2018), <http://www.4vawa.org/ntf-action-alerts-and-news/2018/4/12/national-consensus-statement-of-anti-sexual-assault-and-domestic-violence-organizations-in-support-of-full-and-equal-access-for-the-transgender-community> [https://perma.cc/ZG83-AP3J]. Different ways of conceptualizing trans exclusion from domestic violence shelters as a legal problem are mapped in Rishita Apsani, *Are Women’s Spaces Transgender Spaces? Single-Sex Domestic Violence Shelters, Transgender Inclusion, and the Equal Protection Clause*, 106 CALIF. L. REV. 1689 (2018). They may become relevant if certain federal policies change. See, e.g., Office of Info. & Regulatory Affairs, *View Rule*, REGINFO.GOV,

frame an inquiry into what it is that is making it possible for trans women in this imaginary setting to be set up to take heat for sexual dangers that are not of their own devising, but rather reflections of non-imaginary, real-world, material dangers that cis-men regularly pose to women, both cis and trans.⁴¹ Why is the solution to cis-male sexual violence stopping trans women from being who they are in traditionally women's spaces?

Approached another way, the shower and locker room scene that Bursch advances may have the cultural purchase it does, despite the problematic romantic paternalisms it involves, because of how the scene taps into deeply entrenched cis-male-dominant ways of organizing social and sexual life—and their violences.⁴² Modern, broadly sex-integrated, cis-female-inclusive forms of public life in the United States have been a norm, after all, for what, across history's vast sweep, is only a brief moment in time.⁴³ Even within this wider moment, trans-inclusivity, indeed trans life itself, may at first blush seem to

https://www.reginfo.gov/public/do/eAgendaView_Rule?pubId=201904&RIN=2506-AC53 [<https://perma.cc/Z7JM-AVGP>] (describing proposed new rule, RIN: 2506-AC53, allowing federally-funded homeless shelters to provide for trans-exclusions from “single-sex or sex-segregated” shelters under a range of circumstances). *But see* H.R. 3018, 116th Cong. (2019), <https://www.congress.gov/116/bills/hr3018/BILLS-116hr3018rh.pdf> [<https://perma.cc/R6ZH-9EAK>] (bill “[t]o prohibit the Secretary of Housing and Urban Development from implementing a proposed rule regarding requirements under Community Planning and Development housing programs”). For further discussion on the proposed rule, see Tracy Jan, *Proposed HUD Rule Would Strip Transgender Protections at Homeless Shelters*, WASH. POST (May 22, 2019), <https://www.washingtonpost.com/business/2019/05/22/proposed-hud-rule-would-strip-transgender-protections-homeless-shelters/> [<https://perma.cc/V7RP-PPS8>] (describing the “proposed new rule” as “allowing federally funded shelters to deny people admission on religious grounds or force transgender women to share bathrooms and sleeping quarters with men”).

⁴¹ See 2015 TRANSGENDER SURVEY REPORT, *supra* note 8, at 206, 208 (noting 54% of respondents experienced some form of intimate partner violence during their lifetimes, 19% had an intimate partner force them to engage in sexual activity, and 35% experienced some form of physical violence by an intimate partner); *see also* Peitzmeier et al., *supra* note 8, at 2385–88, 2391–93. *See generally* TAYLOR N.T. BROWN & JODY L. HERMAN, WILLIAMS INST., INTIMATE PARTNER VIOLENCE AND SEXUAL ABUSE AMONG LGBT PEOPLE: A REVIEW OF EXISTING RESEARCH (2015), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/IPV-Sexual-Abuse-Among-LGBT-Nov-2015.pdf> [<https://perma.cc/94E8-J28N>] (discussing intimate partner violence and sexual abuse in relation to sub-groups within the LGBT communities).

⁴² *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (“There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of ‘romantic paternalism’ which, in practical effect, put women not on a pedestal, but in a cage.”); *see also* Brief for Appellant at 21, *Reed v. Reed*, 404 U.S. 71 (1971) (No. 70-4) (quoting *Sail’er Inn, Inc. v. Kirby*, 485 P.2d 529, 541 (1971) (“The pedestal upon which women have been placed has all too often, upon closer inspection, been revealed as a cage.”)).

⁴³ *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 535–39 (1996) (discussing some of this history in the context of higher education). *See generally* Ruth Bader Ginsburg, *Sex Equality and the Constitution*, 52 TUL. L. REV. 451 (1978).

some to involve a significant rupture with sex-based rules built atop traditional ideas of sexual difference, which widely organize social, including sexual, life, along with the social dangers that certain bodies need to be on guard against. No wonder “other women,” as Justice Sotomayor says, may experience aversive, even alarmed, mind-body reactions upon simply hearing the shower and locker room scene described.⁴⁴ Think of this “restroom scenario,” and it is still easy, culturally speaking—remarkably easy as Bursch’s arguments show—to raise specters of trans-inflicted sexual violence against cis-women.⁴⁵ The gesture is in fact so easy to make that an otherwise sympathetic Justice can find herself understandably speaking of the women’s “bedroom” when she means the women’s “bathroom” and characterizing the argument from the “overnight shelter” as “very powerful.”⁴⁶

Much as anything else, these positions reflect a cultural spirit: The ladies’ bathroom, shower, and locker room *are* bedrooms in this culturally-associative sense.⁴⁷ At long last, after tremendous, heroic work, concerns about victims and survivors of sexual and/or domestic abuse are “very powerful,” too.⁴⁸ These things being so, anyone (but, being real about it, distinctively any cis-identified person) who dwells on the shower and locker room scene for long enough may still find themselves being animated toward a “rage” that can grip individuals, as well as “the country.”⁴⁹ Justice Sotomayor was assuredly accurately reporting the views of many cis-women and cis-men, some inclined toward pro-trans positions. The feelings are thus neither purely idiosyncratic nor strictly personal, though, as attitudes about trans people and trans equality change, they may be moving in those directions.⁵⁰ For the time being, they are in no small part about how we share a culturally and historically-specific way of being—a social ontology—that needs to be confronted if it is to be altered in both more sex-equal and pro-trans ways.⁵¹ This social ontology, which the shower and locker room scene taps into, runs deep and is capable of surfacing at and through the

⁴⁴ Harris Funeral Homes Transcript, *supra* note 3, at 10.

⁴⁵ *See id.* at 45.

⁴⁶ *Id.* at 10, 29, 36.

⁴⁷ *See id.* at 10–11, 29–30, 45.

⁴⁸ *Id.* at 36.

⁴⁹ The precise language Justice Sotomayor uses is “raging.” Transcript of Oral Argument at 12, *Bostock v. Clayton Cty.*; and *Altitude Express, Inc. v. Zarda*, Nos. 17-1618, 17-1623 (Oct. 8, 2019) (offering that the “big issue right now raging the country is bathroom usage”).

⁵⁰ A parallel here is found in *Masterpiece Cakeshop*, as discussed in Marc Spindelman, *Masterpiece Cakeshop’s Homiletics*, 68 CLEV. ST. L. REV. 347, 390–402 (2020) (discussing whether the decision by Jack Phillips of Masterpiece Cakeshop to make a custom-made wedding cake for Charlie Craig and David Mullins implicated First Amendment speech rights, while temporizing, hence contextualizing, the claim).

⁵¹ A related set of arguments is deftly delivered in Robin Dembroff, *Real Talk on the Metaphysics of Gender*, 46 PHIL. TOPICS 21 (2018).

level of reason.⁵² Unfortunately, on close inspection, that reason pervasively still entails the dehumanizing and marginalizing unreason of transphobia—and sexism. This is why trans sex discrimination protections, nested at these intersections, are so necessary, but also partly why those protections may seem to so many to unsettle so much and to put so much on the line.⁵³ Anti-trans logics are powerfully culturally resonant, a central part of what the trans-equality project, now fully joined within the wider LGBT equality movement, is up against in an elementary sense.⁵⁴

Recognizing this may make it somewhat easier to apprehend how efficiently Bursch—via the merest of rhetorical gestures—could with so few words so quickly and repeatedly construct transphobic castles in the sky out of ladies’ showers and locker rooms as a form of what some may experience as a decisive argument against any—and all—trans rights. At the level of non-transphobic reason, it should be deeply reassuring to those whose understanding is still evolving in relation to trans people and trans equality that Bursch had to concoct his case in the realm of narrative speculation. After a generation of trans sex equality cases, Bursch—notably—did not tell the Supreme Court about one single actual instance as the basis for the shower and locker room scenes he depicted, though there can be no real doubt that, if he had found one, he would have told the Court about it instead of relying on hypotheticals that he himself

⁵² Compare Jeannie Suk Gersen, *The Transgender Bathroom Debate and the Looming Title IX Crisis*, NEW YORKER (May 24, 2016), <https://www.newyorker.com/news/news-desk/public-bathroom-regulations-could-create-a-title-ix-crisis> [https://perma.cc/E5XJ-FSG2] (“The discomfort that some people, some sexual-assault survivors, in particular, feel at the idea of being in rest rooms with people with male sex organs, whatever their gender, is not easy to brush aside as bigotry.”), with Chase Strangio, *There Is Only a Title IX Crisis if You Believe the Existence of Trans People Is Up for Debate*, SLATE (May 27, 2016), <https://slate.com/human-interest/2016/05/jeannie-suks-newyorker-com-article-was-sloppy-and-inaccurate.html> [https://perma.cc/U2TH-MTML] (critiquing Suk’s thinking, but also allowing that “[p]erhaps Suk is correct that bigotry isn’t the sole motivation behind the recent spate of laws driving trans people out of public life[;] [b]ut laws need not be driven by pure bigotry in order to be morally and legally wrong”). For another perspective, see Meghan Murphy, *There Is No Problem with Trans People in Bathrooms*, FEMINIST CURRENT (Oct. 9, 2019), <https://www.feministcurrent.com/2019/10/09/there-is-no-problem-with-trans-people-in-bathrooms/> [https://perma.cc/X3RE-7L63].

⁵³ On “sex” operating as an exclusionary concept, the re-inclusion of which can bust the category, see Lee Edelman, *Tearooms and Sympathy, or, The Epistemology of the Water Closet*, in THE LESBIAN AND GAY STUDIES READER 553, 564 (Henry Abelove et al. eds., 1993) (discussing homosexuality’s exclusion as something that reinforces male-female sex difference); *id.* at 568 (discussing this in the context of homosexuality, the normativity of which can be “so radical . . . it figures futurity imperiled, it figures history as apocalypse, by gesturing toward the precariousness of familial and national survival”).

⁵⁴ There is a painful history of intra-community division here. For but one of many sources on the subject, see generally Mubarak Dahir, *Whose Movement Is It?*, THE ADVOCATE, May 25, 1999, at 50. See also Susan Stryker, *My Words to Victor Frankenstein Above the Village of Chamounix: Performing Transgender Rage*, in THE TRANSGENDER STUDIES READER 244, 245–46 (Susan Stryker & Stephen Wittle eds., 2006).

made up.⁵⁵ Lacking one, Bursch's audience, prominently and specifically the Supreme Court, has no secure foundation for figuring an attack on a non-trans woman—indeed, on any woman or anyone else—by a trans woman in a shower or locker room as a predicate for its decision in the case.

It is regularly true, as the saying goes, that it gets better. Sometimes, though, as with the arguments ventured in Stephens's case, it actually gets worse before it gets better.

⁵⁵ Not discussed at oral argument was a case mentioned in Harris Funeral Homes's merits brief involving a religious shelter in Alaska that may be thought to provide a template for the "overnight shelter" hypothetical he raised. Brief for the Petitioner at 52–53, R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, No. 18-107 (Oct. 9, 2019) (discussing the case). The case itself did not involve a trans counselor. *See Downtown Soup Kitchen v. Anchorage*, 406 F. Supp. 3d 776, 781–84 (D. Alaska 2019). Various amicus briefs focused on this case as well. *See, e.g.*, Defend My Privacy Amicus Brief, *supra* note 12, at 11–14. Bursch himself returned to the case elsewhere. John Bursch, *Difficult Issues Involving Human Sexuality Require Dialogue, Not Scorn, Misinformation*, HILL (Oct. 15, 2019), <https://thehill.com/blogs/congress-blog/civil-rights/465844-difficult-issues-involving-human-sexuality-require-dialogue> [<https://perma.cc/2FLA-LQYA>] ("In Alaska, local officials redefined 'sex' to try and force a women's overnight shelter to allow a man identifying as a woman to sleep mere feet away from women who have been raped, trafficked and abused. A federal court enjoined that bureaucratic effort."). Other instances, even more vivid, also notably absent from Harris Funeral Homes's briefing and Bursch's oral argument, are found *supra* note 12. *See also, e.g.*, Brief for National Organization for Marriage and Center for Constitutional Jurisprudence as Amicus Curiae Supporting Respondent in No. 17-1618 and Petitioners in Nos. 17-1623, 18-107 at 13–14, *Bostock v. Clayton Cty.*; *Altitude Express, Inc. v. Zarda*; and R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, Nos. 17-1618, 17-1623, 18-107 (Aug. 22, 2019) (discussing a case from Washington state in which "a woman who had suffered sexual abuse as a child was fired from her job for declining to go along with the YMCA's recent policy mandating that women's locker rooms and showers be open to men," even though "the policy re-awakened her old trauma"); Brief for Women's Liberation Front as Amicus Curiae Supporting Petitioner at 14, 14 n.22, R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, No. 18-107 (Oct. 9, 2019) (describing a case from the United Kingdom involving "a man who goes by [a female name], who had previously been convicted of rape, was placed in a women's prison where he went on to sexually assault additional women.").