U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C.

Commissioner
Kalpana Kotagal

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Commissioner Kotagal's Statement on the EEOC's Decision in *Selina S. v. Driscoll*

I voted against the Office of Federal Sector decision in *Selina S. v. Driscoll*. The decision rests on the false premise that transgender workers are not worthy of the agency's protection from discrimination and harassment and that protecting them threatens the rights of other workers. Worse, it suggests that transgender people do not exist. That belief is contradicted by science and is not grounded in the law.

In fact, the decision is legally suspect. It retreats from the Commission's longstanding position in *Lusardi v. Department of the Army*, that an agency's refusal to allow an employee to use the restroom consistent with their gender identity constitutes disparate treatment and contributes to a hostile work environment.[1] In *Bostock v. Clayton County*, the Supreme Court reinforced the principle that Title VII of the Civil Rights Act of 1964 protects transgender workers, holding that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."[2] Here, Complainant was subjected to sex discrimination because she was treated worse than similarly situated coworkers who were allowed to use the restroom that corresponded with their gender identity. Despite the majority's assertions, *Lusardi*'s reasoning endures: "[t]he Agency's actions deprived Complainant of equal status, respect, and dignity in the workplace, and, as a result, deprived her of equal employment opportunities. In restricting her access to the restroom consistent with her gender identity, the Agency refused to recognize Complainant's very identity. Treatment of this kind by one's employer is most certainly adverse."[3]

Moreover, I fear that the decision fails to grapple with the consequences that flow from it. Federal agencies will risk being found liable in court for denying workers access to restrooms consistent with their gender identity and for exposing them to harassment. Transgender workers

[1] EEOC Appeal No. 0120133395, 2015 EEOPUB LEXIS 896, at *34–35 (Mar. 27, 2015).
[2] 590 U.S. 644, 660 (2020).
[3] *Lusardi,* 2015 EEOPUB LEXIS at *28.

will be vulnerable to serious harm. This is not theoretical. Research shows that when denied access to restrooms that match their gender identity, transgender workers often starve and dehydrate themselves, risking medical problems. They are also more likely to experience harassment on the job. In fact, by encouraging gender policing in restrooms, this decision renders all workers more vulnerable to egregious harassment, including those the majority purports to seek to protect.

Transgender people are part of our workplaces. They need to be able to use the bathroom at work just like everyone else. They need to provide for themselves or their families just like everyone else. And they, like everyone else, deserve to work with dignity, safety, and respect. Today's decision abandons these foundational principles.

I. *Selina S.* Is Premised on the Belief that Transgender Workers Do Not Exist

Title VII does not define the word "sex," and the Supreme Court has to date declined to do so. In fact, in *Bostock*, the Court was clear that it need not define the term, stating "nothing in our approach . . . turns on the outcome of the parties' debate [over the definition of sex]."[4] Instead, the Court concluded, "homosexuality and transgender status are inextricably bound up with sex . . . because to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex."[5]

Even so, under the guise of judicial restraint, today's decision declares, "we must conclude that one's sex, under Title VII, is immutable and enduring," referring to an individual's "biological classification as either male or female."[6] Further, the decision states, "[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."[7] The rest

[4] 590 U.S.at 655.
[5] *Id*. at 660–61.
[6] *Selina S. v. Driscoll*, EEOC Appeal No. 2025003976, 12 fn.7 (Feb. 26, 2026).
[7] *Id.* at 8.

of the decision flows from this unfounded assumption. Apparently, the Commission is best positioned to tell transgender workers who they are.

The Commission's decision is at odds with science. Indeed, the American Society for Reproductive Medicine explains that "proposals to define sex into two easily determined categories are unsupported by science and oversimplify the intricate nature of human biology."[8] There are as many as 2.8 million transgender Americans and 5.6 million intersex people in the United States.[9] Remarkably, the decision relegates intersex Americans to a footnote. It also ignores long-settled medical consensus. For decades, gender dysphoria and its precursors have been recognized as diagnoses by the American Psychiatric Association (APA) and included in the *Diagnostic and Statistical Manual*.[10] Growing evidence points to the "biological underpinnings of gender identity."[11] Moreover, the American Medical Association (AMA) has found that "policies excluding transgender individuals from facilities consistent with their gender identity have detrimental effects on the health, safety and well-being of those individuals."[12] Not surprisingly, the AMA and other medical societies, such as the APA, American Academy of Family Physicians and the American Academy of Pediatrics, oppose policies that discriminate against transgender individuals.[13]

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[8] *Just the Facts: Biological Sex*, American Society for Reproductive Medicine, https://www.asrm.org/advocacy-and-policy/fact-sheets-and-one-pagers/just-the-facts-biological-sex/ (last visited Feb. 19, 2026).
[9] Jody L. Herman & Andrew R. Flores, *How Many Adults and Youth Identify as Transgender in the United States?*, Williams Institute, UCLA School of Law 1 (Aug. 2025), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Pop-Update-Aug-2025.pdf [https://perma.cc/6PP4-2P7U]; United Nations Free & Equal, *Intersex People*, Office of the United Nations High Commissioner for Human Rights 1 (Sep. 2025), https://www.unfe.org/sites/default/files/download/Intersex%20factsheet%202025%20-%20EN.pdf [https://perma.cc/DF96-YUZB].
[10] American Psychiatric Association, *Gender Dysphoria*, https://www.psychiatry.org/psychiatrists/diversity/education/transgender-and-gender-nonconforming-patients/gender-dysphoria-diagnosis (last visited Feb. 19, 2026).
[11] Endocrine Society, *Transgender Health*, https://www.endocrine.org/advocacy/position-statements/transgender-health (last visited Feb. 19, 2026).
[12] American Medical Association, *Issue Brief: Transgender Individuals' Access to Public Facilities* 3 (2025), https://www.ama-assn.org/system/files/transgender-public-facilities-issue-brief.pdf (last visited Feb. 23, 2026).
[13] *Id.* at 4.

To justify its reasoning, the agency's decision purports to be concerned with privacy interests and protecting women. All of us care about privacy and public safety. That is why it is already illegal in every state to enter a restroom and hurt someone. Protecting transgender people from discrimination does not undermine the safety of others. The decision perpetuates a baseless assumption that transgender people are dangerous. There is no evidence to support this, however, and the use of privacy and safety to justify exclusion is "no less odious, no less unfounded, and no less harmful than . . . race-based or sexual-orientation-based scare tactics."[14]

Indeed, more than 400 cities and 22 states have enacted laws that protect transgender people from discrimination when it comes to using the bathroom that matches their gender identity, and there has been no resulting increase in public safety incidents in restrooms in any of these places.[15] Over 160 anti-sexual assault and domestic violence organizations have signed a letter in support of these laws and policies, noting they do not threaten women's safety.[16]

II. Complainant Was Subjected to Discrimination by Being Treated Worse Than Similarly Situated Coworkers Because of Sex

Lusardi recognized that an agency's failure to "allow the Complainant to use a restroom that other persons of her gender were freely permitted to use . . . constitutes a harm or loss with respect to the terms and conditions of Complainant's employment."[17] The Commission further explained that the harm was not only being denied access to restrooms, but also being deprived of "equal status, respect, and dignity . . . and, as a result . . . [recognition of] Complainant's very

[14] *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 626 (4th Cir. 2020) (Wynn, J., concurring).
[15] Jody L. Herman et al., *Safety and Privacy in Public Restrooms and Other Gendered Facilities*, UCLA School of Law Williams Institute, 3 (Feb. 2025), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Bathroom-Access-Feb-2025.pdf ("There was no evidence that violent victimization by strangers increased as a result of transgender people having, by law, access to restrooms that accord with their gender identity.").
[16] National Task Force to End Sexual & Domestic Violence*, National Statement in Support of Full and Equal Access for the Transgender Community from Anti-Sexual Assault and Domestic Violence Organizations* (Oct. 30, 2024), https://endsexualviolence.org/wp-content/uploads/2025/09/NTF-Statement-in-Support-of-Transgender-Community-Anti-SV-and-DV-Orgs.pdf (last visited Feb. 23, 2026).
[17] *Lusardi,* 2015 EEOPUB LEXIS at *27.

identity."[18] In eschewing *Lusardi*, today's decision paradoxically declares that Complainant was denied restroom access not because she is transgender, but because of "Complainant's sex, which was still immutably male."[19]

Under the test articulated in *Bostock,* the agency's policy at issue in this case violates Title VII. The Court explained that "Title VII's 'because of' test incorporates the 'simple' and 'traditional' standard of but-for causation," and a "but-for test directs us to change one thing at a time and see if the outcome changes."[20] Here, Complainant's transgender identity is a but-for cause of her exclusion from restrooms that align with her gender identity. If Complainant's sex assigned at birth were female, she would be permitted to use the restroom that aligns with her gender identity.

Moreover, *Bostock* explains that "Title VII prohibits all forms of discrimination because of sex, however they may manifest themselves or whatever other labels might attach to them."[21] This is true regardless of "whether a specific application was anticipated by Congress."[22] In his majority opinion, Justice Gorsuch made clear that, although transgender employees may have been "politically unpopular" in the 1960s at the time of the law's passage, to interpret the law to exclude them from protection would "tilt the scales of justice in favor of the strong or popular and neglect the promise that all persons are entitled to the benefit of the law's terms."[23] Although *Bostock* did not expressly address access to bathrooms, bathroom access is a basic term and condition of employment, so to deny bathroom access that aligns with the employee's gender identity she is transgender is to discriminate against her because of sex. This reading is consistent with decades of federal courts interpreting Title VII, contrary to the majority's protestations.

[18] *Id.* at *28. The right to use the restroom remains a basic term and condition of employment for employees such as Complainant. *See Roberts v. Clark Cnty. Sch. Dist.,* 215 F. Supp. 3d 1001, 1015–16 (D. Nev. 2016) (holding that prohibiting a transgender school safety officer from using sex-specific restrooms was "an adverse employment action" in violation of Title VII).
[19] *Selina S.,* EEOC Appeal No. 2025003976 at 6.
[20] *Bostock*, 590 U.S. at 656.
[21] *Id.* at 670.
[22] *Id.* at 677.
[23] *Id.* at 678.

For example, relying on *Bostock,* the Fourth Circuit held that a school board's policy of denying students access to restrooms that matched their gender identity was unlawful sex discrimination.[24] It reasoned that plaintiff was treated worse than similarly situated students because he alone could not use the restroom that corresponded to his gender identity.[25] Likewise, in the instant case, Complainant was subjected to sex discrimination because she alone could not use the restroom that matched her gender identity. The Fourth Circuit added that "[t]he stigma of being forced to use a separate restroom is likewise sufficient to constitute harm under Title IX, as it 'invite[s] more scrutiny and attention' from other students, 'very publicly brand[ing] all transgender students with a scarlet 'T'."[26] As noted earlier, the Commission also expounded on this dignitary harm to workers in *Lusardi.*

The Supreme Court has recognized the principles that underlie support for protections for transgender employees for decades. In *Price Waterhouse v. Hopkins*, the Court held that sex discrimination encompasses discrimination based on a person's failure to conform to sex stereotypes.[27] As it did more recently in *Bostock*, the Court in *Price Waterhouse* reached this conclusion without defining the word "sex." Instead, the Court acknowledged that Title VII's prohibition against sex discrimination is much broader than the binary conception envisioned by the instant decision. Indeed, several circuit courts have found that transgender plaintiffs can raise sex discrimination claims based on a sex stereotyping theory.[28] In one such case, the Seventh

[24] *Grimm*, 972 F.3d at 616, 619 ("After the Supreme Court's recent decision in *Bostock v. Clayton County* … we have little difficulty holding that a bathroom policy precluding Grimm from using the boys [sic] restrooms discriminated against him 'on the basis of sex.'") (cleaned up).
[25] *Grimm*, 972 F.3d at 610. As the court did in *Grimm*, the Supreme Court has often "looked to its Title VII interpretations of discrimination in illuminating Title IX." *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 616 n.1 (1999) (Thomas, J., dissenting).
[26] *Id.* at 617–18 (citations omitted).
[27] 490 U.S. 228, 250–51 (1989).
[28] *See, e.g.*, *Smith v. City of Salem, Ohio*, 378 F.3d 566, 575 (6th Cir. 2004) (finding in a Title VII case that "discrimination against a plaintiff who is [transgender]—and therefore fails to act and/or identify with his or her [sex assigned at birth]—is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse*, who, in sex-stereotypical terms, did not act like a woman"); *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011) (holding that "discriminating against someone on the basis of his or her gender non-conformity constitutes sex-based discrimination under the Equal Protection Clause"). *See also Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) (relying on *Price Waterhouse* to allow a transgender plaintiff to pursue a claim under the Gender Motivated

Circuit relied on the theory of sex stereotyping laid out in seminal Title VII cases *Price Waterhouse* and *Oncale v. Sundowner Offshore Services*[29] to hold that the plaintiff was likely to succeed on his Title IX claim challenging a policy that excluded him from the restroom that matched his gender identity.[30] It explained, "[b]y definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth. . . . A policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX."[31]

III. *Selina S.* Fails to Grapple with the Consequences that Flow from It

The Commission fails to contend with the far-reaching consequences of its holding. For one, the Commission is exposing federal agencies – and the American taxpayer – to liability in federal court for subjecting transgender employees to disparate treatment and a hostile work environment. Transgender employees are more vulnerable to harassment when they cannot use bathrooms that align with their gender identity. In fact, surveys suggest that when transgender individuals try to use the restroom that matches their sex assigned at birth, they are more likely to be denied access or to be verbally harassed.[32] Single-user restrooms are not a solution either, since they are often unavailable or inconveniently located.[33]

Moreover, the gender policing that these policies embolden heightens the risk of harassment for all workers, particularly those who do not conform to societal gender expectations. During the past several years, many non-transgender women have been harassed

Violence Act because her attack was motivated by "gender—in this case, by her assumption of a feminine rather than a typically masculine appearance or demeanor").
[29] 523 U.S. 75 (1998).
[30] *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1050 (7th Cir. 2017).
[31] *Id.* at 1048, 1049.
[32] Herman et al., *supra* note 15, at 4.
[33] Compl. at 17, 45–46, *Withrow v. United States*, No. 1:25-cv-4073 (D.D.C. Nov. 20, 2025), ECF No. 1 (explaining that single-user restrooms at work are not a solution for Plaintiff due to the lack of consistent access to such restrooms).

and forcibly removed from restrooms because they were mistaken for transgender women. In just one recent incident, a teenager in Minnesota, who is not transgender, was forced to expose her intimate body parts to a server to prove that she is a woman.[34] Notably, the risk of liability does not flow both ways. Courts have recognized that the mere presence of a transgender employee in a restroom is not enough to create a hostile work environment.[35]

Today's decision will also have incalculable human costs. Research shows that because of the increased risk of harassment, transgender workers starve and dehydrate themselves to avoid having to use the bathroom.[36] Some develop health problems such as urinary tract infections or kidney conditions.[37] Others report having to quit their jobs or face being penalized for excessive absences or tardiness.[38] Again, this is not a theoretical issue. In one class case arising from the federal workforce and pending before the U.S. District Court for the District of Columbia, the plaintiff, a former soldier in the Illinois Army National Guard and current civilian federal employee, maintains that she starves and dehydrates herself to minimize restroom usage.[39]

Similarly, in *Grimm*, the student "suffered from stigma, from urinary tract infections from bathroom avoidance, and from suicidal thoughts that led to hospitalization."[40] In fact, because of recurring urinary tract infections, his mother "kept medication 'always stocked at home.'"[41] No one should have to risk harassment or health issues just to be able to provide for themselves and their families.

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[34] Jo Yurcaba, *Minnesota Teen Says Server Forced Her to Prove Her Gender in Restaurant Bathroom*, NBC News (Aug. 12, 2025), https://www.nbcnews.com/nbc-out/out-news/minnesota-teen-says-server-forced-prove-gender-restaurant-bathroom-rcna224562. Notably, after the incident, the teen filed a charge of discrimination against the restaurant, underscoring how discriminatory policies risk employer liability and reputational damage.

[35] *See Cruzan v. Special Sch. Dist., No.1*, 294 F.3d 981 (8th Cir. 2002) (finding that a policy of allowing transgender women to use the women's restroom did not create a hostile work environment for other employees); *Parents for Privacy v. Barr*, 949 F.3d 1210 (9th Cir. 2020) (finding that under Title IX, "[t]he use of facilities for their intended purpose, without more, does not constitute an act of harassment simply because a person is transgender").

[36] Herman et al., *supra* note 15, at 5.

[37] *Id.*

[38] *Id.*

[39] *See* Compl. at 16–17, 46, *Withrow* (No. 1:25-cv-4073).

[40] *Grimm*, 972 F.3d 586 at 593.

[41] *Id.* at 600.

IV. *Selina S.* is Grounded in Politics and Lacks Restraint

Today's decision is motivated not by changes in law or science, but by the President's Executive Order.[42] For confirmation, readers need look no further than the first sentence of the decision.[43] Notably, courts have found that this Executive Order is based on animus because it "reflects a bare desire to harm a politically unpopular group, as its underlying actual purpose" and because "[i]ts language, which declares that it is 'false' that 'males can identify as . . . women and vice versa' and that the only identity that is 'true' in 'reality' is one's biological sex, denies and denigrates the very existence of transgender people—despite the evidence that they do exist and have as long as human history has been recorded."[44] The tone of the decision – unbecoming of a reasoned agency adjudication – also betrays its motivations.

Despite assertions that "circumstances" dictate that the Commission render its decision – "we cannot simply press the pause button to await authoritative guidance from the courts"[45] – the truth is the Commission rushed to issue this ruling. Until recently, the Defendants' dispositive motion in a pending class case, *Withrow v. United States,* in which the Chair is a defendant, was due today, on February 26, 2026. This week, Defendants moved for an extension, which the U.S. District Court for the District of Columbia just granted. That case will address this very question, and in fact, the plaintiff in that case and Complainant here are both employees of the U.S.

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[42] Exec. Order 14168, 90 Fed. Reg. 8615 (Jan. 20, 2025).
[43] *Selina S.*, EEOC Appeal No. 2025003976 at 1 ("It is the policy of the United States that 'intimate spaces [in federal workplaces] . . . are designated by sex and not identity.'" (quoting Exec. Order 14168, § 4(d), 90 Fed. Reg. 8615 (Jan. 20, 2025))).
[44] *Washington v. Trump*, 768 F.Supp.3d 1239, 1277 (W.D. Wash. 2025) (cleaned up).
[45] *Selina S.*, EEOC Appeal No. 2025003976 at 4. Of course, authoritative guidance from the courts already exists. *See, e.g.*, *Grimm*, 972 F.3d 586, 626 (4th Cir. 2020); *Roberts v. Clark Cnty. Sch. Dist.,* 215 F. Supp. 3d 1001 (D. Nev. 2016); *Doe v. Triangle Doughnuts, LLC*, 472 F. Supp. 3d 115 (E.D. Pa. 2020). Further, the majority's approach here contradicts the Chair's own statement from May 2025 concerning federal sector decisions in which she indicated that "the EEOC will recognize that questions of statutory construction . . . are ultimately decided by the courts." EEOC_Memo_-_Ending_Unauthorized_Monetary_Sanctions_Against_Federal_Agencies.pdf, at 1 (last visited Feb. 25, 2026) (citing *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024) (reaffirming core principle that "[i]t is emphatically the province and duty of the judicial department to say what the law is") (quoting *Marbury v. Madison,* 1 Cranch 137, 177 (1803)).

Department of Defense.[46] The putative class includes all transgender and intersex federal employees who have been prohibited from utilizing restrooms consistent with their gender identity. Additionally, in another pending case, *O'Neill v. Hartman*, in the U.S. District Court for the District of Maryland, a transgender federal employee has alleged that barring her from the restroom consistent with her gender identity has contributed to a hostile work environment.[47] If the majority were concerned about exercising restraint and receiving guidance from the courts, it would wait to render this decision, since class certification in *Withrow* would require the Commission to dismiss this appeal, and it may receive guidance from the District Court of Maryland may issue guidance on this exact issue in the coming year. Indeed, "the same judicial humility that requires us to refrain from adding to statutes requires us to refrain from diminishing them."[48]

Conclusion

Because of the heightened risk of harm, the Commission's decision will likely lead to the exodus of transgender employees from the federal government and safety risks for many who remain. For that, all of us will suffer, losing out on the contributions and expertise of these dedicated public servants. I cannot, in good conscience, and in keeping with my oath of office, support the Commission's decision.

[46] *Withrow* (No. 1:25-cv-4073).
[47] Compl. at 6, *O'Neill v. Hartman*, No. 1:25-cv-04228-LKG (D. Md. Dec. 22, 2025), ECF No. 1.
[48] *Bostock,* 590 U.S. at 681.