May 26, 2023

The Honorable David D. Hayes
Greene County Prosecuting Attorney
61 Greene Street, Second Floor, Suite 200
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SYLLABUS: 2023-006

(1) The Ohio Civil Rights Commission cannot authoritatively interpret R.C. 4112.02(G).

(2) R.C. 4112.02(G) does not prohibit operators of public accommodations from adopting policies that limit communal restrooms, changing rooms, and locker rooms to members of a single sex.

(3) Whether a restroom, changing room, or locker room that is open to the public and located in a facility owned by a governmental entity is considered a "public accommodation" under R.C. 4112.01(A)(9) for purposes of R.C. 4112.02(G) is a question of fact that must be determined by the courts.

(4) Political subdivisions and their employees can be liable for violations of R.C. 4112.02(G).

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May 26, 2023

OPINION NO. 2023-006

The Honorable David D. Hayes
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Dear Prosecutor Hayes:

You have requested an opinion concerning the relationship between *Bostock v. Clayton County,* 590 U.S. ____, 140 S.Ct. 1731, 207 L.Ed.2d 218 (2020), and the scope of the protections conferred by R.C. 4112.02(G). I have framed your questions as follows:

(1) Does state law empower the Ohio Civil Rights Commission (the "Commission") to authoritatively interpret Chapter 4112?

(2) Does R.C. 4112.02(G) prohibit restricting restrooms, changing rooms, or locker rooms to a single sex?

(3) Is a restroom, changing room, or locker room that is open to the public and located within a building or facility owned by a county, township, or municipality considered a "public accommodation" under R.C. 4112.01(A)(9) for purposes of R.C. 4112.02(G)?

(4) Can political subdivisions and their employees be held liable for violations of R.C. 4112.02(G)?

My analysis of these questions is set forth below.

Before proceeding, I pause to note two important limits on Attorney General opinions.

First, I cannot resolve factual disputes. Ohio law empowers me to "advise the prosecuting attorneys of the several counties respecting their duties." R.C. 109.14. This statute "does not authorize the Attorney General to decide questions of fact by means of an opinion." 1987 Ohio Op. Att'y Gen. No. 87-082, syllabus, paragraph 3; *see also* 2005 Op. Att'y Gen. No. 2005-002, at 2-12, citing 2004 Op. Att'y Gen. No. 2004-022, at 2-186. Rather, it empowers Attorneys General to provide only *legal* advice. I must, and will, respect the limits of the legislative grant of authority.

Second, the Attorney General's legal opinions state the law as it is, not as a particular Attorney General thinks it should be. *E.g.,* 1980 Op. Att'y Gen. No. 80-011, at 2-58. The people of Ohio elect representatives and senators to make the law. The policy question whether Ohio law *ought to* forbid gender-identity discrimination is a question for the General Assembly, subject to the Governor's veto.

I

Your opinion request invokes the United States Supreme Court's recent decision in *Bostock*. Because

Bostock provides important background to your inquiry, I will begin by laying out *Bostock*'s holding and limits.

A

Title VII of the Civil Rights Act of 1964 prohibits certain employment practices. For example, one key provision says:

> It shall be an unlawful employment practice for an employer—
>
> > (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin …

42 U.S.C. §2000e-2(a).

Of most relevance here, this language prohibits employers from taking adverse action against an employee or applicant "because of" that person's "sex." *Id.* *Bostock* presented the question whether this prohibition on adverse actions because of sex encompasses adverse actions taken because of sexual orientation and gender identity. *See Bostock*, 140 S. Ct. at 1737. Put differently, would an employer who fired an employee (or refused to hire an applicant) based on sexual orientation or transgender status violate Title VII?

The Supreme Court answered that question in the affirmative. The relevant text, *Bostock* noted, forbids adverse actions taken on the basis of "sex." The word "sex," the *Bostock* majority recognized, most naturally refers to biological sex. *Id.* at 1739. And past cases had held that an employer takes an adverse action "because of … sex" if it takes an adverse action against an

employee (or applicant) that it would not have taken "but for" the employee's (or applicant's) biological sex. *Id.* (collecting cases).

The Court determined that, in the context of Title VII, sex is *always* a but-for cause of adverse actions based on sexual orientation or gender identity. In the sexual-orientation context, for example, a man fired for being gay is fired based on a trait (attraction to men) that he would not have been fired for if he were a woman. *Id.* at 1741. In the gender-identity context, a transgender man (that is, a biological female who identifies as a man) fired for being transgender is fired based on behavior (identifying as a man) for which a biological man would not be punished. *Id.* at 1741–42. Relying on these illustrations, the Court concluded that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." *Id.* at 1741. Sex, in other words, will always play a but-for role in the differential treatment under Title VII. Thus, even though "sex" is not the same thing as sexual orientation or gender entity, Title VII's prohibition on hiring or firing someone "because of … sex" encompasses hiring or firing someone because of sexual orientation or gender identity.

Bostock generated two dissenting opinions. They are worth discussing briefly, because their reasoning has proved persuasive to some courts addressing related issues in different statutory contexts.

First, Justice Alito, joined by Justice Thomas, stressed that courts must "interpret statutory terms to 'mean what they conveyed to reasonable people *at the time they were written*.'" *Id.* at 1755 (Alito, J, dissenting), quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 16 (2012). He argued that no one alive at the time of Title VII's

passage in 1964 would have understood a law prohibiting employers from taking adverse action based on one trait (biological sex), to prohibit them from doing so because of distinct traits (sexual orientation and gender identity) that have some causal relationship to sex. *Id.* Regardless, Justice Alito rejected the causal relationship. *Id.* at 1758. He illustrated the point with an example: an employer who refused to hire a gay or transgender applicant without knowing the applicant's sex *would* refuse to hire the applicant based on sexual orientation or gender identity, but *would not* refuse to hire that person based on sex. This, Justice Alito maintained, showed that sexual-orientation and gender-identity discrimination do not necessarily entail sex discrimination.

Justice Kavanaugh separately dissented. He echoed many of Justice Alito's arguments, but stressed in particular that the goal of statutory interpretation "is to apply the meaning that a reasonable reader would derive from the text of the law," such that "the *ordinary meaning* (or the 'everyday meaning' or the 'commonsense' reading) of the relevant statutory text" anchors the inquiry. *Id.* at 1825 (Kavanaugh, J., dissenting), quoting W. Eskridge, *Interpreting Law* 33, 34-35 (2016) (footnote omitted). The ordinary meaning of actions taken "because of … sex," he maintained, does not include actions taken "because of … sexual orientation and gender identity." Justice Kavanaugh expressed sympathy for the policy goal of forbidding such conduct. But he maintained that changing the law was a job for Congress, not the Court. *Id.* at 1836.

B

Bostock's limits are worth emphasizing for purposes of your questions, all of which relate to its impact on the meaning of state law.

As an initial matter, *Bostock* expressly refrained from deciding what might constitute unlawful conduct under other federal or state laws. *Bostock*, 140 S.Ct. at 1753. It recognized that different laws with different phrasing might compel a different result. Consistent with *Bostock*'s admonition, courts have declined to extend *Bostock*'s logic to cases interpreting other federal laws, such as Title IX. *See, e.g.*, *Meriwether v. Hartop*, 992 F.3d 492, 510 fn.4 (6th Cir.2021); *Adams v. Sch. Bd. of St. Johns Cty.*, 57 F.4th 791, 808–09 (11th Cir.2022) (*en banc*). And while *Bostock* is a recent decision, at least one State's high court already declined to adopt its analysis when assessing the meaning of state law. *See, e.g.*, *Vroegh v. Iowa Dept. of Corr.*, 972 N.W.2d 686, 701 (Iowa 2022).

Second, the Court expressly refused to consider whether policies and practices relating to bathrooms, locker rooms, or dress codes qualify as unlawful discrimination based upon sex. *Bostock*, 140 S.Ct. at 1753; *Adams,* 57 F.4th at 808.

Finally, *Bostock* does not embrace an "extended definition of sex," as the Commission has claimed. Ohio Civil Rights Commission*, LGBTQ+: Discrimination Based on Sexual Orientation and Gender Identity*, https://perma.cc/V6GF-QHJT. To the contrary, *Bostock* proceeded from the assumption that "sex" is most naturally understood to mean "status as either male or female [as] determined by reproductive biology." *Bostock*, 140 S.Ct. at 1739. So, the decision does not *extend* the definition of "sex" by holding that the word "sex" *means* "sexual orientation" or "gender identity." It held only that discrimination based on sexual orientation or

gender identity necessarily entails discrimination on the basis of sex. *Id.* at 1741.

II

Your first question asks whether the Commission may issue an authoritative interpretation of statutory language—one that will bind the courts in cases concerning the meaning of Chapter 4112.

The Commission has no such power.

Consider first what the Commission *may* do. The Commission is a creature of statute, and it "may exercise only those powers that the General Assembly confers on it." *In re Icebreaker Windpower, Inc.*, 2022-Ohio-2742, ¶56. The Commission "has a statutory duty, pursuant to R.C. 4112.04(A)(6), to act upon all charges of unlawful discriminatory practice filed by a complaining party in accordance with R.C. 4112.05(B)." 1978 Op. Att'y Gen. No. 78-010, syllabus, paragraph 1. It may also promulgate rules and policies that effectuate the provisions and purposes of its authorizing statute. R.C. 4112.04(A)(4); R.C. 4112.04(A)(5); *see Nelson v. Mohr*, 10th Dist. Franklin No. 13AP-130, 2013-Ohio-4506, ¶14, citing *Carroll v. Dept. of Adm. Servs.,* 10 Ohio App. 3d 108, 110, 10 Ohio B. 132, 460 N.E.2d 704 (10th Dist. 1983); *see also In re Ohio Power Co.,* 144 Ohio St.3d 1, 2015-Ohio-2056, 40 N.E.3d 1060, ¶32. In exercising these powers, the Commission will necessarily interpret state law, including Chapter 4112. Indeed, *all* "branches of government must follow and apply the law—a task that entails some level of interpretation." *TWISM Ents., L.L.C. v. State Bd. of Registration for Professional Engineers & Surveyors*, —Ohio St.3d —, 2022-Ohio-4677, ¶33.

So the Commission will necessarily interpret Chapter 4112 in carrying out its obligations. And in cases that come before it, the Commission may adhere to its view

that, in light of *Bostock*, Ohio laws forbidding differential treatment on the basis of "sex" are best read to forbid differential treatment on the basis of "sexual orientation" or "gender identity." *See* Ohio Civil Rights Commission*, LGBTQ+: Discrimination Based on Sexual Orientation and Gender Identity*, https://perma.cc/V6GF-QHJT.

But the Commission's interpretations will not be authoritative in court. To the contrary, "the ultimate authority to render definitive interpretations of the law has long been understood as resting exclusively in the judicial power." *TWISM,* 2022-Ohio-4677 at ¶33. Thus, were an executive agency (like the Commission) empowered to issue authoritative interpretations of state law, the agency would intrude upon the judicial power, which is reserved to the judiciary under Article IV of Ohio's Constitution. It would also intrude upon the General Assembly's power to make law, which is reserved to the legislature alone by Article II. In light of this, the Supreme Court of Ohio recently held that it is never mandatory for a court to defer to the judgment of an administrative agency. *Id.* at ¶42-43.

To be sure, courts may *consider* an agency's interpretation. But the weight owed to that interpretation will "depend on the persuasive power of the agency's interpretation and not on the mere fact that it is being offered by an administrative agency." *Id.* at ¶45. In other words, the Commission's interpretations will be considered, and accepted or rejected, based on the strength of the Commission's reasoning as determined by the courts. The Commission's interpretations will be treated just like those advanced by any party or friend of the court.

What does all this mean for present purposes? It means that courts and other executive agencies are free to reject the Commission's interpretations of Ohio

law. The interpretation to which you point asserts, without any substantive legal rationale, that the Commission will "apply the extended definition of sex under *Bostock* to all types of discrimination under Ohio law and enforce sex as inclusive of sexual orientation and gender identity in employment, housing, public accommodation, and credit discrimination cases, pursuant to current, emerging, and applicable case law." Ohio Civil Rights Commission, *LGBTQ+: Discrimination Based on Sexual Orientation and Gender Identity*, https://perma.cc/V6GF-QHJT. This statement does not bind Ohio courts in interpreting Ohio law. Instead, courts will construe Chapter 4112 to forbid sexual-orientation and gender-identity discrimination *if and only if* the courts conclude that the chapter is best read to forbid such discrimination. Those courts may consider the Commission's analysis (such as it is) or the analysis in *Bostock*, but they are not required to follow either. Ultimately, it is the job of Ohio's courts to say what Ohio law means in the cases that come before them. And because the Commission's announcement contains no legal reasoning supporting its conclusion, that interpretation ought not be given any weight. (I address the weight owed to *Bostock* later on.)

III

You next ask whether R.C. 4112.02(G), in cases where it applies, prohibits allowing only a single sex to use a bathroom, changing room, or locker room. In other words, does the operator of a public accommodation violate R.C. 4112.02(G) by requiring patrons to use bathrooms, changing rooms, and locker rooms consistent with their biological sex? I conclude that the answer is "no."

Before proceeding, I want to stress that I am analyzing R.C. 4112.02(G)'s application only with respect to bathrooms, changing rooms, and locker rooms that are

located within a public accommodation. Policies governing spaces that are *not* within public accommodations are not subject to R.C. 4112.02(G) at all. As I explain below in Section IV, the question whether a particular space counts as a public accommodation is a fact-bound question I cannot answer. 2005 Op. Att'y Gen. No. 2005-002, at 2-12, citing 2004 Op. Att'y Gen. No. 2004-022, at 2-186.

A

As with any matter requiring statutory interpretation, I begin with the text.

> It shall be an unlawful discriminatory practice:
>
> > (G) For any proprietor or any employee, keeper, or manager of a place of public accommodation to deny to any person, except for reasons applicable alike to all persons regardless of race, color, religion, sex, military status, national origin, disability, age, or ancestry, the full enjoyment of the accommodations, advantages, facilities, or privileges of the place of public accommodation.

R.C. 4112.02(G). This provision, like all other provisions in Chapter 4112, "shall be construed liberally for the accomplishment of its purposes." R.C. 4112.08(A).

Breaking down the text of R.C. 4112.02(G), the statute confers a right and creates an exception.

The right comes in the form of a guarantee. Everyone is entitled to "the full enjoyment of the accommodations, advantages, facilities, or privileges of" public accommodations. *Id.* The statute prohibits "deny[ing]" this right to anyone. *Id.* As used in this statute, "'full enjoyment' … means the right to purchase all

services or products of a place of public accommodation, the right to be admitted to any place of public accommodation, and the right to have access to the services and products of such a place in the same manner as all other customers." *Meyers v. Hot Bagels Factory, Inc.*, 131 Ohio App.3d 82, 104, 721 N.E.2d 1068 (1st Dist.1999). The right conferred is thus a right of equal access.

The narrow exception in R.C. 4112.02(G) says that operators of public accommodations *can* deny access "for reasons applicable alike to all persons regardless of race, color, religion, sex, military status, national origin, disability, age, or ancestry." *Id.* This means that the operator can limit or deny access only if the reasons for doing so do not take any protected trait into account.

The statute's right-and-exception structure guides my response to your question. In particular, this structure means that a policy requiring biological males and biological females to use different bathrooms, changing rooms, and locker rooms violates R.C. 4112.02(G) only if the policy *both*: (1) denies individuals the right to "full enjoyment" of public accommodations; and (2) falls outside the statute's exception. Judged by that standard, such policies are lawful. They do not deny anyone "full enjoyment" of public accommodations. They also fall within the statutory exception.

1

Providing separate bathrooms, changing rooms, and locker rooms for the separate sexes does not violate the right that R.C. 4112.02(G) confers. To the contrary, separating the sexes in these private areas *helps ensure* that no one is, on the basis of sex, denied the full enjoyment of public accommodations.

Begin with the fundamental principle of legal interpretation: words in a legal text "are to be understood in their ordinary, everyday meaning," unless "context indicates that they bear a technical sense." Scalia & Garner, *Reading Law* at §6, p.69 (2012). The goal, in other words, is to read statutes so that they "mean what they conveyed to reasonable people at the time they were written." *Id.* at p.16. All this follows from the nature of written word. "Language in general, and legislation in particular, is a social enterprise to which both speakers and listeners contribute, drawing on background understandings and the structure and circumstances of the utterance." *Herrmann v. Cencom Cable Assocs., Inc.*, 978 F.2d 978, 982 (7th Cir.1992). Thus, words or phrases in a statute must be interpreted with an eye toward "the surrounding words, the setting of the enactment, the function a phrase serves in the statutory structure," and other contextual clues. *Id.*

With that in mind, consider the context surrounding R.C. 4112.02(G)'s enactment. R.C. 1.49(B). The General Assembly enacted R.C. 4112.02(G) in 1961, and expanded the statute to cover "sex" in 1973. *See* Am. H.B. No. 918, 129 Ohio Laws 1694, 1696; Am. Sub. H.B. No. 610, 135 Ohio Laws 1884, 1887. At that time, the ordinary speaker of English would have understood a statute guaranteeing both sexes "full enjoyment" of public accommodations to permit "some segregation between the sexes." *Adams*, 57 F.4th at 804-05. As then-Professor Ruth Bader Ginsburg explained during the relevant time period, "[s]eparate places" for the two sexes "to disrobe, sleep, [and] perform personal bodily functions are permitted, *in some situations required*, by regard for individual privacy." Ruth Bader Ginsburg, *The Fear of the Equal Rights Amendment*, Wash. Post, Apr. 7, 1975, at A21 (emphasis added). Put differently, nearly everyone in 1973 would have understood what almost everyone alive today understands

still: providing women's- and men's-only spaces for certain functions will not deny, and may enhance, equal access to public facilities.

This common understanding is not the vestigial tail of Victorian-era prudishness. To the contrary, "sex separation in bathrooms dates back to ancient times." W. Burlette Carter, *Sexism in the "Bathroom Debates": How Bathrooms Really Became Separated by Sex*, 37 Yale L. & Pol'y Rev. 227, 229 (2018). It stems from two insights so broadly accepted that they are rarely articulated.

First, most members of both sexes have "a privacy interest in shielding [their] bod[ies] from the opposite sex." *Adams*, 57 F.4th at 805; *accord Chaney v. Plainfield Healthcare Ctr.*, 612 F.3d 908, 913 (7th Cir.2010); *see also United States v. Virginia*, 518 U.S. 515, 550 fn.19, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996) (recognizing that admitting women to VMI would "undoubtedly require alterations necessary to afford members of each sex privacy from the other sex"). This interest in maintaining privacy from people of the opposite sex applies without regard to their gender identities. That privacy interest is, if anything, heightened in modern times, as technological advances have made it easier for voyeurs, child pornographers, and others to inconspicuously invade the privacy of others. And these improper acts skew toward males. "Men report feeling less repulsed by the idea of voyeurism than women do … and show a greater willingness to engage in it." Andrew G. Thomas et. al, *Sex Differences in Voyeuristic and Exhibitionist Interests: Exploring the Mediating Roles of Sociosexuality and Sexual Compulsivity from an Evolutionary Perspective*, Archives of Sexual Behavior 50:2151, 2152 (2021). Men are also drastically more likely to commit child-pornography crimes. *See* Mark A. Motivans, et al., *Federal Prosecution of Child*

Sex Exploitation Offenders, 2006, p. 5, tbl. 6 (98.7 percent of child-pornography offenders in 2006 were males). Given the heightened privacy risk that men present, women's interest in having privacy from men in bathrooms, changing rooms, and locker rooms is amply justified by data.

Second, allowing men to share bathrooms, changing rooms, and locker rooms with women increases the ease with which biological males—most especially *men who identify as men*—can victimize women and girls. After all, if bathrooms are not separated by sex, otherwise-concerned observers are less likely to think twice, or to intervene, when a man enters a women's room. Thus, entities that fail to segregate the sexes with respect to communal bathrooms, changing rooms, and locker rooms potentially expose patrons to increased risk. *See Adams*, 57 F.4th at 802.

Recent efforts to depart from the tradition of sex-segregated bathrooms have tended to prove its wisdom. In one high-profile example, a biological male in Virginia raped a student in a girls' bathroom that he was allowed to enter because of school-district policy. *See* Drew Wilder & Gina Cook, *Family of Loudoun Co. Student Sexually Assaulted: 'Ineptitude of All Involved Is Staggering*,' NBC4 Washington (Dec. 12, 2022), https://perma.cc/XN7L-PU7Y. School officials were indicted for their misconduct in responding to the rape. *Id.* Other examples in which biological males abused, harassed, or otherwise made women feel unwelcome in women's shelters, women's prisons, and locker rooms, are easy to find. *See, e.g.*, Dept. of Hous. and Urban Dev., *Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs*, 85 FR 44811, pgs. 44814–15 (July 24, 2020), *proposed rule withdrawn* 86 FR 22125 (April 17, 2021); James Queally

and Anita Chabria, *Indecent Exposure Filed Against Trans Woman Over L.A. Spa Incident,* Los Angeles Times (Sept. 2, 2021), https://perma.cc/BA4E-XC9G; Matt Masterson, *Lawsuit: Female Prisoner Says She Was Raped by Transgender Inmate*, WTTW (Feb. 19, 2020), https://perma.cc/2ZQ9-FSCS; *Allen v. Millington*, 2:22-cv-197, Doc. 1, Verified Complaint at ¶¶33–45 (Oct. 27, 2022).

Because of the risk that these shared spaces present, entities that operate communal (as opposed to single-user) restrooms and locker rooms may face liability if they adopt policies that fail to protect users "from sexual assault and harassment." *Adams*, 57 F.4th at 802.

Perhaps because the wisdom of providing separate private spaces for women is so intuitive, sex-segregated bathrooms have not sparked much litigation or concern. To the contrary, it is an expected and unsurprising aspect of American life. The same goes for girls' and women's sports teams, girls' and women's dormitories, and so on. Indeed, the federal law Title IX allows, and sometimes requires, sex-segregated sports teams and living arrangements. *See, e.g.*, 20 U.S.C. §1681(a)8); 34 C.F.R. §§106.33, 106.41(b)–(c); *Biediger v. Quinnipiac Univ.*, 691 F.3d 85, 91, 105–06 (2d Cir.2012). Title IX guarantees that no one "shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity …" 20 U.S.C. §1681(a). This language has long been understood to permit sex-segregated sports teams and private spaces *precisely because* failing to provide women-only teams and spaces will often result in women being denied the benefits of educational and athletic opportunities.

I hasten to add that much of what I have said has no application to the other protected traits listed in R.C. 4112.02(G). In most situations, separating individuals

based on other protected traits—including "color, religion, … military status, national origin … or ancestry"—*would* entail denying people the full enjoyment of public accommodations. That is because the *only* reason to draw distinctions based on these traits would be to mark with badges of inferiority individuals who bear these traits—to make clear that disfavored groups are not welcome. *That* would deny people full enjoyment of public accommodations, as it would confer a right of access that is equal only in form, not substance, to that held by others.

As already explained, however, there are ample reasons to separate the sexes, which is why doing so *does not* necessarily mark men or women with badges of inferiority. And the same may be true of disability and age. A public accommodation that hosts athletic competitions, for example, may enhance the ability of the physically disabled and the elderly to enjoy those public accommodations by limiting participation in certain competitions to the handicapped or the aged. Similarly, providing parking that permits the elderly and the disabled to more easily access a facility would not seem to deny the non-elderly and non-disabled the full benefit of the public accommodation in question. And no one would seriously argue that an elderly hospital patient denied treatment in a hospital's pediatric wing is denied full enjoyment of the hospital more broadly.

None of my analysis has any bearing on contexts other than those you ask about: bathrooms, changing rooms, and locker rooms. While segregating the sexes for purposes of *these* rooms does not deny either sex full enjoyment of public accommodations, separating the sexes in other contexts will. In some contexts, separating the sexes can be explained only by bigotry. *See, e.g.*, *Baker v. Tippecanoe Country Club, Inc.*, 2001 Ohio Civil Rights Comm. LEXIS 13 (Sept. 18, 2001) (allowing

only men to use a golf course on some days, and only women to use the course on others, violates R.C. 4112.02(G)). As Thurgood Marshall wisely observed, a "sign that says 'men only' looks very different on a bathroom door than a courthouse door." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 468–69 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) (Marshall, J., concurring).

The foregoing establishes that a policy limiting bathrooms, changing rooms, and locker rooms to a single sex does not "deny" anyone access to public accommodations, and thus does not violate R.C. 4112.02(G). But before moving on, it is important to pause to address two final points.

First, I have accounted for the fact that R.C. 4112.02(G) must be liberally construed "for the accomplishment of its purposes." R.C. 4112.08(A). The duty to liberally construe a statute is not a mandate "to rewrite the statute." *State ex rel. Ohio Presbyterian Ret. Servs., Inc. v. Indus. Comm'n of Ohio*, 151 Ohio St.3d 92, 97, 2017-Ohio-7577, 86.N.E.3d 294. And short of rewriting R.C. 4112.02(G), there is no way to read the statute as prohibiting single-sex bathrooms. Further, even if the statute were ambiguous on this score, the liberal-construction canon would not support a contrary reading. That liberal-construction rule favors interpretations that advance the "purposes" of a provision in Chapter 4112. *See* R.C. 4112.08(A). This opinion does that: it advances the purposes of Chapter 4112, because it ensures that neither sex is denied full enjoyment of public accommodations.

Second, I do not wish to diminish the reality that some transgender individuals may feel uncomfortable or disrespected if made to abide by such policies. But in this context, as in so many other legal contexts, the law does not protect subjective preferences.

Understandably so. "Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy." *Kraus v. City of Cleveland*, 163 Ohio St. 559, 561-562, 127 N.E.2d 609 (1955),quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905). Rather than allowing everyone to act as "a law unto himself," *id.*, R.C. 4112.02(G) protects a right susceptible of objective measurement: equal access. This is a right to access facilities on equal terms, not to behave in whatever way one wishes upon receiving that access. *Fall v. LA Fitness*, 161 F. Supp. 3d 601, 610 (S.D. Ohio 2016) ("neither Title II, nor its Ohio counterpart codified at § 4112.02(G), require LA Fitness to allow Mr. Fall to pray in the location he prefers"). Some may consider this equal-access right insufficient to protect the interests of our transgender citizens. But only the legislature can broaden the statutory right—I cannot make the statute confer something more than the equal access the statutory text guarantees.

2

There is a second, independent reason for concluding that R.C. 4112.02(G) requires public accommodations to require the sexes to use different bathrooms, changing rooms, and locker rooms. In particular, such policies are permitted by the exception in R.C. 4112.02(G). In other words, even assuming that sex-segregated-bathroom policies "deny" transgender individuals the full enjoyment of a public accommodation, that denial is lawful, because it is made "regardless of" any protected trait, including "sex."

To see why, return to the text, and two phrases in particular.

The first is "sex." When R.C. 4112.02(G) uses this undefined term, it means "biological sex." This follows from the fact that undefined words in Ohio statutes

bear "their plain, common, and ordinary meaning[s]." *Doe v. Greenville City Sch.*, — Ohio St.3d —, 2022-Ohio-4618, ¶21. The ordinary meaning of "sex" is biological sex—the "two divisions of organic esp[ecially] human beings respectively designated male or female." Webster's Third New International Dictionary at 2081 (1993); *accord* Webster's Second New International Dictionary at 2296 (1948).

The second important phrase is "regardless of," which means "without taking into account." Webster's Third New International Dictionary at 1911 (1993); *accord* Webster's Second New International Dictionary at 2096 (1948).

Combining these two phrases yields a clear rule: operators come within the exception—they do not violate R.C. 4112.02(G)—if they deny access to people without considering their sex (or another protected trait).

Applying this rule, the statutory exception applies in cases where a transgender individual claims that a sex-segregated-bathroom policy "den[ied]" that individual the "full enjoyment" of a public accommodation. R.C. 4112.02(G). To see why, recall what the previous section established: sex-segregated bathrooms do not deny either sex the right of "full enjoyment" of public accommodations. To the contrary, these policies give both sexes equal access to bathrooms, and therefore equal access to—"full enjoyment" of—the public accommodation. Thus, if a transgender individual is denied that access, it *cannot* be because of his sex; he could access the bathroom that accords with his biological sex to the same degree as any other patron. Instead, the reason for his denial is that he is not comfortable using the bathroom assigned to his biological sex. That "reason[]" is "applicable alike to all persons regardless of … sex," R.C. 4112.02(G), since no one can use a bathroom other than the one assigned to his or her sex.

Thus, a denial along these lines would fall squarely within the statutory exception.

B

Bostock does not compel a contrary conclusion. Ohio courts "have determined that federal case law interpreting Title VII … is generally applicable to cases involving alleged violations of R.C. Chapter 4112." *Plumbers & Steamfitters Joint Apprenticeship Committee v. OCRC*, 66 Ohio St.2d 192, 196, 421 N.E.2d 128 (1981); *accord Coryell v. Bank One Trust Co. N.A.,* 101 Ohio St.3d 175, 2004-Ohio-723, 803 N.E.2d 781, ¶15. But ultimately, the meaning of state law is a matter for state courts. Just as *Bostock*'s interpretation of Title VII does not determine the meaning of other federal laws, decisions interpreting those other federal laws, *see, e.g.*, *Dodds v. Dept. of Edn.*, 845 F.3d 217 (6th Cir.2016), do not dictate the meaning of the Ohio law at issue here. And that is especially so where the text of state law materially differs from the text of federal law. Thus, while federal "case law interpreting Title VII has persuasive value in cases…which [involve] comparable provisions in R.C. Chapter 4112," *Hauser v. City of Dayton Police Dept.,* 140 Ohio St.3d 268, 2014-Ohio-3636, 17 N.E.3d 554, ¶14, Ohio courts and executive officers should not "resort to federal case law interpretation of Title VII" when interpreting materially different provisions in Ohio law, *Genaro v. Cent. Transp.,* 84 Ohio St.3d 293, 298, 703 N.E.2d 782 (1999).

Title VII and R.C. 4112.02(G) are materially identical in one key respect: both use the word "sex." And with respect to that word's meaning, my analysis mirrors *Bostock*. In particular, the *Bostock* majority treated the word "sex" as referring to one's "status as either male or female [as] determined by reproductive biology." *Bostock,* 140 S. Ct. at 1739 (citation omitted); *Id.* at

1756–57 (Alito, J., dissenting). So, if anything, *Bostock* bolsters my conclusion that "sex" means "biological sex."

Beyond that, *Bostock* is of little relevance because Title VII and R.C. 4112.02(G) contain materially different language. Title VII does not contain any language resembling R.C. 4112.02(G)'s right to the "full enjoyment" of public accommodations. Accordingly, *Bostock* did not interpret any comparable language, and thus shines no light on whether a policy separating bathrooms, changing rooms, and locker rooms by biological sex denies anyone the "full enjoyment" of public accommodations.

Bostock also shines little light on the meaning of R.C. 4112.02(G)'s exception, which permits operators of public accommodations to deny access for reasons applicable to everyone "regardless of … sex." Recall that *Bostock* relied heavily on the phrase "because of … sex," which had long been interpreted to require application of a but-for test of causation. *Bostock,* 140 S. Ct. at 1739. That phrase "because of" appears nowhere in R.C. 4112.02(G). Instead, R.C. 4112.02(G) uses the phrase "regardless of"—it prohibits exclusion from public accommodations "except for reasons applicable to alike to all persons regardless of … sex." The phrase "regardless of … sex" forbids taking protected traits into account when denying someone the full benefit of public accommodations. That is not a but-for test: even if a protected trait plays a but-for role in the denial of services, the denial will not trigger R.C. 4112.02(G) unless the operator or employee *takes account of* the trait when denying services.

To illustrate, *Bostock* held, in light of the but-for relationship between sex and transgender status, that Title VII prohibits discrimination based on transgender status even when the employer does not know the

employee's or applicant's sex. *See Bostock*, 140 S.Ct. at 1746. That reasoning would not apply to R.C. 4112.02(G), which forbids only discriminatory action that accounts for, or considers, sex. At the very least, the textual difference is significant enough to seriously diminish *Bostock*'s relevance. Indeed, one Ohio court has already concluded that the phrases "regardless of" (the phrase R.C. 4112.02(G) uses) and "because of" (the phrase Title VII uses) bear different meanings. *Love v. Civ. Rights Comm.*, No. 6072, 1983 WL 6548, at *3 (5th Dist., July 19, 1983) (unpublished); *see also Derungs v. Wal-Mart Stores, Inc.*, 374 F.3d 428, 434 (6th Cir.2004).

IV

You next ask whether a restroom, changing room, or locker room that is open to the public and located within a building or facility owned by a county, township, or municipality is considered a "public accommodation" under R.C. 4112.01(A)(9).

I want to pause to note that your question rests on an implicit, and potentially incorrect, assumption. In particular, you assume that bathrooms within public accommodations are accommodations all their own. But R.C. 4112.01(A)(9) defines "public accommodation" as "any inn, restaurant, eating house, barbershop, public conveyance by air, land, or water, theater, store, other place for the sale of merchandise, or any other place of public accommodation or amusement of which the accommodations, advantages, facilities, or privileges are available to the public." Thus, the relevant question in a dispute about a bathroom policy under R.C. 4112.02(G) will *not* (usually, at least) center on whether the bathroom or locker room or changing room is itself a public accommodation. Instead, the dispute will center on whether the facility *in which the room is located* is a public accommodation and, if so, whether

the bathroom policy denies anyone the full enjoyment of that facility for impermissible reasons. While the two inquiries will often lead to the same conclusion, they may sometimes diverge. My opinion should not be understood to accept or reject your implicit assumption.

Regardless, I cannot answer your question. Determining which specific locations are public accommodations must be done on a case-by-case basis. *Baird v. The Salvation Army*, 2005 Ohio Civil Rights Comm. LEXIS 6, *13-14 (Oct. 3, 2005). As the Ohio Supreme Court has explained, the places deemed to be public accommodations in R.C. 4112.01(A)(9) "display several features of distinguishing similarity." *OCRC v. Lysyj*, 38 Ohio St.2d 217, 220, 313 N.E.2d 3 (1974). These features include offering "accommodations, advantages, facilities or privileges to a substantial public," and doing so on a "nonsocial, sporadic, impersonal and nongratuitous basis." *Id; see also* Ohio Adm.Code 4112-5-02(I). Thus, whether a particular place is a public accommodation is a question of fact. As I explained at the outset, I cannot answer such questions in an Attorney General opinion. 2005 Op. Att'y Gen. No. 2005-002, at 2-12, citing 2004 Op. Att'y Gen. No. 2004-022, at 2-186.

V

Your final question is whether a political subdivision or its employees may be held liable for violations of R.C. 4112.02(G). For example, if a court were to reject my reading of R.C. 4112.02(G), could a political subdivision that adopts a sex-segregated-bathroom policy be held liable? Yes, possibly.

R.C. 4112.02(G) applies to "any proprietor or any employee, keeper, or manager of a place of public accommodation." A "proprietor" is an owner, and would naturally include a political subdivision that owns a public

accommodation. Further, because the words "employee, keeper, [and] manager" all naturally encompass employees of the person or entity that owns a public accommodation, these phrases naturally capture employees of any political subdivision that qualifies as a "proprietor." The Commission may bring charges against any "person" who violates R.C. 4112.02(G), and the words "person" is defined to include "all political subdivisions" of the State. R.C. 4112.01(A)(1). Aggrieved individuals may also bring civil actions against anyone who violates R.C. 4112.12(G). *See* R.C. 4112.99(A).

You additionally ask whether political subdivisions and their employees are protected from this liability under R.C. 2744.02(B)(5) or R.C. 2744.03(A)(6)(c). No, they are not. Both statutes apply only in actions "for injury, death, or loss of person or property," not to actions alleging unlawful discrimination. R.C. 2744.02(B); R.C. 2744.03(A). Thus, these statutes have no bearing on claims alleging discrimination under R.C. 4112.02(G). I cannot canvas the entire Revised Code, so it is conceivable that some other statute confers immunity from suit. *See* 2021 Op. Att'y Gen. No. 2021-006, at Slip Op. 11; 2-29. But neither of the statutes you identified does.

Ultimately, the courts, not the Attorney General, must determine liability. 2004 Op. Att'y Gen. No. 2004-032, at 2-300.

Conclusions

Accordingly, it is my opinion, and you are hereby advised, that:

(1) The Ohio Civil Rights Commission cannot authoritatively interpret R.C. 4112.02(G).

(2) R.C. 4112.02(G) does not prohibit operators of public accommodations from adopting policies that limit communal restrooms, changing rooms, and locker rooms to members of a single sex.

(3) Whether a restroom, changing room, or locker room that is open to the public and located in a facility owned by a governmental entity is considered a "public accommodation" under R.C. 4112.01(A)(9) for purposes of R.C. 4112.02(G) is a question of fact that must be determined by the courts.

(4) Political subdivisions and their employees can be liable for violations of R.C. 4112.02(G).

Respectfully,

DAVE YOST
Ohio Attorney General