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October 21, 2015

The Honorable William Brownsberger
Senate Chair, Joint Committee on the Judiciary
State House, Room 504
Boston, MA 02133

The Honorable John Fernandes
House Chair, Joint Committee on the Judiciary
State House, Room 136
Boston, MA 02133

Re: S.735, *An Act relative to transgender anti-discrimination* and H.1577, *An Act relative to gender identity and nondiscrimination*

Dear Chairmen Brownsberger and Fernandes:

Thank you for the opportunity to testify at the hearing on S.735, *An Act relative to transgender anti-discrimination*, filed by Senator Sonia Chang-Diaz, and H.1577, *An Act relative to gender identity and nondiscrimination*, filed by Assistant Majority Leader Byron Rushing and Representative Denise Provost. This legislation is critical to protect the rights of transgender people in Massachusetts and fight discrimination, and I urge the Committee to move quickly with a favorable report. I would like to take this opportunity to provide further information to the Committee on three issues that were raised at the hearing.

First, some asserted that our existing laws adequately protect transgender people from discrimination in places of public accommodation. They do not. Though we encourage victims to report incidents to our office, the Massachusetts Commission Against Discrimination (MCAD), or the police (where appropriate), the remedies currently available are significantly limited. For example, when a victim files a complaint with our office's Civil Rights Division, we may be able to mediate a mutually agreeable resolution between the parties. However, our bargaining power is limited, because liability is not explicit under *any* case, court decision, statute or regulation.

With respect to the MCAD, members of the Committee are likely familiar with two probable cause findings that were recently circulated among your colleagues. These findings did



not conclude that gender identity-based discrimination is prohibited under current Massachusetts law. Rather, these were early-stage findings that simply allowed the matters to go forward to hearing and adjudication. Both complaints, however, were resolved through voluntary settlements without further findings or adjudication. *No court* in Massachusetts has held a place of public accommodation liable for discriminating against a customer because of her gender identity. Additionally, some federal courts have concluded that a theory of sex-based discrimination cannot be used by a transgender person to recover damages under analogous federal anti-discrimination laws. *See, e.g., Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1221 (10th Cir. 2007) (“discrimination against a transsexual based on the person’s status as a transsexual is not discrimination because of sex under Title VII”).

The view that existing law adequately protects transgender people is belied by the prevalence of discrimination against the group. Our office and non-profit organizations in Massachusetts like Gay & Lesbian Advocates & Defenders (GLAD) have received numerous complaints from transgender people, who are routinely discriminated against, particularly in places of public accommodation. As I said at the hearing, our failure to provide these protections under our current law sends the message that we, as a state, do not welcome transgender people or consider them deserving of equal treatment. I think we can all agree that is the wrong message.

Second, some have expressed concern that this legislation would require businesses to undertake expensive renovations, such as building gender-neutral locker rooms and bathrooms. That concern is unfounded and without merit. Under this bill, businesses or places of public accommodation do not need to change any existing practices, except allow visitors to use those facilities that correspond to their *actual* gender identity. Since these places already have to do that for their employees under current law, there is no hardship in extending such protections to customers and members of the public. This bill does not impose *any* construction or renovation requirements, and our office will enforce the law, if enacted, consistent with such interpretation. As far as we know, no other jurisdiction that has these protections in place for transgender people has required new construction or renovation. Moreover, since 2012, our anti-discrimination laws have protected transgender employees from discrimination at their places of work, including in gender-segregated spaces. No employer has been required to build new facilities or renovate existing facilities in order to comply with that law.

Numerous Massachusetts businesses and trade organizations, including the Greater Boston Chamber of Commerce, have endorsed the bill, because they recognize the value in ensuring that all of their customers feel welcome in their stores and facilities and are treated with respect. Companies such as Biogen, Blue Cross/Blue Shield of Massachusetts, Eastern Bank, EMC, Facebook, Google, Harvard Pilgrim Health Care, State Street, and many more understand that this bill is good for business, are not concerned about implementation, and believe it is important to stand with transgender people. This broad base of private sector support demonstrates that the “business case” against the bill is without basis.

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Third, at the hearing, various arguments were offered against the use of gender-segregated facilities by transgender people. Some said that these protections would be used as cover for people to enter into bathrooms or locker rooms for improper reasons. Experience shows that this does not occur. Seventeen other states and the District of Columbia, as well as 225 cities and towns across the country (including 13 in Massachusetts), prohibit gender identity-based discrimination in places of public accommodation. We are unaware of a single instance, in Massachusetts or anywhere else in the country, where an individual has used gender identity protections as a defense to improper or illegal conduct. Nor would they be able to – this is a classic red herring.

Finally, some have invoked the privacy rights of other patrons as a “competing” consideration. Fundamentally, I believe these purported privacy concerns are simply reflective of a certain discomfort with transgender people. Discomfort is not a reason to perpetuate discrimination or prejudice borne by lack of understanding or familiarity with transgender people.

The reality is that transgender people are too often the victims of harassment and violent crime, and this bill will enhance public safety. Many of my colleagues in law enforcement share this view, as you heard in the testimony of Suffolk County District Attorney Daniel Conley as well as Boston Police Commissioner William Evans, and as you see reflected in the letters submitted in support of the bill by the Massachusetts Chiefs of Police Association, the Massachusetts Major City Chiefs, and the individual chiefs of police in the 13 municipalities across this state that already have these protections in place.

Thank you for your work on this important issue. We hope that by clarifying some issues raised at the hearing, we can work with you on the quick passage of this legislation. If you have any questions, please do not hesitate to contact Benjamin Meshoulam, Senior Policy Advisor, at (617) 963-2601.

Sincerely,


Maura Healey

cc: The Honorable Sonia Chang-Diaz
The Honorable Byron Rushing
The Honorable Denise Provost