STATE OF MAINE	SUPERIOR COURT CIVIL ACTION
ANDROSCOGGIN, ss.	DOCKET NO. CV-2009-00199
BRIANNA FREEMAN, Plaintiff, v. REALTY RESOURCES HOSPITALITY, LLC, d/b/a DENNY'S OF AUBURN, Defendant.	PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

The Maine Human Rights Act ("MHRA") prohibits discrimination in public accommodations against individuals on the basis of "sexual orientation," which specifically includes a person's gender identity in order to protect transgender people. 5 M.R.S.A. §§ 4553(9-C) & 4592. Plaintiff Brianna Freeman alleges in this action that Defendant Realty Resources Hospitality, LLC, which owns a Denny's restaurant in Auburn, Maine (hereinafter, "Denny's"), unlawfully denied her access to the women's restroom because she is transgender – that is, because she is a woman who was assigned the sex of male at birth.[1]

After struggling for most of her life to suppress her female gender identity and to try to live as a man, Ms. Freeman was diagnosed in 2005 with Gender Identity Disorder ("GID"), the diagnosis applied to many transgender persons to describe a persistent and pervasive discomfort with one's anatomical sex and a life-long desire to be a member of the opposite sex. In 2006 she began to live as a woman, consistent with established medical protocols for treating

[1] Ms. Freeman has requested civil penal damages and injunctive relief for Defendant's initial and continued denial of access to the women's restroom. Third Am. Compl., Prayers for Relief, ¶¶ 1-5.

transgender individuals with GID. In 2007, after seeking more specific treatment for her GID, Ms. Freeman began a course of female hormone therapy, which to date has resulted in the development of female breast tissue, the softening of her skin, the decrease and thinning of her body and facial hair, and changes to the physiology and sexual function of her genitals. Since 2007, Ms. Freeman has lived and continues to live fully as a woman, including wearing women's clothing, having long hair and occasionally wearing make-up.

Yet, in 2007, Defendant told Ms. Freeman that she could not use the women's restroom at Denny's, where she had been a regular customer since 2002, because she is a transgender woman who has not undergone genital surgery. Defendant continues to exclude Ms. Freeman from using the restroom that is consistent with her gender identity – i.e., the women's restroom – based on the same rationale.

Defendant's actions violate the MHRA's express protection of transgender persons against discrimination in public accommodations. The MHRA specifically protects individuals who have a gender identity that differs from their anatomical/assigned sex at birth.[2] By excluding Ms. Freeman from the women's restroom because she is a transgender woman who has not had genital surgery, Defendant has defeated a central purpose of the MHRA, which is to prohibit discrimination precisely against individuals whose gender identity does not match their assigned sex at birth, regardless of whether they have undergone genital surgery. Defendant has targeted Ms. Freeman for discrimination based on the protected characteristic – the inconsistency between her gender identity and her assigned sex at birth – which is at the heart of what it means to be transgender. Accordingly, taking the uncontroverted evidence in the light most favorable

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[2] "The official designation of a person as male or female usually occurs at or immediately after birth, and is often based on the appearance of the external genitalia." In re Heilig, 816 A.2d 68, 75 (Md. 2003).

to the non-movant, Defendant's stated reason for its action is direct evidence of gender identity discrimination.

STATEMENT OF FACTS

I. Ms. Freeman's Female Gender Identity And Diagnosis And Treatment Of Gender Identity Disorder.

Plaintiff Brianna Freeman is a forty-five year old woman. Plaintiff's Statement of Undisputed Material Facts (hereinafter, "Facts"), ¶¶ 1 & 4. She has lived in Lewiston since 2002, during which she has been a regular customer at Denny's restaurant in Auburn, operated by Defendant Realty Resources Hospital, LLC. Facts, ¶¶ 1, 47, 50 & 51.

Ms. Freeman is also a transgender woman, meaning that she has a female gender identity, although she was assigned the sex of male at birth. Facts, ¶¶ 2-4, 11 & 13. Most people have an internal gender identity that matches their anatomy and assigned sex at birth. Facts, ¶ 12. But for a transgender person, there is a mismatch; the person's gender identity does not match the person's assigned birth sex and anatomy, which results in a distressing and sometimes debilitating conflict. Facts, ¶¶ 12-16. For example, a transgender woman is an individual who was assigned the sex of male at birth but has a female gender identity and lives as a woman. Facts, ¶ 13.

Throughout her childhood, beginning as early as first or second grade, Ms. Freeman felt like she was in the wrong body and was uncomfortable being seen by others as a boy and being expected to live as a boy. Facts, ¶ 28. For example, every time she had to wear traditional male attire, such as a suit and tie, Ms. Freeman felt that she was in the wrong clothes. Id. In addition, Ms. Freeman never felt like she belonged in traditionally male spaces, such as the boy's bathroom. Id. When she got older, Ms. Freeman was embarrassed and ashamed with having to

shave. Id. However, because she grew up in a strict and traditional household, she could not take any actions to explore these feelings of being in the wrong body. Facts, ¶ 30.

During her college years and her work life in her early adulthood, Ms. Freeman continued to deny her feeling of being in the wrong body and tried to be what others expected her to be, including dressing and generally presenting herself to others as a man. Facts, ¶ 31. At the same time, these unresolved feelings caused her much pain and difficulty and made it difficult for her to function on a day-to-day basis. Id. As Ms. Freeman entered adulthood, it became clearer to her that her feelings of being in the wrong body were because internally she was female. Id. After many years of struggle, she took her first outward steps towards acknowledging her female gender identity in 2000, when she tried on female clothing for the first time. Facts, ¶ 32. She immediately felt more authentic wearing women's clothing than she did when wearing men's clothing; wearing women's clothing made her feel more complete. Id. However, Ms. Freeman felt too ashamed to take any further steps at that point in exploring her female gender identity, nor did she feel comfortable wearing women's clothing in public. Id.

In 2004, Ms. Freeman's life became unmanageable as result of her struggle with her gender identity, as well as symptoms related to depression and Post Traumatic Stress Disorder (PTSD). Facts, ¶ 33. She had difficulty sustaining relationships, securing and maintaining employment and housing, and supporting and taking care of herself. Id. As a result, Ms. Freeman sought psychological counseling for the problems she was having as a result of her gender identity issues as well as her feelings of anxiety, depression and stress. Facts, ¶¶ 5 & 33. As part of that counseling, Ms. Freeman was first diagnosed with Gender Identity Disorder ("GID") in 2004. Facts, ¶ 35. At the same time, she also took her first steps toward living and presenting herself to others as a woman, including continuing to wear women's clothing, both at

home and occasionally in public, piercing her ears, wearing jewelry and make-up, and growing her hair longer. Facts, ¶ 34.

GID is a rare and serious medical condition listed in the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV), published by the American Psychiatric Association. Facts, ¶ 14. GID is characterized by a persistent and often intense discomfort with one's assigned sex and one's primary and secondary sex characteristics. Facts, ¶¶ 14-17. This conflict can create intense emotional pain and suffering that is intractable, severe and often incapacitating. Facts, ¶ 16. If left medically untreated, GID can result in dysfunction, debilitating depression and, for some people, incidents of self-harm, including suicide. Id.

The World Professional Association for Transgender Health ("WPATH") has established internationally accepted Standards of Care ("SOC") for the treatment of people with GID. Facts, ¶ 19. The SOC are based upon an individualized medical plan for transition that involves one or more of three components: (1) taking hormones of the desired gender, (2) living the "Real Life Experience," i.e., living full-time in the new gender, and (3) where appropriate for the individual, undergoing a range of surgeries to change various aspects of the body to match the person's gender identity. Facts, ¶¶ 21 & 22. The goal of treatment is to enable a transgender person to live and participate in society consistent with their internal gender identity and to alleviate the distress caused by the conflict between the person's gender identity and their assigned sex. Facts, ¶ 20. The SOC serve as a guide to doctors and mental health providers in prescribing an individualized course of care for any particular patient to address that person's psychological needs. Facts, ¶ 22. Within the parameters of this established medical framework, there is no one-size-fits-all prescription for treatment of GID nor one specific medical protocol that is appropriate for all patients. Id. For some people, living in their true gender role and taking

hormone therapy is sufficient; for others, one or more surgeries may be necessary as well. Facts, ¶¶ 22 & 23. However, genital surgery is not an essential component of gender reassignment and is not required as treatment for all persons with GID. Facts, ¶ 27.

As part of her medical treatment for GID and her transition to being female, Ms. Freeman began living and presenting herself to the world in most settings as a woman in 2006. Facts, ¶¶ 36 & 54-55. Living in the preferred gender role is of critical importance to the psychological health of a person with GID, such as Ms. Freeman. Facts, ¶¶ 9 & 54. If Ms. Freeman is denied the ability to participate in society as female, it undermines her medically-supervised treatment. Facts, ¶ 57.

In particular, use of the restroom that matches a person's gender identity is integral to the medical course of treatment for GID. Facts, ¶ 56. When a transgender woman such as Brianna Freeman is told that she cannot use the women's bathroom, it is traumatic because it negates the most essential and immutable aspect of her identity. Facts, ¶ 58. Specifically, having to use the men's restroom would call into question and challenge Ms. Freeman core identification as a woman and would be deeply damaging to her self-esteem and well-being. Facts, ¶ 60. It would also single her out as a transgender woman to other customers and cause her significant humiliation, embarrassment and anxiety. Id. As such, using the men's restroom is not an option for Ms. Freeman and has not been an option for her since the time she began transitioning to female in 2006. Facts, ¶ 59.

In 2007, Ms. Freeman began seeing Cameron Ives, MSW/LCSW at Tri-County Mental Health for her GID-related issues. Facts, ¶ 38. As part of that treatment. Mr. Ives confirmed Ms. Freeman's GID diagnosis on September 13, 2007. Facts, ¶¶ 39-40. Mr. Ives also referred Ms. Freeman to Christopher Bartlett, M.D. for medical care related to her gender identity. Facts,

¶ 42. Under Dr. Bartlett's supervision, in October 2007, Ms. Freeman began a course of female hormone therapy as a key component of her treatment of GID, which she continues today. Facts, ¶ 43. Since 2007, she has taken hormones to block the production of testosterone and to increase the production of estrogen in her body. Facts, ¶ 44. For Ms. Freeman, the combined effect of the hormone therapy to date includes: the development of female breast tissue, the softening of her skin, the decrease and thinning of her body and facial hair, and changes to the physiology and sexual function of her genitalia. Facts, ¶¶ 25 & 45. In addition, these feminizing hormones have had a calming effect on her mental state and are essential to diminishing her gender dysphoria – the pain and distress associated with her feeling of being in the wrong body. Facts, ¶¶ 24, 26 & 45.

II. Defendant's Exclusion Of Ms. Freeman From The Women's Restroom.

In October 2007, Denny's assistant manager Darren Douin informed Ms. Freeman that she would no longer be able to use the women's restroom, which she had started using sometime in 2006. Facts, ¶¶ 53 & 61. Mr. Douin explained to Ms. Freeman that the reason for this decision was that Defendant understood that she was a transgender woman who had not undergone genital surgery. Facts, ¶¶ 62-64. Consequently, Defendant excluded and continues to exclude Ms. Freeman from the only restroom that is consistent with her gender identity and medical treatment – the women's restroom. Facts, ¶ 94.

Today, Ms. Freeman continues to live as a woman. Facts, ¶ 92. She also continues to frequent the Denny's restaurant in Auburn because it is close to her home, she sometimes meets friends there, and it offers affordable meals. Facts, ¶¶ 52 & 93. However, she has had to limit the amount of time she can spend there because Denny's has informed her that it will continue to

deny her access to the women's restroom for the same reason Mr. Douin initially explained to her in 2007. Facts, ¶¶ 94-95.

ARGUMENT

I. THIS COURT SHOULD GRANT SUMMARY JUDGMENT TO MS. FREEMAN ON COUNT I FOR SEXUAL ORIENTATION DISCRIMINATION.

A. Standard Of Review

This Court must grant summary judgment for Ms. Freeman if (1) there is no genuine issue as to any material fact, and (2) she is entitled to judgment as a matter of law. M.R.Civ.P. 56(c); see also Dyer v. Me. Drilling and Blasting, Inc., 2009 ME 126, ¶ 14, 984 A.2d 210, 214. The court must also "examine the facts in the light most favorable to the nonmoving party." Lightfoot v. School Administration Dist. No. 35, 2003 ME 24, ¶ 6, 816 A.2d 63, 65 (internal citation omitted). Because Denny's admits to the key elements Ms. Freeman must prove in order to succeed in her claim, she is entitled to judgment as a matter of law. Taking the facts in the light most favorable to the Defendant, Denny's admits it excluded Ms. Freeman from the women's restroom. It also asserts that the reason for that exclusion was and is because she is a transgender woman who has not had genital surgery. Facts, ¶¶ 62-64. Because Denny's own justification for its exclusion of Ms. Freeman from the women's restroom, both in 2007 and continuing through today, is direct evidence of sexual orientation discrimination (namely discrimination because of Ms. Freeman's transgender gender identity), Plaintiff is entitled to judgment as a matter of law.

B. The Maine Human Rights Act Protects The Rights Of Transgender Individuals To Live Consistent With Their Gender Identity In All Aspects Of Their Lives Without Discrimination.

The MHRA prohibits a public accommodation from "directly or indirectly refus[ing], discriminat[ing] against or in any manner withhold[ing] from or deny[ing] the full and equal enjoyment to any person . . . any of the accommodations, advantages, facilities, goods, services or privileges of public accommodation," on account of a person's sexual orientation, which includes a person's "gender identity or expression." 5 M.R.S.A. §§ 4553(9-C) & 4592(1).[3] By its plain meaning and the reasonable interpretation of the Maine Human Rights Commission ("MHRC"), "gender identity" means "an individual's gender-related identity, whether or not that identity is different from that traditionally associated with that individual's assigned sex at birth, including, but not limited to, a gender identity that is transgender or androgynous." 94-348 C.M.R. Ch. 3, § 3.02(C)(2).[4] Accordingly, the MHRA prohibits, inter alia, discrimination because a person's gender identity does not match his or her assigned sex at birth. The fact that the MHRC's regulations specifically include a "transgender" gender identity within the phrase "gender identity" further supports the understanding that the MHRA prohibits discrimination that targets individuals for having a gender identity that does not match their assigned sex at birth.

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[3] Defendant has acknowledged that it owns and operates Denny's restaurant in Auburn, which qualifies as a place of public accommodation under the MHRA. See Facts, ¶¶ 47 & 50; 5 M.R.S.A. § 4553(8) (including within definition of "place of public accommodation" "a restaurant, eating house, bar tavern, buffet, saloon, soda fountain, ice cream parlor or other establishment serving or selling food or drink").

[4] The Commission's reasonable interpretations are entitled to "great deference." See S.D. Warren Co. v. Bd. of Environmental Protection, 2005 ME 27, ¶ 7, 868 A.2d 210, 214; Maritime Energy v. Fund. Ins. Review Bd., 2001 ME 45, ¶ 7, 767 A.2d 812, 814. This Court in this action has also found the MHRC's interpretation of the term "sexual orientation" "helpful in determining who is protected under the MHRA." Freeman v. Realty Resources Hospitality, LLC, Decision, at 2 n.1 (May 27, 2010 Androscoggin Sup. Ct.).

As such, the MHRA also prohibits discrimination because a person's gender identity does not match his or her anatomy, which is the basis on which sex is assigned at birth.

The Maine Legislature added "sexual orientation" protections to the MHRA in 2005 to ensure that individuals would not be denied "the basic human right to a life with dignity" because of discrimination based on their gender identity. See 5 M.R.S.A. §§ 4552 & 4553(9-C).[5] Accordingly, the MHRA's extension of protections to transgender individuals must mean, at a minimum, that transgender individuals be able to live consistent with their gender identity in all aspects of their lives, without interference or obstacles arising from discrimination, ignorance or prejudice. And to accomplish that goal, the MHRA's protections must extend to one of the most basic yet essential requirements for a person to live fully in society – the use of public restrooms that match a person's gender identity.

Ms. Freeman is among those individuals that the Legislature specifically intended to protect from discrimination. Ms. Freeman was in 2007 and is today a transgender woman who has a female gender identity that is different from her assigned sex at birth. Facts, ¶¶ 2-4 & 9. She has been living full-time as a woman (including presenting to others as a woman), has been diagnosed with GID and has undergone a medical transition process as part of her medical treatment of GID.[6] Facts, ¶¶ 6-10. Ms. Freeman has sought to use the women's restroom at

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[5] Maine voters ratified passage of the additions of sexual orientation protections to the MHRA. See Associated Press, Maine voters turn back bid to rescind state's gay-rights law, The Boston Globe (November 9, 2005), http://www.boston.com/news/local/maine/articles/2005/11/09/maine_voters_turn_back_bid_to_rescind_states_gay_rights_law/.

[6] Moreover, Ms. Freeman continues to live fully as a woman today and has been undergoing hormone therapy for over 3 years, which has had significant effects on her primary and secondary sex characteristics, including the development of female breast tissue, the softening of her skin, the decrease and thinning of her body and facial hair, and changes to the physiology and sexual function of her genitalia. Facts, ¶ 45. While not necessary for finding a

Denny's in Auburn because, as the restroom that matches her female gender identity, it is the only restroom that she can use. Facts, ¶¶ 53-60. As such, barring Ms. Freeman from the women's restroom is tantamount to barring her from using the restroom entirely, since as a transgender woman, she cannot use the male restroom. Facts, ¶¶ 59-60. As discussed above, for the MHRA's sexual orientation protection to have any real meaning for transgender people, it must protect a transgender woman's ability to live in her community and society as a woman, including ensuring that she can use the women's restroom in public accommodations. And that protection must extend to all transgender persons, regardless of whether they have undergone any particular medical procedure, including whether or not they have had genital surgery. See Section I(D), infra.

C. Defendant's Explanation That Ms. Freeman Was Denied Use Of The Women's Restroom Because She Is A Transgender Woman Who Has Not Had Genital Surgery Is Direct Evidence Of Sexual Orientation Discrimination.

In order to succeed on a disparate treatment discrimination claim, a plaintiff must show that she was discriminated against because of a protected characteristic. See Cumpiano v. Banco Santander Puerto Rico, 902 F.2d 148, 153 (1st Cir. 1990); Maine Human Rights Comm'n v. City of Auburn, 408 A.2d 1253, 1263 (Me. 1979). A plaintiff may meet her burden of proof by either showing direct evidence of discrimination, Patten v. Wal-Mart Stores East, Inc., 300 F.3d 21, 25 (1st Cir. 2002), or by meeting the burden-shifting test laid out in McDonnell Douglas Corporation v. Green, 411 U.S. 792, 802 (1973), for cases where there is only circumstantial evidence of discrimination. Garrett v. Tandy Corp., No. 00-384-P-H, 2003 WL 21250679, at *9 (D. Me. May 30, 2003) (applying federal Title II standards to MHRA claim). Because

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violation on the part of Defendant, these facts serve to underscore the unreasonableness of Defendant's position.

Defendant's own articulation of why it denied Ms. Freeman access to the women's restroom directly violates the MHRA, Ms. Freeman can meet her burden of proof through direct evidence.[7]

Viewing the evidence in the light most favorable to the non-movant, Lightfoot, 816 A.2d at 65, it is undisputed that Defendant's only stated reason for its actions in 2007 is that Ms. Freeman is a transgender woman (i.e. she has a female gender identity and lives as a woman despite being assigned the sex of male based upon her anatomy at birth) who has not undergone genital surgery.[8] Facts, ¶¶ 62-64. It is also undisputed that Defendant has asserted that it continues to prohibit her from using the women's restroom for the same reason. Facts, ¶¶ 70 & 94. By requiring Ms. Freeman to first undergo genital surgery before being allowed to use the women's restroom, Defendant has zeroed in on the one characteristic that is uniquely related to Ms Freeman's transgender status – i.e., the incongruence between her gender identity and the anatomy (specifically, her genitals) that determined her birth sex. Defendant's rationale relies

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[7] However, even were this Court to analyze the merits of this case under the McDonnell-Douglas burden-shifting paradigm, Ms. Freeman can still show that she should be granted summary judgment. Under the McDonnell-Douglas, the plaintiff first must make her prima facie case by showing that she (i) is a member of a protected class, (ii) attempted to exercise the right to full benefits and enjoyment of a place of public accommodation, (iii) was denied those benefits and enjoyment and (iv) was treated less favorably than similarly situated persons who are not members of the protected class. Garrett, 2003 WL 21250679 at *9. As a transgender woman who sought and was denied access to the use of the women's restroom at Denny's restaurant, Ms. Freeman can easily state her prima facie case. See Meléndez v. Autogermana, Inc., 622 F.3d 46, 51 (1st Cir. 2010) ("The burden of making out a prima facie case of discrimination is not onerous."). Once a plaintiff makes out her prima facie case, the burden of production then shifts to the defendant to demonstrate a "legitimate, non-discriminatory reason" for its action. Garrett, 2003 WL 21250679 at *9. Defendant in this case cannot meet this burden for the same reasons that it cannot show that its reasons do not directly violate the MHRA – because its reason for excluding Ms. Freeman from the women's restroom is, on its face, discriminatory on the basis of her gender identity.

[8] Ms. Freeman does not concede that Defendant's stated reasons are in reality what they relied upon in excluding Ms. Freeman, but instead, only assumes such for this motion, as she must for purposes of summary judgment. See Lightfoot, 816 A.2d at 65.

upon the very definition of what it means to be transgender – i.e., living consistent with a gender identity that is not the same as a person's assigned sex at birth – to justify its actions. In addition, Defendant cannot avoid such a blatant violation of the MHRA simply by stating that it would allow Ms. Freeman to use the women's restroom only if she undergoes genital surgery, when such a requirement is aimed at the very characteristic that is off limits to begin with – Ms. Freeman's transgender status.

By excluding her from the women's restroom, Denny's is discriminating against her because of her identity as a transgender woman just as directly and blatantly as it would be if it were to be prohibit her from patronizing the restaurant unless she was wearing men's clothing or presenting herself as a man. In essence, Defendant is telling Ms. Freeman that she cannot access their restroom facilities as a transgender woman, but only as a man – which she is not. As explained in Section I(B), supra, and in Section I(D), infra, the MHRA is precisely intended to protect individuals against discrimination on the basis of any incongruence between their gender identity and their assigned sex based upon their anatomy at birth, including individuals who have not had genital surgery. Accordingly, Defendant's reason, on its face, is direct evidence of sexual orientation discrimination.

D. The Maine Legislature Twice Has Rejected Attempts To Limit The MHRA's Sexual Orientation Protections Only To Transgender Individuals Who Have Had Genital Surgery.

Allowing Defendant to deny Ms. Freeman use of the restroom that matches her gender identity would in effect exclude from the protections of the MHRA a class of transgender

individuals who have not had genital surgery. However, the Maine Legislature twice has already rejected creating such an exception.[9]

In 2005, legislators considered a proposed amendment to the bill that ultimately added sexual orientation to Maine's non-discrimination laws. The amendment, House Amendment "E" (H-86), would have provided that the Maine Human Rights Act "may not be construed to permit a person to use a locker room or bathroom facilities of a public rest room designated for use for a gender other than the gender of that person at birth [unless] the person has [undergone] a medical procedure in which that person's gender is changed...."[10] The full House of Representatives soundly rejected the proposed amendment by a vote of 83-67.[11]

In 2007, a similar amendment was introduced and again rejected. LD 1589 ("An Act to Prohibit the Use of Opposite-gender Bathrooms, Changing Rooms and Locker Rooms") stated:

> [A] person may not use a public locker room, changing room or bathroom facility designated for use by a gender other than the gender of that person at birth. If a person completely undergoes a medical procedure in which that person's gender is changed, that person must use a public locker room, changing room or bathroom facility designated for use by the person's new gender. A violation of this subsection is a Class E crime."[12]

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[9] Defendant unsuccessfully attempted to create such an exception in its Motion to Dismiss, which this Court rejected. See Def.'s Mot. To Dismiss, at 3-4 (arguing that asking a "biological male" to use the men's restroom does not constitute sexual orientation discrimination as a matter of law); Freeman v. Realty Resources Hospitality, LLC, Decision, at 3 - 4 (May 27, 2010 Androscoggin Sup. Ct.) (rejecting Defendant's attempt to dismiss sexual orientation claim). As such, this Court should consider the rejection of such a proposed exception to be the controlling law of the case. United Air Lines, Inc. v. Hewins Travel Consultants, Inc., 622 A.2d 1163, 1167 (Me. 1993) ("The law of the case doctrine is based on 'the sound policy that in the interests of finality and intra-court comity a Superior Court justice should not, in subsequent proceedings involving the same case, overrule or reconsider the decision of another justice.'") (quoting Grant v. City of Saco, 436 A.2d 403, 405 (Me. 1981)).

[10] H-86, 122nd Leg., 1st Reg. Sess. (Me. 2005). Relevant parts of the legislative history have been attached as Attachment A for the convenience of the Court.

[11] Roll-calls and Actions for LD 1196, 122nd Leg., 1st Reg. Sess. (Me. 2005).

[12] LD 1589, 123rd Leg., 1st Reg. Sess., (Me. 2007). Relevant parts of the legislative history have been attached as Attachment B for the convenience of the Court.

The Joint Standing Committee on Criminal Justice & Public Safety unanimously recommended that the bill "ought not to pass."[13]

This Court should not do in this case what the Legislature twice has refused to do – i.e., take away the MHRA's sexual orientation protections based on whether an individual has undergone genital surgery. Such an action would undermine the intent of the Maine Legislature to ensure full participation in society for transgender individuals, including those who have not undergone genital surgery. Moreover, there is nothing in the plain language of the statute supporting such an exemption that turns on whether a person has undergone genital surgery.

E. Because Defendant's Rationale Is An Intentional And Direct Violation Of The MHRA, Defendant's Actual Motivation Is Irrelevant To The Question Of Liability.

Because Defendant's reason is on its face discriminatory, Ms. Freeman need not show invidious motive to discriminate against transgender people on the part of Defendant in order to show that she is entitled to judgment as a matter of law. The Maine Law Court has recognized that in a case of disability discrimination in a place of public accommodation, while there is "[r]arely . . . invidious bias on the part of the proprietor . . . . [a] barrier excludes as effectively as would an intentional policy." Maine Human Rights Comm'n v City of South Portland, 508 A.2d 948, 954 (Me. 1986). That is why the MHRA protects against not only invidious motive but also discriminatory consequences and effect. Maine Human Rights Comm'n v. Local 1361, United Paperworkers Int'l Union AFL-CIO, 383 A.2d 369, 375 (Me. 1978) ("we find nothing in the Maine Act which suggests that the Legislature intended it to apply to the limited situation, typically devoid of proof, that an employer or labor organization intends to discriminate") (finding that labor union discriminated against employee based upon her religious beliefs and

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[13] Id.

remanding for determination of reasonable accommodation). "[T]he touchstone of [the MHRA's] prohibition is whether in fact the disputed practice results in unlawful employment discrimination." Id. See also Int'l Union, United Auto., Aerospace and Agr. Implement Workers of America, UAW v. Johnson Controls, Inc., 499 U.S. 187, 188 (1991) ("absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect," i.e., a disparate impact claim).

In this case, the fact that Defendant's rationale affects only transgender individuals further underscores its inherently discriminatory nature. For example, only transgender women will be excluded from the women's restroom under Defendant's rationale. In contrast, no non-transgender women will be denied use of the women's restroom under Defendant's rationale because, by definition, a non-transgender woman will always have a gender identity that matches her anatomy as established at birth. In other words, Defendant's stated genital surgical requirement is one that can only ever be applied to exclude transgender customers from the restroom that matches their gender identity.

F. Defendant's Stated Reason Violates The MHRA Even If It Would Allow Some Transgender Individuals Who Have Had Genital Surgery To Use The Restroom That Is Consistent With Their Gender Identity.

This Court should grant Ms. Freeman summary judgment, even if Defendant's stated reason may not exclude all transgender women from the women's restroom – i.e., those transgender women who have had surgery to conform their genitals with their female gender identity. Ample case law affirms that an individual can show discrimination based upon a protected characteristic, even if "not all members of a disfavored class are discriminated against." Chadwick v. Wellpoint, Inc., 561 F.3d 38, 43 (1st Cir. 2009) (quoting Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107, 118 (2nd Cir. 2004). See also 1 Barbara

Lindemann & Paul Grossman, Employment Discrimination Law 456 (3d ed. 1996) ("In such cases the employer does not discriminate against the class of men or women as a whole but rather treats differently a subclass of men or women.").

For example, in Chadwick, 561 F.3d 38, the First Circuit recognized a discrimination claim by a female employee alleging sex discrimination under Title VII and the MHRA, even though not all women faced similar discrimination. In that case, the plaintiff alleged that she suffered discrimination as part of a subclass of "women with children, particularly young children," when her employer denied her a promotion allegedly because it did not believe that she could adequately perform the job responsibilities while taking care of young children at home. Id. at 43. In reversing summary judgment for the defendant, the First Circuit reasoned: "Ultimately, regardless of the label given to the claim, the simple question posed by sex discrimination suits is whether the employer took an adverse employment action *at least in part* because of an employee's sex." Id. at 43.

In this case, it does not matter whether the Court views Defendant's rationale as direct evidence of gender identity discrimination (because it goes to the heart of what it means to be transgender), or as discrimination against a sub-class of transgender individuals who have not had genital surgery. Either way, allowing a public accommodation, employer, or landlord to escape liability under the MHRA simply by adding an "additional" criteria (not to mention one that is related to the definition of who is transgender) would eviscerate the MHRA's protections for transgender individuals in Maine. See, e.g., Phillips v. Martin Marietta Corp., 416 F.2d 1257, 1260 (5th Cir. 1969) (dissenting opinion) (reasoning that in sex discrimination cases, if an employer were "[f]ree to add non-sex factors, the rankest sort of discrimination against women can be worked"); Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971) ("[t]he

effect of the [non-discrimination] statute is not to be diluted because discrimination adversely affects only a portion of the protected class.").

G. Creating An Exception To The MHRA Based Upon Whether A Transgender Person Has Had Genital Surgery Is Unworkable And Would Lead To Absurd Results That Are Contrary To The Intent Of The Law.

Through the course of this litigation, Defendant has asserted that its rationale for excluding Ms. Freeman from using the women's restroom would apply to all customers in all of its restaurant, even if that would lead to absurd results. Facts, ¶¶ 70-72 & 81-82. For example, Defendant has stated that it would require a transgender man with a beard and bald head, but who has not had genital surgery, to use the women's restroom, regardless of the comfort of that transgender man or of the female customers who must use the women's restroom with him. Facts, ¶¶ 71-80. Defendant also has asserted that the same would be true for a transgender woman in a dress, heels and make-up, but who has not undergone genital surgery – i.e., she could only use the men's restroom – regardless of the comfort of that transgender women or the male customers who must use the men's restroom with her.[14] Facts, ¶¶ 81-90. The Maine Legislature could not have intended such absurd consequences that would result from creating an exception to the MHRA based upon whether a person has had genital surgery.[15]

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[14] As Ms. Freeman's designated expert Dr. Ettner has explained, most transgender men and women do not need to undergo genital surgery in order to transition fully to the sex that accords with their gender identity. Facts, ¶ 27.

[15] In addition, not only would these outcomes go beyond anything the Legislature could have intended in amending the MHRA, but they also factually undermine any justification of customer comfort that Defendant might offer in defense. To be clear, once this Court finds that Defendant's reason for denying Ms. Freeman use of the women's restroom is, on its face, discriminatory, Defendant cannot offer any justifications in defense. See Desert Palace, Inc. v. Costa, 539 U.S. 90, 94 (2003). Even assuming that Defendant were allowed to justify its discriminatory actions, its own explanation belies any justifications it might assert regarding customer comfort and instead highlights the discriminatory animus against transgender individuals behind its purported justification. See, e.g., Facts, ¶ 80 (Joseph Cloutier, president of Realty Resources Hospitality, responded as follows in his deposition: "A: That's our policy. Q:

Finally, Defendant's rationale is simply unworkable; one cannot determine whether a transgender individual has had genital surgery based upon that person's outward appearance. Facts, ¶¶ 65-69. Instead, it would require self-disclosure by individuals, with physical inspection as the only way to verify a person's self-disclosure. As such, there is simply no workable way for a business, employer or landlord to confirm whether a transgender person has had genital surgery absent visual verification, which the Legislature could not have imagined allowing in adopting the MHRA's prohibition against gender identity discrimination. And even though Defendant has stated that it would only determine whether a person has had genital surgery through self-disclosure, such a method still requires patrons to disclose private medical information, which the Legislature likewise could not have contemplated as permissible under the MHRA.[16] Facts, ¶ 91.

CONCLUSION

For all of the foregoing reasons, Plaintiff Brianna Freeman respectfully requests that the Court grant her Motion for Summary Judgment on Count I of her Third Amended Complaint under the MHRA.

And that would be correct even if another customer is upset about that, isn't that correct? A: That's correct. That's correct. That's correct.")

[16] The invasiveness of this type of questioning and the problems associated with verification are best appreciated by imagining how one might feel in facing the kind of questioning Ms. Freeman has had to endure simply to gain access to a restroom at her local restaurant. For example, the recent public outcry over the Transportation Security Agency's new screening protocols reveals that most people would not agree to a protocol for ascertaining the status of their genitals in order to gain access to its restroom.

Dated: December 6, 2010

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Amend the bill by inserting after section 17 the following:

'**Sec. 18. 5 MRSA §4594-G** is enacted to read:

§4594-G. Locker room or bathroom facilities

This chapter may not be construed to permit a person to use a locker room or the bathroom facilities of a public rest room designated for use for a gender other than the gender of that person at birth. If a person undergoes a medical procedure in which that person's gender is changed, that person may use a locker room or the bathroom facilities of a public rest room designated for use for the person's new gender.'

Further amend the bill by relettering or renumbering any nonconsecutive Part letter or section number to read consecutively.

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Attachment A

SUMMARY

This amendment provides that the Maine Human Rights Act may not be construed to permit a person to use a locker room or the bathroom facilities of a public rest room designated for use for a gender other than the gender of that person at birth unless the person has undergone a medical procedure to change the person's gender.

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LD 1196 (SP 413)

"An Act To Extend Civil Rights Protections to All People Regardless of Sexual Orientation"

(Governor's Bill)

Sponsored by **Senator Karl Turner**

Senate Roll-calls

RC #	Date	Motion	Outcome	# Yeas	# Nays
RC #28	March 28, 2005	Accept Rpt 'A' OTP	PREVAILS	25	10
RC #29	March 29, 2005	Indef Post SAS-44	PREVAILS	22	13
RC #30	March 29, 2005	Indef Post SBS-48	PREVAILS	27	8
RC #33	March 30, 2005	Recede and Concur	PREVAILS	24	10
RC #51	March 30, 2005	ENACTMENT (HIH-92)	PREVAILS	25	10

House Roll-calls

RC #	Date	Motion	Outcome	# Yeas	# Nays
RC #38	March 29, 2005	Commit to Com. on Judiciary	FAILS	72	75
RC #39	March 29, 2005	ACC REPORT 'A' OTP	PREVAILS	88	62
RC #40	March 29, 2005	INDEF POSTPONE H "C" H-84	PREVAILS	76	74
RC #41	March 29, 2005	INDEF POST H 'B' H-83	PREVAILS	81	68
RC #42	March 29, 2005	INDEF POST H 'E' H-86	PREVAILS	83	67
RC #43	March 29, 2005	INDEF POST H 'F' H-87	PREVAILS	95	55
RC #44	March 29, 2005	INDEF POST H 'G' H-88	PREVAILS	98	51
RC	March 29,	INDEF POST H 'J' H-94	PREVAILS	82	68

#45	2005				
RC	March 29,	ADOPT HOUSE AMEND 'I'	PREVAILS	122	28
#46	2005	H-92			
RC	March 30,	Enactment	PREVAILS	91	58
#63	2005				

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LD 1196 (SP 413)

"An Act To Extend Civil Rights Protections to All People Regardless of Sexual Orientation"

(Governor's Bill)

Sponsored by **Senator Karl Turner**

Date	Chamber	Action
3/8/2005	Senate	Under suspension of the Rules Committee on Judiciary suggested and ordered printed. On motion by Senator Hobbins of York **REFERRED** to the Committee on **JUDICIARY** Ordered sent down forthwith for concurrence
3/8/2005	House	Bill **REFERRED** to the Committee on **JUDICIARY**. In concurrence. ORDERED SENT FORTHWITH.
3/28/2005	Senate	Reports **READ** On motion by Senator HOBBINS of York Report A Ought to Pass (Remarks Made) Roll Call Ordered Roll Call Number 28 Yeas 25 - Nays 10 - Excused 0 - Absent 0 **ACCEPTED** **READ ONCE** Assigned for Second Reading next Legislative Day
3/29/2005	Senate	COMMITTEE ON BILLS IN THE SECOND READING REPORTS NO FURTHER VERBAL AMENDMENTS NECESSARY Senator Rotundo, Senate Chair. REPORT ACCEPTED. **READ A SECOND TIME** On motion by Senator HOBBINS of York **TABLED** until Later in Today's Session, pending **PASSAGE TO BE ENGROSSED** Taken from the table by the President On motion of Senator PLOWMAN of Penobscot Senate Amendment "A" (S-44) **READ** (Remarks Made) On motion by Senator HOBBINS of York Senate Amendment "A" (S-44) **INDFINITELY POSTPONED** Roll Call Number 29 Yeas 22 - Nays 13 - Excused 0 - Absent 0 **PREVAILED**

		On motion of Senator PLOWMAN of Penobscot Senate Amendment "B" (S-48) **READ** Senator HOBBINS of York moved to **INDFINITELY POSTPONED** Senate Amendment "B" (S-48) Tabled pending Ruling of the Chair Taken from the table by the President Senate Amendment "B" (S-48) Ruled Germain. Subsequently Motion by Senator HOBBINS of York to **INDEFINITELY POSTPONE** Senate Amendment "B" (S-48) Roll Call Ordered Roll Call Number 30 Yeas 27 - Nays 8 - Excused 0 - Absent 0 **PREVAILED** **PASSED TO BE ENGROSSED** Ordered sent down forthwith for concurrence
3/29/2005	House	Reports **READ**. Representative SIMPSON of Androscoggin moved to **ACCEPT** REPORT A **Ought to Pass** Motion of Representative SHERMAN of Hodgdon to **COMMIT** the Bill and accompanying papers to the Committee on **JUDICIARY FAILED**. **ROLL CALL NO. 38** (Yeas 72 - Nays 75 - Absent 4 - Excused 0)
3/29/2005	House	Subsequently, REPORT A **Ought to Pass** was **ACCEPTED**. **ROLL CALL NO. 39** (Yeas 88 - Nays 62 - Absent 1 - Excused 0) The Bill was **READ ONCE**. Under suspension of the rules, the Bill was given its **SECOND READING** without **REFERENCE** to the Committee on **Bills in the Second Reading**.
3/29/2005	House	On motion of Representative BRYANT-DESCHENES of Turner, **House Amendment "C" (H-84)** was **READ**. On motion of Representative SIMPSON of Androscoggin **House Amendment "C" (H-84)** was **INDEFINITELY POSTPONED**. **ROLL CALL NO. 40** (Yeas 76 - Nays 74 - Absent 1 - Excused 0)
3/29/2005	House	On motion of Representative SHERMAN of Hodgdon, **House Amendment "B" (H-83)** was **READ**. On motion of Representative SIMPSON of Androscoggin **House Amendment "B" (H-83)** was **INDEFINITELY POSTPONED**. **ROLL CALL NO. 41**

		(Yeas 81 - Nays 68 - Absent 2 - Excused 0)
3/29/2005	House	On motion of Representative DUPREY of Hampden, **House Amendment "E" (H-86)** was **READ**. On motion of Representative SIMPSON of Androscoggin **House Amendment "E" (H-86)** was **INDEFINITELY POSTPONED**. **ROLL CALL NO. 42** (Yeas 83 - Nays 67 - Absent 1 - Excused 0)
3/29/2005	House	On motion of Representative DUPREY of Hampden, **House Amendment "F" (H-87)** was **READ**. On motion of Representative SIMPSON of Androscoggin **House Amendment "F" (H-87)** was **INDEFINITELY POSTPONED**. **ROLL CALL NO. 43** (Yeas 95 - Nays 55 - Absent 1 - Excused 0)
3/29/2005	House	On motion of Representative FISCHER of Presque Isle, **House Amendment "I" (H-92)** was **READ** and **ADOPTED**.
3/29/2005	House	On motion of Representative DUPREY of Hampden, **House Amendment "G" (H-88)** was **READ**. On motion of Representative SIMPSON of Androscoggin **House Amendment "G" (H-88)** was **INDEFINITELY POSTPONED**. **ROLL CALL NO. 44** (Yeas 98 - Nays 51 - Absent 2 - Excused 0)
3/29/2005	House	On motion of Representative DUPREY of Hampden, **House Amendment "H" (H-89)** was **READ**. On motion of Representative SIMPSON of Androscoggin **House Amendment "H" (H-89)** was **INDEFINITELY POSTPONED**.
3/29/2005	House	On motion of Representative DUPREY of Hampden, **House Amendment "J" (H-94)** was **READ**. On motion of Representative SIMPSON of Androscoggin **House Amendment "J" (H-94)** was **INDEFINITELY POSTPONED**. **ROLL CALL NO. 45** (Yeas 82 - Nays 68 - Absent 1 - Excused 0)
3/29/2005	House	On motion of Representative DUDLEY of Portland the House **RECONSIDERED** its action whereby **House Amendment "I" (H-92)** was **ADOPTED**. Subsequently, **House Amendment "I" (H-92)** was **ADOPTED**. **ROLL CALL NO. 46**

		(Yeas 122 - Nays 28 - Absent 1 - Excused 0)
	3/29/2005 House	The Bill was **PASSED TO BE ENGROSSED as Amended by House Amendment "I" (H-92)**. In **NON-CONCURRENCE** and sent for concurrence. ORDERED SENT FORTHWITH.
	3/30/2005 Senate	Under suspension of the Rules On motion by Senator HOBBINS of York The Senate **RECEDED** and **CONCURRED** (Remarks Made) Roll Call Ordered Roll Call Number 33 Yeas 24 - Nays 10 - Excused 1 - Absent 0 **PREVAILED**
		PASSED TO BE ENGROSSED AS AMENDED BY House Amendment "I" (H-92) In concurrence
	3/30/2005 House	**PASSED TO BE ENACTED**. **ROLL CALL NO. 63** (Yeas 91 - Nays 58 - Absent 2 - Excused 0) Sent for concurrence. ORDERED SENT FORTHWITH.
	3/30/2005 Senate	Under suspension of the Rules **PASSED TO BE ENACTED** Roll Call Ordered Roll Call Number 51 Yeas 25 - Nays 10 - Excused 0 - Absent 0 In concurrence

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An Act To Prohibit the Use of Opposite-gender Bathrooms, Changing Rooms and Locker Rooms

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 5 MRSA §4594-G is enacted to read:

§ 4594-G. Locker room, changing room or rest room facilities

1. Use of facilities designated for the opposite gender. Notwithstanding the other provisions of this chapter, a person may not use a public locker room, changing room or bathroom facility designated for use by a gender other than the gender of that person at birth. If a person completely undergoes a medical procedure in which that person's gender is changed, that person must use a public locker room, changing room or bathroom facility designated for use by the person's new gender. A violation of this subsection is a Class E crime.

2. Changing appearance. A person who is convicted of a crime requiring registration under Title 34-A, chapter 15 and alters or attempts to alter the person's appearance to enter a public locker room, changing room or bathroom facility designated for use by a gender other than the gender of that person at birth commits a Class C crime.

SUMMARY

This bill makes it a Class E crime when a person enters a public locker room, changing room or bathroom facility designated for use by a gender other than the gender of that person at birth, except for a person who has undergone a medical procedure to change that person's gender, who then is required to use the facilities for the person's new gender. This bill also makes it a Class C crime when a person required to register under the Sex Offender Registration and Notification Act of 1999 alters or attempts to alter that person's appearance to enter a public locker room, changing room or bathroom facility designated for use by a gender other than the gender of that person at birth.

Attachment B

Reported out 5/3

VOTING TALLY SHEET

For LD's

LD #: 1589

Committee: Joint Standing Committee on Criminal Justice & Public Safety

Date: 5/2/07

Motion: ONTP

Motion by: Hanley

Seconded by: Tibbets

	Those Voting In Favor of the Motion	Recommendation of those opposed to the Motion					Absent	Abstain
		ONTP	OTP	OTP-AM	New Draft	Re-Refer		
Senators								
1. Bill Diamond	X							
2. Earle McCormick	X							
3. Roger Sherman	A							
Representatives								
1. Stan Gerzofsky	X							
2. Pat Blanchette	X PAB							
3. Chris Greeley	X							
4. Dawn Hill	X							
5. Stephen Hanley	X							
6. Gary Plummer	X							
7. Joseph Tibbets	X							
8. Bryan Kaenrath	X							
9. Anne Haskell	X AMH							
10. Rick Sykes	X							
TOTALS	13							

SENATE

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EARLE L. MCCORMICK, DISTRICT 21
ROGER L. SHERMAN, DISTRICT 34

MARION HYLAN BARR, LEGISLATIVE ANALYST
FERN NEILSON, COMMITTEE CLERK

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ONE HUNDRED AND TWENTY-THIRD LEGISLATURE

COMMITTEE ON CRIMINAL JUSTICE AND PUBLIC SAFETY

May 7, 2007

Honorable Beth Edmonds, President of the Senate
Honorable Glenn Cummings, Speaker of the House
123rd Maine Legislature
State House
Augusta, Maine 04333

Dear President Edmonds and Speaker Cummings:

Pursuant to Joint Rule 310, we are writing to notify you that the Joint Standing Committee on Criminal Justice and Public Safety has voted unanimously to report the following bills out "Ought Not to Pass":

L.D. 1332 An Act Regarding Tobacco Products in Jails

L.D. 1384 An Act To Rename and Specifically Identify Sex Crimes

L.D. 1589 An Act To Prohibit the Use of Opposite-gender Bathrooms, Changing Rooms and Locker Rooms

L.D. 1612 An Act To Reduce the Incidence of Incarceration for People with Mental Illness

We have also notified the sponsors and cosponsors of each bill listed of the Committee's action.

Sincerely,

Sen. Bill Diamond
Senate Chair

Rep. Stanley J. Gerzofsky
House Chair

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