

Pursuant to Minn. Rules Civ. App. 140, Petitioner Julianne Goins respectfully asks this Court to rehear this case on the following grounds:

1. The Court's holding is based on a serious factual error regarding Goins' identity and biological gender.

The Court held that West did not violate the MHRA by excluding Goins from the women's restroom because Goins failed to establish that she is biologically female and therefore eligible to use the women's bathroom. This holding is based on a serious factual error regarding Goins' identity and biological gender. The Court based its decision on the erroneous factual premise that Goins is what the Court terms a "transgender" person who seeks only to live in the social role of the other gender without undergoing medical treatment, rather than a transsexual person who wishes to undergo sex-reassignment and to alter her biological gender. Opinion, footnote 1. While the Court's definition of the term "transgender" may accurately describe some people, it is grossly inaccurate as applied to Goins, who is indisputably a transsexual woman who has undergone many years of extensive medical treatments to alter her biological gender and who should be considered biologically female for purposes of using the women's restroom.

The evidence in the record is voluminous, credible and undisputed that Goins was diagnosed as a transsexual woman having a female gender identity in 1995 and that she has undergone the very serious medical process of hormonal sex-reassignment and related procedures. These treatments have dramatically altered Goins' anatomical characteristics. As a result of these treatments, Goins has typical female levels of estrogen and typical female

secondary sex characteristics, such as female breasts, a female pattern of body fat distribution, and an absence of facial or body hair. *See generally, Amicus Brief of the Harry Benjamin International Gender Dysphoria Association.* In addition to undergoing these medical procedures, Goins has consistently lived and presented herself to the world as woman since she was diagnosed as transsexual and began her transition in 1995. Opinion at 2. She has also obtained a legal name change and other legal documents reflecting her reassigned biological gender. Opinion at 2. In concluding that Goins is not entitled to be treated as biologically female for purposes of bathroom use, the Court mistakenly focused only on Goins' subjective, internal self-image, ignoring the undisputed evidence that she has undergone extensive medical treatments that have profoundly altered her biological gender, as well as all of the other objective factors that support and bolster her female self-image, including: (1) her consistent external gender presentation and social identity as female for a period of many years; (2) her female secondary sex characteristics (such as breasts and absence of facial hair); (3) her consistent use of female pronouns and a female name; (4) her medical diagnosis as being transsexual and having a female gender identity; (5) her legal name and gender change and her legal identification documents, which show her to be female; (6) West's regarding her as and treating her as a woman in all other respects; and (7) the absence of any evidence that West ever told Goins she could not use the woman's bathroom because she is a biological male.

Because the Court erroneously ignored this undisputed evidence, it has misconceived the question presented by this case. The question posed by Goins' claim is not whether an employer must permit what the Court defines as a "transgender" employee to use the women's restroom,

ie., someone who has a female self-image, but who does not wish to undergo sex-reassignment to alter her biological gender. Rather, the question is whether an employee who not only presents herself and identifies as female, but who is undergoing sex-reassignment and has secondary sex characteristics that are female, and who has legal identification as female should be permitted to use the women's restroom. The Court should correct this serious error by rehearing the case and clarifying that a transsexual person in Goins' situation should be considered female for purposes of using the women's restroom. At a minimum, the Court should receive additional briefing on how to determine a transsexual person's gender for purposes of restroom usage, given that the prior briefing in this case was focused almost exclusively on which legal standard should apply rather than on how to determine Goins' gender within the meaning of the new legal standard governing bathroom discrimination claims that has now been articulated by this Court. This is especially important given the novelty of this new standard, the broad impact of the decision on employers and employees throughout the state, and the importance of providing careful guidance that does not inadvertently undermine and frustrate one of the primary purposes of the statute, which is to integrate transsexual people into the workplace on equal terms with other employees.

2. The Court's suggestion that transitioning from one sex to another turns on genital surgery is based on an outdated, stereotyped view of transsexual people that has no basis in medical reality.

In particular, the Court's suggestion that transitioning from one sex to another turns on genital surgery is based on an outdated, stereotyped view of transsexual people that has no basis in medical reality. The most recent view from experts in the field is that the appropriate medical

procedures necessary to transition successfully must be determined on an individualized basis. See, e.g., *Harry Benjamin International Gender Dysphoria Association, Standards of Care for Gender Identity Disorders*, Sixth Version (2001). For many transsexual people, this includes genital surgery, but for many others it does not. *Id.* In addition, even for transsexual people for whom genital surgery turns out to be medically indicated, the appropriate timing for the surgery is also highly individualized and is affected by such factors as the person's age and health. *Id.* By focusing exclusively on genital surgery, the Court's decision directly conflicts with this contemporary medical understanding of transsexualism and will cause enormous unnecessary hardship and suffering for transsexual people, like Goins in this case, who have been through years of medical treatments to alter their biological gender, but who have not had genital surgery.

3. The Court's conclusion that Goins was not eligible to use the women's restroom is also based on an inaccurate account of how employers normally designate which restroom an employee may use.

Employers do not base assignment of bathroom usage on employees' genitals, which are not seen. Instead, employers generally permit employees to use the restroom corresponding to their external gender presentation, including clothing and secondary sex characteristics such as the presence or absence of breasts and facial hair, backed up by their social and legal identity as male or female. While there may be an assumption that a person's genitals will correspond to their outward gender presentation and social identity, this assumption is not assured. Employers are not generally aware of their employees' private medical histories and would therefore generally never know if an employee was born with an intersex condition affecting his or her

genitals, or had suffered an accident or disease resulting in the loss or disfigurement of genitals. Thus, by focusing exclusively on genitals, the Court's decision is not an accurate account of the usual practice; as a result, it inadvertently permits employers to hold employees who are transsexual or are suspected of being transsexual to be held to a discriminatory standard.

4. The Court's decision also raises serious constitutional concerns insofar as it take the drastic and unprecedented step of authorizing employers to require employees to verify their genitals as a condition of using gender-segregated workplace restrooms.

This holding is not only drastic and unprecedented, it is also in direct conflict with settled Minnesota privacy law. See, e.g., Lake v. Wal-Mart Stores, Inc., 582 N.W. 231, 235 (Minn. 1998) ("One's naked body is a very private part of one's person and generally known to others only by choice. This is a type of privacy interest worthy of protection."). The Court should not construe the MHRA to conflict with this important principle of law, particularly where there is no specific statutory language supporting the Court's interpretation.

5. Finally, the Court of Appeal correctly held that the statute must be applied as written and thus must be interpreted to prohibit West from singling Goins out and requiring her to use a separate bathroom because she has or is perceived as having a gender identity that differs from that traditionally associated with her biological gender.

This Court reversed this holding on the ground that despite the plain language in the statute, the Legislature cannot possibly have meant what it said because protecting transsexual people from discrimination might raise difficult and complex issues relating to showers and

locker rooms in future cases. These policy considerations are not a proper reason to disregard the plain language in the statute. In so doing, this Court has disregarded its own precedent by usurping the policy-making role of the Legislature and frustrating, rather than effectuating, the purpose

of the statute. As this Court has made clear, the object of statutory interpretation is to ascertain and effectuate legislative intent as reflected in the plain language of the statute. Welfare of J.M., J.M., and M.M., 574 N.W.2d 717, 721 (Minn. 1998). Where the language in a statute is clear, the court must interpret the statute as written, without reading into the statutory text a provision not already there. *Id.* at 723. See also Olson v. Olson, 534 N.W.2d 547, 550 (Minn. 1995).

In this case, however, the Court disregarded the plain language of the statute and carved out a judicially created exemption for bathrooms, despite the complete absence of any basis for doing so in the language or legislative history of the statute, or in prior decisions of this Court. If the Legislature had intended to exempt bathrooms from the statute, then it could and would have done so, especially given that the it had created just such an exemption for bathrooms under the sex discrimination provision of the same statute and could easily have included a similar provision when amending the statute to prohibit sexual orientation as well. Minn. Stat. Section 363.02 Subd. 4.

Conclusion

Based on all the records and proceedings in this matter and for the foregoing reasons, Petitioner Goins respectfully requests that this Court rehear this case. The Court has overlooked and failed to consider undisputed material facts, has misapplied and overlooked Minnesota statutory and case law and has misconceived the material question of the case.

Respectfully Submitted,

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