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MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY

CASEY PERKINS, an individual; SPENCER McDONALD, an individual; KASANDRA REDDINGTON, an individual; JANE DOE, an individual, and JOHN DOE, and individual,

Plaintiffs,

v.

STATE OF MONTANA; GREGORY GIANFORTE, in his official capacity as Governor of the State of Montana; and AUSTIN KNUDSEN, in his official capacity as Attorney General of the State of Montana,

Defendants.

Dept. 5

DV-32-2025-282
Hon. Shane Vannatta

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

House Bill 121 (2025) ("HB 121"/"the Act") is a simple bill to reaffirm the longstanding meaning of the word "sex" and to promote women's safety and privacy: it provides that certain multi-occupancy spaces in governmental "covered entities"—restrooms, changing rooms, and sleeping quarters—shall be classified based on the "two sexes, male and female." HB 121, § 1(12). And it provides a private right of action against covered entities in limited circumstances, with the relief limited to "declaratory and injunctive relief, nominal damages, and … other appropriate relief" against the covered entities, not any individual.

Plaintiffs rushed to the courthouse to file their complaint and application for preliminary injunction the day the Act became effective.[1] But this has resulted in fundamental jurisdictional problems of ripeness and standing. There is no record to suggest that anyone has made any complaint related to the Act at any restroom or changing room that any Plaintiff uses, or that Plaintiffs are being or will imminently be impacted in any concrete way.[2] This alone is dispositive because Plaintiffs cannot show a likelihood that this Court has jurisdiction over their hypothetical and abstract challenge to the Act.

In addition, Plaintiffs have not shown a likelihood of success on the merits of their claims. The Act classifies based on sex, not gender or transgender status. Thus, being transgender or "cisgender" (or undergoing any medical procedure or other treatment related to being transgender) is neither necessary nor sufficient for operation of HB 121. Plaintiffs' 60-page application for preliminary injunction is thus a melodramatic exercise in overcomplicating a very simple issue.

[1] Indeed, the Declarations upon which Plaintiffs rely in seeking a preliminary injunction were all dated and signed over a month before the Act became effective.
[2] Plaintiffs do not provide any facts regarding their use of sleeping quarters.

Plaintiffs' application also suffers from multiple additional problems that show they are not likely to succeed on the merits. They never address the actual implications of their argument: that any sex-based classification in government restrooms, changing rooms, and sleeping quarters is and has always been unconstitutional. Under Plaintiffs' reasoning, there is no way to classify restrooms based on sex that does not involve discriminating on the basis of transgender-status. And if the Legislature responded by passing a bill that said one restroom will be for "cis" and "trans" women, and another bathroom will be for "cis" and "trans" men—that would *expressly* discriminate on the basis of "trans" status. Yet Plaintiffs never explain how the state could as a practical matter enforce such a rule (e.g. by inquiring into the sincerity of a person's claim that they are transgender), or how that classification would survive strict scrutiny, which they incorrectly claim is the applicable standard of review to classifications based on transgender status. Their argument is thus not an argument about transgender but an argument against having government sex classifications in restrooms, changing rooms, and sleeping quarters at all.

This raises another critical problem—by effectively arguing for the elimination of sex-based classifications in restrooms and similar spaces—Plaintiffs are asking courts to elevate their preference to use bathrooms that correspond to their subjective gender identity over the concerns of many women who do not want biological men in these vulnerable spaces. But this is precisely the type of balancing that the Legislature is best equipped to handle.

Similarly, Plaintiffs never address a related, fundamental flaw in their argument. Sex-based classifications do not generally classify based on transgender status. And the vast majority of people that the Act's sex-based classification applies to are not transgender. A biological male cannot use the women's restroom; similarly, a biological female cannot use the men's restroom. Stated differently,

being transgender is neither necessary nor sufficient for the classification at issue. This is particularly problematic for Plaintiffs' facial challenge to the Act, which requires showing that there is no set of circumstances in which the Act can constitutionally be enforced.

This Court also should not conclude that subjectively identifying as transgender creates a suspect class. Montana law has not reached that conclusion, which would represent a huge shift, and would result in a large expansion of strict scrutiny without a basis in the constitution. Such a major change in the law is not warranted.[3]

This Court must also be clear at the outset that Plaintiffs have not even attempted to challenge significant portions of HB 121, and that any injunction must be carefully limited. Plaintiffs have not made any allegations regarding sleeping quarters in their motion for preliminary injunction, and thus they have shown no irreparable injury as to Section 4(2) of HB 121. Second, Plaintiffs have not made any allegations regarding correctional centers, juvenile detention facilities, local domestic violence programs, or public schools (other than colleges). HB 121, § 2(3).

LEGAL STANDARD

To obtain a preliminary injunction, Plaintiffs must establish all the following: "(a) the applicant is likely to succeed on the merits; (b) the applicant is likely to

[3] As an example of why this Court should not redefine Montana Constitutional law in a preliminary injunction ruling—particularly where Plaintiffs have failed to meet multiple elements under MCA § 27-19-201(1)—the UK Supreme Court ruled just today that the legal definition of woman is based on biological sex. *See* Annabelle Dickson and Andrew McDonald, *UK Supreme Court rules 'woman' means biological female*, Politico.com (April 16, 2025), https://www.politico.eu/article/uk-supreme-court-rules-woman-means-biological-female-trans-gender-recognition/. This decision is not binding here, but it shows that the relief Plaintiffs seek in their motion is a truly radical redefinition of the law. A copy of the UK court's decision is attached as Exhibit A.

suffer irreparable harm in the absence of preliminary relief; (c) the balance of equities tips in the applicant's favor; and (d) the order is in the public interest." Mont. Code Ann. ("MCA") § 27-19-201(1); *see also Montanans Against Irresponsible Densification, L.L.C. (MAID) v. State*, 2024 MT 200, ¶ 10, 418 Mont. 78, 555 P.3d 759.

Effective March 25, 2025, the law is absolutely clear that "[w]hen conducting the preliminary injunction analysis, the court shall examine the four criteria in subsection (1) independently. The court may not use a sliding scale test, the serious questions test, flexible interplay, or another federal circuit modification to the criteria. MCA § 27-19-201(4)(b); 2025 Mont. Laws ch. 20 (eff. March 25, 2025).[4]

An injunction is an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief; it is never awarded as of right. *Winter v. NRDC, Inc.*, 555 U.S. 7, 22 (2008) (citing *Mazurek v. Armstrong,* 520 U.S. 968, (1997) (per curiam)); *see also Benisek v. Lamone*, 585 U.S. 155, 157 (2018).

Montana courts presume that enacted laws are constitutional. *See Powder River Cnty. v. State*, 2002 MT 259, ¶ 73, 312 Mont. 198, 60 P.3d 357. This is not a toothless presumption: "[t]he constitutionality of a legislative enactment is prima facie presumed," and "[e]very possible presumption must be indulged in favor of the constitutionality of a legislative act." *Id.* ¶¶ 73–74. The question for a reviewing court is not whether it is possible to condemn, but whether it is possible to uphold the statutes. *Satterlee v. Lumberman's Mut. Cas. Co.,* 2009 MT 368, ¶ 10, 353 Mont.

[4] Plaintiffs' Memorandum of Law in Support of Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction, filed two days later (on March 27, 2025), (Doc. 8), and this Court's Temporary Restraining Order, entered eight days later (on April 2, 2025) (Doc. 11), therefore rely on the incorrect legal standard applicable to preliminary injunctions.

265, 222 P.3d 566. Plaintiffs must prove unconstitutionality beyond a reasonable doubt. *Id.*

To prevail on a facial challenge to a law, Plaintiffs "must show that no set of circumstances exists under which the challenged sections would be valid, *i.e.,* that the law is unconstitutional in all of its applications." *Montana Cannabis Indus. Ass'n v. State*, 2016 MT 44, ¶ 14, 382 Mont. 256, 368 P.3d 1131 (cleaned up) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008); *United States v. Salerno*, 481 U.S. 739, 745 (1987)). "[A] facial challenge to a legislative act is of course the most difficult challenge to mount successfully, since the challenger must establish that no circumstances exist under which the act would be valid" *Id.* (citing *In re Marriage of K.E.V.*, 267 Mont. 323, 336, 883 P.2d 1246, 1255 (1994) (Trieweiler, J., concurring and dissenting)).

ARGUMENT

I. Plaintiffs Have Not Met the Requirement of Showing a Likelihood of Success on the Merits

A. Plaintiffs Are Not Likely to Show this Court has Jurisdiction Over their Claims

It is fundamental that Plaintiffs will have to establish jurisdiction to succeed on their claims, and therefore this also is one of the components of the first element for a preliminary injunction—likelihood of success on the merits. Here, Plaintiffs adopted a litigate first-approach by filing their lawsuit and moving for a preliminary injunction on the very day the Act became effective.

This rush to the courthouse has created serious jurisdictional problems of ripeness and standing. *See Colwell v. HHS*, 558 F.3d 1112, 1123 (9th Cir. 2009) (noting that "[s]tanding and ripeness under Article III are closely related" and dismissing based on prudential ripeness where parties rushed to court to sue over policy guidance without any concrete example of how the agency defendant will use

the policy guidance); *see also 350 Mont. v. State*, 2023 MT 87, ¶ 22, 412 Mont. 273, 529 P.3d 847 (recognizing prudential ripeness under Montana law).

Here, the Act applies to "covered entities," which are correctional centers, juvenile detention facilities, local domestic violence programs that receive certain public funding, public buildings, and public schools. HB 121, § 1(3). Plaintiffs are not "covered entities." Second, the only remedy in the text of the Act is a private right of action against the "covered entity," where 1) an individual encounters another individual of the opposite sex in the restroom or changing room and the covered entity provided the other individual permission or failed to take reasonable steps to prohibit the other individual from using the room, or 2) an individual is required by a covered entity to share sleeping quarters. See HB 121, Section 4. Even then, the only remedy under the Act is for the individual to sue the "covered entity," not Plaintiffs; establish that the entity either provided permission or failed to take reasonable steps; and obtain "declaratory and injunctive relief, nominal damages, and … other appropriate relief" against the covered entity. *Id.*

Plaintiffs cannot point to anyone suing or threatening to sue a covered entity under the Act, let alone a concrete threat that as a result of the suit or potential suit a covered entity will take any specific action that will harm Plaintiffs.[5] There is thus no "factually adequate record upon which to base effective review," only speculation about what might happen.

1. Ripeness

"[T]he judicial power of Montana courts is limited to justiciable controversies—in other words, a controversy that can be disposed of and resolved in the courts." *Gateway Opencut Mining Action Grp. v. Bd. of Cnty. Comm'n*, 2011 MT 198, ¶ 16, 361 Mont. 398, 260 P.3d 133 (citing *Greater Missoula Area Fed'n of*

[5] In fact, if any such lawsuit occurred, Plaintiffs could seek to intervene in that suit.

Early Childhood Ed. v. Child Start, Inc., 2009 MT 362, ¶ 22, 353 Mont. 201, 219 P.3d 881). "A justiciable controversy is one that is 'definite and concrete, touching legal relations of parties having adverse legal interests' and 'admitting of specific relief through decree of conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts, or upon an abstract proposition.'" *McDonald v. Jacobsen*, 2022 MT 160, ¶ 8, 409 Mont. 405, 515 P.3d 777 (quoting *Chovanak v. Matthews*, 120 Mont. 520, 526, 188 P.2d 582, 585 (1948)) (emphasis omitted). "The constitutional component of the justiciability limitation derives primarily from the Montana Constitution, which has been interpreted to, like its federal counterpart, limit the courts to deciding only cases and controversies." *Id.* (citing *Reichert v. State ex rel. McCulloch,* 2012 MT 111, ¶ 53, 365 Mont. 92, 278 P.3d 455).

"Ripeness is one of a number of specific doctrines applicable to the justiciability question. It is particularly concerned with whether the case presents an actual, present controversy." *McDonald*, ¶ 8 (citing *Reichert*, ¶ 54). "[C]ases are unripe when the parties point only to hypothetical, speculative, or illusory disputes as opposed to actual, concrete conflicts." *Id.* (quoting *Reichert*, ¶ 54). "To be justiciable, the parties must have existing and genuine (rather than theoretical) rights or interests, the questions must be presented in an adversary context, and the controversy must be one upon which a court's judgment will effectively and conclusively operate, as distinguished from a dispute invoking a purely political, administrative, philosophical, or academic conclusion." *Reichert*, ¶ 53 (citations omitted). The "basic purpose" of ripeness is "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Id*. ¶ 54.

In this case, Plaintiffs' application for preliminary injunction merely identifies certain restrooms in covered entities, but does not show any actual, present

controversy as to any of those restrooms. Plaintiff Casey Perkins ("Perkins") states that there are two multi-occupancy, gender designated restrooms on the fourth floor of the Department of Labor and Industry ("DLI") where Perkins works. Doc. 8 at 10. However, Perkins notes there is also a single-occupancy restroom elsewhere in the building. *Id.* Even prior to the Act, Perkins claims to have used the multi-occupancy restroom "only when the floor is empty or in emergencies." *Id.* It is purely speculative whether anyone will raise an issue with DLI regarding the Act and what, if anything, DLI will do regarding the bathrooms on the fourth floor. Similarly, Perkins does not make any allegations that there has been any issue regarding Memorial Park in Helena, and it is purely speculative that anyone will raise an issue and what, if anything, the park would do regarding an issue (including, for example, providing single-occupancy bathrooms). *Id.* at 11.

Plaintiff McDonald ("McDonald") makes allegations regarding the Montana State Capitol. *Id.* at 11. McDonald states that there are two single-occupancy restrooms in the basement where McDonald works, as well as other single-occupancy restrooms in a different part of the building. *Id.* at 12. McDonald does not make any allegations that there has been any issue regarding McDonald's usage of multi-occupancy restrooms, and it is purely speculative that anyone will raise an issue and what, if anything, the Capitol Building staff would do regarding an issue (including providing additional single-occupancy bathrooms, or making clear that the single-occupancy bathrooms in the leadership offices are okay for all people to use). *See id.* at 12-13.

Plaintiff Kasandra Reddington ("Reddington") claims to use a women's restroom at Reddington's work at Helena College's Donaldson Campus, while noting there are also single-occupancy restrooms. *Id.* 14. Reddington also claims to use multi-occupancy restrooms at Helena College's Airport Campus and the University of Montana Missoula's Campus. *Id.* Reddington does not make any

allegations that there has been any issue regarding Reddington's usage of multi-occupancy restrooms at any of these college campuses, and it is purely speculative that anyone will raise an issue and what, if anything, the relevant college would do regarding an issue. *See id.* Reddington also claims to visit Spring Meadow Lake State Park, and that park has multi-occupancy bathrooms. *Id.* Reddington does not state that there has been an issue, or and what, if anything, the park staff would do regarding an issue (including providing additional single-occupancy bathrooms).

Plaintiff Jane Doe ("Jane Doe") works at the State Print & Mail Department (PMD) which has only gender designated restrooms. *Id.* 15. Jane Doe does not state whether these are even multi-occupancy bathrooms. Jane Doe does not state that there has been an issue, or what, if anything, the PMD staff would do regarding an issue (including designating these bathrooms as single occupancy or providing additional single-occupancy bathrooms). Jane Doe also claims to have visited multiple women's restrooms at public parks "and has never had any issues doing so." Again, without even specifying any parks, Jane Doe does not state that there has ever been an issue, or what, if anything, the park staff would do regarding an issue under HB 121 (including providing additional single-occupancy bathrooms).

Finally, Plaintiff John Doe ("John Doe") claims to have a rare genetic condition, having "two X chromosomes but no Y chromosomes" while also having the SRY gene, which is the sex-determining portion of the Y chromosome.[6] In such a case, the critical SRY portion of the Y chromosome becomes entangled with the X chromosome inherited from the individual's father, causing them to inherit pieces

[6] A recent academic paper explains "[t]hese disorders manifest in various forms and impact the physical, hormonal, and genetic facets of sex development. Affected children are usually raised as males and develop a male gender identity." https://pmc.ncbi.nlm.nih.gov/articles/PMC10693380/.

of both, but the presence or absence of SRY is the "master switch in mammalian sex determination."[7]

Here, John Doe has a birth-observed sex of male, a male gender identity, and uses male bathrooms. And, as explained below, the Act expressly includes as male "[a]n individual who would otherwise fall within this definition, but for a biological or genetic condition." HB 121, Section 1(7). There is thus no basis to even speculate that the Act will have any practical impact on John Doe. Even so, John Doe does not state that there has been an issue related to HB 121, or what, if anything, library or water park staff would do regarding an issue (including providing additional single-occupancy bathrooms and changing areas). Doc. 8 at 15.

In sum, in each of these circumstances, Plaintiffs do not allege even an issue involving anyone (let alone transgender or intersex individuals) related to the Act,[8] only the passage of a law that applies to third parties, that might cause third parties to take some actions, that might impact Plaintiffs in the future. Plaintiffs also do not allege that their usage prior to the effective date of the Act comports with the relevant restroom policies such that the Act has changed anything. This case simply is not ripe because there is no appropriate record on which the Court can base a decision.

2. Standing

For similar reasons, Plaintiffs lack standing to challenge a law that regulates third parties and has not impacted them in any concrete way. The Montana Supreme

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[7] *Id.*; Kenichi Kashimada and Peter Koopman, *Sry: the master switch in mammalian sex determination*, 137 Development 3921 (Dec. 1, 2010) available at https://journals.biologists.com/dev/article/137/23/3921/44191/Sry-the-master-switch-in-mammalian-sex.

[8] For example, if there was an issue at one of these bathrooms involving a biological male who is not transgender using a women's restroom, and the covered entity's response was to ask the male to stop using the restroom, that would not implicate Plaintiffs or the issue of transgender persons in any way.

Court has made clear that "the 'cases at law and in equity' language of Article VII, Section 4(1) [of the Montana Constitution] *embodies the same limitations* as are imposed on federal courts by the 'case or controversy' language of Article III [of the U.S. Constitution]." *Plan Helena, Inc. v. Helena Reg'l Airport Auth. Bd.*, 2010 MT 26, ¶ 6, 355 Mont. 142, 226 P.3d 567 (emphasis added) (internal citations omitted); *see also Advocates for Sch. Trust Lands*, ¶ 18. Plaintiffs must demonstrate case-or-controversy standing—at every stage of litigation—by distinctly showing "a past, present, or threatened injury" that can be "alleviated by successfully maintaining the action." *Heffernan*, ¶ 33. To demonstrate standing, Plaintiffs must show that (1) they suffered an injury in fact that is concrete, particularized, and actual or imminent; (2) the injury is fairly traceable to the defendant's challenged conduct; and (3) the injury is likely to be redressed by a favorable court decision. *Id.* ¶ 32 (citing *Lujan v. Defs. Of Wildlife,* 504 U.S. 555, 560 (1992)). Plaintiffs must support each element of the standing test "with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561. For a preliminary injunction, Plaintiffs must show a likelihood of success on the merits under MCA § 27-19-201(1).

Plaintiffs have not shown a concrete injury that is actual or imminent. As noted in the discussion of ripeness, the Act applies to covered entities; how those covered entities will comply with the Act is not yet clear. The Act allows a private right action *against covered entities*, but the relief is limited to "declaratory and injunctive relief, nominal damages, and … other appropriate relief." HB 121, Section 4(1). Other than granting a declaration and awarding nominal damages, any relief would have to be fashioned by a judge under the principles of equity. It is purely speculative that a judge would use his or her equitable powers to fashion relief that will harm Plaintiffs in a concrete way.

Plaintiffs also have not shown enforcement authority by Defendants such that they are likely to have standing against all of the Defendants they seek to enjoin. *See Am. Freedom Def. Initiative v. Lynch*, 217 F. Supp. 3d 100, 105 (D.D.C. 2016) ("Defendant's lack of enforcement authority is fatal to Plaintiffs' standing to bring this action…"); *see also Digit. Recognition Network, Inc. v. Hutchinson*, 803 F.3d 952, 957-58 (8th Cir. 2015) ("The governor and attorney general do not have authority to enforce the Reader System Act, so they do not cause injury to Digital Recognition. The Act provides for enforcement only through private actions for damages."); *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1156-57 (10th Cir. 2005) ("Nova has confused the statute's immediate coercive effect on the plaintiff[]with any coercive effect that might be applied by the defendants." (citing *Okpalobi v. Foster*, 244 F.3d 405, 426 (5th Cir. 2001) (en banc)).

B. Plaintiffs' Merits Arguments Are Also Unlikely to Succeed

1. The Act Does Not Classify People on the Basis of Transgender or Intersex Status

The Act makes a permissible legislative classification of people based on sex, in line with longstanding precedent and without reference to any individual's subjective gender identity. The first step in evaluation of an equal protection claim is to "identify the classes involved and determine if they are similarly situated." *Planned Parenthood of Mont. v. State*, 2024 MT 228, ¶ 30, 418 Mont. 253, 557 P.3d 440 (2024). Proper identification of the legislative classification is thus critical to determining and applying the appropriate level of scrutiny, yet Plaintiffs stumble at this first step. Also, for Plaintiffs' facial challenge, they "must show that no set of circumstances exists under which the challenged sections would be valid, *i.e.,* that the law is unconstitutional in all of its applications." *Montana Cannabis Indus. Ass'n*, ¶ 14.

Plaintiffs base their entire argument on the false premise that "[o]n its face, the Act classifies people on the basis of both transgender and intersex status and sex" Doc. 8 at 21. But the Act makes no mention whatsoever of transgender or intersex status. Indeed, the Plaintiffs' Memorandum in Support mentions the details of the actual legislative classification made by the Act—classifying people as either "male" or "female"—just once, on page 6, and at no point addresses the full text definition provided by either of these terms. These definitions establish the only legislative classification into which the Act places individuals, and they do so with regard to the individual's possession of either XX or XY sex chromosomes, while accounting for genetic conditions:

> (4) "Female" means a member of the human species who, under normal development, has XX chromosomes and produces or would produce relatively large, relatively immobile gametes, or eggs, during her life cycle and has a reproductive and endocrine system oriented around the production of those gametes. An individual who would otherwise fall within this definition, but for a biological or genetic condition, is female.
>
> …
>
> (7) "Male" means a member of the human species who, under normal development, has XY chromosomes and produces or would produce small, mobile gametes, or sperm, during his life cycle and has a reproductive and endocrine system oriented around the production of those gametes. An individual who would otherwise fall within this definition, but for a biological or genetic condition, is male.

HB 121 § 2(4), (7). Importantly, these definitions apply to *every* person in Montana, not just those in the transgender or intersex communities, and do so without classifying any person on the basis of their "trans"- or "cis"-gendered identity.[9]

The Act cannot be said to discriminate against transgender people as a class because it does not distinguish between people by reason or on the basis of their subjective gender identity. The U.S. Supreme Court addressed a similar situation in *Bray v. Alexandria Women's Health Clinic*, in which the plaintiffs/respondents alleged antiabortion demonstrators were guilty of conspiracy to deprive women, as a class, of their rights. 506 U.S. 263, 269 (1993). First, the Court held that "'[w]omen seeking abortion' is not a qualifying class," and then it turned to the question of whether "the alleged class-based discrimination is directed … at women in general." *Id.* The Court reasoned that there are reasons for opposing abortion "other than hatred of, or condescension toward … women as a class—as is evident from the fact that men and women are on both sides of the issue." *Id.* at 270. Here, the Act's operative definitions for the purpose of its classifications, male or female, each include transgender people. By creating a classification based on sex in which each possible category will be a large group, and in which a small portion each will be transgender people, the Act can be said to create legislative classifications based on sex, but it cannot be said to do so based on subjective gender identity, or transgender or intersex status, for the critical first step—identification of the classes involved—in equal protection analysis.

To avoid the obvious classification made by the Act, Plaintiffs attempt to carve from these groups new, and rather specific, classes: those who may only "use covered facilities that are consistent with their gender identity" and those who may

[9] In fact the reference in the definition of "sex" to "an individual's psychological, behavioral, social, chosen, or subjective experience" is to make clear that that is *not* relevant for purposes of the classification. *See* HB 121, § 1(12).

only use covered facilities that do not align with their gender identity. Doc. 8 at 22. Plaintiffs produce no precedent to support their tailored choice of class.[10] First, it should be noted that all biological men, as defined by the Act, those whose subjective gender identity aligns with that definition and those whose does not, are to be prevented by a covered entity from using a facility designated for women, just as all biological women are to be prevented from entering a facility designated for men.

The class Plaintiffs would fabricate for their claims does not account for other strong convictions that may either be compatible or incompatible with the Act, only their own cherry-picked cohort. Some "cis"-women may wish to enter a restroom designated for men at an auditorium or university stadium to avoid the longer line, or some "trans"-men may not yet feel prepared to enter a male changing room that may be predominantly occupied by "cis"-males. Plaintiffs' proffered class neither includes all individuals who wish to use a facility the Act might keep them out of, nor does it ensure that all its members desire to use "gender identity-conforming" spaces. If the Legislature chose to designate facilities by subjective gender identity rather than by biological sex, there would still be a class of people who could claim they are forced to use a facility contrary to their asserted convictions or needs.

The abolition of any sex or gender designation from restrooms and other facilities in covered entities would lead to its own undesirable results—e.g., the inability to keep men out of the female sleeping quarters in a domestic violence shelter—so as a matter of public policy, the Legislature seems to have decided a

[10] In fact, Montana Supreme Court precedent explicitly recognizes the binary nature of sex—male *or* female. *See Campbell v. Garden City Plumbing & Heating, Inc., 20*04 MT 231, ¶ 16, 322 Mont. 434, 97 P.3d 546 (in sexual harassment claims, plaintiff must first show membership in a protected class; "only two classes are possible, male and female."); *Mont. State Univ.-N. v. Bachmeier,* 2021 MT 26, ¶ 28, 403 Mont. 136, 480 P.3d 233 ("a claimant first must establish membership in a protected class, either male or female.") (citing *Campbell,* ¶ 16).

choice must be made. The proper question, therefore, is "what is the actual classification the Act employs?" Here, the answer is sex, male or female, based on chromosomes (with an exception for biological or genetic conditions). It is from this basis alone that the inquiry may advance to determine the level of scrutiny and the propriety of employing that classification.

2. There is No Suspect Class to Trigger Strict Scrutiny

The Act's plain language classification of all individuals as either male or female demands that this Court resolve the constitutional issues presented on that basis without accepting Plaintiffs' invitation onto novel ground regarding their incorrect assertions that "transgender status is a suspect classification" and that "[s]trict scrutiny applies." Doc. 8 at 27. Montana courts "apply one of three levels of scrutiny when addressing a challenge under the Montana Constitution's Equal Protection Clause: strict scrutiny, middle-tier scrutiny, or the rational basis test." *Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390, ¶ 17, 325 Mont. 148, 104 P.3d 445 (2004). "Strict scrutiny applies if a suspect class or fundamental right is affected," middle-tier scrutiny applies "if the law or policy affects a right conferred by the Montana Constitution, but is not found in the Constitution's Declaration of Rights," and the rational basis test is appropriate when neither strict scrutiny nor middle-tier scrutiny apply." *Id.* ¶¶ 17-19.

A recent Montana Supreme Court concurrence underscores that Plaintiffs' position is founded in neither statute nor precedent. *Cross by & through Cross v. State*, 2024 MT 303, ¶ 61, 419 Mont. 290, 560 P.3d 637 (2024) (McKinnon, J., concurring) ("this Court has not yet explicitly identified the level of scrutiny applicable to classifications that are sex-based, nor has it explicitly stated that sex is a suspect class.") (internal quotation marks omitted). As with *Bray*'s conclusion that the proposed subset class of "'[w]omen seeking abortion' is not a qualifying class," *Bray*, 506 U.S. at 269, this Court is also compelled to conclude that Plaintiffs have

failed to identify a suspect class for equal protection purposes. "Sexual and gender orientation is not considered a 'suspect class' and discrimination so based does not merit strict scrutiny/compelling interest analysis under federal law." *Snetsinger*, ¶ 61. If "transgender people" is not a suspect class, then a subset of transgender individuals who also wish to use "gender identity-conforming" facilities cannot be, either. The only operative class in the Act for the purposes of equal protection analysis, therefore, is sex, and it does not trigger strict scrutiny, either.

While the Montana Supreme Court has not held that sex is a suspect class, *see Cross*, ¶ 61, it acknowledges the application of middle-tier scrutiny to sex or gender classifications in federal law. *See Arneson v. State By & Through Dep't of Admin., Teachers' Ret. Div.*, 262 Mont. 269, 273, 864 P.2d 1245, 1247 (1993) ("The middle-level scrutiny test has been recently applied by the U.S. Supreme Court in discussing cases involving such things as gender…"). Montana also recognizes the unavoidability of creating classifications as part of governing. "To a certain extent, nearly all legislation classifies or sets forth classifications of applicability, benefits and recipients. If some of these classifications are imperfect they do not necessarily violate the equal protection clauses." *Id.* at 274, 864 P.2d at 1248. And regardless of what level of scrutiny this Court applies to the sex-based classifications in the Act, "every possible presumption must be indulged in favor of the constitutionality of the statute." *Id.*

3. The Act Does Not Violate Fundamental Rights

Strict scrutiny is also not applicable because no fundamental rights are affected. Without a suspect class, strict scrutiny cannot apply where the law in question does not violate a fundamental right in the Montana Constitution's Declaration of Rights. *Snetsinger*, ¶ 17. Plaintiffs allege the Act violates Montanans' fundamental rights to privacy, to pursue life's basic necessities, and to due process. The Act does none of these, so strict scrutiny is not appropriate.

a. A Facial Challenge Is Inappropriate for the Act's Provisions

Before addressing specific fundamental rights, it is important to note that a facial challenge is inappropriate here. To prevail on such a challenge, Plaintiffs must establish that "no set of circumstances exists under which the challenged sections would be valid, *i.e.,* that the law is unconstitutional in all of its applications." *Montana Cannabis Indus. Ass'n*, ¶ 14. In that case, the Montana Supreme Court agreed with the District Court that a ban on probationer use of medical marijuana survived a facial challenge because there were some circumstances where the ban could constitutionally function (e.g. where a District Court found the requisite nexus as part of sentencing). *Id.* ¶ 73. Similarly, the Court agreed with the District Court that the challenge to procedures for searches was "inappropriate for a facial challenge" and it would instead be proper to raise an as applied challenge if "issues arise with a warrantless inspection against a particular facility." *Id.* at ¶ 82.

Here, Section 4 of HB 121 allows a private right of action against a covered entity by an individual who encounters an individual of the opposite sex in a bathroom or changing room in two circumstances: 1) where the covered entity provided permission to use the restroom or changing room, or 2) where the covered entity failed to take reasonable steps to prohibit the other individual from using the restroom or changing room. Like the search provisions in *Montana Cannabis*, it is easy to conceive of situations where HB 121 would apply with no impact whatsoever on transgender individuals. Any facial challenge by Plaintiffs is therefore "inappropriate," and it would instead be better to wait for an as applied challenge if "issues arise."

b. The Act Does Not Infringe Reasonable Privacy Expectations

Plaintiffs fail to show that the Act violates their protected right to privacy. A privacy interest is only protected under Article II, section 10 of the Montana

Constitution where (1) "the person involved had a subjective or actual expectation of privacy," and (2) "society is willing to recognize that expectation as reasonable." *State v. Nelson*, 283 Mont. 231, 239, 941 P.2d 441, 446 (1997). Regardless of whether Plaintiffs believe they have an expectation of privacy as to which restroom or sleeping quarters they use, this is not an expectation society accepts as reasonable for the simple fact that, for the vast majority of individuals, this information is not private. The Act applies only to certain shared, multioccupancy spaces within covered entities, so by definition, one expects to encounter others on the way into and once inside these spaces. This is different from the expectation the Act seeks to protect that, once inside, members of one sex will have privacy from the other. While what one does inside a covered facility such as a restroom may be considered private, the action of choosing which public restroom to enter is generally made in public view. Further, for the great majority of people, individuals in society typically expect that others will know which restroom they use. To say that "trans" people have a different expectation and that such an expectation is constitutionally protected would be to bestow upon them greater rights and more protected privacy interests than others in the same society.

To arrive at their opposite conclusion, Plaintiffs stretch precedent, the majority of which is nonbinding on this Court, regarding activities incongruous to the ones covered by the Act. *See* Doc. 8 at 46-49. For instance, Plaintiffs state "all Montanans have the right to 'make intimate personal decisions' and 'conduct personal activities without observation, intrusion, or interference.'" *Id.* at 46 (quoting *Nelson*, 283 Mont. at 241, 941 P.2d at 448). But merely walking into a shared sleeping quarters or multi-occupancy restroom is not a personal activity one expects to conduct "without observation." The false equivalencies to the Act's scope continue with references to caselaw discussing "[r]egulations that interfere with an individual's ability to self-define" and an expectation that an adult's "consensual

sexual activities will not be subject to the prying eyes of others." *Id.* (internal quotation marks and citations omitted). These are inapposite. Again, while one expects to be safe from the "prying eyes of others" once inside a bathroom stall, for instance, accessing the covered facility designated for either males or females is not what is meant by "consensual sexual activities."

Plaintiffs' rhetorical chain of ill-fitted links continues into their claims about "medical judgments affecting [one's] bodily integrity and health" and "a person's medical and psychiatric history." *Id.* at 47 (internal quotation marks and citations omitted). The Act does not bar anybody from choosing to avail themselves of a restroom, which is the closest thing to a judgment regarding bodily integrity the Act may cover. The extent of the right to privacy in the medical context is not unending, and Plaintiffs' argument stretches the credible meaning of that right beyond any scope that would trigger strict scrutiny. *See Wiser v. State, Dep't of Com.*, 2006 MT 20, ¶ 20, 331 Mont. 28, 129 P.3d 133. In *Wiser*, the appellants argued the fundamental right to privacy included "the right to obtain medical care free of regulation," including the right to "seek medical care from unlicensed professionals," and that strict scrutiny must apply to medical licensing laws. *Id.* ¶¶18-20. The Montana Supreme Court rejected the appellants' "contention that the fundamental right extends that broadly" and determined "the State need only demonstrate a rational basis for the regulation." *Id.* at ¶¶ 19-20.

Here, too, the fundamental right does not extend as broadly as Plaintiffs would claim. Plaintiffs have not shown that society finds walking into a single-sex restroom or changing room an unreasonable disclosure of one's medical or psychiatric history. Even accepting Plaintiffs' argument that being observed walking into such a covered facility may "out" someone whose gender identity does not conform with their biological sex as defined in the Act, the details of that individual's "anatomy, genetics, and medical history" are not disclosed. *See* Doc. 8 at 46, 49. Even if the

casual observer would be able to intuit that such an individual had a non-conforming gender identity, the observer would not know whether the person has undergone surgical, hormonal, or other medical procedures to "affirm" that identity, or what their psychological history holds. Plaintiffs provide no evidence to the contrary. Plaintiffs thus fail to establish the Act violates a privacy right.

c. The Act Does Not Bar Anybody from Accessing the Restroom

Next, Plaintiffs incorrectly allege that the Act violates their right to pursue "life's basic necessities," specifically, "the basic necessity of access to restrooms and other sex-separated facilities." Doc. 8 at 49-50. They are not wrong that "[u]rination, bowel movements, and menstrual hygiene are not optional and people must use restrooms to meet those needs," *id.* at 50, but they are incorrect in asserting that the Act prevents anybody from pursuing those activities. To the contrary, the Act serves to standardize restroom choice in covered entities, which may have a normalizing effect and reinforce any individual's sense of belonging in the space designated for their respective sex because nobody else in the space may claim that the person *chose* whether to utilize the male or female facility. "Furthermore, the idea that the right to pursue employment and life's other 'basic necessities' is limited by the State's police power is imbedded in the plain language of the Constitution," so as here, where there is no bar to access, the State may may still regulate the pursuit of necessities without violating that right. *Wiser*, ¶ 24.

In fact, the Act serves as an equalizer when it comes to the decision to use the restroom by establishing clear rules for whom a covered entity should allow access to which room. In the absence of the Act, a "trans" woman may face harassment in either sex's restroom for having chosen that space, but with the Act, a "trans" woman with XY chromosomes will have just as much justification to feel belonging in that facility as a "cis" man. Further, as the act only operates on the basis of sex, not on

subjective gender identity, it addresses the needs of all Montanans, "cis" and "trans" alike. "Trans" and intersex people are not the only ones who have concerns about safety and modesty in restrooms. Just as Plaintiffs report making a choice to avoid a restroom based on their idiosyncratic concerns, "cis" women may also avoid a restroom for fear of a male's presence—regardless of the male's subjective gender identity—in that space.

The Act provides clarity and certainty in these situations. By commanding covered entities to not allow a male in a female space, or vice versa, it represents the Legislature's best efforts to achieve its safety goals. Individuals make choices regarding their own necessities and how to accomplish them all the time, but the Constitution does not demand the government take all of those individual choices or propensities into account. That, nationwide, courthouses are frequently in a bad part of town with inconvenient public parking choices does not deny access to justice for those who choose to avoid the area. That Montana State University disallows the on-campus carrying of loaded firearms, even for concealed carry permit holders, does not deny those who avoid gun-free zones access to education.[11] Plaintiffs reference statistics purporting to show that "almost 60% of transgender Americans had avoided using public restrooms for fear of confrontation, and that almost a third of transgender people said they limited the amount they ate or drank at least once in the previous year so they did not need to use a public restroom." Pls. Mem. in Supp. at 50-51 (internal quotation marks omitted). Assuming these statistics are accurate, this also means that over 40% of transgender Americans don't avoid restrooms, and over two-thirds of them do not limit their food or drink intake. And these general,

[11] Weapons Policy – MSU Policies and Procedures, Montana State University, https://www.montana.edu/policy/firearms_policy/.

nationwide statistics show that people have made these same choices in the absence of the Act, further discrediting the causal link Plaintiffs attempt to establish here.

Far from denying access to restrooms, the Act ensures clarity and predictability as to which restrooms or other facilities any individual—including intersex individuals, despite Plaintiffs' mistaken reading—will be provided access to in a covered entity. Individuals are still free to make their choice to use a restroom or not, but the Act does not deny this choice or facility access to anybody. Thus, the Act does not burden Plaintiffs' art. II, § 3 rights, and strict scrutiny is improper on this basis.

d. The Act is Not Unconstitutionally Vague as to Intersex People

Plaintiffs claim the Act is unconstitutionally vague as applied to intersex people. Plaintiffs contend that "[i]ntersex people do not fit in the Act's restrictive definitions of 'female' or 'male,'" but draw this conclusion, not by examining the definitions of those terms but by focusing on another term entirely. Pls. Mem. in Supp. at 52-53. Plaintiffs look only to HB 121 § 2(12), the definition of "Sex," to complain that the "reflecting its scientific inaccuracy—this binary scheme simply does not fit intersex people." *Id.* at 53. But had they read the definitions of "Female" and "Male," HB 121 §§ 2(4) and (7), rather than the definition of a completely different term, in § 2(12), than the ones they purport to protest, there would be no confusion.

As an initial matter, Plaintiffs' vagueness argument fails because they are not directly regulated by the Act, and because the only enforcement mechanism is by a private party against a covered entity. Here, "covered entities" are subject to a private right of action if they either "provide permission to use a restroom or changing room" or "fail[] to take reasonable steps to prohibit the ... individual from using the

restroom or changing room designated for the opposite sex." HB 121, § 4(1)(b). Therefore, only a covered entity would be subject to some sort of private action.

In addition, as noted above in part III(B)(1), *supra*, the operative definitions for the legislative classification in the Act are those of "Female" and "Male," and these definitions contemplate the classification of individuals "who would otherwise fall within [one or the other respective] definition, but for a biological or genetic condition." HB 121 §§ 2(4), (7). These definitions, therefore, are sufficient to "inform persons of ordinary intelligence what actions are proscribed." *City of Whitefish v. O'Shaughnessy*, 216 Mont. 433, 440, 704 P.2d 1021, 1025 (1985). The Act is not vague as applied because it does not "fail[] to 'provide a person with actual notice' or 'minimal guidelines to law enforcement.'" Pls.' Mem in Supp. at 53 (quoting *State v. Dugan*, 2013 MT 38, ¶ 67, 369 Mont. 39, 303 P.3d 755).

An intersex individual, such as John Doe, with knowledge of his or her condition, can also determine which restroom or other covered facility is available for his use. John Doe's example is instructive in this regard because, despite Plaintiffs' protestations that the Act does not account for intersex people, the operative definitions provide for inclusion. John Doe reports being "diagnosed with de la Chapelle syndrome," a genetic condition in which the individual has "two X chromosomes," but one of the X chromosomes contains the SRY gene, "typically located on a Y chromosome" leading to John Doe having "both male genitalia and breast tissue." Doc. 8, Decl. of John Doe in Supp. of Pls.' Mot. for Prelim. Inj., ¶ 4. This description is confirmed by scientific literature:

> The de la Chapelle syndrome, also known as 46,XX testicular disorder of sex development (DSD), is an exceptionally rare genetic disorder that influences sexual development. Within this condition, individuals with a female karyotype (46,XX) experience undescended testes and ambiguous genitalia stemming from irregular gonadal and genitalia development during fetal gestation.

Nirja Thaker, et al., *A Case of de la Chapelle Syndrome*, Cureus, 2023 Nov. 2;15(11):e48150, available at National Library of Medicine, https://pmc.ncbi.nlm.nih.gov/articles/PMC10693380/ (internal citations omitted). "In approximately 90% of cases, this syndrome is attributed to the presence of the SRY gene on the Y chromosome, *which is responsible for male reproductive development*," becoming entangled in the meiosis process of the father's sperm cell creation, causing the SRY gene to translocate from the Y to the X chromosome. *Id.* (emphasis added)

Based on this explanation, John Doe "would otherwise fall into" the definition of Male "but for a biological or genetic condition," in this case the genetic condition by which the sex-determinative piece of the Y chromosome has become entangled with an X chromosome. HB 121 § 2(7). Under the Act, because John Doe possesses the sex-determining portion of the Y chromosome, even if other portions are missing, John Doe is classified as male and may use the restroom, changing room, or sleeping quarters designated that correspond to John Doe's sex observed at birth—and the sex with which John Does has always lived—without creating a legal concern.

e. The Act Readily Survives Rational Basis and Middle-Tier Scrutiny

While no precedent compels this Court to apply anything more stringent than the rational basis test, even if this Court desired to raise its level of scrutiny to match the federal norm for sex-based classifications and analyze the Act under middle-tier scrutiny, the Act would survive with ease. *Compare Wiser*, ¶ 19 (when the rights affected are not fundamental …the State need only demonstrate a rational basis for the regulation) *with Craig v. Boren*, 429 U.S. 190, 197 (1976) (applying middle-tier scrutiny to sex-based classifications). To clear middle-tier scrutiny, the "means chosen by the legislature (classification) must serve important governmental

objectives and must be substantially related to the achievement of those objectives." *Arneson*, 262 Mont. at 272-73, 864 P.2d at 1247. Any classification that survives middle-tier scrutiny will also survive rational basis analysis, which only requires that the "classification is rationally related to furthering a legitimate state purpose." *Id.* at 273, 864 P.2d at 1247.

The Act's classification serves an important governmental objective in line with the State's police power "by which it can regulate for the health and safety of its citizens." *Wiser*, ¶ 19. The Montana Supreme Court "recognize[s] that the State's exercise of its police powers often implicates individual rights," and such laws can still be constitutional. *Id.* (citing *State v. Rathbone*, 110 Mont. 225, 241, 100 P.2d 86, 92 (1940)). Further, the U.S. Supreme Court has accepted classifications that even treat sexes differently based on biological differences between the sexes. *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 54 (2001) ("Because fathers and mothers are not similarly situated with regard to proof of biological parenthood, the imposition of different rules for each is neither surprising nor troublesome from a constitutional perspective."). This is because the Court has long understood "[t]he truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both," and these differences may cut both ways. *Ballard v. United States*, 329 U.S. 187, 193 (1946) (rejecting an indictment where women were purposefully and systematically excluded from the grand jury). And perhaps for this reason, the Court in *Bostock*, while addressing the targeted firing of individuals based on "a statutorily protected trait," refused "to address bathrooms, locker rooms, or anything else of the kind." *Bostock v. Clayton Cnty.*, 590 U.S. 644, 681 (2020).

The Act's objective, to affirm definitions of the sexes and preserve women's facilities from acts of abuse committed by men, is thus an acceptable and important use of the State's police powers:

> **Purpose.** The purposes of [sections 1 through 4] are to:
>
> (1) reaffirm the longstanding meanings of the terms "sex," "male," and "female in law; and
> (2) preserve women's restrooms, changing rooms, and sleeping quarters for women in facilities where women have traditionally been afforded privacy and safety from acts of abuse, harassment, sexual assault, and violence committed by men.

HB 121 § 1. As discussed above, the Act applies equally to all individuals with XY chromosomes, which it defines as "Male," which encompasses a group far larger than any "trans" people who may fall into it. Plaintiffs allege "anti-trans animus," but fail to address that the Act regulates all males equally, and that the government has an important interest in doing specifically what the Act purports to do.

Plaintiffs cite the statements of two Montana officials—one legislator and the lieutenant governor—to support their claim of "anti-trans animus," but these statements do not mention "trans" individuals and are clearly in line with the Act's actual classification by biological sex. *See* Doc. 8 at 7-8, 36-37. And even if they were improper—which they are plainly not—those statements would not be sufficient to demonstrate an improper legislative purpose where the Act's language is clear. "The Montana Constitution gives legal effect to the 'laws' the Legislature enacts … not the personal beliefs of its members." *State v. Cooksey*, 2012 MT 226, ¶ 90, 366 Mont. 346, 286 P.3d 1174 (Nelson, J., concurring in part) (quoting Mont. Const. art. V, § 11(1)). "The intent of those laws is manifested in *the text of the bills* which the majority of the legislators voted to enact." *Id.* (proof of a law's intent is "not in the audio recordings of off-the-cuff remarks made by two senators during a subcommittee hearing."); *see also Brnovich v. Democratic Nat'l Comm.*, 594 U.S. 647, 689-90 (2021) ("The "cat's paw" theory has no application to legislative bodies. The theory rests on the agency relationship that exists between an employer and a

supervisor, but the legislators who vote to adopt a bill are not the agents of the bill's sponsor or proponents. Under our form of government, legislators have a duty to exercise their judgment and to represent their constituents. It is insulting to suggest that they are mere dupes or tools.").

The full quotations as reported in the news articles covering the remarks cited by the Plaintiffs are as follows:

- State Representative Kerri Seekins-Crowe: "Men do not belong in women spaces, and ignoring the biological differences creates real victims and jeopardizes the dignity and safety of girls."[12]
- State Representative Kerri Seekins-Crowe: "This bill is not about exclusion or hate. It's about common-sense boundaries that have served our society for generations. Women should not have to sacrifice their privacy or their safety because of political agendas or cultural trends."[13]
- Lieutenant Governor Kristen Juras: "Acknowledging biological realities should not be complicated or controversial, and neither should this bill."[14]

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[12] Michael Santoscoy, Montana House Committee Hears Testimony on Controversial Gender Privacy Bill, NBC Montana (Jan. 10, 2025), available at https://nbcmontana.com/news/local/montana-house-committee-hears-testimony-on-controversial-gender-privacy-bill (also noting Seekins-Crowe's comment that "there's no current law protecting women in these spaces").

[13] Matti Olson, *House Bill 121 Passes Second Reading in Montana Legislature*, NonStop Local KULR-8 Television (Jan. 15, 2025), available at https://www.montanarightnow.com/legislature/house-bill-121-passes-secondreading-in-montana-legislature/article_239fc534-d3a6-11ef-8a85-a3f59685c4d1.html.

[14] Jonathon Ambarian, *Montana Bill Would Tie Bathrooms to Biological Sex, Allow Lawsuits for Noncompliance*, KTVH (Jan. 10, 2025), available at https://www.ktvh.com/news/montana-bill-would-tie-bathrooms-to-biological-sexallow-lawsuits-for-noncompliance (noting that Lt. Gov. Juras., who is not a current member of the Legislature, "testified in support" of HB 121).

- Lieutenant Governor Kristen Juras: "Working with the Legislature, the governor's office has been proud of our shared record of defending Montanans from the far left's ideological crusade that has swept the nation."[15]

Doc. 8 at 7-8. None of these statements are inconsistent with the Purpose stated in § 1 of the Act.

While the statements of two officials, one of whom does not even currently serve in the Legislature, is insufficient evidence of animus, as addressed in *Cooksey*, further analysis of Plaintiffs' reliance on these remarks exposes how threadbare Plaintiffs' arguments are. Plaintiffs attempt to characterize Rep. Seekins-Crowe's use of the word "Men" as "referring to transgender women" should be given no credit as they provide no evidence that she meant the word to refer to anything other than *all* adult biological males. *Id.* at 37. Both Rep. Seekins-Crowe and Lt. Gov. Juras refer to biological differences between male and female individuals, a clear reference to the biological terms used in the text of the Act and the exact type of justification of which the U.S. Supreme Court approved in *Nguyen*. 533 U.S. at 54. And the references to left-wing ideology or cultural trends in these statements can just as easily be interpreted as opposing the idea that no such biological differences exist, or frankly, any number of other areas of political debate.

This valid and important governmental purpose of protecting women from violence or harassment perpetrated by men is supported by a multitude of factors. Further, the Act's focus on areas such as restrooms, changing rooms, and sleeping quarters, which have certain vulnerabilities such as being typically more secluded and lacking security cameras or other monitoring, is also supported. For instance, the FBI's crime statistics for Montana show that in the last five years, nearly 72% of aggravated assaults, 83% of rapes, 74% of murders, and 73% of criminal sexual

[15] *Id.*

contact offenses were committed by males.[16] In contrast, 91% of rape victims and 76% of criminal sexual contact victims were female.[17] This pattern holds true for less violent offenses such as "criminal sexual contact"—73% of offenders are male; 76% of victims are female—and this is strong support for recognizing a difference between the sexes when it comes to safety. Scientific studies demonstrate that males have, on average, significantly greater muscle thickness than females, likely "related to gender differences in muscle morphology."[18] These greater average strength differences found in the morphology of males compared to females makes females more vulnerable when in an enclosed space with males as compared to an enclosed space with only females. As the U.S. Supreme Court noted in *Ballard*, "a community made up exclusively of one is different from a community composed of both." 329 U.S. at 193. Such objective differences mean that the classification made in the Act both underscores its "important governmental objectives" and supports that classification as "substantially related to the achievement of those objectives." *Arneson*, 262 Mont. at 272-73, 864 P.2d at 1247.

In addition, the Legislature received testimony from individuals supporting the law and explaining why it was beneficial and focused on safety and privacy:

- Representative Kerri Seekins-Crowe stated in the House Judiciary Committee that: "The Protect Women Act is not about division or exclusion; it's about ensuring everyone, regardless of background, can

[16] Federal Bureau of Investigation, *Crime Data Explorer*, available at https://cde.ucr.cjis.gov/LATEST/webapp/#/pages/explorer/crime/crime-trend (last accessed April 11, 2025).
[17] *Id.*
[18] *E.g.*, Sandro Bartolomei, *A Comparison between Male and Female Athletes in Relative Strength and Power Performances*, J. of Functional Morphology and Kinesiology, 2021 Feb 9;6(1):17, available at https://pmc.ncbi.nlm.nih.gov/articles/PMC7930971/.

feel safe and respected in spaces where privacy is most critical." (at 8:04:30). "This is not about limiting anyone's freedoms; it's about protecting everyone's rights." (at 8:05:54). "Offering reasonable measures that balance safety and privacy with inclusivity and fairness." (at 8:06:05). "I welcome thoughtful and respectful discussion on this important issue." (at 8:06:45).[19]

- Sarah-Beth Nolan from Alliance Defending Freedom testified in the House Judiciary Committee that "[t]his Bill will protect women who are survivors of domestic violence and sex trafficking who often have nowhere to turn but a women's shelter like our client, the Hope Center." These shelters are facing immense pressure to compromise the safety of the women they serve to accommodate men, and in the case of the Hope Center, our shelter was approached by a man who requested to be admitted into the women's sleeping space. With cots just an arm's length apart, the Center decided they could not put their women in a compromised position by allowing a man to sleep beside them. Rather the Center chose to get him the help he needed at an alternative facility, and soon after a complaint was filed threatening the shelter's ability to stay open and serve this community." (at 8:10:38).
- Derek Oestreicher from the Montana Family Foundation testified at the House Judiciary Committee that "[t]his Bill is designed to protect women and girls from the risk of abuse, harassment, sexual assault, and violence in private and intimate spaces. These risks are not hypothetical. Across the nation, there are growing concerns about cases

[19] *See* https://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20250110/-1/51155#info_

where men, whether acting with malicious intent or otherwise, have entered women's facilities and caused women and girls to feel unsafe and violated." (at 8:12:10). He gave an example of a young girl in Bozeman and her peers who "have been deeply uncomfortable and distressed by the school's policy allowing a biological male to use the women's restroom and locker rooms, and these young girls feel that their privacy has been violated, and they feel helpless as their concerns are dismissed by school administrators." (at 8:13:09). He stated that "[t]his Bill is not about exclusion or discrimination, it's about creating a clear, fair, and consistent standard that prioritized the safety, privacy, and dignity of women and girls." (at 8:13:37).

- Loy Chvilicek, who helped start domestic and sexual violence program, testified that "One in three women have been sexually abused. Consider one in three women and their feelings when they go into a public restroom." (at 8:25:33).
- Riley Gaines, a former collegiate athlete, testified regarding her experience of having to change in front of naked man, and that she was never "asked for [her] consent, … did not give [her] consent to this exposure and simultaneously our own exploitation. Montana women should not have to imagine a society where sex-based protections don't exist." (at 8:29:18).
- Amie Ichikawa, who was formerly incarcerated and is an ambassador to the independent women's forum, testified that "[o]ne group's rights cannot come at the cost of another's. 92% of incarcerated women are survivors of sexual abuse." And she testified that in her experience it would be cruel and unusual to house these survivors with inmates of the male sex (at 8:31:54).

- Tanaia Puchta testified that she believes that "males who seek to use female areas are probably not doing so with malicious intent" but "[e]ven if there is no malicious intent, I would have felt ashamed violated and unprotected if I had to change in front of a male." (8:35:10).
- Robin Sertell testified regarding her experience meeting "a young lady at a pregnancy center banquet who shared her story about escaping sex trafficking. She shook as she recounted how [her trafficker] would follow her into the public restrooms taking advantage of relaxed laws in some states that allow men into women's restrooms in order to keep track of her. She reminded me that traffickers use public restrooms to trap and control their victims during public transportation. This young woman deserves the protection that HB 121 will afford to all of Montana's Women." (at 8:38:40).
- Jeanie Walter testified in the Senate Judiciary Committee regarding her own experience suffering from PTSD from being kidnapped and held hostage for nine years shares being petrified and triggered when she hears a male voice while she is half naked in the bathroom (at 10:45:16)[20]

The Act is substantially, and rationally, related to its legitimate goals of safety and privacy, despite Plaintiffs' misapprehension of the Act's plain language or the reality motivating it. For instance, Plaintiffs challenge "the Act's premise—that excluding transgender and intersex people would afford women 'privacy and safety from acts of abuse … and violence committed by *men*'… is misguided, because

[20] https://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20250130/-1/52062#agenda_

transgender and intersex women are women." Pls. Mem. in Supp. at 39. For a multitude of reasons, this statement defies common sense and ignores the plain text of the Act. First, as explained above, the Act does not exclude transgender and intersex people from covered facilities; to the contrary, it creates a classification through which each of the two groups—and thus any of the covered facilities to which they are designated—will certainly be inclusive of "trans" and intersex people. While excluding nobody, the Act segregates *the sexes* so that males, as defined by the Act, are not to enter female-designated facilities and vice versa. The contention that the word "men" in HB 121 § 1(2) is improper "because transgender and intersex women are women" appears nothing short of an intentional confusion of terms by applying definitions of similar words from two different contexts. The word "men" in the language of the Act must be read in the context of similar terms *in the same Act*, such as "male" in § 2(7), which refers to biological sex. When Plaintiffs say "transgender and intersex women are women," they are overtly deviating from the definitions of the Act and, instead, referring to subjective gender identity, which may not conform to one's chromosomes or biological sex.

Regarding Plaintiffs' more fact-driven arguments, the Act is still substantially related to its goals of protecting women from violence, even accepting Plaintiffs' premise that the Legislature does not show that "transgender or intersex people have a predisposition toward" privacy or safety offenses. Pls. Mem. in Supp. at 39. The Act is not targeted at transgender or intersex people; it distinguishes between males and females. As the U.S. Supreme Court notes, even under intermediate scrutiny, "[n]one of our gender-based classification equal protection cases have required that the statute under consideration must be capable of achieving its ultimate objective in every instance." *Nguyen*, 533 U.S. at 70. That the majority of males to be kept out of female facilities under the Act—regardless of their subjective gender identity—would never commit any violent crime against a female is a reality compatible with

the level of scrutiny the Supreme Court applies to, and the legal effectiveness it demands, in its sex-based classification jurisprudence.

It is beside the point that Plaintiffs claim that the Legislature provided no evidence of privacy or safety offenses in covered facilities in Montana, just as it is beside the point that transgender individuals have been found guilty of sexual assault in bathrooms in other states.[21] Indeed, the case of sexual assault in Virginia by a male student in a high school girls' bathroom is instructive of the Act's purpose because there appears to be some debate whether the attacker was genuinely transgender.[22] After the attack, the assailant was transferred to a different high school in the same county, and attacked yet another girl at that school.[23] That the attacks happened and that they were made possible by policies that allowed the male student

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[21] *E.g.*, *Virginia family sues school system for $30 million over student's sexual assault in bathroom*, AP News (Oct. 6, 2023) (describing the convicted attacker as a "male student … wearing a skirt in a women's bathroom"), available at https://apnews.com/article/loudoun-virginia-lawsuit-transgender-bathroom-sexual-assault-a26168568cc20c2aa6cec9bef50e7c3f; *Transgender Wyoming woman convicted of sexually assaulting 10-year-old girl in bathroom*, Fox News (updated October 20, 2017), available at https://www.foxnews.com/us/transgender-wyoming-woman-convicted-of-sexually-assaulting-10-year-old-girl-in-bathroom; KOKH Staff, *Parent files lawsuit after daughter 'severely beaten' in bathroom by trans student*, ABC 15 News (June 1, 2023), available at https://wpde.com/news/nation-world/parent-files-lawsuit-after-daughter-severely-beaten-in-bathroom-by-trans-student-oklahoma-city-edmond-memorial-high-school-superintendent-angela-grunewald.

[22] Drew Wilder, *Loudon school sex assault investigation unsealed by judge*, NBC Washington (Sept. 14, 2023) ("After much discussion over whether the perpetrator was transgender or wore a skirt to get into the restroom where the first teen was attacked, the report found no evidence that the attacker identified as female or gender fluid."), available at https://www.nbcwashington.com/news/local/loudoun-school-sex-assault-investigation-unsealed-by-judge/3423751/.

[23] *Id.*

to enter the girls' bathroom is the precise harm the Act seeks to prevent, regardless of the attacker's subjective gender identity.

To this point, Plaintiffs may reply that "Montana already has robust laws criminalizing abuse, sexual assault, and violence," Pls. Mem. in Supp. at 40, but that does not prevent the Legislature from also enacting additional protective measures, including those specific to vulnerable facilities where additional regulation may be helpful. For instance, in a gym locker room where people shower, change, and use the restroom, it is within the common experience that one will be seen in a state of undress and also encounter and be encountered by individuals in various states of undress. In these environments, where people are in more vulnerable states, it is possible that even typical interactions may more easily approach or cross the line of acceptability. The regularity and unavoidability of this is such a universal experience it even makes a personal impression on (or may have been instigated by) U.S. Supreme Court Justices:

> JUSTICE BREYER: … In my experience when I was 8 or 10 or 12 years old, you know, we did take our clothes off once a day, we changed for gym, okay? And in my experience, too, people did sometimes stick things in my underwear –
>
> (Laughter.)
>
> JUSTICE BREYER: Or not my underwear. Whatever. Whatever. I was the one who did it? I don't know. I mean, I don't think it's beyond human experience, not beyond human experience.

Transcript of Oral Argument at 58:1-10, *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364 (2009) (No. 08-479). In order to curb that possibility in the most imbalanced of circumstances—where males, the group with the highest propensity toward violent crime and the greater strength advantage, would be able to find

females in a particular state of vulnerability—that the Act draws its classifications and establishes its boundaries.

Further, the Act itself demands nothing of individuals. Instead, it operates not by directly regulating the behavior of people, but by establishing a private right of action that allows only "covered entities" to be held responsible for the management of their restrooms, changing rooms, and sleeping quarters. HB 121 § 4; *see also* Part I(A)(2), *supra* (regarding standing). Plaintiffs suggest alternative measures, "such as installing enclosed restroom stalls and urinal dividers," but these would be more onerous on the entities regulated by the Act because such measures amount to requiring millions of dollars of construction and renovation work on numerous already-constructed facilities. Further, such suggested dividers would only mitigate some of the privacy issues the Act seeks to remedy while doing nothing for the safety concerns regarding sexual assault and violence. The Act's method of operation, which does not require a one-size-fits-all approach but simply makes covered entities responsible for failing to ensure their sex-designated spaces are reasonably protected from intrusion by members of the other sex, is a least-restrictive approach that allows for autonomous choice of the covered entities.

* * *

The classification and means of its implementation is therefore not only substantially related to the Act's objectives but also narrowly tailored to that stated purpose. For these reasons, the Act would certainly meet the requirements of constitutionality under rational basis, middle-tier, or even strict scrutiny, and Plaintiffs have failed to meet their burden of showing that they are likely to succeed on the merits. This factor, alone, is sufficient to deny Plaintiffs' Motion for Preliminary Injunction.

II. Irreparable Injury.

Plaintiffs must show more than a possibility of future harm; they are required "to demonstrate that irreparable injury is *likely* in the absence of an injunction." *Winter*, 555 U.S. at 22 (emphasis in the original) (citing *Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983); *Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers*, 415 U.S. 423, 441 (1974); *O'Shea v. Littleton*, 414 U.S. 488, 502 (1974); 11A Charles Alan Wright, Arther R. Miller, & Mary Kay Kane, *Federal Practice and Procedure* § 2948.1, 139 (2d ed. 1995) ("Wright & Miller") (applicant must demonstrate that in the absence of a preliminary injunction, "the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered"); Wright & Miller at 154-55 ("A preliminary injunction will not be issued simply to prevent the possibility of some remote future injury"). Issuing a temporary restraining order or preliminary injunction based only on a possibility of irreparable harm is inconsistent with the U.S. Supreme Court's characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief. *Winter* 555 U.S. at 22 (citing *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam).

This Court must also evaluate if each provision it enjoins is *likely* to cause irreparable injury to Plaintiffs absent an injunction. MCA § 27-19-201(1)(b) (requiring that the applicant to show it is "likely to suffer irreparable harm in the absence of preliminary relief); *Winter*, 555 U.S. at 22 (the applicant must "demonstrate that irreparable injury is *likely* in the absence of an injunction"); *MAID*, ¶ 15 ("Plaintiffs seeking preliminary relief must demonstrate that irreparable injury is likely, not merely speculative, in the absence of an injunction.").

At the outset, Plaintiffs have not made any allegations regarding sleeping quarters in their motion for preliminary injunction, and thus they have shown no irreparable injury as to Section 4(2) of HB 121. Second, Plaintiffs have not made

any allegations regarding correctional centers, juvenile detention facilities, local domestic violence programs, or public schools (other than colleges)." Section 2(3).

In this case, Plaintiffs fail to show a likelihood of irreparable injury for the same reasons that they fail to show ripeness. The Act applies to third parties, "covered entities." Plaintiffs are not covered entities. Having filed their application on the first day the law went into effect, Plaintiffs have not provided evidence of any issue involving anyone's use of the bathroom (let alone transgender or intersex individuals) related to the Act, only the passage of a law that applies to third parties, that might cause third parties to take some actions, that might impact Plaintiffs in the future depending on what sort of judicial relief or policy changes by covered entities occur. Plaintiffs also do not allege that their usage prior to the effective date of the Act comports with the relevant restroom policies such that the Act, as opposed to general societal expectations regarding bathroom and changing room usage, has caused them harm.

Their specific relief also shows that they have not established irreparable injury. They ask the Court to enjoin Defendants "from enforcing the Act, directly or indirectly." Doc. 8 at 59. But Defendants do not enforce the Act. Covered entities may take steps to comply with the Act, but that will depend on the specific facts and circumstances of each covered entity's facilities. For example, if a covered entity changes restrooms from multi-occupancy to single occupancy, or a park adds portable restrooms that are single occupancy to comply with HB 121, there is no indication Plaintiffs would suffer any injury from such actions. Plaintiffs just assume irreparable injury, rather than meeting their burden as to this separate, independent element.

III. The Remaining Factors Also Weigh Against a Preliminary Injunction.

A temporary restraining order and preliminary injunction movant must show that "the balance of equities tips in his favor." *Shell Offshore, Inc. v. Greenpeace,*

Inc., 709 F.3d 1281, 1291 (9th Cir. 2013) (citing *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008)). In assessing whether a plaintiff has met this burden, courts have a "duty . . . to balance the interests of all parties and weigh the damage to each." *See L.A. Mem'l Coliseum Com. v. Nat'l Football League*, 634 F.2d 1197, 1203 (9th Cir. 1980). "If, however, the impact of an injunction reaches beyond the parties, carrying with it a potential for public consequences, the public interest will be relevant to whether the district court grants the preliminary injunction." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1139 (9th Cir. 2009).

In *Maryland v. King*, Chief Justice Roberts recognized that "[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers). This is important because laws are enacted through a democratic process, but injunctions of democratically enacted laws are anti-democratic.

Montana law specifically requires that the Court evaluate the balance of the equities and public interest factors independently of each other and independently of likelihood of success on the merits and likelihood of irreparable injury. MCA § 27-19-201(4)(b). But Plaintiffs' brief simply assumes that if they can establish a likelihood of success on the merits, that these factors automatically tip in their favor as well. *See* Doc. 8 at 56-58. As a result Plaintiffs provide almost no argument or evidence that these factors independently weigh in their favor. Instead, they simply argue that "enforcement of the Act prevents transgender and intersex Montanans from safely using restrooms, changing rooms, and sleeping quarters …." The idea that not enjoining a private right of action against third party covered entities will "prevent" individuals from "safely using restrooms" in all circumstances is simply illogical. Plaintiffs have made little effort and have failed to meet this element for a preliminary injunction. Their request must be denied on this basis alone.

In contrast, the State will suffer harm from having its laws enjoined. Beyond this, women who use bathrooms could suffer harm from the removal of a law that could prevent men from entering those spaces. This raises another critical problem—by effectively arguing for the elimination of sex-based classifications in restrooms and similar spaces—Plaintiffs are asking courts to elevate their preference to use bathrooms that correspond to their subjective gender identity over the concerns of many women who do not want biological men in these vulnerable spaces. And statistics show a fundamental difference between the male and female sexes when it comes to crime and safety. As noted above, 83% of rapes, 74% of murders, and 73% of criminal sexual contact offenses were committed by males.[24] In contrast, 91% of rape victims and 76% of criminal sexual contact victims were female.[25] Moreover, scientific studies demonstrate that males have, on average, significantly greater muscle thickness than females, likely "related to gender differences in muscle morphology."[26] Given these statistics, the Court cannot simply assume that the balance of the equities favors Plaintiffs. Instead under MCA § 27-19-201(1), this is Plaintiff's burden to show this, which they have failed to do.

Also, as noted above, the Legislature received testimony from women regarding anguish they are suffering from men in women's restrooms. Again, this has nothing to do with men being transgender, but rather a longstanding societal expectation about spaces that have been segregated based on sex.

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[24] Federal Bureau of Investigation, *Crime Data Explorer*, available at https://cde.ucr.cjis.gov/LATEST/webapp/#/pages/explorer/crime/crime-trend (last accessed April 11, 2025).

[25] *Id.*

[26] *E.g.*, Sandro Bartolomei, *A Comparison between Male and Female Athletes in Relative Strength and Power Performances*, J. of Functional Morphology and Kinesiology, 2021 Feb 9;6(1):17, available at https://pmc.ncbi.nlm.nih.gov/articles/PMC7930971/.

CONCLUSION

For the foregoing reasons, this Court should deny Plaintiffs' application for preliminary injunction.

DATED this 16th day of April 2025.

Austin Knudsen
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MONTANA DEPARTMENT OF JUSTICE

Attorneys for the Defendants

Exhibit A

Hilary Term
[2025] UKSC 16
On appeal from: [2023] CSIH 37

JUDGMENT

For Women Scotland Ltd (Appellant) *v* The Scottish Ministers (Respondent)

before

Lord Reed, President
Lord Hodge, Deputy President
Lord Lloyd-Jones
Lady Rose
Lady Simler

JUDGMENT GIVEN ON
16 April 2025

Heard on 26 and 27 November 2024

Appellant
Aidan O'Neill KC
Spencer Keen
(Instructed by Balfour + Manson LLP (Edinburgh))

Respondent
Ruth Crawford KC
Lesley Irvine
(Instructed by Scottish Government Legal Directorate)

Intervener – Sex Matters
Ben Cooper KC
David Welsh
(Instructed by Gilson Gray LLP (Edinburgh))

Intervener – Scottish Lesbians; The Lesbian Project; LGB Alliance (written submissions only)
Karon Monaghan KC
Beth Grossman
(Instructed by Doyle Clayton (London))

Intervener – (Equality and Human Rights Commission)
Jason Coppel KC
Zoe Gannon
(Instructed by Equality and Human Rights Commission)

Intervener – Amnesty International UK (written submissions only)
Sarah Hannett KC
Raj Desai
Roisin Swords-Kieley
(Instructed by Russell-Cooke LLP (Putney, London))

LORD HODGE, LADY ROSE AND LADY SIMLER (with whom Lord Reed and Lord Lloyd-Jones agree):

1. This appeal is concerned with establishing the correct interpretation of the Equality Act 2010 ("the EA 2010") which seeks to give statutory protection to people who are at risk of suffering from unlawful discrimination. The questions raised by this appeal directly affect women and members of the trans community. On the one hand, women have historically suffered from discrimination in our society and since 1975 have been given statutory protection against discrimination on the ground of sex. On the other hand, the trans community is both historically and currently a vulnerable community which Parliament has more recently sought to protect by statutory provision.

2. It is not the role of the court to adjudicate on the arguments in the public domain on the meaning of gender or sex, nor is it to define the meaning of the word "woman" other than when it is used in the provisions of the EA 2010. It has a more limited role which does not involve making policy. The principal question which the court addresses on this appeal is the meaning of the words which Parliament has used in the EA 2010 in legislating to protect women and members of the trans community against discrimination. Our task is to see if those words can bear a coherent and predictable meaning within the EA 2010 consistently with the Gender Recognition Act 2004 ("the GRA 2004").

3. As explained more fully below, the EA 2010 seeks to reduce inequality and to protect people with protected characteristics against discrimination. Among the people whom the EA 2010 recognises as having protected characteristics are women, whose protected characteristic is sex, and "transsexual" people, whose protected characteristic is gender reassignment.

4. The question for this court is a matter of statutory interpretation. But before discussing the general approach to statutory interpretation, we set out the structure of this judgment and address the matter of terminology.

5. We discuss terminology, the approach to statutory interpretation and the factual background between paras 6 and 35. We address the historical background to the GRA 2004, its interpretation and its operation between paras 36 and 111. We then between paras 112 and 264 address in some detail the interpretation of the EA 2010 to give its provisions a coherent and predictable meaning. We summarise our reasoning in para 265.

(1) Terminology

6. We are aware of the strength of feeling which has been generated by the disagreements between campaigners seeking to represent the interests of each of these

groups and that taxonomy itself can generate controversy. We are content to draw on the terminology used by the Scottish Ministers in their written case for the purposes of this judgment and have adopted the following terms. A person who is a biological man, ie who was at birth of the male sex, but who has the protected characteristic of gender reassignment is described as a "trans woman". Similarly, a person who is a biological woman, ie who was at birth of the female sex, but who has the protected characteristic of gender reassignment is described as a "trans man". We describe trans women and trans men who have obtained a gender recognition certificate ("GRC") under the GRA 2004 as "trans women with a GRC" and "trans men with a GRC" respectively and their gender resulting from the GRC as their "acquired gender" or "acquired sex".

7. We also use the expression "biological sex" which is used widely, including in the judgments of the Court of Session, to describe the sex of a person at birth, and we use the expression "certificated sex" to describe the sex attained by the acquisition of a GRC.

(2) The question of statutory interpretation

8. The legislation with which this appeal is principally concerned is the EA 2010 and we address the effect, if any, of the GRA 2004 on the interpretation of the terms "sex", "man", "woman", and "male" and "female" used in the EA 2010. The central question on this appeal is whether the EA 2010 treats a trans woman with a GRC as a woman for all purposes within the scope of its provisions, or when that Act speaks of a "woman" and "sex" it is referring to a biological woman and biological sex.

9. The general approach to statutory interpretation in the United Kingdom is well-established. The House of Lords and this court have set out the basic approach on a number of occasions, including in *R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] 2 AC 349. Most recently, this court set out the approach in *R (O) v Secretary of State for the Home Department* [2022] UKSC 3; [2023] AC 255 in which Lord Hodge DPSC, giving the leading judgment, stated (paras 29-31):

> "29. The courts in conducting statutory interpretation are 'seeking the meaning of the words which Parliament used': *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 613 per Lord Reid of Drem. More recently, Lord Nicholls of Birkenhead stated: 'Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context' (*R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] 2 AC 349, 396). Words and passages in a statute derive their meaning from their

> context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained. There is an important constitutional reason for having regard primarily to the statutory context as Lord Nicholls explained in *Spath Holme*, 397: 'Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament.'
>
> 30. External aids to interpretation therefore must play a secondary role. Explanatory Notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions. Other sources, such as Law Commission reports, reports of Royal Commissions and advisory committees, and Government White Papers may disclose the background to a statute and assist the court to identify not only the mischief which it addresses but also the purpose of the legislation, thereby assisting a purposive interpretation of a particular statutory provision. The context disclosed by such materials is relevant to assist the court to ascertain the meaning of the statute, whether or not there is ambiguity and uncertainty, and indeed may reveal ambiguity or uncertainty: *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed (2020), para 11.2. But none of these external aids displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity. …
>
> 31. Statutory interpretation involves an objective assessment of the meaning which a reasonable legislature as a body would be seeking to convey in using the statutory words which are being considered. …"

10. In *R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13; [2003] 2 AC 687, Lord Bingham of Cornhill warned against giving a literal interpretation to a particular statutory provision without regard to the context of the provision in the statute and the purpose of the statute. He stated (para 8):

> "The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment."

11. The general approach of focussing on the words which Parliament has used in a provision is justified by the principle that those are the words which Parliament has chosen to express the purpose of the legislation and by the expertise which the drafters of legislation bring to their task. But where there is sufficient doubt about the specific meaning of the words used which the court must resolve, the indicators of the legislature's purpose outside the provision in question, including the external aids described in para 30 of *R (O)* quoted above, must be given significant weight. As Lord Sales has stated in an extra-judicial writing, "sometimes the purpose for which legislative intervention was required may be the very prominent focus for the legislative activity which follows from it, and thus may frame in a particularly strong way the context in which that activity takes place" (see *"The role of purpose in legislative interpretation: inescapable but problematic necessity"*, Presentation at the Oxford University and University of Notre Dame Seminar on Public Law Theory: Topics in Legal Interpretation, 19 September 2024). Such aids can explain the meaning of a statutory provision which is open to doubt and can themselves alert the court to ambiguity in the provision, but they cannot displace the meanings conveyed by the clear and unambiguous words of a provision construed in the context of the statute as a whole.

12. Lord Nicholls' important constitutional insight in *Spath Holme*, that citizens with the help of their advisers should be able to understand statutes, points towards an interpretation that is clear and predictable. As Lord Hope DPSC stated in *Imperial Tobacco Ltd v Lord Advocate* [2012] UKSC 61; 2013 SC (UKSC) 153, at para 14:

> "The best way of ensuring that a coherent, stable and workable outcome is achieved is to adopt an approach to the meaning of a statute that is constant and predictable. This will be achieved if the legislation is construed according to the ordinary meaning of the words used."

13. The presumption that a word has the same meaning throughout the Act when used more than once in the same statute is consistent with this principle: see *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed (2020) para 21.3. That presumption is based on the idea that the drafters of the statute were seeking to create a coherent statutory text. The weight to be given to the presumption depends upon the context in which the word or phrase appears in the instrument: *Assange v Swedish Prosecution Authority* [2012] UKSC 22; [2012] 2 AC 471, Lord Phillips of Worth Matravers PSC at para 75.

The presumption may be stronger where a word is defined in the Act. In *R (Good Law Project) v Electoral Commission* [2018] EWHC 2414 (Admin), Leggatt LJ stated (para 33):

> "It is generally reasonable to assume that language has been used consistently by the legislature so that the same phrase when used in different places in a statute will bear the same meaning on each occasion – all the more so where the phrase has been expressly defined."

14. Whether Parliament intended a word to have a different meaning in different sections of an Act must be determined by looking at the context of the section in question and the Act as a whole.

(3) How the question arises

15. For Women Scotland ("the appellant") is a feminist voluntary organisation which campaigns to strengthen women's rights and children's rights in Scotland. This case is the second challenge by judicial review which the appellant has raised in relation to statutory guidance which the Scottish Ministers promulgated under section 7 of the Gender Representation on Public Boards (Scotland) Act 2018 ("the 2018 Act"). In the first petition for judicial review the appellant also asserted that the statutory definition of "woman" in the 2018 Act was outside the legislative competence of the Scottish Parliament under the Scotland Act 1998 as amended ("the Scotland Act"). Before we turn to the 2018 Act and the impugned statutory guidance, it may be helpful to outline the basis of that challenge under the Scotland Act.

16. Section 29 of the Scotland Act provides that a provision of an Act of the Scottish Parliament is outside the legislative competence of the Scottish Parliament if it relates to reserved matters. Schedule 5 to the Scotland Act specifies the matters which are reserved to the United Kingdom Parliament. One of the reserved matters (section L2) is "Equal opportunities". Since May 2016 there have been exceptions to the reservation of equal opportunities to allow the Scottish Parliament to legislate for positive action measures in relation to persons to be appointed to non-executive posts on the boards of certain public authorities in Scotland. Section L2 of Schedule 5 so far as relevant stated the exceptions as:

> "Equal opportunities so far as relating to the inclusion of persons with protected characteristics in non-executive posts on boards of Scottish public authorities with mixed functions or no reserved functions.

> Equal opportunities in relation to the Scottish functions of any Scottish public authority or cross-border public authority, other than any function that relates to the inclusion of persons in non-executive posts on boards of Scottish public authorities with mixed functions or no reserved functions. …"

17. The Scottish Parliament passed the 2018 Act to provide for positive action measures to be taken in relation to the appointment of women to non-executive posts on boards of certain Scottish public authorities. The 2018 Act sets out a gender representation objective for a public board which is that "it has 50% of non-executive members who are women" (section 1(1)). The attainment of this objective is carefully circumscribed by section 4 which makes clear that preference can be given to a woman in order to further that objective only where there is no best candidate and only if the appointment of an equally qualified male candidate cannot be justified on the basis of his particular characteristics or situation. Section 2 of the 2018 Act defined "woman" as including:

> "a person who has the protected characteristic of gender reassignment (within the meaning of section 7 of the Equality Act 2010) if, and only if, the person is living as a woman and is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of becoming female."

18. In its first judicial review the appellant challenged the statutory definition of "woman" in section 2 of the 2018 Act and paragraphs of the statutory guidance dated June 2020 which discussed that definition and explained that a trans woman had to meet the three criteria in section 2: to have the characteristic of gender reassignment, be living as a woman, and be proposing to undergo, be undergoing, or have undergone a process (or part of a process) as set out in the section 2 definition. The appellant was successful on appeal before the Second Division of the Inner House of the Court of Session (*For Women Scotland Ltd v Lord Advocate* [2022] CSIH 4; 2022 SC 150), which in para 40 of its judgment dated 18 February 2022 held that "transgender women" is not a protected characteristic under the EA 2010 and that the definition of "woman" adopted in the 2018 Act "impinges on the nature of protected characteristics which is a reserved matter". By interlocutor dated 22 March 2022 the Second Division declared that the definition of "woman" in section 2 of the 2018 Act was outside the legislative competence of the Scottish Parliament. In other words, because the definition of "woman" in section 2 of the 2018 Act included trans women as defined, it went beyond the scope of the exception permitted by section L2 of Schedule 5 to the Scotland Act; it therefore purported to legislate in respect of a reserved matter, namely equal opportunities, and so was outside the competence of the Scottish Parliament.

19. The response of the Scottish Ministers to this judicial decision was to issue fresh statutory guidance dated 19 April 2022. This guidance operated on the premise that the decision of the Second Division had nullified the definition of "woman" in section 2 of the 2018 Act. Instead, the Scottish Ministers asserted that a person who had been issued with a full GRC that her acquired gender was female, had the sex of a woman so that her appointment would count towards the achievement of the 50% objective. As explained below, this stance was consistent with the advice given by the Equality and Human Rights Commission ("EHRC"), which is the non-departmental public body in Great Britain with responsibility for promoting and enforcing equality and non-discrimination laws in England, Scotland and Wales.

20. The paragraph of the revised guidance which the appellant challenges states:

> "2.12 There is no definition of 'woman' set out in the Act with effect from 19 April 2022 following decisions of the Court of 18 February and 22 March 2022. Therefore 'woman' in the Act has the meaning under section 11 and section 212(1) of the Equality Act 2010. In addition, in terms of section 9(1) of the Gender Recognition Act 2004, where a full gender recognition certificate has been issued to a person that their acquired gender is female, the person's sex is that of a woman, and where a full gender recognition certificate has been issued to a person that their acquired gender is male, the person's sex becomes that of a man."

21. In July 2022 the appellant petitioned for judicial review to challenge the revised statutory guidance issued by the Scottish Ministers which it argues is unlawful because it is based on an error of law. The appellant seeks a declarator that the guidance is unlawful and an order for its reduction or the reduction of those parts which are found to be unlawful. The appellant argues that the guidance is not within the devolved competence of the Scottish Government under section 54 of the Scotland Act, which provides:

> "(1) References in this Act to the exercise of a function being within or outside devolved competence are to be read in accordance with this section. …
>
> (3) In the case of any function other than a function of making, confirming or approving subordinate legislation, it is outside devolved competence to exercise the function (or exercise it in any way) so far as a provision of an Act of the Scottish Parliament conferring the function (or, as the case may be,

> conferring it so as to be exercisable in that way) would be outside the legislative competence of the Parliament."

22. The petition followed correspondence between the appellant's solicitors and the Scottish Government Legal Directorate ("SGLD"). In a letter dated 1 June 2022 to the appellant's solicitors the SGLD referred to the EHRC's guidance entitled "Separate and single-sex service-providers: a guide on the Equality Act sex and gender reassignment provisions" as updated in April 2022 in the light of the decision of the Inner House which we described above. The letter quoted from a section of the EHRC guidance, which was headed "What the Equality Act says about the protected characteristics of sex and gender reassignment" and which stated:

> "Under the Equality Act 2010, 'sex' is understood as binary, being a man or a woman. For the purposes of the Act, a person's legal sex is their biological sex as recorded on their birth certificate. A trans person can change their legal sex by obtaining a Gender Recognition Certificate. A trans person who does not have a Gender Recognition Certificate retains the sex recorded on their birth certificate for the purposes of the Act."

The letter continued:

> "This EHRC Guidance confirms that a trans woman with a full GRC has changed their legal sex from their biological sex (male) to their acquired sex (female). Therefore that trans woman has the protected characteristic under the 2010 Act of their acquired sex (female). In terms of the 2018 Act this means that a trans woman with a full GRC must be treated as a woman, which is the position set out in the sentence in the Guidance on the 2018 Act that your clients disagree with."

23. The Scottish Government's revised position therefore is that a trans woman with a full GRC is treated by the EA 2010 as having the acquired sex of a woman and therefore is a "woman" in sections 11 and 212(1) of the EA 2010. They accept that the wording of the guidance set out in para 20 above is unfortunate in so far as it suggests that the inclusion of trans women with a GRC is "in addition" to biological women included in sections 11 and 212(1) of the EA 2010. On their case, therefore, the guidance would mean exactly the same without the third sentence.

24. As explained more fully below, a person who is aged at least 18 can apply for a GRC under the GRA 2004. Section 9(1) of that Act provides that when a full GRC is issued to a person the person's gender becomes "for all purposes" the acquired gender so

that if the acquired gender is the female gender, the person's sex becomes that of a woman. But that provision is "subject to provision made by this Act or any other enactment or any subordinate legislation": section 9(3).

25. The central issue on this appeal is whether references in the EA 2010 to a person's "sex" and to "woman" and "female" are to be interpreted in the light of section 9 of the GRA 2004 as including persons who have an acquired gender through the possession of a GRC.

26. The focus of this appeal is not on the status of the large majority of trans people who do not possess a full GRC. Their sex remains in law their biological sex. This appeal addresses the position of the small minority of trans people who possess a full GRC. Ben Cooper KC, who appears for the intervener, Sex Matters, states in para 31 of his written case that based on the most recent census data, the Office of National Statistics estimated that there are about 48,000 trans men and 48,000 trans women in England and Wales, and Scotland's census 2022 found that 19,990 people were trans, compared with a total of 8,464 people who have ever obtained a GRC as at June 2024. He points out that neither possession of a GRC nor the protected characteristic of gender reassignment requires any specific physiological change.

(4) The decisions of the Court of Session

27. Lady Haldane heard the appellant's challenge in the Outer House. In a carefully reasoned judgment dated 13 December 2022 ([2022] CSOH 90; 2023 SC 61), she dismissed the petition. She rejected the appellant's argument that the Inner House's decision in the first judicial review had authoritatively determined that "sex" in the EA 2010 was confined to biological sex only (para 44). She held that section 9(1) of the GRA 2004 had the effect that a GRC changed a person's sex for all purposes, stating that the language of section 9 of the GRA 2004 "could scarcely be clearer" (para 45). She rejected the appellant's submission that the GRA 2004 had a narrow purpose which had been largely superseded by subsequent legislation, including legislation establishing the legality of same sex marriage. She observed that the GRA 2004 listed exceptions to the rule in section 9(1), such as marriage, parenthood, succession, peerages and trusts, and stated that the founding principle of section 9 of the GRA 2004 is a broad one: "that the acquired gender becomes the person's sex 'for all purposes' subject to any other enactments, or the statutory exceptions listed" (para 47). Lady Haldane rejected the submissions (i) that there was a conflict between the GRA 2004 and the EA 2010, which she stated was "drafted in full awareness of the 2004 Act, and its ambit" (para 50), and (ii) that the EA 2010 impliedly repealed or disapplied section 9(1) of the GRA 2004 (para 52). As a result, "sex" in the EA 2010 was not confined to biological sex but includes the acquired sex of those who possess a GRC obtained under the GRA 2004. Lady Haldane therefore concluded that the revised guidance of the Scottish Ministers on the 2018 Act was lawful.

28. The Second Division of the Inner House (the Lord Justice Clerk (Lady Dorrian), Lord Malcolm and Lord Pentland) on 1 November 2023 refused the appellant's reclaiming motion ([2023] CSIH 37; 2023 SLT 1216). The Second Division, agreeing with Lady Haldane, held that the GRA 2004 was a far-reaching enactment which created a mechanism by which a person could change his or her sex in the eyes of the law. The judgment (para 42) stated that section 9(1), (2) and (3) of the GRA 2004 read together meant that a person with a GRC "acquires the opposite gender for all purposes unless there is a specific exception in the GRA [2004]; or unless the terms and context of a subsequent enactment require a different interpretation to follow". The judgment continued:

> "Should that occur, however, it is to be expected that the inapplicability of section 9(1) would be clearly stated, or at the very least … that the terms of the subsequent legislation are such that they are incompatible with, and would be rendered meaningless or unworkable by, the application of the general principle stated in section 9(1)."

29. The Second Division then examined the terms "sex" in sections 7 and 11 and "man" and "woman" in sections 11 and 212(1) of the EA 2010 and stated that such terms could have a biological meaning or could bear a wider meaning in accordance with the GRA 2004 so that a trans woman would be entitled to protection against discrimination on the ground of sex in her acquired gender as a woman. The terms "sex" and "gender" were often used interchangeably in the EA 2010. The provisions of the GRA 2004 and the EA 2010 could be interpreted consistently for the purposes of both statutes if the wider meaning were adopted. There was nothing in the EA 2010 that mandated a contrary conclusion. The Second Division then considered various provisions of the EA 2010 which the appellant argued were unworkable if the wider meaning of those words were adopted in section 11 of that Act. As we will be discussing those provisions below, it is sufficient at this stage to state that the provisions which the Second Division discussed related to: (i) the Armed Forces (Schedule 9), (ii) separate and single-sex spaces (section 29 and paragraphs 26 and 27 of Schedule 3), (iii) single-sex schools and institutions (Schedules 11 and 12), (iv) communal accommodation (paragraph 3 of Schedule 23), and (v) pregnancy and maternity (sections 4, 17 and 18). Of those provisions the Second Division held that only those relating to pregnancy and maternity might require a narrow interpretation of "woman" as meaning a biological woman. The Second Division also considered and rejected the submission that treating a trans woman as a woman under the EA 2010 would interfere with the right of freedom of association for lesbians. It concluded that persons with a GRC possess under section 11 the protected characteristic of sex according to the terms of their GRC as well as the protected characteristic of gender reassignment under section 7. The Second Division concluded that the Guidance on the 2018 Act was lawful because a person with a GRC in the female gender is a "woman" for the purposes of section 11 of the EA 2010.

30. The appellant now appeals to this court with the permission of the Second Division of the Inner House.

(5) The interventions in this appeal

31. Several persons and organisations applied to the court to intervene in this appeal. The court allowed four organisations to intervene in writing. Two of those four interveners were given permission to make oral submissions in addition to their written submissions.

32. First, the human rights charity, Sex Matters, whose object is to promote human rights where they relate to biological sex, in a focussed 20-page submission argues that "sex" in the EA 2010 should be construed as referring to biological sex principally because (i) trans women, including trans women with a GRC, are protected by the protected characteristic of gender reassignment, and (ii) the wider interpretation of the term "sex" in the EA 2010 leads to absurd or irrational results.

33. Secondly, the EHRC explains its longstanding view and policy position that the terms "sex", "man" and "woman" in the EA 2010 include those whose sex is certified in a GRC. The EHRC recognises that the wider definition which it favours causes difficulties and impairs the operation of the EA 2010 in four areas: (i) discrimination on the grounds of pregnancy and maternity (sections 17 and 18); (ii) the protection against sexual orientation discrimination (section 12(1)(a)) and in particular the risk that lesbians and gay men for whom the biological aspect of their same sex attraction is defining, might be precluded from forming associations which exclude trans women and trans men respectively; (iii) single-sex services (paragraphs 26-28 of Schedule 3), and (iv) communal accommodation (paragraph 3 of Schedule 23). The submission describes these difficulties as profound and suggests that Parliament should urgently resolve them.

34. The court also benefited from written interventions by Amnesty International UK, which submits that human rights principles demonstrate beyond doubt that the interpretation of the Scottish courts is correct. A combined written submission by Scottish Lesbians, the Lesbian Project and the LGB Alliance argues that a male can never be a lesbian as a matter of fact whether in possession of a GRC or not, and that the wider definition of "sex" and "woman" would create serious problems for lesbians in relation to services (section 29) and clubs and associations (sections 101 and 102 and Schedule 16) and would affect claims for direct and indirect discrimination (sections 13, 19 and 19A). The lesbian interveners also pray in aid of their submission rights under articles 8, 11 and 14 of the European Convention on Human Rights.

35. We are grateful to the interveners for their contributions. We are particularly grateful to Ben Cooper KC for his written and oral submissions on behalf of Sex Matters,

which gave focus and structure to the argument that "sex", "man" and "woman" should be given a biological meaning, and who was able effectively to address the questions posed by members of the court in the hour he had to make his submissions.

(6) The legal background: the Sex Discrimination Act 1975

36. The Sex Discrimination Act 1975 ("the SDA 1975") came into force on 29 December 1975, on the same day as the Equal Pay Act 1970. The long title of the Act described it as rendering unlawful certain kinds of sex discrimination and discrimination on the grounds of marriage. The structure of the SDA 1975 established the basis for the later legislation and several of the themes which are discussed later in this judgment emerge for the first time in this Act.

37. Section 1 of the SDA 1975 defined what amounted to discrimination against women. It provided that a person discriminates against a woman in any relevant circumstances if:

> (a) on the ground of her sex he treats her less favourably than he treats or would treat a man: section 1(1)(a) (generally referred to as direct discrimination); or
>
> (b) he applies to her a requirement or condition which he applies or would apply equally to a man but where the proportion of women who can comply with it is "considerably smaller" than the proportion of men who can comply: section 1(1)(b) (generally referred to as indirect discrimination).

38. Section 2(1) provided that section 1 and Parts 2 and 3 of the Act were to be read as applying equally to the treatment of men with such modifications to the wording as necessary. However, section 2(2) provided that in applying the Act to men "no account shall be taken of special treatment afforded to women in connection with pregnancy or childbirth".

39. Sections 5(2) and 82(1) of the SDA 1975 provided that in the Act "woman" includes a female of any age and "man" includes a male of any age. Similarly, in the Equal Pay Act 1970, section 11(2) provided that "In this Act the expressions 'man' and 'woman' shall be read as applying to persons of whatever age".

40. Part 2 of the SDA 1975 dealt with discrimination in the employment field. Section 6(1) made it unlawful for a person to discriminate against a woman in relation to the arrangements he makes for choosing who should be offered a job, in the terms on which he offers her the job or by refusing to offer her the job. Section 6(2) made it unlawful to

discriminate against an employed woman in the way that access to opportunities for promotion, training or other services were offered or by dismissing her. There were several exceptions to the prohibition in section 6 which were designed to establish the boundary between the SDA 1975 and the Equal Pay Act 1970. Broadly, subsections (4) to (7) of section 6 excepted discrimination as regards pay and pensions from this prohibition on the basis that differential treatment of this kind would be dealt with under the Equal Pay Act 1970.

41. Certain exceptions were built into the legislation, some of which were repealed long before the whole Act was superseded by the EA 2010. For example, according to section 6(3) as originally enacted, the prohibition on discrimination under section 6(1) and (2) did not apply to employment "for the purposes of a private household" or where the number of people employed was not more than five. The exception for small employers was repealed by the Sex Discrimination Act 1986 and the private household exception re-enacted in a much narrower form by section 1(2) of the 1986 Act, limiting it to where objection might reasonably be taken by a person living in the home to physical or social contact with someone of the opposite sex.

42. Section 7 of the SDA 1975 as enacted provided the exception which is reflected in the subsequent legislation, namely that discrimination is not unlawful where sex is a genuine occupational qualification ("GOQ"). The exception does not apply to discrimination in the terms and conditions on which a woman is employed; once a woman has been engaged in the job, there can be no genuine occupational reason for giving her less favourable terms and conditions than her male colleagues. The circumstances in which the defence of GOQ could be relied upon included the following:

(a) Where the essential nature of the job called for a man for reasons of physiology (other than physical strength or stamina), or for reasons of authenticity in dramatic performances: section 7(2)(a);

(b) Where the job needed to be held by a man to preserve decency or privacy because it was likely to involve physical contact or where men would be in a state of undress or using sanitary facilities: section 7(2)(b);

(c) Where the job holder had to live in premises provided by the employer and there were no facilities to accommodate women either to sleep separately or to use sanitary facilities. This was subject to the proviso that the exception applied only if it was not reasonable to expect the employer to provide separate facilities: section 7(2)(c);

(d) The job holder worked in a prison or hospital where all the people present were men and it was reasonable that the job should not be held by a woman: section 7(2)(d).

43. The defence of a GOQ could be relied on where only some of the duties of the job fell within the circumstances described but it could not be relied on in respect of a vacancy where the employer already had enough male employees to carry out those duties: section 7(3) and (4).

44. The SDA 1975 exempted a range of jobs from the ambit of the Act in whole or in part. For example, as regards prison officers it was not unlawful to impose a height requirement on both male and female prison officers: see section 18(1). Further the Act made some textual amendments to earlier legislation which assumed that all employees in occupations covered by that legislation would be men. For example, the provision in the Mines and Quarries Act 1954 which provided that no female should be employed below ground at a mine was modified to apply only to jobs where the duties ordinarily required the employee to spend a significant proportion of his time below ground: see section 21(1) of the SDA 1975. The language used in the Coal Mines Regulation Act 1908 was also modified to reflect the fact that women might now be employed; for the words "workman" or "man" there were substituted "worker": section 21(2).

45. Part 3 of the SDA 1975 dealt with discrimination in fields other than employment, in particular schools and universities (with an exception for single-sex establishments) and in the provision of goods, facilities or services. Section 29 provided that it was unlawful to discriminate on grounds of sex in the provision of a wide range of services including banking, transport, recreation and the services of any trade or local authority.

46. Again, there were various exceptions such as providing accommodation where the provider intended to continue to reside at the premises: section 32(1)(a). Section 35(1) provided a more general exception to the prohibition in section 29(1) for a person who provided facilities or services restricted to men where, for example (section 35(1)(c)):

> "(c) the facilities or services are provided for, or are likely to be used by, two or more persons at the same time, and
>
> (i) the facilities or services are such, or those persons are such, that male users are likely to suffer serious embarrassment at the presence of a woman, or

(ii) the facilities or services are such that a user is likely to be in a state of undress and a male user might reasonably object to the presence of a female user."

47. Further, there was an exception where it was likely that there would be physical contact between the user of the facilities and another person and that other person might reasonably object if the user was a woman: see section 35(2).

48. Part 5 of the SDA 1975 conferred further general exceptions. These included the following:

(a) Section 44 provided that nothing prevented excluding men from women's sporting competitions or other activities of a competitive nature where the physical strength, stamina or physique of the average woman put her at a disadvantage to the average man.

(b) Section 46 made further provision about maintaining single-sex communal accommodation provided that the accommodation was managed in a way which "comes as near as may be to fair and equitable treatment of men and women".

(c) Section 49 provided for ensuring appropriate representation on the bodies of trade unions, employer organisations and other professional or trade bodies. Where the body concerned was made up wholly or mainly of elected members it would not be unlawful to reserve seats on the body for persons of one sex in order to ensure that a minimum number of persons of that sex were members, if this was needed "to secure a reasonable lower limit to the number of members of that sex serving on the body".

49. The SDA 1975 was amended in important respects before being repealed by the EA 2010. In 2005 and 2008, provisions were inserted by the Employment Equality (Sex Discrimination) Regulations 2005 (SI 2005/2467) and the Sex Discrimination (Amendment of Legislation) Regulations 2008 (SI 2008/963) to prohibit discrimination against women on the ground of pregnancy or maternity leave both in employment (section 3A) and in the provision of services etc (section 3B).

50. What we draw from this consideration of the SDA 1975 are the following points.

51. First, there can be no doubt that Parliament intended that the words "man" and "woman" in the SDA 1975 would refer to biological sex – the trans community of course existed at the time but their recognition and protection did not.

52. Secondly, the legislation recognised and accommodated the reasonable expectations of people that in situations where there was physical contact between people, or where people would be undressing together or living in the same premises, or using sanitary facilities together, considerations of privacy and decency required that separate facilities be permitted for men and women.

53. Thirdly, a range of other exceptions were considered necessary and reasonable, particularly (a) in relation to sport and competitive activity where typical masculine physique would give an unfair advantage and (b) where positive action was needed to ensure that there was a reasonable representation of men and women on the boards of certain bodies.

(7) Discrimination on the grounds of being transgender: the 1999 Regulations

54. The common law of England and Wales did not recognise the possibility of a person becoming a different gender from their gender at birth. In the well-known case of *Corbett v Corbett (otherwise Ashley)* [1971] P 83, the High Court declared that a marriage was null and void where both parties were biological males but one had undergone gender reassignment. Ormrod J said that over a very large area, the law is indifferent to sex. In other areas, such as insurance and pension schemes, there was nothing to prevent the parties to a contract from agreeing that the person concerned should be treated as a man or a woman, as the case may be: p 105. But marriage was a relationship between a man and a woman and, in the context of marriage, even if not for other purposes, the person was still a biological male. That conclusion that a person could not change sex was applied in the criminal law in *R v Tan* [1983] QB 1053.

55. In *P v S and Cornwall County Council* (Case C-13/94) [1996] ICR 795, [1996] ECR I-2143 ("*P v S*") the European Court of Justice considered the scope of the Equal Treatment Directive, that is Council Directive 76/207/EEC (OJ 1976 L39 p 40) in the context of alleged discrimination connected to gender reassignment. The applicant (a biological male employee) was dismissed by Cornwall County Council after telling her employer that she intended to undergo gender reassignment surgery. She complained of unlawful discrimination on the grounds of her sex. The Judge Rapporteur recorded that the industrial tribunal "found that there was no remedy under the Sex Discrimination Act 1975, the applicable United Kingdom statute, since English law took cognisance only of situations in which men or women were treated differently because they belonged to one sex or the other, and did not recognise a transsexual condition in addition to the two sexes. Under English law, the applicant was at all times a male" (para 7). The Court at para 18 held that the Directive was "simply the expression, in the relevant field, of the principle of equality, which is one of the fundamental principles of Community law". The right not to be discriminated against on grounds of sex was, the Court said, a fundamental human right and accordingly the Directive also applied to discrimination arising from gender reassignment (para 20).

56. The *P v S* decision led to the adoption of the Sex Discrimination (Gender Reassignment) Regulations 1999 (SI 1999/1102) ("the 1999 Regulations"). The 1999 Regulations amended the SDA 1975 in important ways.

57. First, regulation 2 inserted section 2A which defined discrimination as including treating a person, B, less favourably "on the ground that B intends to undergo, is undergoing or has undergone gender reassignment" for the purposes of any provision in Part 2 or, subject to a limited exception, Part 3 of the SDA 1975. A definition of "gender reassignment" was inserted into section 82 of the SDA 1975:

> "'gender reassignment' means a process which is undertaken under medical supervision for the purpose of reassigning a person's sex by changing physiological or other characteristics of sex, and includes any part of such a process ..."

58. The 1999 Regulations did not insert a free-standing prohibition on discrimination separate from section 6. Rather, the prohibition on discriminating against a woman now prohibited direct discrimination as defined by section 2A, namely on the grounds of gender reassignment, but only in the employment field. It was therefore unlawful under section 6 for A to discriminate against a woman in the ways caught by section 6 on the ground that she intended to undergo or was undergoing or had undergone gender reassignment. In light of section 2 of the SDA 1975, this also made it unlawful under section 6 for A to discriminate against a man if A treated him less favourably on that ground. However, the subsections of section 6 which prevented the overlap with the Equal Pay Act 1970 were disapplied so that discrimination in respect of pay and pensions on the grounds of gender reassignment was prohibited under section 6: see the new section 6(8) inserted by regulation 3(1) of the 1999 Regulations.

59. Regulation 4 of the 1999 Regulations inserted section 7A which provided for an exception to the prohibition of discrimination in section 6(1) and (2) of the SDA 1975 where the discrimination fell within section 2A but where "being a man" or "being a woman" was a GOQ for the job and the treatment was reasonable in view of the circumstances described in section 7(2) and any other relevant circumstances.

60. Further, section 7B was inserted into the SDA 1975 to provide an additional exception to the unlawfulness of discrimination under certain elements of section 6(1) where there was a "supplementary genuine occupational qualification" for the job. A supplementary GOQ was defined in the new section 7B(2) as arising only in the circumstances set out in subsection (2). Thus:

> (a) The holder of the job was "liable to be called upon to perform intimate physical searches pursuant to statutory powers": section 7B(2)(a).

(b) The holder of the job had to live in a private home and the job involved a degree of physical or social contact with a person living in the home or knowledge of the intimate details of that person's life and that person might reasonably object to the job being held by someone who was undergoing or who had undergone gender reassignment: section 7B(2)(b).

(c) The holder of the job would have to share accommodation provided by the employer with other employees who, for the purpose of preserving decency and privacy, might reasonably object to sharing the accommodation and facilities with someone whilst the job holder was undergoing gender reassignment: section 7B(2)(c) and 7B(3).

(d) The holder of the job provided personal services to vulnerable individuals and the employer's reasonable view was that the services could not be effectively provided by someone undergoing gender reassignment: section 7B(2)(d) and 7B(3).

61. Some of these exceptions (such as that described in (b) above) were limited to where the person was undergoing or had undergone gender reassignment and did not except discrimination where the person intended to undergo gender reassignment. Others (such as that described in (c) above) applied only where the person intended to undergo or was undergoing gender reassignment but not where the person had undergone gender reassignment. Similar exceptions to discrimination were also provided for other forms of employment, including contract workers (regulation 4(2)-(3) amending section 9 of the SDA 1975), and partnerships (regulation 4(4)-(5) amending section 11 of the SDA 1975).

62. The 1999 Regulations did not amend the definitions of "man" and "woman" in the SDA 1975.

(8) The GRA 2004 as enacted

63. The enactment of the GRA 2004 was prompted by the judgment of the European Court of Human Rights ("ECtHR") in *Goodwin v United Kingdom* (Application No 28957/95) (2002) 35 EHRR 18 ("*Goodwin*") and by a declaration of incompatibility made by the House of Lords in *Bellinger v Bellinger* [2003] UKHL 21, [2003] 2 AC 467 ("*Bellinger*"). In *Goodwin*, the applicant's biological sex was male but she had undergone gender reassignment surgery. The ECtHR held that it was a breach of the applicant's right to respect for private life under article 8 of the Convention for there to be no legal recognition of her acquired gender. The ECtHR described the applicant as having initially undergone hormone therapy, grooming classes and voice training and as having "lived fully as a woman" since 1985. She later underwent gender reassignment surgery at a National Health Service hospital. The Court referred to various difficulties faced by the

applicant because of the failure of the law to recognise her acquired gender. These included her inability to change her birth certificate, and different treatment as regards social security and national insurance issues, pensions and employment. The Court recognised that it had previously held that UK law did not interfere with respect for private life: para 73. But in the light of the then social conditions, it reassessed the appropriate application of the Convention.

64. The ECtHR was struck in particular by the fact that the National Health Service recognised the condition of gender dysphoria and provided reassignment surgery "with a view to achieving as one of its principal purposes as close an assimilation as possible to the gender in which the transsexual perceives that he or she properly belongs" (para 78). Yet there was no legal recognition of her changed status in law. The Court discussed medical evidence about the causes of what it called "transsexualism" and noted that the vast majority of Contracting States, including the UK, provided treatment including irreversible surgery. However, the ongoing debate about the exact causes of the condition were of diminished relevance because "given the numerous and painful interventions involved in such surgery and the level of commitment and conviction required to achieve a change in social gender role" it could not be suggested that there was "anything arbitrary or capricious in the decision taken by a person to undergo gender re-assignment": para 81.

65. The Court concluded that the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone which is not quite one gender or the other was no longer sustainable: para 90.

66. The *Goodwin* judgment was considered by the House of Lords in *Bellinger* where their Lordships were invited to declare a marriage valid which had been entered into by a man and a trans woman. Their Lordships declined to do so. Lord Nicholls referred to *Goodwin* and the Government's announcement that it intended to bring forward primary legislation to address the issue. He said that recognition of Mrs Bellinger as female for the purposes of section 11(c) of the Matrimonial Causes Act 1973 "would necessitate giving the expressions 'male' and 'female' in that Act a novel, extended meaning: that a person may be born with one sex but later become, or become regarded as, a person of the opposite sex": para 36. Lord Nicholls went on:

> "37. This would represent a major change in the law, having far reaching ramifications. It raises issues whose solution calls for extensive enquiry and the widest public consultation and discussion. Questions of social policy and administrative feasibility arise at several points, and their interaction has to be evaluated and balanced. The issues are altogether ill-suited for determination by courts and court procedures. They are pre-eminently a matter for Parliament, the more especially when

> the Government, in unequivocal terms, has already announced its intention to introduce comprehensive primary legislation on this difficult and sensitive subject."

67. The House of Lords held further that it was not possible to "read down" the 1973 Act and made a declaration of incompatibility under section 4 of the Human Rights Act 1998.

68. The GRA 2004 came into force on 4 April 2005 and provides a framework for recognising a person's reassigned gender. The compatibility of the UK's provision for recognition of gender reassignment with article 8 of the Convention was considered by the ECtHR again in *Grant v United Kingdom* (Application No 32570/03) (2006) 44 EHRR 1. There a trans woman complained that she was only entitled to receive her state pension at age 65, the age for men, rather than at 60, the age for women. She had been issued with a GRC once the GRA 2004 came into force. The Court held that the duration of the applicant's victim status lasted from the occasion on which she was refused a pension following the Court's judgment in *Goodwin* until the passing of the GRA 2004: para 43.

69. The main provisions of the GRA 2004:

(a) provided for applications to be made for a GRC and for the criteria to be applied and the evidence to be provided: sections 1, 2 and 3;

(b) established a Gender Recognition Panel ("the Panel") to determine those applications and provided for appeals from decisions of the Panel: section 1(3) and Schedule 1;

(c) provided for the consequences of the issue of a gender recognition certificate, including the creation and maintenance of the Gender Recognition Register described in Schedule 3;

(d) provided for a prohibition on disclosure of protected information about a person who has made an application: section 22;

(e) provided for limited amendments to the SDA 1975.

70. We discuss each of these briefly in turn, focussing for present purposes on the text of the GRA 2004 as originally enacted, since neither party has suggested that any of the amendments made to the GRA 2004 can affect how it applies to the EA 2010.

(i) Applications for gender recognition certificates

71. Section 1 of the GRA 2004 provides that a person aged 18 or over can apply for a GRC on the basis of "living in the other gender" or having changed gender in an overseas country. Section 2 provides that where the application is based on the person living in the other gender, the Panel must grant the application if satisfied that the applicant satisfies four criteria, namely that the applicant:

> (a) has or has had gender dysphoria,
>
> (b) has lived in the acquired gender throughout the period of two years ending with the date on which the application is made,
>
> (c) intends to continue to live in the acquired gender until death, and
>
> (d) complies with the evidential requirements imposed by and under section 3.

72. The evidence required under section 3 includes two medical reports, one of which must be by a registered medical practitioner or chartered psychologist practising in the field of gender dysphoria, and that report must include "details of the diagnosis of the applicant's gender dysphoria". Further, if the applicant has undergone or is undergoing or plans to undergo treatment to modify sexual characteristics, one of the reports must include details of that treatment. The applicant must also provide a statutory declaration that the applicant has lived in the acquired gender for two years and intends to do so until death.

73. From its enactment, the GRA 2004 went further than the decision in *Goodwin* may strictly have required at that point to ensure compliance with article 8. The applicant in *Goodwin* had undergone what the ECtHR described as "the long and difficult process of transformation" (para 78), but the GRA 2004 recognised a broader class of transgender people as entitled to formal recognition even if they had not undergone surgery. In that respect, the GRA 2004 anticipated the decision of the ECtHR in *AP, Garçon and Nicot v France* (Applications Nos 79885/12, 52471/13 and 52596/13, judgment of 6 April 2017). In that case the Court held that it was a breach of article 8 to make legal recognition of a person's transgender status conditional on sterilisation surgery or on treatment which entailed a very high probability of sterility: see para 120 of the judgment. The Court noted

that imposing such a pre-condition presented transgender persons "with an impossible dilemma" if they did not want to undergo sterilisation surgery or treatment. That condition amounted to a violation of article 8. However, there was no breach of article 8 in requiring a diagnosis of gender dysphoria. There was at that time near-unanimity amongst Contracting States in requiring such a diagnosis and imposing that requirement did not infringe article 8: see para 140.

74. Applications for a GRC are determined by the Panel in private and, according to section 4 of the GRA 2004, if the Panel grants the application it must issue a GRC to the applicant. The certificate is either a full certificate if the applicant is not married or an interim certificate if the applicant is married. The Act contains complex provisions for addressing the issues raised by the response of the applicant's spouse to the successful application: see Schedule 4 to the Act. The issue of an interim certificate is a ground for divorce and if divorce ensues, the applicant must then be granted a full GRC. Appeals on a point of law from the rejection of an application go to the High Court or Court of Session: section 8. The certificate must state that the acquired gender is male or is female: the Panel has no power to issue a "non-binary" certificate, even where the applicant has a certificate declaring them to be "non-binary" issued by an overseas authority: see *R (Castellucci) v Gender Recognition Panel* [2024] EWHC 54 (Admin), [2024] KB 995.

75. Section 9 of the GRA 2004 is key to the issues raised in this appeal. It remains in force in the form originally enacted and provides:

> "**9 General**
>
> (1) Where a full gender recognition certificate is issued to a person, the person's gender becomes for all purposes the acquired gender (so that, if the acquired gender is the male gender, the person's sex becomes that of a man and, if it is the female gender, the person's sex becomes that of a woman).
>
> (2) Subsection (1) does not affect things done, or events occurring, before the certificate is issued; but it does operate for the interpretation of enactments passed, and instruments and other documents made, before the certificate is issued (as well as those passed or made afterwards).
>
> (3) Subsection (1) is subject to provision made by this Act or any other enactment or any subordinate legislation."

76. Section 10 and Schedule 3 address the effect of the GRC on the UK birth register entry in relation to the recipient. Other Schedules to the Act deal with amendments to marriage law (Schedule 4) and entitlements to social security benefits and pensions (Schedule 5).

77. The GRA 2004 also expressly excepted particular matters, providing that they were not to be affected wholly or in part by the grant of the GRC. Succession, the descent of peerages, the administration of trusts and the disposition of property under a will were effectively excepted from the regime by sections 15 to 18. Other exceptions, some of which remain in force, were provided for as follows:

(a) Section 12 provided that the fact that a person's gender has become the acquired gender does not affect the status of the person as the father or mother of a child.

(b) Section 19 provided that a person may be excluded from participating as a competitor in a "gender-affected sport" if that was necessary to secure fair competition or the safety of competitors. A "gender-affected sport" was defined as one where "the physical strength, stamina or physique of average persons of one gender would put them at a disadvantage to average persons of the other gender as competitors in events involving the sport."

(c) Section 20 provided that the receipt of a GRC did not prevent a person from being convicted of a gender-specific offence which can be committed only by a person of their biological gender or from being a victim of an offence of which only people of their biological gender can be victims.

78. Section 22 provides for the confidentiality of "protected information" and remains in force. It is an offence for a person who has acquired protected information in an official capacity to disclose that information to any other person. "Protected information" means information which concerns an application for a GRC or, if a GRC had been issued, concerned the person's gender before the acquired gender. Subsection (4) provides gateways for the lawful disclosure of protected information, including where the information does not enable the applicant to be identified, or where the person has agreed to the disclosure or for certain other purposes, including circumstances to be prescribed by the Secretary of State.

79. Section 23 conferred on the Secretary of State and on Scottish Ministers and the appropriate Northern Ireland department a general power to make orders, following appropriate consultation, modifying the operation of any enactment or subordinate legislation in relation to persons whose gender has become the acquired gender. This power was subsequently used to modify Scottish laws on marriage.

80. Schedule 6 to the GRA 2004 made amendments to the SDA 1975, in particular amendments to sections 7A and 7B (inserted by the 1999 Regulations). Neither Schedule 6 nor any other provision in the GRA 2004 made any express amendment to the definition of "man" and "woman" in the SDA 1975.

81. As to what one can glean from the provisions of the GRA 2004 about the intended effect of section 9(1) on the scope of the SDA 1975, the Scottish Ministers drew the court's attention to para 27 of the Explanatory Notes. The notes give as an example of the effect of section 9(1), that a trans man with a GRC would be entitled to protection from discrimination as a woman under the SDA 1975. In our view, this is a good illustration of why the use to which the courts should put explanatory notes is limited to the context of the legislation and the mischief to which its provisions are aimed: see Lord Steyn in *R (Westminster City Council) v National Asylum Support Service* [2002] UKHL 38, [2002] 1 WLR 2956, para 5 and the passages from *R (O)* cited earlier. There is nothing in the notes to suggest that the department had undertaken the kind of detailed analysis of the effect of such a change on the operation of provisions of the SDA 1975, as amended by the 1999 Regulations, that we have undertaken in the following sections of this judgment before giving that as an example of the effect of section 9(1).

82. The Scottish Ministers make a different point on the scope of the amendments made to the SDA 1975 by Schedule 6 to the GRA 2004. The amendments made to sections 7A and 7B disapplied the exceptions for GOQs and supplementary GOQs in those sections if the discrimination was against a person whose gender had become the acquired gender under the GRA 2004. The effect of the amendments made by Schedule 6 is to add a provision removing the exception – so discrimination is not permitted – where the discrimination is against a person whose gender has become the acquired gender under the GRA 2004. In our judgment these provisions say nothing about the intended effect more generally of section 9(1) on the meaning of the terms "man" and "woman" in the SDA 1975. In any event, the provisions regarding GOQs in sections 7A and 7B as amended were not carried forward into the EA 2010. Schedule 9 to that Act made fresh provision for GOQs.

(ii) Guidance and case law on applications for gender recognition certificates

83. The criteria in section 2 and the evidence requirement in section 3 of the GRA 2004 have been the subject of guidance and some case law. There are several authorities which describe the condition of gender dysphoria which must be diagnosed before the applicant can apply for a GRC. In *R (C) v Secretary of State for Work and Pensions* [2017] UKSC 72, [2017] 1 WLR 4127 ("*R (C) v DWP*"), Lady Hale PSC described gender dysphoria as "the overwhelming sense that one has been born into the wrong body, with the wrong anatomy and the wrong physiology": para 1. She referred also to the transgender person's "deep need to live successfully and peacefully in their reassigned gender, something which non-transgender people can take for granted".

84. So far as the medical reports required by section 3 are concerned, the President of the Panel issued guidance in 2005 pursuant to paragraph 6(5) of Schedule 1 (as amended) as to how panels should consider the medical evidence. The guidance states:

> "3. ... the Panel must therefore examine the medical evidence provided in order to determine whether it is satisfied that the applicant has or has had the diagnosis of gender dysphoria. In order to do so the Panel requires more than a simple statement that such a diagnosis was made. The medical practitioner practising in the field who supplies the report should include details of the process followed and evidence considered over a period of time to make the diagnosis in the applicant's case. Nor is it sufficient to use the broad phrase 'gender reassignment surgery' without indicating what surgery has been carried out. Nor should relevant treatments be omitted, such as hormone therapy. These requirements are particularly pertinent in assisting the Panel to be satisfied not only that the applicant has or has had gender dysphoria but also has lived in the acquired gender for at least two years and intends to live in that gender until death.
>
> 4. On the other hand, doctors need not set out every detail which has led them to make the diagnosis. What the Panel needs is sufficient detail to satisfy itself that the diagnosis is soundly based and that the treatment received or planned is consistent with and supports that diagnosis."

85. In *Carpenter v Secretary of State for Justice* [2015] EWHC 464 (Admin), [2015] 1 WLR 4111 a trans woman challenged the requirement under section 3(3) of the GRA 2004 that she had to provide details to the Panel of the surgical treatment she had undergone for the purpose of modifying her sexual characteristics. She argued this infringed her article 8 rights because applicants could be issued with a certificate without having undergone surgery and without therefore having to provide such details. The challenge was rejected. Thirlwall J accepted that the requirement to provide medical details engaged the article 8 right to respect for private life. However, where an applicant had undergone surgery, or planned to do so, that fact was highly relevant, if not central, to the application and was plainly necessary to the Panel's consideration of the criteria in section 2(1)(a) to (c) of the GRA 2004. Thirlwall J said at para 23:

> "Undergoing or intending to undergo surgery for the purposes of modifying sexual characteristics is overwhelming evidence of the existence now or previously of gender dysphoria and of the desire of the applicant to live in the acquired gender until

> death. No competent, conscientious medical practitioner could produce a report on gender dysphoria (past or present) which did not refer to treatment received."

86. She also recorded at para 24 of her judgment that counsel for the Secretary of State had told the court that where an applicant has not undergone any treatment, it is the Panel's usual procedure to require the second report submitted by the applicant to explain why this is the case. She concluded (para 28) that given that the information was necessary to the decision to be taken and that its dissemination beyond the Panel was prohibited, the provision of the information was necessary and proportionate to the legitimate aim and that there was no breach of article 8.

(iii) Living in an acquired gender

87. Many of the judgments handed down in earlier cases addressing transgender issues emphasise the importance to the trans person who had brought the proceedings before the court of modifying their appearance so that they look like a typical person of their acquired gender. For example, *Chief Constable of the West Yorkshire Police v A (No 2)* [2004] UKHL 21, [2005] 1 AC 51 concerned a claim under sections 1 and 6 of the SDA 1975 by a trans woman prior to the coming into force of the GRA 2004. The issue was whether she could be refused appointment as a police officer because in the chief constable's view she was not able to carry out intimate searches of either men or women. She could not search men because she presented as a woman and she could not search women because she was male as a matter of law. In her speech, Lady Hale said at para 61 that the applicant "has done everything that she possibly could do to align her physical identity with her psychological identity. She has lived successfully as a woman for many years. She has taken the appropriate hormone treatment and concluded a programme of surgery. She believes that she presents as a woman in every respect". Similarly, in *R (C) v DWP* Lady Hale PSC recorded that the applicant in the proceedings before the court had undergone full gender reassignment treatment and surgery which included facial feminisation surgery "in [the applicant's] words because it was 'incredibly important' to her 'easily to "pass" as a woman.'": para 3.

88. However, the requirements in section 2(1)(b) and (c) of the GRA 2004 have not been interpreted to require, for example, biological men to prove that they have modified or intend to modify their physical appearance so as to "pass" as a woman in order to establish that they have been "living as" women in the past and that they intend to do so until death.

89. The court was provided with guidance on completing the application form for a GRC issued by His Majesty's Courts and Tribunals Service (rather than by the President of the Panel) (Reference T451). Section 5 of the guidance deals with "Time living in your

acquired gender". Applicants must enter the date from which they can prove that they have been living full time in their acquired gender. The evidence that the guidance suggests that the applicant provide is in the form of documents that are dated and include the applicant's name in the acquired gender. Examples of the documents that can be used are driving licences and passports, payslips, bank statements, official letters from doctors or dentists, utility bills or academic certificates. The guidance states that typically five or six different documents should be included.

90. The court was not provided with any further explanation of what names are regarded as being in any particular gender or whether this refers only to the pronouns used. The guidance also refers to the making of the statutory declaration that the applicant has lived as a male or female and intends to live in that gender until death. There is no guidance as to what it means to live in a gender, other than to ensure that the person's name in certain documents is a name in the acquired gender.

91. The application of this guidance and the relationship between the criteria in sections 2 and 3 were considered by the Divisional Court (Sir Andrew McFarlane P and Lieven J) in *AB v Gender Recognition Panel* [2024] EWHC 1456 (Fam), [2025] 1 WLR 227. There the appellant appealed against the Panel's decision to refuse her application for a GRC in the female gender. The judgment records at paras 7 and 8 that the applicant had provided a range of documents showing that she had changed her name. It noted also that the medical report from a doctor practising in the field of gender dysphoria had described the applicant's goals as regards treatment as requiring "a basic biological incompatibility" since she wanted both to achieve a gynaecoid body shape including adult female breast development and also to retain the capacity "to have a functional penis, with capacity for erection and genital sexual response": para 27. It was, the doctor said, for the applicant "to decide what takes priority". The second medical report provided with AB's application recorded that at interview, the applicant had presented as "straightforwardly feminine" and that she had "moved into a stable female social role".

92. In her judicial review, she challenged the Panel's conclusion that there was very little evidence that the applicant was "living in real life as a female". She submitted that she had followed the guidance by providing as evidence her passport (stating her sex as "F"), deed polls by which she had adopted female names and bank statements with her female name prefixed by "Miss": para 42. She also referred to the hormone treatment and testosterone blocking medication that she had taken except for a short period. The Court criticised the Panel's decision letter for failing to analyse properly the evidence supporting the applicant's assertion that she had been "living in the acquired gender". The decision had not referred to the passport, deed polls or bank account statements and had not given any reasons as to why they were dissatisfied with this evidence. The Court held that the Panel had erred in considering only the medical evidence on the question of whether she had been living as a woman: para 62. That was only one part of the evidence before the Panel on the issue and some of the statements in the medical reports were supportive of her assertion that she had been living in the female gender.

93. The Court concluded at para 67 that the evidence taken as a whole presented a clear and consistent picture of a person who had lived as a female. Although she had for a limited time some years before stopped hormone treatment in order to retain some male sexual function, all the other material, including important official documents, indicated a consistent course of conduct in living her life as female. The Court recorded that further evidence had been provided to enable the Court to make a decision whether to issue her with a GRC in the event that the Panel's decision was set aside. This included a statement that "she has lived as a female since 2012 to the extent that she believes that many of her friends and acquaintances would not know that she had been born male": para 76. The Court issued a GRC. The Court did not therefore address the question whether, if AB's evidence showed that she complied with the guidance because her official documents used female names and pronouns but that she did not "present" as female or occupy a stable female social role, she would have satisfied the criteria that she was living as a woman and that she intended to continue to do so.

(iv) Case law on the effect of section 9(1)

94. As explained earlier, the principal issue in this appeal is the effect of section 9 of the GRA 2004 on the meaning of the words "man" and "woman" in the EA 2010. Section 9 (set out at para 75 above) provides both for a rule that on receipt of a GRC "the person's gender becomes for all purposes the acquired gender" (subsection (1)) and also a carve out from the operation of that rule, namely that it is subject to a provision made in the GRA 2004 itself or in any other enactment or any subordinate legislation (subsection (3)).

95. In her submissions on this point, Ms Crawford KC on behalf of the Scottish Ministers compared section 9(1) with section 40 of the Adoption and Children (Scotland) Act 2007. That provides that an adopted person is to be treated in law as if born as the child of the adopters or adopter (section 40(1)) and further is to be treated in law "as not being the child of any person other than the adopters or adopter" (section 40(3) and (4)). However, that deeming provision is not as absolute as the wording may suggest since subsection (7) provides that the court may direct that subsection (4) does not apply or applies only to the extent specified in the direction.

96. Both parties referred to the case of *Fowler v Revenue and Customs Commissioners* [2020] UKSC 22, [2020] 1 WLR 2227 on the court's approach to the similar issue of interpreting and applying statutory deeming provisions. The court recognises that it would be entirely incorrect to describe section 9(1) as creating a "legal fiction" as a deeming provision does. To the extent that the guidance given by Lord Briggs JSC (with whom the other Justices agreed) is nevertheless helpful by analogy, we note that he emphasised the importance of construing the provision in its context to ensure that it does not produce effects "clearly outside" the purpose for which it is included in the legislation. It should not be applied "so far as to produce unjust, absurd or anomalous results": para 27.

97. The parties also drew the court's attention to the fact that section 9(1) states first that, on the issue of a GRC, a person's *gender* becomes for all purposes the acquired *gender* and then, in parentheses, that the person's *sex* becomes that of the acquired *sex*. We do not draw any inference from this as to the intended breadth of the rule set out in section 9(1). In our judgment, the words in parenthesis are more likely to be intended to forestall any argument that might have arisen if the rule referred only to gender and not to sex (or only to sex and not to gender) and to reflect the fact that the words "gender" and "sex" were used interchangeably in legislation at the time the GRA 2004 was introduced. As Lord Reed PSC said in *R (Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56, [2023] AC 559, legislation across the statute book assumes that all individuals can be categorised as belonging to one of two sexes or genders and those terms have been used interchangeably: para 52.

98. We can address some preliminary points that were raised by the parties.

99. The appellant submitted that the usefulness of section 9(1) was now spent because the problems encountered by trans men and trans women that the legislation was designed to remove have all been removed by other legislation. The pension age for men and women has now been equalised and gender distinctions in many social security benefits have been removed. Civil partnerships and marriage can now be validly entered into by same sex as well as different sex couples. Given the diminished relevance of the GRA 2004 to the rights of transgender people, the appellant argues that the rule in section 9(1) is also largely spent.

100. We do not accept that. Although many provisions of the GRA 2004 have been overtaken by other legislative developments, we consider that the Act continues to have relevance and importance in providing for legal recognition of the rights of transgender people. This recognition of their changed status has practical effects for individual rights and freedoms (including, for example, in the context of marriage, pensions, retirement and social security) but also in recognising their personal autonomy and dignity and avoiding unacceptable discordance in their sense of identity as a transgender person living in an acquired gender. We also agree with the Scottish Ministers that the GRA 2004 is concerned with relationships between private parties as well as between the transgender person and the state.

101. We do, however, see force in Mr Cooper's argument that the carve out in section 9(3) is not limited to express statutory provision excluding the application of section 9(1) or to circumstances where that is a necessary implication. The "necessary implication" test was discussed by the House of Lords in *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] UKHL 21, [2003] 1 AC 563. That case concerned the abrogation of an important common law right, namely the right to rely on legal professional privilege to resist a request for disclosure of documents. At para 45 of his speech, Lord Hobhouse of Woodborough said that where the statute did not contain any

express words that abrogated that right, the question arose whether there was a necessary implication to that effect. He described the test to be applied in those circumstances as distinguishing between what it would have been sensible or reasonable for Parliament to have included or what Parliament would, if it had thought about it, probably have included and what it is clear that the express language of the statute shows that the statute must have included: "A necessary implication is a matter of express language and logic not interpretation": para 45.

102. However, the stringency of the necessary implication test is not appropriate when considering the application of section 9(3) of the GRA 2004. The principle of legality described by Lord Hoffmann in *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115, 131, is not engaged here. This is not a case where the court is being asked to override a basic tenet of the common law or constitutional rights. We therefore reject the submissions made by Ms Irvine for the Scottish Ministers and by the EHRC that only express wording or necessary implication applying that stringent test can disapply the rule in section 9(1).

103. We also reject the submission that the carve out in section 9(3) only operates in respect of future legislation and not legislation, such as the SDA 1975, which was already enacted at the date when the GRA 2004 was enacted. Ms Irvine submitted that the GRA 2004 itself made exhaustive provision for how the rule was to apply to existing statutes. We do not accept that; section 9(3) refers to "any other enactment" and those words have a clear meaning.

104. It is true, as Mr Coppel appearing for the EHRC pointed out, that the explanatory notes for the GRA 2004 described section 9(3) as meaning that the general proposition in section 9(1) was subject to exceptions made by the Act itself "and, for the future, by any other enactment or subordinate legislation" (para 29). But that is not what section 9(3) says and we conclude that the notes are in error in this regard.

105. Limiting the application of section 9(3) to legislation enacted after the GRA 2004 might in some cases produce results adverse to the trans community. For example, *R (McConnell) v Registrar General for England and Wales* [2020] EWCA Civ 559, [2021] Fam 77 concerned a judicial review claim by a trans man with a GRC who had given birth to a son following fertility treatment. The principal issue before the Court of Appeal was whether section 12 of the GRA 2004 which provides that a change of gender "does not affect the status of the person as the father or mother of a child" only precluded recharacterising someone's status as regards children born before the issue of the GRC or whether it also determined the parent's status if the baby was born after the issue of that certificate. The Court held it was both prospective and retrospective so that he had been correctly referred to as the child's "mother" on the birth certificate.

106. The Court of Appeal referred in *McConnell* at paras 23 onwards to an issue that had been raised at first instance before the President of the Family Division, Sir Andrew McFarlane, as to whether Mr McConnell could lawfully have been provided with the fertility treatment which resulted in the birth of his son. In his judgment at first instance ([2019] EWHC 2384 (Fam), [2020] Fam 45), the President noted that the fertility treatment provided by the clinic to Mr McConnell could only lawfully be provided if it comprised "treatment services" capable of being licensed by the Human Fertilisation and Embryology Act 1990 ("HFEA"). "Treatment services" were defined in section 2 of the HFEA as services provided "for the purpose of assisting women to carry children". It is a criminal offence to undertake the creation of an embryo except in pursuance of a licence. The President noted:

> "155. If at the time that he received treatment services at the clinic [Mr McConnell] had been a woman (which by virtue of the GR certificate he was not) then the placing into his womb of gametes, in the form of permitted sperm, would have been lawful under the terms of the clinic's licence, assuming any other licence conditions had been complied with. It must, however, be at least questionable whether the provision of treatment services to a man is within the range of activities that the HFEA is permitted to authorise by licence."

107. The Government's case before the court in *McConnell* was that a decision that Mr McConnell was not a "woman" for the purposes of the scheme would have grave adverse policy consequences. The treatment might be wholly outside the regulatory scheme with the possible result not only that the treatment was unlawful, but that the donor of the sperm became the legal father of the child. The Government also rejected Mr McConnell's argument that the word "woman" in the HFEA now meant "person"; that would "cause insuperable problems elsewhere in the HFEA": para 157. The President declined to determine the issue and the Court of Appeal also did not consider it necessary or appropriate to comment on the question of whether Mr McConnell's treatment was lawfully provided: para 26.

108. This court also does not express any view on that issue. We note only that the effect of the rule in section 9(1) on the very many statutes referring to men and women, whether enacted before or after the GRA 2004, must be carefully considered in the light of the wording, context and policy of the statute in question. It is likely to be unhelpful for the coherence of the law to impose a stringent test for the application of section 9(3).

(v) Case law on the operation of section 9(1)

109. The implications of the change of gender "for all purposes" have been discussed in a number of cases. In *R (C) v DWP* the applicant challenged the policy of the Department of Work and Pensions to retain on its database information about her former (male) sex including her former titles and names. The Supreme Court rejected the argument that the policy was a breach of section 9(1). Lady Hale (with whom the other Justices agreed) said:

> "23. The problem with this argument is that section 9(1) clearly contemplates a change in the state of affairs: before the issue of the GRC a person was of one gender and after the issue of the GRC that person 'becomes' a person of another gender. The sections which follow section 9 are designed, in their different ways, to cater for the effect of that change. …
>
> 24. There is nothing in section 9 to require that the previous state of affairs be expunged from the records of officialdom. Nor could it eliminate it from the memories of family and friends who knew the person in another life."

110. Those passages were cited by the Employment Appeal Tribunal ("EAT") in *Forstater v CGD Europe* [2022] ICR 1 when upholding a complaint of unlawful discrimination by a consultant whose contract had not been renewed because she had expressed gender critical views, that is to say, views supporting the contention that biological sex is immutable. At the end of a comprehensive and impressive judgment, Choudhury P addressed the question whether the presence of section 9(1) meant that the claimant's views were not worthy of protection under section 10 of the EA 2010 and article 9 of the Convention:

> "99. The effect of a GRC, whilst broad as a matter of law, does not mean that a person who, like the claimant, continues to believe that a trans woman with a GRC is still a man, is necessarily in breach of the GRA by doing so; the GRA does not compel a person to believe something that they do not, any more than the recognition by the state of civil partnerships can compel some persons of faith to believe that a marriage between anyone other than a man and a woman is acceptable. That is not to say, of course, that the claimant can, as a result of her belief, disregard the GRC; clearly, she cannot do so in circumstances where the acquired gender is legally relevant, eg in a claim of sex discrimination or harassment."

111. The EAT commented that if the claimant gave expression to her beliefs by refusing to refer to a trans person by their preferred pronoun, that could amount to unlawful harassment in some circumstances, although it would not always have that effect: see paras 103 and 104.

(9) Equality Act 2010: overview of the purpose of the legislation

112. The EA 2010 is an important piece of legislation with a wide scope. It regulates and conditions the relationships and interactions between private individuals and both private and public entities over a field of activities that ranges from ensuring fair recruitment, pay, and treatment in the workplace, to the regulation of the professions, the protection of students from unlawful discrimination in schools, colleges, and universities and the prevention of unfair treatment when accessing healthcare, membership clubs, associations and other goods and services.

113. It is both an amending and consolidating statute which was intended, among other things, to "reform and harmonise equality law and restate the greater part of the enactments relating to discrimination and harassment related to certain personal characteristics" (long title). It consolidated and reformed the Equal Pay Act 1970, the SDA 1975, the Race Relations Act 1976, the Disability Discrimination Act 1995 and other (primarily secondary) legislation addressing unlawful discrimination in other specific areas (religion or belief, sexual orientation, and age) to strengthen the law in order to support greater progress on equality.

(10) The structure of the EA 2010

114. The EA 2010 is arranged over 16 parts and 28 schedules. It closely defines the various forms of prohibited conduct regulated by its provisions. It does that first by establishing "key concepts" in Part 2 and then, in subsequent parts, by creating a series of statutory torts, that is acts that are unlawful conduct in the context of certain activities. These broadly relate to services and public functions; premises; work; education; and associations. The unlawful acts have a wide coverage but there are also numerous exemptions to the unlawful acts created by the EA 2010, some of general application and others specific to certain unlawful acts or characteristics. Individuals can enforce rights under the EA 2010 in tribunals and courts. The EHRC has a role in taking strategic and certain enforcement action under the EA 2010.

115. So far as key concepts are concerned, Part 2 explains and defines the forms of discrimination and other conduct that is prohibited by subsequent parts of the Act. Discrimination comprises:

(a) Direct discrimination (defined in section 13)

(b) Combined discrimination because of a combination of two relevant protected characteristics (defined in section 14)

(c) Discrimination arising from disability (defined in section 15)

(d) Gender reassignment discrimination: cases of absence from work (defined in section 16)

(e) Pregnancy and maternity discrimination: non-work cases (defined in section 17)

(f) Pregnancy and maternity: work cases (defined in section 18)

(g) Indirect discrimination (defined in sections 19 and 19A)

Other prohibited conduct comprises harassment (section 26) and victimisation (section 27) though these are not forms of discrimination for the purposes of the EA 2010.

116. Section 25 is headed "References to particular strands of discrimination" and sets out what is meant by references to characteristic specific discrimination. It covers the nine "protected characteristics" under the EA 2010, namely: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. Relevantly for our purposes, it provides that:

> "(3) Gender reassignment discrimination is—
>
> (a) discrimination within section 13 because of gender reassignment;
>
> (b) discrimination within section 16;
>
> (c) discrimination within section 19 or 19A where the relevant protected characteristic is gender reassignment.

(4) Marriage and civil partnership discrimination is—

(a) discrimination within section 13 because of marriage and civil partnership;

(b) discrimination within section 19 or 19A where the relevant protected characteristic is marriage and civil partnership.

(5) Pregnancy and maternity discrimination is discrimination within section 17 or 18. …

(8) Sex discrimination is—

(a) discrimination within section 13 because of sex;

(b) discrimination within section 19 or 19A where the relevant protected characteristic is sex.

(9) Sexual orientation discrimination is—

(a) discrimination within section 13 because of sexual orientation;

(b) discrimination within section 19 or 19A where the relevant protected characteristic is sexual orientation."

117. These key concepts are then applied in the subsequent parts of the EA 2010 which set out what conduct is unlawful and the exemptions that can be invoked in certain circumstances. We summarise them by way of overview in the next 11 paragraphs.

118. Part 3 (see also Schedules 2 and 3) makes it unlawful (in relation to all protected characteristics except marriage and civil partnership – section 28(1)(b) – and age so far as relating to those under 18 – section 28(1)(a)) to discriminate against (in other words, directly or indirectly), or to harass or victimise a person when providing a service (which is defined in section 31 to include the provision of goods or facilities) or when exercising a public function. Section 29 is the central provision in this Part and provides:

> "29. (1) A person (a 'service-provider') concerned with the provision of a service to the public or a section of the public (for payment or not) must not discriminate against a person requiring the service by not providing the person with the service.
>
> (2) A service-provider (A) must not, in providing the service, discriminate against a person (B)—
>
> (a) as to the terms on which A provides the service to B;
>
> (b) by terminating the provision of the service to B;
>
> (c) by subjecting B to any other detriment. …"

(Subsections (3), (4) and (5) prohibit harassment and victimisation by a service-provider.)

119. Part 4 makes the same or similar provision in relation to persons disposing of (for example, by selling or letting) or managing premises.

120. Part 5 (see also Schedules 6, 7, 8 and 9) makes it unlawful to discriminate against, harass or victimise a person at work or in some forms of employment. It regulates prohibited conduct against prospective, existing and former employees and other workers, and applies to all employers, to partnerships, the police, the Bar, advocates, officeholders, appointments (etc) to public offices, qualification bodies, employment service-providers, trade organisations, and local authorities. In the ordinary employment context, section 39(1) and (2) prohibits discrimination by employers against applicants for employment and employees, in summary, in deciding who should be offered employment, in the terms of employment afforded, in dismissing a person or in subjecting that person to any other detriment.

121. This Part also contains provisions relating to equal pay between men and women. By section 64, these provisions (sections 66 to 70) apply where, "(1) … (a) a person (A) is employed on work that is equal to the work that a comparator of the opposite sex (B) does; (b) a person (A) holding a personal or public office does work that is equal to the work that a comparator of the opposite sex (B) does". Section 65 defines equal work for these purposes, including where work is rated as equivalent by a job evaluation study or where it would have been rated as equal were the evaluation not made on a "sex-specific system" (ie a system that sets values on demands made on a worker that are "for men different from those it sets for women"): see section 65(4) and (5).

122. It also applies to pregnancy and maternity equality "where a woman … is employed, or … holds a personal or public office" (section 72). For example, by section 73(1) if the "terms of the woman's work do not (by whatever means) include a maternity equality clause" they are treated as including one. A maternity equality clause is a provision that, "in relation to the terms of the woman's work", has the effects provided for by section 74. So far as concerns membership rules or rights under an occupational pension scheme, section 75(1) treats such a scheme as including a maternity equality rule if one is not included in the scheme.

123. Provision is also made in this Part making it unlawful for an employment contract to prevent an employee disclosing his or her pay to a colleague; and a power to require private sector employers to publish gender pay gap (the size of the difference between men and women's pay expressed as a percentage) information about differences in pay between men and women (see sections 77 and 78).

124. Part 6 makes it unlawful for education bodies (including higher and further education) to discriminate against, harass or victimise a school pupil or student or applicant for a place.

125. Part 7 (see also Schedules 15 and 16) makes it unlawful for associations (for example, private clubs and associations or other organisations) to discriminate against, harass or victimise members, associates or guests. For the purposes of this Part, associations are defined by section 107(2) as follows: "(2) An 'association' is an association of persons— (a) which has at least 25 members, and (b) admission to membership of which is regulated by the association's rules and involves a process of selection".

126. Provisions for enforcement of the obligations imposed by the EA 2010 are in Part 9. It is unnecessary to elaborate on these for the purposes of this appeal.

127. Part 11 (see also Schedules 18 and 19) establishes a general duty on public authorities to have due regard, when carrying out their functions, to the need: to eliminate unlawful discrimination, harassment or victimisation; to advance equality of opportunity; and to foster good relations: section 149. This section creates what is known as a public sector equality duty or "PSED". It also contains provisions which enable an employer or service-provider or other organisation to take positive action to overcome or minimise a disadvantage arising from people possessing a relevant protected characteristic: sections 158 and 159.

128. Part 14 (see also Schedules 22 and 23) establishes exceptions to certain prohibitions in the earlier Parts in relation to a range of conduct, including action required

by an enactment; protection of women; the provision of benefits by charities; and in sport and sporting competitions.

129. We return to several of these provisions below.

(11) The relevant protection afforded by the EA 2010 to individuals and groups

130. The EA 2010 operates to protect both individuals and groups of people who share a protected characteristic from unlawful discrimination. It has been amended from time to time since its enactment, most recently by the Equality Act 2010 (Amendment) Regulations 2023 (SI 2023/1425) (which inserted section 19A referred to below). The version we refer to below is the version as in force at the date of this judgment.

(i) For individuals

131. At an individual level it does so primarily by means of a general prohibition against less favourable treatment in the form of overt or direct discrimination (section 13) because of one or a combination of individual protected characteristics or by means of more specific direct discrimination provisions which operate similarly in relation to particular characteristics (of relevance here are sections 16 in relation to gender reassignment, and sections 17 and 18 in relation to pregnancy and maternity discrimination).

132. Section 13(1) provides the general definition for direct discrimination as follows:

> "(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

133. There are three points to note about section 13 at this stage.

134. First, to demonstrate less favourable treatment in subsection (1) an actual or hypothetical comparator is often relied on to demonstrate that a person without the relevant protected characteristic was or would have been treated more favourably by person A. Such a comparator (actual or hypothetical) must be a person who does not share B's protected characteristic. Section 23(1) makes clear that, apart from the protected characteristic, there must be "no material difference between the circumstances relating to each case" when determining whether B has been treated less favourably. Accordingly, where sex is the protected characteristic, a woman relying on section 13(1) must compare her treatment with the treatment that was or would have been afforded to a man whose

circumstances are not materially different to hers; in other words, a similarly situated man. Where gender reassignment is the protected characteristic, in the case of a male person proposing to or undergoing gender reassignment to the opposite sex, the correct comparator is likely to be a man without the protected characteristic of gender reassignment and similarly for a woman (although there may be situations where the comparator's sex is immaterial to the comparison). See for example, *Croft v Royal Mail Group plc* [2003] EWCA Civ 1045, [2003] ICR 1425 at para 74.

135. Secondly, pregnancy and maternity are a special category in the sense that there is no need for any comparison in treatment to be made in the case of pregnancy and maternity discrimination. For this category direct discrimination is defined by reference to unfavourable (not less favourable) treatment. So, for example, in a non-work context, section 17 provides:

> "(2) A person (A) discriminates against a woman if A treats her unfavourably because of a pregnancy of hers.
>
> (3) A person (A) discriminates against a woman if, in the period of 26 weeks beginning with the day on which she gives birth, A treats her unfavourably because she has given birth.
>
> (4) The reference in subsection (3) to treating a woman unfavourably because she has given birth includes, in particular, a reference to treating her unfavourably because she is breast-feeding."

136. Similar provision is made by section 18 in a work context:

> "(2) A person (A) discriminates against a woman if, in or after the protected period in relation to a pregnancy of hers, A treats her unfavourably— (a) because of the pregnancy, or (b) because of illness suffered by her in that protected period as a result of the pregnancy.
>
> (3) A person (A) discriminates against a woman if A treats her unfavourably because she is on compulsory maternity leave or on equivalent compulsory maternity leave.
>
> (4) A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to

> exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave or a right to equivalent maternity leave."

137. These provisions recognise that biological men cannot become pregnant and that no comparison can therefore be made between the case of a sick man and a pregnant woman, both of whom need a period of absence from work. The differential provision made for pregnancy and maternity follows from the jurisprudence of the European Court of Justice in the 1990s establishing that since "only women can be refused employment on grounds of pregnancy" a refusal to employ a pregnant woman "therefore constitutes direct discrimination on grounds of sex" without more: see *Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus* (Case C-177/88) [1990] ECR 1-3941 at para 12 and *Handels-og Kontorfunktionærernes Forbund i Danmark v Dansk Arbejdsgiverforening* (Case C-179/88) [1990] ECR 1-3979 which held that the dismissal of a woman because she was pregnant constituted direct discrimination on grounds of her sex without any need to compare her circumstances with those of a man.

138. Consistently with sections 17 and 18 of the EA 2010, special provision is made in relation to direct discrimination in section 13(6) of the EA 2010, where the direct discrimination is because of the protected characteristic of sex, as follows:

> "(6) If the protected characteristic is sex –
>
> (a) less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding;
>
> (b) in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy, childbirth or maternity."

139. In other words, a woman can complain of direct discrimination based on less favourable treatment of her because she is breast-feeding; and a man cannot complain about the "special treatment" afforded only to women in connection with pregnancy, childbirth or maternity.

140. Thirdly, the language of direct discrimination in section 13(1) is different from the language used in the corresponding provision made by section 1(1)(a) of the SDA 1975 which defined direct sex discrimination as treatment by another person of a woman in relevant circumstances if "(a) on the ground of her sex he treats her less favourably than he treats or would treat a man". Section 13(1) by contrast is framed by reference to less favourable treatment "because of a protected characteristic". Under section 13(1) of the

EA 2010 therefore the complainant need not herself possess the protected characteristic relied on: see *Coleman v Attridge Law* (Case C-303/06) [2008] ICR 1128, which held that the EU Equal Treatment Framework Directive (2000/78) protects those who, although not themselves disabled, nevertheless suffer direct discrimination or harassment because of their association with a disabled person. Accordingly, the section 13(1) prohibition includes direct discrimination based on perception, whether or not shared by the person being perceived, and by association. We return to this point below (see paras 250 to 257).

141. Gender reassignment discrimination is covered by section 13 save in cases of absence from work. In these cases, different protection is provided in section 16, which defines direct discrimination in relation to cases of absence from work because of gender reassignment, as follows:

> "**16 Gender reassignment discrimination: cases of absence from work**
>
> (1) This section has effect for the purposes of the application of Part 5 (work) to the protected characteristic of gender reassignment.
>
> (2) A person (A) discriminates against a transsexual person (B) if, in relation to an absence of B's that is because of gender reassignment, A treats B less favourably than A would treat B if—
>
> (a) B's absence was because of sickness or injury, or
>
> (b) B's absence was for some other reason and it is not reasonable for B to be treated less favourably.
>
> (3) A person's absence is because of gender reassignment if it is because the person is proposing to undergo, is undergoing or has undergone the process (or part of the process) mentioned in section 7(1)."

(ii) The protection from discrimination afforded on a group basis

142. The EA 2010 is also concerned to prohibit disguised discrimination which operates at a group level. This is important as Michael Foran explains (in an article entitled "Defining Sex in Law" (2025) 141 LQR 76, 91–92:

> "Arguments concerning the definition of a protected characteristic are never simply manifestations of individual claims. They are always group orientated. The claim that one is a woman is a claim to be included within a particular category of persons and to be excluded from another. It is also a claim to include some persons and to exclude other persons within the group that one is a part of. This matters especially for aspects of the Equality Act 2010 which require duty-bearers to be cognisant of how their conduct might affect those who share a protected characteristic or where there is an obligation to account for the distinct needs and interests of those who share a particular characteristic."

143. The group-based protections are aimed at achieving substantive equality of results for groups with a shared protected characteristic. The EA 2010 does this in several different ways, the most significant of which for our purposes are as follows.

144. First, the provisions concerning indirect discrimination are specifically directed at the problem of group discrimination and their purpose is to counter group (not individual) disadvantage. They operate where an apparently neutral policy or practice is applied generally to everyone but produces a disproportionate disadvantage for a particular group with a shared protected characteristic. Indirect discrimination is defined by sections 19 and/or 19A of the EA 2010. Section 19(1) and (2) provide that indirect discrimination occurs when a person (A) applies to another (B) a "provision, criterion or practice" (generally referred to as a "PCP") if:

> "(a) A applies, or would apply, it to persons with whom B does not share the characteristic,
>
> (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
>
> (c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim."

145. For indirect discrimination to be established, it must be possible to reach general conclusions or make general assumptions about a group with a particular protected characteristic such that an employer or other duty-bearer ought reasonably to be able to appreciate that any particular PCP applied to their workforce or service users may have a disproportionately adverse impact on the group. For example, an employer, who sets a minimum height requirement for employment in a police service at a level that (for physiological reasons) most men, but fewer women can comply with, can reasonably expect that women as a group will be disadvantaged by such a requirement. Unless the employer can justify the minimum height requirement, it will be unlawful as indirectly sex discriminatory. The same would be true of an employer's requirement to fulfil the full range of shift patterns as a tube train driver arranged on a 24 hour per day, seven days per week basis, because it is recognised that those with primary child-care responsibilities (for societal reasons, mostly women) will find it harder to comply with such a requirement than those without (mostly men). In both cases, the employer can reasonably be expected to anticipate these consequences for women as a group in the workforce and can therefore be expected to justify the PCP before imposing it.

146. Section 19A is headed "Indirect discrimination: same disadvantage" and extends the scope of the protection against indirect discrimination (as defined in section 19) to cases where a PCP is applied by A to B; and A also applies the PCP to persons who share a relevant protected characteristic and to those who do not share it; and "B does not share that relevant protected characteristic" (section 19A(1)(c)) but B is put at "substantively the same disadvantage as persons who do share the relevant protected characteristic" (section 19A(1)(e)). We return to this provision below at para 259.

147. Secondly, there are provisions which allow for positive action to address disadvantages faced by groups of people with a shared protected characteristic compared to those without that protected characteristic. Thus, employers or organisations can implement measures to improve opportunities for underrepresented groups, provided these measures are proportionate: see for example, sections 158 and 159 of the EA 2010. In broad terms, these provisions enable a person (P) who reasonably thinks that persons who share a protected characteristic either suffer a disadvantage connected to the characteristic, or have needs that are different from the needs of persons who do not share it, or their participation in an activity is disproportionately low, to take proportionate positive action with the aim of enabling or encouraging that group (comprising persons who share the protected characteristic) to overcome or minimise the disadvantage, meet those needs or participate in the activity.

148. The PSED in section 149 of the EA 2010 also requires public authorities or other persons exercising public functions to have due regard to the need to advance equality of

opportunity between people with and without protected characteristics, taking account of any particular disadvantages, needs or low participation levels, and to foster good relations between such groups. These provisions are directed at increasing equality of opportunity (see the long title to the EA 2010) and are concerned with the same sort of group disadvantage as the provisions dealing with indirect discrimination, whether referable to differences between different groups of people, or to societal attitudes or structures.

149. Thirdly, the EA 2010 also enforces the principle of equal pay for equal work, requiring employers to ensure that men and women are paid the same for doing equivalent roles or work of equal value. Section 64(1) EA 2010 provides that:

> "(1) Sections 66 to 70 apply where – a person (A) is employed on work that is equal to the work that a comparator of the opposite sex (B) does; …"

150. Hypothetical comparators are not permitted in an equal pay claim; A must identify B, a person of the opposite sex, as an actual comparator.

(12) The importance of clarity and consistency both for those with legal rights and protections, and those who have duties imposed on them by the EA 2010

151. Accordingly, it is clear from the above that the EA 2010 gives important legal rights to individuals and groups who are vulnerable to unlawful discrimination because of a particular or shared protected characteristic, and both protects against unlawful discrimination and seeks to advance equal treatment. In doing so it seeks to strike a balance between the rights of one group and another, rights that can conflict with or contradict one another in some circumstances. An obvious example of such conflict emerges in employment cases concerning the protected characteristics of religion or belief on the one hand and sexual orientation on the other: see for example *Islington London Borough Council v Ladele* [2009] EWCA Civ 1357; [2010] 1 WLR 955 which concerned disciplinary proceedings taken against a designated civil partnership registrar who refused to conduct same sex civil partnership ceremonies in accordance with the Civil Partnership Act 2004 on the ground that such unions were contrary to her orthodox Christian belief that "marriage is the union of one man and one woman for life" (para 7).

152. The EA 2010 also imposes duties on individuals and organisations not to discriminate unlawfully. It does so by regulating the practical day-to-day conduct of public and private sector employers (small, medium and large), service-providers and others in relation to employees, workers, service users and members of the public who have one or more protected characteristics. Since sex as a protected characteristic is a ground for these legal rights, it must be possible for sex to be interpreted in a way that is

predictable, workable and capable of being consistently understood and applied in practice by this wide range of duty-bearers.

153. The group-based rights or protections in the EA 2010 recognise that people who share a particular protected characteristic (known or perceived) often have common experiences or needs, whether arising from differences of biology or physiology, or societal expectations or structures affecting their group. These shared experiences or needs can and do give rise to particular disadvantage if they are not met, and they differentiate that group from other groups without the protected characteristic. As we have said, the duties imposed by the EA 2010 require an ability to anticipate that particular rules, policies or practices might affect those who share a protected characteristic and have distinct needs or interests in consequence. Those upon whom the EA 2010 imposes duties (the duty-bearers) must regulate their conduct and practices to avoid unlawful indirect discrimination. Organisations considering taking appropriate positive action measures must be able to identify membership of a disadvantaged group sharing a particular characteristic. Public authorities subject to the duty in section 149 (the PSED) must be able to identify differently affected groups if they are to be able to analyse the features which may disadvantage some groups over others or affect relations between them, in order to analyse the impact of their policies.

154. In short, clarity and consistency about how to identify the relevant groups that share protected characteristics are essential to the practical operation of the EA 2010.

(13) The central question: does the EA 2010 make provision within the meaning of section 9(3) of the GRA 2004 to displace the application of section 9(1)?

155. Against that background, we turn to address the central question in this appeal.

156. To recap, section 9(1) of the GRA 2004, read with section 9(2) and (3), has the effect that the gender of a person with a GRC becomes the acquired gender "for all purposes" so that "if the acquired gender is the male gender, the person's sex becomes that of a man and, if it is the female gender, the person's sex becomes that of a woman", unless there is a specific exception in the GRA 2004 itself or unless the terms and context of an enactment, including a subsequent enactment, demonstrate that there is "provision made" by that enactment pursuant to section 9(3) that negates the effect of section 9(1). In other words, section 9(1) applies unless section 9(3) applies. Section 9(3) will obviously apply where the GRA 2004 or subsequent enactment says so expressly. But express disapplication of section 9(1) is not necessary as we have explained. Section 9(3) will also apply where the terms, context and purpose of the relevant enactment show that it does, because of a clear incompatibility or because its provisions are rendered incoherent or unworkable by the application of the rule in section 9(1).

157. There is no doubt that the EA 2010 was enacted in the knowledge of the existence of the GRA 2004, its known consequences and the case-law which both prompted it (*Goodwin*) and confirmed the GRA 2004 as having remedied the Convention breach (*Grant*). Indeed, the EA 2010 contains an exemption for gender reassignment discrimination in the context of solemnisation of marriage, which refers expressly to the effects of section 9(1) as "[the person's] gender has become the acquired gender under the Gender Recognition Act 2004" (see paragraph 24 of Part 6 and paragraph 25 of Part 6ZA of Schedule 3 to the EA 2010). So, the strongly worded rule in section 9(1) of the GRA 2004 must be taken to apply to the EA 2010 by virtue of section 9(2) unless there is "provision made" in the EA 2010, that disapplies or negates the effect of section 9(1) on the meaning of sex in the EA 2010. If section 9(3) does not apply, then the section 9(1) rule does apply and sex in the EA 2010 must have an extended meaning that includes "certificated sex". If that is the position, then the Scottish Ministers' guidance about the application of the 2018 Act is correct and lawful in making clear that trans women with a GRC can count towards the attainment of the goal of achieving 50% representation of women on the public boards covered by the 2018 Act.

158. There is no provision in the EA 2010 that expressly addresses the effect (if any) which section 9(1) of the GRA 2004 has on the definition of "sex" or the words "woman" or "man" (and cognate expressions) used in the EA 2010. The terms "biological sex" and "certificated sex" do not appear anywhere in the Act. However, the mere fact that the word "biological" is absent from the EA 2010 definition of "sex" is not by itself indicative of Parliament's intention that a "certificated sex" meaning is intended. The same is true of the absence of the word "certificated" in the definition of "sex".

159. In the Outer House, Lady Haldane concluded (at para 53) that section 9(2) of the Victims and Witnesses (Scotland) Act 2014 (as amended by the Forensic Medical Services (Victims of Sexual Offences) (Scotland) Act 2021) can only properly (or fairly) be read to mean biological sex when it uses the term "sex". This is because the purpose of the amendment (introduced by the 2021 Act) was to ensure that section 9(2) of the 2014 Act read as follows: "Before a medical examination of the person is carried out by a registered medical practitioner, the person must be given an opportunity to request that any such medical examination be carried out by a registered medical practitioner of a sex specified by the person". We agree with her analysis: sex as used in this provision must mean biological sex notwithstanding that there is no reference to biological sex in this provision. The clear statutory intention is to respect the right of a female or male victim of a sexual crime to request same sex care should she or he so wish because it has always been, and still is, well recognised that reasonable objection can be taken to an intimate medical examination by a member of the opposite biological sex. References to sex could only be references to biological sex in context.

160. If the EA 2010 can only be read coherently to mean biological sex, the same result must follow. The question that must therefore be answered is whether there are provisions in the EA 2010 that indicate that the biological meaning of sex is plainly intended and/or

that a "certificated sex" meaning renders these provisions incoherent or as giving rise to absurdity. An interpretation that produces unworkable, impractical, anomalous or illogical results is unlikely to have been intended by the legislature.

161. What is necessary therefore is a close analysis of the EA 2010 to identify whether there are indicators within it that demonstrate that section 9(3) of the GRA 2004 applies and displaces the rule in section 9(1). We start by considering the core provisions in the EA 2010 that depend on or relate to "sex" to consider whether as a matter of ordinary language these provisions can only properly be interpreted as meaning biological sex, or whether they are to be interpreted as also extending to include persons living in the opposite acquired gender who have been issued with a GRC (see paras 166 to 209 below). We will then consider the practicability and workability of the duties imposed and protections afforded by the EA 2010 if a "certificated sex" interpretation is adopted (see paras 210 to 246 below). Finally, we will consider whether a "biological sex" interpretation is contra-indicated because it would remove important protection under the EA 2010 from trans people with a GRC (see paras 248 to 264 below).

(14) The meaning of sex in the SDA before and after the enactment of the GRA 2004

162. Before the enactment of the GRA 2004 there is no doubt that references to sex, man and woman in the SDA 1975 were references to biological sex. (See paras 36–53 above.)

163. On enactment of the GRA 2004 as we have explained above, limited changes were made to the SDA 1975, but this was not done by amending the definition of sex and introducing a differently constructed concept of sex. Rather, sex remained biological sex as we have explained in paras 80–82 above.

164. There is no reason to suppose that Parliament intended, by the EA 2010, to introduce a change of substance from the SDA 1975, by introducing a modification to the meaning of sex in accordance with section 9(1) of the GRA 2004. The parties did not draw our attention to anything in the documents which led up to the enactment of the EA 2010 which identified a perceived mischief that needed a change of substance in the law in this regard.

165. But even if we are wrong about that, and we acknowledge that it is difficult to understand the purpose of some of the amendments to the GOQ provisions in the SDA 1975 made by the GRA 2004, the EA 2010 both consolidated and reformed anti-discrimination law. As a self-contained reforming statute, it should be interpreted, if reasonably possible, without recourse to the predecessor provisions. The GOQ provisions in the SDA 1975 were repealed and many of the exemptions were fundamentally

reframed. Thus, whatever the position in relation to the SDA 1975, the focus of our analysis is necessarily on the EA 2010.

(15) Analysis of core provisions of the EA 2010

166. We have set out the approach to statutory construction at paras 8–14 above. Our task is to ascertain the meaning of the words "sex", "woman" and "man" used in the EA 2010, read in their particular context and in light of the wider context and purpose of the anti-discrimination provisions in the EA 2010.

167. The two specific characteristics at the heart of this appeal are "sex" and "gender reassignment". These are maintained as distinct and separately protected characteristics in sections 11 and 7 of the EA 2010 respectively, just as they were in the SDA 1975, as amended.

168. Section 11 of the EA 2010 provides:

> "In relation to the protected characteristic of sex—
>
> (a) a reference to a person who has a particular protected characteristic is a reference to a man or to a woman;
>
> (b) a reference to persons who share a protected characteristic is a reference to persons of the same sex."

169. The only other guidance as to the meaning of these expressions is given in the general interpretation provisions in section 212(1) which provide:

> "In this Act …
>
> 'man' means a male of any age; …
>
> 'woman' means a female of any age."

170. In other words, what is made unlawful is sex discrimination against women and men; and the provision in section 212(1) ensures that boys and girls are protected against discrimination connected to their sex.

171. The definition of sex in the EA 2010 makes clear that the concept of sex is binary, a person is either a woman or a man. Persons who share that protected characteristic for the purposes of the group-based rights and protections are persons of the same sex and provisions that refer to protection for women necessarily exclude men. Although the word "biological" does not appear in this definition, the ordinary meaning of those plain and unambiguous words corresponds with the biological characteristics that make an individual a man or a woman. These are assumed to be self-explanatory and to require no further explanation. Men and women are on the face of the definition only differentiated as a grouping by the biology they share with their group.

172. A certificated sex interpretation would cut across the definition of the protected characteristic of sex in an incoherent way. References to a "woman" and "women" as a group sharing the protected characteristic of sex would include all females of any age (irrespective of any other protected characteristic) and those trans women (biological men) who have the protected characteristic of gender reassignment and a GRC (and who are therefore female as a matter of law). The same references would necessarily exclude men of any age, but they would also exclude some (biological) women living in the male gender with a GRC (trans men who are legally male). The converse position would apply to references to "man" and "men" as a group sharing the same protected characteristic. We can identify no good reason why the legislature should have intended that sex-based rights and protections under the EA 2010 should apply to these complex, heterogenous groupings, rather than to the distinct group of (biological) women and girls (or men and boys) with their shared biology leading to shared disadvantage and discrimination faced by them as a distinct group.

173. Moreover, it makes no sense for conduct under the EA 2010 in relation to sex-based rights and protections to be regulated on a practical day-to-day basis by reference to categories that can only be ascertained by knowledge of who possesses a (confidential) certificate. Some of the practical consequences of a certificated sex definition are described in the case presented by Sex Matters. They state that uncertainty and ambiguity about the circumstances in which it is legitimate to treat (biological) women and girls as a distinct group whose interests need to be considered and protected, have the effect that many organisations now feel inhibited in doing so.

174. The definitions in sections 11 and 212(1) are similar (though not identical) to those in the SDA 1975. Mr O'Neill relied on the contrast between the definition in section 212(1) of the EA 2010 which says, "In this Act … 'woman' means a female of any age" and the previous provisions in sections 5(2) and 82 of the SDA 1975 which said "'woman' includes a female of any age". We do not consider this change to be significant in context. In both cases, the meaning conveyed is simply to make clear that boys and girls are also included within the definition of man and woman respectively. We do not see the words "*includes*" and "*means*" as sufficiently distinctive to lead to any conclusions about whether the EA 2010 was intended to alter or maintain the position under the SDA 1975 that the terms refer to biological sex only.

175. It is significant, however, that there is only one definition of sex. The concept of sex is of foundational importance in the EA 2010. The words sex and woman appear across different parts of the Act and in many sections. It would be surprising if the words sex and woman were intended to have different meanings in different sections or parts of the EA 2010, as the Inner House concluded, especially given the definitions of "man" and "woman" in section 212(1) of the EA 2010. Indeed, it would offend against the principle of legal certainty and the need for a meaning which is constant and predictable, especially in the context of an Act with the purposes we have identified, and which has such practical everyday consequences for so many individuals and organisations in society.

176. The general rule, as we have said, is that words or terms used more than once in the same legislation are taken to have the same meaning whenever they appear, and the general purpose of an interpretation provision is to fix the meaning of such a word or term throughout the legislation in question. This presumption can be rebutted where the context requires, even where a saving for context does not appear in the definition section. But this is likely to be rare and giving a variable meaning to a defined term is generally only done where it is clear that there is a genuine drafting error resulting in differential usage of the word or term in the text of the legislation: see for example the observations to this effect in a human rights context in *Secretary of State for Work and Pensions v M* [2004] EWCA Civ 1343, [2006] QB 380 at para 84.

177. As we shall demonstrate, a strong indicator that the words "sex", "man" and "woman" in the EA 2010 have their biological meaning (and not a certificated sex meaning) is provided by sections 13(6), 17 and 18 (which relate to sex, pregnancy and maternity discrimination) and the related provisions. The protection afforded by these provisions is predicated on the fact of pregnancy or the fact of having given birth to a child and the taking of leave in consequence. Since as a matter of biology, only biological women can become pregnant, the protection is necessarily restricted to biological women.

178. The repeated references in these sections, to a woman who has become pregnant or who is breast-feeding only make sense if sex has its biological meaning. These plain, unambiguous words can only be interpreted coherently as references to biological sex, biological females and biological males. Put another way, if the acquisition of a certificate pursuant to section 9(1) of the GRA 2004 applies to these words, so that biological women living as trans men (with a GRC in the male gender) are male, they would nonetheless be excluded from protection when pregnant notwithstanding a continued capacity to become pregnant, and duty-bearers would not be able to claim relevant exemptions in relation to their treatment. The protections include the following:

> (a) Section 13(6)(a) (in the context of direct discrimination) provides that "If the protected characteristic is sex" "less favourable treatment of a *woman* includes less favourable treatment of *her* because *she* is *breast-feeding*". This provision obviously applies to biological women only. As a matter of ordinary language, it

necessarily excludes all biological men as a homogenous group or class (whether or not they have a GRC).

(b) Section 17(2) makes provision for circumstances where A "discriminates against a *woman* if A treats *her* unfavourably because of a *pregnancy of hers*". Again, all biological women but only biological women are protected; all biological men are excluded from protection as a matter of ordinary language (whether or not they have a GRC).

(c) Section 17(3) gives protection only to a "woman" "because she has given birth". Biological women only are protected (whether or not they have a GRC). Biological men are excluded.

(d) Section 17(4) gives protection only to a "woman" "because she is breast-feeding". Biological women only are protected. Biological men are excluded (whether or not they have a GRC).

(e) Section 18 gives protections only to a "woman" "because of illness suffered by *her* … as a result of the *pregnancy*"; "because *she* is on [various forms of maternity leave]" or "because *she* is exercising or seeking to exercise, or has exercised or sought to exercise, the right to [various forms of maternity leave]": section 18(2)(a)-(b), (3), (4). Biological women only are protected. All biological men are excluded (whether or not they have a GRC).

179. There are other provisions in the EA 2010 that have similar effect. For example, sections 73 to 76 provide for further protections for maternity-related pay (sections 73 and 74); and for the operation of a maternity equality rule in relation to a term of an occupational pension scheme that "does not treat time when the woman is on maternity leave as it treats time when she is not", by modifying the term "so as to treat time when she is on maternity leave as time when she is not" (section 75(3)). These provisions expressly apply to women only: see section 72 which provides that they apply only where a woman is employed or holds a personal or public office. Schedule 7 paragraph 2 is similar in providing that a "sex equality clause does not have effect in relation to terms of work affording special treatment to women in connection with pregnancy or childbirth".

180. Schedule 9 is also relevant. It sets out a series of exemptions from the general prohibition in section 39 (prohibiting discrimination by an employer against prospective and existing employees, among other things, in the terms of employment offered or in affording access to opportunities for promotion or other benefits and facilities) which render it lawful for employers to treat employees (and others) with certain relevant protected characteristics in a differential way. Paragraph 17 is an exception relating to the provision of "non-contractual payments to women on maternity leave". It provides:

> "17(1) A person does not contravene section 39(1)(b) or (2), so far as relating to pregnancy and maternity, by depriving a woman who is on maternity leave of any benefit from the terms of her employment relating to pay."

181. The points we have made above apply with equal force to this provision. Moreover, that the language of "woman" and "her" is deliberate is underscored by a comparison with the immediately following paragraph, paragraph 18, relating to exceptions for benefits dependent on marital status. Paragraph 18 allows access to benefits dependent on marital status to be restricted or refused on grounds of sexual orientation if they accrued or were payable before 5 December 2005 (the day on which section 1 of the Civil Partnership Act 2004 came into force). It does so by identifying those not covered by the exemption in paragraph (1A) as a "person" who is:

> "(1A) … (a) a man who is married to a woman, or (b) a woman who is married to a man, or (c) married to a person of the same sex in a relevant gender change case.
>
> (1B) The reference in sub-paragraph (1A)(c) to a relevant gender change case is a reference to a case where— (a) the married couple were of the opposite sex at the time of their marriage, and (b) a full gender recognition certificate has been issued to one of the couple under the Gender Recognition Act 2004."

182. Three points follow. The references to "man" and "woman" in paragraph 18(1A)(a) and (b) can only be interpreted by their biological meaning for obvious reasons. The reference to a person in (c) is otherwise rendered meaningless, and the provision is unworkable. Secondly, the draftsperson was fully cognisant of the GRA 2004 and plainly understood its unequivocal consequences in the case of marriage where a GRC has been issued. Where the legislation extends to a person to whom a full GRC has been issued, this is done by express provision referring to a "relevant gender change case" and not by the implicit adoption of a legally constructed concept of sex as certificated sex. Thirdly, the Scottish Ministers and the EHRC submit that this provision would be unnecessary if "sex" in the EA 2010 meant biological sex only, as the couple concerned would not in fact be married to a "person of the same sex in a relevant gender change case"; they would still be married to a person of the opposite sex. We do not accept this contention. The GRA 2004 unequivocally applies to the law relating to marriage. This is a consequence of the GRA 2004 itself and not a consequence of interpreting sex in the EA 2010 in any particular way.

183. Schedule 9 paragraph 20 relates to insurance contracts. It provides:

> "20 (1) It is not a contravention of this Part of this Act, so far as relating to relevant discrimination, to do anything in relation to an annuity, life insurance policy, accident insurance policy or similar matter involving the assessment of risk if— (a) that thing is done by reference to actuarial or other data from a source on which it is reasonable to rely, and (b) it is reasonable to do it."

184. Relevant discrimination is defined by paragraph 20(2) as including both "pregnancy and maternity discrimination" and "sex discrimination". In the case of pregnancy and maternity discrimination, only women who can become pregnant can be affected by differential provision of this kind, but a certificated sex definition would exclude trans men who are pregnant (that is, pregnant women living as trans men with a GRC). In the case of sex discrimination, it is impossible to see how an assessment of the differential risk known to be posed by, say, women and men drivers, could possibly be made by reference to actuarial or other reliable data sources that had also to take account of certificated sex based on a GRC. There is no rational basis for thinking that having a certificate could make a difference to the risk posed by drivers of different sexes. Here too, sex can only mean biological sex.

185. There are also provisions in the EA 2010 that allow for differential treatment afforded by service-providers and others to protect the health and safety of women generally and pregnant women in particular. In other words, what would otherwise amount to unlawful discrimination in regulated activities is not unlawful by virtue of these provisions. Two examples are sufficient for our purposes:

(a) The first example concerns pregnant women and consistently with the provisions we have referred to above, provides that a service-provider covered by section 29 of the EA 2010 can refuse to provide a service (or can impose conditions on the provision of the service) to a "pregnant woman" if they reasonably believe that to do so would create a risk to her "health and safety". Schedule 3 paragraph 14(1) and (2) relevantly provides:

> "(1) A service-provider (A) who refuses to provide the service to a pregnant woman does not discriminate against her in contravention of section 29 because she is pregnant if— a) A reasonably believes that providing her with the service would, because she is pregnant, create a risk to her health or safety, (b) A refuses to provide the service to persons with other physical conditions, and (c) the reason for that refusal is that A reasonably believes that providing the service to such persons would create a risk to their health or safety.

> (2) A service-provider (A) who provides, or offers to provide, the service to a pregnant woman on conditions does not discriminate against her in contravention of section 29 because she is pregnant if - (a) the conditions are intended to remove or reduce a risk to her health or safety, (b) A reasonably believes that the provision of the service without the conditions would create a risk to her health or safety, (c) A imposes conditions on the provision of the service to persons with other physical conditions, and (d) the reason for the imposition of those conditions is that A reasonably believes that the provision of the service to such persons without those conditions would create a risk to their health or safety."

(b) This exemption is meaningful and workable only if sex has its biological meaning for the reasons given in para 178 above. Since only biological women can become pregnant, the protection for service-providers is limited to "pregnant women". A service-provider can discriminate lawfully against a pregnant woman by refusing her service or imposing conditions on the service provision to protect the health and safety of the pregnant woman. However, since a trans man with a GRC (who retains the capacity to become pregnant) would be legally male on the Scottish Ministers' case, the service-provider would be unable to rely on this provision in Schedule 3 paragraph 14 in order to refuse or place conditions on the provision of services to a person who is a "pregnant man". (The same point is true in relation to the exemption for differential treatment of pregnant women by associations in Schedule 16 paragraph 2 which allows for what would otherwise be unlawful discrimination in contravention of section 101(1)(b) by associations against pregnant women on the grounds of health and safety.)

(c) The second example is of general application to "women" as a group. It concerns Schedule 22 paragraph 2 which is headed "Protection of women". It relates to work and vocational training and provides:

> "2(1) A person (P) does not contravene a specified provision only by doing in relation to a woman (W) anything P is required to do to comply with— [a series of enactments concerned with 'the protection of women or a description of women which includes W']. …
>
> (2) The references to the protection of women are references to protecting women in relation to — (a) pregnancy or maternity, or (b) any other circumstances giving rise to risks specifically affecting women. …"

186. We have dealt with considerations affecting pregnancy above and they apply equally to paragraph 2(2)(a). Paragraph 2(2)(b) is broader. A certificated sex interpretation would make paragraph 2(2)(b) unworkable: it would be impossible to identify "risks specifically affecting women" because the same health or safety risks would also naturally and inevitably be risks that affect trans men with a GRC who would be legally male on this interpretation (albeit biologically female) and therefore liable to be affected by the same risks.

187. A similar point can be made in relation to the provision made by Schedule 7 paragraph 1 which provides that "Neither a sex equality clause nor a maternity equality clause has effect in relation to terms of work affected by compliance with laws regulating— (a) the employment of women; (b) the appointment of women to personal or public offices"; and to the provision made by Schedule 9 paragraph 20 in relation to insurance contracts and sex discrimination (see paras 183 and 184 above). In both cases, the need to identify laws or the assessment of risk affecting women as a group is rendered difficult if not impossible by a certificated sex interpretation of sex in these provisions.

188. These provisions and the protection against pregnancy and associated (maternity and breast-feeding) discrimination in the EA 2010 are expressly tied to the plain and unambiguous words "woman", "maternity" and the pronouns "she" and "hers". There are no references to risks specifically affecting men, or to a man (or person) who has become pregnant, requires paternity leave or is breast-feeding. The only reference to a man in this context is in section 13(6)(b) which prevents men from complaining about the special treatment accorded to women in connection with pregnancy or childbirth. These provisions are all incoherent and unworkable unless woman and man have their biological meaning.

(16) No variable definition of woman

189. The Second Division of the Inner House recognised the force of this manifestly obvious conclusion in relation to provisions related to pregnancy and maternity. The Inner House concluded that since pregnancy is a matter of fact which hinges entirely on biology, these provisions do mandate a biological meaning of sex (paras 61 and 62 of the judgment). In reaching that conclusion, the Inner House also recognised that there might be other provisions in the EA 2010 where it might equally be necessary to adopt what they described as a "contextual interpretation" of sex as "based on biology" (para 53). However, the Inner House regarded it as impractical to examine every section and every schedule of the EA 2010 to address this possibility.

190. At para 62 the Inner House continued:

> "To interpret these provisions as including only those who are pregnant both as a matter of fact and biology, regardless of the terms of any GRC, does not detract from the proposition that the default interpretation of 'woman' or 'female' would, elsewhere in the Act, include such a person. We do not consider that such an approach leads to an interpretation which is other than 'constant and predictable' (*Imperial Tobacco*, Lord Hope, para 14). We do not understand the observations in *Imperial Tobacco* as excluding an interpretation under which a word or phrase has a default meaning within a statute other than where the context clearly mandates otherwise. What is required is that whenever the phrase or word occurs, its meaning within the particular context where it appears is clear and predictable. The approach which we have identified achieves that."

191. We respectfully disagree with this conclusion. By its nature a variable definition is neither clear, constant nor predictable. It is the opposite in fact. It is also contradicted by the single definition of sex that fixes its meaning in the EA 2010.

192. As Lord Nicholls explained in *Spath Holme*, p 397: "Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament". Individuals and organisations required to apply the requirements of the EA 2010 in practice should not have to work out which of the variable definitions apply without assistance from the words of the legislation itself. We address below the other practical difficulties that flow from a certificated sex interpretation.

193. Moreover, the suggestion in para 63 of the Inner House judgment that the implications of the grant of a GRC under the GRA 2004 may not have been adequately considered in the passage of the EA 2010 (which underwent various iterations and amendments during its passage from Bill to complex, multi-faceted statute) is contradicted by the careful, specific references to the GRA 2004 (including as referred to at para 157 above). There is no factual foundation for this conclusion. Rather, as the Inner House expressly observed earlier in the judgment (at para 33), "When the EA was passed in 2010 it must be assumed that Parliament was fully cognisant of the purpose, terms and effect of the GRA".

194. The Scottish Ministers support the conclusion that differential provision has been made for the definition of sex in the EA 2010. They advance two purported justifications (para 52 of their written case). First, that requiring a different meaning to be given to the term "woman" in the pregnancy context is not impermissible as a matter of statutory construction. Secondly, they say that without requiring a different meaning to be given to the term "woman" in the pregnancy provisions, a person such as the claimant in

McConnell (discussed at paras 105–107 above), namely, a pregnant trans man with a GRC who is for legal purposes a "pregnant man", but a biological woman, would be entitled to protection from discrimination under section 13(1) of the EA 2010 on grounds of gender reassignment – "on the basis that, in so far as the protections afforded to 'women' in respect of birth and maternity fall within the regulated activities, he would, in being treated less favourably by being denied those protections, have been directly discriminated against on that ground".

195. We do not regard either point as justifying a variable definition for sex in the EA 2010. The definition of sex is foundational to the EA 2010. The bare assertion that a variable definition is "not impermissible as a matter of statutory construction" falls far short of providing any compelling basis for concluding that a variable definition was intended in section 212(1) or is required. It is simply not plausible to think that the definition of "sex" as used in the pregnancy and maternity-related provisions is the result of a genuine drafting error. There are no circumstances in which a biological male can become pregnant, and no man can therefore ever be an appropriate comparator in a pregnancy discrimination case. As we have explained, the pregnancy discrimination provisions are deliberately framed on the basis of unfavourable rather than less favourable treatment and tied to biological females for this reason. Given the presumption (which has not been rebutted) that section 212(1) provides a single definition of "woman" for the purposes of the EA 2010, it follows that "woman" wherever used in the EA 2010 must have a single, consistent, stable and predictable meaning.

196. If the Scottish Ministers were right and section 9(1) of the GRA 2004 has effect for the definition of sex throughout the EA 2010, this would suggest a legislative intention to provide protection only for pregnancies of women who do not have a GRC and to exclude persons living in the male gender (biological women) who have a GRC (and so are male on the Scottish Ministers' case) who may become pregnant (as illustrated by the circumstances of the *McConnell* case). It is difficult to see any good reason for such an approach. The Scottish Ministers' second argument about gender reassignment discrimination seeks to address the oddity of this result but is unsatisfactory as a response: on their case a man denied the protections available to women for pregnancy and maternity is most obviously treated differently on grounds of sex and not gender reassignment, but sex discrimination cannot run. Parliament plainly intended biological women to benefit automatically from these protections and it is unlikely to have been the legislative intention that a pregnant trans man with a GRC (legally male but biologically female) should have to pursue gender reassignment discrimination in order to obtain the benefit of such protection, whereas a pregnant trans man without a GRC (legally and biologically female) is automatically entitled to them as a woman.

197. In any event, this alternative argument fails to engage with the more important consequence of the rejection of a variable definition of sex for the Scottish Ministers' arguments. Just as the pregnancy provisions manifestly require sex, woman and man to be interpreted in accordance with the biological meaning of those words, the same is also

true of several other provisions to which we have referred above, and to other core provisions which we address below. Properly understood these further provisions would be unworkable, inconsistent and incoherent if they bore a certificated sex meaning as modified by section 9(1) and (2) of the GRA 2004.

(17) Other core provisions: gender reassignment and sexual orientation

198. Two other core provisions support our conclusion thus far. First, the protected characteristic of gender reassignment is defined distinctly from sex, in section 7 of the EA 2010, and there is no conflation of these separate characteristics. Section 7 provides:

> "**7 Gender reassignment**
>
> (1) A person has the protected characteristic of gender reassignment if the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex.
>
> (2) A reference to a transsexual person is a reference to a person who has the protected characteristic of gender reassignment.
>
> (3) In relation to the protected characteristic of gender reassignment—
>
> (a) a reference to a person who has a particular protected characteristic is a reference to a transsexual person;
>
> (b) a reference to persons who share a protected characteristic is a reference to transsexual persons."

199. Accordingly, the EA 2010 recognises sex and gender reassignment as distinct and separate bases for discrimination and inequality, giving separate protection to each. Those who have the protected characteristic of gender reassignment are referred to as "a transsexual person" (section 7(3)(a)), not as a "trans" woman or man. There is no distinction drawn in section 7 or elsewhere between those for whom the relevant process would involve reassignment male to female or female to male. In other words, it is the attribute of proposing to undergo, undergoing or having undergone a process (or part of

a process) for the purpose of reassignment, which is the common factor, not the sex into which the person is reassigned.

200. The definition does not depend on having a GRC. There is no reference (as there could have been) to the GRA 2004 or to a GRC. Instead, it is dependent on a process for the "purpose of reassigning the person's sex by changing physiological or other attributes of sex". But the fact that section 7 refers to a process for reassigning sex does not lead to the conclusion that such a process results in a change in the protected characteristic of sex under the EA 2010. Section 7 does not say this; nor is it said elsewhere in the EA 2010. The Scottish Ministers contend that it is inherent in this provision because it contemplates the possibility of a change in the protected characteristic of sex from "man" to "woman" and vice versa for persons who have obtained a full GRC. Again, section 7 does not say so. There is nothing in its wording to suggest that the change referred to is based on obtaining a paper certificate. The critical process on which the section 7 characteristic depends involves a change in physiological or other attributes of what must necessarily be biological sex; but there is nothing to suggest that undergoing such a process changes a person's sex as a matter of law. It does not. Indeed, a full process of medical transition to the opposite gender without obtaining a GRC has no effect on the person's sex as a matter of law.

201. Section 9(1) of the GRA 2004 only applies where a full GRC has been obtained. Nobody suggests that a person with a protected characteristic of gender reassignment is entitled on that basis alone to be treated as if their sex has changed for any legal purposes. Without a GRC a trans woman protected by section 7 of the EA 2010 is male for legal purposes and so too a trans man is female for legal purposes. It is significant therefore, that section 7 is considerably broader in scope and coverage than the category of people with a GRC. Moreover, as we have observed above, the data shows that an overwhelming majority of people (in England, Wales and Scotland) with the protected characteristic of gender reassignment do not have a GRC.

202. Since, as we have explained above, neither possession of a GRC nor the protected characteristic of gender reassignment require any physiological change or even any change in outward appearance, there is no obvious outward means of distinguishing between a person with the protected characteristic of gender reassignment who has a GRC and a person with that characteristic who does not. The only difference between these two groups is possession of a paper certificate and that fact (possessing a GRC) is confidential to the person who has it and subject to stringent restrictions on disclosure (see section 22 of the GRA 2004). The duty-bearer cannot ask whether it has been obtained. There is, accordingly, no way for duty-bearers to distinguish confidently between these two groups when regulating their conduct in accordance with obligations imposed by the EA 2010. Moreover, in either case, the individual's biological sex may continue to be readily perceivable and may form the basis of unlawful discrimination. A person has the protected characteristic of gender reassignment as soon as they propose to undergo the process so it may be that at that stage there is no change in outward appearance.

203. The consequence of an interpretation of sex in the EA 2010 as extending to certificated sex pursuant to section 9(1) and (2) of the GRA 2004 would also create an odd inequality of status between those who share the protected characteristic of gender reassignment but do or do not hold a GRC, with the smaller group (holders of a GRC) given additional rights, and no obvious means of distinguishing between the two groups. We can see no good reason why the legislature should have intended that people with the protected characteristic of gender reassignment should be regarded and treated differently under the EA 2010 depending on whether or not they possess a (confidential) certificate, even though in many (if not most) cases there will be no material distinction in their personal characteristics, either as regards gender identity, or appearance, or as to how they are perceived or treated by others or society at large. The difficulty this interpretation would create for service-providers, employers and other organisations in applying equality law to these groups is obvious. Research referred to by Sex Matters shows that, since it is in practice impossible for organisations to distinguish between people with the protected characteristic of gender reassignment who do and do not have a GRC, many organisations feel pressured into accepting de facto self-identification for the purposes of identifying whom to treat as a woman or girl when seeking to apply the group-based rights and protections of the EA 2010 in relation to the protected characteristic of sex. The result in some cases is that certain women-only groups, organisations, and charities have come under pressure (including from funders and commissioners) to include trans women and policy decisions have been taken simply to accept members or users of the opposite biological sex, either assuming that they hold a confidential GRC or on the basis of self-identification.

204. The second core provision is section 12 of the EA 2010 which defines the protected characteristic of sexual orientation and is framed by reference to orientation towards persons of the same sex, the opposite sex, or either sex. Read fairly, references to sex in this provision can only mean biological sex. People are not sexually oriented towards those in possession of a certificate.

205. Section 12 provides as follows:

> "**12 Sexual orientation**
>
> (1) Sexual orientation means a person's sexual orientation towards— (a) persons of the same sex, (b) persons of the opposite sex, or (c) persons of either sex.
>
> (2) In relation to the protected characteristic of sexual orientation— (a) a reference to a person who has a particular protected characteristic is a reference to a person who is of a particular sexual orientation; (b) a reference to persons who

> share a protected characteristic is a reference to persons who are of the same sexual orientation."

206. Accordingly, a person with same sex orientation as a lesbian must be a female who is sexually oriented towards (or attracted to) females, and lesbians as a group are females who share the characteristic of being sexually oriented to females. This is coherent and understandable on a biological understanding of sex. On the other hand, if a GRC under section 9(1) of the GRA 2004 were to alter the meaning of sex under the EA 2010, it would mean that a trans woman (a biological male) with a GRC (so legally female) who remains sexually oriented to other females would become a same sex attracted female, in other words, a lesbian. The concept of sexual orientation towards members of a particular sex in section 12 is rendered meaningless. It would also affect the composition of the groups who share the same sexual orientation (because a trans woman with a GRC and a sexual orientation towards women would fall to be treated as a lesbian) in a similar way as described above in relation to women and girls.

207. Thus, as well as the inevitable loss of autonomy and dignity for lesbians such an approach would carry with it, it would also have practical implications for lesbians across several areas of their lives (as described by Ms Monaghan KC in her written case for the second interveners). Of particular significance is the impact it would have for lesbian clubs and associations governed by Part 7 of the EA 2010, including relatively small associations (they must have at least 25 members and admission must be regulated by the association's rules and involve a process of selection). Part 7 of the EA 2010 prohibits discrimination, harassment and victimisation against applicants for membership, members and their guests, of clubs and associations: sections 101 and 102 of the EA 2010. However, Schedule 16 paragraph 1 allows an association to restrict membership, access to benefits, services and facilities, and access to guests to "persons who share a protected characteristic". In other words, clubs and associations can restrict membership and access to women or to same sex attracted people without contravening sections 101 and 102 of the EA 2010. But there is no exception permitting the exclusion of trans women (biological men) with a GRC (so legally female). Accordingly, if a GRC changes a person's sex for the purposes of the EA 2010, a women-only club or a club reserved for lesbians would have to admit trans women with a GRC (legal females who are biologically male and attracted to women). Evidence referred to by the second interveners suggests that this is having a chilling effect on lesbians who are no longer using lesbian-only spaces because of the presence of trans women (ie biological men who live in the female gender).

208. It is unprincipled to answer this problem by saying, as the Scottish Ministers do, that associations can restrict membership to less than 25 members so that they are not an "association" for the purposes of Part 7. It is also impractical. The Scottish Ministers also suggested in writing that the fact that the members of the association may not be attracted to a particular woman (a trans woman with a GRC who is therefore legally female) or wish to associate with her, does not diminish the protections which they are entitled to in

terms of their own protected characteristic of sexual orientation. Even if this is true (which is doubtful) it does not begin to address the chilling effect a certificated sex interpretation appears to have on the ability of lesbians to associate in lesbian-only spaces. The idea that to do so they should seek instead to restrict membership on the basis of "some shared philosophical belief regarding the immutability of sex" (as Ms Crawford KC suggested in argument) demonstrates the incoherence of the Scottish Ministers' position.

209. In short, the core provisions to which we have referred, which refer to sex, man or woman, are not capable of being read fairly and consistently with the terms of section 9(1) and (2) of the GRA 2004 without defeating their purpose and meaning. The definition of these terms contained in section 212(1), when applied in particular to section 11 (the protected characteristic of sex which is at the heart of this case) is not capable of being interpreted on the basis of certificated sex. Rather, sex has its biological meaning throughout this legislation: "woman" always and only means a biological female of any age in section 212(1). It follows that a biological male of any age cannot fall within this definition; and "woman" does not mean or sometimes mean or include a male of any age who holds a GRC or exclude a female of any age who holds a GRC. To reach any other conclusion would turn the foundational definition of sex on its head and diminish the protection available to individuals and groups against discrimination on the grounds of sex. As we shall explain below, in relation to sex discrimination, an individual will still be entitled to protection against discrimination on the grounds of sex on its biological meaning. Thus, the objective of non-discrimination between the sexes is maintained, while at the same time protecting individuals with a GRC from non-discrimination and without seriously undermining the intention behind the GRA 2004.

(18) Meaning and workability of other provisions

210. We have so far concentrated on the core provisions of sections 7, 11, 12, 13(6) and 17 to 18 of the EA 2010. There are several other provisions that we must address because, contrary to the reasoning and conclusions of the Inner House, they too demonstrate that an interpretation of sex based on certificated sex would render the EA 2010 incoherent and unworkable. In other words, the proper functioning of these provisions depends on a biological interpretation of sex.

(i) Separate and single-sex services

211. Part 3 of the EA 2010 regulates the provision of services and public functions, and we have set out above the terms of the prohibition in section 29 (making it unlawful, among other things, to discriminate in the provision of a service or the exercise of a public function). Schedule 3 contains exemptions from this general prohibition. As we shall explain, some of these permit what would otherwise constitute gender reassignment discrimination but make no similar provision for persons issued with a full GRC. Other

provisions permit carve-outs from what would otherwise constitute sex discrimination under the EA 2010. In enacting these exemptions, the intention must have been to allow for the exclusion of those with the protected characteristic of gender reassignment, regardless of the possession of a GRC, in order to maintain the provision of single or separate services for women and men as distinct groups in appropriate circumstances. These provisions are directed at maintaining the availability of separate or single spaces or services for women (or men) as a group – for example changing rooms, homeless hostels, segregated swimming areas (that might be essential for religious reasons or desirable for the protection of a woman's safety, or the autonomy or privacy and dignity of the two sexes) or medical or counselling services provided only to women (or men) – for example cervical cancer screening for women or prostate cancer screening for men, or counselling for women only as victims of rape or domestic violence.

212. So far as sex discrimination is concerned, paragraph 26 of Schedule 3 provides that the provision of separate services for persons of each sex will not constitute unlawful sex discrimination in the provision of services (contrary to section 29) where joint services for both sexes would be less effective and such provision is a proportionate means of achieving a legitimate aim. Paragraph 26 provides:

> "(1) A person does not contravene section 29, so far as relating to sex discrimination, by providing separate services for persons of each sex if— (a) a joint service for persons of both sexes would be less effective, and (b) the limited provision is a proportionate means of achieving a legitimate aim.
>
> (2) A person does not contravene section 29, so far as relating to sex discrimination, by providing separate services differently for persons of each sex if— (a) a joint service for persons of both sexes would be less effective, (b) the extent to which the service is required by one sex makes it not reasonably practicable to provide the service otherwise than as a separate service provided differently for each sex, and (c) the limited provision is a proportionate means of achieving a legitimate aim."

213. If sex has its biological meaning in this paragraph, then a service-provider can separate male and female users as obvious and distinct groups. For example, a homeless shelter could have separate hostels for men and women provided this pursued a legitimate aim, which might be the safety and security of women users or their privacy and dignity (and the same for male users). By contrast, if sex means certificated sex, the service-provider would have to allow access to trans women with a GRC (in other words, biological males who are female according to section 9(1)) to the women's hostel. The following practical difficulties would arise. First, it would be difficult or impossible for

the service-provider to distinguish between trans women with and without a GRC because, as we have explained, the two groups are often visually or outwardly indistinguishable. Secondly and more fundamentally, it is likely to be difficult (if not impossible) to establish the conditions necessary for separate services for each sex when each group includes persons of both biological sexes. For example, it is difficult to envisage how the condition in paragraph 26(2)(a) (a joint service for persons of both sexes would be less effective) could ever be fulfilled when each sex includes members of the opposite biological sex in possession of a GRC and excludes members of the same biological sex with a GRC. In other words, if as a matter of law, a service-provider is required to provide services previously limited to women also to trans women with a GRC even if they present as biological men, it is difficult to see how they can then justify refusing to provide those services also to biological men and who also look like biological men.

214. Thirdly, it also follows that although the gender reassignment exception in paragraph 28 (see below) does apply, it would be challenging to prove that exclusion of those with the protected characteristic of gender reassignment is a proportionate means of achieving a legitimate aim (for example, protecting the safety of women) when sex means certificated sex and the group includes trans women with a GRC (who are biologically male but legally female) and excludes trans women without a GRC.

215. Paragraph 27 of Schedule 3 ("Single-sex services") presents similar problems if a certificated sex interpretation is adopted. It deals with services provided to one sex only (for example rape or domestic violence counselling, domestic violence refuges, rape crisis centres, female-only hospital wards and changing rooms). It provides:

> "(1) A person does not contravene section 29, so far as relating to sex discrimination, by providing a service only to persons of one sex if— (a) any of the conditions in sub-paragraphs (2) to (7) is satisfied, and (b) the limited provision is a proportionate means of achieving a legitimate aim.
>
> (2) The condition is that only persons of that sex have need of the service.
>
> (3) The condition is that— (a) the service is also provided jointly for persons of both sexes, and (b) the service would be insufficiently effective were it only to be provided jointly.
>
> (4) The condition is that— (a) a joint service for persons of both sexes would be less effective, and (b) the extent to which the

> service is required by persons of each sex makes it not reasonably practicable to provide separate services.
>
> (5) The condition is that the service is provided at a place which is, or is part of— (a) a hospital, or (b) another establishment for persons requiring special care, supervision or attention.
>
> (6) The condition is that— (a) the service is provided for, or is likely to be used by, two or more persons at the same time, and (b) the circumstances are such that a person of one sex might reasonably object to the presence of a person of the opposite sex.
>
> (7) The condition is that— (a) there is likely to be physical contact between a person (A) to whom the service is provided and another person (B), and (b) B might reasonably object if A were not of the same sex as B."

216. The gateway conditions in paragraph 27(2) to (7) cannot be coherently applied if sex does not carry its biological meaning because it is hard to see how the condition in paragraph 27(2) (that only persons of one sex have need of the particular service) can be satisfied if each sex includes members of the opposite biological sex in possession of a GRC and excludes members of the same biological sex with a GRC. For example, take a cervical cancer screening service. On a certificated sex interpretation, a trans man who has a GRC (so is legally male) but (as a biological female) retains a uterus and cervix, has the same need of the cervical cancer screening service that is otherwise reserved for women only. A trans woman with a GRC (so, legally female) would have no such need of that service (as a biological male). The result is that the cervical cancer screening service (needed by biological women only) cannot be said to be needed for members of one sex only on this basis, and condition (2) is not capable of being satisfied.

217. Likewise, a certificated sex interpretation of the conditions in paragraph 27(6) and (7) (that a person of one sex might reasonably object to the presence of a person of the opposite sex, and the physical contact provision) will not be capable of being fulfilled in practice. Again, it is difficult to imagine how or in what circumstances it might be considered reasonable for a woman to object to members of the opposite sex (in condition (6)) where "the opposite sex" would include trans women without a GRC (who remain legally male) but not to "members of her own sex". This would arise if by operation of section 9(1) of the GRA 2004 the group of "members of her own sex" were to include biological men with a GRC, and so legally female who may be physically and outwardly indistinguishable from the former group of trans women without a GRC. While many women in a female-only changing room or on a women-only hospital ward or in a rape

counselling group might reasonably object to the presence of biological males, it is difficult to see how the reasonableness of such an objection could be founded on possession or lack of a certificate. This is so especially when the distinction does not track physical appearance or presentation, and the woman is unlikely to have any information about the GRC at the point at which her objection might be raised. A trans woman with a GRC who presents fully as a woman may feel she is more likely to prompt objections from other users if she enters the men's changing room or other facilities than if she uses the women's changing room or facilities. But in facing that dilemma she is in the same position as a trans woman without a GRC. Although such trans women may in practice choose to use female-only facilities in a way which does not in fact compromise the privacy and dignity of the other women users, the Scottish Ministers do not suggest that a trans woman without a GRC is legally entitled to do so.

218. The physical contact condition (7) gives rise to the same difficulties on a certificated sex interpretation. It can only be met where there is likely to be physical contact between person A, to whom a service is provided, and another person B, and B might reasonably object if A were not of the same sex as B. For example, it is readily understandable that a female massage therapist offering massages in her clients' homes might reasonably object to providing this service to a man in that environment, but for the reasons explained above, hard to see how any reasonable objection to providing the service could depend on whether the trans person (person A) has or does not have a GRC. The objection that B might reasonably have can only fairly be interpreted as being to the biological sex of the other person. It is fanciful (even perverse) to think that any reasonable objection to the presence of a person of the opposite sex could be grounded in GRC status or that a confidential GRC could make any difference at all. Read fairly and in context, the provisions relating to single-sex services can only be interpreted by reference to biological sex.

219. Paragraph 28 provides an additional exception in the context of provision of separate and single-sex services in relation to gender reassignment discrimination. It provides relevantly as follows:

> "(1) A person does not contravene section 29, so far as relating to gender reassignment discrimination, only because of anything done in relation to a matter within sub-paragraph (2) if the conduct in question is a proportionate means of achieving a legitimate aim.
>
> (2) The matters are— (a) the provision of separate services for persons of each sex; (b) the provision of separate services differently for persons of each sex; (c) the provision of a service only to persons of one sex."

220. The references in this paragraph only make sense as references to biological sex. Provided it is proportionate, paragraph 28 exempts gender reassignment discrimination but only in the context of the provision of separate services for men and women or single services to one sex. To rely on this exception there must be a separate or single-sex service that satisfies the establishment conditions to which we have just referred (in paragraphs 26 and 27 for example) and as we have observed, these provisions cannot on the face of it operate coherently if provision of services only to persons of one sex means provision of services to a group comprising women (biological females) and trans women with a GRC (biological males but legally female) but not to trans men with a GRC (biological females but legally male). The difficulty of establishing the conditions for a separate or women-only service on an approach tied to certificated sex makes it difficult to envisage any circumstances where the ability to exclude on gender reassignment grounds could operate.

221. There is nothing in the wording of this provision to indicate that paragraph 28 was directed specifically at those holding a GRC, nor is there any basis for concluding that this is its likely context as the Inner House suggested at para 56. (The example given in the explanatory notes at para 740 also does not distinguish between transexual people with a GRC and those without: "A group counselling session is provided for female victims of sexual assault. The organisers do not allow transsexual people to attend as they judge that the clients who attend the group session are unlikely to do so if a male-to-female transsexual person was also there. This would be lawful"). We can see nothing to support the Inner House's conclusion that "the importance of this paragraph is that it provides the only basis upon which a person might be permitted to exclude a person with a GRC from services which are provided for their acquired sex". Nor is the EHRC correct to assert that paragraph 28 is redundant on a biological interpretation of sex. On the contrary, if sex means biological sex, then provided it is proportionate, the female only nature of the service would engage paragraph 27 and would permit the exclusion of all males including males living in the female gender regardless of GRC status. Moreover, women living in the male gender could also be excluded under paragraph 28 without this amounting to gender reassignment discrimination. This might be considered proportionate where reasonable objection is taken to their presence, for example, because the gender reassignment process has given them a masculine appearance or attributes to which reasonable objection might be taken in the context of the women-only service being provided. Their exclusion would amount to unlawful gender reassignment discrimination not sex discrimination absent this exception.

(ii) Communal accommodation

222. There is a specific exemption for communal accommodation in Schedule 23, paragraph 3 which allows for both sex discrimination and gender reassignment discrimination as follows:

> "(1) A person does not contravene this Act, so far as relating to sex discrimination or gender reassignment discrimination, only because of anything done in relation to— (a) the admission of persons to communal accommodation; (b) the provision of a benefit, facility or service linked to the accommodation."

223. Communal accommodation is defined as follows:

> "(5) Communal accommodation is residential accommodation which includes dormitories or other shared sleeping accommodation which for reasons of privacy should be used only by persons of the same sex.
>
> (6) Communal accommodation may include— (a) shared sleeping accommodation for men and for women; (b) ordinary sleeping accommodation; (c) residential accommodation all or part of which should be used only by persons of the same sex because of the nature of the sanitary facilities serving the accommodation."

224. Here too it is plain that sex has its biological meaning. The Inner House however, held at para 59 that "sex" in this context is defined as including birth sex for those still living in that sex, and "acquired sex" for those in possession of a GRC in the opposite gender. In our judgment, this would undermine the very considerations of privacy and decency between the sexes both in the availability of communal sleeping accommodation and in the use of sanitary facilities which the legislation plainly intended to provide for. If sex has a certificated sex meaning it is difficult to envisage any circumstances in which this gateway could sensibly be met since there would be no rational basis for saying that "for reasons of privacy" any communal accommodation and sanitary facilities should be used by women and trans women with a GRC (so legally female but biologically male) only, but not by trans women without a GRC who may be indistinguishable from those in possession of a GRC (and vice versa). This interpretation would run contrary to the plain intention of these provisions.

225. Accordingly, a certificated sex interpretation produces incoherence in the application of these provisions. Moreover, it is not necessary to achieve the purposes of either the GRA 2004 or the EA 2010. On any view, the plain intention of these provisions is to allow for the provision of separate or single-sex services for women which exclude all (biological) men (or vice-versa). Applying a biological meaning of sex achieves that purpose.

(iii) Single-sex higher education institutions

226. Schedule 12 paragraph 1 addresses admission to single-sex higher education institutions. It provides as follows:

> "(1) Section 91(1), so far as relating to sex, does not apply in relation to a single-sex institution.
>
> (2) A single-sex institution is an institution to which section 91 applies, which—(a) admits students of one sex only, or (b) on the basis of the assumption in sub-paragraph (3), would be taken to admit students of one sex only.
>
> (3) That assumption is that students of the opposite sex are to be disregarded if—(a) their admission to the institution is exceptional, or (b) their numbers are comparatively small and their admission is confined to particular courses or classes.
>
> (4) In the case of an institution which is a single-sex institution by virtue of sub-paragraph (3)(b), section 91(2)(a) to (d), so far as relating to sex, does not prohibit confining students of the same sex to particular courses or classes."

(Section 91 prohibits discrimination in relation to the admission and treatment of a student by responsible bodies of education institutions.)

227. Schedule 12 contains no exception for gender reassignment discrimination in respect of single-sex higher education institutions. The Inner House held (para 58) that this did not support the proposition that sex in section 11 of the EA 2010 is to be read as a reference to biological sex. Rather it held that Schedule 12 can simply be read as circumstances in which Parliament did not consider that an additional carve out for trans people with a GRC was necessary.

228. Again, we respectfully disagree. It was plainly Parliament's intention to allow for single-sex higher education institutions. That much is plain from the express terms of Schedule 12 paragraph 1. However, if sex means certificated sex, the exception from the sex discrimination provisions for single-sex higher education institutions would not allow such institutions to be limited to girls and women, given the absence of any separate exception for gender reassignment discrimination. We can see no rational basis for a certificated sex reading that would oblige such institutions to admit transsexual members

of the opposite (biological) sex with a GRC, whose biological sex is likely to be readily identifiable, whilst excluding others without a GRC, whose circumstances may be materially indistinguishable.

(iv) Single characteristic associations and charities

229. Similarly, Schedule 16 paragraph 1 EA 2010 allows for an association to restrict membership to persons who share a protected characteristic (which would otherwise be unlawful discrimination in contravention of section 101(1)(b)). However, if sex means certificated sex, this exception from the sex discrimination provisions for single characteristic associations would not permit such associations with 25 members or more (see section 107(2) of the EA 2010 discussed above) to be limited to biological women. This is because, as we have said, a certificated sex definition of the protected characteristic of sex would include trans women with a GRC.

230. Nor would single-sex charities be able to use the exception in section 193, which allows them to restrict the provision of benefits to persons who share a protected characteristic in pursuance of a charitable instrument. So far as material, section 193 provides:

> "(1) A person does not contravene this Act only by restricting the provision of benefits to persons who share a protected characteristic if— (a) the person acts in pursuance of a charitable instrument, and (b) the provision of the benefits is within subsection (2).
>
> (2) The provision of benefits is within this subsection if it is— (a) a proportionate means of achieving a legitimate aim, or (b) for the purpose of preventing or compensating for a disadvantage linked to the protected characteristic."

231. Schedule 16 and section 193(1) plainly intend that single-sex associations and charities should be permitted to exist along with other single-characteristic associations. A certificated sex meaning applied to these exceptions would make it impossible for any women's association or charity – including, for example, a mutual support association for women who are victims of male sexual violence, a lesbian social association, a breast-feeding support charity – to be set up or to pursue a dedicated purpose which is directed at the needs of biological females. To require such associations or charities to reconceive of their objects as targeting a group that does not correspond with their original aims, and to allow trans people with a GRC (of the opposite biological sex) to join would significantly undermine the right to associate on the basis of biological sex (or sexual orientation based on biological sex as we have discussed above).

(v) Women's fair participation in sport etc

232. Section 195 of the EA 2010 is headed "Sport". It provides:

> "(1) A person does not contravene this Act, so far as relating to sex, only by doing anything in relation to the participation of another as a competitor in a gender-affected activity.
>
> (2) A person does not contravene section 29, 33, 34 or 35, so far as relating to gender reassignment, only by doing anything in relation to the participation of a transsexual person as a competitor in a gender-affected activity if it is necessary to do so to secure in relation to the activity— (a) fair competition, or (b) the safety of competitors.
>
> (3) A gender-affected activity is a sport, game or other activity of a competitive nature in circumstances in which the physical strength, stamina or physique of average persons of one sex would put them at a disadvantage compared to average persons of the other sex as competitors in events involving the activity.
>
> (4) In considering whether a sport, game or other activity is gender-affected in relation to children, it is appropriate to take account of the age and stage of development of children who are likely to be competitors."

233. The Scottish Ministers and the EHRC submit that a biological sex reading of this provision makes it partly unnecessary. They contend that on this reading it would only be necessary in relation to single-sex sports to exclude indirect gender reassignment discrimination, rather than both direct and indirect as per section 195(2). We are doubtful that this submission is correct, but in any event, it appears to miss the point. The real question is whether the provision operates coherently or not if a certificated sex interpretation of sex is required to be adopted.

234. We consider that this provision is, again, plainly predicated on biological sex, and may be unworkable if a certificated sex interpretation is required. The exemption it creates is a complete exemption in relation to the prohibition against sex discrimination in sport in relation to the participation of a competitor in a sport that is a gender-affected activity (section 195(1)) and a partial exemption for gender reassignment discrimination in relation to the participation of a transsexual person as a competitor in a gender-affected activity but only where the treatment is necessary for fairness or safety reasons. In both

cases the exemption cannot apply unless there is a gender-affected activity. This is a gateway condition.

235. A gender-affected activity is a defined term. It depends on a determination of whether the physical strength, stamina or physique of average persons of one sex would put them at a disadvantage as competitors in a particular sport when compared to average persons of the other sex. Take boxing as an example. This is undoubtedly a gender-affected activity on a biological interpretation of sex in section 195(3). On this basis, it is readily apparent (indeed, obvious) that women's average physical strength, stamina and/or physique will disadvantage them as competitors against average men in a boxing match. However, if average women as a group for comparison with average men for the purposes of section 195(1) includes trans women with GRCs (so legally female but biologically male) the differences in strength, stamina and physique between the two groups may begin to fade. Although at present the numbers of trans people with GRCs may be statistically insignificant, that could not have been predicted at the time the GRA 2004 was enacted, and the effect of section 9(1) cannot depend on how many people are issued with GRCs. Each group has members of the opposite biological sex in it and the gateway condition may be difficult to establish at all. Even if the gateway condition is established, the approach to the group of trans sportswomen who are potentially to be excluded would differ on a rationally unconnected basis: whether or not they have a paper certificate. To exclude trans women with a GRC from the boxing competition, the organiser would have the additional burden of showing that it was necessary to do so in the interests of fairness or safety, whereas a trans woman without a GRC could simply be excluded as a male under section 195(1).

236. On the other hand, a biological definition of sex would mean that a women's boxing competition organiser could refuse to admit all men, including trans women regardless of their GRC status. This would be covered by the sex discrimination exception in section 195(1). But if, in addition, the providers of the boxing competition were concerned that fair competition or safety necessitates the exclusion of trans men (biological females living in the male gender, irrespective of GRC status) who have taken testosterone to give them more masculine attributes, their exclusion would amount to gender reassignment discrimination, not sex discrimination, but would be permitted by section 195(2). It is here that the gender reassignment exception would be available to ensure that the exclusion is not unlawful, whether as direct or indirect gender reassignment discrimination.

(vi) The public sector equality duty and positive action measures for women

237. We have referred above (at paras 127 and 147-149) to the main terms of the PSED (section 149) and the positive action measures available, both in the workplace (section 159) and in the provision of services (section 158). Other specific provision is made

elsewhere – for example, section 104 of the EA 2010 which deals with women only shortlists for Parliamentary seats.

238. As we have explained, all organisations subject to the PSED must have due regard, in considering their rules, policies or practices, to the matters set out in section 149, undertaking where appropriate an equality impact assessment in order to understand how and to what extent the policy in question will affect specific groups with different protected characteristics. Organisations and bodies that are subject to the PSED are required to collect data in order to fulfil this duty.

239. If, in the context of equality between the sexes, the interests of trans women (biological males) who have GRCs (so are legally female) must be considered and advanced as part of the group that share the protected characteristic of being "women", the PSED will require data collection and consideration of a heterogenous group containing biological women, some biological males with a GRC (trans women who are legally female) and excluding some biological females with a GRC (trans men who are legally male). This is a confusing group to envisage because it cuts across and fragments both biological sex and gender reassignment into heterogenous groupings which may have little in common. Any data collection exercise will be distorted by the heterogenous nature of such a group. Moreover, the distinct discrimination and disadvantage faced by women as a group (or trans people) would simply not be capable of being addressed by the PSED because the group being considered would not be a group that, because of the shared protected characteristic of sex, has experienced discrimination or disadvantage flowing from shared biology, societal norms or prejudice. Whereas the interests of biological women (or men) can be rationally considered and addressed, and likewise, the interests of trans people (who are vulnerable and often disadvantaged for different reasons), we do not understand how the interests of this heterogenous group can begin to be considered and addressed.

240. A similar problem arises in relation to the positive action provisions (addressing particular needs, disadvantages, or under-representation of persons who share a protected characteristic (sections 158-159)). If sex means certificated sex, how can an organisation consider the needs of, or disadvantage to, women separately from men, and if it identifies a need for positive action, must it include trans women with GRCs (but not those without) within that action, and exclude biological females with GRCs?

241. In the case of both sets of provisions, the purpose of addressing the particular needs, disadvantages or participation levels of women as a group with the protected characteristic of sex, is undermined if women as a group includes trans women with a GRC (in other words, biological men who are legally female). The guidance at issue in the present case is a good illustration. If the purpose of the positive action measure is to increase representation on public boards of women (with their shared experience of disadvantage based on sex and overcoming such disadvantage), a certificated sex

approach changes the group to be represented. It means that those entitled to be considered for this scheme include biological males who have GRCs but it excludes biological females who have GRCs. This is an irrational approach.

242. Moreover, the different needs of and disadvantages faced by transsexual people (whether or not they have a GRC) can – and in the case of the PSED must – be considered separately without conflating these distinct protected characteristics. To do otherwise is detrimental to both groups. Indeed, a certificated sex reading of sex suggests that the needs and interests of transsexuals without a GRC are different from those with a GRC, though their circumstances may often be indistinguishable. In addressing the need for greater representation of women on public boards, it is hard to see what possible difference it could make to the board in question whether the trans woman in question does or does not hold a GRC.

243. It is no answer to these points to say (as the Scottish Ministers do) that there will always be members of a class who do not conform to the characteristics of the majority of a class and that it does not follow that they are not to be taken as falling within that class and entitled to the benefits to be afforded to it. This misses the point. The group-based rights and duties are concerned with identifying the shared needs and disadvantages that affect women as a group, or trans people as a group. If the first group were to include men and the second group people who are not trans people, it is unlikely that they would have the same needs or share the same disadvantages that would justify their inclusion in the particular group. Equally, the fact that some members of the group do not wish to benefit from a particular measure designed to reduce, say under-representation of that group, does not mean that they do not share the same needs and disadvantages as the group in question.

244. Accordingly, a certificated sex reading of sex in the EA 2010 is not necessary to meet its purpose in relation to the PSED or positive action provisions. On the other hand, such a reading does both undermine the purposes of those provisions and impede clarity of analysis of the different needs of groups with different protected characteristics under them. These provisions deal with potentially conflicting group interests in the field of equality and discrimination law in which Parliament has chosen to protect sex and gender reassignment as distinct protected characteristics. They do not concern individual rights that affect how transsexuals are treated in their general lives, or their ability to bring claims for any form of unlawful discrimination.

(vii) Armed Forces

245. Schedule 9 paragraph 4 of the EA 2010 provides:

> "4(1) A person does not contravene section 39(1)(a) or (c) or (2)(b) by applying in relation to service in the armed forces a relevant requirement if the person shows that the application is a proportionate means of ensuring the combat effectiveness of the armed forces.
>
> (2) A relevant requirement is— (a) a requirement to be a man; (b) a requirement not to be a transsexual person.
>
> (3) This Part of this Act, so far as relating to age or disability, does not apply to service in the armed forces; and section 55, so far as relating to disability, does not apply to work experience in the armed forces."

246. Although we accept that the dual requirement of not being a man and not being transsexual means that this provision can operate effectively on a certificated sex basis, it operates just as effectively adopting a biological sex interpretation. Unlike the Inner House we do not consider that it supports a certificated sex interpretation accordingly.

(19) The EHRC's recognition of problems in their interpretation of sex as certificated sex

247. The EHRC is the expert agency tasked by Parliament with considering the operation of the EA 2010. In its letter of 3 April 2023, the EHRC advised the UK Government about the consequences for the broader functioning of the EA 2010 if the decision of the Lord Ordinary in *For Women Scotland v Scottish Ministers (No 2)* was upheld (as it was in large part, by the Inner House). It is not for the EHRC to determine the meaning of sex in the EA 2010. That is for the courts to do. However, we consider it significant that many of the problems we have identified as leading to incoherence and absurdity in the practical operation of the EA 2010 if a certificated sex interpretation is adopted, are expressly recognised by the EHRC as grounds for urgent consideration of legislative amendment. The letter explains the EHRC's understanding that sex in the EA 2010 has a certificated sex meaning pursuant to sections 9(1) and (2) of the GRA 2004 and continues that "it has not been straightforward for service-providers and employers to apply the law, including in areas such as sport and health services". The EHRC concludes "that if 'sex' is defined as biological sex for the purposes of EA 2010, this would bring greater legal clarity in eight areas". The eight areas are then discussed as follows (numbering added):

> "(1) Pregnancy and maternity: As things stand, protections in the EA 2010 for pregnant women and new mothers fail to cover

trans men who are pregnant and whose legal sex is male. Defining 'sex' as biological sex would resolve this issue.

(2) Freedom of association for lesbians and gay men: If sex means legal sex, then sexual orientation changes on acquiring a GRC: some trans women with a GRC become legally lesbian, and some trans men with a GRC become gay men. As things stand a lesbian support group (for instance) may have to admit a trans woman with a GRC attracted to women without a GRC or to trans women who had obtained a GRC. On the biological definition it could restrict membership to biological women.

(3) Freedom of association for women and men: As things stand, a women's book club (for instance) may have to admit a trans woman who had obtained a GRC. On the biological definition it could restrict membership to biological women.

(4) Positive action: Currently, trans women with a GRC could benefit from 'women-only' shortlists and other measures aimed at increasing female participation. Trans men with a GRC could not. A biological definition of sex would correct this perceived anomaly.

(5) Occupational requirements: Employers are sometimes permitted to restrict positions to women or to men. An employer can (for example) require that a warden in a women's or girls' hostel be female. At present, such a role would be open to a trans woman with a GRC, but not to a trans man with a GRC. A biological definition of sex would correct this perceived anomaly.

(6) Single-sex and separate sex services: Service-providers are sometimes permitted to offer services to the sexes separately or to one sex only. For instance, a hospital might run several women only wards. At present, the starting point is that a trans woman with a GRC can access a 'women-only' service. The service-provider would have to conduct a careful balancing exercise to justify excluding all trans women. A biological definition of sex would make it simpler to make a women's-only ward a space for biological women.

(7) Sport: At present, to exclude trans women with a GRC from women's sports, the organiser must show that it was necessary to do so in the interests of fairness or safety. A biological definition of sex would mean that organisers could exclude trans women from women's sport without this additional burden.

(8) Data collection: When data are broken down by legal not biological sex, the result may seriously distort or impoverish our understanding of social and medical phenomena. A biological definition of sex would require public bodies like universities to apply this category, without the complexity added by a legal definition of sex, to the analysis of data collected in fulfilling the Public Sector Equality Duty."

There are three areas identified by the EHRC where it suggests that a "change" to a biological sex interpretation would be "more ambiguous or potentially disadvantageous". These are as follows, and we discuss each area further below:

"(9) Equal pay provisions: At present, a trans woman with a GRC can bring an equal pay claim by citing a legally male comparator who was paid more. A trans man with a GRC could not. The proposed biological definition would reverse this situation. The effect would be to transfer this right from some trans women to some trans men.

"(10) Direct sex discrimination: At present, a trans woman with a GRC can bring a claim of direct sex discrimination as a woman. A trans man with a GRC could not. The proposed biological definition would reverse this situation. The effect would be to transfer the right from some trans women to some trans men.

"(11) Indirect sex discrimination: At present, a trans woman with a GRC could bring a claim of indirect discrimination as a woman. A trans man with a GRC could not. The proposed biological definition would reverse this situation. The effect would be to transfer this right from some trans women to some trans men.…

On balance, we believe that redefining 'sex' in EA 2010 to mean biological sex would create rationalisations,

> simplifications, clarity and/or reductions in risk for maternity services, providers and users of other services, gay and lesbian associations, sports organisers and employers. It therefore merits further consideration."

(20) Why this interpretation would not be disadvantageous to or remove protection from trans people with or without a GRC

248. Finally, we have concluded that a biological sex interpretation would not have the effect of disadvantaging or removing important protection under the EA 2010 from trans people (whether with or without a GRC). Our reasons for this conclusion follow. We consider protection from both direct and indirect discrimination and harassment, and equal pay.

(i) Direct discrimination and harassment

249. It is now well-established that direct discrimination because of a protected characteristic (section 13 of the EA 2010) encompasses not only cases where the complainant affected by discrimination has the protected characteristic in question, but also where the discriminator perceives that the complainant has the characteristic, or in some other way associates the complainant with the protected characteristic. This can occur, for example, where the complainant is discriminated against because of caring responsibilities for a person with a protected characteristic, such as disability (as happened in *Coleman v Attridge Law* [2008] ICR 1128; *EBR Attridge LLP v Coleman* [2010] ICR 242) or where the complainant is treated detrimentally because it is thought that she or he has a particular protected characteristic even if they do not (*English v Thomas Sanderson Blinds Ltd* [2009] ICR 543, paras 37 to 40 per Sedley LJ, where the protected characteristic was sexual orientation). What is required is that the protected characteristic is a ground for the treatment in question. Terms such as "associative discrimination" and "discrimination by perception" are not a critical part of the analysis. What matters in the former is whether the treatment of the complainant was done because of the protected characteristic of the other person. In a case of perceived discrimination, the correct comparator is someone who is not perceived to have that protected characteristic: *Chief Constable of Norfolk Constabulary v Coffey* [2020] ICR 145. In *Coffey* the EAT (Judge David Richardson) held that where a claimant is treated less favourably on the basis of a mistaken perception that she was disabled, the correct hypothetical comparator was a person who was not perceived to be disabled and who had the same abilities as the claimant. On appeal, Underhill LJ (who gave a judgment with which the other members agreed) upheld the decision and expressly endorsed this comparator (see para 68 referring to para 66 of the EAT judgment [2018] ICR 812**.** (The perception-based approach was approved by Lord Mance JSC in *R (E) v Governing Body of JFS* [2009] UKSC 15, [2010] 2 AC 728 at para 85.)

250. Applied in the context of a discrimination claim made by a trans woman (a biological male with or without a GRC), the claimant can claim sex discrimination because she is perceived as a woman and can compare her treatment with that of a person not perceived to be a woman (whether that is a biological male or a trans man perceived to be male). There is no need for her to declare her true biological sex. There is nothing disadvantageous about this approach. Neither a biological woman nor a trans woman "bring a claim of direct sex discrimination *as a woman*" (as the EHRC suggests). That is not how the EA 2010 operates: a person brings a claim alleging sex discrimination because of a protected characteristic of sex.

251. Take, for example, a trans woman who applies for a job as a sales representative and the sales manager thinks that she is a biological woman because of her appearance and does not offer her the job even though she performed best at interview and gives the job instead to a biological man. She would have a claim for direct discrimination because of her perceived sex and her comparator would be someone who is not perceived to be a woman. The fact that she is not a biological woman should make no difference to her claim, which would be treated in the same way as a direct discrimination claim made by a biological woman based on the sex of the complainant herself.

252. The same approach would follow in a claim of discrimination by association: the appropriate comparator is someone not associated with the protected characteristic, so that a trans woman (biologically male) treated less favourably because of her association with women could claim sex discrimination and compare her treatment with someone who was not associated with women in the same way or manner (whether that was a biological male living as a man or a trans man).

253. It follows that a certificated sex reading of sex in the EA 2010 is not necessary to achieve the purposes of either the GRA 2004 or the EA 2010 as regards protection from direct discrimination. A man who identifies as a woman who is treated less favourably because of the protected characteristic of gender reassignment, will be able to claim on that basis. A man who identifies as a woman who is treated less favourably not because of being trans (the protected characteristic of gender reassignment), but because of being perceived as being a woman, will be able to claim for direct sex discrimination on that basis. This does not entail any practical disadvantage and there is no discordance (as the Scottish Ministers appear to suggest) between the individual's position in society and the ability to claim on this basis. A certificated sex reading of the EA 2010 is not necessary here, and the approach applies equally whether or not the claimant has a GRC.

254. The same is true of harassment pursuant to section 26 of the EA 2010. Harassment is defined by section 26 which provides:

> "(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B."

255. To establish harassment, it is simply necessary to establish a sufficient link between the unwanted conduct and a relevant protected characteristic, and that the conduct violates dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. It follows that, as with section 13(1) EA 2010, under section 26(1)(a) the complainant, B, does not have to possess the relevant protected characteristic to bring an unlawful harassment claim. Conduct will fall within this section where it is related to B's own protected characteristic, or where it is related to a relevant protected characteristic of another person or persons.

256. Applied, for example, to the case of a trans woman with a GRC, who presents as a woman at work and is perceived as a woman, and whose trans status and GRC are confidential: if a colleague harasses her (by making sexualised references to what she is wearing, or degrading comments about how she looks) she can bring a claim for harassment related to sex. She can also bring a harassment claim related to the protected characteristic of gender reassignment but may not wish to do so.

257. Conversely, if a certificated sex reading were adopted, it would have the effect of removing an important aspect of group protection for men and women in the way that direct discrimination under section 13 has been understood to operate. It is well-established that where a policy or rule is applied which applies a criterion that is indissociable from sex in order to determine entitlement to some benefit, that will necessarily constitute unlawful direct discrimination that cannot be justified. A clear example is the policy adopted by the council in *James v Eastleigh Borough Council* [1990] 2 AC 751 (see p764A per Lord Bridge) regarding free admission to the swimming pool for those of pension age at a time when pension ages for men and women were different. For this principle to apply, there must be an "exact correspondence" between the protected characteristic and the criterion in question (see *Preddy v Bull* [2013] UKSC 73, [2013] 1 WLR 3741 at para 21 per Lady Hale DPSC). A certificated sex reading of sex in the EA 2010 would have the effect of preventing that principle from applying in relation to a criterion which is indissociable from biological sex (for example, a sex-based biological characteristic) because that criterion would not be indissociable from the more complex grouping that would then constitute members of the relevant "sex" as modified

by section 9(1). Instead, the application of such a criterion would fall to be considered as a case of indirect discrimination, with the potential for a justification defence. A certificated sex reading of sex would therefore remove this important aspect of protection in relation to direct discrimination under section 13. It is difficult to see why the GRA 2004 could have intended to remove such protection.

(ii) Indirect discrimination

258. Pursuant to section 19 of the EA 2010, unlawful indirect discrimination occurs where the discriminator applies a PCP which places the claimant and persons who share the same protected characteristic at a particular disadvantage, and the treatment in question cannot be justified. Section 19A extends that protection to persons who do not share the same protected characteristic but suffer the same disadvantage as those who do (section 19A(1)(e)).

259. Section 19A was introduced with effect from 1 January 2024 by the Equality Act 2010 (Amendment) Regulations 2023 (made under sections 12(8) and 13 of the Retained EU Law (Revocation and Reform) Act 2023) in order to preserve the effect of EU law, and in particular, to reproduce the principle established by the Court of Justice of the European Union ("the CJEU") in *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia* (Case C-83/14) [2015] IRLR 746. In that case, the CJEU held that the principle of discrimination by association extends to both direct and indirect discrimination, so that where a group which shares a protected characteristic is put at a particular disadvantage, a person who is also put at that same disadvantage may claim discrimination even if she does not share the characteristic in question (paras 56–60). (See also *British Airways plc v Rollett* [2024] EAT 131, [2025] ICR 242 where Eady J, President of the EAT, confirmed that, prior to the UK's exit from the EU, the EA 2010 would have been interpreted so as to give effect to *CHEZ* so that a claimant need not have the same protected characteristic as the disadvantaged group to bring an indirect discrimination claim (para 61).)

260. Consequently, transgender people (irrespective of whether they have a GRC) are protected by the indirect discrimination provisions of the EA 2010 without the need for a certificated sex reading of the EA 2010, both in respect of any particular disadvantage suffered by them as a group sharing the characteristic of gender reassignment and, where members of the sex with which they identify are put at a particular disadvantage, insofar as they are also put at that disadvantage. Again, this does not entail any practical disadvantage or involve any discordance between the claim and the individual's position in society. On the contrary, the claim will be founded on the facts of a particular shared disadvantage. Transgender people are also protected from indirect discrimination where they are put at a particular disadvantage which they share with members of their biological sex.

261. Therefore, a certificated sex reading is not required to achieve any relevant purpose of either statute in respect of indirect discrimination. Conversely, if sex means certificated sex, this would undermine the ability to conduct a robust analysis of biological women (or men) as a group with a shared characteristic (see paras 172–173 above). In short, it would entail concluding that Parliament did not intend biological women (or men) to be a distinct protected group within its core indirect discrimination provision.

(iii) Equal pay

262. The EHRC says (in the letter of 3 April) that on a certificated sex interpretation of sex, a trans woman with a GRC can bring an equal pay claim by identifying a male comparator who was paid more than her whereas a trans man with a GRC could not. This is true. But the position would simply reverse if either the trans man or trans woman did not have a GRC: in other words, a trans man with a GRC (legally male but biologically female) cannot rely on a male comparator to bring an equal pay claim but can do so if he does not have a GRC (and vice versa). That is an odd divergence and is unlikely to have been intended by Parliament. It is also true that a biological definition of sex would transfer this right from some trans women to some trans men. We do not see this difficulty as compelling a different conclusion in these circumstances.

263. The anomaly for trans people is a consequence of the requirement in section 64(1)(a) of the EA 2010 to identify an actual comparator of the opposite sex in order to bring an equal pay claim. But, since on either definition of sex, some trans people will not be able to use the equal pay route because of the express requirement for a comparator of the opposite sex, we do not regard this anomaly as mandating a different conclusion.

(21) Summary on the EA 2010

264. For all these reasons, this examination of the language of the EA 2010, its context and purpose, demonstrate that the words “sex”, “woman” and “man” in sections 11 and 212(1) mean (and were always intended to mean) biological sex, biological woman and biological man. These and the other provisions to which we have referred cannot properly be interpreted as also extending to include certificated sex without rendering them incoherent and unworkable. In other words, in relation to sex discrimination (for the purposes of sections 11 and 212(1)), a person with the protected characteristic of sex has the characteristic of their biological sex only: a trans man with a GRC (a biological female but legally male for those purposes to which section 9(1) of the GRA 2004 applies) is a woman for the purposes of section 11 and a trans woman with a GRC (biologically male but legally female for those purposes to which section 9(1) applies), is a man and not entitled to be treated as a woman under the EA 2010. This conclusion does not remove or diminish the important protections available under the EA 2010 for trans people with a GRC as we have explained. To the contrary, this potentially vulnerable group remains

protected in the ways we have described. In these circumstances, and notwithstanding that there is no express provision in the EA 2010 addressing the effect which section 9(1) of the GRA 2004 has on the definition of "sex", we are satisfied that the EA 2010 does make provision within the meaning of section 9(3) that disapplies the rule in section 9(1) of the GRA 2004.

(22) Summary of our reasoning

265. We are aware that this is a long judgment. It may assist therefore if we summarise our reasoning.

(i) The question for the court is a question of statutory interpretation; we are concerned with the meaning of the provisions of the EA 2010 in the light of section 9 of the GRA (para 2).

(ii) Parliament in using the words "man" and "woman" in the SDA 1975 referred to biological sex (paras 36-51).

(iii) The 1999 Regulations, enacted in response to *P v S*, created a new protected characteristic of a person intending to undergo, or undergoing or having undergone gender reassignment. The 1999 Regulations did not amend the meaning of "man" or "woman" in the SDA 1975 (paras 54-62).

(iv) The GRA 2004 did not amend the meaning of "man" and "woman" in the SDA 1975 (para 80).

(v) Section 9(3) of the GRA 2004 disapplies the rule in section 9(1) of that Act where the words of legislation, enacted before or after the commencement of the GRA 2004, are on careful consideration interpreted in their context and having regard to their purpose to be inconsistent with that rule. It is not necessary that there are express words disapplying the rule in section 9(1) of the GRA 2004 or that such disapplication arises by necessary implication as the legality principle does not apply (paras 99-104).

(vi) The context in which the EA 2010 was enacted was therefore that the SDA 1975 definitions of "man" and "woman" referred to biological sex and trans people had the protected characteristic of gender reassignment.

(vii) The EA 2010 is an amending and consolidating statute. It enacts group-based protections against discrimination on the grounds of sex and gender reassignment and imposes duties of positive action (paras 113, 142-149).

(viii) It is important that the EA 2010 is interpreted in a clear and consistent way so that groups which share a protected characteristic can be identified by those on whom the Act imposes obligations so that they can perform those obligations in a practical way (paras 151-154).

(ix) There is no indication in relevant secondary materials that the EA 2010 modified in any material way the meaning of "man" and "woman" or "sex" from the meanings in the SDA 1975 (para 164).

(x) Interpreting "sex" as certificated sex would cut across the definitions of "man" and "woman" and thus the protected characteristic of sex in an incoherent way. It would create heterogeneous groupings. As a matter of ordinary language, the provisions relating to sex discrimination, and especially those relating to pregnancy and maternity (sections 13(6), 17 and 18), and to protection from risks specifically affecting women (Schedule 22, paragraph 2), can only be interpreted as referring to biological sex (paras 172, 177-188).

(xi) We reject the suggestion of the Inner House that the words can bear a variable meaning so that in the provisions relating to pregnancy and maternity the EA 2010 is referring to biological sex only, while elsewhere it refers to certificated sex as well (paras 189-197).

(xii) Gender reassignment and sex are separate bases for discrimination and inequality. The interpretation favoured by the EHRC and the Scottish Ministers would create two sub-groups within those who share the protected characteristic of gender reassignment, giving trans persons who possess a GRC greater rights than those who do not. Those seeking to perform their obligations under the Act would have no obvious means of distinguishing between the two sub-groups to whom different duties were owed, particularly since they could not ask persons whether they had obtained a GRC (paras 198-203).

(xiii) That interpretation would also seriously weaken the protections given to those with the protected characteristic of sexual orientation for example by interfering with their ability to have lesbian-only spaces and associations (paras 204-209).

(xiv) There are other provisions whose proper functioning requires a biological interpretation of "sex". These include separate spaces and single-sex services (including changing rooms, hostels and medical services), communal accommodation and others (paras 210-228).

(xv) Similar incoherence and impracticability arise in the operations of provisions relating to single-sex characteristic associations and charities, women's fair participation in sport, the operation of the public sector equality duty, and the armed forces (paras 229-246).

(xvi) It is striking that the EHRC has advised the UK Government of the problems created by its interpretation of the EA 2010, which include many of the matters which we have discussed above, and has called for legislation to amend the Act. The absence of coherence and the practical problems to which that interpretation gives rise are clear pointers that the interpretation is not correct (para 247).

(xvii) The interpretation of the EA 2010 (ie the biological sex reading), which we conclude is the only correct one, does not cause disadvantage to trans people, with or without a GRC. In the light of case law interpreting the relevant provisions, they would be able to invoke the provisions on direct discrimination and harassment, and indirect discrimination. A certificated sex reading is not required to give them those protections (paras 248-263).

(xviii) We therefore conclude that the provisions of the EA 2010 which we have discussed are provisions to which section 9(3) of the GRA 2004 applies. The meaning of the terms "sex", "man" and "woman" in the EA 2010 is biological and not certificated sex. Any other interpretation would render the EA 2010 incoherent and impracticable to operate (para 264).

(23) Invalidity of the Scottish Government's Guidance

266. For all these reasons, we conclude that the Guidance issued by the Scottish Government is incorrect. A person with a GRC in the female gender does not come within the definition of "woman" for the purposes of sex discrimination in section 11 of the EA 2010. That in turn means that the definition of "woman" in section 2 of the 2018 Act, which Scottish Ministers accept must bear the same meaning as the term "woman" in section 11 and section 212 of the EA 2010, is limited to biological women and does not include trans women with a GRC. Because it is so limited, the 2018 Act does not stray beyond the exception permitted in section L2 of Schedule 5 to the Scotland Act into reserved matters. Therefore, construed in the way that we have held it is to be construed, the 2018 Act is within the competence of the Scottish Parliament and can operate to encourage the participation of women in senior positions in public life.

267. There may well be public boards on which it is also important for trans people of either or both genders to be represented in order to ensure that their perspective is brought to bear in the board's deliberations and in the organisation's governance. Nothing in this judgment is intended to discourage the appointment of trans people to public boards or to minimise the importance of addressing their under-representation on such boards. The issue here is only whether the appointment of a trans woman who has a GRC counts as the appointment of a woman and so counts towards achieving the goal set in the gender representation objective, namely that the board has 50% of non-executive members who are women. In our judgment it does not.

(24) Conclusion

268. We would allow the appeal.

CERTIFICATE OF SERVICE

I, Michael D. Russell, hereby certify that I have served true and accurate copies of the foregoing Answer/Brief - Brief in Opposition to the following on 04-16-2025:

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