

# United States Senate

June 30, 2020

The Honorable William Barr  
Attorney General of the United States  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, D.C. 20530

Dear Attorney General Barr:

We strongly urge you to rescind a 2017 U.S. Department of Justice (“the Department” or “DOJ”) memorandum<sup>1</sup> in which former Attorney General Jeff Sessions ordered DOJ to take the position that transgender workers are not protected from workplace discrimination under Title VII of the Civil Rights Act of 1964. At the time it was issued, the Sessions memorandum not only reversed a position that Department attorneys had argued in court, but also contradicted the view of the Equal Employment Opportunity Commission and the decisions reached by five federal appeals courts.<sup>2</sup> However, in light of the U.S. Supreme Court’s recent landmark decision in *Bostock v. Clayton County, Ga.*, which held that “[a]n employer who fires an individual merely for being gay or transgender defies the law,”<sup>3</sup> the Sessions memorandum is now at odds with controlling Supreme Court precedent. The Department’s current position therefore misstates the law, poses an ongoing threat to the well-being of transgender workers, and invites liability for employers that misguidedly rely upon it. The Supreme Court’s *Bostock* decision compels DOJ to rescind the Sessions memorandum and we urge you to abandon it immediately.

Notwithstanding the increased visibility and growing acceptance of transgender people in the United States, members of the transgender community disproportionately experience economic instability—instability that was exacerbated by the lack of a uniform interpretation of Title VII’s reach.<sup>4</sup> Before the widespread unemployment of the past six months, the unemployment rate for transgender people was an estimated 15 percent—a rate three times higher than the rest of the U.S. population, which suggests that many transgender applicants are refused a job because of their gender identity or expression.<sup>5</sup> Thirty percent of transgender people in the workforce have

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<sup>1</sup> Memorandum from Attorney General Jeff Sessions to U.S. Attorneys and Heads of Dep’t Components, U.S. Dep’t of Justice (Oct. 4, 2017) (<https://www.justice.gov/ag/page/file/1006981/download>).

<sup>2</sup> *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. Feb. 29, 2000); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. June 8, 2000); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. Aug. 5, 2004); *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. March 25, 2005); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. Dec. 6, 2011); *Dodds v. U.S. Dept. of Education*, 845 F.3d 217 (6th Cir. Dec.16, 2016); and *Whitaker v. Kenosha Unified School District*, 858 F.3d 1034 (7th Cir. May 30, 2017).

<sup>3</sup> *Bostock v. Clayton Cty., Ga.*, No. 17-1618, 2020 WL 3146686 (U.S. June 15, 2020).

<sup>4</sup> James, S. E., Herman, J. L., Rankin, S., Keisling, M., Mottet, L., & Anafi, M. (2016). *The Report of the 2015 U.S. Transgender Survey*. Washington, DC: National Center for Transgender Equality, <https://transequality.org/sites/default/files/docs/usts/USTS-Executive-Summary-Dec17.pdf>

<sup>5</sup> *Id.* at 3.

reported being fired, being denied a promotion, or having experienced other forms of workplace discrimination due to their gender identity or expression, including harassment and assault while on the job.<sup>6</sup>

In recognition of the significant barriers to equal opportunity faced by transgender workers, in 2014, then-Attorney General Eric Holder directed DOJ to adopt the position that Title VII’s “prohibition on sex discrimination...encompasses discrimination based on gender identity, including transgender status.”<sup>7</sup> In adopting this position, the Department weighed the statutory text, existing case law interpreting Title VII, administrative decisions, and Executive Orders. After careful consideration of the applicable law, the Department concluded the “most straightforward reading of Title VII” is that discrimination “because of...sex” encapsulates discrimination on the basis of a worker’s gender identity or expression. Attorney General Holder’s directive cited to Supreme Court precedent recognizing that in drafting Title VII, “Congress meant to obligate” a Title VII plaintiff to prove only “that the employer relied upon sex-based considerations in coming to its decision,”<sup>8</sup> as well as the Court’s admonition that Title VII must be interpreted according to its plain text, in recognition of the fact that “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”<sup>9</sup> In the years following the Department’s adoption of this position, numerous federal courts issued decisions confirming and expanding upon the analysis in the Holder memorandum.<sup>10</sup>

Notwithstanding the body of case law affirming the position of the Holder memorandum, your immediate predecessor withdrew this critical enforcement policy. Former Attorney General Sessions stated that “Title VII does not prohibit discrimination based on gender identity *per se*,” effectively reversing the Department’s legal position.<sup>11</sup> Contrary to the Sessions memorandum’s assertion that its reversal was based upon law and not policy, the memorandum declined to acknowledge numerous decisions holding that transgender workers are protected under Title VII.<sup>12</sup> The position staked out by the Sessions memorandum was also plainly at odds with the Department’s stated goal of “uphold[ing] the civil and constitutional rights of all Americans,

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<sup>6</sup> *Id.* at 2.

<sup>7</sup> Memorandum from Attorney General Eric Holder to U.S. Attorneys and Heads of Dep’t Components, U.S. Dep’t of Justice (Dec. 15, 2014) (<https://www.justice.gov/file/188671/download>).

<sup>8</sup> *Id.* at 2 (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241-42 (1989)).

<sup>9</sup> *Id.* at 2 (citing *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79 (1998)).

<sup>10</sup> See e.g., *Bostock v. Clayton Cty., Georgia*, No. 17-1618, 2020 WL 3146686 (U.S. June 15, 2020); *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F. 3d 560 (6th Cir. 2018); *Equal Employment Opportunity Comm’n v. A & E Tire, Inc.*, 325 F. Supp. 3d 1131 (D. Colo. 2018); *Parker v. Strawser Construction*, 307 F. Supp. 3d 744 (S.D. Ohio Apr. 25, 2018); *E.E.O.C. v. Rent-a-Center East, Inc.*, 264 F. Supp. 3d 952 (C.D. Ill. Sept. 8, 2017); *Mickens v. Gen. Elec. Co.*, No. 3:16CV-00603-JHM, 2016 WL 7015665 (W.D. Ky. Nov. 29, 2016); *Roberts v. Clark Cty. Sch. Dist.*, 215 F. Supp. 3d 1005 (D. Nev. 2016); *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509 (D. Conn. Mar. 18, 2016); *Doe v. State of Arizona*, No. CV-15-02399-PHX-DGC, 2016 WL 1089743 (D. Ariz. Mar. 21, 2016); *United States v. Se. Oklahoma State Univ.*, No. CIV-15-324-C, 2015 WL 4606079 (W.D. Okla. July 10, 2015).

<sup>11</sup> Memorandum from Attorney General Jeff Sessions, *supra* note 1.

<sup>12</sup> Specifically, the 2017 memorandum failed to discuss countervailing circuit court case law holding transgender people are protected under Title VII. See, e.g., *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011).

particularly some of the most vulnerable members of our society.”<sup>13</sup> Moreover, it sent a dangerous message to employers about their obligation under federal law to treat transgender workers equally and without discrimination.

On November 2, 2017, Senators Harris and Murray led a group of 33 senators in calling on former Attorney General Sessions to abandon his callous position and clarify that federal law required that workers be judged based on their ability to do the job, not their gender identity or expression.<sup>14</sup> We also requested that the Department provide us with a list of each case involving complaints of gender identity pending within the Department.<sup>15</sup> The Department failed to respond to this letter.

The Department attempted to justify its cruel change in policy by claiming that its actions were dictated by the text of Title VII—a disingenuous rationale that relied on a willful misinterpretation of the relevant case law. For example, the Sessions memorandum asserted that “[a]s a law enforcement agency, the Department of Justice must interpret Title VII as written by Congress.”<sup>16</sup> A Department spokesman defended the policy change by professing that “[t]he Department of Justice cannot expand the law beyond what Congress has provided.”<sup>17</sup>

The Supreme Court, however, later exposed the fallacy in the Department’s stated justification. On June 15, 2020, the Court issued its historic *Bostock* decision, in which it concluded that Title VII’s prohibition on sex discrimination protects lesbian, gay, bisexual, and transgender workers.<sup>18</sup> Writing for the 6-3 majority, Associate Justice Neil Gorsuch grounded the Court’s decision in the plain meaning of the statutory text. He acknowledged that “[t]hose who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result.”<sup>19</sup> But, he concluded, “the limits of the drafters’ imagination supply no reason to ignore the law’s demands.”<sup>20</sup>

In light of the landmark *Bostock* decision, there can remain no justification for leaving in place an enforcement policy that flatly contradicts Supreme Court precedent. Accordingly, we call on you to rescind the Sessions memorandum immediately.

Furthermore, because of the Department’s failure to respond to our earlier request, we again request that you disclose a list of all cases that have been investigated by the Department since

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<sup>13</sup> U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., ABOUT THE DIVISION, <https://www.justice.gov/crt> (last visited June 30, 2020).

<sup>14</sup> Press Release, U.S. Senator Kamala D. Harris, Harris, Murray, Franken Lead Colleagues in Urging AG Sessions to Protect Transgender Workers from Discrimination (Nov. 2, 2017) (<https://www.harris.senate.gov/newsroom/press-releases/harris-murray-franken-lead-colleagues-in-urging-ag-sessions-to-protect-transgender-workers-from-discrimination>).

<sup>15</sup> *Id.*

<sup>16</sup> Memorandum from Attorney General Jeff Sessions, *supra* note 1.

<sup>17</sup> Emma Green, *The Department of Justice Takes a Stand Against Transgender Rights in the Workplace*, THE ATLANTIC, Oct. 5, 2017, <https://www.theatlantic.com/politics/archive/2017/10/the-department-of-justice-takes-a-stand-against-transgender-rights-in-the-workplace/542154/>.

<sup>18</sup> *Bostock v. Clayton Cty., Ga.*, No. 17-1618, 2020 WL 3146686 (U.S. June 15, 2020).

<sup>19</sup> *Id.* at 2.

<sup>20</sup> *Id.*

January 1, 2017, for complaints of gender identity discrimination, as well as the status of each case.

Sincerely,

*/s/ Kamala D. Harris*

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KAMALA D. HARRIS  
United States Senator

*/s/ Patty Murray*

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PATTY MURRAY  
United States Senator

*/s/ Sheldon Whitehouse*

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SHELDON WHITEHOUSE  
United States Senator

*/s/ Edward J. Markey*

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EDWARD J. MARKEY  
United States Senator

*/s/ Sherrod Brown*

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SHERROD BROWN  
United States Senator

*/s/ Amy Klobuchar*

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AMY KLOBUCHAR  
United States Senator

*/s/ Chris Van Hollen*

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CHRIS VAN HOLLEN  
United States Senator

*/s/ Tammy Baldwin*

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TAMMY BALDWIN  
United States Senator

*/s/ Richard Blumenthal*

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RICHARD BLUMENTHAL  
United States Senator

*/s/ Bernard Sanders*

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BERNARD SANDERS  
United States Senator

*/s/ Mazie K. Hirono*

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MAZIE K. HIRONO  
United States Senator

*/s/ Patrick Leahy*

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PATRICK LEAHY  
United States Senator

*/s/ Jeffrey A. Merkley*

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JEFFREY A. MERKLEY  
United States Senator

*/s/ Ron Wyden*

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RON WYDEN  
United States Senator

*/s/ Jack Reed*

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JACK REED  
United States Senator

*/s/ Tina Smith*

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TINA SMITH  
United States Senator

*/s/ Robert Menendez*

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ROBERT MENENDEZ  
United States Senator

*/s/ Cory A. Booker*

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CORY A. BOOKER  
United States Senator

*/s/ Kirsten Gillibrand*

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KIRSTEN GILLIBRAND  
United States Senator

*/s/ Elizabeth Warren*

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ELIZABETH WARREN  
United States Senator

*/s/ Tim Kaine*

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TIM KAINE  
United States Senator

*/s/ Tammy Duckworth*

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TAMMY DUCKWORTH  
United States Senator

*/s/ Robert P. Casey, Jr.*

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ROBERT P. CASEY, JR.  
United States Senator

*/s/ Christopher A. Coons*

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CHRISTOPHER A. COONS  
United States Senator

*/s/ Richard J. Durbin*

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RICHARD J. DURBIN  
United States Senator

*/s/ Jacky Rosen*

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JACKY ROSEN  
United States Senator

*/s/ Catherine Cortez Masto*

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CATHERINE CORTEZ MASTO  
United States Senator

*/s/ Michael F. Bennet*

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MICHAEL F. BENNET  
United States Senator

*/s/ Tom Carper*

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TOM CARPER  
United States Senator