FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D18-2844

NEVAEH LOVE,

Appellant,

v.

KATOSHIA YOUNG,

Appellee.

On appeal from the Circuit Court for Escambia County.
Edward P. Nickinson, III, Judge.

April 21, 2021

KELSEY, J.

Appellant challenges a final judgment finding Appellee not liable for gender-identity discrimination under the Florida Civil Rights Act of 1992. The FCRA provides in pertinent part as follows:

> All persons are entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation without discrimination or segregation on the ground of race, color, national origin, sex, pregnancy, handicap, familial status, or religion.

§ 760.08, Fla. Stat. (2017).

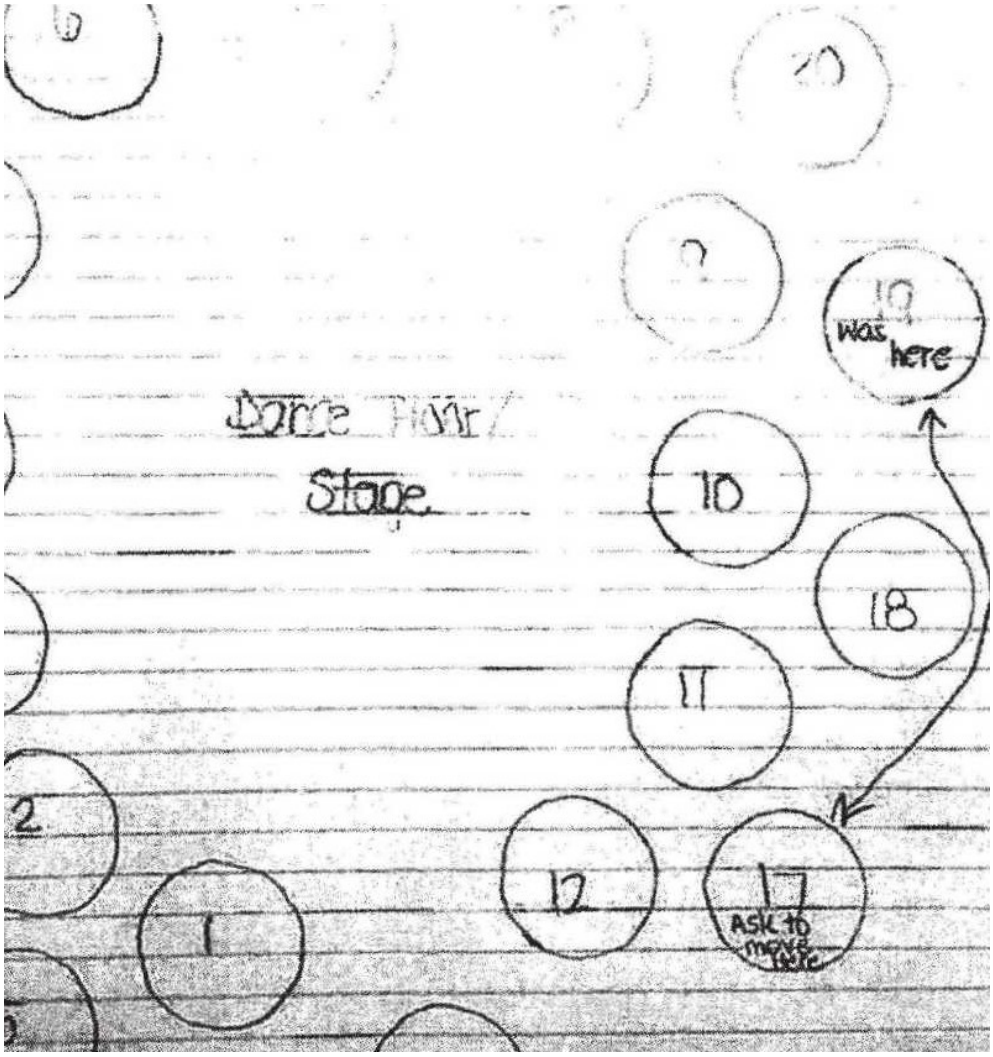
The trial court did not decide whether the FCRA extends to gender identity,[1] but rather applied an "even-if" analysis and decided the case on Appellee's defenses. The record fully supports the trial court's judgment.

I. Facts

After conducting an evidentiary hearing and evaluating witness credibility, the trial court found competent, substantial evidence supporting the following version of the facts, which we are not authorized to reweigh. *See Stinson v. Winn*, 938 So. 2d 554, 555 (Fla. 1st DCA 2006) (holding that a single witness's testimony can be competent, substantial evidence of a fact, even in the face of competing evidence).

Appellant testified to having been assigned male gender at birth, but identifying and presenting as female, thus considered a transgender woman. Appellant joined a group of friends at a show involving male performers called the Black Chippendales. It appears that in a typical performance, the dancers would disrobe to a degree, and then might engage in mutual sexual or sexually-suggestive touching with patrons seated within reach. Appellant admitted to having seen advertisements limiting the show to "ladies only." Appellant's friends arrived first, bought a ticket for Appellant, and sat at table 19 within the ticketed VIP second-row section on the side of the performance area. The tickets did not designate any specific table or seat. The seat map in evidence illustrates the layout and the location of Appellant's table.

[1] We asked the parties to file supplemental briefs addressing *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1741 (2020), and appreciate their additional submissions. However, we strike section III of Appellant's supplemental brief, which improperly exceeded the scope of our focus order and re-argued the merits of the appeal.



Someone recognized Appellant and notified Appellee that there was a "male dressed as a female" in the audience—*not* that Appellant was transgender. When the performers learned that "a man dressed as a woman" was in the audience, they vehemently refused to perform under the risk of having Appellant touch them during the performance—cursing and threatening physical violence if that should happen. One adamantly said he didn't want to dance for guys or "get in on that action." A performer who testified at trial explained as follows:

> We are just not used to dancing for guys. That is just something we don't do. We don't dance in those kinds of clubs and things. That is something we always stand by.

The performer who testified at trial stated that the performers had told Appellee before agreeing to the performance that they would not perform for men.

An organizer of the event, fearful that the patrons would "riot" if the performance were cancelled, offered the performers a compromise solution, which they accepted. Appellant would be asked to move two tables over to table 17, within the same VIP second-row section. Table 17 was closer to table 1 at the front center of the performance area, where the performers could better see and avoid Appellant, if desired. When told of the performers' concerns and asked to move two tables over in the same section and ticket class, Appellant became upset, asked for and received a full refund of the ticket price, and left. Appellant admitted at trial that the dancers would still have been within touching distance from table 17.

II. FCRA Complaint

Appellant filed suit under the FCRA, alleging a version of the facts that the trial court rejected.[2] Appellant claimed to have been asked to move all the way to the back of the room or to leave altogether. Appellant's complaint then alleged only that the privilege or advantage denied to Appellant was that of sitting in the VIP section for the performance: "Young denied Love the privilege or advantage of sitting in the VIP section." It was not until after the ensuing bench trial that Appellant first argued, without seeking to amend the complaint, and while still

[2] Appellant's presuit complaint filed with the Florida Human Rights Commission also relied on the factual allegations that the trial court later rejected as unsupported by the evidence. Given the trial court's rejection of the facts presented to the Commission, which we unanimously also reject, Appellant and the dissent misplace their reliance on the Commission's reasonable-cause letter as bolstering the legitimacy of Appellant's claims.

maintaining that Appellee demanded Appellant move to the back or be ejected, that the mere act of being asked to move within the same seat class constituted a violation of the FCRA.[3]

As already noted, the trial court resolved the factual disputes in Appellee's favor. The court then examined the motivation or defense for the allegedly discriminatory act; i.e., the performers' right to be protected from unwanted sexual touching. *Cf. McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–03 (1973) (holding, in action for employment discrimination under Title VII, plaintiff must establish a prima facie case before burden shifts to employer to "articulate some legitimate, nondiscriminatory reason" for the action). The trial court concluded as follows:

> The Court's decision here represents no more and no less than a finding that when the subject of the activity in question is sex, and when that activity involves sexual or sexually suggestive bodily contact, and when the performers who may be physically involved with that contact have specified they consent to contact only with women, the performers may reasonably expect to retain some say over who is or is not a "woman" for purposes of the activity. Here, the dancers clearly did not consider Ms. Love to be a "woman" for purposes of their performance, and the Court sees no reason why, for that limited purpose, Ms. Love should be able to force those dancers to think otherwise.
>
> . . . No person should be required to perform body-contact sexual or sexually suggestive acts with another except by consent.

The trial court went on to observe that on the facts presented, in the context of sexual touching or contact, granting relief to

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[3] Appellant's claim expanded yet again in the Reply Brief, arguing for the first time that the very existence of a "ladies-only" event violated the FCRA. We cannot legitimately address this or any other unpreserved arguments.

Appellant would require the court to impose Appellant's gender norms on unwilling others, which the court declined to do.

III. Analysis

Appellant (and the dissent) rely on policy arguments that the trial court did not reach, that the Florida Legislature has not adopted, and that are unnecessary to disposition.[4] We can and should instead decide this case on grounds clearly supported by existing law, thus adhering to principles of judicial restraint and avoiding novel public policy decisions. *See PDK Labs., Inc. v. United States Drug Enf't Admin.*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring) ("[T]he cardinal principle of judicial restraint—if it is not necessary to decide more, it is necessary not to decide more—counsels us to go no further.").

The trial court concluded that even if the FCRA did apply here, the ultimate question would be limited to whether the FCRA requires individuals engaged in intimate or sexual performances to allow anyone and everyone to touch them in such a way against their will. The trial court correctly held that the performers' legal rights of personal privacy would prevail over Appellant's apparent claim of an unfettered legal right to subject the performers to unwanted touching, particularly touching of an intimate or sexual nature.

Although Appellant argues that we should reject the trial court's reasoning because there is not, and cannot be, any "unwanted touching" exception in the FCRA, we cannot adopt that reasoning without implicitly invalidating, or creating new exceptions to, numerous existing laws that protect fundamental rights. Multiple Florida laws prohibit unwanted touching,

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[4] In this factual and procedural context, any decision on the scope of the FCRA would be mere dictum. *See* DICTUM, Black's Law Dictionary (11th ed. 2019) ("A judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive).").

including laws on simple battery;[5] sexual battery;[6] sexual harassment;[7] and, ironically, hostile work environment created by unwanted touching.[8] None of these laws creates any public-accommodation exception to the basic rights of privacy and freedom from unwanted physical contact. It would be anomalous indeed to hold that the FCRA must be interpreted to allow unwanted touching that would be remediable under criminal or civil law. We need not and should not go further to affirm the trial court's judgment.

AFFIRMED.

ROWE, J., concurs in result only with opinion; BILBREY, J., dissents with opinion.

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[5] *See* § 784.03, Fla. Stat. (defining battery as an intentional touching or striking of another person against their will).

[6] *See* § 794.011, Fla. Stat. (defining sexual battery as including certain kinds of union with sexual organs, which could conceivably occur under some scenarios involving a sexual dancing/touching performance).

[7] *See generally* § 760.10, Fla. Stat. (prohibiting sex discrimination); *Branch-McKenzie v. Broward Cty. Sch. Bd.*, 254 So. 3d 1007, 1012 (Fla. 4th DCA 2018) (explaining the FCRA prohibits sexual harassment as a form of sex discrimination, and sexual harassment may lead to a hostile work environment).

[8] *See Speedway SuperAmerica, LLC v. Dupont*, 933 So. 2d 75, 84 (Fla. 5th DCA 2006) (On Rehearing En Banc) (holding in FCRA context that "[u]ninvited fondling or groping, as was established in this record, in other contexts constitutes actionable sexual battery, and clearly should not be tolerated in the work place.").

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

ROWE, J., concurring in result only.

I would also affirm the judgment, but for different reasons. *See Robertson v. State*, 829 So. 2d 901, 906 (Fla. 2002) ("[T]he 'tipsy coachman' doctrine[ ] allows an appellate court to affirm a trial court that 'reaches the right result, but for the wrong reasons' so long as 'there is any basis which would support the judgment in the record.'" (quoting *Dade Cnty. Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638, 644 (Fla. 1999))). I would affirm because Grotto Hall was not a place of public accommodation under the Florida Civil Rights Act.

The FCRA prohibits discrimination in any "place of public accommodation". . . "on the ground of race, color, national origin, sex, pregnancy, handicap, familial status, or religion." § 760.08, Fla. Stat. (2016). Public accommodations include:

> [P]laces of public accommodation, lodgings, facilities principally engaged in selling food for consumption on the premises, gasoline stations, places of exhibition or entertainment, and other covered establishments. Each of the following establishments which serves the public is a place of public accommodation within the meaning of this section:
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> (a) Any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than four rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his or her residence.
>
> (b) Any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in

> selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment, or any gasoline station.
>
> (c) Any motion picture theater, theater, concert hall, sports arena, stadium, or other place of exhibition or entertainment.
>
> (d) Any establishment which is physically located within the premises of any establishment otherwise covered by this subsection, or within the premises of which is physically located any such covered establishment, and which holds itself out as serving patrons of such covered establishment.

§ 760.02(11), Fla. Stat. (2016).

The above language shows that the FCRA's public accommodations provisions cover establishments customarily used by the public for defined purposes. The FCRA describes "establishments" with reference to physical locations such as "building[s]," "place[s]," or "premises." *See* § 760.02(11)(a)-(d), Fla. Stat. (2016) (describing food service establishments with "premises," entertainment establishments with a "place," and other establishments "physically located within the premises of any establishment"); *see Crane v. Lifemark Hosp. of Fla., Inc.*, 149 So. 3d 718, 720 (Fla. 3rd DCA 2014)(explaining that the FCRA's provisions "extend only to a 'place of public accommodation'"). The statute also describes covered "establishments" based on their customary uses by the public. *See* § 760.02(11)(a)-(c), Fla. Stat. (2016) (categorizing types of lodging establishments, food service establishments, and entertainment establishments).

But despite the FCRA's broad application to lodging, food service, and entertainment establishments, the Legislature chose to exclude certain establishments used by the public for those same purposes from the FCRA's public accommodations provisions. *See, e.g.*, *Crane*, 149 So. 3d at 721. (explaining that even though a cafeteria within a hospital might otherwise meet the definition of a food service establishment, the cafeteria was not a place of public

accommodation based on the FCRA's exclusion for "eating place[s]" at certain health care facilities). Relevant here is the Legislature's decision to exclude from its definition of public accommodations "lodge halls or other similar facilities of private organizations which are made available for public use occasionally or periodically." § 760.07, Fla. Stat. (2016).

Relying on the statutory exclusion for lodge halls under the FCRA, Young argued that Grotto Hall was not a place of public accommodation based on its occasional and periodic use by the public. Young presented testimony from Grotto Hall's registered agent to describe the public's use of the lodge hall. The agent explained that Grotto Hall was part of Zelica Grotto, a not for profit fraternal organization. Grotto Hall hosted charity bingo events every Saturday that were open to the public. It also hosted dances once a month for various charitable organizations. And as to other events, the agent testified that third parties rented the lodge hall "usually once a month." The only other testimony on the public use of Grotto Hall came from Young, who testified that her private group, Royalty-N-Heelz, rented the lodge hall for the Black Chippendales' performance.

There was no dispute over how often the public used Grotto Hall. Rather, the dispute centered on whether the public's use met the statutory requirement of being periodic or occasional. But when it entered judgment for Young, the trial court did not address whether the FCRA's provision for lodge halls applied to Grotto Hall based on the frequency of its use by the public. Instead, the trial court determined that Grotto Hall was a place of public accommodation simply because "the event being held on June 18, 2016 was not an event hosted by Zelica Grotto."

I disagree with the court's determination. Whether the lodge hall was a place of public accommodation under the FCRA does not turn on whether Zelica Grotto hosted the event at its establishment. It turns on the frequency of the public's use. Unless the public's use of the establishment was more than periodic or occasional, Grotto Hall was not a place of public accommodation. *See* § 760.07, Fla. Stat. (2016).

The undisputed facts show that Grotto Hall was open to the public for weekly bingo events and once-a-month charity dances, and third parties rented the lodge hall "usually once a month." Applying the statute to those facts, I conclude that Grotto Hall was not a place of public accommodation because the public's use of the establishment was periodic (as to the weekly bingo events) or occasional (as to the once-a-month dances and third-party events). *Id*. And because Grotto Hall was not a place of public accommodation, I concur in affirming the trial court's judgment for Young.

BILBREY, J., dissenting.

As explained below, I would reverse for further proceedings in this discrimination case brought under Florida civil rights law. Because the panel affirms, I respectfully dissent.

I. The Florida Civil Rights Act

The Legislature promulgated the Florida Civil Rights Act of 1992 (FCRA) "to secure for all individuals within the state freedom from discrimination because of race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status and thereby to protect their interest in personal dignity." § 760.01(1), Fla. Stat. (2016). The FCRA provides that "[a]ll persons are entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodations without discrimination or segregation" on various grounds including "on the ground of" sex. § 760.08, Fla. Stat. (2016).

II. The Discriminating Dancers

Nevaeh Love bought a VIP ticket to attend a strip-show by male performers called the Black Chippendales.[1] The performance

[1] The show was apparently in the nature of a burlesque show rather than nude dancing, but this distinction is immaterial here.

took place in a rented lodge hall, Grotto Hall.[2] The performance was put on by an unincorporated association, Royalty-N-Heelz. Seating at the performance was first come, first served in the VIP section. Katoshia Young was a member of the association. Young asked Love to move from her chosen seat to a different seat because some of the performers were uncomfortable with Love's proximity based on her sex, which the performers perceived as male.

The performer with the stage name Fantasy testified at trial, "We are just not used to dancing for guys." The performer with the stage name Cowboy was especially adamant against the prospect of "someone who was anatomically male, but dressed as a woman, touching them while they were dancing," and threatened violence if that were to occur. No evidence was presented that Love had previously engaged in disruptive behavior, such as touching dancers against their will, when attending any other performance. And no evidence was presented that Love intended to engage in disruptive behavior at the Black Chippendales' show.

Love refused to move from her chosen seat. Instead, she got a refund and left the performance. The show apparently proceeded without Love in attendance.

III. The Trial Court Proceedings

Love filed a complaint with the Florida Commission on Human Relations (FCHR) alleging sex discrimination in how she was treated. The FCHR found "reasonable cause to believe that a discriminatory practice" in violation of the FCRA had occurred. *See* § 760.11(4), Fla. Stat. (2016). Love then sued Young, as a member of Royalty-N-Heelz. *See Guyton v. Howard*, 525 So. 2d 948, 956 (Fla. 1st DCA 1988) ("The individual members of an unincorporated association are personally liable for tortious acts which they individually commit or participate in, or which they authorize, assent to, or ratify.").

[2] Grotto is a fraternal organization consisting of members who must first be Masons.

The complaint alleged that Love suffered discrimination based on sex. It alleged that Love was forced to sit in the back of the show "because of Love's sex—that is, because Love is a transgendered woman." Later in the complaint Love alleged that Young had violated the FCRA "because of Love's sex." Near the conclusion of the complaint, Love again alleged that Young's actions were "because of Love's sex, i.e., because Love is a transgender woman."

Young answered the complaint with general denials of Love's allegations. Young's answer lacked any affirmative defenses and did not claim that "sex" as a protected class under the FCRA differs from "gender identity."[3]

A bench trial was conducted. Young's defenses were that she did not have exclusive control over the venue, that the show was marketed as a "ladies-only" show, and that Love's ticket did not entitle her to a front-row seat. Young did not contest that Love was entitled to protection under the FCRA and in fact claimed that Young "was only told at the outset that Nevaeh Love was a man, and not a transgender."

In her written closing argument, Young claimed that the facility where the performance occurred was not a public accommodation because it was a privately owned lodge. Young also claimed that she lacked any authority over the other members of Royalty-N-Heelz. Young again did not claim Love's transgender status was not protected under the FCRA, instead claiming that Love was biologically male and therefore properly excluded from a "ladies-only" function.

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[3] Young's one-and-a-half-page answer generally denied various averments in the complaint, as allowed by rule 1.110(c), Florida Rules of Civil Procedure. The answer included a denial of Love's allegation that she was entitled to damages under the FCRA, but it raised no affirmative defenses. *See* Fla. R. Civ. P. 1.140(b) (setting forth how defenses are presented).

Following receipt of the written closing arguments, the trial court found that since the private lodge was often rented out, including to Young's unincorporated association, the performance was a public accommodation under the FCRA. *See* § 760.02(11), Fla. Stat. (2016) (defining public accommodations to include "places of exhibition or entertainment"); § 760.07, Fla. Stat. (2016) (exempting "lodge halls or other similar facilities" from the definition of public accommodation if only made available "for public use occasionally or periodically"). The trial court further found that although Love attended the event at a public accommodation, and otherwise would have been protected by the FCRA, the sexual nature of the performance was such that the FCRA did not apply to her.[4] *See* §§ 760.01–.11 & 509.092, Fla. Stat. (2016). Love appeals the final judgment entered for Young.

IV. The Error in the Trial Court's Holding

The trial court correctly concluded that the performance was a public accommodation under section 760.02(11) and that Love suffered discrimination based on sex. The trial court erred, however, by applying the judge-made defense that the sexual nature of the performance entitled the dancers and organizers to exclude a patron based on sex. In doing so, the trial court did not follow established Florida law on statutory claims and their defenses. If the Legislature has created a cause of action (such as in the FCRA), any defense to the cause of action must also come from the Legislature.[5] The primary opinion adopts and expands on this erroneous holding.

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[4] The trial court noted that had the public accommodation been employment, "seating at a restaurant table," "a room at a hotel or inn" or even "an event in which the audience were passive observers of a performance, such as a ballet or musical concert," Love would have prevailed.

[5] Of course, a person may be excluded from a performance or moved to a less desirable seat for some lawful reason such as being disruptive or intoxicated. In that case, the person is being treated differently for a permissible basis, not because the person belongs to a class protected by the FCRA. *See, e.g.*, § 509.092, Fla. Stat. (allowing public lodging and food service establishments to exclude

The trial court's error is because of violation of separation of powers principles. "If the courts limit or abrogate such legislative enactments through judicial policies, separation of powers issues are created, and that tension must be resolved in favor of the Legislature's right to act in this area." *Comptech Intern., Inc. v. Milam Commerce Park, Ltd.,* 753 So. 2d 1219, 1222 (Fla. 1999). "[T]he statutory claim superseded any common law causes of action. We find the same principle and reasoning applies to common law defenses." *Kilpatrick v. Sklar*, 548 So. 2d 215, 218 (Fla. 1989); *see also Davidson v. Berg*, 243 So. 3d 489, 491 (Fla. 1st DCA 2018).[6]

The FCRA does not except out sexually suggestive public performances from the definition of "public accommodations" in section 760.02(11), nor does it have an exception for minor violations. Instead, the FCRA requires "full and equal enjoyment" of "facilities, privileges, advantages, and accommodations." § 760.08. Being treated differently than others similarly situated based on a protected classification is unlawful discrimination under the FCRA. *Id.* It does not matter, as argued by Young at trial, that the new seat proposed for Love was only a few feet away or others might have preferred the proffered seat over the one Love had selected. A little discrimination is still wrong and unlawful.[7]

"any person who is objectionable or undesirable to the operator" so long as the person is not excluded based on unlawful discrimination). Again, no evidence was offered that Love was disruptive or intended to become disruptive.

[6] Statutory defenses such as failure to comply with conditions precedent in the FRCA or that the statute of limitations has run remain viable. And defenses permitted by the Florida Rules of Civil Procedure, such as lack of jurisdiction or failure to state a cause of action, are available in all civil actions. *See* Fla. R. Civ. P. 1.010 (authors' cmt. 1967) (stating that the Florida Rules of Civil Procedure cover all civil actions including statutory actions); Fla. R. Civ. P. 1.140 (setting forth how defenses are asserted).

[7] For instance, being told to move back one row in a theater because of race is just as unlawful as being told instead to move to

I therefore respectfully submit that the learned trial judge was correct in finding a violation of the FCRA but then erred by creating and applying a judge-made defense to that violation. The nature of the public accommodation where the unlawful discrimination occurred and the extent of the unlawful discrimination should be relevant only as to the amount of damages the aggrieved person may recover under section 760.11(5), Florida Statutes.[8]

When Love was forced to move from her chosen seat at a public accommodation based on sex, she suffered unlawful discrimination and is entitled to damages under the FCRA to "protect [her] interest in personal dignity." § 760.01. I submit that the trial judge erred in creating a judge-made exception to the FCRA and would reverse for further proceedings.

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the balcony or being excluded altogether. This is so even though some patrons might prefer to sit farther back or in the balcony. "In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful." *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), *overruled by Brown v. Board of Ed. of Topeka, Shawnee, County, Kan.*, 347 U.S. 483 (1954). When dealing with open seating within a particular section of seats, equality means keeping one's chosen seat.

[8] The affront suffered by Love is certainly less than some plaintiffs have suffered over the history of civil rights litigation going back to Reconstruction. Since an award of monetary damages is how an aggrieved person is compensated for a violation of the FCRA, it is reasonable that the quantum of damages awarded may differ based on the extent and nature of the discrimination. But because the Legislature has determined that all unlawful discrimination in public accommodation violates the law and so is compensable, judges should not make or approve exceptions to what the Legislature has created.

V. The Primary Opinion Errs in Affirming

The primary opinion affirms based on the trial court's erroneous reasoning but expands on it to note the various laws prohibiting, among other things, battery and sexual battery. No one should be touched against that person's will. But by electing to dance at a public accommodation, the dancers were subject to the FCRA's prohibition against discrimination, including based on sex, regardless of the dancers' opinions. *See Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1727 (2018) ("Nevertheless, while those religious and philosophical objections are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law."). Nor was there any evidence that Love intended to engage in any unauthorized touching.[9]

Many public accommodations involve matters of a sexual nature.[10] Motion picture theaters are public accommodations no

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[9] So we can leave for another day whether a person who chooses employment as an erotic dancer in a public accommodation thereby consents to be touched by any patron regardless of sex or any other protected classification. Additionally, there was no evidence that the dancers planned to permit any touching to the point that the dancers would have been engaging in unnatural and lascivious acts, exposure of sexual organs, prostitution, or obscenity. *See* §§ 800.02, 800.03, 796.07 & 847.011(4), Fla. Stat. (2016). Any such actions would be illegal, regardless of the audience or the consent of the dancers.

[10] Along with the FCHR not creating an exception to Love's complaint based on the sexually explicit nature of the performance, the United States Equal Employment Opportunity Commission has applied Title VII of the Civil Rights Act, on which the FCRA is patterned, to prohibit discrimination based on sex for a male bartender seeking employment at a strip club. *See EEOC v. Gold, Inc. d/b/a Sammy's Gentlemen's Club*, 2019 WL 7169527 (N.D.Fla. Dec. 10, 2019); Press Release, EEOC, Gold, Inc./Sammy's Gentlemen's Club to Pay $20,000 to Settle EEOC Sex

matter if they are showing just G-rated films, or R-, NC-17-, or even X-rated movies. Hotels are public accommodations no matter if they are family-friendly luxury resorts at a theme park or by-the-hour motor courts specializing in intimate rendezvous. Restaurants are public accommodations no matter if they are serving kid-friendly buffets or romantic couples' dinners. Playhouses are public accommodations no matter if they are showing sanitized children's fare or the most outrageous adult productions. The statutory definition of "public accommodation" under section 760.02(11)(a)-(d) is not dependent on the nature of the activities occurring in the facility and does not except out sexual content. As discussed above, judges should not create defenses to statutory causes of action. I respectfully submit that the primary opinion errs in doing so.

VI. The Concurring Opinion Also Errs

The concurring opinion would affirm based on the Grotto Hall not being a public accommodation. The trial court correctly rejected that contention, and Young does not argue this issue as grounds for affirmance. I agree with the concurring opinion that had the trial court been correct in entering judgment for Young, we could affirm even if its rationale were wrong. But on this issue, I believe the trial court was correct while at the same time the trial court's creation of a judge-made defense to a statutory FCRA action warrants reversal.

Exempted from the definition of public accommodations under section 760.02(11)(a)-(d), are "lodge halls or other similar facilities of private organizations which are made available for public use occasionally or periodically." § 760.07, Fla. Stat.[11] Young and the

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Discrimination Lawsuit (Dec. 10, 2019), https://www.eeoc.gov/newsroom/gold-inc-sammys-gentlemens-club-pay-20000-settle-eeoc-sex-discrimination-lawsuit. The EEOC did not create an exception due to the sexualized business of the employer.

[11] Title II of the federal Civil Rights Act of 1964 also protects against discrimination in public accommodations. *See* 42 U.S.C. § 2002a. The federal definition of public accommodations would

concurring opinion do not dispute that Royalty-N-Heelz was engaging in a public use when it rented Grotto Hall and hosted a public performance there. The question is whether Grotto Hall was rented out only "occasionally or periodically" so that it did not qualify as a public accommodation. Those words are not defined by chapter 760, so we must look to the words' plain meaning, *see Ham v. Portfolio Recovery Assocs., LLC*, 308 So. 3d 942, 946 (Fla. 2020), if the plain meaning can be determined.

As the concurring opinion notes, the trial court heard undisputed testimony that Grotto Hall hosted charity bingo every week, dances around once a month, and allowed third-party rentals around once a month, all open to the public. Unlike temporal words such as weekly, monthly, or yearly, "occasionally or periodically" are imprecise terms. *See Occasionally*, MERRIAM-WEBSTER ONLINE DICTIONARY, https://merriam-webster.com/dictionary/occasionally (defining "occasionally" to mean "now and then" and listing "here and there" and "sometimes" as synonyms) (last visited Mar. 31, 2021); *Periodically*, MERRIAM-WEBSTER ONLINE DICTIONARY, https://merriam-webster.com/dictionary/periodically (defining "periodically" to mean "at regular intervals of time" and "from time to time: frequently") (last visited Mar. 31, 2021). But I believe the public use of Grotto Hall occurred more than just occasionally or periodically, as correctly found by the trial court.

The term "occasional" has been interpreted as "happening irregularly and infrequently" when discussing the meaning of the word in another context. *Citizen Prop. Ins. Corp. v. Wise*, 926 So. 2d 403, 403 n. 2 (citing THE OXFORD ENCYCLOPEDIC ENGLISH DICTIONARY, 1004 (3rd ed. 1996)). WEBSTER'S THIRD NEW INTERNATIONAL UNABRIDGED DICTIONARY (1993) also defines "occasional" as "occurring irregularly" or "infrequent." Events occurring around six times per month are not irregular or

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apply to the rental of Grotto Hall since the federal Act applies to private clubs "to the extent that the facilities of such establishment are made available to" nonmembers like other public accommodations. 42 U.S.C. § 2002a(e). The FCRA's provision is more restrictive.

infrequent events. The bingo was a regular event while the dances and rentals to the public were frequent events. I do not believe that Grotto Hall was made available for public use only occasionally so as to be exempt from the FCRA.

The definition of periodically is even less precise. By its plain meaning, periodically could mean as often as hourly or daily. But such a restrictive reading of "periodically" would exempt out any private club from the provisions of the FCRA. If it was the Legislature's intent to except all private organizations they could have done so. *See Joshua v. City of Gainesville*, 768 So. 2d 432, 435 (Fla. 2000) (noting that given the Legislature's directive to apply a liberal reading, an unclear term in the FCRA should not be given a literal meaning "when to do so would lead to an unreasonable conclusion or defeat legislative intent or result in a manifest incongruity") (cleaned up). Public use of Grotto Hall occurred more than just periodically.

Although "occasionally or periodically" are not defined by the FCRA, it does have a subsection, as noted in *Joshua*, which helps with our interpretation if these terms are ambiguous. *Id.* at 435. Section 760.01(3) states that the FCRA "shall be construed according to the fair import of its terms and shall be liberally construed to further the general purposes stated in this section and the special purposes of the particular provision involved." As then-Judge Canady stated in *Gallagher v. Manatee County*, "The rule cannot be used to defeat the plain meaning of the statute. Instead, it guides the interpreter in making an interpretative choice when the text may *reasonably* be understood in more than one way." 927 So. 2d 914, 919 (Fla. 2d DCA 2006); *see also Joshua*, 768 So. 2d at 435. If the concurring opinion's reading of "occasionally or periodically" as well as my reading are reasonable, we should err on the side of a liberal reading of those terms as directed by the Legislature.

Although these terms are imprecise, hosting six or more public events during each month certainly seems to exceed the definition of occasionally or periodically. I do not think a tipsy coachman application of the lodge hall exception to the definition of public accommodations applies here and would not use that as a basis to affirm.

VII. Love Was Protected by the FCRA

The FCRA protects Love from the discrimination she suffered. The claim raised was discrimination based on sex. But even if we consider the claim as one based on gender identity, the United States Supreme Court has recently held that discrimination based on gender identity is discrimination based on sex.

A. Sex, Not Gender Identity, Was the Issue Raised and Adjudicated Below

The record supports that the claim under the FCRA was based on *sex* and that discrimination in a public accommodation based on sex violates the FCRA. Love's complaint, as discussed above, alleged that Love suffered discrimination based on *sex*. The testimony from the dancer Fantasy, quoted above, shows that the dancers did not want to perform for a person of a certain sex, that is for someone the dancers believed to be another male. Fantasy testified that he and the other dancers were told by Young that "we had a guy that was in the building." The dancers' proposal to resolve the issue was "he could sit in the next row of chairs, and just not in the front."

The discrimination Love suffered in being forced to move from her chosen seat was not because she is transgender, but because the dancers were told and believed a male was present in the VIP section. Young was informed "a male dressed as a female" was in attendance. That Love was biologically male but identified as female was not the reason for the discrimination against Love. It was because of the dancers' sex-based objection in not wanting to dance for a "guy" — any guy whether a cisgender "guy" or a transgender "guy." Young's response to the dancers' objections — asking Love to relocate her chosen seat — was discrimination based on *sex*.

The FCRA lacks any exception for one-sex-only events, contrary to Young's argument at trial. The plain language from the Legislature does not exempt "ladies-only," "men-only," or "no guys allowed" events. As discussed above, the judiciary cannot

create a common law defense to a statutory cause of action. In fact, allowing a one-sex-only event in a public accommodation would eviscerate the FCRA. If one-sex-only events were allowed in public accommodations, what would stop a return to the shameful days of whites-only lunch counters and Christians-only hotels? Preventing this sort of discrimination in public accommodations is the entire reason for the FCRA. *See* § 760.01(2). Love suffered unlawful discrimination because of sex when the dancers in a public accommodation thought she was male and wanted her moved from her chosen seat or excluded. For that reason, she has proved a violation of the FCRA.

B. The Supreme Court Has Held Discrimination Based on Gender Identity Is Discrimination Based on Sex

Here, it was only after all appellate briefing was complete that this court ordered supplemental briefing to address *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731 (2020).[12] And it was only in her supplemental brief that Young raised for the first time that the FCRA did not apply to Love's claim. Neither the primary nor the concurring opinions address this issue despite their request for supplemental briefing. Nonetheless, I believe it is appropriate to discuss this issue which this court has raised in this case.[13]

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[12] I dissented from the order requiring supplemental briefing on *Bostock* because I thought the holding was clear. Although I thought it inappropriate to elaborate on my dissent to the order, it was because Young had not defended on the issue at trial or on appeal at that point, because Love's suit was based on sex, and because even if gender identity were at issue *Bostock* would no doubt apply.

[13] The primary opinion objects that my mention of this topic is dicta. I would first point out that it was the other panel members who raised the "on the basis of sex" issue in the order requiring supplemental briefing. Second, I agree that this discussion is dicta, in fact everything in every dissenting opinion is dicta since by dissenting a judge or justice refuses to acquiesce to the holding of the majority. Third, since there is no opinion here joined or concurred in by at least two judges, I respectfully submit that both the primary and concurring opinions are also dicta as to anything

Even if Love had made a claim under the FCRA solely for "gender identity," that would be encompassed under the FCRA's protection against discrimination based on sex.[14] To my knowledge, no Florida appellate decision has passed on this issue.[15] And we lack the benefit of the issue having been raised and adjudicated below. Even so, as mentioned above, if there is any ambiguity, the FCRA "shall be liberally construed to further the general purposes stated in this section." § 760.01(3). Those general purposes include "to secure for all individuals within the state freedom from discrimination" as well as "to protect their interest in personal dignity" and "to promote the interests, rights, and privileges of individuals within the state." § 760.01(2).

The FCRA does not define sex and provides no indication that "sex" is limited to a binary choice based on a person's sexual organs or genetics alone. To the contrary, the Florida Constitution seems to equate sex and gender. Article I, section 2 in the Declaration of

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beyond affirming the trial court. *See* Art. V, § 4(a), Fla. Const.; *Greene v. Massey*, 384 So. 2d 24, 27 (Fla. 1980); Harry Lee Anstead, Gerald Kogan, Thomas D. Hall & Craig Waters, *The Operation and Jurisdiction of the Florida Supreme Court*, 29 NOVA L. REV. 431, 460 (2005).

[14] "Gender identity" is defined as "a person's internal sense of being male, female, some combination of male and female, or neither male nor female." *Gender identity*, MERRIAM-WEBSTER ONLINE DICTIONARY, https://merriam-webster.com/dictionary/gender%20identity (last visited Mar. 31, 2021).

[15] The FCHR has recently published its policy that the FCRA and other Florida civil rights laws cover discrimination based on "non-conformity with gender stereotypes." FLORIDA COMMISSION ON HUMAN RELATIONS, https://fchr.myflorida.com/sexual-discrimination (last visited Mar. 31, 2021). That policy receives no deference from the Florida courts. *See* Art. V, § 21. But I believe the policy is a correct reading of "because of sex" as explained in *Bostock*.

Rights defines basic rights and states, "All natural persons, female and male alike, are equal before the law." The Legislature uses "gender" to mean "sex" in many statutes. *See, e.g,* § 1.01(2), Fla. Stat. (2016) ("Gender-specific language includes the other gender and neuter."); § 27.5302, Fla. Stat. (2016) (prohibiting salary discrimination among assistant public defenders "on the basis of gender or race"); § 28.34, Fla. Stat. (2016) (prohibiting salary discrimination among clerk of court employees "on the basis of gender or race"); § 985.02, Fla. Stat. (2016) (requiring "gender-specific" programs in the juvenile justice system because "[y]oung women and men" need different treatment and services); § 1000.05(2)(a), Fla. Stat. (2016) (prohibiting discrimination in Florida public schools "on the basis of race, ethnicity, national origin, gender, disability, or marital status"); § 1006.71, Fla. Stat. (2016) ("Gender equity in intercollegiate athletics").

"The Florida Civil Rights Act is patterned after Title VII, and therefore federal case law regarding Title VII is applicable." *Castleberry v. Edward M. Chadbourne, Inc.*, 810 So. 2d 1028, 1030 n.3 (Fla. 1st DCA 2002); *see also Byrd v. BT Foods, Inc.*, 948 So. 2d 921 (Fla. 4th DCA 2007); *Hinton v. Supervision Intern., Inc.*, 942 So. 2d 986 (Fla. 5th DCA 2006). Although in her supplemental brief Young argues that *Bostock* is inapplicable to a claim of discrimination in a public accommodation, Young cites no cases in which a Florida court has limited the application of federal Title VII caselaw to only claims of employment discrimination. Such a distinction would contradict the language and intent of the FCRA. *See* § 760.07 (providing a cause of action for unlawful discrimination "in the areas of education, employment, or public accommodations").

In *Bostock*, Justice Gorsuch, writing for the 6-3 majority, interpreted the definition of unlawful discrimination "because of sex" as prohibited by Title VII. *Bostock*, 140 S. Ct. at 1738. As discussed above, the FCRA has identical language. *See* § 760.01(2).[16] The question in *Bostock* was whether "sex" was

[16] Section 760.08 prohibits discrimination "on the ground of" sex. This has the same meaning as "because of." *See Ground*, MERRIAM-WEBSTER ONLINE DICTIONARY, https://merriam-

limited "only to biological distinctions between male and female." *Id.* at 1739. Justice Gorsuch carefully analyzed the meaning of "because of sex" and concluded that it includes discrimination against homosexuals or transgender persons. "That's because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." *Id.* at 1741.

Justice Gorsuch gave this example:

> Or take an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. Again, the individual employee's sex plays an unmistakable and impermissible role in the discharge decision.

Id. at 1741–42. In the context of a public accommodation, if the dancers had discriminated against Love because she was transgender, Justice Gorsuch's example would apply. Patrons who identified as female at birth could watch the performance in their chosen seats; while Love, who now identifies as female, could not remain in hers. This is discrimination because of sex.

When someone suffers discrimination because of sex, any biological distinction between sexes is immaterial in most cases. It is much more likely that the discrimination stems from how the person is perceived by others. *See Adams, by and through Kasper v. School Bd. of St. Johns County, Florida*, 968 F.3d 1286, 1309 (11th Cir. 2020) (citing *Bostock* in affirming the district court and holding that the "meaning of 'sex' in Title IX includes 'gender identity'").

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webster.com/dictionary/ground (defining "ground" to mean "a basis for belief, action or argument") (last visited Mar. 31, 2021).

Love is called transgender because she does not present as how society perceives a stereotypical male. *See Whitaker v. Kenosha Unified Sch. District No. 1 Bd. of Ed.*, 858 F.3d 1034, 1048 (7th Cir. 2017) ("By definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth.").[17] As set forth in the complaint, although biologically male, "she identifies, lives, and presents herself to the world as a woman." If Love suffered discrimination because she did not conform to society's stereotypical expectations of how a biological male should dress and conform to gender roles, that is undoubtedly discrimination because of sex. So regardless of Young's argument in the supplemental briefing ordered by this court, we should find Love protected by the FCRA.

VIII. Conclusion

Nevaeh Love suffered discrimination because of sex when she was asked to move from her chosen seat at a public accommodation after the dancers objected to performing for her based their perception that she was male. The trial judge erred in creating a judge-made defense to the Florida Civil Rights Act based on the sexual nature of the performance. I respectfully submit that the primary opinion errs by expanding on that judge-made defense and the concurring opinion errs by concluding that Grotto Hall was not a public accommodation.

Love's claim was for discrimination based on sex, and one-sex-only limitations in public accommodations violate the FCRA. Finally, even if it were appropriate to analyze Love's claim as based on gender identity, discrimination because of gender identity falls under the FCRA's protection against discrimination based on sex. Love is entitled to all the rights which the Legislature acknowledged in creating the FCRA. As such, I would reverse and remand for further proceedings. Because the primary

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[17] In *Whitaker*, the court allowed a claim for discrimination on the basis of sex under Title IX of the Civil Rights Act of 1964 and noted that other courts "have adopted this reasoning, finding that a transgender plaintiff can state a claim under Title VII for sex discrimination on the basis of a sex-stereotyping theory." 858 F.3d at 1049.

and concurring opinions affirm the trial court's decision, I respectfully dissent.

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