AMERICAN BANKRUPTCY INSTITUTE

2022 Annual Spring Meeting

A Primer on Gender Identity and Pronoun Usage

Presented by ABI's Diversity Working Group

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CONCURRENT SESSION

2022

A Primer on Gender Identity and Pronoun Usage

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Learning Goals

- Why is understanding gender identity important?
- What are the key concepts and terms?
  - Gender identity/gender expression/sexual orientation
  - Pronouns
- How to implement gender identity/expression inclusion in our professional lives
- Legal Construct

Understanding Gender Identity and Expression: LGBTQIA+ Community

- Fosters inclusion of ABI's members, staff and community:
  - Safe space/diversity
  - Retention: Diverse exceptional skills and abilities
- Other broader considerations

The Business Case for

- Diversity, Equity and Inclusion
  - Our firms/work environments
  - Recruitment and retention
  - Clients
  - Business Communities
- Understanding Gender Identity and Expression
  - Values in our society evolve
  - Values in our professional communities evolve
  - Language evolves
  - Self-expression increases

LGBTQQIAA+

Sexual Orientation and Gender Identity Terms

Lesbian
Gay
Bisexual
Transgender
Queer
Questioning
Intersex
Asexual
Aromantic
+ (plus)

Gender Identity

- One's internal sense of being male, female, neither of these, both, or another gender(s)
- People are multi-dimensional
  - Intersectionality
  - Social justice implications

Gender Expression or Presentation

- People presenting their identity through appearance
  - Clothing
  - Hairstyle
  - Accessories
  - Other (expression)

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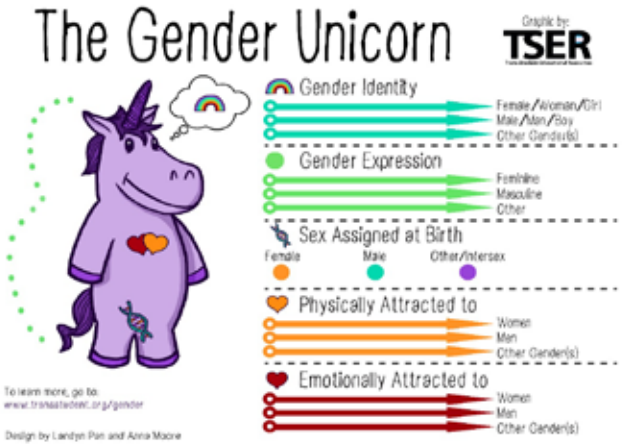
Intersection of Sexual Orientation, Gender Identity and Expression



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A Primer on Pronouns

- Personal pronouns:
  - She is seeking to learn about diversity
  - They are advocating for diversity
- Gender neutral pronouns:
  - The *singular* "they" and "them," among others
- Honorifics:
  - Mr/Miss/Ms/Mrs/Mx/M

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A Primer on Pronouns (cont.)

Pronouns-- A How To Guide

Subject: ____[1] laughed at the notion of a gender binary.

Object: They tried to convince ____[2] that asexuality does not exist.

Possessive: ____[3] favorite color is unknown.

Possessive Pronoun: The pronoun card is ____[4].

Reflexive: ____[1] think(s) highly of ____[5].

The pronoun list on the reverse is not an exhaustive list.
It is good practice to ask which pronouns a person uses.

1	2	3	4	5
(f)ae	(f)aer	(f)aer	(f)aers	(f)aerself
e/ey	em	eir	eirs	eirself
he	him	his	his	himself
per	per	pers	pers	perself
she	her	her	hers	herself
they	them	their	theirs	themself
ve	ver	vis	vis	verself
xe	xem	xyr	xyrs	xemself
ze/zie	hir	hir	hirs	hirself

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Best Practices

- When you meet someone new
- How to handle a mistake
- How to incorporate inclusive language in a variety of settings
- How to intervene as a bystander
- How to act as an ally
- Workplace transitions
- Workplace
- Clients
- Court
- Colleagues
- "Industry"

Legal Construct

- Federal and State Non-Discrimination Laws
  - Civil Rights Act and *Bostock v. Clayton County, GA*
  - Americans with Disabilities Act (ADA)
  - State-level Human Rights and Non-Discrimination Laws
- Biden Administration Executive Orders
- Health Care
  - HIPAA
  - Affordable Care Act, Section 1557
- Education
  - Title IX
  - State Antidiscrimination Laws and Antibullying Laws
  - Local Laws and School District Policies

Legal Hot Topics

- Freedom of speech – *303 Creative LLC v. Elenis*
- Gender affirming care for transgender youth
- Rights of multiple parents
- Worldwide asylum
- *Roe v. Wade* and substantive due process
- Discrimination – *YU Pride Alliance v. Yeshiva University*
- Ongoing consumer debt-related issues

Key Takeaways

1. Refer to others by the name and pronouns they have indicated are safe to use in that setting
2. Treat people based on who they say they are
3. If in doubt, respectfully ask
4. Language validates identity
5. Use gender neutral language
6. Use caution with template documents
7. Don't make assumptions about sexual orientation and gender identity, both generally and based on appearance
8. There is no right or wrong way to perform gender

Questions

Additional Resources

- *Abbott v. Doe (Tex. Ct. App., Mar. 9, 2022, No. 03-22-00107-CV) 2022 Tex. App. LEXIS 1607.*
- *Abbott v. Doe (Tex. Ct. App., Mar. 21, 2022, No. 03-22-00126-CV) 2022 Tex. App. LEXIS 1927.*
- *Arkansas House Bill 1570.*
- *Biden Jr, Joseph R., "Executive Order: Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation," January 20, 2021.*
- *Biden Jr, Joseph R., "Executive Order: Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity," March 8, 2021.*
- *Biden Jr, Joseph R., "Memorandum on Advancing the Human Rights of Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex Persons Around the World," February 4, 2021.*
- *Bostock v. Clayton County, Georgia, _U.S. _, Slip Op. No. 17–1618, June 15, 2020.*
- *Brandt v. Rutledge, "Complaint for Declaratory and Injunctive Relief," No. 4: 21 cv 450–JM (E. D. Ark., May 5, 2021).*
- *Center of Excellence, "Sexual Orientation, Gender Identity & Expression Glossary of Terms"*
- *Cornell University Division of Human Resources, "The Cornell University Transgender Guide to Transitioning & Gender Affirmation in the Workplace."*
- *303 Creative LLC v. Elenis, 6 F4th 1160 (10th Cir. 2021).*
- *303 Creative LLC v. Elenis, "Order List," cert. denied, February 22, 2022.*
- *Defazio, Dena and Sciotti, Michael, "When an Employee Transitions: What Every Employer Should Know," US LAW Magazine, Summer 2021.*
- *Department of Education, "Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of Bostock v. Clayton County," 34 CFR 1 (June 22, 2021).*
- *Department of Health and Human Services, "Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority," 42 CFR 438, et al. (June 18, 2020)*

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- *Department of Health and Human Services, "Notification of Interpretation and Enforcement of Section 1557 of the Affordable Care Act and Title IX of the Education Amendments of 1972," 45 CFR 86, et al. (May 25, 2021).*
- *Division of Human Rights New York State, "Guidance on Protections from Gender Identity Discrimination Under the New York State Human Rights Law."*
- *Doe v. Abbott, "Plaintiffs' Original Petition and Application for Temporary Restraining Order, Temporary Injunction, Permanent Injunction, and Request for Declaratory Relief," No. D-1-GN-22-000977 (Travis County, Texas), March 1, 2022.*
- *Law360 Article, "Justices to Weigh Web Designer's No-LGBTQ Wedding Policy," February 22, 2022.*
- *Law360 Article, "Parents Sue to Block Texas' Transgender 'Child Abuse' Policy," March 1, 2022.*
- *Law360 Article, "Texas Judge Blocks Trans Child Abuse Probes Statewide," March 11, 2022.*
- *Law360 Article, "Texas Deepens Puberty-Blocker Probe into Endo and AbbVie," March 24, 2022.*
- *New York Judicial Ethics Opinion 21-09, January 28, 2021.*
- *Nuprad Consulting LLC, "Shared Language & Terms."*
- *Paxton, Ken (Attorney General of Texas), "Texas Advisory Opinion No. KP-0401," February 18, 2022.*
- *State Bar News 2022, Green, Paula L., "How Lawyers Can Make Sure LGBTQ Clients Don't Face Discrimination," Annual Meeting 2022.*
- *Texas Office of the Attorney General Consumer Protection Division, "Civil Investigative Demand – AbbVie Inc," March 24, 2022.*
- *Texas Office of the Attorney General Consumer Protection Division, "Civil Investigative Demand – Endo Pharmaceuticals Inc," March 24, 2022.*
- *YU Pride Alliance v. Yeshiva University, Complaint, No. 1540101-2021, Supreme Court of the State of New York, April 26, 2021.*

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Panelist Bios

Dena DeFazio is an associate at Barclay Damon LLP, and focuses her practice on regulatory and compliance issues in the health care and human services industry. She assists health care and human services providers with regulatory and compliance matters, including audits and investigations, reimbursement issues, the provision of telehealth services, health information privacy and security compliance, including HIPAA and the 21st Century Cures Act, and restructuring matters. Dena has experience working with behavioral health providers, home care agencies, mental health providers, skilled nursing facilities, and agencies serving individuals with developmental disabilities. She also routinely assists with research, writing, and presentations, and drafts memoranda and other transactional and litigation documents.

Dena also routinely conducts trainings and presentations for health care practitioners, administrators, and employees on supporting the LGBTQIA+ community in professional health care environments. She also assists employers with labor and employment–related matters pertaining to the LGBTQIA+ workforce.

Dena graduated summa cum laude from Albany Law School, where she was a member of the Albany Law Review, President of OUTLaw (Albany Law's LGBTQAI+ and allied student group), and the Northern Regional Chair of the National LGBT Bar Association's Law Student Congress. Prior to law school, Dena earned her MSW from the University at Buffalo, and worked as a social worker, providing supervised visitation and clinical counseling to parents with children in foster care.

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Panelist Bios (cont.)

Nu'Rodney Prad is a native of Montgomery, Alabama. He earned a Bachelor of Arts in political science and a Master of Science in College Student Personnel with emphasis on Counseling – both at the University of Central Arkansas. He is currently completing coursework for a doctorate in education at Temple University's College of Education and Human Development. His research has focused on activism, intersectionality, race, gender, and sexuality.

Currently, Nu'Rodney is the Director of Student Engagement for Institutional Diversity, Equity, Advocacy and Leadership at Temple University. In this role, Nu'Rodney advocates for students while providing programming, workshops, and dialogues surrounding inclusion and social justice issues to the Temple community. He also serves as an advisor to various cultural student organizations at the university. Finally, Nu'Rodney is the President of Mazzoni Center's Board of Directors. Mazzoni Center serves over 38,000 patients and clients in the greater Philadelphia area and focuses on supporting the LGBTQIA+ community.

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Panelist Bios (cont.)

Shain Filcher brings a wide breadth of personal and professional experience fighting for LGBTQ+ people of all ages, particularly LGBTQ+ youth in crisis. Currently, Shain serves as a Staff Attorney within the LGBTQ+ Legal Project at Legal Services of the Hudson Valley. In this role, they work on a wide variety of legal issues specific to members of the LGBTQ+ communities, including discrimination based on sexual orientation, gender identity, and/or gender expression, court-ordered name changes, accessing affirming healthcare, and recognition of legal parentage.

Active in the legal community both locally and nationwide, they spend a great deal of time working within bar associations dedicated to promoting justice in and through the legal profession for all LGBTQ+ people. Shain is the current President of the LGBT Bar Association and Foundation of Greater New York ("LeGaL"). Additionally, they have previously served on the National Conference of Bar Presidents Membership Communications Committee and Membership and Diversity Committee of the National LGBTQ+ Bar Association. They were named to the National LGBTQ+ Bar Association's "Best LGBTQ+ Lawyers Under 40 Class of 2021."

Shain received their law degree from University of Oregon School of Law and BA from the University of Nebraska-Lincoln.

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Moderator Bio

Allen G. Kadish, a restructuring attorney at Archer & Greiner, P.C., in New York, focuses his practice in the areas of corporate crisis management, complex transactions, Chapter 11 restructurings, workouts, creditors' rights, business law and business litigation. His clients include distressed and non-distressed businesses in transition, corporate borrowers in debt transactions, debtors, creditors, lenders, vendors, fiduciaries, purchasers, investors, committees, professionals and others in- and out-of-court. Allen represents parties involved with reorganization and restructuring issues in a wide range of industries, including airline, arts and entertainment, automotive, communications, construction, e-commerce, electronics, energy, environmental, fashion, financial services, food and beverage, gaming, healthcare, investment capital, jewelry, manufacturing, media, oil and gas services, real estate, retail, sports, technology and transportation.

Allen is a qualified mediator, certified by the American Bankruptcy Institute/St. John's University School of Law, and is an approved mediator for the United States Bankruptcy Courts for the Southern and Eastern Districts of New York. Allen has conducted mediations in private commercial disputes, business bankruptcy cases and bankruptcy mega-cases.

In the restructuring industry, Allen is active in the American Bankruptcy Institute, the Turnaround Management Association and workOUT Professionals.

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ABI Presentation
Gender Identity and Terminology
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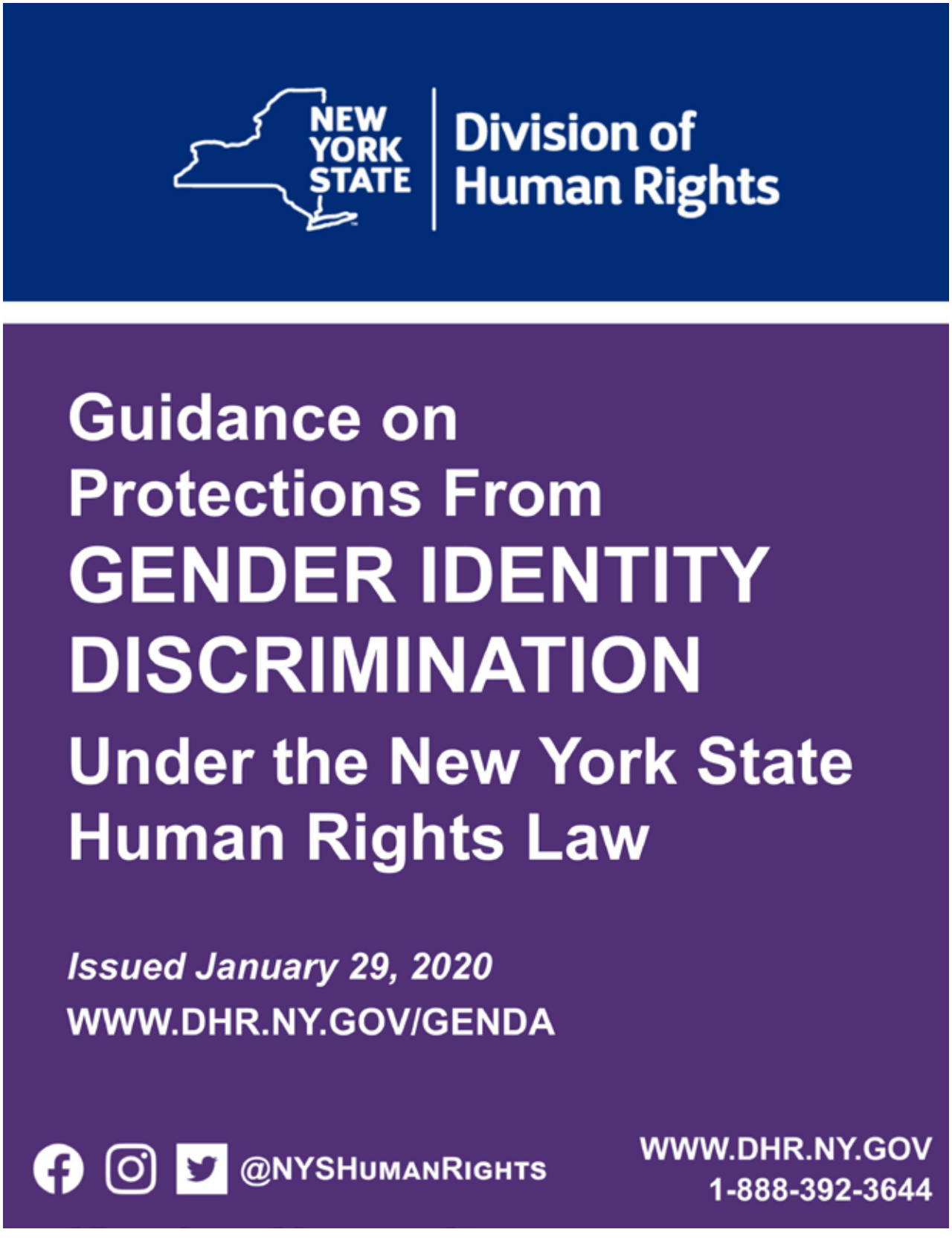
NEW YORK STATE
Division of Human Rights
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NEW YORK STATE | Division of Human Rights

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GUIDANCE ON PROTECTIONS FROM GENDER IDENTITY DISCRIMINATION UNDER THE NEW YORK HUMAN RIGHTS LAW

On January 25, 2019, the New York State Human Rights Law (HRL) was amended to explicitly include "gender identity or expression" as a protected class in all areas of jurisdiction, including employment, places of public accommodation, public and private housing, educational institutions and credit. N.Y. Exec. L §§ 296, 296-a & 296-b. This amendment is known as the Gender Expression Non-Discrimination Act (GENDA).

GENDA defines "gender identity or expression" as "a person's actual or perceived gender-related identity, appearance, behavior, expression, or other gender-related characteristic regardless of the sex assigned to that person at birth, including, but not limited to, the status of being transgender." Exec. L. § 292(35).

Unlawful discrimination because of gender identity or expression can include:

- Questions about gender identity or expression, or assigned sex at birth, such as in a job or housing interview;
- Refusing to hire for a job or to rent an apartment;
- Denying equal access to places of public accommodation, to a school, or to credit;
- Terminating employment or housing;
- Denying the use of restrooms or other facilities consistent with a person's gender identity;
- Asking a transgender person to use a single-occupancy restroom because of someone else's concerns;
- Requiring individuals to show medical or other documents in order to use facilities, such as restrooms, locker rooms or residential facilities, consistent with their gender identity;
- Utilizing grooming, uniform or appearance standards based on sex stereotypes;
- Providing benefits, leave or reasonable accommodations that differ based on gender;
- Refusing to use an individual's requested name or pronouns;
- Subjecting an individual to harassment at work, school or places of public accommodation, or in connection with housing.

This guidance will explain the various areas in which gender identity discrimination can occur, including employment, housing, places of public accommodation and schools, and provide examples of discrimination. It will also provide information about how the Division of Human Rights can protect victims of gender identity discrimination.

GENDER IDENTITY PROTECTION IN NEW YORK STATE

The Division of Human Rights (DHR or Division) is the agency charged with the enforcement of the New York State Human Rights Law (HRL). The passage of GENDA makes clear to all New Yorkers that discrimination based on gender identity or expression is unlawful and that victims have recourse at DHR to vindicate their rights. DHR provides an efficient and cost-free process in which complaints alleging discrimination are promptly investigated and adjudicated, with monetary and other remedies awarded by DHR when discrimination is found.

As early as 1977, it was recognized by a New York court that sex discrimination claims under the Human Rights Law may be brought by individuals alleging discrimination because of their gender identity. In *Richards v. U.S. Tennis Association*, 93 Misc.2d 713 (Sup.Ct. N.Y. Co. 1977), the Court held a requirement that plaintiff, a professional tennis player who had undergone gender affirming surgery, pass the sex-chromatin test in order to be eligible to participate in the women's tournament was grossly unfair, discriminatory and inequitable, and violated plaintiff's rights under the New York Human Rights Law.

Since 1976, DHR has maintained a policy of accepting complaints alleging discrimination on the basis of gender identity or expression, under the protected classes of sex and, where appropriate, disability. In 2016, DHR adopted regulations to further protect individuals discriminated against based on their gender identity, which enshrined DHR's longstanding practice of accepting HRL complaints alleging discrimination because of gender identity or expression. 9 NYCRR § 466.13.

The DHR regulations make clear that in New York, gender dysphoria is considered a medical condition that falls within the broad definition of disability under the HRL. 9 NYCRR 466.13(d). Individuals with disabilities are entitled to reasonable accommodations in employment as long as it does not impose an undue hardship to the employer—a stark contrast to federal disability discrimination law, which excludes medical conditions related to gender identity or expression.

In 2018, the New York State Appellate Division recognized that a woman who identified as transgender had been discriminated against on the basis of sex and disability. In *Advanced Recovery, Inc. v. Fuller*, 162 A.D.3d 659 (2d Dept. 2018), the complainant worked as an auto mechanic. During her employment, she was diagnosed with gender dysphoria and transitioned to female. She began wearing clothing traditionally considered female. After complainant presented her supervisor with a court order changing her legal name to Erin Fuller, she was terminated. She was told her "job would be waiting for [her] as long as [she] c[a]me in wearing normal clothes." The employer failed to issue her final paycheck in her legal name. The Court upheld the Division's Final Order in its entirety.

Effective February 24, 2019, GENDA provides that "gender identity or expression" is a protected characteristic. The Division will continue to vigorously enforce the rights of transgender and gender non-conforming people on the basis of gender identity or expression, sex, and disability, and will liberally construe the provisions of the Human Rights Law as mandated by the statute. N.Y. Exec. L. § 300.

DEFINITIONS

The following definitions may help in understanding this guidance and the extent of the protections provided by GENDA:

Cisgender: a term used to describe a person whose gender identity is the same as their sex assigned at birth.

Gender: The term refers to the socially constructed system of categorizing people according to a range of characteristics often associated with masculinity or femininity. These characteristics may include social structures, attitudes, feelings, behaviors, and appearance. Different cultures and societies have different understandings of gender.

Gender Expression: External appearance of one's gender identity, usually expressed through behavior, clothing, haircut, or voice, and which may or may not conform to socially defined behaviors and characteristics typically associated with the sex assigned to an individual at birth.

Gender Identity: An individual's concept of self as male, female, a blend of both or neither. One's gender identity can be the same or different from their sex assigned at birth. An individual's gender identity may be consistent for their whole lives or may shift over time.

Gender Non-Conforming: A term used to describe a person whose gender expression differs from gender stereotypes, norms, and expectations in a given culture or historical period.

Gender Dysphoria: A recognized medical condition related to an individual having a gender identity different from the sex assigned at birth.

Intersex: An umbrella term that refers to people born with a range of variations in sex characteristics that fall outside of traditional conceptions of male or female bodies.

Misgendering: Attributing a gender to someone that is incorrect or does not align with the person's gender identity.

Non-Binary: A term used to describe a person who does not identify as exclusively male or female.

Transgender: A term used to describe a person whose gender identity and/or expression is different from the sex assigned to the person at birth.

GENDER IDENTITY DISCRIMINATION EXPLAINED

Gender identity discrimination occurs when a person is subjected to inferior treatment because of their gender identity or expression. The Human Rights Law prohibits such conduct in conditions or privileges in employment, schools, in the provision of housing or in places of public accommodation. Such discrimination may occur because an individual has transitioned or intends to transition from one gender to another or because the person is thought not to conform to sex stereotypes. Sex stereotyping occurs when behavior is considered inappropriate or unacceptable because it differs from societal norms or expectations relative to a particular sex, such as where a supervisor reacts negatively to a female employee because he considers her dress or personality traits inappropriate for a woman. Harassment because of gender identity is unlawful, as is retaliation because a person has opposed or otherwise complained about gender Identity discrimination.

Under the HRL, it is not a defense to a discrimination claim that a discriminatory action was taken based on the preferences or prejudices of employees, customers, clients, or other tenants with regard to any protected characteristic. It is also not a defense that a discriminatory action was taken because of the personal religious beliefs of an employer, place of public accommodation, housing provider or other covered entity.

Some specific descriptions of gender identity discrimination are below, along with examples of what gender identity discrimination may look like. The examples are illustrative only, and any case brought to the DHR will be investigated and decided on its merits.

Refusing to Use an Individual's Requested Name, Pronoun, or Title

Misgendering occurs when a person is not referred to with pronouns that are consistent with their gender identity. Refusing to use requested names or titles is also misgendering.

Under the HRL, a covered entity, including an employer, housing provider, educational institution, or an owner or operator of a place of public accommodation may not deliberately refuse to use an individual's requested name, pronoun or title if the refusal is motivated by the individual's actual or perceived gender identity or expression.

New Yorkers have the right to use their requested names and titles regardless of their medical history, appearance, or the sex indicated on their identification. Asking someone in good-faith for their name and requested gender pronouns is not a violation of the HRL.

Example 1

A transgender woman, Anna Jones, has a medical appointment. She told the receptionist she uses the title "Ms." and filled out her intake paperwork accordingly. When it is time for her to see the doctor, the nurse calls out for "Mr. Jones."

Deliberately failing or refusing to include and use a patient's requested name and self-reported gender by medical or other staff is unlawful even if a patient's sex assigned at birth or gender transition may be recorded for the purpose of providing medical care.

Example 2

Daniel Smith is hired at XYZ corporation. The name associated with his social security number is a name he no longer uses because it is inconsistent with his gender identity. His employer refuses to assign an email account or issue business cards with the name Daniel until he obtains a court-ordered name change.

An employer may not condition an individual's use of their self-identified name on obtaining a court-ordered name change or otherwise require proof of identification with that name.

Example 3

Alison was hired for a job at ABC organization and identifies as a woman. Her manager learns that Alison was assigned male at birth and begins referring to her as "he" to other co-workers. Alison's manager says that he will use the correct pronouns if Alison "shows proof" of her identity.

Refusing to use Alison's requested pronoun of "she" is harassing conduct and employers may not require a person to provide information about their medical history or other documents in order to use an individual's requested name, pronoun, and titles. In addition, a covered entity may not deliberately disclose a person's transgender status without consent. (See also example 9 below.)

Refusing to Allow Individuals to Use Facilities Consistent with Their Self-Identified Gender

Multi-occupancy facilities, such as bathrooms or locker rooms, are commonly sex-segregated. Providing such sex-segregated facilities does not violate the HRL.

Covered entities may also offer single-occupancy facilities such as a restroom designed for one person to use at a time.

Regardless of the type of sex-segregated facilities available (multi-occupancy or single-occupancy), a covered entity must allow individuals to use facilities that are consistent with their gender identity, regardless of the individual's sex assigned at birth, anatomy, gender, medical history, appearance, or the sex indicated on the individual's identification.

It is unlawful to require a person to use a single-occupancy restroom because they are transgender, non-binary, or gender non-conforming. This is true even if other employees,

tenants or customers object to sharing a facility with a transgender, non-binary or gender non-conforming person.

Example 4

Jordan is a high school student who is non-binary. Jordan would feel safest using the single sex bathroom assigned to girls. The school administration tells Jordan to use single-occupancy restrooms only.

The school must allow Jordan to access the facilities consistent with Jordan's gender identity or expression. No one can be limited to using single-occupancy restrooms.

Example 5

Adrian is a transgender woman who needs to attend a residential drug treatment program. The program requires Adrian to submit proof of transition-related medical treatment before it will assign her to the women's rooms.

A program may not refuse to permit an individual to participate in or reside in facilities consistent with the individual's gender identity, regardless of whether the individual plans to or has undergone gender-affirming medical treatment. The preference of other participants with regard to Adrian's participation cannot be a reason to deny access.

Imposing Different Appearance Standards Based on Gender

Covered entities may not impose appearance standards based on gender.

Employers and covered entities are entitled to enforce or require specific grooming or appearance standards; however, it must be done without imposing restrictions or requirements specific to gender.

It will not be a defense that an employer or covered entity is catering to the preferences of their customers or clients.

Example 6

Leah is a gender non-conforming woman. She works as a flight attendant at an airline that requires uniforms. The only available options are either pants, vest and tie or a dress and a scarf. Leah requests to wear the option that includes pants, vest, and a tie.

The airline must permit Leah to wear the uniform that consists of pants, vest and a tie based on Leah's gender identity or expression. The fact that customers may object cannot be a reason for denial.

Example 7

A restaurant maintains a dress code for its customers that requires only men to wear ties and a jacket and requires only women to wear a dress or skirt.

The restaurant cannot impose a dress code that has different requirements based on gender. The restaurant may require dress clothes but cannot insist that a woman wear a dress rather than a jacket and tie.

Unequal Terms, Conditions or Benefits Based on Gender Identity

All employers, housing providers, places of public accommodation and schools must offer terms, conditions, and benefits equally, regardless of gender identity or expression. Transgender and gender non-conforming individuals may not be denied equal opportunities for workplace advancement and may not be denied positions that interact with the public. Also, a housing provider, place of public accommodation or a school must permit a person to participate in a sex-segregated services or programs consistent with their gender identity or expression.

A person needing a reasonable accommodation at work for a gender-related disability must be treated in the same manner as other employees in the workplace needing accommodations for disabilities that are not related to gender. An employer may not provide medical leave or other benefits that discriminate based on gender identity. Employers must provide reasonable accommodations to individuals undergoing gender affirming or transition-related procedures, including leave for medical and counseling appointments, surgery and recovery, for treatments that remediate gender dysphoria, or for any other medical condition related to a person's gender identity or expression.

Example 8

Jim is a transgender man and asks his employer for necessary medical leave for gender-affirming treatment. The employer denies the leave time, indicating a religious objection to "facilitating" Jim's transition by providing the leave and the health insurance coverage for the treatment.

Jim is entitled to medical leave as a reasonable accommodation for his gender dysphoria, a recognized medical condition related to an individual having a gender identity different from the sex assigned at birth. He is entitled to health insurance coverage on an equal basis with all other employees.

Revealing a Person's Transgender or Gender Non-conforming Status Without Their Consent

A covered entity may not deliberately disclose a person's transgender, gender non-conforming or intersex status, or their gender dysphoria without their consent.

Some covered entities may have access to a person's medical records or other personal information that reveals the sex assigned to that person at birth. In some circumstances, a person may not want it known that they have a gender identity that is different from the sex assigned to them at birth. Employers, schools or other covered entities must be careful not to inadvertently disclose a person's transgender, gender non-conforming, or intersex status.

Example 9

Jessie was born intersex, identifies as male and uses "he/him/his" pronouns. When filling out paperwork for company-sponsored life insurance, Jessie indicated "N/A" instead of checking either male or female, as this is factually true and consistent with his birth certificate. The Human Resources manager, who reviewed the paperwork, told other employees about this, and began referring to Jessie "it" when discussing him with other employees.

Calling Jessie "it" is harassing conduct. In addition, a covered entity may not deliberately disclose a person's intersex status without consent. (See also example 3 above.)

Example 10

Ben is a college student who identifies as a transgender man. He has not legally changed the name on his birth certificate but uses the name Ben as well as the pronouns he/him/his.

The college produces a student directory with photographs and contact information. In the student directory Ben's picture appears with the name given to him at birth, which appears on all formal records.

A covered entity may not deliberately disclose a person's transgender, gender non-conforming or intersex status without consent. Although Ben has not legally changed his name and student records still contain his former name, Ben has a right to be called by the name and pronoun he uses. The college has also improperly disclosed Ben's transgender status by using the name assigned to him at birth.

Harassment

A covered entity, including employers, housing providers, schools and places of public accommodation may not engage in harassment, such as by making humiliating, abusive or

threatening remarks, name-calling, inappropriate physical contact, or any other harassing conduct. Such covered entities may also be legally responsible for harassment committed by their employees or agents.

All persons working in a workplace have enhanced protection from harassment, including harassment on the basis of gender identity or expression, sex and disability, as well as sexual orientation, race any other basis covered by the HRL. Exec. L. § 296-d.

Unlawful harassment in the workplace now includes any harassing behavior that subjects a person to inferior terms, conditions or privileges of employment because of any protected characteristic. New York State has removed the requirement that harassment be "severe or pervasive" in order to be unlawful. Any inferior treatment is unlawful unless it is shown to be no more than petty slights or trivial inconveniences. Exec. L. § 296(1)(h).

All employers are required to have a sexual harassment policy and procedure and to see that all employees are provided with anti-harassment training annually.

Example 11

Luisa is a transgender woman working in a factory, whose co-workers sometimes make fun of her and call her names related to her transgender status. Luisa's supervisors are aware of this harassment but tell her there is nothing they can do about it.

Luisa's employer has knowledge of the harassment, through its supervisors. An employer is required to take corrective action to stop harassment, and may be held liable for harassment that occurs in the workplace.

Example 12

An individual rented an apartment and filled out the paperwork stating his name is Thomas. The landlord later learns that the sex assigned to Thomas at birth was female. The landlord threatens to evict Thomas, and also harasses him to try to get him to leave.

It is an unlawful discriminatory practice to harass a tenant or attempt to evict a person because of their gender identity.

HOW GENDER IDENTITY PROTECTIONS ARE ENFORCED BY DHR

Any person who feels they have suffered unlawful discrimination may file a complaint with DHR. All procedures of the DHR are free of charge, and the person filing the complaint does not need an attorney.

Filing a Complaint

DHR has regional offices around the state where information may be obtained, and a complaint filed. Complaint forms are also available on the Division's website, www.dhr.ny.gov.

Complaint Investigation

DHR investigates all complaints promptly, usually completing the investigation within 180 days. Based on all the evidence collected by the investigator, the Regional Director will make a determination as to whether there is probable cause to believe that discrimination occurred. If there is a determination of probable cause, the case is forwarded for a public hearing before an Administrative Law Judge. Attempts to conciliate and settle a case are made at all stages of the DHR process.

Public Hearing

At the public hearing before an Administrative Law Judge, testimony is taken under oath, witnesses are subject to cross-examination and a full record is made. Complainants may be represented by their own attorneys, or a Division attorney will be appointed to present the case in support of the complaint. The Administrative Law Judge submits a Recommended Order for the Commissioner's consideration.

Final Orders and Remedies

The Commissioner reviews all submissions, relevant evidence and the Recommended Order, and issues a Final Order either finding discrimination or dismissing the Complaint.

Where the Commissioner finds that discrimination has occurred, remedies may include:

- reinstatement to a job, with back pay;
- provision of housing or access to places of public accommodation;
- compensation for mental anguish;
- an order to cease the discriminatory policies;
- a requirement that training be conducted;
- civil fines and penalties;
- punitive damages;
- attorney's fees.

Appeals

Any DHR Final Order may be appealed to state court. DHR will seek court enforcement of a Commissioner's order finding discrimination if there is no compliance.

RESOURCES

- Governor's LGBTQ Landing Page
  https://www.governor.ny.gov/programs/advancing-lgbtq-equality
- GENDA Public Awareness Campaign Website
  https://dhr.ny.gov/GENDA
- Discrimination Based on Gender Identity or Expression
  https://dhr.ny.gov/sites/default/files/pdf/DHR-gender-identity-brochure.pdf
- Gender Identity Discrimination by Hospitals
  https://dhr.ny.gov/sites/default/files/pdf/DHR_Gender_Identity_Handout.pdf
- Connect with the Division by calling us at **1-888-392-3644** or email us at info@dhr.ny.gov
- Social Media

  Twitter: @nyshumanrights (www.twitter.com/nyshumanrights)

  Instagram: @nyshumanrights (www.instagram.com/nyshumanrights/)

  Facebook: @nyshumanrights (www.facebook.com/nyshumanrights)
- Sign up for our newsletter by emailing newsletter@dhr.ny.gov

SHARED LANGUAGE & TERMS

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Advocate: A person who actively works to end intolerance, educate others, and support social equity for a marginalized group. To actively support/plea in favor of a particular cause, the actionof working to end intolerance, educate others, etc.

Agender: An umbrella term encompassing many different genders of people who commonly do not have a gender and/or have a gender that they describe as neutral. Many agender people are trans. As a new and quickly-evolving term, it is best you ask how someone defines agender for themselves.

Ally: Someone who advocates and supports a community other than their own. Allies are not partof the communities they help. A person should not self-identify as an ally but show that they are one through action.

Androgyny/ous: A gender expression that has elements of both masculinity and femininity. Occasionally used in place of "intersex" to describe a person with both female and male anatomy.

Aromantic: The lack of romantic attraction, and one identifying with this orientation. This may beused as an umbrella term for other emotional attractions such as demiromantic.

Asexual: The lack of sexual attraction, and one identifying with this orientation. This may be usedas an umbrella term for other emotional attractions such as demisexual.

Bigender: Refers to those who identify as two genders. Can also identify as multigender (identifying as two or more genders). Do not confuse this term with Two-Spirit, which is specifically associated with Native American and First Nations cultures.

Binary: Used as an adjective to describe the genders female/ male or woman/man. Since the binary genders are the only ones recognized by general society as being legitimate, they enjoyand (unfairly) privileged status.

Biphobia: The fear or hatred of homosexuality (and other non-heterosexual identities), and persons perceived to be bisexual.

Bisexuality: An umbrella term for people who experience sexual and/or emotional attraction tomore than one gender (pansexual, fluid, omnisexual, queer, etc).

Cisgender: Adjective that means "identifies as their sex assigned at birth" derived from the Latin word meaning "on the same side". A cisgender/cis person is not transgender. "Cisgender" does not indicate biology, gender expression, or sexuality/ sexual orientation. In discussions regardingtrans issues, one would differentiate between women who are trans and women who aren't by saying trans women and cis women. Cis is not a "fake" word and is not a slur. Note that cisgender does not have an "ed" at the end.

Cisgenderism: Systemic prejudice in the favor of cisgender people.

Coming Out: The process in which a person first acknowledges, accepts and appreciates their sexual orientation or gender identity and begins to share that with others.

Drag: Exaggerated, theatrical, and/or performative gender presentation. Although most used to refer to cross-dressing performers (drag queens and drag kings), anyone of any gender can do any form of drag. Doing drag does not necessarily have anything to do with one's sex assigned at birth, gender identity, or sexual orientation gender people seek to make their gender expression (how they look) match their gender identity (who they are), rather than their sex assigned at birth. Someone with a gender nonconforming gender expression may or may not be transgender.

Feminine Presenting: Masculine Presenting: A way to describe someone who expresses gender in a more feminine or masculine way, for example in their hair style, demeanor, clothing choice, or style. Not to be confused with Feminine of Center and Masculine of Center, which often includes a focus on identity as well as expression.

Feminine of Center: Masculine of Center: A word that indicates a range of terms of gender identity and gender presentation for folks who present, understand themselves, relate to others in a more feminine/masculine way. Feminine of center individuals may also identify as femme, submissive, transfeminine, or more; masculine of center individuals may also often identify as butch, stud, aggressive, boi, transmasculine, or more.

Fluid(ity): Generally with another term attached, like gender-fluid or fluid-sexuality, fluid(ity) describes an identity that may change or shift over time between or within the mix of the options available (e.g., man and woman, bi and straight).

Gender Expansive: A person with a wider, more flexible range of gender identity and/ or expression than typically associated with the binary gender system. Often used as an umbrellaterm when referring to young people still exploring the possibilities of their gender expressionand/or gender identity.

Gender Identity: One's internal sense of being male, female, neither of these, both, or other gender(s). Everyone has a gender identity, including you. For transgender people, their sex assigned at birth and their gender identity are not necessarily the same.

Gender Queer: An identity commonly used by people who do not identify or express their genderwithin the gender binary. Those who identify as genderqueer may identify as neither male nor female, may see themselves as outside of or in between the binary gender boxes, or may simply feel restricted by gender labels. Many genderqueer people are cisgender and identify with it as an aesthetic. Not everyone who identifies as genderqueer identifies as trans or nonbinary.

Hate Crime: Hate crime legislation often defines a hate crime as a crime motivated by the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexualorientation of any person.

Heterocentrism: The presumption that everyone is, and should be, heterosexual.

Heteronormative/ Heteronormativity: These terms refer to the assumption that heterosexuality is the norm, which plays out in interpersonal interactions and society and furthers the marginalized of queer people.

Homophobia: The fear or hatred of homosexuality (and other non-heterosexual identities), andpersons perceived to be gay or lesbian.

Intersectionality: Term coined by Kimberly Crenshaw in 1989 to describe how two or more intersecting identities can create various levels of oppression.

Intersex: Describing a person with a less common combination of hormones, chromosomes, and anatomy that are used to assign sex at birth. There are many examples such as Klinefelter Syndrome, Androgen Insensitivity Syndrome, and Congenital Adrenal Hyperplasia. Parents and medical professionals usually coercively assign intersex infants a sex and have, in the past, been medically permitted to perform surgical operations to conform the infant's genitalia to thatassignment. This practice has become increasingly controversial as intersex adults DYADIC Not intersex.

Gay: The adjective used to describe people whose physical, romantic, and/or emotional attractions are to people of the same sex. In the 1960s, gay became more specific to same-gender loving men to describe their sexual orientation

The Gender Binary: A system of viewing gender as consisting solely of two, opposite categories, termed "male and female", in which no other possibilities for gender or anatomy are believed to exist. This system is oppressive to anyone who defies their sex assigned at birth, but particularly those who are gender-variant or do not fit neatly into one of the two standard categories.

Gender Dysphoria: Anxiety and/or discomfort regarding one's sex assigned at birth.

Gender Expression/Presentation: The physical manifestation of one's gender identity through clothing, hairstyle, voice, body shape, etc. (typically referred to as masculine or feminine). Manytrans- speak out against the practice. The term intersex is not interchangeable with or synonym for transgender (although some intersex people do identify as transgender).

Lesbian: A woman who is emotionally, romantically or sexually attracted to other women. Womenand non-binary people may use this term to describe themselves.

Marginalized: Excluded, ignored, or relegated to the outer edge of a group/society/ community.

Non-binary: Preferred umbrella term for all genders other than female/male or woman/man, used as an adjective (e.g. Jesse is a nonbinary person). Not all nonbinary people identify as trans and not all trans people identify as nonbinary. Sometimes (and increasingly), nonbinary can be used to describe the aesthetic/presentation/ expression of a cisgender or transgender person.

Outing: Exposing someone's lesbian, gay, bisexual transgender or gender non-binary identityto others without their permission. Outing someone can have serious repercussions on employment, economic stability, personal safety or religious or family situations.

Pansexual: Capable of being attracted to many/ any gender(s). Sometimes the term omnisexual is used in the same manner. "Pansexual" is being used more and more frequently as more people acknowledge that gender is not binary. Sometimes, the identity fails to recognize that one cannotknow individuals with every existing gender identity.

Passing/Blending: Being perceived by others as a particular identity/ gender or cisgender regardless how the individual in question identifies, e.g. passing as straight, passing as a cis woman, passing as a youth. This term has become controversial as "passing" can imply that oneis not genuinely what they are passing as.

Pronouns: Terms referring to individuals in the third person. They assist with expressing gender identity when utilized correctly.

Queer: General term for gender and sexual minorities who are not cisgender and/or heterosexual. There is a lot of overlap between queer and trans identities, but not all queer people are trans and not all trans people are queer. The word queer is still sometimes used as ahateful slur, so although it has mostly been reclaimed, be careful with its use.

Questioning: A term used to describe people who are in the process of exploring their sexual orientation or gender identity.

Sex Assigned at Birth: The assignment and classification of people as male (AMAB), female (AFAB), intersex, or another sex assigned at birth often based on physical anatomy at birth and/or karyotyping.

Same Gender Loving: A term coined by activist Cleo Manago as a description for homosexuals, particularly in the African American community. SGL is an alternative to Eurocentric homosexual identities e.g. gay and lesbian.

Sexual Orientation: A person's physical, romantic, emotional, aesthetic, and/or other form of attraction to others. In Western cultures, gender identity and sexual orientation are not the same. Trans people can be straight, bisexual, lesbian, gay, asexual, pansexual, queer, etc. just like anyone else. For example, a trans woman who is exclusively attracted to other women would often identify as lesbian.

Social Identity: It involves the ways in which one characterizes oneself, the affinities one has with other people, the ways one has learned to behave in stereotyped social settings, the things one values in oneself and in the world, and the norms that one recognizes or accepts governing everyday behavior.

Transgender/Trans: An umbrella term for people whose gender identity differs from the sex they were assigned at birth. The term transgender is not indicative of gender expression, sexual orientation hormonal makeup, physical anatomy, or how one is perceived in daily life. Note that transgender does not have an "ed" at the end.

Transition: A person's process of developing and assuming a gender expression to match their gender identity. Transition can include coming out to one's family, friends, and/or co-workers; changing one's name and/or sex on legal documents; hormone therapy; and possibly (though not always) some form of surgery. It's best not to assume how one transitions as it is different foreveryone.

Transsexual: A deprecated term that is considered pejorative like transgender in that it indicatesa difference between one's gender identity and sex assigned at birth. Transsexual often - thoughnot always - implicates hormone/ surgical transition from one binary gender (male or female) to the other. Unlike transgender/trans, transsexual is not an umbrella term, as many transgender people do not identify as transsexual. When speaking/ writing about trans people, please avoid the word transsexual unless asked to use it by a transsexual person.

Transmisogyny: Originally coined by the author Julia Serano, this term designates the intersectionality of transphobia and misogyny and how they are often experienced as a form of oppression by trans women.

Transphobia: Systemic violence against trans people, associated with attitudes such as fear, discomfort, distrust, or disdain, This word is used similarly to homophobia, xenophobia, misogyny, etc.

Transman or Transwoman: Trans women generally describes someone assigned male at birth who identifies as a woman. This individual may or may not actively identify as trans. It is grammatically and definitionally correct to include a space between trans and woman. The same concept applies to trans men. Often it is good just to use woman or man. **Sometimes trans women, identify as male-to-female (also MTF, M2F, or trans feminine) and sometimes trans men identify as female-to-male (also FTM, F2M, or trans masculine). Please ask before identifying someone. Use the term and pronouns preferred by the individual. (Developed by Trans Student Educational Resources).

Jordan, T & Prad, N. (2018). The Facilitator in You. National Conference on Race & Ethnicity

The Cornell University

TRANSGENDER GUIDE TO TRANSITIONING & GENDER AFFIRMATION

IN THE WORKPLACE

Cornell University
Division of Human Resources

Department of Inclusion and Workforce Diversity

Contents

Introduction

Cornell University is committed to creating a safe and respectful campus for all members of our community including those of all gender identities and expressions. The following guide provides information about the ways in which the University is committed to supporting our transgender employees. This guide covers specific situations and questions for transgender employees, but is also useful to HR professionals, managers, hiring managers, and allies.

An inclusive workplace aligns with Cornell's institutional values and helps us attract, retain, and promote the best talent. The best talent comes from all backgrounds, experiences and identities and we are committed to supporting a diverse workforce. The goals of this guide are to:

- Provide steps transgender employees can take when coming out and transitioning at work.
- Provide knowledge to help transgender employees update their personal information in university systems.
- Offer information about on-campus and off-campus resources available to support transgender employees.

Cornell University's Non-Discrimination Policy

Cornell University's official non-discrimination policy includes the protection of "sex, sexual orientation, gender identity and expression. This policy furthers the University's commitment to creating a learning, living, and working environment free of bias, discrimination, harassment, and sexual and related misconduct, and to meeting applicable legal requirements.

Tips for Coming Out At Work

This process is very personal and there is no one way to tell your employer and colleagues that you are transgender. Whether, how or when you choose to share this information and who you choose to tell is entirely up to you. Below we provide some tips for your consideration:

- Coming out can be a stressful experience for some people. Remember, you make the decision about when you are comfortable coming out.
    - What does safety and comfort look like for you?
    - Are you comfortable with your own understanding of your identity?

- If and/or when you are ready to share with others, determine what you want to say to your supervisor and/or colleagues.
    - What is important for them to know about you?
    - What is not important for them to know?

- Start with one individual who you believe will be an ally to you and ask them to support you as you come out to others. This might be a close colleague, your supervisor, or someone in human resources.

- Consider developing a personal timeline for when you will tell various colleagues.
    - When do you want to start telling people?
    - Who will you tell first?
    - How will you do this? Email? In-person?

- Meet with your supervisor. Think of what support looks like for you and share this with them when you meet.
    - What do you need to make the workplace feel inclusive to you? This could be access to a bathroom that aligns with your gender identity and gender expression.

- The Department of Inclusion and Workforce Diversity can support by helping you plan your first steps. For more information, email Cornell F. Woodson (cfw58@cornell.edu).

Tips for Transitioning at Work

Whether or not you plan to medically transition or just change your name and gender expression, Cornell is committed to supporting you. Here are a few items you might consider:

- Share this guide or its companion version, "A Guide to Supporting Transgender People in the Workplace", with someone you trust to act as an ally to you during this process. This might be a colleague, your supervisor, or someone in human resources.

- Develop a personal timeline for your transition.
    - If you plan to medically transition, how long will you need to be away?
    - Do you have a timeframe for when this will take place?
    - Even if you don't plan to medically transition, will you want time away? How long?

- Speak with your supervisor about your plans and what you might need in terms of support.
    - Do you want someone to accompany you to this meeting? Someone from Human Resources or the Department of Inclusion and Workforce Diversity is more than willing to attend with you.
    - What does support look like for you?
    - What do you need in order for the workplace to feel inclusive to you?
    - What bathroom will you need access to?

- Construct a timeline with your supervisor.
    - Would you like an announcement made about your transition? When should this be done?
    - Who should receive this announcement? The entire division, department, or just your colleagues? Who will share this and how?
    - When would you like to start using different gender pronouns?
    - Will you take on a new name?
    - When would you like to start using that name?
    - If you plan to use a different bathroom, when will that begin?

- Build your support system. Do you know of university, local, and national resources?

For more questions or items to consider, please view the "Sample Workplace Transition Plan and Guiding Questions" at the end of this guide.

Updating Your Personal Information via Workday

As you begin transitioning, you may want to update your personal information in Workday. Here are some steps for doing so.

Legal Name Change in Workday

Your legal name in Workday must match exactly how your name is listed on any official documentation, such as a social security card, birth certificate, permanent resident card, or employment authorization document. If, as part of your transition, you legally change your name and obtain a new copy of any of these documents---you can submit your legal name change by following these steps:

- Log into Workday and select *personal information*.
- On the next screen, select *legal name* from the *change* column.
- Make the changes you wish to make and select a date your name change should become effective.
- Click submit!

Once you submit the change via Workday, it will route to your local Human Resources Representative who will contact you for supporting documentation. You must submit a copy of your official documentation reflecting your new name to the local HR representative or bring them to Records at 337 Pine Tree Rd., East Hill Plaza.

Preferred Name Change in Workday

Before your name is legally changed or if you are not planning to legally change your name, you may wish to still use a preferred name at work. To do this, follow these steps:

- Log into Workday and select *personal information.*
- On the next screen, select *preferred name* on the *change* column.
- On the next screen, uncheck the box at the top that says, "Use legal name as preferred name".

- On the same page, make your desired changes to your name.
- Click submit!

Please note that your legal name should not be visible to others in the system. Employees will be able to search for you using your preferred name. However, some records such as payroll, health insurance and some benefits, require use of your legal name and; therefore, your legal rather than your preferred name will continue to appear on those records.

Updating the Name Associated with Your Email

When you change your legal or preferred name, as described above, the name that appears when you send email will also be updated. It may take a few minutes before the change actually happens.

Updating Your NetID

Your NetID can only be changed if you change your legal name and after you have submitted your legal name change request to Human Resources via Workday. Once this has been updated in Workday, email computer_access@cornell.edu to request a new NetID.

If you have not or do not plan to legally change your name, then your NetID will remain the same. However, you can choose an alias for your email address to reflect your preferred name. Let's say, for example, your preferred name is Pat Smith, but your legal name is John Smith and the NetID version of your email is js1@cornell.edu. You can create and use an email alias that reads pat.smith@cornell.edu. To do this, you should:

- Go to whoiam.cornell.edu.
- Click the *email* tab.
- Under *advanced options*, look for the section labeled *optional email alias.*
- Click *select your email alias.*
- Select the format you want to use. If you select *special request*, make sure your request meets the special format request guidelines and remember to fill in the *justification* field.

- Click submit!

Please note that if you have only changed your preferred name and then created an email alias, your original NetID will still exist and remain your official NetID for Cornell purposes. Anyone with that NetID will still be able to use it to reach you. However, you can also share your email alias as a way to contact you. Both email addresses reach the same inbox.

Gender Identity and Sexual Orientation in Workday

While you cannot change your gender marker in Workday until it has been legally changed, you can indicate your gender identity. To do this, you should:

- Log into Workday.
- Select *personal information.*
- On the next screen, select *personal information* again in the change column.
- Scroll to the bottom and find *sexual orientation and gender identity box.*
- *To edit, click the pencil icon on the box*
- Make the changes you desire.
- Click submit!

Employee Picture ID

The Office of the University Registrar is responsible for creating university picture ID cards for the Cornell community. To obtain a new employee ID to reflect your preferred name or legal name change and to take a new photo, you can visit the Registrar's Office located in Day Hall, B07. IDs are produced between 8 AM and 4:00 PM, Monday through Friday. No appointment is required and there will be no fee for obtaining a new picture ID.

Transgender Inclusive Health Insurance Plan Options/Features

To learn more about your benefits, please make an appointment with someone in the HR Services & Transition Center. They are located in the East Hill Office Building, Suite 130 (395 Pine Tree Road). You can also contact them via phone at (607) 255 – 3936 or via email at benefits@cornell.edu.

Gender Friendly Restrooms

A part of your transition may include needing access to a bathroom that aligns with your gender identity. In keeping with the University's policy of nondiscrimination and the commitment to inclusion, the University allows students, staff, faculty, and visitors to use the restroom or facility that corresponds to their gender identity. To view our Restroom/Facilities Use Guidelines, click here. The University also maintains a number of universal restrooms across campus to address restroom facility access not necessarily related to gender identity, such as access for parents with children and for other attendants/caregivers. These facilities are all-gender, accessible spaces, which may include amenities for families such as baby changing stations.

On-Campus Resources and Services

Faculty and Staff Assistance Program (FSAP)

Located at 312 College Avenue, FSAP provides confidential counseling and consultation services to benefits eligible Cornell employees and their partners.

Colleague Network Groups (CNGs)

The university sponsors a number of CNGs. There is one for LGBT employees, among other identity groups. For more information, contact Cassandre Joseph at 607-255-3976.

Department of Inclusion and Workforce Diversity (DIWD)

The DIWD is here to provide support as you navigate this process, if issues arise in your workplace, or if you need help finding resources. For more information, contact Cornell F. Woodson at 607-255-5740.

Incident Reporting Form

Should you ever experience or witness an incident related to bias, discrimination, or harassment, you should feel free to submit a report through our incident reporting form. We have dedicated staff members who provide support and follow up on reports.

LGBT Resource Center

Faculty and Staff are involved with the LGBTQIA+ community in a variety of ways by attending one of the many events offered to the larger Cornell community, explore the many academic and social offerings, as well as collaborate with the Center to organize speakers, panels, and other events that help build an inclusive campus community.

Off-Campus Resources and Services

The Ithaca community has a number of great resources for transgender health.

Planned Parenthood of the Southern Finger Lakes

Located in downtown Ithaca (620 W Seneca St, Ithaca, NY 14850), Planned Parenthood of the Southern Finger Lakes has hormone therapy and preventive health services for transgender people. This is not a campus service, but a service provided in the local community. There is a fee for this service but if finances are a concern these can be discussed before one's first appointment. A person may become a new patient if they are seeking transgender related health care for the first time — or, if they are already being seen by a medical provider in their home community or their previous town that is providing transgender related health services to them, they may transfer their care and their records to this office so that they have a local provider here. You can reach them at (607) 273-1513 to request an appointment or request additional information.

The Planned Parenthood website also includes an awesome new booklet that has information on every process for changing your name and information as a transgender person!

Planned Parenthood of the Southern Finger Lakes Transgender Overview
Planned Parenthood of the Southern Finger Lakes Transgender Healthcare, Booklet, and Forms

Voice and Communication Modification Program

One of the only programs like it in the country, the Voice and Communication Modification Program at Ithaca College focuses on developing voice, articulation, non-verbal communication, language, voice-related quality of life, and self-perception. It's open to both male to female and female to male transgender people. Community members have to pay a nominal fee and must sign up in advance to be a part of this group. Information and brochure about the Voice and Communication Modification Program can be found here.

Transgender Support Group

The Ithaca Transgender Group is a confidential, peer-led support group. It meets every other Sunday from 5PM to 7PM. They also hold meetings where they welcome significant others, friends, family and allies. To learn more, visit ithacatransgendergroup.com or email Natasha at natasha@ithacatransgendergroup.com.

Tompkins County Human Rights Commission

Offers telephone or in-office consultation regarding questions of rights, disputes, alleged violation of anti-discrimination laws which provide protection in the areas of employment, housing, credit, public accommodation, and public, non-sectarian educational institutions. To learn more, visit their website here.

Sample Workplace Transition Plan and Guiding Questions

This sample Workplace Transition Plan addresses some of the processes that you might consider discussing with your supervisor. It can be customized to fit your needs and vision for your transition.

1. You could first choose to share the news of your upcoming transition with a trusted ally. This person could be a colleague, someone in HR, or a supervisor.

2. You could then contact someone in HR to discuss your plans for transitioning. This would be an opportunity to learn about all policies related to inclusion, coverage for medical transition, if you are comfortable telling your supervisor, etc.

3. A meeting could be planned between you and your supervisor, as well as anyone else you would like to be present.

4. You, the HR Rep, and your supervisor could consider discussing how the announcement will be made. Will it just be sent to your immediate colleagues? Will it be department wide? Division wide? All three? What format? Who should employees with questions contact?

Note: *Depending on how widely communication about your transition will be shared, management staff beyond your supervisor should be made aware early so they can be prepared to support once the announcement is made*.

5. Consider a timeline for your transition. However, you may not know what this looks like right away. These are some questions to consider as you are planning:

A) When will you begin using a new name, if you choose to do so?

B) When will you begin to use your affirming gender pronouns?

C) If you choose to, when will you begin making changes to your gender expression?

D) If you choose to, when will you begin transitioning medically?

E) How long will you need to be away from work? What dates?

F) When will colleagues be made aware of your transition?
- i. Do you plan to tell certain colleagues one-on-one? What date?
- ii. What date should the department announcement be made?
- iii. What date should the division be made aware?

G) By what date should your email address, employee ID, and name change go live?

Note*: This timeline can be changed, because it is YOUR process. Please remember that certain parts of your transition will take longer than others. Create a timeline that attempts to realistically and accurately predict how long each step might take.*

6) Consider what bathroom you will use and communicate your needs to your supervisor. Do you need a gender neutral bathroom?

7) **For Managers to consider:** Will any bathroom signs need to be changed?

8) **For Managers to consider**: If training will be implemented, when will this take place?

9) **For you to consider:** If training will be implemented, would you like to be present for it?

Transition Plan for [ENTER NAME]

Note: The process of transitioning can change day to day for an individual. This means, the dates chosen for this plan can change too. These dates are meant to be guides for ensuring that the plan is clear and the involved individuals understand their roles and responsibilities. Lastly, it is possible that it may take a few meetings to complete this plan.

Estimate of date to begin using affirming name and pronouns: _____

- What name should be used at this time: _____
  Note: It is completely fine if you do not know at this time.

- What affirming pronouns should be used at this time: _____
  Note: It is completely fine if you do not know at this time.

Prior to the above date, is there another name that you would like used: _____
Note: Until you are ready to use your affirming name, you may not want to keep using the name given to you at birth. Some people choose a nickname.

Estimate of date for obtaining employee ID with new photo: _____

Estimate of date for announcement to team members, if applicable:_____

Estimate of date for making department or unit wide announcement, if applicable:_____

Estimate of date for use of a different bathroom: _____

If you plan to medically transition, what dates will you need to be away from work?
Note: It is completely fine if you do not know at this time.

- Start -_____ End - _____

If training is provided for your team, department, or unit ---- would you like to be there?

- Y or N (Circle one.)

Is there additional information/needs you would like to share at this time?

Sample Employee Transition Announcement Email

Sent: Monday, July XX, XXXX 9:00 AM
To: XXXXXXXXXX@cornell.edu
Subject: Staff change

Dear [INSERT NAME OF DEPARTMENT OR UNIT],

I am writing to notify you of a change regarding one of our staff members in [NAME OF DEPARTMENT OR UNIT].

On [ENTER MONTH] XX, [ENTER NAME OF EMPLOYEE] will have a new preferred name, thus moving forward would like to be addressed as [ENTER AFFIRMING NAME]. [ENTER AFFIRMING NAME] will be using [ENTER AFFIRMING PRONOUNS] as pronouns.

Leadership is working to support [ENTER AFFIRMING NAME] during [ENTER PRONOUN] transition period, as well as with the performance of [ENTER PRONOUN] job. You may address any questions or concerns to [ENTER NAME OF SUPERVISOR] at [ENTER EMAIL AND PHONE NUMBER] or to [ENTER NAME OF YOUR UNIT'S HR REPRESENTATIVE] at [ENTER EMAIL AND PHONE NUMBER].

If you are interested in learning more about the LGBTQQIA+ community at Cornell, please visit the LGBT Resource Center for information, education opportunities, and ways to get involved: http://lgbtrc.cornell.edu . Cornell's Inclusive Excellence Academy is another great resource that offers programs and workshops designed for participants at all stages of their understanding of diversity, inclusion, and belonging: https://diversity.cornell.edu/learning/inclusive-excellence-academy. You may also contact Cornell's Workforce Diversity and Inclusion office at owdi@cornell.edu or (255-7066).

Thank you for your understanding and consideration in keeping Cornell University and [ENTER NAME OF DEPARTMENT OR UNIT] a productive and safe working environment for everyone.

Sincerely,

[ENTER NAME OF PERSON SENDING EMAIL]

How Lawyers Can Make Sure LGBTQ Clients Don't Face Discrimination

By Paula L. Green

When working with LGBTQ clients, attorneys need to arm themselves, not only with the latest anti-discrimination laws and ethical codes, but with first-hand knowledge of their client's legal goals and personal perspectives.

To avoid unnecessary courtroom confrontations, lawyers should learn their clients' stance on relevant issues – such as the use of gender identity pronouns – before a case begins, several speakers said at the opening panel "LGBTQ Lawyering: Representing Our Communities," of the LGBTQ Law Section Annual Meeting.

Hon. Lewis A. Silverman urged attorneys to talk with their clients about the individual's goals if gender discrimination does emerge during a hearing. "You need to have a good conversation with your client beforehand. Some are interested only in the lawsuit at hand. Others are willing to make a public display…to raise a gender identity issue," said Silverman, a judicial hearing officer in the Suffolk County District Court.

Silverman also suggested sending a letter, which defines the pronouns a client wants to be used, to the judge and other counsel to avoid a public confrontation. Attorneys need to be ready to handle a judge's bias as not all judges are aware of the rules regarding gender identification. "Over the years, judges have been somewhat hostile to gender identity," Silverman said. "Some can still be hostile."

Attorneys can have a small folder on hand, filled with copies of ethical rules, to use during a bench conference with the judge and other counsel. Yet Silverman cautioned to avoid a public on-the-record confrontation that could alienate a judge.

Assessing which party in a courtroom is creating a problem might be necessary. Judicial rules, such as Sections 100.2 and 100.3 of the Rules of the Chief Administrative Judge (22 N.Y.C.R.R. Part 100), govern a judge's activities and responsibilities regarding lawyers, staff and court officials. Yet while these rules encompass court personnel, judges at times can have little control over these officials and offensive language can be used repeatedly.

Erin Harrist, supervising attorney at the Legal Aid Society Law and Policy Unit in Brooklyn, said she has heard court officers use language such as "here comes the he/she case." She agrees it is important to talk with a client – before a case begins – about how to handle gender discrimination in the courtroom. "The person might have family members in the courtroom," said Harrist, explaining why a client doesn't want to focus on offensive language. Speaking to court officers after a hearing can be helpful as can be appealing to administrative court officials for training for the offenders.

Harrist said lawyers must follow Rule 8.4 (g) of the New York State Rules of Professional Conduct, which governs misconduct in the practice of law. A lawyer or law firm cannot unlawfully discriminate in the practice of law because of numerous factors, including sexual orientation, gender identify or gender expression. The rule draws from the New York City and New York State anti-discrimination laws, also known as the human rights laws.

Respecting a client's chosen gender identity for people who are detained in county jails or the Rikers Island jail is extremely important. Court and police paperwork can carry the birth gender identity and that can determine in which facility a client will be housed. "It can be an extremely dangerous situation," Harrist added.

Sarah M. Telson, deputy director of legal services at the LGBTQ Anti-Violence Project in New York, urged lawyers to consider the practices and perspectives about the LGBTQ community that exist in their own law firms or organizations. The company website should create a welcoming atmosphere, such as inclusive language in the mission statement. Hiring practices, dress codes and clear procedures for dealing with improper language and gender slurs spoken in the office should be laid out. There should also be practical procedures for staff members changing their names.

Samuel W. Buchbauer, an attorney in the New York City law offices of David A. Caraway, served as moderator of the opening panel, "Representing LGBTQ Clients and Ethical Considerations." He also laid out the red flags that trust and estate attorneys need to watch for when working with LGBTQ clients.

Clients need wills, for example, drafted with careful language to protect the rights of a client's long-term partner if the couple is not married. Guardian plans for non-biological children need to be detailed. Beneficiary forms need to be updated with the names of current partners. Medical directives, health care proxies and living wills must be considered. "Wills can be contested by unsupportive family members," said Buchbauer, adding that some family members can be "downright homophobic."

Christopher R. Riano, chair of the state bar association's LGBTQ Section, president of the Center for Civic Education and a lecturer in constitutional law and government at Columbia University, gave opening remarks before the start of the program, followed by Richard Saenz, senior attorney, criminal justice and police misconduct strategist, at Lambda Legal, in New York City.

D-1-GN-22-000977

CAUSE NO. _____

JANE DOE, individually and as parent and next friend of MARY DOE, a minor; JOHN DOE, individually and as parent and next friend of MARY DOE, a minor; and DR. MEGAN MOONEY,	§	
Plaintiffs	§	
	§	IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS
v.	§	_____ JUDICIAL DISTRICT 353RD, DISTRICT COURT
GREG ABBOTT, sued in his official capacity as Governor of the State of Texas; JAIME MASTERS, sued in her official capacity as Commissioner of the Texas Department of Family and Protective Services; and the TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES,	§	
Defendants.	§	

PLAINTIFFS' ORIGINAL PETITION AND APPLICATION FOR TEMPORARY RESTRAINING ORDER, TEMPORARY INJUNCTION, PERMANENT INJUNCTION, AND REQEUST FOR DECLARATORY RELIEF

Plaintiffs Jane and John Doe[1], individually and as parents and next friends of Plaintiff Mary Doe, a minor; and Dr. Megan Mooney (collectively, "Plaintiffs") file this Petition and Application

[1] Plaintiffs Jane Doe, John Doe, and Mary Doe proceed pseudonymously in order to protect their right to privacy, particularly that of Mary Doe, who is a minor. The Texas Rules of Civil Procedure recognize the need to protect a minor's identity. *See* Tex. R. Civ. P. 21c(a)(3). Such goal would not be possible if the identities of Jane Doe and John Doe were public. Moreover, the disclosure of the Doe Plaintiffs' identities "would reveal matters of a highly sensitive and personal nature, specifically [Mary Doe]'s transgender status and h[er] diagnosed medical condition—gender dysphoria." *Foster v. Andersen*, No. 18-2552-DDC-KGG, 2019 WL 329548, at *2 (D. Kan. Jan. 25, 2019). "[O]ther courts have recognized the highly personal and sensitive nature of a person's transgender status and thus have permitted transgender litigants to proceed under pseudonym." *Id.* (collecting cases). Furthermore, as courts have recognized, the disclosure of a person's transgender status "exposes them to prejudice, discrimination, distress, harassment, and violence." *Arroyo Gonzalez v. Rossello Nevares*, 305 F. Supp. 3d 327, 332 (D.P.R. 2018); *see also Foster*, 2019 WL 329548, at *2. Such is the case here.

for Temporary Restraining Order, Temporary Injunction, Permanent Injunction, and Request for Declaratory Relief ("Petition") against Defendants Greg Abbott, in his official capacity as Governor of the State of Texas ("Governor Abbott" or the "Governor"), Jaime Masters, in her official capacity as Commissioner of the Texas Department of Family and Protective Services ("Commissioner Masters" or the "Commissioner"), and the Texas Department of Family and Protective Services ("DFPS") (collectively, "Defendants"). In support of their Petition, Plaintiffs respectfully show the following:

I. PRELIMINARY STATEMENT

1. After the Texas legislature failed to pass legislation criminalizing well-established and medically necessary treatment for adolescents with gender dysphoria, the Texas Governor, Attorney General, and Commissioner of the Department of Family and Protective Services have attempted to legislate by press release. Governor Abbott's letter instructing DFPS to investigate the families of transgender children is entirely without Constitutional or statutory authority; and despite this, the Commissioner nonetheless issued a statement directing DFPS to carry out the Governor's wishes and agreeing to follow a nonbinding legal opinion that did not change Texas law.

2. The Governor has circumvented the will of the legislature and, in so doing, he and the Commissioner have run afoul of numerous Constitutional and statutory limits on their power. Additionally, by their actions, Defendants have trampled on the Constitutional rights of transgender children, their parents, and professionals who provide vital care to transgender children. The Defendants have, without Constitutional or statutory authority, acted to create a new definition of "child abuse" that singles out a subset of loving parents for scrutiny, investigation, and potential family separation. Their actions caused terror and anxiety among transgender youth and their families across the Lone Star State and singled out transgender youth and their families

for discrimination and harassment. What is more, the Governor's, Attorney General's, and Commissioner's actions threaten to endanger the health and wellbeing of transgender youth in Texas by depriving them of medically necessary care, while communicating that transgender people and their families are not welcome in Texas.

3. The Governor has also declared that teachers, doctors, and the general public are all required, on pain of criminal penalty, to report to DFPS any person who provides or is suspected of providing medical treatment for gender dysphoria, a recognized condition with well-established treatment protocols. And DFPS has started investigating families for child abuse based on reports that the families have followed doctor-recommended treatments for their adolescent children.

4. The actions of the Governor, the Commissioner, and DFPS violate the Texas Administrative Procedure Act, are *ultra vires* and therefore invalid, violate the separation of powers guaranteed by the Texas Constitution, and violate equality and due process protections guaranteed by the Texas Constitution. Plaintiffs ask the Court to enjoin these violations of Texas law and of the plaintiffs' rights and immediately return to the *status quo ante*.

II. PARTIES

5. Plaintiffs Jane Doe, John Doe, and Mary Doe are all residents of Texas. Plaintiffs Jane Doe and John Doe are the parents and next friends of Plaintiff Mary Doe, who is a minor. Plaintiff Mary Doe is transgender, has been diagnosed with gender dysphoria, a serious medical condition, and is currently receiving medically necessary care for the treatment of her gender dysphoria. Plaintiff Jane Doe is an employee of Defendant DFPS.

6. Plaintiff Dr. Megan Mooney is a clinical psychologist and mandated reporter under Texas law. She has a practice based in Houston, Texas that includes transgender patients, many of whom have been diagnosed with gender dysphoria and are receiving treatment for this condition.

7. Defendant Greg Abbott is the Governor of the State of Texas and is sued in his official capacity only. He may be served at 1100 San Jacinto Blvd., Austin, Texas 78701.

8. Defendant Jaime Masters is the Commissioner of the Texas Department of Family and Protective Services and is sued in her official capacity only. She may be served at 701 West 51st Street, Austin, Texas 78751.

9. Defendant Texas Department of Family and Protective Services is a state agency that is statutorily tasked with promoting safe and healthy families and protecting children and vulnerable adults from abuse, neglect, and exploitation. DFPS fulfills these statutory obligations through investigations, services and referrals, and prevention programs. It may be served at 701 West 51st Street, Austin, Texas 78751.

III. JURISDICTION AND VENUE

10. The subject matter in controversy is within the jurisdictional limits of this Court, and the Court has jurisdiction over this action pursuant to Article V, Section 8, of the Texas Constitution and section 24.007 of the Texas Government Code, as well as the Texas Uniform Declaratory Judgments Act, Texas Civil Practice & Remedies Code sections 37.001 and 37.003, and the Texas Administrative Procedure Act, Texas Government Code section 2001.038.

11. This Court has jurisdiction over the parties because all Defendants reside or have their principal place of business in Texas.

12. Plaintiffs seek non-monetary relief.

13. Venue is proper in Travis County because Defendants have their principal office in Travis County. Tex. Civ. Prac. & Rem. Code § 15.002(a)(3).

IV. DISCOVERY CONTROL PLAN

14. Plaintiffs intend for discovery to be conducted under Level 3 of Texas Rule of Civil Procedure 190.

V. FACTUAL BACKGROUND

A. Governor Abbott, Attorney General Paxton, and Commissioner Masters Create New Definitions of "Child Abuse" Under State Law.

15. On February 21, 2022, Attorney General Paxton released Opinion No. KP-0401 ("Paxton Opinion") dated February 18, 2022, which addressed "Whether certain medical procedures performed on children constitute child abuse."[2] The Paxton Opinion was issued in response to Representative Matt Krause's request dated August 23, 2021 about whether certain enumerated "sex-change procedures" when used to treat a minor with gender dysphoria constitute child abuse under state law. Specifically, Representative Krause inquired about and Attorney General Paxton purportedly addressed the following procedures: "sterilization through castration, vasectomy, hysterectomy, oophorectomy, metoidioplasty, orchiectomy, penectomy, phalloplasty, and vaginoplasty; …mastectomies; and … removing from children otherwise healthy or non-diseased body part or tissue."[3] The Paxton Opinion also responded to Representative Krause's additional inquiries about: whether "the following categories of drugs: (1) puberty-suppression or puberty-blocking drugs; (2) supraphysiologic doses of testosterone to females; and (3) supraphysiologic doses of estrogen to males" when used to treat minors with gender dysphoria could constitute child abuse.[4]

16. In summary, Attorney General Paxton's Opinion concluded that the enumerated procedures *could* constitute child abuse. The Opinion was based on the premise that "elective sex

[2] Ken Paxton et al., Re: Whether Certain Medical Procedures Performed on Children Constitute Child Abuse (RQ-0426-KP), Opinion No. KP-0401, at 1 (Feb. 18, 2022), https://texasattorneygeneral.gov/sites/default/files/global/KP-0401.pdf.
[3] *Id.*
[4] *Id.*

changes to minors often has [sic] the effect of permanently sterilizing those minor children."[5] The Paxton Opinion specifies that it "does not address or apply to *medically necessary* procedures."[6]

17. In response to the Paxton Opinion, Governor Abbott sent a letter to DFPS Commissioner Jaime Masters dated February 22, 2022 ("Abbott Letter" of "Abbott's Letter") directing the agency "to conduct a prompt and thorough investigation of any reported instances" of "sex-change procedures," without any regard to medical necessity.[7] The Abbott Letter claimed that "a number of so-called 'sex change' procedures constitute child abuse under existing Texas law."[8] In addition to directing DFPS to investigate reports of procedures referenced in the Paxton Opinion, under threat of criminal prosecution, the Abbott Letter directs "all licensed professionals who have direct contact with children" and "members of the general public" to report instances of minors who have undergone the medical procedures outlined in his Letter and the Paxton Opinion.[9]

18. On February 22, 2022, DFPS announced that it would "follow Texas law as explained in (the) Attorney General opinion" and comply with the Paxton Opinion and Abbott letter and "investigate[]" any reports of the procedures outlined in the new directives ("DFPS Statement"), again, without any regard to medical necessity.[10]

19. Commissioner Masters claimed that prior to the issuance of the Paxton Opinion and Abbott letter, the agency had "no pending investigations of child abuse involving the procedures described in that opinion."[11]

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[5] *Id.* at 2.
[6] *Id.* at 2 (emphasis added).
[7] Greg Abbott, Letter to Hon. Jaime Masters, Commissioner, Tex. Dep't of Fam. & Protective Servs. (Feb. 22, 2022), https://gov.texas.gov/uploads/files/press/O-MastersJaime202202221358.pdf.
[8] *Id.*
[9] *Id.*
[10] Isaac Windes, *Texas AG says trans healthcare is child abuse. Will Fort Worth schools have to report*?, Fort Worth Star-Telegram (Feb. 23, 2022), https://www.star-telegram.com/news/local/crossroads-lab/article258692193.html.
[11] *Id.*

20. Previously, on September 3, 2021, Commissioner Masters responded to an inquiry from Representative Bryan Slaton about the same underlying medical treatment and explained, "I will await the opinion issued by the Attorney General's office before I reach any final decisions on the matters you raise."[12]

21. In the hours and days following the February 2022 actions of Attorney General Paxton, Governor Abbott, and Commissioner Masters, DFPS initiated investigations into families with transgender children, which continue.

22. During the 87th Regular session, the Texas legislature considered, but did not pass, proposed legislation that would have changed Texas law to include treatment for gender dysphoria under the definition of child abuse. Specifically, Senate Bill 1646 ("SB 1646") would have amended Section 261.001 of the Family Code to add certain treatments to the definition of "child abuse." The bill would have amended this provision of the law to include within the definition of "child abuse": "administering or supplying, or consenting to or assisting in the administration or supply of, a puberty suppression prescription drug or cross-sex hormone to a child, other than an intersex child, for the purpose of gender transitioning or gender reassignment; or performing or consenting to the performance of surgery or another medical procedure on a child other than an intersex child, for the purpose of gender transitioning or gender reassignment."[13] SB 1646 did not pass. The legislature considered additional bills that would have prohibited medical treatment for gender dysphoria in minors, including House Bill 68 and House Bill 1339. None of these bills were passed by the duly elected members of the legislature.

[12] Jaime Masters, Letter to Hon. Bryan Slaton, Representative, District 2, Re: Correspondence (Sept. 3, 2021), http://thetexan.ews/wp-content/uploads/2021/09/Response-Letter_Representative-Slaton_Addressing-Gender-Reassignment-090321.pdf.
[13] S.B. 1646, 87th Leg. (Tex. 2021), https://capitol.texas.gov/tlodocs/87R/billtext/pdf/SB01646E.pdf.

23. On July 19, 2021, after the above-referenced legislation failed to pass, Governor Abbott explained on a public radio show that he had a "solution" to what he called the "problem" of medical treatment for minors with gender dysphoria.[14]

B. Responses to New Child Abuse Directives

24. Following the recent attempts by Defendants to change the definition of "child abuse" under Texas law, experts in pediatric medicine, endocrinology, mental health care, and social work issued statements condemning the action and warning that it was counter to established protocols for treating gender dysphoria, could force providers to violate their professional ethics, and would cause substantial harm to minors and their families in Texas.

25. In response to the actions taken by Defendants, the National Association of Social Workers issued the following statement: "The continued attempts in Texas to change the definition of child abuse are in direct opposition to social work values, principles, and Code of Ethics and pose an imminent danger to transgender youth and their families. Furthermore, these shameful actions undermine the established truth supported by every credible medical and mental health organization in the country that the concepts of sexual orientation and gender identity are real and irrefutable components of one's individual identity."[15]

26. The American Academy of Pediatrics and the Texas Pediatric Society condemned the actions of Texas executive officials explaining that "[t]he AAP has long supported gender-affirming care for transgender youth, which includes the use of puberty-suppressing treatments when appropriate, as outlined in its own policy statement, urging that youth who identify as

[14] The Mark Davis Show, *July 19, 2021 8am Hour*, at 11:04 (July 19, 2021), https://omny.fm/shows/the-mark-davis-show/july-19-2021-8am-hour.
[15] *NASW Condemns Efforts to Redefine Child Abuse to Include Gender-Affirming Care*, Nat'l Ass'n Soc. Workers (Feb. 25, 2022), https://www.socialworkers.org/News/News-Releases/ID/2406/NASW-Condemns-Efforts-to-Redefine-Child-Abuse-to-Include-Gender-Affirming-Care.

transgender have access to comprehensive, gender-affirming, and developmentally appropriate health care that is provided in a safe and inclusive clinical space in close consultation with parents."[16]

27. The president of the Texas Pediatric Society explained of the efforts to change the definition of "child abuse" under Texas law: "Evidence-based medical care for transgender and gender diverse children is a complex issue that pediatricians are uniquely qualified to provide. This directive undermines the physician-patient-family relationship and will cause undue harm to children in Texas. TPS opposes the criminalization of evidence-based, gender-affirming care for transgender youth and adolescents. We urge the prioritization of the health and well-being of all youth, including transgender youth."[17]

28. The Endocrine Society condemned the efforts to re-define "child abuse" explaining that these efforts "reject[] evidence-based transgender medical care and will restrict access to care for teenagers experiencing gender incongruence or dysphoria."[18] The Endocrine Society statement went on to explain, "Health care providers should not be punished for providing evidenced-based care that is supported by major international medical groups—including the Endocrine Society, American Medical Association, the American Psychological Association, and the American Academy of Pediatrics—and Clinical Practice Guidelines."[19]

29. The President of the American Psychological Association issued the following statement: "This ill-conceived directive from the Texas governor will put at-risk children at even

[16] *AAP, Texas Pediatric Society Oppose Actions in Texas Threatening Health of Transgender Youth*, Am. Acad. Pediatrics (Feb. 24, 2022), https://www.aap.org/en/news-room/news-releases/aap/2022/aap-texas-pediatric-society-oppose-actions-in-texas-threatening-health-of-transgender-youth/.
[17] *Id.*
[18] *Endocrine Society Alarmed at Criminalization of Transgender Medicine*, Endocrine Soc'y (Feb. 23, 2022), https://www.endocrine.org/news-and-advocacy/news-room/2022/endocrine-society-alarmed-at-criminalization-of-transgender-medicine.
[19] Id.

higher risk of anxiety, depression, self-harm, and suicide. Gender-affirming care promotes the health and well-being of transgender youth and is provided by medical and mental health professionals, based on well-established scientific research. The peer-reviewed research suggests that transgender children and youth who are treated with affirmation and receive evidence-based treatments tend to see improvements in their psychological well-being.

Asking licensed medical and mental health professionals to 'turn in' parents who are merely trying to give their children needed and evidence-based care would violate patient confidentiality as well as professional ethics. The American Psychological Association opposes politicized intrusions into the decisions that parents make with medical providers about caring for their children."[20]

30. Prevent Child Abuse America issued the following statement: "Prevent Child Abuse America (PCA America) knows that providing necessary and adequate medical care to your child is not child abuse, and that transgender and non-binary children need access to age-appropriate, individualized medical care just like every other child. Therefore, PCA America opposes legislation and laws that would deny healthcare access to any child, regardless of their gender identity. Such laws threaten the safety and security of our nation's most vulnerable citizens—children and youth."[21]

31. The Ray E. Helfer Society, an international, multi-specialty society of physicians having substantial research and clinical experience with all medical facets of child abuse and neglect, likewise condemned Defendants' actions. The Helfer Society "opposes equating evidence based, gender affirming care for transgender youth with child abuse, and the criminalization of

[20] *APA President Condemns Texas Governor's Directive to Report Parents of Transgender Minors*, Am. Psych. Ass'n (Feb. 24, 2022), https://www.apa.org/news/press/releases/2022/02/report-parents-transgender-children.
[21] Melissa Merrick, *A Message from Dr. Melissa Merrick in Response to Texas AG Opinion on Gender-Affirming Care*, Prevent Child Abuse Am. (Feb. 23, 2022), https://preventchildabuse.org/latest-activity/gender-affirming-care/.

such care. The provision of medical and mental health care, consistent with the standard of care, is in no way consistent with our definitions of child abuse."[22]

32. Parents and families across the state of Texas are fearful that if they follow the recommendations of their medical providers to treat their adolescent children's suffering from gender dysphoria, they could face investigation, criminal prosecution and the removal of their children from their custody. As a result, parents are scared to remain in Texas, to send their children to school or to the doctor, and to otherwise meet their basic survival needs. They are also scared that if they do not pursue this medically prescribed and necessary care for their children in order to avoid investigation and criminal prosecution, their children's mental and physical health will suffer dramatically.

33. Upon information and belief, some doctors and other providers have discontinued prescribing medically necessary treatment for gender dysphoria to transgender youth as a result of Defendants' actions, causing patients to suffer physical and mental health consequences.

34. The actions taken by Defendants have already caused severe and irreparable harm to families across the state of Texas, including the Doe family, and have put medical and mental health providers in the impossible position of either following their legal and ethical professional responsibilities or facing criminal prosecution or civil and professional repercussions under Texas law.

[22] *Position Statement of the Ray E. Helfer Society On Gender Affirming Care Being Considered Child Abuse and Neglect*, Ray E. Helfer Soc'y (Feb. 2022), https://www.helfersociety.org/assets/docs/Helfer%20Society%20Statement%20On%20Texas%20Transgender%20Action%2002.22.pdf.

C. Treatment for Gender Dysphoria is Well-Established and Medically Necessary.

35. The health care that Governor Abbott has directed DFPS to consider child abuse is actually medically necessary, essential, and often lifesaving medical care that is endorsed and adopted by every major medical organization in the United States.

36. Doctors in Texas use well-established guidelines to diagnose and treat youth with gender dysphoria. Medical treatment for gender dysphoria is prescribed to adolescents only after the onset of puberty and only when doctors determine it to be medically necessary. Parents, doctors, and minors work together to develop a treatment plan consistent with widely accepted protocols supported by every major medical organization in the United States.

37. "Gender identity" refers to a person's internal, innate, and immutable sense of belonging to a particular gender.

38. Although the precise origin of gender identity is unknown, a person's gender identity is a fundamental aspect of human development. There is a general medical consensus that there is a significant biological component to gender identity.

39. Everyone has a gender identity. A person's gender identity is durable and cannot be altered through medical intervention.

40. A person's gender identity usually matches the sex they were designated at birth based on their external genitalia. The terms "sex designated at birth" or "sex assigned at birth" are more precise than the term "biological sex" because there are many biological sex characteristics, including gender identity, and these may not always be in alignment with each other. For example, some people with intersex characteristics may have a chromosomal configuration typically associated with a male sex designation but genital characteristics typically associated with a female sex designation. For these reasons, the Endocrine Society, an international medical organization

of over 18,000 endocrinology researchers and clinicians, warns practitioners that the terms "biological sex" and "biological male or female" are imprecise and should be avoided.[23]

41. Most boys were designated male at birth based on their external genital anatomy, and most girls were designated female at birth based on their external genital anatomy.

42. Transgender youth have a gender identity that differs from the sex assigned to them at birth. A transgender boy is someone who was assigned a female sex at birth but persistently, consistently, and insistently identifies as male. A transgender girl is someone who was assigned a male sex at birth but persistently, consistently, and insistently identifies as female.

43. Some transgender people become aware of having a gender identity that does not match their assigned sex early in childhood. For others, the onset of puberty, and the resulting physical changes in their bodies, leads them to recognize that their gender identity is not aligned with their sex assigned at birth. The lack of alignment between one's gender identity and sex assigned at birth can cause significant distress.

44. According to the American Psychiatric Association's Diagnostic & Statistical Manual of Mental Disorders ("DSM-V"), "gender dysphoria" is the diagnostic term for the condition experienced by some transgender people of clinically significant distress resulting from the lack of congruence between their gender identity and the sex assigned to them at birth. In order to be diagnosed with gender dysphoria, the incongruence must have persisted for at least six months and be accompanied by clinically significant distress or impairment in social, occupational, or other important areas of functioning.

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[23] *See* Wylie C. Hembree et al., *Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent Persons: An Endocrine Society* Clinical Practice Guideline*, 102 J. Clinical Endocrinology & Metabolism 3869, 3875 (2017), https://academic.oup.com/jcem/article/102/11/3869/4157558 [hereinafter "Endocrine Guideline"] ("Biological sex, biological male or female: These terms refer to physical aspects of maleness and femaleness. As these may not be in line with each other (e.g., a person with XY chromosomes may have female-appearing genitalia), the terms biological sex and biological male or female are imprecise and should be avoided.").

45. Being transgender is not itself a medical condition to be cured. But gender dysphoria is a serious medical condition that, if left untreated, can result in debilitating anxiety, severe depression, self-harm, and suicidality.

46. The World Professional Association for Transgender Health ("WPATH") and the Endocrine Society have published widely accepted guidelines for treating gender dysphoria.[24] The medical treatment for gender dysphoria is to eliminate the clinically significant distress by helping a transgender person live in alignment with their gender identity. This treatment is sometimes referred to as "gender transition," "transition related care," or "gender affirming care." These standards of care are recognized by the American Academy of Pediatrics, which agrees that this care is safe, effective, and medically necessary treatment for the health and wellbeing of youth suffering from gender dysphoria.[25]

47. The precise treatment for gender dysphoria for any individual depends on that person's individualized needs, and the guidelines for medical treatment differ depending on whether the treatment is for an adolescent or an adult. No medical treatment is recommended or necessary prior to the onset of puberty, however.

48. Before puberty, gender transition does not include any pharmaceutical or surgical intervention. Instead, it involves social transition, such as using a name and pronouns typically associated with the child's gender identity and dressing consistently with their gender identity.

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[24] Endocrine Guideline; World Prof'l Ass'n for Transgender Health, Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People (7th Version, 2012), https://www.wpath.org/media/cms/Documents/SOC%20v7/SOC%20V7_English2012.pdf?_t=1613669341 [hereinafter, WPATH SOC].

[25] Jason Rafferty, et al., Am. Academy Pediatrics, *Ensuring Comprehensive Care and Support for Transgender and Gender-Diverse Children and Adolescents*, 142 Pediatrics (2018), https://publications.aap.org/pediatrics/article/142/4/e20182162/37381/Ensuring-Comprehensive-Care-and-Support-for; Lee Savio Beers, *American Academy of Pediatrics Speaks Out Against Bills Harming Transgender Youth*, Am. Academy Pediatrics (Mar. 16, 2021), https://www.aap.org/en/news-room/news-releases/aap/2021/american-academy-of-pediatrics-speaks-out-against-bills-harming-transgender-youth/.

49. Under the WPATH Standards of Care and the Endocrine Society Guideline, medical interventions may become medically necessary and appropriate as transgender youth reach puberty. In providing medical treatments to adolescents, pediatric physicians and endocrinologists work in close consultation with qualified mental health professionals experienced in diagnosing and treating gender dysphoria.

50. For many transgender adolescents, going through puberty in accordance with the sex assigned to them at birth can cause extreme distress. Puberty-delaying medication allows transgender adolescents to avoid that, thus minimizing and potentially preventing the heightened gender dysphoria and permanent physical changes that puberty would cause.

51. Under the Endocrine Society Clinical Guideline, transgender adolescents may be eligible for puberty-delaying treatment if:

- A qualified mental health professional has confirmed that:
    - the adolescent has demonstrated a long-lasting and intense pattern of gender nonconformity or gender dysphoria (whether suppressed or expressed),
    - gender dysphoria worsened with the onset of puberty,
    - coexisting psychological, medical, or social problems that could interfere with treatment (e.g., that may compromise treatment adherence) have been addressed, such that the adolescent's situation and functioning are stable enough to start treatment,

      the adolescent has sufficient mental capacity to give informed consent to this (reversible) treatment,
- And the adolescent:

- has sufficient mental capacity to give informed consent to this (reversible) treatment,
- the adolescent has been informed of the effects and side effects of treatment (including potential loss of fertility if the individual subsequently continues with sex hormone treatment) and options to preserve fertility,
- the adolescent has given informed consent and (particularly when the adolescent has not reached the age of legal medical consent, depending on applicable legislation) the parents or other caretakers or guardians have consented to the treatment and are involved in supporting the adolescent throughout the treatment process,

- And a pediatric endocrinologist or other clinician experienced in pubertal assessment:
  - agrees with the indication for gonadotropin-releasing hormone ("GnRH") agonist treatment,
  - has confirmed that puberty has started in the adolescent, and
  - has confirmed that there are no medical contraindications to GnRH agonist treatment.

52. Puberty-delaying treatment is reversible. If an adolescent discontinues the medication, puberty consistent with their assigned sex will resume. Contrary to the assertions in the Paxton Opinion, puberty-delaying treatment does not cause infertility.

53. For some adolescents, it may be medically necessary and appropriate to initiate puberty consistent with the young person's gender identity through gender-affirming hormone

therapy (testosterone for transgender boys, and estrogen and testosterone suppression for transgender girls).

54. Under Endocrine Society Clinical Guidelines, transgender adolescents may be eligible for gender-affirming hormone therapy if:

- A qualified mental health professional has confirmed:
  - the persistence of gender dysphoria,
  - any coexisting psychological, medical, or social problems that could interfere with treatment (e.g., that may compromise treatment adherence) have been addressed, such that the adolescent's environment and functioning are stable enough to start sex hormone treatment,
  - the adolescent has sufficient mental capacity to estimate the consequences of this (partly) irreversible treatment, weigh the benefits and risks, and give informed consent to this (partly) irreversible treatment,
- And the adolescent:
  - has been informed of the partly irreversible effects and side effects of treatment (including potential loss of fertility and options to preserve fertility),
  - has given informed consent and (particularly when the adolescent has not reached the age of legal medical consent, depending on applicable legislation) the parents or other caretakers or guardians have consented to the treatment and are involved in supporting the adolescent throughout the treatment process,

- And a pediatric endocrinologist or other clinician experienced in pubertal induction:
    - agrees with the indication for sex hormone treatment, and
    - has confirmed that there are no medical contraindications to sex hormone treatment.

55. Under the WPATH Standards of Care, transgender young people may also receive medically necessary chest reconstructive surgeries before the age of majority, provided the young person has lived in their affirmed gender for a significant period of time. Genital surgery is not recommended until patients reach the age of majority.

56. Chest reconstructive surgeries have no impact on fertility.

57. Medical treatment recommended for and provided to transgender adolescents with gender dysphoria can substantially reduce lifelong gender dysphoria and can eliminate the medical need for surgery later in life.

58. The treatment protocols for gender dysphoria supported by every major medical organization in the United States are based on extensive research and clinical experience. When existing protocols are followed, no minor is rushed into treatment. The process, instead, requires extensive mental health evaluation and informed consent procedures.

59. Providing gender-affirming medical care can be lifesaving treatment and change the short and long-term health outcomes for transgender youth.

60. All of the treatments used to treat gender dysphoria are also used to treat other conditions in minors with comparable side effects and risks.

61. Many forms of treatment in pediatric medicine and medicine generally are prescribed "off-label". Use of medication for "off-label" non-FDA approved purposes is a common and necessary practice in medicine.

D. Legal Status of Treatment for Gender Dysphoria in the United States

62. No state in the country considers medically recommended treatment for gender dysphoria to be a form of child abuse.

63. No state in the country prohibits doctors from treating, or parents from consenting to treatment for, minor patients with gender dysphoria.

64. Arkansas is the only state to pass a law prohibiting such treatment but the law was enjoined in court before it went into effect and does not classify the treatment as a form of child abuse.[26] When the Arkansas General Assembly passed the bill prohibiting treatment for minors with gender dysphoria, Governor Asa Hutchinson vetoed it, explaining: "I vetoed this bill because it creates new standards of legislative interference with physicians and parents as they deal with some of the most complex and sensitive matters concerning our youths. It is undisputed that the number of minors who struggle with gender incongruity or gender dysphoria is extremely small. But they, too, deserve the guiding hand of their parents and the counseling of medical specialists in making the best decisions for their individual needs. H.B. 1570 puts the state as the definitive oracle of medical care, overriding parents, patients, and health-care experts. While in some instances the state must act to protect life, the state should not presume to jump into the middle of every medical, human and ethical issue. This would be—and is—a vast government overreach."[27]

[26] *Brandt v. Rutledge*, Case No.: 4:21-cv-00450-JM, 2021 WL 3292057 (E.D. Ark. Aug. 2, 2021).
[27] Asa Hutchinson, Opinion, *Why I Vetoed My Party's Bill Restricting Health Care for Transgender Youth*, Wash. Post (Apr. 8, 2021), https://www.washingtonpost.com/opinions/asa-hutchinson-veto-transgender-health-bill-youth/2021/04/08/990c43f4-9892-11eb-962b-78c1d8228819_story.html.

65. In Arkansas, a simple majority of the General Assembly overrode Governor Hutchinson's veto and nonetheless enacted a ban on health care treatments for minors with gender dysphoria. In July 2021, that law was enjoined in federal court. Based on an extensive preliminary injunction record, the court found: "If the Act is not enjoined, healthcare providers in this State will not be able to consider the recognized standard of care for adolescent gender dysphoria. Instead of ensuring that healthcare providers in the State of Arkansas abide by ethical standards, the State has ensured that its healthcare providers do not have the ability to abide by their ethical standards which may include medically necessary transition-related care for improving the physical and mental health of their transgender patients."[28] The court further held that the law "cannot withstand heightened scrutiny and based on the record would not even withstand rational basis scrutiny if it were the appropriate standard of review."[29]

VI. PLAINTIFFS

The Doe Family

66. Plaintiff Jane Doe is married to Plaintiff John Doe and together they are the proud parents of Plaintiff Mary Doe, a 16-year-adolescent. Ex. 1, Decl. of Jane Doe.

67. Plaintiffs Jane and John have called Texas their home for nearly 20 years and Texas is the only home Mary has ever known.

68. Mary Doe is transgender. When she was born, she was designated as "male" on her birth certificate, but she is a girl.

69. From a very young age, Mary has expressed herself and behaved in manner that does not conform with the stereotypes associated with the sex she was designated at birth.

[28] *Brandt v. Rutledge*, Case No.: 4:21-cv-00450-JM, 2021 WL 3292057, at *4 (E.D. Ark. Aug. 2, 2021).
[29] *Id.*

70. Mary's parents have been supportive and accepting of her, giving her the space to express herself and explore who she is.

71. Mary has been under the care of the same pediatrician most of her life. Her pediatrician diagnosed her with gender dysphoria and referred the family to other medical professionals who likewise confirmed that Mary suffers from gender dysphoria.

72. The family has also done research to educate themselves about gender dysphoria and its treatment, and connected Mary with youth support groups that would permit them to have discussions as a family.

73. Following Mary's diagnosis of gender dysphoria, Mary's doctors recommended that Mary be provided with medical care to treat and alleviate her gender dysphoria. This care has included the prescription of puberty-delaying medication and hormone therapy to initiate puberty consistent with her female gender.

74. In consultation with these doctors and after extensive discussions about the benefits and potential side effects of this treatment, Jane Doe, John Doe, and Mary Doe jointly decided to initiate treatment for Mary's gender dysphoria. This treatment has been prescribed by Mary's doctors in accordance with what they believe are best medical practices and what the Doe family understands will be the best course of action to protect Mary's physical and mental health.

75. Mary was worried about having to undergo a puberty that would result in permanent physical characteristics not in alignment with her female gender. Jane and John observed how the prospect of beginning this puberty caused Mary significant distress and exacerbated her dysphoria.

76. Being able to be affirmed as who she is, including through the course of treatment prescribed by her doctors, has brought Mary significant relief and allowed her to thrive.

77. Plaintiff Jane Doe has worked in the field of child protective services at various times throughout her career. At present, Plaintiff Jane Doe is an employee of DFPS, where she works on the review of reports of abuse and neglect. Her track record as a DFPS employee has been exemplary and commended by her supervisors.

78. The issuance of the Paxton Opinion and the Abbott Letter, followed by DFPS's implementation of these to investigate the provision of medically necessary gender-affirming health care as abuse, has wreaked havoc on the Doe family.

79. Plaintiffs Jane Doe, John Doe, and Mary Doe are terrified for Mary's health and wellbeing, and for their family.

80. On February 23, 2022, following the issuance of the Paxton Opinion and the Abbott Letter, Jane communicated with her supervisor at DFPS to seek clarification of how the Abbott Letter would affect DFPS policy. Such clarification was important for her family as well as to her ability to perform her job at DFPS.

81. That same day, and just mere hours later, Jane Doe was placed on leave from her employment because she has a transgender daughter with a medical need for treatment of gender dysphoria.

82. The next day, on the afternoon of February 24, 2022, Plaintiff Jane Doe was informed that her family would be investigated in accordance with Governor Abbott's letter to determine if Jane Doe and John Doe had committed abuse by affirming their transgender daughter's identity and obtaining the medically necessary health care that she needs.

83. On February 25, 2022, a DFPS Child Protective Services (CPS) investigator visited the Doe family's home to interview Jane Doe, John Doe, and Mary Doe. The CPS investigator interviewed Jane Doe and John Doe, who were accompanied by counsel, together, while he

interviewed Mary Doe, who was accompanied by different counsel, apart from her parents. Aside from interviewing the Doe family, the CPS investigator sought access through releases to Mary Doe's medical records, which the Doe Plaintiffs refused to sign.

84. The CPS investigator disclosed that the sole allegation against Jane Doe and John Doe is that they have a transgender daughter and that their daughter may have been provided with medically necessary gender-affirming health care and is "currently transitioning from male to female."

85. The issuance of the Paxton Opinion and the Abbott Letter, along with DFPS's implementation of these, has terrorized the Doe family and inflicted ongoing and irreparable harm.

86. As a result of DFPS's implementation and the subsequent investigation of the Doe family, Jane Doe has been placed on leave from her employment. Should DFPS incorrectly find that Jane Doe and John Doe have committed "abuse" based on Governor Abbott's and Attorney General Paxton's erroneous and misguided missives and understanding of medical treatment for gender dysphoria, Jane Doe could face termination, which would result not only in the loss of income for the family but also their health care coverage.

87. Should DFPS incorrectly issue a finding that there is reason to believe that Jane Doe and John Doe have committed "abuse" based on Governor Abbott's and Attorney General Paxton's erroneous and misguided missives and understanding of medical treatment for gender dysphoria, they would automatically be placed on a child abuse registry and be improperly subject to all of the effects that flow from such placement.

88. The issuance of the Attorney General's opinion and Governor's letter, along with DFPS's implementation of these, has caused a significant amount of stress, anxiety, and fear for the Doe family. For example, Mary has been traumatized by the prospect that she could be

separated from her parents and could lose access to the medical treatment that has enabled her to thrive. The stress has taken a noticeable toll on her, and her parents have observed how their daughter who is typically joyful and happy, is now moodier, stressed, and overwhelmed. Similarly, Jane and John are now filled anxiety and worry. Jane has been unable to sleep, worrying about what they can do and how they can keep their family intact and their daughter safe and healthy. The Doe family is living in constant fear about what will happen to them due to the actions by DFPS, the Governor, and the Attorney General.

89. Plaintiffs Jane and John also worry about the potential physical and mental health consequences of depriving Mary of the medical treatment her doctors have prescribed and that she needs. Not providing Mary with the medically necessary health care that she needs is not an option for them, as their topmost goal and duty are to ensure Mary's health and wellbeing.

Dr. Megan A. Mooney

90. Plaintiff Dr. Megan A. Mooney is a licensed psychologist in Texas. For almost two decades now, she has worked with children and families to respond to and mitigate trauma and harm. Ex. 2, Decl. of Dr. Mooney.

91. Dr. Mooney is also a mandatory reporter obligated to report child abuse and neglect to DFPS. She has received and conducted trainings on mandatory reporting requirements and is familiar with Texas law on child abuse and neglect.

92. She runs a private psychology practice based in Houston that serves children, adolescents, and families. However, she also sees clients elsewhere in the state, including outside of the major metropolitan areas, by video conference.

93. She is bound by professional codes of ethics from the American Psychological Association to do no harm to her patients.

94. Many of her patients are transgender or non-binary young people under the age of 18, including youth with gender dysphoria.

95. Part of Dr. Mooney's job includes providing mental health evaluations for youth with gender dysphoria, referring youth with gender dysphoria for medical treatment, and continuing to treat young people who receive medical treatment for gender dysphoria.

96. She provides this care only after careful mental health evaluations of her clients and with the informed consent of parents and the assent of minor patients.

97. As someone who works closely with LGBTQ+ young people, she has seen first-hand the trauma and harm they face and the bullying and harassment they experience, especially in schools.

98. From a clinical perspective, Dr. Mooney has also observed the tremendous health benefits that her patients experience as a result of medical treatment for gender dysphoria. These clinical observations have been supported by the most up-to-date data and scientific studies she reviews as part of her ongoing professional obligations.

99. Dr. Mooney has seen young people who were depressed and feeling hopeless and scared for their future begin to feel happy and optimistic just by starting medications to suppress puberty or to develop the secondary sex characteristics that align with their gender identity.

100. The Governor's directive and DFPS implementation have placed Dr. Mooney in an untenable situation.

101. If Dr. Mooney fails to report her clients who receive gender-affirming care, she faces the prospect of civil and criminal penalties, the loss of her license, and other severe consequences.

102. However, if she does follow the Governor's letter and DFPS' erroneous reliance on it, she faces even more damaging personal and professional consequences.

103. Dr. Mooney would be violating her professional standards of ethics and inflict serious harm and trauma on her clients.

104. Many clients that she works with have already experienced trauma, and reporting them to DFPS simply for receiving gender-affirming care from a licensed medical provider would cause immense and irreversible harm by subjecting them to an investigation and possible family separation.

105. Being subject to an investigation would dramatically worsen the mental health outcomes of her clients, and could worsen the already tragic rate of suicide among transgender youth.

106. In addition, she would irreparably damage the bonds of trust that she has built with her clients and, as a consequence, could face the possible closure of her practice if clients know that she cannot maintain their trust. She could also be subject to malpractice lawsuits from her clients for failing to adhere to ethical guidelines and for harming her clients.

107. Dr. Mooney could also confront harsh penalties, including prison time, for the false reporting of child abuse, as she would be making a report to DFPS when she knows child abuse is not happening.

108. Thus, the issuance of the Governor's letter and DFPS' implementation has threatened and continues to threaten Dr. Mooney's morality, liberty, and livelihood.

VII. CAUSES OF ACTION

A. Request for Declaratory Relief Under the Texas Administrative Procedure Act – By All Plaintiffs Against Defendants Commissioner Masters and DFPS

109. Plaintiffs incorporate the foregoing paragraphs in support of the following causes of action.

110. Plaintiffs request declaratory relief under the Texas Administrative Procedure Act ("APA"). *See* Tex. Gov't Code § 2001.038(a) ("The validity or applicability of a rule, including an emergency rule adopted under Section 2001.034, may be determined in an action for declaratory judgment if it is alleged that the rule or its threatened application interferes with or impairs, or *threatens to interfere with or impair, a legal right or privilege of the plaintiff*.") (emphasis added).

111. The APA contains a waiver of sovereign immunity to the extent of creating a cause of action for declaratory relief regarding the validity or applicability of a "rule." *Id.*

The DFPS Statement Constitutes a Rule, and Commissioner Masters Bypassed Mandatory APA Procedures for Rule Promulgation.

112. Under the APA, a rule

> (A) means a state agency statement of general applicability that: (i) implements, interprets, or prescribes law or policy; or (ii) describes the procedure or practice requirements of a state agency; (B) includes the amendment or repeal of a prior rule; and (C) does not include a statement regarding only the internal management or organization of a state agency and not affecting private rights or procedures.
>
> *Id.* § 2001.003(6) (line breaks omitted).

113. As DFPS Commissioner, Commissioner Masters is statutorily authorized to "provide protective services for children" and "develop and adopt standards for persons who investigate suspected child abuse or neglect at the state or local level" via rulemaking. Tex. Hum. Res. Code § 40.002(b); Tex. Fam. Code § 261.310(a).

114. As a state agency, DFPS is required to follow APA rulemaking procedures when adopting or changing rules. APA's mandatory procedural requirements for promulgating agency rules, including public notice, comment, and a reasoned justification for the rule. *See* Tex. Gov't Code §§ 2001.023, .029, .033. To be valid, a rule must be adopted in substantial compliance with these procedures. *See id.* § 2001.035. The February 22, 2022 DFPS Statement conveys the Department's official position with respect to the investigation of gender-affirming care as child abuse. The DFPS Statement, issued in accordance with Abbott's Letter, is a statement of general applicability that is (1) directed at a class of all persons similarly situated and (2) affects the interests of the public at large. The statement provides that DFPS *will* implement the Abbott letter's directive and investigate allegations relating to gender-affirming medical care as "child abuse" according to the new definition formulated by the Paxton Opinion. The DFPS Statement thus applies to and affects the private rights of class of persons—all parents of transgender children—as well as members of the general public. *El Paso Hosp. Dist. v. Tex. Health & Human Servs. Comm'n*, 247 S.W. 3d 709, 714 (Tex. 2008) (holding that statement of Health and Human Services Commission had "general applicability" because it applied to "all hospitals"); *Combs v. Entm't Publ'ns, Inc.*, 292 S.W.3d 712, 721-22 (Tex. App.—Austin 2009, no pet.) (holding that Comptroller's statements constituted "rule" under the APA because it applied to all persons and entities similarly situated"); *see also Teladoc, Inc. v. Tex. Med. Bd.*, 453 S.W.3d 606, 615 (Tex. App.—Austin 2014, pet. denied) ("Agency statements of 'general applicability' refer to those 'that affect the interest of the public at large such that they cannot be given the effect of law without public comment,' as contrasted with statements 'made in determining individual rights.'" (citation omitted)).

115. The DFPS Statement prescribes a new DFPS enforcement policy with respect to the investigation of gender-affirming care to minors as child abuse, which changes DFPS policy and constitutes a rule for purposes of the APA. *See Texas Alcoholic Beverage Comm'n v. Amusement & Music Operators of Texas, Inc*., 997 S.W.2d 651, 657-58 (Tex. App.—Austin 1999, writ dism'd w.o.j.) (holding that memoranda constituted a "rule" because they "set out binding practice requirements" that "substantially changed previous enforcement policy" with respect to eight-liner machines). Prior to the DFPS Statement, DFPS had not promulgated any rule pertaining to the investigation of gender-affirming care as child abuse.[30] The DFPS Commissioner explicitly disavowed pursuing these investigations in September, stating "I will await the opinion issued by the Attorney General's office before I reach any final decisions" relating to investigations of gender affirming care as child abuse. The agency has now made a statement that it *will* conduct investigations in accordance with the Attorney General's opinion, while stating that there were "no pending investigations of child abuse involving the procedures described in [the Paxton Opinion]" when DFPS announced this policy change on February 22. Prior to the Commissioner's announcement, there were *no* pending investigations being pursued by DFPS. But now there are investigations targeting Plaintiffs and the Commissioner's statement prescribed a new policy that greatly expands DFPS's scope of enforcement. *See John Gannon, Inc. v. Tex. Dep't of Transp.*, No. 03-18-00696-CV, 2020 WL 6018646, at *5 (Tex. App.—Austin Oct. 9, 2020, pet. denied) (mem. op.) (agency statements that "advise third parties regarding applicable legal requirements" may "constitute 'rules' under the APA" (quoting *LMV-AL Ventures, LLC v. Texas Dep't of Aging & Disability Servs*., 520 S.W.3d 113, 121 (Tex. App.—Austin 2017, pet. denied))).

[30] Even if DFPS had previously promulgated a rule providing for the investigation of gender-affirming medical care as "child abuse", such a rule would have exceeded the bounds of DFPS's authority. *See infra* paras. 118-125.

116. In declaring that investigations would be initiated based on a non-binding opinion from the Attorney General, the Commissioner entirely bypassed the APA's mandatory procedural requirements for promulgating agency rules. The Commissioner did not provide public notice or an opportunity for and full consideration of comments from the public. Additionally, the Commissioner provided no reasoned justification for the policy change, nor for the implementation of the Abbott letter which goes even further than Paxton's Opinion by making no mention of medical necessity. Neither the non-binding Paxton Opinion nor the Abbott Letter—both of which conflict with well-established medical standards of care—are a legitimate basis for the rule. The rule, therefore, is also arbitrary and capricious.

117. A rule that is not properly promulgated under mandatory APA procedures is invalid. *El Paso Hosp. Dist.*, 247 S.W.3d at 715. As such, the DFPS Statement is invalid and should not be given effect, and DFPS enforcement activity implementing the DFPS Statement should be enjoined.

The DFPS Statement Conflicts with DFPS's Enabling Statute, Exceeding its Authority.

118. The DFPS Statement is also invalid because it stands in direct conflict with DFPS's enabling statute and, as such, is an overreach of DFPS's power as established by the legislature.

119. "To establish the rule's facial invalidity, a challenger must show that the rule: (1) contravenes specific statutory language; (2) runs counter to the general objectives of the statute; or (3) imposes burdens, conditions, or restrictions in excess of or inconsistent with the relevant statutory provisions." *Gulf Coast Coal. of Cities v. Pub. Util. Comm'n*, 161 S.W.3d 706, 712 (Tex. App.—Austin 2005).

120. The DFPS Statement contravenes specific language in DFPS's enabling statute. Section 40.002 of the Texas Human Resources Code specifies that DFPS "*shall* . . . provide family support and family preservation services *that respect the fundamental right of parents to control*

the education and upbringing of their children." Tex. Hum. Res. Code § 40.002 (emphasis added). As demonstrated herein, the DFPS Statement infringes on the rights of parents to direct the custody and care of their children, including by providing them with needed medical care. *See infra*, Section VII.D. The new DFPS rule thus conflicts with the obligations imposed on DFPS by its enabling statute and, therefore, is, invalid.

121. In addition to conflicting with specific statutory language, the DFPS Statement also conflicts with the general objectives of DFPS's enabling statute. *See Gulf Coast Coal. of Cities*, 161 S.W.3d at711-12. These general objectives are informed by the specific duties imposed on DFPS by the legislature and encompass the objective of protecting children against abuse while respecting parents' fundamental right to control the upbringing of their children. *See* Tex. Hum. Res. Code § 40.002(b). Not only does the DFPS Statement infringe on parents' fundamental rights, it also *causes* immense harm to minor children with gender dysphoria who have a medical need for treatment that is now considered "child abuse" under the new agency rule.

122. Pursuant to the DFPS Statement and implementation thereof, the Doe Parent Plaintiffs cannot provide medically necessary and doctor-recommended medical treatment to their adolescent child without exposing themselves to criminal liability. Precisely because this medical treatment is necessary, if the Does ceased providing this care, Mary will be greatly and irreparably harmed, including by being forced to undergo endogenous puberty with the permanent physical changes that can result. The new DFPS rule, though cloaked under the guise of protecting children, actually *causes* harm where none existed in the first place. Furthermore, the mere *threat* of enforcement has already impacted Mary by causing her immeasurable anxiety and distress: she is forced to choose between the medical care that she needs and exposing her parents to criminal liability and potentially being removed from their care or, alternatively, abstaining from such

medically necessary care and suffering the physical and mental consequences, all in order to protect their family from DFPS investigation. As such, the new DFPS rule cannot be harmonized with DFPS's general objectives as set forth in its enabling statute. *See R.R. Comm'n of Tex. v. Lone Star Gas Co*., 844 S.W.2d 679, 685 (Tex.1992); *Gerst v. Oak Cliff Sav. & Loan Ass'n*, 432 S.W.2d 702, 706 (Tex. 1968).

123. Every major medical organization in the United States considers the treatment now effectively banned and criminalized by DFPS to be medically necessary. Such a radical disregard of medical science and the medical needs of a subset of minors in Texas cannot be squared with the agency's authority as prescribed by Statute.

124. Finally, nothing in DFPS's enabling statute authorizes it to expand the scope of statutory definitions established by the legislature. The definition of "child abuse" is provided by statute and is not within DFPS's jurisdiction. Because the DFPS Statement is not rooted in any rulemaking authority provided by the legislature, it is invalid. *See Williams v. Tex. State Bd. of Orthotics & Prosthetics*, 150 S.W.3d 563, 568 (Tex. App.-Austin 2004, no pet.) ("An agency rule is invalid if [] the agency had no statutory authority to promulgate it . . . .").

125. This unauthorized expansion of the definition of "child abuse" not only harms the Does, but also altered the duties of mandatory reporters such as Dr. Mooney, subjecting them to criminal liability for failing to report when they are aware that a transgender adolescent is being provided medically necessary treatment for gender dysphoria.

Implementation of the DFPS Statement Interferes with Plaintiffs' Constitutional Rights.

126. Separate and apart from the procedural defects set forth above, the DFPS Statement is also invalid because its application interferes with Plaintiffs' fundamental parental rights and other equality and due process guarantees of the Texas Constitution.

127. Under the APA, an action for declaratory judgment can be sustained if a "rule or its threatened application interferes with or impairs, or threatens to interfere with or impair, a legal right." Tex. Gov't Code § 2001.038(a). Agency rules that are unconstitutional can be invalidated through declaratory judgment. *See Williams*, 150 S.W.3d at 568.

128. The DFPS Statement and implementation thereof interfere with the Doe Parent Plaintiffs' fundamental right to care for their children guaranteed by the Texas State Constitutions. *Wiley v. Spratlan*, 543 S.W.2d 349, 352 (Tex. 1976). The Texas legislature has codified its acknowledgement that parents possess fundamental, constitutional rights beyond those expressly provided for by statute. Tex. Fam. Code § 151.001(a)(11) (concluding enumerated list of parental rights and obligations by stating that a parent has "any other right or duty existing between a parent and child by virtue of law").

129. DFPS's purported interest in preventing transgender children from receiving life-saving and medically recommended treatment for gender dysphoria is far outweighed by parents' rights to determine what medical care is necessary and in the best interests of their child, in consultation with doctors and evidence-based standards of care. A parent's right to control the care of their child is one of the most ancient and natural of all fundamental rights. *See Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985) ("This natural parental right has been characterized as essential, a basic civil right of man, and far more precious than property rights." (citation and quotations omitted)).

130. By, in effect, cutting off the ability of parents to treat their minor adolescent children in accordance with doctor-recommended and clinically appropriate care, the agency's new rule infringes on the Does' parental rights. The agency's new rule substitutes parents' judgment as to what medical care is in the best interests of their children for the judgment of the

government. There is no justification sufficiently compelling to warrant such a gross invasion of parental rights. The DFPS Statement creates a presumption that following clinical guidelines for treating gender dysphoria is incompatible with the best interests of transgender youth, forecloses determinative issues of competence and care, and "run[s] roughshod over the important interests of both parent and child." *Stanley v. Illinois*, 405 U.S. 645, 657 (1972).

131. As such, the DFPS Statement must be declared invalid because it conflicts with Plaintiffs' fundamental rights of parents under the Texas Constitution, as well as other equality and due process guarantees of the Texas Constitution.

B. Ultra Vires Claims – By All Plaintiffs Against Defendants Governor Abbott and Commissioner Masters

132. Plaintiffs incorporate the foregoing paragraphs in support of the following causes of action.

133. Plaintiffs request declaratory relief under the Uniform Declaratory Judgments Act ("UDJA").

134. The UDJA is remedial and intended to settle and afford relief from uncertainty and insecurity with respect to rights under state law and must be liberally construed to achieve that purpose. Tex. Civ. Prac. & Rem. Code. § 37.002. The UDJA waives the sovereign immunity of the State and its officials in actions that challenge the constitutionality of government actions and that seek only equitable relief.

135. Pursuant to the UDJA, Plaintiffs seek a declaratory judgment of the Court that Abbott's Letter and the DFPS Statement directing DFPS to investigate families for providing their children with medically necessary health care:

a. Is *ultra vires* and exceeds the Governor's and the Commissioner's authority under the Texas Family Code; and

b. Contravenes separation of powers established by Article II of the Texas Constitution.

136. In order to stop the Governor's and Commissioner's *ultra vires* and unconstitutional directives from being enforced, Plaintiffs also seek temporary and permanent injunctive relief pursuant to Texas Civil Practices & Remedies Code §§ 37.011 and 65.011.

137. A government official commits an *ultra vires* act when the officer "act[s] without legal authority or fail[s] to perform a purely ministerial act." *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009). An officer acts without legal authority "if he exceeds the bounds of his granted authority or if his acts conflict with the law itself." *Houston Belt & Terminal Ry. Co. v. City of Houston*, 487 S.W.3d 154, 158 (Tex. 2016).

138. In this case, both Governor Abbott and Commissioner Masters have acted without legal authority in directing DFPS to initiate investigations for any reported instances of the enumerated medical procedures in the Abbott Letter. For the reasons discussed below, there is a "probable right to relief" here on the *ultra vires* claims. *See Abbott v. Harris Cty.*, No. 03-21-00429-CV, 2022 WL 92027, at *10 (Tex. App. Jan. 6, 2022) (finding that plaintiffs had established "a probable right to relief on their claim that the Governor's issuance of [an executive order] constitutes an ultra vires act" in granting injunctive relief).

Governor Abbott Has Exceeded His Authority.

139. Governor Abbott has exceeded his authority by unilaterally redefining child abuse and then ordering "prompt and thorough investigation[s]" based on his redefinition.[31]

[31] Greg Abbott, Letter to Hon. Jaime Masters, Commissioner, Tex. Dep't of Fam. & Protective Servs. (Feb. 22, 2022), https://gov.texas.gov/uploads/files/press/O-MastersJaime202202221358.pdf.

140. In contrast to the Governor's past executive orders, *see, e.g.*, Executive Order GA-38 (citing Tex. Gov't Code. § 418.016), Governor Abbott issued this directive without citing any gubernatorial authority.

141. Instead, the Abbott Letter cites only to the Texas Family Code. The Texas Family Code, however, does not give Governor Abbott any authority to define the contours of "child abuse" or to "direct the agency to "conduct . . . investigation[s]," as he attempted to do in his letter.[32] The Texas Family Code itself defines child abuse and outlines DFPS's investigatory authority. *See* Tex. Fam. Code §§ 261.001, 261.301. These laws also specifically task the DFPS Commissioner with establishing procedures for investigating abuse and neglect, based on the definitions of abuse and neglect under Texas law and in accordance with the APA. Thus, the Governor has no authority to define the contours of what constitutes child abuse under Texas law or to unilaterally change any DFPS procedures. Indeed, even the Paxton Opinion merely identified what *could* be considered "child abuse". Governor Abbott then took that non-binding analysis and directed DFPS to presume, in all cases, that a minor adolescent with gender dysphoria with medical treatment consistent with well-established medical guidelines amounted to abuse.

142. Furthermore, the Texas Constitution makes clear that the Governor only administers the law pursuant to the general grant to "cause the laws to be faithfully executed." Tex. Const. art. 4, § 10. The Governor neither makes the law nor possesses the authority to suspend laws under the Texas Constitution. *See* Tex. Const. art. 1, § 28 ("No power of suspending laws in this State shall be exercised except by the Legislature.").

143. Even where a state agency like DFPS has been delegated the power to make rules, the Governor cannot lawfully order the Commissioner to adopt a particular rule, much less order

[32] *Id.*

her to do so without following the proper rulemaking process. *See* Tex. Hum. Res. Code § 40.027(c)(3) (tasking the Commissioner, not the Governor, with "oversee[ing] the development of rules relating to the matters within the department's jurisdiction").

Commissioner Masters Has Exceeded Her Authority.

144. Commissioner Masters has also exceeded her authority and acted *ultra vires* by implementing Governor Abbott's unlawful redefinition of child abuse. In accordance with the DFPS Statement issued soon after the Abbott Letter, Commissioner Masters has already directed her department to investigate any reports of minors who have undergone the medical procedures outlined in the Abbott Letter.

145. These actions contravene Commissioner Masters' limited statutory authority to "adopt rules and policies for the operation of and the provision of services by the department." Tex. Hum. Res. Code § 40.027(e). As set forth in Count A, Commissioner Masters has completely ignored the APA's mandatory rulemaking process. Therefore, the issuance and implementation of the DFPS Statement is *ultra vires* of the Commissioner's statutory rulemaking authority. *See City of El Paso v. Public Util. Comm'n,* 839 S.W.2d 895, 910 (Tex. App.—Austin 1992) ("[I]f there is no specific express authority for a challenged [agency] action, and if the action is inconsistent with a statutory provision or ascertainable legislative intent, we must conclude that, by performing the act, the agency has exceeded its grant of statutory authority."), *aff'd in part & rev'd in part,* 883 S.W.2d 179 (Tex. 1994). Furthermore, the Commissioner lacked authority to issue the DFPS Statement as new law or policy because it is the legislature's constitutional mandate to "provide for revising, digesting and publishing the laws." Tex. Const. art. 3, § 43.

146. Moreover, the DFPS Statement contradicts DFPS's enabling statute, which requires the department to "provide protective services for children" and "provide family support and family preservation services that respect the fundamental right of parents to control the education

and upbringing of their children." Tex. Hum. Res. Code § 40.002(b). Rather than support children and respect the right of parents to raise their children and the rights of transgender minors to receive medically necessary treatment available to similarly situated non-transgender minors, Commissioner Masters' action has already directly caused harm to loving families across Texas. This harm will become even more irreparable as investigations turn into family separations and medically necessary treatments are terminated.

147. Finally, this sequence of events, in which a Commissioner agrees to follow a Governor's unlawful directive—issued not as an executive order but as a letter—has never before been recognized by a court as a proper execution of government authority, further supporting the *ultra vires* nature of both officials' actions here.

C. Separation of Powers Claims – By All Plaintiffs Against Defendants Governor Abbott and Commissioner Masters

148. Plaintiffs incorporate the foregoing paragraphs in support of the following causes of action.

149. Defendants' actions violate the separation of powers established by Article II of the Texas Constitution. Defendants' actions run afoul of Article II in two ways:

a. *First*, the Governor's directive, which criminalizes conduct by adding a new definition of "child abuse" under Section 261.001 of the Texas Family Code, unduly interferes with the functions of the state legislature, which possesses *sole* authority to establish criminal offenses and designate applicable penalties. *See Martinez v. State*, 323 S.W.3d 493, 501 (Tex. Crim. App. 2010).

b. *Second*, all Defendants seek to adopt and enforce an overbroad interpretation of "child abuse." They do this in contravention of the plain

meaning of the statute, and despite the state legislature's recent decision not to adopt such a definition. This too represents an overreach by the executive branch into the legislative function.

150. The Texas Constitution prohibits one branch of state government from exercising power inherently belonging to another branch. Tex. Const. art. II, § 1; *see also Gen Servs. Comm'n v. Little-Tex. Insulation Co.*, 39 S.W.3d 591, 600 (Tex. 2001) (superseded by statute on other grounds).

151. A separation of powers constitutional violation occurs when: (1) one branch of government has assumed or has been delegated a power more "properly attached" to another branch, or (2) one branch has unduly interfered with another branch so that the other branch cannot effectively exercise its constitutionally assigned powers. *Jones v. State*, 803 S.W.2d 712, 715 (Tex. Crim. App. 1991) (citing *Rose v. State*, 752 S.W.2d 529, 535 (Tex. Crim. App. 1987)).

152. The "power to make, alter, and repeal laws" lies with the state legislature, and such power is plenary, "limited only by the express or clearly implied restrictions thereon contained in or necessarily arising from the Constitution." *Diaz v. State*, 68 S.W.3d 680, 685 (Tex. App.—El Paso 2000, pet. denied).

153. In particular, the legislature possesses the *sole* authority to establish criminal offenses and designate applicable penalties. *See Martinez,* 323 S.W.3d at 501; *see also Matchett v. State*, 941 S.W.2d 922, 932 (Tex. Crim. App. 1996) (the authority to define crimes and prescribe penalties for those crimes is vested exclusively with the legislature).

154. Governor Abbott's directive unduly interferes with the state legislature's sole authority to establish criminal offenses and penalties. First, the Abbott Letter outright claims that

"a number of so-called 'sex change' procedures constitute child abuse under existing Texas law," despite the fact that the legislature has failed to pass nearly identical legislation.

155. The Abbott Letter also violates separation of powers by inventing a separate crime when it directs, under the threat of *criminal prosecution*, "all licensed professionals who have direct contact with children" as well as "members of the general public" to report instances of minors who have undergone the medical procedures outlined in the Letter and the Paxton Opinion. This, too, is without legislative approval and represents an overreach by the executive into the core legislative function of establishing crimes and criminal penalties.

156. Second, separate and apart from the criminalization of conduct that has heretofore been legal, all Defendants violate separation of powers by seeking to adopt and enforce an overbroad interpretation of "child abuse" under the Family Code.

157. Courts have repeatedly held that the executive branch and the courts must, in construing statutes, take them as they find them. *See Tex. Highway Comm'n v. El Paso Bldg. & Const. Trades Council*, 234 S.W.2d 857, 863 (Tex. 1950); *Simmons v. Arnim*, 220 S.W. 66, 70 (Tex. 1920); *City of Port Arthur v. Tillman*, 398 S.W.2d 750, 752(Tex. 1965). In particular, the other branches are not empowered to "substitute what [they] believe is right or fair for what the legislature has written," *Vandyke v. State*, 538 S.W.3d 561, 569 (Tex. Crim. App. 2017) (citations omitted), or to give meanings to statutory language that contravene their plain meaning or clear legislative intent. *See Burton v. Rogers,* 492 S.W.2d 695 (Tex. Civ. App.—Beaumont 1973), writ granted, (July 11, 1973) and *judgment rev'd on other grounds*, 504 S.W.2d 404 (Tex. 1973) (finding that words employed by the legislature must be taken in their ordinary and popular acceptation). To do otherwise would once again violate the core legislative power to make, alter, and repeal laws.

158. Defendants violate separation of powers when they attempt to create new and novel definitions for "child abuse" under the Family Code. Defendants endeavored to redefine "child abuse" in spite of the state legislature's recent refusal to adopt Senate Bill 1646, which would have included certain treatments for gender dysphoria in adolescents under the definition of child abuse, and bills like it, such as House Bills 68 and 1339. In expanding the definition of child abuse beyond the limits permitted by the plain meaning of the Family Code, and in clear defiance of legislative intent, the Defendants impermissibly invade the legislative field. *See Brazos River Auth. v. City of Graham*, 354 S.W.2d 99, 109 (Tex. 1961).

159. Finally, there has been no delegation of powers from the state legislature to the executive that would in any way cure the separation of powers violation. While the legislature may not generally delegate its law-making power to another branch, it may designate some agency to carry out legislation for the purposes of practicality or efficiency. *See Tex Boll Weevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 454, 466 (Tex. 1997). Separation of powers requires that in statutes delegating such power, the legislature provide definite guidelines and prescribe sufficient standards to guide the discretion conferred. *See State v. Rhine*, 255 S.W.3d 745, 749 (Tex. App.—Fort Worth 2008, pet. granted). Such standards must be reasonably clear and acceptable as standards of measurement. Tex. Const. art. II § 1.

160. In the instant case, the Texas Family Code provides no such delegation in any way from the state legislature to the executive of the power to expand—unilaterally and without legislative approval—the definition of "child abuse." Recent decisions by the state legislature in fact signal that the legislature does not intend and has explicitly declined to expand the definition of child abuse at this time to include certain gender-affirming care for minors.

161. For the foregoing reasons, Defendants' actions violate state constitutional separation of powers.

D. Due Process Vagueness Claims – By All Plaintiffs Against Defendants Governor Abbott and Commissioner Masters

162. Article 1, Section 19 of the Texas Constitution states: "No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land." Under this guarantee, a governmental enactment is unconstitutionally vague if it fails to provide a person of ordinary intelligence fair notice of what is prohibited or is so standardless that it authorizes or encourages seriously discriminatory enforcement. *See Ex parte Jarreau*, 623 S.W.3d 468, 472 (Tex. App.--San Antonio 2020) (quoting *Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018)). Differently stated, governmental enactments are unconstitutionally void for vagueness when their prohibitions are not clearly defined.

163. Criminal enactments are subject to an even stricter vagueness standard because "the consequences of imprecision are... severe." *Hoffman Estates v. Flipside, Hoffman Estates, Ic.*, 455 U. S. 489, 498–499 (1982). Each ground—a lack of fair notice and a lack of standards for enforcement—provides an independent basis for a facial vagueness challenge. *Ex parte Jarreau*, 623 S.W.3d at 472.

164. The Abbott letter and DFPS's attempt to adopt and enforce an overbroad interpretation of "child abuse" under the Family Code create precisely this type of unconstitutional vagueness. These vague prohibitions leave parents like Plaintiffs Jane and John Doe uncertain how to act in order to avoid criminal penalty in their efforts to provide for the medical needs of the children they love. Under the text of the Family Code itself, a parent is liable for neglect for "failing to seek, obtain, or follow through with medical care for a child, with the failure resulting in or presenting an immediate danger of death, disfigurement, or bodily injury or with the failure

resulting in an observable and material impairment to the growth, development, or functioning of the child." Tex. Fam. Code § 261.001(4)(A)(ii)(b). Failing to seek medically necessary treatment for an adolescent's gender dysphoria could fall within this statutory definition. But if parents pursue the medical care necessary to their transgender minor adolescent's growth, development, or functioning, Defendants' recent actions make them liable for abuse. These parents are left without fair notice of how their actions will be assessed and what standard DFPS will employ.

165. The same is true for mandatory reporters like Plaintiff Dr. Mooney, who are left in a similarly untenable position. Under Defendants' actions, failing to report her clients who receive gender-affirming care will subject her to civil and criminal penalties, the loss of her license, and other severe consequences. If she does report her clients solely because they have sought essential and necessary medical care, however, she will be subject to penalty for violating professional standards of ethics and false reporting of child abuse under the plain terms of the statute, let alone having inflicted serious harm and trauma on her clients. Mandated reporters are left without fair notice of how their actions will be assessed and what standards will apply to them.

E. Deprivation of Parental Rights Due Process Claims – By Plaintiffs Jane and John Doe Against Defendants Governor Abbott and Commissioner Masters

166. Plaintiffs incorporate the foregoing paragraphs in support of the following causes of action.

167. Plaintiffs' right to care for their children is a fundamental liberty interest protected by the Texas Constitution and acknowledged by the legislature. *See Wiley v. Spratlan*, 543 S.W.2d 349, 352 (Tex. 1976); *see also* Tex. Fam. Code § 151.001(a)(11).

168. Under substantive due process, the government may not infringe parental rights unless there exist exceptional circumstances capable of withstanding strict scrutiny. *See Wiley v. Spratlan*, 543 S.W.2d 349, 352 (Tex. 1976). The state must have a compelling state interest, and

the state action in question "*must* be narrowly drawn to express *only* the legitimate state interests at stake." *Gibson v. J.W.T.*, 815 S.W.2d 863, 868 (Tex. App. – Beaumont 1991, writ granted), *aff'd and remanded In re J.W.T.*, 872 S.W.2d 189 (Tex. 1994) (citations omitted).

169. In the present case, there are no exceptional circumstances that would justify Defendants' complete negation of Plaintiffs' fundamental liberty interests in parental autonomy. There is perhaps no right more fundamental than the right of parents to care for their children. *See Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985). Defendants have trampled Plaintiffs' right to care for their children by effectively criminalizing the act of providing medically necessary care to their children in consultation with medical professionals in accordance with applicable standards of care. Defendants' actions cause immeasurable harm to both parents and young people, threaten family separation, and lack any legitimate justification at all, let alone a constitutionally adequate one. This is not a "narrowly drawn" policy that respects Plaintiffs' fundamental due process rights to parent their children.

F. Violation of the Guarantee of Equal Rights and Equality Under the Law – By Plaintiff Mary Doe Against Defendants Governor Abbott and Commissioner Masters

170. The Abbott Letter, DFPS's statement, and DFPS's implementation of these violates the Texas Constitution by denying transgender youth equal protection under law. Under the Texas Constitution, all persons "have equal rights," Tex. Const. art. I, § 3, and "[e]quality under the law shall not be denied or abridged because of sex." Tex. Const. art. I, § 3a.

171. The Abbott letter, incorporated into DFPS's statement, specifically designates "*gender*-transitioning procedures" to be abusive and refers to the Paxton Opinion by noting that it deems "'*sex* change' procedures [to] constitute child abuse." The Abbott letter, incorporated into DFPS's statement, explicitly uses sex-based terms, making plain that the discrimination at issue here is based on sex. Moreover, it discriminates against transgender youth, like Mary, because

they are transgender and they fail to conform to the stereotypes associated with the sex they were designated at birth.

172. As the United States Supreme Court has explained, however, "discrimination based on … transgender status necessarily entails discrimination based on sex." *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1747 (2020); *cf. Tarrant Cty. Coll. Dist. v. Sims*, 621 S.W.3d 323, 329 (Tex. App. 2021) ("[W]e conclude we must follow Bostock and read the TCHRA's prohibition on discrimination 'because of ... sex' as prohibiting discrimination based on an individual's status as a … transgender person."). Likewise, discrimination based on transgender status is independently unconstitutional. *See Brandt v. Rutledge*, No. 4:21CV00450 JM, 2021 WL 3292057, at *2 (E.D. Ark. Aug. 2, 2021) ("The Court concludes that heightened scrutiny applies to Plaintiffs' Equal Protection claims because Act 626 rests on sex-based classifications and because 'transgender people constitute at least a quasi-suspect class.'" (quoting *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 607 (4th Cir. 2020)).

173. The Abbott letter, DFPS's statement, and DFPS's implementation of these directives therefore unlawfully discriminate against transgender youth by deeming the medically necessary care for the treatment of their gender dysphoria as presumptively abuse because they are transgender when the same treatment is permitted for non-transgender youth. By doing so, the Abbott letter, DFPS's statement, and DFPS's implementation of these directives place a stigma and scarlet letter upon transgender youth and subject them to additional harms. For example, the Abbott letter, DFPS's statement, and DFPS's implementation of these directives do nothing to protect transgender youth, yet subject them to abuse investigations simply because of who they are and force the denial of their medically necessary care unless they are separated from their families or their parents are penalized.

VIII. APPLICATION FOR EMERGENCY TEMPORARY RESTRAINING ORDER, TEMPORARY INJUNCTION, AND PERMANENT INJUNCTION

174. In addition to the above-requested relief, Plaintiffs seek a temporary restraining order, temporary injunction, and permanent injunction to stop this *ultra vires*, unlawful, and unconstitutional Order from being enforced by Defendants.

175. A temporary restraining order's purpose is to maintain the status quo pending trial. "The status quo is the last actual, peaceable, non-contested status which preceded the pending controversy." *In re Newton*, 146 S.W.3d 648, 651 (Tex. 2004) (citing *Janus Films, Inc. v. City of Fort Worth*, 358 S.W.2d 589, 589 (Tex. 1962) (per curiam)). Until a permanent injunction can be decided on the merits, Plaintiffs are entitled to a temporary restraining order pursuant to Texas Civil Practice & Remedies Code sections 37.011 and 65.011 and Texas Rules of Civil Procedure 680 *et seq.* to preserve the status quo before the unconstitutional enactment of Abbott's Letter and the DFPS Statement, which incorporate and reference the Paxton Opinion.

176. Plaintiffs meet all the elements necessary for immediate injunctive relief with respect to their APA, *ultra vires*, and separation of powers claims described above. Plaintiffs state a valid cause of action against each Defendant and have a probable right to the relief sought. For the reasons detailed above, there is a substantial likelihood that Plaintiffs will prevail after a trial on the merits because the Governor's directive is *ultra vires*, beyond the scope of his authority, and unconstitutional, and the improper rulemaking and implementation by Commissioner Masters and DFPS are similarly unlawful and void. Further, the Governor's and Commissioner's actions violate the separation of powers by impermissibly encroaching into the legislature's domain. Plaintiffs have already been injured by these actions and will continue to experience imminent and irreparable harm without injunctive relief.

177. Plaintiffs in this suit will face imminent and irreparable harms absent intervention by the Court. Specifically, Jane Doe has already been placed on administrative leave at work and is at risk of losing her job, her livelihood, and the means of caring for her family. Jane, John and Mary Doe face the imminent and ongoing deprivation of their constitutional rights. Mary faces the potential loss of her medically necessary care, which if abruptly discontinued can cause severe physical and emotional harms, including anxiety, depression, and suicidality. If placed on the Child Abuse Registry, Jane could lose the ability to practice her profession, and Jane and John Doe would be barred from ever working with children, including as volunteers in their community. Absent intervention by this court, Dr. Mooney could face civil suit by patients for failing to treat them in accordance with professional standards and loss of licensure for failing to follow her professional ethics, if she complies with Defendants' orders and actions. If she does not comply with Defendants' orders, Dr. Mooney could face immediate criminal prosecution.

178. For the same reasons above, Plaintiffs request the Court issue a temporary restraining order now and a temporary injunction following a hearing within 14 days and a permanent injunction after a trial on the merits. Since there is no adequate remedy at law that is complete, practical, and efficient to the prompt administration of justice in this case, equitable relief is necessary to enjoin the enforcement of enforcement of Defendants' illegal policy, preserve the status quo, and ensure justice.

179. In balancing the equities between Plaintiffs and Defendants, Plaintiffs will suffer imminent, irreparable, and ongoing harm including the deprivation of their vocations, their medical

treatment, and their constitutional rights, whereas the injury to Defendants is nominal pending the outcome of this suit. In fact, enjoining the Order will free an already overburdened DFPS.[33]

180. Plaintiffs are willing to post a bond if ordered to do so by the Court, but request that the bond be minimal because Defendants are acting in a governmental capacity, have no pecuniary interest in the suit, and no monetary damages can be shown. Tex. R. Civ. P. 684.

IX. CONDITIONS PRECEDENT

181. All conditions precedent have been performed or have occurred.

X. RELIEF REQUESTED

182. For the foregoing reasons, Plaintiffs request the Court grant the following relief:

a. A temporary restraining order to preserve the *status quo* and restrain Defendants from improperly relying on Abbott's Letter and the Paxton Opinion to investigate and report families based on the fact that their adolescent children are transgender; are transitioning; or have been prescribed or are being provided with medical treatment for their gender dysphoria, while the validity of Abbott's Letter and the Paxton Opinion are determined at a hearing to be held within 14 days;

b. Upon hearing, a temporary injunction prohibiting Defendants from enforcing Abbott's Letter, the Paxton Opinion, or the DFPS Statement, including by: requiring mandatory reporters or the general public to report families with minor children who are transgender or who have a diagnosis of gender dysphoria and are receiving medically recommended treatment for that condition, and investigating families for possible child abuse based

[33] Reese Oxner & Neelam Bohra, *Texas foster care crisis worsens, with fast-growing numbers of children sleeping in offices, hotels, churches*, Tex. Trib. (July 19, 2021), https://www.texastribune.org/2021/07/19/texas-foster-care-crisis/.

on allegations that they have a child that is transgender or that they have a minor child with gender dysphoria who is being treated with medically prescribed treatment for that condition;

c. After trial, a permanent injunction prohibiting Defendants from enforcing Abbott's Letter or the DFPS Statement, including by: requiring mandatory reporters or the general public to report families with minor children who are transgender or who have a diagnosis of gender dysphoria and are receiving medically recommended treatment for that condition, and investigating families for possible child abuse based on allegations that they have a child that is transgender or that they have a minor child with gender dysphoria who is being treated with medically prescribed treatment for that condition;

d. Declaratory judgment that the DFPS Statement violates the Texas Administrative Procedure Act;

e. Declaratory judgment that Abbott's Letter and the DFPS Statement are *ultra vires* and unconstitutional;

f. Reasonable and necessary attorneys' fees and costs as are equitable and just under Tex. Civ. Prac. & Rem. Code § 37.009; and

g. All other relief, general and special, at law and in equity, as the Court may deem necessary and proper.

[Signature Page Follows]

Dated: March 1, 2022

Respectfully submitted:

By: __/s/ Paul D. Castillo_____

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Attorneys for Plaintiffs

CERTIFICATE OF CONFERENCE

I certify that Plaintiffs have notified Defendants pursuant to the Local Rules of the District Courts of Travis County and will file the certification for requested temporary restraining order hearing.

/s/ Paul D. Castillo
Paul D. Castillo

Exhibit 1

CAUSE NO. _____

JANE DOE, *et al.*,	§	**IN THE DISTRICT COURT OF**
	§	
Plaintiffs,	§	
	§	**TRAVIS COUNTY, TEXAS**
v.	§	**_____ JUDICIAL DISTRICT**
	§	
	§	
GREG ABBOTT, *et. al*,	§	
	§	
Defendants.	§	

DECLARATION OF JANE DOE

I, Jane Doe,[1] hereby declare and state as follows:

1. I am over 18 years of age, of sound mind, and in all respects competent to testify. I have personal knowledge of the facts set forth in this Declaration and would testify competently to those facts if called to do so.

2. Along with my husband John Doe, I am a Plaintiff in this action. We are bringing claims on behalf of ourselves and as the parents and next friends of our daughter, Mary Doe.

3. We are residents of Texas.

4. Our daughter, Mary Doe, is 16 years old. We love and support her and only want what is best for her.

5. Mary is transgender. When she was born, she was designated as "male" on her birth certificate, even though she is a girl.

---

[1] Jane Doe, John Doe, and Mary Doe are pseudonyms. My husband, daughter (who is a minor), and I are proceeding under pseudonyms to protect our right to privacy and ourselves from discrimination, harassment, and violence, as well as retaliation for seeking to protect our rights.

6. From a very young age, Mary has expressed herself and behaved in manner that does not conform with the stereotypes associated with the sex she was designated at birth.

7. We have always permitted Mary to express herself and explore who she is.

8. In 2021, Mary informed us that she was transgender.

9. Mary has been under the care of the same pediatrician her entire life. Her pediatrician diagnosed her with gender dysphoria and referred our family to other medical professionals for further evaluation and treatment. These other medical professionals confirmed that Mary suffers from gender dysphoria.

10. We also did research as a family and connected Mary with youth support groups that would permit us to have discussions as a family.

11. Following Mary's diagnosis of gender dysphoria, Mary's doctors recommended that Mary be provided with medical care to treat and alleviate her gender dysphoria. This care has included the prescription of puberty-delaying medications and hormone therapy.

12. In consultation with these doctors and after extensive discussions about the benefits and potential side effects of this treatment, John, Mary, and I jointly decided to initiate treatment for Mary's gender dysphoria. This treatment has been prescribed by Mary's doctors in accordance with what they believe are best medical practices and what we understand will be the best course of action to protect Mary's physical and mental health.

13. Mary was worried about having to undergo a puberty that would result in permanent physical characteristics not in alignment with her female gender. We observed how the prospect of beginning this puberty caused Mary significant distress and exacerbated her dysphoria.

14. Being able to be affirmed as who she is, including through the course of treatment prescribed by her doctors, has brought Mary significant relief and allowed her to thrive.

15. My topmost commitment as a parent is to ensure to the health, safety, and wellbeing of my daughter, whom John and I love and support.

16. I have worked in the field of child protective services at various times throughout my career. At present, I am an employee for the Texas Department of Family and Protective Services (DFPS), where I work on the review of reports of abuse and neglect. My supervisors have recognized and commended my performance, which has been recognized through career advancement and merit compensation.

17. The issuance of Attorney General Paxton's opinion dated February 18, 2022 and Governor Abbott's letter on February 22, 2022, followed by DFPS's implementation of these to investigate the provision of medically necessary gender-affirming health care as abuse, has wreaked havoc on our lives.

18. We are terrified for Mary's health and wellbeing, and for our family. I feel betrayed by my state and the agency for whom I work.

19. On February 23, 2022, following the issuance of Attorney General Paxton's opinion and Governor Abbott's letter, I contacted my direct supervisor at DFPS to inquire how these would affect DFPS policy. The answer to my inquiry was important for my family as well as to my ability to perform my job at DFPS.

20. That same day, just mere hours later, I was placed on paid leave from my employment because I was the parent of a transgender adolescent who requires necessary medical care for the treatment of gender dysphoria.

21. On February 24, 2022, I was contacted by a DFPS Child Protective Services (CPS) Investigator, who was unknown to me, and informed that my family would be investigated in accordance with Governor Abbott's letter to determine if John and I had committed abuse by

affirming our transgender daughter's identity and following the advice of medical professionals to initiate treatment for her gender dysphoria.

22. On February 25, 2022, the CPS investigator visited our family home to interview Mary, John, and me. The CPS investigator interviewed John and me together, in the presence of our attorney, but he interviewed Mary, who was also accompanied by different attorney, apart from us. Aside from interviewing us, the CPS investigator asked us to sign releases to obtain Mary's medical records; we refused.

23. During his visit, the CPS investigator disclosed that the sole allegation against our family is that John and I have a transgender daughter and that our daughter may have been provided with medically necessary gender-affirming health care and is "currently transitioning from male to female."

24. The issuance of the Attorney General's opinion and Governor's letter, along with DFPS's implementation of these, has caused a significant amount of stress, anxiety, and fear for our family. For example, Mary has been traumatized by the prospect that she could be separated from her parents and could lose access to the medical treatment that has enabled her to thrive. The stress has taken a noticeable toll on her, and our daughter who is typically joyful and happy, is now moodier, stressed, and overwhelmed. Similarly, John and I are now filled anxiety and worry. I have been unable to sleep, worrying about what we can do and how we can keep our family intact and our daughter safe and healthy. We are living in constant fear about what will happen to our family due to the actions by DFPS, the Governor, and the Attorney General.

25. As a result of DFPS's implementation of the Attorney General's opinion and Governor's letter, I have not only been placed on leave from my employment, but may face termination, which would result not only in the loss of income for our family and a job I genuinely

care about.

26. John and I worry about the potential physical and mental health consequences of depriving Mary of the medical treatment her doctors have prescribed and that she needs. Not providing Mary with the medically necessary health care that she needs is not an option for us. Our primary goal and duty are to ensure Mary's health and wellbeing.

27. We do not believe it is a choice to deprive Mary of the medically necessary and essential health care that she requires and risk her health and wellbeing in order to avoid a finding that there is reason to believe that John and I have committed "abuse" and the consequences that would follow such a finding based on DFPS's implementation of the Attorney General's opinion and Governor's letter.

28. John and I have called Texas our home for nearly 20 years and Texas is the only home Mary has ever known. Even if feasible, moving out of state is not a desirable option, as among other things, it could mean the physical separation of our family, the loss of my employment, and separating Mary from her lifelong health care providers.

29. Texas is our home. We are part of a community that has known Mary all her life and been supportive and affirming. We worry not only about the multitude of harms caused by DFPS's implementation of the Attorney General's opinion and Governor's letter that I have described herein, but also about the effect that the actions by DFPS, the Governor, and the Attorney General will have on other transgender youth, like Mary, and their families. Our family is just as much a part of Texas as any other family, and Mary has the right to be provided with the same affirmation, love, and ability to thrive as any other youth in our state.

30. The actions by DFPS, the Governor, and the Attorney General threaten the health and wellbeing of transgender youth like Mary and the integrity of families like ours. We deserve

better from our state and government.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 28th day of February 2022 in Texas.

_____

Jane Doe

Exhibit 2

CAUSE NO. _____

JANE DOE, *et. al.,*	§	
Plaintiffs,	§	**IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS**
v.	§	**_____ JUDICIAL DISTRICT**
GREG ABBOTT, *et. al*,	§	
Defendants.	§	

DECLARATION OF MEGAN A. MOONEY, PH.D.

I, Megan A. Mooney, declare and state as follows:

1. I am over 18 years of age, of sound mind, and in all respects competent to testify. I have personal knowledge of the facts set forth in this Declaration and would testify competently to those facts if called to do so. I am a Plaintiff in this action and I am bringing claims on behalf of myself.

2. I am a licensed psychologist in Texas. For approximately the past 19 years, I have worked with children and families to respond to and mitigate trauma and harm. I am bound by professional codes of ethics to do no harm to my patients.

3. I run a private psychology practice in Houston that serves children, adolescents, and families. Many of my patients are transgender or non-binary young people under the age of 18, including youth with gender dysphoria. According to the American Psychiatric Association's Diagnostic & Statistical Manual of Mental Disorders ("DSM-V"), gender dysphoria is the diagnostic term for the condition experienced by some transgender people of clinically significant distress resulting from the lack of congruence between their gender identity and the sex assigned

to them at birth. In order to be diagnosed with gender dysphoria, the incongruence must have persisted for at least six months and be accompanied by clinically significant distress or impairment in social, occupational, or other important areas of functioning.

4. Part of my job includes providing mental health evaluations for youth with gender dysphoria, referring youth with gender dysphoria for medical treatment, and continuing to treat young people who receive medical treatment for gender dysphoria.

5. I am a mandatory reporter obligated to report child abuse and neglect to the Texas Department of Family Protective Services (DFPS). I have received and conducted trainings on mandatory reporting requirements and am familiar with Texas law on child abuse and neglect. I have reported cases of child abuse to DFPS where appropriate and have testified in court cases involving child abuse and neglect.

6. From a clinical perspective, I have observed the tremendous health benefits that my patients experience as a result of medical treatment for gender dysphoria. My clinical observations are also supported by data and scientific studies. Gender-affirming medical treatment does not harm minors but rather greatly improves their health, wellbeing, and quality of life.

7. The latest actions purporting to require me to report gender-affirming care as child abuse put me in an untenable situation. If I fail to report my clients who receive this medical treatment, I face the prospect of civil and criminal penalties, the loss of my license, and other severe consequences. But if I report any of my clients for receiving critical and medically necessary care, I would be violating professional standards of ethics, inflict serious harm and trauma on my clients, irreparably damage the bonds of trust that I have built with my clients, face the possible closure of my practice if clients know that I cannot maintain their trust, and confront harsh penalties for false reporting of child abuse.

Background

8. I have a bachelor's degree in psychology from Vanderbilt University and completed both a master's degree and doctorate in clinical psychology at the University of Arkansas. During my doctoral program, which I completed in 2005, I was a child and family specialist and a clinical psychology intern at Baylor College of Medicine.

9. Since 2008, I have been a licensed psychologist with the Texas State Board of Examiners of Psychologists (TX License #33819, expires July 31, 2023). I have met all of the requirements for licensing and renewal for psychologists established under Texas Occupations Code, Section 501.2525.

10. As a licensed psychologist, I am required to follow the ethical principles of psychologists and code of conduct from the American Psychological Association ("APA"). The code of conduct requires me to strive to benefit my patients and do no harm, and I must respect the dignity and worth of all people, and the rights of individuals to privacy, confidentiality, and self-determination.[1]

11. I have spent nearly two decades working as a psychologist in Texas with children, adolescents, adults, and families. My focus is on helping young people and families respond to trauma. For over twelve years, I worked at DePelchin Children's Center in Houston, where I supervised a trauma program and provided therapy to children, adolescents, adults, and families. Because DePelchin is a licensed foster care agency, I became intimately familiar with DFPS and cases of abuse and neglect, received training regarding child welfare and mandatory reporting requirements, and I advised other mental health professionals, psychology trainees, and other

[1] Ethical Principles of Psychologists and Code of Conduct (Am. Psych. Ass'n 2017), https://www.apa.org/ethics/code.

employees about mandatory reporting requirements and how to respond to trauma, abuse, and neglect.

12. I am a member of the APA, the Texas Psychological Association ("TPA"), and the Houston Psychological Association. I was president of the TPA in 2020 and served on the board for over seven years. I remain an ex officio member of the TPA board.

13. I teach and train students in psychology at Baylor College of Medicine and the University of Texas Health Sciences Center at Houston. I have also published research and scholarship on trauma faced by LGBTQ+ youth in the Journal of Family Strengths.

14. I am an affiliate member of the National Child Traumatic Stress Network, where I serve on the Sexual Orientation and Gender Identity/Expression (SOGIE) workgroup and helped create resources on LGBTQ+ youth and trauma. I am also part of a working group striving to improve services and treatment for LGBTQ+ youth in foster care in Texas.

15. As someone who works closely with LGBTQ+ young people, I have seen first-hand the trauma and harm they face and the bullying and harassment they experience, especially in schools.[2]

16. In April 2021, I testified against Senate Bill 1646 (Perry), which sought to change the definition of child abuse in Section 261.001 of the Texas Family Code to encompass gender-affirming care, including providing puberty blockers and hormone therapy to transgender youth. This bill was opposed by the TPA, the APA, the Texas Medical Association, the Texas Pediatric

[2] The GLSEN 2019 National School Climate Survey found that 98.8% of LGBTQ+ students had heard negative remarks about gender expression and 87.4% heard negative remarks specifically about transgender people. Joseph G. Kosciw et al., The 2019 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools xviii-xix, GLSEN (2020), https://www.glsen.org/sites/default/files/2021-04/NSCS19-FullReport-032421-Web_0.pdf. In Texas, the vast majority of LGBTQ+ students also regularly heard negative remarks about gender expression and transgender people. School Climate for LGBTQ Students in Texas (State Snapshot), GLSEN (2021), https://www.glsen.org/sites/default/files/2021-01/Texas-Snapshot-2019.pdf.

Society, and the Texas Academy of Family Physicians, among other professional associations. This bill did not become law.

Current Practice and Professional Responsibilities

17. I founded a private psychological practice in 2018 to serve young people and families in Houston and its surrounding areas. Most of my clients live in Houston, but I also see clients who live outside of Houston and Harris County, including by video conference. My practice focuses on providing therapeutic services to children and adolescents and I specialize in assisting clients with trauma and grief. Many of my clients identify as LGBTQ+ and the majority are transgender or non-binary.

18. As a psychologist, I often evaluate and diagnose gender dysphoria in my patients. I sometimes refer patients for medical treatment for gender dysphoria and oversee their ongoing mental health care during the course of such treatment. This care is only provided after careful mental health evaluation and with the informed consent of parents and the assent of minor patients.

19. Medical interventions to treat gender dysphoria in adolescence are effective, safe, and often lifesaving. I have personally witnessed time and time again, young people who were depressed and feeling hopeless and scared for their future begin to feel happy and optimistic just by starting medications to suppress puberty or to develop the secondary sex characteristics that align with their gender identity. Given the exceptionally high rates of suicidality in this population, medical interventions are a critical part of treatment and often save lives. At least 44% of transgender youth attempt suicide during their lifetime as compared to the national average of about 4% for teens.[3] This treatment does not harm patients but helps them; it is not abuse.

[3] *See* Brian S. Mustanski et al., *Mental Health Disorders, Psychological Distress, and Suicidality in a Diverse Sample of Lesbian, Gay, Bisexual, and Transgender Youths*, 100 Am. J. Pub. Health 2426 (2010), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2978194/; Matthew K. Nock et al., *Prevalence, correlates, and treatment of lifetime suicidal behavior among adolescents: results from the National Comorbidity Survey Replication*

20. As part of my ongoing professional obligations, I stay up to date on the latest data on mental health and medical interventions to treat patients with gender dysphoria. I have read numerous studies that document how being able to access gender-affirming care improves the mental health of transgender and non-binary youth and reduces suicidal ideation.[4]

21. As a licensed psychologist, I am required to follow the guidance of the APA and TPA, which recognize the scientific research and medical consensus that gender-affirming care is medically necessary for certain youth with gender dysphoria. The APA has published detailed protocols for providing culturally competent and developmentally appropriate psychological care for transgender and gender non-conforming people.[5] The APA recognizes that "diversity in gender identity and expression is part of the human experience and transgender and gender nonbinary

Adolescent Supplement, 70 JAMA Psychiatry 300 (2013), https://pubmed.ncbi.nlm.nih.gov/23303463/; Michelle M. Johns et al., *Trends in Violence Victimization and Suicide Risk by Sexual Identity Among High School Students - Youth Risk Behavior Survey, United States, 2015-2019*, 69 Morbidity & Mortality Weekly Rep. Supp. 19 (2020), https://pubmed.ncbi.nlm.nih.gov/32817596/; Michelle M. Johns et al., *Transgender Identity and Experiences of Violence Victimization, Substance Use, Suicide Risk, and Sexual Risk Behaviors Among High School Students - 19 States and Large Urban School Districts, 2017*, 68 Morbidity & Mortality Weekly Rep. 67 (2019), https://pubmed.ncbi.nlm.nih.gov/30677012/.

[4] *See, e.g.*, Amy E. Green et al., *Association of Gender-Affirming Hormone Therapy With Depression, Thoughts of Suicide, and Attempted Suicide Among Transgender and Nonbinary Youth*, J. Adolescent Health (2021), https://www.jahonline.org/article/S1054-139X(21)00568-1/fulltext (finding lower rates of depression and suicide among transgender and non-binary youth who receive gender-affirming hormone therapy); Diana M. Turdof et al., *Mental Health Outcomes in Transgender and Nonbinary Youths Receiving Gender-Affirming Care*, 5 JAMA Network Open (2022), https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2789423 (finding that gender-affirming medical interventions were associated with lower odds of depression and suicidality in transgender and non-binary youth); Laura E. Kuper et al., *Body Dissatisfaction and Mental Health Outcomes of Youth on Gender-Affirming Hormone Therapy*, 145 Pediatrics (2020), https://pubmed.ncbi.nlm.nih.gov/32220906/ (reviewing longitudinal studies and finding hormone therapy to improve mental health outcomes for transgender adolescents); Stephen M. Rosenthal, *Challenges in the care of transgender and gender- diverse youth: an endocrinologist's view*, 17 Nature Reviews Endocrinology 581 (2021), https://www.nature.com/articles/s41574-021-00535-9 (reviewing empirical studies identifying mental health benefits of gender-affirming care); Connor Grannis et al., *Testosterone Treatment, Internalizing Symptoms, and Body Image Dissatisfaction in Transgender Boys*, 132 Psychoneuroendocrinology (2021), https://pubmed.ncbi.nlm.nih.gov/34333318/; Jack L. Turban et al., *Pubertal Suppression for Transgender Youth and Risk of Suicidal Ideation*, 145 Pediatrics (2020), https://pubmed.ncbi.nlm.nih.gov/31974216/.

[5] Guidelines for Psychological Practice With Transgender and Gender Nonconforming People (Am. Psych. Ass'n 2015), https://www.apa.org/practice/guidelines/transgender.pdf.

identities and expressions are healthy, incongruence between one's sex and gender is neither pathological nor a mental health disorder."[6]

22. The APA also recognizes that "[s]ome transgender and gender nonbinary individuals seek gender-affirming medical care (e.g., hormone therapy, surgery) while others do not" and has established that "invalidation and rejection of transgender and gender nonbinary identities and diverse gender expressions by others (e.g., families, therapists, school personnel) are forms of discrimination, stigma, and victimization, which result in psychological distress."[7]

23. In 2019, after a review of the research as well as professional guidelines, TPA crafted a formal statement in which it concluded that "transgender children fare best when caregivers and treatment providers establish an affirming and supportive environment within which they can understand their emerging gender identity."

24. Pursuant to these guidelines, it is my job to support all patients in an exploration of their identity and appropriately diagnose and evaluate them. Many clients that I work with have already experienced trauma, and reporting them to DFPS simply for receiving gender-affirming care from a licensed medical provider would cause immense and irreversible harm.

The Governor's Directive and DFPS Implementation

25. Forcing me to report a client and their parents to DFPS for receiving the health care that they need would be catastrophic. Instead of benefiting my patients' mental health and helping them thrive, I would subject them to trauma and stress. My clients and their families could be investigated for child abuse, and families could be split apart simply for providing young people with the medical care that they need.

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[6] APA Resolution on Gender Identity Change Efforts 2 (Am. Psych. Ass'n 2021), https://www.apa.org/about/policy/resolution-gender-identity-change-efforts.pdf.
[7] *Id.* at 1-2.

26. Under the Governor's directive and DFPS's implementation of its redefinition of gender-affirming health care as child abuse, my clients could be separated from their parents and guardians and removed for their homes. My clients' parents could also face catastrophic consequences. And having their families be subject to an investigation will dramatically worsen the mental health outcomes of my clients, and could worsen the already tragic rate of suicide among transgender youth.

27. The recent actions taken by Governor Abbott threaten me with criminal sanctions and put me in an impossible position. If I follow my ethical duties and Texas law by not reporting any of my clients for the health care described in the Governor's letter, I could be subject to prosecution for failure to report child abuse or neglect, which is a Class A misdemeanor and punishable by up to a year in prison and/or a fine of up to $4,000. I could also be subject to an investigation by the Texas Board of Examiners of Psychologists and lose my license, which would end my livelihood and private practice.

28. If I am compelled to follow the Governor's letter and DFPS's erroneous reliance on it, the personal and professional consequences that I face are even more devastating. Under Section 261.107 of the Texas Family Code, I could be charged with false reporting of child abuse if I make a report to DFPS when I know that child abuse is not happening. It is a state jail felony punishable by up to two years in prison and/or a $10,000 fine to falsely report child abuse. I also could be subject to an investigation by the Texas Board of Examiners of Psychologists and lose my license for failing to follow the ethical code of conduct promulgated by the APA. And I could be subject to malpractice lawsuits from my clients for failing to adhere to ethical guidelines and harming my clients. Even worse, it would be a betrayal of the bonds of trust between me and my clients and the oath that I swore as a psychologist to do no harm to my patients.

I declared under the penalty of perjury that the foregoing is true and correct.

Signed on this the 1st day of March, 2022.

Megan A. Mooney, PhD.

Abbott v. Doe

Court of Appeals of Texas, Third District, Austin

March 9, 2022, Filed

NO. 03-22-00107-CV

Reporter

2022 Tex. App. LEXIS 1607 *; 2022 WL 710093

Greg Abbott in his Official Capacity as Governor of the State of Texas; Jaime Masters in her Official Capacity of Commissioner of the Department of Family and Protective Services; and the Texas Department of Family and Protective Services, Appellants v. Jane Doe, individually and as parent and next friend of Mary Doe, a minor; John Doe, individually and as parent and next friend of Mary Doe, a minor; and Dr. Megan Mooney, Appellees

Subsequent History: Injunction granted at *Abbott v. Doe, 2022 Tex. App. LEXIS 1927 (Tex. App. Austin, Mar. 21, 2022)*

Prior History: **[*1]** FROM THE 201ST DISTRICT COURT OF TRAVIS COUNTY. NO. D-1-GN-22-000977, THE HONORABLE AMY CLARK MEACHUM, JUDGE PRESIDING.

Disposition: Dismissed for Want of Jurisdiction.

Case Summary

Overview

HOLDINGS: [1]-The State Parties' appeal under *Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(8)* from the district court's interlocutory order granting a temporary restraining order was dismissed for want of jurisdiction because the district court's issuance of the temporary restraining order was not an implied ruling on the State Parties' jurisdictional plea.

Outcome

Motion granted.

Counsel: For Greg Abbott in his Official Capacity as Governor of the State of Texas, Texas Department of Family and Protective Services, Jaime Masters in her Official Capacity of Commissioner of the Department of Family and Protective Services, Appellant: Mr. Judd E. Stone II; Mr. Ryan Kercher.

For Jane Doe, individually and as parent and next friend of Mary Doe, a minor; John Doe, individually and as parent and next friend of Mary Doe, a minor; and Dr. Megan Mooney, Appellee: Mr. Paul Castillo; Ms. Maddy R. Dwertman; Mr. Derek McDonald; Ms. Shelly L. Skeen; Mr. Nicholas Guillory; Mr. Andre Segura; Mr. Brian Klosterboer.

Judges: Before Chief Justice Byrne, Justices Kelly, and Smith.

Opinion

MEMORANDUM OPINION

PER CURIAM

Greg Abbott, in his official capacity as Governor of Texas, Jaime Masters, in her official capacity as Commissioner of the Department of Family and Protective Services (Department), and the Department (collectively, the State Parties), appeal the district court's interlocutory order granting a temporary restraining order. Appellees have filed an **[*2]** emergency motion to dismiss the appeal for want of jurisdiction. We will grant the motion.

This appeal arises out of a dispute over the legality of providing gender-affirming healthcare to children. On February 22, 2022, Governor Abbott sent a letter to Commissioner Masters enclosing an Attorney General opinion determining that certain types of gender-affirming care might constitute child abuse. He directed the Department to investigate any reports of children receiving those types of treatments. His letter also referenced statutory requirements that licensed professionals who have direct contact with children report suspected child abuse. Appellees—the parents of a transgender child receiving gender-affirming care and a psychologist who treats transgender children—sued the State Parties seeking declaratory and injunctive relief. On March 2, 2022, the district court granted a temporary restraining order (TRO) enjoining the State Parties from taking any action against the plaintiffs based solely on

the Governor's letter or the Attorney General's opinion. The order set a hearing on appellees' request for a temporary injunction on March 11, 2022. The State Parties filed a notice of interlocutory **[*3]** appeal from that order, which they characterize as having "implicitly denied [their] plea to the jurisdiction." *See* Tex. Civ. Prac. & Rem. Code § 51.014(a)(8) (authorizing interlocutory appeal of order that "grants or denies a plea to the jurisdiction by a governmental unit"). Appellees then filed a motion to dismiss this appeal for want of jurisdiction.

Whether we have jurisdiction is a question of law that we consider de novo. Bonsmara Nat. Beef Co. v. Hart of Tex. Cattle Feeders, LLC, 603 S.W.3d 385, 390 (Tex. 2020). "[T]he general rule, with a few mostly statutory exceptions, is that an appeal may be taken only from a final judgment." Lehmann v. Har-Con Corp., 39 S.W.3d 191, 195 (Tex. 2001). We strictly construe statutes authorizing interlocutory appeals because they "'are a narrow exception to the general rule' that 'appellate courts generally only have jurisdiction over final judgments.'" Bonsmara Nat. Beef, 603 S.W.3d at 390 (quoting CMH Homes v. Perez, 340 S.W.3d 444, 447 (Tex. 2011)). The statute relevant here provides that a person may appeal from an order that "grants or denies a plea to the jurisdiction by a governmental unit." Tex. Civ. Prac. & Rem. Code § 51.014(a)(8).

The parties agree that the district court never explicitly ruled on the plea to the jurisdiction. However, denial of a plea to the jurisdiction need not be explicit but may be implied from the context. Bass v. Waller Cnty. Sub-Reg'l Planning Comm'n, 514 S.W.3d 908, 914 (Tex. App.—Austin 2017, no pet.). An implicit ruling is "one that, though unspoken, reasonably can be inferred from something else." Trevino v. City of Pearland, 531 S.W.3d 290, 299 (Tex. App.—Houston [14th Dist.] 2017, no pet.). The supreme court **[*4]** addressed an implicit denial of a plea to the jurisdiction in Thomas v. Long, 207 S.W.3d 334 (Tex. 2006). In that case, the trial court did not rule on the defendant's plea to the jurisdiction but granted partial judgment on the merits of some of claims challenged by the plea. Id. at 339. The supreme court held that "because a trial court cannot reach the merits of a case without subject matter jurisdiction, a trial court that rules on the merits of an issue without explicitly rejecting an asserted jurisdictional attack has implicitly denied the jurisdictional challenge." Id. at 339-40 (internal citation omitted). The State Parties argue that this case is like Thomas because the court's issuance of the TRO "necessarily implies a finding by the trial court that it likely has subject-matter jurisdiction, and that conclusion necessarily rejects the State's jurisdictional arguments."

We disagree. An applicant for a TRO must show, among other things, a "probable right to the relief sought." *In re Abbott, 628 S.W.3d 288, 291 (Tex. 2021)* (orig. proceeding). Making this showing requires the applicant to demonstrate a probable right to the relief sought which can include jurisdictional issues, such as standing. *Id. at 295 n.8* (citing *Abbott v. Anti-Defamation League Austin, Sw., & Texoma Regions, 610 S.W.3d 911, 917 (Tex. 2020)*). However, a court does not necessarily reach the merits of a party's claims by concluding **[*5]** that an applicant has made that preliminary showing and is entitled to a TRO. *See Fernandez v. Pimentel, 360 S.W.3d 643, 646 (Tex. App.—El Paso 2012, no pet.)* ("Because a TRO is merely a precursor to a temporary injunction, it does not constitute a ruling on the merits." (citing *Iranian Muslim Org. v. City of San Antonio, 615 S.W.2d 202, 208 (Tex. 1981)*)).

Nor can we infer from the granting of the TRO that the court denied the State Parties' plea to the jurisdiction. The State Parties argue that this Court has recognized a "trial court's silence as to a jurisdictional challenge is an implicit denial whenever the court issues any order that requires subject-matter jurisdiction." However, they cite a case involving an order that specifically deferred consideration of a plea to the jurisdiction. *Bass, 514 S.W.3d at 915*. This Court has refused to extend *Thomas* to hold that trial courts impliedly deny pleas to the jurisdiction by taking actions that do not reach the merits. *E.g., West Travis Cnty. Pub. Util. Agency v. CCNG Dev. Co., 514 S.W.3d 770, 775 (Tex. App.—Austin 2017, no pet.)* (finding no support for "the notion that an order granting a motion to reinstate necessarily constitutes an implicit denial of a pending jurisdictional challenge"); *Texas Dep't of Pub. Safety v. Salazar, No. 03-11-00206-CV, 2011 Tex. App. LEXIS 2921, 2011 WL 1469429, at *1 (Tex. App.—Austin Apr. 19, 2011, no pet.)* (mem. op.) (holding order continuing plea to jurisdiction and allowing discovery not implicit denial of plea). We will do the same here. Appellees argue that the State Parties filed the plea to the jurisdiction "mere minutes" **[*6]** before the TRO hearing, the district court was not even aware of the filing until an attorney mentioned it, and that no one requested a ruling on the plea. The State Parties do not dispute any of these assertions. Viewing the district court's order in context, we conclude that it is not an implied ruling on the State Parties' jurisdictional plea. *See CCNG Dev., 514 S.W.3d at 775*; *Salazar, 2011 Tex. App. LEXIS 2921, 2011 WL 1469429, at *1*.

As an alternative, the State Parties argue that the order is appealable as a temporary injunction. While the grant or denial of a temporary restraining order is not an appealable order, *In re Texas Nat. Res. Conservation Comm'n, 85 S.W.3d 201, 205 (Tex. 2002)*, an order that grants or

refuses a temporary injunction is an appealable order, *Tex. Civ. Prac. & Rem. Code § 51.014(a)(4)*. Whether an order is a temporary restraining order or a temporary injunction "depends on the order's characteristics and function, not its title." *Texas Nat. Res. Conservation Comm'n, 85 S.W.3d at 205*. "A temporary restraining order is one entered as part of a motion for a temporary injunction, by which a party is restrained pending the hearing of the motion. A temporary injunction is one which operates until dissolved by an interlocutory order or until the final hearing." *Id.* (citing *Del Valle Indep. Sch. Dist. v. Lopez, 845 S.W.2d 808, 809 (Tex. 1992)*). The State Parties argue that the order is appealable as an injunction because it alters the status quo. *See id. at 206* (citing cases holding that **[*7]** "an order that does more than protect the status quo for the allowable period under *Rule 680* is functionally an appealable temporary injunction").

We disagree. The status quo is the "last, actual, peaceable, non-contested status which preceded the pending controversy." *Clint Indep. Sch. Dist. v. Marquez, 487 S.W.3d 538, 555 (Tex. 2016)*. The State Parties argue that the order "radically alters" the status quo by prohibiting the Department from carrying out its legal obligations to investigate allegations of child abuse and neglect. In particular, the order obligates the Department to cease an investigation of the Does and to not undertake further investigations that meet certain criteria. Because the validity of and effect of the Governor's letter and the Attorney General's opinion is contested by the parties, the order returns the parties to the status quo before the issuance of both documents. *See Texas Nat. Res. Conservation Comm'n, 85 S.W.3d at 206* (observing that TRO restraining agency from giving immediate effect to executive director's action did "not alter the status quo"). We conclude that the district court's order is not appealable as a temporary injunction.

We grant appellees' motion and dismiss the State Parties' appeal for want of jurisdiction. *See Tex. R. App. P. 42.3(a).*

Before Chief Justice Byrne, Justices Kelly, and **[*8]** Smith

Dismissed for Want of Jurisdiction

Filed: March 9, 2022

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Abbott v. Doe

Court of Appeals of Texas, Third District, Austin

March 21, 2022, Decided

NO. 03-22-00126-CV

Reporter

2022 Tex. App. LEXIS 1927 *

Greg Abbott in his Official Capacity as Governor of the State of Texas; Jaime Masters in her Official Capacity of Commissioner of the Department of Family and Protective Services; and the Texas Department of Family and Protective Services, Appellants v. Jane Doe, individually and as parent and next friend of Mary Doe, a minor; John Doe, individually and as parent and next friend of Mary Doe, a minor; and Dr. Megan Mooney, Appellees

Prior History: **[*1]** FROM THE 201ST DISTRICT COURT OF TRAVIS COUNTY. NO. D-1-GN-22-000977, THE HONORABLE AMY CLARK MEACHUM, JUDGE PRESIDING.

Abbott v. Doe, 2022 Tex. App. LEXIS 1607 (Tex. App. Austin, Mar. 9, 2022)

Judges: Before Chief Justice Byrne, Justices Kelly and Smith.

Opinion

ORDER

PER CURIAM

Before the Court is a pre-submission challenge to a district court's order enjoining The Department of Family and Protective Services and its Commissioner from complying with the terms of a letter issued by Governor Greg Abbott on February 22, 2022. That letter requires the Department to "conduct a prompt and thorough investigation of any reported instances" of "gender-transitioning procedures" being performed on minors and classifies the use of those procedures as "child abuse." The letter further requires the Department to coordinate with other

agencies in pursuing "criminal penalties" against any parent allowing such procedures and against any professional or member of "the general public" that suspects but fails to report this purported abuse to appropriate authorities. Following an evidentiary hearing, the district court temporarily enjoined appellants from abiding by the directives within the letter pending the outcome of the litigation. That injunction is currently suspended pending the resolution **[*2]** of this appeal. *See* Tex. Civ. Prac. & Rem. Code § 6.001(b); *Texas R. App. P. 29.1(b)*. Appellees now seek emergency relief, pursuant to *Rule of Appellate Procedure 29.3*, asking this Court to reinstate the temporary injunction for the duration of this appeal. Appellants oppose the motion, arguing that *Rule 29.3* does not afford this Court with discretion to award the relief requested.

As we recently observed, "*Rule 29.3* gives us 'great flexibility in preserving the status quo based on the unique facts and circumstances presented.'" Texas Educ. Agency v. Houston Indep. Sch. Dist., 609 S.W.3d 569, 578 (Tex. App.—Austin 2020, order [mand. denied]) (quoting In re Geomet Recycling LLC, 578 S.W.3d 82, 89 (Tex. 2019)). *See also* In re Texas Educ. Agency, 619 S.W.3d 679, 686-87 (Tex. 2021) (holding that statute precluding trial court counter-supersedeas orders in cases against state agencies did not limit appellate court's authority to issue appropriate temporary orders under *Rule 29.3* where statute did not reflect an intent to limit appellate rights). The "status quo" is "the last, actual, peaceable, non-contested status which preceded the pending controversy." In re Newton, 146 S.W.3d 648, 651 (Tex. 2004) (orig. proceeding) (citing Janus Films, Inc. v. City of Fort Worth, 163 Tex. 616, 358 S.W.2d 589 (Tex. 1962)). In addition, "*Rule 29.3* provides a mechanism by which we may . . . prevent irreparable harm to parties properly before us pursuant to our appellate jurisdiction in an interlocutory appeal." Texas Educ. Agency, 609 S.W.3d at 578 (citing Geomet, 578 S.W.3d at 90). One of the orders we may issue under *Rule 29.3* to maintain the status quo and prevent irreparable harm is an order reinstating a suspended injunction. **[*3]** *See* Hughs v. Move Tex. Action Fund, No. 03-20-00497-CV, 2020 WL 6265520, at *1 (Tex. App.—Austin Oct. 23, 2020, order) (confirming authority to reinstate injunction under *Rule 29.3* but denying relief under circumstances); Texas Ass'n of Bus. v. City of Austin, No. 03-18-00445-CV, 2018 WL 3967045, at *1 (Tex. App.—Austin Aug. 17, 2018, order) (reinstating injunction under *Rule 29.3* after finding injunction "necessary to preserve the parties' rights until disposition of the appeal").

A litigant's request for injunctive relief is predicated upon that party's assertion that irreparable harm will result from the challenged act or action. *See* Butnaru v. Ford Motor Co., 84 S.W.3d

198, 204 (Tex. 2002) ("To obtain a temporary injunction, the applicant must plead and prove three elements: (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim." (citations omitted)). In this case, the trial court reviewed the evidence and concluded that appellees had established a probable right to recovery on their claims. It further concluded that the appellees had made a sufficient showing that allowing appellants to follow the Governor's directive pending the outcome of this litigation would result in irreparable harm. Having reviewed the record, we conclude that reinstating the temporary injunction is necessary to maintain the status quo and preserve the rights of all parties. Therefore, without regard to the **[*4]** merits of the issues on appeal, which are not yet briefed to this Court, we exercise our discretion under *Rule 29.3* to reinstate the injunction as issued by the district court on March 11, 2022.

It is ordered on March 21, 2022.

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(ORDER LIST: 595 U.S.)

TUESDAY, FEBRUARY 22, 2022

ORDERS IN PENDING CASES

21M62 CONLEY, VERNELL V. PAYNE, DIR., AR DOC

The motion to direct the Clerk to file a petition for a writ of certiorari out of time is denied.

21M63 M. D. V. MT DEPT. OF PUB. HEALTH, ET AL.

The motion for leave to file a petition for a writ of certiorari with the supplemental appendix under seal is granted.

21M64 WATSON, TERRY G. V. WITTY, KAREY L., ET AL.

The motion for leave to proceed as a veteran is denied.

21M65 CONNER, WILLIE V. FOLKS, WARDEN

The motion to direct the Clerk to file a petition for a writ of certiorari is denied.

21M66 MONTALBAN, JOSE V. MR. POWELL, ET AL.

The motion to direct the Clerk to file a petition for a writ of certiorari out of time is denied.

21M67 LIVIZ, ILYA V. SUPREME COURT OF MA

The motion for leave to file a petition for a writ of certiorari with the supplemental appendix under seal is granted.

21M68 LUNDSTEDT, PETER V. JPMORGAN CHASE BANK, ET AL.

The motion to direct the Clerk to file a petition for a writ of certiorari out of time is denied.

21M69 JAMES, LATWON V. UNITED STATES

The motion for leave to file a petition for a writ of certiorari under seal with redacted copies for the public record

is granted.

21M70 RAND, MICHAEL T. V. UNITED STATES

21M71 CLAIR, GARY L. V. DIXON, SEC., FL DOC, ET AL.

21M72 POPSON, TOMAS C. V. KANSAS CITY, MO, ET AL.

21M73 SYBBLISS, DWAYNE K. V. GARLAND, ATT'Y GEN.

The motions to direct the Clerk to file petitions for writs of certiorari out of time are denied.

21M74 DEEM, MICHAEL A. V. DiMELLA-DEEM, LORNA M.

The motion for leave to file a petition for a writ of certiorari with the supplemental appendix under seal is granted.

21M75 BASKERVILLE, WILLIAM V. UNITED STATES

The motion to direct the Clerk to file a petition for a writ of certiorari out of time is denied.

21M76 SHERWOOD, ROBIN L. V. NEOTTI, WARDEN

The motion for leave to file a petition for a writ of certiorari with the supplemental appendix under seal is granted.

21M77 SALISBURY, CHRISTOPHER M. V. UNITED STATES

The motion to direct the Clerk to file a petition for a writ of certiorari out of time is denied.

21M78 SPENCER, DENNIS V. COLORADO

The motion for leave to file a petition for a writ of certiorari with the supplemental appendix under seal is granted.

21M79 MAYE, GARY V. UNITED STATES

21M80 B. B. V. FL DEPT. OF CHILDREN, ET AL.

The motions to direct the Clerk to file petitions for writs of certiorari out of time are denied.

145, ORIG.) DELAWARE V. PENNSYLVANIA AND WISCONSIN
)
146, ORIG.) ARKANSAS, ET AL. V. DELAWARE

The Exceptions to the Special Master Report are set for oral argument in due course. The motion of Delaware for leave to file Volume III of its appendix under seal is granted. The motion of Arkansas, et al. for leave to file Volume III of their appendix under seal is granted.

21-234 GEORGE, KEVIN R. V. McDONOUGH, SEC. OF VA

The motion of petitioner to dispense with printing the joint appendix is granted.

21-309 SOUTHWEST AIRLINES CO. V. SAXON, LATRICE

The motion of petitioner to dispense with printing the joint appendix is granted. Justice Barrett took no part in the consideration or decision of this motion.

21-429 OKLAHOMA V. CASTRO-HUERTA, VICTOR M.

21-439 NANCE, MICHAEL V. WARD, COMM'R, GA DOC, ET AL.

21-441 SIEGEL, ALFRED H. V. FITZGERALD, JOHN P.

21-511 SHOOP, WARDEN V. TWYFORD, RAYMOND A.

The motions to dispense with printing the joint appendices are granted.

21-676 MUSTA, SUSAN K. V. MENDOTA HEIGHTS DENTAL, ET AL.

21-746 APPLE INC. V. QUALCOMM INC.

21-998 BIERBACH, DANIEL V. DIGGER'S POLARIS, ET AL.

The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

21-1086) MERRILL, AL SEC. OF STATE, ET AL. V. MILLIGAN, EVAN, ET AL.
)
21-1087) MERRILL, AL SEC. OF STATE, ET AL. V. CASTER, MARCUS, ET AL.

These cases are consolidated, and a total of one hour is allotted for oral argument. The question presented in these

cases is: Whether the District Courts in these cases correctly found a violation of section 2 of the Voting Rights Act, 52 U. S. C. §10301.

21-5726 KEMP, DEXTER E. V. UNITED STATES

The motion of petitioner to dispense with printing the joint appendix is granted.

21-6689 McGARRY, DANIEL L. V. CALIFORNIA

21-6740 CHIQUITO, TEDDY V. UNITED STATES, ET AL.

The motions of petitioners for leave to proceed *in forma pauperis* are denied. Petitioners are allowed until March 15, 2022, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

CERTIORARI GRANTED

21-432 ARELLANO, ADOLFO R. V. McDONOUGH, SEC. OF VA

The petition for a writ of certiorari is granted.

21-476 303 CREATIVE LLC, ET AL. V. ELENIS, AUBREY, ET AL.

The petition for a writ of certiorari is granted limited to the following question: Whether applying a public-accommodation law to compel an artist to speak or stay silent violates the Free Speech Clause of the First Amendment.

CERTIORARI DENIED

21-27 ARROW HIGHWAY STEEL, INC. V. DUBIN, ROBERT

21-225 HOWARD, ASHLEY M. V. TEXAS

21-385 DRASC, INC., ET AL. V. NAVISTAR INT'L CORP., ET AL.

21-466 CATHEY, ERIC D. V. TEXAS

21-477 SELF, JASON, ET AL. V. CHER-AE HEIGHTS INDIAN COMMUNITY

21-533 MARTIN, BRAD, ET AL. V. CASTRO, CARLOS

21-541 TUGGLE, TRAVIS V. UNITED STATES

21-563 LENT, WARREN M., ET AL. V. CA COASTAL COMMISSION, ET AL.

21-579 SMITH, KENNETH E. V. HAMM, COMM'R, AL DOC, ET AL.

21-605) ROBERSON, DAVID L. V. UNITED STATES
)
21-706) GILBERT, JOEL I. V. UNITED STATES

21-615 WOODS, CHRISTOPHER A. V. AK STATE EMPLOYEES ASSN., ET AL.

21-653 HARVEY, HAROLD L. V. FLORIDA

21-661 EUGENE, OR, ET AL. V. FCC, ET AL.

21-675 CARSWELL, JEFFREY G., ET AL. V. E. PIHL & SONS, ET AL.

21-678 BIG SANDY RANCHERIA ENTERPRISES V. BONTA, ATT'Y GEN. OF CA, ET AL.

21-683 KITCHIN, JOHN C., ET AL. V. BRIDGETON LANDFILL, LLC, ET AL.

21-690 CANNADY, RODNEY E. V. UNITED STATES

21-692 HAYSTINGS, SGT., ET AL. V. KORB, ALBERT B.

21-716 SIVELLA, DAVID V. LYNDHURST, NJ, ET AL.

21-717 DOES 1-3, JOHN, ET AL. V. MILLS, GOV. OF ME, ET AL.

21-718 HERMANDAD DE EMPLEADOS, ET AL. V. UNITED STATES, ET AL.

21-724 NEW YORK UNIVERSITY V. SACERDOTE, ALAN, ET AL.

21-789 BENTON, CASEY V. BRADLEY, MARY, ET AL.

21-801 McCABE, BARRY V. FAIRFAX COUNTY, VA, ET AL.

21-803 DALE, WENDY V. BUTLER, ALGERNON L.

21-804 ZATTA, PHILIPPE Z. V. ELDRED, STEVEN C., ET AL.

21-805 NORBERG, DOUGLAS V. NV CTR. FOR DERMATOLOGY, ET AL.

21-810 VARGAS, LUIS L. V. LOS ANGELES, CA, ET AL.

21-811 YU, YANBIN, ET AL. V. APPLE INC., ET AL.

21-815 PIERSON, RAYMOND H. V. ROGOW, BRUCE S., ET AL.

21-820 LOUISIANA V. ALEXANDER, CHRISTOPHER

21-821 FARRIER, MARY J. V. LEICHT, GEORGE P., ET AL.

21-824 ABADIE, CECELIA F. V. LOUISIANA ATT'Y DISCIPLINARY BD.

21-831 JACOBSEN, MATT P. V. RUSHMORE LOAN MANAGEMENT, ET AL.

21-832 WALKER, TERRANCE V. INTELLI-HEART SERVICES, ET AL.

21-833 WHITEHEAD, DAVID L. V. TRAVELER'S INSURANCE CO., ET AL.

21-839 OEHMKE, THOMAS H. V. GUINAN, PATRICK A.

21-841) SMALLWOOD, MICHAEL V. NICHOLS, WILLIAM P., ET AL.
)
21-6309) SMITH, PATRICK A. V. NICHOLS, WILLIAM P., ET AL.
)
21-6392) BERRY, JANET V. NICHOLS, WILLIAM P., ET AL.
)
21-6535) SMITH, JENNIFER V. NICHOLS, WILLIAM P., ET AL.
)
21-6545) NICHOLS, DEBRA A. V. NICHOLS, WILLIAM P., ET AL.

21-845 PITLOR, DAVID V. TD AMERITRADE INC., ET AL.

21-850 ELINE, CHELSEA C., ET AL. V. OCEAN CITY, MD

21-853 HEIDARI, REZA V. GARLAND, ATT'Y GEN.

21-855 MAHONEY, PAUL M. V. COURT OF APPEAL OF CA

21-856 BILDER, BARRY D. V. DYKSTRA, JANICE

21-858 CLASSIC CAB CO. V. DC DEPT. OF FOR-HIRE VEHICLES

21-861 FIRST RELIANCE LIFE INSURANCE V. GIORGIO ARMANI CORP.

21-862 HARTMAN, SAMUEL V. PAYNE, DIR., AR DOC

21-863 TALAMANTES-ENRIQUEZ, ALFREDO N. V. GARLAND, ATT'Y GEN.

21-864 YOUNG, GEOFFREY M. V. BARR, GARLAND

21-875 BARNETT, HARRY V. MENARD, INC.

21-878 SEIBERT, CARL M. V. McINTIRE, JEREMY, ET AL.

21-879 MAYER, GREGORY V. HARTFORD LIFE AND ACCIDENT INS.

21-881 SHAO, LINDA V. McMANIS FAULKNER, LLP

21-883 GORE, GLEN D. V. OKLAHOMA

21-886 ISLAMI, ISMET V. KEMPER INDEPENDENCE INSURANCE

21-889 HUSSAIN, BILAL V. GARLAND, ATT'Y GEN.

21-891 WEY, BENJAMIN, ET AL. V. NASDAQ, INC., ET AL.

21-892 PATTERSON, MICAH J. V. VIRGINIA

21-893	APOTEX INC., ET AL. V. CEPHALON, INC., ET AL.
21-894	GARDNER, HELEN V. NY PRESBYTERIAN HOSPITAL, ET AL.
21-897	BENSON, BRIAN, ET AL. V. KEMSKE, ANN, ET VIR
21-904	KINNEY, CHARLES G. V. UNITED STATES, ET AL.
21-905	RIMPSON, NATHANIEL, ET AL. V. UNITED STATES
21-907	KIRBY, KENDA R. V. NORTH CAROLINA
21-909	BUI, KHAI Q. V. CABAELLERO, HERNAN R.
21-910	ZAITZEFF, DAVID V. SEATTLE, WA
21-911	SHARP, DAN V. V. UNITED STATES
21-912	MAEHR, JEFFREY T. V. DEPT. OF STATE
21-913	JAMESTOWN S'KLALLAM TRIBE, ET AL. V. LUMMI NATION, ET AL.
21-915	McKINNEY, HUGH V. WORMUTH, SEC. OF ARMY
21-916	FOFANA, ABRAHIM M. V. MAYORKAS, SEC. OF HOMELAND
21-917	DIAZ, ABEL V. WARDEN, FCI BENNETTSVILLE
21-919	RODENBURG LLP V. CERTAIN UNDERWRITERS AT LLOYD'S
21-921	WITASCHEK, MARK A. V. DISTRICT OF COLUMBIA
21-922	COMBS, JAMES V. INDIANA
21-923	PACHECO, DELILA V. OKLAHOMA
21-924	ATRAQCHI, MICHAEL R., ET UX. V. UNITED STATES, ET AL.
21-925	MONTERO, ADOLFO S. V. UNITED STATES
21-927	CRABTREE, DONALD C. V. CRABTREE, CHRISTINE
21-935	McILWAIN LLC V. HAGENS BERMAN SOBOL SHAPIRO LLP
21-937	HOLLOWAY, CHRISTOPHER L. V. MINNESOTA
21-940	KENTUCKY V. McCARTHY, JARED
21-946	COSCIA, MICHAEL V. UNITED STATES
21-947	DAVIS, TETTUS, ET UX. V. HODGKISS, JONATHON
21-957	WEBBER, MARCI M. V. ILLINOIS
21-964	RYE, SHERRIE V. LUCAS CTY. DEPT. OF JOB

21-982	MARKLAND, TIMOTHY O. V. ASSET ACCEPTANCE, LLC
21-983	MEISNER, RHONDA V. ZYMOGENETICS INC., ET AL.
21-985	OKLAHOMA V. SHRIVER, GAGE CHRISTOPHER J.
21-996	ALLUMS, YONELL V. UNITED STATES
21-1006	KIRSCHNER, MARC S. V. FITZSIMONS, DENNIS J., ET AL.
21-1007	HAWKLAND, ROBERT A. V. HALL, BURKE, ET AL.
21-1011	PATTEN, DERWIN, ET AL. V. DISTRICT OF COLUMBIA
21-1012	HEIDELBERG, BRAD, ET AL. V. D.O.H. OIL CO.
21-1023	GOW, KAY V. UNITED STATES
21-1026	WALTERS, CAMILLE A. V. WI LAWYER REGULATION, ET AL.
21-1035	HARRIS, JOSHUA V. CIR
21-1036	GAMON PLUS, INC. V. CAMPBELL SOUP CO., ET AL.
21-5411	SMITH, JEROME S. V. HOOPER, WARDEN
21-5777	WILSON, VANCE K. V. LOUISIANA
21-5826	BAXTER, ARMEL V. McGINLEY, SUPT., COAL TOWNSHIP
21-5902	CAMPBELL, ALHAKKA V. UNITED STATES
21-5905	CHRISTEN, MITCHELL L. V. WISCONSIN
21-5909	COOPER, SANDS V. ADV. INTERNET AUTO, ET AL.
21-5928	GARCIA, PAUL ANDRE JUDE M. V. GARLAND, ATT'Y GEN.
21-5972	CAMARGO, ALFREDO V. SHINN, DIR., AZ DOC, ET AL.
21-5978	HALL, DEREK L. V. UNITED STATES
21-6068	TINGLE, RONALD V. UNITED STATES
21-6120	PEREZ, JAVIER V. UNITED STATES
21-6139	NUñEZ, YENCY V. UNITED STATES
21-6159	SKINNER, MICHAEL V. FLORIDA
21-6190	FINLEY, JOE L. V. UNITED STATES
21-6191	HERNANDEZ-PACHECO, JULIO V. UNITED STATES
21-6202	CLARK, CHARLES G. V. HAMM, COMM'R, AL DOC

21-6285	HUGHBANKS, GARY V. SHOOP, WARDEN
21-6289	ANDREWS, NORRIS D. V. UNITED STATES
21-6295	MACK, JMARREON V. UNITED STATES
21-6388	ROACH, CALVIN V. WASHINGTON, DIR., U.S. MARSHALS
21-6393	WOODBURY, MICHAEL L. V. FLORIDA
21-6403	GUILLORY, GARLAND V. UNITED STATES
21-6408	HARNAGE, JAMES A. V. BRENNAN, JANINE, ET AL.
21-6413	SMITH, BETTY C. V. FLEMING, JASON, ET AL.
21-6414	MARIETTA, CHARLES W. V. LoBUE, LEANNE, ET AL.
21-6420	TANASESCU, SIMONA, ET AL. V. COROIAN, DORIN, ET AL.
21-6430	ROBERSON, MICHAEL C. V. MORGAN, JOE, ET AL.
21-6432	RYDER, JAMES C. V. OKLAHOMA
21-6438	SMITH, DAVID L. V. NORTH CAROLINA
21-6443	BOSSE, SHAUN M. V. OKLAHOMA
21-6451	BENSON, ADA M. V. IHSS DPSS, ET AL.
21-6462	GOODE, CLARENCE R. V. OKLAHOMA
21-6464	HANSON, JOHN F. V. OKLAHOMA
21-6469	CAMPBELL, GLEN V. LaMANNA, J.
21-6470	KOGIANES, MICHAEL G. V. JENSEN, EDWARD, ET AL.
21-6475	HOLLINGSWORTH, MARK V. MARYLAND
21-6478	MERID, ENDALKACHEW V. VIRGINIA
21-6479	LANGSTON, EARNEST L. V. PHILLIPS, DON
21-6480	MARTINEZ, FRANCISCO C. V. LUMPKIN, DIR., TX DCJ
21-6485	R. S. C. V. TX DEPT. OF FAMILY
21-6488	MANN, BERTRAM S. V. FLORIDA
21-6489	SWANSON, EDWARD F. V. TEXAS
21-6493	KINLEY, JARRETT A. V. PENNSYLVANIA
21-6494	COLE, BENJAMIN R. V. OKLAHOMA

21-6495 AMARO, PEDRO J. V. NEW MEXICO, ET AL.

21-6496 WOOD, CHRISTOPHER V. FLORIDA

21-6497 PARK, HYE-YOUNG V. BRUCE, COLIN S.

21-6498 PARK, HYE-YOUNG V. UNIV. BD. OF TRUSTEES, ET AL.

21-6503 GUPTE, PRADEEP V. UNIV. OF CT

21-6506 ALLEN, E'MARIO C. V. NOETH, SUPT., ATTICA

21-6507 BROWN, LYLE Q. V. OKLAHOMA

21-6508 JONES, DANIEL V. HOCHUL, GOV. OF NY, ET AL.

21-6509 OGUNJOBI, ADESIJUOLA V. UNITED NATIONS, ET AL.

21-6511 SMITH, BETTY C. V. DANIEL, ZACHARY T.

21-6513 SCHNEIDER, CHRISTOPHER V. BANK OF AMERICA, ET AL.

21-6515 MORRIS, CHADD A. V. WORLEY, JERRY, ET AL.

21-6516 ROBINSON, MARTIN V. BAILEY, SEAN

21-6526 PEPPER, DARNEAU V. V. WILLIAMS, DIR., CO DOC, ET AL.

21-6527 JOHNSON, RONALD V. KANSAS

21-6528 LEON, TUSHKAHOMMA J. V. OKLAHOMA

21-6529 JENKINS, BRANDON L. V. OKLAHOMA

21-6531 NICHOLS, BILLY M. V. KERSTEIN, GARY, ET AL.

21-6532 KRUPPE, MARY N. V. CALIFORNIA

21-6533 JOHNSON, JABARI J. V. McGUIRE, KATHLEEN, ET AL.

21-6543 MACKENZIE, CRAIG S. V. FUDGE, SEC. OF HUD, ET AL.

21-6547 LONG, RICHARD L. V. VANNOY, WARDEN

21-6558 ROSARIO, KEITH A. V. PENNSYLVANIA

21-6562 PLAZA, FRANCIS T. V. SMITH, SUPT., HOUTZDALE, ET AL.

21-6563 SANCHEZ-TORRES, HECTOR V. FLORIDA

21-6564 CRUZ, ANTHONY V. CALIFORNIA

21-6567 BROWN, DION V. ILLINOIS

21-6574 WARTERFIELD, ROBERT T. V. LUMPKIN, DIR., TX DCJ

21-6577	OSTOPOWICZ, CHRISTINE K. V. UNITED HEALTHCARE
21-6578	LERI, GREGORY V. UNITED STATES
21-6586	MARTINEZ, MARK J. V. CALIFORNIA
21-6588	ANDERSON, AMY B. V. WRIGHT, WARDEN, ET AL.
21-6590	KING, TERRY L. V. TENNESSEE
21-6596	WOODS, JIMMY D. V. ARIZONA, ET AL.
21-6602	CHRISTIAN, BRANDON V. CROW, DIR., OK DOC
21-6603	BLAUCH, JOANNA V. WESTMINSTER, CO, ET AL.
21-6604	BOWERS, ANDRE V. NOETH, SUPT., ATTICA
21-6606	TYMES, AKIL V. DIXON, SEC., FL DOC
21-6610	BRUNER, CODY A. V. OKLAHOMA
21-6611	SALAZAR, YANET C. V. GARLAND, ATT'Y GEN.
21-6612	CAVITT, BRIAN V. MASSACHUSETTS
21-6613	RUSSELL, DeANDRE, ET UX. V. UNITED STATES, ET AL.
21-6619	NATION, JEREMIAH Y. V. FRAKES, DIR., NE DOC
21-6620	PRALL, TORMU V. BRUCK, ATT'Y GEN. OF NJ, ET AL.
21-6622	LAWSON, RUFUS V. WEST, OFFICER, ET AL.
21-6626	EHINGER, RONALD D. V. MICHIGAN
21-6627	GREENFIELD, BALITHA, ET AL. V. MUNOZ, VANESSA
21-6628	McNABB, FRANK V. TEXAS
21-6635	GIBBS, LARRY A. V. DIXON, SEC., FL DOC
21-6637	IVERY, KENAN V. OHIO
21-6641	WASHBURN, CHOO V. CLARK, JUANA Q.
21-6647	KERR, KENNETH H. V. LUMPKIN, DIR., TX DCJ
21-6648	MONTGOMERY, JOHN C. V. HUDSON, DAVID, ET AL.
21-6649	HULTMAN, PAUL J. V. PARAMO, WARDEN
21-6650	HARVELL, ZACHARY J. V. OKLAHOMA
21-6652	FLUID, SALATHEO V. UNITED STATES

21-6653 FERMIN, URBAN V. ANNUCCI, COMM'R, NY DOC

21-6654 DAVIDSON, DONALD H. V. FLORIDA

21-6655 TREVILLION, HENRY V. UNITED STATES

21-6660 JONES, JOSHUA V. V. RIDDER, EMILY, ET AL.

21-6662 WATTS, BRYANT C. V. TEXAS

21-6663 KHAN, ASHER A. V. UNITED STATES

21-6665 DeLIA, STEVEN W. V. DEPT. OF JUSTICE, ET AL.

21-6666 JOHNSON, JABARI J. V. JOHNSON, JAMES, ET AL.

21-6669 SCULLY, ROBERT W. V. CALIFORNIA

21-6672 BISHOP, TREVOR J. V. CALIFORNIA

21-6673 BEATTY, JOHN V. OHIO

21-6675 McCLELAND, ROBERT V. RAEMISCH, RICK, ET AL.

21-6677 PINSON, SHAWN V. TEXAS

21-6678 MENDEZ, RAUL V. BOISE, ID, ET AL.

21-6680 CANNON, JEMAINE M. V. OKLAHOMA

21-6681 CRAPSER, ERIC M. V. DIXON, SEC., FL DOC

21-6682 SHORT, MARCUS L. V. NEBRASKA

21-6683 VINES, DAVID M. V. BLACK DIAMOND, WA, ET AL.

21-6684 VOLPICELLI, FERRILL J. V. DISTRICT COURT OF NV, ET AL.

21-6686 BAKER, GARRY L. V. LUMPKIN, DIR., TX DCJ

21-6690 PYATT, JOE V. AECOM TECHNICAL SERVICES, INC.

21-6691 HICKS, AARON V. UNITED STATES

21-6692 RAMOS, ALEX D. V. UNITED STATES

21-6694) BRANTLEY, LAWRENCE S. V. TX DEPT. OF FAMILY
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21-6696) L. W. V. TX DEPT. OF FAMILY

21-6697 WALKER, MELVIN V. UNITED STATES

21-6699 J. T. V. MONTGOMERY CTY. DEPT. OF HEALTH

21-6702 PORTER, OSCAR V. JOHNSON, ADM'R, NJ, ET AL.

21-6703	CUMBERLAND, JOSHUA V. VANNOY, WARDEN
21-6704	DREW, JOSE D. V. UNITED STATES
21-6705	WARTERFIELD, ROBERT T. V. LUMPKIN, DIR., TX DCJ
21-6709	WIJE, SURAN V. UNITED STATES
21-6712	FULLER, JERMAR J. V. TEXAS
21-6715	SULLIVAN, LEIHINAHINA V. USDC HI
21-6716	ROMERO, FERNANDO V. McDOWELL, WARDEN
21-6717	SANDERS, KENNETH L. V. UNITED STATES
21-6720	AL-MAQABLH, ALI V. CAMERON, ATT'Y GEN. OF KY
21-6721	ANDERSON, TYRONE V. DELAWARE
21-6722	TREVINO, DANIEL D. V. UNITED STATES
21-6723	WATSON-BUISSON, JEREMY L. V. VIRGINIA
21-6724	THOMPSON, CARL V. ALASKA
21-6725	SCOHY, RUSS V. PINELLAS COUNTY CODE ENFORCEMENT
21-6726	DAVIS, MARK J. V. FLORIDA
21-6727	DICKINSON, ZANE V. SHINN, DIR., AZ DOC, ET AL.
21-6728	SCHIED, DAVID V. U-HAUL INTERNATIONAL, ET AL.
21-6729	SCHIED, DAVID V. UNITED STATES
21-6730	BIYIKOGLU, MEHMET F. V. UNITED STATES
21-6731	McGARVEY, CURTIS J. V. UNITED STATES
21-6737	DONOGHUE, JAMES, P., ET UX. V. CIR
21-6738	WILLINGHAM, KADEEM V. UNITED STATES
21-6741	DEMBY, JAMOR J. V. COUNTY OF CAMDEN, NJ, ET AL.
21-6742	SALGADO-RODRIGUEZ, RAUDEL V. UNITED STATES
21-6743	REYES, JUAN C. V. UNITED STATES
21-6744	RESTO-FIGUEROA, JOSE D. V. UNITED STATES
21-6745	GARRETT, ANTHONY T. V. UNITED STATES
21-6746	RAMIREZ-RUBIO, ADAN V. UNITED STATES

21-6749	SULLIVAN, MATTHEW V. SPROUL, WARDEN
21-6750	WILSON, CLAUDE J. V. UNITED STATES
21-6751	MENDOZA, RUDY V. UNITED STATES
21-6754	MINK, CHAD V. UNITED STATES
21-6755	PUGH, KENNY V. ILLINOIS
21-6757	PETLECHKOV, DIMITAR V. UNITED STATES
21-6758	JONES, CAMERON T. V. UNITED STATES
21-6759	JONES, DARLA R. V. JOHNSON, WARDEN
21-6760	COTTON, DEANDRE S. V. UNITED STATES
21-6761	KILLEN, PATRICK V. UNITED STATES
21-6762	JUAREZ, KARINA L. V. UNITED STATES
21-6767	CLARK, BRYCE C. V. UNITED STATES
21-6768	GOINES, EMANUEL E. V. UNITED STATES
21-6769	BURNING BREAST, LUKE J. V. UNITED STATES
21-6775	HARDAWAY, TEMNE A. V. UNITED STATES
21-6776	CAREY, WESLEY R. V. ILLINOIS
21-6781	DURY, MATTHEW J. V. UNITED STATES
21-6785	THOMAS, JARVIS V. UNITED STATES
21-6786	WARREN, SEMAJI V. UNITED STATES
21-6788	LINDSEY, BERNARD V. UNITED STATES
21-6789	SINGH, GURPREET V. UNITED STATES
21-6790	RYAN, TIMOTHY V. UNITED STATES
21-6793	TILLMAN, MARKETTE V. UNITED STATES
21-6795	WHITE, JERRY V. GARRETT, WARDEN, ET AL.
21-6799	NORRIS, ERICH W. V. BROOK FOREST CMTY. ASSOC.
21-6800	MURSHID, ABDULKHALIQ M. V. MISSISSIPPI
21-6802	WILSON, TARVIS V. DIXON, SEC., FL DOC, ET AL.
21-6803	ROSALES, JAVIER V. UNITED STATES

21-6812	VELASQUEZ, MANUEL G. V. UNITED STATES
21-6814	FLORES-MORA, ELEAZAR V. UNITED STATES
21-6816	CREWS, N'NEKA L. V. COLORADO
21-6817	JONES, RUFUS B. V. DIXON, SEC., FL DOC
21-6819	VARNER, CHRISTOPHER V. SHEPARD, STAN, ET AL.
21-6821	COX, FRANCIS S. V. UNITED STATES
21-6823	ARNOLD, RICHARD M. V. RICHARDSON, WARDEN
21-6824	BARNES, DWIGHT F. V. UNITED STATES
21-6825	BUSTAMANTE, DIANA V. UNITED STATES
21-6831	RICHARDSON, ALBERT L. V. UNITED STATES
21-6833	SARABIA, JASON L. V. UNITED STATES
21-6838	BOYD, BERNARD S. V. UNITED STATES
21-6839	AMODEO, FRANK L. V. UNITED STATES
21-6840	BART, SANDRA L. V. UNITED STATES
21-6844	CARABALLO-MARTINEZ, PEDRO R. V. UNITED STATES
21-6849	VAQUIZ, EDWIN V. UNITED STATES
21-6852	BRADLEY, JOEDON V. UNITED STATES
21-6858	SMITH, DALTON L. V. UNITED STATES
21-6859	SCOTT, JAQUIRRO T. V. UNITED STATES
21-6860	LYERLA, LANNY J. V. UNITED STATES
21-6861	KAYARATH, PIYARATH S. V. UNITED STATES
21-6863	LOUTE, NESLY V. UNITED STATES
21-6864	JACKSON, DENNIS D. V. OHIO
21-6874	BRITT, JOSHUA V. UNITED STATES
21-6876	BRYAN, LEROY A. V. GARLAND, ATT'Y GEN.
21-6878	COX, RONALD V. NOBLES, DEPUTY WARDEN, ET AL.
21-6882	ARGUETA-URBINA, ALEXI L. V. UNITED STATES
21-6884	RODRIGUEZ-MONSERRATE, HERMIN V. UNITED STATES

21-6885	GONZALEZ SEGOVIA, MIGUEL V. UNITED STATES
21-6886	MARTINEZ-RIVERA, ROBERTO V. UNITED STATES
21-6887	RODRIGUEZ-GARCIA, SERGIO V. UNITED STATES
21-6888	RICHMOND, RYAN K. V. UNITED STATES
21-6890	MOATS, ROBERT W. V. UNITED STATES
21-6894	ALVARADO, ARNOLDO V. UNITED STATES
21-6897	RUELAS, RAMON T. V. BOWSER, SUPT., TWO RIVERS
21-6901	MATHES, WILBERT V. UNITED STATES
21-6905	DIAZ-QUINTANA, RAMON V. UNITED STATES
21-6908	FLORES, JESSIE V. CATES, WARDEN
21-6910	CRUZADO-LAUREANO, JUAN M. V. MULDROW, W. STEPHEN
21-6911	CAVIENSS, STANLEY A. V. UNITED STATES
21-6912	JONES, JAMAR V. UNITED STATES
21-6915	GAFFNEY, MAXWELL V. UNITED STATES
21-6918	TREVINO, ROBERT R. V. LUMPKIN, DIR., TX DCJ
21-6919	VIGIL, KEVIN V. UNITED STATES
21-6920	COUSINS, PERRY V. UNITED STATES
21-6921	PERVIS, SEDALE V. UNITED STATES, ET AL.
21-6922	RODD, JEFFREY C. V. LaRIVA, WARDEN
21-6924	VEYSEY, JOHN T. V. WILLIAMS, WARDEN
21-6926	WILCHER, WILLIE V. UNITED STATES
21-6929	SUMMERISE, ROZELLE V. UNITED STATES
21-6930	RIVERA-GEORGE, JUAN V. UNITED STATES
21-6933	RIVERA-ALEJANDRO, CARLOS V. UNITED STATES
21-6936	CHEATHAM, CHARLES R. V. UNITED STATES
21-6937	MICHAEL, COLIN V. UNITED STATES
21-6939	BEARD, CLARENCE T. V. UNITED STATES
21-6940	SALAS TORRES, FERNEY V. UNITED STATES

21-6942 GU, ALISON V. UNITED STATES

21-6944 CORENO-GARAY, JUAN V. UNITED STATES

21-6955 UMBAY, ERICA V. UNITED STATES

21-6958 VORASIANGSUK, VORARUT V. UNITED STATES

21-6960 ROUSH, JONATHAN C. V. UNITED STATES

21-6977 FLANDERS, LAVONT V. UNITED STATES

21-6984 HEJAZI, HAMID M. V. OREGON

21-6985 HEJAZI, HAMID M. V. OREGON

21-6988 PAVULAK, PAUL E. V. WARDEN, FMC BUTNER

21-6991 KENNEY, LLOYD G. V. UNITED STATES

The petitions for writs of certiorari are denied.

21-210 WISCONSIN V. JENSEN, MARK D.

The motion of respondent for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is denied. Justice Barrett took no part in the consideration or decision of this motion and this petition.

21-351 WILD, COURTNEY V. USDC SD FL

The motion of Child USA for leave to file a brief as *amicus curiae* is granted. The petition for a writ of certiorari is denied.

21-560 DAKOTA ACCESS, LLC V. STANDING ROCK SIOUX, ET AL.

The petition for a writ of certiorari is denied. Justice Alito and Justice Kavanaugh took no part in the consideration or decision of this petition.

21-603 OHIO V. BRINKMAN, GEORGE

21-637 LEE, SUPT., EASTERN V. GARLICK, JAMES

21-705 OKLAHOMA V. YARGEE, TED R.

21-734 OKLAHOMA V. LITTLE, JUSTIN D.

The motions of respondents for leave to proceed *in forma pauperis* are granted. The petitions for writs of certiorari are denied.

21-874 ARMSTRONG, ARTHUR O. V. USDC ED NC

The petition for a writ of certiorari is denied. Justice Alito took no part in the consideration or decision of this petition.

21-896) MARTIN, WARDEN V. JOHNSON, ALONZO C.
)
21-6661) JOHNSON, ALONZO C. V. MARTIN, WARDEN

The motion of respondent in No. 21-896 for leave to proceed *in forma pauperis* is granted. The petitions for writs of certiorari are denied.

21-932 TRUMP, DONALD J. V. THOMPSON, BENNIE G., ET AL.

The motion of States United Democracy Center, et al. for leave to file a brief as *amici curiae* is granted. The petition for a writ of certiorari is denied.

21-934 WEINBACH, LANA V. BOEING CO., ET AL.

The petition for a writ of certiorari is denied. Justice Alito took no part in the consideration or decision of this petition.

21-6483 McNEIL, ROBERT A. V. DEPT. OF STATE, ET AL.

The petition for a writ of certiorari before judgment is denied.

21-6549 LAY, WADE V. OKLAHOMA

21-6550 LAY, WADE V. EL HABTI, WARDEN, ET AL.

The petitions for writs of certiorari are denied. Justice Gorsuch took no part in the consideration or decision of these petitions.

21-6561 ARANOFF, GERALD V. ARANOFF, SUSAN

21-6598 PLOURDE, GLEN V. NO. LIGHT ACADIA HOSP., ET AL.

21-6608 TORRES, WILFREDO V. USDC SD NY

21-6617 DOUGLAS, ALAN V. SUPERIOR COURT OF CA

21-6633 HEJAZI, HAMID M. V. WHITE BIRD CLINIC

The motions of petitioners for leave to proceed *in forma pauperis* are denied, and the petitions for writs of certiorari are dismissed. See Rule 39.8.

21-6664 BREEST, ROBERT V. FORMELLA, ATT'Y GEN. OF NH

21-6713 STRAW, ANDREW U. D. V. UNITED STATES

The motions of petitioners for leave to proceed *in forma pauperis* are denied, and the petitions for writs of certiorari are dismissed. See Rule 39.8. As petitioners have repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioners unless the docketing fees required by Rule 38(a) are paid and the petitions are submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) (*per curiam*).

HABEAS CORPUS DENIED

21-6834 IN RE HOSEA JACKSON

The petition for a writ of habeas corpus is denied.

21-6797 IN RE LAWRENCE E. WILSON

The motion of petitioner for leave to proceed *in forma pauperis* is denied, and the petition for a writ of habeas corpus is dismissed. See Rule 39.8.

21-6879 IN RE ALLEN F. CALTON

The motion of petitioner for leave to proceed *in forma*

pauperis is denied, and the petition for a writ of habeas corpus is dismissed. See Rule 39.8. As the petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) (*per curiam*).

MANDAMUS DENIED

21-807 IN RE AMELIA ENG

21-6444 IN RE JAMES J. KNOCHEL

The petitions for writs of mandamus are denied.

21-1039 IN RE GREGORY C. KAPORDELIS

The petition for a writ of mandamus is denied. Justice Kagan took no part in the consideration or decision of this petition.

21-6607 IN RE ANDREW T. BURNS

The petition for a writ of mandamus and/or prohibition is denied.

REHEARINGS DENIED

20-7144 HE, XUE JIE V. XUE, HAIRONG

20-8304 GOSTON, LEE V. PAYNE, DIR., AR DOC

20-8377 GARDNER, HERBERT G. V. LUMPKIN, DIR., TC DCJ

21-153 MANKARUSE, NAGUI V. INTEL CORP., ET AL.

21-507 LAWYERS UNITED INC., ET AL. V. UNITED STATES, ET AL.

21-525 BHIMNATHWALA, HEMANT V. NJ STATE JUDICIARY, ET AL.

21-562 PRUITT, KENNETH A. V. BIDEN, PRESIDENT OF U.S., ET AL.

21-610 SHUMAN, LOUIS S., ET UX. V. CIR

21-673 AUSTIN, ROBERT A. V. McCANN, JAMES, ET AL.

21-720 RATHEAL, RODNEY S. V. UNITED STATES

21-5038 BLEDSOE, DONNELL V. STOCKTON POLICE DEPT., ET AL.

21-5079 BLEDSOE, DONNELL V. GUILIANI, JUDGE, ET AL.

21-5190 HINES, NICHOLAS S. V. REISCH, SEC., SD DOC, ET AL.

21-5223 BLEDSOE, DONNELL V. CBS TELEVISION NETWORK, ET AL.

21-5416 BLEDSOE, DONNELL V. FACEBOOK, ET AL.

21-5470 LOMELI-GARCIA, ALEKSYS V. SHINN, DIR., AZ DOC, ET AL.

21-5490 BOURGEOIS, JOSEPH M. V. TEXAS

21-5554 GIBBS, JOSEPH H. V. SOUTH CAROLINA

21-5621 IN RE PATRICK DISANTO

21-5623 ROBERTS, FELIX V. LUMPKIN, DIR., TX DCJ

21-5654 ORTEGA, MICHAEL V. OREGON

21-5677 ARMSTEAD, RANDOLPH V. DEVILLE, WARDEN

21-5696 GU, FAN V. INVISTA S.A.R.L.

21-5733 WESTRY, ERIC V. LEON, VICTOR

21-5760 AURIEMMA, ANTHONY V. BROOMFIELD MUNICIPAL CT., ET AL.

21-5781 SCURLOCK-ZINDLER, ADELAIDE L. V. ZINDLER, PETER H.

21-5897 SHAKOURI, SHAHRAM V. LUMPKIN, DIR., TX DCJ

21-5903 JOHNSON, ANGELA, ET AL. V. UNITED STATES

21-5986 HAMPTON, KATHLEEN C. V. PROF-2013-S3 LEGAL TITLE TRUST

21-5987 HAMPTON, KATHLEEN C. V. PROF-2013-S3 LEGAL TITLE TRUST

21-6025 HINES, STEWART V. NELSON, GWENDOLEN C.

21-6032 HURT, CHARLES F. V. USDC SD TX

21-6052 MATTISON, LAWRENCE E. V. UNITED STATES

21-6162 SALES, ANTWAIN T. V. TENNESSEE

The petitions for rehearing are denied.

20-8461 IN RE RICHARD C. LUSSY

The petition for rehearing is denied. The Chief Justice took no part in the consideration or decision of this petition.

21-154 MANKARUSE, NAGUI V. RAYTHEON CO., ET AL.

The petition for rehearing is denied. Justice Breyer and Justice Alito took no part in the consideration or decision of this petition.

21-435 LOGGINS, KEVIN D. V. PILSHAW, JUDGE, ET AL.

The petition for rehearing is denied. Justice Gorsuch took no part in the consideration or decision of this petition.

21-5832 IN RE LESLIE WILLIS

21-5833 IN RE LESLIE WILLIS

The petitions for rehearing are denied. Justice Alito took no part in the consideration or decision of these petitions.

20-7143 SHI, HEYANGJING, ET AL. V. MASH, JIM J.

The motion for leave to file a petition for rehearing is denied.

SUPREME COURT OF THE UNITED STATES

ANGEL ORTIZ *v.* DENNIS BRESLIN, SUPERINTENDENT, QUEENSBORO CORRECTIONAL FACILITY, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

No. 20–7846. Decided February 22, 2022

The petition for a writ of certiorari is denied.

Statement of JUSTICE SOTOMAYOR respecting the denial of certiorari.

In New York, criminal defendants who earn sufficient good time credits before the end of their prison sentences are entitled to conditional release. Defendants classified by the State as "level three sex offenders," however, must first assure the State that they will not reside within 1,000 feet of any school. In New York City, this is no easy task, and the difficulties of finding a compliant residence can result in defendants serving additional time in prison past the expiration of their sentences. Because petitioner Angel Ortiz was unable to identify any release address that satisfied the State's requirement, he spent over two additional years incarcerated when he should have been at liberty. Although Ortiz's petition does not satisfy this Court's criteria for granting certiorari, I write to emphasize that New York's residential prohibition, as applied to New York City, raises serious constitutional concerns.

I

Ortiz was sentenced in New York state court to 10 years in prison and 5 years of postrelease supervision. Near the end of his prison term, Ortiz had earned good time credits that entitled him to release to a term of community supervision. As required by New York's Department of Correc-

tions and Community Supervision (DOCCS), Ortiz proposed that he would reside with his mother and his daughter in their New York City apartment. The DOCCS denied Ortiz's request, citing New York law that it interprets to prohibit a person designated as a "level three sex offender," like Ortiz, from residing within 1,000 feet of a school. See N. Y. Exec. Law Ann. §259–c(14); N. Y. Penal Law Ann. §220.00 (West Cum. Supp. 2022).[1] Ortiz then proposed dozens of other release addresses, including various homeless shelters, but DOCCS rejected each one. As a result, Ortiz spent the entirety of his 17 months of conditional release in prison.

Even after Ortiz served the full 10 years of his sentence, Ortiz's confinement did not end. Instead of releasing Ortiz, New York transferred him to a state prison that it designated a "Residential Treatment Facility" to begin serving his period of postrelease supervision. Ortiz spent eight months in two of these facilities, where he lived behind barbed wire, in a general prison population, in conditions nearly identical to those in which he served his sentence.[2] All told, because of New York's residency prohibition, Ortiz was imprisoned for over two years longer than he otherwise would have been.

While at a Residential Treatment Facility, Ortiz filed a petition for a writ of habeas corpus in state court, seeking release to any one of the New York City Department of

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[1] The text of the relevant law provides that a covered "offender shall refrain from knowingly entering into or upon any school grounds." N. Y. Exec. Law Ann. §259–c(14). New York defines "[s]chool grounds" as "any area accessible to the public located within one thousand feet" of a school. N. Y. Penal Law Ann. §220.00. DOCCS interpreted this requirement to reject Ortiz's proposed release address because a childcare center was located in his family's apartment building.

[2] The principal difference between the treatment of Ortiz and the other residents serving sentences was that Ortiz was occasionally allowed to leave, guarded by armed correctional officers, to join a work crew that unloaded trucks at a nearby police facility.

Homeless Services shelters, or, failing that, to live unhoused on the street. The court denied the writ, reasoning that Ortiz had not located "compliant community housing," and thus, his continued detention was warranted. App. to Pet. for Cert. 91a. The intermediate appellate court affirmed, and, in a divided opinion, the New York Court of Appeals affirmed as well.

II

In effect, New York's policy requires indefinite incarceration for some indigent people judged to be sex offenders. The within-1,000-feet-of-a-school ban makes residency for Ortiz and others practically impossible in New York City, where the city's density guarantees close proximity of schools. See *Gonzalez* v. *Annucci*, 32 N. Y. 3d 461, 470, 117 N. E. 3d 795, 800 (2018) (acknowledging the "dearth" of compliant housing in New York City). Rather than tailor its policy to the geography of New York City or provide shelter options for this group, New York has chosen to imprison people who cannot afford compliant housing past both their conditional release date and the expiration of their maximum sentences.

Judge Jenny Rivera's dissent below ably explains how New York's policies as applied to people like Ortiz raise constitutional concerns.[3] *People ex rel. Johnson* v. *Superintendent*, 36 N. Y. 3d 187, 207, 163 N. E. 3d 1041, 1056 (2020). Although individuals generally do not have a protected liberty interest in conditional release before expiration of their sentences, such an interest "may arise from an expectation or interest created by state laws or policies." *Wilkinson* v. *Austin*, 545 U. S. 209, 221 (2005); see also *Sandin* v. *Conner*, 515 U. S. 472, 483–484 (1995) ("States may under certain circumstances create liberty interests. . . protected by

[3]Judge Rowan Wilson's dissent also importantly addresses how DOCCS's policy violates New York City's obligation to provide shelter to those in need. *Johnson*, 36 N. Y. 3d, at 231, 163 N. E. 3d, at 1072.

the Due Process Clause"). Here, New York law provides that a defendant "shall . . . be conditionally released" once he earns sufficient credits, as Ortiz did. N. Y. Penal Law Ann. §70.40 (West 2021). As a New York City resident, Ortiz also enjoyed a right to "shelter and board [for] each homeless man who applies for it." *Callahan* v. *Carey*, 307 App. Div. 2d 150, 151, 762 N. Y. S. 2d 349, 350 (2003). In my view, under these New York state and city policies, Ortiz may well have held a liberty interest at the point that he became entitled to conditional release. At the very least, however, Ortiz indisputably held a liberty interest in his release at the expiration of his full sentence.

The State's denial of Ortiz's liberty interest in his release demands heightened scrutiny. Even absent such scrutiny, however, as Judge Rivera explains, New York's policy of indefinite detention may not withstand even rational-basis review. *Johnson*, 36 N. Y. 3d, at 218–221, 163 N. E. 3d, at 1063–1065. No one doubts that New York's goal of preventing sexual violence toward children is legitimate and compelling, but New York nonetheless must advance that objective through rational means. Courts, law enforcement agencies, and scholars all have acknowledged that residency restrictions do not reduce recidivism and may actually increase the risk of reoffending. For example, in striking down retroactive application of Michigan's residency restriction, the Sixth Circuit found no evidence that "residential restrictions have any beneficial effect on recidivism rates." *Does #1–5* v. *Snyder*, 834 F. 3d 696, 705 (2016). The Superior Court of New Jersey, Appellate Division, struck down local ordinances establishing residential restrictions, concluding that they were pre-empted by state law. See *G. H.* v. *Galloway*, 401 N. J. Super. 392, 951 A. 2d 221 (2008), aff'd, 199 N. J. 135, 971 A. 2d 401 (2009). The court explained that the local ordinances "make it difficult for a [convicted sex offender] to find stable housing, which can cause loss of employment and financial distress, factors

which inadvertently increase the chance of reoffense." 401 N. J. Super., at 417, 951 A. 2d, at 236.

Law enforcement agencies also recognize that residency restrictions are often counterproductive. The Department of Justice acknowledges that there is "no empirical support for the effectiveness of residence restrictions" such as New York's. Office of Justice Programs, Sex Offender Management Assessment and Planning Initiative 205 (2017). In fact, the Department notes, residency restrictions may cause "a number of negative unintended consequences" that "aggravate rather than mitigate offender risk." *Ibid.* An empirical study of recidivism conducted by the Minnesota Department of Corrections confirmed that "none of the 224 sex offenses would likely ha[ve] been deterred by a residency restriction law." G. Duwe, Residency Restrictions and Sex Offender Recidivism: Implications for Public Safety, 2 Geography & Pub. Safety 6, 7 (May 2009). Like the Department of Justice, the Minnesota Department of Corrections concluded that "[b]y making it more difficult for sex offenders to find suitable housing and successfully reintegrate into the community, residency restrictions may actually compromise public safety by fostering conditions that increase offenders' risk of reoffending." *Id.,* at 8.

A large body of scholarship also cautions against residency restrictions as a means of reducing recidivism. Criminologists considering data from Missouri and Michigan concluded that residency restrictions have little or no effect on recidivism. B. Huebner et al., The Effect and Implications of Sex Offender Residence Restrictions: Evidence From a Two-State Evaluation, 13 C. & Pub. Pol'y 139, 156 (2016). A similar study of recidivism rates in Florida reached the same conclusion. P. Zandbergen, J. Levenson, & T. Hart, Residential Proximity to Schools and Daycares: An Empirical Analysis of Sex Offense Recidivism, 37 Crim. Justice & Behavior 482, 498 (2010) ("The results of this study indicate no empirical association between where a

sex offender lives and whether he reoffends sexually against a minor"). Other scholars have explained that by banishing returning individuals to the margins of society, residency restrictions may lead to homelessness, unemployment, isolation, and other conditions associated with an increased risk of recidivism. See generally A. Frankel, Pushed Out and Locked In: The Catch-22 for New York's Disabled, Homeless Sex-Offender Registrants, 129 Yale L. J. Forum 279 (2019).

Despite the empirical evidence, legislatures and agencies are often not receptive to the plight of people convicted of sex offenses and their struggles in returning to their communities. Nevertheless, the Constitution protects all people, and it prohibits the deprivation of liberty based solely on speculation and fear.

When the political branches fall short in protecting these guarantees, the courts must step in. Indeed, although a clear split has yet to develop among Federal Courts of Appeals or state courts of last resort, a growing number of courts have confronted issues cause by the extended imprisonment of people convicted of sex offenses. In Illinois, for instance, a Federal District Court enjoined the State from jailing people convicted of sex offenses "indefinitely because they are unable to find a residence due to indigence and lack of support." *Murphy* v. *Raoul*, 380 F. Supp. 3d 731, 738, 766 (ND Ill. 2019). The Court of Appeals of North Carolina held under state law that North Carolina could not revoke a person's probation simply because he could not find a residence that complied with the State's residency restriction. *State* v. *Talbert*, 221 N. C. App. 650, 727 S. E. 2d 908 (2012). In Wisconsin, after litigation challenged the State's policy of jailing people convicted of sex offenses past their mandatory release dates, Wisconsin voluntarily rescinded its policy requiring detention beyond the expiration of a sentence. See *Werner* v. *Wall*, 836 F. 3d 751, 757 (CA7 2016). Because of the grave importance of these issues and

the frequency with which they arise, it seems only a matter of time until this Court will come to address the question presented in this case.

* * *

New York should not wait for this Court to resolve the question whether a State can jail someone beyond their parole eligibility date, or even beyond their mandatory release date, solely because they cannot comply with a restrictive residency requirement. I hope that New York will choose to reevaluate its policy in a manner that gives due regard to the constitutional liberty interests of people like Ortiz.

OFFICE OF THE ATTORNEY GENERAL
CONSUMER PROTECTION DIVISION

CIVIL INVESTIGATIVE DEMAND

TO: AbbVie Inc.
1 N. Waukegan Road
North Chicago, IL 60064

via CMRRR:
via First Class Mail
Return Date: April 14, 2022

Laura J. Schumacher
Vice Chairman, External Affairs and Chief Legal Officer

via Email: laura.schumacher@abbvie.com

Pursuant to this office's specific authority under section 17.61 of the Texas Deceptive Trade Practices—Consumer Protection Act, Tex. Bus. & Com. Code §§ 17.41–17.63 ("DTPA"), AbbVie Inc. is hereby directed to produce the items listed in Exhibit "A" attached hereto. Such production is governed by the instructions and definitions on this page and subsequent pages.

You are to make available the documentary material described in Exhibit "A" to the undersigned Assistant Attorney General or other authorized agent(s) identified by the Consumer Protection Division ("Division"). This documentary material shall be produced for inspection and copying during normal business hours at your principal office or place of business or may be sent electronically or by certified mail to the Office of Attorney General, 300 W. 15th Street, 9th Floor, Austin, TX 78701 and is due on April 14, 2022. If providing documents electronically, please provide them to Steven Robinson by email Steven.Robinson@oag.texas.gov. **Please contact me upon receipt in order to discuss the return date and the logistics of producing the requested documents to the Consumer Protection Division.**

The Division believes that you are in possession, custody, or control of documentary material relevant to the subject matter of an investigation of actual or possible violations of the DTPA sections 17.46(a) and 17.46(b) related to the advertising, marketing, promotion, sale and distribution of prescription hormone blockers for off-label usage.

TAKE NOTICE THAT pursuant to section 17.62, Texas Business and Commerce Code, any person who attempts to avoid, evade, or prevent compliance, in whole or in part, with this directive by removing, concealing, withholding, destroying, mutilating, altering, or by any other means falsifying any documentary material may be guilty of a misdemeanor and on conviction is punishable by a fine of not more than $5,000.00 or by confinement in the county jail for not more than one year, or both.

ISSUED THIS 24th day of March, 2022.

/s/ Steven Robinson
Steven Robinson
Chief, Consumer Protection
T: (512) 463-2185 | F: (512) 473-8301
Email: steven.robinson@oag.texas.gov

Instructions

1. **Read These Instructions/Definitions Carefully.** Your production must comply with these instructions and definitions.

2. **Duty to Preserve Documents**. All documents and/or other data which relate to the subject matter or requests of this Civil Investigative Demand must be preserved. ***Any ongoing, scheduled or other process of document or data destruction involving such documents or data must cease even if it is your normal or routine course of business for you to delete or destroy such documents or data and even if you believe such documents or data are protected from discovery by privilege or otherwise.*** Failure to preserve such documents or data may result in legal action and may be regarded as spoliation of evidence under applicable law.

3. **Relevant Dates**. Unless otherwise noted, the requests in this Civil Investigative Demand require production of documents from January 1, 2019, to the date of delivery of this Civil Investigative Demand, herein called "the relevant time period."

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   a. The name of each author, sender, creator, and initiator of such document;

   b. the name of each recipient, addressee, or party for whom such document was intended;

   c. the date the document was created;

   d. the date(s) the document was in use;

   e. a detailed description of the content of the document;

   f. the reason it is no longer in your possession, custody or control; and

   g. the document's present whereabouts.

   If the document is no longer in existence, in addition to providing the information indicated above, state on whose instructions the document was destroyed or otherwise disposed of, and the date and manner of the destruction or disposal.

5. **Non-identical Copies to be Produced.** Any copy of a document that differs in any manner, including the presence of handwritten notations, different senders or recipients, etc. must be produced.

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Definitions

1. **"You," "your," "the business," "AbbVie"** means the entity named on page one of this Civil Investigative Demand and includes its past and present officers, employees, agents and representatives, parents and predecessors, divisions, subsidiaries, affiliates, partnerships and joint ventures, and all persons and entities acting or purporting to act under the guidance or on behalf of any of the above. The terms "subsidiary," "affiliate," and "joint venture" refer to any firm in which there is total or partial ownership (25 percent or more) or control between the company and any other person or entity.

2. **"Advertisement"** means any act to bring to the public's attention the availability of goods and/or services and includes, but is not limited to, brochures, newspaper advertisements, yellow pages, internet, web or social media advertisements, websites, signs posted in or outside the business and radio or television advertisements.

3. "**Call notes**" means any document which contains a record of visits by your sales personnel to any health care provider, for the purpose of detailing hormone blockers or disseminating information about hormone blockers.

4. **"Communication"** is to be broadly construed and includes but is not limited to e-mails, notes, faxes, memos, text messages, social media posts, letters, notes of conversations and meetings and recordings of conversations and meetings, whether in text or audio form.

5. "**Concerning**" means directly or indirectly mentioning or describing, relating to, referring to, regarding, evidencing, setting forth, identifying, manifesting, memorializing, created in connection with or as a result of, commenting on, embodying, evaluating, analyzing, tracking, reflecting or constituting, in whole or in part, a stated subject matter.

6. "**Consumer**" means both individuals and businesses.

7. "**Detail**," "**detailing**," or "**detailed**" means any form of communication between your sales representatives or other employees and health care providers, including but not limited to, visits, telephone calls, voicemails, mail, group or individual emails, instant messages, social media

postings or messaging, and electronic message board posts.

8. **"Document"** means the original and all non-identical copies (whether different from the original because of notes, underlining, attachments, or otherwise) of all computer files, and all written, printed, graphic or recorded material of every kind, regardless of authorship. It includes communications in words, symbols, pictures, photographs, sounds, films, and tapes, as well as electronically stored information, computer files, together with all codes and/or programming instructions and other materials necessary to understand and use such systems.

9. "**Employee**" means and includes but is not limited to all current or former salaried employees, hourly employees, agents, independent contractors, individuals performing work as temporary employees, and staff of your board(s) of directors.

10. "**Health care provider**" and "**HCP**" means any physician, surgeon, nurse practitioner, physician assistant, physiatrist, psychiatrist, dentist, pharmacist, podiatrist, nurse, or other person engaged in the business of providing health care services and/or prescribing hormone blocker products in Texas, whether in Texas or another participating state, and any medical facility, hospital, or clinic, including but not limited to the current and former officers, directors, agents, representatives, or employees of any of the foregoing.

11. "**Identify**" or "**identity**" means the following:

a. When used in reference to a natural person, state (1) the person's full name; (2) the person's current or last known address; (3) the person's current or last known telephone number; (4) the person's current or last known email address; and (5) the person's occupation;

b. When used in reference to an artificial person or entity such as a corporation or partnership, state (1) the organization's full name and trade name, if any; (2) the address and telephone number of its principal place of business; and (3) the names and titles of the entity's officers, directors, and managing agents or employees;

c. When used in reference to a document, state (1) the type of document (*e.g.*, letter, memorandum, print-out, report, newspaper, etc.); (2) the title and date, if any, of the document; (3) all authors' names and addresses; (4) all addressees' names and addresses; (5) a brief description of the document's contents; (6) the present location of the document; and (7) the name and address of the person or persons having custody over the document. If any such document was, but is no longer, in your possession or custody or subject to your control, explain the disposition. In all cases where you are requested to identify particular documents, in lieu of such identification you may supply a fully legible exact copy of the document in question. Your acceptance of this option, however, shall in no way prejudice the State's right to require production and allow inspection of all records in your possession;

d. With respect to oral communications, set forth the following information: (1) the substance of the communication; (2) the date and time of the communication; (3) the place of origin of the communication; and if different, as in the case of telephone communications, the place at which the communication was received; (4) identification of each originator and recipient of the communication; and (5) identification of all

persons present at the place of origin, and if different, the place of receipt of the communication at the time the communication took place; and

e. When used in reference to a factual situation or allegation, state with particularity and specificity all facts known which bear upon or relate to the matter which is the subject of the inquiry, using the simplest and most factual statements of which you are capable.

12. **"Including"** means including, but not limited to.

13. "**Market**," "**marketing**," or "**marketed**" means all efforts and communication to promote or increase the use of hormone blockers generally or your hormone blocker products specifically, and includes branded and non-branded advertising and promotion in whatever form. It includes communications with and presentations relating to advisory groups.

14. "**Hormone blocker(s)**" or "**Puberty blocker(s)**" means medication(s) used to inhibit sex hormones, including but not limited to gonadotropin-releasing hormone (GnRH) agonists.

15. "**Person**" means any natural person or such person's legal representative; any partnership, domestic or foreign corporation, or limited liability company; any company, trust, business entity, association, or unincorporated association; and any agent, employee, salesperson, partner, officer, director, member, stockholder, associate, or trustee of another person.

16. **"Person"** includes you and means any entity or natural person.

17. "**Plans**" means documents or communications, including presentations, correspondence, or other memoranda setting forth ideas, thoughts, strategies, steps, formulas, or theories to promote your hormone blocker products or hormone blocker products generally. "Plans" means materials created by you as well as any third parties with whom you have contracted or communicated, and all drafts thereof.

18. "**Relating to**" or "**related to**" means, in whole or in part, constituting, concerning, evidencing, containing, discussing, commenting upon, describing, analyzing, identifying, stating, pertaining to, referring to, forming the basis of, in preparation of, or contradicting.

19. "**Sales personnel**" and "**sales representative**" mean any employee, agent, or independent contractor engaged in the sales, marketing, or promotion of your hormone blocker products or hormone blocker products generally.

EXHIBIT A: DOCUMENTS TO BE PRODUCED

1. Documents sufficient to identify all hormone blocker products that you sell, market, or distribute or have sold, marketed, or distributed from January 1, 2019, to the present, including:

a. The brand name and generic name for each hormone blocker products;

b. The brand name and generic name of each reformulation of such hormone blocker products, if any, and the date and purpose or nature of each reformulation;

c. All available doses and forms of such hormone blocker products for each brand name and each reformulation;

d. The National Drug Code packaging code(s) for each dose and form of each hormone blocker product; and

e. The time period during which you sold, marketed, or promoted each hormone blocker product. If another company sold, marketed, or promoted the hormone blocker product before or after you did, please indicate the time period during which another company sold, marketed, or promoted the hormone blocker product.

2. Produce all documents related to the marketing and promotion of hormone blockers in Texas, including all branded and unbranded marketing materials, advertising, and educational materials, that contain information regarding the usage of hormone blockers, the potential for side effects for long-term usage of hormone blockers, and/or off-label uses of hormone blockers. The scope of this request includes, but is not limited to:

a. Direct-to-consumer advertisements or other direct-to-consumer or patient communications;

b. Advertisements or other marketing materials directed at HCPs;

c. Slim Jims/pocket advertisements and similar materials;

d. Leave behinds (including reprints);

e. Posters;

f. Brochures and pamphlets;

g. Online and electronic materials provided to HCPs and patients/consumers, including emails, links to websites, and the name and address of each website where such materials appeared;

h. Materials with your company's logo;

i. Materials to be distributed by HCPs to patients/consumers; and

j. Materials relating to the treatment of gender dysphoria, the prescribing of hormone-blocker-containing products, or hormone blockers generally that you provided to HCPs.

3. Provide all documents concerning all meetings, conversations, or other communications between you and HCPs in Texas during which your hormone blocker products, hormone blockers generally, and/or the use of hormone blockers for treatment of gender dysphoria was discussed, including but not limited to any call notes, or other notes, reports, analyses, or documents concerning such visits or communications.

4. Produce documents and communications related to materials provided to Texas health care providers describing off-label usage of hormone blockers. The scope of this request includes all communications from Texas health care providers requesting materials describing off-label usage of hormone blockers.

5. Provide all marketing and sales plans and communications relating to such plans, including all documents concerning competitive market share, growth plans, brand, and Strengths, Weaknesses, Opportunities, and Threats ("SWOT") analyses, for each hormone blocker product identified in Request 1, including projections and analyses prior to the U.S. Food and Drug Administration's ("FDA") approval (NDA, SNDA, or ANDA).

6. Provide all documents concerning the training or education of your sales representatives concerning your hormone blocker products, hormone blocker products by other manufacturers, or hormone blockers generally, including but not limited to employee handbooks, manuals, scripts, videos, agendas, talking points, presentations, memoranda, PowerPoint slides, recordings, email, and other messages. The scope of this request specifically includes training pertaining to off-label use of hormone blockers, including off-label use for treatment of gender dysphoria. For each document, state the time period for which it was effective.

7. Provide all documents concerning any internal communications, discussion, analyses, or deliberation within and among members of your risk management or similar committee(s) concerning the effectiveness of your hormone blocker products for treatment of gender dysphoria, hormone blocker use generally for treatment of gender dysphoria, and/or the risks associated with long-term hormone blocker use and/or hormone blocker use for treatment of gender dysphoria.

8. Produce any study or publication, including publication of a peer-reviewed article in any magazine or journal, that you sponsored or funded, in whole or in part, or to which you contributed in any way that relates to any of your hormone blocker products, hormone blockers generally, side effects of hormone blockers, or the treatment of gender dysphoria. In addition, provide the amount of each payment or contribution for each identified study or publication.

9. Provide all periodic reports or documents submitted to the FDA relating to your post-market surveillance requirements for each of your hormone blocker products identified in Request 1.

10. Provide all warning letters, untitled letters, advisory comments, or other communications from the FDA related to your marketing and advertising of your hormone blocker products.

11. Provide all communications, reports, analyses, and other documents concerning misuse, adverse events, side effects, and/or injury for your hormone blocker products. Include in your response: (a) all FDA MedWatch reports involving misuse, adverse events, side effects, and/or injury from your hormone blocker products; (b) all reports by sales representatives or others regarding misuse, adverse events, side effects, and/or injury; (c) all lists or databases you

maintained regarding misuse, adverse events, side effects, and/or injury; and (d) all communications with any professional, law enforcement, or government agencies, including federal, state, county, and municipal regulators, regarding misuse, adverse events, side effects, and/or injury.

12. Produce documents sufficient to identify all investigations of you by any law enforcement or government agencies, including federal, state, and municipal regulators, regarding marketing or representations made by you about the safety or effectiveness of your hormone blocker products or hormone blockers generally for the treatment of gender dysphoria.

13. Produce documents sufficient all lawsuits or private causes of action filed against you regarding marketing or representations made by you about the safety or effectiveness of your hormone blocker products or hormone blockers generally for the treatment of gender dysphoria.

OFFICE OF THE ATTORNEY GENERAL
CONSUMER PROTECTION DIVISION

CIVIL INVESTIGATIVE DEMAND

TO: Endo Pharmaceuticals, Inc.
1400 Atwater Drive
Malvern, PA 19355

via CMRRR:
via First Class Mail
Return Date: April 14, 2022

Matthew J. Maletta
Executive Vice President and Chief Legal Officer

via Email: maletta.matthew@endo.com

Pursuant to this office's specific authority under section 17.61 of the Texas Deceptive Trade Practices—Consumer Protection Act, Tex. Bus. & Com. Code §§ 17.41–17.63 ("DTPA"), Endo Pharmaceuticals Inc. is hereby directed to produce the items listed in Exhibit "A" attached hereto. Such production is governed by the instructions and definitions on this page and subsequent pages.

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The Division believes that you are in possession, custody, or control of documentary material relevant to the subject matter of an investigation of actual or possible violations of the DTPA sections 17.46(a) and 17.46(b) related to the advertising, marketing, promotion, sale and distribution of prescription hormone blockers for off-label usage.

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ISSUED THIS 24th day of March, 2022.

/s/ Steven Robinson
Steven Robinson
Chief, Consumer Protection
T: (512) 463-2185 | F: (512) 473-8301
Email: steven.robinson@oag.texas.gov

Instructions

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Definitions

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3. "**Call notes**" means any document which contains a record of visits by your sales personnel to any health care provider, for the purpose of detailing hormone blockers or disseminating information about hormone blockers.

4. **"Communication"** is to be broadly construed and includes but is not limited to e-mails, notes, faxes, memos, text messages, social media posts, letters, notes of conversations and meetings and recordings of conversations and meetings, whether in text or audio form.

5. "**Concerning**" means directly or indirectly mentioning or describing, relating to, referring to, regarding, evidencing, setting forth, identifying, manifesting, memorializing, created in connection with or as a result of, commenting on, embodying, evaluating, analyzing, tracking, reflecting or constituting, in whole or in part, a stated subject matter.

6. "**Consumer**" means both individuals and businesses.

7. "**Detail**," "**detailing**," or "**detailed**" means any form of communication between your sales representatives or other employees and health care providers, including but not limited to, visits, telephone calls, voicemails, mail, group or individual emails, instant messages, social media

postings or messaging, and electronic message board posts.

8. **"Document"** means the original and all non-identical copies (whether different from the original because of notes, underlining, attachments, or otherwise) of all computer files, and all written, printed, graphic or recorded material of every kind, regardless of authorship. It includes communications in words, symbols, pictures, photographs, sounds, films, and tapes, as well as electronically stored information, computer files, together with all codes and/or programming instructions and other materials necessary to understand and use such systems.

9. "**Employee**" means and includes but is not limited to all current or former salaried employees, hourly employees, agents, independent contractors, individuals performing work as temporary employees, and staff of your board(s) of directors.

10. "**Health care provider**" and "**HCP**" means any physician, surgeon, nurse practitioner, physician assistant, physiatrist, psychiatrist, dentist, pharmacist, podiatrist, nurse, or other person engaged in the business of providing health care services and/or prescribing hormone blocker products in Texas, whether in Texas or another participating state, and any medical facility, hospital, or clinic, including but not limited to the current and former officers, directors, agents, representatives, or employees of any of the foregoing.

11. "**Identify**" or "**identity**" means the following:

a. When used in reference to a natural person, state (1) the person's full name; (2) the person's current or last known address; (3) the person's current or last known telephone number; (4) the person's current or last known email address; and (5) the person's occupation;

b. When used in reference to an artificial person or entity such as a corporation or partnership, state (1) the organization's full name and trade name, if any; (2) the address and telephone number of its principal place of business; and (3) the names and titles of the entity's officers, directors, and managing agents or employees;

c. When used in reference to a document, state (1) the type of document (*e.g.*, letter, memorandum, print-out, report, newspaper, etc.); (2) the title and date, if any, of the document; (3) all authors' names and addresses; (4) all addressees' names and addresses; (5) a brief description of the document's contents; (6) the present location of the document; and (7) the name and address of the person or persons having custody over the document. If any such document was, but is no longer, in your possession or custody or subject to your control, explain the disposition. In all cases where you are requested to identify particular documents, in lieu of such identification you may supply a fully legible exact copy of the document in question. Your acceptance of this option, however, shall in no way prejudice the State's right to require production and allow inspection of all records in your possession;

d. With respect to oral communications, set forth the following information: (1) the substance of the communication; (2) the date and time of the communication; (3) the place of origin of the communication; and if different, as in the case of telephone communications, the place at which the communication was received; (4) identification of each originator and recipient of the communication; and (5) identification of all

persons present at the place of origin, and if different, the place of receipt of the communication at the time the communication took place; and

e. When used in reference to a factual situation or allegation, state with particularity and specificity all facts known which bear upon or relate to the matter which is the subject of the inquiry, using the simplest and most factual statements of which you are capable.

12. **"Including"** means including, but not limited to.

13. "**Market**," "**marketing**," or "**marketed**" means all efforts and communication to promote or increase the use of hormone blockers generally or your hormone blocker products specifically, and includes branded and non-branded advertising and promotion in whatever form. It includes communications with and presentations relating to advisory groups.

14. "**Hormone blocker(s)**" or "**Puberty blocker(s)**" means medication(s) used to inhibit sex hormones, including but not limited to gonadotropin-releasing hormone (GnRH) agonists.

15. "**Person**" means any natural person or such person's legal representative; any partnership, domestic or foreign corporation, or limited liability company; any company, trust, business entity, association, or unincorporated association; and any agent, employee, salesperson, partner, officer, director, member, stockholder, associate, or trustee of another person.

16. **"Person"** includes you and means any entity or natural person.

17. "**Plans**" means documents or communications, including presentations, correspondence, or other memoranda setting forth ideas, thoughts, strategies, steps, formulas, or theories to promote your hormone blocker products or hormone blocker products generally. "Plans" means materials created by you as well as any third parties with whom you have contracted or communicated, and all drafts thereof.

18. "**Relating to**" or "**related to**" means, in whole or in part, constituting, concerning, evidencing, containing, discussing, commenting upon, describing, analyzing, identifying, stating, pertaining to, referring to, forming the basis of, in preparation of, or contradicting.

19. "**Sales personnel**" and "**sales representative**" mean any employee, agent, or independent contractor engaged in the sales, marketing, or promotion of your hormone blocker products or hormone blocker products generally.

EXHIBIT A: DOCUMENTS TO BE PRODUCED

1. Documents sufficient to identify all hormone blocker products that you sell, market, or distribute or have sold, marketed, or distributed from January 1, 2019, to the present, including:

   a. The brand name and generic name for each hormone blocker products;

   b. The brand name and generic name of each reformulation of such hormone blocker products, if any, and the date and purpose or nature of each reformulation;

   c. All available doses and forms of such hormone blocker products for each brand name and each reformulation;

   d. The National Drug Code packaging code(s) for each dose and form of each hormone blocker product; and

   e. The time period during which you sold, marketed, or promoted each hormone blocker product. If another company sold, marketed, or promoted the hormone blocker product before or after you did, please indicate the time period during which another company sold, marketed, or promoted the hormone blocker product.

2. Produce all documents related to the marketing and promotion of hormone blockers in Texas, including all branded and unbranded marketing materials, advertising, and educational materials, that contain information regarding the usage of hormone blockers, the potential for side effects for long-term usage of hormone blockers, and/or off-label uses of hormone blockers. The scope of this request includes, but is not limited to:

   a. Direct-to-consumer advertisements or other direct-to-consumer or patient communications;

   b. Advertisements or other marketing materials directed at HCPs;

   c. Slim Jims/pocket advertisements and similar materials;

   d. Leave behinds (including reprints);

   e. Posters;

   f. Brochures and pamphlets;

   g. Online and electronic materials provided to HCPs and patients/consumers, including emails, links to websites, and the name and address of each website where such materials appeared;

   h. Materials with your company's logo;

   i. Materials to be distributed by HCPs to patients/consumers; and

   j. Materials relating to the treatment of gender dysphoria, the prescribing of hormone-blocker-containing products, or hormone blockers generally that you provided to HCPs.

3. Provide all documents concerning all meetings, conversations, or other communications between you and HCPs in Texas during which your hormone blocker products, hormone blockers generally, and/or the use of hormone blockers for treatment of gender dysphoria was discussed, including but not limited to any call notes, or other notes, reports, analyses, or documents concerning such visits or communications.

4. Produce documents and communications related to materials provided to Texas health care providers describing off-label usage of hormone blockers. The scope of this request includes all communications from Texas health care providers requesting materials describing off-label usage of hormone blockers.

5. Provide all marketing and sales plans and communications relating to such plans, including all documents concerning competitive market share, growth plans, brand, and Strengths, Weaknesses, Opportunities, and Threats ("SWOT") analyses, for each hormone blocker product identified in Request 1, including projections and analyses prior to the U.S. Food and Drug Administration's ("FDA") approval (NDA, SNDA, or ANDA).

6. Provide all documents concerning the training or education of your sales representatives concerning your hormone blocker products, hormone blocker products by other manufacturers, or hormone blockers generally, including but not limited to employee handbooks, manuals, scripts, videos, agendas, talking points, presentations, memoranda, PowerPoint slides, recordings, email, and other messages. The scope of this request specifically includes training pertaining to off-label use of hormone blockers, including off-label use for treatment of gender dysphoria. For each document, state the time period for which it was effective.

7. Provide all documents concerning any internal communications, discussion, analyses, or deliberation within and among members of your risk management or similar committee(s) concerning the effectiveness of your hormone blocker products for treatment of gender dysphoria, hormone blocker use generally for treatment of gender dysphoria, and/or the risks associated with long-term hormone blocker use and/or hormone blocker use for treatment of gender dysphoria.

8. Produce any study or publication, including publication of a peer-reviewed article in any magazine or journal, that you sponsored or funded, in whole or in part, or to which you contributed in any way that relates to any of your hormone blocker products, hormone blockers generally, side effects of hormone blockers, or the treatment of gender dysphoria. In addition, provide the amount of each payment or contribution for each identified study or publication.

9. Provide all periodic reports or documents submitted to the FDA relating to your post-market surveillance requirements for each of your hormone blocker products identified in Request 1.

10. Provide all warning letters, untitled letters, advisory comments, or other communications from the FDA related to your marketing and advertising of your hormone blocker products.

11. Provide all communications, reports, analyses, and other documents concerning misuse, adverse events, side effects, and/or injury for your hormone blocker products. Include in your response: (a) all FDA MedWatch reports involving misuse, adverse events, side effects, and/or injury from your hormone blocker products; (b) all reports by sales representatives or others regarding misuse, adverse events, side effects, and/or injury; (c) all lists or databases you

maintained regarding misuse, adverse events, side effects, and/or injury; and (d) all communications with any professional, law enforcement, or government agencies, including federal, state, county, and municipal regulators, regarding misuse, adverse events, side effects, and/or injury.

12. Produce documents sufficient to identify all investigations of you by any law enforcement or government agencies, including federal, state, and municipal regulators, regarding marketing or representations made by you about the safety or effectiveness of your hormone blocker products or hormone blockers generally for the treatment of gender dysphoria.

13. Produce documents sufficient all lawsuits or private causes of action filed against you regarding marketing or representations made by you about the safety or effectiveness of your hormone blocker products or hormone blockers generally for the treatment of gender dysphoria.

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Sexual Orientation, Gender Identity & Expression Glossary of Terms

The Center of Excellence on LGBTQ+ Behavioral Health Equity (CoE LGBTQ+ BHE) has created this glossary of terms related to sexual orientation, gender identity, and expression (SOGIE) as a resource for behavioral health practitioners to better understand language commonly used in LGBTQ+ communities. This list is not exhaustive, and we encourage professionals to gain a broader foundation on this knowledge by watching our foundational webinars *Sexual Orientation & Behavioral Health 101* and *Gender Identity, Expression & Behavioral Health 101*, available at: https://lgbtqequity.org/learn/. It should also be noted that people use terms in different ways, and the best practice is always to honor language an individual uses to identify themselves.

Agender: A person who does not identify with any particular gender or who identifies without gender.

Ally: A person or organization that actively aligns and uses their resources to support individuals and communities with a specific issue. Here, an individual who openly supports and affirms the rights and dignity of people with diverse SOGIE may be considered an ally.

Androgynous: A gender expression that has both masculine and feminine elements.

Anti-gay bias: Hatred, discrimination, or aversion to lesbian, gay, and bisexual (LGB) people, people perceived to be LGB, or those associated with people who are LGB**.** Often referred to as "homophobia."

Anti-transgender bias: Hatred, discrimination or aversion to transgender, gender variant, or gender diverse people, people perceived to be as such, or those associated with persons who are transgender, gender variant, or gender diverse. Often referred to as "transphobia."

Asexual: A person who does not have sexual desire or attraction. Many asexual people experience romantic attraction and engage in romantic relationships. The term "ace" is often used as shorthand.

Bisexual: A person who is attracted to people of their own gender as well as other genders.

Cisgender: A person whose gender identity and assigned sex at birth align (e.g., a person identifies as a man and was assigned male at birth by a doctor).

Cisgender privilege: The implicit and explicit privileges that cisgender people exercise. These privileges include, but are not limited to, the ability to use public restrooms without fear of verbal abuse, physical intimidation, or arrest. The privileges also encompass freedom from questions about one's anatomy (often by strangers) and the freedom from frequent misgendering. Cisgender people also enjoy a presumed "validity" as a man/woman/human and this validity is not based on surgical procedures or how well one "passes" as a man/woman/human, etc.

Coming out: The process of acknowledging one's sexual orientation or gender identity to oneself and/or individuals in one's life. Often incorrectly thought of to be a one-time event, this is a lifelong and sometimes daily process.

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Cross dress: To wear clothing most often associated (in one's culture and historical timeframe) with people of another gender.

Diverse SOGIE: A more inclusive term to describe all people who identify as having diverse Sexual Orientation, Gender Identity, and/or Gender Expression (SOGIE).

Drag queen/drag king: Someone who dresses and performs as another gender for entertainment purposes. Often embodies a theatrical or exaggerated version of masculinity or femininity; does not necessarily self-identify as transgender.

Feminine: A term used to describe the socially constructed and culturally specific gender behaviors expected of women.

Gay: A term used to describe a man who is attracted to other men. This term may also be used by people of any gender who are attracted to people of their same gender.

Gay-Straight Alliance/Gender Sexuality Alliance (GSA): Formal organization of LGBTQ+ and straight/cisgender people in support of the dignity and rights of LGBTQ+ people, usually developed in the context of creating change in educational institutions and environments.

Gender expression: The ways in which an individual communicates their gender to others through behavior, clothing, hairstyle, voice, etc.; not an indication of gender identity or sexual orientation.

Gender fluid: An individual whose gender identity may continually change throughout their lifetime. These individuals may not feel confined within the socially and culturally expected gender roles and in fact may identify differently from situation to situation.

Gender identity: One's internal, personal sense of their gender. Gender identity is best represented as a spectrum and an individual may move around this spectrum. Some terms that are associated with this spectrum are man, woman, gender fluid, genderqueer, trans, transgender, and two-spirit, although these are not the only terms. Some individuals may identify as both man and woman, neither man nor woman, or nonbinary.

Gender neutral: Anything (such as clothing, styles, activities, or spaces) that a society or culture considers appropriate for anyone, irrespective of gender; anything that carries with it no particular gender associations.

Gender nonconformity: Expressing gender and/or having gender characteristics that do not conform to the expectations of society and culture. Also referred to as gender variant, gender diverse, or gender creative.

Gender role: Culturally or socially determined sets of attitudes and behaviors that are expected of an individual based on their assigned sex at birth or perceived sex.

Genderqueer/Gender Queer: An umbrella term some people use to describe themselves when their experience of their gender identity falls out of the binary of male or female.

Heterosexism: A dominant notion that everyone is heterosexual (or should be) and that heterosexuality is superior, better, and preferred.

Heterosexual: Feeling romantic, emotional, and sexual attraction to a person(s) of the opposite gender with which one identifies; sometimes referred to as being straight.

Heterosexual privilege: The privileges that heterosexual people have because of heterosexism. Being heterosexual carries with it privileges that may be explicit or implicit such as the right to marry, adopt children, be a foster parent, fair employment, etc.

Homosexual: Feeling romantic, emotional, and/or sexual attraction to people of the same gender with which one identifies. This term is considered stigmatizing by many due to its history of being categorized as a mental illness. Discouraged from use unless an individual uses it to self-identify.

Intersectionality: A term coined in 1989 by civil rights activist and legal scholar Kimberlé Crenshaw to describe the unique types of oppression and discrimination experienced by individuals with multiple marginalized identities, in categories such as gender identity, race, class, ability, or sexual orientation. These overlapping systems of oppression interact and contribute to multiple forms of discrimination and systematic social inequality.

Intersex: An umbrella term constructed to describe variations of sex characteristics. This could include mixed chromosomes, elements of both male and female reproductive systems, or genitalia that do not appear clearly male or clearly female at birth. For example, a baby born with a vagina and testes.

Lesbian: A term used to describe a woman who is attracted to other women.

Masculine: A term used to describe the socially constructed and culturally specific gender behaviors expected of men.

Nonbinary: An umbrella term for gender identities that are outside of the gender binary, meaning not exclusively either boy/girl, or man/woman. Nonbinary individuals may have more than one gender, not identify with a gender, or something else altogether.

Out: Openly acknowledging one's sexual orientation and/or gender identity; may be partial (that is, out to some people and not to others).

Outed: When someone accidentally or deliberately reveals another person's sexual orientation and/or gender identity, usually without permission.

Pansexual: A person who is attracted to people regardless of sex, gender identity, or gender expression.

Queer: Historically, this was a derogatory slang term used to identify people with diverse SOGIE. It is now a term that some people with diverse SOGIE are reclaiming and embracing as a symbol of pride that represents all individuals who fall outside of the gender and sexual orientation "norms." It should be noted that it is not acceptable for someone who does not have diverse SOGIE to call someone queer unless the person indicates that is their preferred identity language.

Questioning: Describes a person who may be unsure of one's sexual orientation or gender identity or may be processing or wondering about it.

Romantic attraction: Describes an attraction to another person wherein a person desires intimate romantic behavior, such as dating or having a relationship. Distinct from sexual attraction.

Same gender loving (SGL): A term created by the Black and African American SOGIE diverse community and used by some people of color who see 'gay' and 'lesbian' as terms more connected to a white lesbian or gay identity.

Sex assigned at birth: The sex assigned at birth by a doctor; based on physical anatomy and hormones. Designations include male, female, or intersex and is also referred to as "assigned sex at birth."

Sexism: Discrimination and unfair treatment based on sex or gender in which advantage is usually afforded to men and not women.

Sexual orientation: Describes the emotional, romantic, and/or physical feelings of attraction-usually over a period of time; it is distinct from sexual behavior.

Transgender: An umbrella term for people whose gender identity and/or gender expression differs from what is typically associated with the sex they were assigned at birth. People under the transgender umbrella may describe their gender identity using one or more of a wide variety of terms – including but not limited to transgender. The term "trans" is often used as shorthand.

Transition: A term used to describe the process of moving from one sex/gender to another. Transition can include personal, medical, and legal steps like telling one's family, friends, and co-workers; using a different name and new pronouns; dressing differently; changing one's name and/or sex on legal documents; hormone therapy; and possibly (though not always) one or more types of surgery. The exact steps involved in transition are up to the person transitioning.

Two-Spirit: A term used by some Native American people to recognize individuals who possess qualities or fulfill roles of both genders; often considered part man and part woman or wholly man and wholly woman; often revered as natural peace makers as well as healers and shamans. Depending on the tribe, there may be different definitions. Some tribes consider Two-Spirit a term similar to diverse SOGIE. Others may not recognize the term at all.

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Opinion 21-09

January 28, 2021

Digest: Where a party or attorney has advised the court that their preferred gender pronoun is "they," a judge may not require them to instead use "he" or "she."

Rules: 22 NYCRR 100.2; 100.2(A); 100.3(B)(4)-(5); Opinion 19-50.

Opinion:

A judge asks if they may "require a singular pronoun be used for a singular person" in order to "keep order in the courtroom, and to have a clear record." That is, when a party expresses a preference for gender-neutral plural pronouns (they/them), the judge wishes to require them to instead choose a singular pronoun, he/him or she/her. The judge is concerned that the use of "they" could create confusion in the record as to the number of persons to whom a speaker is referring.

A judge must always avoid even the appearance of impropriety (*see* 22 NYCRR 100.2) and must always act in a manner to promote public confidence in the judiciary's integrity and impartiality (*see* 22 NYCRR 100.2[A]). A judge must "perform judicial duties without bias or prejudice against or in favor of any person" (22 NYCRR 100.3[B][4]). For example, a judge must not, "by words or conduct, manifest bias or prejudice, including but not limited to bias or prejudice based upon ... sexual orientation, gender identity [or] gender expression" (*id.*). A judge "shall require staff, court officials and others subject to the judge's direction and control to refrain from such words or conduct" (*id.*). The judge's responsibility for curbing such manifestations of bias and prejudice in the courtroom even extends to "lawyers in proceedings before the judge" (22 NYCRR 100.3[B][5]).

The "courthouse and courtroom must convey to the public that everyone who appears before the court will be treated fairly and impartially" (Opinion 19-50). While a judge may take reasonable steps to ensure the clarity of the record, including courteously referring to an individual by surname and/or their role in the proceeding as appropriate, a judge must be careful to avoid any appearance of hostility to an individual's gender identity or gender expression. We can see no reason for a judge to pre-emptively adopt a policy barring all court participants, in all circumstances, from being referred to by singular "they," which is one of three personal pronouns in the English language. That is, "they" has been recognized as a grammatically correct use for an individual (*see e.g.* Merriam-Webster, *2019 Word of the Year: They*, https://www.merriam-webster.com/words-at-play/word-of-the-year-2019-they/they).

Adopting and announcing the sort of rigid policy proposed here could result in transgender, nonbinary or genderfluid individuals feeling pressured to choose between the ill-fitting gender pronouns of "he" or "she." This could not only make them feel unwelcome but also distract from the adjudicative process. Thus, as an ethical matter, we believe the described policy, if adopted, could undermine public confidence in the judiciary's impartiality.

In sum, we conclude that, where a person before the court has advised the court that their preferred gender pronoun is "they," the inquiring judge may not require them to use instead "he" or "she" in the proceeding. We trust judges to handle an expressed preference for the use of singular "they" on a case-by-case basis, adopting reasonable procedures in their discretion to

ensure the clarity of the record as needed. We also note that there is no ethical impropriety in making adjustments over the course of a proceeding, if a judge finds that an initial approach was unsuccessful or confusing.

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[1] Of course, the rule "does not preclude legitimate advocacy" by attorneys when sexual orientation or other similar factors "are issues in the proceeding" (22 NYCRR 100.3[B][5]).

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

BOSTOCK *v.* CLAYTON COUNTY, GEORGIA

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 17–1618. Argued October 8, 2019—Decided June 15, 2020*

In each of these cases, an employer allegedly fired a long-time employee simply for being homosexual or transgender. Clayton County, Georgia, fired Gerald Bostock for conduct "unbecoming" a county employee shortly after he began participating in a gay recreational softball league. Altitude Express fired Donald Zarda days after he mentioned being gay. And R. G. & G. R. Harris Funeral Homes fired Aimee Stephens, who presented as a male when she was hired, after she informed her employer that she planned to "live and work full-time as a woman." Each employee sued, alleging sex discrimination under Title VII of the Civil Rights Act of 1964. The Eleventh Circuit held that Title VII does not prohibit employers from firing employees for being gay and so Mr. Bostock's suit could be dismissed as a matter of law. The Second and Sixth Circuits, however, allowed the claims of Mr. Zarda and Ms. Stephens, respectively, to proceed.

Held: An employer who fires an individual merely for being gay or transgender violates Title VII. Pp. 4–33.

(a) Title VII makes it "unlawful . . . for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin." 42 U. S. C. §2000e–2(a)(1). The straightforward application of Title VII's terms interpreted in accord

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*Together with No. 17–1623, *Altitude Express, Inc., et al.* v. *Zarda et al., as Co-Independent Executors of the Estate of Zarda*, on certiorari to the United States Court of Appeals for the Second Circuit, and No. 18–107, *R. G. & G. R. Harris Funeral Homes, Inc.* v. *Equal Employment Opportunity Commission et al.*, on certiorari to the United States Court of Appeals for the Sixth Circuit.

with their ordinary public meaning at the time of their enactment resolves these cases. Pp. 4–12.

(1) The parties concede that the term "sex" in 1964 referred to the biological distinctions between male and female. And "the ordinary meaning of 'because of' is 'by reason of' or 'on account of,'" *University of Tex. Southwestern Medical Center* v. *Nassar,* 570 U. S. 338, 350. That term incorporates the but-for causation standard, *id.,* at 346, 360, which, for Title VII, means that a defendant cannot avoid liability just by citing some *other* factor that contributed to its challenged employment action. The term "discriminate" meant "[t]o make a difference in treatment or favor (of one as compared with others)." Webster's New International Dictionary 745. In so-called "disparate treatment" cases, this Court has held that the difference in treatment based on sex must be intentional. See, *e.g.*, *Watson* v. *Fort Worth Bank & Trust*, 487 U. S. 977, 986. And the statute's repeated use of the term "individual" means that the focus is on "[a] particular being as distinguished from a class." Webster's New International Dictionary, at 1267. Pp. 4–9.

(2) These terms generate the following rule: An employer violates Title VII when it intentionally fires an individual employee based in part on sex. It makes no difference if other factors besides the plaintiff's sex contributed to the decision or that the employer treated women as a group the same when compared to men as a group. A statutory violation occurs if an employer intentionally relies in part on an individual employee's sex when deciding to discharge the employee. Because discrimination on the basis of homosexuality or transgender status requires an employer to intentionally treat individual employees differently because of their sex, an employer who intentionally penalizes an employee for being homosexual or transgender also violates Title VII. There is no escaping the role intent plays: Just as sex is necessarily a but-for cause when an employer discriminates against homosexual or transgender employees, an employer who discriminates on these grounds inescapably intends to rely on sex in its decisionmaking. Pp. 9–12.

(b) Three leading precedents confirm what the statute's plain terms suggest. In *Phillips* v. *Martin Marietta Corp.,* 400 U. S. 542, a company was held to have violated Title VII by refusing to hire women with young children, despite the fact that the discrimination also depended on being a parent of young children and the fact that the company favored hiring women over men. In *Los Angeles Dept. of Water and Power* v. *Manhart,* 435 U. S. 702, an employer's policy of requiring women to make larger pension fund contributions than men because women tend to live longer was held to violate Title VII, notwithstanding the policy's evenhandedness between men and women as groups.

And in *Oncale* v. *Sundowner Offshore Services, Inc.,* 523 U. S. 75, a male plaintiff alleged a triable Title VII claim for sexual harassment by co-workers who were members of the same sex.

The lessons these cases hold are instructive here. First, it is irrelevant what an employer might call its discriminatory practice, how others might label it, or what else might motivate it. In *Manhart*, the employer might have called its rule a "life expectancy" adjustment, and in *Phillips*, the employer could have accurately spoken of its policy as one based on "motherhood." But such labels and additional intentions or motivations did not make a difference there, and they cannot make a difference here. When an employer fires an employee for being homosexual or transgender, it necessarily intentionally discriminates against that individual in part because of sex. Second, the plaintiff's sex need not be the sole or primary cause of the employer's adverse action. In *Phillips*, *Manhart*, and *Oncale*, the employer easily could have pointed to some other, nonprotected trait and insisted it was the more important factor in the adverse employment outcome. Here, too, it is of no significance if another factor, such as the plaintiff's attraction to the same sex or presentation as a different sex from the one assigned at birth, might also be at work, or even play a more important role in the employer's decision. Finally, an employer cannot escape liability by demonstrating that it treats males and females comparably as groups. *Manhart* is instructive here. An employer who intentionally fires an individual homosexual or transgender employee in part because of that individual's sex violates the law even if the employer is willing to subject all male and female homosexual or transgender employees to the same rule. Pp. 12–15.

(c) The employers do not dispute that they fired their employees for being homosexual or transgender. Rather, they contend that even intentional discrimination against employees based on their homosexual or transgender status is not a basis for Title VII liability. But their statutory text arguments have already been rejected by this Court's precedents. And none of their other contentions about what they think the law was meant to do, or should do, allow for ignoring the law as it is. Pp. 15–33.

(1) The employers assert that it should make a difference that plaintiffs would likely respond in conversation that they were fired for being gay or transgender and not because of sex. But conversational conventions do not control Title VII's legal analysis, which asks simply whether sex is a but-for cause. Nor is it a defense to insist that intentional discrimination based on homosexuality or transgender status is not intentional discrimination based on sex. An employer who discriminates against homosexual or transgender employees necessarily and intentionally applies sex-based rules. Nor does it make a difference

that an employer could refuse to hire a gay or transgender individual without learning that person's sex. By intentionally setting out a rule that makes hiring turn on sex, the employer violates the law, whatever he might know or not know about individual applicants. The employers also stress that homosexuality and transgender status are distinct concepts from sex, and that if Congress wanted to address these matters in Title VII, it would have referenced them specifically. But when Congress chooses not to include any exceptions to a broad rule, this Court applies the broad rule. Finally, the employers suggest that because the policies at issue have the same adverse consequences for men and women, a stricter causation test should apply. That argument unavoidably comes down to a suggestion that sex must be the sole or primary cause of an adverse employment action under Title VII, a suggestion at odds with the statute. Pp. 16–23.

(2) The employers contend that few in 1964 would have expected Title VII to apply to discrimination against homosexual and transgender persons. But legislative history has no bearing here, where no ambiguity exists about how Title VII's terms apply to the facts. See *Milner* v. *Department of Navy,* 562 U. S. 562, 574. While it is possible that a statutory term that means one thing today or in one context might have meant something else at the time of its adoption or might mean something different in another context, the employers do not seek to use historical sources to illustrate that the meaning of any of Title VII's language has changed since 1964 or that the statute's terms ordinarily carried some missed message. Instead, they seem to say when a new application is both unexpected and important, even if it is clearly commanded by existing law, the Court should merely point out the question, refer the subject back to Congress, and decline to enforce the law's plain terms in the meantime. This Court has long rejected that sort of reasoning. And the employers' new framing may only add new problems and leave the Court with more than a little law to overturn. Finally, the employers turn to naked policy appeals, suggesting that the Court proceed without the law's guidance to do what it thinks best. That is an invitation that no court should ever take up. Pp. 23–33.

No. 17–1618, 723 Fed. Appx. 964, reversed and remanded; No. 17–1623, 883 F. 3d 100, and No. 18–107, 884 F. 3d 560, affirmed.

GORSUCH, J., delivered the opinion of the Court, in which ROBERTS, C. J., and GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. ALITO, J., filed a dissenting opinion, in which THOMAS, J., joined. KAVANAUGH, J., filed a dissenting opinion.

SUPREME COURT OF THE UNITED STATES

Nos. 17–1618, 17–1623 and 18–107

GERALD LYNN BOSTOCK, PETITIONER
17–1618 *v.*
CLAYTON COUNTY, GEORGIA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

ALTITUDE EXPRESS, INC., ET AL., PETITIONERS
17–1623 *v.*
MELISSA ZARDA AND WILLIAM ALLEN MOORE, JR., CO-INDEPENDENT EXECUTORS OF THE ESTATE OF DONALD ZARDA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

R.G. & G.R. HARRIS FUNERAL HOMES, INC., PETITIONER
18–107 *v.*
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[June 15, 2020]

JUSTICE GORSUCH delivered the opinion of the Court.

Sometimes small gestures can have unexpected consequences. Major initiatives practically guarantee them. In our time, few pieces of federal legislation rank in significance with the Civil Rights Act of 1964. There, in Title VII, Congress outlawed discrimination in the workplace on the basis of race, color, religion, sex, or national origin. Today, we must decide whether an employer can fire someone simply for being homosexual or transgender. The answer is clear. An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.

Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. Likely, they weren't thinking about many of the Act's consequences that have become apparent over the years, including its prohibition against discrimination on the basis of motherhood or its ban on the sexual harassment of male employees. But the limits of the drafters' imagination supply no reason to ignore the law's demands. When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit.

I

Few facts are needed to appreciate the legal question we face. Each of the three cases before us started the same way: An employer fired a long-time employee shortly after the employee revealed that he or she is homosexual or transgender—and allegedly for no reason other than the employee's homosexuality or transgender status.

Gerald Bostock worked for Clayton County, Georgia, as a child welfare advocate. Under his leadership, the county won national awards for its work. After a decade with the

county, Mr. Bostock began participating in a gay recreational softball league. Not long after that, influential members of the community allegedly made disparaging comments about Mr. Bostock's sexual orientation and participation in the league. Soon, he was fired for conduct "unbecoming" a county employee.

Donald Zarda worked as a skydiving instructor at Altitude Express in New York. After several seasons with the company, Mr. Zarda mentioned that he was gay and, days later, was fired.

Aimee Stephens worked at R. G. & G. R. Harris Funeral Homes in Garden City, Michigan. When she got the job, Ms. Stephens presented as a male. But two years into her service with the company, she began treatment for despair and loneliness. Ultimately, clinicians diagnosed her with gender dysphoria and recommended that she begin living as a woman. In her sixth year with the company, Ms. Stephens wrote a letter to her employer explaining that she planned to "live and work full-time as a woman" after she returned from an upcoming vacation. The funeral home fired her before she left, telling her "this is not going to work out."

While these cases began the same way, they ended differently. Each employee brought suit under Title VII alleging unlawful discrimination on the basis of sex. 78 Stat. 255, 42 U. S. C. §2000e–2(a)(1). In Mr. Bostock's case, the Eleventh Circuit held that the law does not prohibit employers from firing employees for being gay and so his suit could be dismissed as a matter of law. 723 Fed. Appx. 964 (2018). Meanwhile, in Mr. Zarda's case, the Second Circuit concluded that sexual orientation discrimination does violate Title VII and allowed his case to proceed. 883 F. 3d 100 (2018). Ms. Stephens's case has a more complex procedural history, but in the end the Sixth Circuit reached a decision along the same lines as the Second Circuit's, holding that Title VII bars employers from firing employees because of

their transgender status. 884 F. 3d 560 (2018). During the course of the proceedings in these long-running disputes, both Mr. Zarda and Ms. Stephens have passed away. But their estates continue to press their causes for the benefit of their heirs. And we granted certiorari in these matters to resolve at last the disagreement among the courts of appeals over the scope of Title VII's protections for homosexual and transgender persons. 587 U. S. ___ (2019).

II

This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment. After all, only the words on the page constitute the law adopted by Congress and approved by the President. If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people's representatives. And we would deny the people the right to continue relying on the original meaning of the law they have counted on to settle their rights and obligations. See *New Prime Inc.* v. *Oliveira*, 586 U. S. ___, ___–___ (2019) (slip op., at 6–7).

With this in mind, our task is clear. We must determine the ordinary public meaning of Title VII's command that it is "unlawful . . . for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." §2000e–2(a)(1). To do so, we orient ourselves to the time of the statute's adoption, here 1964, and begin by examining the key statutory terms in turn before assessing their impact on the cases at hand and then confirming our work against this Court's precedents.

A

The only statutorily protected characteristic at issue in today's cases is "sex"—and that is also the primary term in Title VII whose meaning the parties dispute. Appealing to roughly contemporaneous dictionaries, the employers say that, as used here, the term "sex" in 1964 referred to "status as either male or female [as] determined by reproductive biology." The employees counter by submitting that, even in 1964, the term bore a broader scope, capturing more than anatomy and reaching at least some norms concerning gender identity and sexual orientation. But because nothing in our approach to these cases turns on the outcome of the parties' debate, and because the employees concede the point for argument's sake, we proceed on the assumption that "sex" signified what the employers suggest, referring only to biological distinctions between male and female.

Still, that's just a starting point. The question isn't just what "sex" meant, but what Title VII says about it. Most notably, the statute prohibits employers from taking certain actions "because of" sex. And, as this Court has previously explained, "the ordinary meaning of 'because of' is 'by reason of' or 'on account of.'" *University of Tex. Southwestern Medical Center* v. *Nassar*, 570 U. S. 338, 350 (2013) (citing *Gross* v. *FBL Financial Services*, *Inc.*, 557 U. S. 167, 176 (2009); quotation altered). In the language of law, this means that Title VII's "because of" test incorporates the "'simple'" and "traditional" standard of but-for causation. *Nassar*, 570 U. S., at 346, 360. That form of causation is established whenever a particular outcome would not have happened "but for" the purported cause. See *Gross*, 557 U. S., at 176. In other words, a but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause.

This can be a sweeping standard. Often, events have multiple but-for causes. So, for example, if a car accident

occurred *both* because the defendant ran a red light *and* because the plaintiff failed to signal his turn at the intersection, we might call each a but-for cause of the collision. Cf. *Burrage* v. *United States*, 571 U. S. 204, 211–212 (2014). When it comes to Title VII, the adoption of the traditional but-for causation standard means a defendant cannot avoid liability just by citing some *other* factor that contributed to its challenged employment decision. So long as the plaintiff's sex was one but-for cause of that decision, that is enough to trigger the law. See *ibid.*; *Nassar*, 570 U. S., at 350.

No doubt, Congress could have taken a more parsimonious approach. As it has in other statutes, it could have added "solely" to indicate that actions taken "because of" the confluence of multiple factors do not violate the law. Cf. 11 U. S. C. §525; 16 U. S. C. §511. Or it could have written "primarily because of" to indicate that the prohibited factor had to be the main cause of the defendant's challenged employment decision. Cf. 22 U. S. C. §2688. But none of this is the law we have. If anything, Congress has moved in the opposite direction, supplementing Title VII in 1991 to allow a plaintiff to prevail merely by showing that a protected trait like sex was a "motivating factor" in a defendant's challenged employment practice. Civil Rights Act of 1991, §107, 105 Stat. 1075, codified at 42 U. S. C. §2000e–2(m). Under this more forgiving standard, liability can sometimes follow even if sex *wasn't* a but-for cause of the employer's challenged decision. Still, because nothing in our analysis depends on the motivating factor test, we focus on the more traditional but-for causation standard that continues to afford a viable, if no longer exclusive, path to relief under Title VII. §2000e–2(a)(1).

As sweeping as even the but-for causation standard can be, Title VII does not concern itself with everything that happens "because of" sex. The statute imposes liability on

employers only when they "fail or refuse to hire," "discharge," "or otherwise . . . discriminate against" someone because of a statutorily protected characteristic like sex. *Ibid.* The employers acknowledge that they discharged the plaintiffs in today's cases, but assert that the statute's list of verbs is qualified by the last item on it: "otherwise . . . discriminate against." By virtue of the word *otherwise*, the employers suggest, Title VII concerns itself not with every discharge, only with those discharges that involve discrimination.

Accepting this point, too, for argument's sake, the question becomes: What did "discriminate" mean in 1964? As it turns out, it meant then roughly what it means today: "To make a difference in treatment or favor (of one as compared with others)." Webster's New International Dictionary 745 (2d ed. 1954). To "discriminate against" a person, then, would seem to mean treating that individual worse than others who are similarly situated. See *Burlington N. & S. F. R. Co.* v. *White*, 548 U. S. 53, 59 (2006). In so-called "disparate treatment" cases like today's, this Court has also held that the difference in treatment based on sex must be intentional. See, *e.g., Watson* v. *Fort Worth Bank & Trust*, 487 U. S. 977, 986 (1988). So, taken together, an employer who intentionally treats a person worse because of sex—such as by firing the person for actions or attributes it would tolerate in an individual of another sex—discriminates against that person in violation of Title VII.

At first glance, another interpretation might seem possible. Discrimination sometimes involves "the act, practice, or an instance of discriminating categorically rather than individually." Webster's New Collegiate Dictionary 326 (1975); see also *post,* at 27–28, n. 22 (ALITO, J., dissenting). On that understanding, the statute would require us to consider the employer's treatment of groups rather than individuals, to see how a policy affects one sex as a whole versus the other as a whole. That idea holds some intuitive appeal

too. Maybe the law concerns itself simply with ensuring that employers don't treat women generally less favorably than they do men. So how can we tell which sense, individual or group, "discriminate" carries in Title VII?

The statute answers that question directly. It tells us three times—including immediately after the words "discriminate against"—that our focus should be on individuals, not groups: Employers may not "fail or refuse to hire or . . . discharge any *individual*, or otherwise . . . discriminate against any *individual* with respect to his compensation, terms, conditions, or privileges of employment, because of such *individual's* . . . sex." §2000e–2(a)(1) (emphasis added). And the meaning of "individual" was as uncontroversial in 1964 as it is today: "A particular being as distinguished from a class, species, or collection." Webster's New International Dictionary, at 1267. Here, again, Congress could have written the law differently. It might have said that "it shall be an unlawful employment practice to prefer one sex to the other in hiring, firing, or the terms or conditions of employment." It might have said that there should be no "sex discrimination," perhaps implying a focus on differential treatment between the two sexes as groups. More narrowly still, it could have forbidden only "sexist policies" against women as a class. But, once again, that is not the law we have.

The consequences of the law's focus on individuals rather than groups are anything but academic. Suppose an employer fires a woman for refusing his sexual advances. It's no defense for the employer to note that, while he treated that individual woman worse than he would have treated a man, he gives preferential treatment to female employees overall. The employer is liable for treating *this* woman worse in part because of her sex. Nor is it a defense for an employer to say it discriminates against both men and women because of sex. This statute works to protect individuals of both sexes from discrimination, and does so

equally. So an employer who fires a woman, Hannah, because she is insufficiently feminine and also fires a man, Bob, for being insufficiently masculine may treat men and women as groups more or less equally. But in *both* cases the employer fires an individual in part because of sex. Instead of avoiding Title VII exposure, this employer doubles it.

B

From the ordinary public meaning of the statute's language at the time of the law's adoption, a straightforward rule emerges: An employer violates Title VII when it intentionally fires an individual employee based in part on sex. It doesn't matter if other factors besides the plaintiff's sex contributed to the decision. And it doesn't matter if the employer treated women as a group the same when compared to men as a group. If the employer intentionally relies in part on an individual employee's sex when deciding to discharge the employee—put differently, if changing the employee's sex would have yielded a different choice by the employer—a statutory violation has occurred. Title VII's message is "simple but momentous": An individual employee's sex is "not relevant to the selection, evaluation, or compensation of employees." *Price Waterhouse* v. *Hopkins*, 490 U. S. 228, 239 (1989) (plurality opinion).

The statute's message for our cases is equally simple and momentous: An individual's homosexuality or transgender status is not relevant to employment decisions. That's because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex. Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer's mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the

male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague. Put differently, the employer intentionally singles out an employee to fire based in part on the employee's sex, and the affected employee's sex is a but-for cause of his discharge. 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.

That distinguishes these cases from countless others where Title VII has nothing to say. Take an employer who fires a female employee for tardiness or incompetence or simply supporting the wrong sports team. Assuming the employer would not have tolerated the same trait in a man, Title VII stands silent. But unlike any of these other traits or actions, homosexuality and transgender status are inextricably bound up with sex. Not because homosexuality or transgender status are related to sex in some vague sense or because discrimination on these bases has some disparate impact on one sex or another, but because to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex.

Nor does it matter that, when an employer treats one employee worse because of that individual's sex, other factors may contribute to the decision. Consider an employer with a policy of firing any woman he discovers to be a Yankees fan. Carrying out that rule because an employee is a woman *and* a fan of the Yankees is a firing "because of sex" if the employer would have tolerated the same allegiance in a male employee. Likewise here.

When an employer fires an employee because she is homosexual or transgender, two causal factors may be in play—*both* the individual's sex *and* something else (the sex to which the individual is attracted or with which the individual identifies). But Title VII doesn't care. If an employer would not have discharged an employee but for that individual's sex, the statute's causation standard is met, and liability may attach.

Reframing the additional causes in today's cases as additional intentions can do no more to insulate the employers from liability. Intentionally burning down a neighbor's house is arson, even if the perpetrator's ultimate intention (or motivation) is only to improve the view. No less, intentional discrimination based on sex violates Title VII, even if it is intended only as a means to achieving the employer's ultimate goal of discriminating against homosexual or transgender employees. There is simply no escaping the role intent plays here: Just as sex is necessarily a but-for *cause* when an employer discriminates against homosexual or transgender employees, an employer who discriminates on these grounds inescapably *intends* to rely on sex in its decisionmaking. Imagine an employer who has a policy of firing any employee known to be homosexual. The employer hosts an office holiday party and invites employees to bring their spouses. A model employee arrives and introduces a manager to Susan, the employee's wife. Will that employee be fired? If the policy works as the employer intends, the answer depends entirely on whether the model employee is a man or a woman. To be sure, that employer's ultimate goal might be to discriminate on the basis of sexual orientation. But to achieve that purpose the employer must, along the way, intentionally treat an employee worse based in part on that individual's sex.

An employer musters no better a defense by responding that it is equally happy to fire male *and* female employees who are homosexual or transgender. Title VII liability is

not limited to employers who, through the sum of all of their employment actions, treat the class of men differently than the class of women. Instead, the law makes each instance of discriminating against an individual employee because of that individual's sex an independent violation of Title VII. So just as an employer who fires both Hannah and Bob for failing to fulfill traditional sex stereotypes doubles rather than eliminates Title VII liability, an employer who fires both Hannah and Bob for being gay or transgender does the same.

At bottom, these cases involve no more than the straightforward application of legal terms with plain and settled meanings. For an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex. That has always been prohibited by Title VII's plain terms—and that "should be the end of the analysis." 883 F. 3d, at 135 (Cabranes, J., concurring in judgment).

C

If more support for our conclusion were required, there's no need to look far. All that the statute's plain terms suggest, this Court's cases have already confirmed. Consider three of our leading precedents.

In *Phillips* v. *Martin Marietta Corp.*, 400 U. S. 542 (1971) (*per curiam*), a company allegedly refused to hire women with young children, but did hire men with children the same age. Because its discrimination depended not only on the employee's sex as a female but also on the presence of another criterion—namely, being a parent of young children—the company contended it hadn't engaged in discrimination "because of" sex. The company maintained, too, that it hadn't violated the law because, as a whole, it tended to favor hiring women over men. Unsurprisingly by now,

these submissions did not sway the Court. That an employer discriminates intentionally against an individual only in part because of sex supplies no defense to Title VII. Nor does the fact an employer may happen to favor women as a class.

In *Los Angeles Dept. of Water and Power* v. *Manhart*, 435 U. S. 702 (1978), an employer required women to make larger pension fund contributions than men. The employer sought to justify its disparate treatment on the ground that women tend to live longer than men, and thus are likely to receive more from the pension fund over time. By everyone's admission, the employer was not guilty of animosity against women or a "purely habitual assumptio[n] about a woman's inability to perform certain kinds of work"; instead, it relied on what appeared to be a statistically accurate statement about life expectancy. *Id.*, at 707–708. Even so, the Court recognized, a rule that appears evenhanded at the group level can prove discriminatory at the level of individuals. True, women as a class may live longer than men as a class. But "[t]he statute's focus on the individual is unambiguous," and any individual woman might make the larger pension contributions and still die as early as a man. *Id.*, at 708. Likewise, the Court dismissed as irrelevant the employer's insistence that its actions were motivated by a wish to achieve classwide equality between the sexes: An employer's intentional discrimination on the basis of sex is no more permissible when it is prompted by some further intention (or motivation), even one as prosaic as seeking to account for actuarial tables. *Ibid.* The employer violated Title VII because, when its policy worked exactly as planned, it could not "pass the simple test" asking whether an individual female employee would have been treated the same regardless of her sex. *Id.*, at 711.

In *Oncale* v. *Sundowner Offshore Services, Inc.*, 523 U. S. 75 (1998), a male plaintiff alleged that he was singled out by his male co-workers for sexual harassment. The Court

held it was immaterial that members of the same sex as the victim committed the alleged discrimination. Nor did the Court concern itself with whether men as a group were subject to discrimination or whether something in addition to sex contributed to the discrimination, like the plaintiff's conduct or personal attributes. "[A]ssuredly," the case didn't involve "the principal evil Congress was concerned with when it enacted Title VII." *Id.*, at 79. But, the Court unanimously explained, it is "the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Ibid.* Because the plaintiff alleged that the harassment would not have taken place but for his sex—that is, the plaintiff would not have suffered similar treatment if he were female—a triable Title VII claim existed.

The lessons these cases hold for ours are by now familiar.

First, it's irrelevant what an employer might call its discriminatory practice, how others might label it, or what else might motivate it. In *Manhart*, the employer called its rule requiring women to pay more into the pension fund a "life expectancy" adjustment necessary to achieve sex equality. In *Phillips*, the employer could have accurately spoken of its policy as one based on "motherhood." In much the same way, today's employers might describe their actions as motivated by their employees' homosexuality or transgender status. But just as labels and additional intentions or motivations didn't make a difference in *Manhart* or *Phillips*, they cannot make a difference here. When an employer fires an employee for being homosexual or transgender, it necessarily and intentionally discriminates against that individual in part because of sex. And that is all Title VII has ever demanded to establish liability.

Second, the plaintiff's sex need not be the sole or primary cause of the employer's adverse action. In *Phillips*, *Manhart*, and *Oncale*, the defendant easily could have pointed to some other, nonprotected trait and insisted it was the

more important factor in the adverse employment outcome. So, too, it has no significance here if another factor—such as the sex the plaintiff is attracted to or presents as—might also be at work, or even play a more important role in the employer's decision.

Finally, an employer cannot escape liability by demonstrating that it treats males and females comparably as groups. As *Manhart* teaches, an employer is liable for intentionally requiring an individual female employee to pay more into a pension plan than a male counterpart even if the scheme promotes equality at the group level. Likewise, an employer who intentionally fires an individual homosexual or transgender employee in part because of that individual's sex violates the law even if the employer is willing to subject all male and female homosexual or transgender employees to the same rule.

III

What do the employers have to say in reply? For present purposes, they do not dispute that they fired the plaintiffs for being homosexual or transgender. Sorting out the true reasons for an adverse employment decision is often a hard business, but none of that is at issue here. Rather, the employers submit that even intentional discrimination against employees based on their homosexuality or transgender status supplies no basis for liability under Title VII.

The employers' argument proceeds in two stages. Seeking footing in the statutory text, they begin by advancing a number of reasons why discrimination on the basis of homosexuality or transgender status doesn't involve discrimination because of sex. But each of these arguments turns out only to repackage errors we've already seen and this Court's precedents have already rejected. In the end, the employers are left to retreat beyond the statute's text, where they fault us for ignoring the legislature's purposes

in enacting Title VII or certain expectations about its operation. They warn, too, about consequences that might follow a ruling for the employees. But none of these contentions about what the employers think the law was meant to do, or should do, allow us to ignore the law as it is.

A

Maybe most intuitively, the employers assert that discrimination on the basis of homosexuality and transgender status aren't referred to as sex discrimination in ordinary conversation. If asked by a friend (rather than a judge) why they were fired, even today's plaintiffs would likely respond that it was because they were gay or transgender, not because of sex. According to the employers, that conversational answer, not the statute's strict terms, should guide our thinking and suffice to defeat any suggestion that the employees now before us were fired because of sex. Cf. *post,* at 3 (ALITO, J., dissenting); *post,* at 8–13 (KAVANAUGH, J., dissenting).

But this submission rests on a mistaken understanding of what kind of cause the law is looking for in a Title VII case. In conversation, a speaker is likely to focus on what seems most relevant or informative to the listener. So an employee who has just been fired is likely to identify the primary or most direct cause rather than list literally every but-for cause. To do otherwise would be tiring at best. But these conversational conventions do not control Title VII's legal analysis, which asks simply whether sex was a but-for cause. In *Phillips*, for example, a woman who was not hired under the employer's policy might have told her friends that her application was rejected because she was a mother, or because she had young children. Given that many women could be hired under the policy, it's unlikely she would say she was not hired because she was a woman. But the Court did not hesitate to recognize that the employer in *Phillips* discriminated against the plaintiff because of her sex. Sex

wasn't the only factor, or maybe even the main factor, but it was one but-for cause—and that was enough. You can call the statute's but-for causation test what you will—expansive, legalistic, the dissents even dismiss it as wooden or literal. But it is the law.

Trying another angle, the defendants before us suggest that an employer who discriminates based on homosexuality or transgender status doesn't *intentionally* discriminate based on sex, as a disparate treatment claim requires. See *post*, at 9–12 (ALITO, J., dissenting); *post*, at 12–13 (KAVANAUGH, J., dissenting). But, as we've seen, an employer who discriminates against homosexual or transgender employees necessarily and intentionally applies sex-based rules. An employer that announces it will not employ anyone who is homosexual, for example, intends to penalize male employees for being attracted to men and female employees for being attracted to women.

What, then, do the employers mean when they insist intentional discrimination based on homosexuality or transgender status isn't intentional discrimination based on sex? Maybe the employers mean they don't intend to harm one sex or the other as a class. But as should be clear by now, the statute focuses on discrimination against individuals, not groups. Alternatively, the employers may mean that they don't perceive themselves as motivated by a desire to discriminate based on sex. But nothing in Title VII turns on the employer's labels or any further intentions (or motivations) for its conduct beyond sex discrimination. In *Manhart*, the employer intentionally required women to make higher pension contributions only to fulfill the further purpose of making things more equitable between men and women as groups. In *Phillips*, the employer may have perceived itself as discriminating based on motherhood, not sex, given that its hiring policies as a whole *favored* women. But in both cases, the Court set all this aside as irrelevant. The employers' policies involved intentional discrimination

because of sex, and Title VII liability necessarily followed.

Aren't these cases different, the employers ask, given that an employer could refuse to hire a gay or transgender individual without ever learning the applicant's sex? Suppose an employer asked homosexual or transgender applicants to tick a box on its application form. The employer then had someone else redact any information that could be used to discern sex. The resulting applications would disclose which individuals are homosexual or transgender without revealing whether they also happen to be men or women. Doesn't that possibility indicate that the employer's discrimination against homosexual or transgender persons cannot be sex discrimination?

No, it doesn't. Even in this example, the individual applicant's sex still weighs as a factor in the employer's decision. Change the hypothetical ever so slightly and its flaws become apparent. Suppose an employer's application form offered a single box to check if the applicant is either black or Catholic. If the employer refuses to hire anyone who checks that box, would we conclude the employer has complied with Title VII, so long as it studiously avoids learning any particular applicant's race or religion? Of course not: By intentionally setting out a rule that makes hiring turn on race or religion, the employer violates the law, whatever he might know or not know about individual applicants.

The same holds here. There is no way for an applicant to decide whether to check the homosexual or transgender box without considering sex. To see why, imagine an applicant doesn't know what the words homosexual or transgender mean. Then try writing out instructions for who should check the box without using the words man, woman, or sex (or some synonym). It can't be done. Likewise, there is no way an employer can discriminate against those who check the homosexual or transgender box without discriminating in part because of an applicant's sex. By discriminating against homosexuals, the employer intentionally penalizes

men for being attracted to men and women for being attracted to women. By discriminating against transgender persons, the employer unavoidably discriminates against persons with one sex identified at birth and another today. Any way you slice it, the employer intentionally refuses to hire applicants in part because of the affected individuals' sex, even if it never learns any applicant's sex.

Next, the employers turn to Title VII's list of protected characteristics—race, color, religion, sex, and national origin. Because homosexuality and transgender status can't be found on that list and because they are conceptually distinct from sex, the employers reason, they are implicitly excluded from Title VII's reach. Put another way, if Congress had wanted to address these matters in Title VII, it would have referenced them specifically. Cf. *post,* at 7–8 (ALITO, J., dissenting); *post,* at 13–15 (KAVANAUGH, J., dissenting).

But that much does not follow. We agree that homosexuality and transgender status are distinct concepts from sex. But, as we've seen, discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second. Nor is there any such thing as a "canon of donut holes," in which Congress's failure to speak directly to a specific case that falls within a more general statutory rule creates a tacit exception. Instead, when Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule. And that is exactly how this Court has always approached Title VII. "Sexual harassment" is conceptually distinct from sex discrimination, but it can fall within Title VII's sweep. *Oncale*, 523 U. S., at 79–80. Same with "motherhood discrimination." See *Phillips*, 400 U. S., at 544. Would the employers have us reverse those cases on the theory that Congress could have spoken to those problems more specifically? Of course not. As enacted, Title VII prohibits all forms of discrimination because of sex, however

they may manifest themselves or whatever other labels might attach to them.

The employers try the same point another way. Since 1964, they observe, Congress has considered several proposals to add sexual orientation to Title VII's list of protected characteristics, but no such amendment has become law. Meanwhile, Congress has enacted other statutes addressing other topics that do discuss sexual orientation. This postenactment legislative history, they urge, should tell us something. Cf. *post*, at 2, 42–43 (ALITO, J., dissenting); *post*, at 4, 15–16 (KAVANAUGH, J., dissenting).

But what? There's no authoritative evidence explaining why later Congresses adopted other laws referencing sexual orientation but didn't amend this one. Maybe some in the later legislatures understood the impact Title VII's broad language already promised for cases like ours and didn't think a revision needed. Maybe others knew about its impact but hoped no one else would notice. Maybe still others, occupied by other concerns, didn't consider the issue at all. All we can know for certain is that speculation about why a later Congress declined to adopt new legislation offers a "particularly dangerous" basis on which to rest an interpretation of an existing law a different and earlier Congress did adopt. *Pension Benefit Guaranty Corporation* v. *LTV Corp.*, 496 U. S. 633, 650 (1990); see also *United States* v. *Wells*, 519 U. S. 482, 496 (1997); *Sullivan* v. *Finkelstein*, 496 U. S. 617, 632 (1990) (Scalia, J., concurring) ("Arguments based on subsequent legislative history . . . should not be taken seriously, not even in a footnote").

That leaves the employers to seek a different sort of exception. Maybe the traditional and simple but-for causation test should apply in all other Title VII cases, but it just doesn't work when it comes to cases involving homosexual and transgender employees. The test is too blunt to capture the nuances here. The employers illustrate their concern with an example. When we apply the simple test to Mr.

Bostock—asking whether Mr. Bostock, a man attracted to other men, would have been fired had he been a woman—we don't just change his sex. Along the way, we change his sexual orientation too (from homosexual to heterosexual). If the aim is to isolate whether a plaintiff's sex caused the dismissal, the employers stress, we must hold sexual orientation constant—meaning we need to change both his sex and the sex to which he is attracted. So for Mr. Bostock, the question should be whether he would've been fired if he were a woman attracted to women. And because his employer would have been as quick to fire a lesbian as it was a gay man, the employers conclude, no Title VII violation has occurred.

While the explanation is new, the mistakes are the same. The employers might be onto something if Title VII only ensured equal treatment between groups of men and women or if the statute applied only when sex is the sole or primary reason for an employer's challenged adverse employment action. But both of these premises are mistaken. Title VII's plain terms and our precedents don't care if an employer treats men and women comparably as groups; an employer who fires both lesbians and gay men equally doesn't diminish but doubles its liability. Just cast a glance back to *Manhart*, where it was no defense that the employer sought to equalize pension contributions based on life expectancy. Nor does the statute care if other factors besides sex contribute to an employer's discharge decision. Mr. Bostock's employer might have decided to fire him only because of the confluence of two factors, his sex and the sex to which he is attracted. But exactly the same might have been said in *Phillips*, where motherhood was the added variable.

Still, the employers insist, something seems different here. Unlike certain other employment policies this Court has addressed that harmed only women or only men, the employers' policies in the cases before us have the same adverse consequences for men and women. How could sex be

necessary to the result if a member of the opposite sex might face the same outcome from the same policy?

What the employers see as unique isn't even unusual. Often in life and law two but-for factors combine to yield a result that could have also occurred in some other way. Imagine that it's a nice day outside and your house is too warm, so you decide to open the window. Both the cool temperature outside and the heat inside are but-for causes of your choice to open the window. That doesn't change just because you also would have opened the window had it been warm outside and cold inside. In either case, no one would deny that the window is open "because of" the outside temperature. Our cases are much the same. So, for example, when it comes to homosexual employees, male sex and attraction to men are but-for factors that can combine to get them fired. The fact that female sex and attraction to women can *also* get an employee fired does no more than show the same outcome can be achieved through the combination of different factors. In either case, though, sex plays an essential but-for role.

At bottom, the employers' argument unavoidably comes down to a suggestion that sex must be the sole or primary cause of an adverse employment action for Title VII liability to follow. And, as we've seen, that suggestion is at odds with everything we know about the statute. Consider an employer eager to revive the workplace gender roles of the 1950s. He enforces a policy that he will hire only men as mechanics and only women as secretaries. When a qualified woman applies for a mechanic position and is denied, the "simple test" immediately spots the discrimination: A qualified man would have been given the job, so sex was a but-for cause of the employer's refusal to hire. But like the employers before us today, this employer would say not so fast. By comparing the woman who applied to be a mechanic to a man who applied to be a mechanic, we've quietly

changed two things: the applicant's sex and her trait of failing to conform to 1950s gender roles. The "simple test" thus overlooks that it is really the applicant's bucking of 1950s gender roles, not her sex, doing the work. So we need to hold that second trait constant: Instead of comparing the disappointed female applicant to a man who applied for the same position, the employer would say, we should compare her to a man who applied to be a secretary. And because that jobseeker would be refused too, this must not be sex discrimination.

No one thinks *that*, so the employers must scramble to justify deploying a stricter causation test for use only in cases involving discrimination based on sexual orientation or transgender status. Such a rule would create a curious discontinuity in our case law, to put it mildly. Employer hires based on sexual stereotypes? Simple test. Employer sets pension contributions based on sex? Simple test. Employer fires men who do not behave in a sufficiently masculine way around the office? Simple test. But when that same employer discriminates against women who are attracted to women, or persons identified at birth as women who later identify as men, we suddenly roll out a new and more rigorous standard? Why are *these* reasons for taking sex into account different from all the rest? Title VII's text can offer no answer.

B

Ultimately, the employers are forced to abandon the statutory text and precedent altogether and appeal to assumptions and policy. Most pointedly, they contend that few in 1964 would have expected Title VII to apply to discrimination against homosexual and transgender persons. And whatever the text and our precedent indicate, they say, shouldn't this fact cause us to pause before recognizing liability?

It might be tempting to reject this argument out of hand.

This Court has explained many times over many years that, when the meaning of the statute's terms is plain, our job is at an end. The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration. See, *e.g.*, *Carcieri* v. *Salazar*, 555 U. S. 379, 387 (2009); *Connecticut Nat. Bank* v. *Germain*, 503 U. S. 249, 253–254 (1992); *Rubin* v. *United States*, 449 U. S. 424, 430 (1981). Of course, some Members of this Court have consulted legislative history when interpreting *ambiguous* statutory language. Cf. *post*, at 40 (ALITO, J., dissenting). But that has no bearing here. "Legislative history, for those who take it into account, is meant to clear up ambiguity, not create it." *Milner* v. *Department of Navy*, 562 U. S. 562, 574 (2011). And as we have seen, no ambiguity exists about how Title VII's terms apply to the facts before us. To be sure, the statute's application in these cases reaches "beyond the principal evil" legislators may have intended or expected to address. *Oncale*, 523 U. S., at 79. But "'the fact that [a statute] has been applied in situations not expressly anticipated by Congress'" does not demonstrate ambiguity; instead, it simply "'demonstrates [the] breadth'" of a legislative command. *Sedima, S. P. R. L.* v. *Imrex Co.*, 473 U. S. 479, 499 (1985). And "it is ultimately the provisions of" those legislative commands "rather than the principal concerns of our legislators by which we are governed." *Oncale*, 523 U. S., at 79; see also A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 101 (2012) (noting that unexpected applications of broad language reflect only Congress's "presumed point [to] produce general coverage—not to leave room for courts to recognize ad hoc exceptions").

Still, while legislative history can never defeat unambiguous statutory text, historical sources can be useful for a different purpose: Because the law's ordinary meaning at the time of enactment usually governs, we must be sensitive to the possibility a statutory term that means one thing

today or in one context might have meant something else at the time of its adoption or might mean something different in another context. And we must be attuned to the possibility that a statutory phrase ordinarily bears a different meaning than the terms do when viewed individually or literally. To ferret out such shifts in linguistic usage or subtle distinctions between literal and ordinary meaning, this Court has sometimes consulted the understandings of the law's drafters as some (not always conclusive) evidence. For example, in the context of the National Motor Vehicle Theft Act, this Court admitted that the term "vehicle" in 1931 could literally mean "a conveyance working on land, water or air." *McBoyle* v. *United States*, 283 U. S. 25, 26 (1931). But given contextual clues and "everyday speech" at the time of the Act's adoption in 1919, this Court concluded that "vehicles" in that statute included only things "moving on land," not airplanes too. *Ibid.* Similarly, in *New Prime*, we held that, while the term "contracts of employment" today might seem to encompass only contracts with employees, at the time of the statute's adoption the phrase was ordinarily understood to cover contracts with independent contractors as well. 586 U. S., at ___–___ (slip op., at 6–9). Cf. *post,* at 7–8 (KAVANAUGH, J., dissenting) (providing additional examples).

The employers, however, advocate nothing like that here. They do not seek to use historical sources to illustrate that the meaning of any of Title VII's language has changed since 1964 or that the statute's terms, whether viewed individually or as a whole, ordinarily carried some message we have missed. To the contrary, as we have seen, the employers *agree* with our understanding of all the statutory language—"discriminate against any individual . . . because of such individual's . . . sex." Nor do the competing dissents offer an alternative account about what these terms mean either when viewed individually or in the ag-

gregate. Rather than suggesting that the statutory language bears some other *meaning*, the employers and dissents merely suggest that, because few in 1964 expected today's *result*, we should not dare to admit that it follows ineluctably from the statutory text. When a new application emerges that is both unexpected and important, they would seemingly have us merely point out the question, refer the subject back to Congress, and decline to enforce the plain terms of the law in the meantime.

That is exactly the sort of reasoning this Court has long rejected. Admittedly, the employers take pains to couch their argument in terms of seeking to honor the statute's "expected applications" rather than vindicate its "legislative intent." But the concepts are closely related. One could easily contend that legislators only intended expected applications or that a statute's purpose is limited to achieving applications foreseen at the time of enactment. However framed, the employer's logic impermissibly seeks to displace the plain meaning of the law in favor of something lying beyond it.

If anything, the employers' new framing may only add new problems. The employers assert that "no one" in 1964 or for some time after would have anticipated today's result. But is that really true? Not long after the law's passage, gay and transgender employees began filing Title VII complaints, so at least *some* people foresaw this potential application. See, *e.g.*, *Smith* v. *Liberty Mut. Ins. Co.*, 395 F. Supp. 1098, 1099 (ND Ga. 1975) (addressing claim from 1969); *Holloway* v. *Arthur Andersen & Co.*, 566 F. 2d 659, 661 (CA9 1977) (addressing claim from 1974). And less than a decade after Title VII's passage, during debates over the Equal Rights Amendment, others counseled that its language—which was strikingly similar to Title VII's—might also protect homosexuals from discrimination. See, *e.g.*, Note, The Legality of Homosexual Marriage, 82 Yale L. J. 573, 583–584 (1973).

Why isn't that enough to demonstrate that today's result isn't totally unexpected? How many people have to foresee the application for it to qualify as "expected"? Do we look only at the moment the statute was enacted, or do we allow some time for the implications of a new statute to be worked out? Should we consider the expectations of those who had no reason to give a particular application any thought or only those with reason to think about the question? How do we account for those who change their minds over time, after learning new facts or hearing a new argument? How specifically or generally should we frame the "application" at issue? None of these questions have obvious answers, and the employers don't propose any.

One could also reasonably fear that objections about unexpected applications will not be deployed neutrally. Often lurking just behind such objections resides a cynicism that Congress could not *possibly* have meant to protect a disfavored group. Take this Court's encounter with the Americans with Disabilities Act's directive that no "'public entity'" can discriminate against any "'qualified individual with a disability.'" *Pennsylvania Dept. of Corrections* v. *Yeskey*, 524 U. S. 206, 208 (1998). Congress, of course, didn't list every public entity the statute would apply to. And no one batted an eye at its application to, say, post offices. But when the statute was applied to *prisons*, curiously, some demanded a closer look: Pennsylvania argued that "Congress did not 'envisio[n] that the ADA would be applied to state prisoners.'" *Id.*, at 211–212. This Court emphatically rejected that view, explaining that, "in the context of an unambiguous statutory text," whether a specific application was anticipated by Congress "is irrelevant." *Id.*, at 212. As *Yeskey* and today's cases exemplify, applying protective laws to groups that were politically unpopular at the time of the law's passage—whether prisoners in the 1990s or homosexual and transgender employees

in the 1960s—often may be seen as unexpected. But to refuse enforcement just because of that, because the parties before us happened to be unpopular at the time of the law's passage, would not only require us to abandon our role as interpreters of statutes; it would tilt the scales of justice in favor of the strong or popular and neglect the promise that all persons are entitled to the benefit of the law's terms. Cf. *post*, at 28–35 (ALITO, J., dissenting); *post,* at 21–22 (KAVANAUGH, J., dissenting).

The employer's position also proves too much. If we applied Title VII's plain text only to applications some (yet-to-be-determined) group expected in 1964, we'd have more than a little law to overturn. Start with *Oncale*. How many people in 1964 could have expected that the law would turn out to protect male employees? Let alone to protect them from harassment by other male employees? As we acknowledged at the time, "male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII." 523 U. S., at 79. Yet the Court did not hesitate to recognize that Title VII's plain terms forbade it. Under the employer's logic, it would seem this was a mistake.

That's just the beginning of the law we would have to unravel. As one Equal Employment Opportunity Commission (EEOC) Commissioner observed shortly after the law's passage, the words of "'the sex provision of Title VII [are] difficult to . . . control.'" Franklin, Inventing the "Traditional Concept" of Sex Discrimination, 125 Harv. L. Rev. 1307, 1338 (2012) (quoting Federal Mediation Service To Play Role in Implementing Title VII, [1965–1968 Transfer Binder] CCH Employment Practices ¶8046, p. 6074). The "difficult[y]" may owe something to the initial proponent of the sex discrimination rule in Title VII, Representative Howard Smith. On some accounts, the congressman may have wanted (or at least was indifferent to the possibility

of) broad language with wide-ranging effect. Not necessarily because he was interested in rooting out sex discrimination in all its forms, but because he may have hoped to scuttle the whole Civil Rights Act and thought that adding language covering sex discrimination would serve as a poison pill. See C. Whalen & B. Whalen, The Longest Debate: A Legislative History of the 1964 Civil Rights Act 115–118 (1985). Certainly nothing in the meager legislative history of this provision suggests it was meant to be read narrowly.

Whatever his reasons, thanks to the broad language Representative Smith introduced, many, maybe most, applications of Title VII's sex provision were "unanticipated" at the time of the law's adoption. In fact, many now-obvious applications met with heated opposition early on, even among those tasked with enforcing the law. In the years immediately following Title VII's passage, the EEOC officially opined that listing men's positions and women's positions separately in job postings was simply helpful rather than discriminatory. Franklin, 125 Harv. L. Rev., at 1340 (citing Press Release, EEOC (Sept. 22, 1965)). Some courts held that Title VII did not prevent an employer from firing an employee for refusing his sexual advances. See, *e.g.*, *Barnes* v. *Train*, 1974 WL 10628, *1 (D DC, Aug. 9, 1974). And courts held that a policy against hiring mothers but not fathers of young children wasn't discrimination because of sex. See *Phillips* v. *Martin Marietta Corp.*, 411 F. 2d 1 (CA5 1969), rev'd, 400 U. S. 542 (1971) (*per curiam*).

Over time, though, the breadth of the statutory language proved too difficult to deny. By the end of the 1960s, the EEOC reversed its stance on sex-segregated job advertising. See Franklin, 125 Harv. L. Rev., at 1345. In 1971, this Court held that treating women with children differently from men with children violated Title VII. *Phillips*, 400 U. S., at 544. And by the late 1970s, courts began to recognize that sexual harassment can sometimes amount to sex discrimination. See, *e.g.*, *Barnes* v. *Costle*, 561 F. 2d 983,

990 (CADC 1977). While to the modern eye each of these examples may seem "plainly [to] constitut[e] discrimination because of biological sex," *post*, at 38 (ALITO, J., dissenting), all were hotly contested for years following Title VII's enactment. And as with the discrimination we consider today, many federal judges long accepted interpretations of Title VII that excluded these situations. Cf. *post*, at 21–22 (KAVANAUGH, J., dissenting) (highlighting that certain lower courts have rejected Title VII claims based on homosexuality and transgender status). Would the employers have us undo every one of these unexpected applications too?

The weighty implications of the employers' argument from expectations also reveal why they cannot hide behind the no-elephants-in-mouseholes canon. That canon recognizes that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions." *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 468 (2001). But it has no relevance here. We can't deny that today's holding—that employers are prohibited from firing employees on the basis of homosexuality or transgender status—is an elephant. But where's the mousehole? Title VII's prohibition of sex discrimination in employment is a major piece of federal civil rights legislation. It is written in starkly broad terms. It has repeatedly produced unexpected applications, at least in the view of those on the receiving end of them. Congress's key drafting choices—to focus on discrimination against individuals and not merely between groups and to hold employers liable whenever sex is a but-for cause of the plaintiff's injuries—virtually guaranteed that unexpected applications would emerge over time. This elephant has never hidden in a mousehole; it has been standing before us all along.

With that, the employers are left to abandon their concern for expected applications and fall back to the last line

of defense for all failing statutory interpretation arguments: naked policy appeals. If we were to apply the statute's plain language, they complain, any number of undesirable policy consequences would follow. Cf. *post*, at 44–54 (ALITO, J., dissenting). Gone here is any pretense of statutory interpretation; all that's left is a suggestion we should proceed without the law's guidance to do as we think best. But that's an invitation no court should ever take up. The place to make new legislation, or address unwanted consequences of old legislation, lies in Congress. When it comes to statutory interpretation, our role is limited to applying the law's demands as faithfully as we can in the cases that come before us. As judges we possess no special expertise or authority to declare for ourselves what a self-governing people should consider just or wise. And the same judicial humility that requires us to refrain from adding to statutes requires us to refrain from diminishing them.

What are these consequences anyway? The employers worry that our decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination. And, under Title VII itself, they say sex-segregated bathrooms, locker rooms, and dress codes will prove unsustainable after our decision today. But none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today. Under Title VII, too, we do not purport to address bathrooms, locker rooms, or anything else of the kind. The only question before us is whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual "because of such individual's sex." As used in Title VII, the term "'discriminate against'" refers to "distinctions or differences in treatment that injure protected individuals." *Burlington N. & S. F. R.*, 548 U. S., at 59. Firing employees because of a statutorily protected trait surely counts. Whether other policies and practices

might or might not qualify as unlawful discrimination or find justifications under other provisions of Title VII are questions for future cases, not these.

Separately, the employers fear that complying with Title VII's requirement in cases like ours may require some employers to violate their religious convictions. We are also deeply concerned with preserving the promise of the free exercise of religion enshrined in our Constitution; that guarantee lies at the heart of our pluralistic society. But worries about how Title VII may intersect with religious liberties are nothing new; they even predate the statute's passage. As a result of its deliberations in adopting the law, Congress included an express statutory exception for religious organizations. §2000e–1(a). This Court has also recognized that the First Amendment can bar the application of employment discrimination laws "to claims concerning the employment relationship between a religious institution and its ministers." *Hosanna-Tabor Evangelical Lutheran Church and School* v. *EEOC*, 565 U. S. 171, 188 (2012). And Congress has gone a step further yet in the Religious Freedom Restoration Act of 1993 (RFRA), 107 Stat. 1488, codified at 42 U. S. C. §2000bb *et seq.* That statute prohibits the federal government from substantially burdening a person's exercise of religion unless it demonstrates that doing so both furthers a compelling governmental interest and represents the least restrictive means of furthering that interest. §2000bb–1. Because RFRA operates as a kind of super statute, displacing the normal operation of other federal laws, it might supersede Title VII's commands in appropriate cases. See §2000bb–3.

But how these doctrines protecting religious liberty interact with Title VII are questions for future cases too. Harris Funeral Homes did unsuccessfully pursue a RFRA-based defense in the proceedings below. In its certiorari petition, however, the company declined to seek review of that adverse decision, and no other religious liberty claim is now

before us. So while other employers in other cases may raise free exercise arguments that merit careful consideration, none of the employers before us today represent in this Court that compliance with Title VII will infringe their own religious liberties in any way.

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Some of those who supported adding language to Title VII to ban sex discrimination may have hoped it would derail the entire Civil Rights Act. Yet, contrary to those intentions, the bill became law. Since then, Title VII's effects have unfolded with far-reaching consequences, some likely beyond what many in Congress or elsewhere expected.

But none of this helps decide today's cases. Ours is a society of written laws. Judges are not free to overlook plain statutory commands on the strength of nothing more than suppositions about intentions or guesswork about expectations. In Title VII, Congress adopted broad language making it illegal for an employer to rely on an employee's sex when deciding to fire that employee. We do not hesitate to recognize today a necessary consequence of that legislative choice: An employer who fires an individual merely for being gay or transgender defies the law.

The judgments of the Second and Sixth Circuits in Nos. 17–1623 and 18–107 are affirmed. The judgment of the Eleventh Circuit in No. 17–1618 is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

Nos. 17–1618, 17–1623 and 18–107

GERALD LYNN BOSTOCK, PETITIONER
17–1618 *v.*
CLAYTON COUNTY, GEORGIA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

ALTITUDE EXPRESS, INC., ET AL., PETITIONERS
17–1623 *v.*
MELISSA ZARDA AND WILLIAM ALLEN MOORE, JR., CO-INDEPENDENT EXECUTORS OF THE ESTATE OF DONALD ZARDA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

R.G. & G.R. HARRIS FUNERAL HOMES, INC., PETITIONER
18–107 *v.*
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[June 15, 2020]

JUSTICE ALITO, with whom JUSTICE THOMAS joins, dissenting.

There is only one word for what the Court has done today: legislation. The document that the Court releases is in the form of a judicial opinion interpreting a statute, but that is deceptive.

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on any of five specified grounds: "race, color, religion, sex, [and] national origin." 42 U. S. C. §2000e–2(a)(1). Neither "sexual orientation" nor "gender identity" appears on that list. For the past 45 years, bills have been introduced in Congress to add "sexual orientation" to the list,[1] and in recent years, bills have included "gender identity" as well.[2] But to date, none has passed both Houses.

Last year, the House of Representatives passed a bill that would amend Title VII by defining sex discrimination to include both "sexual orientation" and "gender identity," H. R. 5, 116th Cong., 1st Sess. (2019), but the bill has stalled in the Senate. An alternative bill, H. R. 5331, 116th Cong., 1st Sess. (2019), would add similar prohibitions but contains provisions to protect religious liberty.[3] This bill remains before a House Subcommittee.

Because no such amendment of Title VII has been enacted in accordance with the requirements in the Constitution (passage in both Houses and presentment to the President, Art. I, §7, cl. 2), Title VII's prohibition of

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[1] *E.g.*, H. R. 166, 94th Cong., 1st Sess., §6 (1975); H. R. 451, 95th Cong., 1st Sess., §6 (1977); S. 2081, 96th Cong., 1st Sess. (1979); S. 1708, 97th Cong., 1st Sess. (1981); S. 430, 98th Cong., 1st Sess. (1983); S. 1432, 99th Cong., 1st Sess., §5 (1985); S. 464, 100th Cong., 1st Sess., §5 (1987); H. R. 655, 101st Cong., 1st Sess., §2 (1989); S. 574, 102d Cong., 1st Sess., §5 (1991); H. R. 423, 103d Cong., 1st Sess., §2 (1993); S. 932, 104th Cong., 1st Sess. (1995); H. R. 365, 105th Cong., 1st Sess., §2 (1997); H. R. 311, 106th Cong., 1st Sess., §2 (1999); H. R. 217, 107th Cong., 1st Sess., §2 (2001); S. 16, 108th Cong., 1st Sess., §§701–704 (2003); H. R. 288, 109th Cong., 1st Sess., §2 (2005).

[2] See, *e.g.*, H. R. 2015, 110th Cong., 1st Sess. (2007); H. R. 3017, 111th Cong., 1st Sess. (2009); H. R. 1397, 112th Cong., 1st Sess. (2011); H. R. 1755, 113th Cong., 1st Sess. (2013); H. R. 3185, 114th Cong., 1st Sess., §7 (2015); H. R. 2282, 115th Cong., 1st Sess., §7 (2017); H. R. 5, 116th Cong., 1st Sess. (2019).

[3] H. R. 5331, 116th Cong., 1st Sess., §§4(b), (c) (2019).

discrimination because of "sex" still means what it has always meant. But the Court is not deterred by these constitutional niceties. Usurping the constitutional authority of the other branches, the Court has essentially taken H. R. 5's provision on employment discrimination and issued it under the guise of statutory interpretation.[4] A more brazen abuse of our authority to interpret statutes is hard to recall.

The Court tries to convince readers that it is merely enforcing the terms of the statute, but that is preposterous. Even as understood today, the concept of discrimination because of "sex" is different from discrimination because of "sexual orientation" or "gender identity." And in any event, our duty is to interpret statutory terms to "mean what they conveyed to reasonable people *at the time they were written*." A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 16 (2012) (emphasis added). If every single living American had been surveyed in 1964, it would have been hard to find any who thought that discrimination because of sex meant discrimination because of sexual orientation—not to mention gender identity, a concept that was essentially unknown at the time.

The Court attempts to pass off its decision as the inevitable product of the textualist school of statutory interpretation championed by our late colleague Justice Scalia, but no one should be fooled. The Court's opinion is like a pirate ship. It sails under a textualist flag, but what it actually represents is a theory of statutory interpretation that Justice Scalia excoriated—the theory that courts should "update" old statutes so that they better reflect the current values of society. See A. Scalia, A Matter of Interpretation 22

[4] Section 7(b) of H. R. 5 strikes the term "sex" in 42 U. S. C. §2000e–2 and inserts: "SEX (INCLUDING SEXUAL ORIENTATION AND GENDER IDENTITY)."

(1997). If the Court finds it appropriate to adopt this theory, it should own up to what it is doing.[5]

Many will applaud today's decision because they agree on policy grounds with the Court's updating of Title VII. But the question in these cases is not whether discrimination because of sexual orientation or gender identity *should be* outlawed. The question is *whether Congress did that in 1964*.

It indisputably did not.

I

A

Title VII, as noted, prohibits discrimination "because of . . . sex," §2000e–2(a)(1), and in 1964, it was as clear as clear could be that this meant discrimination because of the genetic and anatomical characteristics that men and women have at the time of birth. Determined searching has not found a single dictionary from that time that defined "sex" to mean sexual orientation, gender identity, or "transgender status."[6] *Ante*, at 2. (Appendix A, *infra*, to

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[5] That is what Judge Posner did in the Seventh Circuit case holding that Title VII prohibits discrimination because of sexual orientation. See *Hively* v. *Ivy Tech Community College of Ind.*, 853 F. 3d 339 (2017) (en banc). Judge Posner agreed with that result but wrote:

"*I would prefer to see us acknowledge openly that today we, who are judges rather than members of Congress, are imposing on a half-century-old statute a meaning of 'sex discrimination' that the Congress that enacted it would not have accepted*." *Id.*, at 357 (concurring opinion) (emphasis added).

[6] The Court does not define what it means by "transgender status," but the American Psychological Association describes "transgender" as "[a]n umbrella term encompassing those whose gender identities or gender roles differ from those typically associated with the sex they were assigned at birth." A Glossary: Defining Transgender Terms, 49 Monitor on Psychology 32 (Sept. 2018), https://www.apa.org/monitor/2018/09/ce-corner-glossary. It defines "gender identity" as "[a]n internal sense of being male, female or something else, which may or may not correspond

this opinion includes the full definitions of "sex" in the unabridged dictionaries in use in the 1960s.)

In all those dictionaries, the primary definition of "sex" was essentially the same as that in the then-most recent edition of Webster's New International Dictionary 2296 (def. 1) (2d ed. 1953): "[o]ne of the two divisions of organisms formed on the distinction of male and female." See also American Heritage Dictionary 1187 (def. 1(a)) (1969) ("The property or quality by which organisms are classified according to their reproductive functions"); Random House Dictionary of the English Language 1307 (def. 1) (1966) (Random House Dictionary) ("the fact or character of being either male or female"); 9 Oxford English Dictionary 577 (def. 1) (1933) ("Either of the two divisions of organic beings distinguished as male and female respectively").

The Court does not dispute that this is what "sex" means in Title VII, although it coyly suggests that there is at least some support for a different and potentially relevant definition. *Ante*, at 5. (I address alternative definitions below. See Part I–B–3, *infra*.) But the Court declines to stand on that ground and instead "proceed[s] on the assumption that 'sex' . . . refer[s] only to biological distinctions between male and female." *Ante*, at 5.

If that is so, it should be perfectly clear that Title VII does not reach discrimination because of sexual orientation or gender identity. If "sex" in Title VII means biologically male or female, then discrimination because of sex means discrimination because the person in question is biologically male or biologically female, not because that person is sexually attracted to members of the same sex or identifies as a member of a particular gender.

How then does the Court claim to avoid that conclusion?

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to an individual's sex assigned at birth or sex characteristics." *Ibid.* Under these definitions, there is no apparent difference between discrimination because of transgender status and discrimination because of gender identity.

The Court tries to cloud the issue by spending many pages discussing matters that are beside the point. The Court observes that a Title VII plaintiff need not show that "sex" was the sole or primary motive for a challenged employment decision or its sole or primary cause; that Title VII is limited to discrimination with respect to a list of specified actions (such as hiring, firing, etc.); and that Title VII protects individual rights, not group rights. See *ante*, at 5–9, 11.

All that is true, but so what? In cases like those before us, a plaintiff must show that sex was a "motivating factor" in the challenged employment action, 42 U. S. C. §2000e–2(m), so the question we must decide comes down to this: if an individual employee or applicant for employment shows that his or her sexual orientation or gender identity was a "motivating factor" in a hiring or discharge decision, for example, is that enough to establish that the employer discriminated "because of . . . sex"? Or, to put the same question in different terms, if an employer takes an employment action solely because of the sexual orientation or gender identity of an employee or applicant, has that employer necessarily discriminated because of biological sex?

The answers to those questions must be no, unless discrimination because of sexual orientation or gender identity inherently constitutes discrimination because of sex. The Court attempts to prove that point, and it argues, not merely that the terms of Title VII *can* be interpreted that way but that they *cannot reasonably be interpreted any other way*. According to the Court, the text is unambiguous. See *ante*, at 24, 27, 30.

The arrogance of this argument is breathtaking. As I will show, there is not a shred of evidence that any Member of Congress interpreted the statutory text that way when Title VII was enacted. See Part III–B, *infra*. But the Court apparently thinks that this was because the Members were not "smart enough to realize" what its language means.

Hively v. *Ivy Tech Community College of Ind.*, 853 F. 3d 339, 357 (CA7 2017) (Posner, J., concurring). The Court seemingly has the same opinion about our colleagues on the Courts of Appeals, because until 2017, every single Court of Appeals to consider the question interpreted Title VII's prohibition against sex discrimination to mean discrimination on the basis of biological sex. See Part III–C, *infra*. And for good measure, the Court's conclusion that Title VII unambiguously reaches discrimination on the basis of sexual orientation and gender identity necessarily means that the EEOC failed to see the obvious for the first 48 years after Title VII became law.[7] Day in and day out, the Commission enforced Title VII but did not grasp what discrimination "because of . . . sex" unambiguously means. See Part III–C, *infra*.

The Court's argument is not only arrogant, it is wrong. It fails on its own terms. "Sex," "sexual orientation," and "gender identity" are different concepts, as the Court concedes. *Ante*, at 19 ("homosexuality and transgender status are distinct concepts from sex"). And neither "sexual orientation" nor "gender identity" is tied to either of the two biological sexes. See *ante*, at 10 (recognizing that "discrimination on these bases" does not have "some disparate impact on one sex or another"). Both men and women may be attracted to members of the opposite sex, members of the same sex, or members of both sexes.[8] And individuals who are born with

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[7] The EEOC first held that "discrimination against a transgender individual because that person is transgender" violates Title VII in 2012 in *Macy* v. *Holder*, 2012 WL 1435995, *11 (Apr. 20, 2012), though it earlier advanced that position in an *amicus* brief in Federal District Court in 2011, *ibid.*, n. 16. It did not hold that discrimination on the basis of sexual orientation violated Title VII until 2015. See *Baldwin* v. *Foxx*, 2015 WL 4397641 (July 15, 2015).

[8] "Sexual orientation refers to a person's erotic response tendency or sexual attractions, be they directed toward individuals of the same sex (homosexual), the other sex (heterosexual), or both sexes (bisexual)." 1 B.

the genes and organs of either biological sex may identify with a different gender.[9]

Using slightly different terms, the Court asserts again and again that discrimination because of sexual orientation or gender identity inherently or necessarily entails discrimination because of sex. See *ante*, at 2 (When an employer "fires an individual for being homosexual or transgender," "[s]ex plays a necessary and undisguisable role in the decision"); *ante*, at 9 ("[I]t is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex"); *ante*, at 11 ("[W]hen an employer discriminates against homosexual or transgender employees, [the] employer . . . inescapably *intends* to rely on sex in its decisionmaking"); *ante*, at 12 ("For an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex"); *ante*, at 14 ("When an employer fires an employee for being homosexual or transgender, it necessarily and intentionally discriminates against that individual in part because of sex"); *ante*, at 19 ("[D]iscrimination based on homosexuality or transgender status necessarily entails discrimination based on sex"). But repetition of an assertion does not make it so, and the Court's repeated assertion is demonstrably untrue.

Contrary to the Court's contention, discrimination because of sexual orientation or gender identity does not in

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Sadock, V. Sadock, & P. Ruiz, Comprehensive Textbook of Psychiatry 2061 (9th ed. 2009); see also American Heritage Dictionary 1607 (5th ed. 2011) (defining "sexual orientation" as "[t]he direction of a person's sexual interest, as toward people of the opposite sex, the same sex, or both sexes"); Webster's New College Dictionary 1036 (3d ed. 2008) (defining "sexual orientation" as "[t]he direction of one's sexual interest toward members of the same, opposite, or both sexes").

[9] See n. 6, *supra*; see also Sadock, *supra,* at 2063 ("transgender" refers to "any individual who identifies with and adopts the gender role of a member of the other biological sex").

and of itself entail discrimination because of sex. We can see this because it is quite possible for an employer to discriminate on those grounds without taking the sex of an individual applicant or employee into account. An employer can have a policy that says: "We do not hire gays, lesbians, or transgender individuals." And an employer can implement this policy without paying any attention to or even knowing the biological sex of gay, lesbian, and transgender applicants. In fact, at the time of the enactment of Title VII, the United States military had a blanket policy of refusing to enlist gays or lesbians, and under this policy for years thereafter, applicants for enlistment were required to complete a form that asked whether they were "homosexual." Appendix D, *infra*, at 88, 101.

At oral argument, the attorney representing the employees, a prominent professor of constitutional law, was asked if there would be discrimination because of sex if an employer with a blanket policy against hiring gays, lesbians, and transgender individuals implemented that policy without knowing the biological sex of any job applicants. Her candid answer was that this would "not" be sex discrimination.[10] And she was right.

The attorney's concession was necessary, but it is fatal to the Court's interpretation, for if an employer discriminates against individual applicants or employees without even knowing whether they are male or female, it is impossible to argue that the employer intentionally discriminated because of sex. Contra, *ante*, at 19. An employer cannot intentionally discriminate on the basis of a characteristic of which the employer has no knowledge. And if an employer does not violate Title VII by discriminating on the basis of

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[10] See Tr. of Oral Arg. in Nos. 17–1618, 17–1623, pp. 69–70 ("If there was that case, it might be the rare case in which sexual orientation discrimination is not a subset of sex"); see also *id.*, at 69 ("Somebody who comes in and says I'm not going to tell you what my sex is, but, believe me, I was fired for my sexual orientation, that person will lose").

sexual orientation or gender identity without knowing the sex of the affected individuals, there is no reason why the same employer could not lawfully implement the same policy even if it knows the sex of these individuals. If an employer takes an adverse employment action for a perfectly legitimate reason—for example, because an employee stole company property—that action is not converted into sex discrimination simply because the employer knows the employee's sex. As explained, a disparate treatment case requires proof of intent—*i.e.,* that the employee's sex motivated the firing. In short, what this example shows is that discrimination because of sexual orientation or gender identity does not inherently or necessarily entail discrimination because of sex, and for that reason, the Court's chief argument collapses.

Trying to escape the consequences of the attorney's concession, the Court offers its own hypothetical:

> "Suppose an employer's application form offered a single box to check if the applicant is either black or Catholic. If the employer refuses to hire anyone who checks that box, would we conclude the employer has complied with Title VII, so long as it studiously avoids learning any particular applicant's race or religion? Of course not." *Ante*, at 18.

How this hypothetical proves the Court's point is a mystery. A person who checked that box would presumably be black, Catholic, or both, and refusing to hire an applicant because of race or religion is prohibited by Title VII. Rejecting applicants who checked a box indicating that they are homosexual is entirely different because it is impossible to tell from that answer whether an applicant is male or female.

The Court follows this strange hypothetical with an even stranger argument. The Court argues that an applicant

could not answer the question whether he or she is homosexual without knowing something about sex. If the applicant was unfamiliar with the term "homosexual," the applicant would have to look it up or ask what the term means. And because this applicant would have to take into account his or her sex and that of the persons to whom he or she is sexually attracted to answer the question, it follows, the Court reasons, that an employer could not reject this applicant without taking the applicant's sex into account. See *ante*, at 18–19.

This is illogical. Just because an applicant cannot say whether he or she is homosexual without knowing his or her own sex and that of the persons to whom the applicant is attracted, it does not follow that an employer cannot reject an applicant based on homosexuality without knowing the applicant's sex.

While the Court's imagined application form proves nothing, another hypothetical case offered by the Court is telling. But what it proves is not what the Court thinks. The Court posits:

> "Imagine an employer who has a policy of firing any employee known to be homosexual. The employer hosts an office holiday party and invites employees to bring their spouses. A model employee arrives and introduces a manager to Susan, the employee's wife. Will that employee be fired? If the policy works as the employer intends, the answer depends entirely on whether the model employee is a man or a woman." *Ante*, at 11.

This example disproves the Court's argument because it is perfectly clear that the employer's motivation in firing the female employee had nothing to do with that employee's sex. The employer presumably knew that this employee was a woman before she was invited to the fateful party. Yet the employer, far from holding her biological sex

against her, rated her a "model employee." At the party, the employer learned something new, her sexual orientation, and it was this new information that motivated her discharge. So this is another example showing that discrimination because of sexual orientation does not inherently involve discrimination because of sex.

In addition to the failed argument just discussed, the Court makes two other arguments, more or less in passing. The first of these is essentially that sexual orientation and gender identity are closely related to sex. The Court argues that sexual orientation and gender identity are "inextricably bound up with sex," *ante*, at 10, and that discrimination on the basis of sexual orientation or gender identity involves the application of "sex-based rules," *ante*, at 17. This is a variant of an argument found in many of the briefs filed in support of the employees and in the lower court decisions that agreed with the Court's interpretation. All these variants stress that sex, sexual orientation, and gender identity are related concepts. The Seventh Circuit observed that "[i]t would require considerable calisthenics to remove 'sex' from 'sexual orientation.'" *Hively*, 853 F. 3d, at 350.[11] The Second Circuit wrote that sex is necessarily "a factor in sexual orientation" and further concluded that "sexual orientation is a function of sex." 883 F. 3d 100, 112–113 (CA2 2018) (en banc). Bostock's brief and those of *amici* supporting his position contend that sexual orientation is "a sex-based consideration."[12] Other briefs state that sexual orientation is "a function of sex"[13] or is "intrinsically related to

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[11] See also Brief for William N. Eskridge Jr. et al. as *Amici Curiae* 2 ("[T]here is no reasonable way to disentangle sex from same-sex attraction or transgender status").

[12] Brief for Petitioner in No. 17–1618, at 14; see also Brief for Southern Poverty Law Center et al. as *Amici Curiae* 7–8.

[13] Brief for Scholars Who Study the LGB Population as *Amici Curiae* in Nos. 17–1618, 17–1623, p. 10.

sex."[14] Similarly, Stephens argues that sex and gender identity are necessarily intertwined: "By definition, a transgender person is someone who lives and identifies with a sex different than the sex assigned to the person at birth."[15]

It is curious to see this argument in an opinion that purports to apply the purest and highest form of textualism because the argument effectively amends the statutory text. Title VII prohibits discrimination because of *sex itself,* not everything that is related to, based on, or defined with reference to, "sex." Many things are related to sex. Think of all the nouns other than "orientation" that are commonly modified by the adjective "sexual." Some examples yielded by a quick computer search are "sexual harassment," "sexual assault, "sexual violence," "sexual intercourse," and "sexual content."

Does the Court really think that Title VII prohibits discrimination on all these grounds? Is it unlawful for an employer to refuse to hire an employee with a record of sexual harassment in prior jobs? Or a record of sexual assault or violence?

To be fair, the Court does not claim that Title VII prohibits discrimination because of *everything* that is related to sex. The Court draws a distinction between things that are "inextricably" related and those that are related in "some vague sense." *Ante*, at 10. Apparently the Court would graft onto Title VII some arbitrary line separating the things that are related closely enough and those that are not.[16] And it would do this in the name of high textualism.

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[14] Brief for American Psychological Association et al. as *Amici Curiae* 11.

[15] Reply Brief for Respondent Aimee Stephens in No. 18–107, p. 5.

[16] Notably, Title VII itself already suggests a line, which the Court ignores. The statute specifies that the terms "because of sex" and "on the basis of sex" cover certain conditions that are biologically tied to sex,

An additional argument made in passing also fights the text of Title VII and the policy it reflects. The Court proclaims that "[a]n individual's homosexuality or transgender status is not relevant to employment decisions." *Ante*, at 9. That is the policy view of many people in 2020, and perhaps Congress would have amended Title VII to implement it if this Court had not intervened. But that is not the policy embodied in Title VII in its current form. Title VII prohibits discrimination based on five specified grounds, and neither sexual orientation nor gender identity is on the list. As long as an employer does not discriminate based on one of the listed grounds, the employer is free to decide for itself which characteristics are "relevant to [its] employment decisions." *Ibid.* By proclaiming that sexual orientation and gender identity are "not relevant to employment decisions," the Court updates Title VII to reflect what it regards as 2020 values.

The Court's remaining argument is based on a hypothetical that the Court finds instructive. In this hypothetical, an employer has two employees who are "attracted to men," and "*to the employer's mind*" the two employees are "materially identical" except that one is a man and the other is a woman. *Ante*, at 9 (emphasis added). The Court reasons that if the employer fires the man but not the woman, the employer is necessarily motivated by the man's biological sex. *Ante*, at 9–10. After all, if two employees are identical in every respect but sex, and the employer fires only one, what other reason could there be?

The problem with this argument is that the Court loads the dice. That is so because in the mind of an employer who does not want to employ individuals who are attracted to

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namely, "pregnancy, childbirth, [and] related medical conditions." 42 U. S. C. §2000e(k). This definition should inform the meaning of "because of sex" in Title VII more generally. Unlike pregnancy, neither sexual orientation nor gender identity is biologically linked to women or men.

members of the same sex, these two employees are not materially identical in every respect but sex. On the contrary, they differ in another way that the employer thinks is quite material. And until Title VII is amended to add sexual orientation as a prohibited ground, this is a view that an employer is permitted to implement. As noted, other than prohibiting discrimination on any of five specified grounds, "race, color, religion, sex, [and] national origin." 42 U. S. C. §2000e–2(a)(1), Title VII allows employers to decide whether two employees are "materially identical." Even idiosyncratic criteria are permitted; if an employer thinks that Scorpios make bad employees, the employer can refuse to hire Scorpios. Such a policy would be unfair and foolish, but under Title VII, it is permitted. And until Title VII is amended, so is a policy against employing gays, lesbians, or transgender individuals.

Once this is recognized, what we have in the Court's hypothetical case are two employees who differ in *two* ways—sex and sexual orientation—and if the employer fires one and keeps the other, all that can be inferred is that the employer was motivated either entirely by sexual orientation, entirely by sex, or in part by both. We cannot infer with any certainty, as the hypothetical is apparently meant to suggest, that the employer was motivated even in part by sex. The Court harps on the fact that under Title VII a prohibited ground need not be the sole motivation for an adverse employment action, see *ante*, at 10–11, 14–15, 21, but its example does not show that sex necessarily played *any* part in the employer's thinking.

The Court tries to avoid this inescapable conclusion by arguing that sex is really the only difference between the two employees. This is so, the Court maintains, because both employees "are attracted to men." *Ante*, at 9–10. Of course, the employer would couch its objection to the man differently. It would say that its objection was his sexual orientation. So this may appear to leave us with a battle of

labels. If the employer's objection to the male employee is characterized as attraction to men, it seems that he is just like the woman in all respects except sex and that the employer's disparate treatment must be based on that one difference. On the other hand, if the employer's objection is sexual orientation or homosexuality, the two employees differ in two respects, and it cannot be inferred that the disparate treatment was due even in part to sex.

The Court insists that its label is the right one, and that presumably is why it makes such a point of arguing that an employer cannot escape liability under Title VII by giving sex discrimination some other name. See *ante*, at 14, 17. That is certainly true, but so is the opposite. Something that is *not* sex discrimination cannot be converted into sex discrimination by slapping on that label. So the Court cannot prove its point simply by labeling the employer's objection as "attract[ion] to men." *Ante*, at 9–10. Rather, the Court needs to show that its label is the correct one.

And a labeling standoff would not help the Court because that would mean that the bare text of Title VII does not unambiguously show that its interpretation is right. The Court would have no justification for its stubborn refusal to look any further.

As it turns out, however, there is no standoff. It can easily be shown that the employer's real objection is not "attract[ion] to men" but homosexual orientation.

In an effort to prove its point, the Court carefully includes in its example just two employees, a homosexual man and a heterosexual woman, but suppose we add two more individuals, a woman who is attracted to women and a man who is attracted to women. (A large employer will likely have applicants and employees who fall into all four categories, and a small employer can potentially have all four as well.) We now have the four exemplars listed below, with the discharged employees crossed out:

~~Man attracted to men~~
Woman attracted to men
~~Woman attracted to women~~
Man attracted to women

The discharged employees have one thing in common. It is not biological sex, attraction to men, or attraction to women. It is attraction to members of their own sex—in a word, sexual orientation. And that, we can infer, is the employer's real motive.

In sum, the Court's textual arguments fail on their own terms. The Court tries to prove that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex," *ante,* at 9, but as has been shown, it is entirely possible for an employer to do just that. "[H]omosexuality and transgender status are distinct concepts from sex," *ante*, at 19, and discrimination because of sexual orientation or transgender status does not inherently or necessarily constitute discrimination because of sex. The Court's arguments are squarely contrary to the statutory text.

But even if the words of Title VII did not definitively refute the Court's interpretation, that would not justify the Court's refusal to consider alternative interpretations. The Court's excuse for ignoring everything other than the bare statutory text is that the text is unambiguous and therefore no one can reasonably interpret the text in any way other than the Court does. Unless the Court has met that high standard, it has no justification for its blinkered approach. And to say that the Court's interpretation is the only possible reading is indefensible.

B

Although the Court relies solely on the arguments discussed above, several other arguments figure prominently in the decisions of the lower courts and in briefs submitted

by or in support of the employees. The Court apparently finds these arguments unpersuasive, and so do I, but for the sake of completeness, I will address them briefly.

1

One argument, which relies on our decision in *Price Waterhouse* v. *Hopkins*, 490 U. S. 228 (1989) (plurality opinion), is that discrimination because of sexual orientation or gender identity violates Title VII because it constitutes prohibited discrimination on the basis of sex stereotypes. See 883 F. 3d, at 119–123; *Hively*, 853 F. 3d, at 346; 884 F. 3d 560, 576–577 (CA6 2018). The argument goes like this. Title VII prohibits discrimination based on stereotypes about the way men and women should behave; the belief that a person should be attracted only to persons of the opposite sex and the belief that a person should identify with his or her biological sex are examples of such stereotypes; therefore, discrimination on either of these grounds is unlawful.

This argument fails because it is based on a faulty premise, namely, that Title VII forbids discrimination based on sex stereotypes. It does not. It prohibits discrimination because of "sex," and the two concepts are not the same. See *Price Waterhouse*, 490 U. S., at 251. That does not mean, however, that an employee or applicant for employment cannot prevail by showing that a challenged decision was based on a sex stereotype. Such evidence is relevant to prove discrimination because of sex, and it may be convincing where the trait that is inconsistent with the stereotype is one that would be tolerated and perhaps even valued in a person of the opposite sex. See *ibid.*

Much of the plaintiff's evidence in *Price Waterhouse* was of this nature. The plaintiff was a woman who was passed over for partnership at an accounting firm, and some of the adverse comments about her work appeared to criticize her for being forceful and insufficiently "feminin[e]." *Id.*, at 235–236.

The main issue in *Price Waterhouse*—the proper allocation of the burdens of proof in a so-called mixed motives Title VII case—is not relevant here, but the plurality opinion, endorsed by four Justices, commented on the issue of sex stereotypes. The plurality observed that "sex stereotypes do not inevitably prove that gender played a part in a particular employment decision" but "can certainly be *evidence* that gender played a part." *Id.*, at 251.[17] And the plurality made it clear that "[t]he plaintiff must show that the employer actually relied on her gender in making its decision." *Ibid.*

Plaintiffs who allege that they were treated unfavorably because of their sexual orientation or gender identity are not in the same position as the plaintiff in *Price Waterhouse*. In cases involving discrimination based on sexual orientation or gender identity, the grounds for the employer's decision—that individuals should be sexually attracted only to persons of the opposite biological sex or should identify with their biological sex—apply equally to men and women. "[H]eterosexuality is not a *female* stereotype; it not a *male* stereotype; it is not a *sex-specific* stereotype at all." *Hively*, 853 F. 3d, at 370 (Sykes, J., dissenting).

To be sure, there may be cases in which a gay, lesbian, or transgender individual can make a claim like the one in *Price Waterhouse*. That is, there may be cases where traits or behaviors that some people associate with gays, lesbians, or transgender individuals are tolerated or valued in persons of one biological sex but not the other. But that is a

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[17] Two other Justices concurred in the judgment but did not comment on the issue of stereotypes. See *id.*, at 258–261 (opinion of White, J.); *id.*, at 261–279 (opinion of O'Connor, J.). And Justice Kennedy reiterated on behalf of the three Justices in dissent that "Title VII creates no independent cause of action for sex stereotyping," but he added that "[e]vidence of use by decisionmakers of sex stereotypes is, of course, quite relevant to the question of discriminatory intent." *Id.*, at 294.

different matter.

2

A second prominent argument made in support of the result that the Court now reaches analogizes discrimination against gays and lesbians to discrimination against a person who is married to or has an intimate relationship with a person of a different race. Several lower court cases have held that discrimination on this ground violates Title VII. See, *e.g.*, *Holcomb* v. *Iona College*, 521 F. 3d 130 (CA2 2008); *Parr* v. *Woodmen of World Life Ins. Co.*, 791 F. 2d 888 (CA11 1986). And the logic of these decisions, it is argued, applies equally where an employee or applicant is treated unfavorably because he or she is married to, or has an intimate relationship with, a person of the same sex.

This argument totally ignores the historically rooted reason why discrimination on the basis of an interracial relationship constitutes race discrimination. And without taking history into account, it is not easy to see how the decisions in question fit the terms of Title VII.

Recall that Title VII makes it unlawful for an employer to discriminate against an individual "because of *such individual's race*." 42 U. S. C. §2000e–2(a) (emphasis added). So if an employer is happy to employ whites and blacks but will not employ any employee in an interracial relationship, how can it be said that the employer is discriminating against either whites or blacks "because of such individual's race"? This employer would be applying the same rule to all its employees regardless of their race.

The answer is that this employer is discriminating on a ground that history tells us is a core form of race discrimination.[18] "It would require absolute blindness to the history

[18] Notably, Title VII recognizes that in light of history distinctions on the basis of race are always disadvantageous, but it permits certain dis-

of racial discrimination in this country not to understand what is at stake in such cases . . . . A prohibition on 'race-mixing' was . . . grounded in bigotry against a particular race and was an integral part of preserving the rigid hierarchical distinction that denominated members of the black race as inferior to whites." 883 F. 3d, at 158–159 (Lynch, J., dissenting).

Discrimination because of sexual orientation is different. It cannot be regarded as a form of sex discrimination on the ground that applies in race cases since discrimination because of sexual orientation is not historically tied to a project that aims to subjugate either men or women. An employer who discriminates on this ground might be called "homophobic" or "transphobic," but not sexist. See *Wittmer* v. *Phillips 66 Co.*, 915 F. 3d 328, 338 (CA5 2019) (Ho, J., concurring).

3

The opinion of the Court intimates that the term "sex" was not universally understood in 1964 to refer just to the categories of male and female, see *ante*, at 5, and while the Court does not take up any alternative definition as a ground for its decision, I will say a word on this subject.

As previously noted, the definitions of "sex" in the unabridged dictionaries in use in the 1960s are reproduced in Appendix A, *infra*. Anyone who examines those definitions can see that the primary definition in every one of them refers to the division of living things into two groups, male and female, based on biology, and most of the definitions further down the list are the same or very similar. In addition, some definitions refer to heterosexual sex acts. See

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tinctions based on sex. Title 42 U. S. C. §2000e–2(e)(1) allows for "instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of [a] particular business or enterprise." Race is wholly absent from this list.

Random House Dictionary 1307 ("coitus," "sexual intercourse" (defs. 5–6)); American Heritage Dictionary, at 1187 ("sexual intercourse" (def. 5)).[19]

Aside from these, what is there? One definition, "to neck passionately," Random House Dictionary 1307 (def. 8), refers to sexual conduct that is not necessarily heterosexual. But can it be seriously argued that one of the aims of Title VII is to outlaw employment discrimination against employees, whether heterosexual or homosexual, who engage in necking? And even if Title VII had that effect, that is not what is at issue in cases like those before us.

That brings us to the two remaining subsidiary definitions, both of which refer to sexual urges or instincts and their manifestations. See the fourth definition in the American Heritage Dictionary, at 1187 ("the sexual urge or instinct as it manifests itself in behavior"), and the fourth definition in both Webster's Second and Third ("[p]henomena of sexual instincts and their manifestations," Webster's New International Dictionary, at 2296 (2d ed.); Webster's Third New International Dictionary 2081 (1966)). Since both of these come after three prior definitions that refer to men and women, they are most naturally read to have the same association, and in any event, is it plausible that Title VII prohibits discrimination based on *any* sexual urge or instinct and its manifestations? The urge to rape?

Viewing all these definitions, the overwhelming impact is that discrimination because of "sex" was understood during the era when Title VII was enacted to refer to men and women. (The same is true of current definitions, which are reproduced in Appendix B, *infra*.) This no doubt explains why neither this Court nor any of the lower courts have tried to make much of the dictionary definitions of sex just

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[19] See American Heritage Dictionary 1188 (1969) (defining "sexual intercourse"); Webster's Third New International Dictionary 2082 (1966) (same); Random House Dictionary of the English Language 1308 (1966) (same).

discussed.

II

A

So far, I have not looked beyond dictionary definitions of "sex," but textualists like Justice Scalia do not confine their inquiry to the scrutiny of dictionaries. See Manning, Textualism and the Equity of the Statute, 101 Colum. L. Rev. 1, 109 (2001). Dictionary definitions are valuable because they are evidence of what people at the time of a statute's enactment would have understood its words to mean. *Ibid.* But they are not the only source of relevant evidence, and what matters in the end is the answer to the question that the evidence is gathered to resolve: How would the terms of a statute have been understood by ordinary people at the time of enactment?

Justice Scalia was perfectly clear on this point. The words of a law, he insisted, "mean *what they conveyed to reasonable people at the time*." Reading Law, at 16 (emphasis added).[20]

Leading proponents of Justice Scalia's school of textualism have expounded on this principle and explained that it is grounded on an understanding of the way language works. As Dean John F. Manning explains, "the meaning of language depends on the way a linguistic community uses words and phrases in context." What Divides Textualists From Purposivists? 106 Colum. L. Rev. 70, 78 (2006). "[O]ne can make sense of others' communications only by placing them in their appropriate social and linguistic context," *id.*, at 79–80, and this is no less true of statutes than any other verbal communications. "[S]tatutes convey meaning only because members of a relevant linguistic

[20] See also *Chisom* v. *Roemer*, 501 U. S. 380, 405 (1991) (Scalia, J., dissenting) ("We are to read the words of [a statutory] text as any ordinary Member of Congress would have read them . . . and apply the meaning so determined").

community apply shared background conventions for understanding how particular words are used in particular contexts." Manning, The Absurdity Doctrine, 116 Harv. L. Rev. 2387, 2457 (2003). Therefore, judges should ascribe to the words of a statute "what a reasonable person conversant with applicable social conventions would have understood them to be adopting." Manning, 106 Colum. L. Rev., at 77. Or, to put the point in slightly different terms, a judge interpreting a statute should ask "'what one would ordinarily be understood as saying, given the circumstances in which one said it.'" Manning, 116 Harv. L. Rev., at 2397–2398.

Judge Frank Easterbrook has made the same points:

> "Words are arbitrary signs, having meaning only to the extent writers and readers share an understanding. . . . Language in general, and legislation in particular, is a social enterprise to which both speakers and listeners contribute, drawing on background understandings and the structure and circumstances of the utterance." *Herrmann* v. *Cencom Cable Assocs.*, *Inc.*, 978 F. 2d 978, 982 (CA7 1992).

Consequently, "[s]licing a statute into phrases while ignoring . . . the setting of the enactment . . . is a formula for disaster." *Ibid.*; see also *Continental Can Co.* v. *Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund*, 916 F. 2d 1154, 1157 (CA7 1990) ("You don't have to be Ludwig Wittgenstein or Hans-Georg Gadamer to know that successful communication depends on meanings shared by interpretive communities").

Thus, when textualism is properly understood, it calls for an examination of the social context in which a statute was enacted because this may have an important bearing on what its words were understood to mean at the time of enactment. Textualists do not read statutes as if they were messages picked up by a powerful radio telescope from a

distant and utterly unknown civilization. Statutes consist of communications between members of a particular linguistic community, one that existed in a particular place and at a particular time, and these communications must therefore be interpreted as they were understood by that community at that time.

For this reason, it is imperative to consider how Americans in 1964 would have understood Title VII's prohibition of discrimination because of sex. To get a picture of this, we may imagine this scene. Suppose that, while Title VII was under consideration in Congress, a group of average Americans decided to read the text of the bill with the aim of writing or calling their representatives in Congress and conveying their approval or disapproval. What would these ordinary citizens have taken "discrimination because of sex" to mean? Would they have thought that this language prohibited discrimination because of sexual orientation or gender identity?

B

The answer could not be clearer. In 1964, ordinary Americans reading the text of Title VII would not have dreamed that discrimination because of sex meant discrimination because of sexual orientation, much less gender identity. The *ordinary meaning* of discrimination because of "sex" was discrimination because of a person's biological sex, not sexual orientation or gender identity. The possibility that discrimination on either of these grounds might fit within some exotic understanding of sex discrimination would not have crossed their minds.

1

In 1964, the concept of prohibiting discrimination "because of sex" was no novelty. It was a familiar and well-understood concept, and what it meant was equal treatment for men and women.

Long before Title VII was adopted, many pioneering state and federal laws had used language substantively indistinguishable from Title VII's critical phrase, "discrimination because of sex." For example, the California Constitution of 1879 stipulated that no one, "*on account of sex*, [could] be disqualified from entering upon or pursuing any lawful business, vocation, or profession." Art. XX, §18 (emphasis added). It also prohibited a student's exclusion from any state university department "on account of sex." Art. IX, §9; accord, Mont. Const., Art. XI, §9 (1889).

Wyoming's first Constitution proclaimed broadly that "[b]oth male and female citizens of this state shall equally enjoy all civil, political and religious rights and privileges," Art. VI, §1 (1890), and then provided specifically that "[i]n none of the public schools . . . shall distinction or discrimination be made *on account of sex*," Art. VII, §10 (emphasis added); see also §16 (the "university shall be equally open to students of both sexes"). Washington's Constitution likewise required "ample provision for the education of all children . . . without distinction or preference *on account of* . . . *sex*." Art. IX, §1 (1889) (emphasis added).

The Constitution of Utah, adopted in 1895, provided that the right to vote and hold public office "shall not be denied or abridged *on account of sex*." Art. IV, §1 (emphasis added). And in the next sentence it made clear what "on account of sex" meant, stating that "[b]oth male and female citizens . . . shall enjoy equally all civil, political and religious rights and privileges." *Ibid.*

The most prominent example of a provision using this language was the Nineteenth Amendment, ratified in 1920, which bans the denial or abridgment of the right to vote "on account of sex." U. S. Const., Amdt. 19. Similar language appeared in the proposal of the National Woman's Party for an Equal Rights Amendment. As framed in 1921, this proposal forbade all "political, civil or legal disabilities or inequalities *on account of sex*, [o]r on account of marriage."

Women Lawyers Meet: Representatives of 20 States Endorse Proposed Equal Rights Amendment, N. Y. Times, Sept. 16, 1921, p. 10.

Similar terms were used in the precursor to the Equal Pay Act. Introduced in 1944 by Congresswoman Winifred C. Stanley, it proclaimed that "[d]iscrimination against employees, in rates of compensation paid, *on account of sex*" was "contrary to the public interest." H. R. 5056, 78th Cong., 2d Sess.

In 1952, the new Constitution for Puerto Rico, which was approved by Congress, 66 Stat. 327, prohibited all "discrimination . . . *on account of* . . . *sex*," Art. II, Bill of Rights §1 (emphasis added), and in the landmark Immigration and Nationality Act of 1952, Congress outlawed discrimination in naturalization "*because of* . . . *sex*." 8 U. S. C. §1422 (emphasis added).

In 1958, the International Labour Organisation, a United Nations agency of which the United States is a member, recommended that nations bar employment discrimination "made *on the basis of* . . . *sex*." Convention (No. 111) Concerning Discrimination in Respect of Employment and Occupation, Art. 1(a), June 25, 1958, 362 U. N. T. S. 32 (emphasis added).

In 1961, President Kennedy ordered the Civil Service Commission to review and modify personnel policies "to assure that selection for any career position is hereinafter made solely on the basis of individual merit and fitness, *without regard to sex*."[21] He concurrently established a "Commission on the Status of Women" and directed it to recommend policies "for overcoming discriminations in government and private employment *on the basis of sex*." Exec. Order No. 10980, 3 CFR 138 (1961 Supp.) (emphasis

[21] J. Kennedy, Statement by the President on the Establishment of the President's Commission on the Status of Women 3 (Dec. 14, 1961) (emphasis added), https://www.jfklibrary.org/asset-viewer/archives/JFKPOF/093/JFKPOF-093-004.

added).

In short, the concept of discrimination "because of," "on account of," or "on the basis of" sex was well understood. It was part of the campaign for equality that had been waged by women's rights advocates for more than a century, and what it meant was equal treatment for men and women.[22]

2

Discrimination "because of sex" was not understood as having anything to do with discrimination because of sexual orientation or transgender status. Any such notion would have clashed in spectacular fashion with the societal norms of the day.

For most 21st-century Americans, it is painful to be reminded of the way our society once treated gays and lesbians, but any honest effort to understand what the terms of Title VII were understood to mean when enacted must take into account the societal norms of that time. And the plain truth is that in 1964 homosexuality was thought to be a mental disorder, and homosexual conduct was regarded as morally culpable and worthy of punishment.

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[22] Analysis of the way Title VII's key language was used in books and articles during the relevant time period supports this conclusion. A study searched a vast database of documents from that time to determine how the phrase "discriminate against . . . because of [some trait]" was used. Phillips, The Overlooked Evidence in the Title VII Cases: The Linguistic (and Therefore Textualist) Principle of Compositionality (manuscript, at 3) (May 11, 2020) (brackets in original), https://ssrn.com/abstract=3585940. The study found that the phrase was used to denote discrimination against "someone . . . motivated by prejudice, or biased ideas or attitudes . . . directed at people with that trait in particular." *Id.*, at 7 (emphasis deleted). In other words, "*discriminate against*" was "associated with negative treatment directed at members of a discrete group." *Id.,* at 5. Thus, as used in 1964, "discrimination because of sex" would have been understood to mean discrimination against a woman or a man based on "unfair beliefs or attitudes" about members of that particular sex. *Id.,* at 7.

In its then-most recent Diagnostic and Statistical Manual of Mental Disorders (1952) (DSM–I), the American Psychiatric Association (APA) classified same-sex attraction as a "sexual deviation," a particular type of "sociopathic personality disturbance," *id.*, at 38–39, and the next edition, issued in 1968, similarly classified homosexuality as a "sexual deviatio[n]," Diagnostic and Statistical Manual of Mental Disorders 44 (2d ed.) (DSM–II). It was not until the sixth printing of the DSM–II in 1973 that this was changed.[23]

Society's treatment of homosexuality and homosexual conduct was consistent with this understanding. Sodomy was a crime in every State but Illinois, see W. Eskridge, Dishonorable Passions 387–407 (2008), and in the District of Columbia, a law enacted by Congress made sodomy a felony punishable by imprisonment for up to 10 years and permitted the indefinite civil commitment of "sexual psychopath[s]," Act of June 9, 1948, §§104, 201–207, 62 Stat. 347–349.[24]

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[23] APA, Homosexuality and Sexual Orientation Disturbance: Proposed Change in DSM–II, 6th Printing, p. 44 (APA Doc. Ref. No. 730008, 1973) (reclassifying "homosexuality" as a "[s]exual orientation disturbance," a category "for individuals whose sexual interests are directed primarily toward people of the same sex and who are either disturbed by . . . or wish to change their sexual orientation," and explaining that "homosexuality . . . by itself does not constitute a psychiatric disorder"); see also APA, Diagnostic and Statistical Manual of Mental Disorders 281–282 (3d ed. 1980) (DSM–III) (similarly creating category of "Ego-dystonic Homosexuality" for "homosexuals for whom changing sexual orientation is a persistent concern," while observing that "homosexuality itself is not considered a mental disorder"); *Obergefell* v. *Hodges*, 576 U. S. 644, 661 (2015).

[24] In 1981, after achieving home rule, the District attempted to decriminalize sodomy, see D. C. Act No. 4–69, but the House of Representatives vetoed the bill, H. Res. 208, 97th Cong., 1st Sess. (1981); 127 Cong. Rec. 22764–22779 (1981). Sodomy was not decriminalized in the District until 1995. See Anti-Sexual Abuse Act of 1994, §501(b), 41 D. C. Reg. 53 (1995), enacted as D. C. Law 10–257.

This view of homosexuality was reflected in the rules governing the federal work force. In 1964, federal "[a]gencies could deny homosexual men and women employment because of their sexual orientation," and this practice continued until 1975. GAO, D. Heivilin, Security Clearances: Consideration of Sexual Orientation in the Clearance Process 2 (GAO/NSIAD–95–21, 1995). See, *e.g.*, *Anonymous* v. *Macy*, 398 F. 2d 317, 318 (CA5 1968) (affirming dismissal of postal employee for homosexual acts).

In 1964, individuals who were known to be homosexual could not obtain security clearances, and any who possessed clearances were likely to lose them if their orientation was discovered. A 1953 Executive Order provided that background investigations should look for evidence of "sexual perversion," as well as "[a]ny criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct." Exec. Order No. 10450, §8(a)(1)(iii), 3 CFR 938 (1949–1953 Comp.). "Until about 1991, when agencies began to change their security policies and practices regarding sexual orientation, there were a number of documented cases where defense civilian or contractor employees' security clearances were denied or revoked because of their sexual orientation." GAO, Security Clearances, at 2. See, *e.g.*, *Adams* v. *Laird*, 420 F. 2d 230, 240 (CADC 1969) (upholding denial of security clearance to defense contractor employee because he had "engaged in repeated homosexual acts"); see also *Webster* v. *Doe*, 486 U. S. 592, 595, 601 (1988) (concluding that decision to fire a particular individual because he was homosexual fell within the "discretion" of the Director of Central Intelligence under the National Security Act of 1947 and thus was unreviewable under the APA).

The picture in state employment was similar. In 1964, it was common for States to bar homosexuals from serving as teachers. An article summarizing the situation *15 years after Title VII became law* reported that "[a]ll states have statutes that permit the revocation of teaching certificates

(or credentials) for immorality, moral turpitude, or unprofessionalism," and, the survey added, "[h]omosexuality is considered to fall within all three categories."[25]

The situation in California is illustrative. California laws prohibited individuals who engaged in "immoral conduct" (which was construed to include homosexual behavior), as well as those convicted of "sex offenses" (like sodomy), from employment as teachers. Cal. Educ. Code Ann. §§13202, 13207, 13209, 13218, 13255 (West 1960). The teaching certificates of individuals convicted of engaging in homosexual acts were revoked. See, *e.g.*, *Sarac* v. *State Bd. of Ed.*, 249 Cal. App. 2d 58, 62–64, 57 Cal. Rptr. 69, 72–73 (1967) (upholding revocation of secondary teaching credential from teacher who was convicted of engaging in homosexual conduct on public beach), overruled in part, *Morrison* v. *State Bd. of Ed.*, 1 Cal. 3d 214, 461 P. 2d 375 (1969).

In Florida, the legislature enacted laws authorizing the revocation of teaching certificates for "misconduct involving moral turpitude," Fla. Stat. Ann. §229.08(16) (1961), and this law was used to target homosexual conduct. In 1964, a legislative committee was wrapping up a 6-year campaign to remove homosexual teachers from public schools and state universities. As a result of these efforts, the state board of education apparently revoked at least 71 teachers' certificates and removed at least 14 university professors. Eskridge, Dishonorable Passions, at 103.

Individuals who engaged in homosexual acts also faced the loss of other occupational licenses, such as those needed to work as a "lawyer, doctor, mortician, [or] beautician."[26] See, *e.g.*, *Florida Bar* v. *Kay*, 232 So. 2d 378 (Fla. 1970) (attorney disbarred after conviction for homosexual conduct in

[25] Rivera, Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States, 30 Hastings L. J. 799, 861 (1979).

[26] Eskridge, Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, *Nomos*, and Citizenship, 1961–1981, 25 Hofstra L. Rev. 817, 819 (1997).

public bathroom).

In 1964 and for many years thereafter, homosexuals were barred from the military. See, *e.g.*, Army Reg. 635–89, §I(2)(a) (July 15, 1966) ("Personnel who voluntarily engage in homosexual acts, irrespective of sex, will not be permitted to serve in the Army in any capacity, and their prompt separation is mandatory"); Army Reg. 600–443, §I(2) (April 10, 1953) (similar). Prohibitions against homosexual conduct by members of the military were not eliminated until 2010. See Don't Ask, Don't Tell Repeal Act of 2010, 124 Stat. 3515 (repealing 10 U. S. C. §654, which required members of the Armed Forces to be separated for engaging in homosexual conduct).

Homosexuals were also excluded from entry into the United States. The Immigration and Nationality Act of 1952 (INA) excluded aliens "afflicted with psychopathic personality." 8 U. S. C. §1182(a)(4) (1964 ed.). In *Boutilier* v. *INS*, 387 U. S. 118, 120–123 (1967), this Court, relying on the INA's legislative history, interpreted that term to encompass homosexuals and upheld an alien's deportation on that ground. Three Justices disagreed with the majority's interpretation of the phrase "psychopathic personality."[27] But it apparently did not occur to anyone to argue that the Court's interpretation was inconsistent with the INA's express prohibition of discrimination "because of sex." That was how our society—and this Court—saw things a half century ago. Discrimination because of sex and discrimination because of sexual orientation were viewed as two entirely different concepts.

To its credit, our society has now come to recognize the injustice of past practices, and this recognition provides the impetus to "update" Title VII. But that is not our job. Our

[27] Justices Douglas and Fortas thought that a homosexual is merely "one, who by some freak, is the product of an arrested development." *Boutilier*, 387 U. S., at 127 (Douglas, J., dissenting); see also *id.*, at 125 (Brennan, J., dissenting) (based on lower court dissent).

duty is to understand what the terms of Title VII were understood to mean when enacted, and in doing so, we must take into account the societal norms of that time. We must therefore ask whether ordinary Americans in 1964 would have thought that discrimination because of "sex" carried some exotic meaning under which private-sector employers would be prohibited from engaging in a practice that represented the official policy of the Federal Government with respect to its own employees. We must ask whether Americans at that time would have thought that Title VII banned discrimination against an employee for engaging in conduct that Congress had made a felony and a ground for civil commitment.

The questions answer themselves. Even if discrimination based on sexual orientation or gender identity could be squeezed into some arcane understanding of sex discrimination, the context in which Title VII was enacted would tell us that this is not what the statute's terms were understood to mean at that time. To paraphrase something Justice Scalia once wrote, "our job is not to scavenge the world of English usage to discover whether there is any possible meaning" of discrimination because of sex that might be broad enough to encompass discrimination because of sexual orientation or gender identity. *Chisom* v. *Roemer*, 501 U. S. 380, 410 (1991) (dissenting opinion). Without strong evidence to the contrary (and there is none here), our job is to ascertain and apply the "*ordinary* meaning" of the statute. *Ibid.* And in 1964, ordinary Americans most certainly would not have understood Title VII to ban discrimination because of sexual orientation or gender identity.

The Court makes a tiny effort to suggest that at least some people in 1964 might have seen what Title VII really means. *Ante*, at 26. What evidence does it adduce? One complaint filed in 1969, another filed in 1974, and arguments made in the mid-1970s about the meaning of the Equal Rights Amendment. *Ibid.* To call this evidence

merely feeble would be generous.

C

While Americans in 1964 would have been shocked to learn that Congress had enacted a law prohibiting sexual orientation discrimination, they would have been bewildered to hear that this law also forbids discrimination on the basis of "transgender status" or "gender identity," terms that would have left people at the time scratching their heads. The term "transgender" is said to have been coined "'in the early 1970s,'"[28] and the term "gender identity," now understood to mean "[a]n internal sense of being male, female or something else,"[29] apparently first appeared in an academic article in 1964.[30] Certainly, neither term was in common parlance; indeed, dictionaries of the time still primarily defined the word "gender" by reference to grammatical classifications. See, *e.g.*, American Heritage Dictionary, at 548 (def. 1(a)) ("Any set of two or more categories, such as masculine, feminine, and neuter, into which words are divided . . . and that determine agreement with or the

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[28] Drescher, Transsexualism, Gender Identity Disorder and the DSM, 14 J. Gay & Lesbian Mental Health 109, 110 (2010).

[29] American Psychological Association, 49 Monitor on Psychology, at 32.

[30] Green, Robert Stoller's *Sex and Gender*: 40 Years On, 39 Archives Sexual Behav. 1457 (2010); see Stoller, A Contribution to the Study of Gender Identity, 45 Int'l J. Psychoanalysis 220 (1964). The term appears to have been coined a year or two earlier. See Haig, The Inexorable Rise of Gender and the Decline of Sex: Social Change in Academic Titles, 1945–2001, 33 Archives Sexual Behav. 87, 93 (2004) (suggesting the term was first introduced at 23rd International Psycho-Analytical Congress in Stockholm in 1963); J. Meyerowitz, How Sex Changed 213 (2002) (referring to founding of "Gender Identity Research Clinic" at UCLA in 1962). In his book, Sex and Gender, published in 1968, Robert Stoller referred to "*gender identity*" as "a working term" "associated with" his research team but noted that they were not "fixed on copyrighting the term or on defending the concept as one of the splendors of the scientific world." Sex and Gender, p. viii.

selection of modifiers, referents, or grammatical forms").

While it is likely true that there have always been individuals who experience what is now termed "gender dysphoria," *i.e.*, "[d]iscomfort or distress related to an incongruence between an individual's gender identity and the gender assigned at birth,"[31] the current understanding of the concept postdates the enactment of Title VII. Nothing resembling what is now called gender dysphoria appeared in either DSM–I (1952) or DSM–II (1968). It was not until 1980 that the APA, in DSM–III, recognized two main psychiatric diagnoses related to this condition, "Gender Identity Disorder of Childhood" and "Transsexualism" in adolescents and adults.[32] DSM–III, at 261–266.

The first widely publicized sex reassignment surgeries in the United States were not performed until 1966,[33] and the great majority of physicians surveyed in 1969 thought that an individual who sought sex reassignment surgery was either "'severely neurotic'" or "'psychotic.'"[34]

It defies belief to suggest that the public meaning of discrimination because of sex in 1964 encompassed discrimination on the basis of a concept that was essentially unknown to the public at that time.

D

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The Court's main excuse for entirely ignoring the social context in which Title VII was enacted is that the meaning of Title VII's prohibition of discrimination because of sex is

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[31] American Psychological Association, 49 Monitor on Psychology, at 32.

[32] See Drescher, *supra*, at 112.

[33] Buckley, A Changing of Sex by Surgery Begun at Johns Hopkins, N. Y. Times, Nov. 21, 1966, p. 1, col. 8; see also J. Meyerowitz, How Sex Changed 218–220 (2002).

[34] Drescher, *supra*, at 112 (quoting Green, Attitudes Toward Transsexualism and Sex-Reassignment Procedures, in Transsexualism and Sex Reassignment 241–242 (R. Green & J. Money eds. 1969)).

clear, and therefore it simply does not matter whether people in 1964 were "smart enough to realize" what its language means. *Hively,* 853 F. 3d, at 357 (Posner, J., concurring). According to the Court, an argument that looks to the societal norms of those times represents an impermissible attempt to displace the statutory language. *Ante*, at 25–26.

The Court's argument rests on a false premise. As already explained at length, the text of Title VII does not prohibit discrimination because of sexual orientation or gender identity. And what the public thought about those issues in 1964 is relevant and important, not because it provides a ground for departing from the statutory text, but because it helps to explain what the text was understood to mean when adopted.

In arguing that we must put out of our minds what we know about the time when Title VII was enacted, the Court relies on Justice Scalia's opinion for the Court in *Oncale* v. *Sundowner Offshore Services, Inc.*, 523 U. S. 75 (1998). But *Oncale* is nothing like these cases, and no one should be taken in by the majority's effort to enlist Justice Scalia in its updating project.

The Court's unanimous decision in *Oncale* was thoroughly unremarkable. The Court held that a male employee who alleged that he had been sexually harassed at work by other men stated a claim under Title VII. Although the impetus for Title VII's prohibition of sex discrimination was to protect women, anybody reading its terms would immediately appreciate that it applies equally to both sexes, and by the time *Oncale* reached the Court, our precedent already established that sexual harassment may constitute sex discrimination within the meaning of Title VII. See *Meritor Savings Bank, FSB* v. *Vinson*, 477 U. S. 57 (1986). Given these premises, syllogistic reasoning dictated the holding.

What today's decision latches onto are *Oncale*'s comments about whether "'male-on-male sexual harassment'" was on Congress's mind when it enacted Title VII. *Ante*, at 28 (quoting 523 U. S., at 79). The Court in *Oncale* observed that this specific type of behavior "was assuredly not the *principal evil* Congress was concerned with when it enacted Title VII," but it found that immaterial because "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." 523 U. S., at 79 (emphasis added).

It takes considerable audacity to read these comments as committing the Court to a position on deep philosophical questions about the meaning of language and their implications for the interpretation of legal rules. These comments are better understood as stating mundane and uncontroversial truths. Who would argue that a statute applies only to the "principal evils" and not lesser evils that fall within the plain scope of its terms? Would even the most ardent "purposivists" and fans of legislative history contend that congressional intent is restricted to Congress's "*principal* concerns"?

Properly understood, *Oncale* does not provide the slightest support for what the Court has done today. For one thing, it would be a wild understatement to say that discrimination because of sexual orientation and transgender status was not the "principal evil" on Congress's mind in 1964. Whether we like to admit it now or not, in the thinking of Congress and the public at that time, such discrimination would not have been evil at all.

But the more important difference between these cases and *Oncale* is that here the interpretation that the Court adopts does not fall within the ordinary meaning of the statutory text as it would have been understood in 1964. To

decide for the defendants in *Oncale*, it would have been necessary to carve out an exception to the statutory text. Here, no such surgery is at issue. Even if we totally disregard the societal norms of 1964, the text of Title VII does not support the Court's holding. And the reasoning of *Oncale* does not preclude or counsel against our taking those norms into account. They are relevant, not for the purpose of creating an exception to the terms of the statute, but for the purpose of better appreciating how those terms would have been understood at the time.

2

The Court argues that two other decisions—*Phillips* v. *Martin Marietta Corp.*, 400 U. S. 542 (1971) (*per curiam*), and *Los Angeles Dept. of Water and Power* v. *Manhart*, 435 U. S. 702 (1978)—buttress its decision, but those cases merely held that Title VII prohibits employer conduct that plainly constitutes discrimination because of biological sex. In *Philips*, the employer treated women with young children less favorably than men with young children. In *Manhart*, the employer required women to make larger pension contributions than men. It is hard to see how these holdings assist the Court.

The Court extracts three "lessons" from *Phillips*, *Manhart*, and *Oncale*, but none sheds any light on the question before us. The first lesson is that "it's irrelevant what an employer might call its discriminatory practice, how others might label it, or what else might motivate it." *Ante*, at 14. This lesson is obviously true but proves nothing. As to the label attached to a practice, has anyone ever thought that the application of a law to a person's conduct depends on how it is labeled? Could a bank robber escape conviction by saying he was engaged in asset enhancement? So if an employer discriminates because of sex, the employer is liable no matter what it calls its conduct, but if the employer's

conduct is not sex discrimination, the statute does not apply. Thus, this lesson simply takes us back to the question whether discrimination because of sexual orientation or gender identity is a form of discrimination because of biological sex. For reasons already discussed, see Part I–A, *supra*, it is not.

It likewise proves nothing of relevance here to note that an employer cannot escape liability by showing that discrimination on a prohibited ground was not its sole motivation. So long as a prohibited ground was a motivating factor, the existence of other motivating factors does not defeat liability.

The Court makes much of the argument that "[i]n *Phillips*, the employer could have accurately spoken of its policy as one based on 'motherhood.'" *Ante*, at 14; see also *ante,* at 16. But motherhood, by definition, is a condition that can be experienced only by women, so a policy that distinguishes between motherhood and parenthood is necessarily a policy that draws a sex-based distinction. There was sex discrimination in *Phillips*, because women with children were treated disadvantageously compared to men with children.

Lesson number two—"the plaintiff's sex need not be the sole or primary cause of the employer's adverse action," *ante*, at 14—is similarly unhelpful. The standard of causation in these cases is whether sex is necessarily a "motivating factor" when an employer discriminates on the basis of sexual orientation or gender identity. 42 U. S. C. §2000e–2(m). But the essential question—whether discrimination because of sexual orientation or gender identity constitutes sex discrimination—would be the same no matter what causation standard applied. The Court's extensive discussion of causation standards is so much smoke.

Lesson number three—"an employer cannot escape liability by demonstrating that it treats males and females comparably as groups," *ante*, at 15, is also irrelevant. There

is no dispute that discrimination against an individual employee based on that person's sex cannot be justified on the ground that the employer's treatment of the average employee of that sex is at least as favorable as its treatment of the average employee of the opposite sex. Nor does it matter if an employer discriminates against only a subset of men or women, where the same subset of the opposite sex is treated differently, as in *Phillips*. That is not the issue here. An employer who discriminates equally on the basis of sexual orientation or gender identity applies the same criterion to every affected *individual* regardless of sex. See Part I–A, *supra*.

III

A

Because the opinion of the Court flies a textualist flag, I have taken pains to show that it cannot be defended on textualist grounds. But even if the Court's textualist argument were stronger, that would not explain today's decision. Many Justices of this Court, both past and present, have not espoused or practiced a method of statutory interpretation that is limited to the analysis of statutory text. Instead, when there is ambiguity in the terms of a statute, they have found it appropriate to look to other evidence of "congressional intent," including legislative history.

So, why in these cases are congressional intent and the legislative history of Title VII totally ignored? Any assessment of congressional intent or legislative history seriously undermines the Court's interpretation.

B

As the Court explained in *General Elec. Co.* v. *Gilbert*, 429 U. S. 125, 143 (1976), the legislative history of Title VII's prohibition of sex discrimination is brief, but it is nevertheless revealing. The prohibition of sex discrimination was "added to Title VII at the last minute on the floor of the

House of Representatives," *Meritor Savings Bank*, 477 U. S., at 63, by Representative Howard Smith, the Chairman of the Rules Committee. See 110 Cong. Rec. 2577 (1964). Representative Smith had been an ardent opponent of the civil rights bill, and it has been suggested that he added the prohibition against discrimination on the basis of "sex" as a poison pill. See, *e.g.*, *Ulane* v. *Eastern Airlines, Inc.*, 742 F. 2d 1081, 1085 (CA7 1984). On this theory, Representative Smith thought that prohibiting employment discrimination against women would be unacceptable to Members who might have otherwise voted in favor of the bill and that the addition of this prohibition might bring about the bill's defeat.[35] But if Representative Smith had been looking for a poison pill, prohibiting discrimination on the basis of sexual orientation or gender identity would have been far more potent. However, neither Representative Smith nor any other Member said one word about the possibility that the prohibition of sex discrimination might have that meaning. Instead, all the debate concerned discrimination on the basis of biological sex.[36] See 110 Cong. Rec. 2577–2584.

Representative Smith's motivations are contested, 883 F. 3d, at 139–140 (Lynch, J., dissenting), but whatever they

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[35] See Osterman, Origins of a Myth: Why Courts, Scholars, and the Public Think Title VII's Ban on Sex Discrimination Was an Accident, 20 Yale J. L. & Feminism 409, 409–410 (2009).

[36] Recent scholarship has linked the adoption of the Smith Amendment to the broader campaign for women's rights that was underway at the time. *E.g.*, Osterman, *supra*; Freeman, How Sex Got Into Title VII: Persistent Opportunism as a Maker of Public Policy, 9 L. & Ineq. 163 (1991); Barzilay, Parenting Title VII: Rethinking the History of the Sex Discrimination Provision, 28 Yale J. L. & Feminism 55 (2016); Gold, A Tale of Two Amendments: The Reasons Congress Added Sex to Title VII and Their Implication for the Issue of Comparable Worth, 19 Duquesne L. Rev. 453 (1981). None of these studies has unearthed evidence that the amendment was understood to apply to discrimination because of sexual orientation or gender identity.

were, the meaning of *the adoption of the prohibition* of sex discrimination is clear. It was no accident. It grew out of "a long history of women's rights advocacy that had increasingly been gaining mainstream recognition and acceptance," and it marked a landmark achievement in the path toward fully equal rights for women. *Id.*, at 140. "Discrimination against gay women and men, by contrast, was not on the table for public debate . . . [i]n those dark, pre-Stonewall days." *Ibid.*

For those who regard congressional intent as the touchstone of statutory interpretation, the message of Title VII's legislative history cannot be missed.

C

Post-enactment events only clarify what was apparent when Title VII was enacted. As noted, bills to add "sexual orientation" to Title VII's list of prohibited grounds were introduced in every Congress beginning in 1975, see *supra*, at 2, and two such bills were before Congress in 1991[37] when it made major changes in Title VII. At that time, the three Courts of Appeals to reach the issue had held that Title VII does not prohibit discrimination because of sexual orientation,[38] two other Circuits had endorsed that interpretation in dicta,[39] and no Court of Appeals had held otherwise. Similarly, the three Circuits to address the application of Title VII to transgender persons had all rejected the argument

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[37] H. R. 1430, 102d Cong., 1st Sess., §2(d) (as introduced in the House on Mar. 13, 1991); S. 574, 102d Cong., 1st Sess., §5 (as introduced in the Senate on Mar. 6, 1991).

[38] See *Williamson* v. *A. G. Edwards & Sons, Inc.*, 876 F. 2d 69, 70 (CA8 1989) (*per curiam*), cert. denied, 493 U. S. 1089 (1990); *DeSantis* v. *Pacific Tel. & Tel. Co.*, 608 F. 2d 327, 329–330 (CA9 1979); *Blum* v. *Gulf Oil Corp.*, 597 F. 2d 936, 938 (CA5 1979) (*per curiam*).

[39] *Ruth* v. *Children's Med. Ctr.*, 1991 WL 151158, *5 (CA6, Aug. 8, 1991) (*per curiam*); *Ulane* v. *Eastern Airlines, Inc.*, 742 F. 2d 1081, 1084–1085 (CA7 1984), cert. denied, 471 U. S. 1017 (1985).

that it covered discrimination on this basis.[40] These were also the positions of the EEOC.[41] In enacting substantial changes to Title VII, the 1991 Congress abrogated numerous judicial decisions with which it disagreed. If it also disagreed with the decisions regarding sexual orientation and transgender discrimination, it could have easily overruled those as well, but it did not do so.[42]

After 1991, six other Courts of Appeals reached the issue of sexual orientation discrimination, and until 2017, every single Court of Appeals decision understood Title VII's prohibition of "discrimination because of sex" to mean discrimination because of biological sex. See, *e.g.*, *Higgins* v. *New Balance Athletic Shoe, Inc.*, 194 F. 3d 252, 259 (CA1 1999); *Simonton* v. *Runyon*, 232 F. 3d 33, 36 (CA2 2000); *Bibby* v. *Philadelphia Coca Cola Bottling Co.*, 260 F. 3d 257, 261 (CA3 2001), cert. denied, 534 U. S. 1155 (2002); *Wrightson* v. *Pizza Hut of Am., Inc.*, 99 F. 3d 138, 143 (CA4 1996); *Hamm* v. *Weyauwega Milk Products, Inc.*, 332 F. 3d 1058, 1062 (CA7 2003); *Medina* v. *Income Support Div., N. M.*, 413 F. 3d 1131, 1135 (CA10 2005); *Evans* v. *Georgia Regional Hospital*, 850 F. 3d 1248, 1255 (CA11), cert. denied, 583 U. S. ___ (2017). Similarly, the other Circuit to formally address whether Title VII applies to claims of discrimination based on transgender status had also rejected the argument, creating unanimous consensus prior to the Sixth Circuit's decision below. See *Etsitty* v. *Utah Transit Authority*, 502 F. 3d 1215, 1220–1221 (CA10

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[40] See *Ulane*, 742 F. 2d, at 1084–1085; *Sommers* v. *Budget Mktg., Inc.*, 667 F. 2d 748, 750 (CA8 1982) (*per curiam*); *Holloway* v. *Arthur Andersen & Co.*, 566 F. 2d 659, 661–663 (CA9 1977).

[41] *Dillon* v. *Frank*, 1990 WL 1111074, *3–*4 (EEOC, Feb. 14, 1990); *LaBate* v. *USPS*, 1987 WL 774785, *2 (EEOC, Feb. 11, 1987).

[42] In more recent legislation, when Congress has wanted to reach acts committed because of sexual orientation or gender identity, it has referred to those grounds by name. See, *e.g.*, 18 U. S. C. §249(a)(2)(A) (hate crimes) (enacted 2009); 34 U. S. C. §12291(b)(13)(A) (certain federally funded programs) (enacted 2013).

2007).

The Court observes that "[t]he people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms," *ante*, at 24, but it has no qualms about disregarding over 50 years of uniform judicial interpretation of Title VII's plain text. Rather, the Court makes the jaw-dropping statement that its decision exemplifies "judicial humility." *Ante*, at 31. Is it humble to maintain, not only that Congress did not understand the terms it enacted in 1964, but that all the Circuit Judges on all the pre-2017 cases could not see what the phrase discrimination "because of sex" really means? If today's decision is humble, it is sobering to imagine what the Court might do if it decided to be bold.

IV

What the Court has done today—interpreting discrimination because of "sex" to encompass discrimination because of sexual orientation or gender identity—is virtually certain to have far-reaching consequences. Over 100 federal statutes prohibit discrimination because of sex. See Appendix C, *infra*; *e.g.*, 20 U. S. C. §1681(a) (Title IX); 42 U. S. C. §3631 (Fair Housing Act); 15 U. S. C. 1691(a)(1) (Equal Credit Opportunity Act). The briefs in these cases have called to our attention the potential effects that the Court's reasoning may have under some of these laws, but the Court waves those considerations aside. As to Title VII itself, the Court dismisses questions about "bathrooms, locker rooms, or anything else of the kind." *Ante*, at 31. And it declines to say anything about other statutes whose terms mirror Title VII's.

The Court's brusque refusal to consider the consequences of its reasoning is irresponsible. If the Court had allowed the legislative process to take its course, Congress would have had the opportunity to consider competing interests and might have found a way of accommodating at least

some of them. In addition, Congress might have crafted special rules for some of the relevant statutes. But by intervening and proclaiming categorically that employment discrimination based on sexual orientation or gender identity is simply a form of discrimination because of sex, the Court has greatly impeded—and perhaps effectively ended—any chance of a bargained legislative resolution. Before issuing today's radical decision, the Court should have given some thought to where its decision would lead.

As the briefing in these cases has warned, the position that the Court now adopts will threaten freedom of religion, freedom of speech, and personal privacy and safety. No one should think that the Court's decision represents an unalloyed victory for individual liberty.

I will briefly note some of the potential consequences of the Court's decision, but I do not claim to provide a comprehensive survey or to suggest how any of these issues should necessarily play out under the Court's reasoning.[43]

"[B]athrooms, locker rooms, [and other things] of [that] kind." The Court may wish to avoid this subject, but it is a matter of concern to many people who are reticent about disrobing or using toilet facilities in the presence of individuals whom they regard as members of the opposite sex. For some, this may simply be a question of modesty, but for others, there is more at stake. For women who have been victimized by sexual assault or abuse, the experience of seeing an unclothed person with the anatomy of a male in a confined and sensitive location such as a bathroom or locker room can cause serious psychological harm.[44]

Under the Court's decision, however, transgender persons will be able to argue that they are entitled to use a bathroom or locker room that is reserved for persons of the

[43] Contrary to the implication in the Court's opinion, I do not label these potential consequences "undesirable." *Ante*, at 31. I mention them only as possible implications of the Court's reasoning.

[44] Brief for Defend My Privacy et al. as *Amici Curiae* 7–10.

sex with which they identify, and while the Court does not define what it means by a transgender person, the term may apply to individuals who are "gender fluid," that is, individuals whose gender identity is mixed or changes over time.[45] Thus, a person who has not undertaken any physical transitioning may claim the right to use the bathroom or locker room assigned to the sex with which the individual identifies at that particular time. The Court provides no clue why a transgender person's claim to such bathroom or locker room access might not succeed.

A similar issue has arisen under Title IX, which prohibits sex discrimination by any elementary or secondary school and any college or university that receives federal financial assistance.[46] In 2016, a Department of Justice advisory warned that barring a student from a bathroom assigned to individuals of the gender with which the student identifies constitutes unlawful sex discrimination,[47] and some lower court decisions have agreed. See *Whitaker* v. *Kenosha Unified School Dist. No. 1 Bd. of Ed.*, 858 F. 3d 1034, 1049 (CA7 2017); *G. G.* v. *Gloucester Cty. School Bd.*, 822 F. 3d 709, 715 (CA4 2016), vacated and remanded, 580 U. S. ___ (2017); *Adams* v. *School Bd. of St. Johns Cty.*, 318 F. Supp. 3d 1293, 1325 (MD Fla. 2018); cf. *Doe* v. *Boyertown Area*

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[45] See 1 Sadock, Comprehensive Textbook of Psychiatry, at 2063 (explaining that "gender is now often regarded as more *fluid*" and "[t]hus, gender identity may be described as masculine, feminine, or somewhere in between").

[46] Title IX makes it unlawful to discriminate on the basis of sex in education: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U. S. C. §1681(a).

[47] See Dept. of Justice & Dept. of Education, Dear Colleague Letter on Transgender Students, May 13, 2016 (Dear Colleague Letter), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf.

School Dist., 897 F. 3d 518, 533 (CA3 2018), cert. denied, 587 U. S. ___ (2019).

Women's sports. Another issue that may come up under both Title VII and Title IX is the right of a transgender individual to participate on a sports team or in an athletic competition previously reserved for members of one biological sex.[48] This issue has already arisen under Title IX, where it threatens to undermine one of that law's major achievements, giving young women an equal opportunity to participate in sports. The effect of the Court's reasoning may be to force young women to compete against students who have a very significant biological advantage, including students who have the size and strength of a male but identify as female and students who are taking male hormones in order to transition from female to male. See, *e.g.*, Complaint in *Soule* v. *Connecticut Assn. of Schools*, No. 3:20–cv–00201 (D Conn., Apr. 17, 2020) (challenging Connecticut policy allowing transgender students to compete in girls' high school sports); Complaint in *Hecox* v. *Little*, No. 1:20–cv–00184 (D Idaho, Apr. 15, 2020) (challenging state law that bars transgender students from participating in school sports in accordance with gender identity). Students in these latter categories have found success in athletic competitions reserved for females.[49]

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[48] A regulation allows single-sex teams, 34 CFR §106.41(b) (2019), but the statute itself would of course take precedence.

[49] "[S]ince 2017, two biological males [in Connecticut] have collectively won 15 women's state championship titles (previously held by ten different Connecticut girls) against biologically female track athletes." Brief for Independent Women's Forum et al. as *Amici Curiae* in No. 18–107, pp. 14–15.

At the college level, a transgendered woman (biological male) switched from competing on the men's Division II track team to the women's Division II track team at Franklin Pierce University in New Hampshire after taking a year of testosterone suppressants. While this student had placed "eighth out of nine male athletes in the 400 meter hurdles the

The logic of the Court's decision could even affect professional sports. Under the Court's holding that Title VII prohibits employment discrimination because of transgender status, an athlete who has the physique of a man but identifies as a woman could claim the right to play on a women's professional sports team. The owners of the team might try to claim that biological sex is a bona fide occupational qualification (BFOQ) under 42 U. S. C. §2000e–2(e), but the BFOQ exception has been read very narrowly. See *Dothard* v. *Rawlinson*, 433 U. S. 321, 334 (1977).

Housing. The Court's decision may lead to Title IX cases against any college that resists assigning students of the opposite biological sex as roommates. A provision of Title IX, 20 U. S. C. §1686, allows schools to maintain "separate living facilities for the different sexes," but it may be argued that a student's "sex" is the gender with which the student identifies.[50] Similar claims may be brought under the Fair Housing Act. See 42 U. S. C. §3604.

Employment by religious organizations. Briefs filed by a wide range of religious groups—Christian, Jewish, and Muslim—express deep concern that the position now adopted by the Court "will trigger open conflict with faith-

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year before, the student won the women's competition by over a second and a half—a time that had garnered tenth place in the men's conference meet just three years before." *Id.*, at 15.

A transgender male—*i.e.*, a biological female who was in the process of transitioning to male and actively taking testosterone injections—won the Texas girls' state championship in high school wrestling in 2017. Babb, Transgender Issue Hits Mat in Texas, Washington Post, Feb. 26, 2017, p. A1, col. 1.

[50] Indeed, the 2016 advisory letter issued by the Department of Justice took the position that under Title IX schools "must allow transgender students to access housing consistent with their gender identity." Dear Colleague Letter 4.

based employment practices of numerous churches, synagogues, mosques, and other religious institutions."[51] They argue that "[r]eligious organizations need employees who actually live the faith,"[52] and that compelling a religious organization to employ individuals whose conduct flouts the tenets of the organization's faith forces the group to communicate an objectionable message.

This problem is perhaps most acute when it comes to the employment of teachers. A school's standards for its faculty "communicate a particular way of life to its students," and a "violation by the faculty of those precepts" may undermine the school's "moral teaching."[53] Thus, if a religious school teaches that sex outside marriage and sex reassignment procedures are immoral, the message may be lost if the school employs a teacher who is in a same-sex relationship or has undergone or is undergoing sex reassignment. Yet today's decision may lead to Title VII claims by such teachers and applicants for employment.

At least some teachers and applicants for teaching positions may be blocked from recovering on such claims by the "ministerial exception" recognized in *Hosanna-Tabor Evangelical Lutheran Church and School* v. *EEOC*, 565 U. S. 171 (2012). Two cases now pending before the Court present the question whether teachers who provide religious instruction can be considered to be "ministers."[54] But even if teachers with those responsibilities qualify, what about other very visible school employees who may not qualify for

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[51] Brief for National Association of Evangelicals et al. as *Amici Curiae* 3; see also Brief for United States Conference of Catholic Bishops et al. as *Amici Curiae* in No. 18–107, pp. 8–18.

[52] Brief for National Association of Evangelicals et al. as *Amici Curiae* 7.

[53] McConnell, Academic Freedom in Religious Colleges and Universities, 53 Law & Contemp. Prob. 303, 322 (1990).

[54] See *Our Lady of Guadalupe School* v. *Morrissey-Berru*, No. 19–267; *St. James School* v. *Biel*, No. 19–348.

the ministerial exception? Provisions of Title VII provide exemptions for certain religious organizations and schools "with respect to the employment of individuals of a particular religion to perform work connected with the carrying on" of the "activities" of the organization or school, 42 U. S. C. §2000e–1(a); see also §2000e–2(e)(2), but the scope of these provisions is disputed, and as interpreted by some lower courts, they provide only narrow protection.[55]

Healthcare. Healthcare benefits may emerge as an intense battleground under the Court's holding. Transgender employees have brought suit under Title VII to challenge employer-provided health insurance plans that do not cover costly sex reassignment surgery.[56] Similar claims have been brought under the Affordable Care Act (ACA), which broadly prohibits sex discrimination in the provision of healthcare.[57]

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[55] See, *e.g.*, *EEOC* v. *Kamehameha Schools/Bishop Estate*, 990 F. 2d 458, 460 (CA9 1993); *EEOC* v. *Fremont Christian School*, 781 F. 2d 1362, 1365–1367 (CA9 1986); *Rayburn* v. *General Conference of Seventh-day Adventists*, 772 F. 2d 1164, 1166 (CA4 1985); *EEOC* v. *Mississippi College*, 626 F. 2d 477, 484–486 (CA5 1980); see also Brief for United States Conference of Catholic Bishops et al. as *Amici Curiae* in No. 18–107, at 30, n. 28 (discussing disputed scope). In addition, 42 U. S. C. §2000e–2(e)(1) provides that religion may be a BFOQ, and allows religious schools to hire religious employees, but as noted, the BFOQ exception has been read narrowly. See *supra*, at 48.

[56] See, *e.g.*, Amended Complaint in *Toomey* v. *Arizona*, No. 4:19–cv–00035 (D Ariz., Mar. 2, 2020). At least one District Court has already held that a state health insurance policy that does not provide coverage for sex reassignment surgery violates Title VII. *Fletcher* v. *Alaska*, ___ F. Supp. 3d ___, ___, 2020 WL 2487060, *5 (D Alaska, Mar. 6, 2020).

[57] See, *e.g.*, Complaint in *Conforti* v. *St. Joseph's Healthcare System*, No. 2:17–cv–00050 (D NJ, Jan. 5, 2017) (transgender man claims discrimination under the ACA because a Catholic hospital refused to allow a surgeon to perform a hysterectomy). And multiple District Courts have already concluded that the ACA requires health insurance coverage for sex reassignment surgery and treatment. *Kadel* v. *Folwell*, ___ F. Supp. 3d ___, ___, 2020 WL 1169271, *12 (MDNC, Mar. 11, 2020) (allowing

Such claims present difficult religious liberty issues because some employers and healthcare providers have strong religious objections to sex reassignment procedures, and therefore requiring them to pay for or to perform these procedures will have a severe impact on their ability to honor their deeply held religious beliefs.

Freedom of speech. The Court's decision may even affect the way employers address their employees and the way teachers and school officials address students. Under established English usage, two sets of sex-specific singular personal pronouns are used to refer to someone in the third person (he, him, and his for males; she, her, and hers for females). But several different sets of gender-neutral pronouns have now been created and are preferred by some individuals who do not identify as falling into either of the two traditional categories.[58] Some jurisdictions, such as

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claims of discrimination under ACA, Title IX, and Equal Protection Clause); *Tovar* v. *Essentia Health*, 342 F. Supp. 3d 947, 952–954 (D Minn. 2018) (allowing ACA claim).

Section 1557 of the ACA, 42 U. S. C. §18116, provides:

"Except as otherwise provided for in this title (or an amendment made by this title), an individual shall not, on the ground prohibited under title VI of the Civil Rights Act of 1964 (42 U. S. C. 2000d et seq.), title IX of the Education Amendments of 1972 (20 U. S. C. 1681 et seq.), the Age Discrimination Act of 1975 (42 U. S. C. 6101 et seq.), or section 794 of title 29, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title (or amendments). The enforcement mechanisms provided for and available under such title VI, title IX, section 794, or such Age Discrimination Act shall apply for purposes of violations of this subsection." (Footnote omitted.)

[58] See, *e.g.*, University of Wisconsin Milwaukee Lesbian, Gay, Bisexual, Transgender, Queer Plus (LGBTQ+) Resource Center, Gender Pronouns (2020), https://uwm.edu/lgbtrc/support/gender-pronouns/ (listing six new categories of pronouns: (f)ae, (f)aer, (f)aers; e/ey, em, eir, eirs; per, pers;

New York City, have ordinances making the failure to use an individual's preferred pronoun a punishable offense,[59] and some colleges have similar rules.[60] After today's decision, plaintiffs may claim that the failure to use their preferred pronoun violates one of the federal laws prohibiting sex discrimination. See *Prescott* v. *Rady Children's Hospital San Diego*, 265 F. Supp. 3d 1090, 1098–1100 (SD Cal. 2017) (hospital staff's refusal to use preferred pronoun violates ACA).[61]

The Court's decision may also pressure employers to suppress any statements by employees expressing disapproval of same-sex relationships and sex reassignment procedures. Employers are already imposing such restrictions voluntarily, and after today's decisions employers will fear

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ve, ver, vis; xe, xem, xyr, xyrs; ze/zie, hir, hirs).

[59] See 47 N. Y. C. R. R. §2–06(a) (2020) (stating that a "deliberate refusal to use an individual's self-identified name, pronoun and gendered title" is a violation of N. Y. C. Admin. Code §8–107 "where the refusal is motivated by the individual's gender"); see also N. Y. C. Admin. Code §§8–107(1), (4), (5) (2020) (making it unlawful to discriminate on the basis of "gender" in employment, housing, and public accommodations); cf. D. C. Mun. Regs., tit. 4, §801.1 (2020) (making it "unlawful . . . to discriminate . . . on the basis of . . . actual or perceived gender identity or expression" in "employment, housing, public accommodations, or educational institutions" and further proscribing "engaging in verbal . . . harassment").

[60] See University of Minn., Equity and Access: Gender Identity, Gender Expression, Names, and Pronouns, Administrative Policy (Dec. 11, 2019), https://policy.umn.edu/operations/genderequity ("University members and units are expected to use the names, gender identities, and pronouns specified to them by other University members, except as legally required"); *Meriwether* v. *Trustees of Shawnee State Univ.*, 2020 WL 704615, *1 (SD Ohio, Feb. 12, 2020) (rejecting First Amendment challenge to university's nondiscrimination policy brought by evangelical Christian professor who was subjected to disciplinary actions for failing to use student's preferred pronouns).

[61] Cf. Notice of Removal in *Vlaming* v. *West Point School Board*, No. 3:19–cv–00773 (ED Va., Oct. 22, 2019) (contending that high school teacher's firing for failure to use student's preferred pronouns was based on nondiscrimination policy adopted pursuant to Title IX).

that allowing employees to express their religious views on these subjects may give rise to Title VII harassment claims.

Constitutional claims. Finally, despite the important differences between the Fourteenth Amendment and Title VII, the Court's decision may exert a gravitational pull in constitutional cases. Under our precedents, the Equal Protection Clause prohibits sex-based discrimination unless a "heightened" standard of review is met. *Sessions* v. *Morales-Santana*, 582 U. S. ___, ___ (2017) (slip op., at 8); *United States* v. *Virginia*, 518 U. S. 515, 532–534 (1996). By equating discrimination because of sexual orientation or gender identity with discrimination because of sex, the Court's decision will be cited as a ground for subjecting all three forms of discrimination to the same exacting standard of review.

Under this logic, today's decision may have effects that extend well beyond the domain of federal anti-discrimination statutes. This potential is illustrated by pending and recent lower court cases in which transgender individuals have challenged a variety of federal, state, and local laws and policies on constitutional grounds. See, *e.g.*, Complaint in *Hecox*, No. 1: 20–CV–00184 (state law prohibiting transgender students from competing in school sports in accordance with their gender identity); Second Amended Complaint in *Karnoski* v. *Trump*, No. 2:17–cv–01297 (WD Wash., July 31, 2019) (military's ban on transgender members); *Kadel* v. *Folwell*, ___ F. Supp. 3d ___, ___–___, 2020 WL 1169271, *10–*11 (MDNC, Mar. 11, 2020) (state health plan's exclusion of coverage for sex reassignment procedures); Complaint in *Gore* v. *Lee*, No. 3:19–cv–00328 (MD Tenn., Mar. 3, 2020) (change of gender on birth certificates); Brief for Appellee in *Grimm* v. *Gloucester Cty. School Bd.*, No. 19–1952 (CA4, Nov. 18, 2019) (transgender student forced to use gender neutral bathrooms at school); Complaint in *Corbitt* v. *Taylor*, No. 2:18–cv–00091 (MD Ala.,

July 25, 2018) (change of gender on driver's licenses); *Whitaker*, 858 F. 3d, at 1054 (school policy requiring students to use the bathroom that corresponds to the sex on birth certificate); *Keohane* v. *Florida Dept. of Corrections Secretary*, 952 F. 3d 1257, 1262–1265 (CA11 2020) (transgender prisoner denied hormone therapy and ability to dress and groom as a female); *Edmo* v. *Corizon, Inc.*, 935 F. 3d 757, 767 (CA9 2019) (transgender prisoner requested sex reassignment surgery); cf. *Glenn* v. *Brumby*, 663 F. 3d 1312, 1320 (CA11 2011) (transgender individual fired for gender non-conformity).

Although the Court does not want to think about the consequences of its decision, we will not be able to avoid those issues for long. The entire Federal Judiciary will be mired for years in disputes about the reach of the Court's reasoning.

* * *

The updating desire to which the Court succumbs no doubt arises from humane and generous impulses. Today, many Americans know individuals who are gay, lesbian, or transgender and want them to be treated with the dignity, consideration, and fairness that everyone deserves. But the authority of this Court is limited to saying what the law *is*.

The Court itself recognizes this:

> "The place to make new legislation . . . lies in Congress. When it comes to statutory interpretation, our role is limited to applying the law's demands as faithfully as we can in the cases that come before us." *Ante*, at 31.

It is easy to utter such words. If only the Court would live by them.

I respectfully dissent.

APPENDIXES
A

Webster's New International Dictionary 2296 (2d ed. 1953):

sex (sĕks), *n.* [F. *sexe*, fr. L. *sexus;* prob. orig., division, and akin to L. *secare* to cut. See SECTION.] **1.** One of the two divisions of organisms formed on the distinction of male and female; males or females collectively. **2.** The sum of the peculiarities of structure and function that distinguish a male from a female organism; the character of being male or female, or of pertaining to the distinctive function of the male or female in reproduction. *Conjugation,* or *fertilization* (union of germplasm of two individuals), a process evidently of great but not readily explainable importance in the perpetuation of most organisms, seems to be the function of differentiation of sex, which occurs in nearly all organisms at least at some stage in their life history. Sex is manifested in the conjugating cells by the larger size, abundant food material, and immobility of the female gamete (*egg*, *egg cell*, or *ovum*), and the small size and the locomotive power of the male gamete (*spermatozoon* or *spermatozoid*), and in the adult organisms often by many structural, physiological, and (in higher forms) psychological characters, aside from the necessary modification of the reproductive apparatus. Cf. HERMAPHRODITE, 1. In botany the term *sex* is often extended to the distinguishing peculiarities of staminate and pistillate flowers, and hence in dioecious plants to the individuals bearing them.

In many animals and plants the body and germ cells have been shown to contain one or more chromosomes of a special kind (called *sex chromosomes; idiochromosomes; accessory chromosomes*) in addition to the ordinary paired autosomes. These special chromosomes serve to

determine sex. In the simplest case, the male germ cells are of two types, one with and one without a single extra chromosome (*X chromosome*, or *monosome*). The egg cells in this case all possess an *X chromosome*, and on fertilization by the two types of sperm, male and female zygotes result, of respective constitution *X*, and *XX*. In many other animals and plants (probably including man) the male organism produces two types of gametes, one possessing an *X chromosome*, the other a *Y chromosome*, these being visibly different members of a pair of chromosomes present in the diploid state. In this case also, the female organism is *XX*, the eggs *X*, and the zygotes respectively male (*XY*) and female (*XX*). In another type of sex determination, as in certain moths and possibly in the fowl, the female produces two kinds of eggs, the male only one kind of sperm. Each type of egg contains one member of a pair of differentiated chromosomes, called respectively *Z chromosomes* and *W chromosomes*, while all the sperm cells contain a *Z* chromosome. In fertilization, union of a *Z* with a *W* gives rise to a female, while union of two *Z* chromosomes produces a male. Cf. SECONDARY SEX CHARACTER.

3. a The sphere of behavior dominated by the relations between male and female. **b** *Psychoanalysis*. By extension, the whole sphere of behavior related even indirectly to the sexual functions and embracing all affectionate and pleasure-seeking conduct.

4. Phenomena of sexual instincts and their manifestations.

5. Sect;—a confused use.

Syn.—SEX, GENDER. SEX refers to physiological distinctions; GENDER, to distinctions in grammar.

—the sex. The female sex; women, in general.

sex, *adj.* Based on or appealing to sex.

sex, *v. t.* To determine the sex of, as skeletal remains.

Webster's Third New International Dictionary 2081 (1966):

[1]**sex** \'seks\ n –*ES often attrib* [ME, fr. L *sexus;* prob. akin to L *secare* to cut–more at SAW] **1:** one of the two divisions of organic esp. human beings respectively designated male or female <a member of the opposite ~> **2:** the sum of the morphological, physiological, and behavioral peculiarities of living beings that subserves biparental reproduction with its concomitant genetic segregation and recombination which underlie most evolutionary change, that in its typical dichotomous occurrence is usu. genetically controlled and associated with special sex chromosomes, and that is typically manifested as maleness and femaleness with one or the other of these being present in most higher animals though both may occur in the same individual in many plants and some invertebrates and though no such distinction can be made in many lower forms (as some fungi, protozoans, and possibly bacteria and viruses) either because males and females are replaced by mating types or because the participants in sexual reproduction are indistinguishable—compare HETEROTHALLIC, HOMOTHALLIC; FERTILIZATION, MEIOSIS, MENDEL'S LAW; FREEMARTIN, HERMAPHRODITE, INTERSEX **3:** the sphere of interpersonal behavior esp. between male and female most directly associated with, leading up to, substituting for, or resulting from genital union <agree that the Christian's attitude toward ~ should not be considered apart from love, marriage, family—M. M. Forney> **4:** the phenomena of sexual instincts and their manifestations <with his customary combination of philosophy, insight, good will toward the world, and entertaining interest in ~—Allen Drury> <studying and assembling what modern scientists have discovered about ~—*Time*>; *specif*: SEXUAL INTERCOURSE <an old law imposing death for ~ outside marriage—William

Empson>

[2]sex \"\ *vt* –ED/–ING/–ES **1:** to determine the sex of (an organic being) <it is difficult to ~ the animals at a distance—E. A. Hooton>—compare AUTOSEXING **2 a:** to increase the sexual appeal or attraction of—usu. used with *up* <titles must be ~*ed* up to attract 56 million customers—*Time*> **b:** to arouse the sexual instincts or desires of—usu. used with *up* <watching you ~*ing* up that bar kitten—Oakley Hall>

9 Oxford English Dictionary 577–578 (1933):

Sex (seks), *sb*. Also 6–7 sexe, (6 seex, 7 pl. sexe, 8 *poss*. sexe's). [ad. L. *sexus* (*u*-stem), whence also F. *sexe* (12th c.), Sp., Pg. *sexo*, It. *sesso*. Latin had also a form *secus* neut. (indeclinable).]

1. Either of the two divisions of organic beings distinguished as male and female respectively; the males or the females (of a species, etc., esp. of the human race) viewed collectively.

1382 WYCLIF *Gen*. vi. 19 Of alle thingis hauynge sowle of ony flehs, two thow shalt brynge into the ark, that maal sex and femaal lyuen with thee. **1532** MORE *Confut. Tindale* II. 152, I had as leue he bare them both a bare cheryte, as wyth the frayle feminyne sexe fall to far in loue. **1559** ALYMER *Harborowe* E 4 b, Neither of them debarred the heires female .. as though it had ben .. vnnatural for that sexe to gouern. **1576** GASCOIGNE *Philomene* xcviii, I speake against my sex. *a* **1586** SIDNEY *Arcadia* II. (1912) 158 The sexe of womankind of all other is most bound to have regardfull eie to mens judgements. **1600** NASHE *Summer's Last Will* F 3 b, A woman they imagine her to be, Because that sexe keepes nothing close they heare. **1615** CROOKE *Body of Man* 274 If wee respect the .. conformation of both the Sexes, the Male is sooner perfected .. in the wombe. **1634** SIR T. HERBERT *Trav*. 19 Both sexe goe naked. **1667** MILTON *P. L.* IX, 822 To add what wants In Femal Sex. **1671**—*Samson* 774 It was a weakness In me, but incident to all our sex. **1679** DRYDEN *Troilus & Cr*. I. ii, A strange dissembling sex we women are. **1711** ADDISON *Spect*. No. 10 ¶ 6 Their Amusements .. are more adapted to the Sex than to the Species. **1730** SWIFT *Let. to Mrs. Whiteway* 28 Dec., You have neither the scrawl nor the spelling of your sex. **1742** GRAY *Propertius* II. 73 She .. Condemns her fickle Sexe's fond Mistake. **1763** G. WILLIAMS in Jesse *Selwyn & Contemp*. (1843) I. 265 It would

astonish you to see the mixture of sexes at this place. **1780** BENTHAM *Princ. Legisl.* VI. §35 The sensibility of the female sex appears .. to be greater than that of the male. **1814** SCOTT *Ld. of Isles* VI. iii, Her sex's dress regain'd. **1836** THIRLWALL *Greece* xi. II. 51 Solon also made regulations for the government of the other sex. **1846** *Ecclesiologist* Feb. 41 The propriety and necessity of dividing the sexes during the publick offices of the Church. **1848** THACKERAY *Van. Fair* xxv, She was by no means so far superior to her sex as to be above jealousy. **1865** DICKENS *Mut. Fr.* II. i, It was a school for both sexes. **1886** MABEL COLLINS *Prettiest Woman* ii, Zadwiga had not yet given any serious attention to the other sex.

b. *collect.* followed by plural verb. *rare.*

1768 GOLDSM. *Good. n. Man* IV. (Globe) 632/2 Our sex are like poor tradesmen. **1839** MALCOM *Trav.* (1840) 40/I Neither sex tattoo any part of their bodies.

c. *The fair(er), gentle(r), soft(er), weak(er) sex; the devout sex*; *the second sex*; † *the woman sex*: the female sex, women. *The* † *better, sterner sex*: the male sex, men.

[**1583** STUBBES *Anat. Abus.* E vij b, Ye magnificency & liberalitie of that gentle sex. **1613** PURCHAS *Pilgrimage* (1614) 38 Strong Sampson and wise Solomon are witnesses, that the strong men are slaine by this weaker sexe.]

1641 BROME *Jovial Crew* III. (1652) H 4, I am bound by a strong vow to kisse all of the woman sex I meet this morning. **1648** J. BEAUMONT *Psyche* XIV. I, The softer sex, attending Him And his still-growing woes. **1665** SIR T. HERBERT *Trav.* (1677) 22 Whiles the better sex seek prey abroad, the women (therein like themselves) keep home and spin. **1665** BOYLE *Occas. Refl.* v. ix. 176 Persons of the fairer Sex. a **1700** EVELYN *Diary* 12 Nov. an. 1644, The Pillar .. at which the devout sex are always rubbing their chaplets. **1701** STANHOPE *St. Aug. Medit.* I. xxxv. (1704) 82, I may .. not suffer my self to be outdone by the weaker Sex. **1732** [see FAIR a. I b]. **1753** HOGARTH *Anal. Beauty* x. 65 An elegant degree of plumpness peculiar to the skin of the softer sex. **1820** BYRON *Juan* IV. cviii, Benign Ceruleans of the second sex! Who advertise new poems by your looks. **1838** *Murray's Hand-bk. N. Germ.* 430 It is much frequented by the fair sex. **1894** C. D. TYLER in *Geog. Jrnl.* III. 479 They are beardless, and usually wear a shock of unkempt hair, which is somewhat finer in the gentler sex.

¶**d.** Used occas. with extended notion. *The third sex*: eunuchs. Also *sarcastically* (see quot. 1873).

1820 BYRON *Juan* IV. lxxxvi, From all the Pope makes yearly, 'twould perplex To find three perfect pipes of the third sex. *Ibid.* V. xxvi, A black old neutral personage Of the third sex stept up. [**1873** LD. HOUGHTON *Monogr.* 280 Sydney Smith .. often spoke with much bitterness of the growing belief in three Sexes of Humanity—Men, Women, and Clergymen.]

e. *The sex*: the female sex. [F. *le sexe*.] Now *rare.*

Appendix A to opinion of ALITO, J.

1589 PUTTENHAM *Eng. Poesie* III. xix. (Arb.) 235 As he that had tolde a long tale before certaine noble women, of a matter somewhat in honour touching the Sex. **1608** D. T[UVILL] *Ess. Pol. & Mor.* 101 b, Not yet weighing with himselfe, the weaknesse and imbecillitie of the sex. **1631** MASSINGER *Emperor East* I. ii, I am called The Squire of Dames, or Servant of the Sex. **1697** VANBRUGH *Prov. Wife* II. ii, He has a strange penchant to grow fond of me, in spite of his aversion to the sex. **1760-2** GOLDSM. *Cit. W.* xcix, The men of Asia behave with more deference to the sex than you seem to imagine. **1792** A. YOUNG *Trav. France* I. 220 The sex of Venice are undoubtedly of a distinguished beauty. **1823** BYRON *Juan* XIII. lxxix, We give the sex the *pas*. **1863** R. F. BURTON *W. Africa* I. 22 Going 'up stairs', as the sex says, at 5 a.m. on the day after arrival, I cast the first glance at Funchal.

f. Without *the*, in predicative quasi-adj. use=feminine. *rare.*

***a* 1700** DRYDEN *Cymon & Iph.* 368 She hugg'd th' Offender, and forgave th' Offence, Sex to the last!

2. Quality in respect of being male or female.

a. With regard to persons or animals.

1526 *Pilgr. Perf.* (W. de. W. 1531) 282 b, Ye bee, whiche neuer gendreth with ony make of his kynde, nor yet hath ony distinct sex. **1577** T. KENDALL *Flowers of Epigr.* 71 b, If by corps supposd may be her seex, then sure a virgin she. **1616** T. SCOTT *Philomythie* I. (ed. 2) A 3 Euen as Hares change shape and sex, some say Once euery yeare. **1658** SIR T. BROWNE *Hydriot.* iii. 18 A critical view of bones makes a good distinction of sexes. **a 1665** DIGBY *Chym. Secrets* (1682) II. 225 Persons of all Ages and Sexes. **1667** MILTON *P. L.* I. 424 For Spirits when they please can either Sex assume, or both. **1710-11** SWIFT *Jrnl. to Stella* 7 Mar., I find I was mistaken in the sex, 'tis a boy. **1757** SMOLLETT *Reprisal* IV. v, As for me, my sex protects me. **1825** SCOTT *Betrothed* xiii, I am but a poor and neglected woman, feeble both from sex and age. **1841** ELPHINSTONE *Hist. India* I. 349 When persons of different sexes walk together, the woman always follows the man. **1882** TENSION-WOODS *Fish N. S. Wales* 116 Oysters are of distinct sexes.

b. with regard to plants (see FEMALE *a.* 2, MALE *a.* 2).

1567 MAPLET *Gr. Forest* 28 Some seeme to haue both sexes and kindes: as the Oke, the Lawrell and such others. **1631** WIDDOWES *Nat. Philos.* (ed. 2) 49 There be sexes of hearbes .. namely, the Male or Female. **1720** P. BLAIR *Bot. Ess.* iv. 237 These being very evident Proofs of a necessity of two Sexes in Plants as well as in Animals. **1790** SMELLIE *Philos. Nat. Hist.* I. 245 There is not a notion more generally adopted, that that vegetables have the distinction of sexes. **1848** LINDLEY *Introd. Bot.* (ed. 4) II. 80 Change of Sex under the influence of external causes.

3. The distinction between male and female in general. In recent use often with more explicit notion: The sum of those differences in the structure and function of the reproductive organs on the ground of which beings are distinguished as male and female, and of the other physiological differences consequent on these; the class of phenomena with which these differences are concerned.

Organs of sex: the reproductive organs in sexed animals or plants.

***a* 1631** DONNE *Songs & Sonn., The Printrose* Poems 1912 I. 61 Should she Be more then woman, she would get above All thought of sexe, and think to move My heart to study her, and not to love. ***a* 1643** CARTWRIGHT *Siedge* III. vi, My Soul's As Male as yours; there's no Sex in the mind. **1748** MELMOTH *Fitzosborne Lett.* lxii. (1749) II. 119 There may be a kind of sex in the very soul. **1751** HARRIS *Hermes* Wks. (1841) 129 Besides number, another characteristic, visible in substances, is that of sex. **1878** GLADSTONE *Prim. Homer* 68 Athenè .. has nothing of sex except the gender, nothing of the woman except the form. **1887** K. PEARSON *Eth. Freethought* xv. (1888) 429 What is the true type of social (moral) action in matters of sex? **1895** CRACKANTHORPE in 19*th Cent.* Apr. 607 (art.) Sex in modern literature. *Ibid.* 614 The writers and readers who have strenuously refused to allow to sex its place in creative art. **1912** H. G. WELLS *Marriage* ii. § 6. 72 The young need .. to be told .. all we know of three fundamental things; the first of which is God, .. and the third Sex.

¶ **4.** Used, by confusion, in senses of SECT (q. v. I, 4 b, 7, and cf. I d *note*).

1575-85 ABP. SANDYS *Serm.* xx. 358 So are all sexes and sorts of people called vpon. **1583** MELBANCKE *Philotimus* L iij b, Whether thinkest thou better sporte & more absurd, to see an Asse play on an harpe contrary to his sex, or heare [etc.]. **1586** J. HOOKER *Hist. Irel.* 180/2 in *Holinshed*, The whole sex of the Oconhours. **1586** T. B. *La Primaud. Fr. Acad.* I. 359 O detestable furie, not to be found in most cruell beasts, which spare the blood of their sexe. **a 1704** T BROWN *Dial. Dead, Friendship* Wks. 1711 IV. 56 We have had enough of these Christians, and sure there can be no worse among the other Sex of Mankind [i.e. Jews and Turks]? **1707** ATTERBURY *Large Vind. Doctr.* 47 Much less can I imagine, why a Jewish Sex (whether of Pharisees or Saducees) should be represented, as [etc.].

5. *attrib.* and *Comb.,* as *sex-distinction, function,* etc.; *sex-abusing, transforming* adjs.; sex-cell, a reproductive cell, with either male or female function; a sperm-cell or an egg-cell.

1642 H. MORE *Song of Soul* I. III. lxxi, Mad-making waters, sex trans-forming springs.

1781 COWPER *Expost.* 415 Sin, that in old time Brought fire from heav'n, the sex-abusing crime. **1876** HARDY *Ethelberta* xxxvii, You cannot have celebrity and sex-privilege both. **1887** *Jrnl. Educ.* No. 210. 29 If this examination craze is to prevail, and the sex-abolitionists are to have their way. **1889** GEDDES & THOMSON *Evol. Sex* 91 Very commonly the sex-cells originate in the ectoderm and ripen there. **1894** H. DRUMMOND *Ascent of Man* 317 The sex-distinction slowly gathers definition. **1897** J. HUTCHINSON *in Arch. Surg.* VIII. 230 Loss of Sex Function.

Sex (seks), *v.* [f. SEX *sb.*] *trans.* To determine the sex of, by anatomical examination; to label as male or female.

1884 GURNEY *Diurnal Birds Prey* 173 The specimen is not sexed, neither is the sex noted on the drawing. **1888** A. NEWTON in *Zoologist* Ser. 111. XII. 101 The .. barbarous phrase of 'collecting a specimen' and then of 'sexing' it.

Concise Oxford Dictionary of Current English 1164 (5th ed. 1964):

sĕx, n. Being male or female or hermaphrodite (*what is its ~?; ~ does not matter; without distinction of age or ~*), whence ~'LESS a., ~'**lėss**NESS n., ~'Y^2 a., immoderately concerned with ~; males or females collectively (*all ranks & both ~es; the fair, gentle, softer, weaker, ~,* & joc. *the ~,* women; *the sterner ~,* men; *is the fairest of her ~*); (attrib.) arising from difference, or consciousness, of ~ (*~ antagonism*, *~ instinct*, *~ urge*); *~ appeal*, attractiveness arising from difference of ~. [f. L *sexus –ūs;* partly thr. F]

Random House Dictionary of the English Language 1307 (1966):

sex (seks), *n.* **1.** The fact or character of being either male or female: *persons of different sex.* **2.** either of the two groups of persons exhibiting this character: *the stronger sex; the gentle sex.* **3.** the sum of the structural and functional differences by which the male and female are distinguished, or the phenomena or behavior dependent on these differences. **4.** the instinct or attraction drawing one sex toward another, or its manifestation in life and

conduct. **5.** coitus. **6. to have sex,** *Informal*. to engage in sexual intercourse. –*v.t.* **7.** to ascertain the sex of, esp. of newly hatched chicks. **8. sex it up,** *Slang*. to neck passionately: *They were really sexing it up last night.* **9. sex up,** *Informal.* **a.** to arouse sexually: *She certainly knows how to sex up the men.* **b.** to increase the appeal of; to make more interesting, attractive, or exciting: *We've decided to sex up the movie with some battle scenes.* [ME < L *sex*(*us*), akin to *secus*, deriv. of *secāre* to cut, divide; see SECTION]

American Heritage Dictionary 1187 (1969):

sex (sĕks) *n.* **1. a.** The property or quality by which organisms are classified according to their reproductive functions. **b.** Either of two divisions, designated *male* and *female*, of this classification. **2.** Males or females collectively. **3.** The condition or character of being male or female; the physiological, functional, and psychological differences that distinguish the male and the female. **4.** The sexual urge or instinct as it manifests itself in behavior. **5.** Sexual intercourse. –*tr.v.* **sexed, sexing, sexes.** To determine the sex of (young chickens). [Middle English, from Old French *sexe*, from Latin *sexus*†.]

B

Webster's Third New International Dictionary 2081 (2002):

[1]**sex** \'seks\ n –ES *often attrib* [ME, fr. L *sexus*; prob. akin to L *secare* to cut—more at SAW] **1:** one of the two divisions of organic esp. human beings respectively designated male or female <a member of the opposite ~> **2:** the sum of the morphological, physiological, and behavioral

peculiarities of living beings that subserves biparental reproduction with its concomitant genetic segregation and recombination which underlie most evolutionary change, that in its typical dichotomous occurrence is usu. genetically controlled and associated with special sex chromosomes, and that is typically manifested as maleness and femaleness with one or the other of these being present in most higher animals though both may occur in the same individual in many plants and some invertebrates and though no such distinction can be made in many lower forms (as some fungi, protozoans, and possibly bacteria and viruses) either because males and females are replaced by mating types or because the participants in sexual reproduction are indistinguishable—compare HETEROTHALLIC, HOMOTHALLIC; FERTILIZATION, MEIOSIS, MENDEL'S LAW; FREEMARTIN, HERMAPHRODITE, INTERSEX **3:** the sphere of interpersonal behavior esp. between male and female most directly associated with, leading up to, substituting for, or resulting from genital union <agree that the Christian's attitude toward ~ should not be considered apart from love, marriage, family—M. M. Forney> **4:** the phenomena of sexual instincts and their manifestations <with his customary combination of philosophy, insight, good will toward the world, and entertaining interest in ~—Allen Drury> <studying and assembling what modern scientists have discovered about ~—*Time*>; *specif*: SEXUAL INTERCOURSE <an old law imposing death for ~ outside marriage—William Empson>

²sex \"\ *vt* –ED/–ING/–ES **1:** to determine the sex of (an organic being) <it is difficult to ~ the animals at a distance—E. A. Hooton>—compare AUTOSEXING **2 a:** to increase the sexual appeal or attraction of—usu. used with *up* <titles must be ~*ed* up to attract 56 million customers—*Time*> **b:** to arouse the sexual instincts or desires of—usu. used with *up* <watching you ~*ing* up that bar kitten—Oakley Hall>

Random House Webster's Unabridged Dictionary 1754 (2d ed. 2001):

Sex (seks), *n.* **1**. either the male or female division of a species, esp. as differentiated with reference to the reproductive functions. **2**. the sum of the structural and functional differences by which the male and female are distinguished, or the phenomena or behavior dependent on these differences. **3**. the instinct or attraction drawing one sex toward another, or its manifestation in life and conduct. **4**. coitus. **5**. genitalia. **6**. **to have sex**, to engage in sexual intercourse. – *v.t.* **7**. to ascertain the sex of, esp. of newly-hatched chicks. **8**. **sex up**, *Informal*. **a**. to arouse sexually: *The only intent of that show was to sex up the audience*. **b**. to increase the appeal of; to make more interesting, attractive, or exciting: *We've decided to sex up the movie with some battle scenes*. [1350–1400; ME < L *Sexus*, perh. akin to *secāre* to divide (see SECTION)]

American Heritage Dictionary 1605 (5th ed. 2011):

Sex (seks) *n.* **1a.** Sexual activity, especially sexual intercourse: *hasn't had sex in months*. **b**. The sexual urge or instinct as it manifests itself in behavior: *motivated by sex*. **2a**. Either of the two divisions, designated female and male, by which most organisms are classified on the basis of their reproductive organs and functions: *How do you determine the sex of a lobster?* **b**. The fact or condition of existing in these two divisions, especially the collection of characteristics that distinguish female and male: *the evolution of sex in plants; a study that takes sex into account.* See Usage Note at **gender. 3.** Females or males considered as a group: *dormitories that house only one sex.* **4**. One's identity as either female or male. **5**. The genitals. ✣ *tr.v.* **sexed, sex-ing, sex-es 1.** To determine the sex of (an organism). **2.** *Slang* **a.** To arouse sexually. Often used with *up*. **b**. To increase the

appeal or attractiveness of. Often used with *up* [Middle English < Latin *sexus*.]

C

Statutes Prohibiting Sex Discrimination

- 2 U. S. C. §658a(2) (Congressional Budget and Fiscal Operations; Federal Mandates)
- 2 U. S. C. §1311(a)(1) (Congressional Accountability; Extension of Rights and Protections)
- 2 U. S. C. §1503(2) (Unfunded Mandates Reform)
- 3 U. S. C. §411(a)(1) (Presidential Offices; Employment Discrimination)
- 5 U. S. C. §2301(b)(2) (Merit System Principles)
- 5 U. S. C. §2302(b)(1) (Prohibited Personnel Practices)
- 5 U. S. C. §7103(a)(4)(A) (Labor-Management Relations; Definitions)
- 5 U. S. C. §7116(b)(4) (Labor-Management Relations; Unfair Labor Practices)
- 5 U. S. C. §7201(b) (Antidiscrimination Policy; Minority Recruitment Program)

- 5 U. S. C. §7204(b) (Antidiscrimination; Other Prohibitions)
- 6 U. S. C. §488f(b) (Secure Handling of Ammonium Nitrate; Protection From Civil Liability)
- 7 U. S. C. §2020(c)(1) (Supplemental Nutrition Assistance Program)
- 8 U. S. C. §1152(a)(1)(A) (Immigration; Numerical Limitations on Individual Foreign States)
- 8 U. S. C. §1187(c)(6) (Visa Waiver Program for Certain Visitors)
- 8 U. S. C. §1522(a)(5) (Authorization for Programs for Domestic Resettlement of and Assistance to Refugees)
- 10 U. S. C. §932(b)(4) (Uniform Code of Military Justice; Article 132 Retaliation)
- 10 U. S. C. §1034(j)(3) (Protected Communications; Prohibition of Retaliatory Personnel Actions)
- 12 U. S. C. §302 (Directors of Federal Reserve Banks; Number of Members; Classes)
- 12 U. S. C. §1735f–5(a) (Prohibition Against Discrimination on Account of Sex in Extension of Mortgage Assistance)

- 12 U. S. C. §1821(d)(13)(E)(iv) (Federal Deposit Insurance Corporation; Insurance Funds)
- 12 U. S. C. §1823(d)(3)(D)(iv) (Federal Deposit Insurance Corporation; Corporation Moneys)
- 12 U. S. C. §2277a–10c(b)(13)(E)(iv) (Farm Credit System Insurance Corporation; Corporation as Conservator or Receiver; Certain Other Powers)
- 12 U. S. C. §3015(a)(4) (National Consumer Cooperative Bank; Eligibility of Cooperatives)
- 12 U. S. C. §§3106a(1)(B) and (2)(B) (Foreign Bank Participation in Domestic Markets)
- 12 U. S. C. §4545(1) (Fair Housing)
- 12 U. S. C. §5390(a)(9)(E)(v) (Wall Street Reform and Consumer Protection; Powers and Duties of the Corporation)
- 15 U. S. C. §631(h) (Aid to Small Business)
- 15 U. S. C. §633(b)(1) (Small Business Administration)
- 15 U. S. C. §719 (Alaska Natural Gas Transportation; Civil Rights)
- 15 U. S. C. §775 (Federal Energy Administration; Sex Discrimination; Enforcement; Other Legal Remedies)

- 15 U. S. C. §1691(a)(1) (Equal Credit Opportunity Act)
- 15 U. S. C. §1691d(a) (Equal Credit Opportunity Act)
- 15 U. S. C. §3151(a) (Full Employment and Balanced Growth; Nondiscrimination)
- 18 U. S. C. §246 (Deprivation of Relief Benefits)
- 18 U. S. C. §3593(f) (Special Hearing To Determine Whether a Sentence of Death Is Justified)
- 20 U. S. C. §1011(a) (Higher Education Resources and Student Assistance; Antidiscrimination)
- 20 U. S. C. §1011f(h)(5)(D) (Disclosures of Foreign Gifts)
- 20 U. S. C. §1066c(d) (Historically Black College and University Capital Financing; Limitations on Federal Insurance Bonds Issued by Designated Bonding Authority)
- 20 U. S. C. §1071(a)(2) (Federal Family Education Loan Program)
- 20 U. S. C. §1078(c)(2)(F) (Federal Payments To Reduce Student Interest Costs)
- 20 U. S. C. §1087–1(e) (Federal Family Education Loan Program; Special Allowances)

- 20 U. S. C. §1087–2(e) (Student Loan Marketing Association)
- 20 U. S. C. §1087–4 (Discrimination in Secondary Markets Prohibited)
- 20 U. S. C. §1087tt(c) (Discretion of Student Financial Aid Administrators)
- 20 U. S. C. §1231e(b)(2) (Education Programs; Use of Funds Withheld)
- 20 U. S. C. §1681 (Title IX of the Education Amendments of 1972)
- 20 U. S. C. §1701(a)(1) (Equal Educational Opportunities; Congressional Declaration of Policy)
- 20 U. S. C. §1702(a)(1) (Equal Educational Opportunities; Congressional Findings)
- 20 U. S. C. §1703 (Denial of Equal Educational Opportunity Prohibited)
- 20 U. S. C. §1705 (Assignment on Neighborhood Basis Not a Denial of Equal Educational Opportunity)
- 20 U. S. C. §1715 (District Lines)
- 20 U. S. C. §1720 (Equal Educational Opportunities; Definitions)

- 20 U. S. C. §1756 (Remedies With Respect to School District Lines)
- 20 U. S. C. §2396 (Career and Technical Education; Federal Laws Guaranteeing Civil Rights)
- 20 U. S. C. §3401(2) (Department of Education; Congressional Findings)
- 20 U. S. C. §7231d(b)(2)(C) (Magnet Schools Assistance; Applications and Requirements)
- 20 U. S. C. §7914 (Strengthening and Improvement of Elementary and Secondary Schools; Civil Rights)
- 22 U. S. C. §262p–4n (Foreign Relations and Intercourse; Equal Employment Opportunities)
- 22 U. S. C. §2304(a)(1) (Human Rights and Security Assistance)
- 22 U. S. C. §2314(g) (Furnishing of Defense Articles or Related Training or Other Defense Service on Grant Basis)
- 22 U. S. C. §2426 (Discrimination Against United States Personnel)
- 22 U. S. C. §2504(a) (Peace Corps Volunteers)
- 22 U. S. C. §2661a (Foreign Contracts or Arrangements; Discrimination)

- 22 U. S. C. §2755 (Discrimination Prohibited if Based on Race, Religion, National Origin, or Sex)

- 22 U. S. C. §3901(b)(2) (Foreign Service; Congressional Findings and Objectives)

- 22 U. S. C. §3905(b)(1) (Foreign Service; Personnel Actions)

- 22 U. S. C. §4102(11)(A) (Foreign Service; Definitions)

- 22 U. S. C. §4115(b)(4) (Foreign Service; Unfair Labor Practices)

- 22 U. S. C. §6401(a)(3) (International Religious Freedom; Findings; Policy)

- 22 U. S. C. §8303(c)(2) (Office of Volunteers for Prosperity)

- 23 U. S. C. §140(a) (Federal-Aid Highways; Nondiscrimination)

- 23 U. S. C. §324 (Highways; Prohibition of Discrimination on the Basis of Sex)

- 25 U. S. C. §4223(d)(2) (Housing Assistance for Native Hawaiians)

- 26 U. S. C. §7471(a)(6)(A) (Tax Court; Employees)

- 28 U. S. C. §994(d) (Duties of the United States Sentencing Commission)
- 28 U. S. C. §1862 (Trial by Jury; Discrimination Prohibited)
- 28 U. S. C. §1867(e) (Trial by Jury; Challenging Compliance With Selection Procedures)
- 29 U. S. C. §206(d)(1) (Equal Pay Act of 1963)
- 29 U. S. C. §§2601(a)(6) and (b)(4) (Family and Medical Leave; Findings and Purposes)
- 29 U. S. C. §2651(a) (Family and Medical Leave; Effect on Other Laws)
- 29 U. S. C. §3248 (Workforce Development Opportunities; Nondiscrimination)
- 30 U. S. C. §1222(c) (Research Funds to Institutes)
- 31 U. S. C. §732(f) (Government Accountability Office; Personnel Management System)
- 31 U. S. C. §6711 (Federal Payments; Prohibited Discrimination)
- 31 U. S. C. §6720(a)(8) (Federal Payments; Definitions, Application, and Administration)

- 34 U. S. C. §10228(c) (Prohibition of Federal Control Over State and Local Criminal Justice Agencies; Prohibition of Discrimination)

- 34 U. S. C. §11133(a)(16) (Juvenile Justice and Delinquency Prevention; State Plans)

- 34 U. S. C. §12161(g) (Community Schools Youth Services and Supervision Grant Program)

- 34 U. S. C. §12361 (Violent Crime Control and Law Enforcement; Civil Rights for Women)

- 34 U. S. C. §20110(e) (Crime Victims Fund; Administration Provisions)

- 34 U. S. C. §50104(a) (Emergency Federal Law Enforcement Assistance)

- 36 U. S. C. §20204(b) (Air Force Sergeants Association; Membership)

- 36 U. S. C. §20205(c) (Air Force Sergeants Association; Governing Body)

- 36 U. S. C. §21003(a)(4) (American GI Forum of the United States; Purposes)

- 36 U. S. C. §21004(b) (American GI Forum of the United States; Membership)

- 36 U. S. C. §21005(c) (American GI Forum of the United States; Governing Body)

- 36 U. S. C. §21704A (The American Legion)
- 36 U. S. C. §22703(c) (Amvets; Membership)
- 36 U. S. C. §22704(d) (Amvets; Governing Body)
- 36 U. S. C. §60104(b) (82nd Airborne Division Association, Incorporated; Membership)
- 36 U. S. C. §60105(c) (82nd Airborne Division Association, Incorporated; Governing Body)
- 36 U. S. C. §70104(b) (Fleet Reserve Association; Membership)
- 36 U. S. C. §70105(c) (Fleet Reserve Association; Governing Body)
- 36 U. S. C. §140704(b) (Military Order of the World Wars; Membership)
- 36 U. S. C. §140705(c) (Military Order of the World Wars; Governing Body)
- 36 U. S. C. §154704(b) (Non Commissioned Officers Association of the United States of America, Incorporated; Membership)
- 36 U. S. C. §154705(c) (Non Commissioned Officers Association of the United States of America, Incorporated; Governing Body)
- 36 U. S. C. §190304(b) (Retired Enlisted Association, Incorporated; Membership)

- 36 U. S. C. §190305(c) (Retired Enlisted Association, Incorporated; Governing Body)

- 36 U. S. C. §220522(a)(8) and (9) (United States Olympic Committee; Eligibility Requirements)

- 36 U. S. C. §230504(b) (Vietnam Veterans of America, Inc.; Membership)

- 36 U. S. C. §230505(c) (Vietnam Veterans of America, Inc.; Governing Body)

- 40 U. S. C. §122(a) (Federal Property and Administrative Services; Prohibition on Sex Discrimination)

- 40 U. S. C. §14702 (Appalachian Regional Development; Nondiscrimination)

- 42 U. S. C. §213(f) (Military Benefits)

- 42 U. S. C. §290cc–33(a) (Projects for Assistance in Transition From Homelessness)

- 42 U. S. C. §290ff–1(e)(2)(C) (Children With Serious Emotional Disturbances; Requirements With Respect to Carrying Out Purpose of Grants)

- 42 U. S. C. §295m (Public Health Service; Prohibition Against Discrimination on Basis of Sex)

- 42 U. S. C. §296g (Public Health Service; Prohibition Against Discrimination by Schools on Basis of Sex)

- 42 U. S. C. §300w–7(a)(2) (Preventive Health and Health Services Block Grants; Nondiscrimination Provisions)

- 42 U. S. C. §300x–57(a)(2) (Block Grants Regarding Mental Health and Substance Abuse; Nondiscrimination)

- 42 U. S. C. §603(a)(5)(I)(iii) (Block Grants to States for Temporary Assistance for Needy Families)

- 42 U. S. C. §708(a)(2) (Maternal and Child Health Services Block Grant; Nondiscrimination Provisions)

- 42 U. S. C. §1975a(a) (Duties of Civil Rights Commission)

- 42 U. S. C. §2000c(b) (Civil Rights; Public Education; Definitions)

- 42 U. S. C. §2000c–6(a)(2) (Civil Rights; Public Education; Civil Actions by the Attorney General)

- 42 U. S. C. §2000e–2 (Equal Employment Opportunities; Unlawful Employment Practices)

- 42 U. S. C. §2000e–3(b) (Equal Employment Opportunities; Other Unlawful Employment Practices)

- 42 U. S. C. §2000e–16(a) (Employment by Federal Government)

- 42 U. S. C. §2000e–16a(b) (Government Employee Rights Act of 1991)

- 42 U. S. C. §2000e–16b(a)(1) (Discriminatory Practices Prohibited)

- 42 U. S. C. §2000h–2 (Intervention by Attorney General; Denial of Equal Protection on Account of Race, Color, Religion, Sex or National Origin)

- 42 U. S. C. §3123 (Discrimination on Basis of Sex Prohibited in Federally Assisted Programs)

- 42 U. S. C. §3604 (Fair Housing Act; Discrimination in the Sale or Rental of Housing and Other Prohibited Practices)

- 42 U. S. C. §3605 (Fair Housing Act; Discrimination in Residential Real Estate-Related Transactions)

- 42 U. S. C. §3606 (Fair Housing Act; Discrimination in the Provision of Brokerage Services)

- 42 U. S. C. §3631 (Fair Housing Act; Violations; Penalties)

- 42 U. S. C. §4701 (Intergovernmental Personnel Program; Congressional Findings and Declaration of Policy)
- 42 U. S. C. §5057(a)(1) (Domestic Volunteer Services; Nondiscrimination Provisions)
- 42 U. S. C. §5151(a) (Nondiscrimination in Disaster Assistance)
- 42 U. S. C. §5309(a) (Community Development; Nondiscrimination in Programs and Activities)
- 42 U. S. C. §5891 (Development of Energy Sources; Sex Discrimination Prohibited)
- 42 U. S. C. §6709 (Public Works Employment; Sex Discrimination; Prohibition; Enforcement)
- 42 U. S. C. §6727(a)(1) (Public Works Employment; Nondiscrimination)
- 42 U. S. C. §6870(a) (Weatherization Assistance for Low-Income Persons)
- 42 U. S. C. §8625(a) (Low-Income Home Energy Assistance; Nondiscrimination Provisions)
- 42 U. S. C. §9821 (Community Economic Development; Nondiscrimination Provisions)
- 42 U. S. C. §9849 (Head Start Programs; Nondiscrimination Provisions)

- 42 U. S. C. §9918(c)(1) (Community Services Block Grant Program; Limitations on Use of Funds)

- 42 U. S. C. §10406(c)(2)(B)(i) (Family Violence Prevention and Services; Formula Grants to States)

- 42 U. S. C. §11504(b) (Enterprise Zone Development; Waiver of Modification of Housing and Community Development Rules in Enterprise Zones)

- 42 U. S. C. §12635(a)(1) (National and Community Service State Grant Program; Nondiscrimination)

- 42 U. S. C. §12832 (Investment in Affordable Housing; Nondiscrimination)

- 43 U. S. C. §1747(10) (Loans to States and Political Subdivisions; Discrimination Prohibited)

- 43 U. S. C. §1863 (Outer Continental Shelf Resource Management; Unlawful Employment Practices; Regulations)

- 47 U. S. C. §151 (Federal Communications Commission)

- 47 U. S. C. §398(b)(1) (Public Broadcasting; Equal Opportunity Employment)

- 47 U. S. C. §§554(b) and (c) (Cable Communications; Equal Employment Opportunity)

- 47 U. S. C. §555a(c) (Cable Communications; Limitation of Franchising Authority Liability)

- 48 U. S. C. §1542(a) (Virgin Islands; Voting Franchise; Discrimination Prohibited)

- 48 U. S. C. §1708 (Discrimination Prohibited in Rights of Access to, and Benefits From, Conveyed Lands)

- 49 U. S. C. §306(b) (Duties of the Secretary of Transportation; Prohibited Discrimination)

- 49 U. S. C. §5332(b) (Public Transportation; Nondiscrimination)

- 49 U. S. C. §40127 (Air Commerce and Safety; Prohibitions on Discrimination)

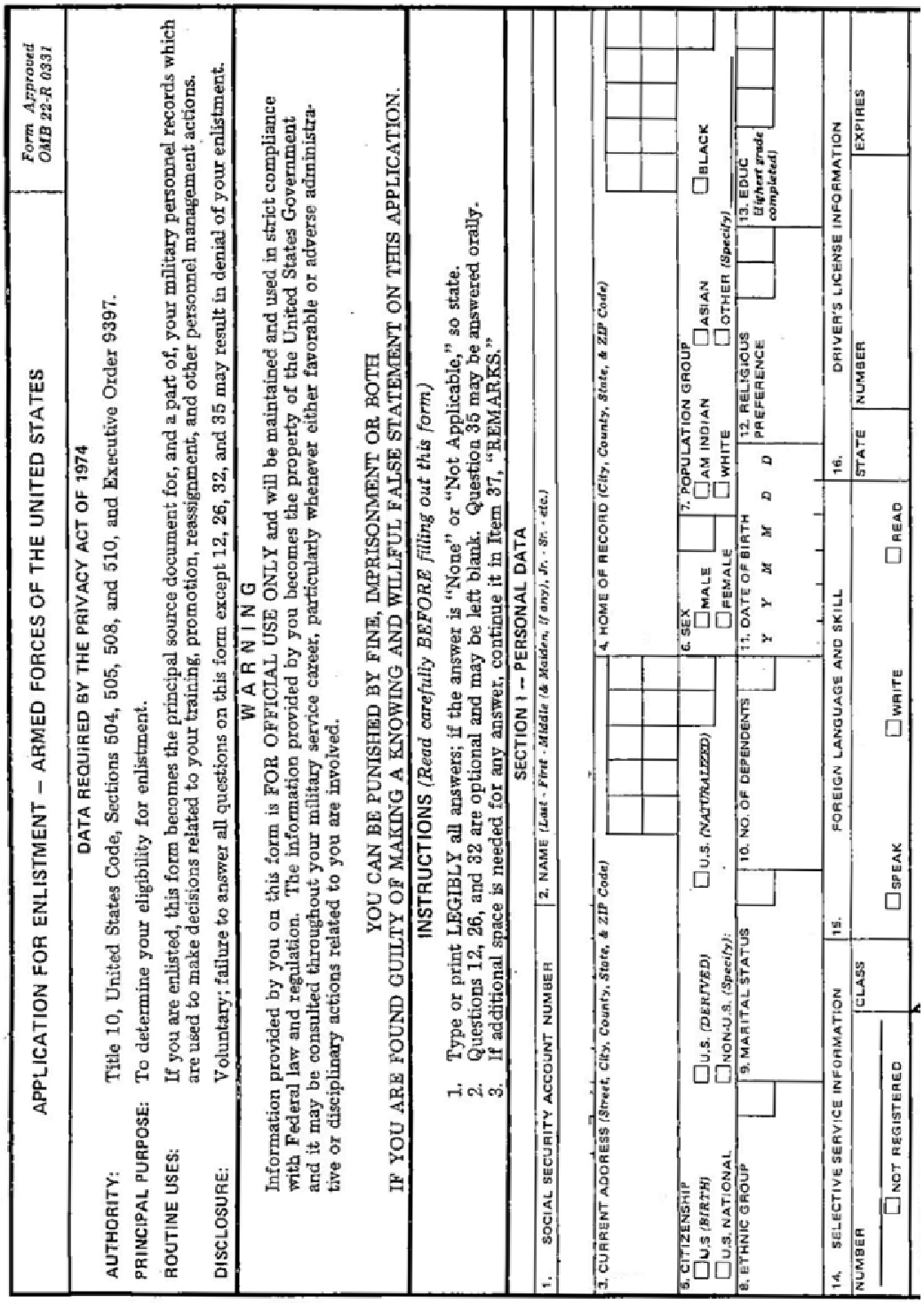
- 49 U. S. C. §47123(a) (Airport Improvement; Nondiscrimination)

- 50 U. S. C. §3809(b)(3) (Selective Service System)

- 50 U. S. C. §4842(a)(1)(B) (Anti-Boycott Act of 2018)

Appendix D to opinion of ALITO, J.

D



APPLICATION FOR ENLISTMENT – ARMED FORCES OF THE UNITED STATES

Form Approved OMB 22-R 0331

DATA REQUIRED BY THE PRIVACY ACT OF 1974

AUTHORITY: Title 10, United States Code, Sections 504, 505, 508, and 510, and Executive Order 9397.

PRINCIPAL PURPOSE: To determine your eligibility for enlistment.

ROUTINE USES: If you are enlisted, this form becomes the principal source document for, and a part of, your military personnel records which are used to make decisions related to your training, promotion, reassignment, and other personnel management actions.

DISCLOSURE: Voluntary; failure to answer all questions on this form except 12, 26, 32, and 35 may result in denial of your enlistment.

W A R N I N G

Information provided by you on this form is FOR OFFICIAL USE ONLY and will be maintained and used in strict compliance with Federal law and regulation. The information provided by you becomes the property of the United States Government and it may be consulted throughout your military service career, particularly whenever either favorable or adverse administrative or disciplinary actions related to you are involved.

YOU CAN BE PUNISHED BY FINE, IMPRISONMENT OR BOTH IF YOU ARE FOUND GUILTY OF MAKING A KNOWING AND WILLFUL FALSE STATEMENT ON THIS APPLICATION.

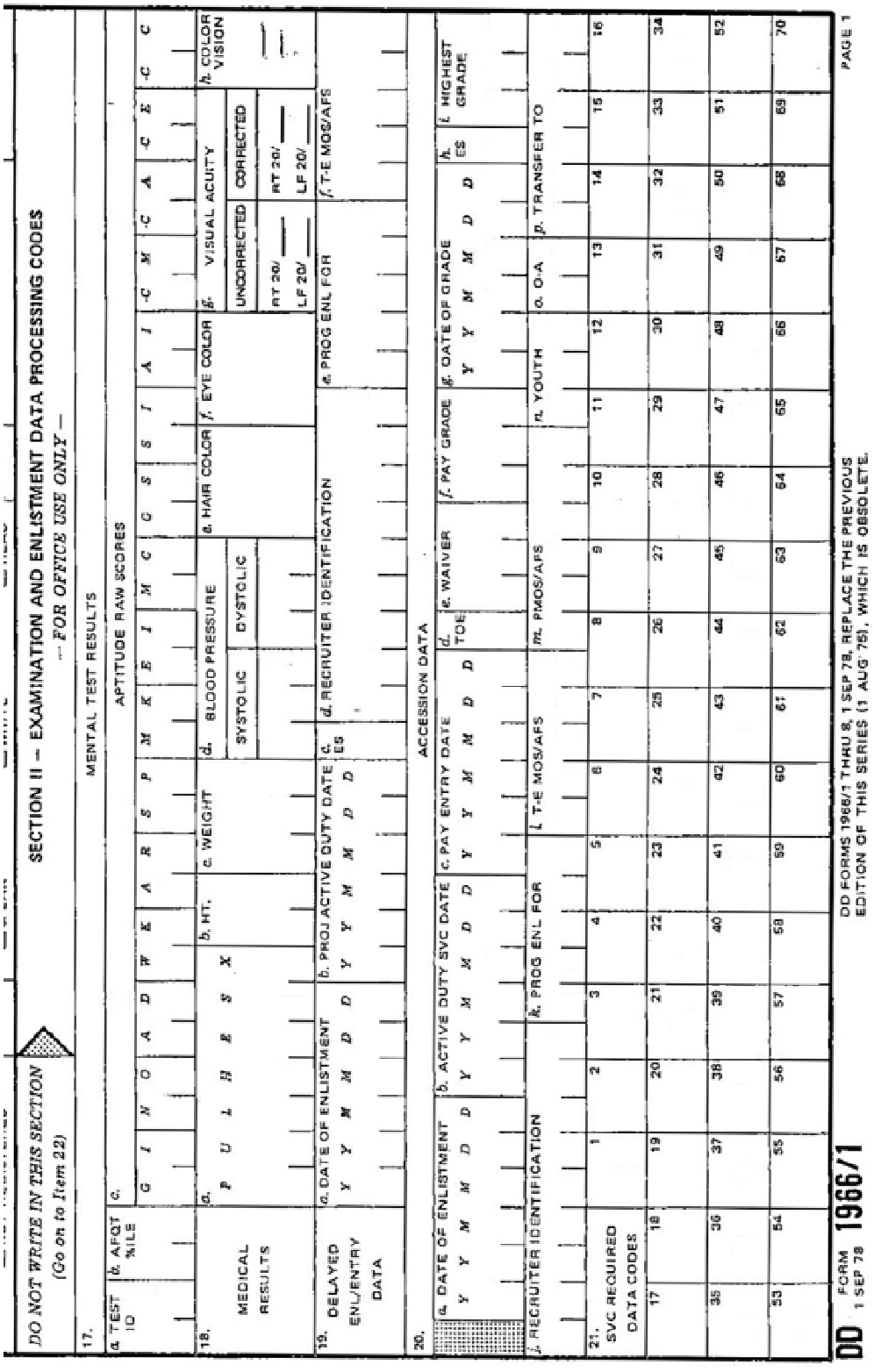
INSTRUCTIONS *(Read carefully BEFORE filling out this form.)*

1. Type or print LEGIBLY all answers; if the answer is "None" or "Not Applicable," so state.
2. Questions 12, 26, and 32 are optional and may be left blank. Question 35 may be answered orally.
3. If additional space is needed for any answer, continue it in Item 37, "REMARKS."

SECTION I – PERSONAL DATA

1. SOCIAL SECURITY ACCOUNT NUMBER
2. NAME *(Last - First - Middle (& Maiden, if any), Jr. - Sr. - etc.)*
3. CURRENT ADDRESS *(Street, City, County, State, & ZIP Code)*
4. HOME OF RECORD *(City, County, State, & ZIP Code)*
5. CITIZENSHIP ☐ U.S. *(BIRTH)* ☐ U.S. *(DERIVED)* ☐ U.S. *(NATURALIZED)* ☐ U.S. NATIONAL ☐ NON-U.S. *(Specify)*:
6. SEX ☐ MALE ☐ FEMALE
7. POPULATION GROUP ☐ AM INDIAN ☐ ASIAN ☐ BLACK ☐ WHITE ☐ OTHER *(Specify)*
8. ETHNIC GROUP
9. MARITAL STATUS
10. NO. OF DEPENDENTS
11. DATE OF BIRTH Y Y M M D D
12. RELIGIOUS PREFERENCE
13. EDUC *(Highest grade completed)*
14. SELECTIVE SERVICE INFORMATION NUMBER ☐ NOT REGISTERED CLASS
15. FOREIGN LANGUAGE AND SKILL ☐ SPEAK ☐ WRITE ☐ READ
16. DRIVER'S LICENSE INFORMATION STATE NUMBER EXPIRES

Appendix D to opinion of ALITO, J.



DO NOT WRITE IN THIS SECTION (Go on to Item 22)

SECTION II — EXAMINATION AND ENLISTMENT DATA PROCESSING CODES — FOR OFFICE USE ONLY —

17. MENTAL TEST RESULTS

a. TEST ID | b. AFQT %ILE | c. APTITUDE RAW SCORES: G I N O A D W K A R S P M K E I M C O S I A I -C M -C A -C E -C C

18. MEDICAL RESULTS: g. P U L H E S X | b. HT. | c. WEIGHT | d. BLOOD PRESSURE: SYSTOLIC / DYSTOLIC | e. HAIR COLOR | f. EYE COLOR | g. VISUAL ACUITY: UNCORRECTED (RT 20/ ___ LF 20/ ___) CORRECTED (RT 20/ ___ LF 20/ ___) | h. COLOR VISION

19. DELAYED ENL/ENTRY DATA: a. DATE OF ENLISTMENT Y Y M M D D | b. PROJ ACTIVE DUTY DATE Y Y M M D D | c. ES | d. RECRUITER IDENTIFICATION | e. PROG ENL FOR | f. T-E MOS/AFS

20. ACCESSION DATA

a. DATE OF ENLISTMENT Y Y M M D D	b. ACTIVE DUTY SVC DATE Y Y M M D D	c. PAY ENTRY DATE Y Y M M D D	d. TOE	e. WAIVER	f. PAY GRADE	g. DATE OF GRADE Y Y M M D D	h. ES	i. HIGHEST GRADE
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16

j. RECRUITER IDENTIFICATION	k. PROG ENL FOR	l. T-E MOS/AFS	m. PMOS/AFS	n. YOUTH	o. O-A	p. TRANSFER TO
17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34
35	36	37	38	39	40	41	42	43	44	45	46	47	48	49	50	51	52
53	54	55	56	57	58	59	60	61	62	63	64	65	66	67	68	69	70

DD FORM 1966/1 1 SEP 78

DD FORMS 1966/1 THRU 8, 1 SEP 78, REPLACE THE PREVIOUS EDITION OF THIS SERIES (1 AUG 75), WHICH IS OBSOLETE.

PAGE 1

Appendix D to opinion of ALITO, J.

LAST NAME: _____ SSN: _____

III. VERIFICATION OF PERSONAL DATA

23. If Preferred Enlistment Name (name given in block 1) is not the same as on your birth certificate and has not been changed by legal procedure prescribed by state law, complete the following:

a. NAME AS SHOWN ON BIRTH CERTIFICATE

_____

I hereby state that I have not changed my name through any court procedure; and that I prefer to use the name by which I am known in the community as a matter of convenience and with no criminal or fraudulent intent. I further state that I am the same person as the one whose name is shown in block 1.

b. WITNESS (Name, grade, and signature)	c. SIGNATURE OF APPLICANT

24. EDUCATION

YEAR & MONTH		NAME AND LOCATION OF SCHOOL	GRADUATE		DEGREE RECEIVED
FROM	TO		YES	NO	

25. CITIZENSHIP VERIFICATION (To be completed in presence of your recruiter).

a. PLACE OF BIRTH (City, State and (if not in USA) Country)	b. BIRTH CERTIFICATE ISSUED BY (County and State)
c. BIRTH CERTIFICATE FILE NUMBER	d. IF NATURALIZED, CERTIFICATE NO.
f. IF ALIEN, ALIEN REGISTRATION NUMBER	e. IF DERIVED, PARENTS' CERTIFICATE NO(S), DATE, PLACE AND COURT
g. NATIVE COUNTRY	h. DATE AND PORT OF ENTRY

26. MILITARY SERVICE

a. Are you now or have ever been in the Regular, Reserve or National Guard of the United States? ☐ No ☐ Yes. If "yes", complete the following:

b. PAY GRADE AND SERVICE NUMBER	c. SERVICE AND COMPONENT	d. DATE OF ENTRY	e. DATE OF DISCH	f. TYPE DISCH/REL	g. TIME LOST (NO. OF DAYS)

h. If you are now a member of a US Reserve or National Guard organization, fill in organization name and unit address:

27a. PREVIOUS MILITARY SERVICE

DO NOT WRITE IN THIS BLOCK

	Years	Months	Days
Total Active Military Service			
Total Inactive Military Service			

b. PEBD

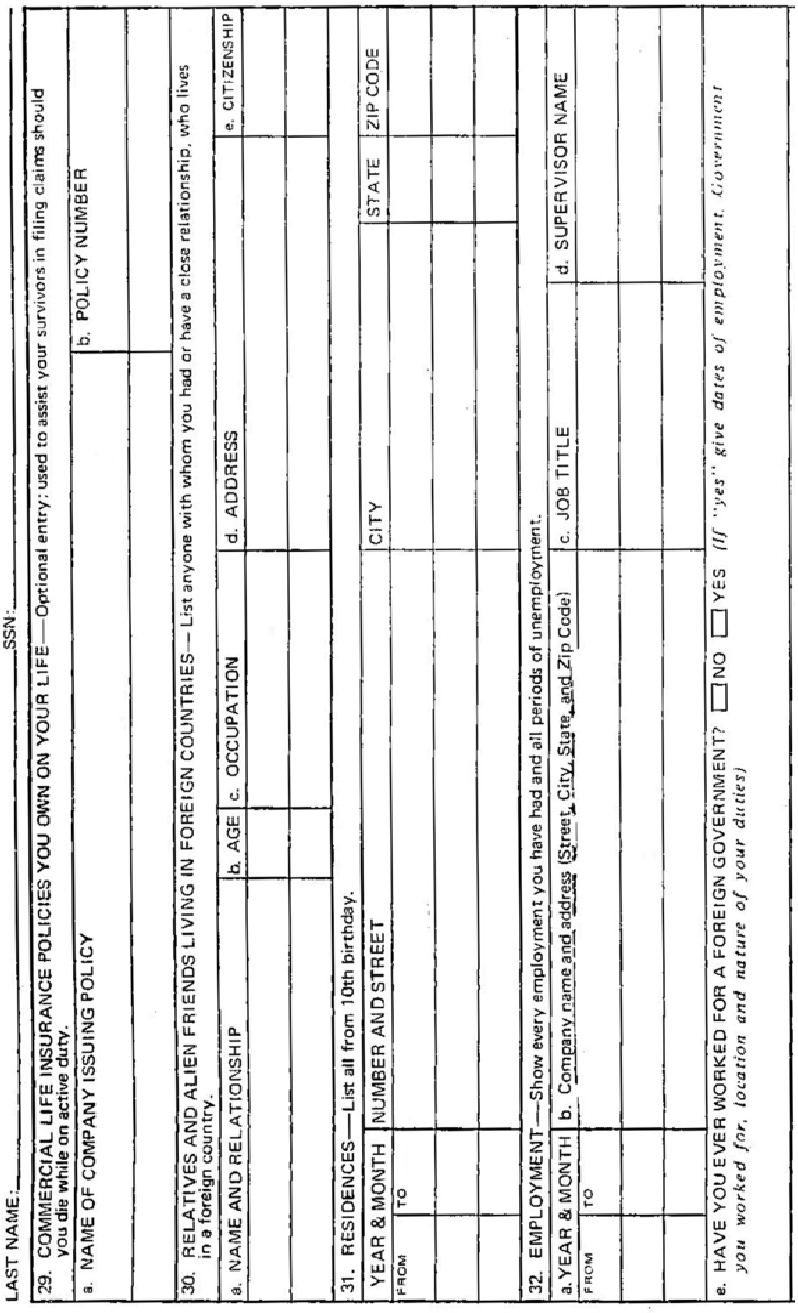
c. ADSD

IV. OTHER BACKGROUND DATA

28a. RELATIVES	b. DATE AND PLACE OF BIRTH	c. PRESENT ADDRESS	d. CITIZENSHIP
FATHER			
MOTHER (Maiden-name)			
SPOUSE (Maiden-name)			
CHILDREN (Show Relationship)			
[illegible]			

DD FORM 1 AUG 75 1966/2 REPLACES DD FORM 1966, 1 JUN 75, WHICH WILL BE USED PAGE 2

Appendix D to opinion of ALITO, J.



LAST NAME: _____ SSN: _____

29. COMMERCIAL LIFE INSURANCE POLICIES YOU OWN ON YOUR LIFE—Optional entry: used to assist your survivors in filing claims should you die while on active duty.

a. NAME OF COMPANY ISSUING POLICY	b. POLICY NUMBER

30. RELATIVES AND ALIEN FRIENDS LIVING IN FOREIGN COUNTRIES—List anyone with whom you had or have a close relationship, who lives in a foreign country.

a. NAME AND RELATIONSHIP	b. AGE	c. OCCUPATION	d. ADDRESS	e. CITIZENSHIP

31. RESIDENCES—List all from 10th birthday.

YEAR & MONTH		NUMBER AND STREET	CITY	STATE	ZIP CODE
FROM	TO				

32. EMPLOYMENT—Show every employment you have had and all periods of unemployment.

a. YEAR & MONTH		b. Company name and address (Street, City, State, and Zip Code)	c. JOB TITLE	d. SUPERVISOR NAME
FROM	TO			

e. HAVE YOU EVER WORKED FOR A FOREIGN GOVERNMENT? ☐NO ☐YES *(If "yes" give dates of employment, Government you worked for, location and nature of your duties)*

33. MEMBERSHIP IN YOUTH PROGRAMS—Optional entry; you *may be* eligible for a higher paygrade, based on membership and participation in the youth programs listed below.
☐ No membership

ORGANIZATION	MEMBERSHIP HELD FROM	MEMBERSHIP HELD TO	CONDUCTED BY (SPONSOR)	LOCATION (SCHOOL AND ADDRESS)	YEARS COMPLETED OR LEVEL REACHED
ROTC					(YEARS)
JROTC					(YEARS)
CAP			AIR FORCE		(LEVEL)
SEA CADET			NAVY		(LEVEL)
OTHER (Specify)					

34. FOREIGN TRAVEL—Other than as a direct result of military service.

YEAR & MONTH		COUNTRY VISITED	PURPOSE OF TRAVEL
FROM	TO		

35. DECLARATIONS—Explain "Yes" answers in item 41.

a. HAVE YOU EVER BEEN REJECTED FOR ENLISTMENT, REENLISTMENT, OR INDUCTION INTO ANY BRANCH OF THE ARMED FORCES OF THE UNITED STATES? ☐ NO ☐ YES

b. ARE YOU A CONSCIENTIOUS OBJECTOR? ☐ NO ☐ YES

c. ARE YOU NOW OR HAVE YOU EVER BEEN A DESERTER FROM ANY BRANCH OF THE ARMED FORCES OF THE UNITED STATES? ☐ NO ☐ YES

d. ARE YOU NOW DRAWING, OR DO YOU HAVE AN APPLICATION PENDING OR APPROVAL FOR, RETIRED PAY, DISABILITY ALLOWANCE, OR SEVERANCE PAY OR A PENSION FROM THE GOVERNMENT OF THE UNITED STATES? ☐ NO ☐ YES

e. ARE YOU THE ONLY LIVING CHILD OF YOUR PARENTS? ☐ NO ☐ YES

36. UNDERSTANDINGS.

a. I understand that if I am rejected for enlistment because of a disqualification I have concealed, I may not be provided return transportation from the place of examination to my home. (INITIALS)

b. (For male applicants only). I understand that if I have not reached my 26th birthday that an original enlistment obligates me to serve in the Armed Forces for a period of six (6) years (active and reserve) unless sooner discharged. (INITIALS)

DD FORM 1 AUG 75 **1966/3** REPLACES DD FORM 1966, 1 JUN 75, WHICH WILL BE USED PAGE 3

Appendix D to opinion of ALITO, J.

LAST NAME: _____ SSN: _____

37. CHARACTER AND SOCIAL ADJUSTMENT: Read and consider the following instructions carefully BEFORE answering questions a through f.

1. If your answer to every question is truthfully "NO", please indicate in the appropriate space.
2. If your answer to any questions in this item is "YES", or you have reservations about answering questions of this nature, you are not required to answer, or explain any of these questions in writing. Instead, you may request a personal interview in which you may provide the required information for each question orally.
3. If you choose the personal interview, the information you give may be investigated; however, any written record of the interview itself will not be retained more than six months after entry upon active duty, and it will not become a part of your permanent military personnel service record.
4. If you enlist, this information may be requested from you again at some future date and may become a part of your security investigative file at that time. This could occur as a result of your being considered for duties involving access to classified information or other types of duty requiring a personnel security investigation.
5. A "YES" answer will not necessarily disqualify you for enlistment. It will depend on the circumstances surrounding the situation involved.

INITIAL HERE IF YOU PREFER A PERSONAL INTERVIEW: _____

APPLICANT HAS BEEN INTERVIEWED AND IS ☐ ELIGIBLE FOR ENLISTMENT, ☐ INELIGIBLE FOR ENLISTMENT

DATE OF INTERVIEW	NAME, ORGANIZATION & TITLE	SIGNATURE OF INTERVIEWER

EXPLAIN "YES" ANSWERS IN ITEM 41:	NO	YES
a. HAVE YOU EVER TAKEN ANY NARCOTIC SUBSTANCE, SEDATIVE, STIMULANT, OR TRANQUILIZER DRUGS EXCEPT AS PRESCRIBED BY A LICENSED PHYSICIAN?		
b. HAVE YOU EVER INTENTIONALLY SNIFFED GLUE, PAINT, HAIRSPRAY, OR OTHER CHEMICAL FUMES?		
c. HAVE YOU EVER BEEN INVOLVED IN THE USE, PURCHASE, POSSESSION OR SALE OF MARIJUANA, LSD, OR ANY HARMFUL OR HABIT-FORMING DRUGS AND/OR CHEMICALS EXCEPT AS PRESCRIBED BY A LICENSED PHYSICIAN?		
d. HAS YOUR USE OF ALCOHOLIC BEVERAGES (*SUCH AS LIQUOR, BEER, WINE*) EVER RESULTED IN THE LOSS OF A JOB, ARREST BY POLICE, or TREATMENT FOR ALCOHOLISM?		
e. HAVE YOU EVER BEEN A PATIENT (*WHETHER OR NOT FORMALLY COMMITTED*) IN ANY INSTITUTION PRIMARILY DEVOTED TO THE TREATMENT OF MENTAL, NERVOUS, EMOTIONAL, PSYCHOLOGICAL, OR PERSONALITY DISORDERS?		
f. HAVE YOU EVER ENGAGED IN HOMOSEXUAL ACTIVITY (SEXUAL RELATIONS WITH ANOTHER PERSON OF THE SAME SEX)?		

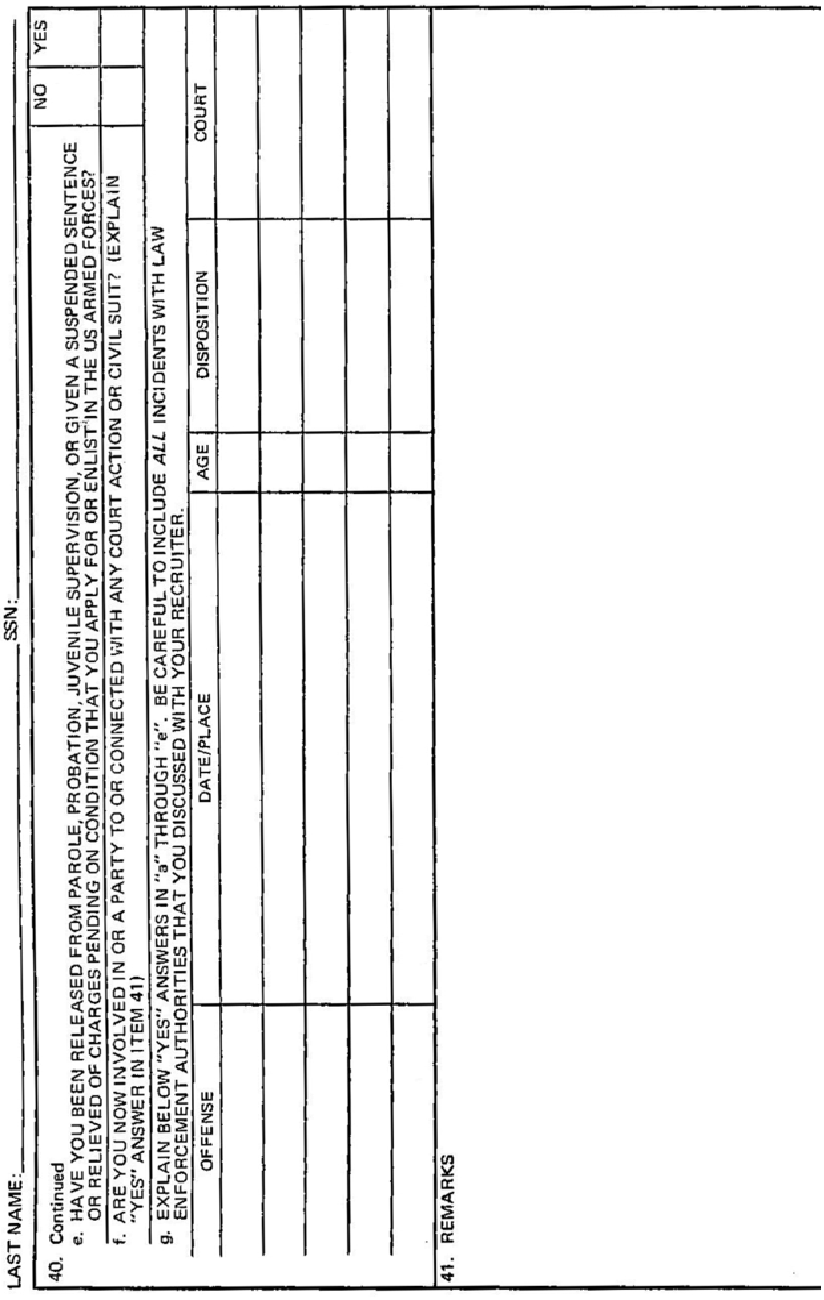
38. MARITAL STATUS AND DEPENDENCY	NO	YES
a. ARE YOU NOW, OR HAVE YOU EVER BEEN MARRIED?		
b. IF YOU HAVE BEEN MARRIED, ARE YOU NOW LIVING WITH YOUR SPOUSE?		
c. HAVE YOU EVER BEEN DIVORCED? (If yes, enter date, place and court which granted divorce or legal separation)		
d. IS ANY COURT ORDER OR JUDGEMENT DIRECTING SUPPORT FOR CHILDREN OF ALIMONY IN EFFECT? (Enter date, place, and court which granted alimony decree, or support as the result of a paternity suit)		
e. IS ANYONE OTHER THAN YOUR SPOUSE AND/OR CHILDREN SOLELY OR PARTIALLY DEPENDENT UPON YOU? (list name & address)		

39. Do you now have, or within the past ten years, have you had knowing membership with the specific intent of furthering the aims of, or adherence to and active participation in any foreign or domestic organizations, association, movement, group, or combination of persons (hereinafter referred to as organizations) which unlawfully advocates or practices the commission of acts of force or violence to prevent others from exercising their rights under the Constitution or laws of the United States or of any State, or which seeks to overthrow the Government of the United States or any State or subdivision thereof by unlawful means?	NO	YES
If you answered "yes", give the names of the organizations and inclusive dates (month and year) of your membership; describe the nature of your activities as a member of the organization(s) in the "Remarks" section, Item 41.		

40. INVOLVEMENT WITH POLICE OR JUDICIAL AUTHORITIES **YOUR ANSWERS TO THE FOLLOWING QUESTIONS WILL BE VERIFIED WITH THE FEDERAL BUREAU OF INVESTIGATION (FBI), AND OTHER AGENCIES TO DETERMINE ANY PREVIOUS RECORDS OF ARREST OR CONVICTIONS OR JUVENILE COURT ADJUDICATIONS. IF YOU CONCEAL SUCH RECORDS AT THIS TIME, YOU MAY, UPON ENLISTMENT, BE SUBJECT TO DISCIPLINARY ACTION UNDER THE UNIFORM CODE OF MILITARY JUSTICE AND/OR DISCHARGE FROM THE MILITARY SERVICE WITH OTHER THAN AN HONORABLE DISCHARGE.**	NO	YES
a. Have you ever been arrested, charged, cited, or held by Federal, State, or other law enforcement or juvenile authorities regardless of whether the citation or charge was dropped or dismissed or you were found not guilty?		
b. As a result of being arrested, charged, cited, or held by law enforcement or juvenile authorities, have you ever been convicted, fined by or forfeited bond to a Federal, State, or other judicial authority or adjudicated a youthful offender or juvenile delinquent (regardless of whether the record in your case has been "sealed" or otherwise stricken from the court record)?		
c. Have you ever been detained, held in, or served time in, any jail or prison, or reform or industrial school or any juvenile facility or institution under the jurisdiction of any City, County, State, Federal or foreign country?		
d. Have you ever been awarded, or are you now under suspended sentence, parole, or probation or awaiting any action on charges against you?		

DD FORM 1 AUG 75 1966/4 REPLACES DD FORM 1966, 1 JUN 75, WHICH WILL BE USED AND DD FORM 373, 1 MAR 74; DD FORM 1916, 1 JUL 73, WHICH ARE OBSOLETE. PAGE 4

Appendix D to opinion of ALITO, J.



LAST NAME: _____ SSN: _____

40. Continued

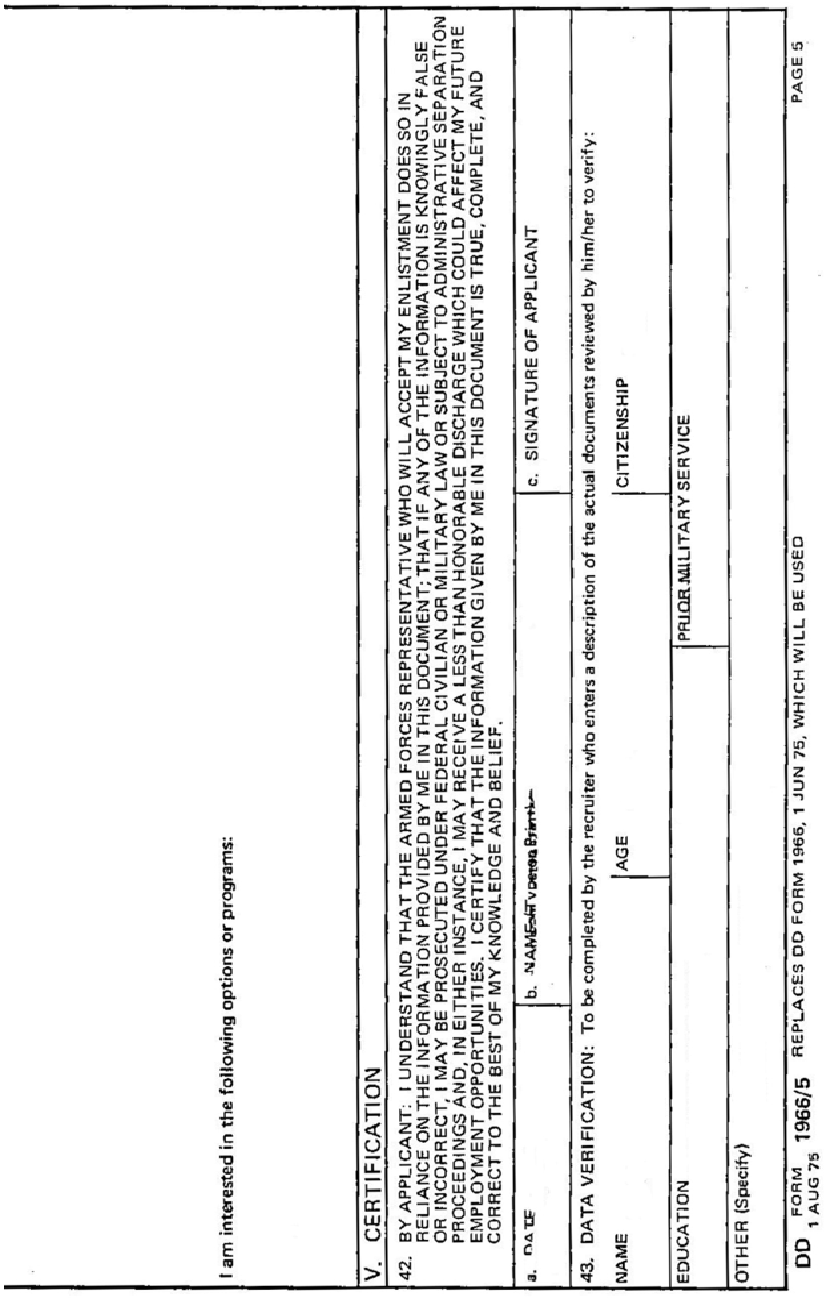
	NO	YES
e. HAVE YOU BEEN RELEASED FROM PAROLE, PROBATION, JUVENILE SUPERVISION, OR GIVEN A SUSPENDED SENTENCE OR RELIEVED OF CHARGES PENDING ON CONDITION THAT YOU APPLY FOR OR ENLIST IN THE US ARMED FORCES?		
f. ARE YOU NOW INVOLVED IN OR A PARTY TO OR CONNECTED WITH ANY COURT ACTION OR CIVIL SUIT? (EXPLAIN "YES" ANSWER IN ITEM 41)		

g. EXPLAIN BELOW "YES" ANSWERS IN "g" THROUGH "e". BE CAREFUL TO INCLUDE *ALL* INCIDENTS WITH LAW ENFORCEMENT AUTHORITIES THAT YOU DISCUSSED WITH YOUR RECRUITER.

OFFENSE	DATE/PLACE	AGE	DISPOSITION	COURT

41. REMARKS

Appendix D to opinion of ALITO, J.



I am interested in the following options or programs:

V. CERTIFICATION

42. BY APPLICANT: I UNDERSTAND THAT THE ARMED FORCES REPRESENTATIVE WHO WILL ACCEPT MY ENLISTMENT DOES SO IN RELIANCE ON THE INFORMATION PROVIDED BY ME IN THIS DOCUMENT; THAT IF ANY OF THE INFORMATION IS KNOWINGLY FALSE OR INCORRECT, I MAY BE PROSECUTED UNDER FEDERAL CIVILIAN OR MILITARY LAW OR SUBJECT TO ADMINISTRATIVE SEPARATION PROCEEDINGS AND, IN EITHER INSTANCE, I MAY RECEIVE A LESS THAN HONORABLE DISCHARGE WHICH COULD AFFECT MY FUTURE EMPLOYMENT OPPORTUNITIES. I CERTIFY THAT THE INFORMATION GIVEN BY ME IN THIS DOCUMENT IS TRUE, COMPLETE, AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF.

a. DATE | b. NAME (Type or Print) | c. SIGNATURE OF APPLICANT

43. DATA VERIFICATION: To be completed by the recruiter who enters a description of the actual documents reviewed by him/her to verify:

NAME | AGE | CITIZENSHIP

EDUCATION | PRIOR MILITARY SERVICE

OTHER (Specify)

DD FORM 1 AUG 75 1966/5 REPLACES DD FORM 1966, 1 JUN 75, WHICH WILL BE USED PAGE 5

Appendix D to opinion of ALITO, J.

LAST NAME: _____ SSN: _____

44. RECRUITER: I certify that I have witnessed applicant's signature above and further certify that I have verified the data in Sections I, III, and IV of this document, and the documents listed above as prescribed by my directives. I understand my liability to trial by courts-martial under the Uniform Code of Military Justice should I effect or cause to be effected the enlistment of anyone known by me to be ineligible for enlistment.

a. DATE	b. NAME, GRADE, SSN, AND RECRUITER ID NO. (Type or Print)	c. SIGNATURE OF RECRUITER

VI. PARENTAL/GUARDIAN CONSENT FOR ENLISTMENT

45. I/we certify that the applicant named herein has no other legal guardian than me/us and I/we consent to his/her enlistment in the _____ subject to all the requirements and lawful commands of the officers who may, from time to time, be placed over him/her; and I/we certify that no promise of any kind has been made to me/us concerning assignment to duty, or promotion during his/her enlistment as an inducement to me/us to sign this consent. I/we hereby authorized the Armed Forces representatives concerned to administer medical examinations, mental and/or aptitude testing, and conduct records checks to determine applicant's enlistment eligibility. I/we relinquish all claim to his/her service and to any wage or compensation for such service.

46. *For enlistment in a Reserve Component:* I/we understand that as a member of a Reserve Component, he/she must serve minimum periods of active duty unless excused by competent authority. In the event he/she fails to fulfill the obligations of his/her Reserve commitment, he/she may be recalled to active duty as prescribed by law. I/we further understand that while the applicant is in the Ready Reserve, he/she may be ordered to extended active duty in time of war or national emergency declared by the Congress or the President or when otherwise authorized by law.

47. I/we certify that the applicant's birth date is:

NAME AND SIGNATURE OF WITNESSING OFFICIAL	SIGNATURE OF PARENT OR LEGAL GUARDIAN
NAME AND SIGNATURE OF WITNESSING OFFICIAL	SIGNATURE OF PARENT OR LEGAL GUARDIAN

VERIFICATION OF SINGLE SIGNATURE CONSENT

VII. ENLISTMENT OPTIONS – Completed by guidance counsellor, career counsellor, recruiter, AFEES Liaison NCO, etc., as specified by sponsoring service.

ENL. COMP.	GRADE/RATE	DATE OF RANK	TERM ENL.	T-E MOS/AFS	PMOS/AFS	WAIVER INFO	OPT ANAL	PROG ENL FOR

Appendix D to opinion of ALITO, J.

SPECIFIC OPTIONS ENLISTED FOR

I certify that I have reviewed all information contained in this document and, to the best of my judgment and belief, applicant fulfills all legal and policy requirements for enlistment. I accept his/her enlistment on behalf of the _____. I further certify that service regulations governing such enlistment have been strictly complied with and any waivers required to effect applicant's enlistment have been secured and are attached to this document.

DATE	NAME, GRADE, AND SSN, ORGANIZATION OR RECRUITER ID (Type or Print)	SIGNATURE

VIII. RECERTIFICATION BY APPLICANT, AND CORRECTION OF DATA AT TIME OF ENLISTMENT

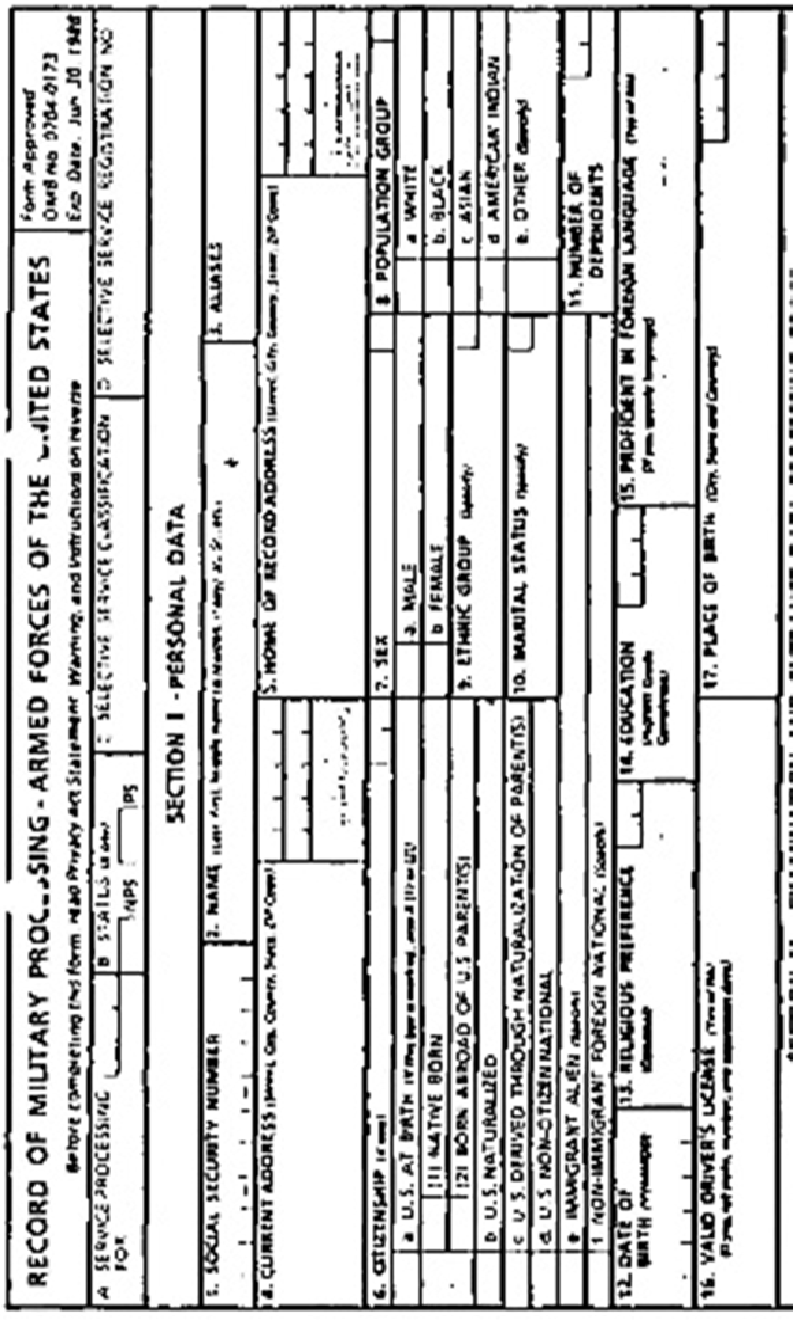
I HAVE REVIEWED ALL INFORMATION CONTAINED IN THIS DOCUMENT; THAT INFORMATION IS STILL CORRECT AND TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF. IF CHANGES WERE REQUIRED, THE ORIGINAL ENTRY HAS BEEN MARKED, "SEE VIII" AND THE CORRECTED INFORMATION IS PROVIDED BELOW, KEYED TO THE APPROPRIATE QUESTION.

QUESTION	CHANGE REQUIRED

DATE	NAME, GRADE, SSN AND SIGNATURE OF WITNESS (Type or Print)	SIGNATURE OF APPLICANT

DD FORM 1 AUG 75 1966/6 REPLACES DD FORM 1966, 1 JUN 75, WHICH WILL BE USED PAGE 6

Appendix D to opinion of ALITO, J.

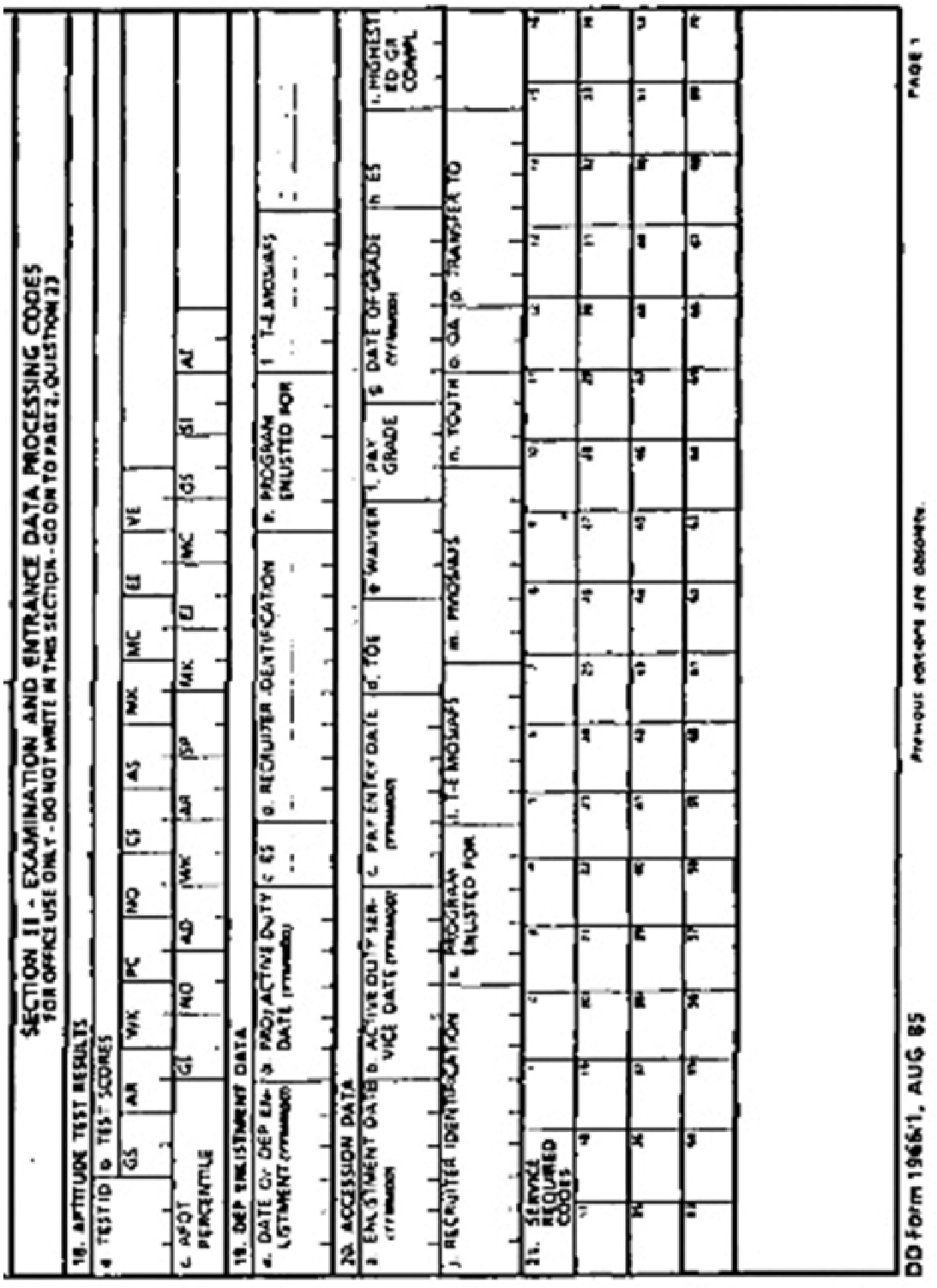


RECORD OF MILITARY PROC...SING - ARMED FORCES OF THE ...ITED STATES

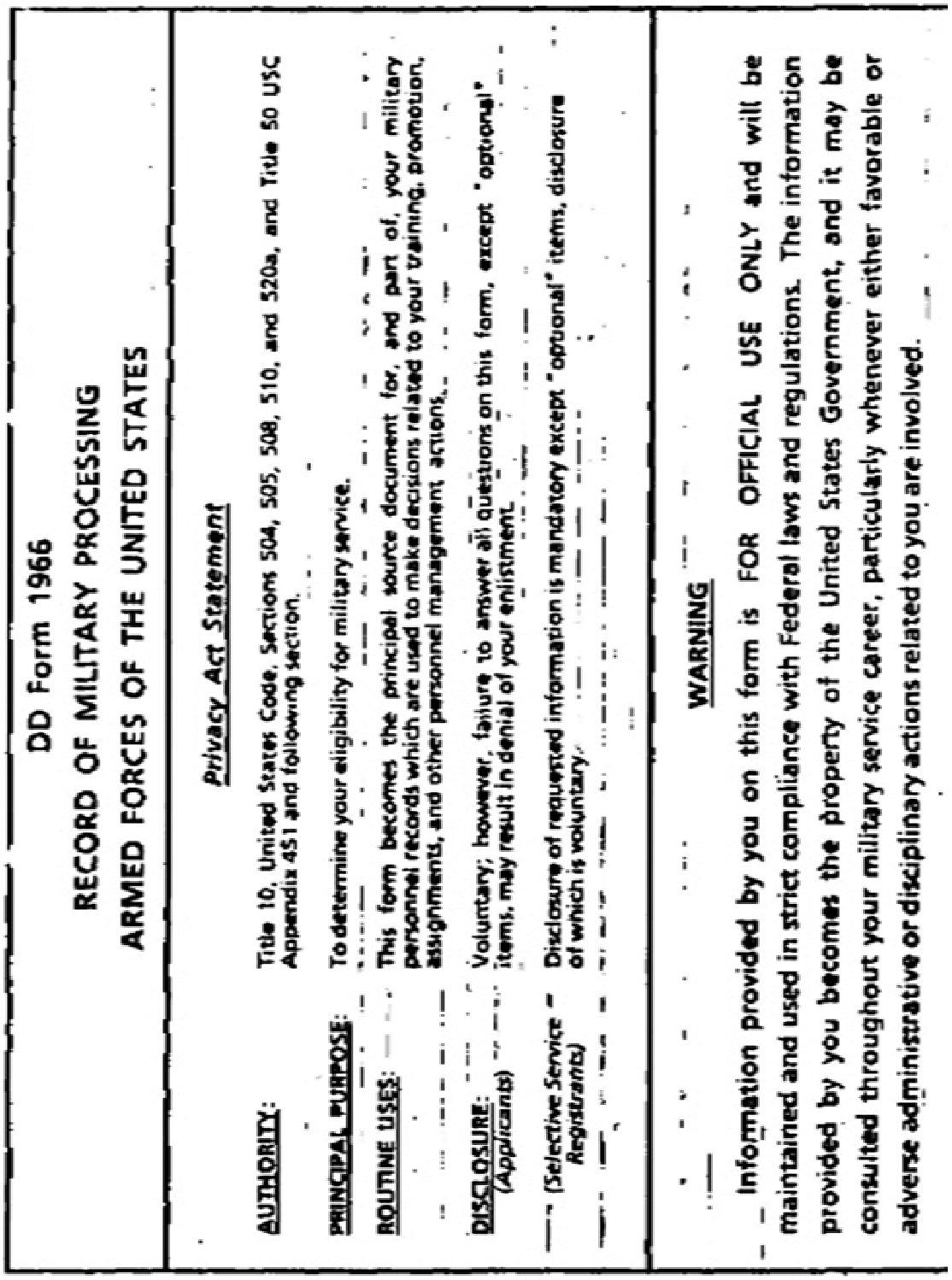
SECTION I - PERSONAL DATA

1. SOCIAL SECURITY NUMBER
2. NAME
3. ALIASES
4. CURRENT ADDRESS
5. HOME OF RECORD ADDRESS
6. CITIZENSHIP
7. SEX
8. POPULATION GROUP
9. ETHNIC GROUP
10. MARITAL STATUS
11. NUMBER OF DEPENDENTS
12. DATE OF BIRTH
13. RELIGIOUS PREFERENCE
14. EDUCATION
15. PROFICIENT IN FOREIGN LANGUAGE
16. VALID DRIVER'S LICENSE
17. PLACE OF BIRTH

Appendix D to opinion of ALITO, J.



Appendix D to opinion of ALITO, J.



DD Form 1966

RECORD OF MILITARY PROCESSING

ARMED FORCES OF THE UNITED STATES

Privacy Act Statement

AUTHORITY: Title 10, United States Code, Sections 504, 505, 508, 510, and 520a, and Title 50 USC Appendix 451 and following section.

PRINCIPAL PURPOSE: To determine your eligibility for military service.

ROUTINE USES: This form becomes the principal source document for, and part of, your military personnel records which are used to make decisions related to your training, promotion, assignments, and other personnel management actions.

DISCLOSURE: *(Applicants)* Voluntary; however, failure to answer all questions on this form, except "optional" items, may result in denial of your enlistment.

(Selective Service Registrants) Disclosure of requested information is mandatory except "optional" items, disclosure of which is voluntary.

WARNING

Information provided by you on this form is FOR OFFICIAL USE ONLY and will be maintained and used in strict compliance with Federal laws and regulations. The information provided by you becomes the property of the United States Government, and it may be consulted throughout your military service career, particularly whenever either favorable or adverse administrative or disciplinary actions related to you are involved.

YOU CAN BE PUNISHED BY FINE, IMPRISONMENT OR BOTH IF YOU ARE FOUND GUILTY OF MAKING A KNOWING AND WILLFUL FALSE STATEMENT ON THIS DOCUMENT.

INSTRUCTIONS

(Read carefully BEFORE filling out this form.)

1. Read Privacy Act Statement above before completing form.

2. Type or print LEGIBLY all answers; if the answer is "None" or "Not Applicable," so state. "OPTIONAL" questions may be left blank.

3. List all responses requiring dates (schools, employment/residences) in chronological order beginning with present or the most recent and work backwards. Show all (employers/residences) for the last five years or since 13th birthday. Give inclusive dates for each period of residence/ employment/school. If additional space is needed for any answer, continue it in item 39, "Remarks."

4. Unless otherwise specified, write all dates as 6 digits (with no spaces or marks) in YYMMDD fashion. February 13, 1985 is written 850213.

DD Form 1966/1R, AUG 85 Previous editions are obsolete . Reverse of Page 1

Appendix D to opinion of ALITO, J.

NAME		SOCIAL SECURITY NUMBER

SECTION III - OTHER PERSONAL DATA

23. CITIZENSHIP *(You must provide your recruiter with the necessary documents to confirm your answers.)*

a. BIRTH CERTIFICATE

(1) FILE NUMBER	(2) ISSUING COUNTY	(3) ISSUING STATE

b. NATIVE COUNTRY

c. IF ALIEN, GIVE ALIEN REGISTRATION NUMBER AND LAST ADDRESS FURNISHED TO IMMIGRATION AND NATURALIZATION SERVICE (INS)

d. DATE/PORT OF ENTRY INTO THE U.S.

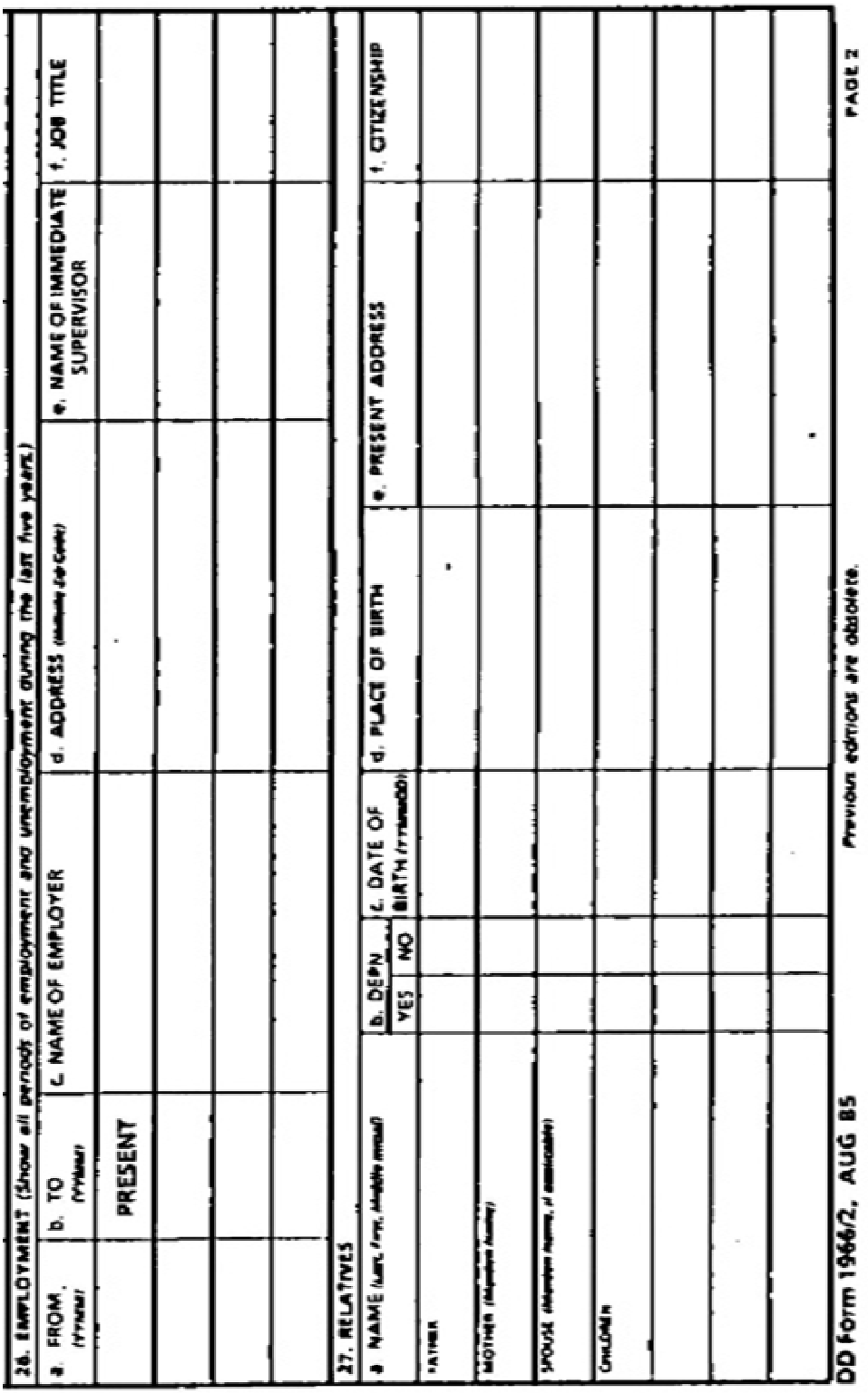
24. EDUCATION *(List all high schools and colleges attended. If none attended, show last school attended.)*

a. FROM (YY/MM)	b. TO (YY/MM)	c. NAME OF SCHOOL	d. LOCATION	e. GRADUATE	
				YES	NO

25. RESIDENCES *(List all for the last five years or since 17th birthday, whichever is shorter.)*

a. FROM (YY/MM)	b. TO (YY/MM)	c. STREET ADDRESS	d. CITY	e. STATE	f. ZIP CODE
	PRESENT				

Appendix D to opinion of ALITO, J.



16. EMPLOYMENT (Show all periods of employment and unemployment during the last five years.)

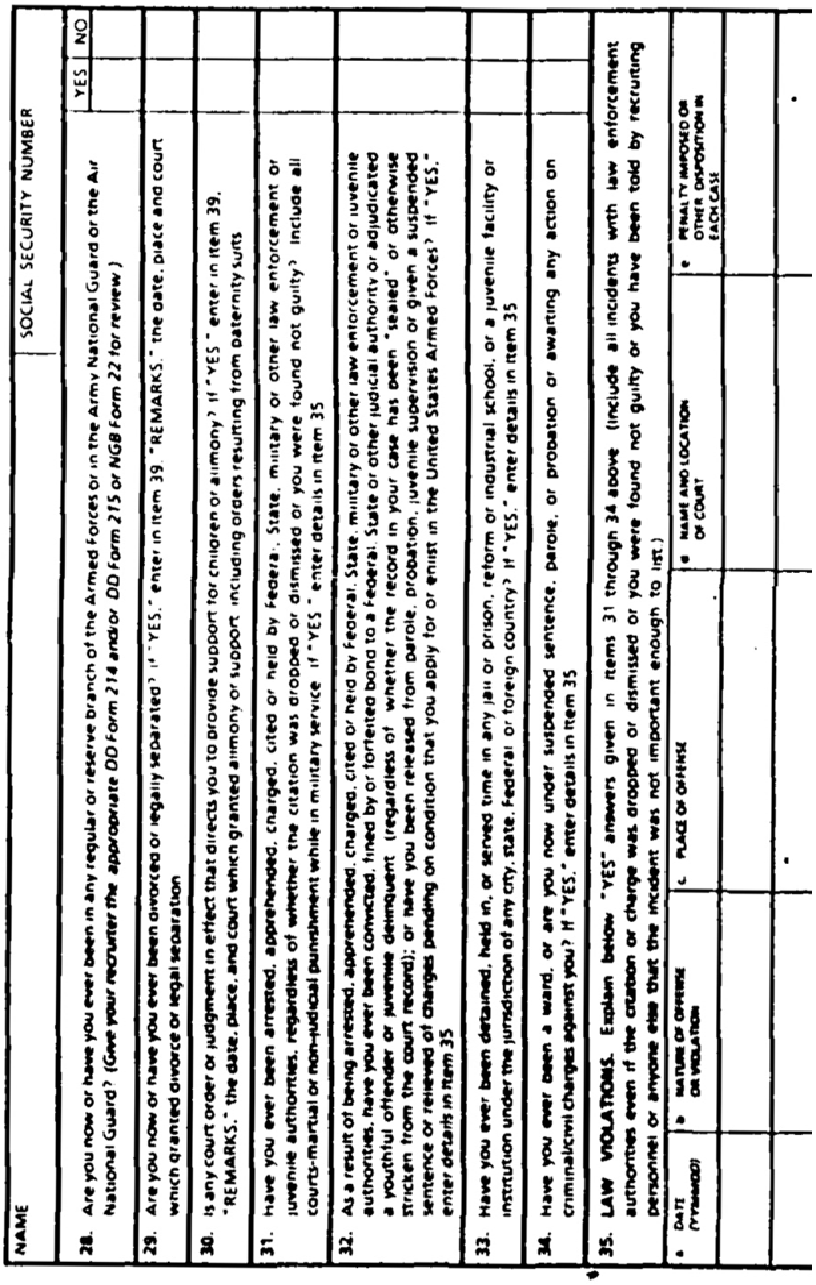
a. FROM (YYMMDD)	b. TO (YYMMDD)	c. NAME OF EMPLOYER	d. ADDRESS (Include Zip Code)	e. NAME OF IMMEDIATE SUPERVISOR	f. JOB TITLE
	PRESENT				

17. RELATIVES

a. NAME (Last, First, Middle Initial)	b. DEPN		c. DATE OF BIRTH (YYMMDD)	d. PLACE OF BIRTH	e. PRESENT ADDRESS	f. CITIZENSHIP
	YES	NO				
FATHER						
MOTHER (Maiden Name)						
SPOUSE (Include former, if applicable)						
CHILDREN						

DD Form 1966/2, AUG 85 Previous editions are obsolete. PAGE 2

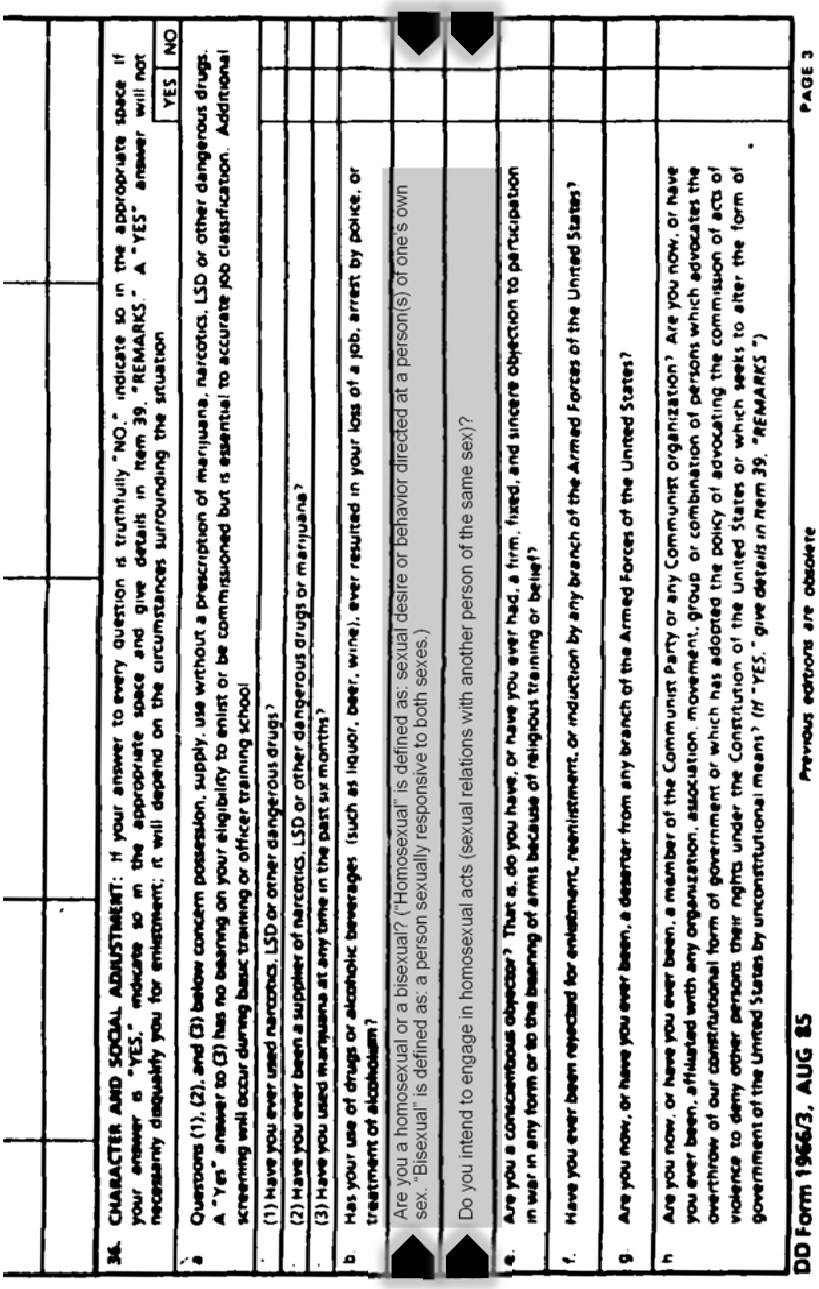
Appendix D to opinion of ALITO, J.



NAME	SOCIAL SECURITY NUMBER		
		YES	NO
28. Are you now or have you ever been in any regular or reserve branch of the Armed Forces or in the Army National Guard or the Air National Guard? (Give your recruiter the appropriate DD Form 214 and/or DD Form 215 or NGB Form 22 for review.)			
29. Are you now or have you ever been divorced or legally separated? If "YES," enter in item 39, "REMARKS," the date, place and court which granted divorce or legal separation			
30. Is any court order or judgment in effect that directs you to provide support for children or alimony? If "YES" enter in item 39, "REMARKS," the date, place, and court which granted alimony or support including orders resulting from paternity suits			
31. Have you ever been arrested, apprehended, charged, cited or held by Federal, State, military or other law enforcement or juvenile authorities, regardless of whether the citation was dropped or dismissed or you were found not guilty? Include all courts-martial or non-judicial punishment while in military service. If "YES," enter details in item 35			
32. As a result of being arrested, apprehended, charged, cited or held by Federal, State, military or other law enforcement or juvenile authorities, have you ever been convicted, fined by or forfeited bond to a Federal, State or other judicial authority or adjudicated a youthful offender or juvenile delinquent (regardless of whether the record in your case has been "sealed" or otherwise stricken from the court record); or have you been released from parole, probation, juvenile supervision or given a suspended sentence or relieved of charges pending on condition that you apply for or enlist in the United States Armed Forces? If "YES," enter details in item 35			
33. Have you ever been detained, held in, or served time in any jail or prison, reform or industrial school, or a juvenile facility or institution under the jurisdiction of any city, state, Federal or foreign country? If "YES," enter details in item 35			
34. Have you ever been a ward, or are you now under suspended sentence, parole, or probation or awaiting any action on criminal/civil charges against you? If "YES," enter details in item 35			

35. **LAW VIOLATIONS.** Explain below "YES" answers given in items 31 through 34 above (include all incidents with law enforcement authorities even if the citation or charge was dropped or dismissed or you were found not guilty or you have been told by recruiting personnel or anyone else that the incident was not important enough to list.)

a. DATE (YY/MM/DD)	b. NATURE OF OFFENSE OR VIOLATION	c. PLACE OF OFFENSE	d. NAME AND LOCATION OF COURT	e. PENALTY IMPOSED OR OTHER DISPOSITION IN EACH CASE



36. CHARACTER AND SOCIAL ADJUSTMENT: If your answer to every question is truthfully "NO," indicate so in the appropriate space. If your answer is "YES," indicate so in the appropriate space and give details in Item 39, "REMARKS." A "YES" answer will not necessarily disqualify you for enlistment; it will depend on the circumstances surrounding the situation. YES NO

a. Questions (1), (2), and (3) below concern possession, supply, use without a prescription of marijuana, narcotics, LSD or other dangerous drugs. A "Yes" answer to (3) has no bearing on your eligibility to enlist or be commissioned but is essential to accurate job classification. Additional screening will occur during basic training or officer training school

(1) Have you ever used narcotics, LSD or other dangerous drugs?

(2) Have you ever been a supplier of narcotics, LSD or other dangerous drugs or marijuana?

(3) Have you used marijuana at any time in the past six months?

b. Has your use of drugs or alcoholic beverages (such as liquor, beer, wine), ever resulted in your loss of a job, arrest by police, or treatment or alcoholism?

Are you a homosexual or a bisexual? ("Homosexual" is defined as: sexual desire or behavior directed at a person(s) of one's own sex. "Bisexual" is defined as: a person sexually responsive to both sexes.)

Do you intend to engage in homosexual acts (sexual relations with another person of the same sex)?

e. Are you a conscientious objector? That is, do you have, or have you ever had, a firm, fixed, and sincere objection to participation in war in any form or to the bearing of arms because of religious training or belief?

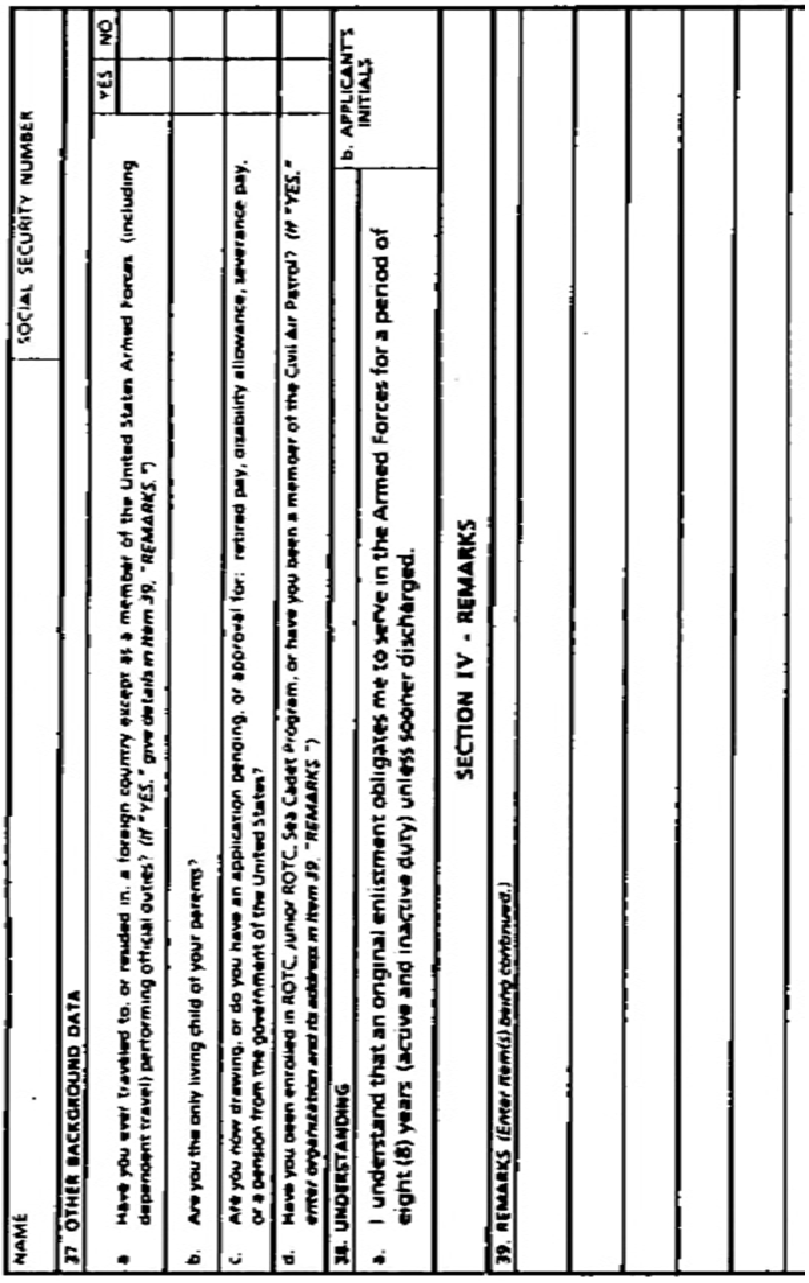
f. Have you ever been rejected for enlistment, reenlistment, or induction by any branch of the Armed Forces of the United States?

g. Are you now, or have you ever been, a deserter from any branch of the Armed Forces of the United States?

h. Are you now, or have you ever been, a member of the Communist Party or any Communist organization? Are you now, or have you ever been, affiliated with any organization, association, movement, group or combination of persons which advocates the overthrow of our constitutional form of government or which has adopted the policy of advocating the commission of acts of violence to deny other persons their rights under the Constitution of the United States or which seeks to alter the form of government of the United States by unconstitutional means? (If "YES," give details in Item 39, "REMARKS.")

DD Form 1966/3, AUG 85 Previous editions are obsolete PAGE 3

Appendix D to opinion of ALITO, J.



NAME	SOCIAL SECURITY NUMBER

37. OTHER BACKGROUND DATA

		YES	NO
a.	Have you ever traveled to, or resided in, a foreign country except as a member of the United States Armed Forces (including dependent travel) performing official duties? (If "YES," give details in Item 39, "REMARKS.")		
b.	Are you the only living child of your parents?		
c.	Are you now drawing, or do you have an application pending, or approval for: retired pay, disability allowance, severance pay, or a pension from the government of the United States?		
d.	Have you been enrolled in ROTC, Junior ROTC, Sea Cadet Program, or have you been a member of the Civil Air Patrol? (If "YES," enter organization and its address in Item 39, "REMARKS.")		

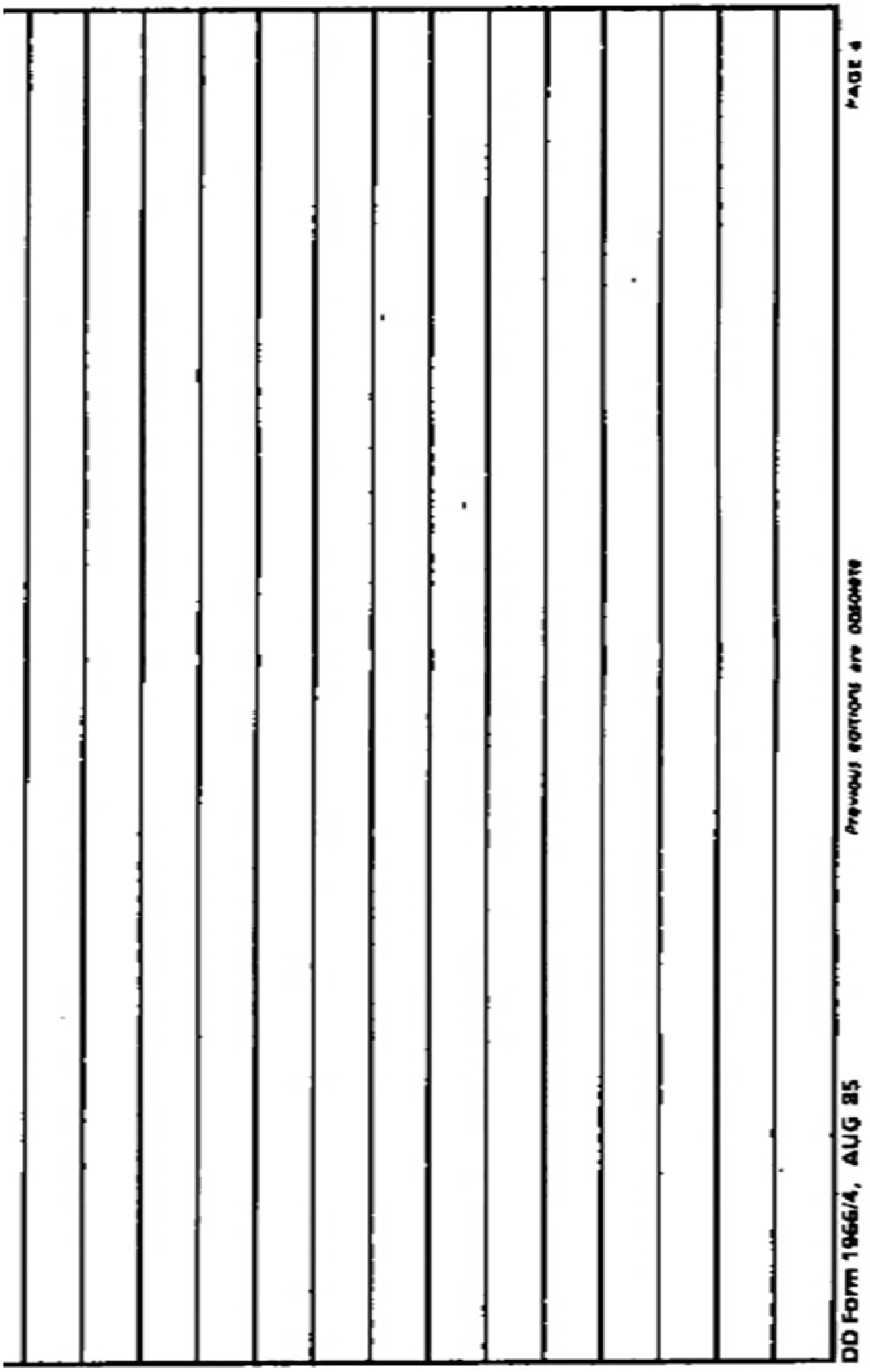
38. UNDERSTANDING

	b. APPLICANT'S INITIALS
a. I understand that an original enlistment obligates me to serve in the Armed Forces for a period of eight (8) years (active and inactive duty) unless sooner discharged.	

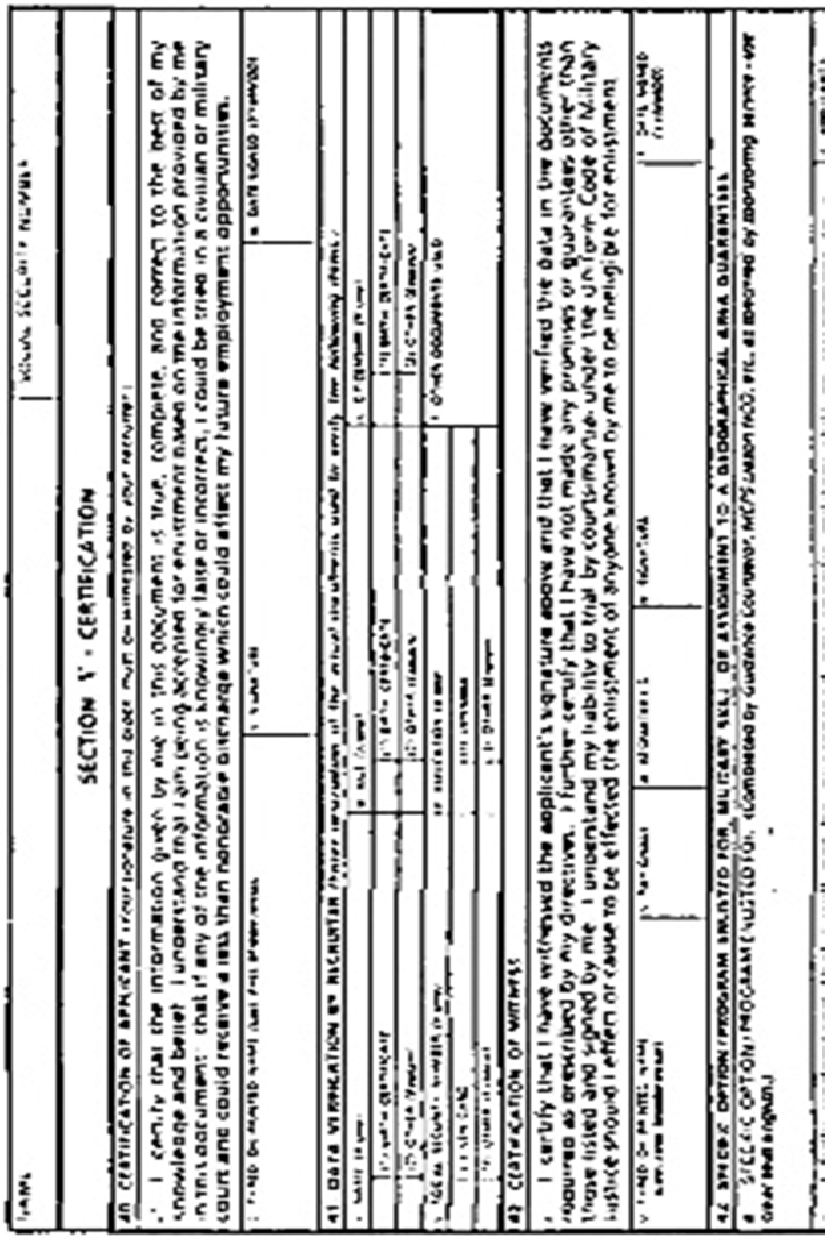
SECTION IV - REMARKS

39. REMARKS *(Enter item(s) being continued.)*

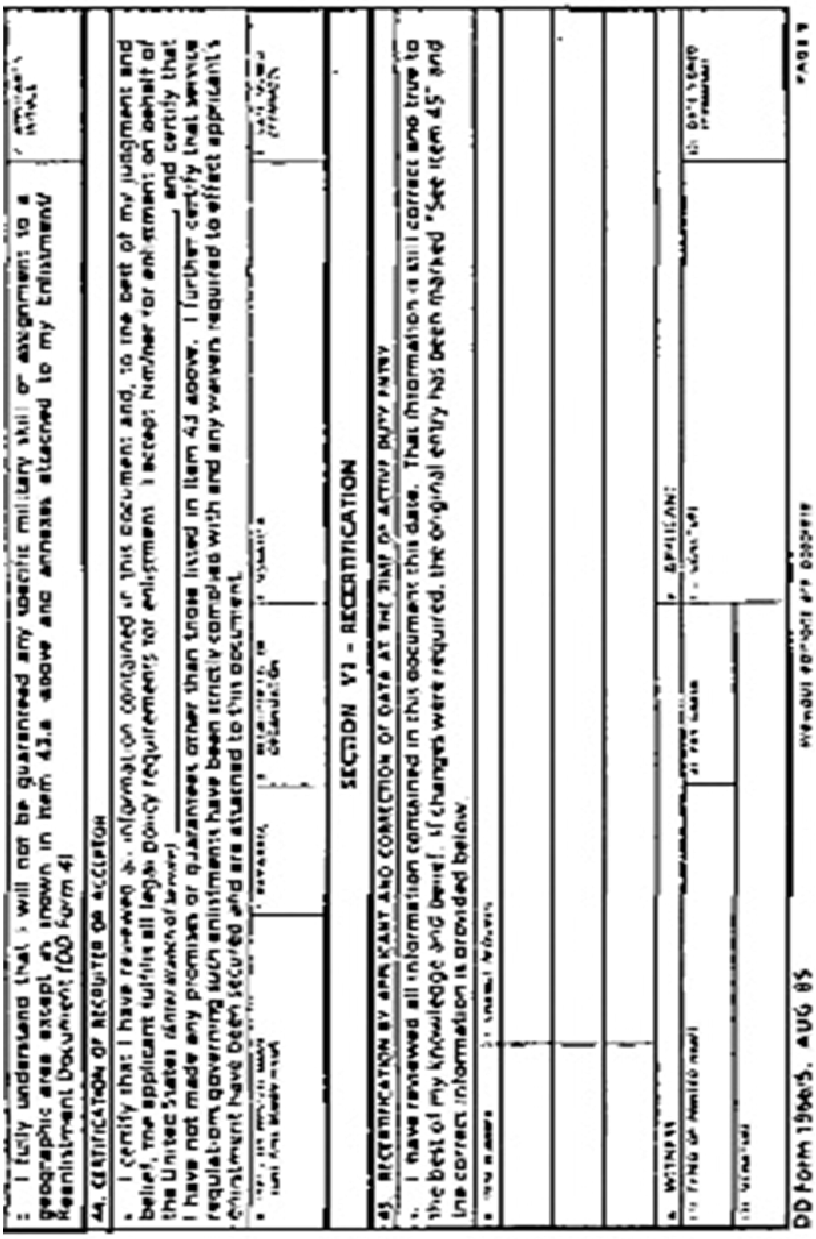
Appendix D to opinion of ALITO, J.



Appendix D to opinion of ALITO, J.



Appendix D to opinion of ALITO, J.


I fully understand that I will not be guaranteed any specific military skill or assignment to a geographic area except as known in Item 43.a above and annexes attached to my Enlistment Document (DD Form 4)

44. CERTIFICATION OF RECRUITER OR ACCESSION

I certify that I have reviewed the information contained in this document and, to the best of my judgment and belief, the applicant fulfills all legal policy requirements for enlistment. I accept him/her for enlistment on behalf of the United States Army/Marine Corps and certify that I have not made any promise or guarantee other than those listed in Item 43 above. I further certify that service regulations governing such enlistments have been strictly complied with and any waivers required to effect applicant's enlistment have been secured and are attached to this document.

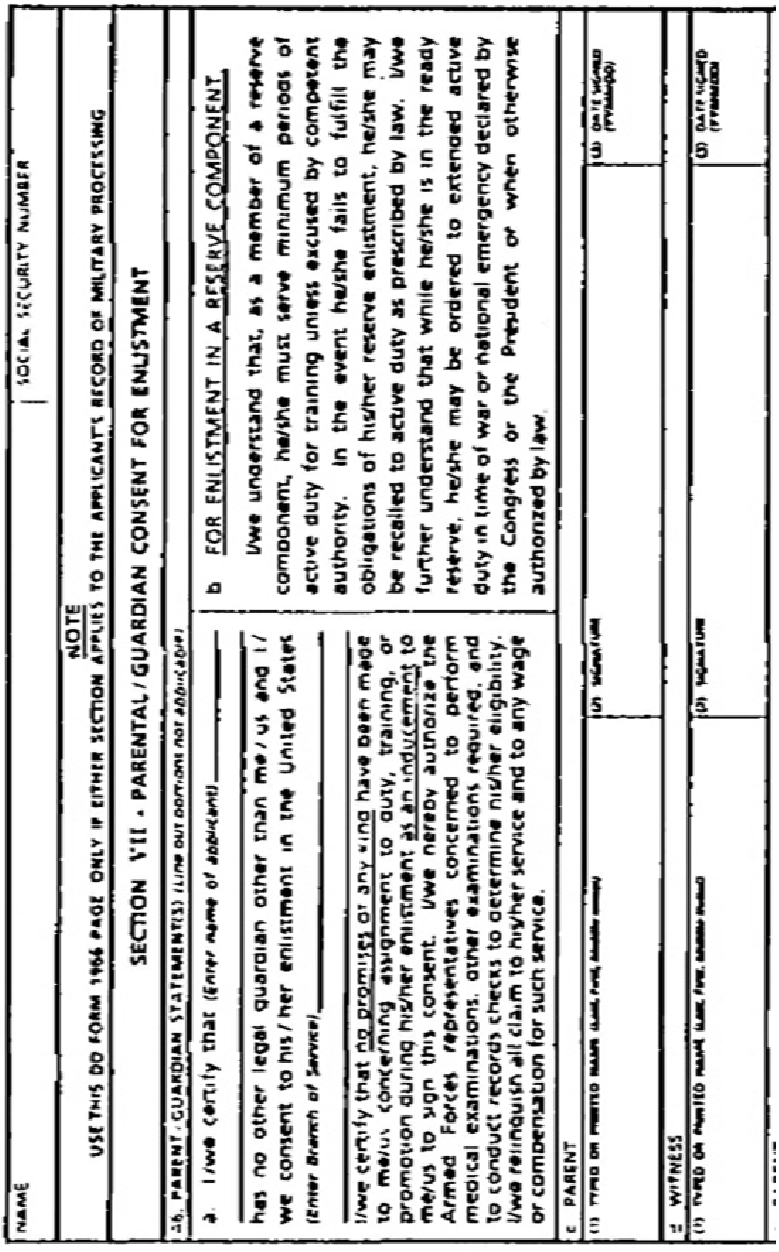
SECTION VI - RECERTIFICATION

45. RECERTIFICATION BY APPLICANT AND CORRECTION OF DATA AT THE TIME OF ACTIVE DUTY ENTRY

I have reviewed all information contained in this document this date. That information is still correct and true to the best of my knowledge and belief. If changes were required, the original entry has been marked "See Item 45" and the correct information is provided below.

DD Form 1966/3, AUG 85

Appendix D to opinion of ALITO, J.



NAME | SOCIAL SECURITY NUMBER

NOTE
USE THIS DD FORM 1966 PAGE ONLY IF EITHER SECTION APPLIES TO THE APPLICANT'S RECORD OF MILITARY PROCESSING

SECTION VII - PARENTAL / GUARDIAN CONSENT FOR ENLISTMENT

26. PARENT / GUARDIAN STATEMENT(S) (Line out sections not applicable)

a. I/we certify that (Enter name of applicant) _____ has no other legal guardian other than me/us and I/we consent to his/her enlistment in the United States (Enter Branch of Service) _____.

I/we certify that no promises or anything have been made to me/us concerning assignment to duty, training, or promotion during his/her enlistment as an inducement to me/us to sign this consent. I/we hereby authorize the Armed Forces representatives concerned to perform medical examinations, other examinations required, and to conduct records checks to determine his/her eligibility. I/we relinquish all claim to his/her service and to any wage or compensation for such service.

b. FOR ENLISTMENT IN A RESERVE COMPONENT

I/we understand that, as a member of a reserve component, he/she must serve minimum periods of active duty for training unless excused by competent authority. In the event he/she fails to fulfill the obligations of his/her reserve enlistment, he/she may be recalled to active duty as prescribed by law. I/we further understand that while he/she is in the ready reserve, he/she may be ordered to extended active duty in time of war or national emergency declared by the Congress or the President or when otherwise authorized by law.

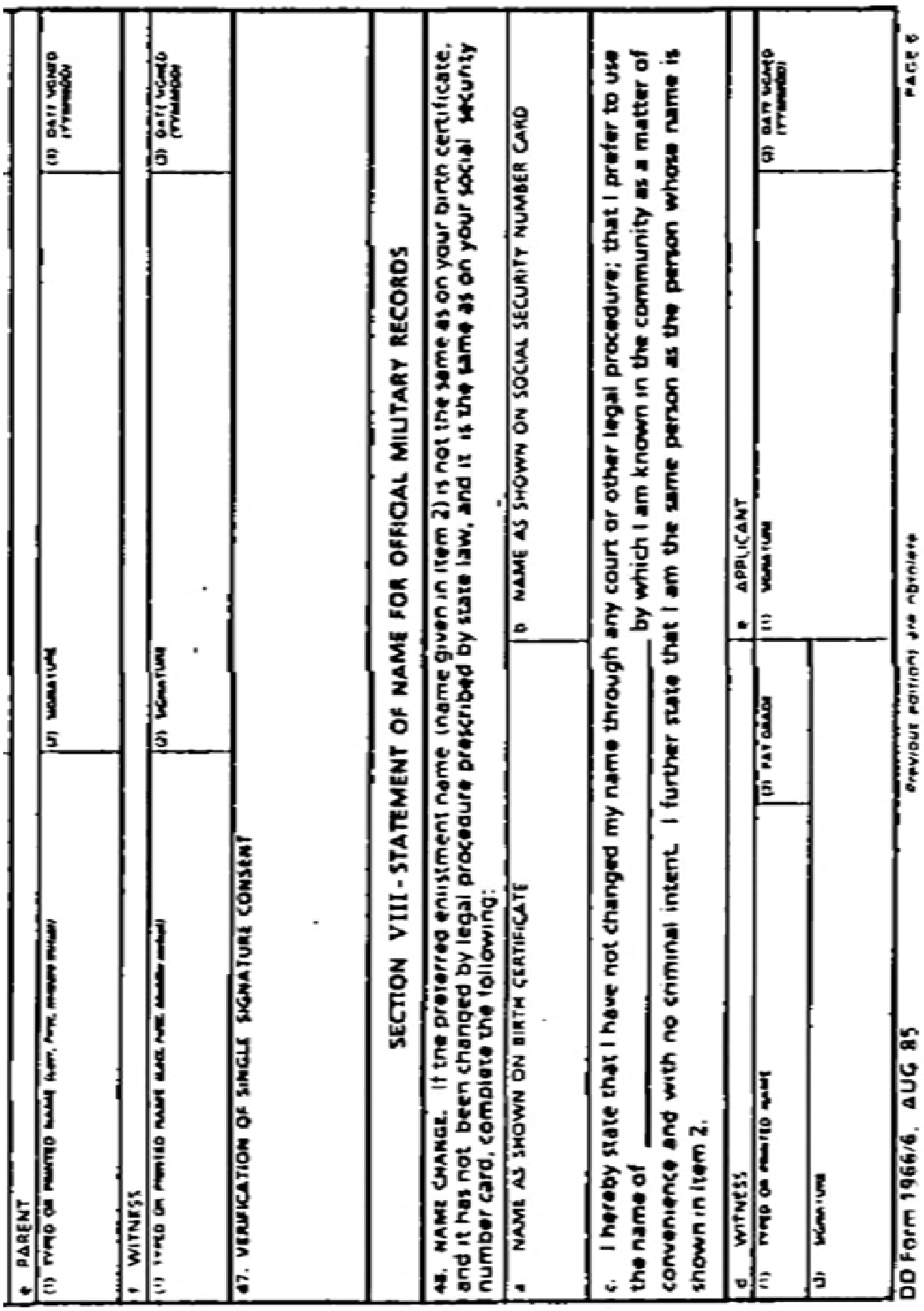
c. PARENT

(1) TYPED OR PRINTED NAME (Last, First, Middle name) | (2) SIGNATURE | (3) DATE SIGNED (YYMMDD)

d. WITNESS

(1) TYPED OR PRINTED NAME (Last, First, Middle name) | (2) SIGNATURE | (3) DATE SIGNED (YYMMDD)

Appendix D to opinion of ALITO, J.



e. PARENT

(1) TYPED OR PRINTED NAME (Last, First, Middle Initial) | (2) SIGNATURE | (3) DATE SIGNED (YYYYMMDD)

f. WITNESS

(1) TYPED OR PRINTED NAME (Last, First, Middle Initial) | (2) SIGNATURE | (3) DATE SIGNED (YYYYMMDD)

47. VERIFICATION OF SINGLE SIGNATURE CONSENT

SECTION VIII - STATEMENT OF NAME FOR OFFICIAL MILITARY RECORDS

48. NAME CHANGE. If the preferred enlistment name (name given in item 2) is not the same as on your birth certificate, and it has not been changed by legal procedure prescribed by state law, and it is the same as on your social security number card, complete the following:

a. NAME AS SHOWN ON BIRTH CERTIFICATE | b. NAME AS SHOWN ON SOCIAL SECURITY NUMBER CARD

c. I hereby state that I have not changed my name through any court or other legal procedure; that I prefer to use the name of _____ by which I am known in the community as a matter of convenience and with no criminal intent. I further state that I am the same person as the person whose name is shown in item 2.

d. WITNESS | e. APPLICANT

(1) TYPED OR PRINTED NAME | (2) PAY GRADE | (1) SIGNATURE | (2) DATE SIGNED (YYYYMMDD)

(3) SIGNATURE

DD Form 1966/6, AUG 85 Previous editions are obsolete PAGE 6

SUPREME COURT OF THE UNITED STATES

Nos. 17–1618, 17–1623 and 18–107

GERALD LYNN BOSTOCK, PETITIONER
17–1618 *v.*
CLAYTON COUNTY, GEORGIA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

ALTITUDE EXPRESS, INC., ET AL., PETITIONERS
17–1623 *v.*
MELISSA ZARDA AND WILLIAM ALLEN MOORE, JR., CO-INDEPENDENT EXECUTORS OF THE ESTATE OF DONALD ZARDA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

R.G. & G.R. HARRIS FUNERAL HOMES, INC., PETITIONER
18–107 *v.*
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[June 15, 2020]

JUSTICE KAVANAUGH, dissenting.

Like many cases in this Court, this case boils down to one fundamental question: Who decides? Title VII of the Civil Rights Act of 1964 prohibits employment discrimination "because of" an individual's "race, color, religion, sex, or national origin." The question here is whether Title VII

should be expanded to prohibit employment discrimination because of sexual orientation. Under the Constitution's separation of powers, the responsibility to amend Title VII belongs to Congress and the President in the legislative process, not to this Court.

The political branches are well aware of this issue. In 2007, the U. S. House of Representatives voted 235 to 184 to prohibit employment discrimination on the basis of sexual orientation. In 2013, the U. S. Senate voted 64 to 32 in favor of a similar ban. In 2019, the House again voted 236 to 173 to outlaw employment discrimination on the basis of sexual orientation. Although both the House and Senate have voted at different times to prohibit sexual orientation discrimination, the two Houses have not yet come together with the President to enact a bill into law.

The policy arguments for amending Title VII are very weighty. The Court has previously stated, and I fully agree, that gay and lesbian Americans "cannot be treated as social outcasts or as inferior in dignity and worth." *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Comm'n*, 584 U. S. ___, ___ (2018) (slip op., at 9).

But we are judges, not Members of Congress. And in Alexander Hamilton's words, federal judges exercise "neither Force nor Will, but merely judgment." The Federalist No. 78, p. 523 (J. Cooke ed. 1961). Under the Constitution's separation of powers, our role as judges is to interpret and follow the law as written, regardless of whether we like the result. Cf. *Texas* v. *Johnson*, 491 U. S. 397, 420–421 (1989) (Kennedy, J., concurring). Our role is not to make or amend the law. As written, Title VII does not prohibit employment discrimination because of sexual orientation.[1]

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[1] Although this opinion does not separately analyze discrimination on the basis of gender identity, this opinion's legal analysis of discrimination on the basis of sexual orientation would apply in much the same way to discrimination on the basis of gender identity.

I

Title VII makes it unlawful for employers to discriminate because of "race, color, religion, sex, or national origin." 42 U. S. C. §2000e–2(a)(1).[2] As enacted in 1964, Title VII did not prohibit other forms of employment discrimination, such as age discrimination, disability discrimination, or sexual orientation discrimination.

Over time, Congress has enacted new employment discrimination laws. In 1967, Congress passed and President Johnson signed the Age Discrimination in Employment Act. 81 Stat. 602. In 1973, Congress passed and President Nixon signed the Rehabilitation Act, which in substance prohibited disability discrimination against federal and certain other employees. 87 Stat. 355. In 1990, Congress passed and President George H. W. Bush signed the comprehensive Americans with Disabilities Act. 104 Stat. 327.

To prohibit age discrimination and disability discrimination, this Court did not unilaterally rewrite or update the

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[2] In full, the statute provides:

"*It shall be an unlawful employment practice for an employer*—

"(1) to fail or refuse to hire or to discharge any individual, or otherwise *to discriminate against any individual* with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual's race, color, religion, sex, or national origin*; or

"(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U. S. C. §2000e–2(a) (emphasis added).

As the Court today recognizes, Title VII contains an important exemption for religious organizations. §2000e–1(a); see also §2000e–2(e). The First Amendment also safeguards the employment decisions of religious employers. See *Hosanna-Tabor Evangelical Lutheran Church and School* v. *EEOC*, 565 U. S. 171, 188–195 (2012). So too, the Religious Freedom Restoration Act of 1993 exempts employers from federal laws that substantially burden the exercise of religion, subject to limited exceptions. §2000bb–1.

law. Rather, Congress and the President enacted new legislation, as prescribed by the Constitution's separation of powers.

For several decades, Congress has considered numerous bills to prohibit employment discrimination based on sexual orientation. But as noted above, although Congress has come close, it has not yet shouldered a bill over the legislative finish line.

In the face of the unsuccessful legislative efforts (so far) to prohibit sexual orientation discrimination, judges may not rewrite the law simply because of their own policy views. Judges may not update the law merely because they think that Congress does not have the votes or the fortitude. Judges may not predictively amend the law just because they believe that Congress is likely to do it soon anyway.

If judges could rewrite laws based on their own policy views, or based on their own assessments of likely future legislative action, the critical distinction between legislative authority and judicial authority that undergirds the Constitution's separation of powers would collapse, thereby threatening the impartial rule of law and individual liberty. As James Madison stated: "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary controul, for *the judge* would then be *the legislator*." The Federalist No. 47, at 326 (citing Montesquieu). If judges could, for example, rewrite or update securities laws or healthcare laws or gun laws or environmental laws simply based on their own policy views, the Judiciary would become a democratically illegitimate super-legislature—unelected, and hijacking the important policy decisions reserved by the Constitution to the people's elected representatives.

Because judges interpret the law as written, not as they might wish it were written, the first 10 U. S. Courts of Appeals to consider whether Title VII prohibits sexual orientation discrimination all said no. Some 30 federal judges

considered the question. All 30 judges said no, based on the text of the statute. 30 out of 30.

But in the last few years, a new theory has emerged. To end-run the bedrock separation-of-powers principle that courts may not unilaterally rewrite statutes, the plaintiffs here (and, recently, two Courts of Appeals) have advanced a novel and creative argument. They contend that discrimination "because of sexual orientation" and discrimination "because of sex" are actually not separate categories of discrimination after all. Instead, the theory goes, discrimination because of sexual orientation always qualifies as discrimination because of sex: When a gay man is fired because he is gay, he is fired because he is attracted to men, even though a similarly situated woman would not be fired just because she is attracted to men. According to this theory, it follows that the man has been fired, at least as a literal matter, because of his sex.

Under this literalist approach, sexual orientation discrimination automatically qualifies as sex discrimination, and Title VII's prohibition against sex discrimination therefore also prohibits sexual orientation discrimination—and actually has done so since 1964, unbeknownst to everyone. Surprisingly, the Court today buys into this approach. *Ante*, at 9–12.

For the sake of argument, I will assume that firing someone because of their sexual orientation may, as a very literal matter, entail making a distinction based on sex. But to prevail in this case with their literalist approach, the plaintiffs must *also* establish one of two other points. The plaintiffs must establish that courts, when interpreting a statute, adhere to literal meaning rather than ordinary meaning. Or alternatively, the plaintiffs must establish that the ordinary meaning of "discriminate because of sex"—not just the literal meaning—encompasses sexual orientation discrimination. The plaintiffs fall short on both counts.

First, courts must follow ordinary meaning, not literal meaning. And courts must adhere to the ordinary meaning of phrases, not just the meaning of the words in a phrase.

There is no serious debate about the foundational interpretive principle that courts adhere to ordinary meaning, not literal meaning, when interpreting statutes. As Justice Scalia explained, "the good textualist is not a literalist." A. Scalia, A Matter of Interpretation 24 (1997). Or as Professor Eskridge stated: The "prime directive in statutory interpretation is to apply the meaning that a reasonable reader would derive from the text of the law," so that "for hard cases as well as easy ones, the *ordinary meaning* (or the 'everyday meaning' or the 'commonsense' reading) of the relevant statutory text is the anchor for statutory interpretation." W. Eskridge, Interpreting Law 33, 34–35 (2016) (footnote omitted). Or as Professor Manning put it, proper statutory interpretation asks "how a reasonable person, conversant with the relevant social and linguistic conventions, would read the text in context. This approach recognizes that the literal or dictionary definitions of words will often fail to account for settled nuances or background conventions that qualify the literal meaning of language and, in particular, of legal language." Manning, The Absurdity Doctrine, 116 Harv. L. Rev. 2387, 2392–2393 (2003). Or as Professor Nelson wrote: No "mainstream judge is interested solely in the literal definitions of a statute's words." Nelson, What Is Textualism?, 91 Va. L. Rev. 347, 376 (2005). The ordinary meaning that counts is the ordinary public meaning at the time of enactment—although in this case, that temporal principle matters little because the ordinary meaning of "discriminate because of sex" was the same in 1964 as it is now.

Judges adhere to ordinary meaning for two main reasons: rule of law and democratic accountability. A society governed by the rule of law must have laws that are known and understandable to the citizenry. And judicial adherence to

ordinary meaning facilitates the democratic accountability of America's elected representatives for the laws they enact. Citizens and legislators must be able to ascertain the law by reading the words of the statute. Both the rule of law and democratic accountability badly suffer when a court adopts a hidden or obscure interpretation of the law, and not its ordinary meaning.

Consider a simple example of how ordinary meaning differs from literal meaning. A statutory ban on "vehicles in the park" would literally encompass a baby stroller. But no good judge would interpret the statute that way because the word "vehicle," in its ordinary meaning, does not encompass baby strollers.

The ordinary meaning principle is longstanding and well settled. Time and again, this Court has rejected literalism in favor of ordinary meaning. Take a few examples:

- The Court recognized that beans may be seeds "in the language of botany or natural history," but concluded that beans are not seeds "in commerce" or "in common parlance." *Robertson* v. *Salomon*, 130 U. S. 412, 414 (1889).
- The Court explained that tomatoes are literally "the fruit of a vine," but "in the common language of the people," tomatoes are vegetables. *Nix* v. *Hedden*, 149 U. S. 304, 307 (1893).
- The Court stated that the statutory term "vehicle" does not cover an aircraft: "No doubt etymologically it is possible to use the word to signify a conveyance working on land, water or air . . . . But in everyday speech 'vehicle' calls up the picture of a thing moving on land." *McBoyle* v. *United States*, 283 U. S. 25, 26 (1931).
- The Court pointed out that "this Court's interpretation of the three-judge-court statutes has frequently deviated from the path of literalism." *Gonzalez* v. *Automatic Employees Credit Union*, 419 U. S. 90, 96 (1974).

- The Court refused a reading of "mineral deposits" that would include water, even if "water is a 'mineral,' in the broadest sense of that word," because it would bring about a "major . . . alteration in established legal relationships based on nothing more than an overly literal reading of a statute, without any regard for its context or history." *Andrus* v. *Charlestone Stone Products Co.*, 436 U. S. 604, 610, 616 (1978).
- The Court declined to interpret "facilitating" a drug distribution crime in a way that would cover purchasing drugs, because the "literal sweep of 'facilitate' sits uncomfortably with common usage." *Abuelhawa* v. *United States*, 556 U. S. 816, 820 (2009).
- The Court rebuffed a literal reading of "personnel rules" that would encompass any rules that personnel must follow (as opposed to human resources rules *about* personnel), and stated that no one "using ordinary language would describe" personnel rules "in this manner." *Milner* v. *Department of Navy*, 562 U. S. 562, 578 (2011).
- The Court explained that, when construing statutory phrases such as "arising from," it avoids "uncritical literalism leading to results that no sensible person could have intended." *Jennings* v. *Rodriguez*, 583 U. S. ___, ___–___ (2018) (plurality opinion) (slip op., at 9–10) (internal quotation marks omitted).

Those cases exemplify a deeply rooted principle: When there is a divide between the literal meaning and the ordinary meaning, courts must follow the ordinary meaning.

Next is a critical point of emphasis in this case. The difference between literal and ordinary meaning becomes especially important when—as in this case—judges consider *phrases* in statutes. (Recall that the shorthand version of the phrase at issue here is "discriminate because of sex.")[3]

[3] The full phrasing of the statute is provided above in footnote 2. This

Courts must heed the ordinary meaning of the *phrase as a whole*, not just the meaning of the words in the phrase. That is because a phrase may have a more precise or confined meaning than the literal meaning of the individual words in the phrase. Examples abound. An "American flag" could literally encompass a flag made in America, but in common parlance it denotes the Stars and Stripes. A "three-pointer" could literally include a field goal in football, but in common parlance, it is a shot from behind the arc in basketball. A "cold war" could literally mean any wintertime war, but in common parlance it signifies a conflict short of open warfare. A "washing machine" could literally refer to any machine used for washing any item, but in everyday speech it means a machine for washing clothes.

This Court has often emphasized the importance of sticking to the ordinary meaning *of a phrase*, rather than the meaning of words in the phrase. In *FCC* v. *AT&T Inc.*, 562 U. S. 397 (2011), for example, the Court explained:

> "AT&T's argument treats the term 'personal privacy' as simply the sum of its two words: the privacy of a person. . . . But two words together may assume a more particular meaning than those words in isolation. We understand a golden cup to be a cup made of or resembling gold. A golden boy, on the other hand, is one who is charming, lucky, and talented. A golden opportunity is one not to be missed. 'Personal' in the phrase 'personal privacy' conveys more than just 'of a person.' It suggests a type of privacy evocative of human concerns—not the sort usually associated with an entity like, say, AT&T." *Id.,* at 406.

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opinion uses "discriminate because of sex" as shorthand for "discriminate . . . because of . . . sex." Also, the plaintiffs do not dispute that the ordinary meaning of the statutory phrase "discriminate" because of sex is the same as the statutory phrase "to fail or refuse to hire or to discharge any individual" because of sex.

Exactly right and exactly on point in this case.

Justice Scalia explained the extraordinary importance of hewing to the ordinary meaning of a phrase: "Adhering to the *fair meaning* of the text (the textualist's touchstone) does not limit one to the hyperliteral meaning of each word in the text. In the words of Learned Hand: 'a sterile literalism . . . loses sight of the forest for the trees.' The full body of a text contains implications that can alter the literal meaning of individual words." A. Scalia & B. Garner, Reading Law 356 (2012) (footnote omitted). Put another way, "the meaning of a sentence may be more than that of the separate words, as a melody is more than the notes." *Helvering* v. *Gregory*, 69 F. 2d 809, 810–811 (CA2 1934) (L. Hand, J.). Judges must take care to follow ordinary meaning "when two words combine to produce a meaning that is not the mechanical composition of the two words separately." Eskridge, Interpreting Law, at 62. Dictionaries are not "always useful for determining the ordinary meaning of word clusters (like 'driving a vehicle') or phrases and clauses or entire sentences." *Id.*, at 44. And we must recognize that a phrase can cover a "dramatically smaller category than either component term." *Id.,* at 62.

If the usual evidence indicates that a statutory phrase bears an ordinary meaning different from the literal strung-together definitions of the individual words in the phrase, we may not ignore or gloss over that discrepancy. "Legislation cannot sensibly be interpreted by stringing together dictionary synonyms of each word and proclaiming that, if the right example of the meaning of each is selected, the 'plain meaning' of the statute leads to a particular result. No theory of interpretation, including textualism itself, is premised on such an approach." 883 F. 3d 100, 144, n. 7 (CA2 2018) (Lynch, J., dissenting).[4]

[4] Another longstanding canon of statutory interpretation—the absurdity canon—similarly reflects the law's focus on ordinary meaning rather

In other words, this Court's precedents and longstanding principles of statutory interpretation teach a clear lesson: Do not simply split statutory phrases into their component words, look up each in a dictionary, and then mechanically put them together again, as the majority opinion today mistakenly does. See *ante*, at 5–9. To reiterate Justice Scalia's caution, that approach misses the forest for the trees.

A literalist approach to interpreting phrases disrespects ordinary meaning and deprives the citizenry of fair notice of what the law is. It destabilizes the rule of law and thwarts democratic accountability. For phrases as well as terms, the "linchpin of statutory interpretation is *ordinary meaning*, for that is going to be most accessible to the citizenry desirous of following the law *and* to the legislators and their staffs drafting the legal terms of the plans launched by statutes *and* to the administrators and judges implementing the statutory plan." Eskridge, Interpreting Law, at 81; see Scalia, A Matter of Interpretation, at 17.

Bottom line: Statutory Interpretation 101 instructs courts to follow ordinary meaning, not literal meaning, and to adhere to the ordinary meaning of phrases, not just the meaning of the words in a phrase.

Second, in light of the bedrock principle that we must adhere to the ordinary meaning of a phrase, the question in this case boils down to the ordinary meaning of the phrase "discriminate because of sex." Does the ordinary meaning of that phrase encompass discrimination because of sexual orientation? The answer is plainly no.

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than literal meaning. That canon tells courts to avoid construing a statute in a way that would lead to absurd consequences. The absurdity canon, properly understood, is "an implementation of (rather than . . . an exception to) the ordinary meaning rule." W. Eskridge, Interpreting Law 72 (2016). "What the rule of absurdity seeks to do is what all rules of interpretation seek to do: *make sense* of the text." A. Scalia & B. Garner, Reading Law 235 (2012).

On occasion, it can be difficult for judges to assess ordinary meaning. Not here. Both common parlance and common legal usage treat sex discrimination and sexual orientation discrimination as two distinct categories of discrimination—back in 1964 and still today.

As to common parlance, few in 1964 (or today) would describe a firing because of sexual orientation as a firing because of sex. As commonly understood, sexual orientation discrimination is distinct from, and not a form of, sex discrimination. The majority opinion acknowledges the common understanding, noting that the plaintiffs here probably did not tell their friends that they were fired because of their sex. *Ante*, at 16. That observation is clearly correct. In common parlance, Bostock and Zarda were fired because they were gay, not because they were men.

Contrary to the majority opinion's approach today, this Court has repeatedly emphasized that common parlance matters in assessing the ordinary meaning of a statute, because courts heed how "most people" "would have understood" the text of a statute when enacted. *New Prime Inc.* v. *Oliveira*, 586 U. S. ___, ___–___ (2019) (slip op., at 6–7); see *Henson* v. *Santander Consumer USA Inc.*, 582 U. S. ___, ___ (2017) (slip op., at 4) (using a conversation between friends to demonstrate ordinary meaning); see also *Wisconsin Central Ltd.* v. *United States*, 585 U. S. ___, ___–___ (2018) (slip op., at 2–3) (similar); *AT&T*, 562 U. S., at 403–404 (similar).

Consider the employer who has four employees but must fire two of them for financial reasons. Suppose the four employees are a straight man, a straight woman, a gay man, and a lesbian. The employer with animosity against women (animosity based on sex) will fire the two women. The employer with animosity against gays (animosity based on sexual orientation) will fire the gay man and the lesbian. Those are two distinct harms caused by two distinct biases that have two different outcomes. To treat one as a form of

the other—as the majority opinion does—misapprehends common language, human psychology, and real life. See *Hively* v. *Ivy Tech Community College of Ind.*, 853 F. 3d 339, 363 (CA7 2017) (Sykes, J., dissenting).

It also rewrites history. Seneca Falls was not Stonewall. The women's rights movement was not (and is not) the gay rights movement, although many people obviously support or participate in both. So to think that sexual orientation discrimination is just a form of sex discrimination is not just a mistake of language and psychology, but also a mistake of history and sociology.

Importantly, an overwhelming body of federal law reflects and reinforces the ordinary meaning and demonstrates that sexual orientation discrimination is distinct from, and not a form of, sex discrimination. Since enacting Title VII in 1964, Congress has *never* treated sexual orientation discrimination the same as, or as a form of, sex discrimination. Instead, Congress has consistently treated sex discrimination and sexual orientation discrimination as legally distinct categories of discrimination.

Many federal statutes prohibit sex discrimination, and many federal statutes also prohibit sexual orientation discrimination. But those sexual orientation statutes expressly prohibit sexual orientation discrimination in addition to expressly prohibiting sex discrimination. *Every single one.* To this day, Congress has never defined sex discrimination to encompass sexual orientation discrimination. Instead, when Congress wants to prohibit sexual orientation discrimination in addition to sex discrimination, Congress explicitly refers to sexual orientation discrimination.[5]

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[5] See 18 U. S. C. §249(a)(2)(A) (criminalizing violence because of "gender, sexual orientation"); 20 U. S. C. §1092(f)(1)(F)(ii) (requiring funding recipients to collect statistics on crimes motivated by the victim's "gender, . . . sexual orientation"); 34 U. S. C. §12291(b)(13)(A) (prohibiting discrimination on the basis of "sex, . . . sexual orientation"); §30501(1)

That longstanding and widespread congressional practice matters. When interpreting statutes, as the Court has often said, we "usually presume differences in language" convey "differences in meaning." *Wisconsin Central*, 585 U. S., at ___ (slip op., at 4) (internal quotation marks omitted). When Congress chooses distinct phrases to accomplish distinct purposes, and does so over and over again for decades, we may not lightly toss aside all of Congress's careful handiwork. As Justice Scalia explained for the Court, "it is not our function" to "treat alike subjects that different Congresses have chosen to treat differently." *West Virginia Univ. Hospitals, Inc.* v. *Casey*, 499 U. S. 83, 101 (1991); see *id.,* at 92.

And the Court has likewise stressed that we may not read "a specific concept into general words when precise language in other statutes reveals that Congress knew how to identify that concept." Eskridge, Interpreting Law, at 415; see *University of Tex. Southwestern Medical Center* v. *Nassar*, 570 U. S. 338, 357 (2013); *Arlington Central School Dist. Bd. of Ed.* v. *Murphy*, 548 U. S. 291, 297–298 (2006); *Jama* v. *Immigration and Customs Enforcement*, 543 U. S. 335, 341–342 (2005); *Custis* v. *United States*, 511 U. S. 485, 491–493 (1994); *West Virginia Univ. Hospitals*, 499 U. S., at 99.

(identifying violence motivated by "gender, sexual orientation" as national problem); §30503(a)(1)(C) (authorizing Attorney General to assist state, local, and tribal investigations of crimes motivated by the victim's "gender, sexual orientation"); §§41305(b)(1), (3) (requiring Attorney General to acquire data on crimes motivated by "gender . . . , sexual orientation," but disclaiming any cause of action including one "based on discrimination due to sexual orientation"); 42 U. S. C. §294e–1(b)(2) (conditioning funding on institution's inclusion of persons of "different genders and sexual orientations"); see also United States Sentencing Commission, Guidelines Manual §3A1.1(a) (Nov. 2018) (authorizing increased offense level if the crime was motivated by the victim's "gender . . . or sexual orientation"); 2E Guide to Judiciary Policy §320 (2019) (prohibiting judicial discrimination because of "sex, . . . sexual orientation").

So it is here. As demonstrated by all of the statutes covering sexual orientation discrimination, Congress knows how to prohibit sexual orientation discrimination. So courts should not read that specific concept into the general words "discriminate because of sex." We cannot close our eyes to the indisputable fact that Congress—for several decades in a large number of statutes—has identified sex discrimination and sexual orientation discrimination as two distinct categories.

Where possible, we also strive to interpret statutes so as not to create undue surplusage. It is not uncommon to find some scattered redundancies in statutes. But reading sex discrimination to encompass sexual orientation discrimination would cast aside as surplusage the numerous references to sexual orientation discrimination sprinkled throughout the U. S. Code in laws enacted over the last 25 years.

In short, an extensive body of federal law both reflects and reinforces the widespread understanding that sexual orientation discrimination is distinct from, and not a form of, sex discrimination.

The story is the same with bills proposed in Congress. Since the 1970s, Members of Congress have introduced many bills to prohibit sexual orientation discrimination in the workplace. Until very recently, all of those bills would have expressly established sexual orientation as a separately proscribed category of discrimination. The bills did not define sex discrimination to encompass sexual orientation discrimination.[6]

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[6] See, *e.g.*, H. R. 14752, 93d Cong., 2d Sess., §§6, 11 (1974) (amending Title VII "by adding after the word 'sex'" the words "'sexual orientation,'" defined as "choice of sexual partner according to gender"); H. R. 451, 95th Cong., 1st Sess., §§6, 11 (1977) ("adding after the word 'sex,' . . . 'affectional or sexual preference,'" defined as "having or manifesting an emotional or physical attachment to another consenting person or persons of either gender, or having or manifesting a preference for such

The proposed bills are telling not because they are relevant to congressional intent regarding Title VII. See *Central Bank of Denver, N. A.* v. *First Interstate Bank of Denver, N. A.*, 511 U. S. 164, 186–188 (1994). Rather, the proposed bills are telling because they, like the enacted laws, further demonstrate the widespread usage of the English language in the United States: Sexual orientation discrimination is distinct from, and not a form of, sex discrimination.

Presidential Executive Orders reflect that same common understanding. In 1967, President Johnson signed an Executive Order prohibiting sex discrimination in federal employment. In 1969, President Nixon issued a new order that did the same. Exec. Order No. 11375, 3 CFR 684 (1966–1970 Comp.); Exec. Order No. 11478, *id.,* at 803. In 1998, President Clinton charted a new path and signed an Executive Order prohibiting sexual orientation discrimination in federal employment. Exec. Order No. 13087, 3 CFR 191 (1999). The Nixon and Clinton Executive Orders remain in effect today.

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attachment"); S. 1708, 97th Cong., 1st Sess., §§1, 2 (1981) ("inserting after 'sex' . . . 'sexual orientation,'" defined as "'homosexuality, heterosexuality, and bisexuality'"); H. R. 230, 99th Cong., 1st Sess., §§4, 8 (1985) ("inserting after 'sex,' . . . 'affectional or sexual orientation,'" defined as "homosexuality, heterosexuality, and bisexuality"); S. 47, 101st Cong., 1st Sess., §§5, 9 (1989) ("inserting after 'sex,' . . . 'affectional or sexual orientation,'" defined as "homosexuality, heterosexuality, and bisexuality"); H. R. 431, 103d Cong., 1st Sess., §2 (1993) (prohibiting discrimination "on account of . . . sexual orientation" without definition); H. R. 1858, 105th Cong., 1st Sess., §§3, 4 (1997) (prohibiting discrimination "on the basis of sexual orientation," defined as "homosexuality, bisexuality, or heterosexuality"); H. R. 2692, 107th Cong., 1st Sess., §§3, 4 (2001) (prohibiting discrimination "because of . . . sexual orientation," defined as "homosexuality, bisexuality, or heterosexuality"); H. R. 2015, 110th Cong., 1st Sess., §§3, 4 (2007) (prohibiting discrimination "because of . . . sexual orientation," defined as "homosexuality, heterosexuality, or bisexuality"); S. 811, 112th Cong., 1st Sess., §§3, 4 (2011) (same).

Like the relevant federal statutes, the 1998 Clinton Executive Order expressly added sexual orientation as a new, separately prohibited form of discrimination. As Judge Lynch cogently spelled out, "the Clinton Administration did not argue that the prohibition of sex discrimination in" the prior 1969 Executive Order "already banned, or henceforth would be deemed to ban, sexual orientation discrimination." 883 F. 3d, at 152, n. 22 (dissenting opinion). In short, President Clinton's 1998 Executive Order indicates that the Executive Branch, like Congress, has long understood sexual orientation discrimination to be distinct from, and not a form of, sex discrimination.

Federal regulations likewise reflect that same understanding. The Office of Personnel Management is the federal agency that administers and enforces personnel rules across the Federal Government. OPM has issued regulations that "govern . . . the employment practices of the Federal Government generally, and of individual agencies." 5 CFR §§300.101, 300.102 (2019). Like the federal statutes and the Presidential Executive Orders, those OPM regulations separately prohibit sex discrimination and sexual orientation discrimination.

The States have proceeded in the same fashion. A majority of States prohibit sexual orientation discrimination in

employment, either by legislation applying to most workers,[7] an executive order applying to public employees,[8] or

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[7] See Cal. Govt. Code Ann. §12940(a) (West 2020 Cum. Supp.) (prohibiting discrimination because of "sex, . . . sexual orientation," etc.); Colo. Rev. Stat. §24–34–402(1)(a) (2019) (prohibiting discrimination because of "sex, sexual orientation," etc.); Conn. Gen. Stat. §46a–81c (2017) (prohibiting discrimination because of "sexual orientation"); Del. Code Ann., Tit. 19, §711 (2018 Cum. Supp.) (prohibiting discrimination because of "sex (including pregnancy), sexual orientation," etc.); D. C. Code §2–1402.11(a)(1) (2019 Cum. Supp.) (prohibiting discrimination based on "sex, . . . sexual orientation," etc.); Haw. Rev. Stat. §378–2(a)(1)(A) (2018 Cum. Supp.) (prohibiting discrimination because of "sex[,] . . . sexual orientation," etc.); Ill. Comp. Stat., ch. 775, §§5/1–103(Q), 5/2–102(A) (West 2018) (prohibiting discrimination because of "sex, . . . sexual orientation," etc.); Iowa Code §216.6(1)(a) (2018) (prohibiting discrimination because of "sex, sexual orientation," etc.); Me. Rev. Stat. Ann., Tit. 5, §4572(1)(A) (2013) (prohibiting discrimination because of "sex, sexual orientation," etc.); Md. State Govt. Code Ann. §20–606(a)(1)(i) (Supp. 2019) (prohibiting discrimination because of "sex, . . . sexual orientation," etc.); Mass. Gen. Laws, ch. 151B, §4 (2018) (prohibiting discrimination because of "sex, . . . sexual orientation," etc.); Minn. Stat. §363A.08(2) (2018) (prohibiting discrimination because of "sex, . . . sexual orientation," etc.); Nev. Rev. Stat. §613.330(1) (2017) (prohibiting discrimination because of "sex, sexual orientation," etc.); N. H. Rev. Stat. Ann. §354–A:7(I) (2018 Cum. Supp.) (prohibiting discrimination because of "sex," "sexual orientation," etc.); N. J. Stat. Ann. §10:5–12(a) (West Supp. 2019) (prohibiting discrimination because of "sexual orientation, . . . sex," etc.); N. M. Stat. Ann. §28–1–7(A) (Supp. 2019) (prohibiting discrimination because of "sex, sexual orientation," etc.); N. Y. Exec. Law Ann. §296(1)(a) (West Supp. 2020) (prohibiting discrimination because of "sexual orientation, . . . sex," etc.); Ore. Rev. Stat. §659A.030(1) (2019) (prohibiting discrimination because of "sex, sexual orientation," etc.); R. I. Gen. Laws §28–5–7(1) (Supp. 2019) (prohibiting discrimination because of "sex, sexual orientation," etc.); Utah Code §34A–5–106(1) (2019) (prohibiting discrimination because of "sex; . . . sexual orientation," etc.); Vt. Stat. Ann., Tit. 21, §495(a)(1) (2019 Cum. Supp.) (prohibiting discrimination because of "sex, sexual orientation," etc.); Wash. Rev. Code §49.60.180 (2008) (prohibiting discrimination because of "sex, . . . sexual orientation," etc.).

[8] See, *e.g.,* Alaska Admin. Order No. 195 (2002) (prohibiting public-employment discrimination because of "sex, . . . sexual orientation," etc.); Ariz. Exec. Order No. 2003–22 (2003) (prohibiting public-employment discrimination because of "sexual orientation"); Cal. Exec. Order No. B–

both. Almost every state statute or executive order proscribing sexual orientation discrimination expressly prohibits sexual orientation discrimination separately from the State's ban on sex discrimination.

54–79 (1979) (prohibiting public-employment discrimination because of "sexual preference"); Colo. Exec. Order (Dec. 10, 1990) (prohibiting public-employment discrimination because of "gender, sexual orientation," etc.); Del. Exec. Order No. 8 (2009) (prohibiting public-employment discrimination because of "gender, . . . sexual orientation," etc.); Ind. Governor's Pol'y Statement (2018) (prohibiting public-employment discrimination because of "sex, . . . sexual orientation," etc.); Kan. Exec. Order No. 19–02 (2019) (prohibiting public-employment discrimination because of "gender, sexual orientation," etc.); Ky. Exec. Order No. 2008–473 (2008) (prohibiting public-employment discrimination because of "sex, . . . sexual orientation," etc.); Mass. Exec. Order No. 526 (2011) (prohibiting public-employment discrimination because of "gender, . . . sexual orientation," etc.); Minn. Exec. Order No. 86–14 (1986) (prohibiting public-employment discrimination because of "sexual orientation"); Mo. Exec. Order No. 10–24 (2010) (prohibiting public-employment discrimination because of "sex, . . . sexual orientation," etc.); Mont. Exec. Order No. 04–2016 (2016) (prohibiting public-employment discrimination because of "sex, . . . sexual orientation," etc.); N. H. Exec. Order No. 2016–04 (2016) (prohibiting public-employment discrimination because of "sex, sexual orientation," etc.); N. J. Exec. Order No. 39 (1991) (prohibiting public-employment discrimination because of "sexual orientation"); N. C. Exec. Order No. 24 (2017) (prohibiting public-employment discrimination because of "sex, . . . sexual orientation," etc.); Ohio Exec. Order No. 2019–05D (2019) (prohibiting public-employment discrimination because of "gender, . . . sexual orientation," etc.); Ore. Exec. Order No. 19–08 (2019) (prohibiting public-employment discrimination because of "sexual orientation"); Pa. Exec. Order No. 2016–04 (2016) (prohibiting public-employment discrimination because of "gender, sexual orientation," etc.); R. I. Exec. Order No. 93–1 (1993) (prohibiting public-employment discrimination because of "sex, . . . sexual orientation," etc.); Va. Exec. Order No. 1 (2018) (prohibiting public-employment discrimination because of "sex, . . . sexual orientation," etc.); Wis. Exec. Order No. 1 (2019) (prohibiting public-employment discrimination because of "sex, . . . sexual orientation," etc.); cf. Wis. Stat. §§111.36(1)(d)(1), 111.321 (2016) (prohibiting employment discrimination because of sex, defined as including discrimination because of "sexual orientation"); Mich. Exec. Directive No. 2019–9 (2019) (prohibiting public-employment discrimination because of "sex," defined as including "sexual orientation").

That common usage in the States underscores that sexual orientation discrimination is commonly understood as a legal concept distinct from sex discrimination.

And it is the common understanding in this Court as well. Since 1971, the Court has employed rigorous or heightened constitutional scrutiny of laws that classify on the basis of sex. See *United States* v. *Virginia*, 518 U. S. 515, 531–533 (1996); *J. E. B.* v. *Alabama ex rel. T. B.*, 511 U. S. 127, 136–137 (1994); *Craig* v. *Boren*, 429 U. S. 190, 197–199 (1976); *Frontiero* v. *Richardson*, 411 U. S. 677, 682–684 (1973) (plurality opinion); *Reed* v. *Reed*, 404 U. S. 71, 75–77 (1971). Over the last several decades, the Court has also decided many cases involving sexual orientation. But in those cases, the Court never suggested that sexual orientation discrimination is just a form of sex discrimination. All of the Court's cases from *Bowers* to *Romer* to *Lawrence* to *Windsor* to *Obergefell* would have been far easier to analyze and decide if sexual orientation discrimination were just a form of sex discrimination and therefore received the same heightened scrutiny as sex discrimination under the Equal Protection Clause. See *Bowers* v. *Hardwick*, 478 U. S. 186 (1986); *Romer* v. *Evans*, 517 U. S. 620 (1996); *Lawrence* v. *Texas*, 539 U. S. 558 (2003); *United States* v. *Windsor*, 570 U. S. 744 (2013); *Obergefell* v. *Hodges*, 576 U. S. 644 (2015).

Did the Court in all of those sexual orientation cases just miss that obvious answer—and overlook the fact that sexual orientation discrimination is actually a form of sex discrimination? That seems implausible. Nineteen Justices have participated in those cases. Not a single Justice stated or even hinted that sexual orientation discrimination was just a form of sex discrimination and therefore entitled to the same heightened scrutiny under the Equal Protection Clause. The opinions in those five cases contain no trace of such reasoning. That is presumably because everyone on this Court, too, has long understood that sexual orientation

discrimination is distinct from, and not a form of, sex discrimination.

In sum, all of the usual indicators of ordinary meaning—common parlance, common usage by Congress, the practice in the Executive Branch, the laws in the States, and the decisions of this Court—overwhelmingly establish that sexual orientation discrimination is distinct from, and not a form of, sex discrimination. The usage has been consistent across decades, in both the federal and state contexts.

Judge Sykes summarized the law and language this way: "To a fluent speaker of the English language—then and now—. . . discrimination 'because of sex' is not reasonably understood to include discrimination based on sexual orientation, a different immutable characteristic. Classifying people by sexual orientation is different than classifying them by sex. The two traits are categorically distinct and widely recognized as such. There is no ambiguity or vagueness here." *Hively*, 853 F. 3d, at 363 (dissenting opinion).

To tie it all together, the plaintiffs have only two routes to succeed here. Either they can say that literal meaning overrides ordinary meaning when the two conflict. Or they can say that the ordinary meaning of the phrase "discriminate because of sex" encompasses sexual orientation discrimination. But the first flouts long-settled principles of statutory interpretation. And the second contradicts the widespread ordinary use of the English language in America.

II

Until the last few years, every U. S. Court of Appeals to address this question concluded that Title VII does not prohibit discrimination because of sexual orientation. As noted above, in the first 10 Courts of Appeals to consider the issue, all 30 federal judges agreed that Title VII does not prohibit sexual orientation discrimination. 30 out of 30

judges.[9]

The unanimity of those 30 federal judges shows that the question as a matter of law, as compared to as a matter of policy, was not deemed close. Those 30 judges realized a seemingly obvious point: Title VII is not a general grant of authority for judges to fashion an evolving common law of equal treatment in the workplace. Rather, Title VII identifies certain specific categories of prohibited discrimination. And under the separation of powers, Congress—not the courts—possesses the authority to amend or update the law, as Congress has done with age discrimination and disability discrimination, for example.

So what changed from the situation only a few years ago when 30 out of 30 federal judges had agreed on this question? Not the text of Title VII. The law has not changed. Rather, the judges' decisions have evolved.

To be sure, the majority opinion today does not openly profess that it is judicially updating or amending Title VII. Cf. *Hively*, 853 F. 3d, at 357 (Posner, J., concurring). But the majority opinion achieves the same outcome by seizing on literal meaning and overlooking the ordinary meaning of the phrase "discriminate because of sex." Although the majority opinion acknowledges that the meaning of a phrase and the meaning of a phrase's individual words *could* differ, it dismisses phrasal meaning for purposes of this case. The majority opinion repeatedly seizes on the meaning of the

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[9] See *Higgins* v. *New Balance Athletic Shoe, Inc.*, 194 F. 3d 252, 258–259 (CA1 1999); *Simonton* v. *Runyon*, 232 F. 3d 33, 36 (CA2 2000); *Bibby* v. *Philadelphia Coca Cola Bottling Co.*, 260 F. 3d 257, 261 (CA3 2001); *Wrightson* v. *Pizza Hut of America, Inc.*, 99 F. 3d 138, 143 (CA4 1996); *Blum* v. *Gulf Oil Corp.*, 597 F. 2d 936, 938 (CA5 1979) (*per curiam*); *Ruth* v. *Children's Medical Center*, 1991 WL 151158, *5 (CA6, Aug. 8, 1991) (*per curiam*); *Ulane* v. *Eastern Airlines, Inc.*, 742 F. 2d 1081, 1084–1085 (CA7 1984); *Williamson* v. *A. G. Edwards & Sons, Inc.*, 876 F. 2d 69, 70 (CA8 1989) (*per curiam*); *DeSantis* v. *Pacific Tel. & Tel. Co.*, 608 F. 2d 327, 329–330 (CA9 1979); *Medina* v. *Income Support Div., N. M.*, 413 F. 3d 1131, 1135 (CA10 2005).

statute's individual terms, mechanically puts them back together, and generates an interpretation of the phrase "discriminate because of sex" that is literal. See *ante*, at 5–9, 17, 24–26. But to reiterate, that approach to statutory interpretation is fundamentally flawed. Bedrock principles of statutory interpretation dictate that we look to ordinary meaning, not literal meaning, and that we likewise adhere to the ordinary meaning of phrases, not just the meaning of words in a phrase. And the ordinary meaning of the phrase "discriminate because of sex" does not encompass sexual orientation discrimination.

The majority opinion deflects that critique by saying that courts should base their interpretation of statutes on the text as written, not on the legislators' subjective intentions. *Ante*, at 20, 23–30. Of course that is true. No one disagrees. It is "the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale* v. *Sundowner Offshore Services, Inc.*, 523 U. S. 75, 79 (1998).

But in my respectful view, the majority opinion makes a fundamental mistake by confusing ordinary meaning with subjective intentions. To briefly explain: In the early years after Title VII was enacted, some may have wondered whether Title VII's prohibition on sex discrimination protected male employees. After all, covering male employees may not have been the intent of some who voted for the statute. Nonetheless, discrimination on the basis of sex against women and discrimination on the basis of sex against men are both understood as discrimination because of sex (back in 1964 and now) and are therefore encompassed within Title VII. Cf. *id.,* at 78–79; see *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U. S. 669, 682–685 (1983). So too, regardless of what the intentions of the drafters might have been, the ordinary meaning of the law demonstrates that harassing an employee because of her sex is discriminating against the employee because of her sex with respect

to the "terms, conditions, or privileges of employment," as this Court rightly concluded. *Meritor Savings Bank, FSB* v. *Vinson*, 477 U. S. 57, 64 (1986) (internal quotation marks omitted).[10]

By contrast, this case involves sexual orientation discrimination, which has long and widely been understood as distinct from, and not a form of, sex discrimination. Until now, federal law has always reflected that common usage and recognized that distinction between sex discrimination and sexual orientation discrimination. To fire one employee because she is a woman and another employee because he is gay implicates two distinct societal concerns, reveals two distinct biases, imposes two distinct harms, and falls within two distinct statutory prohibitions.

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[10] An *amicus* brief supporting the plaintiffs suggests that the plaintiffs' interpretive approach is supported by the interpretive approach employed by the Court in its landmark decision in *Brown* v. *Board of Education*, 347 U. S. 483 (1954). See Brief for Anti-Discrimination Scholars as *Amici Curiae* 4. That suggestion is incorrect. *Brown* is a correct decision as a matter of original public meaning. There were two analytical components of *Brown*. One issue was the meaning of "equal protection." The Court determined that black Americans—like all Americans—have an *individual* equal protection right against state discrimination on the basis of race. (That point is also directly made in *Bolling* v. *Sharpe*, 347 U. S. 497, 499–500 (1954).) Separate but equal is not equal. The other issue was whether that racial nondiscrimination principle applied to public schools, even though public schools did not exist in any comparable form in 1868. The answer was yes. The Court applied the equal protection principle to public schools in the same way that the Court applies, for example, the First Amendment to the Internet and the Fourth Amendment to cars.

This case raises the same kind of inquiry as the *first* question in *Brown*. There, the question was what equal protection meant. Here, the question is what "discriminate because of sex" means. If this case raised the question whether the sex discrimination principle in Title VII applied to some category of employers unknown in 1964, such as to social media companies, it might be a case in *Brown*'s second category, akin to the question whether the racial nondiscrimination principle applied to public schools. But that is not this case.

To be sure, as Judge Lynch appropriately recognized, it is "understandable" that those seeking legal protection for gay people "search for innovative arguments to classify workplace bias against gays as a form of discrimination that is already prohibited by federal law. But the arguments advanced by the majority ignore the evident meaning of the language of Title VII, the social realities that distinguish between the kinds of biases that the statute sought to exclude from the workplace from those it did not, and the distinctive nature of anti-gay prejudice." 883 F. 3d, at 162 (dissenting opinion).

The majority opinion insists that it is not rewriting or updating Title VII, but instead is just humbly reading the text of the statute as written. But that assertion is tough to accept. Most everyone familiar with the use of the English language in America understands that the ordinary meaning of sexual orientation discrimination is distinct from the ordinary meaning of sex discrimination. Federal law distinguishes the two. State law distinguishes the two. This Court's cases distinguish the two. Statistics on discrimination distinguish the two. History distinguishes the two. Psychology distinguishes the two. Sociology distinguishes the two. Human resources departments all over America distinguish the two. Sports leagues distinguish the two. Political groups distinguish the two. Advocacy groups distinguish the two. Common parlance distinguishes the two. Common sense distinguishes the two.

As a result, many Americans will not buy the novel interpretation unearthed and advanced by the Court today. Many will no doubt believe that the Court has unilaterally rewritten American vocabulary and American law—a "statutory amendment courtesy of unelected judges." *Hively*, 853 F. 3d, at 360 (Sykes, J., dissenting). Some will surmise that the Court succumbed to "the natural desire that beguiles judges along with other human beings into imposing their own views of goodness, truth, and justice upon others."

Furman v. *Georgia*, 408 U. S. 238, 467 (1972) (Rehnquist, J., dissenting).

I have the greatest, and unyielding, respect for my colleagues and for their good faith. But when this Court usurps the role of Congress, as it does today, the public understandably becomes confused about who the policymakers really are in our system of separated powers, and inevitably becomes cynical about the oft-repeated aspiration that judges base their decisions on law rather than on personal preference. The best way for judges to demonstrate that we are deciding cases based on the ordinary meaning of the law is to walk the walk, even in the hard cases when we might prefer a different policy outcome.

* * *

In judicially rewriting Title VII, the Court today cashiers an ongoing legislative process, at a time when a new law to prohibit sexual orientation discrimination was probably close at hand. After all, even back in 2007—a veritable lifetime ago in American attitudes about sexual orientation—the House voted 235 to 184 to prohibit sexual orientation discrimination in employment. H. R. 3685, 110th Cong., 1st Sess. In 2013, the Senate overwhelmingly approved a similar bill, 64 to 32. S. 815, 113th Cong., 1st Sess. In 2019, the House voted 236 to 173 to amend Title VII to prohibit employment discrimination on the basis of sexual orientation. H. R. 5, 116th Cong., 1st Sess. It was therefore easy to envision a day, likely just in the next few years, when the House and Senate took historic votes on a bill that would prohibit employment discrimination on the basis of sexual orientation. It was easy to picture a massive and celebratory Presidential signing ceremony in the East Room or on the South Lawn.

It is true that meaningful legislative action takes time—often too much time, especially in the unwieldy morass on

Capitol Hill. But the Constitution does not put the Legislative Branch in the "position of a television quiz show contestant so that when a given period of time has elapsed and a problem remains unsolved by them, the federal judiciary may press a buzzer and take its turn at fashioning a solution." Rehnquist, The Notion of a Living Constitution, 54 Texas L. Rev. 693, 700 (1976). The proper role of the Judiciary in statutory interpretation cases is "to apply, not amend, the work of the People's representatives," even when the judges might think that "Congress should reenter the field and alter the judgments it made in the past." *Henson*, 582 U. S., at ___–___ (slip op., at 10–11).

Instead of a hard-earned victory won through the democratic process, today's victory is brought about by judicial dictate—judges latching on to a novel form of living literalism to rewrite ordinary meaning and remake American law. Under the Constitution and laws of the United States, this Court is the wrong body to change American law in that way. The Court's ruling "comes at a great cost to representative self-government." *Hively*, 853 F. 3d, at 360 (Sykes, J., dissenting). And the implications of this Court's usurpation of the legislative process will likely reverberate in unpredictable ways for years to come.

Notwithstanding my concern about the Court's transgression of the Constitution's separation of powers, it is appropriate to acknowledge the important victory achieved today by gay and lesbian Americans. Millions of gay and lesbian Americans have worked hard for many decades to achieve equal treatment in fact and in law. They have exhibited extraordinary vision, tenacity, and grit—battling often steep odds in the legislative and judicial arenas, not to mention in their daily lives. They have advanced powerful policy arguments and can take pride in today's result. Under the Constitution's separation of powers, however, I believe that it was Congress's role, not this Court's, to amend Title VII. I therefore must respectfully dissent from the

Court's judgment.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare and Medicaid Services

42 CFR Parts 438, 440, and 460

Office of the Secretary

45 CFR Parts 86, 92, 147, 155, and 156

RIN 0945–AA11

Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority

AGENCY: Centers for Medicare & Medicaid Services (CMS); Office for Civil Rights (OCR), Office of the Secretary, Department of Health and Human Services (HHS).

ACTION: Final rule.

SUMMARY: The Department of Health and Human Services (''the Department'' or ''HHS'') is committed to ensuring the civil rights of all individuals who access or seek to access health programs or activities of covered entities under Section 1557 of the Patient Protection and Affordable Care Act (''ACA''). After considering public comments, in this final rule, the Department revises its Section 1557 regulations, Title IX regulations, and specific regulations of the Centers for Medicare & Medicaid Services (''CMS'') as proposed, with minor and primarily technical corrections. This will better comply with the mandates of Congress, address legal concerns, relieve billions of dollars in undue regulatory burdens, further substantive compliance, reduce confusion, and clarify the scope of Section 1557 in keeping with pre-existing civil rights statutes and regulations prohibiting discrimination on the basis of race, color, national origin, sex, age, and disability.

DATES: This rule is effective August 18, 2020.

FOR FURTHER INFORMATION CONTACT: Luben Montoya, Supervisory Civil Rights Analyst, HHS Office for Civil Rights, at (800) 368–1019 or (800) 537–7697 (TDD).

SUPPLEMENTARY INFORMATION:

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I. Executive Summary

A. Purpose

This regulation finalizes the Department's proposed rule concerning Nondiscrimination in Health and Health Education Programs or Activities issued in the **Federal Register** on June 14, 2019 (84 FR 27846), with minor and primarily technical corrections. It makes changes to the Department's existing regulation [1] (''2016 Rule'') implementing Section 1557 of the ACA, 42 U.S.C. 18116. It makes a related amendment to the Department's regulations implementing Title IX of the Education Amendments of 1972 (''Title IX''), and it makes conforming amendments to nondiscrimination provisions within various CMS regulations.

Through Section 1557 of the ACA, Congress applied certain long-standing civil rights nondiscrimination requirements to any health programs or activities that receive Federal financial assistance, and any programs or activities administered by an Executive agency under Title I of the ACA or by an entity established under such Title. It did so by cross-referencing statutes that specify prohibited grounds of discrimination, namely, race, color, national origin, sex, age, or disability, in an array of Federally funded and administered programs or activities. To ensure compliance, Congress dictated that ''[t]he enforcement mechanisms provided for and available under'' such laws ''shall apply for purposes of violations of'' Section 1557.[2]

This final rule returns to the enforcement mechanisms provided for, and available under, those longstanding statutes and the Department's implementing regulations. It eliminates many of the provisions of the 2016 Rule in order to better comply with the mandates of Congress, relieves approximately $2.9 billion in undue regulatory burdens (over five years), furthers substantive compliance, reduces confusion, and clarifies the scope of Section 1557. It empowers the Department to continue its robust enforcement of civil rights laws by making clear that the substantive protections of Title VI of the Civil Rights Act of 1964 (''Title VI''), Title IX, the Age Discrimination Act of 1975 (''Age Act''), and Section 504 of the Rehabilitation Act of 1973 (''Section 504'') remain in full force and effect.[3]

This final rule is needed because the Department has determined that portions of the 2016 Rule are duplicative or confusing, impose substantial unanticipated burdens, or impose burdens that outweigh their anticipated benefits. Additionally, two Federal district courts have determined that the Department exceeded its authority in promulgating parts of the regulation, and one has vacated and remanded those parts of the 2016 Rule. By substantially repealing much of the 2016 Rule, including removing the vacated provisions from the Code of Federal Regulations, the Department reverts to longstanding statutory interpretations that conform to the plain meaning of the underlying civil rights statutes and the United States Government's official position concerning those statutes.

The Department initially estimated the costs from the 2016 Rule at over $942 million across the first five years. 81 FR 31458–59. This figure, however, significantly underestimated actual costs, according to the Department's current estimates. As estimated now, the costs derived merely from the 2016 Rule's requirement to provide notices and taglines with all significant communications, after accounting for electronic delivery, amount to an average annual burden of $585 million per year, for a five-year burden of $2.9 billion. Based on the Department's re-examination of the burden on regulated entities, and after reviewing public comments, the Department has determined that the potential public benefits of imposing such requirements are outweighed by the large costs those requirements impose on regulated entities and other parties.

B. Summary of Major Provisions

(1) Changes to the Section 1557 Regulation

a. Elimination of Overbroad Provisions Related to Sex and Gender Identity

This final rule eliminates certain provisions of the 2016 Rule that exceeded the scope of the authority delegated by Congress in Section 1557. The 2016 Rule's definition of discrimination ''on the basis of sex'' encompassed discrimination on the basis of gender identity (''an individual's internal sense of gender, which may be male, female, neither, or a combination of male and female''). In line with that definition, the 2016 Rule imposed several requirements regarding medical treatment and coverage on the basis of gender identity. The same definition also encompassed discrimination on the basis of ''termination of pregnancy'' without incorporating the explicit abortion-neutrality language of 20 U.S.C. 1688 (which some commenters referred to as the Danforth Amendment) in Title IX, and it imposed a high burden of proof on providers to justify offering gynecological or other single-sex medical services.

All of these are essentially legislative changes that the Department lacked the

[1] 81 FR 31375–473 (May 18, 2016) codified at 45 CFR part 92.

[2] 42 U.S.C. 18116.

[3] While Section 1557 does not incorporate nondiscrimination provisions by reference to Title VII, it provides that nothing in Title I of the ACA is to be construed as invalidating or limiting the rights, remedies, procedures, or legal standards available under certain civil rights laws, and mentions Title VII specifically. 42 U.S.C. 18116(b).

authority to make. They purported to impose additional legal requirements on covered entities that cannot be justified by the text of Title IX, and in fact are in conflict with express exemptions in Title IX, even though Title IX provides the only statutory basis for Section 1557's provision against discrimination ''on the basis of sex.'' For this reason, these provisions have already been vacated and remanded by court order. This final rule omits the vacated language concerning gender identity and termination of pregnancy, thereby bringing the provisions of the Code of Federal Regulations into compliance with the underlying statutes and up-to-date as to the effect of the court's order.

The Department also believes that various policy considerations support this action. The 2016 Rule's provisions on sex discrimination imposed new requirements for care related to gender identity and termination of pregnancy that Congress has never required, and prevented covered entities from drawing reasonable and/or medically indicated distinctions on the basis of sex. As a result, those provisions would have imposed confusing or contradictory demands on providers, interfered inappropriately with their medical judgment, and potentially burdened their consciences. By contrast, under this final rule, each State may balance for itself the various sensitive considerations relating to medical judgment and gender identity, within the limits of applicable Federal statutes (which are to be read according to their plain meaning).

b. Clarification of Scope of Covered Entities

In an additional effort to avoid exceeding the Department's statutory authority, this final rule modifies the 2016 Rule's definition of entities covered by Section 1557 in order to align it more closely with the statutory text.

c. Elimination of Unnecessary or Duplicative Language on Civil Rights Enforcement

This final rule also eliminates provisions of the 2016 Rule that, by unnecessarily duplicating or overlapping with existing civil rights law and regulations, were either inconsistent or redundant with existing law and regulations, and so were likely to cause confusion about the rights of individuals and the corresponding responsibilities of providers. This final rule prohibits any covered entity from discriminating on the basis of race, color, national origin, sex, age, and disability, according to the meaning of these terms in the underlying Federal civil rights statutes that Section 1557 incorporates, and it commits the Department to enforcing these prohibitions through the enforcement mechanisms already available under those statutes' respective implementing regulations. It eliminates the 2016 Rule's definitions of terms and its list of examples of discriminatory practices, as well as its provisions related to discrimination on the basis of association, disparate impact on the basis of sex, health insurance coverage, certain employee health benefits programs, notification of beneficiaries' rights under civil rights laws, designation of responsible employees and adoption of grievance procedures, access granted to OCR for review of covered entities' records of compliance, prohibitions on intimidation and retaliation, enforcement procedures, private rights of action, remedial action, and voluntary action. In all of these matters, this final rule will defer to the relevant existing regulations and the relevant case law with respect to each of the underlying civil rights statutes, as applied to the health context under Section 1557. It will not create, as the 2016 Rule did, a new patchwork regulatory framework unique to Section 1557 covered entities.

d. Elimination of Unnecessary Regulatory Burdens

This final rule modifies provisions of the 2016 Rule that imposed regulatory burdens on covered entities greater than what was needed in order to ensure compliance with civil rights law. Specifically, it eliminates the burdensome requirement for covered entities to send notices and taglines with all significant communications, clarifies that the provision of health insurance, as such, is not a ''health program or activity,'' brings requirements of meaningful access for persons with limited English proficiency (LEP) into conformity with longstanding DOJ and HHS guidance, and permits remote English-language interpreting services to be audio-based rather than requiring them to be video-based.

The final rule retains numerous other provisions of the 2016 Rule that furthered the goal of civil rights compliance without imposing burdens unnecessary to that goal. These include the obligation for covered entities to submit assurances of compliance, as well as most of the 2016 Rule's provisions ensuring access for individuals with LEP and individuals with disabilities.

e. Other Clarifications and Minor Modifications

This final rule modifies the 2016 Rule's discussion of its own relation to other laws, offering a clearer commitment to implement Section 1557 in conformity with the text of the statutes it incorporates, as well as with the text of numerous other applicable civil rights and conscience statutes. It also makes other minor modifications to the regulatory text.

(2) Related and Conforming Amendments to Other Regulations

a. Title IX

Because the Department's failure to incorporate the abortion neutrality language at 20 U.S.C. 1688 (hereinafter ''abortion neutrality'') and the Title IX religious exemption formed part of the *Franciscan* court's reasoning when it vacated parts of the 2016 Rule, this final rule amends the Department's Title IX regulations to explicitly incorporate relevant statutory exemptions from Title IX, including abortion neutrality and the religious exemption.

b. CMS

Ten provisions in CMS regulations, all of which cover entities that are also subject to Section 1557, have in recent years had language inserted that prohibits discrimination on the basis of sexual orientation and gender identity. In light of this final rule's return to the plain meaning of ''on the basis of sex'' in the civil rights statutes incorporated under Section 1557, and the overarching applicability of Section 1557 to these programs, the Department here finalizes amendments to those regulations to ensure greater consistency in civil-rights enforcement across the Department's different programs by deleting the provisions on sexual orientation and gender identity.

C. Summary of the Costs and Benefits of the Major Provisions

This final rule is an economically significant deregulatory action. The Department projects that this final rule will result in approximately $2.9 billion in cost savings (undiscounted) over the first five years after finalization. The Department anticipates that the largest proportion of these estimated savings would result from repealing the 2016 Rule's provisions related to mandatory notices. The Department projects additional savings from eliminating the requirement for OCR to weigh the presence or absence of language access plans, and from repealing provisions that duplicate existing regulatory requirements regarding the

establishment of grievance procedures. The Department estimates that there will be some additional costs to covered entities regarding training and revision of policies and procedures.

The Department believes that the anticipated benefits—which include consistency with Federal statutes, appropriate respect for the roles of Federal courts and Congress, and reduction or elimination of ineffective, unnecessary, or confusing provisions—far outweigh any costs or burdens that may arise from the changes.

Provision(s)	Savings and benefits	Costs
Sec. 1557: Elimination of Overbroad Provisions Related to Sex and Gender Identity.	For provisions already vacated, eliminating them brings the Code of Federal Regulations in line with current law. For other provisions, eliminating them restores the rule of law by confining regulation within the scope of the Department's legal authority; restores Federalism by leaving to the States decisions properly reserved to them; and removes unjustified burdens on providers' medical judgment.	No costs are anticipated for provisions already vacated, and any possible costs for related provisions are not calculable based on available data.
Sec. 1557: Clarification of Scope of Covered Entities.	Correcting this provision improves the rule of law by interpreting the statute according to its plain meaning as closely as possible.	Costs are not calculable based on available data.
Sec. 1557: Elimination of Unnecessary or Duplicative Language on Civil Rights Enforcement.	Eliminating these provisions reduces duplication, inconsistency, and possible confusion in the Department's civil rights regulations, making it easier for covered entities and individuals to know their respective responsibilities and rights.	The Department estimates $275.8 million of costs in the first year for revision of policies and procedures, along with corresponding retraining of employees. (These costs encompass the next listed set of provisions as well.)
Sec. 1557: Elimination of Unnecessary Regulatory Burdens.	Eliminating these provisions reduces unnecessary, unjustified, or excessive burdens on health providers, as well as excessive and confusing paper notices for patients. This will make healthcare more affordable and accessible for Americans and is estimated to save $585 million per year over the first five years.	See above.
Sec. 1557: Other Clarifications and Minor Modifications.	Amending these provisions improves the rule of law by ensuring that regulations remain subject to statutory protections for conscience and other civil rights, and otherwise contributes to the goals of the other regulatory changes listed above.	No costs are anticipated, and any possible costs are not calculable based on available data.
Title IX regulations, related amendment.	This amendment ensures the rule of law by clarifying that Title IX regulations are subject to the statute's own abortion-neutrality language and religious exemption.	No costs are anticipated, and any possible costs are not calculable based on available data.
CMS regulations, conforming amendments.	These amendments restore the rule of law by confining regulations within the scope of their legal authority, and ensure consistency in civil-rights enforcement across the Department's different programs.	Costs are not calculable based on available data.

II. Background

On May 18, 2016, the Department finalized a regulation implementing Section 1557 of the ACA. The Department had received 402 comments [4] in response to a related request for information in 2015, and 24,875 comments [5] in response to the relevant Notice of Proposed Rulemaking, 80 FR 54172–221 (''2015 NPRM'').

Multiple States and private plaintiffs challenged the 2016 Rule in Federal district courts in Texas and North Dakota on the grounds that it violated Federal laws, including the Administrative Procedure Act (''APA'') and the Religious Freedom Restoration Act (''RFRA'').[6] On December 31, 2016, the U.S. District Court for the Northern District of Texas preliminarily enjoined, on a nationwide basis, portions of the 2016 Rule that had interpreted Section 1557 to prohibit discrimination on the basis of gender identity and termination of pregnancy.[7]

On May 2, 2017, the Department of Justice, on behalf of HHS, filed a motion for voluntary remand to reassess the reasonableness, necessity, and efficacy of the enjoined provisions. On May 24, 2019, HHS issued a notice of proposed rulemaking (''the proposed rule'' or ''the 2019 NPRM'') to amend the 2016 Rule, as well as its regulations effectuating Title IX,[8] and to make conforming amendments to certain nondiscrimination provisions of CMS regulations [9] covered by Section 1557. On June 14, 2019, HHS published the proposed rule in the **Federal Register** [10] and accepted public comment for 60 days thereafter.

On October 15, 2019, upon motion of the plaintiffs, and adopting the reasoning from its preliminary injunction order, the U.S. District Court for the Northern District of Texas vacated and remanded the ''the unlawful portions'' of the 2016 Rule that had been subject to that order.[11] On

[4] *https://www.regulations.gov/docket?D=HHS-OCR-2013-0007*. The comment docket identifies 162 submissions, but some submissions to the docket aggregated multiple comments.

[5] *https://www.regulations.gov/docket?D=HHS-OCR-2015-0006*. The comment docket identifies 2,188 submissions, but some submissions to the docket aggregated multiple comments, and ''the great majority'' of comments were not electronic but were submitted by mail as part of ''mass mail campaigns organized by civil rights/advocacy groups.'' 81 FR 31376.

[6] Complaint, *Franciscan All., Inc.* v. *Burwell,* No. 7:16–cv–00108–O (N.D. Tex. Aug. 23, 2016); *Religious Sisters of Mercy* v. *Burwell,* No. 3:16–cv–386 (D.N.D. filed Nov. 7, 2016); *Catholic Benefits Association* v. *Burwell,* No.3:16–cv–432 (D.N.D. filed Dec. 28, 2016).

[7] *See Franciscan All., Inc.* v. *Burwell,* 227 F. Supp. 3d 660, 696 (N.D. Tex. 2016).

[8] 20 U.S.C. 1681 *et seq.;* 45 CFR part 86 (Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance).

[9] 42 CFR 438.3, 438.206, 440.262, 460.98, 460.112; 45 CFR 147.104, 155.120, 155.220, 156.200, 156.1230.

[10] 84 FR 27846 (June 14, 2019) (''Nondiscrimination in Health and Health Education Programs'').

[11] *Franciscan All., Inc.* v. *Azar,* 414 F. Supp. 3d 928, 945 (N.D. Tex. Oct. 15, 2019) (''Since the Court concludes that ''the Rule's conflict with its incorporated statute—Title IX—renders it contrary to law under the APA,'' the appropriate remedy is *vacatur.* Order 38, ECF No. 62. Accordingly, the Court VACATES and REMANDS the unlawful portions of the Rule for Defendants' further consideration in light of this opinion and the Court's December 31, 2016 Order.''; *id.* at 947 (''The Court ADOPTS its prior reasoning from the

Continued

November 21, 2019, the court clarified that ''the Court vacates only the portions of the Rule that Plaintiffs challenged in this litigation,'' namely, ''insofar as the Rule defines *'On the basis of sex'* to include gender identity and termination of pregnancy . . . The remainder of 45 CFR part 92 remains in effect.'' [12]

The Department herein finalizes the proposed rule without change, except as set forth below, after careful consideration of and responses to public comments.

III. Response to Public Comments on the Proposed Rule

The Department received 198,845 comments in response to the proposed rule during the public comment period.[13] Commenters included Members of Congress, State and local governments, State-based Exchanges, tribes and tribal governments, healthcare providers, health insurers, pharmacies, religious organizations, civil rights groups, non-profit organizations, and individuals, among others.

A. General Comments

Comment: Several commenters, including healthcare providers, explained that although they support nondiscrimination in healthcare and equal access to healthcare for all patients, they have difficulty complying with the parameters of the 2016 Rule. They believe that civil rights protections should be balanced against the burdens they create. Accordingly, these commenters support the proposed regulation as it limits the burdens imposed on providers.

Response: The Department agrees with these commenters' support of nondiscrimination in healthcare and intends to robustly enforce the civil rights authorities. The Department is also cognizant of unduly burdensome regulations. For example, the 2016 Rule did not anticipate some costs to covered entities that range from hundreds of millions to billions of dollars as a result of notice and taglines requirements. Therefore, this final rule seeks to alleviate certain burdens on covered entities while still enforcing the nondiscrimination requirements of Title VI, Title IX, the Age Act, and Section 504.

Comment: Some commenters said the proposed rule would stabilize services for individuals with disabilities and create a more equitable distribution of health services.

Response: The Department agrees. This final rule maintains appropriate protections for individuals with disabilities and will provide clarity for providers and individuals.

Comment: Several commenters expressed concern that eliminating discrimination protections in Section 1557 will cause confusion about patients' rights and remove access to administrative remedies that were previously available.

Response: The Department recommits itself in this rule to enforcing nondiscrimination on the basis of all categories protected by statute. The Department is confident that the clarity associated with maintaining longstanding prohibitions on discrimination under Title VI, Title IX, the Age Act, and Section 504, and their respective implementing regulations, will outweigh any initial confusion stemming from the change.

Comment: Some commenters noted the extensive process involved in developing the 2016 Rule, which included a request for information, the 2015 NPRM, and the 2016 Rule, with the Department considering more than 24,875 public comments. Such commenters suggested this proposed rule unnecessarily reopens the 2016 Rule and ignores the reasoned process that the Department had previously completed. Also, a commenter asked why the Department did not publish a request for information before the proposed rule. Others stated that the proposed rule relies disproportionately on a single district court case, *Franciscan Alliance,*[14] to justify a new interpretation of sex. The commenters go on to suggest that the Department relied exclusively on *Franciscan Alliance* to open up the entire 2016 Rule for edits while ignoring numerous other court cases that come to opposing conclusions regarding sex discrimination.[15]

Response: On December 31, 2016, the *Franciscan Alliance* court preliminarily enjoined the 2016 Rule's gender identity and termination of pregnancy provisions on a nationwide basis, finding them unlawful under the APA and RFRA. A few weeks later, a second Federal district court preliminarily stayed enforcement of the 2016 Rule against two other plaintiffs, citing the *Franciscan* decision.[16] Because of the nationwide preliminary injunction, the Department could not enforce certain provisions from the 2016 Rule. In the process of reconsidering the 2016 Rule, and consistent with applicable Executive Orders and deregulatory priorities, the Department examined the rule more broadly and concluded that, for the reasons explained in the 2019 NPRM, the 2016 Rule had significantly underestimated the costs and burdens it imposed. Because Section 1557 authorizes, but does not require, the creation of new implementing regulations, the Department considered it appropriate to repeal certain portions of the 2016 Rule and enforce Section 1557 using the underlying regulations the Department has used to enforce the relevant civil rights statutes identified in Section 1557. The Department also considered the Executive Branch's most recent statements concerning the interpretation of statutory provisions that prohibit discrimination on the basis of sex.

The Department published its proposed rule in the **Federal Register** on June 14, 2019, opening a two-month public comment period. The Department received nearly 200,000 comments for its review. Through this public comment period, the public was given a full opportunity to provide the Department with information regarding the proposal. It is not necessary to engage in an additional solicitation of public comments through a request for information before the notice of proposed rulemaking. The Department also reviewed the 2016 Rule record and its public comments in considering this final rule.

Through this rulemaking, the Department has provided a comprehensive rationale for this final rule. The 2019 NPRM summarized the Department's legal authority to change the 2016 Rule along with policy rationales for doing so. The quantum of evidence necessary to justify rescinding provisions of a rule is not greater than the evidence needed for issuing it in the

preliminary injunction (ECF No. 62) and now HOLDS that the Rule violates the APA and RFRA. Accordingly, the Court VACATES and REMANDS the Rule for further consideration.'').

[12] Order, *Franciscan Alliance,* No. 7:16–cv–00108–O *2 (N.D. Tex. filed Nov. 21, 2019).

[13] *See https://www.regulations.gov/docket?D=HHS-OCR-2019-0007.* The comment docket identifies 155,966 submissions, but some submissions to the docket aggregated multiple comments. HHS estimates the disaggregated number of comments to be 198,845.

[14] *Franciscan Alliance, Inc.* v. *Burwell,* 227 F. Supp. 3d 660 (N.D. Tex. 2016).

[15] Commenters cited *Boyden* v. *Conlin,* 341 F. Supp. 3d 979 (W.D. Wisc. 2018) (holding Wisconsin's use of transgender exclusions in its state employee health insurance plan constituted sex discrimination in violation of Section 1557 and Title VII); *Flack* v. *Wis. Dept. of Health Servs.,* 328 F. Supp. 3d 931, 951 (W.D. Wis. 2018); *Prescott* v. *Rady Children's Hospital-San Diego,* 265 F. Supp. 3d 1090, 1098–100 (S.D. Cal. 2017) (finding Section 1557's plain language bars gender identity discrimination); *Tovar* v. *Essential Health,* 342 F. Supp. 3d 947, 957 (D. Minn. 2018) (same).

[16] *Religious Sisters of Mercy* v. *Burwell,* Nos. 3:16–cv–386 & 3:16–cv–432 (D.N.D. Order of January 23, 2017). *See* 84 FR 27848.

first place.[17] Moreover, after publication of the proposed rule, the Court in *Franciscan Alliance* issued its final judgment vacating and remanding the unlawful portions of the 2016 Rule for the Department's further consideration. The Department has considered that *vacatur,* along with the legal authorities and policy rationales discussed in the NPRM and this preamble, and more thoroughly calculated the costs and effects of the notice and taglines requirements, to arrive at this final rule. Specific responses to comments on its various provisions, including on sex discrimination, are found below.

Comment: Some commenters expressed concern that the updated Section 1557 regulations will have unintended consequences and costs for healthcare providers and individuals seeking healthcare and insurance, particularly pertaining to access standards for people with LEP and communication-based disabilities, in part because the regulatory drafting period was shorter than the period for the 2016 Rule.

Response: The Department has spent several months carefully reviewing comments, providing responses to them in this rule, and finalizing the proposed rule. The Department is leaving several substantive provisions of the 2016 Rule unchanged or substantially unchanged. The changes largely consist of excisions of regulatory text as opposed to the addition of new text, so it is unsurprising that the regulatory drafting period was shorter than the period for the 2016 Rule. In many instances where new or modified regulatory text was proposed, such text was based on existing guidance or regulatory text. The Department considers this to be an adequate process and a sufficient period of time to engage in such rulemaking.

This final rule maintains vigorous protections for people with LEP and communication-based disabilities, as discussed in detail below, and the Department intends to continue robust enforcement of those protections.

Comment: Several commenters indicated that the cost savings cited in the proposed rule are unsupported or based on insufficient data. Several commenters also contend that the proposed rule ignores the costs to individuals, especially LEP individuals, who will allegedly encounter additional barriers to accessing healthcare as a result of the proposed changes. Some commenters were concerned that the proposed rule would help eliminate access to a wide range of affordable preventive health services, including cancer screenings, contraception, and reproductive health services. The commenters believe this loss of access will largely be caused by the proposed changes to the definition of sex discrimination. Many commenters expressed concern that the proposed rule would remove civil rights protections for a number of vulnerable groups, including LEP individuals, LGBT individuals, individuals with disabilities, and women seeking reproductive healthcare. Such commenters state that the removal of these protections would, in turn, result in even greater health disparities for these vulnerable populations. Some commenters stated that the proposed rule would lead to increased discrimination in healthcare, which would lead people to delay or forego healthcare and would result in adverse health outcomes and greater overall healthcare costs to individuals. Some of these commenters note that based on these anticipated increased disparities, the proposed rule is effectively encouraging discrimination.

Response: This final rule leaves in place all statutory civil rights protections for vulnerable groups. Cost savings are treated in the Regulatory Impact Analysis below, which discusses the data, estimates, and assumptions used to support its calculations. Potential health disparities or other alleged costs to individuals or vulnerable groups, including those due to discrimination or barriers to access, are discussed in the relevant sections below (*e.g.,* potential costs to LEP individuals are discussed in comments on those sections of the regulation that deal with national-origin discrimination and/or LEP, while potential costs relating to the gender identity provision are discussed in comments on the section regarding ''discrimination on the basis of sex'').

Comment: Many commenters expressed their belief that this proposed rule diverges from the current body of civil rights laws. These commenters believe that limiting protections based on gender identity, termination of pregnancy, and LEP, runs contrary to civil rights protections.

Response: Current civil rights laws and their protections are discussed, respectively, in the relevant sections below (*e.g.,* civil rights law on gender identity is discussed in the section on ''discrimination on the basis of sex,'' because the 2016 Rule had classified gender identity discrimination as a form of sex-based discrimination).

Comment: Some commenters stated that civil rights protections should not be eliminated because of compliance costs faced by covered entities, and that such balancing runs contrary to the Affordable Care Act and the Administrative Procedure Act. Such commenters argue that if the Department determines that particular protections are too costly or onerous, it should advance more limited protections rather than eliminating them entirely.

Response: This final rule does not, and could not, repeal or eliminate specific protections under any of the four civil rights statutes referenced in Section 1557, and it does not remove the protections provided by the implementing regulations for those statutes.

The Department has, however, chosen to reduce some excessive burdens that were applied to covered entities by the 2016 Rule, but were not required by Section 1557, where the relevant civil rights protections could be enforced using the underlying regulations without the unnecessary burdens imposed by the 2016 Rule.

Comment: Commenters stated that the Department exceeded its authority by proposing this rule. Some commenters indicated that the Department's positions as advanced in the proposed rule are not worthy of deference under the framework established in *Chevron, U.S.A., Inc.* v. *Nat. Res. Def. Council, Inc.,* 467 U.S. 837 (1984), because the proposed rule is contrary to clear congressional intent and is inconsistent with the agency's past policies concerning sex protections. Many of these commenters assert that the changes set forth in the proposed rule run contrary to the requirements of the ACA, pointing to 42 U.S.C. 18114 (Section 1554), which states that the Department shall not ''promulgate any regulation that—(1) creates any unreasonable barriers to the ability of individuals to obtain appropriate medical care; (2) impedes timely access to health care services. . .'' These commenters also state that the Department is attempting to make a legislative change through an administrative action. Some commenters contend that the proposed rule runs contrary to the general intent of the ACA, namely that all individuals should be provided access to healthcare.

Response: The 2016 Rule tried to make essentially legislative changes through administrative action, and those changes were rightly held to be in violation of the APA. The Department does not exceed its authority by rescinding the portions of the 2016 Rule that exceeded the Department's authority. The Department also does not

[17] *See* 84 FR 27850; *F.C.C.* v. *Fox Television Stations, Inc.,* 556 U.S. 502, 514–15 (2009).

violate Section 1554 of the ACA by not including the gender identity and termination of pregnancy provisions in this final rule, which were not supported by the text of the underlying civil rights laws incorporated in Section 1557, and in addition were vacated by court order.

With respect to both Sections 1554 and 1557, the Department interprets the ACA by the plain meaning of its text, and as will be shown below, this final rule brings the Department's Section 1557 regulations in line with a proper understanding of the ACA's text. Parts of the 2016 Rule exceeded the Department's authority under the ACA, and this final rule formally eliminates those portions from the Code of Federal Regulations. The Department believes this approach adheres more closely to the text of the statutes referenced in Section 1557, along with the regulations that the Department has used to implement those statutes for decades. Other parts of the 2016 Rule are being modified or repealed in order to save providers from unnecessary burdens not required by the ACA, so that they are better able to achieve the statute's goal of providing healthcare access to all Americans. Such a reconsideration and elimination of certain regulatory provisions, particularly regulations that the ACA itself did not require to be issued, neither ''creates'' unreasonable regulatory barriers nor impedes timely access to healthcare. If it were otherwise, Section 1554 would essentially serve as a one-way ratchet, preventing the Department from ever reconsidering a regulation that could be characterized as improving access to healthcare in some sense, regardless of the other burdens such regulation may impose on access to health care. The Department's approach in this final rule is also consistent with the Ninth Circuit's recent interpretation of Section 1554: ''[t]he most natural reading of § 1554 is that Congress intended to ensure that HHS, in implementing the broad authority provided by the ACA, does not improperly impose regulatory burdens on doctors and patients.'' [18] As explained throughout the preamble, the Department's rule avoids precisely such burdens by bringing the section 1557 regulations into alignment with the longstanding requirements of the applicable civil rights laws and their implementing regulations (thereby also avoiding additional conscience burdens that the 2016 Rule potentially imposed) and by removing notice and taglines requirements that imposed unjustified burdens on the healthcare system as a whole (some of which would likely have been passed on to individuals).

Comment: Commenters said that Section 1557 should be construed broadly because throughout the ACA, Congress prohibited a variety of forms of discrimination, such as against pre-existing conditions and combating health disparities. Commenters also indicated that the ACA is intended to reduce the cost of healthcare discrimination against the poor, so the Section 1557 rule should implement cost sharing and other insurance requirements.

Response: In the ACA, Congress labeled several provisions other than 1557 as prohibiting discrimination [19] in healthcare, but did not incorporate those other provisions of the ACA into Section 1557. Those other provisions are different from the civil rights provisions set forth in Section 1557 in substance, implementation, and enforcement. This final rule commits the Department to robust enforcement of the nondiscrimination grounds applicable under Section 1557.

Comment: A commenter contended that the Department provided little or no legal, policy, or cost-benefit analysis along with the proposed rule and combined too many changes into a single rule. Some commenters claimed the proposed rule is arbitrary, capricious, and contrary to law, is inconsistent with the agency's mission, and lacks reasoned explanations justifying the policy reversals. Other commenters stated that HHS failed to account for the extensive history of healthcare discrimination, and provided no contrary data to counter the original factual findings in the 2016 Rule. Furthermore, they said that individuals have reasonably placed their reliance upon the Federal government to protect their civil rights as explained in the 2016 Rule.

Response: The Department provided ample legal, policy, and cost-benefit analysis for the proposed rule and provides additional support here for the final rule.[20] The Department proposed changes to the provisions of the 2016 Rule because that rule exceeded the Department's authority under Section 1557, adopted erroneous and inconsistent interpretations of civil rights law, caused confusion, imposed unjustified and unnecessary costs, and conflicted with applicable court decisions. It is unfortunate that, by administrative action, the 2016 Rule may have unreasonably raised expectations about nondiscrimination protections that are not found in the underlying statutes, but this final rule cannot be held responsible for that. The Department gave extensive reasons for its changes in the 2019 NPRM, and gives further reasons in response to comments below. The public comment process provided adequate opportunity to present legal, policy, and cost-benefit analyses, all of which were considered in finalizing this rule, as discussed herein.

The Department also updates and discusses the regulatory impact analysis based on comments and data received. While there are still some questions addressed by this final rule where robust data are unavailable, were not found by the Department, or have not been brought to the Department's attention, the Department is allowed to engage in rulemaking even where the impact of a rule change is difficult or impossible to quantify. The Department has diligently considered the relevant and significant data of which it is aware.

There is no artificial limit on the number of changes a proposed rule may contain—or on the number of parts in the Code of Federal Regulations that can be addressed in a rulemaking. This final rule contains many fewer changes than the 2016 Rule did, and it substantially streamlines the existing 1557 regulation as opposed to enlarging it. Its inclusion of conforming changes to various CMS regulations still gives the final rule a size and scope that is well within the range of other significant proposed rules.

Comment: Several commentators stated that the proposed rule's language that Title IX and Section 1557 must be ''exercised with respect for State sovereignty'' runs contrary to the Supreme Court's decision that Congress has the authority to prohibit discrimination in commercial activity.

Response: This final rule does not, nor does the Department intend to, remove any protection against State action that Congress has provided by statute. It also does not deny States the ability to provide protections that exceed those required by Federal civil rights law. The reference to State sovereignty simply refers to the Department's intention to protect the States by respecting their sovereignty to the extent that doing so does not infringe on Federal law.

Comment: One commenter noted that, after the 2016 Rule was passed, the

[18] *California* v. *Azar,* No. 19–15974, 2020 WL 878528, at *18 (9th Cir. Feb. 24, 2020 (en banc).

[19] *See, e.g.,* ACA Section 2701 (''discriminatory premium rates''); Section 2716 (''discrimination based on salary''); Section 2705 (''discrimination against individual participants and beneficiaries based on health status''); Section 2716 (''discrimination in favor of highly compensated individuals'').

[20] *See* 45 FR at 27875–88.

Department released resources and educational materials, including fact sheets, to explain the 2016 Rule. The commenter requested that the Department release similar resources and educational materials following the finalization of this rule.

Response: The Department is providing the responses to comments contained in this preamble to clarify issues and answer questions concerning this final rule. Furthermore, the Department continues to be committed to providing resources and educational materials to explain civil rights requirements and to assist covered entities with compliance with civil rights statutes and the regulations thereunder, including this regulation.

B. Section 1557 Regulation, Subpart A: General Requirements and Prohibitions

The Department proposed changes to the Section 1557 rule at 45 CFR part 92 to be composed of Subpart A on general requirements and prohibitions, and Subpart B on specific applications related to disability nondiscrimination and language access.

(1) Proposed Repeal of Definitions in § 92.4 of the 2016 Rule

Comments: A commenter contended that eliminating the definitions section in the Section 1557 Regulation would cause confusion, misinterpretation, and inconsistency of terms among the regulations that currently reference or otherwise rely on the underlying definitions in the 2016 Rule.

Response: In significant part, the definitions section of the 2016 Rule duplicates definitions already incorporated into the Section 1557 regulation by reference, and hence creates either inconsistency or redundancy. In other cases, the 2016 Rule contained definitions inconsistent with the text of applicable statutes; indeed, on those grounds, a Federal district court vacated the 2016 Rule's definition of ''on the basis of sex'' insofar as it encompassed gender identity and termination of pregnancy. The Department will continue to enforce Section 1557 using HHS regulations for the underlying civil rights statutes. Many of these regulations have definition sections and operate based on longstanding understandings of how the laws are enforced.

Comments: Some commenters argued that eliminating the phrases ''covered entities'' and ''health program or activities'' would allow many plans and programs to be exempt from the Section 1557 regulation. Other commenters stated that the existing definitions provide clarity and consistency for covered entities. Another commenter stated that the proposed rule would limit Section 1557's application to the specific program or activity that receives Federal assistance, rather than a healthcare entity's entire operations.

Response: See below, under ''Scope of Application in Proposed § 92.3,'' for a discussion of the entities subject to this final rule.

Comment: Some commenters asked the Department to retain the definition of ''auxiliary aids and services'' concerning effective communication for individuals with disabilities. They also asserted that the Department has altered important definitions related to effective communication, without explanation or acknowledgement. While some commenters appreciated the Department's efforts to incorporate many of the current definitions of Title II of the Americans with Disabilities Act [21] (''ADA''), some claim the Department has erred in tracking the language of those definitions.

Response: The Department is not required to track ADA definitions in its Section 1557 regulation. This final rule applies many definitions based on those found in the ADA or its regulations (including ''disability'' and ''auxiliary aids and services''), technical definitions and standards under the ADA, and Uniform Federal Accessibility Standards as promulgated; as discussed below, it also departs from ADA definitions in certain cases. Additionally, this final rule retains effective communication standards for individuals with disabilities under § 92.102; these provisions are drawn from regulations promulgated by the Department of Justice implementing Title II of the ADA.[22] Specific definitions and provisions related to individuals with disabilities are discussed below.

The proposed rule apprised the public of the language the Department sought to finalize in the rule, gave the Department's reasons for changes relative to the 2016 Rule, and provided an opportunity to comment on the proposed language.

Comment: Some commenters opposed the proposed removal of the definition for ''national origin,'' saying it would lead to confusion among providers and recipients as to what constitutes discrimination on the basis of national origin.

Response: The term ''national origin'' is not specifically defined in Title VI or in HHS's implementing regulation, but the Department has appropriately enforced the prohibition on national origin discrimination under Title VI for decades in accord with relevant case law. In implementing this final rule, the Department intends to enforce vigorously the prohibition on national origin discrimination in a manner consistent with the current interpretation under Title VI, including under *Lau* v. *Nichols,* as discussed below.[23]

Comment: Some commenters asserted that the removal of definitions weakens protections for LEP individuals and signals a lack of priority for enforcement by the Department.

Response: As discussed below, meaningful access for individuals with LEP is a key component of the national origin protections under Title VI and Section 1557, and will be well protected by this final rule. The streamlining of this regulation through the elimination of largely redundant definitions will in no way impede the Department's strong commitment to meaningful access for LEP individuals.

Summary of Regulatory Changes: The Department finalizes its repeal of § 92.4 of the 2016 Rule without change. Additional comments concerning the definitions of sex, gender identity, and other specific definitions are discussed in more detail below.

(2) General Changes to 2016 Rule

a. Purpose of Regulation, Revising § 92.1 of the 2016 Rule

The Department proposed to revise the statement of the purpose of the regulation in § 92.1 from ''implement[ation]'' of Section 1557 to ''provid[ing] for the enforcement'' of Section 1557. 84 FR at 27861.

Comment: A commenter said this change in language allows the Department to minimize its involvement in ensuring that nondiscrimination protections are effective.

Response: This is the opposite of the Department's intention. This final rule's title and citation to statutory authority already make clear that it is implementing Section 1557. By changing the rule's language from ''implement'' to ''provide for the enforcement of,'' the Department simply means to emphasize, in terms accessible to a lay audience, that it will fully enforce Section 1557 and the underlying nondiscrimination laws as they fall within the jurisdiction of the Department, according to the text of those laws and their implementing regulations.

[21] 42 U.S.C. 12101 *et seq.*

[22] 42 U.S.C. 12311; *see also* 28 CFR 35.160–164.

[23] *Lau* v. *Nichols,* 414 U.S. 563 (1974).

b. Effective Date

The Department proposed that the effective date of the revised regulation be 60 days after publication of the final rule, in order to relieve significant regulatory burdens, particularly the taglines requirements.[24] The 2016 Rule's effective date was July 18, 2016 (60 days after publication of the final rule), with the exception of the provisions on health insurance and benefit design, which went into effect on January 1, 2017 (the first day of the first plan year following the effective date).[25] The new rule does not include a different effective date for health insurance and benefit design.

Comment: Commenters asked that the Department make the effective date several months prior to the plan open enrollment period that occurs between November 1 and December 15, in order for the covered entities to have sufficient time to incorporate the regulatory changes into the next plan year.

Response: The Department has endeavored to issue this final rule sufficiently in advance of the plan year cycle, so that plans can incorporate the regulatory changes into the next plan year. Moreover, because this final rule generally relieves regulatory requirements rather than adding them, it should be easier for issuers to incorporate such changes into the plans they will offer for the next plan year.

Comment: Commenters stated that it is inappropriate to finalize the change to the definition of sex as it relates to Section 1557 in light of current litigation before the Supreme Court, which may be resolved by the end of the court's term or before. These commenters note that the Supreme Court's ruling in *R.G. & G.R. Harris Funeral Homes* v. *EEOC & Aimee Stephens*[26] will determine whether Title VII of the Civil Rights Act of 1964 extends sex discrimination protections to transgender status, and that the ruling may apply to the definition of sex under Title IX as well. Accordingly, these commenters urge the Department to wait until the Supreme Court decides *Harris Funeral Homes* before publishing a rule that deals with the same subject matter, or allow for commenters to comment again once the case has been decided.

Response: The Department acknowledges the commenters' point of view but respectfully disagrees. The U.S. government has taken the position in *Harris* and other relevant litigation that discrimination ''on the basis of sex'' in Title VII and Title IX does not encompass discrimination on the basis of sexual orientation or gender identity.[27] The Department shares that position and is permitted to issue regulations on the basis of the statutory text and its best understanding of the law and need not delay a rule based on speculation as to what the Supreme Court might say about a case dealing with related issues. The Department also agrees with the *Franciscan Alliance* ruling, according to which the 2016 Rule's extension of sex-discrimination protections to encompass gender identity was contrary to the text of Title IX and hence not entitled to *Chevron* deference.[28] Moreover, to the extent that a Supreme Court decision is applicable in interpreting the meaning of a statutory term, the elimination of a regulatory definition of such term would not preclude application of the Court's construction.

The Department continues to expect that a holding by the U.S. Supreme Court on the meaning of ''on the basis of sex'' under Title VII will likely have ramifications for the definition of ''on the basis of sex'' under Title IX.[29] Title VII case law has often informed Title IX case law with respect to the meaning of discrimination ''on the basis of sex,'' [30] and the reasons why ''on the basis of sex'' (or ''because of sex,'' as used in Title VII) does not encompass sexual orientation or gender identity under Title VII have similar force for the interpretation of Title IX. At the same time, as explained below, the binary biological character of sex (which is ultimately grounded in genetics) takes on special importance in the health context. Those implications might not be fully addressed by future Title VII rulings even if courts were to deem the categories of sexual orientation or gender identity to be encompassed by the prohibition on sex discrimination in Title VII. As a result, the Department considers it appropriate to finalize this rule, which does not define sex, but relies on the plain meaning of the term under Title IX, and does so in the health context within which the Department applies Title IX under Section 1557.

Comment: Commenters disagreed with the Department's reliance on the litigation and court order in *Franciscan Alliance* to justify revisiting the rule, because the injunctive order was not permanent, was allegedly limited to enforcement actions of HHS, and does not require new rulemaking, and because other litigants have intervened in the case to defend the 2016 Rule. Some commenters stated that although the U.S. District Court in *Franciscan Alliance* ruled against the 2016 Rule's definition of sex, other courts have come to conclusions that suggest the opposite, and HHS is not required to alter Department-wide policy based on the injunction in *Franciscan Alliance.* Others argued that the Department improperly relied on one legal decision that they said conflicts with the clear weight of case law. Another commenter stated it would be inappropriate to publish any new rule before a final ruling in *Franciscan Alliance,* as the case is being appealed.

Response: Nearly three years after the preliminary injunction, and after the comment period on the proposed rule had concluded, the court in *Franciscan Alliance* issued a final ruling vacating the 2016 Rule ''insofar as the Rule defines *'On the basis of sex'* to include gender identity and termination of pregnancy,'' and remanding the Rule for further consideration.[31] This final ruling is binding on the Department despite the appellate proceedings still pending in that case: The Department's Section 1557 regulation, as currently operative, does not contain the 2016 Rule's definition of ''on the basis of sex'' to encompass gender identity and termination of pregnancy. The *Franciscan Alliance* court's 2016 injunction gave the Department good cause to reconsider the 2016 Rule, but neither the injunction nor the *vacatur* was the Department's only reason for revising it, as the proposed rule made clear and as the Department's responses to comments in this preamble reiterate. Nothing in the appellate litigation prohibits the Department from finalizing this rule, which it does for the reasons given in this preamble. As for the weight of case law, it is discussed below with respect to the respective provisions of this final rule.

Comment: One commenter noted that the Department's announcement of the proposed rule on May 24, 2019 had stated that a fact sheet explaining the changes in the proposed rule would be

[24] 84 FR at 27888.

[25] 81 FR at 31378.

[26] *R.G. & G.R. Harris Funeral Homes, Inc.* v. *E.E.O.C.,* 139 S. Ct. 1599 (2019).

[27] As noted elsewhere in this preamble, it has been the consistent position of the federal government that ''on the basis of sex'' under Section 1557 does not encompass sexual orientation, including the decision in the 2016 Rule not to include sexual orientation in the definition of that term. *See* 81 FR at 31390.

[28] *Franciscan All., Inc.* v. *Azar,* 414 F. Supp. 3d 928, 945 (N.D. Tex. Oct. 15, 2019) (incorporating its previous ruling at 227 F. Supp. 3d at 685–87).

[29] *See* 84 FR 27855.

[30] *See, e.g., Yusuf* v. *Vassar Coll.,* 35 F.3d 709, 714 (2d Cir. 1994).

[31] Order, *Franciscan Alliance,* No. 7:16–cv–00108–O *2 (N.D. Tex. filed Nov. 21, 2019).

provided in Spanish. However, no such fact sheet has been provided. Accordingly, the commenter requested that the comment period be extended until 60 days after the fact sheet is published in Spanish.

Response: The proposed rule itself did not purport to offer information in Spanish, and the Department was not under a legal obligation to offer a separate fact sheet or to translate it. The Department's press release indicated that a fact sheet, separately created in connection with the press release, would be translated. That is not a basis for reopening the comment period on the proposed rule, because the proposed rule provided the public with adequate notice and a 60-day public comment period, which were legally sufficient.

c. Severability

The Department proposed to repeal the provision in § 92.2(c) of the 2016 Rule stating that if a regulatory provision in this part were held invalid or unenforceable on its face or as applied to a specific person or circumstances, the provision should be construed to the maximum effect permissible by law and be severable such that it would not affect other persons or circumstances that are dissimilar.

Comment: Commenters asked the Department to add a severability provision to the final rule. Specific points recommended included severing repeal of the provisions related to the notices and taglines, and/or the changed scope of applicability, from the sex discrimination provisions. Commenters said that the Supreme Court case *K-Mart Corp.* v. *Cartier, Inc.,* 108 S. Ct. 1811 (1988), would allow the Department to sever the changes in the taglines provision from the proposed rule and implement those changes even in the event that a court delays or suspends the proposed rule.

Response: In part due to these comments, the Department has decided not to finalize the proposal to eliminate the severability provision from the 2016 Rule. Instead the Department will retain that severability provision, but has moved it to § 92.3(d), because § 92.3 is now the provision addressing the application of the rule. This change will be discussed again below in the discussion of § 92.3.

d. Summary of Regulatory Changes

For the reasons described in the proposed rule, and having considered the comments received, the Department finalizes the proposed § 92.1 without change, and confirms that the effective date of this final rule will be 60 days after its publication in the **Federal Register**.

(3) Scope of Application in Proposed § 92.3; Repeal of § 92.208

The Department proposed to repeal § 92.2 of the 2016 Rule, and instead address the scope of application of Section 1557 in a new § 92.3. 84 FR at 27862–63. The Department also proposed to repeal § 92.208 of the 2016 Rule, which had expanded the scope of the Section 1557 statutory provision to apply to certain employee health benefits programs.[32]

a. Generally

Comment: Commenters argued the Department did not provide a reasoned legal, policy, or cost-benefit analysis to support the repeal of § 92.208, which hindered their ability to provide meaningful comments as required by the APA. The commenters maintained that the Department's comparison of § 92.208 to Title IX [33] was flawed, in part because HHS's Title IX regulation does not apply to all bases of discrimination or many of the same covered entities as addressed under Section 1557. Some commenters noted that employees deserve protection from discrimination in employer-sponsored plans.

Response: As seen below in the response to a similar comment on § 92.207, § 92.208 appears in the NPRM in a list of sections of the 2016 Rule that ''are duplicative of, inconsistent with, or may be confusing in relation to the Department's preexisting Title VI, Section 504, Title IX, and the Age Act regulations.'' [34] The Department repeals § 92.208 for reasons similar to those given at greater length below in discussing § 92.207: It seeks to relieve regulatory burden and possible confusion by enforcing the relevant nondiscrimination statutes through their existing regulations.

The Department is not aware of data and methods available to make reliable estimates of all economic impacts predicted by various commenters. The Department's estimates of regulatory impact are discussed below.

Comment: Commenters stated that individuals protected by Section 1557, particularly individuals with disabilities, frequently experience discrimination in healthcare. Commenters expressed concerns that the narrowed application would reduce the number of covered entities and would lead to more discrimination, lack of care, and adverse health outcomes, which they argued is contrary to the stated Congressional intent and purpose of the ACA to expand access to and end discrimination in health insurance. Several State and local government commenters expressed concern that the proposed rule would negatively affect public health in their States and increase costs to States due to more people seeking care through government-funded programs, such as Medicaid.

Conversely, other commenters were supportive of the proposed rule's revised scope and agreed that the 2016 Rule was far too broad in its application. They concurred that narrowing the scope of application would help rein in the regulatory excess and burden of the 2016 rule.

Response: The Department must follow the text of the ACA. To the extent that Congressional intent and purpose are relevant, they are best determined by looking to the plain meaning of the statutory text. This final rule will enforce Section 1557's discrimination requirements against the entities that Congress intended them to be enforced against. The Department's specific reasoning in interpreting Section 1557's scope of coverage follows.

b. § 92.3(a): Covered Programs and Activities

The Department proposed in § 92.3(a) that, except as otherwise provided in part 92, the Section 1557 rule will apply to (1) any health program or activity, any part of which is receiving Federal financial assistance (including credits, subsidies, or contracts of insurance) provided by the Department; (2) any program or activity administered by the Department under Title I of the ACA; or (3) any program or activity administered by any entity established under Title I of the ACA.

Comment: Some commenters opposed removing the full definition of ''Federal financial assistance'' from the 2016 Rule and replacing it with the limited text under proposed § 92.3(a)(1). They stated that the lack of specificity could lead to ambiguity and confusion. Commenters further asserted that the proposed rule was inconsistent with the Department's recently promulgated *Protecting Statutory Conscience Rights in Health*

[32] *Compare* 45 CFR 92.208 (employer liability for discrimination in employee health benefit programs in Section 1557) *with* 45 CFR 86.56 (discrimination on the basis of sex in fringe benefits under Title IX. The enforcement Memorandum of Understanding (MOU) between OPM and the Department, signed by OCR on 11 January 2017, is moot upon publication of this final rule.

[33] 84 FR at 27869, n.148 (comparing § 92.208 with 45 CFR 86.56 (discrimination on the basis of sex in fringe benefits under Title IX)).

[34] 84 FR 27869.

Care (''2019 Conscience Rule''),[35] which included an expansive definition of ''Federal financial assistance.'' [36]

Response: The Department concludes it is appropriate to have a definition of Federal financial assistance that mirrors Section 1557's statutory text to include ''credits, subsidies, or contracts of insurance.'' In addition, the definitions applicable under the preexisting civil rights statutes still apply, and the Department believes it is more appropriate to apply those existing definitions than to maintain the ones in the 2016 Rule. Section 1557 says the enforcement mechanisms provided for and available under the underlying civil rights statutes shall apply, and the Department believes operating under those mechanisms and the definitions that have long been applicable to them, along with the language the Department retains in this final rule, is appropriate moving forward. The 2019 Conscience Rule was based on different statutes.

Comment: Some commenters opposed the proposed rule's exclusion of Federal financial assistance that the Department ''plays a role'' in providing or administering, which had been included in the 2016 Rule's definition of Federal financial assistance. Commenters argued that the statute applies to programs or activities administered by ''an Executive Agency'' and thus should not be limited to HHS. In particular, they objected to the result that qualified health plans (QHPs) would no longer be covered under the rule on the basis that HHS plays a role in administering tax credits. The commenters argued that this interpretation is contrary to a plain reading of the statute, which not only uses the broad term ''Federal financial assistance'' (without a modifier to limit it to assistance directly administered by HHS), but also expressly includes ''credits'' as part of Federal financial assistance. Further, some commenters noted that the Department took an inconsistent and broader approach in its Conscience Rule, wherein HHS exerts jurisdiction over statutes and funding also administered by the U.S. Departments of Labor and Education.

Response: The statutory text of Section 1557 refers simply to ''any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance.'' Because the Section 1557 regulation applies only to the Department, the 2015 NPRM had reasonably sought to limit its scope to Federal financial assistance from the Department, leaving other Departments to enforce Section 1557 within their own sphere.[37] In the 2016 Rule, however, wishing to encompass tax credits administered under Title I, the Department expanded the rule's scope to encompass ''Federal financial assistance that the Department plays a role in providing or administering.'' [38] The Department now regards this expansion as overbroad. While Section 1557 still applies to any health program or activity receiving any Federal financial assistance, this final rule prescribes enforcement only by the Department and within the Department's jurisdiction. The Department does not consider it appropriate in this final rule to apply its provisions to any programs that the Department ''plays a role in'' administering.

Commenters' concerns about covering QHPs are misplaced: These plans remain subject to this rule because they are sold on the Exchanges established under Title I of the ACA (see § 92.3(a)(3) of this final rule). This final rule only prescribes enforcement of Section 1557 by the Department and within the Department's jurisdiction, so the Department believes it is appropriate for this regulation to not include activities funded or administered solely by other Federal agencies even if Section 1557 may apply in those instances.

The 2019 Conscience Rule (as stated above) relied on different statutes than the Section 1557 rule, and the Department drafts its regulations as appropriate for the underlying statutes.

Comment: Commenters disapproved of proposed § 92.3(a)(2), which would limit the rule's application in the context of HHS-administered programs or activities to only those administered under Title I of the ACA. Commenters argued that this interpretation is inconsistent with the statutory text of Section 1557, which applies to ''any program or activity administered by an Executive Agency *or* any entity established under this title [*sc.,* Title I].'' (emphasis added). Commenters argued the proposed § 92.3(a)(2) would incorrectly apply ''under this title'' to modify both phrases. Furthermore, they argued that the Department did not provide an adequate rationale for its interpretation in the proposed rule.

Response: As explained in the 2019 NPRM, the statutory text of Section 1557 applies to ''any program or activity'' administered by an Executive Agency or Title I entities, but does not include the modifier ''health'' with respect to those programs or activities.[39] In the 2016 Rule, the Department limited its application by adding ''health'' to ''programs or activities'' because the Department recognized that Section 1557 was not intended to apply to every program or activity administered by every Executive Agency, whether or not it related to health.[40] The 2016 Rule acknowledged implicitly what the Department now states more clearly: The grammar of the relevant sentence in the Section 1557 statutory text concerning limits to its scope is less clear than it could have been. In resolving the sentence's ambiguity, however, the Department no longer agrees with the 2016 Rule's decision to add a limiting modifier (*i.e.,* ''health'') that Congress did not include in the statutory text. Instead, the Department concludes that Congress had already placed a limitation in the text of Section 1557 by applying the statute to any program or activity administered by an Executive Agency ''under this title'' (meaning Title I of the ACA), as well as to any program or activity administered by an entity established under such title. The Department believes that either this interpretation of the statutory text, or the 2016 Rule's addition of the modifier ''health,'' is necessary in order to make sense of the statutory text; this final rule offers a technical reading of the text that is at least as reasonable as the 2016 Rule's addition of a word not present in the text of the statute.

Comment: Commenters argued that the proposed interpretation to limit coverage to HHS Title I programs or activities would exclude a number of important programs and activities operated by HHS and is inconsistent with Section 504's application to ''any program or activity conducted by an

[35] *Protecting Statutory Conscience Rights in Health Care; Delegations of Authority,* 84 FR 23170–01 (2019).

[36] 45 CFR 88.2.

[37] 80 FR 54173 (''Section 1557 applies to all health programs and activities, any part of which receives Federal financial assistance from any Federal Department. However, this proposed rule would apply only to health programs and activities any part of which receives Federal financial assistance from HHS. This narrowed application is consistent with HHS' enforcement authority over such health programs and activities, but other Federal agencies are encouraged to adopt the standards set forth in this proposed rule in their own enforcement of Section 1557.'').

[38] 81 FR 31467, 31384; *cf.* 80 FR 54216.

[39] 42 U.S.C. 18116(a) (applying Section 1557, in relevant part, to ''any program or activity that is administered by an Executive Agency or any entity established under this title (or amendments).''). *See also* 84 FR at 27861–62 (discussing the Department's statutory interpretation).

[40] 45 CFR 92.2 (applying the final rule, in relevant part, to ''every *health* program or activity administered by the Department; and every *health* program or activity administered by a Title I entity'') (emphasis added).

Executive Agency.'' [41] They point out that HHS's Section 504 regulation applies to ''all programs or activities'' conducted by HHS and all its components, including CMS, HRSA, CDC, and SAMHSA.[42] Further, commenters stated that excluding non-Title I HHS-administered programs and activities, contrary to Section 504, will result in confusion and cause illogical results, whereby recipients would be covered by Section 1557 but the agencies administering the program would not be covered. For example, State Medicaid programs would be subject to Section 1557, but CMS, which oversees those Medicaid programs, would not be covered.

Response: Section 1557 is a nondiscrimination statute under the ACA, which uniquely applies to healthcare, whereas Section 504 is a statute of general applicability. Section 1557 incorporates Section 504's prohibited grounds of discrimination but not its scope: Section 1557's scope differs from that of the underlying statutes. For instance, Section 504 does not include ''contracts of insurance'' in its definition of Federal financial assistance,[43] but this final rule follows the text of Section 1557 by including ''contracts of insurance'' within Federal financial assistance.[44] With respect to CMS, it is covered under this final rule to the extent that it either administers health programs and activities receiving Federal financial assistance or administers programs and activities under Title I. In addition, it is important to note that, as a federal agency, CMS has long been subject to various constitutional and statutory prohibitions on discrimination.

c. § 92.3(b): Scope of the Term ''Health Program or Activity''

The Department proposed in § 92.3(b) to clarify that ''health program or activity'' encompasses all of the operations of entities ''principally engaged in the business of providing healthcare'' that receive Federal financial assistance. The Department proposed to further clarify that for any entity not principally engaged in the business of providing healthcare, such entity's operations are subject to the Section 1557 Rule only to the extent any such operation receives Federal financial assistance provided by the Department.

Comment: Commenters opposed limiting application of the rule when the entity is not principally engaged in the business of providing healthcare. Commenters argued that this would dramatically limit the scope of the rule and is contrary to Congressional intent and the plain meaning of the statute, which covers ''any health program or activity, any part of which is receiving Federal financial assistance. . . .'' Commenters stated that the entire entity receiving Federal financial assistance should be covered, not just the portion receiving funding. Commenters also argued the new framework would cause uncertainty and confusion for covered entities, which would have to clarify the extent of their own compliance, and also would make it harder for consumers to enforce their rights because they would have difficulty determining which entities and which portion of their programs or activities are subject to the rule. Commenters contended this uncertainty could result in lack of access to care, increased health disparities, and increased uncompensated care, all of which would increase overall healthcare costs.

Some commenters stated that the rule incorrectly incorporates the Civil Rights Restoration Act (CRRA) [45] into Section 1557. Commenters argued that the CRRA predates the ACA; nothing in the CRRA's text applies it to future statutes or Section 1557; Congress did not incorporate the CRRA into the Section 1557 statute; and Section 1557 itself is more expansive than the laws amended by the CRRA. Therefore, they say, a broader definition of covered programs and activities should apply to include all health insurers as covered entities. Others argued that the proposed rule's application of the CRRA contravenes the approach taken by Congress in the CRRA. They stated that Congress made clear in the CRRA that if any part of a program or activity receives Federal financial assistance, the entire program or activity must comply with the applicable civil rights laws. Thus, the commenters argued that the proposed rule's limited application when entities are not principally engaged in the business of healthcare, to cover only the specific operation that receives Federal financial assistance, is contrary to the CRRA. Another commenter stated that incorporating the CRRA into Section 1557 would be subject to judicial review, to the extent the Department relies on Section 1557's references to ''grounds'' and ''enforcement mechanisms'' of the underlying statutes to do so, because the Supreme Court held in *Consolidated Rail Corp.* v. *Darrone* that a statute's incorporation of another statute's enforcement mechanisms does not necessarily incorporate its substantive law.[46]

Conversely, other commenters were supportive of reducing regulatory burden by limiting application of the rule in this way. They stated that the 2016 Rule defined ''covered entities'' far too broadly, and that narrowing the scope will help rein in the regulatory excess of that rule. Commenters explained that healthcare entities often provide a variety of services and products, such as insurance coverage for life, disability, or short-term limited duration insurance coverage, and third-party administrative services, which do not receive Federal financial assistance. These commenters agreed that Section 1557 is intended to apply only to those programs receiving Federal funding and not to other parts of the entity's businesses or products when an entity is not principally engaged in the business of providing healthcare.

Response: Section 1557 explicitly incorporates statutes amended by the CRRA, and in this final rule the Department is aligning Section 1557's definition of ''health program or activity'' with the standard articulated in the CRRA in order to provide clarity and consistency. The CRRA clarified the scope of nondiscrimination prohibitions under the civil rights statutes that Section 1557 incorporates. For example, with respect to the health sector, it applied those prohibitions to all health programs or activities receiving Federal financial assistance, but not to all providers of health insurance: It applied ''program or activity'' to cover all of the operations of an entity only when that entity is ''principally engaged in the business of providing . . . health care . . . .'' [47] This final rule clarifies that the term ''health program or activity'' used in Section 1557 should be understood in light of the CRRA's limitations on the term ''program or activity'' as applied to statutes on which Section 1557 relies. As for *Consolidated Rail Corp.* v. *Darrone,* Congress specifically and intentionally

[41] 29 U.S.C. 794 (applying to ''any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service'').

[42] 45 CFR, part 85.

[43] 45 CFR 84.3(h).

[44] 42 U.S.C. 18116(a).

[45] Public Law 100–259, 102 Stat. 28 (Mar. 22, 1988).

[46] *See Consolidated Rail Corp.* v. *Darrone,* 465 U.S. 624, 635 (1984) (holding that Section 504's incorporation of the ''remedies, procedures, and rights'' set forth in Title VI did not mean that Section 504 incorporated Title VI's substantive limitations on actionable discrimination).

[47] *See, e.g.,* CRRA § 3(a) (adding § 908(3)(A)(ii) to Title IX of the Education Amendments of 1972 (codified at 20 U.S.C. 1687(3)(A)(ii)).

overturned that case through the passage of the CRRA.[48]

The 2016 Rule also articulated a standard for ''health program or activity'' that relied upon the ''principally engaged'' prong of the CRRA, which was contested neither before nor after that rule's publication. In the regulatory text, the 2016 Rule defined ''health program or activity'' to apply to all operations of an entity only when it is principally engaged in providing or administering health services, health insurance coverage, or other health coverage.[49] The 2016 Rule preamble clarified that if an entity is not principally engaged in providing health benefits, the Department would apply the rule to its Federally funded health programs and activities.[50]

The Department believes that by specifying the degree to which the Section 1557 regulation covers entities not principally engaged in the business of providing healthcare, this final rule more clearly and consistently applies the CRRA's limitations on ''health program or activity'' across the regulation. The Department agrees with commenters who suggest that in doing so this final rule also advances its goal of reducing regulatory burdens under the ACA in furtherance of Executive Order 13765.

Comment: Commenters argued that limiting the application of the rule to only the portion of the health program or activity that receives Federal financial assistance for entities not principally engaged in the business of providing healthcare is not consistent with the Department's application of Title VI as set forth in HHS's 2003 LEP guidance. This guidance provided that Title VI applies to all parts of a covered entity receiving Federal financial assistance, not just the portion receiving Federal funds.[51]

Response: As a policy guidance document, the Department's LEP guidance cannot be used to create binding standards by which the Department will determine compliance with existing regulatory or statutory requirements.[52] Accordingly, the scope of application as set forth under the CRRA and this final rule would prevail over any conflicting text in the Department's LEP guidance.

d. § 92.3(c) Health Insurance and Healthcare

The Department proposed in § 92.3(c) to state that an entity principally or otherwise engaged in the business of providing health insurance would not be considered to be principally engaged in the business of providing healthcare, and on that sole basis, subject to the Section 1557 regulation. The proposed rule sought comment on whether it should define ''healthcare'' in the rule according to the statutes cited in the proposed rule.

Comment: Several commenters supported the distinction between entities principally engaged in the business of providing healthcare and those principally engaged in the business of providing health insurance. As one commenter stated, ''[p]aying for healthcare is not providing healthcare.'' Other commenters were opposed to this distinction. They argued that it is not consistent with Section 1557's statutory text or the proposed regulatory text at § 92.3(a)(1), both of which specifically include ''contracts of insurance'' as an example of Federal financial assistance. They also stated that this limited application is not consistent with Congressional intent to expand access to healthcare and create new nondiscrimination protections in health insurance.

Some commenters argued that health insurance is inextricably linked with the provision of healthcare. They pointed out that the statutory definition of ''healthcare'' relied upon in the proposed rule is unrelated to either the ACA, health insurance, or discrimination, and thus is not intended for or relevant to Section 1557 or health insurance.[53] Further, they argued that the definition of ''health insurance coverage'' referenced in the proposed rule, 42 U.S.C. 300gg–91, actually bolsters the argument that health insurance includes healthcare, as it defines ''health insurance coverage'' to include ''benefits consisting of *medical care* (provided directly, through *insurance* or reimbursement, or otherwise and including items and services paid for as medical care)'' (emphasis added). They also pointed out that definitions in 42 U.S.C. 300gg–91 are most relevant to Section 1557 because Title I of the ACA relied upon this section for definitions.

Response: The CRRA defined ''program or activity'' in the underlying statutes to apply to all of an entities' operations when it is principally engaged in the business of providing ''healthcare.'' On the other hand, the 2016 Rule expansively interpreted Section 1557's application to ''health programs or activities'' to include all operations of entities that ''provide health insurance coverage or other health coverage,'' whether or not they provided healthcare. Prior to the 2016 Rule, the Department had not interpreted the CRRA's term ''healthcare'' to cover the operations of health insurance issuers (as such).

Commenters are correct that Section 1557 includes ''contracts of insurance'' as a type of Federal financial assistance. The Department agrees that health programs or activities that receive contracts of insurance from the Federal government are covered entities under Section 1557. But this does not mean that health insurers, as such, are health programs or activities.

The Department pointed to 5 U.S.C. 5371, as well as to 45 CFR 160.103, in order to support its conclusion that the plain meaning of ''healthcare'' differs from insurance. And although 42 U.S.C. 300gg–91 explicitly encompasses payment, ''group health plans,'' and ''definitions relating to health insurance'' specifically, it should not be taken out of context: It defines ''medical care'' as ''amounts paid for'' certain medical services, which is an appropriate definition in the health insurance field but not in the healthcare field generally. (When a doctor provides ''medical care,'' she is not providing ''amounts paid for'' medical services—she is providing the services themselves.) Other portions of 42 U.S.C. 300gg–91 also support the distinction between healthcare and health insurance: It says that ''health insurance coverage means benefits consisting of medical care,'' where ''medical care'' is defined as ''amounts paid for . . . the diagnosis, cure, mitigation, treatment, or prevention of disease, or amounts paid for the purpose of affecting any structure or function of the body,'' or

[48] *See McMullen* v. *Wakulla Cty. Bd. of Cty. Commissioners,* 650 F. App'x 703, 705 (11th Cir. 2016), citing S. Rep. No. 100–64, at 2 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 3, 3–4.

[49] 81 FR at 31467. In the proposed rule, the Department disagreed with the 2016 Rule's usage of ''health services, health insurance coverage, or other health coverage'' as overbroad and inconsistent with the statutory text of the CRRA that uses the term ''healthcare.'' *See* 84 FR at 27862–63. However, the Department agrees with the 2016 Rule's limitation based on whether the entity is principally engaged.

[50] 81 FR at 31385–86, 31430–32.

[51] 68 FR 47311, 47313 (Aug. 8, 2003) (''Coverage extends to a recipient's entire program or activity, *i.e.,* to all parts of a recipient's operations. This is true even if only one part of the recipient receives the Federal assistance.'').

[52] *See* U.S. Dept. of Justice, Memorandum of the Office of the Attorney General, Prohibition on Improper Guidance Documents (Nov. 16, 2019), *https://www.justice.gov/opa/press-release/file/1012271/download;* U.S. Dept. of Justice, Memorandum of the Office of the Associate Attorney General, Limiting Use of Agency Guidance Documents In Affirmative Civil Enforcement Cases (Jan. 25, 2018), *https://www.justice.gov/file/1028756/download.*

[53] *See* 84 FR at 27862 (citing the definition of ''health care'' at 5 U.S.C. 5371). Commenters noted that this definition pertains to Federal personnel pay rates.

''amounts paid for transportation primarily for and essential to medical care'' in the primary sense just defined, or ''amounts paid for insurance covering medical care'' in either the primary sense just defined or the secondary sense of transportation for medical care.[54] It does not say that health insurance is healthcare, and it twice relies on the commonsense distinction between medical care proper and the health insurance that covers and pays for such care. It thus supports the Department's view that a health insurer is principally engaged in the business of providing coverage for benefits consisting in healthcare, which is not the same as the business of providing healthcare. This final rule brings the 1557 regulation's scope of coverage closer to the plain meaning of the 1557 statute, especially as read in light of the CRRA's definition of ''program or activity.''

Comment: Commenters were concerned that § 92.3(c) would result in exempting many of the plans, products, and operations of most health insurance issuers, such as self-funded group health plans, the Federal Employees Health Benefits (FEHB) Program, third-party administrator services, or short-term limited duration insurance plans. Commenters feared this would allow health insurance issuers to conduct their other activities in a discriminatory manner. Several commenters were particularly concerned about excluding short-term limited duration insurance plans because these plans have been known to engage in discriminatory practices based on disability, age, and sex.

Other commenters, in contrast, supported the proposed revisions. They stated the 2016 Rule was overly expansive, created an un-level playing field, and resulted in disincentives for issuers to participate in HHS-funded programs, such as offering QHPs or Medicare Advantage plans. This resulted in Section 1557's covering products that Congress explicitly excluded from the rest of the ACA, such as excepted benefits and short-term limited duration insurance plans. Commenters argued it was unlikely that Congress intended Section 1557 to regulate the same plans it had excluded from the ACA.

Response: The Department agrees with commenters who stated that the overly broad reach of the 2016 Rule subjected many insurance products that were not intended to be covered by the ACA to burdensome regulation, inconsistent with Congressional intent.

In the proposed rule, the Department stated that Section 1557 does not apply to short-term limited duration insurance as such, but only if it were offered by an entity for which all of the entity's activities are encompassed by Section 1557, or if such insurance received Federal financial assistance.[55] Under this final rule, where short-term limited duration insurance (1) is offered by an entity that is not principally engaged in the business of providing healthcare, and (2) does not receive Federal financial assistance, the protections of Section 1557 would not apply to it. The Department will robustly enforce the nondiscrimination requirements for QHPs under Title I of the ACA, for Exchange plans established by the ACA, and for any other insurance plans that Section 1557 covers. The reasons that this final rule does not cover FEHB plans are discussed in the response to the next comment.

Comment: The Department received comments related to the exclusion of employer plans and excepted benefits as a result of § 92.3(c). Several commenters objected to the exclusion of self-funded group health plans under the Employee Retirement Income Security Act of 1974 (ERISA) and the Federal Employees Health Benefits (FEHB) Program. Commenters argued that FEHB plans should be covered as a contract of insurance with the Federal government. Some suggested that employer group health plans, including self-funded plans, receive substantial Federal financial assistance in the form of favorable income tax treatment and thus should be covered.

Other commenters strongly supported excluding employer plans. Commenters noted that employers and group health plans are already subject to other Federal laws that prohibit discrimination, and that few employer-sponsored plans receive Federal financial assistance. They stated that the 2016 Rule's broad coverage exceeded statutory authority, encumbered the design and operation of employer group health plans, invited litigation regarding plan benefits, and increased the potential for costly new mandates, all of which were likely to increase healthcare costs for employers and employees alike without adding any additional protections against discrimination. Some commenters expressed support for the provision that third-party administrators of self-funded group health plans would no longer be subject to Section 1557 merely because other portions of their business receive Federal funding.

Some commenters requested further clarification by recommending that the regulatory text at proposed § 92.3(c) be revised to specify that other types of plans should not be considered entities principally engaged in the business of providing healthcare, including self-funded or fully insured group health plans under ERISA; self-funded or fully insured group health plans not covered under ERISA that are sponsored by either governmental employers (''government plans'') or certain religious employers (''church plans'' or ''denominational plans''); and benefit plans and programs excepted under the ACA.[56]

Response: The Department continues to take the position that FEHB plans are not covered under this rule. Even if FEHB plans were considered ''contracts of insurance,'' as suggested by some commenters, they still would not fall under the scope of this rule because the contract would be with the Office of Personnel Management (OPM), which operates the FEHB Program, not with the Department. As noted above, this final rule does not extend the Department's enforcement authority to a covered entity that is not principally engaged in the business of providing healthcare to the extent of its operations that do not receive financial assistance from the Department.

The Department agrees that this final rule will accomplish the Department's goal of reducing regulatory burden. The Department declines to offer further examples of non-covered entities in the regulatory text, as the rule's existing parameters are intended to broadly address different entities. To the extent that employer-sponsored group health plans do not receive Federal financial assistance and are not principally engaged in the business of providing healthcare (as set forth in the rule), they would not be covered entities. The same analysis would apply to employer-sponsored plans not covered by ERISA, such as self-insured church plans or

[54] 42 U.S.C. 300gg–91(b)(1), (a)(2).

[55] The Department notes by way of background that, subsequent to publication of the proposed rule, the U.S. District Court for the District of Columbia granted summary judgment for the Department, upholding its most recent rulemaking on short-term limited duration insurance. *See* Short-Term, Limited-Duration Insurance; Final Rule, 83 FR 38212 (August 3, 2018). The August 2018 final rule largely restored the long-standing definition for short-term limited duration insurance to the definition that was in effect from 1997 to 2016. The Court held that the restored definition was not arbitrary or capricious, finding that ''Congress clearly did *not* intend for the [ACA] to apply to all species of individual health insurance.'' *Association for Community Affiliated Plans* v. *U.S. Department of Treasury,* 392 F. Supp. 3d 22, 45 (D.D.C. 2019), *appeal filed* July 30, 2019.

[56] *See* 42 U.S.C. 300gg–91(c) (defining excepted benefits).

non-Federal governmental plans, as well as to excepted benefits.

Comment: Some commenters said that the proposed rule created confusion about whether QHPs are subject to the rule. Others requested clarification on the proposed rule's application to products offered through the Exchange. Others requested clarification on whether stand-alone dental plans and catastrophic plans, which are also sold through the Exchanges established under Title I, are covered under the rule. Another commenter requested confirmation that the proposed rule would not apply to individual or small-group market health insurance coverage that complies with the ACA but is sold outside of the Exchanges, regardless of whether the parent organization also offers on-Exchange QHPs. Others requested clarification as to how the rule would apply when one health insurance plan includes multiple types of enrollees, including subsidized Exchange enrollees, unsubsidized Exchange enrollees, and off-Exchange enrollees. The comments expressed concern that enrollees in the same plan deserved the same level of nondiscrimination protection and that the same standard should be applied.

Response: Health insurance products are often complex. While the Department provides general responses below in an attempt to clarify application of the rule, OCR will always engage in an individualized fact-based analysis when determining the extent of its jurisdiction over these or any other such products.

A QHP would be covered by the rule because it is a program or activity administered by an entity established under Title I (*i.e.,* an Exchange), pursuant to § 92.3(a)(3). A QHP could also be subject to Section 1557 if it were a recipient of Federal financial assistance, but as stated above, the premium tax credits that the Department plays a role in administering would no longer serve to bring an entity under the jurisdiction of this Section 1557 regulation.

Stand-alone dental plans and catastrophic plans offered through the Exchanges would similarly be subject to § 92.3(a)(3), as these plans are administered by an Exchange, which is an entity established under Title I.

Regarding ACA-compliant plans sold off-Exchange, because a health insurance issuer is not principally engaged in the business of providing healthcare, its operations would be subject to this rule only for the portion that receives Federal financial assistance. The issuer's components (*e.g.,* off-Exchange plans) that do not directly receive Federal financial assistance would not be subject to this rule.

Where a health insurance plan includes multiple types of enrollees, the Department would have to review the specific circumstance, but generally speaking, if a QHP is subject to Section 1557, this rule would apply consistently for all enrollees in the plan.

Comment: The Department received comments related to how the rule would apply to Medicare- and Medicaid-related products. One commenter asked whether the proposed limitation under § 92.3(c) would mean that Section 1557 would no longer apply to health insurance plans managed through Medicare and Medicaid.

A few commenters requested clarification on whether the proposed rule would apply to Employer Group Waiver Plans (EGWPs) and Medicare Part D Retiree Drug Subsidy (RDS) plans, or the employers that sponsor the plans. Commenters argued that applying the rule to these plans could disincentivize employers from sponsoring them and urged that the plans be exempt from the rule. Alternatively, one commenter requested that the Department exempt employer sponsors of ''800 series'' EGWPs, which are offered by Medicare Advantage Organizations (MAOs) or Part D Plan sponsors (PDP sponsors), because the employer is not the entity that receives funding from HHS. Finally, some commenters objected to excluding Medicare Part B from the rule.

Response: To be covered by the rule, a particular entity would have to satisfy one of the applicability requirements set forth in § 92.3. Entities that receive Federal funding through the Department's Medicare Part C (Medicare Advantage), Medicare Part D, or Medicaid programs would be subject to Section 1557 as recipients of Federal financial assistance. This would include Medicare Advantage plans, Medicaid managed care plans, EGWPs, or RDS plans, to the extent that they receive Federal financial assistance.

Pending further details, an employer that does not directly contract with CMS but offers an ''800 series'' EGWP through a MAO or PDP sponsor would not appear to be subject to this rule under this analysis because the employer does not receive the Federal financial assistance; meanwhile, the health insurance issuer offering the EGWP would be subject to the rule for its EGWP plan, due to receipt of either Medicare Part C or Part D funding.

As for Medicare Part B, it is not Federal financial assistance.[57] This remains unchanged from the 2016 Rule, which also determined that Medicare Part B was not Federal financial assistance under Section 1557.

Comment: Some commenters requested that this final rule be accompanied by explicit applicability guidance so that employers and plans could be able to ascertain if the final rule impacts their business.

Response: The Department seeks to provide sufficient clarity in this final rule. If OCR receives substantial questions about the rule's applicability after publication, OCR will consider issuing additional clarification, consistent with applicable law regarding issuance of sub-regulatory guidance.[58]

e. Summary of Regulatory Changes

For the reasons given in the proposed rule, and having considered comments received, the Department finalizes the proposed § 92.3, and repeal of § 92.2 of the 2016 Rule, without change, except that, as discussed in an earlier section of this preamble, and after considering comments on the issue, the Department is not finalizing the proposed repeal of § 92.2(c) concerning severability, but is retaining that provision and has moved it to § 92.3(d).

(4) Nondiscrimination Requirements in Proposed Revisions to § 92.2, and Repeal of § 92.8(d), 92.101, 92.206, 92.207, 92.209, and Appendix B of the 2016 Rule

The Department proposed to repeal § 92.8(d), 92.101, 92.206, 92.207, and Appendix B of the 2016 Rule (which includes repealing notice and taglines

[57] 45 CFR pt. 80 App A, No. 121; *https://www.hhs.gov/civil-rights/for-individuals/faqs/what-qualifies-as-Federal-financial-assistance/301/index.html. See also* 81 FR at 31383, 31385; 84 FR at 27863 (discussing the applicability of the rule to Medicare Part B and clarifying in footnote 100 that ''[t]he Department believes that the Federal financial assistance does not include Medicare Part B under the Social Security Act. *See* 2 CFR 200.40(c) (Uniform Administrative Requirement, Cost Principles, and Audit Requirements for Federal Awards); 45 CFR 75.502(h) (Uniform Administrative Requirement, Cost Principles, and Audit Requirements for HHS Awards).'').

[58] *See, e.g.,* Executive Order 13892 on Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication, 84 FR 55239 (Oct. 9, 2019); Executive Order 13891 on Promoting the Rule of Law Through Improved Agency Guidance Documents, 84 FR 55235 (Oct. 9, 2019); U.S. Dept. of Justice, Memorandum of the Office of the Associate Attorney General, Limiting Use of Agency Guidance Documents In Affirmative Civil Enforcement Cases (Jan. 25, 2018), *https://www.justice.gov/file/1028756/download;* U.S. Dept. of Justice, Memorandum of the Office of the Attorney General, Prohibition on Improper Guidance Documents (Nov. 16, 2019), *https://www.justice.gov/opa/press-release/file/1012271/download.*

provisions), and instead address nondiscrimination requirements in a new § 92.2. The Department proposed to repeal provisions that made applicable across all protected categories those particular requirements, prohibitions, or enforcement mechanisms that had previously applied only to particular circumstances.

The Department requested comments on all aspects of the proposed rule. The Department also specifically requested comment on any unaddressed discrimination on the basis of race, color, or national origin as applied to State and Federally-facilitated Exchanges, with any detailed supporting information. And the Department requested comment on whether, and if so how, the proposed rule addresses clarity and confusion over compliance requirements and the rights of persons protected against discrimination on the basis of race, color, national origin, sex, disability, or age.

The Department received many comments on these proposed changes. The Department will first discuss comments concerning each of the grounds in Section 1557: Race, color, national origin, disability, age, and sex. Then other grounds of discrimination will be discussed, followed by assessment of claims of discriminatory conduct when multiple grounds of discrimination are alleged. Comments concerning disability and LEP protections will be addressed below in the section on Subpart B of the Section 1557 rule.

a. Discrimination on the Basis of Race, Color, or National Origin

i. Generally

Comment: The Department received support for its commitment to continued enforcement of race, color, and national origin protections. Commenters stated that these characteristics are clear and simple to distinguish, contrasting them with gender identity, which is fluid and more difficult to define.

Response: The Department appreciates the support for its continued commitment to the enforcement of protections against discrimination on the basis of race, color, and national origin. The Department agrees that gender identity as a category is difficult to define. This is not, however, the Department's reason for not viewing gender identity as a protected category under Section 1557. The Department enforces statutory prohibitions on discrimination on the basis of race, color, national origin, age, disability, and sex discrimination because they are set forth in the text of statutes incorporated into Section 1557, and gender identity is not set forth as a protected category in those statutes.

Comment: Commenters contended that the proposed changes, including repeal of § 92.101 and the specific discrimination it prohibited, will lead to confusion among individuals and lead healthcare providers to discriminate based on race, color, and national origin. Commenters recommended that the Department retain clear, strong language prohibiting healthcare providers from discriminating based on race, color and national origin.

Response: This final rule's § 92.2 retains clear, strong language prohibiting discrimination on the basis of race, color, or national origin. Covered entities are still required to provide the Department with an assurance, and, pursuant to the underlying civil rights regulations, to post notices, that they do not so discriminate and are in compliance with Federal civil rights law. If the Department learns of confusion among covered entities or individuals as to their civil rights, it will consider issuing further guidance as needed.

Comment: Some commenters contended that the proposed changes will negatively impact women of color, who (according to these commenters) disproportionately rely on the short-term health plans that this final rule does not cover, and are more likely to experience pregnancy-related issues that will cause them to suffer from the rollback of termination of pregnancy protections.

Response: For reasons detailed below, this final rule (a) does not generally apply to short-term limited duration health insurance and (b) only covers termination of pregnancy to the extent permitted by Title IX's abortion-neutrality language, as required by the relevant statutes. The Department will vigorously enforce the prohibitions on discrimination based on race or sex, including under disparate impact analysis with respect to race discrimination as provided for in the relevant Title VI regulations, but the Department remains bound by the limits of the statutes enacted by Congress. The Department's Office of Minority Health also supports outreach to diverse populations and those facing particularized or disproportionate health challenges.

Comment: One commenter expressed concern that the changes in the proposed rule will have a negative impact on access to health screenings and vaccinations for patients. The commenter stated that removal of nondiscrimination requirements for many health insurance providers will leave these populations with little recourse if health insurance providers rescind coverage for preventative health services.

Response: Because this final rule continues to commit the Department to robust enforcement of its prohibitions on discrimination on the basis of race, color, national origin, sex, age, and disability, the Department does not anticipate that it will impede any population's access to preventive care and vaccinations, which (under separate provisions of the ACA) must be covered without cost sharing for group health plans and health insurance issuers offering group or individual health insurance coverage.[59]

ii. Repeal of Notice and Taglines Provisions at § 92.8(d) and Appendix B of the 2016 Rule

The Department proposed to repeal § 92.8(d) of the 2016 Rule, which required a nondiscrimination notice and taglines in all significant communications from covered entities, and also proposed to repeal the sample taglines notice in Appendix B to Part 92. 84 FR at 27857–60. The Department stated its assumption that this will correspondingly ease the burden of the LEP provision in CMS regulations at 45 CFR 155.205(c)(2)(iii)(A), which deemed compliance with the LEP provisions of the Section 1557 regulation to constitute compliance with CMS's requirements.[60]

The Department specifically sought comment to identify ''significant communications'' under the 2016 Rule sent by covered entities that include a notice and taglines but had not been considered by the analysis in the proposed rule, as well as the estimated annual volume of such communications. The Department also requested comment on which communications are significant in healthcare.

Comments: Some commenters stated that the removal of the 2016 Rule's notice and taglines provisions will result in LEP beneficiaries having less knowledge of available language assistance services and that they will likely rely more on family members to provide oral interpretation.

Response: The regulations of the underlying statutes referred to in Section 1557 (Title VI, Section 504, Title IX, and the Age Act) have long mandated that covered entities provide

[59] *See* 42 U.S.C. 300gg–13.

[60] 84 CFR 27887, n. 240, and 27881.

a notice of nondiscrimination.[61] This final rule maintains that requirement. Moreover, it continues to require covered entities to provide taglines whenever such taglines are necessary to ensure meaningful access by LEP individuals to a covered program or activity. It removes only the unduly broad, sometimes confusing, and inefficient requirement that all significant communications contain taglines. This requirement caused significant unanticipated expenses, as discussed in the regulatory impact analysis (RIA) below. Moreover, as discussed below, § 92.101 of this final rule reiterates longstanding criteria to help covered entities conduct an individualized assessment of their program and ensure meaningful access by persons with LEP, and retains the 2016 Rule's prohibition on covered entities' requiring an LEP individual to provide his or her own interpreter or relying on an accompanying adult to interpret or facilitate communication (except in limited circumstances).

Comment: Some commenters disagreed with the Department's proposal to make conforming amendments to the CMS requirements placed on Health Insurance Exchanges and Qualified Health Plan (QHP) issuers at 45 CFR 155.205. These commenters argued that the CMS requirements do not rely on the 2016 Rule's taglines provisions, nor does the 2016 Rule prevent the implementation of additional requirements in more specific programs, such as Medicaid and Medicare. Others agreed with the Department's proposal, raising concerns about CMS's requirements at 45 CFR 155.205, which state that Exchanges and QHP issues are only ''deemed'' in compliance with the CMS requirements ''if they are in compliance with'' the 2016 Rule's taglines provisions. These commenters argued that if the notice and taglines provisions are removed, the CMS compliance provision will cross-reference a repealed rule, which would require QHP issuers and Exchanges to comply with CMS's taglines rule instead. The CMS mandate for 15 taglines for the CMS list of critical documents is arguably as burdensome as the 2016 Rule's taglines provisions; therefore, these commenters argue that any benefit in efficiency yielded by the repeal of the 2016 Rule's taglines provisions would be lost for Exchanges and QHP issuers. These commenters suggest amending the 2016 Rule's provisions to state that there is no specific taglines requirement under Section 1557 and that a covered entity's compliance under applicable Federal and State laws will be considered under Section 1557's LEP meaningful access standards.

Response: The provision at 45 CFR 155.205(c)(2)(iii)(A) and the similar requirement placed on QHP issuers (see HHS Notice of Benefit and Payment Parameters for 2016; Final Rule, 80 FR 10750, 10788 (Feb. 27, 2015)), have not been directly amended in this regard. Nevertheless, as the Department stated in the proposed rule,[62] both of those requirements depend on or refer to the taglines requirements repealed in this final rule. As a result, covered entities are deemed compliant with those particular taglines requirements due to this final rule. Specifically, 45 CFR 155.205(c)(2)(iii)(A) sets forth taglines requirements and then states, ''Exchanges, and QHP issuers that are also subject to § 92.8 of this subtitle, will be deemed in compliance with paragraph (c)(2)(iii)(A) of this section if they are in compliance with § 92.8 of this subtitle.'' The Department informed the public of this interpretation in the proposed rule, and after reviewing public comments, the Department maintains the same position for essentially the same reason. Because this final rule repeals the taglines requirements of the 2016 Rule at § 92.8, entities will not be out of compliance with those requirements, and therefore they will satisfy the condition of the sentence quoted above from 45 CFR 155.205(c)(2)(iii)(A) that they not be out of compliance with taglines requirements in 45 CFR part 92. Although the Department did not propose conforming amendments to those two regulations, and therefore cannot finalize such amendments in this final rule, the Department will consider making appropriate changes to other regulations in the future.

Comment: Commenters, including a health insurance issuer, noted that the 2016 Rule's preamble vaguely defined ''significant communications'' to include ''not only documents intended for the public . . . but also written notices to an individual, such as those pertaining to rights or benefits.'' 81 FR 31402. These commenters argued that because almost all written communications would be considered ''significant'' under this definition, most covered entities included a one- to two-page addition containing the nondiscrimination notice and taglines with most written communications. One health insurance issuer estimated sending the notice and taglines approximately 15 million times in 2018, or about five times for every individual served. One commenter stated that because the Department determined that the notice and taglines requirement in the 2016 Rule imposes a significant financial burden on covered entities, the Department is within its authority to rescind it, especially because of an executive order that limits the effectiveness of subregulatory guidance. Others requested that the Department issue further guidance on what constitutes ''significant'' documents and communications, instead of removing the 2016 Rule's notice and taglines provisions.

Response: The Department agrees with comments that stated the 2016 Rule's notice and taglines requirements were imprecise and overly burdensome. The Department declines to retain those requirements while merely issuing more guidance on what constitute significant communications. First, the requirements are not mandated by statute, and although the 2016 Rule is a regulation and not subregulatory guidance, the Department has determined that its financial burden on covered entities was not justified by the protections or benefits it provided to LEP individuals. Second, the Department believes that other protections as finalized in this rule (and discussed below) better serve the language access needs of LEP individuals and, therefore, are more appropriate. Repeal of the notice and taglines requirements in this rule does not repeal all other notice and taglines requirements that exist under other statutes and rules.

b. Discrimination on the Basis of Disability

The Department is committed under this final rule to enforce protections against discrimination on the basis of disability, both in specific provisions set forth in § 92.102–92.105, and as applicable through the underlying Section 504 regulations, which are more broadly applicable under Section 1557 of the ACA. Comments on these issues are discussed in the section below on Subpart B of the Section 1557 regulation.

c. Discrimination on the Basis of Age

Comment: Commenters expressed concerns that the changes in the proposed rule will lead to discriminatory practices in health plans. In the absence of explicit language prohibiting health plans from discriminating based on age as set forth in § 92.207 of the 2016 Rule, they alleged, health plans may unlawfully

[61] *See* Title VI (45 CFR 80.6 and Appendix to Part 80), Section 504 (45 CFR 84.8), Title IX (45 CFR 86.9), and the Age Act (45 CFR 91.32).

[62] 84 FR at 27881.

deny, cancel, or limit policies, deny or limit coverage for claims, impose additional cost-sharing on coverage, or use discriminatory marketing practices or benefit designs because of age. In particular, some commenters believe that health insurance plans will offer formularies and plan options that deny treatment for older individuals who generally have more health complications. For example, they say, this practice may already be in place with some health plans that offer coverage for hearing aids to children and youths but deny it to older adults. Some commenters said the proposed rule will lead to discrimination against older LGBT adults, who already have high levels of poverty and health disparities, and will contribute to worse health outcomes. Some commenters also alleged the proposed rule encourages unlawful discrimination against LGBT youth, who are already at increased risk of discrimination.

Response: This final rule retains clear language prohibiting discrimination on the basis of age, as defined in the Age Act and enforced through its implementing regulations, in any covered programs and activities, including health plan marketing and benefit design. Moreover, the ACA has specific provisions which limit the extent to which health plans offered under the ACA can charge higher premiums based on age, as well as specific provisions which require guaranteed issuance, address permissible cost sharing requirements, and establish standards for essential benefits and formularies.

The Department remains committed to vigorous enforcement of this prohibition on behalf of all Americans, including LGBT adults and youth. The Department declines to comment on specific cases outside of the normal enforcement process but encourages anyone who has experienced unlawful discrimination, including with respect to health plans, to file a complaint with OCR.

Comment: Commenters expressed concern that the proposed rule will lead to health plans using their benefit design to discriminate against individuals with chronic conditions who are more expensive to insure, including children and youth with serious health conditions. One commenter represented a 13 year old with Down syndrome who, the commenter said, was denied coverage by a private health insurer because that health insurer categorically denied coverage for individuals with Down syndrome.

Response: Many serious health conditions, including Down syndrome, qualify as disabilities under Section 504, which Section 1557 incorporates. The Department will enforce vigorously Section 1557's prohibition on discrimination on the basis of disability against all covered entities, including when discrimination is alleged to have taken place in benefit design. As finalized, the amended § 147.104 would prohibit health insurance issuers from employing ''benefit designs that . . . discriminate based on an individual's race, color, national origin, present or predicted disability, age, sex, expected length of life, degree of medical dependency, quality of life, or other health conditions.'' The ACA also establishes requirements, applicable to health insurance issuers offering individual and group health insurance, concerning guaranteed issuance and renewal.[63] Concerns about whether private health insurers are covered entities are addressed below in the section on this rule's scope of application.

Comment: Some commenters contended the proposed rule will allow health plans to place age restrictions on certain medications, such as age restrictions on contraceptives for youth.

Response: To the extent that covered entities (including health plans) place restrictions based on age, OCR would assess on a case-by-case basis whether such restrictions violate Section 1557's incorporation of grounds prohibited under the Age Act. The Age Act does not forbid certain age distinctions in Federal, State, or local statutes and ordinances, or an action that reasonably takes age into account as a factor that is necessary to the normal operation or achievement of a statutory objective of a program.[64]

d. Discrimination on the Basis of Sex

i. Generally

Comment: Commenters offered different points of view on the definition of the term ''sex,'' as this relates to the definition of discrimination ''on the basis of sex.''

A number of commenters stated that the Department had proposed a new definition of ''sex'' for the Section 1557 rule. Some objected that any reinterpretation of ''sex'' should be addressed by Congress or left to the courts, rather than administrative agencies. Others stated that the proposed regulations realign the Department's interpretation with several decades of Federal court decisions and with the logical interpretation based on the statute's plain meaning of sex (namely sex in its biological meaning), which until 2017 had been the consistent consensus of the Federal courts.

Some commenters said that sex is a binary reality of male and female, and that Title IX and Section 1557 apply this historic understanding of sex. Some commenters stated that there is no evidence in the legislative history of either Title IX or the ACA that Congress intended to prohibit gender identity or sexual orientation discrimination in Section 1557, and that the purpose of Title IX is to ensure women (as biologically distinct from men) equal opportunities in Federally funded programs and activities.[65] Commenters said that the 2016 Rule exceeded the Department's authority by adopting a new, different, or expansive definition of prohibited sex discrimination in its Section 1557 regulation, although Congress declined to do so when presented with the opportunity and instead incorporated its meaning from Title IX which was passed in 1972. Some commenters noted that Congress has repeatedly considered adding gender identity and sexual orientation as protected categories in nondiscrimination laws related to education,[66] or to employment,[67] or in bills that would redefine discrimination ''on the basis of sex'' [68] as the 2016 Rule attempted, but that Congress has chosen not to do so.[69] Where Congress has chosen to prohibit ''gender identity'' discrimination in other statutes, it added the term ''gender identity'' as a

[63] *See* 42 U.S.C. 300gg–1, 300gg.2.

[64] 45 CFR 90.14, 90.15.

[65] Commenters cited 118 Cong. Rec. 5808 (1972); 44 FR at 71423.

[66] See, *e.g., Student Non-Discrimination Act of 2018,* H.R. 5374, 115th Congress, 2nd sess.; online at: *https://www.congress.gov/115/bills/hr5374/BILLS-115hr5374ih.pdf*: ''No student shall, on the basis of actual or perceived sexual orientation or gender identity . . . be excluded from participation in, or be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.''

[67] *See, e.g., Employment Non-Discrimination Act of 2013,* S. 815, 113th Congress, 1st sess.; online at: *https://www.govtrack.us/congress/bills/113/s815/text*: ''It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual . . . because of such individual's actual or perceived sexual orientation or gender identity . . .''

[68] *See, e.g., Equality Act,* H.R. 5, 116th Congress, 1st sess.; online at: *https://www.congress.gov/116/bills/hr5/BILLS-116hr5rfs.pdf*; amends *Civil Rights Act of 1964* ''by striking 'sex,' each place it appears and inserting 'sex (including sexual orientation and gender identity)' . . .''

[69] *See* H.R. 1652, 113th Cong. (2013); S. 439, 114th Cong. (2015). H.R. 3185, 114th Cong. (2015); S. 1858, 114th Cong. (2015); H.R. 2015, 110th Cong. (2007); H.R. 2981, 111th Cong. (2009); S. 811, 112th Cong. (2011); *See* H.R. 4636, 103rd Cong. (1994).

new and separate category of prohibited grounds in addition to ''sex'' without redefining ''sex'' itself.[70] Other commenters said that reliance on legislative history is an improper method of statutory interpretation, and that the Supreme Court has deemed reliance on Congressional inaction to be inappropriate.

One commenter cited U.S. Supreme Court cases as setting forth the binding legal standard of sex discrimination as a binary biological concept. The commenter cited *Tuan Anh Nguyen* v. *I.N.S.* as rejecting an approach of ''[m]echanistic classification of all our differences as stereotypes'' because it obscures the reality that ''physical differences between men and women . . . are enduring,'' 533 U.S. 53, 73 (2001), as well as Justice Ginsburg's majority opinion in *United States* v. *Virginia,* which held that '' '[T]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both.' '' 518 U.S. at 533 (1996).

Some commenters stated that changing cultural preferences should not be the standard for interpreting legal texts. Others analogized Title IX's lack of a definition of ''sex'' to the lack of a definition of ''race'' under the Civil Rights Act of 1964, where courts looked to the plain and ordinary meaning to interpret it as based on a person's ''family, tribe, people, or nation belonging to the same stock.'' Other commenters cited analyses of public meanings at the time of adoption, concluding that when ''gender'' was used, which was rare, it was used in contrast to sex: Gender referred to socially constructed roles, while sex, according to virtually every dictionary of the time, referred to biological differences between men and women.[71] Other commenters stated that use of the term ''gender'' (with regard to one's identity) as separate from ''sex'' (with regard to one's biology) is relatively new and is improperly interpreted today as evidence of support for gender-identity legal theories in prior legal precedents or decades-old statutes. Some commenters asserted that at the time of the passage of the underlying Federal civil rights statutes, ''sex'' and ''gender'' were commonly used identically under Title VII, Title IX, and the Equal Protection Clause to refer to biological sex.[72] However, other commenters disagreed, and stated that historical sources demonstrate the variability and complexity of the concept of sex to include ''[t]he sum of the morphological, physiological, and behavioral peculiarities of living beings.''

Some commenters stated that the terms male or female apply to everyone. Commenters stated that the ''sex'' of an organism is a clear, provable, objective, identifiable, biological, and binary reality according to relevant textbooks, studies, and articles from various specialties in the scientific community, including embryology, genomics, psychiatry, clinical anatomy, neuropsychology, developmental biology, genetics, endocrinology, neuropsychiatry, radiology, organismic and evolutionary biology, neuropharmacology, pediatrics, and pathology.[73] Healthcare providers stated that the reality of sex, as male or female, can be identified through advanced chromosomal testing such as karyotyping or simple genital identification at birth in roughly 99.98% of cases, leaving the remaining 0.02% as diagnoses with intersex or ambiguous conditions. Others stated that delineating a binary division on the basis of reproductive organs reflected an outdated paradigm and was not universally descriptive of transgender, transitioning, androgynous, intersex, two-spirit, or questioning individuals.

Some commenters stated that removal of a regulatory definition of ''sex'' leaves the regulation ambiguous, and the 2016 Rule was justified in clarifying by adding a definition that included gender identity and termination of pregnancy. Other commenters stated that the public widely understands the state of being either male or female, as determined by one's chromosomes or genetics, which leaves no ambiguity.

Response: Because Section 1557 incorporates Title IX's prohibition on discrimination ''on the basis of sex,'' it presupposes that the executive and judicial branches can recognize the meaning of the term ''sex.'' This final rule repeals the 2016 Rule's definition of ''on the basis of sex,'' but declines to replace it with a new regulatory definition. *See* 84 FR at 27857. Instead, the final rule reverts to, and relies upon, the plain meaning of the term in the statute.

''Sex'' according to its original and ordinary public meaning refers to the biological binary of male and female that human beings share with other mammals. As noted in briefs recently submitted by the Federal government to the Supreme Court, discrimination on the basis of sex means discrimination on the basis of the fact that an individual is biologically male or female.[74] Several commenters reference various sources of legislative history: That of Title IX, of Congress's decision to add protections on the basis of sexual orientation and gender identity to other statutes alongside protections on the basis of sex, and of Congress's repeated refusal to add those protections in other cases.[75] These sources support the plain

[70] 18 U.S.C. 249(a)(2).

[71] Commenters cited Joanne Meyerowitz, A History of ''Gender,'' 113 a.m. Hist. Rev. 1346, 1353 (2008); David Haig, The Inexorable Rise of Gender and the Decline of Sex: Social Change in Academic Titles, Archives of Sexual Behavior 1945–2001 (Apr. 2004); Sari L. Reisner, *et al.,* ''Counting'' Transgender and Gender-Nonconforming Adults in Health Research, *Transgender Studies* Quarterly 37 (Feb. 2015); New Oxford Am. Dictionary 721–22, 1600 (3d ed. 2010).

[72] *See Glenn* v. *Brumby,* 663 F.3d 1312, 1315 (11th Cir. 2011) (citing *City of Cleburne* v. *Cleburne Living Ctr., Inc.,* 473 U.S. 432, 440–41 (1985). (''In describing generally the contours of the Equal Protection Clause, the Supreme Court noted its application to this issue, referencing both gender and sex, using the terms *interchangeably* . . .'').

[73] Commenters cited texts including, *e.g.,* T.W. Sadler, Ph.D., *Langman's Medical Embryology* (Philadelphia: Lippincott Williams & Wilkins, 2004), 40; William J. Larsen, Ph.D., *Human Embryology* (New York: Churchill Livingstone, 2001), 519; Keith L. Moore, Ph.D., DSc, and T.V.N. Persaud, M.D., Ph.D. DSc, FRCPath., *The Developing Human: Clinically Oriented Embryology* (Philadelphia: Saunders/Elsevier, 2003), 35; Maureen L. Condic, Ph.D. and Samuel B. Condic, Ph.D., ''Defining Organisms by Organization,'' National Catholic Bioethics Quarterly 5, no. 2 (Summer 2005): 336; Lawrence S. Mayer, Ph.D., and Paul R. McHugh, M.D., ''Sexuality and Gender Findings from the Biological, Psychological, and Social Sciences,'' *New Atlantis* 50 (Fall 2016): 89; Scott F. Gilbert, Ph.D. *Developmental Biology* (Sunderland, Mass.: Sinauer Associates, 2016), 519–20; and William J. Larsen, Ph.D., *Human Embryology* (New York: Churchill Livingstone, 2001), 307; Nichole Rigby, M.A. and Rob J. Kulathinal, Ph.D., ''Genetic architecture of sexual dimorphism in humans,'' *J. of Cellular Physiology* 230, no. 10 (2015): 2305; Jonathan C.K. Wells, Ph.D., ''Sexual dimorphism of body composition,'' *Best Practice & Research: Clinical Endocrinology & Metabolism* 21 (2007): 415; Larry Cahill, Ph.D., ''His Brain, Her Brain,'' *Scientific American,* October 1, 2012; Larry Cahill, Ph.D. ''A Half-Truth Is a Whole Lie: On the Necessity of Investigating Sex Influences on the Brain,'' *Endocrinology* 153 (2012): 2542; Madhura Ingalhalikar, Ph.D., et al., ''Sex differences in the structural connectome of the human brain,'' *Proceedings of the National Academy of Sciences* 111 (January 2014): 823–28.

[74] *Bostock* v. *Clayton Cty. Bd. of Commissioners,* 2019 WL 4014070 at *25 (U.S. 2019) (Brief for the United States as *Amicus Curiae* Supporting Affirmance in No. 17–1618 (*Bostock* v. *Clayton Cty. Bd. of Commissioners*) and Reversal in No. 17–1623 (*Altitude Express Inc.* v. *Zarda*)); Statement of Interest for DOJ, *Soule* v. *Conn. Ass'n of Schools,* 3:20–cv–00201–RNC (D. Conn., filed March 27, 2020) at 4–5 (''When Congress enacted Title IX in 1972, the 'ordinary, contemporary, common meaning' of 'sex' was biological sex. . . . Title IX consistently uses 'sex' as a binary concept capturing only two categories: Male and female.'').

[75] Examples of bills where Congress chose not to enact prohibitions on discrimination on the basis of sexual orientation or gender identity include: The Employment Non-Discrimination Act (ENDA), which has been introduced ten times in the U.S. House of Representatives but has never proceeded out of committee: H.R. 4636 (103rd Cong. 1994); H.R. 1863 (104th Cong. 1995); H.R. 1858 (105th Cong. 1997); H.R. 2355 (106th Cong. 1999); H.R. 2692 (107th Cong. 2001); H.R. 3285 (108th Cong.

meaning of Title IX, but are not the only source of support for the Department's understanding of the meaning of the word ''sex.'' Contemporaneous dictionaries and common usage make clear that ''sex'' in Title IX means biological sex.[76] Even today, the article on gender dysphoria in the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition defines ''sex'' to ''refer to the biological indicators of male and female (understood in the context of reproductive capacity), such as in sex chromosomes, gonads, sex hormones, and nonambiguous internal and external genitalia.'' [77] The term ''gender'' may sometimes be ambiguous. However, neither Title IX nor Section 1557 uses that term, and the ordinary public meaning of the term ''sex'' in Title IX is unambiguous. In order to avoid ambiguities associated with the term ''gender,'' the Department's regulations and guidance have, where relevant, distinguished sex (in its biological meaning) from gender, gender identity, or gender expression.[78]

Some commenters challenge the Department's approach by pointing to medical conditions that they refer to as ''intersex.'' The term refers to rare medical conditions that the medical literature, since 2006, has preferred to call ''disorders of sexual development'' (DSD).[79] DSD are estimated to be present in 0.0167%–0.022% of the population. More importantly, DSD are ''congenital conditions in which development of chromosomal, gonadal, or anatomic sex is atypical.'' [80] This medical definition refers to, and presupposes, the ordinary biological and binary meaning of ''sex,'' just as the definition of any medical disorder presupposes an understanding of healthy baseline functionality.

Title IX,[81] along with its implementing regulations,[82] consistently understands ''sex'' to refer to the biological binary categories of male and female only.[83] The Department of Justice has recently noted that ''[i]f the term 'sex' in Title IX included 'gender identity'—which, according to the American Psychiatric Association, may include 'an individual's identification as . . . some category *other than* male or female,' *Diagnostic and Statistical Manual of Mental Disorders Fifth Edition* 451 (2013) (emphasis added)—then multiple Title IX provisions would make little sense.'' [84] Many comments on the 2019 NPRM assume that Section 1557's protection against discrimination ''on the basis of sex'' covers women's health issues including pregnancy, uterine cancer, and prenatal and postpartum

2003); H.R. 2015 (110th Cong. 2007); H.R. 2981 (111th Cong. 2009); H.R. 1397 (112th Cong. 2011); H.R. 1755 (113th Cong. 2013). Similarly, the Equality Act has been introduced in three successive sessions of Congress; it did not proceed out of committee in the 114th and 115th Congresses, and it passed the House of Representatives on May 17, 2019. *See* H.R. 3185 (114th Cong. 2015); S. 1828 (114th Cong. 2015); H.R. 2282 (115th Cong. 2017); S. 1006 (115th Cong. 2017); H.R. 5 (116th Cong.) (introduced Mar. 3, 2019).

[76] *See* New Oxford Am. Dictionary 721–22, 1600 (3d ed. 2010). Some Federal courts have gone farther, using the legislative history to show that ''Congress never considered nor intended'' for sex under Title VII (which is often used to interpret Title IX) to apply to ''anything other than the traditional concept of sex,'' and that coverage for a concept such as transgender status ''surely'' would have been mentioned in the legislative history had Congress intended such an ''all-encompassing interpretation.'' The Department finds the analysis in these Court decisions persuasive, but declines to rely on their reasoning. *See Ulane* v. *Eastern Airlines Inc.,* 742 F. 2d 1081, 1085 (7th Cir. 1984) (analyzing ''The total lack of legislative history supporting the sex amendment coupled with the circumstances of the amendment's adoption''); *see also Voyles* v. *Ralph K. Davies Medical Center,* 403 F. Supp. 456, 457 (N.D. Cal. 1975), *aff'd,* 570 F.2d 354 (9th Cir. 1978) (finding a ''void'' in the legislative history and concluding that Congress's ''paramount, if not sole, purpose in banning employment practices predicated upon an individual's sex was to prohibit conduct which, had the victim been a member of the opposite sex, would not have otherwise occurred. Situations involving transsexuals, homosexuals or bi-sexuals were simply not considered.'').

[77] American Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders,* 5th ed. (Arlington, VA: American Psychiatric Ass'n, 2013), 451–59.

[78] *See* 45 CFR 411.5; *also* 79 FR 77771, 84 FR 27854. *See* NIH, Office of Research on Women's Health, ''Sex & Gender,'' *https://orwh.od.nih.gov/sex-gender* (''NIH is committed to improving health by supporting the rigorous science that drives medical advances. Sex/gender influence health and disease, and considering these factors in research informs the development of prevention strategies and treatment interventions for both men and women. 'Sex' refers to biological differences between females and males, including chromosomes, sex organs, and endogenous hormonal profiles. 'Gender' refers to socially constructed and enacted roles and behaviors which occur in a historical and cultural context and vary across societies and over time. . . . With continuous interaction between sex and gender, health is determined by both biology and the expression of gender.'').

For these reasons, in general throughout this document the Department prefers to use simply the term ''sex'' because the plain, ordinary meaning of ''sex'' is already biological, so it is generally redundant to use the term ''biological sex.'' Where the Department uses the term ''biological sex,'' or similarly ''biological male'' or ''biological female,'' it does so merely to emphasize this point and for the purposes of clarity in particular contexts, and not to imply that there is a distinction between biological sex and sex under the plain meaning of the term.

[79] R.L.P. Romao, J.L. Pippi Salle, and D.K. Wherett, ''Update on the Management of Disorders of Sex Development,'' *Pediatric Clinics of North America* 59 (2012), 853–69; I.A. Hughes, ''Disorders of Sex Development: A New Definition and Classification,'' *Best Practice & Research Clinical Endocrinology & Metabolism* 22:1 (2008), 119–34.

[80] A. Rawal and P. Austin, ''Concepts and Updates in the Evaluation and Diagnosis of Common Disorders of Sexual Development,'' *Current Urology Reports* 16:83 (2015), 1–9; I. Hughes et al., ''Consequences of the ESPE/LWPES guidelines for diagnosis and treatment of disorders of sex development,'' *Best Practice & Research Clinical Endocrinology & Metabolism* 21:3 (2007), 351–65; P.A. Lee et al., ''Consensus Statement on Management of Intersex Disorders,'' *Pediatrics* 118:2 (2006), e488–500.

[81] *See* 42 U.S.C. 1681(a)(2)(''both sexes''), (a)(2) (''one sex'' and ''other sex''), (a)(6)(B) (''Men's'' and ''Women's''), (a)(6)(B) (''Boy'' and ''Girl''); (a)(7)(A) (''Boys'' and ''Girls''), (a)(7)(B)(i) (''Boys'' and ''Girls''), (a)(8) (''father-son'' ''mother-daughter''), and (a)(8) (''one sex'' and ''other sex''). *See also* 42 U.S.C. 1681(a)(2)(6)(''fraternity'' and ''sorority'').

[82] *See* language such as ''male and female,'' ''both sexes,'' ''each sex,'' ''one sex . . . the other sex,'' and ''boys'' and ''girls,'' at 45 CFR 86.2(s), 86.7, 86.17(b)(2), 86.21(c)(4), 86.31(c), 86.32(b)(2) and (c)(2), 86.33, 86.37(a)(3), 86.41(b) and (c), 86.55(a), 86.58(a) and (b), 86.60(b), and 86.61. *See* similarly Department of Education Title IX regulation at 34 CFR 106.2(s), 106.7, 106.17(b)(2), 106.21(c)(4), 106.31(c), 106.32(b)(2) and (c)(2), 106.33, 106.37(a)(3), 106.41(b) and (c), 106.55(a), 106.58(a) and (b), 106.60(b), and 106.61; Department of Justice Title IX regulation at 28 CFR 54.105, 54.130, 54.230(b)(2), 54.235(b)(3), 54.300(c)(4), 54.400(c), 54.405(b)(2) and (c)(2), 54.410, 54.430(a)(3), 54.450(b) and (c)(2), 54.520(a), 54.535(a) and (b), 54.545(b), and 54.550. *See also* DOJ Coordination and Compliance Division, Title IX Regulations by Agency, *https://www.justice.gov/crt/fcs/Agency_Regulations#2.*

[83] Federal courts have also made this observation. *See, e.g., Doe* v. *Boyertown Area Sch. Dist.,* 897 F.3d 518, 522 (3d Cir. 2018) (''Sex' is defined as 'the anatomical and physiological processes that lead to or denote male or female.' Typically, sex is determined at birth based on the appearance of external genitalia.''); *Hively* v. *Ivy Tech Cmty. Coll.,* 853 F.3d 339, 362 (7th Cir. 2017) (''[i]n common, ordinary usage in 1964—and now, for that matter—the word 'sex' means biologically *male* or *female*.'') (Sykes, J., dissenting) (emphasis in original); *cf. id.* at 357 (''we, who are judges rather than members of Congress, are imposing on a half-century-old statute a meaning of 'sex discrimination' [to include sexual orientation] that the Congress that enacted it would not have accepted.'') (Posner, J., concurring); *G.G. ex rel Grimm* v. *Gloucester Cnty. Sch. Bd.,* 822 F.3d 709, 736 (4th Cir. 2016) (''Title IX was enacted in 1972 and the regulations were promulgated in 1975 and readopted in 1980, and during that time period, virtually every dictionary definition of 'sex' referred to the physiological distinctions between males and females, particularly with respect to their reproductive functions.'') (Niemeyer, J., dissenting); Statement of Interest for DOJ, *Soule* v. *Connecticut Association of Schools,* 3:20–cv–00201–RNC (D. Conn., filed March 27, 2020) at 5 (''Other provisions of Title IX employ ''sex'' as a binary term, and thus provide further confirmation that the prohibition on ''sex'' discrimination does not extend to discrimination on the basis of transgender status or gender identity.''); *Franciscan All., Inc.* v. *Burwell,* 227 F. Supp. 3d 660, 687 (N.D. Tex. 2016) (''the meaning of sex unambiguously refers to the biological and anatomical differences between male and female students as determined at their birth,'' quoting *Texas* v. *United States,* 201 F. Supp. 3d 810, 833 (N.D. Tex. 2016)); *Johnston* v. *Univ. of Pittsburgh of Commw. Sys. of Higher Educ,* 97 F. Supp. 3d 657, 676 (W.D. Pa. 2015) (''[o]n a plain reading of the statute, the term 'on the basis of sex' in Title IX means nothing more than male and female, under the traditional binary conception of sex consistent with one's birth or biological sex'').

[84] Statement of Interest for DOJ, *Soule* v. *Conn. Ass'n of Schools,* 3:20–cv–00201–RNC (D. Conn., filed March 27, 2020) at 5.

services. That assumption is correct: These issues are protected under Section 1557 because of the ordinary and biological meaning of ''sex.''

Prior to the ACA, OCR itself had always applied Title IX in its enforcement actions using the biological binary meaning of sex.[85] Recently, OCR has resolved a number of Section 1557/Title IX cases of discrimination against women in healthcare programs and activities funded by the Department, again relying on a biological understanding of sex.[86] The 2016 Rule itself presupposed the biological meaning of sex when it permitted ''sex-specific'' health programs that are ''restricted to members of one sex,'' when it incorporated ''termination of pregnancy'' into discrimination on the basis of sex, and when it referred repeatedly to ''sex assigned at birth.'' [87]

Supreme Court case law on Title IX has consistently presupposed the biological and binary meaning of ''sex.'' [88] Even when some lower courts have recently extended Title VII or Title IX protections ''on the basis of sex'' to encompass gender identity, they have done so only by presupposing the ordinary public meaning of ''sex'' as a biological binary reality. In *Whitaker* v. *Kenosha Unified Sch. Dist.,* for example, the Seventh Circuit stated: ''Here, the School District's policy cannot be stated without referencing sex, as the School District decides which bathroom a student may use based upon the sex listed on the student's birth certificate. This policy is inherently based upon a sex-classification and heightened review applies.'' [89] Likewise, in *Harris Funeral Homes,* the Sixth Circuit stated: ''Here, we ask whether Stephens would have been fired if Stephens had been a woman who sought to comply with the women's dress code. The answer quite obviously is no. This, in and of itself, confirms that Stephens's sex impermissibly affected Rost's decision to fire Stephens.'' [90] In other words, Stephens ''quite obviously'' is not ''a woman'' because ''Stephens's sex'' is male.[91]

The Department does not deny that some courts have caused confusion as to the meaning of sex in civil rights law. Conflicting views in the lower courts, however, do not preclude the Department, consistent with the position of the U.S. government, as set forth in briefs filed in the Supreme Court, from returning to its decades-long practice of conforming to the original and ordinary public meaning of ''sex'' in Title IX, a meaning that continues to be presupposed even in the same rulings that have caused this confusion.

Some lower courts have recently held that discrimination ''on the basis of sex'' encompasses gender identity or sexual orientation even when ''sex'' is understood in its ordinary, biological, and binary sense. These views will be addressed below in the relevant subsections.

Comment: Some commenters argued that the proposed rule would be inconsistent with the purposes of the ACA; that the weight of law recognizes sexual orientation and gender identity as forms of sex discrimination; and that the proposed rule would undermine Congress's intent to expand access to healthcare and healthcare coverage. Commenters emphasized that it is unacceptable for a healthcare facility to deny medical care to a patient based on the patient's sexual orientation or transgender status.

Response: The Department does not condone the unjustified denial of needed medical care to anyone, and believes that everyone, regardless of gender identity or sexual orientation, should be treated with dignity and respect. The Department must interpret Congress's purpose in passing the ACA by reading that statute's plain text. The ACA sought to expand access to healthcare and healthcare coverage through some means but not others: in particular, Congress saw fit to incorporate into the ACA certain nondiscrimination protections, and not others. For example, in the unlikely event that a healthcare provider were to deny services to someone based solely on his or her political affiliation, the Department would not be able to address such denial of care under Section 1557. Under this final rule, OCR is committed to no less than full enforcement of the prohibitions on discrimination that Congress included in Section 1557, without exceeding the statutory text. Unlike other bases of discrimination, the categories of gender identity and sexual orientation (as well as political affiliation) are not set forth in those statutes.[92]

Comment: Some insurers stated that they already took steps to come into compliance with prohibitions related to gender identity and termination of pregnancy in their plans under the 2016 Rule, and that they will incur burdens to change their plans. Other commenters stated that the 2016 Rule created burdens that, if unrelieved, would encumber their day-to-day affairs and limit their ability to provide healthcare services for their patients or healthcare coverage for their employees.

Response: As discussed in the Regulatory Impact Analysis below, this rule removes certain requirements, without requiring providers to incur new burdens related to those requirements. Whether or not the Department revises the regulation, the past expenditures incurred by insurers and other commenters to come into

[85] In the 2015 NPRM, the earliest record of the Department's new understanding of sex discrimination cited was an OCR letter dated 12 July 2012. 80 FR 54176.

[86] U.S. Department of Health and Human Services, ''HHS Office for Civil Rights Enters Into Agreement with Oklahoma Nursing Home to Protect Patients with HIV/AIDS from Discrimination'' (2018), *https://www.hhs.gov/about/news/2017/09/08/hhs-office-for-civil-rights-enters-into-agreement-with-oklahoma-nursing-home.html*; ''OCR works with DOJ to ensure Federally funded medical center provides communication services for deaf and hard of hearing patients'' (2018), *https://www.hhs.gov/about/news/2017/12/20/ocr-works-with-doj-to-ensure-Federally-funded-medical-center-provides-communication-services-for-deaf-and-hard-of-hearing-patients.html*; ''HHS OCR Secures Agreement with MSU to Resolve Investigation into Sexual Abuse by Larry Nassar'' (2019), *https://www.hhs.gov/about/news/2019/08/12/hhs-ocr-secures-agreement-msu-resolve-investigation-sexual-abuse-larry-nassar.html* (requiring chaperone policies where patients can request a chaperone of the same sex, meaning biological sex, during sensitive physical examinations).

[87] *See* 81 FR 31384, 31387, 31406, 31408–09, 31428, 31429, 31435, 31436, 31467, 31470, 31471, 31472.

[88] *See, e.g., Nat'l Collegiate Athletic Ass'n* v. *Smith,* 525 U.S. 459, 464 (1999) (Title IX claim based on allegation ''that the NCAA discriminates on the basis of sex by granting more waivers from eligibility restrictions to male than female postgraduate student-athletes''); *Cannon* v. *Univ. of Chicago,* 441 U.S. 677, 680 (1979) (Title IX claim based on allegation that plaintiff's ''applications for admission to medical school were denied . . . because she is a woman'').

[89] 858 F.3d 1034, 1051 (7th Cir. 2017).

[90] *Equal Emp't Opportunity Comm'n* v. *R.G. & G.R. Harris Funeral Homes,* 884 F.3d 560 (6th Cir. 2018), 575. *See also* certain passages during oral argument on appeal at the U.S. Supreme Court, *e.g.:* ''here, Ms. Stephens, was being treated differently because of her sex. . . .Yes, if she had not been a—if she had not been assigned at birth the sex that she was assigned at birth, she would have been treated differently'' (Kagan, J., Transcript of Oral Argument at 41, *R.G. & G.R. Harris Funeral Homes, Inc.* v. *E.E.O.C.,* 139 S. Ct. 1599 (2019) (No. 18–107), *https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/18-107_4gcj.pdf*); *See also* Mr. Cole, counsel for respondents at oral argument, *Id.* at 4–5: ''None of [our] arguments ask this Court to redefine or, in Judge Posner's words, update sex. They assume, arguendo, that sex means at a minimum sex assigned at birth based on visible anatomy or biological sex.'' *Id.* at 28: ''[O]ur argument rests on text meaning, at a minimum, sex assigned at birth or biological sex, and everybody agrees— . . . [we are] asking you to interpret the statute as it is written and as everybody agrees it applies to sex assigned at birth.''

[91] *Harris* 884 F.3d at 575. It is true that the *Harris* court referred to Stephens with female pronouns throughout the rest of its ruling, but it appeared to do so based on its concept of gender identity, not of sex. Had the *Harris* court employed female pronouns in the quoted passage, it would have visibly undermined the basis of its Title IX analysis.

[92] The Department responds below to comments with respect to sexual orientation and gender identity specifically.

compliance with the 2016 Rule are ''sunk costs'' that cannot be recovered. With the finalization of this rule, insurers have the option—as they have had since December 31, 2016—of providing such coverage or not. Presumably some insurers will maintain coverage consistent with the 2016 Rule's requirements and some will not. The final rule also does not alter the status quo, and thus does not impose burdens in this regard, because, independent of the finalization of this rule, the 2016 Rule's provisions on gender identity and termination of pregnancy have been vacated by a final order and decision of a federal court.

Comment: Commenters expressed concern that the proposed rule would result in lack of information about gender transition-related services or termination of pregnancy, leaving patients without information about different surgical procedures and prescription options, and in danger of harm. Some argued that women, members of the LGBT community, people with disabilities, people with LEP, and racial minorities need additional specific protections because they will face greater burdens accessing healthcare due to ''intersectionality'' theories. Others, however, said it was not appropriate or reflective of current civil rights law to analogize sexual orientation or gender identity to race or other protected categories.

Some commenters argued that the 2016 Rule had decreased LGBT patients' fears of discrimination, that the proposed rule will lead to discrimination against them (including by States, providers, marketplaces, agents, and brokers), and that this will increase their health disparities, mainly via poorer quality of care, lack of access to willing providers especially in rural areas, postponed care including preventive care, increased healthcare and insurance costs, and impediments to HIV patients' access to medication. Commenters said the rule would undermine the President's goal of eradicating HIV. Commenters relied on national and statewide reports and studies highlighting harm faced by LGBT people due to inadequate healthcare, including an increase in substance abuse; worsening psychiatric disorders; untreated depression leading to suicide; and higher rates of AIDS, HIV and other STIs, cancer, and behavioral health issues. These commenters also argued the proposed rule would permit LGBT people to suffer discrimination and hence stigmatic injury, which could also deter them from disclosing their LGBT status to their physicians and seeking proper care. Commenters alleged high rates of mental conditions (*e.g.,* depression),[93] behavioral conditions (*e.g.,* substance use disorder),[94] developmental conditions (*e.g.,* autism, learning disabilities), and physical conditions (*e.g.,* HIV, heart disease) among the LGBT population. Commenters also expressed concerns about lack of communication and consent between providers and patients, and alleged that the risk of discrimination is heightened in vulnerable populations, including persons with developmental disabilities, persons with LEP, elderly patients with diminished capacity, and those who rely on surrogates or guardians for making medical decisions on their behalf. Others stated that OCR does not have authority to protect all forms of discrimination that may negatively impact people, but that it must act within its statutory authority.

Response: The Department is concerned with the health of all Americans. It acts to the fullest extent of its statutory authority in its efforts to improve the health and wellbeing of all. Under its civil rights authority, it enforces Federal laws requiring nondiscrimination on specified grounds, which in the case of Section 1557 are race, color, national origin, sex, age, and disability. When OCR receives a claim alleging multiple grounds of prohibited discrimination, the Department analyzes the elements of each claim according to the statute applicable to that ground.

Consistent with the text of the ACA and, in this case, the underlying civil rights statutes incorporated into the ACA, the Department seeks, wherever possible, to remove barriers to healthcare. Those barriers include regulations that impede providers' ability to offer healthcare by interfering with their conscientious medical judgments or imposing unnecessary cost burdens on them. By removing such provisions from the 2016 Rule, the Department hopes to increase the availability of healthcare to all populations.

As a matter of policy, the Department recognizes and works to address barriers to treatment caused by stigma about depression, anxiety, substance use disorder, and other comorbid mental and behavioral health conditions.[95] With regard to HIV, this final rule does not alter or affect the longstanding Federal protections against discrimination for individuals with HIV: Section 504, and hence also this final rule, prohibits discrimination on the basis that an individual has HIV.[96] OCR continues to pursue major enforcement actions under its authorities [97] and to provide the public guidance [98] to protect the rights of persons with HIV or AIDS. HHS remains committed to ensuring that those living with HIV or AIDS receive full protection under the law, in accordance with full implementation of the President's National HIV/AIDS Strategy.[99]

Regarding commenters' worries about informed consent, this final rule does not repeal any informed consent requirements. Besides many relevant State laws,[100] CMS regulations also

[93] Commenters cited Remafedi G, French S, Story M, et al., The Relationship Between Suicide Risk and Sexual Orientation: Results of a Population-Based Study. Am J Public Health. 1998;88(1):57–60; McLaughlin KA, Hatzenbuehler ML, Keyes KM. Responses to Discrimination and Psychiatric Disorders Among Black, Hispanic, Female, and Lesbian, Gay, and Bisexual Individuals. Am J Public Health. 2010;100(8):1477–84.

[94] Commenters cited Banez GE, Purcell DW, Stall R, et al., Sexual Risk, Substance Use, and Psychological Distress in HIV Positive Gay and Bisexual Men Who Also Inject Drugs. AIDS. 2005;19 (suppl. 1):49–55.

[95] *See, e.g.,* Pain Management Task Force, ''Pain Management Best Practices, Fact Sheet on Stigma'' (Aug. 13, 2019), *https://www.hhs.gov/sites/default/files/pmtf-fact-sheet-stigma_508-2019-08-13.pdf* (''Compassionate, empathetic care centered on a patient-clinician relationship is necessary to counter the suffering of patients . . . . Patients with painful conditions and comorbidities, such as anxiety, depression or substance use disorder (SUD) face additional barriers to treatment because of stigma.'').

[96] *See* 29 U.S.C. 705(20) (incorporating ADA definition of disability into Section 504); 42 U.S.C. 12102(1)–(3); 28 CFR 35.108(d)(2)(iii)(J).

[97] *See, e.g.,* ''HHS Office for Civil Rights Secures Corrective Action and Ensures Florida Orthopedic Practice Protects Patients with HIV from Discrimination'' (Oct. 30, 2019), *https://www.hhs.gov/about/news/2019/10/30/hhs-ocr-secures-corrective-action-and-ensures-fl-orthopedic-practice-protects-patients-with-hiv-from-discrimination.html*; ''HHS Office for Civil Rights Enters Into Agreement with Oklahoma Nursing Home to Protect Patients with HIV/AIDS from Discrimination'' (Sept. 8, 2017), *https://www.hhs.gov/about/news/2017/09/08/hhs-office-for-civil-rights-enters-into-agreement-with-oklahoma-nursing-home.html.*

[98] *See* OCR, ''Know the Rights That Protect Individuals with HIV and AIDS,'' *https://www.hhs.gov/sites/default/files/ocr/civilrights/resources/factsheets/hivaids.pdf*; OCR, ''Protecting the Civil Rights and Health Information Privacy Rights of People Living with HIV/AIDS,'' *https://www.hhs.gov/civil-rights/for-individuals/special-topics/hiv/index.html.*

[99] *See* ''Ending the HIV Epidemic: A Plan for America,'' *https://www.hiv.gov/Federal-response/ending-the-hiv-epidemic/overview.*

[100] *See, e.g.,* Alaska Stat. § 09.55.556(a); Ark. Code Ann. § 16–114–206; Del. Code Ann. tit. 18, § 6852; Ga. Code Ann. § 31–9–6.1; Haw. Rev. Stat. § 671–3; Idaho Code Ann. § 39–4304; Ind. Code § 16–36–1.5–7; Ky. Rev. Stat. Ann. § 304.40–320; La. Rev. Stat. Ann. § 40:1299.40; Me. Rev. Stat. Ann. tit. 24 § 2905; Neb. Rev. Stat. § 44–2816; Nev. Rev. Stat. § 449.710; N.Y. Pub. Health Law § 2805–d; N.C. Gen. Stat. § 90–21.13; Or. Rev. Stat. § 677.097; 40 Pa. Cons. Stat. § 1303.504; Tenn. Code Ann. § 29–26–118; Tex. Rev. Civ. Stat. Ann. art. 4590i, § 6.02;

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require, as a condition of participation in Medicare, that patients (or their legal surrogate) have the right to make informed decisions, the right to surgical informed consent policies,[101] and the right to properly executed informed consent forms.[102] Most States' malpractice laws address negligent failure to communicate risks and benefits of medical treatment options. Basic elements of informed consent with respect to participation in a clinical trial, for example, include: (1) Providing information needed to make an informed decision; (2) facilitating the understanding of what has been disclosed; and (3) promoting the voluntariness of the decision about whether or not to participate.[103]

The Department knows of no data showing that the proper enforcement of Federal nondiscrimination law according to statutory text will disproportionately burden individuals on the basis of sexual orientation and/or gender identity. Because the 2016 Rule explicitly declined to make sexual orientation a protected category, and because the Rule's gender identity provision has been legally inoperative since December 31, 2016, to the extent that LGBT individuals suffer future harms, it cannot be attributed to the Department's finalizing this rule, as opposed to other causes.

Comment: Commenters raised concerns that, without the 2016 Rule's provisions, certain insurers, such as those offering short-term limited duration insurance plans, would not offer coverage for conditions that affect only women, such as uterine cancer. Some commenters stated that the underlying Title IX regulatory provisions are insufficient by themselves to address access to insurance coverage of procedures provided to a single sex in healthcare. Some commenters stated that, without the 2016 Rule, women would not be able to afford insurance for medical and hospital care.

Response: The Department is strongly committed to promoting women's health. The Department enforces or implements ACA provisions that protect patient access to obstetrical and gynecological care.[104] The Department also enforces other provisions, both within and outside the ACA, that, for example, provide for maternity and newborn care as essential health benefits,[105] require coverage of women's preventive health services,[106] establish (as a matter of statute) the HHS Office of Women's Health and the Pregnancy Assistance Fund,[107] and promote young women's breast health awareness.[108]

The Department's commitment to women's health also includes vigorous enforcement of Section 1557's prohibition on sex-based discrimination. Under HHS's Title IX regulations, which OCR will use for enforcing Section 1557, covered entities must provide medical insurance benefits, services, policies, and plans without discrimination on the basis of sex. This does not preclude a covered entity's providing a covered benefit or service that is used uniquely by individuals of one sex or the other, such as uterine cancer treatments. However, any plan that includes full-coverage health insurance or services must encompass gynecological care.[109] As discussed in the relevant section below, the Department is bound by applicable law in determining the extent to which Section 1557 covers short-term limited duration insurance.

Comment: Some commenters said that the Department was wrong to claim in the 2019 NPRM that State and local entities are better equipped to address issues of gender dysphoria or sexual orientation, because they say that fifty percent of the LGBT population lives in States without laws prohibiting insurance companies from discriminating based on LGBT status. Others said that, because States like New York explicitly protect persons who identify as LGBT, the new rule will cause confusion for providers and patients about people's rights under Federal and State law. Some commenters suggested that including gender identity and sexual orientation in the Final Rule would reduce ambiguity in its interpretation and implementation.

Response: States and localities do indeed manifest a range of different views on what specific protections should be accorded to the categories of sexual orientation and gender identity in civil rights law, including healthcare civil rights law. That is precisely why, under our Constitutional Federal system, it is appropriate not to preempt States' diverse views on these topics without a clear mandate from Congress to do so. This final rule complies with the federalism-related portions of Executive Orders 12866 and 13132 by avoiding undue interference with State, local, or tribal governments in the exercise of their governmental functions. It leaves them free to balance the multiple competing considerations involved in the contentious and fraught set of questions surrounding gender dysphoria and gender identity, and to adopt protections on the basis of sexual orientation or gender identity to the extent that they see fit (so long as they comply with Federal law).[110]

The Department notes, furthermore, that under the guaranteed issuance and renewal provisions of the ACA, health insurance issuers that offer health insurance coverage in the individual or group market in a state must accept every employer and every individual in that state that applies for such coverage, and must renew or continue in force such coverage at the option of the plan sponsor or the individual. *See* 42 U.S.C. 300gg–1 (guaranteed issuance), 300gg–2 (guaranteed renewability). Federal law similarly limits the bases on which a health insurance issuer can vary premium rates in the individual or small group market; such bases are limited to type of coverage (individual or family), rating area, age, and tobacco use. 42 U.S.C. 300gg. Thus, commenters' concern that LGBT individuals could be denied coverage if the Section 1557 rule does not include gender identity (or sexual orientation) is misplaced.

Comment: One commenter expressed concern that the proposed rule will have an effect beyond the United States by showing the international community that the United States Federal government does not recognize protections for individuals based on gender identity or sexual orientation in healthcare.

Response: The Department is not primarily responsible for the United States' foreign relations. Moreover, the Department has an obligation to implement the statutes according to the plain language of the text passed by Congress (unless unconstitutional), regardless of international implications.

Comment: Some commenters requested that the Department retain all guidance it had issued under the 2016 Rule. Other commenters stated that components of HHS continue to offer

Utah Code Ann. § 78–14–5; Vt. Stat. Ann. tit. 12, § 1909; Wash. Rev. Code Ann. § 7.70.050; Wis. Stat. Ann. § 448.30.

[101] 42 CFR 482.51(b)(2).

[102] 42 CFR 482.24(c)(4)(B)(v).

[103] 45 CFR 46.116–117 (HHS Office of Human Research Subject regulations).

[104] *See, e.g.,* 42 U.S.C. 300gg–19a(d).

[105] 42 U.S.C. 18022(b)(1)(D).

[106] 42 U.S.C. 300gg–13.

[107] 42 U.S.C. 237a; 42 U.S.C. 18202.

[108] 42 U.S.C. 280m.

[109] *See, e.g.,* 45 CFR 86.39.

[110] Ambiguity in the 2016 Rule's provisions regarding gender identity is addressed below. The Department further notes that sexual orientation was explicitly rejected as a protected category under the 2016 Rule. 81 FR 31390 (''OCR has decided not to resolve in this rule whether discrimination on the basis of an individual's sexual orientation status alone is a form of sex discrimination.'').

inconsistent guidance about the legal interpretation of the 2016 Rule.

Response: The Department stated in the preamble to the proposed rule that guidance under the 2016 Rule that conflicted with the proposed rule was suspended until further notice.[111] All such guidance is hereby withdrawn, effective upon publication of this final rule, and is in the process of being removed from the Department's website. Pursuant to Executive Order 13891, the Administration is also undertaking efforts to comprehensively review guidance documents ''to ensure that Americans are subject to only those binding rules imposed through duly enacted statutes or through regulations lawfully promulgated under them, and that Americans have fair notice of their obligations,'' [112] which also requires removal of inconsistent guidance from departmental websites.

ii. Gender Identity, Including Single-Sex Services Under § 92.206 of the 2016 Rule

The Department proposed to repeal the 2016 Rule's definition of ''on the basis of sex'' to encompass gender identity, which the 2016 Rule defined as ''an individual's internal sense of gender, which may be male, female, neither, or a combination of male and female, and which may be different from an individual's sex assigned at birth.'' [113] The Department also proposed to repeal § 92.206 of the 2016 Rule, which has three elements. First, the section required covered entities not to discriminate ''on the basis of sex'' (as defined in § 92.4 of the 2016 Rule) in providing access to health programs and activities. Second, it required them to ''treat individuals consistent with their gender identity.'' Third, it prohibited covered entities from ''deny[ing] or limit[ing] health services that are ordinarily or exclusively available to individuals of one sex, to a transgender individual based on the fact that the individual's sex assigned at birth, gender identity, or gender otherwise recorded is different from the one to which such health services are ordinarily or exclusively available.'' [114]

Comment: Commenters offered varying views on the state of gender-identity nondiscrimination protections under current Federal law. Some commenters alleged that it is settled law that Section 1557 prohibits gender identity discrimination. Others stated that, in other Federal court decisions on Title VII and Title IX, the text of the Title IX statute and regulation are held to be ''at least susceptible to'' the interpretation that it prohibits anti-transgender bias.[115]

Other commenters disagreed, stating that the courts are not unanimous on the question and pointed to legal precedent saying that gender identity is not encompassed by sex discrimination under Federal civil rights statutes. Commenters stated that the 2016 Rule had departed from existing civil rights law by creating new prohibited conduct unsupported by the text of the statutes. Commenters stated that Title IX has been interpreted by the courts for decades to apply to biological women.[116] Other commenters stated that the fact that the Supreme Court has agreed to consider the legality of the general theory proposed in the 2016 Rule demonstrates it is a novel and contested legal issue.[117] Other commenters stated Congress clearly intended ''sex discrimination'' to be defined with reference to biological classification as male or female, and that is the only understanding that is reasonably supported by the text, history, or structure of the relevant law. Some criticized the 2016 Rule's reliance on the EEOC's opinion in *Macy* v. *Holder,* 2012 EEOPUB LEXIS 1181, 112 FEOR (LRP) 257 (2012) (Title VII).

Response: The Department disagrees with commenters who contend that Section 1557 or Title IX encompass gender identity discrimination within their prohibition on sex discrimination. Some of the cases referenced by such commenters were decided under the Equal Protection Clause of the Constitution,[118] under which courts have applied intermediate levels of scrutiny, permitting governments to adopt ''discriminatory means'' on the basis of sex only insofar as those means are substantially related to the achievement of important governmental objectives and are not ''used to create or perpetuate the legal, social, and economic inferiority of women.'' [119] The Department does not agree that the Equal Protection cases cited by these commenters require Title IX to include a prohibition on gender identity discrimination. Unlike the Equal Protection Clause, Title VII and Title IX broadly forbid covered entities from discriminating on the basis of sex, with limited exemptions expressly provided in statute. Title VII exempts covered entities from the prohibition on sex discrimination where sex is a ''bona fide occupational qualification.'' [120] Title IX exempts covered entities from the prohibition on sex discrimination for admissions to historically single-sex colleges, school father-son and mother-daughter activities (so long as reasonably comparable activities are provided for students of both sexes), beauty pageants, certain boys' or girls' conferences, single-sex voluntary youth service organizations, fraternities and sororities, and military training programs.[121]

The text of Title IX also demonstrates that it is not susceptible to an interpretation under which it would prohibit gender identity discrimination. The statute permits covered entities to maintain ''separate living facilities for the different sexes,'' and it expressly presents this, not as an exemption from the nondiscrimination requirements, but as an ''interpretation'' of them: Separate-sex living facilities are not, as such, discriminatory.[122] The Department's Title IX regulations likewise permit separate-sex housing, intimate facilities, physical education and human sexuality courses, and contact sports.[123] The statute presents these distinctions as being fully compatible with its nondiscrimination requirement. Nondiscrimination requires that separate-sex facilities and programs be (where relevant) comparable to one another, but the existence of separate-sex facilities and programs is not, as such, discriminatory under Title IX. Consequently, the Department does not believe an interpretation of Title IX that would prohibit gender identity discrimination is compatible with the statute's overall approach towards what

[111] 84 FR 27872 (''Upon publication of this notice of proposed rulemaking, the Department will, as a matter of enforcement discretion, suspend all subregulatory guidance issued before this proposed rule that interprets or implements Section 1557 (including FAQs, letters, and the preamble to [the 2016 Rule]) that is inconsistent with any provision in this proposed rule (including the preamble) or with the requirements of the underlying civil rights statutes cross-referenced by Section 1557 or their implementing regulations.'').

[112] ''Promoting the Rule of Law Through Improved Agency Guidance Documents,'' Exec. Order No. 13891, 84 FR 55235 (Oct. 9, 2019).

[113] 81 FR 31387–88, 31467.

[114] 81 FR 31471.

[115] *See G.G. ex rel. Grimm* v. *Gloucester Cty. Sch. Bd.,* 822 F.3d 709 (4th Cir. 2016), *recalling mandate & issuing stay,* 136 S. Ct. 2442 (2016).

[116] *See, e.g., N. Haven Bd. of Ed.* v. *Bell,* 456 U.S. 512, 517–20, (1982); *Cannon* v. *Univ. of Chi.,* 441 U.S. 677, 680 (1979).

[117] Order, *R.G. & G.R. Harris Funeral Homes* v. *EEOC,* No. 18–107 (U.S. Apr. 22, 2019) (granting certiorari).

[118] *See Glenn* v. *Brumby,* 663 F.3d 1312 (11th Cir. 2011).

[119] *United States* v. *Virginia,* 518 U.S. 515, 516 (1996).

[120] 42 U.S.C. 2000e–2(e)(1).

[121] 20 U.S.C. 1681.

[122] 20 U.S.C. 1686.

[123] 45 CFR 86.32–34, § 86.41.

does and does not constitute sex discrimination.

Case law under both Title VII and Title IX has likewise recognized that these statutes do not forbid reasonable and relevant distinctions between the sexes.[124] As the United States Solicitor General recently put it, ''Many commonplace practices that distinguish between the sexes do not violate [Title VII] because they account for real physiological differences between the sexes without treating either sex less favorably.'' [125] No express statutory carve-out is required in order for employers under Title VII to be permitted to impose a sex-specific dress code that burdens men and women equally, nor in order for educational institutions under Title IX to be permitted to require men and women to shower separately from each other. And as compared to the fields of employment and of education, the field of healthcare necessarily may contain many more ''commonplace practices that distinguish between the sexes . . . [by] account[ing] for real physiological differences between the sexes without treating either sex less favorably.'' As discussed in greater detail later in the subsection of this preamble on gender identity, reasonable distinctions between the sexes may be called for in numerous areas within the Department's expertise, including shared hospital rooms,[126] sex-specific protections for patients' modesty,[127] specialized medical practices related to gynecology,[128] and medical treatments or recommendations relying on sex-based generalizations,[129] and other research situations.[130] The biological differences between men and women are not irrelevant to employment law and education, and they are in many ways even more relevant in the health setting.

In general, a covered entity is permitted to make distinctions on the basis of sex that are ''not marked by misconception and prejudice, nor . . . show disrespect for either class.'' [131] In many cases, removing or weakening such reasonable sex-based distinctions could undermine the equality of the sexes by disproportionately harming women.[132] As discussed further below, case law is still developing as to whether covered entities' refusal to draw these distinctions could in some cases violate personal privacy interests and so create a hostile environment under Title IX.[133] ''[N]eutral terms can mask discrimination that is unlawful,'' while ''gender specific terms can mark a permissible distinction.'' [134] Where the ''[p]hysical differences between men and women'' are relevant, sex-neutral policies will in some cases ''undoubtedly require alterations'' to make them sex-specific, in order ''to afford members of each sex privacy from the other sex in living arrangements.'' [135]

Comment: Commenters stated that *Price Waterhouse* v. *Hopkins,* 490 U.S. 228 (1989), and *Oncale* v. *Sundowner Offshore Oil Services, Inc.,* 523 U.S. 75 (1998), fully support or even require the 2016 Rule's gender identity provisions or their equivalent. Commenters asked the Department to address specific court cases that they stated were contrary to the Department's view, such as *Doe* v. *Boyertown Area Sch. Dist.,* 897 F.3d 518 (3d Cir. 2018), *Whitaker* v. *Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.,* 858 F.3d 1034 (7th Cir. 2017), and *Glenn* v. *Brumby,* 663 F.3d 1312 (11th Cir. 2011).

Response: For most of the history of Title IX case law, the ''commonplace practices that . . . account for real physiological differences between the sexes without treating either sex less favorably'' [136] were uncontroversial and not considered discriminatory. In the past five years, two circuit courts have begun to question this long-standing precedent in proceedings arising from motions for preliminary injunctions, although no circuit court has yet done so in a final ruling.[137]

These courts (and some district courts) draw on the Supreme Court's reasoning in *Price Waterhouse* in order to assert that otherwise permissible distinctions on the basis of sex must be applied (if at all) on the basis of an individual's subjective gender identity. But the novel legal theory advanced by these courts represents a serious misreading of *Price Waterhouse* and of Title IX, a reading that has been disputed by the decisions of other courts, including *Franciscan Alliance.*

Price Waterhouse is a Title VII case and establishes that, '' '[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.' '' [138]

When courts have read *Price Waterhouse* as determining that ''on the basis of sex'' encompasses gender identity, they have done so on the ground that discrimination on the basis of gender identity is, as such, a form of sex stereotyping. But *Price Waterhouse* should be read in light of the Supreme Court definition of a ''stereotype'' about sex ''as a frame of mind resulting from

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[124] *See Wittmer* v. *Phillips 66 Co.,* 915 F.3d 328, 334 (5th Cir. 2019) (Ho, J., concurring); *Jespersen* v. *Harrah's Operating Co.,* 444 F.3d 1104, 1109–10 (9th Cir. 2006) (en banc) (collecting cases).

[125] Brief for EEOC, *R.G. & G.R. Harris Funeral Homes* v. *EEOC,* No. 18–107 (U.S. filed Aug. 16, 2019), at 36.

[126] *See Cypress* v. *Newport News General and Nonsectarian Hospital Association,* 375 F.2d 648, 658 (4th Cir. 1967) (''Our holding is simply that race cannot be a factor in the admission, assignment, classification, or treatment of patients in an institution like this, which is state-supported and receives federal funds. Room assignments may be made with due regard to sex, age, type of illness, or other relevant factors, but racial distinctions are impermissible, since the law forbids the treatment of individuals differently or separately because of their race, color, or national origin.''); *cf.* similar statutory requirements at 10 U.S.C. 4319 (Army), 10 U.S.C. 6931 (Navy), and 10 U.S.C. * 9319 (Air Force) (requiring separation of sleeping and latrine areas for ''male'' and ''female'' recruits); 10 U.S.C. 4320 (Army), 10 U.S.C. 6932 (Navy), and 10 U.S.C. 9320 (Air Force) (limiting after-hours access by drill sergeants and training personnel to persons of the ''same sex as the recruits'').

[127] *See, e.g.,* OCR Voluntary Resolution Agreement with Michigan State University, *https://cms-drupal-hhs-prod.cloud.hhs.gov/sites/default/files/vra-between-msu-and-ocr.pdf,* at IV.D.1.d.iii, IV.D.1.d.v.

[128] *See, e.g.,* Women's Preventive Services Guidelines, Health Resources and Services Administration, Dec. 17, 2019 (HRSA) *https://www.hrsa.gov/womens-guidelines-2019.*

[129] *See* the Department's Office of Women's Health, *https://www.womenshealth.gov/.*

[130] *See* NIH Guidance, *Consideration of Sex as a Biological Variable in NIH-funded Research* (2017), *https://orwh.od.nih.gov/sites/orwh/files/docs/NOT-OD-15-102_Guidance.pdf*; NIH, Office of Research on Women's Health, ''Sex & Gender,'' *https://orwh.od.nih.gov/.*

[131] *See Tuan Anh Nguyen* v. *INS,* 533 U.S. 73.

[132] *See* Brief for EEOC, *Harris Funeral Homes,* at 37–38 (citing cases).

[133] *See, e.g., Doe* v. *Luzerne Cty.,* 660 F.3d 169, 176–77 (3d Cir. 2011) (recognizing that an individual has ''a constitutionally protected privacy interest in his or her partially clothed body'' and that this ''reasonable expectation of privacy'' exists ''particularly while in the presence of members of the opposite sex''); *Brannum* v. *Overton Cty. Sch. Bd.,* 516 F.3d 489, 494 (6th Cir. 2008) (''the constitutional right to privacy . . . includes the right to shield one's body from exposure to viewing by the opposite sex''); *Fortner* v. *Thomas,* 983 F.2d 1024, 1030 (11th Cir. 1993) (''[M]ost people have a special sense of privacy in their genitals, and involuntary exposure of them in the presence of people of the other sex may be especially demeaning or humiliating.''). *But see Parents for Privacy* v. *Barr,* No. 18–35708, (9th Cir. Feb. 12, 2020) (no title IX or constitutional privacy violation for school policy allowing student to use bathroom and locker rooms consistent with their gender identity).

[134] *Tuan Anh Nguyen* v. *INS,* 533 U.S. 64.

[135] *United States* v. *Virginia,* 518 U.S. 515, 550 n.19 (1996) (emphasis added) (brackets and citation omitted).

[136] Brief for EEOC, *Harris Funeral Homes,* at 36.

[137] *Whitaker* v. *Kenosha Unified Sch. Dist.,* 858 F.3d 1034, 1039 (7th Cir. 2017); *Dodds* v. *United States Dep't of Educ.,* 845 F.3d 217 (6th Cir. 2016). The ruling in a third related case, *G.G.* v. *Gloucester Co. Sch. Bd.,* 822 F.3d 709 (4th Cir. 2016), was based on *Auer* deference to Department of Education subregulatory guidance and has since been vacated after that guidance was withdrawn.

[138] *Price Waterhouse* v. *Hopkins,* 490 U.S. 228, 251 (1989), quoting *Los Angeles Dept. of Water & Power* v. *Manhart,* 435 U. S. 702, 707, n. 13 (1978).

irrational or uncritical analysis.'' [139] Wherever ''stereotyping play[s] a motivating role in an employment decision,'' according to *Price Waterhouse,* the employer has demonstrated an ''impermissible motive,'' for stereotypes should not even ''play a part in the decisionmaking process.'' [140]

The Department believes that, unlike stereotypes, reasonable distinctions on the basis of sex, as the biological binary of male and female, may, and often must, ''play a part in the decisionmaking process''—especially in the field of health services. A covered entity such as a healthcare provider is not impermissibly stereotyping biological males (notwithstanding their internal sense of gender) on the basis of sex if it uses pronouns such as ''him''; limits access to lactation rooms and gynecological practices to female users and patients; or lists a male's sex as ''male'' on medical forms. Similarly, a covered health care entity is not impermissibly stereotyping biological females (notwithstanding their internal sense of gender) on the basis of sex if it uses pronouns such as ''her''; warns females that heart-attack symptoms are likely to be quite different than those a man may experience; advises women that certain medications tend to affect women differently than men; or lists a female's sex as ''female'' on medical forms. Finally, it is not stereotyping for covered entities to have bathrooms or changing rooms designated by reference to sex, or to group patients in shared hospital rooms by sex.[141] Such practices and actions are not rooted in stereotypes, but in real biological or physiological differences between the sexes. Moreover, none of these examples disadvantages one sex over another, and in fact the failure to take sex into account may in some cases have a disadvantageous effect.

As the Supreme Court has noted, ''to fail to acknowledge even our most basic biological differences . . . risks making the guarantee of equal protection superficial, and so disserving it. Mechanistic classification of all our differences as stereotypes would operate to obscure those misconceptions and prejudices that are real.'' [142] ''[T]here is nothing irrational or improper in the recognition'' of the social and other consequences of real physiological differences between the sexes; ''[t]his is not a stereotype.'' [143] Reasonable distinctions ''may be based on real differences between the sexes . . . so long as the distinctions are not based on stereotyped or generalized perceptions of differences.'' [144] ''Prohibition of harassment on the basis of sex requires neither asexuality nor androgyny.'' [145]

Justice Ginsburg's majority opinion in *U.S.* v. *Virginia* sharply distinguished sex from other protected classes in this regard: ''Supposed 'inherent differences' are no longer accepted as a ground for race or national origin classifications. Physical differences between men and women, however, are enduring: '[T]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both.' . . . 'Inherent differences' between men and women, we have come to appreciate, remain cause for celebration.'' [146] This recognition of physical (*i.e.,* biological) differences between men and women is not stereotyping and in some cases will ''undoubtedly require alterations'' to accommodated sex-specific differences.[147]

The lower court decisions referenced by commenters held that a covered entity which required transgender individuals to abide by otherwise permissible distinctions on the basis of sex, such as separate-sex bathrooms, would be impermissibly ''imposing its stereotypical notions of how sexual organs and gender identity ought to align.'' [148] A few lower courts have relied on these holdings in interpreting Section 1557 to require covered entities to override these reasonable distinctions based on sex, in deference to an individual's gender identity.[149] The notion that such distinctions on the basis of sex amount, as such, to impermissible stereotyping, would be lethal to countless reasonable and fully permissible healthcare practices, some of which have been identified above. No court has gone so far: These lower courts have questioned such distinctions only insofar as these distinctions come into conflict with an individual's stated gender identity. But *Price Waterhouse* offers no basis for this regime of individualized exceptions to otherwise reasonable distinctions. If it is impermissible stereotyping of a female employee to demand that she not ''behave aggressively,'' then *Price Waterhouse* (to the extent that it applies) requires companies to stop holding *all* female employees to such a stereotyped standard—not merely to grant exceptions for the occasional female employee who objects to that standard.[150] Similarly, if it is impermissible stereotyping to assume that ''sexual organs . . . ought to align'' with the sex listed on one's hospital bracelet, then *Price Waterhouse* (to the extent that it applies) would invalidate the existence of *all* sex markers on hospital bracelets, not merely of those to which a transgender individual has objected. Where a covered entity has not stereotyped but has only drawn a reasonable distinction, *Price Waterhouse* is irrelevant.

Distinctions based on real differences between men and women do not turn into discrimination merely because an individual objects to those distinctions. Title IX does not require covered entities to eliminate reasonable distinctions on the basis of sex whenever an individual identifies with the other sex, or with no sex at all, or with some combination of the two sexes

[139] *Tuan Anh Nguyen* v. *I.N.S.,* 533 U.S. 53, 68 (2001).

[140] *Price Waterhouse,* 490 U.S. 252–53, 254–55. The Civil Rights Act of 1991 amends the *Price Waterhouse* standard to say that ''an unlawful employment practice is established when the complaining party demonstrates that . . . sex . . . was a motivating factor for any employment practice, even though other factors also motivated the practice,'' but the employer may rebut this claim if he or she ''demonstrates that [the employer] would have taken the same action in the absence of the impermissible motivating factor.'' 42 U.S.C. 2000e–2(m), § 2000e–5(g)(2)(B).

[141] *See* 29 CFR 1910.141(c) (OSHA regulation requiring ''toilet rooms separate for each sex'').

[142] *Tuan Anh Nguyen,* 533 U.S. at 73. In *Sessions* v. *Morales-Santana,* 137 S. Ct. 1678 (2017), the Supreme Court struck down, on intermediate-scrutiny grounds, a statute that granted U.S. citizenship to children born abroad of unwed parents if the child's mother had been a U.S. citizen for one year before the birth, but required five years in the case of a U.S. citizen father. However, the Court did not reject the *Nguyen* analysis recognizing that sex distinctions are real, and that not all such distinctions are based on unlawful stereotypes.

[143] *Id.* at 68.

[144] *Faulkner* v. *Jones,* 10 F.3d 226, 232 (4th Cir. 1993).

[145] *Oncale* v. *Sundowner Offshore Oil Services, Inc.,* 523 U.S. 75, 81 (1998).

[146] *United States* v. *Virginia,* 518 U.S. 515, 533 (1996) (internal citations omitted).

[147] *Id.* at 550 n.19.

[148] *Equal Employment Opportunity Comm'n* v. *R.G. &. G.R. Harris Funeral Homes, Inc.,* 884 F.3d 560, 576 (6th Cir. 2018). *See also Whitaker* v. *Kenosha Unified Sch. Dist.,* 858 F.3d 1034, 1051 (7th Cir. 2017) (''the School District treats transgender students like Ash, who fail to conform to the sex-based stereotypes associated with their assigned sex at birth, differently. These students are disciplined under the School District's bathroom policy if they choose to use a bathroom that conforms to their gender identity.''); *Glenn* v. *Brumby,* 663 F.3d 1312, 1316 (11th Cir. 2011) (''A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes.'').

[149] *See Rumble* v. *Fairview Health Servs.,* No. 14–cv–037 (SRN/FLN), 2017 WL 401940 (D. Minn. Jan. 30, 2017); *Prescott* v. *Rady Children's Hospital-San Diego,* 265 F. Supp. 3d 1090, 1098–100 (S.D. Cal. 2017)

[150] *See Price Waterhouse,* 490 U.S. at 235, 250–51.

(as under the 2016 Rule).[151] Rather, Title IX prohibits subjecting a person to less favorable treatment because of his or her sex. Thus, if a person claims to have been discriminated against on the basis of his or her sex, that claim is neither weakened nor strengthened by any allegations about his or her ''internal sense of gender.'' Numerous lower courts have held that, like any other man or woman, a transgender individual may sue under Title VII if he or she is harassed, assaulted, terminated, or otherwise discriminated against because of his or her sex.[152] Under Title IX, as under Title VII, ''[t]ranssexuals are not genderless, they are either male or female and are thus protected under Title VII to the extent that they are discriminated against on the basis of sex.'' [153] The Department will vigorously enforce Section 1557's prohibition on sex-based discrimination, but that prohibition cannot be construed as a prohibition on reasonable sex-based distinctions in the health field.

Comment: Commenters offered a variety of views on the role that a patient's sex and/or gender identity ought to play in medical decision-making.

Many commenters spoke of the importance of sex-reassignment surgeries and cited studies that they said show the value of these surgeries in alleviating gender dysphoria. Others cited different studies that they said show the opposite. Some clinicians expressed concerns about consent and medical appropriateness of pre-pubertal sex reassignment with lifelong physical and mental implications (including permanent sterility) when children and adolescents lack the requisite social, emotional, and intellectual maturity, or life experiences necessary for true consent. Commenters also were concerned about coercive, peer, adult, and ideological pressures on children and adolescents to seek cross-sex hormonal treatment, sex reassignment surgery, or other similar services. Some commenters, including parties to lawsuits against the Department on the ground that the 2016 Rule would require gender transition treatments and therapies for children, criticized the 2016 Rule for containing no age limitation. Commenters stated that the ''gender-affirming'' model is the most controversial form of counseling and, as such, is not used by the Dutch national transgender clinic, which they said is considered the international flagship of gender dysphoria treatment.

Some commenters noted that violations of the 2016 Rule are enforceable by termination of Federal financial assistance and that violations of State law with respect to healthcare may involve civil penalties for negligence or malpractice, etc. In light of this, they stated that the 2016 Rule placed providers in an impossible position, where compliance with one law means noncompliance with another, and either choice results in a steep penalty.

Other commenters said that the 2016 Rule's definition of ''on the basis of sex'' could prohibit the way OB/GYN practices specialize in treating females, and raised the concern that specializing in the treatment of female patients could be deemed prohibited discrimination against biological males who identify as women. Commenters stated that because these services are focused on and tailored to females as a single biological sex, they are able to provide a higher quality of care to those patients. They noted that it has long been a permissible sex-based distinction for OB/GYN doctors to not treat any biological males, and this distinction is recognized under HHS Title IX regulations. Such commenters found the 2016 Rule overbroad and inconsistent with day-to-day affairs in how they practice medicine. But other commenters stated that OB/GYNs are not affected by the transgender requirements under the 2016 Rule and that pre-existing OB/GYN practices are justified by reasonable scientific justifications.

Certain providers advocated for removal of the requirement to ''treat individuals consistent with their gender identity,'' as this provision would violate the conscience rights of healthcare providers, and the ethical and foundational convictions that underlie the entire way they practice medicine. Other commenters said that repeal of this provision leaves no clarity about whether such providers will actually provide treatment for transgender patients, and expressed the concern that affirming treatment consistent with gender identity is necessary for high-value transgender healthcare, as is required for all people in the practice of medicine.

Some commenters noted their concern that the 2016 Rule requires doctors to remove healthy reproductive tissue in sex-reassignment surgeries, even if it may be contrary to the patient's medical interest. For example, if a surgeon performs mastectomies as part of a medically necessary treatment for breast cancer, under the 2016 Rule, he or she could also have been required to perform mastectomies for sex-reassignment purposes when recommended by a psychologist, even if the surgeon believes such treatments are not medically indicated in his or her own professional judgment. Similarly, commentators argued that some doctors might be forced to perform hysterectomies not only against their medical judgment but also outside of their expertise. Other commenters contended that certain procedures are not meaningfully different when performed on a transgender versus non-transgender patient, because the mechanics of the procedures are substantially similar. Although genital reassignment surgery is considered a ''gender transition service,'' clinicians commented that somewhat similar procedures are used for genital reconstruction to repair damaged, diseased, or disfigured genital tissue, or in the treatment of disorders of sexual development.

Commenters also stated that the 2016 Rule would force them to provide services damaging to the health of patients, in conflict with their mission as a healthcare provider, instead of using these medical resources to help patients.[154]

Commenters stated that HHS does not have a compelling interest in requiring the medical provision of, or insurance

[151] *See Johnston* v. *Univ. of Pittsburgh of the Commonwealth Sys. of Higher Educ.,* 97 F. Supp. 3d 657 (W.D. Pa. 2015).

[152] *Barnes* v. *City of Cincinnati,* 401 F.3d 729 (6th Cir. 2005); *Smith* v. *City of Salem,* 378 F.3d 566 (6th Cir. 2004). These cases have been cited, by the 2016 Rule and in some recent court cases, in support of the view that sex discrimination encompasses discrimination on the basis of gender identity. This is a serious misreading pointed out at *Johnston* v. *Univ. of Pittsburgh of Com. Sys. of Higher Educ.,* 97 F. Supp. 3d 657, 675n17 (W.D. Pa. 2015) (''In *Smith* v. *City of Salem,* . . . the court did not conclude that ''transgender'' is a protected class under Title VII, but only that a male or female who is also transgender can assert a sex stereotyping claim under Title VII for adverse employment actions that result from the individual's conformity to their gender identity rather than their biological or birth sex. Indeed, the same year that the 6th Circuit issued its opinion in *Smith,* it affirmed, in an unpublished opinion, a district court decision holding that ''Title VII does not prohibit discrimination based on an individual's status as a transsexual,'' in an employment discrimination case involving a transgender women's use of a men's restroom. *Johnson* v. *Fresh Mark, Inc.,* 98 Fed. App'x. 461, 462 (6th Cir.2004).'').

[153] *Tronetti* v. *TLC HealthNet Lakeshore Hosp.,* No. 03–CV–0375E(SC), 2003 WL 22757935, at *4 (W.D.N.Y. Sept. 26, 2003). *See Rosa* v. *Park West Bank Trust Co.,* 214 F.3d 213, 215–16 (1st Cir. 2000) (discrimination against a cross-dressing man is sex-based discrimination if the entity would have treated a ''similarly situated'' woman differently, *i.e.,* if it treats ''a woman who dresses like a man differently than a man who dresses like a woman'').

[154] Commenters cited specific examples of coercion. *See Minton* v. *Dignity Health,* 2017 WL 7733922 (Cal. Super. Ct. Nov. 2017); *Robinson* v. *Dignity Health,* No. 16–cv–3035 YGR, 2016 WL 7102832 (N.D. Cal. Dec. 6, 2016) (on remand from U.S. Supreme Court).

for, gender transition services or procedures. Other commenters stated that access to such services for transgender patients constitutes a compelling interest. Some commenters challenged the idea that an individual born as one biological sex can in actuality be transformed into a person of the other sex, with or without surgeries or hormone treatments.

Response: The Department recognizes that certain single-sex medical procedures, treatments, or specializations are rooted in the binary and biological meaning of sex for valid scientific and medical reasons. The Department believes the 2016 Rule caused significant confusion and cast doubt as to whether such longstanding specialized practices remained lawful, as indicated, for example, by the fact that commenters had diverging views on how the 2016 Rule impacted OB/GYN practices. The Department declines to interfere in these practices, and repeals a mandate that was, at least, ambiguous and confusing.

The Department appreciates the many comments received on the issue of gender identity, gender dysphoria, and the appropriate care for individuals with gender dysphoria. The Department believes providers should be generally free to use their best medical judgment, consistent with their understanding of medical ethics, in providing healthcare to Americans. The wide variation in these comments confirms that the medical community is divided on many issues related to gender identity, including the value of various ''gender-affirming'' treatments for gender dysphoria (especially for minors), the relative importance of care based on the patient's sex, and the compatibility of gynecological practice with a requirement of nondiscrimination on the basis of gender identity.[155]

The Department is also reluctant to pretermit ongoing medical debate and study about the medical necessity of gender transition treatments. The 2016 Rule assumed that, if a covered entity offers a ''categorical coverage exclusion or limitation for all health services related to gender transition,'' then that entity must be relying on medical judgments that are ''outdated and not based on current standards of care.'' [156] But based on its review of the most recent evidence, the Department concludes that this was an erroneous assertion, and that there is, at a minimum, a lack of scientific and medical consensus to support this assertion, as the comments noted above demonstrate. This lack of scientific and medical consensus—and the lack of high-quality scientific evidence supporting such treatments—is borne out by other evidence. For example, on August 30, 2016, CMS declined to issue a National Coverage Determination (NCD) on sex-reassignment surgery for Medicare beneficiaries with gender dysphoria ''because the clinical evidence is inconclusive.'' [157] CMS determined, ''[b]ased on an extensive assessment of the clinical evidence,'' that ''there is not enough high quality evidence to determine whether gender reassignment surgery improves health outcomes for Medicare beneficiaries with gender dysphoria and whether patients most likely to benefit from these types of surgical intervention can be identified prospectively.'' [158] Similarly, in a 2018 Department of Defense (DOD) report on the diagnosis of gender dysphoria, which included input from both transgender individuals and medical professionals with experience in the care and treatment of individuals with gender dysphoria, DOD found that there is ''considerable scientific uncertainty and overall lack of high quality scientific evidence demonstrating the extent to which transition-related treatments, such as cross-sex hormone therapy and sex reassignment surgery—interventions which are unique in psychiatry and medicine—remedy the multifaceted mental health problems associated with gender dysphoria.'' [159] Other research has found that children who socially transition in childhood faced dramatically increased likelihood of persistence of gender dysphoria into adolescence and adulthood.[160] The Department does not believe that the nondiscrimination requirements in Title IX, incorporated by reference into Section 1557, foreclose medical study or debate on these issues. And to the extent that a medical consensus develops on these issues, it is not clear that regulations of the sort encompassed in the 2016 Rule would be necessary to encourage medical professionals to follow such consensus.

The Department believes that its approach in the 2016 Rule inappropriately interfered with the ethical and medical judgment of health professionals. The preamble to the 2016 Rule stated that, under that Rule, ''a provider specializing in gynecological services that previously declined to provide a medically necessary hysterectomy for a transgender man would have to revise its policy to provide the procedure for transgender individuals in the same manner it provides the procedure for other individuals.'' [161] This statement raised the prospect of forcing a provider to perform irreversible, sterilizing, and endocrine-disrupting procedures on what may be, in the provider's view, non-diseased and properly functioning organs—including in children and youth.[162] A medical provider may rightly judge a hysterectomy due to the presence of malignant tumors to be different in kind from the removal of properly functioning and healthy reproductive tissue for psychological reasons, even if the instruments used are identical. For example, OB/GYNs competent and willing to perform dilation and curettage procedures to aid with recovery from a miscarriage should not, and legally cannot,[163] be forced to perform dilation and curettage procedures for abortions, because the regulatory, ethical, and medical frameworks that apply to abortions are radically different from those that apply to recovery from miscarriages. Moreover, commenters who offer transition services made clear that these often involve specialized cross-sex hormonal treatments before and after any sex-reassignment surgeries, and require coordination of care with urologists, psychiatrists, and a variety of other healthcare professionals in different specialized fields. A provider who routinely provides, for example, hysterectomies to address uterine cancer should be able reasonably to choose not to be involved in what may be the much more medically complicated set of procedures involved in sex reassignment.

[155] Comments referring specifically to providers' conscientious objections to certain forms of treatment are addressed below in the section on ''relation to other laws.''

[156] *Cf.* 81 FR 31472, 31429.

[157] CMS, ''Decision Memo for Gender Dysphoria and Gender Reassignment Surgery'' (CAG–00446N) (Aug. 30, 2016) *https://www.cms.gov/medicare-coverage-database/details/nca-decision-memo.aspx?NCAId=282.*

[158] *Id.*

[159] Department of Defense, ''Report and Recommendations on Military Service by Transgender Persons'' (Feb. 22, 2018), 5.

[160] Thomas D. Steensma, Ph.D., Jenifer K. McGuire, Ph.D. M.P.H., et al. ''Factors Associated with Desistance and Persistence of Childhood Gender Dysphoria: A Quantitative Follow-Up Study,'' 52(6) Journal of the American Academy of Child & Adolescent Psychiatry 582–90 (2013).

[161] 81 FR 31455.

[162] In this regard, the Department distinguishes between the situation created by the requirements of 2016 Rule and the in-program requirements applied within federally funded grant programs where, for example, ''the general rule that the Government may choose not to subsidize speech applies with full force,'' even if the speech concerns what is allegedly required by medical ethics. *See, e.g., Rust* v. *Sullivan,* 500 U.S. 173, 200 (1991).

[163] *See* Church Amendments, 42 U.S.C. 300a–7.

Upon reconsidering this issue, the Department now believes that the 2016 Rule did not offer a sufficient analysis to justify the serious effect of requiring providers to perform certain procedures or provide certain treatments contrary to their medical judgment. The Department does not and need not take a definitive view on any of the medical questions raised in these comments about treatments for gender dysphoria. The question is whether Title IX and Section 1557 require healthcare professionals, as a matter of nondiscrimination, to perform such procedures or provide such treatments. The answer is that they do not. This final rule does not presume to dictate to medical providers the degree to which sex matters in medical decision making, nor does it impose the 2016 Rule's vague and overbroad mandate that they ''treat individuals consistent with their gender identity.''

Nothing in this final rule prohibits a healthcare provider from offering or performing sex-reassignment treatments and surgeries, or an insurer from covering such treatments and procedures, either as a general matter or on a case-by-case basis. The large number of comments received from healthcare providers who perform such treatments and procedures suggests that there is no shortage of providers willing to do so, even without the 2016 Rule's provisions on gender identity (which had been enjoined for over two years by the time of the comment period).

Finally, the *Franciscan Alliance* court held that HHS had not demonstrated a compelling interest in requiring providers with sincerely held religious objections to gender transition services, notwithstanding their objections, to provide these services. The Department sees no compelling interest in forcing the provision, or coverage, of these medically controversial services by covered entities, much less in doing so without a statutory basis.

Comment: Some commenters stated that revising the rule to eliminate the court-vacated provisions on gender identity, in conjunction with other Federal actions related to gender transition-related services, is evidence of animus to transgender individuals, and that the free exercise of religion or conscience claims raised by medical professionals and insurers are merely ''pretext'' for invidious discrimination. Others contended that the proposed rule recognizes the human dignity of all because certain surgical procedures and medications related to gender identity and abortion do not actually serve the health or wellbeing of patients but violate their dignity and physical and psychological integrity, especially of children and women in crisis pregnancies, and that these providers act out of sincere beliefs both as to medical judgment and religious belief in pursuing the best interests of patients regardless of their background or stated identities.

Response: The Department respects the dignity of all individuals. It seeks to further the health and well-being of all, but it can do so only by implementing the laws as adopted by Congress.

Moreover, the Department notes that commenters have provided a number of bases for objections to being forced to provide or cover certain treatments or surgeries contrary to their sincere medical, economic, religious, scientific, ethical, or conscience-based reasons. To presume that religious beliefs on these issues are rooted in bigotry, animosity, or insincerity would risk unlawfully stereotyping people of faith. *See Masterpiece Cakeshop* v. *Colorado Civil Rights Comm'n,* 138 S. Ct. 1719, 1729 (2018) (''To describe a man's faith as 'one of the most despicable pieces of rhetoric that people can use' is to disparage his religion in at least two distinct ways: By describing it as despicable, and also by characterizing it as merely rhetorical—something insubstantial and even insincere.'').[164]

Comment: Commenters expressed various views on whether transgender patients should be treated in accord with their expressed gender identity and/or in accord with their sex.

Some commenters stated that transgender designations conceal real biological sex differences that are relevant to medical risk factors, recognition of which is important for effective diagnosis, treatment, and disease prevention—including effective treatment for patients who identify as transgender. Some added that biological sex differences remain present in numerous bodily systems even after a patient has undergone hormonal and/or surgical transition therapies, and that physicians must be permitted to take these differences into account. Healthcare providers commented that critical decisions are made in the practice of medicine on the basis of objective biological information concerning a person's sex as being male or female because, among other reasons, medications and treatments affect males and females differently, and only females can become pregnant, regardless of stated gender identity. These commenters were concerned that by requiring providers to treat patients consistent with gender identity instead of biological sex, the patients' health is endangered, with both short- and long-term consequences.[165]

Other commenters stated that the Department has not provided sufficient explanation or justification for removing § 92.206 of the 2016 Rule with respect to ensuring equal access to healthcare services without respect to sex, including prohibitions on discriminatory denials of services typically associated with one sex to persons who identify as transgender. The commenters stated that the Department ignored the text of § 92.206 when it asserted in the proposed rule that the 2016 Rule would ''require[e] healthcare entities to code as male all persons who self-identify as male, regardless of biology, [which] may lead to adverse health consequences.''[166] Commenters said § 92.206 properly prohibits, among other things, the arbitrary denial of care based not on clinical considerations but solely on the patient's ''sex as assigned at birth'' or as recorded in medical or insurance records. Others said that while the biological definition of ''sex'' may be appropriate for scientific contexts such as National Institutes of Health (''NIH'') studies, the Department's nondiscrimination provisions should define the term more broadly.

Some commenters commented on a case of a transgender patient with abdominal pains who, as a result of being treated according to a male gender identity, was not diagnosed as being pregnant as part of the triage process and had a stillborn child. Some commenters viewed this set of facts as evidence against the 2016 Rule while others claimed it was evidence for the 2016 Rule.

Response: The Department has long recognized that the practice of medicine and biomedical research routinely involves decisions and diagnoses that legitimately make distinctions based on sex, including decisions made at triage; research studies (including clinical trials); questions of medical history; and requests for a medical consultation. As discussed at length in the NPRM, substantial scientific literature published after the 2016 Rule indicates that sex-specific practices in medicine and research exist because biological

[164] Religious exemptions will be addressed further in the section discussing the final rule's relation to other laws.

[165] Commenters cited texts including William J. Malone, MD, Gender Dysphoria Resource for Providers (3rd Edition); and Michael Laidlaw, MD, ''The Gender Identity Phantom,'' International Discussion Space for Clinicians and Researchers (Oct. 24, 2018) *http://gdworkinggroup.org/2018/10/24/the-gender-identity-phantom.*

[166] *See* 84 FR 27885, n. 55.

(and, derivatively, genetic) differences between males and females are real and matter to health outcomes and research.[167] For example, NIH requires research grant applicants to consider sex as a biological variable ''defined by characteristics encoded in DNA, such as reproductive organs and other physiological and functional characteristics.'' [168] According to an NIH article,

> [s]ex as a biological variable (SABV) is a key part of the new National Institutes of Health (NIH) initiative to enhance reproducibility through rigor and transparency. The SABV policy requires researchers to factor sex into the design, analysis, and reporting of vertebrate animal and human studies. The policy was implemented as it has become increasingly clear that male/female differences extend well beyond reproductive and hormonal issues. Implementation of the policy is also meant to address inattention to sex influences in biomedical research. Sex affects: Cell physiology, metabolism, and many other biological functions; symptoms and manifestations of disease; and responses to treatment. For example, sex has profound influences in neuroscience, from circuitry to physiology to pain perception.[169]

Yet the 2016 Rule required covered entities to ''treat individuals consistent with their gender identity'' in virtually every respect. The 2016 Rule's definition of gender identity does not turn on any biological or external indicia of sex, and explicitly disavows any such reliance.[170] Under the 2016 Rule, one can identify as ''male, female, neither, or a combination of male and female.'' A person's gender identity under the 2016 Rule is determined ultimately by what a person says his or her gender identity is, and a covered entity is bound to treat all individuals ''consistent with their gender identity'' the moment it becomes aware of such a declaration (which must be allowed to change under the 2016 Rule). No other Federal statute, agency rule, or guidance has ever gone so far on this question.[171]

In this regard, the 2016 Rule risked masking clinically relevant, and sometimes vitally important, information by requiring providers and insurers to switch from a scientifically valid and biologically based system of tracking sex to one based on subjective self-identification according to gender identity. By eliminating the transgender provisions and definitions from the 2016 Rule, this final rule clarifies that sex, according to the Title IX's plain meaning, may be taken into account in the provision of healthcare, insurance (including insurance coverage), and health research, as was the practice before the 2016 Rule.

Section 92.206 of the 2016 Rule required covered entities to ''treat individuals consistent with their gender identity'' in every respect save one. Namely, ''a covered entity may not deny or limit health services that are ordinarily or exclusively available to individuals of one sex, to a transgender individual based on the fact that the individual's sex assigned at birth, gender identity, or gender otherwise recorded is different from the one to which such health services are ordinarily or exclusively available.'' This confusingly worded exception is premised on the fact that entities may provide specific services to ''one sex'' based on biology, yet must grant transgender individuals access to such single-sex services regardless of how they identify *and* regardless of their sex (''sex assigned at birth''). The 2016 Rule's mandate cannot answer, for example, how a provider is to determine whether or when a transgender individual is entitled by law to be referred to a women's mental health support group, a men's mental health support group, either group, or both at the same time.

Some providers choose to code and track patients according to their biology for some purposes and according to their gender identity for other purposes. Under the 2016 Rule, however, if a transgender patient self-identifies as male in the medical intake process, yet an examining doctor has reason to believe the patient is biologically female, the doctor could reasonably assume that he or she is *prohibited* from changing the person's chart to reflect female sex, because that would not be treating the person ''consistent with'' her stated gender identity.

In the 2019 NPRM, the Department cited a 2019 case from a medical journal article that concluded that a nurse had applied longstanding standards when triaging what the article called a ''man with abdominal pain,'' who identified as male and had been classified as such, but who was in fact a pregnant woman.[172] Because indications of pregnancy were not manifest, and because the patient was treated according to stated gender identity, her pregnancy was not diagnosed early, and the child was stillborn.

This provider was treating the patient according to her stated gender identity (male), just as the 2016 Rule demanded. Indeed, the provider risked liability under the 2016 Rule for not taking that step. The provider did not act unreasonably when, consistent with longstanding medical practice, it did not have a policy of asking every man with abdominal pain whether he is pregnant.

Unlike the many strained hypothetical objections offered in opposition to the proposed rule, this case is not based on speculation. Rather,

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[167] *See, e.g.,* NIH Research Matters, Gene Linked to Sex Differences in Autism (Apr. 14, 2020), *https://www.nih.gov/news-events/nih-research-matters/gene-linked-sex-differences-autism;* Wei Yang, Nicole M. Warrington, *et al.,* Clinically Important Sex differences in GBM biology revealed by analysis of male and female imaging, transcriptome and survival data, Science Translational Medicine (Jan. 21, 2019), *https://www.ncbi.nlm.nih.gov/pubmed/30602536S* (identifying sex-specific molecular subtypes of glioblastoma); Ramona Stone and W. Brent Weber, Male-Female Differences in the Prevalence of Non-Hodgkin Lymphoma, 81 Journal of Environmental Health 16 (Oct. 2018); *https://www.ncbi.nlm.nih.gov/pubmed/28065609;* Anke Samulowitz, Ida Gremyr, et al., ''Brave Men'' and ''Emotional Women'': A Theory-Guided Literature Review on Gender Bias in Health Care and Gendered Norms towards Patients with Chronic Pain, Pain Research and Management (Feb. 25, 2018), *https://www.ncbi.nlm.nih.gov/pubmed/29682130* (stating that ''the response to opioid receptor antagonists may generate a difference between men's and women's experiences of pain''); Douglas C. Dean III, E.M. Planalp, *et al.,* Investigation of brain structure in the 1-month infant, Brain Structure and Function 1–18 (Jan. 5, 2018), *https://www.ncbi.nlm.nih.gov/pubmed/29305647* (finding differences between male and female infants at the age of 1 month); Stefan Ballestri, Fabio Nascimbeni, *et al.,* NAFLD as a Sexual Dimorphic Disease: Role of Gender and Reproductive Status in the Development and Progression of Nonalcoholic Fatty Liver Disease and Inherent Cardiovascular Risk, Advances in Therapy (May 19, 2017), *https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5487879;* Susan Sullivan, Anna Campbell, *et al.,* What's good for the goose is not good for the gander: Age and gender differences in scanning emotion faces, 72:3 Journals of Gerontology 441 (May 1, 2017), *https://www.ncbi.nlm.nih.gov/pubmed/25969472;* Ester Serrano-Saiz, Meital Oren-Suissa, *et al.,* Sexually Dimorphic Differentiation of a C. Elegans Hub Neuron Is Cell Autonomously Controlled by a Conserved Transcription Factor, 27 Current Biology 199 (Jan. 5, 2017).

[168] NIH Guidance, *Consideration of Sex as a Biological Variable in NIH-funded Research* at 1 (2017), *https://orwh.od.nih.gov/sites/orwh/files/docs/NOT-OD-15-102_Guidance.pdf.*

[169] Janine Austin Clayton (Office of Research on Women's Health, NIH), ''Applying the new SABV (sex as a biological variable) policy to research and clinical care.'' *Physiology & Behavior* 187 (2018), 2.

[170] 81 FR 31467 (''Gender identity means an individual's internal sense of gender'' whose expression ''may or may not conform to social stereotypes associated with a particular gender''); 81 FR 31468 (''[sex] stereotypes can include the expectation that individuals will *consistently identify with only one gender* and that they will act in conformity with the gender-related expressions stereotypically associated with that gender.'') (emphasis added).

[171] *Cf.* 18 U.S.C. 249 (Shepard-Byrd Hate Crimes Act) (defining gender identity as ''actual or perceived gender-related characteristics'').

[172] *See* 84 FR 27855, n. 55, citing Daphne Stroumsa, Elizabeth F.S. Roberts, et al., ''The Power and Limits of Classification—A 32 Year Old Man with Abdominal Pain,'' New England Journal of Medicine (May 16, 2019), *https://www.ncbi.nlm.nih.gov/pubmed/31091369* (a patient with an electronic medical record classification as male did not receive care to treat ''labor, placental abruption, or preeclampsia—urgent conditions presenting a potential emergency'').

it involved the actual death of an unborn child and attendant trauma and anguish for those involved, all potentially because of a misdiagnosis resulting from a reliance on stated gender identity as opposed to sex. Given that life-and-death decisions are frequently made in healthcare settings and often in urgent circumstances, this story serves as an example of the consequences that could result from the confusion caused by the 2016 Rule and its mandate to treat individuals ''consistent with'' stated gender identity.

Comment: Commenters stated that it is clear that characteristics traditionally protected under antidiscrimination law are those inherent, immutable, and readily identifiable. They stated that a binary and biological definition of sex enables consistency and clarity about who is a member of the protected category, what the prohibited conduct is, how covered entities must comply both by inaction and action, and when government enforces a right against discrimination. Commenters stated that changing the definition of the protected category to an identity that is changeable and fluid results in a legal standard that is impractical if not impossible to apply to particular circumstances. Commenters found that those courts that recognize gender identity discrimination apply the prohibitions inconsistently.

Healthcare providers submitted comments stating that ''gender identity'' is a subjective psychological concept that cannot be anatomically located within the brain, and that no MRI or CT scan, autopsy, genetic testing, blood test, or pathology report can localize an ''internal sense'' and verify whether the gender identity of a patient is actually male, female, neither, or a combination of male or female.

Commenters stated that they did not understand the categories in the 2016 Rule's definition of gender identity which are not obviously limited in the number of possible permutations nor anchored in biology. Commenters were concerned that Title IX's prohibitions against disparate treatment of biological women as different from biological males may no longer be prohibited or even enforceable. When a protected category that was binary now becomes a subjective spectrum, commenters did not know what the substantive standard was to establish a facial violation, or how to apply it to particular facts. Some commenters stated that it contradicts Title IX to treat sex as a non-binary concept when the statute explicitly protects persons of either ''one sex'' or ''the other sex.'' Commenters stated the 2016 Rule retained the words male or female—two categories which have long formed the biological and binary concept of sex—but eliminated their substantive content. The breadth of the definition of gender identity included both exterior (''expression'') and interior (''internal'' sense) characteristics; mental (''identity'') and physical (''body characteristics''); variable over time (at birth vs. after birth), feminine or masculine (binary), both (''some combination''), and androgyny (''neither''). Commenters stated that they did not have clarity as to how to assess claims of ''either/or'' disparate treatment as well as ''both/and.'' Commenters also noted the text also included an expansive catchall provision stating that the definition of gender identity ''is not limited to'' what was in that enumerated list.

Response: The Department agrees that gender identity is difficult to define, in some cases difficult to categorize, and frequently very difficult to determine with objective certainty. For these and reasons stated elsewhere, the 2016 Rule's provisions on gender identity were confusing facially and in application. This final rule eliminates that confusion by returning to the plain meaning of the underlying statutes, relying as it does on the plain meaning of ''sex'' as biologically binary.

Comment: The Department received comments stating that the proposed rule would harm the privacy interests of children with gender dysphoria who seek to use restrooms according to gender identity and would otherwise encourage bullying. Commenters also alleged that in Federal court cases concerning gender identity unrelated to health services, courts have rejected arguments about competing privacy concerns of non-transgender individuals with respect to bathroom access for transgender individuals.

Response: These comments show that, although the preamble to the 2016 Rule had stated that it was not intended to overrule ''existing Federal, State and local laws, rules or regulations'' such as Title IX or its regulations, under which ''certain types of sex-specific facilities such as restrooms may be permitted'' such as bathrooms or intimate facilities,[173] even the 2016 Rule's supporters can reasonably interpret its provisions as doing precisely that.

The Department acknowledges that there is new and developing case law on the intersection of privacy concerns of non-transgender individuals and bathroom access for transgender individuals.[174] As commenters pointed out, there have been recent Title IX complaints regarding access to intimate facilities and associated case law. One complaint alleged a sexual assault by a male who identifies as female and had been granted access to a single-sex (female) facility based on stated gender identity.[175] Another incident involved dueling discrimination and privacy complaints concerning the use of communal shower facilities. After filing a complaint, a male who identifies as female was granted an exception to live as a female. A group of females filed complaints that their privacy rights were violated.[176] At least one Title IX complaint similar to these was denied by a court because of the specific facts of the case.[177] But the case law on such complaints is very new and still developing.

The Department notes that, regardless of whether Title IX *requires* covered entities to maintain sex-specific bathrooms, the Title IX regulations continue to *permit* policies that regulate intimate facilities based on sex. These regulations are consistent both with the ordinary, biological understanding of the word ''sex'' as reflected throughout the text of Title IX and the ordinary understanding of discrimination. Indeed, as the U.S. government has noted, the provisions in Title IX stating that nothing in that statute prohibits educational institutions from ''maintaining separate living facilities *for the different sexes*'' ''could not sensibly function if 'the term 'sex' includes 'gender identity,' which, unlike 'sex,' may not be limited to two categories.'' [178] Moreover, it has long been understood that, although ''separate bathrooms are obviously not blind to sex, they do not discriminate because of sex . . . so long as they do not treat men or women disadvantageously compared to the opposite sex.'' [179] In light of experience, including experience since the 2016 Rule was promulgated, the Department concludes that this final rule, by

[173] 81 FR 31409.

[174] *See, e.g., Soule* v. *Conn. Ass'n of Schools,* No. 3:20–cv–00201 (D. Conn. filed Feb. 12, 2020).

[175] Moriah Balingit, ''After Alleged Sexual Assault, Officials Open Investigation of Transgender Bathroom Policy,'' *The Washington Post* (Oct. 9, 2018), *https://www.washingtonpost.com/local/education/after-alleged-sexual-assault-officials-open-investigation-of-transgender-bathroom-policy/2018/10/09/431e7024-c7fd-11e8-9b1c-a90f1daae309_story.html.*

[176] *See* Department of Defense, ''Report and Recommendations,'' 37.

[177] *See Doe* v. *Boyertown Area Sch. Dist.,* 897 F.3d 518, 531–33 (3d Cir. 2018).

[178] Statement of Interest for DOJ, *Soule* v. *Conn. Ass'n of Schools,* 3:20–cv–00201–RNC (D. Conn., filed March 27, 2020) at 5.

[179] Brief for EEOC, *Harris Funeral Homes,* at 36.

removing the possibility that the Section 1557 regulations could be read as overruling Title IX's regulatory permission to maintain certain sex-segregated facilities (a permission consonant with Title IX's prohibition on sex discrimination, as explained above), will better permit covered entities to balance relevant privacy interests. The Department declines to retain a provision that could reasonably be read to prohibit covered entities from recognizing the difference between men and women or acting to protect men's and women's privacy interests in HHS-funded health programs or activities.[180]

Comment: Some commenters challenged the requirement under the 2016 Rule that medical professionals must use a patient's preferred pronouns based entirely on self-identification, regardless of biological sex or the presence or absence of surgery or the use of masculinizing or feminizing hormone treatments. Some commenters disagreed with any requirement that forces providers to treat patients in a manner other than according to their biological sex, including through coerced use of pronouns. Others stated that social transition treatment required providers to use the preferred pronouns or preferred names of patients, and to identify patients according to their preferred sex effectively at all times.

Response: The 2016 Rule preamble held out a provider's ''persistent and intentional refusal to use a transgender individual's preferred name and pronoun and insistence on using those corresponding to the individual's sex assigned at birth'' as a potential example of hostile-environment sex discrimination under Section 1557.[181] At least one district court has held similarly that when a provider allegedly ''continuously referred to'' a transgender patient ''with female pronouns'' in accordance with her sex, this could be sufficient grounds for a sex discrimination claim under Section 1557 in light of the *Price Waterhouse* ''stereotyping'' theory discussed above.[182] This view, again, rested on a misreading of Title IX.

Pronouns are not stereotypes. Pronouns reflect the most elementary sex-based classification in the English language. They are routinely used in scientific contexts to refer to humans as well as any other animals that are either male or female. They identify an individual's sex, which is an essential element of determining sex-based discrimination under Title IX. This final rule does not interfere with the medical judgment of any covered entity in treating gender dysphoria, but Title IX cannot be used to require covered entities to ignore or override the underlying distinctions of sex that Title IX itself is premised upon.

The Department thus does not believe that Title IX requires participants in covered entities to use a pronoun other than the one consistent with an individual's sex and does not believe it otherwise appropriate to dictate pronoun use or force covered entities to recognize a conception of sex or gender identity with which they disagree for medical, scientific, religious, and/or philosophical reasons. This final rule does not prevent covered entities from maintaining or adopting pronoun policies, or endorsing a variety of theories of gender identity, to the extent otherwise allowed by statutory and constitutional law. This rule also does not prevent State and local jurisdictions from imposing such policies to the extent allowed by statutory and constitutional law.

Comment: A commenter contended that the Department exceeded its authority by proposing to roll back protections for transgender individuals, noting that a 2012 letter from OCR stated that Section 1557 protections included gender identity.[183]

Response: Consistent with the position taken by the Executive Branch on Title IX since 2017, the Department has concluded that the position stated in the 2012 OCR letter reflected an incorrect understanding of Title IX, as incorporated into Section 1557. The Department indefinitely suspended the sub-regulatory guidance contained in the 2012 letter in light of the proposed changes to the rule. 84 FR 27872 n.175. Having considered the matters raised fully, the Department disavows the views expressed in the 2012 letter that concern the coverage of gender identity and sex discrimination under Section 1557. Similarly, the Department disavows the views expressed in a voluntary resolution agreement entered into with The Brooklyn Hospital Center in 2015 resolving allegations of gender identity discrimination under Section 1557.[184] To the extent that those views were integrated or incorporated into the 2016 Rule with respect to gender identity, they are rescinded in this final rule.

Comment: Many commenters asserted that the proposed rule removes legal protections for transgender individuals and would allow or encourage providers to deny basic healthcare to individuals who identify as transgender. Commenters pointed to what they said were instances of discrimination on the basis of the identity of the patient as a transgender individual, where providers allegedly used excessive precautions, avoided touching the patient, engaged in unnecessary physical roughness in pelvic examinations, made insensitive jokes, intentionally concealed information about options for different treatments, asked unnecessarily personal questions, referred to transgender patients by pronouns and terms of address based on their biological sex rather than their gender identity, and/or disclosed a patient's medical history without authorization. Others cited 15 closed cases handled by OCR of alleged discrimination against transgender individuals in which providers had refused sex-specific care or coverage on the basis of discrepancies between the individual's sex and stated gender identity.

Response: The Department believes that all people should be treated with dignity and respect, regardless of their characteristics including their gender identity, and they should be given every protection afforded by the Constitution and the laws passed by Congress. The Department is committed to fully and vigorously enforcing all of the nondiscrimination statutes entrusted to it by Congress. For reasons explained above, the term ''on the basis of . . . sex'' in Section 1557 does not encompass discrimination on the basis of gender identity. Unprofessional conduct such as inappropriate jokes or questions, excessive precautions, or concealment of treatment options, may be covered under State medical malpractice, tort, or battery laws.

Commenters' concern about denial of basic healthcare to transgender

[180] *See* OCR Voluntary Resolution Agreement with The Brooklyn Hospital Center (requiring assignment of persons to shared patient rooms according to gender identity) (2015), sub-regulatory guidance contained therein since *abrogated,* as discussed above, *https://www.hhs.gov/sites/default/files/ocr/civilrights/activities/agreements/TBHC/vra.pdf.*

[181] 81 FR 31406.

[182] *See Prescott* v. *Rady Children's Hospital-San Diego,* 265 F. Supp. 3d 1090, 1098–100 (S.D. Cal. 2017) (''As other courts have recognized, '[b]y definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth. '. . . The Complaint alleges that the RCHSD staff discriminated against Kyler by continuously referring to him with female pronouns, despite knowing that he was a transgender boy and that it would cause him severe distress. . . . Accordingly, Ms. Prescott's claim on behalf of Kyler survives under [Section 1557 of] the ACA.'').

[183] *See* Letter from Leon Rodriguez, Director, U.S. Dep't of Health & Human Servs., Office for Civil Rights, to Maya Rupert, Federal Policy Director, National Center for Lesbian Rights (Jul. 12, 2012), *available at https://perma.cc/RB8V-ACZU.*

[184] *See* OCR Voluntary Resolution Agreement with The Brooklyn Hospital Center.

individuals appears to be based largely on unsubstantiated hypothetical scenarios. Although some rare instances have been reported, they are not recent, and the Department is unaware of a significant number of cases where a transgender individual who has accurately identified his or her (biological) sex to a provider has nonetheless been denied relevant, non-transition-related healthcare on the basis of his or her gender identity. The Department is not aware of any providers claiming that they see a need for or wish to make broad, identity-based denials of care. To the contrary, many providers who specifically object to the 2016 Rule's mandates with respect to sex-reassignment treatments and/or elective abortion procedures explicitly affirmed in comments their commitment to treat all patients without regard to self-identification, inclusive of gender identity or sexual orientation. In the anecdotes of discrimination reported by commenters, what is often being alleged is poor care or insensitive treatment rather than outright denial of care, and is often lacking documentation. This lack of substantial evidence supports the Department's understanding, in contrast to the allegations of some commenters, that denial of basic healthcare on the basis of gender identity is not a widespread problem in the U.S. Moreover, to the extent that the 2016 Rule provided against denial of basic healthcare on the basis of gender identity, those provisions of the rule have been preliminarily enjoined since December 2016 and have since been vacated; any future mistreatment hypothesized by commenters would not, then, be the result of this final rule.

Additionally, several of the behaviors alleged by commenters would be unlawful even if Title IX and Section 1557 had never been enacted. Unnecessary roughness in a pelvic examination, or any other medical procedure or examination without a medical basis or appropriate informed consent, may be a case of battery or malpractice, which should be reported to local law enforcement and/or licensing authorities. If such conduct willfully causes bodily injury because of gender identity, and is in or affecting interstate commerce, then it could be a Federal hate crime.[185] When OCR becomes aware of any crimes that may violate Federal law, it may be required to make a referral to the Department of Justice.[186] The Emergency Medical Treatment and Labor Act (EMTALA) also requires stabilization in certain emergency medical situations.

OCR also continues to enforce Federal health information privacy laws to ensure the confidentiality of all individuals' protected medical information, including information concerning gender dysphoria diagnosis or treatment, sexual orientation, or HIV status.[187]

The Department, through its Offices of Minority Health, supports outreach to diverse populations and those facing particularized or disproportionate health challenges.

Comment: Commenters alleged that removing the definitions of ''gender identity'' and ''on the basis of sex'' (which includes gender identity) from the rule would ''erase'' transgender individuals from the *Code of Federal Regulations.*

Response: The Department denies that removal of definitional terms in one regulation has the wide-ranging impact that commenters allege. Under this final rule, transgender individuals remain protected by the same civil rights laws as any other individual, and the Department will vigorously enforce their statutory and regulatory civil rights. This final rule also does not and cannot erase explicit statutory protections for individuals on the basis of gender identity, such as in hate crimes laws that bar violence committed on the basis of an individual's gender identity.[188]

iii. Termination of Pregnancy

Comment: Commenters reacted to the proposed rule's elimination of the 2016 Rule's language that had encompassed ''termination of pregnancy'' within the definition of ''on the basis of sex.'' Commenters stated that the Department's declining to take a position about the full scope of the meaning of ''termination of pregnancy'' in the 2019 NPRM was confusing, and that the point merited clarification. Some providers objected to the inclusion of ''termination of pregnancy'' under the 2016 Rule to the extent that it referred to elective abortions. Other providers interpreted ''termination of pregnancy'' to mean both elective abortion and natural termination of pregnancies. Others stated that all forms of termination of pregnancy should be encompassed in the prohibition on discrimination on the basis of sex.

Some commenters stated that removing the 2016 Rule's definition of ''on the basis of sex'' will allow discrimination against women based upon their abortion history. Commenters also identified a variety of other women's healthcare services related to pregnancy that may be implicated, including prenatal and postpartum services, tubal ligations, and birth control (both as a contraceptive and when used to treat other medical conditions). They also referred to infertility treatments including in vitro fertilization, and pointed to *Benitez* v. *North Coast Women's Care Medical Group, Inc.*[189] as a real-world example of discrimination in this regard. Commenters said that the proposed rule would or could permit discrimination against women through denial or restriction of access to treatments such as these, as well as treatments prior to, during, or after a miscarriage.

Response: Under this final rule, the Department will interpret Section 1557's prohibition on sex-based discrimination consistent with Title IX and its implementing regulations. This final rule ensures that the Department's Section 1557 regulations are implemented consistent with the abortion neutrality and statutory exemptions in Title IX. The regulations are subject to the text of the Title IX statute, so they cannot be ''construed to require or prohibit any person, or public or private entity, to provide or pay for any benefit or service, including the use of facilities, related to an abortion.'' 20 U.S.C. 1688. As explained below, this final rule also incorporates that statutory text explicitly into the Title IX regulations for the sake of clarity, to ensure those regulations are

[185] 18 U.S.C. 249(c)(4) (prohibiting hate crimes that are based on ''actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability'').

[186] *See* 34 U.S.C. 41303 (''All departments and agencies within the Federal government . . . shall report details about crime within their respective jurisdiction to the Attorney General''); 28 U.S.C. 535(b) (''any information, allegation, or complaint received in a department or agency of the executive branch of government relating to violations of title 28 involving Government officers and employees shall be expeditiously reported to the Attorney General by the head of the department or agency'').

[187] *See* U.S. Department of Health and Human Services, ''Careless handling of HIV information jeopardizes patient's privacy, costs entity $387k'' (May 23, 2017), available at *https://www.hhs.gov/about/news/2017/05/23/careless-handling-hiv-information-costs-entity.html* (OCR enforcement under HIPAA); *see also* U.S. Department of Health and Human Services, ''HHS Office for Civil Rights Secures Corrective Action and Ensures Florida Orthopedic Practice Protects Patients with HIV from Discrimination'' (Oct. 30, 2019), *https://www.hhs.gov/about/news/2019/10/30/hhs-ocr-secures-corrective-action-and-ensures-fl-orthopedic-practice-protects-patients-with-hiv-from-discrimination.html* (OCR enforcement under Section 504 and Section 1557).

[188] *See* 18 U.S.C. 249(c)(4) (prohibiting hate crimes that are based on ''actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability'').

[189] *Benitez* v. *N. Coast Women's Care Med. Grp., Inc.,* 106 Cal. App. 4th 978 (Mar. 4, 2003).

implemented consistent with the statute.

The *Franciscan Alliance* court vacated the ''termination of pregnancy'' language in the 2016 Rule because it failed to incorporate the abortion-neutrality language from the Title IX statute.[190] The Court held that ''Congress intended to incorporate the entire statutory structure, including the abortion and religious exemptions,'' [191] and concluded that by failing to include these exemptions, the Department unlawfully ''expanded the 'ground prohibited under' Title IX that Section 1557 explicitly incorporated.'' [192]

The Department is committed to enforcing vigorously the prohibition on discrimination on the basis of sex, through its implementing regulations (which include provisions on termination of pregnancy), as interpreted consistent with the text of Title IX. OCR will fully enforce its statutory authorities concerning any discriminatory denial of access to women's health services, including those related to pregnancy. The Department, however, declines to speculate on particular hypotheticals related to termination of pregnancy, and will proceed based on the specific facts and circumstances of each case that may arise.

Comment: Some commenters stated that without the 2016 Rule, there would be serious and/or life-threatening results because hospitals would not provide abortion care on the basis of religious beliefs, referencing *ACLU* v. *Trinity Health Corporation,* 178 F. Supp. 3d 614 (E.D. Mich. 2016), and *Means* v. *U.S. Conference of Catholic Bishops,* No. 1:15–CV–353, 2015 WL 3970046 (W.D. Mich. 2015). Some alleged that the proposed rule does not comply with constitutional law regarding abortion or the applicable standard of scrutiny for sex discrimination and imposes undue burdens on women. Some stated that the proposed rule would hurt women's health by denying or encouraging denial of access to abortion.

Others submitted evidence challenging the idea that the termination of pregnancy provision, if retained (and not enjoined by a court), would materially increase abortion access for the average person. Specifically, they state that the overwhelming majority of abortions in America are performed at high-volume abortion clinics, and that there is no reason to suspect that retaining the 2016 Rule would lead to a significant increase in hospitals or other institutions willing to perform abortions when compared to abortion providers as a whole. According to commenters, this is in part because many hospitals and medical institutions that do not have a formal position objecting to abortion are free to engage in them now yet do not perform them or do so only to a limited extent.[193] Additionally, commenters said that the relative dearth of doctors willing to perform abortions at institutions appears largely to be a result of independent physician choices, not of the policies of institutions that object to abortions.

Some commenters were concerned that the 2016 Rule's provisions on termination of pregnancy devalue human life, both with respect to unborn children who lose their lives, and with respect to mothers, as many abortions are dangerous and lead to life-threatening complications for women. Other commenters stated that HHS has a compelling interest in defending the sanctity of innocent human life at all stages. Some institutional providers who object to abortion stated that they can and do treat women who have had miscarriages, even using techniques that are commonly used in abortion (such as dilation and curettage), so long as the procedure itself is not intended to and does not result in the taking of a human life.

Response: The Department appreciates all comments related to the highly controversial matter of abortion. The strong views that Americans hold on various sides of this question are an important policy reason supporting the Congressionally-enacted abortion-neutrality language in Federal statutes such as Title IX. Because Section 1557 expressly incorporated Title IX—therefore including the abortion-neutrality provision—the Department likewise incorporates that provision for purposes of the covered entities under Section 1557. This final rule also does not add any abortion-related conscience protections beyond those that Congress has set down in statute. Those statutes have not been held to be unconstitutional. The Department will vigorously enforce these and all other Federal civil rights statutes under its jurisdiction.

This final rule also does not abrogate other longstanding Federal laws that may apply to situations related to pregnancy, including EMTALA and the Pregnancy Nondiscrimination Act. The Department will read all applicable laws and exemptions harmoniously.[194] In addition, the termination of pregnancy provisions of the 2016 Rule have been enjoined since December 2016 and are now vacated. Finally, this rule does not change the legal ability of providers to offer abortions. The Department therefore disagrees with commenters who predict that the finalization of this rule will significantly reduce abortion access or cause resulting health consequences.

iv. Sexual Orientation

Comment: Some commenters stated that the 2016 Rule's § 92.209 should be removed because Title VII and Title IX do not include sexual orientation in their prohibition of sex discrimination. They used as an example the fact that the previous Administration treated sex, sexual orientation, and gender identity as different concepts in an executive order that prohibited discrimination on the basis of sex, sexual orientation, and gender identity in Federal hiring, contracting, and employment.[195] They added that Congress has rejected the sexual orientation and gender identity provisions in the Employment Non-Discrimination Act, the Equality Act, and the Student Non-Discrimination Act.

Others said that sexual orientation is a foundational trait of an individual and that cannot be separated and/or isolated from his or her being and that the proposed rule would enable discrimination based on sexual orientation. Other commenters cite a general fear of discrimination; abuse or neglect related to sexual orientation; a

[190] *Franciscan Alliance,* 227 F. Supp. 3d 660, 690–91 (N.D. Tex. 2016) (''Title IX prohibits discrimination on the basis of sex, but . . . . categorically exempts any application that would require a covered entity to provide abortion or abortion-related services. 20 U.S.C. 1688. . . . Failure to incorporate Title IX's religious and abortion exemptions nullifies Congress's specific direction to prohibit only the ground proscribed by Title IX. That is not permitted.''); *Franciscan Alliance,* 414 F. Supp. 3d 928, 945, 947 (N.D. Tex. 2019) (adopting reasoning from preliminary injunction and vacating the portions of the rule it deemed unlawful).

[191] *Franciscan Alliance,* 227 F. Supp. 3d at 690–91.

[192] *Id.* (citing *Corley* v. *U.S.,* 556 U.S. 303, 314 (2009)).

[193] As one commenter wrote, ''A 2018 study in the journal *Contraception* found that only 7% of obstetrician-gynecologists in private practice had performed an abortion in 2013 or 2014. An older study published in 2011 in *Obstetrics and Gynecology* found that 97% of practicing obstetrician-gynecologists encountered patients seeking an abortion, though only 14% performed them. Finally, a 2014 study published in *Perspectives on Sexual and Reproductive Health* found that just 5% of abortions take place in hospitals or physicians' offices, demonstrating that the vast majority of abortions are not performed by healthcare providers at hospitals or physicians' offices.''

[194] *See* 42 U.S.C. 13955dd(c)(1)(ii) (EMTALA); Public Law 95–555, 92 Stat. 2076 (Oct. 31, 1978) (Pregnancy Nondiscrimination Act).

[195] Exec. Order No. 13672, 79 FR 42971–72 (July 21, 2014), *https://www.govinfo.gov/content/pkg/FR-2014-07-23/pdf/2014-17522.pdf.*

lack of inclusive services; social isolation; a sense of invisibility; lack of educated providers; and distrust of the healthcare system. They argue that these burdens lead to inadequate care, including preventive care, and require a Federal response. In support of these claims, commenters cited a survey stating that 8% of lesbian, gay, and bisexual respondents allege they have been refused care from a healthcare provider due to their sexual orientation.[196] Other commenters, however, cited a survey showing that 97% of responding faith-based medical professionals attest that they ''care for all patients in need, regardless of sexual orientation, gender identification, or family makeup, with sensitivity and compassion, even when [they] cannot validate their choices.'' [197] Thus, some commenters argue, the issue is not one of refusing to care for certain patients based on identity, but instead a matter of declining to participate in a discrete set of morally controversial procedures and treatments that are available elsewhere.

Others said that discrimination because of an individual's sexual orientation is plainly a species of sex stereotyping that is impermissible under Section 1557's sex discrimination prohibition and cite *Baldwin* v. *Foxx,* an EEOC decision,[198] in support of the idea that the final rule should cover sexual orientation.

Response: OCR may only enforce laws that Congress has enacted and the regulations that were promulgated pursuant to that statutory authority. The plain meaning of ''sex'' under Title IX encompasses neither sexual orientation nor gender identity. Concerning commenters' discussion of Congress's failure to add sexual orientation and gender identity to contexts encompassed by Title IX or Title VII, the Department is guided primarily by its understanding of the plain meaning of the statute.[199] This final rule does not change the status quo with respect to sexual orientation, because, as the Department stated in the 2019 NPRM preamble, sexual orientation was not explicitly included in the 2016 Rule text,[200] and the Department has concluded that it is a category separate from sex and does not fall within the ambit of discrimination ''on the basis of sex.''

The U.S. Attorney General and Solicitor General have persuasively argued that *Price Waterhouse* does not elevate sexual orientation to a protected category using a sex stereotyping theory under Title VII, just as it fails to make gender identity a protected category under Title IX.[201] Much as the reasonable distinctions on the basis of sex discussed above (in the subsection on gender identity) are not illegitimate sex stereotypes, so too, distinctions on the basis of sexual orientation do not as such constitute sex stereotyping. As an initial matter, distinctions on the basis of sexual orientation may be sex-neutral and apply equally to both sexes, which would mean that they do not burden anyone on the basis of sex. The Eleventh Circuit has recently rejected the application of *Price Waterhouse* to expand ''sex'' to include ''sexual orientation,'' citing an abundance of case law in support.[202] Additionally, as the Solicitor General has argued, distinctions made on the basis of sexual orientation are not necessarily based on stereotypes, as they may instead be based on ''moral or religious beliefs about sexual, marital, and familial relationships.'' [203] ''There is nothing irrational or improper'' in such beliefs.[204]

The Department notes that in *Baldwin* v. *Foxx,* the EEOC reversed its long-held position that sexual orientation discrimination was not protected under Title VII.[205] The United States government has since rejected the

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[196] *See* Shabab Ahmed Mirza and Caitlin Rooney, Discrimination Prevents LGBTQ People from Accessing Health Care, *Center for American Progress* (January 18, 2018), *https://www.americanprogress.org/issues/lgbt/news/2018/01/18/445130/discrimination-prevents-lgbtq-people-accessing-health-care/.*

[197] *See* Freedom2Care, ''Conscience in healthcare: 2019,'' *https://www.freedom2care.org/polling.*

[198] *Baldwin* v. *Foxx,* EEOC Appeal No. 0120133080, 2015 WL 4397641 (July 15, 2015).

[199] The Department agrees that Congressional inaction on this issue is supportive of the conclusion that Title IX does not encompass sexual orientation or gender identity, although it does not rely on this Congressional inaction in interpreting Title IX.

[200] 81 FR 31390 (''OCR has decided not to resolve in this rule whether discrimination on the basis of an individual's sexual orientation status alone is a form of sex discrimination.'').

[201] *See Bostock* v. *Clayton Cty. Bd. of Commissioners,* 2019 WL 4014070 at *26 (U.S. 2019) (Brief for the United States as *Amicus Curiae* Supporting Affirmance in No. 17–1618 (*Bostock* v. *Clayton Cty. Bd. of Commissioners*) and Reversal in No. 17–1623 (*Altitude Express Inc.* v. *Zarda*)) (''Title VII prohibits disparate treatment of men and women regardless of sexual orientation. Gay, lesbian, and bisexual employees, no less than straight employees, may invoke *Price Waterhouse* if they are subjected to gender-based stereotypes; a gay man who is fired for being too effeminate has just as strong a claim as a straight man who is fired for that reason.''). *See also Etsitty* v. *Utah Transit Authority,* 502 F.3d 1215, 1224–25 (10th Cir. 2007) (explaining that the legal issue ''is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed'').

[202] *Evans* v. *Georgia Reg'l Hosp.,* 850 F.3d 1248, 1256–57 (11th Cir. 2017) (''*Price Waterhouse* and *Oncale* are neither clearly on point nor contrary to *Blum* [v. *Gulf Oil Corp.,* 597 F.2d 936 (5th Cir. 1979) (''Discharge for homosexuality is not prohibited by Title VII. . . .'')]. These Supreme Court decisions do not squarely address whether sexual orientation discrimination is prohibited by Title VII.'') *Id.* at 1256–57 (''Finally, even though they disagree with the decisions, [the plaintiffs] acknowledge that other circuits have held that sexual orientation discrimination is not actionable under Title VII. *See, e.g., Higgins* v. *New Balance Athletic Shoe, Inc.,* 194 F.3d 252, 259 (1st Cir. 1999) (''Title VII does not proscribe harassment simply because of sexual orientation.''); *Simonton* v. *Runyon,* 232 F.3d 33, 36 (2d Cir. 2000) (''Simonton has alleged that he was discriminated against not because he was a man, but because of his sexual orientation. Such a claim remains non-cognizable under Title VII.''); *Bibby* v. *Phila. Coca Cola Bottling Co.,* 260 F.3d 257, 261 (3d Cir. 2001) (''Title VII does not prohibit discrimination based on sexual orientation.''); *Wrightson* v. *Pizza Hut of Am.,* 99 F.3d 138, 143 (4th Cir. 1996), *abrogated on other grounds by Oncale* v. *Sundowner Offshore Servs.,* 523 U.S. 75, 118 S. Ct. 998, 140 L.Ed.2d 201 (1998) (''Title VII does not afford a cause of action for discrimination based upon sexual orientation. . . .''); *Vickers* v. *Fairfield Med. Ctr.,* 453 F.3d 757, 762 (6th Cir. 2006) (''[S]exual orientation is not a prohibited basis for discriminatory acts under Title VII.''); *Hamner* v. *St. Vincent Hosp. & Health Care Ctr., Inc.,* 224 F.3d 701, 704 (7th Cir. 2000) (''[H]arassment based solely upon a person's sexual preference or orientation (and not on one's sex) is not an unlawful employment practice under Title VII.''); *Williamson* v. *A.G. Edwards & Sons, Inc.,* 876 F.2d 69, 70 (8th Cir. 1989) (''Title VII does not prohibit discrimination against homosexuals.''); *Rene* v. *MGM Grand Hotel, Inc.,* 305 F.3d 1061, 1063–64 (9th Cir. 2002) (''[A]n employee's sexual orientation is irrelevant for purposes of Title VII. It neither provides nor precludes a cause of action for sexual harassment. That the harasser is, or may be, motivated by hostility based on sexual orientation is similarly irrelevant, and neither provides nor precludes a cause of action.''); *Medina* v. *Income Support Div.,* 413 F.3d 1131, 1135 (10th Cir. 2005) (''Title VII's protections, however, do not extend to harassment due to a person's sexuality. . . . Congress has repeatedly rejected legislation that would have extended Title VII to cover sexual orientation.'') (internal quotations omitted). *Evans* and the EEOC question these decisions, in part, because of *Price Waterhouse* and *Oncale.* Whether those Supreme Court cases impact other circuit's decisions, many of which were decided after *Price Waterhouse* and *Oncale,* does not change our analysis that *Blum* is binding precedent that has not been overruled by a clearly contrary opinion of the Supreme Court or of this Court sitting *en banc.*'').

[203] *Bostock* v. *Clayton Cty. Bd. of Commissioners,* 2019 WL 4014070 at *25 (U.S. 2019) (Brief for the United States as *Amicus Curiae* Supporting Affirmance in No. 17–1618 (*Bostock* v. *Clayton Cty. Bd. of Commissioners*) and Reversal in No. 17–1623 (*Altitude Express Inc.* v. *Zarda*)).

[204] *See Tuan Anh Nguyen* v. *INS,* 533 U.S. 68. *See also Obergefell* v. *Hodges,* 135 S. Ct. 2585, 2602 (2015) (referring to opinions that are ''based on decent and honorable religious or philosophical premises'' and are therefore not ''disparaged here''); *See Masterpiece Cakeshop* v. *Colorado Civil Rights Comm'n,* 138 S. Ct. 1719, 1729 (2018) (''To describe a man's faith as 'one of the most despicable pieces of rhetoric that people can use' is to disparage his religion in at least two distinct ways: by describing it as despicable, and also by characterizing it as merely rhetorical—something insubstantial and even insincere.'').

[205] *See e.g., Angle* v. *Veneman,* EEOC Decision No. 01A32644, 2004 WL 764265, at *2 (Apr. 5, 2004) (recognizing that the EEOC had ''consistently held that discrimination based on sexual orientation is not actionable under Title VII''), *Marucci* v. *Caldera,* EEOC Decision No. 01982644, 2000 WL 1637387, at *2–*3 (Oct. 27, 2000).

EEOC's novel position.[206] Given Congress's decision not to extend civil rights protections on the basis of sexual orientation in the field of health and human services, the Department believes that State and local governments are best equipped to balance the multiple competing considerations involved in what remain a contentious and fraught set of questions.

v. Scrutiny for Sex-Based Classifications (Repeal of § 92.101(b)(3)(iv) of the 2016 Rule)

The Department proposed to repeal 92.101(b)(3)(iv) of the 2016 Rule, which forbids covered entities from operating a health program or activity restricted to members of one sex unless they can ''demonstrate an exceedingly persuasive justification, that is, that the sex-specific health program or activity is substantially related to the achievement of an important health-related or scientific objective.'' [207]

Comment: Commenters stated that the 2016 Rule's provisions would pose an unjustified burden on, and lead to excessive scrutiny of, entities operating single-sex facilities in healthcare, as well as entities or persons who would claim religious or abortion exemptions under Title IX.

Response: The Department agrees that the 2016 Rule placed an unjustified burden on sex-specific health programs and activities conducted by private entities. The ''exceedingly persuasive justification'' legal standard under Equal Protection jurisprudence sets a limit to *governmental* actions that discriminate on the basis of sex, such as the military draft.[208] This standard is foreign to Title IX jurisprudence.[209] The 2016 Rule cited no case law in support of its decision to import a significantly modified version of this standard from constitutional law into its interpretation of ''on the basis of sex'' as defined by Title IX.[210] The express statutory exemptions to Title IX's nondiscrimination provisions, such as for fraternities and sororities, do not require individual covered entities to provide an ''exceedingly persuasive justification'' before being able to benefit from the exemption. Title IX also does not require religious entities to provide such a justification to qualify for the religious exemption from Title IX nondiscrimination provisions. To require such a justification in the enforcement of Section 1557 would be to impose a significant burden on private entities that the statutory text does not contemplate. Government actors are routinely subjected to levels of judicial scrutiny that private parties (even private parties receiving Federal funds) are not, such as where constitutional provisions restrict government action, or where statutes allow civil rights actions against State actors. *See, e.g.,* 1st Am., U.S. Const.; 42 U.S.C. 1983; 42 U.S.C. 2000bb, *et seq.* It would be inappropriate to constrain medical professionals' best judgment by requiring them to meet the governmental burden of proof every time they seek to draw a reasonable distinction on the basis of sex in providing healthcare or separate programs or activities for the two sexes.[211] As stated above, such distinctions are not inherently discriminatory: It is not discriminating against men to exclude them from, for example, gynecological services, because men are not similarly situated to women for purposes of such services. Providers accordingly should not be required to present an ''exceedingly persuasive justification'' for providing gynecological services only to women. OCR will, however, evaluate, and respond appropriately to, any allegations that a covered entity's sex-specific health programs or activities have in fact discriminated unlawfully on the basis of sex, including sexual harassment.[212]

vi. Disparate Impact Under § 92.101(b)(3)(iii) of the 2016 Rule

The Department proposed to repeal 92.101(b)(iii) of the 2016 Rule, which prohibited selection of sites or facilities that have an effect of discriminating on the basis of sex.[213]

Comment: Some commenters opposed repealing language that affirmed a disparate impact theory under grounds of nondiscrimination encompassed by Section 1557, contending that the civil rights statutes cited in Section 1557 authorize disparate impact claims.

One commenter asserted that the very existence of Section 1557 indicates that the ACA intends to extend protections against disparate impact discrimination to private rights of action: Title VI already applied in the context of healthcare programs and activities, so Section 1557 would have been meaningless if it did not also allow for private rights of action for disparate impact discrimination. The same commenter also took issue with the proposed rule's elimination of monetary damages for disparate impact claims.

Response: Case law has indicated that certain civil rights statutes incorporated by Section 1557 do authorize disparate impact claims: Namely, claims with respect to discrimination on the basis of race, color, national origin, and disability.[214] Title IX, however, authorizes no such claims regarding discrimination on the basis of sex. Similarly, provisions relating to site or facility selection based on race, color, national origin, or disability are found in HHS's Title VI and Section 504 regulations, but are not found in HHS's Title IX regulations.[215] Insofar as the 2016 Rule added new grounds of prohibited discrimination not found in the statute, the Department believes it is necessary to revert to the underlying statutes and their implementing regulations. As a result, to the extent any of the underlying statutes authorize disparate impact claims, this final rule will recognize such claims by virtue of its reliance on the governing statutes, regulations, guidance and case law applicable to such claims, without needing to delineate the availability or lack of availability of all possible claims in this final rule. In reviewing all complaints that raise a disparate impact claim, the Department will consider the circumstances of each complaint and will independently apply each statute and underlying regulation, according to its text and any applicable court precedents, to the health context under Section 1557.[216]

Comment: Some commenters stated that that the proposed rule's removal of protections against disparate impact discrimination, especially concerning race, color, and national origin, will lead to more instances of discrimination and fewer means of recourse.

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[206] *See* Brief for United States, *Bostock* v. *Clayton Cty. Bd. of Commissioners,* No. 17–1618 (U.S. filed Aug. 23, 2019).

[207] 81 FR 31470.

[208] *See Rostker* v. *Goldberg,* 453 U.S. 57, 69–70 (1981).

[209] *See, e.g.,* the clear distinction at *Whitaker* v. *Kenosha Unified Sch. Dist.,* 858 F.3d 1034, 1046–50 (7th Cir. 2017) (''Title IX Claim''), and 1050–54 (''Equal Protection Claim,'' encompassing the ''exceedingly persuasive justification'' test).

[210] *Cf.* 81 FR 31408–09.

[211] *See* 2016 Rule, 81 FR 31409 (''In all cases, . . . OCR will expect a covered entity to supply objective evidence, and empirical data if available, to justify the need to restrict participation in the program to only one sex.'').

[212] *See* U.S. Department of Health and Human Services, ''HHS OCR Secures Agreement with MSU to Resolve Investigation into Sexual Abuse by Larry Nassar'' (2019), *https://www.hhs.gov/about/news/2019/08/12/hhs-ocr-secures-agreement-msu-resolve-investigation-sexual-abuse-larry-nassar.html.*

[213] 81 FR 31470.

[214] *See* 45 CFR 84.4(b)(4) (Title VI); 80.3(b)(2) (Section 504).

[215] *See* 45 CFR 80.3(b)(3) (Title VI); 84.4(b)(5) (Section 504).

[216] The Department responds to comments on private rights of action and damages below in the section on the enforcement mechanisms of the 2016 Rule.

Commenters cited data about health disparities in LGBT and female populations that they asserted were caused by discrimination on the basis of gender identity or termination of pregnancy, and stated that disparate impact analysis under the 2016 Rule is the appropriate way to address such discrimination. Another commenter questioned the persuasiveness of assessing the relative proportion of health disparities between racial, transgender, and/or female populations and other populations. The commenter stated that the available data did not provide conclusive evidence that the health disparities were caused by discriminatory conduct against LGBT persons and individuals seeking abortions, because correlations are not definite evidence of causation. The commenter contended that the proposed rule's approach causes ambiguity by blurring the distinctions between the two.

Response: As an initial matter, the Department wishes to reiterate that it will enforce Section 1557 in light of its regulations that already protect against disparate impact on the basis of race, color, or national origin. With respect to concerns regarding disparate impact on LGBT and abortion-seeking populations, the Department notes that this final rule conforms the Section 1557 Rule to HHS's Title IX regulations, under which the disparate impact standard does not apply. This conformity provides a clearer standard for covered entities, which are no longer required to have legally sufficient knowledge of the causes of statistically disproportionate health disparities on the basis of sex or gender identity.

vii. Insurance Coverage in § 92.207 of the 2016 Rule

The 2016 Rule prohibited insurers from ''hav[ing] or implement[ing] a categorical coverage exclusion or limitation for all health services related to gender transition.'' [217] Its preamble explained that this encompasses a ''range of transition-related services'' to treat gender dysphoria that are ''not limited to surgical treatments and may include, but [are] not limited to, services such as hormone therapy and psychotherapy, which may occur over the lifetime of the individual,'' and that may be required even if not ''strictly identified as medically necessary or appropriate'' insofar as the entity covers other types of similarly ''elective'' procedures.[218]

[217] 81 FR 31472, 31435–36.

[218] *Id.*

Comment: Commenters indicated support for the 2016 Rule's insurance coverage requirements, claiming that the Rule has led to increased access to gender transition services for transgender patients, and that these services will be lost if the proposed rule is finalized. In comments, clinicians provided information about the specific procedures, services, or treatments they perform or offer with respect to gender identity. Among those who offer medical interventions under the category of ''gender transition,'' there was a consensus that such interventions included genital sex reassignment surgeries, cross-sex hormonal treatment, counseling, and often psychological or psychiatric support. Some clinicians stated that only patients with longstanding identification as the opposite sex and distress with their biological sex sought these services. Beyond these, some (but not all) clinicians indicated that gender transition procedures could also include surgery for feminization or masculinization of the entire body, which could include reduction, augmentation, removal, or transplant of tissue, skin, hair, or body fat, as well as ''social transition'' services such as voice training.[219]

Some commenters regard transition services (which they said may include counseling, hormone therapy, and/or a variety of possible surgical treatments) as the governing standard of care. They directed the Department to studies on the matter including those cited in the 2016 Rule preamble, and cited what they said is a consensus of major American medical associations [220] about sex-reassignment surgery, cross-sex hormones, and affirmation counseling. Commenters urged the Department to follow the 2016 Rule in relying on the standards promulgated by the World Professional Association for Transgender Health (WPATH).[221]

Commenters stated that, under the WPATH standards and other protocols, treatment for gender dysphoria may require transition-related care.[222] Commenters asserted specific benefits from transition-related care in treating gender dysphoria.[223] For example, commenters said that access to transition services leads to decreased health disparities, such as lower levels of depression and suicide attempts.[224]

With respect to adolescents, some commenters promoted approaches that affirm or encourage gender identity variation, including sex reassignment, citing data that they said showed it resulted in fewer mental health concerns.[225] Some medical professionals also stated in comments that hormone blockers are a safe and reversible way to delay puberty, noting

[219] Examples of procedures identified were rhinoplasty, blepharoplasty, septoplasty, rhytidoplasty, abdominoplasty, electrolysis, liposuction, jawline modifications, scalp advancement, cheek and chin contouring, fat transfer, pectoral implants, forehead or brow lifts, or breast, buttocks, breast, waist, or lip augmentation/reduction. *See* Whitman-Walker Health; Philadelphia Transgender Center. HHS–OCR–2019–0007–138335 (Whitman-Walker Health). *http://www.thetransgendercenter.com/index.php/femaletomale1/ftm-price-list.html; http://www.thetransgendercenter.com/index.php/maletofemale1/mtf-price-list.html.*

[220] Commenters cited Jason Rafferty, ''Ensuring Comprehensive Care and Support for Transgender and Gender-Diverse Children and Adolescents,'' 142 *Pediatrics* no. 4 (Oct. 2018) (American Academy of Pediatrics policy statement), and noted that the American Medical Association, the American College of Physicians, the American Psychological Association, the American Psychiatric Association, the American Academy of Family Physicians, the Endocrine Society the American College of Obstetricians and Gynecologists, and the American Academy of Pediatrics, among others, support transition-related treatments.

[221] *See* 81 FR 31429.

[222] Commenters cited, for example, Wylie C. Hembree et al., *Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guideline,* 102 The Journal of Clinical Endocrinology & Metabolism 3869 (2017); Am. Medical Ass'n, *AMA Policies on GLBT Issues, Patient-Centered Policy H–185.950, Removing Financial Barriers to Care for Transgender Patients* (2008), *http://www.imatyfa.org/assets/ama122.pdf;* and Am. Psychiatric Ass'n, *Position Statement on Discrimination Against Transgender and Gender Variant Individuals* (2012); *http://www.dhcs.ca.gov/services/MH/Documents/2013_04_AC_06d_APA_ps2012_Transgen_Disc.pdf* (citing WPATH *Standards*); Am. Psychological Ass'n, *Policy on Transgender, Gender Identity & Gender Expression Non-Discrimination* (2008), *http://www.apa.org/about/policy/transgender.aspx.*

[223] Commenters cited, for example, Ashli A. Owen-Smith, et al., *Association Between Gender Confirmation Treatments and Perceived Gender Congruence, Body Image Satisfaction, and Mental Health in a Cohort of Transgender Individuals.* J Sexual Medicine (Jan. 17, 2018); Gemma L. Witcomb et al., *Levels of Depression in Transgender People and its Predictors: Results of a Large Matched Control Study with Transgender People Accessing Clinical Services,* J. Affective Disorders (Feb. 2018); and Cecilia Dhejne et al., *Mental Health and Gender Dysphoria: A Review of the Literature,* 28 Int'l Rev. Psychiatry 44 (2016).

[224] Commenters cited, for example, Lily Durwood, Katie A. McLaughlin, & Kristina R. Olson, *Mental Health and Self-Worth in Socially Transitioned Transgender Youth,* 56 J. Am. Acad. Child Adoles. Pyschiatry 116 (2017); Kristina R. Olson et al., *Mental Health of Transgender Children Who Are Supported in Their Identities,* 137 Pediatrics (2016); and Stephen T. Russel et al., *Chosen Name Use Is Linked to Reduced Depressive Symptoms, Suicidal Ideation, and Suicidal Behaviors Among Transgender Youth,* 64 J. Adolescent Health 503 (2018), *https://www.jahonline.org/article/S1054-139X(18)30085-5/fulltext.*

[225] Commenters cited Hill DB, Menvielle E, Sica KM, Johnson A. *An affirmative intervention for families with gender variant children: parental ratings of child mental health and gender.* J Sex Marital Ther. 36(1):6–23 (2010).

they have been used historically for children experiencing precocious puberty, or puberty at a younger age.

Other commenters disagreed as to whether sex reassignment treatments or surgeries, or gender-affirming therapies, are the proper care for gender dysphoria, or even whether they are ever medically indicated. Instead of surgery, hormones, or cross-sex affirmation counseling, some healthcare providers recommended watchful waiting, talk therapy that affirms a person's biological sex, or psychological or psychiatric treatment of comorbid conditions, as distinct from permanent surgical or hormonal interventions.[226] These providers explained that patients with gender dysphoria can work with a psychiatrist or counselor to better understand their feelings and emotions, and how the incongruence between their psychological identity and biological sex causes them distress. Some clinicians stated that reinforcing a patient's perception that there is something wrong with their body is damaging both to mental and physical health of transgender patients.

Some medical professionals discussed the long-term and irreversible physical effects of cross-sex hormones and puberty blockers, pointing to permanent deepening of voice, clitoromegaly, jaw enlargement, permanent sterility, and sexual dysfunction.[227] Doctors also commented that clinical data have not shown that such hormonal treatments improve the long-term psychological functioning of gender dysphoric persons. Clinicians stated that certain hormone treatments given to persons with gender dysphoria result in glucose and lipid metabolism disorders and cardiovascular conditions. Some clinicians were critical of the research supporting transition services, stating that it does not adequately assess such long-term health consequences and ignores a particularly vulnerable population of patients, namely the growing population of transitioned individuals who wish to transition back but are being ignored or impeded from receiving services affirming their biology.[228] They cited research indicating that patients did not need surgical or hormonal transition services when less drastic interventions would have been effective.[229] Clinicians stated that transition services were burdensome on these patients on several levels—financially, physically, and psychologically. Commenters concluded that repeal of the 2016 Rule would relieve the burden on these transgender individuals by letting providers decide, based on their assessment of individuals, what surgeries or treatments are appropriate according to their medical judgment and without coercive regulatory pressure.

Some medical providers raised concerns that prescription of sex-reassignment procedures and treatments had risked the health of young patients under their care due to lack of capacity at young ages to fully consent to treatments, difficulties with proper diagnosis during changes undergone in adolescence, and the negative impacts on bone mass and growth, emotional development, and sexual function.[230] Some clinicians stated that gender dysphoria is not an immutable mental health condition and, as such, the appropriate treatment is not physical and permanent. Some clinicians stated that current care for gender dysphoria includes accommodation counseling, the ''wait and see'' approach, and (where indicated) detransition therapy, because dysphoria, particularly in children, has a high rates of resolving without other interventions. They said that in their medical judgment, sex reassignment, cross-sex hormones, and affirming counseling are new and controversial treatments with known permanent and negative health consequences. Some medical clinicians criticized the WPATH standards[231] for coming to policy conclusions without adequate clinical evidence and recommending treatments that are still experimental.[232] Other commenters criticized the 2016 Rule for relying on the policy recommendations of an international advocacy group to

[226] Commenters cited sources including Monique Robles, ''Observations in a Gender Diversity Clinic,'' 44 Ethics & Medics 2 (Feb. 2019); and Devita Singh, Ph.D., ''A Follow-up Study of Boys with Gender Identity Disorder,'' Department of Human Development and Applied Psychology, Ontario Institute for Studies in Education, University of Toronto (2012).

[227] Commenters cited sources including Talal Alzahrani, M.D., et al., ''Cardiovascular Disease Risk Factors and Myocardial Infarction in the Transgender Population,'' *Circulation: Cardiovascular Quality and Outcomes* 12:4 (Apr. 2019), *https://www.ncbi.nlm.nih.gov/pubmed/30950651;* and Darios Getahun, M.D., et al., Cross-sex Hormones and Acute Cardiovascular Events in Transgender Persons, *Annals of Internal Medicine* (July 10, 2018), *https://www.ncbi.nlm.nih.gov/pubmed/29987313.*

[228] Commenters cited, for example, Miroslav L. Djordjevic et al., Reversal Surgery in Regretful Male-to-Female Transsexuals After Sex Reassignment Surgery, 13 J. of Sexual Med., 1000, 1006 (2016).

[229] Commenters cited, for example, Joe Shute, ''Sex change regret: Gender reversal surgery is on the rise, so why aren't we talking about it?'' *The Telegraph* (Oct. 1, 2017), *https://www.telegraph.co.uk/health-fitness/body/gender-reversal-surgery-rise-arent-talking.*

[230] Commenters cited, for example, Lieke Josephina Jeanne Johanna Vrouenraets, M.Sc., *et al.,* ''Early Medical Treatment of Children and Adolescents With Gender Dysphoria: An Empirical Ethical Study,'' *Journal of Adolescent Health* (Jan. 12, 2015), *https://www.ncbi.nlm.nih.gov/pubmed/26119518;* and Guido Giovanardi, ''Buying time or arresting development? The dilemma of administering hormone blockers in trans children and adolescents,'' *Porto Biomedical Journal* (2017).

[231] *See* Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People 16 (7th ed. 2011), *https://www.wpath.org/publications/soc.*

[232] Clinicians stated that the WPATH Standards ignored research evidence in support of a ''wait and see'' approach that gender dysphoria during childhood has a desistance rate, without drastic surgical or medical intervention for sex-reassignment or affirmation for social transition. They cited studies including Singh, D., ''A Follow Up Study of Boys with Gender Identity Disorder,'' doctoral dissertation submitted at University of Toronto (2012); Drummond, K. D., Bradley, S. J., Badali-Peterson, M., & Zucker, K. J., ''A follow-up study of girls with gender identity disorder,'' *Developmental Psychology* 44:1 (2008), 34–45; Wallien, M. S. C., & Cohen-Kettenis, P. T., ''Prediction of adult GID: A follow-up study of gender-dysphoric children,'' paper presented at the meeting of the World Professional Association of Transgender Health, Chicago, IL (2007); and Smith, Y.L., Van Goozen, S.H., & Cohen-Kettenis, P. T., ''Adolescents with gender identity disorder who were accepted or rejected for sex reassignment surgery: A prospective follow-up,'' *Journal of the American Academy of Child & Adolescent Psychiatry,* 40:4 (2001), 472–81.

interpret U.S. nondiscrimination laws and develop policy in the American healthcare sector. Other commenters disputed the conclusions of medical professional associations referenced above, stating that they had mischaracterized the medical data, and that life-altering transition interventions are not medically necessary, effective, or safe.[233]

Several commenters who expressed objections to the 2016 Rule clarified that they do not exclude patients from access to healthcare on the basis of the patient's gender identity, but rather objected to the rule requiring that they provide treatment that would be detrimental to the health and well-being of their patients. Part of their medical profession involves recommendations on which treatments will appropriately treat medical conditions to improve the health of their patients, and the choice not to provide transition surgery or abortion is part of those judgments. Some providers indicated that the options for treatment they recommend for patients with gender dysphoria are therapeutic and accommodative counseling to improve long-term health outcomes, particularly of young patients.

Other commenters said the Department should rely on the recent reviews of the clinical data on sex-reassignment surgery and cross-sex hormonal treatment by science and healthcare professionals at HHS and DOD.

Response: These comments further reinforce the Department's conclusion, discussed above in the section on gender identity, that there is no medical consensus to support one or another form of treatment for gender dysphoria. In the Department's current view, the 2016 Rule did not give sufficient evidence to justify, as a matter of policy, its prohibition on blanket exclusions of coverage for sex-reassignment procedures. The Department shares commenters' judgment that the 2016 Rule relied excessively on the conclusions of an advocacy group (WPATH) rather than on independent scientific fact-finding—such as the fact-finding that CMS undertook in deciding to not issue a National Coverage Determination with respect to sex-reassignment surgeries (as discussed above) due to insufficient proof of medical necessity. In addition, commenters identify a lack of clarity in the 2016 Rule's mandate, because of the lack of medical consensus as to what is even encompassed within ''gender transition procedures'' (*e.g.,* whether they include facial reconstruction or hair transplants). All these are further reasons why, as a matter of policy, Federal civil rights law should not be used to override providers' medical judgments regarding treatments for gender dysphoria. But as stated above, even if it were appropriate policy, such an end could not be achieved through application of Section 1557 and Title IX. There is no statutory authority to require the provision or coverage of such procedures under Title IX protections from discrimination on the basis of sex.

Comment: Some commenters state that the provisions in § 92.207(b)(3) through (5) of the 2016 Rule were confusing, overbroad, unclear, and inconsistent. Commenters stated that specificity in this area is necessary for efficient and transparent operation of the health insurance coverage to work for all involved. Commenters expressed concerns that the 2016 Rule did not address whether insurers are required to pay for all such surgeries, including without prior approval; approve them absent some standard of medical necessity; or approve them even over concerns of later malpractice lawsuits by the patient. A commenter reiterated his comments on the 2015 NPRM that the 2016 Rule's requirements related to gender transition were confusing for covered entities. The commenter said the regulatory requirement did not address which healthcare providers must provide these surgeries: *e.g.,* plastic surgeons, thoracic surgeons, general surgeons, or physicians whether or not they ordinarily perform major surgery. Others stated that although the 2016 Rule preamble characterized the categorical exclusion provision as a ''limited'' exception, the provisions on gender transition-related services were very broad and could include facial feminization or masculinization surgeries. Some commenters interpreted ''gender dysphoria'' as only affecting transgender individuals who seek sex re-assignment services, but other commenters cited clinical data indicating that men who had genital combat injuries and women who had removal of cancerous tissue in breasts and have received the diagnosis may also experience body dysmorphia.[234]

Other commenters stated that surgical sex reassignment (which may also include cross-sex hormonal treatment) may cost up to $22,025 on average for those covered by insurers. Still others said that the definition of ''gender dysphoria'' itself has changed rapidly and unpredictably over the years, leading to confusion, and point to its shifting conception as an experience of distress or a personal characteristic, to different and changing terms used for diagnosis of gender dysphoria in the DSM, and to the varied use of both clinical medical terms and sociological identity terms concerning the topic. The American Psychiatric Association justified the abandonment of the term ''gender identity disorder'' and its replacement with ''gender dysphoria'' in the Diagnostic and Statistical Manual of Mental Disorders to reduce stigmatization of the particular mental condition, but commenters noted that the DSM–5 made no changes to remove the classification of ''disorder'' for suicidal ideation, other body dysmorphias, or substance use disorder, which mental health advocates commented are also stigmatizing and may be comorbid with gender dysphoria.

Response: The Department agrees that the 2016 Rule made confusing and overbroad demands on covered entities, including insurance providers, and left unclear to what extent it was requiring providers to provide, or health insurance issuers to cover, treatments such as facial feminization, Adam's apple reduction, and hair transplants as part of ''health services related to gender transition.'' This final rule seeks to handle issues involving the exercise of legitimate medical judgment (including determinations relating to medical necessity and coverage decisions) with greater care, and to provide covered entities with greater clarity regarding their regulatory obligations.

Comment: Some commenters who identified as transgender patients opposed the proposed rule on the grounds that they had budgeted and planned with the expectation that there would be a limited or no cost for transition services due to the 2016 Rule, but they were surprised when they had an out-of-pocket cost not covered by their selected insurance company or plan. A much higher cost for these services resulted in the inability to receive or delay in receiving such services. They described surprise billing at multiple steps of the process, from reviewing health insurance coverage plans to waiting for reimbursements. These commenters stated that they anticipated and relied on OCR's 2016

[233] *See* Michelle Cretella, ''Gender Dysphoria in Children'' (November 2018) (American College of Pediatricians policy statement); *see also* James Cantor, ''American Academy of Pediatrics Policy and Trans- Kids: Fact-Checking,'' *Sexology* (Oct. 2018).

[234] Commenters cited M. Jocelyn Elders, et al., ''Medical Aspects of Transgender Military Service,'' Armed Forces and Society 41(2) (Mar. 2014): 199–220.

Rule as guaranteeing them insurance coverage because it is provided to other patients, and that this was their understanding of the Affordable Care Act and their civil rights protections. Other commenters contended that the 2016 Rule had caused the reduction of blanket exclusions for gender transition in health insurance coverage over the past three years.[235] Others stated that short-term limited duration insurance plans do not provide coverage of gender transition-related services, and therefore if transgender individuals are covered by such plans, they would not be able afford medically necessary services.

Response: With respect to coverage for gender transition services, the Department notes that this final rule makes no changes to what has been the status quo since December 2016, when the Department was enjoined from enforcement of the gender identity provisions of the 2016 Rule; such provisions have now been vacated by a court. Any recent decrease in blanket exclusions for sex-reassignment coverage is therefore more likely to be attributable to health insurance issuer or plan sponsor choice. State-level legal requirements concerning gender identity coverage have also come into effect in recent years, such as State statutes, regulations, guidance,[236] and court orders [237]—this final rule does not affect those changes in any way. But to the extent that provisions in the 2016 Rule did pressure any insurers to cover services on the basis of gender identity that they previously had not covered, such provisions did so without statutory authority, which is why they were preliminarily enjoined and vacated.

As a policy matter, the Department recognizes that surprise billing is a serious problem, but that topic is not a subject of this rulemaking. As for short-term limited duration insurance, for reasons discussed below, it is generally not regulated under this final rule and so is generally not affected by the rule's nondiscrimination requirements in any case.

e. Discrimination on the Basis of Association, Repeal of § 92.209 of the 2016 Rule

The Department proposed to repeal § 92.209 of the 2016 Rule, which included a prohibition on discrimination against an individual or entity on the basis of being known to or believed to have a relationship or association.

Comment: Commenters opposed the repeal of prohibitions against discrimination based on association with a protected category. These commenters contended that removing such protections would cause confusion, both for covered entities who will be unsure of their responsibilities and for individuals who will be unsure of their rights, especially in light of other Federal nondiscrimination laws that the Department enforces. For example, the Department enforces Title II of the ADA and its implementing regulation, which prohibits discrimination against an individual based on his or her association with another individual with a disability, as do Titles I and III of the ADA.[238] Commenters said that this also shows that it would defy Congressional intent, and cause inconsistency among different regulations that covered entities are subject to, if the Department were to withdraw associational discrimination protections from patients seeking healthcare. Commenters also expressed concern that the proposed rule would make it more difficult for those experiencing discrimination by association to enforce their rights. Other commenters stated that the lack of reference to associational discrimination in the proposed rule is inconsistent with existing case law that validates prohibitions on associational discrimination, particularly in employment discrimination cases brought under Title VII pertaining to race, sex, and religion. Others argued that it is incorrect to assume that by referencing the grounds protected under previous civil rights laws, Section 1557 automatically incorporates the limitations found in those laws.

Some commenters contended that specific protected populations are more susceptible to associational discrimination. In particular, commenters stated that deaf and hard-of-hearing patients frequently use hearing companions, especially in hospital settings, and may be subject to associational discrimination. Commenters also identified potential instances of associational discrimination, including an entity's refusing to provide medical services to a white individual due to association with an African American individual, refusing to provide medical services to a child because his parents speak a different language, or refusing to provide services to an individual because her family members have a specific disability.

Response: This final rule neither abrogates nor withdraws any protections available under the incorporated civil rights statutes or their implementing regulations. It simply declines to use the Section 1557 regulation to identify protections beyond those specifically identified in the text of the relevant statutes and regulations. Protections against discrimination on the basis of association will be available under this final rule to the extent that they are available under those statutes and regulations. As stated above, the Department regards this as the best way to decrease confusion. As the *Franciscan Alliance* court noted, the executive branch is obligated to implement Section 1557, with the civil rights statutes it incorporates, by ''giving the statutory text its plain and ordinary meaning, construing the statute as a whole, and giving effect to every word of the statute.'' [239] Courts have held that Section 1557 incorporates the limitations of the civil rights statutes referenced in Section 1557.[240]

Some instances discussed by commenters would appear to constitute discrimination against a person under the underlying civil rights statutes even without the 2016 Rule's prohibition on associational discrimination. For example, if a covered entity refused to provide meaningful access for LEP parents who are legally entitled to make medical decisions on behalf of their child, it could constitute discrimination on the basis of national origin.

f. Multiple Protected Statuses

The Department received many comments about individuals who may have protected status or face discrimination on multiple grounds.

[235] Commenters cited sources including, *e.g.,* Out2Enroll, Summary of Findings: 2019 Marketplace Plan Compliance with Section 1557 (finding that 18.5% of insurers in 2017, 28% of insurers in 2018, and 94% of the insurers did not include blanket exclusions in their plans).

[236] *See, e.g.,* Calif. Health and Safety Code 1365.5; Colo. Insurance Bulletin No. B–3.49; Conn. Insurance Bulletin IC–34; 79 Del. Laws Ch. 47; DC Code 31–2231.11; Haw. Rev. Stat. 431:10A–118.3, 432:1–607.3, 432D–26.3; 50 Ill. Adm. Code 2603.35; Mass. Insurance Bulletin 2014–03; Nev. Rev. Stat. 651.070; Nev. Admin. Code 686A.140(7); 11 New York Codes Rules and Regulations 52.16; New York Insurance Code 2607, 3243, 4330; Ore. Rev. Stat. 746.015; Ore. Admin. Rules 836–080–0055; 46 Pa. Bulletin 2251; Rhode Island Health Insurance Bulletin 2015–3; 8 Va. Stat. Ann. 4724; Vt. Insurance Bulletin 174; Wash. Rev. Code 48.30.300.

[237] *See, e.g., Outfront* v. *Piper,* No. 62–cv–15–7501 (Minn. D. Ct. Nov. 14, 2016) (interpreting the state Constitution as applied to MinnesotaCare); *Good* v. *Iowa Dept. of Human Services,* No. 18–1158 (Iowa S. Ct. Mar. 8, 2019) (interpreting the Iowa Civil Rights Act as applied medical assistance).

[238] 28 CFR 35.130(g) (Title II); 42 U.S.C. 12112(b)(4) (Title I); 42 U.S.C. 12182(b)(1)(E) (Title III).

[239] *Franciscan Alliance, Inc.* v. *Burwell,* 227 F. Supp. 3d 660, 690 (N.D. Tex. 2016).

[240] *See, e.g., Condry* v. *UnitedHealth Group,* 2018 WL 3203046 (N.D. Cal. Jun 27, 2018) (''disparate impact claims on the basis of sex are not cognizable under section 1557'').

Comment: One commenter stated that because the 2016 Rule covers discrimination based on multiple protected statuses, the proposed rule would create a confusing mix of legal standards and available remedies and therefore could limit claims of intentional discrimination, while the 2016 Rule makes it easier for members of the public to file complaints of intersectional discrimination in one place.

Response: OCR has long accepted complaints alleging discrimination based on more than one protected status. OCR has handled those complaints, and will continue to handle them, under the implementing regulations of each of its applicable civil rights laws. Nothing in this final rule changes that. OCR's complaint form provides the public with the option to select multiple forms of prohibited discriminatory practices, such as both race and disability. OCR continues to encourage the public to file complaints about potentially unlawful discrimination, whether on one prohibited basis or on multiple prohibited bases.

Comment: Commenters stated that the proposed rule would compound discrimination faced by individuals with multiple protected characteristics, such as people of color who are also LEP or disabled. Some commenters said that African Americans are more likely to live with disabilities and chronic conditions, and thus would be disproportionately affected by relaxing discrimination restrictions for health insurance plans.

Response: The Department commits itself, in this final rule, to fully enforce Section 1557 according to its text and the text of the underlying statutes, as well as under the Department's implementing regulations for those statutes, as applied to the health context. Although the Department is proposing to repeal the nondiscrimination provision of the 2016 Rule at § 92.101, this final rule replaces it with a general provisions section at § 92.2. The new section will maintain the nondiscrimination requirements required by Title VI, Title IX, the Age Act, and Section 504. As such, individuals with multiple protected characteristics, such as race and disability, would be protected under the Department's enforcement of Section 1557 to the extent those statutes and regulations apply. Those statutes and regulations explain which characteristics are protected.

With respect to LEP and disability, this final rule additionally contains specific sections clarifying those protections. The underlying regulations and guidance for enforcing these statutes establish standards that are well-known by covered entities. The Department will continue to robustly enforce these statutes, and believes this final rule provides appropriate language to ensure that enforcement occurs.

Comment: Commenters contend that African American, Asian American and Pacific Islander, and Native American women are more likely to die from pregnancy-related complications and will be disproportionately affected by changes to the interpretation of sex discrimination in the proposed rule. Others contend that LGBT people of color will be harmed by the proposed regulation; they also state that LGBT people of specific national origins, including Native American and Middle Eastern, experience high rates of negative experiences in healthcare settings related to gender identity. Commenters alleged the proposed rule would disproportionately harm Native American women, women of color, and transgender individuals who are minorities.

Response: As discussed above, the 2016 Rule's definition of ''on the basis of sex'' is not included in this final rule because it exceeded the Department's statutory authority. In addition, with respect to gender identity and termination of pregnancy, the court's longstanding preliminary injunction and eventual *vacatur* of that language means that the results some commenters fear from removing such language would not be the result of this final rule. The Department is not aware of data supporting commenters' assertion that this change will have a disparate impact on the basis of race or national origin, although even if it did, that disparate impact would be attributable to the statutes rather than to this final rule. To the extent that the Department learns that individuals suffer barriers to healthcare on the basis of race, national origin, or any other protected characteristic, it will work to address those barriers within the limits of its statutory authority.

g. Examples of Discriminatory Practices (Repeal of § 92.207 of the 2016 Rule)

The Department proposed to repeal § 92.207 of the 2016 Rule, which stipulated that covered entities must not discriminate on the prohibited bases in providing or administering health-related insurance or other health-related coverage, and listed examples of such prohibited discrimination. Comments pertaining to § 92.207(b)(3)–(5) related to gender identity are discussed above in the section on discrimination on the basis of sex.

Comment: Commenters opposed repealing the explicit provisions of § 92.207 that prohibit covered entities from discriminating in health insurance or other health coverage. Commenters argued that the proposed rule did not provide any reasoned legal or policy basis for the repeal, which precluded the opportunity to provide public comment on the Department's justifications and so violated the APA. While the proposed rule discussed repealing provisions that may be duplicative, inconsistent, or confusing, commenters argued that the Department did not explain under which of these grounds it was repealing § 92.207, and that the proposed rule's supporting footnote [241] listed comparator regulatory citations that did not duplicate or contradict the provisions of § 92.207.

Commenters also expressed concern that repealing this section would allow health insurance issuers to discriminate, particularly with regard to benefit design, and could make it harder for people who experience discrimination to enforce their rights through administrative and judicial complaints. Commenters asserted that, prior to the ACA, health insurance issuers avoided covering costly individuals by employing the discriminatory practices prohibited by § 92.207, and that repealing these explicit prohibitions would allow health insurance issuers to again discriminate in a variety of ways, including by excluding or denying benefits, applying age limits, increasing costs for sicker enrollees, imposing utilization management limitations, and designing discriminatory prescription drug formularies. Commenters also argued that the ACA was intended to increase administrative oversight of private health insurance plans and to prevent discrimination in health insurance, particularly in light of the underlying civil rights laws' historically limited application to private health insurance and benefit design prior to the ACA.

Several commenters argued that the removal of specific nondiscrimination provisions under § 92.207 would make the regulation vague, eliminate guidance for covered entities, and create confusion about what is prohibited conduct, thereby increasing legal

[241] 84 FR at 27869 n.147 (comparing 45 CFR 92.207 with ''45 CFR 80.5 (health benefits under Title VI), 84.43 (health insurance under Section 504), 84.52 (health benefits under Section 504), 84.33 (rule of construction of Section 504 vis-à-vis validly obligated payments from health insurer); 86.39 (health insurance benefits and services under Title IX).'').

uncertainty and risk. This argument was reiterated by some State government regulators, who said that the specificity in the law provides clarity for both covered entities and the State, with State regulators often relying upon the standards in the 2016 Rule to ensure nondiscrimination in health insurance. Other commenters said that the repeal of § 92.207, compounded with the repeal of language access and taglines requirements, would open the door to discrimination based on national origin by healthcare providers.

Response: The number, breadth, and depth of comments received and discussed in this preamble indicate that the public was given an adequate opportunity to provide comment on the Department's justifications for this final rule.

Commenters are correct to note that the ACA has significantly expanded the applicability of Federal civil rights laws to private health insurance plans. That is why, under this final rule, all health insurance programs that remain covered by Section 1557 remain prohibited from discriminating on the grounds specified by the statute. This final rule has a section on scope at § 92.3, and the Department does not believe the rule needs an additional or separate section on health insurance in order to make this clear. OCR will examine carefully any allegations of discrimination by health insurance issuers, including through benefit design, and will vigorously enforce Section 1557's prohibitions. The Department also notes that certain health insurance issuers remain subject to similar nondiscrimination requirements under statutory provisions implemented and the regulations issued by CMS's Center for Consumer Information and Insurance Oversight (CCIIO). Commenters' specific concerns about national origin discrimination are addressed above and below in the relevant sections.

The 2019 NPRM listed § 92.207 among passages of the 2016 Rule that ''are duplicative of, inconsistent with, or may be confusing in relation to the Department's preexisting Title VI, Section 504, Title IX, and the Age Act regulations.'' [242] As the footnote referenced by commenters shows, the Department specifically pointed there to preexisting HHS regulations under those statutes regarding health benefits and health insurance.[243] The substantive overlap between these regulations and § 92.207 is sufficient to show that the latter either duplicates them, or is inconsistent with them, or may be confusing as to whether it is duplicating them or contradicting them. Because Section 1557 does not require a regulation, the Department prefers to enforce the relevant statutes, to the extent possible, through their existing regulations. The changes in the 1557 regulation made by this final rule advance the Administration's goal of reducing the regulatory burden of the ACA and of administrative action in general.[244]

The 2016 Rule's list of examples of prohibited conduct by insurers at § 92.207(b) was followed by a catchall provision at § 92.207(c) stipulating that the enumeration of those specific forms of discrimination was no limitation on the general prohibition on insurers' discriminating on the prohibited grounds. That catchall provision made § 92.207 no less vague, and gave it no less potential to cause confusion, than this final rule's general prohibition on discrimination by covered entities. The Department declines in this preamble to give guidance of this kind to State regulators, who must each work within their own State's regulatory framework for health insurance. The Department notes that State regulators may also rely upon regulations issued by CCIIO, as applicable.

h. Summary of Regulatory Changes

For the reasons discussed herein, and considering the comments received, the Department finalizes its proposed new § 92.2 without change, its repeal of § 92.4 without change, its repeal of the notice requirement in § 92.8(d) and Appendix B without change, and its repeal of § 92.101, 92.206–92.207, and 92.209 without change.

(5) Assurances in Proposed § 92.4, and Repeal of § 92.5 of the 2016 Rule

The Department proposed that the 2016 Rule's provision at § 92.3 requiring an assurance of compliance with Section 1557 be retained and redesignated § 92.4. 84 FR at 27863. Here, as throughout the proposed rule, the Department also updated the 2016 Rule's term ''State-based Marketplace℠'' to read ''State Exchange,'' in conformity with current CMS regulations. 84 FR at 27871.

Comment: Comments contended it is unclear whether submitting assurances required under this provision at § 92.4 would also fulfill the assurance requirements of Section 504 at 45 CFR 84.5.

Response: As under the 2016 Rule, the application package for all HHS grant-making agencies continues to include a requirement that the applying entity submit a signed assurance form (Form 690), which specifically references Section 1557 along with Title VI, Title IX, Section 504, and the Age Act. That form is available at *https://www.hhs.gov/sites/default/files/forms/hhs-690.pdf.* All recipients of Federal financial assistance from HHS are required to submit the consolidated form that satisfies the assurance requirements for both Section 1557 and these four other civil rights statutes.

The Department requested comment on whether this proposal struck the proper balance by retaining the assurance provisions from the 2016 Rule, and whether the benefits of these provisions exceed the burdens imposed by them.

Comment: Some commenters expressed their support for maintaining the current assurance of compliance requirement, noting that an assurance of compliance is an important step towards ensuring that covered entities know their obligations under Section 1557 and remain compliant. Additionally, questions were raised regarding which entity would be responsible for oversight, enforcement, and corrective action should a covered entity violate Section 1557 despite assuring its compliance.

Response: OCR is responsible for enforcing Section 1557 and will provide oversight, enforcement, and corrective action should a covered entity violate its obligations under Section 1557. The Department agrees that assurances of compliance provide valuable services by alerting covered entities of their obligations, and will retain these provisions under § 92.4 of this final rule.

Summary of Regulatory Changes: For the reasons given in the proposed rule, and having considered comments received, the Department finalizes its proposed § 92.4, and repeal of § 92.5 of the 2016 Rule, without change.

(6) Enforcement Mechanisms in Proposed § 92.5, and Repeal of §§ 92.6, 92.7, 92.8, 92.101, 92.301, 92.302, 92.303, and Appendices A and C of the 2016 Rule

The Department proposed provisions on enforcement of Section 1557 at the new § 92.5, 84 FR at 27863, and proposed to repeal §§ 92.6, 92.7, 92.8, 92.101, 92.301, 92.302, 92.303, and

[242] 84 FR 27869.

[243] *See* 84 FR at 27869 n.147.

[244] Executive Order 13765 on Minimizing the Economic Burden of the Patient Protection and Affordable Care Act Pending Repeal, 82 FR 8351 (Jan. 20, 2017); Executive Order 13771 on Reducing Regulation and Controlling Costs (Jan. 30, 2017); Executive Order 13777 on Enforcing the Regulatory Reform Agenda (Feb. 24, 2017); Executive Order 12866 on Regulatory Planning and Review, 58 FR 190 (Oct. 4, 1993), at § 1(b)(10).

Appendices A and C of the 2016 Rule, which also provided for enforcement mechanisms and notices.

a. Enforcement Procedures and Underlying Regulations in § 92.5(a) (Repeal of § 92.302 and § 92.6(a) of the 2016 Rule)

Proposed § 92.5(a) applies the enforcement mechanisms provided for, and available under, Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, or Section 504 of the Rehabilitation Act of 1973, with their respective implementing regulations, to Section 1557.

Comment: Various commenters expressed opposition to the Department's proposal to replace § 92.301 with § 92.5, and requested that the Department retain § 92.301. Others expressed the view that by adopting § 92.5, the Department would be incorrectly limiting the remedies available under Section 1557. Several commenters asserted that enforcement would be more difficult under the proposed rule because, they said, it creates a patchwork of legal standards—unlike the 2016 Rule, which used a single standard that permitted disparate impact claims. They said this would create confusion, hamper enforcement, and dilute the protections provided to individuals.

Response: This final rule properly limits the remedies available under Section 1557. The text of the 2016 Rule, at § 92.301(a), stated that the enforcement mechanisms available and provided for under Title VI, Title IX, Section 504 and the Age Act shall apply for the purposes of Section 1557.[245] But upon reconsideration of these issues, the Department concludes the 2016 Rule applied these mechanisms in a confusing and inconsistent manner. For certain covered entities, it applied Title VI mechanisms, not only to grounds of discrimination prohibited under Title VI, but also to those prohibited under Title IX and Section 504, while leaving Age Act mechanisms in place for the grounds of discrimination it prohibits; for other covered entities, it applied Section 504 mechanisms, not only to grounds of discrimination prohibited under Section 504, but also to those prohibited under Title VI, Title IX, and the Age Act.[246] The 2016 Rule's regulatory structure blended new standards and preexisting standards from underlying civil rights regulations, and imposed those standards alongside the underlying regulations, which were left in place. In contrast, this final rule adopts the enforcement mechanisms for these four statutes and their implementing regulations *respectively,* each for its own statute. The Department believes this minimizes the patchwork effect of the 2016 Rule by using a familiar regulatory regime under those four statutes. The Department also believes this approach is what the statutory text contemplates. Moreover, because OCR has significant experience enforcing civil rights claims using these civil rights statutes' regulations, the Department expects this change to improve enforcement of Section 1557 and, by removing possible confusion, to make it easier for both individuals and covered entities to know their rights and responsibilities.

Comment: One commenter said that the Department's proposal to remove the 2016 Rule's single standard for enforcing claims is inconsistent with the Minnesota District Court's finding in *Rumble* v. *Fairview Health Services* that ''Congress intended to create a new, health-specific, anti-discrimination cause of action that is subject to a singular standard, regardless of a plaintiff's protected class status.'' [247]

Response: The Department disagrees with this commenter's suggestion that it is inappropriate to finalize the proposed rule's repeal of provisions containing certain enforcement mechanisms. The Minnesota District Court found the language of the Section 1557 statute to be ''ambiguous, insofar as each of the four statutes utilize[s] different standards for determining liability, causation, and a plaintiff's burden of proof,'' [248] and concluded that the Department's interpretation of Section 1557 was permissible. However, the Minnesota District Court view is the minority view and has subsequently been rejected by multiple other court rulings that postdate the 2016 Rule.[249] The Department agrees with these latter courts' reasoning. To the extent that the statutory language could be ambiguous, as the Minnesota district court concluded, the Department believes that its new interpretation is a better and reasonable interpretation of the statute, and is at least an equally permissible statutory interpretation, and therefore is entitled to *Chevron* deference, *Chevron U.S.A., Inc.* v. *NRDC,* 467 U.S. 837 (1984). That the Department's interpretation represents a break with a previous interpretation does not preclude the Department from reinterpreting the statute and receiving *Chevron* deference for its new interpretation, *see, e.g., Rust* v. *Sullivan,* 500 U.S. 173, 186–87 (1991). Here, the Department believes that this final rule's approach is the one best suited to reducing confusion and robustly enforcing Section 1557's nondiscrimination provisions.

b. Compensatory Damages (Repeal of § 92.301(b) of the 2016 Rule)

The Department proposed to repeal § 92.301(b) of the 2016 Rule, which provided for compensatory damages for any and all claims under Section 1557.

Comment: Some commenters opposed the changes to the enforcement mechanisms under the proposed rule and asserted that Section 1557 makes available to all individuals any of the enforcement mechanisms available under any of the four civil rights statutes, including but not limited to compensatory damages.

Response: Although the 2016 Rule stated that compensatory damages are available in appropriate administrative and judicial actions under the Section 1557 regulation, the Department has concluded that its enforcement of Section 1557 should conform to the Department of Justice's Title VI Manual. 84 FR at 27851. The manual states that, under applicable Federal case law, compensatory damages are generally unavailable for claims based solely on a Federal agency's disparate impact regulations.[250] Consequently, the Department considers it most appropriate to finalize this rule by eliminating § 92.301(b) and reverting to enforcement under the regulations applicable to Title VI, Title IX, the Age Act, or Section 504. To the extent compensatory damages are, or are not,

[245] 81 FR 31472.

[246] *Id.*

[247] 2015 WL 1197415, at *11 (D. Minn. Mar. 16, 2015).

[248] *Id.* at *10.

[249] *See Briscoe* v. *Health Care Svc. Corp.,* 281 F. Supp. 3d 725, 738 (N.D. Ill. 2017) (''Taken together, the first two sentences of § 1557 unambiguously demonstrate Congress's intent 'to import the various different standards and burdens of proof into a Section 1557 claim, depending upon the protected class at issue.'''), quoting *Southeastern Pennsylvania Transp. Auth.* v. *Gilead Sciences Inc.,* 698–99 (E.D. Pa. 2015); *York* v. *Wellmark, Inc.,* 2017 WL 11261026, at *18 (S.D. Iowa Sept. 6, 2017) (''Congress clearly intended to incorporate the statutes' specific enforcement mechanisms rather than create a general catch-all standard applicable to all discrimination claims.''). *See also Galuten on Behalf of Estate of Galuten* v. *Williamson Med. Ctr.,* 2019 WL 1546940, at *5. (M.D. Tenn. Apr. 9, 2019) (same); *E.S. by and through R.S.* v. *Regence BlueShield,* 2018 WL 4566053, at *4 (W.D. Wash. Sept. 24, 2018); *Doe* v. *BlueCross BlueShield of Tennessee, Inc.,* 2018 WL 3625012, at *6 (W.D. Tenn. July 30, 2018).

[250] *See* DOJ Title VI Manual, *https://www.justice.gov/crt/fcs/T6Manual9* (citing *Alexander* v. *Sandoval,* 532 U.S. 275, 282–83 (2001), *Barnes* v. *Gorman,* 536 U.S. 181, 187 (2002), and *Gebser* v. *Lago Vista Indep. Sch.,* 524 U.S. 274, 87 (1998)).

available under those regulations, the regulations will provide for enforcement of Section 1557 in applicable circumstances in the same way.

This approach is consistent with both the best interpretation of the text and the court decisions (cited above) indicating that Section 1557 does not impose a single standard but instead incorporates the distinct enforcement mechanisms of each of the four civil rights statutes described in Section 1557.[251]

c. Implied Private Rights of Action (Repeal of § 92.302(d) of the 2016 Rule)

The Department proposed to repeal § 92.302(d) of the 2016 Rule, which stated that an individual or entity may bring a civil action in a United States District Court to challenge a violation of Section 1557 or the 2016 Rule.

Comment: Some commenters opposed repeal of this language. Several commenters argued that the existence of a private right of action is clear from the statutory language in Section 1557, which they say explicitly references and incorporates the enforcement mechanisms of the four civil rights laws listed, including a private right of action. They cited cases that allow for Section 1557 to include enforcement mechanisms separate from the mechanisms in underlying statutes.[252] Commenters said that the creation of a private right of action within Section 1557 is consistent with Congress's intent that civil rights laws be broadly interpreted to effectuate the remedial purposes of those laws, and that removing Section 1557's private right of action is inconsistent with precedent of the United States Supreme Court, which has upheld private rights of action under the preexisting civil rights laws.

Response: Upon reconsideration of this issue, the Department no longer intends to take a position in its regulations on the issue of whether Section 1557 provides a private right of action. To the extent that Section 1557 permits private rights of action, plaintiffs can assert claims under Section 1557 itself rather than under the Department's Section 1557 regulation.

Comment: Commenters requested that the Department adopt a regulatory framework for Section 1557 where there is a requirement for exhaustion of administrative remedies before a party can bring a private right of action.

Response: Because the Department is eliminating the language specifying a right to sue, the Department does not consider it necessary to establish a framework and a requirement for exhaustion of administrative remedies before filing suit in court.

d. Voluntary Action (Repeal of § 92.302(c) and § 92.6(b) of the 2016 Rule)

The Department proposed to repeal § 92.302(c) of the 2016 Rule, as well as § 92.6(b), which set forth provisions concerning voluntary cooperation with requests for information, and voluntary action beyond the requirements of Section 1557. These provisions have parallels in the regulations implementing Title VI, Section 504, Title IX, and the Age Act,[253] which the Department will use to enforce Section 1557.

The Department did not receive comments specific to these sections.

e. Access to Records of Compliance (Repeal of § 92.303(c) of the 2016 Rule)

The Department proposed to repeal § 92.303(c) of the 2016 Rule, which set forth the Department's obligations to permit access by OCR to review records and sources of information, and to otherwise comply with OCR investigations under the 2016 Rule.

Comment: Commenters expressed concern that the proposed rule undermines the Department's enforcement authority concerning compliance with Section 1557 by programs and activities administered by the Department.

Response: The regulations implementing Section 1557's four underlying statutes already contain provisions addressing access to review of covered entities' records of compliance.[254] The language in the 2016 Rule to this effect was unnecessary, as OCR has the tools to review records and sources of information under existing regulations.

f. Prohibitions on Intimidation and Retaliation (Repeal of § 92.303(d) of the 2016 Rule)

The Department proposed to repeal § 92.303(d) of the 2016 Rule, which concerns intimidation and retaliation provisions that pertain to the Department.

Comment: Several commenters contended that under the proposed rule, those bringing Section 1557 claims would no longer be explicitly protected from retaliation and discrimination.

Response: The regulations implementing Section 1557's four underlying statutes already contain provisions against intimidation and retaliation as appropriate.[255] The language in the 2016 Rule to this effect was unnecessary. Moreover, OCR ensures the confidentiality of complainants under all the statutes it enforces, to the extent permitted by law and consistent with OCR's investigative needs. In some cases, the Freedom of Information Act, the APA, or other laws may require disclosure of certain information provided by complainants.

g. Perpetuating Discrimination by Assistance and Utilizing Criteria or Methods of Administration (Repeal of § 92.101(b)(1)(ii), (b)(3)(ii), and (b)(4)(ii) of the 2016 Rule)

The Department proposed to repeal § 92.101(b)(1)(ii) and § 92.101(b)(4)(ii), which prohibited significant assistance to any agency, organization, or person that discriminates on the basis of race, color, national origin, or age. The Department also proposed to repeal § 92.101(b)(3)(ii), which prohibited utilization of criteria or methods of administration that have the effect of subjecting individuals to discrimination on the basis of sex.

Comment: One commenter objected to repealing the prohibition on the utilization of criteria or methods of administration that have the effect of subjecting individuals to discrimination on the basis of sex. Arguing that Section 1557 is its own authority, the commenter stated that it is irrelevant that the Title IX regulations do not

[251] *See Galuten,* 2019 WL 1546940, at *5 n.8 (because ''the Age Discrimination Act would not authorize [ ] compensatory damages,'' ''it appears that a Federal court with jurisdiction would be constrained to dismiss Plaintiff's claims for compensatory . . . damages under the ACA'').

[252] Commenters cited *Edmo* v. *Idaho Dep't of Corr.,* No. 1:17–cv–00151–BLW, 2018 WL 2745898, at *9 (D. Idaho June 7, 2018) (''[C]ross-referencing the statutes and the express incorporation of the enforcement mechanisms from those statutes is probative of Congressional intent to provide both a private right and a private remedy for violations of Section 1557.''); *Esparza* v. *Univ. Med. Ctr. Mgmt. Corp.,* No. 17–4803, 2017 WL 4791185, at *5 (E.D. La. Oct. 24, 2017) (concluding it was ''abundantly clear to the Court that Congress intended to create a private right of action to enforce § 1557''); *Doe One* v. *CVS Pharmacy, Inc.,* 348 F. Supp. 3d 967, 982 (N.D. Cal. 2018) (finding plaintiffs had not sufficiently alleged disparate impact); *see also Cannon* v. *Univ. of Chi.,* 441 U.S. 677, 703 (1979) (recognizing that Congress intended to create Title IX remedies comparable to those available under Title VI, including a private cause of action for victims of the prohibited discrimination, and finding that age and advanced degrees criteria had a disparate impact on women); *Rumble* v. *Fairview Health Servs.,* 2015 WL 1197415.

[253] *See* 45 CFR 80.7(d), § 80.8(c)(1) (Title VI); § 84.6(b) (Section 504); proposed § 86.71 (Title IX incorporating 45 CFR 80.7(d)); § 90.49(c) (Age).

[254] *See* 45 CFR 90.45, § 91.31 (Age Act) and § 80.6(c) (Title VI); 45 CFR 84.61 (Section 504 incorporating 45 CFR 80.6(c)); § 86.71, as finalized here (Title IX incorporating 45 CFR 80.6(c)).

[255] *See* 45 CFR 80.7(e) (Title VI); § 91.45 (Age Act); 45 CFR 84.61 (Section 504 incorporating 45 CFR 80.7(e)); § 86.71, as finalized here (Title IX incorporating 45 CFR 80.7(e)).

contain a disparate impact provision. Some commenters also contended that removing the ''significant assistance'' provision would undermine enforcement.

Response: The prohibition on perpetuating discrimination by providing significant assistance to any agency, organization, or person that discriminates is identified only in the Title IX and Section 504 regulations, as applied to sex and disability discrimination claims; [256] the 2016 Rule applied it also to claims on the basis of race, color, national origin, or age. Similarly, as discussed above in the section on discrimination on the basis of sex, there is no disparate impact language in the Department's Title IX regulations, but the 2016 Rule made such language applicable to sex discrimination claims brought under Section 1557. For the reasons given earlier in this section, the Department considers it appropriate to rely on the enforcement mechanisms appropriate to each underlying civil rights statute, rather than to create a new and confusing civil rights regulatory framework specific to the enforcement of Section 1557.

h. Notices of Nondiscrimination Rights and Statement of Nondiscrimination Under the 2016 Rule (Repeal of § 92.8 of the 2016 Rule)

The Department proposed to repeal § 92.8 of the 2016 Rule, which required a notice informing individuals about nondiscrimination and accessibility requirements, such as the sample notice and nondiscrimination statement at Appendix A to Part 92.

Comment: Some commenters contended that HHS did not consider how the removal of the 2016 Rule's notice provisions may result in decreased access to, and utilization of, healthcare by people with disabilities, people with LEP, older adults, people who are LGBT, and other vulnerable populations. These commenters argued that with the notice provision's removal, these protected populations will be limited in knowing their rights under Federal civil rights laws, and in knowing how to file complaints with OCR if faced with discrimination in a healthcare setting. Others stated that the Department did not provide an evidentiary basis for what it deemed would be a ''negligible'' impact on people with LEP or ''additional societal costs'' as a result of removing the notice provisions. Commenters proposed that instead of eliminating the notice provision, the Department should consider requiring covered entities to provide notice on an annual basis, when updated, and upon request, in order to harmonize with the Health Insurance Portability and Accountability Act (HIPAA)'s annual notice requirements. Other commenters similarly proposed that the Department should consider specifying a number of times that a covered entity should send notice to individuals over the course of a year.

Response: The regulations implementing Section 1557's four underlying statutes already contain notice provisions.[257] The language in the 2016 Rule to this effect was unnecessary.

Individuals belonging to any protected category under Section 1557, including those with disabilities or LEP, remain covered under existing standards regarding notice. The Department is unaware of data suggesting that those regulations have been or are inadequate to their purpose of making individuals aware of their civil rights. To the extent that it discovered such data, it would consider revising each regulation as appropriate.

Each of the relevant underlying regulations has its own unique standards on providing notice, tailored to the purposes of each civil rights statute.[258] Compressing these into a single standard under the 2016 Rule has led to an unjustifiable burden and understandable confusion. The Department's estimates of regulatory burden are discussed in the RIA.

Comment: Some commenters stated the Department should clarify when the notice and taglines requirements will no longer be effective with respect to timeframes such as open enrollment for Exchanges, employer-sponsored plans, and Medicare. Most of these communications are subject to the current notice and taglines requirements under the 2016 Rule. Commenters sought clarification from the Department as to whether OCR will enforce the notice and taglines requirement against any covered entity from the date of the proposed rule (June 14, 2019).

Response: The changes made in this final rule will be effective 60 days from the publication of this final rule in the **Federal Register**. The 2016 Rule is in effect until that time, except as enjoined or vacated by courts.

Comment: Several commenters requested that the Department retain parts of § 92.8 of the 2016 Rule that require the designation of a responsible employee and grievance procedures, and the text of sample grievance procedures in Appendix C to Part 92. They said that retaining these provisions would increase access to healthcare and retain uniform responsible employee and grievance procedures.

Response: The Department believes it is appropriate to rely on the regulatory framework that has already been set forth for Section 1557's four underlying statutes. To the extent that those implementing regulations have responsible employee and grievance procedures, they are sufficient for enforcement of Section 1557.

i. Summary of Regulatory Changes

For the reasons described in the proposed rule and considering the comments received, the Department finalizes § 92.5, and the proposed repeal of §§ 92.6, 92.7, 92.8, 92.101, 92.301, 92.302, 92.303, and Appendices A and C of the 2016 Rule, without change.

(7) Relationship to Other Laws in Proposed § 92.6, and Repeal of § 92.2(b) and 92.3 of the 2016 Rule

The Department proposed to repeal §§ 92.2(b) and 92.3 of the 2016 Rule, which addressed the application and relationship of Section 1557 and the 2016 Rule to other laws. The Department proposed instead a new § 92.6. The new § 92.6(a) states that nothing in the 1557 regulations shall be construed to invalidate or limit the rights, remedies, procedures, or legal standards applicable under Title VI, Title VII, Title IX, the Age Act, or Section 504, or to supersede State laws that provide additional protections against discrimination on any basis described in § 92.2. The new § 92.6(b) states that insofar as the application of any requirement under the Section 1557 regulations would violate, depart from, or contradict definitions, exemptions, affirmative rights, or protections provided by any of the statutes cited in paragraph (a) of this section or provided

[256] *See* 45 CFR 84.4(b)(1)(v) (Section 504); § 86.31(b)(6), as finalized here (Title IX).

[257] *See* 45 CFR 80.6 and Appendix to Part 80 (Title VI), § 84.8 (Section 504), § 86.9 (Title IX) and § 91.32 (Age Act).

[258] Title VI, 45 CFR 80.6(d), and the Age Act, 45 CFR 91.32, contain general requirements to provide notice. Section 504 requires more: A covered entity must ''take appropriate initial and continuing steps to notify [individuals] that it does not discriminate on the basis of [disability]'' and include this information in its ''recruitment materials and publications.'' 45 CFR 84.8. Title IX goes even further: A covered entity must ''prominently'' display its notice of nondiscrimination in ''each announcement, bulletin, catalog, or application form which it makes available to any [covered person], or which is otherwise used in connection with the recruitment of students or employees'' and not ''distribute a publication . . . which suggests, by text or illustration, that such [covered entity] treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by [Title IX].'' 45 CFR 86.9.

by the Architectural Barriers Act of 1968 (42 U.S.C. 4151 *et seq.*); the Americans with Disabilities Act of 1990, as amended by the Americans with Disabilities Act Amendments Act of 2008 (42 U.S.C. 12181 *et seq.*); Section 508 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794d); the Coats-Snowe Amendment (42 U.S.C. 238n); the Church Amendments (42 U.S.C. 300a–7); the Religious Freedom Restoration Act (42 U.S.C. 2000bb *et seq.*); Section 1553 of the Patient Protection and Affordable Care Act (42 U.S.C. 18113); Section 1303 of the Patient Protection and Affordable Care Act (42 U.S.C. 18023); the Weldon Amendment (Consolidated Appropriations Act, 2019, Pub. L. 115–245, Div. B sec. 209 and sec. 506(d) (Sept. 28, 2018)); or any related, successor, or similar Federal laws or regulations, such application shall not be imposed or required.

a. Conscience Laws

Comment: Some commenters supported revising the Section 1557 Rule to explicitly identify the Federal public consensus that conscience statutes reflect, in order to ensure appropriate protection for all civil rights. Some noted that the Coats-Snowe and Church Amendments were passed by Congress and signed into law on a bipartisan basis, reflecting explicit protections from discrimination on the Federal, State, or local level if healthcare providers or hospitals seek to be exempted from participation in the performance or training for abortions.

Some commenters supported including references to conscience and religious freedom laws in § 92.6(b), stating that protecting the conscience rights of healthcare providers also protects patients by protecting trust between patients and providers, and allowing providers who entered healthcare on the basis of moral convictions to serve those who are ill consistent with that ethic. They also stated that providers must exercise professional judgment as to what constitutes the best interest of the patient. Commenters stated that respect for the autonomy of the patient should not be misconstrued to create coercive obligations on providers overriding the best interest of the patient. Some stated that the 2016 Rule resulted in a ''Hobson's choice'' of options for certain providers, who were required under the rule to either violate their ethical pledges to Do No Harm or their longstanding oaths as physicians, or comply with the 2016 Rule and be forced to perform abortions. Some commenters also suggested that if those providers complied with laws like Title VII and conscience laws that require religious accommodation, they could risk noncompliance with the 2016 Rule, or vice versa. Some of those commenters contended that coercing providers to compromise their moral integrity negatively impacts both provider and patient, and ultimately hurts the provider's ability to provide patient care. If facing the threat of coercion, such commenters said, providers will continually face escalating moral dilemmas in the practice of their job, resulting in stress and burnout in a time when physician shortages are already increasing.

Other commenters opposed the language in § 92.6(b), saying that the proposed rule construes the Federal conscience protections more broadly than existing law allows. They contended conscience protections and religious liberty are meant for individuals, not entities, and that healthcare systems and entities cannot have the right of conscience, because the notion of conscience is limited to individuals. Some commenters also recommended that instead of removing gender identity and termination of pregnancy language and having the language in § 92.6(b) concerning conscience and religious freedom statutes, the Department should merely insert a narrow religious exemption, for they asserted that preventing discrimination on the basis of gender identity or termination of pregnancy is more critical than religious freedom rights, which should be more heavily scrutinized for pretextual discrimination. Other commenters stated that conscience and religious protections under the current statutes are sufficient and incorporating conscience or religious exemptions is unnecessary. Some opposed referring to the Coats-Snowe Amendment in § 92.6(b), saying that it would allow healthcare providers to decline to make medical care available to any patient based on personal beliefs. Some added that the Department does not have the authority to interpret statutes such as the Coats-Snowe Amendment to limit or supersede Section 1557, which should be seen as controlling law. One commenter stated that Federal conscience statutes are not applicable to the ACA because they are not mentioned in the ACA.

Response: Section 1557 and the ACA did not repeal any Federal conscience law. Indeed, ACA § 1303 specifically provides that ''[n]othing in [the ACA] shall be construed to have any effect on Federal laws regarding—(i) conscience protection; (ii) willingness or refusal to provide abortion; and (iii) discrimination on the basis of the willingness or refusal to provide, pay for, cover, or refer for abortion or to provide or participate in training to provide abortion.'' 42 U.S.C. 8023(c)(2). At the time of its passage, the President stated that ''[u]nder the [ACA], longstanding Federal laws to protect conscience (such as the Church Amendment, 42 U.S.C. 300a–7, and the Weldon Amendment, section 508(d)(1) of Pub. L. 111–8) remain intact and new protections prohibit discrimination against healthcare facilities and healthcare providers because of an unwillingness to provide, pay for, provide coverage of, or refer for abortions.'' [259] New law is to be interpreted consistently with existing law wherever possible, and the Department sees no conflict between Section 1557 and preexisting Federal conscience statutes.

This final rule emphasizes that the Section 1557 regulation will be implemented consistent with various statutes enacted by Congress, including conscience and religious freedom statutes. This should not be a controversial statement, nor should it even be necessary to add, as the Department is always obligated to comply with relevant Federal statutes. But the fact that so many commenters found this provision objectionable is itself a reminder of why such a provision is needed. The fact that the 2016 Rule was the subject of litigation and injunctive relief, in part because of plaintiffs' claim that the 2016 Rule did not clearly state that it would be enforced consistent with conscience and religious freedom statutes, is also a reason the Department believes it is appropriate to make the issue clearer in this final rule. This final rule does not purport to construe the statutes referenced in this section, so it cannot be construing them too broadly (or too narrowly). It would be inappropriate to replace § 92.6(b)'s language with a religious exemption, whether narrow or broad, because § 92.6(b) neither adds to nor takes away from the conscience and religious freedom statutory language that Congress has enacted.

Commenters who discuss the gender identity and termination of pregnancy provisions of the 2016 Rule in this context are confusing two different issues. As stated above, this final rule eliminates the 2016 Rule's provisions related to gender identity for numerous

[259] Executive Order 13535, ''Patient Protection and Affordable Care Act's Consistency with Longstanding Restrictions on the Use of Federal Funds for Abortion'' (March 24, 2010).

legal and policy reasons that have nothing to do with conscience protection, and it eliminates the 2016 Rule's provisions on termination of pregnancy because they failed to incorporate Title IX's abortion-neutrality language (which goes much farther than any mere protection for individual conscientious objectors). In neither case could the Department's concerns have been adequately addressed by permitting individuals to claim a conscientious exemption from those objectionable provisions.

Comment: Many providers with conscientious or religious concerns stated that their medical judgment is based upon a review of the clinical evidence, and that medical ethics requires that they act in accordance with their best medical judgment. For example, some commenters contended that they have practices, such as in the obstetrics and gynecology field, which are specialized to the biological sex of females based on a binary distinction between males and females. Others had objections because of their moral and religious convictions concerning specific procedures that they sincerely believed, both in their medical judgment and ethically, would endanger the health and wellbeing of a person.

Response: By respecting medical professionals' judgment, the Department protects their right and responsibility to follow medical ethics in treating patients to the best of their ability. In their objections to abortion, sex-reassignment procedures, or other treatments covered by the 2016 Rule, some providers assert that not only their medical judgment but also their conscientious or religious beliefs would be burdened by such procedures. The Department believes that the best way to avoid such burdens on conscience is, instead of requiring individual objectors to assert claims under RFRA or other applicable laws, to avoid regulatory requirements that would have forced them to provide such procedures in the first place, as well as to ensure that remaining requirements are interpreted consonant with the applicable Federal conscience statutes.[260] This will protect both providers' medical judgment and their consciences, thus helping to ensure that patients receive the high-quality and conscientious care that they deserve.

Comment: Some commenters argued that religious or conscience exemptions were used as a pretext to conceal animus against LGBT individuals. Commenters expressed concerns that the proposed rule would improperly prioritize conscience and religious freedom rights over LGBT rights or civil rights in general. However, others, such as hospital associations that expressed support for care regardless of gender identity and sexual orientation, explained that they also support appropriate protections for the reasonable accommodation of a nurse or other provider who may assert a sincere conscientious objection to participating in a particular medical procedure. Other providers stated that the exemption they seek is from providing certain treatments, not from treating certain patients. Some submitted their hospital nondiscrimination policies, contending those policies do not include blanket denial of healthcare treatment for LGBT individuals, and in many cases expressly prohibit discrimination on the basis of gender identity or sexual orientation, but that they nonetheless seek limited exemptions on the basis of sincerely held religious and moral convictions. Some individual, institutional, and religious groups affiliated with healthcare providers also provided comments stating that both in policy and in practice, they have never refused to care for a patient on the grounds of their identity as an LGBT individual. They stated that they object to being required to perform services that violate sound medical judgment, ethical convictions, or religious beliefs about the dignity of human beings. Commenters also submitted surveys finding healthcare professionals experienced pressure, coercion or punishment for not participating in training, performing a procedure, or writing a prescription when they had medical or scientific objections.

Response: The Department recognizes that members of the public hold different opinions concerning conscience and religious freedom laws and their interplay with various health contexts, including with respect to LGBT concerns. This final rule does not, however, create any new conscience or religious freedom exemptions beyond what Congress has already enacted.

Comment: Some commenters contend that women of color are more likely to rely on religious hospitals to receive care, and thus women of color will be more likely to be affected by religious exemptions that allow religious hospitals to deny certain reproductive care. Others opposed inclusion of references to conscience and religious freedom laws, stating that the danger of losing Federal funds is the only incentive for covered entities to offer more abortion, contraception, sterilization, gender identity affirming, or sex reassignment services. Other commenters stated that conscience laws were intended to protect health professionals from precisely that form of government coercion.

Some commenters stated that the proposed rule, in particular concerning the Church Amendments, 42 U.S.C. 300a–7, is inconsistent with EMTALA, because the conscience exemptions would deny emergency and stabilizing care, including with respect to abortion or sterilization. Other commenters stated that the rule is consistent with EMTALA, because EMTALA requires protection of the ''unborn child.''

Response: The Department is not aware of any instance to date where a facility required to provide emergency care under EMTALA was unable to do so because of objections protected by the Church Amendments. This final rule does not adopt any stance on how hypothetical conflicts between the Church Amendments and EMTALA ought to be resolved. The Department intends to read every law passed by Congress in harmony to the fullest extent possible, so that all laws are given their fullest possible effect. Commenters' other policy concerns about the possible healthcare effects of the conscience laws are among the many complicated factors that Congress had to balance in the texts of the separate statutes, and it is not the Department's job to overturn the results of that legislative process.

Comment: One commenter compared the proposed rule with the 2019 Conscience Rule and alleged that the Department's recent actions of decreasing protections for patients and increasing protections for providers run contrary to actual public sentiment. The commenter alleged that between 2008 and January 2018, the Department received fewer than 50 complaints regarding violations of Federal religious or conscience statutes while receiving 30,000 complaints of other civil rights discrimination in 2017 alone. Other commenters stated that the 2019 Conscience Rule violates EMTALA, and results in the denial of transition-related surgeries or abortion services in emergencies, because conscience statutes allow exemptions from performance of sterilizations or abortions. Commenters also recommended that the Department delay finalizing the proposed rule pending the outcome of litigation challenging the 2019 Conscience Rule, in order to provide clarity and finality, and to reduce litigation risk as regards the construction of Section 1557 with conscience statutes.

[260] *See California* v. *Azar,* at *24 (''HHS acted well within its authority in deciding how best to avoid conflict with the Federal conscience laws.'').

Response: This final rule is separate from the 2019 Conscience Rule. It does not implement that rule, and it does not implement the statutes implemented by that rule. Several courts have vacated the 2019 Conscience Rule before its effective date, but none of those courts issued any order against the conscience statutes themselves,[261] which the Conscience Rule sought to implement and which this final rule references. Because this final rule does not refer to or rely on the 2019 Conscience Rule, there is no reason to delay finalization of this rule pending further litigation over the 2019 Conscience Rule.

b. Religious Freedom Restoration Act

Comment: Some commenters said that the proposed rule's inclusion of the Religious Freedom Restoration Act (''RFRA'') in § 92.6(b) was unclear and confusing. Others said that it should be excluded because it would allow providers to deny needed healthcare. Other commenters supported inclusion of RFRA, agreeing that it is an important protection for religious conscience from government-imposed burdens. Commenters also pointed out that the Federal government has clearly articulated its commitment to RFRA and religious freedom laws under a recent executive order [262] and the subsequent Attorney General Memorandum [263] to executive departments and agencies that ''Congress has taken special care with respect to programs touching on abortion, sterilization, and other procedures that may raise religious conscience protections.'' [264] One commenter supported the Department's explicit acknowledgment that Section 1557 is subject to RFRA, stating that religious organizations have had to repeatedly go to court to vindicate their conscience rights against the Department's enforcement of the 2016 Rule. Others said that referring to RFRA accurately reflects statutory text and Congressional intent, and would correct a legal misinterpretation of Section 1557 that has been recognized as such by the *Franciscan Alliance* court.

Response: Congress explicitly stated that RFRA applies to ''all Federal law, whether statutory or otherwise, and whether adopted before or after November 16, 1993 . . . unless such law explicitly excludes such application by reference to this chapter.'' [265] Section 1557 does not explicitly exclude such application, so the Department is bound to enforce Section 1557 in compliance with RFRA. The Department agrees with the court in *Franciscan Alliance* that particular provisions in the 2016 Rule violated RFRA as applied to private plaintiffs.[266] In order to ensure that Section 1557 regulations are now interpreted consistently with, and implemented in compliance with, RFRA, the Department considers it appropriate to specify this explicitly.

Comment: Some commenters stated that the text of the Section 1557 statute does not contain a religious exemption, and therefore asked the Department not to include a religious exemption, either explicitly or by reference in § 92.6(b). Other commenters stated that exemptions on religious bases should be blanket exemptions, not case-by-case exemptions as outlined in RFRA.

Response: This final rule does not craft a religious exemption to Section 1557. Congress has already created various religious and conscience protections in healthcare by enacting several statutes, including RFRA, healthcare conscience statutes, and the religious organization exception in Title IX. This final rule simply states that the Section 1557 regulation will be implemented consistent with those statutes.

c. Title IX

Comment: Some commenters opposed including reference to the Title IX statutory religious exemption in § 92.6(b). They said that Section 1557 does not require or authorize Title IX religious or abortion exemptions, because these are limited to educational institutions, and are improper in the healthcare context. Others expressed concern that Section 1557 and Title IX would be subject to exemptions that HHS does not apply to its rules enforcing Title VI.

Other commenters stated that it is unnecessary and unwise to change the standard for the religious exemption under Title IX, and pointed to the legislative history of Title IX, where the Conference Committee rejected an amendment proposed by Senator Hatch to loosen the standard for the religious exemption. Commenters stated that § 92.101(c) of the 2016 Rule took an inconsistent analysis by failing to incorporate Title IX's religious and abortion exemptions, despite incorporating exemptions from the other three Federal civil rights laws referenced in Section 1557.

Still other commenters stated that the Title IX exemption should not apply broadly to large religious institutional healthcare facilities, or that conscience protections and religious liberty cannot apply to institutions like hospitals or healthcare systems because they cannot have the right of conscience: They suggested that conscience is limited to individuals and that an institution is not a person. Other commenters disagreed and pointed to legislative history to recognize that the protections under Title IX's religious exemption are not just for individuals but for institutions.

Response: The text of Title IX applies its religious exemption to institutions, so there should be no question that religious exemptions can apply to institutions as well as individuals.[267] As discussed above regarding termination of pregnancy, the *Franciscan Alliance* court vacated portions of the 2016 Rule for failing to incorporate Title IX's exemption for religious institutions. More generally, the Supreme Court in *Burwell* v. *Hobby Lobby* held that RFRA can apply to for-profit corporations. 573 U.S. 682 (2014). And that holding parallels other Supreme Court precedent making clear that organizations may engage in exercises of religion protected by the First Amendment. *See, e.g., Masterpiece Cakeshop, Ltd.* v. *Colo. Civil Rights Comm'n,* 138 S. Ct. 1719, 1732 (2018); *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC,* 565 U.S. 171, 199 (2012); *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah,* 508 U.S. 520, 525–26, 547 (1993).

Under the Civil Rights Restoration Act amendments to Title IX, the Title IX religious exemption is no longer limited to educational institutions controlled by religious organizations: Any educational operation of an entity may be exempt from Title IX due to control by a religious organization.[268] Section 1557

[261] *See New York* v. *United States Dep't of Health & Human Servs.,* 414 F. Supp. 3d 475 (S.D.N.Y. 2019); *City & Cty. of San Francisco* v. *Azar,* 411 F. Supp. 3d 1001 (N.D. Cal. 2019); *Washington* v. *Azar,* No. 2:19–CV–00183–SAB, 2019 WL 6219541 (E.D. Wash. Nov. 21, 2019).

[262] Executive Order 13798 on Promoting Free Speech and Religious Liberty, 82 FR 21675 (May 4, 2017).

[263] Memorandum of the Attorney General (Oct. 6, 2017), *https://www.justice.gov/opa/press-release/file/1001891/download.*

[264] *Id.*

[265] 42 U.S.C. 2000bb–3.

[266] *Franciscan Alliance,* 2019 WL 5157100 at *9 (''[T]he Court holds that the Rule, which expressly prohibits religious exemptions, substantially burdens Private Plaintiffs' religious exercise in violation of RFRA.'')

[267] *See* 20 U.S.C. 1681(a)(3) (''this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization''); 20 U.S.C. 1687(4) (excluding ''any operation of an entity which is controlled by a religious organization if the application of section 1681 of this title to such operation would not be consistent with the religious tenets of such organization'').

[268] *Id.*

incorporates the statutory scope of Title IX, so it is appropriate for this rule to incorporate the Title IX statutory language concerning religious institutions and abortion neutrality. Although much of Title VI case law can be applied to Title IX situations, the parallel is not perfect because Title IX contains several important statutory exemptions that are absent from Title VI. These are mentioned above in the section on discrimination on the basis of sex.[269]

Comment: Commenters stated that adding the Title IX exemption for religious entities violates the Establishment Clause, because it would force third parties to subsidize or bear the costs of religious exercise, citing *Cutter* v. *Wilkson,* 544 U.S. 709 (2005), *Lee* v. *Weisman,* 505 U.S. 577 (1992), and *Estate of Thornton* v. *Caldor, Inc.* 472 U.S. 703 (1985). Commenters indicated that religious exemptions must take an adequate account of the burdens a requested accommodation may impose on nonbeneficiaries. Commenters similarly suggested that the rule's requirement that the Section 1557 rule be implemented consistent with RFRA would violate the Establishment Clause and should be limited to instances where no third party is harmed by application of RFRA.

Response: Neither RFRA (as applied to Federal government actions), nor Title IX's statutory exemptions, have ever been held unconstitutional by the Supreme Court. The Court has upheld Title VII's statutory exemption for religious organizations,[270] and has denied that statutory exemptions of this type violate the Establishment Clause.[271] The Department will comply with all relevant court rulings.

[269] 20 U.S.C. 1681(a)(6)(B); 34 CFR 106 *et seq.*

[270] *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints* v. *Amos,* 483 U.S. 327, 338–40 (1987); *see also Walz* v. *Tax Commn. of City of New York,* 397 U.S. 664 (1970) (upholding the constitutionality of a state's statutory property tax exemption for religious organizations); *Id.* at 675 (''The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state. No one has ever suggested that tax exemption has converted libraries, art galleries, or hospitals into arms of the state or put employees 'on the public payroll.' There is no genuine nexus between tax exemption and establishment of religion.'').

[271] *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints* v. *Amos,* at 336–37 (''We agree with the District Court that this purpose does not violate the Establishment Clause. . . . A law is not unconstitutional simply because it allows churches to advance religion, which is their very purpose.''); *Id.* at 339 (''It cannot be seriously contended that [Title VII's statutory exemption] impermissibly entangles church and state; the statute effectuates a more complete separation of the two and avoids the kind of intrusive inquiry into religious belief that the District Court engaged in in this case.'').

d. Other Laws and Cases

Comment: The Department received comments supporting the express mention of Section 1303 of the ACA [272] in proposed § 92.6. These commenters contended that this helps clarify the prohibition on mandating QHPs to provide abortions, and that it could not have been Congress's intent to mandate abortion coverage in Section 1557. Section 1303 expressly leaves it up to issuers of health plans to decide not to cover abortion. Other comments stated that Section 1303 should not be expressly mentioned in this rule and that termination of pregnancy should remain as a prohibited basis of discrimination under the Section 1557 rule, notwithstanding Section 1303.

Response: In Section 1303, Congress specified that nothing in the ACA (therefore including Section 1557) ''shall be construed to have *any effect* on Federal laws regarding (i) conscience protection; (ii) willingness or refusal to provide abortion; and (iii) discrimination on the basis of willingness or refusal to provide, pay for, cover, or refer for abortion or to provide or participate in training to provide abortion'' (emphasis added). The Department considers it appropriate to finalize § 92.6 to indicate that the Section 1557 regulation will be implemented consistent with Section 1303, as that provision is relevant to the interpretation of the Federal laws that Section 1557 incorporates by reference.

Comment: The Department received comments from State public officials raising concerns about the 2016 Rule's constitutionality. State public officials contended that the 2016 Rule violated the Spending Clause because the Federal government did not provide adequate notice by clear statement and opportunity to agree to the Section 1557 Rule's new conditions on receipt of Federal financial assistance. States also raised objections under the Eleventh Amendment to the Department-initiated Section 1557 enforcement actions. States identified their obligation to protect the First Amendment rights to free exercise of religion of their citizenry. However, these State commenters noted that the proposed rule's removal of the definition of ''on the basis of sex,'' and the addition of the religious and abortion exemptions, would address these concerns.

Other commenters stated that when the Department said in the 2019 NPRM that State and local entities are better suited than the Federal government to address gender identity discrimination, this was contrary to constitutional law principles and undermined the right to be free from discrimination.

Response: The Department is not aware of any Supreme Court precedent that would call into question the constitutionality of its reasoning about federalism as laid out in the 2019 NPRM.[273] The Department believes that this final rule resolves the concerns States had about the 2016 Rule's constitutionality.

Comment: Some comments from State public officials stated that the 2016 Rule conflicted with State laws on religious accommodations and independent medical judgment of healthcare providers. A different group of State public officials submitted a separate joint comment stating that their States' civil rights legislation and/or regulations prohibited discrimination on the basis of gender identity or sexual orientation, and that the proposed rule would remove the consistency of their laws with the 2016 Rule. They argued that State insurance agencies acted first to promulgate regulations after passage of Section 1557 in 2010, assuming that Section 1557 prohibited gender identity discrimination. Some States also said that the proposed rule's incorporation of Federal conscience statutes would result in conflict with State laws, or with other Department rules requiring covered entities to provide care to all (*e.g.,* vaccination care).

Some States said that as employers they had difficulty resolving religious accommodation laws with Section 1557. Others stated they had no difficulties resolving consumer complaints of discrimination on the basis of gender identity.

Response: The Department agrees that States have a public interest in enforcement of their statutes, including conscience and religious freedom statutes. This final rule respects Federalism: It neither interferes with State laws on conscience protections and medical judgment, nor does it interfere with State laws that provide additional protections (so long as these do not violate other Federal statutes). The rule also explicitly provides that Section 1557 will not be taken to supersede State laws that provide additional protections against discrimination on the enumerated grounds. The Department is not aware of actual, as opposed to hypothetical, conflicts between the statutes incorporated here and other laws or

[272] 42 U.S.C. 18023.

[273] *See* 84 at 27857 (2019 NPRM discussion of ''Sensitive Balancing of Competing Interests at the Local Level'' at Part g).

regulations that the Department enforces.

Comment: A commenter supported including the reference to Section 1553 of the ACA in § 92.6 in order to protect nurses who have objections to participating in assisted suicide, promote trust in the nurse-patient relationship, and keep the profession open to candidates who want to serve as nurses but object to participation in assisted suicide.

Commenters supported the proposal's specification that the proposed regulation not be applied in a manner that conflicts with or supersedes exemptions, rights, or protections contained in several civil rights statutes, such as the Architectural Barriers Act of 1968, the Americans with Disabilities Act of 1990 (as amended by the Americans with Disabilities Act Amendments Act of 2008), and Section 508 of the Rehabilitation Act of 1973.

Some commenters requested that the word ''obligations'' be added in order to specify that the proposed regulation not be applied in a manner that conflicts with or supersedes the exemptions, rights, protections or obligations contained in several civil rights statutes. This addition would help clarify that this consideration is intended to help reduce redundancy, compliance burdens, and confusion for healthcare providers.

Response: The Department appreciates all these comments in support of the proposed rule. The Department declines to add the word ''obligations,'' as the final rule's language adequately addresses its interaction with other civil rights statutes.

Comment: One commenter noted that a number of provisions in the proposed rule seem to contradict portions of the recent Conscience Rule published by the Department.[274] In particular, this proposed rule eliminates and narrows definitions advanced by the 2016 Rule, while the Conscience Rule expands definitions and protections. This proposed rule seeks to drastically cut costs of enforcement by eliminating notice and taglines requirements and other costs for providers, while the Conscience Rule will impose new costs on providers and individuals. Finally, this proposed rule and the Conscience Rule use different definitions to define health programs and activities.

Response: The 2019 Conscience Rule and this final rule rely on different statutes, and different underlying regulations for those statutes, so it is not surprising that there should be differences between their respective definitions and protections. The four civil rights statutes underlying Section 1557 have implementing regulations containing appropriate definitions, protections, and enforcement mechanisms. As explained herein, the Department has now deemed most of the parallel provisions in the 2016 Rule to be unnecessary, superfluous, or unduly burdensome. Therefore the Department considers it appropriate to finalize a Section 1557 rule that is shorter than the 2016 Rule and relies more substantially on those underlying regulations. In contrast, the 2019 Conscience Rule (which has been vacated and is subject to pending litigation) modified previous regulations that are only three sentences long, and that lack the kinds of definitions and enforcement mechanisms found in regulations implementing other civil rights laws enforced by the Department. In promulgating the 2019 Conscience Rule, the Department concluded more extensive regulations were needed in the absence of existing regulations containing such provisions.

Comment: One commenter stated that the proposed rule's changes to the relationship to other laws section at § 92.6 are contrary to the requirements of Section 1557, because the 2016 Rule stated that neither it nor Section 1557 would apply a lesser standard than Title VI, Title IX, Section 504, or the Age Act. In contrast, the proposed rule expressly states that application of the proposed rule will not be required if the proposed rule violates, departs from, or contradicts a number of other Federal civil rights laws.

Response: The Department seeks to give all laws their fullest possible effect. It does not believe that the other laws referenced at § 92.6 are generally in conflict with Title VI, Title IX, Section 504, or the Age Act, except to the extent that some of them (*e.g.,* RFRA) may be specifically designed to limit the applicability of other Federal laws and governmental actions.

e. Summary of Regulatory Changes

For the reasons described in the proposed rule and having considered the comments received, the Department finalizes § 92.6 and repeals §§ 92.2(b) and 92.3 of the 2016 Rule without change.

C. Section 1557 Regulation, Subpart B: Specific Applications to Health Programs or Activities (Sections 92.201–92.205 of the 2016 Rule)

The Department requested comment on the proposed retention and modification of the provisions in Subpart B of the Section 1557 regulation, which imposes specific requirements on covered entities as regards individuals with LEP or disabilities.

(1) Meaningful Access for Individuals With Limited English Proficiency (45 CFR 92.101)

The Department proposed § 92.101(a), which states that any entity operating or administering a health program or activity subject to the Section 1557 regulation is obligated to take reasonable steps to ensure meaningful access to such programs or activities by LEP individuals. It also proposed § 92.101(b), which states that OCR may assess how an entity balances the following four factors:

(1) The number or proportion of LEP individuals eligible to be served or likely to be encountered in the eligible service population;

(2) the frequency with which LEP individuals come in contact with the entity's health program, activity, or service;

(3) the nature and importance of the entity's health program, activity, or service; and

(4) the resources available to the entity and costs.

Section § 92.101(b) retains many of the 2016 Rule's provisions related to access for LEP individuals. It removes definitions of the terms ''qualified bilingual/multilingual staff'' and ''individual with limited English proficiency,'' but the 2019 NPRM expressed the Department's commitment to interpreting those terms naturally and consistently with the 2016 Rule.[275] It also repeals the 2016 Rule's definition of ''national origin.''

The Department requested comment on whether the proposed retention of some provisions that impose requirements on covered entities under the Section 1557 Regulation (which govern health programs or activities), but not on entities that only receive HHS funding for human services, would cause problems or confusion, and (if so) whether this might warrant amendments to the Department's Title VI regulation.

Comment: In response to the Department's request for comment concerning possible amendments to the underlying civil rights regulations, some commenters said that they were unable to provide meaningful comments without HHS first providing explanations and rationale for any proposed changes, and that unanticipated changes could not be

[274] 45 CFR part 88.

[275] 85 FR 27860–61, 27866.

made in a final rule without first giving the public an opportunity to comment on those proposed changes.

Response: The Department did not propose changes to regulations other than those finalized here, but simply invited comment on whether to consider doing so. In this final rule, the Department does not implement any such changes, and in this respect finalizes the proposed rule without change. The Department here finalizes only those changes proposed in the 2019 NPRM (with minor and primarily technical changes to these).

Comment: Some commenters opposed the proposed rule's revisions to the requirements for meaningful access for LEP individuals, arguing that they weaken nondiscrimination requirements. These commenters noted that instead of requiring covered entities to take reasonable steps to provide meaningful access for *each* ''LEP individual eligible to be served or likely to be encountered,'' the proposed rule only requires covered entities to take steps to ensure meaningful access for ''LEP individuals'' generally. These commenters contend that this change will result in a number of LEP individuals unable to access healthcare, and will contribute to discrimination and to healthcare disparities for LEP individuals. Many commenters stated that lack of understanding in a medical setting could cause harm and possibly death to patients with LEP. One commenter emphasized the facilitative role that interpreters play to decrease risk associated with miscommunication between patients and providers. A commenter expressed concerns that healthcare services would dramatically decrease for individuals with LEP who are unable to access an interpreter. Another commenter objected to the notion that oral interpretation for patients would not be required. Some commenters also oppose the replacement of the 2016 Rule's two-factor test with a four-factor test. One commenter recommended replacing the term ''reasonable'' in the Department's LEP Guidance meaningful access standard with the term ''all,'' saying that the word ''reasonable'' leaves too much room for ambiguity in its application.

Response: The 2016 Rule imposed a stringent requirement on covered entities to take reasonable steps to provide meaningful access to each LEP individual eligible to be served or likely to be encountered. This provision could potentially be interpreted to require a covered entity to provide language assistance services to every LEP individual it comes into contact with. This final rule instead follows DOJ's longstanding LEP guidance (under Executive Order 13166), and HHS's corresponding LEP guidance from 2003, by saying that a covered entity under Title VI must take reasonable steps to ensure meaningful access to its programs or activities by LEP individuals.[276] Adopting this language would apply the same standard to both health and human services programs within the Department, and would conform to the other Federal agencies that follow DOJ's LEP Guidance, consistent with its civil-rights coordinating authority. Because Section 1557 incorporates the enforcement mechanisms available under Title VI (which encompasses LEP status under *Lau* v. *Nichols*),[277] it is appropriate for this final rule to adopt the Title VI standard requiring reasonable steps to ensure meaningful access.

This final rule also incorporates the four-factor test found in the DOJ LEP Guidance and reiterated in the Department's own 2003 LEP Guidance. That test is ''designed to be a flexible and fact-dependent standard,'' [278] and is meant to strike a balance that ensures meaningful access by LEP individuals to critical services while not imposing undue burdens on small businesses, small local governments, or small nonprofits. As the 2019 NPRM made clear, an individualized case-by-case assessment of the four factors is the starting point for exercising the Department's enforcement discretion in language access cases.[279]

This final rule retains, and the Department will vigorously enforce, the underlying legal standard of Title VI: Recipients are prohibited from utilizing criteria or methods of administration which have the effect of subjecting individuals to discrimination on the basis of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the program with respect to individuals on the basis of their race, color, or national origin. Entities that utilize such criteria or methods of administration have failed to take reasonable steps to ensure meaningful access to their programs by individuals with LEP and are operating their programs in violation of this final rule's prohibition against discrimination on the basis of national origin. All covered entities remain obligated to submit assurances that they will comply with Title VI and all other relevant civil rights law.[280]

The language access provisions in this final rule are consistent with Title VI enforcement mechanisms and with the Department's longstanding guidance. Title VI enforcement mechanisms are broadly known to the regulated community, and the HHS LEP Guidance has been effective in helping covered entities comply with the statute and implementing regulations. The Department regards the four-factor test, employed since 2003, as the best way of balancing the relevant factors in ensuring nondiscrimination on the basis of national origin. Under this final rule, the Department's LEP Guidance will help covered entities assess their programs using the four factors to ensure meaningful access to their programs by individuals with LEP. By eliminating confusion, inconsistency, redundancy, and unnecessarily burdensome compliance costs, this final rule applies proven enforcement mechanisms and guidance to ensure access to covered programs by individuals with LEP.

Comment: Commenters stated that the proposed rule significantly reduces the administrative burden placed on providers. For example, the proposed rule will allow retail pharmacies to provide patients with better quality of care in a more efficient manner. Another comment emphasized that under the 2016 Rule, providers are required to physically post the information at their facilities, on their websites, and in any ''significant'' publications and communications. This example underscored that the term ''significant'' has never been defined by OCR, which has resulted in providers using taglines notices in nearly every document provided to patients. This practice was described as administratively burdensome and counterproductive, because patients already receive numerous notices mandated by the Department. Another commenter expressed support for the proposed rule's empowerment of individual entities to take reasonable steps to ensure meaningful access.

Response: The Department agrees, and recognizes the burdens imposed by the 2016 Rule's requirement to post notices and taglines in all significant communications and publications, as well as by the difficulty of determining the meaning of ''significant'' with

[276] *See* 67 FR 41455 (June 18, 2002) (DOJ Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons).

[277] 414 U.S. 563 (1974).

[278] 68 FR 47314 (Aug. 8, 2003) (HHS Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons).

[279] 84 FR 27865 (June 14, 2019).

[280] *See* 84 FR 27860.

respect to the numerous and diverse types of programs covered by this final rule. These requirements were difficult for covered entities to implement due to different and overlapping language access requirements imposed by the Federal government and by many States.[281] Stakeholders have informed the Department that the repetitive nature of these requirements dilutes the messages contained in significant communications to the point that some recipients may be disregarding the information entirely.[282] In addition, many beneficiaries do not want to receive extra pages of information they have seen many times before, due to environmental concerns or annoyance.[283] Most significantly, the Department has found scant evidence to demonstrate that repeatedly mailing all beneficiaries of Federal and other health programs taglines with 15 or more languages is an efficient use of covered entities' language access resources when the overwhelming majority of beneficiaries speak English.[284] Savings from the notice and taglines requirements changes are described in more detail in the Regulatory Impact Analysis.

Comment: Some commenters stated that the notices and taglines requirements of the 2016 Rule are burdensome, but that the Department should consult with stakeholders to determine how to most effectively and efficiently communicate with LEP individuals, rather than repeal the requirements.

Response: The Department consulted with the public before and since issuing policy guidance to recipients on compliance with the Title VI obligation to take reasonable steps to ensure meaningful access to their programs by individuals with LEP. The Department also provided stakeholders with an opportunity to comment on the proposed rule during the public comment period.

Comment: The Department received comments opposing the proposed rule's revised § 92.101, which requires covered entities to take reasonable steps to ensure meaningful access to its programs or activities by individuals with LEP. Commenters asserted that the proposed change is contrary to congressional intent because the language in Section 1557 is clear that ''an individual shall not'' be subject to discrimination on the prohibited grounds. Others stated that the proposed § 92.101 inappropriately changes the Section 1557 regulation language and shifts the focus of the regulation from an individual's rights to the covered entity's programs or activities, thus weakening meaningful access and running contrary to the text of Section 1557.

Still others recommended that—through sub-regulatory guidance—the Department should communicate to providers the flexibility of the LEP access requirement.

Response: This final rule fully retains all protections offered by Section 1557, and it does not shift any focus from an individual's rights to the covered entity's programs or activities. It ensures that covered entities do not use their programs or activities to discriminate on the basis of any individual's national origin, which includes (under *Lau's* disparate impact analysis) requiring those entities to provide reasonable access to LEP individuals.

Comment: The Department received comments asserting that language assistance is necessary for individuals with LEP to access Federally funded programs and activities in the healthcare system. Several commenters argued that adequate translation services are a civil right and an important tool for informing individuals with LEP of their healthcare rights. One commenter also expressed concern that informed consent is compromised when a language barrier prevents a patient from understanding what he or she is consenting to. Many commenters also said that individuals with LEP face unique challenges in healthcare that are mitigated by language access services, and that the proposed rule might weaken access by patients with LEP to quality healthcare, resulting in patients' avoiding or postponing the medical care they require out of fear of discrimination or mistreatment due to their national origin or the language they speak.

Response: The Department strongly agrees that language assistance is often vital for ensuring access to Federally funded programs and activities in the healthcare system by individuals with LEP. The Department believes this final rule highlights its commitment to ensuring that individuals with LEP receive language access services that are appropriate under the circumstances and consistent with longstanding enforcement mechanisms and guidance. Accordingly, this final rule clarifies throughout § 92.101 that where language assistance services are required to be offered by a covered entity, they must be no-cost, timely, and accurate; that translators or interpreters provided in order to comply with the law must meet specific minimum qualifications, including ethical principles, confidentiality, proficiency, effective interpretation, and the ability to use specialized terminology as necessary in the healthcare setting; and that a covered entity may not require an individual with LEP to bring his or her own interpreter or rely on a minor child or accompanying adult to facilitate communication, except under limited exceptions. In addition, the Department expects that the cost savings estimated below resulting from repeal of notice and taglines requirements will, where applicable, free up resources that entities can use to provide more access to LEP individuals.

Comment: A commenter said that the proposed rule weakens system-wide standards governing access to language assistance services and will

[281] *E.g.,* 42 U.S.C. 300gg–15(b)(2) and 300gg–19(a)(1)(B) (requiring standards for ensuring that the Summaries of Benefits and Coverage and certain notices are provided in a culturally and linguistically appropriate manner); 42 U.S.C. 1396d(p)(5)(A) (requiring HHS to distribute to States an application form for Medicare cost-sharing in English and 10 non-English languages); 26 CFR 1.501(r)–4(a)(1), (b)(5)(ii) (requiring a hospital organization to translate certain documents, among other requirements, to qualify for a tax-exempt status with respect to a hospital facility); 42 CFR 422.2262(a)(1)–(2) and 422.2264(e) (setting forth Medicare Advantage marketing requirements, which include requiring Medicare Advantage organizations to translate marketing materials into non-English languages spoken by 5% or more of individuals in a plan service area), § 423.2262(a)(1)–(2) and § 423.2264(e) (setting forth Medicare Part D marketing requirements, which include requiring Part D plan sponsors to translate marketing materials into non-English languages spoken by 5% or more of individuals in a plan service area); 45 CFR 155.205(c)(2)(iii)(A) (Marketplaces must post taglines on their websites and include taglines in documents ''critical for obtaining health insurance coverage or access to health care services through a QHP''); 68 FR 47318 (Aug. 8, 2003)—Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons (setting forth guidance on translating ''vital'' documents).

[282] *See* Aetna, ''Member Reactions to 1557 Taglines'' (Apr. 2017), available at *https://www.regulations.gov/document?D=HHS-OCR-2019-0007-0002;* American Health Insurance Plans and Blue Cross Blue Shield Association (May 5, 2017), available at *https://www.regulations.gov/document?D=HHS-OCR-2019-0007-0003;* Pharmaceutical Care Management Association (May 2, 2017), available at *https://www.regulations.gov/document?D=HHS-OCR-2019-0007-0006.*

[283] *See* Aetna (May 1, 2017), available at *https://www.regulations.gov/document?D=HHS-OCR-2019-0007-0005;* Pharmaceutical Care Management Association (Mar. 27, 2017), available at *https://www.regulations.gov/document?D=HHS-OCR-2019-0007-0007;* American Health Insurance Plans and Blue Cross Blue Shield Association (May 5, 2017), available at *https://www.regulations.gov/document?D=HHS-OCR-2019-0007-0003.*

[284] *See* Pharmaceutical Care Management Association (Mar. 27, 2017), available at *https://www.regulations.gov/document?D=HHS-OCR-2019-0007-0007;* American Health Insurance Plans and Blue Cross Blue Shield Association (May 5, 2017), available at *https://www.regulations.gov/document?D=HHS-OCR-2019-0007-0003.*

disincentivize the broader system from embedding and institutionalizing LEP services.

Response: The Department knows of no evidence to support this assertion and considers it an improbable one, as this final rule simply applies the longstanding and well-known enforcement mechanisms of Title VI that have proven effective over time in ensuring access by individuals with LEP to covered programs.

Comment: Commenters said that it would be beneficial if the Department contacted providers with educational documents outlining the requirements under the proposed rule.

Response: It is not Department practice to reach out to all covered entities individually upon every regulatory change. At the same time, OCR does engage in various kinds of outreach to the regulated community. The proposed rule was published in the **Federal Register** and publicized on OCR's website, and this final rule will be publicized similarly. The Department expects its changes to reduce confusion among covered entities. If OCR sees evidence that this final rule's changes are causing any new confusion, OCR will consider issuing relevant guidance and education.

Comment: The Department received comments opposing the elimination of the provision requiring the Director to consider, if relevant, whether an entity has developed and implemented an effective written language access plan appropriate to its particular circumstances. Commenters stated that language access plans are important for evaluating compliance with Section 1557 and for planning efforts to address the needs of LEP individuals.

Response: The HHS LEP Guidance continues to encourage recipients to produce language access plans, but does not require them, and offers assistance to help ensure that implementation provides meaningful access by individuals with LEP. DOJ's LEP Guidance also does not require entities to produce such a plan. This final rule brings the Department's LEP regulations into closer conformity with the DOJ guidance, while Departmental guidance continues to encourage covered entities to go beyond minimum regulatory requirements.

Comment: One commenter argued that the justifications related to costs and resource availability do not supersede the right to meaningful access for individuals with LEP. Another commenter objected to cost's being the primary determinant for compliance with the proposed rule.

Response: Cost is not the primary factor in the four-factor analysis; no single factor is determinative. The four-factor analysis does not supersede the right to meaningful access but rather helps determine when an entity has taken reasonable steps to secure that right.

Comment: Some commenters believe the four-factor analysis under § 92.101(b) is too broad, lacks clarity, does not ensure that translation and other language services are available under important medical circumstances, may require recipients to provide unnecessarily expensive services, and/or weakens recipient language access obligations to serve persons who speak infrequently encountered languages. Others said that the proposed rule does not require a medical provider to make any effort to secure translation services when a patient faces a dire medical condition. Others supported the proposed rule's changes, indicating they would provide more flexibility for covered entities while ensuring that LEP persons have meaningful access to services. Some indicated that covered entities should not be required to provide expensive forms of language assistance, such as video remote interpreting services.

Response: The Department agrees with commenters who state that the four-factor analysis is an appropriate way to allow flexibility for covered entities while ensuring meaningful access for LEP individuals. As to the specific hypothetical situations described by commenters, OCR will evaluate such situations as they are presented to OCR on a case-by-case basis. The fact-dependent nature of Title VI analysis makes it impossible to make pronouncements on such situations without all the relevant facts.

Comment: Some commenters requested that this final rule stipulate that health insurance plans are in compliance with the four-factor test if they incorporate either State LEP requirements or items 4–7 of the National Standards for Culturally and Linguistically Appropriate Services (CLAS).

Response: The ACA instructs the Department to apply to Section 1557 the enforcement mechanisms available under Title VI, which include mechanisms for enforcing language access cases. This final rule relies on longstanding Federal practice in enforcing Title VI; it is far from clear that the Department would have statutory authority to enforce the CLAS standards or State LEP requirements instead. Moreover, recipients that provide language assistance in accordance with CLAS standards and State LEP requirements may still be utilizing other methods of administration that violate the final rule.

Comment: Some commenters suggested that administrative burden would be relieved by adopting uniform language access policies with other components in the Department like CMS, arguing that it would improve patient experiences and reduce errors.

Response: Because CMS program regulations are often implemented under different statutes than are civil rights regulations, and because LEP standards under Title VI have been subject to longstanding standards under DOJ and HHS guidance, the Department does not believe it is necessary at this time to adopt uniform language access standards across these different regulations. This final rule addresses regulations under Section 1557 and the civil rights statutes it incorporates.

Comment: Some commenters argued the proposed rule weakens the qualifications for language service providers by eliminating the words ''qualified'' and ''above average familiarity with'' from the proposed description of language interpreters and translators.

Response: This final rule does not weaken any qualifications for language service providers. It continues to use the term ''qualified'' six times in its regulatory text to describe ''interpreters,'' ''translators,'' or ''staff'' as relevant. As stated in the 2019 NPRM, this final rule eliminates the term ''qualified'' from the 2016 Rule only where it was redundant and clearly implied by the context—namely, a list of the translator's/interpreter's mandatory qualifications, a list that remains unchanged from the 2016 Rule.[285] And the 2016 Rule expressly declined to include any reference to ''above average familiarity.'' [286]

Comment: A commenter asserted that the proposed rule will adversely affect the patient-provider dialogue in addiction treatment programs, and underscored the importance of transparency in discussions about substance use history.

Response: The Department is not aware of any evidence to demonstrate this assertion, and believes that relying on the Department's underlying regulations and guidance will not result in such adverse effects.

Comment: Commenters expressed concern over the Department's proposal to remove requirements on video

[285] 84 FR 27860, 27866.

[286] 81 FR 31390–91.

interpreting quality standards as it relates to using video remote interpreting (VRI) services for LEP individuals or spoken language interpreting. Many commenters noted that most VRI services are done on the same equipment and through the same network and bandwidth for both spoken language and sign language, and that if these standards are removed for spoken language interpreters, there will be an unintended consequence of lower-quality VRI services for deaf and hard of hearing individuals. Other commenters noted that while they appreciated the incorporation of the ADA's definition of VRI, they opposed the removal of the technical and training requirements for the use of VRI for spoken language interpretation.

Some commenters recommended that all covered healthcare entities prioritize the use of on-site sign language interpreters, limit usage of VRI to specific situations, and maintain either a directory of local interpreters available for on-site work or a contract with an interpreter service provider to secure on-site interpreters when needed. Commenters offered detailed suggestions for regulations to limit VRI usage.

Response: In place of blanket requirements for VRI standards, this final rule adopts the four-factor analysis regarding access for LEP individuals, which will help covered entities balance competing considerations related to VRI quality standards. Where high-quality VRI is necessary to provide meaningful access to LEP persons, high-quality VRI will be required just as it was under the 2016 Rule. Furthermore, as is made clear in the next subsection (on proposed § 92.102), this final rule continues to hold covered entities to the ADA Title II standards for video interpretive services where these are needed for effective communication for deaf or hard of hearing individuals.

The Department requested comment on whether HHS's Title VI regulations at 45 CFR part 80 should be amended to address the *Lau* v. *Nichols*[287] precedent.

Comment: A commenter stated that the Department's regulations implementing Title VI do not need to be amended to address *Lau* v. *Nichols* as HHS and DOJ have followed this Supreme Court precedent for decades.

Response: The Department agrees and will continue to enforce Title VI consistent with Federal law.

In reviewing § 92.101 and public comments, the Department observed that the proposed rule inadvertently omitted the word ''or'' from the end of paragraph (b)(4)(ii)(A), concerning exceptions to the prohibition on using an adult accompanying an individual with LEP to interpret or facilitate communication. The ''or'' had been included in the parallel provision of the 2016 Rule at § 92.201(e)(2)(i); in the preamble to the proposed rule, the Department explained that it would apply those exceptions ''[l]ike the current rule'' (meaning as in § 92.201(e) of the 2016 Rule). 84 FR at 27866. To correct this, the Department finalizes § 92.101 with a technical change to insert ''or'' at the end of paragraph (b)(4)(ii)(A).

(2) Effective Communication for Individuals With Disabilities (45 CFR 92.102)

The Department proposed to retain the 2016 Rule's provisions on effective communication for individuals with disabilities. 84 FR at 27866–67.

Comment: A commenter suggested that each Section 1557 covered entity should simply comply with the standards that apply to each entity under the ADA, in order to reduce burden, confusion, and complexity.

Response: As a general matter, the Department does not view a covered entity's compliance with other Federal regulations, adopted with different requirements and for different purposes, as determinative of a covered entity's compliance with Section 1557.

Comment: The Department received comments expressing concern that the proposed rule would cause major harm to people with disabilities, affecting their access to effective healthcare, especially for those individuals in underserved and rural communities. Commenters suggested that because the current rule is working as it was intended, there is not sufficient reason to reopen it. Commenters argued that the ability to effectively communicate includes the individual patient as well as the patient's family/caregivers, and that the inability to effectively communicate can have significant adverse effects on an individual's access to healthcare. Other commenters expressed support for retaining the provisions of 45 CFR 92.202 (redesignated § 92.102), regarding effective communication for individuals with disabilities. Commenters noted that effective communication is a critical component to accessing and receiving healthcare and that often covered entities rely on communication methods that are the preference of the covered entity rather than the choice of the individual with a disability. Commenters stated that giving primary consideration to the choice of aid or service requested by an individual with a disability helps to ensure effective communication and equal opportunity in the healthcare setting. Commenters commended HHS for holding all recipients of Federal financial assistance from HHS to the higher ADA Title II standards.

Response: Access to care continues to be a critical concern for the Department, and access to care clearly requires effective communication. The Department does not believe this final rule will impede individuals' access to care, but that instead it will assist individuals in understanding a covered entity's legal obligations and their own rights under Section 1557. In addition, the rule will assist the Department in complying with the mandates of Congress and further substantive compliance. Finally, because this final rule will lift unnecessary regulatory burdens on providers, the Department hopes that it will increase access to care, including in underserved and rural communities.

Comment: Commenters noted that the current regulation's language tracks the statutory text of Title I and Title III of the ADA and the regulatory language of Title II of the ADA, all of which protect against discrimination based on association or relationship with a person with a disability. They said that the proposed rule's elimination of the 2016 Rule's prohibition on associational discrimination will therefore create bewilderment concerning providers' responsibilities and individuals' rights. Commenters argued that deleting the language will create uncertainty and confusion regarding the responsibilities of providers and the rights of persons who experience discrimination, and inconsistencies with other regulatory requirements that entities are subject to, including the ADA and Section 504.

Response: As stated above, protections against discrimination on the basis of association will be available under this final rule to the extent that they are available under the incorporated civil rights statutes and their implementing regulations. The Department notes that courts have often relied on ADA statutory provisions in their handling of Section 504 claims.[288]

[287] *Lau* v. *Nichols,* 414 U.S. 563 (1974).

[288] *See* Memorandum on Coordination of Federal Agencies' Implementation of Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act, Acting Assistant Attorney General (April 24, 2018); *see, e.g., Theriault* v. *Flynn,* 162 F.3d 46, 48 n.3 (1st Cir. 1998); *Henrietta D.* v. *Bloomberg,* 331 F.3d 261,272 (2d Cir. 2003); *Helen L.* v. *DiDario,* 46 F.3d 325, 330 n.7 (3rd Cir. 1995); *Baird ex rel. Baird* v. *Rose,* 192 F.3d 462, 468 (4th Cir. 1999); *Delano-Pyle* v. *Victoria Cty., Tex.,* Continued

Comment: Several commenters objected that the definition of auxiliary aids and services at proposed § 92.102(b)(1) excludes the term ''Qualified'' before ''Interpreters'' in subsection (i) and before ''Readers'' in subsection (ii), despite being part of the ADA definition at 28 CFR 35.104. Some Commenters strongly encouraged the Department to incorporate the ADA definition of ''Qualified Reader'' as follows: ''Qualified reader means a person who is able to read effectively, accurately, and impartially using any necessary specialized vocabulary.'' [289]

Response: As stated above regarding § 92.101(a), this final rule eliminates the term ''qualified'' from the 2016 Rule only where it was redundant and clearly implied by the context. In this case, subsection (b)(2) clearly lists the mandatory qualifications for interpreters required under subsection (b)(1), and it adopts that list from the ADA definition at 28 CFR 35.104 and § 36.303(f). It would therefore be redundant to describe those interpreters in subsection (b)(1) as ''qualified.'' No definition of ''Qualified Reader'' appears in the 2016 Rule, so the Department is making no change in that regard. But the Department interprets this subsection naturally as requiring qualifications for readers that are similar to the expressly stated qualifications for interpreters.

Comment: Commenters argued that although the proposed rule claims to incorporate the definition of auxiliary aids and services from the regulations implementing Title II of the ADA, the rule as proposed changes the definition of auxiliary aids and services, omitting ''acquisition or modification of equipment and devices; and other similar services and actions'' from the list of examples of aids and services. Commenters noted that this proposed change will confuse providers and people with disabilities and will lead both groups to assume the list in the proposed rule is exhaustive. Commenters opposed these deletions and requested that the Department retain the definition of auxiliary aids and services from the 2016 Rule.

Response: The Department's definition of auxiliary aids and services is consistent with, even if not identical to, that of the ADA. The Department does not deem it necessary to incorporate all of the ADA's examples, as neither the ADA's list nor this final rule's list claims to be exhaustive.

Comment: Some commenters expressed concern regarding the narrowing of the ''free of charge'' and ''timely manner'' provision at proposed § 92.102(b)(2). Commenters noted that the 2016 Rule's language is consistent with existing ADA Title II regulations, which provide that covered entities may not place a surcharge on a particular individual or group of individuals with a disability to cover the costs of the provision of auxiliary aids or program accessibility. Commenters asserted that the proposed § 92.102(b)(2) significantly narrows this provision by stating that ''interpreting service'' shall be provided to individuals free of charge and in a timely manner. These commenters strongly opposed this change and encourage the Department to replace the words ''interpreting service'' with ''auxiliary aids and services'' to be consistent with the ADA and to prevent unnecessary confusion over the requirement.

Response: Like § 92.202 of the 2016 Rule, which it replaces, § 92.102 of this final rule continues to incorporate the ADA Title II regulations at 28 CFR 35.160–164. The new section also includes new language on the qualifications for interpreters, which is where the term ''free of charge'' now appears; the term did not appear in § 92.202 of the 2016 Rule. To the extent that auxiliary aids must be provided free of charge under the 2016 Rule, they must still be provided free of charge under this final rule.

Comment: One commenter asked that the phrase ''in a timely manner'' as used in Section 92.102(b)(2) of the proposed rule be clarified with clear guidance as to what can and cannot be considered ''in a timely manner.''

Response: Application of the term ''in a timely manner'' requires a nuanced analysis that is fact-dependent. Its meaning can be understood from the long history of enforcement of Section 504 and the ADA in the courts and administratively.

Comment: Some commenters supported an exemption from the auxiliary aids and services requirement for covered entities with fewer than 15 employees, stating that it would help alleviate financial and administrative burden for smaller physician group practices that may already have limited resources. Others said that in some areas of the country, especially in small and rural communities, such an exemption could effectively bar access to many providers. Commenters said that any such exemption would be inconsistent with the standard present in Title II [290] and Title III [291] of the ADA, which require the same businesses to provide auxiliary aids and services to individuals with disabilities where necessary to ensure effective communication, regardless of the number of employees. They said that the existence of two competing regulatory standards will confuse small covered entities as to which standard they should follow. Several commenters noted that although a small economic burden may be placed on small businesses that have to comply with this requirement, there are programs that provide tax benefits and funding for the provision of reasonable accommodations, significantly reducing the burden placed on these entities.[292] Some commenters noted that because Titles II and III of the ADA already provide for sufficient mechanisms for providers to request exemptions based on a fundamental alteration in the nature of goods and services provided and undue burden, no additional exemption is needed through Section 1557.

Response: The Department believes that in the interest of uniformity and consistent administration of the law, all employers that receive Federal financial assistance from HHS, regardless of their size, should be held to the auxiliary aids and services requirement. The Department recognizes the importance of individuals being able to effectively communicate with their healthcare providers and is aware that the inability to effectively communicate can have significant adverse effects on individuals' access to effective healthcare. The Department's decision to require all entities, regardless of size, to provide auxiliary aids and services is consistent with OCR's policy for almost two decades,[293] so covered entities will

302 F.3d 567, 574 (5th Cir. 2002); *McPherson* v. *Michigan High School Athletic Ass 'n, Inc.,* 119 F.3d 453, 459–60 (6th Cir. 1997); *Gorman* v. *Bartch,* 152 F.3d 907, 912 (8th Cir. 1998); *Zukle* v. *Regents of Univ. of Cal.,* 166 F.3d 1041, 1045 n.11 (9th Cir. 1999); *Cohan ex rel. Bass* v. *N.M. Dept. of Health,* 646 F.3d 717, 725–26 (10th Cir. 2011); *Bircoll* v. *Miami-Dade Cty.,* 480 F.3d 1072, 1088 n.21 (11th Cir. 2007).

[289] 28 CFR 35.104.

[290] 28 CFR 35.104.

[291] *See* 42 U.S.C. 12182(b)(A)(iii) (under Title III, privately operated public accommodations regardless of their size are obligated to provide appropriate auxiliary aids and services, when necessary to ensure effective communication with individuals with disabilities, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of their programs, services or activities, or would result in undue financial and administrative burdens).

[292] Commenters cited U.S. Department of Justice American with Disabilities Act Update: A Primer for Small Business. (2010). Retrieved from *https://www.ada.gov/regs2010/smallbusiness/smallbusprimer2010.htm;* Internal Revenue Service. (n.d.); Form 8826, Disabled Access Credit. Retrieved from *https://www.irs.gov/forms-pubs/about-form-8826.*

[293] *See* Notice of Exercise of Authority Under 45 CFR 84.52(d)(2) Regarding Recipients With Fewer Than Fifteen Employees, 65 FR 79368 (Dec. 19, 2000).

be familiar with the obligations being imposed. Title II and Title III of the ADA already require public and private healthcare entities to provide auxiliary aids and services regardless of the number of employees. Both Titles state that an entity is not required to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens, and § 92.102 incorporates both of those limitations through its incorporation of the ADA Title II regulations at 28 CFR 35.160–164. Therefore, the Department finds it appropriate not to adopt an exemption from the auxiliary aids and services requirement for covered entities with fewer than 15 employees.

Comment: Commenters said that the ''primary consideration'' standard has evolved such that patients will demand that a particular translator or interpreter be used, regardless of the expense. These commenters argued that when patients demand use of a certain company or specific commercial service, this creates additional unnecessary costs for the covered entity. One commenter stated that Title III of the ADA should be the standard that applies to private businesses covered by Section 1557 regarding effective communication for individuals with disabilities. The commenter asserted that the Title II primary consideration standard is not appropriate for use in a clinical setting and that treating clinicians or the entities themselves are in the best position to determine the types of services necessary to address the communication needs of their patients. The commenter argued that applying Title II standards to private entities has created significant confusion for medical group practices accustomed to following longstanding Title III rules.

Response: Since the 2015 NPRM, the Department has held that it is appropriate, as a condition of receipt of Federal financial assistance from HHS, to hold all recipients to the higher 2010 ADA Title II standards regarding effective communication with individuals with disabilities.[294] The Department does not consider the commenters' concerns to be a sufficient reason to change this policy. Section 92.102 of this final rule seeks to avoid confusion by providing covered entities with clear, specific guidance to help them understand their rights and responsibilities regarding effective communication with individuals with disabilities. As mentioned above, it also incorporates the ''undue burden'' and ''fundamental alteration'' limitations of ADA Title II, in order to avoid excessively burdening covered entities.

(3) Accessibility Standards for Buildings and Facilities (45 CFR 92.103)

The Department proposed at § 92.103(a) to retain the 2016 Rule's requirement that new construction or alteration of buildings or facilities subject to Section 1557 must comply with the 2010 ADA Standards for Accessible Design by January 18, 2018, and to retain the 2016 Rule's allowance of departures from the 2010 ADA standards where other methods are permitted that provide substantially equivalent or greater access to and usability of the building. 84 FR at 27867. The Department proposed at § 92.103(b) to create a safe harbor for new construction or alteration of buildings or facilities subject to Section 1557, allowing existing facilities which were only required to be compliant with the Uniform Federal Accessibility Standards (''UFAS''), the 1991 ADA Standards, or the 2010 ADA Standards as of July 18, 2016, to be deemed compliant, unless there is new construction or alteration after January 18, 2018. Finally, the Department proposed at 92.103(c) to identify the three applicable building and facility detailed technical accessibility standards by cross-reference to their underlying regulations, instead of listing them in a separate definitions section.

Upon further consideration of this language and the public comments, the Department observed a potential ambiguity in § 92.203 of the 2016 Rule. The rule distinguished between construction or alteration commenced ''on or after July 18, 2016'' in the first sentence of § 92.203(a), those commenced ''on or before July 18, 2016'' in the first sentence of § 92.203(b), and those commenced ''before July 18, 2016'' in the last sentence of § 92.203(b). This potentially left it unclear how the rule would apply to construction or alteration commenced on July 18, 2016. To avoid confusion, the Department is finalizing § 92.103 with a technical change, by deleting the phrase ''on or'' from the first sentence of § 92.103(a), and adding ''on or'' before the word ''before'' in the last sentence of § 92.103(b). This resolves the ambiguity while providing leeway to activities commenced on July 18, 2016 where it was not clear how the 2016 Rule applied.

Comment: Commenters supported the proposal to continue to apply the 2010 ADA Standards' definition of ''public building or facility'' to all entities covered under Section 1557, by retaining the provisions of 45 CFR 92.203 (redesignated § 92.103) regarding accessibility standards for buildings and facilities. Commenters opposed any type of additional exemption from the requirements concerning multistory building elevators[295] and Text Telephone (TTY) requirements.[296] Some commenters strongly opposed the proposed rule's incorporation of the private entity TTY standard from the 2010 ADA Standards, and requested the retention of the existing TTY ratios, and the adoption of stringent Real-Time Text (RTT) ratios. Others noted that lack of accessible medical equipment presents barriers to effective healthcare for people with impaired mobility or strength and other disabilities, and they requested that the Department require healthcare facilities to follow the 2017 Architectural and Transportation Barriers Compliance Board (U.S. Access Board) Standards for Accessible Medical Diagnostic Equipment.[297]

Response: The Department believes that, because the great majority of entities covered by the 2016 Rule have already been subject to the 2010 ADA Standards, an approach that emphasizes uniform application of the 2010 Standards will promote conformity with pre-existing civil rights statutes while enabling greater consistency among implementing agencies. Any significant reevaluation of those standards or adoption of new standards is beyond the scope of this regulation. In the case of adopting new standards, the Department also declines to make such a significant regulatory change without the benefit of notice and public comment.

(4) Accessibility of Information and Communication Technology (45 CFR 92.104)

The Department proposed to retain the 2016 Rule's provisions on accessibility of information and communication technology for individuals with disabilities. 84 FR at 27867. The Department also proposed at 92.104(c) to update the 2016 Rule's

[294] 80 FR 54186.

[295] *See* 42 U.S.C. 12101 *et seq.* Exception 1 of section 206.2.3 of the 2010 ADA standards exempts multistory buildings besides the professional office of a healthcare provider owned by private entities from the requirement to provide an elevator to facilitate an accessible route throughout the building. This exemption does not apply to public entities.

[296] The 2010 ADA Standards also specifies TTY requirements for public buildings different from private buildings. Compare ADA 2010 Standard 217.4.3.1 (public buildings) with ADA 2010 Standard 217.4.3.2 (private buildings).

[297] *See* Information and Communication Technology (ICT) Standards and Guidelines, 82 FR 5790 (Jan. 18, 2017) (final rule); 83 FR 2912 (Jan. 22, 2018) (technical edits).

outdated term ''electronic and information technology'' with the term ''information and communication technology,'' as defined in the U.S. Access Board regulations. 84 FR at 27871.

Comment: Commenters expressed concern with the Department's proposed change to the definition of ''information and communication technology'' (ICT), in proposed § 92.104(c). Commenters noted that the critical phrase ''but are not limited to'' has been removed from the definition the Department claims to have incorporated from the U.S. Access Board's definition for ICT.[298] The commenters argue that due to the difficulty in predicting what technologies will be in place moving forward, it is important to maintain flexibility and ensure that the regulation keep pace with emerging technologies.

Response: The list of auxiliary aids was not intended as an all-inclusive or exhaustive catalogue of possible or available auxiliary aids or services—nor could it possibly be, given the new devices that will become available with emerging technology. The Department omitted the phrase ''but are not limited to'' merely in order to avoid unnecessary legal jargon. The plain meaning of ''include'' already encompasses ''but are not limited to,'' as it signifies that the listed items are only parts of a larger whole.

Comment: One commenter requested that the Department require recipients of Federal financial assistance to ensure that health programs or activities provided through their websites comply with the requirements of Title III, rather than Title II, of the ADA, if the recipient is otherwise covered by Title III. The commenter argued that the burden placed on small practices by having to comply with both Title II and Title III would likely outweigh any benefit to individuals who require accessible technology.

Response: The Department believes that this comment understates the benefit of the Title II standards to individuals who require accessible technology. Effective communication is a critical component for individuals to be able to access and receive healthcare, and this includes being able to access covered entities' websites. The Department believes that in the interest of uniformity of access for individuals with disabilities, all entities that receive Federal financial assistance from HHS should be held to the higher information and communication technology standards of Title II. The ADA does not exempt small providers from this requirement, although § 92.104 does incorporate the ADA's ''undue financial and administrative burden'' and ''fundamental alteration'' exemptions in order to protect covered entities from excessive burdens.

Comment: Some commenters stated that the Department should cross-reference Section 508 in its proposed § 92.104. The commenters noted that although the proposed rule tracks the concepts of the Section 508 regulations, it does not include the appropriate cross-reference, which will cause confusion if and when the Section 508 regulations are updated.

Response: If and when Section 508 regulations are updated, the Department will evaluate whether or not to update § 92.104 accordingly. Because this final rule does not incorporate Section 508 regulations but merely tracks them, the Department believes that a cross reference could cause unnecessary confusion if and when Section 508 regulations are updated or changed.

(5) Requirement To Make Reasonable Modifications (45 CFR 92.105)

The Department proposed at § 92.105 to retain the 2016 Rule's requirement that covered entities make reasonable modifications to policies, practices, or procedures when necessary to avoid discrimination on the basis of disability, unless the covered entity can demonstrate that the modification would fundamentally alter the health program or activity. 84 FR at 27868. The Department sought comment on whether to include an exemption for ''undue hardship.'' *Id.*

Comment: Commenters strongly opposed an exemption for undue hardship in regard to the requirement that covered entities make reasonable modifications to policies, practices, or procedures when necessary, to avoid discrimination on the basis of disability, except if the modification would fundamentally alter the nature of the health program or activity. Commenters pointed out that the current regulations track Title II of the ADA. Commenters stated that Title III does not absolve a covered entity from providing all forms of auxiliary aids if providing a particular auxiliary aid would result in undue burden, and that a provider has an obligation to find an alternative auxiliary aid in such cases. Commenters noted that because Title II and III of the ADA already provide mechanisms for providers to request exemptions based on an undue burden, no additional exemption is needed. Commenters stated that the substitute language proposed is from regulations related to employment and ill-fitting and inappropriate in a healthcare context. Commenters requested that if an exemption for undue hardship is provided, it should mirror the undue burden provision of the ADA, to ensure the two Federal laws are in sync and do not conflict with one another and lead to confusion.

Response: The Department agrees with commenters who ask that the regulations continue tracking Title II of the ADA, whose requirement for reasonable modifications includes a fundamental alteration exemption but no undue hardship exemption. The Department believes that this position helps promote continued consistency with pre-existing civil rights statutes. The reasonable modification analysis already applies to many entities subject to Section 1557 and is well-defined by regulation and decades of case law. Continuing to apply the ''reasonable modification'' analysis to Section 1557 promotes consistency with pre-existing civil rights law and is consistent with the U.S. Supreme Court's decision interpreting Section 504 in *Alexander* v. *Choate,* 469 U.S. 287 (1985), Title II of the ADA, and OCR's longstanding interpretation of Section 504.

Comment: Commenters objected to substituting the Title II reasonable modification language with language stating that covered entities ''shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified'' individual with a disability. Further, a commenter argued that use of the term ''known,'' outside the employment context, would suggest an overly narrow interpretation of the scope of Section 1557 and introduce an unnecessarily burdensome and intrusive process into the healthcare context. Commenters expressed concern that importing the ''known physical or mental limitation'' language would suggest to covered entities that their obligations are limited, and would create an undue focus on the measures that entities must take in response to requests for modifications.

Response: The Department shares the concern that introduction of the phrase ''known physical or mental limitations'' may cause covered entities to introduce

[298] *See* 36 CFR app. A § 1194 (2011) (defining ICT as ''Information technology and other equipment, systems, technologies, or processes, for which the principal function is the creation, manipulation, storage, display, receipt, or transmission of electronic data and information, as well as any associated content. Examples of ICT include but are not limited to: Computers and peripheral equipment; information kiosks and transaction machines; telecommunications equipment; customer premises equipment; multifunction office machines; software; applications; websites; videos; and electronic documents.'').

exceedingly burdensome and intrusive processes into the healthcare context. In contrast, the concept of reasonable modification taken from Title II has long applied to a wide range of entities covered by Section 1557, making such entities familiar with the requirements imposed, and is well-defined by regulation and decades of case law. The Department believes that continuing to apply the reasonable modification analysis to Section 1557 will help promote consistency with pre-existing civil rights statutes.

Comment: Several commenters noted that the citation for the proposed reasonable modification language the Department claims conforms to the Department of Justice's Section 504 coordinating regulations is to a non-existent portion of the Code of Federal Regulations. These commenters argue that these incorrect citations make it impossible for the public to analyze the context or case law of the proposed imported language and that such uncertainty makes it impossible for the public to reliably know what the Department is proposing.

Response: The Department thanks these commenters for bringing this citing error to its attention. For clarity, the Department notes that it intended to cite to 28 CFR 42.511, not § 92.205.[299] But for the reasons stated above, the Department has determined that it should retain the current Title II reasonable modification language.

Comment: Some commenters recommended that the rule include the addition of examples of programmatic modifications that are often needed by those with disabilities, such as the modification of wait times, office hours, and other business practices that can make accessibility to healthcare for people with disabilities difficult.

Response: The Department declines to enshrine a list of examples of ''programmatic modifications'' needed by those with disabilities. Because this final rule applies to a diverse range of covered entities, codifying examples would not provide meaningful guidance to the full spectrum of regulated covered entities. The Department believes that each covered entity ought to determine for itself which programmatic modifications with respect to its health programs and activities should be undertaken to avoid discrimination on the basis of disability, subject to enforcement by OCR in case of a complaint.

Comment: Commenters found inappropriate the Department's requesting comment on whether it has struck the appropriate balance in proposed §§ 92.102 through 92.105 with respect to Section 504 rights and obligations imposed on the regulated community, as such a balancing exercise is not called for by the statute and inserts inappropriate regulatory subtlety.

Response: In any rulemaking, addressing obstacles that impede individuals from exercising their rights should be balanced against potentially unnecessary obligations that may be imposed on the regulated community. Agencies engage in this type of balancing in order to ensure that the interests and issues of both individuals and the regulated community are fairly considered during the rulemaking process, helping to minimize the burden associated with Federal regulations.

Comment: A commenter said that in order to promote clarity and affirm that VRI quality standards apply in any remote interpreting situation that may arise for a person with a disability, § 92.101 of the proposed rule ought to cross-reference the VRI quality standards in § 92.102.

Response: Section 92.102 covers individuals with disabilities. § 92.101 covers individuals with LEP status, which is not a disability. Individuals with disabilities have different needs than LEP individuals, and the current regulatory text reflects that difference. If an LEP individual happens also to have a disability, then the VRI quality standards of § 92.102 will apply to him/her.

(6) Summary of Regulatory Changes

The Department finalizes the proposed sections § 92.101 through 92.105 without change, except that technical changes are made to add the word ''or'' at the end of § 92.101(b)(4)(ii)(A), to delete the phrase ''on or'' from the first sentence of § 92.103(a), and to add the phrase ''on or'' before the word ''before'' in the last sentence of § 92.103(b).

D. Title IX Regulations

The Department proposed to conform its Title IX regulations to current statutory provisions.

(1) Nomenclature, Rules of Appearance, Effective Date Modifications to Rules at 45 CFR 86.31 and 86.71

The Department proposed to make a nomenclature change to the Title IX regulation by replacing ''United States Commissioner of Education'' with the official's current title, ''Secretary of Education.'' [300] The Department also proposed to update the Title IX regulation's statutory citations to include the full current text of Title IX as amended by the CRRA.

The Department also proposed to repeal a prohibition on discrimination on the basis of ''rules of appearance'' in 45 CFR 86.31. The Department further proposed to update the enforcement section in the Department's Title IX regulation at 45 CFR 86.71, which currently discusses only enforcement procedures for the interim period before the issuance of the consolidated Title IX regulation. This final rule applies language from the Title IX regulation, which incorporates Title VI procedures.

Comment: The Department received comments indicating that the rules of appearance prohibition is well supported by Title IX and that HHS provides no basis for removing the prohibition.

Response: This final rule's NPRM explained that currently, the Department is the only Federal agency with Title IX regulatory language prohibiting discrimination ''against any person in the application of any rules of appearance.'' [301] The phrase ''rules of appearance'' does not appear in Title IX and was never defined in any agency's Title IX regulations. Consequently, the Department believes the phrase may cause confusion in the public about Title IX's coverage and compliance responsibilities, and has already led to at least one lawsuit. Because this language is not in the current regulations of any other agencies, this final rule limits the potential for conflicting and inequitable Federal agency enforcement of Title IX with respect to ''rules of appearance.''

(2) Abortion Neutrality of 20 U.S.C. 1688 in 45 CFR 86.2 and 86.18

The Department also proposed to modify its Title IX regulations, at 45 CFR 86.18, to reflect the statutory text Congress enacted in Title IX. This text includes what some commenters referred to as the Danforth Amendment, 20 U.S.C. 1688, which states that Title IX is not to be construed to force or require any individual or hospital or any other institution, program, or activity receiving Federal funds to perform or pay for an abortion; to require or prohibit any person, or public or private entity, to provide or pay for any benefit or service, including the use

[299] *See* 84 FR 27868 (citing to 28 CFR 92.205).

[300] *See* 45 CFR 86.2(n).

[301] *See, e.g.,* 47 FR 32527 (July 28, 1982) (Department of Education Title IX regulation); 65 FR 52858 (Aug. 30, 2000) (common rule adopted by twenty agencies), 66 FR 4627 (Feb. 20, 2001) (common rule adopted by Department of Energy); 82 FR 46656 (Oct. 6, 2017) (U.S. Department of Agriculture adopting common rule).

of facilities, related to an abortion; or to permit a penalty to be imposed on any person or individual because such person or individual is seeking or has received any benefit or service related to a legal abortion.[302] The Department also proposed to add a provision, similar to the provision of the Section 1557 regulation discussed above under ''relation to other laws,'' ensuring that its Title IX regulation would be construed consistently with various religious freedom and conscience statutes, including the explicit religious exemptions in the text of Title IX itself.

Comment: One commenter stated that adding Title IX's abortion neutrality language in the Department's Title IX regulations would be a violation of the plain language of the definition of sex discrimination in the regulations, which includes termination of pregnancy. Others noted that discrimination based on termination of pregnancy has been recognized by courts as sex discrimination and therefore argued that the proposed rule is contrary to civil rights laws and constitutional principles. Some noted that Title IX itself expressly does not permit penalties based on a woman's prior termination of pregnancy.

Others, however, supported the incorporation of Title IX's religious exemptions and other Federal conscience statutory protections, arguing that they are consistent with abortion neutrality. Still others stated that discrimination on the basis of sex should not include termination of pregnancy at all, under existing law and the statutory text of Section 1557 and Title IX. Some submitted legislative history from Title IX (Senate Committee Report 100–64) to show that Congress intended to allow for abortion exemptions and exclusion of health insurance coverage for abortion services, and that Congress did not intend to require all hospitals to provide abortion services to the general public.[303] But other commenters were critical of using legislative history to interpret a statute.

Response: This final rule does not remove the language from the Department's Title IX regulations that prohibits certain forms of discrimination on the basis of ''termination of pregnancy.'' [304] However, as stated above in the section on discrimination on the basis of sex (subsection on ''termination of pregnancy''), the Title IX regulations are governed by the text of the Title IX statute and cannot be ''construed to require or prohibit any person, or public or private entity, to provide or pay for any benefit or service, including the use of facilities, related to an abortion'' (20 U.S.C. 1688). This final rule adds language to the Title IX regulations in order to make this clear. Although some commenters cite legislative history, the Department interprets the statutory text as written. Regardless, the Department does not believe there is tension between the legislative history and the text.

By adding the abortion neutrality language to the Title IX regulations, and stating in the Section 1557 regulation that it will be applied consistent with Title IX (including that language), this final rule ensures compliance with the rationale in *Franciscan Alliance,* where the Court rightly held that the Department's regulations forbidding discrimination on the basis of sex must be construed in light of the underlying text of Title IX, including abortion neutrality.

Comment: Commenters stated that religious exemptions would make it harder to find healthcare in low provider areas, and that religious refusals also harm people who live in rural areas and must travel for an abortion. However, other commenters stated that this inclusion of various Federal conscience statutes and appropriations riders would ensure that healthcare providers who have conscience objections to abortion will feel welcome within the healthcare profession and will ease retention of healthcare providers already in the field.

Some specifically stated their support for the Department's inclusion of the First Amendment, and for Department guidance that the proposed rule be construed consistent with religious liberty and free speech protections, to clarify that the interpretation, application, and enforcement of the proposed rule will be consistent with religious liberty. Other commenters stated that referring to the First Amendment rightly addresses the recent Supreme Court ruling in *NIFLA* v. *Becerra*.[305] Commenters were concerned that the 2016 Rule would require a faith-based hospital to inform a patient about terminating her pregnancy in direct contravention of sincerely-held religious beliefs. This would be in conflict with *NIFLA,* where the Supreme Court held that such a mandate ''imposes an unduly burdensome disclosure requirement that will chill [] protected speech.'' [306]

Response: The Department agrees that this final rule should be construed consistent with the First Amendment, conscience statutes, and all relevant statutes and appropriations riders relating to abortion, to the extent they remain in effect or applicable. Agency regulations are subject to the requirements of the First Amendment in any case, and the Department considers it appropriate to say so explicitly here. All the other laws referenced establish Congressionally required parameters that may apply to the Department's interpretation, implementation, and enforcement of Title IX and of this final rule.[307] Commenters' policy objections to these statutory constraints are not a sufficient reason for the Department not to finalize this provision of the rule, which will ensure compliance with statutory requirements.

(3) Summary of Regulatory Changes

For the reasons described herein and having considered the comments received, the Department finalizes changes to 45 CFR 86.2, 86.18, 86.31, and 86.71 without change.

E. Conforming Amendments to CMS Regulations

The Department proposed to make conforming amendments to ten regulations of CMS that prohibited discrimination on the basis of gender identity and/or sexual orientation in the establishment and operation of ACA exchanges; in the marketing and design practices of health insurance issuers under the ACA; in the administration, marketing, and enrollment practices of QHPs under the ACA; in beneficiary enrollment and the promotion and delivery of services under Medicaid; and in the delivery of services under the PACE program. These conforming changes were proposed, among other

[302] *See* Public Law 100–259, 102 Stat. 28, sec. 8 (Mar. 22, 1988) (codified at 20 U.S.C. 1688).

[303] *See* Senate Committee Report 100–64 (''This bill does not expand abortion rights. Religiously-controlled organizations will continue to be able to apply for, and receive, an exemption from Title IX requirements where compliance with those requirements would violate their religious tenets. For example, a religiously controlled university that wished to exclude insurance coverage of abortions from an otherwise comprehensive student health insurance policy, could seek a religious exemption. . . . Title IX covers only students and employees, and does not reach the public at large. Therefore, claims that the bill would require hospitals to provide abortion services to the general public are false.'').

[304] *See* 45 CFR § 86.21(c)(3), 86.40(b)(1), 86.40(b)(4), 86.40(b)(5), 86.51(b)(2), 86.51(b)(6), 86.57(b), 86.57(c), 86.57(d).

[305] *Natl. Inst. of Fam. and Life Advocates* v. *Becerra,* 138 S. Ct. 2361 (2018).

[306] *Id.* at 2378.

[307] To the extent the relevant provisions are found in an appropriations rider, they apply to the Department's interpretation, implementation, and enforcement of Title IX every year that they are enacted.

reasons, to ensure uniformity across the Department with respect to regulations that cover many of the same entities.

(1) Generally

Comment: Several commenters contended that the proposed rule exceeds the authority of the Director of OCR by attempting to remove references to gender identity and sexual orientation from all HHS healthcare regulations, including those issued by other HHS agencies unrelated to Section 1557, although the rule purported to be promulgated by authority from Section 1557 and other sections within the ACA. Commenters stated that the nondiscrimination protections proposed to be eliminated from CMS regulations are unrelated to Section 1557 and its regulation, and that this elimination was proposed without sufficient legal, policy, or cost-benefit analyses as well as without knowledge of their potential impacts on various CMS programs and on LGBT patients, who (commenters said) may be discriminated against if these amendments are finalized. Also, commenters contend the conforming amendments, if implemented, would affect a wide range of healthcare programs, including private insurance and education programs. Some said they were unaware of any instances in which inclusion of sexual orientation as a basis for nondiscrimination in these CMS rules had been challenged or opposed. Others said that it was arbitrary to single out sexual orientation and gender identity for elimination, since some of the CMS regulations being amended also protect other characteristics not expressly enumerated by statute.

Response: Both the proposed rule and this final rule are promulgated by the Secretary of Health and Human Services, who has jurisdiction over all Department regulations, including those falling under the jurisdiction of CMS. Moreover, each of the programs, activities, or entities in the proposed conforming amendments falls within the scope of Section 1557 as entities established under Title I of the ACA (for example, Exchanges [308]), entities administered under Title I of the ACA (for example, QHPs [309]) or health programs or activities receiving Federal financial assistance from the Department, including contracts of insurance.[310] The ACA and certain Federal statutes identifying other protected categories provide the bases for the nondiscrimination clauses in health programs and activities funded or administered by HHS.[311]

The Department has reviewed the legal authorities underlying and cited in the nondiscrimination provisions of these CMS regulations and the explanations set forth in those rules. Some of them relied on or referenced Section 1557, some relied on different statutory provisions, and some are cross-referenced in the 2016 Rule. None of the statutory authorities underlying the CMS rules amended here explicitly references sexual orientation or gender identity. To the extent some of those regulations were promulgated based on broad authority to issue regulations,[312] inclusion of nondiscrimination criteria that are not explicitly set forth in other applicable civil rights statutes may not necessarily exceed the Department's statutory authority. Nevertheless, the Department deems it appropriate to pursue a more uniform practice concerning nondiscrimination categories across programs and activities to which Section 1557 applies, and to do so consistent with the government's position concerning discrimination on the basis of sex.

In addition, for several of the CMS final rules, their corresponding proposed rules had not mentioned adding sexual orientation and gender identity as nondiscrimination categories.[313] Although some of those proposed rules also did not mention adding other common nondiscrimination categories, the Department now views the addition of sexual orientation and gender identity as nondiscrimination categories as having presented different legal and policy concerns from other categories. Notably, these nondiscrimination categories are not required by applicable law, appear in only a handful of federal antidiscrimination statutes, and have been the subject of extensive litigation, controversy, and confusion generally. Thus, the Department believes the addition of sexual orientation and gender identity as nondiscrimination categories in its regulations should have been submitted for public comment and, notwithstanding the lack of legal challenge to these CMS regulations on this basis, proposes conforming amendments for purposes of clarity, consistency, and uniformity.

Therefore, the Department deems it appropriate to finalize the proposed conforming amendments to these CMS regulations without change (with the exception of a technical correction described below), in order to create a more uniform practice concerning nondiscrimination on the basis of sex among HHS programs to which Section 1557 applies, and to avoid the possibility that there was insufficient statutory authority to impose gender identity or sexual orientation nondiscrimination prohibitions through those regulations.

The Department is unaware of any data that would make cost-benefit analyses for these specific changes possible, and notes that the insertion of sexual orientation and gender identity language (repealed by these amendments) had already been implemented without any cost-benefit analyses. These provisions are eliminated for reasons parallel to those put forth here and in the proposed rule with respect to proper statutory construction, legal authority, and the Department's policy goals.

Comment: Some commenters supported proposals to remove the provisions prohibiting discrimination on the basis of sexual orientation specifically from regulations encompassed by the conforming amendments, in order to reflect current law and current regulatory policy. They reiterated the 2016 Rule's statement that there is no settled statutory law or court-settled law that discrimination on the basis of sexual orientation is legally included within the reach of Title IX.

Response: For the reasons explained above, the Department agrees with the 2016 Rule's decision not to include an explicit prohibition on sexual orientation discrimination. Similarly, the Department concludes it is appropriate to remove such language through these conforming amendments.

(2) Delivery of Medicaid Services (42 CFR 438.3(d)(4), 438.206(c)(2), 440.262)

The Department proposed conforming amendments to multiple provisions in Title 42 of the Code of Federal Regulations that apply to delivery of

[308] *See* Public Law 111–148, tit. I, subtit. D, Part II (Consumer Choices and Insurance Competition Through Health Benefit Exchanges).

[309] *See* Public Law 111–148, tit. I, subtit. D, Part I (Establishment of Qualified Health Plans).

[310] These include Medicare Advantage (Medicare Part C) plans, Medicare Part D plans, Medicaid Managed Care Organizations (MCOs), Medicaid Prepaid Inpatient Health Plans, (PIHPs), Medicaid Prepaid Ambulatory Health Plans (PAHPs), Medicaid Primary Care Case Managers (PCCMs), Primary Care Case Management Entities (PCCM-Es) and Programs for All-inclusive Care for the Elderly serving Medicare and Medicaid beneficiaries (PACE).

[311] *See* 42 CFR 438.3(d)(4), 438.206(c)(2), 440.262, 460.98(a)(3), 460.112(a).

[312] *See, e.g.,* ACA Section 1321 (42 U.S.C. 18041(a)) (authorizing the Secretary to ''issue regulations setting standards . . . with respect to . . . the establishment and operation of Exchanges . . . the offering of qualified health plans through such Exchanges . . . and . . . such other requirements as the Secretary determines appropriate'').

[313] *See, e.g.,* 78 FR 13406 (Feb. 27, 2013) (final rule) and 77 FR 70584, 70585 (Nov. 26, 2012) (NPRM).

Medicaid services found in § 438.3(d)(4) as applied to MCOs, PIHPs, PAHPs, PCCMs or PCCM entities, § 438.206(c)(2) by MCOs, PIHPs, and PAHPs participating in State efforts, and § 440.262 by the States themselves.

Three of the provisions applied to Medicaid managed care. The Department proposed on June 1, 2015, and then finalized on May 6, 2016, a regulation with several nondiscrimination provisions applicable to fee-for-service medical assistance under Medicaid. 80 FR 31098 (June 1, 2015) (Medicaid NPRM); 81 FR 27895 (May 6, 2016) (Medicaid final rule). The Department prohibited discrimination on the basis of ''sexual orientation and ''gender identity'' by MCOs, PIHPs, PAHPs, PCCMs, and PCCM-Es. 42 CFR 438.3(d)(4). And it required that certain of these entities promote access and/or delivery of services ''in a culturally competent manner to all enrollees . . . regardless of gender, sexual orientation or gender identity.'' 42 CFR§ 438.206(c)(2).

In promulgating these regulations, the Department relied on a statute granting general rulemaking authority to the Secretary of HHS to make and publish rules and regulations as may be necessary to efficiently administer Medicare and Medicaid. Section 1102 of the Social Security Act, 42 U.S.C. 1302(a). It also cited provisions of the Social Security Act that require Medicaid State plans for medical assistance to ''provide . . . such methods of administration . . . as are found by the Secretary to be necessary for the proper and efficient operation of the plan.'' Section 1902(a)(4) of the Social Security Act (42 U.S.C. 1396a(a)). And it cited Section 1902(a)(19) of the Social Security Act to justify additional methods of administration and new protected categories necessary for the proper operation of a State plan, for best interest of the beneficiaries, and for cultural competency. 81 FR 27895 (Medicaid final rule). None of these authorities prohibits discrimination on the basis of gender identity or sexual orientation.

In reviewing § 440.262, the Department became aware that in proposing a conforming amendment to the first sentence, the proposed rule is worded to delete the second sentence of that section, which reads ''These methods must ensure that beneficiaries have access to covered services that are delivered in a manner that meets their unique needs.'' The Department's intent was to make a conforming amendment to the first sentence of that section, but not to delete the second sentence. Therefore, the Department finalizes the conforming amendment to the first sentence of § 440.262 without change, but makes a technical correction by finalizing the section to retain the second sentence of that section. In other words, the Department is finalizing the change to the first sentence of § 440.262, but is not finalizing the deletion of the second sentence. In addition, the Department corrects the grammar of the second sentence, by changing the word ''meet'' to ''meets.'' Medicare's PACE Program Employees and Organizations (42 CFR 460.98(b)(3), 460.112(a)).

The Department proposed conforming amendments to two provisions that apply to PACE, a health program receiving HHS Federal financial assistance that is therefore subject to Section 1557.

In 2006, the Department promulgated a regulation administering PACE that prohibited discrimination on the basis of sexual orientation. 71 FR 71244 (Dec. 8, 2006) (PACE final rule). Sexual orientation had not been identified as a protected category in the statute authorizing PACE. *See* Public Law 98–21, as amended (codified at 42 U.S.C. 1396u–4 *et seq.*).

In the PACE final rule, in response to a request from two commenters to ''broaden the list of categories under which the PACE Organization cannot discriminate to include sexual orientation,'' the Department agreed to amend 42 CFR 460.98(b)(3) to prohibit discrimination on the basis of sexual orientation for Medicare and Medicaid participants. The PACE proposed rule also prohibited discrimination on the basis of sexual orientation by employees and contractors of Medicare-participating PACE programs. 42 CFR 460.112(a) (providing that ''[e]ach participant has the right not to be discriminated against in the delivery of required PACE services based on race, ethnicity, national origin, religion, sex, age, sexual orientation, mental or physical disability, or source of payment'').

Medicare Part A programs, including PACE, are subject to Title VI, Title IX, Section 504, and the Age Act. OCR has the authority to review recipient policies and procedures and certify that recipients of Federal financial assistance under Medicaid Part A comply with Title VI, Title IX, Section 504, and the Age Act, and their implementing regulations. CMS now directs applicants to an online attestation portal on the OCR website to assure compliance with those four civil rights statutes as well as with Section 1557.

In reviewing § 460.112(a), the Department became aware that in proposing a conforming amendment to the first two sentences, the proposed rule is worded to delete the remainder of the subsection. The Department's intent was to make a conforming amendment to the first two sentences of subsection (a), but not to delete its remainder. Therefore, the Department finalizes the conforming amendment to the first two sentences of § 460.112(a) without change, but as a matter of technical correction does not finalize the deletion of the remaining sentences, and instead finalizes subsection (a) to retain the remainder of that subsection.

Comment: Commenters expressed concern that PACE organizations would be allowed to discriminate against LGBTQ people under the proposed rule.

Response: The Department believes that everyone should be treated with dignity and respect and given every protection afforded by the Constitution and the laws passed by Congress. None of the statutes authorizing the PACE regulations prohibits discrimination on the basis of gender identity or sexual orientation.

(3) General Standards for Exchanges, QHPs for Exchanges, and Health Plan Issuers (45 CFR 155.120(c)(ii)), 156.200(e))

In 2012, the Department added ''sexual orientation'' and ''gender identity'' into certain regulations for the administration of the ACA by States, the Exchanges, and QHP issuers. 77 FR 18469 (Mar. 27, 2012) (''Administration of Exchanges final rule''). The Department cited Section 1321 of the ACA as its authority to add new nondiscrimination requirements. 76 FR at 41873, 41897 (July 15, 2011) (''Administration of Exchanges proposed rule'').

Section 1321 is a general regulatory provision allowing HHS to regulate establishment, operation, and standards in Exchanges and for QHPs. It does not contain the words ''sexual orientation'' or ''gender identity,'' or specify that the authority to set standards includes the authority to specify classes protected from discriminatory conduct that are not otherwise specified in nondiscrimination statutes.[314] Sections 155.120(c)(ii) and 156.200(e) were both later referenced in the preamble to the 2016 Rule as nondiscrimination provisions that the 2016 Rule

[314] Section 1321(a) of the ACA provides that the Secretary of the Department of Health and Human Services ''shall, as soon as practicable after the date of enactment of this Act, issue regulations setting standards for meeting the requirements under this title, and the amendments made by this title, with respect to—(A) the establishment and operation of Exchanges (including SHOP Exchanges); (B) the offering of qualified health plans through such Exchanges . . .'' 42 U.S.C. 18041(a)(1)(A)–(B).

''complements.'' *See* 81 FR 31376, 31428 (May 18, 2016). The 2016 Rule also provided that the States, Exchanges, and issuers are ''obligated to comply with both sets of requirements.'' *Id.*

(4) Guaranteed Coverage (45 CFR 147.104(e))

In the February 27, 2013 edition of the **Federal Register**, the Department finalized a new regulation expanding the nondiscrimination provisions applicable to QHP issuers, including prohibitions on discrimination on the basis of gender identity and sexual orientation, citing Section 1321(a) of the ACA as the applicable statutory authority. 78 FR 13406 (Guaranteed Coverage final rule, codified at 45 CFR 147.104(e)). Nevertheless, the language in the final rule prohibiting discrimination on the basis of gender identity and sexual orientation was not in the proposed rule. *See* 77 FR 70584, 70613 (Nov. 26, 2012). It appears that the Department added this language in response to a commenter asking that HHS ''broaden[ ] [§ 147.104(e)] to apply to all forms of discrimination prohibited by the March 27, 2012 Exchange final rule and section 1557 of the Affordable Care Act, such as discrimination based on age, disability, race, ethnicity, gender, and sexual orientation, not just discrimination against individuals with significant or high cost healthcare needs.'' 78 FR at 13417.

As legal authority, the Department also relied on Section 2702 of the Public Health Service Act, as amended by the Affordable Care Act, Public Law 111–148 (Mar. 23, 2010), which only required that any ''individual or group market in a State must accept every employer and individual in the State that applies for such coverage.'' There was no explicit reference to categories of individuals protected by nondiscrimination laws.

The rule administered the ACA's guarantee of coverage in the group and individual health insurance markets. *See* 42 U.S.C. 300gg–1. The Department attached the sexual orientation and gender identity nondiscrimination provision as part of the requirement for issuers to accept every employer and individual in the State who applies for coverage, subject to a few exceptions. Section 300gg–1 does not specify nondiscrimination criteria, including sexual orientation or gender identity.

The rule applied not only to the health plan issuer but also to its ''officials, employees, agents and representatives.'' 45 CFR 147.104(e). It prohibited these covered entities from discriminating based on a variety of bases, including an individual's sex, sexual orientation, or gender identity. *Id.* In the Guaranteed Coverage final rule, the Department justified the 45 CFR 147.104(e) nondiscrimination provision on the ground that it ''ensures consistency with . . . the non-discrimination standards applicable to QHPs under § 156.200(e),'' to which sexual orientation and gender identity provisions had previously been added (as described above). 78 FR at 13426. The Guaranteed Coverage final rule was also referenced in the preamble to the 2016 Rule, which described it as both ''independent of'' and ''complement[ary]'' to Section 1557. 81 FR at 31428.[315]

The Department notes that this amendment to the Guaranteed Coverage final rule does not negate the rule's requirement that health insurance issuers offering group or individual coverage ''must offer to any individual or employer in the State all products that are approved for sale in the applicable market, and must accept any individual or employer that applies for any of those products.'' 45 CFR 147.104(a). That requirement applies independent of the explicit nondiscrimination categories set forth in § 147.104(a).

(5) Enrollment in QHPs Through Exchanges by Agents or Brokers (45 CFR 155.220(j)(2)(i))

In the December 2, 2015 edition of the **Federal Register**, the Department proposed a rule that would prohibit agents or brokers from discriminating on the basis of sexual orientation and gender identity when assisting individuals and employers in applying for or enrolling in QHPs sold through a Federally-facilitated Exchange. 80 FR 75488. This proposed rule was adopted without change in March of the following year. 81 FR 12204 (Mar. 8, 2016) (codified at 45 CFR 155.220(j)(2)(i)). The final rule also stated that covered entities must comply with ''certain other Federal civil rights laws [that] impose non-discrimination requirements,'' such as Section 1557 of the ACA.[316] The final rule further directed issuers who seek certification of one or more QHPs to the OCR website for information about the Section 1557 NPRM.[317]

(6) Enrollment in QHPs and Exchanges by QHP Issuers (45 CFR 156.1230(b)(2))

In the September 6, 2016 edition of the **Federal Register**, the Department proposed a gender identity and sexual orientation nondiscrimination provision to rules governing marketing or conduct by issuers of individual market QHPs sold through the Federally-facilitated Exchanges in the direct enrollment of individuals in a manner that is considered to be through the Exchange. 81 FR 61456. The rule proposed that QHP issuers would be required to ''refrain from marketing or conduct that is misleading . . . coercive, or discriminates based on race, color, national origin, disability, age, sex, gender identity, or sexual orientation.'' *Id.* The proposed language was finalized that December. 81 FR 94058 (Dec. 22, 2016) (codified at 45 CFR 156.1230(b)(3), since redesignated as 45 CFR 156.1230(b)(2) (see 84 FR 17454, 17568 (Apr. 25, 2019, effective June 24, 2019))). The Department cited Section 1321 of the ACA as its authority to promulgate the nondiscrimination provision. The authority section of the regulation also encompasses Section 1311 of the ACA, which prohibits QHPs from ''employ[ing] marketing practices or benefit designs that have the effect of discouraging the enrollment in such plan by individuals with significant health needs.'' [318]

(7) Summary of Regulatory Changes

The Department finalizes without change the proposed conforming amendments at 42 CFR 438.3(d), 438.206(c)(2), and 460.98(b)(3), and 45 CFR§ 147.104(e), 155.120(c)(ii), 155.220(j)(2)(i), and 156.200(e). It finalizes the proposed conforming amendment of the first sentence of § 440.262 without change, but retains the second sentence of that section without deleting it, and makes one grammatical correction to the second sentence. It finalizes the proposed conforming amendment of the first two sentences of § 460.112(a) without change, but retains the remainder of that subsection without deleting it.

With respect to 45 CFR 156.1230(b)(2), the proposed rule indicated it would amend § 156.1230(b)(3), but effective June 24, 2019, § 156.1230(b)(3) was redesignated as § 156.1230(b)(2). *See* 84 FR at 17568.

[315] *See* 81 FR 31376, 31428 (May 18, 2016) (''We noted that this section [92.207] is independent of, but complements, the nondiscrimination provisions that apply to . . . issuers of qualified health plans under other Departmental regulations, and that entities covered under those provisions and Section 1557 are obligated to comply with both sets of requirements.'').

[316] 81 FR 12312 (''Issuers that receive Federal financial assistance, including in connection with offering a QHP on an Exchange, are subject to Title VI of the Civil Rights Act of 1964, the Age Discrimination Act of 1975, section 504 of the Rehabilitation Act of 1973, and section 1557 of the Affordable Care Act'').

[317] *Id.*

[318] 42 U.S.C. 18031.

Therefore, this rule finalizes the change at the redesignated location of the text at § 156.1230(b)(2).

IV. Regulatory Impact Analysis

The Department has examined the impacts of this final rule as required by Executive Order 12866 on Regulatory Planning and Review, 58 FR 51735 (Oct. 4, 1993); Executive Order 13563 on Improving Regulation and Regulatory Review, 76 FR 3821 (Jan. 21, 2011); Executive Order 13132 on Federalism, 64 FR 43255 (Aug. 4, 1999); Executive Order 13175 on Tribal Consultation, 65 FR 67249 (Nov. 6, 2000); Executive Order 13771 on Reducing Regulation and Controlling Costs, 82 FR 9339 (Jan. 30, 2017); the Congressional Review Act (Pub. L. 104–121, sec. 251, 110 Stat. 847 (Mar. 29, 1996)); the Unfunded Mandates Reform Act of 1995, Public Law 104–4, 109 Stat. 48 (Mar. 22, 1995); the Regulatory Flexibility Act (Pub. L. 96–354, 94 Stat. 1164 (Sept. 19, 1980); Executive Order 13272 on Proper Consideration of Small Entities in Agency Rulemaking, 67 FR 53461 (Aug. 16, 2002); Executive Order 12250, Leadership and Coordination of Nondiscrimination Laws, 45 FR 72995 (Nov. 2, 1980), and the Paperwork Reduction Act of 1995, 44 U.S.C. 3501, *et seq.*

A. Executive Orders 12866 and Related Executive Orders on Regulatory Review

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects; distributive impacts; and equity). Executive Order 13563 is supplemental to Executive Order 12866 and reaffirms the principles, structures, and definitions governing regulatory review established there.

As discussed below, the Department has estimated that this final rule will have a beneficial effect on the economy greater than $100 million in at least one year. Thus, it has been concluded that this final rule is economically significant. It has, therefore, been determined that this final rule is a ''significant regulatory action'' under Executive Order 12866 and, accordingly, the Office of Management and Budget (OMB) has reviewed this final rule.

The executive summary at the beginning of this preamble contains a summary of this final rule in its summary of major provisions, and describes the reasons it is needed in describing the purpose of this final rule.

(1) Consideration of Regulatory Alternatives

The Department carefully considered several alternatives, including the option of not pursuing any regulatory changes, but rejected that approach for several reasons.

First, not pursuing any regulatory changes would be inconsistent with the Administration's policies of appropriately reducing regulatory burden, in general, with respect to individuals, businesses and others, and from the ACA specifically.

Second, not pursuing any regulatory change would be inconsistent with various court rulings that have rejected or undermined the legal positions taken by the Department in the 2016 Rule. It would not, for example, ensure that the text of the Code of Federal Regulations accurately reflects the *vacatur* of the provisions including gender identity and termination of pregnancy as prohibited grounds of discrimination on the basis of sex. It also would not account for the decision of the Northern District of Illinois that the ''plain and unambiguous'' statutory text of Section 1557 indicated that a plaintiff could only use the enforcement mechanism of the underlying civil rights statute that corresponds to its claim. *Briscoe* v. *Health Care Serv. Corp.,* 281 F. Supp. 3d 725, 737–38 (N.D. Ill. 2017) (dismissing a Section 1557 claim for sex discrimination using a disparate impact standard, because plaintiffs cannot bring disparate impact claims under Title IX); *accord Galuten on Behalf of Estate of Galuten* v. *Williamson Med. Ctr.,* 2019 WL 1546940, at * (M.D. Tenn. Apr. 9, 2019); *E.S. by and through R.S.* v. *Regence BlueShield,* 2019 WL 4566053, at *4 (W.D. Wash. Sept. 24, 2018); *but see Rumble* v. *Fairview Health Servs.,* No. 14–cv–2037 (SRN/FLN) (D. Minn. Mar. 16, 2017) (declining to determine the specific standard on a motion to dismiss and rejecting the implication that Congress meant to create a ''new anti-discrimination framework completely 'unbound by the jurisdiction of the four referenced statutes,' '' but concluding Congress ''likely'' intended a single standard to avoid ''patently absurd consequences''). In addition, it would fail to account for the decisions of Federal courts in California, New York, and Iowa that did not recognize disparate impact claims for sex discrimination under Section 1557, because such claims are not cognizable under Title IX. *See Condry* v. *UnitedHealth Group,* No. 3:17–cf–00183–VC (N.D. Calif. June 27, 2018) (Slip. Op. at 7); *Weinreb* v. *Xerox Business Services,* 323 F. Supp. 3d 501, 521 (S.D.N.Y. 2018); *York* v. *Wellmark, Inc.,* No. 4:16–cv–00627–RGE–CFB, Slip. Op. at *30 (S.D. Iowa Sep. 6, 2017). A court in Pennsylvania similarly indicated that there is no disparate impact claim for discrimination on the basis of race under Section 1557, because such claims are unavailable under Title VI. *See Southeastern Pennsylvania* v. *Gilead,* 102 F. Supp. 3d 688 (E.D. Pa. 2015); *but see Callum* v. *CVS Corp.,* 137 F. Supp. 3d 817 (D.S.C. 2015).

Third, the Department believes that the status quo would not address, much less remedy, public confusion regarding complainants' rights and covered entities' legal obligations. The Department believes that revisiting the rule will address inconsistences between the Department's underlying regulations and the regulations and actions taken by other components of the Government. As applied to sex discrimination claims, the 2016 Rule set forth a definition of discrimination on the basis of sex under Section 1557 implementing Title IX that varied from the practice of other Departments. If the Department uses interpretations of Title IX that differ from other Departments and from the legal interpretation of the U.S. Government as set forth by the Department of Justice, it could lead to inconsistent outcomes across complainants and covered entities, with the problem especially acute in cases involving a single covered entity being investigated with respect to the same allegations by multiple Departments that come to different conclusions on effectively the same question.

The Department also considered adding ''gender identity'' and ''sexual orientation'' to a definition of ''sex'' or ''on the basis of sex'' under Title IX. The Department concluded it is inappropriate to do so in light of the ordinary public meaning of discrimination on the basis of sex under Title IX. This final rule will also significantly restore the ability of States to establish policies in this area, based on their weighing of the competing interests at stake. As a policy matter, the Department believes State and local entities are better equipped to address with sensitivity issues of gender dysphoria, sexual orientation, and any competing privacy interests, especially when young children or intimate settings are involved. The Department's position will not bar covered entities from choosing to grant protections on the basis of sexual orientation and gender identity that do not conflict with any other Federal law. The Department has also determined that economic incentives, performance objectives, or

other related forms of regulation are neither appropriate nor feasible solutions to the problems to be solved.

The Department also considered simply repealing the 2016 Rule *in toto* and not issuing a replacement regulation. Such an approach would be consistent with the Administration's goals of reducing the regulatory burden on covered entities, and is allowed under Section 1557, as that provision does not require the Department to issue implementing regulations. However, the Department is committed to vigorous enforcement of civil rights and nondiscrimination laws as directed by Congress, and considers it worthwhile to set forth that commitment in a Section 1557 regulation which takes the position that the Department will use the enforcement mechanisms available under the statutes cited in Section 1557 and their underlying regulations. Additionally, the Department believes that certain provisions—such as those addressing the assurance of compliance with Section 1557, effective communication and accessibility for individuals with disabilities, and certain language access services—address applications of civil rights laws without the statutory or legal conflicts, or excessive regulatory burdens, entailed by other provisions of the current Rule.

The Department also considered retaining the provision on visual standards for video remote interpreting services for LEP individuals. However, the burden of requiring covered entities to provide video technology training and utilize expensive software does not appear to be justified based on minimal benefit to language speakers who can effectively communicate when there is clear audio transmission through the remote interpreting service.

Accordingly, the Department believes it is appropriate to clarify how OCR will enforce the ACA's nondiscrimination protections by replacing the 2016 Rule with regulatory provisions (1) applying the enforcement mechanisms provided under the civil rights statutes and related implementing regulations cited in Section 1557 to the contexts identified in Section 1557, (2) vesting enforcement authority under Section 1557 with the Director of the Office for Civil Rights, and (3) specifying how Section 1557 enforcement shall interact with existing laws—while retaining certain language and disability access provisions and the assurances provision.

With respect to the requirement that covered entities provide nondiscrimination notices and taglines, the Department considered keeping the requirement but limiting the frequency of required mailings to one per year to each person served by the covered entity. To estimate the cost of this option, the Department adopted the base assumptions described in this Regulatory Impact Analysis regarding the number of covered entities and the average unit cost associated with the low-end and high-end costs of a notice and taglines mailing (materials, postage, and labor).[319] The Department adjusted the volume of mailings based on the average number of individuals served by each covered entity.[320] The Department assumed the same covered entity compliance rate for the insurance industry as under this Regulatory Impact Analysis but assumed an increased compliance rate for non-insurers (assuming 30% instead of 10%) to reflect that more entities would likely comply with the requirements if the burden were to be significantly reduced to one mailing per customer/patient per year. Based on this method, the estimated total cost of this alternative is approximately $63 million per year. Although this option poses a significantly reduced burden, the Department believes the costs under this alternative still outweigh the benefits because such mass multi-language taglines mailings would still be received overwhelmingly by English speakers and because the requirement to issue nondiscrimination notices would be largely duplicative of nondiscrimination notice requirements that already exist under Section 1557's underlying civil rights regulations.[321]

(2) Considerations for Cost-Effective Design

In this final rule, the Department replaces much of the 2016 Rule, to significantly reduce regulatory burdens and to return to the longstanding understanding of the underlying nondiscrimination obligations imposed by the civil rights laws referenced in Section 1557.

In the preamble to the 2016 Rule, the Department observed that there were pre-existing requirements under Federal civil rights laws that, ''except in the area of sex discrimination,'' applied to a large percentage of entities covered by the 2016 Rule. 81 FR at 31446. Thus, in the 2016 Rule the Department concluded it did not expect covered entities to undertake additional costs with respect to that rule's prohibitions on discrimination on the basis of race, color, national origin, age, or disability, ''except with respect to the voluntary development of a language access plan.'' *Id.*

By finalizing this rule without the 2016 Rule's definition of sex discrimination and eliminating the requirements regarding notices, taglines, and visual standards in video remote interpreting services for LEP individuals, language access plans, and duplicative grievance procedures, the final rule also allows covered entities the freedom to order their operations more efficiently, more flexibly, and in a more cost-effective manner.

Accordingly, returning to the familiar longstanding requirements is a cost-effective way of (1) removing the unjustified burdens imposed by the 2016 Rule; (2) reducing confusion among the public and covered entities; (3) promoting consistent, predictable, and cost-effective enforcement; and (4) creating space for innovation in the provision of compliant services by covered entities (including flexible and innovative language access practices and technology), while faithfully and vigorously enforcing Section 1557's civil rights protections.

(3) Methodology for Cost-Benefit Analysis

For purposes of this Regulatory Impact Analysis (RIA), the final rule adopts the list of covered entities and other cost assumptions identified in the 2016 Rule's RIA and that of the 2019 proposed rule. The use of assumptions from the 2016 Rule in the present RIA, however, does not mean that the Department adopts those assumptions in any respect beyond the purpose of estimating (1) the number of covered entities that would be relieved of burden, and (2) cost relief. For example, the 2016 Rule based several cost estimates on an expansive definition of Federal financial assistance, which significantly impacted the number of covered entities currently burdened by the 2016 Rule; thus, it is appropriate to use that definition for estimating cost relief. Such use, however, should not be interpreted as an endorsement or

[319] The average of the low ($0.035) and high ($0.32) unit costs is $0.18 per notice and tagline mailing.

[320] The estimated volume is expected to vary based on covered entity type. For instance, each of the 180 health insurance issuers serve 685,138 individuals on average, based on the number of insured individuals (123 million), which equates to 685,138 mailings per issuer. Each of the 185,649 physicians' offices serve 1,703 individuals, based on the average number of individuals (316 million) associated with 990 million physicians visits. On average, each covered entity serves about 3,000 persons per entity, which equates to 3,000 mailings per entity, based on 820 million persons served by 275,002 covered entities.

[321] *See* 45 CFR 80.6(d) (Title VI), 84.8 (Section 504), 86.9 (Title IX), 91.32 (Age Act).

acceptance of the definition for any other purpose.

The Department also does not ''carry over'' every assumption from the 2016 Rule for this final rule's RIA calculation. Most notably, the Department no longer considers its prior estimates of costs imposed due to the 2016 Rule's taglines requirement to be accurate or valid, and provides a more thorough and accurate estimate for purposes of this final rule.

Cost savings result from the repeal of (1) the provision on the incentive for covered entities to develop language access plans and (2) the provisions on notice and taglines. In addition, the Department quantitatively analyzes and monetizes the impact that this final rule may have on covered entities' voluntary actions to re-train their employees on, and adopt policies and procedures to implement, the legal requirements of this final rule. The Department analyzes the remaining benefits and burdens qualitatively because of the uncertainty inherent in predicting other concrete actions that such a diverse scope of covered entities might take in response to this final rule.

The Department also considered the public comments submitted in response to the proposed rule. The Department appreciates the information and various perspectives provided in those comments, which are summarized below and for which responses are provided.[322]

(4) Cost-Benefit Analysis

a. Overview

In the 2016 Rule, the Department estimated $942 million [323] in costs (over five years) due to impacts on personnel training and familiarization, enforcement, posting of nondiscrimination notices and taglines, and revisions in covered entity policies and procedures. 81 FR 31446, and 31458–59 (at Table 5). As stated earlier, the Department estimated in the 2016 Rule that these costs would arise *primarily* from requirements imposed by the 2016 Rule with which covered entities were not already complying.[324] The Department specifically identified the 2016 Rule's interpretation of sex discrimination to cover gender identity and sex stereotyping,[325] and the 2016 Rule's consideration of language access plans for compliance purposes, as provisions triggering the imposition of new costs.[326] *See* 81 FR 31459—Table 5.

In 2016, the Department estimated that the 2016 Rule's nondiscrimination notice requirement would impose approximately $3.6 million in one-time additional costs on covered entities. 81 FR 31469. Regarding these requirements, the Department stated: ''We are uncertain of the exact volume of taglines that will be printed or posted, but we estimate that covered entities will print and post the same number of taglines as notices and therefore the costs would be comparable to the costs for printing and disseminating the notice, or $3.6 million.'' 81 FR 31469. Thus, the total notice and taglines cost was estimated at $7.2 million in the first year and was predicted to go down to zero after year one, despite the regulatory requirement for covered entities to provide notices and taglines to beneficiaries, enrollees, and applicants by appending notices and taglines to all ''significant publications and significant communications'' larger than postcards or small brochures. *Compare* 81 FR 31458 (Table 5), *with* 45 CFR 92.8.

For reasons explained more fully below, the 2016 estimate of $7.2 million in one-time costs stemming from the notice and taglines requirement was a gross underestimation, and thus this final rule's elimination of those requirements would generate a large economic benefit of approximately $2.9 billion over five years on the repeal of the notice and taglines provision.

Table 1 shows the expected cost savings from the repeal of the notice and taglines provision and the quantified costs to firms for training and revising procedures and policies.

TABLE 1—ACCOUNTING TABLE OF ECONOMIC BENEFITS AND COSTS OF ALL FINALIZED CHANGES

[In millions]

	Year 1	Year 2	Year 3	Year 4	Year 5	Total
Savings:						
Total (undiscounted)	$643	$614	$585	$556	$528	$2,926
Total (3%)	624	579	536	494	455	2,688
Total (7%)	601	536	478	425	376	2,416
Costs—Quantified Costs:						
Total (undiscounted)	276	0	0	0	0	276
Total (3%)	269	0	0	0	0	269
Total (7%)	259	0	0	0	0	259
Net Total (undiscounted | 3% | 7%)						2,650 $2,319 (3%) $2,157 (7%)

Non-quantified benefits and costs are described below.

[322] The population, labor, and similar statistical data used in this RIA are also not changed from those used in the RIA in the proposed rule, because updating that data from the time of the proposed rule in June 2019 to the time of the publication of this final rule would not lead to substantive changes in the analysis.

[323] Throughout the regulatory impact analysis in the 2016 Rule, the 2016 estimates used 2014 dollars unless otherwise noted.

[324] 81 FR 31446 (''to the extent that certain actions are required under the final rule where the same actions are already required by prior existing civil rights regulations, we assume that the actions are already taking place and thus that they are not a burden imposed by the rule'').

[325] 81 FR 31455 (''Although a large number of providers may already be subject to state laws or institutional policies that prohibit discrimination on the basis of sex in the provision of health services, the clarification of the prohibition of sex discrimination in this regulation, particularly as it relates to discrimination on the basis of sex stereotyping and gender identity, may be new.'').

[326] Although the 2016 Rule did not require covered entities to develop a language access plan, the Rule stated that the development and implementation of a language access plan is a factor the Director ''shall'' take into account when evaluating whether an entity is in compliance with Section 1557. 45 CFR 92.201(b)(2). Therefore, the Department anticipated that 50% of covered entities would be induced to develop and implement a language access plan following issuance of the 2016 Rule. 81 FR 31454.

b. Generally Applicable Benefits and Burdens

i. Simplification and Flexibility

This final rule would result in other tangible benefits for covered entities. First, because this final rule is simpler and more easily administrable, it would be less likely that covered entities will need to pay for legal advice or otherwise expend organizational resources to understand their obligations under Section 1557, either in general or with respect to any particular situation that arises. Second, this final rule reduces the need for covered entities to expend labor and money on an ongoing basis to maintain internal procedures for mitigating the legal risk that persists due to unresolved controversy over the meaning of Section 1557. The Department solicited comment regarding the nature and magnitude of such ongoing costs incurred by covered entities, and below the Department summarizes and responds to significant comments regarding the regulatory impact of changes to the notice and taglines requirements.

This final rule will also carry intangible benefits, including that covered entities would enjoy increased freedom to adapt their Section 1557 compliance programs to most efficiently address their particular needs, benefiting both covered entities and individuals. The value of knowledge of civil rights is difficult to quantify. Covered entities will be free under the final rule to implement policies and procedures that comply with Federal civil rights laws in creative, effective, and efficient ways that are tailored to the covered entities and the communities that they serve.

ii. Policies and Procedures Concerning Gender Identity

In the proposed rule, the Department anticipated that the 2016 Rule likely induced many covered entities to conform their policies and operations to reflect gender identity as a protected category under Title IX. The Department requested and received public comments on the possible benefits and burdens related to changes in the proposed rule.

Comment: Many commenters contended that the proposed rule would lead covered entities to remove protections from transgender individuals in their policies and procedures. Commenters contended that these changes would lead to a wide range of burdensome results, including discrimination on the basis of gender identity and resulting negative health consequences, increased costs for treatment of such conditions, cost-shifting to transgender individuals, and increased burdens on the public health system due to the changes. Commenters also contended that similar results would occur from the Department's decision not to include sexual orientation nondiscrimination provisions in the proposed rule.

Response: The Department does not believe that this final rule will lead to significant burdens on entities due to changes to the gender identity language from the 2016 Rule, nor that the commenters have identified sufficient data to show that these negative consequences will occur or the extent to which they will occur. In December 2016, the *Franciscan Alliance* court preliminarily enjoined the gender identity provisions of the 2016 Rule on a nationwide basis, and more recently the court vacated those provisions. Consequently, this final rule's revisions to the provisions addressing gender identity do not change covered entities' obligations. Therefore, even though some entities may have changed their policies and procedures at the outset of the 2016 Rule, the Department concludes that because the gender identity provisions of the 2016 Rule have been vacated prior to this rule being finalized, it is even less likely than at the time of the proposed rule that this final rule will lead to changes in policies and procedures concerning gender identity. In addition, as explained above, the 2016 Rule did not include language prohibiting discrimination on the basis of sexual orientation status standing alone as a form of sex discrimination. The Department therefore does not anticipate any material change to covered entities' policies concerning sexual orientation as a result of this final rule.

In addition, it is worth noting that many covered entities are located in jurisdictions that prohibit sexual orientation and gender identity discrimination under State or local laws. Therefore, such entities are unlikely to change their policies, training, or grievance procedures concerning gender identity as a result of this final rule. Moreover, nothing in this final rule, or in the court decisions, prohibits entities from maintaining gender identity nondiscrimination policies and procedures voluntarily, and the Department believes some covered entities will continue to do so.

If some entities change their policies and procedures based on this final rule, such a reversion may entail amending organizational nondiscrimination policies and training materials, and communicating those changes to employees. The process of voluntarily reverting to previous practices would likely result in net cost savings to covered entities. Otherwise these entities likely would not take such action. In addition, the Department believes that, if this final rule led to covered entities changing policies and procedures, some covered entities may no longer incur costs associated with processing grievances related to gender identity discrimination under Title IX, because such claims will not be cognizable under this final rule.

The Department, however, is uncertain as to the total number of covered entities that will change their policies and grievance processes to reflect the changes in this final rule. The reasons for this uncertainty include, as stated above, the fact that such changes would only be indirectly attributable to this rule, not caused by this rule, because previous court rulings have negated the gender identity provisions from the 2016 Rule for over three years, and this rule has no effect on State and local gender identity protections. The Department is not aware of data about how many entities might change their policies for these indirect reasons.

Similarly, the Department also lacks the data necessary to estimate the number of individuals who currently benefit from covered entities' policies governing discrimination on the basis of gender identity who would no longer receive those benefits after publication of this rule—nor data to estimate how many of those individuals may experience the workplace and health-related negative consequences that many commenters contend will result from this final rule. The Department similarly lacks data to estimate what greater public health costs, cost-shifting, and expenses may result from entities changing their nondiscrimination policies and procedures after promulgation of this rule. The Department reiterates that it believes these effects will be minimal, again due to the fact that gender identity provisions were vacated from the 2016 Rule by the *Franciscan Alliance* court before this rulemaking was finalized.

c. Baseline Assumptions

The following discussion identifies the economic baselines from which the Department measures the expected costs and benefits of this final rule. Its baselines includes the cost estimates in the 2016 Rule, in addition to data it has gathered since the 2016 Rule was implemented, as described in more detail below. The Department also considered public comments, and

responds to significant comments in this discussion.

Key assumptions track those set forth in the proposed rule and include the following: (1) The 2016 Rule triggered significant activity on the part of covered entities, generating both costs and benefits; (2) under the December 2016 nationwide preliminary injunction in *Franciscan Alliance,* and the October 2019 final judgment in that case, the gender identity and termination of pregnancy provisions of the 2016 Rule have been unenforceable and are now absent from the 2016 Rule, without regard to whether this rule is finalized; (3) covered entities were already generally complying with civil rights laws and related regulations that were in effect before the 2016 Rule, and so this final rule generally does not impose any new burden beyond those imposed prior to the issuance of the 2016 Rule;[327] (4) the projected costs from the 2016 Rule for years 1 and 2 have been incurred, and the projected costs from years 3, 4, and 5 have not been incurred; (5) repeal of the 2016 Rule's notice and taglines requirements does not affect notice or taglines requirements required by CMS guidance or regulations that do not reference, rely on, or depend upon the taglines requirements of the 2016 Rule; (6) a relatively small percentage of physicians and hospitals currently append notices and taglines to billing statements sent to patients, while all insurance companies append notices and taglines to their explanations of benefits statements; and (7) covered employers are more likely to train employees who interact with the public than those who do not.

[327] OMB Circular A–4 discusses the practice whereby an RIA for a rule codifying a policy may include the impacts of that policy, even if the effects follow directly from an action by another branch of the federal government. The Circular notes that: ''In some cases, substantial portions of a rule may simply restate statutory requirements that would be self-implementing, even in the absence of the regulatory action. In these cases, you should use a pre-statute baseline. If you are able to separate out those areas where the agency has discretion, you may also use a post-statute baseline to evaluate the discretionary elements of the action.'' Although a baseline established prior to the *Franciscan Alliance* court's December 2016 and October 2019 orders would be considered analogous to the pre-statute baseline discussed in Circular A–4, given the existence of the RIA for the 2016 Rule, an assessment relative to a pre-*Franciscan Alliance* baseline would add little to the body of relevant analysis, and the longstanding duration of the court orders contributes to a lack of new data pertaining to certain alleged effects of language falling under those orders. For these reasons, the baseline established after December 2016, which isolates the effects most directly attributable to certain elements of this rule's finalization, is emphasized throughout the relevant parts of this RIA.

d. Covered Entities

i. Entities Covered by Section 1557

The 2016 Rule and this final rule apply to any entity that has a health program or activity, any part of which receives Federal financial assistance from the Department, any program or activity administered by the Department under Title I of the ACA, or any program or activity administered by an entity established under such Title. Covered entities under the 2016 Rule's definition [328] include the following:

(A) Entities With a Health Program or Activity, Any Part of Which Receives Federal Financial Assistance From the Department

The RIA for the 2016 Rule stated that the Department, through agencies such as the Health Resources and Services Administration (HRSA), the Substance Abuse and Mental Health Services Administration (SAMHSA), the Centers for Disease Control and Prevention (CDC), and the Centers for Medicare & Medicaid Services (CMS), provides Federal financial assistance through various mechanisms to health programs or activities of local governments, State governments, and the private sector. An entity may receive Federal financial assistance from more than one component in the Department. For instance, Federally qualified health centers receive Federal financial assistance from CMS by participating in Medicaid programs and may also receive Federal financial assistance from HRSA through grant awards. Because more than one funding stream may provide Federal financial assistance to an entity, the examples we provide may not uniquely capture entities that receive Federal financial assistance from only one component of the Department. Under the 2016 Rule, the covered entities consisted of the following:

(i) Entities receiving Federal financial assistance through their participation in Medicare (excluding Medicare Part B) or Medicaid (about 133,343 facilities).[329] Examples of these entities cited in the 2016 Rule's RIA include:

- Hospitals (includes short-term, rehabilitation, psychiatric, and long-term)
- Skilled nursing facilities/nursing facilities (facility-based and freestanding)
- Home health agencies
- Physical therapy/speech pathology programs
- End-stage renal disease dialysis centers
- Intermediate care facilities for individuals with intellectual disabilities
- Rural health clinics
- Physical therapy—independent practice
- Comprehensive outpatient rehabilitation facilities
- Ambulatory surgical centers
- Hospices
- Organ procurement organizations
- Community mental health centers
- Federally qualified health centers.

(ii) Laboratories that are hospital-based, office-based, or freestanding that receive Federal financial assistance through Medicaid payments for covered laboratory tests (about 445,657 laboratories with Clinical Laboratory Improvement Act certification).

(iii) Community health centers receiving Federal financial assistance through grant awards from HRSA (1,300 community health centers).[330]

(iv) Health-related schools in the United States and other health education entities receiving Federal financial assistance through grant awards to support 40 health professional training programs that include oral health, behavioral health, medicine, geriatric, and physician's assistant programs.[331]

(v) State Medicaid agencies receiving Federal financial assistance from CMS to operate CHIP (includes every State, the District of Columbia, Puerto Rico, Guam, the Northern Marianas, U.S. Virgin Islands, and American Samoa).

(vi) State public health agencies receiving Federal financial assistance from CDC, SAMHSA, and other HHS components (includes each State, the District of Columbia, Puerto Rico, Guam, the Northern Marianas, U.S. Virgin Islands, and American Samoa).

(vii) QHP issuers receiving Federal financial assistance through advance payments of premium tax credits and cost-sharing reductions (which include at least the 169 health insurance issuers in the Federally-facilitated Exchanges receiving Federal financial assistance

[328] As noted above, we use the list and number of covered entities and other figures from the 2016 Rule's RIA in this RIA for the sake of consistency and convenience, but such use does not mean that we adopt or accept any of the underlying analysis, definitions, or assumptions from the 2016 Rule's RIA for any other purpose related to this final rule.

[329] CMS, Provider of Service file (June 2014), *https://www.cms.gov/Research-Statistics-Data-and-Systems/Downloadable-Public-Use-Files/Provider-of-Services/POS2014.html.*

[330] HRSA, Justification of Estimates for Appropriation Committee For Fiscal Year 2016, 53, *http://www.hrsa.gov/about/budget/budgetjustification2016.pdf.*

[331] HRSA, Justification of Estimates for Appropriation Committee For Fiscal Year 2016, 53, *http://www.hrsa.gov/about/budget/budgetjustification2016.pdf.*

through advance payments of premium tax credits and cost-sharing reductions, and at least 11 health insurance issuers operating in the State Exchanges).[332]

(viii) Physicians receiving Federal financial assistance through Medicaid payments, ''meaningful use'' payments, and other sources, but not Medicare Part B payments (Medicare Part B payments to physicians are not Federal financial assistance). The Medicare Access and CHIP Reauthorization Act amended Section 1848 of the Act to sunset ''meaningful use'' payment adjustments for Medicare physicians after the 2018 payment adjustment.

In the 2016 Rule, the Department estimated that that rule likely covered almost all licensed physicians because they accept Federal financial assistance from sources other than Medicare Part B. Many physicians participate in more than one Federal, State, or local health program that receives Federal financial assistance, and many practice in several different settings, which increases the possibility that they may receive payments constituting Federal financial assistance.

For the sake of consistency and convenience, the Department uses the 2016 Rule's RIA estimate of the number of physicians receiving Federal financial assistance. As the 2016 Rule RIA noted, based on 2010 Medicaid Statistical Information System data (the latest available), about 614,000 physicians accept Medicaid payments and are covered under Section 1557 as a result.[333] This figure represents about 69% of licensed physicians in the United States, based on the 890,000 licensed physicians reported in the Area Health Resource File.[334] In addition, physicians receiving Federal payments from non-Part B Medicare sources will also come under Section 1557. The 2016 RIA noted that, as of January 2014, 296,500 Medicare-eligible professionals had applied for funds to support their ''meaningful use'' technology efforts.[335] Adding the approximately 614,000 physicians who receive Medicaid payments to the 296,500 physicians who receive meaningful use payments would yield over 900,000 physicians potentially reached by Section 1557 because they participate in Federal programs other than Part B of Medicare. Because physicians can receive both Medicaid and meaningful use payments, and these figures are not adjusted for duplication, the 900,000 result is best interpreted as an upper bound.

When the Department compared the upper-bound estimated number of physicians participating in Federal programs other than Medicare Part B (over 900,000) to the number of licensed physicians counted in HRSA's Area Health Resource File (approximately 890,000), and allowing for duplication in both the Medicare/Medicaid and HRSA numbers,[336] the Department concluded in the 2016 Rule RIA that almost all practicing physicians in the United States are reached by Section 1557 because they accept some form of Federal remuneration or reimbursement apart from Medicare Part B.

(B) Programs or Activities Administered by the Department Under Title I of the ACA

This final rule applies to programs or activities administered by the Department under Title I of the ACA. Such programs or activities include temporary high-risk pools (section 1101), temporary reinsurance for early retirees (section 1102), Department mechanisms for identifying affordable health insurance coverage options (section 1103), the wellness program demonstration project (section 1201, adding Public Health Service (PHS) Act 2705(*l*)), the provision of community health insurance options (section 1323), and the establishment of risk corridors for certain plans (section 1342).

(C) Entities Established Under Title I of ACA

This final rule applies to the health insurance exchanges established under Title I of the ACA. Such exchanges currently include the 12 State Exchanges (and D.C. Exchange), six State Exchanges on the Federal platform and 32 Federally-facilitated Exchanges.[337] Title I additionally establishes State advisory councils concerning community health insurance (section 1323) and certain reinsurance entities under the transitional reinsurance program (section 1341).

ii. Entities Covered by Title IX

Title IX applies to recipients of Federal financial assistance for education programs or activities. 20 U.S.C. 1681. The population of applicable covered entities is defined by the term ''recipient'' in the Department's Title IX regulations. The population includes any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and that operates an education program or activity that receives such assistance, including any subunit, successor, assignee, or transferee thereof. *See, e.g.,* 45 CFR 86.2. Under the definition of program or activity, recipients of Federal financial assistance within the scope of Title IX may include colleges, universities, local educational agencies, vocational education systems, or other entities or organizations principally engaged in the business of providing education. *See, e.g.,* 45 CFR part 86, App. A (cross-referencing Appendix B to 45 CFR part 80).

e. Cost Savings From Eliminating Notice and Taglines Requirement

The Department's baseline for calculating the savings from repealing the notice and taglines requirement includes approximately $585 million in additional average annual costs (over the next five years) that were not considered in the 2016 Rule. It is important to note that, while industry estimates prompted the Department to reassess the burdens imposed by the 2016 Rule, the Department conducted and relied upon its own cost analysis in developing the RIA for this final rule.

The 2016 Rule estimated $7.1 million for covered entities and $70,400 for the Federal government in combined annual costs for printing and distributing nondiscrimination notices and taglines, with the costs being apportioned roughly equally between notices and taglines. 81 FR at 31453. As explained in detail below, the Department estimates the combined notice and taglines requirement has actually cost

[332] Qualified Health Plans Landscape Individual Market Medical (2015), *https://data.healthcare.gov/dataset/2015-QHP-Landscape-Individual-Market-Medical/mp8z-jtg7*.

[333] John Holahan and Irene Headen, Kaiser Commission on Medicaid and the Uninsured, Medicaid Coverage and Spending in Health Reform: National and State-by-State Results for Adults at or Below 133% FPL (2010), *https://kaiserfamilyfoundation.files.wordpress.com/2013/01/medicaid-coverage-and-spending-in-health-reform-national-and-state-by-state-results-for-adults-at-or-below-133-fpl.pdf*. Estimates are based on data from FY 2010 MSIS.

[334] HRSA, Area Health Resource Files (2015), *http://ahrf.hrsa.gov*.

[335] Mynti Hossain and Marsha Gold, Mathematical Policy Research Inc.: Prepared for The Office of the National Coordinator for Health Information Technology, HHS, Monitoring National Implementation of HITECH: Status and Key Activity Quarterly Summary (Jan. to Mar. 2014), *http://www.healthit.gov/sites/default/files/globalevaluationquarterlyreport_januarymarch2014.pdf*.

[336] The Area Health Resource File itself double counts physicians who are licensed in more than one State.

[337] CMS, State-Based Exchanges for Plan Year 2018 (Nov. 1, 2019), *https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/state-marketplaces.html*.

covered entities hundreds of millions of dollars per year.

The 2016 Rule requires covered entities to include a notice and taglines for any ''significant'' document or publication, but did not define the term ''significant.'' 45 CFR 92.8(f)(1)(i).[338] Thus, covered entities have interpreted this provision to require a notice and taglines to accompany many communications from covered entities, including annual benefits notices, medical bills from hospitals and doctors, explanations of benefits from health insurance companies or health plans, and communications from pharmacy benefit managers.

This led to an extraordinary amount of mailed or electronically delivered communications by entities such as plan administrators and pharmacy benefit managers, including with every auto-ship refill reminder, formulary notice, and specialty benefit letter. Further, some other entities that operate in multiple States have interpreted the 2016 Rule as requiring them to include taglines for as many as 60 languages, or have included that many taglines in mailed or electronically-delivered communications due to the cost or technical barriers to customizing mailing inserts on a State-by-State basis, and thus have incurred costs to send up to an additional two double-sided pages of notices with each communication.[339]

To estimate the volume of notices and taglines that accompany an annual benefits notice, we began with the approximately 300 million persons in the United States who have health insurance,[340] or approximately 91% of the U.S. population. The Department then assumed that the annual notice of benefits (that includes a notice and taglines) is sent to each policyholder, not to each individual member of a covered household, such as covered children. Of the total U.S. population, 306 million individuals belong to 117.7 million households. For the data set relied on, a ''household'' includes ''all the people who occupy a housing unit . . . . The occupants may be a single family, one person living alone, two or more families living together, or any other group of related or unrelated people [341] who share living arrangements.'' [342] By implication, 17.3 million individuals do not belong to a household,[343] and live in group quarters.[344] The Department assumed that the percentage of the U.S. population that is uninsured, 9%, is the same percentage of U.S. individuals belonging to U.S. households that are uninsured. To calculate the number of annual benefits notices, the Department added the total number of individuals that do not belong to a household (17.3 million) to the total number of households (117.7 million), and discounted the sum (135 million) by 9% to exclude those individuals who are not insured. The total number of annual notices of benefits that include a nondiscrimination notice and taglines is therefore approximately 123 million (approximately 91% of 135 million).

To estimate the volume of notices and taglines that accompany communications from the health insurance Exchanges, the Department assumes the Exchanges send communications to the 11.8 million individuals enrolled in the individual market.[345] It assumes that the Exchanges send out approximately 1.5 notices per person per year. This accounts for the annual re-enrollment communication plus additional communications Exchanges will send for special enrollment periods. Thus, the total estimated volume of notices and taglines attributable to the Exchanges is 17.7 million.

To estimate the volume of notices and taglines that accompany hospital bills and explanations of benefits sent by insurance companies (or health plans) for hospital admissions, the Department first estimated the total number of hospital bills and explanation of benefits that would be sent to patients annually. There are 35 million hospital admissions per year.[346] For the purpose of this estimate, the Department assumes that each admission generates three bills from one hospital visit—each of which would include a notice and taglines document, for a total of 105 million bills, assuming three bills per admission.[347] The Department assumes that 10% of the 105 million bills will have a notice and taglines document attached, for a total of 10.5 million notice and taglines documents.

For patients who were insured upon admission to the hospital, in addition to the three hospital bills they would receive (on average), they would receive three associated explanations of benefits from their insurer or health plan, each of which would also include notice and taglines documents. If more than three service providers bill a patient for a hospital visit, then the savings associated with this patient encounter will be greater than estimated due to the additional notice and taglines documents that the insurer would send with each additional explanation of benefits beyond the initial three assumed. If fewer than three service providers bill for a hospital visit, then the savings will be less due to the decreased volume of notice and taglines documents that the insurer would send because the insurer would send fewer than three explanation of benefits. Given that approximately 91% of the U.S. population is insured, the

[338] After publishing the 2016 Rule, OCR issued guidance explaining that any significant publication printed on an 8.5 x 11 sheet of paper is not considered small sized and, thus, must include a minimum of 15 taglines. *See* OCR, Question 23, General Questions about Section 1557 (May 18, 2017), *https://www.hhs.gov/civil-rights/for-individuals/section-1557/1557faqs/index.html.*

[339] Although OCR has issued guidance stating that a covered entity may identify the top 15 languages spoken across all the States that the entity serves, *See https://www.hhs.gov/civil-rights/for-individuals/section-1557/1557faqs/aggregation_tagline/index.html,* evidence of notices that some covered entities shared with OCR suggests covered entities with beneficiaries in multiple States may issue more comprehensive tagline notices with more than 15 languages, likely because of reasonable interpretations of the relevant provisions of the 2016 Rule, and the higher cost of attempting to tailor notices and taglines to individuals based on their specific State.

[340] Calculated by subtracting total uninsured population (28.1 million as of 2016), *See https://www.census.gov/library/publications/2017/demo/p60-260.html,* from the total U.S. Population (327 million as of March 14, 2018), *See https://www.census.gov/popclock.*

[341] The calculations do not take into account households where two or more unrelated persons have individual coverage, and thus receive separate annual notices at the same household. The Department believes, however, that this exclusion has only a minor impact on the overall figures.

[342] U.S. Census Bureau, American Community Survey and Puerto Rico Community Survey 2016 Subject Definitions 76, *https://www2.census.gov/programs-surveys/acs/tech_docs/subject_definitions/2016_ACSSubjectDefinitions.pdf* (defining ''household'' under ''Household Type and Relationship'').

[343] The Department subtracted 306 million individuals belonging to a household from the total U.S. population of 323.4 million individuals. *See* U.S. Census Bureau, *https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk* (relied on 2016 population nationally).

[344] U.S. Census Bureau, American Community Survey and Puerto Rico Community Survey 2016 Subject Definitions 76, *https://www2.census.gov/programs-surveys/acs/tech_docs/subject_definitions/2016_ACSSubjectDefinitions.pdf* (''People not living in households are classified as living in group quarters.''). ''Group quarters include . . . college residence halls, . . . skilled nursing facilities, . . . correctional facilities, and workers' dormitories.'' U.S. Census Bureau, 2016 American Community Survey/Puerto Rico Community Survey Group Quarters Definitions, 1 *https://www2.census.gov/programs-surveys/acs/tech_docs/group_definitions/2016GQ_Definitions.pdf.*

[345] *See* CMS, *Health Insurance Exchanges 2018 Open Enrollment Period Final Report* (Apr. 3, 2018), *https://www.cms.gov/Newsroom/MediaReleaseDatabase/Fact-sheets/2018-Fact-sheets-items/2018-04-03.html.*

[346] CDC, Chartbook on Long-Term Trends in Health (2016), *http://www.cdc.gov/nchs/data/hus/hus16.pdf#317.*

[347] The Department presumes one hospital visit likely will generate a bill from the physician and two bills from any combination of services, such as anesthesia, ambulance service, imaging/radiology, or laboratory or blood work.

Department estimates that approximately 32 million of the 35 million hospital admissions are associated with insured patients (91% of 35 million hospital admissions).[348] This assumption does not account for variation in healthcare consumption between the insured and uninsured populations. It is possible that more hospital admissions are attributable to the uninsured than the insured population. If such is the case, the Department's estimate for the number of notices and taglines attributable to explanations of benefits would be lower. Further, this estimate does not account for outpatient hospital visits, which would increase the volume of notices and taglines. Moreover, if the elderly, nearly all of whom are insured by Medicare, make up a disproportionate share of hospital admissions, the Department's estimate for the number of notices and taglines attributable to explanations of benefits would be higher.

As discussed further below, the Department assumes 100% of insurance companies are compliant with the notice and taglines requirement. Thus, approximately 96 million notice and taglines documents are attributable to the explanations of benefits sent by insurers (32 million admissions times three explanation of benefits). Using rounded values, approximately 107 million additional notices and taglines (96 million plus 11 million) are related to hospital admissions.

To estimate the volume of notices and taglines that accompany doctor's bills and explanations of benefits from a physician's visit, the Department relied on data showing that individuals visit physicians' offices approximately 990 million times each year.[349] Given that approximately 9% [350] of Americans are uninsured, the Department assumes (and subtracting an estimated 5% for uninsured patients who do not visit the doctor, except in an emergency) that 95% of individuals who see doctors every year are insured in some form. The Department assumes that each visit to a compliant doctor's office will generate at least one bill from the doctor and at least one explanation of benefits from the health insurance company. As explained below, it also assumes that 10% of doctors and 100% of insurance companies comply with the notice and taglines requirement. Thus, approximately 99 million notices and taglines are attributable to doctors billing the patients directly, and approximately 941 million are attributable to explanations of benefits sent by insurers, which results in a total of 1.04 billion additional notices and taglines related to physician visits.

Because experience and substantial feedback from healthcare insurers suggests a very high degree of compliance with the notice and taglines requirements when it comes to documents such as explanations of benefits, the Department presumes 100% compliance for purposes of this RIA. Anecdotal evidence, however, suggests that hospital and physician compliance with the notice and taglines requirements in the documents discussed above is not standard industry practice. The Department estimates that, at most, 10% of such covered entities include notices and taglines in their significant mailed communications with patients. Although, according to the 2016 Rule's RIA, most hospitals and physicians are covered entities under Section 1557, the Department believes their failure to adopt notices and taglines as a standard billing and communication practice may be due to the fact the notice and taglines requirement in the 2016 Rule mentions a duty to notify ''beneficiaries, enrollees, applicants, and members of the public'' and does not explicitly mention ''patients.'' 45 CFR 92.8(a). Additionally, the preamble to the 2016 Rule explained that the notice and taglines requirement covered communications ''pertaining to rights or benefits,'' which insurance companies have universally interpreted as applying to significant numbers of communications they send to beneficiaries. 81 FR at 31402. For these reasons, the Department's calculations presume a 10% compliance rate for hospitals and physicians and a 100% compliance rate by health insurance companies concerning the notice and taglines requirement as it relates to bills and explanations of benefits, respectively.

To estimate the volume of notices and taglines that accompany pharmacy-related communications, the Department relied on estimates from the Pharmaceutical Care Management Association, which, due to the nature of its organization, obtained an estimated number of impacted beneficiaries from its member organizations. Approximately 173 million beneficiaries are being impacted annually by the notice and taglines requirement, and these beneficiaries receive between 6 and 28 communications per year with an accompanying notice and taglines. The Department relied on the average of this estimate (17 communications per year per beneficiary) to determine that 2.9 billion prescription-related communications (*e.g.,* communications from pharmacy benefit managers) are sent each year.[351]

To calculate the costs of the notice and taglines requirement, the Department assumes that the underlying communication to which a nondiscrimination notice and taglines document is attached is a communication that is on average three sheets of paper or less. Combined with the nondiscrimination notice and taglines (which constitute another 1–4 sides of a page, that is, 1 sheet single-sided [352] to 2 sheets of paper double-sided), the total number of sheets of paper that would be transmitted is equivalent to 4–5 sheets of paper or less. The associated costs of the notice and taglines requirement are (1) materials, (2) postage, and (3) labor. Because of the uncertainty around some of the estimates, we report ranges for some values in this analysis.

For materials, the Department assumes that materials (paper and ink) per notice and taglines mailing insert will cost between $0.025 and $0.10. The Department assumes that low materials cost would be $0.025 to print a 1-page notice and taglines on a single sheet of paper single-sided, and the high materials cost of $0.10 to print a 4-page notice and taglines on 2 sheets of paper double sided.

For postage, the Department estimates that the additional weight of the notice

[348] Calculated by subtracting total uninsured population (28.1 million as of 2016), *See https://www.census.gov/library/publications/2017/demo/p60-260.html,* from the total U.S. Population in 2016 (323,405,935), *See https://www.census.gov/popclock. http://news.gallup.com/poll/225383/uninsured-rate-steady-fourth-quarter-2017.aspx?g_source=Well-Being&g_medium=newsfeed&g_campaign=tiles.*

[349] CDC, Ambulatory Care Use and Physician Office Visits (2016), *https://www.cdc.gov/nchs/fastats/physician-visits.htm.* As noted above, the Department relies on the 2016 RIA assumption that virtually all doctors receive Federal financial assistance and, thus, are subject to the 2016 Rule.

[350] Calculated by subtracting total uninsured population (28.1 million as of 2016), *See https://www.census.gov/library/publications/2017/demo/p60-260.html,* from the total U.S. Population in 2016 (323,405,935), *See https://www.census.gov/popclock.*

[351] Source: Pharmaceutical Care Management Association (May 2, 2017), available at *https://www.regulations.gov/document?D=HHS-OCR-2019-0007-0006.*

[352] Although this cost-benefit analysis assumes a lower-bound estimate that a notice of nondiscrimination and 15 taglines may be printed on one side of one sheet of paper, the Department believes that a notice of that length is likely noncompliant with the 2016 Rule requirement to be posted ''in conspicuously-visible font size.'' *See also* OCR, Sample Notice Informing Individuals About Nondiscrimination and Accessibility Requirements and Sample Nondiscrimination Statement: Discrimination is Against the Law (printed on two sides of one sheet of paper), *https://www.hhs.gov/sites/default/files/sample-ce-notice-english.pdf.*

and taglines inserts result in a range of no incremental postage costs (low-end) to $0.21 per mailing (high-end). For instance, if an underlying communication is three sheets of paper or less, a covered entity's inclusion of one double-sided page (or shorter) of notice and taglines insert would likely weigh one ounce or less (approximately four letter-sized pages weigh one ounce).[353] Consequently, in this scenario, the notice and taglines insert would not increase the total weight of the mailing beyond the one ounce of postage that a covered entity would already expect to incur. If, however, a covered entity included 2 sheets of paper double-sided containing the nondiscrimination notice and taglines, added to a communication of three sheets of paper or more, the total weight of the mailing would likely be at least five sheets of paper, and therefore over one ounce. The marginal cost of postage for each ounce is $0.20.[354]

For labor, the Department estimates the burden to download, print, and include these notices and taglines with all significant communications for an office clerk (Occupation Code No. 43–9061) with a mean hourly wage of $16.92/hour [355] plus an additional $16.92/hour in fringe benefits, or $33.84/hour for labor costs.[356] Based on experience, entities can manually fold and insert notices and taglines into envelopes at a rate of approximately 360 per hour. Entities that use commercial machines can fold and insert notices and taglines as fast as 5,400 envelopes per hour.[357] The Department uses the average of 2,880 notices and taglines that can be folded and placed into an envelope in an hour. Under these assumptions, the unit labor cost per notice and taglines mailing is $0.01.

Considering materials, postage, and labor, the per-unit cost for the notice and taglines insert ranges from $0.035 at the low end (for one single-sided sheet of paper of notice and taglines) to $0.32 at the high end (for two double-sided sheets of paper of notice and taglines), if the Department assumes that the average underlying mailer is 3 sheets of paper.

In addition, the Department estimates that some of these costs would be mitigated absent this final rule, due to transitions to electronic delivery for some communications affected by the 2016 Rule. The Department estimated, in the RIA for the Proposed Rule, that electronic delivery would reduce costs of affected communications by approximately 10–20% absent this final rule, shifting linearly from 10% in the first year to 20% in the fifth year following implementation (in other words, increasing by 2.5 percentage points each year). Survey results from Cognizant [358] indicate that 70 percent of respondents consider it important to be able to view medical care-related statements (*e.g.,* explanation of benefits documents) electronically, and that 42 percent are able to do so currently. But the same survey found that ''[a]doption rates are low for the digital services currently offered by health insurers, even for those that respondents rated as very important,'' with ''just about half of the members who were aware of'' a given digital service having actually ''used it.'' According to another survey by InstaMed,[359] 23% of providers offer some electronic billing, but even out of those providers who do, 58% still provide fewer than half of their bills electronically.[360] Moreover, it is likely that younger generations are the ones currently enrolling in e-statements; given that a disproportionate amount of health care services and products, especially pharmaceuticals, are consumed by the elderly, the communications containing the notices and taglines affected by this rule may be relatively unlikely to use e-statements. Therefore, as one end of a range of electronic delivery estimates, the Department maintains the earlier assumption of 10 percent in the first year, growing linearly to 20 percent in the fifth year after finalization, and departs from the preliminary RIA's assumption only in that the linear growth is extended past the fifth year. At the opposite end of the range of estimates, the electronic delivery rate is assumed to be 21 percent upfront (reflecting the higher of the two survey results cited above, with adjustment to account for the fact that in those surveys, 50% or less of patients offered electronic delivery have been accepting it) and 42 percent in Year 5 (reflecting the same survey, without such adjustment), with subsequent increases continuing at 5.25 percentage points per year.

In combining the two input ranges for Table 2 below—the cost per printed and mailed communication and the electronic delivery rates—the low ends are used together and the high ends are used together, to reflect that entities facing relatively high costs for printed communications would have greater incentive to shift to electronic delivery where feasible. The primary estimates relied on for Table 1, however, use simply the midpoint of each of the two input ranges.

Electronic delivery would eliminate postage costs, but may to a certain extent merely shift the costs of paper and printing from the entity providing the communication to the consumer/beneficiary/patient, given that some consumer/beneficiary/patient recipients of electronic communications will print them out and incur costs for the paper and ink associated with doing so. The Department has not included such consumer/beneficiary/patient costs in its estimates.

The Department averages the low and high-end estimates to determine a primary estimate of annual cost savings, which results in average savings of approximately $0.58 billion per year, over the first five years, after adjusting for electronic delivery.

As discussed above, the proposed rule noted that, with repeal of the 2016 Rule requirements, the Department assumed that two other regulatory requirements for taglines would also be fully repealed because they depend on, or refer to, the 2016 Rule for authority for the taglines requirement. The first is the requirement placed on Health Insurance Exchanges (*see* 45 CFR 155.205(c)(2)(iii)(A)), which the Department estimates issue 17.7 million communications per year, primarily through eligibility and enrollment communications. The second is the requirement placed on QHP issuers (*see* HHS Notice of Benefit and Payment Parameters for 2016; 2016 Rule, 80 FR 10750, 10788 (Feb. 27, 2015)), whose costs are incorporated into the volume calculations for annual notices of benefits, and explanations of benefits discussed in more detail above. Those

[353] *See* ''How Many Sheets of Paper Fit in a 1 Ounce Envelope for Mailing Purposes,'' *https://www.reference.com/business-finance/many-sheets-paper-fit-1-ounce-envelope-mailing-purposes-84ba93a60789c2e1.*

[354] *See* U.S. Postal Service Postage Rates, *https://www.stamps.com/usps/current-postage-rates/.*

[355] BLS, Occupational Employment and Wages (May 2018), *https://www.bls.gov/oes/2018/may/oes_nat.htm.*

[356] CMS estimates that the labor costs would be a one-time cost of $16,244 for Medicaid managed care and a one-time cost of $9,669 for CHIP managed care. The Department assumes for its calculations that the labor costs for the notice and tagline provisions are not one-time but are ongoing costs associated with the value of office clerks' time printing and including the notices and taglines with significant publications and significant communications.

[357] *See, e.g.,* Pitney Bowes, ''Folders and Inserters,'' *https://www.pitneybowes.com/nz/folders-inserters.html.*

[358] *See https://www.cognizant.com/InsightsWhitepapers/The-Digital-Mandate-for-Health-Plans-codex1760.pdf.*

[359] *See https://www.instamed.com/white-papers/trends-in-healthcare-payments-annual-report/.*

[360] *See https://www.cognizant.com/InsightsWhitepapers/The-Digital-Mandate-for-Health-Plans-codex1760.pdf* and *https://www.instamed.com/white-papers/trends-healthcare-payments-report-2018/.*

two other regulations have not yet been amended in this respect, but the Department clarified above that because those requirements inform entities they will be deemed in compliance if they are in compliance with the Section 1557 rule's notice and taglines requirement, and because the latter has now been repealed by this final rule, covered entities do not need to independently comply with those two other regulatory requirements cross referencing the Section 1557 rule. As a result, these estimates continue to assume this final rule will result in cost savings with respect to those requirements.

The Department also assumes that health insurance entities would not voluntarily append notices and taglines to routine monthly premium statements absent the 2016 Rule, but are doing so because of it (or because of a requirement in another regulation that bases its requirement on the 2016 Rule's requirement).

TABLE 2—ANNUAL SAVINGS FROM REPEAL OF REQUIREMENT TO PUBLISH AND MAIL NOTICES AND TAGLINES, BY VOLUME OF TRANSACTIONS PER TYPE PER YEAR AFTER ACCOUNTING FOR ELECTRONIC DELIVERY

[in millions]

	Count	Estimated low Savings ($0.035/unit)	Estimated high savings ($0.32/unit)
Exchange eligibility and enrollment communications	17.7	Year 1: $1 Year 5: $0	Year 1: $4. Year 5: $3.
Annual notice of benefits	123	Year 1: $4 Year 5: $3	Year 1: $31. Year 5: $23.
Explanations of Benefits—hospital admissions	96	Year 1: $3 Year 5: $3	Year 1: $24. Year 5: $18.
Explanations of Benefits—physician's visits	941	Year 1: $30 Year 5: $26	Year 1: $238. Year 5: $175.
Medical bills—hospital admissions	11	Year 1: $0 Year 5: $0	Year 1: $3. Year 5: $2.
Medical bills—physician visits	99	Year 1: $3 Year 5: $3	Year 1: $25. Year 5: $18.
Pharmacy-related notices	2,900	Year 1: $91 Year 5: $81	Year 1: $733. Year 5: $538.
Total, accounting for electronic communications	4,188	Year 1: $132 Year 5: $117	Year 1: $1,059. Year 5: $777.

The primary estimate of annual savings is approximately $0.63 billion in Year 1 and $0.51 billion in Year 5 after accounting for electronic delivery. The Department assumes that the nine other CMS regulations or guidelines requiring taglines will continue to be in effect, and the cost of complying with these CMS requirements would need to be subtracted from the total savings that the 2016 Rule's rescission generates for the healthcare sector as set forth in Table 2. These requirements include (1) Group Health Plans and Health Insurance Issuers requirements; [361] (2) Navigator requirements; [362] (3) Non-Navigator Assistance Personnel requirements; [363] Medicaid requirements; [364] Medicaid Managed Care requirements; [365] CHIP requirements; [366] CHIP Managed Care requirements; [367] Hospitals Qualifying for Tax-Exempt Status requirements; [368] and Medicare Advantage (Part C) and Prescription Drug Plans (Part D) requirements.[369]

Comment: Some commenters indicated that the notice and taglines requirements that the Department proposed for removal led to substantial costs that the Department understated. For example, they contended costs may be higher than the Department estimated in the proposed rule because plans had to revise internal documents, incur significant IT costs, and work with outside vendors to implement the 2016 Rule. Commenters also contended the 2016 Rule resulted in significant annual printing costs.

One commenter calculated that the costs of the mailings related to pharmacy services yielded additional costs of $1 billion a year. The commenter supported the Proposed Rule's RIA aggregate estimate that the requirement would save plans $101 to $928 million a year and provided a specific example in which an affected entity reported incurring $3.9 million in printing costs and $4 million in operations costs to send 55.5 million communications.

Another company reported almost $1 million in annual increased expenses on toner, developer, paper, and postage related to notice and taglines requirements. Another commenter stated the costs associated with complying with the 2016 Rule's requirement accounts for 4.5% of one company's budgeted operating income. Some commenters also stated the proposed rule would significantly reduce the administrative burden placed on providers, saying that what constitutes a ''significant'' communication has been insufficiently clear and has resulted in broad interpretations and providers using the taglines in almost every document.

Some commenters estimated that the dental profession has spent over $240 million to date on compliance with the 2016 Rule. The commenter noted that the time and cost for dental offices to interpret the regulations, print documents, alter existing publications, and modify websites has been significant. Several dental offices believe repealing the notice and taglines requirements will lead to cost savings and will allow staff to spend time on appropriate patient care and communication instead.

One commenter explained that in its Pennsylvania line of business, it serves

[361] 45 CFR 147.136(e)(2)(iii) and (e)(3), and § 147.200(a)(5).

[362] 45 CFR 155.215(c)(4).

[363] 45 CFR 155.215(c)(4).

[364] 42 CFR 435.905(b)(3).

[365] 42 CFR 438.10(d)(2) through (3), (d)(5)(i) and (iii), and (j).

[366] 42 CFR 457.340(a).

[367] 42 CFR 457.1207.

[368] 26 CFR 1.501(r) through 1(b)(24)(vi).

[369] Medicare Marketing Guidelines § 30.5.1, *https://www.cms.gov/Medicare/Health-Plans/ManagedCareMarketing/FinalPartCMarketingGuidelines.html.*

800,000 persons and sends them 2-page double-sided notices and taglines 6,205,000 times a year under the 2016 Rule, resulting in $245,175 in annual mailing costs. The commenter noted it has similar experiences in all of its Medicaid lines of business.

Other commenters suggested the Department overestimated the costs of the 2016 Rule's notice and taglines requirements. One association stated that the Department's estimate in the proposed rule overestimated by failing to account for notices generated by a machine, included in bulk mailings, or facilitated through the use of computers. The commenter also believed that, while electronic delivery would eliminate postage costs, it would not shift the cost of paper and printing to the consumer/beneficiary/patient, stating it is unlikely that a significant percentage of individuals would download and print documents sent to them electronically. Similarly, the commenter contended the Department failed to account for the significant degree to which communications can be provided electronically and the degree to which some entities, such as insurance plans, have already been doing so for years.

Another commenter, however, agreed with OCR's calculation that the notice and taglines requirement has resulted in the inclusion of one to two sheets of paper. Similarly, one commenter stated it implemented multiple versions of the two-page notice and taglines on thousands of documents in its businesses, which consumed significant resources. The commenter noted that the requirements also impacted covered entity partners as well, particularly print vendors.

Some commenters asked the Department to separate out costs for providing notices as distinct from providing taglines, and for posting notices as distinct from mailing them.

Response: The Department appreciates the comments regarding the costs of the 2016 Rule's notice and taglines requirements. The Department agrees with commenters who contend that the requirements imposed significant and costly burdens far beyond the estimates set forth in the 2016 Rule. The Department finalizes this rule in significant part to relieve those burdens.

Some commenters contended the Department's estimates in the proposed rule were understated, and others contended the Department's estimates were overstated. The comments generally provided data from specific entities or circumstances.

The Department's estimate of the average cost of mailings is based on data received from covered entities across the affected industry, and generally takes into account processes and methods used in mailings such as machines, computers, and bulk handling. Although the Department suggested that some patients and beneficiaries might print notices electronically mailed to them, the Department did not factor those potential costs in its estimate. To the extent that commenters contended the Department failed to consider the extent to which notices and taglines are delivered electronically, this is incorrect, as the Department's preliminary estimates included downward adjustments to its estimates based on electronic delivery, and its revised estimates reflect a broader range of potential electronic delivery rates. Moreover, other commenters contend that they continue to experience significant costs based on non-electronic delivery—contending in some cases that the Department's estimates of those costs were understated.

Commenters were correct to identify that some costs, such as revising internal documents, IT costs, and setting up relationships with outside vendors, resulted from the 2016 Rule. The Department does not estimate that this final rule will lead to cost savings with regard to those types of expenses, however, because they are generally sunk costs that covered entities incurred at the time of the 2016 Rule and will not be able to recover as a result of this final rule. This final rule does not prohibit entities from continuing to provide the type and number of notices and taglines required by the 2016 Rule, but gives covered entities the flexibility to not provide them.

The Department declines to accept the suggestion of some commenters that the Department separate out the costs of notices from the costs of taglines. Information from covered entities indicates that notices and taglines are usually provided together, often on overlapping pages. Because this final rule removes both requirements, the Department's estimates are intended to cover the costs of both notices and taglines.

Comment: One commenter stated that the Department improperly relied on healthcare corporations for its fact-finding and analysis in the proposed rule. In particular, conclusions that the repetitive nature of notices and taglines dilute messages, that beneficiaries do not want to receive them, and that there is no evidence that more beneficiaries have sought language assistance because of the notices, were largely gathered from the covered entities themselves.

Response: The Department relies on its own data, publicly available data, and data submitted by members of the public—including covered entities—to attempt to estimate the impact of its regulations. The Department takes into consideration the sources of the data it considers, and attempts to weigh all such data appropriately based on the information the Department has available to it.

f. Costs Arising From Removal of Notice and Taglines Requirement

Repealing the notice and taglines requirement may impose costs, such as decreasing access to, and utilization of, healthcare for non-English speakers by reducing their awareness of available translation services.

Comment: Some commenters generally supported the Department's assessment that the benefits from the notice and taglines requirements were hard to quantify and likely not significant. A health insurance plan commenter stated that since the implementation of the 2016 Rule, it has not experienced significant changes in its member demographics or languages spoken, and has not seen any notable increases in requests for translation services. One commenter also stated that its pharmacy benefit manager found that since 2017, the volume of valid complaints about discrimination are less than 1% overall and could be better handled by personnel already in place. The commenter stated further that since 2017, it has filled approximately 3.5 billion prescriptions and mailed nearly half a billion beneficiary communications. In this time period, approximately 0.002% (26 of 14,000) of calls made to the discrimination hotline were closely related to a complaint. Several commenters stated they did not see a significant increase in requests after the 2016 Rule required notices and taglines, but instead experienced relatively flat demand.

Some commenters also expressed concerns regarding wastefulness of the notice and taglines. A commenter calculated that it has spent nearly $16 million since 2017 to accommodate the current requirements and will save at least $3.5 million annually under the proposed rule. One commenter suggested that an analysis of the impact of the notice and taglines should take into account the content and frequency of the notices, overall consumer health literacy, costs and administrative burdens, and whether notices are truly meaningful to consumers.

Other commenters suggested that the 2016 Rule's notice and taglines requirements likely yielded benefits to intended individuals. A hospital commented that it observed a 10% increase in the volume of interpreter service encounters each year over the last three years. Another commenter stated that it saw a 28% reduction on its per-member per-month claims cost with its Spanish-speaking population. Several commenters from a variety of organizations request an analysis of the impact on those who most use the services affected by the proposed provision (LEP individuals) and on those who provide services to the impacted population. Several organizations, including a State government, also contended that LEP individuals are a significant portion of the population and tend towards poorer health outcomes. They also suggested that removing the notice and taglines requirements may cause such individuals to delay care or not receive care until their medical issues are more severe and costlier to treat, and they urged the Department to estimate such costs.

Another commenter stated that even though HHS justified the proposed rule in part by citing data that over three-quarters of the U.S population over the age of 18 speak only English at home and are not well served by taglines or notices, the commenter believes that if a quarter of the population does not speak English at home that is an argument against repealing the notice and taglines.

Several commenters suggested repeal of the taglines provisions may negatively impact LEP individuals. One commenter cited a study claiming that health inequities cost the U.S. economy $309.3 billion a year.

Response: The Department appreciates the comments concerning the effectiveness and benefits of the notice and taglines requirements from the 2016 Rule. As noted in the proposed rule, previously received reports from covered entities are consistent with some public comments suggesting that the 2016 Rule's requirements did not appreciably increase the use of translation services. One such report indicated that utilization of translation services did not appreciably rise after the 2016 Rule's imposition of notice and taglines requirements.[370] Although some commenters contended that they experienced an increase in translation services after the 2016 Rule, others reported a different experience. The Department generally agrees with the latter, and the difference in reports from different commenters and other sources reinforces the Department's view of the difficulty of attempting to calculate the 2016 Rule's benefits to individuals needing translation services. The Department does not believe it has data enabling it to fulfill the request of commenters who urged the Department to calculate the value of such benefits lost as the result of this final rule, as distinct from data that more generally estimate costs resulting from inequality or delay in care.

As noted in the proposed rule, there are other reasons to believe the 2016 Rule's notice and taglines requirements imposed burdens disproportionate to potential benefits for intended beneficiaries. The vast majority of recipients of taglines do not require translation services. For example, according to Census statistics, as of 2015, over three-quarters (79%) of the U.S. population over age five speak only English at home, followed by Spanish (13%).[371] Although a commenter contends this statistic provides an argument in favor of maintaining multi-language taglines, the Department disagrees regarding a requirement to send such taglines where almost 80% of the recipients likely speak only English at home, and a majority of the remainder spoke English ''very well.'' [372] Additionally, of persons selecting a written language preference when registering for coverage on the HealthCare.gov platform for 2017, 90.29% selected English, followed by 8.23% who selected Spanish.[373] These data indicate that, for the large majority of people who receive them, the required language taglines mailings provide little to no benefit because they are already proficient English speakers with little need for translation services.

Furthermore, the 2016 Rule's requirements added 47 languages to existing language access requirements, but that only increased access to 0.4% of the entire U.S. population. This was after broadly defining ''limited English proficiency'' to include those who speak English ''well'' but not ''very well.'' [374] The Department's Office for Civil Rights also produced a list of the top 15 languages in each State; however, 26 of the languages on OCR's list are spoken by less than 0.004 percent of the population. As a result, in some States, especially those with sparser populations, the 2016 Rule required health insurance issuers to provide taglines services in languages spoken by very few people in the State. For instance, in Wyoming, issuers needed to provide translation notices in Gujarati and Navajo in every significant communication sent to beneficiaries to account for approximately 40 Gujarati speakers and 39 Navajo speakers; in Montana issuers were required to provide notices to account for approximately 80 speakers of Pennsylvania Dutch; and in Puerto Rico, issuers had to provide taglines notices to account for approximately 22 Korean speakers and 22 French Creole speakers.[375]

The Department also continues to believe that the notice and taglines required by the 2016 Rule imposed burdens on many recipients and may interfere in their receipt and understanding of important healthcare information. Prior to the proposed rule, the Department received many communications from beneficiaries and advocacy groups complaining about the excessive amount of paperwork they receive. These individuals and groups

[370] *See* Aetna (May 1, 2017), available at *https://www.regulations.gov/document?D=HHS-OCR-2019-0007-0005.*

[371] U.S. Census Bureau, *B16007: Age by Language Spoken at Home for the Population 5 Years and Over,* 2011–2015 American Community Survey (American FactFinder) (2017), *https://factfinder.census.gov/bkmk/table/1.0/en/ACS/16_5YR/S1601/0100000US. See also* Kimberly Proctor, Shondelle M. Wilson-Frederick, et *al., The Limited English Proficient Population: Describing Medicare, Medicaid, and Dual Beneficiaries,* 2.1 Health Equity 87 (May 1, 2018), *http://online.liebertpub.com/doi/10.1089/heq.2017.0036* (identifying Spanish as the language of the largest majority of limited English proficient speakers in Medicaid and Medicare, according to the 2014 American Community Survey).

[372] U.S. Census Bureau, *B16007: Age by Language Spoken at Home for the Population 5 Years and Over,* 2011–2015 American Community Survey (American FactFinder) (2017), *https://factfinder.census.gov/bkmk/table/1.0/en/ACS/16_5YR/S1601/0100000US.*

[373] CMS, *Race, Ethnicity, and Language Preference in the Health Insurance Marketplaces 2017 Open Enrollment Period* (April 2017), *https://www.cms.gov/About-CMS/Agency-Information/OMH/Downloads/Data-Highlight-Race-Ethnicity-and-Language-Preference-Marketplace.pdf.* States that that do not use the *HealthCare.gov* platform, such as California and New York, were not included in this report.

[374] *See* HHS OCR, Frequently Asked Questions to Accompany the Estimates of at Least the Top 15 Languages Spoken by Individuals with Limited English Proficiency under Section 1557 of the Affordable Care Act, Question 2 (Sept. 1, 2016), *https://www.hhs.gov/civil-rights/for-individuals/section-1557/1557faqs/top15-languages/index.html* (using 2013 year estimates). *See* U.S. Census Bureau, Language Spoken at Home by Ability to Speak English for the Population 5 Years and Over, *https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_14_5YR_B16001&prodType=table* (2016 year estimates).

[375] OCR, Resource for Entities Covered by Section 1557 of the Affordable Care Act, Estimates of at Least the Top 15 Languages Spoken by Individuals with Limited English Proficiency for the 50 States, the District of Columbia, and the U.S. Territories (Aug. 2016), *https://www.hhs.gov/sites/default/files/resources-for-covered-entities-top-15-languages-list.pdf.*

explained that few people read the notice and taglines and most ignore the last pages of lengthy health documents. Additionally, documents that contain a significant number of pages that recipients do not value can often induce annoyance or frustration due to perceived wasting of time, ignorance of the customers' actual needs or language abilities, waste of economic resources, or insensitivity to environmental concerns.

These communications coincide with the views of some commenters and generally support the Department's conclusion that the 2016 Rule has resulted in ''cognitive overload,'' where individuals experience a diminished ability to process information when inundated with duplicative information and paperwork. These frustrations, though difficult to quantify, are reasonable to expect given the large volume of healthcare communications with notice and taglines that most Americans receive. It is also reasonable to expect that repeated mailings of taglines to people who do not want them may negatively impact their likelihood to read truly significant documents from their insurers or doctors, and may negatively impact health outcomes in some cases.

It is also noteworthy that other rules exist to benefit the persons whom the 2016 Rule's notice and taglines requirements intended to assist. Regulations under Section 504 of the Rehabilitation Act generally require the provision of auxiliary aids and services in health programs or activities that receive Federal financial assistance. 45 CFR 84.52(d). Because the notice requirement under the 2016 Rule required frequent mailed notification of the availability of auxiliary aids and services, the Department suggested in the proposed rule that repealing the notice of nondiscrimination requirement may result in additional societal costs, such as decreased utilization of auxiliary aids and services by individuals with disabilities due to their reduced awareness of such services. Some commenters agreed, but they did not suggest any way to reliably calculate such effects, and the Department is not aware of any. This impact may also be limited because the Section 504 regulations already require recipients of Federal financial assistance employing fifteen or more persons to provide notice to participants, beneficiaries, applicants, employees, and other interested persons of the availability of such aids and services. 45 CFR 85.12 and § 84.22(f).

Additionally, some commenters contended that repealing the notices and taglines may lead to persons not being made aware of their right to file complaints with OCR, and that some of those persons may suffer remediable grievances but will not complain to OCR absent notices informing them of the process. The Department continues, however, to not be aware of a way to quantify those potential effects. In addition, as noted above, the regulations implementing Section 1557's four underlying statutes already contain notice provisions, *see* 45 CFR 80.6 and Appendix to Part 80 (Title VI), § 84.8 (Section 504), § 86.9 (Title IX) and § 91.32 (Age Act), and therefore this potential cost may be minimal.

g. Cost Savings From Changes to Language Access Plan Provisions

Although the 2016 Rule did not require covered entities to develop a language access plan, the Rule stated that the development and implementation of a language access plan is a factor the Director ''shall'' take into account when evaluating whether an entity is in compliance with Section 1557. 45 CFR 92.201(b)(2). Therefore, the Department anticipated that 50% of covered entities would develop and implement a language access plan following issuance of the 2016 Rule. 81 FR at 31454.

Comment: One commenter noted that physician group practices report financial losses and significant costs when treating patients that require interpretation or translation services. The commenter stated that providing reimbursement at the Federal level would help offset extra costs incurred to provide these services free of charge and reimburse group practices for increased upfront costs and time required to care for LEP individuals. The commenter contended that face-to-face interpretation services cost between $50 and $150 per hour and may include a minimum hour requirement and transportation fee. The commenter points to one practice that reported being billed nearly $300 for a single in-person interpreter service this year due to a minimum rate and transportation fee. The practice reported paying $1,200 in interpretation fees for one month for nine individuals.

Response: The Department appreciates these comments. With respect to serving LEP patients, this final rule gives more flexibility to covered entities, while specific obligations to patients will be governed by criteria that has been set forth in longstanding guidelines. It is not within the scope of this rule to provide for Federal reimbursements.

Comment: Several commenters claim the proposed rule failed to consider the benefits to LEP individuals that will be lost by repealing certain provisions. Such commenters state there are tens of millions of LEP people who rely on protections from Section 1557. Another commenter notes that four million Medicare beneficiaries are LEP. A commenter notes that only 15 States use the Medicaid option to reimburse for interpretation. Commenters state that the language access protections in the 2016 Rule benefit Latino/a patients, Asian American and AAPI patients, LEP gender-based violence victims, low-income LEP patients, older adults, people with disabilities, and lower-income older adults.

Some commenters contend that the rule will lead to reduced awareness of language services by LEP persons and by the general public about their rights and protections. One commenter stated that if the rule is finalized, organizations like community health centers that are not funded or do not receive reimbursement for language services will face increased burdens when fewer clients will be aware of their language access rights and likely turn to them instead of to covered entities.

Commenters opposing the proposed rule claimed it would lead to inequality and a reduction in the quality of language access available; the avoidance of care, leading to worsened conditions and avoidable higher-cost hospital services; increased costs due to missed appointments, delayed care, and ''non-compliant'' self-care; increased Emergency Room use; lower preventive care access and use; malpractice costs; avoidable hospital readmissions; higher rates of uninsurance; unnecessary tests and procedures; higher rates of mortality; misunderstood diagnoses and prognoses leading to poor quality of care; and costs due to lower rates of outpatient follow-up, poor medication adherence, and lack of understanding of discharge diagnosis and instructions.

One commenter claimed that HHS's estimate that covered entities would save around $17.7 million per year by eliminating references to language access plans overlooks larger healthcare savings generated by access to interpretation services. Two commenters point to a 2017 study finding that easily accessible language interpretation services avoided an estimated 119 readmissions that were associated with savings of $161,404 per month in an academic hospital. Two commenters pointed to a 2010 report finding that at least 35 of 1,373 malpractice claims were linked to inadequate language access.

Another commenter cited a report that found that 2.5% of one malpractice carrier's closed claims involved language issues that cost the carrier over $5 million in damages, settlements, and legal fees. Costs included damages paid to patients, legal fees, time lost when defending the lawsuit, loss of reputation and patients, fear of possible monetary loss, and stress.

Response: The Department acknowledges the potential of reduced awareness of the availability of language services by LEP individuals by the changes made in this rule, or downstream effects on malpractice claims due to less awareness. As noted above, however, this final rule continues to provide protections for LEP individuals and commits the Department to enforcement of Section 1557. The Department believes, therefore, that the negative effects predicted by some commenters may be mitigated by the continued commitment to enforcement of Section 1557. The data cited by commenters either do not assess the overall impact of the 2016 Rule as compared to a regime with continued enforcement of Section 1557, or address information about broader matters without providing a method for the Department to specifically analyze how this final rule will cause the effects commenters fear may occur. In this respect, the Department believes that malpractice carriers themselves, not Federal civil rights regulators, are best equipped to determine what practices malpractice carriers should require for the sake of reducing their own financial risk.

Therefore, in consideration of the public comments and the Department's analyses, the Department adopts the estimates from the proposed rule concerning changes to language access plan provisions.

In the proposed rule, OCR estimated that the burden for developing a language access plan is approximately three hours of medical and health service manager staff time in the first year, and an average of one hour of medical and health service manager staff time per year to update the plan in subsequent years. Throughout, we assume that the total dollar value of labor, which includes wages, benefits, and overhead, is equal to 200 percent of the wage rate. The value of an hour of time for people in this occupation category, after adjusting for overhead and benefits, is therefore estimated to be $109.36 based on Bureau of Labor Statistics (BLS) data for 2018.[376] These are within the general range provided by some commenters' description of costs they have experienced.

The Department estimated that approximately 269,141 entities could potentially make changes and develop language access plans in response to the 2016 Rule, as part of the requirement to take reasonable steps to provide meaningful communication with LEP individuals (calculated by reducing the 275,002 affected entities by the 5,861 hospitals and nursing care facilities that were already subject to language access plan requirements under Medicare Part A). The Department further assumed that only 50% of the identified entities would actually make changes to implement a language access plan. If the actual compliance rate were higher, the costs would be higher. These assumptions imply that the total cost of developing language access plans will be approximately $44.1 million (269,141 entities multiplied by 50% of entities multiplied by 3 hours per entity multiplied by $109.36 per hour) in the first year and approximately $14.7 million (269,141 entities multiplied by 50% of entities multiplied by 1 hour per entity multiplied by $109.36 per hour) per year in subsequent years. The Department assumes sunk costs cannot be recovered by this rule, and therefore that initial language access plan development costs attributable to the 2016 Rule cannot be recovered.

By repealing the provision of the 2016 Rule regarding the Language Access Plans, the Department estimates annual savings are $14.7 million.

h. Cost Savings Attributed to Covered Entities' Handling of Certain Grievances

This final rule repeals the requirement for each covered entity with 15 or more employees to have a compliance coordinator and a written grievance procedure to handle complaints alleging violations of Section 1557. The Department estimates that, under the final rule, covered entities no longer have to incur certain labor costs associated with processing grievances related to sex discrimination complaints as they relate to gender identity as defined under the 2016 Rule because such definitions would be repealed and no longer binding. This repeal would not, however, affect the independent obligations that entities covered by Section 1557 have to comply with Federal regulations under Section 504 and Title IX to have written processes in place to handle grievances alleging certain disability and sex discrimination claims, respectively.[377]

For the sake of consistency and convenience, the Department used the methodology from the 2016 Rule as a foundation for estimating the projected savings from this proposed rule provision.

The 2016 Rule estimated that, in years three through five of the 2016 Rule's implementation, covered entities with 15 or more employees would incur $85.5 million in costs annually to handle Section 1557 grievances. 81 FR at 31458. This estimate assumed that covered entities would experience an average increase in grievances equal to OCR's projected long-term increase in caseload of about 1%. *Id.* The 2016 Rule monetized this 1% increase in caseload as a labor cost equivalent to 1% of the annual median wage for a medical and health service manager (occupation code 11–9111). *Id.* The Department continues to assume that OCR's increase in caseload attributed to the 2016 Rule reasonably informs the increase in grievance processing that covered entities will experience.

Based on OCR's tracking of Section 1557 complaints received from promulgation of the 2016 Rule (May 18, 2016) until present, OCR predicts that its long-term caseload would have increased 5% rather than 1% as originally predicted. Further, OCR believes roughly 60% of this increase (which equals 3% of the overall increase) would have been attributable to discrimination claims based on the 2016 Rule's definition of sex discrimination with respect to gender identity and sex stereotyping. The Department uses the phrase ''would have'' with regard to OCR's caseload because, as described above, the Department has been preliminarily enjoined on a nationwide basis by a Federal court from enforcing claims based on the 2016 Rule's definition of sex discrimination, and those provisions have now been vacated by the same court.

The 2016 Rule asserted that private parties have the right to challenge a violation of Section 1557 or the 2016 Rule in Federal court, independent of OCR enforcement or involvement. 45 CFR 92.302(d). In the preamble to the 2016 Rule, the Department suggested that the ability for private parties to sue

[376] BLS, Occupational Employment and Wages (May 2018), *https://www.bls.gov/oes/2018/may/oes_nat.htm.*

[377] *See, e.g.,* 45 CFR 84.7(a) (HHS regulations implementing Section 504) (requiring a written process to be in place for handling grievances alleging disability discrimination), § 86.8(a) (HHS regulations implementing Title IX) (requiring a written process to be in place for handling grievances alleging sex discrimination).

under the 2016 Rule would result in covered entities bearing increased compliance costs. 81 FR at 31395 (''the presence of a coordinator and grievance procedure enhances the covered entity's accountability and helps bring concerns to prompt resolution, oftentimes prior to an individual bringing a private right of action.''). The preliminary injunction did not apply to suits filed by private parties. Although the Supreme Court has recognized a private right of action for some civil rights statutes enforced by the Department, under this final rule the Department would no longer assert in the regulatory text or the preamble to the rule that a private right of action exists for parties to sue covered entities for any and all alleged violations. Because the issue of whether a person has a right to sue in Federal court under Section 1557 is one determined by the courts themselves and not by the Department's regulations, the Department does not estimate that this change will lead to any economic impact.

Although this final rule removes from the 2016 Rule the expansive inclusion of gender identity and sex stereotyping in the definition of sex discrimination, a court has recently vacated the gender identity provisions of the 2016 Rule. Regarding sex stereotyping, to the extent the 2016 Rule used that term to encompass gender identity, the sex stereotyping provision had no real-world effect after the court decision. To the extent sex stereotyping in the 2016 Rule did not encompass gender identity, the Supreme Court already recognized a degree of relevance of sex stereotyping in sex discrimination claims. This is discussed in more detail in the section above on sex-based discrimination. Therefore, the Department does not believe there would be a direct material economic impact regarding grievance procedures from this final rule's change in the definitions concerning sex stereotyping.

In addition, due to voluntary policies or more stringent State requirements, the Department expects that 50% of covered entities would likely continue to accept and handle grievances alleging discrimination based on gender identity and sex stereotyping as set forth under the 2016 Rule.

In the proposed rule, the Department estimated that covered entities would have experienced a 3% increase in gender identity and sex stereotyping grievance claims over the long term due to the 2016 Rule, and half of that caseload (1.5%) could have been due to the 2016 Rule's language encompassing gender identity and sex stereotyping claims in States where covered entities are not otherwise required to handle those claims. The proposed rule estimated an annual savings in labor attributed to a 1.5% decrease in grievance caseload as $123.4 million, representing 1.5% of the annual median wage of a medical and health service manager ($199,472 fully loaded) multiplied by the 41,250 covered entities with 15 or more employees.

Nevertheless, in this final rule the Department does not estimate a cost savings concerning grievance procedures. This is because, as stated repeatedly elsewhere, the court order vacating the gender identity provisions of the 2016 Rule means that this final rule's changes concerning gender identity will have no direct material economic impact. The *Franciscan Alliance* court order forms the new legal baseline in this respect, and therefore the primarily-emphasized economic baseline, for the purposes of this estimate. To the extent sex-stereotyping claims remain viable, they were already authorized by the Supreme Court's longstanding interpretation of sex stereotyping.

i. Additional Costs for Training and Familiarization

To comply with the final rule, the Department anticipates that some covered entities may incur costs to re-train employees in order to realize potential longer-term costs savings from the deregulatory aspects of this final rule's changes. The Department assumes that employers are most likely to train employees who interact with the public, and will therefore likely train between 40% and 60% of their employees, as the percentage of employees that interact with patients and the public varies by covered entity. For purposes of the analysis, the Department assumes that 50% of the covered entity's staff will receive one-time training on the requirements of the regulation. It uses the 50% estimate as a proxy, given the lack of certain information as described below. For the purposes of the analysis, the Department does not distinguish between employees whom covered entities will train and those who obtain training independently of a covered entity.

i. Number of Covered Entities That May Train Workers

The 2016 Rule estimated that 275,002 covered entities would train their employees on the rule's requirements in general (including training regarding language access provisions), and used that 275,002 figure as the basis for calculating costs to covered entities arising specifically out of the rule's prohibition on discrimination on the basis of sex. *See* 81 FR at 31450. The Department assumes, for purposes of this analysis, that the 2016 Rule's estimate was an accurate and reasonable basis for calculating costs arising from the need to provide training regarding the 2016 Rule.

TABLE 3—NUMBER OF HEALTHCARE ENTITY FIRMS COVERED BY RULE

NAIC	Entity type	Number of firms
62142	Outpatient mental health and substance abuse centers	4,987
621491	HMO medical centers	104
621492	Kidney dialysis centers	492
621493	Freestanding ambulatory surgical and emergency centers	4,121
621498	All other outpatient care centers	5,399
6215	Medical and diagnostic laboratories	7,958
6216	Home healthcare services	21,668
6219	All other ambulatory healthcare services	6,956
62321	Residential intellectual and developmental disability facilities	6,225
6221	General medical and surgical hospitals	2,904
6222	Psychiatric and substance abuse hospitals	411
6223	Specialty (except psychiatric and substance abuse) hospitals	373
6231	Nursing care facilities (skilled nursing facilities)	8,623
44611	Pharmacies and drug stores	18,852
6211	Offices of physicians	185,649
524114	Insurance Issuers	180

TABLE 3—NUMBER OF HEALTHCARE ENTITY FIRMS COVERED BY RULE—Continued

NAIC	Entity type	Number of firms
	Navigator grantees	100
Total Entities		275,002

ii. Number of Individuals Who Will Receive Training

The first category of healthcare staff that may receive training comprises health diagnosing and treating practitioners. This category includes physicians, dentists, optometrists, physician assistants, occupational, physical, speech and other therapists, audiologists, pharmacists, registered nurses, and nurse practitioners. The BLS occupational code for this grouping is 29–1000, and the 2018 reported count for this occupational group is approximately 5.4 million, with average loaded wages of $98.04 per hour.

The second category of healthcare staff that the Department assumes will receive training comprises degreed technical staff (Occupation code 29–2000) and accounts for 3.1 million workers with average loaded wages of $46.52 per hour. Technicians work in almost every area of healthcare: x-ray, physical, speech, psychiatric, dietetic, laboratory, nursing, and records technicians, to name but a few areas.

The third category of healthcare staff that the Department assumes will receive training comprises non-degreed medical assistants (Occupation code 31–0000), and includes psychiatric and home health aides, orderlies, dental assistants, and phlebotomists. Healthcare support staffs (technical assistants) operate in the same medical disciplines as technicians, but often lack professional degrees or certificates. The Department refers to this workforce as non-degreed, compared to medical technicians who generally have degrees or certificates. There are approximately 4.1 million individuals employed in these occupations, with average loaded wages of $31.14 per hour.

The fourth category of healthcare staff that the Department assumes will receive training is healthcare managers (approximately 0.4 million based on BLS data for occupation code 11–9111), with average loaded wages of $109.36 per hour. Because the Department assesses costs of familiarization with the regulation for one manager at each entity, it assumes that those managers will have already become familiar with the regulation and will not need additional training.

The fifth category of healthcare staff that the Department assumes will receive training is office and administrative assistants—Office and Administrative Support Occupation (Occupation code 43–0000). These workers are often the first staff patients encounter in a health facility and, because of this, covered entities might find it important that staff, such as receptionists and assistants, receive training on the regulatory requirements. Approximately 2.8 million individuals were employed in these occupations in health facilities in 2018, with average loaded wages of $36.50 per hour. The Department assumes that outreach workers are included in the five categories listed above, especially in the manager category.

iii. Total Costs of Training

The 2016 Rule estimated that covered entities would incur $420.8 million in undiscounted costs to train employees on the requirements of the Rule, distributed roughly evenly over the first two years after the 2016 Rule's effective date. 81 FR at 31458. This conclusion presumed covered entities were already periodically training employees on their obligations under Section 1557, but that the 2016 Rule's new sex discrimination requirements would induce covered entities to engage in additional ''comprehensive training.'' 81 FR at 31447.

For the purposes of this regulatory impact analysis, the Department assumes covered entities would face similar costs to retrain the workforce on this final rule's requirements.[378] However, because some covered entities will avoid incurring training expenses when they are not required to (as they will not be subject to the final rule), and because several States with large populations already prohibit gender identity discrimination in healthcare, the Department further assumes that only 50% of covered entities would modify their policies and procedures to reflect the changes in the final rule. Moreover, to the extent entities were motivated to provide training specifically due to the sex discrimination components of the 2016 Rule, a court has already vacated the gender identity and termination of pregnancy provisions of the 2016 Rule, and this final rule simply amends the Code of Federal Regulations to conform to the *vacatur* in that regard. The Department further assumes that 50% of covered entities, or 137,501, would train their employees to reflect the changes in this final rule. As in the 2016 Rule, the Department assumes that approximately half of the employees at these covered entities will engage in an average of an additional hour of training, and that this will occur in the first year of implementing this rule. These assumptions imply total training costs of $235.9 million. The 2016 Rule's calculations of training costs did not anticipate any ongoing training costs after year one—either in the form of annual refresher training for returning employees or training for new employees. The Department now believes that covered entities likely incur such costs, but assumes that equal costs would also be incurred under this final rule. Therefore, the Department has excluded ongoing training costs from the calculation of the baseline and from the calculation of the projected costs of the proposed rule, because such training has a net zero effect on projected costs.

j. Additional Costs for Revising Policies and Procedures

As discussed above, the Department anticipates that 50% of covered entities, or approximately 137,501 entities, would choose to revise their policies or procedures to reflect this final rule's clarification of the application of Section 1557, while other covered entities may retain their policies to ensure compliance with State or local laws. The Department assumes that it would take, on average, three to five hours for a provider to modify policies and procedures concerning this final rule. The Department selects four hours, the midpoint of this range, for the analysis. The Department further assumes that an average of three of these hours would be spent by a mid-level manager equivalent to a first-line

[378] Training costs in the 2016 Rule relied upon 2014 wages. *See, e.g.,* 81 FR at 31451 (estimating the median hourly wage for occupation code 29–1000 at $36.26, unloaded, at *https://www.bls.gov/oes/special.requests/oesm14nat.zip* .

supervisor (Occupation code 43–1011), at a cost of $57.06 per hour [379] after adjusting for overhead and benefits, while an average of one hour would be spent by executive staff equivalent to a general and operations manager (Occupation code 11–1021), at a cost of $119.12 per hour [380] after adjusting for overhead and benefits. The total cost for the estimated 137,501 covered entities to make their policies and procedures consistent with the final rule's changes is estimated to be approximately $39.9 million following implementation of this rule.

The above estimates of time and number of entities that would choose to revise their policies under the regulation are approximate estimates based on general BLS data. Due to the wide range of types and sizes of covered entities, from complex multi-divisional hospitals to small neighborhood clinics and physician offices, the above estimates of time and number of entities that would choose to revise their policies under the regulation is difficult to calculate precisely.

k. Other Benefits or Costs

The 2016 Rule's regulatory impact analysis did not include an economic cost-benefit analysis of the regulation's impact on health insurance benefit design. The Department lacks sufficient data on how much burden the 2016 Rule has placed on the development and operation of insurance benefits policies, and thus is unable to fully assess the benefit of removing this requirement.

The Department received several comments concerning the impact of the proposed rule on issues concerning discrimination on the basis of LGBTQ status, sex stereotyping, termination of pregnancy, and other provisions.

Comment: Many commenters objected that the Department did not estimate the potential for increases in the denial, delay, or substandard delivery of healthcare services from the rule's changes concerning gender identity.

One commenter suggested exploring quantitative analysis based on a survey by Harvard University and National Public Radio (NPR) in which 18% of LGBTQ people polled in 2017 reported foregoing care that they need, including preventive care, due to fears of or experiences of discrimination (including 22% of transgender people).[381] The comment estimated that this regulation will cost $1.4 billion in excess costs over the next ten years simply to treat cases of four particular cancers that would have been detected and prevented by screening, and that there will be an 18% increase in preventable mortality from these four cancers among LGBT people. The comment cited the 2016 value of a statistical life (VSL) used by the U.S. Department of Transportation to estimate these preventable deaths as being worth $39 billion to the U.S. economy over the next ten years.

Another commenter provided a list of potential sources of economic costs the proposed rule could produce concerning transgender patients, including out-of-pocket costs shifted because of transgender exclusions; increased costs from healthcare issues exacerbated by discriminatory delay or denial of care; increased costs related to sex coding; or increased costs due to substandard delivery of care. Other commenters similarly contended that literature on increased costs due to discrimination could be used to estimate economic costs. But such commenters did not provide quantitative values of such costs, or of ways to attribute the costs or portions thereof to this rulemaking.

One healthcare provider stated that they have not incurred any unreasonable costs in delivering care to its LGBTQ patients from complying with nondiscrimination protections based on sexual orientation and gender identity. The commenter added that adopting transgender-inclusive healthcare practices can reduce the costs associated with complications that arise when care is delayed or denied transgender patients due to discrimination.

One commenter stated that patients without primary care would experience an increase in emergency room visits, which would result in increased costs for the healthcare system—including from hospitals' and the government's absorbing and subsidizing the costs of uninsured patients.

Commenters raised similar comments concerning sexual orientation as did the commenters discussing gender identity or LGBTQ issues more broadly, contending the proposed rule should estimate the impact of not including protections against sexual orientation discrimination.

Response: The Department appreciates the comments concerning the regulatory impact of this final rule's changes concerning gender identity.

This rule commits the Department to vigorous enforcement of the nondiscrimination provisions of Section 1557 and Title IX as incorporated therein, according to the plain meaning of the protections set forth in those statutes. In addition, the gender identity provisions of the 2016 Rule were preliminarily enjoined on a nationwide basis by a court from December 2016 until October 2019, when they were vacated entirely. As a result, this final rule maintains the status quo with respect to gender identity under the enforcement of the Section 1557 rule.

Based on the Department's review of the public comments, the commenters did not provide, and the Department is not otherwise aware of, reliable data or methods to calculate the economic impacts concerning gender identity that they allege would be attributable to this final rule. Commenters cited various sources of data, but many were either too narrow in not providing a basis to estimate the impacts of this rule nationwide, or were too broad in discussing aspects of the healthcare system but not impacts of this specific rule. For example, citations to data about the percent of transgender persons who forgo care due to fears or experiences of discrimination, and a calculation of the costs to the healthcare system resulting from such occurrences, are not sufficient to estimate the effects of this final rule itself, due to court orders preliminarily enjoining and then vacating provisions in the 2016 Rule, State and local laws that already provide gender identity protections, and other factors that prevent the Department from showing that this final rule is causing those effects. For example, one poll cited by commenters was conducted in 2017, when the 2016 Rule was already in place, but when its gender identity provisions were preliminarily enjoined. So it is not clear from that poll that the 2016 Rule yielded the benefits the commenters say it did, and it is even less clear how this final rule will remove those benefits. Generally, the Department's review of comments is that concerns about increased costs to LGBT persons from this final rule do not offer sufficient quantitative evidence for the Department to provide an estimate along these dimensions.

Finally, as discussed above, because the 2016 Rule contained no prohibition on sexual orientation discrimination in the 2016 Rule, the Department does not deem there to be an economic impact resulting from this final rule with respect to sexual orientation discrimination.

[379] BLS, Occupational Employment and Wages, May 2018, *https://www.bls.gov/oes/2018/may/oes_nat.htm.*

[380] *Id.*

[381] NPR, ''Discrimination in America: Experiences and Views of LGBTQ Americans'' (Nov. 2017), available at *https://www.npr.org/documents/2017/nov/npr-discrimination-lgbtq-final.pdf.*

Consequently, commenters' warnings of effects of this rule's changes on these issues do not give rise to impacts that are properly attributable to this rule and that the Department believes can be estimated for the purposes of this analysis.

Comment: One commenter contended that the Department should include analysis of the consequences of removing sex stereotyping language from the rule. The commenter suggested that costs of this rescission could include increased confusion for patients and covered entities, increased discrimination based on sex stereotyping with attendant economic and non-economic costs to patients and the public health system, increased need for legal advice, and increased litigation.

Response: To the extent that sex stereotyping language from the 2016 Rule was interpreted to encompass gender identity, court orders have preliminarily enjoined and now vacated those provisions. Therefore, this final rule does not directly induce changes in this regard. To the extent that sex stereotyping is a recognized category of sex discrimination under longstanding Supreme Court precedent, this final rule commits the Department to continuing to vigorously enforce Title IX through Section 1557, and therefore the Department estimates that this final rule will not have any material effect on the scope of sex stereotyping claims as authorized by Title IX and Section 1557.

Comment: A commenter objected that the proposed rule did not estimate the economic impact of withdrawal of Federal guidance and technical support concerning the 2016 Rule.

Response: All guidance and technical support concerning the 2016 Rule was withdrawn by operation of the preamble to the proposed rule, which itself is a guidance document—not directly by this final rule. The outdated guidance documents are in the process of being removed from the Department's websites. The Department is not aware of any data that would allow it to estimate the effects of changes to its sub-regulatory guidance. To the extent that certain guidance and technical support concerned provisions of the 2016 Rule that were enjoined and vacated, this final rule is not the direct cause of the Department's non-enforcement of those provisions.

Comment: Some commenters contended that the proposed rule would lead to economic burdens concerning termination of pregnancy for women and other patients who are denied access to care. One commenter stated that there is well-documented research that shows the significant healthcare costs women experience when they face healthcare denials. Another commenter stated that women will suffer negative health effects or death if they are denied services relating to complications from an abortion or a miscarriage. Another commenter stated that there are costs to patients facing discrimination as a result of having a previous termination of pregnancy.

Several commenters contended that the proposed rule would place undue costs and burdens on survivors of sexual and domestic violence. The commenters stated that healthcare programs provide critical and costly care for survivors of domestic violence, sexual assault, and human trafficking. The commenters stated that recent data from the CDC shows that the lifetime per-victim cost of intimate partner violence was $103,767 for women victims, with 59% going to medical costs, and that more than 550,000 injuries due to intimate partner violence require medical attention each year.

Response: The Department appreciates comments in this regard. This final rule fully commits the Department to enforcement of Section 1557 and Title IX to protect women from discrimination on the basis of sex, including and especially vulnerable populations such as survivors of domestic violence, sexual assault, and human trafficking. As noted above, court orders have already enjoined and now vacated the termination of pregnancy provisions from the 2016 Rule. Therefore, this final rule does not have a direct material economic impact with regard to discrimination on the basis of termination of pregnancy. This final rule further ensures the Department will enforce Section 1557 and Title IX consistent with the statutory provisions of Title IX. The Department lacks data or methods enabling it to provide quantitative estimates of any alleged economic impacts related to termination of pregnancy provisions.

Comment: A commenter contended that the Department should conduct a cost-benefit analysis specifically on the impact of adopting Title IX's religious exemptions, or compliance with RFRA.

Response: The Department disagrees. The Title IX statute already includes certain exemptions concerning religious groups, and RFRA protects certain exercises of religion from substantial burdens. This final rule affirms that the Department will only enforce Section 1557 consistent with the statutory provisions of Title IX and RFRA, and amends the Title IX regulations to explicitly include the provisions of the Title IX statute concerning religious groups and abortion neutrality. As the Department is already bound by statute to implement Title IX and Section 1557 consistent with those statutes and with RFRA, the Department does not attribute its compliance with those statutes to be attributable to this final rule. Economic impacts due to compliance with Title IX and RFRA would be attributable, not to this final rule, but to those statutes themselves, and are not relevant for this regulatory impact analysis.

Comment: One commenter stated that the Department should estimate the economic impacts of its conforming amendments.

Response: Section 1557 encompasses all the CMS programs addressed by the conforming amendments, so the Department's estimates of impacts of changes to the Section 1557 rule already encompass the impact on entities covered by those rules.

(5) Impact on State, Local, and Tribal Entities Under Executive Orders 12866, 13132, and 13175

a. State and Local Governments

Executive Order 13132 establishes certain requirements that an agency must meet when it issues a rule that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. Executive Order 13132, 64 FR 43255 (Aug. 4, 1999). The Department does not believe that this final rule would (1) impose substantial direct requirements costs on State or local governments; (2) preempt State law; or (3) otherwise have Federalism implications. Section 1557 itself provides that it shall not be construed ''to supersede State laws that provide additional protections against discrimination on any basis described in subsection (a) [of Section 1557].'' 42 U.S.C. 18116(b).

The final rule maintains the full force of Federal civil rights laws' protections against discrimination, but does not attempt to impose a ceiling on how those protections may be observed by States. State and local jurisdictions would continue to have the flexibility to impose additional civil rights protections.

The Department believes that there would be reduced costs to State and local entities, by repealing wasteful Federal mandates and giving States more flexibility to address the needs of LEP individuals or other regional-specific issues.

The Department believes that the change to its Title IX regulations will

not have a substantial direct effect on the States, on the relationship between the national government and the States, on the distribution of power and responsibilities among the various levels of government, or on tribal self-government or sovereignty. This final rule does not subject Title IX funding recipients to new obligations, but rather implements Title IX according to its statutory text, and relieves potential burdens on the States or tribes that could have resulted from any prior interpretation of Title IX by HHS that was inconsistent with the statute. This final rule allows States and tribes to adopt or continue to provide nondiscrimination protections on the basis of sexual orientation, gender identity, or termination of pregnancy, in State, local, and tribal law. Therefore, the Department has determined that this final rule does not have sufficient Federalism implications to warrant the preparation of a Federalism summary impact statement under Executive Order 13132, and that the rule would not implicate the requirements of Executive Orders 12866 and 13175 with respect to tribes.

Comment: One commenter stated it was inconsistent for the Department to say the 2016 Rule imposed burdens on States but that the proposed rule would not impose new burdens.

Response: The 2016 Rule imposed or may have imposed burdens concerning notices and taglines, as well as gender identity and termination of pregnancy provisions beyond the text of Title IX. This final rule can relieve such burdens without imposing new burdens. To the extent that the gender identity and termination of pregnancy provisions were vacated in October 2019, the Department agrees this final rule does not relieve such burdens, but to the same extent, this final rule does not impose any corresponding burdens.

Comment: A commenter stated that HHS points to no evidence of substantial burdens on States and localities as regards the provision or coverage of medically necessary care related to gender transition.

Response: The Department's conclusion that this final rule does not impose new burdens on States and localities is independent of the Department's suggestion that the 2016 Rule, to the extent it prohibited discrimination on grounds exceeding Title IX and State and local law, also imposed burdens on such States and localities.

Comment: One commenter stated that the proposed rule could impose additional costs on States that adopted policies related to private insurance and Medicaid based on the 2016 Rule that see an increase in healthcare discrimination complaints in their State-level human rights commissions, as HHS OCR will no longer receive such complaints, and such States may reinstate or maintain exclusions and face costly litigation.

Response: The court orders preliminarily enjoining and eventually vacating the 2016 Rule's gender identity and termination of pregnancy provisions have been in effect since December 2016. States have, therefore, not been bound by those provisions, and this final rule's changes in that regard will not cause States to need to change their policies in that regard. States will also not likely see an increase in complaints at the State level as a result of this rule, because HHS OCR has not been able to enforce those provisions for almost the entire lifespan of the 2016 Rule. Finally, this rule does not require States to reinstate exclusions from coverage, so litigation that States might face as a result of doing so are not directly attributable to this final rule.

b. Tribal Governments

Executive Order 12866 directs that significant regulatory actions avoid undue interference with State, local, or tribal governments, in the exercise of their governmental functions. Executive Order 12866 at § 6(a)(3)(B).[382] Executive Order 13175 further directs that Agencies respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments. Executive Order 13175 at § 2(a). The Department does not believe that the final rule would implicate the requirements of Executive Orders 12866 and 13175 with respect to tribal sovereignty.

(6) Avoidance of Inconsistent, Incompatible, or Duplicative Regulations

Executive Order 12866 requires the Department to avoid issuing regulations that are inconsistent, incompatible, or duplicative with other regulations that it has issued or that have been issued by other Federal agencies. Executive Order 12866 at § 1(b)(10). Section 1557 itself requires avoidance of duplication by providing that the enforcement mechanisms under specifically identified civil rights laws ''shall apply for purposes of violations'' of Section 1557. 42 U.S.C. 18116(a).[383] The preamble to the 2016 Rule repeatedly stated that, with the exception of issues concerning notices, sex discrimination, and language access plans, it was merely applying civil rights protections that were already applicable and familiar to covered entities. *See* 81 FR at 31446. (''It is important to recognize that this final rule, except in the area of sex discrimination, applies pre-existing requirements in Federal civil rights laws to various entities, the great majority of which have been covered by these requirements for years.''); 81 FR at 31464 (''For the most part, because this regulation is consistent with existing standards applicable to the covered entities, the new burdens created by its issuance are minimal.'').

With regard to the current 2016 Rule's notice and taglines requirement, covered entities are already subject to dozens of regulations concerning multi-language taglines or notices concerning an individual's right to have documents translated. For example, CMS imposes taglines requirements on health insurance marketplaces, QHP issuers, group health plans and health insurance issuers, navigators, non-navigator assistance personnel, Medicaid, Medicaid managed care, Children's Health Insurance Program, Medicare Advantage, and Medicare Part D.[384]

[382] As stated in the preceding section, the final rule does not have Federalism implications.

[383] For the applicable enforcement mechanisms, *See* 45 CFR parts 80 and 81 (Title VI), 85 (Section 504), 86 (Title IX), 90 and 91 (Age Act).

[384] 45 CFR 147.136(e)(2)(iii) and (e)(3) and § 147.200(a)(5) (requiring group health plans and QHP issuers to post taglines in languages in which 10% of individuals with LEP county-wide are exclusively literate on internal claims and appeals notices, and requiring QHP issuers to post on its Summary of Benefits and Coverage), § 155.215(c)(4) (requiring Navigators and non-Navigator personnel in States with Marketplaces operated by HHS to ''[p]rovide oral and written notice to consumers with LEP, in their preferred language, informing them of their right to receive language assistance services and how to obtain them''); 42 CFR 435.905(b)(3) (Medicaid regulations requiring individuals to be ''informed of the availability of language services . . . and how to access . . . [them] through providing taglines in non–English languages indicating the availability of language services''); § 438.10(c)(5)(i) through (ii) (Medicaid managed care regulations requiring taglines until July 1, 2017); § 438.10(d)(2) through (3), (d)(5)(i), (d)(5)(iii) and (d)(5)(j) (Medicaid managed care regulations requiring taglines on ''all written materials for potential enrollees'' in the prevalent non-English languages in the State and requiring notification that ''oral interpretation is available for any language and written translation is available in prevalent languages'' during the rating period for contracts with managed care entities beginning on or after July 1, 2017), § 457.340(a) (applying certain Medicaid requirements to the Children's Health Insurance Program, including § 435.905(b)(3), which requires individuals to be ''informed of the availability of language services . . . and how to access . . . [them] through providing taglines in non-English languages indicating the availability of language services''), 457.1207 (applying certain

Furthermore, a Department of Treasury regulation imposed taglines requirements for hospital organizations to qualify for tax-exempt status.[385] Additionally, in 2003, the Department issued guidance under Title VI, setting forth a flexible four-factor framework to assess the necessity and reasonableness for providing written translation for LEP individuals.[386] Finally, the ACA itself provides that each summary of benefits and coverage provided by issuers—perhaps the single most important health insurance-related document a person receives—must be ''presented in a culturally and linguistically appropriate manner.'' 42 U.S.C. 300gg–15(b)(2).

Substantially replacing many provisions of the 2016 Rule, including removing the notice and taglines requirements, would eliminate significant redundancies identified above, while maintaining vigorous enforcement of existing Federal civil rights statutes.

B. Executive Order 13771 on Reducing and Controlling Regulatory Costs

This final rule is deemed an E.O. 13771 deregulatory action. The Department estimates that this final rule would generate $0.24 billion in net annualized savings at a 7% discount rate (discounted relative to year 2016, over a perpetual time horizon, in 2016 dollars).

Furthermore, Executive Order 13765 states that ''the Secretary of Health and Human Services (Secretary) and the heads of all other executive departments and agencies (agencies) with authorities and responsibilities under the [ACA] shall exercise all authority and discretion available to waive, defer, grant exemptions from, or delay the implementation of any provision or requirement of the [ACA] that would impose a fiscal burden on any State or a cost, fee, tax, penalty, or regulatory burden on individuals, families, healthcare providers, health insurers, patients, recipients of healthcare services, [or] purchasers of health insurance.'' Executive Order 13765, 82 FR 8351, 8351 (Jan. 24, 2017). In implementing Section 1557 of the ACA, the 2016 Rule imposed significant regulatory burdens on covered entities, including States, healthcare providers, and health insurers, without sufficient corresponding benefits for patients or beneficiaries. By proposing to substantially replace the 2016 Rule with a regulation that requires compliance with pre-existing civil rights laws, the Department is acting in accordance with Executive Order 13765 in exercising its authority and discretion to address the fiscal burdens on States, and the regulatory burdens imposed on individuals, families, healthcare providers, health insurers, patients, and recipients of healthcare service. The final rule will particularly reduce the economic burden imposed on healthcare providers and insurers required to provide taglines under the 2016 Rule. Decreasing the burden on these providers and insurers will allow them to pass along some of the cost savings to individuals, families, patients, and beneficiaries of insurance to whom they provide services or coverage. Additionally, eliminating the taglines requirement will alleviate burdens on patients and insurance beneficiaries that neither need nor want to receive repeated taglines mailings.

C. Congressional Review Act

The Congressional Review Act (CRA) defines a ''major rule'' as ''any rule that the Administrator of the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget finds has resulted in or is likely to result in—(A) an annual effect on the economy of $100,000,000 or more; (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.'' 5 U.S.C. 804(2). Based on the analysis of this final rule under Executive Order 12866, this rule is expected to be a major rule for purposes of the CRA because it generates cost savings of over $100 million. The Department will comply with the CRA's requirements to inform Congress.

D. Unfunded Mandates Reform Act

This final rule is not subject to the Unfunded Mandates Reform Act because it falls under an exception for regulations that establish or enforce any statutory rights that prohibit discrimination on the basis of race, color, religion, sex, national origin, age, handicap, or disability. 2 U.S.C. 1503(2).

E. Regulatory Flexibility Act and Executive Order 13272 on Proper Consideration of Small Entities in Agency Rulemaking

The Regulatory Flexibility Act (RFA) requires agencies to analyze regulatory options that would minimize any significant impact of a rule on small entities. Public Law 96–354, 94 Stat. 1164 (Sept. 19, 1980) (codified at 5 U.S.C. 601 through 612). The RFA requires an agency to describe the impact of a rulemaking on small entities by providing an initial regulatory flexibility analysis, unless the agency expects that the rule will not have a significant economic impact on a substantial number of small entities, provides a factual basis for this determination, and proposes to certify the statement. 5 U.S.C. 603(a), 605(b). If an agency must provide an initial regulatory flexibility analysis, this analysis must address the consideration of regulatory options that would minimize the economic impact of the rule on small entities. 5 U.S.C. 603(c).

For purposes of the RFA, small entities include small businesses, nonprofit organizations, and small governmental jurisdictions. HHS considers a rule to have a significant impact on a substantial number of small entities if it has at least a three percent impact on revenue for at least five percent of small entities.

Based on its examination, the Department has concluded that this final rule does not have a significant economic impact on a substantial number of small entities. The preamble to the 2016 Rule discussed the character of small entities impacted by the 2016 Rule in detail. 81 FR at 31463–64. Although this final rule will affect numerous small entities, it does not create new or expanded requirements,

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Medicaid managed care requirements to Children's Health Insurance Program managed care, including § 438.10(c)(5)(i)–(ii) until the State fiscal year beginning on or after July, 1, 2018), § 438.10(d)(2)–(3), (d)(5)(i), (iii), (j) (applying certain Medicaid managed care requirements to Children's Health Insurance Program managed care, in the State fiscal year beginning on or after July, 1, 2018); CMS, 2017 Medicare Marketing Guidelines, § 30.5.1, § 100.2.2, § 8, § 80–8 (Jun. 10, 2016), *https://www.cms.gov/Medicare/Health-Plans/ManagedCareMarketing/Downloads/2017MedicareMarketingGuidelines2.pdf* (providing a CMS Multi-Language Insert'' for certain Medicare Advantage Plan's and Medicare Part D Plan Sponsors' marketing materials meeting the percentage translation threshold in § 422.2264(e) and § 423.2264(e) of Title 42 of the CFR). As discussed in the RIA section, we presume 45 CFR 155.205(c)(2)(iii)(A) (requiring Marketplaces and QHP issuers to post taglines on their websites and documents ''critical for obtaining health insurance coverage or access to health care services through a QHP'') and other provisions that depend or refer to 45 CFR part 92 for their tagline requirements will no longer apply under this final rule.

[385] *See* 79 FR 78954 (Dec. 31, 2014) (finalizing rule requiring the plain language summary of the financial assistance policy for hospital organizations to qualify as tax exempt, to indicate, if applicable, whether the summary, the financial assistance policy, and the application for such assistance are available in other languages).

[386] Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 68 FR 47315 (Aug. 8, 2003) (HHS LEP Guidance).

and, for all the reasons stated in the RIA, it will be reducing economic burdens on such entities overall. The changes concerning gender identity and termination of pregnancy, having already been vacated by court order, are not expected to result in any impact. The changes to the Department's Title IX rule would not impose any new substantive obligations on Federal funding recipients and, in fact, would provide regulatory clarity and relief for any small entities previously subject to several of the policies and requirements imposed by the Department. The changes made in conforming amendments overlap those made in the Section 1557 rule and described in the RIA.

To the extent that this final rule imposes economic costs, these are generally limited to entities' voluntary choices to revise their policies and procedures and conduct training, and the Department believes these costs are well below those required to have a significant impact on a substantial number of small entities. In addition, the majority of the costs associated with this final rule are proportional to the size of entities, meaning that even the smallest of the affected entities are unlikely to face a substantial impact.

For these reasons, the Secretary certifies that the final rule will not have a significant impact on a substantial number of small entities.

Executive Order 13272 on Proper Consideration of Small Entities in Agency Rulemaking reinforces the requirements of the RFA and requires the Department to notify the Chief Counsel for Advocacy of the Small Business Administration if the final rule may have a significant economic impact on a substantial number of small entities under the RFA. Executive Order 13272, 67 FR 53461 (Aug. 16, 2002). Because the economic impact of the proposed rule is not significant under the RFA, the Department is not subject to Executive Order 13272's notification requirement.

F. Executive Order 12250 on Leadership and Coordination of Nondiscrimination Laws

Pursuant to Executive Order 12250, the Attorney General has the responsibility to ''coordinate the implementation and enforcement by Executive agencies of . . . Title IX of the Education Amendments of 1972 (20 U.S.C. 1681 *et seq.*)'' Executive Order 12250 at § 1–2(b), 45 FR 72995 (Nov. 2, 1980). The proposed rule was reviewed and approved by the Attorney General, and this final rule was also reviewed and approved by the Attorney General in finalizing the proposed rule without change.

G. Paperwork Reduction Act

The Department has determined that this final rule does not impose additional reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.* Under the rule, OCR will update and revise its burden analysis by removing the burden associated with the posting of a nondiscrimination notice and taglines, development and implementation of a language access plan, and designation of a compliance coordinator and adoption of grievance procedures for covered entities with 15 or more employees. OCR has obtained Paperwork Reduction Act approval for this reporting requirement via an update to HHS Form 690 (Consolidated Civil Rights Assurance Form) [387] separate from this rulemaking.

(D) Delegation of Authority

Notice is hereby given that I have delegated to the Director, Office for Civil Rights (OCR), with authority to re-delegate, enforcement and administration of Section 1557 of the Patient Protection and Affordable Care Act [42 U.S.C. 18116]. This delegation includes the authority to develop and direct implementation of the requirements of Section 1557 of the Patient Protection and Affordable Care Act [42 U.S.C. 18116] as applied to the Department and recipients of the Department's funds. This delegation supersedes the delegation of authority under Section 1557 to the Health Resources and Services Administration (HRSA) on April 21, 2016 in 81 FR 25680 (April 29, 2016).

List of Subjects

42 CFR Part 438

Civil rights, Discrimination, Grant programs-health, Individuals with disabilities, Medicaid, National origin, Nondiscrimination, Reporting and recordkeeping requirements, Sex discrimination.

42 CFR Part 440

Civil rights, Discrimination, Grant programs-health, Individuals with disabilities, Medicaid, National origin, Nondiscrimination, Sex discrimination.

42 CFR Part 460

Age discrimination, Aged, Civil rights, Discrimination, Health Incorporation by reference, Individuals with disabilities, Medicare, Medicaid, National origin, Nondiscrimination, Religious discrimination, Reporting and recordkeeping requirements, Sex discrimination.

45 CFR Part 86

Civil rights, Colleges and universities, Employment, Administrative practice and procedure, Buildings and facilities, Education of individuals with disabilities, Education, Educational facilities, Educational research, Educational study programs, Equal educational opportunity, Equal employment opportunity, Graduate fellowship program, Grant programs—education, Individuals with disabilities, Investigations, Reporting and recordkeeping requirements, Sex discrimination, State agreement program, Student aid, Women.

45 CFR Part 92

Administrative practice and procedure, Age discrimination, Civil rights, Discrimination, Elderly, Healthcare, Health facilities, Health insurance, Health programs or activities, Individuals with disabilities, National origin, Nondiscrimination, Reporting and recordkeeping requirements, Sex discrimination.

45 CFR Part 147

Age discrimination, Civil rights, Discrimination, Healthcare, Health insurance, Individuals with disabilities, National origin, Nondiscrimination, Reporting and recordkeeping requirements, Sex discrimination, State regulation of health insurance.

45 CFR Part 155

Actuarial value, Administration and calculation of advance payments of the premium tax credit, Administrative practice and procedure, Advance payments of premium tax credit, Age discrimination, Civil rights, Cost-sharing reductions, Discrimination, Healthcare access, Health insurance, Individuals with disabilities, National origin, Nondiscrimination, Plan variations, Reporting and recordkeeping requirements, Sex discrimination, State and local governments.

45 CFR Part 156

Administrative appeals, Administrative practice and procedure, Administration and calculation of advance payments of premium tax credit, Advertising, Advisory Committees, Age discrimination, Brokers, Civil rights, Conflict of interest, Consumer protection, Cost-sharing reductions, Discrimination, Grant programs-health, Grants administration,

[387] *See* HHS OCR, Assurance of Compliance Portal, *https://ocrportal.hhs.gov/ocr/aoc/instruction.jsf.*

Healthcare, Health insurance, Health maintenance organization (HMO), Health records, Hospitals, American Indian/Alaska Natives, Individuals with disabilities, Loan programs-health, Organization and functions (Government agencies), Medicaid, National origin, Nondiscrimination, Payment and collections reports, Public assistance programs, Reporting and recordkeeping requirements, Sex discrimination, State and local governments, Sunshine Act, Technical assistance, Women, Youth.

For the reasons set forth in the preamble, the Department of Health and Human Services amends 42 CFR parts 438, 440, and 460 and 45 CFR parts 86, 92, 147, 155, and 156 as follows:

Title 42—Public Health

PART 438—MANAGED CARE

■ 1. The authority citation for part 438 continues to read as follows:

Authority: 42 U.S.C. 1302.

■ 2. Amend § 438.3 by revising paragraph (d)(4) to read as follows:

§ 438.3 Standard contract requirements.

* * * * *

(d) * * *

(4) The MCO, PIHP, PAHP, PCCM or PCCM entity will not discriminate against individuals eligible to enroll on the basis of race, color, national origin, sex, or disability and will not use any policy or practice that has the effect of discriminating on the basis of race, color, or national origin, sex, or disability.

* * * * *

■ 3. Amend § 438.206 by revising paragraph (c)(2) to read as follows:

§ 438.206 Availability of services.

* * * * *

(c) * * *

(2) *Access and cultural considerations.* Each MCO, PIHP, and PAHP participates in the State's efforts to promote the delivery of services in a culturally competent manner to all enrollees, including those with limited English proficiency and diverse cultural and ethnic backgrounds, disabilities, and regardless of sex.

* * * * *

PART 440—SERVICES: GENERAL PROVISIONS

■ 4. The authority citation for part 440 continues to read as follows:

Authority: 42 U.S.C. 1302.

■ 5. Revise § 440.262 to read as follows:

§ 440.262 Access and cultural conditions.

The State must have methods to promote access and delivery of services in a culturally competent manner to all beneficiaries, including those with limited English proficiency, diverse cultural and ethnic backgrounds, disabilities, and regardless of sex. These methods must ensure that beneficiaries have access to covered services that are delivered in a manner that meets their unique needs.

PART 460—PROGRAMS OF ALL-INCLUSIVE CARE FOR THE ELDERLY (PACE)

■ 6. The authority citation for part 460 continues to read as follows:

Authority: 42 U.S.C. 1302, 1395l, 1395eee(f), and 1396u–4(f)).

■ 7. Amend § 460.98 by revising paragraph (b)(3) to read as follows:

§ 460.98 Service delivery.

* * * * *

(b) * * *

(3) The PACE organization may not discriminate against any participant in the delivery of required PACE services based on race, ethnicity, national origin, religion, sex, age, mental or physical disability, or source of payment.

* * * * *

■ 8. Amend § 460.112 by revising paragraph (a) to read as follows:

§ 460.112 Specific rights to which a participant is entitled.

(a) *Respect and nondiscrimination.* Each participant has the right to considerate, respectful care from all PACE employees and contractors at all times and under all circumstances. Each participant has the right not to be discriminated against in the delivery of required PACE services based on race, ethnicity, national origin, religion, sex, age, mental or physical disability, or source of payment. Specifically, each participant has the right to the following:

(1) To receive comprehensive health care in a safe and clean environment and in an accessible manner.

(2) To be treated with dignity and respect, be afforded privacy and confidentiality in all aspects of care, and be provided humane care.

(3) Not to be required to perform services for the PACE organization.

(4) To have reasonable access to a telephone.

(5) To be free from harm, including physical or mental abuse, neglect, corporal punishment, involuntary seclusion, excessive medication, and any physical or chemical restraint imposed for purposes of discipline or convenience and not required to treat the participant's medical symptoms.

(6) To be encouraged and assisted to exercise rights as a participant, including the Medicare and Medicaid appeals processes as well as civil and other legal rights.

(7) To be encouraged and assisted to recommend changes in policies and services to PACE staff.

* * * * *

Title 45—Public Welfare

PART 86—NONDISCRIMINATION ON THE BASIS OF SEX IN EDUCATION PROGRAMS OR ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE

■ 9. The authority citation for part 86 is revised to read as follows:

Authority: 20 U.S.C. 1681 through 1688; Pub. L. 100–259, 102 Stat. 28 (Mar. 22, 1988).

■ 10. Amend § 86.2:

■ a. In paragraph (a), by adding ‘‘, 1687, 1688’’ after ‘‘1686’’; and

■ b. In paragraph (n), by removing the words ‘‘United States Commissioner of Education’’ and adding in their place the words ‘‘Secretary of Education’’.

■ 11. Add § 86.18 to read as follows:

§ 86.18 Amendments to conform to statutory exemptions.

(a) Nothing in this part shall be construed to force or require any individual or hospital or any other institution, program, or activity receiving Federal funds to perform or pay for an abortion.

(b) Nothing in this part shall be construed to require or prohibit any person, or public or private entity, to provide or pay for any benefit or service, including the use of facilities, related to an abortion. Nothing in the preceding sentence shall be construed to permit a penalty to be imposed on any person or individual because such person or individual is seeking or has received any benefit or service related to a legal abortion.

(c) This part shall be construed consistently with, as applicable, the First Amendment to the Constitution, Title IX's religious exemptions (20 U.S.C. 1681(a)(3) and 1687(4)), the Religious Freedom Restoration Act (42 U.S.C. 2000b *et seq.*), and provisions related to abortion in the Church Amendments (42 U.S.C. 300a–7), the Coats-Snowe Amendment (42 U.S.C. 238n), section 1303 of the Patient Protection and Affordable Care Act (42 U.S.C. 18023), and appropriation rider provisions relating to abortion, to the extent they remain in effect or applicable, such as the Hyde

Amendment (*e.g.,* Consolidated Appropriations Act, 2019, Pub. L. 115–245, Div. B, secs. 506–07), the Helms Amendment (*e.g.,* Continuing Appropriations Act, 2019, Pub. L. 116–6, Div. F, Title III), and the Weldon Amendment (*e.g.,* Consolidated Appropriations Act, 2019, Pub. L. 115–245, Div. B, sec. 507(d)).

■ 12. Amend § 86.31 by revising paragraph (b) to read as follows:

§ 86.31 Education programs or activities.

* * * * *

(b) *Specific prohibitions.* Except as provided in this subsection, in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex:

(1) Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;

(2) Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;

(3) Deny any person any such aid, benefit, or service;

(4) Subject any person to separate or different rules of behavior, sanctions, or other treatment;

(5) Apply any rule concerning the domicile or residence of a student or applicant, including eligibility for in-State fees and tuition;

(6) Aid or perpetuate discrimination against any person by providing significant assistance to any agency, organization, or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees;

(7) Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.

* * * * *

■ 13. Revise § 86.71 to read as follows:

§ 86.71 Enforcement procedures.

For the purposes of implementing this Part, the procedural provisions applicable to Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d) are hereby adopted and incorporated herein by reference. These procedures may be found at 45 CFR 80.6 through 80.11 and 45 CFR part 81.

■ 14. Revise part 92 to read as follows:

PART 92—NONDISCRIMINATION ON THE BASIS OF RACE, COLOR, NATIONAL ORIGIN, SEX, AGE, OR DISABILITY IN HEALTH PROGRAMS OR ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE AND PROGRAMS OR ACTIVITIES ADMINISTERED BY THE DEPARTMENT OF HEALTH AND HUMAN SERVICES UNDER TITLE I OF THE PATIENT PROTECTION AND AFFORDABLE CARE ACT OR BY ENTITIES ESTABLISHED UNDER SUCH TITLE

Subpart A—General Provisions

Sec.
92.1 Purpose.
92.2 Nondiscrimination requirements.
92.3 Scope of application.
92.4 Assurances.
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Subpart B—Specific Applications to Health Programs or Activities

92.101 Meaningful access for individuals with limited English proficiency.
92.102 Effective communication for individuals with disabilities.
92.103 Accessibility standards for buildings and facilities.
92.104 Accessibility of information and communication technology.
92.105 Requirement to make reasonable modifications.

Authority: 42 U.S.C. 18116; 5 U.S.C. 301, Pub. L. 100–259, 102 Stat. 28 (Mar. 22 1988); 42 U.S.C. 2000d *et seq.* (Title VI of the Civil Rights Act of 1964, as amended); 29 U.S.C. 794 (Section 504 of the Rehabilitation Act of 1973, as amended); 20 U.S.C. 1681 *et seq.* (Title IX of the Education Amendments of 1972, as amended); 42 U.S.C. 6101 *et seq.;* (Age Discrimination Act of 1975, as amended); *Lau* v. *Nichols,* 414 U.S. 563 (1974).

Subpart A—General Provisions

§ 92.1 Purpose.

The purpose of this part is to provide for the enforcement of section 1557 of the Patient Protection and Affordable Care Act, 42 U.S.C. 18116, prohibiting discrimination under any health program or activity receiving Federal financial assistance, or under any program or activity administered by an Executive agency, or by any entity established, under Title I of such law, on the grounds of race, color, national origin, sex, age, or disability, except as provided in Title I of such law (or any amendment thereto). Section 1557 requires the application of the enforcement mechanisms under Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d *et seq.*), Title IX of the Education Amendments of 1972 (20 U.S.C. 1681 *et seq.*), the Age Discrimination Act of 1975 (42 U.S.C. 6101 *et seq.*), and Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) for purposes of violations of Section 1557 and this part.

§ 92.2 Nondiscrimination requirements.

(a) Except as provided in Title I of the Patient Protection and Affordable Care Act (or any amendment thereto), an individual shall not, on any of the grounds set forth in paragraph (b) of this section, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any health program or activity, any part of which is receiving Federal financial assistance (including credits, subsidies, or contracts of insurance) provided by the U.S. Department of Health and Human Services; or under any program or activity administered by the Department under such Title; or under any program or activity administered by any entity established under such Title.

(b) The grounds are the grounds prohibited under the following statutes:

(1) Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d *et seq.*) (race, color, national origin);

(2) Title IX of the Education Amendments of 1972 (20 U.S.C. 1681 *et seq.*) (sex);

(3) The Age Discrimination Act of 1975 (42 U.S.C. 6101 *et seq.*) (age); or

(4) Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) (disability).

§ 92.3 Scope of application.

(a) Except as otherwise provided in this part, this part applies to

(1) Any health program or activity, any part of which is receiving Federal financial assistance (including credits, subsidies, or contracts of insurance) provided by the Department;

(2) Any program or activity administered by the Department under Title I of the Patient Protection and Affordable Care Act; or

(3) Any program or activity administered by any entity established under such Title.

(b) As used in this part, ''health program or activity'' encompasses all of the operations of entities principally engaged in the business of providing healthcare that receive Federal financial assistance as described in paragraph (a)(1) of this section. For any entity not principally engaged in the business of providing healthcare, the requirements applicable to a ''health program or activity'' under this part shall apply to such entity's operations only to the extent any such operation receives Federal financial assistance as described in paragraph (a)(1) of this section.

(c) For purposes of this part, an entity principally or otherwise engaged in the

business of providing health insurance shall not, by virtue of such provision, be considered to be principally engaged in the business of providing healthcare.

(d) Any provision of this part held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, shall be construed so as to continue to give maximum effect to the provision permitted by law, unless such holding shall be one of utter invalidity or unenforceability, in which event the provision shall be severable from this part and shall not affect the remainder thereof or the application of the provision to other persons not similarly situated or to other, dissimilar circumstances.

§ 92.4 Assurances.

(a) *Assurances.* An entity applying for Federal financial assistance to which this part applies shall, as a condition of any application for Federal financial assistance, submit an assurance, on a form specified by the Director of the Department's Office for Civil Rights, that the entity's health programs or activities will be operated in compliance with section 1557 and this part. A health insurance issuer seeking certification to participate in an Exchange or a State seeking approval to operate a State Exchange to which section 1557 or this part applies shall, as a condition of certification or approval, submit an assurance, on a form specified by the Director of the Department's Office for Civil Rights, that the health program or activity will be operated in compliance with section 1557 and this part. An applicant or entity may incorporate this assurance by reference in subsequent applications to the Department for Federal financial assistance or requests for certification to participate in an Exchange or approval to operate a State Exchange.

(b) *Duration of obligation.* The duration of the assurances required by this subpart is the same as the duration of the assurances required in the Department's regulations implementing section 504 at 45 CFR 84.5(b).

(c) *Covenants.* When Federal financial assistance is provided in the form of real property or interest, the same conditions apply as those contained in the Department's regulations implementing section 504 at 45 CFR 84.5(c), except that the nondiscrimination obligation applies to discrimination on all bases covered under section 1557 and this part.

§ 92.5 Enforcement mechanisms.

(a) The enforcement mechanisms provided for, and available under, Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d *et seq.*), Title IX of the Education Amendments of 1972 (20 U.S.C. 1681 *et seq.*), the Age Discrimination Act of 1975 (42 U.S.C. 6101 *et seq.*), or Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), including under the Department's regulations implementing those statutes, shall apply for purposes of violations of § 92.2 of this part.

(b) The Director of the Office for Civil Rights has been delegated the authority to enforce 42 U.S.C. 18116 and this part, which includes the authority to handle complaints, initiate and conduct compliance reviews, conduct investigations, supervise and coordinate compliance within the Department, make enforcement referrals to the Department of Justice, in coordination with the Office of the General Counsel and the relevant component or components of the Department, and take other appropriate remedial action as the Director deems necessary, in coordination with the relevant component or components of the Department, and as allowed by law to overcome the effects of violations of 42 U.S.C. 18116 or of this part.

§ 92.6 Relationship to other laws.

(a) Nothing in this part shall be construed to invalidate or limit the rights, remedies, procedures, or legal standards available to individuals aggrieved under Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d *et seq.*), Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et seq.*), Title IX of the Education Amendments of 1972 (20 U.S.C. 1681 *et seq.*), the Age Discrimination Act of 1975 (42 U.S.C. 6101 *et seq.*), or Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), or to supersede State laws that provide additional protections against discrimination on any basis described in § 92.2 of this part.

(b) Insofar as the application of any requirement under this part would violate, depart from, or contradict definitions, exemptions, affirmative rights, or protections provided by any of the statutes cited in paragraph (a) of this section or provided by the Architectural Barriers Act of 1968 (42 U.S.C. 4151 *et seq.*); the Americans with Disabilities Act of 1990, as amended by the Americans with Disabilities Act Amendments Act of 2008 (42 U.S.C. 12181 *et seq.*), Section 508 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794d), the Coats-Snowe Amendment (42 U.S.C. 238n), the Church Amendments (42 U.S.C. 300a–7), the Religious Freedom Restoration Act (42 U.S.C. 2000bb *et seq.*), Section 1553 of the Patient Protection and Affordable Care Act (42 U.S.C. 18113), Section 1303 of the Patient Protection and Affordable Care Act (42 U.S.C. 18023), the Weldon Amendment (Consolidated Appropriations Act, 2019, Pub. L. 115–245, Div. B sec. 209 and sec. 506(d) (Sept. 28, 2018)), or any related, successor, or similar Federal laws or regulations, such application shall not be imposed or required.

Subpart B—Specific Applications to Health Programs or Activities

§ 92.101 Meaningful access for individuals with limited English proficiency.

(a) Any entity operating or administering a health program or activity subject to this part shall take reasonable steps to ensure meaningful access to such programs or activities by limited English proficient individuals.

(b) *Specific applications*—(1) *Enforcement discretion.* In evaluating whether any entity to which paragraph (a) of this section applies has complied with paragraph (a) of this section, the Director of the Department's Office for Civil Rights may assess how such entity balances the following four factors:

(i) The number or proportion of limited English proficient individuals eligible to be served or likely to be encountered in the eligible service population;

(ii) The frequency with which LEP individuals come in contact with the entity's health program, activity, or service;

(iii) The nature and importance of the entity's health program, activity, or service; and

(iv) The resources available to the entity and costs.

(2) *Language assistance services requirements.* Where paragraph (a) of this section, in light of the entity's individualized assessment of the four factors set forth in paragraph (b)(1) of this section, requires the provision of language assistance services, such services must be provided free of charge, be accurate and timely, and protect the privacy and independence of the individual with limited English proficiency. Language assistance services may include:

(i) Oral language assistance, including interpretation in non-English languages provided in-person or remotely by a qualified interpreter for an individual with limited English proficiency, and the use of qualified bilingual or multilingual staff to communicate directly with individuals with limited English proficiency; and

(ii) Written translation, performed by a qualified translator, of written content in paper or electronic form into languages other than English.

(3) *Specific requirements for interpreter and translation services.* (i) Where paragraph (a) of this section, in light of the entity's individualized assessment of the four factors set forth in paragraph (b)(1) of this section, requires the provision of interpreter services, they must be provided by an interpreter who:

(A) Adheres to generally accepted interpreter ethics principles, including client confidentiality;

(B) Has demonstrated proficiency in speaking and understanding at least spoken English and the spoken language in need of interpretation; and

(C) Is able to interpret effectively, accurately, and impartially, both receptively and expressly, to and from such language(s) and English, using any necessary specialized vocabulary, terminology and phraseology.

(ii) Where paragraph (a) of this section, in light of the entity's individualized assessment of the four factors set forth in paragraph (b)(1) of this section, requires the provision of translation services for written content (in paper or electronic form), they must be provided by a translator who:

(A) Adheres to generally accepted translator ethics principles, including client confidentiality;

(B) Has demonstrated proficiency in writing and understanding at least written English and the written language in need of translation; and

(C) Is able to translate effectively, accurately, and impartially to and from such language(s) and English, using any necessary specialized vocabulary, terminology and phraseology.

(iii) If remote audio interpreting services are required to comply with paragraph (a) of this section, in light of the entity's individualized assessment of the four factors set forth in paragraph (b)(1) of this section, the entity to which section 1557 applies (as defined in § 92.3 of this part) shall provide:

(A) Real-time, audio over a dedicated high-speed, wide-bandwidth video connection or wireless connection that delivers high-quality audio without lags or irregular pauses in communication;

(B) A clear, audible transmission of voices; and

(C) Adequate training to users of the technology and other involved individuals so that they may quickly and efficiently set up and operate the remote interpreting services.

(4) *Restricted use of certain persons to interpret or facilitate communication.* If an entity is required by paragraph (a) of this section, in light of the entity's individualized assessment of the four factors set forth in paragraph (b)(1) of this section, to provide interpretation services, such entity shall not:

(i) Require an individual with limited English proficiency to provide his or her own interpreter;

(ii) Rely on an adult accompanying an individual with limited English proficiency to interpret or facilitate communication, except

(A) In an emergency involving an imminent threat to the safety or welfare of an individual or the public, where there is no qualified interpreter for the individual with limited English proficiency immediately available; or

(B) Where the individual with limited English proficiency specifically requests that the accompanying adult interpret or facilitate communication, the accompanying adult agrees to provide such assistance, and reliance on that adult for such assistance is appropriate under the circumstances;

(iii) Rely on a minor child to interpret or facilitate communication, except in an emergency involving an imminent threat to the safety or welfare of an individual or the public, where there is no qualified interpreter for the individual with limited English proficiency immediately available; or

(iv) Rely on staff other than qualified bilingual/multilingual staff to communicate directly with individuals with limited English proficiency.

(c) *Acceptance of language assistance services is not required.* Nothing in this section shall be construed to require an individual with limited English proficiency to accept language assistance services.

§ 92.102 Effective communication for individuals with disabilities.

(a) Any entity operating or administering a program or activity under this part shall take appropriate steps to ensure that communications with individuals with disabilities are as effective as communications with others in such programs or activities, in accordance with the standards found at 28 CFR 35.160 through 35.164. Where the regulatory provisions referenced in this section use the term ''public entity,'' the term ''entity'' shall apply in its place.

(b) A recipient or State Exchange shall provide appropriate auxiliary aids and services, including interpreters and information in alternate formats, to individuals with impaired sensory, manual, or speaking skills, where necessary to afford such persons an equal opportunity to benefit from the service in question.

(1) Auxiliary aids and services include:

(i) Interpreters on-site or through video remote interpreting (VRI) services, as defined in 28 CFR 35.104 and 36.303(f); note takers; real-time computer-aided transcription services; written materials; exchange of written notes; telephone handset amplifiers; assistive listening devices; assistive listening systems; telephones compatible with hearing aids; closed caption decoders; open and closed captioning, including real-time captioning; voice, text, and video-based telecommunication products and systems, text telephones (TTYs), videophones, and captioned telephones, or equally effective telecommunications devices; videotext displays; accessible information and communication technology; or other effective methods of making aurally delivered information available to individuals who are deaf or hard of hearing; and

(ii) Readers; taped texts; audio recordings; Braille materials and displays; screen reader software; magnification software; optical readers; secondary auditory programs; large print materials; accessible information and communication technology; or other effective methods of making visually delivered materials available to individuals who are blind or have low vision.

(2) When an entity is required to provide an interpreter under paragraph (b) of this section, the interpreting service shall be provided to individuals free of charge and in a timely manner, via a remote interpreting service or an onsite appearance, by an interpreter who

(i) Adheres to generally accepted interpreter ethics principles, including client confidentiality; and

(ii) Is able to interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary, terminology and phraseology.

(3) An interpreter for an individual with a disability for purposes of this section can include, for example, sign language interpreters, oral transliterators (individuals who represent or spell in the characters of another alphabet), and cued language transliterators (individuals who represent or spell by using a small number of handshapes).

(c) Disability means, with respect to an individual, a physical or mental impairment that substantially limits one or more major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment, as defined and construed in the Rehabilitation Act, 29 U.S.C. 705(9)(B), which incorporates the definition of disability in the Americans

with Disabilities Act (ADA), as amended (42 U.S.C. 12102 *et seq.*). Where this part cross-references regulatory provisions that use the term ''handicap,'' ''handicap'' means ''disability'' as defined in this section.

§ 92.103 Accessibility standards for buildings and facilities.

(a) Each facility or part of a facility in which health programs or activities are conducted that is constructed or altered by or on behalf of, or for the use of, a recipient or State Exchange shall comply with the 2010 Standards, if the construction or alteration was commenced after July 18, 2016, except that if a facility or part of a facility in which health programs or activities are conducted that is constructed or altered by or on behalf of, or for the use of, a recipient or State Exchange, was not covered by the 2010 Standards prior to July 18, 2016, such facility or part of a facility shall comply with the 2010 Standards if the construction was commenced after January 18, 2018. Departures from particular technical and scoping requirements by the use of other methods are permitted where substantially equivalent or greater access to and usability of the facility is provided. All newly constructed or altered buildings or facilities subject to this section shall comply with the requirements for a ''public building or facility'' as defined in section 106.5 of the 2010 Standards.

(b) Each facility or part of a facility in which health programs or activities under this part are conducted that is constructed or altered by or on behalf of, or for the use of, a recipient or State Exchange in conformance with the 1991 Standards at appendix D to 28 CFR part 36 or the 2010 Standards shall be deemed to comply with the requirements of this section and with 45 CFR 84.23(a) and (b) with respect to those facilities, if the construction or alteration was commenced on or before July 18, 2016. Each facility or part of a facility in which health programs or activities are conducted that is constructed or altered by or on behalf of, or for the use of, a recipient or State Exchange in conformance with UFAS shall be deemed to comply with the requirements of this section and with 45 CFR 84.23(a) and (b), if the construction was commenced on or before July 18, 2016 and such facility was not covered by the 1991 Standards or 2010 Standards.

(c) For purposes of this part:

(1) ''1991 Standards'' refers to the 1991 Americans with Disabilities Act Standards for Accessible Design at appendix D to 28 CFR part 36.

(2) ''2010 Standards'' refers to the 2010 ADA Standards for Accessible Design, as defined in 28 CFR 35.104.

(3) ''UFAS'' refers to the Uniform Federal Accessibility Standards as promulgated in 49 FR 31528 (Aug. 7, 1984).

§ 92.104 Accessibility of information and communication technology.

(a) Entities required to comply with § 92.2, unless otherwise exempted by this part, shall ensure that their health programs or activities provided through information and communication technology are accessible to individuals with disabilities, unless doing so would result in undue financial and administrative burdens or a fundamental alteration in the nature of the health programs or activities. When undue financial and administrative burdens or a fundamental alteration exist, the covered entity shall provide information in a format other than an electronic format that would not result in such undue financial and administrative burdens or a fundamental alteration, but would ensure, to the maximum extent possible, that individuals with disabilities receive the benefits or services of the health program or activity that are provided through information and communication technology.

(b) A recipient or State Exchange shall ensure that its health programs or activities provided through websites comply with the requirements of Title II of the Americans with Disabilities Act (42 U.S.C. 12131 through 12165).

(c) For purposes of this part, ''information and communication technology'' (ICT) means information technology and other equipment, systems, technologies, or processes, for which the principal function is the creation, manipulation, storage, display, receipt, or transmission of electronic data and information, as well as any associated content. Examples of ICT include computers and peripheral equipment; information kiosks and transaction machines; telecommunications equipment; customer premises equipment; multifunction office machines; software; applications; websites; videos; and, electronic documents.

§ 92.105 Requirement to make reasonable modifications.

Any entity to which section 1557 applies (as defined in § 92.3 of this part) shall make reasonable modifications to its policies, practices, or procedures when such modifications are necessary to avoid discrimination on the basis of disability, unless the covered entity can demonstrate that making the modifications would fundamentally alter the nature of the health program or activity. For the purposes of this section, the term ''reasonable modifications'' shall be interpreted in a manner consistent with the term as set forth in the regulation promulgated under Title II of the Americans with Disabilities Act, at 28 CFR 35.130(b)(7).

PART 147—HEALTH INSURANCE REFORM REQUIREMENTS FOR THE GROUP AND INDIVIDUAL HEALTH INSURANCE MARKETS

■ 15. The authority citation for part 147 continues to read as follows:

Authority: 42 U.S.C. 18021, 18031, 18041, 18044, 18054, 18061, 18063, 18071, and 18082, 26 U.S.C. 36B, 31 U.S.C. 9701.

■ 16. Amend § 147.104 by revising paragraph (e) to read as follows:

§ 147.104 Guaranteed availability of coverage.

* * * * *

(e) *Marketing.* A health insurance issuer and its officials, employees, agents and representatives must comply with any applicable State laws and regulations regarding marketing by health insurance issuers and cannot employ marketing practices or benefit designs that will have the effect of discouraging the enrollment of individuals with significant health needs in health insurance coverage or discriminate based on an individual's race, color, national origin, present or predicted disability, age, sex, expected length of life, degree of medical dependency, quality of life, or other health conditions.

* * * * *

PART 155—EXCHANGE ESTABLISHMENT STANDARDS AND OTHER RELATED STANDARDS UNDER THE AFFORDABLE CARE ACT

Subpart B—General Standards Related to the Establishment of an Exchange

■ 17. The authority citation for part 155 continues to read as follows:

Authority: 42 U.S.C. 18021–18024, 18031–18033, 18041–18042, 18051, 18054, 18071, and 18081–18083.

■ 18. Amend § 155.120 by revising paragraph (c)(1)(ii) to read as follows:

§ 155.120 Non-interference with Federal law and non-discrimination standards.

* * * * *

(c) * * *

(1) * * *

(ii) Not discriminate based on race, color, national origin, disability, age, or sex.

* * * * *

■ 19. Amend § 155.220 by revising paragraph (j)(2)(i) to read as follows:

§ 155.220 Ability of States to permit agents and brokers to assist qualified individuals, qualified employers, or qualified employees enrolling in QHPs.

* * * * *

(j) * * *

(2) * * *

(i) Provide consumers with correct information, without omission of material fact, regarding the Federally-facilitated Exchanges, QHPs offered through the Federally-facilitated Exchanges, and insurance affordability programs, and refrain from marketing or conduct that is misleading (including by having a direct enrollment website that HHS determines could mislead a consumer into believing they are visiting *HealthCare.gov*), coercive, or discriminates based on race, color, national origin, disability, age, or sex;

* * * * *

PART 156—HEALTH INSURANCE ISSUER STANDARDS UNDER THE AFFORDABLE CARE ACT, INCLUDING STANDARDS RELATED TO EXCHANGES

■ 20. The authority citation for part 156 continues to read as follows:

Authority: 5 U.S.C. 552; 42 U.S.C. 300jj–11 and 300jj–14.

■ 21. Amend § 156.200 by revising paragraph (e) to read as follows:

§ 156.200 QHP issuer participation standards.

* * * * *

(e) *Non-discrimination.* A QHP issuer must not, with respect to its QHP, discriminate on the basis of race, color, national origin, disability, age, or sex.

* * * * *

■ 22. Amend § 156.1230 by revising paragraph (b)(2) to read as follows:

§ 156.1230 Direct enrollment with the QHP issuer in a manner considered to be through the Exchange.

* * * * *

(b) * * *

(2) The QHP issuer must provide consumers with correct information, without omission of material fact, regarding the Federally-facilitated Exchanges, QHPs offered through the Federally-facilitated Exchanges, and insurance affordability programs, and refrain from marketing or conduct that is misleading (including by having a direct enrollment website that HHS determines could mislead a consumer into believing they are visiting *HealthCare.gov*), coercive, or discriminates based on race, color, national origin, disability, age, or sex.

Dated: May 20, 2020.

Alex M. Azar II,

Secretary of Health and Human Services.

[FR Doc. 2020–11758 Filed 6–12–20; 4:15 pm]

BILLING CODE 4153–01–P

BRIEFING ROOM

Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation

JANUARY 20, 2021 • PRESIDENTIAL ACTIONS

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. Policy. Every person should be treated with respect and dignity and should be able to live without fear, no matter who they are or whom they love. Children should be able to learn without worrying about whether they will be denied access to the restroom, the locker room, or school sports. Adults should be able to earn a living and pursue a vocation knowing that they will not be fired, demoted, or mistreated because of whom they go home to or because how they dress does not conform to sex-based stereotypes. People should be able to access healthcare and secure a roof over their heads without being subjected to sex discrimination. All persons should receive equal treatment under the law, no matter their gender identity or sexual orientation.

These principles are reflected in the Constitution, which promises equal protection of the laws. These principles are also enshrined in our Nation's anti-discrimination laws, among them Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e *et seq*.). In *Bostock v. Clayton County*, 590 U.S. ___ (2020), the Supreme Court held that Title VII's prohibition on discrimination "because of . . . sex" covers discrimination on the basis of gender identity and sexual orientation. Under *Bostock*'s reasoning, laws that prohibit sex discrimination — including Title IX of the Education Amendments of 1972, as amended (20 U.S.C. 1681 *et seq*.), the Fair Housing Act, as amended (42 U.S.C. 3601 *et seq*.), and section 412 of the Immigration and Nationality Act, as amended (8 U.S.C. 1522), along with their respective implementing regulations — prohibit discrimination on the basis of gender identity or sexual orientation, so long as the laws do not contain sufficient indications to the contrary.

Discrimination on the basis of gender identity or sexual orientation manifests differently for different individuals, and it often overlaps with other forms of prohibited discrimination, including discrimination on the basis of race or disability. For example, transgender Black

Americans face unconscionably high levels of workplace discrimination, homelessness, and violence, including fatal violence.

It is the policy of my Administration to prevent and combat discrimination on the basis of gender identity or sexual orientation, and to fully enforce Title VII and other laws that prohibit discrimination on the basis of gender identity or sexual orientation. It is also the policy of my Administration to address overlapping forms of discrimination.

Sec. 2. Enforcing Prohibitions on Sex Discrimination on the Basis of Gender Identity or Sexual Orientation. (a) The head of each agency shall, as soon as practicable and in consultation with the Attorney General, as appropriate, review all existing orders, regulations, guidance documents, policies, programs, or other agency actions ("agency actions") that:

(i) were promulgated or are administered by the agency under Title VII or any other statute or regulation that prohibits sex discrimination, including any that relate to the agency's own compliance with such statutes or regulations; and

(ii) are or may be inconsistent with the policy set forth in section 1 of this order.

(b) The head of each agency shall, as soon as practicable and as appropriate and consistent with applicable law, including the Administrative Procedure Act (5 U.S.C. 551 *et seq*.), consider whether to revise, suspend, or rescind such agency actions, or promulgate new agency actions, as necessary to fully implement statutes that prohibit sex discrimination and the policy set forth in section 1 of this order.

(c) The head of each agency shall, as soon as practicable, also consider whether there are additional actions that the agency should take to ensure that it is fully implementing the policy set forth in section 1 of this order. If an agency takes an action described in this subsection or subsection (b) of this section, it shall seek to ensure that it is accounting for, and taking appropriate steps to combat, overlapping forms of discrimination, such as discrimination on the basis of race or disability.

(d) Within 100 days of the date of this order, the head of each agency shall develop, in consultation with the Attorney General, as appropriate, a plan to carry out actions that the agency has identified pursuant to subsections (b) and (c) of this section, as appropriate and consistent with applicable law.

Sec. 3. Definition. "Agency" means any authority of the United States that is an "agency" under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(5).

Sec. 4. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

JOSEPH R. BIDEN JR.

THE WHITE HOUSE,
January 20, 2021.

BRIEFING ROOM

Memorandum on Advancing the Human Rights of Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex Persons Around the World

FEBRUARY 04, 2021 • PRESIDENTIAL ACTIONS

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

This memorandum reaffirms and supplements the principles established in the Presidential Memorandum of December 6, 2011 (International Initiatives to Advance the Human Rights of Lesbian, Gay, Bisexual, and Transgender Persons). That memorandum, for the first time, directed executive departments and agencies (agencies) engaged abroad to ensure that United States diplomacy and foreign assistance promote and protect the human rights of lesbian, gay, bisexual, and transgender persons everywhere. This memorandum builds upon that historic legacy and updates the 2011 memorandum.

All human beings should be treated with respect and dignity and should be able to live without fear no matter who they are or whom they love. Around the globe, including here at home, brave lesbian, gay, bisexual, transgender, queer, and intersex (LGBTQI+) activists are fighting for equal protection under the law, freedom from violence, and recognition of their fundamental human rights. The United States belongs at the forefront of this struggle — speaking out and standing strong for our most dearly held values. It shall be the policy of the United States to pursue an end to violence and discrimination on the basis of sexual orientation, gender identity or expression, or sex characteristics, and to lead by the power of our example in the cause of advancing the human rights of LGBTQI+ persons around the world.

Through this memorandum, I am directing all agencies engaged abroad to ensure that United States diplomacy and foreign assistance promote and protect the human rights of LGBTQI+ persons. Specifically, I direct the following actions, consistent with applicable law:

Section 1. Combating Criminalization of LGBTQI+ Status or Conduct Abroad. Agencies engaged abroad are directed to strengthen existing efforts to combat the criminalization by

foreign governments of LGBTQI+ status or conduct and expand efforts to combat discrimination, homophobia, transphobia, and intolerance on the basis of LGBTQI+ status or conduct. The Department of State shall, on an annual basis and as part of the annual report submitted to the Congress pursuant to sections 116(d) and 502B(b) of the Foreign Assistance Act of 1961 (22 U.S.C. 2151n(d) and 2304(b)), report on human rights abuses experienced by LGBTQI+ persons globally. This reporting shall include anti-LGBTQI+ laws as well as violence and discrimination committed by both state and nonstate actors against LGBTQI+ persons.

Sec. 2. Protecting Vulnerable LGBTQI+ Refugees and Asylum Seekers. LGBTQI+ persons who seek refuge from violence and persecution face daunting challenges. In order to improve protection for LGBTQI+ refugees and asylum seekers at all stages of displacement, the Departments of State and Homeland Security shall enhance their ongoing efforts to ensure that LGBTQI+ refugees and asylum seekers have equal access to protection and assistance, particularly in countries of first asylum. In addition, the Departments of State, Justice, and Homeland Security shall ensure appropriate training is in place so that relevant Federal Government personnel and key partners can effectively identify and respond to the particular needs of LGBTQI+ refugees and asylum seekers, including by providing to them adequate assistance and ensuring that the Federal Government takes all appropriate steps, such as potential increased use of Embassy Priority-1 referrals, to identify and expedite resettlement of highly vulnerable persons with urgent protection needs.

Sec. 3. Foreign Assistance to Protect Human Rights and Advance Nondiscrimination. Agencies involved with foreign aid, assistance, and development programs shall expand their ongoing efforts to ensure regular Federal Government engagement with governments, citizens, civil society, and the private sector to promote respect for the human rights of LGBTQI+ persons and combat discrimination. Agencies involved with foreign aid, assistance, and development programs should consider the impact of programs funded by the Federal Government on human rights, including the rights of LGBTQI+ persons, when making funding decisions, as appropriate and consistent with applicable law.

Sec. 4. Swift and Meaningful United States Responses to Human Rights Abuses of LGBTQI+ Persons Abroad. The Department of State shall lead a standing group, with appropriate interagency representation, to help ensure the Federal Government's swift and meaningful response to serious incidents that threaten the human rights of LGBTQI+ persons abroad. When foreign governments move to restrict the rights of LGBTQI+ persons or fail to enforce legal protections in place, thereby contributing to a climate of intolerance, agencies engaged

abroad shall consider appropriate responses, including using the full range of diplomatic and assistance tools and, as appropriate, financial sanctions, visa restrictions, and other actions.

Sec. 5. Building Coalitions of Like-Minded Nations and Engaging International Organizations in the Fight Against LGBTQI+ Discrimination. Bilateral relationships with allies and partners, as well as multilateral fora and international organizations, are key vehicles to promote respect for and protection of the human rights of LGBTQI+ persons and to bring global attention to these goals. Agencies engaged abroad should strengthen the work they have done and initiate additional efforts with other nations, bilaterally and within multilateral fora and international organizations, to: counter discrimination on the basis of LGBTQI+ status or conduct; broaden the number of countries willing to support and defend the human rights of LGBTQI+ persons; strengthen the role, including in multilateral fora, of civil society advocates on behalf of the human rights of LGBTQI+ persons; and strengthen the policies and programming of multilateral institutions, including with respect to protecting vulnerable LGBTQI+ refugees and asylum seekers.

Sec. 6. Rescinding Inconsistent Policies and Reporting on Progress. Within 100 days of the date of this memorandum or as soon as possible thereafter, all agencies engaged abroad shall review and, as appropriate and consistent with applicable law, take steps to rescind any directives, orders, regulations, policies, or guidance inconsistent with this memorandum, including those issued from January 20, 2017, to January 20, 2021, to the extent that they are inconsistent with this memorandum. The heads of such agencies shall also, within 100 days of the date of this memorandum, report to the President on their progress in implementing this memorandum and recommend additional opportunities and actions to advance the human rights of LGBTQI+ persons around the world. Agencies engaged abroad shall each prepare a report within 180 days of the date of this memorandum, and annually thereafter, on their progress toward advancing these initiatives. All such agencies shall submit these reports to the Department of State, which will compile a report on the Federal Government's progress in advancing these initiatives for transmittal to the President. The Department of State shall make a version of the compiled annual report available to the Congress and the public.

Sec. 7. Definitions. (a) For the purposes of this memorandum, agencies engaged abroad include the Departments of State, the Treasury, Defense, Justice, Agriculture, Commerce, Labor, Health and Human Services, and Homeland Security, the United States Agency for International Development (USAID), the United States International Development Finance Corporation (DFC), the Millennium Challenge Corporation, the Export-Import Bank of the United States, the Office of the United States Trade Representative, and such other agencies as the President may designate.

(b) For the purposes of this memorandum, agencies involved with foreign aid, assistance, and development programs include the Departments of State, the Treasury, Defense, Justice,

Agriculture, Commerce, Labor, Health and Human Services, and Homeland Security, USAID, DFC, the Millennium Challenge Corporation, the Export-Import Bank of the United States, the Office of the United States Trade Representative, and such other agencies as the President may designate.

Sec. 8. General Provisions. (a) Nothing in this memorandum shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department, agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This memorandum shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

(d) The Secretary of State is authorized and directed to publish this memorandum in the *Federal Register*.

JOSEPH R. BIDEN JR.

Federal Register / Vol. 86, No. 46 / Thursday, March 11, 2021 / Presidential Documents 13803

Presidential Documents

Executive Order 14021 of March 8, 2021

Guaranteeing an Educational Environment Free From Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. *Policy.* It is the policy of my Administration that all students should be guaranteed an educational environment free from discrimination on the basis of sex, including discrimination in the form of sexual harassment, which encompasses sexual violence, and including discrimination on the basis of sexual orientation or gender identity. For students attending schools and other educational institutions that receive Federal financial assistance, this guarantee is codified, in part, in Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.,* which prohibits discrimination on the basis of sex in education programs or activities receiving Federal financial assistance.

Sec. 2. *Review of Agency Actions.* (a) Within 100 days of the date of this order, the Secretary of Education, in consultation with the Attorney General, shall review all existing regulations, orders, guidance documents, policies, and any other similar agency actions (collectively, agency actions) that are or may be inconsistent with the policy set forth in section 1 of this order, and provide the findings of this review to the Director of the Office of Management and Budget.

(i) As part of the review required under subsection (a) of this section, the Secretary of Education shall review the rule entitled ''Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance,'' 85 FR 30026 (May 19, 2020), and any other agency actions taken pursuant to that rule, for consistency with governing law, including Title IX, and with the policy set forth in section 1 of this order.

(ii) As soon as practicable, and as appropriate and consistent with applicable law, the Secretary of Education shall review existing guidance and issue new guidance as needed on the implementation of the rule described in subsection (a)(i) of this section, for consistency with governing law, including Title IX, and with the policy set forth in section 1 of this order.

(iii) The Secretary of Education shall consider suspending, revising, or rescinding—or publishing for notice and comment proposed rules suspending, revising, or rescinding—those agency actions that are inconsistent with the policy set forth in section 1 of this order as soon as practicable and as appropriate and consistent with applicable law, and may issue such requests for information as would facilitate doing so.

(b) The Secretary of Education shall consider taking additional enforcement actions, as appropriate and consistent with applicable law, to enforce the policy set forth in section 1 of this order as well as legal prohibitions on sex discrimination in the form of sexual harassment, which encompasses sexual violence, to the fullest extent permissible under law; to account for intersecting forms of prohibited discrimination that can affect the availability of resources and support for students who have experienced sex discrimination, including discrimination on the basis of race, disability, and national origin; to account for the significant rates at which students

who identify as lesbian, gay, bisexual, transgender, and queer (LGBTQ+) are subject to sexual harassment, which encompasses sexual violence; to ensure that educational institutions are providing appropriate support for students who have experienced sex discrimination; and to ensure that their school procedures are fair and equitable for all.

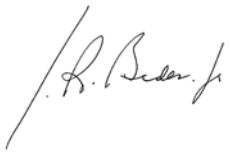
Sec. 3. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.



THE WHITE HOUSE,
March 8, 2021.

[FR Doc. 2021–05200
Filed 3–10–21; 8:45 am]
Billing code 3295–F1–P

Stricken language would be deleted from and underlined language would be added to present law.

State of Arkansas *As Engrossed: H3/2/21 H3/8/21*
93rd General Assembly
A Bill
Regular Session, 2021 HOUSE BILL 1570

By: Representatives Lundstrum, Barker, Bentley, Brown, Bryant, Cavenaugh, Cloud, Coleman, C. Cooper, Cozart, Crawford, Dalby, Dotson, C. Fite, Furman, Gazaway, Gonzales, M. Gray, Haak, Hollowell, Ladyman, Lowery, Lynch, J. Mayberry, McGrew, McNair, S. Meeks, Miller, Payton, Penzo, Pilkington, Ray, Richmond, Slape, B. Smith, Speaks, Tollett, Tosh, Underwood, Vaught, Warren, Watson, Wing, *Bragg, Hillman, Wooten*
By: Senators A. Clark, B. Ballinger, Beckham, Bledsoe, B. Davis, J. English, Gilmore, K. Hammer, Hill, Irvin, B. Johnson, M. Johnson, Rapert, Rice, G. Stubblefield, D. Wallace, *D. Sullivan, Hester, T. Garner*

For An Act To Be Entitled

AN ACT TO CREATE THE ARKANSAS SAVE ADOLESCENTS FROM EXPERIMENTATION (SAFE) ACT; AND FOR OTHER PURPOSES.

Subtitle

TO CREATE THE ARKANSAS SAVE ADOLESCENTS FROM EXPERIMENTATION (SAFE) ACT.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

SECTION 1. Title.

This act shall be known and may be cited as the "Arkansas Save Adolescents from Experimentation (SAFE) Act".

SECTION 2. Legislative findings.

The General Assembly finds that:

(1) Arkansas has a compelling government interest in protecting the health and safety of its citizens, especially vulnerable children;

(2)(A) Only a small percentage of the American population experiences distress at identifying with their biological sex.

(B) According to the American Psychiatric Association, “For natal adult males, prevalence ranges from 0.005% to 0.014%, and for

natal females, from 0.002% to 0.003%.";

(3) For the small percentage of children who are gender nonconforming or experience distress at identifying with their biological sex, studies consistently demonstrate that the majority come to identify with their biological sex in adolescence or adulthood, thereby rendering most physiological interventions unnecessary;

(4) Furthermore, scientific studies show that individuals struggling with distress at identifying with their biological sex often have already experienced psychopathology, which indicates these individuals should be encouraged to seek mental health services to address comorbidities and underlying causes of their distress before undertaking any hormonal or surgical intervention;

(5) Even among people who have undergone inpatient gender reassignment procedures, suicide rates, psychiatric morbidities, and mortality rates remain markedly elevated above the background population;

(6)(A) Some healthcare providers are prescribing puberty-blocking drugs, such as gonadotropin-releasing hormone analogues, in order to delay the onset or progression of puberty in children who experience distress at identifying with their biological sex.

(B) The prescribing of puberty-blocking drugs is being done despite the lack of any long-term longitudinal studies evaluating the risks and benefits of using these drugs for the treatment of such distress or gender transition;

(7) Healthcare providers are also prescribing cross-sex hormones for children who experience distress at identifying with their biological sex, despite the fact that no randomized clinical trials have been conducted on the efficacy or safety of the use of cross-sex hormones in adults or children for the purpose of treating such distress or gender transition;

(8) The use of cross-sex hormones comes with serious known risks, such as:

(A) For biological females:

(i) Erythrocytosis, which is an increase in red blood cells;

(ii) Severe liver dysfunction;

(iii) Coronary artery disease, including heart attacks;

(iv) Cerebrovascular disease, including strokes;

(v) Hypertension;

(vi) Increased risk of breast and uterine cancers; and

(vii) Irreversible infertility; and

(B) For biological males:

(i) Thromboembolic disease, including blood clots;

(ii) Cholelithiasis, including gallstones;

(iii) Coronary artery disease, including heart attacks;

(iv) Macroprolactinoma, which is a tumor of the pituitary gland;

(v) Cerebrovascular disease, including strokes;

(vi) Hypertriglyceridemia, which is an elevated level of tryglycerides in the blood;

(vii) Breast cancer; and

(viii) Irreversible infertility;

(9) Genital and nongenital gender reassignment surgeries are generally not recommended for children, although evidence indicates referrals for children to have such surgeries are becoming more frequent;

(10)(A) Genital gender reassignment surgery includes several irreversible invasive procedures for males and females and involves the alteration of biologically healthy and functional body parts.

(B) For biological males, surgery may involve:

(i) Genital reconstruction including penectomy, which is the removal of the penis;

(ii) Orchiectomy, which is the removal of the testicles;

(iii) Vaginoplasty, which is the construction of a vagina-like structure, typically through a penile inversion procedure;

(iv) Clitoroplasty, which is the construction of a clitoris-like structure; and

(v) Vulvoplasty, which is the construction of a vulva-like structure.

(C) For biological females, surgery may involve:

(i) A hysterectomy or oophorectomy;

(ii) Reconstruction of the urethra;

(iii) Genital reconstruction including metoidioplasty or phalloplasty, which is the construction of a penis-like structure;

(iv) Vaginectomy, which is the removal of the vagina;

(v) Scrotoplasty, which is the construction of a penis-like and scrotum-like structure; and

(vi) Implantation of erection or testicular prostheses;

(11) The complications, risks, and long-term care concerns associated with genital gender reassignment surgery for both males and females are numerous and complex;

(12)(A) Nongenital gender reassignment surgery includes various invasive procedures for males and females and also involves the alteration or removal of biologically normal and functional body parts.

(B) For biological males, this surgery may involve:

(i) Augmentation mammoplasty;

(ii) Facial feminization surgery;

(iii) Liposuction;

(iv) Lipofilling;

(v) Voice surgery;

(vi) Thyroid cartilage reduction;

(vii) Gluteal augmentation;

(viii) Hair reconstruction; and

(ix) Other aesthetic procedures.

(C) For biological females, this surgery may involve:

(i) A subcutaneous mastectomy;

(ii) Voice surgery;

(iii) Liposuction;

(iv) Lipofilling;

(v) Pectoral implants; and

(vi) Other aesthetic procedures;

(13)(A) It is an accepted principle of economics and public policy that when a service or product is subsidized or reimbursed, demand for that service or product is increased.

(B) Between 2015 and 2016, gender reassignment surgeries increased by nearly twenty percent (20%) in the United States;

(14) It is of grave concern to the General Assembly that the medical community is allowing individuals who experience distress at identifying with their biological sex to be subjects of irreversible and drastic nongenital gender reassignment surgery and irreversible, permanently sterilizing genital gender reassignment surgery, despite the lack of studies showing that the benefits of such extreme interventions outweigh the risks; and

(15) The risks of gender transition procedures far outweigh any benefit at this stage of clinical study on these procedures.

SECTION 3. Arkansas Code Title 20, Chapter 9, is amended to add an additional subchapter to read as follows:

Subchapter 15 — Arkansas Save Adolescents from Experimentation (SAFE) Act

20-9-1501. Definitions.

As used in this subchapter:

(1) "Biological sex" means the biological indication of male and female in the context of reproductive potential or capacity, such as sex chromosomes, naturally occurring sex hormones, gonads, and nonambiguous internal and external genitalia present at birth, without regard to an individual's psychological, chosen, or subjective experience of gender;

(2) "Cross-sex hormones" means:

(A) Testosterone or other androgens given to biological females in amounts that are larger or more potent than would normally occur naturally in healthy biological sex females; and

(B) Estrogen given to biological males in amounts that are larger or more potent than would normally occur naturally in healthy biological sex males;

(3) "Gender" means the psychological, behavioral, social, and cultural aspects of being male or female;

(4) "Gender reassignment surgery" means any medical or surgical service that seeks to surgically alter or remove healthy physical or anatomical characteristics or features that are typical for the individual's

biological sex, in order to instill or create physiological or anatomical characteristics that resemble a sex different from the individual's biological sex, including without limitation, genital or nongenital gender reassignment surgery performed for the purpose of assisting an individual with a gender transition;

(5) "Gender transition" means the process in which a person goes from identifying with and living as a gender that corresponds to his or her biological sex to identifying with and living as a gender different from his or her biological sex, and may involve social, legal, or physical changes;

(6)(A) "Gender transition procedures" means any medical or surgical service, including without limitation physician's services, inpatient and outpatient hospital services, or prescribed drugs related to gender transition that seeks to:

(i) Alter or remove physical or anatomical characteristics or features that are typical for the individual's biological sex; or

(ii) Instill or create physiological or anatomical characteristics that resemble a sex different from the individual's biological sex, including without limitation medical services that provide puberty-blocking drugs, cross-sex hormones, or other mechanisms to promote the development of feminizing or masculinizing features in the opposite biological sex, or genital or nongenital gender reassignment surgery performed for the purpose of assisting an individual with a gender transition.

(B) "Gender transition procedures" do not include:

(i) Services to persons born with a medically verifiable disorder of sex development, including a person with external biological sex characteristics that are irresolvably ambiguous, such as those born with 46 XX chromosomes with virilization, 46 XY chromosomes with undervirilization, or having both ovarian and testicular tissue;

(ii) Services provided when a physician has otherwise diagnosed a disorder of sexual development that the physician has determined through genetic or biochemical testing that the person does not have normal sex chromosome structure, sex steroid hormone production, or sex steroid hormone action;

(iii) The treatment of any infection, injury,

disease, or disorder that has been caused by or exacerbated by the performance of gender transition procedures, whether or not the gender transition procedure was performed in accordance with state and federal law or whether not funding for the gender transition procedure is permissible under this subchapter; or

(iv) Any procedure undertaken because the individual suffers from a physical disorder, physical injury, or physical illness that would, as certified by a physician, place the individual in imminent danger of death or impairment of major bodily function unless surgery is performed;

(7) "Genital gender reassignment surgery" means a medical procedure performed for the purpose of assisting an individual with a gender transition, including without limitation:

(A) Surgical procedures such as penectomy, orchiectomy, vaginoplasty, clitoroplasty, or vulvoplasty for biologically male patients or hysterectomy or ovariectomy for biologically female patients;

(B) Reconstruction of the fixed part of the urethra with or without a metoidioplasty; or

(C) Phalloplasty, vaginectomy, scrotoplasty, or implantation of erection or testicular prostheses for biologically female patients;

(8) "Healthcare professional" a person who is licensed, certified, or otherwise authorized by the laws of this state to administer health care in the ordinary course of the practice of his or her profession;

(9) "Nongenital gender reassignment surgery" means medical procedures performed for the purpose of assisting an individual with a gender transition including without limitation:

(A) Surgical procedures for biologically male patients, such as augmentation mammoplasty, facial feminization surgery, liposuction, lipofilling, voice surgery, thyroid cartilage reduction, gluteal augmentation, hair reconstruction, or various aesthetic procedures; or

(B) Surgical procedures for biologically female patients, such as subcutaneous mastectomy, voice surgery, liposuction, lipofilling, pectoral implants, or various aesthetic procedures;

(10) "Physician" means a person who is licensed to practice medicine in this state;

(11) "Puberty-blocking drugs" means gonadotropin-releasing

hormone analogues or other synthetic drugs used in biological males to stop luteinizing hormone secretion and therefore testosterone secretion, or synthetic drugs used in biological females which stop the production of estrogens and progesterone, when used to delay or suppress pubertal development in children for the purpose of assisting an individual with a gender transition; and

(12) "Public funds" means state, county, or local government monies, in addition to any department, agency, or instrumentality authorized or appropriated under state law or derived from any fund in which such moneys are deposited.

20-9-1502. Prohibition of gender transition procedures for minors.

(a) A physician or other healthcare professional shall not provide gender transition procedures to any individual under eighteen (18) years of age.

(b) A physician, or other healthcare professional shall not refer any individual under eighteen (18) years of age to any healthcare professional for gender transition procedures.

(c) A physician or other healthcare professional is not prohibited from providing any of the following procedures which are not gender transition procedures to an individual under eighteen (18) years of age:

(1) Services to persons born with a medically verifiable disorder of sex development, including a person with external biological sex characteristics that are irresolvably ambiguous, such as those born with 46 XX chromosomes with virilization, 46 XY chromosomes with undervirilization, or having both ovarian and testicular tissue;

(2) Services provided when a physician has otherwise diagnosed a disorder of sexual development that the physician has determined through genetic or biochemical testing that the person does not have normal sex chromosome structure, sex steroid hormone production, or sex steroid hormone action;

(3) The treatment of any infection, injury, disease, or disorder that has been caused by or exacerbated by the performance of gender transition procedures, whether or not the gender transition procedure was performed in accordance with state and federal law or whether not funding for the gender transition procedure is permissible under this subchapter; or

(4) Any procedure undertaken because the individual suffers from a physical disorder, physical injury, or physical illness that would, as certified by a physician, place the individual in imminent danger of death or impairment of major bodily function unless surgery is performed.

20-9-1503. Prohibition on use of public funds for gender transition procedures.

(a) Public funds shall not be directly or indirectly used, granted, paid, or distributed to any entity, organization, or individual that provides gender transition procedures to an individual under eighteen (18) years of age.

(b) Healthcare services furnished in the following situations shall not include gender transition procedures to an individual under eighteen (18) years of age:

(1) By or in a healthcare facility owned by the state or a county or local government; or

(2) By a physician or other healthcare professional employed by state or a county or local government.

(c) Any amount paid by an individual or an entity during a taxable year for provision of gender transition procedures or as premiums for health care coverage that includes coverage for gender transition procedures is not tax-deductible.

(d) The Arkansas Medicaid Program shall not reimburse or provide *coverage for gender transition procedures to an individual under eighteen (18) years of age.*

20-9-1504. Enforcement.

(a) Any referral for or provision of gender transition procedures to an individual under eighteen (18) year of age is unprofessional conduct and is subject to discipline by the appropriate licensing entity or disciplinary review board with competent jurisdiction in this state.

(b) A person may assert an actual or threatened violation of this subchapter as a claim or defense in a judicial or administrative proceeding and obtain compensatory damages, injunctive relief, declaratory relief, or any other appropriate relief.

(c)(1) A person shall bring a claim for a violation of this subchapter

no later than two (2) years after the day the cause of action accrues.

(2) An individual under eighteen (18) years of age may bring an action throughout their minority through a parent or next friend, and may bring an action in their own name upon reaching majority at any time from that point until twenty (20) years after reaching the age of majority.

(d) Notwithstanding any other provision of law, an action under this subchapter may be commenced, and relief may be granted, in a judicial proceeding without regard to whether the person commencing the action has sought or exhausted available administrative remedies.

(e) In any action or proceeding to enforce a provision of this subchapter, a prevailing party who establishes a violation of this subchapter shall recover reasonable attorneys' fees.

(f)(1) The Attorney General may bring an action to enforce compliance with this subchapter.

(2) This subchapter does not deny, impair, or otherwise affect any right or authority of the Attorney General, the State of Arkansas, or any agency, officer, or employee of the state, acting under any law other than this subchapter, to institute or intervene in any proceeding.

SECTION 4. Arkansas Code Title 23, Chapter 79, Subchapter 1, is amended to add an additional section to read as follows:

23-79-164. Insurance coverage of gender transition procedures for minors prohibited.

(a) As used in this section, "gender transition procedures" means the same as defined in § 20-9-1501.

(b) A health benefit plan under an insurance policy or other plan providing healthcare coverage in this state shall not include reimbursement for gender transition procedures for a person under eighteen (18) years of age.

(c) A health benefit plan under an insurance policy or other plan providing healthcare coverage in this state is not required to provide coverage for gender transition procedures.

/s/Lundstrum

 INDEX NO. UNASSIGNED

NYSCEF DOC. NO. 1 RECEIVED NYSCEF: 04/26/2021

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

---------- X

YU PRIDE ALLIANCE, MOLLY MEISELS, DONIEL WEINREICH, AMITAI MILLER, and ANONYMOUS,

Plaintiffs,

-against-

YESHIVA UNIVERSITY, VICE PROVOST CHAIM NISSEL, and PRESIDENT ARI BERMAN,

Defendants.

----------X

Index No.: 154010/2021

Plaintiffs Designate New York County as the Place of Trial

SUMMONS

Plaintiff's Address:
c/o Emery Celli Brinckerhoff Abady Ward & Maazel LLP
600 Fifth Avenue, 10th Floor
New York, NY 10020

To the above-named Defendants:

PLEASE TAKE NOTICE THAT YOU ARE HEREBY SUMMONED to answer the Complaint in this action and to serve a copy of your answer on the Plaintiffs' attorneys within 20 days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York).

YOU ARE HEREBY NOTIFIED THAT should you fail to answer, a judgment will be entered against you by default for the relief demanded in the complaint.

Dated: April 26, 2021
New York, New York

EMERY CELLI BRINCKERHOFF ABADY
WARD & MAAZEL LLP

By: /s/ Katherine Rosenfeld
Katherine Rosenfeld
Marissa R. Benavides
Max Selver

600 Fifth Avenue, 10th Floor
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and

Diane L. Houk, *Of Counsel*

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Vice Provost Chaim Nissel
c/o Yeshiva University Office of the General Counsel

President Ari Berman
c/o Yeshiva University Office of the General Counsel

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SUPREME COURT OF THE STATE OF NEW YORK
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Plaintiffs,

-against-

YESHIVA UNIVERSITY, VICE PROVOST CHAIM NISSEL, and PRESIDENT ARI BERMAN,

Defendants.
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Index No.: 154010/2021

COMPLAINT

JURY DEMAND

Plaintiffs YU Pride Alliance, Molly Meisels, Doniel Weinreich, Amitai Miller, and John Doe[1], by and through their attorneys Emery Celli Brinckerhoff Abady Ward & Maazel LLP, for their Complaint allege as follows:

PRELIMINARY STATEMENT

1. Plaintiff YU Pride Alliance is an unofficial undergraduate student organization for LGBTQ[2] students and their allies at Yeshiva University ("YU"). Plaintiffs Miller, Weinreich, Meisels, and Doe are four current and former YU undergraduate students. Yeshiva University is a private research university in New York City that enrolls more than 3,000 undergraduate students, and "offer[s] a unique dual curriculum comprising Jewish studies and liberal arts and sciences courses." For years, and with increasing urgency since 2018, YU undergraduates have requested that the University approve an official LGBTQ student organization. YU has refused

[1] Throughout the Complaint, John Doe refers to Plaintiff Anonymous.
[2] LGBTQ refers to people who are lesbian, gay bisexual, trans, queer, or other non-cisgender or non-heterosexual identities. *What is LBGTQ*, The Lesbian, Gay, Bisexual & Transgender Community Center, https://gaycenter.org/about/lgbtq/.

to permit the students to form a recognized club for LGBTQ students. On three occasions in 2019 and 2020, YU denied official recognition to an undergraduate student organization seeking to form an LGBTQ student club, only because of the group's LGBTQ status, membership, and mission of fostering a safe and inclusive community for LBGTQ students. YU will not allow a student club with the term "LGBT" or "gay" in the title. There will not be a club, the administration announced in September 2020, because it would "cloud" the university's "nuanced" position on the treatment of LGBTQ students.

2. On a tangible level, YU's refusal to officially recognize the club deprives Plaintiff the YU Pride Alliance and its members of the important benefits enjoyed by YU's 116 other recognized student organizations, such as the use of campus facilities for meetings (the Alliance must meet off-campus), funding for its activities (the Alliance must fundraise outside the university for its own events, speakers, and snacks), advertising for events in student email blasts and bulletin boards (the Alliance relies on social media and word-of-mouth), and participation in club fairs for incoming students (the Alliance cannot put up a table and greet incoming students along with its peer clubs).

3. Beyond depriving students of access to these tangible benefits of student clubs, YU's refusal to recognize the YU Pride Alliance sends a stark and painful message of rejection and non-belonging to its LGBTQ students and their allies. By its acts of intentional discrimination, YU has inflicted and is continuing to inflict grave dignitary, emotional, and psychological harms on these college students, and indeed on all its students, who need belonging, safety, community, and support. An official LGBTQ student club is not only Plaintiffs' right as students, it is necessary to their health and well-being on campus. Students may feel isolated and unwelcome on campus, and do not know where to go for resources,

guidance, or camaraderie. A club will provide these students with a safe space to create a community and support each other as they navigate the challenges of being LGBTQ Jewish individuals. It will give the students access to funding and communication resources so they may hold and publicize events addressing LGBTQ issues and build relationships with other LGBTQ students and allies.

4. YU's conduct is not only damaging to its students, it is blatantly illegal under the New York City Human Rights Law. Worse, YU knows that it is. 25 years ago, YU retained a preeminent law firm to advise it on this precise issue, namely, whether the institution had to officially recognize an LGBTQ student organization. YU was advised by its lawyers that there was "no credible legal argument" to ban the student group. YU has privately acknowledged for decades that it cannot legally discriminate against LGBTQ student groups: "[YU] is subject to the human rights ordinance of the City of New York . . . . *Under this law, YU cannot ban gay student clubs. It must make facilities available to them in the same manner as it does to other student groups*," the University wrote in a 1995 Fact Sheet titled "Gay Student Organizations."

5. YU's legal analysis is as correct today as it was in 1995. While YU seeks to provides undergraduates with a dual curriculum of Jewish scholarship and academics,[3] it is bound by the New York City Human Rights Law ("NYCHRL"), just like any other university in the City. Fifty years ago, YU elected to register as a non-sectarian corporation to benefit from government funding that was unavailable to entities organized as religious corporations. Since then, it has received hundreds of millions of dollars in New York State funds and benefits. Because it is a secular institution, it cannot pick and choose which New York City laws apply to

[3] Yeshiva University, 2018 Return of Organization Exempt from Income Tax (Form 990).

it and which do not. YU is a quintessential place of public accommodation and it may not discriminate against students.

6. Plaintiffs have been waging a difficult campaign for many years to challenge YU's obstinate refusal to follow the law. Still, YU refuses to change. Most recently in September 2020, YU issued a public statement claiming to support tolerance but explicitly rejecting the existence of LGBTQ student clubs on campus.

7. Yeshiva University will not recognize an official LGBTQ student club on its campus despite students' demonstrated need, despite its own guidance and policies, despite students' patient advocacy asking it to change, and despite its obligation to do so at law. Plaintiffs bring this action to require YU to comply with the law and recognize the YU Pride Alliance as an official student club with equal club access to the University's facilities and benefits as the 116 other student clubs on campus, and for other relief to remedy YU's years of discrimination.

PARTIES

8. Plaintiff Yeshiva University Pride Alliance ("YU Pride Alliance" or "Alliance") is an unofficial group of current undergraduate students at Yeshiva University who seek to create an official student club that will provide a supportive space on campus for all students, of all sexual orientations and gender identities, to feel respected, visible, and represented and foster awareness and sensitivity to the unique experience of being a LGBTQ+ person at YU and in the Orthodox community. YU Pride Alliance is comprised exclusively of full-time students in good standing at YU. YU Pride Alliance is governed by an eight-person student board. YU Pride Alliance was denied recognition as an official student club by Yeshiva University, and denied access to the privileges and resources provided to official student clubs, by the Yeshiva

University administration. YU Pride Alliance seeks recognition from Yeshiva University as a student club for the 2021-2022 academic year.

9. Plaintiff Molly Meisels is a natural person and a citizen of the State of California. They are a former student at Yeshiva University during the relevant time period until January 2021 and the former President of the YU Pride Alliance. They identify as LGBTQ and use they/her pronouns.

10. Plaintiff Doniel Weinreich is a natural person and a citizen of the State of New Jersey. He is a former full-time student at Yeshiva University during the relevant time period until May 2020. Mr. Weinreich was also a board member of the YU Pride Alliance. He is an ally of LGBTQ students and uses he/him pronouns.

11. Plaintiff Amitai Miller is a natural person and a citizen of the State of Texas. He was a student at Yeshiva University during the relevant time period until May 2020 and was Student Council President during the 2018-2019 school year. He identifies as LGBTQ and uses he/him pronouns.

12. Plaintiff John Doe is a natural person and a citizen of the State of New York. He is a current full-time student in good standing at Yeshiva University. He has been a member of the YU Pride Alliance since August 2020 and is currently serving as a member on its board. He identifies as LGBTQ and uses he/him pronouns. He seeks to participate as a member of the YU Pride Alliance as a recognized student club for the 2021-2022 academic year.

13. Defendant Yeshiva University ("Yeshiva" or "YU") is registered with the New York State Department of State, Division of Corporations as a domestic not-for-profit corporation. It is a provider of a public accommodation as defined by § 8-102 of the Administrative Code of the City of New York (the "Code").

14. Defendant Dr. Chaim Nissel ("Nissel") is an employee and/or agent of Defendant Yeshiva and has been employed as the Vice Provost of Student Affairs from August 2020 to the present. Defendant Nissel was previously employed as the University Dean of Students from 2012 to August 2020. He is also the University's Title IX Coordinator.

15. Defendant Rabbi Dr. Ari Berman ("Berman") is an employee and/or agent of Defendant Yeshiva and is employed as its President.

JURISDICTION AND VENUE

16. This Court, as a court of general jurisdiction, has subject matter jurisdiction over and is competent to adjudicate the causes of action set forth in this Complaint.

17. This Court has jurisdiction pursuant to Article 30 of the New York State Civil Practice Laws and Rules ("CPLR") § 3001 to grant declaratory relief and § 6001 to grant injunctive relief.

18. Venue properly lies in this Court pursuant to Article 5 of the New York Civil Practice Law and Rules, Section 503, as Defendant Yeshiva University is a resident of New York County and a substantial part of the events giving rise to the claim arose in New York County.

STATEMENT OF FACTS

19. Defendant Yeshiva University is a private, non-profit institution of higher education.

20. Defendant Yeshiva University has been incorporated as a domestic not-for-profit corporation subject to the New York Education Law since December 15, 1969.

21. Defendant Yeshiva University receives state and federal financial aid and is registered as a charitable 501(c)(3) organization.

22. Defendant Yeshiva University is eligible to receive certain financial support from New York State because it is registered as an educational corporation, rather than a religious one.

23. YU has obtained millions of dollars in tax-exempt bond financing through the Dormitory Authority of the State of New York ("DASNY"). For example, in 2011 Defendant Yeshiva University issued a $90 million bond through the DASNY. DASNY prohibits bond issuers from using these funds for a religious purpose.

24. Founded in the late 19th century, Yeshiva describes itself as "the country's oldest and most comprehensive institution combining Jewish scholarship with academic excellence and achievement in the liberal arts and sciences, medicine, law, business, social work, psychology, Jewish studies, education, and research."

25. YU enrolls more than 3,000 undergraduate students at Yeshiva College, Stern College for Women, the Sy Syms School of Business, the Katz School of Science and Health, and the S. Daniel Abraham Program in Israel.

26. As of the Fall 2020 semester, YU recognized 116 undergraduate student clubs indicative of the broad interests of its student body.

27. YU's 116 recognized student groups organize around interests and identities as diverse as poetry and private equity, video games and the outdoors, and College Democrats and College Republicans, as well as across broad categories such as "Art," "Business," "Health and Wellness," "Sports and Fitness," and "Politics and Activism."

28. YU recognizes several cultural and affinity groups for students such as the Sephardic Club, YU Europeans, and the International Club.

29. The formal process for forming a student club is straightforward. Students may submit a club application in accordance with the procedures of the Wilf Campus, the Beren Campus, or both campuses, depending on where they seek to have a club.

30. Under Article III Section 4:3 of the Wilf Campus Undergraduate Student Body Constitution ("Wilf Constitution"), a "group of students wishing to form a club affiliated with the Student Government and Yeshiva University shall submit to the Yeshiva Student Union ("YSU") Vice President of Clubs a petition to that effect containing the name of the proposed club, a statement of its purpose and goals, the specific Student Government Association or Council under whose auspices it seeks to operate, no fewer than twenty-five signatures of students, and the signature of a Faculty Advisor." The Wilf Student Councils' Club Rules and Guidelines reiterates these requirements.

31. Under the Wilf Constitution, the YSU Vice President of Clubs presents club applications to the five voting members of the student General Assembly. The student General Assembly then approves each application by a majority vote.

32. Under Article VII Section I.B of the Constitution of the Beren Campus Undergraduate Student Government Association ("Beren Constitution"), "applications for new club status shall be made [to the applicable student council] during an agreed upon two week period within the first three weeks of each academic semester."

33. Under the Beren Constitution, "[a]fter the application process closes, the applicable council shall hold a 'presentation day' within the following two weeks, in which each new club seeking club status shall explain to the council what their request entails and why it should be granted."

34. While Yeshiva University technically places approval of student clubs within the purview of the student government, that delegation of responsibility is in practice limited.

35. Yeshiva University retains the discretion and authority to override the decisions of student governments to accept or reject a student club.

36. Yeshiva University from time to time exercises its discretion to recognize or reject the student governments' recommendations with respect to the approval or denial of certain student clubs.

37. Defendant Yeshiva University has intentionally opposed and refused to recognize an undergraduate LGBTQ student organization at its constituent schools for years.[4]

38. YU denied official university recognition to an undergraduate LGBTQ student organization three times in 2019 and 2020 alone. These denials trace back more than a decade. One of the first public iterations of an LGBTQ club at YU, the "Tolerance Club," officially formed in 2009. In 2009, the Tolerance Club held an event called "Being Gay in the Modern Orthodox World" which attracted approximately 700 people from the YU community.[5]

39. At the event, YU students explained that the school's atmosphere of silence surrounding issues of LGBTQ identity was "agony" inducing and forced students to maintain silence about their own LGBTQ identities as a survival mechanism.

40. Upon information and belief, the Tolerance Club disbanded shortly after this event because of the significant pressure it faced from the YU administration.

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[4] *See* Carolyn J. Mooney, *Religion vs. Gay Rights – Yeshiva U. Debates Whether Recognition of Gay Groups Threatens Its Identity*, THE CHRONICLE (Nov. 16, 1994) https://www.chronicle.com/article/Religion-vs-Gay-Rights/85236. Many of Yeshiva University's graduate and professional schools have permitted graduate LGBTQ student groups to form. For example, the Benjamin N. Cardozo School of Law, a graduate affiliate of Yeshiva University, recognizes the law student group OUTlaw as an official LGBTQ student group. The Albert Einstein College of Medicine had also recognized an LGBTQ student group for decades prior to the College's separation from Yeshiva University in 2015. The group continues to exist at the College as "EAGBLT."

[5] E.B. Solomont, *YU Holds Discussion on Homosexuality*, JERUSALEM REPORT (Dec. 24, 2009), https://www.jpost.com/Jewish-World/YU-holds-discussion-on-homosexuality.

1) SPRING 2019: YU REFUSES TO RECOGNIZE THE GAY-STRAIGHT ALLIANCE, A PRIDE ALLIANCE PREDECESSOR

41. In 2018, Plaintiff Miller was elected President of the Yeshiva College Student Association ("YCSA") for the 2018-2019 school year.

42. In his capacity as YSCA President, Plaintiff Miller met with YU LGBTQ students to understand the difficulties they faced on campus due to their LGBTQ identities. The students described to Miller their feelings of isolation, rejection, and fear.

43. During the fall of 2018 and the spring 2019 semester, Plaintiff Miller, along with two other Student Council Presidents, met repeatedly with Defendant Nissel to discuss ways to make LGBTQ students feel more welcome on campus. Miller discussed the creation of an official GSA to host LGBTQ events and speakers on campus and create a safe atmosphere for LGBTQ students on campus.[6] At these meetings, Nissel declined to give Miller concrete answers and said only that he needed to speak to more senior administrators.

44. In September or October 2018, Plaintiff Meisels met with Office of Student Life ("OSL") Director Josh Weisberg and Defendant Nissel to discuss their request for the formation of an official LGBTQ student group such as a Gay Straight Alliance ("GSA"). Weisburg suggested that they instead modify an existing official student club for minority identity students called the "Diversity Club."

45. On or about February 3, 2019, a student activist, along with several other students, submitted a formal application to the Student Council presidents for GSA club approval. In the application, the stated purpose of the club was "to provide a safe space for

[6] Jacob Stone, *Former Student Leaders Detail Past Efforts for LGBTQ Inclusion,* YU Commentator (Nov. 24, 2019), https://yucommentator.org/2019/11/former-student-leaders-detail-past-efforts-for-lgbtq-inclusion/; Lilly Gelman, *Enough is Enough: Yeshiva University Students Protest LGBTQ Discrimination,* Moment Mag. (Aug. 29, 2019), https://momentmag.com/enough-is-enough-yeshiva-university-students-protest-lgbtq-discrimination-on-campus/.

students to meet, support each other, and talk about issues related to the intersection of sexual orientation and Jewish identity."

46. On or about February 5, 2019, Plaintiff Miller and other students met with Defendant Nissel to discuss the GSA's club application. During the meeting, Defendant Nissel expressed that the GSA would be allowed to form, as long as it was not called "Gay Straight Alliance" and did not include the terms "LGBT," "queer," or "gay" in the title. Defendant Nissel requested that the club's description be sent to him once the club made its application.

47. On February 13, 2019, the students proposed to Defendant Nissel that the GSA Club could be called "Ahava" (the Hebrew word for "love"). In response, Defendant Nissel sent a description of the "Jewish Activism Club," which mentioned LGBTQ inclusion along with numerous other topics in its mission statement.

48. Defendant Nissel's email stated that the existence of the Jewish Activism Club should negate the need for a GSA.

49. In or around early to mid-February of 2019, the Student Council Presidents approved the GSA application.

50. In or around late February 2019, Defendant Nissel verbally informed Plaintiff Miller that an LGBTQ club would not be allowed to form, stating, in sum and substance, that while a club addressing general student tolerance on campus would be allowed, a club specifically addressing LGBTQ inclusion would not.

51. After receiving this rejection, Plaintiff Miller emailed Defendant President Berman to arrange a meeting to discuss why the administration had rejected the GSA's application.

52. Plaintiff Miller met with Defendant Berman and then-Special Advisor to the President Rabbi Ari Lamm on or about April 15, 2019. At the meeting, Defendant Berman did not address Plaintiff Miller's concerns that YU had blocked the GSA. Defendant Berman focused only on his position of the need for further "dialogue." In a subsequent email, Defendant Berman directed Plaintiff Miller to take his concerns to the OSL.

53. Plaintiff Miller held many additional meetings with YU administrators during his 2018-2019 tenure as YCSA President to request approval for an official LGBTQ club, including Defendant Berman, Senior Vice President Josh Joseph, Dean Rabbi Menachem Penner, and administrators from the OSL. These administrators repeatedly requested that Plaintiff Miller articulate the need for an LGBTQ club, which he did. Yet the administrators still did not allow an LGBTQ club to be formed.

a) YU Interferes with Student Events with an LGBTQ Focus

54. In April 2019, Plaintiff Meisels invited New York State Assembly Member Deborah Glick to speak on campus about her experience as an LGBTQ legislator, and Assembly Member Glick accepted. The OSL approved the event. However, during the planning process for the event, members of the YU administration variously informed Plaintiff Meisels that (1) they did not want her to host the event and provide a space for LGBTQ students to complain to Assembly Member Glick about their experience on campus; and (2) if the event did take place, it could not focus on LGBTQ issues. After Plaintiff Meisels negotiated with the OSL, the OSL allowed the event to move forward under the title, "Overcoming Adversity: Minority Representation in NY Politics." The event was held on May 2, 2019.

2) SPRING 2020: YU REFUSES TO RECOGNIZE THE YU PRIDE ALLIANCE

a) September 2019: The YU Pride Alliance is Formed As an Unofficial Student Group for LGBTQ Students, and Faces Opposition from Yeshiva

55. On September 15, 2019, Plaintiff Meisels, along with other Yeshiva University students, alumni, and other supporters, led and participated in the "We, Too, Are YU" march. The march ended at one of Defendant Yeshiva's campuses.

56. At the march, Plaintiff Meisels announced the formation of a new LGBTQ student group called the Yeshiva University Pride Alliance ("YU Pride Alliance") and called on the YU administration to recognize it as an official club.

57. The founding members of the YU Pride Alliance established an eight-person board, headed by a president and vice-president. The outgoing president and vice-president select their successors, while the board members interview and select new board members. The Alliance decided not to keep track of its membership to protect students' identities.

b) YU Convenes a Panel that Pressures Students to Justify the Need for a Club But Offers Nothing in Return

58. Upon information and belief, in or around the fall of 2019, President Berman convened a panel of rabbis and educators, led by then-Senior Vice President Josh Joseph, and tasked them with fostering initiatives to address matters of inclusion, including LGBTQ-related issues.

59. At meetings with students convened by this panel, YU administrators required the members of the YU Pride Alliance to justify the need for an LGBTQ student club to a degree never required of another student group seeking approval.

60. In response, YU Pride Alliance members repeatedly explained the many benefits to students of having an official club, including creating a physically safe space for LGBTQ

students to meet, fostering feelings of community, improving students' mental health, and encouraging productive conversation regarding LGBTQ identity and religious identity.

61. Despite the YU Pride Alliance's good-faith participation in the panel's meetings, students were not provided with information regarding what YU would do, if anything, to address the YU Pride Alliance's concerns related to LGBTQ inclusivity on campus.

c) December 3, 2019: Senior Vice President Joseph Discourages Official LGBTQ Club

62. On December 3, 2019, members of the YU Pride Alliance, including Plaintiffs Meisels and Weinreich, met with YU Senior Vice President Josh Joseph to discuss the need for an LGBTQ student group on campus.

63. At the meeting, Vice President Joseph stated that he represented the Yeshiva University administrative team, rabbis, and trustees.

64. Upon information and belief, Vice President Joseph was at all times acting at the direction of and as the agent of Defendants Yeshiva University and President Berman.

65. During the meeting, YU Pride Alliance members explicitly requested that YU approve an official LGBTQ student club.

66. YU Pride Alliance members also expressed their concerns regarding homophobia on campus, feelings of being unwelcome and physically unsafe due to their LGBTQ identities, the desire to be able to hold LGBTQ events on campus, and ways to ensure LGBTQ equality and inclusion on campus.

67. Vice President Joseph repeatedly asked YU Pride Alliance members to justify the need for an official LGBTQ student club generally, for a club with a name that indicated its relationship to LGBTQ issues, and for a club that focuses on LGBTQ issues specifically.

68. Consistent with Defendants' position that it would not allow an official, recognized LGBTQ student club to be formed, Vice President Joseph implied that the students

should abandon their efforts for an official LGBTQ club and instead join an umbrella student clubs that addressed a range of issues, only some of which relate to LGBTQ students.

69. Vice President Joseph indicated to the YU Pride Alliance members that he and Defendant Berman believed that some YU administrative officials' views and the Alliance members' views were likely to be "irreconcilable."

70. Vice President Joseph also indicated that Defendants' approach to the YU Pride Alliance and LGBTQ groups more generally was being guided in part by concerns against the clubs from "outside" parties. Joseph also intimated YU Pride Alliance should not publicly challenge Yeshiva University on this issue because it would inappropriately invite outside voices into the conversation.

71. Towards the end of the meeting, a YU Pride Alliance member asked Vice President Joseph to tell the students why the YU Pride Alliance club should not exist. Vice President Joseph stated that he could not.

d) January 30, 2020: YU Pride Alliance Submits a Club Application

72. On or about January 30, 2020, Plaintiff Meisels and the YU Pride Alliance board completed the Wilf and Beren "Club Application Spring 2020" application form on behalf of the YU Pride Alliance and submitted it to the Yeshiva Student Union, the student governing body charged with approving or denying applications in the first instance.

73. The YU Pride Alliance application satisfied the club application requirements under the Wilf and Beren Constitutions.

74. The YU Pride Alliance proposed a club name of "The YU Alliance." It set forth a paragraph-long mission statement. It identified the specific Student Councils under which it sought to operate, including the Yeshiva Student Union, the Yeshiva College Student Association, and the Stern College for Women Student Council. It included a PDF of

approximately 70 student signatures—well over the 25 required— and the signature of its faculty advisor Professor Daniel Kimmel.

75. The mission statement of the YU Pride Alliance as set forth in its Spring 2020 club application was as follows:

> The Yeshiva University Alliance is a group of undergraduate YU students hoping to provide a supportive space on campus for all students, of all sexual orientations and gender identities, to feel respected, visible, and represented. Conversation is at the heart of our community, in order to foster awareness and sensitivity to the unique experiences of being a LGBTQ+ person in YU and the Orthodox community, and to advocate for their unconditional inclusion and acceptance. Our space will promote open dialogue for all, regardless of religious views and political affiliations. We ask students to be cognizant and respectful of the beliefs, experiences, and backgrounds of everyone in attendance at our functions. At our events, please do not express assumptions about or hostility towards any person or organization.

76. Upon information and belief, the General Assembly reviewed the Pride Alliance's application for approval alongside all other club applications submitted for that semester.

e) February 9, 2020: Yeshiva Student Council Presidents Abstain from Voting on YU Pride Alliance Club Application

77. After the YU Pride Alliance submitted its application, on or about February 5, 2020, the Yeshiva University administration met with the Student Council Presidents to discuss the new club applications for the semester. Upon information and belief, Plaintiff YU Pride Alliance's club application was the focus of these discussions.

78. Following their meeting with the administrators, on or about February 9, 2020, the Student Council Presidents took the extraordinary step of publicly abstaining from voting on the Pride Alliance's club application.

79. Citing concerns that the club application implicated matters above their position as students, the Student Council presidents emailed a statement to the Yeshiva University

Student Body that they were abstaining from a vote on whether to grant official club status to the YU Pride Alliance and leaving the matter to the YU administration to decide.

80. The email said, "The decision about a club focusing on LBGTQ+ matters at Yeshiva University is too complex and nuanced to be voted on by Student Council Presidents. We are not administrators, we are not rabbis, and we are not subject matter experts."

81. Upon information and belief, the General Assembly had never before abstained from voting on a club application.

82. With the General Assembly's abstention, the decision to approve the club's application was now the responsibility of Defendant Yeshiva University.

83. Upon information and belief, by on or around February 9, 2020, all other new club applicants for the Spring 2020 semester received a decision regarding approval or denial of the club, except for the YU Pride Alliance.

84. On or about February 9, 2020, Plaintiff Weinreich filed a discrimination complaint with YU about the YU Alliance's Spring 2020 club's application for official status.

85. On or about February 27, 2020 Plaintiff Weinreich was able to review a copy of YU's decision in response to his discrimination complaint. YU concluded that no action was required at that time because no official determination regarding the club's status had been rendered and because another club, the Jewish Activism Club, included a reference to LGBTQ issues in their mission statement. Plaintiff Weinreich was never provided with a copy of the decision and was not permitted to make a copy.

f) YU Denies the YU Pride Alliance's Spring 2020 Club Application

86. On or about February 11, 2020 Plaintiffs Weinreich and Meisels, along with the other members of the YU Pride Alliance, sent an email to Vice President Joseph requesting that

YU render a decision on the club's application by the next day so that they would be able to participate in the Wilf club fair, which was scheduled for February 12, 2020 on the Wilf campus.

87. The YU Pride Alliance never received any response or answer to their February 11, 2020 request for a decision on the club's application, from Vice President Joseph or any member of the administration.

88. By taking no action in response to the request of the student body to resolve the club's application, Yeshiva denied the YU Pride Alliance's February 2020 application.

89. Lacking the needed approval and recognition from the administration, the YU Pride Alliance could only participate unofficially in the Wilf club fair held on February 12, 2020. Hours before the club fair began, Plaintiff Weinreich informally asked two Student Council presidents if the YU Pride Alliance could set up a table at the fair, despite having no official decision from the YU administration. Both presidents indicated that they would not stop the Pride Alliance from doing so. Alliance members hastily gathered materials and found a space at the fair to set up a table. Throughout the fair, they could not tell students that they were an official club, and they were at risk of being asked to leave at any time. Due to their unofficial status, they were unable to participate in the Beren club fair in any capacity.

90. On February 19, 2020, at the invitation of the Student Council presidents, Plaintiff Weinreich, Meisels, and other members of the YU Pride Alliance attended a meeting between the Student Council presidents and the administration, including Vice President Joseph and Defendant Nissel, to discuss the Alliance's club application.

91. At the meeting, Alliance members directly asked the YU administration if they would approve the YU Pride Alliance as an official club. Vice President Joseph and Defendant Nissel refused to give any answer or timeline.

92. The YU Pride Alliance did not function as a recognized student club for the Spring 2020 semester.

93. During the Spring 2020 semester, YU Pride Alliance members did not meet on campus prior to the coronavirus pandemic, did not have access to University funding for student events, could not advertise any events through official YU channels, and could not host LGBTQ-themed events. During the coronavirus pandemic, YU provided all recognized student groups with access to a premium Zoom account so that students could virtually meet and continue their club activities without the time and streaming limitations of free Zoom accounts; the Alliance had to borrow an account from a sympathetic non-profit group.

94. If YU had recognized the YU Pride Alliance as a student club for the spring 2020 semester, the group planned to hold meet-and-greets on campus where students could meet and discuss their identities, and invite speakers to campus to talk about being Jewish and LGBTQ.

95. Because there was no recognized student club, Meisels and other members of the YU Pride Alliance were required to fundraise from an outside donor to support their informal club events.

96. On May 8, 2020, Plaintiff Miller expressed to the University Office of Human Resources that he wanted to file a discrimination complaint against YU for actions taken against LGBTQ students, specifically based on YU's repeated rejection of the formation of an LGBTQ group on campus. In response, he was told that it would be futile to file a complaint because the University had already issued a decision on February 24, 2020 in response to another student's complaint about the discriminatory denial of an LGBTQ club, in which it denied the complaint.

3) SEPTEMBER 2020: YU AGAIN DENIES THE YU PRIDE ALLIANCE RECOGNITION AND PUBLICLY ANNOUNCES THAT IT WILL NOT RECOGNIZE LGBTQ STUDENT CLUBS

97. On September 3, 2020, despite knowing that it might be futile, the YU Pride Alliance persisted in applying again for official club status for the Fall 2020 semester.

98. That same day, Yeshiva University administrators emailed a statement dedicated to the issue of LGBTQ students at YU, titled "Fostering an Inclusive Community," to the entire YU community. The statement was signed by Dr. Yael Muskat, Rabbi Yaakov Neuburger, Dr. Rona Novick, and Dr. David Pelcovitz.

99. In the September 3, 2020 statement, the YU administration stated as its policy that it would not recognize LGBTQ clubs on campus.

100. Tucked between various promises to make Yeshiva University more open to LGBTQ students by, for example, providing additional training, YU stated that it would not permit LGBTQ students to form an official club.

101. In the statement, Yeshiva stated: "The message of Torah on this issue is nuanced, both accepting each individual with love and affirming its timeless prescriptions. While students will of course socialize in gatherings they see fit, forming a new club as requested under the auspices of YU will cloud this nuanced message."

102. Yeshiva's September 3, 2020 statement was intended to convey and did convey to the YU Pride Alliance and the whole YU community that the YU Pride Alliance (and any other LGBTQ student group) would not be recognized as an official student club.

103. Upon information and belief, President Berman authorized and approved the September 3, 2020 statement.

104. Covering the September 3, 2020 statement, the student newspaper reported, "The statement also revealed that YU will not approve an LGBTQ club, a decision passed to administrators in February."[7]

105. Defendant Yeshiva University's publication of this statement unequivocally again denied the YU Pride Alliance's application to be recognized as an official student club, including for the Fall 2020 semester.

106. The September 3, 2020 statement was a devastating blow to YU Pride Alliance members. After years of seeking recognition for a club and YU evading the question, YU had announced to the entire University community that it would not allow one.

107. On September 29, 2020, members of the YU Pride Alliance board attended a virtual video meeting with the "YU Inclusion Panel," including Defendant Nissel, Rosh Yeshiva Yaakov Neuburger, Dean Rona Novick, Counseling Center Director Yael Muskat, and Professor David Pelcovitz in a further attempt to receive official guidance from Yeshiva.

108. At this meeting, YU Pride Alliance board members again expressed the importance to LGBTQ students having a club, holding public events, and having public conversations about LGBTQ issues. One board member presented academic research showing the elevated suicide risk among LGBTQ students and how LGBTQ student groups lower that risk because they help address prejudice and social stigma, and provide a safe space for LGBTQ students to form community.

109. At one point, a YU Pride Alliance board member directly asked the Panel members what led to Defendant Yeshiva University's decision not to allow the YU Pride

[7] Sruli Fuchter, *YU Announces New LGBTQ Inclusivity Policies, Denies LGBTQ Club Formation,* YU Commentator (Sept. 3, 2020), https://yucommentator.org/2020/09/yu-announces-new-lgbtq-inclusivity-policies-denies-lgbtq-club-formation/.

Alliance to exist as a club. The board member also pointed out that YU made that decision without ever holding an official meeting with the YU Pride Alliance as an entity to discuss its intent to deny the club or provide YU Pride Alliance an opportunity to respond.

110. Rosh Yeshiva Neuburger reiterated that making an LGBTQ club formal would "cloud" the issues being considered and sacrifice real accomplishment. He then said that a conversation about holding events could be held in the future, but that YU would not commit to having any substantive discussion about what event guidelines could look like without having actual proposed events in hand.

111. YU Pride Alliance board members understood Rosh Yeshiva Neuburger's response to be another attempt to delay the establishment of formal rules, policies, or procedures that would allow the YU Pride Alliance to host events or otherwise engage in club activities.

112. On December 9, 2020, a student unaffiliated with the YU Pride Alliance received a letter from Defendant Nissel regarding his prior discrimination complaint against the University for its denial of the Alliance's club application. In the letter, Defendant Nissel confirmed that YU had decided not to approve the YU Pride Alliance as a student group.

4) YESHIVA UNIVERSITY HAS NOT CHANGED ITS OFFICIAL POSITION OF REFUSING TO RECOGNIZE OR PERMIT AN LGBTQ STUDENT ORGANIZATION

113. Defendants continue to refuse to recognize an official LGBTQ undergraduate student club at Yeshiva University.

114. Since its September 3, 2020 statement, Defendants have not publicly changed, revised, or revisited their official position that Yeshiva University will not recognize an official LGBTQ student club.

115. It is the current policy and practice of Yeshiva University not to recognize any official undergraduate club or organization for students who identify as LGBTQ.

116. Based on the foregoing, Plaintiffs YU Pride Alliance and Doe believe that YU will deny any future application for the YU Pride Alliance to receive official student club status.

5) YU'S REJECTION OF AN LGBTQ STUDENT CLUB HAS HARMED PLAINTIFFS

117. At all relevant times, Defendants have known or perceived the individual Plaintiffs and the student members of the YU Pride Alliance to be individuals who identify as LGBTQ, or to be individuals who seek to associate with other individuals who identify as LGBTQ.

118. Plaintiffs have each been harmed by Defendants' denial of the YU Pride Alliance, and its predecessor, the GSA.

119. Plaintiffs have all been negatively impacted by the lack of an official LGBTQ student group on campus during their time as undergraduate students at YU.

120. Plaintiffs may not hold meeting on campus; they must travel off-campus for meetings. They cannot choose panels and speakers on issues of its choice. They receive no funding and have had to fundraise from outside sources. During the pandemic, they did not have a premium Zoom account from YU like all other student groups. They are not listed on YU's student group list. They are not invited to the annual club fairs for new students. Plaintiffs have experienced feelings of isolation, fear, and rejection. They have felt unwelcome and unwanted on their own campus. Because they do not have a club, Plaintiffs have been deprived a safe space to create a community of people facing these same challenges as LGBTQ Jewish individuals at YU.

121. YU students have stated to Plaintiff John Doe that LGBTQ students and their allies do not have any right to "their" campus and resources, or to make YU sanction an LGBTQ club, and that instead should leave campus and withdraw from YU.

122. These deprivations and casually cruel remarks contribute to a campus environment that prevents students from having full and equal access to a successful college experience.

123. Educational institutions which provide LGBTQ students with access to recognized student groups and formal organizational spaces enable student success by allowing students to build leadership and civic engagement skillsets, develop peer and mentoring networks, and experience belonging and support.

124. Defendant' refusal to recognize the YU Pride Alliance and its issuance of a public statement to that effect on September 3, 2020 has communicated to Plaintiffs and the broader community that it does not see Plaintiffs as equal to other students or entitled to the rights that other students enjoy.

125. Plaintiffs have expended significant time and energy trying to persuade Defendants to recognize their student organization. The individual Plaintiffs have lost opportunities to further advance their studies, engage with other clubs, participate in their own hobbies and activities, and spend time with friends and family.

126. Plaintiff YU Pride Alliance has had to divert significant club time and resources to its efforts to secure club recognition from the administration. Rather than advocating for the administration to follow the law, Plaintiff YU Pride Alliance members could have instead organized additional events to promote LGBTQ understanding and tolerance on campus; provided services and resources to LGBTQ students on campus; hosted gatherings celebrating

religious holidays; or simply bonded over books or television shows. In other words, absent Defendants' discrimination, the YU Pride Alliance could have functioned as a normal club serving the needs of LGBTQ students at YU.

a) Yeshiva's Actions Violate Its Own Policies

127. YU's official "Non-Discrimination and Anti-Harassment Policy & Complaint Procedures" document recognizes as unlawful and prohibits any discrimination "based on . . . sex . . . sexual orientation, [and] gender identity and expression."[8]

128. Defendants' refusal to approve the YU Pride Alliance as a recognized undergraduate club is unlawful discrimination based on sex, sexual orientation, and gender identity and expression in violation of this policy.

129. The Yeshiva University "Undergraduate Student Bill of Rights and Responsibilities" states that "[s]tudents who are otherwise qualified have the right to participate fully in the University community without discrimination as defined by federal, state, and local law" and to "be treated fairly with respect and dignity at all times." The same document includes provisions that allow students to "organize and join clubs and participate in events in all cases in accordance with applicable rules and procedures."[9]

130. Defendants' refusal to approve Plaintiff YU Pride Alliance as a sanctioned undergraduate club or allow Plaintiffs to organize and/or join an LGBTQ club is a violation of Plaintiffs' rights under the Undergraduate Student Bill of Rights and Responsibilities.

[8] Yeshiva University, *Non-Discrimination and Anti-Harassment Policy & Complaint Procedures,* (Dec. 31, 2020), https://www.yu.edu/sites/default/files/inline-files/Non-Discrimination%20and%20Anti-Harassment%20Policy%20-%20TIX%20Policy%20%28December%2031%2C%202020%29%20%2800056181xA0726%29_1.pdf.
[9] Yeshiva University, *Undergraduate Student Bill of Rights and Responsibilities, Undergraduate Student Disciplinary Procedures,* https://www.yu.edu/sites/default/files/legacy//uploadedFiles/Student_Life/Resources_and_Services/Standards_and_Policies/Updated%20Bill%20of%20Rights%2011.29.12.pdf

b) Yeshiva is Subject to, and Has Violated, the New York City Human Rights Law

131. Denying recognition and club benefits to an LGBTQ student group, such as the YU Pride Alliance, violates Defendants' obligations under the New York City Human Rights Law.

132. By denying recognition of an LGBTQ student group, such as the YU Pride Alliance, Defendants have denied Plaintiffs of the benefits of club recognition, including funding from student government and use of university facilities, which includes virtual facilities provided by YU during the COVID-19 pandemic.

133. Defendants' refusal to grant YU Pride Alliance's student club applications has also denied Plaintiffs of the social and emotional benefits of an LGBTQ student club, including the existence of an official space to find and provide mutual support, foster community, and share experiences.

134. These privileges have been granted to other approved clubs on campus.

135. This disparate treatment and the denial of these concomitant benefits to club recognition, solely based on Plaintiffs' sex, sexual orientation, or gender identity, is not only harmful to the students, but also unlawful as it amounts to a failure to provide equal access to facilities in violation of New York City laws.

136. Section 8-107(4) of the New York City administrative code prohibits providers of public accommodation from denying the "full and equal enjoyment" of those "accommodations, advantages, services, facilities, or privileges" due to a number of protected characteristics, including gender and sexual orientation.

137. Section 8-107(20) of the New York City administrative code prohibits providers of public accommodation from denying the "full and equal enjoyment" of those "accommodations, advantages, services, facilities, or privileges" due to a relationship or

association with individuals who identify with a number of protected characteristics, including gender and sexual orientation.

138. Defendant Yeshiva University is subject to the New York City Human Rights Law.

139. Denying recognition and approval of an undergraduate LGBTQ club denies Plaintiffs full and equal enjoyment of Yeshiva University's accommodations, advantages, services, facilities, and privileges.

140. The accommodations, advantages, services, facilities, and privileges that YU is denying Plaintiffs but provides in full to other recognized student clubs include, but are not limited to, the use of campus spaces and the ability to reserve campus spaces for club use; club funding to host speakers and other club-related events, to prepare event materials such as flyers and pamphlets, and to provide food and/or beverages at meetings and/or events; access to student fairs and other events at which campus organizations make themselves known to students; and official recognition on the Yeshiva University Student Clubs and Organizations website.

141. Plaintiffs have not previously filed a civil or administrative action alleging an unlawful discriminatory practice with respect to the allegations that are the subject of this Complaint.

CLAIMS FOR RELIEF

FIRST CAUSE OF ACTION

N.Y.C. Admin. Code § 8-107(4) – Discrimination on the Basis of Gender and Sexual Orientation in Violation of the New York City Human Rights Law
(On Behalf of All Plaintiffs)
(Against All Defendants)

142. Plaintiffs repeat and reallege the allegations set forth in the preceding paragraphs as if fully set forth herein.

143. Defendants are providers of a public accommodation pursuant to N.Y.C. Admin. Code § 8-102 because they are "providers, whether unlicensed or licensed, of goods, services, facilities, accommodations, advantages or privileges of any kind."

144. Defendants know or perceive the individual Plaintiffs and student members of YU Pride Alliance to identify as LGBTQ, and know or perceive the YU Pride Alliance's activities to be focused on LGBTQ issues and its mission to be fostering a safe and inclusive community for LBGTQ students.

145. Defendants have denied Plaintiffs equal advantages, facilities, and privileges of a public accommodation by denying their requests for the YU Pride Alliance to be an official club because of Plaintiffs' actual or perceived gender or sexual orientation, in violation of § 8-107(4)(a)(1)(a) of the Code and have damaged Plaintiffs thereby.

SECOND CAUSE OF ACTION

N.Y.C. Admin. Code § 8-107(4) – Discrimination on the Basis of Gender and Sexual Orientation in Violation of the New York City Human Rights Law (On Behalf of Plaintiffs Meisels, Miller, and Weinreich) (Against All Defendants)

146. Plaintiffs repeat and reallege the allegations set forth in the preceding paragraphs as if fully set forth herein.

147. Defendants know or perceive Plaintiffs Meisels, Miller, and Weinreich to identify as LGBTQ.

148. Defendants have denied Plaintiffs Meisels, Miller, and Weinreich equal advantages, facilities, and privileges of a public accommodation by denying the request for the Gay-Straight Alliance to be an official club because of the actual or perceived gender or sexual orientation of Gay-Straight Alliance members, in violation of § 8-107(4)(a)(1)(a) of the Code and have damaged them thereby.

THIRD CAUSE OF ACTION

N.Y.C. Admin. Code § 8-107(4) – Discrimination on the Basis of Gender and Sexual Orientation in Violation of the New York City Human Rights Law (On Behalf of Plaintiffs YU Pride Alliance, Meisels, and Doe) (Against All Defendants)

149. Plaintiffs repeat and reallege the allegations set forth in the preceding paragraphs as if fully set forth herein.

150. Defendants are providers of a public accommodation pursuant to N.Y.C. Admin. Code § 8-102 because they are "providers, whether unlicensed or licensed, of goods, services, facilities, accommodations, advantages or privileges of any kind."

151. Defendants' September 3, 2020 written communication to the Yeshiva University community titled "Fostering an Inclusive Community" communicated that Defendants would not allow an official LGBTQ student club or organization at Yeshiva University.

152. Defendants communicated their intent to refuse, withhold from, and/or deny to Plaintiffs the full and equal enjoyment, on equal terms and conditions, of a public accommodation, by publicly stating on September 3, 2020 that they would not allow Plaintiffs to establish an official LGBTQ student club such as YU Pride Alliance at Yeshiva University on account of gender and sexual orientation, in violation of § 8-107(4)(a)(2)(a) of the Code and have damaged Plaintiffs thereby.

FOURTH CAUSE OF ACTION

N.Y.C. Admin. Code § 8-107(20) – Discrimination on the Basis of Association in Violation of the New York City Human Rights Law (On Behalf of All Plaintiffs) (Against All Defendants)

153. Plaintiffs repeat and reallege the allegations set forth in the preceding paragraphs as if fully set forth herein.

154. Defendants knew or perceived members of the YU Pride Alliance to identify as LGBTQ and knew or perceived the YU Pride Alliance's activities to be focused on LGBTQ issues and its mission to be fostering a safe and inclusive community for LBGTQ students.

155. Defendants knew or perceived that Plaintiffs, by virtue of their request for the YU Pride Alliance to receive official club approval, sought to associate with students who identify or are perceived as LGBTQ.

156. Defendants have denied Plaintiffs the advantages, facilities, and privileges of a public accommodation because of their relationship or association with individuals who identify or are perceived as LGBTQ, in violation of § 8-107(20) of the Code and have damaged them thereby.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that judgment be entered against Defendants as follows:

1. Declaring that Defendants Yeshiva University, Vice Provost Chaim Nissel, and President Ari Berman violated the Plaintiffs' rights under the New York City Human Rights Law by virtue of their conduct alleged in this action and that Defendants' actions continue to cause these ongoing violations of Plaintiffs' rights;
2. Restraining Defendants Yeshiva University, Vice Provost Chaim Nissel, and President Ari Berman from continuing their unlawful refusal to (a) officially recognize the YU Pride Alliance as a student organization because of the actual or perceived sexual orientation or gender of the YU Pride Alliance's members, and/or the YU Pride Alliance's status, mission, and/or activities on behalf of

LGBTQ students and (b) grant the YU Pride Alliance the full and equal accommodations, advantages, facilities, and privileges of Yeshiva University, because of the actual or perceived sexual orientation or gender of the YU Pride Alliance's members, and/or the YU Pride Alliance's status, mission and/or activities on behalf of LGBTQ students.

3. Awarding such damages to Plaintiffs Meisels, Weinreich, Miller, and Doe as will fully compensate for injury caused by Defendants' unlawful practices;

4. Awarding punitive damages to Plaintiffs;

5. Awarding Plaintiffs reasonable attorneys' fees, costs, and expenses incurred in prosecuting this action; and

6. Granting Plaintiffs such other further relief as may be just and proper.

Dated: April 26, 2021
New York, New York

EMERY CELLI BRINCKERHOFF ABADY WARD & MAAZEL LLP

By: /s/ Katherine Rosenfeld
Katherine Rosenfeld
Marissa R. Benavides
Max Selver
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and

Attorneys for Plaintiffs

Diane L. Houk, *Of Counsel*

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION

DYLAN BRANDT, by and through his mother, Joanna Brandt; JOANNA BRANDT; SABRINA JENNEN, by and through her parents, Lacey and Aaron Jennen; LACEY JENNEN; AARON JENNEN; BROOKE DENNIS, by and through her parents, Amanda and Shayne Dennis; AMANDA DENNIS; SHAYNE DENNIS; PARKER SAXTON, by and through his father, DONNIE SAXTON; DONNIE SAXTON; MICHELE HUTCHISON, on behalf of herself and her patients; and KATHRYN STAMBOUGH, on behalf of herself and her patients

PLAINTIFFS

v.

Case No. 4:21CV450-JM

LESLIE RUTLEDGE, in her official capacity as the Arkansas Attorney General; AMY E. EMBRY, in her official capacity as the Executive Director of The Arkansas State Medical Board; and SYLVIA D. SIMON, ROBERT BREVING JR., VERYL D. HODGES, JOHN H. SCRIBNER, ELIZABETH ANDERSON, RHYS L. BRANMAN, EDWARD "WARD" GARDNER, RODNEY GRIFFIN, BETTY GUHMAN, BRIAN T. HYATT, TIMOTHY C. PADEN, DON R. PHILIPS, WILLIAM L. RUTLEDGE, and DAVID L. STAGGS, in their official capacity as members of the Arkansas State Medical Board

DEFENDANTS

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs, by and through their attorneys, bring this Complaint against the above-named Defendants, their employees, agents, and successors in office, and in support thereof state the following:

I. PRELIMINARY STATEMENT

1. On April 6, 2021, the Arkansas General Assembly passed HB 1570, enacted as Act 626 (hereafter the "Health Care Ban"), overriding Governor Asa Hutchinson's veto of the bill within 24 hours and banning the provision of medically necessary and potentially lifesaving

healthcare to transgender adolescents. The law was passed over the sustained and robust opposition of medical experts in Arkansas and across the country. The law could be enforced as soon as July 28, 2021.[1]

2. Since long before the adoption of the Health Care Ban, there has been a well-established medical consensus that certain medical treatments are necessary to treat some adolescents diagnosed with gender dysphoria—a medical and mental health condition characterized by clinically significant distress caused by an incongruence between a person's gender identity and the sex they were assigned at birth. Medical guidelines recognized by all the major medical associations provide a framework for the safe and effective treatment of this condition. For some adolescent patients with gender dysphoria, puberty-delaying treatment and hormone therapy are medically indicated to alleviate severe distress. Chest reconstruction surgery may be medically necessary for some older adolescents.

3. The Health Care Ban, by prohibiting any medical treatment "related to gender transition," denies adolescents medically necessary treatment and prevents parents from obtaining medically necessary care for their children. It further prohibits doctors from treating their patients in accordance with the well-established standards of care or from referring patients to other doctors to receive the appropriate care.

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[1] Under the Arkansas Constitution, Acts of the General Assembly without an emergency clause or specified effective date, like HB 1570, become effective ninety (90) days after adjournment of the session where enacted. The General Assembly did not adjourn the 2021 session; instead, the legislature took extended recess under HCR 1015, stating, "should the General Assembly remain in extended recess for longer than ninety (90) days, all acts that do not contain an emergency clause or a specific effective date shall become effective on the 91st day following April 30, 2021." On May 20, 2021, Attorney General Leslie Rutledge issued Opinion No. 2021-029, which opines that "unless the General Assembly reconvenes on or before July 27, 2021, acts with no emergency clause or specified effective date become effective on July 28, 2021."

4. While the Health Care Ban purports to protect young people from alleged risks associated with the prohibited care, all of the medical care prohibited by the Health Care Ban is permitted for *any* reason *except* to affirm a gender identity that differs from a patient's sex assigned at birth.

5. After the General Assembly first passed the Health Care Ban on March 29, 2021, Governor Hutchinson vetoed the bill, calling it "overbroad," "extreme," and "a vast government overreach." He said the legislation interfered with "the guiding hand" of both parents and the healthcare professionals they have chosen to care for their children. He also expressed concern that, if passed, the bill would lead to significant harm to transgender youth as cautioned by healthcare experts.

6. If the Health Care Ban goes into effect, it will have devastating consequences for transgender youth in Arkansas. These young people will be unable to obtain medical care that their doctors and parents agree they need—and those already receiving care will have their treatment abruptly halted—which could have serious and potentially life-threatening consequences. For some transgender youth, the prospect of losing this critical medical care, even before the legislation is in effect, is unbearable. In the weeks after the bill passed, at least six transgender adolescents in Arkansas attempted suicide.

7. Some parents of transgender children are making plans to move out of state should the law take effect out of fear for their children's health and safety if they are unable to get necessary medical treatment. They may have to leave their jobs, businesses, extended families, and communities to get the treatment their children need. These families have already lived through the impact of untreated gender dysphoria on their children and have seen how treatment has enabled them to thrive. As one father put it, "We can't go back." But many families do not

have the resources to uproot their lives and they are terrified about what will happen to their children if the law takes effect.

8. The Health Care Ban not only threatens the health and well-being of transgender youth in Arkansas, it is also unconstitutional. It violates the Equal Protection Clause of the Fourteenth Amendment because it discriminates on the basis of sex and transgender status by prohibiting certain medical treatments only for transgender patients and only when the care is "related to gender transition." This discrimination cannot be justified under heightened scrutiny or any level of equal protection scrutiny. In addition, by preventing parents from seeking appropriate medical care for their children when the course of treatment is supported by the child and their doctor, the Health Care Ban interferes with the right to parental autonomy guaranteed by the Due Process Clause of the Fourteenth Amendment. Lastly, the Health Care Ban violates the First Amendment by prohibiting healthcare providers from referring their patients for medical treatments that are in accordance with the accepted medical standards of care to treat gender dysphoria.

II. THE PARTIES

A. The Minor Plaintiffs and Their Families[2]

1. The Brandt Family

9. Plaintiffs Dylan Brandt and Joanna Brandt live in Greenwood, Arkansas. Joanna is the mother of Dylan, who is 15. Dylan is transgender and is currently receiving medically

[2] The Minor Plaintiffs sue by and through their parents, pursuant to Federal Rule of Civil Procedure 17(c).

necessary care that would be prohibited by the Health Care Ban. The Brandts are pictured here.

2. The Jennen Family

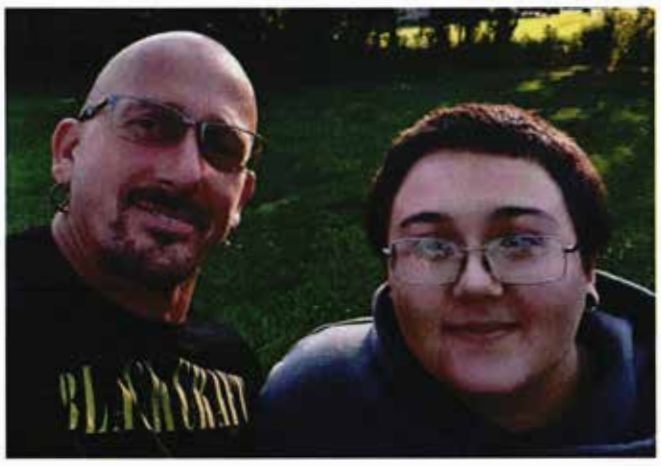
10. Plaintiffs Sabrina Jennen, Lacey Jennen, and Aaron Jennen live in Fayetteville, Arkansas. Lacey and Aaron are the parents of Sabrina, who is 15. Sabrina is transgender and is currently receiving medically necessary care that would be prohibited by the Health Care Ban. The Jennens are pictured here. Sabrina is second from left.

3. The Dennis Family

11. Plaintiffs Brooke Dennis, Amanda Dennis, and Shayne Dennis live in Bentonville, Arkansas. Amanda and Shayne are the parents of Brooke, who is 9. Brooke is transgender. Once she begins puberty, which could be at any time, Brooke's parents, with the advice of her doctors, intend to have her begin receiving medical care that would be prohibited by the Health Care Ban. The Dennises are pictured here. Brooke is on the far right.

4. The Saxton Family

12. Plaintiffs Parker Saxton and Donnie Saxton live in Conway, Arkansas. Donnie is the father of Parker, who is 16. Parker is transgender and this month will begin receiving medically necessary care that would be prohibited by the Health Care Ban. The Saxtons are pictured here.



B. Doctor Plaintiffs

1. Dr. Michele Hutchison

13. Plaintiff Dr. Michele Hutchison is a pediatric endocrinologist and Associate Professor in the Department of Pediatrics, College of Medicine at the University of Arkansas for Medical Sciences. She has been working at the Gender Spectrum Clinic at Arkansas Children's Hospital (the "Clinic") since its inception in February, 2018. Dr. Hutchison provides gender-affirming care that would be prohibited by the Health Care Ban. She is bringing her claims in her individual capacity on behalf of herself and her patients.

2. Dr. Kathryn Stambough

14. Plaintiff Dr. Kathryn Stambough is a doctor in the Division of Pediatric and Adolescent Gynecology in the Department of Obstetrics and Gynecology at the University of Arkansas for Medical Sciences. Her clinic is part of Arkansas Children's Hospital. Dr. Stambough refers patients at her clinic to other doctors who provide gender-affirming care, which would be prohibited by the Health Care Ban. In addition, Dr. Stambough works at the Gender Spectrum

Clinic one day each month. When she is at the Clinic, Dr. Stambough provides gender-affirming care that would be prohibited by the Health Care Ban. She is bringing her claims in her individual capacity on behalf of herself and her patients.

C. Defendants

15. Defendant Leslie Rutledge is the Attorney General of the State of Arkansas. The Attorney General's offices are located at 323 Center Street, Suite 200, Little Rock, Arkansas. Under the Health Care Ban, Defendant Rutledge is tasked with bringing legal actions to enforce compliance with that law. Defendant Rutledge is sued in her official capacity.

16. Defendant Amy E. Embry is the Executive Director of The Arkansas State Medical Board (the "Medical Board"). The Medical Board is an agency of the State of Arkansas with the power to license physicians and revoke physicians' licenses, among other things. Under the Health Care Ban, the Medical Board is charged with disciplining individuals within its licensing jurisdiction who violate the provisions of that law. The Medical Board is located at 1401 West Capitol Avenue, Suite 340, Little Rock, Arkansas. Defendant Embry is sued in her official capacity.

17. Defendants Sylvia D. Simon, Robert Breving Jr., Veryl D. Hodges, John H. Scribner, Elizabeth Anderson, Rhys L. Branman, Edward "Ward" Gardner, Rodney Griffin, Betty Guhman, Brian T. Hyatt, Timothy C. Paden, Don R. Philips, William L. Rutledge, and David L. Staggs (all, together with Defendant Embry, the "Medical Board Defendants") are members of the Medical Board. The Medical Board Defendants are sued in their official capacity.

III. JURISDICTION AND VENUE

18. This action arises in part under the United States Constitution, 42 U.S.C. § 1983.

19. This Court has subject matter jurisdiction pursuant to Article III of the United States Constitution and 28 U.S.C. §§ 1331, 1343, and 1367.

20. This Court is authorized to issue a declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202.

21. Venue in this district is proper pursuant to 28 U.S.C. § 1391(b)(1)(2), because one or more of the defendants resides in this district and because a substantial part of the events giving rise to the claims occurred in this district.

IV. FACTUAL BACKGROUND

A. Standards of Care for Treating Adolescents with Gender Dysphoria

22. Doctors in Arkansas use well-established guidelines to diagnose and treat youth with gender dysphoria.

23. "Gender identity" refers to a person's internal, innate, and immutable sense of belonging to a particular gender.

24. Although the precise origin of gender identity is unknown, a person's gender identity is a fundamental aspect of human development. There is a general medical consensus that there is a significant biological component to gender identity.

25. Everyone has a gender identity. A person's gender identity is durable and cannot be altered through medical intervention.

26. A person's gender identity usually matches the sex they were designated at birth based on their external genitalia. The terms "sex designated at birth" or "sex assigned at birth" are more precise than the term "biological sex" because there are many biological sex characteristics and they may not align with each other in a single direction. For example, some people with intersex characteristics may have a chromosomal configuration typically associated with a male sex designation but genital characteristics typically associated with a female sex designation. For these reasons, the Endocrine Society, an international medical organization of over 18,000

endocrinology researchers and clinicians, warns practitioners that the terms "biological sex" and "biological male or female" are imprecise and should be avoided.

27. Most boys were designated male at birth based on their external genital anatomy, and most girls were designated female at birth based on their external genital anatomy. But transgender children have a gender identity that differs from the sex assigned to them at birth. A transgender boy is someone who was assigned a female sex at birth but persistently, consistently, and insistently identifies as male. A transgender girl is someone who was assigned a male sex at birth but persistently, consistently, and insistently identifies as female.

28. Gender identity is deeply rooted in early life. Some transgender people become aware of having a gender identity that does not match their assigned sex early in childhood. For others, the onset of puberty, and the resulting physical changes in their bodies, leads them to recognize that their gender identity is not aligned with their sex assigned at birth.

29. The lack of alignment between one's gender identity and their sex assigned at birth can cause significant distress.

30. According the American Psychiatric Association's Diagnostic & Statistical Manual of Mental Disorders ("DSM-V"), "gender dysphoria" is the diagnostic term for the condition experienced by some transgender people of clinically significant distress resulting from the lack of congruence between their gender identity and the sex assigned to them at birth. In order to be diagnosed with gender dysphoria, the incongruence must have persisted for at least six months and be accompanied by clinically significant distress or impairment in social, occupational, or other important areas of functioning.

31. Being transgender is not itself a medical condition to be cured. But gender dysphoria is a serious medical condition that, if left untreated, can result in debilitating anxiety, severe depression, self-harm, and suicide.

32. The World Professional Association for Transgender Health ("WPATH") and the Endocrine Society have published widely accepted standards of care for treating gender dysphoria. The medical treatment for gender dysphoria is to eliminate the clinically significant distress by helping a transgender person live in alignment with their gender identity. This treatment is sometimes referred to as "gender transition," "transition-related care," or "gender-affirming care." These standards of care are recognized by the American Academy of Pediatrics, which agrees that this care is safe, effective, and medically necessary treatment for the health and well-being of youth suffering from gender dysphoria.

33. The precise treatment for gender dysphoria depends upon each person's individualized needs, and the medical standards of care differ depending on whether the treatment is for a pre-pubertal child, an adolescent, or an adult.

34. Before puberty, gender transition does not include any pharmaceutical or surgical intervention and is limited to "social transition," which means allowing a transgender child to live and be socially recognized in accordance with their gender identity. Typically, social transition can include allowing children to wear clothing, to cut or grow their hair, to use preferred names and pronouns, and to use restrooms and other sex-separated facilities in line with their gender identity instead of the sex assigned to them at birth.

35. Under the WPATH Standards of Care and the Endocrine Society Clinical Guidelines, medical interventions may become medically necessary and appropriate as transgender youth reach puberty. In providing medical treatments to adolescents, pediatric endocrinologists work in close

consultation with qualified mental health professionals experienced in diagnosing and treating gender dysphoria.

36. For many transgender adolescents, going through puberty in accordance with the sex assigned to them at birth can cause extreme distress. Puberty-delaying medication allows transgender adolescents to avoid this, therefore minimizing and potentially preventing the heightened gender dysphoria and permanent physical changes that puberty would cause.

37. Under the Endocrine Society Clinical Guidelines, transgender adolescents may be eligible for puberty-delaying treatment if:

- A qualified mental health professional has confirmed that:
  - the adolescent has demonstrated a long-lasting and intense pattern of gender nonconformity or gender dysphoria (whether suppressed or expressed);
  - gender dysphoria worsened with the onset of puberty;
  - any coexisting psychological, medical, or social problems that could interfere with treatment (e.g., that may compromise treatment adherence) have been addressed, such that the adolescent's situation and functioning are stable enough to start treatment;
  - has sufficient mental capacity to give informed consent to this (reversible) treatment.
- And the adolescent:
  - has been informed of the effects and side effects of treatment (including potential loss of fertility if the individual subsequently continues with sex hormone treatment) and options to preserve fertility;
  - has given informed consent and (particularly when the adolescent has not reached the age of legal medical consent, depending on applicable legislation) the parents or other caretakers or guardians have consented to the treatment and are involved in supporting the adolescent throughout the treatment process.
- And a pediatric endocrinologist or other clinician experienced in pubertal assessment:
  - agrees with the indication for gonadotropin-releasing hormone ("GnRH") agonist treatment;

- has confirmed that puberty has started in the adolescent;
- has confirmed that there are no medical contraindications to GnRH agonist treatment.

38. Puberty-delaying treatment is reversible. If an adolescent discontinues the medication, puberty consistent with their assigned sex will resume.

39. For some youth, it may be medically necessary and appropriate to initiate puberty consistent with the young person's gender identity through gender-affirming hormone therapy (testosterone for transgender boys, and estrogen and testosterone suppression for transgender girls).

40. Under Endocrine Society Clinical Guidelines, transgender adolescents may be eligible for gender-affirming hormone therapy if:

- A qualified mental health professional has confirmed:
  - the persistence of gender dysphoria;
  - any coexisting psychological, medical, or social problems that could interfere with treatment (e.g., that may compromise treatment adherence) have been addressed, such that the adolescent's environment and functioning are stable enough to start sex hormone treatment;
  - the adolescent has sufficient mental capacity to estimate the consequences of this (partly) irreversible treatment, weigh the benefits and risks, and give informed consent to this (partly) irreversible treatment.
- And the adolescent:
  - has been informed of the partly irreversible effects and side effects of treatment (including potential loss of fertility and options to preserve fertility);
  - has given informed consent and (particularly when the adolescent has not reached the age of legal medical consent, depending on applicable legislation) the parents or other caretakers or guardians have consented to the treatment and are involved in supporting the adolescent throughout the treatment process.
- And a pediatric endocrinologist or other clinician experienced in pubertal induction:

- agrees with the indication for sex hormone treatment;
- has confirmed that there are no medical contraindications to sex hormone treatment.

41. Adolescents who receive gender-affirming hormones after having received puberty-delaying treatment never go through puberty in accordance with the sex assigned to them at birth and, instead, go through puberty that matches their gender identity.

42. Pre-pubertal boys and girls are indistinguishable with respect to secondary sex characteristics. If a pre-pubertal child receives puberty-delaying treatment, they will never develop the secondary sex characteristics of the sex assigned to them at birth, and when they are provided hormones in accordance with their gender identity, they will develop only the secondary sex characteristics that match their gender identity.

43. For example, transgender boys treated with puberty-delaying medication and then gender-affirming hormones, will receive the same amount of testosterone during puberty that non-transgender boys generate with their gonads or testes. They will develop the phenotypic features of non-transgender boys such as muscle mass, fat distribution, facial and body hair, and lower vocal pitch. Likewise, transgender girls treated with puberty-delaying medication and then gender-affirming hormones, will receive the same amount of estrogen during puberty that non-transgender girls generate endogenously. They will develop the same muscle mass, fat distribution, skin and female hair patterns, and breasts typically associated with non-transgender girls.

44. Adolescents who first receive treatment later in puberty and are only treated with gender-affirming hormone therapy (and not puberty-delaying treatment) also go through a puberty consistent with their gender identity. However, they will have undergone physical changes associated with their endogenous puberty that may not be wholly reversed by hormone therapy.

45. Under the WPATH standards of care, transgender young people may also receive medically necessary chest reconstructive surgeries before the age of majority, provided the young person has lived in their affirmed gender for a significant period of time. Genital surgery is not recommended until patients reach the age of majority.

46. Medical treatment recommended for and provided to transgender adolescents with gender dysphoria can substantially reduce lifelong gender dysphoria and can eliminate the medical need for surgery later in life.

47. Providing gender-affirming medical care can be lifesaving treatment and can change the short- and long-term health outcomes for transgender youth.

B. The General Assembly's Passage of the Health Care Ban

48. On March 29, 2021, the Arkansas General Assembly passed the Health Care Ban, prohibiting healthcare professionals from providing "gender transition procedures" to anyone under 18 or "refer[ring]" anyone under 18 to any healthcare professional for such procedures. The law stipulates that healthcare professionals who provide or refer minor patients for such care are subject to discipline for unprofessional conduct by the appropriate licensing entity or disciplinary review board, and may be sued by the Attorney General or private parties. The Health Care Ban also prohibits coverage of gender transition procedures for minors by Medicaid or private insurance.

49. The General Assembly titled the Health Care Ban the "Save Adolescents from Experimentation (SAFE) Act," despite the fact that the banned medical treatment is part of the well-established standards of care for the treatment of gender dysphoria in adolescents.

50. In passing the law, the General Assembly ignored testimony from Arkansas doctors about the lifesaving benefits of gender-affirming care to their transgender patients and the unavoidable grave harm to the health and well-being of transgender youth if they are prohibited

from receiving this care. This included testimony in the Senate that after the Health Care Ban passed the House, in just one week, multiple transgender youth were admitted to the emergency room because of an attempted suicide.

51. Not a single doctor with experience treating transgender youth testified in support of the bill.

52. The General Assembly ignored the testimony of transgender people who shared their painful experiences of depression and suicide attempts prior to receiving treatment for their gender dysphoria.

53. The General Assembly ignored the testimony of parents pleading for it not to risk their children's health and survival by stripping them of the medical care that has enabled them to thrive.

54. Not only did the General Assembly ignore established medical standards by passing the Health Care Ban, the majority of both chambers passed resolutions expressing their view that "gender reassignment medical treatments" are not "natural." HR 1018, SR 7.

55. Some members of the General Assembly further expressed their personal beliefs in opposition to gender-affirming care that had nothing to do with the purported medical concerns enumerated in the Health Care Ban's legislative findings. Rep. Bentley, for example, stated that "Father God, our Creator, has some very important things that he would like to say about [the Health Care Ban]," and that it is "impossible to govern the world without God and the Bible." Rep. Bentley went on to quote Biblical passages in support of the bill, including "a woman shall not wear anything that pertains to a man, nor a man put on a woman's garments, for all who do so are an abomination to the Lord your God." Rep. Wooten, when addressing the bill, stated that

"God made you like you are," and "this nation is based on God's word." Rep. Wooten compared transgender youth to a child who "comes to you and says, 'I wanna be a cow.'"

56. On April 5, 2021, Governor Hutchinson vetoed the Health Care Ban "because it creates new standards of legislative interference with physicians and parents as they deal with some of the most complex and sensitive matters concerning our youths." Governor Hutchinson explained that "[the Health Care Ban] puts the state as the definitive oracle of medical care, overriding parents, patients and healthcare experts" which "would be—and is—a vast government overreach." Governor Hutchinson further noted that "[t]he leading Arkansas medical associations, the American Academy of Pediatrics and medical experts across the country all oppose this law" because "denying best practice medical care to transgender youth can lead to significant harm to the young person—from suicidal tendencies and social isolation to increased drug use."

57. Within 24 hours, with a simple majority vote, the General Assembly overrode the Governor's veto and the Health Care Ban passed into law. Only one senator was allowed to speak in support of the Governor's veto before debate was terminated, over objection, by a motion for immediate consideration, and the Senate voted to override the veto.

58. The Health Care Ban was part of a barrage of bills in the Arkansas General Assembly targeting transgender people during the 2021 legislative session.

59. SB 347 would have made it a felony for a healthcare provider to provide "gender transition services" to anyone under 18 years of age.

60. There were two bills and a proposed constitutional amendment to ban transgender students from participating in school sports. Both bills passed and were signed into law. *See* SB 354 (sports ban which passed and is now Act 461), SB 450 (additional sports ban now Act 953).

61. Another bill—HB 1749—would have provided that employees of public schools and colleges are not "required to use a pronoun, title, or other word to identify a . . . student as male or female that is inconsistent with the . . . student's biological sex."

62. There were also bills aimed at shielding students from hearing about transgender people. SB 389, which was enacted as Act 552, provides that parents be given notice and a right to opt their children out of any curriculum or school materials related to sexual orientation or gender identity (as well as sex education). Moreover, SR 7 included a provision that "every child deserves an education . . . free of . . . politicized ideas about sexual orientation and gender identity."

63. Other bills would have barred transgender people from using restrooms or other facilities that accord with their gender identity in schools and other public buildings. *See* HB 1882, HB 1905, and HB 1951.

64. The General Assembly's passage of the Health Care Ban had nothing to do with protecting children and everything to do with expressing disapproval of transgender people.

C. The Impact of the Health Care Ban on Plaintiffs

1. The Minor Plaintiffs and Their Families

(1) The Brandt Family

65. Dylan Brandt is about to finish his freshman year of high school, where his favorite subject is psychology. Outside school, he likes spending time on TikTok, a social media platform, where he makes short videos lip-synching to songs and shares motivational sentiments.

66. Dylan is transgender. When he was born, he was designated as female on his birth certificate but his gender identity is male.

67. Dylan knew from a young age that he did not feel comfortable with his gender. In seventh grade he cut his hair short and started exclusively dressing in gender-neutral clothing. By the end of seventh grade, Dylan knew he was a boy and came out to his mother as transgender.

Dylan started his social transition that summer. He chose the name Dylan and started eighth grade with his new name and using male pronouns. Since then, everyone who knows the Brandts in Greenwood recognizes Dylan as the boy he is.

68. Although Joanna, Dylan's mother, was initially surprised when Dylan told her he is a boy, it made sense to her upon reflection. Dylan had "rejected all things feminine" from the moment he could make decisions about his life. He had also been experiencing depression as well as anxiety in social situations.

69. Joanna consulted Dylan's pediatrician about his realization that he was transgender and he was referred to the Gender Spectrum Clinic, where he had his first visit in January 2020. During that visit, he was diagnosed with gender dysphoria. Dylan began receiving Depo-Provera to stop menstruation.

70. In August 2020, Dylan began treatment with testosterone, which has been transformative for him. He has become a happy, confident teenager. He embraces social situations that he would have avoided in the past. Dylan's depression and anxiety substantially decreased. As a result of the hormone therapy, Dylan's voice has dropped, he started growing facial hair, and his body started to change in ways typical of a male puberty. These changes have caused Dylan to feel more comfortable in his own skin. According to Joanna, Dylan's "eyes light up" when people recognize and affirm his male gender. Dylan's social transition and medical treatment have allowed him to be affirmed in all aspects of his life.

71. Dylan's name was legally changed in August 2020, and his birth certificate was updated to reflect the legal name change.

72. The prospect of losing access to gender-affirming medical care has caused both Dylan and Joanna tremendous stress. Dylan has been on hormone therapy for over nine months.

The Brandts were informed at the inception of his treatment that abruptly stopping hormone therapy would be detrimental to Dylan's health.

73. Joanna is also concerned about her son's mental health should his treatment be cut off. Joanna fears Dylan will lose the happiness and self-confidence that he has experienced because of treatment, and is worried that Dylan's depression will return if his care is cut off and his body begins to undergo permanent changes from the initiation of his endogenous puberty.

74. The Brandts have deep ties to Greenwood. They have a community of friends and family there. Joanna owns her home and a business. Because she fears for her son's safety and well-being should his healthcare be cut off, to ensure that Dylan can continue his treatment, Joanna is considering moving to another state if the Health Care Ban goes into effect.

(2) The Jennen Family

75. Sabrina Jennen is a high school sophomore and a dedicated student who made it to the national championships for Quiz Bowl, an academic trivia competition. Sabrina plays violin and acoustic guitar, earned a black belt in Taekwondo, and enjoys gaming with her friends. After high school, Sabrina plans to attend college to study medical or environmental sciences.

76. Sabrina is transgender. When she was born, she was designated as male on her birth certificate but her gender identity is female.

77. Sabrina began to realize her gender identity in late 2019 and came out to her family in July 2020. Lacey and Aaron, Sabrina's parents, found a therapist for Sabrina, who diagnosed her with gender dysphoria.

78. Since coming out to her family and friends, Sabrina started using female pronouns, wearing feminine clothing, and growing her hair. Sabrina plans to legally change her name this summer so that it will appear on her driver's license when she is old enough to get one.

79. In or around January 2021, with her parents' support, Sabrina began gender-affirming hormone therapy. She was prescribed a testosterone suppressant and estrogen to initiate puberty consistent with her gender identity. The treatment has been life-changing for her. Before treatment, Sabrina could not see a future for herself. She experienced depression, struggled to sleep, and engaged in self-harm. There were times her parents were worried about her being left alone. Since starting hormone therapy, Sabrina has become genuinely happy and confident for the first time since she can remember. Sabrina's depression has subsided; she has not engaged in self-harm and she has become more engaged with her family.

80. The prospect of losing access to her medical care causes Sabrina and her parents to feel extremely anxious and terrifies them. If her treatment is stopped, Sabrina worries that the dysphoria, depression, and anxiety will recur. Her parents fear for her survival if the medical treatment that has sustained her is cut off. They cannot bear to lose the happy and thriving daughter that Sabrina has become, nor can they return to constant concern over her safety. As Aaron put it, "We can't go back."

81. The Jennens love their Fayetteville community. Sabrina has a robust network of friends, family, educators, and a church community that supports her that would be difficult, if not impossible, to replace. Sabrina's sisters are also deeply connected to their school and community—one is on her school cheerleading squad and competes on the track team and in Quiz Bowl competitions; the other takes ice skating lessons and loves school and the friends she has made there. Lacey and Aaron are lifelong residents of Arkansas, and graduates of the University of Arkansas at Fayetteville. Lacey is engaged with her local church community and serves on the Urban Forestry Board for the City of Fayetteville. Aaron's job as a government lawyer is based

in Fayetteville. Lacey's and Aaron's parents and several of their siblings and their families live close by in Northwest Arkansas. All of their extended family live in Arkansas.

82. Lacey and Aaron want to continue to raise their children in Fayetteville and do not want to leave, but if the Health Care Ban takes effect, they understand that they might have to leave to keep Sabrina healthy and safe.

(3) The Dennis Family

83. Brooke Dennis is in third grade and loves to read and write in her virtual diary. She takes gymnastics and wants to be a gymnast when she grows up. Brooke likes jumping on the trampoline in her backyard and can do backward somersaults.

84. Brooke is transgender. When Brooke was born, she was designated as male on her birth certificate, but her gender identity is female.

85. Although Amanda and Shayne, Brooke's parents, did not discuss Brooke's female gender with her until last year, as Amanda describes it, "Brooke always knew who she was." From the time she was 2 years old, Brooke gravitated towards all traditionally feminine activities. Brooke would often put a shirt on her head to create long "hair" for herself, and around the holidays, Amanda and Shayne could never keep the Christmas tree skirt on the tree because Brooke would take it off and wear it. Brooke's parents were buying her traditionally boys' clothes, but when she was 4 years old, her grandma bought her colorful sneakers from the girls' section of the store. From then on, Brooke chose to wear only traditionally feminine clothing.

86. It is confusing for Brooke that others have not always recognized her as she recognizes herself, and it causes her extreme distress. For example, one Halloween, when Brooke was in second grade, Amanda and Shayne took Brooke to the store and told her she could choose a costume, but Brooke was paralyzed by anxiety. Brooke knew what she wanted—the costumes

in the girls' section—but she was fearful of what people would say if she picked one of the costumes designated for girls. The situation was even more difficult at school. Brooke felt distressed when the teacher would line up the boys and the girls for bathroom breaks and she would be asked what she was doing in the boys' restroom, and when Brooke's classmates would debate whether she is a boy or a girl. Brooke frequently came home from school crying and started to act out. She started seeing the school counselor regularly in the 2019—20 school year.

87. In April 2020, a photographer came to the house to take family portraits. During the photoshoot, the photographer used female pronouns with Brooke, and Amanda and Shayne noticed that Brooke did not correct the photographer. After the photo shoot, Amanda asked Brooke how that made her feel. Brooke told her that she liked it and would prefer if people used female pronouns. Her parents told her that would be fine, and Brooke declared, "I am Brooke and I'm a she." As Shayne put it, "It was as if a cloud lifted and the smile came back."

88. Since then, she is known as Brooke and is referred to by female pronouns at home, by her grandparents, at school, and in the community. Brooke has returned to being the happy, bright-eyed child she used to be. Amanda and Shayne were relieved that Brooke's distress was behind her and their child was once again flourishing.

89. After the conversation about pronouns last April, Amanda and Shayne had Brooke begin therapy with a counselor experienced with youth experiencing an incongruence between their gender and assigned sex at birth. The counselor diagnosed Brooke with gender dysphoria in June 2020, and referred the family to the Gender Spectrum Clinic at Arkansas Children's Hospital.

90. Brooke and her parents went to the Clinic in October 2020. They were provided information about gender dysphoria and the standards of care for treatment. The doctor told Amanda and Shayne to closely watch Brooke for signs of puberty, and advised that puberty-

delaying treatment could begin at the onset of puberty. Brooke and her parents will have regular check-in appointments with the Clinic to monitor her development.

91. At 9 years of age, puberty could begin for Brooke at any time. Brooke is already anxious about the prospect of going through a typical male puberty. Brooke openly worries about how her body is different than the girls at school. Brooke has observed the changes her older brother is going through and recently cried and told her mom that she didn't want to get an Adam's apple.

92. Because Brooke is already so anxious about puberty, when Brooke starts puberty Amanda and Shayne plan to start her on puberty-delaying treatment, which her doctors confirm would be medically indicated. They feel this is critical to prevent the distress of going through a typical male puberty and to give the family time to assess whether gender-affirming hormone therapy will be medically necessary to keep Brooke healthy.

93. Amanda and Shayne are worried about not being able to obtain puberty-delaying treatment for Brooke when her endogenous puberty begins. In the short-term, Amanda and Shayne have explored their options for flying out-of-state for treatment. However, this is not a sustainable option financially. Further, the Health Care Ban would prevent Brooke's physicians from referring her to a doctor in a state where gender-affirming care is not prohibited.

94. Amanda and Shayne's only other option is to move out-of-state, and they will do so if necessary to get the treatment Brooke needs. But moving would impose significant hardship on the Dennis family. They have all developed close friendships in the community and the children's schools, and Amanda's job in leadership development at Walmart, is in Bentonville. They would also be moving away from Shayne's elderly parents for whom they provide supportive

care. Amanda and Shayne will do what is necessary to protect Brooke's health and well-being, but they believe that they should not be forced to leave their state to do so.

(4) The Saxton Family

95. Parker Saxton is a sophomore in high school. Parker sings in the school choir and is learning how to play the guitar.

96. Parker is transgender. When he was born, he was designated as female on his birth certificate but his gender identity is male.

97. When Parker was around 13 years old, he came out to his father as transgender in a letter. Parker asked his dad to refer to him by male pronouns and to call him by a typically male version of his birth name. He later chose the name Parker. Donnie was not surprised when he received the letter. Parker had already taken steps to change his appearance—he had cut his hair short when he was 11 years old, and, starting in the seventh grade, dressed exclusively in clothes traditionally viewed as masculine. Donnie could see that Parker was uncomfortable in his body—Parker had been struggling since pre-school when he would tell Donnie he did not want to be a girl, and, for as long as Donnie can remember, Parker experienced debilitating anxiety about having to use public restrooms. As Parker started puberty, it distressed him seeing his body change in ways that felt even more divergent from his gender identity.

98. Donnie has not always understood what it means to be transgender and did not always support transgender rights. But as Donnie watched Parker suffer, and as he started to learn more and understand Parker's feelings, his views shifted. As Donnie put it, "I wish that I could say that my child has spent their entire life being comfortable in their skin, but that's just not true for Parker." It took Donnie some time to get used to using male pronouns with Parker. But now

they flow easily for him as he sees Parker as "my little dude." Donnie is proud and supportive of his son.

99. After Parker came out as transgender, he took further steps to socially transition. He started introducing himself with a male name and asked that he be referred to by male pronouns. Parker has gradually come out as transgender to his school choir community. At a choir performance, he wore a tuxedo.

100. Though taking steps to socially transition helped Parker feel more like himself, he continued to struggle with gender dysphoria. Parker began wearing four or five sports bras at a time in an effort to change the physical appearance of his body; he feels uncomfortable getting out of the shower and viewing himself in a mirror, and he refuses to participate in activities that would require him to wear a bathing suit. As Donnie put it, Parker "just wants to look in the mirror and see the person that he is on the inside staring back at him so that he can go about his day."

101. Parker asked Donnie to take him to receive medical care to change his physical appearance to match his male gender. In 2019, Donnie took Parker to the Gender Spectrum Clinic. There, Parker was diagnosed with gender dysphoria. One of the first steps Parker's doctors recommended was that he be treated with Depo-Provera to stop menstruation. Parker has been getting that treatment since the fall of 2019.

102. Parker's mental health greatly improved after he started receiving healthcare to treat his gender dysphoria. As a result, he was able to stop taking the Zoloft that he had been taking to manage his anxiety and depression.

103. Because Parker responded so well to receiving this treatment, and because his understanding of his male gender has been persistent and consistent, Parker's doctor agreed with

Parker and Donnie that Parker would benefit from starting testosterone. Parker is scheduled to begin receiving testosterone injections at the end of this month.

104. After making great strides as a result of his treatment, Parker's anxiety worsened when he learned about the General Assembly's effort to pass the Health Care Ban, and he had to resume taking medication for anxiety. The passage of the Health Care Ban was devastating to him. Donnie began sleeping on the couch close to Parker's bedroom because Parker's sleep has been disturbed, and Donnie wants to be available to provide emotional support in the event he needs it. Parker and Donnie worry about the physical and mental health consequences of beginning testosterone and then having to stop. But not taking testosterone is not an option given Parker's severe dysphoria.

105. If the Health Care Ban goes into effect, the Saxtons would explore leaving the state so that Parker can receive the treatment that he, his father, and his doctors all agree is necessary. But this would be difficult for the family. Donnie, who is a plumber, has a business in Conway. Moving would jeopardize the family's financial stability. It would also separate the family from Donnie's parents—with whom they have a close, supportive relationship—and other relatives. The Saxton family has been part of their community all of their lives. Donnie feels that because everyone knows Parker, he is safe there, and Donnie worries about having to go elsewhere. Donnie thinks it is wrong that the General Assembly is making it so hard for him to take care of his son.

2. Doctor Plaintiffs

(1) Dr. Michele Hutchison

106. Dr. Hutchison graduated from medical school at the University of Texas Southwestern Medical School in 1999. Following medical school, Dr. Hutchison completed

residency and fellowship programs in Endocrinology at the University of Texas Southwestern Medical School in 2002 and 2004, respectively.

107. Dr. Hutchison is a pediatric endocrinologist and Associate Professor in the Department of Pediatrics, College of Medicine at the University of Arkansas for Medical Sciences, where she treats youth with a variety of endocrine conditions. Since 2018, she has also been treating patients at the Arkansas Children's Hospital's Gender Spectrum Clinic, which provides healthcare to transgender youth with gender dysphoria.

108. The Clinic treats patients in accordance with the standards of care developed by WPATH and the Endocrine Society. The Clinic has an interdisciplinary team, including mental health providers, to ensure each child receives appropriate and necessary care.

109. Dr. Hutchison has treated about 200 youth at the Clinic since its opening. There are around 160 patients currently under the Clinic's care.

110. At the Clinic, Dr. Hutchison provides puberty-delaying treatment for transgender patients with gender dysphoria at the onset of puberty when medically indicated. This treatment pauses puberty and provides the patient and their family more time to determine the long-term course of treatment. Such treatment also prevents patients from suffering the severe emotional and physical consequences of going through puberty that does not match their gender identity.

111. For patients whose gender identity has been persistent and consistent, Dr. Hutchison will explore gender-affirming hormone therapy (estrogen and testosterone suppression for transgender girls; testosterone for transgender boys) with patients and their families, beginning around the age of 14, and initiate such treatment if medically indicated. There are no medical treatments indicated or provided for pre-pubertal children with gender dysphoria.

112. The same treatments Dr. Hutchison provides to her transgender patients at the Clinic—puberty-delaying medication, testosterone, estrogen, and testosterone suppressants—she also provides to non-transgender patients. In her general pediatric endocrinology practice, Dr. Hutchison provides puberty-delaying treatment to non-transgender children with precocious puberty. She provides testosterone to non-transgender boys with delayed puberty or who have insufficient testosterone for a variety of reasons. Dr. Hutchison provides estrogen to treat non-transgender girls with primary ovarian insufficiency or Turner's Syndrome. And she provides testosterone suppressants to treat non-transgender girls with polycystic ovarian syndrome. If the Health Care Ban takes effect, Dr. Hutchison will be prohibited from providing these treatments to her transgender patients because they relate to "gender transition," but she will be able to continue providing the same treatments to her non-transgender patients to help bring their bodies into alignment with their gender.

113. When Clinic patients inform Dr. Hutchison that they are moving out of state, she will provide them information about clinics in their new state that provide gender-affirming medical care for transgender adolescents. Dr. Hutchison considers it part of her obligation to care for her patients to help them find the care they need if she is unable to continue providing such care.

114. Given the administrative and civil penalties attached to the Health Care Ban, if it takes effect, Dr. Hutchison will not be able to treat her transgender patients with gender dysphoria in accordance with the accepted standards of care. If she were to follow the medically indicated protocols for treating gender dysphoria, she would face adverse licensing action or other judicial or administrative consequences. Moreover, Dr. Hutchison is concerned that if the Health Care Ban goes into effect, the Gender Spectrum Clinic might have to close.

115. Dr. Hutchison knows from personal experience in treating hundreds of adolescents with gender dysphoria that the Health Care Ban, if permitted to take effect, will significantly and severely compromise the health of her patients. As Dr. Hutchison testified before the Senate Public Health and Labor Committee on March 22, 2021, she "had multiple kids in [the] emergency room because of an attempted suicide" after the Health Care Ban passed out of the House. After the law was passed, her office received calls from numerous families panicking because their children were expressing suicidal thoughts related to the prospect of losing the healthcare they rely on for their well-being.

116. Being forced to deny her patients medically necessary care that can be lifesaving for some patients violates the tenets of Dr. Hutchison's profession by leaving them to suffer needless pain.

117. Dr. Hutchison has grave concerns about her patients' ability to survive, much less thrive, if the Health Care Ban takes effect.

118. Dr. Hutchison is bringing her claims in her individual capacity on behalf of herself and her patients.

(2) Dr. Kathryn Stambough

119. Dr. Stambough graduated from medical school in 2011 and completed a residency in Obstetrics and Gynecology in 2015 at Washington University in Saint Louis. She completed a fellowship at Baylor College of Medicine/Texas Children's Hospital that focused on Pediatric and Adolescent Gynecology. During her residency and fellowship programs, Dr. Stambough trained in the provision of hormone therapy to treat various conditions, including gender dysphoria.

120. Dr. Stambough is a pediatric and adolescent gynecologist at the University of Arkansas for Medical Sciences. For the past year, Dr. Stambough has also been attending one day

per month at the Gender Spectrum Clinic. As part of her work at the Clinic, Dr. Stambough provides gender-affirming hormone therapy when medically indicated for patients with gender dysphoria diagnoses beginning around the age of 14.

121. The same treatments Dr. Stambough provides to her transgender patients at the Clinic, she also provides to non-transgender patients. In her pediatric gynecology practice, Dr. Stambough provides estrogen to non-transgender girls for a range of conditions, such as primary ovarian insufficiency, hypogonadotropic hypogonadism, and Turner's Syndrome. Dr. Stambough also prescribes puberty-delaying medication for non-transgender patients undergoing precocious puberty. She uses that same medication—GnRH agonist—to treat other conditions, including endometriosis. In addition, Dr. Stambough provides other forms of hormone therapy to treat polycystic ovarian syndrome; menstrual issues including painful, irregular or heavy periods; and for menstrual suppression for patients with many conditions including cancer and spinal cord disorders, as well as transgender boys with gender dysphoria.

122. When Dr. Stambough sees patients in her gynecology practice who present signs of gender dysphoria, she refers them to the Gender Spectrum Clinic. Her ability to make these referrals is essential for her to connect her patients with appropriate and necessary care.

123. Given the penalties attached to the Health Care Ban, if it takes effect, Dr. Stambough will not be able to provide gender-affirming medical care to her patients in accordance with the accepted standards of care. Nor will she be permitted to refer patients in her pediatric gynecology practice for such care. If she were to do so, she would face adverse licensing action or other judicial or administrative consequences. Moreover, Dr. Stambough is concerned that if the Health Care Ban goes into effect, the Gender Spectrum Clinic might have to close.

124. Being forced to withhold referrals from patients at her pediatric gynecology practice, and to deny her patients at the Clinic medically necessary care that can be lifesaving for some patients, violates the tenets of Dr. Stambough's profession by leaving her patients to suffer needless pain.

125. Dr. Stambough worries greatly about the impact on her patients if they cannot access the medically necessary and lifesaving treatment prohibited by the Health Care Ban.

126. Dr. Stambough is bringing her claims in her individual capacity on behalf of herself and her patients.

V. THERE ARE NO LEGITIMATE JUSTIFICATIONS FOR THE HEALTH CARE BAN

127. The Health Care Ban establishes a complete ban on well-established medical treatments for minors when, and only when, they are provided to transgender youth for the purpose of "assisting an individual with a gender transition."

128. In relevant part, the Health Care Ban provides that "[a] physician or other healthcare professional shall not provide gender transition procedures to any individual under eighteen (18) years of age." HB 1570 § 3, 20-9-1502(a). The Health Care Ban also prohibits Medicaid or private insurance coverage for minors receiving such care. HB 1570 § 4, 23-79-164(b).

129. The Health Care Ban defines "gender transition" as "the process in which a person goes from identifying with and living as a gender that corresponds to his or her biological sex to identifying with and living as a gender different from his or her biological sex, and may involve social, legal, or physical changes." HB 1570 §3, 20-9-1501(5).

130. The "gender transition procedures" prohibited by the law are defined as "any medical or surgical service . . . related to gender transition that seeks to . . . [a]lter or remove

physical or anatomical characteristics or features that are typical for the individual's biological sex" or "[i]nstill or create physiological or anatomical characteristics that resemble a sex different from the individual's biological sex, including without limitation medical services that provide puberty-blocking drugs, cross-sex hormones, or other mechanisms to promote the development of feminizing or masculinizing features in the opposite biological sex, or genital or nongenital gender reassignment surgery performed for the purpose of assisting an individual with a gender transition." HB 1570 §3, 20-9-1501(6).

131. While the Health Care Ban prohibits the use of well-established treatments for gender dysphoria in transgender adolescents—including puberty-delaying drugs, hormone therapy (testosterone for transgender boys, and estrogen and testosterone suppressants for transgender girls), and chest surgery—because these treatments are provided for the purpose of assisting "gender transition," it permits the use of these same treatments for any other purpose.

132. The puberty-delaying drugs proscribed by the Health Care Ban for the treatment of gender dysphoria because they assist with "gender transition" are the same drugs that are commonly used to treat central precocious puberty. Central precocious puberty is the premature initiation of puberty—before 8 years of age in people assigned female at birth and before 9 years of age in people assigned male—by the central nervous system. When untreated, central precocious puberty can lead to impairment of final adult height as well as antisocial behavior and lower academic achievement. The Health Care Ban permits puberty-delaying treatment for central precocious puberty because it is not provided for purposes of assisting with "gender transition"; that is, it is not prescribed to affirm a person's gender identity different from their sex assigned at birth.

133. The Health Care Ban prohibits hormone therapy when the treatment is used to assist with "gender transition," but the same hormone therapy is permitted when prescribed to non-transgender patients to help bring their bodies into alignment with their gender. For example, non-transgender boys with delayed puberty may be prescribed testosterone if they have not begun puberty by 14 years of age. Without testosterone, for most of these patients, puberty would eventually initiate naturally. However, testosterone is prescribed to avoid some of the social stigma that comes from undergoing puberty later than one's peers and failing to develop the secondary sex characteristics consistent with their gender at the same time as their peers. Likewise, non-transgender girls with primary ovarian insufficiency, hypogonadotropic hypogonadism (delayed puberty due to lack of estrogen caused by a problem with the pituitary gland or hypothalamus), or Turner's Syndrome (a chromosomal condition that can cause a failure of ovaries to develop) may be treated with estrogen. And non-transgender girls with polycystic ovarian syndrome (a condition that can cause increased testosterone and, as a result, symptoms including facial hair) may be treated with testosterone suppressants. The same treatments that are permitted for non-transgender minors—often to affirm their gender—are banned if provided to transgender minors for the same reason.

134. The Health Care Ban prohibits chest surgery on transgender young men to treat gender dysphoria because it assists with "gender transition," but minors are permitted to undergo comparable surgeries. For example, non-transgender adolescent boys can have surgery to treat gynecomastia—the proliferation of ductal or glandular breast tissue, as opposed to adipose tissue, in individuals assigned male at birth. And non-transgender adolescent girls can have breast reconstruction surgery, including to address conditions such as breast hypoplasia: a lack of breast development in people assigned female at birth. These kinds of surgeries are commonly performed

to reduce psychosocial distress, often related to the incongruence with one's gender. Therefore, a transgender boy assigned female at birth cannot receive chest-masculinizing surgery to affirm his gender identity but a non-transgender boy can. Likewise, a transgender girl cannot receive chest-feminizing surgery to affirm her gender identity but a non-transgender girl can.

135. The legislative findings in the Health Care Ban cite an alleged lack of sufficient evidence to support the banned treatments. Specifically, the findings reference a lack of randomized clinical trials on the use of hormone therapy to treat gender dysphoria. This purported concern about the evidentiary basis for such treatment does not justify prohibiting it only when used to provide gender-affirming care to treat transgender adolescents with gender dysphoria. The very same evidence is deemed acceptable to provide the same treatments for any other purpose.

136. The absence of "randomized clinical trials" is no reason to discount the standards of care recommended by major medical associations. Indeed, much of medicine is developed without "randomized clinical trials." This criticism of treatment for gender dysphoria could be extended to other essential care, including treatments that the law expressly permits.

137. There can be many reasons why conducting randomized trials is not necessary or appropriate for evaluating a course of treatment. Clinical research focusing on children is less likely to use randomized trials than is clinical research for adults and, it may, at times, be unethical to conduct randomized trials. For randomized trials to be ethical, clinical equipoise must exist; there must be uncertainty about whether the efficacy of the intervention or the control is greater. That is not the case with respect to the medical protocols for treating adolescents with gender dysphoria, which are known to provide significant relief to patients. It would be unethical to knowingly expose some trial participants to an inferior intervention or to withhold treatment

altogether. Accordingly, in the field of pediatrics, parents and their children must often make decisions about medical care without the benefit of randomized trials.

138. One example of an accepted—and permitted—treatment that has not been tested through randomized clinical trials is the use of puberty-delaying drugs to treat precocious puberty. Even without randomized clinical trials, existing observational evidence is considered sufficiently strong to establish the standard of care for treatment of central precocious puberty. The very same treatment with the very same evidence permitted to treat central precocious puberty is prohibited when used to assist transgender adolescents with "gender transition."

139. Similarly, there are no randomized clinical trials of genital surgery on minors with intersex conditions. The Health Care Ban explicitly permits medical intervention, including surgical intervention, when a minor has an intersex condition (referred to in the law as a "disorder of sexual development"), despite the lack of such evidence and significant ethical concerns raised by performing such procedures on infants too young to participate in the decision-making process. HB 1570 § 3, 20-9-1501(6)(B)(i).

140. The General Assembly's purported interest in protecting minors from potential risks associated with the prohibited medical care likewise cannot justify the Health Care Ban. Under the Health Care Ban, the risks related to puberty-delaying drugs, hormone therapy, and chest surgeries are acceptable when used to treat non-transgender youth for other purposes, but not when used to treat gender dysphoria in transgender adolescents.

141. Every medical intervention carries potential risks and potential benefits. Weighing the potential benefits and risks of the treatment for gender dysphoria is a prudential judgment similar to other judgments made by healthcare providers, adolescent patients, and their parents.

Adolescent patients and their parents often make decisions about treatments with less evidence and/or greater risks than the treatment prohibited by the Health Care Ban.

142. The current standards of care for treating gender dysphoria in minors are consistent with general ethical principles of informed consent. The Endocrine Society clinical practice guidelines extensively discuss the potential benefits, risks, and alternatives to treatment, and its recommendations regarding the timing of interventions are based in part on the treatment's potential risks and the adolescent's decision-making capacity.

143. There is nothing unique about any of the medically accepted treatments for adolescents with gender dysphoria that justify singling out these treatments for prohibition based on concern about adolescents' inabilities to assent or their parents' inabilities to consent.

144. The Health Care Ban subjects medical care for transgender adolescents with gender dysphoria to a double standard. The law singles out such care for sweeping prohibitions while permitting the same medical treatments carrying the same potential risks when prescribed to treat non-transgender patients for any other purpose.

145. The legislative findings claim "that studies consistently demonstrate that the majority [of gender non-conforming children] come to identify with their biological sex in adolescence or adulthood, thereby rendering most physiological interventions unnecessary." But this reflects a complete misunderstanding of the treatment for gender dysphoria. No medical treatments are indicated until adolescence. And the evidence is clear that when gender dysphoria is present in adolescence, patients almost always persist in their gender identity in the long-term.

146. The goal of treatment for gender dysphoria is not to change someone's gender identity; rather, it is to resolve the distress associated with the disconnect between their assigned

sex at birth and their gender identity. Denying treatment to transgender adolescents will not cause them to stop being transgender, but it will cause them to experience distress from lack of treatment.

VI. THE HEALTH CARE BAN WILL CAUSE SEVERE HARM TO TRANSGENDER YOUTH

147. Withholding gender-affirming medical treatment from adolescents with gender dysphoria when it is medically indicated puts them at risk of extreme harm to their health and well-being.

148. Adolescents with untreated gender dysphoria suffer significant distress. Many are on medication for depression and anxiety. Self-harm and suicidal ideation are exceedingly common. Suicidality among transgender young people is a crisis. In one survey, more than half of transgender youths had seriously contemplated suicide. Studies have found that as many as 40% of transgender people have attempted suicide at some point in their lives.

149. When adolescents are able to access puberty-delaying drugs and hormone therapy, which prevents them from going through endogenous puberty and allows them to go through puberty consistent with their gender identity, their distress recedes and their mental health improves. Both clinical experience and medical studies confirm that for many young people, this treatment is transformative, and they go from painful suffering to thriving.

150. If a healthcare provider is forced to immediately stop puberty-delaying drugs or hormone therapy due to the Health Care Ban, it will cause patients to immediately resume their endogenous puberty. This could result in extreme distress for patients who have been relying on medical treatments to prevent bodily changes that come with their endogenous puberty. For a girl who is transgender, this could mean that she would immediately start experiencing genital growth, body hair growth, deepening of her voice and development of a more pronounced Adam's apple. For a boy who is transgender, this could mean the initiation of a menstrual cycle and breast growth.

These changes can be extremely distressing for a young person who had been experiencing gender dysphoria that was relieved by medical treatments.

151. Additionally, the effects of undergoing one's endogenous puberty may not be reversible even with subsequent hormone therapy and surgery in adulthood, thus exacerbating lifelong gender dysphoria in patients who have this medically-indicated treatment withheld or cut off. Bodily changes from puberty as to stature, genital growth, voice, and breast development can be impossible or more difficult to counteract.

152. For patients who are currently undergoing treatment with gender-affirming hormones like estrogen or testosterone, abruptly withdrawing care can result in a range of serious physiological and mental health consequences. The body takes about six weeks to ramp up endogenous hormones, so if a healthcare provider is forced to abruptly stop treatment, a patient will be without sufficient circulating hormones at all. This can result in depressed mood, hot flashes, and headaches. For patients on spironolactone—a testosterone suppressant—abruptly terminating treatment can cause a patient's blood pressure to spike, increasing a young person's risk of heart attack or stroke. The abrupt withdrawal of treatment also results in predictable and negative mental health consequences including heightened anxiety and depression.

153. Prior to the Health Care Ban, none of the more than 200 youth who have been treated by the Gender Spectrum Clinic had attempted suicide. In the weeks since the Health Care Ban passed, six transgender adolescent patients have attempted suicide.

154. Gender-affirming medical care can be lifesaving treatment for minors experiencing gender dysphoria. The major medical and mental health associations support the provision of such care and recognize that the mental and physical health benefits to receiving this care outweigh the

risks. These groups include the American Academy of Pediatrics,[3] American Medical Association,[4] the Endocrine Society,[5] the Pediatric Endocrine Society,[6] the American Psychological Association,[7] the American Academy of Family Physicians,[8] the American College of Obstetricians and Gynecologists,[9] the National Association of Social Workers,[10] and WPATH.[11]

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3 *See* Policy Statement: Ensuring Comprehensive Care and Support for Transgender and Gender Diverse Children and Adolescents, *available at*: https://pediatrics.aappublications.org/content/142/4/e20182162.

4 *See* Resolution 122 (A–08), *available at*: http://www.tgender.net/taw/ama_resolutions.pdf.

5 *See* Transgender Health, an Endocrine Society position statement, *available at*: https://www.endocrine.org/advocacy/position-statements/transgender-health.

6 *See* The Pediatric Endocrine Society Opposes Bills that Harm Transgender youth, *available at*: https://pedsendo.org/news-announcements/the-pediatric-endocrine-society-opposes-bills-that-harm-transgender-youth-2/.

7 *See* Position Statement on Access to Care for Transgender and Gender Diverse Individuals (2018), *available at*: https://www.psychiatry.org/File%20Library/About-APA/Organization-Documents-Policies/Policies/Position-2018-Discrimination-Against-Transgender-and-Gender-Diverse-Individuals.pdf.

8 *See* Resolution No. 1004 (2012), *available at*: http://www.aafp.org/dam/AAFP/documents/about_us/special_constituencies/2012RCAR_Advocacy.pdf.

9 *See* Committee Opinion No. 823: Health Care for Transgender Individuals, *available at*: https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2021/03/health-care-for-transgender-and-gender-diverse-individuals.

10 See Transgender and Gender Identity Issues Policy Statement, *available at*: https://www.socialworkers.org/assets/secured/documents/da/da2008/reffered/Transgender.pdf.

11 *See* Position Statement on Medical Necessity of Treatment, Sex Reassignment, and Insurance Coverage in the USA (2016), *available at*: https://www.wpath.org/media/cms/Documents/Web%20Transfer/Policies/WPATH-Position-on-Medical-Necessity-12-21-2016.pdf.

VII. CAUSES OF ACTION

COUNT ONE

THE HEALTH CARE BAN VIOLATES THE FOURTEENTH AMENDMENT'S GUARANTEE OF EQUAL PROTECTION UNDER THE LAW (MINOR AND DOCTOR PLAINTIFFS)

155. The Equal Protection Clause of the Fourteenth Amendment protects individuals and groups from discrimination by the government.

156. The Health Care Ban harms transgender youth, including the Minor Plaintiffs and the patients cared for by the Doctor Plaintiffs, by denying them medically necessary care and insurance coverage for such care because of their sex and because of their transgender status.

157. Under the Equal Protection Clause of the Fourteenth Amendment, government discrimination based on sex, including discrimination based on stereotypes associated with a person's sex assigned at birth, is subject to heightened judicial scrutiny and is therefore presumptively unconstitutional.

158. Under the Equal Protection Clause, government discrimination based on transgender status is also subject to at least heightened scrutiny and is presumptively unconstitutional.

159. Transgender people have obvious, immutable, and distinguishing characteristics that define that class as a discrete group. These characteristics bear no relation to transgender people's abilities to perform in, or contribute to, society.

160. Transgender people have historically been subject to discrimination, and remain a very small minority of the American population that lacks political power.

161. The Health Care Ban bars the provision of various forms of medically necessary care, and insurance coverage for such care, only when the care is related to a patient's "gender

transition," which is defined as "the process in which a person goes from identifying with and living as a gender that corresponds to his or her biological sex to identifying with and living as a gender different from his or her biological sex." HB 1570 §3, 20-9-1501(5).

162. Treatment for gender dysphoria—a condition that only transgender people suffer from—is always aimed at affirming a gender identity that differs from a person's assigned sex at birth.

163. Under the Health Care Ban, the same medical treatments that are prohibited when provided to transgender adolescents to help align their bodies with their gender identity may be provided to non-transgender patients to help align their bodies with their gender identity, or for any other purpose.

164. Under the Health Care Ban, the Doctor Plaintiffs are prohibited from providing certain medically necessary care to their transgender adolescent patients that they are permitted to provide to their non-transgender adolescent patients, and that doctors who do not treat transgender adolescent patients are permitted to provide to all of their patients.

165. Under the terms of the Health Care Ban, whether or not a person can receive certain medical treatments turns on their assigned sex at birth.

166. Under the terms of the Health Care Ban, whether or not a person can receive certain medical treatments turns on whether they are transgender.

167. Under the terms of the Health Care Ban, whether or not a person can receive certain medical treatments turns on whether the care tends to reinforce or disrupt stereotypes associated with a person's sex assigned at birth.

168. The Health Care Ban does nothing to protect the health or well-being of minors. To the contrary, it gravely threatens the health and well-being of adolescents with gender dysphoria by denying them access to lifesaving care.

169. The Health Care Ban is not substantially related to any important government interest, nor is it rationally related to any legitimate government interest.

170. The Health Care Ban's targeted ban on medically necessary care provided for transgender youth is based on generalized fears, negative attitudes, stereotypes, and moral disapproval of transgender people that are not legitimate bases for unequal treatment under any level of scrutiny.

171. Defendants are liable for their violation of the right to equal protection under 42 U.S.C. § 1983, and the Minor Plaintiffs and Doctor Plaintiffs are entitled to a declaratory judgment that the Health Care Ban violates the Equal Protection Clause of the Fourteenth Amendment.

COUNT TWO

THE HEALTH CARE BAN VIOLATES THE RIGHT TO PARENTAL AUTONOMY GUARANTEED BY THE FOURTEENTH AMENDMENT'S DUE PROCESS CLAUSE (PARENT PLAINTIFFS)

172. The Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.

173. That fundamental right of parental autonomy includes the right of parents to seek and to follow medical advice to protect the health and well-being of their minor children.

174. Parents' fundamental right to seek and follow medical advice is at its apogee when the parents, their minor child, and that child's doctor all agree on an appropriate course of medical treatment.

175. The Health Care Ban's prohibition against well-accepted medical treatments for adolescents with gender dysphoria stands directly at odds with parents' fundamental right to make decisions concerning the care of their children. The Health Care Ban barges into Arkansas families' living rooms and strips Arkansas parents of the right to provide medical care for their children.

176. The Health Care Ban does nothing to protect the health or well-being of minors. To the contrary, it gravely threatens the health and well-being of adolescents with gender dysphoria by denying their parents the ability to obtain lifesaving care for them.

177. The Health Care Ban's prohibition against the provision of medically accepted treatments for adolescents with gender dysphoria is not narrowly tailored to serve a compelling government interest; nor is it rationally related to any legitimate government interest.

178. Defendants are liable for their violation of the right to due process under 42 U.S.C. § 1983, and the Parent Plaintiffs are entitled to a declaratory judgment that the Health Care Ban violates the Due Process Clause of the Fourteenth Amendment.

COUNT THREE

THE HEALTH CARE BAN VIOLATES THE FIRST AMENDMENT'S FREE SPEECH PROTECTIONS (ALL PLAINTIFFS)

179. The First Amendment's guarantee of the freedom of speech applies to the states through the Fourteenth Amendment.

180. The speech restricted by the Health Care Ban is fully protected by the Free Speech Clause of the First Amendment. The Doctor Plaintiffs have a First Amendment right to refer patients for medically accepted treatments for gender dysphoria, and would continue to do so when medically appropriate absent the Health Care Ban. The Minor Plaintiffs and Parent Plaintiffs have

a First Amendment right to hear their doctors' medical recommendations, including their referrals to other healthcare providers.

181. The Health Care Ban violates the First Amendment because it impermissibly restricts what physicians and other healthcare providers can say about medically accepted treatment for gender dysphoria. It prevents a "physician, or other healthcare professional" from "refer[ring] any individual under eighteen (18) years of age to any healthcare professional for gender transition procedures." HB 1570 § 3, 20-9-1502(b).

182. The Health Care Ban's referral prohibition prevents healthcare professionals from speaking about medical treatments only in certain instances, specifically with respect to referring transgender patients under 18 years of age for such procedures when they are for the purpose of "gender transition." Healthcare professionals are permitted to refer non-transgender patients for the same treatments when for purposes other than gender transition.

183. The Health Care Ban is subject to strict scrutiny because it is neither viewpoint nor content neutral.

184. The Health Care Ban discriminates on the basis of viewpoint by penalizing speech only when that speech is related to care that would affirm a gender identity when that gender identity is different from a person's assigned sex at birth. The law does not restrict speech related to care that would affirm a gender identity that matches a person's assigned sex at birth.

185. The Health Care Ban discriminates on the basis of content because it penalizes speech related to transgender patients, gender transition, and treatment for gender dysphoria, thus penalizing healthcare professionals based on the content of their speech.

186. The Health Care Ban's referral prohibition cannot satisfy strict scrutiny, or any other level of First Amendment scrutiny.

187. Defendants are liable for their violation of the right to freedom of speech under 42 U.S.C. § 1983, and the Doctor, Minor, and Parent Plaintiffs are entitled to a declaratory judgment that the Health Care Ban violates the Free Speech Clause of the First Amendment.

VIII. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully pray that this Court:

i. Enter a judgment declaring that the Health Care Ban violates the equal protection clause, the right to parental autonomy guaranteed by the due process clause, and the right to freedom of speech protected by the First Amendment, and is therefore unenforceable;

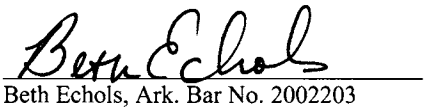
ii. Issue preliminary and permanent injunctions enjoining Defendants, their employees, agents, and successors in office from enforcing the Health Care Ban;

iii. Award Plaintiffs their costs and expenses, including reasonable attorneys' fees, pursuant to 42 U.S.C. § 1988; and

iv. Grant such other relief as the Court deems just and proper.

Dated: May 25, 2021

Respectfully submitted,



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**motions to appear pro hac vice pending*

review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. *See* section 307(b)(2).

List of Subjects in 40 CFR Part 81

Environmental protection, Air pollution control, National parks, Wilderness areas.

Dated: May 17, 2021.

John Blevins,

Acting Regional Administrator, Region 4.

For the reasons stated in the preamble, EPA amends 40 CFR part 81 as follows:

PART 81—DESIGNATION OF AREAS FOR AIR QUALITY PLANNING PURPOSES

■ 1. The authority citation for part 81 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

■ 2. In § 81.343, the table titled ''Tennessee–2010 Sulfur Dioxide NAAQS (Primary)'' is amended by revising the entry for ''Sumner County, TN'' to read as follows:

§ 81.343 Tennessee.

* * * * *

TENNESSEE—2010 SULFUR DIOXIDE NAAQS

[Primary]

Designated area	Designation	
	Date [1]	Type
* *	* * *	* *
Sumner County, TN [2] ..... Sumner County	June 24, 2021	Attainment/Unclassifiable.
* *	* * *	* *

[1] This date is April 9, 2018, unless otherwise noted.
[2] Excludes Indian country located in each area, if any, unless otherwise specified.

* * * * *

[FR Doc. 2021–10983 Filed 5–24–21; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 112

Definitions

CFR Correction

■ In Title 40 of the Code of Federal Regulations, Protection of Environment, Parts 100 to 135, revised as of July 1, 2020, on page 26, in section 112.2, reinstate the definition of ''worst case discharge,'' in alphabetical order, to read as follows:

* * * * *

Worst case discharge for an on-shore non-transportation related facility means the largest foreseeable discharge in adverse weather conditions as determined using the worksheets in Appendix D to this part.

[FR Doc. 2021–11115 Filed 5–24–21; 8:45 am]

BILLING CODE 0099–10–D

DEPARTMENT OF HEALTH AND HUMAN SERVICES

45 CFR Parts 86 and 92

Notification of Interpretation and Enforcement of Section 1557 of the Affordable Care Act and Title IX of the Education Amendments of 1972

AGENCY: Office of the Secretary, Department of Health and Human Services (HHS).

ACTION: Notification of interpretation and enforcement.

SUMMARY: This Notification is to inform the public that, consistent with the Supreme Court's decision in *Bostock* and Title IX, beginning May 10, 2021, the Department of Health and Human Services (HHS) will interpret and enforce section 1557 of the Affordable Care Act prohibition on discrimination on the basis of sex to include: Discrimination on the basis of sexual orientation; and discrimination on the basis of gender identity. This interpretation will guide the Office for Civil Rights (OCR) in processing complaints and conducting investigations, but does not itself determine the outcome in any particular case or set of facts.

DATES: This notification of interpretation became effective May 10, 2021.

FOR FURTHER INFORMATION CONTACT: Rachel Seeger at (202) 619–0403 or (800) 537–7697 (TDD).

SUPPLEMENTARY INFORMATION: HHS is informing the public that, consistent with the Supreme Court's decision in *Bostock* [1] and Title IX,[2] beginning May 10, 2021, the Department of Health and Human Services (HHS) will interpret and enforce Section 1557's [3] prohibition on discrimination on the basis of sex to include: (1) Discrimination on the basis of sexual orientation; and (2) discrimination on the basis of gender identity.

I. Background

The Office for Civil Rights (OCR) at the U.S. Department of Health and Human Services (the Department) is responsible for enforcing Section 1557 of the Affordable Care Act (Section 1557) and regulations issued under Section 1557, protecting the civil rights of individuals who access or seek to access covered health programs or activities. Section 1557 prohibits discrimination on the bases of race, color, national origin, sex, age, and

[1] *Bostock* v. *Clayton County,* 140 S. Ct. 1731 (2020). *https://www.supremecourt.gov/opinions/19pdf/17-1618_hfci.pdf.*

[2] Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq. https://www.govinfo.gov/content/pkg/CFR-2011-title45-vol1/pdf/CFR-2011-title45-vol1-part86.pdf.*

[3] Section 1557 of the Patient Protection and Affordable Care Act. *https://www.govinfo.gov/content/pkg/USCODE-2010-title42/pdf/USCODE-2010-title42-chap157-subchapVI-sec18116.pdf.*

disability in covered health programs or activities. 42 U.S.C. 18116(a).

On June 15, 2020, the U.S. Supreme Court held that Title VII of the Civil Rights Act of 1964 (Pub. L. 88–352) (Title VII)'s [4] prohibition on employment discrimination based on sex encompasses discrimination based on sexual orientation and gender identity. *Bostock* v. *Clayton County, GA,* 140 S. Ct. 1731 (2020). The *Bostock* majority concluded that the plain meaning of ''because of sex'' in Title VII necessarily included discrimination because of sexual orientation and gender identity. *Id.* at 1753–54.

Since *Bostock,* two federal circuits have concluded that the plain language of Title IX of the Education Amendments of 1972's (Title IX) prohibition on sex discrimination must be read similarly. See *Grimm* v. *Gloucester Cnty. Sch. Bd.,* 972 F.3d 586, 616 (4th Cir. 2020), *as amended* (Aug. 28, 2020),[5] *reh'g en banc denied,* 976 F.3d 399 (4th Cir. 2020), *petition for cert. filed,* No. 20–1163 (Feb. 24, 2021); *Adams* v. *Sch. Bd. of St. Johns Cnty.,* 968 F.3d 1286, 1305 (11th Cir. 2020), *petition for reh'g en banc pending,* No. 18–13592 (Aug. 28, 2020).[6] In addition, on March 26, 2021, the Civil Rights Division of the U.S. Department of Justice issued a memorandum to Federal Agency Civil Rights Directors and General Counsel [7] concluding that the Supreme Court's reasoning in *Bostock* applies to Title IX of the Education Amendments of 1972. As made clear by the Affordable Care Act, Section 1557 prohibits discrimination ''on the grounds prohibited under . . . Title IX.'' 42 U.S.C. 18116(a).

Consistent with the Supreme Court's decision in *Bostock* and Title IX, beginning today, OCR will interpret and enforce Section 1557's prohibition on discrimination on the basis of sex to include: (1) Discrimination on the basis of sexual orientation; and (2) discrimination on the basis of gender identity. This interpretation will guide OCR in processing complaints and conducting investigations, but does not itself determine the outcome in any particular case or set of facts.

In enforcing Section 1557, as stated above, OCR will comply with the Religious Freedom Restoration Act, 42 U.S.C. 2000bb *et seq.*,[8] and all other legal requirements. Additionally, OCR will comply with any applicable court orders that have been issued in litigation involving the Section 1557 regulations, including *Franciscan Alliance, Inc.* v. *Azar,* 414 F. Supp. 3d 928 (N.D. Tex. 2019); [9] *Whitman-Walker Clinic, Inc.* v. *U.S. Dep't of Health & Hum. Servs.,* 485 F. Supp. 3d 1 (D.D.C. 2020); [10] *Asapansa-Johnson Walker* v. *Azar,* No. 20–CV–2834, 2020 WL 6363970 (E.D.N.Y. Oct. 29, 2020); [11] and *Religious Sisters of Mercy* v. *Azar,* No. 3:16–CV–00386, 2021 WL 191009 (D.N.D. Jan. 19, 2021).[12]

OCR applies the enforcement mechanisms provided for and available under Title IX when enforcing Section 1557's prohibition on sex discrimination. 45 CFR 92.5(a). Title IX's enforcement procedures can be found at 45 CFR 86.71 (adopting the procedures at 45 CFR 80.6 through 80.11 and 45 CFR part 81).

If you believe that a covered entity violated your civil rights, you may file a complaint at *https://www/hhs.gov/ocr/complaints.*

Dated: May 13, 2021.

Xavier Becerra,

Secretary, Department of Health and Human Services.

[FR Doc. 2021–10477 Filed 5–24–21; 8:45 am]

BILLING CODE 4153–01–P

[4] Title VII of the Civil Rights Act of 1964 (Pub. L. 88–352) (41 CFR part 60–20). *https://www.govinfo.gov/content/pkg/FR-2015-01-30/pdf/2015-01422.pdf.*

[5] *Grimm* v. *Gloucester Cnty. Sch. Bd.,* 972 F.3d 586, 616 (4th Cir. 2020). *https://www.ca4.uscourts.gov/opinions/191952.P.pdf.*

[6] *Adams* v. *Sch. Bd. of St. Johns Cnty.,* 968 F.3d 1286, 1305 (11th Cir. 2020). *https://media.ca11.uscourts.gov/opinions/pub/files/201813592.pdf.*

[7] March 26, 2021, the Civil Rights Division of the U.S. Department of Justice memorandum to Federal Agency Civil Rights Directors and General Counsel re: Application *of Bostock* v. *Clayton County* to Title IX of the Education Amendments of 1972. *https://www.justice.gov/crt/page/file/1383026/download.*

[8] Religious Freedom Restoration Act, 42 U.S.C. 2000bb *et seq. https://www.govinfo.gov/content/pkg/USCODE-2010-title42/pdf/USCODE-2010-title42-chap21B-sec2000bb-1.pdf.*

[9] *Franciscan Alliance, Inc.* v. *Azar,* 414 F. Supp. 3d 928 (N.D. Tex. 2019). *https://www.govinfo.gov/content/pkg/USCOURTS-nyed-1_20-cv-02834/pdf/USCOURTS-nyed-1_20-cv-02834-0.pdf.*

[10] *Whitman-Walker Clinic, Inc.* v. *U.S. Dep't of Health & Hum. Servs.,* 485 F. Supp. 3d 1 (D.D.C. 2020). *http://www.ca5.uscourts.gov/opinions/unpub/20/20-10093.0.pdf.*

[11] *Asapansa-Johnson Walker* v. *Azar,* No. 20–CV–2834, 2020 WL 6363970 (E.D.N.Y. Oct. 29, 2020). *https://www.govinfo.gov/content/pkg/USCOURTS-nyed-1_20-cv-02834/pdf/USCOURTS-nyed-1_20-cv-02834-0.pdf.*

[12] *Religious Sisters of Mercy* v. *Azar,* No. 3:16–CV–00386, 2021 WL 191009 (D.N.D. Jan. 19, 2021). *https://www.hhs.gov/sites/default/files/document-124-memorandum-opinion-and-order.pdf.*

NATIONAL SCIENCE FOUNDATION

45 CFR Part 670

RIN 3145–AA59

Conservation of Antarctic Animals and Plants

AGENCY: National Science Foundation.

ACTION: Final rule.

SUMMARY: Pursuant to the Antarctic Conservation Act of 1978, as amended, the National Science Foundation (NSF) is amending its regulations to reflect changes to Annex II to the Protocol on Environmental Protection to the Antarctic Treaty (Protocol) agreed to by the Antarctic Treaty Consultative Parties. These changes reflect the outcomes of a legally binding Measure already adopted by the Parties at the Thirty-Second Antarctic Treaty Consultative Meeting (ATCM) in Baltimore, MD (2009).

DATES: Effective May 25, 2021.

FOR FURTHER INFORMATION CONTACT: Bijan Gilanshah, Assistant General Counsel, Office of the General Counsel, at 703–292–8060, National Science Foundation, 2415 Eisenhower Avenue, W 18200, Alexandria, VA 22314.

SUPPLEMENTARY INFORMATION: Measure 16 (2009) was adopted at the Thirty-Second ATCM at Baltimore, MD, on April 17, 2009 and amends Annex II to the Protocol. The revisions were composed primarily of minor clarifying, editorial and technical updates which would result in generally insignificant changes in current practice or legal requirements. For example, Antarctic terrestrial and freshwater invertebrates (generally microscopic or miniscule) are already protected by statute and regulation from ''harmful interference'' and related permitting requirements. These Annex II changes brought such protections in line with other Antarctic species for purposes of ''takes'' of such organisms. Other changes would also result in no significant change in U.S. practice, including changes to language in Annex II regarding criteria for taking zoo specimens, criteria for introduction of non-native species, and criteria for lethal takings of specially protected species, etc. Finally, one change removes an erroneous reference to ''marine algae'' in the current regulation and a new section is added specifically designating Antarctic native invertebrates.

The Antarctic Conservation Act of 1978, as amended (''ACA'') (16 U.S.C. 2401, *et seq.*) implements the Protocol. Section 2405 of title 16 of the ACA directs the Director of the National

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requirements, Security measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

Authority: 46 U.S.C. 70034, 70051; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add § 165.T11–057 to read as follows:

§ 165.T11–057 Safety Zone; Southwest Shelter Island Channel Entrance Closure, San Diego, CA.

(a) *Location.* The following area is a safety zone: The Northeast Shelter Island Channel Entrance and all navigable waters of San Diego Bay encompassed by by a three hundred yard circle centered on the coordinate 32°43′13.7″ N, longitude 117°13′7.8″ W.

(b) *Definitions.* As used in this section, *designated representative* means a Coast Guard Patrol Commander, including a Coast Guard coxswain, petty officer, or other officer operating a Coast Guard vessel and a Federal, State, and local officer designated by or assisting the Captain of the Port Sector San Diego (COTP) in the enforcement of the safety zone.

(c) *Regulations.* (1) Under the general safety zone regulations in subpart C of this part, you may not enter the safety zone described in paragraph (a) of this section unless authorized by the COTP or the COTP's designated representative.

(2) To seek permission to enter, contact the COTP or the COTP's representative by VHF Channel 16. Those in the safety zone must comply with all lawful orders or directions given to them by the COTP or the COTP's designated representative.

(d) *Enforcement period.* This section will be enforced from 8:30 a.m. until 10:30 a.m. on June 22, 2021.

Dated: June 16, 2021.

T.J. Barelli,

Captain, U.S. Coast Guard, Captain of the Port Sector San Diego.

[FR Doc. 2021–13136 Filed 6–21–21; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF EDUCATION

34 CFR Chapter I

Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of Bostock v. Clayton County

AGENCY: Office for Civil Rights, Department of Education.

ACTION: Interpretation.

SUMMARY: The U.S. Department of Education (Department) issues this interpretation to clarify the Department's enforcement authority over discrimination based on sexual orientation and discrimination based on gender identity under Title IX of the Education Amendments of 1972 in light of the Supreme Court's decision in *Bostock* v. *Clayton County.* This interpretation will guide the Department in processing complaints and conducting investigations, but it does not itself determine the outcome in any particular case or set of facts.

DATES: This interpretation is effective June 22, 2021.

FOR FURTHER INFORMATION CONTACT: Alejandro Reyes, Director, Program Legal Group, Office for Civil Rights. Telephone: (202) 245–7272. Email: *Alejandro.Reyes@ed.gov.*

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll-free, at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

Background: Title IX of the Education Amendments of 1972, 20 U.S.C. 1681–1688, prohibits discrimination on the basis of sex in any education program or activity offered by a recipient of Federal financial assistance. The Department's Office for Civil Rights (OCR) is responsible for the Department's enforcement of Title IX.

OCR has long recognized that Title IX protects all students, including students who are lesbian, gay, bisexual, and transgender, from harassment and other forms of sex discrimination. OCR also has long recognized that Title IX prohibits harassment and other forms of discrimination against all students for not conforming to stereotypical notions of masculinity and femininity. But OCR at times has stated that Title IX's prohibition on sex discrimination does not encompass discrimination based on sexual orientation and gender identity. To ensure clarity, the Department issues this Interpretation addressing Title IX's coverage of discrimination based on sexual orientation and gender identity in light of the Supreme Court decision discussed below.

In 2020, the Supreme Court in *Bostock* v. *Clayton County,* 140 S. Ct. 1731, 590 U.S. ____ (2020), concluded that discrimination based on sexual orientation and discrimination based on gender identity inherently involve treating individuals differently because of their sex. It reached this conclusion in the context of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e *et seq.,* which prohibits sex discrimination in employment. As noted below, courts rely on interpretations of Title VII to inform interpretations of Title IX.

The Department issues this Interpretation to make clear that the Department interprets Title IX's prohibition on sex discrimination to encompass discrimination based on sexual orientation and gender identity and to provide the reasons for this interpretation, as set out below.

Interpretation:

Title IX Prohibits Discrimination Based on Sexual Orientation and Gender Identity.

Consistent with the Supreme Court's ruling and analysis in *Bostock,* the Department interprets Title IX's prohibition on discrimination ''on the basis of sex'' to encompass discrimination on the basis of sexual orientation and gender identity. As was the case for the Court's Title VII analysis in *Bostock,* this interpretation flows from the statute's ''plain terms.'' *See Bostock,* 140 S. Ct. at 1743, 1748–50. Addressing discrimination based on sexual orientation and gender identity thus fits squarely within OCR's responsibility to enforce Title IX's prohibition on sex discrimination.

I. The Supreme Court's Ruling in Bostock

The Supreme Court in *Bostock* held that sex discrimination, as prohibited by Title VII, encompasses discrimination based on sexual orientation and gender identity. The Court explained that to discriminate on the basis of sexual orientation or gender identity ''requires an employer to intentionally treat individual employees differently because of their sex.'' 140 S. Ct. at 1742.[1] As the Court also explained,

[1] The Court recognized that the parties in *Bostock* each presented a definition of ''sex'' dating back to Title VII's enactment, with the employers' definition referring to ''reproductive biology'' and the employees' definition ''capturing more than anatomy[.]'' 140 S. Ct. at 1739. The Court did not adopt a definition, instead ''assum[ing]'' the definition of sex provided by the employers that the employees had accepted ''for argument's sake.'' *Id.* As the Court made clear, it did not need to adopt

Continued

when an employer discriminates against a person for being gay or transgender, the employer necessarily discriminates against that person for ''traits or actions it would not have questioned in members of a different sex.'' *Id.* at 1737.

The Court provided numerous examples to illustrate why ''it is impossible to discriminate against a person'' because of their sexual orientation or gender identity ''without discriminating against that individual based on sex.'' *Id.* at 1741. In one example, when addressing discrimination based on sexual orientation, the Court stated:

> Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer's mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague. Put differently, the employer intentionally singles out an employee to fire based in part on the employee's sex, and the affected employee's sex is a but-for cause of his discharge.

Id.

In another example, the Court showed why singling out a transgender employee for different treatment from a non-transgender (*i.e.,* cisgender) employee is discrimination based on sex:

> [T]ake 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.

II. Bostock's Application to Title IX

For the reasons set out below, the Department has determined that the interpretation of sex discrimination set out by the Supreme Court in *Bostock*—that discrimination ''because of . . . sex'' encompasses discrimination based on sexual orientation and gender identity—properly guides the Department's interpretation of discrimination ''on the basis of sex'' under Title IX and leads to the conclusion that Title IX prohibits discrimination based on sexual orientation and gender identity.

a. *There is textual similarity between Title VII and Title IX.*

Like Title VII, Title IX prohibits discrimination based on sex.

Title IX provides, with certain exceptions: ''No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .'' 20 U.S.C. 1681(a).

Title VII provides, with certain exceptions: ''It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex[ ] . . .; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex[ ] . . . .'' 42 U.S.C. 2000e–2(a). (Title VII also prohibits discrimination based on race, color, religion, and national origin.)

Both statutes prohibit sex discrimination, with Title IX using the phrase ''on the basis of sex'' and Title VII using the phrase ''because of'' sex. The Supreme Court has used these two phrases interchangeably. In *Bostock,* for example, the Court described Title VII in this way: ''[I]n Title VII, Congress outlawed discrimination in the workplace *on the basis of* race, color, religion, sex, or national origin.'' 140 S. Ct. at 1737 (emphasis added); *id.* at 1742 (''[I]ntentional discrimination *based on sex* violates Title VII . . . .'' (emphasis added)); *see also Jackson* v. *Birmingham Bd. of Educ.,* 544 U.S. 167, 174 (2005) (''[W]hen a funding recipient retaliates against a person *because* he complains of sex discrimination, this constitutes intentional 'discrimination' '*on the basis of* sex,' in violation of Title IX.'' (second emphasis added)); *Meritor Sav. Bank* v. *Vinson,* 477 U.S. 57, 64 (1986) (''[W]hen a supervisor sexually harasses a subordinate *because of* the subordinate's sex, that supervisor 'discriminate[s]' *on the basis of sex.*'' (emphasis added)).

In addition, both statutes specifically protect *individuals* against discrimination. In *Bostock,* 140 S. Ct. at 1740–41, the Court observed that Title VII ''tells us three times—including immediately after the words 'discriminate against'—that our focus should be on individuals.'' The Court made a similar observation about Title IX, which uses the term *person,* in *Cannon* v. *University of Chicago,* 441 U.S. 677, 704 (1979), stating that ''Congress wanted to avoid the use of federal resources to support discriminatory practices [and] to provide *individual* citizens effective protection against those practices.'' *Id.* (emphasis added).

Further, the text of both statutes contains no exception for sex discrimination that is associated with an individual's sexual orientation or gender identity. As the Court stated in *Bostock,* ''when Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule.'' 140 S. Ct. at 1747. The Court has made a similar point regarding Title IX: ''[I]f we are to give Title IX the scope that its origins dictate, we must accord it a sweep as broad as its language.'' *N. Haven Bd. of Ed.* v. *Bell,* 456 U.S. 512, 521 (1982) (citations and internal alterations omitted). It also bears noting that, in interpreting the scope of Title IX's prohibition on sex discrimination the Supreme Court and lower Federal courts have often relied on the Supreme Court's interpretations of Title VII. *See, e.g., Franklin* v. *Gwinnett Cnty. Pub. Sch.,* 503 U.S. 60, 75 (1992); *Jennings* v. *Univ. of N.C.,* 482 F.3d 686, 695 (4th Cir. 2007); *Frazier* v. *Fairhaven Sch. Comm.,* 276 F.3d 52, 66 (1st Cir. 2002); *Gossett* v. *Oklahoma ex rel. Bd. of Regents for Langston Univ.,* 245 F.3d 1172, 1176 (10th Cir. 2001).

Moreover, the Court in *Bostock* found that ''no ambiguity exists about how Title VII's terms apply to the facts before [it]''—*i.e.,* allegations of discrimination in employment against several individuals based on sexual orientation or gender identity. 140 S. Ct. at 1749. After reviewing the text of Title IX and Federal courts' interpretation of Title IX, the Department has concluded that the same clarity exists for Title IX. That is, Title IX prohibits recipients of Federal financial assistance from discriminating based on sexual orientation and gender identity in their education programs and activities. The Department also has concluded for the reasons described in this document that, to the extent other interpretations may exist, this is the best interpretation of the statute.

In short, the Department finds no persuasive or well-founded basis for declining to apply *Bostock*'s reasoning—discrimination ''because of

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either definition to conclude that discrimination ''because of . . . sex'' encompasses discrimination based on sexual orientation and gender identity. *Id.* (''[N]othing in our approach to these cases turns on the outcome of the parties' debate . . . .''). Similar to the Court's interpretation of Title VII, the Department's interpretation of the scope of discrimination ''on the basis of sex'' under Title IX does not require the Department to take a position on the definition of sex, nor do we do so here.

. . . sex'' under Title VII encompasses discrimination based on sexual orientation and gender identity—to Title IX's parallel prohibition on sex discrimination in federally funded education programs and activities.

b. Additional case law recognizes that the reasoning of Bostock *applies to Title IX and that differential treatment of students based on gender identity or sexual orientation may cause harm.*

Numerous Federal courts have relied on *Bostock* to recognize that Title IX's prohibition on sex discrimination encompasses discrimination based on sexual orientation and gender identity. *See, e.g., Grimm* v. *Gloucester Cnty. Sch. Bd.,* 972 F.3d 586, 616 (4th Cir. 2020), *as amended* (Aug. 28, 2020), *reh'g en banc denied,* 976 F.3d 399 (4th Cir. 2020), *petition for cert filed,* No. 20–1163 (Feb. 24, 2021); *Adams* v. *Sch. Bd. of St. Johns Cnty.,* 968 F.3d 1286, 1305 (11th Cir. 2020), *petition for reh'g en banc pending,* No. 18–13592 (Aug. 28, 2020); *Koenke* v. *Saint Joseph's Univ.,* No. CV 19–4731, 2021 WL 75778, at *2 (E.D. Pa. Jan. 8, 2021); *Doe* v. *Univ. of Scranton,* No. 3:19–CV–01486, 2020 WL 5993766, at *11 n.61 (M.D. Pa. Oct. 9, 2020).

The Department also concludes that the interpretation set forth in this document is most consistent with the purpose of Title IX, which is to ensure equal opportunity and to protect individuals from the harms of sex discrimination. As numerous courts have recognized, a school's policy or actions that treat gay, lesbian, or transgender students differently from other students may cause harm. *See, e.g., Grimm,* 972 F.3d at 617–18 (describing injuries to a transgender boy's physical and emotional health as a result of denial of equal treatment); *Adams,* 968 F.3d at 1306–07 (describing ''emotional damage, stigmatization and shame'' experienced by a transgender boy as a result of being subjected to differential treatment); *Whitaker ex rel. Whitaker* v. *Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.,* 858 F.3d 1034, 1044–46, 1049–50 (7th Cir. 2017) (describing physical and emotional harm to a transgender boy who was denied equal treatment); *Dodds* v. *U.S. Dep't of Educ.,* 845 F.3d 217, 221–22 (6th Cir. 2016) (describing ''substantial and immediate adverse effects on the daily life and well-being of an eleven-year-old'' transgender girl from denial of equal treatment); *Doe,* 2020 WL 5993766, at **1–3 (describing harassment and physical targeting of a gay college student that interfered with the student's educational opportunity); *Harrington ex rel. Harrington* v. *City of Attleboro,* No. 15–CV–12769–DJC, 2018 WL 475000, at **6–7 (D. Mass. Jan. 17, 2018) (describing '' 'wide-spread peer harassment' and physical assault [of a lesbian high school student] because of stereotyping animus focused on [the student's] sex, appearance, and perceived or actual sexual orientation'').

c. The U.S. Department of Justice's Civil Rights Division has concluded that Bostock*'s analysis applies to Title IX.*

The U.S. Department of Justice's Civil Rights Division issued a Memorandum from Principal Deputy Assistant Attorney General for Civil Rights Pamela S. Karlan to Federal Agency Civil Rights Directors and General Counsels regarding Application of *Bostock* v. *Clayton County* to Title IX of the Education Amendments of 1972 (Mar. 26, 2021), *https://www.justice.gov/crt/page/file/1383026/download.*

The memorandum stated that, after careful consideration, including a review of case law, ''the Division has determined that the best reading of Title IX's prohibition on discrimination 'on the basis of sex' is that it includes discrimination on the basis of gender identity and sexual orientation.'' Indeed, ''the Division ultimately found nothing persuasive in the statutory text, legislative history, or caselaw to justify a departure from *Bostock's* textual analysis and the Supreme Court's longstanding directive to interpret Title IX's text broadly.''

III. Implementing This Interpretation

Consistent with the analysis above, OCR will fully enforce Title IX to prohibit discrimination based on sexual orientation and gender identity in education programs and activities that receive Federal financial assistance from the Department. As with all other Title IX complaints that OCR receives, any complaint alleging discrimination based on sexual orientation or gender identity also must meet jurisdictional requirements as defined in Title IX and the Department's Title IX regulations, other applicable legal requirements, as well as the standards set forth in OCR's Case Processing Manual, *www.ed.gov/ocr/docs/ocrcpm.pdf.*[2]

Where a complaint meets applicable requirements and standards as just described, OCR will open an investigation of allegations that an individual has been discriminated against because of their sexual orientation or gender identity in education programs or activities. This includes allegations of individuals being harassed, disciplined in a discriminatory manner, excluded from, denied equal access to, or subjected to sex stereotyping in academic or extracurricular opportunities and other education programs or activities, denied the benefits of such programs or activities, or otherwise treated differently because of their sexual orientation or gender identity. OCR carefully reviews allegations from anyone who files a complaint, including students who identify as male, female or nonbinary; transgender or cisgender; intersex; lesbian, gay, bisexual, queer, heterosexual, or in other ways.

While this interpretation will guide the Department in processing complaints and conducting investigations, it does not determine the outcome in any particular case or set of facts. Where OCR's investigation reveals that one or more individuals has been discriminated against because of their sexual orientation or gender identity, the resolution of such a complaint will address the specific compliance concerns or violations identified in the course of the investigation.

This interpretation supersedes and replaces any prior inconsistent statements made by the Department regarding the scope of Title IX's jurisdiction over discrimination based on sexual orientation and gender identity. This interpretation does not reinstate any previously rescinded guidance documents.

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You may also access documents of the Department published in the **Federal Register** by using the article search feature at *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit

[2] Educational institutions that are controlled by a religious organization are exempt from Title IX to the extent that compliance would not be consistent with the organization's religious tenets. *See* 20 U.S.C. 1681(a)(3).

your search to documents published by the Department.

Suzanne B. Goldberg,

Acting Assistant Secretary for Civil Rights.

[FR Doc. 2021–13058 Filed 6–21–21; 8:45 am]

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DEPARTMENT OF COMMERCE

Patent and Trademark Office

37 CFR Part 11

[Docket No.: PTO–C–2013–0042]

RIN 0651–AC91

Changes to Representation of Others Before the United States Patent and Trademark Office; Correction

AGENCY: United States Patent and Trademark Office, Commerce.

ACTION: Final rule; correction.

SUMMARY: The United States Patent and Trademark Office (USPTO or Office) is correcting an earlier final rule, ''Changes to the Representation of Others Before the United States Patent and Trademark Office,'' that appeared in the **Federal Register** on May 26, 2021 and which takes effect on June 25, 2021. This document corrects a minor error. No other changes are being made to the underlying final rule.

DATES: This rule is effective June 25, 2021.

FOR FURTHER INFORMATION CONTACT: William R. Covey, Deputy General Counsel for Enrollment and Discipline and Director of the Office of Enrollment and Discipline, at 571–272–4097.

SUPPLEMENTARY INFORMATION: This document corrects an error pertaining to revisions to definitions made in the final rule. Specifically, the Office intended to change the listed definition of ''Roster'' to ''Roster or register.'' The Code of Federal Regulations editors informed the Office that the original **Federal Register** instruction to ''revise'' the definition was incorrect. Rather, the correct instruction should be to ''remove and add'' the intended definition. This document corrects that instruction.

In FR Doc. 2021–10528, appearing on page 28442 in the **Federal Register** of Wednesday, May 26, 2021, the following correction is made:

§ 11.1 [Corrected]

■ On page 28452, in the first column, in part 11, correct amendatory instruction 4 to read as follows:

■ 4. Amend § 11.1 by:

■ a. Revising the definitions of ''Conviction or convicted'' and ''Practitioner;''

■ b. Removing the entry for ''Roster'' and adding, in alphabetical order, an entry for ''Roster or register;'' and

■ c. Revising the definitions for ''Serious crime'' and ''State.''

The revisions and addition read as follows:

Andrew Hirshfeld,

Commissioner for Patents, Performing the Functions and Duties of the Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

[FR Doc. 2021–13145 Filed 6–21–21; 8:45 am]

BILLING CODE 3510–16–P

LIBRARY OF CONGRESS

Copyright Office

37 CFR Parts 201, 202, 203, 210, and 370

[Docket No. 2021–3]

Technical Amendments Regarding the Copyright Office's Organizational Structure

AGENCY: U.S. Copyright Office, Library of Congress.

ACTION: Final rule.

SUMMARY: This final rule makes technical changes to the U.S. Copyright Office's regulations pertaining to its organizational structure in light of the agency's recent reorganization. It reflects recent structural changes, updates certain of the Office's division names, and adds a new section for the Copyright Claims Board established by the Copyright Alternative in Small-Claims Enforcement Act of 2020.

DATES: Effective July 22, 2021.

FOR FURTHER INFORMATION CONTACT: Regan A. Smith, General Counsel and Associate Register of Copyrights, by email at *regans@copyright.gov,* Kevin R. Amer, Deputy General Counsel, by email at *kamer@copyright.gov,* or Joanna R. Blatchly, Attorney-Advisor, by email at *jblatchly@copyright.gov* or by telephone at (202) 707–8350.

SUPPLEMENTARY INFORMATION: The Copyright Office is publishing this final rule pursuant to its May 2021 reorganization. This effort is intended to accomplish two goals: (1) Rename divisions and realign certain reporting structures to improve the Office's effectiveness and efficiency; and (2) reflect the agency structure for the new copyright small-claims tribunal established by the Copyright Alternative in Small-Claims Enforcement (''CASE'') Act of 2020.[1] The Register has determined that these changes will optimize business processes and aid in the administration of her functions and duties as Director of the Copyright Office.[2]

Operational reorganization. The reorganization reduces the number of direct reports to the Register of Copyrights and is expected to create administrative and cost efficiencies by consolidating operational organizations currently headed by senior-level positions. The reorganization brings the Office of the Chief Financial Officer (renamed the Financial Management Division) and the Copyright Modernization Office (renamed the Product Management Division) under the supervision of the Chief of Operations (renamed the Assistant Register and Director of Operations (''ARDO'')). Realigning these divisions under the ARDO consolidates operational support elements under one senior manager, in line with operational structures across the Library of Congress. This consolidation is expected to facilitate Office coordination with centralized Library services, and with similar functional elements of other service units. It is also expected to allow the Office to increase the effectiveness of communications across areas of operational responsibility, in alignment with strategic objectives.

The reorganization renames certain organizational elements and senior positions for purposes of greater clarity and consistency. The Office of Public Records and Repositories is renamed the Office of Copyright Records. As noted above, the Office of the Chief of Operations is renamed the Office of the Director of Operations. The following subordinate offices are also renamed: The Copyright Acquisitions Division (''CAD'') is renamed Acquisitions and Deposits (''A&D''); the Administrative Services Office (''ASO'') is renamed the Administrative Services Division (''ASD''); and the Receipt Analysis and Control Division (''RAC'') is renamed the Materials Control and Analysis Division (''MCA''). The Copyright Modernization Office (''CMO'') is renamed the Product Management Division (''PMD'').

Further, the Office of the Chief Financial Officer (''CFO'') is renamed the Financial Management Division (''FMD'') and work units under this division are also renamed, including by

[1] Public Law 116–260, sec. 212, 134 Stat. 1182, 2176 (2020).

[2] *See* 17 U.S.C. 701(a).

303 Creative LLC v. Elenis

United States Court of Appeals for the Tenth Circuit

July 26, 2021, Filed

No. 19-1413

Reporter

6 F.4th 1160 *; 2021 U.S. App. LEXIS 22449 **

303 CREATIVE LLC, a limited liability company; LORIE SMITH, Plaintiffs - Appellants, v. AUBREY ELENIS; CHARLES GARCIA; AJAY MENON; MIGUEL RENE ELIAS; RICHARD LEWIS; KENDRA ANDERSON; SERGIO CORDOVA; JESSICA POCOCK; PHIL WEISER, Defendants - Appellees.FOUNDATION FOR MORAL LAW; CATO INSTITUTE; CENTER FOR RELIGIOUS EXPRESSION; CATHOLICVOTE.ORG EDUCATION FUND; LAW AND ECONOMIC SCHOLARS; TYNDALE HOUSE PUBLISHERS; CROSSROADS PRODUCTIONS, INC., d/b/a Catholic Creatives; WHITAKER PORTRAIT DESIGN, INC., d/b/a Christian Professional Photographers; THE BRINER INSTITUTE, INC.; STATE OF ARIZONA; STATE OF ALABAMA; STATE OF ALASKA; STATE OF ARKANSAS; STATE OF KENTUCKY; STATE OF LOUISIANA; STATE OF MISSOURI; STATE OF MONTANA; STATE OF NEBRASKA; STATE OF OKLAHOMA; STATE OF SOUTH CAROLINA; STATE OF TENNESSEE; STATE OF TEXAS; STATE OF WEST VIRGINIA; ROBERT P. GEORGE, Professor; AMERICAN CIVIL LIBERTIES UNION OF COLORADO; AMERICAN CIVIL LIBERTIES UNION FOUNDATION; AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE; ANTI-DEFAMATION LEAGUE; BEND THE ARC: A JEWISH PARTNERSHIP FOR JUSTICE; CENTRAL CONFERENCE OF AMERICAN RABBIS; GLOBAL JUSTICE INSTITUTE, METROPOLITAN COMMUNITY CHURCHES; HADASSAH, THE WOMEN'S ZIONIST ORGANIZATION OF AMERICA, INC.; HINDU AMERICAN FOUNDATION; INTERFAITH ALLIANCE FOUNDATION; INTERFAITH ALLIANCE OF COLORADO; MEN OF REFORM JUDAISM; PEOPLE FOR THE AMERICAN WAY FOUNDATION; RECONSTRUCTIONIST RABBINICAL ASSOCIATION; SIKH COALITION; WOMEN OF REFORM JUDAISM; UNION FOR REFORM JUDAISM; STATE OF MASSACHUSETTS; STATE OF CALIFORNIA; STATE OF CONNECTICUT; STATE OF DELAWARE; DISTRICT OF COLUMBIA; STATE OF HAWAII; STATE OF ILLINOIS; STATE OF MAINE; STATE OF MARYLAND; STATE OF MINNESOTA; STATE OF NEVADA; STATE OF

NEW JERSEY; STATE OF NEW MEXICO; STATE OF NEW YORK; STATE OF NORTH CAROLINA; STATE OF OREGON; STATE OF PENNSYLVANIA; STATE OF RHODE ISLAND; STATE OF VERMONT; STATE OF VIRGINIA; STATE OF WASHINGTON; LAW PROFESSORS OF THE STATE OF COLORADO; LAW PROFESSORS FROM THE STATE OF KANSAS; LAW PROFESSORS FROM THE STATE OF NEW MEXICO; LAW PROFESSORS FROM THE STATE OF OKLAHOMA; LAW PROFESSORS FROM THE STATE OF UTAH; LAW PROFESSORS FROM THE STATE OF WYOMING; LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW; SOUTHERN POVERTY LAW CENTER; ASIAN AMERICAN LEGAL DEFENSE & EDUCATION FUND; LATINOJUSTICE PRLDEF; LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS; NATIONAL ACTION NETWORK; THE CENTER FOR CONSTITUTIONAL RIGHTS; CENTER FOR CONSITUTIONAL RIGHTS; FLOYD ABRAMS; ERWIN CHEMERINSKY; WALTER DELLINGER; KERMIT ROOSEVELT; AMANDA SHANOR; REBECCA TUSHNET; MAX H. BAZERMAN; MONICA C. BELL; ISSA KOHLER-HAUSMANN; DAVID LAIBSON; ADAM J. LEVITIN; MARY-HUNTER MCDONNELL; NEERU PAHARIA; NINA STROHMINGER; TOM R. TYLER; LAUREN E. WILLIS; LAMBDA LEGAL DEFENSE & EDUCATION FUND, INC., Amici Curiae.

Subsequent History: US Supreme Court certiorari granted by, in part *303 Creative LLC v. Elenis, 2022 U.S. LEXIS 840 (U.S., Feb. 22, 2022)*

Prior History: **[**1]** Appeal from the United States District Court for the District of Colorado. (D.C. No. 1:16-CV-02372-MSK-CBS).

303 Creative LLC v. Elenis, 405 F. Supp. 3d 907, 2019 U.S. Dist. LEXIS 165391, 2019 WL 4694159 (D. Colo., Sept. 26, 2019)

Case Summary

Overview

HOLDINGS: [1]-A website designer who intended to refuse to create websites celebrating same-sex marriages had standing to bring a pre-enforcement challenge to the Colorado Anti-Discrimination Act (CADA) because the designer had a credible fear of prosecution; [2]-The designer's First Amendment free speech challenge to CADA failed. CADA's accommodation

clause, Colo. Rev. Stat. § 24-34-601(2)(a), was narrowly tailored to Colorado's interest in ensuring equal access to publicly available goods and services, and the designer's proposed statement of intent to deny service based on sexual orientation was not protected by the First Amendment; [3]-The designer's Free Exercise Clause challenge failed because CADA was a neutral law that was generally applicable. Colorado's recognition of message-based refusals did not give rise to a system of individualized exemptions.

Outcome

Judgment affirmed.

Counsel: Kristin K. Waggoner (Jonathan A. Scruggs and Katherine L. Anderson, Alliance Defending Freedom, Scottsdale, Arizona; David A. Cortman and John J. Bursch, Alliance Defending Freedom, Washington, DC, with her on the briefs), Alliance Defending Freedom, Scottsdale, Arizona, appearing for Plaintiffs-Appellants.

Eric R. Olson, Solicitor General (Phillip J. Weiser, Colorado Attorney General; Billy Lee Seiber, First Assistant Attorney General; Jack D. Patten, III, Senior Assistant Attorney General; Vincent E. Morscher and Skippere S. Spear, with him on the brief), Colorado Department of Law, Denver, Colorado, appearing for Defendants-Appellees.

Judges: Before TYMKOVICH, Chief Judge, BRISCOE, and MURPHY, Circuit Judges.

Opinion by: BRISCOE

Opinion

[*1168] BRISCOE, Circuit Judge.

I. Introduction

Appellants Lorie Smith and her website design company 303 Creative, LLC (collectively, "Appellants") appeal the district court's grant of summary judgment in favor of Appellees Aubrey Elenis, Director of the Colorado Civil Rights Division (the "Director"), Anthony Aragon, Ulysses J. Chaney, Miguel Rene Elias, Carol Fabrizio, Heidi Hess, **[**2]** Rita Lewis, and Jessica Pocock, members of the Colorado Civil Rights Commission (the "Commission"), and Phil Weiser,

Colorado Attorney General (collectively, "Colorado"). Appellants challenge Colorado's Anti-Discrimination Act ("CADA") on free speech, free exercise, and vagueness and overbreadth grounds.

As to our jurisdiction, we hold that Appellants have standing to challenge CADA. As to the merits, we hold that CADA satisfies strict scrutiny, and thus permissibly compels Appellants' speech. We also hold that CADA is a neutral law of general applicability, and that it is not unconstitutionally vague or overbroad. Accordingly, exercising jurisdiction under *28 U.S.C. § 1291*, we affirm the district court's grant of summary judgment in favor of Colorado.

II. Background

A. Factual Background

1. CADA

CADA restricts a public accommodation's ability to refuse to provide services based on a customer's identity. Specifically, CADA defines a public accommodation as "any place of business engaged in any sales to the public and any place offering services, facilities, privileges, advantages, or accommodations to the public." *Colo. Rev. Stat. § 24-34-601(1)*. Exempted from CADA's definition of public accommodations are places that are "principally **[**3]** used for religious purposes." *Id.*

Under CADA's "*Accommodation Clause*," a public accommodation may not:

> directly or indirectly . . . refuse . . . to an individual or a group, because of . . . sexual orientation . . . the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation . . . .

Colo. Rev. Stat. § 24-34-601(2)(a).

Under CADA's "*Communication Clause*," a public accommodation also may not:

> directly or indirectly . . . publish . . . any . . . communication . . . that indicates that the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or

> accommodations of a place of public accommodation will be refused . . . or that an individual's patronage . . . is unwelcome, **[*1169]** objectionable, unacceptable, or undesirable because of . . . sexual orientation . . . .

Id.

CADA exempts certain sex-based restrictions from the *Accommodation Clause and Communication Clause*. Specifically, under CADA, "it is not a discriminatory practice for a person to restrict admission to a place of public accommodation to individuals of one sex if such restriction has a bona fide relationship to the goods, services, facilities, privileges, advantages, or accommodations of such place of public accommodation." *Colo. Rev. Stat. § 24-34-601(3)*.

CADA provides several **[**4]** different means of enforcement. A person alleging a violation of CADA can bring a civil action in state court. The state court may levy a fine of "not less than fifty dollars nor more than five hundred dollars for each violation." *Colo. Rev. Stat. § 24-34-602(1)(a)*. A complainant can also file charges alleging discrimination with the Colorado Civil Rights Division. The Commission, individual Commissioners, or the Colorado Attorney General may also independently file charges alleging discrimination "when they determine that the alleged discriminatory or unfair practice imposes a significant societal or community impact." Aplts.' App. at 2-315, ¶ 7. The Director of the Civil Rights Division then investigates the allegations and determines whether the charge is supported by probable cause. If probable cause is found, the Director provides the parties with written notice and commences a compulsory mediation. If mediation fails, a hearing may be held before the Colorado Civil Rights Commission, a single Commissioner, or an administrative law judge. If a violation is found after a hearing, the Commission may issue a cease and desist order against the offending public accommodation.

In a different case, Colorado enforced CADA **[**5]** against a bakery that, because of its owner's religious beliefs, refused to provide custom cakes that celebrated same-sex marriages. That case eventually made its way up to the United States Supreme Court, where the Court ruled in favor of the baker. *See Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n, 138 S. Ct. 1719, 201 L. Ed. 2d 35 (2018)*. There, the Court held that Colorado violated the *Free Exercise Clause* by enforcing CADA in a manner "inconsistent with the State's obligation of religious neutrality." *Id. at 1723*. The Court relied, in part, on statements made by a Commissioner who disparaged the baker's religious beliefs when the Commission adjudicated that case. *Id. at 1729*.

The Court also noted that, on at least three other occasions, Colorado declined to enforce CADA against other bakers who refused to create custom cakes that disparaged same-sex marriages. *Id. at 1730*.

At a public meeting held a few days after the Court's ruling in *Masterpiece Cakeshop*, a single Commissioner opined that, despite the Court's ruling, the Commissioner who was referenced in *Masterpiece Cakeshop* did not say "anything wrong." Aplts.' App. at 3-609. Others at that hearing, however, including Director Elenis, voiced agreement with the Court's ruling and their commitment to follow that ruling. *See, e.g.*, *id.* at 3-606 (Director Elenis: "So **[**6]** in these cases going forward, Commissioners and ALJs and others, including the Staff at the Division, have to be careful how these issues are framed so that it's clear that full consideration was given to sincerely—what is termed as sincerely-held religious objections.").

2. Appellants

303 Creative is a for-profit, graphic and website design company; Ms. Smith is its **[*1170]** founder and sole member-owner. Appellants are willing to work with all people regardless of sexual orientation. Appellants are also generally willing to create graphics or websites for lesbian, gay, bisexual, or transgender ("LGBT") customers. Ms. Smith sincerely believes, however, that same-sex marriage conflicts with God's will. Appellants do not yet offer wedding-related services but intend to do so in the future. Consistent with Ms. Smith's religious beliefs, Appellants intend to offer wedding websites that celebrate opposite-sex marriages but intend to refuse to create similar websites that celebrate same-sex marriages. Appellants' objection is based on the message of the specific website; Appellants will not create a website celebrating same-sex marriage regardless of whether the customer is the same-sex couple themselves, **[**7]** a heterosexual friend of the couple, or even a disinterested wedding planner requesting a mock-up. As part of the expansion, Appellants also intend to publish a statement explaining Ms. Smith's religious objections (the "Proposed Statement"):

> These same religious convictions that motivate me also prevent me from creating websites promoting and celebrating ideas or messages that violate my beliefs. So I will not be able to create websites for same-sex marriages or any other marriage that is not between one man and one woman. Doing that would compromise my Christian witness and tell a story about

> marriage that contradicts God's true story of marriage — the very story He is calling me to promote.

Aplts.' App. at 2-326 (¶ 91).

Appellants have not yet offered wedding-related services, or published the Proposed Statement, because Appellants are unwilling to violate CADA.

B. Procedural Background

Appellants brought a pre-enforcement challenge to CADA in the United States District Court for the District of Colorado. Appellants alleged a variety of constitutional violations, including that CADA's *Accommodation Clause and Communication Clause* violated the *Free Speech and Free Exercise Clauses of the First Amendment*, and that CADA's Communication Clause violated the *Due Process Clause of the Fourteenth Amendment* because it was facially overbroad **[**8]** and vague. Colorado moved to dismiss. At a motions hearing, both parties agreed there were no disputed material facts and that the matter should be resolved through summary judgment.

After summary judgment briefing had concluded, the district court found that Appellants only established standing to challenge the *Communication Clause*, and not the *Accommodation Clause*. The district court initially declined to rule on the merits of Appellants' *Communication Clause* challenges, however, because *Masterpiece Cakeshop* was then pending before the United States Supreme Court. After the Supreme Court's ruling in *Masterpiece Cakeshop*, the district court denied Appellants' summary judgment motion on its *Communication Clause* challenges. In doing so, the district court "assume[d] the constitutionality of the *Accommodation Clause* . . . ." *Id.* at 3-568. The district court also ordered Appellants to show cause why final judgment should not be granted in favor of Colorado. *Id.* at 3-588. After additional briefing, the district court granted summary judgment in favor of Colorado.

Appellants timely appealed the district court's final judgment. They assert that the district court erred (1) in determining that Appellants lack standing to challenge the *Accommodation Clause*; (2) in assuming **[*1171]** the *Accommodation Clause* does not compel speech and in ruling that the *Communication Clause* does not **[**9]** compel speech; (3) in rejecting Appellants' Free Exercise challenges to both Clauses; and (4) in rejecting Appellants' overbreadth and vagueness challenges to the *Communication Clause*.

III. Analysis

A. Standard of Review

Summary judgment is warranted when the movant is entitled to "judgment as a matter of law" in the absence of a "genuine dispute as to any material fact." *Fed. R. Civ. P. 56(a)*. We review the entry of summary judgment de novo, "applying the same standard for summary judgment that applied in the district court." *Sandoval v. Unum Life Ins. Co. of Am., 952 F.3d 1233, 1236 (10th Cir. 2020)*; *see also Lincoln v. BNSF Ry. Co., 900 F.3d 1166, 1180 (10th Cir. 2018)* (stating that when reviewing summary judgment "we need not defer to factual findings rendered by the district court") (citation and internal quotation marks omitted). We view the evidence and draw all reasonable inferences in favor of the non-movant. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. Where the activity in question is arguably protected by the *First Amendment*, the court has "an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." *Citizens for Peace in Space v. City of Colo. Springs, 477 F.3d 1212, 1219 (10th Cir. 2007)* (quoting *Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 499, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984)*).

B. Standing

"Standing is a jurisdictional issue that may be raised by the court at any time." *Buchwald v. Univ. of N.M. Sch. of Med., 159 F.3d 487, 492 (10th Cir. 1998)*. Whether a party has standing is a question of law reviewed de novo. *Comm. to Save the Rio Hondo v. Lucero, 102 F.3d 445, 447 (10th Cir. 1996)*.

"*Article III of the Constitution* limits **[**10]** the jurisdiction of federal courts to 'Cases' and 'Controversies.'" *Susan B. Anthony List v. Driehaus, 573 U.S. 149, 157, 134 S. Ct. 2334, 189 L. Ed. 2d 246 (2014)* (quoting *U.S. Const. art. III, § 2*). The doctrine of standing serves as "[o]ne of those landmarks" in identifying "the 'Cases' and 'Controversies' that are of the justiciable sort referred to in Article III." *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 119*

L. Ed. 2d 351 (1992). Under Article III, standing requires at least three elements: injury in fact, causation, and redressability. Id. at 560-61.

1. Injury in Fact

An injury in fact is "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." Initiative and Referendum Inst. v. Walker, 450 F.3d 1082, 1087 (10th Cir. 2006) (en banc) (quoting Lujan, 504 U.S. at 560). In the context of a pre-enforcement challenge, to show an injury in fact, a party must allege "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." SBA List, 573 U.S. at 159 (quoting Babbitt v. Farm Workers, 442 U.S. 289, 298, 99 S. Ct. 2301, 60 L. Ed. 2d 895 (1979)); *see also* Colo. Outfitters Ass'n v. Hickenlooper, 823 F.3d 537, 545 (10th Cir. 2016). Article III does not require the plaintiff to risk "an actual arrest, **[*1172]** prosecution, or other enforcement action." SBA List, 573 U.S. at 158 (citing Steffel v. Thompson, 415 U.S. 452, 459, 94 S. Ct. 1209, 39 L. Ed. 2d 505 (1974)).

Reviewing the issue de novo, we conclude that Appellants have shown an injury in fact. Appellants have sufficiently demonstrated both an intent to provide graphic and web design services to the public in a manner that exposes them **[**11]** to CADA liability, and a credible threat that Colorado will prosecute them under that statute.

Although not challenged by Colorado, *see* Colorado's Br. at 26, we are satisfied that Appellants have shown an "intention to engage in a course of conduct arguably affected with a constitutional interest." SBA List, 573 U.S. at 159. Although Appellants have not yet offered wedding website services, Ms. Smith has been employed as a graphic and web designer in the past. Appellants have also provided clear examples of the types of websites they intend to provide, as well as the intended changes to 303 Creative's webpage. And Ms. Smith holds a sincere religious belief that prevents her from creating websites that celebrate same-sex marriages.

We are also satisfied that Appellants' intended "course of conduct"[1] is at least "arguably . . . proscribed by [the] statute," i.e., CADA. *SBA List, 573 U.S. at 162* (alterations in original). In briefing the merits of its claims, Appellants, somewhat contradictorily, assert that "Colorado concedes that [Appellants] serve[] regardless of status, do[] not discriminate against LGBT persons, and make[] only message-based referrals." Aplts.' Br. at 31-32. True enough, the parties stipulated to the district court **[**12]** that Appellants are "willing to work with all people regardless of classifications such as race, creed, sexual orientation, and gender." Aplts.' App. at 2-322 (¶ 64). Thus, it might appear that Appellants have no exposure to liability under CADA. Although neither party presses this argument on appeal, we address it to assure ourselves of jurisdiction. *Buchwald, 159 F.3d at 492*.

To be sure, some of Appellants' intended course of conduct would not violate CADA, and thus would not give rise to standing. For example, Appellants are willing to "create custom graphics and websites for gay, lesbian, or bisexual clients . . . so long as the custom graphics and websites do not violate [Appellants'] religious beliefs, as is true for all customers." Aplts.' App. 2-322 (¶ 65). Thus, Appellants are not injured because CADA might "compel" them to create a website announcing a birthday party for a gay man; that is something Appellants would do willingly. Nor are Appellants injured because CADA might "compel" them to create a website announcing "God is Dead"; Colorado concedes CADA would not apply if Appellants would not produce such a website for any customers. *See* Colorado's Br. at 42. But, of course, neither birthday **[**13]** parties nor Nietzschean pronouncements are the focus of Appellants' challenge.

Setting aside other hypotheticals, we focus on what is to us the most obvious scenario: Appellants refuse a same-sex couple's request for a website celebrating their wedding but accept an opposite-sex couple's identical request for a website celebrating their wedding. Considering this scenario, Appellants' injury becomes clear. Although Appellants might comply **[*1173]** with CADA in other circumstances, at least *some* of Appellants' intended course of conduct arguably would "deny to an individual . . . because of . . . sexual orientation . . . the full and equal enjoyment of [goods and services]." *Colo. Rev. Stat. § 24-34-601(2)(a)*.

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[1] We refer to Appellants' "course of conduct" in applying the standard under *SBA List* for determining Article III standing; our discussion as to standing does not indicate whether Appellants' "course of conduct" is speech or commercial conduct.

A couple's request for a wedding website is, at least arguably, "inextricably bound up with" the couple's sexual orientation. *Bostock v. Clayton Cnty., Ga., 140 S. Ct. 1731, 1742, 207 L. Ed. 2d 218 (2020)*. As the Supreme Court explained in *Bostock*, "[an] employer's ultimate goal might be to discriminate on the basis of sexual orientation. But to achieve that purpose the employer must, along the way, intentionally treat an employee worse based in part on that individual's sex." *Id.* So too here—although Appellants' "ultimate goal" might be to only discriminate against same-sex marriage, to do so Appellants **[**14]** might also discriminate against same-sex couples. As a result, Appellants' refusal may be "because of" the customers' sexual orientation, and thereby expose them to liability under CADA. *See also Lawrence v. Texas, 539 U.S. 558, 583, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003)* (O'Connor, J., concurring) (anti-sodomy law does not target "conduct," but "is instead directed toward gay persons as a class"). We do not decide whether Appellants' (or any other businesses') conscience-or message-based objections are a defense against CADA; we only hold that such objections are at least "arguably . . . proscribed by [the] statute." *SBA List, 573 U.S. at 162* (quoting *Babbitt, 442 U.S. at 298*) (alterations in original).

Colorado asserts that, even if Appellants have shown an intent to violate CADA, Appellants have not shown a credible threat of prosecution. Specifically, Colorado questions whether Appellants will "actually den[y] services based on a person's sexual orientation" and whether such a person will "file[] a charge of discrimination." Colorado's Br. at 27; *see also id.* at 33-35. According to Colorado, Appellants' fear of prosecution is not credible because it requires the court to speculate about the actions of Appellants' would-be customers.

We disagree. Appellants have a credible fear of prosecution because Appellants' **[**15]** liability under CADA and Colorado's enforcement of CADA are both "sufficiently imminent." *SBA List, 573 U.S. at 159*. Appellants' potential liability is inherent in the manner they intend to operate—excluding customers who celebrate same-sex marriages. Thus, Appellants are rightfully wary of offering wedding-related services and may challenge CADA as chilling their speech. *See id. at 163* ("Nothing in this Court's decisions require a plaintiff who wishes to challenge the constitutionality of a law to confess that he will in fact violate that law."); *also Walker, 450 F.3d at 1089* (pre-enforcement plaintiff need not show "a present intention to engage in [proscribed] speech at a specific time in the future").

Contrary to Colorado's assertion, Appellants' fears do not "rest[] on guesswork" or "a highly attenuated chain of possibilities." Colorado's Br. at 29. If anything, it is Colorado that invites this court to speculate. Assuming Appellants offer wedding-related services to the public as they say they will, there is no reason to then conclude that Appellants will fail to attract customers. Nor is there reason to conclude that only customers celebrating opposite-sex marriages will request Appellants' services. In short, we find nothing "imaginary **[**16]** or speculative" about Appellants' apprehensions that they may violate CADA if they offer wedding-based services in the manner that they intend. *SBA List, 573 U.S. at 165*.

[*1174] If Appellants violate CADA, it is also "sufficiently imminent" that Colorado will enforce that statute against Appellants. In *SBA List*, the Supreme Court described at least three factors to be used in determining a credible fear of prosecution: (1) whether the plaintiff showed "past enforcement against the same conduct"; (2) whether authority to initiate charges was "not limited to a prosecutor or an agency" and, instead, "any person" could file a complaint against the plaintiffs; and (3) whether the state disavowed future enforcement. *Id. at 164-65*.

All three factors indicate Appellants have a credible fear of prosecution. First, Colorado has a history of past enforcement against nearly identical conduct—i.e., *Masterpiece Cakeshop*, which, at the time Appellants filed their complaint, had been litigated through various state administrative and court proceedings for over two years. Aplts.' App. at 2-317 (¶ 25). Although Appellants create websites—not cakes—this distinction does not diminish Appellants' fear of prosecution; there is no indication that Colorado **[**17]** will enforce CADA differently against graphic designers than bakeries. Second, any (would be) customer who requests a website for a same-sex wedding and is refused may file a complaint and initiate a potentially burdensome administrative hearing against Appellants. Aplts.' App. at 2-314 (¶ 4). Thus, Appellants must fear not only charges brought by Colorado, but charges brought by any person who might request a website celebrating same-sex marriage. And third, Colorado declines to disavow future enforcement against Appellants. Colorado's Br. at 29.

Colorado asks us to conclude that there is no "active enforcement by the state," because, aside from *Masterpiece Cakeshop*, Appellants only identify three similar cases, each of which ended with a "no probable cause" finding. Colorado's Br. at 33-34. Yet, those cases involved businesses that *supported* same-sex marriage. Considering all four cases collectively, Appellants have a credible fear that CADA will be enforced against businesses that object to

same-sex marriage. Indeed, the Supreme Court has found that Colorado's non-enforcement against businesses that support same-sex marriage evinced a Free Exercise violation. *See Masterpiece Cakeshop, 138 S. Ct. at 1730* ("Another indication **[**18]** of hostility is the difference in treatment between [Jack] Phillips' case [in *Masterpiece Cakeshop*] and the cases of other bakers who objected to a requested cake on the basis of conscience and prevailed before the Commission.").

Colorado also asserts that it "need not 'refute and eliminate all possible risk that the statute might be enforced' to demonstrate a lack of a case or controversy." Colorado's Br. at 29 (quoting *Mink v. Suthers, 482 F.3d 1244, 1255 (10th Cir. 2007)*). Although not dispositive, non-disavowal of future enforcement remains a relevant factor for courts to consider in determining standing. *See, e.g.*, *Holder v. Humanitarian Law Project, 561 U.S. 1, 16, 130 S. Ct. 2705, 177 L. Ed. 2d 355 (2010)* (considering government's non-disavowal of future enforcement). Further, in the case upon which Colorado relies, the attorney general publicly disavowed enforcement against the plaintiff. *Mink, 482 F.3d at 1255 n.8*. Here, Attorney General Weiser has made no similar promise to Appellants. Indeed, Colorado's strenuous assertion that it has a compelling interest in enforcing CADA indicates that enforcement is anything but speculative. *See* Colorado's Br. at 67 ("That other website designers are willing to serve the LGBT **[*1175]** community is of no moment").[2]

In short, on the summary-judgment record presented, we conclude that Appellants show **[**19]** an injury in fact because they intend to discriminate in a manner that is arguably proscribed by CADA, and they show a credible fear that Colorado will enforce CADA against them.

2. Causation and Redressability

Colorado also challenges causation and redressability as to Director Elenis and Attorney General Weiser. Specifically, Colorado asserts that those defendants, unlike the Commission,

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[2] For similar reasons, Colorado's reliance on the Supreme Court's recent decision in *California v. Texas* is misplaced. *141 S. Ct. 2104, 210 L. Ed. 2d 230 (2021)*. In that case, the Supreme Court found that plaintiffs lacked standing to challenge an Affordable Care Act provision that carried a penalty of $0, and thus had "no means of enforcement." *Id. at 2114*. By contrast, CADA imposes a minimum penalty of $50. ***Colo. Rev. Stat. § 24-34-602(1)(a)***. Colorado provides no indication that those statutory penalties are unenforceable. Colorado's repeated refutations of both actual and threatened enforcement are puzzling, to say the least.

lack "enforcement authority" under CADA, and thus do not cause and cannot redress Appellants' injuries. Colorado's Br. at 30.

"[T]he causation element of standing requires the named defendants to possess authority to enforce the complained-of provision." *Bronson v. Swensen, 500 F.3d 1099, 1110 (10th Cir. 2007)*. Causation does not require a plaintiff to limit a suit to only the most culpable defendants; rather, causation merely requires that the plaintiff's injury is "fairly traceable" to those defendants. *Id. at 1109*. Redressability requires "that a favorable judgment would meaningfully redress the alleged injury." *Walker, 450 F.3d at 1098*.

Here, Appellants' injury is not merely the risk of complaints filed by private customers—it also includes the burden of administrative proceedings before the Director and the prospect of litigation brought by the Attorney General. Those injuries are "fairly **[**20]** traceable" to Director Elenis and Attorney General Weiser. Colorado concedes that, under CADA, Director Elenis may "investigate[] charges of discrimination, issue[] subpoenas to compel information, issue[] a determination of probable cause or no probable cause, and conduct[] mandatory mediation if cause is found, or dismiss[] if no cause is found." Colorado's Br. at 30. Colorado also concedes that, under CADA, Attorney General Weiser has "limited" enforcement authority. *Id.* at 31. Thus, the traceability issues in this case differ from those in *Bronson*. There, the defendant was a county clerk who refused to issue a marriage license, but who had no authority to enforce the criminal statute at issue. *500 F.3d at 1111*. Here, both Director Elenis and Attorney General Weiser have authority to enforce CADA.

Just as Appellants' injury is traceable to Director Elenis and Attorney General Weiser, enjoining Director Elenis and Attorney General Weiser from enforcing CADA would redress Appellants' fears that they may be subject to investigation, or face charges brought by the Attorney General. Accordingly, we conclude that Appellants have established Article III standing.[3]

3. Ripeness

[3] Because we conclude that Appellants have standing, we decline to address whether the district court could assume the constitutionality of the ***Accommodation Clause*** after first finding Appellants lacked standing to challenge that Clause.

For the same reasons Appellants have established **[**21]** standing, we are **[*1176]** satisfied that this case is ripe. *See* SBA List, 573 U.S. at 157 n.5 (acknowledging that, in pre-enforcement challenges, standing and ripeness often "boil down to the same question") (quoting MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 128 n.8, 127 S. Ct. 764, 166 L. Ed. 2d 604 (2007)). Certainly, the record would be better developed, and the legal issues would be clearer, if Appellants had denied services to a customer, that customer filed a complaint, and that complaint was adjudicated through the appropriate administrative and judicial channels. Yet, as discussed above, Article III does not require a pre-enforcement plaintiff to risk arrest or actual prosecution before bringing claim in federal court. Any prudential considerations presented in this case do not prevent us from exercising our "virtually unflagging" obligation to hear cases within our jurisdiction. SBA List, 573 U.S. at 167 (citing Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 126, 134 S. Ct. 1377, 188 L. Ed. 2d 392 (2014)).

C. Free Speech

It is a "fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 573, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995); Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 547 U.S. 47, 61, 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006) (recognizing the principle "that freedom of speech prohibits the government from telling people what they must say").

1. The Accommodation Clause

a. Compelled Speech

Appellants' creation of wedding websites is pure speech. The websites Appellants intend to offer "celebrate and promote the **[**22]** couple's wedding and unique love story" by combining custom text, graphics, and other media. Aplts.' App. at 2-325 (¶¶ 81, 84). The websites consequently express approval and celebration of the couple's marriage, which is itself often a particularly expressive event. *See* Obergefell v. Hodges, 576 U.S. 644, 657, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015) (recognizing "untold references to the beauty of marriage in religious

and philosophical texts spanning time, cultures, and faiths, as well as in art and literature in all their forms"). Appellants' custom websites are similar to wedding videos and invitations, both of which have also been found to be speech. *See* Telescope Media Grp. v. Lucero, 936 F.3d 740, 751-52 (8th Cir. 2019) (wedding videographers engaged in speech); Brush & Nib Studios, LC v. City of Phoenix, 247 Ariz. 269, 448 P.3d 890, 908 (Ariz. 2019) (custom wedding invitations are pure speech).

Our analysis relies on the custom and unique nature of Appellants' services, rather than their chosen medium. As Colorado asserts, the mere fact that Appellants' trade is "in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed" is not sufficient to show a speech interest. Colorado's Br. at 44 (quoting *FAIR*, 547 U.S. at 62). In *FAIR*, the Supreme Court rejected arguments that the Solomon Amendment compelled speech by requiring law schools to accommodate military recruiters, including sending **[**23]** students emails on behalf of military recruiters or providing military recruiters with access to law school facilities. The Court noted that "accommodating the military's message does not affect the law schools' speech, because the schools are not speaking when they host interviews and recruiting receptions. . . . [A] law school's decision to allow recruiters on campus is not inherently expressive." **[*1177]** 547 U.S. at 64. In contrast, here, creating a website (whether through words, pictures, or other media) implicates Appellants' unique creative talents, and is thus inherently expressive.

Appellants' own speech is implicated even where their services are requested by a third-party. In *Hurley*, the Supreme Court recognized a parade organizer's Free Speech interests, despite the fact that the organizer lacked a "particularized message" or that the speech would be initially generated by the participants, and not the organizer. Hurley, 515 U.S. at 569-70. The speech element is even clearer here than in *Hurley* because Appellants actively create each website, rather than merely hosting customer-generated content on Appellants' online platform. *Compare* Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241, 258, 94 S. Ct. 2831, 41 L. Ed. 2d 730 (1974) ("A newspaper is more than a passive receptacle or conduit for news, comment, and advertising."), **[**24]** *with* FAIR, 547 U.S. at 64 ("In this case, accommodating the military's message does not affect the law school's speech, because the schools are not speaking when they host interviews and recruiting receptions."), *and* PruneYard Shopping Ctr. v. Robins, 447

U.S. 74, 85, 100 S. Ct. 2035, 64 L. Ed. 2d 741 (1980) (shopping center may be forced to "use his property as a forum for the speech of others").

Nor does a profit motive transform Appellants' speech into "commercial conduct." *See* Colorado's Br. at 37. The *First Amendment's* protections against compelled speech are "enjoyed by business corporations generally and by ordinary people engaged in unsophisticated expression as well as by professional publishers." *Hurley, 515 U.S. at 574*. Thus, as the Supreme Court has recognized, for-profit businesses may bring compelled speech claims. *See, e.g.*, *Tornillo, 418 U.S. at 254* (for-profit newspaper cannot be compelled to accommodate political candidates' "right of reply"); *Pac. Gas and Elec. Co. v. Public Utilities Comm'n of Cal., 475 U.S. 1, 9, 106 S. Ct. 903, 89 L. Ed. 2d 1 (1986)* (utility company cannot be compelled to include critic's speech in utility company's billing envelopes).

The *Accommodation Clause* also "compels" Appellants to create speech that celebrates same-sex marriages. Colorado asserts that the *Accommodation Clause* only regulates Appellants' conduct in picking customers and does not regulate Appellants' speech. *See* Colorado's Br. at 40. Yet, this argument is foreclosed by *Hurley*. As with the Massachusetts **[**25]** public accommodations law in *Hurley*, CADA has the effect "of declaring the sponsors' speech itself to be the public accommodation." *Hurley, 515 U.S. at 573*. By compelling Appellants to serve customers they would otherwise refuse, Appellants are forced to create websites—and thus, speech—that they would otherwise refuse.

Colorado also asserts that the *Accommodation Clause* does not require a specific message or statement unrelated to regulating conduct. *See* Colorado's Br. at 46 (citing *Wooley v. Maynard, 430 U.S. 705, 97 S. Ct. 1428, 51 L. Ed. 2d 752 (1977)* and *W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943)*). Yet, again, neither was a specific message or statement required in *Hurley*. Further, as the Supreme Court explained in *FAIR*, "compelled-speech cases are not limited to the situation in which an individual must personally speak the government's message." *FAIR, 547 U.S. at 63*. Relying on *Hurley*, the Court explained in *FAIR* that compelled speech **[*1178]** may be found where "the complaining speaker's own message was affected by the speech it was forced to accommodate." *Id.* So here, the result of the *Accommodation Clause* is that Appellants are forced to create custom websites they otherwise would not.

Because the *Accommodation Clause* compels speech in this case, it also works as a content-based restriction. *See* Nat'l Inst. of Family and Life Advocates v. Becerra, 138 S. Ct. 2361, 2371, 201 L. Ed. 2d 835 (2018) ("By requiring petitioners to inform women how they can obtain state-subsidized abortions . . . the **[**26]** licensed notice plainly 'alters the content' of petitioners' speech.") (quoting Riley v. Nat'l Fed. of Blind of N.C., Inc., 487 U.S. 781, 795, 108 S. Ct. 2667, 101 L. Ed. 2d 669 (1988)). Appellants cannot create websites celebrating opposite-sex marriages, unless they also agree to serve customers who request websites celebrating same-sex marriages. CADA's purpose and history also demonstrate how the statute is a content-based restriction. As Colorado makes clear, CADA is intended to remedy a long and invidious history of discrimination based on sexual orientation. *See* Colorado's Br. at 65-66. Thus, there is more than a "substantial risk of excising certain ideas or viewpoints from the public dialogue." Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994). Eliminating such ideas is CADA's very purpose. For similar reasons, the Supreme Court in *Hurley* concluded that eliminating discriminatory bias was a "decidedly fatal objective" in light of a Free Speech challenge. Hurley, 515 U.S. at 579; *see also* TMG, 936 F.3d at 753 (Minnesota public accommodations law operates as a content-based restriction "by requiring the Larsens to convey 'positive' messages about same-sex weddings"); B&N, 448 P.3d at 914 (Arizona public accommodations law is facially neutral, but operates as a content-based restriction).

b. Strict Scrutiny

Whether viewed as compelling speech or as a content-based restriction, the *Accommodation Clause* must satisfy **[**27]** strict scrutiny—i.e., Colorado must show a compelling interest, and the *Accommodation Clause* must be narrowly tailored to satisfy that interest. Reed v. Town of Gilbert, Ariz., 576 U.S. 155, 164, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015).

Here, Colorado has a compelling interest in protecting both the dignity interests of members of marginalized groups and their material interests in accessing the commercial marketplace. *See, e.g.*, Roberts v. U.S. Jaycees, 468 U.S. 609, 624, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984) (Minnesota public accommodation law's goals of "eliminating discrimination and assuring its citizens equal access to publicly available goods and services . . . plainly serves compelling state interests of the highest order"). Colorado's interest in preventing both dignitary and material harms to LGBT people is well documented. Colorado has a unique interest in

remedying its own discrimination against LGBT people. *See* Colorado's Br. at 65 (discussing *Romer v. Evans, 517 U.S. 620, 630, 634, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996)* (holding that Colorado state constitutional amendment preventing protected status for LGBT people violated the *Equal Protection Clause*)). Even setting Colorado's history aside, Colorado, like many other states, has an interest in preventing ongoing discrimination against LGBT people. *See* Br. of Lambda Legal Defense and Education Fund as *amicus curiae*, at 15 (describing ongoing discrimination against LGBT people in Colorado); Br. of Mass., **[**28]** et al. as *amicus curiae* at 7-8 (describing laws in other **[*1179]** states that address discrimination based on sexual orientation).

Nor do we construe Appellants' arguments as challenging Colorado's interest in combating discrimination generally. Rather, Appellants assert Colorado fails to establish a compelling interest because "[Appellants] do[] not discriminate against anyone," and because "Colorado can curb discriminatory conduct without compelling or silencing [Appellants]." Aplts.' Br. at 54; *see also* Aplts.' Reply at 26. Appellants do not appear to deny that, at least in other contexts, LGBT people may suffer discrimination, and Colorado may have an interest in remedying that harm. Thus, Appellants' arguments more appropriately address whether CADA is narrowly tailored—not whether CADA furthers a compelling interest.

The *Accommodation Clause* is not narrowly tailored to preventing dignitary harms. As the Supreme Court has repeatedly made clear, "[w]hile the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the **[**29]** government." *Hurley, 515 U.S. at 579*; *see also Boy Scouts of Am. v. Dale, 530 U.S. 640, 659, 120 S. Ct. 2446, 147 L. Ed. 2d 554 (2000)* ("The state interests embodied in New Jersey's public accommodations law [prohibiting expulsion of a LGBT scoutmaster] do not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association."). So too here. As compelling as Colorado's interest in protecting the dignitary rights of LGBT people may be, Colorado may not enforce that interest by limiting offensive speech. Indeed, the *First Amendment* protects a wide range of arguably greater offenses to the dignitary interests of LGBT people. *See Snyder v. Phelps, 562 U.S. 443, 131 S. Ct. 1207, 179 L. Ed. 2d 172 (2011)* (extending *First Amendment* protections to funeral picketers).

The *Accommodation Clause* is, however, narrowly tailored to Colorado's interest in ensuring "equal access to publicly available goods and services." *U.S. Jaycees, 468 U.S. at 624*. When regulating commercial entities, like Appellants, public accommodations laws help ensure a free and open economy. Thus, although the commercial nature of Appellants' business does not diminish their speech interest, it does provide Colorado with a state interest absent when regulating noncommercial activity. *Compare id., 468 U.S. at 626* (recognizing "the changing nature of the American economy and of the importance, both to the individual and to society, of removing the barriers to economic advancement **[**30]** and political and social integration that have historically plagued certain disadvantaged groups"), *with Dale, 530 U.S. at 657* ("As the definition of 'public accommodation' has expanded from clearly commercial entities, such as restaurants, bars, and hotels, to membership organizations such as the Boy Scouts, the potential for conflict between state public accommodations laws and the *First Amendment* rights of organizations has increased.").

The Supreme Court's decision in *Heart of Atlanta Motel v. United States* illustrates the commercial consequences of public accommodation laws. *379 U.S. 241, 85 S. Ct. 348, 13 L. Ed. 2d 258 (1964)*. In that case, the Court upheld Title II of the Civil Rights Act of 1964 under Congress's *Commerce Clause* powers. In doing so, the Court recognized the "overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse." *Id. at 257*. The Court recited evidence of racial discrimination **[*1180]** by hotels and motels, which was so pervasive that some travelers relied on a special guidebook listing non-discriminatory businesses. *Id. at 253*. Thus, the cumulative result of those discriminatory practices discouraged interstate commerce.

We do not define Colorado's interest as "ensuring access to a *particular* person's unique, artistic product [i.e., Appellants']." Dissent at 27 (emphasis in original); **[**31]** *see also id.* at 27 n.8. We recognize access to Appellants' services may be the *consequence* of enforcing CADA, but that is not to say it is CADA's purpose or Colorado's primary interest. For example, CADA does not apply only to public accommodations of a certain level of quality or artistic merit. In fact, CADA is silent as to these attributes, leaving their appraisal to consumers. Nor does CADA conscript Appellants' services for some collective or redistributive end. CADA only applies here because Appellants intend to sell their unique services to the public. The question then becomes whether Colorado's interest in ensuring access to the marketplace *generally* still applies with the same

force to Appellants' case *specifically*—i.e., "whether [Colorado] has such an interest in denying an exception to [Appellants]." *Fulton, 141 S. Ct. at 1881*.

Excepting Appellants from the *Accommodation Clause* would necessarily relegate LGBT consumers to an inferior market because Appellants' *unique* services are, by definition, unavailable elsewhere. As discussed above, our analysis emphasizes the custom and unique nature of Appellants' services. For the same reason that Appellants' custom and unique services are speech, those services are also inherently **[**32]** not fungible. To be sure, LGBT consumers may be able to obtain wedding-website design services from other businesses; yet, LGBT consumers will never be able to obtain wedding-related services of the same quality and nature as those that Appellants offer. Thus, there are no less intrusive means of providing equal access to those types of services.[4]

Amici dispute whether subjecting businesses to the *Accommodation Clause* ultimately chills commerce by discouraging businesses from entering the market, due to fears that they will be compelled to create objectionable products. *Compare* Br. of Law and Economics Scholars as *amicus curiae* at 4 (enforcing the *Accommodation Clause* will "either force unwilling associations or force the exit of a class of market participants"), *with* Br. of Scholars of Behavioral Science and Economics as *amicus curiae* at 9 (asserting "markets cannot always be counted on to 'self-correct' and produce a welfare-maximizing outcome"). With respect to amici, we find the dispute beside the point. This case does not present a competitive market. Rather, due to the unique nature of Appellants' services, this case is more similar to a monopoly. The product at issue is not merely "custom-made wedding websites," **[**33]** but rather "custom-made wedding websites of the same quality and nature as those made by Appellants." In that market, only Appellants exist. And, as amici apparently agree, monopolies present unique anti-discrimination concerns. *See* **[*1181]** Br. of Law and Economics Scholars at 9 ("The only exception to this principle is a monopoly situation, in which consumers are faced with a sole supplier who could decide for all

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[4] The cumulative effect of discrimination also explains why other statutory exemptions, such as sex-based discrimination motivated by a "bona fide relationship," are permissible. *See* Aplts.' Reply at 26-27. Such exemptions promote open commerce as a whole and are consistent with Colorado's interest in ensuring access to the commercial marketplace. We do not decide whether the "bona fide relationship" exemption should apply to Appellants. *See infra*, III.D.1.b. We only hold that the existence of that exemption does not require us to craft new ones.

sorts of reasons, including invidious motives, to refuse to deal with a group of potential consumers.").

We are also unpersuaded by the Supreme Court of Arizona's analysis in *Brush & Nib*. There, the Supreme Court of Arizona concluded that custom wedding invitations are speech because they are not fungible products, unlike a hamburger or pair of shoes. *B&N, 448 P.3d at 910*. With that much we agree—custom products often implicate speech. Yet, the Supreme Court of Arizona then held that exempting custom invitations from a public accommodation law would not undermine the law's purpose. *Id. at 916*. Thus, ostensibly, the *B&N* Court reasoned that any market harm was limited. We are unconvinced. It is not difficult to imagine the problems created where a wide range of custom-made services are available to a favored group **[**34]** of people, and a disfavored group is relegated to a narrower selection of generic services. Thus, unique goods and services are where public accommodation laws are most necessary to ensuring equal access.[5]

To be clear, we, like the Dissent, do not question Appellants' "sincere religious beliefs" or "good faith." Dissent at 1. Yet, we fail to see how Appellants' sincerity or good faith should excuse them from CADA. Appellants' intent has no bearing on whether, as a consequence, same-sex couples have limited access to goods or services. For this reason, it is unclear to us why the Dissent places such repeated emphasis on Appellants' "good faith." *See, e.g.*, Dissent at 21 ("Nor is Ms. Smith's statement intended to be derogatory or malicious."); *id.* at 52 ("We must presume [Ms. Smith] has reached her beliefs 'based on decent and honorable religious or philosophical premises.'") (quoting *Obergefell, 576 U.S. at 672*). Further, as the Supreme Court has recently reaffirmed, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit *First Amendment* protection." *Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1876, 210 L. Ed. 2d 137 (2021)* (citing *Thomas v. Review Bd. of*

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[5] Elsewhere, the Dissent endorses our view that Appellants' services are unique. *See* Dissent at 15 ("It is obvious to even the most casual viewer that Ms. Smith is creating a customized art product—which incorporates unique, expressive speech—for her customers."). In doing so, we think the Dissent commits the same error as the *B&N* court. The Dissent never explains how Appellants' services are unique when considering Appellants' speech interests, but fungible when considering Colorado's interest in preventing material harms to consumers. To us, Appellants' services must either be unique for both analyses, or fungible for both. Such consistency does not "cheapen" the artistic value of Appellants' services. Dissent at 29. It is precisely because Appellants' unique services *are* valuable that exclusion is harmful. It is the Dissent that cheapens Appellants' artistry by implying Appellants' services are no better than those available elsewhere.

Ind. Employment Security Div., 450 U.S. 707, 714, 101 S. Ct. 1425, 67 L. Ed. 2d 624 (1981)). To us, whether an exception limits market access depends upon the uniqueness of the public accommodation's **[**35]** goods and services—not the sincerity of the public accommodation's beliefs.

We also recognize that "compelled speech is deeply suspect in our jurisprudence—and rightly so, given the unique harms it presents." Dissent at 10. Yet, at the same time, "[t]he axiom that places of public accommodation are open to everyone is deeply rooted in the American legal system." *TMG, 936 F.3d at 763* (Kelly, J., concurring in part and dissenting in **[*1182]** part). Indeed, the Supreme Court has repeatedly emphasized public accommodation laws' vital importance—even against Constitutional challenges. *See, e.g.*, *Masterpiece Cakeshop, 138 S. Ct. at 1728* ("It is unexceptional that Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public."); *Hurley, 515 U.S. at 572* ("Provisions like these are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the *First* or *Fourteenth Amendments*."); *Heart of Atlanta Motel, 379 U.S. at 260* ("[I]n a long line of cases this Court has rejected the claim that the prohibition of racial discrimination in public accommodations interferes with **[**36]** personal liberty."). We resolve the tension between these two lines of jurisprudence by holding that enforcing CADA as to Appellants' unique services is narrowly tailored to Colorado's interest in ensuring equal access to the commercial marketplace.[6]

2. The Communication Clause

Appellants also assert that the *Communication Clause* unconstitutionally abridges their Free Speech rights. Specifically, Appellants intend to publish a Proposed Statement on 303 Creative's website, stating Appellants "will not be able to create websites for same-sex marriages or any other marriage that is not between one man and one woman." Aplts.' App. at 2-364. Colorado responds that the *Communication Clause* merely prohibits a public

[6] The Dissent implies that our holding applies to "*all* artists." Dissent at 30 (emphasis in original). As should be clear, our holding does not address how CADA might apply to non-commercial activity (such as commissioning a mural for some charitable purpose).

accommodation from advertising what is already unlawful under the *Accommodation Clause*. Specifically, the *Communication Clause* makes it unlawful for a public accommodation to publish a statement indicating that service will be refused because of sexual orientation. *Colo. Rev. Stat. § 24-34-601(2)(a)*.

The *Communication Clause* does not violate the Appellants' Free Speech rights. As the district court correctly held, Colorado may prohibit speech that promotes unlawful activity, including unlawful discrimination. Aplts.' App. at 3-577-78. In *Pittsburgh Press Company v. Pittsburgh Commission on Human Relations*, the **[**37]** Supreme Court held that publishing employment advertisements in "sex-designated columns" was not protected by the *First Amendment*. *413 U.S. 376, 378, 93 S. Ct. 2553, 37 L. Ed. 2d 669 (1973)*. The Court reasoned that, because the underlying employment practice was illegal sex discrimination, there was no protected *First Amendment* interest. *Id. at 389*. In contrast, in *Bigelow v. Virginia, 421 U.S. 809, 95 S. Ct. 2222, 44 L. Ed. 2d 600 (1975)*, the Supreme Court held that publishing advertisements for abortion services was protected by the *First Amendment*, so long as the underlying services were themselves legal. In that case, the Court held that, although the abortion services were illegal if offered in Virginia, Virginia had no interest in regulating advertisements for services offered in New York, where the services were legal. *Id. at 828*. Appellants appear to acknowledge that their *Accommodation Clause and Communication Clause* challenges go hand in hand, at least to the extent the merits of those challenges are "intertwined." Aplts.' Reply at 6; *see also* **[*1183]** Aplts.' Br. at 53-57 (addressing both clauses simultaneously as to strict scrutiny).

Having concluded that the *First Amendment* does not protect Appellants' proposed denial of services, we also conclude that the *First Amendment* does not protect the Proposed Statement. Parts of the Proposed Statement might not violate the *Accommodation Clause*, such as those parts expressing Appellants' commitment to their clients or Ms. Smith's **[**38]** religious convictions. Yet, the Proposed Statement also expresses an intent to deny service based on sexual orientation—an activity that the *Accommodation Clause* forbids and that the *First Amendment* does not protect. Thus, the Proposed Statement itself is also not protected and Appellants' challenge to the *Communication Clause* fails. *See Pittsburgh Press, 413 U.S. at 389*

(commercial advertising is not protected where "the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity").[7]

D. Free Exercise

1. CADA is a Neutral Law of General Applicability

"[L]aws incidentally burdening religion are ordinarily not subject to strict scrutiny under the *Free Exercise Clause* so long as they are neutral and generally applicable." *Fulton, 141 S. Ct. at 1876* (citing *Employment Div., Dep't of Hum. Resources of Or. v. Smith, 494 U.S. 872, 878-82, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990)*); *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993)* ("[A] law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.").

a. CADA is a Neutral Law

"Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices *because of their religious nature*." *Fulton, 141 S. Ct. at 1877* (emphasis added); *see also Lukumi, 508 U.S. at 533* ("[I]f the object of a law is to infringe upon or restrict **[**39]** practices *because of their religious motivation*, the law is not neutral[.]") (emphasis added). "Factors relevant to the assessment of governmental neutrality include 'the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body.'" *Masterpiece Cakeshop, 138 S. Ct. at 1731* (quoting *Lukumi, 508 U.S. at 540*).

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[7] We presume the Dissent agrees that, under *Pittsburgh Press* and *Bigelow*, Appellants' Free Speech challenge to the ***Communication Clause*** must rise or fall with their challenge to the ***Accommodation Clause***. We recognize the Dissent's disagreement with our analysis of the ***Accommodation Clause***, and thus its implicit disagreement with our conclusion as to the ***Communication Clause***.

In *Masterpiece Cakeshop*, the Court held that Colorado had enforced CADA against a baker (Jack Phillips) without "the religious neutrality that the Constitution requires." *138 S. Ct. at 1724*. The Court relied, in part, on a Commissioner's statement describing the baker's religious objection as "one of the most despicable pieces of rhetoric that people can use." *Id. at 1729*. The Court explained that this statement impermissibly disparaged Phillips' religion by "describing it as despicable, and also by characterizing it as something merely rhetorical." *Id.* The Court **[*1184]** instructed the Commission that it "was obliged under the *Free Exercise Clause* to proceed in a manner neutral toward and tolerant of Phillips' religious beliefs." *Id. at 1731*.

Appellants provide no evidence that Colorado will ignore the **[**40]** Court's instruction in *Masterpiece Cakeshop*, and thus provide no evidence that Colorado will enforce CADA in a non-neutral fashion. Appellants rely on a comment from a public meeting held a few days after the Court's ruling in *Masterpiece Cakeshop*. At the public meeting, a different Commissioner voiced his "support" for the Commissioner whose comments that were at issue in *Masterpiece Cakeshop*, opining that the Commissioner discussed in *Masterpiece Cakeshop* did not say "anything wrong." Aplts.' App. at 3-609. The single Commissioner's statement at the public meeting, however, does not indicate Colorado will deviate from the Court's instruction in *Masterpiece Cakeshop*. In contrast to the single Commissioner's opinion, several others at the public meeting voiced their agreement with the Court's ruling, or their commitment to follow that ruling. *Id.* at 3-606 (Director Elenis: "So in these cases going forward, Commissioners and ALJs and others, including the Staff at the Division, have to be careful how these issues are framed so that it's clear that full consideration was given to sincerely—what is termed as sincerely-held religious objections."); *id.* 3-608 (Commissioner Carol Fabrizio: **[**41]** "[*Masterpiece Cakeshop*] was correctly decided from the outside, but I also hope that anything that is taken out of here or listened to or—that we're open to being respectful of everybody's views."). In short, Appellants' pre-enforcement challenge is dissimilar to the post-enforcement challenge in *Masterpiece Cakeshop*.

b. CADA is Generally Applicable

A law is not generally applicable "if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton, 141 S. Ct. at*

1877. "[W]hether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue." Tandon v. Newsom, 141 S. Ct. 1294, 1296, 209 L. Ed. 2d 355 (2021) (per curiam). "The principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause." Lukumi, 508 U.S. at 543. "Neutrality and general applicability are interrelated, and . . . failure to satisfy one requirement is a likely indication that the other has not been satisfied." Id. at 531.

A law is also not generally applicable "if it 'invites' the government to consider the particular reasons for **[**42]** a person's conduct by providing 'a mechanism for individualized exemptions.'" Fulton, 141 S. Ct. at 1877 (quoting Smith, 494 U.S. at 884) (alteration omitted). "[W]here the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Id.* (quoting Smith, 494 U.S. at 884). In *Smith*, the Court explained that a "good cause" exemption from requirements for unemployment compensation benefits "created a mechanism for individualized exemptions." Smith, 494 U.S. at 884 (citing Bowen v. Roy, 476 U.S. 693, 707, 106 S. Ct. 2147, 90 L. Ed. 2d 735 (1986)); *see also* Sherbert v. Verner, 374 U.S. 398, 401 n.4, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963). And more **[*1185]** recently, in *Fulton*, the Court explained that exemptions from contractual obligations made available at the "sole discretion" of a city commissioner trigger strict scrutiny. 141 S. Ct. at 1878.

Appellants assert that CADA is not generally applicable because Colorado enforces a "religious-speakers policy," under which religiously-motivated objections are viewed with greater scrutiny than secularly-motivated objections. *See* Aplts.' Br. at 48. For example, although Colorado admits that a business is not required to design a website proclaiming "God is Dead" if it would decline such a design for any customer, *see* Colorado's Br. at 42, Appellants must design a website celebrating same-sex marriage, even though it would **[**43]** decline such a design for any customer.

In support of their claim of a religious-speakers policy, Appellants also rely on the record in *Masterpiece Cakeshop*. In that case, Phillips asserted a disparity in treatment between his case and three other cases related to a customer named William Jack. In the Jack cases, bakers refused Jack's requests for cakes that "conveyed disapproval of same-sex marriage, along with

religious text." *Masterpiece Cakeshop, 138 S. Ct. 1719 at 1730*. The Colorado Court of Appeals held that the three bakers lawfully refused Jack service "because of the offensive nature of the requested message." *Id. at 1731* (quoting *Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 282 n.8, 2015 COA 115 (Colo. App. 2015)*).

The Supreme Court held that this difference in treatment was "[a]nother indication of hostility" toward Phillips' religious motivations. *Id. at 1729*. Contrary to the Colorado Court of Appeals, the Supreme Court held that the difference in treatment between the Phillips and Jack cases could not be based on "the government's own assessment of offensiveness." *Id. at 1731*. According to the Court, such reasoning "elevates one view of what is offensive over another and itself sends a signal of official disapproval of Phillips' religious beliefs." *Id.* The Supreme Court declined to address, however, "whether the cases should ultimately **[**44]** be distinguished." *Id. at 1730*. Rather, the Court's holding in *Masterpiece Cakeshop* was narrowly limited to the discriminatory enforcement in that particular case, and left open CADA's future enforcement against other objectors. *Id. at 1732*; *see also Fulton, 141 S. Ct. at 1930* (Gorsuch, J., concurring) ("[A]ll that victory [in *Masterpiece Cakeshop*] assured Mr. Phillips was a new round of litigation—with officials now presumably more careful about admitting their motives.").

In concurring opinions, Justices Kagan and Gorsuch disagreed as to whether Colorado could apply CADA in the Phillips case, but not in the Jack cases. According to Justice Kagan, the bakers in the Jack cases did not discriminate against Jack's religion because the bakers would have refused *any* customer's request for cakes denigrating gay people and same-sex marriage. *Masterpiece Cakeshop, 138 S. Ct. at 1733* (Kagan, J., concurring). In Justice Kagan's view, "[t]he different outcomes in the Jack cases and the Phillips case could thus have been justified by a plain reading and neutral application of Colorado law—untainted by any bias against a religious belief." *Id.* (Kagan, J., concurring). According to Justice Gorsuch, however, the Jack cases and the Phillips case "share[d] all legally salient features." **[**45]** *Id. at 1735* (Gorsuch, J., concurring). In Justice Gorsuch's view, Colorado could apply CADA in both cases, or in neither case, but "the one thing it can't do is apply a more generous legal test to secular objections than religious ones." *Id. at 1737* (Gorsuch, J., concurring); *see also id. at 1739* (Gorsuch, J., **[*1186]** concurring) ("Only by adjusting the dials *just right*—fine-tuning the level of generality up or down for each case based solely on the identity of the parties and the substance of their views—can

you engineer the Commission's outcome, handing a win to Mr. Jack's backers but delivering a loss to Mr. Phillips.") (emphasis in original).

Although a gerrymander similar to the one identified by Justice Gorsuch may still exist, Appellants have only shown a gerrymander favoring LGBT consumers, as opposed to a gerrymander disfavoring religious-speakers. Indeed, a "pro-LGBT" gerrymander is likely inevitable given CADA's purpose and its content-based restrictions on speech. *See supra*, III.C.1.a. Appellants provide no evidence that Colorado permits secularly-motivated objections to serving LGBT consumers. Similarly, Appellants provide no evidence that Colorado enforces CADA against religiously-motivated objections that do **[**46]** not injure the dignitary or material interests of LGBT consumers. In short, Appellants fail to show that Colorado "permit[s] secular conduct that undermines the government's asserted interests *in a similar way*." *Fulton, 141 S. Ct. at 1877* (emphasis added).

The Supreme Court's recent cases addressing Free Exercise challenges to COVID-19 restrictions are instructive. In *Tandon v. Newsom*, the Court explained "[c]omparability is concerned with the risks various activities pose, not the reasons why people gather." *141 S. Ct. at 1296* (per curiam). Accordingly, the Court held that California could not restrict at-home religious exercise while permitting secular activities that posed similar risks of COVID-19 transmission. *Id. at 1297*. The Court reached a similar conclusion in *Roman Catholic Diocese of Brooklyn v. Cuomo*, holding that New York could not restrict access to houses of worship while permitting access to secular facilities with similar safety records regarding the spread of COVID-19. *141 S. Ct. 63, 66-67, 208 L. Ed. 2d 206 (2020)* (per curiam). Here, however, Appellants rely on comparators that injure LGBT consumers. For example, in the Jack cases, non-enforcement was consistent with Colorado's pro-LGBT gerrymander. Because Appellants provide no examples where Colorado permitted **[**47]** "secular-speakers" to discriminate against LGBT consumers, Appellants fail to show that Colorado disfavors similarly-situated "religious-speakers."[8]

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[8] The Dissent is correct that Colorado "has the burden to establish that the challenged law satisfies strict scrutiny." Dissent at 40 n.15 (quoting *Tandon, 141 S. Ct. at 1296* (per curiam)). But that burden is irrelevant here because strict scrutiny does not apply to Appellants' Free Exercise claims. And it is Appellants' burden to show, at the very least, a triable issue of material fact that CADA is not neutral or generally-applicable. *Compare* *Axson-Flynn v. Johnson, 356 F.3d 1277, 1299 (10th Cir. 2004)* ("Because Axson-Flynn has raised a genuine issue of material fact as to whether Defendants maintained a discretionary system of case-by-case exemptions from curricular requirements, we hold that summary judgment on her free exercise 'individualized exemption'

Colorado's recognition of message-based refusals also does not give rise to a system of "individualized exemptions." *See* Aplts.' Br. at 49. Message-based refusals are not an "exemption" from CADA's requirements; they are a defense. A public accommodation only violates CADA when it discriminates "because of" a consumer's membership in a protected class. *Colo. Rev. Stat. § 24-34-601(2)(a)*. **[*1187]** Ostensibly, message-based refusals are unrelated to class-status and fail to satisfy CADA's causation standard. Because message-based refusals do not violate CADA as an initial matter, there is nothing to "exempt" from the statute. *See* Exempt, Black's Law Dictionary (11th ed. 2019) ("Free or released from a duty or liability to which others are held.").

Message-based refusals are also not "individualized." "[A] system of individualized exemptions is one that gives rise to the application of a subjective test." *Axson-Flynn, 356 F.3d at 1297* (internal quotation omitted). Conversely, an exemption is not "individualized" simply because it "contain[s] express exceptions for objectively defined categories **[**48]** of persons." *Id. at 1298*. As we explained in *Axson-Flynn*, "[w]hile of course it takes some degree of individualized inquiry to determine whether a person is eligible for even a strictly defined exemption, that kind of limited yes-or-no inquiry is qualitatively different from the kind of case-by-case system envisioned by the *Smith* Court in its discussion of *Sherbert* and related cases." *Id.*

We are satisfied that message-based refusals may be objectively defined and are not the type of subjective test that triggers the individualized exemption exception. We need not decide how CADA's causation standard should apply to Appellants' message-based refusal. *See supra*, III.B.1. We also reiterate that, on a more developed record, Appellants might show that Colorado enforces that standard in a way that discriminates against religion, violating the *Free Exercise Clause*. Yet, whatever issues may be presented in a future case, it is clear to us that CADA's causation standard itself is qualitatively different from the broad, discretionary analyses presented in other individualized exemption cases. *See, e.g., Fulton, 141 S. Ct. at 1878* (exemptions granted in city official's "sole discretion"); *Sherbert, 374 U.S. at 401 n.4* (exemptions granted for "good cause"); *Axson-Flynn, 356 F.3d at 1299* (exemptions granted **[**49]** through "pattern of ad hoc discretionary decisions").

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claim was improper."), *with* *Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 655 (10th Cir. 2006)* ("[I]nconsistent with the requirements of *Axson-Flynn*, Grace United has not pointed to any evidence to support its conclusory allegation that the City specifically targeted religious groups or the Methodist denomination in its enforcement of the ordinance in this case.").

The Dissent's discussion of the individualized exemption exception conflates an "individualized exemption" with "individualized adjudication." For example, the Dissent concludes that the individualized exemption exception should apply because "the entire CADA enforcement mechanism is structured to make case-by-case determinations." Dissent at 36; *see also id.* at 43 ("By demonstrating that CADA sets up a case-by-case system for determining exceptions, Ms. Smith has shown CADA's application here must be reviewed with strict scrutiny with regard to the free exercise claims."). Accordingly, CADA does not grant "individualized exemptions" simply because causation is determined by the specific facts of each case. Were we to conclude otherwise, a wide range of criminal statutes would also become subject to Free Exercise challenges because courts adjudicate a defendant's guilt through "case-by-case determinations."

Although we hold that the "religious-speakers policy" identified by Appellants is not an "exemption," CADA provides for two exemptions that warrant closer attention. First, CADA exempts places that are "principally used for religious **[**50]** purposes" from its definition of public accommodations. *Colo. Rev. Stat. 24-34-601(1)*. This exemption does not trigger strict scrutiny. To the extent a "religious-purpose" exemption is individualized, the exemption expressly *favors* religious exercise over places used for secular purposes.[9]

[*1188] Second, CADA exempts sex-based discrimination "if such restriction has a bona fide relationship to the goods, services, facilities, privileges, advantages, or accommodations of such place of public accommodation." *Colo. Rev. Stat. § 24-34-601(3)*. On the pre-enforcement record before us, Appellants have not shown the "bona fide relationship" exemption should trigger strict scrutiny. Like CADA's causation standard, a fact-finder may objectively determine whether a public accommodation's discriminatory practice is "related" to the public accommodation's goods or services. Whether such a relationship is "bona fide" seems closer to the type of discretionary standard subject to the individualized exemption exception. The statute

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[9] Indeed, an exemption for places "principally used for religious purposes" may, in at least some instances, be required by the *First Amendment*. *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 565 U.S. 171, 190, 132 S. Ct. 694, 181 L. Ed. 2d 650 (2012)* (recognizing a "ministerial exception" to generally applicable employment laws). As Justice Alito noted in *Fulton*, the ministerial exemption is in "tension" with the *Smith* standard. *Fulton, 141 S. Ct. at 1916 n.77* (Alito, J., concurring). We need not resolve that tension here. We only note that, under the Supreme Court's precedent, CADA remains generally applicable despite exempting some religious exercise.

is silent as to when a relationship is "bona fide," and the parties do not define that term in their briefing. Despite that ambiguity, however, the term is facially unlike the "entirely discretionary" exemption addressed in *Fulton* ***[**51]***. *141 S. Ct. at 1878*. Thus, we conclude that the mere existence of a "bona fide relationship" exemption does not, on its own, trigger strict scrutiny.

We pause because Colorado's *application* of the "bona fide relationship" exemption may trigger strict scrutiny on a post-enforcement record. For example, strict scrutiny would apply if Colorado "refuse[d] to accept religious reasons for [a bona fide relationship] on equal footing with secular reasons for [a bona fide relationship]." *Axson-Flynn, 356 F.3d at 1298*. And, if it did so, Colorado must offer a "compelling reason why it has a *particular interest* in denying an exception to [Appellants] while making [it] available to others." *Fulton, 141 S. Ct. at 1882* (emphasis added). Thus, a future case may present the closer questions of whether the "bona fide relationship" exemption should apply here, or, assuming Colorado denies such an exemption, whether such denial violates the *Free Exercise Clause*. On this pre-enforcement record, however, Appellants have not shown the exemption will be applied in an impermissible manner.

2. Appellants Cannot Assert a Hybrid Rights Claim

We apply heightened scrutiny to a hybrid-rights claim where a plaintiff brings a "colorable" companion claim, i.e., one with a "fair probability or likelihood, but **[**52]** not a certitude, of success on the merits." *Axson-Flynn, 356 F.3d at 1297*. Because Appellants' other constitutional claims either fail or were not raised on appeal, Appellants have no companion claim. Thus, there is no reason to apply heightened scrutiny under a hybrid-rights theory. In any event, CADA would satisfy heightened scrutiny for the same reasons that it satisfies strict scrutiny, as explained above..

E. Overbreadth and Vagueness

The *Communication Clause* not only prohibits statements indicating that goods or services "will be refused, withheld from, or denied an individual," but also prohibits statements indicating "that an individual's patronage or presence at a place of public accommodation is unwelcome, objectionable, unacceptable, or undesirable because of [protected status]." *Colo. Rev. Stat. §*

24-34-601(2)(a). **[*1189]** Appellants challenge this latter restriction, which they term the "Unwelcome Provision," as unconstitutionally overbroad and vague. *See* Aplts.' Br. at 57.

1. The Communication Clause Is Not Unconstitutionally Overbroad

The Unwelcome Provision does not render the *Communication Clause* unconstitutionally overbroad, because the Communication Clause's "application to protected speech [is not] substantial . . . relative to the scope of the law's plainly legitimate applications." **[**53]** *Virginia v. Hicks, 539 U.S. 113, 119-20, 123 S. Ct. 2191, 156 L. Ed. 2d 148 (2003)* (citing *Broadrick v. Oklahoma, 413 U.S. 601, 613, 615, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973)*). Even assuming the Unwelcome Provision, when read alone, unconstitutionally restricts speech, the *Communication Clause*, when read as a whole, is primarily focused on access to goods and services. Thus, in a case like the one here, "whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Broadrick, 413 U.S. at 615-16*. We need not apply the Unwelcome Provision in this case because Appellants' Proposed Statement violates the Communication Clause's prohibition on statements indicating refusal of services. *See* Aplts.' App. at 2-364 (Proposed Statement that Appellants "will not be able to create websites for same-sex marriages or any other marriage that is not between one man and one woman").

The Dissent concludes that the Unwelcome Provision is overbroad because it would punish numerous forms of protected speech. In support, the Dissent identifies several examples where a public accommodation might violate the Unwelcome Provision without violating the Communication Clause's separate prohibition on statements indicating refusal of services. *See* Dissent at 48-49.[10] We are unconvinced that the Dissent's examples are "substantial . . . relative to the scope of the law's **[**54]** plainly legitimate applications." *Hicks, 539 U.S. at 119-20*. Aside from this case and *Masterpiece Cakeshop*, amici document numerous other cases where public accommodations communicated, either directly or indirectly, that a consumer's presence was

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[10] As a preliminary matter, we question the Dissent's conclusion that those examples would, in fact, be "covered by . . . the Unwelcome Provision." Dissent at 50. Taking one of the Dissent's examples, it is unclear to us whether a store owner's sign stating "We honor God and His commandments here" necessarily "indicates" that an atheist customer is unwelcome. *See id.* at 48. Such a sign may cause the customer to subjectively *feel* unwelcome, even if the business does not intend any offensiveness. "Indicates" may have, under CADA, a narrower definition than the Dissent implies.

unwelcome and that they would be refused access. *See, e.g.*, Br. of Law Professors from the States of Colo., et al., as *amicus curiae* at 22-24 (describing examples of discrimination against LGBT people in Colorado); Br. of Religious and Civil Rights Organizations as *amicus curiae* at 24-26 (describing examples of discrimination against religious minorities). To be clear, we express no opinion as to whether the Unwelcome Provision might violate the *First Amendment* in other contexts. We merely conclude that those violations are better addressed on their own facts, and do not warrant the "strong medicine" of the overbreadth doctrine. *Broadrick, 413 U.S. at 613*.

2. The Communication Clause Is Not Unconstitutionally Vague

Appellants' vagueness challenge also fails because their Proposed Statement **[*1190]** indicates a refusal of services. Appellants rely on *Johnson v. United States, 576 U.S. 591, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015)*, where the Supreme Court struck the *Residual Clause of the Armed Career Criminals Act* as void for vagueness. The Supreme Court held that the Residual Clause was unconstitutionally **[**55]** vague, even if "some conduct" might clearly be proscribed. *Id. at 602*. In doing so, the Court described the standard for determining whether a statute is, as a matter of law, unconstitutionally vague—not the standard for determining when a party may bring a vagueness challenge. Accordingly, the district court in this case correctly relied on *Expressions Hair Design v. Schneiderman*, a case decided after *Johnson*, in which the Supreme Court reaffirmed that "a plaintiff whose speech is clearly proscribed cannot raise a successful vagueness claim." *137 S. Ct. 1144, 1151-52, 197 L. Ed. 2d 442 (2017)* (quoting *Holder v. Humanitarian Law Project, 561 U.S. 1, 20, 130 S. Ct. 2705, 177 L. Ed. 2d 355 (2010)*); *see also Humanitarian Law Project, 561 U.S. at 21* ("Of course, the scope of the material-support statute may not be clear in every application. But the dispositive point here is that the statutory terms are clear in their application to plaintiffs' proposed conduct, which means that plaintiffs' vagueness challenge must fail."). Because the Proposed Statement is clearly proscribed by the Communication Clause's prohibition on statements indicating refusal of services, Appellants cannot separately challenge the Unwelcome Provision as unconstitutionally vague.[11]

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[11] The Dissent's vagueness analysis suffers the same defects as its overbreadth analysis. What makes a consumer "feel" unwelcome may be unduly vague. Yet, CADA only proscribes communications that "indicate" a consumer is unwelcome. Whether a communication indicates as such may entail a more objective standard than the Dissent implies. And, in any event,

IV. Conclusion

We agree with the Dissent that "the protection of minority viewpoints is not only essential to protecting speech and self-governance **[**56]** but also a good in and of itself." Dissent at 12. Yet, we must also consider the grave harms caused when public accommodations discriminate on the basis of race, religion, sex, or sexual orientation. Combatting such discrimination is, like individual autonomy, "essential" to our democratic ideals. And we agree with the Dissent that a diversity of faiths and religious exercise, including Appellants', "enriches" our society. Dissent at 44. Yet, a faith that enriches society in one way might also damage society in other ways, particularly when that faith would exclude others from unique goods or services. In short, Appellants' Free Speech and Free Exercise rights are, of course, compelling. But so too is Colorado's interest in protecting its citizens from the harms of discrimination. And Colorado cannot defend that interest while also excepting Appellants from CADA.

For these reasons, we AFFIRM the district court's grant of summary judgment in favor of Colorado.

JUDGMENT

This case originated in the District of Colorado and was argued by counsel.

The judgment of that court is affirmed.

Dissent by: Tymkovich

Dissent

19-1413, *303 Creative v. Elenis*, Tymkovich, Chief Judge, dissenting.

> *If liberty means anything at **[**57]** all, it means the right to tell people what they do not want to hear*.
>
> - George Orwell

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the Dissent never explains why Appellants may bring a vagueness claim when their Proposed Statement clearly indicates a refusal of services.

No one denies Lorie Smith's sincere religious beliefs, good faith, and her willingness to serve clients regardless of race, creed, ethnicity, or sexual orientation. But what she will not do is compromise her **[*1191]** beliefs and produce a message at odds with them. The Constitution neither forces Ms. Smith to compromise her beliefs nor condones the government doing so. In fact, this case illustrates exactly why we have a *First Amendment*. Properly applied, the Constitution protects Ms. Smith from the government telling her what to say or do.

But the majority takes the remarkable—and novel—stance that the government may force Ms. Smith to produce messages that violate her conscience. In doing so, the majority concludes not only that Colorado has a compelling interest in forcing Ms. Smith to speak a government-approved message against her religious beliefs, but also that its public-accommodation law is the least restrictive means of accomplishing this goal. No case has ever gone so far. Though I am loathe to reference Orwell, the majority's opinion endorses substantial government interference in matters of speech, religion, and **[**58]** conscience. Indeed, this case represents another chapter in the growing disconnect between the Constitution's endorsement of pluralism of belief on the one hand and anti-discrimination laws' restrictions of religious-based speech in the marketplace on the other. It seems we have moved from "live and let live" to "you can't say that." While everyone supports robust and vigorously enforced anti-discrimination laws, those laws need not and should not force a citizen to make a Hobson's choice over matters of conscience. Colorado is rightfully interested in protecting certain classes of persons from arbitrary and discriminatory treatment. But what Colorado cannot do is turn the tables on Ms. Smith and single out her speech and religious beliefs for discriminatory treatment under the aegis of anti-discrimination laws.

The Constitution is a shield against CADA's discriminatory treatment of Ms. Smith's sincerely held religious beliefs. The *First Amendment* prohibits states from "abridging the freedom of speech" or the "free exercise" of religion. *U.S. Const. amend. I*. And the freedom to speak necessarily guarantees the right to remain silent. So the majority ushers forth a brave new world when it acknowledges that CADA compels **[**59]** both speech and silence—yet finds this intrusion constitutionally permissible. CADA forces Ms. Smith to violate her faith on pain of sanction both by prohibiting religious-based business practices and by penalizing her if she does speak out on these matters in ways Colorado finds "unwelcome" or "undesirable."[1]

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[1] The Colorado Anti-Discrimination Act provides that, for places of public accommodation:

I agree with the majority that Ms. Smith has standing to bring her claims and that [*1192] the case is ripe. But because I cannot agree that Colorado may force Ms. Smith to create messages or stay silent contrary to her beliefs, I respectfully dissent.

I. Free Speech

It is important to understand from the outset that Ms. Smith and Colorado *agree* that she will serve anyone, regardless of protected class status. In the district court, both she and Colorado stipulated that: (1) Ms. Smith is "willing to work with all people regardless of classifications such as race, creed, sexual orientation and gender"; and (2) Ms. Smith does "not object to and will gladly create custom graphics and websites for gay, lesbian, or bisexual clients or for organizations run by gay, lesbian, or bisexual persons so long as the custom graphics and websites do not violate [her] religious beliefs, as is true for all customers." Aplt. App. 2-322. Ms. Smith and Colorado also agree that she "will decline any [**61] request to design, create, or promote content that: contradicts biblical truth; demeans or disparages others; promotes sexual immorality; supports the destruction of unborn children; incites violence; or promotes any conception of marriage other than marriage between one man and one woman." *Id.* at 2-323. And counsel for Ms. Smith confirmed at oral argument that she would represent clients regardless of sexual orientation in creating websites that celebrate opposite-sex weddings.

In short, Colorado appears to agree that Ms. Smith does not distinguish between customers based on protected-class status and thus advances the aims of CADA.

> It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, gender identity, gender expression, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or, directly or indirectly, to publish, circulate, issue, display, post, or mail any written, electronic, or printed communication, notice, or advertisement that indicates that the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation will be refused, withheld from, or denied an individual or that an individual's patronage or presence at a place of public accommodation [**60] is unwelcome, objectionable, unacceptable, or undesirable because of disability, race, creed, color, sex, sexual orientation, gender identity, gender expression, marital status, national origin, or ancestry.

Colo. Rev. Stat. § 24-34-601, *as amended by* H.B. 21-1108 (enacted May 20, 2021). CADA was amended in May 2021 to add "gender identity" and "gender expression" as protected class characteristics.

But when *any* customer asks Ms. Smith to create expressive content that violates her sincerely held beliefs, she will decline the request.[2] Colorado claims to endorse this type of message-based refusal, asserting that "the Commission does not interpret [CADA] to require any business owner, regardless of religious beliefs, to produce a message it would decline to produce for any customer." Appellee Br. at 62. Yet Colorado and the majority argue that Ms. Smith must do exactly this: create expressive content celebrating same-sex weddings as long as she will create **[**62]** expressive content celebrating opposite-sex weddings. This is paradigmatic compelled speech.

A. Compelled Speech Provisions Are Subject to Strict Scrutiny

Government-compelled speech is antithetical to the *First Amendment*. Forcing an individual "to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable . . . . 'invades the sphere of intellect and spirit which it is the purpose of the *First Amendment* to our Constitution to reserve from all official control.'" *Wooley v. Maynard, 430 U.S. 705, 715, 97 S. Ct. 1428, 51 L. Ed. 2d 752 (1977)* (quoting *W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943)*). Thus, the government cannot—for example—coerce affirmations of belief, compel unwanted expression, or force one speaker to host the message of another as a public accommodation. *See Barnette, 319 U.S. at 633-34*; *Wooley, 430 U.S. at 714*; *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 573, **[*1193]** 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995)*.

The compelled speech doctrine was first articulated in 1943 in Justice Jackson's opinion in *Barnette*. In that case, Jehovah's Witness parents and schoolchildren sought to enjoin the enforcement of compulsory flag-salute laws, as the required salute and accompanying pledge of allegiance violated their religious beliefs. Justice Jackson concluded that the *First Amendment* protected the schoolchildren's right to free speech, noting that "[t]o sustain the compulsory flag salute we are required to say that a *Bill of Rights* which guards the individual's **[**63]** right to speak his own mind, left it open to public authorities to compel him to utter what is not in his

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[2] At oral argument, the following hypothetical was posed of Ms. Smith's counsel: imagine a heterosexual wedding planner approached Ms. Smith, asking her to design five mock-up wedding websites for the wedding planner to attract potential customers—four for opposite-sex weddings and one for a same-sex wedding. Ms. Smith's counsel confirmed that she would not make a same-sex wedding website for a heterosexual client.

mind." *Barnette, 319 U.S. at 634*. Written against the backdrop of World War II, the opinion cautioned against the "[c]ompulsory unification of opinion" of the like sought by the "fast failing efforts of our present totalitarian enemies." *Id. at 641*. "[T]he *First Amendment to our Constitution* was designed to avoid these ends by avoiding these beginnings"—namely, by preventing the government from coercing speech in the first instance. *Id.*

Over three decades later, the Court again confirmed that the government cannot compel an unwilling individual to speak or even passively display the government's ideological message, no matter its popularity. In 1977, the *Wooley* Court struck down New Hampshire regulations requiring the display of the state's "Live Free or Die" motto on license plates. *Wooley, 430 U.S. at 714*. The motto's wide acceptance was irrelevant because the "*First Amendment* protects the right of individuals to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable." *Id. at 717*. *Wooley* also expanded *Barnette*'s logic: just as the government cannot coerce affirmations of belief, it also cannot require an individual to be a "courier **[**64]** for [the State's] message," even when that message does not otherwise interfere with the individual's own speech. *Id.*

Nor can the government require a speaker to be a courier for another citizen's message. In *Hurley*, the Court unanimously held as unconstitutional the application of the Massachusetts public-accommodations statute to the organizers of Boston's St. Patrick's Day Parade. *Hurley, 515 U.S. at 572-73*. Forcing the organizers of the parade—which itself is protected expression—to allow the participation of the Irish-American Gay, Lesbian & Bisexual Group "had the effect of declaring the sponsors' speech itself to be the public accommodation." *Id. at 573*. "[T]his use of the State's power violates the fundamental rule of protection under the *First Amendment*, that a speaker has the autonomy to choose the content of his own message." *Id.* Organizing the parade and selecting participants was expressive, so applying the public-accommodations law to force the organizers to include unwanted speech was an impermissible intrusion on the freedom to create that expression. *See id. at 576* ("[W]hen dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy **[**65]** over the message is compromised."). Indeed, "[w]hile the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Hurley, 515 U.S. at 579*.

[*1194] And the autonomy to speak *necessarily* includes the freedom to remain silent. Because "'*all* speech inherently involves choices of what to say and what to leave unsaid,' . . . one important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.'" *Id. at 573* (quoting *Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n of Cal., 475 U.S. 1, 11, 19, 106 S. Ct. 903, 89 L. Ed. 2d 1 (1986)*) (emphasis in original). The Supreme Court has "held time and again that freedom of speech includes both the right to speak freely and the right to refrain from speaking at all." *Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31, 138 S. Ct. 2448, 2463, 201 L. Ed. 2d 924 (2018)* (internal quotation marks omitted). As the *Hurley* Court held, "the choice of a speaker not to propound a particular point of view . . . is presumed to lie beyond the government's power to control." *Hurley, 515 U.S. at 575*. The rule that a "speaker has the right to tailor . . . speech[] applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would **[**66]** rather avoid." *Id. at 573*; *see also Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1745, 201 L. Ed. 2d 35 (2018)* (Gorsuch, J., concurring) ("Because the government cannot compel speech, it also cannot 'require speakers to affirm in one breath that which they deny in the next.'" (quoting *Pac. Gas & Elec. Co., 475 U.S. at 16*)).

Key to the *Hurley* decision was the expressive nature of a parade. This crucial point distinguishes it from the Court's decision compelling college campuses to allow military recruiters in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47, 61, 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006)*. The Solomon Amendment, challenged in that case, required law schools to afford military recruiters access to campus facilities for interviews and promotional events, including access to school scheduling emails and announcements. *Id. at 60*. But the law schools were already providing these services to other speakers, and the notification emails and posted notices were not considered the law schools' *expressive* speech. *Id. at 61-63*. The law schools' actions in sending out such notices were not "affected by the speech it was forced to accommodate" because the emails did not constitute expressive conduct. *Id. at 63-64*; *see also id. at 64* ("Unlike a parade organizer's choice of parade contingents, a law school's decision to allow recruiters on campus is not inherently expressive."). This is why, in *Hurley*, the Massachusetts public-accommodation **[**67]** law had "been applied in a peculiar way": it had made *expressive* speech the public accommodation and thereby changed its message. *Hurley, 515 U.S. at 572*. Nothing about the access afforded by the Solomon Amendment, in contrast, compromised the law schools' expressive beliefs.

In more recent cases, the Supreme Court has confirmed the *First Amendment's* antipathy toward government-compelled speech. The government may no more "prohibit the dissemination of ideas that it disfavors" than it can "compel the endorsement of ideas that it approves." *Knox v. Serv. Emps. Int'l Union, Local 1000, 567 U.S. 298, 309, 132 S. Ct. 2277, 183 L. Ed. 2d 281 (2012)*. A state cannot compel pregnancy crisis centers—many of which are pro-life—to inform patients about the availability of abortions because it "alter[s] the content of their speech." *Nat'l Inst. of Family & Life Advocates v. Becerra (NIFLA), 138 S. Ct. 2361, 2371, 201 L. Ed. 2d 835 (2018)* (quoting *Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 795, [*1195] 108 S. Ct. 2667, 101 L. Ed. 2d 669 (1988)*) (alterations incorporated); *see also NIFLA, 138 S. Ct. at 2379* (Kennedy, J., concurring) ("This law is a paradigmatic example of the serious threat presented when government seeks to impose its own message in the place of individual speech, thought, and expression."). Nor can a state force individuals to pay dues to subsidize a private organization's speech. *Janus, 138 S. Ct. at 2464*. And—until now—our own precedent has similarly taken a deeply skeptical approach to compelled speech. *See Axson-Flynn v. Johnson, 356 F.3d 1277, 1283 (10th Cir. 2004)* (finding a genuine dispute of material fact as to whether **[**68]** university's compulsion of theater student's speech was pretextual); *Cressman v. Thompson, 798 F.3d 938, 951 (10th Cir. 2015)* (discussing the long prohibition on compelled speech); *Phelan v. Laramie Cty. Cmty. Coll. Bd. of Trustees, 235 F.3d 1243, 1247 (10th Cir. 2000)* (noting that, in government-speech contexts, the "crucial question is whether, in speaking, the government is compelling others to espouse or to suppress certain ideas and beliefs"); *Semple v. Griswold, 934 F.3d 1134, 1143 (10th Cir. 2019)* (concluding that a Colorado state amendment raising standards for citizen ballot initiatives did not compel speech by requiring interactions with voters in all state senate districts).

Accordingly, compelled speech is deeply suspect in our jurisprudence—and rightly so, given the unique harms it presents. For one, the ability to choose what to say or not to say is central to a free and self-governing polity. As Justice Alito wrote in *Janus*:

> When speech is compelled, . . . additional damage is done. In that situation, individuals are coerced into betraying their convictions. Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning, and for this reason, . . . a law commanding "involuntary affirmation" of objected-to beliefs would require "even more immediate and urgent grounds" than a law demanding silence.

Id. (quoting *Barnette, 319 U.S. at 634*). The "[c]ompulsory **[**69]** unification of opinion" cautioned by Justice Jackson in *Barnette* is not only a social harm but a personal one. *319 U.S. at 641*. The *choice* of what to say has value, regardless of what is said or not said; narrowing the field of permissible expression diminishes autonomy and free will.

Moreover, the government's ability to compel speech and silence would make hollow the promise of other *First Amendment* freedoms. Freedom of association means little without the ability to express the bonds of connection, *see Boy Scouts of Am. v. Dale, 530 U.S. 640, 655-56, 120 S. Ct. 2446, 147 L. Ed. 2d 554 (2000)*, and the freedom to petition for redress of grievances is valueless unless one is protected from retribution for that speech. The freedom of the press is essentially coextensive with—and reliant on—the freedom of speech. *See, e.g., Branzburg v. Hayes, 408 U.S. 665, 708, 92 S. Ct. 2646, 33 L. Ed. 2d 626 (1972)*. And the freedom to exercise one's religion necessitates the ability to speak, engage in expressive conduct, *and* conscientiously refuse to speak, in order to have meaningful protection at all. *See, e.g., NIFLA, 138 S. Ct. at 2379* ("Freedom of speech secures freedom of thought and belief.") (Kennedy, J., concurring).

It is axiomatic that freedom of speech properly keeps the power of the government in check and preserves democratic self-government. *See, e.g., Thornhill v. State of Alabama, 310 U.S. 88, 95, 60 S. Ct. 736, 84 L. Ed. 1093 (1940)* ("The safeguarding of these rights to the ends that **[**70]** men may speak as they think on matters vital to them and that falsehoods may be exposed **[*1196]** through the processes of education and discussion is essential to free government."). This is why, of course, electoral speech is essential to a free and functioning republic. *Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 339, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010)* ("Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people."). Stifling minority speech is the prototypical "slippery slope" toward authoritarianism, recognized in the first of the compelled speech cases: "As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity." *Barnette, 319 U.S. at 640*. To paraphrase Orwell, liberty must mean the right to tell others—especially the government—what it does not want to hear.

Furthermore, the protection of minority viewpoints is not only essential to protecting speech and self-governance but also a good in and of itself. *See, e.g., Wooley, 430 U.S. at 715* ("The *First Amendment* protects the right of individuals to hold a point of view different from the majority

and to refuse to foster, in the way New Hampshire commands, an idea they find morally objectionable."); *Texas v. Johnson, 491 U.S. 397, 414, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989)* ("If there is a bedrock principle underlying the *First Amendment*, it is **[**71]** that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."). Indeed, the "point of all speech protection, . . . is to shield just those choices of content that in someone's eyes are misguided, or even hurtful." *Hurley, 515 U.S. at 574*. The lack of minority viewpoints would impoverish the richness of conversation and impede the search for truth contemplated by the *First Amendment*. *See, e.g., Thornhill, 310 U.S. at 95* ("Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth.").

Because of its existential threat to the most sacred freedoms, we are tasked with reviewing instances of compelled expressive speech with the utmost skepticism. The majority's endorsement of compelled speech directed at Ms. Smith turns away from these foundational principles.

B. CADA Compels Expressive Speech

The Supreme Court's repeated, emphatic disapprobation of compelled expressive speech leaves little room for other conclusions. So it is all the more troubling when, in a case where the parties have stipulated that Ms. Smith's work is expressive speech—"*[the] custom wedding websites* ***[**72]*** *will be expressive in nature*"—the majority decides that its compulsion is constitutional.[3]

Creating custom wedding websites is not merely conduct, or even expressive conduct. Ms. Smith's wedding websites as a whole—and the "text, graphics, and . . . videos" that comprise them—are pure speech. *See Kaplan v. California, 413 U.S. 115, 119-20, 93 S. Ct. 2680, 37 L. Ed. 2d 492 (1973)* (pure speech includes the printed **[*1197]** word, oral utterances, pictures, films, paintings, drawings, and engravings); *Brown v. Ent. Merchants Ass'n, 564 U.S. 786, 790,*

[3] Ms. Smith and Colorado stipulated that her "custom wedding websites will be expressive in nature, using text, graphics, and in some cases videos to celebrate and promote the couple's wedding and unique love story." Aplt. App. at 2-325. The parties also agree that "[a]ll of these expressive elements will be customized and tailored to the individual couple and their unique love story." *Id.* And the parties stipulate that "[v]iewers of the wedding websites will know that the websites are Plaintiffs' original artwork because all of the wedding websites will say 'Designed by 303Creative.com.'" *Id.*

131 S. Ct. 2729, 180 L. Ed. 2d 708 (2011) (holding that books, plays, movies, and video games all communicate ideas, which "suffices to confer First Amendment protection"); Cressman, 798 F.3d at 953 (noting that "an artist's sale of his own original work is pure speech"). This is because the websites are greater than the sum of their parts: each custom website conveys Ms. Smith's message or interpretation of celebration of the couple's union. *See* Cressman, 798 F.3d at 952-53 (emphasizing that the "animating principle behind pure-speech protection" is "safeguarding self-expression"). The parties agree on this point, stipulating that "[b]y creating wedding websites, Ms. Smith and 303 Creative will collaborate with prospective brides and grooms in order to use their unique stories as source material to express Ms. Smith's and 303 Creative's message celebrating and promoting God's design **[**73]** for marriage as the lifelong union of one man and one woman." Aplt. App. at 2-325.

The fact that Ms. Smith sells her custom website designs does not reduce their value as speech. "It is well settled that a speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak." Riley, 487 U.S. at 801. The creative confluence of the text and graphics in these original, individualized websites produce *expression*—which deserves the highest protection under the First Amendment.[4]

If anything, this is an easier case than those involving wedding cakes, *see* Masterpiece, 138 S. Ct. at 1723, wedding photographs, *see* Chelsey Nelson Photography LLC v. Louisville/Jefferson Cty. Metro Gov't, 479 F. Supp. 3d 543, 2020 WL 4745771, at *10 (W.D. Ky. Aug. 14, 2020), Updegrove v. Herring, No. 1:20-CV-1141, 2021 U.S. Dist. LEXIS 62307, 2021 WL 1206805, at *1 (E.D. Va. Mar. 30, 2021), and Elane Photography, LLC v. Willock, 2013- NMSC 040, 309 P.3d 53, 59 (N.M. 2013), wedding videos, *see* Telescope Media Grp. v. Lucero, 936 F.3d 740,

[4] Ms. Smith's custom websites are not commercial speech—or even *expressive* commercial speech. The Supreme Court has recognized that while advertising, for example, is purely commercial speech, *see* Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 637, 105 S. Ct. 2265, 85 L. Ed. 2d 652, 17 Ohio B. 315 (1985), expressive art—including art created in exchange for money—is afforded First Amendment protection. *See, e.g.*, Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 557-58, 95 S. Ct. 1239, 43 L. Ed. 2d 448 (1975) (theater production); Hurley, 515 U.S. at 569 (paintings, music, poetry, expressive parades); Kaplan, 413 U.S. at 119-20 (pure speech includes the printed word, oral utterances, pictures, films, paintings, drawings, and engravings). Jackson Pollock sold his paintings, Leonard Bernstein profited from his compositions, and Lewis Carroll published his works to sell—but their creations are "unquestionably shielded." Hurley, 515 U.S. at 569. Indeed, to hold that pure speech for sale is not deserving of First Amendment protection would be the exception that swallows the rule. Nearly all art and expressive speech has a commercial aspect in its creation because artists' and speakers' livelihoods often depend on its sale. But a paid speaker is still a speaker. *See* Riley, 487 U.S. at 801.

750 (8th Cir. 2019), wedding floral arrangements, *see State v. Arlene's Flowers, Inc., 193 Wn.2d 469, 441 P.3d 1203, 1225 (Wash. 2019)*, *cert. denied*, (U.S. July 2, 2021) (No. 19-333), or even custom wedding invitations, *see* Brush & Nib Studio, LC v. City of Phoenix, 448 P.3d 890, 908 (Ariz. 2019). It is obvious to even the most casual viewer that Ms. Smith is creating a customized art product—which incorporates unique, expressive speech—for her customers.

[*1198]

Fig. 1 – A prototype of a wedding website page design by Ms. Smith.

Yet the majority does not afford Ms. Smith's pure speech any protection, endorsing CADA's compulsion of both speech and silence. If Ms. Smith creates wedding websites for opposite-sex couples, CADA compels **[**74]** her to create wedding websites for same-sex couples. She does not, for example, pre-design t-shirts and set a stack of them on a shelf, available to be picked up by any customer who walks in the store. (If that were the case, CADA's application would be uncontroversial: Ms. Smith would be required to serve *every* customer wanting to buy the pre-designed t-shirt, regardless of protected class status.) Instead, Ms. Smith's wedding websites will be custom-made, conveying both the couple's message about their wedding *and* Ms. Smith's own beliefs about and interpretation of marriage. So the majority recognizes that CADA forces artists to create individualized, expressive artwork that conveys a message betraying their beliefs—yet finds this constitutionally permissible.[5]

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[5] As long as a public-accommodation law is applied neutrally and not to expression, it is a commendable—and constitutional—effort by a state to eliminate discriminatory treatment of protected classes. *See* Hurley, 515 U.S. at 572 ("Provisions like these

[*1199] This departs from the explanation of a case substantially similar to this one, *Telescope Media*. *See* 936 F.3d at 750. There, the Eighth Circuit recognized that wedding videographers made videos that, "[b]y design, . . . serve as a medium for the communication of ideas about marriage" and are thus "a form of speech that is entitled to *First Amendment* protection." *Id. at 750-51* (internal quotation marks omitted). Indeed, the Eighth Circuit acknowledged, "once conduct **[**75]** crosses over to speech or other expression, the government's ability to regulate it is limited." *Id. at 755*. Because the public-accommodation law thus required the videographers "to speak favorably about same-sex marriage if they choose to speak favorably about opposite-sex marriage," it impermissibly compelled speech. *Id. at 752*. And the Arizona Supreme Court came to a similar conclusion about custom wedding invitations. *See Brush & Nib Studio, 448 P.3d at 914-15* (holding that Arizona's public-accommodations law had compelled the pure speech of the custom wedding invitation designers). Another federal court agreed with regard to wedding photography. *See Chelsey Nelson Photography, 479 F. Supp. 3d 543, 2020 WL 4745771, at *10*; *but see Elane Photography, 309 P.3d at 59* (holding New Mexico's public-accommodations law did not compel speech when enforced against wedding photographer who refused to photograph same-sex weddings).

The majority instead concludes that Ms. Smith must either agree to propound messages accepting and celebrating same-sex marriage contrary to her deeply held principles or face financial penalties and remedial training under CADA.[6] This is not a meaningful choice—nor is it one Colorado can or should force her to make. *See Hurley, 515 U.S. at 573* (recognizing the rule that the government "may not compel affirmance of a belief with which the speaker **[**76]** disagrees").

This is the central lesson of *Hurley*. A state may not regulate speech itself as a public accommodation under anti-discrimination laws. But CADA does so here, making Ms. Smith's

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are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the *First* or *Fourteenth Amendments*."); *Masterpiece, 138 S. Ct. at 1728* ("It is unexceptional that Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public. And there are no doubt innumerable goods and services that no one could argue implicate the *First Amendment*.").

[6] These penalties include fines between $50 and $500 for each violation, compulsory mediation, orders to comply with CADA, and requirements that the charged party take other remedial actions, including required training, reports, and posting notices "setting forth the substantive rights of the public." ***Colo. Rev. Stat. §§ 24-34-602(1)(a)***, ***24-34-306***, ***24-34-605***. But I doubt any amount of training or struggle session would make Ms. Smith amenable to violating her conscience.

artistic talents the vehicle for a message anathema to her beliefs. The expansive view Colorado takes of CADA's reach would not stop with Ms. Smith's wedding websites. Indeed, the State could wield CADA as a sword, forcing an unwilling Muslim movie director to make a film with a Zionist message or requiring an atheist muralist to accept a commission celebrating Evangelical zeal. After all, the Muslim director would make films and the atheist muralist would paint murals for the general public with other messages. And that, Colorado contends, is all that is required to force them to accommodate a customer's request if it relates to the customer's protected class status:

> [CADA] requires commercial actors to offer specific goods and services to customers regardless of protected class status only 'if, and to the extent[,]' the merchant willingly provides those goods and services to the general public. . . . *That those goods and services may involve the vendor's creative or expressive skill does not change* ***[**77]*** *this analysis*.

Appellee Br. at 46 (emphasis added). The majority agrees, declaring that "unique **[*1200]** goods and services are where public accommodation laws are most necessary to ensuring equal access." Maj. Op. at 31. It appears that the path to "coercive elimination of dissent" is steep—and short. *Barnette, 319 U.S. at 641*.

Moreover, CADA compels silence. Ms. Smith would like to post on her website an honest, straightforward message about why she will only make wedding websites for weddings involving one man and one woman.[7] Endorsing same-sex marriage is a message Ms. Smith will not

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[7] Ms. Smith's intended statement reads in full:

> I love **[**78]** weddings.
>
> Each wedding is a story in itself, the story of a couple and their special love for each other.
>
> I have the privilege of telling the story of your love and commitment by designing a stunning website that promotes your special day and communicates a unique story about your wedding — from the tale of the engagement, to the excitement of the wedding day, to the beautiful life you are building together.
>
> I firmly believe that God is calling me to this work. Why? I am personally convicted that He wants me — during these uncertain times for those who believe in biblical marriage — to shine His light and not stay silent. He is calling me to stand up for my faith, to explain His true story about marriage, and to use the talents and business He gave me to publicly proclaim and celebrate His design for marriage as a life-long union between one man and one woman.
>
> These same religious convictions that motivate me also prevent me from creating websites promoting and celebrating ideas or messages that violate my beliefs. So I will not be able to create websites for same-sex marriages or any other marriage

create for any client. But CADA prevents her from informing clients of this. The State of Colorado can—and will, given its arguments throughout this litigation and given its past actions—penalize her. *See, e.g.,* *Masterpiece, 138 S. Ct. 1719, 1726, 201 L. Ed. 2d 35 (2018)* (discussing the penalties imposed on Masterpiece Cakeshop by the Commission); *Masterpiece Cakeshop Inc. v. Elenis* (*Masterpiece II*), No. 1:18-cv-02074-WYD-STV (D. Colo. Jan. 4, 2019), ECF No. 94 (order on suit regarding Colorado's second enforcement action brought against Masterpiece Cakeshop for refusing to make a birthday cake celebrating a sex-change). This reality forces Ms. Smith to stay silent about her convictions.

Fig. 2 - The statement Ms. Smith wishes to publish on her business's website.

Nor is Ms. Smith's statement intended to be derogatory or malicious. She forthrightly **[*1201]** states her firm conviction—grounded in her Christian faith—that conscience requires her to create wedding websites only for marriages between one man and one woman. Doing otherwise, she states, would "compromise [her] Christian witness." Aplt. App. at 2-326.

Ms. Smith, like some other businesses that espouse religious sentiments, is simply informing the public that she operates her business in accordance with her faith. And as an artist, she will not create commissioned messages contrary to her beliefs. Her business is firmly nondiscriminatory. Her policy applies to *all* clients: as Ms. Smith's counsel explained at oral argument, she would not create a same-sex wedding website—even a prototype for a non-existent couple—for anyone, regardless of sexual orientation. Her statement simply informs potential clientele of the constraints of her faith, and the *First Amendment* protects Ms. Smith's right to do so.

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that is not between one man and one woman. Doing that would compromise my Christian witness **[**79]** and tell a story about marriage that contradicts God's true story of marriage — the very story He is calling me to promote.

Aplt. App. at 1-110.

*C. Content-and [**80] Viewpoint-Based Restriction*

Like laws that compel speech, laws that restrict speech based on content or viewpoint are also highly suspect. As applied to Ms. Smith, CADA does both.

A law is content-based if it "applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert, Ariz., 576 U.S. 155, 163, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015)*; *see also R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 395, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992)*. This "requires a court to consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys." *Reed, 576 U.S. at 163* (quoting *Sorrell v. IMS Health Inc., 564 U.S. 552, 566, 131 S. Ct. 2653, 180 L. Ed. 2d 544 (2011)*); *see also Aptive Env't., LLC v. Town of Castle Rock, Colo., 959 F.3d 961, 981-83 (10th Cir. 2020)* (treating an ordinance that facially distinguished between commercial solicitation and other types of solicitation as content-based). Of course, "[s]ome facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose." *Id.* But "[b]oth are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny." *Id. at 163-64*. Also subject to strict scrutiny are laws that are facially content-neutral but that "cannot be 'justified without reference to the content of the regulated speech,' or that were adopted by the government 'because of disagreement with the message the **[**81]** speech conveys.'" *Id. at 164* (quoting *Ward v. Rock Against Racism, 491 U.S. 781, 791, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989)*) (alterations incorporated). All of these types of content-based regulations—which "target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed, 576 U.S. at 163*.

Furthermore, a law that discriminates based on viewpoint is an even more "blatant" violation of the *First Amendment*. *Rosenberger v. Rector & Visitors of Univ. of Virginia, 515 U.S. 819, 829, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995)*. Because the government is regulating "speech based on 'the specific motivating ideology or the opinion or perspective of the speaker,'" it is a more "egregious form of content discrimination." *Reed, 576 U.S. at 168* (quoting *Rosenberger, 515 U.S. at 829*). Consequently, the "government must abstain from regulating speech when the specific motivating ideology **[*1202]** or the opinion or perspective of the speaker is the rationale

for the restriction." *Rosenberger, 515 U.S. at 829*. The *First Amendment* thus "forbid[s] the State to exercise viewpoint discrimination," and such a regulation must undergo the strictest scrutiny. *Id.*

As the majority recognizes, CADA is indisputably a content-and viewpoint-based regulation. The "crucial first step in the content-neutrality analysis [is] determining whether the law is content neutral on its face." *Reed, 576 U.S. at 165*. Take, for example, the provision **[**82]** that requires an arbiter to—at the very least—read a challenged "communication, . . . notice, or advertisement" to determine whether it "indicates that the full and equal enjoyment" of the public accommodation "will be refused, withheld from, or denied an individual." *Colo. Rev. Stat. § 24-34-601(2)(a)*. The permissibility of the communication depends on *what* it says—or, stated simply, its content.

Similarly, determining whether a person has been denied accommodation *because of* a protected class status requires, of course, an inquiry into the motivation behind the denial. (This is, in large part, why the Commission exists.) Because the *content* of the message determines the applicability of the statute and the *viewpoint* of the speaker determines the legality of the message, CADA is both content-and viewpoint-based. But both point to the same conclusion: "A law that is content-based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech." *Reed, 576 U.S. at 165* (internal quotation marks omitted).

* * *

Whether CADA compels speech or regulates speech based on its content or discriminates against speech based on its **[**83]** viewpoint—or all three—one thing is clear, as the majority concedes: CADA must undergo strict scrutiny. Under a proper application of strict scrutiny, CADA fails to pass constitutional muster.

D. CADA Fails Strict Scrutiny

Although the majority properly finds CADA compels expressive speech, *see* Maj. Op. at 24, it resists the firm teaching of precedent that the resulting compulsion violates the Constitution. And even though the majority also agrees that CADA is a content-based restriction on speech, *see*

Maj. Op. at 25, its permissive application of strict scrutiny is troubling. The majority tells us not to worry because Colorado has good reasons to violate Ms. Smith's conscience for the greater good. After all, she is only one person out of many. But this is misguided. *See* Barnette, 319 U.S. at 638 ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the **[**84]** outcome of no elections.").

To be sure, the Supreme Court has warned that it "wish[es] to dispel the notion that strict scrutiny is strict in theory, but fatal in fact." Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995) (internal quotation marks omitted). But "it is the rare case in which a State demonstrates" that a provision passes strict scrutiny. Williams-Yulee v. Fla. Bar, 575 U.S. 433, 444, 135 S. Ct. 1656, 191 L. Ed. 2d 570 (2015) (internal quotation marks omitted). In the context **[*1203]** of expressive speech, the stakes are high—so a rigorous application of strict scrutiny is vital.

As the majority acknowledges, strict scrutiny requires the government to demonstrate that the provision "is justified by a compelling government interest and is narrowly drawn to serve that interest." Brown, 564 U.S. at 799; *see also* Pac. Gas & Elec. Co., 475 U.S. 1, 19, 106 S. Ct. 903, 89 L. Ed. 2d 1 (1986) (holding that a law that compels speech is only valid if it is a "narrowly tailored means of serving a compelling state interest"). When determining whether a law is narrowly tailored, "the court should ask whether the challenged regulation is the least restrictive means among available, effective alternatives." Ashcroft v. ACLU, 542 U.S. 656, 666, 124 S. Ct. 2783, 159 L. Ed. 2d 690 (2004). And in the free-speech context, "narrow" means the law must "avoid unnecessarily abridging speech." *See* Williams-Yulee, 575 U.S. at 444. It also means a law cannot be overinclusive, *see* Brown, 564 U.S. at 804, or underinclusive, *see* Reed, 576 U.S. at 171-72. The existence of administrable, reasonable **[**85]** alternatives indicate the law is not sufficiently narrow to survive the rigors of strict scrutiny. *See* Ashcroft, 542 U.S. at 666. Ultimately, the court's task is to ensure that "speech is restricted no further than necessary to achieve the [government's] goal[.]" *Id.*

CADA is not narrowly tailored so as to survive its encroachment on *First Amendment* liberties. Eliminating discrimination in places of public accommodation is undeniably a compelling state interest. *See* *Roberts v. U.S. Jaycees, 468 U.S. 609, 628, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984)* ("[A]cts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent[.]"). And as a general proposition, "ensuring 'equal access to publicly available goods and services'" is also a compelling government interest. Maj. Op. at 28 (quoting *U.S. Jaycees, 468 U.S. at 624*). But ensuring access to a *particular* person's unique, artistic product—as the majority holds, *see* Maj. Op. at 33—is *not* a compelling state interest.[8] Nor does the majority cite any case law to support this unconventional characterization of a compelling interest.

And in advancing its aims, Colorado has failed to narrowly tailor CADA so as to preserve vital speech protections. **[**86]** For one, CADA is overinclusive, intruding into protected **[*1204]** speech both by compelling it and by suppressing it, as discussed above. For another, there are reasonable, practicable alternatives Colorado could implement to ensure market access while better protecting speech. Colorado could simply take seriously (and codify) its own statement that CADA allows for message-based exceptions. *See* Appellee Br. at 62 ("[T]he Commission does not interpret [CADA] to require any business owner, regardless of religious beliefs, to produce a message it would decline to produce for any customer."). This practicable alternative protects artists' speech interests while not harming the state's interest in ensuring market access. After all, the Commission claims to interpret CADA in this way already.

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[8] In concluding that CADA is narrowly tailored, the majority appears to conflate the compelling-interest analysis with the narrow-tailoring analysis. The majority states that CADA is "narrowly tailored to Colorado's interest in ensuring access to the commercial marketplace." Maj. Op. at 33. Although the majority acknowledges that "the commercial nature of [Ms. Smith's] business does not diminish [her] speech interest," *id.* at 28, the opinion then states that this same commercial nature allows Colorado to regulate it.

But this statement—and the ensuing discussion—is not aimed at how narrowly CADA is or is not tailored; rather, it confuses the *means* (how a State accomplishes its compelling interest) with the *ends* (the State's compelling interest it seeks to further). Put differently, the majority appears to endorse the proposition that if the government's *compelling interest* is drawn narrowly enough, the government may use any means to further it. Other than pointing out how CADA is aimed at regulating commercial behavior, the majority says nothing about how CADA uses the least restrictive means to accomplish its goal and "avoid[s] unnecessarily abridging speech." *See* *Williams-Yulee, 575 U.S. at 444*. The majority's discussion on this point merely reiterates Colorado's purportedly compelling interest in providing market access to Ms. Smith's website designs in particular.

Alternatively, Colorado could allow artists—those who are engaged in making expressive, custom art—to select the messages they wish to create, free from fear of retribution. Or Colorado could exempt from CADA artists who create expressive speech about or for weddings, as Mississippi does. *See* Miss. Code Ann. § 11-62-5(5). Colorado could also modify its definition of "place of public accommodation" by placing expressive businesses beyond **[**87]** its reach. *See Colo. Rev. Stat. § 24-34-601(1)*. Indeed, CADA already excludes one type of expressive establishment: "places principally used for religious purposes." *Id.*

In any event, the majority overlooks these simple answers that would keep Colorado properly within the bounds of the Constitution. Instead, the majority allows the government to dictate what shall and shall not be said, impinging on the most vital *First Amendment* liberties. Rather than embracing the idea that creative, expressive works are even worthier of *First Amendment* protection by virtue of their originality and intrinsic worth, the majority comes to the *opposite* conclusion. It holds that "unique goods and services are where public accommodation laws are most necessary to ensuring equal access." Maj. Op. at 32. It premises this argument on the idea (novel to the *First Amendment*) of a "monopoly of one," characterizing the "product at issue [as] not merely 'custom-made wedding websites,' but rather 'custom-made wedding websites of the same quality and nature as those *made by [Ms. Smith]*.'" *Id.* at 30-31 (emphasis added). The majority then concludes that "monopolies present unique anti-discrimination concerns," justifying regulation of a market in which "only [Ms. Smith] exist[s]." *Id.* at **[**88]** 30.

But this reductive reasoning leads to absurd results. By describing custom artists as creating a monopoly of one, the majority uses the very quality that gives the art value—its expressive and singular nature—to cheapen it. In essence, the majority holds that the *more* unique a product, the more aggressively the government may regulate access to it—and thus the *less* *First Amendment* protection it has.[9] This is, in a word, unprecedented. And this interpretation subverts our core understandings of the *First Amendment*. After all, if speech can be regulated by the government solely by reason of its novelty, nothing unique would be worth saying. And because essentially all artwork is inherently "not fungible," *id.* at 28, the scope of the majority's opinion is staggering. Taken to its logical end, the government could regulate the messages

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[9] This was not the conclusion reached by the *Hurley* Court. Consider what was at issue in that case: participation in the Boston St. Patrick's Day—Evacuation Day Parade. What could possibly be more unique and non-fungible than marching in this famous, storied parade? *See* Hurley, 515 U.S. at 560-61 (discussing the long history of the parade).

communicated by *all* artists, forcing them to promote messages approved by the **[*1205]** government in the name of "ensuring access to the commercial marketplace."[10] *Id.* at 27.

In sum, I am persuaded by what Justice Jackson wrote nearly 80 years ago: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, **[**89]** religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Barnette, 319 U.S. at 642*. These words are as true now as they were then.

II. Free Exercise

The majority then turns to Ms. Smith's right to freely exercise her religious beliefs. State actions that infringe on this right enshrined in the *First Amendment* can range from extreme (and unconstitutional) to permissible. A short review of the legal framework demonstrates where CADA's application to Ms. Smith falls on this spectrum.

At one end of the spectrum are neutral laws that are generally applicable, which treat religious and secular entities the same. *See Emp. Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 878-79, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990)*; *Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1876, 210 L. Ed. 2d 137 (2021)*.[11] These laws are subject to rational basis review. A

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[10] The majority points out that its holding "does not address how CADA might apply to non-commercial activity (such as commissioning a mural for some charitable purpose)." Maj. Op. at 33 n.6. But this is surely cold comfort for the vast majority of artists, who make a living by selling their work. Artists should not have to choose to either disavow their beliefs or charitably create in order to have control over their own messages.

[11] On June 17, 2021, the Supreme Court issued its opinion in *Fulton v. Philadelphia*, a case in which Philadelphia had ended its relationship with Catholic Social Services for approving foster parents because CSS's religious beliefs on marriage prevented it from approving same-sex couples. *141 S. Ct. at 1874*. Although one of the issues presented was whether *Employment Division v. Smith* should be overturned, the Court held that "[t]his case falls outside *Smith*" because Philadelphia's policies were not "generally applicable." *Id. at 1878*.

Nevertheless, since *Smith*, several Supreme Court justices have written or joined in expressing doubt about *Smith*'s free exercise jurisprudence. *See, e.g., Fulton, 141 S. Ct. at 1882* (Barrett, J., concurring) ("In my view, the textual and structural arguments against *Smith* are more compelling. As a matter of text and structure, it is difficult to see why the *Free Exercise Clause*—lone among the *First Amendment* freedoms—offers nothing more than protection from discrimination."); *Id. at 1883* (Alito, J., concurring) (writing that "[*Smith*'s] severe holding is ripe for reexamination" and "correct[ion]"); *Id. at 1926* (Gorsuch, J., concurring) ("*Smith* failed to respect this Court's precedents, was mistaken as a matter of the Constitution's original public

"law that is both **[*1206]** neutral and generally applicable need only be rationally related to a legitimate governmental interest to survive a constitutional challenge." *Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 649 (10th Cir. 2006)*; *see also Smith, 494 U.S. at 878-79*. Furthermore, "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993)* (emphasis added). "[A]n individual's religious beliefs [do not] excuse him from compliance with an otherwise valid law prohibiting conduct **[**90]** that the State is free to regulate." *Smith, 494 U.S. at 878-79*.

But a state's discriminatory treatment—hidden in the guise of facial neutrality—may be less apparent. *See Lukumi Babalu Aye, 508 U.S. at 534* ("Facial neutrality is not determinative. The *Free Exercise Clause* . . . extends beyond facial discrimination."). A law may place certain secular activities in a favored category at the same time it places religious activities in a less favorable category—perhaps by denying them exemptions or excluding them from benefits or beneficial treatment. *See id. at 537-38*. But "[t]he *Free Exercise Clause* bars even 'subtle departures from neutrality' on matters of religion." *Masterpiece, 138 S. Ct. at 1731*. As a result, "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the *Free Exercise Clause*, whenever they treat *any* comparable secular activity more favorably than religious exercise." *Tandon v. Newsom, 141 S. Ct. 1294, 1296, 209 L. Ed. 2d 355 (2021)* (per curiam) (emphasis in original); *see also Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 67, 208 L. Ed. 2d 206 (2020)* (per curiam) (stating that because COVID-

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meaning, and has proven unworkable in practice."); *Kennedy v. Bremerton Sch. Dist., 139 S. Ct. 634, 637, 203 L. Ed. 2d 137 (2019)*, *denial of cert.* (Alito, J., concurring, joined by Thomas, Gorsuch, and Kavanaugh, JJ.) (writing that *Smith* "drastically cut back on the protection provided by the *Free Exercise Clause*"); *City of Boerne v. Flores, 521 U.S. 507, 548, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997)* (O'Connor, J., dissenting) (stating that "*Smith* is gravely at odds with our earlier free exercise precedents."); *id. at 565* (Souter, J., dissenting) ("I have serious doubts about the precedential value of the *Smith* rule and its entitlement to adherence."); *id. at 566* (Breyer, J., dissenting); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 559, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993)* (Souter, J., concurring in part and concurring in the judgment). And recent COVID-restriction-related opinions have cast doubt on *Smith*'s precedential value for cases in which a state's facially neutral regulations result in disparate treatment between secular and religious entities. *See Tandon v. Newsom, 141 S. Ct. 1294, 1296, 209 L. Ed. 2d 355 (2021)* (per curiam); *Roman Cath. Diocese of Brookyn v. Cuomo, 141 S. Ct. 63, 67, 208 L. Ed. 2d 206 (2020)* (per curiam).

But because this case presents the "individualized exemptions" exception to *Smith*, we need not predict whether *Smith* has continued viability.

related capacity restrictions resulted in disparate treatment between houses of worship and some businesses, the restrictions were not neutral and generally applicable and thus subject to **[**91]** strict scrutiny).

The Supreme Court has identified at least two ways in which a law can lack general applicability, thereby triggering strict scrutiny review. One of these is "if [a law] prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton, 141 S. Ct. at 1877*. Such a law might be underinclusive, targeting only certain harms purportedly caused by religious conduct while permitting similar harms by others. *See Lukumi Babalu Aye, 508 U.S. at 545-46*.

The other manner in which a law may not be generally applicable is the individualized exemption exception. "A law is not generally applicable if it 'invites' the government to consider the particular reasons for a person's conduct by providing 'a mechanism for individualized exemptions.'" *Fulton, 141 S. Ct. at 1877* (quoting *Smith, 494 U.S., at 884*) (alterations incorporated); *see also Grace United Methodist Church, 451 F.3d at 650*. "[T]he individualized exemption exception inquiry can be summarized as follows: as long as a law remains exemptionless, it is considered generally applicable and religious groups cannot claim a right to exemption; **[*1207]** however, when a law has secular exemptions, a challenge by a religious group becomes possible." *Grace United Methodist Church, 451 F.3d at 650*. Accordingly, this exception "is limited . . . to systems that are designed **[**92]** to make case-by-case determinations." *Axson-Flynn, 356 F.3d at 1298* (finding that a university's treatment of an LDS student's right to free exercise of her religion was part of a system of individualized exemptions because it had granted an exception to a Jewish student). This is because such a system "permit[s] the government to grant exemptions based on the circumstances underlying each application" of the law. *Fulton, 141 S. Ct. at 1877*. Accordingly, "[t]o ensure that individuals do not suffer unfair treatment on the basis of religious animus, subjective assessment systems that invite consideration of the particular circumstances behind an applicant's actions . . . trigger strict scrutiny." *Grace United Methodist Church, 451 F.3d at 651* (internal quotation marks omitted).

At the far end of the spectrum, a state violates the right to free exercise when it expressly discriminates against—or demonstrates animus toward—religion. This type of action is subject to the "strictest scrutiny." *Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2019, 198 L. Ed. 2d 551 (2017)* ("The *Free Exercise Clause* 'protect[s] religious observers

against unequal treatment' and subjects to the strictest scrutiny laws that target the religious for 'special disabilities' based on their 'religious status.'" (quoting *Lukumi Babalu Aye, 508 U.S. at 533*). As Justice Kennedy wrote in another case involving CADA, "[T]he government, if it is to **[**93]** respect the Constitution's guarantee of free exercise, cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices." *Masterpiece, 138 S. Ct. at 1731*. In other words, a statute that discriminates against religious beliefs or prohibits conduct *because* they are religious must pass strict scrutiny review. *Lukumi Babalu Aye, 508 U.S. at 531-33, 546*. This type of law is invalid unless it is narrowly tailored to accomplish the government's compelling interest. *See Grace United Methodist Church, 451 F.3d at 649* ("[I]f a law that burdens a religious practice is not neutral or generally applicable, it is subject to strict scrutiny, and the burden on religious conduct violates the *Free Exercise Clause* unless it is narrowly tailored to advance a compelling governmental interest.").

Given this legal framework, CADA clearly violates Ms. Smith's Free Exercise rights.

Colorado asserts that CADA is a neutral, generally applicable law because it purports to regulate only commercial conduct, or the "terms and conditions under which a business chooses to offer goods or services for sale to the public." Appellee Br. at 38. All that CADA requires of Ms. Smith, therefore, is that she "make that product **[**94]** or service available to all customers regardless of protected class status." Appellee Br. at 38. If CADA were enforced exactly in this even-handed manner, perhaps it would be neutral and generally applicable, and perhaps it would pass the resulting rational basis scrutiny.[12]

But this is not how CADA works. Colorado *has* allowed exceptions. In fact, the **[*1208]** entire CADA enforcement mechanism is structured to make case-by-case determinations. *See* Maj. Op. at 6-7 (discussing investigative and adjudicative processes dictated by CADA). CADA deputizes *anyone* to file a complaint challenging a business practice, and the Commission is required to investigate and rule on each complaint individually. *Id.* There is no meaningful difference between the Commission's role in enforcing CADA here and the Commissioner's role in *Fulton* in parceling out exceptions for foster care contracts. In that case, Philadelphia's provision "incorporate[d] a system of individual exemptions, made available . . . at the sole

[12] As discussed above, 303 Creative does not deny website services based on sexual orientation.

discretion of the Commissioner." *Fulton, 141 S. Ct. at 1878* (internal quotation marks omitted). And, as here, Philadelphia "made clear that the Commissioner 'ha[d] no intention of granting an exception'" to the Catholic charity. **[**95]** *Id.* (quoting the petition for certiorari). But in cases where this causes "religious hardship," held the Court, this "exception system" triggers strict scrutiny. *Id.* (quoting *Smith, 494 U.S. at 884*).

The Colorado Civil Rights Commission operates under exactly the same ad-hoc system as in *Fulton*. The Commission is the sole arbiter for handling complaints submitted to it—decreeing when a religious objection is valid[13] and when it is not, doling out punishment and reprieve based on its own standards. As the Supreme Court has made clear, "in circumstances in which individualized exemptions from a general requirement are available, the government 'may not refuse to extend that system to cases of religious hardship without compelling reason.'" *Lukumi Babalu Aye, 508 U.S. at 537* (quoting *Smith, 494 U.S. at 884*); *see also Fulton, 141 S. Ct. at 1878*; *Tandon, 141 S. Ct. at 1296*.[14] Because **[*1209]** CADA's enforcement requires the

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[13] Or, for that matter, whether a sex-related "restriction has a bona fide relationship to the goods, services, facilities, privileges, advantages, or accommodations of such place of public accommodation." ***Colo. Rev. Stat. § 24-34-601(3)***.

[14] The majority declines to apply heightened scrutiny under a hybrid-rights theory because it concludes that Ms. Smith's free speech claim fails. *See* Maj. Op. at 47. But because CADA employs case-by-case individualized exemptions, it triggers strict scrutiny, *see Lukumi Babalu Aye, 508 U.S. at 537*, not the "heightened scrutiny" required in the hybrid-rights context, *see Axson-Flynn, 356 F.3d at 1295*.

Moreover, jurists and scholars have expressed doubts as to the practical validity of *Smith*'s hybrid-rights doctrine, characterizing it as dicta, difficult to define, illogical, and untenable. *See, e.g., Lukumi Babalu Aye, 508 U.S. at 567* (Souter, J., concurring) ("And the distinction *Smith* draws strikes me as ultimately untenable. If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule, and, indeed, the hybrid exception would cover the situation exemplified by *Smith*."); *Axson-Flynn, 356 F.3d at 1301* ("We agree with the district court that the law regarding this controversial 'hybrid-rights' exception is not clearly established, and even this Court has recognized that '[i]t is difficult to delineate the exact contours of the hybrid-rights theory discussed in *Smith*.'" (quoting *Swanson, 135 F.3d at 699*)); *Kissinger v. Bd. of Trustees of Ohio State Univ., Coll. of Veterinary Med., 5 F.3d 177, 180 (6th Cir. 1993)* (criticizing the hybrid-rights doctrine as illogical and declining to apply it); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, *57 U. Chi. L. Rev. 1109, 1122 (1990)* ("[A] legal realist would tell us . . . that the *Smith* Court's notion of 'hybrid' claims was not intended to be taken seriously."). And courts are "divided on the strength of the independent constitutional right claim that is required to assert a cognizable hybrid rights claim, with a number of courts, including this circuit, expressing the view that a litigant is required to assert at least a 'colorable' claim to an independent constitutional right to survive summary judgment." *Grace United Methodist Church, 451 F.3d at 656*.

Regardless, in a similar case on wedding videography, the Eighth Circuit acknowledged that the hybrid-rights doctrine supported a free speech claim that was intertwined with a free exercise claim. *See Telescope Media, 936 F.3d at 758*. But it may simply be

Commission to make individualized assessments of complaints—which is *necessarily* structured to allow individualized exemptions for some and not for others—it must undergo strict scrutiny.

The arbitrary way in which Colorado has handed out exceptions to CADA is best demonstrated by a familiar case: ***[**96]*** *Masterpiece*. *See* 138 S. Ct. at 1730. There, the Court delivered a stinging rebuke to the Commission, declaring that its "treatment of [the baker's] case ha[d] some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection." *Id. at 1729*. Besides this remarkable reprimand, though, *Masterpiece* has additional relevance here with respect to the differential treatment of religious individuals. *Masterpiece*'s applicability is not, as the majority would have it, related to any animus (or lack thereof) of the Commission. Rather, it indicates how the CADA-created system of individualized exceptions is designed for—and *has already resulted in*—disparate treatment, particularly for religious speakers. For example, during the pendency of the *Masterpiece* litigation, a professing Christian man, William Jack, filed CADA complaints against three bakeries for refusing to make cakes that expressed opposition to same-sex marriage. Aplt. App. at 1-027-28; *see also Masterpiece Cakeshop, 138 S. Ct. at 1728*. But the Commission found that there was "no probable cause" to Mr. Jack's "creed" discrimination complaints because the bakeries would not have made cakes with those messages for any customer, regardless of creed. But **[**97]** around the same time, the Commission concluded that Masterpiece Cakeshop had violated CADA by refusing to make a cake because of the customer's status—that is, sexual orientation. In other words, the Commission contended, the Jack cases were acceptable message-based refusals, while the Masterpiece case was an unacceptable status-based refusal.

But this evinces a failure to act neutrally toward religious belief. *Masterpiece, 138 S. Ct. at 1730* ("Another indication of hostility is the difference in treatment between Phillips' case and the cases of other bakers who objected to a requested cake on the basis of conscience and prevailed before the Commission."). As Justice Gorsuch pointed out, the Commission "slid[] up and down the *mens rea* scale, picking a mental state standard to suit its tastes depending on its sympathies" in coming to these inconsistent conclusions. *Id. at 1737* (Gorsuch, J., concurring). Such "gerrymander[ing]" leads to unacceptable "results-driven reasoning" by civil authorities.[15]

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a distinction without a difference, for as the *Telescope Media* panel stated, "it is not at all clear that the hybrid-rights doctrine will make any real difference in the end. After all, the [appellants'] free-speech claim already requires the application of strict scrutiny." *Id. at 760*. The same is true here.

Id. ***[*1210]*** *at 1739*. Stated more simply, the Commission cannot use different standards for religious individuals and non-religious individuals. *See id. at 1737* ("But the one thing [the Commission] can't do is apply a more generous legal test to secular objections **[**98]** than religious ones."). This type of differential treatment is the most intolerable of the "individualized exemption" exception to *Smith*, as recognized in *Lukumi Babalu Aye., 508 U.S. at 537* (quoting *Smith, 494 U.S. at 884*).

And contrary to the majority's assertion, Colorado may not "gerrymander" CADA, *see* Maj. Op. at 39, to benefit a certain group when its practical effect is to violate the rights of another. *See Lukumi Babalu Aye, 508 U.S. at 524* (invalidating ordinances where "the principle of general applicability was violated because the secular ends asserted in defense of the laws were pursued only with respect to conduct motivated by religious beliefs"); *id. at 535* (determining the validity of the law by looking to the "ordinances' *operation*" (emphasis added)).

Despite all this, Colorado continues to profess that CADA allows for message-based refusals, stating: "[T]he Commission does not interpret [CADA] to require any business owner, regardless of religious beliefs, to produce a message it would decline to produce for any customer."[16]

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[15] The majority disagrees, holding that Colorado may engage in "a gerrymander favoring LGBT customers, as opposed to a gerrymander disfavoring religious-speakers." Maj. Op. at 41. But in doing so, the majority places the burden on the wrong party. In a system of case-by-case adjudication *exactly like this one*—where the Commission would determine whether a person's objection to same-sex marriage is religiously motivated—strict scrutiny must apply. *See also Fulton, 141 S. Ct. at 1878*. As the Supreme Court has made clear, "the government has the burden to establish that the challenged law satisfies strict scrutiny." *Tandon, 141 S. Ct. at 1296*. The majority disregards this, stating that Ms. Smith "provide[s] no evidence that Colorado permits secularly-motivated objections to serving LGBT consumers." Maj. Op. at 41 (internal citations to *Lukumi Babalu Aye* omitted). Of course, it is the government's job to prove CADA passes muster—not Ms. Smith's.

[16] The majority states that "[m]essage-based refusals are not an 'exemption' from CADA's requirements; they are a defense." Maj. Op. at 43. This contradicts Colorado's own position that the Commission "interpret[s] [CADA]" to allow message-based refusals; if Colorado says it interprets the law this way, it provides guidance to business owners *before* a complaint is filed, not after. Such an interpretation gives notice to business owners that they may make message-based refusals without fear that they will be dragged before the Commission to present this argument as a defense. And such an interpretation should prevent the Commission from seriously investigating any complaint based on a message-based refusal in the first instance—thus "free[ing] or releas[ing]" message-based refusals from liability under CADA. *See* Exempt, Black's Law Dictionary (11th ed. 2019).

But even assuming that the majority's characterization is correct, a defense available only to some and not others *based on protected class status* triggers strict scrutiny. The majority claims that "[o]stensibly, message-based refusals are unrelated to class-status," Maj. Op. at 43, but in CADA's enforcement history, they can and have been related to protected class status. It is precisely why the differential treatment between the secular bakeries' refusals and Jack Phillips's refusal in *Masterpiece* has

Appellee Br. at 62. As Ms. Smith's counsel affirmed at oral argument, Ms. Smith would refuse to make any message celebrating same-sex marriage for *any* client, regardless of sexual orientation. This is **[**99]** exactly the type of refusal Colorado claims Ms. Smith can make: a message-based refusal not rooted in the identity or status of the client. But again, Colorado slides up and down the *mens rea* scale, presuming that Ms. Smith has discriminatory intent in her faith-based **[*1211]** refusal while allowing other artists to refuse to convey messages contrary to their non-faith-based beliefs. Just because Ms. Smith's beliefs may seem to be a minority viewpoint to Colorado does not give it the right to presume ill-intent.[17] On the contrary, it is precisely *because* Ms. Smith's views may be in the minority that they must be afforded the greatest protection. *See* *Masterpiece, 138 S. Ct. 1737* (Gorsuch, J., concurring) ("Popular religious views are easy enough to defend. It is in protecting unpopular religious beliefs that we prove this country's commitment to serving as a refuge for religious freedom."); *Fulton, 141 S. Ct. at 1925* (Alito, J., concurring) ("Suppressing speech—or religious practice—simply because it expresses an idea that some find hurtful is a zero-sum game."). This is the promise of the *Free Exercise Clause*, and it is why Colorado's treatment of Ms. Smith's religious beliefs must be rejected.

Indeed, we need only look at our own precedent. In *Axson-Flynn*, the University of Utah refused to exempt an LDS student from speaking profanity in her acting program—which she refused to do because of her religious beliefs—but *did* grant an exemption for a Jewish student who refused to perform on Yom Kippur. *Axson-Flynn, 356 F.3d at 1298*. Because this meant the

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enduring relevance here: because both were making a message-based refusal, Colorado demonstrated religious animus in crediting one and not the other. *Masterpiece, 138 S. Ct. at 1731*. Or imagine a Muslim muralist, contacted by a Jewish restaurant owner requesting a depiction of the Israeli flag with a Zionist message. The Muslim muralist might refuse to paint such a message—but the message is undeniably intertwined with the Jewish restaurant owner's protected religious class status. Even though "message-based refusals may be objectively defined," Maj. Op. at 44, Colorado can and does enforce its purported message-based-refusal rule in a subjective manner based on protected class status. This requires strict scrutiny review.

[17] As the Supreme Court made clear in *Obergefell*, individuals with religious convictions about marriage

> may continue **[**100]** to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The *First Amendment* ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.

Obergefell v. Hodges, 576 U.S. 644, 679-80, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015).

University had a system of individualized exemptions, the panel concluded the LDS student had raised a genuine issue of material fact as to whether her case fell in the "individualized exemption" exception. In other words, the University "maintained a discretionary system of making individualized case-by-case determinations regarding who should receive exemptions from curricular requirements," indicating it was not demonstrating the requisite neutrality to the student's religious **[**101]** beliefs. *Id. at 1299*. Furthermore, the "'system of individualized exemptions' need not be a written policy, but rather the plaintiff may show a pattern of ad hoc discretionary decisions amounting to a 'system.'" *Id.*

By demonstrating that CADA sets up a case-by-case system for determining exceptions, Ms. Smith has shown CADA's application here must be reviewed with strict scrutiny with regard to the free exercise claims. *See Fulton, 141 S. Ct. at 1878*; *id. at 1881* ("A government policy can survive strict scrutiny only if it advances 'interests of the highest order' and is narrowly tailored to achieve those interests." (quoting *Lukumi, 508 U.S. at 546*)). "So long as [Colorado] can achieve its interests in a manner that does not burden religion, it must do so." *Id. at 1881*.

But for the same reasons CADA fails strict scrutiny with regard to Ms. Smith's free speech claims, it fails with regard to the free exercise claims. *See Grace United Methodist Church, 451 F.3d at 649* ("[I]f a law that burdens a religious practice is not neutral or generally applicable, it is subject to strict scrutiny, and the burden on religious conduct violates the *Free Exercise Clause* unless it is narrowly tailored to advance a compelling governmental interest."). With regard to the compelling interest analysis, Colorado bears the burden of proving not that it **[**102]** "has a compelling interest **[*1212]** in enforcing its non-discrimination policies generally, but whether it has such an interest in denying an exception" to Ms. Smith. *Fulton*, Slip Op. at 14. Colorado has not done so here. And with respect to the narrow tailoring analysis, Colorado must show CADA is not "the least restrictive means among available, effective alternatives." *Ashcroft, 542 U.S. at 666*. But, as discussed above, effective alternatives *do* exist. Colorado says it allows message-based refusals for religious beliefs. Given its infamous history in not administering these exceptions in a neutral way, *see Masterpiece, 138 S. Ct. at 1729*, perhaps Colorado can write this provision into CADA. Or perhaps it could exempt religious speakers when their refusal to provide a service or product is rooted in a sincerely held religious belief. Or again, Colorado could exempt faith-based artists who speak about weddings from the requirements of CADA.

When all is said and done, allowing business owners like Ms. Smith to operate in accordance with the tenets of their faiths does not damage society but enriches it. Indeed, "we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social **[**103]** organization." *Barnette, 319 U.S. at 641*. Religious liberty is among the purest forms of self-determination because it allows believers to retain sovereignty of the soul. Because of this, the "*Free Exercise Clause* commits government itself to religious tolerance." *Lukumi Babalu Aye, 508 U.S. at 547*. Even though Colorado has not committed itself to respect this diversity, our *First Amendment* protects Ms. Smith.

III. Facial Challenge for Overbreadth and Vagueness

Finally, the majority fails to protect Ms. Smith from CADA's Orwellian diktat that regulates businesses based on the subjective experience of customers. CADA contains a breathtakingly broad and vague provision prohibiting "directly or indirectly" speaking in such a way that makes a customer feel "unwelcome, objectionable, unacceptable, or undesirable" because of a protected characteristic.[18] *Colo. Rev. Stat. § 24-34-601(2)(a)*. Facially and as applied to Ms. Smith, this "Unwelcome Provision" easily flunks the requirement that fair notice be given to citizens about what can or cannot be said in exercising *First Amendment* rights. Like *Nineteen Eighty-Four*'s Winston Smith, CADA wants Lorie Smith to not only accept government approved speech but also to endorse it.

In the *First Amendment* context, a plaintiff may bring a facial challenge "whereby a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens, 559 U.S. 460, 473, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010)*; *see also Virginia v. Hicks, 539 U.S. 113, 119-20, 123 S. Ct. 2191, 156 L. Ed. 2d 148 (2003)* (holding that a "law's application to protected speech [must] be 'substantial,' not only in an absolute sense, but also relative to the scope of the

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[18] It states:

> It is a discriminatory practice and unlawful for a person, . . . directly or indirectly, to [communicate] *that* ***[**104]*** *an individual's patronage or presence at a place of public accommodation is unwelcome, objectionable, unacceptable, or undesirable* because of disability, race, creed, color, sex, sexual orientation, gender identity, gender expression, marital status, national origin, or ancestry.

Colo. Rev. Stat. § 24-34-601(2)(a).

law's plainly legitimate applications . . . before applying the 'strong medicine' of overbreadth **[*1213]** invalidation" (quoting *Broadrick v. Oklahoma, 413 U.S. 601, 613, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973)*). In *Stevens*, the Supreme Court held as constitutionally overbroad an animal cruelty ban that applied to any depiction in which "a living animal is intentionally maimed, mutilated, tortured, wounded, or killed." *Id. at 474* (quoting the statute at issue). The Court picked through each of these words, one by one, determining whether any of these words made the statute's reach too broad. The words "wounded" and "killed" **[**105]** encompassed too much legal, protected conduct. *Id. at 475-76*. Even the statute's inclusion of the additional element of "accompanying acts of cruelty" did not work to contain the too-broad meaning of "wounded" and "killed." *Id. at 474*.

Nor may a statute be so impermissibly vague as to deprive a potential lawbreaker of due process. As the Supreme Court has explained:

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute abuts upon sensitive areas of basic *First Amendment* freedoms, it operates to inhibit the exercise of those freedoms. Uncertain meanings inevitably **[**106]** lead citizen[s] to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked.

Grayned v. City of Rockford, 408 U.S. 104, 108-09, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972) (internal quotation marks omitted; alterations incorporated); *see also U.S. Jaycees, 468 U.S. at 629* ("The void-for-vagueness doctrine reflects the principle that a statute which either forbids or requires the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.") (internal quotation marks omitted; alterations incorporated).

The void-for-vagueness doctrine also prevents arbitrary enforcement by government officials and properly maintains separation of powers. *See* Sessions v. Dimaya, 138 S. Ct. 1204, 1225, 200 L. Ed. 2d 549 (2018) (Gorsuch, J., concurring) ("Vague laws invite arbitrary power"); id. at 1205 ("Nor is the worry only that vague laws risk allowing judges to assume legislative power. Vague laws also threaten to transfer legislative power to police and prosecutors, leaving to them the job of shaping a vague statute's contours through their enforcement decisions."). And when a law abridges First Amendment civil rights, it must be subjected to an especially "stringent vagueness test." Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc., 455 U.S. 489, 499, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982).

CADA's "do-not-offend provision" is both overbroad **[**107]** and vague. Begin with the provision's overbreadth. Analyzing any of the operative words—"unwelcome, objectionable, unacceptable, or undesirable"—is instructive. Take, for instance, "unwelcome." Merriam-Webster defines unwelcome as "not wanted." It surely implies a **[*1214]** subjective element on behalf of the person who feels unwelcome. For example, an atheist who walked into a hardware store owned by a Christian might feel unwelcome if he saw a sign inside that said, "We honor God and His commandments here." This sign says nothing about the atheist's protected class status, and it certainly does not directly "indicate" that he is unwelcome. And the store's purveyors might not have hung the sign with that intent whatsoever—but the statute includes *indirect* as well as *direct* speech or conduct. This otherwise completely innocent and lawful sign—indeed, a sign protected by the First Amendment—would fall within the provision's purview.

Or suppose a restaurant owner hung a Confederate flag outside his establishment. Given its controversial status, such a symbol might make potential patrons feel unwelcome in that restaurant, or perhaps make them feel as though the owner finds their business undesirable. But government **[**108]** regulation of displaying a flag as part of expressive or symbolic speech is surely subject to strict scrutiny under the First Amendment. *See* Spence v. State of Washington, 418 U.S. 405, 415, 94 S. Ct. 2727, 41 L. Ed. 2d 842 (1974) (holding the display of an United States flag upside down and with a peace sign taped on it was protected expression); Texas v. Johnson, 491 U.S. 397, 406, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989) (concluding that a man's "burning of the [United States] flag was conduct 'sufficiently imbued with elements of communication' to implicate the First Amendment" (quoting Spence, 418 U.S. at 409)).

Or take "objectionable." Perhaps a Muslim shop owner hangs a sign that reads, "There is no God but Allah and Muhammad is His Prophet." A Christian who walked into the store may feel that the shopkeeper *objects* to his beliefs about Jesus Christ as his savior—which would make the sign an indirect statement that the Christian's views about Jesus Christ (or about Muhammad, for that matter) are *objectionable*. But the sign is, of course, protected speech. It takes little imagination to multiply these examples by dozens. The provision unyieldingly sweeps in substantial swaths of protected conduct and speech.

The majority's position that the Unwelcome Provision cannot be overbroad because it is couched within the Communication Clause's "primar[y] focus[] on access to goods and services," Maj. Op. at 48, is unpersuasive. **[**109]** For one, all of the examples above relate to access to goods and services within places of public accommodation and would be covered by both the *Communication Clause* and the Unwelcome Provision—yet the speech in each example is undoubtedly protected. For another, the Unwelcome Provision does not solely target *access* to goods and services: indeed, communication that an individual's mere *presence* at a place of public accommodation is unwelcome is swept into the law as well. *Colo. Rev. Stat. § 24-34-601(2)(a)* (prohibiting communication "that an individual's *patronage or presence* at a place of public accommodation is unwelcome, objectionable, unacceptable, or undesirable" because of a protected class status (emphasis added)). Moreover, by its own terms, the Unwelcome Provision applies not only to direct but indirect communication. The majority fails to explain how its market-access theory will permissibly apply to *indirect* communication—communication that, in other words, may not even be aimed at an individual's access to a product or place of public accommodation. Is the monopolist-of-one artist required to silence herself?

As for vagueness, the examples discussed above make clear that the terms **[*1215]** "unwelcome, objectionable, **[**110]** unacceptable, [and] undesirable" are too flexible in meaning to give proper notice to any reasonable person as to the provision's reach. Indeed, given the terms' subjective valence, their definitions could be nearly limitless. The Unwelcome Provision abuts directly against "sensitive areas of basic *First Amendment* freedoms," thus "operat[ing] to inhibit the exercise of those freedoms." *Grayned, 408 U.S. at 109*. In verging on, or even overlapping with, protected speech, the provision has confusing and uncertain meanings that "inevitably lead citizen[s] to steer far wider of the unlawful zone than if the boundaries of the

forbidden areas were clearly marked." *Id.* And given this wide latitude, Colorado state officials and courts can arbitrarily interpret the provision, parceling out punishment and mercy at whim.

Colorado says no harm, no foul. But its own statements in this litigation belie Colorado's willingness to distribute punishment inequitably. Colorado explained at oral argument that interpreting the provision would require case-by-case analysis—and that outcomes would "depend on the context." Oral Arg. at 31:50. Hanging a Confederate flag, for example, might be acceptable in "some circumstances" and not in others. ***[**111]*** *Id.* at 32:10. But Colorado offers no cognizable standard by which business owners, the Commission, or judges can determine which are which. And the provision itself does not give any clues for interpretation. Rather, the Unwelcome Provision

> leaves the people to guess about what the law demands—and leaves judges to make it up. You cannot discern answers to any of the questions this law begets by resorting to the traditional canons of statutory interpretation. No amount of staring at the statute's text, structure, or history will yield a clue. Nor does the statute call for the application of some preexisting body of law familiar to the judicial power.

Sessions v. Dimaya, 138 S. Ct. at 1225 (Gorsuch, J., concurring). Without hints about how to apply these traditional methods of interpretation, the provision invites exactly the type of capricious enforcement prohibited by due process.

Because it cannot give proper and clear notice of what is lawful and what is not, this provision of CADA is unconstitutionally vague and overbroad.

IV. Conclusion

Lest it go unsaid in this case: We must presume Ms. Smith wants to live and speak by her faith, not discriminate against any particular group or person. We must presume she has reached her **[**112]** beliefs "based on decent and honorable religious or philosophical premises." *Obergefell, 576 U.S. at 672*. And we must presume that her beliefs are anything but trivial. So it is in protecting the right to hold these beliefs that we understand the true resilience of the *First Amendment*. The "freedom to differ is not limited to things that do not matter much. That would

be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order." *Barnette, 319 U.S. at 642*.

For these reasons, I dissent.

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KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 18, 2022

The Honorable Matt Krause
Chair, House Committee on General
Investigating
Texas House of Representatives
Post Office Box 2910
Austin, Texas 78768-2910

Opinion No. KP-0401

Re: Whether certain medical procedures performed on children constitute child abuse (RQ-0426-KP)

Dear Representative Krause:

You ask whether the performance of certain medical and chemical procedures on children—several of which have the effect of sterilization—constitute child abuse.[1] You specifically ask about procedures falling under the broader category of "gender reassignment surgeries." Request Letter at 1. You state that such procedures typically are performed to "transition individuals with gender dysphoria to their desired gender," and you identify the following specific "sex-change procedures":

> (1) sterilization through castration, vasectomy, hysterectomy, oophorectomy, metoidioplasty, orchiectomy, penectomy, phalloplasty, and vaginoplasty; (2) mastectomies; and (3) removing from children otherwise healthy or non-diseased body part or tissue.

Id. at 1 (footnotes omitted). Additionally, you ask whether "providing, administering, prescribing, or dispensing drugs to children that induce transient or permanent infertility" constitutes child abuse. *See id*. at 1–2. You include the following categories of drugs: (1) puberty-suppression or puberty-blocking drugs; (2) supraphysiologic doses of testosterone to females; and (3) supraphysiologic doses of estrogen to males. *See id.*

[1]*See* Letter from Honorable Matt Krause, Chair, House Comm. on Gen. Investigating, to Honorable Ken Paxton, Tex. Att'y Gen. at 1 (Aug. 23, 2021), https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/rq/2021/pdf/RQ0426KP.pdf ("Request Letter"); *see also* Letter from Honorable Jaime Masters, Comm'r, Tex. Dept. of Family & Protective Servs., to Honorable Greg Abbott, Governor, State of Tex. at 1 (Aug. 11, 2021), https://gov.texas.gov/uploads/files/press/Response_to_August_6_2021_OOG_Letter_08.11.2021.pdf (on file with the Op. Comm.) (hereinafter "Commissioner's Letter").

You qualify your question with the following statement: "Some children have a medically verifiable genetic disorder of sex development or do not have the normal sex chromosome structure for male or female as determined by a physician through genetic testing that require procedures similar to those described in this request." *Id.* at 2. In other words, in rare circumstances, some of the procedures you list are borne out of medical necessity. For example, a minor male with testicular cancer may need an orchiectomy. This opinion does not address or apply to medically necessary procedures.

I. Executive Summary

Based on the analysis herein, each of the "sex change" procedures and treatments enumerated above, when performed on children, can legally constitute child abuse under several provisions of chapter 261 of the Texas Family Code.

- These procedures and treatments can cause "mental or emotional injury to a child that results in an observable and material impairment in the child's growth, development, or psychological functioning." TEX. FAM. CODE § 261.001(1)(A).

- These procedures and treatments can "caus[e] or permit[] the child to be in a situation in which the child sustains a mental or emotional injury that results in an observable and material impairment in the child's growth, development, or psychological functioning." *Id*. § 261.001(1)(B).

- These procedures and treatments can cause a "physical injury that results in substantial harm to the child." *Id*. § 261.001(1)(C).

- These procedures and treatments often involve a "failure to make a reasonable effort to prevent an action by another person that results in physical injury that results in substantial harm to the child[,]" particularly by parents, counselors, and physicians. *Id*. § 261.001(1)(D).

In addition to analysis under the Family Code, we discuss below the fundamental right to procreation, issues of physical and emotional harm associated with these procedures and treatments, consent laws in Texas and throughout the country, and existing child abuse standards. Each of the procedures and treatments you ask about can constitute child abuse when performed on minor children.

II. Nature and context of the question presented

Forming the basis for your request, you contend that the "sex change" procedures and treatments you ask about are typically performed to transition individuals with gender dysphoria to their desired gender. *See* Request Letter at 1. The novel trend of providing these elective sex changes to minors often has the effect of permanently sterilizing those minor children. While you refer to these procedures as "sex changes," it is important to note that it remains medically impossible to truly change the sex of an individual because this is determined biologically at

conception. No doctor can replace a fully functioning male sex organ with a fully functioning female sex organ (or vice versa). In reality, these "sex change" procedures seek to destroy a fully functioning sex organ in order to cosmetically create the illusion of a sex change.

Beyond the obvious harm of permanently sterilizing a child, these procedures and treatments can cause side effects and harms beyond permanent infertility, including serious mental health effects, venous thrombosis/thromboembolism, increased risk of cardiovascular disease, weight gain, decreased libido, hypertriglyceridemia, elevated blood pressure, decreased glucose tolerance, gallbladder disease, benign pituitary prolactinoma, lowered and elevated triglycerides, increased homocysteine levels, hepatotoxicity, polycythemia, sleep apnea, insulin resistance, chronic pelvic pain, and increased cancer and stroke risk.[2]

While the spike in these procedures is a relatively recent development,[3] sterilization of minors and other vulnerable populations without clear consent is not a new phenomenon and has an unsettling history. Historically weaponized against minorities, sterilization procedures have harmed many vulnerable populations, such as African Americans, female minors, the disabled, and others.[4] These violations have been found to infringe upon the fundamental human right to procreate. Any discussion of sterilization procedures in the context of minor children must, accordingly, consider the fundamental right that is at stake: the right to procreate. Given the uniquely vulnerable nature of children, and the clear dangers of sterilization demonstrated throughout history, it is important to emphasize the crux of the question you present today—*whether facilitating (parents/counselors) or conducting (doctors) medical procedures and treatments that could permanently deprive minor children of their constitutional right to procreate, or impair their ability to procreate, before those children have the legal capacity to consent to those procedures and treatments, constitutes child abuse*.

The medical evidence does not demonstrate that children and adolescents benefit from engaging in these irreversible sterilization procedures. The prevalence of gender dysphoria in children and adolescents has never been estimated, and there is no scientific consensus that these sterilizing procedures and treatments even serve to benefit minor children dealing with gender dysphoria. As stated by the Centers for Medicare and Medicaid Services, "There is not enough high-quality evidence to determine whether gender reassignment surgery improves health outcomes for Medicare beneficiaries with gender dysphoria and whether patients most likely to benefit from these types of surgical intervention can be identified prospectively."[5] Also, "several studies show a higher rate of regret at being sterilized among younger women than among those

[2]*See* Timothy Cavanaugh, M.D., *Cross-Sex Hormone Therapy*, FENWAY HEALTH (2015), https://www.lgbtqiahealtheducation.org/wp-content/uploads/Cross-Sex-Hormone-Therapy1.pdf.

[3]SOCIETY FOR EVIDENCE BASED GENDER MEDICINE, https://segm.org/ (demonstrating a spike in referrals to Gender Identify Development Services around the mid-2010s).

[4]Alexandra Stern, Ph.D., *Forced sterilization policies in the US targeted minorities and those with disabilities – and lasted into the 21st Century*, (Sept. 23, 2020), https://ihpi.umich.edu/news/forced-sterilization-policies-us-targeted-minorities-and-those-disabilities-and-lasted-21st.

[5]Centers for Medicare and Medicaid Services, Decision Memo for Gender Dysphoria and Gender Reassignment Surgery (CAG-00446N) (Aug. 30, 2016), http://www.lb7.uscourts.gov/documents/17-264URL1DecisionMemo.pdf.

who were sterilized at a later age." 43 FED. REG. at 52,151, 52,152. This further indicates that minor children are not sufficiently mature to make informed decisions in this context.

There is no evidence that long-term mental health outcomes are improved or that rates of suicide are reduced by hormonal or surgical intervention. "Childhood-onset gender dysphoria has been shown to have a high rate of natural resolution, with 61-98% of children reidentifying with their biological sex during puberty. No studies to date have evaluated the natural course and rate of gender dysphoria resolution among the novel cohort presenting with adolescent-onset gender dysphoria."[6] One of the few relevant studies monitored transitioned individuals for 30 years. It found high rates of post-transition suicide and significantly elevated all-cause mortality, including increased death rates from cardiovascular disease and cancer, although causality could not be established.[7] The lack of evidence in this field is why the Centers for Medicare & Medicaid Services rejected a nationwide coverage mandate for adult gender transition surgeries during the Obama Administration. Similarly, the World Professional Association for Transgender Health states that with respect to irreversible procedures, genital surgery should not be carried out until patients reach the legal age of majority to give consent for medical procedures in a given country.[8]

Generally, the age of majority is eighteen in Texas. TEX. CIV. PRAC. & REM. CODE § 129.001. With respect to consent to sterilization procedures, Medicaid sets the age threshold even higher, at twenty-one years old. Children and adolescents are promised relief and asked to "consent" to life-altering, irreversible treatment—and to do so in the midst of reported psychological distress, when they cannot weigh long-term risks the way adults do, and when they are considered by the State in most regards to be without legal capacity to consent, contract, vote, or otherwise. Legal and ethics scholars have suggested that it is particularly unethical to radically intervene in the normal physical development of a child to "affirm" a "gender identity" that is at odds with bodily sex.[9]

State and federal governments have "wide discretion to pass legislation in areas where there is medical and scientific uncertainty." *Gonzales v. Carhart*, 550 U.S. 124, 163 (2007). Thus, states routinely regulate the medical profession and routinely update their regulations as new trends arise and new evidence becomes available. In the opioid context, for instance, states responded to an epidemic caused largely by pharmaceutical companies and medical professionals. Dismissing as "opioidphobic" any concern that "raising pain treatment to a 'patients' rights' issue could lead to overreliance on opioids," these experts created new pain standards and assured doctors that

[6]SOCIETY FOR EVIDENCE BASED GENDER MEDICINE, https://segm.org/.

[7]*See* Cecilia Dhejne, et al., *Long-term Follow-up of Transsexual Persons Undergoing Sex Reassignment Surgery: Cohort Study in Sweden*, 6 PLOS ONE, Issue 2, 5 (Feb. 22, 2011) (19 times the expected norm overall (Table 2), and 40 times the norm for biological females (Table s1)), https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0016885.

[8]WORLD PROFESSIONAL ASS'N FOR TRANSGENDER HEALTH, *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People* at 59 (7th ed. 2012), available at https://www.wpath.org/media/cms/Documents/SOC%20v7/SOC%20V7_English2012.pdf?_t=1613669341.

[9]Ryan T. Anderson & Robert P. George, Physical Interventions on the Bodies of Children to "Affirm" their "Gender Identity" Violate Sound Medical Ethics and Should Be Prohibited, PUBLIC DISCOURSE: THE JOURNAL OF THE WITHERSPOON INSTITUTE (Dec. 8, 2019), https://www.thepublicdiscourse.com/2019/12/58839/.

prescribing more opioids was largely risk free.[10] *Id.* As we know now, the results were—indeed, *are*—nothing short of tragic.[11] There is always the potential for novel medical determinations to promote purported remedies that may not improve patient outcomes and can even result in tragic harms. The same potential for harm exists for minors who have engaged in the type of procedures or treatments above.

The State's power is arguably at its zenith when it comes to protecting children. In the Supreme Court's words, that is due to "the peculiar vulnerability of children." *Bellotti v. Baird*, 443 U.S. 622, 634 (1979); *see also Ginsberg v. New York*, 390 U.S. 629, 640 (1968) ("The State also has an independent interest in the well-being of its youth."). The Supreme Court has explained that children's "inability to make critical decisions in an informed, mature manner" makes legislation to protect them particularly appropriate. *Bellotti*, 443 U.S. at 634. The procedures that you ask about impose significant and irreversible effects on children, and we therefore address them with extreme caution, mindful of the State's duty to protect its children. *See generally T.L. v. Cook Children's Med. Ctr.*, 607 S.W.3d 9, 42 (Tex. App.—Fort Worth 2020), *cert. denied*, 141 S. Ct. 1069 (2021) ("Children, by definition, are not assumed to have the capacity to take care of themselves. They are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as *parens patriae.* In this respect, the [child]'s liberty interest may, in appropriate circumstances, be subordinated to the State's *parens patriae* interest in preserving and promoting the welfare of the child.") (citation omitted).

III. To the extent that these procedures and treatments could result in sterilization, they would deprive the child of the fundamental right to procreate, which supports a finding of child abuse under the Family Code.

A. The procedures you describe can and do cause sterilization.

The surgical and chemical procedures you ask about can and do cause sterilization.[12] Similarly, the treatments you ask about often involve puberty-blocking medications. Such medications suppress the body's production of estrogen or testosterone to prevent puberty and are being used in this context to pause the sexual development of a person that occurs during puberty. The use of these chemical procedures for this purpose is not approved by the federal Food and Drug Administration and is considered an "off-label" use of the medications. These chemical procedures prevent a person's body from developing the capability to procreate. There is insufficient medical evidence available to demonstrate that discontinuing the medication resumes a normal puberty process. *See generally Hennessy-Waller v. Snyder*, 529 F. Supp. 3d 1031, 1042 (D. Ariz. 2021), citing *Bell v. Tavistock and Portman NHS Foundation Trust*, 2020 EWHC 3274,

[10]*See* David W. Baker, *The Joint Commission's Pain Standards: Origins and Evolution* 4 (May 5, 2017) (footnotes omitted), https://perma.cc/RZ42-YNRC ("[N]o large national studies were conducted to examine whether the standards improved pain assessment or control.").

[11]*See generally* U.S. HEALTH & HUMAN SERVS., WHAT IS THE U.S. OPIOID EPIDEMIC?, https://www.hhs.gov/opioids/about-the-epidemic/index html.

[12]*See* Philip J. Cheng, *Fertility Concerns of the Transgender Patient*, TRANSL ANDROL UROL. 2019;9(3):209-218 (explaining that hysterectomy, oophorectomy, and orchiectomy "results in permanent sterility"), https://www ncbi nlm nih.gov/pmc/articles/PMC6626312/.

¶ 134 (Dec. 1, 2020) (referring to *Bell's* conclusion that a clinic's practice of prescribing puberty-suppressing medication to individuals under age 18 with gender dysphoria and determining such treatment was experimental). Thus, because the procedures you inquire about can and do result in sterilization, they implicate a minor child's constitutional right to procreate.

B. The United States Constitution protects a fundamental right to procreation.

The United States Supreme Court recognizes that the right to procreate is a fundamental right under the Fourteenth Amendment. *See Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). Almost a century ago, the Court explained the unique concerns sterilization poses respecting this fundamental right:

> The power to sterilize, if exercised, may have subtle, far reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty.

Id. To the extent the procedures you describe cause permanent damage to reproductive organs and functions of a child before that child has the legal capacity to consent, they unlawfully violate the child's constitutional right to procreate. *See generally* 43 FED. REG. at 52,146–52,152 (discussing ripeness for coercion and regret rates among minor children).

C. Because children are legally incompetent to consent to sterilization, procedures and treatments that result in a child's sterilization are unauthorized and infringe on the child's fundamental right to procreate.

Under Texas law, a minor is a person under eighteen years of age that has never been married and never declared an adult by a court. *See* TEX. CIV. PRAC. & REM. CODE § 129.001; TEX. FAM. CODE §§ 1.104, 101.003 (including a minor on active duty in the military, one who does not live with a parent or guardian and who manages their own financial affairs, among others). State law recognizes seven instances in which a minor can consent to certain types of medical treatment on their own. *See id.* § 32.003. None of the express provisions relating to a minor's ability to consent to medical treatment addresses consent to the procedures used for "gender-affirming" treatment. *See generally id.*

The lack of authority of a minor to consent to an irreversible sterilization procedure is consistent with other law. The federal Medicaid program does not allow for parental consent, has established a minimum age of 21 for consent to sterilization procedures, and imposes detailed requirements for obtaining that consent. 42 C.F.R. §§ 441.253(a); 441.258 ("Consent form requirements"). Federal Medicaid funds may not be used for any sterilization without complying with the consent requirements, meaning a doctor may not be reimbursed for sterilization procedures performed on minors. *Id*. § 441.256(a).

The higher age limit for sterilization procedures was implemented due to a number of special concerns, including historical instances of forced sterilization. *See* 43 FED. REG. 52146, 52148. "[M]inors and other incompetents have been sterilized with federal funds and . . . an indefinite number of poor people have been improperly coerced into accepting a sterilization operation under the threat that various federally supported welfare benefits would be withdrawn unless they submitted to irreversible sterilization." *Relf v. Weinberger*, 372 F. Supp. 1196, 1199 (D.D.C. 1974), *vacated*, 565 F.2d 722 (D.C. Cir. 1977). In addition, the 21-year minimum age-of-consent rule accounted for concerns that minors were more susceptible to coercion than those over 21 and that younger women had higher rates of regret for sterilization than those who were sterilized at a later age. 43 FED. REG. at 52,151 (pointing to comments suggesting that "persons under 21 are more susceptible to coercion than those over 21 and are more likely to lack the maturity to make an informed decision" and acknowledging "these considerations favor protecting such individuals by limiting their access to the procedure"); *see id.* at 52,151–52,152 (pointing to "several studies [that] show a higher rate of regret at being sterilized among younger women than among those who were sterilized at a later age").

Regarding parental consent, Texas law generally recognizes a parent's right to consent to a child's medical care. TEX. FAM. CODE § 151.001(a)(6) ("A parent of a child has the following rights and duties: . . . (6) the right to consent to the child's . . . medical and dental care, and psychiatric, psychological, and surgical treatment . . ."). But this general right to consent to certain medically necessary procedures does not extend to elective (not medically necessary) procedures and treatments that infringe upon a minor child's constitutional right to procreate. Indeed, courts have analyzed the imposition of unnecessary medical procedures upon children in similar circumstances in the past to determine whether doing so constitutes child abuse.

One such situation that the law has addressed is often referred to as "Munchausen by proxy" or "factitious disorder imposed on another":

> [A] psychological disorder that is characterized by the intentional feigning, exaggeration, or induction of the symptoms of a disease or injury in oneself or another and that is accompanied by the seeking of excessive medical care from various doctors and medical facilities typically resulting in multiple diagnostic tests, treatments, procedures, and hospitalizations. Unlike the malingerer, who consciously induces symptoms to obtain something of value, the patient with a factitious disorder consciously produces symptoms for unconscious reasons, without identifiable gain.[13]

In situations such as this, an individual intentionally seeks to procure—often by deceptive means, such as exaggeration—unnecessary medical procedures or treatments either for themselves or others, usually their children. In Texas, courts have found that these "Munchausen by proxy" situations can constitute child abuse. *See generally Williamson v. State*, 356 S.W.3d 1, 19–21 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd) (recognizing that an unnecessary medical procedure

[13] *Factitious disorder*, MERRIAM-WEBSTER.COM DICTIONARY, https://www merriam-webster.com/dictionary/factitious%20disorder.

may cause serious bodily injury, supporting a charge of injury to a child under section 22.04 of the Penal Code).[14]

In the context of elective sex change procedures for minors, the Legislature has not provided any avenue for parental consent, and no judicial avenue exists for the child to proceed with these procedures and treatments without parental consent. By comparison, Texas law respecting abortion requires parental consent and, in extenuating circumstances, permits non-parental consent for a minor to obtain an abortion. TEX. OCC. CODE § 164.052(19) (requiring written consent of a child's parent before a physician may perform an abortion on an unemancipated minor); TEX. FAM. CODE § 33.003 (authorizing judicial approval of a minor's abortion without parental consent in limited circumstances). But the Texas Legislature has not decided to make those same allowances for consent to sterilization, and thus a parent cannot consent to sterilization procedures or treatments that result in the permanent deprivation of a minor child's constitutional right to procreate.[15] Thus, no avenue exists for a child to consent to or obtain consent for an elective procedure or treatment that causes sterilization.

IV. The procedures and treatments you describe can constitute child abuse under the Family Code.

Having established the legal and cultural context of this opinion request, we now consider whether these procedures and treatments qualify as child abuse under the Family Code. *See* Request Letter at 1. Where, as a factual matter, one of these procedures or treatments cannot result in sterilization, a court would have to go through the process of evaluating, on a case-by-case basis, whether that procedure violates any of the provisions of the Family Code—and whether the procedure or treatment poses a similar threat or likelihood of substantial physical and emotional harm. Thus, where a factual scenario involving non-medically necessary, gender-based procedures or treatments on a minor causes or threatens to cause harm or irreparable harm[16] to the child—comparable to instances of Munchausen syndrome by proxy or criminal injury to a child—or demonstrates a lack of consent, etc., a court could find such procedures to constitute child abuse under section 261.001.

A. The Texas Legislature defines child abuse broadly.

Family Code chapter 261 provides for the reporting and investigation of abuse or neglect of a child. *See* TEX. FAM. CODE §§ 261.001–.505; *see also* TEX. PENAL CODE § 22.04 (providing for the offense of injury to a child). Section 261.001 defines abuse through a broad and nonexclusive list of acts and omissions. TEX. FAM. CODE § 261.001(1); *see also In re Interest of*

[14]*See also* Tex. Dep't of Fam. & Protective Servs., Tex. Practice Guide for Child Protective Servs. Att'ys, § 7, at 15 (2018), https://www.dfps.state.tx.us/Child_Protection/Attorneys_Guide/default.asp.

[15]Federal Medicaid programs will not reimburse for these types of procedures on minors, regardless of whether the child or parent consents, because of the numerous concerns outlined in the Federal Register provisions discussed above. *See* 43 FED. REG. at 52,146–52,159.

[16] For example, a non-medically necessary procedure or treatment that seeks to alter a minor female's breasts in such a way that would or could prevent that minor female from having the ability to breastfeed her eventual children likely causes irreparable harm and could form the basis for a finding of child abuse.

S.M.R., 434 S.W.3d 576, 583 (Tex. 2014). Of course, this broad definition of abuse would apply to and include criminal acts against children, such as "female genital mutilation"[17] or "injury to a child."[18]

Your questions implicate several components of section 261.001(1). Subsection 261.001(1)(A) identifies "mental or emotional injury to a child that results in an observable and material impairment in the child's growth, development, or psychological functioning." Subsection 261.001(1)(B) provides that "causing or permitting the child to be in a situation in which the child sustains a mental or emotional injury that results in an observable and material impairment in the child's growth, development, or psychological functioning" is abuse. Subsection 261.001(1)(C) includes as abuse a "physical injury that results in substantial harm to the child, or the genuine threat of substantial harm from physical injury to the child." And subsection 261.001(1)(D) includes "failure to make a reasonable effort to prevent an action by another person that results in physical injury that results in substantial harm to the child."

Offering some clarity to the scope of "abuse" under subsection 261.001(1), the Texas Department of Family and Protective Services ("Department") adopted rules giving meaning to the key terms and phrases used in the definition. The Department acknowledges that emotional abuse is a subset of abuse that includes "[m]ental or emotional injury to a child that results in an observable and material impairment in the child's growth, development, or psychological functioning." 40 TEX. ADMIN. CODE § 707.453(a) (Tex. Dept. of Fam. & Protective Servs., What is Emotional Abuse?). The Department's rules provide that "[m]ental or emotional injury" means

> [t]hat a child of any age experiences significant or serious negative effects on intellectual or psychological development or functioning. . . . and exhibits behaviors indicative of observable and material impairment . . . . mean[ing] discernable and substantial damage or deterioration to a child's emotional, social, and cognitive development.

Id. § 707.453(b)(1)–(2).

With respect to physical injuries, the Department further clarified the meaning of the phrase "[p]hysical injury that results in substantial harm to the child," explaining that it means in relevant part a

[17]A person commits an offense if the person: (1) knowingly circumcises, excises, or infibulates any part of the labia majora or labia minora or clitoris of another person who is younger than 18 years of age; (2) is a parent or legal guardian of another person who is younger than 18 years of age and knowingly consents to or permits an act described by Subdivision (1) to be performed on that person; or (3) knowingly transports or facilitates the transportation of another person who is younger than 18 years of age within this state or from this state for the purpose of having an act described by Subdivision (1) performed on that person. TEX. HEALTH & SAFETY CODE § 167.001.

[18]A person commits an offense if he intentionally, knowingly, recklessly, or with criminal negligence, by act or intentionally, knowingly, or recklessly by omission, causes to a child, elderly individual, or disabled individual: (1) serious bodily injury; (2) serious mental deficiency, impairment, or injury; or (3) bodily injury. TEX. PENAL CODE § 22.04.

> real and significant physical injury or damage to a child that includes but is not limited to . . . [a]ny of the following, if caused by an action of the alleged perpetrator directed toward the alleged victim: . . . *impairment of or injury to any bodily organ or function*; . . . .

Id. § 707.455(b)(2)(A) (emphasis added). The Department's rules also define a "[g]enuine threat of substantial harm from physical injury" to include the

> *declaring or exhibiting the intent or determination to inflict real and significant physical injury or damage to a child.* The declaration or exhibition does not require actual physical contact or injury.

Id. § 707.455(b)(1) (emphasis added).

Subsection 261.001(1) and these rules define "abuse" broadly to include mental or emotional injury in addition to a physical injury. To the extent the specific procedures about which you ask may cause mental or emotional injury or physical injury within these provisions, they constitute abuse.

Further, the Legislature has explicitly defined "female genital mutilation" and made such act a state jail felony. *See* TEX. HEALTH & SAFETY CODE § 167.001(a)–(b). While the Legislature has not elsewhere defined the phrase "genital mutilation", nor specifically for males of any age,[19] the Legislature's criminalization of a particular type of genital mutilation supports an argument that analogous procedures that include genital mutilation—potentially including gender reassignment surgeries—could constitute "abuse" under the Family Code's broad and non-exhaustive examples of child abuse or neglect.[20] *See* TEX. FAM. CODE § 261.001(1)(A)–(M); *see generally* Commissioner's Letter at 1 (concluding that genital "mutilation may cause a genuine threat of substantial harm from physical injury to the child"). Thus, many of the procedures and treatments you ask about can constitute "female genital mutilation," a standalone criminal act. But even where these procedures and treatments may not constitute "female genital mutilation" under Texas law, a court could still find that these procedures and treatments constitute child abuse under section 261.001 of the Family Code.

B. Each of these procedures and treatments can constitute abuse under Texas Family Code § 261.001(1)(A), (B), (C), or (D).

The Texas Family Code is clear—causing or permitting substantial harm to the child or the child's growth and development is child abuse. Courts have held that an unnecessary surgical

[19]Your letter does not mention nor request an analysis under federal law. However, under federal law, there are at least two definitions of female genital mutilation, 8 U.S.C § 1374 and 18 U.S.C. § 116. For purposes of this opinion, we have not considered federal statutes, nor have we undertaken any analysis under state or federal constitutions beyond that included here.

[20]The Eighty-seventh Legislature considered multiple bills that would have amended Family Code subsection 261.001(1) to expressly include in the definition of abuse the performing of surgery or other medical procedures on a child for the purpose of gender transitioning or gender reassignment. Those bills did not pass. *See, e.g.*, Tex. H.B. 22, 87th Leg., 3d C.S. (2021).

procedure that removes a healthy body part from a child can constitute a real and significant injury or damage to the child. *See generally Williamson v. State*, 356 S.W.3d 1, 19–21 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd) (recognizing that an unnecessary medical procedure may cause serious bodily injury, supporting a charge of injury to a child under section 22.04 of the Penal Code). The *Williamson* case involved a "victim of medical child abuse, sometimes referred to as Munchausen Syndrome by Proxy." *Id.* at 5. Munchausen syndrome by proxy is "where an alleged perpetrator . . . attempts to gain medical procedures and issues for [their] child for secondary gain for themselves . . . . [A]s a result, the children are subjected to multiple diagnostic tests, therapeutic procedures, sometimes operative procedures, in order to treat things that aren't really there." *Williamson*, 356 S.W.3d at 11. In the *Williamson* case, the abuse was perpetrated on the child when he was five and six years old by his mother. *Id.* The evidence showed that two surgeries performed on the child "were not medically necessary and that [his mother] knowingly and intentionally caused the unnecessary procedures to be performed by fabricating, exaggerating, and inducing the symptoms leading to the surgeries." *Id.*

Similarly, in *Austin v. State*, a court of appeals upheld the conviction for felony injury of a child of a mother suffering from Munchausen syndrome by proxy who injected her son with insulin. *See* 222 S.W.3d 801, 804 (Tex. App.—Austin 2007, pet. ref'd); *see also In re McCabe*, 580 S.E.2d 69, 73 (N.C. Ct. App. 2003) (concluding that abuse through Munchausen syndrome by proxy was abuse under state statute defining abuse in a similar manner as chapter 261); *Matter of Aaron S.*, 625 N.Y.S.2d 786, 793 (Fam. Ct. 1993), *aff'd sub nom. Matter of Suffolk Cnty. Dep't of Soc. Servs on Behalf of Aaron S.*, 626 N.Y.S.2d 227 (App. Div. 1995) (finding that a mother neglected her son by subjecting him to a continuous course of medical treatment for condition which he did not have and that he was a neglected child under state statute governing abuse of a child). In guidance documents published for its child protective services attorneys, the Texas Department of Family and Protective Services explains that "Munchausen by proxy syndrome is relatively rare, but when it occurs, it is frequently a basis for a finding of child abuse."[21] Whether motivated by Munchausen syndrome by proxy or otherwise, it is clear that unnecessary medical treatment inflicted on a child by a parent can constitute child abuse under the Family Code.

By definition, procedures and treatments resulting in sterilization cause "physical injury that results in substantial harm to the child, or the genuine threat of substantial harm from physical injury to the child" by surgically altering key physical body parts of the child in ways that render entire body parts, organs, and the entire reproductive system of the child physically incapable of functioning. Thus, such procedures and treatments can constitute child abuse under section 261.001(1)(C). Even where the procedure or treatment does not involve the physical removal or alteration of a child's reproductive organs (*i.e.* puberty blockers), these procedures and treatments can cause "mental or emotional injury to a child that results in an observable and material impairment in the child's growth, development, or psychological functioning" by subjecting a child to the mental and emotional injury associated with lifelong sterilization—an impairment to

[21]TEX. DEP'T OF FAM. & PROTECTIVE SERVS., TEX. PRACTICE GUIDE FOR CHILD PROTECTIVE SERVS. ATT'YS, § 7, at 15 (2018), https://www.dfps.state.tx.us/Child_Protection/Attorneys_Guide/default.asp (citing *Reid v. State*, 964 S.W.2d 723 (Tex. App.—Amarillo 1998, pet. ref'd) (mem. op.) (expert testimony admitted regarding general acceptance of Munchausen diagnosis as a form of child abuse)).

one's growth and development. Therefore, a court could find these procedures and treatments to be child abuse under section 261.001(1)(A). Further, attempts by a parent to consent to these procedures and treatments on behalf of their child may, if successful, "cause or permit the child to be in a situation in which the child sustains a mental or emotional injury that results in an observable and material impairment in the child's growth, development, or psychological functioning[,]" and could be child abuse under section 261.001(1)(B). Additionally, the failure to stop a doctor or another parent from conducting these treatments and procedures on a minor child can constitute a "failure to make a reasonable effort to prevent an action by another person that results in physical injury that results in substantial harm to the child[,]" and this "failure to make a reasonable effort to prevent" can also constitute child abuse under section 261.001(1)(D). Any person that conducts or facilitates these procedures or treatments could be engaged in child abuse, whether that be parents, doctors, counselors, etc.

It is important to note that anyone who has "a reasonable cause to believe that a child's physical or mental health or welfare has been adversely affected by abuse or neglect by any person shall immediately make a report" as described in the Family Code. TEX. FAM. CODE § 261.101(a). Further, "[i]f a professional has reasonable cause to believe that a child has been abused or neglected or may be abused or neglected, or that a child is a victim of an offense under Section 21.11, Penal Code, and the professional has reasonable cause to believe that the child has been abused as defined by Section 261.001, the professional shall make a report not later than the 48th hour after the hour the professional first has reasonable cause to believe that the child has been or may be abused or neglected or is a victim of an offense under Section 21.11, Penal Code." TEX. FAM. CODE § 261.101(b). The term includes teachers, nurses, doctors, day-care employees, employees of a clinic or health care facility that provides reproductive services, juvenile probation officers, and juvenile detention or correctional officers. *Id*. A failure to report under these circumstances is a criminal offense. TEX. FAM. CODE § 261.109(a).

S U M M A R Y

Each of the "sex change" procedures and treatments enumerated above, when performed on children, can legally constitute child abuse under several provisions of chapter 261 of the Texas Family Code.

When considering questions of child abuse, a court would likely consider the fundamental right to procreation, issues of physical and emotional harm associated with these procedures and treatments, consent laws in Texas and throughout the country, and existing child abuse standards.

Very truly yours,

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