

# GENDER IDENTITY POLICY UNDER THE BIDEN ADMINISTRATION\*

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On the campaign trail, President Joe Biden said one of his top legislative priorities for the first 100 days of his presidency was to amend the 1964 Civil Rights Act to explicitly prohibit discrimination based on sexual orientation and gender identity.<sup>1</sup> The Biden-endorsed Equality Act is the primary legislative proposal for embedding sexual orientation and gender identity as protected classes in federal law. It defines “gender identity” as “gender-related identity, appearance, mannerisms, or other gender-related characteristics of an individual, regardless of the individual’s designated sex at birth.”<sup>2</sup> This definition does not require a clinical diagnosis of gender dysphoria, hormonal or surgical interventions, or retrospective changes to the sex listed on a birth certificate. While the Trump administration viewed sex as an objective, fixed, biological binary based ultimately on genetics,<sup>3</sup> the Biden administration (like the Obama administration) views sex as including “gender identity,” which it defines as “[o]ne’s internal sense of self as man, woman, both or neither.”<sup>4</sup>

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<sup>1</sup> *The Biden Plan to Advance LGBTQ+ Equality in America and Around the World*, JOE BIDEN FOR PRESIDENT: OFFICIAL CAMPAIGN WEBSITE, <https://joebiden.com/lgbtq-policy/>.

<sup>2</sup> Equality Act, H.R. 5, 117th Cong. § 9(2) (2021); Equality Act, S. 393, 117th Cong. § 9(2) (2021). At the time of this article’s publication, the Equality Act has passed in the House, but faces an uncertain future in the Senate.

<sup>3</sup> See, e.g., 85 Fed. Reg. 37,189 (June 19, 2020).

<sup>4</sup> See, e.g., Office of Population Affairs, U.S. Dep’t of Health & Human Servs., Gender-Affirming Care and Young People (Mar. 2022), <https://opa.hhs.gov/sites/default/files/2022-03/gender-affirming-care-young-people-march-2022.pdf>. Cf. 81 Fed. Reg. 31,375, 31,467 (May 18, 2016) (“*Gender identity* means 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.”).

Some critics of the Equality Act call it well-intentioned but misguided,<sup>5</sup> while others deem it “at war with reality.”<sup>6</sup> They point to ways the Act would infringe on women’s rights and discriminate against people and institutions of faith. For example, the Act would expand the number of private businesses that would be classified as “public accommodations” subject to its nondiscrimination provisions—explicitly including health care establishments, shelters, and adoption and foster care providers.<sup>7</sup> In practice, this would penalize health care professionals who decline, based on their medical judgment or ethical convictions, to participate in gender transition services, such as “sex reassignment” surgeries or hormonal treatments, including for minor children; require shelters for women experiencing domestic and sexual abuse to admit into those safe spaces biological males who identify as female; and force faith-based adoption and foster care agencies to choose between violating their religious beliefs about marriage, human embodiment, and sexuality, or shutting down. The Act would also override women’s and girls’ rights to privacy, safety, and fair achievement by requiring that they share their restrooms, locker rooms, and female athletic competitions with biological males.

Further, the Act would for the first time in history prohibit the Religious Freedom Restoration Act of 1993 (RFRA) from applying to a federal law.<sup>8</sup> RFRA, passed with overwhelming bipartisan support and signed into law by President Bill Clinton, “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.”<sup>9</sup> RFRA restored federal protections for religious liberty after the Supreme Court reduced the First Amendment’s Free Exercise Clause protections in the 1990 case *Employment Division v. Smith*.<sup>10</sup> The Equality Act, however, would explicitly exclude those protections where sexual orientation and gender identity are concerned. As law professor and religious liberty expert Douglas Laycock put it: “[The Equality

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<sup>5</sup> See, e.g., *Truth About the Equality Act*, U.S. CONFERENCE OF CATHOLIC BISHOPS, <https://www.usccb.org/equality-act>.

<sup>6</sup> Margaret Harper McCarthy, *The Equality Act Is at War With Reality*, WALL ST. J. (Mar. 30, 2021), <https://www.wsj.com/articles/the-equality-act-is-at-war-with-reality-11617143549>.

<sup>7</sup> H.R. 5 §§ 2(a)(3), 3(a)(2)(C).

<sup>8</sup> *Id.* § 9(2) (“The Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000bb et seq.) shall not provide a claim concerning, or a defense to a claim under, a covered title, or provide a basis for challenging the application or enforcement of a covered title.”).

<sup>9</sup> *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1754 (2020) (citing 42 U.S.C. § 2000bb-1).

<sup>10</sup> 494 U.S. 872 (1990).

Act] protects the rights of one side, but attempts to destroy the rights of the other side.”<sup>11</sup>

With the Equality Act facing difficult odds in the Senate, the Biden administration has imposed its gender identity policies through its regulatory and enforcement powers. These policies largely ignore competing interests or rights of women, children, and religious organizations and persons.

This article analyzes the Biden administration’s gender identity policies to date. It begins with a discussion of the U.S. Supreme Court’s latest word on transgender discrimination in *Bostock v. Clayton County*. It then reviews Biden’s executive actions and orders establishing his administration’s gender identity policies, contrasting them with the Trump administration’s policies. Finally, the article examines the implications of the Biden administration’s gender identity policies for employment, health care, education, and athletics, with a focus on their impact on women’s rights, children’s interests, and religious liberty.

### I. *BOSTOCK*

In June 2020, the U.S. Supreme Court held in *Bostock v. Clayton County* that “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.’”<sup>12</sup>

*Bostock* was a set of three consolidated cases involving employee terminations, two allegedly based on homosexuality and the third allegedly based on transgender status.<sup>13</sup> The question in *Bostock* was “whether an employer who fires someone simply for being homosexual or transgender” violates Title VII of the Civil Rights Act of 1964<sup>14</sup>—the federal law that makes it unlawful for certain employers to “discriminate against” an employee because of the employee’s “race, color, religion, sex, or national origin.”<sup>15</sup> The Court, in a 6-3

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<sup>11</sup> Danielle Kurtzleben, *House Passes the Equality Act: Here’s What it Would Do*, NPR (updated Feb. 25, 2021, 4:39 PM), <https://www.npr.org/2021/02/24/969591569/house-to-vote-on-equality-act-heres-what-the-law-would-do>.

<sup>12</sup> 140 S. Ct. at 1753.

<sup>13</sup> *Id.* at 1737.

<sup>14</sup> *Id.* at 1753.

<sup>15</sup> 42 U.S.C. § 2000e-2(a)(1).

decision authored by Justice Neil Gorsuch and joined by Chief Justice John Roberts and Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan, answered this question in the affirmative.<sup>16</sup> The majority assumed that “sex” refers only to the “biological distinctions between male and female,” but it went on to explain that “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”<sup>17</sup> Thus in all three cases, the employer violated Title VII by intentionally firing its employee based in part on sex (i.e., homosexuality and transgender status).<sup>18</sup> Notably, the majority did not adopt gender identity as a protected category, stating that its decision did not turn on whether the definition of sex “captur[ed] more than anatomy” or “reach[ed] at least some norms concerning gender identity and sexual orientation.”<sup>19</sup>

The Court acknowledged concerns from the employers that its decision would make sex-specific bathrooms, locker rooms, and dress codes “unsustainable” under Title VII and “sweep beyond Title VII to other federal or state laws that prohibit sex discrimination.”<sup>20</sup> But the majority simply stated that such questions were for “future cases” and that the Court would not prejudice any such questions because those were issues for another day.<sup>21</sup>

The Court also acknowledged the employers’ concerns that Title VII “may require some employers to violate their religious convictions,” but it likewise left those concerns for “future cases.”<sup>22</sup> The Court, however, stated that it is “deeply concerned with preserving the promise of the free exercise of religion enshrined in our Constitution”—a “guarantee” that “lies at the heart of our pluralistic society”—and flagged three doctrines protecting religious liberty it thought relevant to the question:<sup>23</sup>

1. Title VII’s religious organization exemption, which allows religious organizations to employ individuals “of a particular religion”;<sup>24</sup>

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<sup>16</sup> See 140 S. Ct. at 1737. Justices Clarence Thomas, Samuel Alito, and Brett Kavanaugh dissented.

<sup>17</sup> *Id.* at 1739, 1741.

<sup>18</sup> *Id.* at 1754.

<sup>19</sup> *Id.* at 1739.

<sup>20</sup> *Id.* at 1753.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 1753–54.

<sup>23</sup> *Id.* at 1754.

<sup>24</sup> 42 U.S.C. § 2000e-1(a). Title VII defines “religion” as “all aspects of religious observance and practice, as well as belief.” *Id.* § 2000e(j).

2. The ministerial exception under the First Amendment, which “can bar the application of employment discrimination laws ‘to claims concerning the employment relationship between a religious institution and its ministers’”;<sup>25</sup> and
3. RFRA, which the Court described as a “super statute” that “might supersede Title VII’s commands in appropriate cases.”<sup>26</sup>

The Court’s attempt to cabin, or at least postpone, *Bostock*’s application to contexts outside hiring and firing did not work. Advocates, courts, and the Biden administration are applying *Bostock*’s reasoning in expansive ways.

## II. GENDER IDENTITY POLICY UNDER THE BIDEN ADMINISTRATION

During the Trump administration, the federal government took the position that discrimination on the basis of sex referred to biological sex and did not extend to sexual orientation or gender identity. This position was a departure from that of the Obama administration with respect to gender identity, but not with respect to sexual orientation.<sup>27</sup> While signaling a willingness to entertain sex stereotyping claims that may overlap with sexual orientation, the Obama administration, to the surprise of many, did not recognize sexual orientation as a stand-alone category of discrimination because, as it put it, “no Federal appellate court has concluded to date that Title IX’s prohibition of discrimination ‘on the basis of sex’—or Federal laws prohibiting sex discrimination more generally—prohibits sexual orientation discrimination.”<sup>28</sup> At the same time, the Obama administration urged legislatures and courts to change the law to prohibit both sexual orientation and gender identity discrimination.

The Trump Department of Justice (DOJ) argued against interpreting sex discrimination to encompass discrimination on the basis of sexual orientation

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<sup>25</sup> *Bostock*, 140 S. Ct. at 1754 (quoting *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188 (2012)).

<sup>26</sup> *Id.* (citing 42 U.S.C. § 2000bb-3).

<sup>27</sup> *See, e.g.*, 81 Fed. Reg. 31,375, 31,390 (May 18, 2016) (“[The Office for Civil Rights at the U.S. Department of Health and Human Services] 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 under Section 1557.”).

<sup>28</sup> *Id.* at 31,389 (internal quotation marks omitted).

and gender identity in *Bostock* and its two companion cases, *Altitude Express, Inc. v. Zarda* and *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*.<sup>29</sup> The Equal Employment Opportunity Commission (EEOC)—the federal agency charged with preventing and remedying illegal employment discrimination, including under Title VII—originally brought the lawsuit against Harris Funeral Homes on behalf of a transgender employee during the Obama administration.<sup>30</sup> After losing in the district court, the EEOC appealed to the Sixth Circuit, and Donald Trump became president soon thereafter. The EEOC, however, continued with its appeal and argued the case before the Sixth Circuit. The same day as the oral argument, DOJ (which handles EEOC cases at the Supreme Court) issued a memo concluding that “Title VII does not prohibit discrimination based on gender identity *per se*.”<sup>31</sup> After the Sixth Circuit ruled in favor of the employee, the Trump DOJ abandoned the EEOC’s former position on certiorari to the Supreme Court.<sup>32</sup>

In a stark contrast to the Trump administration’s policies, hours after Biden was sworn in as President of the United States on January 20, 2021, he issued a sweeping executive order on discrimination on the basis of gender identity and sexual orientation.<sup>33</sup> The executive order lays out the Biden administration’s priorities: “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.”<sup>34</sup> Despite the Supreme Court’s disclaimer in *Bostock* that it was not addressing sex discrimination outside the Title VII hiring and firing context, the executive order relies on *Bostock*, claiming that “[u]nder *Bostock*’s reasoning, laws that prohibit sex

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<sup>29</sup> Brief for the United States as Amicus Curiae Supporting Affirmance in No. 17-1618 and Reversal in No. 17-1623, *Bostock v. Clayton Cnty.*, Nos. 17-1618 & 17-1623 (U.S. Aug. 23, 2019); Brief for the Federal Respondent Supporting Reversal, *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Emp’t Opportunity Comm’n*, No. 18-107 (U.S. Aug. 16, 2019).

<sup>30</sup> *Equal Emp’t Opportunity Comm’n v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018), *aff’d sub nom. Bostock*, 140 S. Ct. 1731.

<sup>31</sup> Memorandum from the Attorney General, Dep’t of Justice, to United States Attorneys and Heads of Department Components on Revised Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964 1 (Oct. 4, 2017), <https://assets.documentcloud.org/documents/4067383/Attachment-2.pdf>.

<sup>32</sup> See *supra* note 29.

<sup>33</sup> Exec. Order No. 13,988, 86 Fed. Reg. 7023 (Jan. 20, 2021) (Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation).

<sup>34</sup> *Id.*

discrimination . . . prohibit discrimination on the basis of gender identity or sexual orientation, so long as the laws do not contain sufficient indications to the contrary.”<sup>35</sup> The order calls on the heads of federal agencies to consider whether to revise, suspend, rescind, or promulgate agency “orders, regulations, guidance documents, policies, programs, or other agency actions . . . as necessary to fully implement” federal statutes that prohibit sex discrimination and the administration’s policy set forth in the order.<sup>36</sup>

This order was hailed by the Human Rights Campaign, a leading LGBTQ advocacy organization, as “the most substantive, wide-ranging executive order concerning sexual orientation and gender identity ever issued by a United States president,” and one that would impact employment, health care, education, and “other key areas of life.”<sup>37</sup> The executive order has been cited repeatedly in subsequent agency regulations proposed under the Biden administration.

Biden signed another executive order a few days later on January 25 regarding transgender persons in the military: “It is my conviction as Commander in Chief of the Armed Forces that gender identity should not be a bar to military service.”<sup>38</sup> The order reversed the Trump administration’s rule preventing transgender persons (in most circumstances) “from joining the Armed Forces and from being able to take steps to transition gender while serving.”<sup>39</sup> In response to Biden’s order, the U.S. Department of Defense revised its transgender policies to allow military service as “one’s self-identify [sic] gender, provided all appropriate standards are met” and allow those serving “medical treatment, gender transition and recognition in one’s self-

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 7023–24.

<sup>37</sup> HRC Staff, *President Biden Issues Most Substantive, Wide-Ranging LGBTQ Executive Order in U.S. History*, HUMAN RIGHTS CAMPAIGN (Jan. 20, 2021), <https://www.hrc.org/press-releases/president-biden-issues-most-substantive-wide-ranging-lgbtq-executive-order-in-u-s-history> (quoting Human Rights Campaign President Alphonso David).

<sup>38</sup> Exec. Order No. 14,004, 86 Fed. Reg. 7471, 7471 (Jan. 25, 2021) (Enabling All Qualified Americans to Serve Their Country in Uniform).

<sup>39</sup> *Id.*

identify [sic] gender.”<sup>40</sup> The Biden Department of Veterans Affairs has since moved to offer sex reassignment surgeries to transgender veterans.<sup>41</sup>

Adding to his record number of presidential executive orders within the first weeks of a presidency, Biden issued two more orders elaborating on his administration’s gender identity policy on March 8, 2021. One outlines that his administration’s policy is “to establish and pursue a comprehensive approach to ensure that the Federal Government is working to advance equal rights and opportunities, regardless of gender or gender identity, in advancing domestic and foreign policy—including by promoting workplace diversity, fairness, and inclusion across the Federal workforce and military.”<sup>42</sup> The order established a White House Gender Policy Council within the Executive Office of the President to coordinate federal government efforts to “advance gender equity and equality.”<sup>43</sup> “Equity” is defined as “the consistent and systematic fair, just, and impartial treatment of all individuals.”<sup>44</sup> The order provides a list of the individuals this includes:

women and girls; Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders, and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality.<sup>45</sup>

The other order focuses on education: “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.”<sup>46</sup> The order

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<sup>40</sup> Terri Moon Cronk, *DOD Revises Transgender Policies to Align with White House*, DOD NEWS (Mar. 31, 2021), <https://www.defense.gov/Explore/News/Article/Article/2557118/dod-revises-transgender-policies-to-align-with-white-house/>.

<sup>41</sup> Leo Shane III, *VA to Offer Gender Surgery to Transgender Vets for the First Time*, MILITARY TIMES (June 19, 2021), <https://www.militarytimes.com/veterans/2021/06/19/va-to-offer-gender-surgery-to-transgender-vets-for-the-first-time/>.

<sup>42</sup> Exec. Order No. 14,020, 86 Fed. Reg. 13,797, 13,797 (Mar. 8, 2021) (Establishment of the White House Gender Policy Council).

<sup>43</sup> *Id.* at 13,797–98.

<sup>44</sup> *Id.* at 13,800.

<sup>45</sup> *Id.*

<sup>46</sup> Exec. Order No. 14,021, 86 Fed. Reg. 13,803, 13,803 (Mar. 8, 2021) (Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity).

calls on the Secretary of Education to review and implement regulations consistent with the policy.<sup>47</sup>

On June 25, 2021, Biden issued yet another executive order, this time on “diversity, equity, inclusion, and accessibility in the federal workforce.”<sup>48</sup> Section 11 on “advancing equity for LGBTQ+ employees” states that federal employees “should be able to openly express their sexual orientation, gender identity, and gender expression, and have these identities affirmed and respected, without fear of discrimination, retribution, or disadvantage.”<sup>49</sup> Federal agencies are directed to provide health care coverage for “comprehensive gender-affirming care,” use “non-binary” gender markers and pronouns, and explore opportunities to expand availability of “gender non-binary facilities and restrooms.”<sup>50</sup>

In both 2021 and 2022, Biden proclaimed March 31 “Transgender Day of Visibility.”<sup>51</sup> On March 31, 2022, he issued a video message stating his entire administration is “committed to advancing transgender equality in the classroom, on the playing field, at work, in our military, in our housing and health care systems—everywhere. Simply everywhere.”<sup>52</sup> Biden reiterated his promise to expand federal nondiscrimination protections to cover gender identity and his call on Congress to pass the Equality Act.<sup>53</sup> The White House issued a fact sheet announcing new actions and documenting the series of

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<sup>47</sup> *Id.*

<sup>48</sup> Exec. Order No. 14,035, 86 Fed. Reg. 34,593 (June 25, 2021) (Diversity, Equity, Inclusion, and Accessibility in the Federal Workforce).

<sup>49</sup> *Id.* at 34,600.

<sup>50</sup> *Id.* at 34,600–01.

<sup>51</sup> Joseph. R. Biden Jr., A Proclamation on Transgender Day of Visibility, 2021, White House (Mar. 31, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/03/31/a-proclamation-on-transgender-day-of-visibility-2021/>; Joseph. R. Biden Jr., A Proclamation on Transgender Day of Visibility, 2022, White House (Mar. 30, 2022), <https://www.whitehouse.gov/briefing-room/presidential-actions/2022/03/30/a-proclamation-on-transgender-day-of-visibility-2022/>.

<sup>52</sup> President Biden (@POTUS), Twitter (Mar. 31, 2022, 10:04 AM), <https://twitter.com/POTUS/status/1509532210495254528>.

<sup>53</sup> *Id.*; Biden Proclamation on Transgender Day of Visibility 2022, *supra* note 51.

actions already taken by the Biden administration in support of its gender identity policies.<sup>54</sup>

While Biden's gender identity executive orders and policies touch on many contexts, this article focuses specifically on how they affect employment, health care, education, and athletics.

### A. Employment

In the employment context, the Supreme Court in *Bostock* decided that sex discrimination under Title VII includes discrimination on the basis of homosexuality and transgender status. Apart from an unlikely superseding Supreme Court decision or an even more unlikely intervention by Congress, *Bostock*'s protections for homosexual and transgender employees with respect to status-based hiring and firing decisions are here to stay. A few days after the Court issued its decision in June 2020, the Republican-controlled EEOC indicated its adoption of the Supreme Court's interpretation in updated, non-binding "technical assistance."

Although the Commission retains a Republican majority until July 2022 when the five-year term of one of three Republican-appointed Commissioners expires, a Democrat Commissioner became Chair when Biden became president. The Chair controls the "administrative operations of the Commission," such as deciding what business the Commission votes on and issuing technical assistance that, unlike guidance, does not require a vote of the full Commission.<sup>55</sup>

On the first anniversary of *Bostock*, June 15, 2021, the Chair issued a "technical assistance document" on "what the *Bostock* decision means for LGBTQ+ workers (and all covered workers) and for employers across the country."<sup>56</sup> The document purported to "briefly explain[] the Supreme Court's decision in *Bostock v. Clayton County* and the EEOC's established legal positions on sexual-orientation- and gender-identity-related workplace discrimination issues."<sup>57</sup> It stated employees have a right to dress and use sex-

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<sup>54</sup> Fact Sheet, The White House, FACT SHEET: Biden-Harris Administration Advances Equality and Visibility for Transgender Americans (Mar. 31, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/31/fact-sheet-biden-harris-administration-advances-equality-and-visibility-for-transgender-americans/>.

<sup>55</sup> 42 U.S.C. § 2000e-4(a).

<sup>56</sup> EEOC, Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity (June 15, 2021), <https://www.eeoc.gov/protections-against-employment-discrimination-based-sexual-orientation-or-gender-identity>.

<sup>57</sup> *Id.*

specific bathrooms, locker rooms, and showers consistent with their gender identity, and that the “misuse” of preferred names or pronouns could constitute unlawful harassment.<sup>58</sup> It further implied employers in the *private* sector are bound by pre-*Bostock* federal sector Commission decisions that extended sexual orientation and gender identity discrimination prohibitions to the federal workplace.<sup>59</sup>

The document, however, was only “issued upon approval of the Chair” of the EEOC and explicitly acknowledged that it “does not have the force and effect of law and is not meant to bind the public in any way.”<sup>60</sup> The document was challenged in court, including by a group of twenty states that argued “*Bostock* did not identify any of the following EEOC-defined forms of ‘discrimination’ as discrimination under Title VII”: sex-specific dress codes; single-sex bathrooms, locker rooms, and showers; preferred names and pronouns; and customer or client references.<sup>61</sup> Despite the document “purport[ing] to represent the EEOC’s interpretation of what Title VII demands of employers subject to Title VII,” the states allege that this cannot be true, since the full five-member Commission did not vote on or approve the contents or the issuance of the document as is required to establish official EEOC policy or positions.<sup>62</sup>

On Transgender Day of Visibility in 2022, the EEOC announced that it was adding the “nonbinary” gender marker “X” and the prefix “Mx.” as part of its intake process for charges of employment discrimination.<sup>63</sup> The press release stated that the EEOC “recogniz[es] that the binary construction of

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> Complaint ¶¶ 81–85, *Tennessee v. U.S. Dep’t of Educ.*, No. 3:21-cv-00308 (E.D. Tenn. Aug. 30, 2021) [hereinafter *Twenty States Complaint*] (raising Administrative Procedure Act (APA), separation of powers, sovereign immunity, and Tenth Amendment claims). The twenty states are Tennessee, Alabama, Alaska, Arizona, Arkansas, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, and West Virginia. *Id.* Texas filed its own lawsuit challenging the document. Complaint, *Texas v. Equal Emp’t Opportunity Comm’n*, No. 2:21-cv-00194-Z (N.D. Tex. Sept. 20, 2021) (amended Mar. 9, 2022).

<sup>62</sup> *Twenty States Complaint* ¶¶ 88–92.

<sup>63</sup> Press Release, EEOC, EEOC to Add Non-Binary Gender Option to Discrimination Charge Intake Process (Mar. 31, 2022), <https://www.eeoc.gov/newsroom/eeoc-add-non-binary-gender-option-discrimination-charge-intake-process>.

gender as either ‘male’ or ‘female’ does not reflect the full range of gender identities.”<sup>64</sup> This move departs significantly from the Supreme Court’s decision in *Bostock*, which assumed that “sex” refers only to the “biological distinctions between male and female.”<sup>65</sup>

The exact implications of *Bostock* in the employment context are still an open question, particularly as it relates to religious liberty. Title VII prohibits both sex discrimination and discrimination on the basis of religion. Title VII defines “religion” to include “all aspects of religious observance and practice, as well as belief” and requires employers to “reasonably accommodate” employees’ religious observances and practices when such accommodations do not impose “undue hardship on the conduct of the employer’s business.”<sup>66</sup> Generally, if providing an accommodation to an employee would subject another employee to a hostile work environment, that accommodation would constitute an undue hardship.<sup>67</sup> Under Title VII, unlawful harassment occurs when the conduct is unwelcome and “severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive.”<sup>68</sup> Apart from Title VII, employees raising gender identity or religious discrimination claims may rely on other federal or state human rights or nondiscrimination laws to advance their workplace claims.<sup>69</sup>

There is ongoing litigation involving the denial of employees’ religious accommodation requests to not participate in any work activity affirming or celebrating a view of sex or gender contrary to their sincerely held religious beliefs.<sup>70</sup> One major unresolved issue is whether Title VII requires use of a

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<sup>64</sup> *Id.*

<sup>65</sup> 140 S. Ct. 1731, 1739 (2020).

<sup>66</sup> 42 U.S.C. § 2000e(j).

<sup>67</sup> See EEOC, Compliance Manual on Religion Discrimination § 12-IV-B-4 (2021), <https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination>.

<sup>68</sup> EEOC, *Harassment*, <https://www.eeoc.gov/harassment>.

<sup>69</sup> See, e.g., *Hobby Lobby Stores, Inc. v. Sommerville*, No. 2-19-0362, 2021 IL App (2d) 190362 (Ill. App. Ct. Aug. 13, 2021) (awarding \$220,000 in damages against employer for violating Illinois Human Rights Act prohibition against gender identity discrimination by refusing transgender identifying employee use of women’s restroom); see also *infra* note 72 (listing cases raising non-Title VII claims).

<sup>70</sup> See, e.g., *Equal Emp’t Opportunity Comm’n v. Kroger Ltd. P’ship I*, No. 4:20-cv-01099 (E.D. Ark.) (involving Title VII failure to accommodate claims by two grocery store employees who requested religious accommodations to avoid wearing an apron with a visible rainbow-colored heart emblem on the bib that they believed endorsed LGBT values in violation of their religious beliefs); *Brennan v. Deluxe Corp.*, No. 1:18-cv-02119 (D. Md.) (involving Title VII failure to accommodate claim by employee who was disciplined and fired for not completing employer’s online ethics and

transgender person's preferred pronouns in the workplace. Some argue that refusal to use a person's preferred name and pronouns is harassment and discriminatory.<sup>71</sup> Others are litigating over whether employees who have religious objections to using pronouns that do not correspond to a person's biological sex are entitled to a religious accommodation or protection under Title VII, RFRA, the First Amendment, or various state laws. With increasing numbers of children identifying as transgender, this issue is becoming prevalent in the school context; multiple teachers have been fired over their refusal, based on their religious beliefs, to use preferred names or pronouns in violation of school policy (even in cases where they opt to not use pronouns altogether to avoid unintentionally giving offense).<sup>72</sup>

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compliance course because the "correct" answer to a multiple-choice question about gender identity issues conflicted with his religious beliefs).

<sup>71</sup> See generally Chan Tov McNamara, *Misgendering as Misconduct*, 68 UCLA L. REV. DISCOURSE 40 (2020) (arguing that "misgendering" is "objectively offensive conduct" and should be considered harassment or discrimination).

<sup>72</sup> See, e.g., *Vlaming v. W. Point Sch. Bd.*, 10 F.4th 300 (4th Cir. 2021) (affirming rejection of federal court removal of claims under the Virginia constitution and state statutes by high school French teacher who was fired for not abiding by school nondiscrimination policy that required him to use student's preferred pronouns in violation of his religious beliefs); *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021) (reversing dismissal of First Amendment free speech and free exercise claims by professor disciplined by university for not following university's gender identity nondiscrimination policy when he refused to address transgender identifying student by student's preferred title and pronouns and instead used only student's last name), *settled & voluntarily dismissed sub nom. Meriwether v. Trustees of Shawnee State Univ.*, No. 1:18-cv-00753 (S.D. Ohio Apr. 14, 2022), *press release available at* <https://adfmedia.org/case/meriwether-v-trustees-shawnee-state-university> (university agreed to pay teacher \$400,000 plus attorneys' fees, and agreed teacher has a right to choose when to use, or avoid using, titles or pronouns when referring to or addressing students, including when student requests preferred pronouns); *Kluge v. Brownsburg Cmty. Sch. Corp.*, 1:19-cv-2462 (S.D. Ind. July 12, 2021) (granting summary judgment for school on Title VII failure to accommodate and retaliation claims by Christian music teacher who was allegedly forced to resign for not complying with school name policy requiring use of students' preferred names and pronouns in violation of his religious beliefs after school revoked accommodation to use last names only for all students); see also *Cross v. Loudoun Cnty. Sch. Bd.*, No. CL21-3254 (Va. Dec. 1, 2021) (affirming parties' agreement to permanently enjoin school in case raising free speech and free exercise claims by elementary school teacher who was placed on administrative leave after speaking out against proposed preferred pronoun policy at public school board meeting); *Ricard v. USD 475 Geary Cnty. Schs. Sch. Bd. Members*, No. 5:22-cv-04015 (D. Kan.) (involving First Amendment free speech and free exercise of religion, unconstitutional conditions, Fourteenth Amendment due process and equal protection, and breach of contract claims by middle school teacher who was

On the employer side, a qualifying religious organization is generally able to “assert as a defense to a Title VII claim of discrimination or retaliation that it made the challenged employment decision on the basis of religion.”<sup>73</sup> But there is also ongoing litigation over whether Title VII’s religious organization exemption or other laws, such as the First Amendment or RFRA, permit religious organizations, including churches, to fire or otherwise discipline employees who do not align with their doctrines on matters of marriage, gender, and sexuality.<sup>74</sup> If the Equality Act passes and effectively removes RFRA protections from Title VII claims, religious organizations would have to qualify for an exemption under Title VII, the First Amendment, or another law.

On a related issue, even before *Bostock*, the EEOC took the position that Title VII requires employers to provide health insurance coverage for gender transition services if they provide coverage for similar services for other reasons.<sup>75</sup> After *Bostock*, the EEOC was preemptively sued by a number of

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suspended and reprimanded for harassment and bullying for not using students’ preferred name and denied religious accommodation from using preferred pronouns).

<sup>73</sup> EEOC, Compliance Manual, *supra* note 67, at § 12-I-C-1.

<sup>74</sup> *See, e.g.*, *Demkovich v. St. Andrew Apostle Parish*, 3 F.4th 968 (7th Cir. 2021) (en banc) (holding First Amendment ministerial exception applies to and bars hostile work environment claim of parish music director who was fired by priest for entering into same-sex marriage in violation of Church teaching); *Bear Creek Bible Church & Braidwood Mgmt. v. Equal Emp’t Opportunity Comm’n*, No. 4:18-cv-00824 (N.D. Tex. Nov. 22, 2021) (holding church and similar church-type employers qualify for Title VII’s religious organization exemption for their religious hiring decisions, while religious business-type employers do not, but are protected under RFRA and the First Amendment); *Billard v. Charlotte Catholic High Sch.*, 3:17-cv-00011 (W.D.N.C. Sept. 3, 2021) (granting summary judgment on Title VII sex discrimination claim in favor of substitute drama teacher who was fired by Catholic school after announcing same-sex engagement and finding claim not barred by Title VII religious organization exemption, RFRA, or the First Amendment); *Starkey v. Roman Catholic Archdiocese of Indianapolis, Inc.*, No. 1:19-cv-03153 (S.D. Ind. Aug. 11, 2021) (holding ministerial exception bars claims of discrimination, retaliation, and hostile work environment under Title VII, and violations of state tort law by guidance counselor whose employment contract was not renewed by Catholic school for entering into same-sex marriage in violation of contract and church teaching), *appealed*, No. 21-2524 (7th Cir.); *Fitzgerald v. Roncalli High Sch., Inc.*, No. 1:19-cv-04291 (S.D. Ind.) (involving religious defenses under Title VII and the First Amendment to claims of discrimination, retaliation, and hostile work environment under Title VII and violations of state tort law by guidance counselor whose employment contract was not renewed by Catholic school for entering into same-sex civil union in violation of contract and church teaching); *DeWeese-Boyd v. Gordon Coll.*, No. 1777CV01367 (Mass. Supp. Ct.) (involving application of ministerial exception to state law claims of associate professor of social work who disagreed with college’s religious beliefs and policies on human sexuality and whose application for promotion to full professorship was declined allegedly because of her poor performance).

<sup>75</sup> *See, e.g.*, *Amicus Br. of the Equal Emp’t Opportunity Comm’n in Supp. of Pl. and in Opp’n to Def.’s Mot. to Dismiss*, *Robinson v. Dignity Health*, No. 4:16-cv-03035 (N.D. Cal. Aug. 22,

Catholic-affiliated health care and health insurance entities and several Catholic employers seeking an injunction barring enforcement of a requirement to provide gender transition services or insurance coverage for such services (that would violate their sincerely held religious beliefs). The agency declined to say it would refrain from enforcing such a requirement against those religious organizations.<sup>76</sup> The district court concluded that the enforcement of such a requirement would violate plaintiffs' exercise of religion rights under RFRA.<sup>77</sup> Similarly, the Christian Employers Alliance sued the EEOC over its interpretation that Title VII's sex discrimination prohibition requires religious non-profit and for-profit employers to provide and pay for insurance coverage of gender transition services in violation of the employers' religious beliefs.<sup>78</sup>

In another lawsuit brought by a Christian church and Christian-owned business, a district court held that after *Bostock* employer policies denying

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2016) (arguing hospital's categorical exclusion of coverage for gender transition treatments in its employee health plan, while providing coverage of "medically necessary" treatment for other serious health conditions, stated plausible Title VII sex discrimination claim); Consent Decree ¶ 30, Equal Emp't Opportunity Comm'n v. Deluxe Financial Servs., Inc., No. 15-cv-02646 (D. Minn. Jan. 20, 2016) (entering into three-year consent decree, which provided, inter alia: "As of January 1, 2016, Defendant's national health benefits plan does not and will not include partial or categorical exclusions for otherwise medically necessary care solely on the basis of sex (including transgender status) and gender dysphoria. For example, if the health benefits plan covers exogenous hormone therapy for non-transgender enrollees who demonstrate medical necessity for treatment, the plan cannot exclude exogenous hormone therapy for transgender enrollees or persons diagnosed with gender dysphoria where medical necessity for treatment is also demonstrated."); Julie Moreau, *Walmart Subsidiary Discriminated Against Transgender Worker, EEOC Finds*, NBC NEWS (Aug. 8, 2017, 10:33 AM), <https://www.nbcnews.com/feature/nbc-out/walmart-subsidiary-discriminated-against-transgender-worker-eeoc-finds-n790696> (reporting EEOC letter of determination found that Sam's Club (a Walmart subsidiary) violated Title VII, maintaining: "Robison was denied medical coverage because she is transgender, and that Walmart's health care policy 'categorically excluded coverage of any services for "transgender treatment/sex therapy," denying [Robison] medically necessary care that would have been covered if not for her transgender status.'" (alteration in original)).

<sup>76</sup> *Religious Sisters of Mercy v. Azar*, 513 F. Supp. 3d 1113, 1142 (D.N.D. 2021) ("The EEOC has never disavowed an intent to enforce Title VII's prohibition on gender-transition exclusions in health plans against the CBA or its members. At the same time, the EEOC has enforced that very interpretation against other employers."), *appealed sub nom.* *Religious Sisters of Mercy v. Becerra*, No. 21-1890 (8th Cir.) (oral argument held December 15, 2021).

<sup>77</sup> *Id.* at 1149.

<sup>78</sup> Complaint ¶ 3, *Christian Emp'rs Alliance v. U.S. Equal Emp't Opportunity Comm'n*, No. 1:21-cv-00195 (D.N.D. Oct. 18, 2021).

coverage of sex reassignment surgeries and cross-sex hormones violate Title VII since “these policies would *only* function to discriminate against individuals with gender dysphoria.”<sup>79</sup> The court, however, held that workplace policies regarding sexual conduct, dress codes, and sex-specific restrooms did *not* violate Title VII because they “do not treat one sex worse than the other.”<sup>80</sup>

Apart from Title VII, employers may also be required to provide insurance coverage for gender transition services under Biden administration health insurance regulations, discussed below.

### *B. Health Care*

In the health care context, several groups are seeking to force insurance plans to cover and hospitals and medical professionals to provide the full range of gender transition services, including for minor children. Litigation is ongoing over whether and to what extent insurance coverage for and provision of such services is required by law and whether there are any exemptions when the services conflict with medical judgments, conscience, or religious beliefs.

#### 1. Section 1557 Regulations

2016 Rule. In the wake of the passage of the Patient Protection and Affordable Care Act (the ACA),<sup>81</sup> the U.S. Department of Health and Human Services (HHS) under the Obama administration issued a slew of regulations, including one in 2016 implementing Section 1557 of the ACA (the “2016 Rule”).<sup>82</sup> Section 1557 guarantees that no individual can be denied benefits in a federally run or federally funded health program because of their race, color, national origin, sex, age, or disability—all well-established categories of civil rights law.<sup>83</sup> It does so by incorporating the “ground[s] prohibited under” and the enforcement mechanisms from four existing federal civil rights laws, including the prohibition against discrimination “on the basis of

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<sup>79</sup> *Bear Creek Bible Church & Braidwood Mgmt.*, No. 4:18-cv-00824, at 68.

<sup>80</sup> *Id.* at 62–69.

<sup>81</sup> Pub. L. 111-148, 124 Stat. 119 (2010) as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. 111-152, 124 Stat. 1029 (codified in scattered sections of U.S.C.).

<sup>82</sup> Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31,375 (May 18, 2016) (codified at 45 C.F.R. § 92).

<sup>83</sup> 42 U.S.C. § 18116.

sex” in Title IX of the Education Amendments of 1972.<sup>84</sup> As Ryan Anderson and Roger Severino noted in 2016, “Section 1557 of the ACA does not create special privileges for new classes of people or require insurers and physicians to cover or provide specific procedures or treatments.”<sup>85</sup>

The Obama administration’s 2016 Rule, however, redefined discrimination “on the basis of sex” to include discrimination based on “termination of pregnancy,” “sex stereotyping,” and “gender identity,” which was 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.”<sup>86</sup> HHS explicitly chose not to include “sexual orientation” as part of the definition.<sup>87</sup> Under the 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.”<sup>88</sup> (“Medically necessary” treatments, as used by the Obama and Biden administrations and gender identity advocates, describe medical interventions and alterations that attempt to ameliorate a person’s internal psychological distress that arises from having a biological sex that differs from their stated internal gender identity by physically altering the person’s body. At the same time, any therapies designed to help such people accept their biological sex are deemed not medically necessary.) HHS’s rule also required private employers, individuals, and taxpayers to fund health insurance coverage for these procedures, irrespective

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<sup>84</sup> *Id.* § 18116(a) (citing Title IX, 20 U.S.C. § 1681 et seq.). Title IX contains a religious exemption, which provides that Title IX does not apply to a covered entity controlled by a religious organization if its application would be inconsistent with the religious tenets of the organization, 20 U.S.C. § 1681(a)(3), and an abortion neutrality provision. 20 U.S.C. § 1688.

<sup>85</sup> ROGER SEVERINO & RYAN T. ANDERSON, PROPOSED OBAMACARE GENDER IDENTITY MANDATE THREATENS FREEDOM OF CONSCIENCE AND THE INDEPENDENCE OF PHYSICIANS, HERITAGE FOUND. BACKGROUNDER NO. 3089 2 (Jan. 8, 2016), <https://www.heritage.org/health-care-reform/report/proposed-obamacare-gender-identity-mandate-threatens-freedom-conscience>.

<sup>86</sup> 81 Fed. Reg. 31,375, 31,467.

<sup>87</sup> *Id.* at 31,390 (“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 under Section 1557.”).

<sup>88</sup> *Id.* at 31,455.

of whether it conflicts with their medical judgments or consciences<sup>89</sup> and despite HHS's 2016 national coverage determination that its own Medicare program need not cover sex reassignment surgeries due to insufficient scientific evidence of medical necessity.<sup>90</sup> The 2016 Rule, however, did not just *allow* gender transition services, including sex reassignment surgery, but effectively *required* them despite their controversial nature.

The question of the proper treatment of gender dysphoria—the clinical diagnosis that requires treatment—is unsettled, and respected physicians have raised serious concerns about the propriety of prescribing progressively irreversible and sterilizing cross-sex hormones, sex reassignment surgeries, and other gender transition treatments, particularly for children.<sup>91</sup> Nevertheless, under the 2016 Rule, if physicians administered treatments or performed surgeries that *could* further gender transitions (such as mastectomies on biological females to treat cancer), they were *required* to provide such services for gender transition purposes, including for minors. If they failed to comply, they faced severe consequences such as loss of federal funding for their practices or for their employers (which would likely result in job loss).

Along with ignoring the medical judgment of those who believe transition is not the proper treatment of gender dysphoria, especially for minor children, the Rule's transgender mandate created serious conflicts of conscience for many health care professionals. In the Rule, HHS declined to adopt the exemption for religious institutions required under Title IX (which is otherwise

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<sup>89</sup> See *id.* at 31,378–80.

<sup>90</sup> See U.S. Ctrs. for Medicare & Medicaid Servs., Decision Memo for Gender Dysphoria and Gender Reassignment Surgery (CAG-00446N) (Aug. 30, 2016) (stating the agency “is not issuing a National Coverage Determination (NCD) at this time on gender reassignment surgery for Medicare beneficiaries with gender dysphoria because the clinical evidence is inconclusive for the Medicare population”), <https://www.cms.gov/medicare-coverage-database/details/nca-decision-memo.aspx?NCAId=282&CoverageSelection=National&Keyword=gender+reassignment+surgery&KeywordLookUp=Title&KeywordSearchType=And&bc=gAAACAACAAAA=&>.

<sup>91</sup> See *generally* Ethics & Pub. Pol'y Ctr., EPPC Scholars Comment Opposing Proposed Rule “Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2023,” RIN 0938-AU65 (Jan. 27, 2022), <https://eppc.org/wp-content/uploads/2022/01/EPPC-Scholars-Comment-Opposing-SOGL-Insurance-Mandate.pdf> (discussing the unsettled nature of the proper treatment of gender dysphoria, as well as the harms and risks of transition treatments, especially for minors); RYAN T. ANDERSON, WHEN HARRY BECAME SALLY: RESPONDING TO THE TRANSGENDER MOMENT (2018) (same); ABIGAIL SHRIER, IRREVERSIBLE DAMAGE: THE TRANSGENDER CRAZE SEDUCING OUR DAUGHTERS (2020) (exploring the “trans” epidemic sweeping teenage girls and the push for “life-changing interventions on young girls—including medically unnecessary double mastectomies and puberty blockers that can cause permanent infertility”).

incorporated by Section 1557).<sup>92</sup> Instead, HHS called it “a blanket religious exemption,” refused to apply it, and claimed that other laws such as RFRA and provider conscience statutes “appropriately address[]” any religious concerns.<sup>93</sup> But by prohibiting differential treatment on the basis of gender identity in health services, the rule targeted health care professionals and organizations that, as a matter of professional medical judgment, conscience, or religious faith, “believe that maleness and femaleness are biological realities to be respected and affirmed, not altered or treated as diseases.”<sup>94</sup>

The 2016 Rule’s redefinition of sex discrimination was challenged in two different federal district courts by nine states, several religious organizations, and an association of over 19,000 health care professionals.<sup>95</sup> On December 31, 2016, one federal district court preliminarily enjoined nationwide the challenged provisions, concluding that they violated the Administrative Procedure Act (APA) by “contradicting existing law and exceeding statutory authority,” and also likely violated RFRA.<sup>96</sup> The second federal district court agreed.<sup>97</sup> On October 15, 2019, the first court issued a final judgment, vacating the rule because its attempt to prohibit discrimination on the basis of “gender identity” and “termination of pregnancy” violated both the APA and RFRA.<sup>98</sup> These rulings bind HHS from enforcing those provisions. HHS

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<sup>92</sup> Cf. 81 Fed. Reg. 31,375, 31,380 (“We decline to adopt commenters’ suggestion that we import Title IX’s blanket religious exemption into Section 1557. Section 1557 itself contains no religious exemption.”), with 42 U.S.C. § 18116(a) (“an individual shall not, *on the ground prohibited under* . . . title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), . . . be excluded from participation in, be denied the benefits of, or be subjected to discrimination under . . .” and “[t]he enforcement mechanisms provided for and available under such . . . title IX . . . shall apply for purposes of violations of this subsection”).

<sup>93</sup> 81 Fed. Reg. 31,375, 31,435.

<sup>94</sup> SEVERINO & ANDERSON, *supra* note 85, at 1–2.

<sup>95</sup> See *Franciscan Alliance, Inc. v. Burwell*, 227 F. Supp. 3d 660 (N.D. Tex. 2016); *Religious Sisters of Mercy v. Burwell*, No. 3:16-cv-00386 (D.N.D.), *appealed sub nom. Religious Sisters of Mercy*, No. 21-1890; *Catholic Benefits Assoc. v. Burwell*, No. 3:16-cr-00432 (D.N.D.) (later consolidated with *Religious Sisters of Mercy*), *appealed sub nom. Religious Sisters of Mercy*, No. 21-1890.

<sup>96</sup> *Franciscan Alliance*, 227 F. Supp. 3d at 670.

<sup>97</sup> *Religious Sisters of Mercy*, Nos. 3:16-cv-00386 & 3:16-cr-00432, at 2–3 (D.N.D. Jan. 23, 2017) (staying enforcement of 2016 Rule’s “prohibitions against discrimination on the bases of gender identity and termination of pregnancy” as to plaintiffs in both cases), *appealed*, No. 21-1890 (8th Cir.).

<sup>98</sup> *Franciscan Alliance, Inc. v. Azar*, 414 F. Supp. 3d 928, 947 (N.D. Tex. 2019).

appealed both rulings, not disputing the RFRA analysis, but arguing that the plaintiffs failed to demonstrate standing, ripeness, and irreparable harm.<sup>99</sup>

2020 Rule. HHS under the Trump administration rescinded the 2016 Rule (with some exceptions not relevant here) and issued a new rule in 2020.<sup>100</sup>

After substantial review, including consideration of hundreds of thousands of public comments, HHS under Trump publicly unveiled the final rule on June 12, 2020 (coincidentally a few days before the *Bostock* decision), and sent it to the federal register for publication.<sup>101</sup> The 2020 rule explicitly eliminated the 2016 rule's inclusion of "gender identity" within the definition of discrimination "on the basis of sex" in health care under Section 1557. Instead, the 2020 rule did not define sex, but stated that sex discrimination under Section 1557 should be understood per its ordinary original public meaning of the exclusive "biological binary of male and female."<sup>102</sup> In anticipating the potential effect of the *Bostock* decision (which was issued while the rule's publication in the Federal Register was pending), HHS stated, "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."<sup>103</sup>

The 2020 Rule maintained "vigorous enforcement of federal civil rights laws on the basis of race, color, national origin, disability, age, and sex," but it restored "the rule of law by revising certain provisions" in the 2016 Rule that exceeded the scope of the authority Congress delegated in Section 1557.<sup>104</sup> Specifically, HHS said it would thereafter treat "sex discrimination"

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<sup>99</sup> *Religious Sisters of Mercy*, No. 21-1890 (oral argument held December 15, 2021).

<sup>100</sup> Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority, 85 Fed. Reg. 37,160 (June 19, 2020).

<sup>101</sup> Press Release, U.S. Dep't of Health & Human Servs., HHS Finalizes Rule on Section 1557 Protecting Civil Rights in Healthcare, Restoring the Rule of Law, and Relieving Americans of Billions in Excessive Costs (June 12, 2020), <https://www.hhs.gov/guidance/document/hhs-finalizes-rule-section-1557-protecting-civil-rights-healthcare-restoring-rule-law-and>. The rule was officially published in the federal register on June 19, 2020. See 85 Fed. Reg. 37,160.

<sup>102</sup> 85 Fed. Reg. 37,160, 37,178.

<sup>103</sup> *Id.* at 37,168.

<sup>104</sup> HHS Finalizes Rule on Section 1557, *supra* note 101.

“according to the plain meaning of the word ‘sex’ as male or female and as determined by biology.”<sup>105</sup>

The 2020 Rule was challenged in multiple federal district courts,<sup>106</sup> resulting in several of its provisions being enjoined.<sup>107</sup> One court said the agency should have halted publication of the rule to consider *Bostock*'s implications,<sup>108</sup> while another court held that the rule is “contrary to *Bostock*.”<sup>109</sup> Neither court addressed the fact that the Supreme Court premised its *Bostock* decision on the assumption that “sex” refers only to the “biological distinctions between male and female”<sup>110</sup> and did not adopt “gender identity” as a protected class, only “transgender status.”<sup>111</sup>

2021 Biden “Notification.” On May 10, 2021, Biden’s HHS issued a “notification of interpretation and enforcement,” stating, “Consistent with the Supreme Court’s decision in *Bostock* and Title IX, beginning today, [the Office for Civil Rights (OCR)] will interpret and enforce Section 1557’s prohibition on discrimination on the basis of sex to include: (1) discrimination

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<sup>105</sup> *Id.* Both the 2016 Rule and the 2020 Rule declined to recognize sexual orientation as a protected category under Section 1557.

<sup>106</sup> See *Whitman-Walker Clinic, Inc. v. U.S. Dep’t of Health & Human Servs.*, 485 F. Supp. 3d 1 (D.D.C. 2020); *Asapansa-Johnson Walker v. Azar*, 480 F. Supp. 3d 417 (E.D.N.Y. 2020); *Washington v. U.S. Dep’t of Health & Human Servs.*, 482 F. Supp. 3d 1104 (W.D. Wash. 2020); *Bos. All. Of Gay, Lesbian, Bisexual & Transgender Youth v. U.S. Dep’t of Health & Human Servs.*, No. 1:20-cv-11297 (D. Mass.); *New York v. U.S. Dep’t of Health & Human Servs.*, No. 1:20-cv-05583 (S.D.N.Y.).

<sup>107</sup> *Whitman-Walker Clinic*, 485 F. Supp. 3d 1 (preliminarily enjoining HHS from enforcing portions of the 2020 Rule); *Asapansa-Johnson Walker*, 480 F. Supp. 3d 417 (staying portions of the 2020 Rule’s repeal of portions of the 2016 Rule and preliminarily enjoining HHS from enforcing the repeal of those provisions); *Asapansa-Johnson Walker*, No. 1:20-cv-02834 (E.D.N.Y. Oct. 29, 2020) (staying/enjoining additional portions of the 2020 Rule’s repeal of portions of the 2016 rule). *But see Washington*, 482 F. Supp. 3d 1104 (denying motion for preliminary injunction because Washington State lacked Article III standing).

<sup>108</sup> *Whitman-Walker Clinic*, 485 F. Supp. 3d at 42 (“It is sufficient for the Court to determine that *Bostock*, at the very least, has significant implications for the meaning of Title IX’s prohibition on sex discrimination, and that it was arbitrary and capricious for HHS to eliminate the 2016 Rule’s explication of that prohibition without even acknowledging—let alone considering—the Supreme Court’s reasoning or holding.”).

<sup>109</sup> *Asapansa-Johnson Walker*, 480 F. Supp. 3d at 420 (“[T]he Court concludes that the proposed rules are, indeed, contrary to *Bostock* and, in addition, that HHS did act arbitrarily and capriciously in enacting them.”).

<sup>110</sup> 140 S. Ct. at 1739.

<sup>111</sup> *Id.* at 1746–47.

on the basis of sexual orientation; and (2) discrimination on the basis of gender identity.”<sup>112</sup> The notification acknowledged that HHS is bound to comply with RFRA and “all other legal requirements” and “all applicable court orders,” but it gave no indication as to how any of those obligations applied to it.<sup>113</sup>

The notification has been challenged in several lawsuits, including under the APA, RFRA, and the First Amendment’s protections of free speech, free association, and free exercise of religion.<sup>114</sup> In one case brought by a Catholic hospital and a Christian health care professional association, the court permanently enjoined HHS’s interpretation and enforcement of Section 1557 and any regulations that would require the plaintiffs to perform or provide insurance coverage for gender transition services (or abortions).<sup>115</sup> The court called HHS’s “notification” an act of “administrative fiat,” raising doubt about the agency’s power to issue such commands outside the public rule-making process,<sup>116</sup> which both the Obama and Trump administrations followed with the 2016 and 2020 rules. HHS has since announced it was planning to propose a new Section 1557 rule in April 2022 (though at the time this article was published in May, the rule has not yet been proposed), which is anticipated to formally adopt regulations consistent with its May 2021 notification.<sup>117</sup>

On March 2, 2022, HHS released another “notice and guidance” document on “gender affirming care, civil rights, and patient privacy.”<sup>118</sup> The document reiterated that OCR is investigating and enforcing Section 1557 cases

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<sup>112</sup> U.S. Dep’t of Health & Human Servs., Notification of Interpretation and Enforcement of Section 1557 of the Affordable Care Act and Title IX of the Education Amendments of 1972 3 (May 10, 2021), <https://www.hhs.gov/sites/default/files/ocr-bostock-notification.pdf>.

<sup>113</sup> *Id.*

<sup>114</sup> See *Am. Coll. of Pediatricians v. Becerra*, No. 1:21-cv-00195 (E.D. Tenn.) (involving APA, RFRA, constitutional structural federalism and lack of enumerated powers, and First Amendment religion, speech, and association claims by two medical associations that together represent 3,000 physicians and health professionals); *Neese v. Becerra*, No. 2:21-cv-00163 (N.D. Tex.) (involving APA claim by class action of health-care providers subject to section 1557); *Christian Emp’rs Alliance*, No. 1:21-cv-00195 (involving APA, RFRA, and First Amendment free exercise and free speech claims by religious employers alliance).

<sup>115</sup> *Franciscan Alliance, Inc. v. Becerra*, No. 7:16-cv-00108, at 21 (N.D. Tex. Aug. 9, 2021).

<sup>116</sup> *Id.* at 8.

<sup>117</sup> 87 Fed. Reg. 5002, 5060 (Jan. 31, 2022) (Introduction to the Unified Agenda of Federal Regulatory and Deregulatory Actions-Fall 2021).

<sup>118</sup> Office for Civil Rights, U.S. Dep’t of Health & Human Servs., HHS Notice and Guidance on Gender Affirming Care, Civil Rights, and Patient Privacy (Mar. 2, 2022), <https://www.hhs.gov/sites/default/files/hhs-ocr-notice-and-guidance-gender-affirming-care.pdf>.

involving discrimination on the basis of sexual orientation and gender identity.<sup>119</sup> It elaborated:

Categorically refusing to provide treatment to an individual based on their gender identity is prohibited discrimination. Similarly, federally-funded covered entities restricting an individual's ability to receive medically necessary care, including gender-affirming care, from their health care provider solely on the basis of their sex assigned at birth or gender identity likely violates Section 1557.<sup>120</sup>

This guidance document was issued by HHS in response<sup>121</sup> to a February 2022 Texas Attorney General opinion letter, which stated that sterilizing treatments and other permanent “sex-change procedures” “can constitute child abuse when performed on minor children.”<sup>122</sup> These treatments and procedures include: “(1) puberty-suppression or puberty-blocking drugs; (2) supraphysiologic doses of testosterone to females; and (3) supraphysiologic doses of estrogen to males,” as well as “(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 parts or tissue.”<sup>123</sup> Texas’s governor subsequently directed the Texas Department of Family and Protective Services (DFPS) to “conduct a prompt and thorough investigation of any reported instances of these abusive procedures in the State of Texas.”<sup>124</sup>

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<sup>119</sup> *Id.* at 1.

<sup>120</sup> *Id.* at 2.

<sup>121</sup> Press Statement, U.S. Dep’t of Health & Human Servs., Statement by HHS Secretary Xavier Becerra Reaffirming HHS Support and Protection for LGBTQI+ Children and Youth (Mar. 2, 2022), <https://www.hhs.gov/about/news/2022/03/02/statement-hhs-secretary-xavier-becerra-reaffirming-hhs-support-and-protection-for-lgbtqi-children-and-youth.html>.

<sup>122</sup> Tex. Att’y Gen. Op. Letter No. KP-0401, from Ken Paxton, Attorney General, to Matt Krause, Chair, House Committee on General Investigating, Texas House of Representatives 1–2 (Feb. 18, 2022), <https://www.texasattorneygeneral.gov/sites/default/files/opinion-files/opinion/2022/kp-0401.pdf>.

<sup>123</sup> *Id.* at 1.

<sup>124</sup> Letter from Greg Abbott, Governor, State of Texas, to Jaime Masters, Commissioner, Texas Department of Family and Protective Services (Feb. 22, 2022), <https://gov.texas.gov/uploads/files/press/O-MastersJaime202202221358.pdf>. Texan parents of a child who identifies as transgender and a Texas DFPS doctor sued Texas over its actions. *Doe v. Abbott*, No. D-1-G -22-000977 (Tex. Jud. D.).

In addition to the guidance document, HHS Secretary Xavier Becerra issued a press statement opposing Texas' actions, stating, "The Texas government's attacks against transgender youth and those who love and care for them are discriminatory and unconscionable. These actions are clearly dangerous to the health of transgender youth in Texas."<sup>125</sup> Becerra stated HHS "is closely monitoring the situation in Texas, and will use every tool at [its] disposal to keep Texans safe," and he encouraged those investigated by Texas for child abuse to contact HHS's Office for Civil Rights "to report their experience."<sup>126</sup> Texas responded by challenging HHS's targeting and the March 2 guidance in court.<sup>127</sup>

Concurrent with litigation over HHS's Section 1557 regulations and interpretations, transgender patients and employees are bringing Section 1557 sex discrimination claims against, respectively, religious hospitals (for not providing gender transition surgeries or treatments) and their employers (for not providing insurance coverage of those services).<sup>128</sup> One federal district court held that RFRA did not bar such a claim because the federal government was not a party to the litigation.<sup>129</sup>

## 2. Transgender Insurance Mandates

HHS has never formally determined that gender transition treatments are medically necessary care, and its most recent national coverage determination on the matter went the other way.<sup>130</sup> Indeed, none of the drugs used to block puberty and induce cross-sex masculine or feminine features are approved as safe or effective for such uses by the U.S. Food and Drug Administration.

Nevertheless, in addition to Section 1557's nondiscrimination provision, HHS is taking steps to require insurance coverage of gender transition

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<sup>125</sup> Becerra Reaffirming HHS Support and Protection for LGBTQI+ Children and Youth, *supra* note 121.

<sup>126</sup> *Id.*

<sup>127</sup> First Amended Complaint, *Texas v. EEOC*, No. 2:21-cv-00194-Z.

<sup>128</sup> See, e.g., *Hammons v. Univ. of Md. Med. Sys. Corp.*, No. 1:20-cv-02088 (D. Md. July 28, 2021) (relying on *Bostock* to deny motion to dismiss on Section 1557 sex discrimination claim against Catholic hospital that refused based on its religious beliefs and Catholic Directives to perform a hysterectomy on a biological female with gender dysphoria).

<sup>129</sup> See *C.P. v. Blue Cross Blue Shield of Ill.*, 536 F. Supp. 3d 791 (W.D. Wash. 2021) (denying motion to dismiss). *But see* Rachel N. Morrison, *Does the EEOC Really Get to Decide Whether RFRA Applies in Employment-Discrimination Lawsuits?*, NAT'L REV. (Sept. 21, 2021, 4:09 PM) ("RFRA should be available 'in all cases' as a defense whenever the government substantially burdens religious exercise through 'all Federal law, and the implementation of that law'—regardless of whether the government is a party to the lawsuit.").

<sup>130</sup> See *supra* note 90.

services by recognizing such services as a new “essential health benefit.”<sup>131</sup> In October 2021, HHS’s Centers for Medicare & Medicaid Services (CMS) approved Colorado’s essential health benefits benchmark plan for individual markets and small groups (fewer than 51 employees) to require insurance coverage for “gender affirming” services, meaning services affirming only a person’s identification of gender that is *inconsistent* with the person’s biological sex.<sup>132</sup> These services would include, “at minimum”: puberty blockers for children (with no stated age minimum); cross-sex hormones; genital and non-genital surgical procedures (hysterectomy, penectomy, mastectomy); blepharoplasty (eye and lid modification); face/forehead and/or neck tightening; facial bone remodeling for facial feminization; genioplasty (chin width reduction); rhytidectomy (cheek, chin, and neck); cheek, chin, and nose implants; lip lift/augmentation; mandibular angle augmentation/creation/reduction (jaw); orbital recontouring; rhinoplasty (nose reshaping); laser or electrolysis hair removal; and breast/chest augmentation, reduction, construction.<sup>133</sup> Biden-appointed CMS Administrator Chiquita Brooks-LaSure said Colorado was a “model for other states to follow and we invite other states to follow suit.”<sup>134</sup>

But instead of waiting for other states to copy Colorado, in January 2022, CMS issued a proposed rule that would have required all insurers of individual market and small group plans across the country to cover the same gender transition services covered under Colorado’s plan.<sup>135</sup> The proposal would also

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<sup>131</sup> Fact Sheet, *supra* note 54 (listing approval of state’s addition of “gender-affirming care as an essential health benefit” as part of the “historic work” supporting the Biden administration’s gender identity policies).

<sup>132</sup> Press Release, Ctrs. For Medicare & Medicaid Servs., U.S. Dep’t of Health & Human Servs., Biden-Harris Administration Greenlights Coverage of LGBTQ+ Care as an Essential Health Benefit in Colorado (Oct. 12, 2021), <https://www.cms.gov/newsroom/press-releases/biden-harris-administration-greenlights-coverage-lgbtq-care-essential-health-benefit-colorado>. There is no provision of coverage for mental health or any other service to affirm a person’s biological sex.

<sup>133</sup> DIV. OF INSURANCE, COLO. DEP’T OF REGULATORY AGENCIES, BENEFITS FOR HEALTH CARE COVERAGE: COLORADO BENCHMARK PLAN 38 (May 7, 2021), available at <https://doi.colorado.gov/insurance-products/health-insurance/aca-information/aca-benchmark-health-insurance-plan-selection> (click on “Benchmark plan changes – submission documents” and open document titled “Colorado Benchmark plan for 2023.pdf”).

<sup>134</sup> Administration Greenlights Coverage of LGBTQ+ Care as an Essential Health Benefit in Colorado, *supra* note 132.

<sup>135</sup> 87 Fed. Reg. 584, 597.

have amended benefit design requirements in fully-insured large group plans (more than 50 employees) so that excluding coverage of treatments for gender dysphoria could be considered “presumptively discriminatory.”<sup>136</sup> These new requirements would have resulted from the proposal to add “sexual orientation and gender identity” nondiscrimination provisions to several federal insurance regulations.<sup>137</sup> Because CMS specifically disclaimed that it was relying on Section 1557 as authority to issue its proposed non-discrimination regulations (instead relying on other provisions), the proposal would have acted as an end-run around the injunctions in Section 1557 litigation.

To the surprise of many, when CMS finalized the rule at the end of April 2022, it did so without the proposed sexual orientation and gender identity nondiscrimination provisions.<sup>138</sup> CMS explained that because the impending Section 1557 rule will address issues related to sex discrimination, “HHS is of the view that it would be most prudent to address the nondiscrimination proposals related to sexual orientation and gender identity in the [CMS] proposed rule at a later time, to ensure that they are consistent with the policies and requirements that will be included in the section 1557 rulemaking.”<sup>139</sup>

### 3. Gender Transition Treatments for Minors

None of the Biden administration’s gender identity policies exclude treatments for minor children under the administration’s unidirectional affirmation model. This policy position is advocated by HHS’s Assistant Secretary of Health, pediatrician Rachel Levine (formerly Richard Levine).<sup>140</sup> Levine, who identifies as transgender, advocates for transgender identifying children being administered puberty blockers and cross-sex hormones, and

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<sup>136</sup> *Id.* at 595–97, 667.

<sup>137</sup> *Id.* at 595–97.

<sup>138</sup> Fact Sheet, Ctrs. For Medicare & Medicaid Servs., HHS Notice of Benefit and Payment Parameters for 2023 Final Rule Fact Sheet (Apr. 28, 2022), <https://www.cms.gov/newsroom/fact-sheets/hhs-notice-benefit-and-payment-parameters-2023-final-rule-fact-sheet>.

<sup>139</sup> *Id.*

<sup>140</sup> U.S. Dep’t of Health & Human Servs., *Admiral Rachel L. Levine, M.D.*, <https://www.hhs.gov/about/leadership/rachel-levine.html> (last reviewed Mar. 8, 2022).

undergoing mastectomies and sterilizing sex reassignment surgeries,<sup>141</sup> as well as for homeless youth to have an “accelerated” transition process.<sup>142</sup>

During Levine’s confirmation hearing before the Senate Health, Education, Labor and Pensions Committee, Senator Rand Paul of Kentucky asked Levine whether “minors are capable of making such a life-changing decision as changing one’s sex,” and whether the government should intervene “to override the parent’s consent to give a child puberty blockers, cross-sex hormones, and/or amputation surgery of breasts and genitalia.”<sup>143</sup> Levine refused to answer both questions, responding that “transgender medicine is a very complex and nuanced field with robust research and standards of care that have been developed.”<sup>144</sup>

While the Trump HHS Office for Civil Rights was under the direction of Roger Severino, it invited and met the leading figures in transgender medicine, including Dr. Levine. Agency officials confirmed Levine’s support for surgeries and hormones for children and asked, “What does it mean to be male or female?” Levine could not give a coherent answer.<sup>145</sup>

On Transgender Day of Visibility in 2022, HHS was the first federal agency to fly the transgender flag outside its building.<sup>146</sup> Secretary Becerra

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<sup>141</sup> See, e.g., Sarah Jacoby, *What Is Gender-Affirming Care? Admiral Rachel Levine Explains*, TODAY (Feb. 25, 2022, 4:08 PM), <https://www.today.com/health/health/gender-affirming-care-admiral-rachel-levine-rcna17677>.

<sup>142</sup> See Rachel Levine, Address at Franklin & Marshall College, “It’s a Transgeneration: Issues in Transgender Medicine” (Jan. 19, 2017), available at <https://www.fandm.edu/news/latest-news/2017/01/19/transgender-health-and-the-changes-occurring-in-the-gender-binary>.

<sup>143</sup> C-SPAN, *Confirmation Hearing for Surgeon General and Assistant Health Secretary Nominees* (Feb. 25, 2021), <https://www.c-span.org/video/?509143-1/confirmation-hearing-surgeon-general-assistant-health-secretary-nominees>.

<sup>144</sup> *Id.*

<sup>145</sup> Roger Severino (@RogerSeverino), Twitter (Feb. 25, 2021, 12:49 PM), <https://twitter.com/rogerseverino/status/1364996043385888771>. Cf. C-SPAN, *Jackson Confirmation Hearing, Day 2 Part 6* (Mar. 22, 2022), <https://www.c-span.org/video/?518342-102/jackson-confirmation-hearing-day-2-part-6> (Senator Blackburn: “Can you provide a definition for the word ‘woman?’” Ketanji Brown Jackson: “Can I provide a definition? . . . I can’t.” Blackburn: “You can’t?” Jackson: “Not in this context. I’m not a biologist.”).

<sup>146</sup> Secretary Xavier Becerra (@SecBecerra), Twitter (Mar. 31, 2022, 8:44 AM), <https://twitter.com/secbecerra/status/1509512008026267650>.

and Assistant Secretary Levine both issued statements in support,<sup>147</sup> and the Department released several documents endorsing “social affirmation” at any age (including preferred name and pronouns and restroom and facility use that corresponds to a person’s gender identity), as well as puberty blockers, cross-sex hormones, and “top” and “bottom” sex reassignment surgeries in early adolescence and onward.<sup>148</sup> In response, Florida’s Department of Health issued guidelines clarifying that the treatment of gender dysphoria for children and adolescents should *not* include social gender transition, puberty blockers, cross-sex hormones, or sex reassignment surgeries based on “the lack of conclusive evidence, and the potential for long-term, irreversible effects.”<sup>149</sup>

Also on Transgender Day of Visibility, DOJ sent a letter to state attorneys general “reminding them of federal constitutional and statutory provisions”—including Section 1557—that it claims protect transgender youth who seek “gender-affirming care,”<sup>150</sup> and the Secretary of State issued a statement calling the denial of such care “violence.”<sup>151</sup>

In addition to Texas’ child abuse determination, several states have passed laws that prohibit providing minor children with some combination of

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<sup>147</sup> Press Release, U.S. Dep’t of Health & Human Servs., Statements by HHS Secretary Xavier Becerra, Assistant Secretary for Health Admiral Rachel Levine, and Assistant Secretary for Global Affairs Loyce Pace on International Transgender Day of Visibility (Mar. 31, 2022), <https://www.hhs.gov/about/news/2022/03/31/statements-hhs-secretary-xavier-becerra-assistant-secretary-health-admiral-rachel-levine-assistant-secretary-global-affairs-loyce-pace-international-transgender-day-visibility.html>.

<sup>148</sup> See, e.g., Office of Population Affairs, U.S. Dep’t of Health & Human Servs., Gender-Affirming Care and Young People (Mar. 2022), <https://opa.hhs.gov/sites/default/files/2022-03/gender-affirming-care-young-people-march-2022.pdf>. But see *Fact-Checking the HHS*, SOC’Y FOR EVIDENCE BASED GENDER MED. (Apr. 7, 2022), <https://segm.org/fact-checking-gender-affirming-care-and-young-people-HHS> (debunking the “many highly inaccurate” claims made by HHS in its “Gender-Affirming Care and Young People” document).

<sup>149</sup> Office of the State Surgeon Gen., Fla. Dep’t of Health, Treatment of Gender Dysphoria for Children and Adolescents (Apr. 20, 2022), <https://www.floridahealth.gov/documents/newsroom/press-releases/2022/04/20220420-gender-dysphoria-guidance.pdf>.

<sup>150</sup> Press Release, U.S. Dep’t of Justice, Justice Department Reinforces Federal Nondiscrimination Obligations in Letter to State Officials Regarding Transgender Youth (Mar. 31, 2022), <https://www.justice.gov/opa/pr/justice-department-reinforces-federal-nondiscrimination-obligations-letter-state-officials>; Letter, Kristen Clarke, Assistant Attorney General, Civil Rights Div., U.S. Dep’t of Justice, to State Attorneys General (Mar. 31, 2022), <https://www.justice.gov/opa/press-release/file/1489066/download>.

<sup>151</sup> Press Statement, Antony J. Blinken, Secretary of State, U.S. Dep’t of State, On Transgender Day of Visibility (Mar. 31, 2022), <https://www.state.gov/on-transgender-day-of-visibility-2/>.

puberty blockers, cross-sex hormones, and sex reassignment surgeries,<sup>152</sup> and more states are considering similar measures. When Arkansas’s law—which prohibits gender transition procedures (including puberty blockers, cross-sex hormones, and sex reassignment surgeries) for minors, as well as public funds and insurance coverage for such procedures—was challenged in federal court, the Biden DOJ issued a statement of interest against the law, raising its interest in protecting “nondiscriminatory access to healthcare” under Section 1557.<sup>153</sup> In another federal lawsuit challenging an Alabama law that criminalizes providing minors with puberty blockers, cross-sex hormones, and sex reassignment surgeries, the Biden DOJ intervened, filing a complaint alleging the law violates the Equal Protection Clause of the Fourteen Amendment.<sup>154</sup>

#### 4. Conscience and Religious Freedom Protections

Several key Biden appointees have been critical of conscience and religious freedom rights in health care,<sup>155</sup> especially as they relate to gender identity discrimination, and despite the *Bostock* Court specifically recognizing the constitutional guarantee of the free exercise of religion in a related context.<sup>156</sup>

Shortly after becoming Secretary of HHS, Becerra dismantled the Conscience and Religious Freedom Division within HHS’s Office for Civil Rights, which was established in 2018 “to restore federal enforcement of our nation’s laws that protect the fundamental and unalienable rights of conscience and religious freedom” and protect the rights of people of all faiths to be free from discrimination in health care.<sup>157</sup> This was no surprise since from its inception the Division faced the skepticism and disdain of key Biden

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<sup>152</sup> See, e.g., Ala. S.B. 184 (2022); Ariz. S.B. 1138 (2022); Ark. H.B. 1570 (2021); Tenn. H.B. 0578 (2021).

<sup>153</sup> Statement of Interest of the United States, *Brandt v. Rutledge*, No. 4:21-cv-450 (E.D. Ark. June 17, 2021).

<sup>154</sup> Complaint in Intervention, *Eknes-Tucker v. Alabama*, No. 2:22-cv-184 (M.D. Ala. Apr. 29, 2022).

<sup>155</sup> See Rachel N. Morrison, *In Its First Year, Biden’s HHS Relentlessly Attacked Christians and Unborn Babies*, THE FEDERALIST (Mar. 18, 2022), <https://thefederalist.com/2022/03/18/in-its-first-year-bidens-hhs-relentlessly-attacked-christians-and-unborn-babies/>; see also Roger Severino, *Who Has Been Politicizing the HHS Office for Civil Rights?*, NAT’L REV. (Sept. 17, 2021, 12:05 PM), <https://www.nationalreview.com/corner/who-has-been-politicizing-the-hhs-office-for-civil-rights/>.

<sup>156</sup> See *Bostock*, 140 S. Ct. at 1754.

<sup>157</sup> Press Release, U.S. Dep’t of Health & Human Servs., HHS Announces New Conscience and Religious Freedom Division (Jan. 18, 2018).

appointees. For example, prior to joining HHS, Levine stated that the Division should be “either disbanded or certainly redirected.”<sup>158</sup> Similarly, Melissa Rogers—who was appointed by Biden to serve as Executive Director of the White House Office of Faith-Based and Neighborhood Partnerships (a position she held in the Obama administration as well)<sup>159</sup>—wrote in 2020, prior to her appointment, that the new administration should “immediately” review the Division “to evaluate the need for this office and its effectiveness.”<sup>160</sup>

Becerra also removed the authority of the Office for Civil Rights to receive complaints and enforce conscience and religious protections under RFRA and the First Amendment, giving that responsibility instead to “Department components” that, unlike OCR, are not conscience and religious freedom experts or equipped to handle such complaints.<sup>161</sup> HHS is further planning to propose rescinding Trump-era conscience regulations.<sup>162</sup> When it comes to the Biden administration’s gender identity policies, it has yet to specify what, if any, conscience and religious freedom protections it will recognize when there is a conflict.

In short, Biden’s appointees, their statements, and actions by HHS leave substantial reason to doubt that HHS will respect existing laws protecting conscience and religious freedom. This does not bode well for health care

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<sup>158</sup> Chris Johnson, *Rachel Levine Tapped to Become First Out Transgender Senate-Confirmed Official*, WASH. BLADE (Jan. 19, 2021), <https://www.washingtonblade.com/2021/01/19/historic-rachel-levine-tapped-to-become-first-openly-transgender-senate-confirmed-official/>.

<sup>159</sup> Fact Sheet, The White House, FACT SHEET: President Biden Reestablishes the White House Office of Faith-Based and Neighborhood Partnerships (Feb. 14, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/02/14/fact-sheet-president-biden-reestablishes-the-white-house-office-of-faith-based-and-neighborhood-partnerships/>.

<sup>160</sup> MELISSA ROGERS & E. J. DIONNE JR., BROOKINGS INST., A TIME TO HEAL, A TIME TO BUILD: RECOMMENDATIONS FOR THE NEXT ADMINISTRATION ON RESPECTING RELIGIOUS FREEDOM AND PLURALISM, FORGING CIVIL SOCIETY PARTNERSHIPS, AND NAVIGATING FAITH’S ROLE IN FOREIGN POLICY 33 (Oct. 21, 2020), [https://www.brookings.edu/wp-content/uploads/2020/10/A\\_Time\\_to\\_Heal\\_report.pdf](https://www.brookings.edu/wp-content/uploads/2020/10/A_Time_to_Heal_report.pdf).

<sup>161</sup> 86 Fed. Reg. 67,067 (Nov. 24, 2021) (Delegation of Authority); *see also* Letter from Lisa J. Pino, Director, Office for Civil Rights, U.S. Dep’t of Health & Human Servs., to Xavier Becerra, Secretary, U.S. Dep’t of Health & Human Servs., on DECISION—Sign Delegation of Authority on the Religious Freedom Restoration Act and the Religion Clause of the First Amendment to the U.S. Constitution (Nov. XX, 2021), [https://www.lankford.senate.gov/imo/media/doc/HHS\\_RFRA\\_Memo.pdf](https://www.lankford.senate.gov/imo/media/doc/HHS_RFRA_Memo.pdf) (requesting Becerra rescind OCR’s delegation of authority to enforce RFRA and the Religious Clauses of the First Amendment and recognizing that the Department will be criticized that it “does not take seriously its compliance with RFRA or the First Amendment”).

<sup>162</sup> *See* Proposed Rule, Rescission of the Regulation entitled “Protecting Statutory Conscience Rights in Health Care; Delegations of Authority,” RIN: 0945-AA18.

providers who have conscientious or religious objections to providing gender transition services, including for minors.

### C. Education & Athletics

Title IX of the Education Amendments of 1972 prohibits discrimination based on sex in education programs or activities that receive federal financial assistance, such as grants or student loans.<sup>163</sup> Title IX applies to nearly all schools, public and private. But it does *not* apply to an educational institution that is “controlled by a religious organization” to the extent that its application would be inconsistent with the religious tenets of the organization.<sup>164</sup> Historically, Title IX’s prohibitions against sex discrimination were understood to refer to discrimination on the basis of biological sex, and its text and regulations repeatedly recognize a biological binary of male and female.<sup>165</sup> For example, Title IX explicitly states that its provisions are not to be construed as prohibiting an educational institution “from maintaining separate living facilities for the different sexes,”<sup>166</sup> which its regulations explain include separate toilet, locker room, and shower facilities.<sup>167</sup>

#### 1. School Facilities and Harassment

In May 2016, Obama’s Department of Education (ED)—the federal agency that enforces Title IX—along with DOJ issued a “Dear Colleague” letter cosigned by Catherine Lhamon and Vanita Gupta, later Biden’s Assistant Secretary for Civil Rights at ED and DOJ Associate Attorney General, respectively. The letter called for transgender students to have access to sex-separate bathrooms and locker rooms consistent with their gender identity.<sup>168</sup> The letter was formally rescinded shortly after President Trump took office

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<sup>163</sup> Office for Civil Rights, U.S. Dep’t of Educ., *Title IX and Sex Discrimination* (last modified Aug. 20, 2021), [https://www2.ed.gov/about/offices/list/ocr/docs/tix\\_dis.html](https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html).

<sup>164</sup> 20 U.S.C. § 1681(a)(3); *see also* 34 C.F.R. § 106.12.

<sup>165</sup> *See, e.g.*, 20 U.S.C. § 1681 (“one sex,” “both sexes,” “other sex,” “boy or girl conferences”); 34 C.F.R. § 106.34 (“one sex,” “boys and girls”); *id.* § 106.41 (“one sex,” “both sexes,” “other sex”).

<sup>166</sup> 20 U.S.C. § 1686.

<sup>167</sup> 34 C.F.R. § 106.33.

<sup>168</sup> Letter from Catherine E. Lhamon, Assistant Secretary for Civil Rights, U.S. Dep’t of Educ., & Vanita Gupta, Principal Deputy Assistant Attorney General for Civil Rights, U.S. Dep’t of Just., to Colleague on Transgender Students (May 13, 2016), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>.

by a new Dear Colleague letter.<sup>169</sup> The new letter emphasized that the withdrawal of the Obama administration guidance documents “does not leave students without protections from discrimination, bullying, or harassment,” and that “[a]ll schools must ensure that all students, including LGBT students, are able to learn and thrive in a safe environment.”<sup>170</sup>

The Trump administration followed up with an additional memo that stated ED may open an investigation in various situations on a case-by-case basis, including cases in which gender-based harassment created a hostile environment for a transgender student.<sup>171</sup> The memo provided the following examples of “gender-based harassment”:

acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping, such as refusing to use a transgender student’s preferred name or pronouns when the school uses preferred names for gender-conforming students or when the refusal is motivated by animus toward people who do not conform to sex stereotypes.<sup>172</sup>

After some commentators characterized the apparent requirement to use a transgender student’s preferred pronouns as posing a threat to the free speech and religious liberty of teachers, staff, and students,<sup>173</sup> the Trump administration walked back this position in a memo, stating, “a recipient generally would not violate Title IX by, for example, recording a student’s biological sex in school records, or referring to a student using sex-based pronouns that correspond to the student’s biological sex.”<sup>174</sup>

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<sup>169</sup> Letter from Sandra Battle, Acting Assistant Secretary for Civil Rights, U.S. Dep’t of Educ., & T.E. Wheeler, II, Acting Assistant Attorney General for Civil Rights, U.S. Dep’t of Just., to Colleague on Withdrawing Statements of Policy and Guidance (Feb. 22, 2017), <https://www.justice.gov/opa/press-release/file/941551/download>.

<sup>170</sup> *Id.* at 2.

<sup>171</sup> Memorandum from Candice Jackson, Acting Assistant Secretary for Civil Rights, Office for Civil Rights, U.S. Dep’t of Educ., to Regional Directors on OCR Instructions to the Field re Complaints Involving Transgender Students (June 6, 2017), available at <https://www.documentcloud.org/documents/3866816-OCR-Instructions-to-the-Field-Re-Transgender.html>.

<sup>172</sup> *Id.* at 1–2.

<sup>173</sup> See, e.g., Nicole Russell, *Government Shouldn’t Force Teachers to Use Transgender Pronouns*, DAILY SIGNAL (Sept. 5, 2019), <https://www.dailysignal.com/2019/09/05/government-shouldnt-force-teachers-to-use-transgender-pronouns/>; Eric Owens, *Trump Administration Vows to Investigate Teachers for Using Biologically Accurate Pronouns*, DAILY CALLER (June 21, 2017, 1:09 PM), <https://dailycaller.com/2017/06/21/trump-administration-vows-to-investigate-teachers-for-using-biologically-accurate-pronouns/>.

<sup>174</sup> Memorandum from Office of the General Counsel, U.S. Dep’t of Educ., for Kimberly M. Richey, Acting Assistant Secretary, Office for Civil Rights, U.S. Dep’t of Educ., on *Bostock v.*

The memo, issued in response to the Supreme Court's *Bostock* decision, explained that while the decision is potentially relevant in some circumstances, "*Bostock* applies only to Title VII," pointing out that *Bostock* "does not purport to construe, much less abrogate, Title IX's statutory and regulatory text permitting or requiring biological sex to be taken into account in an educational setting."<sup>175</sup> The memo reiterated that "the ordinary public meaning of 'sex' at the time of Title IX's enactment was biological sex, male or female, not transgender status or sexual orientation" and that "the Department's regulations recognizing the male/female biological binary carry extra weight and interpretative authority because they were the product of uniquely robust and direct Congressional review."<sup>176</sup> As such, the Department believed that generally it would not be a violation of Title IX to "record[] a student's biological sex in school records, or refer[] to a student using sex-based pronouns that correspond to the student's biological sex, or refus[e] to permit a student to participate in a program or activity lawfully provided for members of the opposite sex, regardless of transgender status or homosexuality."<sup>177</sup> Likewise, when it came to athletics, "a person's biological sex *is* relevant for the considerations involving athletics, and distinctions based thereon are permissible and may be required because the sexes are not similarly situated" based on the "physiological differences between males and females."<sup>178</sup> The memo pointed out that "one of Title IX's crucial purposes is protecting women's and girls' athletic opportunities . . . including by providing for sex-segregated athletics."<sup>179</sup> This memo was quickly rescinded by the Biden administration as "inconsistent" with its policy on gender identity and sexual orientation.<sup>180</sup>

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*Clayton Cty.*, 140 S. Ct. 1731 (2020) 4 (Jan. 8, 2021), <https://www2.cd.gov/about/offices/list/ocr/correspondence/other/ogc-memorandum-01082021.pdf>.

<sup>175</sup> *Id.* at 6.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 4.

<sup>178</sup> *Id.* at 7.

<sup>179</sup> *Id.*

<sup>180</sup> The memo on the ED's website states: "ARCHIVED AND NOT FOR RELIANCE. This document expresses policy that is inconsistent in many respects with Executive Order 13988 on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation and was issued without the review required under the Department's Rulemaking and Guidance Procedures, 85 Fed. Reg. 62,597 (Oct. 5, 2020)." *See id.*

The Biden DOJ issued a letter on March 26, 2021, concluding that “[a]fter considering the text of Title IX, Supreme Court caselaw, and developing jurisprudence,” the “best reading” of Title IX after *Bostock* is that its prohibition against sex discrimination includes “discrimination on the basis of gender identity and sexual orientation.”<sup>181</sup> The letter explains that “*Bostock*’s discussion of the text of Title VII informs the [DOJ Civil Rights] Division’s analysis of the text of Title IX.”<sup>182</sup>

In response to Biden’s March 2021 executive order on gender identity and sexual orientation discrimination in education, ED issued its own letter in April 2021 to students, educators, and other stakeholders, stating that it will conduct a “comprehensive review” of the Department’s regulations and policies, including a virtual public hearing in June 2021, forthcoming Q&A document, and an anticipated notice of proposed rulemaking.<sup>183</sup> The proposed rule “to align the Title IX regulations with the priorities of the Biden-Harris Administration” was anticipated in April 2022 (though at the time this article was published in May, the rule has not yet been proposed).<sup>184</sup> A leak disclosed draft text of the rule: “Discrimination on the basis of sex includes discrimination on the basis of sex stereotypes, sex-related characteristics (including intersex traits), pregnancy or related conditions, sexual orientation, and gender identity.”<sup>185</sup> A coalition of state attorneys general and a group of Members of Congress both wrote to ED urging the department to not issue its proposed rule.<sup>186</sup>

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<sup>181</sup> Memorandum from Pamela S. Karlan, Principal Deputy Assistant Attorney General, Civil Rights Div., U.S. Dep’t of Just., to Federal Agency Civil Rights Directors and General Counsels on Application of *Bostock v. Clayton County* to Title IX of the Education Amendments of 1972 2 (Mar. 26, 2021), <https://www.justice.gov/crt/page/file/1383026/download>.

<sup>182</sup> *Id.* at 1.

<sup>183</sup> Letter from Suzanne B. Goldberg, Acting Assistant Secretary for Civil Rights, Office for Civil Rights, U.S. Dep’t of Educ., to Students, Educators, and other Stakeholders on Executive Order 14021 2 (Apr. 6, 2021), <https://www2.ed.gov/about/offices/list/ocr/correspondence/stakeholders/20210406-titleix-EO-14021.pdf>.

<sup>184</sup> 87 Fed. Reg. 5002, 5047.

<sup>185</sup> Laura Meckler, *New Title IX Rules Set to Assert Rights of Transgender Students*, WASH. POST (Mar. 30, 2022, 6:00 AM), <https://www.washingtonpost.com/education/2022/03/30/transgender-discrimination-title-ix-rule-students/>.

<sup>186</sup> Letter from fifteen state attorneys general to Catherine E. Lhamon, Assistant Sec’y, Office for Civil Rights, U.S. Dep’t of Educ., on U.S. Department of Education’s Title IX Rulemaking (Apr. 5, 2022), [https://content.govdelivery.com/attachments/MTAG/2022/04/05/file\\_attachments/2123604/Title%20IX%20Coalition%20Letter%204.5.22.pdf](https://content.govdelivery.com/attachments/MTAG/2022/04/05/file_attachments/2123604/Title%20IX%20Coalition%20Letter%204.5.22.pdf); Letter from forty Members of Congress to Miguel Cardona, Sec’y, U.S. Dep’t of Educ., on the Department of Education’s Plan to

Like HHS, ED issued a “Notification of Interpretation” on June 22, 2021, explaining that it would enforce Title IX’s sex discrimination prohibition as encompassing discrimination based on gender identity and sexual orientation.<sup>187</sup> A June 23, 2021, “Dear Educator” letter emphasized this commitment.<sup>188</sup> The letter’s accompanying fact sheet provided examples of the kinds of incidents the Department can investigate.<sup>189</sup> These examples include the use of slurs, physical contact, a school’s failure to investigate, a teacher telling the class “there are only boys and girls,” requiring a transgender student to use a restroom in the nurse’s office instead of a restroom that corresponds with the student’s gender identity, and a district policy that biological male students who identify as transgender cannot participate on girls’ athletic teams.<sup>190</sup>

The same coalition of twenty states that sued EEOC over its technical assistance document<sup>191</sup> also sued ED over both its Notification of Interpretation and its Dear Educator letter, challenging the Department’s reading of *Bostock* as entailing that Title IX prohibits discrimination based on gender identity and sexual orientation.<sup>192</sup> The lawsuit pointed out that “*Bostock* did not address any of the examples of purported discrimination identified in the Fact Sheet,” such as athletics and preferred names and pronouns, and that it

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Issue a Proposed Rule Reinterpreting the Prohibition on Sex-Based Discrimination Under Title IX of the Education Amendments of 1972 to Include “Sexual Orientation” and “Gender Identity” (Apr. 12, 2022), <https://hartzler.house.gov/sites/hartzler.house.gov/files/2022.04.12%20SOGI%20Title%20IX%20Letter%20to%20DOE%20FINAL.pdf>.

<sup>187</sup> Office for Civil Rights, U.S. Dep’t of Educ., 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*, 86 Fed. Reg. 32,637 (June 22, 2021).

<sup>188</sup> Letter from Suzanne B. Goldberg, Acting Assistant Sec’y for Civil Rights, Office for Civil Rights, U.S. Dep’t of Educ., to Educators on Title IX’s 49th Anniversary (June 23, 2021), <https://www2.ed.gov/about/offices/list/ocr/correspondence/stakeholders/educator-202106-tix.pdf>.

<sup>189</sup> Fact Sheet, Civil Rights Div., U.S. Dep’t of Just., & Office for Civil Rights, U.S. Dep’t of Educ., Confronting Anti-LGBTQI+ Harassment in Schools: A Resource for Students and Families (June 2021), <https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-tix-202106.pdf>.

<sup>190</sup> *Id.* at 1. ED issued another fact sheet in June 2021 detailing ways to support transgender youth in school. Fact Sheet, U.S. Dep’t of Educ., Supporting Transgender Youth in School (June 2021), <https://www2.ed.gov/about/offices/list/ocr/docs/ed-factsheet-transgender-202106.pdf>.

<sup>191</sup> See *supra* note 61 and accompanying text.

<sup>192</sup> Complaint, *Tennessee v. U.S. Dep’t of Educ.*, No. 3:21-cv-00308 (E.D. Tenn. Aug. 30, 2021) (raising APA, Spending Clause, First Amendment, Separation of Powers, and Tenth Amendment claims).

“expressly declined to resolve any questions about bathrooms, locker rooms, or the like.”<sup>193</sup>

In conjunction with the actions by the DOJ and ED and in response to Biden’s day-one executive order on gender identity, the Department of Housing and Urban Development issued a “directive” on February 11, 2021, explaining that it was interpreting and enforcing the Fair Housing Act’s sex discrimination provisions—which apply to school campus housing—to prohibit discrimination based on sexual orientation and gender identity.<sup>194</sup> The directive was challenged in court by a religious college seeking to ensure that it can continue its student housing policies based on biological sex, including for single-sex residence halls, dorm rooms, and communal showers.<sup>195</sup>

Over the last several years, policies regarding which bathrooms transgender students can or must use has been the subject of litigation. Some of the legal challenges have come from transgender students who wish to use the restrooms that correspond with their gender identity in violation of a school policy requiring students to use the restrooms that correspond with their biological sex.<sup>196</sup> In two such cases relied on by the Biden administration, *Grimm v. Gloucester County School Board* out of the Fourth Circuit and *Adams v. School Board of St. Johns County* out of the Eleventh Circuit, the

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<sup>193</sup> *Id.* ¶¶ 66–69.

<sup>194</sup> Memorandum from Jeanine M. Worden, Acting Assistant Secretary for Fair Housing & Equal Opportunity, U.S. Dep’t of Housing & Urban Dev., to Office of Fair Housing & Equal Opportunity, Fair Housing Assistance Program Agencies, and Fair Housing Initiatives Program Grantees, on Implementation of Executive Order 13988 on the Enforcement of the Fair Housing Act (Feb. 11, 2021), [https://www.hud.gov/sites/dfiles/PA/documents/HUD\\_Memo\\_EO13988.pdf](https://www.hud.gov/sites/dfiles/PA/documents/HUD_Memo_EO13988.pdf).

<sup>195</sup> *Sch. of Ozarks, Inc. v. Biden*, No. 6:21-03089-CV-RK (W.D. Mo. Jun. 4, 2021) (denying motion for temporary restraining order and preliminary injunction, and dismissing case), *appealed*, No. 21-2270 (8th Cir.) (oral argument held Nov. 17, 2021).

<sup>196</sup> *See, e.g., Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017) (affirming district court grant of preliminary injunction against school district’s unwritten policy prohibiting seventeen year old transgender high school student from using boys’ restroom because it likely violated Title IX and Fourteenth Amendment’s Equal Protection Clause); *Dodds v. U.S. Dep’t of Educ.*, 845 F.3d 217, 22 (6th Cir. 2016) (per curiam) (denying request to stay preliminary injunction ordering school to permit eleven year old transgender student use of the girls’ restroom and treat student “as a female”); *A.S. v. Lee*, 3:21-cv-00600 (M.D. Tenn. Aug. 5, 2021) (denying temporary restraining order in Equal Protection Clause and Title IX challenge against Tennessee law requiring students who identify as transgender to use restrooms that correspond with their biological sex, a single-occupancy restroom, or an employee restroom); *R.M.A. ex rel. Appleberry v. Blue Springs R-IV Sch. Dist.*, 568 S.W.3d 420 (Mo. 2019) (holding transgender middle-school student stated sex discrimination claim under Missouri Human Rights Act when student, a biological female whose legal sex is male, allegedly was not permitted to use the boys’ restroom or locker room).

circuit court panels held post-*Bostock* that public school students have the right under both Title IX and the Equal Protection Clause of the Fourteenth Amendment to use bathrooms consistent with their gender identity.<sup>197</sup> Both decisions were appealed. In *Grimm*, the Fourth Circuit denied rehearing en banc and the Supreme Court denied certiorari.<sup>198</sup> In *Adams*, the Eleventh Circuit granted rehearing en banc and vacated the panel's 2-1 decision.<sup>199</sup> The vacated panel majority had held that *Bostock's* reasoning that Title VII with its "starkly broad terms" forbids discrimination against transgender people "applies with the same force to Title IX's equally broad prohibition on sex discrimination."<sup>200</sup> The dissent, however, pointed out that "any guidance *Bostock* might otherwise provide about whether Title VII allows for sex-separated bathrooms does not extend to Title IX," since Title IX expressly "permits schools to act on the basis of sex through sex-separated bathrooms."<sup>201</sup> At the time this article was published, the en banc Eleventh Circuit had not issued its opinion.<sup>202</sup>

On the other side, parents and students have brought legal challenges seeking to invalidate school policies that allow transgender students to use school bathrooms, locker rooms, and showers that do not match their biological sex. These challenges have been brought under Title IX, as well as on other grounds, such as privacy rights, parental rights, free exercise of religion, and various state laws.<sup>203</sup> The cases have been met with mixed results so far,

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<sup>197</sup> *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 593 (4th Cir. 2020) (holding equal protection and Title IX "can protect transgender students from school bathroom policies that prohibit them from affirming their gender"); *Adams v. Sch. Bd. of St. Johns Cnty.*, 968 F.3d 1286, 1292 (11th Cir. 2020) (holding school district policy prohibiting transgender high school student from using boys' restroom violated "Constitution's guarantee of equal protection and Title IX's prohibition of sex discrimination"), *vacated*, No. 18-13592 (11th Cir. Aug. 23, 2021).

<sup>198</sup> *Grimm v. Gloucester Cnty. Sch. Bd.*, 976 F.3d 399 (4th Cir. 2020), *cert. denied*, No. 20-1163 (U.S. Jun. 28, 2021).

<sup>199</sup> *Adams*, No. 18-13592 (11th Cir. Aug. 23, 2021).

<sup>200</sup> *Adams*, 968 F.3d at 1305, *vacated*, No. 18-13592 (11th Cir. Aug. 23, 2021).

<sup>201</sup> *Id.* at 1320 (Pryor, C.J., dissenting).

<sup>202</sup> Oral argument was held February 22, 2022.

<sup>203</sup> *See, e.g.*, *Parents for Privacy v. Barr*, 949 F.3d 1210 (9th Cir. 2020) (affirming dismissal of Fourteenth Amendment privacy and parental rights, First Amendment free exercise, and Title IX claims by parents against school district policy allowing transgender students to use school bathrooms, locker rooms, and showers that correspond with their gender identity), *cert. denied*, No. 20-

but with the Biden administration's support and its interpretation of Title IX, schools will likely use federal guidance as a shield for any voluntarily adopted gender identity policies.

The Biden administration's policies will likely require schools to allow students to use bathrooms, locker rooms, and dorm rooms that are consistent with their stated gender identity, without any consideration of the privacy or safety of other students.<sup>204</sup> Such requirements could violate Title IX's prohibition against "sexual harassment," which current ED regulations define as including "[u]nwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the [school's] education program or activity."<sup>205</sup> It is unclear how ED, schools, and courts will treat these conflicting Title IX claims.<sup>206</sup>

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62 (U.S. Dec. 7, 2020); *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518 (3d Cir. 2018) (rejecting constitutional bodily privacy, Title IX, and state tort law claims by students and parents, and refusing to enjoin Pennsylvania school district policy allowing transgender students to use bathrooms and locker rooms consistent with their gender identities instead of their biological sex); *Students & Parents for Privacy v. Sch. Dirs. of Twp. High Sch. Dist. 211*, 377 F. Supp. 3d 891 (N.D. Ill. 2019) (refusing to dismiss First Amendment free exercise, Title IX, and Illinois RFRA claims, while dismissing Fourteenth Amendment bodily autonomy and parental rights claims, by students and parents challenging high school policy allowing transgender students to use bathrooms and locker rooms conforming to their gender identity); *Christian Action Network v. Va. Dep't of Educ.*, No. CL21000282-00 (Va. Cir. Ct., July 27, 2021) (dismissing free speech, free exercise, privacy, equal protection, and parental rights claims under federal and state law by student families against Virginia Department of Education model policies on the treatment of transgender public school students, including access to restrooms, locker rooms, and changing facilities that correspond to students' gender identities); *see also Doe I v. Madison Metro. Sch. Dist.*, No. 20-cv-454 (Wis. Cir. Ct.) (involving state constitution parental and religious liberty rights claims by parents of students against school district policy allowing, *inter alia*, students to transition at school without parental notice or consent).

<sup>204</sup> This is already an issue at some schools. *See, e.g.*, Shawn Cohen, *EXCLUSIVE: 'We're Uncomfortable in our Own Locker Room.'* Lia Thomas' UPenn Teammate Tells how the Trans Swimmer Doesn't Always Cover Up her Male Genitals when Changing and Their Concerns Go Ignored by their Coach, DAILY MAIL ONLINE (Jan. 27, 2022, 3:58 PM), <https://www.dailymail.co.uk/news/article-10445679/Lia-Thomas-UPenn-teammate-says-trans-swimmer-doesnt-cover-genitals-locker-room.html>.

<sup>205</sup> 34 C.F.R. § 106.30(a) (amended by 85 Fed. Reg. 30,026, 30,574 (May 19, 2020) (Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance)).

<sup>206</sup> *Cf.* Title IX Complaint from Penny Nance, President and CEO, Concerned Women for Am., and Mario Diaz, General Counsel, Concerned Women for Am., to Catherine E. Lhamon, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., against University of Pennsylvania for Ongoing Title IX Violations, <https://concernedwomen.org/wp-content/uploads/2022/03/CWA-UPENN-Title-IX-Complaint.pdf> (alleging Title IX violations for allowing a biological male to compete in women's

## 2. School Sports

Besides access to school facilities, one of the most contentious issues regarding gender identity policies has to do with women's and girls' sports. Title IX regulations allow for separate male and female school sports "where selection for such teams is based upon competitive skill or the activity involved is a contact sport."<sup>207</sup> Title IX's passage was lauded for dramatically increasing athletic opportunities for women and girls by ensuring that "athletic interests and abilities of male and female students must be equally and effectively accommodated."<sup>208</sup>

As proponents of women's sports point out, males as a class biologically have the capacity to perform at a higher level athletically than females because the average male is bigger, stronger, and faster than the average female.<sup>209</sup> This is because males have greater heart and lung capacity, bone density, muscle mass, as well as testosterone levels.<sup>210</sup> That is not to say that *all* males are better athletes than *all* females or that the top female athletes are not better

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swimming and creating a hostile environment by allowing swimmer in women's locker room); Christopher Tremoglie, *EXCLUSIVE: UPenn, Philly DA Ignore Complaints About Lia Thomas's Male Nudity in Women's Locker Room*, WASH. EXAMINER (Feb. 25, 2022), <https://www.washingtonexaminer.com/opinion/exclusive-upenn-philly-da-ignore-complaints-about-lia-thomass-male-nudity-in-the-womens-locker-room> (discussing how university and government officials ignored complaints alleging violations of Title IX when university allowed transgender swimmer to expose male genitalia in women's locker room); News Release, Stanley Law Group, PLLC, Family of Loudoun County Girl Sexually Assaulted at Stone Bridge High School to Pursue Civil Action Against Loudoun County Public Schools (Oct. 14, 2021), [https://stoplpcscrt.com/wp-content/uploads/2021/10/FILE\\_1482.pdf](https://stoplpcscrt.com/wp-content/uploads/2021/10/FILE_1482.pdf) (announcing Title IX legal action against county alleging high school male student claiming to be "gender fluid" was permitted access to girls' restroom under school restroom policy and sexually assaulted female student); *Parents for Privacy*, 949 F.3d at 1240 ("A policy that allows transgender students to use school bathroom and locker facilities that match their self-identified gender in the same manner that cisgender students utilize those facilities does not . . . create actionable sex harassment under Title IX.").

<sup>207</sup> 34 C.F.R. § 106.41(b).

<sup>208</sup> Office for Civil Rights, U.S. Dep't of Educ., *Requirements Under Title IX of the Education Amendments of 1972*, <https://www2.ed.gov/about/offices/list/ocr/docs/interath.html> (last modified Jan. 10, 2020).

<sup>209</sup> See INDEP. WOMEN'S FORUM & INDEP. WOMEN'S LAW CTR., *COMPETITION: TITLE IX, MALE-BODIED ATHLETES, AND THE THREAT TO WOMEN'S SPORTS* 17 (2021), [https://www.iwf.org/wp-content/uploads/2021/09/COMPETITION\\_FINAL.pdf](https://www.iwf.org/wp-content/uploads/2021/09/COMPETITION_FINAL.pdf).

<sup>210</sup> See generally *id.* at 17–18 (summarizing the physiological differences between males and females).

than the average male athlete, but that males as a class *on average* have an inherent physiological advantage over women. If you look at track, swimming, and weightlifting records for both sexes at the high school, college, and Olympic levels, this becomes obvious.<sup>211</sup> Despite what some may believe, this “male athletic advantage” does not disappear with testosterone suppression, even if it decreases.<sup>212</sup>

Women’s sports proponents argue that allowing biological males to compete with biological females undermines the very purpose of Title IX to ensure “equal athletic opportunity” and the point of having sex-specific sports in the first place.<sup>213</sup> Just like weight classes in weightlifting or wrestling give lighter individuals more and safer opportunities to compete, sex-specific sports provide females more and safer opportunities to compete. Male participation in contact sports with and against females increases females’ risk of physical injury.<sup>214</sup> In practice, not limiting women’s and girls’ sports to biological females takes athletic opportunities—including awards, records, and potential college scholarships—away from women and girls. This has already happened at the high school, collegiate, and professional levels.

In Connecticut, a group of high school female track athletes sued to stop two biological male transgender athletes from participating in girls’ track, arguing that their participation would take away the girls’ opportunities to compete at the state championship, win or medal at the state championship, and gain access to college recruitment and scholarships.<sup>215</sup> The lawsuit argues that the state’s policy “allowing boys who identify as girls to compete in girls’ athletic events” runs afoul of Title IX by failing “to provide equal treatment, benefits and opportunities in athletic competition to girls.”<sup>216</sup> The Trump DOJ filed a statement of interest in the case supporting the female track

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<sup>211</sup> See, e.g., Doriane Lambelet Coleman & Wickliffe Shreve, *Comparing Athletic Performances: The Best Elite Women to Boys and Men*, CTR. FOR SPORTS LAW & POLICY, DUKE LAW, <https://law.duke.edu/sports/sex-sport/comparative-athletic-performance/> (comparing the 2017 top women’s results to the boys’ and men’s results across multiple standard track and field events). See generally COMPETITION, *supra* note 209, at 18–27 (2021) (discussing “the male athletic advantage” and differences in men’s and women’s athletic performances from high school to world records).

<sup>212</sup> See generally COMPETITION, *supra* note 209, at 27–31 (discussing the limits of testosterone suppression).

<sup>213</sup> 34 C.F.R. § 106.41(c).

<sup>214</sup> See generally COMPETITION, *supra* note 209, at 34 (2021) (discussing increased risk of injury).

<sup>215</sup> See *Soule v. Conn. Ass’n of Sch., Inc.*, No. 3:20-cv-00201 (D. Conn.).

<sup>216</sup> V. Compl. for Decl. & Inj. Relief & Damages, *Soule*, No. 3:20-cv-00201, at ¶¶ 70, 170 (D. Conn. Feb. 12, 2020).

athletes.<sup>217</sup> But the Biden DOJ withdrew the statement, simply stating, “The government has reconsidered the matter.”<sup>218</sup> This move is indicative of the Biden administration’s policy that students should be allowed to play on athletic teams that are consistent with their gender identities, meaning that biological males who identify as transgender should be allowed to participate in women’s and girls’ sports.

Many states have considered or are considering legislation on the issue. For example, more than fifteen states have passed bills prohibiting biological male students from competing in girls’ or women’s school or college athletic teams.<sup>219</sup> Tennessee’s governor explained that he signed his state’s bill “to preserve women’s athletics and ensure fair competition” and in response “to damaging federal policies that stand in opposition to the years of progress made under Title IX.”<sup>220</sup> These state laws protecting women’s and girls’ athletics will likely be challenged in court, with opponents claiming the support of the Biden administration.<sup>221</sup> In fact, when a middle school transgender student challenged West Virginia’s law in federal district court, the Biden DOJ issued a statement of interest in the case, advising the court of its view that the law violated Title IX and the Equal Protection Clause of the Fourteenth Amendment.<sup>222</sup>

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<sup>217</sup> Statement of Interest, *Soule*, No. 3:20-cv-00201 (D. Conn. Mar. 24, 2020).

<sup>218</sup> Notice of Withdrawal of Statement of Interest, *Soule*, No. 3:20-cv-00201 (D. Conn. Feb. 23, 2021).

<sup>219</sup> States include Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Iowa, Kansas, Kentucky, Mississippi, Oklahoma, South Dakota, Tennessee, Texas, Utah, and West Virginia. See Ala. H.B. 391 (2021); Ariz. S.B. 1165 (2022); Ark. S.B. 354 (2021); Fl. S.B. 1028 (2021); Ga. H.B. 1084 (2022); Idaho H.B. 500 (2020); Iowa H.F. 2416 (2022); Kan. S.B. 160 (2022); Ky. S.B. 83 (2022); Miss. S.B. 2536 (2021); Okla. S.B. 2 (2022); S.D. S.B. 46 (2022); Tenn. S.B. 228 (2021); Tex. H.B. 25 (2021); Utah H.B. 11 (2022); W. Va. H.B. 3293 (2021).

<sup>220</sup> Gov. Bill Lee (@GovBillLee), Twitter (Mar. 26, 2021, 5:21 PM), <https://twitter.com/GovBillLee/status/1375558428702220289>.

<sup>221</sup> See, e.g., *B.P.J. v. W. Va. State Bd. Educ.*, No. 2:21-cv-00316 (D. W.Va. July 21, 2021) (preliminarily enjoining enforcement of West Virginia law prohibiting biological male students from competing on women’s sports teams as violation of Title IX and Equal Protection Clause as applied to transgender middle school student); *Hecox v. Little*, 479 F. Supp. 3d 930 (D. Idaho 2020) (preliminarily enjoining Idaho law prohibiting biological male students from competing on women’s sports teams as violation of Equal Protection Clause of the Fourteenth Amendment), *remanded by Hecox v. Little*, No. 20-35813 (9th Cir. June 24, 2021) (remanding to district court to determine whether plaintiff student’s claim is moot).

<sup>222</sup> Statement of Interest of the United States, *B.P.J.*, No. 2:21-cv-00316.

With the impending Biden Title IX regulations, schools subject to Title IX could soon face conflicting state and federal requirements. This will likely lead to more litigation, and the Supreme Court will likely have to step in to decide whether sex discrimination under Title IX includes discrimination on the basis of gender identity and sexual orientation, and whether that means transgender identifying biological males must be allowed to compete in girls' and women's athletics.

### 3. Parental Rights

Several states are considering laws that would prohibit or limit primary school instruction on sexual orientation or gender identity, leaving such instruction to parents. In March 2022, Florida enacted a Parental Rights in Education law that prohibits classroom instruction on sexual orientation and gender identity in kindergarten through third grade and requires that instruction on these topics in other grades be “age-appropriate or developmentally appropriate” for students.<sup>223</sup> In response, Secretary of Education Miguel Cardona issued a statement accusing Florida's governor of choosing “to target some of Florida's most vulnerable students and families, all while under the guise of ‘parents’ rights” and promising that the Department “will be monitoring this law upon implementation to evaluate whether it violates federal civil rights law.”<sup>224</sup>

Parental rights of and custody by parents of minor children who wish to undergo social or medical gender transitions when a parent does not support transitioning is a growing issue. In the state context, many parents have lost custody of their child—often with the encouragement and support of schools—for not catering to their child's wishes when it comes to gender.<sup>225</sup>

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<sup>223</sup> Fla. H.B. 1557 (2022).

<sup>224</sup> Press Release, U.S. Dep't of Edu., Statement by Secretary of Education Miguel Cardona on Newly Signed Florida State Legislation (Mar. 28, 2022), <https://www.ed.gov/news/press-releases/statement-secretary-education-miguel-cardona-newly-signed-florida-state-legislation>.

<sup>225</sup> See, e.g., *Protecting Our Children: How Radical Gender Ideology is Taking Over Public Schools & Harming Kids*, HERITAGE FOUND. (Mar. 7, 2022), <https://www.heritage.org/gender/event/protecting-our-children-how-radical-gender-ideology-taking-over-public-schools-harming> (testimony of mother who lost custody of high school daughter after not supporting daughter's medical transition encouraged by school, and whose daughter, after stated-funded medical transition, committed suicide); Abigail Shrier, *Child Custody's Gender Gauntlet*, CITY J. (Feb. 7, 2022), <https://www.city-journal.org/child-custody-gender-gauntlet> (discussing court proceedings involving father who lost custody of son for not agreeing son was transgender and should start medical transition); *In re JNS*, No. F17-334 X (Ohio Hamilton Cnty. Juvenile Ct. Feb. 16, 2018) (giving custody of a seventeen-year-old transgender child to grandparents after parents sought for religious reasons to stop the teen from undergoing cross-sex hormones or sex reassignment surgery).

Relatedly, in the foster care context, federal policies suggest that not endorsing a foster care youth's gender identity makes one unfit to be a foster parent. Indeed, a government fact sheet stated, "Respecting [foster care youths'] gender identity and expression is very important. Behaviors that openly reject a youth's LGBTQ+ identity must be avoided and not tolerated[,] . . . including religious activities, sports activities, and family gatherings."<sup>226</sup>

#### 4. Religious Schools

The Biden administration's gender identity requirements will not be limited to public schools but will also extend to private and religious schools that receive government funding, which includes any school that enrolls students who participate in school lunch programs or receive federal student grants or loans. Title IX's religious exemption, however, may allow certain religious schools to retain and implement their beliefs about gender and sexuality when they conflict with Biden's gender identity policies.

In March 2021, a group of students challenged Title IX's religious exemption in court, claiming that it harms LGBT students in violation of the Equal Protection and Establishment Clauses (among other laws).<sup>227</sup> Biden's DOJ, tasked with defending the statutory exemption, stated in a court filing that it will do so: "the Federal Defendants' ultimate objective is to defend the statutory exemption and its current application by ED."<sup>228</sup> On February 8, 2022, the Biden Department of Education dismissed a sex discrimination complaint against Brigham Young University challenging the religious university's position that same-sex romantic relationships violate the honor code.<sup>229</sup> ED assured the university of its religious exemption from Title IX regulations, including those related to housing, health and insurance benefits and services, and athletics, to the extent application of those provisions would

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<sup>226</sup> Factsheets for Families, Children's Bureau, Admin. on Children, Youth & Families, Admin. for Children & Families, U.S. Dep't of Health & Human Servs., Supporting LGBTQ+ Youth: A Guide for Foster Parents 6 (June 2021), <https://www.childwelfare.gov/pubPDFs/lgbtqyouth.pdf>.

<sup>227</sup> *Hunter v. U.S. Dep't Educ.*, No. 6:21-cv-00474 (D. Or.).

<sup>228</sup> Defs.' Opp. Mots. Intervene ECF Nos. 8 & 26 at 7, *Hunter*, Case No. 6:21-cv-474 (D. Or. June 8, 2021).

<sup>229</sup> Letter from Sandra Roesti, Supervisory Attorney, Office for Civil Rights, U.S. Dep't of Educ., to President Kevin J. Worthen, Brigham Young Univ., on Brigham Young University OCR Case Number 08-20-2196 (Feb. 8, 2022), <https://news.byu.edu/0000017e-e090-ddc8-a77f-f8b78c8c0001/final-signed-ocr-decision>.

conflict with the university's religious tenets pertaining to sexual orientation and gender identity.<sup>230</sup> Without a Title IX religious exemption, religious colleges and universities, especially those that serve students from underprivileged communities, would face an untenable choice: either violate their deeply held religious beliefs about gender and sexuality or close their doors.

Although it is uncertain whether the federal government can legally require schools, particularly religious schools, to comply with the various gender identity policies pushed by the Biden administration, the threat of the loss of federal funding and bureaucratic investigations, coupled with social and media pressure, will likely lead many schools to voluntarily adopt such policies, whether or not they are legally required.

### III. CONCLUSION

This article discussed the Biden administration's gender identity policies in the context of employment, health care, education, and athletics, with a specific focus on their impacts on women's rights, children's interests, and religious liberty. But there are many other contexts that will also be impacted, especially if the Equality Act is passed, such as housing, prisons, women's shelters, and adoption and foster agencies. Ultimately, the Supreme Court will likely be asked to weigh in on the questions it put off in *Bostock*: whether sex-specific bathrooms, locker rooms, and sports teams are in fact "unsustainable" under gender identity discrimination laws, and the extent to which RFRA or the First Amendment provide protection for religious exercise.

But more immediately, Congress (and the American people) will have to decide whether the Biden administration's gender identity policies reflect the will of the people, and whether they unacceptably burden women's rights, children's interests, and religious liberty.

#### Other Views:

- Office of Population Affairs, U.S. Dep't of Health & Human Servs., Gender-Affirming Care and Young People (Mar. 2022), <https://opa.hhs.gov/sites/default/files/2022-03/gender-affirming-care-young-people-march-2022.pdf>.
- Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894 (2019),

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<sup>230</sup> *Id.* at 1–2.

*available at* <https://harvardlawreview.org/2019/01/they-them-and-theirs/>.

- World Professional Assoc. for Transgender Health, Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People, 7th Version (2011), *available at* [https://www.wpath.org/media/cms/Documents/SOC%20v7/SOC%20V7\\_English.pdf](https://www.wpath.org/media/cms/Documents/SOC%20v7/SOC%20V7_English.pdf).
- Rachel Levine, Address at Franklin & Marshall College, “It’s a Transgeneration: Issues in Transgender Medicine” (Jan. 19, 2017), *available at* <https://www.fandm.edu/news/latest-news/2017/01/19/transgender-health-and-the-changes-occurring-in-the-gender-binary>.