November 6, 2015

Submitted Electronically

U.S. Department of Health and Human Services
Office for Civil Rights
Hubert H. Humphrey Building
Room 509F
200 Independence Avenue, SW
Washington, DC 20201

Re: Nondiscrimination in Health Programs and Activities
RIN 0945-AA02

Dear Sir or Madam:

On behalf of the United States Conference of Catholic Bishops, National Association of Evangelicals, Christian Medical Association, Institutional Religious Freedom Alliance, Christian Legal Society, World Vision (US), Ethics and Religious Liberty Commission of the Southern Baptist Convention, Liberty Institute, Family Research Council, and the National Catholic Bioethics Center, we respectfully submit the following comments on the proposed OCR

regulations on nondiscrimination in health programs and activities. 80 Fed. Reg. 54172 (Sept. 8, 2015).

The proposed regulations are intended to implement Section 1557 of the Affordable Care Act. Section 1557 provides, among other things, that an individual shall not, on the ground prohibited under Title IX of the Education Amendments of 1972, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving federal financial assistance. 42 U.S.C. § 18116. Subject to certain exceptions, Section 901 of Title IX prohibits discrimination on the basis of sex. 20 U.S.C. § 1681. Religious organizations are exempt from this prohibition if its application would be inconsistent with their religious tenets. 20 U.S.C. § 1681(a)(3).

We agree that the prevention of sex discrimination in health programs and activities is a laudable statutory goal. Everyone should have access to health care and health coverage. The proposed regulations are problematic, however, because they construe sex discrimination to include—

- discrimination based on "termination of pregnancy" (insofar as this might be read to require the provision of, or coverage or referral for, abortion).

- discrimination based on "gender identity."

- the categorical or automatic exclusion by an insurer of "services related to gender transition," and the denial or limitation of coverage of such services in some circumstances.

- discrimination based on "sex stereotypes," defined to protect "individuals who identify as neither, both, or as a combination of male and female genders."

- discrimination based on the sex of a person with whom an individual has a "relationship or association" (insofar as this might be read to treat same-sex relationships as a classification protected at law).

This expansive definition of sex discrimination lacks support in the language and legislative history of Title IX, and is likely to have a detrimental effect on the privacy interests of patients, to interfere in some instances with the effective delivery of health care services, and to infringe upon the religious and moral convictions of health care providers, insurers, and other stakeholders. Based on these flaws, the regulations violate federal law, including the Administrative Procedure Act.

Finally, like Title IX, which Section 1557 mirrors, the regulations ought to have a religious exemption of proper scope.

We believe that the changes urged in this letter are critical and that without them, the regulations are unlikely to survive scrutiny in the courts.

More detailed comments follow.

I. Abortion

The proposed regulations forbid discrimination "on the basis of sex" in health programs, including health plans, that receive federal financial assistance.[1] 80 Fed. Reg. at 54218 [§ 92.101]. The regulations define discrimination "on the basis of sex," in turn, to include discrimination on the basis of "termination of pregnancy." *Id*. at 54216 [§ 92.4]. From these two provisions, readers may infer (incorrectly) that the regulations require the provision of, or coverage or referral for, abortion. To prevent such a misreading, it is important that OCR state explicitly in the regulations that neither Section 1557 nor the regulations impose such a requirement.

There are at least three reasons why Section 1557 does not require the provision of, or coverage or referral for, abortion.

First, far from mandating coverage of abortion, ACA expressly leaves it up to issuers to decide whether to cover abortion. ACA, § 1303,[2] codified at 42 U.S.C. § 18023. Congress could not have intended in Section 1557 to *mandate* abortion coverage when, in Section 1303 of the very same Act, Congress is explicit that ACA does *not* mandate abortion coverage. *Id*. Any conflict, if there were one (which there is not, because declining involvement in abortion is not sex discrimination), would have to be resolved in favor of Section 1303 by virtue of the "except" clause in Section 1557. ACA, § 1557 (prohibiting certain forms of discrimination "[e]xcept as otherwise provided for in this title"). Therefore, in giving issuers the discretion whether to cover abortion, Section 1303 trumps any nondiscrimination requirement of Section 1557 to the extent of any inconsistency. In fact, Section 1303 explicitly says: "*Notwithstanding* any other provision of this title [meaning Title I of ACA, which includes Section 1557] … *nothing* in this title … shall be construed to require a qualified health plan to provide coverage" of any abortion. ACA, § 1303(b)(1)(A) (emphasis added). It is therefore clear that nothing in ACA, including Section 1557, requires coverage of abortion.

Other provisions of ACA reinforce this conclusion with respect to both the coverage and provision of abortion. For example, Section 1303(a)(1) allows a State to "prohibit abortion coverage" in all its qualified health plans. And Section 4101(b) of ACA, establishing funding for school-based health centers, excludes from the program any center that performs abortions, and bars any federal funds in the program from being used for abortions. 42 U.S.C. §§ 280h-5(a)(3)(C), 280h-5(f)(1)(B). Obviously, Section 1557 cannot forbid as "discrimination" a refusal to provide or

[1] Consistent with OCR's enforcement authority, the regulations only apply to health programs and activities that are HHS-funded. 80 Fed. Reg. at 54173 n.2. However, the regulations are likely to be a model for other departments—a result that OCR actively encourages. *Id*. (stating that "other Federal agencies are encouraged to adopt the standards set forth in this proposed rule"). Thus, our requested corrections and modifications are all the more important.

[2] As amended by Section 10104(c) of the Health Care and Education Reconciliation Act, Pub. L. 111-152.

fund abortion or abortion coverage, as other provisions of the same title of ACA permit exactly such a refusal on the part of the federal government itself and states.

Second, the right to exclude abortion coverage from health plans, and the right of health care providers not to provide or refer for abortion, is protected under other federal law, including the Weldon amendment. The Weldon amendment, which has been included in every Labor/HHS appropriations law enacted since 2004, states that "[n]one of the funds made available in this Act may be made available to a Federal agency or program … if such agency … [or] program … subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions."[3] The Weldon amendment defines the term "health care entity" broadly to include "an individual physician or other health care professional, a hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, or any other kind of health care facility, organization, or plan." Moreover, the Church amendment (42 U.S.C. § 300a-7) states that public authorities may not condition a health facility's receipt of various kinds of HHS funding on a willingness to provide abortions contrary to its moral or religious convictions, and that facilities receiving such funds may not discriminate against a student, employee, or candidate for study or employment because of that individual's moral or religious objection to abortion. In other words, under longstanding federal law, it is a mandate for involvement in abortion that constitutes illegal discrimination.

Third, under the Danforth amendment to Title IX, "[n]othing in this chapter [*i.e.*, Title IX] shall be construed to require … any person, or public or private entity, to provide or pay for any benefit or service, including the use of facilities, related to an abortion." 20 U.S.C. § 1688. Since no abortion-related benefit or service is required under *any* provision of Title IX ("[n]othing in this chapter"), it follows that non-provision or non-coverage of abortion is not sex discrimination under Section 901 of Title IX. *A fortiori*, the non-provision or non-coverage of abortion is not sex discrimination under Section 1557 of ACA.

For these reasons, the final regulations should state that Section 1557 does not require the provision of, referral for, or coverage of, abortion.

II. Gender Identity

The proposed regulations define discrimination "on the basis of sex" to include discrimination on the basis of "gender identity." 80 Fed. Reg. at 54216 [§ 92.4]. The regulations define gender identity, in turn, to mean "an individual's internal sense of gender, which may be different from that individual's sex assigned at birth." *Id.* For several reasons, the inclusion of "gender identity" in the definition of sex discrimination is an erroneous interpretation of the law.

First, Title IX says nothing about "gender identity." Instead, it uses the term "sex." The ordinary dictionary definition of "sex" is the character of being male or female. Webster's New

[3] Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, Div. G, tit. V, § 507(d) (Dec. 16, 2014).

World Dictionary (3d College ed.). Because Title IX says nothing about "gender identity," there is no basis for including it in regulations implementing Section 1557.

Second, the legislative history of Title IX does not support the inclusion of gender identity in the definition of sex discrimination. Title IX was intended to provide equal educational opportunities for both sexes. *Lothes* v. *Butler County Juvenile Rehabilitation Center*, 243 Fed. App'x 950, 955 (6th Cir. 2007). There is no basis for concluding that Congress intended, in Title IX, to protect "an individual's internal sense of gender" (80 Fed. Reg. at 54216) as opposed to his or her biological sex. The phrase "gender identity" was never used in congressional debate over Title IX.

Third, case law does not support the government's interpretation. We are aware of only one Title IX case that takes up the issue, and it rejects the claim that Title IX forbids discrimination on the basis of gender identity. *Johnston* v. *Univ. of Pittsburgh*, No. 3:13-213, 2015 WL 1497753, at *12 (W.D. Pa. Mar. 31, 2015).

Fourth, though OCR claims that its interpretation of "on the basis of sex" to include gender identity discrimination is "well accepted" (80 Fed. Reg. at 54176), the authority it cites for this interpretation is weak. OCR cites: (a) settlement agreements and court filings by the Department of Justice; (b) statements by OCR and other federal agencies; and (c) a handful of court cases. *Id*. Settlement agreements and court filings by a party provide no authority for any legal proposition. The agency decisions and policies upon which OCR relies did not involve Title IX. In any event, such decisions and policies receive judicial deference only insofar as they are persuasive.[4] OCR's interpretation of Title IX to include a prohibition on gender identity discrimination is unpersuasive for reasons given here.

Only one of the court decisions cited by OCR arose under Title IX, and that decision, as noted above, *rejects* the claim that sex discrimination includes gender identity. *Johnston*, *supra*, 2015 WL 1497753, at *12. Three other cases cited by OCR arose under Title VII of the Civil Rights Act of 1964. But Section 1557 says nothing about Title VII. If Congress had intended to track Title VII, it would have mentioned that title instead of, or in addition to, Title IX.

To be sure, courts sometimes rely on interpretations of Title VII's prohibition of sex discrimination in the workplace in construing Section 901 of Title IX. But any reliance on Title VII runs headlong into the fact that most courts have *rejected* the claim that "gender identity" is a protected class under that title. Title VII's prohibition of "sex discrimination," for example, does not make transsexual individuals a protected class,[5] does not preclude reasonable workplace

[4] *United States* v. *Mead Corp*., 533 U.S. 218, 228 (2001).

[5] *Etsitty* v. *Utah Transit Auth.*, 502 F.3d 1215, 1221 (10th Cir. 2007) ("This Court agrees with … the vast majority of federal courts to have addressed this issue and concludes discrimination against a transsexual based on the person's status as a transsexual is not discrimination because of sex under Title VII"). While some courts have allowed Title VII sex discrimination claims by transsexual employees on the *Price Waterhouse* theory of "sex stereotyping," most have held that such stereotyping is a distinct legal category that is not congruent with gender identity. *E.g*., *Smith* v. *City of Salem*, 378 F.3d 566, 574-75 (6th Cir. 2004) (noting that an individual's status as a transsexual is irrelevant to the availability of Title VII protection under *Price Waterhouse*); *see Price Waterhouse* v.

rules requiring different dress and grooming standards for men and women,[6] and does not preclude the reservation of restrooms and locker rooms based on biological sex.[7] Use of the term "gender identity" is therefore over-inclusive because it goes beyond what Title VII proscribes by way of sex discrimination. On the other hand, if OCR intends merely to follow *Price Waterhouse*, *see* n.5, *supra*, then the use of the term "gender identity" is under-inclusive because claims of sex stereotyping, as courts have construed that term, do not require a showing of discrimination based on gender identity.[8] For these reasons, the term "gender identity" is a poor fit with Title VII's ban on sex discrimination. For the same reasons, it is a poor fit with Title IX and Section 1557.

Fifth, if ACA prohibits discrimination on the basis of gender identity, as OCR claims, then efforts in the current Congress to enact the Equality Act, a bill that would, among other things, forbid discrimination on the basis of gender identity by health care providers and in health care programs funded by the federal government,[9] would be inexplicable. There would be no proposal in the current Congress to prohibit gender identity discrimination in federally-funded health care programs if federal law already prohibited it.[10]

Hopkins, 490 U.S. 228 (1989) (holding that an accounting firm's failure to admit a female employee to partnership because it considered her to be too "macho" was sex stereotyping in violation of Title VII's prohibition of sex discrimination).

[6] *Jespersen* v. *Harrah's Operating Co.*, 392 F.3d 1076, 1080 (9th Cir. 2004) (holding that "grooming and appearance standards that apply differently to women and men do not constitute discrimination on the basis of sex"); *Nichols* v. *Azteca Rest. Enters*., 256 F.3d 864, 875 n.7 (9th Cir. 2001) (stating that "there is [no] violation of Title VII occasioned by reasonable regulations that require male and female employees to conform to different dress and grooming standards"), cited with approval in *Etsitty*, 502 F.3d at 1224-25.

[7] *Etsitty*, 502 F.3d at 1225 (noting that "an employer's requirement that employees use restrooms matching their biological sex … does not discriminate against employees who fail to conform to gender stereotypes"); *see Johnson* v. *Fresh Mark*, 98 Fed. App'x 461 (6th Cir. 2004) (holding that an employer did not violate Title VII when it refused to allow an employee, born male but preparing for sex change surgery, to use the women's restroom).

[8] Ann Hopkins, the plaintiff in *Price Waterhouse*, is a prime example. Hopkins was denied admission to partnership in her accounting firm because of her perceived masculine mannerisms and for not dressing more "femininely." There is no indication that she identified with *being* a man – if anything, that was a stereotype imposed on her by the defendant. Further, as courts have noted, there are limits to how far one can stretch *Price Waterhouse*. There is no suggestion in the opinion, for example, that Title VII requires Price Waterhouse to allow Ms. Hopkins to cross-dress at work or to use the men's restroom, and the case law under Title VII is to the contrary. *See* notes 5 to 7, *supra*.

[9] S. 1858, § 3(a) (amending 42 U.S.C. § 2000a to forbid discrimination on the basis of gender identity by any establishment that provides health care); *id*. § 6 (amending 42 U.S.C. § 2000d to forbid discrimination on the basis of gender identity by any program or activity receiving federal financial assistance); *id*. § 9 (defining "sex," for purposes of title II, III, IV, VI, VII, and IX of the Civil Rights Act of 1964, to include "sexual orientation or gender identity").

[10] The Equality Act endorses the actions of federal agencies that have construed "[n]umerous provisions of Federal law" (including Title VII) to include gender identity discrimination, *id.* at § 2(8), but this endorsement too would be unnecessary if Congress had already banned gender identity discrimination in Title VII or elsewhere.

For these reasons, the final regulations should not define sex discrimination to include discrimination on the basis of gender identity. This is not to suggest that *any* person should be excluded from health services. An orthopedic practice group, for example, would be acting unprofessionally if it refused to treat a person's fractured limb because of his or her political affiliation, marital status, family size, matriculation, intellectual interests, sexual practices, gender identity, or any number of other reasons. The point of the regulations, however, is not to create a code of professional ethics but to implement a particular provision of ACA, and that provision says nothing about any of these categories.

III. Gender Transition

The proposed regulations state that, in providing or administering health-related insurance or other health-related coverage, a "covered entity"[11] shall not: (a) "[c]ategorically or automatically exclude from coverage, or limit coverage for, all health services related to gender transition," or (b) "[o]therwise deny or limit coverage, or deny a claim, for specific health services related to gender transition if such denial or limitation results in discrimination against a transgender individual." 80 Fed. Reg. at 54220 [§ 92.207]. Thus, the proposed regulations require covered entities to treat gender transition services on a par with other services, and thus to provide coverage of at least some gender transition services.[12]

The proposed regulations also require coverage of gender transition services in the covered entity's own "employee health benefit program"[13] when any of three conditions is met:

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[11] The term "covered entity" means "[a]n entity that operates a health program or activity, any part of which receives Federal financial assistance." 80 Fed. Reg. at 54215 [§ 92.4]. The term also includes "[a]n entity established under Title I of the ACA that administers a health program or activity," and HHS itself. *Id.*

[12] OCR elaborates (80 Fed. Reg. at 54190):

> In evaluating whether it is discriminatory to deny or limit a request for coverage of a particular service for an individual seeking the service as part of transition-related care, OCR will start by inquiring whether and to what extent coverage is available when the same service is not related to gender transition. If, for example, a health plan or State Medicaid agency denies a claim for coverage of a hysterectomy that a patient's provider says is medically necessary to treat gender dysphoria, OCR will evaluate the extent of the plan's coverage of hysterectomies under other circumstances. OCR will also carefully scrutinize whether the covered entity's explanation for the denial or limitation of coverage for transition-related care is legitimate and not a pretext for discrimination.
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> These provisions do not, however, affirmatively require covered entities to cover any particular procedure or treatment for transition-related care; nor do they preclude a covered entity from applying neutral standards that govern the circumstances in which it will offer coverage to all its enrollees in a nondiscriminatory manner.

[13] The term "employee health benefit program" includes "[h]ealth benefits coverage or health insurance provided to employees and/or their dependents established, operated, sponsored or administered by, for, or on behalf of one or more employers, whether provided or administered by entities including but not limited to an employer, group health plan (as defined in the Employee Retirement Income Security Act of 1974 (ERISA, at 29 U.S.C. 1191(a)), third party administrator, or health insurance issuer." 80 Fed. Reg. at 54215-26 [§ 92.4]. It also includes an "employer provided or sponsored wellness program," an "employer-provided health clinic," and "[l]ong term care

the entity (1) is principally engaged in providing or administering health services or health insurance coverage, (2) receives federal financial assistance a primary objective of which is to fund the employer's employee health benefit program, or (3) operates a health program or activity that is not an employee health benefit program but receives federal financial assistance. 80 Fed. Reg. at 54220 [§ 92.208]. An entity "principally engaged in providing or administering health services or health insurance coverage" includes "a hospital, health clinic, group health plan, health insurance issuer, physician's practice, community health center, nursing facility, residential or community-based treatment facility, or other similar entity." 80 Fed. Reg. at 54216 [§ 92.4] (defining "health program or activity").

Thus, under the proposed regulations, an employer principally engaged in providing health services and that receives federal financial assistance (*e.g*., a religiously-affiliated hospital or nursing home that participates in Medicaid) would have to cover some services related to gender transition in the health plan that it offers to its own employees.[14] Likewise, an issuer of health insurance that participates in the exchange will be required to provide coverage for health services related to gender transition, whether or not the plan is offered on the exchange.[15]

For several reasons, we object to the proposed mandatory coverage of health services related to gender transition.

First, because "on the basis of sex" does not include "gender identity," as shown in the preceding section, neither does a health plan's choice not to cover services related to gender transition constitute sex discrimination.

Second, even assuming for argument's sake that "on the basis of sex" includes "gender identity" (which it does not), there is still no basis under Title IX for mandating coverage of services related to gender transition. When the federal government last attempted to mandate coverage of a specific item under a federal statute prohibiting sex discrimination, its attempt foundered in the courts. *In re Union Pacific Railroad Employment Practices Litigation*, 479 F.3d 936 (8th Cir. 2007) (holding that Title VII's ban on sex discrimination does not require coverage of contraceptives). Indeed, it was not until the more recent contraceptive mandate,

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coverage or insurance provided or administered by an employer, group health plan, third party administrator, or health insurance issuer." *Id*.

[14] This is the case "whether the employee health benefit program is self-insured or fully-insured by the employer." 80 Fed. Reg. at 54191 (preamble); *see id*. at 54215-16 [§ 92.4] (defining "employee health benefit program").

[15] This is so because plans sold on the exchange are eligible for federal tax credits and subsidies. Credits and subsidies are a form of federal financial assistance. 80 Fed. Reg. at 54216 [§ 92.4]; *see* ACA § 1557 (applying non-discrimination requirements to a "health program or activity, any part of which is receiving Federal financial assistance, including credits … [or] subsidies"); *see also* 80 Fed. Reg. at 54189 (preamble) ("[A]n issuer that participates in the Marketplace and thereby receives Federal financial assistance, and that also offers plans outside the Marketplace, will be covered by the proposed regulation for *all* its health plans, as well as when it acts as a third party administrator for an employer-sponsored group health plan.") (emphasis added).

issued as a regulation under the preventive services provision of ACA (*not* Section 1557), that the issue became prominent.[16]

The case for mandated coverage of services related to gender transition services under Title IX is even *weaker* than the claim for mandated coverage of contraceptives under Title VII. Under the Pregnancy Discrimination Act ("PDA"), prohibited sex discrimination under Title VII includes discrimination on the basis of pregnancy and related medical conditions. Yet, even with the benefit of this additional statutory language—language not found in Title IX—the Eighth Circuit, the only federal court of appeals to decide the issue, concluded that it is not sex discrimination under Title VII to exclude coverage of contraceptives. *Union Pacific*, 479 F.3d at 939-45. Here, the connection with any Act of Congress is even more attenuated. There is nothing in the text of Title IX—indeed, there is no federal statutory authority of *any* kind—to suggest that health plans must include coverage for services related to gender transition.

Third, while OCR characterizes them as "services," we believe, as do many health care providers, that medical and surgical interventions that attempt to alter one's sex are, in fact, detrimental to patients. Such interventions are not properly viewed as health care because they do not cure or prevent disease or illness. Rather they reject a person's nature at birth as male or female. Surgical alteration of the genitalia, in particular, mutilates the body by taking a perfectly healthy bodily system and rendering it dysfunctional.[17] We expect that many providers, insurers, and others will find mandatory coverage of such procedures objectionable—not because of any discriminatory animus, but because they view them as bad medicine—even potentially exposing health care providers to claims of medical malpractice.

Dr. Paul McHugh, former Psychiatrist-in-Chief and current University Distinguished Service Professor of Psychiatry and Behavioral Sciences at Johns Hopkins Hospital, concludes that procedures relating to gender transition misidentify the underlying problem and provide no cure:

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[16] Over a hundred organizations have filed lawsuits challenging the contraceptive mandate issued under the preventive services provision of ACA. For a list of cases, see http://www.becketfund.org/hhsinformationcentral/.

[17] Richard P. Fitzgibbons, M.D., *et al*., *The Psychopathology of "Sex Reassignment" Surgery: Assessing its Medical, Psychological and Ethical Appropriateness*, National Catholic Bioethics Quarterly 97, 100 (Spring 2009) ("Sexual reassignment surgery requires the destruction of healthy sexual and reproductive organs"), available at www.ncbcenter.org/document.doc?id=581. A surgeon at Johns Hopkins expressed his reaction to the act of mutilation involved in gender reassignment surgery this way: "Imagine what it's like to get up at dawn and think about spending the day slashing with a knife at perfectly well-formed organs, because ... psychiatrists do not understand what … the problem [is]." *Id*. at 100 (reporting the comment).

The theory offered in support of attempted sex change has also been challenged on natural law grounds as seeking to cancel out the sexual difference between males and females. *See* Pope Francis, General Audience on Man and Woman (Apr. 15, 2015) ("For example, I ask myself, if the so-called gender theory is not … an expression of frustration and resignation, which seeks to cancel out sexual difference because it no longer knows how to confront it. Yes, we risk taking a step backwards. The removal of difference in fact creates a problem, not a solution."), https://w2.vatican.va/content/francesco/en/audiences/2015/documents/papa-francesco_20150415_udienza-generale.html.

> [P]olicy makers and the media are doing no favors either to the public or the transgendered by treating their confusions as a right in need of defending rather than as a mental disorder that deserves understanding, treatment and prevention. This intensely felt sense of being transgendered constitutes a mental disorder in two respects. The first is that the idea of sex misalignment is simply mistaken—it does not correspond with physical reality. The second is that it can lead to grim psychological outcomes.
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> "Sex change" is biologically impossible. People who undergo sex-reassignment surgery do not change from men to women or vice versa. Rather they become feminized men or masculinized women. Claiming that this is a civil-rights matter and encouraging surgical intervention is in reality to collaborate with and promote a mental disorder.

Paul R. McHugh, M.D., *Transgender Surgery Isn't the Solution: A Drastic Physical Change Doesn't Address Underlying Psycho-Social Troubles* (June 12, 2014), available at http://www.wsj.com/articles/paul-mchugh-transgender-surgery-isnt-the-solution-1402615120.

Medical research supports these conclusions. Tracking patients over a 30-year period, a study by the Karolinska Institute in Sweden "revealed that beginning about 10 years after having the surgery, the transgendered began to experience increasing mental difficulties. Most shockingly, their suicide mortality rose almost 20-fold above the comparable nontransgender population." *Id.*; *see* Cecilia Dhejne, *et al*., *Long-Term Follow-Up of Transsexual Persons Undergoing Sex Reassignment Surgery: Cohort Study in Sweden* (Feb. 22, 2011) ("Persons with transsexualism, after sex reassignment, have considerably higher risks for mortality, suicidal behaviour, and psychiatric morbidity than the general population"), at http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3043071/pdf/pone.0016885.pdf; *see also* David Batty, *Sex Changes Are Not Effective, Say Researchers*, THE GUARDIAN (July 30, 2004) ("There is no conclusive evidence that sex change operations improve the lives of transsexuals, with many people remaining severely distressed and even suicidal after the operation," according to a review of more than 100 international medical studies of post-operative transsexual individuals), at http://www.theguardian.com/society/2004/jul/30/health.mentalhealth.

Hormonal treatment also poses risks. Puberty-delaying hormones administered to children to facilitate later sex-change surgery "stunt[s] [their] growth and risk[s] causing sterility." McHugh, *Transgender Surgery Isn't the Solution*, *supra*.

By contrast, decisions *not* to provide hormonal or surgical interventions have yielded *positive* results. Vanderbilt University and London's Portman Clinic report, for example, that a large percentage of children (70 to 80%) who reported transgender feelings but received no medical or surgical intervention ultimately lost those feelings. *Id*.

These outcomes suggest that patients are not well served, and that their health is actually *harmed*, by attempts to change their sex. Since the goal of health coverage is to preserve and promote good health, such attempts should not be made a mandatory item of coverage. Indeed, given the emerging research and experience, such attempts could expose health care professionals to claims of medical malpractice.

Fourth, mandating coverage of gender transition services will violate the religious and moral convictions of many stakeholders, including religiously-affiliated health care providers. We reserve our discussion of this issue for Part VII, *infra*.

For all of these reasons, OCR should delete from the final regulations language forbidding the exclusion of services related to gender transition services from employee health benefits programs.

IV. Sex Stereotypes

The proposed regulations define discrimination "on the basis of sex" to include discrimination on the basis of "sex stereotyping." 80 Fed. Reg. at 54216 [§ 92.4]. The regulations define the term "sex stereotypes," in turn, to include:

> [S]tereotypical notions of gender, including expectations of how an individual represents or communicates gender to others, such as behavior, clothing, hairstyles, activities, voice, mannerisms, or body characteristics. These stereotypes can include expectations that gender can only be constructed within two distinct opposite and disconnected forms (masculinity and femininity), and that gender cannot be constructed outside of this gender construct (individuals who identity as neither, both, or as a combination of male and female genders).

80 Fed. Reg. at 54216-17 [§ 92.4].

For all the reasons we have discussed with respect to "gender identity" and "gender transition," OCR's definition of "sex stereotypes" goes beyond what Congress intended when it included Section 1557 in ACA.

Indeed, the unprecedentedly broad definition of "sex stereotypes" goes even further afield than these other categories. It is impossible for an individual to be "neither, both, or … a combination of male and female" (80 Fed. Reg. at 54217 [§ 92.4]), and there is no legal authority for the proposition that individuals who claim to identify as such constitute a protected class under Title IX or any other federal law.

For these reasons, OCR should modify its definition of "sex stereotypes."

V. Sexual Orientation

In the preamble, OCR makes a series of statements about sexual orientation that are in tension with each other and with the proposed regulations. 80 Fed. Reg. at 54176.

On the one hand, OCR states that it "support[s] banning discrimination … on the basis of sexual orientation" as a "matter of policy." *Id*. OCR cites a recent decision by the EEOC holding that Title VII's ban on sex discrimination forbids sexual orientation discrimination in the workplace. *Id.*

On the other hand, OCR concedes that "[t]o date, no Federal appellate court has concluded that *Title IX's* prohibition of discrimination 'on the basis of sex'—or Federal laws prohibiting sex discrimination more generally—prohibits sexual orientation discrimination, and some appellate courts previously reached the opposite conclusion." *Id*. (emphasis added).

Without adopting a definitive position, OCR then states that "[t]he final rule should reflect the *current* state of nondiscrimination law, including with respect to prohibited bases of discrimination. [OCR] seek[s] comment on the best way of ensuring that this rule includes *the most robust set of protections supported by the courts on an ongoing basis*." 80 Fed. Reg. at 54177 (emphasis added).

The proposed regulations themselves—which, of course, trump any statements in the preamble—do not forbid discrimination on the basis of sexual orientation or conduct as such, but they do forbid discrimination on the basis of the sex of a person with whom an individual "is known or believed to have a relationship or association." 80 Fed. Reg. at 54220 [§ 92.209]. Thus, notwithstanding the absence of any determination by OCR in the preamble, and OCR's apparent decision not to adopt a *per se* prohibition on sexual orientation discrimination, the quoted language appears to protect relationships, including presumably sexual relationships, between persons of the same sex. That, at least, is one reading. And it seems a plausible reading given that the EEOC decision cited by OCR relied on, among other things, associational rights in finding that Title VII forbids sexual orientation discrimination.

If that is the reading *intended* by OCR, then the proposed regulations, we submit, would accomplish indirectly what the government lacks the statutory authority to do directly, namely treat sexual orientation as a protected class. As OCR correctly acknowledges (80 Fed. Reg. at 54176), no federal appellate court has interpreted Title IX's ban on sex discrimination to protect same-sex relationships or conduct. Likewise, Title VII, even if relevant, says nothing about same-sex relationships or conduct, and federal courts of appeals have uniformly held that Title VII does not forbid discrimination on the basis of "sexual orientation."[18] The EEOC's decision

[18] *Larson* v. *United Air Lines*, 482 Fed. App'x 344, 348 n.1 (10th Cir. 2012); *Gilbert* v. *Country Music Ass'n*, 432 Fed. App'x 516, 520 (6th Cir. 2011); *Pagan* v. *Gonzalez*, 430 Fed. App'x 170, 171-72 (3d Cir. 2011); *Dawson* v. *Bumble & Bumble*, 398 F.3d 211, 217-18 (2d Cir. 2005); *Osborne* v. *Gordon & Schwenkmeyer Corp*., 10 Fed. App'x 554, 554 (9th Cir. 2001); *Richardson* v. *BFI Waste Sys.*, 2000 WL 1272455, *1 (5th Cir. Aug. 15, 2000); *Hamner* v. *St. Vincent Hospital & Health Care Center, Inc*., 224 F.3d 701, 704, 707 (7th Cir. 2000); *Higgins* v. *New Balance Athletic Shoe*, 194 F.3d 252, 259 (1st Cir. 1999); *Hopkins* v. *Baltimore Gas & Elec. Co*., 77 F.3d 745, 751-

to the contrary—unsupported by statutory text, legislative history, or case law—is clearly an aberration, and therefore does not provide a justification for construing sex discrimination to include sexual orientation discrimination.

That Section 1557 does not bar sexual orientation discrimination in federal health programs is also evident from the introduction in the current Congress of the Equality Act. If enacted, the Equality Act would, among other things, prohibit sexual orientation discrimination by health care providers and in programs (including health programs) that receive federal funds. No such proposal would have been made in the current Congress if federal law already included such a prohibition. Non-enactment of the Equality Act and similar bills "is strong evidence of congressional intent in the face of consistent judicial decisions refusing to interpret 'sex' to include sexual orientation." *Simonton* v. *Runyon*, 232 F.3d 33, 35 (2d Cir. 2000).

OCR's duty is not to ensure "robust … protections" or to implement its own "policy" preferences with respect to sexual orientation (80 Fed. Reg. at 54176-77), but to carry out the statute. ACA, § 1557(c) ("The Secretary may promulgate regulations *to implement this section*.") (emphasis added). Accordingly, consistent with the great weight of authority, the final regulations should state that Section 1557 does not forbid discrimination on the basis of sexual orientation.

VI. Adverse Impact on Patients

The proposed regulations (80 Fed. Reg. at 54219 [§ 92.206]) state:

> A covered entity shall provide individuals equal access to its health programs or activities without discrimination on the basis of sex, and shall treat individuals consistent with their gender identity, except that any health services that are ordinarily or exclusively available to individuals of one gender may not be denied or limited based on the fact that an individual's sex assigned at birth, gender identity, or gender otherwise recorded in a medical record is different from the one to which such health services are ordinarily or exclusively available.

As we have noted, gender identity is not a protected class under Section 1557, and the prohibition against sex discrimination in Title IX that Section 1557 cross-references is not properly construed to include gender identity. In addition, the inclusion of gender identity in a regulation requiring equal access to health services will have an adverse impact on the privacy of patients and, in some cases, interfere with the effective delivery of health services.

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52 & n.3 (4th Cir. 1996); *Williamson* v. *A.G. Edwards and Sons*, 876 F.2d 69, 70 (8th Cir. 1989); *Blum* v. *Gulf Oil Corp*., 597 F.2d 936, 938 (5th Cir. 1979) (binding on the Eleventh Circuit, as well as the Fifth, because it was decided before October 1, 1981, as held in *Bonner* v. *City of Prichard*, 661 F.2d 1206 (11th Cir. 1981)). The case law often does not differentiate between same-sex attraction and same-sex conduct; none of the cited cases affirmatively suggests that either sexual attraction or sexual conduct is protected under Title VII.

Being a biological male or female has especially important consequences in the delivery of health services because such services pertain to the health of the human *body*, which by its very nature is male or female. Just as a health care provider may, for the sake of patient privacy or for therapeutic reasons, lawfully consider an applicant's or employee's sex in making employment decisions,[19] a patient's biological sex is often relevant and properly considered in the delivery of health services. For example, the residents of a health care facility such as a nursing home have a privacy interest in not being required to share a bedroom with a member of the opposite sex to whom they are not married.[20] Likewise, some health care services are rendered more effective when provided to persons of the same sex. For example, a psychologist providing group therapy to female rape victims should not be required to admit as a patient into those group therapy sessions an individual who is male but "identifies" as female. Otherwise therapeutic outcomes that are achieved by limiting such sessions to biological women would be compromised.

For these reasons, OCR should delete references to gender identity from the final regulations.

VII. Religious Convictions and the Title IX Exemption

Congress could have enacted a law that simply prohibited sex discrimination in health programs and activities that receive federal financial assistance. Had that been the intent, in straightforward fashion Congress would have adopted such language. But it did not. Instead, Congress enacted as part of ACA a provision (Section 1557) that bars discrimination in federally funded health programs and activities on grounds prohibited *under Title IX*.

The adoption-by-reference of Title IX was not accidental or meaningless, but shows that Congress intended the prohibition on sex discrimination in federal health program and activities to track that of Title IX. Otherwise there would have been no reason to reference that title.

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[19] *See, e.g.*, *Healey* v. *Southwood Psychiatric Hosp.*, 78 F.3d 128 (3d Cir. 1996) (assigning female child care specialist to night shift was not unlawful because the presence of both males and females on all shifts was necessary to meet the therapeutic and privacy needs of a mixed-sex patient population of children and adolescents in a psychiatric hospital); *Jones* v. *Hinds Gen. Hosp.*, 666 F. Supp. 933 (S.D. Miss. 1987) (male patients in a hospital have a right to a hospital orderly who is male); *Local 567* v. *Michigan Council*, 635 F. Supp. 1010 (E.D. Mich. 1986) (patients in a state mental hospital have a right to a personal hygiene aide of the same sex); *Backus* v. *Baptist Med. Ctr.*, 510 F. Supp. 1191 (E.D. Ark. 1981) (ob-gyn patients have a privacy right to an obstetrical nurse who is female), *vacated as moot*, 671 F.2d 1100 (8th Cir. 1982); *Fesel* v. *Masonic Home of Delaware*, 447 F. Supp. 1346 (D. Del. 1978) (female residents of a retirement home have a right to a nursing aide who is female). In each of the cited cases, patient privacy interests prevailed over a claim of sex discrimination.

[20] A similar problem occurs with respect to bathrooms and locker rooms. OCR states in the preamble that health care providers may offer *separate* bathrooms and locker rooms. 80 Fed. Reg. at 54181 ("HHS does not propose to prohibit separate toilet, locker room, and shower facilities where comparable facilities are provided to individuals, regardless of sex."). But it is unclear whether, by this statement, OCR means separate in the sense of limiting access to biological men and women. In any event, the proposed regulations themselves are silent on the issue.

Title IX's prohibition on sex discrimination (20 U.S.C. § 1681), in turn, has crucial exceptions. In particular, Title IX's prohibition on sex discrimination does not apply to an educational institution that is controlled by a religious organization if its application would not be consistent with the organization's religious tenets.

Tellingly, for *other* prohibited areas of discrimination (race, color, national origin, age and disability), OCR *has* incorporated existing exceptions into its interpretation of Section 1557.[21] But not so with respect to sex discrimination. Indeed, *none* of the exceptions set forth in Title IX or its implementing regulations are carried over in the proposed regulations. Even though Title IX is replete with exceptions, including a very broad religious exception, OCR's proposed ban on sex discrimination has no exception. Given Congress's intent that the prohibition on sex discrimination in federally-funded health programs and activities be modeled on Title IX, this omission cannot be justified.

Since Congress decided to incorporate Title IX's prohibition on sex discrimination in Section 1557, Title IX is controlling. And since Title IX has a religious exemption, the regulations implementing Section 1557 must have one too. Indeed, OCR says that it wants "to ensure that the rule has the proper scope and appropriately protects sincerely held religious beliefs to the extent that those beliefs conflict with provisions of the regulation." 80 Fed. Reg. at 54173. But the regulations themselves propose no such protection. They should. And the exemption should be at least as broad as that set forth in Title IX (though, obviously, not limited to the educational setting).

The need to adopt a religious exception is also supported by other federal law. As OCR recognizes, "certain [legal] protections" for religious convictions "already exist" (80 Fed. Reg. at 54173), including the Religious Freedom Restoration Act ("RFRA"). The case for accommodation under RFRA is strong, as demonstrated below, but requiring case-by-case litigation of religious accommodation claims under RFRA would be an unnecessary drain on the government's own resources. *Cf.* note 16 and accompanying text, *supra* (noting the protracted and still-ongoing RFRA litigation that has resulted from the contraceptive mandate). Further, RFRA's case-by-case nature makes it an unsuitable vehicle to alone protect the free exercise interests of religious organizations. OCR can prevent such unfairness by adopting a religious exemption in the regulations themselves.

Failure to adopt such an exemption means the government will face (and likely lose) numerous challenges under RFRA. RFRA forbids the federal government to substantially burden the exercise of religion, even if the burden results from a rule of general applicability, unless the burden furthers a compelling government interest by the means least restrictive of religious exercise. 42 U.S.C. § 2000bb-1. A substantial burden occurs if a condition on the availability of a federal financial assistance "forc[es] [an institution] to choose between

[21] 80 Fed. Reg. 54218 [§ 92.101(c)] ("The exceptions applicable to Title VI apply to discrimination on the basis of race, color, or national origin under this part. The exceptions applicable to Section 504 apply to discrimination on the basis of disability under this part. The exceptions applicable to the Age Act apply to discrimination on the basis of age under this part.").

following the precepts of [its] religion and forfeiting [federal funding], on the one hand, and abandoning one of the precepts of [its] religion in order to [qualify for federal funding], on the other hand…" *Sherbert* v. *Verner*, 374 U.S. 398, 404 (1963), quoted in Office of Legal Counsel, Memorandum Opinion, "Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juvenile Justice and Delinquency Act," at 12 (June 29, 2007).[22] Indeed, in such a case, the government has "put[] the same kind of burden upon the free exercise of religion as would a fine imposed against [the institution] for [its exercise of religion]." *Id*.

Once a substantial burden is demonstrated, the government bears the burden of proving that its action is the least restrictive means of furthering a compelling government interest. 42 U.S.C. § 2000bb-1(b). This standard has teeth. A "broadly formulated interest" does not suffice for purposes of demonstrating a compelling interest. *Holt* v. *Hobbs*, 135 S. Ct. 853, 863 (2015). Instead, the government must prove that its action furthers a compelling interest as applied to the *specific* individuals or organizations whose religious convictions are thereby burdened. *Id*. at 863. The least-restrictive-means standard, in turn, is "exceptionally demanding" and requires the government to show "that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting party." *Id*. at 864. "If a less restrictive means is available for the Government to achieve its goals, the Government must use it." *Id*. (brackets omitted).

The regulations proposed by OCR will substantially burden religious exercise. The burden is not justified by a compelling interest, and any legitimate government interest, if there is one, can be furthered by less restrictive alternatives.

Three examples suffice.

First, absent clarification, the proposed regulations could be read to require the provision of, and coverage or referral for, abortion. So read, the regulations would condition the availability of federal financial assistance on the performance of acts that violate the religious beliefs of various stakeholders with respect to the sanctity of human life. OCR has *no* interest, let alone a compelling one, in requiring the provision and coverage of abortion, especially when Congress, as noted above, has affirmatively and repeatedly protected decisions not to provide or cover abortion.

Second, the proposed regulations will force employers to include services related to gender transition in the health coverage they offer to their employees. Thus, the regulations would condition the availability of federal financial assistance on the performance of acts that conflict with religious convictions about the sexual differences between men and women. Because Congress has not required such coverage, it is not clear to us that any legitimate interest could be claimed by OCR, let alone that it could demonstrate a compelling interest furthered by means least restrictive of religious liberty.[23]

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[22] Available at http://www.justice.gov/sites/default/files/olc/opinions/2007/06/31/worldvision_0.pdf.

[23] Here too the Church amendment is relevant. The amendment provides that no individual shall be required to perform or assist in the performance of any part of a health care service program or research activity funded in

Third, the proposed regulations will require nondiscrimination on the basis of gender identity, and on the basis of the sex of a person with whom the patient associates (including, presumably, one with whom the patient has a sexual relationship). Thus, the regulations will condition the availability of federal financial assistance on the performance of counseling services that may conflict with a therapist's own religious beliefs about sexual difference and sexual relations. A therapist, on the one hand, may believe that a patient's self-reported problems are actually *caused* by, or associated with, lack of acceptance of his or her own biological sex, or by a sexual relationship that is immoral and therefore destructive to the patient. The patient, on the other hand, may be looking for *affirmation* of a choice to identify as a man (though born a woman) or woman (though born a man), or of a sexual relationship with a person of the same sex. In such circumstances, when the moral presuppositions of therapist and patient are so fundamentally at odds, it is not clear what legitimate interest (let alone what compelling interest) the government could assert in requiring a counseling relationship between that particular therapist and patient.[24] Indeed, it is not clear how the *patient* would be served in such circumstances. Requiring a therapist to abandon his or her religious and moral convictions as a condition of engaging in therapy would obviously imperil his or her livelihood, burdening religious exercise and raising serious questions with respect to rights of association and speech.[25]

These examples are not meant to be exhaustive. Our underlying point is that the proposed regulations present a number of opportunities for conflict with religious beliefs, and that OCR's protection of religious liberty should not be relegated to case-by-case litigation under RFRA. OCR, instead, should adopt a proper religious exemption as required by Section 1557. Title IX has one, and the regulations must have one as well, at least as broad as the one in Title IX.

For these reasons, we recommend that the final regulations adopt the following provision, which tracks Title IX:

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whole or in part under a program administered by the Secretary of HHS if the performance or assistance in such part of such program or activity would be contrary to his or her religious or moral beliefs. 42 U.S.C. § 300a-7(d). Thus, an individual's decision on religious or moral grounds not to provide or assist in providing services related to gender transition, in a program or activity funded in whole or in part under an HHS-administered program, is legally protected. HHS has not stated, and in our view cannot state, a legitimate (let alone compelling) government interest in overriding a stakeholder's religious or moral objection to providing coverage for gender transition services, when it is required by Congress to fully respect objections to performing or assisting in the performance of these same services in all programs that receive its funds.

[24] *See*, *e.g.*, *Ward* v. *Polite*, 667 F.3d 727 (6th Cir. 2012) (state university lacked a compelling interest in excluding from its graduate counseling program a student who, for religious reasons, requested referral of a homosexual client to another counselor). Naturally there may be many reasons why a therapist might legitimately decline to offer his or her services to a particular client. A reason for doing so is no less legitimate because it is faith-based.

[25] Of course, some counselors hold themselves out expressly as providing counseling from the viewpoint of a particular faith tradition, a fact that many prospective and actual patients who share that tradition will find attractive and beneficial.

RELIGIOUS ORGANIZATIONS WITH CONTRARY RELIGIOUS TENETS. The prohibition on sex discrimination shall not apply to a religious organization if such application would not be consistent with the religious tenets of such organization.[26]

VIII. Administrative Procedure Act

The regulations are in direct conflict, and are otherwise inconsistent, with federal law, and therefore violate the Administrative Procedure Act. 5 U.S.C. § 706 (authorizing a court to "hold unlawful and set aside agency action[s]" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

Conclusion

When the regulations were first proposed, they were "hailed as groundbreaking."[27] That is a strike *against* them. OCR's task is not to break new ground, but to carry out an Act of Congress. As discussed here, the proposed regulations fail to do that.

We respectfully submit that in the final regulations, OCR: (a) must make clear that Section 1557 does not require the provision of, referral or coverage for, abortion; (b) must not define sex discrimination to include gender identity discrimination; (c) must not require coverage of gender transition services; (d) must revise its overly broad interpretation of sex stereotypes; (e) must clarify that Section 1557 does not forbid discrimination on the basis of sexual orientation; and (f) must include a religious exemption that is at least as broad as the one in Title IX (but without restriction to an educational setting). The exemption, at a minimum, should state that the prohibition on sex discrimination shall not apply to a religious organization if such application would not be consistent with the religious tenets of such organization.

Without these changes, the regulations, for the reasons stated in this letter, are unlikely to survive scrutiny in the courts.

Thank you in advance for your careful consideration of these comments.

[26] For purposes of the regulations, an organization should be regarded as religious if it holds itself out as religious, a criterion that is easily administered and familiar to HHS and to the courts. *E.g.*, 45 C.F.R. § 147.131; *Spencer* v. *World Vision*, 633 F.3d 723, 724 (9th Cir. 2011).

[27] Lena H. Sun & Lenny Bernstein, *U.S. Moves to Protect Women, Transgender People in Health Care*, THE WASH. POST (Sept. 3, 2015), at https://www.washingtonpost.com/national/health-science/us-offers-new-health-rules-to-protect-women-transgender-people-others/2015/09/03/ddf90170-5246-11e5-9812-92d5948a40f8_story.html.

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