ETHICS AND PUBLIC POLICY CENTER

December 2, 2024

Via regulations.gov

Xavier Becerra
Secretary
Department of Health and Human Services
200 Independence Avenue SW
Washington, DC 20201

Re: EPPC Scholars Comment on RIN 0991-AC36—HHS Acquisition Regulation: Regulatory Review (HHSAR Case 2023-002)

Dear Secretary Becerra:

We are scholars at the Ethics and Public Policy Center, and we write in response to the Department of Health and Human Services (HHS) proposed rule "HHS Acquisition Regulation: Regulatory Review."[1] Rachel N. Morrison is an EPPC Fellow, Director of EPPC's HHS Accountability Project, and a former attorney at the Equal Employment Opportunity Commission. Natalie Dodson is a Policy Analyst and member of EPPC's HHS Accountability Project.

HHS is proposing to amend and update its Health and Human Services Acquisition Regulation (HHSAR) by adding, removing, and revising different parts. Several of the parts HHS proposes to revise include nondiscrimination requirements for contractors and the government. These requirements, which we address below, raise questions about what constitutes discrimination on certain bases, such as disability, sex, sexual orientation, and gender identity. HHS's proposal also fails to address the broad constitutional and statutory protections for religious organizations contracting with HHS to make employment decisions based on religion. We ask HHS to clarify the scope of its nondiscrimination requirements consistent with the law and acknowledge constitutional and statutory protections for religious organizations to "ensure[] that Government procurements are handled fairly and consistently, that the Government receives overall best value, and that the Government and contractors both operate under a known set of rules."[2]

I. Disability Discrimination Requirements

Several of the regulations prohibit disability discrimination. For example, proposed 48 CFR 311.7100 (incorporated into proposed 48 CFR 311.7102) requires contractors to conduct events in public accommodations and commercial facilities in a way that complies with nondiscrimination on the basis of disability, including "physical access to public accommodations and commercial facilities." Proposed 48

[1] 89 Fed. Reg. 80634 (Oct. 3, 2024), https://www.federalregister.gov/documents/2024/10/03/2024-17095/hhs-acquisition-regulation-regulatory-review.
[2] *Id.* at 80634.

CFR 311.7102 requires that the above clause be inserted into "solicitations, contracts, and orders requiring the contractor to conduct events in accordance with 311.7100(b)."

Next, proposed 48 CFR 337.7004 states: "It is the policy of the HHS that no person otherwise eligible will be excluded from participation in, denied the benefits of, or subjected to discrimination in the administration of HHS programs and services based on non-merit factors such as … disability (physical or mental)." It further states that "Contracting officers shall ensure the requirements of clause 352.237-74 are flowed down to subcontractors at any tier." Proposed clause 352.237-74 on non-discrimination in service delivery repeats HHS's nondiscrimination policy, states that the contractor agrees to comply with the policy, including by ensuring that its employees and any subcontractor staff comply, and requires the contractor to ensure that the policy requirements and compliance flow down to any subcontractors. Per proposed 48 CFR 337.7006, the clause shall be inserted "in solicitations, contracts, and orders involving delivery of services under HHS' programs directly to the public."

Finally, proposed 48 CFR 322.808 requires contractors to comply and cooperate with HHS investigations of disability discrimination and harassment.

We support disability nondiscrimination requirements rightly understood. HHS, however, has unlawfully claimed that "gender dysphoria" can be a qualifying disability under disability discrimination laws, such as in its recently finalized disability discrimination rule.[3] In just September, a coalition of 17 states sued HHS over its unlawful extension of disability nondiscrimination protections to gender dysphoria. *See* Complaint at 2, *Texas v. Becerra*, No. 24-225 (N.D. Tex., Sept. 26, 2024) ("The Final Rule's stipulation that gender dysphoria 'may be a disability' is contrary to the express language in the Rehabilitation Act and the ADA, and the Court should set aside the Final Rule, enjoin Defendants from enforcing or implementing it, and declare it unlawful.").[4]

Does the Department adopt the same position that gender dysphoria may be a qualifying disability for purposes of these regulations? Such a position would be inconsistent with 28 CFR 36, incorporated into 48 CFR 311.7100 (48 CFR 311.7102 incorporates 48 CFR 311.7100), which excludes gender identity disorders from the definition of disability, acknowledges that sex is binary, and recognizes sex-specific spaces. *See, e.g.*, 28 CFR 36.105(g)(1)("The term "disability" does not include—Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders"); 28 CFR 36.403(g)((2)(iii) ("At least one accessible restroom for each sex or a single unisex restroom"); Appendix B, 213, 603, 604, and 608 Toilet and Bathing Facilities, Rooms, and Compartments, Discussion of Toilet and Bathing Rooms (recognizing "the opposite sex" and existence of "separate sex facilities"); Appendix C, Section 36.403 Alterations: Path of Travel ("at least one accessible restroom for each sex or a single unisex restroom").

As explained below, gender dysphoria is not a qualifying disability under federal disability nondiscrimination laws, and extending disability protections to gender dysphoria raises many issues. The

[3] HHS, Nondiscrimination on the Basis of Disability in Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 40066 (May 9, 2024), https://www.federalregister.gov/documents/2024/05/09/2024-09237/nondiscrimination-on-the-basis-of-disability-in-programs-or-activities-receiving-federal-financial.
[4] https://www.texasattorneygeneral.gov/sites/default/files/images/press/HHS%20Rehabilitation%20Act%20Complaint%20Filestamped.pdf.

Department should clarify that the disability discrimination obligations under these regulations do not extend to gender dysphoria.

A. Gender dysphoria is not a qualifying disability.

Despite HHS' claims that persons diagnosed with "gender dysphoria" may now assert rights and bring claims under Section 504 of the Rehabilitation Act and the Americans with Disabilities Act (ADA),[5] gender dysphoria is not a qualifying disability under either Section 504 or the ADA. Most notably, both the Rehabilitation Act and the ADA explicitly excluded from the definition of disability "transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders."[6]

Gender dysphoria is a gender identity disorder. The American Psychiatric Association swapped out the term "gender identity disorder" for the new term "gender dysphoria" when it updated the DSM in 2013. According to The Advocate, "the world's leading source of LGBT news and information," the DSM "replace[d] the diagnostic term 'Gender Identity Disorder' with the term 'Gender Dysphoria.'"[7] The reason this change was made was to remove the stigma that transgender persons face, not to designate a different condition.; "the new term implies a temporary mental state rather than an all-encompassing disorder, a change that helps remove the stigma transgender people face by being labeled 'disordered.'"[8]

HHS's reliance on the split Fourth Circuit panel decision in *Williams v. Kincaid* is unpersuasive.[9] HHS's analysis of the opinion of its disability discrimination rule appears to be driven more by its ideological commitment to LBGTQI+ rights than its constitutional duties and its statutory obligations under the ADA and the Administrative Procedure Act.

More importantly, one circuit court decision, especially a poorly reasoned one, does not make the law. Importantly, the Supreme Court has never held that Section 504 covers gender dysphoria.

As our EPPC colleague Ed Whelan explained, the Fourth Circuit's divided opinion "eviscerated" the statutory exclusion.[10] He noted that the majority opinion claims that "gender dysphoria is categorically *not* a 'gender identity disorder' at all" because "when the ADA was enacted in 1990, the concept of 'gender identity disorders' did not include gender dysphoria."

> By [Judge] Motz's illogic, the fact that the American Psychiatric Association removed "gender identity disorders" from its revised diagnostic manual in 2013 and substituted a narrower diagnosis of "gender dysphoria" somehow means that gender dysphoria is not a "gender identity disorder" under the ADA.[11]

As Whelan showed, Judge Marvin Quattlebaum's dissent shows the illogic of the panel majority's analysis:

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[5] 89 Fed Reg. at 40066.
[6] 29 U.S.C. § 705(20)(F); 42 U.S.C. § 12211.
[7] Camille Beredjick, *DSM-V To Rename Gender Identity Disorder 'Gender Dysphoria'*, The Advocate, July 12, 2012, https://www.advocate.com/politics/transgender/2012/07/23/dsm-replaces-gender-identity-disorder-gender-dysphoria.
[8] *Id*.
[9] 45 F.4th 759 (4th Cir. 2022), *cert. denied*, 600 U.S. ___ (U.S. June 30, 2023) (No. 22-633).
[10] Ed Whelan, *Fourth Circuit's Transgender Dysphoria*, National Review, Aug. 17, 2022, https://www.nationalreview.com/bench-memos/fourth-circuits-transgender-dysphoria/.
[11] *Id.*

> But as Judge Marvin Quattlebaum explains in dissent (slip op. at 38-47), the gender dysphoria that [plaintiff] Williams alleges—"discomfort or distress that is caused by a discrepancy between a person's gender identity and that person's sex assigned at birth (and the associated gender role and/or primary and secondary sex characteristics)"—"falls precisely under the [American Psychiatric Association's] description of, and diagnostic criteria for, gender identity disorders" in its diagnostic manual in effect in 1990. Indeed, Quattlebaum shows more broadly that "[f]rom 1990 to today, gender identity disorder has been understood to include distress and discomfort from identifying as a gender different from the gender assigned at birth."
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> What's more, a gender identity disorder wouldn't even fall within the general definition of an ADA "disability" in the first place unless it resulted in an "impairment that substantially limits one or more major life activities of [an] individual." So it's precisely because the subcategory of gender dysphoria involves "clinically significant stress" that the exclusion comes into play.
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> Second, Motz maintains that even if gender dysphoria is a gender identity disorder under the ADA, Williams's complaint can plausibly be read to support the inference that his gender disorder "result[ed] from physical impairments." (Slip op. at 15-20.) But as Quattlebaum objects, the complaint does not identify any part of Williams's body that is impaired or even alleges any physical impairment. (Slip op. at 50-53.)

After the Supreme Court declined the petition for certiorari in the case, Whelan highlighted portions of Justice Alito's dissent from denial, which itself draws on Judge Marvin Quattlebaum's dissent.[12]

This is not the first time the Biden-Harris administration has falsely claimed that gender dysphoria counts as a disability. Even before the Fourth Circuit decided *Kincaid*, DOJ's Civil Rights Division sent a letter to States Attorneys General on March 31, 2022, which stated:

> **Section 504 of the Rehabilitation Act of 1973** protects people with disabilities, which can include individuals who experience gender dysphoria. Restrictions that prevent, limit, or interfere with otherwise qualified individuals' access to care due to their gender dysphoria, gender dysphoria diagnosis, or perception of gender dysphoria may violate Section 504.[13]

Shockingly, the letter failed to note that Congress specifically excluded "gender identity disorders not resulting from physical impairments, or other sexual behavior disorders" from the definition of disability under Section 504.

As one of us noted at the time, "At best, the DOJ was sloppy with the letter's medical claims and legal analysis in the administration's rush to push gender ideology. At worst, the letter was a deliberate attempt to obfuscate the limits of gender medicine and the law in an attempt to 'encourage' state attorneys general to push the Biden administration's preferred policies over legal obligations."[14]

HHS should not repeat the same errors here.

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[12] Ed Whelan, *Fourth Circuit's Transgender Dysphoria Evades Supreme Court Review*, National Review, July 3, 2023, https://www.nationalreview.com/bench-memos/fourth-circuits-transgender-dysphoria-evades-supreme-court-review/.

[13] DOJ, Civil Rights Division, Letter to State Attorneys General, Mar. 31, 2022, https://www.justice.gov/opa/press-release/file/1489066/download.

[14] Rachel N. Morrison, *Biden DOJ Letter Pushes Transgender Misinformation and Implies Gender Dysphoria Is a Disability*, National Review, May 13, 2022, https://www.nationalreview.com/bench-memos/biden-doj-letter-pushes-transgender-misinformation-and-implies-gender-dysphoria-is-a-disability/.

B. Extending disability protections to gender dysphoria raises many concerns.

Prohibiting discrimination on the basis of gender dysphoria could be interpreted as requiring doctors to provide insurance to cover medical interventions for gender dysphoria, including for minors. Gender dysphoria nondiscrimination claims have also extended to self-selected pronouns and access to sex-specific spaces based on identity, not biology. These applications raise many concerns.

First, interpreting gender dysphoria as a protected disability results in a situation where the Biden-Harris HHS's favored—and sometimes mandated—treatments for gender dysphoria render patients *permanently* disabled. HHS, under the Biden-Harris administration, has claimed that it is "medically necessary" that people with gender dysphoria, including children, have access to so-called "gender-affirming care," such as puberty blockers, cross-sex hormones, and so-called "gender-affirming surgeries."[15]

As we have explained to HHS and other federal agencies in other public comments, what HHS calls "gender-affirming care" can have profound and permanent effects on the human body, which is one important reason why clinicians have increasingly been raising concerns over these gender-transition interventions.[16] In short, "gender-affirming care"—including puberty blockers, cross-sex hormones, and surgical interventions—can render a patient permanently sterile and impair sexual function.

This is relevant because HHS has defined disability to include a physical or mental impairment that substantially limits an individual's major life activities, including his or her reproductive system.[17] HHS has also stated that "anatomical loss affecting one or more body systems" also renders one disabled.[18]

It thus seems that under HHS' interpretation of federal law, people with gender dysphoria are "disabled" under Section 504 and the ADA; *and* the "medically necessary" treatment for this "disability" *also* renders patients disabled under Section 504 and the ADA. We are unaware of any other situation

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[15] *See, e.g.* HHS, Nondiscrimination in Health Programs and Activities, 89 Fed. Reg. 37522, 37535, 37672 (May 6, 2024), https://www.federalregister.gov/documents/2024/05/06/2024-08711/nondiscrimination-in-health-programs-and-activities; Office for Civil Rights, U.S. Dep't Health & Hum. Servs., HHS Notice and Guidance on Gender Affirming Care, Civil Rights, and Patient Privacy 1 (Mar. 2, 2022), https://www.hhs.gov/sites/default/files/hhs-ocr-notice-and-guidance-gender-affirming-care.pdf/; Office of Population Affairs, U.S. Dep't Health & Hum. Servs., Gender Affirming Care and Young People (Mar. 2022), https://opa.hhs.gov/sites/default/files/2023-08/gender-affirming-care-young-people.pdf.

[16] *See, e.g.*, EPPC Scholars Comment Opposing "Nondiscrimination in Health Programs and Activities," RIN 0945-AA17 (Oct. 3, 2022), https://eppc.org/wp-content/uploads/2022/10/EPPC-Scholars-Comment-Opposing-1557-Proposed-Rule.pdf; EPPC Scholars Comment Opposing "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," RIN 1870-AA16, Docket ID ED-2021-OCR-0166 (Sept. 12, 2022), https://eppc.org/wp-content/uploads/2022/09/EPPC-Scholars-Comment-Opposing-Title-IX-Proposed-Rule.pdf; *see also* Brief of Amicus Curiae Ethics and Public Policy Center in Support of Petitioners, *Folwell v. Kadel*, No. 24-99 (U.S., Aug. 29, 2024), https://eppc.org/wp-content/uploads/2024/09/Kadel-EPPC-Amicus.pdf (arguing "there is not, and never has been, medical consensus regarding treatment for gender dysphoria," "gender-transitioning interventions cause serious harms," and "recent disclosures reveal WPATH is an ideological organization with no claim to represent medical consensus").

[17] HHS, Nondiscrimination on the Basis of Disability in Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 40066, 40067-68 (May 9, 2024), https://www.federalregister.gov/documents/2024/05/09/2024-09237/nondiscrimination-on-the-basis-of-disability-in-programs-or-activities-receiving-federal-financial (describing §84.4)); *id.* at 40180 ("'Major life activities include . . . the operation of a major bodily function such as . . . reproductive systems").

[18] *Id*. at 40068.

where HHS has mandated a course of treatment that renders a patient—either invariably or necessarily—"disabled" under its understanding of federal law.

Second, regarding pronouns, this raises many questions about the scope of its application, such as whether contractors must police pronoun usage by employees, customers, and beneficiaries. A pronoun mandate also raises free speech and religious liberty concerns. These concerns are discussed more below in the sections on gender identity discrimination and protections for religious organizations.

Third, requiring access to sex-specific spaces in public accommodations and commercial facilities based on a gender dysphoria diagnosis, not biology, raises privacy and safety concerns and conflicting obligations under sex discrimination laws.

In short, HHS should clarify that disability nondiscrimination requirements in these regulations *do not* extend to gender dysphoria. But if not, HHS should explain what nondiscrimination on the basis of gender dysphoria entails, address the above concerns, and explain how those requirements comport with constitutional and statutory protections for free speech and religious freedom.

II. Sexual Orientation and Gender Identity Discrimination Requirements

Several of the proposed regulations prohibit sexual orientation and gender identity discrimination. For example, proposed 48 CFR 322.808 and 322.810 require contractors to comply and cooperate with HHS investigations of sexual orientation and gender identity discrimination and harassment. Proposed 48 CFR 337.7004 states: "It is the policy of the HHS that no person otherwise eligible will be excluded from participation in, denied the benefits of, or subjected to discrimination in the administration of HHS programs and services based on non-merit factors such as … gender identity [and] sexual orientation…." This policy is repeated in proposed 48 CFR 352.237-74, which requires contractors to comply with the policy, including by ensuring compliance by its employees and any subcontractors.

HHS does not elaborate on what constitutes discrimination and harassment based on sexual orientation and gender identity under these regulations. But HHS and other agencies have taken an expansive view, claiming in guidances and rules that it is discrimination or harassment to "misgender" someone, not allow access to sex-specific spaces based on identity, not provide medical interventions to support a "gender transition," and not cover such interventions in an employer-sponsored insurance plan.[19]

Does the Department adopt a similar interpretation?

Outside the narrow context of *Bostock*, HHS should drop its sexual orientation and gender identity nondiscrimination and harassment requirements. As discussed below, no federal civil rights law passed by Congress prohibits discrimination based on sexual orientation or gender identity. Nevertheless, the Biden-

[19] *See, e.g.*, Office for Civil Rights, HHS, 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; HHS, Nondiscrimination in Health Programs and Activities, 89 Fed. Reg. 37522 (May 6, 2024), https://www.federalregister.gov/documents/2024/05/06/2024-08711/nondiscrimination-in-health-programs-and-activities; EEOC, Enforcement Guidance on Harassment in the Workplace (Apr. 29, 2024), https://www.eeoc.gov/laws/guidance/enforcement-guidance-harassment-workplace; Dep't of Educ., Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 33,474 (Apr. 29, 2024), https://www.federalregister.gov/documents/2024/04/29/2024-07915/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal. Notably, as discussed below, these guidances and rules have been enjoyed by many federal courts.

Harris administration and HHS have gone beyond *Bostock*'s limited holding to impose broad sexual orientation and gender identity mandates, which have been enjoined by many federal courts. Sexual orientation and gender identity nondiscrimination obligations also raise free speech, religious liberty, and other concerns that the agency must consider.

A. Congress has not imposed a sexual orientation or gender identity nondiscrimination mandate.

Congress has never made gender identity, sexual orientation, or transgender status-protected EEO categories. Indeed, there have been multiple attempts to include gender identity, sexual orientation, or transgender status as a protected basis in civil rights laws, but all these efforts have failed.[20]

Title VII prohibits discrimination in employment on the basis of *sex*. As discussed below, *Bostock* did not change that. Congress also refused to give the Equal Employment Opportunity Commission (EEOC) substantive rulemaking authority under Title VII, meaning that none of its guidances, especially those that go beyond Title VII's text and the Supreme Court's direction in *Bostock v. Clayton County*, have the force and effect of law. As discussed below, these guidances have been enjoined by federal courts for going beyond Title VII, *Bostock*, and the EEOC's authority.

Further, President Biden's pro-LGBT executive orders and policy priorities cannot make gender identity, sexual orientation, or transgender status a protected nondiscrimination basis. The branch tasked with making laws is the legislature, not the executive.

B. Bostock was a limited holding.

The Supreme Court's decision in *Bostock* was limited. The Court did not hold that Title VII (or any other law) bars discrimination (or harassment) on the basis of gender identity. To the extent that the Court addressed sexual orientation and transgender status, its decision was limited to hiring and firing (not harassment) and was based on consideration of the employee's sex.

In *Bostock*, the Court held that under Title VII, "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.'"[21] While the Court used the terms "sexual orientation" and "transgender status" (not "gender identity") throughout its opinion,[22] it made clear that it was the employees' sex, not their

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[20] *See, e.g.*, S.788 - 116th Congress (2019-2020): Equality Act, S.788, 116th Cong. (2019), https://www.congress.gov/bill/116th-congress/senate-bill/788; S.393 - 117th Congress (2021-2022): Equality Act, S.393, 117th Cong. (2021), https://www.congress.gov/bill/117th-congress/senate-bill/393; Text - H.R.15 - 118th Congress (2023-2024): Equality Act, H.R.15, 118th Cong. (2023), https://www.congress.gov/bill/118th-congress/house-bill/15/text.

[21] *Bostock v. Clayton County,* 590 U.S. 644, 681 (2020).

[22] The *Bostock* majority uses the term "gender identity" only once, as then only as a descriptor of what the employees in the case argued and an argument that was not relevant for the Court's decision:

> The employees . . . submit[] that, even in 1964, the term [sex] . . . captur[ed] more than anatomy and reaching at least some norms concerning gender identity and sexual orientation. But because nothing in our approach to these cases turns on the outcome of the parties' debate, and because the employees concede the point for argument's sake, we proceed on the assumption that "sex" signified what the employers suggest, referring only to biological distinctions between male and female.

Id. at 656.

sexual orientation or transgender status, that must be the "but-for cause" of an employer's adverse action.[23]

Bostock was premised on the assumption that "sex" refers "only to biological distinctions between male and female."[24] The Court held Title VII is violated: "[i]f the employer intentionally relies in part on an individual employee's sex when deciding to discharge the employee—put differently if changing the employee's sex would have yielded a different choice by the employer."[25] For example:

> [T]ake an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth.[26]

Reading "gender identity" into *Bostock* is fundamentally incompatible with the decision. *Bostock* assumed sex is biological and binary and premised its holding on the assumption that "sex" refers only to the "biological distinctions between male and female."[27] Sex as a biological binary is incompatible with the notion that each person can self-proclaim a "gender identity" that is fluid or along a spectrum.

In short, *Bostock* did not adopt "gender identity" as a protected class or category and did not support broad claims of "sexual orientation" and "transgender status" discrimination without regard for the employee's sex.[28]

Further, the Court explained that it was only addressing hiring and firing under Title VII and was not addressing a "broader scope" of conduct, such as "bathrooms, locker rooms, or anything else of the kind."[29] Addressing concerns that its decision would "sweep beyond Title VII to other federal or state laws that prohibit sex discrimination," the Court explained that it would "not prejudge" any such concerns because "none of th[o]se other laws [we]re before [them]."[30] As one federal district court explained, *Bostock*'s holding was cabined to "homosexuality and transgender *status*"; it does not extend to "correlated *conduct*—specifically, the sex-specific: (1) dress; (2) bathroom; (3) pronoun; and (4) healthcare practices."[31] Likewise, *Bostock* did not address harassment.

In sum, HHS cannot rely on *Bostock* to support its regulations imposing broad sexual orientation and gender identity nondiscrimination requirements.

C. Biden-Harris Administration's and HHS's broad *Bostock* interpretations have been enjoined by federal courts.

The Biden-Harris Administration's expansive interpretation and application of *Bostock* has been enjoined or vacated by numerous federal courts in different contexts.

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[23] *Id.* at 660.
[24] *Id.* at 656.
[25] *Id.* at 659-60.
[26] *Id.* at 660.
[27] *Id*. at 656.
[28] *Id.* at 661 ("to discriminate on [homosexuality or transgender status] grounds requires an employer to intentionally treat individual employees differently because of their sex").
[29] *Id*. at 655, 681.
[30] *Id.* at 681.
[31] *Texas v. EEOC*, No. 21-194, at *4 (N.D. Tex. Oct. 1, 2022).

EEOC Bostock Guidance. On the one-year anniversary of *Bostock*, the EEOC Chair unilaterally issued guidance purportedly on what *Bostock* means for gender identity and sexual orientation discrimination in employment, including applications to employee conduct like dress, sex-specific bathrooms, and self-selected pronouns.[32] Although the EEOC claimed its guidance was "intended only to provide clarity to the public regarding existing requirement under law,"[33] federal courts have disagreed. Within months of the guidance being released, two federal courts held the guidance was unlawful.[34]

EEOC Harassment Guidance. EEOC issued harassment guidance that does "not have the force and effect of law and is not meant to bind the public in any way" but is meant to "provide clarity to the public regarding existing requirements under the law or agency policies."[35] Going far beyond *Bostock*, the guidance states that "[s]ex-based discrimination under Title VII includes employment discrimination based on … gender identity[,] … including how that identity is expressed."[36] Examples of harassment include: "outing (disclosure of an individual's sexual orientation or gender identity without permission)," "repeated and intentional use of a name or pronoun inconsistent with the individual's known gender identity (misgendering)," and "the denial of access to a bathroom or other sex-segregated facility consistent with the individual's gender identity."[37] This guidance has been enjoined by a federal court.[38]

Title IX Rule. Title IX prohibits discrimination on the basis of sex in federally funded educational programs and activities.[39] The Biden-Harris Department of Education claimed in a final rule that Title IX's prohibition against sex discrimination extends to gender identity and sexual orientation discrimination.[40] This rule is enjoined by many federal courts.[41]

Section 1557 Guidance and Rule. Section 1557 of the Affordable Care Act prohibits discrimination in federally funded healthcare programs and activities on the grounds prohibited under Title IX (i.e., sex).[42]

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[32] EEOC, *Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity* (June 14, 2021), https://www.eeoc.gov/laws/guidance/protections-against-employment-discrimination-based-sexual-orientation-or-gender.
[33] *Id.*
[34] *See Texas v. EEOC*, 633 F. Supp. 3d 824, 831 (N.D. Tex. 2022) (The EEOC "misread[] *Bostock* by melding 'status' and 'conduct' into one catchall protected class covering all conduct correlated to 'sexual orientation' and 'gender identity. Justice Gorsuch expressly did not do that."); *Tennessee v. U.S. Dep't of Educ*., 615 F. Supp. 3d 807 (E.D. Tenn. 2022).
[35] EEOC, Enforcement Guidance on Harassment in the Workplace (Apr. 29, 2024), https://www.eeoc.gov/laws/guidance/enforcement-guidance-harassment-workplace.
[36] *Id.*
[37] *Id.*
[38] *See Cath. Benefits Assoc. v. Burrows*, No. 24-142 (D. N.D. Sept. 23, 2024).
[39] 20 U.S.C. §§ 1681 *et seq.*
[40] Dep't of Educ., Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 33,474 (Apr. 29, 2024), https://www.federalregister.gov/documents/2024/04/29/2024-07915/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal.
[41] *See Alabama v. Cardona*, No. 24-12444 (11th Cir. Aug. 22, 2024); *Texas v. United States*, No. 24-86 (N.D. Tex. July 11, 2024); *Carroll Indep. Sch. Dist. v. U.S. Dep't of Educ.*, No. 24-461 (N.D. Tex. July 11, 2024); *Tennessee v. Cardona*, No. 24-72 (E.D. Ky. June 7, 2024), *app. for partial stay denied*, No. 24A78, 603 U.S. ___ (2024); *Louisiana v. U.S. Dep't of Educ.*, No. 24-563 (W.D. La. June 13, 2024), *app. for partial stay denied*, No. 24A79, 603 U.S. (2024); *Oklahoma v. Cardona*, No. 24-461 (W.D. Okla. July 31, 2024); *Arkansas v. U.S. Dep't of Educ.*, No. 24-636 (E.D. Mo. July 24, 2024); *Kansas v. U.S. Dep't of Educ.*, No. 24-4041 (D. Kan. July 2, 2024); *Texas v. Cardona*, No. 23-604 (N.D. Tex. Aug. 5, 2024) (amended order granting motion for summary judgment).
[42] 42 U.S.C. § 18116 (citing title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq.).

Relying on *Bostock*, the Biden-Harris HHS issued guidance and a final rule claiming that Section 1557 prohibits discrimination based on gender identity and sexual orientation.[43] This guidance and rule have been enjoined by federal courts.[44]

D. A broad interpretation of sexual orientation and gender identity discrimination and harassment raises free speech, religious liberty, and other concerns.

If HHS chooses to maintain sexual orientation and gender identity as protected nondiscrimination bases (it should not), it is far from clear what discrimination and harassment based on these categories would entail.

For instance, HHS issued a final rule claiming that not affirming and supporting a foster child's "LGBTQI+ status or identity" is harassment, mistreatment, and abuse.[45] It would be harassment to not allow a person to present in a way that is consistent with their self-proclaimed gender identity under a sex-specific dress and grooming code.[46] Further, the EEOC claimed in its harassment guidance that gender identity-based harassment includes so-called "misgendering" or the use of biologically accurate sex-based pronouns instead of a person's self-selected pronouns.[47] The Commission has also implied that harassment includes comments that reference a person's birth or legal name (so-called "deadnaming") or even a person's biological sex without consent.[48]

According to both HHS and the EEOC, denial of access to a sex-specific space or activity based on a person's self-declared identity would also be considered harassment.[49]

These nondiscrimination and harassment claims may implicate constitutional and statutory protections for free speech and religious freedom. By implying that discrimination and harassment is prohibited based on sexual orientation and gender identity but not clarifying what constitutes harassment, HHS could unlawfully infringe on or "chill" the free speech and religious freedom rights of employers, employees, contractors, subcontractors, customers, and beneficiaries.

HHS is bound by the First Amendment's Free Speech and Free Exercise Clauses, as well as the Religious Freedom Restoration Act.[50] Title VII prohibits religious discrimination and has religious

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[43] Office for Civil Rights, HHS, 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; HHS, Nondiscrimination in Health Programs and Activities, 89 Fed. Reg. 37522 (May 6, 2024), https://www.federalregister.gov/documents/2024/05/06/2024-08711/nondiscrimination-in-health-programs-and-activities.

[44] *See Texas v. Becerra*, No. 24-211 (E.D. Tex. July 3, 2024); *Tennessee v. Becerra*, No. 24-161 (S.D. Miss. July 3, 2024); *Florida v. HHS*, No. 24-1080 (M.D. Fla. July 3, 2024); *Christian Emps. All. v. EEOC*, No. 21-195 (D. N.D. Mar. 4, 2024).

[45] *See* HHS, Designated Placement Requirements Under Titles IV–E and IV–B for LGBTQI+ Children, 89 Fed. Reg. 34818 (Apr. 30, 2024), https://www.govinfo.gov/content/pkg/FR-2024-04-30/pdf/2024-08982.pdf.

[46] *See* EEOC, Enforcement Guidance on Harassment in the Workplace (Apr. 29, 2024), https://www.eeoc.gov/laws/guidance/enforcement-guidance-harassment-workplace.

[47] *See id.*

[48] *See id.*; EEOC, *EEOC Sues Culver's for Discriminating Against Transgender Employee and Retaliating Against Him and His Co-Workers* (Oct. 25, 2024), https://www.eeoc.gov/newsroom/eeoc-sues-culvers-discriminating-against-transgender-employee-and-retaliating-against-him.

[49] *See* EEOC, Enforcement Guidance on Harassment in the Workplace (Apr. 29, 2024), https://www.eeoc.gov/laws/guidance/enforcement-guidance-harassment-workplace; HHS, Designated Placement Requirements Under Titles IV–E and IV–B for LGBTQI+ Children, 89 Fed. Reg. 34818 (Apr. 30, 2024), https://www.govinfo.gov/content/pkg/FR-2024-04-30/pdf/2024-08982.pdf.

accommodation protections for employees that require employers to provide reasonable accommodations for the employee's religious beliefs, observances, and practices, as well as a religious organization exemption that permits religious employers to make employment decisions based on religion.[51]

Further, as mentioned above, allowing someone of the other sex (regardless of how that person identifies) into a sex-specific space or activity raises privacy and safety concerns. It could also raise conflicting claims of sex-based harassment.

We elaborate on the practical, as well as legal concerns with a pronoun and bathroom mandate in our comment on EEOC's harassment guidance.[52] If HHS similarly interprets the gender identity nondiscrimination requirements under its proposed regulations, it must address these practical and legal concerns.

III. Pregnancy Discrimination Requirements

Proposed 48 CFR 322.808 requires contractors to comply and cooperate with HHS investigations of pregnancy discrimination and harassment.

The Biden-Harris administration has attempted to shoehorn protections for abortion into laws meant to protect pregnant women and their unborn children. For example, the EEOC's regulations implementing the Pregnant Workers Fairness Act, which provides pregnancy accommodation protections in the workplace, broadly interpreted "pregnancy, childbirth, or related medical conditions" to include: "current pregnancy; past pregnancy; potential or intended pregnancy (which can include infertility, fertility treatment, and the use of contraception); labor; and childbirth (including vaginal and cesarean delivery)" and "termination of pregnancy, including via miscarriage, stillbirth, or abortion," among a "non-exhaustive" list of other conditions.[53]

As we explained in our comment on EEOC's proposed regulations, EEOC was wrong as a legal and policy matter to equate abortion with pregnancy.[54] As we explained, the regulations raise serious concerns about free speech, free exercise, and freedom of association concerns under the First Amendment and other laws protecting religious freedom and conscience. There is no federal constitutional right to abortion, and no law passed by Congress mandates the provision, accommodation, or facilitation of abortion. In short, there is no federal governmental interest in abortion. And any agency regulation purporting to impose an abortion nondiscrimination requirement without Congressional direction will violate the major questions doctrine, and after *Loper Bright*, agency regulations are no longer given deference.

HHS should clarify that pregnancy discrimination and harassment requirements under its regulations do not include abortion.

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[50] 42 U.S.C. § 2000bb *et seq.*
[51] 42 U.S.C. §§ 2000e(j), 2000e-1(a).
[52] EPPC Scholar Comment on EEOC PROPOSED Enforcement Guidance on Harassment in the Workplace, Docket ID EEOC-2023-0005, RIN 3046-ZA02 (Nov. 1, 2023), https://eppc.org/wp-content/uploads/2023/11/EPPC-Scholar-Comment-on-EEOC-Proposed-Harassment-Guidance.pdf.
[53] EEOC, Implementation of the Pregnant Workers Fairness Act, 89 Fed. Reg. 29096, 29183 (Apr. 19, 2024), https://www.federalregister.gov/documents/2024/04/19/2024-07527/implementation-of-the-pregnant-workers-fairness-act.
[54] EPPC Scholars Comment on Regulations To Implement the Pregnant Workers Fairness Act Proposed Rule, RIN 3046–AB30, Docket ID EEOC-2023-0004 (Oct. 10, 2023), https://eppc.org/wp-content/uploads/2023/10/EPPC-Scholar-Comment-EEOC-Regulations-to-Implement-the-Pregnant-Workers-Fairness-Act.pdf.

IV. Religious Organization Protections

As flagged above, depending on what nondiscrimination obligations HHS's regulations will impose, there are religious freedom concerns, especially for religious organizations. We ask that in addition to clarifying what is prohibited under the nondiscrimination regulations, HHS also clarify the scope of protections for religious organizations and how those protections will interact with HHS's nondiscrimination regulations.

These protections, detailed below, include the First Amendment, the Religious Freedom Restoration Act (RFRA), Title VII, and federal conscience protection laws.

First Amendment. The First Amendment protects the free exercise of religion.

HHS and eight other federal agencies issued a joint rule, "Partnerships With Faith-Based and Neighborhood Organizations," recognizing First Amendment protections for religious organizations that partner with the federal government.[55] In their proposed rule, the agencies recognized a "nondiscrimination principle" that has been emphasized in several recent Supreme Court decisions, most significantly *Trinity Lutheran Church of Columbia, Inc. v. Comer* and *Espinoza v. Montana Department of Revenue*.[56] Under these cases, the agencies not "disqualifying otherwise eligible recipients from a public benefit 'solely because of their religious character' imposes a penalty on the free exercise of religion that triggers the most exacting scrutiny.'"[57] In *Trinity Lutheran*, the Court held that under the First Amendment's Free Exercise Clause, an applicant could not be excluded from a state grant program simply because of the applicant's religious nature. More recently, in *Fulton v. City of Philadelphia*, the Court held that the Free Exercise Clause required the government to provide regulatory accommodation to a funded, faith-based foster care placement agency.[58]

This Nondiscrimination Principle requires HHS to ask itself, as it establishes and administers funding programs, whether its rules force religious organizations "to choose between participation in a public program and their right to free exercise of religion." When the government puts religious groups to this choice, it implicates concerns protected by the Free Exercise Clause. Furthermore, these cases make clear that the government does not violate the Establishment Clause when it respects Americans' Free Exercise rights.

Though the Supreme Court has held that the Free Exercise Clause does not require the government to grant religious accommodations to generally applicable laws, the Supreme Court made clear in *Fulton* that individualized exemptions to a nondiscrimination requirement (such as the waiver process described in the proposed rules) make the requirement not "generally appliable" and thus subject to strict scrutiny.

Under strict scrutiny, it is not enough for the government to assert an interest that is compelling in the abstract, such as an interest in preventing employment discrimination. Rather, courts must "scrutinize the asserted harm of granting specific exemptions to particular religious claimants."

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[55] Partnerships with Faith-Based and Neighborhood Organizations, 89 Fed. Reg. 15671 (Mar. 4, 2024), https://www.federalregister.gov/documents/2024/03/04/2024-03869/partnerships-with-faith-based-and-neighborhood-organizations.

[56] Partnerships With Faith-Based and Neighborhood Organizations, 88 Fed. Reg. 2395 (Jan. 13, 2023), https://www.federalregister.gov/documents/2023/01/13/2022-28376/partnerships-with-faith-based-and-neighborhood-organizations (citing *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449 (2017); *Espinoza v. Montana Dep't of Revenue*, 591 U.S. 464 (2020)).

[57] *Id.* at 2401 (quoting *Espinoza*, 140 S. Ct. at 2255 (quoting *Trinity Lutheran*, 137 S. Ct. at 2021)).

[58] *Fulton v. City of Philadelphia*, 593 U.S. 522 (2021).

The First Amendment also guarantees the "independence of religious institutions in matters of faith and doctrine."[59] That constitutional protection includes employment decisions falling under what has been dubbed the "ministerial exception." This exception requires courts to "stay out of employment disputes involving those holding certain important positions with" religious organizations, such as those that "play certain key roles" and who perform "vital religious duties" at the core of the mission of the religious institution.[60] The Supreme Court, lower courts, and EEOC religion guidance have all recognized that the ministerial exception covers a much broader range of employment positions than the term "minister" might otherwise suggest. As the EEOC recognizes in its religion guidance, the ministerial exception "applies regardless of whether the challenged employment decision was for 'religious' reasons."[61] HHS should recognize that the ministerial exception can apply to employment discrimination and harassment claims by key employees at religious organizations. These claims would most likely involve situations where the employee disagrees with the employer's religious beliefs about marriage, gender, sexuality, and abortion.

Recognition of the potential application of the ministerial exception is particularly important because a vast majority of courts of appeals have held that the First Amendment protects religious groups from the burdens of litigation, not merely the imposition of liability, regarding their ministerial employment decisions.[62] EEOC religion guidance directs its staff to "resolve[]" the ministerial exception "at the earliest possible stage before reaching [an] underlying discrimination claim."[63] The guidance explains the exception is "not just a legal defense ..., but a constitutionally-based guarantee that obligates the government and the courts to refrain from interfering or entangling themselves with religion."[64] As explained more fully in an amicus brief filed on behalf of Rachel Morrison and former EEOC General Counsel Sharon Fast Gustafson, "If not required to resolve the ministerial exception at the outset, EEOC staff will have free rein to launch long and onerous investigations into religious organizations, with all of their attendant costs."[65]

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[59] *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020).
[60] *Id*. at 2060, 2066.
[61] EEOC, Compliance Manual on Religious Discrimination § 12-1.C.2 (2021) [hereinafter "EEOC Religion Guidance"], *available at* https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination.
[62] *See Natal v. Christian & Missionary All*., 878 F.2d 1575, 1577-78 (1st Cir. 1989); *Lee* v. *Sixth Mount Zion Baptist Church*, 903 F.3d 113, 118 n.4 (3d Cir. 2018); *Rayburn v. General Conf. of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985); *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972); *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 836 (6th Cir. 2015); *Demkovich v. St. Andrew the Apostle Par.*, 3 F.4th 968, 980–982 (7th Cir. 2021) (en banc); *Scharon v. St. Luke's Episcopal Presbyterian Hosps.*, 929 F.2d 360, 363 (8th Cir. 1991); *EEOC v. Cath. U. of Am.*, 83 F.3d 455, 466-467 (D.C. Cir. 1996).
[63] EEOC Religion Guidance § 12-I.C.2.
[64] *Id*. Concerningly, and in contrast to the religion guidance, EEOC recently filed an amicus brief in *Garrick v. Moody Bible Institute* urging the Seventh Circuit to dismiss Moody's appeal of the denial of its religious defenses to a Title VII sex discrimination claim, arguing that Moody's religious defenses should not get appellate review until *after* all the other underlying claims are litigated in the district court. *See* Sharon Fast Gustafson & Rachel N. Morrison, *EEOC's 'Gender Discrimination' Campaign and Crusade against Religious Employers*, National Review, Sept. 27, 2023, 1:00 PM, https://www.nationalreview.com/bench-memos/eeocs-gender-discrimination-campaign-and-crusade-against-religious-employers/ (discussing concerns of EEOC's *Garrick* amicus brief). "As a taxpayer-funded government agency, the EEOC should be neutral, objective, and fair. It should favor, or at least it should not deliberately frustrate, litigation economy." *Id.*
[65] Brief for Former EEOC General Counsel and Religious Nondiscrimination Expert as Amicus Curiae in Support of Petitioner, *Faith Bible Chapel v. Gregory Tucker*, No. 22-741 (U.S. Mar. 10, 2023), https://eppc.org/wp-content/uploads/2023/03/FINAL-Faith-Bible-Former-EEOC-Amici-Brief-c.pdf.

RFRA. The Religious Freedom Restoration Act (RFRA) subjects the federal government to strict scrutiny when it substantially burdens religious exercise.[66] Under RFRA, the federal government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless "it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[67]

As the Supreme Court recognized in *Bostock*, RFRA is a "super statute" that "might supersede Title VII's commands in appropriate cases."[68] For example, the Fifth Circuit held just last year that RFRA prohibited the EEOC from enforcing its broad interpretation of *Bostock* against objecting religious employers.[69] RFRA can likewise supersede other nondiscrimination laws and regulations.

Title VII Religious Organization Exemption. Title VII's religious organization exemption states: "This subchapter shall not apply ... to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."[70] *This subchapter* covers discrimination (including harassment) claims based on sex (and any derivative sexual orientation and gender identity claims). Thus, even though religious organizations are generally subject to Title VII's nondiscrimination requirements on the basis of sex, by the text of Title VII, that prohibition (part of "this subchapter") does not apply with respect to "the employment of individuals of a particular religion."

EEOC's religion guidance rightly recognizes that Title VII's religious exemptions "allow a qualifying religious organization 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."[71] Employment, as the EEOC recognizes, covers the full range of the employer-employee relationship, which includes policies about abortion, pronouns, and sex-specific spaces. "Religion," as defined in Title VII, "includes all aspects of religious observance and practice, as well as belief."[72] As such, Title VII allows qualifying religious organizations to make employment decisions based on religion, which includes beliefs, observances, and practices. This protection extends regardless of how the underlying harassment claim is characterized. For example, even though a certain employment decision could be characterized as harassment based on sex, if the underlying employment decision was based on the religious organization's religious beliefs, observances, or practices, Title VII's religious organization exemption would apply.

Proposed 48 CFR 352.222-70 references the Department of Labor Office of Federal Contract Compliance Programs (OFCCP), and proposed 48 CFR 322.810 cites FAR 52.222-26, which references OFCCP, including its definitions for gender identity and sexual orientation. OFCCP issued a rule that ignores the text of Title VII, limits of *Bostock*, and EEOC religion Guidance to minimize the protections of Title VII's religious organization exemption. We address the shortcoming of that rule in our comment.[73]

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[66] 42 U.S.C. §§ 2000bb–2000bb-4.
[67] *Id.* § 2000bb-1(a)-(b).
[68] *Bostock v. Clayton Cnty.*, 590 U.S. 644, 682 (2020) (citing 42 U.S.C. § 2000bb-3).
[69] *Braidwood Mgmt. v. EEOC*, 70 F.4th 914, 940 (5th Cir. 2023).
[70] 42 U.S.C. § 2000e-1(a).
[71] EEOC Religion Guidance § 12-1.C.1.
[72] 42 U.S.C. § 2000e.
[73] EPPC Scholars Comment Opposing "Proposal to Rescind Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption," RIN 1250-AA09 (Dec. 9, 2021), https://eppc.org/wp-content/uploads/2021/12/EPPC-Scholars-Comment-Opposing-OFCCP-Proposal.pdf.

Federal Conscience Protection Laws. HHS is charged with enforcing over two dozen federal laws that protect conscience and religious freedom rights of individuals and organizations in health care. Many of these laws focus on the most controversial medical interventions, such as abortion, sterilization, and assisted suicide, and provide protections for those who do not want to participate in or pay for such interventions based on their conscience—whether religious beliefs or moral convictions.

Congress said that the federal government must respect the conscience rights of health care professionals and entities, full stop. For example, nothing in the Church Amendments describes any conditions under which a public official or entity can require an individual to perform an abortion or sterilization procedure in violation of his or her religious beliefs or moral convictions.[74] And as discussed above, abortion is potentially relevant for pregnancy discrimination regulations, and sterilization is relevant for any gender dysphoria or gender identity discrimination regulation that requires provision, facilitation, or coverage of sterilizing gender-transition drugs or surgeries.

In sum, HHS should acknowledge the legal protections for religious organizations and explain the interplay between its nondiscrimination regulations and those protections in its final rule.

Conclusion

HHS should clarify the scope of its nondiscrimination requirements, ensure such requirements are consistent with the law, and acknowledge constitutional and statutory protections for religious organizations.

Sincerely,

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[74] *See* 42 U.S.C. § 300a-7(b).