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To: Office for Civil Rights; Centers for Medicare & Medicaid Services; and Office of the Secretary, U.S. Department of Health and Human Services

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Date: Friday, September 30, 2022

RE: Comments on Proposed Rulemaking: ***Nondiscrimination in Health Programs or Activities Receiving Federal Financial Assistance***, 87 Fed. Reg. 47824 – 47920 (August 4, 2022)
Docket ID: HHS-OS-2022-0012
RIN: 0945-AA17

*** Comments submitted via the Federal eRulemaking Portal at *http://www.regulations.gov*
Microsoft Word "print-to-PDF" format

PREAMBLE

We write in response to the Notice of Proposed Rulemaking (hereinafter "2022 NPRM") posted by the U.S. Department of Health and Human Services (hereinafter "HHS") on August 4, 2022, and published in the Federal Register, 87 Fed. Reg. 47824 - 47920 (Aug. 4, 2022). The 2022 NPRM, inter alia, proposes new regulations as well as amendments to existing regulations

pertaining to discrimination as prohibited by Section 1557, 42 U.S.C. § 18116 (hereinafter "Sec. 1557") of the Patient Protection and Affordable Care Act, Pub. L. 111-148, enacted March 23, 2010 (hereinafter "ACA"), as well as additional insurance regulations proposed by Centers for Medicare & Medicaid Services (hereinafter "CMS").

The proposed regulations for Sec. 1557 are to be codified at 45 C.F.R. Pt. 92 (hereinafter "Part 92"). Subsection 1557(a) adopts by reference four venerable civil rights nondiscrimination acts: (i) Title VI, prohibiting discrimination on the bases of race, color, and national origin in federally funded programs or activities; (ii) Title IX, prohibiting discrimination on the bases of sex and blindness or severely impaired vision in federally funded programs or activities, as well as in employment; (iii) the Age Discrimination Act of 1975, prohibiting discrimination on the basis of age in federally funded programs or activities; and (iv) Section 504 of the Rehabilitation Act of 1973, prohibiting discrimination on the basis of disability in federally funded programs or activities, as well as in employment.

We address below select proposed regulations in Part 92 concerning sex discrimination in federally funded health programs or activities said by the 2022 NPRM to be an implementation of Sec. 1557.

1. Proposed 92.1(a) (protected classes): Subsection 1557(a) incorporates by reference, inter alia, all of Title IX of the Education Amendments of 1972, Pub. L. 92-318, 20 U.S.C. §§ 1681 - 1688, as amended (hereinafter "Title IX"). Title IX is about more than sex discrimination. Section 1684 of Title IX makes "blindness or severely impaired vision" a prohibited basis of discrimination. Accordingly, the list of protected classes in proposed 92.1(a) (and elsewhere in the 2022 NPRM) is incomplete. There are two—not one—protected classes in Title IX, a fact that will later be brought to bear on the correct interpretation of subsection 1557(a).

2. Proposed 92.2(a)(1) and (b) (limited applications); 92.207 (discrimination in health insurance): (A) We note that proposed 92.2(a)(1) limits the operation of Part 92 to federal financial assistance, directly or indirectly, received "from the Department [HHS]." Accordingly, Part 92 does not apply to financial assistance from other federal departments, independent agencies, and sources.

(B) We note that proposed 92.2(a)(1) limits the operation of Part 92 to "[e]very health program or activity" that receives federal financial assistance from HHS. Accordingly, Sec. 1557 is not binding on non-health programs or activities. In the 2022 NPRM, HHS requests comment on this limitation to *health* programs or activities, as opposed to Part 92 applying to *all* programs or activities administered by HHS. *See* 87 Fed. Reg. at 47838. The limited application is required by the plain text of the statute. Subsection 1557(a) plainly states that "an individual shall not . . . be subjected to discrimination under[] any *health* program or activity, any part of which is receiving Federal financial assistance . . ." (emphasis added).

(C) We note that proposed 92.2(b) provides that Part 92 does not apply to an employer regarding its employment practices, including the provision of employee group health benefits to

its employees. This will help to prevent wasteful duplication with other federal laws and agencies that already cover unlawful employment discrimination.

The practical operation of proposed 92.207, however, is to deny a religious employer a group health insurance product that it can purchase or otherwise obtain that is consistent with the employer's religious beliefs. Part 92 then works to either impose a burden on the employer's religious practices or cause the employer to be exposed to liability for a claim of employment discrimination.

Here is how that unfolds in practice: Organizations to which the 2022 NPRM applies are called "covered entities." Covered entities include "hospitals, health clinics, *group health plans, health insurance issuers*, physicians' practices, pharmacies, community-based health care providers, nursing facilities, residential or community-based treatment facilities, and other similar entities." 87 Fed. Reg. at 47844 (emphasis added). Covered entities also include third-party administrators ["TPAs"] for self-funded group health plans. 87 Fed. Reg. at 47845. Proposed 92.207 prohibits covered entities from selling or otherwise providing an insurance product that aligns with the beliefs and practices of religious employers. Because these religious employers cannot obtain that which is illegal for insurance companies to provide, there results a burden on the employer's religion.

Even if a religious employer were to somehow obtain an employee group health policy that was consistent with its faith, such an employer is at risk of liability. The preamble makes it evident that HHS will transfer to the EEOC those situations where employers fail to provide to their employees the mandated health coverage. The EEOC will scrutinize a religious employer's healthcare package to determine if it is a form of employment discrimination under Title VII of the '64 Civil Rights Act. *See* 87 Fed. Reg. at 47877 (citing 28 C.F.R. § 42.605, requiring referral); 87 Fed. Reg. at 47838 ("should [HHS] receive a complaint under Section 1557 alleging discrimination by an employer . . . such a complaint will be referred to the appropriate Federal agency," including the EEOC).

Proposed 92.207 must be altered to expressly state that group health insurers and TPAs are permitted to offer insurance products to employers consistent with their religious faith so that employers do not face a Catch-22 between the requirements of Part 92 and a charge of discrimination by the EEOC.

3. Proposed 92.3 (the relationship of 1557 to Title IX); 92.101(a) (is Title IX incorporated by 1557 or is just "sex" incorporated); 92.101(a)(2) (adding sexual orientation and gender identity as protected classes): In relevant part, subsection 1557(a) provides that "an individual shall not, on the ground prohibited under . . . title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.) . . . , be subjected to discrimination under[] any health program or activity" receiving federal funding. Also incorporated by reference are Title VI, the Age Act, and § 504.

Emphasizing the word "ground" (which is singular, not the plural "grounds"),[1] HHS's claim is that the only substance of Title IX that is incorporated by 1557(a) is the protected class of "sex"[2]—not the protected classes of "sex" and those with "blindness or severely impaired vision." And as to the other three civil rights acts listed in Sec. 1557, the only substance said by HHS to be incorporated is—without further qualification—the protected classes of "race, color, national origin, age, and disability." This is HHS's incorporation narrative.

If Congress had intended in Sec. 1557 to do nothing more than prohibit discrimination on the bases of sex, race, color, national origin, age, and disability, why not say so far more simply? Why all the elaborate and wordy recitation in 1557(a) using the full titles and names of the four civil rights acts, along with complete citations to the U.S. Code? How does HHS's incorporation narrative explain its omission of "blindness or severely impaired vision" as a protected class? If keeping incorporation limited to "sex" was Congress's true meaning, why the express mention of all eight sections of Title IX, 20 U.S.C. §§ 1681 to 1688, by use of "1681 et seq."?[3] A congressional reference to just "1681" would have been sufficient.

The choice of words by Congress in using "on the ground prohibited" in subsection 1557(a) more easily tells a different story. Congress typically would use "bases" or "protected classes" if the legislative intent were to incorporate—without more—"sex," along with race, color, national origin, age, and disability. Further, if "ground" were just meant as a synonym for "protected classes" or "prohibited bases," it would have to be the plural "grounds."[4] The use of the singular "ground" more naturally means that Congress intended to gather within the scope of the incorporation by 1557(a) something more contingent than just "sex." That more contingent sweep is best understood as embracing all of Title IX, meaning, yes, the two protected classes of "sex" and "blindness or severely impaired vision," but also including any limitations placed on the definition of the word "sex," any statutory exemptions to sex discrimination, and the abortion-neutral rule of construction in § 1688.

To illustrate, the "ground" protected by reference to § 504 is not any and all disabled individuals, but a class far more contingent, namely: "[n]o otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title."[5] Indeed, while many individuals who acquire a disease or medical condition are considered "disabled," there is an explicit exclusion from that "ground" for individuals having "gender identity disorders not resulting from physical impairments."[6] That is the picture of 1557(a)'s more contingent

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[1] The significance of "ground" being singular is tacitly acknowledged in the 2022 NPRM preamble where HHS found it necessary—to have the text fit with HHS's narrative—to change "ground" to "ground[s]." *See* 87 Fed. Reg. at 47840 ("The Department's analysis begins with the relevant statutory text. Section 1557 prohibits discrimination 'on the ground[s] prohibited under' Title IX . . . . ").

[2] *See* 87 Fed. Reg. at 47839-40 (2022 NPRM's commentary on meaning of "ground" in subsection 1557(a)).

[3] Et seq. means "and the following."

[4] Note that proposed 92.5(c) refers to the classes protected by Sec. 1557 as "all bases," not "the ground" or even "the ground[s]." Similarly, proposed 92.206a) refers to "discriminating on the basis of sex." *See also, supra*, note 1.

[5] The quotation is from § 504(a) of the Rehabilitation Act of 1973, codified at 29 U.S.C. § 794(a).

[6] The definition of the term "individual with disability" in the Rehabilitation Act of 1973, 29 U.S.C. § 705(20), is by cross-reference now taken from the Americans with Disabilities Act, 42 U.S.C. § 12102(1)(A). That definition has various statutory contingencies, excluding from the meaning of disability "homosexuality . . . transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical

incorporation. Similarly, the "ground" protected by the Age Discrimination Act, 42 U.S.C. § 6101 et seq., is not just any person, regardless of age, benefiting from a federally funded program or activity. Rather, there are limitations on who is within the scope of the "protected class" in the Age Act. To give just one example, a person claiming to be harmed by age discrimination is *not* of the act's protected "ground" if "the program or activity . . . reasonably takes into account age as a factor necessary to the normal operation or the achievement of any statutory objective of such program or activity."[7] In summary, the "ground" protected by 504 or the Age Act, embraces, yes, a protected class (disabled or aged), but also embraces various contingencies spelled out in the underlying civil rights act (504 or Age Act).

Accordingly, the "ground" of Title IX embraces, yes, the prohibitions on sex and blindness discrimination, but also embracing the spelled-out exceptions in Title IX, as well as not forgetting the rule of construction in § 1688. This meaning of "the ground protected" is fair to all sides because it fully accounts all the tradeoffs struck during the congressional debates over Title IX, as amended. And among those contingencies and tradeoffs, of keenest interest to many religious organizations are the two exemptions for religious employers in § 1681(a)(3) and at the end of § 1687,[8] as well as the rule of construction in § 1688 paring back on what it means to "discriminate on the basis of sex."

To cabin the meaning of 1557(a)'s "on the ground" as referring alone to sex, without the accompanying limits and exceptions, is for HHS to choose, as its interpretative rule, the most hostile treatment possible of widely practiced religious beliefs and observances by America's religious employers. Due to high profile clashes in ongoing lawsuits such as *Franciscan Alliance*[9] and other venues,[10] as well as the decision in *Bostock*, HHS knows this to be true. In this regard, then, HHS's interpretive narrative for Sec. 1557 is nothing short of targeting a common religious practice.

In conclusion, a specific intentional consequence of HHS's choice of interpretive rule is that the 2022 NPRM fails to incorporate Title IX's religious-tenet exemptions from a claim of sex discrimination. This becomes even more important to religious employers when the sweep of proposed 92.101(a)(2) greatly expands "sex" discrimination to include sexual orientation and gender identity. This must be rejected.

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impairments, or other sexual behavior disorders," as well as "compulsive gambling, kleptomania . . . pyromania; or . . . psychoactive substance use disorders resulting from current illegal use of drugs." 42 U.S.C. § 12211(a) and (b).

[7] Quoting from the Age Act, 42 U.S.C. § 6103(b)(1)(A).

[8] *See* 20 U.S.C. § 1681(a)(3) ("this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization"), and 20 U.S.C. § 1687 ("except that such term does not include any operation of an entity which is controlled by a religious organization if the application of section 1681 of this title to such operation would not be consistent with the religious tenets of such organization"). There is some variation in the scope of the two religious-tenet exemptions.

[9] *See, e.g.,* Franciscan Alliance v. Becerra, 553 F. Supp.3d 361 (N.D. Tex. 2021), *amended* No. 7:16-cv-00108-O, 2021 WL 6774686 (N.D. Tex. Oct. 1, 2021); Franciscan Alliance v. Burwell, 227 F. Supp.3d 660 (N.D. Tex. 2016).

[10] HHS's ongoing disregard of religious beliefs held by millions of Americans dates as least as far back as the litigation outbreak over the ACA and contraception devices culminating in Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

Yet a second specific intentional consequence of HHS's choice of interpretive rule is that the 2022 NPRM fails to incorporate the abortion-neutral rule in Title IX. The § 1688 text is known as the Danforth Amendment, a provision added to Title IX as part of the Civil Rights Restoration Act of 1987.[11] By its terms and intent the Danforth Amendment is a rule of construction ("Nothing in this title shall be construed to require or prohibit . . . ."), not an exemption to a nondiscrimination rule.[12] A college does not have to be religious to invoke the Danforth Amendment. Section 1688 cuts back on the definition of "sex" as a protected basis of discrimination. For example, it is not sex discrimination for a college to offer its students a low-cost health insurance policy that excludes coverage for an elective abortion. This cutback in the meaning of sex discrimination becomes especially important in the 2022 NPRM because proposed 92.101(a)(2) expands the meaning of sex discrimination to include discrimination based on "pregnancy, or related conditions." In the 2022 NPRM, it is left unclear whether HHS construes "related conditions" to include a "termination of pregnancy," that is, an elective abortion.[13] This must be rejected.

More on abortion, below, under proposed 92.4 (definitions).

4. Proposed 92.4 (definitions; pregnancy, or related conditions): Proposed 92.4 is incomplete. Part 92 requires definitions of the following terms:

- "Gender-affirming care," *see, e.g.*, proposed 92.206(b)(4) and 92.206(c);
- "Gender identity," *see, e.g.,* proposed 92.10(a)(1)(i) and 92.101(a)(2);
- "Pregnancy, or related conditions," *see, e.g.,* proposed 92.8(b) and 92.101(a)(2);
- "Sex," *passim* Part 92;
- "Sex characteristics, including intersex traits," *see, e.g.,* proposed 92.8(b), 92.10(a)(1)(i), and 92.101(a)(2); and
- "Sexual orientation," *see, e.g.,* proposed 92.10(a)(1)(i) and 92.101(a)(2).

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[11] The Danforth Amendment was to ensure that a claim of sex discrimination did not result in a recipient of funding to have to provide or pay for an abortion. *See* Senate Passes Civil Rights Bill with Abortion-Limiting Amendment, Associated Press News. For example, if low-cost health insurance is made available by a college to its students, it is not sex discrimination if the policy does not cover elective abortions.

[12] Commentary in the 2022 NPRM repeatedly mischaracterizes § 1688 (the Danforth Amendment) as an "exception." *See* 87 Fed. Reg. at 47839-40.

[13] Note that the Title IX regulations presently being proposed by the U.S. Department of Education employ, as a part of the definition of discrimination on the basis of pregnancy, the denial of an elective abortion. *See* proposed 106.2 (definition of "pregnancy or related conditions"), in NPRM filed by U.S. Dept. of Education, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 87 Fed. Reg. 41309 et seq. (July 12, 2022). It is doublespeak to argue that discrimination on the basis of "pregnancy, and related conditions" includes an elective abortion. Abortion is not a *condition related* to pregnancy; it *ends* a pregnancy. However, that is what the Department of Education is claiming, and HHS might follow. *See* 87 Fed. Reg. at 47878-79 (HHS commentary on discrimination based on "pregnancy, and related conditions").

It is self-evident that the above-listed terms are important to understanding Part 92 and thereby need definition in proposed 92.4. To fail to provide greater definition of terms like "gender identity" or "intersex traits" invites lack of context, confused and uneven enforcement, and needless litigation. Not providing these definitions is a failure to give adequate notice of what is being made unlawful and an opportunity to be heard and object, and thereby cause a lack of due process and vagueness. It will also waste resources, governmental and private, in later litigation, and invite delay in policy implementation and compliance.

"Pregnancy, or related conditions" needs defining for additional reasons. If HHS should follow the lead of the U.S. Department of Education and define an elective abortion as a form of "condition related" to a pregnancy, that needs full and timely disclosure so that the public can comment. Regardless, such a move would thrice over conflict with the expressed will of Congress. First, as already discussed above, the Danforth Amendment, § 1688 of Title IX, requires "abortion neutrality" of Sec. 1557 and its implementation in Part 92. Second, the Weldon Amendment expressly forbids HHS prejudicing covered entities, such as religious healthcare providers and their group insurers, on the basis that they refuse to provide, perform, or cover abortion.[14] Third, § 1303 of the ACA, 42 U.S.C. § 18023, requires "abortion neutrality" of Sec. 1557 and its underlying regulations. Subsection 1303(c) in relevant part says: "Nothing in this Act shall be construed to have any effect on Federal laws regarding conscience protection," the "refusal to provide abortion," or "discrimination on the basis of the . . . refusal to provide, pay for, cover, or refer for abortion." Subsection 1303(b) states: "Notwithstanding any other provision of this [Title I of the ACA,] nothing in this title . . . shall be construed to require a qualified health plan to provide coverage" for abortion. And subsection 1303(a) gives states the option to prohibit abortion coverage in group healthcare plans, an option that would be meaningless if Part 92 preempted such state legislation.

"Pregnancy, or related conditions" must be defined in proposed 92.4 to expressly exclude an elective abortion. Abortion ends the life of an unborn child. This child's life, like all human life, is sacred and priceless. Anything less than for Part 92 to be abortion neutral is for HHS to openly defy the will of Congress, a violation of U.S. Const. art. II, § 2, cl. 8.

"Sex" appears throughout Part 92 and must be defined. Moreover, because HHS relies on *Bostock*, HHS is bound by the definition of "sex" in *Bostock*. In *Bostock*, "sex" is binary, either male or female, as demonstrated by an individual's chromosomes, DNA, and reproductive organs. The term "sex characteristics," as used by HHS, is sometimes contrary to the term "sex" being binary. Accordingly, "sex characteristics" either must be avoided in the regulations or

[14] The Weldon Amendment - PDF was originally passed as part of the HHS appropriation and has been readopted (or incorporated by reference) in each subsequent HHS appropriations act since 2005. It provides that "[n]one of the funds made available in this Act [making appropriations for the Departments of Labor, HHS, and Education] may be made available to a Federal agency or program, or to a state or local government, if such agency, program, or government 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." It also defines "health care entity" 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."

must be used in a manner not to contradict the term "sex" being binary. Anything less is in conflict with *Bostock* and thereby arbitrary and capricious.

5. Proposed 92.5 (assurances); proposed 92.6 (remedial action); proposed 92.8 (policies and procedures); proposed 92.9 (training); and proposed 92.10 (notices). Each of these five proposed regulations burden an employer's religious beliefs and practices when sex discrimination is expanded to include discrimination based on sexual orientation or gender identity. The regulations are written with a presumption that they are binding on every employer. However, that is not so when religious employers are excused under the religious-tenet exemptions of Title IX, or under some other Federal conscience or religious freedom protection law.

For a religious employer to be compelled to give the requisite assurances when it comes to sexual orientation or gender identity is to burden its religion. *See* proposed 92.5. For a religious employer to be compelled to render remedial action when it comes to sexual orientation or gender identity is to burden its religion. *See* proposed 92.6. For a religious employer to be compelled to adopt nondiscrimination policies and procedures when it comes to sexual orientation or gender identity is to burden its religion. *See* proposed 92.8. For a religious employer to be compelled to train its employees in avoiding discrimination violations when it comes to sexual orientation or gender identity is to burden its religion. *See* proposed 92.9. And for a religious employer to be compelled to give the requisite notices when it comes to sexual orientation or gender identity is to not only burden its religion, but to also violate its First Amendment right not to be compelled to speak. *See* proposed 92.10.

These covered entities need to be assured in advance that their religious liberty is secure and will be honored, or they will be forced to practice under a constant threat of government enforcement or threat of a private cause of action (*see* proposed 92.301). The problem is that as the 2022 NPRM is currently drafted, the religious employer is not going to know in advance if a religious exemption will be honored by the Office for Civil Rights (hereinafter "OCR"). Even worse, proposed 92.302 (discussed below) suggests that any decision by OCR concerning religious exemptions or accommodations would be case-specific and therefore would not offer these covered entities a guarantee of protection from a future enforcement action. Even a favorable resolution by OCR would not be precedent for other covered entities with respect to their claim for religious accommodation.

In the HHS narrative the religious-tenet exemptions in Title IX are unavailable. Moreover, Part 92 does not discuss application of the Weldon Amendment or Sec. 1303 of the ACA (they get only cursory mention in the preamble). We have a problem when these seemingly applicable statutory mandates to accommodate religion are not acknowledged in the text of the rule as exempting covered entities that are religious.

Proposed 92.5, 92.6, 92.8, 92.9, and 92.10 put the religious employer in a totally defensive posture. This is unfair and unwise. Many religious employers, especially small operators, will respond to this cold treatment by not even applying for federal funding in programs for which they are eligible. As a result, it is the people they serve who will most suffer. HHS can address

this by rewriting Part 92 in a manner that will quickly and finally resolve the issue of religious accommodation as a threshold matter (perhaps employing a rebuttable presumption favoring religious exemption), one that will honor at the outset the free exercise of religion as vested in congressional statutory religious accommodations and in the First Amendment.

6. Proposed 92.302 (OCR preclearance for Federal conscience and religious freedom laws); proposed 92.3(c): Proposed 92.302 provides a means whereby covered entities that are religious may seek a predetermination by OCR that it is exempt from all or some of Part 92 because of "a Federal conscience or religious freedom law."

There is much that can be said in criticism of proposed 92.302. However, first it must be noted that the proposed rule is optional and so can be ignored. Proposed 92.302(a) says "may notify OCR," not *shall* notify OCR. The rule must expressly state that it is optional, and that there is no prejudice if a covered entity does not seek a preclearance.

Proposed 92.302 has many failings, not least of which, for reasons already stated above, is that it fails to acknowledge that Sec. 1557 incorporates the religious-tenet exemptions in Title IX. When it applies, this exemption is absolute—not a balancing test that weighs competing interests. The regulation also fails to expressly mention a covered entity's safeguards under RFRA and RLUIPA,[15] as well as the church autonomy doctrine and the Free Exercise Clause in the First Amendment.[16] True, one hazard of making a list of rights and defenses is that you leave one out. But that can be easily remedied by stating that the list is not meant to be exhaustive.[17]

Proposed 92.302 fails to expressly acknowledge that OCR must avoid a line-drawing test of who is exempt and who is not that prefers one type of religious organizational polity over another organizational polity.[18] Further, the rule fails to acknowledge that the doctrine of church autonomy requires that OCR not make inquiries into the validity, meaning, or importance of a religious question or dispute.[19]

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[15] The failure of the regulation to expressly mention the Religious Freedom Restoration Act (RFRA) and the Religious Land Use and Institutionalized Persons Act (RLUIPA) is particularly inexcusable given RFRA's mention in *Bostock*, as well as the recent RFRA judgment against HHS in cases like Franciscan Alliance, Inc. v. Becerra, No. 21-11174, 2022 WL 3700044 (5th Cir. Aug. 26, 2022) (upholding entry of permanent injunction entered by trial court against HHS based on finding that regulations requiring performance of gender-reassignment surgeries and abortions violated religious beliefs of plaintiffs as protect by RFRA).

[16] *See* 87 Fed. Reg. at 47841-42 (Aug. 4, 2022). Proposed 92.302 and commentary fails to mention the Conscience Rule, 84 Fed. Reg. 23170 (May 21, 2019).

[17] Some religious conscience protections are also in place under the 1973 Frank Church Amendments to the Hill-Burton Act, such that religious hospitals and individuals receiving federal funds for health care may refuse to provide certain medical services. *See* 42 U.S.C. § 300a-7.

[18] *See* Larson v. Valente, 456 U.S. 228 (1982).

[19] *See* Rosenberger v. Rector & Visitors, 515 U.S. 819, 843-44 (1995) (university should avoid distinguishing between evangelism, on the one hand, and the expression of ideas merely approved by a given religion); Widmar v. Vincent, 454 U.S. 263, 269-70 n.6, 272 n.11 (1981) (holding that inquiries into religious significance of words or events are to be avoided); Thomas v. Review Board, 450 U.S. 707, 715-16 (1981) (not within judicial function or competence to resolve religious differences)

HHS's commentary on proposed 92.303 says that OCR, when it comes to balancing rights under laws such as RFRA, will consider any harm to third parties. *See* 87 Fed. Reg. at 47885-86. But a consideration of third-party harms is not required by the Establishment Clause.[20] Moreover, while some accommodations like RFRA call for case-specific balancing tests, other religious freedom defenses do not entail balancing of interests. For example, the religious-tenet exemptions in Title IX[21] and the church autonomy doctrine in the First Amendment are absolute; if they apply, the lawsuit is at an end, and no balancing of interests is called for or even allowed.[22] When there is interest balancing such as with RFRA, how can there be "preclearance" when OCR is going to treat each matter case by case? It is a contradiction in terms.

Proposed 92.302(c) and (d) make the utilization of the preclearance regulation high risk and low reward. We anticipate that few covered entities will use it. There is lack of trust of OCR given the history of religious recipients and HHS. Most recipients will wait to raise their exemptions and other defenses in an adversarial setting with a neutral decisionmaker; that is, they will wait until the matter is in litigation. Only civil litigation will yield a neutral decisionmaker and a final determination binding on all interested parties (complainant, HHS, and covered entity).

Perhaps extended debate over the details of proposed 92.302 is unnecessary. Existing rule 34 C.F.R. § 106.12, promulgated by the U.S. Department of Education to manage a religious-tenets exemption in Title IX, a rebuttable presumption, and the recent decision in Maxon v. Fuller Theological Seminary, No. 2:19-cv-09969, 2021 WL 5882035 (9th Cir. 2021) are together adaptable to meet the need for a workable preclearance mechanism.[23]

We stress that any preclearance rule, to be acceptable, must be quick and simple to use, must be without prejudice, and must be entirely at the option of the covered entity.

7. Proposed 92.101(a)(2) (inclusion of sexual orientation and gender identity as classes protected from discrimination); proposed 42 C.F.R. Parts 438, 440, and 460; 45 C.F.R. Parts 147, 155, and 156: In Bostock v. Clayton County, 140 S. Ct. 1731 (2020), the Supreme Court of the United States was asked to resolve a discrete legal issue, namely: whether Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination "because of . . . sex," prohibits an employer from firing someone simply for being homosexual or transgender. *Id.* at 1738-39. The Court answered this question in the affirmative. The majority explained that

[20] *See* Mark Storslee, *Religious Accommodation, the Establishment Clause, and Third-Party Harm*, 86 UNIV. CHICAGO LAW REVIEW 871 (2019); Carl H. Esbeck, *Do Discretionary Religious Exemptions Violate the Establishment Clause?*, 106 KENTUCKY LAW JOURNAL 603 (2018).
[21] *See* Maxon v. Fuller Theological Seminary, No. 2:19-cv-09969, 2021 WL 5882035 (9th Cir. 2021) (applying religious-tenets exemption of Title IX).
[22] *See* Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 565 U.S. 171, 194-95 (2012) (EEOC prevented from even raising claim of pretext once matter was determined to be a church autonomy case).
[23] The Title IX religious exemptions were interpreted, upheld, and enforced in *Maxon*, 2022 WL 5882035. A unanimous panel held that a Title IX religious organization need not first apply for and be precleared to later invoke the exemption, that a funding recipient claiming the exemption need not be controlled by a separate corporation or denomination, and that the court would not second-guess a seminary's assertion that its religious tenets did not permit retaining the complaining students because of a same-sex marriage.

Title VII's "because of . . . sex" text incorporates a "but for" causation standard. So long as "sex" was one "but for" cause of an employee's termination, that was sufficient to state a prima facie case under Title VII. *Id.* at 1739. The Court further explained that "sex" refers to the biological distinctions between males and females. *Id.* Taken together, the Court believed "[a]n employer violates Title VII when it intentionally fires an individual employee based in part on [biological] sex." *Id.* at 1741. The majority went on to reason that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." *Id.* "[H]omosexuality and transgender status are inextricably bound up with sex" because "to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their [biological] sex." *Id.* at 1742. It follows that under Title VII, as a prima facie matter, "employers are prohibited from firing employees on the basis of homosexuality or transgender status." *Id.* at 1753.

The Court was careful to stress the narrowness of its opinion. *Id.* In particular, its holding did not "sweep beyond Title VII to other federal or state laws that prohibit sex discrimination," nor did the High Court's decision "purport to address bathrooms, locker rooms, [dress codes,] or anything else of the kind." *Id.* The Court expressly declined to "prejudge" any laws or issues not before it, observing instead that "[w]hether policies and practices might or might not qualify as unlawful discrimination or find justifications under other provisions of Title VII are questions for future cases." *Id. See also* Pelcha v. MW Bancorp, Inc., 988 F.3d 318, 324 (6th Cir. 2021) (by its own terms *Bostock* is of limited reach); Meriwether v. Hartop, 992 F.3d 492, 510 n.4 (6th Cir. 2021) (the principles in *Bostock* do not automatically extend to Title IX).[24]

At this writing, it is unknown if the High Court will follow the interpretive literalism of *Bostock* as it seeks the original congressional meaning when it comes to the set of protected classes in Title IX first enacted in 1972. *See* House Report of the Education and Labor Committee, No. 92-554 (Oct. 8, 1971); Senate Report of the Labor and Public Welfare Committee, No. 92-346 (Aug. 3, 1971); and Senate Conference Report, No. 92-798 (May 22, 1972).[25] The congressional debate back in 1971-72 shows a complete absence of any consideration of discrimination on the basis of either sexual orientation or gender identity. If and when the Court rules on the meaning of sex discrimination in Title IX, we do not expect it to conclude that the title extends to sexual orientation and gender identity. Rather, as in the *Bostock* dissents by Justices Alito and Kavanaugh, we expect the Supreme Court will hold that Congress, when first enacting the Education Amendments of 1972, meant only to prohibit discrimination on the two bases of sex (biologically male and female) and blindness or serious visual impairment.

For like reasons, we do not find persuasive the interpretation of Title IX found in the president's *Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation*, Executive Order No. 13988, 86 Fed. Reg. 7023-7025

[24] We are aware that there are federal circuit cases that extend *Bostock* to Title IX. *See* Grimm v. Gloucester Cnty. Sch. Bd, 972 F.3d 586 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 2878 (U.S. June 28, 2021) (No. 20-1163). But our point is that we do not think that the U.S. Supreme Court will apply the interpretative rationale in *Bostock* to Title IX.

[25] All three reports are collected at 1972 U.S. Code, Cong. & Admin. News vol. 2, pp. 2462, 2559, and 2608. For discussion of the precursor to Title IX, *see id.* at 2467, 2511-12, 2566-67, 2671-72.

(Jan. 20, 2021).[26] More importantly, an executive order cannot unilaterally enlarge upon the rule-making authority that Congress in Sec. 1557 delegated to HHS.

In State of Tennessee v. U.S. Department of Education, No. 3:21-cv-308, 2022 WL 2791450 (E.D. Tenn. July 15, 2022), a federal district court noted that in 2021 the Department of Education had issued guidance documents to schools applying the interpretive rule of *Bostock* to Title IX. Slip op. 3-5. The court went on to find that such guidance was procedurally and substantively unlawful under the Administrative Procedure Act. Slip op. 6, 19-20, 38-42. Indeed, the guidance documents had "overlooked the caveats" in *Bostock* that the decision was expressly limited to Title VII and administratively "created new law." Slip op. 41. The Department of Education guidance wrongly purported "to expand the footprint of Title IX's 'on the basis of sex' language." *Id.* The district court concluded that, inter alia, there was a likelihood of plaintiffs' success on the merits and issued a preliminary injunction against the Department of Education.[27]

We also note for these Comments our parallel objection to the revisions proposed by CMS to 42 C.F.R. Parts 438, 440, and 460, as well as 45 C.F.R. Parts 147, 155, and 156, insofar as these revisions reflect HHS's interpretation that the protected class of biological "sex" includes prohibiting discrimination on the bases of sexual orientation and gender identity. In January 2022, CMS proposed similar insurance regulations, but they were successfully opposed.[28] Once again, CMS must abandon the proposed revisions.

8. Proposed 92.101(a)(2) (sexual orientation and gender identity as newly protected classes and the Major Question Doctrine); Proposed 92.206 (what should constitute unlawful discrimination in a health program or activity): As a separate and independent ground for rejecting HHS's brief that the prohibition on sex discrimination in Title IX includes discrimination on the bases of sexual orientation and gender identity, we look to the recent decision in West Virginia v. Environmental Protection Agency, 142 S. Ct. 2587 (2022). In this breakthrough case for restoring separation of powers, the Supreme Court held that the EPA does not have congressional authority to limit emissions at existing power plants through what is called "generation shifting" to renewable energy sources such as solar and wind. Finding that the proposed action of the EPA's Clean Power Plan fell under the "major question doctrine," the

[26] *See also* Executive Order 14075, Advancing Equality for Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex Individuals, 87 Fed. Reg. 37189 (signed June 15, 2022); Executive Order 14021, Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation and Gender Identity, 86 Fed. Reg. 13803 (signed March 8, 2021).

[27] *See also* Judge Grasz, dissenting in The School of the Ozarks, Inc. v. Biden, No. 21-2270, 2022 WL 2963474 (8th Cir. July 27, 2022), noting that memorandum of understanding issued pursuant to president's executive order by Department of Housing and Urban Development to implement a change in interpretation concerning sex discrimination as prohibited by the Fair Housing Act of 1968 should be enjoined because of failure to give notice and opportunity to file comments as required by the Administrative Procedure Act. The panel majority dismissed for plaintiff's lack of standing and so did not reach the merits.

[28] EPPC Scholars Comment Opposing Proposed Rule, *Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2023*, RIN 0938-AU65, EPPC Scholars Comment Opposing SOGI Insurance NPRM.

Court held that generation shifting required specific congressional approval for such a momentous agency directive. Chief Justice Roberts, for the Court, wrote that in "certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent makes us 'reluctant to read into ambiguous statutory text' the delegation claimed [by the EPA] to be lurking there. . . . To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to 'clear congressional authorization' for the power it claims." *Id.* at 2609. Justice Gorsuch, joined by Justice Alito, wrote a concurring opinion. Justice Gorsuch noted the importance of the major question doctrine, stating that it "seeks to protect against 'unintentional, oblique, or otherwise unlikely' intrusions" on the areas of "self-government, equality, fair notice, federalism, and the separation of powers." *Id.* at 2620.

Now shift from the regulation of clean air to the regulation of healthcare discrimination. Sec. 1557 of the ACA incorporates, in part, the mandate to stop discrimination on the bases of "sex" and "blindness or other visual impairment" in the delivery of healthcare in federally funded programs or activities. Part 92, relying on *Bostock*, expands the mandate to the classes of sexual orientation and gender identity. This is a profound expansion of regulatory oversight that for years will raise major questions of political, public health, religious, and ethical significance. And the expansion will only increase with each passing year because the federal budget increases with each year, including those monies appropriated to "health programs or activities." Thus, we have here not just a one-time inflation of HHS power, but a year-by-year expansion that will track that of a growing federal budget. This compounding of administrative authority more than meets the criteria of the APA's Major Question Doctrine.

There is a complete absence of direction from Congress in Sec. 1557 on how to balance the complex mix of new competing interests. That is because the Executive Branch has unilaterally ventured on a major new policy thrust—not one building on past legislative hearings, findings, and directions from Congress—rather, a thrust based on a controversial extension of a controversial Supreme Court decision (*Bostock*), combined with a strained interpretation of subsection (1557(a)), that in turn is said to partly incorporate from a statute enacted 50 years ago (Title IX), incorporating that part of Title IX that HHS likes but leaving behind those parts of Title IX that HHS dislikes (religious exemptions and the Danforth Amendment).

The policy questions are not just important and novel, but numerous. First, the covered entities impacted are legion. It is not just hospitals, but medical clinics and doctor's offices, along with their staff, that are newly regulated. Additionally involved are medical insurance companies, pharmacists and pharmacies, nursing facilities for seniors, medical and nursing colleges and their faculty, and K-12 school counseling and nursing offices. Second, often we will be dealing with the medical profession and professional codes of ethics. Medicine is a profession because it requires years of clinical experience and wise judgment on the part of physicians and nurses. Part 92 impacts the existing codes of ethical conduct. These codes are best left to development by the profession itself, not the government.[29] Importantly, it is just fundamentally

[29] Without saying so, Part 92 sets medical and ethical standards for the practice of medicine. In doing so, it will sometimes transgress medical codes of ethics. To illustrate, in proposed 92.206(b)(4) a health provider cannot "deny or limit health services sought for purpose of gender transition or other gender-affirming care that the covered entity would provide to an individual for other purposes if the denial or limitation is based on a patient's sex assigned at

backward to use a nondiscrimination law to set medical standards and ethics. Third, Part 92 will implicate educational curriculum in the medicine and nursing colleges. It will implicate the nature of government-funded research at these colleges and elsewhere in the corporate for-profit sector. It will implicate privacy in hospital and nursing facility rooms and restrooms, as well as preferred pronouns of patients. Fourth, the operative parties here are often religious organizations, as well as individuals of faith working at secular organizations. In countless factual settings the First Amendment and RFRA require that their religious freedom be honored. Fifth, state laws are impacted, said to be preempted, and thus there is a clash of federal policy with state and local policy. Federalism (also a form of separation of powers) comes away diminished and damaged. Sixth, there is a lot of money involved, both public and private money. Health care is expensive. The United States leads the world in per capita spending on health care. Health insurance companies are deeply affected. Seventh, when dealing with minors, parental rights properly come into play and must be respected. There has been a surge in gender dysphoria and transgender-identification among American adolescents, especially adolescent girls. This rise tracks the rise in social media use by minors. Some states are adopting legislation where social services are taking children away from parents denying their child transition health care. Other states are doing much the opposite where children are protected from parents willing to accede to their child's pleas for medical assistance to transition. Parents should be informed and involved in each step of their child's health care, but Part 92 leaves them out of the loop. Eighth, when dealing with minors and young adults, schools and colleges get involved. This is because of school clinics that render healthcare to students, but also because of government shaping and steering medical research via government grants. For all these reasons and more, the 2022 NPRM raises major questions.

Before HHS unilaterally expands Sec. 1557 beyond the protected classes of sex and blindness, *West Virginia v. EPA* requires that Congress must first act through the U.S. Constitution Article I bicameral legislative process. For years, Congress has had pending legislation that would add sexual orientation and gender identity to Title IX (as well as other venerable nondiscrimination acts like Title VII), but the bills repeatedly have died in the House or Senate.[30] That continued failure to pass legislation, in an elected body regularly subject to voters, is also democracy in action—saying "no" to this HHS-driven expansion. Congress—even to this day, post-*Bostock*—cannot enact a bill that adds sexual orientation and gender identity to Title IX. And that was certainly not the original meaning when Congress first drafted, debated, and finally enacted Title IX fifty years ago. *See* 1972 U.S. Code, Cong. & Admin. News vol. 2, pp. 2462, 2559, and 2608 (congressional reports on legislative history of Title IX).

CONCLUDING REMARKS

birth, gender identity, or gender otherwise recorded." Proposed 92.206(c) goes on to add that "a provider's belief that gender transition or other gender-affirming care can never be beneficial for such individuals (or its compliance with a state or local law that reflects a similar judgment) is not a sufficient basis for a judgment that a health service is not clinically appropriate."

[30] Legislation presently before Congress seeks to balance the interests of persons seeking gender transition services and the service providers who object to providing these services in particular instances, whether on medical, ethical, or religious grounds. *See, e.g.*, H.R. 1440, 117th Cong. (Feb. 26, 2021).

The regulations proposed by the 2022 NPRM are understudied and ill considered. If promulgated, a major effect of Part 92 will be an increase in the United States of gender confusion and irreversible medical transitioning followed by regret. We anticipate that individuals, especially children and adolescents, will raise increasing claims that they are in the "wrong body" and therefore desire to undergo gender transition, either to relieve distress or as an expression of personal autonomy. Sometimes this will involve psycho-social changes: the person asserts a new identity, reinforced by a different name, pronouns, and wardrobe. At other times it will involve a medical or surgical change, in which case the individual is provided pharmacological or surgical interventions that alter the body's function and appearance and may even impair or destroy healthy reproductive organs. These harms and costs must be considered before finalizing the rule.

At its core, the individual who takes on a transgender identity rejects the physiological fact and significance of the sexed body, and seeks to enforce cultural, medical, and legal validation of that person's autonomously declared identity—an event called gender affirmation. Can the government be certain that this is natural, let alone good? That is a major policy question for Congress to weigh, not for a unilateral dictate from the Executive Branch. The Article I Branch makes the law; Article II executes the law; Article III says what the law is. Authority is widely disbursed in this manner for the protection of all in the civic polity. There is a crying need for more public debate, more science-based research, and fuller exploration of avenues to strike compromises.

The medical specialty of pediatrics remains embroiled in a heated and complex debate concerning how best to care for young adults reporting gender dysphoria.[31] As with science generally, the scientific papers in gender studies sometimes conflict. Even the popular press is documenting a sincere and science-based debate among American and European pediatrics concerning how best to treat adolescents reporting ever-increasing numbers of gender dysphoria. The matter is not even close to being resolved, with direct implications for Title IX and this pending NPRM. To quote one recent article:

> [The American Academy of Pediatrics'] new position also raises serious concerns about the Biden administration's proposed Title IX rules. If implemented, these would put enormous pressure on schools to defer uncritically to their students' self-identification, often without parental knowledge or approval. Researchers and clinicians working in the area of pediatric gender medicine have observed that "social transition"—using a child's preferred name and pronouns—carries serious risks of iatrogenesis, meaning an intervention that is itself the cause of illness. When a school treats a child as his or her stated identity, that school, whether intentionally or not, may be locking in a state of temporary distress or confusion and helping it congeal into an "identity." Such a child faces much higher chances of going down the medical path. If [Moira] Szilagyi [, president of AAP] is right, then the Biden administration's proposed rules are a step in the wrong direction—with potentially devastating consequences.[32]

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[31] *See* Abigal Shrier, Irreversible Damage: The Transgender Craze Seducing Our Daughters (Regnery Publishing 2021); Abigail Anthony, *American Academy of Pediatrics Accused of Censoring Concerns about 'Gender-Affirmative Care',* NATIONAL REVIEW (July 29, 2022).

[32] Leor Sapir, *A Victory for Child Welfare? Did the American Academy of Pediatrics tacitly reverse its stance on pediatric gender medicine?* CITY JOURNAL, https://www.city-journal.org/did-the-aap-just-reverse-its-gender-transition-policy (Aug. 22, 2022).

We post here this op-ed by Dr. Leor Sapir, not because it necessarily states the correct side of the debate (we think it does), but because HHS cannot ignore that there is such an ongoing clash among credible medical experts, and to proceed now with the medical science in such turmoil is to charge forward in reckless disregard of the wellbeing of thousands of school-age teens. HHS cannot ignore that Congress—not HHS—is the constitutionally appointed forum for debating, collecting facts, compromising, and eventually settling these matters.

Thank you for your attention to the foregoing Comments.

Respectfully submitted,

Thomas More Society, Christian Legal Society, National Association of Evangelicals, and Institutional Religious Freedom Alliance

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