

# Inclusive Interpretations of Sex Discrimination Law



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## Executive Summary

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Over the past two decades, federal courts have developed a consistent legal narrative – discrimination against LGBTQ people is unlawful sex discrimination under our nation’s civil rights laws. Numerous federal agencies, including the Equal Employment Opportunity Commission (EEOC), have embraced this interpretation and incorporated these protections into administrative protections in the context of housing, healthcare, grant making and more.

## **Lack of explicit inclusion is not exclusion**

Although sexual orientation and gender identity are not explicitly incorporated into existing civil rights laws, courts have made clear that discrimination against LGBTQ people is unlawful sex stereotyping and is prohibited by sex non-discrimination provisions. These courts have concluded that the line between sex discrimination and discrimination against LGBTQ people “is ‘difficult to draw’ because that line does not exist, save as a lingering and faulty judicial construct.”<sup>1</sup>

## **Federal agencies have successfully implemented this interpretation for almost a decade and Trump wants to ignore it**

Beginning in 2009, the federal government began explicitly enforcing a myriad of civil rights laws to protect LGBTQ people. From the Fair Housing Act to the Affordable Care Act, from the Department of Labor to the Department of Justice, the executive branch developed a clear, and legally sound, civil rights infrastructure for LGBTQ people. The Trump administration has chipped away at these protections and has ignored established, modern legal jurisprudence to excuse discrimination. The Trump administration can change regulations, but it cannot change the law.

## **Statutory codification of this judicial precedent is essential**

While legal precedent and federal agency regulations have gone a long way towards ending discrimination, LGBTQ people must have concrete, explicit federal protections in statute. Without these clear protections, individuals facing discrimination have little legal recourse aside from taking their employer, the business that denied them service or their school to court. This is not a realistic solution for the majority of our community.

## **LGBTQ people are covered by existing civil rights laws under sex non-discrimination provisions**

These protections are real, and they are powerful. These protections are rooted in decades-old case law and have been successfully implemented across the country by numerous federal agencies. However, in the absence of concrete statutory protections, access to these rights is limited and can be publicly undermined – although not erased – by executive branch actions and statements.

# Introduction

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**“Statutory prohibitions often go beyond the principal evil [they were passed to combat] to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.” – Justice Antonin Scalia, *Oncale v. Sundowner Offshore Services*.<sup>2</sup>**

The 1964 Civil Rights Act prohibits discrimination on the basis of sex. This discrimination can take many forms. Although traditionally we have understood sex discrimination at work to include unfair bias that influences hiring, firing and promotion decisions, protections from sex discrimination extends far beyond these explicit actions.

Since 1964, courts have breathed life into these statutory protections – reflecting an understanding that discrimination is insidiously dynamic. It is well settled law that discrimination on the basis of sex stereotypes (including on the basis of sexual orientation and gender identity), pregnancy and sexual harassment are all prohibited under Title VII’s sex discrimination provision. This interpretation has also been adopted by courts in the context of Title IX and the Fair Housing Act.

Recent efforts by the Trump administration to narrow this interpretation at the Departments of Justice, Health and Human Services (HHS), and Education run counter to legal precedent and existing Supreme Court precedent regarding the interpretation of Title VII to include classes or characteristics not originally considered by the 1964 Congress.

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The Federal government’s promotion of an exclusive, limited interpretation reflects a willingness to ignore meaningful case law and a reticence to employ mainstream legal theories that are inconsistent with the extreme ideological agenda of the administration.

This is not only bad policy, it is not the law. This report explores the legal development and evolution of sex discrimination protections in federal statutes and what these protections mean for LGBTQ people.

# Lack of explicit inclusion is not exclusion

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## Most federal civil rights laws do not include explicit protections on the basis of sexual orientation or gender identity.

However, some significant protections from discrimination have flowed to the lesbian, gay, bisexual, transgender and queer (LGBTQ) community through an inclusive interpretation of the meaning of “sex” to also prohibit discrimination on the basis of sex stereotypes. This interpretation has been applied to LGBTQ people for almost two decades by the federal courts, agencies and the EEOC.

Unlawful sex stereotyping discrimination occurs when an individual experiences disparate, negative treatment in the context of employment, housing, education and other key areas of life because they fail to conform to societal stereotypes about how a woman or man should look, speak or behave.

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The Supreme Court solidified this interpretation in the 1989 case *Price Waterhouse v. Hopkins*, in which the Court found that a woman who had been denied partnership because she did not conform to the stereotype of how women ought to behave, had experienced unlawful sex discrimination prohibited by Title VII of the 1964 Civil Rights Act.<sup>3</sup>

Ann Hopkins was a successful senior manager who was pivotal to securing a \$25 million government contract. However, colleagues described her as “macho” and as a “tough-talking somewhat masculine hard-nosed [manager],” advised that she should “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry” and take “a course at charm school” if she wanted to become a partner.<sup>4</sup>

She was not rejected from partnership because she happened to be a woman; she was rejected from partnership because she happened not to be the kind of woman that her prospective partners felt she ought to be.

# Discrimination on the basis of sexual orientation or gender identity is rooted in sex stereotypes.

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***Price Waterhouse* has shaped modern sex discrimination jurisprudence for three decades. Federal courts and agencies have embraced this interpretation to ensure that civil rights protections fully achieve their Congressional mission – recognizing that these statutes were designed to be nimble, dynamic and responsive.**

In 2011, the EEOC determined that a transgender worker had experienced unlawful sex discrimination under Title VII when she was denied a job because of her gender identity.<sup>5</sup> The Commission cited *Price Waterhouse* and subsequent Title VII case law holding that:

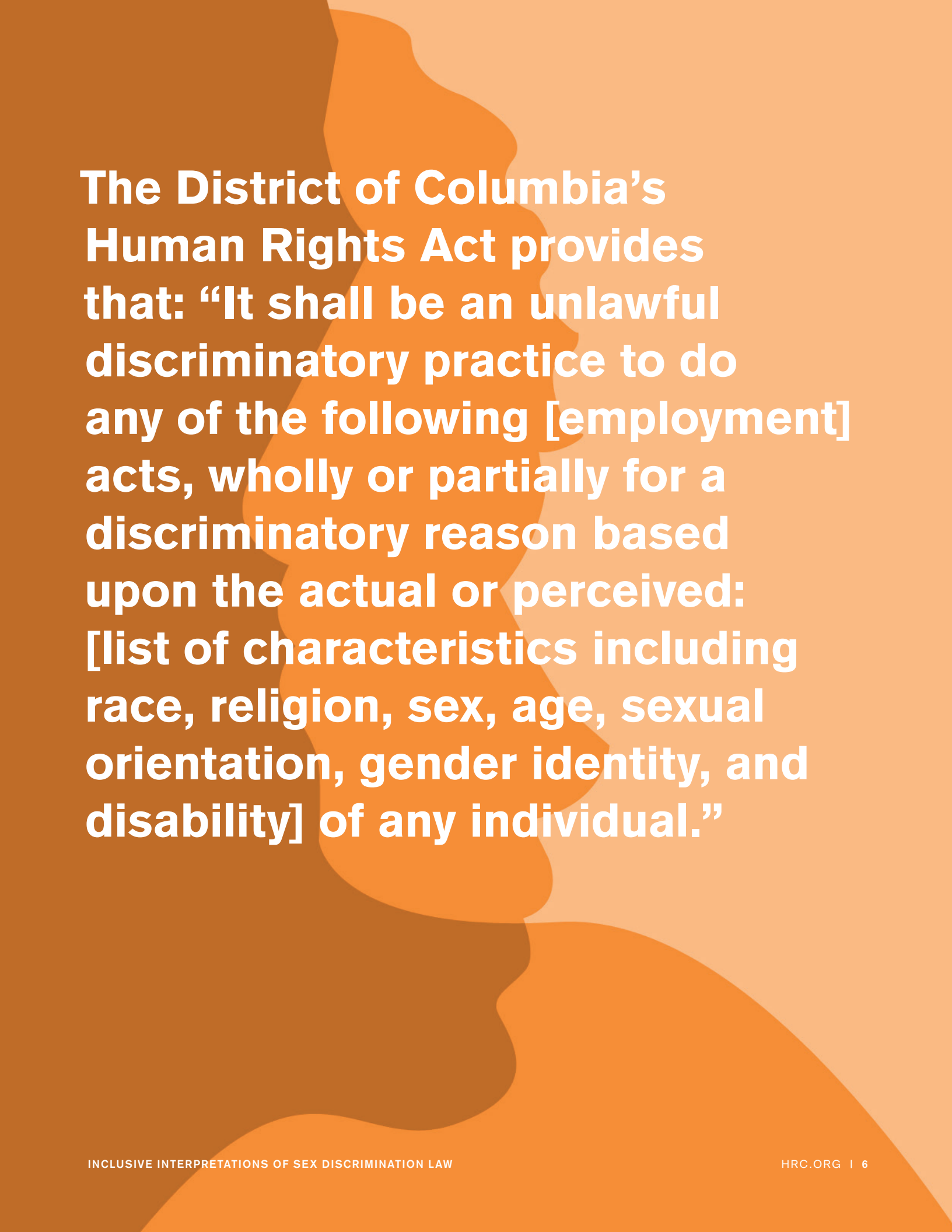
Although most courts have found protection for transgender people under Title VII under a theory of gender stereotyping, evidence of gender stereotyping is simply one means of proving sex discrimination. Title VII prohibits discrimination based on sex whether motivated by hostility, by a desire to protect people of a certain gender, by assumptions that disadvantage men, by gender stereotypes, or by the desire to accommodate other people's prejudices or discomfort . . . Thus, a transgender person who has experienced discrimination based on his or her gender identity may establish a prima facie case of sex discrimination through any number of different formulations.<sup>6</sup>

The Commission has also explicitly held that refusing to allow a transgender worker to access single-sex spaces in accordance with their gender identity is unlawful sex discrimination under Title VII.<sup>7</sup>

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The EEOC reached a congruent decision in *Baldwin v. Fox* in 2015, holding that a claim of sexual orientation discrimination is “necessarily” a claim of sex discrimination for the purposes of Title VII. In *Baldwin*, the Commission found that an employer had unlawfully relied on “sex-based-considerations” when denying an employee a promotion based on his sexual orientation. The Commission recognized that sexual orientation as a concept cannot be defined or understood without reference to sex. Because of the inextricable way in which sexual orientation and sex are tied, they must be looked at through the same legal lens. The EEOC has also determined that denial of spousal health benefits based solely on the sex of the spouse is unlawful under Title VII.



**The District of Columbia’s Human Rights Act provides that: “It shall be an unlawful discriminatory practice to do any of the following [employment] acts, wholly or partially for a discriminatory reason based upon the actual or perceived: [list of characteristics including race, religion, sex, age, sexual orientation, gender identity, and disability] of any individual.”**

## Sex Stereotyping, Sexual Orientation, and Gender Identity Discrimination in the Federal Courts

The federal bench has overwhelmingly adopted this interpretation to include transgender people under the protective umbrella of sex nondiscrimination statutes. In 2000, the Ninth Circuit held that a transgender woman had recourse under sex nondiscrimination provisions of the Gender Motivated Violence Act, and the First Circuit held that a gender nonconforming person had recourse under the sex nondiscrimination provision of the Equal Credit Opportunity Act.<sup>9</sup>

In its 2011 *Glenn v. Brumby* decision, the Eleventh Circuit ruled in favor of an employee of the Georgia General Assembly's Office of Legislative Counsel who alleged that she was fired because of discrimination based on her sex and gender identity.<sup>10</sup> Judge William Pryor wrote for the court explaining that, "discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender."<sup>11</sup>

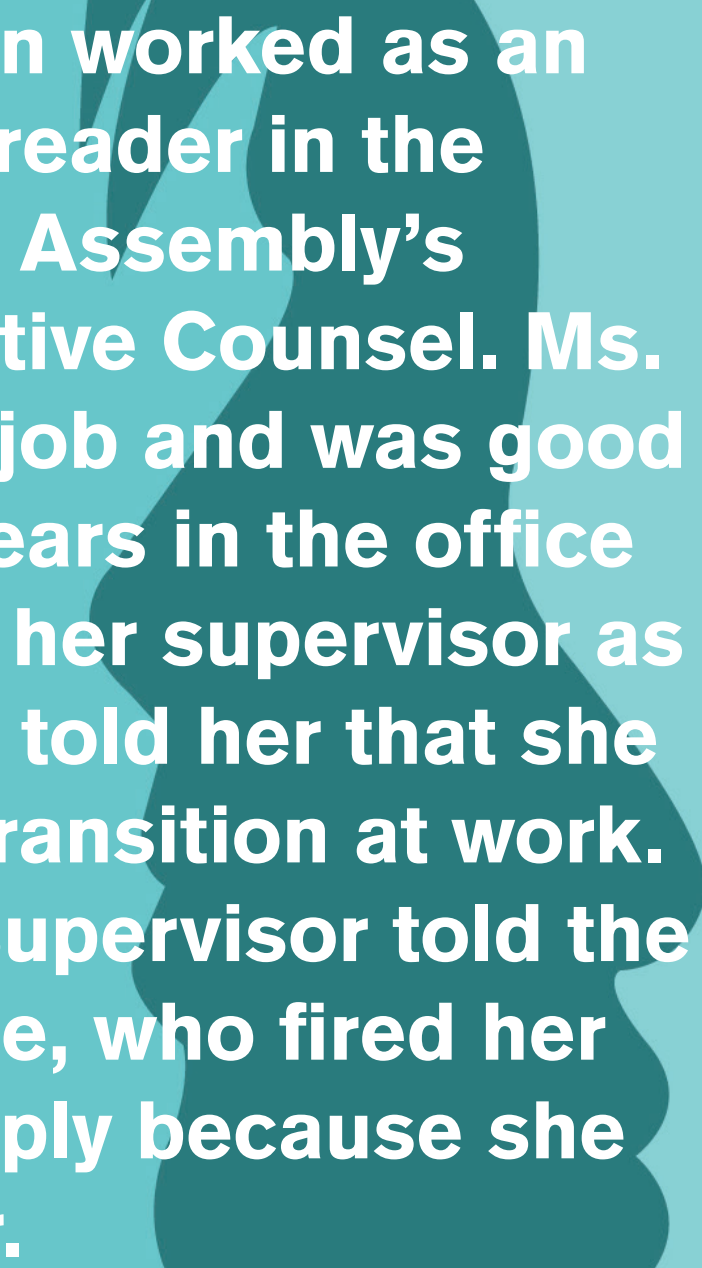
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The Sixth, Seventh, and Ninth Circuits, and many district courts, have all likewise recognized that claims of discrimination on the basis of gender identity is per se sex discrimination under Title VII and other federal civil rights laws based on *Price Waterhouse*.<sup>12</sup>

In *Whitaker v. Kenosha School District*,<sup>13</sup> the Seventh Circuit recognized that discrimination against a transgender person because of their gender identity is sex discrimination under Title IX and the Equal Protection clause. Here the court relied on *Price Waterhouse* and subsequent sex stereotyping cases in its holding determining that "[b]y definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth."<sup>14</sup> The court distinguished contrary precedent finding that "[a] person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes."<sup>15</sup> The court adopted a broad view of sex discrimination explaining that this "encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms."<sup>16</sup>





**Vandy Beth Glenn worked as an editor and proofreader in the Georgia General Assembly's Office of Legislative Counsel. Ms. Glenn loved her job and was good at it. After two years in the office she came out to her supervisor as transgender and told her that she would begin to transition at work. Her immediate supervisor told the head of the office, who fired her immediately simply because she was transgender.**

**In 2009, Kim Hively was serving as a professor at Ivy Tech Community College of Indiana. One morning she kissed her girlfriend goodbye in the parking lot of the school before going inside. This kiss was reported to her supervisor who reprimanded her for unprofessional behavior on campus. Over the next five years Ms. Hively was denied promotion after promotion – never receiving full time status. She was fired in 2014.**

## Tonya and Rachel Smith are a loving, married same-sex couple from Colorado. Rachel is also transgender.

In 2015, they were looking for a new home for their family. Their must-haves were simple – they needed a home that was affordable, with outdoor space for their young children, and near a quality public school. They found the perfect duplex in the community of Gold Hill. However, only a few hours after touring the property the landlord emailed, informing them that she would not rent the unit to them because of their “unique relationship.”

In 2017, the Colorado District Court held that a landlord’s refusal to rent a townhouse to a lesbian couple, one of whom is transgender, violated the Fair Housing Act’s sex nondiscrimination provision.<sup>17</sup> The landlord cited the couple’s “unique relationship” as the reason for the denial. Relying on *Price Waterhouse* and the sex stereotyping analysis, the court held that “discrimination against women (like [Smith]) for failure to conform to stereotype norms concerning to or with whom a woman should be attracted, should marry, and/or should have children is discrimination on the basis of sex under the FHA.”<sup>18</sup>

In the context of healthcare, district courts in Minnesota and California have explicitly determined that discrimination on the basis of gender identity is prohibited under the Affordable Care Act’s sex discrimination provision. In Minnesota, a court determined that “[b]ecause the term ‘transgender’ describes people whose gender expression differs from their assigned sex at birth, discrimination based on an individual’s transgender status constitutes discrimination based on gender stereotyping.”<sup>19</sup> Similarly in California the district court held in 2017 that “[b]ecause Title VII, and by extension Title IX, recognize

that discrimination on the basis of transgender identity is discrimination on the basis of sex.”<sup>20</sup>

The reasoning adopted in *Price Waterhouse v. Hopkins* also encompasses people who have experienced discrimination because they are, or are perceived to be, lesbian or gay. A stereotype that, for example, a man should be in a relationship with a woman is challenged by a man who is in a relationship with a man. If a person experiences discrimination because they are or are perceived to be gay, that is sex-based discrimination. These stereotypes and resulting discrimination are used to enforce adherence to both gender and heterosexual norms.

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The 2017 case of Kimberly Hively, a lesbian woman who a circuit court determined had an actionable claim under Title VII because the anti-lesbian discrimination she experienced was discrimination on the basis of sex, was not appealed to the Supreme Court and is now binding precedent in the Seventh Circuit.<sup>21</sup> Examining Hively’s case “through the lens of the gender nonconformity line of cases,” the court found that she “represents the ultimate case of failure to conform to the female stereotype ... which views heterosexuality as the norm.”<sup>22</sup> The court then concluded that “the line between a gender nonconformity claim and one based on sexual orientation ... does not exist at all.”

The Second Circuit reached a similar conclusion when it overturned existing circuit precedent, ruling in favor of plaintiff Donald Zarda, a gay man who alleged he was fired because of his sexual orientation.<sup>24</sup> The Second Circuit,

ruling in favor of Zarda, observed that “the question of whether there has been improper reliance on sex stereotypes can sometimes be answered by considering whether the behavior or trait at issue would have been viewed more or less favorably if the employee were of a different sex.”<sup>25</sup> It is highly unlikely that the employer would have taken the same action against a female employee who was attracted to men as the male employee who was attracted to men. The court further concluded that to ignore the “sex-dependent nature of sexual orientation” denied the natural protections afforded by Title VII.<sup>26</sup>

In the December 2015 case *Videckis v. Pepperdine University*, a California federal judge determined that two female students had an actionable sex discrimination claim under Title IX against Pepperdine University for alleged intentional discrimination on the basis of sexual orientation.<sup>27</sup>

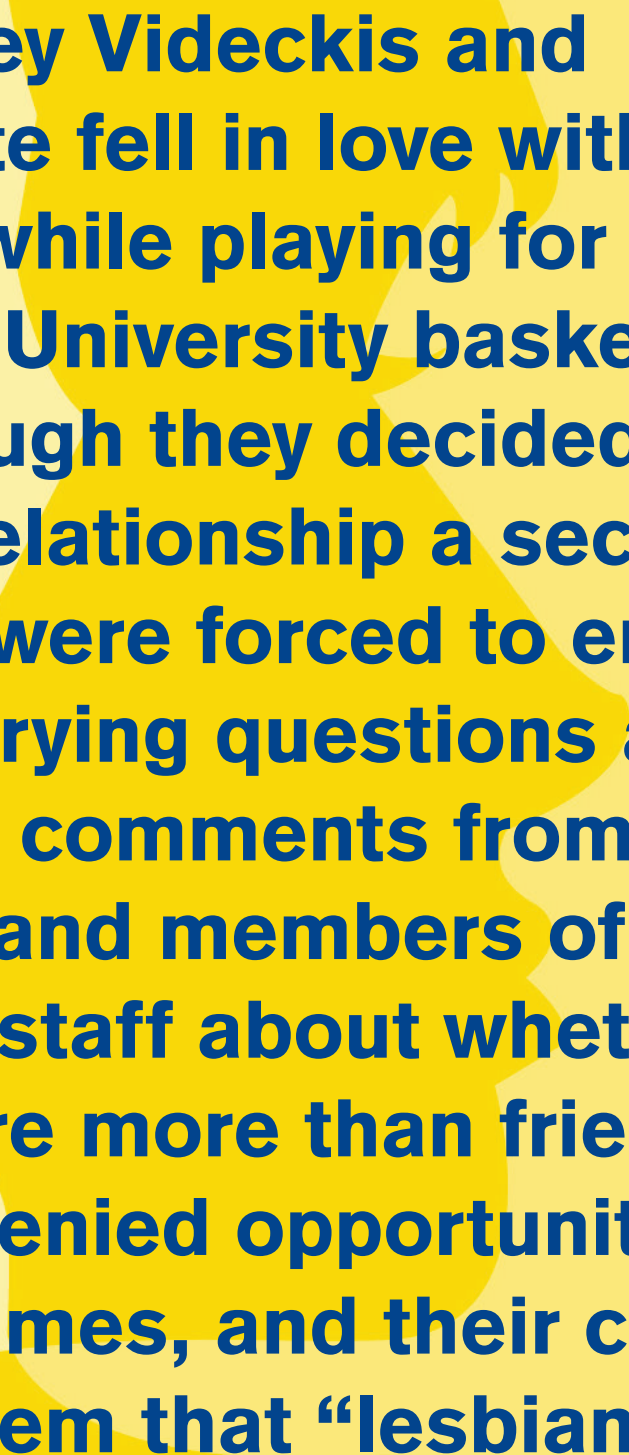
The two students alleged that the coach of the basketball team, of which they were both members, assumed the two were in a relationship with one another, and based on that assumption, asked inappropriate questions and made discriminatory comments toward them. The University argued the students could not allege discrimination on the basis of sexual orientation as an independent claim under Title IX. The court rejected this argument and held discrimination on the basis of sexual orientation is an actionable claim on the basis of sex under Title IX.

**The court reasoned “[a] plaintiff’s ‘actual’ sexual orientation is irrelevant to a Title IX or Title VII claim because it is the biased mind of the alleged discriminator that is the focus of the analysis.”<sup>28</sup> The court concluded that, “[t]he line between sex discrimination and sexual orientation discrimination is ‘difficult to draw’ because that line does not exist, save as a lingering and faulty judicial construct.”<sup>29</sup>**

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In the healthcare context, a federal judge in Washington state determined that a gay plaintiff’s sex discrimination claim could proceed under Title VII and the Equal Pay Act in *Hall v. BNSF Railway Co.*<sup>30</sup> In this case, a worker was denied access to spousal health insurance coverage for his husband. The judge explicitly provided that the plaintiff “experienced adverse employment action in the denial of spousal health benefit due to sex, where similarly situated females [married to males] were treated more favorably by getting the benefit.” This decision echoed the holding in a 2002 case, *Heller v. Columbia Edgewater Country Club*, in which the court determined that treating an employee who is dating a woman differently than if she were to date a man is unlawful sex discrimination.<sup>32</sup>



**In 2014, Haley Videckis and Layana White fell in love with each other while playing for the Pepperdine University basketball team. Although they decided to keep their relationship a secret, the women were forced to endure months of prying questions and intimidating comments from their coach and members of the university's staff about whether or not they were more than friends. They were denied opportunities to play in games, and their coach once told them that “lesbianism isn't welcome on this team.”**

# Executive Branch Actions and LGBTQ Protections

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## Federal agencies have successfully incorporated sexual orientation and gender identity sex discrimination protections for years.

Between 2009 and 2016 numerous federal agencies adopted explicit protections for LGBTQ people under existing civil rights statutes. These protections impacted programs like housing assistance, health care access, and grant making and came from a diverse set of agencies including the Departments of Labor, Education, Justice, and the Office of Personnel Management. In the context of Title IX of the Education Amendments of 1972, the Departments of Education and Justice adopted the sex stereotyping legal reasoning between 2010 and 2016 in their respective interpretations and enforcement of Title IX.

Through a series of “Dear Colleague” letters and guidance documents, the Department of Education advised that Title IX prohibits gender-based harassment of students, including: harassment by a person of the same sex, harassment for “failing to conform to stereotypical notions of masculinity or femininity,” discrimination against transgender and gender non-conforming students, failure to respect transgender students’ gender identity when operating single-sex classes, and failure to respect transgender students’ gender identity for purposes of restroom access, gender pronouns, and athletics.<sup>33</sup>

The Affordable Care Act prohibits discrimination on the basis of sex, and the implementing regulation explicitly embraces the legal concept that discrimination against transgender people is per se sex discrimination.<sup>34</sup> In 2016, HHS implemented a regulation interpreting this provision to include gender identity and sex stereotyping.<sup>35</sup> This regulation forbids health care providers and health plans from adopting categorical exclusions of transition-related care, requires that individuals not be excluded from care based on their transgender status, and mandates that individuals are treated consistently with their gender

identity including in pronoun usage and access to sex segregated facilities. Generally, courts have affirmed that both the regulation and the underlying statute prohibit discrimination on the basis of gender identity.

The Department of Housing and Urban Development (HUD) has similarly concluded that the Fair Housing Act covers claims based on sex stereotyping and gender identity in addition to publishing regulations prohibiting discrimination in HUD programs on the basis of sexual orientation or gender identity.<sup>36</sup>

**These administrative protections are not only consistent with the federal case law, but also reflect the historic deference owed to the EEOC regarding interpretation of Title VII. As a rule, executive branch agencies look to the EEOC’s interpretation of Title VII to determine coverage for purposes of sex discrimination claims.**

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## The case law is clear and is loyal to the vision of the original civil rights statutes, but the Trump administration doesn't care

The Trump administration has routinely ignored this clear legal trajectory in order to exclude transgender and LGB people from the protections we deserve. We have seen leaked memos, rescinded guidance, and legal filings that not only fail to incorporate relevant, modern legal reasoning, but rely on manufactured legal footing designed to support unnecessary and harmful changes.

For example, in his confirmation hearing earlier this year, Attorney General William Barr reiterated his previously stated position advocating against interpreting federal laws to include sexual orientation or gender identity. This is a position that disregards the holdings of more than forty federal courts in the last twenty years. He specifically stated that he would look to the interpretation of “sex” as understood in 1964, arguing that this interpretation had been the “common understanding for almost 40 years.”<sup>37</sup> This interpretation runs counter to modern legal analysis and existing Supreme Court precedent regarding the interpretation of Title VII to include classes or characteristics not originally considered by the 1964 Congress.

HHS also published a proposed rule this month replacing the 2016 regulations implementing the civil rights provision of the Affordable Care Act, Section 1557, which prohibits discrimination in healthcare on the basis of sex.<sup>38</sup> The Office of Civil Rights at HHS began interpreting this provision to include LGBTQ people and accepting complaints and conducting investigations of gender identity and stereotyping discrimination as early as 2012.

After nearly six years of analysis and input from experts, HHS published a final regulation implementing Section 1557 and interpreting the statutory prohibition of discrimination on the basis of sex to include gender identity and sex stereotyping including some types of discrimination on the basis of sexual orientation in 2016.<sup>39</sup> These critical protections have been a true sea change for LGBTQ people seeking healthcare. The regulations published this month ostensibly remove gender identity discrimination protections entirely from the regulation. These changes are in response to an injunction in a case requesting religious exemptions; however, HHS's response is not compelled by the litigation

These are only a few of the recent examples of this administration's careless disregard and dismissal of modern legal thought. The persistent promotion of an outdated and exclusionary interpretation of our civil rights laws reflects a uniform willingness on behalf of the entire administration to ignore meaningful case law and a reticence to employ mainstream legal theories that run counter to their ideological motivations.

Regardless of this administration's actions, the statutes remain unchanged — discrimination on the basis of sex in the context of our nation's civil rights laws is against the law. However, if these regulations and guidance documents are revised to exclude LGBTQ people explicitly, our community will be forced to take their complaints of discrimination directly to the courts. This will undoubtedly limit individual access to justice to those who can afford it.

**MAHA H.M. IBRAHIM, ESQ.**  
**EQUAL RIGHTS ADVOCATES**

# Sexual Harassment as a form of Sex Discrimination

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**Title VII and Title IX prohibit discrimination in employment and in education, respectively, on the basis of sex.<sup>1</sup> Both statutes contain an explicit prohibition of “sex discrimination.”<sup>2</sup>**

Neither statute refers explicitly to “sexual harassment” in its text, yet decades of case law and subsequent implementing regulations provide that sexual harassment is a form of unlawful sex discrimination under both of these civil rights statutes.<sup>3</sup> This interpretation is settled law and no longer a matter of controversy in the courts.

## Sexual Harassment Under the Law

The implementing regulations of Title VII define sexual harassment as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature or based on sex that affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating hostile or offensive work environment.<sup>4</sup>

Courts and the Department of Education have found that “as Title VII is violated if a sexually hostile working environment is created by co-workers and tolerated by the employer, Title IX is violated if a sexually hostile educational environment is created by a fellow student or students and the supervising authorities knowingly failed to act to eliminate the harassment,”<sup>5</sup> The Department of

Education and courts follow the guidelines and case law established for sexual harassment under Title VII when analyzing incidents of sexual harassment under Title IX.<sup>6</sup>

Sexual harassment need not involve conduct of a sexual nature or be based on sexual desire. The sex, gender identity, sexual orientation, or sexual desires of either party does not determine whether or not the harassing behavior was a form of sexual harassment constituting unlawful sex discrimination under civil rights laws.<sup>7</sup>

Additionally, the victim of sexual harassment does not have to be the person harassed, but could be anyone affected by the offensive conduct.<sup>8</sup>

## The Connection Between Sexual Harassment as Unlawful Sex Discrimination Under Title IX and Under Title VII: Discrimination Starts Young and Can Adversely Affect A Person's Entire Lifetime

The existing rights of LGBTQI and other communities to work and learn free from sexual harassment and other forms of discrimination is under attack by the very agencies charged with enforcing these rights. For example, in February of 2017, just one month after assuming government leadership, the Trump Administration's Department of Education (DOE) and Department of Justice (DOJ) rescinded the Obama Administration's May 2016 Dear Colleague Letter on Transgender Students.<sup>9</sup>



That guidance detailed the rights of transgender and gender non-conforming students to use educational facilities that matched their gender identities and directed schools to “treat a student’s gender identity as the student’s sex for purposes of Title IX and its implementing regulations.”<sup>10</sup>

Sexual harassment in school is prevalent, pushes students out of their education, and serves as a primer for sexual harassment and other forms of sex based discrimination that they may experience into their working years and throughout their lifetime.<sup>11</sup> Of the well documented widespread and continuing discrimination in employment against LGBT people, harassment “was the most frequently reported form of sexual orientation-based discrimination by [survey and probability sample studies] respondents who were open about being LGB in the workplace.”<sup>12</sup>

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In a 2011 study published by Brad Sears and Christy Mallory of the UCLA Williams Institute, 35 percent reported having been harassed, and 27 percent reported that they had been harassed within the five years immediately before the survey.<sup>13</sup> From education to the workplace, harassment of LGBTQ people denies them their right to equitable access to education, threatens their livelihoods and careers, and results in disparate rates of unemployment and poverty among LGBTQ people, especially people of color.

Dear Colleague Letters and other forms of guidance issued by previous administrations are relatively easy to rescind by subsequent administrations that attempt to exclude LGBTQI people from protections against sexual harassment because these forms of guidance did not go through the more rigorous Notice and Comment process administrative agencies must engage in when they seek to reform, rescind, or implement new regulations interpreting the essential civil rights they are tasked with enforcing.<sup>14</sup>

However, even regulations can be subject to a drastic reversal of course away from the fundamental statutory rights and established case law that prior administrations have acknowledged for decades. Regulatory protections are at risk when federal agencies led by administrations adverse to equality and principles of social justice are willing to engage in the administrative Notice and Comment process to fundamentally shift or eviscerate existing protections.<sup>15</sup>

Codifying protections against sexual harassment and other forms of discrimination against LGBTQI persons in Congressionally promulgated statute is the strongest and safest approach to ensuring robust protections against sex discrimination for the LGBTQI community with assured legal permanence.

**The Trump administration has routinely ignored this clear legal trajectory in order to exclude transgender and LGB people from the protections we deserve. We have seen leaked memos, rescinded guidance, and legal filings that not only fail to incorporate relevant, modern legal reasoning, but rely on manufactured legal footing designed to support unnecessary and harmful changes.**

# Statutory Codification of this Case Law Is Critical

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**The judicial advances over the past three decades have been critical towards achieving LGBTQ equality and equipping victims of discrimination with meaningful legal recourse.**

However, judicially crafted protections cannot replace explicit federal statutes prohibiting discrimination on the basis of sexual orientation and gender identity. Without these laws, victims of discrimination will have to file a suit against an employer, landlord, or business owner and argue their case in a court of law. This not only requires access to the legal system, but also luxuries that many in our community just don't have – including time and money.

**This is why the Equality Act is so important. The Equality Act amends existing civil rights law—including the Civil Rights Act of 1964, the Fair Housing Act, the Equal Credit Opportunity Act, the Jury Selection and Services Act, to explicitly include sexual orientation and gender identity as protected characteristics.**

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This is why the Equality Act is so important. The Equality Act amends existing civil rights law—including the Civil Rights Act of 1964, the Fair Housing Act, the Equal Credit Opportunity Act, the Jury Selection and Services Act, to explicitly include sexual orientation and gender identity as protected characteristics.

The legislation also amends the Civil Rights Act of 1964 to prohibit discrimination in public spaces and services and federally funded programs on the basis of sex. The Equality Act will equip individuals facing discrimination with clear, concrete protections that they can use to hold their employer or a landlord accountable. It also provides critical notice to these covered entities regarding their obligations under the law.

# About the Authors

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**Robin Knauer Maril serves as associate legal director at the Human Rights Campaign.**

Her work focuses on federal programs and administrative policies that impact the LGBTQ community. Prior to joining HRC, Robin served as a Presidential Management Fellow at the U.S. Department of Housing and Urban Development in Washington, D.C. Also at HUD, Robin worked as a regulatory attorney in the Legislation and Regulation Division of the Office of the General Counsel. An Oklahoma native, Robin graduated with her bachelor's degree in women's studies summa cum laude from the University of Oklahoma, where she was also selected for Phi Beta Kappa. Robin received her law degree from Temple University's Beasley School of Law, where she was named a Rubin Public Interest Law Fellow.

**Cathryn Oakley is the state legislative director and senior counsel at the Human Rights Campaign, where she is responsible for advising legislators and advocates working to enact laws that further LGBTQ equality.**

She focuses in particular on passing non-discrimination laws at the state and local levels and combating anti LGBTQ legislation in state legislatures, including bills preventing municipalities from passing non-discrimination ordinances, bills that would give state agents the ability to deny service from LGBTQ people, and anti-transgender legislation that limits the ability of transgender people — including students — to access facilities in accordance with their gender identity. Cathryn earned her law degree from the George Mason University School of Law and is a member of the Virginia Bar. She holds a bachelor's degree in Economics from Smith College, where she was a Research Fellow at the Louise W. and Edmund J. Kahn Liberal Arts Institute. Prior to working at the Human Rights Campaign, Cathryn practiced family law in Northern Virginia.

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# Appendix

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- 20 *Prescott v. Rady Children's Hosp.-  
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- 21 *Hively v. Ivy Tech Cmty. Coll. of  
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- 22 *Id.* at 346.
- 23 *Id.*
- 24 *Zarda v. Altitude Express*, 883 F.3d  
100 (2d Cir. 2018).
- 25 *Id.* at 120.
- 26 *Id.* at 113.
- 27 150 F.Supp.3d 1151 (2015).
- 28 *Id.* at 1159 – 1160.
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- 32 195 F. Supp. 2d 1212, 1223-24 (D.  
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- 33 Dear Colleague Letter from the  
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- 34 42 USCA § 18116 (2010).
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# Sexual Harassment as a form of Sex Discriminations

## Appendix

<sup>1</sup> Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq.; Title IX of the Education Amendments of 1972, 20 U.S.C. §1681, et seq. Title VII applies to employers who employ 15 or more employees. (42 U.S.C. §2000e(b)). Title IX applies to any education program that receives federal funding, with some limited exceptions which are explicitly delineated in the statute. (20 U.S.C. §1681(a)).

<sup>2</sup> 42 U.S.C. §2000e-2(a)(1) and 20 U.S.C. §1681(a), respectively.

<sup>3</sup> See, *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986) (establishing sexual harassment as a form of unlawful sex discrimination under Title VII); See also, 29 C.F.R. §1604.11, an implementing regulation of Title VII, which defines “Sexual Harassment.” (Promulgated through public notice and comment by the Equal Employment Opportunity Commission (EEOC) Nov. 10, 1980, 45 FR 74677, as amended at 64 FR 58334, Oct. 29, 1999). For Title IX, See, *Gebser v. Lago Vista Independent School District*, 524 U.S. 629 (1999) (holding that a school can be liable

for monetary damages if a teacher sexually harasses a student, when other requirements for liability by the school are met); See also, *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999) (holding that a school may also be liable for monetary damages if one student sexually harasses another student in the school’s program and the requirements for liability under *Gebser* are likewise met). Before the *Gebser* and *Davis* decisions, the Department of Education’s Office for Civil Rights (OCR), the primary federal agency tasked by Congress with administering and enforcing Title IX, clarified that it was the agency’s explicit interpretation that unlawful sex based discrimination under Title IX included sexual harassment. See, “Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties,” (1997 Guidance), 62 FR 12034 (March 13, 1997).

<sup>4</sup> 29 C.F.R. §1604.11.

<sup>5</sup> *Davis v. Monroe County Bd. Of Education*, 74 F.3d 1186, 1193 (11th Cir. 1996).

<sup>6</sup> See, e.g., *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 75 (1992) (applying Title VII principles in determining that a student was entitled to protection from sexual harassment by a teacher in school under Title IX).

<sup>7</sup> See, e.g., *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998).

<sup>8</sup> See, e.g., *U.S. Equal Employment Opportunity Commission, Facts About Sexual Harassment*, available at <https://www.eeoc.gov/eeoc/publications/fs-sex.cfm> (last visited May 3, 2019).

<sup>9</sup> See, e.g., U.S. Secretary of Education Betsy DeVos Issues Statement on New Title IX Guidance, U.S. Department of Education Archived Information, February 22, 2017, available at <https://www.ed.gov/news/press-releases/us-secretary-education-betsy-devvos-issues-statement-new-title-ix-guidance> (last visited May 3, 2019). U.S. Department of Justice, Civil Rights Division and U.S. Department of Education, Office for Civil Rights, *Dear Colleague Letter on Transgender Students*, May 13,

2016, Archived, available at <https://www.2ed.gov/about/offices/list/ocr/letters/colleague-201605-titleix-transgender.pdf> (last visited May 3, 2019).

<sup>10</sup> For example, in one study 48% of Seventh through 12th Graders report experiencing sexual harassment. See, Catherine Hill & Holly Kearl, *Crossing the Line: Sexual Harassment at School*, American Association of University Women (2011), available at <https://www.aauw.org/research/crossing-the-line/> (last visited May 3, 2019). See also, Joseph G. Kosciw, J.G., Greytak, E.A., Xongrone, A.D., Clark, C.M., & Truong, N.L., *The 2017 National School Climate Survey: The Experience of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools*, Gay Lesbian & Straight Education Network New York: GLSEN at 26 (2018), available at <https://www.glsen.org/article/2017-national-school-climate-survey-1> (finding that more than half of LGBTQ students ages 13-21 are sexually harassed at school); See also Centers for Disease Control and Prevention, *Youth Risk Behavior*

*Survey*, MMWR Vol. 65, No. 9 (Aug. 12, 2016), available at <https://www.cdc.gov/mmwr/volumes/65/ss/pdfs/ss6509.pdf> (last visited May 3, 2019) (national survey finding that lesbian and bisexual girls and gay and bisexual boys in grades 9-12 experienced higher rates of sexual harassment and assault than their straight counterparts).

<sup>11</sup> Christine Michelle Duffy, Esq. & Denise M. Visconti, Esq., eds., *Gender Identity and Sexual Orientation Discrimination in the Workplace: A Practical Guide, Chapter 40: Employment Discrimination Against LGBT People: Existence and Impact*, by Brad Sears, Esq. & Christy Mallory, Esq., The Bureau of National Affairs, Inc. at 40-3 to 40-4 (2014).

<sup>12</sup> Brad Sears & Christy Mallory, *Documented Evidence of Employment Discrimination & Its Effects on LGBT People 4* (July 2011), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Sears-Mallory-Discrimination-July-2011.pdf> (last visited May 3, 2019).

<sup>13</sup> This process is governed by the 1946 Administrative Procedure Act, 5 U.S.C. § 551 et seq., Pub.L. 79-404, 60 Stat. 237.

<sup>14</sup> See, e.g., The Department of Educations November 29, 2018, Notice of Proposed Rule Making on Title IX, 83 FR 61462.



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