MEMORANDUM 2023-44

Equal Rights Amendment: Further Discussion

In 2022, the Legislature adopted a resolution assigning the Commission[1] to "undertake a comprehensive study of California law to identify any defects that prohibit compliance with the [Equal Rights Amendment.]"[2] More specifically:

> [The] Legislature authorizes and requests that the California Law Revision Commission study, report on, and prepare recommended legislation to revise California law (including common law, statutes of the state, and judicial decisions) to remedy defects related to (i) inclusion of discriminatory language on the basis of sex, and (ii) disparate impacts on the basis of sex upon enforcement thereof. In studying this matter, the commission shall request input from experts and interested parties, including, but not limited to, members of the academic community and research organizations. The commission's report shall also include a list of further substantive issues that the commission identifies in the course of its work as topics for future examination….[3]

The Commission commenced work on this topic in 2022, considering a proposed approach for the study.[4] The proposed approach has two stages: first, the Commission will examine the possibility of enacting a provision in state law to achieve the effect of the Equal Rights Amendment ("ERA") (such a provision is referred to hereafter as a "sex equality provision"); and second, the Commission will use the sex equality provision to evaluate existing California law, to identify and remedy defects (i.e., provisions that have discriminatory language or disparate impacts).[5] The Commission is currently working on the first stage of this study.

This memorandum provides additional background information and further discussion of the possible next steps in this study.

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1 Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

2 2022 Cal. Stat. res. ch. 150.

3 *Id.*

4 Memorandum 2022-51; see also Minutes (Nov. 2022), pp. 3-4.

5 See Memorandum 2022-51, p. 2.

EFFECT OF THE EQUAL RIGHTS AMENDMENT

The ERA provides that "[e]quality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex."[6]

To codify a sex equality provision to achieve the effect of this language, the Commission has considered the scope of the ERA's sex equality guarantee.[7]

SUBCOMMITTEE DISCUSSION AT AUGUST MEETING

As Memorandum 2023-41 indicates, the Commission did not have a quorum for its August meeting, but the commissioners present worked as a subcommittee and had a lengthy discussion of this topic.

The subcommittee also received a presentation from Professor Mary Ziegler of UC Davis School of Law.[8] Professor Ziegler spoke on Equality and Reproductive Rights. Professor Ziegler described the history of the federal ERA and state ERAs with respect to reproductive issues. She noted that several states have interpreted their state ERAs to cover reproductive issues. Professor Ziegler noted that the U.S. Supreme Court has not addressed reproductive issues as sex equality issues, however the Court's jurisprudence involving sex stereotypes and sex discrimination (*Bostock* case) provides an argument for the treatment of reproductive issues as sex equality issues.[9] And Professor Ziegler noted that the concept of "real differences" has been cited in the case law (including the recent *Dobbs* case) and elsewhere in efforts to distinguish reproductive issues and treat them differently from other sex equality matters.

Memorandum 2023-40, prepared for the August meeting, provided additional background on constitutional doctrines related to religion and offered possible approaches for addressing these doctrines in the Commission's work. The First Supplement provided a comment on the approaches described in the main memorandum.

The Commissioners' discussion in August involved the constitutional doctrines related to religion and how religious protection claims may interact with sex equality protections. The discussion highlighted uncertainties about the scope of the doctrines, posing questions about situations in which religious beliefs could entail restricting or impairing the rights of

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6 H.J. Res. 208 (1972), 86 Stat. 1523.

7 Memoranda 2023-10, 2023-17.

For this study, the Commission concluded that the term "sex" should be understood broadly, consistent with federal anti-discrimination law, to include issues related to pregnancy, sexual harassment, sexual orientation, and gender identity. See Minutes (Feb. 2023), p. 3; see also generally Memorandum 2023-10.

8 Prof. Ziegler's presentation is available at https://www.youtube.com/watch?v=e1601MuRd18.

9 See also generally C.M. Cahill, *Sex Equality's Irreconcilable Differences*, 132 Yale L. J. 910 (Feb. 2023), *available at* https://www.yalelawjournal.org/feature/sex-equalitys-irreconcilable-differences.

other people. During the discussion, Commissioners also questioned how a situation involving competing claims related to religious rights might be resolved (i.e., different individuals have religious beliefs that conflict with one another).

In the context of this study and sex equality, these questions are particularly significant because religious beliefs and values are often cited as underlying views about the societal roles of women and men,[10] sexual morality and reproductive issues,[11] as well as opposition to same-sex marriage,[12] preferred name/pronoun policies,[13] and protections for transgender individuals.[14] Regardless of the reasoning or justification behind these views, they can still "reinforce established gender norms and stereotypes about women's and men's identities,

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[10] See, e.g., S. Howard, D.L. Oswald, & M.S. Kirkman, *The Relationship Between God's Gender, Gender System Justification and Sexism*, 30 Intl. J. for the Psychology of Religion 216 (Mar. 2020), *version available at* https://epublications.marquette.edu/cgi/viewcontent.cgi?article=1531&context=psych_fac.

> Social scientists and feminist theorists suggest one reason gender inequality is able to persist and coexist with social progress in the United States is because ideological patriarchy (i.e., a social system in which men hold primary power and predominate in roles of political leadership, moral authority, social privilege and control of property) is deeply embedded in the social fabric of society. Consequently, patriarchy is perpetuated by socializing agents and institutions and reinforced daily across a variety of contexts.
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> Religion in particular, has been identified as one of the major perpetuators and reinforcers of patriarchal ideology. Conservative beliefs, attitudes and practices centered around gendered authority in institutions such as marriage, family, home, church and politics have historically been endorsed by the world's major religions (i.e., Judaism, Christianity, and Islam) across various societies around the world. Furthermore, feminist theologians and behavioral scientists alike have argued that religions that primarily conceptualize God as male (and other divine authority figures) versus other gendered conceptualizations, serve to legitimize male authority across various social and political contexts.

(Citations omitted). Quoted language can be found on page 3 of the version posted at the link provided above. See also, e.g., A. Simon, *California Christian School Forfeits Football Game Against Team that Allows Girls to Play*, SFGate (Oct. 5, 2023), https://www.sfgate.com/preps/article/christian-school-forfeit-football-opponent-girl-18409530.php.

[11] See, e.g., Burwell v. Hobby Lobby Stores (2014) 573 U.S. 682; Zubik v. Burwell (2016) 578 U.S. 403; see also generally V.C. Brannon, Cong. Res. Serv., Religious Objections to Nondiscrimination Laws: Supreme Court October Term 2022 LSB 10833 (Sept. 29, 2022), *available at* https://crsreports.congress.gov/product/pdf/LSB/LSB10833; Pub. Rights/Private Conscience Project & Center for Gender and Sexuality Law, Unmarried & Unprotected: How Religious Liberty Bills Harm Pregnant People, Families and Communities of Color (Jan. 2017), *available at* https://lawrightsreligion.law.columbia.edu/sites/default/files/content/Reports/Report_UnmarriedUnprotected_1.25.17.pdf.

[12] See, e.g., 303 Creative v. Elenis (2023) 600 U.S. __, 143 S.Ct. 2298, 2309; Masterpiece Cakeshop v. Colo. Civil Rights Comm'n (2018) 584 U.S. __, 138 S.Ct. 1719.

[13] See, e.g., Meriwether v. Hartop (6th Cir. 2021) 992 F.3d 492; Kluge v. Brownsburg Cmty. Sch. Corp. (7th Cir. 2023) 64 F.4th 861, vacated and remanded 2023 WL 4842324.

[14] See generally, e.g., Hon. V. S. Kolakowski, *The Role of Religious Objections to Transgender and Nonbinary Inclusion and Equality and/or Gender Identity Protection*, 47 ABA Civil Rights and Social Justice Group Human Rights Magazine No. 3/4 (July 5, 2022), *available at* https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/intersection-of-lgbtq-rights-and-religious-freedom/the-role-of-religious-objections-to-transgender-and-nonbinary-inclusion-and-equality/; see also M. Lipka & P. Tevington, Pew Research Center , *Attitudes About Transgender Issues Vary Widely Among Christians, Religious 'Nones' in U.S.* (July 7, 2022), https://www.pewresearch.org/short-reads/2022/07/07/attitudes-about-transgender-issues-vary-widely-among-christians-religious-nones-in-u-s/.

social roles, and behavior[,]"[15] and thereby interfere with efforts to overcome inequalities.[16] And where an individual's religious beliefs about sex roles and behavior are at odds with laws to achieve sex equality, there can be disputes about to reconcile how religious protections with sex equality protections. It is important to note that, while religious protections can extend broadly to include beliefs of lesser-known religions, religious beliefs that are in tension with sex equality can be seen in the world's major religions.[17]

Below, the memorandum addresses a specific issue discussed in August and provides some additional information related to that topic, followed by a brief note about constitutional jurisprudence at the U.S. Supreme Court to supplement the prior memoranda.

Religiously Motivated Conduct and Third-Party Harms

Given the uncertainty and shifts in the U.S. Supreme Court's constitutional jurisprudence, the Commissioners expressed uncertainty about the possible scope of religious constitutional protections, particularly for issues where the religious claim involves conduct that is directed at a third party. Currently, the *Smith* test establishes the key test for free exercise claims and permits valid, neutral laws of general applicability, even where those laws burden religious conduct and practices.[18] However, most of the Supreme Court Justices have expressed some concern or skepticism about the *Smith* test and whether it is sufficiently protective of religious conduct.[19] Given that, even a robust understanding of the existing doctrine and how it might apply in novel situations may not provide useful guidance as to how the Court may resolve issues where religious beliefs conflict with sex equality.

Along similar lines, the Commissioners discussed what the limits to the protection of religiously motivated conduct might be. As a general matter, one limit would seem to be that religious beliefs could not be used to excuse causing affirmative physical harm to other

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[15] N. Sattari, et al., *Dismantling "Benevolent" Sexism*, Harv. Bus. Rev. (Jun. 8, 2022), https://hbr.org/2022/06/dismantling-benevolent-sexism ("While hostile sexism upholds traditional gender roles by punishing women who challenge them, benevolent sexism does so through well-intentioned actions. Each type of sexism uses different tactics, but the potential consequences for working women are the same, including possible negative impacts on mental and physical health, increased feelings of incompetence, and less career support.").

[16] See generally, e.g., *id.*

[17] See *supra* note 10.

[18] Emp't Div., Dep't of Human Res. of Or. v. Smith (1990) 494 U.S. 872; see also Memorandum 2023-26, pp. 10-18 (discussing *Smith* and subsequent legal developments involving religious protections).

[19] Memorandum 2023-26, p. 18 ("Two concurring opinions [in *Fulton v. City of Philadelphia*] (comprising a majority of the Justices) raised broader questions about whether the holding in *Smith* should be revisited, citing 'compelling' arguments against the holding in *Smith a*nd 'startling consequences' that result from applying the holding in *Smith*." (citations omitted)).

adults.[20] Beyond that, the limits for when the government can or will prevent harm arising from religiously motivated conduct is far from clear.[21] For instance, a number of states, including California, exclude situations where a child is denied medical treatment in favor of prayer or religious healing practices from their criminal laws against child abuse.[22] Broadly, on the question of whether parents can be held criminally liable in the United States when their children died due to the parents' religious-based decision to avoid medical treatments, the legal outcomes have been mixed.[23]

And, as the prior memorandum and August discussion touched on, the concerns about how broadly the scope of religious protections might sweep is challenging to assess where the legal standard to permit religious burdens is stringent (i.e., the direction that the U.S. Supreme Court seems to be moving). The challenges for governing under such an approach were recognized by Justice Scalia in the *Smith* decision, where he stated "[p]recisely because 'we are a cosmopolitan nation made up of people of almost every conceivable religious preference,' and precisely because we value and protect that religious divergence,

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[20] See, e.g., Cantwell v. Connecticut (1940) 310 U.S. 296, 308 ("No one would have the hardihood to suggest that the principle of … religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect.").

[21] See generally, e.g., J.P. Wolf & N.J Kepple, *Individual and County-Level Religious Participation, Corporal Punishment, and Physical Abuse of Children: An Exploratory Study*, 34 J. Interpersonal Violence 3983 (Oct. 2019), *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5758423/; A.J. Harris, *Whipped, Hit and Locked in Closets: Life Inside Some Religious Day Cares*, Reveal News – Center for Investigative Reporting (Apr. 13, 2016), https://revealnews.org/article/whipped-hit-and-locked-in-closets-life-inside-some-religious-day-cares/; J. Sweeny, *Banning Child Marriage in America: An Uphill Fight Against Evangelical Pressure*, Salon (Mar. 11, 2018), https://www.salon.com/2018/03/11/banning-child-marriage-in-america-an-uphill-fight-against-evangelical-pressure/; D. McClendon & A. Sandstrom, Pew Research Center, *Child Marriage is Rare in the U.S., Though This Varies by State* (Nov. 2016), https://www.pewresearch.org/short-reads/2016/11/01/child-marriage-is-rare-in-the-u-s-though-this-varies-by-state/ (California cited as having above-average rates of child marriage; more girls than boys are married as children); Cal. S.B. 404 (Wahab 2023-24).

[22] Pen. Code § 270 ("If a parent provides a minor with treatment by spiritual means through prayer alone in accordance with the tenets and practices of a recognized church or religious denomination, by a duly accredited practitioner thereof, such treatment shall constitute 'other remedial care', as used in this section."); see also A. Sandstrom, Pew Research Center, *Most States Allow Religious Exemptions from Child Abuse and Neglect Laws* (Aug. 12, 2016), https://www.pewresearch.org/short-reads/2016/08/12/most-states-allow-religious-exemptions-from-child-abuse-and-neglect-laws/; Child Welfare Information Gateway, Children's Bureau, Admin. for Children and Families, U.S. Dep't of Health and Human Servs., Definitions of Child Abuse and Neglect (Current through May 2022), https://www.childwelfare.gov/pubPDFs/define.pdf.

[23] See generally, e.g., Harv. Divinity Sch., Christian Scientists in the Courts, https://rpl.hds.harvard.edu/religion-context/case-studies/minority-america/christian-scientists-courts ("[A]t least 50 Christian Scientists have been charged with murder or manslaughter after their children died of diseases curable by modern medicine. However, despite frequent litigation there has been no judicial consensus over whether practitioners or parents are criminally negligent, or free to deny medical care to children due to freedom of religion. … [I]n 1974, the federal government granted the Church a religious exemption from child neglect and abuse laws, to prevent parents and practitioners from being charged. Within 10 years, all 50 states had passed similar religious exemptions. However, after many high-profile manslaughter cases in the 1980s and 1990s, several states decided to remove these laws. Still, as of 2016, 34 states continue to exempt Christian Science parents from liability for refusing to provide medical assistance to their children.").

we cannot afford the luxury of deeming presumptively invalid, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order."[24]

Federal Do No Harm Act

As noted in Memorandum 2023-26, following the *Smith* decision, the federal government enacted the Religious Freedom Restoration Act ("RFRA"). RFRA requires that strict scrutiny be satisfied where a generally applicable law substantially burdens religious exercise.[25] After the August discussion, the staff became aware of a federal effort to limit the application of RFRA in situations where the religiously motivated conduct would cause harm to third parties.

The federal Do No Harm Act,[26] which has been introduced in several prior congressional sessions, was also introduced in the current congressional session. This legislation "would amend [the federal Religious Freedom Restoration Act ("RFRA")] so that it cannot be used to preempt laws that prohibit discrimination, govern wages and collective bargaining, prohibit child labor and abuse, provide access to health care, govern public accommodations, or require that goods and services be provided in a contract or program."[27]

A 2023 report prepared by the democratic members of the House Committee on Education & the Workforce describes how the legal landscape regarding religious liberty claims has changed since RFRA was adopted (1993):

> Over the past three decades, there has been a sustained, and at times bipartisan, effort to advance the religious liberty interests of a vocal minority at the expense of the civil and legal rights of all. These efforts have resulted in the advancement of policies that allow faith-based grantees and federal contractors using taxpayer dollars to engage in employment discrimination based on religion and have weakened protections for individuals based on their religious beliefs, practices, or lack thereof; sexual orientation; or gender identity. These efforts have also resulted

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[24] Emp't Div., Dep't of Human Res. of Or. v. Smith (1990) 494 U.S. 872, 888 (citation omitted).

[25] 42 U.S.C. § 2000bb-1; see also Memorandum 2023-26, pp. 12-15.

[26] Do No Harm Act was introduced in 118th Congress (2023-24) as H.R. 2725 (Scott) and S. 1206 (Booker). For previous history, see generally Educ. & the Workforce Committee Democrats, Religious Liberty? The History of Religious Liberty in Federal Policy from 1993-2022 (Jan. 2023) (hereafter, "Religious Liberty in Federal Policy Report"), *available at* https://democrats-edworkforce.house.gov/imo/media/doc/religious_liberty_the_history_of_religious_liberty_in_federal_policy_from_1993_to_2022.pdf (noting introductions of Do No Harm Act in 2016, 2019, and 2021); *Do No Harm: Examining the Misapplication of the 'Religious Freedom Restoration Act': Hearing Before the H. Comm. On Educ. And Labor*, 116th Cong. (Jun. 25, 2019), *transcript available at* https://www.govinfo.gov/content/pkg/CHRG-116hhrg37317/html/CHRG-116hhrg37317.htm.

[27] Religious Liberty in Federal Policy Report, *supra* note 26, at 12; see also generally E. London & M. Siddiqi, Ctr. for Am. Progress, Religious Liberty Should Do No Harm (Apr. 11, 2019), *available at* https://www.americanprogress.org/article/religious-liberty-no-harm/.

in policies that allow faith-based grantees to engage in religious coercion and potentially deny program beneficiaries federally-funded social services because of a provider's religious tenets. These efforts have also given rise to policies that may limit access to health care services based on an employer's or provider's religious beliefs. Taking all these actions together, there has been a redefining of who is a victim of discrimination, and thus deserving of protection, in our policies and laws. The victim of discrimination is no longer the individual denied an equal opportunity to participate in or be employed by a federally-funded social service program; instead, the victim now is a faith-based organization that wants the discretion to reject or exclude individuals based on their religious beliefs, practices, or lack thereof, as well as based on sexual orientation or gender identity. Under this framework, the right to discriminate because of religious liberty interests is paramount to long sought, and hard fought, rights to be free and protected from discrimination.

These kinds of discriminatory practices shift the weight of the federal government from supporting victims of discrimination to supporting the right to discriminate with federal funds. This is a profound change in the civil rights landscape of our nation where historically the power of the federal purse has been used to expand equal opportunity regardless of one's protected status. Continuing this trajectory has the potential to further unravel fundamental civil and legal protections across several areas such as health care, social service programs, worker protections, and child nutrition. To reverse this dangerous trend, federal policymakers must be aware of, and proactively respond to, executive, administrative, and legislative actions that advance religious liberty rights at the expense of undermining other fundamental rights. Religious liberty is a fundamental American value that has made our nation a beacon and model for the world, but pursuit of religious freedom should, at a minimum, not come at the expense of civil rights protections and access to social safety net programs and health care services.[28]

Note Regarding Broader Direction of Constitutional Jurisprudence

Commentators have noted that recent U.S. Supreme Court constitutional jurisprudence has moved away from long-standing balancing tests in favor of a "history and tradition" standard. This movement is reflected in recent decisions involving the Establishment Clause, Second Amendment, and the Due Process Clause.[29] Some legal commentators have

[28] Religious Liberty in Federal Policy Report, *supra* note 26, at 21 (footnotes omitted).

[29] See https://constitution.congress.gov/browse/essay/amdt1-3-7-3/ALDE_00013091/; R.B. Siegel, *How "History and Tradition" Perpetuates Inequality:* Dobbs *on Abortion's Nineteenth-Century Criminalization*, 60 Hous. L. Rev. 901 (2023), *available at* https://houstonlawreview.org/article/77671-how-history-and-tradition-perpetuates-inequality-_dobbs_-on-abortion-s-nineteenth-century-criminalization; H. Kanu, Justice Matters Commentary, *Supreme Court's 'History and Tradition' Test Corrodes Church-State Barrier*, Reuters (Oct. 5, 2022), https://www.reuters.com/legal/government/supreme-courts-history-and-tradition-test-corrodes-church-state-barrier-2022-10-05/; see also, e.g., Kennedy v. Bremerton School Dist. (2022) 597 U.S. __, 142 S.Ct. 2407; Dobbs v. Jackson Women's Health Org. (2022) 597 U.S. __, 142 S.Ct. 2228; Am. Legion v. Am. Humanist Ass'n (2019) 588 U.S. __, 139 S.Ct. 2067; N.Y. State Rifle & Pistol Ass'n v. Bruen (2022) 597 U.S. __, 142 S.Ct. 2111; District of Columbia v. Heller (2008) 554 U.S. 570.

noted signals of the possible expansion of this history and tradition test into other areas of constitutional jurisprudence.[30]

From a sex equality perspective, the growth of the "history and tradition" test as a leading test for constitutional interpretation is concerning, as, historically, women were accorded far fewer legal rights.[31] Further, given questions about whether the Equal Protection Clause was understood to provide protection on the basis of sex, the possible use of this history and tradition test for sex-based equal protection claims could undermine sex equality jurisprudence.[32] More broadly, relying on history and tradition as the guiding light in constitutional equality jurisprudence is likely to exacerbate inequality.

History of Gendered Norms and Stereotypes

Looking at the history of the ERA, one can see that historical norms and stereotypes can interact with the law in complicated ways. And, as described below, moving away from those norms and stereotypes can help improve legal protections across the board.

Around the start of the 20th century, progressive labor reformers achieved some success

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[30] See, e.g., H. Gass, *Supreme Court Turns to History: How Does Past Speak to the Present?*, Christian Science Monitor (Jul. 11, 2022), https://www.csmonitor.com/USA/Justice/2022/0711/Supreme-Court-turns-to-history-How-does-past-speak-to-the-present (quoting Reva Siegel as stating "[t]his court is interested in extending history and tradition into other areas of law."); M. Ziegler, Opinion, *The Anti-Abortion Pill Judge is Back — With an Alarming New Target*, MSNBC (Oct. 2, 2023), https://www.msnbc.com/opinion/msnbc-opinion/free-speech-dobbs-abortion-kacsmaryk-rcna118243 (discussing the application of the history and tradition test to a free speech issue).

[31] M. Tertilt et al., *The Origins of Women's Rights*, Centre for Economic Policy Research VoxEU (Jan. 2, 2022), https://cepr.org/voxeu/columns/origins-womens-rights.

> Until the early 19th century, American women lost their legal identity upon getting married and accordingly could not sign a contract, own property, or initiate divorce. The legal position of American women began to improve in the mid-19th century when women started obtaining basic economic rights. For example, the state of New York passed the Married Women's Property Act in 1848, and almost all states had given women the legal right to own property by 1900. Interestingly, the rights in this first stage of reform were granted to women at a time when only men could vote.
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> During the second stage of the expansion of women's rights, women obtained political rights and, in particular, the right to vote in all elections in 1920. Laws regulating the legal equality of women in the labour market were passed much later during the 1960s, constituting the third stage in the expansion of women's rights. The Equal Pay Act of 1963 and Title VII of the Civil Rights Acts of 1964 eliminated most labour market asymmetries between female and male employees. During the fourth stage, starting in the 1970s and still ongoing, women's rights related to their own bodies have substantially improved. Specifically, laws were introduced that made marital rape, teenage marriage, domestic violence, and sexual harassment illegal and punishable by law.

Id.; see also https://nationalwomenshistoryalliance.org/resources/womens-rights-movement/detailed-timeline/; Siegel, *supra* note 29.

[32] See S. Condon, *Scalia: Constitution Doesn't Protect Women or Gays from Discrimination*, CBS News (Jan. 4, 2011), https://www.cbsnews.com/news/scalia-constitution-doesnt-protect-women-or-gays-from-discrimination/ (quoting then-Justice Scalia discussing whether the U.S. Constitution prohibits discrimination on the basis of sex: "[i]t doesn't. Nobody ever thought that that's what it meant. Nobody ever voted for that.").

with pushing for protective workplace rules for women (or children).[33] At that time, labor reforms affecting men faced significant resistance, so reformers saw labor standards for women as both important to address special disadvantages faced by women, as well as providing some momentum towards broader labor reforms that affected all employees.[34] In this period, the ERA was first proposed (in 1923).[35] At that time, "[m]any female reformers opposed the amendment in fear that it would end protective labor and health legislation designed to aid female workers and poverty-stricken mothers."[36] Over time, much of that protective workplace legislation was extended to cover all workers.[37]

Even in the early 1970s (when Congress passed the ERA), concerns remained that imposing the same workplace rules on men and women could have unequal practical effect, given that working women generally had more homemaking and caregiving responsibilities.[38] In other words, laws that fail to account for these differences could, overall, impose a more significant burden on women.[39]

And the differential gendered responsibilities for unpaid and household work persist today.[40] This affects working women in a variety of ways, including that paid-care employment is largely staffed by women who are poorly compensated for this critical

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[33] N. Woloch, A Class by Herself: Protective Laws for Women Workers, 1890s-1990s, p. 1 (2015), *introduction reproduced at* http://assets.press.princeton.edu/chapters/i10504.pdf ("In the first two decades of the twentieth century, most states passed not only laws to regulate child labor but also at least some type of women's labor laws, that is, measures to provide maximum hours, minimum wages, night work bans, or occupational exclusions. Such laws, their advocates claimed, would redress the special disadvantages that women faced in the labor market. They would also provide an 'entering wedge' for more 'general' laws that affected men — a beachhead from which to promote labor standards for all employees.").

[34] *Id.*

[35] https://www.equalrightsamendment.org/faq.

[36] https://historymatters.gmu.edu/d/7018/.

[37] See K. Andrias, *Class, Care, and the Equal Rights Amendment*, 43.1 Columb. J. of Gender & L. 2, 4-5 (2022), *available at* https://journals.library.columbia.edu/index.php/cjgl/article/view/9789/4929.

[38] https://historymatters.gmu.edu/d/7018/.

[39] See *id.* (quoting Testimony of Myra K. Wolfgang, Vice President of the Hotel and Restaurant Employees and Bartenders International Union AFL-CIO, Secretary-Treasurer of its Detroit Local, and a member of the Michigan Women's Commission: "Equality of opportunity for men and women must be achieved without impairing the social legislation which promotes true equality for safeguarding the health, safety and economic welfare of all.

For an example, the passage of an hours limitation law for women provided them with a shield against obligatory overtime to permit them to carry on their life at home as wives and mothers. While all overtime should be optional for both men and women, it is absolutely mandatory that overtime for women be regulated because of her double role in our society.")

[40] See, e.g., S. Devulapalli, *Charts Show Biggest Pay Differences Among California Workers*, S.F. Chronicle (Sept. 5, 2023), *available at* https://www.sfchronicle.com/california/article/pay-gap-gender-race-18341547.php (For California, 2021 "[d]ata shows the wage disparity between men and women widening with higher pay. Men made up 70% of all workers who made more than $240,000. Women comprised 54% of all workers in the lowest category of income."); Cal. Comm'n on the Status of Women and Girls, California Blueprint for Women's Pandemic Economic Recovery 65-88 (2022), *available at* https://women.ca.gov/california-blueprint-for-womens-pandemic-economic-recovery/ (hereafter, "California Blueprint"); J. Carpenter, *The Unpaid Work that Always Falls to Women*, CNN Money (Feb. 21, 2018), *available at* https://money.cnn.com/2018/02/21/pf/women-unpaid-work/index.html; A. Hochschild, The Second Shift: Working Parents and the Revolution at Home (1989).

work.[41] Beyond employment, there are other practical, gender-based economic disparities that exacerbate this compensation differential.[42]

CALIFORNIA CONSTITUTIONAL PROVISIONS REGARDING RELIGION

Prior memoranda in this study have described the U.S. Constitution's two religious provisions, the Establishment Clause and the Free Exercise Clause.[43] Those materials focused more on the details of the federal free exercise doctrine, as well as discussing related federal statutory developments (the federal Religious Freedom Restoration Act and Religious Land Use and Institutionalized Persons Act).

This discussion provides some background on the California Constitution provisions related to religion and how California's provisions differ from those in the U.S. Constitution.

The staff thanks Commissioner Carrillo for his assistance and scholarship on this topic.

California Constitution Religion Provisions

As described in the casebook California Constitutional Law, the California Constitution contains six religion provisions:

- Article I, Section 4: no establishment of religion.
- Article I, Section 4: free exercise of religion.
- Article XVI, Section 5: no aid to religion.
- Article IX, Section 8: no aid to religious schools.
- Article IX, Section 9: University of California is nonsectarian.
- Article XIII, Section 4: religious property exemption from property taxation.[44]

The first two of these, the Establishment Clause and the Free Exercise Clause, have federal analogues.[45] While the California Establishment Clause is "practically identical" to the federal clause, the language of California's Free Exercise protection is notably different

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41 California Blueprint, *supra* note 40, at 80 (quoting a Boston Consulting Group report that indicates "[w]omen are also the heavy lifters in the paid-care economy. About three-quarters of the 34 million people paid to provide care are women."), 81 ("Jobs in paid-care fields which are female-dominated have historically been low-wage and the average child daycare employee earns just $25,000 annually. 92% of these workers are women. According to the Economic Policy Institute, the average wage for early childhood and home health workers is significantly less than that of an average worker.").

42 See, e.g., J. Christensen, *How a 'Pink Tax' on Women Can Hurt Their Health, Especially for Breast Cancer Patients*, CNN Health (Oct. 2, 2023), https://www.cnn.com/2023/10/02/health/health-pink-tax-for-women-hurts-their-health/index.html.

43 See generally Memorandum 2023-26, pp. 3-18; Memorandum 2023-40, pp. 10-18.

44 D.A. Carrillo & D.Y. Chou, California Constitutional Law 722 (2021).

45 *Id.*

from that of the federal clause.[46] Both of these California provisions are discussed in more detail below.

The remaining religion provisions in the California Constitution have no federal analogues.[47] The two "no aid" provisions would seem to require a greater separation between church and state than the federal Establishment Clause might demand.[48] However, the application of those provisions may be limited by recent federal constitutional case law striking down restrictions on the ability of religiously affiliated entities to receive government funds.[49] In particular, the U.S. Supreme Court, in 2020, struck down a Montana constitutional provision, which is similar to California's, prohibiting aid to religious schools.[50] Overall, the recent federal case law takes a more expansive view the scope of the federal free exercise protection that restricts states from requiring a higher degree of separation between church and state (specifically relating to the distribution of government funds to religious entities). In short, the recent federal cases seem to leave states less room (if any) to provide different constitutional rules on these issues.[51] For this

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[46] *Id.*

[47] *Id.* at 722-23.

[48] *Id.* at 758 ("[A]t least a plurality of the California Supreme Court has suggested that these no aid provisions, as a general rule, require stricter separation of church and state than the federal constitution."), 759-60 (discussing the incidental benefits standard that has been used by the California Supreme Court for assessing claims under one of California's no aid provisions and noting that it is less than clear how that standard fits with the federal tests for constitutional religious claims); see also D.A. Carrillo & S.G. Smith, *California Constitutional Law: The Religion Clauses*, 45 U. S.F. L. Rev. 689, 738-43 (2011) (discussing the incidental benefits test in more detail).

[49] See, e.g., Carson v. Makin (2022) 142 S.Ct. 1987; Espinoza v. Mont. Dep't of Rev. (2020) 591 U.S. __, 140 S.Ct. 2246, 2262-63 (finding Montana Constitution's provision prohibiting "aid to a school controlled by a church, sect, or denomination" violates the federal Constitution Free Exercise Clause); Trinity Lutheran Church of Columbia v. Comer (2017) 582 U.S. 449.

See also generally V.C. Brannon, Congressional Research Service, Carson v. Makin: Using Government Funds for Religious Activity, LSB 10785, p. 4 (July 6, 2022), *available at* https://crsreports.congress.gov/product/pdf/LSB/LSB10785. That report provides:

> [T]he Supreme Court has drawn a constitutional distinction between direct financial aid, which it has said may not be used for religious activities, and indirect financial aid, which may be used for religious activities so long as the government operates the program in a way that is neutral towards religion. Accordingly, Carson itself might not implicate federal provisions prohibiting direct assistance from being used for religious activity, particularly if those provisions are not applied to exclude religious entities from a program but merely restrict how both religious and nonreligious entities may use public funds. Instead, under prevailing precedent, the government may still violate the Establishment Clause if it directly funds religious activity. However, that Establishment Clause precedent on funding religious activity was based in part on an approach [set forth in *Lemon v. Kurtzman*] that the Court has now abandoned [as indicated in the opinion in *Kennedy v. Bremerton School District*].

[50] Espinoza v. Mont. Dep't of Rev. (2020) 591 U.S. __, 140 S.Ct. 2246; see also Carrillo & Chou, *supra* note 44, at 760-61.

[51] See cases cited *supra* note 49.

> If *Espinoza* applies broadly to all state constitutional provisions similar to Montana's, the federal religion clauses will likely be dispositive — particularly if the CA clauses provide for greater separation of church

reason, the "no aid" provisions are noted here, but not discussed further in this memorandum.

The final two provisions (i.e., University of California is nonsectarian and religious property taxation exemption) would seem to be only indirectly relevant to the issues in this study and, therefore, are not discussed below.

California's Free Exercise Clause

California's Free Exercise Clause provides: "Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State."[52]

The case law has not provided a clear answer on whether the distinct phrasing of California's Free Exercise Clause (in particular, the "no preference" language) suggests that religion claims brought under the state Constitution should be analyzed using a different test than federal claims.[53] The California Supreme Court briefly noted that the standard for state free exercise claims had not been determined in a 2004 case:

> In a case that truly required us to do so, we should not hesitate to exercise our responsibility and final authority to declare the scope and proper interpretation of the California Constitution's free exercise clause. … A future case might lead us to choose the rule of *Sherbert*, the rule of *Smith*, or an as-yet unidentified rule that more precisely reflects the language and history of the California Constitution and our own understanding of its import. But "[t]hese important questions should await a case in which their resolution affects the outcome." [54]

In a 2008 case, the Court discussed the final possibility, the "as-yet unidentified rule," and clarified that the character of that contemplated unidentified rule would be "an *intermediate standard*, less exacting than the rigorous first option [strict scrutiny] but more so than the second [permitting valid, neutral laws of general applicability]."[55] The Court made that

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and state than the federal constitution. If it does apply to all similar state constitutional religion provisions, *Espinoza* seems to eliminate the California Constitution as a basis for establishing greater separation of church and state and dictates that the resolution of federal constitutional religion questions is dispositive.

Carrillo & Chou, *supra* note 44, at 762.

[52] Cal. Const. art I, § 4. Contrast this with the federal Free Exercise Clause, which prohibits Congress from making a law "prohibiting the free exercise [of religion]."

[53] Carrillo & Chou, *supra* note 44, at 723-24.

For a discussion of the federal free exercise doctrine, see Memorandum 2023-26, pp. 7-18. The 1990 case, *Employment Division, Department of Human Resources of Oregon v. Smith* (hereafter, "*Smith*"), is discussed on pages 10-12.

[54] Catholic Charities of Sacramento v. Superior Court (2004) 32 Cal.4th 527, 562 (citations omitted), cert. denied 543 U.S. 816 (2004). Decision is reproduced in relevant part in Carrillo & Chou, *supra* note 44, at 724-33.

[55] N. Coast Women's Care Med. Grp. v. Superior Court (2008) 44 Cal.4th 1145, 1159. Decision is reproduced in relevant part in Carrillo & Chou, *supra* note 44, at 733-38.

statement in rejecting an argument that the language of California's clause could be read to require a test stricter than strict scrutiny. More specifically, the argument was that the clause should be read to permit "religious objectors to disregard a particular state law unless doing so compromises the peace or safety of the state or is licentious."[56]

The staff did not find other California Supreme Court case law that interpreted the scope of language referencing acts that are "licentious or inconsistent with the peace or safety of the State."[57]

Also, of interest for the Commission's purposes, the California Supreme Court's free exercise case law has recognized "eliminating gender discrimination" (specifically related to health care coverage for contraceptives) and "ensuring full and equal access to medical treatment irrespective of sexual orientation" as compelling state interests that would satisfy the most stringent test (strict scrutiny) and, thereby, permit a law that burdens religious belief or practice.[58]

California's Establishment Clause

As indicated above, California's Establishment Clause is essentially identical to the federal clause. California's clause was also adopted in 1974,[59] shortly after a key federal Establishment Clause case, *Lemon v. Kurtzman*, set forth a three-part test for assessing federal Establishment Clause claims.[60] Given that timing, it is perhaps unsurprising that the California Supreme Court has applied the *Lemon* test to assess California Establishment Clause claims. [61]

However, the *Lemon* test has fallen out of favor at the U.S. Supreme Court.[62] More

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[56] *Id.*

[57] But see Carrillo & Smith, *supra* note 48, at 712-17.

[58] *Catholic Charities of Sacramento*, 32 Cal.4th at 564-65 (gender discrimination); *N. Coast Women's Care Med. Grp.*, 44 Cal.4th at 1158 (full and equal medical care access).

In the *Catholic Charities* case, the Court also noted that the sought exemption from a law requiring contraceptive coverage would impact the ability of third parties (women) to get equitable treatment. In the decision (which predates more recent case law on this point), the Court noted that it was "unaware of any decision in which this court, or the United States Supreme Court, has exempted a religious objector from the operation of a neutral, generally applicable law despite the recognition that the requested exemption would detrimentally affect the rights of third parties." *Catholic Charities of Sacramento*, 32 Cal.4th at 565.

[59] Carrillo & Chou, *supra* note 44, at 739.

[60] (1971) 403 U.S. 602; see also https://constitution.congress.gov/browse/essay/amdt1-3-3/ALDE_00013073/; ("*Lemon v. Kurtzman*'s three-part test instructed courts that for a government action to be considered constitutional: (1) it must have a secular legislative *purpose*; (2) its principal or primary *effect* must be one that neither advances nor inhibits religion; and (3) it must not foster an excessive government *entanglement* with religion." (internal quotation marks omitted)).

[61] Carrillo & Chou, *supra* note 44, at 739, 740-57.

[62] See, e.g., L. Goodrich, Essay, *Will the Supreme Court Replace the* Lemon *Test?*, Harv. L. Rev. Blog (Mar. 11, 2019), https://harvardlawreview.org/blog/2019/03/will-the-supreme-court-replace-the-_lemon_-test/ ("Oral

recent federal case law (as noted briefly above) has applied a "history and tradition" analysis to assess Establishment Clause claims.[63] And, while *Lemon* was not expressly overruled, the Court, in the 2022 case *Kennedy v. Bremerton School District*, said it had "abandoned" the *Lemon* test in favor of a test that relies on "historical practices and understandings."[64]

Since those federal developments, the California Supreme Court has not had occasion to consider what this changing federal Establishment Clause doctrine means for interpretation of California's Establishment Clause.[65]

LEGISLATIVE UPDATES

California Legislation

The California Legislature began its recess September 14, 2023. During the legislative session, the Legislature approved, and the Governor has signed, several bills related to sex equality issues. In particular, the Governor signed several bills related to reproductive health care[66] and LGBTQ+ Californians.[67]

One item of particular note, as the pending bill was discussed in a prior memorandum in this study,[68] is the repeal of California's prohibition on requiring or funding employee travel to states that permit discrimination on the basis of sexual orientation, gender identity, or gender expression.[69] The legislation, which was adopted as an urgency measure, replaces the travel prohibition with a new program: the Building and Reinforcing Inclusive, Diverse, Gender-Supportive Equity Project ("BRIDGE Project").[70] The purpose of the BRIDGE Project "is to raise public awareness and promote civil rights and antidiscrimination

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argument in *American Legion* suggested there are at least five votes to reject *Lemon*. Justices Thomas and Alito have heavily criticized *Lemon* in the past. Chief Justice Roberts and Justice Kavanaugh seemed to agree that *Lemon* is too subjective to be useful. And Justice Gorsuch called *Lemon* a 'dog's breakfast,' suggesting it's 'time for this Court to thank *Lemon* for its services and send it on its way.'").

63 See *supra* note 29 and associated text.

64 597 U.S. __, 142 S.Ct. 2407, 2427-28; see also https://constitution.congress.gov/browse/essay/amdt1-3-3/ALDE_00013073 ("In 2022's *Kennedy v. Bremerton School District* the Supreme Court said it had 'abandoned *Lemon* and its endorsement test offshoot' in favor of 'an analysis focused on original meaning and history.' The Court said the shortcomings of *Lemon*'s '"ambitiou[s]," abstract, and ahistorical approach to the Establishment Clause' ... were 'apparent.' Nonetheless, the Court did not expressly overrule *Lemon* or other precedent applying that test, leaving questions about how courts will apply those rulings in the future." (footnotes omitted)).

65 The staff found no California Supreme Court case law interpreting the state Establishment Clause since 2022.

66 https://www.gov.ca.gov/2023/09/27/california-expands-access-and-protections-for-reproductive-health-care/.

67 https://www.gov.ca.gov/2023/09/23/governor-newsom-signs-legislation-supporting-lgbtq-californians/.

68 Memorandum 2023-21, p. 9.

69 2023 Cal. Stat. ch. 199 (SB 447 (Atkins)).

70 *Id.*

through education, advertising, and marketing activities."[71]

The Governor has until October 14, 2023, to sign or veto legislation. If there are further legislative updates that relate to sex equality, those will be noted in future materials.

Federal Legislation

While preparing this memorandum, the staff also learned about two pending federal acts that relate to sex equality. The federal Do No Harm Act is discussed above, while a brief note about the federal Equality in Our Laws Act is below.

Federal Equality in Our Laws Act

The federal Equality in Our Laws Act was introduced to "enshrine gender equity in the U.S. code by replacing masculine generics with gender neutral language."[72] A press release describing this legislation indicates:

> Research shows that the use of masculine generics — the practice of using masculine nouns and pronouns (he/him/his) to refer to people of all genders — is not only reflective of sexist social structures, but can actually reinforce gender stereotypes and social discrimination. For example, a 2015 study found that men were perceived as more fitting for a high-status leadership position than women when a masculine job title was used. In a growing effort to counter such gender stereotyping and discrimination, organizations and governments are increasingly adopting gender-neutral language. Despite this, much of the U.S. Code [] still uses masculine generics.[73]

The press release also indicates that several states have undertaken such efforts.[74]

The staff notes that the legislative drafting practice utilized by the Commission, which is derived from practice of Legislative Counsel and directed by the Legislature, is to draft statutes using gender-neutral language, where appropriate, and to eliminate unnecessary or inapt gendered pronouns.[75]

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[71] Gov't Code § 12100.171(b).

[72] See Press Release from Congresswoman Summer Lee, *Pressley, Lee, Garcia Introduce Equality in Our Laws Act* (Jul. 25, 2023), *available at* https://pressley.house.gov/2023/07/25/pressley-lee-garcia-introduce-equality-in-our-laws-act/. According to the press release, the legislation would "[d]irect the Office of Law Revision Counsel (OLRC) to make non-substantive, gender-neutral revisions to the non-positive law portions of the Code" and "[d]irect OLRC to prepare a draft bill that makes non-substantive, gender-neutral revisions to the positive law portions of the Code."

On the issue of legislative drafting related to gender, see D.L. Revell & J. Vapnek, *Gender-Silent Legislative Drafting in a Non-Binary World*, 48 Capital Univ. L. Rev. 103 (2020), *available at* https://www.capitallawreview.org/article/12970-gender-silent-legislative-drafting-in-a-non-binary-world.

[73] *Id.*

[74] *Id.*

[75] 2018 Cal. Stat. res. ch. 190 (ACR 260 (Low)); see also 2021 Cal. Stat. ch. 133 (SB 272 (Laird)); https://capitolweekly.net/the-micheli-files-california-statutes-are-being-modernized-including-gender-neutral-drafting/.

REPORTS

The Williams Institute has prepared two background reports for the Commission's consideration. Those reports have been attached as Exhibits to this memorandum. The staff greatly appreciates the assistance of the Williams Institute in researching these issues and preparing these reports to share their findings. The staff wants to extend a special thanks to Williams Institute Legal Director Christy Mallory and Summer Law Fellow Donovan Bendana for their work on these issues.

The first report discusses the scope of definitions of sex discrimination in federal and state laws. In particular, the report considers whether sex stereotypes, pregnancy, gender identity, sexual orientation, and intersex traits are encompassed by the sex discrimination definitions used by different federal agencies. The report also identifies states in which a state agency or court has interpreted sex discrimination to include sexual orientation and gender identity discrimination.

The second report provides further research on some of the matters discussed in an earlier staff memorandum in this study (Memorandum 2023-26). In particular, the second report describes recent developments involving the federal Affordable Care Act and claims for religious exemptions or challenges involving the federal Religious Freedom Restoration Act. The second report also discusses legal developments related to preferred pronouns policies and practices. The report concludes with a brief discussion addressing specific free speech issues involving sex equality (specifically, related to schools and employment).

SEX EQUALITY PRINCIPLE

In the August discussion, Commissioners raised questions about the next steps in this project and the overall goals for this work. During that discussion, two key points were raised:

- One frequently cited effect of the ERA is that it would increase the level of scrutiny (from intermediate to strict) accorded to sex equality claims under the U.S. Constitution.[76] Under the California Constitution's equal protection doctrine, sex-based claims are already subject to strict scrutiny.[77]

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[76] Memorandum 2023-17, p. 2.

[77] See, e.g., In re Marriage Cases (2008) 43 Cal.4th 757, 833 ("[T]he governing California cases long have established that statutes that discriminate on the basis of sex or gender are subject to strict scrutiny under the California Constitution…." (citations omitted)); Catholic Charities of Sacramento v. Superior Court (2004) 32 Cal.4th 527, 564 (indicating that the Women's Contraceptive Equity Act "serves the compelling state interest of eliminating gender discrimination" and that gender discrimination "violates the equal protection clause of the California Constitution and

- California's statutory anti-discrimination laws (related to employment, housing, education, and state action) expressly protect against discrimination based on pregnancy, sexual orientation, gender identity (i.e., characteristics that the Commission found were within the scope of this work).[78]

On those broad issues, California law generally appears to be aligned with the ERA. This is, perhaps, unsurprising. In the period between Congress proposing the ERA (1972) and the ERA passing the state ratification threshold (2020), legal scholars were suggesting that many of the ERA's goals had been met through changing judicial interpretation of the federal Equal Protection Clause that extended constitutional protections to sex discrimination and effectively created a "de facto ERA."[79] While federal equal protection jurisprudence currently applies intermediate scrutiny to assess sex-based claims (and many suggest that the ERA would increase that to strict scrutiny, which California already applies in such cases),[80] the practical effect of this change in the level of scrutiny is somewhat unclear.[81] Beyond the level of scrutiny, the ERA could also expand the scope of issues that are cognizable under the U.S. Constitution's sex equality protections (i.e., to include issues that have either been excluded from or have not yet been addressed in the U.S. Supreme Court's equal protection jurisprudence).[82] More specifically, in its equal protection

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triggers the highest level of scrutiny" (citation omitted)); Molar v. Gates (4th Dist. 1979) 98 Cal.App.3d. 1, 13 ("In *Sail'er Inn, Inc. v. Kirby*, a female citizen challenged the constitutionality of a California law prohibiting women from tending bar unless they or their husbands held the liquor license on equal protection grounds. Our Supreme Court held that the bartending law was indeed unconstitutional under the equal protection clauses of the state and federal Constitutions and in doing so declared that 'classifications based upon sex should be treated as suspect.' *Sail'er Inn* thus clearly established the principle that gender-based differentials are to be treated as 'suspect classifications' which must be subjected to intense judicial scrutiny to determine if they violate the right to equal protection guaranteed by the state Constitution. The Supreme Court has consistently reaffirmed this principle. Thus, in *Arp v. Workers' Comp. Appeals Bd.*, the court stated that 'the strict scrutiny/compelling state interest test must govern sex discrimination challenges under Article I, section 7, of the California Constitution,' and in *Hardy v. Stumpf*, the court acknowledged that '[c]lassifications predicated on gender are deemed suspect in California.'"(citations omitted)); Boren v. Dep't of Emp. Dev. (3rd Dist. 1976) 59 Cal.App.3d 250, 255-256 ("According to California decisional law, a statute establishing 'suspect classifications' or trenching upon 'fundamental interests' is vulnerable to strict judicial scrutiny; it may be sustained by a showing of a compelling state interest which necessitates the distinction; a sex-based classification is treated as suspect." (citations omitted)).

[78] See Memorandum 2023-21; see also, e.g., Gov't Code §§ 11135(a) (No person in the State of California shall, on the basis of sex, race, color, religion, ancestry, national origin, ethnic group identification, age, mental disability, physical disability, medical condition, genetic information, marital status, or sexual orientation, be unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is conducted, operated, or administered by the state or by any state agency, is funded directly by the state, or receives any financial assistance from the state."); 12926(r) (defining "sex" to include pregnancy, childbirth, breastfeeding, and gender, which, in turn, includes gender identity and gender expression).

[79] R.B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA (2005-06 Brennan Center Symposium Lecture)*, 94 Cal. L. Rev. 1323, 1332-34 (2006).

[80] See generally Memorandum 2023-17.

[81] Siegel, *supra* note 79, at 1334 ("Shortly after the *Virginia Military Institut*e decision, Justice Ruth Bader Ginsburg observed: 'There is no practical difference between what has evolved and the ERA.'" (citations omitted)).

[82] See Memorandum 2023-17, pp. 9-10.

jurisprudence, the U.S. Supreme Court has not treated pregnancy and reproductive issues as sex equality issues (subject to intermediate scrutiny).[83] However, California may be on good legal footing with respect to those issues as well, given that the state has enshrined reproductive protections in its Constitution in a provision that is expressly intended to further the state constitution's equal protection guarantee.[84]

Some scholars have suggested that the ERA should be understood to encompass a broader concept of equality, one where the overall goal is not simple neutrality with respect to sex and gender in the law.[85] Scholars who have questioned the treatment of equality as a requirement of legal neutrality have suggested that the ERA's guarantee of equality on the basis of sex may be better understood as focusing on equality of opportunity and ability to participate in society.[86] Without a federal ERA as legal authority, laws that seek to codify this concept of equality may be in tension with the existing constitutional equal protection doctrines.[87]

This section of the memorandum lays out some different options for how the Commission might want to proceed in this study. The options are presented roughly in order of the breadth of the resulting legal reform, from broad to narrow.

Option 1: Examine the Possibility of a State Constitutional Equal Rights Amendment

California's Constitution currently contains several provisions related to sex equality.[88] Taken together, these provisions provide for significant sex equality protections. However,

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[83] Dobbs v. Jackson Women's Health Org. (2022) 597 U.S. __, 142 S.Ct. 2228, 2245-46 (The decision indicates that the argument that the Equal Protection Clause would provide an abortion right "is squarely foreclosed by our precedents, which establish that a State's regulation of abortion is not a sex-based classification and is thus not subject to the 'heightened scrutiny' that applies to such classifications. The regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a 'mere pretex[t] designed to effect an invidious discrimination against members of one sex or the other.' And as the Court has stated, the 'goal of preventing abortion' does not constitute 'invidiously discriminatory animus' against women."); Geduldig v. Aiello (1974) 417 U.S. 484, 496-97 (In discussing the disability insurance program at issue, which excluded pregnancy from its coverage, the Court stated "There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.").

[84] Cal. Const. art. I, § 1.1 ("The state shall not deny or interfere with an individual's reproductive freedom in their most intimate decisions, which includes their fundamental right to choose to have an abortion and their fundamental right to choose or refuse contraceptives. This section is intended to further the constitutional right to privacy guaranteed by Section 1, and the constitutional right to not be denied equal protection guaranteed by Section 7. Nothing herein narrows or limits the right to privacy or equal protection.").

[85] See, e.g., J.C. Suk, Essay, *A Dangerous Imbalance: Pauli Murray's Equal Rights Amendment and the Path to Equal Power*, 107 Va. L. Rev. Online 3, 24-25 (Jan. 29, 2021), https://virginialawreview.org/articles/a-dangerous-imbalance-pauli-murrays-equal-rights-amendment-and-the-path-to-equal-power/; C.A. MacKinnon, Women's Lives, Men's Laws 13-21(2005).

[86] See J.C. Suk, After Misogyny: How the Law Fails Women and What to Do about It 152-79 (2023).

[87] See, e.g., Students for Fair Admissions v. President and Fellows of Harvard College (2023) 600 U.S. 181.

[88] E.g., Cal. Const. art. I, §§ 1, 1.1, 7, 8, and 31. See also discussion of "Status of State Constitutional Amendments" in Memorandum 2023-40, p. 10 and discussion of "California Constitution" in Memorandum 2023-17, pp. 16-19.

California does not have a single comprehensive provision that is akin to the Equal Rights Amendment. Given that, one option would be to craft such a constitutional provision.

Legally, the staff has not identified any deficiencies regarding the scope of the California Constitution's protections of sex equality that would require the enactment of new, stand-alone provision.[89] Therefore, the legal benefits of this effort are somewhat uncertain (i.e., how would such a provision change legal outcomes?). And the work and resources this effort might require would likely be considerable (some of that work would need to be done by others, given the Commission's restrictions on advocacy and limited resources).

Symbolically, a comprehensive, ERA-like constitutional amendment could make an important statement about the value that California places on equality. In the staff's view, this is a strong reason in favor of this option.

That said, the staff believes that it is unlikely that a proposed constitutional amendment was what the Legislature had in mind when assigning the Commission this study. While the Commission has worked on constitutional amendments in the past,[90] those amendments involved implementation work to conform to broader governmental changes (i.e., trial court restructuring). As indicated above, the Commission is not well-positioned to shepherd a constitutional amendment through the full process.

For these reasons, the staff recommends against pursuing this option.

If the Commission is interested in exploring this option further, the staff would recommend starting by soliciting feedback from legislative stakeholders on this approach.

Option 2: Craft a Broad Statutory Sex Equality Protection

As discussed in Memorandum 2023-21, California has several statutory anti-discrimination laws. California has anti-discrimination protections that apply to employment, housing, education, public accommodations, state action, and health care.[91]

Another option would be for the Commission to work on crafting a broad statutory sex

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89 See Memorandum 2023-17, pp. 10-11; see also *supra* note 88.

90 *Trial Court Unification: Constitutional Revision (SCA 3)*, 24 Cal. L. Revision Comm'n Reports 1 (1994).

91 Civ. Code § 51 (public accommodations), Educ. Code § 220 (education), Gov't Code §§ 11135 (state programs and activities), 12940 (employment), 12955 (housing), Health & Safety Code §§ 1357.503, 1367.042, and 1399.851 (health care). See also Memorandum 2023-21, Ltr. From Sarah Ream, Acting Gen. Counsel for Cal. Dep't of Managed Health Care to All California Licensed Health Plans re APL 20-022 – Compliance with California nondiscrimination requirements (Jun. 15, 2020), *available at* https://www.dmhc.ca.gov/Portals/0/Docs/DO/APL20-022-ComplianceWithCaliforniaNondiscriminationRequirements.pdf.

California also has a number of more specific or narrow anti-discrimination protections. E.g., Bus. & Prof. Code § 23425-23438 (related to alcohol licenses for various clubs and associations, many provisions contain an anti-discrimination rule); Health & Safety Code § 1586.7 (adult day health care centers); Pub. Util. Code § 40121 (labor contracts for Orange County Transit District).

equality protection. One challenge is assessing what the scope of such a provision would be (i.e., would the provision focus on certain types of conduct? Or would this provision essentially be a guide to statutory interpretation?).

If the sex equality provision is intended to focus on specific types of conduct, the Commission would need to determine what types of conduct to cover. As noted above, California has anti-discrimination laws that cover broad issues. At this point, the staff is not aware of any major areas that California anti-discrimination laws do not cover. Expanding anti-discrimination protections into new areas will require a close eye to potential constitutional limits. As noted in the prior memoranda, the U.S. Supreme Court has limited the reach of certain anti-discrimination protections on constitutional grounds.[92]

If, instead, the Commission wanted to explore enacting a statutory ERA-like provision, such a provision could presumably be intended to either (1) adjust or clarify the applicable standard for assessing a sex-based equal protection claim or (2) clarify the scope of characteristics that would be covered by statutory sex discrimination prohibitions. Each of those options is discussed briefly below.

Statutory Provision to Clarify Standard for Sex-Based Equal Protection Claims

As indicated above, California's equal protection jurisprudence generally accords sex-based claims strict scrutiny. However, the California Supreme Court has not yet considered equal protection claims covering all the different issues that the Commission decided are within the scope of sex for the purposes of this work. One possible approach would be to craft a statutory provision intended to make clear that strict scrutiny applies to the full scope of sex equality claims.

Although it arises in a different context and was intended to change the legal test applied by the U.S. Supreme Court to free exercise claims,[93] the staff notes that the federal Religious Freedom Restoration Act is a statute that does something along these lines.[94] The staff also identified an example of a strict scrutiny statutory test in a section of the California Civil Code. That provision prohibits burdens on the ability of a minority group[95] to affect future legislation through policy decisionmaking changes, unless strict scrutiny is

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92 See generally Memorandum 2023-40, pp. 2-4 (discussing *303 Creative v. Elenis*); Memorandum 2023-26, pp. 35-38 (discussing *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston* and *Boy Scouts of America v. Dale*).

93 See discussion of "Federal Religious Freedom Restoration Act" in Memorandum 2023-25, pp. 12-15.

94 42 U.S.C. § 2000bb-1 (Subdivision (b) provides that "Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person — (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.").

95 A minority group is defined in the statute as "a group of persons who share in common any race, ethnicity, nationality, or sexual orientation." Civ. Code § 53.7(b)(2).

satisfied.[96] The provision provides, in part:

> A statute, ordinance, or other state or local rule, regulation, or enactment shall be determined valid in an action brought pursuant to this section, only upon a showing by the government that the burden imposed by the statute, ordinance, or other state or local rule, regulation, or enactment satisfies both of the following criteria:
>
> (1) The burden is necessary to serve a compelling government interest.
>
> (2) The burden is no greater than necessary to serve the compelling government interest. [97]

As a general matter, the nature of this type of provision would be quasi-constitutional, in that the provision would effectively seek to, by statute, clarify the scope of the constitutional equal protection doctrine.

Statutory Provision Clarifying Scope of Characteristics Covered by Sex Discrimination Prohibitions

Another similar option would be to craft a rule for interpreting statutory anti-discrimination rules. That rule could make clear that any statute that prohibits discrimination on the basis of sex encompasses the different characteristics that the Commission decided were within the scope of this work.[98]

While many of California's broad anti-discrimination protections expressly cover the key characteristics, California law has a number of more specific or narrow anti-discrimination protections that may not specifically address the different sex characteristics.[99] A provision that provides broad interpretive guidance could be an important backstop to ensure that the sex discrimination prohibitions are understood to broadly encompass all of the protected sex characteristics.

Option 3: Move Into Phase 2 of This Work

Finally, given the lack of apparent problems with the broad direction of California sex equality laws, the Commission could consider simply moving to the second phase of this work without seeking to craft a broad equality principle.

The second phase of this work will entail a two-prong effort: (1) conducting a significant outreach effort to get comments identifying specific problematic laws with sex-based disparate impacts and (2) code-wide searches for sex-related language that is either discriminatory or unnecessary.

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96 *Id.* § 53.7. This provision also indicates that such a burden would be a denial of equal protection.

97 *Id.* § 53.7(c).

98 See *supra* note 91.

99 See *supra* note 7.

If the Commission decides to proceed with this option, the second prong of this work could include identifying specific sex discrimination prohibitions where the scope may not be sufficiently clear. Those items could be addressed individually, as opposed to by a broad statutory interpretation rule (as described above).

NEXT STEPS

The staff is seeking direction from the Commission on which of the options presented above the Commission would like to pursue in this study. In addition, if the Commission would like to proceed with Options 1 or 2, the staff is also seeking direction on which of the drafting approaches presented in Memorandum 2023-40 that the Commission would like the staff to use with respect to the constitutional doctrines that may affect the scope of sex equality protections. Finally, for the different drafting approaches, the staff is also seeking direction as to where in the Commission's materials that the Commission would like to address these constitutional doctrines (i.e., the Commission's narrative report, the Commission Comment, or the proposed legislative language).

If the Commission would like further detail and examples of multiple options or approaches before choosing between them, the staff can offer more detail in future materials.

How would the Commission like to proceed?

Respectfully submitted,

Kristin Burford
Chief Deputy Director

Federal and State Agency Definitions of Sex Discrimination that Include Sexual Orientation and Gender Identity Discrimination

After the Supreme Court's 2020 decision in *Bostock v. Clayton County,*[1] federal agencies were directed by President Biden to interpret "sex discrimination" to include discrimination on the basis of sexual orientation and gender identity. This directive followed a long history of agencies expanding the definition of the term "sex discrimination" in response to court cases. Today, one or more federal agency defines "sex discrimination" to include discrimination on the basis of the being, or being perceived to be:

- Male, female, or gender nonbinary (sex);
- Intersex status (sex characteristics);
- Lesbian, gay, bisexual, queer, heterosexual, or asexual (sexual orientation);
- Cisgender or transgender (gender identity);
- Gender conforming or non-conforming (gender expression);
- Sex or gender stereotypes; and
- Pregnancy, childbirth or related medical conditions, breastfeeding, false pregnancy, termination of pregnancy, contraception, infertility treatment, or recovery from any of these conditions.

Federal Agency	Sex Stereotypes?	Pregnancy?	Gender Identity?	Sexual Orientation?	Intersex Traits?
Equal Employment Opportunity Commission	Y	Y (including abortion and contraception)	Y	Y	N (no explicit reference)
Dept. of Education	Y	Y	Y	Y	Y
Dept. of Justice	Y	Y	Y	Y	Y
Dept. of Housing and Urban Development	Y (implicitly)	N (family status is treated as a separate protected class)	Y	Y	N (no explicit reference)
Dept. of Health and Human Services	Y	Y	Y	Y	Y
OFCCP (federal contractors)	Y	Y	Y	N (sexual orientation is its own protected class under E.O. 11246)	N (no explicit reference)
Dept. of Agriculture	Y	Y	Y	Y	N (no explicit reference)

[1] U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-NVTA-2016-2, PREVENTING EMPLOYMENT DISCRIMINATION AGAINST LESBIAN, GAY, BISEXUAL, OR TRANSGENDER WORKERS (BROCHURE) (2014), https://www.eeoc.gov/laws/guidance/preventing-employment-discrimination-against-lesbian-gay-bisexual-or-transgender.

In addition, agencies or courts in several states interpret "sex discrimination" in their state statutes to include sexual orientation and gender identity discrimination. Examples of these interpretations include:

- Alaska: Alaska Commission for Human Rights
- Arizona: Arizona Attorney General's court filing in Bruer vs. The State of Arizona
- Kansas: Kansas Human Rights Commission's Statement on Bostock
- Kentucky: Kentucky Commission on Human Rights
- Florida: Florida Commission on Human Rights
- Michigan: Michigan Civil Rights Commission's Interpretive Statement
- North Dakota: North Dakota Department of Labor and Human Rights statement (2020)
- Ohio: Ohio Civil Rights Commission
- Pennsylvania: Guidance on Discrimination on the Basis of Sex Under the Pennsylvania Human Relations Act (PHRA)
- Texas: Texas 5th Circuit Court of Appeals ruling in Tarrant County Community College v. Sims

U.S. Equal Employment Opportunity Commission

The U.S. Equal Employment Opportunity Commission defines sex discrimination as prohibited by Title VII as discrimination against a person "because of that person's sex, including the person's sexual orientation, gender identity, or pregnancy."[2]

The EEOC interpreted Title VII's bar on sex discrimination to encompass discrimination based on gender identity and sexual orientation prior to the Supreme Court's 2020 decision in *Bostock v. Clayton County*.[3] In April 2012, the EEOC issued an administrative decision holding that discrimination based on gender identity/transgender status is sex discrimination.[4] In December of 2012, the Agency adopted a Strategic Enforcement Plan which prioritized enforcement of Title VII's sex discrimination provisions as applied to LGBT individuals.[5] In July 2015, the EEOC held that sexual orientation discrimination is sex discrimination.[6]

The EEOC has interpreted pregnancy discrimination as sex discrimination since 1972[7], predating the Pregnancy Discrimination act of 1978 (which reaffirmed the EEOC's Guidelines on pregnancy

[2] *Sex-Based Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/sex-based-discrimination. (last visited Mar. 27, 2023).
[3] U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-NVTA-2016-2, PREVENTING EMPLOYMENT DISCRIMINATION AGAINST LESBIAN, GAY, BISEXUAL, OR TRANSGENDER WORKERS (BROCHURE) (2014), https://www.eeoc.gov/laws/guidance/preventing-employment-discrimination-against-lesbian-gay-bisexual-or-transgender.

[4] U.S. EQUAL EMP. OPPORTUNITY COMM'N, NVTA-2021-1, PROTECTIONS AGAINST EMPLOYMENT DISCRIMINATION BASED ON SEXUAL ORIENTATION OR GENDER IDENTITY (2021), https://www.eeoc.gov/laws/guidance/protections-against-employment-discrimination-based-sexual-orientation-or-gender.
[5] *Fact Sheet: Recent EEOC Litigation Regarding Title VII & Anti-LGBT-Related Discrimination,* U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/fact-sheet-recent-eeoc-litigation-regarding-title-vii-lgbt-related-discrimination# (last updated July 8, 2016).
[6] *Id.*
[7] 29 C.F.R § 1604.10 (1972).

discrimination)[8]. The Commission states that pregnancy discrimination can include discrimination based on current, past, or potential pregnancy; medical condition relating to pregnancy or childbirth (including breastfeeding/lactation); having or choosing not to have an abortion; and in some circumstances, contraception and infertility treatment.[9]

The EEOC also defines sex discrimination to include discrimination based on gender stereotypes consistent with the Supreme Court's 1989 decision in *Price Waterhouse v. Hopkins*.[10]

U.S. Department of Education

The Department of Education interprets Title IX to prohibit discrimination based on gender identity, sexual orientation, intersex conditions, sex stereotypes, and pregnancy and related conditions.

In 2010, ED issued a Dear Colleague Letter in which they took the position that Title IX's sex discrimination prohibition includes harassment based on sex stereotypes.[11] While the Department stated that "Title IX does not prohibit discrimination based solely on sexual orientation," they explained that "when students are subjected to harassment on the basis of their LGBT status, they may also…be subjected to forms of sex discrimination prohibited under Title IX."[12]

Over the last decade, the ED has changed their position on whether discrimination based on gender identity and transgender status qualify as prohibited sex discrimination under Title IX. In May of 2016, the ED and the DOJ released a joint Dear Colleague letter which took the position that Title IX's prohibition on sex discrimination "encompasses discrimination based on a student's gender identity, including discrimination based on a student's transgender status."[13] In February 2017, however, the two agencies issued a joint letter announcing their withdrawal of the statements in the 2016 letter following a preliminary injunction from a federal district court enjoining their enforcement of the interpretation embodied in therein.[14]

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[8] 29 C.F.R. § 1604, Supplementary Information (1979), https://www.ojp.gov/pdffiles1/Digitization/58845NCJRS.pdf

[9] *Pregnancy Discrimination and Pregnancy-Related Disability Discrimination*, U.S. Equal Emp. Opportunity Comm'n, https://www.eeoc.gov/pregnancy-discrimination (last visited Mar. 29, 2023); U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-CVG-2015-1, ENFORCEMENT GUIDANCE ON PREGNANCY DISCRIMINATION AND RELATED ISSUES (2015), https://www.eeoc.gov/laws/guidance/enforcement-guidance-pregnancy-discrimination-and-related-issues#IA3d/.

[10] *Sex Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/youth/sex-discrimination#:~:text=Title%20VII%20of%20the%20Civil,sexual%20orientation%2C%20and%20gender%20identity (last visited Mar. 29, 2023); U.S. EQUAL EMP. OPPORTUNITY, COMM'N, EEOC-CVG-2007-1, ENFORCEMENT GUIDANCE: UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES (2007), https://www.eeoc.gov/laws/guidance/enforcement-guidance-unlawful-disparate-treatment-workers-caregiving-responsibilities ; 29 C.F.R § 1604.2(ii) (2022); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

[11] U.S. DEP'T OF EDUC., OFF. FOR CIV. RTS., DEAR COLLEAGUE LETTER 7 (2010), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf.

[12] *Id*. at 8. The Department offered an example of a gay student who was harassed at school for failure to conform to stereotypically male characteristics and claimed that this counted as prohibited sex discrimination.

[13] U.S. DEP'T OF JUST., CIV. RTS. DIV. & U.S. DEP'T OF EDUC., OFF. FOR CIV. RTS., DEAR COLLEAGUE LETTER ON TRANSGENDER STUDENTS (2016), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf.

[14] U.S. DEP'T OF JUST., CIV. RTS. DIV. & U.S. DEP'T OF EDUC., OFF. FOR CIV. RTS., DEAR COLLEAGUE LETTER (2017), https://www.justice.gov/opa/press-release/file/941551/download. The letter reasons that the position taken in the 2016 letter, that Title IX requires "access to sex-segregated facilities based on gender identity," was not supported by "extensive legal analysis" and did not "undergo any formal public process."

In June of 2021, ED issued a Notice of Interpretation stating that the agency would interpret and enforce Title IX to prohibit discrimination based on sexual orientation, gender identity, consistent with the Court's decision in *Bostock*.[15] The Department also issued fact sheets on combatting anti-LBTQIA+ discrimination in schools and supporting transgender youth, both of which affirm that discrimination based on sexual orientation and gender identity are forms of sex discrimination.[16] ED has also issued a fact sheet on supporting intersex students which affirms that discrimination based on intersex status is also a form of prohibited sex discrimination.[17]

ED's regulations interpret Title IX's prohibition on sex discrimination to also prohibit "discrimination against a student based on pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery from any of these conditions."[18]

In 2022, ED issued proposed regulations which would further clarify that Title IX prohibits discrimination on the basis of "sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity. More specifically, "Title IX's broad prohibition on discrimination ''on the basis of sex''… encompasses, at a minimum, discrimination against an individual because, for example, they are or are perceived to be male, female, or nonbinary; transgender or cisgender; intersex; currently or previously pregnant; lesbian, gay, bisexual, queer, heterosexual, or asexual; or gender-conforming or gender-nonconforming. All such classifications depend, at least in part, on consideration of a person's sex." [19]

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[15] Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of Bostock v. Clayton County, 34 C.F.R. Chapter I (2021), https://www2.ed.gov/about/offices/list/ocr/docs/202106-titleix-noi.pdf. Due to a federal court order, the agency cannot currently enforce the interpretation against several states. *Tenn. v. U.S. Dep't of Educ.,* No. 3:21-cv-308 (E.D. Tenn.) (July 15, 2022).

[16] U.S. DEP'T OF JUST., CIV. RTS. DIV. & U.S. DEP'T OF EDUC., OFF. FOR CIV. RTS., CONFRONTING ANTI-LGBTQI+ HARASSMENT IN SCHOOLS (2021), https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-tix-202106.pdf; U.S. DEP'T OF EDUC., SUPPORTING TRANSGENDER YOUTH IN SCHOOL (2021), https://www2.ed.gov/about/offices/list/ocr/docs/ed-factsheet-transgender-202106.pdf.

[17] U.S. DEP'T OF EDUC., OFF. FOR CIV. RTS., SUPPORTING INTERSEX STUDENTS (2021), https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-intersex-202110.pdf.

[18] U.S. DEP'T OF EDUC., OCR-00069, SUPPORTING THE ACADEMIC SUCCESS OF PREGNANT AND PARENTING STUDENTS 5 (2013), https://www2.ed.gov/about/offices/list/ocr/docs/pregnancy.pdf ; U.S. DEP'T OF EDUC., OFF. FOR CIV. RTS., DISCRIMINATION BASED ON PREGNANCY AND RELATED CONDITIONS (2022), https://www2.ed.gov/about/offices/list/ocr/docs/ocr-pregnancy-resource.pdf.

[19] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390-41391 (proposed July 12, 2022) (to be codified at 34 C.F.R. pt. 106), https://www.govinfo.gov/content/pkg/FR-2022-07-12/pdf/2022-13734.pdf ; U.S. DEP'T OF EDUC., FACT SHEET: U.S. DEPARTMENT OF EDUCATION'S 2022 PROPOSED AMENDMENTS TO ITS TITLE IX REGULATIONS, https://www2.ed.gov/about/offices/list/ocr/docs/t9nprm-factsheet.pdf.

U.S. Department of Justice

The Department of Justice's Civil Rights Division states that sex discrimination (for the purposes of 5 non-discrimination laws they enforce) includes discrimination based on "sexual orientation, gender identity, and intersex traits."[20]

In 2001, DOJ issued a guidance document interpreting Executive Order 13160's sex discrimination prohibition to encompass harassment based on sex-stereotyping.[21] The Guidance Document also interprets sex discrimination to include pregnancy discrimination, including discrimination "on the basis of pregnancy, childbirth, false pregnancy, termination of pregnancy, or recover therefrom."[22]

In 2006, the Department of Justice argued in litigation that "Title VII's prohibition of discrimination based on sex did not cover discrimination based on transgender status or gender identity *per* se."[23] In 2014, the Attorney General issued a memorandum announcing that the Department of Justice would no longer adhere to that position.[24] However, in 2017, the Attorney General revoked this memorandum, and the Department re-adopted their previous position.[25] DOJ advanced their original position that Title VII's sex discrimination prohibition does not encompass gender identity or transgender status in *R.G. & G.R. Harris Funeral Homes*.[26]

DOJ also filed amicus briefs in *Bostock* and *Zarda,* arguing that Title VII's sex non-discrimination provisions do not prohibit sexual orientation discrimination.[27] However, following the Supreme Court's decision in *Bostock*, DOJ issued memoranda stating that sexual orientation and gender identity discrimination prohibited by Title IX and other sex non-discrimination laws enforced by the DOJ[28]. DOJ

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[20] *LGBTQ+*, U.S. DEP'T OF JUST., OFF. OF JUST. PROGRAMS, https://www.ojp.gov/program/civil-rights/lgbtq (last accessed Mar. 29, 2023).

[21] Dep't Of Just., Executive Order 13160 Guidance Document, 66 Fed. Reg. 5398 (2001) at 5402, https://www.govinfo.gov/content/pkg/FR-2001-01-18/pdf/01-1494.pdf.

[22] *Id*.

[23] DEP'T OF JUST., OFF. OF THE ATTORNEY GEN., TREATMENT OF THE TRANSGENDER EMPLOYMENT DISCRIMINATION CLAIMS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (2014), https://www.justice.gov/file/188671/download.

[24] *Id*.

[25] DEP'T OF JUST., OFF. OF THE ATTORNEY GEN., REVISED TREATMENT OF TRANSGENDER EMPLOYMENT DISCRIMINATION CLAIMS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (2017), https://www.justice.gov/d9/pages/attachments/2021/01/20/attorney_general_memorandum_-_revised_treatment_of_transgender_employment_discrimination_claims_under_title_vii_of_the_civil_rights_act_of_1964.pdf

[26] Brief for the Federal Respondent in Opposition, R.G. & G.R. Harris Funeral Homes v. Equal Emp. Opportunity Comm'n (No. 18-107), https://www.justice.gov/sites/default/files/briefs/2018/10/24/18-107_rg_gr_harris_funeral_homes_opp.pdf ; Brief for the Federal Respondent Supporting Reversal, R.G. & G.R. Harris Funeral Homes v. Equal Emp. Opportunity Comm'n (No.18-107), https://www.justice.gov/sites/default/files/briefs/2019/08/19/18-107bsunitedstates.pdf.

[27] Brief for the United States as Amicus Curiae, Bostock v. Clayton County & Altitude Express v. Zarda (Nos. 17-1618 and 17-1263), https://www.justice.gov/sites/default/files/briefs/2019/08/23/17-1618bsacunitedstates.pdf ; Brief for the United States as Amicus Curiae, Zarda v. Altitude Express (No. 15-3775), https://legacy.lambdalegal.org/sites/default/files/legal-docs/downloads/document1.pdf.

[28] U.S. DEP'T OF JUST., CIV. RTS. DIV., INTERPRETATION OF BOSTOCK V. CLAYTON COUNTY REGARDING THE NONDISCRIMINATION PROVISIONS OF THE SAFE STREETS ACT, THE JUVENILE JUSTICE AND DELINQUENCY PREVENTION ACT, THE VICTIMS OF CRIME ACT, AND

has also stated that "the *Bostock* holding applies with equal force to discrimination on the ground of intersex traits."[29] Additionally, DOJ issued a 2022 letter to State Attorneys General explaining that creating barriers to gender-affirming care for transgender minors may constitute sex discrimination in violation of the Equal Protection Clause.[30]

U.S. Department of Housing and Urban Development

The U.S. Department of Housing and Urban Development defines sex discrimination under the Fair Housing Act to include gender identity and sexual orientation.[31]

In 2010, the Assistant Secretary for Fair Housing and Equal Opportunity issued a memorandum which stated that discrimination based on sexual orientation, gender identity, and gender expression may violate the Fair Housing Act even though it does not explicitly protect those characteristics.[32] In 2012, the agency reaffirmed that "discrimination based on sex under the Fair Housing Act includes discrimination because of nonconformity with gender stereotypes."[33] In 2016, they reaffirmed this position again, adding that "HUD interprets the Fair Housing Act's prohibition on sex discrimination to include, at a minimum, discrimination related to an individual's sexual orientation where the evidence establishes that the discrimination is based on sex stereotypes."[34] In 2021, following *Bostock*¸ HUD issued a memorandum stating that it would adopt the Court's interpretation of sex discrimination to include sexual orientation and gender identity discrimination in interpreting the Fair Housing Act.[35]

THE VIOLENCE AGAINST WOMEN ACT (2022), https://www.justice.gov/crt/page/file/1481776/download ; U.S. DEP'T OF JUST., CIV. RTS. DIV., APPLICATION OF BOSTOCK V. CLAYTON COUNTY TO TITLE IX OF THE EDUCATION AMENDMENTS OF 1972 (2021), https://www.justice.gov/crt/page/file/1383026/download.

[29] U.S. DEP'T OF JUST., CIV. RTS. DIV., INTERPRETATION OF BOSTOCK V. CLAYTON COUNTY REGARDING THE NONDISCRIMINATION PROVISIONS OF THE SAFE STREETS ACT, THE JUVENILE JUSTICE AND DELINQUENCY PREVENTION ACT, THE VICTIMS OF CRIME ACT, AND THE VIOLENCE AGAINST WOMEN ACT 3 (2022), https://www.justice.gov/crt/page/file/1481776/download.

[30] U.S. DEP'T OF JUST., CIV. RTS. DIV., LETTER TO STATE ATTORNEYS GENERAL (2022), https://www.justice.gov/file/1492456/download.

[31] *Housing Discrimination Under the Fair Housing Act,* U.S. DEP'T OF HOUS. AND URB. DEV., https://www.hud.gov/program_offices/fair_housing_equal_opp/fair_housing_act_overview (last visited Apr. 11, 2023).

[32] U.S. DEP'T OF HOUS. AND URB. DEV., ASSISTANT SEC'Y FOR FAIR HOUS. AND EQUAL OPPORTUNITY, ASSESSING COMPLAINTS THAT INVOLVE SEXUAL ORIENTATION, GENDER IDENTITY, AND GENDER EXPRESSION (2010), https://www.fairhousingnc.org/wp-content/uploads/2012/03/HUD-Memo-re-Sexual-Orientation-Discrimination-6-15-2010.pdf. This memo gives an example of a prospective tenant who is discriminated against based on her gender expression and states this may violate the FHA's prohibition of sex discrimination. However, the memo does not explicitly contemplate sexual orientation discrimination as a form of sex discrimination. While the memo gives an example of a gay man being discriminated against, it states that this may count as disability discrimination if the landlord discriminates because they believe the man may spread HIV/AIDS.

[33] Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity, 77 Fed. Reg. 5666 (Feb. 3, 2012), https://www.govinfo.gov/content/pkg/FR-2012-02-03/pdf/2012-2343.pdf.

[34] Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act, 81 Fed. Reg. 63059 (Sept. 14, 2016), https://www.govinfo.gov/content/pkg/FR-2016-09-14/pdf/2016-21868.pdf.

[35] U.S. DEP'T OF HOUS. AND URB. DEV., ASSISTANT SEC'Y FOR FAIR HOUS. AND EQUAL OPPORTUNITY, IMPLEMENTATION OF EXECUTIVE ORDER 13988 ON THE ENFORCEMENT OF THE FAIR HOUSING ACT (2021), https://www.hud.gov/sites/dfiles/PA/documents/HUD_Memo_EO13988.pdf.

Because the Fair Housing Act explicitly prohibits discrimination based on familial status, HUD opted in 2016 not to define pregnancy discrimination as a form of sex discrimination despite comments on a proposed rule urging them to do.[36]

U.S. Department of Health and Human Services

The U.S. Department of Health and Human Services currently interprets the Affordable Care Act's prohibition on sex discrimination to include pregnancy, sexual orientation, gender identity, and sex characteristics.[37] However, the agency has taken inconsistent positions over the past decade regarding the scope of sex non-discrimination protections.

In 2016, HHS promulgated a rule defining discrimination "on the basis of sex" as following: "the term… includes, but is not limited to, discrimination on the basis of pregnancy, false pregnancy, termination of pregnancy, or recovery therefrom, childbirth or related medical conditions, sex stereotyping, and gender identity."[38] In response to comment about intersex people, they stated that the prohibition on sex discrimination would extend to discrimination "on the basis of intersex traits or atypical sex characteristics."[39] In response to a comment about sexual orientation, they said sex discrimination includes "at a minimum, sex discrimination related to an individual's sexual orientation where the evidence establishes that the discrimination is based on gender stereotypes" but declined to resolve whether discrimination based on "sexual orientation status alone" counts as sex discrimination.[40]

However, in June 2020, HHS promulgated a rule eliminating their "overbroad" definition of sex discrimination by removing the language regarding termination of pregnancy and gender identity.[41] HHS again changed their definition of sex discrimination in 2021; following *Bostock*, HHS released a Notification of Interpretation and Enforcement announcing that they would interpret the ACA's prohibition on sex discrimination to include discrimination based on sexual orientation and gender identity.[42] In 2022, HHS issued a proposed rule which would clarify "that discrimination the basis of sex includes discrimination on the basis of sex stereotypes; sex characteristics, including intersex traits; pregnancy or related conditions; sexual orientation; and gender identity."[43]

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[36] Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act, 81 Fed. Reg. at 63058.

[37] *Section 1557 of the Patient Protection and Affordable Care Act*, HHS, https://www.hhs.gov/civil-rights/for-individuals/section-1557/index.html (last accessed Apr. 14, 2023). This interpretation is embodied in a Proposed Rule which has not yet been finalized. *See* Nondiscrimination in Health Programs and Activities, 87 Fed. Reg. 47824 (Aug. 4, 2022), https://www.govinfo.gov/content/pkg/FR-2022-08-04/pdf/2022-16217.pdf.

[38] Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31376 (May 18, 2016) at 31387, https://www.govinfo.gov/content/pkg/FR-2016-05-18/pdf/2016-11458.pdf.

[39] *Id.* at 31389.

[40] *Id*. at 31390.

[41] Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority, 85 Fed. Reg. 37160 (June 19, 2020), https://www.govinfo.gov/content/pkg/FR-2020-06-19/pdf/2020-11758.pdf.

[42] DEP'T OF HEALTH AND HUMAN SERV., NOTIFICATION OF INTERPRETATION AND ENFORCEMENT OF SECTION 1557 OF THE AFFORDABLE CARE ACT AND TITLE IX OF THE EDUCATION AMENDMENTS OF 1972 (2021), https://www.hhs.gov/sites/default/files/ocr-bostock-notification.pdf ; Nondiscrimination in Health Programs and Activities, 87 Fed. Reg. 47824.

[43] Nondiscrimination in Health Programs and Activities, 87 Fed. Reg. at 47858.

OFCCP

The Office of Federal Contract Compliance Programs defines "sex" for the purposes of Executive Order 11246's prohibition of sex discrimination as follows: "The term sex includes, but is not limited to, pregnancy, childbirth, or related medical conditions; gender identity; transgender status; and sex stereotyping."[44]

In July 2014, President Obama signed Executive Order 13672, which amended Executive Order 11246 by expressly prohibiting discrimination based on sexual orientation or gender identity.[45] In August 2014, OFCCP issued a directive which clarified that gender identity discrimination is a form of sex discrimination in addition to being a stand-alone protected category. [46] The directive also states sex discrimination includes discrimination based on transgender status.[47]

In 2016, the OFCCP substantively updated their guidance on sex discrimination for the first time since 1970 to clarify that sex discrimination includes encompasses "discrimination on the bases of pregnancy, childbirth, related medical conditions, gender identity, transgender status, and sex stereotyping."[48] In response to comments suggesting that sexual orientation be added to this definition, the OFCCP replied that they felt it unnecessary to add to their definition given its express protection under E.O. 11246.[49]

USDA (Sub-Agency)

In 2021, the National Institute of Food and Agriculture (NIFA) issued a fact sheet wherein they stated that Title IX's sex discrimination prohibition includes "sex stereotypes and sex-related characteristics, including sexual orientation, gender identity, and pregnancy and related conditions."[50]

In 2022, following *Bostock*, USDA's Food and Nutrition Service Civil Rights Division issued a memorandum announcing their determination that "discrimination based on gender identity and sexual orientation can constitute prohibited sex discrimination under Title IX and the Food and Nutrition Act."[51]

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[44] 41 C.F.R. § 60-20.2(a).
[45] Exec. Order. No. 134672 (2014).
[46] U.S. DEP'T OF LAB., OFF. OF FED. CONT. COMPLIANCE PROGRAMS, (DIR) 2014-02, GENDER IDENTITY AND SEX DISCRIMINATION (2014), https://www.dol.gov/agencies/ofccp/directives/2014-02.
[47] *Id*.
[48] Discrimination on the Basis of Sex, 81 Fed. Reg. 39108-39109 (June 15, 2016).
[49] *Id*. at 39120.
[50] NAT'L INST. OF FOOD AND AGRIC., TITLE IX OF THE EDUCATION AMENDMENTS ACT OF 1972 (2021), https://www.nifa.usda.gov/sites/default/files/resource/USDA%20NIFA_TitleIX%20Fact%20Sheet_2pages%20508_DOJ%20Remediated.pdf.
[51] U.S. DEP'T OF AGRIC., FOOD AND NUTRITION SERV. CIVIL RTS. DIV., CRD 01-2022, APPLICATION OF BOSTOCK V. CLAYTON COUNTY TO PROGRAM DISCRIMINATION COMPLAINT PROCESSING (2022), https://fns-prod.azureedge.us/sites/default/files/resource-files/crd-01-2022.pdf.

Equal Rights Amendment: Potential Constitutional Conflicts for Sex Equality Protections

I. Regulations, policy developments, and recent/ongoing litigation related to the ACA (particularly RFRA challenges/religious exemptions)

A. Administrative Rules

1. HHS's Section 1557 2022 Proposed Rule[1]:

Summary:

On August 4, 2022, the U.S. Department of Health and Human Services (HHS) issued a Notice of Proposed Rulemaking (NPRM or Proposed Rule) to reinterpret section 1557 of the Affordable Care Act (ACA), which prohibits discrimination on the basis of race, color, national origin, sex, age or disability in a health program or activity, any part of which is receiving federal financial assistance. The proposed rule restores and strengthens certain civil rights protections under federally funded health programs and HHS programs which were limited by the Trump administration's version of the rule issued in 2020, specifically regarding discrimination on the basis of sex, including sexual orientation and gender identity.

Additionally, the Proposed Rule bolsters protections against discrimination in healthcare by clarifying that funds received under several federal healthcare programs, including Medicare Parts A-D, are included in the definition of federal financial assistance under the law. As such, under the Proposed Rule, the list of entities expected to comply with the nondiscrimination measures outlined in Section 1557 of the ACA is significantly expanded, in many ways aligning with the Obama administration's version of the rule issued in 2016. The Proposed Rule also expands the applicability of the post-*Bostock*[2] interpretation of "on the basis of sex" to Medicaid, Children's Health Insurance Programs (CHIP), and Programs of All-Inclusive Care for the Elderly (PACE).

HHS is expected to finalize the rule within the coming months. At this time, it is unclear whether or to what extent HHS will amend the Proposed Rule based on public feedback as HHS has received over 85,000 public comments in response to the Proposed Rule.

Covered entities/scope:

Under the 2022 Proposed Rule, a covered health program or activity includes any project, enterprise, venture, or undertaking to (1) provide or administer health-related services, health insurance coverage, or other health-related coverage; (2) provide assistance to persons in obtaining health-related services, health insurance coverage, or other health-related coverage, (3) provide clinical, pharmaceutical, or medical care; (4) engage in health research; or (5) provide health education for health care professionals or others.

[1] Nondiscrimination in Health Programs and Activities, 87 Fed. Reg. 47,824 (Aug. 4, 2022).
[2] Bostock v. Clayton County, Georgia, 140 S.Ct. 1731 (2020).

The 2022 Proposed Rule would apply to all of the operations of any entity principally engaged in the activities described above if any part of the activity or program receives Federal financial assistance. Such entities include, but are not limited to, state or local health agencies, hospitals, health clinics, health insurance issuers, physician's practices, pharmacies, community-based health care providers, such as home health agencies, nursing facilities, residential or community-based treatment facilities, or other similar entities.

The 2022 Proposed Rule may also apply to health insurance issuers acting as third-party administrators that develop group health plan documents or policies for self-insured plans, group health plans that receive Federal financial assistance, medical centers, and hospital systems. The 2022 Proposed Rule also applies to health insurance marketplaces and health programs administered by HHS, such as Medicare Parts A-D.

Covered entities with 15 or more employees will need to develop and implement, or update, their nondiscrimination policies and civil rights grievance procedures to facilitate compliance with Section 1557 rules, in addition to hiring or appointing a Section 1557 coordinator to oversee compliance. Covered entities are also required to develop record-retention procedures for grievances that allege discrimination, training programs to educate relevant employees on Section 1557 policies and procedures, and provide nondiscrimination notices to the public, among other things.

Religious exemptions/rights of religious objectors:

The 2022 Proposed Rule provides a specific means for recipients to notify the Department of their views regarding the application of Federal conscience or religious freedom laws.

Under the 2022 Rule, a recipient may raise with the Department its belief that the application of a specific provision or provisions of this regulation as applied to it would violate Federal conscience or religious freedom laws (i.e. the Coats-Snowe Amendment, Church Amendments, RFRA, section 1553 of the ACA, section 1303 of the ACA, and the Weldon Amendment).

Once a notice has been filed, the Office for Civil Rights (OCR) will promptly consider those views in responding to any complaints or otherwise determining whether to proceed with any investigation or enforcement activity regarding that recipient's compliance with the relevant provisions of this regulation. Any relevant ongoing investigation or enforcement activity regarding the recipient is temporarily suspended until a case-specific determination has been made by OCR regarding whether the particular recipient is exempt from—or subject to a modified requirement under—the specific provision in question.

In determining whether a recipient is exempt from the application of the specific provision or provisions raised in its notification, OCR must assess whether there is a sufficiently concrete factual basis for making a determination and apply the applicable legal standards of the referenced statute. If OCR determines that a recipient is entitled to an exemption or modification of the application of certain provisions of this rule based on the application of such laws, that determination does not otherwise limit the application as to any other provision.

In taking a case-by-case approach to such determinations, the Department hopes to better account for any harm an exemption could have on third parties and, in the context of RFRA, consider whether the

application of any substantial burden on a person's exercise of religion is in furtherance of a compelling interest and is the least restrictive means of advancing that compelling interest.

This new rule is a significant departure from the prior 2020 Trump administration rule that instead adopted blanket abortion and religious freedom exemptions for health care providers. Prior to that, the 2016 Obama Administration regulation provided that covered entities did not have to comply with Section 1557's prohibition of sex discrimination, but only if doing so would have violated existing federal abortion and religious exemption laws.

2. HHS's Safeguarding the Rights of Conscience 2023 Proposed Rule[3]:

Background:

Several provisions of Federal law prohibit recipients of certain Federal funds from coercing individuals and entities in the healthcare field into participating in actions they find religiously or morally objectionable. However, because courts have held that certain conscience protection laws do not contain an implied private right of action (i.e. an individual or entity whose rights have been violated is unable to sue in federal court), it is incumbent on HHS to vindicate any violation of rights.

Following the passage of the Affordable Care Act (ACA), HHS in 2011 issued a proposed rule that aimed to enforce and clarify the conscience rights for certain healthcare providers, individuals, and entities who have religious or moral objections to certain healthcare services. Choosing to enforce three abortion-focused conscience provisions (the Church Amendments, the Weldon Amendment, and the Coats-Snowe Amendment), the 2011 Rule established a complaint process for individuals and entities that believe their rights have been violated, and required that recipients of certain HHS funding certify that they were in compliance with the conscience protections. The 2011 Rule reiterated that healthcare providers do not have to participate in, pay for, provide coverage for or refer for certain healthcare services if they have a religious or moral objection to doing so.

In 2019, under the Trump Administration, HHS issued a new rule aimed at expanding the statutory conscience rights of individuals and entities participating in the healthcare system, including healthcare providers, insurers, and employers. The 2019 Rule expanded upon its incorporation of the Church, Weldon, and Coats-Snowe Amendments to include the enforcement of all federal conscience protection laws. It also expanded the scope of conscience protection to include advance care planning, assisted suicide, and euthanasia, and expanded the definition of "assist in the performance" of a procedure to include training, licensing, and administrative support that may facilitate a procedure.

The 2019 Rule was challenged in court in multiple jurisdictions, including the Southern District of New York, the Northern District of California, the Eastern District of Washington, and the District of Maryland. These courts concluded that the 2019 Rule was defective in various ways, including that it exceeded the HHS's authority, was inconsistent with certain statutes, was arbitrary and capricious, and did not comply with the notice-and-comment requirements of the Administrative Procedure Act. The 2019 Rule was therefore vacated in its entirety and HHS has been operating under the 2011 Rule since its adoption.

[3] Safeguarding the Rights of Conscience as Protected by Federal Statutes, 88 Fed. Reg. 820 (Jan. 5, 2023).

Summary:

The 2023 Rule partially rescinds the 2019 Rule, while leaving in effect the framework created by the 2011 Rule. The 2023 Rule retains three aspects of the 2019 Rule while addressing concerns raised by many of the commenters and echoed in federal district court decisions. In particular, the 2023 Rule retains: (1) the expanded application of all federal conscience law provisions identified in the 2019 Rule; (2) several enforcement provisions; and (3) a voluntary notice provision.

HHS proposes to expand the category of "federal healthcare provider conscience protection statutes" covered by the Proposed Rule and maintains the Office for Civil Rights ("OCR") as the centralized HHS office for receiving and investigating complaints under these provisions. The 2023 Rule would retain the 2019 Rule's complaint handling and investigation provisions and its voluntary notice provisions with some modifications, and provide a model notice for the recipients to use and tailor to their particular circumstances.

B. Litigation

In recent years, a number of RFRA claims have been brought by religiously-affiliated employers or healthcare institutions challenging the ACA's sex-discrimination protections. Notable Supreme and Circuit Court decisions in this area of the law include *Burwell v. Hobby Lobby*[4], *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*[5], *Religious Sisters of Mercy v. Becerra*[6], and *Franciscan Alliance v. Becerra*[7], all discussed in the Commission's May 2023 memorandum[8]. This section tackles more recent developments percolating in lower courts revolving around RFRA and the ACA in a big-picture effort to capture where the fight between the First Amendment and sex equality is heading. There appear to be two distinct legal pathways in which plaintiffs are utilizing RFRA to evade compliance with ACA's non-discrimination provisions.

1. RFRA Challenges to the ACA

In the first set of cases, private plaintiffs are directly suing HHS in an as-applied challenge to the Biden administration's 2022 Proposed Rule. The courts reached the merits in one and dismissed the other on lack of standing.

[4] 573 U.S. 682 (2014).
[5] 140 S.Ct. 2367 (2020).
[6] 2023 WL 2586217 (8th Cir.).
[7] 47 F.4th 368 (5th Cir. 2022).
[8] Kristin Burford, "Equal Rights Amendment: Potential Constitutional Conflicts for Sex Equality Protections," California Law Revision Commission (May 10, 2023).

a) Braidwood v. Becerra (Fifth Circuit)

Background:

Since the passage of the Affordable Care Act (ACA) in 2010, more than 2,000 lawsuits have been filed in state and federal courts challenging part or all of the legislation.[9] *Braidwood Management v. Becerra* is the most recent of those challenges, contesting the ACA's requirement that most private insurance plans cover recommended preventive care services without cost sharing. In the case, Christian-owned businesses and six individuals in Texas assert that (1) the requirements in the law for specific expert committees and a federal government agency to recommend covered preventive services is unconstitutional, and, more pertinent, that (2) the requirement to cover preexposure prophylaxis (PrEP), medication for HIV prevention, violates their religious rights.

Procedural History:

On September 7, 2022, Judge Reed O'Connor at the US District Court in the Northern District of Texas ruled partly in favor of the plaintiffs and partly in favor of the Department of Health and Human Services (HHS), but found that the ACA's PrEP mandate violates Braidwood's rights under the Religious Freedom Restoration Act (RFRA).[10] On March 30, 2023, Judge O'Connor issued a ruling for the remedy in this case, striking down the ACA's requirement to cover PrEP medications for HIV prevention.[11] The federal government appealed this decision and on June 13, 2023, the Fifth Circuit Court of Appeals issued a stay of the district court's ruling. The federal government can continue enforcing the preventive services requirement until the Fifth Circuit issues its final ruling on the merits after hearing oral arguments.

RFRA Claim:

The plaintiffs assert the requirement to cover PrEP, as applied to them, violates their rights under the Religious Freedom Restoration Act. Relying on the Supreme Court's ruling in *Burwell v. Hobby Lobby*, the plaintiffs contend that they are left with a "Hobson Choice" to provide health insurance that covers these medications and services that violate their religious beliefs or refuse to offer any health insurance to its employees. Notably, the plaintiffs state the requirement to cover PrEP "imposes a substantial burden on the religious freedom of those who oppose homosexual behavior on religious grounds" claiming further that PrEP drugs "facilitate and encourage homosexual behavior, prostitution, sexual promiscuity, and intravenous drug use." The plaintiffs also contend the provision violates the rights of individuals who have religious objections and wish to purchase health insurance without PrEP coverage.

[9] Abbe Gluck, Mark Regan, & Erica Turret, "The Affordable Care Act's Litigation Decade," 108 Geo. L.J. 1471, 1518 (2020).
[10] Braidwood Management Inc. v. Becerra, 627 F. Supp. 3d 624 (N.D. Tex. 2022).
[11] Braidwood Management Inc. v. Becerra, 2023 WL 2703229 (N.D. Tex.).

b) *American College of Pediatricians v. Becerra* (Eastern District of Tennessee/Sixth Circuit)[12]

The American College of Pediatricians, the Catholic Medical Association, and an OB-GYN doctor who specializes in caring for adolescents filed suit in federal court challenging the Biden administration's 2022 proposed rule reinterpreting sex discrimination to include gender identity and sexual orientation. The plaintiffs are claiming injury by alleging that they face a credible threat of prosecution under HHS's new guidelines on section 1557 of the ACA.

On November 11, 2022, the district court ruled in favor of the Biden administration, dismissing the case for lack of standing. The district court judge ruled that the plaintiffs were unable to point to any facts relating to relevant factors to support their contention that they face a credible threat of prosecution under section 1557. The judge found that the plaintiffs did not allege that they have received any enforcement warning letters from HHS regarding their refusal to perform gender-transition services nor is there a feature of section 1557 that makes it easier to enforce against the plaintiffs, such as a citizen-enforcement provision. The judge determined that HHS has not taken any position, whatsoever, on enforcement against these plaintiffs, besides its assurance in the Bostock Notification that it will comply with the *Franciscan Alliance* injunction. Thus, the plaintiffs have not alleged that they face a credible threat of prosecution or that their alleged injury is impending. The plaintiffs' claims were dismissed without prejudice.

On January 13, 2023, the plaintiffs appealed to the Sixth Circuit where the case currently sits pending review.

2. RFRA As A Defense In Suits Between Private Parties

In addition to *Braidwood* and *American College of Pediatricians*, there are two other notable and ongoing cases that involve invoking RFRA as a shield against enforcement of the ACA's anti-sex discrimination provisions between private parties. As detailed below, the pertinent issue at the center of these cases hinges on whether courts determine that RFRA can even apply to suits involving only private parties. The circuit courts are currently split on the issue. The Second[13], Eighth[14], Ninth[15], and District of Columbia[16] Circuits have applied RFRA whenever a person's religious exercise is burdened by the application of federal law, including in suits solely between private parties. The Sixth[17] and Seventh[18] Circuits, by contrast, maintain that RFRA applies only to suits in which the government is a party.

[12] American College of Pediatricians v. Becerra, 2022 WL 17084365 (E.D. Tenn.).
[13] Hankins v. Lyght, 441 F.3d 96 (2d Cir. 2006).
[14] In re Young v. Crystal Evangelical Free Church, 141 F.3d 854 (8th Cir. 1998).
[15] Worldwide Church of God v. Phila. Church of God, 227 F.3d 1110 (9th Cir. 2000).
[16] EEOC v. Catholic Univ. of Am., 83 F.3d 455, 468–69 (D.C. Cir. 1996).
[17] Gen. Conference Corp. of Seventh Day Adventists v. McGill, 617 F.3d 402 (6th Cir. 2010).
[18] Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036, 1042 (7th Cir. 2006).

a) *Hammons v. University of Maryland Medical System Corporation* [UMMS] (District of Maryland/Fourth Circuit)[19]

In *Hammons*, the plaintiff and patient, a transgender man, filed suit against UMMS which operated a hospital system and related entities, alleging that the religious hospital's refusal to allow him to have a hysterectomy performed to treat his gender dysphoria constituted sex discrimination under the Affordable Care Act's (ACA) nondiscrimination provision.

On January 6, 2023, the federal district judge ruled in favor of the plaintiff. Despite dismissing the plaintiff's Establishment and Equal Protection Clause claims, the court held that the hospital's decision to cancel a hysterectomy that a patient sought as a treatment for gender dysphoria constituted discrimination on the basis of the patient's sex and that the corporation could be held liable under ACA's nondiscrimination provision for a hospital's discriminatory conduct in canceling a hysterectomy. The judge also ruled that a permanent injunction that prohibited the Department of Health and Human Services (HHS) from requiring members of certain religious organizations to perform gender transition procedures did not apply to bar a patient from bringing a claim against the hospital.[20] Finally, the judge ruled, as a matter of first impression, that the Religious Freedom Restoration Act (RFRA) defense protecting the exercise of religion from substantial burden by the government does not apply to suits involving only private parties:

> "While the Supreme Court and the Fourth Circuit have never addressed the issue of whether RFRA applies to suits involving only private parties, and there is a circuit split on the issue, the weight of circuit court authority tips in favor of a conclusion that it does not."[21]

Hammons, despite winning at the district court under the ACA's § 1557, appealed to the Fourth Circuit contending that his constitutional Establishment and Equal Protection Clause claims should not have been dismissed. The Fourth Circuit has yet to rule on the appeal.

b) *Pritchard v. Blue Cross Blue Shield of Illinois* (Western District of Washington/Ninth Circuit)[22]

In this case, plaintiffs C.P., a transgender male, and his mother, Patricia Pritchard, claim that Blue Cross violated the anti-discrimination provision of the ACA when it administered discriminatory exclusions of gender-affirming care in a self-funded health care plan. Ms. Pritchard receives health care coverage through her employer under the Catholic Health Initiatives Medical Plan and C.P. is enrolled in that plan as her dependent. Defendant, Blue Cross, acts as the third-party claims administrator for the plan. It does not receive Federal financial assistance for its administration of self-funded plans but does receive Federal financial assistance for other of its products.

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[19] Hammons v. University of Maryland Medical System Corporation, 2023 WL 121741 (D. Md.).
[20] Three Federal district courts have enjoined the Department from enforcing Section 1557 in certain respects against the plaintiffs in those cases and their members. *See Religious Sisters of Mercy,* 513 F. Supp. at 1153-54; *Franciscan All., Inc.* v. *Becerra,* 553 F. Supp. 3d 361, 378 (N.D. Tex. 2021), *amended,* No. 7:16-CV-00108-O, 2021 WL 6774686 (N.D. Tex. Oct. 1, 2021); *Christian Emp'rs All.* v. *EEOC,* No. 21-cv-00195, 2022 WL 1573689 (D. N.D. May 16, 2022).
[21] *Hammons*, 2023 WL 121741 at *16.
[22] Pritchard v. Blue Cross Blue Shield of Illinois, 2022 WL 17788148 (W.D. Wash.).

On December 19, 2022, the district court judge ruled in favor of the plaintiffs. The court ruled that Blue Cross, as a third-party administrator, is a covered entity under Section 1557 and has discriminated against the plaintiffs and the class plaintiffs by denying them services for gender-affirming care under individual and class plaintiffs' insurance policies:

> "It cannot be…that Blue Cross can trump statutory anti-discrimination law with a potential religious protection claim from a co-contractor…which allegedly frees that co-contractor and Blue Cross from obedience to the law."[23]

Additionally, the court denied Blue Cross's motion for summary judgment based on RFRA on the premise that RFRA provides relief against the government and does not apply to disputes between private parties.

Following the ruling, a certified class of transgender individuals and their parents sought a court injunction to block Blue Cross Blue Shield of Illinois from denying coverage for gender dysphoria-related treatments. On April 17, 2023, the district court stayed the class action pending the outcome of a pivotal appeal in the Ninth Circuit involving benefit claims administration.

C. Recent Cases Involving RFRA And Other Federal Non-Discrimination Laws

(1) *Hunter v. United States Department of Education* (District of Oregon) - Title IX[24]

LGBTQ+ students who applied to, attended, or were currently attending religious colleges and universities that received federal funding brought a putative class action against the United States Department of Education for violations of the First Amendment, Fifth Amendment, Administrative Procedure Act (APA), and Religious Freedom Restoration Act (RFRA), alleging that the Department facilitated and encouraged schools' discrimination by failing to enforce Title IX against schools based on the Department's application of religious exemptions.

On January 12, 2023, the district court ruled in favor of the defendants. The court ruled that the LGBTQ+ students failed to state a claim that religious exemption under Title IX violated RFRA. The judge held that, in the context of the Religious Freedom Restoration Act (RFRA), the fact that a private entity receives government funding or is subject to regulation does not convert its conduct into government action; nor does the government's acquiescence, approval, or encouragement of private conduct. The judge concluded by noting that "[t]he text of RFRA is clear that government granting exemptions does not constitute a violation, unless impermissible under Establishment Clause principles."[25]

While the students did also allege an Establishment Clause violation, the judge was similarly unsympathetic to such a claim. The judge relied on the Supreme Court's decision in *Corporation of Presiding Bishop v. Amos*[26]. The 1987 decision upheld the religious exemption to Title VII's prohibition against religious discrimination in employment, determining that the exemption satisfied the three-part *Lemon*[27] test and did not violate the

[23] *Id.* at *10.
[24] Hunter v. United States Department of Education, 2023 WL 172199 (D. Or.).
[25] *Id.* at *16.
[26] 483 U.S. 327 (1987).
[27] Lemon v. Kurtzman, 403 U.S. 602 (1971).

Establishment Clause. The district court found Title IX's religious exemption to (1) have a secular purpose, (2) only incidentally and not purposefully advance religion, and (3) not excessively entangle the government in carrying out an organization's religious mission.

(2) *School of the Ozarks, Inc. v. Biden* (Eighth Circuit) - Fair Housing Act[28]

A private Christian college brought action alleging that a memorandum issued by the acting assistant secretary of the United States Department of Housing and Urban Development (HUD) directing the Office of Fair Housing and Equal Opportunity to enforce the Fair Housing Act's (FHA) prohibitions against sex discrimination, including discrimination based on sexual orientation and gender identity, violated the Administrative Procedure Act (APA), Free Speech and Free Exercise Clauses, Appointments Clause, and Religious Freedom Restoration Act (RFRA).

On July 27, 2022, the Eight Circuit affirmed the district court's decision, siding with the Biden administration and refusing to reach the merits of the case. The court ruled that the memorandum issued by HUD directing the Office of Fair Housing and Equal Opportunity to enforce the Fair Housing Act's prohibitions against sex discrimination, including discrimination based on sexual orientation and gender identity, did not present an imminent threat to free speech or free exercise rights of a private Christian college that had single-sex residence halls and prohibited biological males who identified as females from living in female dormitories. The court pointed to the fact that HUD has never filed a housing discrimination charge against any college or university exempted from Title IX's prohibitions on sex discrimination in housing, or enforced FHA's sex-discrimination prohibition against any similarly situated institution of higher education.

On February 27, 2023, the plaintiffs petitioned the Supreme Court to hear the case. On June 20, 2023, the Supreme Court denied certiorari.[29]

(3) *Ratliff v. Wycliffe Associates, Inc.* (Middle District of Florida) - Title VII[30]

In this case, Defendant operates a Bible translation company that boosts a mission to advance the work of Bible translation around the world. Defendant employed Plaintiff, a gay man, as a Software Developer II in its Information Technology Department. While working in his role as Software Developer II, Plaintiff married his current husband. Shortly thereafter, Plaintiff emailed Defendant's Human Resources Director to inform her of his newly minted marital status and to request an update of his health insurance. After the HR Director asked Plaintiff for supporting documentation, Plaintiff complied by submitting his marriage certificate to confirm the name of his male spouse. A mere seven days after Plaintiff's request, Defendant terminated Plaintiff, admitting that Defendant had made this decision, at least in part, in light of his sexual orientation.

On May 26, 2023, the district judge ruled in favor of the plaintiff, concluding that none of the factors from *Hosanna-Tabor*[31] weigh in favor of finding that the plaintiff falls under the purview of the ministerial exception. The court concluded that (1) the defendant did not bestow the plaintiff with a ministerial title or

[28] 41 F.4th 992 (8th Cir. 2022).
[29] School of the Ozarks, Inc. v. Biden, 2023 WL 4065624.
[30] Ratliff v. Wycliffe Associates, Inc., 2023 WL 3688082 (M.D. Fla.)
[31] Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C., 565 U.S. 171 (2012).

anything even remotely similar, (2) the plaintiff simply did not work in a position that "reflected a significant degree of religious training followed by a formal process of commissioning," (3) the plaintiff never held himself out "as a minister of [Defendant's organization] by accepting the formal call to religious service" or "claiming certain tax benefits," and (4) the plaintiff did not perform job duties that "reflected a role in conveying the [religious organization's] message and carrying out its mission."[32] Additionally, the court (while acknowledging that the circuit courts are split on the issue) agreed with the plaintiff that RFRA is not applicable to private lawsuits.

(4) *Braidwood v. EEOC* (Fifth Circuit) - Title VII[33]

A Christian church and Christian-owned business that did not wish to hire or retain employees who engaged in gay or transgender conduct brought a putative class action against the Equal Employment Opportunity Commission (EEOC) and EEOC commissioners, seeking declaration that they were entitled to exemption from Title VII sex discrimination provisions based on their religious beliefs, and declaration that various workplace policies did not violate Title VII. The businesses moved for summary judgment and to certify various classes, and the EEOC and commissioners also moved for summary judgment.

The district court found that the putative classes had standing and, as such, all Christian-owned businesses were exempt from Title VII under Religious Freedom Restoration Act (RFRA). The judge ruled that Christian employers could implement sex-specific dress and grooming codes for men and women, as well as require employees to use restrooms designated for their biological sex.

On June 20, 2023, the Fifth Circuit both affirmed and vacated portions of the district court decision. The circuit court concluded that a proposed class of every employer in the United States that opposes homosexual or transgender behavior for religious or nonreligious reasons was not sufficiently precise or ascertainable to warrant class certification. However, the appeals court agreed with the district court that RFRA precluded the EEOC from enforcing the anti-discrimination guidance against the specific employers involved in the case. The court concluded that interpreting statutory prohibitions on sex discrimination to include sexual orientation and gender identity substantially burdened the plaintiffs' ability to operate pursuant to their sincerely-held religious beliefs that heterosexual marriage was only form of marriage sanctioned by God, that premarital sex was wrong, and that men and women were to dress and behave in accordance with distinct and God-ordained, biological sexual identity. In the court's view, forcing a company to hire employees with opposing religious views was not least restrictive means of promoting the government's interest in eradicating workplace discrimination. Thus, the court granted the two plaintiffs individualized exemptions to Title VII.

D. Recent Non-RFRA, Sex-Equality Case

(1) *Grabowski v. Arizona Board of Regents* (Ninth Circuit) - Title IX[34]

A student-athlete filed an action against an Arizona state university, its board of regents, and his coaches alleging deliberate indifference and retaliation to his claims that his teammates harassed him because of his

[32] *Ratliff*, 2023 WL 3688082 at *3.
[33] Braidwood Management, Incorporated v. Equal Employment Opportunity Commission, 70 F.4th 914 (5th Cir. 2023).
[34] Grabowski v. Arizona Board of Regents, 69 F.4th 1110 (9th Cir. 2023).

perceived sexual orientation, in violation of Title IX. The United States District Court for the District of Arizona dismissed the complaint on the grounds that no Supreme Court or Ninth Circuit case has expressly held discrimination based on perceived sexual orientation is actionable under Title IX. The district court also found that the complaint failed to allege a deprivation of the plaintiff's educational opportunity, a required element for holding the University defendants liable for the alleged harassment The student-athlete appealed to the Ninth Circuit.

On June 13, 2023, the Ninth Circuit reversed with respect to the district court's decision regarding Title IX's coverage but affirmed the lower court's dismissal of the complaint for failure to allege a deprivation of educational opportunity. Relying on the Supreme Court's decision in *Bostock* regarding Title VII, the Ninth Circuit held that discrimination on the basis of perceived or actual sexual orientation is similarly a form of sex discrimination under Title IX. The circuit court found that the alleged harassment stemmed from the belief that the male plaintiff was attracted to men instead of women. That harassment is both motivated by the stereotype that men should be attracted only to women and an entrenched belief that men should conform to a particular masculine stereotype. Both are impermissible forms of discrimination in violation of Title VII and Title IX.

II. Preferred Pronouns Policies

A. State Legislation on Preferred Pronouns in Schools

Teachers and students do not have to use students' pronouns and names at school if they don't align with the sex they were assigned at birth, under legislation passed by lawmakers in Alabama, Arkansas, Florida, Indiana, Iowa, Kentucky, Montana, North Dakota, Tennessee and Utah since last year.[35] Many of the states additionally require teachers to alert parents if students disclose that they identify as transgender and/or prefer to use different pronouns.

Florida's legislation is the most extreme and constitutionally suspect of the 10 states. Under House Bill 1069, signed into law by Governor Ron DeSantis on May 17, 2023, teachers (1) cannot ask students their pronouns, (2) cannot be required to use students' or other teachers' pronouns if they don't align with their sex assigned at birth, and also (3) may not share the pronouns they use for themselves with students if they do not correspond to the teacher's sex.[36] Two other states, Arizona and North Dakota, similarly passed legislation that would have prohibited teachers from voluntarily electing to use a student's preferred pronouns if different from their biological sex. However, the Governors of both states vetoed the legislation, citing the First Amendment's prohibition on compelled government speech.[37]

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[35] Eesha Pendharkar, "Pronouns for Trans, Nonbinary Students: The States With Laws That Restrict Them in Schools," Education Week (Jun. 14, 2023) https://www.edweek.org/leadership/pronouns-for-trans-nonbinary-students-the-states-with-laws-that-restrict-them-in-schools/2023/06.
[36] H.B. 1069, Leg., 2023 Reg. Sess. (Fla. 2023).
[37] "Arizona governor vetoes bill banning use of transgender students' names, pronouns," AP News (May 22, 2023) https://apnews.com/article/arizona-transgender-pronoun-bill-veto-hobbs-8808a8aec6a9e61e80e52bb0cdad7e88; "North Dakota governor vetoes transgender pronouns bill," CBS News (Mar. 31, 2023) https://www.cbsnews.com/minnesota/news/north-dakota-governor-vetoes-transgender-pronouns-bill/.

All of the laws have been championed by Republican lawmakers, and are part of a larger, national push restricting the rights of transgender, nonbinary, and gender-nonconforming students, whose access to school bathrooms and participation in school sports has also been limited in several states by state laws or district policies. Proponents say the laws protect the First Amendment rights of teachers and the rights of parents to direct their children's education.

B. Challenges to Preferred Pronouns Requirements

As educational institutions have begun to adopt policies aimed at promoting acceptance and inclusivity of gender-diverse students, lawsuits have slowly arisen challenging requirements that educators use students' preferred pronouns over their objection.

(1) *Meriwether v. Hartop* (Sixth Circuit)[38]

A professor at a public college brought claims against the college officials for violations of Free Speech and Free Exercise rights. Prior, the professor received written reprimand for violating, during political philosophy classes, the college's policy requiring faculty to refer to students by pronouns that reflected their self-asserted gender identity. The U.S. District Court for the Southern District of Ohio dismissed the professor's complaint for failure to state a claim. The district court ruled that the professor's speech was given in his official capacity as an employee of the college, not as a private citizen, and thus not protected by the First Amendment. The court also determined that the college's gender-pronoun policy was religiously neutral and therefore does not give rise to Free Exercise concerns. The professor appealed to the Sixth Circuit.

The Sixth Circuit panel disagreed with the district court, finding the professor's claims plausible. The circuit court determined that professors at public universities retain First Amendment protections when engaged in core academic functions, such as teaching and scholarship, and that a professor's use of pronouns in the classroom arguably could be included in such a protected sphere. The court also determined that the professor's pronoun usage could be construed as a matter of public concern, giving more weight to the argument that the speech is protected by the First Amendment against state punishment. The Sixth Circuit also pronounced that while the college's pronoun policy facially appears to be religiously neutral, courts have an obligation to meticulously scrutinize potential irregularities in applying allegedly neutral and generally applicable laws to determine whether a law is being used to suppress religious beliefs. The Sixth Circuit accordingly remanded the case back to the district court to be adjudicated on its merits.

(2) *Ricard v. USD 475 Geary County, KS School Board* (District of Kansas)[39]

In Kansas, a Christian, public-school teacher brought a lawsuit requesting a preliminary injunction against the county school board in opposition to the district's policies that (1) require her to refer to students by their preferred first name and pronouns and (2) prohibit her from referring to a student by the student's preferred names and pronouns in her communications with the student's parents unless the student has explicitly granted her permission to do so. The teacher, a middle school math teacher, was suspended and disciplined for not using a transgender student's preferred name and pronouns. The teacher contends that referring to

[38] 992 F.3d 492 (6th Cir. 2021).
[39] 2022 WL 1471372 (D. KS).

children with pronouns inconsistent with their biological sex is against her religious tenants and that parents have a fundamental right to know if their child is being referred to as a different gender and with a different name while at school.

The district court denied the teacher's preliminary injunction request in relation to the school's preferred names and pronouns policy. After clarification from the school district, the court rejected the injunction request on the grounds that the school policy is not mandatory and without exception. Teachers are not required to use preferred pronouns and may instead refer to students only by their preferred first name, provided the teacher elects not to use pronouns for any student. Additionally, any inadvertent or unintentional use of pronouns to refer to some students, where a teacher's standard practice is to refer to all students only by preferred first name, will not transform the teacher's speech into a policy violation.

The district court did, however, find that the school's policy regarding teachers' communication with parents that reference their children's preferred names and pronouns did give rise to Free Exercise concerns. Citing the teacher's religious beliefs that the Bible prohibits dishonesty and lying, the court reasoned that the teacher would be faced with a "Hobbesian choice" of complying with the district's policy or violating her religious beliefs. The district court thus enjoined the school district from disciplining the teacher for referring to a student by the student's preferred name and pronouns in her communications with the student's parents within the regular course of her duties.

C. Non-School Cases

While clashes between the First Amendment and preferred pronouns requirements have primarily occurred in the realm of education, the issue is beginning to percolate in non-school settings.

(1) *United States v. Varner* (Fifth Circuit)[40]

In *Varner*, a transgender woman and federal prisoner filed a letter requesting to change their name on their judgment of confinement to reflect their changed gender identity. The United States District Court for the Eastern District of Texas denied the motion. The prisoner appealed to the Fifth Circuit and filed an additional motion to be addressed using female pronouns.

On January 15, 2020, the Fifth Circuit denied the plaintiff's motion for a name change and further held that. as a matter of procedure, federal courts cannot require litigants, judges, court personnel, or anyone else to refer to litigants with gender dysphoria with pronouns matching their subjective gender identity. The court concluded that neither the Constitution nor any federal statute justified imposing such a requirement.

(2) *Queen of Angels Catholic Bookstore v. City of Jacksonville* (Middle District of Florida)[41]

On February 22, 2023, a Catholic, Jacksonville bookstore filed a lawsuit against the city over its human rights ordinance which allows individuals to file a complaint of discrimination if he or she feels they have been denied the full and equal enjoyment of goods, services, or facilities offered to the general public based on

[40] United States v. Varner, 948 F.3d 250 (5th Cir. 2020).
[41] Catholic Bookstore, Inc. v. City of Jacksonville, 2023 WL 3931839 (M.D. Fla.).

their sexual orientation or gender identity. The lawsuit argues the law violates free-speech rights by barring employees from referring to transgender people with pronouns reflecting their sex at birth.

(3) *Haskins v. Bio Blood Components* (Western District of Michigan)[42]

In this district court case, the defendant terminated the plaintiff because she would not use her co-worker's preferred pronouns. The plaintiff asked her supervisor for a reasonable accommodation based on religion, which her supervisor refused and terminated her without discussion. The plaintiff alleged that her First Amendment rights had been violated and that she had been discriminated against in violation of Title VII.

On February 17, 2023, the district judge ruled that the plaintiff's complaint states a viable claim under Title VII for a failure to accommodate her religious beliefs and that the case can proceed. The court dismissed the plaintiff's First Amendment claim as not applicable to private parties. The court's decision only discusses the viability of the plaintiff's religious discrimination claim. The judge made no mention of the apparent clash between religious and sex discrimination under Title VII and in light of the Supreme Court's ruling in *Bostock*. The court will likely engage in such a discussion and the need for interest balancing when the case is fully adjudicated on the merits.

III. Free Speech vs. Sex Equality (Other Areas of the Law)

A. Student Speech

The Supreme Court has long recognized that students are protected by the First Amendment in public schools. In the seminal case, *Tinker v. Des Moines Independent Community School District*[43], the Court affirmed that neither students nor teachers "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." However, the Court also laid out two instances in which schools may regulate student speech: when the speech (1) "materially disrupts classwork or involves substantial disorder" or (2) "colli[des] with the rights of other students to be secure and to be let alone."[44] Although Tinker laid out two instances in which student speech may be regulated, the Court has largely ignored the "rights of others" prong of the test and instead relied solely upon the "substantial disruption" prong.

In certain instances, *Tinker*'s two prongs can clash with one another, particularly when it comes to sex discrimination. In attempting to subdue *Tinker*'s inherent conflict, circuit courts have attempted to resolve the issue by a form of analysis that merges both *Tinker*'s first and second prongs. In 2008, the Seventh Circuit in *Nuxoll v. Indian Prairie School District*[45] prohibited a school from censuring a student's "Be Happy, Not Gay" t-shirt without reasonable forecast that it would provoke incidents of harassment of homosexual students or poison the educational atmosphere. However, a couple of years earlier in 2006, the Ninth Circuit in *Harper v. Poway Unified School District*[46] found that a school with a history of physical altercations resulting from students'

[42] Haskins v. Bio Blood Components, 2023 WL 2071483 (W.D. Mich.).
[43] 393 U.S. 503 (1969).
[44] *Id.* at 513.
[45] 523 F.3d 668 (7th Cir. 2008).
[46] 445 F.3d 1166 (9th Cir. 2006).

homophobic comments was constitutionally justified in prohibiting a student's t-shirt with phrases including "homosexuality is shameful" and "I will not accept what God has condemned."

Another area of student speech where sex equality and First Amendment principles clash is school dress codes that adhere to sex-based stereotypes. There have not been any U.S. Supreme Court cases on gender expression and dress. However, lower federal courts have typically upheld school dress codes under the First Amendment notion that dress codes are non-expressive conduct and viewpoint neutral.[47] However, in the post-*Bostock* legal landscape, transgender plaintiffs are beginning to challenge sex-based dress codes as an unconstitutional form of sex discrimination.[48]

B. Hostile Environments

Through Title VII, Congress and the courts have imposed on all covered employers an obligation to guarantee their employees a workplace free from sexual harassment on the notion that such conduct is a form of sex discrimination that works to keep jobs and employment opportunities sex-segregated according to traditional gender roles. Scholars, such as Jack Balkin of Yale Law School, have suggested that sexual harassment should be unprotected speech in other similar situations of economic and social dependence.[49] Harassment doctrine should not be confined to particular spaces, such as the workplace, but instead to particular situations and environments where people are particularly subject to unjust and intolerable harassment and coercion. Similar to the captive audience doctrine, that the First Amendment does not protect speech in which individuals are unable to avoid or escape from receiving particular messages due to physical or situational constraints, so too should the First Amendment provide no refuge to hostile, coercive environments that perpetuate status-based harms.

[47] Blau v. Fort Thomas Public School Dist., 401 F.3d 381 (6th Cir. 2005).
[48] L.B. v. Harrison County School District, 1:23CV00124, WL (S.D. Miss. 2023).
[49] Jack M. Balkin, "Free Speech and Hostile Environments," 99 Colum. L. Rev. 2295 (1999).