



THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL
ONE ASHBURTON PLACE
BOSTON, MASSACHUSETTS 02108

MAURA HEALEY
ATTORNEY GENERAL

(617) 727-2200
(617) 727-4765 TTY
www.mass.gov/ago

November 19, 2018

The Honorable Alex M. Azar II
Secretary of Health and Human Services
U.S. Department of Health and Human Services
330 C Street, SW
Washington, D.C. 20201

The Honorable Betsy DeVos
Secretary of Education
U.S. Department of Education
400 Maryland Avenue, SW
Washington, D.C. 20202

Re: Civil Rights Protections for Transgender and Gender Nonconforming People

Dear Secretary Azar and Secretary DeVos:

The undersigned Attorneys General for Massachusetts, California, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Iowa, Maryland, Minnesota, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, and Washington, write to express our deep concern over recent reports that your Departments are contemplating adopting a narrow definition of “sex” that would have the purpose and effect of excluding transgender and gender nonconforming people from the protections of critical federal civil rights laws like Title IX and the nondiscrimination provisions of the Affordable Care Act. The definition reportedly under consideration—which would constrain prohibitions on sex discrimination in federally funded programs and activities to exclude discrimination based on gender identity—is contrary to medical consensus, unsupported by any legitimate governmental interest, and against the weight of applicable law. We urge you to reject it.

There are an estimated 1.4 million transgender people living in the United States,¹ and many more who do not conform to traditional gender norms. Transgender people are our

¹ Andrew R. Flores et al., *How Many Adults Identify as Transgender in the United States?*, The Williams Inst., 3 (June 2016), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf>.

coworkers, neighbors, friends, and family members. Transgender people contribute to our communities in countless ways—as parents, educators, public safety officers, artists, medical professionals, and business owners, to name a few. They also serve in our Armed Forces. These residents are worthy of dignity and respect, and deserve the full protection of our laws.

The transgender community has suffered, and continues to suffer, “severe persecution and discrimination.” *Doe v. Trump*, 275 F. Supp. 3d 167, 208-09 (D.D.C. 2017). According to the 2015 United States Transgender Survey, transgender people face verbal harassment and physical violence at home, in school, and in their communities; grapple with mistreatment in the workplace and unemployment; confront difficulty obtaining and maintaining housing; and endure myriad other forms of discrimination due to their gender identity.² To combat such discrimination, at least twenty states and hundreds of municipalities have enacted civil rights protections for transgender people in education, employment, health care, housing, and/or public accommodations.³ These laws have strengthened our states and localities by making us more fair and inclusive places to live, work, and attend school. Still, too many jurisdictions lack meaningful legal protections for transgender and gender nonconforming people, to the detriment of our society at large. Having protections in place at the federal level is critical in this context. Our federal laws and policies should promote basic principles of nondiscrimination and inclusion rather than single out people for disparate treatment and exclusion.

Despite clear evidence of the serious harms that discrimination continues to inflict on the transgender community, the Administration seems intent not only on rolling back existing federal civil rights protections for this vulnerable population, but also denying transgender people even basic recognition. There is no sound basis in science, policy, or law for taking such a drastic step backward. And the sort of prejudice and intolerance reflected in this effort is antithetical to our values as Americans.

Defining “sex” as an immutable, binary biological trait determined by or before birth is inconsistent with current medical consensus. The American Medical Association, for example, recognizes that “gender is ‘incompletely understood as a binary selection’ because gender, gender identity, sexual orientation, and genotypic and phenotypic sex are not always aligned,”

² Sandy E. James et al., *The Report of the 2015 U.S. Transgender Survey*, Nat’l Ctr. for Transgender Equality (Dec. 2016) (“Survey”), <https://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF>; Ryan Thoreson, “*Like Walking through a Hailstorm*”—*Discrimination Against LGBT Youth in US Schools*, Human Rights Watch (Dec. 7, 2016), https://www.hrw.org/sites/default/files/report_pdf/uslgbt1216web_2.pdf; Walter O. Bockting et al., *Stigma, Mental Health, and Resilience in an Online Sample of the US Transgender Population*, 103(5) *Am. J. Public Health* 943, 943 (2013) (“Transgender people face systematic oppression and devaluation as a result of social stigma attached to their gender nonconformity.”).

³ See, e.g., *Cities and Counties with Non-Discrimination Ordinances that Include Gender Identity*, Human Rights Campaign, <https://www.hrc.org/resources/cities-and-counties-with-non-discrimination-ordinances-that-include-gender>; *State Maps of Laws and Policies*, Human Rights Campaign, <https://www.hrc.org/state-maps>.

and instead encourages education on “the medical spectrum of gender identity.”⁴ The American Psychological Association likewise recognizes that “diverse gender expressions, regardless of gender identity, and diverse gender identities, beyond a binary classification, are normal and positive variations of the human experience.”⁵ The AMA also recently passed resolutions that, among other things, support health insurance coverage for transgender people, call for the adoption of nondiscrimination policies by hospitals and other health care providers, and oppose any “policies preventing transgender individuals from accessing basic human services and public facilities in line with one’s gender identity.”⁶ The APA has done the same.⁷ In short, there is no medical or scientific justification for such a narrow definition of sex.⁸

Nor does it serve any legitimate governmental interest to define sex so as to exclude transgender people from accessing health care, education, employment, and other aspects of daily life on equal terms with non-transgender people. To the contrary, in the experience of the undersigned states, the full inclusion of all people, irrespective of gender identity or expression, makes our jurisdictions more vibrant and more productive. Legal protections for transgender people also improve public safety. Transgender and gender nonconforming people are frequently the targets of criminal activity, particularly in public places. Having strong laws in place that prohibit discrimination has the added effect of reducing hate crimes and other attacks on these populations.⁹ On the other hand, effectively eliminating protections against gender-identity-based discrimination in connection with federally funded programs and activities would send the unmistakable and dangerous message that the federal government views these populations as unworthy of protection.

⁴ Robert Nagler Miller, *AMA Takes Several Actions Supporting Transgender Patients*, AMA News (June 12, 2017), <https://wire.ama-assn.org/ama-news/ama-takes-several-actions-supporting-transgender-patients>; American Medical Association (AMA) Directive, *Medical Spectrum of Gender*, D-295.312 (2017).

⁵ American Psychological Association (APA) Council Policy Manual, *Resolution on Gender and Sexual Orientation Diversity in Children and Adolescents in Schools* (2015).

⁶ AMA Policy, *Removing Financial Barriers to Care for Transgender Patients*, H-185.950 (2016); AMA Policy, *Nondiscriminatory Policy for the Health Care Needs of LGBTQ Populations*, H-65.976 (2017); AMA Policy, *Access to Basic Human Services for Transgender Individuals*, H-65.964 (2017).

⁷ See, e.g., APA Council Policy Manual, *Policy on Transgender, Gender Identity & Gender Expression Non-Discrimination* (2008).

⁸ For more information, see Lambda Legal, *Professional Organization Statements Supporting Transgender People in Health Care* (last updated Sept. 18, 2018), https://www.lambdalegal.org/sites/default/files/publications/downloads/resource_trans-professional-statements_09-18-2018.pdf.

⁹ See e.g., Levy & Levy, *When Love Meets Hate: The Relationship Between State Policies on Gay and Lesbian Rights and Hate Crime Incidence*, 61 Soc. Sci. Res. 142-159 (Jan. 2017); see also, Letters from the Massachusetts Chiefs of Police Association and Massachusetts Major City Chiefs, *Re: Protecting Transgender Individuals in Places of Public Accommodation* (Oct. 1, 2015), <https://www.mass.gov/files/documents/2016/08/wj/ew-le.pdf>.

The proposed definition is also contrary to an established and growing body of federal law. For decades, federal caselaw has tracked our evolving collective understanding that sex discrimination necessarily encompasses invidious gender-based assumptions and stereotypes. Nearly thirty years ago, in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the Supreme Court recognized that gender stereotyping may constitute unlawful sex discrimination in the employment context. Several years later, in concluding that it was unconstitutional for a state military college to exclude women, the Court affirmed the principle that “[s]tate actors controlling gates to opportunity . . . may not exclude qualified individuals based on ‘fixed notions concerning the roles and abilities of males and females.’” *United States v. Virginia*, 518 U.S. 515, 541 (1996) (citation omitted). More recently, the vast majority of federal courts to have considered the question have found that disparate treatment based on gender identity (i.e., discrimination against transgender individuals) constitutes unlawful sex discrimination in employment, education, and health care because it is grounded in impermissible gender-based stereotypes.¹⁰ Thus, defining “sex” to exclude any concept of gender identity is contrary to the weight of applicable law.

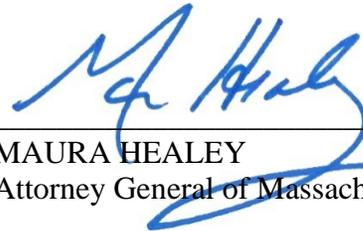
Finally, in light of the fact that legal protections for transgender and gender nonconforming people generally have been expanding in recent years, there is no hiding that the Administration’s attempt now to narrow the definition of “sex” to exclude these populations is really nothing more than discrimination for its own sake and thus contrary to basic principles of equal protection. *See, e.g., Romer v. Evans*, 517 U.S. 620, 633 (1996) (“[L]aws singling out a

¹⁰ *See, e.g., Equal Employment Opportunity Comm’n v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018), *petition for cert. filed* (U.S. July 20, 2018) (No. 18-107) (Title VII); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017) (Title IX); *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339 (7th Cir. 2017) (Title VII); *Dodds v. United States Dept. of Educ.* 845 F.3d 217 (6th Cir. 2016) (Title IX); *M.A.B. v. Board of Educ.*, 286 F. Supp. 3d 704 (D. Md. 2018) (Title IX); *Grimm v. Gloucester County Sch. Bd.*, 302 F. Supp. 3d 730 (E.D. Va. 2018) (Title IX); *Tovar v. Essentia Health*, 2018 WL 4516949 (D. Minn. Sept. 20, 2018) (ACA); *Boyden v. Conlin*, 2018 WL 4473347 (W.D. Wis. Sept. 18, 2018) (ACA); *Prescott v. Rady Children’s Hosp.-San Diego*, 265 F. Supp. 3d 1090 (S.D. Cal. 2017) (ACA); *A.H. ex rel. Handling v. Minersville Area Sch. Dist.*, 290 F. Supp. 3d 321 (M.D. Pa. 2017) (Title IX); *Roberts v. Clark Cty. Sch. Dist.*, 215 F. Supp. 3d 1001 (D. Nev. 2016) (Title VII); *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509 (D. Conn. 2016) (Title VII); *see also Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011) (holding that terminating an employee because she is transgender violates the prohibition on sex-based discrimination under the Equal Protection Clause); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000) (holding that a transgender individual could state a claim for sex discrimination under the Equal Credit Opportunity Act); *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000) (holding that a transgender individual could state a claim under the Gender Motivated Violence Act); *but see Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1221 (10th Cir. 2007) (“discrimination against a transsexual [sic] based on the person’s status as a transsexual [sic] is not discrimination because of sex under Title VII”); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (“discrimination based on one’s transsexualism [sic] does not fall within the protective purview of [Title VII]”). We understand that a judge in the Northern District of Texas recently ruled otherwise, including in the context of interpreting Section 1557 of the Affordable Care Act. *See Franciscan Alliance, Inc. v. Burwell*, 227 F. Supp. 3d 660 (N.D. Tex. 2016). That decision clearly is an outlier and we urge you to treat it as such rather than as an excuse to engage in further discrimination.

certain class of citizens for disfavored legal status or general hardships are rare. A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.”); *Dept. of Agriculture v. Moreno*, 413 U. S. 528, 534 (1973) (“[I]f the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare ... desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.”); *see also Doe v. Trump, supra*, (holding that reinstating a prohibition on open military service by transgender individuals likely violates the Equal Protection Clause); *Stockman v. Trump*, 2017 WL 9732572 (C.D. Cal. Dec. 22, 2017) (same); *Karnoski v. Trump*, 2017 WL 6311305 (W.D. Wash. Dec. 11, 2017) (same); *Stone v. Trump*, 280 F. Supp. 3d 747 (D. Md. 2017) (same).

For these reasons, we urge your Departments to forego any efforts to further marginalize transgender and gender nonconforming people by defining the term “sex” in a manner meant to deny them the full rights, protections, and recognition of federal civil rights laws.

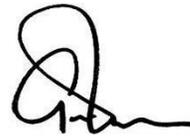
Sincerely,



MAURA HEALEY
Attorney General of Massachusetts



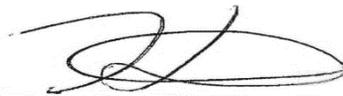
XAVIER BECCERA
Attorney General of California



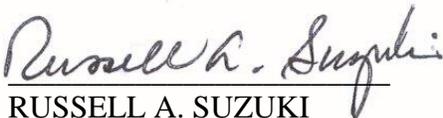
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Attorney General of Connecticut



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Attorney General of Delaware



KARL A. RACINE
Attorney General of the District of Columbia



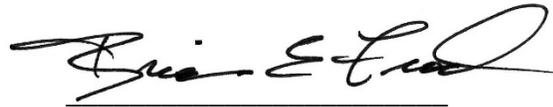
RUSSELL A. SUZUKI
Attorney General of Hawaii



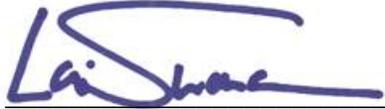
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Attorney General of Iowa



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Attorney General of Maryland



LORI SWANSON
Attorney General of Minnesota



GURBIR S. GREWAL
Attorney General of New Jersey



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Attorney General of New York



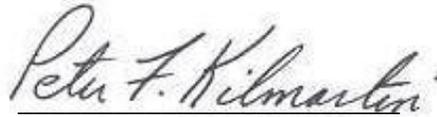
JOSH STEIN
Attorney General of North Carolina



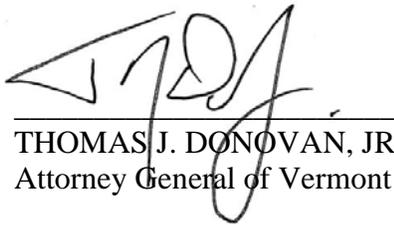
ELLEN ROSENBLUM
Attorney General of Oregon



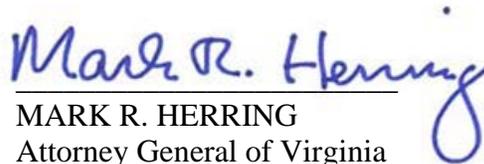
JOSH SHAPIRO
Attorney General of Pennsylvania



PETER F. KILMARTIN
Attorney General of Rhode Island



THOMAS J. DONOVAN, JR.
Attorney General of Vermont



MARK R. HERRING
Attorney General of Virginia



BOB FERGUSON
Attorney General of Washington