No. 16-273

IN THE

Supreme Court of the United States

GLOUCESTER COUNTY SCHOOL BOARD,

Petitioner,

v.

G. G., BY HIS NEXT FRIEND AND MOTHER, DEIRDRE GRIMM,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

AMICI CURIAE BRIEF OF SECRETARY OF EDUCATION ARNE DUNCAN, SECRETARY OF EDUCATION JOHN B. KING, JR., AND OTHER FORMER OFFICIALS FROM THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND DEPARTMENTS OF EDUCATION, JUSTICE, LABOR AND HEALTH AND HUMAN SERVICES IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

This brief is submitted by the following *amici curiae:*

- **Arne Duncan**, United States Secretary of Education (2009-2015);
- **John B. King, Jr.**, United States Secretary of Education (2016-2017);
- **Catherine E. Lhamon**, Assistant Secretary for Civil Rights, United States Department of Education (2013-2017);
- **James Cole, Jr.**, General Counsel, United States Department of Education (2014-2017);
- **Mathew S. Nosanchuk**, Senior Counselor to the Assistant Attorney General, Civil Rights Division, United States Department of Justice (2009-2012);
- **Patricia Shiu**, Director of Office of Federal Contract Compliance Programs, United States Department of Labor (2009-2016);
- **David Michaels**, Assistant Secretary of Labor for the Occupational Safety and Health Administration, United States Department of Labor (2009-2017);

1. Pursuant to Supreme Court Rule 37.6, counsel for *amici* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amici* or their counsel, has made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court.

- **M. Patricia Smith**, Solicitor, United States Department of Labor (2010-2017);

- **David Lopez**, General Counsel, United States Equal Employment Opportunity Commission (2010-2016); and

- **Jocelyn Samuels**, Senior Counselor to the Assistant Attorney General for Civil Rights, United States Department of Justice (2009-2011); Principal Deputy Assistant Attorney General for Civil Rights, United States Department of Justice (2011-2013); Acting Assistant Attorney General for Civil Rights, United States Department of Justice (2013-2014); Director, Office of Civil Rights, United States Department of Health and Human Services (2014-2017).

Amici have an interest because each served as a cabinet secretary or other senior official responsible for the interpretation and application of federal anti-discrimination laws that prohibit discrimination on the basis of sex, including those set forth in Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 ("Title IX"), Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-2000e-17 ("Title VII"), and Section 1557 of the Patient Protection and Affordable Care Act, 49 U.S.C. § 18116 ("Section 1557").

As senior officials charged with determining the application of these laws to transgender individuals, *amici* submit this brief to advise the Court of the extensive process and analysis undertaken by their respective cabinet departments regarding the scope of these federal

laws. These processes informed and/or independently validated the Department of Education's interpretation of Title IX and its implementing regulations to include within the prohibition against sex discrimination a prohibition against discrimination on the basis of gender identity. The Department of Education has consistently enforced Title IX and its implementing regulations to protect victims of gender identity discrimination since at least 2013, and based its published interpretive guidance on a substantial body of case law and administrative decision-making. This interpretation and enforcement of Title IX was consistent with the concurrent, but independently developed Department of Justice interpretation and enforcement of the same and similar provisions, as well as the conclusions of other federal offices and agencies that have interpreted and/or applied similar anti-sex discrimination statutory provisions under Title VII and Section 1557, including the Departments of Labor and Health and Human Services.

The Executive Branch officials responsible for implementing federal law have conducted a careful analysis of the law and have each come to the conclusion that the statutory bans on sex discrimination cover discrimination based on gender identity. *Amici* respectfully submit that this considered analysis, based on the officials and agencies' own expertise in their respective areas, both reflects and reinforces the proper interpretation of Title IX as forbidding discrimination on the basis of gender identity.

SUMMARY OF THE ARGUMENT

Amici, as senior officials in their respective cabinet departments with responsibility for civil rights, had the duty to faithfully implement Title IX and related laws that forbid discrimination on the basis of sex. In executing that duty, each of the *amici* undertook an extensive administrative process to ensure that his or her Department fully considered statutory law, legal precedent, regulatory guidance, scientific analysis, and the factual record in reaching its conclusions. The Department of Education's analysis determined that an individual may face discrimination on the basis of "sex" under Title IX regardless of whether that person's gender is different than that recorded on their birth certificate. Accordingly, it concluded that individuals whose gender was different than their sex designated at birth could not be precluded under Title IX, among other forms of discrimination, from using the restroom corresponding with their gender identity. The Department of Justice separately and in parallel reached the identical conclusion.

The Department of Education's interpretation of Title IX to include protection against discrimination on account of gender identity is based on years of jurisprudence and administrative decision making. The law was settled by this Court in *Price Waterhouse v. Hopkins* that the concept of sex discrimination, as interpreted under federal statute, forbids discrimination against an individual based on "sex-based considerations," including gender. 490 U.S. 228, 242 (1989). In 2012, the U.S. Equal Employment Opportunity Commission ("EEOC") recognized that "intentional discrimination against a transgender individual because that person is transgender is, by

definition, discrimination 'based on sex'" in violation of Title VII.[2] *Macy v. Holder*, EEOC Appeal No. 0120120821, 2012 WL 1435995, at *11 (Apr. 20, 2012). And in 2015, the EEOC stated that Title VII's prohibition against sex discrimination requires employers to allow transgender employees to use the restroom corresponding with their gender identity. *Lusardi v. McHugh*, EEOC Appeal No. 0120133395, 2015 WL 1607756, at *7-8 (Apr. 1, 2015).

Prior to 2013, neither the Department of Education nor Department of Justice had occasion to determine whether and to what extent the word "sex" under Title IX or its implementing regulations includes the concept of gender identity. Following the EEOC's decision in *Macy*, however, both Departments were called to investigate numerous complaints of discrimination against transgender students in schools between 2013 and 2014. In individual cases concerning treatment of transgender students, the Department of Education determined that a recipient of federal funding under Title IX generally must treat students consistent with their gender identity in all aspects of school activities. Based on continuing issues arising in school districts with respect to transgender student access, and informed by the Court's decision in *Price Waterhouse* and the EEOC's decision in *Macy*, the Department of Education's Office for Civil Rights ("OCR") conducted a comprehensive review to determine the extent to which Title IX protects against discrimination on the basis of gender identity. The Department of Education

2. Courts regularly rely on Title VII precedent to analyze discrimination "on the basis of sex" under Title IX. *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 75 (1992) (citing *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986)).

undertook an extensive review of relevant laws, facts, and science related to gender identity. After months of study and review, the Department of Education's OCR determined that discrimination against students on the basis of gender identity is a form of prohibited sex-based discrimination.

This interpretation of Title IX was reflected in both the Department of Education's January 7, 2015 letter, authored by former OCR Acting Deputy Assistant Secretary for Policy, Mr. James A. Ferg-Cadima (App. 121a), as well as the Department of Education's May 13, 2016 Dear Colleague letter, which was deemed "significant guidance" by the Department and was issued jointly with the Department of Justice. U.S. Dep't of Just., Civ. Rts. Division & U.S. Dep't of Educ., Off. for Civ. Rts., *Dear Colleague Letter* (May 13, 2016) available at https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf. The Fourth Circuit determined that the Department of Education's January 2015 letter, and interpretation of Title IX and its implementing regulations therein, was duly developed and thus entitled to substantial and controlling deference under the authority of *Auer v. Robbins*, 519 U.S. 452 (1997). App. 20a-25a.

Petitioner ignores this developed public history, and instead claims the Department of Education's January 2015 letter "cited no agency document requiring schools to treat transgender students 'consistent with their gender identity' regarding restroom, locker room, or shower access." Pet. Br. at 14. Petitioner's statement fail to acknowledge the extensive process of agency review and factual development by multiple agencies and departments that support the January 2015 letter and the

interpretation that sex discrimination prohibitions include prohibitions on discrimination based on gender identity. The new Administration was likewise misinformed, when it advised—in rescinding both the January 2015 letter and the May 2016 joint guidance—that neither document contained "extensive legal analysis or explain[ed] how the position is consistent with the express language of Title IX, nor did [either document] undergo any formal public process." *Id.* at p. 1. In fact, the Department of Education's analysis included careful consideration of the text of Title IX, related precedents, and public administrative proceedings. Similar care attended the interpretations adopted by other agencies, including the Departments of Justice, Labor, and Health and Human Services, that analogous prohibitions on sex discrimination include prohibitions on discrimination based on gender identity.

Amici submit this detailed accounting of the review process to address Petitioner's mistaken claims, and better inform this Court's analysis of the care taken by *amici's* departments to ensure fidelity to Title IX. Based on the full record, *amici* respectfully request that this Court agree with the Department of Education that Title IX's prohibition against sex discrimination includes a protection on the basis of gender identity.

ARGUMENT

I. The Departments Of Education And Justice Independently Are Responsible For Enforcing Title IX And Its Implementing Regulations And Thus Investigate And Resolve Mixed Questions Of Law And Fact Concerning Their Violation

The core mission of the Department of Education is to promote student achievement and preparation for global competitiveness through educational excellence and equal educational opportunities for every individual. 20 U.S.C. § 3402(1). One of the ways this mission is supported is through the Department's vigorous enforcement of civil rights laws, including those that prohibit sex discrimination under Title IX. See U.S. Dep't of Educ., *About OCR*, available at www.ed.gov/ocr/aboutocr.html.

Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). Title IX was signed into law on June 23, 1972. Act of June 23, 1972, Pub. L. No. 92-318, §§ 901-907, 8 Stat. 235, 373-75.

Pursuant to Congress's delegation of authority, the Department of Health, Education and Welfare promulgated Title IX's implementing regulations in 1975, which were later adopted by the Department of Education upon its creation in 1980. See 40 Fed. Reg. 24,128 (June 4, 1975); see also 65 Fed. Reg. 52,858-01 (Aug. 30, 2000). Those regulations make clear that a recipient of funding under Title IX may not, on the basis of sex, "provide aid,

benefits, or services in a different manner" or "[s]ubject any person to separate or different rules of behavior, sanctions, or other treatment." 34 C.F.R. § 106.31(b). Recipients under Title IX may, however, "provide separate toilet, locker room, and shower facilities on the basis of sex" without running afoul of Title IX, so long as the "facilities provided for students of one sex" are "comparable to such facilities provided for students of the other sex." 28 C.F.R. § 54.410 (Department of Justice); 34 C.F.R. § 106.33 (Department of Education).

Prior to 2013, neither the Department of Education nor Department of Justice had occasion to interpret Title IX and its implementing regulations to include protection against discrimination on the basis of gender identity. Since 2013, however, in a series of reviews arising from claims of discrimination, both agencies determined that discrimination on the basis of gender identity was included within the ambit of these laws forbidding sex discrimination. That interpretation was later memorialized in the Department of Education's January 2015 letter and the May 2016 joint guidance issued by both Departments. Indeed, the Fourth Circuit properly granted the Department of Education's interpretation of Title IX and its implementing regulations substantial and controlling deference based on the underlying administrative review, pursuant to *Auer v. Robbins*. App. 20a-25a. Since then, an additional five district courts have evaluated this interpretation of Title IX and its implementing regulations, and all but one has agreed with the Fourth Circuit's determination. See *Texas v. United States*, No. 7:16cv54, __ F. Supp. 3d __, 2016 WL 4426495, at *14-15 (N.D. Tex. Aug. 21, 2016) (rejecting view); *Carca*ño v. Patrick McCrory, *et al*., No. 1:16cv236,

__ F. Supp. 3d __, 2016 WL 4508192, at *11-13 (M.D. North Carolina Aug. 26, 2016) (adopting view); *Whitaker v. Kenosha Unified Sch. Dist. No. 1*, No. 16-CV-943-PP, 2016 WL 5239829, at *3-4 (E.D. Wisc. Sept. 22, 2016) (same); *Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep't of Educ.*, No. 2:16-CV-524, 2016 WL 5372349, at *10-13 (S.D. Ohio Sept. 26, 2016) (same); *Students & Parents for Privacy v. U.S. Dep't of Educ.*, No. 16-CV-4945, 2016 WL 6134121, at *17-18 (N.D. Ill. Oct. 18, 2016) (same).

Notwithstanding, Petitioner contends the Fourth Circuit's decision granting deference to the Department of Education's 2015 letter was improper because that written guidance constituted an uninformed judgment by the Department, and did not reflect meaningful administrative proceedings, analysis, or judgment. Pet. Br. 59-61. The new Administration likewise chose not to maintain these Department interpretations—and instead rescinded both the 2015 letter and May 2016 joint guidance—asserting that neither set of written guidance contained "extensive legal analysis or explain[ed] how the position is consistent with the express language of Title IX, nor did they undergo any formal public process." U.S. Dep't of Just., Civ. Rts. Division & U.S. Dep't of Educ., Off. for Civ. Rts., *Dear Colleague Letter* at 1 (Feb. 22, 2017), available at https://www2.ed.gov/about/offices/list/ocr/lgbt.html. As explained below, both Departments conducted precisely the type of administrative review and analysis of law and facts to which federal courts typically accord deference. Their judgments were based on a substantial record of jurisprudence, agency decision making and studies reviewed by both the Departments of Education and Justice.

II. The Departments of Education And Justice's Interpretation Of Title IX And Its Implementing Regulations To Include Protections Against Discrimination On The Basis Of Gender Identity Is Consistent With, And Was Informed By, Decades Of Jurisprudence And Administrative Decision Making

The Departments of Education and Justice relied on substantial case law as well as administrative decision making when deciding to interpret Title IX and its implementing regulations to include protections against discrimination on the basis of gender identity.

A. This Court's Decision In *Price Waterhouse v. Hopkins* And Its Progeny Established The Framework For The Departments Of Education And Justice's Decision To Interpret Title IX And Its Implementing Regulations To Include Protections Against Discrimination On The Basis Of Gender Identity

In 1989, this Court issued its decision in *Price Waterhouse*, 490 U.S. at 242 and rightly "eviscerated" a prior line of cases[3] that had largely construed federal statutory prohibitions against "sex" discrimination to prohibit only discrimination on the basis of biological status as male or female. *Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004). In *Price Waterhouse*, this Court

3. See *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1084 (7th Cir. 1984), *cert. denied*, 471 U.S. 1017 (1985); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 661-63 (9th Cir. 1977).

interpreted Title VII to prohibit stereotyping on the basis of sex and found that an accounting firm had violated Title VII by denying a female senior manager partnership not because of her female physical characteristics alone, but rather because she was considered "macho," "aggressive," and not "feminine[]" enough. 490 U.S. at 235. This Court expressly rejected the argument that "sex" discrimination within the meaning of Title VII occurs only where biological sex is taken into consideration, and instead interpreted the statute to include protection against differential treatment based on "sex-based" considerations, including gender. *Id*. at 241-242. The Court emphasized that "'[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'" *Id*. at 251 (quoting *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)).

Circuit courts have applied this principle of "sex" stereotyping to prohibit discrimination against transgender persons, including the Ninth, Sixth and Eleventh Circuits. *Schwenk v. Hartford*, 204 F.3d 1187, 1201-02 (9th Cir. 2000); *Smith*, 378 F.3d at 571-72; *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011). District Courts have also applied this theory in Title IX cases. See e.g., *Pratt v. Indian River Cent. Sch. Dist.*, 803 F. Supp. 2d 135, 151 (N.D.N.Y. 2011) see also *Miles v. N.Y. Univ.*, 979 F. Supp. 248, 250 (S.D.N.Y. 1997).

The prohibition against treatment based on a third party's stereotypes about how individuals must behave based on the gender denoted on their birth certificate was also endorsed within the Title IX context by the

Department of Education in separate written guidance issued in 2001 and 2010. See U.S. Dep't of Educ., Off. For Civ. Rts., *Revised Sexual Harassment Guidance: Harassment of Students By School Employees, Other Students, Or Third Parties Title IX* (Jan. 19, 2001), available at https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html#_ednref16l (noting that "gender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping, but not involving conduct of a sexual nature, is also a form of sex discrimination to which a school must respond"); U.S. Dep't of Educ. Off. for Civ. Rts., *Dear Colleague Letter* at 7 (Oct. 26, 2010), available at https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html (noting that sex discrimination under Title IX can be found if students are harassed either for exhibiting what is perceived as a stereotypical characteristic for their sex, or for failing to conform to stereotypical notions of masculinity and femininity.).

Indeed, the Departments of Education and Justice began investigating complaints about discrimination based on gender identity in schools as early as 2010. As part of its examination of the application of civil rights laws to transgender students, representatives from the Department of Education held listening sessions beginning in 2010 with various stakeholders, including transgender students and parents or guardians of both transgender and non-transgender students, as well as representatives from school board organizations, school administrators, faith leaders, athletics associations, educators, and institutions of higher education. Declaration of Catherine E. Lhamon, *State of Texas v. United States of America*, Case No. 7:16-cv-54-0, Dkt. No. 95-1 (Nov. 7, 2016) at

¶ 12. Through these engagements, the Department of Education learned about the issues transgender students face in schools. The Department of Education also received many inquiries from educators, state education agencies, students, families, legislators, and the public about the application of Title IX to transgender and gender non-conforming students. *Id.*

For example, on October 28, 2010, the Department of Education's OCR received a complaint against the Tehachapi Unified School District following the suicide of a 13 year old boy amidst allegations of gender based harassment. U.S. Dep't of Just., Civ. Rts. Division & U.S. Dep't of Educ., Off. for Civ. Rts., *Letter to Richard L. Swanson*, OCR Case No. 09-11-1031, DOJ Case No. DJ 169-11 E-38 at 1 (June 30, 2011), available at https://www.justice.gov/sites/default/files/crt/legacy/2013/01/17/tehachapiletter.pdf. In a letter written to the School District, the Departments of Education and Justice made clear that Title IX prohibits "gender-based harassment" against a student "either for exhibiting what is perceived as a stereotypical characteristic of the student's sex, or for not conforming to stereotypical notions of masculinity and femininity." *Id.* at 2. Finding that the District had permitted gender-based harassment to occur against the deceased student, both Departments noted that Title IX prohibits "gender-based harassment of all students, regardless of the actual or perceived sex, sexual orientation, or gender identity of the harasser or victim." *Id.* The District agreed to voluntarily settle the matter, and to take "effective steps designed to prevent harassment in its education programs, including, and in particular, sexual and gender-based harassment" based on the person's nonconformity with gender stereotypes,

pursuant to a Voluntary Resolution Agreement. Tehachapi Unified Sch. Dist., U.S. Dep't of Just., Civ. Rts. Division & U.S. Dep't of Educ., Off. for Civ. Rts., *Resolution Agreement*, OCR Case No. 09-11-1031, DOJ Case No. DJ 169-11E-38 at 2 (June 30, 2011), available at https://www.justice.gov/sites/default/files/crt/legacy/2013/01/17/tehachapiagreement.pdf.

The Departments of Education and Justice also began an investigation of sex-based harassment of gender nonconforming students in the Anoka-Hennepin School District in 2010. U.S. Dep't of Educ., Off. for Civ. Rts., *Letter to Dennis Carlson*, OCR Case No. 05-11-5901 (Mar. 15, 2012), available at https://www2.ed.gov/about/offices/list/ocr/docs/investigations/05115901-a.pdf. There, the investigation addressed the issue of harassment of District students on the basis of sex, including peer-on-peer harassment relating to gender non-conformance. *Id.* at 1. In 2012, the Departments of Education and Justice concluded their investigation, and stated that students were harassed, some almost every day for years, because of their failure to conform to gender stereotypes, including female students reportedly being called "manly," "guy," or "he-she," and male students being called "girl" and being told "you're a guy, act like it." *Id.* at p. 3. A female student also reported being told to go "kill herself," and other students reported being threatened and being "subjected to physical assaults because of their nonconformity to gender stereotypes." *Id.* The investigation ultimately resulted in a consent decree, filed in court by the Department of Justice. *Doe v. United States*, Consent Decree, Nos. 11-cv-01999-JNE-SER, 11-cv-02282-JNE-SER (D. Minn. March 5, 2012).

B. The EEOC's Decisions in *Macy* And *Lusardi* Further Shaped The Department of Education's Interpretation Of Title IX And Its Implementing Regulations To Include Protections Against Discrimination On The Basis Of Gender Identity

Following the reasoning set forth by this Court in *Price Waterhouse* and its progeny, the EEOC interpreted Title VII's prohibition against sex discrimination to include an express protection on the basis of gender identity in its watershed *Macy v. Holder* decision. There, the EEOC stated in 2012 that "intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination 'based on sex'" in violation of Title VII. *Macy*, 2012 WL 1435995 at *11. Following *Macy*, in 2015, the EEOC stated that Title VII requires employers to allow transgender employees to use the restroom corresponding with their gender identity. *Lusardi*, 2015 WL 1607756 at *7.[4]

4. Several lower courts have since followed the EEOC's approach, holding that excluding men who are transgender from men's restrooms and women who are transgender from women's restrooms deprives them of their ability to participate fully in employment, in violation of Title VII. See *Mickens v. Gen. Elec. Co.*, No. 3:16-CV-00603-JHM, 2016 WL 7015665, at *3 (W.D. Ky. Nov. 29, 2016); *Roberts v. Clark County Sch. Dist.*, No. 2:15-CV-00388-JAD-PAL, 2016 WL 5843046, at *1 (D. Nev. Oct. 4, 2016).

C. Based On *Price Waterhouse* And The EEOC's Decision In *Macy*, The Department Of Education Concluded That Title IX And Its Implementing Regulations Require Transgender Students To Have Access To Programs And Facilities That Match Their Gender Identity

In 2011, the Departments of Education and Justice began jointly investigating the Arcadia Unified School District in Southern California for failing to permit a transgender boy to use the boys' restrooms, locker rooms, and other sex-segregated facilities. U.S. Dep't of Just., Civ. Rts. Division & U.S. Dep't of Educ., Off. for Civ. Rts., *Letter to Dr. Joel Shawn*, DOJ Case No. DJ169-12C-79, OCR Case No. 09-12-1020 (July 24, 2013), available at https://www.justice.gov/sites/default/files/crt/legacy/2013/07/26/arcadialetter.pdf. After a two-year investigation in which the Departments jointly reviewed this Court's decision in *Price Waterhouse* and the EEOC's decision in *Macy*, including each decision's respective progeny, and after multiple years of studying the issue and consulting with stakeholders and other federal agencies about scientific consensus, the Departments of Education and Justice identified, for the first time in 2013, concerns regarding a school district's compliance with Title IX and its implementing regulations for failing to provide a transgender student access to a bathroom consistent with his gender identity. *Id.* at 4. The District agreed to voluntarily settle the matter, and to "permit the Student to use male-designated facilities at school and on school-sponsored trips and to otherwise treat the Student as a boy in all respects." Arcadia Unified Sch. Dist., U.S. Dep't of Just., Civ. Rts. Division & U.S. Dep't of Educ., Off. for Civ. Rts., *Resolution Agreement*, OCR Case No.

09-12-1020, DOJ Case No. 169-12C-70 (July 24, 2013), available at https://www.justice.gov/sites/default/files/crt/legacy/2013/07/26/arcadiaagree.pdf.[5]

Consistent with this understanding, and reflective of the judicial decisions and agency determinations described above, the Department of Education issued additional guidance in April 2014, expressly stating that Title IX protects against discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity. U.S. Dep't of Educ., Off. for Civ. Rts., *Questions and Answers on Title IX and Sexual Violence* at B-2 (April 2014), available at https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf. The Department of Education designated this document as a "significant guidance document" under the Office of Management and Budget's Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007), meaning it underwent interagency review and invited public comment. See U.S. Dep't of Educ., *Significant Guidance at the Department of Education*, available at https://ed.gov/policy/gen/guid/significant-guidance.html (noting that each significant guidance document "provides an e-mail link that allows members of the public to submit questions or comments, including requests that [the Department of Education] revise the significant guidance document[,]" and that the Department will "take public comments into account in the course of developing new guidance or modifying existing guidance.").

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5. The Department of Justice further endorsed this interpretation of Title IX in an amicus brief filed in *Carmichael v. Galbraith*, No. 12-11074 (5th Cir. 2013).

The Department of Education issued further "significant guidance" in December 2014, stating that under Title IX a "recipient generally must treat transgender students consistent with their gender identity in all aspects of the planning, implementation, enrollment, operation, and evaluation of single-sex classes." U.S. Dep't of Educ., Off. for Civ. Rts., *Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities* at 25 (Dec. 1, 2014), available at https://www2.ed.gov/about/offices/list/ocr/docs/faqs-title-ix-single-sex-201412.pdf.

It is within this context that the Department of Education issued its January 2015 guidance at the heart of this dispute. The Department's January 2015 guidance was issued shortly after Petitioner Gloucester County School Board passed its resolution restricting Respondent's access to only restrooms that corresponded with his "biological gender[.]" App. 144a. The guidance was in response to a December 14, 2014 inquiry sent to the Department's Acting Assistant Secretary for Communications and Outreach, Mr. Massie Ritsch, which asked whether the Department had any "guidance or rules for what is or is not acceptable for a school to do when establishing policies for transgender students to access restrooms and other similar sex-segregated facilities[.]" App. 119a. The inquiry also sought Department "guidance or rules" on: (1) whether a transgender student may be required to use a different restroom than other students, such as a restroom in a nurse's office or a restroom designated for school employees; and (2) whether an organization such as a school, a school district, or a university may limit access to facilities to only those whose gender identity is consistent with their sex assigned at birth. *Id.*

On January 7, 2015, the Department of Education's Acting Deputy Assistant Secretary for Policy in the Department's OCR, Mr. James A. Ferg-Cadima, responded to the December 14, 2014 inquiry, and reiterated the Department's position that Title IX "prohibits recipients of Federal financial assistance from discriminating on the basis of sex, including gender identity and failure to conform to stereotypical notions of masculinity and femininity." App. 121a. Mr. Ferg-Cadima also made clear that the Department's interpretation of Title IX was consistent with case law, citing *Price Waterhouse* and its progeny, and the "adjudications and guidance documents of other Federal agencies," including the EEOC's decision in *Macy* and other administrative determinations applying the same interpretation of identical or similar federal statutory provisions prohibiting sex discrimination, including those detailed below. *Id.* at 121a-123a. Mr. Ferg-Cadima also made clear, consistent with the Department's prior guidance, that when a "school elects to separate or treat students differently on the basis of sex…, a school generally must treat transgender students consistent with their gender identity." *Id.* at 122a.

Three months later, in April 2015, the Department of Education's OCR issued a "Title IX Resource Guide" again making clear that Title IX protects students, employees, applicants for admission and employment, and other persons from all forms of sex discrimination, "including discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity." U.S. Dep't of Educ., Off. for Civ. Rts., *Title IX Resource Guide*, (Apr. 2015), available at https://www2.ed.gov/about/offices/list/ocr/docs/dcl-title-ix-coordinators-guide-201504.pdf.

Consistent with this guidance, the Department of Education entered into three separate resolution agreements in 2015 to resolve allegations of discrimination against transgender students that included denial of access to facilities and programs consistent with their gender identity. In August 2015, the Department settled with Central Piedmont Community College in North Carolina after investigating a complaint that the college discriminated against a student based on her gender when college personnel asked her to provide identification and medical documentation to verify her sex, and suspended her for her failure to do so. U.S. Dep't of Educ., Off. for Civ. Rts., *Letter to Tony Zeiss*, OCR No. 11-14-2265 (Aug. 14, 2015), available at https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/11142265-a.pdf. Under the resolution agreement, the college voluntarily agreed to notify all students of their right to use the restroom corresponding with their gender identity, and to ensure that personnel honor requests by students wishing to be referred to by a different name and/or gender. Central Piedmont Community College & U.S. Dep't of Educ., Off. for Civ. Rts., *Voluntary Resolution Agreement*, OCR No. 11-14-2265 (Aug. 13, 2015), available at https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/11142265-b.pdf.

In December 2015, after a two-year investigation, the Department of Education settled with Township High School District 211 in Illinois after the Department determined that the District improperly denied a 14-year-old transgender girl access to the girls' locker room and instead required her to use separate facilities to change clothes for her physical education classes. In the resolution agreement, the District agreed to provide the student with

access to female locker room facilities consistent with her gender identity, and to take steps to protect the privacy of all students by installing and maintaining sufficient privacy curtains within the girls' locker rooms. U.S. Dep't of Educ., Off. for Civ. Rts., *Letter to Daniel E. Cates*, OCR Case No. 05-14-1055 (Nov. 2, 2015), available at at https://www2.ed.gov/documents/press-releases/township-high-211-letter.pdf (resolution letter); see also Township High School District 211 & U.S. Dep't of Educ., Off. for Civ. Rts., *Agreement to Resolve*, OCR No. 05-14-1055 (Dec. 2, 2015), available at https://www2.ed.gov/documents/press-releases/township-high-211-agreement.pdf.

The Department of Education resolved an additional complaint in December 2015 against Broadalbin-Perth Central School District in New York, where a 9-year-old transgender girl alleged she was required to use a gender-neutral restroom in the nurse's office or a family restroom. U.S. Dep't of Educ., Off. for Civ. Rts., *Letter to Stephen M. Tomlinson*, OCR No. 02-13-1220 (Dec. 22, 2015), available at https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/02131220-a.pdf. The District voluntarily agreed to adopt and publish revised grievance procedures and notices of nondiscrimination in all relevant policies, and to provide assurance that the District would take steps that would prevent the recurrence of discrimination on the basis of gender identity. Broadalbin-Perth Central Sch. Dist. & U.S. Dep't of Educ., Off. for Civ. Rts., *Resolution Agreement*, OCR No. 02-13-1220, available at https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/02131220-b.pdf (resolution agreement).

The Departments of Education and Justice further endorsed their collective interpretation of Title IX to include protections on the basis of gender identity in a number of court briefings throughout 2015, including the statement of interest in the district court below and as *amicus curiae* in the Fourth Circuit's consideration of this case. See Statement of Interest of the United States, *G.G. v. Gloucester County Sch. Bd.*, No. 4:15cv54 (E.D. Va., June 29, 2015); Brief for the United States as Amicus Supporting Plaintiff-Appellant and Urging Reversal, *G.G. v. Gloucester County Sch. Bd.*, No. 15-2056 (4th Cir. Oct. 28, 2015).

On May 9, 2016, the Department of Justice further endorsed this interpretation of Title IX when it sued the State of North Carolina, the University of North Carolina, and the North Carolina Department of Public Safety alleging discrimination against transgender individuals. *United States v. State of North Carolina*, Case No. 1:16-cv-425, Complaint (M.D.N.C. May 9, 2016). Specifically, the Department of Justice alleged that North Carolina's statute requiring designation of restrooms based on users' biological sex "stated on a person's birth certificate"—North Carolina Session Law 2016-3, House Bill 2 ("H.B. 2")—violated Title VII, Title IX, and the Violence Against Women's Act ("VAWA"). *Id.* at ¶¶ 2, 12.

Days later, on May 13, 2016, the Departments of Justice and Education issued joint "significant" guidance, stating that when a "school provides sex-segregated activities and facilities, transgender students must be allowed to participate in such activities and access such facilities consistent with their gender identity." U.S. Dep't of Educ., Off. for Civ. Rts. & U.S. Dep't of Just., Civ. Rts. Division,

Dear Colleague Letter on Transgender Students (May 13, 2016), available at https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf. In that guidance, the Departments of Education and Justice also made clear that "[h]arassment that targets a student based on gender identity, transgender status, or gender transition is harassment based on sex, and the Departments enforce Title IX accordingly." *Id.* at 2. Shortly thereafter, the Department of Education published a document entitled *Examples of Policies and Emerging Practices for Supporting Transgender Students." U.S. Department of Education, Office of Elementary and Secondary Education & Office of Safe and Healthy Students, Examples of Policies and Emerging Practices for Supporting Transgender Students*, (May 2016), available at https://www2.ed.gov/about/offices/list/oese/oshs/emergingpractices.pdf.

Two months later, in July 2016, the Department of Justice urged the district court in the North Carolina suit to defer to the Departments of Education and Justice's "consistent interpretation" of their regulations. *United States v. State of North Carolina*, Case No. 1:16-cv-425, Memorandum of Law in Support of Plaintiff United States' Motion for Preliminary Injunctive Relief at 12-13 (M.D.N.C. July 5, 2016). The Department of Justice pointed the district court to the Departments' interpretations requiring that "funding recipients who choose to provide sex-segregated facilities must treat transgender individuals consistent with their gender identity[.]" *Id.* (referencing the May 13, 2016 joint guidance). The Department of Justice also reconfirmed its position that "[t]reating transgender people differently from non-transgender people because they are transgender constitutes differential treatment

'because of . . . sex' under Title VII." *Id.* at 18. The Department of Justice further explained that, "given that courts have traditionally considered Title VII and Title IX's sex discrimination prohibitions to be consistent, it would be incongruous to find that Title VII permits employers . . . to bar transgender men and women from workplace facilities consistent with their gender identity when recipients of federal funding under Title IX cannot." *Id.* at 17 (footnote omitted).

Notwithstanding this extensive and well-developed history, the new Administration rescinded both the January 2015 opinion letter and the May 2016 joint guidance on the purported grounds that neither document underwent a formal public process, or contained extensive legal analysis. U.S. Dep't of Just., Civ. Rts. Division & U.S. Dep't of Educ., Off. for Civ. Rts., *Dear Colleague Letter* at 2 (Feb. 22, 2017), available at https://www2.ed.gov/about/offices/list/ocr/lgbt.html. Not only does this argument ignore the history of the Department of Education's interpretation of Title IX to include protections against gender identity discrimination, it also ignores the other federal departments and agencies that have reached the same interpretation of similar federal anti-discrimination statutory provisions.

III. The Department Of Education's Interpretation Of Title IX And Its Implementing Regulations To Include Protections For Transgender Students Is Consistent With Other Agency Interpretations Under Federal Law

The Department of Education's interpretation of Title IX and its implementing regulations was consistent with the determinations other federal agencies, including the

Departments of Justice, Labor, and Health and Human Services when interpreting and/or applying similar anti-discrimination provisions under VAWA, Title VII and Section 1557 to include a prohibition against gender identity discrimination.

A. The Department Of Justice Interprets And Enforces Title VII To Include Protections Against Discrimination Based On Gender Identity

In April 2014, the Department of Justice filed a statement of interest in support of a transgender woman alleging sex discrimination based on her failure to conform to gender stereotypes. *Burnett v. City of Philadelphia—Free Library*, Civil Action No. 09-4348, Statement of Interest of the United States of America (E.D. Pa. April 4, 2014) ("*Burnett* Statement of Interest"). The Department of Justice stated, in reliance on *Price Waterhouse*, that "transgender individuals may show that discrimination grounded in gender stereotypes is discrimination 'because of . . . sex,' in violation of Title VII." *Id.* at 1. *Burnett* Statement of Interest at 3-4. The Department also summarized the already-growing body of lower federal court decisions recognizing "that disparate treatment against a transgender plaintiff can be discrimination 'because . . . of sex.'" *Id.* at 4-6 Among other authorities, the Department of Justice cited the Sixth Circuit's decision in *Smith*, 378 F.3d at 575, which had held a decade earlier that "discrimination against a plaintiff who is a transsexual—and therefore fails to act and/or identify with his or her gender—is no different from the discrimination directed against [the plaintiff] in *Price Waterhouse* who, in sex-stereotypical terms, did not act like a woman." *Id.* at 4.

Later that year, on December 15, 2014, the Department of Justice announced that, "considering the text of Title VII, the relevant Supreme Court case law interpreting the statute, and the developing jurisprudence in this area, . . . the best reading of Title VII's prohibition of sex discrimination is that it encompasses discrimination based on gender identity, including transgender status." Office of the Attorney General, *Memorandum: Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964* at 2 (Dec. 15, 2014) ("Holder Memorandum"), available at https://www.justice.gov/file/188671/download. Consistent with the Department of Justice's earlier statements, the Department of Justice's position in the Holder Memorandum followed this Court's directive in *Price Waterhouse* that "by using 'the simple words 'because of,' . . . Congress meant to obligate' a Title VII plaintiff to prove only 'that the employer relied upon sex-based considerations in coming to its decision.'" *Id.* (quoting *Price Waterhouse*, 490 U.S. at 241-42). The Department concluded that "[i]t follows that, as a matter of plain meaning, Title VII's prohibition against discrimination 'because of . . . sex' encompasses discrimination founded on sex-based considerations, including discrimination based on an employee's transitioning to, or identifying as, a different sex altogether." *Id.* The Department's position acknowledged that even if "Congress may not have had such claims in mind when it enacted Title VII," this Court "has made clear that Title VII must be interpreted according to its plain text, noting that 'statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.'" *Id.* (quoting

Justice Scalia's opinion in *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79 (1998)).

In March 2015, the Department of Justice filed a complaint on behalf of Rachel Tudor, a transgender woman, alleging her university employer denied her tenured professor application because of her gender identity, gender transition, and nonconformance with gender stereotypes. *United States v. Southeastern Okla. State Univ.*, Case No. Civ-15-324-C, Complaint at ¶ 71 (W.D. Okla. March 30, 2015), available at https://www.justice.gov/file/385886/download. Consistent with the December 2014 Holder Memorandum, and the Department of Justice's prior statements of its position, the Department of Justice contended the university's discrimination against the professor on the basis of her gender identity was discrimination on the basis of her sex in violation of Title VII. *Id.*

Later, on May 9, 2016, and as discussed above, the Department of Justice sued the State of North Carolina, the University of North Carolina, and the North Carolina Department of Public Safety alleging discrimination against transgender individuals. *United States v. State of North Carolina*, Case No. 1:16-cv-425, Complaint (M.D.N.C. May 9, 2016). The Department of Justice reconfirmed its position that treating transgender people differently from non-transgender people because they are transgender constitutes differential treatment 'because of . . . sex' under Title VII."

B. The Department Of Justice's Guidance On The 2013 VAWA Amendment Requires Permitting Transgender Persons To Use Sex-Segregated Facilities Corresponding To Their Gender Identity

The Violence Against Women Reauthorization Act of 2013 amended VAWA by conditioning receipt of Department of Justice grant funds on prohibiting discrimination, including discrimination based on gender identity. Pub. L. No. 113-4, § 3(b), 127 Stat. 54, 61-62 (2013) (codified as amended at 42 U.S.C. § 13925(b)(13)). An exception to this condition provided that where "sex segregation or sex-specific programming is necessary to the essential operation of a program, nothing in this paragraph shall prevent any such program or activity from consideration of an individual's sex." 42 U.S.C. § 13925(b)(13)(B).

The Department of Justice's guidance on the nondiscrimination condition advised VAWA grant recipients that the need for victims to "share bedrooms and bathrooms" could be "a significant consideration supporting" the need "to segregate beneficiaries of the opposite sex by bedroom and bathroom." U.S. Dep't of Just., Off. for Civ. Rts., *Frequently Asked Questions: Nondiscrimination Grant Condition in the Violence Against Women Reauthorization Act of 2013*, at 7 (Apr. 9, 2014), available at www.justice.gov/ovw/docs/faqs-ngc-vawa.pdf. In explaining how a recipient could permissibly consider a transgender person's "sex" to segregate facilities within the meaning of 42 U.S.C. § 13925(b)(13)(B),[6]

6. The Department of Justice has taken the position that "[t]he term 'sex' carries the same meaning in VAWA that it does in

the Department advised that "[a] recipient that operates a sex-segregated or sex-specific program should assign a beneficiary to the group or service which corresponds to the gender with which the beneficiary identifies." *Id.* at 8 (emphasis added). The Department further advised that a recipient should give "serious consideration" to "[a] victim's own views with respect to personal safety" and "ensure that its services do not isolate or segregate victims based upon actual or perceived gender identity." *Id.* at 8-9. And as a practical matter, the Department advised that "best practices dictate that the recipient should ask a transgender beneficiary which group or service the beneficiary wishes to join." *Id.* at 9.

C. The Department Of Labor Has Interpreted Federal Law Within Its Purview Consistent With Title VII To Provide Protections Against Gender Identity Discrimination

Like the Departments of Education and Justice, the Department of Labor has also interpreted the federal laws barring sex discrimination within its interpretive authority to include protections against gender identity discrimination, consistent with Title VII.

On June 30, 2014, the Department announced it would update its enforcement protocols and anti-discrimination guidance to "reflect current law" and clarify that the Department provides "the full protection of the federal

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Title IX and Title VII." *United States v. State of North Carolin*a, Case No. 1:16-cv-425, Memorandum of Law in Support of Plaintiff United States' Motion for Preliminary Injunctive Relief at 35 (M.D.N.C. July 5, 2016) (citing *Schwenk*, 204 F.3d at 1202)).

non-discrimination laws that" it enforces for "transgender individuals." U.S. Dep't of Labor, Secretary Thomas Perez, *Justice and Identity* (June 30, 2014), avilable at https://obamawhitehouse.archives.gov/blog/2014/07/01/justice-and-identity. The Department also announced its Office of Federal Contract Compliance Programs ("OFCCP"), Civil Rights Center ("CRC"), and Office of Safety and Health Administration ("OSHA") would issue "guidance to make clear that discrimination on the basis of transgender status is discrimination based on sex." *Id.*

The OFCCP is a civil rights and worker protection agency, charged with enforcing anti-discrimination provisions set forth in Executive Order 11246, as amended, including those that protect against sex discrimination.[7] 79 Fed. Reg. 72,985, 72,985 (Dec. 9, 2014). In August 2014, the OFFCP issued Directive 2014-02, making clear that "existing agency guidance on discrimination on the basis of sex under Executive Order 11246, as amended, includes discrimination on the basis of gender identity and transgender status." Dep't of Labor, Off. of Fed. Cont. Compliance Programs, *Directive (DIR) 2014-02* (Aug. 19, 2014), available at https://www.dol.gov/ofccp/regs/compliance/directives/dir2014_02.html. Approximately one year later, and after receiving over 500

7. Prior to the issuance of Executive Order 13672, Executive Order 11246 only prohibited employment discrimination by companies doing business with the Federal Government on the bases of race, color, religion, sex, and national origin. 30 Fed. Reg. 12,319, 12,319 (Sept. 24, 1965). On July 21, 2014, President Obama issued Executive Order 13672, adding sexual orientation and gender identity to the prohibited bases of discrimination under Executive Order 11246. 79 Fed. Reg. at 72,985. The OFCCP revised its implementing regulations implementing the same at 41 C.F.R. Parts 60-1, 60-2, 60-4, and 60-50 on December 9, 2014. 79 Fed. Reg. at 72,993-72,995.

public comments, the OFCCP published a separate Final Rule, updating its regulations at 41 CFR Part 60-20 to include within the prohibition against sex discrimination protection against discrimination on the basis of gender identity. 81 Fed. Reg. 39,108, 39,118-39,119 (June 15, 2016). In so doing, the OFCCP expressly aligned its sex discrimination regulations with current law under Title VII, as interpreted by the courts and the EEOC. *Id*. at 39119. The Final Rule also makes clear that denying "transgender employees access to the restrooms, changing rooms, showers, or similar facilities designated for use by the gender with which they identify" is considered an "unlawful sex-based discriminatory practice" within the meaning of the OFCCP's regulations. 41 C.F.R. § 60-20.2(b)(13).

The CRC has likewise interpreted the anti-sex discrimination provisions within Section 188 of the Workforce Innovation and Opportunity Act ("WIOA") to include protections against discrimination on the basis of gender identity. Section 188 of WIOA, among other things, prohibits discrimination on the basis of sex in the administration of, or in connection with any programs and activities funded or otherwise financially assisted in whole or in part under Title I of WIOA. Workforce Innovation and Opportunity Act, Pub. L. No. 113-128, § 188, 128 Stat. 1425, 1597-99 (2014). The CRC interprets the nondiscrimination provisions of the WIOA consistent with the principles of Title VII. 81 Fed. Reg. 87,130-01, 87,130 (Dec. 2, 2016). On December 2, 2016, the CRC issued a Final Rule, subject to public comment and review, stating that "complaints of discrimination based on sex stereotyping, transgender status, or gender identity will be recognized as complaints of sex discrimination" under Section 188 of WOIA. 81 Fed. Reg. at 87,135.

And in 2015, OSHA issued guidance relating to transgender persons' access to bathroom facilities that correspond with their gender identity. U.S. Dep't of Labor, Occupational Safety and Health Admin., *Guidance to Employers: Best Practices-A Guide to Restroom Access for Transgender Workers*, OSHA Publication 3795 (2015), available at https://www.osha.gov/Publications/OSHA3795.pdf. OSHA requires all employers under its jurisdiction to provide employees with sanitary and available toilet facilities. The OSHA guidance makes clear that gender identity "is an intrinsic part of each person's identity and everyday life." *Id.* Accordingly, it is "essential for employees to be able to work in a manner consistent with how they live the rest of their daily lives, based on their gender identity." *Id*. Therefore, OSHA states that restricting employees "to using only restrooms that are not consistent with their gender identity, or segregating them from other workers by requiring them to use gender-neutral or other specific restrooms, singles those employees out and may make them fear for their physical safety." *Id*. Accordingly, OSHA offers best policies, including: (1) single-occupancy gender-neutral (unisex) facilities; and (2) use of multiple-occupant, gender-neutral restroom facilities with lockable single occupant stalls.

D. The Department Of Health And Human Services Has Interpreted Section 1557 To Include Protections Against Discrimination On The Basis Of Gender Identity

The Department of Health and Human Service's interpretation of Section 1557 to include protections against discrimination on the basis of gender identity is also consistent with the Department of Education's interpretation of Title IX and its implementing regulations.

Section 1557 of the Patient Protection and Affordable Care Act provides that an individual shall not be excluded from participation in, be denied of the benefits of, or be subjected to discrimination on the grounds prohibited under Title VI of the Civil Rights Act of 1964, (race, color, national origin), Title IX (sex), the Age Discrimination Act (age), and Section 504 of the Rehabilitation Act of 1973 (disability), under any health program or activity, any part of which is receiving federal financial assistance, or under any program or activity that is administered by an Executive Agency or any entity established under Title I of the Affordable Care Act or its amendments. 42 U.S.C. § 18116(a). The Department of Health and Human Services is authorized under Section 1557(c) to promulgate regulations to implement the nondiscrimination requirements of Section 1557. 5 U.S.C. § 301.

As early as 2012, the Department of Health and Human Services began interpreting Section 1557's prohibition against sex-based discrimination to include a prohibition against gender-identity based discrimination. In a response to the National Center for Lesbian Rights in 2012, for example, the Office for Civil Rights at the Department ("OCR") stated that it would interpret "Section 1557's sex discrimination prohibition [to extend] to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity and will accept such complaints for investigation." U.S. Dep't of Health and Human Services, *Letter to Maya Rupert*, OCR Transaction No. 12-000800 at 1 (July 12, 2012), available at http://www.nachc.org/wp-content/uploads/2015/06/OCRLetterJuly2012.pdf. Based on this understanding, the Department subsequently reached a voluntary resolution with Brooklyn Hospital

Center following allegations that hospital staff members had created a hostile environment for a transgender woman because she was transgender, including forcing her to share a room with a male patient. Brooklyn Hospital Ctr. & U.S. Dep't Health and Human Servs., *Voluntary Resolution Agreement*, Transaction No. 12-147291.

To further inform its rulemaking under Section 1557, in August 2013 the Department's OCR solicited information from the public through a Request for Information published in the Federal Register, requesting information on issues relating to Section 1557. 81 Fed. Reg. 31,376, 31,376 (May 18, 2016). After receiving and considering 402 comments over the course of two years, the Department issued a proposed rule on September 8, 2015 entitled "Nondiscrimination in Health Programs and Activities," and invited comment by all interested parties. 80 Fed. Reg. 54,172-01 (Sept. 8, 2015). The comment period ended on November 9, 2015, at which time the Department had received 24,875 comments. 81 Fed. Reg. 31,376, 31,376 (May 18, 2016). The Department issued its Final Rule on May 18, 2016. 81 Fed. Reg. at 31,376; 45 C.F.R. Part 92. Citing the decisions of other federal agencies, including those made by the Departments of Labor and Education described above, the Department of Health and Human Services defined discrimination "on the basis of sex" to include discrimination on the basis of gender identity. 45 C.F.R. § 92.101. The Final Rule also made clear that each covered entity must provide individuals "equal access to its health programs or activities without discrimination on the basis of sex; and a covered entity shall treat individuals consistent with their gender identity[.]"

45 C.F.R. § 92.206.[8]The Final Rule also prohibited discrimination on the basis of gender identity in the provision or administration of health-related insurance. 45 C.F.R. § 92.207.

In its detailed analysis of this issue, the Department cited not only the administrative record of its rulemaking and positions taken by other agencies, but also courts, including in the context of Section 1557, that have recognized that sex discrimination includes discrimination based on gender identity. 81 Fed. Reg. at 31,387; see *Rumble v. Fairview Health Servs.*, Civ. No. 14-cv-2037, 2015 WL 1197415, at *10 (D. Minn. Mar. 16, 2015) (order denying motion to dismiss claim under Section 1557). In short, the Department stated that the definition of "on the basis of sex" established by the Department's Final Rule is "based upon existing regulation and previous Federal agencies' and courts' interpretations that discrimination on the basis of sex includes discrimination on the basis of gender identity and sex stereotyping[.]" 81 Fed. Reg. 31,388.

In sum, consistent with the careful analysis by the Departments of Labor and Justice of legal requirements related to gender identity discrimination, the Department

8. The Final Rule also notes that covered entities must provide individuals equal access to health programs or activities without discrimination on the basis of sex, and must treat individuals consistent with their gender identity "except that a covered entity may not deny or limit health services that are ordinarily or exclusively available to individuals of one sex, to a transgender individual based on the fact that the individual's sex assigned at birth, gender identity, or gender otherwise recorded is different from the one to which such health services are ordinarily or exclusively available." 45 C.F.R. § 92.206.

of Health and Human Services has interpreted Section 1557's prohibition of discrimination on the basis of sex to include protections against discrimination on the basis of gender identity.

CONCLUSION

The Department of Education's determination as to the requirements of Title IX and its implementing regulations, providing protections against discrimination on the basis of gender identity, has been in place since at least 2013. The Department's interpretation of these laws rested on a substantial body of case law, including from this Court, and administrative decision making, and is consistent with the duly developed interpretations of Title VII and Section 1557 by other federal agencies. The interpretation adopted by the Fourth Circuit is correct, and is fully consistent with the administrative proceedings and findings of four federal agencies that separately and independently addressed these issues. For the foregoing reasons, *amici* urge this Court to affirm the Fourth Circuit's decision below.

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