



Office of the Attorney General

Washington, D.C. 20530

October 6, 2017

MEMORANDUM FOR ALL EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: THE ATTORNEY GENERAL 
SUBJECT: Federal Law Protections for Religious Liberty

The President has instructed me to issue guidance interpreting religious liberty protections in federal law, as appropriate. Exec. Order No. 13798 § 4, 82 Fed. Reg. 21675 (May 4, 2017). Consistent with that instruction, I am issuing this memorandum and appendix to guide all administrative agencies and executive departments in the execution of federal law.

...

A. Religious Freedom Restoration Act of 1993 (RFRA)

The Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb *et seq.*, prohibits the federal government from “substantially burden[ing] a person’s exercise of religion” unless “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.” *Id.* § 2000bb-1(a), (b). The Act applies even where the burden arises out of a “rule of general applicability” passed without animus or discriminatory intent. *See id.* § 2000bb-1(a). It applies to “any exercise of religion, whether or not compelled by, or central to, a system of religious belief,” *see* §§ 2000bb-2(4), 2000cc-5(7), and covers “individuals” as well as “corporations, companies, associations, firms, partnerships, societies, and joint stock companies,” 1 U.S.C. § 1, including for-profit, closely-held corporations like those involved in *Hobby Lobby*, 134 S. Ct. at 2768.

Subject to the exceptions identified below, a law “substantially burden[s] a person’s exercise of religion,” 42 U.S.C. § 2000bb-1, if it bans an aspect of the adherent’s religious observance or practice, compels an act inconsistent with that observance or practice, or substantially pressures the adherent to modify such observance or practice, *see Sherbert*, 374 U.S. at 405–06....

...

As with claims under the Free Exercise Clause, RFRA does not permit a court to inquire into the reasonableness of a religious belief, including into the adherent’s assessment of the religious connection between a belief asserted and what the government forbids, requires, or prevents. *Hobby Lobby*, 134 S. Ct. at 2778....

...

.... But “broadly formulated interests justifying the general applicability of government mandates” are insufficient. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006). The government must establish a compelling interest to deny an accommodation to the particular claimant. *Id.* at 430, 435–38....

...

The compelling-interest requirement applies even where the accommodation sought is “an exemption from a legal obligation requiring [the claimant] to confer benefits on third parties.” *Hobby Lobby*, 134 S. Ct. at 2781 n.37. Although “in applying RFRA ‘courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries,’” the Supreme Court has explained that almost any governmental regulation could be reframed as a legal obligation requiring a claimant to confer benefits on third parties. *Id.* (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005)). As nothing in the text of RFRA admits of an exception for laws requiring a claimant to confer benefits on third parties, 42 U.S.C. § 2000bb-1, and such an exception would have the potential to swallow the rule, the Supreme Court has rejected the proposition that RFRA accommodations are categorically unavailable for laws requiring claimants to confer benefits on third parties. *Hobby Lobby*, 134 S. Ct. at 2781 n.37.

In The Aftermath of the “Reset” of HB2
Paul Stam
April 13, 2017

In the aftermath of the “reset” of HB2 Gov. Roy Cooper made four claims, on Capital Tonight, Spectrum Cable, April 10, 2017.

1.) Under the law, as HB2 was repealed and replaced by HB142, those persons claiming to be transgendered will still be able to use the changing room/restrooms of their own choice. This will doubtless be a surprise to the managers of HB 142 who assured the public that HB142 preserved the privacy and security of women and children. An April 12, 2017 blog post by Professor Robert Joyce of the UNC School of Government advises local governments that while they may not adopt “policies” individual managers may allow biological males into women’s changing rooms and, if they don’t they may be liable to that biological male.

Governor Cooper’s claim may also surprise state employees since Governor Cooper has not rescinded Governor McCrory’s Executive Order dated April 12, 2016 on the usage of changing rooms and restrooms in state offices under the Governor’s control.

2.) Governor Cooper claims that HB142 now allows local government (cities and counties) to enact protected classes for their own employees. This is really a surprise since HB2 specifically provided that this was already allowed. HB142 made no change there. See Section 3.1(c) (last clause) of HB2.

3.) Governor Cooper claims that under HB142 cities and counties can now enact ordinances requiring their bidders to have additional protected classifications for the contractors’ employees and vendors. This position was taken by the University of North Carolina School of Government the day after HB142 became law. This would be a surprise to the managers of HB142 since House leadership did not intend this change.

Here is the opinion of the School of Government through Professor Norma Houston.

Perhaps the more significant impact on city and county contracting authority is the repeal of the prohibition under HB2 against imposing anti-discrimination requirements on bidders. For example, under HB2, a city or county could not require bidders to provide a statement that the bidder does not discriminate on the basis of sexual orientation, transgender, or gender identity because state law under HB2 did not prohibit discrimination on those grounds. Now, with the repeal of HB2, there does not appear to be a legal barrier to a city or county imposing such an anti-discrimination requirement on bidders.

Can a city or county require a contractor to have an anti-discrimination policy relating to the contractor’s suppliers or subcontractors that includes nondiscrimination on the basis of sexual orientation, transgender, or gender identity?

- ☐ Pre-HB2: Yes
- ☐ HB2: No

But Governor Cooper and the School of Government are wrong for this reason:

Even though the “prohibition under HB2 against imposing anti-discrimination requirements on bidders” is “repeal[ed],” the former version of those statutes (G.S. 160A-20.1(a) and G.S. 153A-449(a)), now resurrected, forbids cities/counties to “require a private contractor under this section to abide by any restriction that the city could not impose on all employers in the city, such as paying minimum wage or providing paid sick leave to its employees, as a condition of bidding on a contract.”

As to bidders, requiring nondiscrimination policies in employment would be in violation of this restored version of the statutory language because the city “could not impose [such employment nondiscrimination policies] on all employers in the city,” at least not until December 2020. That is prohibited by Section 2 of HB142, which disables cities from “enact[ing] or amend[ing] an ordinance regulating private employment practices.” The locality could not “require” a bidder “to abide” by restrictions in the ordinance because the local government cannot “impose” such restrictions on all employers in the locality until 2020.

Since Section 2 of HB142 forbids “enact[ing] or amend[ing] an ordinance . . . regulating public accommodations,” a city also cannot require a bidder to abide by a public accommodations nondiscrimination policy because it cannot impose such policies on all employers in the city. (Certainly, in any city, there is at least one employer that is also a public accommodation. Until 2020, the city cannot “impose” a public accommodations nondiscrimination policy on that employer, and consequently “all employers.”) And after December 1, 2020 local governments would have no such power anyway. *Williams v. Blue Cross/BlueShield*, supra at 8.

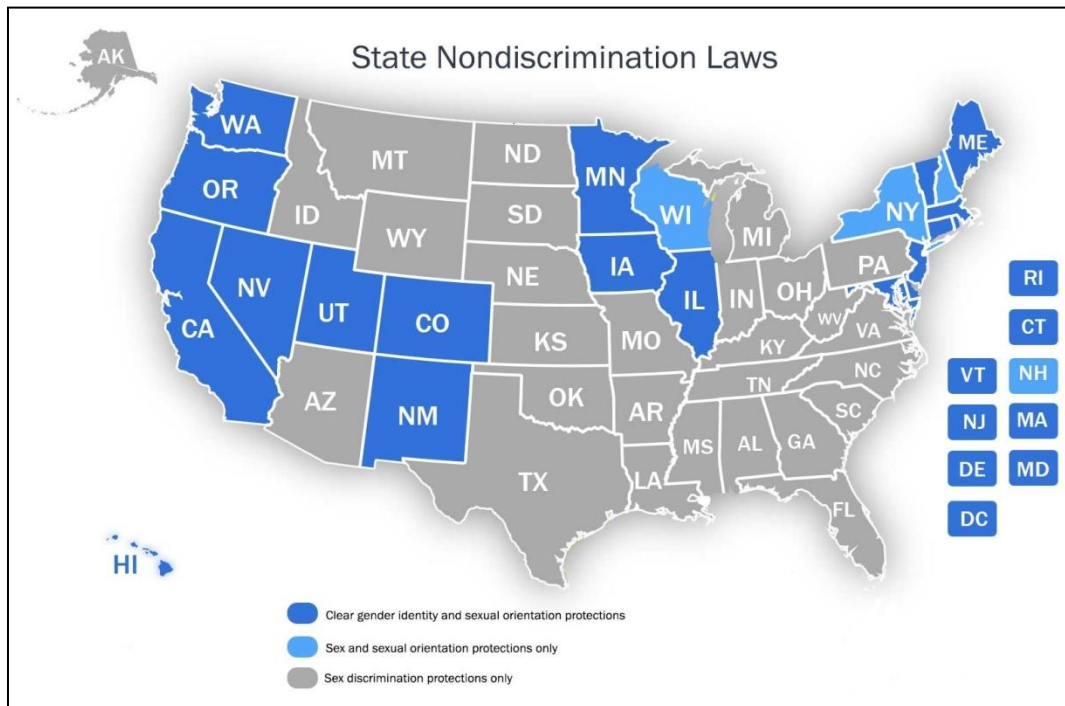
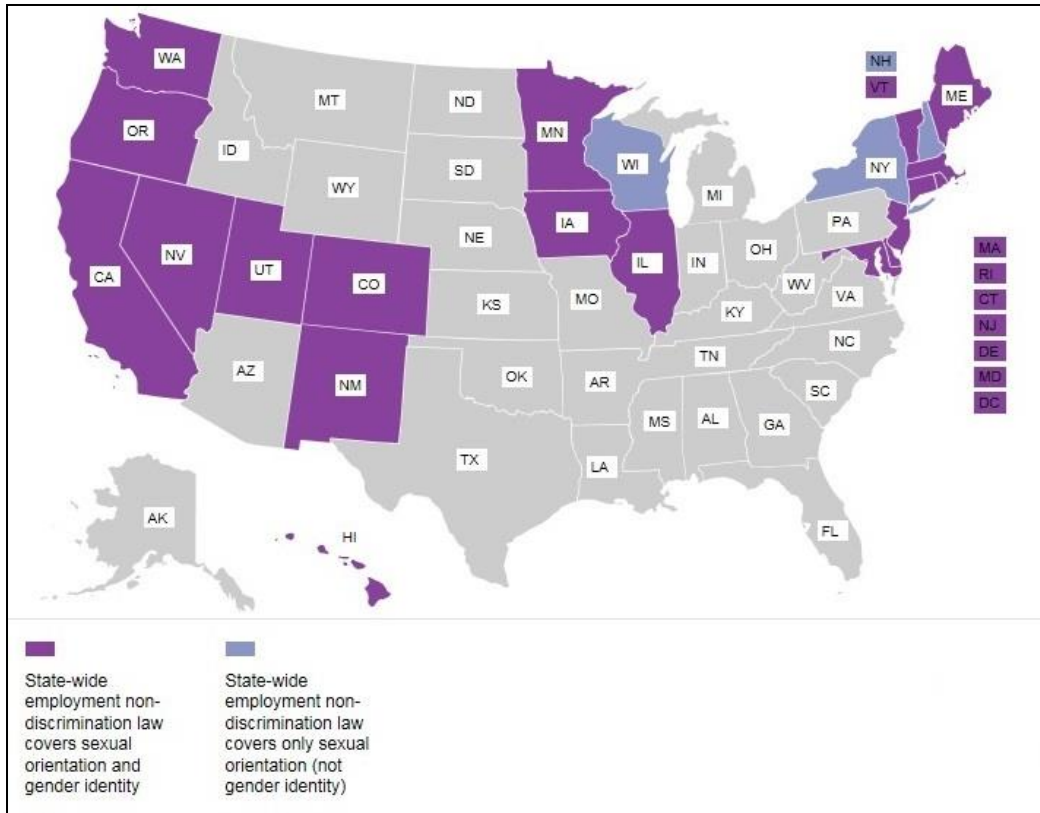
4.) Governor Roy Cooper will push for statewide LGBT as a protected classification even before December 2020. In other words he will keep the pot boiling for the elections of 2017 (municipal), 2018(legislative), 2019 (municipal) and 2020 (legislative). This should come as no surprise except to those who thought they were putting the issue to rest for almost four years.

This claim (or promise) by the Governor requires more explanation and a look at the actual law of discrimination.

The Truth about Discrimination and State Law

North Carolina state law on non-discrimination is the same or very similar to that of 28 other states.¹ For visual proof please examine the two maps below compiled by the ACLU and Transequality. On each map the gray states like North Carolina do not have extra special rights based on “sexual orientation” or “gender identity.”

¹See <http://paulstam.info/wp-content/uploads/2016/05/I-WANT-TO-HELP-PAYPAL.pdf>. Also see <https://www.aclu.org/map/non-discrimination-laws-state-state-information-map>.



Proponents of the Charlotte type discrimination ordinance said it has been enacted in 200 cities

nationwide. Their leader, Chris Sgro, used 100 cities. Some of those cities are in states marked gray. Whether it is 100 or 200 means that about 10,000 other cities and towns located in 28 states nationwide do not have classifications based on sexual orientation or gender identity.

NORTH CAROLINA LAW PROTECTS THE RIGHTS OF LGBT PERSONS. LGBT PERSONS HAVE THE SAME RIGHTS THAT OTHERS DO. Let me explain in detail:

North Carolina residents have all of the rights that come from the United States Constitution and Statutes, the North Carolina State Constitution and Statutes, and local ordinances. These rights are available in full to *almost* everyone.

Article I Section 1 of the North Carolina Constitution provides as follows:

The equality and rights of persons.

We hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness.

There are exceptions. Aliens do not have the right to vote, whether here legally or illegally. Children do not have the right to enter into most contracts nor the right to vote nor the right to buy alcohol. Those who by mental disease are not able to conduct their own affairs may be declared incompetent by a Court. Their rights are protected and enhanced by the appointment of a Guardian. Convicted criminals lose some of their rights. But even convicted criminals have the right in most circumstances to not undress or use the bathroom or shower in the presence of a person of the opposite sex.²

Each of us has the same rights when facing the same circumstances. For historical reasons the exercise of these rights has been protected by additional constitutional or statutory provisions.

Article I Section 19 of the North Carolina Constitution provides:

Law of the land; equal protection of the laws

No person shall be taken, imprisoned, or dispossessed of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin.

The 14th Amendment (Section 1) to the United States Constitution provides:

² The North Carolina Department of Public Safety, Adult Correction and Juvenile Justice stated in a memo on May 10, 2016, that, "Convicted criminals and inmates do have privacy rights when it comes to their using the restroom or changing clothes and they have the right to not be observed by members of the opposite sex while using the restroom or changing clothes. The specific policy language is included in the Prison Rape Elimination Act (PREA), with which the Division of Adult Correction...Community Corrections and Juvenile Justice...abides."

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Private v. Public

Some acts of discrimination are appropriate for private persons but are not appropriate for a government. I may prefer to vacation in the mountains but the government must not say that I must go to the mountains rather than to the beach.

When Romeo met Juliet, he discriminated on the basis of (biological) sex when he chose a particular biological female. When Juliet met Romeo she discriminated on the basis of (biological) sex, choosing a particular biological male. Homosexual or lesbian persons exercise private discrimination by choosing a partner of the same sex.

Discrimination based on some factors may be reasonable (like choosing the mountains over the beach) or even wise. Indeed, a "discriminating" person is defined as one who is discerning, one who notes "differences with nicety," one who has "excellent taste or judgment." But other types of discrimination are improper for a government or for a provider of public accommodations. These types of discrimination are not allowed by NC law.

Prior to the passage of HB2 the personal characteristics subject to extra scrutiny for discrimination have generally been race, color, national origin, sex (biological) and religion. That was true before the passage of the HB2 and HB142 and is true today. (Other personal traits like age, disability, and familial status are also used where appropriate to the statute.

Equality NC, Human Rights Campaign claim that LGBT persons just want the same rights that everyone else already has. This is not true.

WE ALL HAVE THE SAME RIGHTS WHEN CONFRONTING THE SAME SITUATION.

One problem with "identity"-based preferences (like "sexual orientation" or "gender identity") is subjectivity. That subjectivity translates to rule other than by law. The "identity" actor determines the law. The law that codifies the right becomes nothing more than "law cover" for the individual, a tool of individualized empowerment. Here is why:

"I want to be a Cherokee," said Sen. Elizabeth Warren, whose tenure at Harvard improved its diversity rating. But that did not turn her into a Native American. "I want to be a girl" said the biological boy who won All-State Honors in the 2016 Alaska Girls Track and Field Competition.

IS "SEXUAL ORIENTATION" A REASONABLE AND DEFINABLE TERM TO USE IN DISCRIMINATION LAW? NO. "Sexual orientation" is inherently undefinable and undefined.

What is the meaning of the word “orientation?” Is it purely subjective? Is it what is in a person's mind or does it relate to behavior?

What is meant by “sexual orientation?” Some have the “orientation” or “behavior” of wanting or having more than one sexual partner. For centuries we have had laws against bigamy and polygamy and there are civil consequences for adultery. Those laws are being challenged in some Western states. There are tens of thousands of polygamous marriages in those states that are not being prosecuted. In addition there are millions of Americans who see nothing wrong with polygamy or adultery, either because of their cultural background or their own personal desires.

How would special rights for those claiming “sexual orientation” work?

Extra scrutiny for discrimination on the basis of “sexual orientation” would mean that a job applicant who states to his or her prospective employer or current employer that he or she has a polygamous marriage or is in a polygamous or adulterous living situation, or wishes to have multiple sexual partners, would have extra special rights to be hired or to not be fired. If the desire (or behavior) of having multiple sexual partners is not a “sexual orientation” what could be?

There are many good reasons why an employer might not want to employ a person whose “sexual orientation” is to polygamy or adultery. The employer should have the right to make that decision. Similarly, an employee should have the right to choose to work only for those employers who make that very reasonable decision.

“Gender Identity” is not a reasonable or even definable term. President Obama’s Departments of Justice and Education proved that “gender identity” is purely subjective. While the Trump administration has withdrawn the Obama directive, that does not mean that the term now has an objective component. Just ask National Geographic or the Boy Scouts of America who will now determine “sex” based on what is on an application rather than on reality.

In the case of *G.G. ex rel. Grimm v. Gloucester Cnty. School Bd.*, 2016 WL 1567467 (4th Cir. Apr. 19, 2016), (first stayed and then vacated and remanded by the U.S. Supreme Court, March 2017) “gender identity” was the issue.

On May 13, 2016, the United States Departments of Justice and Education had issued a joint letter to public schools nationwide, explaining a school’s obligation under Title IX regarding transgender students and “gender identity.”³

“[g]ender identity refers to an individual’s internal sense of gender. A person’s gender identity may be different from or the same as the person’s sex assigned at birth...Under Title IX, a school must treat students consistent with their gender identity even if their education records or identification documents indicate a different sex...Under Title IX, there is no medical diagnosis or treatment requirement that students must meet as a prerequisite to being treated consistent with their gender identity.” (*emphases added*).

³ Available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>.

“Gender Identity” is **purely subjective**. Only the individual determines whether “he,” “she” or “s(he)” is female or male that day.

To see where this is headed, please see Facebook’s policy on updating a user’s gender identity on the user’s profile page: <https://www.rt.com/usa/236283-facebook-gender-custom-choice/>. Facebook offers 58 pre-populated options to choose from OR a user can create and type in the user’s unique chosen “gender.”

Legal lines are more acceptable when drawn on the basis of benign and immutable characteristics - e.g., race, color, national origin, sex (biological) and disabilities. Religion is included as a suspect class because of its place in the First Amendment to the U.S. Constitution and Article I Section 13 of the NC Declaration of Rights.

If individuals are allowed to justify and demand acceptance of their behavior or orientation by wholly self-determined “identity” claims then the law becomes lawless.

HB2 codified the preexisting state law on discrimination and the preexisting state law on local authority. While HB2 was repealed by HB142 the same common law now applies which, in North Carolina, does not include LGBT as “protected classes.” Those wanting to change this have the burden of demonstrating why their proposals are for the public good and what they actually intend by their proposals.

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APPENDIX

I. Cases that address the issue of how the term "sex" should be defined in discrimination claims "because of sex":

D.C. Circuit:

Title VII

Schroer v. Billington, 755 F. Supp 2d 293 (D.D.C. 2008)

- Title VII's prohibition of sex discrimination did not apply to discrimination based on transgender status or gender identity per se.
- The court noted that both parties had presented conflicting expert testimony on the issue of whether gender identity is a component of "sexuality" as opposed to "sex" but found it unnecessary and inappropriate to try to resolve this scientific controversy. The court explained that since it had found that discrimination against a person because she was a transsexual was literally discrimination because of sex, it was not necessary to draw sweeping conclusions about the reach of Title VII since the plaintiff would prevail even if the decisions defining the word "sex" in Title VII as referring only to anatomical or chromosomal sex were still good law.

1st Circuit:

Title VII

Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 259 (1st Cir. 1999) (New England)

- Court upheld summary judgment dismissing plaintiff's Title VII claim based on sexual orientation, stating, "we regard it as settled law that, as drafted and authoritatively construed, Title VII does not proscribe harassment simply because of sexual orientation."

2nd Circuit:

Title VII

Fabian v. Hosp. of Cent. Connecticut, No. 3:12-CV-1154 (SRU), 2016 WL 1089178 (D. Conn. Mar. 18, 2016)

- "[D]iscrimination on the basis of gender stereotypes, or on the basis of being transgender, or intersex, or sexually indeterminate, constitutes discrimination on the basis of the properties or characteristics typically manifested in sum as male and female—and that discrimination is literally discrimination "because of sex." On the basis of the plain language of the statute, and especially in light of the interpretation of that language evident in Price Waterhouse's acknowledgement that gender-stereotyping discrimination is discrimination "because of sex," I conclude that discrimination on the basis of transgender identity is cognizable under Title VII."

Simonton v. Runyon, 232 F.3d 33 (2d Cir. 2000)

- "Interpreting the definition of "sex," we held that the other categories afforded protection under Title VII refer to a person's status as a member of a particular race,

color, religion or nationality. “Sex,” when read in this context, logically could only refer to membership in a class delineated by gender, rather than sexual activity regardless of gender.... The proscribed differentiation under Title VII, therefore, must be a distinction based on a person's sex, not on his or her sexual affiliations. Because the term “sex” in Title VII refers only to membership in a class delineated by gender, and not to sexual affiliation, Title VII does not proscribe discrimination because of sexual orientation.”

3rd Circuit

Title VII

Bibby v. Philadelphia Coca Cola Bottling Co., 260 F.3d 257, 261 (3d Cir. 2001)

- Title VII of the 1964 Civil Rights Act, provides that “[i]t shall be an unlawful employment practice ... to discriminate against any individual ... because of ... sex.” It is clear, however, that Title VII does not prohibit discrimination based on sexual orientation. Congress has repeatedly rejected legislation that would have extended Title VII to cover sexual orientation.

Title IX

Johnston v. Univ. of Pittsburgh of Com. Sys. of Higher Educ., 97 F. Supp. 3d 657, (W.D. Pa. 2015), appeal dismissed (Mar. 30, 2016)

- Title IX does not prohibit discrimination on the basis of transgender itself because transgender is not a protected characteristic under the statute. The Court has found no federal court case that has squarely decided this issue in the Title IX context.
- On a plain reading of the statute, the term “on the basis of sex” in Title IX means nothing more than male and female, under the traditional binary conception of sex consistent with one's birth or biological sex. The exclusion of gender identity from the language of Title IX is not an issue for this Court to remedy. It is within the province of Congress—and not this Court—to identify those classifications which are statutorily prohibited.
- “[W]hile Title IX was intended to provide equal educational opportunities for both sexes, the statute does not necessarily prohibit sex-segregated spaces in educational settings. . . . [T]he Third Circuit has recognized that Title IX authorizes single-sex athletic teams in certain circumstances.
- Finally, the Court finds particularly compelling that the regulations implementing Title IX explicitly permit educational institutions subject to Title IX to provide separate toilet, locker room, and shower facilities on the basis of sex[.] Thus, Title IX and its implementing regulations clearly permit schools to provide students with certain sex-segregated spaces, including bathroom and locker room facilities, to perform certain private activities and bodily functions consistent with an individual's birth sex.

Evancho v. Pine-Richland School District, 237 F.Supp.3d 267 (W.D. Pa. 2017)

- Plaintiffs are public high school students who identify as transgender seeking preliminary injunctive relief from Pine-Richland School District's Resolution 2, which would prevent them from using the restroom that corresponds with their gender identity. The court found that the Plaintiffs did not show likely success on the merits on the Title IX claim under the 2017 guidance issued by the Department of Education and Department of Justice. However, the court granted a preliminary injunction based on the equal protection claim raised by the students because: (A) they are likely to succeed on the merits of the equal protection claim; (B) they are likely to suffer irreparable harm without relief; (C) the balance of harms favors them; and (D) relief is in the public interest.

Doe by and through Doe v. Boyertown Area School District, 2017 WL 3675418 (E.D. Pa. 2017)

- Plaintiffs are students seeking a preliminary injunction by claiming that the school district's practice of allowing students identifying as transgender to access bathrooms and locker rooms consistent with their gender identity violates their constitutional right to privacy, Title IX, and the Pennsylvania common law right to privacy. The court denied the plaintiffs' motion for preliminary injunction because they did not meet the high burden required to clearly show that they are entitled to the extraordinary remedy of a preliminary injunction. According to the court, plaintiffs did not show that they were likely to suffer irreparable injury without a preliminary injunction.

4th Circuit

Title VII

Lewis v. High Point Regional Health System, 79 F. Supp.3d 588 (2015)

- Lewis, a transgendered male identifying with the female gender, applied for a job as a CNA with the High Point Regional Health System. Lewis alleged harassment during the job interviews and was not hired in the position. Defendant moved to dismiss the claim on the grounds that Title VII does not protect based on sexual orientation.
- Neither the 4th Circuit or US Supreme Court have recognized Title VII claims based on sexual orientation, but that plaintiff's claim was based on transgendered status, rather than sexual orientation, which has not been addressed by the 4th Circuit or US Supreme Court. Because defense's motion to dismiss was based on sexual orientation, rather than transgendered status, the trial court denied the motion to dismiss. The court noted in dicta that the defendant did not raise the issue of whether plaintiff's complaint fit within a gender stereotyping framework. The case was later dismissed with prejudice by the plaintiff.

Title IX

Gloucester County School Board v. G.G. ex rel. Grimm, 137 S.Ct. 1239 (U.S. 2017)

- The trial court, granted the motion to dismiss the claim under Title IX, finding that Title IX did not cover gender identity claims. The court also denied the motion for preliminary injunction. That order was appealed to the 4th circuit. The 4th Circuit ruled that U.S. Department of Education regulations related to sex-segregated

restrooms under Title IX were ambiguous as applied to transgender students, that the Department of Education's interpretation of the regulation, directing that, "when a school elects to separate or treat students differently on the basis of sex...the school must generally treat transgender students consistent with their gender identity," should be accorded controlling weight in the case, and that the student's Title IX claim should not be dismissed.

- The case was appealed to the U.S. Supreme Court, but following the rescinding of the guidance document by the U.S. Department of Education, the Supreme Court vacated the judgment and remanded the case to the Fourth Circuit Court of Appeals for further consideration in light of the guidance document issued by the Department of Education and Department of Justice on February 22, 2017.
- Because the student, G.G., graduated in June 2017, the Fourth Circuit has remanded the issue to the trial court to determine if the issue is moot and should be dismissed. *Grimm v. Gloucester Cty. Sch. Bd.*, No. 15-2056, 2017 WL 3699241 (4th Cir. Aug. 2, 2017),

6th Circuit

Vickers v. Fairfield Med. Ctr., 453 F.3d 757 (6th Cir. 2006)

- Title VII of the Civil Rights Act of 1964 prohibits an employer from discriminating against an individual "with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." As is evident from the above-quoted language, sexual orientation is not a prohibited basis for discriminatory acts under Title VII. However, the Supreme Court has held that same-sex harassment is actionable under Title VII under certain circumstances. "[S]exual orientation is irrelevant for purposes of Title VII. It neither provides nor precludes a cause of action for sexual harassment." Likewise, individuals who are perceived as or who identify as homosexuals are not barred from bringing a claim for sex discrimination under Title VII.

7th Circuit:

Title VII

Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1084-87 (7th Cir. 1984)

- "Title VII does not protect transsexuals. . . . Even though Title VII is a remedial statute, and even though some may define "sex" in such a way as to mean an individual's "sexual identity," our responsibility is to interpret this congressional legislation and determine what Congress intended when it decided to outlaw discrimination based on sex."
- The plain language of the statute did not include coverage of transsexuals. "It is a maxim of statutory construction that, unless otherwise defined, words should be given their ordinary, common meaning. . . . The phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men. The words of Title VII do not outlaw discrimination against a person who has a sexual identity disorder, i.e., a person born with a male body who believes himself to be female, or a person born with a female body who believes herself to

be male; a prohibition against discrimination based on an individual's sex is not synonymous with a prohibition against discrimination based on an individual's sexual identity disorder or discontent with the sex into which they were born."

- "In our view, to include transsexuals within the reach of Title VII far exceeds mere statutory interpretation. Congress had a narrow view of sex in mind when it passed the Civil Rights Act, and it has rejected subsequent attempts to broaden the scope of its original interpretation. For us to now hold that Title VII protects transsexuals would take us out of the realm of interpreting and reviewing and into the realm of legislating. . . . If Congress believes that transsexuals should enjoy the protection of Title VII, it may so provide. Until that time, however, we decline in behalf of the Congress to judicially expand the definition of sex as used in Title VII beyond its common and traditional interpretation.

Spearman v. Ford Motor Co., 231 F.3d 1080 (7th Cir. 2000)

- Title VII prohibits an employer from harassing an employee "because of [the employee's] sex." Same-sex sexual harassment is actionable under Title VII "to the extent that it occurs 'because of' the plaintiff's sex." We have stated that "[t]he phrase in Title VII prohibiting discrimination based on sex" means that "it is unlawful to discriminate against women because they are women and against men because they are men." In other words, Congress intended the term "sex" to mean "biological male or biological female," and not one's sexuality or sexual orientation. Therefore, harassment based solely upon a person's sexual preference or orientation (and not on one's sex) is not an unlawful employment practice under Title VII.

8th Circuit

Title VII

Sommers v. Budget Mktg., Inc., 667 F.2d 748, 750 (8th Cir. 1982)

- "[F]or the purposes of Title VII the plain meaning must be ascribed to the term "sex" in absence of clear congressional intent to do otherwise. Furthermore, the legislative history does not show any intention to include transsexualism in Title VII. The amendment adding the word "sex" to the Civil Rights Act was adopted one day before the House passed the Act without prior legislative hearings and little debate. It is, however, generally recognized that the major thrust of the "sex" amendment was towards providing equal opportunities for women. Also, proposals to amend the Civil Rights Act to prohibit discrimination on the basis of "sexual preference" have been defeated. Sommers's claim is not one dealing with discrimination on the basis of sexual preference. Nevertheless, the fact that the proposals were defeated indicates that the word "sex" in Title VII is to be given its traditional definition, rather than an expansive interpretation. Because Congress has not shown an intention to protect transsexuals, we hold that discrimination based on one's transsexualism does not fall within the protective purview of the Act.

10th Circuit:

Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1221-22 (10th Cir. 2007)

- "[D]iscrimination against a transsexual based on the person's status as a transsexual is not discrimination because of sex under Title VII. In reaching this conclusion, this court recognizes it is the plain language of the statute and not the primary intent of Congress that guides our interpretation of Title VII.
- "[T]here is nothing in the record to support the conclusion that the plain meaning of "sex" encompasses anything more than male and female. In light of the traditional binary conception of sex, transsexuals may not claim protection under Title VII from discrimination based solely on their status as a transsexual. Rather, like all other employees, such protection extends to transsexual employees only if they are discriminated against because they are male or because they are female.
- Scientific research may someday cause a shift in the plain meaning of the term "sex" so that it extends beyond the two starkly defined categories of male and female. . . . At this point in time and with the record and arguments before this court, however, we conclude discrimination against a transsexual because she is a transsexual is not "discrimination because of sex." Therefore, transsexuals are not a protected class under Title VII and Etsitty cannot satisfy her prima facie burden on the basis of her status as a transsexual.

EEOC

Lusardi v. McHugh, (Appeal No. 0120133395) (2015)

- EEOC, in an agency decision, addressed a claim related to a transitioning transgender individual who was not permitted to use the multiple occupancy bathroom of choice, and found a Title VII violation. The EEOC held that Title VII does not make any medical procedure a prerequisite for equal opportunity, and an "agency may not condition access to facilities – or to other terms, conditions, or privileges of employment – on the completion of certain medical steps that the agency itself has unilaterally determined will somehow prove the bona fides of the individual's gender identity." Lusardi also held that supervisory or co-worker confusion or anxiety could not be used to justify discriminatory terms and conditions of employment, and that restriction of the complainant from using common restrooms was an adverse employment action.

II. Cases where circuits have recognized sex stereotyping claims involving transgender, gender identity, or sexual orientation.

DC Circuit:

Title VII

Terveer v. Billington, 34 F.Supp.3d 100 (D.D.C. 2014)

- Former employee of Library of Congress sufficiently pled that he was victim of sex stereotyping, which was form of sex discrimination recognized as cognizable under Title VII, in his suit against Librarian of Library of Congress, as his employer, by alleging that he was homosexual male whose sexual orientation was not consistent

with Librarian's perception of acceptable gender roles, that his status as homosexual male did not conform to Librarian's gender stereotypes associated with men, and that his orientation as homosexual had removed him from his supervisor's preconceived definition of male, and by further alleging that Librarian denied him promotions and created hostile work environment because of his nonconformity with male sex stereotypes.

1st Circuit

Title VII

Centola v. Potter, 183 F. Supp. 2d 403, 408-09 (D. Mass. 2002)

- Allowing denied claim based on sexual orientation as basis for Title VII claim, but allowed Title VII claim to proceed past summary judgment when plaintiff alleged discrimination on the basis of sex stereotyping based on his sexual orientation. The court held, "Stated in a gender neutral way, the rule is: If an employer acts upon stereotypes about sexual roles in making employment decisions, or allows the use of these stereotypes in the creation of a hostile or abusive work environment, then the employer opens itself up to liability under Title VII's prohibition of discrimination on the basis of sex."

Equal Credit Opportunities Act

Rosa v. Parks W. Bank & Trust Co., 214 F.3d 213 (1st Cir. 2000)

- Plaintiff brought claim of sex discrimination under the Equal Credit Opportunities Act alleging that bank refused to provide him with a loan application because he did not come dressed in masculine attire. 1st Circuit reversed grant of 12(b)(6) motion to bank on claim of sex discrimination, as evidence was not fully developed, and reason may have been based in sex stereotyping, allowing claim to proceed, based on perceived sexual orientation, not allowing claim to proceed, or based on inability to match the individual to their identity document, not allowing the claim to proceed.

6th Circuit:

Barnes v. City of Cincinnati, 401 F.3d 729, 737 (6th Cir. 2005)

- Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as "transsexual," is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity. See also Smith v. City of Salem, 378 F.3d 566 (6th Cir.2004), and Myers v. Cuyahoga County, Ohio, 182 Fed. Appx. 510, (6th Cir. 2006)

7th Circuit

Title IX

Whitaker By Whitaker v. Kenosha Unified School District No. 1 Board of Education, 858 F.3d 1034 (7th Cir. 2017)

- Whitaker brought suit, alleging that the School District's unwritten bathroom policy violated Title IX of the Education Amendments Act of 1972 and the Fourteenth Amendment's Equal Protection Clause, and moved for preliminary injunctive relief, seeking an order granting access to the boys' restrooms. That order was granted by the trial court, and was appealed to the 7th Circuit.
- The 7th Circuit upheld the preliminary injunction, finding that Whitaker would be able to state a Title IX claim under the theory of sex stereotyping, and that Whitaker would be able to make an Equal Protection claim subject to heightened scrutiny review by the courts, and would be likely to succeed on these claims.

9th Circuit:

Gender Motivated Violence Act

Schwenk v. Hartford, 204 F.3d 1187, 1201-02 (9th Cir. 2000)

- " In Price Waterhouse, which was decided after Holloway and Ulane, the Supreme Court held that Title VII barred not just discrimination based on the fact that Hopkins was a woman, but also discrimination based on the fact that she failed "to act like a woman"—that is, to conform to socially-constructed gender expectations. What matters, for purposes of this part of the Price Waterhouse analysis, is that in the mind of the perpetrator the discrimination is related to the sex of the victim: here, for example, the perpetrator's actions stem from the fact that he believed that the victim was a man who "failed to act like" one. Thus, under Price Waterhouse, "sex" under Title VII encompasses both sex—that is, the biological differences between men and women—and gender. Discrimination because one fails to act in the way expected of a man or woman is forbidden under Title VII. Accordingly, the argument that the GMVA parallels Title VII and applies only to sex is in part right and in part wrong. The GMVA does parallel Title VII. However, both statutes prohibit discrimination based on gender as well as sex. Indeed, for purposes of these two acts, the terms "sex" and "gender" have become interchangeable."

Title VII

Kastl v. Maricopa Cty. Cmty. Coll. Dist., 325 F. App'x 492 (9th Cir. 2009)

- In Price Waterhouse v. Hopkins, the Supreme Court explained that gender stereotyping is direct evidence of sex discrimination prohibited by Title VII. Relying on Hopkins, in Schwenk v. Hartford, we held, in the context of the Gender Motivated Violence Act, that transgender individuals may state viable sex discrimination claims on the theory that the perpetrator was motivated by the victim's real or perceived non-conformance to socially-constructed gender norms. After Hopkins and Schwenk, it is unlawful to discriminate against a transgender (or any other) person because he or she does not behave in accordance with an employer's expectations for men or women.

11th Circuit

Equal Protection Clause

Glenn v. Brumby, 663 F.3d 1312, 1316-20 (11th Cir. 2011)

Court held that discriminating against someone on the basis of his or her gender non-conformity constitutes sex-based discrimination under the Equal Protection Clause, noting *Price Waterhouse* holding that discrimination on the basis of gender stereotype is sex-based discrimination. "There is thus a congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms. Accordingly, discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender."

General Assembly: Executive Order No. 24