November 9, 2015

U.S. Department of Health and Human Services
Office for Civil Rights
Attention: 1557 NPRM (RIN 0945-AA02)
Hubert H. Humphrey Building, Room 509F
200 Independence Avenue, SW
Washington, D.C. 20201

RE: Nondiscrimination in Health Programs and Activities; Proposed Rule RIN 0945-AA02

To Whom It May Concern:

We are grateful for the opportunity to provide comments on the Notice of Proposed Rulemaking Regarding Nondiscrimination in Health Programs and Activities ("Proposed Rule"). The Proposed Rule aims to implement Section 1557 of the Affordable Care Act ("Section 1557" and "ACA," respectively), the provision of that statute requiring non-discrimination in all health programs and activities receiving federal financial assistance, being administered by an Executive agency, or meeting other criteria. We commend the Office of Civil Rights of the U.S. Department of Health and Human Services ("OCR") for its thoughtful development of these regulations.

The undersigned are scholars of law, public policy, public health, psychology, demography, and economics with substantial expertise related to antidiscrimination law and discrimination based on sex, gender identity, and sexual orientation. Many of the undersigned are affiliated with the Williams Institute at UCLA School of Law. The Williams Institute is a research center dedicated to conducting rigorous and independent academic research on sexual orientation and gender identity, including on health and economic disparities and discrimination facing lesbian, gay, bisexual, and transgender ("LGBT") people and legal protections against discrimination related to sexual orientation and gender identity.

Our comments address the following topics. In **Part I**, we provide a brief summary of the existing research on health disparities and discrimination facing LGBT people. This discussion underscores the importance that the finalized regulation ("Final Rule") robustly protects against discrimination on the basis of gender identity and sexual orientation, which we address in **Parts II and III**. In particular, the Final Rule should prohibit discrimination based on sex stereotypes and gender identity (**Part II)** and sexual orientation (**Part III**) because all are species of sex discrimination. Regardless of whether the Final Rule prohibits sexual orientation discrimination as per se sex discrimination, the Final Rule should explain in detail the ways in which sexual orientation discrimination is unlawful sex discrimination. **Part IV** recommends that the Final Rule require covered entities to certify their compliance with the applicable laws and collect and report relevant data. In **Part V**, we discuss that the Final Rule should not include any additional religious exemption.

I. LGBT PEOPLE FACE HEALTH DISPARITIES AND DISCRIMINATION

According to the most recent population-based data, 3.9% of adults in the United States identify as LGBT,[1] implying based on population estimates there are about 9.5 million LGBT adults across the country. Willingness to identify as LGBT in surveys or other contexts can be affected by social stigma so there are likely individuals who do not identify as LGBT on surveys but do so in other dimensions of their lives.[2] With respect to younger people, studies indicate that sexual minority youth and young adults constitute between 6-8%, and transgender youth constitute between 1.3-3.2%, of the youth population in the United States.[3]

LGBT people are remarkably diverse in terms of geographic, demographic, and economic characteristics. For example, LGBT people live in every state and all or nearly all of our country's counties, and their racial and ethnic make-up is similar to that of the general population.[4] Contrary to popular stereotypes about the affluence of the LGBT community, research also demonstrates the economic diversity of LGBT people, including higher rates of poverty and food insecurity than non-LGBT people.[5]

Discrimination and prejudice against LGBT people remains pervasive across the United States.[6] Research documents widespread discrimination and stigma against LGBT people in

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[1] Jeffrey M. Jones & Gary J. Gates, *Same-Sex Marriages Up After Supreme Court Ruling* (Gallup, 2015) (discussing also that nearly 1 million individuals in the United States are married to someone of the same sex), http://www.gallup.com/poll/186518/sex-marriages-supreme-court-ruling.aspx?g_source=Social%20Issues&g_medium=lead&g_campaign=tiles.

[2] *See* Gary J. Gates, "LGBT Identity: A Demographer's Perspective," 45 *Loy. L.A. L. Rev.* 693, 712 (2012), *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-LLR-Spring-2012.pdf. Furthermore, the percentage of people who *self-identify* as LGB does not count the many people who are attracted to others of the same-sex, or who have same-sex sexual behavior, but who do not identify as LGB. *Id.*

[3] Bianca D.M. Wilson et al., *Sexual and Gender Minority Youth In Foster Care: Assessing Disproportionality and Disparities in Los Angeles*, at 36-37 (Williams Institute, 2014), http://williamsinstitute.law.ucla.edu/wp-content/uploads/LAFYS_report_final-aug-2014.pdf.

[4] Gary J. Gates, *LGBT Demographics: Comparisons among population-based surveys*, at 6 & 9-10 (Williams Institute, 2014), http://williamsinstitute.law.ucla.edu/wp-content/uploads/lgbt-demogs-sep-2014.pdf; Gary J. Gates & Abigail M. Cooke, *United States Census Snapshot: 2010* (Williams Institute, 2011) (reporting same-sex couples were identified by the 2010 Census to be in 93% of U.S. counties), http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census2010Snapshot-US-v2.pdf.

[5] *See, e.g.*, Randy Albelda et al., *Poverty in the Lesbian, Gay, and Bisexual Community* (Williams Institute, 2009), http://williamsinstitute.law.ucla.edu/wp-content/uploads/Albelda-Badgett-Schneebaum-Gates-LGB-Poverty-Report-March-2009.pdf; M.V. Lee Badgett et al., *New Patterns of Poverty in the Lesbian, Gay, and Bisexual Community* (Williams Institute, 2013), http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGB-Poverty-Update-Jun-2013.pdf; Gary J. Gates, *LGBT People Are Disproportionately Food Insecure* (Williams Institute, 2014), http://williamsinstitute.law.ucla.edu/wp-content/uploads/Food-Insecurity-in-LGBT-Communities.pdf; Gary J. Gates & Frank Newport, *Special Report: 3.4% of U.S. Adults Identify as LGBT* (Gallup, 2013), http://www.gallup.com/poll/158066/special-report-adults-identify-lgbt.aspx.

[6] *See, e.g.*, Jennifer Pizer et al., "Evidence of Persistent and Pervasive Workplace Discrimination Against LGBT People: The Need for Federal Legislation Prohibiting Discrimination and Providing Equal Employment Benefits," 45 *Loy. L.A. L. Rev.* 715, 720-42 (2012), *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/Pizer-Mallory-Sears-Hunter-ENDA-LLR-2012.pdf.

healthcare, as well as other barriers to care and well-being for LGBT people.[7] Of course, LGBT people can face discrimination and stigma in a wide variety of settings and from many sources, including (in addition to healthcare) employment, housing, and family life. In turn, such discrimination, stigma, and barriers to care can have negative consequences for the health and wellbeing of LGBT individuals.[8] Federal government reports and agencies recognize this. For example, Healthy People 2020 reports that "[s]ocial determinants affecting the health of LGBT individuals largely relate to oppression and discrimination."[9] Similarly, the Centers for Disease Control and Prevention ("CDC"), report that homophobia, stigma, and discrimination can negatively affect the physical and mental health of gay and bisexual men, as well as the quality of the healthcare they receive.[10] The Office of Women's Health also recognizes that discrimination and stigma may lead to lesbians and bisexual women having higher rates of depression and anxiety than other women, as well as being less likely than other women to get routine mammograms and clinical breast exams.[11] The CDC also reports that discrimination and social stigma may help explain the high risk for HIV infection among transgender women,[12] among other health concerns facing transgender people. These risks may be compounded by vulnerabilites due to poverty, racial discrimination, age, geography, and other characteristics.[13]

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[7] *See, e.g.*, IOM (Institute of Medicine), *The Health of Lesbian, Gay, Bisexual, and Transgender People: Building a Foundation for Better Understanding*, at 212-14 (2011) (discussing evidence of stigma, discrimination, and violence against LGBT people because of their sexual orientation or gender identities), *available at* http://www.ncbi.nlm.nih.gov/books/NBK64806/pdf/Bookshelf_NBK64806.pdf. The Institute of Medicine further explains that "[s]ome LGBT individuals face discrimination in the health care system that can lead to an outright denial of care or to the delivery of inadequate care. There are many examples of manifestations of enacted stigma against LGBT individuals by health care providers. LGBT individuals have reported experiencing refusal of treatment by health care staff, verbal abuse, and disrespectful behavior, as well as many other forms of failure to provide adequate care." *Id.* at 62. Furthermore, "[f]ear of stigmatization or previous negative experiences with the health care system may lead LGBT individuals to delay seeking care." *Id.* (discussing "felt stigma"); *see also id.* at 63-64 (discussing "internalized stigma" and other personal barriers to care). Similarly, with respect to LGBT youth, the Institute of Medicine observes that "the disparities in both mental and physical health that are seen between LGBT and heterosexual and non-gender-variant youth are influenced largely by their experiences of stigma and discrimination during the development of their sexual orientation and gender identity and throughout the life course. *Id.* at 142.

[8] *See, e.g.*, Pizer et al., *supra* note 6, at 734-42 (discussing research documenting that workplace discrimination negatively affects the income and health of LGBT people).

[9] U.S. Department of Health and Human Services, Office of Disease Prevention and Health Promotion, Healthy People 2020, *Lesbian, Gay, Bisexual, and Transgender Health*, http://www.healthypeople.gov/2020/topics-objectives/topic/lesbian-gay-bisexual-and-transgender-health?topicid=25 (last visited Nov. 5, 2015).

[10] U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, *Gay and Bisexual Men's Health, Stigma and Discrimination*, http://www.cdc.gov/msmhealth/stigma-and-discrimination.htm (last visited Nov. 5, 2015).

[11] U.S. Department of Health and Human Services, Office of Women's Health, *Lesbian and Bisexual Health*, http://womenshealth.gov/publications/our-publications/fact-sheet/lesbian-bisexual-health.pdf.

[12] U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, *HIV Among Transgender People*, http://www.cdc.gov/hiv/group/gender/transgender/index.html (last visited Nov. 5, 2015).

[13] IOM, *supra* note 7, at 227-28; *see also, e.g.*, Bostwick et al., "Mental health and suicidality among racially and ethnically diverse sexual minority youths," 104(6) *Am J Public Health* 1129 (2014); Angel Kastanis & Bianca D.M. Wilson, *Race/Ethnicity, Gender, and Socioeconomic Wellbeing of Individuals in Same-sex Couples* (Williams Institute, 2014) (reported similar patterns of racial disparities in income and employment among individuals in

According to Healthy People 2020, LGBT people face the following health disparities in addition to those mentioned above:

- LGBT youth are 2 to 3 times more likely to attempt suicide;
- LGBT youth are more likely to be homeless;
- Lesbians are less likely to get preventive services for cancer;
- Gay men are at higher risk of HIV and other STDs, especially among communities of color;
- Lesbians and bisexual females are more likely to be overweight or obese;
- Transgender individuals have a high prevalence of HIV/STDs, victimization, mental health issues, and suicide and are less likely to have health insurance than heterosexual or LGB individuals;
- Elderly LGBT individuals face additional barriers to health because of isolation and a lack of social services and culturally competent providers;
- LGBT populations have the highest rates of tobacco, alcohol, and other drug use.[14]

The evidence of healthcare discrimination against LGBT people; the evidence of health disparities and barriers to healthcare facing LGBT people; and the more general economic and social vulnerabilities facing LGBT people underscore the significance of the Final Rule prohibiting sexual orientation and gender identity discrimination.

II. GENDER IDENTITY DISCRIMINATION AND SEX STEREOTYPING ARE SEX DISCRIMINATION

A. The Proposed Rule Correctly Prohibits Discrimination Based on Sex Stereotypes and Gender Identity But the Definition of Sex Stereotypes Should be Expanded to Comport with Case Law

Section 1557 of the ACA prohibits discrimination on the basis of sex.[15] Under Proposed Rule § 92.4, "on the basis of sex" "includes, but is not limited to, on the basis of pregnancy, false pregnancy, termination of pregnancy, or recovery therefrom, childbirth or related medical conditions, sex stereotyping, or gender identity."[16] The Proposed Rule further defines "gender identity" and "sex stereotypes" as follows:

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same-sex and different-sex couples), http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census-Compare-Feb-2014.pdf.

[14] U.S. Department of Health and Human Services, Office of Disease Prevention and Health Promotion, Healthy People 2020, *Lesbian, Gay, Bisexual, and Transgender Health*, http://www.healthypeople.gov/2020/topics-objectives/topic/lesbian-gay-bisexual-and-transgender-health?topicid=25 (last visited Nov. 5, 2015) (citations omitted).

[15] *See* 42 U.S.C. § 18116(a). Specifically, Section 1557's sex discrimination prohibition stems from Title IX of the Education Amendments of 1972. *See id.*

[16] 80 Fed. Reg. 54,216.

> Gender identity is an individual's internal sense of gender, which may be different from that individual's sex assigned at birth. The way an individual expresses gender identity is frequently called "gender expression," and may or may not conform to social stereotypes associated with a particular gender. A transgender individual is an individual whose gender identity is different from the sex assigned to that person at birth; an individual with a transgender identity is referred to in this part as a transgender individual. [17]
>
> Sex stereotypes refers to stereotypical notions of gender, including expectations of how an individual represents or communicates gender to others, such as behavior, clothing, hairstyles, activities, voice, mannerisms, or body characteristics. These stereotypes can include expectations that gender can only be constructed within two distinct opposite and disconnected forms (masculinity and femininity), and that gender cannot be constructed outside of this gender construct (individuals who identify as neither, both, or as a combination of male and female genders).[18]

We agree with the Proposed Rule that sex discrimination includes discrimination motivated by sex stereotypes or gender identity. Following the Supreme Court's decision in *Price Waterhouse v. Hopkins*,[19] "it is well settled that Title VII's interdiction of [sex discrimination] prohibits an employer from taking adverse action because an employee's behavior or appearance fails to conform to gender stereotypes"[20]—including, for example, stereotypes that a woman should "walk more femininely, talk more femininely, [or] dress more femininely."[21] In other words, as the U.S. Department of Justice recently explained with respect to Title IX:

> *Price Waterhouse* rejected the notion that "sex" discrimination occurs only in situations in which an employer prefers a man over a woman (or vice versa); rather, a prohibition on sex discrimination encompasses any differential treatment based on a consideration "related to the sex of" the individual.[22]

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[17] 80 Fed. Reg. 54,216.

[18] 80 Fed. Reg. 54,216-54,217.

[19] 490 U.S. 228 (1989).

[20] *Dawson v. H&H Elec., Inc.*, No. 4:14-cv-583, 2015 WL 5437101, at * 3 (E.D. Ark. Sept. 15, 2015) (citing *Price Waterhouse*, 490 U.S. at 251); *Lewis v. Heartland Inns of America, LLC*, 591 F.3d 1033, 1039 (8th Cir. 2010)). Although *Price Waterhouse* arose under Title VII, courts and agencies look to case law interpreting Title VII for guidance when interpreting Title IX. *See, e.g., Jennings v. Univ. of North Carolina*, 482 F.3d 686, 695 (4th Cir. 2007); *Yusuf v. Vassar College*, 35 F.3d 709, 715 (2d Cir. 1994).

[21] *Price Waterhouse*, 490 U.S. at 235 (plurality) (internal quotation marks omitted).

[22] Brief for the United States as Amicus Curiae Supporting Plaintiff-Appellant and Urging Reversal, at 8, *G.G. v. Gloucester County School Bd.*, No. 15-2056 (4th Cir. Oct. 28, 2015) (ECF No. 25-1) (quoting *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) (Gender Motivated Violence Act)).

Following *Price Waterhouse*, numerous federal courts, including several Courts of Appeals, have held, in both constitutional and statutory contexts, that discrimination based on an individual's gender identity or expression—including discrimination related to one's transition from one gender to another, identification as transgender, or non-conformity with gender norms—is sex discrimination.[23] As the Eleventh Circuit explained:

> A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes. "[T]he very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior." . . . There is thus a congruence between discriminating against transgender . . . individuals and discrimination on the basis of gender-based behavioral norms.[24]

The Ninth Circuit has explained that, "under *Price Waterhouse*, 'sex' under Title VII encompasses both sex—that is, the biological differences between men and women—*and* gender" and that "[d]iscrimination because one fails to act in the way expected of a man or woman is forbidden under Title VII."[25] The Sixth Circuit similarly has observed that "[t]he Supreme Court made clear that in the context of Title VII, discrimination because of 'sex' includes gender discrimination."[26]

Many courts and federal agencies that have interpreted existing sex discrimination protections to cover discrimination based on gender identity or expression have relied on a gender stereotyping theory that transgender and gender non-conforming individuals are protected from discrimination based on their deviation, or perceived deviation, from gender stereotypes. While evidence of impermissible gender stereotyping is one way to prove sex discrimination, it is not the only way. For example, in *Schroer v. Billington*, the court held:

> The evidence establishes that the Library was enthusiastic about hiring David Schroer—until she disclosed her transsexuality. The Library revoked the offer

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[23] *See, e.g.*, *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011); *Barnes v. City of Cincinnati*, 401 F.3d 729, 736-37 (6th Cir. 2005); *Smith v. City of Salem*, 378 F.3d 566, 571-75 (6th Cir. 2004); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000) (Equal Credit Opportunity Act); *Schwenk*, 204 F.3d at 1201-02; *Lewis v. High Point Reg'l Health Sys.*, 79 F. Supp. 3d 588 (E.D.N.C. 2015); *Finkle v. Howard County, Md.*, 12 F. Supp. 3d 780, 788 (D. Md. 2014); *Muir v. Applied Integrated Technologies, Inc.*, No. CIV.A. DKC 13-0808, 2013 WL 6200178 (D. Md. Nov. 26, 2013); *Schroer v. Billington*, 577 F. Supp. 2d 293, 306-08 (D.D.C. 2008); *Lopez v. River Oaks Imaging Diagnostic Group, Inc.*, 542 F. Supp. 2d 653, 660 (S.D. Tex. 2008). *See also* Statement of Interest of the United States of America, at 4-14, *Jamal v. Saks*, No. 4:14-cv-02782 (S.D. Tex. Jan. 26, 2015) (ECF No. 19). *But see, e.g.*, *Etsitty v. Utah Transit. Auth.*, 502 F.3d 1215, 1221-22 (10th Cir. 2005) ("This court agrees with *Ulane* and the vast majority of federal courts to have addressed this issue and concludes discrimination against a transsexual based on the person's status as a transsexual is not discrimination because of sex under Title VII."); *Ulane v. Eastern Airlines*, 742 F.2d 1081, 1087 (7th Cir. 1985) (holding Title VII "is not so expansive in scope as to prohibit discrimination against transsexuals").

[24] *Glenn*, 663 F.3d at 1316 (quoting Ilona M. Turner, "Sex Stereotyping Per Se: Transgender Employees and Title VII," 95 *Cal. L. Rev.* 561, 563 (2007)).

[25] *Schwenk*, 204 F.3d at 1202.

[26] *Smith*, 378 F.3d at 572.

> when it learned that a man named David intended to become, legally, culturally, and physically, a woman named Diane. This was discrimination "because of . . . sex."[27]

Thus, as the U.S. Equal Employment Opportunity Commission ("EEOC") explained in *Macy v. Holder*, a person facing gender identity or expression discrimination may (but need not) rely on evidence of gender stereotyping; the ultimate question is whether sex or gender was a motivating factor of the discrimination.[28] In so holding, the EEOC acknowledged that Congress was "likely not considering the problems of discrimination that were faced by transgender individuals" when Congress enacted and amended Title VII. But the EEOC pointed to the Supreme Court's unanimous statement in *Oncale v. Sundowner Offshore Services, Inc.* that "'statutory prohibitions often go beyond the principal evil [they were passed to combat] to cover reasonably comparable evils,'" and that Title VII's prohibition of sex-based discrimination "'must extend to [sex-based discrimination] of any kind that meets the statutory requirements.'"[29]

Similarly, in 2012, OCR explained that "Section 1557's sex discrimination prohibition extends 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."[30] In 2014, then-U.S. Attorney General Holder adopted *Macy*'s holding for the Department of Justice's Title VII purposes, even while recognizing that "courts have reached varying conclusions about whether discrimination based on gender identity in and of itself—including transgender status—constitutes discrimination based on sex."[31] Other federal agencies have also concluded that sex discrimination includes discrimination based on gender identity and

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[27] *Schroer*, 577 F. Supp. 2d at 306.

[28] *Macy v. Holder*, Appeal No. 0120120821, 2012 WL 1435995, at *10 (E.E.O.C. Apr. 20, 2012).

[29] *Id.* at *10 (quoting *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79-80 (1998)).

[30] Letter from Leon Rodriguez, Director, U.S. Department of Health & Human Services, Office for Civil Rights, to Maya Rupert, Federal Policy Director, National Center for Lesbian Rights (Jul. 12, 2012), *available at* https://www.nachc.com/client/OCRLetterJuly2012.pdf.

[31] Attorney General Memorandum, *Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of* 1964 (Dec. 15, 2014), *available at* http://www.justice.gov/file/188671/download.

transgender status,[32] as did the only court to date to rule on this issue in the context of Section 1557.[33]

B. Conclusion and Recommendation

The Proposed Rule correctly proposes to formally adopt for OCR its existing interpretation of discrimination "on the basis of sex" as including discrimination motivated by sex stereotypes and/or gender identity. The Final Rule should adhere to the Proposed Rule's definition of "on the basis of sex" as including sex stereotypes and gender identity.

We further recommend that the definition of "sex stereotypes" be expanded to cover aspects of sex stereotypes discussed in the case law described above, but not clearly covered by the Proposed Rule's current definition. In particular, we recommend that the definition of "sex stereotypes" in Proposed Rule § 92.4 be revised as follows (deleting the strikethroughs and adding the italics):

> Sex stereotypes refers to stereotypical notions of gender, including ***norms, preferences, or*** expectations of how an individual represents or communicates gender to others, such as behavior, clothing, hairstyles, activities, voice, mannerisms, or body characteristics. These stereotypes can include expectations that gender can only be constructed within two distinct opposite and disconnected forms (masculinity and femininity), ~~and~~ that gender cannot be constructed outside of this gender construct (individuals who identify as neither, both, or as a combination of male and female genders)~~.~~***, that individuals consistently identify with one and only one of two genders (male or female), and that they act in conformity with the gender-related expressions stereotypically associated with that gender. Sex stereotypes also include gendered norms, preferences, or expectations related to the appropriate roles or behavior of men and women, such as the expectation that women are primary caregivers, and aspects of an individual's sexual orientation, such as the sex of an individual's sexual or romantic partners***.

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[32] *See, e.g.*, 5 C.F.R. §§ 300.102-300.103, 335.103, 410.302, 537.105 (Office of Personnel Management); U.S. Dep't of Labor, Office of Federal Contract Compliance Programs, Notice of Proposed Ruling Regarding Discrimination on the Basis of Sex, 80 Fed. Reg. 5246 (Jan. 30, 2015); U.S. Dep't of Labor, Office of Federal Contract Compliance Programs, Directive 2015-1 Regarding Handling Individual and Systemic Sexual Orientation and Gender Identity Discrimination Complaints (Apr. 16, 2015); U.S. Dep't of Labor, Office of Federal Contract Compliance Programs, Directive 2014-02 Regarding Gender Identity and Sex Discrimination (Aug. 19, 2014); Dep't of Educ., *Title IX Resource Guide*, 1 (Apr. 2015); U.S. Dep't of Education, Questions and Answers on Title IX and Sexual Violence, at 5 (Apr. 29, 2014); *Secretary, U.S. Dep't of Housing and Urban Development v. Toone*, FHEO Nos. 06-12-1130-8; 06-121363-8 (Charge of Discrimination) (Office of Hearings & Appeals Aug. 15, 2013); U.S. Dep't of Housing and Urban Development, Memorandum from John Trasviña, Assistant Secretary for Fair Housing and Equal Opportunity, to Fair Housing and Equal Opportunity Regional Directors, Assessing Complaints that Involve Sexual Orientation, Gender Identity, and Gender Expression (June 2010).

[33] *Rumble v. Fairview Health Services*, No. 14-cv-2037, 2015 WL 1197415, *2 (D. Minn. Mar. 16, 2015) (holding ACA's sex discrimination prohibition "necessarily" encompasses bias based on gender identity or transgender status).

III. SEXUAL ORIENTATION DISCRIMINATION IS SEX DISCRIMINATION, AND LESBIAN, GAY, AND BISEXUAL PEOPLE ARE PROTECTED FROM SEX DISCRIMINATION

The Proposed Rule does not include sexual orientation discrimination as a form of sex discrimination because, in OCR's view, "[c]urrent law is mixed on whether existing Federal nondiscrimination laws prohibit discrimination on the basis of sexual orientation as part of their prohibitions on sex discrimination."[34] This sweeping statement about the state of the law—and exclusion of sexual orientation in the Proposed Rule's definition of "on the basis of sex"—does not account for the *different* ways in which sexual orientation discrimination is sex-based. A close review of the case law supports OCR in concluding in the Final Rule that (A) lesbian, gay, and bisexual ("LGB") people, like all people, are protected from sex discrimination, including same-sex harassment and sex stereotyping; (B) sexual orientation discrimination is sex-based, including when it is based on gender stereotypes; and (C) a contrary position is not sound. We discuss each of these points in turn.

A. LGB People Are Protected From Sex Discrimination, Including Sex Stereotyping And Same-Sex Harassment

Early on, some courts seemed to view LGB plaintiffs as only able to have claims related to their sexual orientation and unable to have sex discrimination claims.[35] However, the law is clear that LGB people are protected from sex discrimination, including sex stereotyping and same-sex harassment.[36] With respect to sex stereotyping, "since *Price Waterhouse*, every court of appeals has recognized that disparate treatment for failing to conform to gender-based expectations is sex discrimination and has also concluded that this principle applies with equal force in cases involving plaintiffs who are gay, bisexual, heterosexual, or transgender."[37] And in *Oncale*, the Supreme Court unanimously held that sex discrimination includes "sexual harassment of any kind that meets the statutory requirements" regardless of the victim's or the

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[34] 80 Fed. Reg. 54,176.

[35] *See, e.g., Williamson v. A.G. Edward and Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989) ("Title VII does not prohibit discrimination against homosexuals.").

[36] *See, e.g., Prowel v. Wise*, 579 F.3d 285, 289 (3rd Cir. 2009) (observing that precedent holding that Title VII does not prohibit sexual orientation discrimination does not mean "that a homosexual individual is barred from bringing a *sex discrimination* claim under Title VII, which plainly prohibits discrimination 'because of sex.'"); *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d at 1065 ("[The district court] appears to have held that Rene's otherwise viable cause of action was defeated because he believed he was targeted because he is gay. That is not the law.") *Cf.* Statement of Interest of the United States of America, at 4-5, *Jamal v. Saks*, No. 4:14-cv-02782 (S.D. Tex. Jan. 26, 2015) (ECF No. 19) (explaining "Title VII protects all people, including transgender individuals, from sex discrimination"). In this connection, we note that a recent empirical assessment of same-sex harassment cases revealed judicial biases against "openly gay" alleged harassers and in favor of heterosexism. Jessica A. Clarke, "Inferring Desire," 63 *Duke L.J.* 525, 571-95 (2013).

[37] *Couch v. Chu*, Appeal No. 0120131136, 2013 WL 4499198, at *7 (E.E.O.C. Aug. 13, 2013) (citing *Prowel*, 579 F.3d at 290; *Miller v. City of New York*, 177 Fed. App'x. 195 (2d. Cir 2006); *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2d Cir. 2005); *Smith*, 378 F.3d at 572; *Doe by Doe v. City of Belleville, Ill.*, 119 F.3d 563, 581 (7th Cir. 1997) *vacated on other grounds by* 523 U.S. 1001 (1998)).

harasser's sex.[38] The Department of Justice's Title IX Legal Manual explains: "Title IX's prohibition of discrimination on the basis of sex can include protections against same-sex harassment . . . [and] lower courts have held that Title IX applies even if the participant and harasser are of the same sex."[39]

To prevent any confusion going forward, the Final Rule should explicitly provide that LGB people are protected under its sex discrimination provisions.[40]

B. Sexual Orientation Discrimination Is Sex Discrimination

The law with respect to the relationship between sexual orientation discrimination and sex discrimination is undoubtedly evolving, as the Proposed Rule recognizes. As explained below, a growing number of courts and agencies are concluding that sexual orientation discrimination is sex discrimination based on several *different* theories. The Proposed Rule's sweeping statement about the state of the law in this area—and seeming exclusion of sexual orientation from the definition of "on the basis of sex"—fails to account for the *different* ways in which sexual orientation discrimination is sex-based. In finalizing these regulations, OCR should carefully consider each of the theories below separately, though they reinforce one another and function together in articulating the ways in which sexual orientation discrimination is sex-based.

Indeed, the EEOC recently issued a detailed decision explaining how and why sexual orientation discrimination is per se sex discrimination. In *Baldwin v. Foxx*, the EEOC ruled in favor of an employee who alleged that he did not receive a promotion because of his sexual orientation.[41] The EEOC explained that "[a] complainant alleging that an [employer] took his or her sexual orientation into account in an employment action necessarily alleges that the [employer] took his or her sex into account."[42] In reaching this conclusion, the EEOC

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[38] *Oncale*, 523 U.S. at 80; *see also E.E.O.C. v. Boh Bros. Const. Co., L.L.C.*, 731 F.3d 444 (5th Cir. 2013) (en banc).

[39] U.S. Dep't of Justice, *Title IX Legal Manual* (last updated Aug. 6, 2015), *available at* http://www.justice.gov/crt/about/cor/coord/ixlegal.php (internal citations omitted).

[40] Should the Final Rule *not* define "on the basis of sex" to include gender identity, then this discussion shall also apply to transgender individuals.

[41] *Baldwin v. Foxx*, Appeal No. 0120133080, 2015 WL 4397641, at *4-*8 (E.E.O.C. July 15, 2015). *Baldwin* is the culmination of numerous federal-sector and private-employment cases decided by the EEOC. *See, e.g.*, *Cote v. Wal-Mart*, Charge No. 523-2014-00916 (E.E.O.C. Jan. 29, 2015) (concluding Wal-Mart discriminated against an employee on the basis of sex under Title VII when it denied the employee the opportunity to enroll her same-sex spouse in company provided health care benefits); *Luigi B. v. Johnson*, Appeal No. 0120110576, 2014 WL 4407457, at *7 (E.E.O.C. Aug. 20, 2014); *Hal T. v. Cordray*, Appeal No. 0120141108, 2014 WL 7398828, at *5-*6 (E.E.O.C. Dec. 18, 2014); *Complainant v. Donahoe*, Appeal No. 0120132452, 2014 WL 6853897, at *3-*5 (E.E.O.C. Nov. 18, 2014); *Complainant v. Secretary, Dept. of Veterans Affairs*, Appeal No. 0120110145, 2014 WL 5511315, at *3-*4 (E.E.O.C. Oct. 23, 2014); *Couch*, 2013 WL 4499198, at *7-*12; *Brooker v. Donahoe*, Appeal No. 0120112085, 2013 WL 4041270, at *2-*3 (E.E.O.C. May 20, 2013); *Culp v. Napolitano*, Appeal No. 0720130012, 2013 WL 2146756, at *3-*4 (E.E.O.C. May 7, 2013); *Castello v. Donahoe*, Appeal No. 0120111795, 2011 WL 6960810, at *2-*3 (E.E.O.C. Dec. 20, 2011); *Veretto v. Donahoe*, Appeal No. 0120110873, 2011 WL 2663401, at *3 (E.E.O.C. July 1, 2011).

[42] *Baldwin*, 2015 WL 4397641, at *4.

thoroughly explained that sexual orientation cannot be defined or understood without reference to sex and gender; discrimination on the basis of sexual orientation is premised on sex-based preferences, assumptions, expectations, stereotypes, or norms; and sexual orientation discrimination is sex discrimination because it is associational discrimination on the basis of sex.[43]

The reasoning of *Baldwin* is sound. In fact, since its issuance, two federal courts have agreed with its reasoning and conclusions.[44] For example, in *Isaacs v. Felder Services, LLC*, the court rejected the sweeping notion that "'[s]exual orientation discrimination is neither included in nor contemplated by Title VII'" and instead "agree[d]" with the EEOC's analyses and conclusions in *Baldwin*.[45] In *Roberts v. United Parcel Service, Inc.*, the court quoted with approval virtually all of *Baldwin*'s legal analyses.[46]

i. Sexual Orientation Discrimination Is Sex Discrimination Because Sexual Orientation Is Inseparable From Sex

As the EEOC first explained in *Baldwin*, sexual orientation cannot be defined or understood without reference to sex and gender:

> A man is referred to "gay" if he is physically and/or emotionally attracted to other men. A woman is referred to as "lesbian" if she is physically and/or emotionally attracted to other women. Someone is referred to as "heterosexual" or "straight" if he or she is physically and/or emotionally attached to some of the opposite-sex.[47]

Similarly, according to the Institute of Medicine, "the focus of sexual orientation *is the biological sex of a person's actual or potential relationship partners*" and "sexual orientation is *inherently a relational construct* [because it] depends on the biological sex of the individuals involved, *relative to each other*."[48] Accordingly, it is clear that sexual orientation cannot be

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[43] *Id.* (collecting and discussing cases).

[44] *Isaacs v. Felder Services, LLC*, No. 2:13cv693, 2015 WL 6560655, at *3 (M.D. Ala. Oct. 29, 2015); *Roberts v. United Parcel Service, Inc.*, No. 13-CV-6161, __ F. Supp. 3d __, 2015 WL 4509994, at *15-*19 (E.D.N.Y. July 27, 2015). The only federal court that has declined to follow *Baldwin* did so in the special circumstances of a motion to reconsider. In *Burrows v. College of Central Florida*, No. 5:14-cv-197, 2015 WL 5257135, at *2 (M.D. Fla. Sept. 9, 2015), the court declined to reconsider its prior decision that Title VII does not protect against sexual orientation discrimination, which was decided prior to *Baldwin*, because "[a]lthough the EEOC's [*Baldwin*] decision is relevant and would be considered *persuasive* authority, it is not *controlling*." *Id.* Thus, the court ruled, the plaintiff failed to satisfy the narrow requirements for reconsideration of a prior decision. *Id.* Significantly, however, the court registered no disagreement with *Baldwin*'s analyses. *See id.*

[45] *Isaacs*, 2015 WL 6560655, at *3 (quoting magistrate judge's report and recommendations; alternation in original).

[46] *Roberts*, 2015 WL 4509994, at *15-*19.

[47] *Baldwin*, 2015 WL 4397641, at *5 (citing American Psychological Ass'n, *Definition of Terms: Sex, Gender, Gender Identity, Sexual Orientation* (Feb. 2011)).

[48] IOM, *supra* note 7, at 27 (first and second emphases added).

separated or understood apart from sex and allegations of sexual orientation discrimination necessarily involve sex-based considerations.[49]

In other words, sexual orientation discrimination is sex discrimination because it unavoidably entails treating someone less favorably because of her or his sex. *Baldwin* provides two helpful examples:

> [A]ssume that an employer suspends a lesbian employee for displaying a photo of her female spouse on her desk, but does not suspend a male employee for displaying a photo of his female spouse on his desk. The lesbian employee in that example can allege that her employer took an adverse action against her that the employer would not have taken had she been male. That is a legitimate claim under Title VII that sex was unlawfully taken into account in the adverse employment action. *See Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978) ("Such a practice does not pass the simple test of whether the evidence shows 'treatment of a person in a manner which but for that person's sex would be different."'). The same result holds true if the person discriminated against is straight. Assume a woman is suspended because she has placed a picture of her husband on her desk but her gay colleague is not suspended after he places a picture of his husband on his desk. The straight female employee could bring a cognizable Title VII claim of disparate treatment because of sex.[50]

Numerous courts, too, have concluded that sexual orientation discrimination is sex discrimination based on this logic. In *Heller v. Columbia Edgewater Country Club*, for example, the court adopted (on de novo review) the magistrate judge's rulings that an employer is engaged in unlawful gender discrimination if the employee would have been treated differently if she were a man dating a woman, instead of a woman dating a woman.[51] "One way (but certainly not the only means) of satisfying [Title VII] is to inquire whether the harasser would have acted the same if the gender of the victim had been different."[52] In *Hall v. BNSF Railway Co.*, the court reached a similar conclusion with respect to health insurance coverage, explaining that the plaintiffs (two employees each married to a same-sex spouse) "experienced adverse employment action in the denial of spousal health benefit, due to [their] sex, where similarly situated females [married to males] were treated more favorably by getting the benefit."[53] In the Title IX context, in *Videckis v. Pepperdine University*, the court recently observed:

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[49] *See also* Courtney Weiner, Note, "Harassment as Sex Discrimination Under Title VII and Title IX," 37 *Colum. Hum. Rts. L. Rev.* 189, 195-202 (2005) (discussing social science and legal theory support for the interrelationship between sex, gender, and sexual orientation).

[50] *Id. See also* Andrew Koppelman, "Why Discrimination Against Lesbians and Gay Men is Sex Discrimination," 69 *N.Y.U.L. Rev.* 197, 208 (1994) ("If a business fires Ricky ... because of his sexual activities with Fred, while th[is] action [ ] would not have been taken against Lucy if she did exactly the same things with Fred, then Ricky is being discriminated against because of his sex.").

[51] 195 F. Supp. 2d 1212, 1215-16, 1223-24 (D. Or. 2002).

[52] *Id.* at 1223.

[53] No. No. C13–2160, 2014 WL 4719007, at *2 (W.D. Wash. Sept. 22, 2014); *see also In re Levenson*, 537 F.3d 925, 929 (9th Cir. 2009) (Reinhardt, J.); *Foray v. Bell Atlantic*, 56 F. Supp. 2d 327, 329-30 (S.D.N.Y. 1999)

> [D]iscrimination based on a same-sex relationship could fall under the umbrella of sexual discrimination [prohibited by Title IX] even if such discrimination were not based explicitly on gender stereotypes. For example, a policy that female basketball players could only be in relationships with males inherently would seem to discriminate on the basis of gender.[54]

Federal courts have similarly concluded that discrimination against same-sex couples is sex-based discrimination under the Equal Protection and Due Process Clauses of the Constitution.[55]

The Department of Justice recently relied on comparable logic in arguing to the Fourth Circuit that Title IX prohibits schools from barring transgender students from using a sex-segregated restroom that corresponds to their gender identity.[56] In so arguing, the Department of Justice's sex-discrimination logic proceeded as follows:

> Whereas the policy permits non-transgender students to use the restrooms that correspond to their gender identity (because their gender identity and "biological gender" are aligned), it prohibits G.G. from doing so because, although he identifies and presents as male, the school deems his "biological gender" to be female.[57]

This logic—that cisgender individuals receive a benefit because their gender identity aligns with their sex assigned at birth, but transgender individuals do not receive that benefit because their gender identity does not align with their sex assigned at birth—is comparable to the logic described above on sexual orientation discrimination; that is, for example, a straight man receives a benefit because he is in a relationship with a woman, but a lesbian does not receive that benefit when she is in a relationship with a woman. In both cases, the benefit is provided or denied based on a sex-based consideration related to the plaintiff's sex, which relevant antidiscrimination law prohibits.[58]

(rejecting Title VII claim by employee with a different-sex domestic partner seeking access to same-sex domestic partner benefits, not because the plan didn't discriminate on the basis of sex, but because the plaintiff (being able to marry his partner) was not similarly situated to employees in same-sex relationships).

[54] *Videckis v. Pepperdine Univ.*, __ F. Supp. 3d __, No. 15-298, 2015 WL 1735191 (C.D. Cal. 2015).

[55] *See, e.g.*, *Waters v. Ricketts*, 48 F. Supp. 3d 1271, 1281 (D. Neb. 2015); *Lawson v. Kelly*, No. 14-0622-CV, __ F. Supp. 3d __, 2014 WL 5810215, at *8 (W.D. Mo. Nov. 7, 2014); *Rosenbrah v. Daugaard*, 61 F. Supp. 3d 845, 860-61 (D.S.D. 2014); *Jernigan v. Crane*, 64 F. Supp. 3d 1260, 1286 (E.D. Ark. 2014); *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1206 (D. Utah 2013); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 996 (N.D. Cal. 2010); *see also Latta v. Otter*, 771 F.3d 456, 480-96 (9th Cir. 2014) (Berzon, J., concurring); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 971-73 (Mass. 2003) (Greaney, J., concurring); *Baehr v. Lewin*, 852 P.2d 44, 64-67 (Haw. 1993) (plurality opinion).

[56] Brief for the United States as Amicus Curiae Supporting Plaintiff-Appellant and Urging Reversal, at 9, *G.G. v. Gloucester County School Bd.*, No. 15-2056 (4th Cir. Oct. 28, 2015) (ECF No. 25-1) (quoting *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) (Gender Motivated Violence Act)).

[57] *Id.*

[58] *See id*. at 8-10.

ii. Sexual Orientation Discrimination Is Sex Discrimination Because It Virtually Always, If Not Always, Involves Discrimination Based on Gender Stereotypes

Sexual orientation discrimination also is sex discrimination because it virtually always, if not always, involves discrimination based on gender stereotypes. Numerous federal courts, including several Courts of Appeals, have held that conduct that may be viewed as discrimination based on sexual orientation often is based on impermissible gender stereotypes.[59] Indeed, as the Seventh Circuit observed, "it is not at all uncommon for sexual harassment and other manifestations of sex discrimination to be accompanied by homophobic epithets; one need only browse the federal reporters to see that the two routinely go hand in hand."[60] Even more to the point, "[s]tereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality"[61] and that "gender-loaded language can easily be used to refer to perceived sexual orientation and vice versa."[62]

Further, conduct that constitutes both sexual orientation discrimination and sex discrimination includes not only discrimination based on stereotypes about masculinity or femininity,[63] but also discrimination based on disapproval of or hostility toward nonconformity with the gender stereotype that persons form (or should form) intimate, romantic, or spousal relationships with a person of a different sex, rather than a person of the same sex.[64] As one district court explained:

> Sexual orientation harassment is often, if not always, motivated by a desire to enforce heterosexually defined gender norms. In fact, stereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women. While one paradigmatic form of stereotyping occurs when co-workers single out an effeminate man for scorn, in fact, the issue is far more complex. The harasser may discriminate against an openly gay co-worker, or a

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[59] *See, e.g.*, *Prowel v. Wise*, 579 F.3d at 291-92; *Miller v. City of New York*, 177 Fed. Appx. 195, 197 (2nd Cir. 2006); *Rene*, 305 F.3d at 1065-68; *id.* at 1068-69 (Pregerson, J. concurring); *Nichols v. Azteca Rest. Enterprises Inc.*, 256 F.3d 864, 874-75 (9th Cir. 2001); *Simonton v. Runyon*, 232 F.3d 33, 37-38 (2nd Cir. 2000); *Doe by Doe v. Belleville*, 119 F.3d at 592-94; *Deneffe v. Skywest, Inc.*, No. 14-cv-00348, 2015 WL 2265373, at *6 (D. Colo. May 11, 2015); *Koren v. Ohio Bell Tel. Co.*, 894 F. Supp. 2d 1032, 1037-38 (N.D. Ohio 2012); *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002).

[60] *Doe by Doe v. Belleville*, 119 F.3d at 593.

[61] *Howell v. N. Cent. College*, 320 F. Supp. 2d 717, 723 (N.D. Ill. 2004).

[62] *Henderson v. Labor Finders of Virginia, Inc.*, No. 3:12cv600, 2013 WL 1352158, at *5 (E.D. Va. Apr. 1, 2013).

[63] *See, e.g.*, *Nichols*, 256 F.3d at 874-75 ("At its essence, the systematic abuse directed at Sanchez reflected a belief that Sanchez did not act as a man should act."); *Koren*, 894 F. Supp. 2d at 1037-38 (concluding that discrimination against a male plaintiff based on his adoption of his husband's surname—"a 'traditionally' feminine practice"—could constitute a failure to conform to gender stereotypes).

[64] *See, e.g.*, *Heller*, 195 F. Supp. 2d at 1224 ("Viewing the evidence in the light most favorable to plaintiff, a jury could find that Cagle repeatedly harassed (and ultimately discharged) Heller because Heller did not conform to Cagle's stereotype of how a woman ought to behave [in terms of being attracted to and dating a man].").

> co-worker that he perceives to be gay, whether effeminate or not, because he thinks, "real men don't date men." The gender stereotype at work here is that "real" men should date women, and not other men.[65]

Even before its decision in *Baldwin*, the EEOC emphasized this close relationship between discrimination based on sexual orientation and discrimination based on a perceived failure to conform to gender stereotypes. In *Couch v. Chu*, for example, the EEOC concluded that a claim of harassment based on a complainant's "'perceived sexual orientation' [was] a claim of discrimination based on the perception that he does not conform to gender stereotypes of masculinity, and therefore state[d] a viable claim under Title VII's sex discrimination prohibition."[66] In *Couch*, the EEOC found actionable as sex discrimination the use of the epithets "fag" and "faggot," which the EEOC described as "offensive, insulting, and degrading sex-based epithet against gay men" that have been "historically used when a person is displaying a belief that a male is not as masculine or as manly as" the person using the epithets.[67] Courts have decided similarly under Title IX.[68]

The EEOC has also ruled in several federal-sector cases that discrimination on the basis of sexual orientation could establish violations of Title VII based on the gender-stereotyping theory that men and women should be sexually attracted to (and should marry) individuals of a different sex.[69] Similarly, in *Terveer v. Billington*, the court concluded that the plaintiff plausibly stated a claim of sex discrimination based on his allegations that his "status as a homosexual male did not conform to [his supervisor's] gender stereotypes associated with men under [his] supervision . . . and that his orientation as a homosexual had removed him from [his supervisor's] preconceived definition of male."[70]

To be sure, some courts have stated that "'a gender stereotyping claim should not be used

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[65] *Centola v. Potter*, 183 F. Supp. 2d at 410 (citation omitted).

[66] *Couch*, 2013 WL 4499198, at *8; *see also* cases cited *supra* note 41; *Dupra v. Dep't of Commerce*, Appeal No. 0120112052, 2013 WL 1182329 (E.E.O.C. May 15, 2013); *Jennings v. Dep't of Labor*, Appeal No. 0120112716, 2013 WL 874649 (E.E.O.C. Feb. 25, 2013); *Baker v. Soc. Sec. Admin.*, Appeal No. 0120110008, 2013 WL 1182258 (E.E.O.C. Jan. 11, 2013); *Rosa v. Dep't of Veterans Affairs*, Appeal No. 0120091318, 2009 WL 2513955 (E.E.O.C. Aug. 3, 2009).

[67] *Id.*at *8; *see also Nichols*, 256 F.3d at 870, 875 (holding the epithet "faggot" was used because of sex).

[68] *Estate of Brown v. Ogletree*, No. 11-cv-1491, 2012 WL 591190, at *16-*17 (S.D. Tex. Feb. 21, 2012), *modified on other grounds by Estate of Brown v. Cypress Fairbanks Indep. Sch. Dist.*, 863 F. Supp. 2d 632 (S.D. Tex. 2012); *Schroeder v. Maumee Board of Education*, 296 F. Supp. 2d 869, 871-72, 879-80 (N.D. Ohio 2003); *Ray v. Antioch Unified Sch. Dist.*, 107 F. Supp. 2d 1165, 1170 (N.D. Cal. 2000).

[69] *See, e.g.*, *Baker*, 2013 WL 1182258, at *5-*6; *Veretto*, 2011 WL 2663401, at *3.

[70] *Terveer v. Billington*, 34 F. Supp. 3d 100, 116 (2014); *see also Vickedis v. Pepperdine University*, __ F. Supp. 3d __ 2015 WL 1735191, at *8 (C.D. Cal. Apr. 16, 2015) ("[T]he line between discrimination based on gender stereotyping and discrimination based on sexual orientation is blurry, at best, and thus a claim that Plaintiffs were discriminated against on the basis of their relationship and their sexual orientation may fall within the bounds of Title IX").

to bootstrap protection for sexual orientation into Title VII.'"[71] However, these decisions do not adequately take into account the close relationships between discrimination based on sexual orientation and discrimination based on sex and how frequently examples of the former also are examples of the latter. Nor do these decisions rest on sound reasoning, as described in Part III.C below. But even these courts make clear that LGB people are protected from sex-based discrimination including gender stereotyping, and so should the Final Rule.[72]

There is another important point. The law only requires that sex be "a motivating factor" of the discrimination for it to be unlawful; sex does not have to be the only motivating factor.[73] Thus, to the extent the Final Rule does not define "on the basis of sex" to include sexual orientation, the Final Rule should reflect the fact that discrimination that can be described as both sexual orientation discrimination and sex discrimination is unlawful. For as the Ninth Circuit correctly stated: "Whatever else [the discriminatory acts] may, or may not, have been 'because of' has no legal consequence" if sex was a motivating factor for the conduct.[74] Indeed, as the Departments of Justice and Education recently instructed in the Title IX context, "even where [discrimination] appears, at first blush, to be based on sexual orientation (including, for example, the use of anti-gay slurs and epithets)," liability may ensue where the conduct at issue is sex-based "arising from, among other things, the [plaintiff's] nonconformity with gender stereotypes."[75]

iii. Sexual Orientation Discrimination Is Sex Discrimination Because It Is Associational Discrimination Based on Sex

Proposed Rule § 92.209 explicitly prohibits discrimination "against an individual or entity in its health programs or activities on the basis of the race, color, national origin, age, disability, or sex of an individual with whom the individual or entity is known or believed to have a relationship or association." We agree this language is appropriate and necessary to protect LGBT people (and others) from discrimination based on the protected characteristics of one's known or perceived relatives, partners, friends, and other types of associates.

At the same time, in assessing whether sexual orientation discrimination is sex discrimination, OCR must also take into account the ways in which that is true due to associational discrimination. As the EEOC helpfully explained in *Baldwin*:

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[71] *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 464 (6th Cir. 2006) (quoting *Dawson*, 398 F.3d at 218; *see also Kiley v. Am. Soc'y for Prevention of Cruelty to Animals*, 296 Fed. App'x 107, 109 (2d Cir. 2008).

[72] *See, e.g.*, *Kiley*, 296 Fed. App'x at 109; *Dawson*, 398 F.3d at 218.

[73] *See Yusuf v. Vassar College*, 35 F.3d 709, 715 (2d Cir. 1994) ("Looking to these analogous bodies of law, we may safely say that Title IX bars the imposition of university discipline where gender is a motivating factor in the decision to discipline.") *abrogated on other grounds by Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510 (2002).

[74] *Rene*, 305 F.3d at 1066.

[75] Letter from U.S. Department of Justice Civil Rights Division and U.S. Department of Education Office of Civil Rights to Richard L. Swanson, Superintendent, Tehachapi Unified School District, ED/OCR Case No. 09-11-1031, DOJ Case No. DJ 169-11E-38, at 14. (June 30, 2011), *available at* http://www.justice.gov/sites/default/files/crt/legacy/2013/01/17/tehachapiletter.pdf.

> An employee alleging discrimination on the basis of sexual orientation is alleging that his or her employer took his or her sex into account by treating him or her differently for *associating* with a person of the same sex. For example, a gay man who alleges that his employer took an adverse employment action against him because he associated with or dated men states a claim of sex discrimination under Title VII; the fact that the employee is a man instead of a woman motivated the employer's discrimination against him. Similarly, a heterosexual man who alleges a gay supervisor denied him a promotion because he dates women instead of men states an actionable Title VII claim of discrimination because of his sex.[76]

In *Isaacs*, too, the court explained that "'Title VII . . . prohibits employers from treating an employee or applicant differently than other employees or applicants based on the fact that such individuals are in a same-sex marriage or because the employee has [or is interested in having] a personal association with someone of a particular sex. Adverse action on that basis is, 'by definition,' discrimination because of the employee or applicant's sex.'"[77]

C. Conclusions That Sexual Orientation Discrimination Is Not Sex Discrimination Are Not Sound

The Preamble to the Proposed Rule notes that, to date, "no Federal appellate court has concluded that Title IX's prohibition of discrimination 'on the basis of sex'—or Federal laws prohibiting sex discrimination more generally—prohibits sexual orientation discrimination, and some appellate courts previously reached the opposite conclusion."[78] However, a close review of those appellate decisions supports OCR reaching its own independent conclusion as to scope of Section 1557's sex discrimination prohibition.

The Preamble to the Proposed Rule cites *Kiley v. American Society for the Preservation of the Cruelty to Animals*, a decision of the Second Circuit holding that Title VII does not prohibit sexual orientation discrimination.[79] *Kiley* is a perfect example for our analysis here. In *Kiley*, the Second Circuit relied on circuit precedent to conclude that Title VII does not prohibit sexual orientation discrimination because (1) Title VII does not explicitly enumerate sexual orientation as a prohibited basis of discrimination; (2) the scant legislative history of the sex discrimination provision does not support reading sexual orientation discrimination to be

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[76] *Baldwin*, 2015 WL 4397641, at *6.

[77] *Id.* (quoting *Baldwin*, 2015 WL 4397641, at *4) (alternations in original) (citing as compare *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1986) ("Where a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of his race [in violation of Title VII].")).

[78] 80 Fed. Reg. 54,216 & n.22 (citing *Kiley v. Am. Soc'y for Prevention of Cruelty to Animals*, 296 Fed. App'x 107, 109 (2d Cir. 2008); *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 759 (6th Cir. 2006); *Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257, 260 (3d Cir. 2001)). *See also, e.g.*, *Williamson v. A.G. Edward and Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989); *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327, 329-32 (9th Cir. 1979).

[79] *Kiley*, 296 F.3d App'x at 109.

prohibited under it; and (3) Congressmembers have continually introduced legislation to explicitly add sexual orientation to federal non-discrimination laws.[80] Most, if not all, appellate courts that have concluded that Title VII (or similar statutes) do not prohibit sexual orientation discrimination have utilized some or all of these rationales. For ease of discussion, we refer to these rationales as the "*Kiley* rationales" though they root back in the case law, repeating themselves time after time without any additional analyses.

While the first and third rationales are factually correct that does not make them sound bases for holding that the plain text "because of sex" or "on the basis of sex" does not include sexual orientation discrimination. Moreover, the third rationale based on the existence of federal legislation to add sexual orientation (and gender identity) to federal antidiscrimination laws is unsound because it is contrary to the Supreme Court's statement that "[c]ongressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change."[81] The second rationale based on Title VII's legislative history is also unsound in light of the Supreme Court's ruling in *Oncale* that Title VII's prohibition of sex-based discrimination "must extend to [discrimination] of any kind that meets the statutory requirements."[82]

Indeed, courts and numerous federal agencies (including the Department of Justice) have recognized all of this—and declined to follow each of the three *Kiley* rationales—with respect to gender identity. Just last month, for example, the Department of Justice filed an amicus brief to the Fourth Circuit explaining that Title IX prohibits discrimination on the basis of gender identity. In that brief, the Department of Justice succinctly explained:

> To be sure, a few courts have held, largely based on assumptions about what Congress must have intended when it enacted Title VII in 1964, that the prohibition on sex discrimination does not apply to discrimination against transgender individuals. *See, e.g.*, *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1221-1222 (10th Cir. 2007) (relying on *Ulane* [*v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1084-1087 (7th Cir. 1984)]). But as *Schroer* observed, those decisions "represent an elevation of 'judge-supposed legislative intent over clear statutory text.'" 577 F. Supp. 2d at 307 (quoting *Zuni Pub. Sch. Dist. No. 89 v. Department of Educ.*, 550 U.S. 81, 108 (2007) (Scalia, J., dissenting)). It may well be that the Congresses that enacted Title VII in 1964 and Title IX in 1972 did not have transgender individuals in mind. But the same can be said for other conduct that is now recognized as prohibited sex discrimination under those statutes. *See, e.g.*, *Oncale*[], 523 U.S. 75[]. As the Supreme Court explained in *Oncale*, "male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII." *Id.* at 79. Nonetheless, the Court emphasized that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of

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[80] *Id.*

[81] *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (internal quotation marks omitted).

[82] *Oncale*, 523 U.S. at 79-80.

> our laws rather than the principal concerns of our legislators by which we are governed." *Ibid.* Excluding from the statute's purview conduct that falls within its plain text simply because Congress may not have contemplated it "is no longer a tenable approach to statutory construction." *Schroer*, 577 F. Supp. 2d at 307.[83]

The same is no less true with respect to sexual orientation. The legislative history of Title VII and Title IX are not helpful in determining if Congress intended the sex discrimination prohibition to prohibit sexual orientation discrimination. And even if Congress did not have sexual orientation discrimination in mind when it enacted Title VII or Title IX, that fact does not determine whether the statutory text "because of sex" or "on the basis of sex" includes sexual orientation discrimination. For, again, the Supreme Court has unanimously ruled that "statutory prohibitions often go beyond the principal evil [they were passed to combat] to cover reasonably comparable evils," and that Title VII's prohibition of sex-based discrimination "must extend to [sex-based discrimination] of any kind that meets the statutory requirements."[84]

Not only are the proffered rationales for holding that sexual orientation discrimination does not constitute sex discrimination hollow, we are aware of no federal Court of Appeals that has engaged in a sustained analysis about what is *actually occurring* with respect to sex and gender when someone is discriminated against "on the basis of sexual orientation." Indeed, these courts merely assume that sexual orientation and sex must be different and distinct, but why must that be so?[85] To the contrary, as explained above, the definition of sexual orientation necessarily is sex-based. And, as the EEOC and other courts have carefully explained, sexual orientation discrimination stems from sex-based considerations. OCR should not repeat *Kiley*'s anemic analyses in writing the Final Rule.

The Seventh Circuit's recent decision process in *Muhammad v. Caterpillar, Inc.* is also illuminating. The plaintiff alleged that his co-workers subjected him to racial and sexual harassment, including references and slurs related to his sexual orientation, and that he was suspended after complaining about the harassment to his supervisor.[86] Affirming summary judgment to the employer, the Seventh Circuit issued an opinion in September 2014 stating, based on a then 14-year-old circuit precedent, that Title VII's prohibition on sex discrimination categorically does not extend to a person's sexual orientation.[87] The plaintiff sought rehearing, and the EEOC filed a brief in support. The EEOC urged the Seventh Circuit to "modify the categorical statements [about Title VII's coverage with respect to sexual orientation] in its

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[83] Brief for the United States as Amicus Curiae Supporting Plaintiff-Appellant and Urging Reversal at 12-13, *G.G. v. Gloucester County School Bd.*, No. 15-2056 (4th Cir. Oct. 28, 2015) (ECF No. 25-1).

[84] *Oncale*, 523 U.S. at 79-80.

[85] *Cf.* Letter from U.S. Attorney General Eric H. Holder, Jr. to The Honorable John A. Boehner, Speaker, U.S. House of Representatives (Feb. 23, 2011) ("And none engages in an examination of all the factors that the Supreme Court has identified as relevant to a decision about the appropriate level of scrutiny."), *available at* http://www.justice.gov/opa/pr/letter-attorney-general-congress-litigation-involving-defense-marriage-act.

[86] 767 F.3d 694, 696 (7th Cir. 2014).

[87] *See* 2014 WL 4418649, at *2 (7th Cir. Sept. 9, 2014) (citing *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1085 (7th Cir. 2000)).

opinion, overruling this Court's precedent if necessary."[88] The Seventh Circuit heeded the EEOC's counsel and issued an amended decision in October 2014 that omitted the problematic language and ruled on an entirely different ground.[89] While we must not read too much into the Seventh Circuit's substantial amendments to its *Muhammad* decision, the court's actions at least cast doubt on the viability of its (and other courts') prior precedent holding that Title VII does not cover sexual orientation discrimination.[90]

D. Conclusion and Recommendations

In 2014, when Attorney General Holder adopted *Macy*'s holding for the Department of Justice's Title VII purposes, he recognized that "courts have reached varying conclusions about whether discrimination based on gender identity in and of itself—including transgender status—constitutes discrimination based on sex."[91] The same can be said for sexual orientation as a form of sex discrimination. Similarly, in 2011, the Attorney General determined that, under the Equal Protection Clause, discrimination on the basis of sexual orientation is subject to heightened judicial review, despite the "substantial circuit court authority applying rational basis review to sexual-orientation classifications."[92] The Attorney General "carefully examined each of those decisions" and concluded they were not sound.[93] OCR should undertake the same careful analyses with respect to Section 1557's coverage of sexual orientation discrimination.

For the reasons provided above, the case law is not as "mixed" as the Proposed Rule suggests. The law—and importantly logic and critical thinking—supports OCR in concluding that sexual orientation discrimination is a species of sex discrimination. Accordingly, we recommend that the Final Rule define "on the basis of sex" to include sexual orientation. In turn, we suggest "sexual orientation" be defined as "heterosexuality, homosexuality, and bisexuality."[94]

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[88] Brief of the U.S. Equal Employment Opportunity Commission As Amicus Curiae in Support of Rehearing, at 4, *Muhammad v. Caterpillar, Inc.*, No. 12-1723 (7th Cir. Oct. 9, 2014) (ECF No. 54).

[89] *See* 767 F.3d 694 (7th Cir. 2014).

[90] *See Isaacs*, 2015 WL 6560655, at *3 (citing *Muhammad* for the same).

[91] Attorney General Memorandum, *Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of* 1964 (Dec. 15, 2014), *available at* http://www.justice.gov/file/188671/download. Similarly, in *Schroer*, the court stated:

> What makes Schroer's sex stereotyping theory difficult is that, when the plaintiff is transsexual, direct evidence of discrimination based on sex stereotypes may look a great deal like discrimination based on transsexuality itself, a characteristic that, in and of itself, nearly all federal courts have said is unprotected by Title VII.

577 F. Supp. 2d at 305 (collecting cases).

[92] *See* Holder Letter, *supra* note 85.

[93] *Id.*

[94] *See* IOM, *supra* note 7, at 28 ("[S]exual orientation is often discussed according to three main categories.").

Prohibiting sexual orientation discrimination in the Final Rule, moreover, would align it with other non-discrimination regulations HHS has issued pursuant to the ACA that prohibit sexual orientation discrimination.[95] Such consistency would serve to more fully protect LGB people in the healthcare arena and would provide greater clarity to covered entities and the broader public about the scope of the ACA's non-discrimination protections.

Regardless of whether the Final Rule prohibits sexual orientation discrimination as per se sex discrimination, the Final Rule should be explicit about its protections for LGB people and the scope of prohibited sex discrimination with respect to them. Of particular importance, the Final Rule should explain that prohibited sex discrimination includes sexual orientation discrimination that is based on gender stereotypes, norms, preferences, or expectations. Thus, *at the very least*, the definition of "on the basis of sex" should include "sexual orientation when based on sex-based considerations including sex stereotypes."

The Final Rule should also explain that conduct that constitutes sex-based sexual orientation discrimination includes not only discrimination based on stereotypes about masculinity or femininity,[96] but also discrimination based on disapproval of or hostility toward nonconformity with the gender stereotype that persons form (or should form) intimate, romantic, or spousal relationships with a person of a different sex, rather than a person of the same sex.[97] Accordingly, we recommend that the Proposed Rule's definition of "sex stereotypes" be revised as follows to comport with case law (deleting the strikethroughs and adding the bold italics):

> Sex stereotypes refers to stereotypical notions of gender, including ***norms, preferences, or*** expectations of how an individual represents or communicates gender to others, such as behavior, clothing, hairstyles, activities, voice, mannerisms, or body characteristics. These stereotypes can include expectations that gender can only be constructed within two distinct opposite and disconnected forms (masculinity and femininity), ~~and~~ that gender cannot be constructed outside of this gender construct (individuals who identify as neither, both, or as a combination of male and female genders)~~.~~***, that individuals consistently identify with one and only one of two genders (male or female), and that they act in conformity with the gender-related expressions stereotypically associated with that gender. Sex stereotypes also include gendered norms, preferences, or expectations related to the appropriate roles or behavior of men and women, such as the expectation that women are primary caregivers, and aspects of an individual's sexual orientation, such as the sex of an individual's sexual or romantic partners.***

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[95] *See* 45 C.F.R. §§ 155.120(c)(1)(ii), 147.104(e), 156.200(e), 156.125(a), and 156/125(b)).

[96] *See, e.g.*, *Koren*, 894 F. Supp. 2d at 1037-38 (concluding that discrimination against a male plaintiff based on his adoption of his husband's surname—"a 'traditionally' feminine practice"—could constitute a failure to conform to gender stereotypes).

[97] *See, e.g.*, *Heller*, 195 F. Supp. 2d at 1224 (concluding that a claim for discrimination based on gender stereotypes was actionable where an employer did not approve of a lesbian employee because she "is attracted to and dates other women, whereas [the employer] believes that a woman should be attracted to and date only men").

To ensure clarity of the Final Rule, we recommend that it incorporate a non-exhaustive list of examples of prohibited sex discrimination related to actual or perceived sexual orientation, including but not limited to:

- A man is admitted to a hospital that receives federal financial assistance. On the intake form, the man lists a male name as the emergency contact, stating on the form that his relationship to the emergency contact is "domestic partner." One of the nurses sees this and tells the other nurses who all agree that men should only be in relationships with women. The nurses do not promptly tend to the patient's needs, as they do individuals who are in relationships with someone of a different sex. This conduct is prohibited sex discrimination.[98]

- A woman telephones an insurance carrier about acquiring health insurance. She asks about insurance coverage for her and her wife. The insurance carrier's telephone operator does not tell the woman about the plan that likely is best for her but instead offers a plan that is more expensive and is otherwise not suitable, because, in the operator's view, women should marry men not women. This conduct is prohibited sex discrimination.[99]

- A participant in a health program that receives federal financial assistance is constantly referred to as "fag" "faggot" and "gay" by program staff. The program leader informs the participant that "nobody wants you here," based on rumors of his perceived sexual orientation. This conduct is prohibited sex discrimination.[100]

- At a hospital that receives federal financial assistance, the admitting personnel assumes that someone seeking admittance to the facility is lesbian based on how she is dressed, how her hair is styled, and her manner of walk. As a result, the admitting personnel suggests to this person that she would be better served elsewhere and refuses to admit her. This conduct is prohibited sex discrimination.[101]

- At a health fair, a man approaches an insurance carrier about acquiring health insurance. The insurance carrier's representative believes the man is gay because, in the representative's view, he appears and speaks in an "effeminate" manner, his hair is well groomed, and he sat

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[98] *Cf., e.g.*, *Heller*, 195 F. Supp. 2d at 1223 ("One way (but certainly not the only means) of satisfying [Title VII] is to inquire whether the harasser would have acted the same if the gender of the victim had been different. . . . A less direct route to the same result is provided by [a gender stereotyping theory under *Price Waterhouse*].").

[99] *Cf., e.g., id.*; *Hall*, 2014 WL 4719007, at *3-*4.

[100] *Cf., e.g., Nichols*, 256 F.3d at 870, 875 (9th Cir. 2001) (holding that the epithet "faggot" was used because of sex); *Doe by Doe v. City of Belleville*, 119 F.3d at 593 n. 27 ("Indeed, a homophobic epithet like "fag," for example, may be as much of a disparagement of a man's perceived effeminate qualities as it is of his perceived sexual orientation."); *Henderson*, 2013 WL 1352158, at *1-*2, *5-*6; *Couch*, 2013 WL 4499198, at *8 ("We note that the words "fag" and "faggot" have been historically used in the United States as a highly offensive, insulting, and degrading sex-based epithet against gay men. Additionally, the words "fag" and "faggot" are offensive, insulting, and degrading sex-based epithets historically used when a person is displaying their belief that a male is not as masculine or as manly as they are.").

[101] *Cf., e.g., Dawson*, 398 F.3d at 221 ("Generally speaking, one can fail to conform to gender stereotypes in two ways: (1) through behavior or (2) through appearance.").

"the way a woman would sit." The insurance carrier quotes the man a higher premium than is warranted. This conduct is prohibited sex discrimination.[102]

- A female patient at long-term care facility receiving federal financial assistance is openly bisexual. Facility staff constantly make derogatory comments about her sexual orientation and repeatedly ask her questions such as "When you were with women, did you wear the dick in your relationships?"; "Were you the man?"; and "Who wore the pants?" This conduct is prohibited sex discrimination.[103]

- A participant in a health program that receives federal financial assistance, who is open about being a gay man, is told by program staff that he is not a "real man" or a "manly man" and that he should "toughen up." As a result, the program staff inhibit the participant's ability to take full advantage of the program. The participant believes he is being targeted because of his sexual orientation. This conduct is prohibited sex discrimination.[104]

IV. ASSURANCES REQUIRED; DATA COLLECTION NEEDED

Proposed Rule § 92.5 requires a covered entity to submit an assurance that it is in compliance with Section 1557 and the implementing regulations. We agree that such assurances are necessary. In addition, we recommend requiring covered entities to collect and report relevant demographic data to help demonstrate compliance. Robust data collection is an essential component of effective efforts to monitor compliance with non-discrimination laws such as Section 1557.[105] However, covered entities should not attempt to determine someone's sexual orientation or gender identity through visual observation or any similar method. Rather, such data collection should be based on individuals' voluntary disclosure of their sexual orientation and gender identity, and anyone's refusal to provide such information must be protected from adverse treatment. Further, covered entities should be required to keep such data confidential and use them only in ways that are in accordance with Section 1557 and its implementing regulations.

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[102] *Cf., e.g., Prowel*, 579 F.3d at 287-92 (holding jury could conclude that harassment of a gay man targeting his gender-nonconforming behavior and appearance is sex discrimination); *Centola*, 183 F. Supp. 2d at 409-10 (same holding based on different allegations)

[103] *Cf., e.g.*, *Heller*, 195 F. Supp. 2d at 1216-20, 1223-25.

[104] *Cf., e.g., Miller*, 177 Fed. App'x. at 197 (holding "a factfinder could reasonably infer that [the plaintiff's] failure to conform to sex stereotypes was a reason for his being discriminated against based on his gender[,]" including evidence that the plaintiff was subjected "to a regimen intended to 'make a man' out of him"); *Smith*, 378 F.3d at 572 (holding that allegation that plaintiff was harassed for "not being masculine enough" stated a claim of discrimination on the bases of sex stereotyping); *Doe by Doe v. City of Belleville*, 119 F.3d at 581 (holding that a man who is harassed by his male coworkers because he exhibits his masculinity in a way that does not meet his coworkers' idea of how men are to behave is harassed because of his sex).

[105] *Cf.* ACA § 4302 (requiring data collection related to health disparities by federally conducted or supported healthcare or public health programs, activities, and surveys).

V. THE FINAL RULE SHOULD NOT PROVIDE ANY ADDITIONAL RELIGIOUS EXEMPTION

The Preamble to the Proposed Rule seeks comment on the proper scope of the Final Rule to "appropriately protect[] sincerely held religious beliefs to the extent that those beliefs conflict with provisions of the regulation."[106] In seeking such comments, the Preamble also recognizes that "a fundamental purpose of the ACA is to ensure that vital health care services are broadly and nondiscriminatorily available to individuals throughout the country."[107] We agree that our laws need to appropriately balance religious liberties, non-discrimination protections, and individuals' vital need for healthcare. In balancing those interests, we *first* observe that the plain language of Section 1557 does not authorize any religious exemption to it beyond those provided elsewhere in Title I of the ACA.[108] *Second*, research leads us to conclude that existing federal laws—often complemented by state laws—already provide robust protections for religious liberties such that the Final Rule need not include any additional religious exemption. Sincerely-held religious beliefs in the healthcare context are already strongly protected at the federal and state level by, in addition to constitutional protections, statutory and regulatory provisions. These include healthcare refusal laws,[109] the federal Religious Freedom Restoration Act ("RFRA") and state RFRAs,[110] provisions in the ACA related to abortion services,[111] and regulations issued under the ACA related to preventive health services.[112]

The inclusion of additional religious exemptions could significantly undermine the non-discrimination protections Section 1557 explicitly provides. Unlike many other kinds of

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[106] 80 Fed. Reg. 54,173.

[107] *Id.*

[108] *See* 42 U.S.C. § 18116(a) ("Except as other provided in this Title . . .").

[109] *See, e.g.*, 42 U.S.C. 300a-7; 42 U.S.C. 238n; Consolidated and Continuing Appropriations Act of 2015, Pub. L. No. 003-235, 507(d) (Dec. 16, 2014). *See generally* Douglas NeJaime & Reva B. Siegel, "Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics," 124 *Yale L.J.* 2516, 2531-42 (2015) (discussing the growth of conscience-based healthcare refusal laws at the federal and state level, and observing that "[f]ueled by complicity-based objections, refusal laws expanded to cover acts and actors only remotely connected to the challenged healthcare service"); Douglas NeJaime & Reva Siegel, "*Conscience and the Culture Wars*," *Am. Prospect* 70 (Summer 2015) ("[H]ealth care refusal laws rarely require institutions to provide alternative care; many even authorize providers to refuse to inform patients that they are being denied services that they may want.").

[110] 42 U.S.C. 2000bb-1; *see also Burwell v. Hobby Lobby Stores, Inc*., 134 S. Ct. 2751 (2014) (holding, under RFRA, that ACA provisions requiring employee health insurance plans to include contraception coverage may not be applied to closely-held for-profit corporations with sincerely-held religious objections to that requirement); NeJaime & Siegel, "Conscience Wars," *supra* note 109, at 2516-29 (describing as "complicity-based conscience claims" the unique type of claims raised in *Hobby Lobby* and more generally being raised by people of faith seeking religious exemptions from antidiscrimination laws and other laws concerns sex, reproduction, and marriage, on the theory that those laws make the objector complicit in the assertedly sinful conduct of others); *id*. at 2579-85 (discussing third-party harm in the context of RFRA).

[111] *See, e.g.*, 42 U.S.C. 18023. For example, "No qualified health plan offered through an Exchange may discriminate against any individual health care provider or health care facility because of its unwillingness to provide, pay for, provide coverage of, or refer for abortions." 42 U.S.C. § 18023(b)(4).

[112] *See* 45 C.F.R. 147.131.

religious exemptions, religious exemptions for healthcare providers have detrimental effects on third parties—here, patients.[113] In the healthcare setting, where individuals are seeking vital services, refusals are especially likely to impose harm. Patient access to services can be obstructed, and patients can be denied important information about alternative providers. Of course, refusals can also stigmatize patients. Given the intersection with non-discrimination provisions, refusals would affect groups already vulnerable to barriers to access and discriminatory treatment. Courts, as well as legislatures, have routinely denied religious exemptions when doing so would impose significant harm on others.[114] Accordingly, adding religious exemptions to Section 1557 would be unwise as both a policy and legal matter.

IV. CONCLUSION

For the reasons provided above, we recommend that the Final Rule (1) prohibit sex discrimination on the basis of sex stereotypes, gender identity, and sexual orientation; (2) expand the definition of sex stereotypes to comport with existing case law; (3) provide that LGB people are protected from sex discrimination, including sex stereotyping; (4) prohibit sexual orientation discrimination that is sex-based, and provide examples of such prohibited discrimination; (5) prohibit discrimination on the basis of association; (6) require covered entities to certify their compliance with ACA Section 1557 and the implementing regulations, and collect and report relevant data; and (7) not include any additional religious exemption.

We thank you for the opportunity to comment on the Proposed Rule. We applaud the work of OCR to develop these regulations and, more generally, to vigorously and carefully enforce the non-discrimination protections of the ACA and other laws.

Respectfully Submitted,

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(signatories continued on following pages)

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[113] *See* NeJaime & Siegel, "Conscience Wars," *supra* note 109, at 2566-78 (discussing a wide variety of material and dignitary harms that result from accommodating complicity-based conscience claims); *see also id.* at 2585 ("Concern about material and dignitary harm to third parties might lead legislators to reject a proposed accommodation or, at the very least, to consider strategies to minimize the accommodation's impact on other citizens. Accommodations that do not include mechanisms to offset significant third-party effects—such as those common in healthcare refusal laws—single out some citizens to bear the cost of others' religious convictions."); *see also Hobby Lobby*, 134 S. Ct. at 2760 ("The effect of the HHS-created accommodation on the women employed by Hobby Lobby and the other companies involved in these cases would be precisely zero."); *id.* at 2780-83.

[114] *See, e.g.*, *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710 (1985); *Tony and Susan Alamo Foundation v. Sec'y of Labor*, 471 U.S. 290, 304-05 (1985); *United States v. Lee*, 455 U.S. 252, 261 (1982).

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