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NEW YORK  
CITY BAR

**REPORT BY THE LESBIAN, GAY, BISEXUAL, TRANSGENDER,  
AND QUEER RIGHTS COMMITTEE**

**POLICY RECOMMENDATIONS RESPECTFULLY SUBMITTED TO THE  
BIDEN-HARRIS ADMINISTRATION REGARDING  
LEGAL PROTECTIONS FOR LGBTQ COMMUNITIES**

We write on behalf of the Lesbian, Gay, Bisexual, Transgender, and Queer (“LGBTQ”) Rights Committee (“the Committee”) of the New York City Bar Association. We submit this report to the Biden-Harris Transition to summarize the key actions that we hope President Biden and his Administration will continue to take to protect LGBTQ communities. While there are many areas where support is vital, the Committee focuses on the following priorities where swift change is needed: civil rights in education, employment, and health; and immigration.

**I. EXECUTIVE SUMMARY**

The Committee condemns the Trump Administration’s attacks, both targeted and caustic, on our communities’ legal protections over the last four years. Often on a daily basis, we watched the rise of threats to LGBTQ lives and human dignity. From blocking access to asylum for LGBTQ people fleeing deadly persecution, to rolling back foundational civil rights protections for children and adults alike through policymaking and interfering in litigation, these legally dubious positions must be systematically reversed as promptly as possible before more irreparable damage is done.

We ask that you consider our recommendations to take the following steps to “Build Back Better” to an improved baseline that advances access to civil and economic justice, bodily autonomy, and asylum more than ever before and free from constant threat.

- Revise and expand civil rights protections in:
  - Title IX: Equity in Education, including athletics;
  - Employment;
  - The Affordable Care Act (“ACA”);
  - Protect LGBTQ people from overly broad religious civil rights exemptions;
- Institute intersex surgery protections through the U.S. Department of Health and Human Services (“HHS”); and
- Rescind revised asylum criteria.

**About the Association**

*The mission of the New York City Bar Association, which was founded in 1870 and has 25,000 members, is to equip and mobilize a diverse legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest in our community, our nation, and throughout the world.*

## II. DETAILED RECOMMENDATIONS

### A. Revise and Expand Civil Rights Protections

#### 1. *Title IX: Equity in Education*

As Justice Sonia Sotomayor aptly stated, “We are never going to reach equality in America until we achieve equality in education.”<sup>1</sup> For decades, LGBTQ students have been denied the foundational civil rights protections that were solidified almost fifty years ago with the passage of Title IX of the Education Amendments of 1972.<sup>2</sup> In shifting federal, state, and local political environments—at best, apathetic to students’ interests, and, at worst, overtly hostile—it is more important than ever to ensure all students receive federal gender-based protections under Title IX. In the wake of the grave injustices committed under the former Administration, the Committee urges you and your Administration to take swift, definitive action to finally secure lasting equity in education for this country’s LGBTQ students. Without this clarity, students of all ages across the country will continue to face challenges to their fundamental rights throughout their education—from the most basic access to school restrooms to participation in class, musicals, athletics, school dances, and other programs and activities consistent with their gender identity and expression and/or sexual orientation.

As you know, Title IX prohibits discrimination based on sex in the education programs and activities of education institutions that receive federal assistance.<sup>3</sup> Since Title IX was enacted, the guidance and jurisprudence of the U.S. Department of Education (“U.S. DOE”) and its Office for Civil Rights (“OCR”) evolved to clarify that, logically, these sex discrimination protections apply to gender identity and expression and sexual orientation.<sup>4</sup> However, the harmful events and decisions of the last four years demonstrate that without definitive action at the federal level, this progress for LGBTQ students is vulnerable to attack. Even those students who make it to court suffer as their cases often languish in state and federal fora for years. As a recent example, even after transgender student Gavin Grimm prevailed at multiple levels of litigation,<sup>5</sup> the Gloucester School District again petitioned the Supreme Court for certiorari<sup>6</sup> to challenge protections for

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<sup>1</sup> Interview by Abigail Golden-Vazquez with Justice Sonia Sotomayor (Mar. 24, 2017), in Abigail Golden-Vazquez, *Justice Sonia Sotomayor Speaks Out on Latino Identity and Civic Engagement*, ASPEN INST. (Apr. 3, 2017), <https://www.aspeninstitute.org/blog-posts/justice-sonia-sotomayor-speaks-latino-identity-civic-engagement>. (All Sites Last Visited May 19, 2021)

<sup>2</sup> 20 U.S.C. § 1681 *et seq.*; 34 C.F.R. § 106.

<sup>3</sup> *See* 20 U.S.C. § 1681(a).

<sup>4</sup> *See, e.g., Dear Colleague Letter on Transgender Students*, OCR and DOJ (May 13, 2016), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf> (Obama Administration guidance stating that Title IX protects gender identity) [hereinafter *2016 Dear Colleague Letter*], *rescinded by Dear Colleague Letter*, OCR and DOJ (Feb. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf> (Trump Administration rescinding that guidance); *see also, e.g., National Center for Transgender Equality, Federal Case Law on Transgender People and Discrimination*, <https://transequality.org/federal-case-law-on-transgender-people-and-discrimination> (last visited Mar. 14, 2021) (collecting federal cases).

<sup>5</sup> *Grimm v. Gloucester Cty. Sch. Bd.*, 400 F. Supp. 3d 444 (E.D. Va. 2019), *aff’d*, 972 F.3d 586 (4th Cir. 2020), *as amended* (Aug. 28, 2020).

<sup>6</sup> Petition for Writ of Certiorari, *Grimm*, 976 F.3d 399 (4th Cir. 2020), No. 20-1163.

transgender students against different treatment. The District frames its challenge in the Petition as follows: “The district court and the Fourth Circuit then held that both Title IX and the Fourteenth Amendment’s Equal Protection Clause forbid schools from denying transgender students access to the restrooms assigned to the opposite biological sex. Following yet another election, the current Administration has announced it intends to enforce that position nationwide.”<sup>7</sup>

The Committee is encouraged by your appointment of Dr. Miguel Cardona as Secretary of Education, and strongly endorses your immediate stand in support of LGBTQ students with your *Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation* (“January 2021 Order”),<sup>8</sup> *Executive Order on Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity*,<sup>9</sup> and April 6, 2021 letter to stakeholders announcing the forthcoming U.S. DOE public hearing, question and answer period, and anticipated Notice of Proposed Rulemaking.<sup>10</sup> These are important first steps to begin reversing the incalculable damage from the flawed legal position of the Department of Justice (“DOJ”), U.S. DOE, and OCR under the Trump Administration. The Committee is also relieved and heartened to see that your Administration rejects the untenable legal positions (supporting protections only based on “biological sex”) outlined in former Principal Deputy General Counsel’s memorandum to the former Acting Assistant Secretary of OCR<sup>11</sup> and similar DOJ communications, and that the DOJ Civil Rights Division clarified in March 2021 that Title IX protections include gender identity and sexual orientation.<sup>12</sup>

The Committee respectfully requests the following additional steps to solidify that Title IX’s protections cover gender identity (beyond “male” and “female”), gender expression, and sexual orientation, consistent with the Supreme Court of the United States’ decision in *Bostock v. Clayton Cnty.*:<sup>13</sup>

- a) Amend the Title IX regulations<sup>14</sup> to explicitly recite these protections, such as by defining “sex” to include “gender identity and expression” and “sexual orientation” as applicable to all relevant regulatory provisions;

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<sup>7</sup> *Id.* at 2.

<sup>8</sup> Exec. Order No. 13988, 86 Fed. Reg. 7023 (Jan. 25, 2021).

<sup>9</sup> Exec. Order No. 14021, 86 Fed. Reg. 13803 (Mar. 11, 2021).

<sup>10</sup> Letter from Suzanne B. Goldberg, OCR (Apr. 6, 2021), <https://www2.ed.gov/about/offices/list/ocr/correspondence/stakeholders/20210406-titleix-eo-14021.pdf>.

<sup>11</sup> See Reed Rubinstein, *Memorandum for Kimberly M. Richey Acting Assistant Secretary of the Office of Civil Rights*, DOE (Jan. 8, 2021), <https://www2.ed.gov/about/offices/list/ocr/correspondence/other/ogc-memorandum-01082021.pdf>.

<sup>12</sup> Pamela S. Karlan, *Memorandum on Application of Bostock v. Clayton County to Title IX of the Education Amendments of 1972*, (Mar. 26, 2021), <https://www.justice.gov/crt/page/file/1383026/download>.

<sup>13</sup> 140 S. Ct. 1731 (2020) (holding that gender identity and sexual orientation are protected under the “sex” provisions of Title VII).

<sup>14</sup> 34 C.F.R. pt. 106.

- b) Support passage of The Equality Act<sup>15</sup> in its current form, without religious exemptions, as the U.S. House of Representatives recently passed again. The Act would amend various federal laws, including Titles II, VI, and VII of the Civil Rights Act of 1964 to protect individuals based on sexual orientation and gender identity in employment, education, housing, credit, and jury service. This would both build on *Bostock* by codifying protections for LGBTQ protected characteristics and extend those Civil Rights Act protections to federally funded programs and a broader scope of public accommodations, including transportation and online services; and
- c) Issue new OCR guidance, such as through notice-and-comment rulemaking and/or re-issuing a more expansive *Dear Colleague Letter on Transgender Students*, that increases the protections described in the Obama Administration’s letter.<sup>16</sup>

- i. Athletics and Transgender Students

The Committee celebrates your January 2021 Order,<sup>17</sup> which reaffirms that Title IX protections (and those under other statutes) include sexual orientation and gender identity, as a powerful opening salvo signaling a changing tide in the battle for LGBTQ rights, dignity, and recognition in American education. In the context of the broader campaign for transgender rights, transgender athletes have been disingenuously targeted by transphobic voices as proxies in the broader goal of categorically excluding transgender people from public spaces.<sup>18</sup>

For the past four years, the Trump Administration served as a weapon for these voices to turn their discriminatory animus into law, as starkly illustrated for transgender student athletes. For example, in 2017 the DOJ rescinded the Obama Administration OCR’s *Dear Colleague Letter*

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<sup>15</sup> S. 393, 117th Cong. (2021); H.R. 5, 117th Cong. (2021). See Danielle Kurtzleben, *House Passes The Equality Act: Here’s What It Would Do*, NPR (Feb. 24, 2021 4:39 PM E.T.), <https://www.npr.org/2021/02/24/969591569/house-to-vote-on-equality-act-heres-what-the-law-would-do>.

<sup>16</sup> See 2016 *Dear Colleague Letter*, *supra* note 4.

<sup>17</sup> *Supra* note 8.

<sup>18</sup> See, e.g., Prager, U., *The End of Women’s Sports*, YOUTUBE (Nov. 16, 2020), <https://www.youtube.com/watch?v=-BuV-s1SYLk> (video sponsored by the Alliance Defending Freedom (“ADF”), a Southern Poverty Law Center-designated hate group, featuring the named plaintiff in *Soule v. Conn. Interscholastic Athletic Conference*, referring to transgender girls as “biological males” and “biological boys” and referring to cisgender girls as “actual girls”); Melissa Gira Grant, *The Mothers Leading the Battle Against Trans Student Athletes*, NEW REPUBLIC (Feb. 19, 2021), <https://newrepublic.com/article/161425/trans-student-athletes-white-supremacy-mothers> (“The Connecticut girls’ mothers have used the idea of defending their daughters to fight for trans exclusionary laws and policies. Their appeals are couched in the language of protection and womanhood, which have long been calls to preserve a racial hierarchy. In these efforts to legalize discrimination in school athletics, there is a parallel to the fight—though it is a different one—to maintain school segregation based on race. When right-wing media look to illustrate the trans student athlete ‘debate,’ they often pick Black trans girls and women to make these accomplished athletes seem like outsiders, like threats.”); Kate Sosin, *An elite group tackling transgender sports inclusion has a compromise — and trans people aren’t part of it*, 19TH (Feb. 5, 2021), <https://19thnews.org/2021/02/an-elite-group-tackling-transgender-sports-inclusion-has-a-compromise-and-trans-people-arent-part-of-it/> (critiquing the Women’s Sports Policy Working Group as a disingenuous attempt to exclude transgender girls from sports and contrasting the group’s stated goal of finding a middle ground in the debate with its failure to include transgender voices in the working group).

on *Transgender Students*<sup>19</sup> and in March 2020 filed a Statement of Interest<sup>20</sup> supporting the plaintiffs in *Soule v. Conn. Interscholastic Athletic Conference* in their opposition to transgender participation in women’s high school sports. The OCR also issued a Revised Letter of Impending Enforcement Action<sup>21</sup> in reference to *Soule* maintaining that the decision in *Bostock*,<sup>22</sup> interpreting protections on the basis of “sex” to include gender identity, does not apply to transgender students under Title IX. The Committee commends the DOJ for withdrawing support<sup>23</sup> from the plaintiffs in *Soule* and urges the Administration to continue to reverse the Trump Administration’s activities because they are patently legally flawed and incredibly harmful for students. In recently granting defendants’ motion to dismiss in *Soule*, on procedural grounds, and finding plaintiffs’ action seeking to enjoin the gender-inclusive athletics policy to be moot, the Court emphasized that “[e]very Court of Appeals to consider the issue” has held in an “unbroken line of authority” that “Title IX requires schools to treat transgender students consistent with their gender identity.”<sup>24</sup>

As noted above, codifying the Title IX gender identity and expression protections from your Administration’s January 2021 Order<sup>25</sup> is a key next step. Until then, our nation’s students remain vulnerable to continued denial of equal protection under the law. At the federal level, in February 2021, Congress introduced the federal Protection of Women and Girls in Sports Act.<sup>26</sup> The proposed law would recognize sex solely on the basis of reproductive biology and genetics at birth, enforce the gender binary, and erase intersex people’s rights. It also has the potential to subject students to stigmatizing and humiliating genitalia examinations to determine their eligibility to participate in sports.

Moreover, as the American Civil Liberties Union (“ACLU”) recently warned, there is a targeted and coordinated attack against transgender students underway: “In 2020, 18 states introduced legislation that would ban transgender student athletes from participating in school sports.”<sup>27</sup> As of April 2021, at least 30 states have introduced similar legislation.<sup>28</sup> Even since that ACLU warning, Mississippi recently passed a law specifically discriminating against transgender

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<sup>19</sup> See 2016 *Dear Colleague Letter*, *supra* note 4 and accompanying text.

<sup>20</sup> See Matthew J. Donnelly, Statement of Interest, DOJ (March 24, 2020), *Soule v. Conn. Interscholastic Athletic Conference*, No. 3:20 Civ. 00201, (D. Conn., filed Feb. 12, 2020), <https://www.justice.gov/opa/press-release/file/1262901/download>.

<sup>21</sup> See Kimberly M. Richey, *Revised Letter of Enforcement Action*, OCR (Aug. 31, 2020), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/01194025-a2.pdf> (regarding *Soule* and related cases).

<sup>22</sup> *Supra* note 13.

<sup>23</sup> Suzanne B. Goldberg, *Withdrawal Letter*, DOJ (Feb. 23, 2021), *Soule*, No. 3:20 Civ. 00201, (D. Conn., filed Feb. 12, 2020), <https://www.aclu.org/legal-document/soule-et-al-v-ct-association-schools-et-al-doj-withdrawl-letter>.

<sup>24</sup> *Soule*, No. 3:20-CV-00201 (RNC), 2021 WL 1617206, at \*10 (D. Conn. Apr. 25, 2021).

<sup>25</sup> *Supra* note 8.

<sup>26</sup> S. 251, 117th Cong. (2021); H.R. 426, 117th Cong. (2021).

<sup>27</sup> See *The Coordinated Attack on Trans Student Athletes*, ACLU (Feb. 26, 2021), <https://www.aclu.org/news/lgbt-rights/the-coordinated-attack-on-trans-student-athletes>.

<sup>28</sup> See *West Virginia Senate Passes Anti-Trans Athlete Bill*, HUMAN RIGHTS CAMPAIGN (Apr. 8, 2021), <https://www.hrc.org/press-releases/west-virginia-senate-passes-anti-trans-athlete-bill>.



students in athletics,<sup>29</sup> and New Jersey could be next.<sup>30</sup> The lawmakers launching this concerted attack report no real world examples where cisgender students are disadvantaged because of transgender students in athletics,<sup>31</sup> and New York Times<sup>32</sup> and Washington Post<sup>33</sup> articles (reporting that the number of states with anti-transgender legislation has climbed to 34) outline how harmful these policies would be for students. In sum, these laws would prevent transgender students from participating in athletics by either requiring inaccessible medical interventions (which, even if accessible, may not be consistent with their gender identity, health needs, etc.) as a condition precedent, or by forcing them to renounce their identity in order to compete with others based on the sex they were incorrectly assigned at birth rather than their gender identity.

The Committee urges the Biden Administration to be vigilant so as to identify and oppose legislation that serves to discriminate against transgender athletes, including a bill introduced in the current legislative session.<sup>34</sup> It is important that the Biden Administration be proactive in ensuring that transgender athletes are protected against discrimination.<sup>35</sup> Examples of necessary protections include, but are not limited to:

- a) The right to use bathrooms, locker rooms, and other facilities consistent with a person's gender—including nonbinary—identity. This can be achieved with gender-neutral facilities.<sup>36</sup>

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<sup>29</sup> S.B. 2536, Reg. Session 2021 (Miss. 2021). See WLBT Digital, *Gov. Reeves signs bill banning trans athletes from school sports*, WMC (Mar. 13, 2021), <https://www.wmcactionnews5.com/2021/03/11/reeves-sign-bill-banning-trans-athletes-school-sports-thurs>; Alex Bollinger, *Mississippi is the First State to Pass a Law Attacking Transgender Youth*, LGBTQ NATION (Mar. 5, 2021), <https://www.lgbtqnation.com/2021/03/mississippi-first-state-pass-law-attacking-transgender-youth> (describing first such legislation of 2021).

<sup>30</sup> See *Legislation Would Mandate Participation Based on Sex at Birth*, CAPE MAY HERALD (Mar. 10, 2021), [https://www.capemaycountyherald.com/news/government/article\\_a77b8a42-81b0-11eb-bd18-a301c8ead89c.html](https://www.capemaycountyherald.com/news/government/article_a77b8a42-81b0-11eb-bd18-a301c8ead89c.html).

<sup>31</sup> See Associated Press, *Lawmakers can't cite local examples of problems with transgender girls in sports*, WCNC (Mar. 3, 2021), <https://www.wcnc.com/article/news/politics/national-politics/lawmakers-local-examples-problems-transgender-girls-sports/507-17dfb298-e774-4788-9819-dc704496f73b> (“Legislators in over 20 states have introduced bills this year that would ban transgender girls from competing on girls’ sports teams in public high schools. Yet in almost every case, sponsors cannot cite a single instance in their own state or region where such participation has caused problems.”).

<sup>32</sup> Gillian R. Brassil, *How Some States Are Moving to Restrict Transgender Women in Sports*, N.Y. TIMES (Mar. 11, 2021), <https://www.nytimes.com/2021/03/11/sports/transgender-athletes-bills.html>.

<sup>33</sup> See Elizabeth Sharrow, *Five States Ban Transgender Girls from Girls’ School Sports. But Segregating Sports by Sex Hurts all Girls*, WASH. POST (Apr. 16, 2021), <https://www.washingtonpost.com/politics/2021/04/16/five-states-ban-transgender-girls-girls-school-sports-segregating-sports-by-sex-hurts-all-girls/>; Will Hobson, *The Fight for the Future of Transgender Athletes*, WASH. POST (Apr. 15, 2021), <https://www.washingtonpost.com/sports/2021/04/15/transgender-athletes-womens-sports-title-ix/>.

<sup>34</sup> See Press release from Rep. Greg Steube, *Steube Reintroduces Bill to Protect Women and Girls in Competitive Sports*, STEUBE.HOUSE.GOV (Jan. 21, 2021), <https://steube.house.gov/media/press-releases/steube-reintroduces-bill-protect-women-and-girls-competitive-sports>.

<sup>35</sup> See Shoshana K. Goldberg, *Fair Play: The Importance of Sports Participation for Transgender Youth*, CTR. AM. PROGRESS (Feb. 8, 2021), <https://www.americanprogress.org/issues/lgbtq-rights/reports/2021/02/08/495502/fair-play> [hereinafter *Fair Play*] (listing proposed actions to ensure protection of transgender and nonbinary student athletes).

<sup>36</sup> See *id.*

- b) The right of transgender and intersex individuals to participate in sports. Every child should have the opportunity to participate in sports without compromising their gender identity. Participation in athletics benefits mental, physical, and social health and provides a source of empowerment. It has also been shown that participating in sports allows students to develop the skills necessary to eventually earn higher incomes.<sup>37</sup>
- c) The right to non-invasive, non-stigmatizing, and expeditious methods to determine eligibility for school sports teams. Students should not be subjected to genital examinations or hormone tests.<sup>38</sup>

One way to safeguard the long-term future of the rights of transgender athletes is by implementing national guidelines on creating a safe and supportive school environment for transgender and gender-nonconforming students. New York serves as a model for these national guidelines and allows transgender students to participate in sex-segregated sports teams in a manner consistent with their gender identity without any medical transition or invasive testing.<sup>39</sup>

Misleadingly, opponents to full inclusion of transgender athletes attempt to frame the issue as a false choice between the competing interests of cisgender and transgender female athletes.<sup>40</sup> We urge your Administration to be guided, instead, by this fundamental precept: requiring transgender students to medically transition prior to being given the opportunity to participate in sex-segregated sports teams enforces gender and racial stereotypes<sup>41</sup> and forces transgender, gender-nonconforming, and intersex students to be subjected to humiliating, invasive, and unnecessary medical exams. In a political climate where medical transition for youth is at risk, requiring medical transition for transgender students to participate in athletics in a manner consistent with their gender identities only serves to exclude transgender youth from sports.<sup>42</sup>

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<sup>37</sup> See *id.*

<sup>38</sup> See *id.*

<sup>39</sup> See e.g., *Rules & Regulations Handbook*, N.Y. STATE PUB. ATHLETIC ASS'N 48 (Feb. 2021), [http://www.nysphsaa.org/Portals/0/PDF/Handbook/2017-18%20Handbook/NYSPHSA%20Handbook%20%282017%29\\_3.pdf](http://www.nysphsaa.org/Portals/0/PDF/Handbook/2017-18%20Handbook/NYSPHSA%20Handbook%20%282017%29_3.pdf); *Guidance to School Districts for Creating a Safe and Supportive School Environment For Transgender and Gender Nonconforming Students*, N.Y.S. EDUC. DEP'T (July 2015), [http://www.p12.nysed.gov/dignityact/documents/Transg\\_GNCGuidanceFINAL.pdf](http://www.p12.nysed.gov/dignityact/documents/Transg_GNCGuidanceFINAL.pdf); *Guidelines to Support Transgender and Gender Expansive Students*, N.Y.C. DEP'T EDUC., <https://www.schools.nyc.gov/school-life/school-environment/guidelines-on-gender/guidelines-to-support-transgender-and-gender-expansive-students> (last visited Mar. 28, 2021).

<sup>40</sup> See, e.g., *NWLC Leads Amicus Brief Against Idaho Law That Targets Trans Women and Girls and Harms All Female Students*, NAT'L WOMEN'S LAW CTR. (Dec. 21, 2020), <https://nwlc.org/blog/nwlc-leads-amicus-brief-against-idaho-law-that-targets-trans-women-and-girls-and-harms-all-female-students> (articulating a position, in *Hecox v. Little*, against Idaho bill H.B. 500 and stating that the District Court had “soundly rejected” the argument that “discrimination against transgender girls is necessary to ensure athletic opportunities for cisgender girls...”), at p. 24. See also *Hecox v. Little*, No. 1:2020cv00184 - Document 63 (D. Idaho 2020) at 65 – 74.

<sup>41</sup> See *id.*

<sup>42</sup> See *Fair Play*, *supra* note 35; see generally, KATRINA KAKARIS & REBECCA M. JORDAN-YOUNG, *TESTOSTERONE: AN UNAUTHORIZED BIOGRAPHY* (2019).

## 2. *Employment*

President Obama and then-Vice President Biden made historic strides to expand opportunities and advance equality and justice for all Americans, including members of the LGBTQ communities. With respect to the area of employment law, these included the signing of an Executive Order<sup>43</sup> prohibiting federal contractors from discriminating against any employee or applicant for employment because of their gender identity or sexual orientation. Further, under President Obama, the DOJ issued guidance<sup>44</sup> that concluded that the prohibition against sex discrimination in Title VII encompassed claims of discrimination on the basis of gender identity, including transgender status, and agencies, including Office of Personnel Management, the State Department, Social Security Administration, and HHS, took numerous actions to ensure that transgender applicants and employees were treated fairly and without discrimination in the workplace.<sup>45</sup>

The Trump Administration, however, began scaling back those policies and positions. It further took aggressive positions in court filings and in cases that were in direct opposition to those taken by the prior administration and appointed federal judges with a judicial track record of disfavoring equality for LGBTQ people in the workplace.<sup>46</sup> The Committee hopes that the Biden Administration will readopt the positions undertaken by the Obama Administration<sup>47</sup> as a baseline, with the focus being a greater emphasis on equality in the workplace for all Americans, including LGBTQ people.

We urge the Biden Administration to continue to implement an ambitious LGBTQ workplace rights agenda in at least the following ways. First, the government should take positions that support and advance LGBTQ rights and equality on matters litigated in federal court, especially those that come before the U.S. Supreme Court. Second, all leadership positions appointed by the President should have a proven understanding and track record of supporting and advancing LGBTQ rights in the workplace. Third, we urge President Biden to appoint members to the federal judiciary who have shown a sympathetic understanding of the Court's role under the Constitution in the protection of personal and individual rights, including those of LGBTQ

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<sup>43</sup> Exec. Order 1367279, 79 Fed. Reg. 72985 (Dec. 9, 2014).

<sup>44</sup> U.S. Attorney General, *Memorandum on Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964*, DOJ (Dec. 15, 2014), <https://www.justice.gov/file/188671/download>.

<sup>45</sup> See, e.g., Office of the Press Secretary, *FACT SHEET: Obama Administration's Record and the LGBT Community*, WHITE HOUSE (June 9, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/06/09/fact-sheet-obama-administrations-record-and-lgbt-community>.

<sup>46</sup> See Brooke Sopelsa, *A third of Trump's court nominees have anti-LGBTQ history, report finds*, NBC NEWS (Dec. 23, 2019), <https://www.nbcnews.com/feature/nbc-out/third-trump-s-court-nominees-have-anti-lgbtq-history-report-n1106691>.

<sup>47</sup> See Office of the Press Secretary, *supra* note 45.



people.<sup>48</sup> Finally, the Administration should commit to measures that ensure employer-funded healthcare does not inhibit civil rights based on sexual orientation or transgender status.

### 3. *Affordable Care Act*

The Committee celebrates the May 10, 2021 HHS announcement (“HHS May 2021 Announcement”) that its OCR will “interpret and enforce” the Section 1557 of the ACA<sup>49</sup> and Title IX<sup>50</sup> prohibitions on sex discrimination to include discrimination on the basis of sexual orientation and gender identity, consistent with *Bostock*<sup>51</sup> and “subsequent court decisions.”<sup>52</sup>

We look forward to reviewing the forthcoming publication in the Federal Register codifying this crucial step and rescinding the June 19, 2020 final rule<sup>53</sup> (the “2020 Rule”) that removed protections for sexual orientation and gender identity under Section 1557 of the ACA.

The 2020 Rule essentially gutted sexual orientation and gender identity nondiscrimination protections that had been provided for in the 2016 regulation that explicitly defined the scope of Section 1557, which prohibits discrimination based on race, color, national origin, sex, age, and disability in any federally funded or administered health program or activity, to include discrimination based on sexual orientation and gender identity. The 2020 Rule not only eliminated these protections, including the removal of vital health insurance coverage for transgender individuals, it also took away nondiscrimination prohibitions based on gender identity and sexual orientation in ten other federal regulations.<sup>54</sup>

The HHS May 2021 Announcement aligns with your January 2021 Order<sup>55</sup> to prevent and combat discrimination, which appropriately targeted the 2020 Rule and its adverse consequences for LGBTQ civil rights by immediately mandating that federal agencies, including HHS, take any

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<sup>48</sup> See Emily Wax-Thibodeaux, *Biden’s ambitious LGBT agenda poises him to be nation’s most pro-equality president in history*, WASHINGTON POST (Jan. 11, 2011), <https://www.washingtonpost.com/politics/2021/01/11/biden-lgbtq-policies>.

<sup>49</sup> See Nondiscrimination in Health Programs and Activities, 45 C.F.R. pt. 92 (2016).

<sup>50</sup> Citing Title IX enforcement procedures, 45 C.F.R. § 86.71.

<sup>51</sup> *Supra* note 13.

<sup>52</sup> See HHS, *HHS Announces Prohibition on Sex Discrimination Includes Discrimination on the Basis of Sexual Orientation and Gender Identity*, (May 10, 2021), <https://www.hhs.gov/about/news/2021/05/10/hhs-announces-prohibition-sex-discrimination-includes-discrimination-basis-sexual-orientation-gender-identity.html> (publication in the Federal Register pending).

<sup>53</sup> Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority, 42 C.F.R. § 438 *et seq.* (2020).

<sup>54</sup> See MaryBeth Musumeci et al., *The Trump Administration’s Final Rule on Section 1557 Non-Discrimination Regulations Under the ACA and Current Status*, KFF table 2 (Sept. 18, 2020), <https://www.kff.org/racial-equity-and-health-policy/issue-brief/the-trump-administrations-final-rule-on-section-1557-non-discrimination-regulations-under-the-aca-and-current-status> (illustrating multiple provisions of the 2020 Rule that specifically removed sexual orientation and/or gender identity from prohibited bases for discrimination).

<sup>55</sup> *Supra* note 8.

necessary steps to align their nondiscrimination protections with your Administration’s policy to prevent and combat discrimination based on gender identity and sexual orientation.

In addition, we urge your Administration to support passage of the Equality Act without religious exemptions. The HHS May 2021 Announcement notes that in enforcing Section 1557 to prohibit sexual orientation and gender identity discrimination, OCR will comply with the Religious Freedom Restoration Act of 1993 (“RFRA”).<sup>56</sup> The Supreme Court in *Bostock* left a disquieting opening for exceptions for religious organizations under RFRA, which in effect creates a loophole for discrimination: “[b]ecause RFRA operates as a kind of super statute, displacing the normal operation of other federal laws, it might supersede Title VII’s commands in appropriate cases. But how these doctrines protecting religious liberty interact with Title VII are questions for future cases too.”<sup>57</sup> For example, in January 2021, the District Court of North Dakota held in *Religious Sisters of Mercy v. Azar* that RFRA’s religious freedom protections entitled the Catholic plaintiffs to permanent injunctive relief from having to provide or cover the cost of gender transition procedures under Section 1557 of the ACA or *any implementing regulations*.<sup>58</sup> Thus, restoring Section 1557 protections does not prevent courts from upholding discriminatory practices if the party engaged in the discriminatory conduct is granted an exception under RFRA.<sup>59</sup> By passing the Equality Act, which prohibits an entity from using RFRA as a license to discriminate, the courts would be prevented from granting a religious freedom exception to discriminate on the basis of sex, gender identity, or sexual orientation.<sup>60</sup>

## **B. Protect LGBTQ People from Overly Broad Religious Civil Rights Exemptions**

In many respects, our country’s foundational protection of religious liberty has been warped into a tool to discriminate against LGBTQ peoples in various arenas, including employment, health care, adoption, housing, public accommodation, and numerous government-funded programs. Religious freedom, properly understood, is a shield to protect those who are unfairly discriminated against because of their faith. It must not be made into a sword to discriminate against marginalized peoples in the false name of faith. Nonetheless, executive orders signed by former President Trump and task forces instituted by his Administration sought to

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<sup>56</sup> 42 U.S.C. § 2000bb *et seq.*

<sup>57</sup> *Bostock*, 140 S. Ct. at 1754 (internal citation omitted).

<sup>58</sup> See *Religious Sisters of Mercy v. Azar*, Case No. 3:16 Civ. 00386 (D.N.D. Jan. 19, 2021).

<sup>59</sup> See Sharita Gruberg, *Bostock: The Future of LGBTQ Civil Rights*, CTR. AM. PROGRESS (Aug. 28, 2020), <https://www.americanprogress.org/issues/lgbtq-rights/reports/2020/08/26/489772/beyond-bostock-future-lgbtq-civil-rights>.

<sup>60</sup> See, e.g., Danielle Kurtzleben, *House Passes The Equality Act: Here’s What It Would Do*, NPR (Feb. 24, 2021), <https://www.npr.org/2021/02/24/969591569/house-to-vote-on-equality-act-heres-what-the-law-would-do>; Ryan Thoreson, *Why the US needs the Equality Act*, HUM. RTS. WATCH (Mar. 16, 2019), <https://www.hrw.org/news/2019/03/16/why-us-needs-equality-act#>. As discussed at *supra* p. 4, the Equality Act would amend various federal laws, including Titles II, VI, and VII of the Civil Rights Act of 1964 to protect individuals based on sexual orientation and gender identity in employment, education, housing, credit, and jury service. This would both build on *Bostock* by codifying protections for LGBTQ protected characteristics and extend those Civil Rights Act protections to federally funded programs and a broader scope of public accommodations, including transportation and online services. Importantly, RFRA could not be used to overcome the Act’s protections.

provide cover to organizations and individuals to use religion as a tool to discriminate against LGBTQ people.<sup>61</sup>

The Committee therefore requests that the White House rescind the *Executive Order on Promoting Free Speech and Religious Liberty*<sup>62</sup> and *Executive Order on Establishment of a White House Faith and Opportunity Initiative*.<sup>63</sup> Among other broad directives, the first executive order requires the U.S. Attorney General to “issue guidance interpreting religious liberty protections in Federal law,” and the second establishes the titular Initiative to enable “faith-based and community organizations, to the fullest opportunity permitted by law, to compete on a level playing field for grants, contracts, programs, and other Federal funding opportunities.” These orders, and the mandatory implementing guidance,<sup>64</sup> were part of a broader effort to justify discrimination against LGBTQ people as a form of religious liberty.<sup>65</sup> In the same vein, the Committee also recommends the disbandment of the DOJ Religious Liberty Task Force<sup>66</sup> and the Conscience and Religious Freedom Division in the HHS,<sup>67</sup> and any other agency organization that seeks to undermine discrimination protections in the name of religious liberty.

The Committee strongly supports the steps your Administration and the DOJ is each taking to reassess and hopefully rescind the HHS “conscience rule” *Protecting Statutory Conscience Rights in Health Care*,<sup>68</sup> as the consolidated cases<sup>69</sup> challenging the rule are held in abeyance. Allowing health care providers to deny patients medically necessary treatment or services because

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<sup>61</sup> See Erin Mulvaney et al., *Trump Agencies Move to Limit LGBT Rights as Courts Expand Them*, BLOOMBERG LAW (July 6, 2020, 5:06 AM), <https://news.bloomberglaw.com/daily-labor-report/trump-agencies-move-to-limit-lgbt-rights-as-courts-expand-them>.

<sup>62</sup> Exec. Order No. 13798, 82 Fed. Reg. 21675 (May 4, 2017).

<sup>63</sup> Exec. Order No. 13831, 83 Fed. Reg. 20715 (May 3, 2018).

<sup>64</sup> See, e.g., OMB M-20-09, *Memorandum for the Heads of Executive Departments and Agencies, Guidance Regarding Federal Grants and Executive Order 13798*, (Jan. 16, 2020), <https://www.whitehouse.gov/wp-content/uploads/2020/01/M-20-09.pdf>, DOJ, *Guidance Regarding Department of Justice Grants and Executive Order 13798* (Jan. 19, 2021), <https://www.justice.gov/file/1298191/download>.

<sup>65</sup> See Maggie Siddiqi et al., *Recommendations for the Biden Administration on Engaging With Religious Communities*, CTR. AM. PROGRESS (Nov. 13, 2020), <https://www.americanprogress.org/issues/religion/reports/2020/11/13/492875/recommendations-biden-administration-engaging-religious-communities>; Caroline Medina et al., *Improving the Lives and Rights of LGBTQ People in America*, CTR. AM. PROGRESS (Jan. 12, 2021), <https://www.americanprogress.org/issues/lgbtq-rights/reports/2021/01/12/494500/improving-lives-rights-lgbtq-people-america>; *Connecting the Dots: Trump Administration Efforts to Create a License to Discriminate Across the Country*, ACLU (May 15, 2020), [https://www.aclu.org/sites/default/files/field\\_document/connecting\\_the\\_dots\\_2020\\_05\\_15.pdf](https://www.aclu.org/sites/default/files/field_document/connecting_the_dots_2020_05_15.pdf) (providing specific examples of Trump Administration’s efforts to sanction discrimination) [hereinafter *Connecting the Dots*].

<sup>66</sup> See Jeff Sessions, *Attorney General Sessions Delivers Remarks at the Department of Justice’s Religious Liberty Summit*, DOJ (July 30, 2018) <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-department-justice-s-religious-liberty-summit>.

<sup>67</sup> See *Connecting the Dots*, supra note 65, at 2.

<sup>68</sup> 84 Fed. Reg. 23170.

<sup>69</sup> See, e.g., *New York v. United States Dep’t of Health & Hum. Servs.*, 414 F. Supp. 3d 475, 496 (S.D.N.Y. 2019) (appeal pending).

of their religious beliefs would negatively impact LGBTQ communities. The Committee also requests that HHS issue guidance for health care providers to ensure they cannot refuse to treat patients, by drawing on existing mandates such as the Emergency Medical Treatment and Labor Act.<sup>70</sup>

In addition to undoing the harmful actions of the Trump Administration, the Committee asks President Biden and his Administration to take affirmative actions to protect LGBTQ people and other marginalized communities from those who would cloak harmful discrimination in the guise of religion by instructing all agencies within the Executive Branch to proactively review their rules and priorities and promulgate new rules or course correct so that religious freedom is not used as an excuse to discriminate. The DOJ should also be instructed to take litigation positions that accurately reflect the current state of the law and strike the correct balance between protecting religious liberty and the rights of LGBTQ people.

### **C. Institute Intersex Surgery Protections Through HHS**

The Committee recommends that HHS work to end the practice of performing medically unnecessary genital and gonadal surgeries on intersex infants, which harm marginalized individuals, negate sexual and reproductive decision-making autonomy, and contravene patient-centered care.<sup>71</sup>

Children with intersex traits are often subjected to medically unnecessary, irreversible, nonconsensual genital surgeries. Up to 1.7 percent of people around the world are born with sex characteristics—including gonads, genitals, hormones, and chromosomes—that do not fit typical notions of “male” or “female” bodies.<sup>72</sup> Almost always, these variations are healthy differences that require no urgent surgical intervention.<sup>73</sup> However, medically unnecessary “normalization” surgeries remain common.<sup>74</sup> In these surgeries, doctors attempt to “correct” healthy variations,

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<sup>70</sup> 42 U.S.C. § 1395dd. The EMTALA was enacted in 1986 to ensure public access to emergency services regardless of ability to pay. Hospitals are then required to provide stabilizing treatment for patients with emergency medical conditions. Centers for Medicaid and Medicare Services, <https://www.cms.gov/Regulations-and-Guidance/Legislation/EMTALA>.

<sup>71</sup> This statement relates only to intersex infants and children, and their autonomy to make decisions about their bodies if and when they choose. This statement should not be construed as taking a position on circumcision performed on persons with male sex characteristics for religious purposes, nor is this statement addressing a person’s right to make decisions about their body during pregnancy.

<sup>72</sup> See “*I Want to Be Like Nature Made Me*”: *Medically Unnecessary Surgeries on Intersex Children in the US*, HUMAN RIGHTS WATCH AND INTERACT 19 (2018), [https://www.hrw.org/sites/default/files/report\\_pdf/lgbtintersex0717\\_web\\_0.pdf](https://www.hrw.org/sites/default/files/report_pdf/lgbtintersex0717_web_0.pdf) [hereinafter *HRW*].

<sup>73</sup> Intersex Society of North America, FAQ, <https://isna.org/faq/conditions/cah/> (last visited Apr 11, 2021). Congenital Adrenal Hyperplasia (CAH), one of the most common intersex traits, can cause adrenal problems that can be dangerous or even life-threatening if not treated; however, these health risks do not come from the variations in sex characteristics that are also associated with CAH, and genital surgeries do not do anything to address the risk of adrenal crisis in children with CAH.

<sup>74</sup> See *HRW*, *supra* note 72, at 20-21.

commonly performing the surgeries on children between the ages of 3 and 6 months old, simply because intersex bodies do not conform to stereotypical expectations of male or female children.<sup>75</sup>

The Committee advocates for the end of these unnecessary, nonconsensual, and irreversible surgeries inflicted upon intersex people, and supports the right of parents to receive accurate and timely information about medical interventions that they may feel pressured into consenting to without a full understanding of the life-long ramifications and known risks of these surgeries.<sup>76</sup> “Normalizing” surgeries on a child’s genitals or reproductive organs can severely harm the child, both physically and emotionally. Negative consequences can include “scarring, incontinence, loss of sexual sensation and function, psychological trauma including depression and post-traumatic stress disorder, the risk of anesthetic neurotoxicity attendant to surgical procedures on young children, sterilization, the need for lifelong hormonal therapy, and irreversible surgical imposition of a sex assignment that the individual later rejects.”<sup>77</sup> The risks associated with these surgeries are troublingly high, and there is no evidence that these surgeries actually benefit the child when performed without individual consent.

These surgeries are also widely condemned by national and international human rights organizations as practices that violate a range of fundamental rights, including freedom from torture and the rights to health, autonomy, and integrity.<sup>78</sup> These surgeries, when performed without the consent of the patient, have been condemned by the American Academy of Family Physicians, the World Health Organization, Physicians for Human Rights, Human Rights Watch, Amnesty International, Lambda Legal, the ACLU, the Gay & Lesbian Medical Association, and every intersex-led organization in the world focusing on intersex populations.<sup>79</sup> Multiple United Nations treaty committees and expert bodies have condemned these surgeries, some even likening them to a form of torture or ill-treatment.<sup>80</sup> In August 2018, the California legislature passed a resolution supporting and recognizing the diversity of intersex individuals and calling upon stakeholders to end medically unnecessary surgeries on intersex individuals by recommending

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<sup>75</sup> See *Genitoplasty – Treatment Options*, WEILL CORNELL MEDICINE, <https://urology.weillcornell.org/clinical-conditions/pediatric-urology/genitoplasty/treatment-options> (last visited Apr. 4, 2021).

<sup>76</sup> For more information on the Bar’s support for a bill that would create such an education campaign in New York, see *Medically Unnecessary Surgeries For Intersex Children: Education Campaign*, N.Y.C. BAR ASS’N (Feb. 13, 2020), <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/medically-unnecessary-surgeries-for-intersex-children-education-campaign>; see also Int. No. 1748-A, 2021 N.Y.C. Council Sess. (N.Y. 2021).

<sup>77</sup> HRW, *supra* note 72, at 89.

<sup>78</sup> *Id.* at 13.

<sup>79</sup> See Kyle Knight, *US Medical Association Stands Against Unnecessary Intersex Surgeries*, HUMAN RIGHTS WATCH (Sept. 17, 2018), <https://www.hrw.org/news/2018/09/17/us-medical-association-stands-against-unnecessary-intersex-surgeries>; see also *GLMA Passes Resolution on Intersex Surgery*, INT’L FOUND. FOR GENDER EDUC. (Mar. 7, 1998), <http://www.ifge.org/news/1998/march/nws3218b.htm>.

<sup>80</sup> See Sylvan Fraser, *Constructing the Female Body: Using Female Genital Mutilation Law to Address Genital-Normalizing Surgery on Intersex Children in the United States*, 9 INT’L J. HUM. RTS. HEALTHCARE 62, 67 (2016) (“Both the UN Special Rapporteur on Torture and the UN Special Rapporteur on Violence Against Women define [Female Genital Mutilation] as torture and have clarified that ‘medicalizing’ FGM does not immunize it from classification as a human rights violation.”).



deferral, as warranted, of medical interventions until the child is able to participate in decision making.<sup>81</sup>

We urge your Administration to follow California’s lead and join the global community in seeking to end medically unnecessary surgeries performed on intersex infants and children. HHS should design resources that must be provided to parents and/or guardians that will specifically address important considerations when deciding whether medical intervention may be safely delayed until the infant is older and can voice thoughts about the procedure. HHS should also evaluate the regulatory tools at its disposal, encourage research into this area, and help set policy that will protect intersex infants and children from medically unnecessary surgery.

#### **D. Rescind Revised Asylum Criteria**

In defining the categories of individuals who are eligible for asylum, Congress defined a refugee as “any person who is outside any country of such person’s nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, *membership in a particular social group*, or political opinion.”<sup>82</sup> While not defined in statute, case law has included persecution on the basis of sexual orientation, gender identity, gender expression, and HIV status as falling under “membership in a particular social group.”<sup>83</sup> Currently, there are 70 countries in which sexual orientation, gender identity, gender expression, and HIV status are criminalized. In these countries, sentences may include fines, life imprisonment, and even the death penalty. Furthermore, in some countries, persecution occurs at the hands of law enforcement agencies who aggressively pursue and prosecute members of the LGBTQ communities.<sup>84</sup> In other instances, persecution takes the form of law enforcement ignoring family members or community leaders engaging in persecutory acts.<sup>85</sup>

##### **1. *Proposed 8 C.F.R. § 208.1(f)(8): Gender Prohibited as a Basis for Granting Asylum or Withholding of Removal***

With regard to the adopted *Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review*,<sup>86</sup> the first of many problematic sections occurs in what would be codified under 8 C.F.R. § 208.1(f)(8). There, the Trump Administration made particular efforts

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<sup>81</sup> SCR-110 (Cal. 2018).

<sup>82</sup> 8 U.S.C. § 1101(a)(42) (emphasis added).

<sup>83</sup> *Id. See, e.g., Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1082 (9th Cir. 2015); *Karouni v. Gonzales*, 399 F.3d 1163, 1172 (9th Cir. 2005); *Matter of Toboso-Alfonso*, 20 I&N Dec. 819, 822 (BIA 1990); *U.S. Citizenship and Immigration Services, Guidance for Adjudicating Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI) Refugee and Asylum Claims Training Module*, (Nov. 6, 2015), AILA Doc. No. 17110304.

<sup>84</sup> *See #OUTLAWED THE LOVE THAT DARE NOT SPEAK ITS NAME*, HUMAN RIGHTS WATCH, [http://internap.hrw.org/features/features/lgbt\\_laws](http://internap.hrw.org/features/features/lgbt_laws) (listing anti-LGBT laws by country, with penalty) (last visited Apr. 3, 2021).

<sup>85</sup> *See* Plaintiffs’ Motion for Temporary Restraining Order at 73, *Immigration Equality v. Dept. of Homeland Security*, No. 20 Civ. 09253 (JD) (9<sup>th</sup> Cir. December 22, 2020), ECF No. 13.

<sup>86</sup> 85 Fed. Reg. 80274.

to prevent adjudicators from granting asylum or withholding from removal on the basis of gender. While the proposed regulation makes no mention of LGBT status as being included in “gender-based” exclusion, it also provides no guidance as to how the “gender-based” exclusion will relate to LGBTQ asylum seekers.<sup>87</sup> Given the recent holding in *Bostock*,<sup>88</sup> adjudicators without proper guidance may interpret “gender-based” exclusions as excluding LGBTQ asylum seekers. Were they to do so, asylum seekers, fleeing persecution on the basis of their sexual orientation or gender identity, would be barred from seeking asylum as it would now fall under “gender-based” discrimination, per Supreme Court precedent.

## **2. Proposed 8 C.F.R. §§ 208.1(f)(1) & (2): Interpersonal Animus or Retribution and Interpersonal Animus**

The second set of problematic sections of the proposed final rule occur where it bars asylum or withholding of removal for persecution based on (i) “interpersonal animus or retribution,”<sup>89</sup> or (ii) “interpersonal animus in which the alleged prosecutor has not targeted, or manifested an animus against, other members of an alleged particular social group in addition to the member who has raised the claim at issue.”<sup>90</sup> The term “interpersonal” is generally defined as, “Between persons. . . to describe behaviour between people in any encounter.”<sup>91</sup> When looking at the plain meaning of the statute, the proposed rule effectively eliminates the possibility of any claim of asylum based on persecution, because every act of violence committed by one person against another can be deemed “interpersonal.”<sup>92</sup> Furthermore, LGBTQ individuals are six times more likely to experience violence at the hands of a family member or a well-known acquaintance.<sup>93</sup> When violence is committed at the hands of a family member or acquaintance, officers may abuse their discretion and easily classify the persecution as “interpersonal.”

Additionally, the bar on persecution based on “interpersonal animus or retribution” contravenes the intended purpose of the Immigration and Nationality Act,<sup>94</sup> which provides that “race, religion, nationality, membership in a particular group, or political opinion” need only be “at least one central reason” for persecution.<sup>95</sup> Despite the apparent intent of the drafters that asylum seekers be required only to prove a well-founded fear in one of the aforementioned categories, the exclusion based on “interpersonal animus or retribution” places an additional burden in order

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<sup>87</sup> See Plaintiff’s Motion, *supra* note 85, at 87.

<sup>88</sup> *Supra* note 13.

<sup>89</sup> 85 Fed. Reg. 80386 (to be codified at 8 C.F.R. §§ 208.1(f)(1), 1208(f)(1)).

<sup>90</sup> 85 Fed. Reg. 80386 (to be codified at 8 C.F.R §§ 208.1(f)(2), 1208(f)(2)).

<sup>91</sup> *Interpersonal*, OXFORD ENGLISH DICTIONARY, <https://www.oed.com/view/Entry/98146?redirectedFrom=interpersonal#eid> (last visited Jan. 11, 2021).

<sup>92</sup> See Plaintiff’s Motion, *supra* note 85, at 101.

<sup>93</sup> *Victimization Rates and Traits of Sexual and Gender Minorities in the US: Results from the National Crime Victimization Survey, 2017*, WILLIAMS INST. (Oct. 2020), <https://williamsinstitute.law.ucla.edu/publications/sgm-victimization-us>.

<sup>94</sup> 8 U.S.C. § 1101 *et seq.*

<sup>95</sup> 8 U.S.C. § 1158(b)(1)(B)(i).

to intentionally disqualify individuals who would meet the “at least one central reason” requirement.<sup>96</sup>

As written, the final rule also adds an unnecessary evidentiary hurdle for applicants to qualify for asylum. As noted, § 1158(b)(1)(B)(i) currently only requires that the asylum seeker prove one central categorical reason for persecution. However, the language of 8 C.F.R. § 208.1(f)(2) now requires victims of persecution to provide evidence that their persecutors also targeted other members of the same particular social group or else have their claim denied. As such, this may require the victim to locate another individual who has been victimized by the same perpetrator in order to overcome the “interpersonal animus or retribution” exclusion.<sup>97</sup> This unnecessary burden ignores the fact that a second victim might not exist when the persecution comes from the hands of a family member or close acquaintance. In the event that a second victim does exist, such a person may not be willing to go on the record for fear that they may be victimized again.<sup>98</sup> As such, this proposed evidentiary burden is irrational and serves no legitimate purpose other than to further dismantle the United States’ asylum system.

**3. *Proposed 8 C.F.R. § 208.13(d)(2)(A): Eliminates adjudicators’ discretion to grant asylum if an applicant traveled through more than one third country, or was present in any third country for more than 14 days***

According to proposed rule 8 C.F.R. § 208.13(d)(2)(A), adjudicators’ discretion to grant asylum is eliminated if an applicant traveled through more than one third country, or was present in any third country for more than 14 days. The proposed rule fails to consider whether the asylum seeker would have been safe in the third country or even if asylum was even available in that country.

For LGBTQ asylum seekers, this rule is particularly devastating. Of the 70 countries where LGBTQ status is criminalized, not one of them is directly connected to the United States by a land border. Additionally, many of those countries do not have non-stop flights to the United States. As such, asylum seekers may be forced to reveal their status in another country that is equally hostile towards individuals based on their sexual orientation, gender identity, gender expression, or HIV status lest they be denied asylum when they enter the United States.<sup>99</sup> As the proposed rule would have a disproportionate impact on LGBTQ asylum seekers and those living with HIV, this proposed rule ought to be struck down, as it has been on prior occasions.<sup>100</sup>

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<sup>96</sup> See Plaintiff’s Motion, *supra* note 85, at 104.

<sup>97</sup> See *id.* at 112.

<sup>98</sup> See *id.*

<sup>99</sup> *Id.* at 151.

<sup>100</sup> See *E. Bay Sanctuary Covenant v. Barr*, 964 F.3d 832 (9th Cir. 2020) (holding that the Transit ban was arbitrary, capricious, contrary to law, and in excess of the Departments’ statutory authority as it does virtually nothing to ensure that a third country is a “safe option” for the applicant).

For all the above reasons, the Ninth Circuit granted a preliminary injunction against what became popularly known as the “Death to Asylum” Rule,<sup>101</sup> preventing it from taking effect on January 11, 2021.<sup>102</sup> As such, we urge your Administration to implement a policy vacating the “Death to Asylum Rule” and restore refugee and asylum system back to its intended purpose. The proposed regulation represents a final blow to the United States’ long-standing commitment to protect individuals where there are substantial grounds for believing that the person would be in danger of being subjected to persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.<sup>103</sup>

### III. CONCLUSION

Thank you very much for your consideration of these crucial issues impacting the LGBTQ communities. The Committee would welcome the opportunity to speak with a member of your staff, should that be helpful. Our Director of Advocacy, Elizabeth Kocienda, is happy to coordinate a meeting or answer any questions. Please do not hesitate to contact her at [ekocienda@nycbar.org](mailto:ekocienda@nycbar.org) or (212) 382-4788.

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<sup>101</sup> See, e.g., Nolan Rappaport, *What Trump's new 'death to asylum' rule actually says*, HILL (Dec. 14, 2020), <https://thehill.com/opinion/immigration/530069-what-trumps-new-death-to-asylum-rule-actually-says>.

<sup>102</sup> *Immigration Equality v. Dept. of Homeland Security*, No. 20-cv-09253-JD (9th Cir. January 8, 2021) (order granting preliminary injunction).

<sup>103</sup> 8 U.S.C. § 1101(a)(42)