BEFORE THE
OFFICE OF PERSONNEL MANAGEMENT

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NONDISCRIMINATION PROVISIONS

SUPPLEMENT TO PETITION FOR RECONSIDERATION

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SUBMITTED BY EMILY T. PRINCE, ESQ.

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Pursuant to the Administrative Procedure Act, 5 U.S.C. 551 et seq., Petitioner submits this supplement to Petitioner's petition for reconsideration, submitted August 25, 2014, of the Office of Personnel Management's (OPM) final rule, dated July 29, 2014, which purports to update OPM nondiscrimination regulations in light of new statutory provisions and decisions of the Equal Employment Opportunity Commission (EEOC). Specifically, these additional documents further demonstrate that the transgender-exclusionary insurance clauses are contrary to sound medical practice and therefore are arbitrary and capricious discrimination against transgender Federal employees.

The Center of Excellence for Transgender Health at the University of California, San Francisco (The Center), dedicated to increasing access to comprehensive, effective, and affirming health care services for trans and gender-variant communities, provides recommendations to health care professionals who treat transgender individuals using evidence-based transgender medicine. As the Center states, "Once [an insurance carrier] labels the patient as transgender or transsexual, many types of coverage may be routinely denied, where they would be covered for patients who are not identified as transgender or transsexual. Physicians or their support staff members may need to interact with insurance claims processors on behalf of their transgender or transsexual patients to insist that medically necessary treatments are covered."[1]

The Center's statements are consistent with the most recent statements of the foremost authority on transgender health, the World Professional Association for Transgender Health (WPATH). As an international multidisciplinary professional association the mission of WPATH is to promote evidence based care, education, research, advocacy, public

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[1] Insurance Issues, *Primary Care Protocol for Transgender Patient Care, Center of Excellence for Transgender Health*, University of California, San Francisco, Department of Family and Community Medicine, April 2011 (available at http://transhealth.ucsf.edu/trans?page=protocol-insurance).

policy and respect in transgender health.[2] WPATH publishes the Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People (SOC), currently in its seventh version.[3] The SOC state, with respect to insurance carriers denying medically necessary care, "In many places around the world, access to health care for transsexual, transgender, and gender-nonconforming people is also limited by a lack of health insurance or other means to pay for needed care. WPATH urges health insurance companies and other third-party payers to cover the medically necessary treatments to alleviate gender dysphoria."[4]

The Center and WPATH are far from the only organizations that have demonstrated the medical necessity of transition-related care currently permitted to be excluded by OPM's acceptance of insurance contracts excluding "services, drugs, or supplies related to sex transformation."[5] In 2013, Lambda Legal, a national legal organization whose mission is to achieve full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people, and those with HIV, compiled a list of professional organization statements supporting transgender people in health care, including support for WPATH's Standards of Care.[6] These organizations include the American Medical Association,[7] the American Psychiatric Association,[8] the American Psychological Association,[9] the American Academy

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[2] Mission and Values, World Professional Association for Transgender Health (available at http://www.wpath.org/site_page.cfm?pk_association_webpage_menu=1347&pk_association_webpage=3910).

[3] Standards of Care Version 7, World Professional Association for Transgender Health, 2011 (available at http://admin.associationsonline.com/uploaded_files/140/files/Standards%20of%20Care,%20V7%20Full%20Book.pdf).

[4] Id. at 33. The internal citation is incorporated by reference into this request for reconsideration.

[5] U.S. Office of Personnel Management, FEHB Program Carrier Letter 2014-17, (June 13, 2014) (available at http://www.opm.gov/healthcare-insurance/healthcare/carriers/2014/2014-17.pdf) (establishing an OPM policy continuing to permit insurance carriers to discriminate against transition-related care).

[6] Lambda Legal, *Professional Organization Statements Supporting Transgender People in Health Care*, July 2, 2013 (available at http://www.lambdalegal.org/sites/default/files/publications/downloads/fs_professional-org-statements-supporting-trans-health_4.pdf).

[7] American Medical Association, Resolution H-195.950, *Removing Financial Barriers to Care for Transgender Patients*, (Res. 122; A-08). Each of the internal citations is incorporated by reference into this request for reconsideration.

[8] American Psychiatric Association, *Position Statement on Access to Care for Transgender and Gender Variant Individuals*, 2012 (available at http://www.psych.org/File%20Library/Advocacy%20and%20Newsroom/Position%20Statements/ps2012_TransgenderCare.pdf); American Psychiatric Association, *Position Statement on Discrimination Against Transgender and Gender Variant Individuals*, 2012 (available at

of Family Physicians,[10] the American College of Nurse Midwives,[11] the National Association of Social Workers,[12] the National Commission on Correctional Health Care,[13] and the American College of Obstetricians and Gynecologists.[14]

In the FEHB Program Carrier Letter 2014-17, the U.S. Office of Personnel Management stated:

> There is an evolving professional consensus that treatment is considered medically necessary for certain individuals who meet established Diagnostic and Statistical Manual (DSM) criteria for a diagnosis of Gender Identity Disorder/Gender Dysphoria. Accordingly, OPM is removing the requirement that FEHB brochures exclude "services, drugs, or supplies related to sex transformations" in Section 6 of the FEHB plan brochure effective with the 2015 plan year.[15]

There is no question that the General Exclusion was intended to discriminate against the diagnosis of Gender Identity Disorder / Gender Dysphoria, despite its grossly inappropriate

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http://www.psychiatry.org/File%20Library/Advocacy%20and%20Newsroom/Position%20Statements/ps2012_TransgenderDiscrimination.pdf).

[9] American Psychological Association, *Transgender, Gender Identity, & Gender Expression Non-Discrimination*, 2008 (available at http://www.apa.org/about/policy/transgender.aspx). Each of the internal citations is incorporated by reference into this request for reconsideration.

[10] American Academy of Family Physicians, *Transgender Care*, Resolution No. 1004, 2012 (available at http://www.aafp.org/dam/AAFP/documents/about_us/special_constituencies/2012RCAR_Advocacy.pdf).

[11] American College of Nurse Midwives, *Transgender / Transsexual / Gender Variant Health Care*, 2012 (available at http://www.midwife.org/ACNM/files/ACNMLibraryData/UPLOADFILENAME/000000000278/Transgender%20Gender%20Variant%20Position%20Statement%20December%202012.pdf). Each of the internal citations is incorporated by reference into this request for reconsideration.

[12] National Association of Social Workers, *Transgender and Gender Identity Issues*, 2008 (available at https://www.socialworkers.org/da/da2008/finalvoting/documents/Transgender%202nd%20round%20-%20Clean.pdf). Each of the internal citations is incorporated by reference into this request for reconsideration.

[13] National Commission on Correctional Health Care, *Transgender Health Care in Correctional Settings*, 2009 (available at http://www.ncchc.org/transgender-health-care-in-correctional-settings).

[14] American College of Obstetricians and Gynecologists, *Health Care for Transgender Individuals*, 2011 (available at http://www.acog.org/Resources_And_Publications/Committee_Opinions/Committee_on_Health_Care_for_Underserved_Women/Health_Care_for_Transgender_Individuals).

[15] Carrier Letter, *supra* note 5.

language of "sex transformations." Any denial of any claim on the basis of the General Exclusion necessarily constitutes discrimination on the basis of transition from one's assigned sex at birth. The maintenance of the General Exclusion is discriminatory in effect and, by its plain text, is discriminatory in its intended application to deny medically necessary care to individuals solely on the basis that the care at issue is for the purpose of "sex transformations" – that is to say, for the purpose of transition.

Such discrimination is illegal under Federal law and Federal agencies and contractors are expressly forbidden from engaging in such discrimination. In *Macy v. Holder*,[16] the U.S. Equal Employment Opportunity Commission held that discrimination on the basis of gender identity was unlawful discrimination on the basis of sex under Title VII on three separate but equally controlling bases. One of these bases addressed what OPM refers to as "sex transformations." The Commission held that discriminating against the act of transition was discrimination "because of sex," drawing the analogy that it would be similarly unlawful discrimination "because of religion" to discriminate against someone on the basis of religious conversion.[17] Discrimination against claims for "sex transformation" is necessarily within the scope of the conduct prohibited by *Macy*.

Pursuant to *Macy*, on August 19, 2014, the U.S. Department of Labor issued Directive 2014-02.[18] The directive prohibits Federal contractors from discriminating on the basis of sex as defined within *Macy*, under Executive Order 11246,[19] even as it existed prior to its amendment by Executive Order 13672.[20] These Executive Orders apply to insurance carriers participating in the Federal Employee Health Benefit Program, as demonstrated by U.S. Office of Personnel Management Federal Employee Health Benefit Program Carrier Letter 2014-21(a).[21]

Under 42 U.S.C. § 18116,[22] it is illegal for an individual to "be excluded from participation in, be denied the benefits of, or subjected to discrimination under, any health program or

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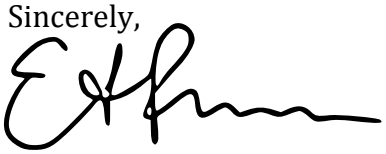
[16] *Macy v. Holder*, U.S. Equal Employment Opportunity Commission Appeal No. 0120120821 (April 20, 2012).
[17] *Id*. at 13-14; *see also Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008).
[18] U.S. Department of Labor Office of Federal Contract Compliance Programs Directive 2014-02, (August 19, 2014) (available at http://www.dol.gov/ofccp/regs/compliance/directives/dir2014_02.html).
[19] Executive Order 11246 – Equal Employment Opportunity, as Amended (Sept. 24, 1965) (available at http://www.dol.gov/ofccp/regs/statutes/eo11246.htm).
[20] Executive Order 13672 – Further Amendments to Executive Order 11478, Equal Employment Opportunity in the Federal Government, and Executive Order 11246, Equal Employment Opportunity (July 21, 2014) (available at http://www.gpo.gov/fdsys/pkg/FR-2014-07-23/pdf/2014-17522.pdf).
[21] U.S. Office of Personnel Management, FEHB Program Carrier Letter 2014-21(a), (August 18, 2014) (available at http://www.opm.gov/healthcare-insurance/healthcare/carriers/2014/2014-21.pdf).
[22] 42 U.S.C. § 18816 (2010) (available at http://www.gpo.gov/fdsys/pkg/USCODE-2010-title42/html/USCODE-2010-title42-chap157-subchapVI-sec18116.htm).

activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency"[23] on the basis of sex, as a ground prohibited by Title IX of the Education Amendments of 1972.[24] Enforcement mechanisms for discrimination on the basis of sex in employment and education are explicitly authorized by statute in 42 U.S.C. § 18116. Furthermore, state action that constitutes discrimination on the basis of sex is subject to heightened scrutiny under the Equal Protection Clause of the Fourteenth Amendment; this discrimination against transgender Federal employees lacks an "exceedingly persuasive justification" for "important governmental objectives" that require permitting such discrimination by FEHB insurance carriers.[25]

Because the only possible reading of the "services, drugs, or supplies related to sex transformation" general exclusion is that it is intended to discriminate on the basis of gender identity and because such discrimination is in violation of Federal statutes and the Fourteenth Amendment, I request that the Office of Personnel Management reconsider its failure to address this discrimination in its July 29, 2014 final rule, along with such other and further action as is just and necessary.

Sincerely,



Emily T. Prince, Esq.

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[23] *Id*.

[24] Discrimination on the basis of sex under Title IX of the Education Amendments of 1972 has traditionally been construed identically to that of discrimination on the basis of sex under Title VII of the Civil Rights Act of 1964. The Department of Education has made clear that Title IX prohibits "discriminating on the basis of sex, including gender identity." U.S. Department of Education, Office for Civil Rights, Letter dated January 7, 2015 (available at http://www.emily-esque.com/wp/wp-content/uploads/2015/01/DOED-Reply-re-Transgender-Student-Restroom-Access.pdf).

[25] United States v. Virginia, 518 U.S. 515 (1996).

*Increasing access to comprehensive, effective, and affirming healthcare services for trans and gender-variant communities*

# Insurance Issues

## Electronic Medical Records (EMR)

Patients may wish to be labeled 'Male' or 'Female' according to their gender identity and expression, their legal status, or according to the wa they are registered with their insurance carrier. They may wish to be referred to as 'Female' in one situation (e.g., in their record with the physician's office and in personal interactions with the physician and staff), but 'Male' in other situations (e.g., on forms related to their insurance coverage, lab work, etc.). This application of terminology could change at any time as individuals come to understand or evaluate their gender.

EMR systems that do not have transgender-specific options make it more difficult for transgender people to change the sex designator unde which they will be classified, or such systems may permit a change but will retain a record of that change which will be visible to numerous people outside of the physician or patient's control, leaving transgender and transsexual patients vulnerable to exposure and discrimination. Clinics are encouraged to adopt flexible systems or develop a workaround.

## Insurance Issues

Health insurance policies often overtly exclude treatments for transgender or transsexual people's health care needs, even when these neec are not related to a gender transition. Some policies are beginning to offer transgender-inclusive plans where employers (who provide the pl as an employee benefit) have demanded that the carriers do so. Much of the difficulty that transgender people experience with respect to insurance is due to coding systems that provide certain procedures for individuals of one or the other sex. For example, if a transman who is enrolled in the insurance system as a male (which facilitates coverage for his labs that compare results with 'male' values) develops uterine fibroids and requires a hysterectomy, the insurance carrier typically denies coverage with the rationale that hysterectomy is only covered for females. Once the carrier labels the patient as transgender or transsexual, many types of coverage may be routinely denied, where they wo be covered for patients who are not identified as transgender or transsexual. Physicians or their support staff members may need to interact with insurance claims processors on behalf of their transgender or transsexual patients to insist that medically necessary treatments are covered. In such interactions it will be necessary to support the patient's preferred gender in relationship to the insurance company in the be interests of the patient's health.


(http://www.wpath.org/site_home.cfm)

**About**

Mission and Values (http://www.wpath.org/site_page.cfm?pk_association_webpage_menu=1347&pk_association_webpage=3910)

Ethics and Standards (http://www.wpath.org/site_page.cfm?pk_association_webpage_menu=1347&pk_association_webpage=4233)

Committees (http://www.wpath.org/site_page.cfm?pk_association_webpage_menu=1347&pk_association_webpage=3908)

Executive Committee and Board of Directors (http://www.wpath.org/site_page.cfm?pk_association_webpage_menu=1347&pk_association_webpage=3909)

Association Awards (http://www.wpath.org/site_page.cfm?pk_association_webpage_menu=1347&pk_association_webpage=4840)

History of the Association (http://www.wpath.org/site_page.cfm?pk_association_webpage_menu=1347&pk_association_webpage=4647)

Student Initiative Taskforce (http://www.wpath.org/site_page.cfm?pk_association_webpage_menu=1347&pk_association_webpage=5130)

# Mission and Values

## Mission Statement

As an international multidisciplinary professional Association the mission of The World Professional Association for Transgender Health (WPATH) is to promote evidence based care, education, research, advocacy, public policy and respect in transgender health.

## Vision Statement

The vision of The World Professional Association for Transgender Health (WPATH) is to bring together diverse professionals dedicated to developing best practices and supportive policies worldwide that promote health, research, education, respect, dignity, and equality for transgender, transsexual, and gender-variant people in all cultural settings.

## Goals and Tasks

As an international interdisciplinary, professional organization, the World Professional Association for Transgender Health (WPATH) will work to further the understanding and treatment of gender identity disorders by professionals in medicine, psychology, law, social work, counseling, psychotherapy, family studies, sociology, anthropology, sexology, speech and voice therapy, and other related fields.

WPATH provides opportunities for professionals from various sub-specialties to communicate with each other in the context of research and treatment of gender identity disorder including sponsoring biennial scientific symposia.

WPATH publishes the Standards of Care and Ethical Guidelines, which articulate a professional consensus about the psychiatric, psychological, medical, and surgical management of gender identity disorders, and help professionals understand the parameters within which they may offer assistance to those with these conditions.

WPATH WORLD PROFESSIONAL ASSOCIATION for TRANSGENDER HEALTH

www.wpath.org

# Standards of Care

## for the Health of Transsexual, Transgender, and Gender-Nonconforming People

The World Professional Association for Transgender Health

Version 7

WPATH WORLD PROFESSIONAL ASSOCIATION for TRANSGENDER HEALTH

# Standards of Care

## for the Health of Transsexual, Transgender, and Gender-Nonconforming People

Eli Coleman, Walter Bockting, Marsha Botzer, Peggy Cohen-Kettenis, Griet DeCuypere, Jamie Feldman, Lin Fraser, Jamison Green, Gail Knudson, Walter J. Meyer, Stan Monstrey, Richard K. Adler, George R. Brown, Aaron H. Devor, Randall Ehrbar, Randi Ettner, Evan Eyler, Rob Garofalo, Dan H. Karasic, Arlene Istar Lev, Gal Mayer, Heino Meyer-Bahlburg, Blaine Paxton Hall, Friedmann Pfäfflin, Katherine Rachlin, Bean Robinson, Loren S. Schechter, Vin Tangpricha, Mick van Trotsenburg, Anne Vitale, Sam Winter, Stephen Whittle, Kevan R. Wylie & Ken Zucker



7th Version[1] | www.wpath.org

ISBN: X-XXX-XXXXX-XX

1 This is the seventh version of the *Standards of Care* since the original 1979 document. Previous revisions were in 1980, 1981, 1990, 1998, and 2001. Version seven was published in the International Journal of Transgenderism, 13(4), 165–232. doi:10.1080/15532739.2011.700873

If mental health professionals are uncomfortable with, or inexperienced in, working with transsexual, transgender, and gender-nonconforming individuals and their families, they should refer clients to a competent provider or, at minimum, consult with an expert peer. If no local practitioners are available, consultation may be done via telehealth methods, assuming local requirements for distance consultation are met.

## Issues of Access to Care

Qualified mental health professionals are not universally available; thus, access to quality care might be limited. WPATH aims to improve access and provides regular continuing education opportunities to train professionals from various disciplines to provide quality, transgender-specific health care. Providing mental health care from a distance through the use of technology may be one way to improve access (Fraser, 2009b).

In many places around the world, access to health care for transsexual, transgender, and gender-nonconforming people is also limited by a lack of health insurance or other means to pay for needed care. WPATH urges health insurance companies and other third-party payers to cover the medically necessary treatments to alleviate gender dysphoria (American Medical Association, 2008; Anton, 2009; The World Professional Association for Transgender Health, 2008).

When faced with a client who is unable to access services, referral to available peer support resources (offline and online) is recommended. Finally, harm-reduction approaches might be indicated to assist clients with making healthy decisions to improve their lives.

# VIII
# Hormone Therapy

## Medical Necessity of Hormone Therapy

Feminizing/masculinizing hormone therapy—the administration of exogenous endocrine agents to induce feminizing or masculinizing changes—is a medically necessary intervention for many transsexual, transgender, and gender-nonconforming individuals with gender dysphoria

# FEHB Program Carrier Letter

**All FEHB Carriers**

**U.S. Office of Personnel Management**
**Healthcare and Insurance**

**Letter No. 2014-17** **Date: June 13, 2014**

Fee-for-Service [14] Experience-rated HMO [14] Community-rated HMO [15]

**SUBJECT: Gender Identity Disorder/Gender Dysphoria**

This letter provides guidance for FEHB carriers regarding treatment of individuals who meet established criteria for a diagnosis of Gender Identity Disorder/Gender Dysphoria.

Carrier Letter 2011-12 directed carriers to allow individuals who identify as transgender to select their preferred gender designation for health records. It also reinforced the need to provide health benefits consistent with each person's individual medical status before and after gender transition.

There is an evolving professional consensus that treatment is considered medically necessary for certain individuals who meet established Diagnostic and Statistical Manual (DSM) criteria for a diagnosis of Gender Identity Disorder/Gender Dysphoria. Accordingly, OPM is removing the requirement that FEHB brochures exclude "services, drugs, or supplies related to sex transformations" in Section 6 of the FEHB plan brochure effective with the 2015 plan year.

Carriers will propose one of two options on coverage of services, drugs, and supplies regarding a diagnosis of Gender Identity Disorder/Gender Dysphoria:

1) Remove the **General Exclusion** language and provide to OPM the specific brochure text that describes the covered components and limitations of care for the diagnosis; or

2) Maintain the **General Exclusion** language for the 2015 plan year.

Let your contract specialist know by June 30, 2014 which option you are proposing and include the brochure text if applicable. Consistent with other benefit and rate negotiations, provide your contract specialist with all required information and necessary justification.

For questions or additional information, please contact your contract specialist.

Sincerely

John O'Brien
Director
Healthcare and Insurance

Lambda Legal
making the case for equality

# PROFESSIONAL ORGANIZATION STATEMENTS SUPPORTING TRANSGENDER PEOPLE IN HEALTH CARE[1]

## American Medical Association

Resolution: Removing Financial Barriers to Care for Transgender Patients (2008)

> An established body of medical research demonstrates the effectiveness and medical necessity of mental health care, hormone therapy and sex reassignment surgery as forms of therapeutic treatment for many people diagnosed with GID… Therefore, be it RESOLVED, that the AMA supports public and private health insurance coverage for treatment of gender identity disorder.

http://www.tgender.net/taw/ama_resolutions.pdf

Resolution H-185.950: Removing Financial Barriers to Care for Transgender Patients (2008)

Our AMA supports public and private health insurance coverage for treatment of gender identity disorder as recommended by the patient's physician. (Res. 122; A-08)

http://www.ama-assn.org/resources/doc/PolicyFinder/policyfiles/HnE/H-185.950.HTM

## American Psychiatric Association

Position Statement on Access to Care for Transgender and Gender Variant Individuals (2012)

> The American Psychiatric Association:
>
> 1. Recognizes that appropriately evaluated transgender and gender variant individuals can benefit greatly from medical and surgical gender transition treatments.
>
> 2. Advocates for removal of barriers to care and supports both public and private health insurance coverage for gender transition treatment.
>
> **3.** Opposes categorical exclusions of coverage for such medically necessary treatment when prescribed by a physician.

[1] Compiled by Lambda Legal. For more information, contact Dru Levasseur, Transgender Rights Attorney, Lambda Legal, 120 Wall Street, 19th Floor, New York, NY 10005, (212) 809-8585 (telephone), (212) 809-0055 (fax), dlevasseur@lambdalegal.org.

www.psychiatry.org/File%20Library/Advocacy%20and%20Newsroom/Position%20Statements/ps2012_TransgenderCare.pdf

Position Statement on Discrimination Against Transgender and Gender Variant Individuals (2012)

> Being transgender gender or variant implies no impairment in judgment, stability, reliability, or general social or vocational capabilities; however, these individuals often experience discrimination due to a lack of civil rights protections for their gender identity or expression… Thus, this position statement is relevant to the APA because discrimination and lack of equal civil rights is damaging to the mental health of transgender and gender variant individuals.
>
> The American Psychiatric Association:
>
> 1. Supports laws that protect the civil rights of transgender and gender variant individuals.
>
> 2. Urges the repeal of laws and policies that discriminate against transgender and gender variant individuals.
>
> 3. Opposes all public and private discrimination against transgender and gender variant individuals in such areas as health care, employment, housing, public accommodation, education, and licensing.
>
> 4. Declares that no burden of proof of such judgment, capacity, or reliability shall be placed upon these individuals greater than that imposed on any other persons.

www.psychiatry.org/File%20Library/Advocacy%20and%20Newsroom/Position%20Statements/ps2012_TransgenderDiscrimination.pdf

**American Psychological Association**

Policy on Transgender, Gender Identity & Gender Expression Non-Discrimination (2008)

> As stated in the Policy on Transgender, Gender Identity & Gender Expression Non-Discrimination, the APA "opposes all public and private discrimination on the basis of actual or perceived gender identity and expression and urges the repeal of discriminatory laws and policies" and "calls upon psychologists in their professional roles to provide appropriate, nondiscriminatory treatment to transgender and gender variant individuals and encourages psychologists to take a leadership role in working against discrimination towards transgender and gender variant individuals[.]"

> The "APA recognizes the efficacy, benefit and medical necessity of gender transition treatments for appropriately evaluated individuals and calls upon public and private insurers to cover these medically necessary treatments."

http://www.apa.org/about/policy/transgender.aspx

**American Academy of Family Physicians**

Resolution No. 1004 (2012)

> In 2007, an AAFP Commission declared that the association has a policy opposing any form of patient discrimination and stated its opposition to the exclusion of transgender health care. In 2012, the organization released a new resolution: "RESOLVED, That the American Academy of Family Physicians (AAFP) support efforts to require insurers to provide coverage for comprehensive care of [transgender] individuals including medical care, screening tests based on medical need rather than gender, mental health care, and, when medically necessary, gender reassignment surgery."

http://www.aafp.org/dam/AAFP/documents/about_us/special_constituencies/2012RCAR_Advocacy.pdf

**American Academy of Physician Assistants**

Non-Discrimination Statement[2] (Adopted 2000; amended 2004, 2006, 2007 and 2008)

> "Physician assistants should not discriminate against classes or categories of patients in the delivery of needed health care. Such classes and categories include…gender identity."

**American College of Nurse Midwives**

Transgender/Transsexual/Gender Variant Health Care (2012)

> The American College of Nurse-Midwives (ACNM) supports efforts to provide transgender, transsexual, and gender variant individuals with access to safe, comprehensive, culturally competent health care and therefore endorses the 2011 World Professional Association for Transgender Health (WPATH) Standards of Care.[3]

[2] Please see "Ethical Conduct for the Physician Assistant Profession" (Adopted 2000, amended 2004, 2006, 2007, and 2008) and "Comprehensive Health Care Reform" (Adopted 2005 and amended 2010). Thanks to Diane Bruessow for this compilation.
[3] Thanks to Andre Wilson of Jamison Green & Associates for making us aware of this organization statement.

**National Association of Social Workers**

Transgender and Gender Identity Issues Policy Statement (2008)

> NASW supports the rights of all individuals to receive health insurance and other health coverage without discrimination on the basis of gender identity, and specifically without exclusion of services related to transgender or transsexual transition…in order to receive medical and mental health services through their primary care physician and the appropriate referrals to medical specialists, which may include hormone replacement therapy, surgical interventions, prosthetic devices, and other medical procedures.

http://www.socialworkers.org/da/da2008/finalvoting/documents/Transgender%202nd%20round%20-%20Clean.pdf

**World Professional Association for Transgender Health**

Clarification on Medical Necessity of Treatment, Sex Reassignment, and Insurance Coverage in the U.S.A. (2008)

> WPATH found that decades of experience with the Standards of Care show gender transitions and related care to be accepted, good medical practice and effective treatment. In a 2008 clarification, WPATH stated:
>
> [S]ex reassignment, properly indicated and performed as provided by the Standards of Care, has proven to be beneficial and effective in the treatment of individuals with transsexualism, gender identity disorder, and/or gender dysphoria. Sex reassignment plays an undisputed role in contributing toward favorable outcomes, and comprises Real Life Experience, legal name and sex change on identity documents, as well as medically necessary hormone treatment, counseling, psychotherapy, and other medical procedures...
>
> The medical procedures attendant to sex reassignment are not 'cosmetic' or 'elective' or for the mere convenience of the patient. These reconstructive procedures are not optional in any meaningful sense, but are understood to be medically necessary for the treatment of the diagnosed condition.

http://www.wpath.org/documents/Med%20Nec%20on%202008%20Letterhead.pdf

**National Commission on Correctional Health Care**

Position Statement: Transgender Health Care in Correctional Settings (2009)

> The health risks of overlooking the particular needs of transgender inmates are so severe that acknowledgment of the problem and policies that assure appropriate and responsible provision of health care are needed….
>
> Because prisons, jails, and juvenile justice facilities have a responsibility to ensure the physical and mental health and well-being of transgender people in their custody, correctional health staff should manage these inmates in a manner that respects the biomedical and psychological aspects of a gender identity disorder (GID) diagnosis.

http://www.ncchc.org/transgender-health-care-in-correctional-settings

**American Public Health Association**

The Need for Acknowledging Transgender[ed] Individuals within Research and Clinical Practice (1999)

> The APHA issued a policy statement concluding that transgender[ed] "individuals are not receiving adequate health care, information, or inclusion within research studies because of discrimination by and/or lack of training of health care providers and researchers; therefore…"
>
> The APHA therefore "Urges researchers and health care workers to be sensitive to the lives of transgender[ed] individuals and treat them with dignity and respect, and not to force them to fit within rigid gender norms. This includes referring to them as the gender with which they identify;
>
> Urges researchers, health care workers, the National Institutes of Health, and the Centers for Disease Control and Prevention to be aware of the distinct health care needs of transgender[ed] individuals; and
>
> Urges the National Institutes of Health and the Centers for Disease Control and Prevention to make available resources, including funding for research, that will enable a better understanding of the health risks of transgender[ed] individuals, especially the barriers they experience within health care settings…"

http://www.apha.org/advocacy/policy/policysearch/default.htm?id=204

**American College of Obstetricians and Gynecologists**

The American College of Obstetricians and Gynecologists, *Committee Opinion No. 512: Health Care for Transgender Individuals*, 118 OBSTETRICS AND GYNECOLOGY 1454 (2011).

> Transgender individuals face harassment, discrimination, and rejection within our society. Lack of awareness, knowledge, and sensitivity in health care communities eventually leads to inadequate access to, underutilization of, and disparities within the health care system for this population. Although the care for these patients is often managed by a specialty team, obstetrician-gynecologists should be prepared to assist of refer transgender individuals with routine treatment and screening as well as hormonal and surgical therapies. The American College of Obstetricians and Gynecologists opposes discrimination on the basis of gender identity and urges public and private health insurance plans to cover the treatment of gender identity disorder.

http://www.ncfr.org/news/acog-releases-new-committee-opinion-transgender-persons

**Revised July 2, 2013**

AMERICAN MEDICAL ASSOCIATION HOUSE OF DELEGATES

Resolution: 122
(A-08)

Introduced by: Resident and Fellow Section, Massachusettes Medical Society, California Medical Association, Medical Society of the State of New York

Subject: Removing Financial Barriers to Care for Transgender Patients

Referred to: Reference Committee A

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Whereas, The American Medical Association opposes discrimination on the basis of gender identity[1] and

Whereas, Gender Identity Disorder (GID) is a serious medical condition recognized as such in both the Diagnostic and Statistical Manual of Mental Disorders (4th Ed., Text Revision) (DSM-IV-TR) and the International Classification of Diseases (10th Revision),[2] and is characterized in the DSM-IV-TR as a persistent discomfort with one's assigned sex and with one's primary and secondary sex characteristics, which causes intense emotional pain and suffering;[3] and

Whereas, GID, if left untreated, can result in clinically significant psychological distress, dysfunction, debilitating depression and, for some people without access to appropriate medical care and treatment, suicidality and death;[4] and

Whereas, The World Professional Association For Transgender Health, Inc. ("WPATH") is the leading international, interdisciplinary professional organization devoted to the understanding and treatment of gender identity disorders,[5] and has established internationally accepted Standards of Care [6] for providing medical treatment for people with GID, including mental health care, hormone therapy and sex reassignment surgery, which are designed to promote the health and welfare of persons with GID and are recognized within the medical community to be the standard of care for treating people with GID; and

Whereas, An established body of medical research demonstrates the effectiveness and medical necessity of mental health care, hormone therapy and sex reassignment surgery as forms of therapeutic treatment for many people diagnosed with GID; [7] and

Whereas, Health experts in GID, including WPATH, have rejected the myth that such treatments are "cosmetic" or "experimental" and have recognized that these treatments can provide safe and effective treatment for a serious health condition;[7] and

Whereas, Physicians treating persons with GID must be able to provide the correct treatment necessary for a patient in order to achieve genuine and lasting comfort with his or her gender, based on the person's individual needs and medical history;[8] and

Whereas, The AMA opposes limitations placed on patient care by third-party payers when such care is based upon sound scientific evidence and sound medical opinion;[9, 10] and

Whereas, Many health insurance plans categorically exclude coverage of mental health, medical, and surgical treatments for GID, even though many of these same treatments, such as psychotherapy, hormone therapy, breast augmentation and removal, hysterectomy, oophorectomy, orchiectomy, and salpingectomy, are often covered for other medical conditions; and

Whereas, The denial of these otherwise covered benefits for patients suffering from GID represents discrimination based solely on a patient's gender identity; and

Whereas, Delaying treatment for GID can cause and/or aggravate additional serious and expensive health problems, such as stress-related physical illnesses, depression, and substance abuse problems, which further endanger patients' health and strain the health care system; therefore be it

RESOLVED, That the AMA support public and private health insurance coverage for treatment of gender identity disorder (Directive to Take Action); and be it further

RESOLVED, That the AMA oppose categorical exclusions of coverage for treatment of gender identity disorder when prescribed by a physician (Directive to Take Action).

Fiscal Note: No significant fiscal impact.

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1. AMA Policy H-65.983, H-65.992, and H-180.980
2. Diagnostic and Statistical Manual of Mental Disorders (4th ed.. Text revision) (2000) ("DSM-IV-TR"), 576-82, American Psychiatric Association; International Classification of Diseases (10th Revision) ("ICD-10"), F64, World Health Organization. The ICD further defines transsexualism as "[a] desire to live and be accepted as a member of the opposite sex, usually accompanied by a sense of discomfort with, or inappropriateness of, one's anatomic sex, and a wish to have surgery and hormonal treatment to make one's body as congruent as possible with one's preferred sex." ICD-10, F64.0.
3. DSM-IV-TR, 575-79
4. Id. at 578-79.
5. World Professional Association for Transgender Health: http://www.wpath.org. Formerly known as The Harry Benjamin International Gender Dysphoria Association.
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8. The Harry Benjamin International Gender Dysphoria Association’s Standards of Care for Gender Identity Disorders, at 18.
9. Id.
10. AMA Policy H-120.988

**Relevant AMA policy**

**H-65.983 Nondiscrimination Policy**

The AMA opposes the use of the practice of medicine to suppress political dissent wherever it may occur. (Res. 127, A-83; Reaffirmed: CLRPD Rep. 1, I-93; Reaffirmed: CEJA Rep. 2, A-05)

**H-65.992 Continued Support of Human Rights and Freedom**

Our AMA continues (1) to support the dignity of the individual, human rights and the sanctity of human life, and (2) to oppose any discrimination based on an individual's sex, sexual orientation, race, religion, disability, ethnic origin, national origin or age and any other such reprehensible policies. (Sub. Res. 107, A-85; Modified by CLRPD Rep. 2, I-95; Reaffirmation A-00; Reaffirmation A-05)

**H-180.980 Sexual Orientation as Health Insurance Criteria**

The AMA opposes the denial of health insurance on the basis of sexual orientation. (Res. 178, A-88; Reaffirmed: Sub. Res. 101, I-97)

**H-120.988 Patient Access to Treatments Prescribed by Their Physicians**

The AMA confirms its strong support for the autonomous clinical decision-making authority of a physician and that a physician may lawfully use an FDA approved drug product or medical device for an unlabeled indication when such use is based upon

sound scientific evidence and sound medical opinion; and affirms the position that, when the prescription of a drug or use of a device represents safe and effective therapy, third party payers, including Medicare, should consider the intervention as reasonable and necessary medical care, irrespective of labeling, should fulfill their obligation to their beneficiaries by covering such therapy, and be required to cover appropriate "off-label" uses of drugs on their formulary. (Res. 30, A-88; Reaffirmed: BOT Rep. 53, A-94; Reaffirmed and Modified by CSA Rep. 3, A-97; Reaffirmed and Modified by Res. 528, A-99; Reaffirmed: CMS Rep. 8, A-02; Reaffirmed: CMS Rep. 6, A-03; Modified: Res. 517, A-04)

# Position Statement on Access to Care for Transgender and Gender Variant Individuals

Approved by the Board of Trustees, July 2012
Approved by the Assembly, May 2012

"Policy documents are approved by the APA Assembly and Board of Trustees These are position statements that define APA official policy on specific subjects " – *APA Operations Manual*.

Issue: Significant and long-standing medical and psychiatric literature exists that demonstrates clear benefits of medical and surgical interventions to assist gender variant individuals seeking transition. However, private and public insurers often do not offer, or may specifically exclude, coverage for medically necessary treatments for gender transition. Access to medical care (both medical and surgical) positively impacts the mental health of transgender and gender variant individuals.

The APA's vision statement includes the phrase: "Its vision is a society that has available, accessible quality psychiatric diagnosis and treatment," yet currently, transgender and gender variant individuals frequently lack available and accessible treatment. In addition, APA's values include the following points:

- best standards of clinical practice
- patient-focused treatment decisions
- scientifically established principles of treatment
- advocacy for patients

Transgender and gender variant individuals currently lack access to the best standards of clinical practice, frequently do not have the opportunity to pursue patient-focused treatment decisions, do not receive scientifically established treatment and could benefit significantly from APA's advocacy.

## APA Position:

**Therefore, the American Psychiatric Association:**

1. **Recognizes that appropriately evaluated transgender and gender variant individuals can benefit greatly from medical and surgical gender transition treatments.**
2. **Advocates for removal of barriers to care and supports both public and private health insurance coverage for gender transition treatment.**
3. **Opposes categorical exclusions of coverage for such medically necessary treatment when prescribed by a physician.**

*Authors: Jack Drescher, M.D., Ellen Haller, M.D., APA Caucus of Lesbian, Gay and Bisexual Psychiatrists.*

# Background to the Position Statement

Transgender and gender variant people are frequently denied medical, surgical and psychiatric care related to gender transition despite significant evidence that appropriately evaluated individuals benefit from such care. It is often asserted that the DSM (and ICD) diagnoses provide the only pathways to insurance reimbursement for transgender individuals seeking medical assistance. However, to date, the APA has issued no treatment guidelines for gender identity disorder (GID) in either children or adults. This omission is in contrast to an increasing proliferation of APA practice guidelines for other DSM diagnoses (1).

The absence of a formal APA opinion about treatment of a diagnosis of its own creation has contributed to an ongoing problem of many health care insurers and other third party payers claiming that hormonal treatment and sex reassignment surgery (SRS) are "experimental treatments," "elective treatments," or "not medically necessary," and, therefore, not reimbursable or covered under most insurance plans. The lack of consistency in how a transgender condition is defined by some institutions further marginalizes these individuals based on their subjective, surgical and hormonal status (2). In addition, treatment is not always accessible to wards of governmental agencies, such as transgender and gender variant individuals in foster care and prison systems. In other words, the presence of the GID diagnosis in the DSM has not served its intended purpose of creating greater access to care--one of the major arguments for diagnostic retention (1).

Lack of access to care adversely impacts the mental health of transgender and gender variant people, and both hormonal and surgical treatment have been shown to be efficacious in these individuals (3-7). Practice guidelines have been developed based on peer-reviewed scientific studies and are published and available for clinicians to access (3, 8, 9). The American Medical Association and the American Psychological Association both have position statements stating the critical importance of access to care for transgender and gender variant individuals (10, 11).

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# Position Statement on Discrimination Against Transgender and Gender Variant Individuals

Approved by the Board of Trustees, July 2012
Approved by the Assembly, May 2012

"Policy documents are approved by the APA Assembly and Board of Trustees These are position statements that define APA official policy on specific subjects " – *APA Operations Manual*.

Issue: Being transgender gender or variant implies no impairment in judgment, stability, reliability, or general social or vocational capabilities; however, these individuals often experience discrimination due to a lack of civil rights protections for their gender identity or expression. As a result, transgender and gender variant persons face challenges in their marriage, adoption and parenting rights, are regularly discharged from uniformed services or are rejected from enlisting due to their gender identity, and have difficulty revising government identity documents. Incarcerated transgender and gender variant persons suffer risks to their personal safety and lack of access to comprehensive healthcare. Further, transgender and gender variant individuals may be inappropriately assigned space in gender-segregated facilities such as inpatient psychiatric units and residential treatment programs. Transgender and gender variant people are frequently harassed and discriminated against when seeking housing or applying to jobs or schools and are often victims of violent hate crimes.

The APA declares in its vision statement that it is, "the voice and conscience of modern psychiatry." Thus, this position statement is relevant to the APA because discrimination and lack of equal civil rights is damaging to the mental health of transgender and gender variant individuals. In addition, APA's values include "advocacy for patients." Speaking out firmly and professionally against discrimination and lack of equal civil rights is a critical advocacy role that the APA is uniquely positioned to take.

## APA Position:

**Therefore, the American Psychiatric Association:**

1. **Supports laws that protect the civil rights of transgender and gender variant individuals**
2. **Urges the repeal of laws and policies that discriminate against transgender and gender variant individuals.**
3. **Opposes all public and private discrimination against transgender and gender variant individuals in such areas as health care, employment, housing, public accommodation, education, and licensing.**
4. **Declares that no burden of proof of such judgment, capacity, or reliability shall be placed upon these individuals greater than that imposed on any other persons.**

*Authors: Jack Drescher, M.D., Ellen Haller, M.D., APA Caucus of Lesbian, Gay and Bisexual Psychiatrists.*

# Background to the Position Statement

In 1973, the American Psychiatric Association removed the diagnosis of homosexuality from the DSM-II (1, 2) and issued a position statement of support of gay and lesbian civil rights (3). In subsequent years, APA continued to expand its public positions regarding gay and lesbian civil rights. In 1990, APA issued a statement opposing "exclusion and dismissal from the armed services on the basis of sexual orientation" (4). In 1992, APA called on "all international health organizations, psychiatric organizations, and individual psychiatrists in other countries to urge the repeal in their own countries of legislation that penalizes homosexual acts by consenting adults in private" (5).

In 2000, following Vermont's passage of civil union laws, APA endorsed "the legal recognition of same-sex unions and their associated legal rights, benefits and responsibilities" (6). In 2002, APA approved a position statement supporting "initiatives which allow same-sex couples to adopt and co-parent children and supports all the associated legal rights, benefits, and responsibilities which arise from such initiatives" (7).

In 2005, after Massachusetts' 2004 legalization of marriage equality, APA issued a statement supporting "the legal recognition of same-sex civil marriage with all rights, benefits and responsibilities conferred by civil marriage, and opposes restrictions to those same rights, benefits, and responsibilities" (8).

In contrast to its strong affirmation of lesbian and gay civil rights since the 1973 decision to remove homosexuality from the DSM, APA has not issued position statements in support of transgender civil rights. The APA Committee on Gay, Lesbian, and Bisexual Issues often functioned as the default clearinghouse for queries to the APA about trans issues.

Gender variant and transgender individuals must cope with multiple unique challenges. They face significant discrimination, prejudice and hatred and the potential for victimization from violent hate crimes (9). In the workplace, bias may impact transgender people as part of the application process or during their employment precipitated by the individual coming out as transgender (either on their own or by being "outed" by others), or transitioning while an employee. These individuals also need to navigate numerous expensive and complex legal issues such as changing their identity documents including, in part, their social security, driver's license, and passport (10). They often experience discrimination when accessing non-gender transition-related health care and are denied numerous basic civil rights and protections (11). Gender variant and transgender people have no federal protection against discrimination on the basis of their gender identity or expression in public accommodations, housing, credit, education, or federally-funded programs.

The mental health of gender variant and transgender people is hypothesized to be adversely impacted by discrimination and stigma. For example, gender-based discrimination and victimization were found to be independently associated with attempted suicide in a population of transgender individuals, 32% of whom had histories of trying to kill themselves (12). And, in the largest survey to date of gender variant and transgender people with an N of 6,450, 41% reported attempting suicide (13).

Other organizations, including the American Medical Association and the American Psychological Association, have endorsed strong policy statements deploring the discrimination experienced by gender variant and transgender individuals and calling for laws to protect their civil rights (14, 15).

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# Transgender, Gender Identity, & Gender Expression Non-Discrimination

*Adopted by the American Psychological Association Council of Representatives August, 2008*.

**Whereas** transgender and gender variant people frequently experience prejudice and discrimination and psychologists can, through their professional actions, address these problems at both an individual and a societal level;

**Whereas** the American Psychological Association opposes prejudice and discrimination based on demographic characteristics including gender identity, as reflected in policies including the Hate Crimes Resolution (Paige, 2005), the Resolution on Prejudice Stereotypes and Discrimination (Paige, 2007), APA Bylaws (Article III, Section 2), the Ethical Principles of Psychologists and Code of Conduct (APA 2002, 3.01 and Principle E);

**Whereas** transgender and other gender variant people benefit from treatment with therapists with specialized knowledge of their issues (Lurie, 2005; Rachlin, 2002), and that the Ethical Principles of Psychologists and Code of Conduct state that when scientific or professional knowledge ...is essential for the effective implementation of their services or research, psychologists have or obtain the training....necessary to ensure the competence of their services...” (APA 2002, 2.01b);

**Whereas** discrimination and prejudice against people based on their actual or perceived gender identity or expression detrimentally affects psychological, physical, social, and economic well-being (Bockting et al., 2005; Coan et al., 2005; Clements-Nolle, 2006; Kenagy, 2005; Kenagy & Bostwick, 2005; Nemoto et al., 2005; Resolution on Prejudice Stereotypes and Discrimination, Paige, 2007; Riser et al., 2005; Rodriquez-Madera & Toro-Alfonso, 2005; Sperber et al., 2005; Xavier et al., 2005);

**Whereas** transgender people may be denied basic non-gender transition related health care (Bockting et al., 2005; Coan et al., 2005; Clements-Nolle, 2006; GLBT Health Access Project, 2000; Kenagy, 2005; Kenagy & Bostwick, 2005; Nemoto et al., 2005; Riser et al., 2005; Rodriquez-Madera & Toro-Alfonso, 2005; Sperber et al., 2005; Xavier et al., 2005);

**Whereas** gender variant and transgender people may be denied appropriate gender transition related medical and mental health care despite evidence that appropriately evaluated individuals benefit from gender transition treatments (De Cuypere et al., 2005; Kuiper & Cohen-Kettenis, 1988; Lundstrom, et al., 1984; Newfield, et al., 2006; Pfafflin & Junge, 1998; Rehman et al., 1999; Ross & Need, 1989; Smith et al., 2005);

**Whereas** gender variant and transgender people may be denied basic civil rights and protections (Minter, 2003; Spade, 2003) including: the right to civil marriage which confers a social status and important legal benefits, rights, and privileges (Paige, 2005); the right to obtain appropriate identity documents that are consistent with a post-transition identity; and the right to fair and safe and harassment-free institutional environments such as care facilities, treatment centers, shelters, housing, schools, prisons and juvenile justice programs;

**Whereas** transgender and gender variant people experience a disproportionate rate of homelessness (Kammerer et al., 2001), unemployment (APA, 2007) and job discrimination (Herbst et al., 2007), disproportionately report income below the poverty line (APA, 2007) and experience other financial disadvantages (Lev, 2004);

**Whereas** transgender and gender variant people may be at increased risk in institutional environments and facilities for harassment, physical and sexual assault (Edney, 2004; Minter, 2003; Peterson et al., 1996; Witten & Eyler, 2007) and inadequate medical care including denial of gender transition treatments such as hormone therapy (Edney, 2004; Peterson et al., 1996; Bockting et al., 2005; Coan et al., 2005; Clements-Nolle, 2006; Kenagy, 2005; Kenagy & Bostwick, 2005; Nemoto et al., 2005; Newfield et al., 2006; Riser et al., 2005; Rodriquez-Madera &Toro-Alfonso, 2005; Sperber et al., 2005; Xavier et al., 2005);

**Whereas** many gender variant and transgender children and youth face harassment and violence in school environments, foster care, residential treatment centers, homeless centers and juvenile justice programs (D'Augelli, Grossman, & Starks, 2006; Gay Lesbian and Straight Education Network, 2003; Grossman, D'Augelli, & Slater, 2006);

**Whereas** psychologists are in a position to influence policies and practices in institutional settings, particularly regarding the implementation of the Standards of Care published by the World Professional Association of Transgender Health (WPATH, formerly known as the Harry Benjamin International Gender Dysphoria Association) which recommend the continuation of

gender transition treatments and especially hormone therapy during incarceration (Meyer et al., 2001);

**Whereas** psychological research has the potential to inform treatment, service provision, civil rights and approaches to promoting the well-being of transgender and gender variant people;

**Whereas** APA has a history of successful collaboration with other organizations to meet the needs of particular populations, and organizations outside of APA have useful resources for addressing the needs of transgender and gender variant people;

**Therefore be it resolved** that APA opposes all public and private discrimination on the basis of actual or perceived gender identity and expression and urges the repeal of discriminatory laws and policies;

**Therefore be it further resolved** that APA supports the passage of laws and policies protecting the rights, legal benefits, and privileges of people of all gender identities and expressions;

**Therefore be it further resolved** that APA supports full access to employment, housing, and education regardless of gender identity and expression;

**Therefore be it further resolved** that APA calls upon psychologists in their professional roles to provide appropriate, nondiscriminatory treatment to transgender and gender variant individuals and encourages psychologists to take a leadership role in working against discrimination towards transgender and gender variant individuals;

**Therefore be it further resolved** that APA encourages legal and social recognition of transgender individuals consistent with their gender identity and expression, including access to identity documents consistent with their gender identity and expression which do not involuntarily disclose their status as transgender for transgender people who permanently socially transition to another gender role;

**Therefore be it further resolved** that APA supports access to civil marriage and all its attendant benefits, rights, privileges and responsibilities, regardless of gender identity or expression;

**Therefore be it further resolved** that APA supports efforts to provide fair and safe environments for gender variant and transgender people in institutional settings such as supportive living environments, long-term care facilities, nursing homes, treatment facilities, and shelters, as well as custodial settings such as prisons and jails;

**Therefore be it further resolved** that APA supports efforts to provide safe and secure educational environments, at all levels of education, as well as foster care environments and juvenile justice programs, that promote an understanding and acceptance of self and in which all youths, including youth of all gender identities and expressions, may be free from discrimination, harassment, violence, and abuse;

**Therefore be it further resolved** that APA supports the provision of adequate and necessary mental and medical health care treatment for transgender and gender variant individuals;

**Therefore be it further resolved** that APA recognizes the efficacy, benefit and medical necessity of gender transition treatments for appropriately evaluated individuals and calls upon public and private insurers to cover these medically necessary treatments;

**Therefore be it further resolved** that APA supports access to appropriate treatment in institutional settings for people of all gender identities and expressions; including access to appropriate health care services including gender transition therapies;

**Therefore be it further resolved** that APA supports the creation of educational resources for all psychologists in working with individuals who are gender variant and transgender;

**Therefore be it further resolved** that APA supports the funding of basic and applied research concerning gender expression and gender identity;

**Therefore be it further resolved** that APA supports the creation of scientific and educational resources that inform public discussion about gender identity and gender expression to promote public policy development, and societal and familial attitudes and behaviors that affirm the dignity and rights of all individuals regardless of gender identity or gender expression;

**Therefore be it further resolved** that APA supports cooperation with other organizations in efforts to accomplish these ends.

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**Please cite this policy statement as:**

Anton, Barry S. (2009). Proceedings of the American Psychological Association for the legislative year 2008: Minutes of the annual meeting of the Council of Representatives, February 22-24, 2008, Washington, DC, and August 13 and 17, 2008, Boston, MA, and minutes of the February, June, August, and December 2008 meetings of the Board of Directors. American Psychologist 64, 372-453. doi:10.1037/a0015932

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# Transgender, Gender Identity, & Gender Expression Non-Discrimination

*Adopted by the American Psychological Association Council of Representatives August, 2008*.

**Whereas** transgender and gender variant people frequently experience prejudice and discrimination and psychologists can, through their professional actions, address these problems at both an individual and a societal level;

**Whereas** the American Psychological Association opposes prejudice and discrimination based on demographic characteristics including gender identity, as reflected in policies including the Hate Crimes Resolution (Paige, 2005), the Resolution on Prejudice Stereotypes and Discrimination (Paige, 2007), APA Bylaws (Article III, Section 2), the Ethical Principles of Psychologists and Code of Conduct (APA 2002, 3.01 and Principle E);

**Whereas** transgender and other gender variant people benefit from treatment with therapists with specialized knowledge of their issues (Lurie, 2005; Rachlin, 2002), and that the Ethical Principles of Psychologists and Code of Conduct state that when scientific or professional knowledge ...is essential for the effective implementation of their services or research, psychologists have or obtain the training....necessary to ensure the competence of their services...” (APA 2002, 2.01b);

**Whereas** discrimination and prejudice against people based on their actual or perceived gender identity or expression detrimentally affects psychological, physical, social, and economic well-being (Bockting et al., 2005; Coan et al., 2005; Clements-Nolle, 2006; Kenagy, 2005; Kenagy & Bostwick, 2005; Nemoto et al., 2005; Resolution on Prejudice Stereotypes and Discrimination, Paige, 2007; Riser et al., 2005; Rodriquez-Madera & Toro-Alfonso, 2005; Sperber et al., 2005; Xavier et al., 2005);

**Whereas** transgender people may be denied basic non-gender transition related health care (Bockting et al., 2005; Coan et al., 2005; Clements-Nolle, 2006; GLBT Health Access Project, 2000; Kenagy, 2005; Kenagy & Bostwick, 2005; Nemoto et al., 2005; Riser et al., 2005; Rodriquez-Madera & Toro-Alfonso, 2005; Sperber et al., 2005; Xavier et al., 2005);

**Whereas** gender variant and transgender people may be denied appropriate gender transition related medical and mental health care despite evidence that appropriately evaluated individuals benefit from gender transition treatments (De Cuypere et al., 2005; Kuiper & Cohen-Kettenis, 1988; Lundstrom, et al., 1984; Newfield, et al., 2006; Pfafflin & Junge, 1998; Rehman et al., 1999; Ross & Need, 1989; Smith et al., 2005);

**Whereas** gender variant and transgender people may be denied basic civil rights and protections (Minter, 2003; Spade, 2003) including: the right to civil marriage which confers a social status and important legal benefits, rights, and privileges (Paige, 2005); the right to obtain appropriate identity documents that are consistent with a post-transition identity; and the right to fair and safe and harassment-free institutional environments such as care facilities, treatment centers, shelters, housing, schools, prisons and juvenile justice programs;

**Whereas** transgender and gender variant people experience a disproportionate rate of homelessness (Kammerer et al., 2001), unemployment (APA, 2007) and job discrimination (Herbst et al., 2007), disproportionately report income below the poverty line (APA, 2007) and experience other financial disadvantages (Lev, 2004);

**Whereas** transgender and gender variant people may be at increased risk in institutional environments and facilities for harassment, physical and sexual assault (Edney, 2004; Minter, 2003; Peterson et al., 1996; Witten & Eyler, 2007) and inadequate medical care including denial of gender transition treatments such as hormone therapy (Edney, 2004; Peterson et al., 1996; Bockting et al., 2005; Coan et al., 2005; Clements-Nolle, 2006; Kenagy, 2005; Kenagy & Bostwick, 2005; Nemoto et al., 2005; Newfield et al., 2006; Riser et al., 2005; Rodriquez-Madera &Toro-Alfonso, 2005; Sperber et al., 2005; Xavier et al., 2005);

**Whereas** many gender variant and transgender children and youth face harassment and violence in school environments, foster care, residential treatment centers, homeless centers and juvenile justice programs (D'Augelli, Grossman, & Starks, 2006; Gay Lesbian and Straight Education Network, 2003; Grossman, D'Augelli, & Slater, 2006);

**Whereas** psychologists are in a position to influence policies and practices in institutional settings, particularly regarding the implementation of the Standards of Care published by the World Professional Association of Transgender Health (WPATH, formerly known as the Harry Benjamin International Gender Dysphoria Association) which recommend the continuation of

gender transition treatments and especially hormone therapy during incarceration (Meyer et al., 2001);

**Whereas** psychological research has the potential to inform treatment, service provision, civil rights and approaches to promoting the well-being of transgender and gender variant people;

**Whereas** APA has a history of successful collaboration with other organizations to meet the needs of particular populations, and organizations outside of APA have useful resources for addressing the needs of transgender and gender variant people;

**Therefore be it resolved** that APA opposes all public and private discrimination on the basis of actual or perceived gender identity and expression and urges the repeal of discriminatory laws and policies;

**Therefore be it further resolved** that APA supports the passage of laws and policies protecting the rights, legal benefits, and privileges of people of all gender identities and expressions;

**Therefore be it further resolved** that APA supports full access to employment, housing, and education regardless of gender identity and expression;

**Therefore be it further resolved** that APA calls upon psychologists in their professional roles to provide appropriate, nondiscriminatory treatment to transgender and gender variant individuals and encourages psychologists to take a leadership role in working against discrimination towards transgender and gender variant individuals;

**Therefore be it further resolved** that APA encourages legal and social recognition of transgender individuals consistent with their gender identity and expression, including access to identity documents consistent with their gender identity and expression which do not involuntarily disclose their status as transgender for transgender people who permanently socially transition to another gender role;

**Therefore be it further resolved** that APA supports access to civil marriage and all its attendant benefits, rights, privileges and responsibilities, regardless of gender identity or expression;

**Therefore be it further resolved** that APA supports efforts to provide fair and safe environments for gender variant and transgender people in institutional settings such as supportive living environments, long-term care facilities, nursing homes, treatment facilities, and shelters, as well as custodial settings such as prisons and jails;

**Therefore be it further resolved** that APA supports efforts to provide safe and secure educational environments, at all levels of education, as well as foster care environments and juvenile justice programs, that promote an understanding and acceptance of self and in which all youths, including youth of all gender identities and expressions, may be free from discrimination, harassment, violence, and abuse;

**Therefore be it further resolved** that APA supports the provision of adequate and necessary mental and medical health care treatment for transgender and gender variant individuals;

**Therefore be it further resolved** that APA recognizes the efficacy, benefit and medical necessity of gender transition treatments for appropriately evaluated individuals and calls upon public and private insurers to cover these medically necessary treatments;

**Therefore be it further resolved** that APA supports access to appropriate treatment in institutional settings for people of all gender identities and expressions; including access to appropriate health care services including gender transition therapies;

**Therefore be it further resolved** that APA supports the creation of educational resources for all psychologists in working with individuals who are gender variant and transgender;

**Therefore be it further resolved** that APA supports the funding of basic and applied research concerning gender expression and gender identity;

**Therefore be it further resolved** that APA supports the creation of scientific and educational resources that inform public discussion about gender identity and gender expression to promote public policy development, and societal and familial attitudes and behaviors that affirm the dignity and rights of all individuals regardless of gender identity or gender expression;

**Therefore be it further resolved** that APA supports cooperation with other organizations in efforts to accomplish these ends.

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# Resolution No. 1004

2012 National Conference of Special Constituencies—Sheraton Kansas City Hotel at Crown Center

Transgender Care

Submitted by: Laura Ellis, MD, FAAFP, GLBT
Werner Brammer, MD, FAAFP, GLBT
Bruce Echols, MD, FAAFP, GLBT
Andrew Goodman, MD, GLBT

WHEREAS, Gender Identity Disorder is a medically recognized condition, and

WHEREAS, persons with Gender Identity Disorder who are not provided care can suffer serious psychological and physical issues including suicide, and

WHEREAS, care for Gender Identity Disorder is lifelong and multifaceted including surgical, hormonal, and psychological support and

WHEREAS, this care is expensive and out of reach of many people, and

WHEREAS, many insurers specifically exclude transgender care, and

WHEREAS, the American Academy of Family Physicians (AAFP) has already resolved that employers and health plans should not discriminate by actual or perceived gender in the provision of prescription drugs and devices, elective sterilization procedures, and diagnostic testing (2011 COD), now, therefore, be it

RESOLVED, That the American Academy of Family Physicians (AAFP) support efforts to require insurers to provide coverage for comprehensive care of transgendered individuals including medical care, screening tests based on medical need rather than gender, mental health care, and, when medically necessary, gender reassignment surgery.

AMERICAN COLLEGE of NURSE-MIDWIVES
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# POSITION STATEMENT

## Transgender/Transsexual/Gender Variant Health Care

The American College of Nurse-Midwives (ACNM) supports efforts to provide transgender, transsexual, and gender variant individuals with access to safe, comprehensive, culturally competent health care and therefore endorses the 2011 World Professional Association for Transgender Health (WPATH) Standards of Care.

It is the position of ACNM that midwives

> Exhibit respect for patients with nonconforming gender identities and do not pathologize differences in gender identity or expression;
> Provide care in a manner that affirms patients' gender identities and reduces the distress of gender dysphoria or refer to knowledgeable colleagues;
> Become knowledgeable about the health care needs of transsexual, transgender, and gender nonconforming people, including the benefits and risks of gender affirming treatment options;
> Match treatment approaches to the specific needs of patients, particularly their goals for gender expression and need for relief from gender dysphoria;
> Have resources available to support and advocate for patients within their families and communities (schools, workplaces, and other settings).

To facilitate these goals, ACNM is committed to

- Work toward the incorporation of information about gender identity, expression, and development in all midwifery educational programs;
- Make available educational materials that address the identities and health care needs of gender variant individuals in order to improve midwives' cultural competence in providing care to this population;
- Support legislation and policies that prohibit discrimination based on gender expression or identity;
- Support measures to ensure full, equal, and unrestricted access to health insurance coverage for all care needed by gender variant individuals.

**Background**

Gender variant people face multiple barriers to accessing health care and suffer disproportionate disparities in health outcomes. Gender variant individuals experience higher rates of discrimination in housing, education, and employment and lower rates of health insurance coverage than the general population.[1] As many as one-fourth of gender variant people avoid

health care services due to concerns about discrimination and harassment.[2] HIV infection within the gender variant community is 4 times the rate of the general population; rates of drug, alcohol, and tobacco use, and depression and suicide attempts are also higher.[2,3] These outcomes disproportionately affect gender variant people of color.

When gender variant individuals are able to obtain health insurance, most find that their insurance providers specifically exclude gender affirming therapies (eg hormonal or surgical procedures), deny basic preventative care services on the basis of gender identity, and refuse to cover sex-specific services due to perceived gender incongruence (eg a man with a cervix may be refused coverage for a pap smear).[4-6] Few legal recourses exist because gender identity and expression are excluded from federal and most state non-discrimination protections.

In addition, the under-reported and under-researched reproductive health care needs of gender variant individuals are of particular interest to midwives. Qualitative studies and anecdotal evidence confirm that gender variant individuals desire parenting roles and can and do create biological families.[7]

**Midwifery Practice and the Gender Variant Patient**

As many as half of gender variant individuals report having to educate their health care providers about their health care needs, but gender variant people do not by default have unique or complicated health issues. Most members of this community require the same primary, mental, and sexual health care that all individuals need.[8] The most important thing all midwives can do to improve the health care outcomes of gender variant individuals is to use their skills to provide care that is welcoming and accessible.

Musculoskeletal, cardiovascular, breast, and pelvic care for individuals who have undergone hormonal and/or surgical therapy is typically straightforward but in some cases requires additional training. Similarly, administration of hormone therapy for gender affirmation is appropriate for primary care providers, including certified nurse-midwives/certified midwives (CNMs®/CMs®) who have undergone appropriate training. The World Professional Association for Transgender Health (WPATH) "strongly encourages the increased training and involvement of primary care providers in the area of feminizing/masculinizing hormone therapy."[9] Seeking hormone therapy is the entryway to health care for many gender variant individuals. According to WPATH, "medical visits relating to hormone maintenance provide an opportunity to deliver broader care to a population that is often medically underserved." [9]

CNMs/CMs should seek to provide evidence-based, welcoming, and accessible care for gender variant individuals in accordance with ACNM Standard of Practice VIII[10] and their state regulatory bodies.

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Note. The term "gender variant" is used throughout this document to reflect a broad range of gender non-conforming identities, expressions, and experiences. This term is used as an umbrella term for all individuals whose gender expression or identity differs from the sex assigned at birth.

Source: Task Force on Gender Bias; Clinical Standards and Documents Section DOSP

Developed: November 2012

Board of Directors Approved: December 2012

# Transgender Health Care in Correctional Settings

‹ Back to Position Statements

## INTRODUCTION

Transgender people face an array of risks to their health and well-being during incarceration, and are often targets of physical assault and emotional abuse. They are commonly placed in correctional facilities according to their genitals and/or sex assigned at birth, regardless of their gender presentation. The health risks of overlooking the particular needs of transgender inmates are so severe that acknowledgment of the problem and policies that assure appropriate and responsible provision of health care are needed.

The term transgender refers to a person who identifies with or expresses a gender identity that does not match traditional ideas about the sex assigned to the person at birth. Transgender women are people who were assigned the sex of male at birth and who now identify as women. Transgender men are people who were assigned the sex of female at birth and who now identify as men. Transgender people may identify as men, women, neither, both, or another gender. They can be of any race, sexual orientation, age, religion, body type, socioeconomic background, or national origin.

The National Commission on Correctional Health Care publishes Standards for prisons, jails, and juvenile justice facilities that address board-approved recommendations for an adequate health care delivery system, including issues such as patient confidentiality, discharge planning, health professional qualifications, medication availability and delivery, and staff training. Position statements are intended to provide information on the management of specific problems not addressed in the Standards.

## POSITION STATEMENT

Because prisons, jails, and juvenile justice facilities have a responsibility to ensure the physical and mental health and well-being of transgender people in their custody, correctional health staff should manage these inmates in a manner that respects the biomedical and psychological aspects of a gender identity disorder (GID) diagnosis. The National Commission on Correctional Health Care recommends that the following principles guide correctional health professionals in addressing the needs of transgender inmates:

### Health Management

1. The management of medical (e.g., medically necessary hormone treatment) and surgical (e.g., genital reconstruction) transgender issues should follow accepted standards developed by professionals with expertise in transgender health. Determination of treatment necessary for transgender patients should be on a case-by-case basis. Ideally, correctional health staff should be trained in transgender health care issues. Alternatively, they should

have access to other professionals with expertise in transgender health care to help determine appropriate management and provide training in transgender issues.

2. Because inmate-patients may be under different stages of care prior to incarceration, there should be no blanket administrative or other policies that restrict specific medical treatments for transgender people. Policies that make treatments available only to those who received them prior to incarceration or that limit GID treatment to psychotherapy should be avoided. Policies that attempt to “freeze” gender transition at the stage reached prior to incarceration are inappropriate and out of step with medical standards, and should be avoided.

3. Diagnosed transgender patients who received hormone therapy prior to incarceration should have that therapy continued without interruption pending evaluation by a specialist, absent urgent medical reasons to the contrary. Transgender inmates who have not received hormone therapy prior to incarceration should be evaluated by a health care provider qualified in the area of transgender health to determine their treatment needs. When determined to be medically necessary for a particular inmate, hormone therapy should be initiated and sex reassignment surgery considered on a case-by-case basis. Regular laboratory monitoring should be conducted according to community medical standards.

4. Treatment for genital self-harm or for complications arising from prior surgery or from self-treatment should be provided when medically necessary.

5. Correctional health care providers should provide patient education materials to help transgender patients cope with their diagnosis and treatment.

6. Psychotherapy such as “reparative” therapy or attempts to alter gender identity should not be employed. Reparative therapy inappropriately portrays GID as a mental illness and not a medical condition.

## Patient Safety

7. In matters of housing, recreation, and work assignments, custody staff should be aware that transgender people are common targets for violence. Accordingly, appropriate safety measures should be taken regardless of whether the person is placed in male or female housing areas.

## Discharge Planning

8. Transgender inmates receiving hormone therapy should receive a sufficient supply upon release to last until a community provider assumes care. Referrals should be made to community-based organizations with sensitive and inclusive services for transgender people.

9. Correctional policies for management of transgender inmates should be developed and implemented in partnership with local transgender communities, particularly current and former inmates, and transgender service providers when possible.

**Adopted by the National Commission on Correctional Health Care Board of Directors**
**October 18, 2009**

## NOTES

1. Standards of Care for Gender Identity Disorders, available from the World Professional Association for

Transgender Health at **http://www.wpath.org/publications_standards.cfm**.

**The American College of Obstetricians and Gynecologists**
*Women's Health Care Physicians*

# COMMITTEE OPINION

Number 512 • December 2011

**Committee on Health Care for Underserved Women**

*This information should not be construed as dictating an exclusive course of treatment or procedure to be followed.*

# Health Care for Transgender Individuals

**ABSTRACT:** Transgender individuals face harassment, discrimination, and rejection within our society. Lack of awareness, knowledge, and sensitivity in health care communities eventually leads to inadequate access to, underutilization of, and disparities within the health care system for this population. Although the care for these patients is often managed by a specialty team, obstetrician–gynecologists should be prepared to assist or refer transgender individuals with routine treatment and screening as well as hormonal and surgical therapies. The American College of Obstetricians and Gynecologists opposes discrimination on the basis of gender identity and urges public and private health insurance plans to cover the treatment of gender identity disorder.

## The Spectrum of Transgender Identity

*Transgender* is a broad term used for people whose gender identity or gender expression differs from their assigned sex at birth (Box 1) (1). However, there is no universally accepted definition of the word "transgender" because of the lack of agreement regarding what groups of people are considered "transgender." In addition, definitions often vary by geographic region and by individual (2). The American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition, Text Revision, considers transgender individuals to be individuals with a disturbance in sexual or gender identity. Any combination of sexual and gender identity is possible for transgender individuals (Box 2). The diagnosis of gender identity disorder is only established for individuals with clinically significant distress and functional impairment caused by the persistent discomfort with one's assigned sex and primary and secondary sex characteristics. If untreated, gender identity disorder can result in psychologic dysfunction, depression, suicidal ideation, and even death (3).

Prevalence rates of transgender populations are not clearly established; however, studies suggest that transgender individuals constitute a small but substantial population (4). Additional research is needed among this population as outlined by the Institute of Medicine Report, *The Health of Lesbian, Gay, Bisexual, and Transgender People: Building a Foundation for Better Understanding* (2).

The social and economic marginalization of transgender individuals is widespread. Harassment, discrimination, and rejection occur frequently within an individual's own family and affect educational, employment, and housing opportunities.

Transgender individuals, particularly young transgender individuals, are disproportionately represented in the homeless population (5). Once homeless, individuals may be denied access to shelters because of their gender or are placed in inappropriate housing. Subsequently, many homeless transgender individuals turn to survival sex (the exchange of sex for food, clothing, shelter, or other basic needs), which increases the risk of exposure to sexually transmitted infections and becoming victims of violence (6). In one small study, 35% of male-to-female transgender individuals tested positive for human immunodeficiency virus (HIV), 20% were homeless, and 37% reported physical abuse (7).

## Barriers to Health Care

Within the medical community, transgender individuals face significant barriers to health care. This includes the failure of most health insurance plans to cover the cost of mental health services, cross-sex hormone therapy, or gender affirmation surgery. This barrier exists despite evidence that such treatments are safe and effective and that cross-gender behavior and gender identity issues are not an issue of choice for the individual and cannot be reversed with psychiatric treatment (8). With medical and psychiatric care that affirms transgender identity, the transgender individual can lead an enhanced, functional life (9).

### Box 1. Transgender Definitions

*Transsexual*—an individual who strongly identifies with the other sex and seeks hormones or gender-affirmation surgery or both to feminize or masculinize the body; may live full-time in the crossgender role.*

*Crossdresser*—an individual who dresses in the clothing of the opposite sex for reasons that include a need to express femininity or masculinity, artistic expression, performance, or erotic pleasure, but do not identify as that gender. The term "transvestite" was previously used to describe a crossdresser, but it is now considered pejorative and should not be used.†

*Bigendered*—individuals who identify as both or alternatively male and female, as no gender, or as a gender outside the male or female binary.†

*Intersex*—individuals with a set of congenital variations of the reproductive system that are not considered typical for either male or female. This includes newborns with ambiguous genitalia, a condition that affects 1 in 2,000 newborns in the United States each year.‡

*Female-to-male*—refers to someone who was identified as female at birth but who identifies and portrays his gender as male. This term is often used after the individual has taken some steps to express his gender as male, or after medically transitioning through hormones or surgery. Also known as FTM or transman.†

*Male-to-female*—refers to someone who was identified as male at birth but who identifies and portrays her gender as female. This term is often used after the individual has taken some steps to express her gender as female, or after medically transitioning through hormones or surgery. Also known as MTF or transwoman.†

* The health of lesbian, gay, bisexual, and transgender people: building a foundation for better understanding. Committee on Lesbian, Gay, Bisexual, and Transgender Health Issues and Research Gaps and Opportunities, Board on the Health of Select Populations, Institute of Medicine of the National Academies. Washington, DC: National Academies Press; 2011. Available at: http://www.nap.edu/openbook.php?record_id=13128&page=R1. Retrieved August 8, 2011.

† Fenway Health. Glossary of gender and transgender terms. Boston (MA): Fenway Health; 2010. Available at: http://www.fenwayhealth.org/site/DocServer/Handout_7-C_Glossary_of_Gender_and_Transgender_Terms__fi.pdf. Retrieved July 22, 2011.

‡ Dreger AD. "Ambiguous sex"--or ambivalent medicine? Ethical issues in the treatment of intersexuality. Hastings Cent Rep 1998; 28:24–35.

### Box 2. Sexual Identity and Gender Identity Definitions

*Sex*—designation of a person at birth as male or female based on anatomy and biology.*

*Gender identity*—a person's innate identification as a man, woman, or something else that may or may not correspond to the person's external body or assigned sex at birth.*

*Gender expression*—how individuals present themselves socially, including clothing, hairstyle, jewelry, and physical characteristics, including speech and mannerisms. This may not be the same gender in all settings.*

*Sexual orientation*—a person's physical, romantic, emotional, and/or spiritual attraction to individuals of the same (lesbian or gay), different (heterosexual), or both (bisexual) biologic sexes. Sexual orientation does not define the real-life sexual practices and behaviors of an individual.*

*Sexual behavior*—the sexual encounters and behaviors of the individual. This is likely to be the most important factor in assessing the risk of sexually transmitted infections. Sexual behavior differs from sexual orientation; for example, not all individuals who engage in same-sex behaviors view themselves as gay, lesbian, or bisexual.

*Legal sex*—sex as stated on legal identifications, forms, and documents. Transgender individuals may adopt a second name other than their legal name with which they may prefer to be addressed. Transgender persons should be asked for their preferred name, even if it differs from their legal name and sex. State regulations vary and it may be difficult or impossible for a transgender individual to meet that state's requirements to change their legal sex.†

* Fenway Health. Glossary of gender and transgender terms. Boston (MA): Fenway Health; 2010. Available at: http://www.fenwayhealth.org/site/DocServer/Handout_7-C_Glossary_of_Gender_and_Transgender_Terms__fi.pdf. Retrieved July 22, 2011.

† This is a significant issue for transgender individuals. Some states have adopted progressive laws that do not require gender-affirmation surgery or an original birth certificate; instead, these laws allow individuals to change their legal sex with a letter from their health care providers stating that the individuals live their lives as this gender. See the National Center for Transgender Equality (www.transequality.org) and the Transgender Law and Policy Institute (www.transgenderlaw.org) for more information, including descriptions of state laws.

The consequences of inadequate treatment are staggering. Fifty-four percent of transgender youth have attempted suicide and 21% resort to self-mutilation. More than 50% of persons identified as transgender have used injected hormones that were obtained illegally or used outside of conventional medical settings. Additionally, such individuals frequently resort to the illegal and dangerous use of self-administered silicone injections to spur masculine or feminine physiologic changes (5). The American College of Obstetricians and Gynecologists, therefore, urges public and private health insurance plans to cover the treatment of gender identity disorder.

## Caring for Transgender Individuals

Obstetrician–gynecologists should be prepared to assist or refer transgender individuals for routine treatment

and screening as well as hormonal and surgical therapies. Basic preventive services, like sexually transmitted infection testing and cancer screening, can be provided without specific expertise in transgender care. Hormonal and surgical therapies for transgender patients may be requested, but should be managed in consultation with health care providers with expertise in specialized care and treatment of transgender patients (see Resources). Physical and emotional issues for transgender individuals and the effects of aging, as in all other individuals, affect the health status of this population and should be addressed. Health care providers who are morally opposed to providing care to this population should refer them elsewhere for care. For more information, a resource guide on health care for transgender individuals is available at www.acog.org/departments/dept_notice.cfm?recno=18&bulletin=5825.

## Creating a Welcoming Environment

Health care providers' discomfort when treating transgender individuals may alienate patients and result in lower quality or inappropriate care as well as deter them from seeking future medical care (10). Excellent resources exist to facilitate the provision of culturally competent care for transgender patients (10). Adding a "transgender" option to check boxes on patient visit records can help to better capture information about transgender patients, and could be a sign of acceptance to that person (10). Questions should be framed in ways that do not make assumptions about gender identity, sexual orientation, or behavior. It is more appropriate for clinicians to ask their patients which terms they prefer (1). Language should be inclusive, allowing the patient to decide when and what to disclose. The adoption and posting of a nondiscrimination policy can also signal health care providers and patients alike that all persons will be treated with dignity and respect. Assurance of confidentiality can allow for a more open discussion, and confidentiality must be ensured if a patient is being referred to a different health care provider. Training staff to increase their knowledge and sensitivity toward transgender patients will also help facilitate a positive experience for the patient (10). It is important to prepare now to treat a future transgender patient. Additional guidelines for creating a welcoming office environment for transgender patients have been developed by the Gay and Lesbian Medical Association and can be found at http://www.glma.org/_data/n_0001/resources/live/GLMA%20guidelines%202006%20FINAL.pdf.

## Gender Transition: World Professional Association for Transgender Health Guidelines

The World Professional Association for Transgender Health is a multidisciplinary professional society representing the specialties of medicine, psychology, social sciences, and law. Their published clinical guidelines about the psychiatric, psychologic, medical, and surgical management of gender identity disorders are widely used by specialists in transgender health care (11), but are not universally accepted by all members of the transgender health community because critics consider them to be overly restrictive and inflexible.

The World Professional Association for Transgender Health guidelines describe the transition from one gender to another in three stages: 1) living in the gender role consistent with gender identity; 2) the use of cross-sex hormone therapy after living in the new gender role for at least 3 months; 3) gender-affirmation surgery after living in the new gender role and using hormonal therapy for at least 12 months. Additional clinical guidelines have been published by the Endocrine Society (12).

### Female-to-Male Transgender Individuals

#### *Hormones*

Methyltestosterone injections every 2 weeks are usually sufficient to suppress menses and induce masculine secondary sex characteristics (13). Before receiving androgen therapy, patients should be screened for medical contraindications and have periodic laboratory testing, including hemoglobin and hematocrit to evaluate for polycythemia, liver function tests, and serum testosterone level assessments (goal is a mid normal male range of 500 microgram/dL), while receiving the treatment.

#### *Surgery*

Hysterectomy, with or without salpingo-oophorectomy, is commonly part of the surgical process. An obstetrician–gynecologist who has no specialized expertise in transgender care may be asked to perform this surgery, and also may be consulted for routine reasons such as dysfunctional bleeding or pelvic pain. Reconstructive surgery should be performed by a urologist, gynecologist, plastic surgeon, or general surgeon who has specialized competence and training in this field.

#### *Screening*

Age-appropriate screening for breast cancer and cervical cancer should be continued unless mastectomy or removal of the cervix has occurred. For patients using androgen therapy who have not had a complete hysterectomy, there may be an increased risk of endometrial cancer and ovarian cancer (13).

### Male-to-Female Transgender Individuals

#### *Hormones*

Estrogen therapy results in gynecomastia, reduced hair growth, redistribution of fat, and reduced testicular volume. All patients considering therapy should be screened for medical contraindications. After surgery, doses of estradiol, 2–4 mg/d, or conjugated equine estrogen, 2.5 mg/d, are often sufficient to keep total testosterone levels to normal female levels of less than 25 ng/dL. Nonoral therapy

also can be offered. It is recommended that male-to-female transgender patients receiving estrogen therapy have an annual prolactin level assessment and visual field examination to screen for prolactinoma (13).

### *Surgery*

Surgery usually involves penile and testicular excision and the creation of a neovagina (14). Reported complications of surgery include vaginal and urethral stenosis, fistula formation, problems with remnants of erectile tissue, and pain. Vaginal dilation of the neovagina is required to maintain patency. Other surgical procedures that may be performed include breast implants and nongenital surgery, such as facial feminization surgery.

### *Screening*

Age-appropriate screening for breast and prostate cancer is appropriate for male-to-female transgender patients. Opinion varies regarding the need for Pap testing in this population. In patients who have a neocervix created from the glans penis, routine cytologic examination of the neocervix may be indicated (15). The glans are more prone to cancerous changes than the skin of the penile shaft, and intraepithelial neoplasia of the glans is more likely to progress to invasive carcinoma than is intraepithelial neoplasia of other penile skin (14).

## Conclusion

Obstetrician–gynecologists should be prepared to assist or refer transgender individuals. Physicians are urged to eliminate barriers to access to care for this population through their own individual efforts. An important step is to identify the sexual orientation and gender identity status of all patients as a routine part of clinical encounters and recognize that many transgender individuals may not identify themselves. The American College of Obstetricians and Gynecologists urges health care providers to foster nondiscriminatory practices and policies to increase identification and to facilitate quality health care for transgender individuals, both in assisting with the transition if desired as well as providing long-term preventive health care.

## Resources

Select clinics with expertise in treating transgender individuals:

Fenway Community Health
www.fenwayhealth.org

University of Minnesota, Center for Sexual Health
www.phs.umn.edu/clinic/home.html

Callen-Lorde Community Health Center
www.callen-lorde.org

Tom Waddell Health Center
www.sfdph.org/dph/comupg/oservices/medSvs/hlthCtrs/TransgenderHlthCtr.asp

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ISSN 1074-861X

Health care for transgender individuals. Committee Opinion No. 512. American College of Obstetricians and Gynecologists. Obstet Gynecol 2011;118:1454–8.

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, DC 20507

Mia Macy,
Complainant,

v.

Eric Holder,
Attorney General,
Department of Justice,
(Bureau of Alcohol, Tobacco, Firearms and Explosives),
Agency.

Appeal No. 0120120821

Agency No. ATF-2011-00751

## DECISION

On December 9, 2011, Complainant filed an appeal concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. For the following reasons, the Commission finds that the Complainant's complaint of discrimination based on gender identity, change of sex, and/or transgender status is cognizable under Title VII and remands the complaint to the Agency for further processing.

## BACKGROUND[1]

Complainant, a transgender woman, was a police detective in Phoenix, Arizona. In December 2010 she decided to relocate to San Francisco for family reasons. According to her formal complaint, Complainant was still known as a male at that time, having not yet made the transition to being a female.

Complainant's supervisor in Phoenix told her that the Bureau of Alcohol, Tobacco, Firearms and Explosives (Agency) had a position open at its Walnut Creek crime laboratory for which the Complainant was qualified. Complainant is trained and certified as a National Integrated Ballistic Information Network (NIBIN) operator and a BrassTrax ballistics investigator.

Complainant discussed the position with the Director of the Walnut Creek lab by telephone, in either December 2010 or January 2011, while still presenting as a man. According to Complainant, the telephone conversation covered her experience, credentials, salary and

[1] The facts in this section are taken from the EEO Counselor's Report and the formal complaint of discrimination. Because this decision addresses a jurisdictional issue, we offer no position on the facts themselves and thus no position on whether unlawful discrimination occurred in this case.

benefits. Complainant further asserts that, following the conversation, the Director told her she would be able to have the position assuming no problems arose during her background check. The Director also told her that the position would be filled as a civilian contractor through an outside company.

Complainant states that she talked again with the Director in January 2011 and asked that he check on the status of the position. According to Complainant in her formal complaint, the Director did so and reasserted that the job was hers pending completion of the background check. Complainant asserts, as evidence of her impending hire, that Aspen of DC ("Aspen"),[2] the contractor responsible for filling the position, contacted her to begin the necessary paperwork and that an investigator from the Agency was assigned to do her background check.[3]

On March 29, 2011, Complainant informed Aspen via email that she was in the process of transitioning from male to female and she requested that Aspen inform the Director of the Walnut Creek lab of this change. According to Complainant, on April 3, 2011, Aspen informed Complainant that the Agency had been informed of her change in name and gender. Five days later, on April 8, 2011, Complainant received an email from the contractor's Director of Operations stating that, due to federal budget reductions, the position at Walnut Creek was no longer available.

According to Complainant, she was concerned about this quick change in events and on May 10, 2011,[4] she contacted an agency EEO counselor to discuss her concerns. She states that the counselor told her that the position at Walnut Creek had not been cut but, rather, that someone

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[2] It appears from the record that Aspen of DC may be considered a staffing firm. Under the Commission's Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms, EEOC Notice No. 915.002 (December 3, 1997), we have recognized that a "joint employment" relationship may exist where both the Agency and the "staffing firm" may be deemed employers. The Commission makes no determination at this time as to whether or not a "joint employment" relationship exists in this case as this issue is not presently before us.

[3] On March 28, 2011, Complainant received an e-mail from the contractor asking her to fill out an application packet for the position. It is unclear how far the background investigation had proceeded prior to Complainant notifying the contractor of her gender change, but e-mails included in the record indicate that the Agency's Personnel Security Branch had received Complainant's completed security package, that Complainant had been interviewed by a security investigator, and that the investigator had contacted Complainant on March 31, 2011 and had indicated that he "hope[d] to finish your investigation the first of next week."

[4] In the narrative accompanying her formal complaint, Complainant asserts she contacted the Agency's EEO Counselor on May 5, 2011. However, the EEO Counselor's report indicates that the initial contact occurred on May 10, 2011.

else had been hired for the position. Complainant further states that the counselor told her that the Agency had decided to take the other individual because that person was farthest along in the background investigation.[5] Complainant claims that this was a pretextual explanation because the background investigation had been proceeding on her as well. Complainant believes she was incorrectly informed that the position had been cut because the Agency did not want to hire her because she is transgender.

The EEO counselor's report indicates that Complainant alleged that she had been discriminated against based on sex, and had specifically described her claim of discrimination as "change in gender (from male to female)."

On June 13, 2011, Complainant filed her formal EEO complaint with the Agency. On her formal complaint form, Complainant checked off "sex" and the box "female," and then typed in "gender identity" and "sex stereotyping" as the basis of her complaint. In the narrative accompanying her complaint, Complainant stated that she was discriminated against on the basis of "my sex, gender identity (transgender woman) and on the basis of sex stereotyping."

On October 26, 2011, the Agency issued Complainant a Letter of Acceptance, stating that the "claim alleged and being accepted and referred for investigation is the following: Whether you were discriminated against based on your gender identity sex (female) stereotyping when on May 5, 2011, you learned that you were not hired as a Contractor for the position of [NIBIN] Ballistics Forensic Technician in the Walnut Creek Lab, San Francisco Field Office." The letter went on to state, however, that "since claims of discrimination on the basis of gender identity stereotyping cannot be adjudicated before the [EEOC], your claims will be processed according to Department of Justice policy." The letter provided that if Complainant did not agree with how the Agency had identified her claim, she should contact the EEO office within 15 days.

The Department of Justice has one system for adjudicating claims of sex discrimination under Title VII and a separate system for adjudicating complaints of sexual orientation and gender identity discrimination by its employees. This separate process does not include the same rights offered under Title VII and the EEOC regulations set forth under 29 C.F.R. Part 1614. See Department of Justice Order 1200.1, Chapter 4-1, B.7.j, found at http://www.justice.gov/jmd/ps/chpt4-1.html (last accessed on March 30, 2012). While such complaints are processed utilizing the same EEO complaint process and time frames – including an ADR program, an EEO investigation and issuance of a final Agency decision – the Department of Justice process allows for fewer remedies and does not include the right to request a hearing before an EEOC Administrative Judge or the right to appeal the final Agency decision to the Commission.

[5] The Counselor's Report includes several email exchanges with various Agency officials who informed the counselor of the circumstances by which it was decided not to hire Complainant.

On November 8, 2011, Complainant's attorney contacted the Agency by letter to explain that the claims that Complainant had set forth in the formal complaint had not been correctly identified by the Agency. The letter explained that the claim as identified by the Agency was both incomplete and confusing. The letter noted that "[Complainant] is a transgender woman who was discriminated against during the hiring process for a job with [the Agency]," and that the discrimination against Complainant was based on "separate and related" factors, including on the basis of sex, sex stereotyping, sex due to gender transition/change of sex, and sex due to gender identity. Thus, Complainant disagreed with the Agency's contention that her claim in its entirety could not be adjudicated through the Title VII and EEOC process simply because of how she had stated the alleged bases of discrimination.

On November 18, 2011, the Agency issued a correction to its Letter of Acceptance in response to Complainant's November 8, 2011 letter. In this letter, the Agency stated that it was accepting the complaint "on the basis of sex (female) and gender identity stereotyping." However, the Agency again stated that it would process only her claim "based on sex (female)" under Title VII and the EEOC's Part 1614 regulations. Her claim based on "gender identity stereotyping" would be processed instead under the Agency's "policy and practice," including the issuance of a final Agency decision from the Agency's Complaint Adjudication Office.

## CONTENTIONS ON APPEAL

On December 6, 2011, Complainant, through counsel, submitted a Notice of Appeal to the Commission asking that it adjudicate the claim that she was discriminated against on the basis of "sex stereotyping, sex discrimination based gender transition/change of sex, and sex discrimination based gender identity" when she was denied the position as an NIBIN ballistics technician.

Complainant argues that EEOC has jurisdiction over her entire claim. She further asserts that the Agency's "reclassification" of her claim of discrimination into two separate claims of discrimination - one "based on sex (female) under Title VII" which the Agency will investigate under Title VII and the EEOC's Part 1614 regulations, and a separate claim of discrimination based on "gender identity stereotyping" which the Agency will investigate under a separate process designated for such claims -- is a "de facto dismissal" of her Title VII claim of discrimination based on gender identity and transgender status.

In response to Complainant's appeal, the Agency sent a letter to the Commission on January 11, 2012, arguing that Complainant's appeal was "premature" because the Agency had accepted a claim designated as discrimination "based on sex (female)."

In response to the Agency's January 11, 2012 letter, Complainant wrote to the Agency on February 8, 2012, stating that, in light of how the Agency was characterizing her claim, she wished to withdraw her claim of "discrimination based on sex (female)," as characterized by the Agency, and to pursue solely the Agency's dismissal of her complaint of discrimination

based on her gender identity, change of sex and/or transgender status. In a letter to the Commission dated February 9, 2012, Complainant explained that she had withdrawn the claim "based on sex (female)" as the Agency had characterized it, in order to remove any possible procedural claim that her appeal to the Commission was premature.

Complainant reiterates her contention that the Agency mischaracterized her claim and asks the Commission to rule on her appeal that the Agency should investigate, under Title VII and the EEOC's Part 1614 regulations, her claim of discriminatory failure to hire based on her gender identity, change of sex, and/or transgender status.

## ANALYSIS AND FINDINGS

The narrative accompanying Complainant's complaint makes clear that she believes she was not hired for the position as a result of making her transgender status known. As already noted, Complainant stated that she was discriminated against on the basis of "my sex, gender identity (transgender woman) and on the basis of sex stereotyping." In response to her complaint, the Agency stated that claims of gender identity discrimination "cannot be adjudicated before the [EEOC]." See Agency Letters of October 26, 2011 and November 18, 2011. Although it is possible that the Agency would have fully addressed her claims under that portion of her complaint accepted under the 1614 process, the Agency's communications prompted in Complainant a reasonable belief that the Agency viewed the gender identity discrimination she alleged as outside the scope of Title VII's sex discrimination prohibitions. Based on these communications, Complainant believed that her complaint would not be investigated effectively by the Agency, and she filed the instant appeal.

EEOC Regulation 29 C.F.R. §1614.107(b) provides that where an agency decides that some, but not all, of the claims in a complaint should be dismissed, it must notify the complainant of its determination. However, this determination is not appealable until final action is taken on the remainder of the complaint. In apparent recognition of the operation of §1614.107(b), Complainant withdrew the accepted portion of her complaint from the 1614 process so that the constructive dismissal of her gender identity discrimination claim would be a final decision and the matter ripe for appeal.

In the interest of resolving the confusion regarding a recurring legal issue that is demonstrated by this complaint's procedural history, as well as to ensure efficient use of resources, we accept this appeal for adjudication. Moreover, EEOC's responsibilities under Executive Order 12067 for enforcing all Federal EEO laws and leading the Federal government's efforts to eradicate workplace discrimination, require, among other things, that EEOC ensure that uniform standards be implemented defining the nature of employment discrimination under the statutes we enforce. Executive Order 12067, 43 F.R. 28967, § 1-301(a) (June 30, 1978). To that end, the Commission hereby clarifies that claims of discrimination based on transgender

status, also referred to as claims of discrimination based on gender identity, are cognizable under Title VII's sex discrimination prohibition, and may therefore be processed under Part 1614 of EEOC's federal sector EEO complaints process.

We find that the Agency mistakenly separated Complainant's complaint into separate claims: one described as discrimination based on "sex" (which the Agency accepted for processing under Title VII) and others that were alternatively described by Complainant as "sex stereotyping," "gender transition/change of sex," and "gender identity" (Complainant Letter of Nov. 8, 2011); by the Agency as "gender identity stereotyping" (Agency Letter Nov. 18, 2011); and finally by Complainant as "gender identity, change of sex and/or transgender status" (Complainant Letter Feb. 8, 2012). While Complainant could have chosen to avail herself of the Agency's administrative procedures for discrimination based on gender identity, she clearly expressed her desire to have her claims investigated through the 1614 process, and this desire should have been honored. Each of the formulations of Complainant's claims are simply different ways of stating the same claim of discrimination "based on . . . sex," a claim cognizable under Title VII.

Title VII states that, except as otherwise specifically provided, "[a]ll personnel actions affecting [federal] employees or applicants for employment ... shall be made free from any discrimination *based on ...sex ....*" 42 U.S.C. § 2000e-16(a) (emphasis added). *Cf.* 42 U.S.C. §§ 2000e-2(a)(1), (2) (it is unlawful for a covered employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate with respect to his compensation, terms, conditions, or privileges of employment," or to "limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, *because of such individual's . . . sex*") (emphasis added).

As used in Title VII, the term "sex" "encompasses both sex—that is, the biological differences between men and women—and gender." See Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000); see also Smith v. City of Salem, 378 F.3d 566, 572 (6th Cir. 2004) ("The Supreme Court made clear that in the context of Title VII, discrimination because of 'sex' includes gender discrimination."). As the Eleventh Circuit noted in Glenn v. Brumby, 663 F.3d 1312, 1316 (11th Cir. 2011), six members of the Supreme Court in Price Waterhouse agreed that Title VII barred "not just discrimination because of biological sex, but also gender stereotyping—failing to act and appear according to expectations defined by gender." As such, the terms "gender" and "sex" are often used interchangeably to describe the discrimination prohibited by Title VII. See, e.g., Price Waterhouse v. Hopkins, 490 U.S. 228, 239 (1989) (emphasis added) ("Congress' intent to forbid employers to take *gender* into account in making employment decisions appears on the face of the statute.").

That Title VII's prohibition on sex discrimination proscribes gender discrimination, and not just discrimination on the basis of biological sex, is important. If Title VII proscribed only discrimination on the basis of biological sex, the only prohibited gender-based disparate treatment would be when an employer prefers a man over a woman, or vice versa. But the

statute's protections sweep far broader than that, in part because the term "gender" encompasses not only a person's biological sex but also the cultural and social aspects associated with masculinity and femininity.

In Price Waterhouse, the employer refused to make a female senior manager, Hopkins, a partner at least in part because she did not act as some of the partners thought a woman should act. Id. at 230-31, 235. She was informed, for example, that to improve her chances for partnership she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." Id. at 235. The Court concluded that discrimination for failing to conform with gender-based expectations violates Title VII, holding that "[i]n the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender." Id. at 250.

Although the partners at Price Waterhouse discriminated against Ms. Hopkins for failing to conform to stereotypical gender norms, gender discrimination occurs any time an employer treats an employee differently for failing to conform to any gender-based expectations or norms. "What matters, for purposes of . . . the Price Waterhouse analysis, is that in the mind of the perpetrator the discrimination is related to the sex of the victim." Schwenk, 204 F.3d at 1201-02; see also Price Waterhouse, 490 U.S. at 254-55 (noting the illegitimacy of allowing "sex-linked evaluations to play a part in the [employer's] decision-making process").

"Title VII does identify one circumstance in which an employer may take gender into account in making an employment decision, namely, when gender is a 'bona fide occupational qualification [ (BFOQ) ] reasonably necessary to the normal operation of th[e] particular business or enterprise.'" Price Waterhouse, 490 U.S. at 242 (quoting 42 U.S.C. § 2000e-2(e)). Even then, "the [BFOQ] exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex.'" See Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971) (Marshall, J., concurring). "The only plausible inference to draw from this provision is that, in all other circumstances, a person's gender may not be considered in making decisions that affect her." Price Waterhouse, 490 U.S. at 242.[6]

When an employer discriminates against someone because the person is transgender, the employer has engaged in disparate treatment "related to the sex of the victim." See Schwenk, 204 F.3d at 1202. This is true regardless of whether an employer discriminates against an employee because the individual has expressed his or her gender in a non-stereotypical fashion, because the employer is uncomfortable with the fact that the person has transitioned or is in the process of transitioning from one gender to another, or because the employer simply does not

[6] There are other, limited instances in which gender may be taken into account, such as is in the context of a valid affirmative action plan, see Johnson v. Santa Clara County Transportation Agency, 480 U.S. 616 (1987), or relatedly, as part of a settlement of a pattern or practice claim.

like that the person is identifying as a transgender person. In each of these circumstances, the employer is making a gender-based evaluation, thus violating the Supreme Court's admonition that "an employer may not take gender into account in making an employment decision." Price Waterhouse, 490 U.S. at 244.

Since Price Waterhouse, courts have widely recognized the availability of the sex stereotyping theory as a valid method of establishing discrimination "on the basis of sex" in many scenarios involving individuals who act or appear in gender-nonconforming ways.[7] And since Price Waterhouse, courts also have widely recognized the availability of the sex stereotyping theory as a valid method of establishing discrimination "on the basis of sex" in scenarios involving transgender individuals.

For example, in Schwenk v. Hartford, a prison guard had sexually assaulted a pre-operative male-to-female transgender prisoner, and the prisoner sued, alleging that the guard had

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[7] See, e.g., Lewis v. Heartland Inns of Am., L.L.C., 591 F.3d 1033, 1041 (8th Cir. 2010) (concluding that evidence that a female "tomboyish" plaintiff had been fired for not having the "Midwestern girl look" suggested "her employer found her unsuited for her job . . . because her appearance did not comport with its preferred feminine stereotype"); Prowel v. Wise Business Forms, Inc., 579 F.3d 285 (3rd Cir. 2009) (an effeminate gay man who did not conform to his employer's vision of how a man should look, speak, and act provided sufficient evidence of gender stereotyping harassment under Title VII); Medina v. Income Support Div., 413 F.3d 1131, 1135 (10th Cir. 2005) (involving a heterosexual female who alleged that her lesbian supervisor discriminated against her on the basis of sex, and finding that "a plaintiff may satisfy her evidentiary burden [under Title VII] by showing that the harasser was acting to punish the plaintiff's noncompliance with gender stereotypes"); Nichols v. Azteca Rest. Enters., 256 F.3d 864, 874-75 (9th Cir. 2001) (concluding that a male plaintiff stated a Title VII claim when he was discriminated against "for walking and carrying his tray 'like a woman' - i.e., for having feminine mannerisms"); Simonton v. Runyon, 232 F.3d 33, 37 (2d Cir. 2000) (indicating that a gay man would have a viable Title VII claim if "the abuse he suffered was discrimination based on sexual stereotypes, which may be cognizable as discrimination based on sex"); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 261 n.4 (1st Cir. 1999) (analyzing a gay plaintiff's claim that his co-workers harassed him by "mocking his supposedly effeminate characteristics" and acknowledging that "just as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity . . . a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotypical expectations of masculinity"); Doe by Doe v. City of Belleville, 119 F.3d 563, 580-81 (7th Cir. 1997) (involving a heterosexual male who was harassed by other heterosexual males, and concluding that "a man who is harassed because his voice is soft, his physique is slight, his hair is long, or because in some other respect he . . . does not meet his coworkers' idea of how men are to appear and behave, is harassed 'because of' his sex"), vacated and remanded on other grounds, 523 U.S. 1001 (1998).

violated the Gender Motivated Violence Act (GMVA), 42 U.S.C. § 13981. 204 F.3d at 1201-02. The U.S. Court of Appeals for the Ninth Circuit found that the guard had known that the prisoner "considered herself a transsexual and that she planned to seek sex reassignment surgery in the future." Id. at 1202. According to the court, the guard had targeted the transgender prisoner "only after he discovered that she considered herself female[,]" and the guard was "motivated, at least in part, by [her] gender"—that is, "by her assumption of a feminine rather than a typically masculine appearance or demeanor." Id. On these facts, the Ninth Circuit readily concluded that the guard's attack constituted discrimination because of gender within the meaning of both the GMVA and Title VII.

The court relied on Price Waterhouse, reasoning that it stood for the proposition that discrimination based on sex includes discrimination based on a failure "to conform to socially-constructed gender expectations." Id. at 1201-02. Accordingly, the Ninth Circuit concluded, discrimination against transgender females - i.e., "as anatomical males whose *outward behavior and inward identity* [do] not meet social definitions of masculinity" - is actionable discrimination "because of sex." Id. (emphasis added); cf. Rosa v. Park W. Bank & Trust Co., 214 F.3d 213, 215-16 (1st Cir. 2000) (finding that under Price Waterhouse, a bank's refusal to give a loan application to a biologically-male plaintiff dressed in "traditionally feminine attire" because his "attire did not accord with his male gender" stated a claim of illegal sex discrimination in violation of the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f).

Similarly, in Smith v. City of Salem, the plaintiff was "biologically and by birth male." 378 F.3d at 568. However, Smith was diagnosed with Gender Identity Disorder (GID), and began to present at work as a female (in accordance with medical protocols for treatment of GID). Id. Smith's co-workers began commenting that her appearance and mannerisms were "not masculine enough." Id. Smith's employer later subjected her to numerous psychological evaluations, and ultimately suspended her. Id. at 569-70. Smith filed suit under Title VII alleging that her employer had discriminated against her because of sex, "both because of [her] *gender non-conforming conduct* and, more generally, because of [her] *identification* as a transsexual." Id. at 571 (emphasis added).

The district court rejected Smith's efforts to prove her case using a sex-stereotyping theory, concluding that it was really an attempt to challenge discrimination based on "transsexuality." Id. The U.S. Court of Appeals for the Sixth Circuit reversed, stating that the district court's conclusion:

> cannot be reconciled with Price Waterhouse, which does not make Title VII protection against sex stereotyping conditional or provide any reason to exclude Title VII coverage for non sex-stereotypical behavior simply because the person is a transsexual. As such, discrimination against a plaintiff who is a transsexual—and therefore fails to act and/or identify with his or her gender—is no different from the discrimination directed against [the plaintiff] in Price Waterhouse who, in sex-stereotypical terms, did not act like a woman. Sex

> stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as "transsexual" is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity. Accordingly, we hold that Smith has stated a claim for relief pursuant to Title VII's prohibition of sex discrimination.

Id. at 574–75.[8]

Finally, as the Eleventh Circuit suggested in Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011), consideration of gender stereotypes will inherently be part of what drives discrimination against a transgendered individual. In that case, the employer testified at his deposition that it had fired Vandiver Elizabeth Glenn, a transgender woman, because he considered it "inappropriate" for her to appear at work dressed as a woman and that he found it "unsettling" and "unnatural" that she would appear wearing women's clothing. Id. at 1320. The firing supervisor further testified that his decision to dismiss Glenn was based on his perception of Glenn as "a man dressed as a woman and made up as a woman," and admitted that his decision to fire her was based on "the sheer fact of the transition." Id. at 1320–21. According to the Eleventh Circuit, this testimony "provides ample direct evidence" to support the conclusion that the employer acted on the basis of the plaintiff's gender non-conformity and therefore granted summary judgment to her. Id. at 1321.

In setting forth its legal reasoning, 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." Ilona M. Turner, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 Cal. L. Rev. 561, 563 (2007); *see also* Taylor Flynn, *Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality,* 101 Colum. L.Rev. 392, 392 (2001) (defining transgender persons as those whose "appearance, behavior, or other personal characteristics differ from traditional gender norms"). There is thus a congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms.

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[8] See also Barnes v. City of Cincinnati, 401 F.3d 729, 741 (6th Cir. 2005) (affirming a jury award in favor of a pre-operative transgender female, ruling that "a claim for sex discrimination under Title VII . . . can properly lie where the claim is based on 'sexual stereotypes'" and that the "district court therefore did not err when it instructed the jury that it could find discrimination based on 'sexual stereotypes'").

> Accordingly, discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender.

Glenn v. Brumby, 663 F.3d 1312, 1316-17 (11th Cir. 2011).[9]

There has likewise been a steady stream of district court decisions recognizing that discrimination against transgender individuals on the basis of sex stereotyping constitutes discrimination because of sex. Most notably, in Schroer v. Billington, the Library of Congress rescinded an offer of employment it had extended to a transgender job applicant after the applicant informed the Library's hiring officials that she intended to undergo a gender transition. See 577 F. Supp. 2d 293 (D.D.C. 2008). The U.S. District Court for the District of Columbia entered judgment in favor of the plaintiff on her Title VII sex discrimination claim. According to the district court, it did not matter "for purposes of Title VII liability whether the Library withdrew its offer of employment because it perceived Schroer to be an insufficiently masculine man, an insufficiently feminine woman, or an inherently gender-nonconforming transsexual." Id. at 305. In any case, Schroer was "entitled to judgment based on a Price-Waterhouse-type claim for sex stereotyping . . . ." Id.[10]

To be sure, the members of Congress that enacted Title VII in 1964 and amended it in 1972 were likely not considering the problems of discrimination that were faced by transgender individuals. But as the Supreme Court recognized in Oncale v. Sundowner Offshore Services, Inc.:

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[9] But see Etsitty v. Utah Trans. Auth., No. 2:04-CV-616, 2005 WL 1505610, at *4-5 (D. Utah June 24, 2005) (concluding that Price Waterhouse is inapplicable to transsexuals), aff'd on other grounds, 502 F.3d 1215 (10th Cir.2007).

[10] The district court in Schroer also concluded that discrimination against a transgender individual on the basis of an intended, ongoing, or completed gender transition is "*literally* discrimination 'because of . . . sex.'" Schroer, 577 F. Supp. 2d at 308; see also id. at 306-07 (analogizing to cases involving discrimination based on an employee's religious conversion, which undeniably constitutes discrimination "because of . . . religion" under Title VII). For other district court cases using sex stereotyping as grounds for establishing coverage of transgender individuals under Title VII, see Michaels v. Akal Security, Inc., No. 09-cv-1300, 2010 WL 2573988, at * 4 (D. Colo. June 24, 2010); Lopez v. River Oaks Imaging & Diag. Group, Inc., 542 F. Supp. 2d 653, 660 (S.D. Tex. 2008); Mitchell v. Axcan Scandipharm, Inc., No. Vic. A. 05-243, 2006 WL 456173 (W.D. Pa. Feb. 17, 2006); Tronetti v. TLC HealthNet Lakeshore Hosp., No. 03-CV-0375E(SC), 2003 WL 22757935 (W.D.N.Y. Sept. 26, 2003); Doe v. United Consumer Fin. Servs., No. 1:01 CV 111, 2001 WL 34350174 (N.D. Ohio Nov. 9, 2001).

> [S]tatutory prohibitions often go beyond the principal evil [they were passed to combat] to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed. Title VII prohibits "discriminat[ion] . . . because of . . . sex" in . . . employment. [This] . . . must extend to [sex-based discrimination] of any kind that meets the statutory requirements.

523 U.S. at 79-80; see also Newport News, 462 U.S. at 679-81 (rejecting the argument that discrimination against men does not violate Title VII despite the fact that discrimination against women was plainly the principal problem that Title VII's prohibition of sex discrimination was enacted to combat).

Although most courts have found protection for transgender people under Title VII under a theory of gender stereotyping, evidence of gender stereotyping is simply one means of proving sex discrimination. Title VII prohibits discrimination based on sex whether motivated by hostility,[11] by a desire to protect people of a certain gender,[12] by assumptions that disadvantage men,[13] by gender stereotypes,[14] or by the desire to accommodate other people's prejudices or discomfort.[15] While evidence that an employer has acted based on stereotypes about how men or women should act is certainly one means of demonstrating disparate treatment based on sex, "sex stereotyping" is not itself an independent cause of action. As the Price Waterhouse Court

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[11] See Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986) (recognizing that sexual harassment is actionable discrimination "because of sex"); Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998) ("A trier of fact might reasonably find such discrimination, for example, if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace.").

[12] See Int'l Union v. Johnson Controls, 499 U.S. 187, 191 (1991) (policy barring all female employees except those who were infertile from working in jobs that exposed them to lead was facially discriminatory on the basis of sex).

[13] See, e.g., Newport News, 462 U.S. at 679-81 (providing different insurance coverage to male and female employees violates Title VII even though women are treated better).

[14] See, e.g., Price Waterhouse, 490 U.S. at 250-52.

[15] See, e.g., Chaney v. Plainfield Healthcare Ctr., 612 F.3d 908, 912 (7th Cir. 2010) (concluding that "assignment sheet that unambiguously, and daily, reminded [the plaintiff, a black nurse,] and her co-workers that certain residents preferred no black" nurses created a hostile work environment); Fernandez v. Wynn Oil Co., 653 F.2d 1273, 1276-77 (9th Cir. 1981) (a female employee could not lawfully be fired because her employer's foreign clients would only work with males); Diaz v. Pan American World Airways, Inc., 442 F.2d 385, 389 (5th Cir. 1971) (rejecting customer preference for female flight attendants as justification for discrimination against male applicants).

noted, while "stereotyped remarks can certainly be *evidence* that gender played a part" in an adverse employment action, the central question is always whether the "employer actually relied on [the employee's] gender in making its decision." Id. at 251 (emphasis in original).

Thus, a transgender person who has experienced discrimination based on his or her gender identity may establish a prima facie case of sex discrimination through any number of different formulations. These different formulations are not, however, different claims of discrimination that can be separated out and investigated within different systems. Rather, they are simply different ways of describing sex discrimination.

For example, Complainant could establish a case of sex discrimination under a theory of gender stereotyping by showing that she did not get the job as an NIBIN ballistics technician at Walnut Creek because the employer believed that biological men should consistently present as men and wear male clothing.

Alternatively, if Complainant can prove that the reason that she did not get the job at Walnut Creek is that the Director was willing to hire her when he thought she was a man, but was not willing to hire her once he found out that she was now a woman—she will have proven that the Director discriminated on the basis of sex. Under this theory, there would actually be no need, for purposes of establishing coverage under Title VII, for Complainant to compile any evidence that the Director was engaging in gender stereotyping.

In this respect, gender is no different from religion. Assume that an employee considers herself Christian and identifies as such. But assume that an employer finds out that the employee's parents are Muslim, believes that the employee should therefore be Muslim, and terminates the employee on that basis. No one would doubt that such an employer discriminated on the basis of religion. There would be no need for the employee who experienced the adverse employment action to demonstrate that the employer acted on the basis of some religious stereotype—although, clearly, discomfort with the choice made by the employee with regard to religion would presumably be at the root of the employer's actions. But for purposes of establishing a prima facie case that Title VII has been violated, the employee simply must demonstrate that the employer impermissibly used religion in making its employment decision.

The District Court in Schroer provided reasoning along similar lines:

> Imagine that an employee is fired because she converts from Christianity to Judaism. Imagine too that her employer testifies that he harbors no bias toward either Christians or Jews but only 'converts.' That would be a clear case of discrimination 'because of religion.' No court would take seriously the notion that 'converts' are not covered by the statute. Discrimination "because of religion" easily encompasses discrimination because of a change of religion.

577 F. Supp. 2d at 306.

Applying Title VII in this manner does not create a new "class" of people covered under Title VII—for example, the "class" of people who have converted from Islam to Christianity or from Christianity to Judaism. Rather, it would simply be the result of applying the plain language of a statute prohibiting discrimination on the basis of religion to practical situations in which such characteristics are unlawfully taken into account. See Brumby, 663 F.3d at 1318-19 (noting that "all persons, whether transgender or not" are protected from discrimination and "[a]n individual cannot be punished because of his or her perceived gender non-conformity").

Thus, we conclude that intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination "based on . . . sex," and such discrimination therefore violates Title VII. [16]

## CONCLUSION

Accordingly, the Agency's final decision declining to process Complainant's entire complaint within the Part 1614 EEO complaints process is **REVERSED**. The complaint is hereby **REMANDED** to the Agency for further processing in accordance with this decision and the Order below.

## ORDER (E0610)

The Agency is ordered to process the remanded complaint in accordance with 29 C.F.R. § 1614.108 et seq. The Agency shall acknowledge to the Complainant that it has received the remanded claims **within thirty (30) calendar days** of the date this decision becomes final. The Agency shall issue to Complainant a copy of the investigative file and also shall notify Complainant of the appropriate rights **within one hundred fifty (150) calendar days** of the date this decision becomes final, unless the matter is otherwise resolved prior to that time. If the Complainant requests a final decision without a hearing, the Agency shall issue a final decision **within sixty (60) days** of receipt of Complainant's request. A copy of the Agency's letter of acknowledgment to Complainant and a copy of the notice that transmits the investigative file and notice of rights must be sent to the Compliance Officer as referenced below.

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[16] The Commission previously took this position in an amicus brief docketed with the district court in the Western District of Texas on Oct. 17, 2011, where it explained that "[i]t is the position of the EEOC that disparate treatment of an employee because he or she is transgender is discrimination "because of . . . sex" under Title VII." EEOC Amicus Brief in *Pacheco v. Freedom Buick GMC Truck*, No. 07-116 (W.D. Tex. Oct. 17, 2011), Dkt. No. 30, at page 1, 2011 WL 5410751. With this decision, we expressly overturn, in light of the recent developments in the caselaw described above, any contrary earlier decisions from the Commission. See, e.g., Jennifer Casoni v. United States Postal Service, EEOC DOC 01840104 (Sept. 28, 1984); Campbell v. Dep't of Agriculture, EEOC Appeal No. 01931703 (July 21, 1994); Kowalczyk v. Dep't of Veterans Affairs, EEOC Appeal No. 01942053 (March 14, 1996).

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0610)

Compliance with the Commission's corrective action is mandatory. The Agency shall submit its compliance report **within thirty (30) calendar days** of the completion of all ordered corrective action. The report shall be submitted to the Compliance Officer, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, DC 20013. The Agency's report must contain supporting documentation, and the Agency must send a copy of all submissions to the Complainant. If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). **If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.** See 29 C.F.R. § 1614.409.

STATEMENT OF RIGHTS - ON APPEAL

RECONSIDERATION (M0610)

The Commission may, in its discretion, reconsider the decision in this case if the Complainant or the Agency submits a written request containing arguments or evidence which tends to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or

2. The appellate decision will have a substantial impact on the policies, practices, or operations of the Agency.

Requests to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision or **within twenty (20) calendar days** of receipt of another party's timely request for reconsideration. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at 9-18 (Nov. 9, 1999). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, DC 20013. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your request for reconsideration. The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(c).

## COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the Agency, or filed your appeal with the Commission. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. **Filing a civil action will terminate the administrative processing of your complaint.**

## RIGHT TO REQUEST COUNSEL (Z0610)

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request from the Court that the Court appoint an attorney to represent you and that the Court also permit you to file the action without payment of fees, costs, or other security. See Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791, 794(c). **The grant or denial of the request is within the sole discretion of the Court.** Filing a request for an attorney with the Court does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File a Civil Action").

FOR THE COMMISSION:

Bernadette B. Wilson
Acting Executive Officer
Executive Secretariat

April 20 2012
Date

**(2008)**

**Diane J. SCHROER, Plaintiff,**

**v.**

**James H. BILLINGTON, Librarian of Congress, Defendant.**

Civil Action No. 05-1090 (JR).

**United States District Court, District of Columbia.**

September 19, 2008.

# *FINDINGS OF FACT AND CONCLUSIONS OF LAW*

JAMES ROBERTSON, District Judge.

Diane Schroer claims that she was denied employment by the Librarian of Congress because of sex, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1). Evidence was taken in a bench trial on August 19-22, 2008.

## *Facts*

Diane Schroer is a male-to-female transsexual. Although born male, Schroer has a female gender identity—an internal, psychological sense of herself as a woman. Tr. at 37. In August 2004, before she changed her legal name or began presenting as a woman, Schroer applied for the position of Specialist in Terrorism and International Crime with the Congressional Research Service (CRS) at the Library of Congress. The terrorism specialist provides expert policy analysis to congressional committees, members of Congress and their staffs. Pl.Ex. 1. The position requires a security clearance.

Schroer was well qualified for the job. She is a graduate of both the National War College and the Army Command and General Staff College, and she holds masters degrees in history and international relations. During Schroer's twenty-five years of service in the U.S. Armed Forces, she held important command and staff positions in the Armored Calvary, Airborne, Special Forces and Special Operations Units, and in combat operations in Haiti and Rwanda. Tr. at 22-31. Pl.Ex. 9. Before her retirement from the military in January 2004, Schroer was a Colonel assigned to the U.S. Special Operations Command, serving as the director of a 120-person classified organization that tracked and targeted high-threat international terrorist organizations. In this position, Colonel Schroer analyzed sensitive intelligence reports, planned a range of classified and conventional operations, and regularly briefed senior military and government officials, including the Vice President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff. Tr. 32-33. At the time of her military retirement, Schroer held a Top Secret, Sensitive Compartmented Information security clearance, and had done so on a continuous basis since 1987. Tr. at 33. After her retirement, Schroer joined a private consulting firm, Benchmark International, where, when she applied for the CRS position, she was working as a program manager on an infrastructure security project for the National Guard. Tr. at 36.

When Schroer applied for the terrorism specialist position, she had been diagnosed with gender identity disorder and was working with a licensed clinical social worker, Martha Harris, to develop a medically appropriate plan for transitioning from male to female. Tr. at 36-38. The transitioning process was guided by a set of treatment protocols formulated by the leading organization for the study and treatment of gender identity disorders, the Harry Benjamin International Gender Dysphoria Association. Pl.Ex. 45; Tr. at 193. Because she had not yet begun presenting herself as a woman on a full-time basis, however, she applied for the position as "David J. Schroer," her legal name at the time. In October 2004, two months after submitting her application, Schroer was invited to interview with three members of the CRS staff—Charlotte Preece, Steve Bowman, and Francis Miko. Preece, the Assistant Director for Foreign Affairs, Defense and Trade, was the selecting official for the position. Tr. at 103. Schroer attended the interview dressed in traditionally masculine attire—a sport coat and slacks with a shirt and tie.

Tr. at 45.

Schroer received the highest interview score of all eighteen candidates. Pl.Ex. 18. In early December, Preece called Schroer, told her that she was on the shortlist of applicants still in the running, and asked for several writing samples and an updated list of references. Tr. at 49. After receiving these updated materials, the members of the selection committee unanimously recommended that Schroer be offered the job. Tr. at 105. In mid-December, Preece called Schroer, offered her the job, and asked, before she processed the administrative paper work, whether Schroer would accept it. Tr. at 108. Schroer replied that she was very interested but needed to know whether she would be paid a salary comparable to the one she was currently receiving in the private sector. The next day, after Preece confirmed that the Library would be able to offer comparable pay, Schroer accepted the offer, and Preece began to fill out the paperwork necessary to finalize the hire. *Id.*

Before Preece had completed and submitted these documents, Schroer asked her to lunch on December 20, 2004. Schroer's intention was to tell Preece about her transsexuality. She was about to begin the phase of her gender transition during which she would be dressing in traditionally feminine clothing and presenting as a woman on a full-time basis. She believed that starting work at CRS as a woman would be less disruptive than if she started as a man and later began presenting as a woman. Tr. at 53.

When Schroer went to the Library for this lunch date, she was dressed in traditionally masculine attire. Before leaving to walk to a nearby restaurant, Preece introduced her to other staff members as the new hire who would soon be coming aboard. Preece also gave Schroer a short tour of the office, explaining where her new colleagues' offices were and describing Schroer's job responsibilities. Tr. at 56. As they were sitting down to lunch, Preece stated that they were excited to have Schroer join CRS because she was "significantly better than the other candidates." *Id.* Schroer asked why that was so, and Preece explained that her skills, her operational experience, her ability creatively to answer questions, and her contacts in the military and in defense industries made her application superior. Tr. at 56; 110.

About a half hour into their lunch, Schroer told Preece that she needed to discuss a "personal matter." Tr. at 57. She began by asking Preece if she knew what "transgender" meant. Preece responded that she did, and Schroer went on to explain that she was transgender, that she would be transitioning from male to female, and that she would be starting work as "Diane." Preece's first reaction was to ask, "Why in the world would you want to do that?" Tr. at 57, 110. Schroer explained that she did not see being transgender as a choice and that it was something she had lived with her entire life. Preece then asked her a series of questions, starting with whether she needed to change Schroer's name on the hiring documentation. Schroer responded that she did not because her legal name, at that point, was still David. Schroer went on to explain the Harry Benjamin Standards of Care and her own medical process for transitioning. She told Preece that she planned to have facial feminization surgery in early January and assured her that recovery from this surgery was quick and would pose no problem for a mid-January start date. In the context of explaining the Benjamin Standards of Care, Schroer explained that she would be living full-time as a woman for at least a year before having sex reassignment surgery. Such surgery, Schroer explained, could normally be accomplished during a two-week vacation period and would not interfere with the requirements of the job. Tr. at 59.

Preece then raised the issue of Schroer's security clearance, asking what name ought to appear on hiring documents. Schroer responded that she had several transgender friends who had retained their clearances while transitioning and said that she did not think it would be an issue in her case. Schroer also mentioned that her therapist would be available to answer any questions or provide additional background as needed. Tr. at 60. Because Schroer expected that there might be some concern about her appearance when presenting as a woman, she showed Preece three photographs of herself, wearing traditionally feminine professional attire. Although Preece did not say it to Schroer, her reaction on seeing these photos was that Schroer looked like "a man dressed in women's clothing." Tr. at 112. Preece did not ask Schroer whether she had told her references or anyone at Benchmark of her transition.

Although Schroer initially thought that her conversation with Preece had gone well, she thought it "ominous" that Preece ended it by stating "Well, you've given me a lot to think about. I'll be in touch." Tr. at 63.

Preece did not finish Schroer's hiring memorandum when she returned to the Library after lunch. *See* Pl.Ex. 23.[1] Instead, she went to speak with Cynthia Wilkins, the personnel security officer for the Library of Congress. Preece told Wilkins that she had just learned that the candidate she had planned to recommend for the terrorism specialist position would be transitioning from

male to female and asked what impact that might have on the candidate's ability to get a security clearance. Tr. at 120. Wilkins did not know and said that she would have to look into the applicable regulations. Preece told Wilkins that the candidate was a 25-year military veteran. She did not recall whether or not she mentioned that Schroer currently held a security clearance. Preece did not provide, and Wilkins did not ask for, the sort of information—such as Schroer's full name and social security number—that would have allowed Wilkins access to information on Schroer's clearance history. Had Preece requested her to do so, Wilkins had the ability to access Schroer's complete investigative file through a centralized federal database. Tr. at 272, 279-82.

Preece testified that at this point, without waiting to hear more from Wilkins, she was leaning against hiring Schroer. Tr. at 121-22. She said that Schroer's transition raised five concerns for her. First, she was concerned about Schroer's ability to maintain her contacts within the military. Specifically, Preece thought that some of Schroer's contacts would no longer want to associate with her because she is transgender. Tr. at 113. At no point after learning of Schroer's transition, however, did Preece discuss the continuing viability of her contacts with Schroer, nor did she raise this concern with any of Schroer's references, all of whom in fact knew that she was transitioning. Tr. at 51, 114. Second, Preece was concerned with Schroer's credibility when testifying before Congress. When CRS specialists testify before Congress, they typically provide Members with brief biographical statements to give them credibility. Preece was concerned "that everyone would know that [Schroer] had transitioned from male to female because only a man could have her military experiences." Tr. at 114. Preece thought that this would be an obstacle to Schroer's effectiveness. Tr. at 115. Third, Preece testified that she was concerned with Schroer's trustworthiness because she had not been up front about her transition from the beginning of the interview process. Tr. at 117. Preece did not, however, raise this concern to Schroer during their lunch. Fourth, Preece thought that Schroer's transition might distract her from her job. Although Preece seems to have connected this concern to Schroer's surgeries, she did not ask for additional information about them or otherwise discuss the issue further with Schroer. Tr. at 118. Finally, Preece was concerned with Schroer's ability to maintain her security clearance. In Preece's mind, "David Schroer" had a security clearance, but "Diane Schroer" did not. Even before speaking with Wilkins, Preece "strongly suspected" that David's clearance simply would not apply to Diane. Tr. at 117. She had this concern, but she did not ask Schroer for any information on the people she knew who had undergone gender transitions while retaining their clearances. *Id.*

After her lunch with Schroer, Preece also relayed the details of her conversation to a number of other officials at CRS, including Daniel Mulholland, the Director of CRS, and Gary Pagliano, one of the defense section heads, whose reaction was to ask Preece if she had a good second candidate for the job. Later the same afternoon, Preece received an email from one of the Library's lawyers, setting up a meeting for the next morning to discuss the terrorism specialist position. Tr. at 123. That evening, as Preece thought about the issue, she was puzzled by the idea that "someone [could] go[] through the experience of Special Forces [and] decide that he wants to become a woman." Tr. at 124. Schroer's background in the Special Forces made it harder for Preece to think of Schroer as undergoing a gender transition. *Id.*

The next morning, on December 21, 2004, at nine o'clock, Preece met with Kent Ronhovde, the Director of the Library of Congress, Wilkins, and two other members of the CRS staff from workforce development. Tr. at 124. Preece described her lunch conversation with Schroer and stated that Schroer had been, but no longer was, her first choice for the position. Tr. at 126. As Preece recalls the meeting, Wilkins stated that she was unable to say one way or another whether Diane Schroer would be able to get a security clearance. *Id.* at 126. Preece testified that Wilkins proposed that Schroer would have to a have a "psychological fitness for duty examination," after which the Library would have to decide whether to initiate a full background investigation. Wilkins testified that she was not familiar with such an "examination" and likely would not have used such a phrase, Tr. at 290-91, but she confirmed that she told the meeting that she would not approve a waiver for Schroer so that she could start working before the clearance process was complete. Wilkins made this decision without having viewed Schroer's application, her resume, or her clearance status and history. Tr. at 127. Preece understood the substance of Wilkins' comments to be that David's security clearance was not relevant to Diane, and that Diane would need a separate clearance. She assumed that that process could take up to a year.

At no point during the meeting did Preece express a continuing interest in hiring Schroer. She did not suggest that Wilkins pull and review David Schroer's security file to confirm her own assumption that the security clearance process would be a lengthy one. No one in the meeting asked whether the organization currently holding Schroer's clearance knew of her transition. There was no discussion of whether anyone else at the Library had dealt with a similar situation. Tr. at 128-29.

By the end of the meeting, Preece had made up her mind that she no longer wanted to recommend Schroer for the terrorism specialist position. Tr. at 131. Preece testified that the security clearance was the critical, deciding factor because of "how long it would take." She also testified, however, that she would have leaned against hiring Schroer even if she had no concerns regarding the security clearance, because her second candidate, John Rollins, presented "fewer complications"—because, unlike Schroer, he was not transitioning from male to female. Tr. at 133-34.

Later that day, Preece circulated a draft of what she proposed to tell Schroer to those who had participated in the meeting. The email stated:

> David. I'm calling to let you know that I am not going forward with my recommendation to hire you for the terrorism position. In light of what you told me yesterday, I feel that you are putting me and CRS in an awkward position for a number of reasons as you go through this transition period. I am primarily concerned that you could not likely be brought on in a timeframe that is needed for me to fill the position. Our Personnel Security Office has told me that the background investigation process that will be required for you to start work could be lengthy. I am also concerned that the past contacts I had counted on you to bring to the position may not now be as fruitful as they were in the past. Finally I have concerns that the transition that you are in the process of might divert your full attention away from the mission of CRS.
>
> I could be wrong on any one of these complicated factors, but taken together I do not have a high enough degree of confidence to recommend you for the position. Having said that, I very much appreciate your candor and your courage. I wish you the best and want to let you know that you should feel free to[] apply for future positions at the Library.

Pl.Ex. 19. Preece was then called into the General Counsel's office for a meeting at eleven o'clock. Afterward, Preece circulated a revised email with the header "Draft per discussion with General Coun[sel]." Pl.Ex. 20. It read:

> David, Given the level and the complexities of the position, I don't think this is a good fit. This has been a difficult decision, but given the immediate needs of Congress, I've decided not to go forward with the recommendation.
>
> (Listen. If needed say) That's all I'm prepared to say at this time.

*Id.* Later that same afternoon, Preece called Schroer to rescind the job offer. She said, "Well, after a long and sleepless night, based on our conversation yesterday, I've determined that you are not a good fit, not what we want." Tr. at 63. Schroer replied that she was very disappointed. Preece ended the conversation by thanking Schroer for her honesty. Tr. at 64; 138. Preece then called John Rollins, who had a lower total interview score than Schroer, *see* Pl.Ex. 18, and offered him the position. He accepted.

Since January 2005, Schroer has lived full-time as a woman. Tr. at 66. She has changed her legal name to Diane Schroer and obtained a Virginia driver's license and a United States Uniformed Services card reflecting her name change and gender transition. Pl.Ex. 7.

## *Analysis*

It is unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). The "ultimate question" in every Title VII case is whether the plaintiff has proved that the defendant intentionally discriminated against her because of a protected characteristic. *St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 511, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). The Library argues that it had a number of non-discriminatory reasons for refusing to hire Schroer, including concerns about her ability to maintain or timely receive a security clearance, her trustworthiness, and the potential that her transition would distract her from her job. The Library also argues that a hiring decision based on transsexuality is not unlawful discrimination under Title VII.

After hearing the evidence presented at trial, I conclude that Schroer was discriminated against because of sex in violation of

Title VII. The reasons for that conclusion are set forth below, in two parts. First, I explain why, as a factual matter, several of the Library's stated reasons for refusing to hire Schroer were not its "true reasons, but were ... pretext[s] for discrimination," *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). Second, I explain why the Library's conduct, whether viewed as sex stereotyping or as discrimination literally "because of ... sex," violated Title VII.

## I.

None of the five assertedly legitimate reasons that the Library has given for refusing to hire Schroer withstands scrutiny.

### *A. Security clearance concerns were pretextual*

Preece has claimed that her primary concern was Schroer's ability to receive a security clearance in a timely manner. It is uncontested that the ability to maintain or receive security clearance is a requirement for the terrorism specialist position. In light of the inquiry that the Library actually made into Schroer's clearance history and the specific facts affecting her case, however, I conclude that this issue was a pretext for discrimination.

Kenneth Lopez, the Library's Director of Security and Emergency Preparedness, and Wilkins' supervisor, testified about the clearance process for new employees. Lopez explained that, in appropriate circumstances, the Library recognizes as a matter of reciprocity the security clearance held by an individual at a prior government agency. Tr. at 247. The three general requirements for reciprocity are that the previous investigation was undertaken in a timely manner, that the investigation had an adequate scope,[2] and that there has not been a significant break in service. When new information that might raise security concerns about a candidate otherwise eligible for reciprocity is raised, the Library evaluates that information before making a decision as to whether to grant reciprocity. Tr. at 251. That there is new information does not necessarily mean that a new, full-scale investigation is needed. Tr. at 285.

When the candidate does not have a valid, prior clearance, the Library may nonetheless grant a waiver so that the person may start work, conditionally employed, before the security investigation has been completed. A waiver is not needed for someone holding a current clearance of appropriate scope. Tr. at 256.

Although Preece knew that Schroer held a security clearance, she did not provide Wilkins with any of the information that might have been needed to see whether reciprocity would apply. Wilkins had the ability to access Schroer's entire security file, but she did not do so-because she was not asked to.

Without any specific information about Schroer—including whether she might have already addressed any issues arising out of her gender transition with the current holder of her security clearance (Benchmark)—Wilkins performed the most general kind of research. She looked into the Adjudication Guidelines and the Adjudication Desk Reference for information about transsexuality and found two potentially relevant guidelines.[3] The first was the sexual behavior guideline, which provides that sexual behavior that causes an individual to be vulnerable to blackmail or coercion may be cause for a security concern. Tr. at 276. Wilkins acknowledged, however, that an individual who has disclosed her transsexuality would not present blackmail concerns. Tr. at 277. The other potentially relevant guideline deals with security concerns raised by emotional, mental or personality disorders. Psychological disorders, including gender identity disorder, are not *per se* disqualifying but are to be evaluated as part of the person's entire background. Tr. at 257. Lopez testified when an employee discloses such a disorder, the proper procedure is for the personnel security officer to consult with the Library's Health Services. After interviewing the candidate and, potentially, his or her mental health providers, a Health Services officer determines whether or not the information raises a security concern. For an individual already holding a clearance, if Health Services is satisfied that the disorder raises no security concerns, the personnel security office proceeds to grant reciprocity. Tr. at 253.

The Library made no effort to determine whether Schroer's previous clearance would receive reciprocal recognition or to determine whether the agency previously holding Schroer's clearance already knew of, and had already investigated any concerns related to Schroer's gender identity disorder. Wilkins stated that she would not approve a waiver without determining whether reciprocity might apply, and therefore without determining whether a waiver actually would have been required. Without

being given a concrete time frame by Wilkins, and without speaking to anyone in Health Services, Preece simply "assumed" that it would take a year before Schroer would be fully cleared. This assumption was connected to no specific information about Schroer or her clearance history, and was not informed by the Library's own procedures for adjudicating possible security issues arising from a psychological disorder.[4]

The Library's statements about the time pressures that they were operating under to fill the position with someone with a full security clearance, as opposed to a provisional waiver, are not credible. The terrorism specialist opening was first posted in August. Schroer was not interviewed until October and did not receive an offer until mid-December. The person who previously held the job, Audrey Cronin, worked for six months during 2003 before receiving her clearance. Tr. at 438; Pl. Ex. 64. Cronin's first performance evaluation, completed after eight months on the job, in no way reflected that her work had been impaired by the fact that she had lacked a clearance during three quarters of the period under evaluation. Pl.Ex. 65. John Rollins, who ultimately filled the position denied to Schroer, did not receive his final clearance until "several months" after he began working at CRS. Tr. at 304.

## *B. Trustworthiness and distraction concerns were pretextual*

The Library's professed concerns with Schroer's trustworthiness and ability to focus on the job were also pretextual. At trial, the Library conceded as undisputed that Schroer "had no other co-morbidities or stressors that would have prevented her from performing the duties of the terrorism specialist, or that would have presented any issue regarding her stability, judgment, reliability or ability to safeguard classified information." Tr. at 349. Preece's stated concern with Schroer's trustworthiness was belied by the fact that she thanked Schroer for her honesty in the course of rescinding the job offer. If Preece had really been concerned with Schroer's ability to focus on her work responsibilities, she could have raised the matter directly and asked Schroer additional questions about her planned surgeries, asked her current employer and references about Schroer's ability to focus, or spoken with Schroer's therapist, as Schroer had offered. Preece did none of those things.

## *C. Credibility and contacts concerns were facially discriminatory*

The Library's final two proffered legitimate non-discriminatory reasons— that Schroer might lack credibility with Members of Congress, and that she might be unable to maintain contacts in the military—were explicitly based on her gender non-conformity and her transition from male to female and are facially discriminatory as a matter of law. Deference to the real or presumed biases of others is discrimination, no less than if an employer acts on behalf of his own prejudices. *See* *Williams v. Trans World Airlines, Inc.,* 660 F.2d 1267, 1270 (8th Cir.1981) (firing employee in response to racially charged, unverified customer complaint is direct evidence of racial discrimination by employer); *cf.* *Fernandez v. Wynn Oil Co.,* 653 F.2d 1273, 1276 (9th Cir.1981) ("stereotypic impressions of male and female roles do not qualify gender as a [bona fide occupational qualification]"); *Diaz v. Pan American World Airways, Inc.,* 442 F.2d 385 (5th Cir.1971) (same). In any event, the Library made no effort to discern if its concern was actually a reasonable one, as it easily could have done by contacting any of the high-ranking military officials that Schroer listed as references. Pl.Ex. 5.

# II.

Schroer contends that the Library's decision not to hire her is sex discrimination banned by Title VII, advancing two legal theories. The first is unlawful discrimination based on her failure to conform with sex stereotypes. The second is that discrimination on the basis of gender identity is literally discrimination "because of ... sex."

## *A. Sex stereotyping*

Plaintiff's sex stereotyping theory is grounded in the Supreme Court's decision in *Price Waterhouse v. Hopkins,* 490 U.S. 228, 251, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989). In that case, a female senior manager was denied partnership in a large accounting firm in part because she was perceived to be too "macho" for a woman. *Id.* at 235, 109 S.Ct. 1775. Her employer

advised that she would improve her chances at partnership if she would "take `a course at charm school'" and would "`walk more femininely, talk more femininely, dress more femininely, wear makeup, have her hair styled, and wear jewelry.'" *Id.* Justice Brennan observed that it did not "require expertise in psychology to know that, if an employee's flawed `interpersonal skills' can be corrected by a softhued suit or a new shade of lipstick, perhaps it is the employee's sex and not her interpersonal skills that has drawn the criticism." *Id.* at 255, 109 S.Ct. 1775. In ruling for the plaintiff, the Court held that Title VII reaches claims of discrimination based on "sex stereotyping." *Id.* at 250-51, 109 S.Ct. 1775 (plurality opinion); *id.* at 258-261, 109 S.Ct. 1775 (White, J., concurring); *id.* at 272-73, 109 S.Ct. 1775 (O'Connor, J., concurring). "In the specific context of sex stereotyping," the Court explained, "an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender." *Id.* at 250, 109 S.Ct. 1775.

After *Price Waterhouse,* numerous federal courts have concluded that punishing employees for failure to conform to sex stereotypes is actionable sex discrimination under Title VII. *See, e.g., Medina v. Income Support Div.,* 413 F.3d 1131, 1135 (10th Cir.2005) ("[A] plaintiff may satisfy her evidentiary burden [under Title VII] by showing that the harasser was acting to punish the plaintiff's noncompliance with gender stereotypes."); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 264 (3d Cir.2001) (Title VII claim is stated when "the harasser was acting to punish the victim's noncompliance with gender stereotypes"); *Nichols v. Azteca Rest. Enters., Inc.,* 256 F.3d 864, 874 (9th Cir.2001) (male plaintiff stated a Title VII claim where he was harassed "for walking and carrying his tray `like a woman'—i.e., for having feminine mannerisms"); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 261 n. 4 (1st Cir.1999) ("Just as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity, a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotypical expectations of masculinity."); *Doe v. City of Belleville,* 119 F.3d 563, 581 (7th Cir.1997) ("a man who is harassed because his voice is soft, his physique is slight, his hair is long, or because in some other respect he ... does not meet his coworkers' idea of how men are to appear and behave, is harassed `because of his sex"), *vacated and remanded on other grounds,* 523 U.S. 1001, 118 S.Ct. 1183, 140 L.Ed.2d 313 (1998).

Following this line of cases, the Sixth Circuit has held that discrimination against transsexuals is a form of sex stereotyping prohibited by *Price Waterhouse* itself:

> After *Price Waterhouse,* an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination that would not occur but for the victim's sex. It follows that employers who discriminate against men because they do wear dresses and makeup, or otherwise act femininely, are also engaging in discrimination, because the discrimination would not occur but for the victim's sex.
>
> ...
>
> [D]iscrimination against a plaintiff who is transsexual—and therefore fails to act and/or identify with his or her gender— is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse,* who, in sex-stereotypical terms, did not act like a woman. Sex stereotyping based on a person's gender nonconforming behavior is impermissible discrimination, irrespective of the cause of that behavior.

*Smith v. Salem,* 378 F.3d 566, 574-75 (6th Cir.2004); *see also Barnes v. City of Cincinnati,* 401 F.3d 729, 737 (6th Cir.2005). In my 2006 memorandum denying the Library's motion to dismiss, in this case, I expressed reservations about the Sixth Circuit's broad reading of *Price Waterhouse.* I explained that "[n]either the logic nor the language of *Price Waterhouse* establishes a cause of action for sex discrimination in every case of sex stereotyping." *Schroer v. Billington,* 424 F.Supp.2d 203, 208 (D.D.C.2006). I held that what *Price Waterhouse* actually recognized was a Title VII action for *disparate treatment,* as between men and women, based on sex stereotyping. Accordingly, I concluded that "[a]dverse action taken on the basis of an employer's gender stereotype that does not impose unequal burdens on men and women does not state a claim under Title VII." *Id.* at 209. While I agreed with the Sixth Circuit that a plaintiffs transsexuality is not a bar to a sex stereotyping claim, I took the position that "such a claim must actually arise from the employee's appearance or conduct and the employer's stereotypical perceptions." *Id.* at 211. In other words, "a *Price-Waterhouse* claim could not be supported by facts showing that [an adverse employment action] resulted *solely* from [the plaintiffs] disclosure of her gender dysphoria." *Schroer v. Billington,* 525 F.Supp.2d 58, 63 (D.D.C.2007).

That was before the development of the factual record that is now before me.

My conclusion about a disparate treatment requirement relied heavily on the panel decision in *Jespersen v. Harrah's Operating Co.,* 392 F.3d 1076 (9th Cir. 2004). That decision was later affirmed *en banc. Jespersen v. Harrah's Operating Co.,* 444 F.3d 1104, 1109 (9th Cir.2006). The defendant in *Jespersen* had instituted a company-wide "Personal Best" grooming policy, which, in addition to gender-neutral standards of fitness and professionalism, required women to wear stockings and colored nail polish, to wear their hair "teased, curled, or styled," and to wear make-up. 392 F.3d at 1077. The policy also prohibited men from wearing makeup, nail polish, or long hair. Plaintiff Darlene Jespersen was fired for refusing to wear makeup, which she testified made "her feel sick, degraded, exposed and violated," "forced [] to be feminine," and "dolled up" like a sexual object. *Id.* Despite the subjective, gender-related toll that the policy exacted from Jespersen, the Ninth Circuit held that firing her for non-compliance with the policy did not violate Title VII, since, in that court's judgment, the "Personal Best" policy imposed equally burdensome, although gender-differentiated, standards on men and women.

In her post-trial briefing, Schroer convincingly argues that *Jespersen's* disparate treatment requirement ought not apply in this case. Unlike *Jespersen,* this case does not involve a generally applicable, gender-specific policy, requiring proof that the policy itself imposed unequal burdens on men and women. Instead, Schroer argues that her *direct evidence* that the Library's hiring decision was motivated by sex stereotypical views renders proof of disparate treatment unnecessary.[5]

Schroer's case indeed rests on direct evidence, and compelling evidence, that the Library's hiring decision was infected by sex stereotypes. Charlotte Preece, the decisonmaker, admitted that when she viewed the photographs of Schroer in traditionally feminine attire, with a feminine hairstyle and makeup, she saw a man in women's clothing. Tr. at 112-13. In conversations Preece had with colleagues at the Library after her lunch with Schroer, she repeatedly mentioned these photographs. Tr. at 120-21, 172-73. Preece testified that her difficulty comprehending Schroer's decision to undergo a gender transition was heightened because she viewed David Schroer not just as a man, but, in light of her Special Forces background, as a particularly masculine kind of man. Tr. at 124. Preece's perception of David Schroer as especially masculine made it all the more difficult for her to visualize Diane Schroer as anyone other than a man in a dress. *Id.* Preece admitted that she believed that others at CRS, as well as Members of Congress and their staffs, would not take Diane Schroer seriously because they, too, would view her as a man in women's clothing. *Tr.* at 112-15, 132-34.

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. *See Ulane v. Eastern Airlines,* 742 F.2d 1081, 1085 (7th Cir.1984); *Sommers v. Budget Mktg., Inc.,* 667 F.2d 748, 750 (8th Cir. 1982); *Holloway v. Arthur Andersen & Co.,* 566 F.2d 659, 662-63 (9th Cir.1977); *Doe v. U.S. Postal Service,* 1985 U.S. Dist. LEXIS 18959, 1985 WL 9446, *2 (D.D.C. 1985). Take Preece's testimony regarding Schroer's credibility before Congress. As characterized by Schroer, the Library's credibility concern was that she "would not be deemed credible by Members of Congress and their staff because people would perceive her to be a woman, and would refuse to believe that she could possibly have the credentials that she had." [Dkt. 67 at 7]. Plaintiff argues that this is "quintessential sex stereotyping" because Diane Schroer is a woman and does have such a background. *Id.*[6] But Preece did not testify that she was concerned that Members of Congress would perceive Schroer simply to be a woman. Instead, she testified that "everyone would know that [Schroer] had transitioned from male to female because only a man could have her military experiences." Tr. at 114.

Ultimately, I do not think that it matters for purposes of Title VII liability whether the Library withdrew its offer of employment because it perceived Schroer to be an insufficiently masculine man, an insufficiently feminine woman, or an inherently gender-nonconforming transsexual. One or more of Preece's comments could be parsed in each of these three ways. While I would therefore conclude that Schroer is entitled to judgment based on a *Price Waterhouse-type* claim for sex stereotyping, I also conclude that she is entitled to judgment based on the language of the statute itself.

## *B. Discrimination because of sex*

Schroer's second legal theory is that, because gender identity is a component of sex, discrimination on the basis of gender

identity is sex discrimination. In support of this contention, Schroer adduced the testimony of Dr. Walter Bockting, a tenured associate professor at the University of Minnesota Medical School who specializes in gender identity disorders. Dr. Bockting testified that it has long been accepted in the relevant scientific community that there are nine factors that constitute a person's sex. One of these factors is gender identity, which Dr. Bockting defined as one's personal sense of being male or female.[7] Tr. at 210.

The Library adduced the testimony of Dr. Chester Schmidt, a professor of psychiatry at the Johns Hopkins University School of Medicine and also an expert in gender identity disorders. Dr. Schmidt disagreed with Dr. Bockting's view, of the prevailing scientific consensus and testified that he and his colleagues regard gender identity as a component of "sexuality" rather than "sex." According to Dr. Schmidt, "sex" is made up of a number of facets, each of which has a determined biologic etiology. Dr. Schmidt does not believe that gender identity has a single, fixed etiology. Tr. at 372, 400-04.

The testimony of both experts—on the science of gender identity and the relationship between intersex conditions and transsexuality—was impressive. Resolving the dispute between Dr. Schmidt and Dr. Bockting as to the proper scientific definition of sex, however, is not within this Court's competence. More importantly (because courts render opinions about scientific controversies with some regularity), deciding whether Dr. Bokting or Dr. Schmidt is right turns out to be unnecessary.

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

Analysis "must begin ... with the language of the statute itself" and "[i]n this case it is also where the inquiry should end, for where, as here, the statute's language is plain, `the sole function of the courts is to enforce it according to its terms.'" *United States v. Ron Pair Enters.*, 489 U.S. 235, 241, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989) (quoting *Caminetti v. United States*, 242 U.S. 470, 485, 37 S.Ct. 192, 61 L.Ed. 442 (1917)).

Imagine that an employee is fired because she converts from Christianity to Judaism. Imagine too that her employer testifies that he harbors no bias toward either Christians or Jews but only "converts." That would be a clear case of discrimination "because of religion." No court would take seriously the notion that "converts" are not covered by the statute. Discrimination "because of religion" easily encompasses discrimination because of a *change* of religion. But in cases where the plaintiff has changed her sex, and faces discrimination because of the decision to stop presenting as a man and to start appearing as a woman, courts have traditionally carved such persons out of the statute by concluding that "transsexuality" is unprotected by Title VII. In other words, courts have allowed their focus on the label "transsexual" to blind them to the statutory language itself.

In *Ulane v. Eastern Airlines,* the Seventh Circuit held that discrimination based on sex means only that "it is unlawful to discriminate against women because they are women and against men because they are men." The Court reasoned that the statute's legislative history "clearly indicates that Congress never considered nor intended that [Title VII] apply to anything other than the traditional concept of sex." 742 F.2d 1081, 1085 (7th Cir.1981). The Ninth Circuit took a similar approach, holding that Title VII did not extend protection to transsexuals because Congress's "manifest purpose" in enacting the statute was only "to ensure that men and women are treated equally." *Holloway v. Arthur Andersen & Co.,* 566 F.2d 659, 663 (9th Cir.1977). More recently, the Tenth Circuit has also held that because "sex" under Title VII means nothing more than "male and female," the statute only extends protection to transsexual employees "if they are discriminated against because they are male or because they are female." *Etsitty v. Utah Transit Authority,* 502 F.3d 1215, 1222 (10th Cir.2005).

The decisions holding that Title VII only prohibits discrimination against men because they are men, and discrimination against women because they are women, represent an elevation of "judge-supposed legislative intent over clear statutory text." *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 127 S.Ct. 1534, 1551, 167 L.Ed.2d 449 (2007) (Scalia, J., dissenting).[8] In their holdings that discrimination based on changing one's sex is not discrimination because of sex, *Ulane, Holloway,* and *Etsitty* essentially reason "that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." *Church of the Holy Trinity v. United States,* 143 U.S. 457, 459, 12 S.Ct. 511, 36 L.Ed. 226 (1892). This is no longer a tenable approach to statutory construction. *See Public Citizen v. United States Dep't of Justice,* 491 U.S. 440, 473, 109 S.Ct. 2558, 105 L.Ed.2d 377 (1989) (Kennedy, J., concurring). Supreme Court decisions

subsequent to *Ulane* and *Holloway* have applied Title VII in ways Congress could not have contemplated. As Justice Scalia wrote for a unanimous court:

> Male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.

*Oncale v. Sundowner Offshore Services, Inc.,* 523 U.S. 75, 79, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998).

For Diane Schroer to prevail on the facts of her case, however, it is not necessary to draw sweeping conclusions about the reach of Title VII. Even if the decisions that define the word "sex" in Title VII as referring only to anatomical or chromosomal sex are still good law—after that approach "has been eviscerated by *Price Waterhouse,*" *Smith,* 378 F.3d at 573—the Library's refusal to hire Schroer after being advised that she planned to change her anatomical sex by undergoing sex reassignment surgery was *literally* discrimination "because of ... sex."

In 2007, a bill that would have banned employment discrimination on the basis of sexual orientation and gender identity was introduced in the House of Representatives. *See* H.R.2015, 110 Cong., 1st Sess. (2007). Two alternate bills were later introduced: one that banned discrimination only on the basis of sexual orientation, H.R. 3685, 110 Cong., 1st Sess. (2007), and another that banned only gender identity discrimination, H.R. 3686, 110 Cong., 1st Sess. (2007). None of those bills was enacted.

The Library asserts that the introduction and non-passage of H.R.2015 and H.R. 3686 shows that transsexuals are not currently covered by Title VII and also that Congress is content with the status quo. However, as Schroer points out, another reasonable interpretation of that legislative non-history is that some Members of Congress believe that the *Ulane* court and others have interpreted "sex" in an unduly narrow manner, that Title VII means what it says, and that the statute requires, not amendment, but only correct interpretation. As the Supreme Court has explained,

> [S]ubsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress. It is a particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns, as it does here, a proposal that does not become law. Congressional 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.

*Pension Ben. Guar. Corp. v. LTV Corp.,* 496 U.S. 633, 650, 110 S.Ct. 2668, 110 L.Ed.2d 579 (1990) (internal citations and quotation marks omitted).

## *Conclusion*

In refusing to hire Diane Schroer because her appearance and background did not comport with the decisionmaker's sex stereotypes about how men and women should act and appear, and in response to Schroer's decision to transition, legally, culturally, and physically, from male to female, the Library of Congress violated Title VII's prohibition on sex discrimination.

The Clerk is directed to set a conference to discuss and schedule the remedial phase of this case.

[1] Her partial, draft memorandum had begun:

I recommend Mr. David Schroer for the position of Specialist in Terrorism and International Crime in the Foreign Affairs, Defense, and Trade Division of the Congressional Research Service. His qualifications and experience make[] him the best qualified candidate from among the other 8 applicants on the final referral list.

Mr. Schroer has extensive experience as a practitioner and strategic planner in counterterrorism. Since 1986 he was involved in leading counterterrorism and counterinsurgency operations around the world.

[2] "Scope" goes to the thoroughness of the prior investigation based on the level of clearance. Someone who holds only a "Secret" level

clearance will not have had as thorough an investigation as someone holding a "Top Secret" clearance. Tr. at 254-55.

[3] Wilkins testified that these guidelines and reference materials implement Executive Order 10450, 18 Fed.Reg. 2489 (1953), and Executive Order 12968, 60 Fed.Reg. 40245 (1995). Tr. at 263.

[4] The Library has never argued that Title VII's jurisdictional exemption regarding security clearances, 42 U.S.C. § 2000e-2(g), applies in this case, and, unlike in *Department of Navy v. Egan,* 484 U.S. 518, 108 S.Ct. 818, 98 L.Ed.2d 918 (1988), Schroer is not challenging the denial of a security clearance. She asserts, rather, that the Library's failure to follow its own procedures establishes pretext.

[5] For example, in *Oncale v. Sundowner Offshore Services, Inc.,* the male plaintiff complaining of sexual harassment in violation of Title VII had been "forcibly subjected to sex-related, humiliating actions" and had been "physically assaulted ... in a sexual manner" by other male co-workers. 523 U.S. 75, 77, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998). The Supreme Court did not require Oncale to show that he had been treated worse than women would have been treated, but only that "he suffered discrimination *in comparison to other men."* *Rene v. MGM Grand Hotel, Inc.,* 305 F.3d 1061, 1067 (9th Cir.2002) (en banc) (emphasis in original).

[6] Plaintiff also presented the testimony of Dr. Kalev Sepp, Deputy Assistant Secretary of Defense for Special Operations, that women have served in the Special Forces since the 1970s. *Id.* at 98-99.

[7] The other eight factors, according to Dr. Bockting, are chromosomal sex, hypothalamic sex, fetal hormonal sex, pubertal hormonal sex, sex of assignment and rearing, internal morphological sex, external morphological sex, and gonads.

[8] Discrimination because of race has never been limited only to discrimination for being one race or another. Instead, courts have recognized that Title VII's prohibition against race discrimination protects employees from being discriminated against because of an interracial marriage, or based on friendships that cross racial lines. *See, e.g., McGinest v. GTE Serv. Corp.,* 360 F.3d 1103, 1118 (9th Cir.2004).

# United States Department of Labor

## Office of Federal Contract Compliance Programs

## Office of Federal Contract Compliance Programs (OFCCP)

DIRECTIVE (DIR) 2014-02

DIRECTIVE

U.S. DEPARTMENT OF LABOR

Office of Federal Contract Compliance Programs

Directives (DIRs) provide guidance to OFCCP staff or federal contractors on enforcement and compliance policy or procedures. Directives do not change the laws and regulations governing OFCCP's programs and do not establish any legally enforceable rights or obligations.

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Effective Date: August 19, 2014

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1. SUBJECT: Gender Identity and Sex Discrimination

2. PURPOSE: To clarify that existing agency guidance on discrimination on the basis of sex under Executive Order 11246, as amended, includes discrimination on the bases of gender identity and transgender status.

3. REFERENCES: Macy v. Holder, Appeal No. 0120120821, 2012 WL 1435995 (EEOC) (2012), also available at http://www.eeoc.gov/decisions/0120120821%20Macy%20v%20DOJ%20ATF.txt (last accessed August 12, 2014), on remand, DOJ Final Agency Decision, Agency Complaint No. ATF–2011–00751, DJ No. 187–9–149 (July 8, 2013).

4. AFFECTED POLICY:

   - A. 41 CFR § 60–1.1; 60–1.4(a)(1); 60–1.4(b)(1); 60–1.8; 60–1.10; 60–1.20(a); 60–3.1 – 60–3.18; and 60–20.1 – 60–20.6.
   - B. Federal Contract Compliance Manual (FCCM) § 1F05; 2H; 2J05; 2L02; 2L03; 3A; 3H03; 3H04; 3I03; 3J; 3L; 6E03; 6E04; 6E06; and 6E10.

5. BACKGROUND: As the Secretary of the U.S. Department of Labor (DOL) has said:

> Our workforce and our entire economy are strongest when we embrace diversity to its fullest, and that means opening doors of opportunity to everyone and recognizing that the American Dream excludes no one.[1]

Consistent with this statement, on June 30, 2014, the Secretary announced that DOL is updating its enforcement protocols and nondiscrimination guidance to clarify that DOL provides the full protection of the federal nondiscrimination laws that it enforces to individuals on the bases of gender identity and transgender status. This directive is, therefore, issued to clarify the Office of Federal Contract Compliance Programs' (OFCCP) interpretation of the nondiscrimination obligation.

OFCCP enforces Executive Order 11246, as amended, a law that prohibits federal contractors and subcontractors from discriminating on the basis of race, color, religion, sex, or national origin.[2] OFCCP interprets the nondiscrimination obligations under Executive Order 11246 in accordance with Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq. (Title VII), which prohibits employers from discriminating on the same protected bases.[3] This means that OFCCP enforces the nondiscrimination obligations under Executive Order 11246 by following Title VII and the case law principles that have developed interpreting that statute. Additionally, since the Equal Employment Opportunity Commission (EEOC) is the lead federal agency responsible for administering and enforcing Title VII, pursuant to Executive Order 12067, OFCCP generally defers to the EEOC's interpretations of Title VII law.

Under current Title VII case law principles, discrimination based on gender identity or transgender status, as defined below, is discrimination based on sex. In its decision in Macy v. Holder, 2012 WL 1435995, the EEOC unanimously concluded that discrimination because a person is transgender is sex discrimination in violation of Title VII. The complainant in Macy, a transgender woman working as a police detective, alleged that she was denied a job with the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) when she informed the ATF that she was in the process of transitioning from male to female. The EEOC concluded that discrimination on these grounds was discrimination "on the basis of sex," citing both the text of Title VII and multiple federal court decisions interpreting the statute.

First, the EEOC identified sex stereotyping as one way in which a transgender employee, job applicant, or former employee[4] could prove sex discrimination. Specifically, disparate treatment of a transgender employee because he or she does not conform to the gender stereotypes associated with his or her biological sex is a form of sex discrimination—a theory frequently upheld by federal courts.[5] The EEOC noted that Title VII prohibits discrimination based on gender, which "encompasses not only a person's biological sex but also the cultural and social aspects associated with masculinity and femininity." Macy, 2012 WL 1435995 at *6.

The EEOC explained that treating a person differently because the person is transgender is by definition sex discrimination because it is "related to the sex of the victim" in violation of Title VII.[6] This is true regardless of whether the discrimination was motivated by sex stereotyping or by some other reason related to the employee's gender identity, such as discomfort with the idea of a transition. The EEOC additionally noted that Ms. Macy would have had a claim of sex discrimination if the employer was willing to hire her when he thought she was a man, but was not willing to hire her once he found out that she was a woman.

The EEOC, therefore, concluded that gender identity and transgender status did not need to be specifically addressed in Title VII in order to be protected bases of discrimination, as they are simply part of the protected category of "sex" under Title VII.[7]

Consistent with Macy and the Title VII case law on which it is based, this directive deals with discrimination on the basis of gender identity only as a form of sex discrimination. It does not address gender identity as a stand–alone protected category, which (along with sexual orientation) is the subject of Executive Order 13672. As noted above, Executive Order 13672 amends Executive Order 11246 effective immediately, and will apply to contracts entered into on or after the effective date of the implementing regulations.

6. ROLES AND RESPONSIBILITIES: It is the responsibility ofcompliance officers (COs) to conduct complaint investigations and compliance evaluations related to transgender status and gender identity in accordance with this directive.

7. POLICY: In accordance with Macy v. Holder and the Title VII case law on which it is based, OFCCP continues to fully investigate and seek to remedy instances of sex discrimination that occur because of an employee's gender identity or transgender status. OFCCP continues to accept and investigate individual and systemic complaints alleging sex discrimination against transgender employees. In the case of individual allegations of gender identity discrimination, and pursuant to the Memorandum of Understanding between EEOC and OFCCP,[8] OFCCP will request that it initially retain such complaints to ensure effective enforcement of this Directive. OFCCP continues to seek to remedy any findings of sex

discrimination against transgender employees that are discovered by OFCCP compliance officers during scheduled compliance evaluations of federal contractors or subcontractors. When investigating whether a federal contractor or subcontractor discriminated against an employee because of his or her gender identity, the agency continues to adhere to the existing Title VII framework for proving sex discrimination, as outlined in the FCCM.

3. ATTACHMENTS: None.

Patricia A. Shiu
Director
Office of Federal Contract Compliance Programs

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[1] Secretary Thomas Perez, U.S. Department of Labor, Work in Progress: The Official Blog of the U.S. Department of Labor, Justice and Identity, http://social.dol.gov/blog/justice-and-identity/ (June 30, 2014) (last accessed August 12, 2014).

[2] Executive Order 11246 was amended by Executive Order 13672, effective July 21, 2014, to add sexual orientation and gender identity to the list of categories protected from discrimination. E.O. 13672 will apply to contracts entered into on or after the effective date of the implementing regulations.

[3] See OFCCP, FCCM § 2H01 (July 2013), available at http://www.dol.gov/ofccp/regs/compliance/fccm/FCCM_FINAL_508c.pdf (last accessed August 12, 2014); see also OFCCP v. Honeywell, 77-OFC-3, Sec'y of Labor Dec. and Order on Mediation, June 2, 1993, at 14 and 16 & Sec'y of Labor Dec. and Remand Order, March 2, 1994; OFCCP v. Illinois Institute of Technology, 80–OFC–11, Sec'y Final Order, December 23, 1982; OFCCP v. Firestone, 80–OFC–15, Sec'y Dec., July 13, 1980, rev'd on other grounds, Firestone v. Marshall, 507 F. Supp. 1330 (E.D. Tex. 1981).

[4] Hereafter, this Directive uses the term "employee" to refer to applicants for employment and current and former employees.

[5] Among the cases the EEOC relied on were Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011) (termination of a transgender employee constituted discrimination on the basis of gender non–conformity and sex–stereotyping discrimination under Equal Protection Clause); Barnes v. City of Cincinnati, 401 F.3d 729 (6th Cir. 2005) (affirming jury instructions allowing a claim for sex discrimination under Title VII as sex stereotyping in favor of a transgender woman), and Smith v. City of Salem, 378 F.3d 566, 574 (6th Cir. 2004) ("discrimination against a plaintiff who is a transsexual – and therefore fails to act and/or identify with his or her gender – is no different from the discrimination directed against [the plaintiff] in Price Waterhouse [v. Hopkins, 490 U.S. 228 (1989),] who, in sex–stereotypical terms, did not act like a woman"). In addition to these appellate cases, "[t]here has likewise been a steady stream of district court decisions recognizing that discrimination against transsexuals on the basis of sex stereotyping constitutes discrimination because of sex." Macy, 2012 WL 1435995 at *9.

[6] See also Schroer v. Billington, 577 F. Supp.2d 293, 308 (D. D.C. 2008) (finding the defendant's "refusal to hire Schroer after being advised that she planned to change her anatomical sex by undergoing sex reassignment surgery was literally discrimination 'because of . . . sex' ") (emphasis in the original).

[7] See also EEOC, "Clarification of processing complaints of transgender individuals added to Title VII/ Section 1614 Claims of Sex Discrimination by LGBT Employees," available at http://www.eeoc.gov/federal/directives/lgbt_complaint_processing.cfm (last accessed August 12, 2014). The EEOC's decision also aligns with a number of federal agencies' interpretations of sex discrimination and gender identity under the civil rights statutes that they enforce. See Department of Education, Questions and Answers on Title IX

and Sexual Violence (April 29, 2014), available at http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf (last accessed August 12, 2014), p. 5 (interpreting Title IX's sex discrimination prohibition as "extend[ing] to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity"); OPM, "Nondiscrimination Provisions–Proposed Rule," 78 Fed. Reg. 54434 (September 4, 2013) (proposing to amend various nondiscrimination sections appearing in 5 C.F.R. to categorize gender identity discrimination as a form of sex discrimination); Department of Health and Human Services, "Request for Information Regarding Nondiscrimination in Certain Health Programs and Activities," 78 Fed. Reg. 46558, 46559 (August 1, 2013) (including gender identity as "sex discrimination" under Section 1557 of the Affordable Care Act).

[8] EEOC–OFCCP Memorandum of Understanding, §7(c) (November 9, 2011), available at http://www.eeoc.gov/laws/mous/eeoc_ofccp.cfm (last accessed August 12, 2014).

# United States Department of Labor

## Office of Federal Contract Compliance Programs

## Office of Federal Contract Compliance Programs (OFCCP)

### Executive Order 11246, As Amended

— DISCLAIMER —

Executive Order 11246 — Equal Employment Opportunity

SOURCE: The provisions of Executive Order 11246 of Sept. 24, 1965, appear at 30 FR 12319, 12935, 3 CFR, 1964-1965 Comp., p.339, unless otherwise noted.

Under and by virtue of the authority vested in me as President of the United States by the Constitution and statutes of the United States, it is ordered as follows:

Part I — Nondiscrimination in Government Employment

[Part I superseded by EO 11478 of Aug. 8, 1969, 34 FR 12985, 3 CFR, 1966-1970 Comp., p. 803]

Part II - Nondiscrimination in Employment by Government Contractors and Subcontractors

Subpart A - Duties of the Secretary of Labor

SEC. 201.The Secretary of Labor shall be responsible for the administration and enforcement of Parts II and III of this Order. The Secretary shall adopt such rules and regulations and issue such orders as are deemed necessary and appropriate to achieve the purposes of Parts II and III of this Order.

[Sec. 201 amended by EO 12086 of Oct. 5, 1978, 43 FR 46501, 3 CFR, l978 Comp., p. 230]

Subpart B - Contractors' Agreements

SEC. 202. Except in contracts exempted in accordance with Section 204 of this Order, all Government contracting agencies shall include in every Government contract hereafter entered into the following provisions:

During the performance of this contract, the contractor agrees as follows:

1. The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.

2. The contractor will, in all solicitations or advancements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex or national origin.

3. The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the agency contracting

officer, advising the labor union or workers' representative of the contractor's commitments under Section 202 of Executive Order No. 11246 of September 24, 1965, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

4. The contractor will comply with all provisions of Executive Order No. 11246 of Sept. 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.

5. The contractor will furnish all information and reports required by Executive Order No. 11246 of September 24, 1965, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

6. In the event of the contractor's noncompliance with the nondiscrimination clauses of this contract or with any of such rules, regulations, or orders, this contract may be cancelled, terminated, or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order No. 11246 of Sept. 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order No. 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

7. The contractor will include the provisions of paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to Section 204 of Executive Order No. 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as may be directed by the Secretary of Labor as a means of enforcing such provisions including sanctions for noncompliance: Provided, however, that in the event the contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction, the contractor may request the United States to enter into such litigation to protect the interests of the United States." [Sec. 202 amended by EO 11375 of Oct. 13, 1967, 32 FR 14303, 3 CFR, 1966-1970 Comp., p. 684, EO 12086 of Oct. 5, 1978, 43 FR 46501, 3 CFR, 1978 Comp., p. 230]

SEC. 203.

a. Each contractor having a contract containing the provisions prescribed in Section 202 shall file, and shall cause each of his subcontractors to file, Compliance Reports with the contracting agency or the Secretary of Labor as may be directed. Compliance Reports shall be filed within such times and shall contain such information as to the practices, policies, programs, and employment policies, programs, and employment statistics of the contractor and each subcontractor, and shall be in such form, as the Secretary of Labor may prescribe.

b. Bidders or prospective contractors or subcontractors may be required to state whether they have participated in any previous contract subject to the provisions of this Order, or any preceding similar Executive order, and in that event to submit, on behalf of themselves and their proposed subcontractors, Compliance Reports prior to or as an initial part of their bid or negotiation of a contract.

c. Whenever the contractor or subcontractor has a collective bargaining agreement or other contract or understanding with a labor union or an agency referring workers or providing or supervising apprenticeship or training for such workers, the Compliance Report shall include such information as to such labor union's or agency's practices and policies affecting compliance as the Secretary of Labor may prescribe: Provided, That to the extent such information is within the exclusive possession of a labor union or an agency referring workers or providing or supervising apprenticeship or training and such labor union or agency shall refuse to furnish such information to the contractor, the contractor shall so certify to the Secretary of Labor as part of its Compliance Report and shall set forth what efforts he has made to obtain such information.

d. The Secretary of Labor may direct that any bidder or prospective contractor or subcontractor shall submit, as part

of his Compliance Report, a statement in writing, signed by an authorized officer or agent on behalf of any labor union or any agency referring workers or providing or supervising apprenticeship or other training, with which the bidder or prospective contractor deals, with supporting information, to the effect that the signer's practices and policies do not discriminate on the grounds of race, color, religion, sex or national origin, and that the signer either will affirmatively cooperate in the implementation of the policy and provisions of this Order or that it consents and agrees that recruitment, employment, and the terms and conditions of employment under the proposed contract shall be in accordance with the purposes and provisions of the order. In the event that the union, or the agency shall refuse to execute such a statement, the Compliance Report shall so certify and set forth what efforts have been made to secure such a statement and such additional factual material as the Secretary of Labor may require.

[Sec. 203 amended by EO 11375 of Oct. 13, 1967, 32 FR 14303, 3 CFR, 1966-1970 Comp., p. 684; EO 12086 of Oct. 5, 1978, 43 FR 46501, 3 CFR, 1978 Comp., p. 230]

SEC. 204

a. The Secretary of Labor may, when the Secretary deems that special circumstances in the national interest so require, exempt a contracting agency from the requirement of including any or all of the provisions of Section 202 of this Order in any specific contract, subcontract, or purchase order.

b. The Secretary of Labor may, by rule or regulation, exempt certain classes of contracts, subcontracts, or purchase orders (1) whenever work is to be or has been performed outside the United States and no recruitment of workers within the limits of the United States is involved; (2) for standard commercial supplies or raw materials; (3) involving less than specified amounts of money or specified numbers of workers; or (4) to the extent that they involve subcontracts below a specified tier.

c. Section 202 of this Order shall not apply to a Government contractor or subcontractor that is a religious corporation, association, educational institution, or society, with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities. Such contractors and subcontractors are not exempted or excused from complying with the other requirements contained in this Order.

d. The Secretary of Labor may also provide, by rule, regulation, or order, for the exemption of facilities of a contractor that are in all respects separate and distinct from activities of the contractor related to the performance of the contract: provided, that such an exemption will not interfere with or impede the effectuation of the purposes of this Order: and provided further, that in the absence of such an exemption all facilities shall be covered by the provisions of this Order."

[Sec. 204 amended by EO 13279 of Dec. 16, 2002, 67 FR 77141, 3 CFR, 2002 Comp., p. 77141 - 77144]

Subpart C - Powers and Duties of the Secretary of Labor and the Contracting Agencies

SEC. 205. The Secretary of Labor shall be responsible for securing compliance by all Government contractors and subcontractors with this Order and any implementing rules or regulations. All contracting agencies shall comply with the terms of this Order and any implementing rules, regulations, or orders of the Secretary of Labor. Contracting agencies shall cooperate with the Secretary of Labor and shall furnish such information and assistance as the Secretary may require.

[Sec. 205 amended by EO 12086 of Oct. 5, 1978, 43 FR 46501, 3 CFR, 1978 Comp., p. 230]

SEC. 206.

a. The Secretary of Labor may investigate the employment practices of any Government contractor or subcontractor

to determine whether or not the contractual provisions specified in Section 202 of this Order have been violated. Such investigation shall be conducted in accordance with the procedures established by the Secretary of Labor.

b. The Secretary of Labor may receive and investigate complaints by employees or prospective employees of a Government contractor or subcontractor which allege discrimination contrary to the contractual provisions specified in Section 202 of this Order.

[Sec. 206 amended by EO 12086 of Oct. 5, 1978, 43 FR 46501, 3 CFR, 1978 Comp., p. 230]

SEC. 207. The Secretary of Labor shall use his/her best efforts, directly and through interested Federal, State, and local agencies, contractors, and all other available instrumentalities to cause any labor union engaged in work under Government contracts or any agency referring workers or providing or supervising apprenticeship or training for or in the course of such work to cooperate in the implementation of the purposes of this Order. The Secretary of Labor shall, in appropriate cases, notify the Equal Employment Opportunity Commission, the Department of Justice, or other appropriate Federal agencies whenever it has reason to believe that the practices of any such labor organization or agency violate Title VI or Title VII of the Civil Rights Act of 1964 or other provision of Federal law.

[Sec. 207 amended by EO 12086 of Oct. 5, 1978, 43 FR 46501, 3 CFR, 1978 Comp., p. 230]

SEC. 208.

a. The Secretary of Labor, or any agency, officer, or employee in the executive branch of the Government designated by rule, regulation, or order of the Secretary, may hold such hearings, public or private, as the Secretary may deem advisable for compliance, enforcement, or educational purposes.

b. The Secretary of Labor may hold, or cause to be held, hearings in accordance with Subsection of this Section prior to imposing, ordering, or recommending the imposition of penalties and sanctions under this Order. No order for debarment of any contractor from further Government contracts under Section 209(6) shall be made without affording the contractor an opportunity for a hearing.

## Subpart D - Sanctions and Penalties

SEC. 209. In accordance with such rules, regulations, or orders as the Secretary of Labor may issue or adopt, the Secretary may:

1. Publish, or cause to be published, the names of contractors or unions which it has concluded have complied or have failed to comply with the provisions of this Order or of the rules, regulations, and orders of the Secretary of Labor.

2. Recommend to the Department of Justice that, in cases in which there is substantial or material violation or the threat of substantial or material violation of the contractual provisions set forth in Section 202 of this Order, appropriate proceedings be brought to enforce those provisions, including the enjoining, within the limitations of applicable law, of organizations, individuals, or groups who prevent directly or indirectly, or seek to prevent directly or indirectly, compliance with the provisions of this Order.

3. Recommend to the Equal Employment Opportunity Commission or the Department of Justice that appropriate proceedings be instituted under Title VII of the Civil Rights Act of 1964.

4. Recommend to the Department of Justice that criminal proceedings be brought for the furnishing of false information to any contracting agency or to the Secretary of Labor as the case may be.

5. After consulting with the contracting agency, direct the contracting agency to cancel, terminate, suspend, or cause to be cancelled, terminated, or suspended, any contract, or any portion or portions thereof, for failure of the contractor or subcontractor to comply with equal employment opportunity provisions of the contract.

Contracts may be cancelled, terminated, or suspended absolutely or continuance of contracts may be conditioned upon a program for future compliance approved by the Secretary of Labor.

5. Provide that any contracting agency shall refrain from entering into further contracts, or extensions or other modifications of existing contracts, with any noncomplying contractor, until such contractor has satisfied the Secretary of Labor that such contractor has established and will carry out personnel and employment policies in compliance with the provisions of this Order.

(b) Pursuant to rules and regulations prescribed by the Secretary of Labor, the Secretary shall make reasonable efforts, within a reasonable time limitation, to secure compliance with the contract provisions of this Order by methods of conference, conciliation, mediation, and persuasion before proceedings shall be instituted under subsection (a)(2) of this Section, or before a contract shall be cancelled or terminated in whole or in part under subsection (a)(5) of this Section.

[Sec. 209 amended by EO 12086 of Oct. 5, 1978, 43 FR 46501, 3 CFR, 1978 Comp., p. 230]

SEC. 210. Whenever the Secretary of Labor makes a determination under Section 209, the Secretary shall promptly notify the appropriate agency. The agency shall take the action directed by the Secretary and shall report the results of the action it has taken to the Secretary of Labor within such time as the Secretary shall specify. If the contracting agency fails to take the action directed within thirty days, the Secretary may take the action directly.

[Sec. 210 amended by EO 12086 of Oct. 5, 1978, 43 FR 46501, 3 CFR, 1978 Comp., p 230]

SEC. 211. If the Secretary shall so direct, contracting agencies shall not enter into contracts with any bidder or prospective contractor unless the bidder or prospective contractor has satisfactorily complied with the provisions of this Order or submits a program for compliance acceptable to the Secretary of Labor.

[Sec. 211 amended by EO 12086 of Oct. 5, 1978, 43 FR 46501, 3 CFR, 1978 Comp., p. 230]

SEC. 212. When a contract has been cancelled or terminated under Section 209(a)(5) or a contractor has been debarred from further Government contracts under Section 209(a)(6) of this Order, because of noncompliance with the contract provisions specified in Section 202 of this Order, the Secretary of Labor shall promptly notify the Comptroller General of the United States.

[Sec. 212 amended by EO 12086 of Oct. 5, 1978, 43 FR 46501, 3 CFR, 1978 Comp., p. 230]

## Subpart E - Certificates of Merit

SEC. 213. The Secretary of Labor may provide for issuance of a United States Government Certificate of Merit to employers or labor unions, or other agencies which are or may hereafter be engaged in work under Government contracts, if the Secretary is satisfied that the personnel and employment practices of the employer, or that the personnel, training, apprenticeship, membership, grievance and representation, upgrading, and other practices and policies of the labor union or other agency conform to the purposes and provisions of this Order.

SEC. 214. Any Certificate of Merit may at any time be suspended or revoked by the Secretary of Labor if the holder thereof, in the judgment of the Secretary, has failed to comply with the provisions of this Order.

SEC. 215. The Secretary of Labor may provide for the exemption of any employer, labor union, or other agency from any reporting requirements imposed under or pursuant to this Order if such employer, labor union, or other agency has been awarded a Certificate of Merit which has not been suspended or revoked.

## Part III - Nondiscrimination Provisions in Federally Assisted Construction Contracts

SEC. 301. Each executive department and agency, which administers a program involving Federal financial assistance shall require as a condition for the approval of any grant, contract, loan, insurance, or guarantee thereunder, which may involve a construction contract, that the applicant for Federal assistance undertake and agree to incorporate, or cause to be incorporated, into all construction contracts paid for in whole or in part with funds obtained from the Federal Government or borrowed on the credit of the Federal Government pursuant to such grant, contract, loan, insurance, or guarantee, or undertaken pursuant to any Federal program involving such grant, contract, loan, insurance, or guarantee, the provisions prescribed for Government contracts by Section 202 of this Order or such modification thereof, preserving in substance the contractor's obligations thereunder, as may be approved by the Secretary of Labor, together with such additional provisions as the Secretary deems appropriate to establish and protect the interest of the United States in the enforcement of those obligations. Each such applicant shall also undertake and agree (1) to assist and cooperate actively with the Secretary of Labor in obtaining the compliance of contractors and subcontractors with those contract provisions and with the rules, regulations and relevant orders of the Secretary, (2) to obtain and to furnish to the Secretary of Labor such information as the Secretary may require for the supervision of such compliance, (3) to carry out sanctions and penalties for violation of such obligations imposed upon contractors and subcontractors by the Secretary of Labor pursuant to Part II, Subpart D, of this Order, and (4) to refrain from entering into any contract subject to this Order, or extension or other modification of such a contract with a contractor debarred from Government contracts under Part II, Subpart D, of this Order.

[Sec. 301 amended by EO 12086 of Oct. 5, 1978, 43 FR 46501, 3 CFR, 1978 Comp., p. 230]

SEC. 302.

a. "Construction contract" as used in this Order means any contract for the construction, rehabilitation, alteration, conversion, extension, or repair of buildings, highways, or other improvements to real property.

b. The provisions of Part II of this Order shall apply to such construction contracts, and for purposes of such application the administering department or agency shall be considered the contracting agency referred to therein.

c. The term "applicant" as used in this Order means an applicant for Federal assistance or, as determined by agency regulation, other program participant, with respect to whom an application for any grant, contract, loan, insurance, or guarantee is not finally acted upon prior to the effective date of this Part, and it includes such an applicant after he/she becomes a recipient of such Federal assistance.

SEC. 303.

a. The Secretary of Labor shall be responsible for obtaining the compliance of such applicants with their undertakings under this Order. Each administering department and agency is directed to cooperate with the Secretary of Labor and to furnish the Secretary such information and assistance as the Secretary may require in the performance of the Secretary's functions under this Order.

b. In the event an applicant fails and refuses to comply with the applicant's undertakings pursuant to this Order, the Secretary of Labor may, after consulting with the administering department or agency, take any or all of the following actions: (1) direct any administering department or agency to cancel, terminate, or suspend in whole or in part the agreement, contract or other arrangement with such applicant with respect to which the failure or refusal occurred; (2) direct any administering department or agency to refrain from extending any further assistance to the applicant under the program with respect to which the failure or refusal occurred until satisfactory assurance of future compliance has been received by the Secretary of Labor from such applicant; and (3) refer the case to the Department of Justice or the Equal Employment Opportunity Commission for appropriate law enforcement or other proceedings.

c. In no case shall action be taken with respect to an applicant pursuant to clause (1) or (2) of subsection (b)

without notice and opportunity for hearing.

[Sec. 303 amended by EO 12086 of Oct. 5, 1978, 43 FR 46501, 3 CFR, 1978 Comp., p. 230]

SEC. 304. Any executive department or agency which imposes by rule, regulation, or order requirements of nondiscrimination in employment, other than requirements imposed pursuant to this Order, may delegate to the Secretary of Labor by agreement such responsibilities with respect to compliance standards, reports, and procedures as would tend to bring the administration of such requirements into conformity with the administration of requirements imposed under this Order: Provided, That actions to effect compliance by recipients of Federal financial assistance with requirements imposed pursuant to Title VI of the Civil Rights Act of 1964 shall be taken in conformity with the procedures and limitations prescribed in Section 602 thereof and the regulations of the administering department or agency issued thereunder.

## Part IV - Miscellaneous

SEC. 401. The Secretary of Labor may delegate to any officer, agency, or employee in the Executive branch of the Government, any function or duty of the Secretary under Parts II and III of this Order.

[Sec. 401 amended by EO 12086 of Oct. 5, l978, 43 FR 46501, 3 CFR, 1978 Comp., p. 230]

SEC. 402. The Secretary of Labor shall provide administrative support for the execution of the program known as the "Plans for Progress."

SEC. 403.

a. Executive Orders Nos. 10590 (January 19, 1955), 10722 (August 5, 1957), 10925 (March 6, 1961), 11114 (June 22, 1963), and 11162 (July 28, 1964), are hereby superseded and the President's Committee on Equal Employment Opportunity established by Executive Order No. 10925 is hereby abolished. All records and property in the custody of the Committee shall be transferred to the Office of Personnel Management and the Secretary of Labor, as appropriate.

b. Nothing in this Order shall be deemed to relieve any person of any obligation assumed or imposed under or pursuant to any Executive Order superseded by this Order. All rules, regulations, orders, instructions, designations, and other directives issued by the President's Committee on Equal Employment Opportunity and those issued by the heads of various departments or agencies under or pursuant to any of the Executive orders superseded by this Order, shall, to the extent that they are not inconsistent with this Order, remain in full force and effect unless and until revoked or superseded by appropriate authority. References in such directives to provisions of the superseded orders shall be deemed to be references to the comparable provisions of this Order.

[Sec. 403 amended by EO 12107 of Dec. 28, 1978, 44 FR 1055, 3 CFR, 1978 Comp., p, 264]

SEC. 404. The General Services Administration shall take appropriate action to revise the standard Government contract forms to accord with the provisions of this Order and of the rules and regulations of the Secretary of Labor.

SEC. 405. This Order shall become effective thirty days after the date of this Order.

# Presidential Documents

**Executive Order 13672 of July 21, 2014**

## Further Amendments to Executive Order 11478, Equal Employment Opportunity in the Federal Government, and Executive Order 11246, Equal Employment Opportunity

By the authority vested in me as President by the Constitution and the laws of the United States of America, including 40 U.S.C. 121, and in order to provide for a uniform policy for the Federal Government to prohibit discrimination and take further steps to promote economy and efficiency in Federal Government procurement by prohibiting discrimination based on sexual orientation and gender identity, it is hereby ordered as follows:

**Section 1**. *Amending Executive Order 11478.* The first sentence of section 1 of Executive Order 11478 of August 8, 1969, as amended, is revised by substituting ''sexual orientation, gender identity'' for ''sexual orientation''.

**Sec. 2**. *Amending Executive Order 11246.* Executive Order 11246 of September 24, 1965, as amended, is hereby further amended as follows:

(a) The first sentence of numbered paragraph (1) of section 202 is revised by substituting ''sex, sexual orientation, gender identity, or national origin'' for ''sex, or national origin''.

(b) The second sentence of numbered paragraph (1) of section 202 is revised by substituting ''sex, sexual orientation, gender identity, or national origin'' for ''sex or national origin''.

(c) Numbered paragraph (2) of section 202 is revised by substituting ''sex, sexual orientation, gender identity, or national origin'' for ''sex or national origin''.

(d) Paragraph (d) of section 203 is revised by substituting ''sex, sexual orientation, gender identity, or national origin'' for ''sex or national origin''.

**Sec. 3**. *Regulations.* Within 90 days of the date of this order, the Secretary of Labor shall prepare regulations to implement the requirements of section 2 of this order.

**Sec. 4**. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an agency or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

**Sec. 5**. *Effective Date.* This order shall become effective immediately, and section 2 of this order shall apply to contracts entered into on or after the effective date of the rules promulgated by the Department of Labor under section 3 of this order.

THE WHITE HOUSE,
*July 21, 2014.*

[FR Doc. 2014–17522
Filed 7–22–14; 11:15 am]
Billing code 3295–F4

# FEHB Program Carrier Letter
## All Community-Rated HMO Carriers

**U.S. Office of Personnel Management**
**Healthcare and Insurance**

**Letter No. 2014-21(a)** **Date:** August 18, 2014

Fee-for-service [n/a ] Experience-rated HMO [n/a ] Community-rated HMO [19]

**SUBJECT: Change to the Standard Contract**

**2015 Contract Year**. Please review Attachment A, which details the proposed Standard Contract changes for Federal Employees Health Benefits Program community-rated HMO carriers for Contract Year 2015. If you have comments, please provide them as soon as possible or no later than Friday, September 19th.

Please note that on July 21, 2014, amendments were made to Executive Order 11478, Equal Employment Opportunity in the Federal Government, and Executive Order 11246, Equal Employment Opportunity. The U.S. Department of Labor (DOL) will complete regulations within 90 days of the above date to outline Federal contract requirements. We will revisit the amendments to these Executive Orders and how they affect the FEHB standard contracts once the DOL releases the regulations.

Please email your comments to FEHBcontramend@opm.gov, with a copy to your OPM contract representative.

We look forward to working with you on your contract.

Sincerely,

John O'Brien
Director
Healthcare and Insurance

Enclosure

# §18116. Nondiscrimination

## (a) In general

Except as otherwise provided for in this title [1] (or an amendment made by this title),[1] an individual shall not, on the ground prohibited under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), or section 794 of title 29, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title [1] (or amendments). The enforcement mechanisms provided for and available under such title VI, title IX, section 794, or such Age Discrimination Act shall apply for purposes of violations of this subsection.

## (b) Continued application of laws

Nothing in this title [1] (or an amendment made by this title) [1] shall be construed to invalidate or limit the rights, remedies, procedures, or legal standards available to individuals aggrieved under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), section 794 of title 29, or the Age Discrimination Act of 1975 [42 U.S.C. 6101 et seq.], or to supersede State laws that provide additional protections against discrimination on any basis described in subsection (a).

## (c) Regulations

The Secretary may promulgate regulations to implement this section.

(Pub. L. 111–148, title I, §1557, Mar. 23, 2010, 124 Stat. 260.)

### References in Text

This title, referred to in subsecs. (a) and (b), is title I of Pub. L. 111–148, Mar. 23, 2010, 124 Stat. 130, which enacted this chapter and enacted, amended, and transferred numerous other sections and notes in the Code. For complete classification of title I to the Code, see Tables.

The Civil Rights Act of 1964, referred to in subsecs. (a) and (b), is Pub. L. 88–352, July 2, 1964, 78 Stat. 241. Titles VI and VII of the Act are classified generally to subchapters V (§2000d et seq.) and VI (§2000e et seq.), respectively, of chapter 21 of this title. For complete classification of this Act to the Code, see Short Title note set out under section 2000a of this title and Tables.

The Education Amendments of 1972, referred to in subsecs. (a) and (b), is Pub. L. 92–318, June 23, 1972, 86 Stat. 235. Title IX of the Act, known as the Patsy Takemoto Mink Equal Opportunity in Education Act, is classified principally to chapter 38 (§1681 et seq.) of Title 20, Education. For complete classification of title IX to the Code, see Short Title note set out under section 1681 of Title 20 and Tables.

The Age Discrimination Act of 1975, referred to in subsecs. (a) and (b), is title III of Pub. L. 94–135, Nov. 28, 1975, 89 Stat. 728, which is classified generally to chapter 76 (§6101 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 6101 of this title

and Tables.

[1] *See References in Text note below.*

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

January 7, 2015

Emily T. Prince, Esq.
[redacted]

Dear Ms. Prince:

I write in response to your letter, sent via email to the U.S. Department of Education (the Department) on December 14, 2014, regarding transgender students' access to facilities such as restrooms. In your letter, you mentioned statements in recent guidance documents issued by the Department concerning the application of Title IX of the Education Amendments of 1972 (Title IX) to gender identity discrimination. In addition, you identified a particular school district's policy about access to restrooms and asked about the existence and distribution of any guidance by the Department about policies or practices regarding transgender students' access to restrooms. Your letter has been referred to the Department's Office for Civil Rights (OCR), and I am happy to respond.

As you know, OCR's mission includes enforcing Title IX, which prohibits recipients of Federal financial assistance from discriminating on the basis of sex, including gender identity and failure to conform to stereotypical notions of masculinity or femininity.[1] OCR enforces and interprets Title IX consistent with case law,[2] and with the adjudications and guidance documents of other Federal agencies.[3]

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[1] *See* OCR's April 2014 Questions and Answers on Title IX and Sexual Violence at B-2, http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf.

[2] *See*, *e.g.*, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (holding that Title VII of the Civil Rights Act of 1964's (Title VII) prohibition on sex discrimination bars discrimination based on gender stereotyping, that is "insisting that [individuals] matched the stereotype associated with their group"); *Barnes v. City of Cincinnati*, 401 F.3d 729, 736-39 (6th Cir. 2005) (holding that demotion of transgender police officer because he did not "conform to sex stereotypes concerning how a man should look and behave" stated a claim of sex discrimination under Title VII); *Smith v. City of Salem*, 378 F.3d 566, 574-75 (6th Cir. 2004) ("[D]iscrimination against a plaintiff who is a transsexual—and therefore fails to act and/or identify with his or her gender—is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse*, who, in sex-stereotypical terms, did not act like a woman."); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000) (applying *Price Waterhouse* to conclude, under the Equal Credit Opportunity Act, that plaintiff states a claim for sex discrimination if bank's refusal to provide a loan application was because plaintiff's "traditionally feminine attire.... did not accord with his male gender"); *Schwenk v. Hartford,* 204 F.3d 1187, 1201-02 (9th Cir. 2000) (holding that discrimination against transgender females—*i.e.*, "as anatomical males whose outward behavior and inward identity [do] not meet social definitions of masculinity"—is actionable discrimination "because of sex" under the Gender Motivated Violence Act").

[3] *See*, *e.g.*, U.S. Dept. of Justice, Memorandum from the Attorney General regarding the Treatment of

The Department's Title IX regulations permit schools to provide sex-segregated restrooms, locker rooms, shower facilities, housing, athletic teams, and single-sex classes under certain circumstances. When a school elects to separate or treat students differently on the basis of sex in those situations, a school generally must treat transgender students consistent with their gender identity.[4] OCR also encourages schools to offer the use of gender-neutral, individual-user facilities to any student who does not want to use shared sex-segregated facilities.

OCR refrains from offering opinions about specific facts, circumstances, or compliance with federal civil rights laws without first conducting an investigation, and does not release information about its pending investigations. Nevertheless, it may be useful to be aware that in response to OCR's recent investigations of two complaints of gender identity discrimination, recipients have agreed to revise policies to make clear that transgender students should be treated consistent with their gender identity for purposes of restroom access. For examples of how OCR enforces Title IX in this area, please review the following resolutions of OCR investigations involving transgender students: Arcadia Unified School District;[5] and Downey Unified School District.[6]

OCR is committed to helping all students thrive at school and ensuring that schools take action to prevent and respond promptly and effectively to all forms of discrimination, including gender-identity discrimination. OCR staff is also available to

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Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964 (Dec. 15, 2014) (stating that the protection of Title VII extends to claims of discrimination based on an individual's gender identity, including transgender status), http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/12/18/title_vii_memo.pdf; *see also Macy v. Holder*, Appeal No. 012012082 (U.S. Equal Emp't Opportunity Comm'n Apr. 20, 2012) (holding that gender identity and transgender status did not need to be specifically addressed in Title VII in order to be prohibited bases of discrimination, as they are simply part of the protected category of "sex"), http://www.eeoc.gov/decisions/0120120821%20Macy%20v%20DOJ%20ATF.txt; U.S. Dept. of Health & Human Services, Office for Civil Rights, *Letter to Maya Rupert, Esq.*, Transaction No. 12-0008000 (July 12, 2012) (stating that Section 1557 of the Affordable Care Act, which incorporates Title IX's prohibition on sex discrimination, "extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity"), http://www.scribd.com/doc/101981113/Response-on-LGBT-People-in-Sec-1557-in-the-Affordable-Care-Act-from-the-U-S-Dept-of-Health-and-Human-Services; U.S. Dep't of Labor, Office of Federal Contract Compliance Programs, *Gender Identity and Sex Discrimination*, Directive 2014-02 (Aug. 14, 2014) (directing that for purposes of Executive Order 11246, which prohibits employment discrimination on the basis of sex by federal contractors and subcontractors, "discrimination based on gender identity or transgender status … is discrimination based on sex"), http://www.dol.gov/ofccp/regs/compliance/directives/dir2014_02.html.

[4] *See*, *e.g.*, OCR's December 2014 Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities, at Q. 31, http://www2.ed.gov/about/offices/list/ocr/docs/faqs-title-ix-single-sex-201412.pdf.

[5] OCR Case No. 09-12-1020 (July 24, 2013), http://www.justice.gov/crt/about/edu/documents/arcadialetter.pdf (resolution letter); and http://www.justice.gov/crt/about/edu/documents/arcadiaagree.pdf (resolution agreement).

[6] OCR Case No. 09-12-1095 (October 14, 2014), http://www2.ed.gov/documents/press-releases/downey-school-district-letter.pdf (resolution letter); and http://www2.ed.gov/documents/press-releases/downey-school-district-agreement.pdf (resolution agreement).

offer schools technical assistance on how to comply with Title IX and ensure all students, including transgender students, have equal access to safe learning environments.

If you have questions, want additional information or technical assistance, or believe that a school is engaging in discrimination based on gender identity or another basis protected by the laws enforced by OCR, you may visit OCR's website at www.ed.gov/ocr or contact OCR at (800) 421-3481 (TDD: 800-877-8339) or at ocr@ed.gov. You may also fill out a complaint form online at www.ed.gov/ocr/complaintintro.html.

I hope that this information is helpful and thank you for contacting the Department.

Sincerely,

James A. Ferg-Cadima
Acting Deputy Assistant Secretary for Policy
Office for Civil Rights

Syllabus

# UNITED STATES *v.* VIRGINIA ET AL.

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 94–1941. Argued January 17, 1996—Decided June 26, 1996*

Virginia Military Institute (VMI) is the sole single-sex school among Virginia's public institutions of higher learning. VMI's distinctive mission is to produce "citizen-soldiers," men prepared for leadership in civilian life and in military service. Using an "adversative method" of training not available elsewhere in Virginia, VMI endeavors to instill physical and mental discipline in its cadets and impart to them a strong moral code. Reflecting the high value alumni place on their VMI training, VMI has the largest per-student endowment of all public undergraduate institutions in the Nation. The United States sued Virginia and VMI, alleging that VMI's exclusively male admission policy violated the Fourteenth Amendment's Equal Protection Clause. The District Court ruled in VMI's favor. The Fourth Circuit reversed and ordered Virginia to remedy the constitutional violation. In response, Virginia proposed a parallel program for women: Virginia Women's Institute for Leadership (VWIL), located at Mary Baldwin College, a private liberal arts school for women. The District Court found that Virginia's proposal satisfied the Constitution's equal protection requirement, and the Fourth Circuit affirmed. The appeals court deferentially reviewed Virginia's plan and determined that provision of single-gender educational options was a legitimate objective. Maintenance of single-sex programs, the court concluded, was essential to that objective. The court recognized, however, that its analysis risked bypassing equal protection scrutiny, so it fashioned an additional test, asking whether VMI and VWIL students would receive "substantively comparable" benefits. Although the Court of Appeals acknowledged that the VWIL degree lacked the historical benefit and prestige of a VMI degree, the court nevertheless found the educational opportunities at the two schools sufficiently comparable.

*Held:*

1. Parties who seek to defend gender-based government action must demonstrate an "exceedingly persuasive justification" for that action. *E. g., Mississippi Univ. for Women* v. *Hogan*, 458 U. S. 718, 724. Nei-

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*Together with No. 94–2107, *Virginia et al.* v. *United States*, also on certiorari to the same court.

ther federal nor state government acts compatibly with equal protection when a law or official policy denies to women, simply because they are women, full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities. To meet the burden of justification, a State must show "at least that the [challenged] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" *Ibid.*, quoting *Wengler* v. *Druggists Mut. Ins. Co.*, 446 U. S. 142, 150. The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females. See, *e. g.*, *Weinberger* v. *Wiesenfeld*, 420 U. S. 636, 643, 648. The heightened review standard applicable to sex-based classifications does not make sex a proscribed classification, but it does mean that categorization by sex may not be used to create or perpetuate the legal, social, and economic inferiority of women. Pp. 531–534.

2. Virginia's categorical exclusion of women from the educational opportunities VMI provides denies equal protection to women. Pp. 534–546.

(a) Virginia contends that single-sex education yields important educational benefits and that provision of an option for such education fosters diversity in educational approaches. Benign justifications proffered in defense of categorical exclusions, however, must describe actual state purposes, not rationalizations for actions in fact differently grounded. Virginia has not shown that VMI was established, or has been maintained, with a view to diversifying, by its categorical exclusion of women, educational opportunities within the Commonwealth. A purpose genuinely to advance an array of educational options is not served by VMI's historic and constant plan to afford a unique educational benefit only to males. However well this plan serves Virginia's sons, it makes no provision whatever for her daughters. Pp. 535–540.

(b) Virginia also argues that VMI's adversative method of training provides educational benefits that cannot be made available, unmodified, to women, and that alterations to accommodate women would necessarily be so drastic as to destroy VMI's program. It is uncontested that women's admission to VMI would require accommodations, primarily in arranging housing assignments and physical training programs for female cadets. It is also undisputed, however, that neither the goal of producing citizen-soldiers, VMI's *raison d'être*, nor VMI's implementing methodology is inherently unsuitable to women. The District Court made "findings" on "gender-based developmental differences" that restate the opinions of Virginia's expert witnesses about typically male or typically female "tendencies." Courts, however, must take "a hard

look" at generalizations or tendencies of the kind Virginia pressed, for state actors controlling gates to opportunity have no warrant to exclude qualified individuals based on "fixed notions concerning the roles and abilities of males and females." *Mississippi Univ. for Women*, 458 U. S., at 725. The notion that admission of women would downgrade VMI's stature, destroy the adversative system and, with it, even the school, is a judgment hardly proved, a prediction hardly different from other "self-fulfilling prophec[ies], see *id.*, at 730, once routinely used to deny rights or opportunities. Women's successful entry into the federal military academies, and their participation in the Nation's military forces, indicate that Virginia's fears for VMI's future may not be solidly grounded. The Commonwealth's justification for excluding all women from "citizen-soldier" training for which some are qualified, in any event, does not rank as "exceedingly persuasive." Pp. 540–546.

3. The remedy proffered by Virginia—maintain VMI as a male-only college and create VWIL as a separate program for women—does not cure the constitutional violation. Pp. 546–558.

(a) A remedial decree must closely fit the constitutional violation; it must be shaped to place persons unconstitutionally denied an opportunity or advantage in the position they would have occupied in the absence of discrimination. See *Milliken* v. *Bradley*, 433 U. S. 267, 280. The constitutional violation in this case is the categorical exclusion of women, in disregard of their individual merit, from an extraordinary educational opportunity afforded men. Virginia chose to leave untouched VMI's exclusionary policy, and proposed for women only a separate program, different in kind from VMI and unequal in tangible and intangible facilities. VWIL affords women no opportunity to experience the rigorous military training for which VMI is famed. Kept away from the pressures, hazards, and psychological bonding characteristic of VMI's adversative training, VWIL students will not know the feeling of tremendous accomplishment commonly experienced by VMI's successful cadets. Virginia maintains that methodological differences are justified by the important differences between men and women in learning and developmental needs, but generalizations about "the way women are," estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them outside the average description. In myriad respects other than military training, VWIL does not qualify as VMI's equal. The VWIL program is a pale shadow of VMI in terms of the range of curricular choices and faculty stature, funding, prestige, alumni support and influence. Virginia has not shown substantial equality in the separate educational opportunities the Commonwealth supports at VWIL and VMI. Cf. *Sweatt* v. *Painter*, 339 U. S. 629. Pp. 547–554.

Syllabus

(b) The Fourth Circuit failed to inquire whether the proposed remedy placed women denied the VMI advantage in the position they would have occupied in the absence of discrimination, *Milliken*, 433 U. S., at 280, and considered instead whether the Commonwealth could provide, with fidelity to equal protection, separate and unequal educational programs for men and women. In declaring the substantially different and significantly unequal VWIL program satisfactory, the appeals court displaced the exacting standard developed by this Court with a deferential standard, and added an inquiry of its own invention, the "substantive comparability" test. The Fourth Circuit plainly erred in exposing Virginia's VWIL plan to such a deferential analysis, for "all gender-based classifications today" warrant "heightened scrutiny." See *J. E. B.* v. *Alabama ex rel. T. B.*, 511 U. S. 127, 136. Women seeking and fit for a VMI-quality education cannot be offered anything less, under the Commonwealth's obligation to afford them genuinely equal protection. Pp. 554–558.

No. 94–2107, 976 F. 2d 890, affirmed; No. 94–1941, 44 F. 3d 1229, reversed and remanded.

GINSBURG, J., delivered the opinion of the Court, in which STEVENS, O'CONNOR, KENNEDY, SOUTER, and BREYER, JJ., joined. REHNQUIST, C. J., filed an opinion concurring in the judgment, *post*, p. 558. SCALIA, J., filed a dissenting opinion, *post*, p. 566. THOMAS, J., took no part in the consideration or decision of the case.

*Paul Bender* argued the cause for the United States in both cases. With him on the briefs were *Solicitor General Days*, *Assistant Attorney General Patrick*, *Cornelia T. L. Pillard*, *Jessica Dunsay Silver*, and *Thomas E. Chandler*.

*Theodore B. Olson* argued the cause and filed briefs for respondents in No. 94–1941 and petitioners in No. 94–2107. With him on the briefs were *James S. Gilmore III*, Attorney General of Virginia, *William H. Hurd*, Deputy Attorney General, *Thomas G. Hungar*, *D. Jarrett Arp*, *Robert H. Patterson, Jr.*, *Anne Marie Whittemore*, *William G. Broaddus*, *J. William Boland*, *Griffin B. Bell*, and *William A. Clineburg, Jr.*†

†Briefs of *amici curiae* urging reversal in No. 94–1941 were filed for the State of Maryland et al. by *J. Joseph Curran, Jr.*, Attorney General of Maryland, and *Andrew H. Baida*, Assistant Attorney General, and by the Attorneys General for their respective jurisdictions as follows: *Margery*

JUSTICE GINSBURG delivered the opinion of the Court.

Virginia's public institutions of higher learning include an incomparable military college, Virginia Military Institute (VMI). The United States maintains that the Constitution's equal protection guarantee precludes Virginia from reserving exclusively to men the unique educational opportunities VMI affords. We agree.

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*S. Bronster* of Hawaii, *Scott Harshbarger* of Massachusetts, *Frankie Sue Del Papa* of Nevada, *C. Sebastian Aloot* of the Northern Mariana Islands, and *Theodore R. Kulongoski* of Oregon; for the Employment Law Center et al. by *Patricia A. Shiu* and *Judith Kurtz;* and for the National Women's Law Center et al. by *Robert N. Weiner, Marcia D. Greenberger, Sara L. Mandelbaum, Janet Gallagher, Mary Wyckoff, Steven R. Shapiro,* and *Susan Deller Ross.*

Briefs of *amici curiae* urging affirmance in No. 94–1941 were filed for the State of South Carolina et al. by *Charles Molony Condon,* Attorney General, *Treva Ashworth,* Deputy Attorney General, *Kenneth P. Woodington,* Senior Assistant Attorney General, *Reginald I. Lloyd,* Assistant Attorney General, and *M. Dawes Cooke, Jr.;* and for Kenneth E. Clark et al. by *James C. Roberts* and *George A. Somerville.*

Briefs of *amici curiae* were filed in both cases for the State of Wyoming et al. by *William U. Hill,* Attorney General of Wyoming, *Thomas W. Corbett, Jr.,* Attorney General of Pennsylvania, and *Bradley B. Cavedo;* for Bennett College et al. by *Wendy S. White;* for the Center for Military Readiness et al. by *Mellissa Wells-Petry* and *Jordan W. Lorence;* for the Employment Law Center et al. by *Patricia A. Shiu* and *Judith Kurtz;* for the Independent Women's Forum et al. by *Anita K. Blair* and *C. Douglas Welty;* for Mary Baldwin College by *Craig T. Merritt* and *Richard K. Willard;* for the South Carolina Institute of Leadership for Women by *Julianne Farnsworth;* for Wells College et al. by *David M. Lascell;* for Women's Schools Together, Inc., et al. by *John C. Danforth* and *Thomas C. Walsh;* and for Nancy Mellette by *Valorie K. Vojdik, Henry Weisburg, Suzanne E. Coe,* and *Robert R. Black.*

Briefs of *amici curiae* were filed in No. 94–1941 for the American Association of University Professors et al. by *Joan E. Bertin* and *Ann H. Franke;* and for Rhonda Cornum et al. by *Allan L. Gropper.*

*Daniel F. Kolb, Herbert J. Hansell, Paul C. Saunders, Norman Redlich, Barbara R. Arnwine, Thomas J. Henderson,* and *Richard T. Seymour* filed a brief for the Lawyers' Committee for Civil Rights Under Law as *amicus curiae* in No. 94–2107.

## I

Founded in 1839, VMI is today the sole single-sex school among Virginia's 15 public institutions of higher learning. VMI's distinctive mission is to produce "citizen-soldiers," men prepared for leadership in civilian life and in military service. VMI pursues this mission through pervasive training of a kind not available anywhere else in Virginia. Assigning prime place to character development, VMI uses an "adversative method" modeled on English public schools and once characteristic of military instruction. VMI constantly endeavors to instill physical and mental discipline in its cadets and impart to them a strong moral code. The school's graduates leave VMI with heightened comprehension of their capacity to deal with duress and stress, and a large sense of accomplishment for completing the hazardous course.

VMI has notably succeeded in its mission to produce leaders; among its alumni are military generals, Members of Congress, and business executives. The school's alumni overwhelmingly perceive that their VMI training helped them to realize their personal goals. VMI's endowment reflects the loyalty of its graduates; VMI has the largest per-student endowment of all public undergraduate institutions in the Nation.

Neither the goal of producing citizen-soldiers nor VMI's implementing methodology is inherently unsuitable to women. And the school's impressive record in producing leaders has made admission desirable to some women. Nevertheless, Virginia has elected to preserve exclusively for men the advantages and opportunities a VMI education affords.

## II

### A

From its establishment in 1839 as one of the Nation's first state military colleges, see 1839 Va. Acts, ch. 20, VMI has remained financially supported by Virginia and "subject to

the control of the [Virginia] General Assembly," Va. Code Ann. § 23–92 (1993). First southern college to teach engineering and industrial chemistry, see H. Wise, Drawing Out the Man: The VMI Story 13 (1978) (The VMI Story), VMI once provided teachers for the Commonwealth's schools, see 1842 Va. Acts, ch. 24, § 2 (requiring every cadet to teach in one of the Commonwealth's schools for a 2-year period).[1] Civil War strife threatened the school's vitality, but a resourceful superintendent regained legislative support by highlighting "VMI's great potential[,] through its technical know-how," to advance Virginia's postwar recovery. The VMI Story 47.

VMI today enrolls about 1,300 men as cadets.[2] Its academic offerings in the liberal arts, sciences, and engineering are also available at other public colleges and universities in Virginia. But VMI's mission is special. It is the mission of the school

> "'to produce educated and honorable men, prepared for the varied work of civil life, imbued with love of learning, confident in the functions and attitudes of leadership, possessing a high sense of public service, advocates of the American democracy and free enterprise system, and ready as citizen-soldiers to defend their country in

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[1] During the Civil War, school teaching became a field dominated by women. See A. Scott, The Southern Lady: From Pedestal to Politics, 1830–1930, p. 82 (1970).

[2] Historically, most of Virginia's public colleges and universities were single sex; by the mid-1970's, however, all except VMI had become coeducational. 766 F. Supp. 1407, 1418–1419 (WD Va. 1991). For example, Virginia's legislature incorporated Farmville Female Seminary Association in 1839, the year VMI opened. 1839 Va. Acts, ch. 167. Originally providing instruction in "English, Latin, Greek, French, and piano" in a "home atmosphere," R. Sprague, Longwood College: A History 7–8, 15 (1989) (Longwood College), Farmville Female Seminary became a public institution in 1884 with a mission to train "white female teachers for public schools," 1884 Va. Acts, ch. 311. The school became Longwood College in 1949, Longwood College 136, and introduced coeducation in 1976, *id.*, at 133.

> time of national peril.'" 766 F. Supp. 1407, 1425 (WD Va. 1991) (quoting Mission Study Committee of the VMI Board of Visitors, Report, May 16, 1986).

In contrast to the federal service academies, institutions maintained "to prepare cadets for career service in the armed forces," VMI's program "is directed at preparation for both military and civilian life"; "[o]nly about 15% of VMI cadets enter career military service." 766 F. Supp., at 1432.

VMI produces its "citizen-soldiers" through "an adversative, or doubting, model of education" which features "[p]hysical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination in desirable values." *Id.*, at 1421. As one Commandant of Cadets described it, the adversative method "'dissects the young student,'" and makes him aware of his "'limits and capabilities,'" so that he knows "'how far he can go with his anger, . . . how much he can take under stress, . . . exactly what he can do when he is physically exhausted.'" *Id.*, at 1421–1422 (quoting Col. N. Bissell).

VMI cadets live in spartan barracks where surveillance is constant and privacy nonexistent; they wear uniforms, eat together in the mess hall, and regularly participate in drills. *Id.*, at 1424, 1432. Entering students are incessantly exposed to the rat line, "an extreme form of the adversative model," comparable in intensity to Marine Corps boot camp. *Id.*, at 1422. Tormenting and punishing, the rat line bonds new cadets to their fellow sufferers and, when they have completed the 7-month experience, to their former tormentors. *Ibid.*

VMI's "adversative model" is further characterized by a hierarchical "class system" of privileges and responsibilities, a "dyke system" for assigning a senior class mentor to each entering class "rat," and a stringently enforced "honor code," which prescribes that a cadet "'does not lie, cheat, steal nor tolerate those who do.'" *Id.*, at 1422–1423.

VMI attracts some applicants because of its reputation as an extraordinarily challenging military school, and "because its alumni are exceptionally close to the school." *Id.*, at 1421. "[W]omen have no opportunity anywhere to gain the benefits of [the system of education at VMI]." *Ibid.*

B

In 1990, prompted by a complaint filed with the Attorney General by a female high-school student seeking admission to VMI, the United States sued the Commonwealth of Virginia and VMI, alleging that VMI's exclusively male admission policy violated the Equal Protection Clause of the Fourteenth Amendment. *Id.*, at 1408.[3] Trial of the action consumed six days and involved an array of expert witnesses on each side. *Ibid.*

In the two years preceding the lawsuit, the District Court noted, VMI had received inquiries from 347 women, but had responded to none of them. *Id.*, at 1436. "[S]ome women, at least," the court said, "would want to attend the school if they had the opportunity." *Id.*, at 1414. The court further recognized that, with recruitment, VMI could "achieve at least 10% female enrollment"—"a sufficient 'critical mass' to provide the female cadets with a positive educational experience." *Id.*, at 1437–1438. And it was also established that "some women are capable of all of the individual activities required of VMI cadets." *Id.*, at 1412. In addition, experts agreed that if VMI admitted women, "the VMI ROTC experience would become a better training program from the perspective of the armed forces, because it would provide training in dealing with a mixed-gender army." *Id.*, at 1441.

The District Court ruled in favor of VMI, however, and rejected the equal protection challenge pressed by the United States. That court correctly recognized that *Mississippi Univ. for Women* v. *Hogan*, 458 U. S. 718 (1982), was

[3] The District Court allowed the VMI Foundation and the VMI Alumni Association to intervene as defendants. 766 F. Supp., at 1408.

the closest guide. 766 F. Supp., at 1410. There, this Court underscored that a party seeking to uphold government action based on sex must establish an "exceedingly persuasive justification" for the classification. *Mississippi Univ. for Women*, 458 U. S., at 724 (internal quotation marks omitted). To succeed, the defender of the challenged action must show "at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Ibid.* (internal quotation marks omitted).

The District Court reasoned that education in "a single-gender environment, be it male or female," yields substantial benefits. 766 F. Supp., at 1415. VMI's school for men brought diversity to an otherwise coeducational Virginia system, and that diversity was "enhanced by VMI's unique method of instruction." *Ibid.* If single-gender education for males ranks as an important governmental objective, it becomes obvious, the District Court concluded, that the *only* means of achieving the objective "is to exclude women from the all-male institution—VMI." *Ibid.*

"Women are [indeed] denied a unique educational opportunity that is available only at VMI," the District Court acknowledged. *Id.*, at 1432. But "[VMI's] single-sex status would be lost, and some aspects of the [school's] distinctive method would be altered," if women were admitted, *id.*, at 1413: "Allowance for personal privacy would have to be made," *id.*, at 1412; "[p]hysical education requirements would have to be altered, at least for the women," *id.*, at 1413; the adversative environment could not survive unmodified, *id.*, at 1412–1413. Thus, "sufficient constitutional justification" had been shown, the District Court held, "for continuing [VMI's] single-sex policy." *Id.*, at 1413.

The Court of Appeals for the Fourth Circuit disagreed and vacated the District Court's judgment. The appellate court held: "The Commonwealth of Virginia has not . . . advanced any state policy by which it can justify its determination,

under an announced policy of diversity, to afford VMI's unique type of program to men and not to women." 976 F. 2d 890, 892 (1992).

The appeals court greeted with skepticism Virginia's assertion that it offers single-sex education at VMI as a facet of the Commonwealth's overarching and undisputed policy to advance "autonomy and diversity." The court underscored Virginia's nondiscrimination commitment: "'[I]t is extremely important that [colleges and universities] deal with faculty, staff, and students *without regard to sex, race, or ethnic origin.*'" *Id.*, at 899 (quoting 1990 Report of the Virginia Commission on the University of the 21st Century). "That statement," the Court of Appeals said, "is the only explicit one that we have found in the record in which the Commonwealth has expressed itself with respect to gender distinctions." 976 F. 2d, at 899. Furthermore, the appeals court observed, in urging "diversity" to justify an all-male VMI, the Commonwealth had supplied "no explanation for the movement away from [single-sex education] in Virginia by public colleges and universities." *Ibid.* In short, the court concluded, "[a] policy of diversity which aims to provide an array of educational opportunities, including single-gender institutions, must do more than favor one gender." *Ibid.*

The parties agreed that "*some* women can meet the physical standards now imposed on men," *id.*, at 896, and the court was satisfied that "neither the goal of producing citizen soldiers nor VMI's implementing methodology is inherently unsuitable to women," *id.*, at 899. The Court of Appeals, however, accepted the District Court's finding that "at least these three aspects of VMI's program—physical training, the absence of privacy, and the adversative approach—would be materially affected by coeducation." *Id.*, at 896–897. Remanding the case, the appeals court assigned to Virginia, in the first instance, responsibility for selecting a remedial course. The court suggested these options for the Commonwealth: Admit women to VMI; establish parallel institutions

or programs; or abandon state support, leaving VMI free to pursue its policies as a private institution. *Id.*, at 900. In May 1993, this Court denied certiorari. See 508 U. S. 946; see also *ibid.* (opinion of SCALIA, J., noting the interlocutory posture of the litigation).

C

In response to the Fourth Circuit's ruling, Virginia proposed a parallel program for women: Virginia Women's Institute for Leadership (VWIL). The 4-year, state-sponsored undergraduate program would be located at Mary Baldwin College, a private liberal arts school for women, and would be open, initially, to about 25 to 30 students. Although VWIL would share VMI's mission—to produce "citizen-soldiers"—the VWIL program would differ, as does Mary Baldwin College, from VMI in academic offerings, methods of education, and financial resources. See 852 F. Supp. 471, 476–477 (WD Va. 1994).

The average combined SAT score of entrants at Mary Baldwin is about 100 points lower than the score for VMI freshmen. See *id.*, at 501. Mary Baldwin's faculty holds "significantly fewer Ph. D.'s than the faculty at VMI," *id.*, at 502, and receives significantly lower salaries, see Tr. 158 (testimony of James Lott, Dean of Mary Baldwin College), reprinted in 2 App. in Nos. 94–1667 and 94–1717 (CA4) (hereinafter Tr.). While VMI offers degrees in liberal arts, the sciences, and engineering, Mary Baldwin, at the time of trial, offered only bachelor of arts degrees. See 852 F. Supp., at 503. A VWIL student seeking to earn an engineering degree could gain one, without public support, by attending Washington University in St. Louis, Missouri, for two years, paying the required private tuition. See *ibid.*

Experts in educating women at the college level composed the Task Force charged with designing the VWIL program; Task Force members were drawn from Mary Baldwin's own faculty and staff. *Id.*, at 476. Training its attention on methods of instruction appropriate for "most women," the

Task Force determined that a military model would be "wholly inappropriate" for VWIL. *Ibid.;* see 44 F. 3d 1229, 1233 (CA4 1995).

VWIL students would participate in ROTC programs and a newly established, "largely ceremonial" Virginia Corps of Cadets, *id.*, at 1234, but the VWIL House would not have a military format, 852 F. Supp., at 477, and VWIL would not require its students to eat meals together or to wear uniforms during the schoolday, *id.*, at 495. In lieu of VMI's adversative method, the VWIL Task Force favored "a cooperative method which reinforces self-esteem." *Id.*, at 476. In addition to the standard bachelor of arts program offered at Mary Baldwin, VWIL students would take courses in leadership, complete an off-campus leadership externship, participate in community service projects, and assist in arranging a speaker series. See 44 F. 3d, at 1234.

Virginia represented that it will provide equal financial support for in-state VWIL students and VMI cadets, 852 F. Supp., at 483, and the VMI Foundation agreed to supply a $5.4625 million endowment for the VWIL program, *id.*, at 499. Mary Baldwin's own endowment is about $19 million; VMI's is $131 million. *Id.*, at 503. Mary Baldwin will add $35 million to its endowment based on future commitments; VMI will add $220 million. *Ibid.* The VMI Alumni Association has developed a network of employers interested in hiring VMI graduates. The Association has agreed to open its network to VWIL graduates, *id.*, at 499, but those graduates will not have the advantage afforded by a VMI degree.

## D

Virginia returned to the District Court seeking approval of its proposed remedial plan, and the court decided the plan met the requirements of the Equal Protection Clause. *Id.*, at 473. The District Court again acknowledged evidentiary support for these determinations: "[T]he VMI methodology could be used to educate women and, in fact, some

women . . . may prefer the VMI methodology to the VWIL methodology." *Id.*, at 481. But the "controlling legal principles," the District Court decided, "do not require the Commonwealth to provide a mirror image VMI for women." *Ibid.* The court anticipated that the two schools would "achieve substantially similar outcomes." *Ibid.* It concluded: "If VMI marches to the beat of a drum, then Mary Baldwin marches to the melody of a fife and when the march is over, both will have arrived at the same destination." *Id.*, at 484.

A divided Court of Appeals affirmed the District Court's judgment. 44 F. 3d 1229 (CA4 1995). This time, the appellate court determined to give "greater scrutiny to the selection of means than to the [Commonwealth's] proffered objective." *Id.*, at 1236. The official objective or purpose, the court said, should be reviewed deferentially. *Ibid.* Respect for the "legislative will," the court reasoned, meant that the judiciary should take a "cautious approach," inquiring into the "legitima[cy]" of the governmental objective and refusing approval for any purpose revealed to be "pernicious." *Ibid.*

"[P]roviding the option of a single-gender college education may be considered a legitimate and important aspect of a public system of higher education," the appeals court observed, *id.*, at 1238; that objective, the court added, is "not pernicious," *id.*, at 1239. Moreover, the court continued, the adversative method vital to a VMI education "has never been tolerated in a sexually heterogeneous environment." *Ibid.* The method itself "was not designed to exclude women," the court noted, but women could not be accommodated in the VMI program, the court believed, for female participation in VMI's adversative training "would destroy . . . any sense of decency that still permeates the relationship between the sexes." *Ibid.*

Having determined, deferentially, the legitimacy of Virginia's purpose, the court considered the question of means.

Exclusion of "men at Mary Baldwin College and women at VMI," the court said, was essential to Virginia's purpose, for without such exclusion, the Commonwealth could not "accomplish [its] objective of providing single-gender education." *Ibid.*

The court recognized that, as it analyzed the case, means merged into end, and the merger risked "bypass[ing] any equal protection scrutiny." *Id.*, at 1237. The court therefore added another inquiry, a decisive test it called "substantive comparability." *Ibid.* The key question, the court said, was whether men at VMI and women at VWIL would obtain "substantively comparable benefits at their institution or through other means offered by the [S]tate." *Ibid.* Although the appeals court recognized that the VWIL degree "lacks the historical benefit and prestige" of a VMI degree, it nevertheless found the educational opportunities at the two schools "sufficiently comparable." *Id.*, at 1241.

Senior Circuit Judge Phillips dissented. The court, in his judgment, had not held Virginia to the burden of showing an "'exceedingly persuasive [justification]'" for the Commonwealth's action. *Id.*, at 1247 (quoting *Mississippi Univ. for Women*, 458 U. S., at 724). In Judge Phillips' view, the court had accepted "rationalizations compelled by the exigencies of this litigation," and had not confronted the Commonwealth's "actual overriding purpose." 44 F. 3d, at 1247. That purpose, Judge Phillips said, was clear from the historical record; it was "not to create a new type of educational opportunity for women, . . . nor to further diversify the Commonwealth's higher education system[,] . . . but [was] simply . . . to allow VMI to continue to exclude women in order to preserve its historic character and mission." *Ibid.*

Judge Phillips suggested that the Commonwealth would satisfy the Constitution's equal protection requirement if it "simultaneously opened single-gender undergraduate institutions having substantially comparable curricular and extra-curricular programs, funding, physical plant, adminis-

tration and support services, and faculty and library resources." *Id.*, at 1250. But he thought it evident that the proposed VWIL program, in comparison to VMI, fell "far short . . . from providing substantially equal tangible and intangible educational benefits to men and women." *Ibid.*

The Fourth Circuit denied rehearing en banc. 52 F. 3d 90 (1995). Circuit Judge Motz, joined by Circuit Judges Hall, Murnaghan, and Michael, filed a dissenting opinion.[4] Judge Motz agreed with Judge Phillips that Virginia had not shown an "'exceedingly persuasive justification'" for the disparate opportunities the Commonwealth supported. *Id.*, at 92 (quoting *Mississippi Univ. for Women*, 458 U. S., at 724). She asked: "[H]ow can a degree from a yet to be implemented supplemental program at Mary Baldwin be held 'substantively comparable' to a degree from a venerable Virginia military institution that was established more than 150 years ago?" 52 F. 3d, at 93. "Women need not be guaranteed equal 'results,'" Judge Motz said, "but the Equal Protection Clause does require equal opportunity . . . [and] that opportunity is being denied here." *Ibid.*

## III

The cross-petitions in this suit present two ultimate issues. First, does Virginia's exclusion of women from the educational opportunities provided by VMI—extraordinary opportunities for military training and civilian leadership development—deny to women "capable of all of the individual activities required of VMI cadets," 766 F. Supp., at 1412, the equal protection of the laws guaranteed by the Fourteenth Amendment? Second, if VMI's "unique" situation, *id.*, at 1413—as Virginia's sole single-sex public institution of

[4] Six judges voted to rehear the case en banc, four voted against rehearing, and three were recused. The Fourth Circuit's local Rule permits rehearing en banc only on the vote of a majority of the Circuit's judges in regular active service (currently 13) without regard to recusals. See 52 F. 3d, at 91, and n. 1.

higher education—offends the Constitution's equal protection principle, what is the remedial requirement?

## IV

We note, once again, the core instruction of this Court's pathmarking decisions in *J. E. B.* v. *Alabama ex rel. T. B.*, 511 U. S. 127, 136–137, and n. 6 (1994), and *Mississippi Univ. for Women*, 458 U. S., at 724 (internal quotation marks omitted): Parties who seek to defend gender-based government action must demonstrate an "exceedingly persuasive justification" for that action.

Today's skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history. As a plurality of this Court acknowledged a generation ago, "our Nation has had a long and unfortunate history of sex discrimination." *Frontiero* v. *Richardson*, 411 U. S. 677, 684 (1973). Through a century plus three decades and more of that history, women did not count among voters composing "We the People";[5] not until 1920 did women gain a constitutional right to the franchise. *Id.*, at 685. And for a half century thereafter, it remained the prevailing doctrine that government, both federal and state, could withhold from women opportunities accorded men so long as any "basis in reason" could be conceived for the discrimination. See, *e. g.*, *Goesaert* v. *Cleary*, 335 U. S. 464, 467 (1948) (rejecting challenge of female tavern owner and her daughter to Michigan law denying bartender licenses to females—except for wives and daughters of male tavern owners; Court would not "give ear" to the contention that "an unchivalrous desire of male

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[5] As Thomas Jefferson stated the view prevailing when the Constitution was new:

"Were our State a pure democracy . . . there would yet be excluded from their deliberations . . . [w]omen, who, to prevent depravation of morals and ambiguity of issue, could not mix promiscuously in the public meetings of men." Letter from Thomas Jefferson to Samuel Kercheval (Sept. 5, 1816), in 10 Writings of Thomas Jefferson 45–46, n. 1 (P. Ford ed. 1899).

bartenders to . . . monopolize the calling" prompted the legislation).

In 1971, for the first time in our Nation's history, this Court ruled in favor of a woman who complained that her State had denied her the equal protection of its laws. *Reed* v. *Reed*, 404 U. S. 71, 73 (holding unconstitutional Idaho Code prescription that, among "'several persons claiming and equally entitled to administer [a decedent's estate], males must be preferred to females'"). Since *Reed*, the Court has repeatedly recognized that neither federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities. See, *e. g.*, *Kirchberg* v. *Feenstra*, 450 U. S. 455, 462–463 (1981) (affirming invalidity of Louisiana law that made husband "head and master" of property jointly owned with his wife, giving him unilateral right to dispose of such property without his wife's consent); *Stanton* v. *Stanton*, 421 U. S. 7 (1975) (invalidating Utah requirement that parents support boys until age 21, girls only until age 18).

Without equating gender classifications, for all purposes, to classifications based on race or national origin,[6] the Court, in post-*Reed* decisions, has carefully inspected official action that closes a door or denies opportunity to women (or to men). See *J. E. B.*, 511 U. S., at 152 (KENNEDY, J., concurring in judgment) (case law evolving since 1971 "reveal[s] a strong presumption that gender classifications are invalid"). To summarize the Court's current directions for cases of official classification based on gender: Focusing on the differen-

[6] The Court has thus far reserved most stringent judicial scrutiny for classifications based on race or national origin, but last Term observed that strict scrutiny of such classifications is not inevitably "fatal in fact." *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 237 (1995) (internal quotation marks omitted).

tial treatment or denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is "exceedingly persuasive." The burden of justification is demanding and it rests entirely on the State. See *Mississippi Univ. for Women*, 458 U. S., at 724. The State must show "at least that the [challenged] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.' " *Ibid.* (quoting *Wengler* v. *Druggists Mut. Ins. Co.*, 446 U. S. 142, 150 (1980)). The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females. See *Weinberger* v. *Wiesenfeld*, 420 U. S. 636, 643, 648 (1975); *Califano* v. *Goldfarb*, 430 U. S. 199, 223–224 (1977) (STEVENS, J., concurring in judgment).

The heightened review standard our precedent establishes does not make sex a proscribed classification. Supposed "inherent differences" are no longer accepted as a ground for race or national origin classifications. See *Loving* v. *Virginia*, 388 U. S. 1 (1967). Physical differences between men and women, however, are enduring: "[T]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both." *Ballard* v. *United States*, 329 U. S. 187, 193 (1946).

"Inherent differences" between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity. Sex classifications may be used to compensate women "for particular economic disabilities [they have] suffered," *Califano* v. *Webster*, 430 U. S. 313, 320 (1977) *(per curiam)*, to "promot[e] equal employment opportunity," see *California Fed. Sav. & Loan Assn.* v. *Guerra*, 479 U. S. 272, 289 (1987), to advance full development of the talent and capacities of our Nation's peo-

ple.[7] But such classifications may not be used, as they once were, see *Goesaert*, 335 U. S., at 467, to create or perpetuate the legal, social, and economic inferiority of women.

Measuring the record in this case against the review standard just described, we conclude that Virginia has shown no "exceedingly persuasive justification" for excluding all women from the citizen-soldier training afforded by VMI. We therefore affirm the Fourth Circuit's initial judgment, which held that Virginia had violated the Fourteenth Amendment's Equal Protection Clause. Because the remedy proffered by Virginia—the Mary Baldwin VWIL program—does not cure the constitutional violation, *i. e.*, it does not provide equal opportunity, we reverse the Fourth Circuit's final judgment in this case.

## V

The Fourth Circuit initially held that Virginia had advanced no state policy by which it could justify, under equal protection principles, its determination "to afford VMI's unique type of program to men and not to women." 976 F. 2d, at 892. Virginia challenges that "liability" ruling and asserts two justifications in defense of VMI's exclusion of

[7] Several *amici* have urged that diversity in educational opportunities is an altogether appropriate governmental pursuit and that single-sex schools can contribute importantly to such diversity. Indeed, it is the mission of some single-sex schools "to dissipate, rather than perpetuate, traditional gender classifications." See Brief for Twenty-six Private Women's Colleges as *Amici Curiae* 5. We do not question the Commonwealth's prerogative evenhandedly to support diverse educational opportunities. We address specifically and only an educational opportunity recognized by the District Court and the Court of Appeals as "unique," see 766 F. Supp., at 1413, 1432; 976 F. 2d, at 892, an opportunity available only at Virginia's premier military institute, the Commonwealth's sole single-sex public university or college. Cf. *Mississippi Univ. for Women* v. *Hogan*, 458 U. S. 718, 720, n. 1 (1982) ("Mississippi maintains no other single-sex public university or college. Thus, we are not faced with the question of whether States can provide 'separate but equal' undergraduate institutions for males and females.").

women. First, the Commonwealth contends, "single-sex education provides important educational benefits," Brief for Cross-Petitioners 20, and the option of single-sex education contributes to "diversity in educational approaches," *id.*, at 25. Second, the Commonwealth argues, "the unique VMI method of character development and leadership training," the school's adversative approach, would have to be modified were VMI to admit women. *Id.*, at 33–36 (internal quotation marks omitted). We consider these two justifications in turn.

A

Single-sex education affords pedagogical benefits to at least some students, Virginia emphasizes, and that reality is uncontested in this litigation.[8] Similarly, it is not disputed that diversity among public educational institutions can serve the public good. But Virginia has not shown that VMI was established, or has been maintained, with a view to diversifying, by its categorical exclusion of women, educational opportunities within the Commonwealth. In cases of this genre, our precedent instructs that "benign" justifications proffered in defense of categorical exclusions will not be accepted automatically; a tenable justification must describe actual state purposes, not rationalizations for ac-

[8] On this point, the dissent sees fire where there is no flame. See *post*, at 596–598, 598–600. "Both men and women can benefit from a single-sex education," the District Court recognized, although "the beneficial effects" of such education, the court added, apparently "are stronger among women than among men." 766 F. Supp., at 1414. The United States does not challenge that recognition. Cf. C. Jencks & D. Riesman, The Academic Revolution 297–298 (1968):

"The pluralistic argument for preserving all-male colleges is uncomfortably similar to the pluralistic argument for preserving all-white colleges . . . . The all-male college would be relatively easy to defend if it emerged from a world in which women were established as fully equal to men. But it does not. It is therefore likely to be a witting or unwitting device for preserving tacit assumptions of male superiority—assumptions for which women must eventually pay."

tions in fact differently grounded. See *Wiesenfeld,* 420 U. S., at 648, and n. 16 ("mere recitation of a benign [or] compensatory purpose" does not block "inquiry into the actual purposes" of government-maintained gender-based classifications); *Goldfarb,* 430 U. S., at 212–213 (rejecting government-proffered purposes after "inquiry into the actual purposes" (internal quotation marks omitted)).

*Mississippi Univ. for Women* is immediately in point. There the State asserted, in justification of its exclusion of men from a nursing school, that it was engaging in "educational affirmative action" by "compensat[ing] for discrimination against women." 458 U. S., at 727. Undertaking a "searching analysis," *id.*, at 728, the Court found no close resemblance between "the alleged objective" and "the actual purpose underlying the discriminatory classification," *id.*, at 730. Pursuing a similar inquiry here, we reach the same conclusion.

Neither recent nor distant history bears out Virginia's alleged pursuit of diversity through single-sex educational options. In 1839, when the Commonwealth established VMI, a range of educational opportunities for men and women was scarcely contemplated. Higher education at the time was considered dangerous for women;[9] reflecting

[9] Dr. Edward H. Clarke of Harvard Medical School, whose influential book, Sex in Education, went through 17 editions, was perhaps the most well-known speaker from the medical community opposing higher education for women. He maintained that the physiological effects of hard study and academic competition with boys would interfere with the development of girls' reproductive organs. See E. Clarke, Sex in Education 38–39, 62–63 (1873); *id.*, at 127 ("identical education of the two sexes is a crime before God and humanity, that physiology protests against, and that experience weeps over"); see also H. Maudsley, Sex in Mind and in Education 17 (1874) ("It is not that girls have not ambition, nor that they fail generally to run the intellectual race [in coeducational settings], but it is asserted that they do it at a cost to their strength and health which entails life-long suffering, and even incapacitates them for the adequate performance of the natural functions of their sex."); C. Meigs, Females and Their Diseases 350 (1848) (after five or six weeks of "mental and educational discipline," a healthy woman would "lose . . . the habit of menstruation"

widely held views about women's proper place, the Nation's first universities and colleges—for example, Harvard in Massachusetts, William and Mary in Virginia—admitted only men. See E. Farello, A History of the Education of Women in the United States 163 (1970). VMI was not at all novel in this respect: In admitting no women, VMI followed the lead of the Commonwealth's flagship school, the University of Virginia, founded in 1819.

"[N]o struggle for the admission of women to a state university," a historian has recounted, "was longer drawn out, or developed more bitterness, than that at the University of Virginia." 2 T. Woody, A History of Women's Education in the United States 254 (1929) (History of Women's Education). In 1879, the State Senate resolved to look into the possibility of higher education for women, recognizing that Virginia "'has never, at any period of her history,'" provided for the higher education of her daughters, though she "'has liberally provided for the higher education of her sons.'" *Ibid.* (quoting 10 Educ. J. Va. 212 (1879)). Despite this recognition, no new opportunities were instantly open to women.[10]

Virginia eventually provided for several women's seminaries and colleges. Farmville Female Seminary became a public institution in 1884. See *supra*, at 521, n. 2. Two women's schools, Mary Washington College and James Madison University, were founded in 1908; another, Radford University, was founded in 1910. 766 F. Supp., at 1418–1419. By the mid-1970's, all four schools had become coeducational. *Ibid.*

Debate concerning women's admission as undergraduates at the main university continued well past the century's midpoint. Familiar arguments were rehearsed. If women

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and suffer numerous ills as a result of depriving her body for the sake of her mind).

[10] Virginia's Superintendent of Public Instruction dismissed the coeducational idea as "'repugnant to the prejudices of the people'" and proposed a female college similar in quality to Girton, Smith, or Vassar. 2 History of Women's Education 254 (quoting Dept. of Interior, 1 Report of Commissioner of Education, H. R. Doc. No. 5, 58th Cong., 2d Sess., 438 (1904)).

were admitted, it was feared, they "would encroach on the rights of men; there would be new problems of government, perhaps scandals; the old honor system would have to be changed; standards would be lowered to those of other coeducational schools; and the glorious reputation of the university, as a school for men, would be trailed in the dust." 2 History of Women's Education 255.

Ultimately, in 1970, "the most prestigious institution of higher education in Virginia," the University of Virginia, introduced coeducation and, in 1972, began to admit women on an equal basis with men. See *Kirstein* v. *Rector and Visitors of Univ. of Virginia*, 309 F. Supp. 184, 186 (ED Va. 1970). A three-judge Federal District Court confirmed: "Virginia may not now deny to women, on the basis of sex, educational opportunities at the Charlottesville campus that are not afforded in other institutions operated by the [S]tate." *Id.*, at 187.

Virginia describes the current absence of public single-sex higher education for women as "an historical anomaly." Brief for Cross-Petitioners 30. But the historical record indicates action more deliberate than anomalous: First, protection of women against higher education; next, schools for women far from equal in resources and stature to schools for men; finally, conversion of the separate schools to coeducation. The state legislature, prior to the advent of this controversy, had repealed "[a]ll Virginia statutes requiring individual institutions to admit only men or women." 766 F. Supp., at 1419. And in 1990, an official commission, "legislatively established to chart the future goals of higher education in Virginia," reaffirmed the policy "'of affording broad access" while maintaining "autonomy and diversity.'" 976 F. 2d, at 898–899 (quoting Report of the Virginia Commission on the University of the 21st Century). Significantly, the commission reported:

> "'Because colleges and universities provide opportunities for students to develop values and learn from role

> models, it is extremely important that they deal with faculty, staff, and students without regard to sex, race, or ethnic origin.'" *Id.*, at 899 (emphasis supplied by Court of Appeals deleted).

This statement, the Court of Appeals observed, "is the only explicit one that we have found in the record in which the Commonwealth has expressed itself with respect to gender distinctions." *Ibid.*

Our 1982 decision in *Mississippi Univ. for Women* prompted VMI to reexamine its male-only admission policy. See 766 F. Supp., at 1427–1428. Virginia relies on that reexamination as a legitimate basis for maintaining VMI's single-sex character. See Reply Brief for Cross-Petitioners 6. A Mission Study Committee, appointed by the VMI Board of Visitors, studied the problem from October 1983 until May 1986, and in that month counseled against "change of VMI status as a single-sex college." See 766 F. Supp., at 1429 (internal quotation marks omitted). Whatever internal purpose the Mission Study Committee served—and however well meaning the framers of the report—we can hardly extract from that effort any commonwealth policy even-handedly to advance diverse educational options. As the District Court observed, the Committee's analysis "primarily focuse[d] on anticipated difficulties in attracting females to VMI," and the report, overall, supplied "very little indication of how th[e] conclusion was reached." *Ibid.*

In sum, we find no persuasive evidence in this record that VMI's male-only admission policy "is in furtherance of a state policy of 'diversity.'" See 976 F. 2d, at 899. No such policy, the Fourth Circuit observed, can be discerned from the movement of all other public colleges and universities in Virginia away from single-sex education. See *ibid.* That court also questioned "how one institution with autonomy, but with no authority over any other state institution, can give effect to a state policy of diversity among institutions." *Ibid.* A purpose genuinely to advance an array of educa-

tional options, as the Court of Appeals recognized, is not served by VMI's historic and constant plan—a plan to "afor[d] a unique educational benefit only to males." *Ibid.* However "liberally" this plan serves the Commonwealth's sons, it makes no provision whatever for her daughters. That is not *equal* protection.

B

Virginia next argues that VMI's adversative method of training provides educational benefits that cannot be made available, unmodified, to women. Alterations to accommodate women would necessarily be "radical," so "drastic," Virginia asserts, as to transform, indeed "destroy," VMI's program. See Brief for Cross-Petitioners 34–36. Neither sex would be favored by the transformation, Virginia maintains: Men would be deprived of the unique opportunity currently available to them; women would not gain that opportunity because their participation would "eliminat[e] the very aspects of [the] program that distinguish [VMI] from . . . other institutions of higher education in Virginia." *Id.*, at 34.

The District Court forecast from expert witness testimony, and the Court of Appeals accepted, that coeducation would materially affect "at least these three aspects of VMI's program—physical training, the absence of privacy, and the adversative approach." 976 F. 2d, at 896–897. And it is uncontested that women's admission would require accommodations, primarily in arranging housing assignments and physical training programs for female cadets. See Brief for Cross-Respondent 11, 29–30. It is also undisputed, however, that "the VMI methodology could be used to educate women." 852 F. Supp., at 481. The District Court even allowed that some women may prefer it to the methodology a women's college might pursue. See *ibid.* "[S]ome women, at least, would want to attend [VMI] if they had the opportunity," the District Court recognized, 766 F. Supp., at 1414, and "some women," the expert testimony established, "are

capable of all of the individual activities required of VMI cadets," *id.*, at 1412. The parties, furthermore, agree that "*some* women can meet the physical standards [VMI] now impose[s] on men." 976 F. 2d, at 896. In sum, as the Court of Appeals stated, "neither the goal of producing citizen soldiers," VMI's *raison d'être*, "nor VMI's implementing methodology is inherently unsuitable to women." *Id.*, at 899.

In support of its initial judgment for Virginia, a judgment rejecting all equal protection objections presented by the United States, the District Court made "findings" on "gender-based developmental differences." 766 F. Supp., at 1434–1435. These "findings" restate the opinions of Virginia's expert witnesses, opinions about typically male or typically female "tendencies." *Id.*, at 1434. For example, "[m]ales tend to need an atmosphere of adversativeness," while "[f]emales tend to thrive in a cooperative atmosphere." *Ibid.* "I'm not saying that some women don't do well under [the] adversative model," VMI's expert on educational institutions testified, "undoubtedly there are some [women] who do"; but educational experiences must be designed "around the rule," this expert maintained, and not "around the exception." *Ibid.* (internal quotation marks omitted).

The United States does not challenge any expert witness estimation on average capacities or preferences of men and women. Instead, the United States emphasizes that time and again since this Court's turning point decision in *Reed* v. *Reed*, 404 U. S. 71 (1971), we have cautioned reviewing courts to take a "hard look" at generalizations or "tendencies" of the kind pressed by Virginia, and relied upon by the District Court. See O'Connor, Portia's Progress, 66 N. Y. U. L. Rev. 1546, 1551 (1991). State actors controlling gates to opportunity, we have instructed, may not exclude qualified individuals based on "fixed notions concerning the roles and abilities of males and females." *Mississippi Univ. for Women*, 458 U. S., at 725; see *J. E. B.*, 511 U. S., at 139, n. 11 (equal protection principles, as applied to gender classifications, mean

state actors may not rely on "overbroad" generalizations to make "judgments about people that are likely to . . . perpetuate historical patterns of discrimination").

It may be assumed, for purposes of this decision, that most women would not choose VMI's adversative method. As Fourth Circuit Judge Motz observed, however, in her dissent from the Court of Appeals' denial of rehearing en banc, it is also probable that "many men would not want to be educated in such an environment." 52 F. 3d, at 93. (On that point, even our dissenting colleague might agree.) Education, to be sure, is not a "one size fits all" business. The issue, however, is not whether "women—or men—should be forced to attend VMI"; rather, the question is whether the Commonwealth can constitutionally deny to women who have the will and capacity, the training and attendant opportunities that VMI uniquely affords. *Ibid.*

The notion that admission of women would downgrade VMI's stature, destroy the adversative system and, with it, even the school,[11] is a judgment hardly proved,[12] a prediction

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[11] See *post*, at 566, 598–599, 603. Forecasts of the same kind were made regarding admission of women to the federal military academies. See, *e. g.*, Hearings on H. R. 9832 et al. before Subcommittee No. 2 of the House Committee on Armed Services, 93d Cong., 2d Sess., 137 (1975) (statement of Lt. Gen. A. P. Clark, Superintendent of U. S. Air Force Academy) ("It is my considered judgment that the introduction of female cadets will inevitably erode this vital atmosphere."); *id.*, at 165 (statement of Hon. H. H. Callaway, Secretary of the Army) ("Admitting women to West Point would irrevocably change the Academy. . . . The Spartan atmosphere—which is so important to producing the final product—would surely be diluted, and would in all probability disappear.").

[12] See 766 F. Supp., at 1413 (describing testimony of expert witness David Riesman: "[I]f VMI were to admit women, it would eventually find it necessary to drop the adversative system altogether, and adopt a system that provides more nurturing and support for the students."). Such judgments have attended, and impeded, women's progress toward full citizenship stature throughout our Nation's history. Speaking in 1879 in support of higher education for females, for example, Virginia State Senator C. T. Smith of Nelson recounted that legislation proposed to pro-

hardly different from other "self-fulfilling prophec[ies]," see *Mississippi Univ. for Women*, 458 U. S., at 730, once routinely used to deny rights or opportunities. When women first sought admission to the bar and access to legal education, concerns of the same order were expressed. For example, in 1876, the Court of Common Pleas of Hennepin County, Minnesota, explained why women were thought ineligible for the practice of law. Women train and educate the young, the court said, which

> "forbids that they shall bestow that time (early and late) and labor, so essential in attaining to the eminence to which the true lawyer should ever aspire. It cannot therefore be said that the opposition of courts to the admission of females to practice . . . is to any extent the outgrowth of . . . 'old fogyism[.]' . . . [I]t arises rather from a comprehension of the magnitude of the responsibilities connected with the successful practice of law, and a desire to *grade up* the profession." In re Application of Martha Angle Dorsett to Be Admitted to Practice as Attorney and Counselor at Law (Minn. C. P. Hennepin Cty., 1876), in The Syllabi, Oct. 21, 1876, pp. 5, 6 (emphasis added).

A like fear, according to a 1925 report, accounted for Columbia Law School's resistance to women's admission, although

> "[t]he faculty . . . never maintained that women could not master legal learning . . . . No, its argument has been . . . more practical. If women were admitted to

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tect the property rights of women had encountered resistance. 10 Educ. J. Va. 213 (1879). A Senator opposing the measures objected that "there [was] no formal call for the [legislation]," and "depicted in burning eloquence the terrible consequences such laws would produce." *Ibid.* The legislation passed, and a year or so later, its sponsor, C. T. Smith, reported that "not one of [the forecast "terrible consequences"] has or ever will happen, even unto the sounding of Gabriel's trumpet." *Ibid.* See also *supra*, at 537–538.

> the Columbia Law School, [the faculty] said, then the choicer, more manly and red-blooded graduates of our great universities would go to the Harvard Law School!" The Nation, Feb. 18, 1925, p. 173.

Medical faculties similarly resisted men and women as partners in the study of medicine. See R. Morantz-Sanchez, Sympathy and Science: Women Physicians in American Medicine 51–54, 250 (1985); see also M. Walsh, "Doctors Wanted: No Women Need Apply" 121–122 (1977) (quoting E. Clarke, Medical Education of Women, 4 Boston Med. & Surg. J. 345, 346 (1869) ("'God forbid that I should ever see men and women aiding each other to display with the scalpel the secrets of the reproductive system . . . .'")); cf. *supra*, at 536–537, n. 9. More recently, women seeking careers in policing encountered resistance based on fears that their presence would "undermine male solidarity," see F. Heidensohn, Women in Control? 201 (1992); deprive male partners of adequate assistance, see *id.*, at 184–185; and lead to sexual misconduct, see C. Milton et al., Women in Policing 32–33 (1974). Field studies did not confirm these fears. See Heidensohn, *supra*, at 92–93; P. Bloch & D. Anderson, Policewomen on Patrol: Final Report (1974).

Women's successful entry into the federal military academies,[13] and their participation in the Nation's military forces,[14] indicate that Virginia's fears for the future of VMI

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[13] Women cadets have graduated at the top of their class at every federal military academy. See Brief for Lieutenant Colonel Rhonda Cornum et al. as *Amici Curiae* 11, n. 25; cf. Defense Advisory Committee on Women in the Services, Report on the Integration and Performance of Women at West Point 64 (1992).

[14] Brief for Lieutenant Colonel Rhonda Cornum, *supra*, at 5–9 (reporting the vital contributions and courageous performance of women in the military); see Mintz, President Nominates 1st Woman to Rank of Three-Star General, Washington Post, Mar. 27, 1996, p. A19, col. 1 (announcing President's nomination of Marine Corps Major General Carol Mutter to rank of Lieutenant General; Mutter will head corps manpower and planning); Tousignant, A New Era for the Old Guard, Washington Post, Mar. 23,

may not be solidly grounded.[15] The Commonwealth's justification for excluding all women from "citizen-soldier" training for which some are qualified, in any event, cannot rank as "exceedingly persuasive," as we have explained and applied that standard.

Virginia and VMI trained their argument on "means" rather than "end," and thus misperceived our precedent. Single-sex education at VMI serves an "important governmental objective," they maintained, and exclusion of women is not only "substantially related," it is essential to that objective. By this notably circular argument, the "straightforward" test *Mississippi Univ. for Women* described, see 458 U. S., at 724–725, was bent and bowed.

The Commonwealth's misunderstanding and, in turn, the District Court's, is apparent from VMI's mission: to produce "citizen-soldiers," individuals

> "'imbued with love of learning, confident in the functions and attitudes of leadership, possessing a high sense of public service, advocates of the American democracy and free enterprise system, and ready . . . to defend their country in time of national peril.'" 766 F. Supp., at 1425 (quoting Mission Study Committee of the VMI Board of Visitors, Report, May 16, 1986).

Surely that goal is great enough to accommodate women, who today count as citizens in our American democracy equal in stature to men. Just as surely, the Commonwealth's

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1996, p. C1, col. 2 (reporting admission of Sergeant Heather Johnsen to elite Infantry unit that keeps round-the-clock vigil at Tomb of the Unknowns in Arlington National Cemetery).

[15] Inclusion of women in settings where, traditionally, they were not wanted inevitably entails a period of adjustment. As one West Point cadet squad leader recounted: "[T]he classes of '78 and '79 see the women as women, but the classes of '80 and '81 see them as classmates." U. S. Military Academy, A. Vitters, Report of Admission of Women (Project Athena II) 84 (1978) (internal quotation marks omitted).

great goal is not substantially advanced by women's categorical exclusion, in total disregard of their individual merit, from the Commonwealth's premier "citizen-soldier" corps.[16] Virginia, in sum, "has fallen far short of establishing the 'exceedingly persuasive justification,'" *Mississippi Univ. for Women*, 458 U. S., at 731, that must be the solid base for any gender-defined classification.

## VI

In the second phase of the litigation, Virginia presented its remedial plan—maintain VMI as a male-only college and create VWIL as a separate program for women. The plan met District Court approval. The Fourth Circuit, in turn, deferentially reviewed the Commonwealth's proposal and decided that the two single-sex programs directly served Virginia's reasserted purposes: single-gender education, and "achieving the results of an adversative method in a military environment." See 44 F. 3d, at 1236, 1239. Inspecting the VMI and VWIL educational programs to determine whether they "afford[ed] to both genders benefits comparable in substance, [if] not in form and detail," *id.*, at 1240, the Court of Appeals concluded that Virginia had arranged for men and women opportunities "sufficiently comparable" to survive equal protection evaluation, *id.*, at 1240–1241. The United States challenges this "remedial" ruling as pervasively misguided.

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[16] VMI has successfully managed another notable change. The school admitted its first African-American cadets in 1968. See The VMI Story 347–349 (students no longer sing "Dixie," salute the Confederate flag or the tomb of General Robert E. Lee at ceremonies and sports events). As the District Court noted, VMI established a program on "retention of black cadets" designed to offer academic and social-cultural support to "minority members of a dominantly white and tradition-oriented student body." 766 F. Supp., at 1436–1437. The school maintains a "special recruitment program for blacks" which, the District Court found, "has had little, if any, effect on VMI's method of accomplishing its mission." *Id.*, at 1437.

A

A remedial decree, this Court has said, must closely fit the constitutional violation; it must be shaped to place persons unconstitutionally denied an opportunity or advantage in "the position they would have occupied in the absence of [discrimination]." See *Milliken* v. *Bradley*, 433 U. S. 267, 280 (1977) (internal quotation marks omitted). The constitutional violation in this suit is the categorical exclusion of women from an extraordinary educational opportunity afforded men. A proper remedy for an unconstitutional exclusion, we have explained, aims to "eliminate [so far as possible] the discriminatory effects of the past" and to "bar like discrimination in the future." *Louisiana* v. *United States*, 380 U. S. 145, 154 (1965).

Virginia chose not to eliminate, but to leave untouched, VMI's exclusionary policy. For women only, however, Virginia proposed a separate program, different in kind from VMI and unequal in tangible and intangible facilities.[17] Having violated the Constitution's equal protection requirement, Virginia was obliged to show that its remedial proposal "directly address[ed] and relate[d] to" the violation, see *Milliken*, 433 U. S., at 282, *i. e.*, the equal protection denied to women ready, willing, and able to benefit from educational

[17] As earlier observed, see *supra*, at 529, Judge Phillips, in dissent, measured Virginia's plan against a paradigm arrangement, one that "could survive equal protection scrutiny": single-sex schools with "substantially comparable curricular and extra-curricular programs, funding, physical plant, administration and support services, . . . faculty[,] and library resources." 44 F. 3d 1229, 1250 (CA4 1995). Cf. *Bray* v. *Lee*, 337 F. Supp. 934 (Mass. 1972) (holding inconsistent with the Equal Protection Clause admission of males to Boston's Boys Latin School with a test score of 120 or higher (up to a top score of 200) while requiring a score, on the same test, of at least 133 for admission of females to Girls Latin School, but not ordering coeducation). Measuring VMI/VWIL against the paradigm, Judge Phillips said, "reveals how far short the [Virginia] plan falls from providing substantially equal tangible and intangible educational benefits to men and women." 44 F. 3d, at 1250.

opportunities of the kind VMI offers. Virginia described VWIL as a "parallel program," and asserted that VWIL shares VMI's mission of producing "citizen-soldiers" and VMI's goals of providing "education, military training, mental and physical discipline, character . . . and leadership development." Brief for Respondents 24 (internal quotation marks omitted). If the VWIL program could not "eliminate the discriminatory effects of the past," could it at least "bar like discrimination in the future"? See *Louisiana*, 380 U. S., at 154. A comparison of the programs said to be "parallel" informs our answer. In exposing the character of, and differences in, the VMI and VWIL programs, we recapitulate facts earlier presented. See *supra*, at 520–523, 526–527.

VWIL affords women no opportunity to experience the rigorous military training for which VMI is famed. See 766 F. Supp., at 1413–1414 ("No other school in Virginia or in the United States, public or private, offers the same kind of rigorous military training as is available at VMI."); *id.*, at 1421 (VMI "is known to be the most challenging military school in the United States"). Instead, the VWIL program "deemphasize[s]" military education, 44 F. 3d, at 1234, and uses a "cooperative method" of education "which reinforces self-esteem," 852 F. Supp., at 476.

VWIL students participate in ROTC and a "largely ceremonial" Virginia Corps of Cadets, see 44 F. 3d, at 1234, but Virginia deliberately did not make VWIL a military institute. The VWIL House is not a military-style residence and VWIL students need not live together throughout the 4-year program, eat meals together, or wear uniforms during the schoolday. See 852 F. Supp., at 477, 495. VWIL students thus do not experience the "barracks" life "crucial to the VMI experience," the spartan living arrangements designed to foster an "egalitarian ethic." See 766 F. Supp., at 1423–1424. "[T]he most important aspects of the VMI educational experience occur in the barracks," the District Court

found, *id.*, at 1423, yet Virginia deemed that core experience nonessential, indeed inappropriate, for training its female citizen-soldiers.

VWIL students receive their "leadership training" in seminars, externships, and speaker series, see 852 F. Supp., at 477, episodes and encounters lacking the "[p]hysical rigor, mental stress, . . . minute regulation of behavior, and indoctrination in desirable values" made hallmarks of VMI's citizen-soldier training, see 766 F. Supp., at 1421.[18] Kept away from the pressures, hazards, and psychological bonding characteristic of VMI's adversative training, see *id.*, at 1422, VWIL students will not know the "feeling of tremendous accomplishment" commonly experienced by VMI's successful cadets, *id.*, at 1426.

Virginia maintains that these methodological differences are "justified pedagogically," based on "important differences between men and women in learning and developmental needs," "psychological and sociological differences" Virginia describes as "real" and "not stereotypes." Brief for Respondents 28 (internal quotation marks omitted). The Task Force charged with developing the leadership program for women, drawn from the staff and faculty at Mary Baldwin College, "determined that a military model and, especially VMI's adversative method, would be wholly inappropriate for educating and training *most women*." 852 F. Supp., at 476 (emphasis added). See also 44 F. 3d, at 1233–1234 (noting Task Force conclusion that, while "some women would be suited to and interested in [a VMI-style experience]," VMI's adversative method "would not be effective for *women as a group*" (emphasis added)). The Com-

[18] Both programs include an honor system. Students at VMI are expelled forthwith for honor code violations, see 766 F. Supp., at 1423; the system for VWIL students, see 852 F. Supp., at 496–497, is less severe, see Tr. 414–415 (testimony of Mary Baldwin College President Cynthia Tyson).

monwealth embraced the Task Force view, as did expert witnesses who testified for Virginia. See 852 F. Supp., at 480–481.

As earlier stated, see *supra*, at 541–542, generalizations about "the way women are," estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them outside the average description. Notably, Virginia never asserted that VMI's method of education suits *most men.* It is also revealing that Virginia accounted for its failure to make the VWIL experience "the entirely militaristic experience of VMI" on the ground that VWIL "is planned for women who do not necessarily expect to pursue military careers." 852 F. Supp., at 478. By that reasoning, VMI's "entirely militaristic" program would be inappropriate for men in general or *as a group,* for "[o]nly about 15% of VMI cadets enter career military service." See 766 F. Supp., at 1432.

In contrast to the generalizations about women on which Virginia rests, we note again these dispositive realities: VMI's "implementing methodology" is not "inherently unsuitable to women," 976 F. 2d, at 899; "some women . . . do well under [the] adversative model," 766 F. Supp., at 1434 (internal quotation marks omitted); "some women, at least, would want to attend [VMI] if they had the opportunity," *id.*, at 1414; "some women are capable of all of the individual activities required of VMI cadets," *id.*, at 1412, and "can meet the physical standards [VMI] now impose[s] on men," 976 F. 2d, at 896. It is on behalf of these women that the United States has instituted this suit, and it is for them that a remedy must be crafted,[19] a remedy that will end their

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[19] Admitting women to VMI would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements, and to adjust aspects of the physical training programs. See Brief for Petitioner 27–29; cf. note following 10 U. S. C. § 4342 (academic and other standards for women admitted to the Military, Naval,

exclusion from a state-supplied educational opportunity for which they are fit, a decree that will "bar like discrimination in the future." *Louisiana*, 380 U. S., at 154.

B

In myriad respects other than military training, VWIL does not qualify as VMI's equal. VWIL's student body, faculty, course offerings, and facilities hardly match VMI's. Nor can the VWIL graduate anticipate the benefits associated with VMI's 157-year history, the school's prestige, and its influential alumni network.

Mary Baldwin College, whose degree VWIL students will gain, enrolls first-year women with an average combined SAT score about 100 points lower than the average score for VMI freshmen. 852 F. Supp., at 501. The Mary Baldwin faculty holds "significantly fewer Ph. D.'s," *id.*, at 502, and receives substantially lower salaries, see Tr. 158 (testimony of James Lott, Dean of Mary Baldwin College), than the faculty at VMI.

Mary Baldwin does not offer a VWIL student the range of curricular choices available to a VMI cadet. VMI awards baccalaureate degrees in liberal arts, biology, chemistry, civil engineering, electrical and computer engineering, and mechanical engineering. See 852 F. Supp., at 503; Virginia Military Institute: More than an Education 11 (Govt. exh. 75,

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and Air Force Academies "shall be the same as those required for male individuals, except for those minimum essential adjustments in such standards required because of physiological differences between male and female individuals"). Experience shows such adjustments are manageable. See U. S. Military Academy, A. Vitters, N. Kinzer, & J. Adams, Report of Admission of Women (Project Athena I–IV) (1977–1980) (4-year longitudinal study of the admission of women to West Point); Defense Advisory Committee on Women in the Services, Report on the Integration and Performance of Women at West Point 17–18 (1992).

lodged with Clerk of this Court). VWIL students attend a school that "does not have a math and science focus," 852 F. Supp., at 503; they cannot take at Mary Baldwin any courses in engineering or the advanced math and physics courses VMI offers, see *id.*, at 477.

For physical training, Mary Baldwin has "two multi-purpose fields" and "[o]ne gymnasium." *Id.*, at 503. VMI has "an NCAA competition level indoor track and field facility; a number of multi-purpose fields; baseball, soccer and lacrosse fields; an obstacle course; large boxing, wrestling and martial arts facilities; an 11-laps-to-the-mile indoor running course; an indoor pool; indoor and outdoor rifle ranges; and a football stadium that also contains a practice field and outdoor track." *Ibid.*

Although Virginia has represented that it will provide equal financial support for in-state VWIL students and VMI cadets, *id.*, at 483, and the VMI Foundation has agreed to endow VWIL with $5.4625 million, *id.*, at 499, the difference between the two schools' financial reserves is pronounced. Mary Baldwin's endowment, currently about $19 million, will gain an additional $35 million based on future commitments; VMI's current endowment, $131 million—the largest public college per-student endowment in the Nation—will gain $220 million. *Id.*, at 503.

The VWIL student does not graduate with the advantage of a VMI degree. Her diploma does not unite her with the legions of VMI "graduates [who] have distinguished themselves" in military and civilian life. See 976 F. 2d, at 892–893. "[VMI] alumni are exceptionally close to the school," and that closeness accounts, in part, for VMI's success in attracting applicants. See 766 F. Supp., at 1421. A VWIL graduate cannot assume that the "network of business owners, corporations, VMI graduates and non-graduate employers . . . interested in hiring VMI graduates," 852 F. Supp., at 499, will be equally responsive to her search for employment,

see 44 F. 3d, at 1250 (Phillips, J., dissenting) ("the powerful political and economic ties of the VMI alumni network cannot be expected to open" for graduates of the fledgling VWIL program).

Virginia, in sum, while maintaining VMI for men only, has failed to provide any "comparable single-gender women's institution." *Id.*, at 1241. Instead, the Commonwealth has created a VWIL program fairly appraised as a "pale shadow" of VMI in terms of the range of curricular choices and faculty stature, funding, prestige, alumni support and influence. See *id.*, at 1250 (Phillips, J., dissenting).

Virginia's VWIL solution is reminiscent of the remedy Texas proposed 50 years ago, in response to a state trial court's 1946 ruling that, given the equal protection guarantee, African-Americans could not be denied a legal education at a state facility. See *Sweatt* v. *Painter*, 339 U. S. 629 (1950). Reluctant to admit African-Americans to its flagship University of Texas Law School, the State set up a separate school for Heman Sweatt and other black law students. *Id.*, at 632. As originally opened, the new school had no independent faculty or library, and it lacked accreditation. *Id.*, at 633. Nevertheless, the state trial and appellate courts were satisfied that the new school offered Sweatt opportunities for the study of law "substantially equivalent to those offered by the State to white students at the University of Texas." *Id.*, at 632 (internal quotation marks omitted).

Before this Court considered the case, the new school had gained "a faculty of five full-time professors; a student body of 23; a library of some 16,500 volumes serviced by a full-time staff; a practice court and legal aid association; and one alumnus who ha[d] become a member of the Texas Bar." *Id.*, at 633. This Court contrasted resources at the new school with those at the school from which Sweatt had been excluded. The University of Texas Law School had a full-time faculty of 16, a student body of 850, a library containing over

65,000 volumes, scholarship funds, a law review, and moot court facilities. *Id.*, at 632–633.

More important than the tangible features, the Court emphasized, are "those qualities which are incapable of objective measurement but which make for greatness" in a school, including "reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige." *Id.*, at 634. Facing the marked differences reported in the *Sweatt* opinion, the Court unanimously ruled that Texas had not shown "substantial equality in the [separate] educational opportunities" the State offered. *Id.*, at 633. Accordingly, the Court held, the Equal Protection Clause required Texas to admit African-Americans to the University of Texas Law School. *Id.*, at 636. In line with *Sweatt*, we rule here that Virginia has not shown substantial equality in the separate educational opportunities the Commonwealth supports at VWIL and VMI.

C

When Virginia tendered its VWIL plan, the Fourth Circuit did not inquire whether the proposed remedy, approved by the District Court, placed women denied the VMI advantage in "the position they would have occupied in the absence of [discrimination]." *Milliken*, 433 U. S., at 280 (internal quotation marks omitted). Instead, the Court of Appeals considered whether the Commonwealth could provide, with fidelity to the equal protection principle, separate and unequal educational programs for men and women.

The Fourth Circuit acknowledged that "the VWIL degree from Mary Baldwin College lacks the historical benefit and prestige of a degree from VMI." 44 F. 3d, at 1241. The Court of Appeals further observed that VMI is "an ongoing and successful institution with a long history," and there remains no "comparable single-gender women's institution." *Ibid.* Nevertheless, the appeals court declared the substantially different and significantly unequal VWIL program sat-

isfactory. The court reached that result by revising the applicable standard of review. The Fourth Circuit displaced the standard developed in our precedent, see *supra*, at 532–534, and substituted a standard of its own invention.

We have earlier described the deferential review in which the Court of Appeals engaged, see *supra*, at 528–529, a brand of review inconsistent with the more exacting standard our precedent requires, see *supra*, at 532–534. Quoting in part from *Mississippi Univ. for Women*, the Court of Appeals candidly described its own analysis as one capable of checking a legislative purpose ranked as "pernicious," but generally according "deference to [the] legislative will." 44 F. 3d, at 1235, 1236. Recognizing that it had extracted from our decisions a test yielding "little or no scrutiny of the effect of a classification directed at [single-gender education]," the Court of Appeals devised another test, a "substantive comparability" inquiry, *id.*, at 1237, and proceeded to find that new test satisfied, *id.*, at 1241.

The Fourth Circuit plainly erred in exposing Virginia's VWIL plan to a deferential analysis, for "all gender-based classifications today" warrant "heightened scrutiny." See *J. E. B.*, 511 U. S., at 136. Valuable as VWIL may prove for students who seek the program offered, Virginia's remedy affords no cure at all for the opportunities and advantages withheld from women who want a VMI education and can make the grade. See *supra*, at 549–554.[20] In sum, Virginia's

[20] Virginia's prime concern, it appears, is that "plac[ing] men and women into the adversative relationship inherent in the VMI program . . . would destroy, at least for that period of the adversative training, any sense of decency that still permeates the relationship between the sexes." 44 F. 3d, at 1239; see *supra*, at 540–546. It is an ancient and familiar fear. Compare *In re Lavinia Goodell*, 39 Wis. 232, 246 (1875) (denying female applicant's motion for admission to the bar of its court, Wisconsin Supreme Court explained: "Discussions are habitually necessary in courts of justice, which are unfit for female ears. The habitual presence of women at these would tend to relax the public sense of decency and propriety."), with Levine, Closing Comments, 6 Law & Inequality 41 (1988) (presentation at

remedy does not match the constitutional violation; the Commonwealth has shown no "exceedingly persuasive justification" for withholding from women qualified for the experience premier training of the kind VMI affords.

## VII

A generation ago, "the authorities controlling Virginia higher education," despite long established tradition, agreed "to innovate and favorably entertain[ed] the [then] relatively new idea that there must be no discrimination by sex in offering educational opportunity." *Kirstein*, 309 F. Supp., at 186. Commencing in 1970, Virginia opened to women "educational opportunities at the Charlottesville campus that [were] not afforded in other [state-operated] institutions." *Id.*, at 187; see *supra*, at 538. A federal court approved the Commonwealth's innovation, emphasizing that the University of Virginia "offer[ed] courses of instruction . . . not available elsewhere." 309 F. Supp., at 187. The court further noted: "[T]here exists at Charlottesville a 'prestige' factor

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Eighth Circuit Judicial Conference, Colorado Springs, Colo., July 17, 1987) (footnotes omitted):

"Plato questioned whether women should be afforded equal opportunity to become guardians, those elite Rulers of Platonic society. Ironically, in that most undemocratic system of government, the Republic, women's native ability to serve as guardians was not seriously questioned. The concern was over the wrestling and exercise class in which all candidates for guardianship had to participate, for rigorous physical and mental training were prerequisites to attain the exalted status of guardian. And in accord with Greek custom, those exercise classes were conducted in the nude. Plato concluded that their virtue would clothe the women's nakedness and that Platonic society would not thereby be deprived of the talent of qualified citizens for reasons of mere gender."

For Plato's full text on the equality of women, see 2 The Dialogues of Plato 302–312 (B. Jowett transl., 4th ed. 1953). Virginia, not bound to ancient Greek custom in its "rigorous physical and mental training" programs, could more readily make the accommodations necessary to draw on "the talent of [all] qualified citizens." Cf. *supra*, at 550–551, n. 19.

[not paralleled in] other Virginia educational institutions." *Ibid.*

VMI, too, offers an educational opportunity no other Virginia institution provides, and the school's "prestige"—associated with its success in developing "citizen-soldiers"—is unequaled. Virginia has closed this facility to its daughters and, instead, has devised for them a "parallel program," with a faculty less impressively credentialed and less well paid, more limited course offerings, fewer opportunities for military training and for scientific specialization. Cf. *Sweatt*, 339 U. S., at 633. VMI, beyond question, "possesses to a far greater degree" than the VWIL program "those qualities which are incapable of objective measurement but which make for greatness in a . . . school," including "position and influence of the alumni, standing in the community, traditions and prestige." *Id.*, at 634. Women seeking and fit for a VMI-quality education cannot be offered anything less, under the Commonwealth's obligation to afford them genuinely equal protection.

A prime part of the history of our Constitution, historian Richard Morris recounted, is the story of the extension of constitutional rights and protections to people once ignored or excluded.[21] VMI's story continued as our comprehension of "We the People" expanded. See *supra*, at 532, n. 6.

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[21] R. Morris, The Forging of the Union, 1781–1789, p. 193 (1987); see *id.*, at 191, setting out letter to a friend from Massachusetts patriot (later second President) John Adams, on the subject of qualifications for voting in his home State:

"[I]t is dangerous to open so fruitful a source of controversy and altercation as would be opened by attempting to alter the qualifications of voters; there will be no end of it. New claims will arise; women will demand a vote; lads from twelve to twenty-one will think their rights not enough attended to; and every man who has not a farthing, will demand an equal voice with any other, in all acts of state. It tends to confound and destroy all distinctions, and prostrate all ranks to one common level." Letter from John Adams to James Sullivan (May 26, 1776), in 9 Works of John Adams 378 (C. Adams ed. 1854).

There is no reason to believe that the admission of women capable of all the activities required of VMI cadets would destroy the Institute rather than enhance its capacity to serve the "more perfect Union."

* * *

For the reasons stated, the initial judgment of the Court of Appeals, 976 F. 2d 890 (CA4 1992), is affirmed, the final judgment of the Court of Appeals, 44 F. 3d 1229 (CA4 1995), is reversed, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

JUSTICE THOMAS took no part in the consideration or decision of these cases.

CHIEF JUSTICE REHNQUIST, concurring in the judgment.

The Court holds first that Virginia violates the Equal Protection Clause by maintaining the Virginia Military Institute's (VMI's) all-male admissions policy, and second that establishing the Virginia Women's Institute for Leadership (VWIL) program does not remedy that violation. While I agree with these conclusions, I disagree with the Court's analysis and so I write separately.

## I

Two decades ago in *Craig* v. *Boren*, 429 U. S. 190, 197 (1976), we announced that "[t]o withstand constitutional challenge, . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." We have adhered to that standard of scrutiny ever since. See *Califano* v. *Goldfarb*, 430 U. S. 199, 210–211 (1977); *Califano* v. *Webster*, 430 U. S. 313, 316–317 (1977); *Orr* v. *Orr*, 440 U. S. 268, 279 (1979); *Caban* v. *Mohammed*, 441 U. S. 380, 388 (1979); *Davis* v. *Passman*, 442 U. S. 228, 234–235, 235, n. 9 (1979); *Personnel Administrator of Mass.* v. *Feeney*, 442 U. S. 256, 273 (1979);

*Califano* v. *Westcott*, 443 U. S. 76, 85 (1979); *Wengler* v. *Druggists Mut. Ins. Co.*, 446 U. S. 142, 150 (1980); *Kirchberg* v. *Feenstra*, 450 U. S. 455, 459–460 (1981); *Michael M.* v. *Superior Court, Sonoma Cty.*, 450 U. S. 464, 469 (1981); *Mississippi Univ. for Women* v. *Hogan*, 458 U. S. 718, 724 (1982); *Heckler* v. *Mathews*, 465 U. S. 728, 744 (1984); *J. E. B.* v. *Alabama ex rel. T. B.*, 511 U. S. 127, 137, n. 6 (1994). While the majority adheres to this test today, *ante*, at 524, 533, it also says that the Commonwealth must demonstrate an " 'exceedingly persuasive justification' " to support a gender-based classification. See *ante*, at 524, 529, 530, 531, 533, 534, 545, 546, 556. It is unfortunate that the Court thereby introduces an element of uncertainty respecting the appropriate test.

While terms like "important governmental objective" and "substantially related" are hardly models of precision, they have more content and specificity than does the phrase "exceedingly persuasive justification." That phrase is best confined, as it was first used, as an observation on the difficulty of meeting the applicable test, not as a formulation of the test itself. See, *e. g.*, *Feeney*, *supra*, at 273 ("[T]hese precedents dictate that any state law overtly or covertly designed to prefer males over females in public employment require an exceedingly persuasive justification"). To avoid introducing potential confusion, I would have adhered more closely to our traditional, "firmly established," *Hogan*, *supra*, at 723; *Heckler*, *supra*, at 744, standard that a gender-based classification "must bear a close and substantial relationship to important governmental objectives." *Feeney*, *supra*, at 273.

Our cases dealing with gender discrimination also require that the proffered purpose for the challenged law be the actual purpose. See *ante*, at 533, 535–536. It is on this ground that the Court rejects the first of two justifications Virginia offers for VMI's single-sex admissions policy, namely, the goal of diversity among its public educational institutions. While I ultimately agree that the Common-

wealth has not carried the day with this justification, I disagree with the Court's method of analyzing the issue.

VMI was founded in 1839, and, as the Court notes, *ante*, at 536–537, admission was limited to men because under the then-prevailing view men, not women, were destined for higher education. However misguided this point of view may be by present-day standards, it surely was not unconstitutional in 1839. The adoption of the Fourteenth Amendment, with its Equal Protection Clause, was nearly 30 years in the future. The interpretation of the Equal Protection Clause to require heightened scrutiny for gender discrimination was yet another century away.

Long after the adoption of the Fourteenth Amendment, and well into this century, legal distinctions between men and women were thought to raise no question under the Equal Protection Clause. The Court refers to our decision in *Goesaert* v. *Cleary*, 335 U. S. 464 (1948). Likewise representing that now abandoned view was *Hoyt* v. *Florida*, 368 U. S. 57 (1961), where the Court upheld a Florida system of jury selection in which men were automatically placed on jury lists, but women were placed there only if they expressed an affirmative desire to serve. The Court noted that despite advances in women's opportunities, the "woman is still regarded as the center of home and family life." *Id.*, at 62.

Then, in 1971, we decided *Reed* v. *Reed*, 404 U. S. 71, which the Court correctly refers to as a seminal case. But its facts have nothing to do with admissions to any sort of educational institution. An Idaho statute governing the administration of estates and probate preferred men to women if the other statutory qualifications were equal. The statute's purpose, according to the Idaho Supreme Court, was to avoid hearings to determine who was better qualified as between a man and a woman both applying for letters of administration. This Court held that such a rule violated the Fourteenth Amendment because "a mandatory preference to members of either

sex over members of the other, merely to accomplish the elimination of hearings," was an "arbitrary legislative choice forbidden by the Equal Protection Clause." *Id.*, at 76. The brief opinion in *Reed* made no mention of either *Goesaert* or *Hoyt*.

Even at the time of our decision in *Reed* v. *Reed*, therefore, Virginia and VMI were scarcely on notice that its holding would be extended across the constitutional board. They were entitled to believe that "one swallow doesn't make a summer" and await further developments. Those developments were 11 years in coming. In *Mississippi Univ. for Women* v. *Hogan*, *supra*, a case actually involving a single-sex admissions policy in higher education, the Court held that the exclusion of men from a nursing program violated the Equal Protection Clause. This holding did place Virginia on notice that VMI's men-only admissions policy was open to serious question.

The VMI Board of Visitors, in response, appointed a Mission Study Committee to examine "the legality and wisdom of VMI's single-sex policy in light of" *Hogan*. 766 F. Supp. 1407, 1427 (WD Va. 1991). But the committee ended up cryptically recommending against changing VMI's status as a single-sex college. After three years of study, the committee found "'no information'" that would warrant a change in VMI's status. *Id.*, at 1429. Even the District Court, ultimately sympathetic to VMI's position, found that "[t]he Report provided very little indication of how [its] conclusion was reached" and that "[t]he one and one-half pages in the committee's final report devoted to analyzing the information it obtained primarily focuses on anticipated difficulties in attracting females to VMI." *Ibid.* The reasons given in the report for not changing the policy were the changes that admission of women to VMI would require, and the likely effect of those changes on the institution. That VMI would have to change is simply not helpful in addressing the constitutionality of the status after *Hogan*.

Before this Court, Virginia has sought to justify VMI's single-sex admissions policy primarily on the basis that diversity in education is desirable, and that while most of the public institutions of higher learning in the Commonwealth are coeducational, there should also be room for single-sex institutions. I agree with the Court that there is scant evidence in the record that this was the real reason that Virginia decided to maintain VMI as men only.* But, unlike the majority, I would consider only evidence that postdates our decision in *Hogan*, and would draw no negative inferences from the Commonwealth's actions before that time. I think that after *Hogan*, the Commonwealth was entitled to reconsider its policy with respect to VMI, and not to have earlier justifications, or lack thereof, held against it.

Even if diversity in educational opportunity were the Commonwealth's actual objective, the Commonwealth's position would still be problematic. The difficulty with its position is that the diversity benefited only one sex; there was single-sex public education available for men at VMI, but no corresponding single-sex public education available for women. When *Hogan* placed Virginia on notice that

*The dissent equates our conclusion that VMI's "asserted interest in promoting diversity" is not "'genuine,'" with a "charge" that the diversity rationale is "a pretext for discriminating against women." *Post*, at 579–580. Of course, those are not the same thing. I do not read the Court as saying that the diversity rationale is a pretext for discrimination, and I would not endorse such a proposition. We may find that diversity was not the Commonwealth's real reason without suggesting, or having to show, that the real reason was "antifeminism," *post*, at 580. Our cases simply require that the proffered purpose for the challenged gender classification be the actual purpose, although not necessarily recorded. See *ante*, at 533, 535–536. The dissent also says that the interest in diversity is so transparent that having to articulate it is "absurd on its face." *Post*, at 592. Apparently, that rationale was not obvious to the Mission Study Committee which failed to list it among its reasons for maintaining VMI's all-men admissions policy.

VMI's admissions policy possibly was unconstitutional, VMI could have dealt with the problem by admitting women; but its governing body felt strongly that the admission of women would have seriously harmed the institution's educational approach. Was there something else the Commonwealth could have done to avoid an equal protection violation? Since the Commonwealth did nothing, we do not have to definitively answer that question.

I do not think, however, that the Commonwealth's options were as limited as the majority may imply. The Court cites, without expressly approving it, a statement from the opinion of the dissenting judge in the Court of Appeals, to the effect that the Commonwealth could have "simultaneously opened single-gender undergraduate institutions having substantially comparable curricular and extra-curricular programs, funding, physical plant, administration and support services, and faculty and library resources." *Ante*, at 529–530 (internal quotation marks omitted). If this statement is thought to exclude other possibilities, it is too stringent a requirement. VMI had been in operation for over a century and a half, and had an established, successful, and devoted group of alumni. No legislative wand could instantly call into existence a similar institution for women; and it would be a tremendous loss to scrap VMI's history and tradition. In the words of Grover Cleveland's second inaugural address, the Commonwealth faced a condition, not a theory. And it was a condition that had been brought about, not through defiance of decisions construing gender bias under the Equal Protection Clause, but, until the decision in *Hogan*, a condition that had not appeared to offend the Constitution. Had Virginia made a genuine effort to devote comparable public resources to a facility for women, and followed through on such a plan, it might well have avoided an equal protection violation. I do not believe the Commonwealth was faced with the stark choice of either admitting women to VMI, on the

one hand, or abandoning VMI and starting from scratch for both men and women, on the other.

But, as I have noted, neither the governing board of VMI nor the Commonwealth took any action after 1982. If diversity in the form of single-sex, as well as coeducational, institutions of higher learning were to be available to Virginians, that diversity had to be available to women as well as to men.

The dissent criticizes me for "disregarding the four all-women's private colleges in Virginia (generously assisted by public funds)." *Post,* at 595. The private women's colleges are treated by the Commonwealth *exactly* as all other private schools are treated, which includes the provision of tuition-assistance grants to Virginia residents. Virginia gives no special support to the women's single-sex education. But obviously, the same is not true for men's education. Had the Commonwealth provided the kind of support for the private women's schools that it provides for VMI, this may have been a very different case. For in so doing, the Commonwealth would have demonstrated that its interest in providing a single-sex education for men was to some measure matched by an interest in providing the same opportunity for women.

Virginia offers a second justification for the single-sex admissions policy: maintenance of the adversative method. I agree with the Court that this justification does not serve an important governmental objective. A State does not have substantial interest in the adversative methodology unless it is pedagogically beneficial. While considerable evidence shows that a single-sex education is pedagogically beneficial for some students, see 766 F. Supp., at 1414, and hence a State may have a valid interest in promoting that methodology, there is no similar evidence in the record that an adversative method is pedagogically beneficial or is any more likely to produce character traits than other methodologies.

## II

The Court defines the constitutional violation in these cases as "the categorical exclusion of women from an extraordinary educational opportunity afforded to men." *Ante,* at 547. By defining the violation in this way, and by emphasizing that a remedy for a constitutional violation must place the victims of discrimination in "'the position they would have occupied in the absence of [discrimination],'" *ibid.*, the Court necessarily implies that the only adequate remedy would be the admission of women to the all-male institution. As the foregoing discussion suggests, I would not define the violation in this way; it is not the "exclusion of women" that violates the Equal Protection Clause, but the maintenance of an all-men school without providing any—much less a comparable—institution for women.

Accordingly, the remedy should not necessarily require either the admission of women to VMI or the creation of a VMI clone for women. An adequate remedy in my opinion might be a demonstration by Virginia that its interest in educating men in a single-sex environment is matched by its interest in educating women in a single-sex institution. To demonstrate such, the Commonwealth does not need to create two institutions with the same number of faculty Ph. D.'s, similar SAT scores, or comparable athletic fields. See *ante,* at 551–552. Nor would it necessarily require that the women's institution offer the same curriculum as the men's; one could be strong in computer science, the other could be strong in liberal arts. It would be a sufficient remedy, I think, if the two institutions offered the same quality of education and were of the same overall caliber.

If a State decides to create single-sex programs, the State would, I expect, consider the public's interest and demand in designing curricula. And rightfully so. But the State should avoid assuming demand based on stereotypes; it must not assume *a priori,* without evidence, that there would be

no interest in a women's school of civil engineering, or in a men's school of nursing.

In the end, the women's institution Virginia proposes, VWIL, fails as a remedy, because it is distinctly inferior to the existing men's institution and will continue to be for the foreseeable future. VWIL simply is not, in any sense, the institution that VMI is. In particular, VWIL is a program appended to a private college, not a self-standing institution; and VWIL is substantially underfunded as compared to VMI. I therefore ultimately agree with the Court that Virginia has not provided an adequate remedy.

JUSTICE SCALIA, dissenting.

Today the Court shuts down an institution that has served the people of the Commonwealth of Virginia with pride and distinction for over a century and a half. To achieve that desired result, it rejects (contrary to our established practice) the factual findings of two courts below, sweeps aside the precedents of this Court, and ignores the history of our people. As to facts: It explicitly rejects the finding that there exist "gender-based developmental differences" supporting Virginia's restriction of the "adversative" method to only a men's institution, and the finding that the all-male composition of the Virginia Military Institute (VMI) is essential to that institution's character. As to precedent: It drastically revises our established standards for reviewing sex-based classifications. And as to history: It counts for nothing the long tradition, enduring down to the present, of men's military colleges supported by both States and the Federal Government.

Much of the Court's opinion is devoted to deprecating the closed-mindedness of our forebears with regard to women's education, and even with regard to the treatment of women in areas that have nothing to do with education. Closed-minded they were—as every age is, including our own, with regard to matters it cannot guess, because it simply does not