

How Federal Agencies Can Ensure Nondiscrimination and Advance Equity for Nonbinary and Gender Nonconforming People*

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I. Executive Summary

Today, between 1 and 1.5 million adults in the United States identify as nonbinary—a number that is likely growing as more Americans feel comfortable coming out. “Nonbinary” is an umbrella term for people whose gender falls outside of the gender binary. Nonbinary people encompass a diverse range of gender identities, expressions, and experiences. Nonbinary people have existed in cultures around the world and throughout history. Nonbinary people are often conflated with other related groups such as intersex people or transgender men and women. These are distinct but overlapping groups.

Like other LGBTQI+ populations, nonbinary people face widespread social stigma, discrimination, and physical violence. Discrimination against nonbinary people may occur and be justified in ways similar to discrimination against other LGBTQI+ people, yet also may take unique forms or be defended by different arguments. Nonbinary people have enjoyed relatively less positive visibility and affirmation than some other gender and sexual minority groups, and they may be even more frequently subject to dismissive attitudes or negative stereotypes, such as that they are “just seeking attention” or “going through a phase.”

Courts and federal agencies have developed a growing body of case law, regulation, and interpretive guidance on sex discrimination and LGBTQI+ populations, informing and informed by the U.S. Supreme Court’s landmark 2020 ruling in *Bostock v. Clayton County*. To date, however, there is little federal guidance, regulation, or case law expressly addressing discrimination against nonbinary people, even as nonbinary people and other gender minorities are targeted by escalating trends of both state-sponsored discrimination and violent extremism. As we explain, *Bostock*’s holding applies fully to discrimination against nonbinary people, including discrimination under the guise of sex segregation, and federal agencies should expressly interpret and enforce sex discrimination laws accordingly.

Advancing nondiscrimination protections and investing in equity for nonbinary people is more important than ever. The White House and federal agencies should proactively incorporate nonbinary people into *Bostock* implementation and equity programming.

The attached white paper includes detailed recommendations for the White House, including the Office of Management and Budget (OMB), as well as the U.S. Departments of Justice (DOJ), Education (ED), Health and Human Services (HHS), and the Equal Employment Opportunity Commission (EEOC), as well as overarching recommendations for all federal agencies. These recommendations reflect the guiding principles of ending gender discrimination, including unnecessary gender-based classifications, and respecting individual liberty, autonomy, and privacy. While broad, these recommendations are not exhaustive. It is important for agencies to consider additional steps needed to ensure equity and inclusion for nonbinary people in other areas beyond the scope of these recommendations—especially in workforce, housing and homelessness, immigration, human rights, and development programs.

II. Background on the nonbinary population

Today, between 1 and 1.5 million adults in the United States identify as nonbinary¹—a number that is likely growing as more Americans feel comfortable coming out. “Nonbinary” has become a common umbrella term² to describe a person’s experience or expression of their gender as falling outside of the socially constructed³ gender binary. Nonbinary people may experience their gender as being between male and female, having aspects of both, or as being something completely different; others may not experience having any gender.⁴ Nonbinary people are not new; cultures across time and around the world have recognized more than two gender categories.⁵ Even within the specific context of the U.S. today, nonbinary people as a group encompass a diverse range of gender identities, expressions, and experiences.

A. **Nonbinary people are a distinct population, though overlapping with and sharing many experiences in common with other LGBTQI+ populations.**

Our legal analysis and policy recommendations are intended to broadly address the rights and needs of people who are not exclusively a man or a woman. They may not, however, account for the diverse identities, experiences, or needs of all people who fit this description, including those with culturally specific identities or experiences of nonbinary gender. For example, Two-Spirit is often used as an umbrella term for culturally specific gender and sexual minority experiences among Native American communities.⁶

Additionally, the nonbinary population is distinct from the intersex population. “Intersex” refers to people who are born with variations in their physical sex characteristics that differ from typical notions of male or female bodies. Some intersex people also identify as nonbinary, but being intersex does not automatically make someone nonbinary. Likewise, most nonbinary people are not intersex.

Some people consider nonbinary people, by definition, to be a subset of the transgender population. Others see nonbinary people and transgender people as two distinct (but overlapping) populations. On an individual level, some but not all nonbinary people identify as transgender as well as nonbinary.

Like transgender men and women, nonbinary people have a diverse range of experiences about how they understand and express their genders, including whether and how they come out to people in their lives; access gender-affirming health care; change their names, pronouns, or identity documentation; or wear clothing from a different retail category. There is no one way to look or be nonbinary. Nonbinary people may be perceived by others as consistently male or consistently female, or as androgynous or “ambiguous.” Like anyone else, nonbinary people may be perceived by others in a consistent way, or this may vary based on clothing or context.

Like other LGBTQI+ people—and perhaps to a greater degree based on a relative lack of visibility or acceptance—nonbinary people may be stereotyped and stigmatized as unserious, unstable, attention-seeking, or “going through a phase.”⁷ As a result, nonbinary people are “almost twice as likely as their binary transgender counterparts to refrain from asking their

employers to refer to them by the correct pronouns”⁸ The same barriers also constrain nonbinary people from accessing resources or support from professionals such as lawyers,⁹ which may obscure from policymakers the challenges that nonbinary people experience.

B. Nonbinary people are targets of animus and experience many types of harm.

Like other LGBTQI+ populations and other people perceived as not conforming to sex stereotypes, nonbinary people face pervasive mistreatment, including harassment, discrimination, and physical violence. Fifty-five percent of nonbinary people have been physically attacked or sexually assaulted in adulthood.¹⁰ More than half of nonbinary adults (55%) report feeling that they are less respected because of being nonbinary.¹¹ As a result of these experiences, and further compounding them, 51% of nonbinary adults have symptoms consistent with serious mental illness, and 39% have attempted suicide.¹² Nonbinary people often suffer chronic stressors, including not having enough money to make ends meet, having strained family relationships, and feeling mentally and physically tired because of their jobs.¹³

Nonbinary people are often impacted by the same or similar discriminatory acts, laws, and practices as transgender men and women. Discrimination against nonbinary people can also take unique forms or be justified with slightly different arguments.¹⁴ Nonbinary people frequently confront specific barriers or forms of animus not typically experienced by transgender women and men. Because of pervasive stereotypes about gender, institutional recognition of genders typically only account for men and women, and nonbinary and gender nonconforming people face disbelief, disregard, and disrespect.¹⁵ Opponents of equality continue to question whether *Bostock* protects nonbinary people at all.¹⁶

There is little federal guidance, regulation, or case law expressly addressing the rights of nonbinary people or discrimination against them, even as nonbinary people and other gender minorities are targeted by escalating trends of both state-sponsored discrimination¹⁷ and violent extremism.¹⁸ Ensuring federal nondiscrimination protections are appropriately applied, and equity efforts leveraged, to protect these communities is more important than ever. Policies developed with only transgender men and women in mind fail to address discrimination against people who do not fit exclusively into either of these categories—for example, with regard to sex-segregated facilities or dress codes.¹⁹ Instead, policymakers must understand and meet the unique challenges that nonbinary people face.

This white paper provides two types of advice. First, it explains how federal agencies should interpret federal nondiscrimination laws with respect to discrimination against nonbinary people. Second, it provides policy recommendations for how federal agencies can adopt, promote, and incentivize best practices to advance fair treatment and opportunities for nonbinary people.

III. Federal law prohibits discrimination against nonbinary people.

In *Bostock v. Clayton County*, the Supreme Court held that discrimination based on homosexuality or transgender status constitutes discrimination because of sex in violation of Title VII.²⁰ The Court held that “sex is necessarily a but-for cause when [someone] discriminates against homosexual or transgender [people], [and someone] who discriminates on these grounds inescapably intends to rely on sex in [their] decisionmaking.”²¹ Applying the Court’s reasoning, discrimination against nonbinary people can be conceptualized in at least three distinct but complementary ways: (1) as a form of, or as indistinguishable from, discrimination based on transgender status; (2) as discrimination based on gender identity; (3) as necessarily relying on sex as a but-for cause; (4) as discrimination based on gender non-conformity or sex stereotypes more generally in violation of Title VII’s prohibition on sex discrimination (and similar federal anti-discrimination statutes). Additionally, discrimination against a nonbinary person may implicate disability statutes in some circumstances, such as where a person has gender dysphoria or intersex variations.

A. Discrimination based on nonbinary identity or status is discrimination based on gender identity or transgender status under *Bostock*.

The Court in *Bostock* held that Title VII categorically prohibits unlawful discrimination against employees based on transgender status.²² The Court implicitly relied on a common definition of what makes someone transgender—not identifying with their sex assigned at birth. Nonbinary people (who were assigned male or female at birth) do not identify as male or female. Although some nonbinary people self-identify as transgender and others do not, the Court’s functional definition of transgender status in *Bostock* clearly covers nonbinary people and discrimination against them. At least one lower court has already adopted this approach, treating a nonbinary employee as transgender for purposes of *Bostock*.²³ Importantly, people do not have to identify as “transgender” or “nonbinary” to be covered by Title VII based on the same reasoning that men who have sex with men are protected from sexual orientation discrimination even if they do not identify as “gay” or “homosexual.”²⁴

Whether or not one considers nonbinary people to fall within a category of “transgender people,” discrimination against them is clearly based on their gender identity. Federal courts and agencies have long held that gender identity discrimination is sex discrimination and have treated *Bostock* as confirming this conclusion.²⁵ Indeed, courts have often used the terms interchangeably.²⁶ By definition, being nonbinary is a matter of gender identity. No matter whether a person describes their identity as other than male or female, having elements of both, being fluid, or as having no gender as all, discrimination on any of these bases is clearly based on “gender identity.”

B. Discrimination against nonbinary people is also “inextricably bound up with sex” and based on sex non-conformity under *Bostock*.

Setting aside the labels of “gender identity” and “transgender status,” discrimination based on nonbinary identity is “inextricably bound up with sex” under *Bostock*.²⁷ As the *Bostock* Court emphasized, Title VII prohibits discrimination “[s]o long as the plaintiff’s sex was one but-for cause of that decision” or where “a protected trait like sex was a ‘motivating factor.’”²⁸ Thus, the employee in *Bostock* who is a transgender woman would not have been fired if she had been assigned female at birth.²⁹ Although the *Bostock* decision does not mention nonbinary people,³⁰ its causal test yields the same result for nonbinary employees as it did for Aimee Stephens.

An employer who targets a nonbinary employee might argue that nonbinary status fails in *Bostock*’s but-for test because it would not have treated the nonbinary employee differently if the employee had a different sex assigned at birth. Under this view, unlike a transgender woman or man’s transgender status, being nonbinary is not tied to a person’s sex assigned at birth. However, *Bostock* makes plain that discriminating against all nonbinary employees regardless of their assigned sex is no defense, and insisting that an employee identify and otherwise comport with expectations for either their assigned sex or for another binary sex is no less because of sex. The fact that an employer discriminates against people of more than one sex, or for factors other than sex, does not exonerate it for discriminating against any individual at least in part because of that employee’s sex.³¹ The majority in *Bostock* rebutted a similar argument multiple times throughout the decision, especially when it explained that an employer who seeks to discriminate against both men and women who are gay, transgender, or gender nonconforming does not “avoid[] Title VII exposure,” but “doubles it”.³² Thus, discrimination against nonbinary people, including gender nonconforming people who do not identify as nonbinary, is sex discrimination.

While some fact patterns may be subtly different for a nonbinary employee than for a transgender man or woman, the analysis remains similar to the scenarios discussed in *Bostock* if the employer’s actions are similar, regardless of the specific gender-related identity or characteristics targeted by the employer. Notably, sex stereotypes “can include the expectation that individuals will consistently identify with only one gender.”³³ Nonbinary and gender nonconforming people, by definition, fail to conform to sex stereotypes. While many nonbinary people may express their gender outwardly in ways that obviously flout gender stereotypes, even nonbinary people who may be perceived as conforming to many stereotypes associated with their sex assigned at birth defy the central stereotype of not in fact identifying with that sex. In other words, an assumption that sex or gender is binary is the ultimate sex stereotype. Numerous precedents have applied this application of sex stereotyping to anti-transgender discrimination, and their holdings are equally applicable to discrimination on the basis of nonbinary gender identity or status.³⁴

C. Familiar principles prohibit discrimination against nonbinary individuals in the context of sex-separated policies or practices.

Applying these familiar principles, it is impermissible discrimination to require transgender women and men to use facilities, follow dress codes, or display gendered identification cards or badges in a manner that singles them out and causes harm; the same is true for nonbinary people. Thus, existing Labor Department guidance, and state and local interpretive guidance, provide that a nonbinary student should be able to use facilities “where the student feels most comfortable regarding their gender identity.”³⁵ In some circumstances, where being forced to choose between male and female options would impose significant harms on an individual and there is no sufficient competing interest or legal exception, nondiscrimination laws may require that they be provided some alternative opportunity. For example, the current passport “X” gender option resulted, in part, from a lawsuit presenting an Equal Protection claim.³⁶ Similarly, just as an employer could not require *all* employees to be identified as “Mr.” in business communications, nor could it require all employees to choose to be referred to as *either* “Mr.” or “Ms.” where this would result in adverse action towards a nonbinary employee.³⁷

IV. Recommendations for all federal agencies

All federal agencies should adopt the overarching recommendations below. These recommendations adhere to the guiding principles of advancing gender equity: ensuring gender-based classifications are necessary and well-tailored, and eliminating those that are not; and respecting individual liberty, autonomy, and privacy.

- Ensure targeted outreach and engagement with nonbinary populations include nonbinary people who experience multiple forms of marginalization, and that policy and program decisions reflect their needs; including BIPOC; deaf, disabled, chronically ill, and neurodivergent people; immigrants; working class or poor people; and currently or formerly court-involved or incarcerated people.
 - Accordingly, use plain language and accessible design for people with low literacy, limited English proficiency, and blind and deaf individuals in any informational materials, government forms, and public outreach efforts of special interest for nonbinary populations.
- Center nonbinary voices in the decision-making process to remedy these issues by hiring nonbinary people for federal government positions and consulting with nonbinary stakeholders whenever there are decisions made that impact nonbinary populations, including when planning and designing research and interpreting data.
- Ensure meaningful consideration and consultation of nonbinary people in equity, civil rights, diversity, and inclusion strategies, policies, and activities, including all efforts pursuant to President Biden’s executive orders and memorandums on LGBTQI+ equality and racial and gender equity,³⁸ including federal workforce DEIA efforts, pursuant to Executive Order 14035.
- Promote nonbinary visibility and leadership through public communications, convenings, reports, and stakeholder engagement.
 - Use public speeches, events, reports, and other opportunities to lift up the stories, voices, and leadership of nonbinary people.
 - Release a statement and social media content recognizing International Nonbinary People’s Day (July 14).
- Adopt rules and guidance expressly clarifying that discrimination on the basis of sex includes discrimination on the basis of sexual orientation, sex stereotypes, sex characteristics, and gender identity, including nonbinary gender identity and failure to conform to sex stereotypes.
 - It is important to include regulatory and preamble language that encompasses genders other than male and female in a broad and flexible way, even if nonbinary people are also named specifically, in order to include people who do not specifically use the word “nonbinary” to describe themselves. This is especially important to account for regional, educational, and cultural differences that may affect the language that community members use.

- For all agencies with civil rights enforcement responsibilities (including but not limited to DOJ/CRT, ED/OCR, HHS/OCR, EEOC, DOL, DHS, HUD, USDA, and CFPB), strategically use the full range of tools available to respond to state and policies laws that openly discriminate against transgender, nonbinary, and intersex people. These tools include strong public statements; expert convenings and stakeholder events; targeted grant funding; grant incentives and requirements; legal, policy, and best practice guidance; training and technical assistance; reports, fact sheets, and research summaries; compliance reviews, directed investigations; statements of interest and *amicus* briefs; pattern or practice investigations; and, where appropriate, affirmative litigation or enforcement actions.
- Make it an agency priority to act on, and publicize, one or more civil rights complaint resolutions, compliance reviews, statements of interest, amicus briefs, or affirmative litigations that squarely address the rights of nonbinary individuals.
- Support and promote federal and state legislation and institutional policies that advance equity for nonbinary people.³⁹
- Include nonbinary people in grant and program priorities, incentives, definitions, and training and technical assistance provisions related to target, priority, or underserved populations.
- Collect, analyze, disaggregate, and report inclusive data related to gender (including nonbinary gender), sexual orientation, and variations in sex characteristics in federal surveys, public health surveillance, electronic health records, and civil rights complaint enforcement.
- Review and consider eliminating (or making optional) mandatory collection or display of personally identifiable gender-related data on ID documents, badges, and similar documents, where not required for programmatic, statistical, or legal compliance purposes. Personally identifiable gender information should be excluded from data matching activities whenever possible.
- Promote universal, gender-neutral design in new or remodeled facilities, especially federal facilities and federally funded construction. In existing single-sex or sex-segregated facilities, clarify that nonbinary, otherwise gender-variant, and intersex individuals should be permitted to use the facilities that they feel most comfortable using at any given time.
- Adopt and promote best practices for gender inclusion in workplaces, schools, social and health services, and other institutions, including:
 - Options to use chosen names and pronouns on ID badges, email addresses, business cards, and directories;
 - Gender-neutral dress codes and grooming policies; and
 - Accessible, privacy-friendly, all-gender facilities.
- Build agency capacity to advance equity for nonbinary and all LGBTQI+ people by:
 - Addressing nonbinary populations in agency strategic planning and outreach.
 - Building subject-matter expertise within agency staff.

- Ensuring staff tasked with equity or LGBTQI+ specific initiatives or issues have adequate capacity, support, and access to decisionmakers, including by establishing well-placed, dedicated staff positions.
- Strengthening coordination between agency leadership and program staff; between career and political staff; and between grantmaking and civil rights offices on equity and LGBTQI+ specific initiatives.
- Prioritizing equity and civil rights initiatives for nonbinary and other LGBTQI+ populations in agency budget requests and discretionary funding.

A. Recommendations for the White House

1. Policy Coordination

- The Domestic Policy Council (DPC), Gender Policy Council (GPC), and National Security Council (NSC) should work with agencies to ensure engagement and full inclusion of nonbinary people in all gender and LGBTQI+ equity efforts, including government-wide strategies and plans, such as the forthcoming *U.S. National Action Plan to End Gender-Based Violence*.
- Work with the General Services Administration (GSA) and other agencies to:
 - Clarify policy guidance and training to ensure equal access to restroom facilities in federal buildings for nonbinary people.
 - Identify and promote inclusive, universal designs for future construction or renovation in federal facilities, including gender-inclusive restroom designs that advance equity, accessibility, and privacy.

2. Presidential Personnel and Federal Workforce

- The Presidential Personnel Office (PPO) and White House Fellows should work proactively to recruit, nominate, and appoint diverse, highly qualified, openly nonbinary individuals throughout the Biden-Harris Administration and to federal boards and commissions.
- The Office of White House Counsel should prioritize identifying diverse, highly qualified individuals to be the first openly bisexual, transgender, nonbinary, or intersex nominees to the federal bench.
- The Domestic Policy Council (DPC) and Gender Policy Council (GPC) should work with OPM, EEOC, National Institute of Standards and Technology (NIST), and other agencies to ensure engagement and full inclusion of nonbinary individuals in recruitment, training, workplace climate, data collection, eliminating barriers to timely name changes in employee records and credentials and other efforts pursuant to the Government-wide Strategic Plan to Advance Diversity, Equity, Inclusion, and Accessibility in the Federal Workforce.
- The Domestic Policy Council (DPC) and Gender Policy Council (GPC) should work with OPM to ensure full implementation of EO 14035's commitment to comprehensive coverage of gender affirming care for federal employees and dependents, including nonbinary individuals

3. Public and Stakeholder Engagement

- The Office of Public Engagement (OPE) and Office of Communications should promote visibility and acceptance of nonbinary people and ensure they are included and highlighted in stakeholder outreach and public events; mentioned in public communications; and considered for civil awards and decorations.
 - OPE should also urge federal agencies to do the same.
- The White House should leverage observances, such as Nonbinary People’s Day (July 14), to promote acceptance and celebrate the contributions of nonbinary people, including through publicized roundtables, livestreamed events, statements, and Presidential proclamations, and urge federal agencies to do the same.

4. Information Management Policies and Practices

- OMB should issue guidance to agencies under the Paperwork Reduction Act and other relevant laws and executive orders, and coordinate with agencies across the government to ensure Fair Information Practice Principles are applied to personally identifiable gender and gender-related data,⁴⁰ and ensure these principles are followed in information collection reviews (ICRS), including:
 - Ensure that administrative forms and data collections that collect or display personally identifiable gender data do so based on self-identification and include appropriate response options for nonbinary individuals.
 - Advise agencies to avoid displaying, disseminating, or matching personally identifiable gender information on a mandatory basis—including gender markers on identification documents—absent a relevant, necessary, and clearly explained purpose, and directs agencies to include justifications for such uses in any information collection request.
 - Reduce unnecessary administrative burdens for individuals changing name information on federal forms and records, including by accepting additional forms of evidence of name change, such as name changes by administrative order, common law, or customary usage.
 - Where appropriate, add fields for chosen or preferred name and for personal pronouns (building on VA’s EHR modernization efforts).
 - Establish procedures and training to ensure use of the chosen or preferred name in customer-service and public-facing contexts, and of the designated pronouns in all contexts.
 - Ensure readability and accessibility and minimize psychological, comprehension, and disability-related burdens for forms collecting this information, including by utilizing behavioral science and conducting user testing that considers the experiences of LGBTQI+ and other marginalized populations as well as the unique contexts of particular programs and forms.⁴¹
 - Individuals should have the ability to opt out of providing their personally identifiable gender information or at least specific uses of their personally identifiable gender information.

- In general, personally identifiable gender information should be collected using a single field wherein individuals designate their gender identity. It is only appropriate to collect more information in clinical settings where a provider needs the information for a specific purpose. For example, it may be appropriate for a provider ask what gender is listed with a health insurance company if the health insurance company requires it to submit a claim. Or, if a doctor wishes to know whether a nonbinary patient should be informed about their risk of prostate or cervical cancer, it may appropriate to collect information about reproductive organs. However, keep in mind that some intersex people may not realize they are intersex and may not know what internal reproductive organs they have.
- Individuals should be provided with the option to have their inputted name and personally identifiable gender information be made portable across federal agencies, systems, credentials, and programs without separate applications. They should be informed about how these data may be used and how these data may be transferred between agencies and/or between the government and the private sector.
- Agencies should communicate their timelines for adopting these changes, as appropriate, through press statements, updates on websites, social media, and public outreach.

B. Recommendations for Department of Justice

- DOJ should ensure that its initiatives, policy reviews, sample policies, training and technical assistance, assessments, and funding opportunities—including but not limited to those developed pursuant to sections 5 and 11 of Executive Order 14075 on LGBTQI Equality—incorporate meaningful consideration, discussion, and inclusion of nonbinary individuals and their needs and rights, including with respect to barriers caused by binary gender-based documentation, facilities, and activities.

1. Regulations

- Consistent with DOJ’s June 2022 memo,⁴² strengthen Safe Streets Act nondiscrimination regulations to provide definitions and clarify protections with respect to:
 - Sexual and gender-based harassment.
 - Discrimination based on sex, including pregnancy, marital or familial status, sex stereotypes, sex characteristics, sexual orientation, or gender identity, including nonbinary gender identity.
 - Employment discrimination in areas such as fringe benefits, job assignments or duties, or workplace dress, grooming, conduct, or other policies.
 - Equal access to single-sex facilities or activities, including for nonbinary individuals.

2. Guidance and Grant Requirements

- Work with ED to supplement updated Title IX rules with guidance on LGBTQI+ students’ rights under Title IX, FERPA, and the Equal Access Act, including examples of discrimination against nonbinary, gender nonconforming, and intersex students.

- Consistent with DOJ’s June 2022 memo, issue robust nondiscrimination guidance and adopt new grant requirements under the Safe Streets Act and related statutes that specifically addresses grantees’ responsibility to prevent discriminatory policies or practices toward nonbinary and other LGBTQI+ populations.
- Direct all DOJ grantmaking offices to adopt grant requirements to demonstrate robust implementation of policies to prohibit, detect, and respond to sexual and gender-based harassment by law enforcement officials, including any form of sexual activity while on duty or using police resources, without exception.
- Expand on recent Office on Violence Against Women (OVW) gender-bias guidance through grant requirements and incentives, and technical assistance to prevent the criminalization of survivors of sexual, domestic, intimate partner, and gender-based violence, and to prevent discrimination against nonbinary and other LGBTQI+ survivors in DOJ-funded programs.⁴³
- The Office of Juvenile Justice and Delinquency Programs (OJJDP) should issue updated guidance and revise its grant requirements and priorities to fully address the rights and needs of LGBTQI+ youth, including with respect to discrimination against nonbinary people.
 - In doing so, the OJJDP should implement the 2016 Federal Advisory Committee on Juvenile Justice recommendations on LGBTQI+ youth.⁴⁴

3. Enforcement and Compliance Activity

- Seek opportunities to file *amicus* briefs or statements of interest in cases that implicate nonbinary people’s rights. Fact patterns to look for include the following:
 - Failure to investigate or take appropriate action regarding allegations of sexual or gender-based harassment or violence, especially in a prison, university, or other institutional setting.
 - Discrimination in discipline, isolation, searches, or institutional practices toward nonbinary individuals in schools, prisons, or other settings.
 - Discriminatory requirements to list a male or female designation on ID documents or official records, and prohibitions on changing sex designations.
 - Discrimination in health coverage or services toward nonbinary people, including with respect to gender-affirming, preventive, or assisted reproduction services.
 - Misgendering or nonconsensual disclosure of gender-related information in violation of Equal Protection, civil rights statutes, or privacy statutes (including with respect to students’ peers or family members).
 - Discrimination against nonbinary people with respect to access to or placement within sex-segregated settings, such as restrooms, changing rooms, shelters, jails, or other residential facilities.
 - Discriminatory single-sex dress codes, classes, or other programs or practices.
 - Claims of sex-based bona fide occupational qualifications (BFOQs) that limit women’s opportunities and/or exclude transgender, nonbinary, and intersex workers.

- Claims of religious or other exemptions from civil rights laws with respect to any of the above or other forms of discrimination against nonbinary people.
- Anticipate future applications of law and legal arguments to nonbinary people when briefing other cases involving sex discrimination or nonbinary-adjacent issues. For example, when briefing matters involving sex-specific or single-sex practices, policies, or spaces, ensure that both the language used and the framing of arguments are consistent with protecting the rights of nonbinary people in subsequent cases.
- CRT, OJP, OVW, and CRS should proactively seek information on the treatment of nonbinary people in compliance reviews and pattern and practice investigations.
 - Steps to consider toward this end include strengthening outreach plans, building on subject-matter expertise, refining systems for collaborating with and sharing information with other agency components, and identifying community-based organizations that can partner with agencies in implementing and supporting the reforms called for in findings and resolutions.

4. Research and Data Collection

- Test and implement demographic measures on nonbinary status in federal surveys and other voluntary data collections.

5. Institutionalizing Equity and Inclusion

- Prioritize increasing capacity for civil rights compliance, coordination, data collection, and equity efforts, including with respect to discrimination on the basis of nonbinary gender identity or sex stereotypes, in agency planning and budget requests for OJP, CRT, OVW, BJS, and other components.

C. Recommendations for Department of Health and Human Services

- HHS should ensure that its initiatives, policy reviews, sample policies, training and technical assistance, assessments, and funding opportunities— including but not limited to those developed pursuant to sections 2 through 7 and 9 through 12 of Executive Order 14075 on LGBTQI Equality—incorporate meaningful consideration, discussion, and inclusion of nonbinary individuals and their needs and rights, including with respect to barriers caused by binary gender-based documentation, facilities, and activities, and with respect to affirming services and care.

1. Regulations

- The Office of Civil Rights (OCR) should adopt robust regulations expressly clarifying that discrimination on the basis of sex under the Affordable Care Act (ACA) includes discrimination on the basis of nonbinary gender identity or sex characteristics as well as discrimination on the basis of failure to conform to sex stereotypes.
 - Regulations and accompanying guidance should expressly prohibit forms of discrimination affecting nonbinary people, including with respect to sex segregation and gender-affirming care.

- HHS should build on the recent Title IX proposed rule by expressly spelling out protections for nonbinary people and avoiding or revising language that unnecessarily assumes a gender binary throughout.
- OCR should work with other agencies to adopt an ACA Section 1557 Common Rule, and to update the Title IX Common Rule, to clarify that sex discrimination includes discrimination on the basis of gender identity, including a nonbinary gender identity as well as discrimination on the basis of failure to conform to sex stereotypes.
- The Office of the Assistant Secretary for Financial Resources (ASFR) should adopt new rules prohibiting discrimination HHS grants, including on the basis of sexual orientation, sex characteristics, sex stereotypes and gender identity, including nonbinary gender identity and nonconformity with sex stereotypes.
- The Center for Medicare and Medicaid Services (CMS) should restore and expand Medicaid, Medicare, and Marketplace nondiscrimination rules to prohibit discrimination based on sexual orientation, sex characteristics, sex stereotypes, and gender identity, including nonbinary gender identity and nonconformity with sex stereotypes.

2. Guidance and Grant Requirements

- OCR should issue interpretive guidance on patients' privacy and nondiscrimination rights under Section 1557, HIPAA, and other laws, including ensuring nonbinary people are not denied clinically appropriate health services or coverage due to gender coding.
- The US Preventive Services Task Force (USPSTF) and Health Resource and Services Administration (HRSA) should ensure all preventive care recommendations—particularly in areas related to sexual or reproductive health—are revised, where appropriate, to make clear that they are fully applicable to nonbinary people and people who otherwise do not conform to sex stereotypes, based on their anatomy or medical history.
- The National Center for Health Statistics (NCHS) should work with the National Committee on Vital and Health Statistics and the Vital Statistics Cooperative Program to promote removal of the sex field from birth certificates,⁴⁵ including through stakeholder engagement, technical assistance, and recommended forms and standards such as the US Standard Certificate of Live Birth (last updated 2003) and the Model State Vital Statistics Act and Regulations (last updated 1992/2011).
- CMS should adopt clear, LGBTQI-inclusive nondiscrimination guidance for Medicaid and Medicare programs, including:
 - Adding LGBTQI-inclusive nondiscrimination language to its Program Manuals, including the Medicare Benefit Policy and Claims Processing Manuals and the State Medicaid Manual.
 - Issuing guidance letters to states broadly addressing the varied forms that sex discrimination can take, including sex stereotyping, discrimination on the basis of sexual orientation, discrimination on the basis of gender identity including nonbinary gender identity, and discrimination on the basis of a failure to conform to sex stereotypes.

- The Center for Consumer Information and Insurance Oversight (CCIIO) should issue guidance to insurers to ensure nonbinary consumers are not denied care due to gender coding.
- The FDA should review and revise its Risk Evaluation and Mitigation Strategies (REMS), where appropriate, to be gender-neutral and use inclusive language.

3. Public Outreach, Engagement, and Education

- HHS's public education, information, and messaging activities, including activities directed at men and women where appropriate, should be inclusive of nonbinary people as well as people who do not otherwise conform to sex stereotypes.
- HHS offices—including but not limited to HRSA, OPA, CDC, and CMS—should create and promote further informational resources for health professionals, patients and families, the health IT industry, and others that address nonbinary people and their health care needs, including but not limited to gender affirming and preventive care.
- The Administration for Children and Families (ACF) should fund targeted projects (including but not limited to demonstration and evaluation grants) to promote family, health care provider, and agency education and acceptance of LGBTQI+ youth, including a meaningful focus on the needs of nonbinary children and children who do not conform to sex stereotypes.
- HHS should take actions to protect informed consent and bodily autonomy and improve care for intersex children and youth, including by:
 - Ensuring Medicaid, CHIP, and other federal funding is not used for non-emergent gonadectomies or other surgeries on intersex children and youth too young to give informed consent or assent.
 - Creating a public education campaign with informational resources for families and health care professionals to promote affirming care and informed consent.
- The CDC should ensure its Health Communication Gateway tools, templates, trainings, campaigns, and other resources include and address transgender, nonbinary, and intersex people.
- CCIIO should ensure that its consumer outreach and assistance efforts—including relevant training, technical assistance webinars, materials, and grant announcements—address outreach to nonbinary and other LGBTQI+ people and their families (including, but not limited to, in LGBTQI+-focused outreach materials).
- The FDA should ensure meaningful inclusion of nonbinary populations in its public health education and other prevention efforts, including campaigns focused on sexual or reproductive health, LGBTQI+ populations, or recruiting for clinical trials (and gender-specific campaigns where appropriate).
- The Substance Abuse and Mental Health Services Administration (SAMSHA) should strengthen health practitioner education and training for working with nonbinary people as well as people who do not conform to sex stereotypes throughout its training, products, publications, and resources.

- SAMSHA’s Evidence-Based Practices Resource Center should create publications and products focused on increasing cultural and clinical competence with nonbinary people as well as people who otherwise do not conform to sex stereotypes.
- SAMHSA, in collaboration with other HHS agencies, should strengthen its efforts to end anti-LGBTQI+ conversion therapy, including issuing a strong updated report that is inclusive of the experiences and needs of nonbinary people.

4. Enforcement and Compliance Activity

- OCR should pursue and publicize directive investigations, complaint resolutions, and compliance reviews that advance the nondiscrimination and privacy rights of nonbinary people.
- CCIIO should incorporate proactive review for discriminatory benefit designs on the basis of sex, including with respect to gender affirming care and gender coding, as part of the Qualified Health Plan certification process.
- ACF should leverage the CMS/ACF Foster Care Learning Collaborative to improve quality of care for LGBTQI+ youth in foster care, building on the March 2022 ACF guidance.
- ACF should considering using the Title IV-E partial review process to request information from states whose public actions raise questions about compliance with statutory requirements with respect to LGBTQI+ youth, as described in the March 2022 guidance.
- The Center for Medicaid and CHIP Services (CMCS) should leverage its quality improvement initiatives to better understand practices of state agencies toward the medical management of nonbinary youth, provide technical assistance, and promote protection of children’s health and rights.

5. Data Collection and Research

- AHRQ, CDC, HRSA, and other HHS agencies should implement the March 2022 National Academies of Sciences, Engineering, and Medicine recommendations for ensuring all HHS surveys and other data collections include effective response options for nonbinary people, including testing specific nonbinary response options.
 - These agencies should also implement the NASEM recommendations to evaluate and add measures on variations in sex characteristics.
- The Office of the Chief Information Officer (OCIO) should work with OCR and other HHS components to review the collection and use of gender-related personally identifiable information (PII) in HHS forms and information collections and ensure compliance with the Fair Information Practice Principles, Privacy Act, Paperwork Reduction Act, and E-Government Act.
- The Assistant Secretary for Planning and Evaluation (ASPE) should include consideration of nonbinary people in health equity and disparities research and, where possible, data analyses in key areas, including mental health and barriers to health care.
- ASPE should produce a report on policy trends and key challenges in health care and coverage for transgender, nonbinary, and intersex people.

- The OS-Patient-Centered Outcomes Research Trust Fund (OS-PCORTF) should support research projects focused on understanding and improving the health of nonbinary people.
- The Administration for Community Living (ACL) should support building a knowledge base for serving older adults and people with disabilities (PWD) who are nonbinary or do not conform to sex stereotypes, including through ensuring meaningful inclusion in research, evaluations, and data collection.
- AHRQ should address nonbinary health disparities in its National Healthcare Quality and Disparities Reports, especially health disparities among multiply marginalized nonbinary people.
- The CDC's Injury Center should promote better understanding of injuries among and violence against nonbinary people through funding, research, and technical assistance.
- NIH, CDC, AHRQ, and FDA should promote meaningful inclusion and identification of patients who are nonbinary in medical studies. These studies should not represent identifying as nonbinary or failure to conform with sex or gender stereotypes as a pathology or symptom of pathology.

6. Institutionalizing Equity and Inclusion

- Prioritize increasing capacity for civil rights compliance, coordination, data collection, and equity efforts, including with respect to discrimination on the basis of nonbinary gender identity or sex stereotypes, in agency planning and budget requests for CMS, CCIIO, ONC, OCR, CDC, NIH, and other components.
- HHS components should seek to recruit qualified nonbinary researchers, health professionals, and community advocates to HHS advisory groups and review panels.
- The Office of the Secretary should make nonbinary health and equity a focus of the Department's LGBTQI+ Policy Coordinating Committee and consider creating a nonbinary subcommittee or working group.
- ACF should strengthen and ensure nonbinary inclusion in broader DEIA and LGBTQI+ equity efforts, including:
 - Funding a National Resource Center for LGBTQI+ Youth;
 - Establishing a Senior Advisor for LGBTQI+ Youth position;
 - Establishing an LGBTQI+ Youth advisory committee;
 - Issuing updated and expanded guidance on nondiscrimination and best practices; and,
 - Establishing training requirements and resources for ACF staff and grantees.
- ACL should promote equity and inclusion for older adults and people with disabilities who are nonbinary or do not conform to sex stereotypes through its grants, training, and technical assistance programs, including the National Resource Center on LGBT Aging and other ACL-funded Resource Centers.
- ASFR should ensure HHS grant announcements, training, and technical assistance address nonbinary people and people who otherwise do not conform to sex stereotypes as

underserved populations, especially in areas such as youth, mental health, sexual health, family planning, social determinants of health, violence prevention, and health disparities.

- The Assistant Secretary for Administration (ASA) should work with other HHS EEO and civil rights offices to ensure all HHS staff and contractors receive relevant training on gender-inclusive practices, including implementing grooming policies that do not reference sex, options to use chosen names and pronouns on ID badges, email addresses, business cards, and directories, and providing accessible, privacy-friendly, all-gender facilities.
- CDC, CMS, and other HHS agencies should name nonbinary individuals as underserved populations in grant programs and funding notices, especially in youth, mental health, sexual health, family planning, social determinants of health, violence prevention, and health disparities.
- The HRSA Bureau of Primary Health Care (BPHC) should ensure its National Training and Technical Assistance Partners (NTTAP) address the needs of nonbinary individuals as underserved populations and consider funding an NTTAP focused on this. BPHC should create, fund, or identify publications and resources to support health centers in serving nonbinary people.
- The Indian Health Service (IHS) should provide training and technical assistance to its staff, contractors, and grantees on cultural and clinical competence with nonbinary and Two-Spirit people.
- IHS should revitalize its LGBTQ-Two Spirit Workgroup, including addressing provider cultural and clinical competence and stakeholder engagement.
- NIH's Sexual & Gender Minority Research Office (SGMRO) should work with the Institutes and Centers to conduct and promote programming and engagement that focuses on and is meaningfully inclusive of nonbinary populations—including highlighting nonbinary researchers and community-based participatory research.
- The Office of Disease Prevention and Health Promotion (ODPHP) should promote nonbinary health through Healthy People 2030 and the LGBT Health Workgroup.
- SAMHSA should ensure its grant announcements, policies, training, and technical assistance efforts name and address the needs of nonbinary people as underserved populations.
- The Assistant Secretary for Legislation (ASL) should ensure inclusion of nonbinary people in HHS's legislative views, priorities, and Congressional reporting and testimony, including, but not limited to, in areas related to sexual and reproductive health, health equity, civil rights, and LGBTQI+ people.
- DASH should promote and incentivize inclusive biology and health education and sexual health services that acknowledge people who do not conform to sex stereotypes and variations in gender expression.

7. Global Health

- The Office of Global Affairs (OGA) should promote the health and rights of nonbinary people, especially traditional or culturally specific gender minority groups, through its global health diplomacy.

D. Recommendations for Department of Education

- ED should ensure that its initiatives, policy reviews, sample policies, training and technical assistance, assessments, and funding opportunities— including but not limited to those developed pursuant to sections 2, 8, and 11 of Executive Order 14075 on LGBTQI Equality—incorporate meaningful consideration, discussion, and inclusion of nonbinary individuals and their needs and rights, including with respect to barriers caused by binary gender-based documentation, facilities, and activities.

1. Regulations

- The Department should swiftly finalize its June 2022 Title IX proposed rules, including:
 - Proposed provisions clarifying that discrimination on the basis of sex includes discrimination on the basis of sexual orientation, gender identity, sex stereotypes, and sex characteristics.
 - Proposed provisions clarifying that Title IX prohibits policies or practices that prevent students from participating in school in accord with their gender identity.
 - Proposed provisions to restore and strengthen definitions, coverage standards, prevention requirements, and procedural protections for survivors of sexual harassment and violence for all students, employees, and members of campus committees.⁴⁶
 - Adding regulatory language or examples to make clear that Title IX prohibits discrimination against nonbinary students, including with respect to otherwise sex-segregated activities; and prohibits the use of gendered names or terms to mock, ridicule, or abuse a student in a manner that limits educational opportunities.
- The Department should swiftly issue additional proposed rules to:
 - Prohibit the exclusion of transgender, nonbinary, or intersex students from playing school sports—including through invasive medical tests, examinations, documentation, or birth or legal documents.
 - Revise the 2020 rules on Title IX’s religious exemption, by (1) requiring institutions to give the Department advance notice of their intention to rely on the exemption, and (2) clarifying the definition schools eligible for the exemption narrowly to effectuate Title IX’s text and purpose.
- The Department should work with DOJ and other agencies to revise the 2001 Title IX Common Rule accordingly to codify core elements of ED’s rule, including protections for LGBTQI+ students.

2. Guidance and Grant Requirements

- OCR should provide clarity that, under Title IX, nonbinary students or employees should be able to use school facilities they determine are most appropriate for them.⁴⁷
- OESE should work with relevant stakeholder organizations and nonbinary people to publish updated best practice resources on supporting LGBTQI+ students that expressly address the needs of nonbinary students.

- OESE should promote equity for nonbinary students through updated guidance, templates, and technical assistance resources on the Every Student Succeeds Act (ESSA) that the needs of LGBTQI+ students, including nonbinary students.
- The Department should identify opportunities to incentivize, or promote privacy-friendly, accessible all-gender facilities based on universal design principles in new construction, remodeling, or renovation projects. For example, the Department could disseminate information about best practices, model building codes, and assessing facility needs in school or other climate surveys.⁴⁸

3. Public Outreach, Engagement, and Education

- Direct all ED grantmaking offices to identify and meaningfully include nonbinary and other LGBTQI+ populations within equity efforts, definitions, and priorities, including through grant requirements, training, and technical assistance activities.
- Grants, publications, resources, and technical assistance should promote science, health, and sex education that recognize people who do not conform to sex stereotypes and variations in gender expression.
- Briefs, guidance, reports, and statements discussing discriminatory state laws and policies regarding sports, school facilities, curricula, student support services, or similar topics should squarely address their impacts on, and best practices for supporting, nonbinary students.
- The Department should promote visibility and acceptance by including nonbinary students and educators' voices and stories in public events, statements, publications, and observances, including by recognizing International Nonbinary People's Day (July 14), and throughout the year.

4. Enforcement and Compliance Activity

- OCR and the Student Privacy Policy Office (SPPO) should pursue and publicize directed investigations, complaint resolutions, and compliance reviews that advance the nondiscrimination and privacy rights of nonbinary students.

5. Research and Data Collection

- The Department should test, add, analyze, and report response options to identify nonbinary individuals.
- The Department should annually report disaggregated OCR complaint data, including disaggregated data on claims involving discrimination based on nonbinary gender identity or status.
- The Department should fund research on the experiences of nonbinary students, including meaningful inclusion and identification in large studies.
- The Department should strengthen the Civil Rights Data Collection (CRDC) by adding a nonbinary response option for all measures of students or staff by sex or gender.

6. Institutionalizing Equity and Inclusion

- Prioritize increasing capacity for civil rights compliance, coordination, data collection, and equity efforts, including with respect to discrimination on the basis of nonbinary gender identity or sex stereotypes, in agency planning and budget requests for OESE, IES, OCR, SPPO, and other components.

E. Recommendations for the Equal Opportunity Employment Commission (EEOC)

- The EEOC should adopt updated formal enforcement guidance on anti-LGBTQI+ discrimination and harassment, including discussion and examples of discrimination against nonbinary workers and workers who do not conform to sex stereotypes.
- The EEOC should revise the informational resources on its website related to discrimination based on sexual orientation, gender identity, sex stereotypes, and sex characteristics to include discussion and examples of discrimination against nonbinary workers and workers who do not conform to sex stereotypes.
- External resources, education, and training for employers and internal training for investigators should include information on best practices for gender inclusion, including:
 - Options to use chosen first names and pronouns on ID badges, email addresses, business cards, and directories;
 - Dress code and grooming policies that do not reference sex;
 - Accessible, privacy-friendly, all-gender facilities; and
 - Coverage for gender-affirming/transgender related care in employee benefit plans.
- The EEOC should pursue and publicize case resolutions, statements of interest, *amicus* briefs, and affirmative litigation on behalf of nonbinary workers and dependents.
- The EEOC should move forward with its Equity Action Plan⁴⁹ by consulting with stakeholders and including gender self-identification response options on EEOC forms that are inclusive of nonbinary people and people who do not conform to sex stereotypes. These efforts should be complemented with broad public education to obtain reliable data, as contemplated in the Equity Action Plan.
- Prioritize increasing capacity for compliance, coordination, data collection, and equity efforts with respect to LGBTQI+ workers, including for nonbinary workers and dependents, in EEOC's Strategic Enforcement Plan and budget requests.

V. Conclusion

This is a pivotal moment for nonbinary people, who face both growing visibility and official recognition and escalating political, legal, and at times violent backlash. The White House and federal agencies have an important role in bolstering legal protections, deepening equity efforts, and sending a message to the public about the acceptance of gender expansive people.

¹ Williams Institute, UCLA School of Law, 1.2 million LGBTQ Adults in the US Identify as Nonbinary, June 22, 2021, <https://williamsinstitute.law.ucla.edu/press/lgbtq-nonbinary-press-release/>; Bianca Wilson & Ilan Meyer, *Nonbinary LGBTQ Adults in the United States*, WILLIAMS INST. (2021), <https://williamsinstitute.law.ucla.edu/publications/nonbinary-lgbtq-adults-us/>.

² People who are not exclusively men or women use a variety of other terms to describe themselves (e.g., genderfluid, genderqueer, gender variant, agender, or bigender). Some terms, such as Two-Spirit, exist within a specific cultural context and must be understood within that context. Indian Health Service, *Two Spirit*, <https://www.ihs.gov/lgbt/health/twospirit/> (last visited April 21, 2022) (“Most Indigenous communities have specific terms in their own languages for the gender-variant members of their communities and the social and spiritual roles these individuals fulfill; with over 500 surviving Native American cultures, attitudes about sex and gender can be very diverse.”).

³ To say that gender categories are socially constructed is not to deny that there are certain biological features that bear a material relationship to familiar sex categories. Rather, gender categories (including a dyadic or binary categorization of gender) are socially constructed because there is no objective physical characteristic or cluster of characteristics that unambiguously demarcates gender boundaries. *See Anatomy Does Not Define Gender: Proposals in the United States to Classify People on the Basis of Anatomy or Genetics Have No Scientific Basis and Should be Scrapped*, 563 NATURE 5 (2018).

⁴ S.E. James et al., *The Report of the 2015 U.S. Transgender Survey*, NAT’L CTR. FOR TRANSGENDER EQUAL., 40 (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>.

⁵ *See* Samantha Mesa-Miles, *Two Spirit: The Trials and Tribulations of Gender Identity in the 21st Century*, INDIAN COUNTRY TODAY (Sept. 13, 2018), <https://indiancountrytoday.com/archive/two-spirit-the-trials-and-tribulations-of-gender-identity-in-the-21st-century?redir=1> (describing “Two Spirit,” a term used in Native American culture to describe a third gender); Núria López Torres, *Intimate Portraits of Mexico’s Third-Gender Muxes*, NEW YORK TIMES (Oct. 26, 2021), <https://www.nytimes.com/2021/09/27/travel/mexico-muxes-third-gender.html> (explaining that the concept of a different or third gender existed in several Indigenous societies across North America); *Hinduism Case Study – Gender*, Harvard Divinity School Religious Literacy Project (2018), https://hwpi.harvard.edu/files/rpl/files/gender_hinduism.pdf?m=1597338930 (describing that Hindu society has long recognized a third gender).

⁶ This document does not account for the culturally specific experiences of Two-Spirit people. A similar discussion about the experiences and needs of Two-Spirit people would require a separate, complete collaboration with Two-Spirit communities, which is beyond the scope of this project.

⁷ *Id.*

⁸ *Id.*

⁹ In a landmark 2015 survey, 12% of nonbinary respondents reported having negative experiences with legal services providers in the past year, compared to 5% of trans women and men. *See* James et al., *supra* note 4.

¹⁰ *Id.*

¹¹ *See* Wilson & Meyer, *supra* note 1.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ A. Russell, Note, *Bostock v. Clayton County: The Implications of a Binary Bias*, 106 CORNELL L. REV. 1601, 1607 (2021).

¹⁶ *See, e.g.*, Senator Ted Cruz, Questions for the Record for Ketanji Brown Jackson, Nominee to be Associate Justice of the United States Supreme Court (2021),

<https://www.judiciary.senate.gov/imo/media/doc/Judge%20Ketanji%20Brown%20Jackson%20Written%20Responses%20to%20Questions%20for%20the%20Record.pdf> (“Do you hold a view on whether the holding expressed by the Supreme Court in the *Bostock v. Clayton County, Ga.* decision encompasses bisexuals and “gender non-binary” individuals? Yes or no?”).

¹⁷ As of June 2022, 18 states have enacted one or more laws targeting transgender, nonbinary, and intersex youth, including five enacting laws or pursuing administrative policies to ban gender-affirming medical care for youth; 18 enacting laws banning youth from school sports; three enacting laws banning youth from school restrooms, and six enacting or maintaining laws banning classroom discussion of transgender or nonbinary identities. One state recently enacted a law banning state agencies from issuing identification with a gender-neutral designation. *See, e.g.*, Movement Advancement Project, Snapshot: LGBTQ Equality State by State, <https://www.lgbtmap.org/equality-maps/equality-maps> (last visited Aug. 9, 2022); American Civil Liberties Union, Legislation Affecting LGBTQ Rights Across the Country, <https://www.aclu.org/legislation-affecting-lgbtq-rights-across-country> (last visited Aug. 9, 2022).

¹⁸ For example, in May and June 2022 the town of Kiel, WI faced numerous bomb threats expressly demanding local officials stop investigating whether a nonbinary student had been harassed by fellow students. The bomb threats led to the cancellation of all remaining in-person classes for the school year. *See Madeline Fox*, Kiel School Board Closes Title IX Investigation Over Wrong Pronouns That Prompted Threats of Violence, WPR, June 3, 2022, <https://www.wpr.org/kiel-school-board-closes-title-ix-investigation-over-wrong-pronouns-prompted-threats-violence>.

¹⁹ For example, a school policy developed with only girls and boys in mind may require nonbinary students to select a “bathroom gender,” which imposes a “Hobson’s choice” by forcing them to choose between two harmful options.

²⁰ *Bostock v. Clayton Cnty.*, 141 S. Ct. 1731, 1737 (2020).

²¹ *Id.* at 1734.

²² *Id.* at 1737.

²³ *Lammers v. Pathways to a Better Life, LLC*, No. 18-C-1579, 2021 WL 3033370, at *2 (E.D. Wis. July 19, 2021).

²⁴ *Cf. Bear Creek Bible Church v. EEOC*, No. 4-18-cv-00824 (N.D. Tex. Nov. 22, 2021) (rejecting argument that *Bostock* does not apply to discrimination based on “bisexual conduct”).

²⁵ *See, e.g., Texas v. EEOC*, No. 2:21-cv-194 (N.D. Tex. May 26, 2022) (describing *Bostock* as holding “gender identity” discrimination prohibited); *Walker v. Azar*, 480 F. Supp. 3d 417, 419 (E.D.N.Y. 2020) (same); *see also* “Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County.*” 86 Fed. Reg. 32637 (June 22, 2021).

²⁶ *Compare Whitaker v. Kenosha Unified School District*, 858 F.3d 1034, 1047 (7th Cir. May 30, 2017) (framing claim as whether “a transgender student who alleges discrimination on the basis of his or her transgender status can state a claim of sex discrimination”), *with id.* at 1051 (“There is no denying that transgender individuals face discrimination, harassment, and violence because of their gender identity.”). *See also* U.S. Department of Justice, Application of *Bostock v. Clayton County* to Title IX of the Education Amendments of 1972 (March 26, 2021).

²⁷ *Id.* at 1742.

²⁸ *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Specifically, the plurality determined that Title VII prohibits employers from denying an employment opportunity to a person because they act in a way that may be considered unacceptable for someone of that gender but would be seen as acceptable for someone of another gender. *See id.* at 1790-91 (stating that a woman cannot be discriminated against for being assertive if a man is praised for this behavior). The Court reasoned that it is not possible for an employer to make an employment decision based on whether an individual conforms to certain sex-based standards (e.g., of personality traits or of conduct) without sex being a but-for cause of that decision. *Id.* at 1784-87.

²⁹ *Id.* at 1741 (“[I]f changing the employee’s sex would have yielded a different choice by the employer...a statutory violation has occurred.”).

³⁰ The Court does not have to mention nonbinary people specifically for the same reasons that there is no “canon of donut holes” in Title VII. *See id.* at 1747 (“[T]here [is not] any such thing as a ‘canon of donut holes,’ in which Congress’s failure to speak directly to a specific case that falls within a more general statutory rule creates a tacit exception.”).

³¹ *See id.* at 1748-49 (“At bottom, the employers’ argument unavoidably comes down to a suggestion that sex must be the sole or primary cause of an adverse employment action for Title VII liability to follow. And, as we’ve seen, that suggestion is at odds with everything we know about the statute.”); *id.* at 1741 (“So an employer

who fires a woman, Hannah, because she is insufficiently feminine and also fires a man, Bob, for being insufficiently masculine may treat men and women as groups more or less equally. But in both cases the employer fires an individual in part because of sex. Instead of avoiding Title VII exposure, this employer doubles it.”).

³² See *id.* at 1742 (“An employer musters no better a defense by responding that it is equally happy to fire male *and* female employees who are homosexual or transgender.”); *id.* at 1749 (“Title VII’s plain terms and our precedents don’t care if an employer treats men and women comparably as groups; an employer who fires both lesbians and gay men equally doesn’t diminish but doubles its liability.”).

³³ 81 Fed. Reg. 31375.

³⁴ See, e.g., *Glenn v. Brumby*, 663 F.3d 1312, 1318-19 (11th Cir. 2011); *Smith v. City of Salem*, 378 F.3d 566, 568 (6th Cir. 2004); see also *Schwenk v. Hartford*, 204 F.3d 1187, 1201-02 (9th Cir. 2000) (holding that a prison guard targeting a transgender woman based on her stereotypically feminine appearance and demeanor constituted sex discrimination under Title VII and the Gender Motivated Violence Act).

³⁵ See, e.g., Department of Labor, Job Corps IN 15-15: FAQs for Ensuring Equal Opportunity for Transgender Applicants and Students (2015), <https://prh.jobcorps.gov/Information%20Notices/Pages/default.aspx?RootFolder=%2FInformation%20Notices%2FPRH%20Information%20Notices%2FPY%2015>; see also New York Division of Human Rights, Guidance on Protections From Gender Identity Discrimination (2020), <https://dhr.ny.gov/genda>; NYC Human Rights Commission, Gender Identity/Gender Expression: Legal Enforcement Guidance (2019), <https://www1.nyc.gov/site/cchr/law/legal-guidances-gender-identity-expression.page>.

³⁶ *Zzyym v. Pompeo*, 341 F. Supp. 3d 1248, 1260 (D. Colo. 2018) (finding Administrative Procedure Act violations and entering injunction), *vacated and remanded*, 958 F.3d 1014 (10th Cir. 2020) (finding APA violations and remanding to agency). While the rulings in this case did not address the merits of the Equal Protection claim, key aspects of the reasoning for the Administrative Procedure Act arbitrariness holdings would have been relevant to the constitutional claim. Cf. *Morris v. Pompeo* No. 19-00569 (D. Nev. Nov. 23, 2020) (finding Equal Protection implicated where a restriction on passport applicant’s gender marker selection, in effect, “only applies to transgender passport applicants”).

³⁷ NYC Human Rights Commission, Gender Identity/Gender Expression: Legal Enforcement Guidance (2019), <https://www1.nyc.gov/site/cchr/law/legal-guidances-gender-identity-expression.page>.

³⁸ These include:

EO 14075 of June 15, 2022 (Advancing Equality for LGBTQI Individuals);
EO 14074 of May 25, 2022 (Advancing Effective, Accountable Policing and Criminal Justice Practices to Enhance Public Trust and Public Safety);
EO 14035 of June 25, 2021 (Diversity, Equity, Inclusion, and Accessibility in the Federal Workforce);
EO 14021 of March 8, 2021 (Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity);
EO 14020 of March 8, 2021 (Establishment of the White House Gender Policy Council);
National Security Memorandum/NSM–4 of February 4, 2021 (Memorandum on Advancing the Human Rights of LGBTQI Persons Around the World);
National Security Memorandum/NSM–3 of February 4, 2021 (Memorandum on Revitalizing America’s Foreign Policy and National Security Workforce, Institutions, and Partnerships);
EO 14010 of February 2, 2021 (Creating a Comprehensive Regional Framework to Address the Causes of Migration, To Manage Migration Throughout North and Central America, and To Provide Safe and Orderly Processing of Asylum Seekers at the United States Border);
EO 14012 of February 2, 2021 (Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans);
EO 13988 of January 20, 2021 (Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation);
EO 13985 of January 20, 2021 (Advancing Racial Equity and Support for Underserved Communities Through the Federal Government).

³⁹ Such as the New York Human Rights Law and student athletics associations that develop policies that protect transgender, nonbinary, and intersex athletes.

⁴⁰ This guidance should build on existing policies and guidance, including OMB M-22-10, Improving Access to Public Benefits Programs Through the Paperwork Reduction Act (Apr. 13, 2022); Presidential Memorandum on Restoring Trust in Government Through Scientific Integrity and Evidence-Based Policymaking (Jan. 27, 2021); OMB Circular A-130, Appx. II: Responsibilities for Managing Personally Identifiable Information (2016).

⁴¹ See, e.g., National Center for Health Statistics, Cognitive Interview Evaluation of X Gender Marker Definitions for the U.S. Passport Application Form (2022), https://www.cdc.gov/Qbank/report/Miller_2022_NCHS_GenderX.pdf.

⁴² Memorandum from Associate Attorney General Vanita Gupta, The Department's Implementation and Administrative Enforcement of Title VI and the Safe Streets Act (June 22, 2022), <https://www.justice.gov/asg/page/file/1514511/download>.

⁴³ Improving Law Enforcement Response to Sexual Assault and Domestic Violence by Identifying and Preventing Gender Bias (Mar. 2022), <https://www.justice.gov/ovw/page/file/1509451/download>.

⁴⁴ Federal Advisory Committee on Juvenile Justice, *Recommendations of the LGBT Subcommittee: Advancing the Reform Process for LGBQ/GNCT Youth in the Juvenile Justice System* (Jan. 12, 2017), <https://facjj.ojp.gov/sites/g/files/xyckuh291/files/media/document/lgbt-recommendations-final-facjj.pdf>.

⁴⁵ If this is not feasible, the sex field should be removed from the public portion of birth certificates.

⁴⁶ LGBTQ+ people experience elevated rates of sexual victimization across their lifespan, including in educational settings. J. Chen et al., *Sexual Violence, Stalking, and Intimate Partner Violence by Sexual Orientation, United States*, 10(1) PSYCHOL. VIOLENCE 110–119 (2020).

⁴⁷ See, e.g., Department of Labor, Job Corps IN 15-15: FAQs for Ensuring Equal Opportunity for Transgender Applicants and Students (2015), <https://prh.jobcorps.gov/Information%20Notices/Pages/default.aspx?RootFolder=%2FInformation%20Notices%2FPRH%20Information%20Notices%2FPY%2015>.

⁴⁸ B. Washick, H.J. Tobin, A. Ridings & T. Juste, *States' Use of the Every Student Succeeds Act to Advance LGBTQ+ Equity: Assessment of State Plans and Recommendations*, GLSEN (2021), <https://www.glsen.org/essa-implementation>.

⁴⁹ Equal Emp. Opportunity Comm'n, *Equity Action Plan in Accordance with Executive Order 13985 – Advancing Racial Equity and Support for Underserved Communities through the Federal Government* (2022).