Sexuality Law (3rd Edition)

2020 Supplement

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Chapter 1 – pages 256-258.

Add a new subsection J to Chapter 1: Interpretation of Sex Discrimination Laws.

Notes on Interpretation of Sex Discrimination Laws on page 256 provides an introduction to the Supreme Court's June 25, 2020, decision in Bostock v. Clayton County, Georgia.

Add the following opinion at page 258:

Gerald Lynn Bostock v. Clayton County, Georgia
Supreme Court of the United States
540 U.S. ___, 2020 U.S. LEXIS 3252 (June 15, 2020)

JUSTICE GORSUCH delivered the opinion of the Court.

Sometimes small gestures can have unexpected consequences. Major initiatives practically guarantee them. In our time, few pieces of federal legislation rank in significance with the Civil Rights Act of 1964. There, in Title VII, Congress outlawed discrimination in the workplace on the basis of race, color, religion, sex, or national origin. Today, we must decide whether an employer can fire someone simply for being homosexual or transgender. The answer is clear. An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.

Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. Likely, they weren't thinking about many of the Act's consequences that have become apparent over the years, including its prohibition against discrimination on the basis of motherhood or its ban on the sexual harassment of male employees. But the limits of the drafters' imagination supply no reason to ignore the law's demands. When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit.

I

Few facts are needed to appreciate the legal question we face. Each of the three cases before us started the same way: An employer fired a long-time employee shortly after the employee revealed that he or she is homosexual or transgender—and allegedly for no reason other than the employee's homosexuality or transgender status.

Gerald Bostock worked for Clayton County, Georgia, as a child welfare advocate. Under his leadership, the county won national awards for its work. After a decade with the county, Mr. Bostock began participating in a gay recreational softball league. Not long after that, influential members of the community allegedly made disparaging comments about Mr. Bostock's sexual orientation and participation in the league. Soon, he was fired for conduct "unbecoming" a county employee.

Donald Zarda worked as a skydiving instructor at Altitude Express in New York. After several seasons with the company, Mr. Zarda mentioned that he was gay and, days later, was fired.

Aimee Stephens worked at R. G. & G. R. Harris Funeral Homes in Garden City, Michigan. When she got the job, Ms. Stephens presented as a male. But two years into her service with the company, she began treatment for despair and loneliness. Ultimately, clinicians diagnosed her with gender dysphoria and recommended that she begin living as a woman. In her sixth year with the company, Ms. Stephens wrote a letter to her employer explaining that she planned to "live and work full-time as a woman" after she returned from an upcoming vacation. The funeral home fired her before she left, telling her "this is not going to work out."

II

This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment. After all, only the words on the page constitute the law adopted by Congress and approved by the President. If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people's representatives. And we would deny the people the right to continue relying on the original meaning of the law they have counted on to settle their rights and obligations.

With this in mind, our task is clear. We must determine the ordinary public meaning of Title VII's command that 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." To do so, we orient ourselves to the time of the statute's adoption, here 1964, and begin by examining the key statutory terms in turn before assessing their impact on the cases at hand and then confirming our work against this Court's precedents.

A

The only statutorily protected characteristic at issue in today's cases is "sex"—and that is also the primary term in Title VII whose meaning the parties dispute. Appealing to roughly contemporaneous dictionaries, the employers say that, as used here, the term "sex" in 1964 referred to "status as either male or female [as] determined by reproductive biology." The employees counter by submitting that, even in 1964, the term bore a broader scope, capturing more than anatomy and reaching at least some norms concerning gender identity and sexual orientation. But because nothing in our approach to these cases turns on the outcome of the parties' debate, and because the employees concede the point for argument's sake, we proceed on the assumption that "sex" signified what the employers suggest, referring only to biological distinctions between male and female. Still, that's just a starting point. The question isn't just what "sex" meant, but what Title VII says about it.

Most notably, the statute prohibits employers from taking certain actions "because of" sex. And, as this Court has previously explained, "the ordinary meaning of 'because of' is 'by

reason of' or 'on account of.'" In the language of law, this means that Title VII's "because of" test incorporates the "'simple'" and "traditional" standard of but-for causation. That form of causation is established whenever a particular outcome would not have happened "but for" the purported cause. In other words, a but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause.

This can be a sweeping standard. Often, events have multiple but-for causes. So, for example, if a car accident occurred both because the defendant ran a red light and because the plaintiff failed to signal his turn at the intersection, we might call each a but-for cause of the collision. When it comes to Title VII, the adoption of the traditional but-for causation standard means a defendant cannot avoid liability just by citing some other factor that contributed to its challenged employment decision. So long as the plaintiff 's sex was one but-for cause of that decision, that is enough to trigger the law . . . .

As sweeping as even the but-for causation standard can be, Title VII does not concern itself with everything that happens "because of" sex. The statute imposes liability on employers only when they "fail or refuse to hire," "discharge," "or otherwise . . . discriminate against" someone because of a statutorily protected characteristic like sex. The employers acknowledge that they discharged the plaintiffs in today's cases but assert that the statute's list of verbs is qualified by the last item on it: "otherwise . . . discriminate against." By virtue of the word otherwise, the employers suggest, Title VII concerns itself not with every discharge, only with those discharges that involve discrimination.

Accepting this point, too, for argument's sake, the question becomes: What did "discriminate" mean in 1964? As it turns out, it meant then roughly what it means today: "To make a difference in treatment or favor (of one as compared with others)." Webster's New International Dictionary 745 (2d ed. 1954). To "discriminate against" a person, then, would seem to mean treating that individual worse than others who are similarly situated. In so-called "disparate treatment" cases like today's, this Court has also held that the difference in treatment based on sex must be intentional. So, taken together, an employer who intentionally treats a person worse because of sex—such as by firing the person for actions or attributes it would tolerate in an individual of another sex—discriminates against that person in violation of Title VII.

At first glance, another interpretation might seem possible. Discrimination sometimes involves "the act, practice, or an instance of discriminating categorically rather than individually." On that understanding, the statute would require us to consider the employer's treatment of groups rather than individuals, to see how a policy affects one sex as a whole versus the other as a whole. That idea holds some intuitive appeal too. Maybe the law concerns itself simply with ensuring that employers don't treat women generally less favorably than they do men. So how can we tell which sense, individual or group, "discriminate" carries in Title VII?

The statute answers that question directly. It tells us three times—including immediately after the words "discriminate against"—that our focus should be on individuals, not groups: Employers may not "fail or refuse to hire or . . . discharge any individual, or otherwise . . .

discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." §2000e-2(a)(1). And the meaning of "individual" was as uncontroversial in 1964 as it is today: "A particular being as distinguished from a class, species, or collection." Webster's New International Dictionary, at 1267. Here, again, Congress could have written the law differently. It might have said that "it shall be an unlawful employment practice to prefer one sex to the other in hiring, firing, or the terms or conditions of employment." It might have said that there should be no "sex discrimination," perhaps implying a focus on differential treatment between the two sexes as groups. More narrowly still, it could have forbidden only "sexist policies" against women as a class. But, once again, that is not the law we have.

The consequences of the law's focus on individuals rather than groups are anything but academic. Suppose an employer fires a woman for refusing his sexual advances. It's no defense for the employer to note that, while he treated that individual woman worse than he would have treated a man, he gives preferential treatment to female employees overall. The employer is liable for treating this woman worse in part because of her sex. Nor is it a defense for an employer to say it discriminates against both men and women because of sex. This statute works to protect individuals of both sexes from discrimination and does so equally. 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.

B

From the ordinary public meaning of the statute's language at the time of the law's adoption, a straightforward rule emerges: An employer violates Title VII when it intentionally fires an individual employee based in part on sex. It doesn't matter if other factors besides the plaintiff's sex contributed to the decision. And it doesn't matter if the employer treated women as a group the same when compared to men as a group. If the employer intentionally relies in part on an individual employee's sex when deciding to discharge the employee—put differently, if changing the employee's sex would have yielded a different choice by the employer—a statutory violation has occurred. Title VII's message is "simple but momentous": An individual employee's sex is "not relevant to the selection, evaluation, or compensation of employees." Price Waterhouse v. Hopkins, 490 U. S. 228, 239 (1989) (plurality opinion).

The statute's message for our cases is equally simple and momentous: An individual's homosexuality or transgender status is not relevant to employment decisions. That's because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex. Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer's mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague. Put differently, the employer intentionally singles out an employee to fire based in part on the

employee's sex, and the affected employee's sex is a but-for cause of his discharge. Or take an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. Again, the individual employee's sex plays an unmistakable and impermissible role in the discharge decision.

That distinguishes these cases from countless others where Title VII has nothing to say. Take an employer who fires a female employee for tardiness or incompetence or simply supporting the wrong sports team. Assuming the employer would not have tolerated the same trait in a man, Title VII stands silent. But unlike any of these other traits or actions, homosexuality and transgender status are inextricably bound up with sex. Not because homosexuality or transgender status are related to sex in some vague sense or because discrimination on these bases has some disparate impact on one sex or another, but because to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex.

Nor does it matter that, when an employer treats one employee worse because of that individual's sex, other factors may contribute to the decision. Consider an employer with a policy of firing any woman he discovers to be a Yankees fan. Carrying out that rule because an employee is a woman and a fan of the Yankees is a firing "because of sex" if the employer would have tolerated the same allegiance in a male employee. Likewise, here. When an employer fires an employee because she is homosexual or transgender, two causal factors may be in play—both the individual's sex and something else (the sex to which the individual is attracted or with which the individual identifies). But Title VII doesn't care. If an employer would not have discharged an employee but for that individual's sex, the statute's causation standard is met, and liability may attach.

Reframing the additional causes in today's cases as additional intentions can do no more to insulate the employers from liability. Intentionally burning down a neighbor's house is arson, even if the perpetrator's ultimate intention (or motivation) is only to improve the view. No less, intentional discrimination based on sex violates Title VII, even if it is intended only as a means to achieving the employer's ultimate goal of discriminating against homosexual or transgender employees. There is simply no escaping the role intent plays here: Just as sex is necessarily a but-for cause when an employer discriminates against homosexual or transgender employees, an employer who discriminates on these grounds inescapably intends to rely on sex in its decisionmaking. Imagine an employer who has a policy of firing any employee known to be homosexual. The employer hosts an office holiday party and invites employees to bring their spouses. A model employee arrives and introduces a manager to Susan, the employee's wife. Will that employee be fired? If the policy works as the employer intends, the answer depends entirely on whether the model employee is a man or a woman. To be sure, that employer's ultimate goal might be to discriminate on the basis of sexual orientation. But to achieve that

purpose the employer must, along the way, intentionally treat an employee worse based in part on that individual's sex.

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. Title VII liability is not limited to employers who, through the sum of all of their employment actions, treat the class of men differently than the class of women. Instead, the law makes each instance of discriminating against an individual employee because of that individual's sex an independent violation of Title VII. So just as an employer who fires both Hannah and Bob for failing to fulfill traditional sex stereotypes doubles rather than eliminates Title VII liability, an employer who fires both Hannah and Bob for being gay or transgender does the same.

At bottom, these cases involve no more than the straightforward application of legal terms with plain and settled meanings. For an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex. That has always been prohibited by Title VII's plain terms—and that "should be the end of the analysis."

C

If more support for our conclusion were required, there's no need to look far. All that the statute's plain terms suggest, this Court's cases have already confirmed. Consider three of our leading precedents.

In Phillips v. Martin Marietta Corp., 400 U. S. 542 (1971) (per curiam), a company allegedly refused to hire women with young children, but did hire men with children the same age. Because its discrimination depended not only on the employee's sex as a female but also on the presence of another criterion—namely, being a parent of young children—the company contended it hadn't engaged in discrimination "because of" sex. The company maintained, too, that it hadn't violated the law because, as a whole, it tended to favor hiring women over men. Unsurprisingly by now, these submissions did not sway the Court. That an employer discriminates intentionally against an individual only in part because of sex supplies no defense to Title VII. Nor does the fact an employer may happen to favor women as a class.

In Los Angeles Dept. of Water and Power v. Manhart, 435 U. S. 702 (1978), an employer required women to make larger pension fund contributions than men. The employer sought to justify its disparate treatment on the ground that women tend to live longer than men, and thus are likely to receive more from the pension fund over time. By everyone's admission, the employer was not guilty of animosity against women or a "purely habitual assumptio[n] about a woman's inability to perform certain kinds of work"; instead, it relied on what appeared to be a statistically accurate statement about life expectancy. Even so, the Court recognized, a rule that appears evenhanded at the group level can prove discriminatory at the level of individuals. True, women as a class may live longer than men as a class. But "[t]he statute's focus on the individual is unambiguous," and any individual woman might make the larger pension contributions and

still die as early as a man. Likewise, the Court dismissed as irrelevant the employer's insistence that its actions were motivated by a wish to achieve classwide equality between the sexes: An employer's intentional discrimination on the basis of sex is no more permissible when it is prompted by some further intention (or motivation), even one as prosaic as seeking to account for actuarial tables. The employer violated Title VII because, when its policy worked exactly as planned, it could not "pass the simple test" asking whether an individual female employee would have been treated the same regardless of her sex.

In Oncale v. Sundowner Offshore Services, Inc., 523 U. S. 75 (1998), a male plaintiff alleged that he was singled out by his male co-workers for sexual harassment. The Court held it was immaterial that members of the same sex as the victim committed the alleged discrimination. Nor did the Court concern itself with whether men as a group were subject to discrimination or whether something in addition to sex contributed to the discrimination, like the plaintiff 's conduct or personal attributes. "[A]ssuredly," the case didn't involve "the principal evil Congress was concerned with when it enacted Title VII." But, the Court unanimously explained, it is "the provisions of our laws rather than the principal concerns of our legislators by which we are governed." Because the plaintiff alleged that the harassment would not have taken place but for his sex—that is, the plaintiff would not have suffered similar treatment if he were female—a triable Title VII claim existed.

The lessons these cases hold for ours are by now familiar.

First, it's irrelevant what an employer might call its discriminatory practice, how others might label it, or what else might motivate it. In Manhart, the employer called its rule requiring women to pay more into the pension fund a "life expectancy" adjustment necessary to achieve sex equality. In Phillips, the employer could have accurately spoken of its policy as one based on "motherhood." In much the same way, today's employers might describe their actions as motivated by their employees' homosexuality or transgender status. But just as labels and additional intentions or motivations didn't make a difference in Manhart or Phillips, they cannot make a difference here. When an employer fires an employee for being homosexual or transgender, it necessarily and intentionally discriminates against that individual in part because of sex. And that is all Title VII has ever demanded to establish liability.

Second, the plaintiff 's sex need not be the sole or primary cause of the employer's adverse action. In Phillips, Manhart, and Oncale, the defendant easily could have pointed to some other, nonprotected trait and insisted it was the more important factor in the adverse employment outcome. So, too, it has no significance here if another factor—such as the sex the plaintiff is attracted to or presents as—might also be at work, or even play a more important role in the employer's decision.

Finally, an employer cannot escape liability by demonstrating that it treats males and females comparably as groups. As Manhart teaches, an employer is liable for intentionally requiring an individual female employee to pay more into a pension plan than a male counterpart even if the scheme promotes equality at the group level. Likewise, an employer who intentionally fires an individual homosexual or transgender employee in part because of that

individual's sex violates the law even if the employer is willing to subject all male and female homosexual or transgender employees to the same rule.

III

What do the employers have to say in reply? For present purposes, they do not dispute that they fired the plaintiffs for being homosexual or transgender. . . . The employers' argument proceeds in two stages. Seeking footing in the statutory text, they begin by advancing a number of reasons why discrimination on the basis of homosexuality or transgender status doesn't involve discrimination because of sex. But each of these arguments turns out only to repackage errors we've already seen and this Court's precedents have already rejected. In the end, the employers are left to retreat beyond the statute's text, where they fault us for ignoring the legislature's purposes in enacting Title VII or certain expectations about its operation. They warn, too, about consequences that might follow a ruling for the employees. But none of these contentions about what the employers think the law was meant to do, or should do, allow us to ignore the law as it is.

A

Maybe most intuitively, the employers assert that discrimination on the basis of homosexuality and transgender status aren't referred to as sex discrimination in ordinary conversation. If asked by a friend (rather than a judge) why they were fired, even today's plaintiffs would likely respond that it was because they were gay or transgender, not because of sex. According to the employers, that conversational answer, not the statute's strict terms, should guide our thinking and suffice to defeat any suggestion that the employees now before us were fired because of sex.

But this submission rests on a mistaken understanding of what kind of cause the law is looking for in a Title VII case. In conversation, a speaker is likely to focus on what seems most relevant or informative to the listener. So an employee who has just been fired is likely to identify the primary or most direct cause rather than list literally every but-for cause. To do otherwise would be tiring at best. But these conversational conventions do not control Title VII's legal analysis, which asks simply whether sex was a but-for cause. . . . You can call the statute's but-for causation test what you will—expansive, legalistic, the dissents even dismiss it as wooden or literal. But it is the law.

Trying another angle, the defendants before us suggest that an employer who discriminates based on homosexuality or transgender status doesn't intentionally discriminate based on sex, as a disparate treatment claim requires. But, as we've seen, an employer who discriminates against homosexual or transgender employees necessarily and intentionally applies sex-based rules. An employer that announces it will not employ anyone who is homosexual, for example, intends to penalize male employees for being attracted to men and female employees for being attracted to women.

What, then, do the employers mean when they insist intentional discrimination based on homosexuality or transgender status isn't intentional discrimination based on sex? Maybe the

employers mean they don't intend to harm one sex or the other as a class. But as should be clear by now, the statute focuses on discrimination against individuals, not groups. Alternatively, the employers may mean that they don't perceive themselves as motivated by a desire to discriminate based on sex. But nothing in Title VII turns on the employer's labels or any further intentions (or motivations) for its conduct beyond sex discrimination. In Manhart, the employer intentionally required women to make higher pension contributions only to fulfill the further purpose of making things more equitable between men and women as groups. In Phillips, the employer may have perceived itself as discriminating based on motherhood, not sex, given that its hiring policies as a whole favored women. But in both cases, the Court set all this aside as irrelevant. The employers' policies involved intentional discrimination because of sex, and Title VII liability necessarily followed.

Aren't these cases different, the employers ask, given that an employer could refuse to hire a gay or transgender individual without ever learning the applicant's sex? Suppose an employer asked homosexual or transgender applicants to tick a box on its application form. The employer then had someone else redact any information that could be used to discern sex. The resulting applications would disclose which individuals are homosexual or transgender without revealing whether they also happen to be men or women. Doesn't that possibility indicate that the employer's discrimination against homosexual or transgender persons cannot be sex discrimination?

No, it doesn't. Even in this example, the individual applicant's sex still weighs as a factor in the employer's decision. Change the hypothetical ever so slightly and its flaws become apparent. Suppose an employer's application form offered a single box to check if the applicant is either black or Catholic. If the employer refuses to hire anyone who checks that box, would we conclude the employer has complied with Title VII, so long as it studiously avoids learning any particular applicant's race or religion? Of course not: By intentionally setting out a rule that makes hiring turn on race or religion, the employer violates the law, whatever he might know or not know about individual applicants.

The same holds here. There is no way for an applicant to decide whether to check the homosexual or transgender box without considering sex. To see why, imagine an applicant doesn't know what the words homosexual or transgender mean. Then try writing out instructions for who should check the box without using the words man, woman, or sex (or some synonym). It can't be done. Likewise, there is no way an employer can discriminate against those who check the homosexual or transgender box without discriminating in part because of an applicant's sex. By discriminating against homosexuals, the employer intentionally penalizes men for being attracted to men and women for being attracted to women. By discriminating against transgender persons, the employer unavoidably discriminates against persons with one sex identified at birth and another today. Any way you slice it, the employer intentionally refuses to hire applicants in part because of the affected individuals' sex, even if it never learns any applicant's sex.

Next, the employers turn to Title VII's list of protected characteristics—race, color, religion, sex, and national origin. Because homosexuality and transgender status can't be found

on that list and because they are conceptually distinct from sex, the employers reason, they are implicitly excluded from Title VII's reach. Put another way, if Congress had wanted to address these matters in Title VII, it would have referenced them specifically.

But that much does not follow. We agree that homosexuality and transgender status are distinct concepts from sex. But, as we've seen, discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second. Nor is there 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. Instead, when Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule. And that is exactly how this Court has always approached Title VII. "Sexual harassment" is conceptually distinct from sex discrimination, but it can fall within Title VII's sweep. Same with "motherhood discrimination." Would the employers have us reverse those cases on the theory that Congress could have spoken to those problems more specifically? Of course not. As enacted, Title VII prohibits all forms of discrimination because of sex, however they may manifest themselves or whatever other labels might attach to them.

The employers try the same point another way. Since 1964, they observe, Congress has considered several proposals to add sexual orientation to Title VII's list of protected characteristics, but no such amendment has become law. Meanwhile, Congress has enacted other statutes addressing other topics that do discuss sexual orientation. This post-enactment legislative history, they urge, should tell us something.

But what? There's no authoritative evidence explaining why later Congresses adopted other laws referencing sexual orientation but didn't amend this one. Maybe some in the later legislatures understood the impact Title VII's broad language already promised for cases like ours and didn't think a revision needed. Maybe others knew about its impact but hoped no one else would notice. Maybe still others, occupied by other concerns, didn't consider the issue at all. All we can know for certain is that speculation about why a later Congress declined to adopt new legislation offers a "particularly dangerous" basis on which to rest an interpretation of an existing law a different and earlier Congress did adopt. Sullivan v. Finkelstein, 496 U. S. 617, 632 (1990) (Scalia, J., concurring) ("Arguments based on subsequent legislative history . . . should not be taken seriously, not even in a footnote").

That leaves the employers to seek a different sort of exception. Maybe the traditional and simple but-for causation test should apply in all other Title VII cases, but it just doesn't work when it comes to cases involving homosexual and transgender employees. The test is too blunt to capture the nuances here. The employers illustrate their concern with an example. When we apply the simple test to Mr. Bostock—asking whether Mr. Bostock, a man attracted to other men, would have been fired had he been a woman—we don't just change his sex. Along the way, we change his sexual orientation too (from homosexual to heterosexual). If the aim is to isolate whether a plaintiff's sex caused the dismissal, the employers stress, we must hold sexual orientation constant—meaning we need to change both his sex and the sex to which he is attracted. So for Mr. Bostock, the question should be whether he would've been fired if he were

a woman attracted to women. And because his employer would have been as quick to fire a lesbian as it was a gay man, the employers conclude, no Title VII violation has occurred.

While the explanation is new, the mistakes are the same. The employers might be onto something if Title VII only ensured equal treatment between groups of men and women or if the statute applied only when sex is the sole or primary reason for an employer's challenged adverse employment action. But both of these premises are mistaken. 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. Just cast a glance back to Manhart, where it was no defense that the employer sought to equalize pension contributions based on life expectancy. Nor does the statute care if other factors besides sex contribute to an employer's discharge decision. Mr. Bostock's employer might have decided to fire him only because of the confluence of two factors, his sex and the sex to which he is attracted. But exactly the same might have been said in Phillips, where motherhood was the added variable.

Still, the employers insist, something seems different here. Unlike certain other employment policies this Court has addressed that harmed only women or only men, the employers' policies in the cases before us have the same adverse consequences for men and women. How could sex be necessary to the result if a member of the opposite sex might face the same outcome from the same policy?

What the employers see as unique isn't even unusual. Often in life and law two but-for factors combine to yield a result that could have also occurred in some other way. Imagine that it's a nice day outside and your house is too warm, so you decide to open the window. Both the cool temperature outside and the heat inside are but-for causes of your choice to open the window. That doesn't change just because you also would have opened the window had it been warm outside and cold inside. In either case, no one would deny that the window is open "because of" the outside temperature. Our cases are much the same. So, for example, when it comes to homosexual employees, male sex and attraction to men are but-for factors that can combine to get them fired. The fact that female sex and attraction to women can also get an employee fired does no more than show the same outcome can be achieved through the combination of different factors. In either case, though, sex plays an essential but-for role.

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.

B

Ultimately, the employers are forced to abandon the statutory text and precedent altogether and appeal to assumptions and policy. Most pointedly, they contend that few in 1964 would have expected Title VII to apply to discrimination against homosexual and transgender persons. And whatever the text and our precedent indicate, they say, shouldn't this fact cause us to pause before recognizing liability?

It might be tempting to reject this argument out of hand. This Court has explained many times over many years that, when the meaning of the statute's terms is plain, our job is at an end. The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration. Of course, some Members of this Court have consulted legislative history when interpreting ambiguous statutory language. But that has no bearing here. "Legislative history, for those who take it into account, is meant to clear up ambiguity, not create it." Milner v. Department of Navy, 562 U. S. 562, 574 (2011). And as we have seen, no ambiguity exists about how Title VII's terms apply to the facts before us. To be sure, the statute's application in these cases reaches "beyond the principal evil" legislators may have intended or expected to address. But "'the fact that [a statute] has been applied in situations not expressly anticipated by Congress'" does not demonstrate ambiguity; instead, it simply "'demonstrates [the] breadth'" of a legislative command. Sedima, S. P. R. L. v. Imrex Co., 473 U. S. 479, 499 (1985). And "it is ultimately the provisions of" those legislative commands "rather than the principal concerns of our legislators by which we are governed." Oncale, 523 U. S., at 79; see also A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 101 (2012) (noting that unexpected applications of broad language reflect only Congress's "presumed point [to] produce general coverage—not to leave room for courts to recognize ad hoc exceptions").

Still, while legislative history can never defeat unambiguous statutory text, historical sources can be useful for a different purpose: Because the law's ordinary meaning at the time of enactment usually governs, we must be sensitive to the possibility a statutory term that means one thing today or in one context might have meant something else at the time of its adoption or might mean something different in another context. And we must be attuned to the possibility that a statutory phrase ordinarily bears a different meaning than the terms do when viewed individually or literally. To ferret out such shifts in linguistic usage or subtle distinctions between literal and ordinary meaning, this Court has sometimes consulted the understandings of the law's drafters as some (not always conclusive) evidence.

The employers, however, advocate nothing like that here. They do not seek to use historical sources to illustrate that the meaning of any of Title VII's language has changed since 1964 or that the statute's terms, whether viewed individually or as a whole, ordinarily carried some message we have missed. To the contrary, as we have seen, the employers agree with our understanding of all the statutory language— "discriminate against any individual . . . because of such individual's . . . sex." Nor do the competing dissents offer an alternative account about what these terms mean either when viewed individually or in the aggregate. Rather than suggesting that the statutory language bears some other meaning, the employers and dissents merely suggest that, because few in 1964 expected today's result, we should not dare to admit that it follows ineluctably from the statutory text. When a new application emerges that is both unexpected and important, they would seemingly have us merely point out the question, refer the subject back to Congress, and decline to enforce the plain terms of the law in the meantime.

That is exactly the sort of reasoning this Court has long rejected. Admittedly, the employers take pains to couch their argument in terms of seeking to honor the statute's

"expected applications" rather than vindicate its "legislative intent." But the concepts are closely related. One could easily contend that legislators only intended expected applications or that a statute's purpose is limited to achieving applications foreseen at the time of enactment. However framed, the employer's logic impermissibly seeks to displace the plain meaning of the law in favor of something lying beyond it.

If anything, the employers' new framing may only add new problems. The employers assert that "no one" in 1964 or for some time after would have anticipated today's result. But is that really true? Not long after the law's passage, gay and transgender employees began filing Title VII complaints, so at least some people foresaw this potential application. And less than a decade after Title VII's passage, during debates over the Equal Rights Amendment, others counseled that its language—which was strikingly similar to Title VII's—might also protect homosexuals from discrimination. See, e.g., Note, The Legality of Homosexual Marriage, 82 Yale L. J. 573, 583-584 (1973).

Why isn't that enough to demonstrate that today's result isn't totally unexpected? How many people have to foresee the application for it to qualify as "expected"? Do we look only at the moment the statute was enacted, or do we allow some time for the implications of a new statute to be worked out? Should we consider the expectations of those who had no reason to give a particular application any thought or only those with reason to think about the question? How do we account for those who change their minds over time, after learning new facts or hearing a new argument? How specifically or generally should we frame the "application" at issue? None of these questions have obvious answers, and the employers don't propose any.

One could also reasonably fear that objections about unexpected applications will not be deployed neutrally. Often lurking just behind such objections resides a cynicism that Congress could not possibly have meant to protect a disfavored group. . . . [A]pplying protective laws to groups that were politically unpopular at the time of the law's passage — whether prisoners in the 1990s or homosexual and transgender employees in the 1960s — often may be seen as unexpected. But to refuse enforcement just because of that, because the parties before us happened to be unpopular at the time of the law's passage, would not only require us to abandon our role as interpreters of statutes; it would tilt the scales of justice in favor of the strong or popular and neglect the promise that all persons are entitled to the benefit of the law's terms.

The employer's position also proves too much. If we applied Title VII's plain text only to applications some (yet-to-be-determined) group expected in 1964, we'd have more than a little law to overturn. Start with Oncale. How many people in 1964 could have expected that the law would turn out to protect male employees? Let alone to protect them from harassment by other male employees? As we acknowledged at the time, "male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII." Yet the Court did not hesitate to recognize that Title VII's plain terms forbade it. Under the employer's logic, it would seem this was a mistake.

That's just the beginning of the law we would have to unravel. As one Equal Employment Opportunity Commission (EEOC) Commissioner observed shortly after the law's

passage, the words of "'the sex provision of Title VII [are] difficult to . . . control.'" Franklin, Inventing the "Traditional Concept" of Sex Discrimination, 125 Harv. L. Rev. 1307, 1338 (2012) (quoting Federal Mediation Service to Play Role in Implementing Title VII, [1965-1968 Transfer Binder] CCH Employment Practices ¶8046, p. 6074). The "difficult[y]" may owe something to the initial proponent of the sex discrimination rule in Title VII, Representative Howard Smith. On some accounts, the congressman may have wanted (or at least was indifferent to the possibility of) broad language with wide-ranging effect. Not necessarily because he was interested in rooting out sex discrimination in all its forms, but because he may have hoped to scuttle the whole Civil Rights Act and thought that adding language covering sex discrimination would serve as a poison pill. Certainly nothing in the meager legislative history of this provision suggests it was meant to be read narrowly.

Whatever his reasons, thanks to the broad language Representative Smith introduced, many, maybe most, applications of Title VII's sex provision were "unanticipated" at the time of the law's adoption. In fact, many now-obvious applications met with heated opposition early on, even among those tasked with enforcing the law. In the years immediately following Title VII's passage, the EEOC officially opined that listing men's positions and women's positions separately in job postings was simply helpful rather than discriminatory. Some courts held that Title VII did not prevent an employer from firing an employee for refusing his sexual advances. And courts held that a policy against hiring mothers but not fathers of young children wasn't discrimination because of sex.

Over time, though, the breadth of the statutory language proved too difficult to deny. By the end of the 1960s, the EEOC reversed its stance on sex-segregated job advertising. In 1971, this Court held that treating women with children differently from men with children violated Title VII. And by the late 1970s, courts began to recognize that sexual harassment can sometimes amount to sex discrimination. While to the modern eye each of these examples may seem "plainly [to] constitut[e] discrimination because of biological sex," all were hotly contested for years following Title VII's enactment. And as with the discrimination we consider today, many federal judges long accepted interpretations of Title VII that excluded these situations. Would the employers have us undo every one of these unexpected applications too?

The weighty implications of the employers' argument from expectations also reveal why they cannot hide behind the no-elephants-in-mouseholes canon. That canon recognizes that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions." Whitman v. American Trucking Assns., Inc., 531 U. S. 457, 468 (2001). But it has no relevance here. We can't deny that today's holding—that employers are prohibited from firing employees on the basis of homosexuality or transgender status—is an elephant. But where's the mousehole? Title VII's prohibition of sex discrimination in employment is a major piece of federal civil rights legislation. It is written in starkly broad terms. It has repeatedly produced unexpected applications, at least in the view of those on the receiving end of them. Congress's key drafting choices—to focus on discrimination against individuals and not merely between groups and to hold employers liable whenever sex is a but-for cause of the plaintiff 's

injuries—virtually guaranteed that unexpected applications would emerge over time. This elephant has never hidden in a mousehole; it has been standing before us all along.

With that, the employers are left to abandon their concern for expected applications and fall back to the last line of defense for all failing statutory interpretation arguments: naked policy appeals. If we were to apply the statute's plain language, they complain, any number of undesirable policy consequences would follow. Gone here is any pretense of statutory interpretation; all that's left is a suggestion we should proceed without the law's guidance to do as we think best. But that's an invitation no court should ever take up. The place to make new legislation, or address unwanted consequences of old legislation, lies in Congress. When it comes to statutory interpretation, our role is limited to applying the law's demands as faithfully as we can in the cases that come before us. As judges we possess no special expertise or authority to declare for ourselves what a self-governing people should consider just or wise. And the same judicial humility that requires us to refrain from adding to statutes requires us to refrain from diminishing them.

What are these consequences anyway? The employers worry that our decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination. And, under Title VII itself, they say sex-segregated bathrooms, locker rooms, and dress codes will prove unsustainable after our decision today. But none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today. Under Title VII, too, we do not purport to address bathrooms, locker rooms, or anything else of the kind. The only question before us is whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual "because of such individual's sex." As used in Title VII, the term "'discriminate against'" refers to "distinctions or differences in treatment that injure protected individuals." Firing employees because of a statutorily protected trait surely counts. Whether other policies and practices might or might not qualify as unlawful discrimination or find justifications under other provisions of Title VII are questions for future cases, not these.

Separately, the employers fear that complying with Title VII's requirement in cases like ours may require some employers to violate their religious convictions. We are also deeply concerned with preserving the promise of the free exercise of religion enshrined in our Constitution; that guarantee lies at the heart of our pluralistic society. But worries about how Title VII may intersect with religious liberties are nothing new; they even predate the statute's passage. As a result of its deliberations in adopting the law, Congress included an express statutory exception for religious organizations. §2000e-1(a). This Court has also recognized that the First Amendment can bar the application of employment discrimination laws "to claims concerning the employment relationship between a religious institution and its ministers." Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 565 U. S. 171, 188 (2012). And Congress has gone a step further yet in the Religious Freedom Restoration Act of 1993 (RFRA), 42 U. S. C. §2000bb et seq. That statute prohibits the federal government from substantially burdening a person's exercise of religion unless it demonstrates that doing so both furthers a compelling governmental interest and represents the least restrictive means of

furthering that interest. §2000bb-1. Because RFRA operates as a kind of super statute, displacing the normal operation of other federal laws, it might supersede Title VII's commands in appropriate cases. See §2000bb-3.

But how these doctrines protecting religious liberty interact with Title VII are questions for future cases, too. Harris Funeral Homes did unsuccessfully pursue a RFRA-based defense in the proceedings below. In its certiorari petition, however, the company declined to seek review of that adverse decision, and no other religious liberty claim is now before us. So, while other employers in other cases may raise free exercise arguments that merit careful consideration, none of the employers before us today represent in this Court that compliance with Title VII will infringe their own religious liberties in any way.

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. . . Ours is a society of written laws. Judges are not free to overlook plain statutory commands on the strength of nothing more than suppositions about intentions or guesswork about expectations. In Title VII, Congress adopted broad language making it illegal for an employer to rely on an employee's sex when deciding to fire that employee. We do not hesitate to recognize today a necessary consequence of that legislative choice: An employer who fires an individual merely for being gay or transgender defies the law.

Notes and Questions

1. Chief Justice Roberts and Associate Justices Ginsburg, Breyer, Sotomayor and Kagan signed Justice Gorsuch's opinion. Justice Alito dissented, joined by Justice Thomas, and Justice Kavanaugh wrote a separate dissent. Justice Gorsuch's opinion summarizes and replies to many of the dissenters' arguments. The essence of the dissenters' arguments can be boiled down to a simple proposition: If a textualist approach to statutory interpretation means a search for the "ordinary public meaning of its terms at the time of its enactment," then the word "sex" in the list of forbidden grounds for employment discrimination in Title VII could not possibly include discrimination against somebody because they are gay or transgender because nobody would have thought that in 1964, given the general hostility to gay and transgender people at that time. Are you satisfied with Justice Gorsuch's response to that objection?

2. Justice Kavanaugh pointed out in dissent that thirty federal judges in Court of Appeals decisions from ten circuits had unanimously rejected the claim that Title VII bans discrimination because of sexual orientation until the recent *en banc* decisions by the 7th and 2nd Circuits that created the circuit split now resolved by this opinion. He rejected the likelihood that so many federal judges could have missed a "clear" meaning if it was, indeed, clear. He also suggested that Justice Gorsuch's approach was too literalistic:

> "For the sake of argument, I will assume that firing someone because of their sexual orientation may, as a very literal matter, entail making a distinction based on sex," he wrote. "But to prevail in this case with their literalist approach, the plaintiffs must also establish one of two other points. The plaintiffs must establish that courts, when interpreting a statute, adhere to literal meaning rather than ordinary meaning. Or alternatively, the plaintiffs must establish that the ordinary meaning of 'discriminate because of sex'"—not just the literal meaning—encompasses sexual orientation discrimination."

Thus, he explained how he and Gorsuch – both self-proclaimed "textualists" -- could come to opposite conclusions about the meaning of the text, and showed that textualism, as such, does not inevitably lead to one particular result when a court attempts to interpret a statute.

3. In 2013 (the Macy gender identity case, see Chapter 3, page 413) and 2015 (the Baldwin sexual orientation case, see Chapter 2, page 308), the Equal Employment Opportunity Commission (EEOC), the federal agency charged with administration of Title VII, reversed its earlier position and agreed that Title VII had the meaning that Justice Gorsuch attributes to it. These administrative rulings were not binding on the courts, however, having been adopted in the adjudication of federal employee discrimination cases rather than in regulations. They both mentioned a textualist reading, but also invoked a sex stereotype theory derived from Price Waterhouse v. Hopkins, and an associational theory derived from cases recognizing as race discrimination an employer firing an employee for being in an interracial relationship. Justice Gorsuch does not rely on the EEOC decisions or these other theories in his opinion. Justice Alito's dissent describes and specifically rejects these other two theories.

4. Justice Alito's dissent emphasizes many questions left unanswered by the Court's opinion, such as the potential religious freedom defense employers may raise under the Religious Freedom Restoration Act (RFRA), or the question whether transgender employees will be entitled under Title VII to use workplace restrooms and locker rooms consistent with their gender identity. The EEOC has answered the restroom question affirmatively, but its ruling is not binding on the courts. As to the religious freedom claim, Justice Gorsuch wrote that this issue was not presented to the Court by the employers in Bostock, Zarda, or Harris Funeral Homes, but that RFRA might provide a defense to an employer in an appropriate case in the future. The 6th Circuit's opinion in Harris Funeral Home devotes a section to analyzing and rejecting the employer's RFRA defense in that case, which we omitted in the version of the opinion presented in Chapter 3 of the Casebook. We have now extracted that portion of the 6th Circuit's opinion and included it in this supplement as an addition to Chapter 2, to be inserted at page 358.

5. While the Court's opinion in Bostock was pending, the Court granted a petition for certiorari in Fulton v. City of Philadelphia, 922 F.3d 140 (3rd Cir. 2019), a case presenting

the question whether a city violated the 1st Amendment free exercise rights of a religious child welfare agency when the city ended the agency's authorization to certify applicants to be foster parents because the agency refused to evaluate married same-sex couples. Will an opinion in Fulton have any bearing on employer free exercise claims mentioned by Alito? The court of appeals ruling in Fulton can be found in this 2020 Supplement as an addition to Chapter 2(D).

6. Justice Gorsuch mentions that other provisions of Title VII may come into play in determining whether differential treatment of employees because they are LGBT violates Title VII. Most significantly, as to hiring, in 42 U.S.C. Section 2000e-2(e), Congress provided employers with an affirmative defense called the "bona fide occupational qualification" defense, referred to by employment lawyers as the BFOQ defense. If sex is a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise," an employer may take sex into account in deciding whom to hire. The Supreme Court has found that this is a very narrow defense, placing the burden on the employer to prove that it must exclude people on the basis of their sex in order for their enterprise to operate. Can you think of any examples where not being LGBT would be a bona fide occupational qualification?

7. Justice Alito noted that more than 100 federal statutes forbid sex discrimination in some particular context. Perhaps the most notable are the Fair Housing Act, Title IX of the Education Amendments Act, the Affordable Care Act (incorporating by reference Title IX), and the Equal Credit Opportunity Act. Is he correct in suggesting that the Court's decision in Bostock necessarily applies to such other federal statutes? Justice Alito helpfully appended a list of relevant federal statutes to his dissent. While the Bostock decision was pending, the U.S. Court of Appeals for the 8th Circuit was considering the question whether the Fair Housing Act's prohibition of sex discrimination would extend to a claim by a married lesbian couple denied housing by an adult retirement home. Walsh v. Friendship Village, 352 F.Supp.3d 920 (E.D. Mo. 2019). The district court had dismissed the FHA claim, based on an 8th Circuit Title VII precedent rejecting sexual orientation discrimination claims. The 8th Circuit panel put the case "on hold" after holding argument, pending a ruling in Bostock. After the Bostock decision, the 8th Circuit panel remanded the case to the district court with instructions to reconsider its decision in light of Bostock. Numerous lower federal courts have held that transgender students are protected from discrimination under Title IX of the Education Amendments of 1972. See, e.g., Whitaker v. Kenosha Unified School District No. 1 Board of Education, 858 F.3d 1034 (7th Cir. 2017) (Chapter 3, p. 457); Parents for Privacy v. Barr, 949 F.3d 1210 (9th Cir., February 12, 2020); Doe v. Boyertown Area School District, 897 F.3d 518 (3rd Cir. 2018), cert. denied, 139 S. Ct. 2636 (2019).

8. Title VII applies to non-governmental employers with at least 15 employees, as well as state and federal employees, but not elected officials or uniformed military personnel. The majority of private sector workers in the United States are employed in businesses

with fewer than 15 employees. Most state and local employment discrimination laws extend to smaller companies not covered by Title VII. Fewer than half the states specifically include sexual orientation or gender identity in their anti-discrimination laws, but all of them include sex. The state laws generally cover, in addition to employment, places of public accommodation, housing, and public services. While the U.S. Supreme Court's interpretation of Title VII is not binding on state and local courts and agencies interpreting their state or local laws, many jurisdictions treat Title VII rulings as authoritative. In an opinion issued shortly after Bostock, Nance v. Lima Auto Mall, Inc., 2020-Ohio-3419 (June 22, 2020), the Court of Appeals of Ohio explained: "Since the Ohio Supreme Court has held that federal case law is 'generally applicable to cases involving alleged violations of R.C. Chapter 4112,' the type of claim that Angelina raises herein [conceptually a sexual orientation discrimination claim] could potentially have a basis in law under Bostock." Prior to Bostock, state civil rights agencies in Pennsylvania and Michigan had interpreted their state sex discrimination laws to cover sexual orientation claims. Thus, the Bostock ruling may affect not only other federal sex discrimination laws but also state and local sex discrimination laws.

9. To what extent will Bostock affect the level of judicial review afforded under the Equal Protection requirements of the 5th and the 14th Amendments to federal or state government policies that discriminate against LGBT people? While Bostock was pending, five federal district courts had lawsuits challenging the Trump Administration's adoption of a policy sharply limiting military service by transgender people. Plaintiffs challenging the policy rely principally on the 5th Amendment's equal protection requirement. (See Chapter 3, page 491, and additions to Chapter 3 in this Supplement.)

10. The Bostock dissenters insisted that the Court was "legislating" rather than interpreting. "Who decides" whether federal law protects LGBT people from discrimination, asked Justice Kavanaugh, contending that this is a policy decision for Congress. Nonetheless, he was moved at the end of his dissent to salute this "victory" – at least for lesbians and gay men. "Notwithstanding my concern about the Court's transgression of the Constitution's separation of powers, it is appropriate to acknowledge the important victory achieved today by gay and lesbian Americans. Millions of gay and lesbian Americans have worked hard for many decades to achieve equal treatment in fact and in law. They have exhibited extraordinary vision, tenacity, and grit—battling often steep odds in the legislative and judicial arenas, not to mention in their daily lives. They have advanced powerful policy arguments and can take pride in today's result. Under the Constitution's separation of powers, however, I believe that it was Congress's role, not this Court's, to amend Title VII. I therefore must respectfully dissent from the Court's judgment." Perhaps his omission of transgender people from this quotation is inadvertent, but his dissent focuses narrowly on sexual orientation.

11. In hostile environment sexual harassment cases under Title VII, lower courts are divided about whether that theory can be used to subject an employer to liability when a bully is a

so-called “equal opportunity harasser” who harasses both men and women. Some courts say that such a bully is not discriminating “because of sex” and thus his or her conduct is not forbidden under Title VII. Others find that the conduct can be actionable if it is “of a sexual nature.” Does Bostock put an end to the argument? Consider the following from Justice Gorsuch’s opinion: “This statute works to protect individuals of both sexes from discrimination and does so equally. 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.” Does this resolve the argument on “equal opportunity” sexual harassers?

Chapter 2 – Claimed Constitutional Exemptions from Compliance with Anti-Discrimination Laws – Religious Freedom and Free Speech Claims, page 358

As noted in the Casebook, after the Obergefell decision, the tension between 1st Amendment free exercise of religion and free speech principles and the requirements of public accommodation laws and policies that prohibited sexual orientation discrimination produced intense legal battles. The Supreme Court had denied review to the New Mexico Supreme Court's decision in the pre-Obergefell Elaine Photography case (Page 344), but subsequently agreed to review the Masterpiece Cakeshop litigation from Colorado, concerning a baker's refusal to produce a custom-designed wedding cake for a same-sex couple. In the event, the Supreme Court's ruling, summarized in Chapter 1, evaded the underlying questions of either a religious exemption or a free exemption – both claims being presented in the case – by focusing on the Court's concern that the baker had not received the benefit of a "neutral forum" to decide his case.

The Court will take another crack at the issues in a different context during the October 2020 Term in Fulton v. City of Philadelphia, in which a Catholic social services agency does battle with the City of Philadelphia over the City's insistence that an agency must be willing to provide services to same-sex couples as a condition to participate in the City's foster care system. In another dispute that replays the Masterpiece Cakeshop controversy in a different context, the 8th Circuit revives a videographer's claim to a First Amendment free speech right to refuse to make wedding videos for same-sex marriages, and to state that exclusion on their website. Enough similar cases have arisen to suggest that eventually the Supreme Court will have to take on another version of Masterpiece Cakeshop.

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Fulton v. City of Philadelphia
922 F.3d 140 (3rd Cir. 2019), cert. granted, February 24, 2020

Thomas L. Ambro, Circuit Judge.

I. Background

Catholic Social Services is a religious non-profit organization affiliated with the Archdiocese of Philadelphia that provides foster care services in Philadelphia. Created in 1917 as the Catholic Children's Bureau, it is part of a tradition of caring for children in need that stretches back even further, to the yellow fever outbreak of 1797. As an affiliate of the Catholic Church, CSS sees caring for vulnerable children as a core value of the Christian faith and therefore views its foster care work as part of its religious mission and ministry. When the Catholic Children's Bureau was founded, foster care was handled on a private basis, but over the following century that changed. Today that care is comprehensively regulated both by the Commonwealth of Pennsylvania and by the City of Philadelphia.

The Commonwealth, the City, and the private foster care agencies each play a role in the Philadelphia foster care system. State regulations set the criteria people or families must meet to

become foster parents, as well as the duties of both foster parents and foster care agencies. Those agencies then develop relationships with individual foster families, which begin when a family approaches an agency seeking to become foster parents. It must evaluate the applicants under the Commonwealth's criteria to determine whether they would be suitable candidates. One criterion concerns the "[e]xisting family relationships, attitudes and expectations regarding the applicant's own children and parent/child relationship, especially as they might affect a foster child."

When a child in need of foster care comes into the City's custody, Human Services refers that child to one of the foster care agencies with which it has a contractual relationship. Once the City refers a child to an agency, that agency selects an appropriate foster parent for the child, although Human Services can oppose a child's placement with a particular foster parent if necessary.

At the outset of this litigation, the City of Philadelphia had contracts with 30 foster care agencies, including CSS. These are one-year contracts renewed on an annual basis. Agencies are compensated by the City for their services; CSS's contract provided for a per diem rate for each child placed in one of its affiliated foster homes. This payment did not cover its full expenses, meaning that CSS operated at a loss. The contract required it to certify its foster parents in accord with state regulations but did not otherwise impose conditions on the certification process. It did, however, include language prohibiting CSS from discriminating due to race, color, religion, or national origin, and it incorporated the City's Fair Practices Ordinance, which in part prohibits sexual orientation discrimination in public accommodations.

This last requirement, and the parties' differing understandings of it, led to this controversy. CSS takes the position that it cannot certify a same-sex married couple as foster parents consistent with its religious views. As an affiliate of the Catholic Church, CSS adheres to the belief that marriage is between a man and a woman. It is not unwilling to work with LGBTQ individuals as foster parents. However, state regulations require it to consider an applicant's "existing family relationships" as part of the certification process. In applying this criterion, CSS will only certify foster parents who are either married or single; it will not certify cohabitating unmarried couples, and it considers all same-sex couples to be unmarried. So far as the record reflects, no same-sex couples have approached CSS seeking to become foster parents.

On March 9, 2018, a reporter from the Philadelphia Inquirer called Human Services and stated that two of the City's foster care agencies, CSS and Bethany Christian Services, would not work with same-sex couples as foster parents. The Inquirer published an article to this effect on March 13, 2018. In response, the Commissioner of Human Services, Cynthia Figueroa, called officials at both CSS and Bethany Christian asking if this report was true. Both organizations confirmed the report. James Amato, the Secretary of CSS, told Commissioner Figueroa that his agency would not certify same-sex couples because it was against the Church's views on marriage and, when told this was discrimination, replied that he was merely following the teachings of the Catholic Church. Commissioner Figueroa then called a number of other foster care agencies asking whether they had similar policies; none did. All but one of the other agencies Figueroa called were religiously affiliated. As for the one secular agency, she testified that she had a "good relationship" with its CEO.

Shortly thereafter, Amato attended a meeting with Figueroa in an unsuccessful attempt to resolve the impasse. At this meeting, Amato invoked CSS's hundred-year history of providing services to the City. Figueroa responded by noting that times had changed over the course of that relationship, that women and African-Americans did not have the same rights when it started, and that she herself would likely not have been in her position a century earlier. Figueroa, who is Catholic and Jesuit-educated, also remarked to Amato that it would be great if CSS could follow the teachings of Pope Francis. Amato later testified that Figueroa specifically stated that CSS should follow Pope Francis as opposed to the Archdiocese of Philadelphia or its Archbishop Charles J. Chaput; Figueroa denied mentioning anyone other than Pope Francis. Figueroa also indicated to Amato that the matter had the attention of the highest levels of City government, by which she testified she meant herself, her chain of command, and ultimately Mayor James Kenney. She also testified that prior to this meeting she spoke briefly with the Mayor; she told him that she was working to address the issue and would brief him after more decisions had been made.

Immediately after his meeting with Figueroa, Amato received a phone call from a representative of Human Services who informed him that it would no longer refer new foster children to CSS, a policy known as an "intake freeze." Figueroa testified that she implemented the freeze because of her serious concern that CSS's relationship with Human Services might end in the near future. Given the preference for stability in placing foster care children, she did not want to send any new children to an agency they might well have to leave in a matter of months. This was not the first time Human Services had instituted an intake freeze out of a concern that it might not be able to continue working with a given agency. The freeze nonetheless did not affect children already placed with CSS.

Nor did it affect other aspects of CSS's relationship with the City. Family foster care is only one component of Philadelphia's framework for at-risk children. The City also employs private agencies to operate "congregate care" facilities, or group homes, for children in state custody who have not been assigned to a foster family for one reason or another. And it partners with "Community Umbrella Agencies" that work with children in the community to address problems in their home environment that might prevent them from remaining at home. CSS operates as a congregate care provider and a Community Umbrella Agency, and its services in those capacities were not affected by the intake freeze or any subsequent developments in this dispute pertaining to foster care. Indeed, in each unrelated area it continues working with the City to this day.

On several occasions Human Services granted exceptions to the intake freeze where there were particularly strong reasons why CSS would be the best placement for an individual child—for example, if one of that child's siblings had already been placed with a CSS family. It does not appear that any exemption requests were denied.

Meanwhile, on March 15, 2018, two days after the Inquirer article, the City Council passed a resolution authorizing the Philadelphia Commission on Human Relations to "investigate Department of Human Services' policies on contracting with social services agencies that ... discriminate against prospective LGBTQ foster parents." The resolution stated that "the City of

Philadelphia has laws in place to protect its people from discrimination that occurs under the guise of religious freedom," and declared that any "agency which violates City contract rules in addition to the Fair Practices Ordinance should have their contract with the City terminated with all deliberate speed." The following day (March 16), lawyers for the Commission wrote to CSS with a battery of questions regarding its policies about working with same-sex couples or LGBTQ individuals. It responded on April 16, 2018, challenging both the legal basis for what it termed the "City's unlawful suspension" of its contract and the Commission's jurisdiction over the matter. Centrally, CSS argued that its screening of would-be foster parents was not a public accommodation and hence not subject to the Fair Practices Ordinance.

Lawyers from the City wrote back separately on the jurisdictional and substantive points on May 7, 2018. As to substance, the City asserted that its contract with CSS had not been formally suspended, and that it did not require any referrals to that agency. Therefore the City could not possibly have breached the contract by suspending referrals. The letter noted several provisions of the contract that, it argued, forbade CSS's policy of discrimination.

After setting out the City's legal interpretation of the contract, the letter stated its plan going forward:

> Please also note that CSS's current contract expires on June 30, 2018, and the City is under no legal obligation to enter into a new contract for any period thereafter. We are hopeful that we can work out any differences before then, but please be advised that—except where the best interests of a child demands otherwise—the City does not plan to agree to any further referrals to CSS, and the City intends to assist with the transition of foster families to other agencies, absent assurances that CSS is prepared to adhere to its contractual obligations and, in implementing its City contract, to comply with all applicable laws, including those related to non-discrimination. We believe our current contract with CSS is quite clear that this is our right, but please be advised that any further contracts with CSS will be explicit in this regard.

The letter underscored "respect [for CSS's] sincere religious beliefs, but your freedom to express them is not at issue here where you have chosen voluntarily to partner with us in providing government-funded, secular social services." It stressed the importance of equality as "both a legal requirement, and an important City policy and value that must be embodied in our contractual relationships." In addition, the City reaffirmed that it did not want to see its "valuable relationship with CSS ... come to an end," but instead hoped that CSS would agree to comply going forward with the terms of the Fair Practices Ordinance.

As to jurisdiction, the City further asserted that foster care is a public accommodation, triggering both the Ordinance's mandate and the Commission's jurisdiction. The City requested a response to the questions in its March 16 letter within 10 days and threatened subpoenas if CSS did not comply. The latter responded by filing this lawsuit, alleging 16 causes of action against the City, Human Services, and the Human Relations Commission. Three individuals who had worked with CSS as foster parents—Sharonell Fulton, Cecilia Paul, and Toni Lynn Simms-Busch—were also listed as plaintiffs. On June 5, 2018, plaintiffs moved for a temporary

restraining order and preliminary injunction. Their proposed order would have required the City to "resume providing foster care referrals to [CSS] and permitting children to be placed with the foster families it has certified without delay," to "rescind its prior directive prohibiting any foster care referrals to [CSS,] ... to resume all dealings with [it] on the same terms as they had proceeded prior to March 2018," and also to "resume and to continue operating under the current Contract, without breach, termination, or expiration, or to enter into a new Contract identical in all material respects to the current Contract, while this matter remains pending."

The District Court denied the application for preliminary injunctive relief in a memorandum opinion, and plaintiffs appealed the same day. They argue to us that the District Court wrongly held that they were not likely to succeed on the merits of their Free Exercise, Establishment Clause, and Freedom-of-Speech claims, as well as under the Pennsylvania Religious Freedom Protection Act. Plaintiffs asked the District Court for injunctive relief pending appeal the following day, which it denied.

. . . Finally, appellants filed an emergency application to the Supreme Court for an injunction pending appeal or an immediate grant of certiorari. Justice Alito referred the application to the full Court, which denied it.

III. Discussion

A. The Free Exercise Clause

CSS principally contends that the City's actions violated its rights under the Free Exercise Clause. The First Amendment provides that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." This prohibition applies to the States through the Fourteenth Amendment. Per Employment Division v. Smith, 494 U.S. 872, 877 (1990), the Free Exercise Clause "means, first and foremost, the right to believe and profess whatever religious doctrine one desires." Thus, the First Amendment obviously excludes all governmental regulation of religious beliefs as such. The government may not compel affirmation of religious belief, punish the expression of doctrines it believes to be false, impose special disabilities on the basis of religious views or religious status, or lend its power to one or the other side in controversies over religious authority or dogma. Likewise, it forbids government acts specifically designed to suppress religiously motivated practices or conduct.

The Free Exercise Clause does not, however, "relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" Id. at 879, (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in the judgment)). As Justice Felix Frankfurter stated nearly eighty years ago, "[c]onscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs." Id. at 879 (quoting Minersville Sch. Dist. Bd. of Educ. v. Gobitis, 310 U.S. 586, 594–95 (1940) (Frankfurter, J.)). Among other things, this means that religious or conscientious objections do not supersede the basic obligation to comply with generally applicable civil rights laws provided those laws are applied neutrally. See Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Com'n,,

138 S.Ct. 1719, 1727 (2018) ("Nevertheless, while ... religious and philosophical objections [to same-sex marriage] are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law."); see also Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 561 U.S. 661, 694 n.24 (2010) (observing that, under Smith, the Free Exercise Clause did not require public law school to grant religious exemption to its "all-comers" policy forbidding discrimination by student organizations).

CSS contends that the City's enforcement of its laws and policies was neither neutral nor generally applicable. It first argues that the City's reliance on the Fair Practices Ordinance, which prohibits discrimination on the basis of sexual orientation in public accommodations, is misplaced because evaluating prospective foster parents is not a public accommodation. The District Court disagreed and held that the Ordinance did apply to CSS. We need not address this issue, however, as the contract between CSS and the City expired on June 30, 2018. As a result, requiring the City to comply with the terms of that agreement is now moot. What remains is whether it may insist on the inclusion of new, explicit language forbidding discrimination on the ground of sexual orientation as a condition of contract renewal, or whether it must offer CSS a new contract that allows it to continue engaging in its current course of conduct.

To support its claim that the City's proposed anti-discrimination clause is not permissible under Smith, CSS invokes cases where courts have found ostensibly neutral government action unconstitutional because it was motivated by ill will toward a specific religious group or otherwise impermissibly targeted religious conduct. See, e.g., Masterpiece Cakeshop, 138 S. Ct. 1719; Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993). These cases, and similar decisions by our Court, clarify Smith by reaffirming that the government may not conceal an impermissible attack on religion behind a cloak of neutrality and general application. Thus, a challenger under the Free Exercise Clause must show that it was treated differently because of its religion. Put another way, it must show that it was treated more harshly than the government would have treated someone who engaged in the same conduct but held different religious views.

The focus on different treatment of religious and secular conduct is clear in Lukumi, the font of this doctrine. There the City of Hialeah, Florida had adopted an ordinance prohibiting the slaughtering of animals except in certain recognized circumstances. The history of the law's adoption made plain, however, that this was no earnest piece of animal welfare legislation but rather an attempt to suppress the practice of Santeria, a fusion of traditional African religion and Catholicism that developed in Cuba in the Nineteenth Century and incorporates animal sacrifice in many of its rituals. Lukumi, 508 U.S. at 524. The emergency sessions that led to the ordinance, held immediately after a Santeria church first tried to open in town, were rife with unrestrained hostility. Council members referred to supposed Biblical prohibitions on animal sacrifice except for consumption and asked, "What can we do to prevent the Church from opening?" The audience cheered these remarks and taunted the president of the Church, plus the chaplain of the city police department called Santeria "an abomination to the Lord."

Moreover, the ordinance itself, though ostensibly concerned with animal welfare, plainly reflected this hostility. Its restriction on animal killing was limited to "sacrifice," and was further limited to the context of "a public or private ritual or ceremony." Although it did not apply if the killing was "for the primary purpose of food consumption," or if the animals were "specifically raised for food purposes," the ordinance did apply to ritual sacrifice even if the animal was eaten during the ritual, as would often happen in Santeria rituals. As the Court noted, the "net result" of these definitions was that "few if any killings of animals are proscribed other than Santeria sacrifice. ... Indeed, careful drafting ensured that, although Santeria sacrifice is prohibited, killings that are no more necessary or humane in almost all other circumstances are unpunished." This "gerrymander" of the ordinance, along with the striking hostility at the public meetings, left the Court with only "one conclusion: The ordinances had as their object the suppression of religion."

Masterpiece Cakeshop featured similar demonstrations of religious animosity and differing treatment of religious conduct. Denver baker Jack Phillips refused to make a cake for a gay couple's wedding reception, citing his religious conviction that marriage is only the union of a man and a woman. Phillips believed that, were he "to create a wedding cake for an event that celebrates something that directly goes against the teachings of the Bible, [it] would have been a personal endorsement and participation in the ceremony and relationship that they were entering into." The couple sued under Colorado's public accommodations statute. The case was referred to the state's Civil Rights Commission, which concluded that Phillips had engaged in prohibited discrimination and that neither Phillips's religious free exercise nor his free speech rights were violated by applying this anti-discrimination law to him.

The Supreme Court ultimately reversed; while Colorado generally had the right to enforce its civil rights laws against Phillips, it was bound under the First Amendment to afford him a "neutral and respectful consideration." Instead, the Commission expressed open hostility toward Phillips and his religion and treated him differently from others similarly situated because of that religion. The Court noted ambiguous expressions from commissioners that could be taken either as reflecting resentment toward Phillips's religious views or simply the uncontroversial principle that "a business cannot refuse to provide services based on sexual orientation, regardless of" those views. ("One commissioner suggested that Phillips can believe 'what he wants to believe,' but cannot act on his religious beliefs 'if he decides to do business in the state.' A few moments later, the commissioner restated the same position: 'If a businessman wants to do business in the state and he's got an issue with the—the law's impacting his personal belief system, he needs to look at being able to compromise.'")

These ambiguous statements were more sinister, however, in the context of another commissioner's naked hostility toward religion.

> Freedom of religion and religion ha[ve] been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the Holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of

> the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.

This, the Court noted, disparaged Phillips's religion "in at least two distinct ways: by describing it as despicable, and also by characterizing it as merely rhetorical—something insubstantial and even insincere." By calling religion the "most despicable" way to justify hurting others, the comment also suggested that the commissioner thought Phillips's actions were worse specifically because of their religious character.

The inference that Phillips was treated worse because of his religion was bolstered by the Commission's different treatment of other bakers who refused to bake cakes bearing homophobic expressions. The state Civil Rights Division found that these actions did not violate the state's civil rights laws because the requested message was offensive in nature. Thus, it appeared that the state had "treated the other bakers' conscience-based objections as legitimate, but [Phillips's] as illegitimate—thus sitting in judgment of his religious beliefs themselves."

Our Court's Free Exercise Clause jurisprudence in the wake of Smith and Lukumi likewise asks whether challengers have been treated worse than others who engaged in similar conduct because of their religious character. For example, Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359 (3d Cir. 1999), we held unconstitutional the Newark Police Department's policy that officers could not have facial hair. The Department had granted exceptions to this policy due to medical need but would not grant similar exceptions to Sunni Muslims whose religion forbade them to shave their beards. This was "sufficiently suggestive of discriminatory intent ... to trigger heightened scrutiny," id. at 365, which the policy could not survive.

Similarly, in Tenafly Eruv Association v. Borough of Tenafly, 309 F.3d 144 (3d Cir. 2002), the Borough of Tenafly had on its books an ordinance prohibiting the affixing of "any sign or advertisement, or other matter upon," among other things, telephone poles. In practice, this ordinance was almost never enforced, and it was common to see house number signs, lost animal signs, commemorative ribbons, holiday displays, wreaths, and various other fixtures on the town's telephone poles. But when Orthodox Jewish residents sought to erect an eruv by placing lechis on utility poles, the Borough refused to grant them a similar exemption and sought to enforce the ordinance. We held that the Borough thereby violated the Free Exercise Clause. Although the ordinance itself was general and neutral, such that Smith might apply, it had not been enforced evenhandedly. Instead, the Borough had an apparent practice of granting ad hoc exceptions but refused to make one for the Orthodox Jews' religious practice. This system of discretionary exemptions called for strict scrutiny (meaning they must be justified by a compelling government interest and narrowly tailored to achieve that compelling interest), and the Borough's actions could not survive.

These cases have in common that religiously motivated conduct was treated worse than otherwise similar conduct with secular motives. The ordinance in Lukumi was pretzeled to prohibit only Santeria ritual sacrifices and no other animal killings, even those no more humane or necessary. In Fraternal Order of Police the City of Newark granted exemptions to its facial

hair policy for medical reasons but not for religious ones. In Tenafly an ordinance virtually never enforced was exacted exclusively on the religious practice of Orthodox Jews. And in Masterpiece the comments of Commission members, along with the disparate treatment of other bakers' secular claims of conscience, raised suspicion that Phillips had been treated more harshly because the Commission found his religious views offensive.

The question in our case, then, is whether CSS was treated differently because of its religious beliefs. Put another way, was the City appropriately neutral, or did it treat CSS worse than it would have treated another organization that did not work with same-sex couples as foster parents but had different religious beliefs? Based on the record before us, that question has a clear answer: no. The City has acted only to enforce its non-discrimination policy in the face of what it considers a clear violation.

As evidence that the City acted out of religious hostility, CSS first points to the City Council's resolution authorizing the Commission on Human Relations' inquiry, which stated that "Philadelphia has laws in place to protect its people from discrimination that occurs under the guise of religious freedom." But this comment falls into the grey zone identified by the Supreme Court in Masterpiece—a remark that could express contempt for religion or could merely state the well-established legal principle that religious belief will not excuse compliance with general civil rights laws. Unlike the commissioner in Masterpiece who suggested that religious justifications for discrimination are merely rhetorical, here City officials repeatedly emphasized that they respected CSS's beliefs as sincere and deeply held. The Commission's May 7, 2018 letter, for instance, stated that "[w]e respect your sincere religious beliefs, but your freedom to express them is not at issue here where you have chosen voluntarily to partner with us in providing government-funded, secular social services." This is the kind of respectful consideration found lacking in Masterpiece, and nowhere in the record did the City depart from this respectful posture.

CSS next points to Commissioner Figueroa's statements during her meeting with Amato that "it would be great if we could follow the teachings of Pope Francis." Taken out of context, some might think this remark improper, as it has clear religious overtones. But context is important: the comment was made during a negotiation attempting to find a mutually agreeable solution to this controversy. In that light, Figueroa's statement is best viewed as an effort to reach common ground with Amato by appealing to an authority within their shared religious tradition. The First Amendment does not prohibit government officials working with religious organizations in this kind of partnership from speaking those organizations' language and making arguments they may find compelling from within their own faith's perspective. And though these attempts to persuade CSS were ultimately unsuccessful, the record does not suggest that the City then sought to punish it for this disagreement.

CSS also argues that Commissioner Figueroa's decision to call mostly religious foster care agencies to ask if they had a similar policy is evidence that the City impermissibly targeted religion. But focusing her inquiries on religious agencies made sense: the only agencies Figueroa knew that refused to work with same-sex couples—CSS and Bethany Christian—did so for religious reasons. She had little reason to think that nonreligious agencies might have a similar

policy. In fact, no other religious agency besides the two mentioned by the reporter had this policy, and Figueroa did call one secular agency as well.

Finally, CSS points to several public statements (the most recent of which occurred in 2015) made by Mayor Kenney critical of the Archdiocese of Philadelphia and of Archbishop Chaput. No doubt the Mayor expressed concerns toward the local Catholic Church, with a particular focus on the Church's stance on gay rights. But CSS's claim that he "prompted" Human Services' 2018 inquiry in this case misstates the record. Figueroa testified that she discussed the issue with the Mayor prior to meeting with Amato and told the Mayor she would brief him once a decision had been made. There is nothing in the record before us suggesting that he played a direct role, or even a significant role, in the process.

The evidence CSS offers of religious bias or hostility appears significantly less than what was present in Lukumi or even in Masterpiece. Nor is there much to suggest that the City treated CSS differently because of its religion. It argues that it has been subject to selective enforcement, akin to that in Tenafly and Fraternal Order of Police, because the City adopted what CSS sees as novel legal arguments invented during this controversy to justify its actions against CSS. First, it claims that the City had never previously taken the position that the Fair Practices Ordinance applies to the screening of foster parents. But nothing before us suggests that the City took this position disingenuously or as a pretext for persecuting CSS. Its interpretation of the Ordinance, with which the District Court agreed, was hardly frivolous. Nor is it suspicious that the City had never previously taken this position: the record contains no evidence of any foster care agencies discriminating in ways that would violate the Fair Practices Ordinance prior to this controversy. The issue simply seems not to have come up previously.

Second, CSS argues that the City created what CSS calls a "must-certify policy" as a justification for the actions against it. The City's position, according to CSS, is that foster agencies must at least evaluate any applicants who come to them seeking to become foster parents rather than referring them to a different agency—although agencies would retain their discretion whether to certify an applicant as fit after evaluation. CSS perceives that the City would object to any referral, and it argues that this was a novel position adopted during this controversy. Amato testified that referrals from one agency to another are a routine way of finding the best fit for a given applicant. But the record here is unclear, both as to the City's current position and as to its policy prior to this case. The former is not necessarily an objection to any referrals at all so much as an objection to referrals made for an improper basis, i.e., that the referring agency refuses to work with members of a protected class. As to the latter, the referrals Amato described may have only involved an agency suggesting that a family might prefer a different agency rather than refusing to work with a particular applicant outright. It would be consistent for the City to insist that, while agencies are free to inform applicants if they believe a different agency would be a better fit, they must leave the ultimate decision up to the applicants. In any case, this dispute does not indicate improper religious hostility on the City's part, only a routine regulatory disagreement.

Third, CSS argues that the City has acted inconsistently because Human Services will consider factors such as race or disability when placing foster children with foster parents. But

there are many differences between CSS's behavior and the City's consideration of race or disability when placing a foster child. Most significantly, unlike CSS, Human Services never refuses to work with individuals because of their membership in a protected class. Instead it seeks to find the best fit for each child, taking the whole of that child's life and circumstances into account. And there is no instance in the record of Human Services knowingly permitting any other foster agency to discriminate against members of a protected class.

In sum, at the preliminary injunction stage CSS shows insufficient evidence that the City violated the Free Exercise Clause. The Fair Practices Ordinance has not been gerrymandered as in Lukumi, and there is no history of ignoring widespread secular violations as in Tenafly or the kind of animosity against religion found in Masterpiece. Here the City has been working with CSS for many decades fully aware of its religious character. It continues to work with CSS as a congregate care provider and as a Community Umbrella Agency even to this day despite CSS's religious views regarding marriage. And the City has expressed a constant desire to renew its relationship with CSS as a foster care agency if it will comply with the City's non-discrimination policies protecting same-sex couples.

CSS sees the City's non-discrimination policy as a pretext to exclude it from public life because of its religious character, and invokes Trinity Lutheran Church of Columbia v. Comer, 137 S. Ct. 2012 (2017), in which the Supreme Court held unconstitutional rules excluding religious organizations from a public grant program. CSS's counsel at oral argument described the proposed contract language expressly forbidding discrimination on the basis of orientation as a "poison pill." CSS likewise states in its brief that "[t]he City thus proposes to change its foster care contract specifically to prohibit [CSS's] religious exercise." But it can point to no specific evidence demonstrating that the City acted other than out of a sincere commitment to equality and non-discrimination.

CSS's theme devolves to this: the City is targeting CSS because it discriminates against same-sex couples; CSS is discriminating against same-sex couples because of its religious beliefs; therefore the City is targeting CSS for its religious beliefs. But this syllogism is as flawed as it is dangerous. It runs directly counter to the premise of Smith that, while religious belief is always protected, religiously motivated conduct enjoys no special protections or exemption from general, neutrally applied legal requirements. That CSS's conduct springs from sincerely held and strongly felt religious beliefs does not imply that the City's desire to regulate that conduct springs from antipathy to those beliefs. If all comment on religiously motivated conduct by those enforcing neutral, generally applicable laws against discrimination is construed as ill will against the religious belief itself, then Smith is a dead letter, and the nation's civil rights laws might be as well. As the Intervenors rightly state, the "fact that CSS's non-compliance with the City's non-discrimination requirements is based on its religious beliefs does not mean that the City's enforcement of its requirements constitutes anti-religious hostility."

We thus believe the District Court did not abuse its discretion in finding that CSS has failed to demonstrate a sufficient likelihood of success on the merits of its Free Exercise Clause claim.

B. The Establishment Clause

CSS argues that the City's actions violated not only the First Amendment's Free Exercise Clause but also its Establishment Clause. "The clearest command of the ... [Establishment] Clause is that one religious denomination cannot be officially preferred over another." Larson v. Valente, 456 U.S. 228, 244 (1982). In this case, the two Religion Clauses largely run together: insofar as CSS alleges that it has been blacklisted for its religious beliefs, it is alleging both a Free Exercise violation (persecution for its religious views) and an Establishment Clause violation (the City declaring some religious viewpoints favored and others disfavored).

Insofar as the Establishment claim here is analytically independent of the Free Exercise claim, CSS contends the City has dictated its preferred religious viewpoint—that religious institutions should recognize the marriage of same-sex couples—and has conditioned CSS's future contract on adherence to that perspective. To support this claim it focuses primarily on Commissioner Figueroa's statement in her meeting with Amato that "it would be great if we could follow the teachings of Pope Francis." CSS sees this as the City telling it which religious leaders to follow and how to interpret their teachings, and then "punishing" it when it refused to comply.

If the City truly were punishing CSS for refusing to adopt its preferred view of Catholic teaching, no doubt that would be an impermissible establishment of religion. But that is not what happened here. Human Services still works with CSS as a congregate care provider and a Community Umbrella Agency. It still works with Bethany Christian as a foster care agency, even though Bethany also maintains its religious opposition to same-sex marriage. This supports the view that CSS is not being excluded due to its religious beliefs. Indeed, the City has maintained its other relationships with CSS and has merely insisted that, if CSS wants to continue providing foster care, it must abide by the City's non-discrimination policy in doing so. There is simply no evidence that this is a veiled attempt to coerce or impose certain religious beliefs on CSS.

The District Court thus did not abuse its discretion in finding that CSS has not shown a likelihood of success on the merits of its Establishment Clause claim.

C. Freedom of Speech

In addition to its claims under the First Amendment's Religion Clauses, CSS also claims that the City has violated its freedom-of-speech rights in two different ways: by compelling it to speak in ways it finds disagreeable and by retaliating against it for engaging in protected speech.

i. Compelled Speech

For over 70 years it has been axiomatic that the Free Speech Clause also protects the right not to speak. CSS claims it has been compelled to speak because Pennsylvania law imposes a requirement that, after evaluating prospective foster parents, an agency must "give written notice to foster families of its decision to approve, disapprove or provisionally approve the foster family." Because the City forbids CSS from finding an applicant unqualified for a "discriminatory reason," including their sexual orientation or same-sex relationship, it is therefore forcing CSS "to make written endorsements that violate its sincere religious beliefs."

The problem with this argument is that the ostensibly compelled speech occurs in the context of CSS's performance of a public service pursuant to a contract with the government. In Rust v. Sullivan, 500 U.S. 173 (1991), the Supreme Court upheld conditions on government grants under Title X of the Public Health Service Act preventing grant programs from providing to their patients not only abortion services but also counseling or information about abortion. The Court held that this was not an impermissible restriction on speech or viewpoint discrimination because the government is free to fund only those programs that comport with its own view on matters such as abortion.

Agency for International Development v. Alliance for Open Society International, 570 U.S. 205 (2013) (" AOSI"), clarified this rule by holding that, while the government may place conditions on the use of public grant monies, it may not require grant recipients to adopt the government's views as their own. Thus, the requirement that organizations receiving money to combat HIV/AIDS not use that money "to promote or advocate the legalization or practice of prostitution or sex trafficking," 22 U.S.C. § 7631(e), was acceptable under Rust. But the rule that no funds could be used by any organization "that does not have a policy explicitly opposing prostitution and sex trafficking," id. § 7631(f), unconstitutionally compelled speech. It did not simply tell grant recipients how to use the government's money but required them to affirm their own agreement with the government's policy—not unlike the requirement in Barnette that schoolchildren recite the Pledge of Allegiance.

CSS argues that it has been required to adopt the City's views about same-sex marriage and to affirm these views in its evaluations of prospective foster parents, and that this violates the rule of AOSI. It contends that the speech in question is beyond the scope of its contract with the City because the requirement of performing evaluations comes from state law rather than from the contract itself, and because the compensation formula in the contract is not tied to the number of evaluations performed. We disagree. The speech here only occurs because CSS has chosen to partner with the government to help provide what is essentially a public service. The exact allocation of responsibility between the Commonwealth and the City, or the funding structure in the contract, does not change that. Neither Rust nor AOSI, nor any other relevant precedent, focused on the precise funding structure of the government contracts at issue. Instead, the cases focus on whether the condition pertains to the program receiving government money, as the City's non-discrimination requirements do here.

The City would violate AOSI if it refused to contract with CSS unless it officially proclaimed its support for same-sex marriage. But to the contrary, the City is willing to work with organizations that do not approve of gay marriage, as its continued relationship with Bethany Christian, its continued relationship with CSS in its other capacities, and its willingness to resume working with CSS as a foster care agency attest. Therefore, CSS's compelled speech claim does not at this time have a reasonable likelihood of success, and the District Court did not abuse its discretion in so holding.

ii. Speech Retaliation

To prevail on a speech retaliation claim, a plaintiff must show that it engaged in constitutionally protected activity, that the government responded with retaliation, and that the protected activity caused the retaliation. This rule is a straightforward application of the First Amendment's basic command that the government may not punish those who utter protected speech. CSS argues that it provides foster care services as a religious ministry protected by the First Amendment and that it "engages in protected speech when it evaluates families" as potential foster parents. It also asserts retaliation against it for statements made to the Inquirer, and for its subsequent statements to Human Services confirming that it would not work with same-sex couples as foster parents.

This claim is unlikely to succeed because the City's actions were regulatory rather than retaliatory in nature. The speech retaliation doctrine is implicated where the government has taken some action against an individual ostensibly unrelated to that individual's protected speech yet motivated by a desire to retaliate. See, e.g., Eichenlaub, 385 F.3d at 282–85 (approving retaliation claim alleging that the Township denied building permit applications to punish a landowner's speech at a public meeting). Here, on the contrary, the City has directly regulated the very conduct CSS claims is constitutionally protected: its refusal to evaluate or work with same-sex couples. Thus, the City has "retaliated" against CSS only in the same way enforcement of any government regulation "retaliates" against those who violate it.

Insofar as CSS claims it was subject to retaliation for its statements to the Inquirer and to Human Services confirming that it engages in the discriminatory conduct to which the City objects, this too cannot support a valid retaliation claim. We do not read the City's actions as punishing CSS for those statements rather than for the discriminatory conduct itself. Once again, the District Court did not abuse its discretion in ruling that CSS has failed to establish a reasonable likelihood of success on its speech retaliation claim.

D. The Pennsylvania Religious Freedom Protection Act

CSS's final claim is under the Pennsylvania Religious Freedom Protection Act (RFPA), 71 Pa. Stat. Ann. § 2401 et seq. Similar in some ways to the federal Religious Freedom Restoration Act, 42 U.S.C. § 2000bb et seq., the RFPA generally provides that "an agency shall not substantially burden a person's free exercise of religion, including any burden which results from a rule of general applicability." It may do so, however, if it proves by a preponderance of the evidence that the burden both is "(1) [i]n furtherance of a compelling interest of the agency" and is "(2) [t]he least restrictive means of furthering the compelling interest." 71 Pa. Stat. Ann. § 2404. "Substantially burden" is defined as an action that does any of the following:

(1) Significantly constrains or inhibits conduct or expression mandated by a person's sincerely held religious beliefs[;]

(2) Significantly curtails a person's ability to express adherence to the person's religious faith[;]

(3) Denies a person a reasonable opportunity to engage in activities which are fundamental to the person's religion[;]

(4) Compels conduct or expression which violates a specific tenet of a person's religious faith.

Id. § 2403. CSS argues that all four forms of substantial burden exist here. Its argument as to each prong ultimately rests on this: CSS's foster care work is part of its religious ministry, its religious convictions prevent it from "endorsing" same-sex marriage, and under the City's policies it may not engage in its foster care ministry while abiding by its convictions. Thus, CSS must choose either endorsing a viewpoint that violates the tenets of its faith or ceasing its religious ministry of providing foster care.

Pennsylvania courts applying the RFPA scrutinize claims of religious burden to see whether the burdened activity is truly "fundamental to the person's religion." See, e.g., Commonwealth v. Parente, 956 A.2d 1065, 1074 (Pa. Commw. Ct. 2008) ("Parente never testified that his activities ... constitute 'activities which are fundamental to his religion' .... Rather, at best, Parente's testimony merely establishes that he engaged in these activities based upon his religious beliefs or that they flowed from a religious mission.").

In Ridley Park United Methodist Church v. Zoning Hearing Board Ridley Park Borough, 920 A.2d 953 (Pa. Commw. Ct. 2007), for instance, the Pennsylvania Commonwealth Court held that a church was not entitled to a RFPA exemption from a local zoning code in order to operate a daycare center on its property. While the daycare center "aided in carrying out the Church's religious mission," it was not a "fundamental religious activity of a church." By analogy, "ministering to the sick can flow from a religious mission, but it is not a fundamental religious activity of a church because a hospital may be built to satisfy that mission." Thus, it appears that Pennsylvania courts consider an activity "fundamental to a person's religion" if it is an inherently religious activity as opposed to something that could be done either by a religious person or group or by a secular one. The parallel here is direct: caring for vulnerable children can flow from a religious mission, but it is not an intrinsically religious activity under Pennsylvania law.

It thus seems unlikely that the Pennsylvania courts would recognize a substantial burden on CSS's exercise of religion in this case. We have noted before, however, that this facet of RFPA jurisprudence "appears to create some tension between state and federal law," as the "Supreme Court has cautioned against making religious interpretations in the First Amendment context." Combs v. Homer-Center Sch. Dist., 540 F.3d 231, 258 (3d Cir. 2008) (Scirica, J., concurring); see also Smith, 494 U.S. at 886–87, 110 S.Ct. 1595 ("It is no more appropriate for judges to determine the 'centrality' of religious beliefs ... in the free exercise field ... than it would be for them to determine the 'importance' of ideas ... in the free speech field.").

Thus we make clear that even if we were to assume there is a substantial burden here, CSS is not likely to prevail on its RFPA claim because the City's actions are the least restrictive means of furthering a compelling government interest. It is black-letter law that "eradicating discrimination" is a compelling interest. See Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984). And mandating compliance is the least restrictive means of pursuing that interest. See Hobby Lobby, 573 U.S. at 733 ("The Government has a compelling interest in providing equal opportunity to participate in the workforce without regard to race, and prohibitions on racial

discrimination are precisely tailored to achieve that critical goal."); see also E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 594 (6th Cir. 2018) (denying several alternative means of enforcing the government's interest in preventing discrimination against transgender employee in favor of simply enforcing the ban on that discrimination).

CSS offers several reasons why the City has no compelling interest in enforcing the Fair Practices Ordinance here. First, it asserts that evaluating potential foster parents is not a public accommodation. Second, it calls the harm the City seeks to prevent speculative, citing Brown v. Entertainment Merchants Association, 564 U.S. 786, 799–800 (2011), for the principle that "ambiguous proof" of speculative harms will not suffice to provide a compelling interest. Finally, it argues that the City cannot have a compelling interest in preventing it from discriminating because doing so will not increase the number of foster agencies willing to work with same-sex couples: either the City allows CSS to continue discriminating, in which case there are 29 agencies willing to work with those applicants, or it ceases operation altogether, in which case there will still be 29 agencies willing to work with those applicants.

These arguments miss the mark entirely. The government's interest lies not in maximizing the number of establishments that do not discriminate against a protected class, but in minimizing—to zero—the number of establishments that do. And that interest is by no means limited to public accommodations as defined by the Fair Practices Ordinance. Thus, even if we were to assume that evaluating potential foster parents is not a public accommodation, the City would still have a compelling interest in adding a nondiscrimination provision to future contracts.

Nor is the harm the City seeks to prevent speculative. Brown held that a law restricting violent video games, on the theory that they would make children become more violent, could not be sustained, in part due to the lack of sound empirical support for this theory. This has no application here, where the mere existence of CSS's discriminatory policy is enough to offend the City's compelling interest in anti-discrimination. CSS notes that no same-sex couples have ever—so far as the record reflects—approached it seeking to become foster parents. This is not surprising given the Philadelphia Archdiocese's well-known opposition to gay marriage. But this is beside the point. The harm is not merely that "gay foster parents will be discouraged from fostering." Appellant's Br. at 63. It is the discrimination itself.

So even if CSS could show a substantial burden on its religious exercise as defined by the RFPA, the City's actions appear to survive strict scrutiny. Thus, the District Court did not abuse its discretion in determining that CSS has not established a reasonable likelihood of success on the merits of its RFPA claim.

E. Other Preliminary Injunction Considerations

We conclude, as the District Court did, that at the preliminary injunction stage and on the record before us, CSS is not reasonably likely to succeed on the merits of any of its claims. This alone defeats the request for a preliminary injunction. In any event, we also agree with the District Court that CSS has not met the other factors considered for a preliminary injunction.

To prevail, CSS must show not only a reasonable likelihood of success but also that it is more likely than not to suffer irreparable harm without an injunction. It identified several alleged irreparable harms before the District Court, but on appeal it wisely focuses on the prospect that, without a contract from the City, it will go out of business. Arguably even this would be compensable through money damages. In any case, CSS has not met its burden of demonstrating that it is more likely than not to suffer this injury. Its congregate care and Community Umbrella Agency functions are unaffected, it has other foster care contracts with neighboring counties, and even as to its foster care services in Philadelphia CSS cites only to Amato's self-professed "guess" that it would have to cease those operations within months.

Even if CSS could establish both of the gatekeeping factors—likelihood of success on the merits and irreparable harm—neither the balance of the equities nor the public interest would favor issuing an injunction here. The District Court set out at length the City's interests in requiring CSS to abide by its nondiscrimination policy, and we agree that the City's interests weigh substantially in its favor—particularly in ensuring that government services are open to all Philadelphians. Placing vulnerable children with foster families is without question a vital public service, no doubt why there are 29 other foster care agencies, including Bethany Christian, that provide this service. Deterring discrimination in that effort is a paramount public interest.

F. Conclusion

The City stands on firm ground in requiring its contractors to abide by its non-discrimination policies when administering public services. Under Smith, the First Amendment does not prohibit government regulation of religiously motivated conduct so long as that regulation is not a veiled attempt to suppress disfavored religious beliefs. And while CSS may assert that the City's actions were not driven by a sincere commitment to equality but rather by antireligious and anti-Catholic bias (and is of course able to introduce additional evidence as this case proceeds), the current record does not show religious persecution or bias. Instead it shows so far the City's good faith in its effort to enforce its laws against discrimination. Hence we hold that the District Court did not abuse its discretion in denying the motion for preliminary injunctive relief and affirm its thorough and well-reasoned decision.

Chapter 2 – New Subsection (E) – Religious Freedom Restoration Act, page 358

In Elane Photography v. Willock, included in the Casebook on page 344, a wedding photographer who declined to provide services to a lesbian couple for their commitment ceremony was held to have violated Maine's public accommodations law, which expressly bans discrimination by businesses because of the sexual orientation of potential customers. In the opinion, the New Mexico Supreme Court rejected an affirmative defense under the New Mexico Religious Freedom Restoration Act, finding that the Act was only available in defending against an enforcement action by a government agency, and that case was brought by the lesbian couple. Many federal courts have similarly interpreted the federal Religious Freedom Restoration Act.

The following case, EEOC v. R.G. & G.R. Harris Funeral Homes, was one of three dealt with in a single opinion by the U.S. Supreme Court in Bostock v. Clayton County (2020), holding that sexual orientation and gender identity discrimination claims are covered by Title VII of the Civil Rights Act of 1964 as being discrimination because of an individual's sex. In the Harris Funeral Homes case, the owner of a chain of funeral homes in the Detroit suburbs had dismissed a funeral director after she informed the owner, a devout Catholic whose faith would not countenance the idea, that the funeral director was transitioning to a female identity. The funeral director, Aimee Stephens, filed a charge of sex discrimination with the EEOC, which brought suit to enforce Title VII on her behalf. The funeral director asserted a RFRA defense and won primarily on that basis before the district court. The 6th Circuit reversed, ruling for the EEOC and Aimee Stephens (who had intervened as a co-plaintiff) on the merits of her Title VII claim. The 6th Circuit reversed the district court's grant of summary judgment, which had been premised on the employer's RFRA defense. The Funeral Home petitioned the Supreme Court for review, but only on the Title VII questions in the case, not on the RFRA defense. In the version of the 6th Circuit's opinion that is included in Chapter 3 of the Casebook, we omitted the portion of the opinion dealing with RFRA, since the purpose for inclusion of that case in Chapter 3 was to address the question whether Title VII can be interpreted to cover a gender identity discrimination claim, and the Supreme Court held "yes" to that. We add the RFRA portion of the Harris Funeral Homes 6th Circuit opinion back here as this part of the 6th Circuit's ruling provides an interesting analysis of the RFRA defense to a Title VII claim. In Bostock, Justice Gorsuch noted the possible availability of a RFRA defense for an employer claiming a religious basis for refusing to employ a gay or transgender person in "an appropriate case," but the Court left to another day the determination of when such a defense would be appropriate.

Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes, Inc. 884 F. 3d 560 (6th Cir. 2018).

KAREN NELSON MOORE, Circuit Judge.

Aimee Stephens (formerly known as Anthony Stephens) was born biologically male. While living and presenting as a man, she worked as a funeral director at R.G. & G.R. Harris Funeral Homes, Inc. (the Funeral Home), a closely held for-profit corporation that operates three funeral homes in Michigan. Stephens was terminated from the Funeral Home by its owner and operator, Thomas Rost, shortly after Stephens informed Rost that she intended to transition from male to female and would represent herself and dress as a woman while at work. . . .

The Funeral Home is a closely held for-profit corporation Thomas Rost, who has been a Christian for over sixty-five years, owns 95.4% of the company and operates its three funeral home locations. Rost proclaims "that God has called him to serve grieving people" and "that his purpose in life is to minister to the grieving." To that end, the Funeral Home's website contains a mission statement that states that the Funeral Home's "highest priority is to honor God in all that we do as a company and as individuals" and includes a verse of scripture on the bottom of the mission statement webpage. The Funeral Home itself, however, is not affiliated with a church; it does not claim to have a religious purpose in its articles of incorporation; it is open every day, including Christian holidays; and it serves clients of all faiths. "Employees have worn Jewish

head coverings when holding a Jewish funeral service." Although the Funeral Home places the Bible, "Daily Bread" devotionals, and "Jesus Cards" in public places within the funeral homes, the Funeral Home does not decorate its rooms with "visible religious figures . . . to avoid offending people of different religions." Rost hires employees belonging to any faith or no faith to work at the Funeral Home, and he "does not endorse or consider himself to endorse his employees' beliefs or non-employment-related activities."

* * * * * * * * *

With regard to the Funeral Home's decision to terminate Stephens's employment, the district court determined that there was "direct evidence to support a claim of employment discrimination" against Stephens on the basis of her sex, in violation of Title VII. However, the court nevertheless found in the Funeral Home's favor because it concluded that the Religious Freedom Restoration Act (RFRA) precludes the EEOC from enforcing Title VII against the Funeral Home, as doing so would substantially burden Rost and the Funeral Home's religious exercise and the EEOC had failed to demonstrate that enforcing Title VII was the least restrictive way to achieve its presumably compelling interest "in ensuring that Stephens is not subject to gender stereotypes in the workplace in terms of required clothing at the Funeral home." Based on its narrow conception of the EEOC's compelling interest in bringing the claim, the district court concluded that the EEOC could have achieved its goals by proposing that the Funeral Home impose a gender-neutral dress code. The EEOC's failure to consider such an accommodation was, according to the district court, fatal to its case.

* * * * * * * * *

Religious Freedom Restoration Act

Congress enacted RFRA in 1993 to resurrect and broaden the Free Exercise Clause jurisprudence that existed before the Supreme Court's decision in Employment Division v. Smith, 494 U.S. 872 (1990), which overruled the approach to analyzing Free Exercise Clause claims set forth by Sherbert v. Verner, 374 U.S. 398 (1963). See City of Boerne v. Flores, 521 U.S. 507, 511-15 (1997). To that end, RFRA precludes the government from "substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability," unless the government "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1. RFRA thus contemplates a two-step burden-shifting analysis: First, a claimant must demonstrate that complying with a generally applicable law would substantially burden his religious exercise. Upon such a showing, the government must then establish that applying the law to the burdened individual is the least restrictive means of furthering a compelling government interest.

The questions now before us are whether (1) we ought to remand this case and preclude the Funeral Home from asserting a RFRA-based defense in the proceedings below because Stephens, a non-governmental party, joined this action as an intervenor on appeal; (2) if not, whether the Funeral Home adequately demonstrated that it would be substantially burdened by the application of Title VII in this case; (3) if so, whether the EEOC nevertheless demonstrated

that application of a such a burden to the Funeral Home furthers a compelling governmental interest; and (4) if so, whether the application of such a burden constitutes the least restrictive means of furthering that compelling interest. We address each inquiry in turn.

i. Applicability of the Religious Freedom Restoration Act. [The court held that RFRA continued to be applicable even though Stephens had intervened as a co-plaintiff on appeal, based on Stephens' representation in her intervention motion that she was not planning to add any issues that had not been before the district court. Therefore, for purposes of this appeal, the EEOC's status as plaintiff-appellant made the RFRA defense available to Harris Funeral Homes.]

ii. Prima Facie Case Under RFRA

To assert a viable defense under RFRA, a religious claimant must demonstrate that the government action at issue "would (1) substantially burden (2) a sincere (3) religious exercise." In reviewing such a claim, courts must not evaluate whether asserted "religious beliefs are mistaken or insubstantial." Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2779 (2014). Rather, courts must assess "whether the line drawn reflects 'an honest conviction.'" In addition, RFRA, as amended by the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), protects "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A).

The EEOC argues that the Funeral Home's RFRA defense must fail because "RFRA protects religious exercise, not religious beliefs," and the Funeral Home has failed to "identif[y] how continuing to employ Stephens after, or during, her transition would interfere with any religious 'action or practice.'" The Funeral Home, in turn, contends that the "very operation of [the Funeral Home] constitutes protected religious exercise" because Rost feels compelled by his faith to "serve grieving people" through the funeral home, and thus "[r]equiring [the Funeral Home] to authorize a male funeral director to wear the uniform for female funeral directors would directly interfere with — and thus impose a substantial burden on — [the Funeral Home's] ability to carry out Rost's religious exercise of caring for the grieving."

If we take Rost's assertions regarding his religious beliefs as sincere, which all parties urge us to do, then we must treat Rost's running of the funeral home as a religious exercise — even though Rost does not suggest that ministering to grieving mourners by operating a funeral home is a tenet of his religion, more broadly. The question then becomes whether the Funeral Home has identified any way in which continuing to employ Stephens would substantially burden Rost's ability to serve mourners. The Funeral Home purports to identify two burdens. "First, allowing a funeral director to wear the uniform for members of the opposite sex would often create distractions for the deceased's loved ones and thereby hinder their healing process (and [the Funeral Home's] ministry)," and second, "forcing [the Funeral Home] to violate Rost's faith . . . would significantly pressure Rost to leave the funeral industry and end his ministry to grieving people." Neither alleged burden is "substantial" within the meaning of RFRA.

The Funeral Home's first alleged burden — that Stephens will present a distraction that will obstruct Rost's ability to serve grieving families — is premised on presumed biases. As the EEOC observes, the Funeral Home's argument is based on "a view that Stephens is a 'man' and

would be perceived as such even after her gender transition," as well as on the "assumption that a transgender funeral director would so disturb clients as to 'hinder healing.'" The factual premises underlying this purported burden are wholly unsupported in the record. Rost testified that he has never seen Stephens in anything other than a suit and tie and does not know how Stephens would have looked when presenting as a woman. Rost's assertion that he believes his clients would be disturbed by Stephens's appearance during and after her transition to the point that their healing from their loved ones' deaths would be hindered at the very least raises a material question of fact as to whether his clients would actually be distracted, which cannot be resolved in the Funeral Home's favor at the summary-judgment stage. Thus, even if we were to find the Funeral Home's argument legally cognizable, we would not affirm a finding of substantial burden based on a contested and unsupported assertion of fact.

But more to the point, we hold as a matter of law that a religious claimant cannot rely on customers' presumed biases to establish a substantial burden under RFRA. Though we have seemingly not had occasion to address the issue, other circuits have considered whether and when to account for customer biases in justifying discriminatory employment practices. In particular, courts asked to determine whether customers' biases may render sex a "bona fide occupational qualification" under Title VII have held that "it would be totally anomalous . . . to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid."

We could agree that courts should not credit customers' prejudicial notions of what men and women can do when considering whether sex constitutes a "bona fide occupational qualification" for a given position while nonetheless recognizing that those same prejudices have practical effects that would substantially burden Rost's religious practice (i.e., the operation of his business) in this case. … [N]otwithstanding any evidence to that effect in the record, we refuse to treat discriminatory policies as essential to Rost's business — or, by association, his religious exercise.

The Funeral Home's second alleged burden also fails. Under Holt v. Hobbs, 135 S. Ct. 853 (2015), a government action that "puts [a religious practitioner] to th[e] choice" of "'engag[ing] in conduct that seriously violates [his] religious beliefs' [or] . . . fac[ing] serious" consequences constitutes a substantial burden for the purposes of RFRA. Here, Rost contends that he is being put to such a choice, as he either must "purchase female attire" for Stephens or authorize her "to dress in female attire while representing [the Funeral Home] and serving the bereaved," which purportedly violates Rost's religious beliefs, or else face "significant[] pressure . . . to leave the funeral industry and end his ministry to grieving people." Neither of these purported choices can be considered a "substantial burden" under RFRA.

First, though Rost currently provides his male employees with suits and his female employees with stipends to pay for clothing, this benefit is not legally required and Rost does not suggest that the benefit is religiously compelled. In this regard, Rost is unlike the employers in Hobby Lobby, who rejected the idea that they could simply refuse to provide health care altogether and pay the associated penalty (which would allow them to avoid providing access to contraceptives in violation of their beliefs) because they felt religiously compelled to provide

their employees with health insurance. And while "it is predictable that the companies [in Hobby Lobby] would face a competitive disadvantage in retaining and attracting skilled workers" if they failed to provide health insurance, the record here does not indicate that the Funeral Home's clothing benefit is necessary to attract workers; in fact, until the EEOC commenced the present action, the Funeral Home did not provide any sort of clothing benefit to its female employees. Thus, Rost is not being forced to choose between providing Stephens with clothing or else leaving the business; this is a predicament of Rost's own making.

Second, simply permitting Stephens to wear attire that reflects a conception of gender that is at odds with Rost's religious beliefs is not a substantial burden under RFRA. We presume that the "line [Rost] draw[s]" — namely, that permitting Stephens to represent herself as a woman would cause him to "violate God's commands" because it would make him "directly involved in supporting the idea that sex is a changeable social construct rather than an immutable God-given gift" —constitutes "an honest conviction." See Hobby Lobby, 134 S. Ct. at 2779. But we hold that, as a matter of law, tolerating Stephens's understanding of her sex and gender identity is not tantamount to supporting it.

Most circuits, including this one, have recognized that a party can sincerely believe that he is being coerced into engaging in conduct that violates his religious convictions without actually, as a matter of law, being so engaged. Courts have recently confronted this issue when non-profit organizations whose religious beliefs prohibit them "from paying for, providing, or facilitating the distribution of contraceptives," or in any way "be[ing] complicit in the provision of contraception" argued that the Affordable Care Act's opt-out procedure — which enables organizations with religious objections to the contraceptive mandate to avoid providing such coverage by either filling out a form certifying that they have a religious objection to providing contraceptive coverage or directly notifying the Department of Health and Human Services of the religious objection — substantially burdens their religious practice. See Eternal Word TV Network, Inc. v. Sec'y of the United States HHS, 818 F.3d 1122, 1132-33, 1143 (11th Cir. 2016).

Eight of the nine circuits to review the issue, including this court, have determined that the opt-out process does not constitute a substantial burden. The courts reached this conclusion by examining the Affordable Care Act's provisions and determining that it was the statute — and not the employer's act of opting out — that "entitle[d] plan participants and beneficiaries to contraceptive coverage." As a result, the employers' engagement with the opt-out process, though legally significant in that it leads the government to provide the organizations' employees with access to contraceptive coverage through an alternative route, does not mean the employers are facilitating the provision of contraceptives in a way that violates their religious practice.

We view the Funeral Home's compliance with antidiscrimination laws in much the same light. Rost may sincerely believe that, by retaining Stephens as an employee, he is supporting and endorsing Stephens's views regarding the mutability of sex. But as a matter of law, bare compliance with Title VII — without actually assisting or facilitating Stephens's transition efforts — does not amount to an endorsement of Stephens's views. As much is clear from the Supreme Court's Free Speech jurisprudence, in which the Court has held that a statute requiring law schools to provide military and nonmilitary recruiters an equal opportunity to recruit

students on campus was not improperly compelling schools to endorse the military's policies because "[n]othing about recruiting suggests that law schools agree with any speech by recruiters," and "students can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so, pursuant to an equal access policy." Rumsfeld v. Forum for Acad. & Institutional Rights, Inc., 547 U.S. 47, 65 (2006). Similarly, here, requiring the Funeral Home to refrain from firing an employee with different religious views from Rost does not, as a matter of law, mean that Rost is endorsing or supporting those views. Indeed, Rost's own behavior suggests that he sees the difference between employment and endorsement, as he employs individuals of any or no faith, "permits employees to wear Jewish head coverings for Jewish services," and "even testified that he is not endorsing his employee's religious beliefs by employing them."

At bottom, the fact that Rost sincerely believes that he is being compelled to make such an endorsement does not make it so. Accordingly, requiring Rost to comply with Title VII's proscriptions on discrimination does not substantially burden his religious practice. The district court therefore erred in granting summary judgment to the Funeral Home on the basis of its RFRA defense, and we REVERSE the district court's decision on this ground. As Rost's purported burdens are insufficient as a matter of law, we GRANT summary judgment to the EEOC with respect to the Funeral Home's RFRA defense.

iii. Strict Scrutiny Test

Because the Funeral Home has not established that Rost's religious exercise would be substantially burdened by requiring the Funeral Home to comply with Title VII, we do not need to consider whether the EEOC has adequately demonstrated that enforcing Title VII in this case is the least restrictive means of furthering a compelling government interest. However, in the interest of completeness, we reach this issue and conclude that the EEOC has satisfied its burden. We therefore GRANT summary judgment to the EEOC with regard to the Funeral Home's RFRA defense on the alternative grounds that the EEOC's enforcement action in this case survives strict scrutiny.

(a) Compelling Government Interest

Under the "to the person" test, the EEOC must demonstrate that its compelling interest "is satisfied through application of the challenged law [to] . . . the particular claimant whose sincere exercise of religion is being substantially burdened." This requires "look[ing] beyond broadly formulated interests justifying the general applicability of government mandates and scrutiniz[ing] the asserted harm of granting specific exemptions to particular religious claimants."

As an initial matter, the Funeral Home does not seem to dispute that the EEOC "has a compelling interest in the 'elimination of workplace discrimination, including sex discrimination.'" However, the Funeral Home criticizes the EEOC for "cit[ing] a general, broadly formulated interest" to support enforcing Title VII in this case. According to the Funeral Home, the relevant inquiry is whether the EEOC has a "specific interest in forcing [the Funeral Home] to allow its male funeral directors to wear the uniform for female funeral directors while on the

job." The EEOC instead asks whether its interest in "eradicating employment discrimination" is furthered by ensuring that Stephens does not suffer discrimination (either on the basis of sex-stereotyping or her transgender status), lose her livelihood, or face the emotional pain and suffering of being effectively told "that as a transgender woman she is not valued or able to make workplace contributions." Stephens similarly argues that "Title VII serves a compelling interest in eradicating all the forms of invidious employment discrimination proscribed by the statute," and points to studies demonstrating that transgender people have experienced particularly high rates of "bodily harm, violence, and discrimination because of their transgender status."

The Funeral Home's construction of the compelling-interest test is off-base. Rather than focusing on the EEOC's claim — that the Funeral Home terminated Stephens because of her proposed gender nonconforming behavior — the Funeral Home's test focuses instead on its defense (discussed above) that the Funeral Home merely wishes to enforce an appropriate workplace uniform. But the Funeral Home has not identified any cases where the government's compelling interest was framed as its interest in disturbing a company's workplace policies. For instance, in Hobby Lobby, the issue, which the Court ultimately declined to adjudicate, was whether the government's "interest in guaranteeing cost-free access to the four challenged contraceptive methods" was compelling—not whether the government had a compelling interest in requiring closely held organizations to act in a way that conflicted with their religious practice.

The Supreme Court's analysis in cases like Wisconsin v. Yoder, 406 U.S. 205 (1972), and Holt guides our approach. In those cases, the Court ultimately determined that the interests generally served by a given government policy or statute would not be "compromised" by granting an exemption to a particular individual or group. See Holt, 135 S. Ct. at 863. Thus, in Yoder, the Court held that the interests furthered by the government's requirement of compulsory education for children through the age of sixteen (i.e., "to prepare citizens to participate effectively and intelligently in our open political system" and to "prepare[] individuals to be self-reliant and self-sufficient participants in society") were not harmed by granting an exemption to the Amish, who do not need to be prepared "for life in modern society" and whose own traditions adequately ensure self-sufficiency. Similarly, in Holt, the Court recognized that the Department of Corrections has a compelling interest in preventing prisoners from hiding contraband on their persons, which is generally effectuated by requiring prisoners to adhere to a strict grooming policy, but the Court failed to see how the Department's "compelling interest in staunching the flow of contraband into and within its facilities . . . would be seriously compromised by allowing an inmate to grow a 1/2-inch beard."

Here, the same framework leads to the opposite conclusion. Failing to enforce Title VII against the Funeral Home means the EEOC would be allowing a particular person — Stephens — to suffer discrimination, and such an outcome is directly contrary to the EEOC's compelling interest in combating discrimination in the workforce. In this regard, this case is analogous to Eternal Word, in which the Eleventh Circuit determined that the government had a compelling interest in requiring a particular nonprofit organization with religious objections to the Affordable Care Act's contraceptive mandate to follow the procedures associated with obtaining an accommodation to the Act because

> applying the accommodation procedure to the plaintiffs in these cases furthers [the government's] interests because the accommodation ensures that the plaintiffs' female plan participants and beneficiaries — who may or may not share the same religious beliefs as their employer — have access to contraception without cost sharing or additional administrative burdens as the ACA requires.

818 F.3d at 1155. The Eternal Word court reasoned that "[u]nlike the exception made in Yoder for Amish children," who would be adequately prepared for adulthood even without compulsory education, the "poor health outcomes related to unintended or poorly timed pregnancies apply to the plaintiffs' female plan participants or beneficiaries and their children just as they do to the general population." Similarly, here, the EEOC's compelling interest in eradicating discrimination applies with as much force to Stephens as to any other employee discriminated against based on sex.

It is true, of course, that the specific harms the EEOC identifies in this case, such as depriving Stephens of her livelihood and harming her sense of self-worth, are simply permutations of the generic harm that is always suffered in employment discrimination cases. But O Centro's "to the person" test does not mean that the government has a compelling interest in enforcing the laws only when the failure to enforce would lead to uniquely harmful consequences. Rather, the question is whether "the asserted harm of granting specific exemptions to particular religious claimants" is sufficiently great to require compliance with the law. O Centro, 546 U.S. at 431. Here, for the reasons stated above, the EEOC has adequately demonstrated that Stephens has and would suffer substantial harm if we exempted the Funeral Home from Title VII's requirements.

Finally, we reject the Funeral Home's claim that it should receive an exemption, notwithstanding any harm to Stephens or the EEOC's interest in eradicating discrimination, because "the constitutional guarantee of free exercise[,] effectuated here via RFRA . . . [,] is a higher-order right that necessarily supersedes a conflicting statutory right." This point warrants little discussion. The Supreme Court has already determined that RFRA does not, in fact, "effectuate . . . the First Amendment's guarantee of free exercise," because it sweeps more broadly than the Constitution demands. And in any event, the Supreme Court has expressly recognized that compelling interests can, at times, override religious beliefs — even those that are squarely protected by the Free Exercise Clause. We therefore decline to hoist automatically Rost's religious interests above other compelling governmental concerns. The undisputed record demonstrates that Stephens has been and would be harmed by the Funeral Home's discriminatory practices in this case, and the EEOC has a compelling interest in eradicating and remedying such discrimination.

(b) Least Restrictive Means

The final inquiry under RFRA is whether there exist "other means of achieving [the government's] desired goal without imposing a substantial burden on the exercise of religion by the objecting part[y]." "The least-restrictive-means standard is exceptionally demanding," and the EEOC bears the burden of showing that burdening the Funeral Home's religious exercise

constitutes the least restrictive means of furthering its compelling interests. Where an alternative option exists that furthers the government's interest "equally well," the government "must use it," Holt, 135 S. Ct. at 864. In conducting the least-restrictive-alternative analysis, "courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." Hobby Lobby, 134 S. Ct. at 2781 n.37. Cost to the government may also be "an important factor in the least-restrictive-means analysis."

The district court found that requiring the Funeral Home to adopt a gender-neutral dress code would constitute a less restrictive alternative to enforcing Title VII in this case and granted the Funeral Home summary judgment on this ground. According to the district court, the Funeral Home engaged in illegal sex stereotyping only with respect to "the clothing Stephens [c]ould wear at work," and therefore a gender-neutral dress code would resolve the case because Stephens would not be forced to dress in a way that conforms to Rost's conception of Stephens's sex and Rost would not be compelled to authorize Stephens to dress in a way that violates Rost's religious beliefs.

Neither party endorses the district court's proposed alternative, and for good reason. The district court's suggestion, although appealing in its tidiness, is tenable only if we excise from the case evidence of sex stereotyping in areas other than attire. Though Rost does repeatedly say that he terminated Stephens because she "wanted to dress as a woman" and "would no longer dress as a man," the record also contains uncontroverted evidence that Rost's reasons for terminating Stephens extended to other aspects of Stephens's intended presentation. For instance, Rost stated that he fired Stephens because Stephens "was no longer going to represent himself as a man," and Rost insisted that Stephens presenting as a female would disrupt clients' healing process because female clients would have to "share a bathroom with a man dressed up as a woman." The record thus compels the finding that Rost's concerns extended beyond Stephens's attire and reached Stephens's appearance and behavior more generally.

At the summary-judgment stage, where a court may not "make credibility determinations, weigh the evidence, or draw [adverse] inferences from the facts," the district court was required to account for the evidence of Rost's non-clothing-based sex stereotyping in determining whether a proposed less restrictive alternative furthered the government's "stated interests equally [as] well." Here, as the evidence above shows, merely altering the Funeral Home's dress code would not address the discrimination Stephens faced because of her broader desire "to represent [her]self as a [wo]man." Indeed, the Funeral Home's counsel conceded at oral argument that Rost would have objected to Stephens's coming "to work presenting clearly as a woman and acting as a woman," regardless of whether Stephens wore a man's suit, because that "would contradict [Rost's] sincerely held religious beliefs."

The Funeral Home's proposed alternative — to "permit businesses to allow the enforcement of sex-specific dress codes for employees who are public-facing representatives of their employer, so long as the dress code imposes equal burdens on the sexes and does not affect employee dress outside of work" — is equally flawed. The Funeral Home's suggestion would do nothing to advance the government's compelling interest in preventing and remedying discrimination against Stephens based on her refusal to conform at work to stereotypical notions

of how biologically male persons should dress, appear, behave, and identify. Regardless of whether the EEOC has a compelling interest in combating sex-specific dress codes — a point that is not at issue in this case — the EEOC does have a compelling interest in ensuring that the Funeral Home does not discriminate against its employees on the basis of their sex. The Funeral Home's proposed alternative sidelines this interest entirely.

The EEOC, Stephens, and several amici argue that searching for an alternative to Title VII is futile because enforcing Title VII is itself the least restrictive way to further EEOC's interest in eradicating discrimination based on sex stereotypes from the workplace. We agree.

. . . . As a final point, we reject the Funeral Home's suggestion that enforcing Title VII in this case would undermine, rather than advance, the EEOC's interest in combating sex stereotypes. According to the Funeral Home, the EEOC's requested relief reinforces sex stereotypes because the agency essentially asks that Stephens "be able to dress in a stereotypical feminine manner." This argument misses the mark. Nothing in Title VII or this court's jurisprudence requires employees to reject their employer's stereotypical notions of masculinity or femininity; rather, employees simply may not be discriminated against for a failure to conform. Title VII protects both the right of male employees "to c[o]me to work with makeup or lipstick on [their] face[s]," and the right of female employees to refuse to "wear dresses or makeup," without any internal contradiction.

In short, the district court erred in finding that EEOC had failed to adopt the least restrictive means of furthering its compelling interest in eradicating discrimination in the workplace.

Notes and Questions

1. RFRA was passed by Congress in reaction to the Supreme Court's ruling in Employment Division v. Smith, a case that, as noted in the opinion above, overruled prior 1st Amendment jurisprudence dealing with 1st Amendment Free Exercise of Religion challenges to the application of federal or state laws that impose a burden on an individual's free exercise of religion. After Employment Division v Smith, a challenger in such a case could not bring a 1st Amendment claim if the government was applying a law of general application that was not specifically targeted at the religious beliefs or practices in question. Congress passed RFRA in an attempt to revive the prior constitutional test, but the Supreme Court ruled that Congress could not effectively overrule a constitutional decision by the Court. Congress went "back to the drawing board" and passed a scaled down version of RFRA, which essentially carved an exception out of federal laws of general application by giving individuals (and, the Supreme Court subsequently held, corporations as well) the right to raise a statutory free exercise of religion defense against enforcement actions by federal agencies. EEOC v. Harris Funeral Homes is one such case.

2. Are you persuaded by the Court's conclusion that the EEOC was not imposing a substantial burden on Thomas Rost's religion when it sued him for discharging Aimee Stephens due to her gender transition, assuming, as the court does, that he holds his religious beliefs in good faith?

3. The court identifies the prevention and remedy of unlawful discrimination as a compelling interest of the state. Congress has never expressly forbidden employment discrimination because of sexual orientation or gender identity, but the Supreme Court ruled in Bostock that those grounds of discrimination are actually a form of sex discrimination covered by Title VII. Does that mean that the federal government has a compelling interest to prevent and remedy sexual orientation and gender identity discrimination, in the absence of any relevant Congressional findings as to those forms of discrimination?

4. Is a court order to reinstate Aimee Stephens to work at Harris Funeral Homes presenting as a woman the least intrusive remedy? Aimee Stephens died a few weeks before the Supreme Court ruled in Bostock, so the remedy on remand of her case to the Michigan district court will be limited to damages payable to her estate, but a statutorily authorized remedy in a Title VII sex discrimination case can be reinstatement of the discharged employee with back-pay and compensation for lost benefits and, in cases of intentional discrimination, a jury can award compensatory and punitive damages in appropriate cases.

Chapter 3, Section F – "The Sex Discrimination Issue" at page 455 – Change this Heading to read: "Transgender Students"

At Page 471, Note 2, add the following:

The 9th Circuit Court of Appeals affirmed a different district court's denial of a preliminary injunction in a virtually identical case in Parents for Privacy v. Barr, 949 F.3d 1210 (9th Cir., February 12, 2020). Judge Wallace Tashima summarized the court's holding as follows: "We agree with the district court and hold that there is no Fourteenth Amendment fundamental privacy right to avoid all risk of intimate exposure to or by a transgender person who was assigned the opposite biological sex at birth. We also hold that a policy that treats all students equally does not discriminate based on sex in violation of Title IX, and that the normal use of privacy facilities does not constitute actionable sexual harassment under Title IX just because a person is transgender. We hold further that the Fourteenth Amendment does not provide a fundamental parental right to determine the bathroom policies of the public schools to which parents may send their children, either independent of the parental right to direct the upbringing and education of their children or encompassed by it. Finally, we hold that the school district's policy is rationally related to a legitimate state purpose and does not infringe Plaintiffs' First Amendment free exercise rights because it does not target religious conduct. Accordingly, we affirm the district court's dismissal with prejudice of the action." To similar effect, see Doe v. Boyertown Area School District, 897 F.3d 518 (3rd Cir. 2018), cert. denied, 139 S. Ct. 2636 (2019).

Bottom of Page 471 (text beginning after Note 3) through end of Notes and Questions on Page 491 – DELETE this material. [This material relates to the court of appeals opinion in the Harris Funeral Home case, which has now been decided by the U.S. Supreme Court and is included in this Supplement at Chapter One].

Chapter 3 – Subsection G – "Transgender Military Service" – Substitute the following opinion by the 9th Circuit Court of Appeals for the District Court opinion in this case on Page 493.

Background on the issue of military service by transgender individuals can be found on pages 491-493 of the Casebook. The Karnoski case is one of five federal lawsuits in different district courts challenging the constitutionality of the Trump Administration's announced policy restricting military service by transgender individuals. Four of the cases filed in the fall of 2017 after the White House announced the initial details of the policy resulted in preliminary injunctions, including the one issued on December 11, 2017, in the opinion that appears in the casebook. The 9th Circuit's opinion, responding to appeals filed by the government seeking to have the preliminary injunction vacated and to challenge various discovery rulings by the district court, was issued several months after the Supreme Court had granted a motion by the

government to stay pending preliminary injunctions in the case, as a result of which the policy was allowed to go into effect in April of 2019. Surprisingly, implementation of the policy was not followed by reports of discharges of transgender military members.

The 9th Circuit's opinion sets out the background of the litigation in detail. Much of the opinion concerns disputes about discovery, which have been edited from the opinion so as to focus mainly on the substantive constitutional law concerning the challenge to the constitutionality of the policy.

Ryan Karnoski v. Donald J. Trump
926 F.3d 1180 (9th Cir. 2019)

PER CURIAM:

I

A. Background

Historically, transgender individuals could not serve openly in the military. In August 2014, the Department of Defense ("DoD") eliminated its categorical ban on retention of transgender service members, enabling each branch of the military to reassess its own policies. In 2015, then-Secretary of Defense Ashton Carter created a working group to study the policy and readiness implications of allowing transgender individuals to serve in the military. Secretary Carter instructed the working group to "start with the presumption that transgender persons can serve openly without adverse impact on military effectiveness and readiness, unless and except where objective, practical impediments are identified." As part of this review, the RAND National Defense Research Institute was commissioned to conduct a study and issue a report of its findings (the "RAND Report"). The RAND Report concluded that health care for transgender service members would be a "very small part of the total health care" provided to service members and estimated the impact on the military's readiness from accepting transgender individuals would be "negligible."

Following the issuance of the RAND Report, Secretary Carter in June 2016 ordered the armed forces to adopt a new policy on military service by transgender individuals (the "Carter Policy"). The policy provided that "transgender individuals shall be allowed to serve [openly] in the military ... while being subject to the same standards and procedures as other members with regard to their medical fitness for duty, physical fitness, uniform and grooming, deployability, and retention."

On June 30, 2017, Secretary Mattis deferred accessing transgender applicants into the military until January 1, 2018. The announcement stated that the armed forces "will review their accession plans and provide input on the impact to the readiness and lethality of our forces."

1. The July 26, 2017 Twitter Announcement

On July 26, 2017, President Trump announced over Twitter that the United States would no longer accept or allow transgender people to serve in the military:

> After consultation with my Generals and military experts, please be advised that the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. Military. Our military must be focused on decisive and overwhelming victory and cannot be burdened with the tremendous medical costs and disruption that transgender in the military would entail. Thank you.

This is sometimes referred to as the "Twitter Announcement."

2. The August 25, 2017 Presidential Memorandum

The Twitter Announcement was followed on August 25, 2017, by a Presidential Memorandum (the "2017 Memorandum," and collectively with the Twitter Announcement, sometimes referred to as "the Ban"). The 2017 Memorandum noted that until June 2016, the DoD and the Department of Homeland Security ("DHS") "generally prohibited openly transgender individuals from accession into the United States military and authorized the discharge of such individuals." The 2017 Memorandum noted that Secretary Carter had revised those policies in 2016, but it expressed the view that Secretary Carter had "failed to identify a sufficient basis to conclude that terminating the Departments' longstanding policy and practice would not hinder military effectiveness and lethality, disrupt unit cohesion, or tax military resources."

The 2017 Memorandum "direct[ed] the Secretary of Defense, and the Secretary of Homeland Security with respect to the U.S. Coast Guard, to return to the longstanding policy and practice on military service by transgender individuals that was in place prior to June 2016 until such time as a sufficient basis exists upon which to conclude that terminating that policy and practice would not .... hinder military effectiveness and lethality, disrupt unit cohesion, or tax military resources."

Specifically, the 2017 Memorandum directed the Departments to "maintain the [pre-2016] policy regarding accession of transgender individuals into military service," and to "halt all use of DoD or DHS resources to fund sex-reassignment surgical procedures for military personnel." It directed the Secretary of Defense, in consultation with the Secretary of Homeland Security, to submit "a plan for implementing" the general policy and the specific directives of the 2017 Memorandum by February 21, 2018. It provided that, "[a]s part of the implementation plan, the Secretary of Defense, in consultation with the Secretary of Homeland Security, shall determine how to address transgender individuals currently serving in the United States military," but stated that, "[u]ntil the Secretary has made that determination, no action may be taken against such individuals under the policy [mandating a return to the pre-2016 policy]."

3. The Complaint

The amended complaint alleges that the policy adopted through the Twitter Announcement and the 2017 Memorandum discriminates against transgender people regarding military service in violation of the equal protection and substantive due process guarantees of the Fifth Amendment and the free speech guarantee of the First Amendment of the U.S. Constitution.

Plaintiffs included nine individuals, three organizations, and, as intervenor, the State of Washington. Plaintiff Ryan Karnoski, for example, is a transgender man who holds a master's degree in social work, works as a mental health technician, comes from a family with a history of military service, and aspires to serve as an officer in the military. His desire to join the military came into sharper focus following the death of his cousin, who was killed in action in Afghanistan in 2009. He would like to join the military but is prohibited from doing so because of his transgender status. Plaintiff Staff Sergeant Cathrine Schmid is a transgender woman who was diagnosed with gender dysphoria in 2013. She joined the Army in 2005, has received numerous awards and decorations for her service, and currently serves as a Signals Intelligence Analyst. She serves openly as a woman, and she is recognized and treated as female in all aspects of military life. In June 2017, Staff Sergeant Schmid submitted an application to become an Army warrant officer, but her application was placed on hold in light of her transgender status.

4. Secretary Mattis' September 2017 Interim Guidance

On September 14, 2017, Secretary Mattis acknowledged receipt of the 2017 Memorandum and promised to "present the President with a plan to implement the policy and directives in the Presidential Memorandum" no later than February 21, 2018. Secretary Mattis also issued "Interim Guidance" to take effect immediately and remain in effect pending promulgation of a final policy. The Interim Guidance provided that the pre-2016 policies prohibiting the accession of transgender individuals into the military would remain in effect and that no new sex reassignment surgical procedures for military personnel would be permitted after March 22, 2018. It further provided that "no action may be taken to involuntarily separate or discharge an otherwise qualified Service member solely on the basis of a gender dysphoria diagnosis or transgender status" during the interim period.

5. Secretary Mattis' Creation of a Panel to Develop the Implementation Plan

On the same day that Secretary Mattis issued the Interim Guidance, he directed "the Deputy Secretary of Defense and the Vice Chairman of the Joint Chiefs of Staff to lead the [DoD] in developing an Implementation Plan on military service by transgender individuals, to effect the policy and directives in [the] Presidential Memorandum." The Implementation Plan was to "establish the policy, standards and procedures for service by transgender individuals in the military, consistent with military readiness, lethality, deployability, budgetary constraints, and applicable law." The Deputy Secretary of Defense and Vice Chairman of the Joint Chiefs of Staff were to be supported by "a panel of experts drawn from [the] DoD and [DHS]," consisting of "senior uniformed and civilian Defense Department and U.S. Coast Guard leaders" and "combat veterans." Secretary Mattis directed this panel to "bring a comprehensive, holistic, and objective approach to study military service by transgender individuals, focusing on military readiness, lethality, and unit cohesion, with due regard for budgetary constraints and consistent with applicable law."

6. The December 11, 2017 Preliminary Injunction

On December 11, 2017, the district court issued a nationwide preliminary injunction enjoining Defendants from "taking any action relative to transgender people that is inconsistent with the status quo that existed prior to President Trump's July 26, 2017 announcement." Defendants filed an appeal from the preliminary injunction, but subsequently moved to voluntarily dismiss their appeal.

7. The February 2018 Defense Department Report

The panel created by Secretary Mattis met 13 times over a period of 90 days. Secretary Mattis reported that the panel:

> met with and received input from transgender Service members, commanders of transgender Service members, military medical professionals, and civilian medical professionals with experience in the care and treatment of individuals with gender dysphoria. The [p]anel also reviewed available information on gender dysphoria, the treatment of gender dysphoria, and the effects of currently serving individuals with gender dysphoria on military effectiveness, unit cohesion, and resources. Unlike previous reviews on military service by transgender individuals, the [p]anel's analysis was informed by the Department's own data obtained since the [Carter Policy] began to take effect last year.

In February 2018, the Department of Defense produced a 44-page report based on the panel's work ("the 2018 Report").

8. Secretary Mattis' February 22, 2018 Memorandum

Secretary Mattis forwarded the 2018 Report to the President accompanied by a memorandum dated February 22, 2018 (the "Mattis Memorandum"). Secretary Mattis, citing the panel's work and his professional judgment, recommended that the President adopt the following policies:

> * Transgender persons with a history or diagnosis of gender dysphoria are disqualified from military service, except under the following limited circumstances: (1) if they have been stable for 36 consecutive months in their biological sex prior to accession; (2) Service members diagnosed with gender dysphoria after entering into service may be retained if they do not require a change of gender and remain deployable within applicable retention standards; and (3) currently serving Service members who have been diagnosed with gender dysphoria since the previous administration's policy took effect and prior to the effective date of this new policy, may continue to serve in their preferred gender and receive medically necessary treatment for gender dysphoria.
>
> * Transgender persons who require or have undergone gender transition are disqualified from military service.
>
> * Transgender persons without a history or diagnosis of gender dysphoria, who are otherwise qualified for service, may serve, like all other Service members, in their biological sex.

Secretary Mattis further recommended that the President revoke the 2017 Memorandum in order to allow the adoption of these proposed policies.

9. The March 23, 2018 Presidential Memorandum

On March 23, 2018, the President accepted Secretary Mattis's recommendation, revoked the 2017 Memorandum, and authorized the implementation of "any appropriate policies concerning military service by transgender individuals."

B. The District Court's April 13, 2018 Order

In the meantime, cross-motions for summary judgment and partial summary judgment had been filed in the district court. The 2018 Policy issued days before the motions were to be heard, and the district court immediately requested supplemental briefs from the parties. In addition, Defendants moved to dissolve the December 11, 2017 preliminary injunction on the ground that the 2017 Memorandum had been supplanted by the 2018 Policy.

On April 13, 2018, the district court granted in part and denied in part the cross-motions for summary judgment. The district court first determined that the 2018 Policy had not rendered Plaintiffs' challenges moot. It observed that the burden of demonstrating mootness "is a heavy one," citing County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979). The district court found "that the 2018 Memorandum and the Implementation Plan do not substantively rescind or revoke the Ban, but instead threaten the very same violations that caused it and other courts to enjoin the Ban in the first place."

Addressing Plaintiffs' constitutional claims, the district court concluded that transgender individuals constitute a suspect class and "that the Ban must satisfy the most exacting level of scrutiny if it is to survive." The district court identified four relevant factors for determining whether a classification was suspect or quasi-suspect: (1) whether as a historical matter the class was subject to discrimination; (2) whether the class has a defining characteristic that frequently bears a relationship to its ability to perform or its contribution to society; (3) whether the class exhibits obvious immutable or distinguishing characteristics that define it as a discrete group; and (4) whether the class is a minority or is politically powerless. The district court noted that "courts have consistently found that transgender people constitute, at minimum, a quasi-suspect class," but applying these factors, the district court further concluded that transgender people constitute a suspect class.

Turning to the question of deference, the district court started with its previous determination that the Ban was not owed deference because it was not supported by any evidence of considered reason or deliberation. The district court noted, however, that because "the specifics of the Ban have been further defined in the 2018 Memorandum and the Implementation Plan, whether the Court owes deference to the Ban presents a more complicated question." The district court explained that: (1) any justification for the Ban must be "genuine, not hypothesized or invented post hoc in response to litigation" (quoting United States v. Virginia, 518 U.S. 515, 533 (1996)); (2) the "complex[,] subtle and professional decisions as to the composition ... and control of a military force are essentially professional military

judgments" (quoting Gilligan v. Morgan, 413 U.S. 1, 10 (1973)); and (3) its "entry of a preliminary injunction was not intended to prevent the military from continuing to review the implications of open service by transgender people, nor to preclude it from ever modifying the Carter Policy." The district court further noted that Defendants asserted that the 2018 Policy was the product of deliberative review and entitled to deference.

However, the district court declined to grant Defendants relief on the question of deference, noting that: (1) the 2018 Policy, including the 2018 Report, raised unresolved questions of fact; (2) the Implementation Plan was not disclosed until March 29, 2018; and (3) Plaintiffs had not had an opportunity to test or respond to the claims in the 2018 Policy. The district court concluded that on the present record, it "cannot determine whether the DoD's deliberative process—including the timing and thoroughness of its study and the soundness of the medical and other evidence it relied upon—is of the type to which Courts typically should defer." Accordingly, the district court denied "summary judgment as to the level of deference due."

The district court proceeded to hold that, for the same reasons it could not grant summary judgment as to the level of deference, it could not reach the merits of the constitutional violations alleged by Plaintiffs. It therefore denied their request for summary judgment on their equal protection, due process, and First Amendment claims.

The district court also addressed Defendants' contention that the district court was without jurisdiction to impose injunctive or declaratory relief against the President in his official capacity. The district court granted Defendants' motion for partial summary judgment with regard to injunctive relief and denied it with regard to declaratory relief. It opined that this was an appropriate instance for declaratory relief. The district court did not rule on the merits of Defendants' motion to dissolve the preliminary injunction, and instead ordered the motion stricken. It stated:

> The preliminary injunction previously entered otherwise remains in full force and effect. Defendants (with the exception of President Trump), their officers, agents, servants, employees, and attorneys, and any other person or entity subject to their control or acting directly or indirectly in concert or participation with Defendants are enjoined from taking any action relative to transgender people that is inconsistent with the status quo that existed prior to President Trump's July 26, 2017 announcement.

The order directed the parties to proceed with discovery and to prepare for trial. Defendants appeal from the district court's order striking their motion to dissolve the preliminary injunction.

C. The District Court's July 27, 2018 Discovery Order [The portion of the Court's opinion discussing the discovery controversies between the parties has been deleted here.]

II

A. Legal Standard Governing Dissolution of a Preliminary Injunction

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008). We review an order regarding preliminary injunctive relief for abuse of discretion but review any underlying issues of law de novo. Credit Suisse First Boston Corp. v. Grunwald, 400 F.3d 1119, 1126 n.7 (9th Cir. 2005).

Pursuant to 28 U.S.C. § 1292(a)(1), we have jurisdiction to review an order "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions." See Gon v. First State Ins. Co., 871 F.2d 863, 865 (9th Cir. 1989). However, we have held "that a party that has failed to appeal from an injunction cannot regain its lost opportunity simply by making a motion to modify or dissolve the injunction, having the motion denied, and appealing the denial. In such a case, the appeal is limited to the propriety of the denial and does not extend to the propriety of the original injunction itself." Id. at 866.

More specifically, we have held that in "reviewing denials of motions to dissolve injunctions, we do not consider the propriety of the underlying order, but limit our review to the new material presented with respect to the motion to dissolve." Sharp v. Weston, 233 F.3d 1166, 1169–70 (9th Cir. 2000). "A party seeking modification or dissolution of an injunction bears the burden of establishing that a significant change in facts or law warrants revision or dissolution of the injunction." Id. at 1170; see also Alto v. Black, 738 F.3d 1111, 1120 (9th Cir. 2013).

B. We vacate the district court's striking of Defendants' motion to dissolve the preliminary injunction and remand for the district court to consider the merits of the motion

Our inquiry under Sharp has two parts. We must first address whether the party seeking dissolution of the injunction has established "a significant change in facts or law." Sharp, 233 F.3d at 1170. If this showing has been made, the court must then address whether this change "warrants ... dissolution of the injunction." This latter inquiry should be guided by the same criteria that govern the issuance of a preliminary injunction.14 In seeking dissolution of a preliminary injunction, however, the burden with respect to these criteria is on the party seeking dissolution.

1. Defendants have demonstrated a significant change in facts

Defendants have made the requisite threshold showing of a significant change in facts. Plaintiffs assert that the 2018 Policy, like the 2017 Memorandum, broadly prohibits military service by transgender persons. Beyond the narrow reliance exception, transgender individuals who wish to serve openly in their gender identity are altogether barred from service. Even individuals who are willing to serve in the gender assigned to them at birth are barred from accession if they have a history or diagnosis of gender dysphoria, unless they can "demonstrate 36 consecutive months of stability — i.e., absence of gender dysphoria — immediately preceding their application." For service members who do not qualify under the reliance exception, transition-related medical care is also prohibited. Those who have undergone transition are disqualified from service, and those who have not transitioned are disqualified unless they suppress their gender identity and serve in their birth-assigned sex. Plaintiffs

conclude that the new policy continues to broadly exclude transgender persons from service in the military.

But regardless of its overall effect, the 2018 Policy is significantly different from the 2017 Memorandum in both its creation and its specific provisions. Plaintiffs asserted that no deference was due to the 2017 Memorandum because that policy was not the product of military judgment — i.e. because "President Trump did not rely upon the professional judgment of military authorities before announcing the [policy]." The 2018 Policy, however, involved a study by a panel of military experts that met 13 times over a period of 90 days, a 44-page report issued by the Department of Defense, and a substantive memorandum issued by Secretary Mattis. Moreover, there are significant substantive differences between the 2017 Memorandum and the 2018 Policy. For example, the 2018 Policy includes a reliance exception for service members diagnosed with gender dysphoria after January 1, 2018 that the 2017 Policy lacked.

We hold that Defendants have made a sufficient showing of significant change to require the district court to address whether the change warrants dissolution of the preliminary injunction. We remand for the district court to perform this analysis.

2. Factors for the district court to consider in evaluating whether the significant change warrants dissolution of the preliminary injunction

Among the factors to be considered on remand are the level of constitutional scrutiny applicable to the equal protection or substantive due process rights of transgender persons and also the deference due to military decision-making. These two factors, although conceptually distinct, are here intertwined as we are asked to consider the propriety of a military decision concerning transgender persons. The district court concluded that the 2018 Policy had to satisfy "strict scrutiny if it is to survive." Our view is that existing law does not support the application of a strict scrutiny standard of review in this context.

In United States v. Virginia, 518 U.S. 515, 532–33 (1996), the Supreme Court held that for "cases of official classification based on gender ... the reviewing court must determine whether the proffered justification is 'exceedingly persuasive.'" The justification "must be genuine, not hypothesized or invented post hoc in response to litigation," and "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." The Court further commented that "[p]hysical differences between men and women, however, are enduring," and that these differences should "remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity." Although the Supreme Court's opinion in Virginia requires something more than rational basis review, it does not require strict scrutiny.

We wrestled with defining the appropriate level of judicial scrutiny of a military decision based on sexual orientation in Witt v. Department of the Air Force, 527 F.3d 806 (9th Cir. 2008). In reviewing the military's "Don't Ask, Don't Tell" (DADT) policy for gay and lesbian service members, we adopted a three-factor test based on the Supreme Court's opinion in Sell v. United States, 539 U.S. 166, 179-81 (2003). We held that:

> when the government attempts to intrude upon the personal and private lives of homosexuals, in a manner that implicates the rights identified in Lawrence [v. Texas, 539 U.S. 558 (2003)], the government must advance an important governmental interest, the intrusion must significantly further that interest, and the intrusion must be necessary to further that interest. In other words, for the third factor, a less intrusive means must be unlikely to achieve substantially the government's interest.

Witt, 527 F.3d at 819.

However, we held that this "heightened scrutiny" approach "is as-applied rather than facial." We cited the Supreme Court's admonishment in City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 447 (1985), that an as-applied approach "is the preferred course of adjudication since it enables courts to avoid making unnecessarily broad constitutional judgments." Witt, 527 F.3d at 819. We explained that we had to "determine not whether DADT has some hypothetical post hoc rationalization in general, but whether a justification exists for the application of the policy as applied to Major Witt."

Here, in concluding that a strict scrutiny standard of review applied, the district court reasonably applied the factors ordinarily used to determine whether a classification affects a suspect or quasi-suspect class. See Windsor v. United States, 699 F.3d 169, 181 (2d Cir. 2012) (listing these factors), aff'd on other grounds, 570 U.S. 744 (2013). Nonetheless, in light of the analysis in Virginia and Witt, the district court should apply a standard of review that is more than rational basis but less than strict scrutiny.

Defendants assert that, because this case involves judicial review of military decision-making, mere rational basis review applies. This contention, however, is foreclosed by our decision in Witt. See Witt, 527 F.3d at 821; see also Rostker v. Goldberg, 453 U.S. 57, 71 (1981) (explaining that the Court's decision in Schlesinger v. Ballard, 419 U.S. 498 (1975), "did not purport to apply a different equal protection test because of the military context, but did stress the deference due congressional choices among alternatives in exercising the congressional authority to raise and support armies and make rules for their governance"). Under Witt, deference informs the application of intermediate scrutiny, but it does not displace intermediate scrutiny and replace it with rational basis review.

Defendants alternatively argue that rational basis review applies because the classifications challenged here are based on "gender dysphoria" and "gender transition" rather than transgender status. This too is unpersuasive. On its face, the 2018 Policy regulates on the basis of transgender status. It states that "Transgender persons with a history or diagnosis of gender dysphoria are disqualified from military service, except under [certain] limited circumstances," that "Transgender persons who require or have undergone gender transition are disqualified from military service," and that "Transgender persons without a history or diagnosis of gender dysphoria ... may serve ... in their biological sex." We conclude that the 2018 Policy on its face treats transgender persons differently than other persons, and consequently something more than rational basis but less than strict scrutiny applies.

We also reject Plaintiffs' contention that no deference is owed here. Plaintiffs first argue that deference is not owed to the 2017 Memorandum because that policy was not the product of military judgment. Next, they argue that deference is not owed to the 2018 Policy because that policy simply implemented the 2017 Memorandum. According to Plaintiffs, the 2018 Policy "is not a new policy at all, but rather the expected and mandated outcome of President Trump's directives." As such, it could not have constituted a meaningful exercise of military judgment, because "whatever independent judgment the military brought to bear, it was limited to determining how to implement the [2017 Memorandum] — not whether to do so." Plaintiffs argue the deliberative process that led to the 2018 Policy was not an exercise of independent military judgment because the scope of this review was "constrained by President Trump's directives," the officials who conducted the review were not "free to disagree with President Trump," and the review's ultimate recommendations, having been "dictated" by the President, were "preordained."

Although Plaintiffs on remand may present additional evidence to support this theory, the current record does not bear out the contention that the 2018 Policy was nothing more than an implementation of the 2017 Memorandum, or that the review that produced the 2018 Policy was limited to this purpose. It is true that the 2017 Memorandum directed the Secretary of Defense to develop "a plan for implementing both the general policy ... and the specific directives set forth in [that] memorandum." It is also true that Secretary Mattis subsequently created a panel to develop such a plan. But the 2017 Memorandum also provided that the Secretary of Defense "may advise [the President] at any time, in writing, that a change to this policy is warranted," and Secretary Mattis, accordingly, directed the panel not only to develop an implementation plan but also to "bring a comprehensive, holistic, and objective approach to study military service by transgender individuals." The panel, in turn, appears to have construed its mandate broadly. The policies ultimately recommended by Secretary Mattis were somewhat different from the President's earlier policy and directives, and the President adopted the Secretary's recommendations.

In short, the district court must apply appropriate military deference to its evaluation of the 2018 Policy. See Witt, 527 F.3d at 821. On the current record, a presumption of deference is owed, because the 2018 Policy appears to have been the product of independent military judgment. In applying intermediate scrutiny on remand, the district court may not substitute its "own evaluation of evidence for a reasonable evaluation" by the military. Rostker, 453 U.S. at 68. Of course, "deference does not mean abdication." Witt, 527 F.3d at 821 (quoting Rostker, 453 U.S. at 70). Defendants bear the burden of establishing that they reasonably determined the policy "significantly furthers" the government's important interests, and that is not a trivial burden.

Because the 2018 Policy is a significant change from the 2017 Memorandum, the district court on remand must apply the "traditional" standard for injunctive relief to determine whether dissolution of the injunction is warranted, addressing: (1) whether Plaintiffs have made a sufficient showing of a likelihood of success on the merits; (2) whether Plaintiffs will be

irreparably harmed absent interim relief; (3) whether the issuance of an injunction will substantially injure other parties; and (4) where the public interest lies.

C. We extend the Supreme Court's stay of the preliminary injunction

On January 22, 2019, the Supreme Court issued an order staying the district court's preliminary injunction, pending Defendants' appeal in this court. As we vacate the district court's striking of Defendants' motion to dissolve the preliminary injunction and direct the district court to consider the motion on its merits, we now, consistent with the Supreme Court's order, stay the preliminary injunction through the district court's further consideration of the motion to dissolve.

IV

We conclude that in striking the motion to dissolve the preliminary injunction, the district court failed to give the 2018 Policy the thorough consideration due. Regardless of the merits of the 2017 Memorandum, the reasonableness of the 2018 Policy must be evaluated on the record supporting that decision and with the appropriate deference due to a proffered military decision. Accordingly, we vacate the district court's striking of Defendants' motion to dissolve the preliminary injunction and remand the matter to the district court for reconsideration. Consistent with the Supreme Court's January 22, 2019 order, we stay the district court's December 11, 2017 preliminary injunction through the district court's reconsideration of Defendants' motion. If the district court denies the motion to dissolve the injunction, the stay shall remain in place throughout this court's disposition of any appeal by the Government. . . .

The district court's striking of Defendants' motion to dissolve the preliminary injunction is vacated, the preliminary injunction is stayed pending the district court's reconsideration of that motion, Defendants' petition for writ of mandamus is granted, the district court's July 27, 2018 discovery order is vacated, and this case is remanded to the district court.

Following the Supreme Court's January 22, 2019 decision, Plaintiffs informed this court that they no longer oppose the remedy of vacatur of the preliminary injunction and remand sought by Defendants. Plaintiffs asked this court to "enter a summary order vacating the preliminary injunction and remanding to the district court for further proceedings." In response, Defendants urged us to "issue a reasoned decision vacating the district court's preliminary injunction." We have adopted neither of these paths. Our decision remands for the district court to consider the merits of Defendants' motion to dissolve the preliminary injunction. If Plaintiffs no longer wish to pursue a preliminary injunction, they may so advise the district court on remand.

Notes and Questions

1. The District Court ruled that discrimination because of transgender status is subject to strict scrutiny under the 5th Amendment's equal protection requirement, using the various factors that the Supreme Court has discussed in other contexts to determine whether the challenged policy involves a "suspect classification." Why did the 9th Circuit disagree with this conclusion? What is the consequence of the 9th Circuit's finding that heightened scrutiny,

not strict scrutiny, is the appropriate test for evaluating the constitutionality of the government's policy? Is the 9th Circuit's conclusion consistent with the Supreme Court's handling of sexual orientation discrimination issues in U.S. v. Windsor and Obergefell v. Hodges? Would the Supreme Court's 2020 ruling in Bostock v. Clayton County, a statutory interpretation case, affect your analysis?

2. The plaintiffs have argued, in response to the 9th Circuit's opinion, that the 2018 policy proposed to the President by Secretary Mattis and subsequently adopted with the President's approval is not entitled to the usual deference according policies formulated based on military expertise, based on their contention that the President's charge to Secretary Mattis was to recommend an "implementation plan," not to propose a different plan. The plaintiffs continue to maintain that the 2018 policy is not the result of military deliberation, and that contention has been the focus of the discovery requests seeking to probe the process by which the 2018 plan was formulated. Since the 9th Circuit issued its ruling, the District Court has issued more than half a dozen opinions addressing defense objections to the plaintiffs' various discovery requests. In the portion of the 9th Circuit's opinion omitted from the text above, the Court of Appeals discussed the various privileges that might apply to limit discovery, directing the District Court that it cannot order production of broad categories of documents, but rather must examine particular documents as to which the government interposes a claim of privilege and to as to each item decide whether the plaintiffs are entitled to receive the document, subject to the protective order that the District Court issued earlier in the case to prevent the public dissemination of internal Executive Branch documents. The discovery process had dragged on for more than a year by the time of this writing in July 2020. Finding that the government's renewed motion to dissolve the preliminary injunction could not be resolved without the completion of discovery, the District Court had not by the end of June 2020 ruled on that motion.

3. If the President is not re-elected in November, it is likely that the incoming Administration would move to reinstate the policy adopted by former Defense Secretary Ashton Carter, as described in the Background section of the 9th Circuit's opinion. This would moot the plaintiffs' demand for declaratory and injunctive relief with respect to the policy, but it would not necessarily moot claims for damages by individual plaintiffs concerning the impact on their planned or actual military careers.

Chapter 3, Section H – Other Sexual Minorities, add at page 501

An introduction to issues of intersexuality and non-binary gender identity can be found on pages 500-501 of the casebook.

The district court opinion in Zzymm v. Kerry beginning on page 501 should be replaced by the following 10th Circuit opinion. With the change of administration, former Secretary of

State John Kerry is replaced by Secretary of State Michael Pompeo. The change of administration did not produce a change of policy.

ZZyym v. Pompeo
958 F.3d 1014 (10th Cir. 2020)

BACHARACH, Circuit Judge.

United States citizens ordinarily need a passport to leave or reenter the country. 8 U.S.C. § 1185(b). The passport serves a dual function, proving both identity and allegiance to the United States. Haig v. Agee, 453 U.S. 280, 293 (1981). For decades, the State Department has identified applicants based on characteristics like an individual's sex. In identifying an applicant's sex, the State Department has taken a binary approach, considering everyone as either male or female. This approach has thwarted Dana Zzyym's ability to get a passport. Zzyym applied for a U.S. passport, but was intersex and could not accurately identify as either male or female. Because neither option applied, Zzyym requested a passport with an "X" designation for the sex. The State Department refused and denied Zzyym's application. Zzyym sued, alleging that reliance on the binary sex policy

- exceeded the State Department's statutory authority,
- was arbitrary and capricious under the Administrative Procedure Act, and
- violated the U.S. Constitution. . . .

I. Dana Zzyym, an intersex person, applies for a passport.

The State Department defines an intersex individual as "someone 'born with reproductive or sexual anatomy and/or chromosomal pattern that does not fit typical definitions of male or female.'" This definition fits Zzyym, who was born with both male and female genitalia. Given the presence of genitalia for both sexes, Zzyym's birth certificate was initially left blank for the sex designation. But Zzyym's parents decided to raise Zzyym as a male, so the original birth certificate's blank for sex was filled in as "male." The State Department has treated this birth certificate as the original.

Zzyym lived as a male until adulthood. As an adult, Zzyym explored living as a woman and obtained a driver's license identifying as female. But Zzyym grew increasingly uncomfortable living as a woman and eventually identified as a nonbinary intersex person. While identifying as intersex, Zzyym obtained an amended birth certificate identifying the sex as "UnKnown."

When applying for a passport, Zzyym understood the need for accuracy. So rather than check the box for male or female, Zzyym wrote "intersex." To support the identification as intersex, Zzyym supplied

- a letter requesting an "X" sex designation and

• a letter from a physician stating that Zzyym is intersex.

Zzyym also provided the State Department with the amended birth certificate identifying the sex as "UnKnown" and a Colorado driver's license identifying the sex as female. [After applying for an intersex passport, Zzyym obtained a driver's license identifying the sex as "X."]

II. The State Department denies Zzyym's passport application.

The State Department denied Zzyym's request to designate the sex as "X," explaining that every applicant needed to check the box for either male or female. The State Department offered Zzyym three options:

1. Zzyym could obtain a passport identifying the sex as female, consistent with the driver's license.

2. Zzyym could obtain a passport identifying the sex as male if a physician attested that Zzyym had transitioned to become a male.

3. Zzyym could withdraw the application.

Zzyym declined these options and requested reconsideration, providing two more physicians' letters stating that Zzyym is intersex. The State Department declined to reconsider and again denied Zzyym's application based on the binary consideration of everyone as either male or female.

III. Zzyym sues the State Department.

Zzyym sued and the district court ordered a remand, concluding that the State Department's denial of Zzyym's application was arbitrary and capricious. On remand, the State Department decided to retain its policy and again denied Zzyym's application for a passport with an "X" sex designation. The district court again concluded that the State Department had violated the Administrative Procedure Act, and the government appeals. [The District Court, having resolved the case in Zzyym's favor under the APA, abstained from ruling their constitutional claims.]

IV. The State Department acted within its statutory authority.

The district court concluded that the State Department had exceeded its statutory authority by enforcing its binary sex policy against Zzyym. The government disputes this conclusion, and Zzyym presents two arguments in rebuttal:

1. The government waived this issue by omitting it from the opening appellate brief.

2. The State Department lacked statutory authority to deny a passport application based on a refusal to check either the "male" or "female" box.

We conclude that (1) the government did not waive this issue and (2) the State Department had statutory authority to require applicants to identify their sex as male or female.

A. Standard of Review

We conduct de novo review of the district court's determination of the State Department's statutory authority. If the State Department lacked statutory authority, its decision must be set aside. 5 U.S.C. § 706(2)(C).

B. The State Department did not waive this argument.

In our view, the government's opening appellate brief adequately addressed the issue of statutory authority. Though only one appellate issue was identified, the government argued that the State Department had good reason to deny Zzyym's passport application. The government apparently intended that analysis to address both of the district court's rulings. This approach was reasonable because the district court had intertwined its rulings on Zzyym's arguments. See Prieto v. Quarterman, 456 F.3d 511, 517 (5th Cir. 2006) (stating that when procedural and substantive issues were "inextricably intertwined," the appellant did not waive the procedural issue by briefing only the substantive issue). The district court concluded that

- the State Department's reasons had been arbitrary and capricious and
- the absence of good reasons meant that the State Department had exceeded its statutory authority.

Zzyym v. Pompeo, 341 F. Supp. 3d 1248, 1260 (D. Colo. 2018).

Both rulings rested on the State Department's failure to justify its reliance on the binary sex policy. ("Because neither the Passport Act nor any other law authorizes the denial of a passport application without good reason, and adherence to a series of internal policies that do not contemplate the existence of intersex people is not good reason, the Department has acted in excess of its statutory jurisdiction."). We thus conclude that the government adequately briefed its challenge as to statutory authority. Given this conclusion, we reject Zzyym's allegation of waiver.

C. The State Department had statutory authority to deny Zzyym's passport application based on the binary sex policy.

The Passport Act allows the Secretary of State to "grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries ... under such rules as the President shall designate and prescribe for and on behalf of the United States and no other person shall grant, issue, or verify such passports." 22 U.S.C. § 211a. In turn, the President has delegated the authority to prescribe rules to the Secretary of State. Executive Order 11295, 31 Fed. Reg. 10,603 (Aug. 5, 1966). We must consider the scope of statutory authority delegated to the Secretary of State and the State Department.

The statutory language is permissive, authorizing the State Department to deny passports for reasons not listed in the Act. Haig v. Agee, 453 U.S. 280, 290 (1981). For example, the Act does not say whether the State Department can deny passports to applicants unwilling to state their birth dates or Social Security numbers. Despite the absence of an express statutory provision, few would question the State Department's authority to deny passports when applicants withhold their birth dates or Social Security numbers. See 22 C.F.R. § 51.20(b)

(requiring applicants to answer all questions pertaining to eligibility for a passport). The Passport Act is silent about the State Department's authority to deny a passport to applicants who do not identify as male or female. Given this silence, Zzyym disputes the State Department's statutory authority to deny a passport to an applicant unwilling to check the box for either male or female.

The Supreme Court has addressed other challenges to the State Department's authority to deny passports for reasons that are not listed in the Passport Act. In these cases, the Supreme Court has analyzed the State Department's statutory authority by considering past administrative practice and congressional acquiescence. See, e.g., Kent v. Dulles, 357 U.S. 116, 127–30 (1958); Zemel v. Rusk, 381 U.S. 1, 7–13 (1965); Haig v. Agee, 453 U.S. 280, 291–301 (1981).

The Supreme Court first relied on past administrative practice in Kent v. Dulles. There the government insisted that applicants disclaim membership in the Communist Party in order to qualify for passports. When some applicants refused, the State Department declined to consider their applications. The Supreme Court held that the State Department had exceeded its statutory authority. In reaching this holding, the Court observed that the State Department had previously denied passports based on citizenship, allegiance to the United States, or unlawful conduct. By contrast, the State Department had inconsistently denied passports based on belief or association. This inconsistency made it unlikely that Congress had acquiesced in denying passports based on an applicant's membership in the Communist Party.

But when the State Department has consistently restricted passports, courts assume that Congress has acquiesced if it has not legislated on the subject. For example, in Zemel v. Rusk, the Supreme Court held that the State Department could refuse to validate passports for travel to Cuba. The Court reasoned that the Passport Act's language was broad enough to permit restrictions on where the applicant could go, emphasizing the State Department's history of restricting destinations. But the State Department must sometimes confront novel challenges. Without past opportunities to enforce a policy, the State Department's open assertion of authority implies congressional acquiescence. Haig v. Agee, 453 U.S. 280, 303 (1981).

The Supreme Court inferred such congressional acquiescence in Haig v. Agee. There the State Department revoked the passport of a former CIA officer who had exposed undercover CIA operatives while travelling abroad. In the past, the State Department had rarely encountered the need to revoke a passport based on national security or foreign policy. But the infrequency of previous challenges didn't matter; the Court reasoned that the State Department had "openly asserted" its power to revoke a passport for reasons involving national security and foreign policy and Congress had not stepped in. The Court thus concluded that Congress had implicitly approved the State Department's exercise of statutory power. So the Court upheld the State Department's revocation of the passport.

Agee's logic fits here. Prior to Zzyym's application, the State Department had never denied a passport based on an applicant's unwillingness to identify as male or female. But under Agee, the infrequency of enforcement does not strip the State Department of statutory authority.

In denying a passport to Zzyym, the State Department followed a binary sex policy that had been in place for roughly 39 years.

Zzyym argues that the passport application itself did not alert Congress to the State Department's policy. But the binary sex policy was hardly a secret, for the State Department had enacted regulations requiring every applicant to use particular forms and to answer all of the questions on those forms. 22 C.F.R. § 51.20(a)–(b). Congress could have said if it wanted to allow applicants to bypass certain questions. Given the longevity of the State Department's policy and Congress's apparent acquiescence, we conclude that the binary sex policy fell within the State Department's statutory authority.

Despite Congress's apparent acquiescence, Zzyym contends that the State Department can deny passports only for the reasons identified in Kent, Zemel, and Agee: citizenship, allegiance, unlawful conduct, foreign policy, and national security. We disagree. Though the Supreme Court has crystallized some lawful and unlawful justifications for denying a passport, these justifications are illustrative — not exhaustive. The Supreme Court addressed them only because they were at issue in the three cases. See, e.g., Kent, 357 U.S. at 127–28 (focusing only on established reasons for denying a passport that are "material here"). The Supreme Court didn't suggest that these were the only reasons that could justify denial of a passport. We thus conclude that the State Department had statutory authority to deny a passport to Zzyym for failing to identify as a male or female.

V. The State Department's reliance on its binary sex policy was arbitrary and capricious.

The resulting issue is whether this application of the binary sex policy was arbitrary and capricious based on the existing administrative record. See 5 U.S.C. § 706(2)(A) (arbitrary-and-capricious standard); Copar Pumice Co. v. Tidwell, 603 F.3d 780, 791 n.3 (10th Cir. 2010) (existing administrative record). For this inquiry, we presume that the policy was valid and place the burden of proof on Zzyym. W. Watersheds Project v. Bureau of Land Mgmt., 721 F.3d 1264, 1273 (10th Cir. 2013).

Our review is "narrow," and we are "not to substitute [our] judgment" for the State Department's. Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). Given the narrowness of our review, we will disturb the administrative action only if the State Department relied on improper factors, disregarded an important aspect of the problem, provided an explanation that was implausible or inconsistent with the evidence, or failed to consider an appropriate alternative. On appeal, the government defends its reasons for requiring Zzyym to identify as a male or female.

A. Only two of the State Department's five reasons are supported by the administrative record.

The State Department gave five reasons for relying on the binary sex policy:

1. The policy ensured the accuracy and reliability of U.S. passports.

2. The policy helped identify individuals ineligible for passports.

3. The policy helped make passport data useful for other agencies.

4. No medical consensus existed on how to determine whether someone was intersex.

5. Creating a third designation for sex ("X") was not feasible.

We conclude that the first, fourth, and fifth reasons lack record support, but the second and third reasons are supported.

1. The State Department's first reason (that the binary sex policy ensured the accuracy and reliability of U.S. passports) lacks support in the record.

The State Department justified the binary sex policy in part as a way to promote accuracy and reliability, reasoning that every U.S. jurisdiction had identified all citizens as either male or female. For this justification, the State Department focused on how it determines eligibility for passports. This determination ordinarily requires the State Department to verify an applicant's identity through identification documents issued by other U.S. jurisdictions. So the State Department considered how those jurisdictions identify characteristics such as an individual's sex.

The State Department noted that many U.S. jurisdictions allow amendment of identification documents, but differ on when to allow an amendment. For example, if a male transitions to a female, different jurisdictions may vary in

• whether to allow amendment of a birth certificate to reflect the new sex and

• what evidence is required to obtain the amendment.

Given these differences, the State Department focuses only on original identification documents.

We thus consider how U.S. jurisdictions have treated a citizen's sex in original identification documents. For this inquiry, we use May 2017 as the applicable time frame because that is when the State Department denied Zzyym's request. In May 2017, every U.S. jurisdiction used a binary sex policy in a citizen's original identification documents, always listing the sex as either male or female. Given the prevalence of binary sex policies, the State Department reasoned that listing a sex other than male or female would hamper verification of an applicant's identity.

Zzyym argues that requiring consistency between inaccurate identification documents does not render them more accurate or reliable. We agree. And for intersex individuals like Zzyym, treating every applicant as male or female would necessarily create inaccuracies. The State Department acknowledges that some individuals are born neither male nor female. Forcing these individuals to pick a gender thus injects inaccuracy into the data. A chef might label a jar of salt a jar of sugar, but the label does not make the salt any sweeter. Nor does requiring intersex people to mark "male" or "female" on an application make the passport any more accurate.

But the State Department prizes accuracy. To promote accuracy, the State Department requires applicants to submit original birth certificates, 22 C.F.R. § 51.42, and establish identity with corroborating identification documents, 22 C.F.R. § 51.23. If the designated sex does not

match the identification documents, the applicant must obtain medical certification by a licensed physician. 7 FAM § 1310(a) App. M. Given these requirements, an intersex applicant like Zzyym could not accurately complete the passport application in May 2017. If the applicant was intersex, the original identification documents would not accurately identify the applicant's sex. So the State Department's reliance on original identification documents would prevent intersex applicants from accurately identifying their sex.

At oral argument, the State Department conceded that applications for intersex individuals like Zzyym would be less accurate under the binary sex policy. The State Department thus noted that it had offered to produce a passport with an "F" (matching Zzyym's original Colorado driver's license) or an "M" (matching the original birth certificate). But when asked what an applicant like Zzyym should do to ensure the accuracy of the passport, counsel for the State Department acknowledged that (1) "it may be difficult when one is confronted with a form with limited options that may not track one's best answer to a question" and (2) applicants "have to choose what fits best, and that may not be the most accurate answer that they would like to provide, but it is the answer that is available."

In many cases, however, the "best" available answer may not conform to the applicant's original identity documents. States issue most original identification documents; and when the State Department denied Zzyym's application, most state identification documents pigeonholed everyone as male or female even though some people are neither. So reliance on the original identification documents would sometimes create inaccurate information.

Zzyym's experience illustrates the inevitable inaccuracies of a binary sex policy. Zzyym had two original identification documents that would ordinarily establish the sex: The original birth certificate identified Zzyym as male, and the driver's license said female. With conflicting identification documents, the State Department instructed Zzyym to either identify as female or obtain a medical certification showing transition to male. But this instruction didn't make sense because Zzyym hadn't transitioned from female to male, and Zzyym's original birth certificate said that Zzyym was male.

The State Department's policy effectively allowed Zzyym to obtain a passport by claiming to be either male or female. But the State Department's binary sex policy assumes that Zzyym must be one or the other. How could Zzyym be neither male nor female and accurately identify as either sex? Given the State Department's willingness to allow Zzyym to identify as either male or female, the binary sex policy sunders the accuracy and reliability of information on Zzyym's passport application.

* * *

The State Department lacks record support for its asserted interest in accuracy and reliability. The State Department mirrored how every U.S. jurisdiction was treating gender in May 2017, but these jurisdictions shoehorned everyone into a binary sex classification ill-suited for intersex applicants. The State Department thus relied on information that didn't accurately describe intersex applicants like Zzyym.

2. The State Department's second reason (that the binary sex policy helped the State Department identify individuals ineligible for passports) is supported by the record.

The State Department also explained that the binary sex policy helpfully matches how other federal agencies record someone's sex. This explanation is supported by the record.

The State Department denies passport applications for various reasons. See 22 C.F.R. §§ 51.60–51. To evaluate these applications, the State Department must gather a broad range of information from federal, state, and local authorities. For example, the State Department may need to collect information from other federal agencies to decide whether an applicant has defaulted on a federal loan (22 C.F.R. § 51.60(a)(1)), has committed a sex offense (22 C.F.R. § 51.60(g)), or has obtained a conviction for drug trafficking (22 C.F.R. § 51.61).

The State Department thus underscored two facts bearing on the need for consistency in data recorded by different federal agencies:

> 1. "Sex is one of the primary data points used by these agencies in recordkeeping ...." Appellants' App'x vol. 1, at 85; see id. at 45–46 ("Sex is a key component of the 'biometric identity' that the Department uses to verify the identity of the applicant and distinguish individuals.").
>
> 2. "[A]ll such agencies recognize only two sexes." Id. at 85.

In May 2017, the State Department's system required an applicant's data to match many other federal agencies. And every federal database identified each person as either male or female. So if the State Department searched for Zzyym with an "X" designation for sex, the search would yield mismatches for the applicant's sex. To uncover the reason for the mismatches, an employee in the State Department would need to manually override the "X" designation of sex.

The State Department could thus rationally insist on identifying the applicant's sex in a way that matched other federal databases. To minimize confusion, the State Department reasonably concluded that a binary sex policy could enhance the ability to verify identity.

Of course, the State Department also searches state and local databases in order to assess eligibility for a passport. For example, federal law prohibits the issuance of passports to anyone owing more than $2,500 in back child support. 42 U.S.C. § 652(k); 22 C.F.R. § 51.60(a)(2). Child support is governed by state law and enforced by state and local agencies. Though some state agencies did accommodate a third sex designation in 2017, the State Department reasonably concluded that inaccuracies could still arise when contrasting an "X" sex designation with the more common methods of designating someone's sex.

Zzyym points out that the State Department could obtain useable information from other agencies despite differences in the ways that they identified an individual's sex. For example, if an applicant's sex didn't match a federal agency's records, the State Department could verify an applicant's social security number, date of birth, and name. But manually overriding the mismatches would require additional resources.

Zzyym also points out that the State Department was apparently willing to tolerate mismatches for transgender individuals. For these individuals, the State Department used a process allowing an applicant to identify a sex differing from the one on the driver's license or birth certificate. Zzyym questions why the State Department was willing to accept mismatches for transgender applicants but not intersex applicants.

This argument proves that the State Department could accommodate discrepancies — not that it had to do so. In adopting the transgender policy, the State Department needed to evaluate all pertinent factors. Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971). But we have little information on the mix of factors contributing to the State Department's policy for transgender applicants. For example, nothing in the record suggests whether the State Department considered the possibility of mismatches with state databases as a factor weighing against the transgender policy.

Regardless of what the pertinent factors were, we know that the State Department was ultimately willing to tolerate some mismatches between transgender applicants' passport applications and the original identification documents. But we don't know how the State Department weighed the inevitability of these mismatches. Given the absence of information on how the State Department weighed this factor for transgender applicants, we cannot speculate. So the State Department's apparent tolerance for mismatches among transgender applicants does not bear on the reasonableness of this factor for intersex applicants.

Transgender applicants aside, Zzyym points out that mismatches may emerge whenever the State Department and a particular state use different methods to identify an individual's sex. For example, Zzyym points to the instruction to identify as either male or female, which may or may not correspond to states' underlying databases. So under either approach, mismatches will arise.

But the State Department has reasonably tried to limit unnecessary mismatches. Under arbitrary-and-capricious review, the agency need not select a perfect solution — just a rational one. Because the State Department could rationally try to reduce unnecessary mismatches, we conclude that the administrative record supports the State Department's second reason to rely on the binary sex policy.

3. The State Department's third reason (that the binary sex policy helped make passport data useful for other agencies) is supported by the record.

The State Department also reasoned that using a third sex designation could burden other state and federal agencies when they use the State Department's data. Again, the State Department noted that (1) most agencies' systems accommodate only two sexes and (2) allowing a third sex designation could complicate searches. These complications, the State Department reasoned, would burden other agencies that use passport data. For example, the State Department pointed to law enforcement, which often uses passport data to identify victims and to locate criminal suspects.

Zzyym argues that the State Department's rationale lacks record support and relies on "sweeping assumptions about technical specifications of third-party computer systems." We disagree. The State Department could reasonably conclude that use of a third sex designation would impede at least some other systems that classify everyone as either male or female. We thus conclude that the administrative record supported the State Department's third reason to rely on the binary sex policy.

4. The State Department's fourth reason (that a lack of medical consensus existed on how to identify individuals as intersex) is unsupported by the record.

The State Department also concluded that the medical community lacks a consensus on how to determine whether someone is intersex, rendering an "X" designation "unreliable as a component of identity." But this reasoning lacks support in the administrative record and does not apply to unquestionably intersex individuals like Zzyym.

According to the State Department, medical experts vary on whether to base intersexuality solely on somatic characteristics, self-identification as intersex, or both. But the State Department cites no scientific evidence of this disagreement about the medical definition of intersexuality. In defending this rationale, the State Department cites pages 86 and 87 of its appendix. This page is simply an excerpt from the State Department's brief in district court. In that brief, the State Department failed to cite any evidentiary support for a disagreement in the medical community about the meaning of intersexuality. Indeed, the State Department's appellate brief defines intersexuality based on somatic characteristics, stating that an intersex person is "someone 'born with reproductive or sexual anatomy and/or chromosomal pattern that does not fit typical definitions of male or female.'" This definition appears consistent with the academic literature on intersexuality.

In district court, the State Department pointed out that three physicians had given three different reasons for classifying Zzyym as intersex:

1. Zzyym "was born with ambiguous genitalia." Appellants' App'x vol. 1, at 59.

2. Zzyym "has had the appropriate clinical treatment for transition to intersex." Id. at 71.

3. Zzyym "was born intersex," "identifies as intersex," and "has had surgery for transition to female genitalia." Id. at 73.

These differences, the State Department argued, illustrated the lack of medical consensus about the meaning of intersexuality.

The State Department's argument in district court had overlooked the context for these differences. The first physician had classified Zzyym as intersex based solely on the basis of somatic characteristics, referring to the presence of ambiguous genitalia. The State Department rejected this explanation and pointed Zzyym to the policy for transgender applicants, which required a physician's statement attesting to "appropriate clinical treatment for transition to the new gender." In response, Zzyym supplied the second letter, which complied with the State Department's instruction to verify transition to the new gender. The third letter simply

confirmed that Zzyym was intersex and identified as intersex. None of the letters purported to define intersexuality or discussed how the medical community defines intersexuality.

Even if the medical community disagreed on whether some individuals are intersex, the State Department would need to explain why the lack of a consensus would justify denying Zzyym's application. See Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962) (stating that administrative decisions must rationally connect the factual findings to the decision being made).

The State Department didn't provide such an explanation, assuming instead that disagreement about whether some applicants were intersex would prevent classification of anyone as intersex. Why? The State Department has never questioned whether Zzyym is intersex. Given Zzyym's undebatable intersexuality, the State Department failed to explain why a lack of consensus about other individuals would justify forcing intersex individuals like Zzyym to inaccurately identify themselves as male or female. Without such an explanation, we conclude that the State Department lacked record support for its fourth reason to rely on a binary sex classification.

5. The State Department's fifth reason (that adding a third sex designation ("X") would be infeasible) lacks support in the record.

Finally, the State Department reasoned that a third sex designation would be infeasible because of the required time and expense. But the State Department did not estimate the additional time or expense. The State Department said only that it anticipated "considerable" challenges to

- alter various systems,
- update systems within the Bureau of Consular Affairs,

*1030 • update internal State Department systems, and

- update systems within other federal agencies that rely on passport data.

After the district court granted judgment to Zzyym, the State Department moved to stay the court's order. With this motion, the State Department attached a declaration quantifying the time and expense to alter the passport system. The declarant

- noted that standard U.S. passports are electronic and contain chips with a secure digitized image and biographic data,
- described many information technology systems that would require modification, and
- estimated that changing existing software systems would take 24 months and cost $11 million.

We decline to consider these estimates because "review of agency action 'generally focuses on the administrative record in existence at the time of the agency's decision.' " Copar Pumice Co.

v. Tidwell, 603 F.3d 780, 791 n.3 (10th Cir. 2010) (quoting Forest Guardians v. U.S. Forest Serv., 579 F.3d 1114, 1131 (10th Cir. 2009)); see p. 1022, above.10

To justify the lack of an estimate, the State Department cites Hillsdale Environmental Loss Prevention, Inc. v. U.S. Army Corps of Engineers, 702 F.3d 1156 (10th Cir. 2012). That opinion does not apply. In Hillsdale, we held that the Army Corps had not needed to quantify the effects of granting a permit on certain air emissions because those emissions involved only a small fraction of the anticipated impact. Here the government's argument is different — that a change would obviously increase cost.

To assess the government's allegation of an obvious increase in cost, we must engage in a searching, careful inquiry. In doing so, we cannot accept conclusory statements in lieu of a meaningful explanation.

The expense is not obvious. Indeed, nine states (California, Colorado, Maine, Minnesota, Nevada, New Jersey, Oregon, Vermont, and Washington) insist that "adding non-binary gender designation in accord with national and international standards has required negligible administrative effort — the kind that accompanies routine changes to government documents." One of these states (Colorado) represents that it incurred no cost in adopting a third sex designation. Given the conflicting information and the absence of any cost evidence in the administrative record, we do not regard the additional expense as obvious. In the absence of any meaningful explanation, the State Department lacks record support for its reliance on additional time and expense.

B. The State Department did not fail to consider alternatives.

Zzyym insists that the State Department had to consider the alternative of a third sex designation before deviating from international standards. See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 51 (1983). But the State Department did consider those standards, and reliance on the binary sex policy conformed to those standards.

The International Civil Aviation Organization (ICAO) sets standards to ensure that every country's passports are machine-readable. The State Department followed that policy, making every U.S. passport machine-readable. In recognizing gender changes and intersex individuals, the ICAO noted that some countries might issue passports with an "unspecified" designation, using an "X" printed letter and a "<" machine-readable character. In explaining its decision to adhere to the binary sex policy, the State Department attached a document entitled "Use of a Third Sex Marker by Contracting States as Permitted by ICAO." The attachment of this document showed that the State Department had recognized the ICAO change.

The binary sex policy conforms to the ICAO standard. The ICAO allowed use of a third sex designation but did not require it. The State Department simply decided not to use the ICAO's option, reasoning that it would not have matched how any U.S. jurisdiction was treating the designation of sex in original identification documents. The State Department thus considered the alternative of using a third sex designation.

VI. Given the existence of two reasons that are supported and three others that are unsupported, the State Department must reconsider its denial of Zzyym's application.

We have concluded that (1) the State Department's first, fourth, and fifth reasons are unsupported and (2) the second and third reasons are supported. We have no way of knowing whether the State Department would still have relied on the binary sex policy if limited to the second and third reasons.

When an administrative decision rests on multiple grounds—some supported and some not—we must determine what the agency would have done had it recognized its errors. When an agency has indicated that its reasons were independent and one of the reasons was flawed, we have upheld the agency action. Am. Fed'n of Gov't Emps. AFL-CIO, Local 2263 v. Fed. Labor Relations Auth., 454 F.3d 1101, 1107 (10th Cir. 2006). But we have never encountered a situation where we cannot tell whether the agency would have taken the same action if it had known that some justifications were unsupported.

Two circuits, the D.C. Circuit and the Fifth Circuit, have considered this issue. The D.C. Circuit has held that when an agency relies on multiple grounds and some of the reasons are unsupported, the court can ordinarily uphold the administrative decision only if the agency clearly would have reached the same decision if limited to the supported reasons. NLRB v. CNN Am., Inc., 865 F.3d 740, 756 (D.C. Cir. 2017); Bally's Park Place, Inc. v. NLRB, 646 F.3d 929, 939 (D.C. Cir. 2011); Casino Airlines, Inc. v. Nat'l Transp. Safety Bd., 439 F.3d 715, 717 (D.C. Cir. 2006). For this holding, the D.C. Circuit has reasoned that "[a]rbitrary and capricious review strictly prohibits us from upholding agency action based only on our best guess as to what reasoning truly motivated it." Williams Gas Processing-Gulf Coast Co. v. FERC, 475 F.3d 319, 328–29 (D.C. Cir. 2006). So when the court cannot tell whether an agency's surviving rationale would have led to the same decision, the D.C. Circuit has remanded to the agency. See, e.g., Consol. Edison Co. of New York v. FERC, 823 F.2d 630, 641 (D.C. Cir. 1987).

The Fifth Circuit took a different approach in Texas Tech Physicians Ass'ns v. DHS, 917 F.3d 837 (5th Cir. 2019). There the court said in a footnote:

> Typically, when an agency reaches a decision based on erroneous reasoning, the Chenery doctrine prohibits a reviewing court from upholding that decision for an alternative reason. But when an agency gives multiple reasons, we may uphold its decision based on any one of those reasons. Salt River Project Agr. Imp. & Power Dist. v. United States, 762 F.2d 1053, 1060 n.8 (D.C. Cir. 1985).

Id. at 844 n.4 (citation omitted). In stating that the court could uphold the decision for any one of the agency's stated reasons, the court relied solely on a D.C. Circuit opinion: Salt River Project Agricultural Improvement & Power District v. United States, 762 F.2d 1053 (D.C. Cir. 1985). See Texas Tech Physicians, 917 F.3d at 844 n.4.

Salt River follows the D.C. Circuit's ordinary approach. Under this approach, the D.C. Circuit has ordinarily required remand when an agency gives multiple reasons for a decision and one or more of the reasons are invalid. But the D.C. Circuit also recognizes that agencies

sometimes make clear that they would have reached the same decision even without the invalid reasons.

In Salt River, the D.C. Circuit confronted this situation when an agency had found that a railroad lacked market dominance after considering four types of competition: (1) intramodal, (2) intermodal, (3) product, and (4) geographic. The D.C. Circuit upheld the findings on product and geographic competition and invalidated the findings on intramodal and intermodal competition. The court noted that invalidation of some of the agency's reasons would ordinarily require remand because the court cannot "presume that the [agency] would have made the decision on other, valid grounds." But the court decided that it could uphold the agency's ultimate result, reasoning that the administrative findings clearly showed that the agency would have "conclude[d] that [the railroad] lack[ed] market dominance based on its findings on product and geographic competition."

We have not yet considered the need to remand when an agency

• gives multiple reasons, some supported and others unsupported, and

• doesn't indicate whether the agency would have reached the same result without relying on the unsupported reasons.

But both the Supreme Court and our court have addressed analogous issues. In doing so, both courts have taken an approach resembling the D.C. Circuit's. For example, we've reversed and remanded when a district court erroneously submits a legal question to the jury and it's uncertain whether the jury relied on an improper view of the law. The Supreme Court has done the same when a valid and invalid theory were submitted to the jury and the jury returned a general verdict, creating uncertainty on whether the jury relied on the invalid theory. Requiring reversal in these circumstances, the Supreme Court and our court have reasoned that a general verdict cannot stand when the court must speculate on whether the factfinder would have reached the same determination without an error.

The same reasoning applies when we review administrative decisions. Here too we lack the power to "guess at the theory underlying the agency's action." SEC v. Chenery Corp., 332 U.S. 194, 197 (1947). If we can't determine whether the agency necessarily relied on deficient reasons, it would make little sense to uphold the agency's action. In these cases, remand is appropriate "since proceeding on the right path may require or at least permit the agency to make qualifications and exceptions that the wrong one would not." Henry J. Friendly, Chenery Revisited: Reflections on Reversal and Remand of Administrative Orders, 1969 Duke L.J. 199, 223.

But a court can sometimes discern from the record whether the agency would have reached the same decision without relying on the unsupported reasons. See, e.g., Casino Airlines, Inc. v. Nat'l Transp. Safety Bd., 439 F.3d 715, 718 (D.C. Cir. 2006) (denying a petition for review because the agency's decision shows that there is no reasonable dispute that the agency relied on an independent, valid reason rather than the invalid reason); see also p. 1032, above (discussing Salt River Project Agric. Improvement & Power Dist. v. United States, 762

F.2d 1053 (D.C. Cir. 1985)). For example, we can uphold administrative action when an agency gives two independent reasons and only one of them is valid. Am. Fed'n of Gov't Emps. AFL-CIO, Local 2263 v. Fed. Labor Relations Auth., 454 F.3d 1101, 1105–07 (10th Cir. 2006); accord Doe v. McAleenan, 929 F.3d 478, 485 (7th Cir. 2019) ("[B]ecause [the agency's] determination was based on two independent and alternative grounds, we would have to find error in both determinations in order to grant relief to [the petitioner].").

Other administrative determinations are harder to parse. For example, in Consolidated Edison Co. of New York v. FERC, the D.C. Circuit remanded after rejecting one of the agency's justifications. 823 F.2d 630, 641 (D.C. Cir. 1987). The court emphasized that the agency's error had not been "some minor misstatement of law or fact that [could] be passed over as an unfortunate lapse." The error had reflected the agency's "pervasive frame of mind ... about a crucial problem," making it difficult to determine whether the agency would have made the same decision without the error.

This case presents the same difficulty. The State Department never said

- whether the State Department's five reasons were independent or
- what the State Department would have decided if it had not considered the inevitability of inaccuracies, surmised a lack of medical consensus, and assumed the infeasibility of a third sex designation.

It certainly appears that concern for accuracy was key to the State Department's decision. Congress has criminalized false information in a passport application, 18 U.S.C. § 1542, and the State Department separately requires applicants to truthfully answer every question on the application. 22 C.F.R. § 51.20(b). In the face of a criminal penalty and regulatory requirement, we cannot simply assume that the State Department would have relied on the binary sex policy even after learning that it would create inaccuracies in passports.

These inaccuracies are inevitable because some people, like Zzyym, are indisputably intersex. But the State Department has not acknowledged the inherent inaccuracies that arise when applying the binary sex policy to these individuals. Without this acknowledgment or an explanation for forcing indisputably intersex applicants to apply as either male or female, the State Department undermined the accuracy of Zzyym's identifying information and assumed without any evidence that an intersex designation would be too costly and lack a medical consensus.

At the same time, we differ with the district court as to the disposition. The district court concluded that the State Department lacked any supportable reasons to rely on the binary sex policy. We disagree. In our view, the State Department reasonably concluded that its policy matched how most jurisdictions identified an individual's sex, facilitating the State Department's assessment of eligibility for passports and other agencies' use of passport data. We thus

- vacate the district court's entry of judgment for Zzyym and the court's issuance of a permanent injunction against enforcement of the binary sex policy as to Zzyym and

• remand with instructions to vacate the State Department's decision and reconsider Zzyym's application for an intersex passport.13

Add to ***Notes and Questions*** on page 506:

Replace existing note 2 and add notes 3 and 4:

2. The number of states that allow non-binary designations on drivers' licenses and individual state-issued ID documents has continued to grow slowly.

3. How should this dispute be resolved? Assuming that an applicant for a passport presents the agency with appropriate documentation by qualified professionals as to their non-binary status, is there any good policy reason for the State Department to refuse to accommodate the applicant? Do you agree with the 10th Circuit about some of the "reasons" given by the Department as being "supported" and others not?

4. The court did not address any constitutional issues on the merits. Which constitutional doctrines studied earlier in the course might apply to Zzyym's claim of entitlement to have their non-binary status reflected on their passport?

* * * * * * * * * * * * * *

Although some states have moved by statute or administrative decision-making to accommodate non-binary people for purposes of birth certificates, drivers' licenses and other forms of government-issued identification, in some states the question has been left to be decided by judicial interpretation of statutes that do not address nonbinary status directly. The most recent appellate ruling at the time of writing comes from the Oregon Court of Appeals.

In the Matter of Jones David Hollister, Petitioner
305 Or. App. 368 (July 8, 2020)
Court of Appeals of Oregon.

MOONEY, J.

This case presents a question of first impression. Does ORS 33.460 permit the circuit court to grant a legal change of sex from male or female to nonbinary? The circuit court concluded that the statute does not permit such a change, and it denied petitioner's application under ORS 33.460.

Pursuant to ORS 33.460, petitioner filed an application to change petitioner's legal sex from female to nonbinary. In support of that application, petitioner filed an attestation that they had undergone surgical, hormonal, or other treatment appropriate for the purpose of affirming petitioner's gender identity. The circuit court held a hearing on the application. Petitioner argued that, having complied with the statutory attestation requirement, they were entitled to have their application granted. They argued further that "nonbinary" is the sex designation that affirms their

gender identity and that they used the form supplied by the Oregon Judicial Department, Office of State Court Administrator, which provides the options of male, female, and nonbinary as sex designations to which petitioner may request change. Petitioner argued that using male and female as the only options under ORS 33.460 places them in the position of having to give false or inconsistent answers on forms that require truthful answers.

> Petitioner[‘s] counsel specifically argued:
>
> > So the problem is, though, that then you have a birth certificate that says one thing. You have a—you have a DMV license that says one thing, but you don’t have a legal designation, and so that puts people in these binds with what is their legal—what is their—what are they supposed to check for those boxes? And for my client, checking either box is a lie. They don’t identify as male or female, and so for them to be having to check one of those boxes is not an accurate reflection of what—of what their experience. And so it’s asking them to say something that is not true every time they have to fill out those boxes.

The circuit court took the matter under advisement and later issued its written order and general judgment denying petitioner’s application. In the order, the court reviewed the text, context, and legislative history of ORS 33.460 and concluded that it “may not issue a General Judgment for change of sex to nonbinary.” In explaining its decision, the court focused on the inclusion of both “sex” and “gender” in the statute, noting that, while those words “are not defined in the context of [ORS 33.460,] the language chosen by the legislature clearly addresses a change of sex rather than gender.” It rejected petitioner’s request for a change of sex from female to “nonbinary” as inconsistent with the “present wording of the ‘sex’ change statute.”

Petitioner appeals, arguing as they did before the circuit court that ORS 33.460, by its terms, allows a circuit court to change a person’s legal sex to nonbinary. Petitioner also advances an as-applied constitutional challenge to ORS 33.460 under the First and Fourteenth Amendments to the United States Constitution and Article I, section 20, of the Oregon Constitution. Petitioner did not fully develop those constitutional challenges and, because they are not necessary to the resolution of this appeal, we do not address them.

Whether ORS 33.460 allows for a legal change of sex to nonbinary is a question of statutory construction. We “review for legal error by employing the methodology set out in PGE v. Bureau of Labor and Industries, 317 Or. 606, 611, 859 P.2d 1143 (1993), and State v. Gaines, 346 Or. 160, 171-72, 206 P.3d 1042 (2009).” State v. Corcilius, 294 Or. App. 20, 21, 430 P.3d 169 (2018). PGE and Gaines require us to ascertain the meaning of the statute most likely intended by the legislature that adopted it. State v. Cloutier, 351 Or. 68, 75, 261 P.3d 1234 (2011). We do that “by examining the text of the statute in its context, along with relevant legislative history, and, if necessary, canons of construction.” Generally, “the text of the statutory provision itself is the starting point for interpretation and is the best evidence of the legislature’s intent.” PGE, 317 Or. at 610, 859 P.2d 1143. And so we begin with the text of ORS 33.460, as amended in 2017:

> "(1) Application for legal change of sex of a person may be heard and determined by any circuit court in this state. A circuit court may order a legal change of sex and enter a judgment indicating the change of sex if the individual attests that the individual has undergone surgical, hormonal or other treatment appropriate for the individual for the purpose of affirming gender identity.
>
> "(2) The court may order a legal change of sex and enter the judgment in the same manner as that provided for change of name of a person under ORS 33.410.
>
> "(3) If a person applies for a change of name under ORS 33.410 at the time the person applies for a legal change of sex under this section, the court may order change of name and legal change of sex at the same time and in the same proceeding."

The key language is that a court may order a legal "change of sex" and enter a judgment reflecting that change, if the applicant "attests" that the applicant has undergone "treatment" that is "appropriate for * * * the purpose of affirming gender identity." When it denied the legal sex change, the circuit court essentially concluded that the "gender identity" of nonbinary does not correspond with a legally available "sex" designation. As we explain, because the authority to grant a legal sex change arises upon the filing of an attestation that the applicant has undergone treatment for the purpose of affirming gender identity, the legal change must be to a sex designation that reflects the applicant's affirmed gender identity.

When interpreting a statute, we give "words of common usage" their "plain, natural, and ordinary meaning." Generally, we presume that the ordinary meaning of a word is reflected in a dictionary. While Oregon courts generally rely on Webster's Third New International Dictionary, consulting several dictionaries, including dictionaries contemporaneous with the enactment of a statute, better ensures that a court determines a word's "ordinary" usage and avoids the possibility that dictionary selection affects the outcome. Given the evolving lexical information concerning the key words and phrases here, we review them not only in Webster's dictionary, but also in dictionaries with relevant scientific, professional, and contemporary focus that were available in 2017.

First, the noun "sex" is defined as (1) "one of the two divisions of organic [especially] human beings respectively designated male or female"; and (2) "the sum of the morphological, physiological, and behavioral peculiarities of living beings that subserves biparental reproduction * * *, that in its typical dichotomous occurrence is [usually] genetically controlled and associated with special sex chromosomes, and that is typically manifested as maleness and femaleness." Webster's Third New Int'l Dictionary 2081 (unabridged ed. 2002). The American Heritage Dictionary of the English Language 1605 (5th ed. 2011) (American Heritage) provides similar definitions: (1) "Either of the two divisions, designated female and male, by which most organisms are classified on the basis of their reproductive organs and functions"; (2) "The fact or condition of existing in these two divisions, especially the collection of characteristics that distinguish female and male"; (3) "Females or males considered as a group"; (4) "One's identity as either female or male"; (5) "The genitals." According to Merriam-Webster Unabridged

Dictionary (Merriam-Webster), the first known use of "sex" dates back to the fourteenth century. Sex, Unabridged. Merriam-Webster.com (last updated Apr. 2016).

Second, "gender," also a noun, is defined as (1) "sex"; (2) "any of two or more subclasses within a grammatical class of a language *** that are partly arbitrary but also partly based on distinguishable characteristics such as *** sex." Webster's at 944. American Heritage defines "gender" as (1) "A grammatical category, often designated as male, female, or neuter, used in the classification of nouns, pronouns, adjectives, and, in some languages, verbs that may be arbitrary or based on characteristics such as sex"; (2) "a. Either of the two divisions, designated female and male, by which most organisms are classified on the basis of their reproductive organs and functions; sex. b. One's identity as female or male or as neither entirely female nor entirely male. c. Females or males considered as a group." Id. at 730. Merriam-Webster, which builds on the foundation of Webster's, adds, "the behavioral, cultural, or psychological traits typically associated with one sex." Gender, Unabridged.Merriam-Webster.com (last updated Apr. 2016). Use of the word "gender" also dates back to the fourteenth century. Id.

"Gender identity," also a noun, is not defined in Webster's. It does, however, appear in Merriam-Webster, which defines the term as "a person's internal sense of being male, female, some combination of male and female, or neither male nor female." Gender Identity, Unabridged.Merriam-Webster.com (last updated Apr. 2016). The American Psychological Association (APA) defines "gender identity" as "an individual's identification as male, female, or, occasionally, some category other than male or female." Diagnostic and Statistical Manual of Mental Disorders 1636-37 (5th ed. 2013). Its first known use was in 1964. Gender Identity, Unabridged.Merriam-Webster.com.

The term "nonbinary" is not mentioned in ORS 33.460. But because it is the gender identity to which petitioner seeks to change, we note that the term "nonbinary" is now, and was in 2017, well understood to encompass the gender identity of one who identifies as neither entirely male nor entirely female, as modern dictionaries and other sources show. As with "gender identity," Webster's does not define the term "nonbinary." But, again, it is defined in Merriam-Webster to mean "relating to or being a person who identifies with or expresses a gender identity that is neither entirely male nor entirely female." Nonbinary, Unabridged.Merriam-Webster.com (last updated Apr. 2016). "Nonbinary" is an adjective that, like "male" and "female," can describe a person's sex, gender, or gender identity.

Those definitions provide a helpful springboard for the analytic process of interpreting the statute and the legislature's intent because, of course, we "do not simply consult dictionaries and interpret words in a vacuum." Where, as here, the dispute "centers on the meaning of a particular word or words, a dictionary definition—although providing some evidence of meaning—should not be relied on to resolve a dispute about plain meaning without critically examining how the definition fits into the context of the statute itself." State v. Gonzalez-Valenzuela, 358 Or. 451, 461, 365 P.3d 116 (2015).

> "[A] statute's plain meaning is frequently more than the sum of its individually defined terms. Dictionary definitions lack context and often fail to capture the nuanced

> connotations conveyed by the normal use of a term in a particular context. Those more nuanced connotations may represent the plain meaning of a term in context even though those connotations result from tacit knowledge, accumulated experience, and common sense that are not reflected well—if at all—in dictionary definitions. As a result, dictionaries are only the starting point for our textual analysis and should not be used as the ending point."

Id. at 461-62, 365 P.3d 116.

"The relationship between 'sex' and 'gender' is more complicated than [the dictionary] definitions suggest." Shelby Hanssen, Beyond Male or Female: Using Nonbinary Gender Identity to Confront Outdated Notions of Sex and Gender in the Law, 96 Or. L. Rev. 283, 285 (2017) (detailing the relationship between sex and gender identity and describing the complexities of categorization by chromosomes, genitalia, or gender identity as it pertains to the nonbinary, genderqueer, transgender, and intersex communities). Historically, limiting the definition of "sex" to "male" and "female" might have seemed reasonable given references to "biparental reproduction" and the "typical dichotomous occurrence" of "sex chromosomes" as expressed in Webster's. The historical view of "sex" as "male" or "female" is reflected even more recently, for example, Johns Hopkins University Medicine's Glossary of Transgender Terms defines "assigned sex at birth" as "[t]he sex (male or female) assigned to a child at birth, most often based on the child's external anatomy." Linell Smith, Glossary of Transgender Terms (Nov. 20, 2018), https://www.hopkinsmedicine.org/news/articles/glossary-of-terms-1 (emphasis added). But, binary views of sex are not consistent with the wide range of well-documented natural variations of physical traits that do not match either a male or female sex designation. See Anne Fausto-Sterling, Sexing the Body: Gender Politics and the Construction of Sexuality 30-39 (2000); Melanie Blackless et al, How Sexually Dimorphic Are We? Review and Synthesis, 12 Am. J. Hum. Biol. 151 (2000). Put another way, binary views of "sex" do not reflect the reality of well-documented occurrences of individual, biologic variations concerning the "sex" of individuals.

We now return to the text of ORS 33.460 with a greater understanding of the significance of the term "gender identity" as used in that statute:

> "A circuit court may order a legal change of sex and enter a judgment indicating the change of sex if the individual attests that the individual has undergone surgical, hormonal or other treatment appropriate for the individual for the purpose of affirming gender identity."

The legislature conditioned a legal change of sex on an applicant attesting to "treatment" that "affirms" the applicant's "gender identity." Gender identity, in turn, is not limited to "male" or "female," see Gender Identity, Unabridged.Merriam-Webster.com ("gender identity" means "a person's internal sense of being male, female, some combination of male and female, or neither male nor female" (emphasis added)). Given, then, that an applicant's gender identity is the basis for the applicant's legal change of sex, it logically follows that, under ORS 33.460, legal sex designations cannot be limited to "male" or "female." The statute's requirement that the legal sex

designation correspond to the applicant's affirmed gender identity strongly suggests that the option of "nonbinary" be available as a choice.

As we interpret ORS 33.460, we look also to related Oregon statutes, and especially those enacted simultaneously with it. As discussed in more detail below, the legislature amended ORS 33.460 in 2017 through House Bill (HB) 2673. In that bill, the legislature also amended ORS 432.235, which allows a person to change the sex designation on the person's birth certificate. Both statutes use the same sentence structure. Under both ORS 33.460 and ORS 432.235, a change of sex is appropriate when the individual attests that the change is for the purpose of affirming the applicant's gender identity.

Although it does not strictly inform our statutory construction analysis, we note that the Oregon Health Authority's administrative rule, OAR 333-011-0272, implementing ORS 432.235 and effective January 1, 2018, allows a person to change the sex listed on that person's birth certificate when "the sex on the [birth certificate] does not match the gender identity of the registrant" by affirming that "the sex currently appearing on the [birth certificate] is different than the registrant's gender identity and the sex designation requested supports the registrant's gender identity." Consistent with ORS 33.460, ORS 432.235 and OAR 333-011-1272 provide a mechanism to allow a change of sex designation on a person's birth certificate to conform to the person's gender identity.

Prior versions of ORS 33.460 provide additional context. The statute was originally enacted in 1981 and, at that time, required a "surgical procedure" before a legal change of sex could be ordered. That requirement remained in place until 2013, when the legislature amended the statute to allow a court to order a legal change of sex "if the court determine[d] that the individual ha[d] undergone surgical, hormonal or other treatment appropriate for that individual for the purpose of gender transition and that sexual reassignment ha[d] been completed." Or. Laws 2013, ch. 366, § 52. Finally, the statute was amended in 2017 to its current form, which requires only that the applicant attest that they have undergone some form of "surgical, hormonal or other treatment" "for the purpose of affirming gender identity."

That evolution suggests to us that, when the statute was originally enacted, the legislature intended to limit a change of sex to "male" or "female" because a "surgical procedure" was required, reflecting an understanding of sex that was based upon male or female physical characteristics. In 2013, the legislature broadened the scope of the statute by also allowing a change of sex if the person had undergone hormonal or "other treatment" for the purpose of gender transition. At least one Oregon circuit court granted a sex change application to nonbinary under that statutory framework. In the Matter of Jamie Shupe, Multnomah County Circuit Court Case No. 16CV13991. However, the language of the statute as it existed in 2013 required the person's sexual reassignment to have been completed, suggesting that the legislature was continuing to tie legal sex to male and female physical characteristics. The legislature removed that requirement in 2017 and, in doing so, clarified its intent to expand the scope of the statute by shifting the focus away from physical anatomy to affirming gender identity. To view the amendments otherwise would be to render them meaningless.

Having reviewed the text and context of ORS 33.460, we conclude that, when an applicant complies with the attestation requirements of ORS 33.460, the circuit court's authority to grant the requested change of legal sex is not restricted to male or female; rather, the new sex designation must affirm the petitioner's gender identity whether that is male, female, or nonbinary. The circuit court erred in concluding that it lacked authority under ORS 33.460 to approve petitioner's application for a legal change of sex from female to nonbinary. Reversed and remanded.

Notes and Questions

1. The court did not rule on any constitutional issues, focusing solely on interpretation of the statutory language. If the court had concluded that the statute does not authorize the trial court to order the state to recognize the petitioner as non-binary, it would then have to address the constitutional claim. Which constitutional provisions can be the basis of arguments that a non-binary person is entitled to be recognized as such by the government?

2. In its interpretation, is the court undertaking a "textualist" approach to interpreting the statute? If so, what is the relevance of the past versions of the statute or of dictionary definitions of the words used in the statute around the time it was enacted? How is the court's textualist approach similar or different to the approach taken by Justice Neil Gorsuch in his opinion for the Supreme Court in Bostock v. Clayton County, Georgia, issued shortly before the Oregon decision? In what respects do the Oregon courts differ from the U.S. Supreme Court in their approach to interpreting statutory text?

3. In light of the court's treatment of the non-binary recognition issue in this case, do you think that the court would interpret Oregon's anti-discrimination statute, which lists gender identity as one of the prohibited grounds for discrimination, as providing non-binary individuals with protection against discrimination on the basis of their gender identity? Would that be consistent with the intention of the legislature at the time it amended the law to include "gender identity" as a prohibited ground of discrimination?

At the end of this Subsection H, add a new Subsection I – "Transgender Inmates and the 8th Amendment":

Much of the litigation over transgender rights is now initiated by jail and prison inmates over a wide variety of issues. Most pressing for many of them is the ability to get gender identity appropriate health care in prison. Prison administrators in the United States long took the position of ignoring transgender identity, housing transgender inmates based on their sex as identified at birth rather than their gender identity, denying those who had already transitioned before being incarcerated the hormones needed to sustain their transition, and denying them clothing and the ability to maintain their gender presentation. In addition, virtually all prisons

traditionally followed a policy of absolutely denying any transitional care to people who had not transitioned prior to their incarceration. In addition, many transgender inmates have found themselves incarcerated in conditions exposing them to serious harm at the hands of other inmates and corrections personnel.

The Supreme Court has only once ruled in a case brought by a transgender inmate, Farmer v. Brennan (Chapter 1, page 60), finding that a transgender inmate may find protection under the 8th Amendment of the Constitution (prohibiting cruel and unusual punishment) if prison authorities were "deliberately indifferent" to the need to protect transgender inmates from harm. But the Court has refrained from dealing with other aspects of prison policies, despite a huge volume of litigation (much of it pro se) in the lower federal courts and widening gaps between the approaches taken by different Circuit Courts of Appeals on the question of transgender health care in prison.

The 9th Circuit's 2019 decision in Edmo v. Corizon is the first final federal appeals court ruling enforcing an order by a district court that a state prison system provide gender confirmation surgery to a transgender inmate. (In an earlier case, a 1st Circuit three-judge panel ordered gender confirmation surgery for an inmate but was reversed en banc.) In Edmo, en banc rehearing was denied and a cert petition has been filed. The panel decision was a unanimous per curiam affirmance of the district court. The failure of a majority of the 9th Circuit judges to vote for an en banc rehearing drew dissenting opinions, excerpts from which we provide following the panel decision.

Edmo v. Corizon
935 F. 3d 757 (9th Cir., 2019)
Rehearing en banc denied, 949 F.3d 489 (9th Cir. 2020)
Petition for certiorari filed, May 6, 2020.

PER CURIAM:

The Eighth Amendment prohibits "cruel and unusual punishments." "The Amendment embodies broad and idealistic concepts of dignity, civilized standards, humanity, and decency." Estelle v. Gamble, 429 U.S. 97, 102 (1976). Our society recognizes that prisoners "retain the essence of human dignity inherent in all persons." Brown v. Plata, 563 U.S. 493, 510 (2011). Consistent with the values embodied by the Eighth Amendment, for more than 40 years the Supreme Court has held that "deliberate indifference to serious medical needs" of prisoners constitutes cruel and unusual punishment. Estelle, 429 U.S. at 106. When prison authorities do not abide by their Eighth Amendment duty, "the courts have a responsibility to remedy the resulting violation." Brown, 563 U.S. at 511. We do so here.

Adree Edmo (formerly Mason Dean Edmo) is a male-to-female transgender prisoner in the custody of the Idaho Department of Correction (IDOC). Edmo's sex assigned at birth (male) differs from her gender identity (female). The incongruity causes Edmo to experience persistent distress so severe it limits her ability to function. She has twice attempted self-castration to remove her male genitalia, which cause her profound anguish. Both sides and their medical experts agree: Edmo suffers from gender dysphoria, a serious medical condition. They also agree

that the appropriate benchmark regarding treatment for gender dysphoria is the World Professional Association of Transgender Health Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People (WPATH Standards of Care). And the State does not seriously dispute that in certain circumstances, gender confirmation surgery (GCS) can be a medically necessary treatment for gender dysphoria. The parties' dispute centers around whether GCS is medically necessary for Edmo—a question we analyze with deference to the district court's factual findings.

Following four months of intensive discovery and a three-day evidentiary hearing, the district court concluded that GCS is medically necessary for Edmo and ordered the State to provide the surgery. Its ruling hinged on findings individual to Edmo's medical condition. The ruling also rested on the finding that Edmo's medical experts testified persuasively that GCS was medically necessary, whereas testimony from the State's medical experts deserved little weight. In contrast to Edmo's experts, the State's witnesses lacked relevant experience, could not explain their deviations from generally accepted guidelines, and testified illogically and inconsistently in important ways. The district court's detailed factual findings were amply supported by its careful review of the extensive evidence and testimony. Indeed, they are essentially unchallenged. The appeal boils down to a disagreement about the implications of the factual findings.

Crediting, as we must, the district court's logical, well-supported factual findings, we hold that the responsible prison authorities have been deliberately indifferent to Edmo's gender dysphoria, in violation of the Eighth Amendment. The record before us, as construed by the district court, establishes that Edmo has a serious medical need, that the appropriate medical treatment is GCS, and that prison authorities have not provided that treatment despite full knowledge of Edmo's ongoing and extreme suffering and medical needs. In so holding, we reject the State's portrait of a reasoned disagreement between qualified medical professionals. We also emphasize that the analysis here is individual to Edmo and rests on the record in this case. We do not endeavor to project whether individuals in other cases will meet the threshold to establish an Eighth Amendment violation. The district court's order entering injunctive relief for Edmo is affirmed, with minor modifications noted below.

I. Background

A. Gender Dysphoria and its Treatment

Transgender individuals have a "[g]ender identity"—a "deeply felt, inherent sense" of their gender—that does not align with their sex assigned at birth. Am. Psychol. Ass'n, Guidelines for Psychological Practice with Transgender and Gender Nonconforming People, 70 Am. Psychologist 832, 834 (2015). Recent estimates suggest that approximately 1.4 million transgender adults live in the United States, or 0.6 percent of the adult population.

Gender dysphoria is "[d]istress that is caused by a discrepancy between a person's gender identity and that person's sex assigned at birth (and the associated gender role and/or primary and secondary sex characteristics)." World Prof'l Ass'n for Transgender Health, Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People 2 (7th ed.

2011) (hereinafter WPATH SOC). The Fifth Edition of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-5) sets forth two conditions that must be met for a person to be diagnosed with gender dysphoria.

> First, there must be "[a] marked incongruence between one's experienced/expressed gender and assigned gender, of at least 6 months' duration, as manifested by at least two of the following":
>
> (1) "a marked incongruence between one's experienced/expressed gender and primary and/or secondary sex characteristics";
>
> (2) "a strong desire to be rid of one's primary and/or secondary sex characteristics because of a marked incongruence with one's experienced/expressed gender";
>
> (3) "a strong desire for the primary and/or secondary sex characteristics of the other gender";
>
> (4) "a strong desire to be of the other gender";
>
> (5) "a strong desire to be treated as the other gender"; or
>
> (6) "a strong conviction that one has the typical feelings and reactions of the other gender."

Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 452 (5th ed. 2013) (hereinafter DSM-5). Second, the person's condition must be associated with "clinically significant distress"—i.e., distress that impairs or severely limits the person's ability to function in a meaningful way and has reached a threshold that requires medical or surgical intervention, or both. Id. at 453, 458. Not every transgender person has gender dysphoria, and not every gender dysphoric person has the same medical needs.

Gender dysphoria is a serious but treatable medical condition. Left untreated, however, it can lead to debilitating distress, depression, impairment of function, substance use, self-surgery to alter one's genitals or secondary sex characteristics, self-injurious behaviors, and even suicide.

The district court found that the WPATH Standards of Care "are the internationally recognized guidelines for the treatment of individuals with gender dysphoria." Most courts agree. See, e.g., De'lonta v. Johnson, 708 F.3d 520, 522–23 (4th Cir. 2013); Keohane v. Jones, 328 F. Supp. 3d 1288, 1294 (N.D. Fla. 2018), appeal filed, No. 18-14096 (11th Cir. 2018); Norsworthy v. Beard, 87 F. Supp. 3d 1164, 1170 (N.D. Cal.), appeal dismissed & remanded, 802 F.3d 1090 (9th Cir. 2015); Soneeya v. Spencer, 851 F. Supp. 2d 228, 231–32 (D. Mass. 2012). *But see* Gibson v. Collier, 920 F.3d 212, 221 (5th Cir. 2019) ("[T]he WPATH Standards of Care reflect not consensus, but merely one side in a sharply contested medical debate over [GCS]."); cf. Kosilek, 774 F.3d at 76–79 (recounting testimony questioning the WPATH Standards of Care). And many of the major medical and mental health groups in the United States—including the American Medical Association, the American Medical Student Association, the American Psychiatric Association, the American Psychological Association, the American Family Practice Association, the Endocrine Society, the National Association of Social Workers, the American

Academy of Plastic Surgeons, the American College of Surgeons, Health Professionals Advancing LGBTQ Equality, the HIV Medicine Association, the Lesbian, Bisexual, Gay and Transgender Physician Assistant Caucus, and Mental Health America—recognize the WPATH Standards of Care as representing the consensus of the medical and mental health communities regarding the appropriate treatment for transgender and gender dysphoric individuals.

Each expert in this case relied on the WPATH Standards of Care in rendering an opinion. As the State acknowledged to the district court, the WPATH Standards of Care "provide the best guidance," and "are the best standards out there." "There are no other competing, evidence-based standards that are accepted by any nationally or internationally recognized medical professional groups." Edmo, 358 F. Supp. 3d at 1125. "[B]ased on the best available science and expert professional consensus," the WPATH Standards of Care provide "flexible clinical guidelines" "to meet the diverse health care needs of transsexual, transgender, and gender nonconforming people." WPATH SOC at 1–2. Treatment under the WPATH Standards of Care must be individualized: "[w]hat helps one person alleviate gender dysphoria might be very different from what helps another person. Clinical departures from the [WPATH Standards of Care] may come about because of a patient's unique anatomic, social, or psychological situation; an experienced health professional's evolving method of handling a common situation; a research protocol; lack of resources in various parts of the world; or the need for specific harm reduction strategies."

The WPATH Standards of Care identify the following evidence-based treatment options for individuals with gender dysphoria:

> (1) "changes in gender expression and role (which may involve living part time or full time in another gender role, consistent with one's gender identity)";
>
> (2) "psychotherapy (individual, couple, family, or group) for purposes such as exploring gender identity, role, and expression[,] addressing the negative impact of gender dysphoria and stigma on mental health[,] alleviating internalized transphobia[,] enhancing social and peer support[,] improving body image[,] or promoting resilience";
>
> (3) "hormone therapy to feminize or masculinize the body"; and
>
> (4) "surgery to change primary and/or secondary sex characteristics (e.g., breasts/chest, external and/or internal genitalia, facial features, body contouring)."

The WPATH Standards of Care state that many individuals "find comfort with their gender identity, role, and expression without surgery." For others, however, "surgery is essential and medically necessary to alleviate their gender dysphoria." That group cannot achieve "relief from gender dysphoria ... without modification of their primary and/or secondary sex characteristics to establish greater congruence with their gender identity." The weight of opinion in the medical and mental health communities agrees that GCS is safe, effective, and medically necessary in appropriate circumstances. See, e.g., U.S. Dep't of Health & Human Servs., No. A-13-87, Decision No. 2576, (Dep't Appeals Bd. May 30, 2014.").

The WPATH criteria for genital reconstruction surgery in male-to-female patients include the following:

(1) "persistent, well documented gender dysphoria";

(2) "capacity to make a fully informed decision and to consent for treatment";

(3) "age of majority in a given country";

(4) "if significant medical or mental health concerns are present, they must be well controlled";

(5) "12 continuous months of hormone therapy as appropriate to the patient's gender goals"; and

(6) "12 continuous months of living in a gender role that is congruent with their gender identity."

WPATH SOC at 60. The parties' dispute focuses on whether Edmo satisfied the fourth and sixth criteria.

With respect to the fourth criterion, the WPATH Standards of Care provide that coexisting medical or mental health concerns unrelated to the person's gender dysphoria do not necessarily preclude surgery. But those concerns need to be managed prior to, or concurrent with, treatment of a person's gender dysphoria. Coexisting medical or mental health issues resulting from a person's gender dysphoria are not an impediment under the fourth criterion. It may be difficult to determine, however, whether mental or medical health concerns result from the gender dysphoria or are unrelated.

The WPATH Standards of Care explain that the sixth criterion—living for 12 months in an identity-congruent role—is intended to ensure that the person experiences the full range of "different life experiences and events that may occur throughout the year." During that time, the patient should present consistently in her desired gender role.

Scientific studies show that the regret rate for individuals who undergo GCS is low, in the range of one to two percent. The district court found, and the State does not dispute on appeal, that Edmo does not have any of the risk factors that would make her likely to regret GCS.

The WPATH Standards of Care apply equally to all individuals "irrespective of their housing situation" and explicitly state that health care for transgender individuals "living in an institutional environment should mirror that which would be available to them if they were living in a non-institutional setting within the same community." WPATH SOC at 67. The next update to the WPATH Standards of Care will likewise apply equally to incarcerated persons. The National Commission on Correctional Health Care (NCCHC), a leading professional organization in health care delivery in the correctional context, endorses the WPATH Standards of Care as the accepted standards for the treatment of transgender prisoners.

In summary, the broad medical consensus in the area of transgender health care requires providers to individually diagnose, assess, and treat individuals' gender dysphoria, including for those individuals in institutionalized environments. Treatment can and should include GCS when medically necessary. Failure to follow an appropriate treatment plan can expose transgender

individuals to a serious risk of psychological and physical harm. The State does not dispute these points; it contends that GCS is not medically necessary for Edmo.

B. Edmo's Treatment

Edmo is a transgender woman in IDOC custody. Her sex assigned at birth was male, but she identifies as female. In her words, "my brain typically operates female, even though my body hasn't corresponded with my brain." Edmo has been incarcerated since pleading guilty in 2012 to sexual abuse of a 15-year-old male at a house party. Edmo was 21 years old at the time of the criminal offense. Edmo is currently incarcerated at the Idaho State Correctional Institution (ISCI). At the time of the evidentiary hearing, she was 30 years old and due to be released from prison in 2021. Edmo has viewed herself as female since age 5 or 6. She struggled with her gender identity as a child and teenager, presenting herself intermittently as female, but around age 20 or 21 she began living fulltime as a woman. Although she identified as female from an early age, Edmo first learned the term "gender dysphoria" and the contours of that diagnosis around the time of her incarceration. Shortly thereafter, Corizon psychiatrist Dr. Scott Eliason diagnosed her with "gender identity disorder," now referred to as gender dysphoria. Corizon psychologist Dr. Claudia Lake confirmed that diagnosis.

While incarcerated, Edmo has changed her legal name to Adree Edmo and the sex on her birth certificate to "female" to affirm her gender identity. Throughout her incarceration, Edmo has consistently presented as female, despite receiving many disciplinary offense reports for doing so. For example, when able to do so, Edmo has worn her hair in feminine hairstyles and worn makeup, for which she has received multiple disciplinary offense reports. Medical providers have documented Edmo's feminine presentation since 2012. Neither the parties nor their experts dispute that Edmo suffers from gender dysphoria. That dysphoria causes Edmo to feel "depressed," "disgusting," "tormented," and "hopeless."

To alleviate Edmo's gender dysphoria, prison officials have, since 2012, provided hormone therapy. Edmo has followed and complied with her hormone therapy regimen, which helps alleviate her gender dysphoria to some extent. The hormones "clear[ ] [her] mind" and have resulted in breast growth, body fat redistribution, and changes in her skin. Today, Edmo is hormonally confirmed, which means that she has the hormones and secondary sex characteristics (characteristics, such as women's breasts, that appear during puberty but are not part of the reproductive system) of an adult female. Edmo has gained the maximum physical changes associated with hormone treatment.

Hormone therapy has not completely alleviated Edmo's gender dysphoria. Edmo continues to experience significant distress related to gender incongruence. Much of that distress is caused by her male genitalia. Edmo testified that she feels "depressed, embarrassed, [and] disgusted" by her male genitalia and that this is an "everyday reoccurring thought." Her medical records confirm her disgust, noting repeated efforts by Edmo to purchase underwear to keep, in Edmo's words, her "disgusting penis" out of sight.

In addition to her gender dysphoria, Edmo suffers from major depressive disorder with anxiety and drug and alcohol addiction, although her addiction has been in remission while

incarcerated. Edmo has taken her prescribed medications for depression and anxiety. Prison officials have also provided Edmo mental health treatment to help her work through her serious underlying mental health issues and a pre-incarceration history of trauma, abuse, and suicide attempts. Edmo sees her psychiatrist when scheduled. But Edmo does not see her treating clinician, Krina Stewart, because Edmo does not believe Stewart is qualified to treat her gender dysphoria. Edmo has attended group therapy sessions inconsistently.

In September 2015, Edmo attempted to castrate herself for the first time using a disposable razor blade. Before doing so, she left a note to alert officials that she was not "trying to commit suicide," and was instead "only trying to help [her]self." Edmo did not complete the castration, though she continued to report thoughts of self-castration in the following months.

On April 20, 2016, Dr. Eliason evaluated Edmo for GCS. At the time, IDOC's policy concerning the treatment of gender dysphoric prisoners provided that GCS "will not be considered for individuals within [IDOC], unless determined medically necessary by" the treating physician. Corizon's policy does not mention GCS. In his evaluation, Dr. Eliason noted that Edmo reported she was "doing alright." He also noted that Edmo had been on hormone replacement therapy for the last year and a half, but that she felt she needed more. He reported that Edmo had stated that hormone replacement therapy helped alleviate her gender dysphoria, but she remained frustrated with her male anatomy. Dr. Eliason indicated that Edmo appeared feminine in demeanor and interaction style. He also indicated that Edmo had previously attempted to "mutilate her genitalia" because of the severity of her distress. Dr. Eliason later testified that, at the time of his evaluation, he felt that Edmo's gender dysphoria "had risen to another level," as evidenced by her self-castration attempt. But Dr. Eliason also flagged that he had spoken to prison staff about Edmo's behavior and they explained it was "notable for animated affect and no observed distress." He similarly noted that he had personally observed Edmo and did not see significant dysphoria; instead, she "looked pleasant and had a good mood."

As to GCS, Dr. Eliason explained in his notes that while medical necessity for GCS is "not very well defined and is constantly shifting," in his view, GCS would be medically necessary in at least three situations: (1) "congenital malformations or ambiguous genitalia," (2) "severe and devastating dysphoria that is primarily due to genitals," or (3) "some type of medical problem in which endogenous sexual hormones were causing severe physiological damage." Dr. Eliason concluded that Edmo "does not meet any of those ... criteria" and, for that reason, GCS is not medically necessary for her. Dr. Eliason instead concluded that hormone therapy and supportive counseling suffice to treat Edmo's gender dysphoria for the time being, despite recognizing that Edmo had attempted self-castration on that regimen. Dr. Eliason indicated that he would continue to monitor and assess Edmo.

Dr. Eliason staffed Edmo's evaluation with Dr. Jeremy Stoddart, Dr. Murray Young, and Jeremy Clark, who all agreed with his assessment. They did not observe Edmo; rather, they agreed with Dr. Eliason's recommended treatment as he presented it to them. The record is sparse on the qualifications of Dr. Stoddart and Dr. Young, but Clark has never personally

treated anyone with gender dysphoria and was not qualified under IDOC policy to assess whether GCS would be appropriate for Edmo.

Dr. Eliason also discussed his evaluation with IDOC's Management and Treatment Committee (MTC), a multi-disciplinary team composed of medical providers, mental health clinicians, IDOC's Chief Psychologist, and prison leadership. The MTC meets periodically to evaluate and address the unique medical, mental health, and housing needs of prisoners with gender dysphoria. The committee "does not make any individual treatment decisions regarding" treatment for inmates with gender dysphoria. "Those determinations are made by the individual clinicians or the medical staff employed by Corizon." The MTC agreed with Dr. Eliason's assessment.

Although not mentioned in his April 20, 2016 notes, Dr. Eliason testified at the evidentiary hearing that he considered the WPATH Standards of Care when determining Edmo's treatment. Citing those standards, Dr. Eliason testified that he did not believe GCS was appropriate for two reasons: (1) because mental health issues separate from Edmo's gender dysphoria were not "fully in adequate control" and (2) because Edmo had not lived in her identified gender role for 12 months outside of prison. He explained that Edmo needed to experience "living as a woman" around "her real social network – her family and friends on the outside" so that she could "determine whether or not she felt like that was her real identity."

Edmo was never evaluated for GCS again, but the MTC considered her gender dysphoria and treatment plan during later meetings. The MTC continues to believe that GCS is not medically necessary or appropriate for Edmo.

In December 2016, Edmo tried to castrate herself for the second time. A medical note from the incident reports that Edmo said she no longer wanted her testicles. Edmo reported to medical providers that she was "feeling angry/frustrated that [she] was not receiving the help desired related to [her] gender dysphoria. Inmate Edmo's actions were reported as a method to stop/cease testosterone production in Edmo's body. Edmo denied suicidal ideation ...." Edmo's second attempt was more successful than the first. She was able to open her testicle sac with a razor blade and remove one testicle. She abandoned her attempt, however, when there was too much blood to continue. She then sought medical assistance and was transported to a hospital, where her testicle was repaired. Edmo was receiving hormone therapy both times she attempted self-castration.

Edmo testified that she was disappointed in herself for coming so close but failing to complete her self-castration attempts. She also testified that she continues to actively think about self-castration. To avoid acting on those thoughts and impulses, Edmo "self-medicat[es]" by cutting her arms with a razor. She says that the physical pain helps to ease the "emotional torment" and mental anguish her gender dysphoria causes her. Edmo further testified that she expects GCS to help alleviate some of her gender dysphoria. In particular, she testified that she expects GCS to help her avoid having "as much depression about myself and my physical body. I don't think I will be so anxious that people are always knowing I'm different ...." Edmo

recognizes, however, that GCS "is not a fix-all": "[i]t's not a magic operation. ... I'm still going to have to face the same stressors that we all face in everyday life ...."

D. The Evidentiary Hearing

[After Edmo filed her lawsuit, the trial judge granted her motion for appointed counsel, who filed a motion for a temporary injunction on her behalf.] At the evidentiary hearing, each side had eight hours to present its case. The district court heard live testimony from seven witnesses over three days. It also considered thousands of pages of exhibits, including Edmo's medical records. With the parties' agreement, the court also permitted the State to submit declarations in lieu of live testimony and permitted Edmo to impeach the declarations with deposition testimony.

At the outset of the hearing, the district court noted that "[w]e're here on a hearing for a temporary injunction," but it explained that "it's hard for me to envision this hearing being anything but a hearing on a final injunction[,] at least as to" the injunctive relief ordering GCS. The court stated that it was unsure whether that made a difference, and it asked the parties to address at some point whether the hearing was for a preliminary injunction or a permanent injunction. Notably, the State did not do so. The district court heard testimony from three percipient witnesses: Edmo, Dr. Eliason (the Corizon physician), and Jeremy Clark (an IDOC clinician who did not meet IDOC's criteria to assess Edmo for GCS). Their relevant testimony is largely recounted above.

It also heard testimony from four expert witnesses, two each for Edmo and the State. Dr. Randi Ettner, Ph.D. in psychology, testified first for Edmo. Dr. Ettner is one of the authors of the current (seventh) version of the WPATH Standards of Care. She has been a WPATH member since 1993 and chairs its Institutionalized Persons Committee. Dr. Ettner has authored or edited many peer-reviewed publications on the treatment of gender dysphoria and transgender health care more broadly, including the leading textbook used in medical schools on the subject. She also trains medical and mental health providers on treating people with gender dysphoria. Dr. Ettner has been retained as an expert witness on gender dysphoria and its treatment in many court cases, and she has been appointed as an independent expert by one federal court to evaluate an incarcerated person for GCS.

Dr. Ettner has evaluated, diagnosed, and treated between 2,500 and 3,000 individuals with gender dysphoria. She has referred about 300 people for GCS. She has also refused to recommend surgery for some patients who have requested it. She believes that not everyone who has gender dysphoria needs GCS. Dr. Ettner also has "[e]xtensive experience" treating and providing post-operative care for patients who have undergone GCS.

Dr. Ettner has assessed approximately 30 incarcerated individuals with gender dysphoria for GCS and other medical care, but she has not treated incarcerated patients. She has not worked in a prison and she is not a Certified Correctional Healthcare Professional.

Based on her evaluation of Edmo and a review of Edmo's medical records, Dr. Ettner diagnosed Edmo with gender dysphoria, depressive disorder, anxiety, and suicidal ideation. In

Dr. Ettner's opinion, GCS is medically necessary for Edmo and should be immediately performed. She explained that most patients with gender dysphoria do not require GCS, but Edmo requires it because hormone therapy has been inadequate for her and Edmo has attempted to remove her own testicles. Dr. Ettner further explained that GCS would give Edmo congruent genitalia, eliminating the severe distress Edmo experiences due to her male anatomy.

Dr. Ettner further opined that Edmo meets the WPATH criteria for GCS. She explained that Edmo has "persistent and well-documented long-standing gender dysphoria"; Edmo "has no thought disorders and no impaired reality testing"; Edmo is the age of majority in this country; although Edmo has depression and anxiety, those conditions do not "impair her ability to undergo surgery" because they are "as controlled as [they] can be"; Edmo has had six years of hormone therapy; and Edmo has lived for more than one year "as a woman to the best of her ability in a male prison."

More specifically, as to the fourth criterion, Dr. Ettner opined that Edmo does not have mental health concerns that would preclude GCS. She explained that Edmo's depression and anxiety are as "controlled as can be" because Edmo "is taking the maximum amount of medication that controls depression." Dr. Ettner noted that Edmo has complied with taking her prescribed medications and that psychotherapy is not "a precondition for surgery" under the WPATH Standards of Care. She also flagged that Edmo has the capacity to comply with her postsurgical treatment, as evidenced by her compliance with her hormone therapy to date. As to the clinical significance of Edmo's self-castration attempts and cutting behaviors, Dr. Ettner explained that neither behavior indicates that Edmo has inadequately controlled mental health concerns. Rather, those behaviors indicate "the need for treatment for gender dysphoria." Dr. Ettner explained that when an individual who is not psychotic or delusional attempts what we call surgical self-treatment – because we don't regard removal of the testicles or attempted removal of the testicles as either mutilation or self-harm – we regard it as an intentional attempt to remove the target organ that produces testosterone, which, in fact, is the cure for gender dysphoria. In Dr. Ettner's opinion, Edmo's depression and anxiety "will be attenuated post surgery."

Dr. Ettner opined that Edmo satisfies the sixth criterion because she has lived "as a woman to the best of her ability in a male prison." Dr. Ettner based her opinion on Edmo's "appearance ... , her disciplinary records, which indicated that she had attempted to wear her hair in a feminine hairstyle and to wear makeup even though that was against the rules and she was – received some sort of disciplinary action for that, and her – the way that she was receiving female undergarments and had developed the stigma of femininity, the secondary sex characteristics, breast development, et cetera." Dr. Ettner opined that if Edmo does not receive GCS, "[t]he risks would be, as typical in inadequately treated or untreated gender dysphoria, either surgical self-treatment, emotional decompensation, or suicide." Dr. Ettner explained that Edmo "is at particular risk of suicide given that she has a high degree of suicide ideation." If, on the other hand, Edmo receives surgery, Dr. Ettner opined that

> [i]t would eliminate the gender dysphoria. It would provide a level of wellbeing that she hasn't had previously. It would eliminate 80 percent of the testosterone in

> her body, necessitating a lower dose of hormones going forward, which would be particularly helpful given that she has elevated liver enzymes. And it would, I believe, eliminate much of the depression and the attendant symptoms that she is experiencing.

Dr. Ryan Gorton, M.D., also testified for Edmo. Dr. Gorton is an emergency medicine physician. He also works pro bono at a clinic serving uninsured patients or those with Medicare or Medicaid. Many of those patients have mental health conditions or have been in prison. He has published peer-reviewed articles on the treatment of gender dysphoria, and he has been qualified as an expert witness in cases involving transgender health care. Dr. Gorton also provides training on transgender health care issues to many groups, is a member of WPATH, and serves on WPATH's Transgender Medicine and Research Committee and its Institutionalized Persons Committee.

Dr. Gorton has been the primary care physician for about 400 patients with gender dysphoria. At the time of the evidentiary hearing, Dr. Gorton was treating approximately 100 patients with gender dysphoria. Dr. Gorton has assessed patients for gender dysphoria, initiated and monitored hormone treatment, referred patients for mental health treatment, and determined the appropriateness of GCS. At the time of the evidentiary hearing, Dr. Gorton was providing follow-up care for about 30 patients who had vaginoplasty. Dr. Gorton has no experience treating transgender inmates and is not a Certified Correctional Healthcare Professional.

Based on his review of Edmo's medical records and his in-person evaluation of Edmo, Dr. Gorton opined that GCS is medically necessary for Edmo and that she meets the WPATH criteria for GCS. He explained that Edmo has "persistent well-documented gender dysphoria," as shown in her prison medical records; she has the capacity "to make a fully informed decision and to consent for treatment" because "she didn't seem at all impaired in her decision-making capacity"; she is the age of majority; she has depression and anxiety, "but they are not to a level that would preclude her getting [GCS]"; she had 12 consecutive months of hormone therapy; and she has been living in her "target gender role ... despite an environment that's very hostile to that and some negative consequences that she has experienced because of that." Dr. Gorton further opined that if Edmo "is not provided surgery, there is a very substantial chance she will try to attempt self-surgery again. And that's especially worrisome given her attempts have been progressive. ... So I think she might be successful" on her next attempt. He predicted that there is little chance that Edmo's gender dysphoria will improve without surgery. Conversely, Dr. Gorton anticipated that Edmo is unlikely to regret surgery because "her gender dysphoria is very genital-focused" and regret rates among GCS patients are very low. Dr. Gorton also opined that Edmo's self-castration attempts demonstrate "that she has severe genital-focused gender dysphoria and that she is not getting the medically necessary treatment to alleviate that." He elaborated that Edmo's depression and anxiety are not driving Edmo's self-castration attempts: "there [are] a lot of people with depression and anxiety who don't remove their testicles."

Finally, Dr. Gorton criticized Dr. Eliason's evaluation of Edmo. He explained that he disagreed with Dr. Eliason's conclusion that Edmo does not need GCS and he also disagreed with the three "criteria" Dr. Eliason gave for when GCS would be necessary. Dr. Gorton

criticized Dr. Eliason's first criterion—that GCS could be needed where there is "congenital malformation or ambiguous genitalia"—because that situation "isn't even germane to transgender people"; rather, it relates to "people with intersex conditions." As to the second criterion—that GCS could be needed when a patient is suffering from "severe and devastating gender dysphoria that is primarily due to genitals"—Dr. Gorton pointed out that the WPATH Standards of Care for surgery require only "clear and significant dysphoria." And even applying Dr. Eliason's higher bar, Dr. Gorton explained that Edmo would still qualify for GCS because she has twice attempted self-castration, demonstrating "severe genital-focused dysphoria." Finally, Dr. Gorton characterized Dr. Eliason's third criterion—that GCS could be needed in situations when "endogenous sexual hormones were causing severe physiological damage"—as "bizarre." Dr. Gorton could not conjure "a clinical circumstance where that would be the case that your hormones that your body produces are attacking you .... I just don't understand what [Dr. Eliason] is talking about there."

Dr. Keelin Garvey, M.D., testified for the State. Dr. Garvey is a psychiatrist and Certified Correctional Healthcare Professional. As the former Chief Psychiatrist of the Massachusetts Department of Corrections, Dr. Garvey chaired the Gender Dysphoria Treatment Committee. She directly treated a "couple of patients" with gender dysphoria earlier in her career as Deputy Medical Director, but she has not done so in recent years. Prior to evaluating Edmo, Dr. Garvey had never evaluated a patient in person to determine whether that person needed GCS. Dr. Garvey has never recommended a patient for GCS, and she has not done follow-up care with a person who has received GCS.

Based on her evaluation of Edmo and a review of Edmo's medical records, Dr. Garvey diagnosed Edmo with gender dysphoria, major depressive disorder, alcohol use disorder, stimulant use disorder, and opioid use disorder. She explained that the latter three are in remission. Relying on the WPATH Standards of Care, Dr. Garvey opined that GCS is not medically necessary for Edmo. Dr. Garvey first explained that Edmo does not meet the first WPATH Standards of Care criterion — "persistent, well documented gender dysphoria" — because of a lack of evidence in pre-incarceration medical records that Edmo presented as female before her time in prison. Dr. Garvey acknowledged, however, that Edmo has been presenting as female since 2012 and that she has been diagnosed with gender dysphoria since that time.

Dr. Garvey then explained that Edmo does not meet the fourth criterion — "medical/mental health concerns must be well controlled" — because Edmo "is actively self-injuring." Dr. Garvey elaborated that "self-injury in any form is never considered a healthy or productive coping mechanism" and that she would like to see Edmo "develop further coping skills that she would be able to use following surgery so that she is not engaging in self-injury after surgery." Dr. Garvey's concern is that GCS is a "stressful undertaking" and Edmo lacks "effective coping strategies" to deal with the stress.

Finally, Dr. Garvey testified that Edmo does not meet the sixth criterion—"12 continuous months of living in a gender role that is congruent with gender identity"—because Edmo has not presented as female outside of prison and "there [are] challenges to using her time in a men's

prison as this real-life experience because it doesn't offer her the opportunity to actually experience all those things she is going to go through on the outside."

Dr. Joel Andrade, Ph.D. in social work, also testified for the State. He is a licensed clinical social worker and is a Certified Correctional Healthcare Professional with an emphasis in mental health. Dr. Andrade has over a decade of experience providing and supervising the provision of correctional mental health care, including directing and overseeing the treatment of inmates diagnosed with gender dysphoria in the custody of the Massachusetts Department of Corrections in his roles as clinical director, chair of the Gender Dysphoria Supervision Group, and member of the Gender Dysphoria Treatment Committee. As a member of the Gender Dysphoria Treatment Committee, Dr. Andrade recommended GCS for two inmates. But the recommendations were contingent on the inmates living in a women's prison for approximately 12 months before the surgery. The Massachusetts Department of Corrections, like IDOC, houses prisoners according to their genitals, so the inmates had not been moved (nor had their surgery occurred).

Dr. Andrade has never directly treated patients with gender dysphoria, nor has he been a treating clinician for a patient who has had GCS. His "experience with gender dysphoria comes almost exclusively from [his] participation on the Massachusetts Department of Corrections' Gender Dysphoria Treatment Committee and Supervision Group." Dr. Andrade did not qualify, under the IDOC gender dysphoria policy in effect at the time of his assessment of Edmo, to assess a person for GCS because he is neither a psychologist nor a physician.

Based on his evaluation of Edmo and a review of her medical records, Dr. Andrade diagnosed Edmo with "major depressive disorder, recurrent, in partial remission," "generalized anxiety disorder," "alcohol use disorder, severe," and gender dysphoria. Dr. Andrade also diagnosed Edmo with borderline personality disorder. The district court did not credit this diagnosis, however, because no other person (including the State's other expert, Dr. Garvey) has ever diagnosed Edmo with borderline personality disorder and Dr. Andrade was unable to identify his criteria for this diagnosis. The record amply supports the district court's finding in this respect.

Dr. Andrade opined that Edmo does not meet the WPATH criteria for GCS. He explained that, based on his review of Edmo's pre-incarceration records, Edmo did not present as female or discuss her gender dysphoria before incarceration. Dr. Andrade testified that he would like to see Edmo live as female outside of a correctional setting before receiving GCS, or, at the least, live in a women's prison first. IDOC, however, houses prisoners according to their genitals. Dr. Andrade also explained that Edmo needs to work through some of her trauma, particularly sexual abuse that she suffered, and other mental health concerns before receiving surgery. Dr. Andrade opined that Edmo's mental health issues will not be cured by GCS.

At the close of the hearing, the district court reiterated that it was unsure "how we can hear [Edmo's request for GCS] on a preliminary injunction. ... [I]f I order it, then it's done." The court further suggested that the request for GCS could "only be resolved in a final hearing" and noted that it had, in effect, "treated this hearing as [a] final hearing on the issue." The court, as it

had done at the outset of the hearing, asked the parties to address whether the hearing was for a preliminary or permanent injunction. In response, Edmo contended that the court could order GCS in a preliminary injunction. The State did not address the court's question. It instead contended that the standard for a mandatory injunction—which can be preliminary or permanent—should apply.

E. The District Court's Decision

On the merits, the district court concluded that Edmo had established her Eighth Amendment claim. The district court first held that Edmo suffers from gender dysphoria, which is undisputedly "a serious medical condition." It then concluded that GCS is medically necessary to treat Edmo's gender dysphoria. In a carefully considered, 45-page opinion, the district court specifically found "credible the testimony of Plaintiff's experts Drs. Ettner and Gorton, who have extensive personal experience treating individuals with gender dysphoria both before and after receiving gender confirmation surgery," and who opined that GCS was medically necessary. The court rejected the contrary opinions of the State's experts because "neither Dr. Garvey nor Dr. Andrade has any direct experience with patients receiving gender confirmation surgery or assessing patients for the medical necessity of gender confirmation surgery," and neither of the State's experts had meaningful "experience treating patients with gender dysphoria other than assessing them for the existence of the condition." The district court also noted that the State's "experts appear to misrepresent the WPATH Standards of Care by concluding that Ms. Edmo, despite presenting as female since her incarceration in 2012, cannot satisfy the WPATH criteria because she has not presented as female outside of the prison setting." As the district court noted, "there is no requirement in the WPATH Standards of Care that a patient live for twelve months in his or her gender role outside of prison before becoming eligible for" GCS. Finally, the district court explained that the State was deliberately indifferent to Edmo's gender dysphoria because it "fail[ed] to provide her with available treatment that is generally accepted in the field as safe and effective, despite her actual harm and ongoing risk of future harm including self-castration attempts, cutting, and suicidal ideation." The district court also stated that the evidence "suggest[ed] that Ms. Edmo has not been provided gender confirmation surgery because Corizon and IDOC have a de facto policy or practice of refusing this treatment for gender dysphoria to prisoners," which amounts to deliberate indifference.

After analyzing the merits, the district court concluded that Edmo satisfied the other prerequisites to injunctive relief. . . . Having concluded that Edmo was entitled to an injunction, the court ordered the State "to provide Plaintiff with adequate medical care, including gender confirmation surgery." It ordered the State to "take all actions reasonably necessary to provide Ms. Edmo gender confirmation surgery as promptly as possible and no later than six months from the date of this order."

F. Appellate Proceedings . . .

III. Challenges to the District Court's Grant of Injunctive Relief . . .

The State contends that the district court erred in granting an injunction because (1) Edmo's Eighth Amendment claim fails and (2) Edmo has not shown that she will suffer

irreparable injury in the absence of an injunction. We disagree. We hold, based on the district court's factual findings, that Edmo established her Eighth Amendment claim and that she will suffer irreparable harm—in the form of ongoing mental anguish and possible physical harm—if GCS is not provided.

A. The Merits of Edmo's Eighth Amendment Claim

"[D]eliberate indifference to serious medical needs of prisoners" violates the Eighth Amendment. Because "society takes from prisoners the means to provide for their own needs," the government has an "obligation to provide medical care for those whom it is punishing by incarceration." To establish a claim of inadequate medical care, a prisoner must first "show a 'serious medical need' by demonstrating that 'failure to treat a prisoner's condition could result in further significant injury or the 'unnecessary and wanton infliction of pain.'" Serious medical needs can relate to "physical, dental and mental health."

The State does not dispute that Edmo's gender dysphoria is a sufficiently serious medical need to trigger the State's obligations under the Eighth Amendment. Nor could it. Gender dysphoria is a "serious ... medical condition" that causes "clinically significant distress"—distress that impairs or severely limits an individual's ability to function in a meaningful way. As Edmo testified, her gender dysphoria causes her to feel "depressed," "disgusting," "tormented," and "hopeless," and it has caused past efforts and active thoughts of self-castration. As this and many other courts have recognized, Edmo's gender dysphoria is a sufficiently serious medical need to implicate the Eighth Amendment.

If, as here, a prisoner establishes a sufficiently serious medical need, that prisoner must then "show the [official's] response to the need was deliberately indifferent." An inadvertent or negligent failure to provide adequate medical care is insufficient to establish a claim under the Eighth Amendment. In other words, "[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner." To "show deliberate indifference, the plaintiff must show that the course of treatment the [official] chose was medically unacceptable under the circumstances and that the [official] chose this course in conscious disregard of an excessive risk to the plaintiff's health."

1. The Medical Necessity of GCS for Edmo

The crux of the State's appeal is that it provided adequate and medically acceptable care to Edmo. Accepted standards of care and practice within the medical community are highly relevant in determining what care is medically acceptable and unacceptable. Typically, "[a] difference of opinion between a physician and the prisoner—or between medical professionals—concerning what medical care is appropriate does not amount to deliberate indifference." But that is true only if the dueling opinions are medically acceptable under the circumstances. "In deciding whether there has been deliberate indifference to an inmate's serious medical needs, we need not defer to the judgment of prison doctors or administrators." Nor does it suffice for "correctional administrators wishing to avoid treatment ... simply to find a single practitioner willing to attest that some well-accepted treatment is not necessary. In the final analysis under the Eighth Amendment, we must determine, considering the record, the judgments of prison

medical officials, and the views of prudent professionals in the field, whether the treatment decision of responsible prison authorities was medically acceptable.

Reviewing the record and the district court's extensive factual findings, we conclude that Edmo has established that the "course of treatment" chosen to alleviate her gender dysphoria "was medically unacceptable under the circumstances." This conclusion derives from the district court's factual findings, which are not "illogical, implausible, or without support in inferences that may be drawn from the facts in the record." In particular, and as we will explain, this is not a case of dueling experts, as the State paints it. The district court permissibly credited the opinions of Edmo's experts that GCS is medically necessary to treat Edmo's gender dysphoria and that the State's failure to provide that treatment is medically unacceptable. Edmo's experts are well-qualified to render such opinions, and they logically and persuasively explained the necessity of GCS and applied the WPATH Standards of Care—the undisputed starting point in determining the appropriate treatment for gender dysphoric individuals. On the other side of the coin, the district court permissibly discredited the contrary opinions of the State's treating physician and medical experts. Those individuals lacked expertise and incredibly applied (or did not apply, in the case of the State's treating physician) the WPATH Standards of Care. In other words, the district court did not clearly err in making its credibility determinations, so it is not our role to reevaluate them. The credited testimony establishes that GCS is medically necessary. [In a section dissecting the testimony by the state's experts, the court repeatedly showed how their testimony was inconsistent with the WPATH Standards of Care, unlike the testimony of Edmo's experts.]

2. Deliberate Indifference

The State next contends that even if the treatment provided Edmo was medically unacceptable, no defendant acted "in conscious disregard of an excessive risk to [Edmo's] health." We disagree. The record demonstrates that Dr. Eliason acted with deliberate indifference to Edmo's serious medical needs. Dr. Eliason knew, as of the time of his evaluation, that Edmo had attempted to castrate herself. He also knew that Edmo suffers from gender dysphoria; he knew she experiences "clinically significant" distress that impairs her ability to function. He acknowledged that Edmo's self-castration attempt was evidence that Edmo's gender dysphoria, in his words, "had risen to another level." Dr. Eliason nonetheless continued with Edmo's ineffective treatment plan. Edmo then tried to castrate herself a second time, in December 2016. Dr. Eliason knew of that nearly catastrophic event, but he did not reevaluate or recommend a change to Edmo's treatment plan, despite indicating in his April 2016 evaluation that he would continue to monitor and assess Edmo's condition. Dr. Eliason continued to see Edmo after that time, and he considered Edmo's treatment as a member of the MTC. At no point did Dr. Eliason change his mind or the treatment plan regarding surgery. Under these circumstances, we conclude that Dr. Eliason knew of and disregarded the substantial risk of severe harm to Edmo.

The State urges that neither Dr. Eliason nor any other defendant acted with deliberate indifference because none acted with "malice, intent to inflict pain, or knowledge that [the] recommended course of treatment was medically inappropriate." The State misstates the

standard. A prisoner "must show that prison officials 'kn[e]w of and disregard[ed]' the substantial risk of harm,' but the officials need not have intended any harm to befall the inmate; 'it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm.'" Neither the Supreme Court nor this court has ever required a plaintiff to show a "sinister [prison official] with improper motives," as the State would require. It is enough that Dr. Eliason knew of and disregarded an excessive risk to Edmo's health by rejecting her request for GCS and then never re-evaluating his decision despite ongoing harm to Edmo.

The State also contends that because the defendants provided some care to Edmo, no defendant could have been deliberately indifferent. The provision of some medical treatment, even extensive treatment over a period of years, does not immunize officials from the Eighth Amendment's requirements. As the Fourth Circuit has aptly analogized,

> imagine that prison officials prescribe a painkiller to an inmate who has suffered a serious injury from a fall, but that the inmate's symptoms, despite the medication, persist to the point that he now, by all objective measure, requires evaluation for surgery. Would prison officials then be free to deny him consideration for surgery, immunized from constitutional suit by the fact they were giving him a painkiller? We think not.

De'lonta, 708 F.3d at 526. Here, although the treatment provided Edmo was important, it stopped short of what was medically necessary.

3. Out-of-Circuit Precedent

Our decision cleaves to settled Eighth Amendment jurisprudence, which requires a fact-specific analysis of the record (as construed by the district court) in each case. Several years ago, the First Circuit, sitting en banc, employed that fact-based approach to evaluate a gender dysphoric prisoner's Eighth Amendment claim seeking GCS. The First Circuit confronted the following record: credited expert testimony disagreed as to whether GCS was medically necessary; the prisoner's active treatment plan, which did not include GCS, had "led to a significant stabilization in her mental state"; and a report and testimony from correctional officials detailed significant security concerns that would arise if the prisoner underwent GCS. "After carefully considering the community standard of medical care, the adequacy of the provided treatment, and the valid security concerns articulated by the DOC," a 3–2 majority of the en banc court concluded that the plaintiff had not demonstrated GCS was medically necessary treatment for her gender dysphoria.

Our approach mirrors the First Circuit's, but the important factual differences between cases yield different outcomes. Notably, the security concerns in Kosilek, which the First Circuit afforded "wide-ranging deference," are completely absent here. The State does not so much as allude to them. The medical evidence also differs. In Kosilek, qualified and credited experts disagreed about whether GCS was necessary. As explained above, the district court's careful factual findings admit of no such disagreement here. Rather, they unequivocally establish that GCS is the safe, effective, and medically necessary treatment for Edmo's severe gender dysphoria.

We recognize, however, that our decision is in tension with Gibson v. Collier. In that case, the Fifth Circuit held, in a split decision, that "[a] state does not inflict cruel and unusual punishment by declining to provide [GCS] to a transgender inmate." It did so on a "sparse record" — which included only the WPATH Standards of Care and was notably devoid of "witness testimony or evidence from professionals in the field" — compiled by a pro se plaintiff. Despite the sparse record, a 2–1 majority of the Gibson panel concluded that "there is no consensus in the medical community about the necessity and efficacy of [GCS] as a treatment for gender dysphoria. ... This on-going medical debate dooms Gibson's claim."

We respectfully disagree with the categorical nature of our sister circuit's holding. Most fundamentally, Gibson relies on an incorrect, or at best outdated, premise: that "[t]here is no medical consensus that [GCS] is a necessary or even effective treatment for gender dysphoria." As the record here demonstrates and the State does not seriously dispute, the medical consensus is that GCS is effective and medically necessary in appropriate circumstances. The WPATH Standards of Care—which are endorsed by the American Medical Association, the American Medical Student Association, the American Psychiatric Association, the American Psychological Association, the American Family Practice Association, the Endocrine Society, the National Association of Social Workers, the American Academy of Plastic Surgeons, the American College of Surgeons, Health Professionals Advancing LGBTQ Equality, the HIV Medicine Association, the Lesbian, Bisexual, Gay and Transgender Physician Assistant Caucus, and Mental Health America—recognize this fact. Each expert in this case agrees. As do others in the medical community. The Fifth Circuit is the outlier.

Gibson's broad holding stemmed from a dismaying disregard for procedure. As noted, the "sparse" summary judgment record that the pro se plaintiff developed included "only the WPATH Standards of Care." Perhaps that factual deficiency doomed Gibson's Eighth Amendment claim. But to reach its broader holding that denying GCS cannot, as a matter of law, violate the Eighth Amendment — in other words, to reject every conceivable Eighth Amendment claim based on the denial of GCS — the Fifth Circuit coopted the record from Kosilek, a First Circuit decision that predates Gibson by four years. We doubt the analytical value of such an anomalous procedural approach. Worse yet, the medical opinions from Kosilek do not support the Fifth Circuit's categorical holding. Dr. Chester Schmidt's and Dr. Stephen Levine's testimony in Kosilek, which the Fifth Circuit relied on, do not support the proposition that GCS is never medically necessary. Dr. Schmidt and Dr. Levine testified that GCS was not necessary in the factual circumstances of that case, that is, based on the unique medical needs of the prisoner at issue. The only suggestion in Kosilek that GCS is never medically necessary is in the First Circuit's recitation of the testimony of Dr. Cynthia Osborne. The First Circuit recounted that Dr. Osborne testified that she "did not view [GCS] as medically necessary in light of the 'whole continuum from noninvasive to invasive' treatment options available to individuals with" gender dysphoria. To the extent this vague portrait of Dr. Osborne's testimony conveys her belief that GCS is never medically necessary, she has apparently changed her view in the more than ten years since she testified in Kosilek. Like both sides and all four medical experts who testified here, Dr. Osborne now agrees that GCS "can be medically necessary for some, though not all, persons with [gender dysphoria], including some

prison inmates." Osborne & Lawrence, Male Prison Inmates with Gender Dysphoria, 45 Archives of Sexual Behav. at 1651. In her and her co-author's words, "[GCS] is a safe, effective, and widely accepted treatment for [gender dysphoria]; disputing the medical necessity of [GCS] based on assertions to the contrary is unsupportable." The predicate medical opinions that Gibson is premised upon, then, do not support the Fifth Circuit's view that GCS is never medically necessary. The consensus is that GCS is effective and medically necessary in appropriate circumstances.

Gibson is unpersuasive for several additional reasons. It directly conflicts with decisions of this circuit, the Fourth Circuit, and the Seventh Circuit, all of which have held that denying surgical treatment for gender dysphoria can pose a cognizable Eighth Amendment claim. Rosati, 791 F.3d at 1040 (alleged blanket ban on GCS and denial of GCS to plaintiff with severe symptoms, including repeated self-castration attempts, states an Eighth Amendment claim); Fields v. Smith, 653 F.3d 550, 552–53, 558–59 (7th Cir. 2011) (law banning hormone treatment and GCS, even if medically necessary, violates the Eighth Amendment); De'lonta, 708 F.3d at 525 (alleged denial of an evaluation for GCS states an Eighth Amendment claim). Relatedly, Gibson eschews Eighth Amendment precedent requiring a case-by-case determination of the medical necessity of a particular treatment. In this latter respect, Gibson also contradicts and misconstrues the precedent it purports to follow: Kosilek. According to the Gibson majority, "the majority in Kosilek effectively allowed a blanket ban on sex reassignment surgery." Not so. The First Circuit did precisely what we do here: assess whether the record before it demonstrated deliberate indifference to the plaintiff's gender dysphoria. On the record before it, the First Circuit determined that either of two courses of treatment (one included GCS and one did not) were medically acceptable. In light of those medically acceptable alternatives, the First Circuit explained that it was not its place to "second guess medical judgments or to require that the DOC adopt the more compassionate of two adequate options." It expressly cautioned that the opinion should not be read to "create a de facto ban against [GCS] as a medical treatment for any incarcerated individual," as "any such policy would conflict with the requirement that medical care be individualized based on a particular prisoner's serious medical needs." The Fifth Circuit disregarded these words of warning.

B. Irreparable Harm

The State next contends that the district court erred in finding that Edmo would be irreparably harmed absent an injunction. In reaching its conclusion, the district court found that Edmo experiences ongoing "clinically significant distress," meaning "the distress impairs or severely limits [her] ability to function in a meaningful way." This finding is supported by Edmo's testimony that her gender dysphoria causes her to feel "depressed," "disgusting," "tormented," and "hopeless"; that she actively experiences thoughts of self-castration; and that she "self-medicat[es]" by cutting her arms with a razor to avoid acting on those thoughts and impulses. The district court also found that in the absence of surgery, Edmo "will suffer serious psychological harm and will be at high risk of self-castration and suicide." This finding is supported by the credited expert testimony of Dr. Ettner and Dr. Gorton, who detailed the escalating risks of self-surgery, suicide, and emotional decompensation should Edmo be denied

surgery. It is no leap to conclude that Edmo's severe, ongoing psychological distress and the high risk of self-castration and suicide she faces absent surgery constitute irreparable harm.

. . . .VI. Conclusion

We apply the dictates of the Eighth Amendment today in an area of increased social awareness: transgender health care. We are not the first to speak on the subject, nor will we be the last. Our court and others have been considering Eighth Amendment claims brought by transgender prisoners for decades. During that time, the medical community's understanding of what treatments are safe and medically necessary to treat gender dysphoria has changed as more information becomes available, research is undertaken, and experience is gained. The Eighth-Amendment inquiry takes account of that developing understanding. We hold that where, as here, the record shows that the medically necessary treatment for a prisoner's gender dysphoria is gender confirmation surgery, and responsible prison officials deny such treatment with full awareness of the prisoner's suffering, those officials violate the Eighth Amendment's prohibition on cruel and unusual punishment.

Edmo v. Corizon, Inc.
949 F. 3d 489 (9th Cir., 2020) (dissent from denial of rehearing en banc)

O'SCANNLAIN, Circuit Judge,* with whom CALLAHAN, BEA, IKUTA, R. NELSON, BADE, BRESS, BUMATAY, and VANDYKE, Circuit Judges, join, respecting the denial of rehearing en banc:

With its decision today, our court becomes the first federal court of appeals to mandate that a State pay for and provide sex-reassignment surgery to a prisoner under the Eighth Amendment. The three-judge panel's conclusion—that any alternative course of treatment would be "cruel and unusual punishment"—is as unjustified as it is unprecedented. To reach such a conclusion, the court creates a circuit split, substitutes the medical conclusions of federal judges for the clinical judgments of prisoners' treating physicians, redefines the familiar "deliberate indifference" standard, and, in the end, constitutionally enshrines precise and partisan treatment criteria in what is a new, rapidly changing, and highly controversial area of medical practice. Respectfully, I believe our court's unprecedented decision deserved reconsideration en banc.

* * * * * * * *

To reach its conclusion that sex-reassignment surgery was medically necessary, the panel spends most of its lengthy opinion extolling and explaining the WPATH Standards of Care. Because Dr. Eliason failed to "follow" or "reasonably deviate from" the WPATH Standards, the panel concluded that his treatment choice was "medically unacceptable under the circumstances." To reach the ultimate conclusion—that Dr. Eliason had a deliberately indifferent state of mind and was consequently in violation of the Eighth Amendment—the panel posited that Dr. Eliason's awareness of the risks that Edmo would attempt to castrate herself or

feel "clinically significant" distress "demonstrates that Dr. Eliason acted with deliberate indifference." Each conclusion was legal error.

"Deliberate indifference is a high legal standard." It is, after all, under governing precedent one form of the "unnecessary and wanton infliction of pain" that is the sine qua non of an Eighth Amendment violation. Estelle, 429 U.S. at 104. Simply put, Edmo must prove that Dr. Eliason's chosen course of treatment was the doing of a criminally reckless—or worse—state of mind. Farmer v. Brennan, 511 U.S. 825, 839 (1994).

We have stated that a deliberately indifferent state of mind may be inferred when "the course of treatment the doctors chose was medically unacceptable under the circumstances" and "they chose this course in conscious disregard of an excessive risk to plaintiff's health." Yet even most objectively unreasonable medical care is not deliberately indifferent. "[M]ere 'indifference,' 'negligence,' or 'medical malpractice'" is not enough to constitute deliberate indifference. Lemire v. Cal. Dep't of Corrs. & Rehab., 726 F.3d 1062, 1082 (9th Cir. 2013). "Even gross negligence is insufficient to establish deliberate indifference ...." Likewise, "[a] difference of opinion between a physician and the prisoner—or between medical professionals—concerning what medical care is appropriate does not amount to deliberate indifference." Snow v. McDaniel, 681 F.3d 978, 987 (9th Cir. 2012). Although the panel organizes its opinion according to the dictum we first articulated in Jackson, it so contorts the standard as to render deliberate indifference exactly what we have said it is not: a constitutional prohibition on good-faith disagreement between medical professionals.

The panel first, and fundamentally, errs by misunderstanding what it means for a chosen treatment to be medically "unacceptable" for purposes of the Eighth Amendment. As did the district court, the panel concludes that the decision to continue hormone treatment and counseling instead of sex-reassignment surgery for Edmo was "medically unacceptable under the circumstances" because, in short, Dr. Eliason failed to "follow" or "reasonably deviate from" the WPATH Standards of Care. Yet such an approach to the Eighth Amendment suffers from three essential errors. First, contrary to the panel's suggestion, constitutionally acceptable medical care is not defined by the standards of one organization. Second, the panel relies on standards that were promulgated by a controversial self-described advocacy group that dresses ideological commitments as evidence-based conclusions. Third, once the WPATH Standards are put in proper perspective, we are left with a "case of dueling experts," compelling the conclusion that Dr. Eliason's treatment choice was indeed medically acceptable.

A mere professional association simply cannot define what qualifies as constitutionally acceptable treatment of prisoners with gender dysphoria. In Bell v. Wolfish, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979), the Supreme Court rejected the argument that prison conditions must reflect those set forth in the American Public Health Association's Standards for Health Services in Correctional Institutions, the American Correctional Association's Manual of Standards for Adult Correctional Institutions, or the National Sheriffs' Association's Handbook on Jail Architecture. According to the Court, "the recommendations of these various groups may be instructive in certain cases, [but] they simply do not establish the constitutional minima." After all, even acclaimed, leading treatment criteria only represent the "goals recommended by

the organization in question" and the views of the promulgating physicians, and so, without more, a physician's disagreement with such criteria is simply the "'difference of medical opinion' ... [that is] insufficient, as a matter of law, to establish deliberate indifference."

In its discussion of the role of treatment standards, the panel fails to cite a single case in which a professional organization's standards of care defined the line between medically acceptable and unacceptable treatment. Instead, the panel cites two cases, one from the Seventh Circuit and one from the Eighth, for the proposition that professional organizations' standards of care are "highly relevant in determining what care is medically acceptable and unacceptable." That may be. But as those two cases demonstrate, the range of medically acceptable care is defined by qualities of that care (or of its opposite) and not by professional associations. Medically unacceptable care is "grossly incompetent or inadequate care," Allard v. Baldwin, 779 F.3d 768, 772 (8th Cir. 2015), or care that constitutes "such a substantial departure from accepted professional judgment to demonstrate that the person responsible did not base the decision on ... [accepted professional] judgment," Henderson v. Ghosh, 755 F.3d 559, 566 (7th Cir. 2014) (original parenthetical) (quoting McGee v. Adams, 721 F.3d 474, 481 (7th Cir. 2013) (stipulating that "medical professionals ... are 'entitled to deference in treatment decisions unless no minimally competent professional would have so responded' ")). For its part, the First Circuit holds in its own sex-reassignment-surgery case that medical care does not violate the Eighth Amendment so long as it is "reasonably commensurate with the medical standards of prudent professionals." Kosilek v. Spencer, 774 F.3d 63, 90 (1st Cir. 2014) (en banc). The panel is alone in its insistence that a professional association's standards add up to the constitutional minima.

In the words of the panel, speaking for our court, the WPATH Standards are "the gold standard," the "established standards" for evaluations of the necessity of sex-reassignment surgery, the "undisputed starting point in determining the appropriate treatment for gender dysphoric individuals." But such overwrought acclaim is just the beginning of the panel's thorough enshrinement of the WPATH Standards. The district court chose which expert to rely on by looking at which expert hewed most closely to the WPATH Standards of Care. And the panel uncritically approves such an approach, calling the WPATH Standards "a useful starting point for analyzing the credibility and weight to be given to each expert's opinion." By rejecting any expert not (in the court's view) appropriately deferential to WPATH, the district court and now the panel have effectively decided ab initio that only the WPATH Standards could constitute medically acceptable treatment.

One would be forgiven for inferring from the panel's opinion that its bold assertions about the WPATH Standards are uncontroverted truths. But, as the Fifth Circuit has recognized, "the WPATH Standards of Care reflect not consensus, but merely one side in a sharply contested medical debate over sex reassignment surgery." Gibson v. Collier, 920 F.3d 212, 221 (5th Cir. 2019). For its part, the First Circuit, sitting en banc, has likewise held that "[p]rudent medical professionals ... do reasonably differ in their opinions regarding [WPATH's] requirements." Our court should have done the same.

The WPATH Standards are merely criteria promulgated by a controversial private organization with a declared point of view. According to Dr. Stephen Levine, author of the

WPATH Standards' fifth version, former Chairman of WPATH's Standards of Care Committee, and the court-appointed expert in Kosilek, WPATH attempts to be "both a scientific organization and an advocacy group for the transgendered. These aspirations sometimes conflict." Sometimes the pressure to be advocates wins the day. As Levine put it, "WPATH is supportive to those who want sex reassignment surgery. ... Skepticism and strong alternate views are not well tolerated. Such views have been known to be greeted with antipathy from the large numbers of nonprofessional adults who attend each [of] the organization's biennial meetings ...." WPATH's own description of its drafting process makes this clear. Initially, the sections of the sixth version were each assigned to an individual member of WPATH who then published a literature review with suggested revisions. The suggested revisions were then discussed and debated by a thirty-four-person Revision Committee, all before a subcommittee drafted the new document. Only about half of the Revision Committee possesses a medical degree. The rest are sexologists, psychotherapists, or career activists, with a sociologist and a law professor rounding out the group.

The pressure to be advocates appears to have won the day in the WPATH Standards' recommendations regarding institutionalized persons. Recall that one central point of contention between the State's witnesses and Edmo's was over whether Edmo's time undergoing hormone therapy in prison provides sufficient guarantee that she could live well outside of prison as a woman without having ever done so before. The district court resolved the debate by citing the WPATH Standards' section on institutionalized persons, which tersely stipulates that institutionalized persons should not be "discriminated against" on the basis of their institutionalization. Such a recommendation is not supported by any research about the similarity between prisoners' experiences with sex-reassignment surgery and that of the general public. Indeed, as Edmo's expert witness and WPATH author, Dr. Randi Ettner, admits, there is only one known instance of a person undergoing sex-reassignment surgery while incarcerated—leaving medical knowledge about how such surgery might differ totally undeveloped.

Instead, WPATH's recommendation for institutionalized persons merely expresses a policy preference. The article from which the recommendations are adapted stipulates upfront that, because WPATH's "mission" is "to advocate for nondiscriminatory" care, it presumes that treatment choices should be the same for all "demographic variables, unless there is a clinical indication to provide services in a different fashion." Unable to make an evidentiary finding from a sample size of one, the article concludes that its presumption should set the standard of care and then proceeds to recommend revisions with the express purpose of influencing how courts review gender dysphoria treatments under the Eighth Amendment. As a later peer-reviewed study by Dr. Cynthia Osborne and Dr. Anne Lawrence put it, WPATH's institutionalized-persons recommendations follow from an "ethical principle," not "extensive clinical experience." Cynthia S. Osborne & Anne A. Lawrence, Male Prison Inmates With Gender Dysphoria: When Is Sex Reassignment Surgery Appropriate?, 45 Archives of Sexual Behav. 1649, 1651 (2016).

Even apart from the concerns over WPATH's ideological commitments, its evidentiary basis is not sufficient to justify the court's reliance on its strict terms. The WPATH Standards

seem to suggest as much. In its own words, the WPATH Standards are simply "flexible clinical guidelines," which explicitly allow that "individual health professionals and programs may modify them." . . .

The panel's disposition results from its failure to put the WPATH Standards in proper perspective. Had the district court understood that Edmo's experts' role in WPATH marks them not with special insight into the legally acceptable care, but rather as mere participants in an ongoing medical debate, they would have acknowledged this case for what it is: a "case of dueling experts." Instead of giving Drs. Garvey and Andrade (to say nothing of Dr. Eliason) "no weight" due to their insufficient fealty to WPATH, the district court should have recognized them as legitimate, experienced participants in that debate. And had the State's experts' criticisms of and interpretation of the WPATH Standards been given proper weight—any weight at all—the district court would have had to conclude that the State's disagreement with Edmo's experts was a mere "difference of medical opinion," not a constitutional violation. . . .

Even were the panel correct that the only medically acceptable way to approach a gender dysphoric patient's request for sex-reassignment surgery is to apply the WPATH Standards of Care, we still could not infer a constitutional violation from these facts. As the Supreme Court has explained, the Eighth Amendment simply proscribes categories of punishment, and punishment is "a deliberate act intended to chastise or deter." "[O]nly the 'unnecessary and wanton infliction of pain' implicates the Eighth Amendment." Hence the commonplace deliberate-indifference inquiry, which is a culpability standard equivalent to criminal recklessness. Simply put, unless the official "knows of and disregards an excessive risk to inmate health and safety," he does not violate the Eighth Amendment. . . .

The panel's novel approach to Eighth Amendment claims for sex-reassignment surgery conflicts with every other circuit to consider the issue. The panel acknowledges such a circuit split with the Fifth Circuit's opinion in Gibson v. Collier, 920 F.3d 212 (5th Cir. 2019), but tries—and fails—to distinguish the First Circuit's en banc opinion in Kosilek v. Spencer, 774 F.3d 63 (1st Cir. 2014). The panel does not even address a third decision: the Tenth Circuit's opinion in Lamb v. Norwood, 899 F.3d 1159 (10th Cir. 2018). . . . Although I am not aware of any other circuits to have directly addressed the questions posed in this case, for its part, the Seventh Circuit has held that it is at least not "clearly established" that there is a constitutional right to gender-dysphoria treatment beyond hormone therapy. Campbell v. Kallas, 936 F.3d 536, 549 (7th Cir. 2019). Nor is it "clearly established" that a prison medical provider is prohibited from denying sex-reassignment surgery on the basis of the patient's status as an institutionalized person. With this decision, our circuit sets itself apart.

I do not know whether sex-reassignment surgery will ameliorate or exacerbate Adree Edmo's suffering. Fortunately, the Constitution does not ask federal judges to put on white coats and decide vexed questions of psychiatric medicine. The Eighth Amendment forbids the "unnecessary and wanton infliction of pain," not the "difference of opinion between a physician and the prisoner—or between medical professionals." Yet today our court assumes the role of Clinical Advisory Committee. Far from rendering an opinion "individual to Edmo" that "rests on the record," the panel entrenches the district court's unfortunate legal errors as the law of this

circuit. Instead of permitting prudent, competent patient care, our court enshrines the WPATH Standards as an enforceable "medical consensus," effectively putting an ideologically driven private organization in control of every relationship between a doctor and a gender dysphoric prisoner within our circuit. Instead of reserving the Eighth Amendment for the grossly, unjustifiably reckless, the panel infers a culpable state of mind from the supposed inadequacy of the treatment.

BUMATAY, Circuit Judge, with whom CALLAHAN, IKUTA, R. NELSON, BADE, and VANDYKE, Circuit Judges, join, and with whom COLLINS, Circuit Judge, joins as to Part II, dissenting from the denial of rehearing en banc:

Like the panel and the district court, I hold great sympathy for Adree Edmo's medical situation. And as with all citizens, her constitutional rights deserve the utmost respect and vigilant protection. As the district court rightly stated,

> The Rule of Law, which is the bedrock of our legal system, promises that all individuals will be afforded the full protection of our legal system and the rights guaranteed by our Constitution. This is so whether the individual seeking that protection is black, white, male, female, gay, straight, or, as in this case, transgender.

I respect Edmo's wishes and hope she is afforded the best treatment possible. But whether SRS is the optimal treatment for Edmo's gender dysphoria is not before us. As judges, our role is not to take sides in matters of conflicting medical care. Rather, our duty is to faithfully interpret the Constitution. That duty commands that we apply the Eighth Amendment, not our sympathies. Here, in disregard of the text and history of the Constitution and precedent, the panel's decision elevates innovative and evolving medical standards to be the constitutional threshold for prison medical care. In doing so, the panel minimizes the standard for establishing a violation of the Eighth Amendment. After today's denial of rehearing en banc, the Ninth Circuit stands alone in finding that a difference of medical opinion in this debated area of treatment amounts to "cruel and unusual" punishment under the Constitution. While this posture does not mean we are wrong, it should at least give us pause before embarking on a new constitutional trajectory. This is especially true given the original meaning of the Eighth Amendment. Because the panel's opinion reads into the Eighth Amendment's Cruel and Unusual Clause a meaning in conflict with its text, original meaning, and controlling precedent, I respectfully dissent from the denial of rehearing en banc . . . .

The Eighth Amendment's history and text entreat us to hold the line on the heightened standards for a constitutional deprivation found in our precedent. As Justice Thomas rightly observed, "[t]he Eighth Amendment is not, and should not be turned into, a National Code of Prison Regulation." Hudson, 503 U.S. at 28, 112 S.Ct. 995 (Thomas, J., dissenting). By judicially mandating an innovative and evolving standard of care, the panel effectively constitutionalizes a set of guidelines subject to ongoing debate and inaugurates yet another circuit split. And by diluting the requisite state of mind from "deliberate indifference" to negligence, the panel effectively holds that — contrary to Supreme Court precedent — "[m]edical malpractice [does] become a constitutional violation merely because the victim is a

prisoner." Estelle, 429 U.S. at 106, 97 S.Ct. 285 (altered). I respectfully dissent from the denial of rehearing en banc.

Notes and Questions

1. The likelihood that the Supreme Court will grant certiorari is high in light of the Circuit split, the significant number of courts of appeals that have ruled the other way, and the unprecedented nature of the relief ordered in this case. The petition for certiorari is likely to draw numerous amicus curiae briefs, which will alert the Court to the widespread interest in resolving this question. Although transgender people are a tiny percentage of the population, they are disproportionately represented in the prison population (as they are disproportionately represented in the numbers of people subject to serious hate crimes in the United States).

2. Prison inmates are totally reliant on the prison system for all of their health care needs. They are not allowed to retain their own doctors or to import their own medicine into the prison. As such, the Supreme Court has ruled that they are entitled to be provided with health care at the expense of the government, but only that which is medically necessary to address serious medical conditions. It has taken decades of litigation to generate a body of precedent finding that severe gender dysphoria is a serious medical condition, although there are still some federal judges who may dispute that characterization. Having identified a serious medical condition, however, is only one step in determining whether the denial of any particular treatment violates the 8th Amendment rights of the transgender prisoner.

3. In the Edmo litigation, the district court gave great weight to the WPATH standards, and evaluated the expert witnesses proffered by the state of Idaho in light of their understanding and endorsement or rejection of those standards. Was it proper for the district court so to do? Consider the arguments of the dissent concerning the status of WPATH. Since the federal judges are not medical experts, their decision-making must necessarily rely heavily on expert testimony. As a practical matter, how can federal judges decide whether particular procedures are medically necessary when confronted with experts taking opposing sides on the issue?

4. In the Kosilek case, mentioned in the opinions, a 1st Circuit panel found that sex reassignment surgery was medically necessary for Michelle Kosilek, who had been sentenced to life in prison after being convicted of murdering her wife. (These events took place before Kosilek sought to transition to her female gender identity.) After considerable litigation, Kosilek won a court order allowing her to transition in prison through counseling and hormones, but the State of Massachusetts drew the line at sex reassignment surgery. A district judge and a three-judge court of appeals panel (voting 2-

1) ordered the surgery, but a five judge en banc panel voted 3-2 to reverse that ruling. The en banc panel noted conflicting expert testimony in the trial record and the particular security concerns of prison officials about where Kosilek could be safely housed after a complete transition. Because of the nature of her crime, housing her in a women's prison was presented as a very risky proposition, and she would be very vulnerable to harassment and assault housed in a male prison. Housing in solitary confinement for the rest of her life would definitely be cruel and unusual punishment. The en banc panel bowed to the Massachusetts prison authorities' argument that the status quo, in which she was managing to live in a men's prison without final surgical transition was not a violation of her 8th Amendment rights.

Subsection I – "Legislative Solutions" – at page 506, Change this Subsection to Subsection J.

At page508, add the following sentence to the final paragraph: In 2020, the United States Supreme Court confirmed this interpretation of Title VII in the *Bostock* case (See Supplement to Chapter One).

And then add a new final paragraph as follows:

The Supreme Court's decision in *Bostock* does not obviate the need for passage of the Equality Act to address LGBTQ discrimination. Although a coalition of civil rights groups sent a letter to the Attorney General during July 2020 asking that Attorney General Sessions' guidance of September 2017 rejecting coverage of sexual orientation or gender identity discrimination claims under sex discrimination laws be withdrawn, there was no immediate response from the Justice Department. The textualist interpretation of *Bostock* should apply to all other federal sex discrimination laws, but the Equality Act also fills a gap in the Civil Rights Act of 1964 by adding "sex" to the list of prohibited grounds of discrimination under other Titles of the 1964 Act. (The floor amendment during 1964 added "sex" only to Title VII.) For example, Title II of that Act, which bans discrimination in public accommodations, applies to race discrimination but not to sex discrimination. States that have laws banning discrimination in public accommodation (and most states have such laws) include discrimination on the basis of sex. If state courts, as suggested earlier in this supplement, generally follow Title VII precedents in interpreting their state law bans on sex discrimination, the need to amend more state and local laws to add sexual orientation or gender identity may end.

Chapter 4, Section A.10 – "Questions after Windsor and Obergefell" – Add a new note d. at page 536:

d. Common-law marriages for same-sex couples: Obergefell ruled that marriage must be equally available to same-sex couples. That ruling necessarily applies to the availability of common-law marriage, which is still available in a number of states, including Texas, Iowa, and the District of Columbia. Some states that used to recognize common law marriages have changed their laws so that such marriages if entered into after the effective date of the change in

the law will not be recognized. However, if the marriage was formed before that effective date, the state will continue to recognize that marriage. Alabama changed its law in 2017. Pennsylvania made the change in 2005. Most states abolished the doctrine over a century ago, e.g., California (1895) and Illinois (1905).

Many people misunderstand the nature of common-law marriage. For example, some people believe that if you merely live together long enough you might become common-law married. That is not possible. There is no such thing as an "accidental" marriage. Marriage is a contract and it required two competent parties to enter into an agreement to be married. The two basic requirements of common- law marriage, therefore, are: (1) the parties must agree to be married, and (2) the couple must hold themselves out as a married couple. The "holding out" requirement can be met in a number of ways, such as both parties using the same last name or by filing joint tax returns. The other important point to note is that once you are married, whether under the common-law doctrine or by obtaining a license, you are really married. That is common-law marriages are just as certain as other marriages and so would require a divorce to end the marriage. In addition, even those states that do not recognize common-law marriage for its own residents will recognize a common-law marriage that was validly entered into in a state that does recognize common-law marriages.

No issue should arise regarding the ability of a same-sex couple to currently enter into a common-law marriage on the same basis of opposite-sex couples. However, an interesting issue has arisen regarding the retroactive application of *Obergefell* and whether or not it is possible that some sex-couples did in fact enter into a valid common-law marriage while living in a state that did not at the time recognize marriage equality. Consider the following case:

Swicegood v. Thompson
--- S.E.2d ----, 2020 WL 3551786
Court of Appeals of South Carolina (2000)

LOCKEMY, C.J.:

In this appeal from the family court's dismissal of Cathy Swicegood's complaint alleging the existence of a common-law marriage with her same-sex partner, Polly Thompson, Swicegood argues the family court erred by dismissing the case for lack of subject matter jurisdiction. We affirm.

FACTS

In March 2014, Swicegood filed an action in family court seeking an order recognizing the existence of a common-law marriage, a decree of separate support and maintenance, alimony, equitable division of marital property, and related relief. Swicegood alleged she and Thompson cohabited as sole domestic partners for over thirteen years until December 10, 2013, agreed to be married, and held themselves out publicly as a married couple. She alleged the couple exchanged and wore wedding rings, co-owned property as joint tenants with the right of survivorship, included each other as devisees in their respective wills, and shared a joint bank account.

Swicegood further alleged Thompson listed her as a "domestic partner/qualified beneficiary" on Thompson's health insurance and as a beneficiary on her retirement account.

Thompson moved to dismiss the action, alleging the family court lacked subject matter jurisdiction over Swicegood's complaint because the parties were not married and lacked the capacity to marry. In response, Swicegood filed a memorandum and several affidavits. In her own affidavit, she attested Thompson proposed marriage to her on September 16, 2008, and the parties were declared married approximately two and a half years later during a ceremony in Las Vegas, Nevada on February 12, 2011. In addition, Swicegood submitted the affidavits of two individuals who each attested they witnessed a wedding ceremony between Swicegood and Thompson in Las Vegas on February 12, 2011. Finally, Swicegood included the affidavit of a person who stated she spoke to Thompson a few weeks after the couple separated and Thompson said, "If our marriage was legal in South Carolina, I would be in a world of s--t."

Thompson likewise submitted a memorandum and several exhibits in support of her motion to dismiss. She argued that in August 2012 and September 2013, she and Swicegood signed affidavits of domestic partnership in which they acknowledged they had "a close personal relationship in lieu of a lawful marriage," were "unmarried" and "not married to anyone." Thompson contended these documents indicated the parties did not hold themselves out as a married couple. In her affidavit, Thompson attested Swicegood knew they were not married. She stated she and Swicegood participated in a "commitment ceremony" in Las Vegas "on a lark," but they knew it was not a wedding and that they could not legally marry in Nevada. Thompson attested she gave Swicegood several rings during their relationship, but she intended none of these to signify they were married. She stated she was not and never had been married to Swicegood: "We both knew that if we wanted to get married, we could go to a state that allowed same-sex marriage. It was not our intent to enter into marriage, and we did not." Thompson also stated she witnessed Swicegood marry another woman in a ceremony in 1995.

Thompson submitted the affidavits of several individuals. One affiant stated she was present at the ceremony in Las Vegas but characterized it as a commitment ceremony, not a wedding, and stated she never heard Thompson refer to Swicegood as her spouse. Two other affiants also attested Thompson never referred to Swicegood as her spouse or described their relationship as a marriage. Finally, a reverend attested he performed a "holy union" between Swicegood and another woman in 1995.

The family court dismissed Swicegood's complaint on May 7, 2014, concluding it lacked subject matter jurisdiction to adjudicate the issues because a common-law marriage was not legally possible pursuant to [South Carolina's DOMA statute], which was still in force at the time. Swicegood appealed. While Swicegood's appeal was pending, the Supreme Court of the United States decided Obergefell v. Hodges, in which it held "same-sex couples may exercise the fundamental right to marry," and the state laws challenged in that case were "invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples." Consequently, this court issued an unpublished opinion remanding the case to the family court with instructions to "consider the implications of Obergefell on its

subject matter jurisdiction." See Swicegood v. Thompson, 2016-UP-013 (S.C. Ct. App. filed Jan. 13, 2016).

Upon remand, the family court directed the parties to brief the following questions: (1) whether Obergefell applied to common-law marriages and (2) whether Obergefell applied retroactively.4 After hearing argument on these questions, the family court again concluded it lacked subject matter jurisdiction over the matters raised in Swicegood's complaint, finding that although Obergefell applied to common-law marriages, it could not retroactively create a common-law marriage between Swicegood and Thompson. The court concluded Obergefell could not "logically be read to exclude common-law marriages," and so long as South Carolina continued to recognize the validity of common-law marriages for opposite-sex couples, it had "a constitutionally mandated duty to recognize the validity of common-law marriages for same-sex couples." The court did not expressly resolve the question of whether Obergefell applied retroactively, but it concluded the couple could not have formed a common-law marriage because [the South Carolina DOMA] was in place throughout the couple's thirteen-year period of cohabitation, and they believed they lacked the legal right to be a married couple during that time. The court, therefore, concluded the couple could not have formed the requisite intention and mutual agreement to be married. Additionally, the family court concluded that even assuming Swicegood and Thompson cohabited with an actual intent and mutual agreement to be married, [the state DOMA] acted as a legal impediment to the creation of a common-law marriage between them. The court therefore concluded the couple could not have formed such marriage unless they renewed their intention and agreement to be married after the Obergefell decision triggered the removal of the impediment. Accordingly, the family court reaffirmed its dismissal based on lack of subject matter jurisdiction. This appeal followed.

LAW/ANALYSIS

I. Impediment

Swicegood acknowledges that when she and Thompson formed an intent and mutual agreement to treat each other as spouses, [the state DOMA] was considered to present an impediment to marriage and this "perceived impediment" continued to exist throughout the relationship until they separated. She contends, however, [the statute] could not have functioned as an impediment because Obergefell removed the impediment as a matter of constitutional law and the removal of the impediment acted retroactively. Swicegood asserts the prohibition of same-sex marriage could not have precluded the parties from forming a common-law marriage as a matter of law because unconstitutional laws are void ab initio, which requires our courts to treat such laws as if they never existed. She argues that if the parties formed intent and mutual agreement to treat each other as spouses under the common law, their marriage would be valid notwithstanding it occurred prior to Obergefell and in light of Obergefell, the existence of a valid common-law marriage would not be precluded as a matter of law. We disagree.

> "Subject-matter jurisdiction is the 'power to hear and determine cases of the general class to which the proceedings in question belong.' The family court has jurisdiction to hear and determine matters relating to common-law marriage. If no common-law

> marriage existed between the parties, the family court lacked subject matter jurisdiction to hear any other matters Swicegood raised in her complaint. Thus, it was necessary for the court to first determine whether a common-law marriage existed.

"A common-law marriage is formed when two parties contract to be married." Callen, 365 S.C. at 624, 620 S.E.2d at 62. "A valid common[-]law marriage requires that the facts and circumstances show an intention on the part of both parties to enter into a marriage contract, usually evidenced by a public and unequivocal declaration by the parties." "The fact finder is to look for mutual assent: the intent of each party to be married to the other and a mutual understanding of each party's intent." Callen, 365 S.C. at 624, 620 S.E.2d at 62.

> When, however, there is an impediment to marriage, such as one party's existing marriage to a third person, no common-law marriage may be formed, regardless whether mutual assent is present. Further, after the impediment is removed, the relationship is not automatically transformed into a common-law marriage. Instead, it is presumed that relationship remains non-marital.

Id. "[F]or a common[-]law marriage to arise, the parties must agree to enter into a common[-]law marriage after the impediment is removed, though such agreement may be gathered from the conduct of the parties." Yarbrough v. Yarbrough, 280 S.C. 546, 551, 314 S.E.2d 16, 19 (Ct. App. 1984). Although much of our decisional law regarding impediments involves bigamous relationships, in Callen, our supreme court held an impediment to common-law marriage existed due to the couple's residency in jurisdictions that did not recognize common-law marriage. Id. at 624-25, 620 S.E.2d at 63. Our supreme court held that due to the couple's residency in such jurisdictions until the couple moved to South Carolina, there was an impediment to the marriage, and "no common-law marriage could have been formed, if at all, until after the move." Id. Thus, our courts have recognized an impediment to marriage outside of the context of a bigamous relationship.

In Obergefell, the United States Supreme Court held,

> [T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. The Court now holds that same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them. Baker v. Nelson[5] must be and now is overruled, and the State laws challenged by Petitioners in these cases are now held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.

Obergefell did not expressly instruct state courts in whether to apply its holding prospectively or retrospectively. However, the United States Supreme Court applies a general rule of retroactivity. See Solem v. Stumes, 465 U.S. 638, 642, 104 S.Ct. 1338, 79 L.Ed.2d 579 (1984).

Several jurisdictions that have recognized informal or common-law marriages have applied Obergefell retroactively to find litigants were entitled to establish common-law

marriages even when such marriages were created and ended—either by death or separation—before Obergefell was decided. See In re Marriage of Hogsett & Neale, 2018 COA 176, ¶ 24 ("In states like Colorado that recognize common[-]law marriage, retroactive application of Obergefell means that same-sex couples must be accorded the same right as opposite-sex couples to prove a common[-]law marriage even when the alleged conduct establishing the marriage pre-dates Obergefell."), cert. granted in part, 2019 WL 4751467 (Colo. 2019) (granting certiorari in part to consider whether the court of appeals erred in affirming the trial court's finding that no common-law marriage existed); Gill v. Nostrand, 206 A.3d 869, 874-75 (D.C. 2019) ("We now expressly recognize ... that a same-sex couple may enter into common-law marriage in the District of Columbia and that this rule applies retroactively. Thus, the trial court was correct in ruling that 'a party in a same-sex relationship must be given the opportunity to prove a common[-]law marriage, even at a time when same-sex marriage was not legal ....' "); Ranolls, 223 F. Supp. 3d 613 (holding Obergefell applied retroactively to allow the partner of the decedent in a wrongful death case to assert a claim as an alleged common-law spouse even though the decedent died prior to the Obergefell decision and there was a genuine issue of material fact as to the couple's marital status at the time of the decedent's death, making summary judgment inappropriate); In re Estate of Carter, 159 A.3d 970, 972 (Pa. Super. Ct. 2017) (holding "the United States Constitution mandates that same-sex couples have the same right to prove a common[-]law marriage as do opposite-sex couples" notwithstanding the alleged spouse died before Obergefell was decided).

Our review of United States Supreme Court decisional law compels the conclusion Obergefell must be applied retroactively. See Harper, 509 U.S. at 100, 113 S.Ct. 2510 ("The Supremacy Clause ... does not allow federal retroactivity doctrine to be supplanted by the invocation of a contrary approach to retroactivity under state law. Whatever freedom state courts may enjoy to limit the retroactive operation of their own interpretations of state law ... cannot extend to their interpretations of federal law."); …

Nevertheless, the Supreme Court has noted, "[A]s courts apply 'retroactively' a new rule of law to pending cases, they will find instances where that new rule, for well-established legal reasons, does not determine the outcome of the case." Reynoldsville Casket Co., 514 U.S. at 758-59, 115 S.Ct. 1745. Because we found federal law requires us to apply Obergefell retroactively, the question we now consider is whether the family court's finding that the prohibition on same-sex marriage acted as an impediment is an appropriate independent legal basis under South Carolina law to affirm its decision. See id. at 756, 115 S.Ct. 1745 (noting such well-established legal reasons may include "a pre-existing, separate, independent rule of state law, having nothing to do with retroactivity").

Swicegood urges us to apply the reasoning the Superior Court of Pennsylvania applied in Carter, 159 A.3d 970. We decline to do so. There, the court reversed the trial court's holding that it was legally impossible for a same-sex couple to have entered into a common-law marriage before common-law marriages were abolished in Pennsylvania because, at the time, it was not legal for same-sex couples to enter into a common-law marriage. Id. at 977. Pennsylvania's legislature abolished common-law marriage effective January 1, 2005, but its marriage laws

permitted "the legal recognition of common-law marriages contracted before January 1, 2005." Id. at 974. In Carter, the appellant alleged he and his same-sex partner, who died before Obergefell was decided, had previously entered into a common-law marriage. Id. at 972-73. The superior court held because state laws prohibiting same-sex couples from marrying had been declared unconstitutional, such laws could not preclude a same-sex couple from establishing the existence of a pre-2005 common-law marriage. Id. at 977-78. Although the court applied Obergefell retroactively, it did not consider the question of whether the statute prohibiting same-sex marriage acted as an impediment prior to its invalidation. Thus, we find Carter does not assist us in deciding the matter at issue in this case.

* * *

We find the family court did not err by determining [the state DOMA] constituted an impediment to the formation of a common-law marriage between Swicegood and Thompson. Here, for the duration of the parties' relationship, South Carolina prohibited same-sex marriage. Both parties acknowledged this fact in their pleadings. Pursuant to the Court's holding in Obergefell, [the state DOMA statute] is unconstitutional and no longer valid law. Nevertheless, because the statute was in effect during the time Swicegood alleges the parties formed a common-law marriage, it acted as an impediment, which prevented them from creating a valid marriage. See Callen, 365 S.C. at 624, 620 S.E.2d at 62 ("When ... there is an impediment to marriage ... no common-law marriage may be formed, regardless whether mutual assent is present. Further, after the impediment is removed, the relationship is not automatically transformed into a common-law marriage. Instead, it is presumed that relationship remains non-marital."); …

Although we must apply Obergefell retroactively, retroactive application of the decision does not require us to ignore the fact the law operated as an impediment to the formation of a common-law marriage between same-sex couples when it was still in force. Our state law concerning impediments to marriage is "a pre-existing, separate, independent rule of state law, having nothing to do with retroactivity," which formed an "independent legal basis" for the family court's dismissal of Swicegood's complaint. … Our state laws prohibiting same-sex marriage constituted an impediment to the formation of a common-law marriage until the impediment was removed. As with any impediment to marriage, Swicegood and Thompson were required to enter into a new agreement to be married after the removal of the impediment, either by way of participating in a civil ceremony or by renewing their agreement to assume a marital relationship.

To determine whether the impediment prevented Swicegood and Thompson from forming a common-law marriage as a matter of law, we must first determine when the removal of the impediment occurred. The family court found the impediment remained in place until the Obergefell decision. [It is possible the impediment was removed earlier when a federal district court in South Carolina ruled the state DOMA statute unconstitutional. See Condon, 21 F. Supp. At 587. But that date was November 20, 2014 and the couple had already broken up by that time so there was no way they could have formed a common-law marriage after the impediment was removed.]

We emphasize our decision is limited to only those circumstances under which neither party disputes the alleged marital relationship ended prior to November 20, 2014. When a purported spouse brings an action in family court to establish the existence of a common-law marriage with a person of the same sex and neither party disputes the relationship ended before November 20, 2014, the couple could not have formed a common-law marriage as a matter of law.

II. Intent

Swicegood contends the family court erred by finding the parties lacked intent as a matter of law because the question of intent and mutual agreement is a question of fact distinct from the issue of whether an impediment prevented the marriage from having legal effect. We disagree.

"Whether a common-law marriage exists is a question of law." Callen, 365 S.C. at 624, 620 S.E.2d at 62. "A common-law marriage is formed when two parties contract to be married." Id. "A valid common[-]law marriage requires that the facts and circumstances show an intention on the part of both parties to enter into a marriage contract, usually evidenced by a public and unequivocal declaration by the parties." Owens, 320 S.C. at 545, 466 S.E.2d at 375.

> The fact finder is to look for mutual assent: the intent of each party to be married to the other and a mutual understanding of each party's intent. Consideration is the participation in the marriage. If these factual elements are present, then the court should find as a matter of law that a common-law marriage exists.

Callen, 365 S.C. at 624, 620 S.E.2d at 62. "A party ... must at least know that his actions will render him married as that word is commonly understood." Id. at 626, 620 S.E.2d at 63. "If a party does not comprehend that his 'intentions and actions' will bind him in a 'legally binding marital relationship,' then he lacks intent to be married." Id. "The proponent of the alleged marriage has the burden of proving the elements by a preponderance of the evidence." Id. at 623, 620 S.E.2d at 62; …

Although Swicegood asserts she and Thompson agreed to live as a married couple, both parties acknowledged in their pleadings that [the state DOMA] presented a barrier to marriage throughout their relationship. Because they acknowledge their awareness that this law prevented them from marrying in this state during their relationship, we find Swicegood and Thompson could not have formed the intent and mutual agreement to enter a legally binding marital relationship. See Callen, 365 S.C. at 626, 620 S.E.2d at 63. Accordingly, we find the family court did not err by concluding Swicegood and Thompson could not have formed the requisite intention and agreement to be married as a matter of law.

CONCLUSION

Consistent with the Supreme Court's opinion in Obergefell, we hold section 20-1-15 is unconstitutional and is no longer valid law. We hold the Obergefell decision must be applied retroactively. Nevertheless, the law acted as an impediment to marriage during the time it was still in effect. Therefore, the parties were required to renew their agreement to marry after the removal of the impediment. Because the parties' relationship ended before South Carolina's

prohibition of same-sex marriage was struck down, they could not have formed a common-law marriage as a matter of law. Moreover, because the parties acknowledge they knew they could not legally marry in this state during the entirety of their relationship, they could not have formed the intent and mutual agreement to enter a legally binding marital relationship. Based on the foregoing, the family court's dismissal of Swicegood's complaint for lack of subject matter jurisdiction is AFFIRMED.

Notes and Questions

1. Is the court really giving full retroactive effect to Obergefell? If this couple had married in Massachusetts or Connecticut or Iowa in 2011 (or even in New York after July 24 that year), their marriage would have been recognized in South Carolina under Obergefell. However, they "married" (or whatever they did) in Nevada, which at that time did not recognize marriage equality. Apparently they went through a wedding ceremony in Las Vegas, which one can do at certain venues without getting a license. If there is no license then the wedding has no legal effect.

2. What if the couple had publicly stated numerous times something like the following: "We know that South Carolina bans same-sex marriage, but we think that law is unconstitutional and so we will hold ourselves out as married anyway." Now, might they have evidence of sufficient intent to satisfy the court? Note, the court rules "as a matter of law" that they could not have an intent to be married so long as the state statute was on the books, but what if they thought the statute was unconstitutional? What if instead of "divorce" being the issue, the issue had been whether or not Swicegood was a surviving spouse? Such a case arose in Austin, Texas before *Obergefell* had been decided. The surviving spouse claimed their common law marriage in Texas was valid and the probate judge (Guy Herman) agreed ruling that the Texas DOMA was unconstitutional. There was no appeal so the case is not reported.

3. The facts in the Austin case are similar to the facts in the *Carter* case from Pennsylvania, mentioned by the *Swicegood* court. In *Carter*, a male couple, partnered for 17 years, had exchanged rings in 1996 and celebrated their anniversary each year in February after that. Carter died unexpectedly in a motorcycle accident in 2013. In 2016, the surviving spouse, Hunter, filed a claim asking for a declaratory judgment that he and Carter were common-law spouses. Pennsylvania recognized such unions prior to 2005. No one opposed the claim. In fact, members of the deceased's family gave evidence to support the claim. Nonetheless the trial court ruled that a common law marriage was not possible because same-sex marriages were not recognized by the state of Pennsylvania until 2014. The court denied the petition and Hunter appealed. The appellate court ruled that because *Obergefell* had to be applied retroactively Hunter should have the same opportunity to prove his common-law marriage as any opposite-sex spouse would have. Yet, the *Swicegood* court says *Carter* is inapplicable to their facts because the Pennsylvania court did not consider whether or not the Pennsylvania law banning same-sex marriages was an impediment. Isn't it possible that the existence of the law may be relevant to the intent of the parties, which was a fact issue remanded to the trial court in *Carter*?

Section A.13 – "Spousal Benefits" -- note material at page 546-47, add the following paragraph at the end (top of page 547):

Now that the Supreme Court has decided in *Bostock* that Title VII covers discrimination on the basis of sexual orientation, is there any way an employer, covered by Title VII, can provide spousal benefits only to opposite-sex spouses? Might an employer claim some form of "religious exemption?"

Section B.1.c – "State-Wide Recognition of Marriage Alternatives: An Overview" – Add to note 3, at page 567:

In 2019, California amended its Domestic Partnership Law, to become effective January 1, 2020: Opposite-sex couples can now register as domestic partners on an equal basis with same-sex partners. The age 62 age restriction has been removed.

Chapter 5, Section C.2.b – "Claims to Parenthood Outside of Adoption: Intentional Parenthood" – add the following paragraphs to note 1, at page 699:

The law that applies to recognition of a non-biological mom who participates in the planning of the pregnancy, the birth, and early raising of the child, varies from state to state, depending on the content of state statutes. The State of Florida, for example, continues to apply its statutory scheme which requires a biological connection between the parent and the child (outside of adoption) in order to recognize parentage. See Springer v. Springer, 277 So.3d 727 (Fla. Dist. Ct. App. 2019). In *Springer*, the non-biological mother paid for the sperm and signed a co-parentage agreement with the birth mother. The court ruled she could not be recognized as a parent because she had no biological connection with the child.

Statutes that base parenthood on biology have generally been ruled constitutional relying on Supreme Court precedents that base the constitutional right to parent a child primarily on biology (although also on adoption and sometimes on marriage). For a critique of this restricted constitutional view of parentage rights see Douglas NeJaime, The Constitution of Parenthood, 72 STAN. L. REV. 261 (2020).

Section C.2.e – "Claims to Parenthood Outside of Adoption: Presumed Parenthood by Virtue of Relationship with the Natural Parent" – add the following sentence to the end of note 3:

In a recent Utah Supreme Court decision, the court applied *Obergefell* and *Pavan* to a gay male married couple in order to give them the same right that opposite-sex married couples have to enter into a valid surrogacy agreement despite the gendered language in the state statute that appeared to restrict the right to opposite-sex couples. See In re Gestational Agreement, 449 P.3d 69 (Utah 2019), reproduced below in this Supplement to be considered with the ART materials later in Chapter Five.

Section D.4 – "Enforcement of Surrogacy Contracts" – add new note 3 at page 74:

3. The Utah statute that authorizes enforceable surrogacy contracts restricts them to couples in which the intended mother must show that she is "unable to bear a child or is unable to do so without unreasonable risk to her physical or mental health or to the unborn child." To be enforceable the contract must be validated by a tribunal. A gay male married couple who had negotiated a surrogacy contract with a woman and her husband went to court to seek validation of their contract and ran into a hurdle because of the gendered language in the statute requiring the intended mother to show that she was unable to bear a child. Their case is reproduced here:

In re Gestational Agreement,
449 P.3d 69
Supreme Court of Utah, 2019

Chief Justice Durrant, opinion of the Court:

Introduction

This appeal comes to us unopposed. A married couple, both men, wish to become parents. The couple entered into an agreement with a woman and her husband to have the woman act as a gestational surrogate, carrying a fertilized embryo that contains the genetic material of one of the couple. In Utah, by statute, this type of "gestational agreement" "is not enforceable" unless it is "validated by a tribunal." A court "may issue an order validating the gestational agreement" "only on finding that" certain conditions are met, one such condition being that "medical evidence" must be presented "show[ing] that the intended mother is unable to bear a child or is unable to do so without unreasonable risk to her physical or mental health or to the unborn child."

The intended parents, prospective gestational mother, and her husband (collectively, Petitioners) filed a joint petition, pursuant to the statute, requesting that the district court validate their gestational agreement. The court denied the petition, reasoning that the statute's use of the words "mother and her plainly refer to a woman," and concluding that because "neither of the legally married intended parents are women the Court must deny their petition." Petitioners appealed, and the court of appeals certified the case to us.

Petitioners argue, first, that the statute, as interpreted by the district court, violates the Uniform Operation of Laws provision of the Utah Constitution, as well as the Due Process and Equal Protection Clauses of the United States Constitution. They also make a statutory interpretation argument, asserting that the word "mother" should be interpreted in a gender-neutral way to mean "parent." The State of Utah has submitted an amicus brief agreeing with Petitioners' second argument and urging us to interpret the statute in a gender-neutral fashion so as to avoid the constitutional questions. The State relies on a statutory rule of construction instructing courts to interpret a "word used in one gender [to] include[ ] the other gender" when doing so would not be "inconsistent with the manifest intent of the Legislature," or "repugnant to the context of the statute." According to the State, this rule of construction requires us to read the word "mother" as "father" or "parent."

But Petitioners' and the State's proposed statutory interpretation is "inconsistent with the manifest intent of the Legislature" and "repugnant to the context of the statute." Their suggested reading would effectively nullify the requirement that an intended mother show medical evidence that she is unable to bear a child altogether or without serious risk of harm to her or the child—an action that would undercut the legislature's intention. Additionally, their proposal contradicts provisions within the Utah Uniform Parentage Act (Act)—the act encompassing the gestational agreement statute—that explicitly separate "mother" and "father" into distinct gender-specific terms. Because Petitioners' and the State's proposed interpretation is inconsistent with the manifest intent of the legislature and repugnant to the context of the statute, we are statutorily precluded from applying the suggested rule of construction. We therefore hold that the district court's interpretation is consistent with the manifest intent of the legislature and thus address the constitutional challenge to the statute.

Under the district court's interpretation, the intended mother requirement precludes married same-sex male couples from obtaining a valid gestational agreement—a benefit statutorily linked to marriage. Petitioners argue that recent United States Supreme Court

precedent precludes states from denying similarly situated same-sex couples marital benefits afforded to couples of the opposite sex, and the State does not oppose this argument. Accordingly, we hold section 78B-15-803(2)(b) unconstitutional. We further hold that the unconstitutional subsection should be severed, leaving the remainder of the statute intact, because doing so would not disrupt the overall operation of the Act or undermine the legislature's intent in enacting the statute. We therefore reverse and remand for further proceedings consistent with this opinion.

Analysis

Petitioners first argue that the district court misinterpreted the Utah Code by failing to read the statute in a gender-neutral way in order to avoid constitutional concerns. The State agrees with Petitioners and urges us to interpret "mother" to mean "father" or "parent," relying on our rules of statutory construction for support. Employing our rules of statutory construction and the canon of constitutional avoidance to construe the statute in a gender-neutral manner is inconsistent, however, with the manifest intent of the legislature and is repugnant to the context of the statute. We therefore interpret "mother" in section 78B-15-803(2)(b) of the Utah Code to mean "female parent," thereby compelling a constitutional analysis of the statute. Because a plain reading of section 78B-15-803(2)(b) works to deny certain same-sex married couples a marital benefit freely afforded to opposite-sex married couples, we hold the statute violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment, under the analysis set forth in Obergefell. We likewise hold that section 78B-15-803(2)(b) is severable from the Act.

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II. The Legislature Intended "Mother" to Mean "Female Parent" in Utah Code Section 78B-15-803

"When interpreting a statute, it is axiomatic that this court's primary goal is to give effect to the legislature's intent in light of the purpose that the statute was meant to achieve." it is well established that "the best evidence of the legislature's intent is 'the plain language of the statute itself.' " Therefore, "we assume, absent a contrary indication, that the legislature used each term advisedly according to its ordinary and usually accepted meaning," and "we presume[ ] that the expression of one [term] should be interpreted as the exclusion of another."

On that basis, we assume, "absent a contrary indication," that the use of the word "mother" within Utah Code section 78B-15-803 was used "advisedly," and to the exclusion of other words, like "father" or "parent." Because the plain and ordinary meaning of the word "mother" is "female parent," we are bound, as the district court concluded it was, to read the statute as requiring that one of the intended parents be a female parent.

Petitioners and the State argue, however, that there exists an express codified indication that the legislature did not necessarily intend to restrict the word "mother" to mean only a female parent. They point to the Utah Code section 68-3-12, which provides the following specific instructions for construing terms that are phrased in only one gender or phrased in singular terms: "unless the construction would be ... inconsistent with the manifest intent of the

Legislature; or ... repugnant to the context of the statute," a word used in "[t]he singular includes the plural, and the plural includes the singular" and "[a] word used in one gender includes the other gender." The State urges us to apply the latter rule of construction and read the word "mother" as including the "other gender," so that, in effect, "mother" means "parent." To do so, as noted above, we would need to depart from the plain meaning of the word "mother."

The State correctly notes that there is a direct statutory indication that words in one gender should be construed to include the other. But, as noted in the statute itself, we apply these statutory rules of construction only when they would not be "inconsistent with the manifest intent of the Legislature" or "repugnant to the context of the statute." Here, applying the State's interpretation of "mother" as including the "other gender" contradicts the legislative intent as evidenced in the plain language of the Act and is repugnant to the context of the statute.

Under the State's proposed reading, the statute would provide that a court could validate a gestational agreement where "medical evidence shows that the intended mother parent is unable to bear a child." Under such a construction, an opposite-sex couple could obtain court validation merely by demonstrating that an intended father—who is an "intended parent"—is incapable of bearing a child. Because every opposite-sex couple could make this showing automatically (every opposite-sex couple contains a male member and obviously a male cannot bear a child), this interpretation would write the intended mother requirement out of the statute. It would therefore be "inconsistent with the manifest intent of the Legislature" and "repugnant to the context of the statute" to read "mother" to mean "parent."

Even were we to employ both codified rules of construction noted above—first, that the word "mother" be construed to include the other gender, and second, that the singular be construed to include the plural—the problem remains. Under this approach, we would construe the statute to mean that Petitioners must demonstrate that "medical evidence shows that the intended mother is parents are unable to bear a child or is are unable to do so without unreasonable risk to her their physical or mental health or to the unborn child." Unlike the State's proposed reading, this interpretation does not allow one intended parent's inability to bear a child to permit the district court to validate a gestational agreement. Instead, such reading would require that the intended parents as a unit be incapable of safely bearing a child. While this interpretation does not eviscerate the intended mother requirement of section 78B-15-803(2)(b) in the same way as the State's proposed reading, it nevertheless contradicts the plain language of the statute, which clearly limits the meaning of the word "mother" to female parent.

It is well established that "terms of a statute are to be interpreted as a comprehensive whole and not in a piecemeal fashion." So a "proposed interpretation that is plausible in isolation may ... 'lose[ ] its persuasive effect when we [seek to] harmonize [it] with the rest of' the statutory scheme." That is precisely the case here.

An examination of a few additional provisions within the Act makes clear that a gender-neutral interpretation of the gestational agreement provisions is untenable. Section 78B-15-102, the "Definitions" section of the Act, clearly illustrates that the legislature intended the term

"mother" to have a distinct and separate meaning from the word "father." While the Act fails to define "mother" or "father" expressly, other definitions in section 102 indicate the word "mother" was intended to be tied to the female gender. For example, the legislature expressly linked "mother" to "woman" in its definition of "Gestational mother": " 'Gestational mother' means an adult woman who gives birth to a child under a gestational agreement." Additionally, the legislature repeatedly linked "father" to the male gender. For example, "Adjudicated father" is defined as "a man who has been adjudicated by a tribunal to be the father of a child," "Alleged father" is defined as "a man who alleges himself to be, or is alleged to be, the genetic father or a possible genetic father of a child," and "Declarant father" is defined as "a male who ... claims to be the genetic father of a child." And, in case there was any confusion as to the term "man" within these definitions, the legislature further stated that " 'Man' ... means a male individual." Thus, it seems clear from the statute's language that the legislature understood "mother" to be female-specific and distinct from the male-specific term "father."

Likewise, the legislature repeatedly associated the term "mother" with the physical act of carrying and giving birth to a child—an act performed exclusively by females. The Act uses the term "birth mother" throughout the statute, while referring to fathers mainly as "alleged fathers," "adjudicated fathers," or "declarant fathers." Similarly, several definitions within section 102 expressly tie motherhood to the act of giving birth. For example, the statute defines "Birth expenses" to include "expenses for the biological mother during her pregnancy and delivery," and, as stated above, defines "Gestational mother" as "an adult woman who gives birth to a child under a gestational agreement." Likewise, the act of giving birth is directly linked to womanhood: the Act states that the term "Donor" does not include "a husband who provides sperm, or a wife who provides eggs," or "a woman who gives birth to a child." The word "mother" under the statute, therefore, denotes a gender that is biologically capable of carrying and giving birth to a child, as opposed to one that is not.

The Act also repeatedly draws a distinct line between "father" and "mother." In its definitional section the Act provides that " 'Genetic testing' means an analysis of genetic markers to exclude or identify a man as the father or a woman as the mother of a child." Similarly, in determining the parent-child relationship, the Act provides that "[t]he mother-child relationship is established between a woman and a child" while "[t]he father-child relationship is established between a man and a child." Thus, it is clear that the legislature intended the term "mother" to be read as a female parent, distinct and separate from the word "father," and not as a gender-neutral term.

Accordingly, reading the term "mother" to mean "father" or "parent," as Petitioners and the State suggest, is "inconsistent with the manifest intent of the Legislature" and "repugnant to the context of the statute." Given the legislature's repeated efforts to distinguish "mother" from "father," we cannot say that the legislature intended "mother" to include "father" or "parent." Thus, the construction statute, by its own terms, precludes us from using those rules here.

In addition to the clear language of the statute, it seems highly unlikely the legislature intended Petitioners' proposed interpretation, given the legal landscape at the time the law was passed. As noted by the Petitioners, "[t]he statute was ... written with gender specific language at

a time when marriage in Utah could only be between a man and a woman." Section 78B-15-803 was adopted in 2005—ten years before the United States Supreme Court's decision extending the constitutional right to marry to same-sex couples. At the time the law went into effect, Utah's constitutional provision prohibiting same-sex marriage was operative and legally enforceable. The legislature therefore likely did not contemplate a reading of the statute that would allow same-sex couples to enter valid gestational agreements—a benefit the legislature expressly conditioned on marriage.

Accordingly, the district court was correct in holding the word "mother" under section 78B-15-803 unambiguously refers to woman and that it was bound to apply the statute as written.

III. The Canon of Constitutional Avoidance is Inapplicable

Both the Petitioners and the State attempt to bolster their gender-neutral interpretation by citing to this court's canon of constitutional avoidance. The State argues that "[u]nder the constitutional avoidance doctrine, the Court should interpret 'mother' and 'her' in section 78B-15-803 to include 'father' and 'his.' " Such construction, the State suggests, "avoids the serious ... constitutional questions raised by the district court's alternative construction." But Petitioners and the State jump the gun.

It is true that when faced with multiple reasonable readings of a statute, we construe the statute in a way that avoids doubts as to its constitutionality. We have cautioned, however, that "too-hasty invocation of the canon can easily undermine legislative intent." An appeal to constitutional avoidance is "not an invitation for us to break faith with the statute's text." So even "when we are trying to save a statute from constitutional concerns, we are not at liberty to rewrite the statute."

… Rather, we are required to confront the constitutionality of the statute head on.

IV. Utah Code Section 78B-15-803(2)(b) is Unconstitutional Under Obergefell and Pavan

Petitioners alternatively argue that the intended mother requirement in section 78B-15-803(2)(b) violates the Utah and federal constitution. … The State has waived its right to defend the statute's constitutionality. Our review of this issue therefore could stop here. Nevertheless, we choose to fully address Petitioners' constitutional argument in light of the important issues at stake in this case.

As noted above, section 78B-15-803(2)(b) of the Utah Code effectively conditions the validation of a gestational agreement on at least one of the two intended parents being a female parent. This squarely violates Obergefell in that it deprives married same-sex male couples of the ability to obtain a valid gestational agreement—a marital benefit freely provided to opposite-sex couples. Under the statute, married same-sex male couples are treated differently than married opposite-sex couples. Because under Obergefell same-sex married couples are constitutionally

entitled to the "constellation of benefits that the States have linked to marriage," we hold the intended mother requirement in Utah Code section 78B-15-803(2)(b) unconstitutional.

In Obergefell, the United States Supreme Court held as follows: "the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty." The Court noted, however, that this right may include not only "symbolic recognition," but also "material benefits to protect and nourish the union."

> States ... have throughout our history made marriage the basis for an expanding list of governmental rights, benefits, and responsibilities. These aspects of marital status include: taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decisionmaking authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers' compensation benefits; health insurance; and child custody, support, and visitation rules.

The Court further held that because the "States have contributed to the fundamental character of the marriage right by placing that institution at the center of so many facets of the legal and social order," there should be "no difference between same- and opposite-sex couples with respect to [these rights]."

While the Obergefell Court did not address at length how state laws should be implemented in light of same-sex couples' right to marry, the Court did hold that the Constitution "does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex." On this basis, the Court invalidated several challenged state laws in Obergefell "to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples." Thus, Obergefell precluded states from denying same-sex couples "the constellation of benefits that the States have linked to marriage."

The United States Supreme Court recently affirmed this notion. In Pavan v. Smith, the Court reviewed an Arkansas statute that required the name of a mother's male spouse to appear on her child's birth certificate, even when the mother conceived the child by means of artificial insemination through an anonymous sperm donation, but made no such requirement when the mother's spouse was female under the same circumstance. The Arkansas statute therefore allowed officials to omit the name of a married woman's female spouse from her child's birth certificate while at the same time mandating that the name of a married woman's male spouse be placed on the certificate. Two married same-sex couples brought suit seeking a declaration that the state's law violated the Constitution under Obergefell. On appeal, a divided Arkansas Supreme Court ultimately sided with the state, holding that the statute did "not run afoul of Obergefell" because the state law was centered on the biological relationship of the mother or father to the child and not the marital relationship of the husband and wife.

The United States Supreme Court summarily reversed the Arkansas Supreme Court's decision, holding that the law's "differential treatment infringes on Obergefell's commitment to

provide same-sex couples 'the constellation of benefits that the States have linked to marriage.' " The Court made clear that the state chose "to make its birth certificates more than a mere marker of biological relationships." Instead, the "State uses those certificates to give married parents a form of legal recognition that is not available to unmarried parents." Accordingly, the Court held that "Arkansas may not, consistent with Obergefell, deny married same-sex couples that recognition." . . .

A valid gestational agreement is undoubtedly a benefit linked to marriage. Obtaining a valid gestational agreement is, in many cases, one of the most important benefits afforded to couples who may not be medically capable of having a biological child. Such an agreement works to secure parental rights to an unborn child and bestows rights and benefits upon the intended parents. The State has explicitly conditioned this benefit on a petitioner's marital status; no unmarried couple may obtain one. It is therefore unquestionably linked to marriage.

Application of section 78B-15-803(2)(b) results in disparate treatment of similarly situated same-sex male marriages. The statute requires that medical evidence be presented to the court, showing that the intended mother is medically incapable of bearing a child or to do so would otherwise harm her or the child. It is impossible for married same-sex male couples to meet this requirement since neither member is a "mother" under the statute. Requiring one of the two intended parents to be female precludes married same-sex male couples from entering into a valid gestational agreement—a benefit explicitly conditioned on marriage. The statute therefore treats married same-sex male couples differently than married opposite-sex couples. Under Obergefell and Pavan, the Constitution proscribes such disparate treatment.

V. Utah Code Section 78B-15-803(2)(b) is Severable From the Act

Having concluded that section 78B-15-803(2)(b) of the Utah Code is unconstitutional, we must now determine whether that subsection is severable from the rest of the Act. [Here, the court concludes that it is. Therefore, the remainder of the Act is constitutional and remains in full force.]

Conclusion

Under a plain reading of the statute, a gestational agreement is unenforceable unless at least one of the intended parents is female. This requirement precludes married same-sex male couples from obtaining a valid agreement. As required by Obergefell and Pavan, we hold that section 78B-15-803(2)(b) is unconstitutional under the Fourteenth Amendment's Equal Protection and Due Process Clauses. Additionally, we hold that the intended mother requirement of section 78B-15-803(2)(b) is severable from the remainder of the Act. We accordingly reverse and remand for further proceedings consistent with this opinion.

Notes and Questions

1. By 2020, approximately half the states had laws on their books regulating surrogacy, and, in some cases, outright banning the arrangement. The trend in recent statutory enactments, however, has been in favor of statutes that permit surrogacy. Courtney Joslin has recently identified at least 20 such permissive surrogacy statutes. See Courtney G.

Joslin, (Not) Just Surrogacy, __ Cal. L. Rev. __ (forthcoming 2021), available on SSRN at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3561081. A number of these permissive statutes have gendered provisions. Some, such as the Utah statute, require proof of medical necessity for using the arrangement. Others have requirements that the child produced by surrogacy arrangements have genetic material from both of the intended parents. What do you think of such requirements?

2. The pros and cons of surrogacy have been debated for decades. While the arrangement is certainly a boon for those couples who are medically incapable of reproducing, there are countervailing public policy considerations. Some believe that paying someone else to have a baby for you is too close to buying and selling children, which is certainly against public policy. Others fear that allowing a widespread practice of surrogacy arrangements might create an underclass of women who see having babies as a way of making a living because they have few other options. If you were designing a permissive surrogacy statute that would be equally available to same-sex male or female couples, what would you include? Would you, for example, limit its application to married couples?