Sexuality Law (3rd Edition)

2021 Case Supplement

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Cases in this Supplement:

Bostock v Clayton County, Georgia (U.S. Supreme Court, 2020) (Interpretation of Title VII to extend to sexual orientation and gender identity discrimination claims)

Fulton v. City of Philadelphia (U.S. Supreme Court, 2021) (Catholic agency not required to comply with City's non-discrimination policy because it incorporated discretion exceptions)

Demkovich v. St. Andrew the Apostle Parish (7th Circuit en banc, 2021) (religious organization may not be sued by a ministerial employee for hostile environment harassment under civil rights laws)

EEOC v. R.G. & G.R. Harris Funeral Homes, Inc. (6th Cir. 2018) (Religious Freedom Restoration Act does not provide a defense to Title VII gender identity discrimination claim).

Hecox v. Little (U.S. Dist. Ct., Idaho, 2020) (granting preliminary injunction against enforcement of a state law excluding transgender women from participating in scholastic sports competition as women).

Karnoski v. Trump (9th Circuit, 2019) (interlocutory ruling in challenge to the constitutionality of Trump Administration's policy concerning military service by transgender individuals).

Zzyym v. Pompeo (10th Circuit, 2020) (directing State Department to reconsider its refusal to issue a passport with an "X" gender marker for a U.S. citizen who identified as non-binary).

In the Matter of Jones David Hollister, Petitioner (Oregon Court of Appeals, 2020) (Ruling that trial courts have the authority to grant a legal change of sex from male or female to non-binary).

Edmo v. Corizon (9th Circuit, 2019; cert denied, 2020) (Denying gender affirmation surgery to inmate with severe gender dysphoria violated the 8th Amendment's ban on cruel and unusual punishment).

Swicegood v. Thompson (Court of Appeals ofSouth Carolina, 2020) (rejecting application of common law marriage to a same-sex couple whose relationship predated the Obergefell decision).

LaFleur v. Pyfer (Supreme Court of Colorado, 2021)(recognizing application of common law marriage to a same-sex couple whose relationship predated the Obergefell decision).

E. J. D.-B. v. U.S. Dep't of State (9th Circuit, 2020)(child of married man is U.S. citizen even though the child was born in Canada and was the genetic offspring of the non-citizen husband).

In re Gestational Agreement (Utah Supreme Court, 2019) (enforcing gestational surrogacy agreement between male same-sex couple and female surrogate).

Xochihua-Jaimes v. Barr (9th Circuit, 2021) (awarding protection under the Convention Against Torture to a Mexican lesbian).

Otto v. City of Boca Raton, Florida (11th Circuit, 2020) (Municipal ban on the performance of conversion therapy entirely through speech violates 1st Amendment rights of practitioners).

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:

Bostock v. Clayton County, Georgia
Supreme Court of the United States
540 U.S. ___, 140 S. Ct. 1731 (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. Justice Alito, consistent with his views expressed in dissents in other LGBT rights cases, voiced particular concern for the impact of this decision on persons with religious objections to homosexuality and transgender status.

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 in a federal employee case under Title VII, 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 the Harris Funeral Home case 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. 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 employ. 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"?

6. Justice Alito noted in his dissent 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.), cert. denied, 141 S. Ct. 894 (2020); Doe v. Boyertown Area School District, 897 F.3d 518 (3rd Cir. 2018), cert. denied, 139 S. Ct. 2636 (2019). The Court denied a petition for certiorari to review the 4th Circuit's opinion in Gloucester County School Board v. Grimm, 972 F.3d 586 (4th Cir. 2020), cert. denied, 2021 WL 2637992 (June 28, 2021), a long-running case in which Gavin Grimm, a transgender boy, challenged the school district's policy that he could not use the boys' restrooms at his high school, and the Board's refusal to correct his transcript to acknowledge a Virginia court order changing his name to Gavin. By the time of the 4th Circuit's 2020 decision upholding a judgement for Grimm under both Title IX and the Equal Protection Clause, Grimm had long since graduated, but the courts had determined that the case was not totally moot since he had a damage claim deriving from his exclusion from the restroom facilities throughout his last few years as a student, as well as an affirmative claim for correction of his school records.

7. 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. Most private sector workers in the United States are employed in businesses with fewer than 15 employees. State and local employment discrimination laws generally 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. In the year after Bostock, several other state and federal courts have applied the ruling as a persuasive precedent to interpret state and local bans on sex discrimination in a variety of contexts.

8. 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 relied principally on the 5th Amendment's equal protection requirement, and most agreed that heightened scrutiny applied to the policy, putting the burden on the government to show that it substantially advanced an important state interest. No final ruling on the merits had been issued when, a few days after taking office, President Joseph R. Biden issued an executive order rescinding the Trump Administration's policy. (See Chapter 3, page 491, and additions to Chapter 3 in this Supplement.)

9. 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.

10. 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?

Add a new Section K to Chapter 1, following the materials on Bostock v. Clayton County, at page 258:

K. The Clash of Religious Free Exercise and Anti-Discrimination Policy

In Masterpiece Cakeshop v. Colorado Civil Rights Commission, 138 S. Ct. 1719 (2018), the Court considered a claim that a for-profit business and its proprietor, Jack Phillips, was protected under the Free Exercise Clause of the 1st Amendment from having to comply with a state law banning discrimination by public accommodations on the basis of sexual orientation. Phillips had declined an order from a same-sex couple seeking a custom-designed cake to celebrate their marriage. See Casebook, 3rd Edition, pages 253-256. The Court avoided deciding the question whether the 1st Amendment would generally shield a business with religious objections, instead ruling for the Petitioner after finding that the Colorado Civil Rights Commission members had made public comments evincing hostility to Mr. Phillips' religious beliefs and that the Commission had acted inconsistently in bringing charges against Mr. Phillips but not against other bakeries who had declined a request by a customer to make wedding cakes decorated to condemn same-sex marriages on religious grounds. The Court held that a person charged with violating the civil rights law was entitled to a "neutral" forum to decide whether he had violated the law, but that the Commission had evinced "hostility" to religion and thus was not a neutral forum.

During its October 2020 Term, the Court reviewed another case involving a clash between 1st Amendment Free Exercise rights and a government anti-discrimination policy, in Fulton v. City of Philadelphia, 2021 WL 245923, 2021 U.S. LEXIS 3121 (June 17, 2021). However, as in Masterpiece Cakeshop, the Court's view of the facts led it to a narrower decision than observers had anticipated. The Court granted review on three questions posed by Petitioners, including whether it should reconsider Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990), which had held that individuals would have to comply with neutral laws of general applicability even if doing so would burden their free exercise of religion. Petitioners (and several members of the Court) saw this case as a vehicle to overrule Smith and restore prior Free Exercise law, under which any law that burdens the free exercise of religion would deem presumptively unconstitutional, subject to strict scrutiny, with the burden on the government to prove a compelling interest that the challenge law was narrowly tailored to achieve. Thus, the stakes were very high.

Fulton v. City of Philadelphia
Supreme Court of the United States
593 U.S. ___, 141 S. Ct. 1868 (2021)

Chief Justice Roberts delivered the opinion of the Court.

Catholic Social Services [CSS] is a foster care agency in Philadelphia. The City stopped referring children to CSS upon discovering that the agency would not certify same-sex couples to

be foster parents due to its religious beliefs about marriage. The City will renew its foster care contract with CSS only if the agency agrees to certify same-sex couples. The question presented is whether the actions of Philadelphia violate the First Amendment.

I

The Catholic Church has served the needy children of Philadelphia for over two centuries. In 1798, a priest in the City organized an association to care for orphans whose parents had died in a yellow fever epidemic. During the 19th century, nuns ran asylums for orphaned and destitute youth. When criticism of asylums mounted in the Progressive Era, the Church established the Catholic Children's Bureau to place children in foster homes. Petitioner CSS continues that mission today.

The Philadelphia foster care system depends on cooperation between the City and private foster agencies like CSS. When children cannot remain in their homes, the City's Department of Human Services assumes custody of them. The Department enters standard annual contracts with private foster agencies to place some of those children with foster families.

The placement process begins with review of prospective foster families. Pennsylvania law gives the authority to certify foster families to state-licensed foster agencies like CSS. 55 Pa. Code §3700.61 (2020). Before certifying a family, an agency must conduct a home study during which it considers statutory criteria including the family's "ability to provide care, nurturing and supervision to children," "[e]xisting family relationships," and ability "to work in partnership" with a foster agency. The agency must decide whether to "approve, disapprove or provisionally approve the foster family."

When the Department seeks to place a child with a foster family, it sends its contracted agencies a request, known as a referral. The agencies report whether any of their certified families are available, and the Department places the child with what it regards as the most suitable family. The agency continues to support the family throughout the placement.

The religious views of CSS inform its work in this system. CSS believes that "marriage is a sacred bond between a man and a woman." Because the agency understands the certification of prospective foster families to be an endorsement of their relationships, it will not certify unmarried couples—regardless of their sexual orientation—or same-sex married couples. CSS does not object to certifying gay or lesbian individuals as single foster parents or to placing gay and lesbian children. No same-sex couple has ever sought certification from CSS. If one did, CSS would direct the couple to one of the more than 20 other agencies in the City, all of which currently certify same-sex couples. For over 50 years, CSS successfully contracted with the City to provide foster care services while holding to these beliefs.

But things changed in 2018. After receiving a complaint about a different agency, a newspaper ran a story in which a spokesman for the Archdiocese of Philadelphia stated that CSS would not be able to consider prospective foster parents in same-sex marriages. The City Council called for an investigation, saying that the City had "laws in place to protect its people from discrimination that occurs under the guise of religious freedom." The Philadelphia Commission

on Human Relations launched an inquiry. And the Commissioner of the Department of Human Services held a meeting with the leadership of CSS. She remarked that "things have changed since 100 years ago," and "it would be great if we followed the teachings of Pope Francis, the voice of the Catholic Church." Immediately after the meeting, the Department informed CSS that it would no longer refer children to the agency. The City later explained that the refusal of CSS to certify same-sex couples violated a non-discrimination provision in its contract with the City as well as the non-discrimination requirements of the citywide Fair Practices Ordinance [FPO]. The City stated that it would not enter a full foster care contract with CSS in the future unless the agency agreed to certify same-sex couples.

CSS and three foster parents affiliated with the agency filed suit against the City, the Department, and the Commission. The Support Center for Child Advocates and Philadelphia Family Pride intervened as defendants. As relevant here, CSS alleged that the referral freeze violated the Free Exercise and Free Speech Clauses of the First Amendment. CSS sought a temporary restraining order and preliminary injunction directing the Department to continue referring children to CSS without requiring the agency to certify same-sex couples.

The District Court denied preliminary relief. It concluded that the contractual non-discrimination requirement and the Fair Practices Ordinance were neutral and generally applicable under *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), and that the free exercise claim was therefore unlikely to succeed. The court also determined that the free speech claims were unlikely to succeed because CSS performed certifications as part of a government program.

The Court of Appeals for the Third Circuit affirmed. Because the contract between the parties had expired, the court focused on whether the City could insist on the inclusion of new language forbidding discrimination on the basis of sexual orientation as a condition of contract renewal. The court concluded that the proposed contractual terms were a neutral and generally applicable policy under Smith. The court rejected the agency's free speech claims on the same grounds as the District Court.

CSS and the foster parents sought review. They challenged the Third Circuit's determination that the City's actions were permissible under Smith and also asked this Court to reconsider that precedent.

II

A

The Free Exercise Clause of the First Amendment, applicable to the States under the Fourteenth Amendment, provides that "Congress shall make no law . . . prohibiting the free exercise" of religion. As an initial matter, it is plain that the City's actions have burdened CSS's religious exercise by putting it to the choice of curtailing its mission or approving relationships inconsistent with its beliefs. The City disagrees. In its view, certification reflects only that foster parents satisfy the statutory criteria, not that the agency endorses their relationships. But CSS believes that certification is tantamount to endorsement. And "religious beliefs need not be

acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." Thomas v. Review Bd. of Ind. Employment Security Div., 450 U. S. 707, 714 (1981). Our task is to decide whether the burden the City has placed on the religious exercise of CSS is constitutionally permissible.

Smith held that laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable. CSS urges us to overrule Smith, and the concurrences in the judgment argue in favor of doing so. But we need not revisit that decision here. This case falls outside Smith because the City has burdened the religious exercise of CSS through policies that do not meet the requirement of being neutral and generally applicable. See Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U. S. 520, 531-532 (1993).

Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature. CSS points to evidence in the record that it believes demonstrates that the City has transgressed this neutrality standard, but we find it more straightforward to resolve this case under the rubric of general applicability.

A law is not generally applicable if it "invite[s]" the government to consider the particular reasons for a person's conduct by providing "'a mechanism for individualized exemptions.'" Smith, 494 U. S., at 884. For example, in Sherbert v. Verner, 374 U. S. 398 (1963), a Seventh-day Adventist was fired because she would not work on Saturdays. Unable to find a job that would allow her to keep the Sabbath as her faith required, she applied for unemployment benefits. The State denied her application under a law prohibiting eligibility to claimants who had "failed, without good cause . . . to accept available suitable work." We held that the denial infringed her free exercise rights and could be justified only by a compelling interest.

Smith later explained that the unemployment benefits law in Sherbert was not generally applicable because the "good cause" standard permitted the government to grant exemptions based on the circumstances underlying each application. Smith went on to hold that "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." 494 U. S., at 884.

A law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way. In Church of Lukumi Babalu Aye, Inc. v. Hialeah, for instance, the City of Hialeah adopted several ordinances prohibiting animal sacrifice, a practice of the Santeria faith. The City claimed that the ordinances were necessary in part to protect public health, which was "threatened by the disposal of animal carcasses in open public places." But the ordinances did not regulate hunters' disposal of their kills or improper garbage disposal by restaurants, both of which posed a similar hazard. The Court concluded that this and other forms of underinclusiveness meant that the ordinances were not generally applicable.

B

The City initially argued that CSS's practice violated section 3.21 of its standard foster care contract. We conclude, however, that this provision is not generally applicable as required by Smith. The current version of section 3.21 specifies in pertinent part:

> "Rejection of Referral. Provider shall not reject a child or family including, but not limited to, . . . prospective foster or adoptive parents, for Services based upon . . . their . . . sexual orientation . . . unless an exception is granted by the Commissioner or the Commissioner's designee, in his/her sole discretion."

This provision requires an agency to provide "Services," defined as "the work to be performed under this Contract," to prospective foster parents regardless of their sexual orientation.

Like the good cause provision in Sherbert, section 3.21 incorporates a system of individual exemptions, made available in this case at the "sole discretion" of the Commissioner. The City has made clear that the Commissioner "has no intention of granting an exception" to CSS. But the City "may not refuse to extend that [exemption] system to cases of 'religious hardship' without compelling reason." Smith, 494 U. S., at 884.

The City and intervenor-respondents resist this conclusion on several grounds. They first argue that governments should enjoy greater leeway under the Free Exercise Clause when setting rules for contractors than when regulating the general public. The government, they observe, commands heightened powers when managing its internal operations. And when individuals enter into government employment or contracts, they accept certain restrictions on their freedom as part of the deal. Given this context, the City and intervenor-respondents contend, the government should have a freer hand when dealing with contractors like CSS.

These considerations cannot save the City here. As Philadelphia rightly acknowledges, "principles of neutrality and general applicability still constrain the government in its capacity as manager." We have never suggested that the government may discriminate against religion when acting in its managerial role. And Smith itself drew support for the neutral and generally applicable standard from cases involving internal government affairs. The City and intervenor-respondents accordingly ask only that courts apply a more deferential approach in determining whether a policy is neutral and generally applicable in the contracting context. We find no need to resolve that narrow issue in this case. No matter the level of deference we extend to the City, the inclusion of a formal system of entirely discretionary exceptions in section 3.21 renders the contractual non-discrimination requirement not generally applicable.

Perhaps all this explains why the City now contends that section 3.21 does not apply to CSS's refusal to certify same-sex couples after all. Instead, the City says that section 3.21 addresses only "an agency's right to refuse 'referrals' to place a child with a certified foster family." We think the City had it right the first time. Although the section is titled "Rejection of Referral," the text sweeps more broadly, forbidding the rejection of "prospective foster . . . parents" for "Services," without limitation. The City maintains that certification is one of the services foster

agencies are hired to perform, so its attempt to backtrack on the reach of section 3.21 is unavailing. Moreover, the City adopted the current version of section 3.21 shortly after declaring that it would make CSS's obligation to certify same-sex couples "explicit" in future contracts, confirming our understanding of the text of the provision.

The City and intervenor-respondents add that, notwithstanding the system of exceptions in section 3.21, a separate provision in the contract independently prohibits discrimination in the certification of foster parents. That provision, section 15.1, bars discrimination on the basis of sexual orientation, and it does not on its face allow for exceptions. But state law makes clear that "one part of a contract cannot be so interpreted as to annul another part." Shehadi v. Northeastern Nat. Bank of Pa., 474 Pa. 232, 236, 378 A. 2d 304, 306 (1977); see Commonwealth ex rel. Kane v. UPMC, 634 Pa. 97, 135, 129 A. 3d 441, 464 (2015). Applying that "fundamental" rule here, an exception from section 3.21 also must govern the prohibition in section 15.1, lest the City's reservation of the authority to grant such an exception be a nullity. As a result, the contract as a whole contains no generally applicable non-discrimination requirement.

Finally, the City and intervenor-respondents contend that the availability of exceptions under section 3.21 is irrelevant because the Commissioner has never granted one. That misapprehends the issue. The creation of a formal mechanism for granting exceptions renders a policy not generally applicable, regardless whether any exceptions have been given, because it "invite[s]" the government to decide which reasons for not complying with the policy are worthy of solicitude — here, at the Commissioner's "sole discretion."

C

In addition to relying on the contract, the City argues that CSS's refusal to certify same-sex couples constitutes an "Unlawful Public Accommodations Practice" in violation of the Fair Practices Ordinance. That ordinance forbids "deny[ing] or interfer[ing] with the public accommodations opportunities of an individual or otherwise discriminat[ing] based on his or her race, ethnicity, color, sex, sexual orientation, . . . disability, marital status, familial status," or several other protected categories. Phila. Code §9-1106(1) (2016). The City contends that foster care agencies are public accommodations and therefore forbidden from discriminating on the basis of sexual orientation when certifying foster parents.

CSS counters that "foster care has never been treated as a 'public accommodation' in Philadelphia." In any event, CSS adds, the ordinance cannot qualify as generally applicable because the City allows exceptions to it for secular reasons despite denying one for CSS's religious exercise. But that constitutional issue arises only if the ordinance applies to CSS in the first place. We conclude that it does not because foster care agencies do not act as public accommodations in performing certifications.

The ordinance defines a public accommodation in relevant part as "[a]ny place, provider or public conveyance, whether licensed or not, which solicits or accepts the patronage or trade of the public or whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold, or otherwise made available to the public." §9-1102(1)(w). Certification is not "made available to the public" in the usual sense of the words. To make a service "available"

means to make it "accessible, obtainable." Merriam-Webster's Collegiate Dictionary 84 (11th ed. 2005); see also 1 Oxford English Dictionary 812 (2d ed. 1989) ("capable of being made use of, at one's disposal, within one's reach"). Related state law illustrates the same point. A Pennsylvania antidiscrimination statute similarly defines a public accommodation as an accommodation that is "open to, accepts or solicits the patronage of the general public." Pa. Stat. Ann., Tit. 43, §954(l). It fleshes out that definition with examples like hotels, restaurants, drug stores, swimming pools, barbershops, and public conveyances. The "common theme" is that a public accommodation must "provide a benefit to the general public allowing individual members of the general public to avail themselves of that benefit if they so desire." Blizzard v. Floyd, 149 Pa. Commw. 503, 506, 613 A. 2d 619, 621 (1992).

Certification as a foster parent, by contrast, is not readily accessible to the public. It involves a customized and selective assessment that bears little resemblance to staying in a hotel, eating at a restaurant, or riding a bus. The process takes three to six months. Applicants must pass background checks and a medical exam. Foster agencies are required to conduct an intensive home study during which they evaluate, among other things, applicants' "mental and emotional adjustment," "community ties with family, friends, and neighbors," and "[e]xisting family relationships, attitudes and expectations regarding the applicant's own children and parent/child relationships." 55 Pa. Code §3700.64. Such inquiries would raise eyebrows at the local bus station. And agencies understandably approach this sensitive process from different angles. As the City itself explains to prospective foster parents, "[e]ach agency has slightly different requirements, specialties, and training programs." All of this confirms that the one-size-fits-all public accommodations model is a poor match for the foster care system.

The City asks us to adhere to the District Court's contrary determination that CSS qualifies as a public accommodation under the ordinance. The concurrence adopts the City's argument, seeing no incongruity in deeming a private religious foster agency a public accommodation. We respectfully disagree with the view of the City and the concurrence. Although "we ordinarily defer to lower court constructions of state statutes, we do not invariably do so." Frisby v. Schultz, 487 U. S. 474, 483 (1988). Deference would be inappropriate here. The District Court did not take into account the uniquely selective nature of the certification process, which must inform the applicability of the ordinance. We agree with CSS's position, which it has maintained from the beginning of this dispute, that its "foster services do not constitute a 'public accommodation' under the City's Fair Practices Ordinance, and therefore it is not bound by that ordinance." We therefore have no need to assess whether the ordinance is generally applicable.

III

The contractual non-discrimination requirement imposes a burden on CSS's religious exercise and does not qualify as generally applicable. The concurrence protests that the "Court granted certiorari to decide whether to overrule [Smith]," and chides the Court for seeking to "sidestep the question." But the Court also granted review to decide whether Philadelphia's actions were permissible under our precedents. CSS has demonstrated that the City's actions are subject to "the most rigorous of scrutiny" under those precedents. Because the City's actions are therefore examined under the strictest scrutiny regardless of Smith, we have no occasion to reconsider that decision here.

A government policy can survive strict scrutiny only if it advances "interests of the highest order" and is narrowly tailored to achieve those interests. Lukumi, 508 U. S., at 546. Put another way, so long as the government can achieve its interests in a manner that does not burden religion, it must do so.

The City asserts that its non-discrimination policies serve three compelling interests: maximizing the number of foster parents, protecting the City from liability, and ensuring equal treatment of prospective foster parents and foster children. The City states these objectives at a high level of generality, but the First Amendment demands a more precise analysis. Rather than rely on "broadly formulated interests," courts must "scrutinize the asserted harm of granting specific exemptions to particular religious claimants." O Centro, 546 U. S., at 431. The question, then, is *not* whether the City has a compelling interest in enforcing its non-discrimination policies generally, but whether it has such an interest in denying an exception to CSS.

Once properly narrowed, the City's asserted interests are insufficient. Maximizing the number of foster families and minimizing liability are important goals, but the City fails to show that granting CSS an exception will put those goals at risk. If anything, including CSS in the program seems likely to increase, not reduce, the number of available foster parents. As for liability, the City offers only speculation that it might be sued over CSS's certification practices. Such speculation is insufficient to satisfy strict scrutiny, particularly because the authority to certify foster families is delegated to agencies by the State, not the City, see 55 Pa. Code §3700.61.

That leaves the interest of the City in the equal treatment of prospective foster parents and foster children. We do not doubt that this interest is a weighty one, for "[o]ur society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth." Masterpiece Cakeshop, 138 S. Ct. 1719. On the facts of this case, however, this interest cannot justify denying CSS an exception for its religious exercise. The creation of a system of exceptions under the contract undermines the City's contention that its non-discrimination policies can brook no departures. The City offers no compelling reason why it has a particular interest in denying an exception to CSS while making them available to others.

***

As Philadelphia acknowledges, CSS has "long been a point of light in the City's foster-care system." CSS seeks only an accommodation that will allow it to continue serving the children of Philadelphia in a manner consistent with its religious beliefs; it does not seek to impose those beliefs on anyone else. The refusal of Philadelphia to contract with CSS for the provision of foster care services unless it agrees to certify same-sex couples as foster parents cannot survive strict scrutiny, and violates the First Amendment. In view of our conclusion that the actions of the City violate the Free Exercise Clause, we need not consider whether they also violate the Free Speech Clause. The judgment of the United States Court of Appeals for the Third Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

Justice Barrett, with whom Justice Kavanaugh joins, and with whom Justice Breyer joins as to all but the first paragraph, concurring.

In Employment Division v. Smith, 494 U. S. 872 (1990), this Court held that a neutral and generally applicable law typically does not violate the Free Exercise Clause—no matter how severely that law burdens religious exercise. Petitioners, their amici, scholars, and Justices of this Court have made serious arguments that Smith ought to be overruled. While history looms large in this debate, I find the historical record more silent than supportive on the question whether the founding generation understood the First Amendment to require religious exemptions from generally applicable laws in at least some circumstances. In my view, the textual and structural arguments against Smith are more compelling. As a matter of text and structure, it is difficult to see why the Free Exercise Clause—alone among the First Amendment freedoms—offers nothing more than protection from discrimination.

Yet what should replace Smith? The prevailing assumption seems to be that strict scrutiny would apply whenever a neutral and generally applicable law burdens religious exercise. But I am skeptical about swapping Smith's categorical antidiscrimination approach for an equally categorical strict scrutiny regime, particularly when this Court's resolution of conflicts between generally applicable laws and other First Amendment rights—like speech and assembly—has been much more nuanced. There would be a number of issues to work through if Smith were overruled. To name a few: Should entities like Catholic Social Services—which is an arm of the Catholic Church—be treated differently than individuals? Cf. Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 565 U. S. 171 (2012). Should there be a distinction between indirect and direct burdens on religious exercise? Cf. Braunfeld v. Brown, 366 U. S. 599, 606-607 (1961) (plurality opinion). What forms of scrutiny should apply? Compare Sherbert v. Verner, 374 U. S. 398, 403 (1963) (assessing whether government's interest is "'compelling'"), with Gillette v. United States, 401 U. S. 437, 462 (1971) (assessing whether government's interest is "substantial"). And if the answer is strict scrutiny, would pre-Smith cases rejecting free exercise challenges to garden-variety laws come out the same way? See Smith, 494 U. S., at 888-889.

We need not wrestle with these questions in this case, though, because the same standard applies regardless whether Smith stays or goes. A longstanding tenet of our free exercise jurisprudence—one that both pre-dates and survives Smith—is that a law burdening religious exercise must satisfy strict scrutiny if it gives government officials discretion to grant individualized exemptions. As the Court's opinion today explains, the government contract at issue provides for individualized exemptions from its nondiscrimination rule, thus triggering strict scrutiny. And all nine Justices agree that the City cannot satisfy strict scrutiny. I therefore see no reason to decide in this case whether Smith should be overruled, much less what should replace it. I join the Court's opinion in full.

Justice Alito, with whom Justice Thomas and Justice Gorsuch join, concurring in the judgment.

This case presents an important constitutional question that urgently calls out for review: whether this Court's governing interpretation of a bedrock constitutional right, the right to the free exercise of religion, is fundamentally wrong and should be corrected. In Smith, the Court abruptly pushed aside nearly 40 years of precedent and held that the First Amendment's Free Exercise Clause tolerates any rule that categorically prohibits or commands specified conduct so long as it does not target religious practice. Even if a rule serves no important purpose and has a devastating

effect on religious freedom, the Constitution, according to Smith, provides no protection. This severe holding is ripe for reexamination. [Justice Alito's opinion goes on at length with a detailed history of 1st Amendment Free Exercise jurisprudence leading up to Smith, and with objections to the reasoning of the Court in that case.] . . .

This decision might as well be written on the dissolving paper sold in magic shops. The City has been adamant about pressuring CSS to give in, and if the City wants to get around today's decision, it can simply eliminate the never-used exemption power. If it does that, then, voilà, today's decision will vanish—and the parties will be back where they started. The City will claim that it is protected by Smith; CSS will argue that Smith should be overruled; the lower courts, bound by Smith, will reject that argument; and CSS will file a new petition in this Court challenging Smith. What is the point of going around in this circle?

> [*Omitted here is the bulk of Justice Alito's 77-page opinion, which appears to have been a draft for what he hoped would be the majority opinion if he could attract at least five Justices to vote for it. Overruling Smith would not change the outcome of this case, however, which is why this is written as a concurrence in the judgement and not a dissent. But it is a de facto dissent from the Court's decision not to consider expressly whether to overrule Smith.]*

After receiving more than 2,500 pages of briefing and after more than a half-year of post-argument cogitation, the Court has emitted a wisp of a decision that leaves religious liberty in a confused and vulnerable state. Those who count on this Court to stand up for the First Amendment have every right to be disappointed—as am I.

Justice Gorsuch, with whom Justice Thomas and Justice Alito join, concurring in the judgment.

The Court granted certiorari to decide whether to overrule Smith. As Justice Alito's opinion demonstrates, Smith failed to respect this Court's precedents, was mistaken as a matter of the Constitution's original public meaning, and has proven unworkable in practice. A majority of our colleagues, however, seek to sidestep the question. They agree that the City of Philadelphia's treatment of Catholic Social Services (CSS) violates the Free Exercise Clause. But, they say, there's no "need" or "reason" to address the error of Smith today.

On the surface it may seem a nice move, but dig an inch deep and problems emerge. (*Justice Gorsuch devoted much of his dissent, partially omitted here, to criticizing the majority's conclusion that the case could be decided without reconsidering Smith by characterizing the facts in such a way that Smith would not apply*.)

*

Given all the maneuvering, it's hard not to wonder if the majority is so anxious to say nothing about Smith's fate that it is willing to say pretty much anything about municipal law and the parties' briefs. One way or another, the majority seems determined to declare there is no "need" or "reason" to revisit Smith today.

But tell that to CSS. Its litigation has already lasted years—and today's (ir)resolution promises more of the same. Had we followed the path Justice Alito outlines—holding that the City's rules cannot avoid strict scrutiny even if they qualify as neutral and generally applicable—this case would end today. Instead, the majority's course guarantees that this litigation is only getting started. As the final arbiter of state law, the Pennsylvania Supreme Court can effectively overrule the majority's reading of the Commonwealth's public accommodations law. The City can revise its FPO to make even plainer still that its law does encompass foster services. Or with a flick of a pen, municipal lawyers may rewrite the City's contract to close the §3.21 loophole.

Once any of that happens, CSS will find itself back where it started. The City has made clear that it will never tolerate CSS carrying out its foster-care mission in accordance with its sincerely held religious beliefs. To the City, it makes no difference that CSS has not denied service to a single same-sex couple; that dozens of other foster agencies stand willing to serve same-sex couples; or that CSS is committed to help any inquiring same-sex couples find those other agencies. The City has expressed its determination to put CSS to a choice: Give up your sincerely held religious beliefs or give up serving foster children and families. If CSS is unwilling to provide foster-care services to same-sex couples, the City prefers that CSS provide no foster-care services at all. This litigation thus promises to slog on for years to come, consuming time and resources in court that could be better spent serving children. And throughout it all, the opacity of the majority's professed endorsement of CSS's arguments ensures the parties will be forced to devote resources to the unenviable task of debating what it even means.

Nor will CSS bear the costs of the Court's indecision alone. Individuals and groups across the country will pay the price—in dollars, in time, and in continued uncertainty about their religious liberties. Consider Jack Phillips, the baker whose religious beliefs prevented him from creating custom cakes to celebrate same-sex weddings. See Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n, 138 S. Ct. 1719 (2018). After being forced to litigate all the way to the Supreme Court, we ruled for him on narrow grounds similar to those the majority invokes today. Because certain government officials responsible for deciding Mr. Phillips's compliance with a local public accommodations law uttered statements exhibiting hostility to his religion, the Court held, those officials failed to act "neutrally" under Smith. But with Smith still on the books, all that victory assured Mr. Phillips was a new round of litigation—with officials now presumably more careful about admitting their motives. A nine-year odyssey thus barrels on. No doubt, too, those who cannot afford such endless litigation under Smith's regime have been and will continue to be forced to forfeit religious freedom that the Constitution protects. . . .

It's not as if we don't know the right answer. Smith has been criticized since the day it was decided. No fewer than ten Justices—including six sitting Justices—have questioned its fidelity to the Constitution. The Court granted certiorari in this case to resolve its fate. The parties and amici responded with over 80 thoughtful briefs addressing every angle of the problem. Justice Alito has offered a comprehensive opinion explaining why Smith should be overruled. And not a single Justice has lifted a pen to defend the decision. So what are we waiting for?

We hardly need to "wrestle" today with every conceivable question that might follow from recognizing Smith was wrong. To be sure, any time this Court turns from misguided precedent back toward the Constitution's original public meaning, challenging questions may arise across a

large field of cases and controversies. But that's no excuse for refusing to apply the original public meaning in the dispute actually before us. Rather than adhere to Smith until we settle on some "grand unified theory" of the Free Exercise Clause for all future cases until the end of time, the Court should overrule it now, set us back on the correct course, and address each case as it comes.

What possible benefit does the majority see in its studious indecision about Smith when the costs are so many? The particular appeal before us arises at the intersection of public accommodations laws and the First Amendment; it involves same-sex couples and the Catholic Church. Perhaps our colleagues believe today's circuitous path will at least steer the Court around the controversial subject matter and avoid "picking a side." But refusing to give CSS the benefit of what we know to be the correct interpretation of the Constitution is picking a side. Smith committed a constitutional error. Only we can fix it. Dodging the question today guarantees it will recur tomorrow. These cases will keep coming until the Court musters the fortitude to supply an answer. Respectfully, it should have done so today.

Notes and Questions

1. Once the Court determined that Employment Division v. Smith did not apply to this case, it proceeded to subject the City's position to heightened scrutiny. Are you persuaded that it did so correctly? The Court devotes just a few paragraphs to the task, easily rules out the City's first two articulated interests as not compelling, and then gets to the core of the case:

   > That leaves the interest of the City in the equal treatment of prospective foster parents and foster children. We do not doubt that this interest is a weighty one, for "[o]ur society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth." Masterpiece Cakeshop, 138 S. Ct. 1719. On the facts of this case, however, this interest cannot justify denying CSS an exception for its religious exercise. The creation of a system of exceptions under the contract undermines the City's contention that its non-discrimination policies can brook no departures. The City offers no compelling reason why it has a particular interest in denying an exception to CSS while making them available to others.

   The question could be whether the City has a compelling interest in not granting an exception from the requirement that agencies contracting to perform foster care services not discrimination because of sexual orientation. But the Court treats the question as whether the contract allows for any exceptions at the City's discretion, and concludes that because it does the City's has "no particular interest" in denying the exception sought by CSS "while making them available to others." This lumps together into one argument all possible exceptions to anti-discrimination policies regarding several different characteristics (the list of which the Court conveniently leaves out of its quotation from the relevant provision of the City's foster care agency contract). Earlier in the opinion, Chief Justice Roberts insists on a granular rather than a general approach, but he abandons that insistence here. Is that correct?

2. At the time this case was decided, the Court had before it a petition for review of the Washington Supreme Court's decision in Arlene's Flowers v. Washington, No. 19-333.

The Washington Supreme Court upheld the trial court's ruling that a florist violated the state's public accommodations law by refusing an order for floral designs for a same-sex wedding based on her religious objections. The Court had already remanded the case back to the Washington Supreme Court once, for reconsideration in light of its ruling in Masterpiece Cakeshop. The Washington Supreme Court's new opinion stated that it had scrutinized the record and found no evidence of hostility to religion by the trial court or itself in this case, reaffirming its earlier decision against the florist. The day after the Court issued its ruling in Fulton v. City of Philadelphia, the Petitioner (represented by the same organization that represented CSS in Fulton, "Alliance Defending Freedom") filed a supplement to its pending petition, mentioning Fulton in passing and again calling on the Court to resolve the clash between the state's anti-discrimination law and the Petitioner's religious free exercise rights. Responses by the State's Attorney General and the Plaintiffs urged the Court to reject the supplement on the ground that it presented no new matter, merely reiterating arguments from its original petition filed two years earlier and barely mentioning Fulton in passing. However, it was clear that the supplement was intended to get the members of the Court who were interested in reconsidering Smith to place the question on their argument list for the Fall 2021 Term. However, the Court denied the petition on July 2, 2021.

3. During its October 2020 Term, the Court denied petitions to review several other rulings by lower courts. In Davis v. Ermold, 141 S. Ct. 3 (2020), it refused to review a decision by the 6th Circuit, 936 F.3d 429 (2019), which had affirmed a damage award against Kim Davis, a Kentucky county clerk who had refused to issue a marriage license to a same-sex couple in the wake of the Obergefell case. Justice Thomas, joined by Justice Alito, released a statement pointing out the tension between Free Exercise and the Court's marriage equality decision in Obergefell, although conceding that this case was not the proper vehicle for addressing it. In Idaho Department of Correction v. Edmo, 141 S. Ct. 610 (2020), the Court refused to review a decision by the 9th Circuit, Edmo v. Corizon, Inc., 935 F.3d 757 (2019), affirming a district court's order that the Idaho Correction Department provide gender affirmation surgery to a transgender prison inmate, despite a circuit split on the question whether denying such treatment would violate the 8th Amendment rights of the inmate. (The 9th Circuit's opinion can be found in this 2021 Case Supplement on page ____.) It is possible the petition was denied on mootness grounds, since the Court's earlier denial of a motion to stay the 9th Circuit's ruling resulted in the inmate receiving the surgical procedure while the petition was pending. In Parents for Privacy v. Barr, 949 F.3d 1210 (9th Cir.), cert. denied, 141 S. Ct. 894 (2020), the Court declined to review the 9th Circuit's ruling that had rejected a constitutional privacy challenge by parents of cisgender high school students to an Oregon school district's policy allowing transgender students to use restroom facilities based on their gender identity rather than their sex as identified at birth. This is a recurring issue that may eventually get to the Court, but it denied a petition for certiorari in Gloucester County School Board v. Grimm, 972 F.3d 586 (4th Cir. 2020), cert. denied, 2021 WL 2637992 (June 28, 2021).
In Box v. Henderson, 141 S. Ct. 953 (2020), the Court declined to review a 7th Circuit ruling, Henderson v. Box, 947 F.3d 482 (2020), applying the Court's decision in Pavan v. Smith to require Indiana to list the female spouse of a birth mother on their child's birth certificate as a parent.

Chapter 2 – Sexual Orientation Discrimination: Constitutional & Statutory Protection

A. Constitutional Protection: The Guarantees of Due Process and Equal Protection of the Laws

Add to Notes and Questions at page 307:

4. Consider the potential impact of Bostock v. Clayton County on the question how the courts should deal equal protection claims based on sexual orientation. Under the logic of Justice Gorsuch's opinion, sexual orientation claims could be considered sex discrimination claims. The Supreme Court applies heightened scrutiny to claims that a government action or policy discriminates because of sex. If the courts follow the rationale of the Bostock decision in equal protection cases, they should be applying heightened scrutiny, under which the challenged policy is presumed unconstitutional unless the government defendant can demonstrate that the challenged policy substantially advances an important government interest.

B. Statutory Claims – Sex Discrimination

The Bostock decision, added to Chapter 1 in this 2021 Supplement, can take the place of the cases in Chapter 2(B) of the casebook dealing with federal law.

There remains the question whether state or local laws that ban discrimination because of sex will be interpreted as covering sexual orientation and gender identity discrimination claims, using Bostock as a persuasive precedent. In the first year following the Supreme Court's announcement of Bostock in June 2020, several state agencies, state courts, and federal courts sitting in diversity cases, have noted that federal precedents under Title VII are generally deemed to be very persuasive in the interpretation of state civil rights laws, and some courts have assumed, without necessarily deciding, that such state and local laws should be interpreted in parallel with Bostock.

Another question remaining after the Bostock case is whether the Supreme Court's opinion has render superfluous the Equality Act, a bill pending in Congress that would explicitly add "sexual orientation" and "gender identity" to all federal laws that forbid discrimination because of sex, would add "sex" as well as "sexual orientation" and "gender identity" to the forbidden grounds of discrimination under the public accommodations provision of the Civil Rights Act of 1964, and clarify that the Religious Freedom Restoration Act does not provide a defense to discrimination claims under federal law. The House of Representatives passed the Equality Act early in 2021, but its fate in the Senate remains uncertain. Because the Equality Act does more than just amend federal sex discrimination laws, and would "lock in" the Supreme Court's interpretation of "discrimination because of sex" so that it could not be overruled by a future Supreme Court, it is neither superfluous nor redundant.

C. Claimed Constitutional Exemptions from Compliance with Anti-Discrimination Laws

In Masterpiece Cakeshop v. Colorado Civil Rights Commission, 138 S. Ct. 1719 (2018), and Fulton v. City of Philadelphia, 2021 U.S. LEXIS 3121, 2021 WL 245923 (2021), the Supreme Court ruled in favor of Petitioners who asserted a right under the Free Exercise Clause to discriminate on the basis of sexual orientation in providing goods or a public service, despite being located in jurisdictions that outlawed sexual orientation discrimination by public accommodations. In Masterpiece, the Colorado state courts found a baker could not refuse to make a wedding cake for a same-sex couple, but the Supreme Court found that the administrative process was tainted by hostility to the baker's religious views and set aside the state court ruling. In Fulton, a Catholic foster care agency lost its contract with the City of Philadelphia because of its refusal to evaluate married same-sex couples to be foster parents, but the Supreme Court found that the agency was not a public accommodation subject to the city's anti-discrimination ordinance and that the contract between the agency and the City, by reserving to the City sole discretion to grant exceptions to its non-discrimination requirements, was not a rule of "general applicability," thus subjecting the City's action to strict scrutiny. In neither case did the Court reconsider or overrule its decision in Employment Division v. Smith, although several members of the Court have stated their desire to do so. If Smith was overruled, the strict scrutiny approach taken by the Court in Fulton would apply whenever a government entity sought to enforce an anti-discrimination policy against a person or entity that raised a Free Exercise defense or challenge to the policy. Until the Court reconsiders Smith, such a defense should fail so long as the case falls within Smith's parameters of neutral laws of general applicability. The Court avoided another opportunity to consider whether to overrule Smith when it denied certiorari on July 2 in Arlene's Flowers v. State of Washington, a case of a florist who was found to violate the state's anti-discrimination law by refusing to make floral decorations for a same-sex wedding.

Pages 343-344 – Subsection D – Claimed Constitutional Exemptions from Compliance with Anti-Discrimination Laws

The bottom paragraph on page 343 and its continuation to the top of page 344 discusses the "ministerial exception" to anti-discrimination laws recognized for the first time by the Supreme Court in Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC, 565 U.S. 171 (2012). The concept of a "ministerial employee" of a religious organization was broadened by the Court in Our Lady of Guadalupe School v. Morrissey-Berru, 140 S. Ct. 2049, 2060 (2020). In essence, the Court appeared to gave religious organizations carte blanche to make their personnel decisions concerning ministerial employees without regard to the strictures of employment discrimination law, as a matter of constitutionally protected religious freedom, well beyond the provision in Title VII allowing religious organizations to take religion into account in making their personnel decisions. In the following en banc ruling by the 7Th Circuit, the concept of the ministerial exception is explored in the context of a gay church music director, with

particular focus on an issue that has generated a circuit split: whether a ministerial employee can bring a hostile environment harassment claim against their employer under anti-discrimination laws.

Demkovich v. St. Andrew the Apostle Parish

United States Court of Appeals for the Seventh Circuit
2021 U.S. App. LEXIS 20410, 2021 WL 2880232 (July 9, 2021)

BRENNAN, Circuit Judge.

The ministerial exception, grounded in the First Amendment's Religion Clauses, protects religious organizations from employment discrimination suits brought by their ministers. The question here is whether this constitutional protection applies to hostile work environment claims based on minister-on-minister harassment. We hold that it does.

I

St. Andrew the Apostle Parish in Calumet City, Illinois is a Roman Catholic church of the Archdiocese of Chicago. In September 2012, the church hired Sandor Demkovich as its music director, choir director, and organist. Reverend Jacek Dada, a Catholic priest and the church's pastor, supervised Demkovich in these roles. Over the next two years, their relationship deteriorated, culminating in Demkovich's termination by Reverend Dada in September 2014. Demkovich alleges that Reverend Dada, who is not a defendant here, discriminated against him based largely on his sexual orientation and physical condition.

Demkovich is a gay man. According to Demkovich, Reverend Dada repeatedly subjected him to derogatory comments and demeaning epithets showing a discriminatory animus toward his sexual orientation. The frequency and hostility of these remarks increased after Reverend Dada learned that Demkovich planned to marry his partner while still employed by the church. After Demkovich's marriage in September 2014, Reverend Dada asked for his resignation and told him that his marriage was against the teachings of the Catholic Church. When Demkovich refused, Reverend Dada fired him.

Demkovich also suffers from diabetes, metabolic syndrome, and weight issues. Before Demkovich's termination, Reverend Dada allegedly made belittling and humiliating comments based on these conditions as well. Reverend Dada's remarks, by Demkovich's account, had no discernible connection with the terms of his employment and adversely affected his mental and physical health.

Eventually, Demkovich sued the church and the Archdiocese for employment discrimination. In his initial complaint, Demkovich claimed the church fired him based on his

sex, sexual orientation, marital status, and disability. He alleged the church therefore violated Title VII of the 1964 Civil Rights Act and the Americans with Disabilities Act and analogous state and county laws. The church moved to dismiss Demkovich's case under FRCP 12(b)(6) and raised the ministerial exception as an affirmative defense to his claims. The district court deemed Demkovich a minister protected by the exception, granted the church's motion, and dismissed the complaint in full, albeit without prejudice.

In his amended complaint, Demkovich repackaged his allegations of discriminatory termination as hostile work environment claims. The church again moved to dismiss and invoked the ministerial exception a second time. The district court granted this motion in part, dismissing Demkovich's hostile work environment claims based on sex, sexual orientation, and marital status while allowing his disability-based hostile work environment claims to proceed. The district court held that the ministerial exception did not categorically bar Demkovich's hostile work environment claims. Protection under the ministerial exception instead turned on whether the plaintiff challenged a tangible or intangible employment action. Claims based on tangible employment actions, such as termination, were categorically barred; claims based on intangible employment actions, such as discriminatory remarks and insults, were not. The district court reasoned that tangible employment actions implicated a minister's employment status, and therefore the religious organization's authority over that minister, in ways unlike intangible employment actions. Because Demkovich alleged intangible employment actions in his amended complaint, the ministerial exception was not a "categorical bar" to his claims. Rather, only concerns over excessive church-state entanglement—as when a religious organization proffers a religious justification for alleged conduct—could trigger the ministerial exception's protection against intangible employment action claims. For the district court, application of the ministerial exception to intangible employment actions depended on a case-by-case balancing. This balancing led the district court to dismiss Demkovich's claims of a hostile work environment based on his sex, sexual orientation, and marital status. Several factors supported protecting the church. First, the church offered a religious justification for Reverend Dada's allegedly discriminatory remarks. Second, Demkovich's status as a minister implicated the church's absolute right to choose its own ministers without civil interference. And third, practical and procedural concerns, including the need to probe for animus and intrusive discovery, favored applying the ministerial exception. The balance tipped the other way for Demkovich's disability-based hostile work environment claims, however. The church offered no religious justification for these claims, so the district court did not see the same risks of excessive entanglement present in adjudicating the sex, sexual orientation, and marital status claims. With only Demkovich's disability claims remaining, discovery began.

On the church's motion, the district court then certified a controlling question of law to this court under 28 U.S.C. § 1292(b): Under Title VII and the Americans with Disabilities Act, does the ministerial exception ban all claims of a hostile work environment brought by a plaintiff who qualifies as a minister, even if the claim does not challenge a tangible employment action?

A motions panel of this court accepted this interlocutory appeal. An appeal under § 1292(b) brings up the whole certified order. We "may address any issue fairly included within the certified order because 'it is the order that is appealable, and not the controlling question identified by the district court.'" A divided panel affirmed the district court's decision denying dismissal of Demkovich's disability-based hostile work environment claim, and reversed its dismissal of his sex, sexual orientation, and marital status claims. We vacated the panel opinion and reheard this interlocutory appeal en banc. Our review is de novo.

II

A

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." From the Establishment Clause and the Free Exercise Clause flows the ministerial exception, which "ensures that the authority to select and control who will minister to the faithful—a matter 'strictly ecclesiastical'—is the church's alone." Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC, 565 U.S. 171, 194-95 (2012) These Religion Clauses "often exert conflicting pressures." Cutter v. Wilkinson, 544 U.S. 709, 719 (2005). But when it comes to the ministerial exception, they work in unison toward the common goal of protecting the employment rights of religious organizations. Our Lady of Guadalupe School v. Morrissey-Berru, 140 S. Ct. 2049, 2060 (2020) ("Under this rule, courts are bound to stay out of employment disputes involving those holding certain important positions with churches and other religious institutions.").

The interests implicated by the ministerial exception have a rich lineage. Questions over the boundary between religious and civil authority have been present since the founding. Supreme Court precedent reflects repeated engagement with that boundary and teaches that avoidance, rather than intervention, should be a court's proper role when adjudicating disputes involving religious governance. This well-established principle means what it says: churches must have "independence in matters of faith and doctrine and in closely linked matters of internal government."

The ministerial exception follows naturally from the church autonomy doctrine. In McClure v. Salvation Army, a female employee of the Salvation Army—an "officer" within this religious charity organization—alleged sex discrimination in violation of Title VII. 460 F.2d 553, 555-56 (5th Cir. 1972). The Fifth Circuit held that she was a minister, and the First Amendment barred her claim as a result. In doing so, it recognized that "[t]he relationship between an organized church and its ministers is its lifeblood" and "[m]atters touching this relationship must necessarily be recognized as of prime ecclesiastical concern." Deciding the minister's Title VII claim would intrude upon this sacred relationship, so the Fifth Circuit forbade it.

In Hosanna-Tabor, the Supreme Court unanimously endorsed the ministerial exception. There, a teacher sued an Evangelical Lutheran school for unlawful retaliation under the ADA. The Court held that the teacher was a minister, so it barred her claim. Recognizing the central importance of ministers to religious organizations, the Court concluded that allowing an employment discrimination suit against the school would contravene both the Free Exercise Clause ("which protects a religious group's right to shape its own faith and mission through its appointments") and the Establishment Clause ("which prohibits government involvement in such ecclesiastical decisions"). For the Court, "[r]equiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision." This sort of civil intrusion "interferes with the internal governance of the church" by "depriving the church of control over the selection of those who will personify its beliefs." The Court's decision was the result of not only its past church autonomy jurisprudence, but also of what had long been held by the circuit courts: ecclesiastical independence in employment was of prime importance. In the end, between the "interest of society in the enforcement of employment discrimination statutes" and "the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission," the Court held that "the First Amendment has struck the balance for us."

Our Lady of Guadalupe recently reiterated Hosanna-Tabor's holding. The Court in Our Lady of Guadalupe confronted the consolidated appeals of two Catholic school teachers who alleged discriminatory terminations in violation of the ADA and the Age Discrimination in Employment Act of 1967, respectively. Because there existed "abundant record evidence that they both performed vital religious duties," the ministerial exception barred the employment discrimination suits of the two teachers. Although Our Lady of Guadalupe mainly concerned how to define ministerial status, the decision emphasized that "a church's independence on matters 'of faith and doctrine' requires the authority to select, supervise, and if necessary, remove a minister without interference by secular authorities." This was because "[w]ithout that power, a wayward minister's preaching, teaching, and counseling could contradict the church's tenets and lead the congregation away from the faith." Simply put, "[t]he ministerial exception was recognized to preserve a church's independent authority in such matters." Hosanna-Tabor first endorsed the ministerial exception, and Our Lady of Guadalupe confirmed its strength.

From Hosanna-Tabor and Our Lady of Guadalupe, we take two principles. First, although these cases involved allegations of discrimination in termination, their rationale is not limited to that context. The protected interest of a religious organization in its ministers covers the entire employment relationship, including hiring, firing, and supervising in between. Second, we cannot lose sight of the harms—civil intrusion and excessive entanglement—that the ministerial exception prevents. Especially in matters of ministerial employment, the First Amendment thus "gives special solicitude to the rights of religious organizations." Hosanna-Tabor, 565 U.S. at 189.

B

With these precedents in mind, we consider Demkovich's hostile work environment claims. To succeed on a hostile work environment claim, a plaintiff must show: (1) unwelcome harassment; (2) based on a protected characteristic; (3) that was so severe or pervasive as to alter the conditions of employment and create a hostile or abusive working environment; and (4) a basis for employer liability. Demkovich proceeds under Title VII and the ADA. Under either Act, and no matter the alleged animus, the elements of a hostile work environment remain the same. For its part, the ministerial exception operates as an affirmative defense to employment discrimination claims, turning on the function of the employee and safeguarding all faiths.

A hostile work environment is based on the totality of the circumstances. Courts consider "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993). This inquiry is "fact intensive." For example, we account for "the specific circumstances of the working environment" as well as "the relationship between the harassing party and the harassed." Finding a hostile work environment, then, "is not, and by its nature cannot be, a mathematically precise test." But when proved, one thing is certain: "the work environment was so pervaded by discrimination that the terms and conditions of employment were altered." Vance v. Ball State Univ., 570 U.S. 421, 427 (2013); accord Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986).

III

This case concerns what one minister, Reverend Dada, said to another, Demkovich. Adjudicating Demkovich's allegations of minister-on-minister harassment would not only undercut a religious organization's constitutionally protected relationship with its ministers, but also cause civil intrusion into, and excessive entanglement with, the religious sphere. Judicial involvement in this dispute would depart from Hosanna-Tabor and Our Lady of Guadalupe and threaten the independence of religious organizations "in a way that the First Amendment does not allow."

A

Demkovich's hostile work environment claims challenge a religious organization's independence in its ministerial relationships. A judgment against the church would legally recognize that it fostered a discriminatory employment atmosphere for one of its ministers. So the church, like any other employer, must have necessarily failed in supervision and control, either directly or indirectly. And if Demkovich succeeds in his suit, it means his ministerial work environment "was so pervaded by discrimination that the terms and conditions of employment were altered."

But Hosanna-Tabor and Our Lady of Guadalupe teach that ministerial employment is fundamentally distinct. As the Court emphasized in Hosanna-Tabor, "[t]he members of a religious group put their faith in the hands of their ministers." A minister is the "chief instrument" for a religious organization "to fulfill its purpose." Only through a minister does a religious organization speak in its own voice and spread its own message. In precluding termination claims by ministers, Hosanna-Tabor and Our Lady of Guadalupe recognize that a minister's religious significance makes this employment relationship different than others, and deservedly so. Just as a religious organization "must be free to choose those who will guide it on its way," so too must those guides be free to decide how to lead a religious organization on that journey.

A minister's legal status recognizes that ministerial employment differs from nonreligious employment, or even from nonministerial employment within a religious organization. Take Demkovich for example. As music director, choir director, and organist for the church, Demkovich assisted in the celebration of Mass by priests, Reverend Dada included. His participation in the liturgy was the reason for his work. No other employer, besides a religious one, could impose this type of work requirement upon Demkovich. The work environment of a minister thus differs from the work environment of any other employee. Because ministers and nonministers are different in kind, the First Amendment requires that their hostile work environment claims be treated differently.

Religion permeates the ministerial workplace in ways it does not in other workplaces. Ministers, by their religious position and responsibilities, produce their employment environment. From giving a rabbinic sermon on a Jewish holy day to leading a mosque in a call to prayer, ministers imbue a religious organization with spirituality. Given a minister's role in the religious organization's practice of the faith, allowing hostile work environment claims here "intrudes upon more than a mere employment decision." Put differently, analyzing a minister's hostile work environment claim based on another minister's conduct is not just a legal question but a religious one, too.

As personnel is policy, employees are environment. If "the relationship between an organized church and its minister is its lifeblood," then the relationship between its ministers is its backbone. Interaction between ministers is critical to a religious organization and its mission. Demkovich's duties were liturgical by nature. How Demkovich's employment ended—with a dispute over religious doctrine—cements the religious character of their relationship. As the Court stated in Our Lady of Guadalupe: "The ministerial exception was recognized to preserve a church's independent authority in such matters." Reverend Dada's supervision of Demkovich is such a matter.

The contours of the ministerial relationship are best left to a religious organization, not a court. Within a religious organization, workplace conflict among ministers takes on a constitutionally protected character. To render a legal judgment about Demkovich's work

environment is to render a religious judgment about how ministers interact. According to the dissent, our holding condones harassment of a minister as necessary to supervise or control that minister. We disagree. Deciding where a minister's supervisory power over another minister ends and where employment discrimination law begins is not a line to be drawn in litigation, the point of the ministerial exception.

Precluding hostile work environment claims arising from minister-on-minister harassment also fits within the doctrinal framework of the ministerial exception. A religious organization's supervision of its ministers is as much a "component" of its autonomy as "is the selection of the individuals who play certain key roles." Our Lady of Guadalupe, 140 S. Ct. at 2060. It would be incongruous if the independence of religious organizations mattered only at the beginning (hiring) and the end (firing) of the ministerial relationship, and not in between (work environment). In sum, segmenting the ministerial relationship runs counter to the teachings of Hosanna-Tabor and Our Lady of Guadalupe, from which we see no reason to depart.

For this same reason, we apply the ministerial exception in the way the Supreme Court has applied it. Just as a religious organization need not proffer a religious justification for termination claims, a religious organization need not do so for hostile work environment claims. The dissent contends that "neutral, secular principles of law" should apply here, as in "property, contract, tax, or tort" cases. But the Court has rejected a similar argument. In Hosanna-Tabor, the Court held that a "valid and neutral law of general applicability," Employment Div., Dept. of Human Resources of Ore. v. Smith, 494 U.S. 872, 879 (1990), did not foreclose recognition of the ministerial exception. "Smith involved government regulation of only outward physical acts," while the minister's termination in Hosanna-Tabor "concern[ed] government interference with an internal church decision that affects the faith and mission of the church itself." The same is true for the ministerial work environment. Attempts to cabin Hosanna-Tabor and Our Lady of Guadalupe to tangible employment action claims likewise do not persuade. In those cases, the Court made no distinction, explicit or implicit, between tangible or intangible employment actions, so neither do we.

B

Adjudicating Demkovich's hostile work environment claims would also lead to impermissible intrusion into, and excessive entanglement with, the religious sphere. To do so would contravene the Religion Clauses in much the same way the termination claims did in Hosanna-Tabor and Our Lady of Guadalupe. By probing the ministerial work environment, the state—acting through a court—interferes with the Free Exercise Clause, "which protects a religious group's right to shape its own faith and mission." A religious organization shapes its faith and mission through its work environment just as much as "through its appointments." Allowing the state to regulate the ministerial work environment similarly runs afoul of the Establishment Clause, "which prohibits government involvement in such ecclesiastical

decisions." How one minister interacts with another, and the employment environment that follows, is a religious, not judicial, prerogative. In complement rather than conflict, the Free Exercise Clause and the Establishment Clause therefore preclude Demkovich's hostile work environment claims. . . .

The ministerial exception's status as an affirmative defense makes some threshold inquiry necessary. At the same time, discovery to determine who is a minister differs materially from discovery to determine how that minister was treated, especially because admissible evidence is only a subset of discoverable information. Even more onerous would be the depositions of fellow ministers and the search for a subjective motive behind the alleged hostility. It is this subjectivity that differentiates hostile work environment claims from tort claims, which seldom probe for discriminatory animus. Tort liability—unlike liability for employment discrimination claims—generally does not arise as a direct result of the protected ministerial relationship. And nothing indicates that the offensive and derogatory comments here bring about any claim other than for employment discrimination. Analogies to tort law fail to recognize that a hostile work environment claim brings the entire ministerial relationship under invasive examination. Taken together, these concerns are at least in part why we must "stay out of employment disputes involving those holding certain important positions with churches and other religious institutions."

Like the Religion Clauses, employment discrimination statutes serve "undoubtedly important" societal interests. Yet "the very process of inquiry" in weighing these competing interests "may impinge on rights guaranteed by the Religion Clauses." NLRB v. Cath. Bishop of Chicago, 440 U.S. 490, 502 (1979). When these interests conflict, as here, the ministerial exception must prevail. The dissent asserts that a balancing approach is best. But as the Court declared in Hosanna-Tabor, "the First Amendment has struck the balance for us." 565 U.S. at 196.

C

[After reviewing the 7th Circuit's prior rulings on the ministerial exception, the court stated]: On a final note, we acknowledge the split in the circuits on whether the ministerial exception covers hostile work environment claims. The Tenth Circuit holds that it does. Skrzypczak v. Roman Cath. Diocese of Tulsa, 611 F.3d 1238, 1243-46 (10th Cir. 2010). The Ninth Circuit holds that it does not, at least as a categorical matter. Compare Elvig, 375 F.3d at 969, and Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940, 945-50 (9th Cir. 1999), with Werft v. Desert Sw. Annual Conf. of United Methodist Church, 377 F.3d 1099, 1101-04 (9th Cir. 2004) (per curiam). The church contends that the Eleventh and Fifth Circuits have also weighed in on this issue. But we are not sure the cases cited cleanly presented hostile work environment claims. Regardless of the depth of the split, courts on either side recognized this court's position before Demkovich's suit. See Skrzypczak, 611 F.3d at 1245 ("[W]e choose to follow the Seventh Circuit's decision in AliceaHernandez v. Catholic Bishop of Chicago, 320

F.3d 698 (7th Cir. 2003), which, in our opinion, is the better-reasoned approach."); Elvig, 375 F.3d at 960 n.4 ("The Seventh Circuit would perhaps sweep up Elvig's claim within its blanket statement that the 'ministerial exception' applies without regard to the type of claims being brought. Alicea-Hernandez, 320 F.3d at 703." In this decision, we remove any doubt as to where we stand. . . .

HAMILTON, Circuit Judge, joined by ROVNER and WOOD, Circuit Judges, dissenting.

The majority opinion decides a hard question but makes it look easy. The majority holds that the "ministerial exception" recognized in First Amendment doctrine bars any hostile environment employment claims by "ministerial employees." The majority tells us that the risks of unconstitutional intrusion and entanglement between civil courts and faith communities are just too great to allow any such lawsuit. This bar will apply regardless of how severe, pervasive, or hostile the work environment is, regardless of whether the hostility is motivated by race, sex, national origin, disability, or age, and regardless of whether the hostility is tied to religious faith and practice. I respectfully dissent.

The majority opinion makes the case look easy by scarcely acknowledging or engaging with the arguments on the other side. It also disregards the limits the Supreme Court imposed on its decision in Hosanna-Tabor, where the Court made clear it was deciding only that the ministerial exception applies to terminations of ministers. By focusing too much on religious liberty and too little on counterarguments and other interests, the majority opinion takes our circuit's law beyond necessary protection of religious liberty. It instead creates for religious institutions a constitutional shelter from generally applicable laws, at the expense of the rights of employees.

We should instead stick with the panel's more cautious approach to this relatively new and rare question. We should weigh competing interests case-by-case to protect both religious liberty and laws against employment discrimination.

(First,) the Supreme Court has not decided this question. By taking broad quotations out of context, the majority opinion gives the impression that the Supreme Court has already decided the question in this case in Hosanna-Tabor and Our Lady of Guadalupe School v. Morrissey-Berru, 140 S. Ct. 2049 (2020). It has not, and it has taken pains to say it has not.

In Hosanna-Tabor, the Supreme Court first recognized the ministerial exception that every circuit had recognized. The plaintiff in that case was a ministerial employee (a "called" teacher in a religious school) who had been fired to retaliate against her for trying to assert her rights under the Americans with Disabilities Act. The Supreme Court affirmed summary judgment for the employer. Hosanna-Tabor said that the ministerial exception is not a statutory interpretation. It is an application of the First Amendment: "Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a

mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs."

The majority errs by disregarding the limits the Supreme Court put on its decision. The Court was working against the backdrop of more than a century of precedents of church encounters with civil authority. The Court was therefore cautious in Hosanna-Tabor, saying that it was not deciding the question we face here, which is whether the ministerial exception applies to suits that do not result from the firing of a ministerial employee:

> The case before us is an employment discrimination suit brought on behalf of a minister, challenging her church's decision to fire her. Today we hold only that the ministerial exception bars such a suit. We express no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers.

565 U.S. at 196. Because Demkovich's amended complaint addresses only his treatment by his supervisor while he was employed and does not challenge his firing or any other tangible employment action, it falls squarely into the area that Hosanna-Tabor expressly declined to reach.

The majority here also quotes references in Our Lady of Guadalupe to a church's "employment relationship" with its ministers. From these unqualified references, the majority seems to infer that Our Lady of Guadalupe drove past the guardrail in Hosanna-Tabor without actually saying so. That's a misreading of the opinion. Hosanna-Tabor recognized the ministerial exception for the first time in Supreme Court jurisprudence, but with the limits just noted. Our Lady of Guadalupe decided an apparent circuit split on how courts should decide who counts as a ministerial employee.

(Second), circuits and state courts are split on the question before us. The circuit split is a sign that the question before us is not as easy as the majority presents it. In applying the ministerial exception, the Ninth Circuit has drawn a line between tangible employment actions and hostile environment claims. In Bollard v. California Province of the Society of Jesus, 196 F.3d 940 (9th Cir. 1999), plaintiff had been training for the priesthood. He alleged that his superiors subjected him to sexual harassment so severe that he left the Jesuit order before taking vows as a priest. The district court dismissed under the then-emerging ministerial exception.

The Ninth Circuit reversed, emphasizing that the case did not present any challenge to "the Jesuit order's choice of representative, a decision to which we would simply defer without further inquiry." The Jesuits also did not defend the alleged harassment as motivated by religious faith; the Jesuits condemned it.

The Ninth Circuit found that the Free Exercise Clause did not require the courts to deny relief on the hostile environment claim:

> The Free Exercise Clause rationale for protecting a church's personnel decisions concerning its ministers is the necessity of allowing the church to choose its

> representatives using whatever criteria it deems relevant. That rationale does not apply here, for the Jesuits most certainly do not claim that allowing harassment to continue unrectified is a method of choosing their clergy. Because there is no protected-choice rationale at issue, we intrude no further on church autonomy in allowing this case to proceed than we do, for example, in allowing parishioners' civil suits against a church for the negligent supervision of ministers who have subjected them to inappropriate sexual behavior.

A "generalized and diffuse concern" about church autonomy, the court added, was not enough to require dismissal.

Bollard went on to consider the problem of entanglement under the Establishment Clause. The court found there would be no need to evaluate religious doctrine or the "reasonableness" of Jesuit practices. Finding there would be no greater entanglement than in other private civil suits against a church, the Ninth Circuit found no constitutional barrier to the sexual harassment claim that did not challenge any tangible employment action.

The Ninth Circuit followed that same course in Elvig v. Calvin Presbyterian Church, 375 F.3d 951 (9th Cir. 2004), and drew essentially the same line the panel drew here. The plaintiff was an ordained minister. She alleged that a senior minister sexually harassed her and, after she protested, retaliated against her. The district court dismissed. Following Bollard, the Ninth Circuit reversed in part. The plaintiff could not challenge any tangible employment decisions but could pursue her hostile environment claims, including damages for emotional distress and reputational harm.

The Tenth Circuit took a different approach, expressly disagreeing with Bollard and Elvig in Skrzypczak v. Roman Catholic Diocese of Tulsa, 611 F.3d 1238 (10th Cir. 2010), where the plaintiff was a ministerial employee and sued for sex discrimination, including both tangible employment actions and a sexually hostile environment. The Tenth Circuit affirmed dismissal of all claims, reasoning as the majority does here that even the hostile environment claim would pose too great a threat of entanglement with religious matters.

(Third), the majority's rule draws an odd, arbitrary line in constitutional law. The central thrust of the majority opinion is that religious liberty will be undermined if churches are accountable in civil courts for what would otherwise be illegal discrimination against ministerial employees subjected to hostile work environments based on race, sex, disability, or national origin. To be clear, I agree that such cases raise serious concerns about protecting religious liberty, but defendants' cries of doom call for a little more skepticism. Churches and their leaders are already accountable in civil courts for many similar sorts of claims. Courts already navigate these waters with more attention to nuance and less reliance on absolute immunities. Religious liberty still thrives.

First, defendants and all members of this court agree that employment discrimination laws may be enforced against churches on behalf of non-ministerial employees. Those employees may assert rights against churches for discrimination in hiring, firing, compensation, and every other aspect of the employment relationship, including hostile environment claims. Second, defendants and all members of this court agree that even ministerial employees may assert tort claims against supervising ministers and churches as institutions. On-the-job conduct that supports statutory claims for hostile environment discrimination may also amount to torts, including assault and battery (when abuse is physical) and intentional infliction of emotional distress.

Third, defendants and all members of this court agree that supervising ministers may be subject to criminal law for crimes committed against church employees, including ministerial employees.

Fourth, defendants and all members of this court agree that churches and their ministers are subject to civil law—including tort and criminal law—for wrongs committed against parishioners and others. For example, cases of ministers sexually abusing parishioners, especially children, have become too familiar.

In each of these types of cases, there is some risk of burdening religious liberty and entangling civil and religious affairs. But the First Amendment does not categorically defeat any of them. Consider, for example, parish priests who sexually abused children and were transferred to other parishes. Investigations into tort and criminal liability of supervisors and churches as institutions cannot avoid looking into a church's supervision and control of a ministerial employee. Delicate legal questions may arise, but such investigations, civil suits, and even prosecutions may proceed. No one here suggests that the First Amendment flatly prohibits the inquiries. Instead, if a special difficulty arises under the First Amendment, courts will deal with it.

In this case, however, the majority adopts a broad exception for any hostile environment claims by ministerial employees. That produces an oddly arbitrary line. I see no good reason why the careful, case-by-case approach to First Amendment issues is appropriate in these other categories of cases but is intolerable in this one.

(Fourth), the line between tangible employment actions and hostile environments fits the purposes of the ministerial exception. Defendants say this category of cases is special because of the central role of ministers and churches' need to be able to select and supervise them. That need lies at the heart of the ministerial exception, as the Supreme Court explained in Hosanna-Tabor and repeated in Our Lady of Guadalupe.. But the defendants' answer is too glib.

The First Amendment question has never been what sorts of legal immunities might help churches. As Bollard teaches, the question is whether this particular legal immunity "is necessary

to comply with the First Amendment." After all, we are talking here about imposing constitutional restrictions on Congressional power to protect employees from invidious discrimination based on race, sex, disability, or national origin. The government's interest in preventing such discrimination has long been recognized as "compelling" for purposes of constitutional analysis, e.g., New York State Club Ass'n v. City of New York, 487 U.S. 1, 14 n.5 (1988), and one that Congress considered a policy "of the highest priority." Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 & n.3 (1968), citing committee reports on what became the Civil Rights Act of 1964.

To answer whether this additional immunity from hostile environment claims is necessary, we should start with powers that are undisputed: the powers churches already have to select and control their ministers, free of constraints from employment discrimination and other laws. Hiring, firing, promoting, retiring, transferring—these are decisions that employers, including religious organizations, make to select those who carry out their work. The latent power to take such actions offers other tools for control. Further control is available through many other tangible employment actions, including decisions about compensation, benefits, working conditions, resources available to do the job, training, support from other staff and volunteers, and so on.

Employment discrimination law is built on the recognition that employers have these powers to control their employees. As the Supreme Court explained in Ellerth: "Tangible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates" and require "an oficial act of the enterprise." Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 762 (1998). Control is the very point of those powers. As Ellerth explained, that's why employers are held accountable for these tangible decisions when managers make them with an unlawful purpose.

Hostile environment claims, while they may arise under the same statutes, involve quite different elements and special rules for employer liability. The differences show that religious employers do not need exemption from such claims to be able to select, supervise, or control their ministers.

Hostile environment claims, which are essentially tortious in nature, are by definition based on actions that are not necessary for effective supervision of employees. In general, "sexual harassment by a supervisor is not conduct within the scope of employment," so the employer cannot be held liable for that conduct. However, "an employer can be liable, nonetheless, where its own negligence is a cause of the harassment," or where the supervisor takes tangible employment action against the employee. If no tangible employment action is taken, these rules treat harassment as a tort committed by a supervisor against an employee but acting outside the scope of the supervisor's employment.

Defendants here argue in effect that their power as employers to take tangible employment actions against ministerial employees does not give them enough power to select, supervise, and control those employees. But the Supreme Court's leading case on the subject teaches that a hostile work environment, by definition, simply is not a permissible means of exerting (constitutionally protected) "control" over employees and accomplishing the mission of the business or religious organization. Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993). The conduct plaintiff alleges here is classic tortious harassment under Harris, Ellerth, Faragher, Meritor Savings Bank FSB v. Vinson, 477 U.S. 57, 65-66 (1986), and countless other cases in the lower courts: his supervisor allegedly subjected him to a campaign of verbal abuse based on his sex, sexual orientation, and disabilities, ultimately interfering with his job performance and mental and physical health. Or so we must assume here on the pleadings.

An employer's need and right to control employees should not embrace harassing behavior that the Supreme Court has defined in numerous cases as conduct that "unreasonably interferes with an employee's work performance." The notion that such harassment is somehow necessary to control or supervise an employee is, under employment discrimination law, an oxymoron.

The majority tells us, however, that hostile environment claims by ministerial employees threaten religious liberty because they will cast a shadow over a supervisory minister's "counseling" of a wayward subordinate. With respect, neither defendants nor the majority have identified any cases actually challenging counseling or good-faith supervision in the decades that such cases might have been brought. The suggestion that federal courts cannot tell the difference between pastoral counseling, even with "tough love" or "stern counseling" as the majority puts it, and torrents of the most vile and abusive epithets aimed at race, sex, sexual orientation, and disability does not give sufficient credit to the federal courts. Courts have been protecting religious liberty for generations by policing lines far more subtle than the one that worries defendants and the majority in this case.

(Fifth), the majority departs from a long practice of carefully balancing civil law and religious liberty. Application of employment discrimination laws, including in hostile environment claims, poses some risk of "entanglement" between civil power and churches. But that recognition should be only the beginning of the analysis, not the end. Where faith communities encounter civil law, American courts have a long history of balancing the powerful interests on both sides to protect religious freedom while enforcing other important legal rights. The problem here is particularly sensitive, involving tension between the freedom of religion and employees' rights to be free from invidious discrimination.

The cases speak of both procedural and substantive entanglement. Defendants argue that both are inevitable here. Yet courts have relatively little experience with hostile environment claims by ministerial employees against religious employers. Perhaps defendants' predictions of intolerable abuses and intrusions may come true. Yet in more than twenty years, they have not in

the Ninth Circuit. Until shown otherwise, I believe courts can manage a balance that respects the rights of both churches and their employees.

Procedural entanglement may result from "a protracted legal process pitting church and state as adversaries," in which the religious organization would be subjected to "the full panoply of legal process designed to probe the mind of the church," including "far-reaching" remedies and "continued court surveillance of the church's policies and decisions" even after final judgment. Rayburn v. General Conference of Seventh-Day Adventists, 772 F.2d 1164, 1171 (4th Cir. 1985). Substantive entanglement occurs "where the Government is placed in a position of choosing among competing religious visions." E.E.O.C. v. Catholic University of America, 83 F.3d 455, 465 (D.C. Cir. 1996).

The potential for procedural entanglement does not justify a categorical rule against all hostile environment claims by ministerial employees. Religious employers have long been subject to employment discrimination suits by their non-ministerial employees. The processes of civil litigation can be intrusive, of course; no employer welcomes them. But civil litigation of such claims against religious employers has not been deemed a sufficient basis to require dismissal. Tort, contract, and property cases are not barred categorically. Procedural entanglement is not necessarily any more a concern with hostile environment claims by ministerial employees than with claims by non-ministerial employees. These cases are no more suitable for a one-size-fits-all prohibition. . . .

Accordingly, the potential for procedural entanglement should not bar plaintiff's claims here entirely. Courts can and should deal with procedural entanglement problems as they arise, not close the courthouse to the entire category of cases.

The more difficult problems arise here in terms of potential substantive entanglement. Again, though, we need to keep in mind that some entanglement is "inevitable" and that only "excessive" entanglement violates the First Amendment. Courts have managed potential entanglement problems in church litigation across a range of subjects, from contracts and property disputes to employment disputes, torts, and church elections and schisms. The general parameters are familiar. Civil courts must not decide questions of correct faith and practice, such as deciding which of two rival groups seeking control of church property has the better theological or doctrinal arguments. At the same time, civil courts sometimes must decide questions of property, contract, tax, or tort law in cases involving churches. They may do so if they avoid issues of faith and stick to applying neutral, secular principles of law. . . .

If we consider the full sweep of the case law, rather than just one side of it, we see a need for balance and nuance, not new absolute rules in constitutional law. In this case, plaintiff is not asking the court to pass on the substance of the Catholic Church's religious doctrines or practices. Civil courts have nothing to say about whether the Church should permit same-sex marriage, for example, or whether the Church should have a hierarchical supervisory structure.

The Church was free to decide whether to retain plaintiff or fire him. But plaintiff's hostile work environment claims allege conduct that constituted abuse under neutral, generally applicable standards that would be enforceable on behalf of a non-ministerial employee. That conduct is, by definition, not necessary to control or supervise any employee. As in cases applying secular legal rules to torts, contracts, or property disputes, I would hold that courts may apply secular hostile-environment law to actions taken toward all employees, including ministers, absent a showing that the circumstances of the particular case will require excessive entanglement between civil and religious realms.

(Sixth), Consequences and Stakes. Finally, it is important to look past the abstractions about religious liberty and past the factual details of this case. We should consider the full range of facts that might prompt ministerial employees to bring hostile environment claims that the majority now bars. We know that people who exercise authority within churches can be all too human. Casebooks and news reports tell us of cases of sexual harassment by ministers, sometimes directed at parishioners, sometimes at non-ministerial employees, and sometimes at other (typically less senior) ministers. As noted in the panel majority, within this circuit alone, hostile environment claims have been brought against other types of employers on the basis of highly disturbing facts. In briefs and oral argument, defendants have acknowledged that a religious employer could be held civilly liable for a supervisor's criminal or tortious conduct toward a ministerial employee, or for [a] pattern of racial abuse and harassment. Such cases would not violate the supervisor's or the employer's First Amendment rights. If criminal or tort cases do not, then it is hard to see why a statutory case based on the same conduct would necessarily violate the First Amendment, whether or not the supervisor claims a religious motive.

Given that the ministerial exception is driven by constitutional necessity, it is difficult for me to conclude that the First Amendment requires immunity where supervisors and coworkers of ministerial employees, for example, leave nooses at the desk of a Black minister while repeatedly subjecting him to verbal abuse with racial epithets and symbols, or subject one teacher to pervasive and unwelcome sexual attention, or subject another to intimidating harassment based on national origin. Such harassment simply is not necessary to "control" ministerial (or any other) employees. We may all hope that such extreme allegations against religious organizations would be very rare. Yet the majority's holding today will put even this sort of extreme conduct beyond the reach of employment discrimination statutes.

From a practical standpoint, the majority's decision also raises the stakes for future decisions about who should be deemed a "ministerial" employee. Here we deal with alleged abuse of a music minister by a parish priest of the Catholic Church, two men surely at the core of the ministerial exception. Yet many employers with religious affiliations, such as hospitals and schools, are trying to expand the reach of the ministerial exception to cover a much broader range of their employees, such as teachers, nurses, and other health-care workers. Hosanna-Tabor and Our Lady of Guadalupe both involved schools and teachers, of course.

Lawyers for such employers have been offering public advice about how to try to expand the reach of the ministerial exception as far as possible. One group advises, for example: "by distributing religious duties to as many staff members as is reasonably appropriate, a religious organization can increase the perception that employees who have those duties are ministers. Assigning employees responsibilities in prayer and devotions, including leading staff devotional studies, or responsibilities to provide congregational/member care, move those employees toward the 'minister' end of the spectrum." Donn C. Meindertsma, Employment Law for Ministries, Conner Winters (Mar. 2019), https://www.cwlaw.com/newsletters-40 (last visited July 8, 2021). Consistent with these efforts, in other cases religious employers have invoked the ministerial exception more broadly than seems reasonable. Also, of course, federal courts are familiar with cases of doctors sexually harassing nurses and principals sexually harassing teachers. The combination of the majority's holding in this case with efforts to expand the categories of employees deemed "ministerial" threatens to leave many without basic legal protection of their dignity and employment.

* * *

The hostile environment claims before us present a conflict between two of the highest values in our society and legal system: religious liberty and non-discrimination in employment. The Supreme Court has not answered this question, nor does the First Amendment itself. Circuits and state courts are divided. For the reasons explained above and in the panel majority, I submit that the majority's absolute bar to statutory hostile environment claims by ministerial employees is not necessary to protect religious liberty or to serve the purposes of the ministerial exception. The majority's reasoning also stands in tension with the other categories of similar cases that may proceed in civil courts. I would allow plaintiff to pursue his hostile environment claims with the understanding that the district court should intervene if the specific case poses a serious threat to religious liberty.

Notes and Questions

1. There is no dispute between the majority and the dissent about whether Sandor Demkovich was a "ministerial employee." The Supreme Court's leading decisions, Hosanna-Tabor and Our Lady of Guadalupe, both faced that issue in the context of teachers of non-religious subjects (English, Math, Science) in religious schools. In Our Lady of Guadalupe, the Court expanded on its analysis in Hosanna-Tabor to find that it is not required that a teacher have any particular religious training or title to be considered a ministerial employee, so long as the teacher plays some role in the religious education or activities of their students. Given that expansive view, do you have any doubt that the Music Director of a church, who also rehearses and conducts its choir and plays the organ during church services, in collaboration with the service officiant in selecting the music and presenting the service, would be considered a ministerial employee? The dissent notes efforts by religious hospitals to extend the category of ministerial employees to

include, for example, nurses and other supporting staff. Does the 1st Amendment's support for religious liberty require the creation of such a broad category of employees exempt from the protections of anti-discrimination law on the basis of race, sex (including sexual orientation and gender identity), national origin, age, or disability?

2. In the split of circuit authority, which would be the preferred approach in your view? To categorically exclude hostile environment harassment claims by ministerial employees, or to engage in a balancing test under which such claims could be brought if the harassment was truly severe (as it would have to be to state a claim under Supreme Court precedents) and the religious employer could not cite any principle of religious doctrine to support the challenged action?

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, not by the government. 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 a supplement to Chapter 2, as this part of the 6th Circuit's ruling provides an interesting analysis of the RFRA defense to a Title VII claim. Even though the underlying claim is for gender identity discrimination, the RFRA analysis would presumably be the same if the claim was based on sexual orientationl

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. The Equality Act, a bill pending in Congress, would clarify that religious free exercise claims may not be a defense to anti-discrimination charges under federal law.

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

sexstereotyping 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 selfreliant 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 – Gender Identity and the Law

The next edition of the Casebook will totally reorganize Chapter 3 in light of the extraordinary developments in gender identity law since the 3rd Edition was published.

Section D, from page 413 to page 422 in the Casebook, is now subsumed under the Supreme Court's decision in Bostock v. Clayton County, Georgia, found in Chapter 1, in which it affirmed the 6th Circuit's Title VII ruling in the Harris Funeral Home, which can be found in the Casebook on page 472 to page 490 and can be omitted unless instructors feel that the cursory treatment of gender identity in Justice Gorsuch's opinion should be supplemented by the 6th Circuit's discussion in this case.

In the next edition of the Casebook, there will be a separate Section on Transgender Inmates and the 8th Amendment. The central cases would be Fields v. Smith, 653 F.3d 550 (7th Cir., 2011), cert. denied, 132 S. Ct. 1810 (2012), and Edmo v. Corizon, 935 F. 3d 757 (9th Cir., 2019), cert

denied, 141 S. Ct. 610 (2020). Fields is on page 422 of the Casebook, and Edmo can be found below on page __ of this Supplement.

Section D should be renamed as Legal Recognition of Gender Identity, and begins with Emani Love v. Ruth Johnson, 146 F. Supp. 3d 848 (E.D. Mich. 2015), beginning on page 431 of the Casebook.

Page 445. Add new Note 3:

The Utah Supreme Court ruled in In the MATTER OF the Sex Change of Sean W. Childers-Gray, 487 P.3d 96 (2021), that Utah courts had common law powers to order a change of sex designation despite the lack of specific statutory authorization to do so. The court derived its ruling from the statutory provisions authorizing courts to order name changes (which mentioned in passing a sex change as a reason for a name change), and, addressing the issue at a conceptual level, found that the name of a person is an aspect of their legal identity and status, and that it was well within the jurisdiction of the state courts to handle both issues at the same time. Thus, the trial court erred by granting name changes to transgender applicants but refusing to make a declaration of gender due to the lack of express statutory authorization to do so. The court said that an applicant for a change of sex designation from that indicated on their birth certificate should provide evidence that a licensed health care provider had provided treatment to effect a change of gender. A lengthy dissenting opinion charged the court with legislating.

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

Whitaker v. Kenosha Unified School District, on page 457 in the Casebook, remains a leading case on this issue.

At Page 471, Note 1, substitute the following:

1. The Supreme Court denied cert in this case, 138 S. Ct. 1260 (2018). A settlement had been reached in mediation, but ultimately collapsed. The Supreme Court also subsequently denied review in a similar case from the 4th Circuit, Grimm v. Gloucester County School Board, 972 F.3d 586, motion for rehearing en banc denied, 976 F.3d 399 (2020), cert denied, June 28, 2021.

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.) and the Supreme Court subsequently denied a petition for certiorari, 141 S.Ct. 894 (2020), and the Supreme Court subsequently denied a petition for certiorari. 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 with Note 3 through the end of Notes and Questions on Page 491 – Omit this section of the casebook. These pages include the 6th Circuit Court of Appeals' opinion in the Harris Funeral Home case, which has since been decided by the U.S. Supreme Court as part of Bostock v. Clayton County, Georgia, and is included in this Supplement in Chapter One on the Title VII interpretation issue. A portion of the 6th Circuit opinion is provided elsewhere in this supplement on the issue of possible application of the Religious Freedom Restoration Act as a defense by an employer with religious objections to transgender status.]

Page 471 – New Note 3:

New Note 3: The Trump Administration withdrew the Obama Administration's interpretation of Title IX and in the spring of 2020 adopted a new interpretive rule providing that Title IX did not apply to gender identity claims. That rule was published in the Federal Register shortly *after* the Supreme Court ruled in Bostock v. Clayton County that discrimination because of transgender status is a form of discrimination because of sex in construing Title VII. As most courts in Title IX cases follow Title VII interpretive precedents of the Supreme Court, lower federal courts confronting challenges to the Trump Administration's new rule had little trouble finding it to conflict with the statute. Upon taking office, President Joseph R. Biden, Jr., issued an executive order directing Executive Branch agencies with enforcement authority over sex discrimination laws to follow the reasoning of Bostock unless there was some good reason not to do so in the context of a particular statute. Subsequently, the Justice Department (Civil Rights Division) and the Education Department issued formal interpretations of Title IX to cover gender identity discrimination claims, withdrawing the Trump Administration's interpretive rule, and the Supreme Court denied a petition for certiorari in Grimm v. Gloucester County School Board.

New Note 4. In Meriwether v. Hartop, 992 F.3d 492 (6th Cir. 2021), a state university professor refused to comply with his school's requirement to respect the gender identity of students when addressing them or referring to them. After some incidents of the professor "misgendering" a transgender student in his class, the university investigated the student's complaint, put a

disciplinary letter in the professor's personnel file, and warned him that further incidents of misgendering could incur more significant discipline. He sued in federal court, claiming a violation of his 1st Amendment freedom of speech. The district court dismissed the case, but a three-judge panel of the 6th Circuit reversed, found that the professor's choice of language in addressing and mentioning the student was political speech on a topic of public concern that was protected by the 1st Amendment, implicitly finding that the professor's free speech rights outweighed the student's right to be free of gender identity discrimination under Title IX. The 6th Circuit denied a petition for rehearing en banc on July 8, 2021. In a similar case involving a high school teacher who refused to comply with the school's naming and pronoun policy for transgender students, a federal district court in Indiana rejected a similar constitutional claim, as well as a claim that the school was required under Title VII's ban on religious discrimination to "accommodate" the teacher's religious beliefs by allowing him to address all students by their last names without using pronouns, as the court found this would impose an undue hardship on the school. See Kluge v. Brownsburg Community School Corporation, 432 F. Supp. 3d 823 (S.D. Ind. 2020) (dismissing constitutional claim); 2021 WL 2915023 (S.D. Ind. 2021) (granting summary judgment to school corporation on Title VII claim).

Page 491 – Insert the following text and case:

A newly emerging issue involving transgender students pertains to their right to participate in scholastic sports competition. The ability of transgender women to compete as women was one of the earliest gender identity legal issues to be litigated. In 1977, a New York trial judge ruled in Richards v. United States Tennis Association, 93 Misc. 2d 713 (N.Y. Sup. Ct., N.Y. County), that USTA violated the rights of a transgender woman by refusing to allow her to compete in the U.S. Open Tennis Tournament at Forest Hills as a woman, based on her inability to pass the Barr Body Test, which purported to show whether an individual was genetically female. See page 364 in the casebook. Ironically, as the issue of transgender women competing in sports heated up more than 40 years later, Renee Richards announced that she now agreed with those who contended that transgender women should generally not be allowed to compete as women, at least if, like her, they had not transitioned until adulthood and thus had gone through puberty as a man.

* * * * * * *

Beginning during the Trump Administration, Republican state legislators, abetted by the U.S. Department of Education (which contended that Title IX of the Education Amendments of 1972 did not cover gender identity discrimination claims), introduced bills in many states providing that only those identified as female at birth could compete in women's scholastic sports activities, and were successful in getting several enacted. In the following opinion, a federal district judge considers a legal challenge to such a law enacted in Utah.

Hecox v. Little

U.S. Dist. Ct., D. Idaho
479 F. Supp. 3d 930 (2020)

David C. Nye, Chief U.S. District Court Judge

I. OVERVIEW

The primary question before the Court—whether the Court should enjoin the State of Idaho from enforcing a newly enacted law which precludes transgender female athletes from participating on women's sports—involves complex issues relating to the rights of student athletes, physiological differences between the sexes, an individual's ability to challenge the gender of other student athletes, female athlete's rights to medical privacy and to be free from potentially invasive sex identification procedures, and the rights of all students to have complete access to educational opportunities, programs, and activities available at school. The debate regarding transgender females' access to competing on women's sports teams has received nationwide attention and is currently being litigated in both traditional courts and the court of public opinion.

Despite the national focus on the issue, Idaho is the first and only state to categorically bar the participation of transgender women in women's student athletics. This categorical bar to girls and women who are transgender stands in stark contrast to the policies of elite athletic bodies that regulate sports both nationally and globally—including the National Collegiate Athletic Association ("NCAA") and the International Olympic Committee ("IOC")—which allow transgender women to participate on female sports teams once certain specific criteria are met.

In addition to precluding women and girls who are transgender and many who are intersex from participating in women's sports, Idaho's law establishes a "dispute" process that allows a currently undefined class of individuals to challenge a student's sex. Idaho Code § 33-6203(3). If the sex of any female student athlete—whether transgender or not—is disputed, the student must undergo a potentially invasive sex verification process. This provision burdens all female athletes with the risk and embarrassment of having to "verify" their "biological sex" in order to play women's sports. Similarly situated men and boys—whether transgender or not—are not subject to the dispute process because Idaho's law does not restrict individuals who wish to participate on men's teams.

Finally, as an enforcement mechanism, Idaho's law creates a private cause of action against a "school or institution of higher education" for any student "who is deprived of an athletic opportunity" or suffers any harm, whether direct or indirect, due to the participation of a woman who is transgender on a women's team. Id. § 33-6205(1). Idaho schools are also

precluded from taking any "retaliation or other adverse action" against those who report an alleged violation of the law, regardless of whether the report was made in good faith or simply to harass a competitor. Id. at § 33-6205(2).

Plaintiffs seek a preliminary injunction which would enjoin enforcement of Idaho's law pending trial on the merits . . . To issue an injunction preserving the status quo by enjoining the law's enforcement, the Court must primarily decide whether Plaintiffs have constitutional and prudential standing to challenge the law, whether they state facial or only as-applied constitutional challenges, and whether they are likely to succeed on their claim, based upon the current record, that the law violates the Equal Protection Clause of the Fourteenth Amendment.

II. BACKGROUND

On March 30, 2020, Idaho Governor Bradley Little ("Governor Little") signed the Fairness in Women's Sports Act (the "Act") into law. Idaho Code Ann. § 33-6201–6206.1 Plaintiffs' Complaint challenges the constitutionality of the Act. Among other things, Plaintiffs contend that the Act violates their constitutional rights to equal protection, due process, and the right to be free from unconstitutional searches and seizures. Plaintiffs seek preliminary relief solely on their equal protection claim, arguing the Act discriminates on the basis of transgender status by categorically barring transgender women from participating in women's sports, and also discriminates on the basis of sex by subjecting all women student-athletes to the risk of having to undergo invasive, unnecessary tests to "verify" their sex, while permitting all men student-athletes to participate in men's sports without such risk.

A. Definitions

As the Third Circuit recently explained, in the context of issues such as those raised in the instant case, "such seemingly familiar terms as 'sex' and 'gender' can be misleading." Doe ex rel. Doe v. Boyertown Area Sch. Dist., 897 F.3d 518, 522 (3d Cir. 2018). The Court accordingly begins by defining relevant terms utilized in this decision.

"Sex" is defined as the "anatomical and physiological processes that lead to or denote male or female. Typically, sex is determined at birth based on the appearance of external genitalia." A person's "gender identity" is his or her "deep-core sense of self as being a particular gender." "Although the detailed mechanisms are unknown, there is a medical consensus that there is a significant biologic component underlying gender identity." The term "cisgender" refers to a person who identifies with the sex that person was determined to have at birth. Boyertown, 897 F.3d at 522.

"Transgender" refers to "a person whose gender identity does not align with the sex that person was determined to have at birth." A transgender woman "is therefore a person who has a lasting, persistent female gender identity, though the person's sex was determined to be male at

birth." Transgender individuals may experience "gender dysphoria," which is "characterized by significant and substantial distress as result of their birth-determined sex being different from their gender identity." "In order to be diagnosed with gender dysphoria, the incongruence must have persisted for at least six months and be accompanied by clinically significant distress or impairment in social, occupational, or other important areas of functioning." If left untreated, symptoms of gender dysphoria can include severe anxiety and depression, suicidality, and other serious mental health issues.. Attempted suicide rates in the transgender community are over 40%..

The term "intersex" is an umbrella term for a person "born with unique variations in certain physiological characteristics associated with sex, "such as chromosomes, genitals, internal organs like testes or ovaries, secondary sex characteristics, or hormone production or response." Some intersex traits are identified at birth, while others may not be discovered until puberty or later in life, if ever.

B. The Parties

1. Plaintiffs

Plaintiffs in this action include Lindsay Hecox, and Jean and John Doe on behalf of their minor daughter, Jane Doe (collectively "Plaintiffs"). Lindsay is a transgender woman athlete who lives in Idaho and attends Boise State University ("BSU"). As part of her treatment for gender dysphoria, Lindsay has undergone hormone therapy by being treated with testosterone suppression and estrogen, which lower her circulating testosterone levels and affect her bodily systems and secondary sex characteristics. Lindsay is a life-long runner who intends to try out for the BSU women's cross-country team in fall 2020, and for the women's track team in spring 2021. Under current NCAA rules, Lindsay could compete at NCAA events in September—when she has completed one year of hormone treatment.

Jane is a 17-year old girl and athlete who is cisgender. Jane has played sports since she was four and competes on the soccer and track teams at Boise High School, where she is a rising senior. After tryouts in August, Jane intends to play on Boise High's soccer team again in fall 2020. Because most of her closest friends are boys, she has an athletic build, rarely wears skirts or dresses, and has at times been thought of as "masculine," Jane worries that one of her competitors may dispute her sex pursuant to section 33-6203(3) of the Act.

2. Defendants

The defendants named in this action (collectively "Defendants") include Governor Little [and a long list of other Idaho government officials.]

3. Proposed Intervenors

Proposed intervenors Madison ("Madi") Kenyon and Mary ("MK") Marshall (collectively "Madi and MK" or the "Proposed Intervenors") are Idaho cisgender female athletes. Like Lindsay and Jane, Madi and MK are "female athletes for whom sports is a passion and life-defining pursuit." Madi and MK both run track and cross-country on scholarship at Idaho State University ("ISU") in Pocatello, Idaho. Both competed against a transgender woman athlete last year at the University of Montana and had "deflating experiences" of running against and losing to that athlete. The Proposed Intervenors support the Act and wish to have their personal concerns fully set forth and represented in this case.

C. The Act

1. Overview

Idaho passed House Bill 500 ("H.B. 500"), the genesis for the Act, on March 16, 2020. In the United States, high school interscholastic athletics are generally governed by state interscholastic athletic associations, such as the Idaho High School Activities Association ("IHSAA"). The NCAA sets policies for member colleges and universities, including BSU. Prior to the passage of H.B. 500, the IHSAA policy allowed transgender girls in K-12 athletics in Idaho to compete on girls' teams after completing one year of hormone therapy suppressing testosterone under the care of a physician for purposes of gender transition. Similarly, the NCAA policy allows transgender women attending member colleges and universities in Idaho to compete on women's teams after one year of hormone therapy suppressing testosterone.

2. Legislative History

On February 19, 2020, the House State Affairs Committee heard testimony on H.B. 500. Ty Jones, Executive Director of the IHSAA, answered questions at that hearing and noted that no Idaho student had ever complained of participation by transgender athletes, and no transgender athlete had ever competed under the IHSAA policy regulating inclusion of transgender athletes. In addition, millions of student-athletes have competed in the NCAA since it adopted its policy in 2011 of allowing transgender women to compete on women's teams after one year of hormone therapy suppressing testosterone, with no reported examples of any disturbance to women's sports as a result of transgender inclusion. Rep. Ehardt admitted during the hearing that she had no evidence any person in Idaho had ever challenged an athlete's eligibility based on gender.

On February 25, 2020, Idaho Attorney General Lawrence Wasden ("Attorney General Wasden") warned in a written opinion letter that H.B. 500 raised serious constitutional and other legal concerns due to the disparate treatment and impact it would have on both transgender and intersex athletes, as well as its potential privacy intrusion on all female student athletes. On February 26, 2020, the House debated the bill. Rep. Ehardt referred to two high school athletes in Connecticut and one woman in college who are transgender and who participated on teams for

women and girls. Rep. Ehardt argued that the mere fact of these athletes' participation exemplified the "threat" the bill sought to address. The bill passed the House floor after the debate.

After passage in the House, H.B. 500 was heard in the Senate State Affairs Committee and was passed out of Committee on March 9, 2020. The next day, the bill was sent to the Committee of the Whole Senate for amendment, and minor amendments were made. One day later, on March 11, 2020, the World Health Organization declared COVID-19 a pandemic and many states adjourned state legislative sessions indefinitely. By contrast, the Idaho Senate remained in session and passed H.B. 500 as amended on March 16, 2020. After the House concurred in the Senate amendments, the bill was delivered to Governor Little on March 19, 2020.

Professor Dorianne Lambelet Coleman, whose work was cited in the H.B. 500 legislative findings, urged Governor Little to veto the bill, explaining her research was misused and that "there is no legitimate reason to seek to bar all trans girls and women from girls' and women's sport, or to require students whose sex is challenged to prove their eligibility in such intrusive detail." Professor Coleman endorsed the existing NCAA rule, which mirrors the IHSAA policy, and stated: "No other state has enacted such a flat prohibition against transgender athletes, and Idaho shouldn't either."

Five former Idaho Attorneys General likewise urged Governor Little to veto the bill "to keep a legally infirm statute off the books." They urged Governor Little to "heed the sound advice" of Attorney General Wasden, who had "raised serious concerns about the legal viability and timing of this legislation." Nevertheless, based on legislative findings that, inter alia, "inherent, physiological differences between males and females result in different athletic capabilities," Governor Little signed H.B. 500 into law on March 30, 2020.

For purpose of the instant motions, the Act contains three key provisions. First, the Act provides that "interscholastic, intercollegiate, intramural, or club athletic teams or sports that are sponsored by a public primary or secondary school, a public institution of higher education, or any school or institution whose students or teams compete against a public school or institution of higher education" shall be "expressly designated as one (1) of the following based on biological sex: (a) Males, men, or boys; (b) Females, women, or girls; or (c) Coed or mixed." Idaho Code § 33-6203(1). The Act mandates, "[a]thletic teams or sports designated for females, women, or girls shall not be open to students of the male sex." Id. at § 33-6203(2). The Act does not contain comparable limitation for any individuals—whether transgender or cisgender—who wish to participate on a team designated for males.

Second, the Act creates a dispute process for an undefined class of individuals *949 who may wish to "dispute" any transgender or cisgender female athlete's sex. This provision provides:

> A dispute regarding a student's sex shall be resolved by the school or institution by requesting that the student provide a health examination and consent form or other statement signed by the student's personal health care provider that shall verify the student's biological sex. The health care provider may verify the student's biological sex as part of a routine sports physical examination relying only on one (1) or more of the following: the student's reproductive anatomy, genetic makeup, or normal endogenously produced testosterone levels. The state board of education shall promulgate rules for schools and institutions to follow regarding the receipt and timely resolution of such disputes consistent with this subsection.

Id. at § 33-6203(3).

Third, the Act creates an enforcement mechanism to ensure compliance with its provisions. Specifically, the Act creates a private cause of action for any student negatively impacted by violation of the Act, stating:

> (1) Any student who is deprived of an athletic opportunity or suffers any direct or indirect harm as a result of a violation of this chapter shall have a private cause of action for injunctive relief, damages, and any other relief available under law against the school or institution of higher education.
> (2) Any student who is subject to retaliation or other adverse action by a school, institution of higher education, or athletic association or organization as a result of reporting a violation of this chapter to an employee or representative of the school, institution, or athletic association or organization, or to any state or federal agency with oversight of schools or institutions of higher education in the state, shall have a private cause of action for injunctive relief, damages, and any other relief available under law against the school, institution, or athletic association or organization.
> (3) Any school or institution of higher education that suffers any direct or indirect harm as a result of a violation of this chapter shall have a private cause of action for injunctive relief, damages, and any other relief available under law against the government entity, licensing or accrediting organization, or athletic association or organization.
> (4) All civil actions must be initiated within two (2) years after the harm occurred. Persons or organizations who prevail on a claim brought pursuant to this section shall be entitled to monetary damages, including for any psychological, emotional, and physical harm suffered, reasonable attorney's fees and costs, and any other appropriate relief.

II. ANALYSIS

Since there are three pending motions with different applicable legal standards, the Court will set forth the appropriate legal standard when addressing each motion. Because the Court's decision on the Motion to Intervene will determine the parties in this action, and its decision on the Motion to Dismiss will determine whether Plaintiffs may bring their Motion for a Preliminary Injunction, the Court begins with the Motion to Intervene, follows with Defendants'

Motion to Dismiss, and, since the Court finds the Motion to Dismiss is appropriately denied in part and granted in part, concludes with consideration of the Motion for Preliminary Injunction.

A. Motion to Intervene

[The court allowed the proposed Intervenors to participate as parties to defend the statute, finding that they were likely to make arguments that the government defendants were unlikely to make.]

B. Motion to Dismiss

Defendants filed a Motion to Dismiss Plaintiffs' action, contending Plaintiffs lack standing, that their claims are not ripe for review, and that their facial challenges fail as a matter of law.

2. Analysis

a. Standing

i. Lindsay [The court held that Lindsay has individual standing to challenge the law, which went into effect shortly after signing and categorically excluded transgender women from participating in women's sports, as well as subjecting them to invasive verification procedures if anybody challenged their female status as spelled out in the statute.]

ii. Jane

Jane has also alleged an injury in fact because, by virtue of the Act's passage, she is now subject to disparate, and less favorable, treatment based on sex. As a female student athlete, Jane risks being subject to the "dispute process," a potentially invasive and expensive medical exam, loss of privacy, and the embarrassment of having her sex challenged, while male student athletes who play on male teams do not face such risks. The Supreme Court has long recognized that unequal treatment because of gender like that codified by the Act "is an injury in fact" sufficient to convey standing. . . . As a cisgender girl who plays on the Boise High soccer team and who will run track on the girl's team in the spring, Jane is subject to worse and differential treatment than are similarly situated male students who play for boy's teams in Idaho. Jane has suffered an injury because she is subject to disparate rules for participation on girls' teams, while boys can play on boys' teams without such rules. . . . That Jane has not had her sex challenged does not change the fact that she is subject to different, and less favorable, rules for participation on girls' teams that similarly situated boys are not. . . . Because it finds both Lindsay and Jane have alleged an injury in fact, the Court turns to Defendants' ripeness argument.

b. Ripeness

[The court held that there was no problem with ripeness, as the case raises purely legal issues and the statute went into effect shortly after it was signed.]

c. Facial Challenge

[The court granted the defendant's motion to dismiss the facial challenge to the statute, but said that the challenge to the statute as applied to the plaintiffs could go forward.]

C. Motion for Preliminary Injunction (Dkt. 22)

2. Analysis

a. Equal Protection Clause

The Equal Protection Clause of the Fourteenth Amendment requires that all similarly situated people be treated alike. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439 (1985). Equal protection requirements restrict state legislative action that is inconsistent with core constitutional guarantees, such as equality in treatment. Obergefell v. Hodges, 576 U.S. 644 (2015). However, the Fourteenth Amendment's "promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons." Romer v. Evans, 517 U.S. 620, 631 (1996). The Supreme Court has attempted to reconcile this reality with the equal protection principle by developing tiers of judicial scrutiny. Latta v. Otter, 19 F. Supp. 3d 1054, 1073 (D. Idaho) ("Latta I"), aff'd, Latta v. Otter, 771 F.3d 456 (9th Cir. 2014) ("Latta II"). "The level of scrutiny depends on the characteristics of the disadvantaged group or the rights implicated by the classification."

When a state restricts an individual's access to a fundamental right, the policy must withstand strict scrutiny, which requires that the government action serves a compelling purpose and that it is the least restrictive means of doing so. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 16-17 (1973). The Supreme Court has recognized that the Constitution protects a number of fundamental rights, including the right to privacy concerning consensual sexual activity, Lawrence v. Texas, 539 U.S. 558, 578 (2003), the right to marriage, Obergefell, 135 S. Ct. at 2599, and the right to reproductive autonomy, Eisenstadt v. Baird, 405 U.S. 438, 455 (1972). Access to interscholastic sports is not, however, a constitutionally recognized fundamental right. See, e.g., Walsh v. La. High Sch. Athletic Ass'n, 616 F.2d 152, 159–60 (5th Cir. 1980) (explaining that a student's interest in playing sports "amounts to a mere expectation rather than a constitutionally protected claim of entitlement[.]").

When a fundamental right is not at stake, a court must analyze whether the government policy discriminates against a suspect class. Cleburne, 473 U.S. at 440 (identifying race, alienage, and national origin as suspect classifications vulnerable to pernicious discrimination).

Because government policies that discriminate on the basis of race or national origin typically reflect prejudice, such policies will survive only if the law survives strict scrutiny. Strict scrutiny review is so exacting that most laws subjected to this standard fail, leading one former Supreme Court Justice to quip that strict scrutiny review is "strict in theory, but fatal in fact." Fullilove v. Klutznick, 448 U.S. 448, 519 (1980).

Statutes that discriminate on the basis of sex, a "quasi-suspect" classification, need to withstand the slightly less stringent standard of "heightened" scrutiny. Craig v. Boren, 429 U.S. 190, 197 (1976); United States v. Virginia, 518 U.S. 515, 533 (1996) ("VMI"). To withstand heightened scrutiny, classification by sex "must serve important governmental objectives and must be substantially related to achievement of those objectives." Craig, 429 U.S. at 197. "The purpose of this heightened level of scrutiny is to ensure quasi-suspect classifications do not perpetuate unfounded stereotypes or second-class treatment."

The District of Idaho determined transgender individuals qualify as a quasi-suspect class in F.V. v. Barron, 286 F. Supp. 3d 1131, 1143–1145 (2018) ("Barron"). While not specifically stating that transgender individuals constitute a quasi-suspect class, the Ninth Circuit has also held that heightened scrutiny applies if a law or policy treats transgender persons in a less favorable way than all others. Karnoski v. Trump, 926 F.3d 1180, 1201 (9th Cir. 2019). Further, although in the context of Title VII, the Supreme Court has recently stated, "it is impossible to discriminate against a person for being ... transgender without discriminating against that individual based on sex." Bostock v. Clayton Cty., Ga., 140 S. Ct. 1731, 1741 (2020).

Finally, the least stringent level of scrutiny is rational basis review. Rational basis review is applied to laws that impose a difference in treatment between groups but do not infringe upon a fundamental right or target a suspect or quasi-suspect class. Heller v. Doe, 509 U.S. 312, 319–321 (1993). "[A] classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity." Id. at 319. Rational-basis review in equal protection analysis "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." FCC v. Beach Communications, Inc., 508 U.S. 307, 313 (1993)). Under rational basis review, a classification "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." Id. at 320.

b. Appropriate level of scrutiny

Plaintiffs argue heightened scrutiny is appropriate in this case because the Act discriminates on the basis of both transgender status and sex. Defendants acknowledge that the Act may be subject to heightened scrutiny but suggest the Act does not discriminate on the basis of transgender status or sex because it simply "treats all biological males the same and prohibits them from participating in female sports to protect athletic opportunities for biological females." While contending, "[n]either the Supreme Court nor the Ninth Circuit has recognized 'gender

identity' as a suspect class," the Intervenors argue the Act nonetheless passes heightened scrutiny. Finally, the United States contends that even assuming, arguendo, that the Act triggers heightened scrutiny, it "readily withstand[s] this form of review."

Because all parties focus their arguments on the Act's ability to withstand heightened scrutiny, and because the Court finds heightened scrutiny is appropriate pursuant to Craig, 429 U.S. at 197, 97 S.Ct. 451, VMI, 518 U.S. at 533, 116 S.Ct. 2264, Barron, 286 F. Supp. 3d at 1144, and Karnoski, 926 F.3d at 1201, the Court applies this level of review.

c. Likelihood of Success on the Merits-Lindsay

i. Discrimination based on transgender status

Defendants and the United States suggest the Act does not discriminate against transgender individuals because it does not expressly use the term "transgender" and because the Act does not ban athletes on the basis of transgender status, but rather on the basis of the innate physiological advantages males generally have over females. The Ninth Circuit rejected a similar argument in Latta II, 771 F.3d at 468. In Latta II, the Ninth Circuit considered defendants' claim that Idaho and Nevada's same-sex marriage bans did not discriminate on the basis of sexual orientation, but rather on the basis of procreative capacity. The Ninth Circuit rebuffed this contention, explaining:

> Effectively if not explicitly, [defendants] assert that while these laws may disadvantage some same-sex couples and their children, heightened scrutiny is not appropriate because differential treatment by sexual orientation is an incidental effect of, but not the reason for, those laws. However, the laws at issue distinguish on their face between opposite-sex couples, who are permitted to marry and whose out-of-state marriages are recognized, and same-sex couples, who are not permitted to marry and whose marriages are not recognized. Whether facial discrimination exists 'does not depend on why' a policy discriminates, 'but rather on the explicit terms of the discrimination.' Hence, while the procreative capacity distinction that defendants seek to draw could represent a justification for the discrimination worked by the laws, it cannot overcome the inescapable conclusion that Idaho and Nevada do discriminate on the basis of sexual orientation.

Id. at 467–68 (quoting Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. Johnson Controls, Inc., 499 U.S. 187, 199 (1991)).

Similarly, the Act on its face discriminates between cisgender athletes, who may compete on athletic teams consistent with their gender identity, and transgender women athletes, who may not compete on athletic teams consistent with their gender identity. Hence, while the physiological differences the Defendants suggest support the categorical bar on transgender

women's participation in women's sports may justify the Act, they do not overcome the inescapable conclusion that the Act discriminates on the basis of transgender status.

As mentioned, the Ninth Circuit has held that classifications based on transgender status are subject to heightened scrutiny. Karnoski, 926 F.3d at 1201. The Court accordingly applies heightened scrutiny to the Act. Under this level of scrutiny, four principles guide the Court's equal protection analysis. The Court: (1) looks to the Defendants to justify the Act; (2) must consider the Act's actual purposes; (3) need not accept hypothetical, post hoc justifications for the Act; and (4) must decide whether Defendants' proffered justifications overcome the injury and indignity inflicted on Plaintiffs and others like them. When applying heightened scrutiny, the Court does not adopt the strong presumption in favor of constitutionality or heavy deference to legislative judgments characteristic of rational basis review. Further, under heightened scrutiny review, the Court must examine the Act's "actual purposes and carefully consider the resulting inequality to ensure that our most fundamental institutions neither send nor reinforce messages of stigma or second-class status."

ii. The Ninth Circuit's holding in Clark

At the outset, the Court recognizes that sex-discriminatory policies withstand heightened scrutiny when sex classification is "not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances." Michael M. v. Superior Ct. of Sonoma Cty., 450 U.S. 464, 469 (1981) (upholding law that held only males criminally liable for statutory rape because the consequences of teenage pregnancy essentially fall only on girls, so applying statutory rape law solely to men was justified since men suffer fewer consequences of their conduct). The Equal Protection Clause does not require courts to disregard the physiological differences between men and women. Michael M., 450 U.S. at 481; Clark, 695 F.2d at 1131.

As repeatedly highlighted by Defendants, the Intervenors, and the United States (collectively hereinafter the Act's "Proponents"), the Ninth Circuit in Clark held that there "is no question" that "redressing past discrimination against women in athletics and promoting equality of athletic opportunity between the sexes" is "a legitimate and important governmental interest" justifying rules excluding males from participating on female teams. Clark, 695 F.2d at 1131. In Clark, the Ninth Circuit determined a policy in Arizona of excluding boys from girls' teams simply recognized "the physiological fact that males would have an undue advantage competing against women," and would diminish opportunity for females. The Clark Court also explained that "even wiser alternatives to the one chosen" did not invalidate Arizona's policy since it was "substantially related to the goal" of providing fair and equal opportunities for females to participate in athletics.

While the Court recognizes and accepts the principals outlined in Clark, Clark's holding regarding general sex separation in sport, as well as the justifications for such separation, do not

appear to be implicated by allowing transgender women to participate on women's teams. In Clark, the Ninth Circuit held that it was lawful to exclude cisgender boys from playing on a girls' volleyball team because: (1) women had historically been deprived of athletic opportunities in favor of men; (2) as a general matter, men had equal athletic opportunities to women; and (3) according to stipulated facts, average physiological differences meant that "males would displace females to a substantial extent" if permitted to play on women's volleyball teams. Clark, 695 F.2d at 1131. These principals do not appear to hold true for women and girls who are transgender.

First, like women generally, women who are transgender have historically been discriminated against, not favored. In a large national study, 86% of those perceived as transgender in a K–12 school experienced some form of harassment, and for 12%, the harassment was severe enough for them to leave school. National Center for Transgender Equality, 2015 U.S. Transgender Survey: Idaho State Report 1–2, https://www.transequality.org/sites/default/files/docs/usts/USTSIDStateReport% 281017% 29.pdf (October 2017). According to the same study, 48% of transgender people in Idaho have experienced homelessness in their lifetime, and 25% were living in poverty. Rather than a general separation between a historically advantaged group (cisgender males) and a historically disadvantaged group (cisgender women), the Act excludes a historically disadvantaged group (transgender women) from participation in sports, and further discriminates against a historically disadvantaged group (cisgender women) by subjecting them to the sex dispute process. The first justification for the Arizona policy at issue in Clark is not present here.

Second, under the Act, women and girls who are transgender will not be able to participate in any school sports, unlike the boys in Clark, who generally had equal athletic opportunities. Clark, 695 F.2d at 1131. Participating in sports on teams that contradict one's gender identity "is equivalent to gender identity conversion efforts, which every major medical association has found to be dangerous and unethical." As such, the Act's categorical exclusion of transgender women and girls entirely eliminates their opportunity to participate in school sports—and also subjects all cisgender women to unequal treatment simply to play sports—while the men in Clark had generally equal athletic opportunities.

Third, it appears transgender women have not and could not "displace" cisgender women in athletics "to a substantial extent." Clark, 695 F.2d at 1131. Although the ratio of males to females is roughly one to one, less than one percent of the population is transgender. Presumably, this means approximately one half of one percent of the population is made up of transgender females. It is inapposite to compare the potential displacement allowing approximately half of the population (cisgender men) to compete with cisgender women, with any potential displacement one half of one percent of the population (transgender women) could cause cisgender women. It appears untenable that allowing transgender women to compete on women's teams would substantially displace female athletes.

And fourth, it is not clear that transgender women who suppress their testosterone have significant physiological advantages over cisgender women. The Court discusses the distinction between physical differences between men and women in general, and physical differences between transgender women who have suppressed their testosterone for one year and women below. However, the interests at issue in Clark—Defendants' central authority—pertained to sex separation in sport generally and are not necessarily determinative here.

iii. The Act's justifications

The legislative findings and purpose portion of the Act suggests it fulfills the interests of promoting sex equality, providing opportunities for female athletes to demonstrate their skill, strength, and athletic abilities, and by providing female athletes with opportunities to obtain college scholarship and other accolades. Idaho Code § 33-6202(12). Plaintiffs do not dispute that these are important governmental objectives. They instead argue that the Act is not substantially related to such important governmental interests. At this stage of the litigation, and without further development of the record, the Court is inclined to agree.

(1) Promoting Sex Equality and Providing Opportunities for Female Athletes

The legislative record reveals no history of transgender athletes ever competing in sports in Idaho, no evidence that Idaho female athletes have been displaced by Idaho transgender female athletes, and no evidence to suggest a categorical bar against transgender female athlete's participation in sports is required in order to promote "sex equality" or to "protect athletic opportunities for females" in Idaho. Idaho Code § 33-6202(12). Rather than presenting empirical evidence that transgender inclusion will hinder sex equality in sports or athletic opportunities for women, both the Act itself and Proponents rely exclusively on three transgender athletes who have competed successfully in women's sports.

Specifically, during the entire legislative debate over the Act, the only transgender women athletes referenced were two high school runners who compete in Connecticut, and who were, notably, also defeated by cisgender girls in recent races. Notably, unlike the IHSAA and NCAA rules in place in Idaho before the Act, Connecticut does not require a transgender woman athlete to suppress her testosterone for any time prior to competing on women's teams.

The Intervenors identify a third transgender athlete, June Eastwood, and argue that their athletic opportunities were limited by Eastwood's participation in women's sports. The State also highlights this example. However, Eastwood was not an Idaho athlete and the competition at issue took place at the University of Montana. So, the Idaho statute would have no impact on Eastwood. More importantly, although the Intervenors lost to Eastwood, Eastwood was also ultimately defeated by her cisgender teammate. And, losing to Eastwood at one race did not deprive the Intervenors from the opportunity to compete in Division I sports, as both continue to compete on the women's cross-country and track teams with ISU.

The evidence cited during the House Debate on H.B. 500 and in the briefing by the Proponents regarding three transgender women athletes who have each lost to cisgender women athletes does not provide an "exceedingly persuasive" justification for the Act. Heightened scrutiny requires that a law solves an actual problem and that the "justification must be genuine, not hypothesized." VMI, 518 U.S. at 533. In the absence of any empirical evidence that sex inequality or access to athletic opportunities are threatened by transgender women athletes in Idaho, the Act's categorical bar against transgender women athletes' participation appears unrelated to the interests the Act purportedly advances.

Plaintiffs have also presented compelling evidence that equality in sports is not jeopardized by allowing transgender women who have suppressed their testosterone for one year to compete on women's teams. Plaintiffs' medical expert, Dr. Joshua Safer, suggests that physiological advantages are not present when a transgender woman undergoes hormone therapy and testosterone suppression. Before puberty, boys and girls have the same levels of circulating testosterone. After puberty, the typical range of circulating testosterone for cisgender women is similar to before puberty, and the circulating testosterone for cisgender men is substantially higher.

Dr. Safer contends there "is a medical consensus that the difference in testosterone is generally the primary known driver of differences in athletic performance between elite male athletes and elite female athletes." Dr. Safer highlights the only study examining the effects of gender-affirming hormone therapy on the athletic performance of transgender athletes. The small study showed that after undergoing gender affirming intervention, which included lowering their testosterone levels, the athletes' performance was reduced so that relative to cisgender women, their performance was proportionally the same as it had been relative to cisgender men prior to any medical treatment. In other words, a transgender woman who performed 80% as well as the best performer among men of that age before transition would also perform at about 80% as well as the best performer among women of that age after transition.

Defendants' medical expert, Dr. Gregory Brown, also confirms that male's performance advantages "result, in large part (but not exclusively), from higher testosterone concentrations in men, and adolescent boys, after the onset of male puberty." While Dr. Brown maintains that hormone and testosterone suppression cannot fully eliminate physiological advantages once an individual has passed through male puberty, the Court notes some of the studies Dr. Brown relies upon actually held the opposite. Further, the majority of the evidence Dr. Brown cites, and most of his declaration, involve the differences between male and female athletes in general, and contain no reference to, or information about, the difference between cisgender women athletes and transgender women athletes who have suppressed their testosterone.

Yet, the legislative findings for the Act contend that even after receiving hormone and testosterone suppression therapy, transgender women and girls have "an absolute advantage" over non-transgender girls. Idaho Code § 33-6202(11). In addition to the evidence cited above,

several factors undermine this conclusion. For instance, there is a population of transgender girls who, as a result of puberty blockers at the start of puberty and gender affirming hormone therapy afterward, never go through a typical male puberty at all. These transgender girls never experience the high levels of testosterone and accompanying physical changes associated with male puberty, and instead go through puberty with the same levels of hormones as other girls. As such, they develop typically female physiological characteristics, including muscle and bone structure, and do not have an ascertainable advantage over cisgender female athletes.

Defendants do not address how transgender girls who never undergo male puberty can have "an absolute advantage" over cisgender girls. Nor do Defendants address why transgender athletes who have never undergone puberty should be categorically excluded from playing women's sports in order to protect sexual equality and access to opportunities in women's sports. The Act's legislative findings do claim the "benefits that natural testosterone provides to male athletes is not diminished through the use of puberty blockers and cross-sex hormones." Idaho Code § 33-6202(11). However, the study cited in support of this proposition was later altered after peer review, and the conclusions the legislature relied upon were removed. Defendants provide no explanation as to why the Legislators relied on the pre-peer review version of the article or why Defendants did not correct this fact in their briefing after the peer reviewed version was published. In fact, the study did not involve transgender athletes at all, but instead considered the differences between transgender men who increased strength and muscle mass with testosterone treatment, and transgender women who lost some strength and muscle mass with testosterone suppression. The study also explicitly stated it "is important to recognize that we only assessed proxies for athletic performance ... it is still uncertain how the findings would translate to transgender athletes." Anna Wiik et. al, Muscle Strength, Size, and Composition Following 12 months of Gender-affirming Treatment in Transgender Individual, J. CLIN. METAB., 105(3):e805-e813 (2020).

In addition, several of the Act's legislative findings which purportedly demonstrate the "absolute advantage" of transgender women are based on a study by Doriane Lambelet Coleman. Idaho Code § 33-6202(5), (10). Professor Coleman herself urged Governor Little to veto H.B. 500 because her work was misused, and she also endorsed the NCAA's rule of allowing transgender women to participate after one year of hormone and testosterone suppression. The policies of elite athletic regulatory bodies across the world, and athletic policies of most every other state in the country, also undermine Defendants' claim that transgender women have an "absolute advantage" over other female athletes. Specifically, the International Olympic Committee and the NCAA require transgender women to suppress their testosterone levels in order to compete in women's athletics. The NCAA policy was implemented in 2011 after consultation with medical, legal, and sports experts, and has been in effect since that time. Millions of student-athletes have competed in the NCAA since 2011, with no reported examples of any disturbance to women's sports as a result of transgender inclusion. Similarly, every other state in the nation permits women and girls who are transgender to participate under varying rules, including some which require hormone suppression prior to participation. The Proponents'

failure to identify any evidence of transgender women causing purported sexual inequality other than four athletes (at least three of whom who have notably lost to cisgender women) is striking in light of the international and national policy of transgender inclusion.

Finally, while general sex separation on athletic teams for men and women may promote sex equality and provide athletic opportunities for females, that separation preexisted the Act and has long been the status quo in Idaho. Existing rules already prevented boys from playing on girls' teams before the Act. However, the IHSAA policy also allows transgender girls to participate on girls' teams after one year of hormone suppression. Similarly, the existing NCAA rules also preclude men from playing on women's teams but allow transgender women to compete after one year of testosterone suppression. Because Proponents fail to show that participation by transgender women athletes threatened sexual equality in sports or opportunities for women under these pre-existing policies, the Act's proffered justifications do not appear to overcome the inequality it inflicts on transgender women athletes.

The Ninth Circuit in Clark ruled that sex classification can be upheld only if sex represents "a legitimate accurate proxy." Clark, 695 F.2d at 1129. The Clark Court further explained the Supreme Court has soundly disapproved of classifications that reflect "archaic and overbroad generalizations," and has struck down gender-based policies when the policy's proposed compensatory objective was without factual justification. Given the evidence highlighted above, it appears the "absolute advantage" between transgender and cisgender women athletes is based on overbroad generalizations without factual justification. Ultimately, the Court must hear testimony from the experts at trial and weigh both their credibility and the extent of the scientific evidence. However, the incredibly small percentage of transgender women athletes in general, coupled with the significant dispute regarding whether such athletes actually have physiological advantages over cisgender women when they have undergone hormone suppression in particular, suggest the Act's categorical exclusion of transgender women athletes has no relationship to ensuring equality and opportunities for female athletes in Idaho.

(2) Ensuring Access to Athletic Scholarships

The Act also identifies an interest in advancing access to athletic scholarships for women. Idaho Code § 33-6202(12). Yet, there is no evidence in the record to suggest that the Act will increase scholarship opportunities for girls. Just as the head of the IHSAA testified during the legislative debate on H.B. 500 that he was not aware of any transgender girl ever playing high school girls' sports in Idaho, there is also no evidence of a transgender person ever receiving any athletic scholarship in Idaho. Nor have the scholarships of the Intervenors—the only identified Idaho athletes who have purportedly been harmed by competing against a transgender woman athlete—been jeopardized. Both Intervenors continue to run track and cross-country on scholarship with ISU, despite their loss to a transgender woman athlete at the University of Montana.

The Act's incredibly broad sweep also belies any genuine concern with an impact on athletic scholarships. . . .

(3) The Act's Actual Purpose

The Act's legislative findings reinforce the idea that the law is directed at excluding women and girls who are transgender, rather than on promoting sex equality and opportunities for women. For instance, the Act's criteria for determining "biological sex" appear designed to exclude transgender women and girls and to reverse the prior IHSAA and NCAA rules that implemented sex-separation in sports while permitting transgender women to compete. Idaho Code § 33-6203(3).

Specifically, an athlete subject to the Act's dispute process may "verify" their sex using three criteria: (1) reproductive anatomy, (2) genetic makeup, or (3) endogenous testosterone, i.e., the level of testosterone the body produces without medical intervention. This excludes some girls with intersex traits because they cannot establish a "biological sex" of female based on these verification metrics. It also completely excludes transgender girls.

Girls under eighteen generally cannot obtain gender-affirming genital surgery to treat gender dysphoria, and therefore will not have female reproductive anatomy. Many transgender women over the age of eighteen also have not had genital surgery, either because it is not consistent with their individualized treatment plan for gender dysphoria or because they cannot afford it. With respect to genetic makeup, the overwhelming majority of women who are transgender have XY chromosomes, so they cannot meet the second criteria. And, by focusing on "endogenous" testosterone levels, rather than actual testosterone levels after hormone suppression, the Act excludes transgender women whose circulating testosterone levels are within the range typical for cisgender women.

Thus, the Act's definition of "biological sex" intentionally excludes the one factor that a consensus of the medical community appears to agree drives the physiological differences between male and female athletic performance. Significantly, the preexisting Idaho and current NCAA rules instead focus on that factor. That the Act essentially bars consideration of circulating testosterone illustrates the Legislature appeared less concerned with ensuring equality in athletics than it was with ensuring exclusion of transgender women athletes.

In addition, it is difficult to ignore the circumstances under which the Act was passed. As COVID-19 was declared a pandemic and many states adjourned state legislative session indefinitely, the Idaho Legislature stayed in session to pass H.B. 500 and become the first and only state to bar all women and girls who are transgender from participating in school sports. At the same time, the Legislature also passed another bill, H.B. 509, which essentially bans transgender individuals from changing their gender marker on their birth certificates to match their gender identity. Governor Little signed H.B. 500 and H.B. 509 into law on the same day.

That the Idaho government stayed in session amidst an unprecedented national shutdown to pass two laws which dramatically limit the rights of transgender individuals suggests the Act was motivated by a desire for transgender exclusion, rather than equality for women athletes, particularly when the national shutdown preempted school athletic events, making the rush to the pass the law unnecessary.

Finally, the Proponents turn the Act on its head by arguing that transgender people seek "special" treatment by challenging the Act. This argument ignores that the Act excludes only transgender women and girls from participating in sports, and that Lindsay simply seeks the status quo prior to the Act's passage, rather than special treatment. Further, the Proponents' argument that Lindsay and other transgender women are not excluded from school sports because they can simply play on the men's team is analogous to claiming homosexual individuals are not prevented from marrying under statutes preventing same-sex marriage because lesbians and gays could marry someone of a different sex. The Ninth Circuit rejected such arguments in Latta II, 771 F.3d at 467, as did the Supreme Court in Bostock, 140 S. Ct. at 1741–42.

In short, the State has not identified a legitimate interest served by the Act that the preexisting rules in Idaho did not already address, other than an invalid interest of excluding transgender women and girls from women's sports entirely, regardless of their physiological characteristics. As such, Lindsay is likely to succeed on the merits of her equal protection claim. Again, at this stage, the Court only discusses the "likelihood" of success based on the information currently in the record. Actual success—or failure—on the merits will be determined at a later stage.

d. Likelihood of Success-Jane

[The court also found that Jane had shown a likelihood of success on the merits.]

e. Irreparable Harm

Lindsay and Jane both face irreparable harm due to violations of their rights under the Equal Protection Clause. "It is well established that the deprivation of constitutional rights unquestionably constitutes irreparable injury." Hernandez v. Sessions, 872 F.3d 976, 994 (9th Cir. 2017) (internal citations omitted); Monterey Mech. Co. v. Wilson, 125 F.3d 702, 715 (9th Cir. 1997) (holding that an equal protection violation constitutes irreparable harm).

Beyond this dispositive presumption, Lindsay and Jane will both suffer specific "harm for which there is no adequate legal remedy" in the absence of an injunction. Ariz. Dream Act Coal. v. Brewer, 757 F.3d 1053, 1068 (9th Cir. 2014). If Lindsay is denied the opportunity to try out for and compete on BSU's women's teams, she will permanently lose a year of NCAA eligibility that she can never get back. Lindsay is also subject to an Act that communicates the

State's "moral disproval" of her identity, which the Constitution prohibits. Lawrence v. Texas, 539 U.S. 558, 582–83 (2003). When Jane tries out for Boise High's women's soccer team, she will be subject to the possibility of embarrassment, harassment, and invasion of privacy through having to verify her sex. Such violations are irreparable. Obergefell, 135 S. Ct. at 2606 ("Dignitary wounds cannot always be healed with the stroke of a pen."). Lindsay and Jane both also face the injuries detailed supra, section III.B.2, if the Act is not enjoined.

The Court accordingly finds Plaintiffs will likely suffer irreparable harm if the Act is not enjoined.

f. Balance of the Equities and Public Interest

Where, as here, the government is a party, the "balance of the equities" and "public interest" prongs of the preliminary injunction test merge. Drakes Bay Oyster Co., 747 F.3d at 1092. In evaluating the balance of the equities, courts "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." Winter, 555 U.S. at 24, 129 S.Ct. 365. As explained above, Plaintiffs' harms weigh significantly in favor of injunctive relief.

In stark contrast to the deeply personal and irreparable harms Plaintiffs face, a preliminary injunction would not harm Defendants because it would merely maintain the status quo while Plaintiffs pursue their claims. . . .

IV. CONCLUSION

The Court recognizes that this decision is likely to be controversial. While the citizens of Idaho are likely to either vehemently oppose, or fervently support, the Act, the Constitution must always prevail. It is the Court's role—as part of the third branch of government—to interpret the law. At this juncture, that means looking at the Act, as enacted by the Idaho Legislature, and determining if it may violate the Constitution. In making this determination, it is not just the constitutional rights of transgender girls and women athletes at issue but, as explained above, the constitutional rights of every girl and woman athlete in Idaho. Because the Court finds Plaintiffs are likely to succeed in establishing the Act is unconstitutional as currently written, it must issue a preliminary injunction at this time pending trial on the merits.

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 this and other cases, 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. The plaintiffs' quest for permanent injunctive relief was essentially mooted by the Biden Administration's decision to end The Trump Administration policy and the Defense Department's subsequent adoption of a policy banning gender identity discrimination in the armed forces.

Karnoski v. 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 [pre2016] 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 decisionmaking, 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 was not entitled to the usual deference according policies formulated based on

military expertise, based on their contention that President Trump's charge to Secretary Mattis was to recommend an "implementation plan," not to propose a different plan. The plaintiffs continued to maintain that the 2018 policy was not the result of military deliberation. That contention has been the focus of the discovery requests seeking to probe the process by which the 2018 plan was formulated. After the 9th Circuit issued its ruling, the District Court issued more than 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 could not order production of broad categories of documents, but rather must examine particular documents as to which the government interposed a claim of privilege and to as to each item decide whether the plaintiffs were 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 two years by the time of this writing in July 2021.

3. Upon taking office in January 2021, President Joseph R. Biden, Jr., issued an executive order directing the Defense Department to withdraw the transgender service policies adopted by the Trump Administration and to restore a policy consistent with the position taken by Secretary Carter in 2016. Subsequently, the Department not only ended the disqualification of persons with gender dysphoria from military service, but adopted a written policy of non-discrimination on the basis of gender identity and announced that the military health care system would cover gender transition procedures. That would render moot the request for declaratory and injunctive relief in the pending lawsuits, but not necessarily damage claims arising from the injuries suffered by transgender individuals while the Trump Administration policies were in effect. But during the first six months of 2021, the regular flow of new rulings on discovery in the Karnoski case came to a halt.

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.

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-andcapricious 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. AFLCIO, 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 have been 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?

5. The Biden Administration's Secretary of State, Antony Blinken, announced during LGBT Pride Month (June 2021), that the State Department would undertake the logistical steps necessary to make it possible to provide an "X" gender marker on passports by the end of 2021. In the meantime, he announced, the Department was relaxing the requirements for transgender individuals to obtain passports. Henceforth, unlike the procedures described by the 10th Circuit in Zzyym, the Department will accept a passport applicant's declaration of their gender without regard to whether it is inconsistent with what appears on their birth certificate of driver's license, without requiring any certification from a licensed health care provider. This procedure would apply both to initial applications for a passport and applicants to change the gender indication on an existing 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

Court of Appeals of Oregon.
305 Or. App. 368 (July 8, 2020)

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[ʻs] 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. GonzalezValenzuela, 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 nonbinary 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 certiorari denied by the Supreme Court. 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.), cert. denied, 141 S. Ct. 610 (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. A13-87, 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 selfinjuring." 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 factspecific 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 EighthAmendment 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 goodfaith 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 institutionalizedpersons 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

The Supreme Court denied the state's petition for certiorari, despite the split in circuit authority on the question whether a state prison inmate might have a right under the 8th Amendment to receive gender affirmation surgery if the court finds as a matter of fact that this is medically necessary to deal with severe gender dysphoria. By the time the Court conferenced on this petition, the state had already provided the surgery to Adree Edmo, as the Supreme Court had previously denied the state's motions to stay the 9th Circuit's ruling pending Supreme Court review. Thus, it is possible the Court considered the controversy in this case to be moot and dismissed on that basis, but the Court normally does not announced the reasons for a cert denial, although the reasons may be exposed if one or more justices file statements concurring or dissenting in the decision to deny review.

1. Prison inmates are totally reliant on the prison system for all 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.

2. 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?

3. In Kosilek, 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.) 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 page 508, 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. However, upon taking office on January 20, 2021, President Joseph R. Biden, Jr., issued an Executive Order citing the Bostock decision and directing Executive Branch agencies to apply its reasoning in cases involving sex discrimination subject to federal anti-discrimination statutes. The textualist interpretation of *Bostock* should logically 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 accommodations (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, although it is not certain that all states would adhere to that practice.

Chapter 4, Section A.10 – "Questions after Windsor and Obergefell" –

1. Add the following text to note b, point one dealing with retroactive community property:

See LaFrance v. Cline, 477 P.3d 369 (Nev. App. 2020)(unpublished and thus unciteable), which dealt with a Nevada couple who married in Canada in 2003 and who divorced in Nevada in 2018, disputed whether property acquired as of 2003 could be classified as community property even though Nevada did not recognize same-sex marriage in 2003 and therefore would not have recognized the property when acquired as community property. The court ruled that yes, it was community property and addressed the complaints of one party as follows:

> LaFrance argues that retroactivity is unfair because she and Cline managed their finances and property under the assumption that they did not have the legal rights and duties enjoyed by opposite-sex spouses. However, under *Obergefell*, Nevada must credit the parties' marriage as having taken place in 2003 and apply the same terms and conditions as accorded to opposite-sex spouses. See *Obergefell*, 576 U.S. at 681 (stating that states must give full faith and credit to marriages lawfully licensed in other states). These conditions include a presumption that any property acquired during the marriage is community property, NRS 123.220, and an opportunity for spouses to rebut this presumption by showing by clear and certain proof that specific property is separate. *Todkill v. Todkill*, 88 Nev. 231, 235-36, 495 P.2d 629, 631-32 (1972).

2. Add a new note 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
431 S.C. 130, 847 S.E.2d 104 (2020)
Court of Appeals of South Carolina

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 commonlaw 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 samesex 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 nonmarital."); …

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. It should be noted that *Swicewood* is an outlier, as the following case, LaFleur v. Pyfer, shows, by citing to three cases from other jurisdictions that explicitly recognize the effect of applying *Obergefell* retroactively to validate common law marriages that may have occurred before *Obergefell* was decided. See Ranolls v. Dewling, 223 F. Supp. 3d 613, 622 (E.D. Tex. 2016); Gill v. Nostrand, 206 A.3d 869, 874–75 (D.C. 2019); In re J.K.N.A., 398 Mont. 72, 454 P.3d 642, 649 (2019). [Note the cite to these three cases in LaFleur is omitted in the case as edited below.]

3. 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. But it is referenced in In re State, 489 S.W.3d 454 at note 9 (Tex. 2016).

4. 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 commonlaw 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 is not really an impediment as such but may be relevant to the intent of the parties, which was a fact issue remanded to the trial court in *Carter*?

LaFleur v. Pyfer
479 P.3d 869
Supreme Court of Colorado (2021).

JUSTICE MÁRQUEZ delivered the Opinion of the Court.

In 2018, Respondent Timothy Pyfer filed a dissolution of marriage petition, alleging that he had entered into a common law marriage with his same-sex partner, Petitioner Dean LaFleur, when they held a ceremony before family and friends on November 30, 2003, and exchanged vows and rings. LaFleur countered that Pyfer's claim was legally impossible because at the time of the 2003 ceremony, Colorado did not recognize same-sex marriages. In the interim, however, the U.S. Supreme Court held that same-sex couples may exercise the fundamental right to marry and struck down state laws that excluded same-sex couples from civil marriage as unconstitutional. *Obergefell v. Hodges*, 576 U.S. 644 . . . . We accepted jurisdiction over this case . . . to address whether, in light of *Obergefell*, a same-sex couple may prove a common law marriage entered in Colorado *before* the state recognized same-sex couples' fundamental right to marry.

We hold that a court may recognize a common law same-sex marriage entered in Colorado before the state recognized same-sex couples' fundamental right to marry. We reach this conclusion for two reasons.

First, as stated, *Obergefell* struck down state laws that excluded same-sex couples from civil marriage as unconstitutional. The general rule is that a statute that is declared unconstitutional is void ab initio; it is inoperative as if it had never been enacted. Consequently, state law restrictions held unconstitutional in *Obergefell* cannot serve as an impediment to the recognition of a same-sex marriage predating that decision. Indeed, recognition of a same-sex marriage is the remedy for a state's earlier violation of the couple's constitutional rights. Moreover, because *Obergefell* held that states must allow same-sex couples to enter marriages on the same terms and conditions as different-sex couples, and because Colorado recognizes common law marriages between different-sex couples, it therefore must also recognize such marriages between same-sex couples—including those entered into pre-*Obergefell*. Of course, to be recognized as a bona fide common law marriage, the relationship must satisfy the updated test we articulate today in *Hogsett*. ("[A] common law marriage may be established by the mutual consent or agreement of the couple to enter the legal and social institution of marriage, followed by conduct manifesting that mutual agreement. The key question is whether the parties mutually intended to enter a *marital*

relationship—that is, to share a life together as spouses in a committed, intimate relationship of mutual support and mutual obligation.").

Second, to the extent *Obergefell* did not merely recognize an existing fundamental right to marry but announced a new rule of federal law, we conclude that the decision applies retroactively to marriages (including common law marriages) predating that decision. Under the Court's retroactivity jurisprudence in the civil law context, when the Supreme Court "applies a rule of federal law to the parties before it, that rule ... must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate [the Court's] announcement of the rule." *Harper v. Va. Dep't of Tax'n*, 509 U.S. 86 (1993). Because the *Obergefell* Court applied its rule of federal law to the litigants before it, we conclude that the Court's holding in *Obergefell* that restrictions on same-sex marriages are unconstitutional must be given retroactive effect.

Accordingly, we agree with the district court that the parties here were not, as a matter of law, barred from entering into a common law marriage in 2003. Applying the refined test announced today in *Hogsett* for determining whether a couple has entered into a common law marriage, we uphold the district court's determination that the parties entered into a common law marriage. . . .

I. Facts and Procedural History

LaFleur argued that, as a matter of law, the couple could not have entered into a common law marriage because "same sex marriages were not recognized or protected under Colorado law" at that time. LaFleur further argued that, as a matter of fact, he and Pyfer did not mutually agree to enter into a common law marriage, as required.

Following an evidentiary hearing during which the court heard testimony from the parties and several of their family members and friends, the district court held that Pyfer and LaFleur entered into a common law marriage on November 30, 2003, the date of the ceremony. The court acknowledged that same-sex marriage was not recognized in Colorado until at least 2014. It reasoned, however, that same-sex couples' ability to marry was eventually "recognized as a fundamental right that could not be denied" and that this right was not "suddenly created" but "existed prior to 2014." Thus, the court concluded, Pyfer and LaFleur could enter into a common law marriage before Colorado recognized same-sex couples' right to marry.

The court acknowledged that it had to decide "whether one can exhibit the intent to be married [for purposes of establishing a common law marriage] when such a relationship is not cognizable under the law." The court then weighed the evidence from the hearing to determine the parties' intent to enter a marital relationship. It found that Pyfer proposed marriage to LaFleur and that Pyfer intended to be married. LaFleur accepted the proposal in front of Pyfer's sister, and the parties later participated in a ceremony in which they exchanged vows and rings before family and friends. The court noted that this ceremony "certainly appear[ed] to be a wedding." The court highlighted photographs in evidence showing that "[t]here were rings, tuxes, attendance [by friends and family], [a] toast, vows, [and] a reverend," and it observed that Pyfer and LaFleur signed a document titled "Certificate of Holy Union." Moreover, after the ceremony, Pyfer "held himself out as married to family and friends" and listed LaFleur as his spouse on an HR form in

2016 and on a vehicle in 2017. LaFleur financially supported Pyfer and they cohabitated, sharing the same room until "the last couple of years" before the dissolution petition was filed.

LaFleur testified that he never intended to be married and would not have gone through with the ceremony had he thought it would be legally binding with respect to his assets. However, the court found that LaFleur knew that Pyfer was listing him as a spouse on documents and was telling his family and friends they were married, and there was no evidence that LaFleur ever confronted Pyfer about doing so.

The court acknowledged that neither Pyfer nor LaFleur "really wore their wedding rings"; that they "did not share bank accounts"; that LaFleur's family "denied that the parties were married" and "minimized the impact of the ceremony"; and that LaFleur did not "tell his co-workers he was married," although the court also heard testimony that LaFleur worked in an environment that was "not welcoming" of same-sex couples.

After weighing all of this evidence, the court ultimately found that, even if he "did not want all of the legal obligations that come with a marriage," LaFleur "acquiesced when he accepted [Pyfer's marriage] proposal and went through with their ceremony" and "intended to be joined with [Pyfer] for the rest of his life" on the date of the ceremony. The court therefore concluded that Pyfer and LaFleur entered into a common law marriage on November 30, 2003.

The court then proceeded with the dissolution proceedings and entered a dissolution decree and permanent orders. The court awarded the entirety of the marital value of the home to LaFleur. It awarded $50,000 of LaFleur's Roth IRA to Pyfer and ordered each party to pay the debts accrued in his name. The court acknowledged that the spousal maintenance guidelines provided for an award of $734 per month for seven and a half years. However, it deviated downward from the guidelines and ordered $700 per month for four years, reasoning that Pyfer "lived rent-free" with LaFleur and, toward the end of the relationship, was engaged in an extramarital affair.

Pyfer appealed, arguing that the division of property was inequitable and not supported by sufficient findings; that the maintenance award was an unjustified downward deviation from the guidelines; and that both rulings constituted abuses of discretion. LaFleur cross-appealed, challenging the court's ruling that the parties had entered into a common law marriage.

After this court granted certiorari to review *Hogsett* and [another common law marriage case], LaFleur petitioned this court to review this case along with the other two. We accepted jurisdiction and directed the parties to focus their oral argument on the question of whether a common law same-sex marriage entered in Colorado may be recognized as predating Colorado's recognition of formal same-sex marriages.

Recognition of a Common Law Same-Sex Marriage Before *Obergefell*

The question raised in this case is whether a court may recognize a common law same-sex marriage entered in Colorado before the state recognized same-sex couples' fundamental right to marry. LaFleur argues that he and Pyfer could not have entered into a common law marriage predating *Obergefell* because (1) the parties could not, as a matter of law, have formed the requisite intent

to enter into a common law marriage when same-sex marriage was not recognized as lawful; and (2) *Obergefell* did not have retroactive effect. We disagree.

1. *Obergefell* Rendered Colorado's Restrictions on Same-Sex Marriage Void Ab Initio

Obergefell struck down state laws that excluded same-sex couples from civil marriage as unconstitutional. The longstanding general rule is that a statute that is declared unconstitutional is void ab initio; it is inoperative as if it had never been enacted. . . .

Under this principle, state law restrictions on same-sex marriage—such as Colo. Const. art. II, § 31, and section 14-2-104(1)(b) and 104(2)—deemed unconstitutional in *Obergefell*, cannot stand as an impediment to the recognition of a same-sex marriage predating that decision. Recognition of a same-sex marriage is the remedy for the state's earlier violation of the couple's constitutional rights; the failure to recognize such a marriage effectively continues to enforce the very laws deemed invalid. By logical extension, because *Obergefell* held that states must allow same-sex couples to enter marriages on the "same terms and conditions as opposite-sex couples," *Obergefell*, 576 U.S. at 676, 135 S.Ct. 2584, and because Colorado recognizes *common law* marriages between opposite sex-couples, it must also recognize such marriages between same-sex couples—including those entered into pre-*Obergefell*.

We find *In re Estate of Carter*, 159 A.3d 970 (Pa. Super. Ct. 2017), instructive on this point. There, a Pennsylvania appellate court reversed a lower court's ruling that it was "legally impossible" for a same-sex couple to prove a common law marriage where the state abolished common law marriages in 2005 and same-sex marriages were not recognized until May 2014. The court observed that the premise of the lower court's analysis—that the state's now-invalidated exclusionary marriage law was legally binding during the time the couple might otherwise have entered into a common law marriage—"misreads the fundamental import" of *Obergefell*. It concluded that "a court today may not rely on the now-invalidated provisions of the Marriage Law to deny th[e] constitutional reality" that "same-sex couples have precisely the same capacity to enter marriage contracts as do opposite-sex couples," and held that because different-sex couples may establish a common law marriage predating 2005, same-sex couples must also have that right.

For the same reason, we disagree with the South Carolina Court of Appeals' decision in *Swicegood v. Thompson*, 431 S.C. 130, 847 S.E.2d 104, 112 (S.C. App. 2020), which held that the state's marriage statute, although invalidated by *Obergefell*, nevertheless "operated as an impediment to the formation of a common-law marriage between same-sex couples *when it was still in force*." (Emphasis added.) This view mistakenly assumes that the unconstitutional law, although void, was ever in force. "[W]hat a court does with regard to an unconstitutional law is simply to ignore it. It decides the case '*disregarding the [unconstitutional] law*,' because a law repugnant to the Constitution 'is void, and is as no law.' " . . . To treat a law repugnant to the Constitution as a barrier to forming an agreement to be married fails to disregard that unconstitutional law; indeed, it resurrects it. Put differently, to hold that a same-sex couple may enter a marriage only *after Obergefell* wholly disregards the effect of that decision.

Similarly, we reject LaFleur's contention that, as a matter of law, it was impossible for a same-sex couple to form the requisite intent to enter into a common law marriage before Colorado

recognized same-sex couples' fundamental right to marry.

As we hold today in *Hogsett*, to enter the legal and social institution of marriage, a couple must mutually agree "to enter a *marital* relationship—that is, to share a life together as spouses in a committed, intimate relationship of mutual support and obligation." *Hogsett.* That the marital relationship was not recognized at the time does not change the nature of the relationship itself. An analogy to anti-miscegenation laws is instructive. LaFleur's argument suggests that an interracial couple lacked the capacity, as a matter of law, to enter into a marriage pre-*Loving* because the state in which they resided did not recognize the relationship. But, as noted above, courts rejected such logic in the wake of the *Loving* decision. *See*, *e.g.*, *Reaves*, 434 P.2d at 298; *Lewis*, 306 F. Supp. at 1183–84. In the wake of *Obergefell*, we do the same for same-sex couples.

To the extent that LaFleur contends that he did not anticipate that his relationship could carry legal consequences, we are unpersuaded. Many couples may not appreciate or intend the legal consequences of entering into a marital relationship, or anticipate the ways in which those consequences may shift over time as the law evolves. But a couple need not intend the *legal consequences* of a marital relationship in order to intend to enter into the relationship itself. Instead, the focus is on whether the parties intended to enter into a relationship that is *marital in nature*. The myriad rights, benefits, and responsibilities bestowed on the marital relationship by the state reflect the government's and society's pledge to support and protect the union, but they are incidental to the marital relationship itself. Thus, the fact that a couple did not anticipate or intend the legal consequences of entering a marital relationship does not render their intent to enter into such a relationship legally impossible.

In sum, for the reasons above, we conclude that a court may recognize a common law same-sex marriage entered in Colorado before the state recognized same-sex couples' fundamental right to marry.

Note

The *Hogsett* case, which is mentioned several times in LaFleur, was decided the same day and also involved a same-sex couple and the question whether or not they were in a valid common law marriage pre-*Obergefell*. See Hogsett v. Neale, 478 P.3d 713 (Col. 2021). In that case, the Colorado Supreme Court refined the meaning of the "intent" requirement for purposes of establishing a common law marriage. It is not the intent to enter into a legally recognized marriage, but rather the mutual intent to enter into a marital relationship. In *Hogsett*, even though the two women went through a commitment ceremony, the court found there was insufficient evidence to show that both women intended the same sort of relationship, i.e., one that was marriage-like or one that merely a commitment for now. In fact the party who was contesting the existence of a common law marriage testified that she did not believe in marriage and did not believe that two people could be committed to each other for life.

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 employers 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).

Add a new note 5 at page 700:

5. The Kansas Supreme Court handed down two important parentage decisions on the same day, November 6, 2020. See Matter of M.F. By and Through K.L., 312 Kan. 322 (2020) and Matter of W.L., 312 Kan. 367 (2020). Both dealt with the "holding out" requirement for a nonbiological mom (the partner) to claim motherhood. Under K.S.A. 23-2208(a)(4): A man can be presumed to be father if "[t]he man notoriously or in writing recognizes paternity of the child, including but not limited to a voluntary acknowledgment." Earlier case law held that this provision applies equally to claims of motherhood made by a woman. Therefore the question in both cases was whether the partner had notoriously recognized motherhood. In both cases, the lower courts had ruled against the partner. The Kansas Supreme Court found flaws in the analysis applied by the lower courts and made the following key points:

- The partner need only provide by a preponderance of the evidence that she has notoriously recognized motherhood.

- There does not need to be anything in writing.
- It is not the mutual agreement to co-parent that needs to be proved, but instead the notorious recognition of motherhood.
- If the partner satisfies her burden, the burden switches to the mother to rebut by clear and convincing evidence. The thing to be rebutted is the notorious recognition. Whether or not the partner was a "good mother" or not is not relevant at this stage. It is whether she is a mother.
- If the mother satisfies her burden, then the burden switches to the partner.
- If two conflicting presumptions arise then "the presumption which on the facts is founded on the weightier considerations of policy and logic, including the best interests of the child" prevails.
- The key time for determining this fact is at the birth of the child and not later. Having two parents at birth is a good thing.
- This timing will protect against a change in mind later in time.
- Finally, the constitutional rights of the mother under *Troxel* must be considered.

Note: In other cases, courts have reasoned that *Troxel* only applies when the mother is contesting claims by someone who is not a parent. If the partner is declared a parent, then *Troxel* does not apply. Under the Kansas analysis, it appears that *Troxel* can be considered in the process of determining parentage.

Also, if the partner's failure to mother the child well cannot be considered to determine whether or not she is a mother, it can be considered in determining how much access she should have to the child.

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. Assisted Reproductive Technologies – page 735

At Page 736, ad a new subsection 1.A. United States State Department and ART

Section 301(g) of the Immigration and Nationality Act ("INA") (codified at 8 U.S.C. § 1401(g)) entitles a person born abroad to citizenship at birth if one of that person's married parents is a United States citizen and the other is a foreign national, as long as the citizen parent satisfies certain statutorily prescribed periods of residency in the U.S. In applying this provision, consider

the situation of a gay married couple in which one spouse is an American citizen and the other spouse is not. If they have a child during their marriage, Section 301(g) would appear to provide that the child, even if born abroad, with U.S. citizenship from the moment of birth. But this is not the rule that was applied to Andrew Mason Dvash-Banks and his child, Ethan Jacob Dvash-Banks, when Andrew (an American citizen) and his husband (an Israeli citizen) had a child in Canada.

The problem in the Dvash-Banks case was the application of rule contained in the State Department's internal Foreign Affairs Manual (FAM) that provided for a child to be considered born in wedlock both parents must be genetically related to the child. If a child were born out of wedlock, the child needed to be related only to the parent who was an American citizen. As you might imagine, the definition of "born in wedlock" presents huge problems for children who are born using ART.

Andrew Mason DVASH-BANKS and Ethan Jacob Dvash-Banks, Plaintiffs,
v.
THE UNITED STATES DEPARTMENT OF STATE

Complaint for Declaratory and Injunctive Relief

1. This action challenges a United States Department of State ("State Department") policy that hurts families and undermines the familial relationships of same-sex parents. The agency's policy unconstitutionally disregards the dignity and sanctity of same-sex marriages by refusing to recognize the birthright citizenship of the children of married same-sex couples. Plaintiffs are members of a family who have suffered and continue to suffer harm because of the State Department's policy. The family includes Andrew Mason Dvash-Banks ("Andrew")—a United States citizen, who was born and raised in this country; Andrew's husband, Elad Dvash-Banks ("Elad"), an Israeli citizen; and their twin sons, Ethan Jacob Dvash-Banks ("Ethan") and Aiden James Dvash-Banks ("Aiden") (collectively, the "twins").

2. Both Ethan and Aiden were conceived and born during Andrew's marriage to Elad. Andrew and Elad conceived the twins using their own sperm and eggs from the same anonymous donor. They used Elad's sperm to conceive Ethan and Andrew's sperm to conceive Aiden. A surrogate carried the twins to term together in her womb and gave birth to them moments apart on XX/XX/2016, in Canada. Andrew and Elad are the only parents Ethan and Aiden have, and the only people Canadian law1 recognizes as Ethan and Aiden's parents. Accordingly, Andrew and Elad have been the twins' legal parents from the day they came into this world together.

3. At birth, both Ethan and Aiden qualified for United States citizenship pursuant to Section 301(g) of the Immigration and Nationality Act ("INA") (codified at 8 U.S.C. § 1401(g)). That clause entitles a person born abroad to citizenship at birth if one of that person's married parents

is a United States citizen and the other is a foreign national, as long as the citizen parent satisfies certain statutorily prescribed periods of residency in the U.S. Andrew is a U.S. citizen who has lived in the United States for over twenty-four years, and so clearly satisfies the residency requirements of Section 301(g). Because Andrew and Elad were married to each other when Ethan and Aiden were born, Ethan and Aiden have been U.S. citizens since birth under Section 301(g).

4. The State Department, through the United States Embassy in Toronto, Canada, however, failed to apply Section 301 to Ethan and Aiden. Instead, it applied Section 309 of the INA (codified at 8 U.S.C. § 1409), a provision of the statute which applies only to children born "out of wedlock." Because the State Department wrongly considered Ethan and Aiden to have been born "out of wedlock," it erroneously concluded that they could qualify for citizenship at birth only pursuant to provisions applicable to the children of unwed parents. It then incorrectly determined that the twins could acquire citizenship at birth only pursuant to Section 309 and only if Andrew's sperm had been used to conceive them both.

5. Focusing improperly on the biological relationship between each child and the parent who conceived him, the State Department then recognized Aiden's citizenship and denied Ethan's. The State Department's application of Section 309 instead of Section 301 is an unlawful, unconstitutional refusal to recognize the validity of Andrew's and Elad's marriage and, therefore, that a child born to them during their marriage is the offspring of that marriage. The fact that the State Department's policy has led children identified by their birth certificates as twins with the same parents to have different nationalities listed on their passports crystallizes both the indignity and absurdity of the policy's effect.

6. The State Department's failure to recognize and give effect to the marriage between Andrew and Elad also denies Ethan the rights and privileges that accompany U.S. citizenship, including the right to reside permanently in the U.S., the right to obtain a U.S. passport, and, when he is older, the right to run for political office. Because the State Department does not recognize Ethan's U.S. citizenship, he cannot visit or live in the United States freely as other members of his family can.

7. Andrew and Aiden may reside in the U.S. permanently because they are U.S. citizens. Elad may legally reside in the U.S. permanently because he has a family-based immigrant visa through his marriage to Andrew. The State Department's policy, however, renders Ethan the only member of his family without the freedom to live in the U.S. permanently. The State Department's decision to withhold from Ethan the same rights granted to his twin brother means that he will experience the indignity and stigma of unequal treatment imposed and endorsed by the U.S. government. No governmental purpose could justify imposing these indignities on a child of a valid marriage or restricting a family's freedom to live as a family—together.

8. The State Department's policy is not only wrong and harmful, it is also contrary to the INA as well as the guarantees of due process and equal protection enshrined in the Fifth Amendment. To the extent that the State Department's policy was adopted before the Supreme Court's recent

precedents guaranteeing equality to same-sex married couples and their families, its continued enforcement violates that precedent. The Supreme Court has made clear that the Constitution requires that same-sex marriages receive the same legal effects and respect as opposite-sex marriages. The State Department's policy, or at least its application to Ethan, violates that mandate by restricting eligibility for citizenship under Section 301 of the INA solely to children whose parents are in opposite-sex marriages. These violations create real and significant hardships for the Dvash-Banks family and others like them. Soon, Ethan will be old enough to realize that the U.S. government views him as an alien with no enforceable connection to his father or brother, and discriminates against him based on the sex and sexual orientation of his parents.

9. The State Department's policy is arbitrary and capricious and serves no rational, legitimate, or substantial governmental interest. The State Department's policy drives families apart by treating the children of the same married parents differently depending upon which father's sperm was used during fertilization. The threat that this policy poses to family unity confirms that it is contrary to the legislative intent of the INA, which enshrines the preservation of the family unit as a paramount consideration. Neither the INA nor the U.S. Constitution permits the State Department's unlawful policy to stand.

10. Plaintiffs bring this action both to challenge the State Department's policy as well as to request that this Court, pursuant to Section 360 of the INA (codified at 8 U.S.C. § 1503), declare that Ethan is a U.S. citizen at birth.

Result of lawsuit: In Dvash-Banks v. Pompeo, 2019 WL 911799 (C.D. Cal. 2019), the District Court ruled in favor of Dvash-Banks, relying of earlier Ninth Circuit precedent that had struck down the FAM rule of genetic connection to both parents as applied to opposite sex married couples. The government appealed to the Ninth Circuit.

E. J. D.-B. v. U.S. Dep't of State
825 F. App'x 479, 480 (9th Cir. 2020)

MEMORANDUM

The sole issue in this case is whether the district court correctly concluded that E.J. Dvash-Banks ("E.J.") is a citizen of the United States. Because the district court's decision was correct under binding circuit precedent, we affirm.

E.J. was conceived through Assisted Reproductive Technology and born in Canada. In January 2017, his legal parents, United States citizen Andrew Dvash-Banks ("Andrew") and Israeli citizen Elad Dvash-Banks ("Elad"), applied for a passport for E.J. under 8 U.S.C. § 1401(g), which confers citizenship on "a person born outside the geographical limits of the United States

and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States." The United States consulate in Ontario, Canada, denied the application because E.J. was conceived using Elad's sperm. The district court, however, held that E.J. was a citizen under this Court's decisions in Scales v. INS, 232 F.3d 1159 (9th Cir. 2000), and Solis-Espinoza v. Gonzales, 401 F.3d 1090 (9th Cir. 2005), which hold that § 1401(g) does not require a biological relationship between a child and the citizen parent through whom citizenship is claimed.

The government concedes that *Scales* and *Solis-Espinoza* control this case and has appealed to preserve the argument that those cases were incorrectly decided. As a three-judge panel, we are bound by *Scales* and *Solis-Espinoza*. See Miller v. Gammie, 335 F.3d 889, 899 (9th Cir. 2003) (en banc). Because the district court did not err in applying Ninth Circuit law, we affirm.

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 (2019)
Supreme Court of Utah

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 genderneutral 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.
***

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 genderneutral 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 78B15-803 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-15803(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, 109 Calif. L. Rev. 401 (2021). 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?

Chapter 6 – Section E – Sexual Minority Refugees

Add the following after the Notes and Questions section concluding on page 815:

In Bringas-Rodriguez, the court remanded the case for a final determination. In the case below, the 9th Circuit went the extra step of ordering that the petitioner be extended protection under the Convention against Torture, finding that the record evidence did not support the decisions by the IJ and the BIA to deny relief:

XOCHIHUA-JAIMES v. BARR

962 F.3d 1175 (9th Cir. 2020)

M. SMITH, Circuit Judge:

Lucero Xochihua-Jaimes, a native and citizen of Mexico, petitions for review of the BIA's denial of her Convention Against Torture (CAT) claim. Petitioner has lived in the United States for almost twenty years, since she fled Mexico as a teenager after being raped multiple times and being ejected from her parents' home because she is a lesbian. Petitioner eventually became involved in an abusive relationship with Luna, a man connected to Los Zetas, one of Mexico's major drug cartels. After Petitioner reported Luna for raping her twelve-year-old daughter in 2013, and Luna went to prison as a result, Luna's family began a campaign of threatening Petitioner that if she ever returned to Mexico, Petitioner and her daughter would be killed. The Immigration Judge (IJ) found that Petitioner did not carry her CAT burden, and the Board of Immigration Appeals (BIA) affirmed. We grant the petition and hold that Petitioner is entitled to deferral of removal pursuant to CAT.

FACTUAL AND PROCEDURAL BACKGROUND

I. Facts

Petitioner grew up in Veracruz, Mexico, where she lived with her parents and two siblings. At seven or eight years old, her grandfather and later her cousin began raping her. Her parents did not protect her. After Petitioner came out as a lesbian, her parents told her that the sexual abuse was happening so she could "learn to be a woman."

In 2001, as a teenager, Petitioner was raped by a schoolteacher and became pregnant with her first child, a daughter we will refer to as I.X. When Petitioner reported the rape to her parents, her parents did not believe her because she had a girlfriend. Soon afterward her father kicked her out of the house. Petitioner fled to the United States and entered without admission or parole.

In 2003, Petitioner met Clemente Leonardo Arias Luna, a Mexican citizen and U.S. lawful permanent resident, in North Carolina. Luna offered, and Petitioner agreed, to enter a "pretend" relationship, in order for Petitioner to regain her parents' approval by appearing to be heterosexual. In 2004, Luna began beating and raping Petitioner. Petitioner would ultimately have five children by him. According to Petitioner, Luna and "all his family" were then, and are still, members of Los Zetas.

Also in 2004, Luna's nephew Chavelo attempted to sexually assault Petitioner. Petitioner reported the assault to the police in North Carolina, who arrested Chavelo. However, when it became evident that Petitioner would be called to testify against Chavelo, Luna moved her to Arizona. Luna used abuse, rape, and taking Petitioner's children away in order to force Petitioner to stay with him, despite her attempts to escape from him. Petitioner also stayed because her relationship with Luna was the only way to keep her parents talking to her—as she said, "they are the only family I have."

In 2005, Petitioner was apprehended by immigration authorities, and agreed to voluntarily return to Mexico. Petitioner's parents refused to take her in, so Petitioner went to stay with a cousin of Luna's in Baja California, whom Petitioner described as one of Los Zetas' "major heads of the drugs over there." When she arrived, this cousin "beat [her] up very bad," pointed a gun at her head, and told her if she ever left Luna he would kill her. Petitioner testified that onlookers "were all just laughing," and that "the police would drive by, but they wouldn't give me any help. They were just laughing at me."

Petitioner stayed in Baja California for one month while she "wait[ed] for the bruises to go away" and had a surgery for an ectopic pregnancy. Petitioner then re-entered the United States without admission or parole. She lived in a mobile home in Arizona with Luna and her children. She eventually began working cleaning jobs outside the home. Luna continued to abuse her. Petitioner called the police to report Luna multiple times, but she received no help from them.

In 2010, Petitioner became aware that Luna had bribed Mexican officials to put the mother of some of his other children, Isabelle Moreno, in jail. Moreno had reported Luna and his family for threatening her and taking her children, and Luna was able to pay off Mexican police to put Moreno in jail instead of him. Petitioner learned about this incident because Luna made Petitioner help take care of Moreno's children during her incarceration.
Petitioner managed to leave her relationship with Luna in 2012, on the condition that she would allow him to see their children. Although Luna provided no financial support, he agreed to babysit when Petitioner was at work.

In 2013, Luna sexually molested I.X., then twelve years old, while Petitioner was working a night shift. Petitioner filed a police report but the police did not immediately apprehend Luna because he had fled to California. Luna returned to Petitioner's home a few months later, where he broke down the door, hit Petitioner, and tried to take the children. Petitioner's neighbor called the police but Luna fled again. In March 2014, Luna returned, and a neighbor witnessed Luna sexually molesting I.X. The neighbor called the police, who successfully apprehended Luna. Luna is currently serving a 37-year sentence for sexual conduct with, and molestation of, a child.

At some point after Luna's arrest, police came to Petitioner's home while she was working and a babysitter was watching her children. The babysitter hid because she was afraid of talking to the police due to her immigration status. The police concluded that the children were unsupervised. As a result, Arizona Child Protective Services took Petitioner's children. Petitioner has been trying to regain custody ever since.

After Luna was imprisoned, two of Luna's adult children (a son and a daughter from another relationship, both members of Los Zetas, who live in California) went to Petitioner's home. They put a gun to Petitioner's back, threw her to the floor, and threatened that Petitioner "would pay because their dad was in jail." They threatened that if Petitioner ever returned to Mexico, she and I.X. "would be dead." Petitioner believes they would have taken her children if they had been present at the time. Petitioner received numerous threats thereafter, accompanied by actions such as breaking the windows of her house, cutting the brake fluid lines of her truck, and puncturing her tires. The threats continued to reach her even after she changed her telephone number and would only worsen when she reported incidents to the police. The threats came from several members of Luna's family, including the same son and daughter who had previously gone to Petitioner's house, as well as Chavelo, Luna's nephew, who tried to sexually assault Petitioner in North Carolina, and who is now in Mexico again after being deported. In light of these threats, Petitioner believes that Luna's Zetas relatives in Mexico would torture and murder both her and I.X. if she were removed.

In 2015, Petitioner met a lawyer who "guarantee[d]" to get her custody of her children again for a $2000 fee. Petitioner's co-worker, Yvette, offered to lend Petitioner the money if

Petitioner helped Yvette pick up Yvette's family members. Petitioner agreed and drove behind Yvette to "the middle of nowhere," where three armed strangers entered Petitioner's vehicle and yelled at her to drive fast. Petitioner refused, driving so slowly that she got pulled over by police. The strangers fled before police could apprehend them. Petitioner cooperated fully, and the police found nothing in Petitioner's vehicle. However, police arrested Yvette and found six backpacks full of marijuana in Yvette's vehicle. Petitioner claims she had not known she was agreeing to help pick up drugs, and that she would not have agreed to help Yvette if she had known. Petitioner fought her case for 11 months before the prosecutor and public defender convinced Petitioner to sign a plea deal for a 2-year sentence for possession of marijuana for sale. The judge sentenced Petitioner to 1.5 years.

When her prison sentence was completed, Petitioner was charged with removal. She petitioned for withholding of removal and CAT protection. Petitioner fears that Los Zetas will find and torture her anywhere in Mexico. She thinks they will easily find her because of her unique surname. Petitioner believes Los Zetas previously tried to kidnap her brother and sister who still live in Veracruz. Petitioner has received numerous threats from various members of Luna's family who are also Zetas. Petitioner believes that Los Zetas are able to control Mexican police and that the Mexican police therefore will not protect her from Luna, Luna's family, or Los Zetas.

II. IJ Decision

On consideration of whether Petitioner was eligible for deferral of removal under CAT, the IJ first found that Petitioner's past harms in Mexico did not amount to torture. The IJ found that neither the sexual abuse Petitioner suffered in Mexico as a child or teenager, nor the mental suffering she experienced as a result of her parents' reaction to her sexual orientation, constituted torture.

The IJ then found that, even assuming Petitioner's past harm did amount to torture, Petitioner failed to establish that she would more likely than not be tortured if removed to Mexico. The IJ acknowledged Petitioner's evidence of mistreatment of LGBTQ individuals and of cartel violence generally, but stated that country reports "do not necessarily show that a particular person would be in danger of being subjected to torture upon his or her return to that country. Instead, specific grounds must exist to indicate that the applicant will be personally at risk of torture."

The IJ concluded that Petitioner had not demonstrated that she would be "personally at risk of torture." The IJ reasoned that no one in Mexico besides Petitioner's family knows about her sexual orientation. The IJ also reasoned that Petitioner's testimony about Luna and his family's connection to Los Zetas was "speculative," and "it [was] unclear how she knows this still to be true." Although acknowledging Petitioner's testimony that the cousin of Luna's who harmed her in 2005 was then connected to Los Zetas, the IJ faulted Petitioner for "fail[ing] to

provide specific testimony or evidence of any current connections between [Luna's] family and the Zetas."

The IJ additionally concluded, "[b]ased on the evidence of record," that Petitioner "could reasonably avoid the harm she fears by relocating to another part of Mexico." The IJ reasoned that Petitioner was at risk only in Baja and Veracruz, and that Zetas members other than Luna's family would be unlikely to recognize Petitioner elsewhere. The IJ "accord[ed] little weight to the applicant's unsubstantiated opinion that the Zetas cartel is present throughout all of Mexico and would identify her based on the 'peculiarity' of her last name." The IJ found that Los Zetas operate only "within the state of Veracruz and surrounding areas." The IJ then reasoned that, "Mexico is a large country with millions of inhabitants. It seems unlikely that there is nowhere in Mexico that the applicant could live without being harmed." The IJ concluded that:

> [T]he applicant need not attempt to live in every single Mexican state to demonstrate the impossibility of relocation, because that would not be feasible. However, having never attempted to move in Mexico, but merely speculating that [Luna] has connections throughout the entire country, does not provide sufficient evidence to determine that relocation is impossible in the applicant's case.

Finally, the IJ concluded that, "even if the applicant could establish that it is more likely than not that she would be tortured in Mexico, ... there is no basis for concluding the Mexican government and its officials would participate in torturing the applicant either actively or by willful blindness." The IJ reasoned that, "[d]espite its evident problems, the Mexican government does not, as an entity, practice, condone, or willfully acquiesce in torture. ... Admittedly, there have been a number of incidents of alleged torture by members of law enforcement; however, the Mexican government has demonstrated its commitment to eradicating such behaviors."

III. BIA Decision

The BIA affirmed the IJ's alternative holding that "even if the applicant's past mistreatment amounted to torture, she did not establish that she will more likely than not be tortured if returned to Mexico."

The BIA concluded that Petitioner had provided insufficient evidence "to establish that she would more likely than not be targeted by any criminal element or any other person in Mexico." The BIA affirmed the IJ's findings that no one outside of Petitioner's immediate family knows about her sexual orientation, that Petitioner's family would not torture her, that Petitioner's testimony about Luna's connections to Los Zetas was "speculative," and that the country conditions evidence did not show that Petitioner would be personally at risk.

The BIA affirmed the IJ's determination that Petitioner could reasonably relocate to avoid the harm she fears. The BIA affirmed the IJ's findings that Petitioner's opinion that Los

Zetas are present throughout Mexico was "unsubstantiated," that Petitioner had not had interactions with Los Zetas apart from Luna's family members, and that Los Zetas operate "within the state of Veracruz and surrounding areas." The BIA held that "[t]he applicant's speculation that [Luna] has country-wide connections in Mexico, coupled with the lack of any attempt to relocate, does not provide adequate evidence to conclude that relocation is not a reasonable option." The BIA also found that country conditions evidence did not establish that Petitioner was more likely than not to be tortured in all areas of Mexico simply as an LGBTQ individual.

The BIA affirmed the IJ's determination that Petitioner failed to establish consent or acquiescence by a public official. The BIA stated that "[t]he fact that there are corrupt police officials does not mean that the government consents or acquiesces in the torture of its citizens." The BIA approved the IJ's reasoning that "the Mexican government is aggressively combating corruption, drug cartels, and violence against members of the LGBT" community. The BIA rejected Petitioner's argument that the 2005 incident demonstrated acquiescence by public officials where the police drove by and laughed, because "[t]his incident, which is not described with much detail, is insufficient ... in light of ... more recent country conditions evidence."

ANALYSIS

Substantial evidence does not support the BIA's determination that Petitioner failed to meet her burden of proof under CAT that she would more likely than not be tortured, with the consent or acquiescence of a public official, if returned to Mexico. The BIA reached its determination by misapplying our precedents regarding acquiescence of a public official and regarding the possibility of safe relocation, as well as by making or affirming factual findings that are directly contradicted by the record. Contrary to the BIA's determination, we hold that the existing record compels the conclusion that Petitioner has met her burden under CAT.

To be eligible for relief under CAT, an applicant bears the burden of establishing that she will more likely than not be tortured with the consent or acquiescence of a public official if removed to her native country. "Torture is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment that do not amount to torture." 8 C.F.R. § 1208.18(a)(2). The threat of imminent death, whether directed at the applicant or someone the applicant knows, may constitute torture. §§ 1208.18(a)(4)(iii)–(iv). Rape and sexual assault may constitute torture, and "certainly rise to the level of torture for CAT purposes" when inflicted due to the victim's sexual orientation.

In evaluating a CAT claim, "the IJ must consider all relevant evidence; no one factor is determinative." Maldonado v. Lynch, 786 F.3d 1155, 1164 (9th Cir. 2015) (en banc). Relevant evidence includes:

(i) Evidence of past torture inflicted upon the applicant;

(ii) Evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured;
(iii) Evidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable; and
(iv) Other relevant information regarding conditions in the country of removal.

8 C.F.R. § 1208.16(c)(3). "CAT claims must be considered in terms of the aggregate risk of torture from all sources, and not as separate, divisible CAT claims." Quijada-Aguilar v. Lynch, 799 F.3d 1303, 1308 (9th Cir. 2015).

I. Acquiescence of a Public Official

"Acquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity." 8 C.F.R. § 1208.18(a)(7). "Government acquiescence does not require actual knowledge or willful acceptance of torture; awareness and willful blindness will suffice." Aguilar-Ramos v. Holder, 594 F.3d 701, 705–06 (9th Cir. 2010). However, "a general ineffectiveness on the government's part to investigate and prevent crime will not suffice to show acquiescence." Andrade-Garcia v. Lynch, 828 F.3d 829, 836 (9th Cir. 2016).

In Madrigal v. Holder, 716 F.3d 499 (9th Cir. 2013), we considered an asylum and CAT case specifically involving Los Zetas in Mexico. Regarding the relationship between public officials and Los Zetas, we said:

> Significant evidence in the record calls into doubt the Mexican government's ability to control Los Zetas. The available country conditions evidence demonstrates that violent crime traceable to drug cartels remains high despite the Mexican government's efforts to quell it.... Furthermore, notwithstanding the superior efforts of the Mexican government at the national level, corruption at the state and local levels "continue[s] to be a problem." Many police officers are "involved in kidnapping, extortion, or providing protection for, or acting directly on behalf of, organized crime and drug traffickers," which leads to the "continued reluctance of many victims to file complaints." ... [C]orruption is also rampant among prison guards, and [Zetas] prisoners can and do break out of prison with the guards' help.

(quoting U.S. Dep't of State, 2008 Human Rights Report: Mexico (2009)). As to acquiescence for CAT purposes, we said:

> Importantly, an applicant for CAT relief need not show that the entire foreign government would consent to or acquiesce in his torture.... Voluminous evidence in the record explains that corruption of public officials in Mexico remains a problem, particularly at the state and local levels of government, with police officers and prison guards frequently working directly on behalf of drug cartels.... "[I]t is not contrary to the

purpose of the CAT ... to hold Mexico responsible for the acts of its officials, including low-level ones, even when those officials act in contravention of the nation's will." (quoting Ramirez-Peyro v. Holder, 574 F.3d 893, 901 (8th Cir. 2009)).

In Barajas-Romero v. Lynch, 846 F.3d 351 (9th Cir. 2017), a case involving another drug cartel in Mexico, we further clarified the standard we applied in Madrigal. The BIA had reasoned that "the danger [the petitioner] faced from the drug cartel and corrupt police did not establish government involvement because Mexican law, and national policy to root out the corruption, established the absence of official acquiescence." In other words, the BIA reasoned that acquiescence by "rogue" public officials is not enough. We rejected BIA's "rogue official" exception as inconsistent with Madrigal. To the contrary, a rogue public official is still a "public official" under CAT.

We emphasized this point again in Bringas-Rodriguez v. Sessions, 850 F.3d 1051 (9th Cir. 2017) (en banc), a case involving a Mexican applicant who was physically and sexually abused by family members and a neighbor during his childhood and teenage years because of his perceived sexual orientation. Applying the related asylum standard that asks whether a government is "unable or unwilling to control" a persecutor, we stressed that high-level government efforts, however important and laudable, do not necessarily reflect low-level government actors on the ground. We specifically recognized the difficulties that the national Mexican government has had in controlling violence against LGBTQ individuals and in controlling drug cartels, in part because state and local officials are among the perpetrators and are involved with the cartels.

Although the BIA cited Barajas-Romero in its decision here, its interpretation of the facts still suffered from the same mistake we identified in Madrigal, Barajas-Romero, and Bringas-Rodriguez. Both the IJ and the BIA relied on national efforts to combat drug cartels and the corruption of public officials in order to find that "the government" would not acquiesce in any torture Petitioner might suffer. Yet the record compels the conclusion that the corruption of public officials remains a problem, including specifically with regard to Los Zetas. The BIA even admitted that "there are corrupt officials."

In addition to the extensive country conditions evidence indicating the prevalence of acquiescence by public officials in the torture committed by Los Zetas generally, Petitioner testified that she was personally beaten severely and threatened with death at gunpoint by a member of Los Zetas, while Mexican police officers looked on and did not nothing but laugh. This testimony, which the IJ found credible, establishes the acquiescence of public officials in a past instance of torture. The BIA erred in concluding that Petitioner's testimony about this incident was insufficient in light of more recent country conditions evidence. As explained above, the country conditions evidence shows that corruption of government officials, especially of the police with regard to drug cartels, and specifically with regard to Los Zetas, remains a major problem in Mexico. The country conditions evidence certainly does not indicate that low-

level government corruption has been so rectified as to render insufficient Petitioner's testimony regarding acquiescence by specific police officers in Petitioner's specific circumstances.

Furthermore, Petitioner testified, and the IJ credited her testimony, that Luna was able to bribe Mexican officials in 2010 to put the mother of some of his other children in jail after that mother reported Luna or his family for threatening her and taking her children. This testimony further establishes that there are Mexican officials willing to aid the unlawful behavior of Luna, Luna's relatives, and other Zetas members. This inference is not diminished by the fact that, as the IJ noted, Petitioner does not know if the mother is still in jail.

In summary, the record compels the conclusion that Petitioner has established the requisite level of acquiescence by public officials to satisfy that aspect of her CAT claim. She testified to multiple instances of such acquiescence in the past involving her personal circumstances, and presented extensive country conditions evidence documenting the widespread problem of public official acquiescence in Zetas crimes generally.

II. Evidence that the Applicant Could Safely Relocate

Among its assessment of "all evidence relevant to the possibility of future torture," the IJ must consider "[e]vidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured." 8 C.F.R. § 1208.16(c)(3)(ii). The regulation "does not place a burden on an applicant to demonstrate that relocation within the proposed country of removal is impossible." Nor, however, "do the regulations shift the burden to the government, because they state that the applicant carries the overall burden of proof." Instead, the IJ must simply "consider all relevant evidence; no one factor is determinative."

Although the BIA cited Maldonado here, and neither the IJ nor the BIA expressly stated that the burden was on Petitioner to prove impossibility of relocation, their analyses strongly indicate that they applied this reasoning anyway. The BIA concluded that the IJ "found an absence of evidence indicating that the applicant could not relocate." The IJ stated that "Mexico is a large country" and "[i]t seems unlikely that there is nowhere in Mexico that the applicant could live without being harmed." Neither the IJ nor the BIA cited any affirmative "[e]vidence that [Petitioner] could relocate to a part of [Mexico] where ... she is not likely to be tortured." 8 C.F.R. § 1208.16(c)(3)(ii).

Moreover, contrary to the IJ's and BIA's findings, extensive record evidence shows that Los Zetas operate in many parts of Mexico, including states far away from "Veracruz and surrounding areas." The 2016 State Department Report and other articles in the record cite torture, kidnappings, and murders by Los Zetas in numerous states throughout Mexico. Petitioner testified that Luna's family is in Baja California and that these family members include prominent Zetas members. We recognized in Madrigal that Los Zetas had beheaded Petitioner's fellow soldiers in Jalisco who were involved in arresting Zetas members, then

tracked down Petitioner to a remote village in which he was hiding. Neither the IJ nor the BIA cited any evidence that there are states in Mexico where Los Zetas are unable to operate. Even if Los Zetas did not find her, Petitioner is at heightened risk throughout Mexico on account of her sexual orientation. Extensive record evidence demonstrates that LGBTQ individuals are at risk throughout Mexico. See also Bringas-Rodriguez, 850 F.3d at 1072 (Mexico has actually experienced "an increase in violence against gay, lesbian, and transgender individuals during the years in which greater legal protections have been extended to these communities.") (quoting Avendano-Hernandez, 800 F.3d at 1081). We have rejected reasoning such as the IJ employed here, that an applicant can be deemed able to safely relocate based on hiding her fundamental identity. See, e.g., Edu v. Holder, 624 F.3d 1137, 1146 (9th Cir. 2010) (rejecting BIA's conception that CAT protection requires alien to give up practice of political beliefs in order to avoid torture); Hernandez-Montiel v. INS, 225 F.3d 1084, 1093 (9th Cir. 2000) (recognizing that sexual orientation is "so fundamental to one's identity that a person should not be required to abandon" it), overruled on other grounds by Thomas v. Gonzales, 409 F.3d 1177 (9th Cir. 2005) (en banc), vacated by 547 U.S. 183 (2006). Although in some circumstances the generalized risk due to Petitioner's LGBTQ identity may not meet the more-likely-than-not standard on its own, it weighs against a conclusion that there is "evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured." 8 C.F.R. § 1208.16(c)(3)(ii). Moreover, "CAT claims must be considered in terms of the aggregate risk of torture from all sources." Quijada-Aguilar, 799 F.3d at 1308.

In summary, we conclude that the lack of affirmative evidence that there is a general or specific area within Mexico where Petitioner can safely relocate, the evidence that Los Zetas operate throughout much of Mexico, and the evidence that LGBTQ individuals are at heightened risk throughout Mexico, together compel a conclusion contrary to the BIA's. Although not determinative on its own, the evidence relating to the possibility of relocation weighs in favor of granting Petitioner relief.

III. Future Torture

The ultimate inquiry in evaluating whether an applicant is entitled to CAT relief is whether, upon consideration of all relevant evidence relevant, the applicant has met her burden to establish that it is more likely than not that she will suffer future torture if removed to the proposed country of removal

"'[P]ast torture is ordinarily the principal factor on which we rely when an applicant who has been previously tortured seeks relief under the Convention' because, absent changed circumstances, 'if an individual has been tortured and has escaped to another country, it is likely that [s]he will be tortured again if returned to the site of h[er] prior suffering.'"Avendano-Hernandez, 800 F.3d at 1080 (quoting Nuru v. Gonzales, 404 F.3d 1207, 1217 (9th Cir. 2005)). The rapes Petitioner suffered as a child and teenager, and her parents' reactions to those rapes (either telling Petitioner she deserved it, not believing her, or ejecting her from the house),

demonstrate some likelihood that Petitioner is at risk of future torture, particularly in the form of sexual abuse, based on her gender and sexual orientation. Likewise, the 2005 beating and death threat Petitioner suffered from a prominent Zetas member and cousin of Luna's demonstrates some likelihood that she would again suffer severe assault or indeed, as she has now left Luna, death, if that cousin or his Zetas associates were to find her in Mexico.

Furthermore, Petitioner's credible testimony that the conditions in Mexico remain the same compels the conclusion that it is more likely than not that Los Zetas will target Petitioner for murder or other torture if she is removed to Mexico. Petitioner testified that she received death threats from Luna's Zetas relatives and was subject to repeated intimidation tactics for reporting the rape of her daughter and then for reporting the threats themselves. Petitioner testified that the individuals threatening her include Chavelo, Luna's nephew who tried to sexually assault Petitioner in 2004, who is currently living in Mexico after being deported and working with Luna's uncles and cousins in Mexico. Petitioner also testified that Los Zetas tried to kidnap her siblings who are still in Veracruz.

As discussed above, the record also includes extensive evidence that LGBTQ individuals are subject to a heightened risk of torture throughout Mexico.

Considering all relevant evidence, we conclude that the record compels the conclusion that petitioner has met her burden of proof to establish that it is more likely than not that she will suffer future torture if removed to her native country.

CONCLUSION

We grant the petition and remand for the agency to grant deferral of removal pursuant to CAT because the record compels the conclusion that Petitioner will more likely than not be tortured if she is removed to Mexico.

NOTES AND QUESTIONS

1. Under what circumstances would it be appropriate for a federal appeals court to substitute its evaluation of the facts for those of the Immigration Judge and the Board of Immigration Appeals?

2. When a non-citizen seeking to remain in the United States has been convicted of a serious crime, the immigration law disqualifies them from receiving asylum or ordinary withholding of removal upon proving a reasonable fear of persecution. Instead, the only potential relief is protection from removal under the Convention against Torture (CAT). As you can tell from the court's discussion of Ms. Xochihua-Jaimes' claim, the concept of "torture" for this purpose is a flexible one, and can apparently extend to any conduct inflicting serious physical or psychological harm on an individual, and the petitioner has

the burden of showing that they would be likely to be subjected to torture at the hands of government agents or private parties whose activities the government condones, ignores, or is unable to control. During the Trump Administration, the Justice Department imposed a very narrow interpretation on coverage of the CAT, and since the IJ's are employees of the Justice Department who serve without the lifetime employment protections afforded to Article III judges, they tend to be very responsible to the policy directives of the Attorney General. Is it appropriate to have individuals thus incentivized making potentially life or death decisions concerning refugee petitions?

Chapter 6 – Section F – Bans on "Conversion Therapy."

The introductory paragraph on page 816 mentions that challenges to statutes banning the practice of conversion therapy had been rejected by the courts. In the following case, an 11th Circuit panel held that such laws violate the 1st Amendment. This case should be read in conjunction with Pickup v. Brown, the 9th Circuit opinion in the casebook on page 816:

Otto v. City of Boca Raton, Florida

981 F.3d 854 (11th Cir. 2020)

GRANT, Circuit Judge:

Boca Raton and Palm Beach County prohibit therapists from engaging in counseling or any therapy with a goal of changing a minor's sexual orientation, reducing a minor's sexual or romantic attractions (at least to others of the same gender or sex), or changing a minor's gender identity or expression—though support and assistance to a person undergoing gender transition is specifically permitted. These restrictions apply even to purely speech-based therapy. Two therapists argue that the ordinances infringe on their constitutional right to speak freely with clients. They appeal the district court's denial of their motion for a preliminary injunction. We understand and appreciate that the therapy is highly controversial. But the First Amendment has no carveout for controversial speech. We hold that the challenged ordinances violate the First Amendment because they are content-based regulations of speech that cannot survive strict scrutiny.

I.

A.

In late 2017, Palm Beach County, Florida and the City of Boca Raton joined a growing list of states and municipalities that prohibit controversial therapies called sexual orientation change efforts (SOCE). The City and the County both passed ordinances based on legislative findings that SOCE poses a serious health risk to minors. These findings cited various studies and the position papers of numerous medical and public health organizations.

The City and County ordinances are substantially identical, differing primarily in how they penalize violations. The City's ordinance applies to "any person who is licensed by the State of Florida to provide professional counseling," except for clergy. The ordinance bars covered providers from treating minors with any counseling, practice or treatment performed with the goal of changing an individual's sexual orientation or gender identity, including, but not limited to, efforts to change behaviors, gender identity, or gender expression, or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same gender or sex.

The County enacted a similar ordinance banning covered providers from engaging in SOCE with minor clients. Its definition of provider is consistent with the City's. . . . But both ordinances contain a significant carveout: they expressly allow "counseling that provides support and assistance to a person undergoing gender transition."

B.

Robert Otto and Julie Hamilton are licensed marriage and family therapists with practices in Palm Beach County, including within the City of Boca Raton. Among other services, they provide counseling to minors who have unwanted same-sex attraction or unwanted gender identity issues. Plaintiffs characterize their counseling as "talk therapy"—that is, therapy conducted solely through speech.

Before the ordinances went into effect, plaintiffs often saw clients who presented with depression and anxiety due to internal conflicts over their sexuality or gender identity. Both therapists disclaim any ability to "change" any person's sexual orientation; they believe, however, that through speech-based therapy, their clients who wish to do so can reduce same-sex behavior and attraction and eliminate what they term confusion over gender identity.

Plaintiffs say their therapy is voluntary and client-directed. Their clients typically have "sincerely held religious beliefs conflicting with homosexuality, and voluntarily seek SOCE counseling in order to live in congruence with their faith and to conform their identity, concept of self, attractions, and behaviors to their sincerely held religious beliefs."

Neither the City nor the County disputes that plaintiffs' practices consisted entirely of speech. But the defendants maintain that SOCE, in any form, poses serious health risks to children and adolescents. Specifically, they cite a seriously increased risk of depression and suicide.

Plaintiffs filed suit to permanently enjoin enforcement of both ordinances. The next day, they moved for a preliminary injunction on two grounds: that the ordinances violate the First

Amendment and that the ordinances are preempted by state law. [The district court denied the motion, finding plaintiffs failed to demonstrate a likelihood of success on the merits of their claims.]

III.

The First Amendment prohibits the political restriction of speech in simple but definite terms: "Congress shall make no law ... abridging the freedom of speech." U.S. Const. amend. I. Those same terms, and their guarantee of free speech, now apply to states and municipalities as well as to the federal government. At the heart of that guarantee is "the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994).

The plaintiffs claim that the SOCE ordinances violate that principle by restricting speech-based therapy because the local governments disagree with the message, ideas, subject matter, and content of the words spoken during their clients' therapy. The local governments counter that their only intention is to protect minors from the harm that is surely caused by that speech, and say that because it is professional speech or conduct they have the power to limit it.

This is a case about what speech the First Amendment allows the government to ban, and under what circumstances. So the first question we need to consider is whether the ordinances are content-based regulations. If they are, we analyze them under strict scrutiny; if not, they receive the lighter touch of intermediate scrutiny or perhaps even rational basis review. "In cases at the margin, it may sometimes be difficult to figure out what constitutes speech protected by the First Amendment. But this is not a hard case in that respect." Wollschlaeger v. Governor, Fla., 848 F.3d 1293, 1307 (11th Cir. 2017) (en banc). The answer to the content-based-or-not question turns out to be as easy here as it was in Wollschlaeger: because the ordinances depend on what is said, they are content-based restrictions that must receive strict scrutiny.

The local governments' characterization of their ordinances as professional regulations cannot lower that bar. The Supreme Court has consistently rejected attempts to set aside the dangers of content-based speech regulation in professional settings: "As with other kinds of speech, regulating the content of professionals' speech 'pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information.'" Nat'l Inst. of Fam. & Life Advocs. v. Becerra138 S. Ct. 2361, 2374 (2018) (hereafter referred to as NIFLA).

Nor can the local governments evade the First Amendment's ordinary presumption against content-based speech restrictions by saying that the plaintiffs' speech is actually conduct. We can understand why they would make this claim; if the ordinances restricted only non-expressive conduct, and not speech, then they would not implicate the First Amendment at all. Our Court, though, has already rejected the practice of relabeling controversial speech as conduct. In a case quite similar to this one, we laid down an important marker: "the enterprise of labeling certain verbal or written communications 'speech' and others 'conduct' is unprincipled and susceptible to manipulation." Wollschlaeger, 848 F.3d at 1308. And between that decision and this one, the Supreme Court also rejected an attempt to regulate speech by recharacterizing it

as professional conduct. See NIFLA, 138 S. Ct. at 2373–74. So too here. The local governments cannot rescue their ordinances by calling the plaintiffs' speech conduct.

Strict scrutiny ordinarily applies to content-based restrictions of speech, and this case is no different. That means we must consider whether the ordinances are "narrowly tailored to serve compelling state interests." Laws or regulations almost never survive this demanding test, and these ordinances are not outliers. Forbidding the government from choosing favored and disfavored messages is at the core of the First Amendment's free-speech guarantee.

A.

A content-based law is one that "applies to particular speech because of the topic discussed or the idea or message expressed." Reed, 576 U.S. at 163. Few categories of regulation have been as disfavored as content-based speech restrictions, which are "presumptively invalid." R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992). That's because, "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." Mosley, 408 U.S. at 95. So regulations that are grounded in the content of speech, and that allow the government "to discriminate on the basis of the content" of that speech, "cannot be tolerated under the First Amendment." Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd., 502 U.S. 105, 116 (1991).

The "mere assertion of a content-neutral purpose" is not enough "to save a law which, on its face, discriminates based on content." Turner, 512 U.S. at 642–43. So the first question is not about a law's purpose, but about its effect—whether it restricts or penalizes speech on the basis of that speech's content. It is not always easy to determine whether a law is content-based—but sometimes it is. "Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter." Reed, 576 U.S. at 163. Two laws held unconstitutional, by the Supreme Court and this Court, respectively, provide useful examples: a federal statute that prohibited the sale and possession of videos depicting animal cruelty, and the Florida law in Wollschlaeger, which prevented doctors from "asking questions concerning the ownership of a firearm or ammunition by the patient." See United States v. Stevens, 559 U.S. 460, 464 (2010); Wollschlaeger, 848 F.3d at 1303 (quoting Fla. Stat. § 790.338(2) (2011)). If adorable videos of puppies are allowed and horrifying videos of puppy abuse are not, that restriction is based on content, no matter how desirable it may be. And if Florida doctors may ask their patients about ownership of anything other than a firearm, that too is a content-based restriction. Those rules were obviously content-based because they regulated certain subject matters but not others.

One reliable way to tell if a law restricting speech is content-based is to ask whether enforcement authorities must "examine the content of the message that is conveyed" to know whether the law has been violated. Take a recent example from the Supreme Court. To see if a robocall was legal, authorities needed to know what the call was about: collecting government debt or anything else. "That is about as content-based as it gets." Barr v. Am. Ass'n of Pol. Consultants, Inc., 140 S. Ct. 2335, 2346 (2020) (plurality opinion); see also League of Women Voters, 468 U.S. at 383 (to determine whether a particular statement was prohibited,

"enforcement authorities must necessarily examine the content of the message that is conveyed").

Other regulations are more obviously content neutral. An anti-demonstration statute, for example, that prohibited such activities within 35 feet of an abortion clinic was deemed content neutral. See McCullen, 573 U.S. at 479–85. Proving whether a demonstrator broke the law required showing physical proximity to an abortion clinic, but it would make no difference whether a demonstration supported or opposed the clinic's work. Similarly, a municipal ordinance was not content-based when it required bands using the city's outdoor stage to also use the city's sound system (which controlled volume and sound mix). See Ward v. Rock Against Racism, 491 U.S. 781, 792 (1989). That regulation applied to all bands equally, and was not conditioned on the messages in songs or the political views of band members; in other words, it could be "justified without reference to the content of the regulated speech."

We cannot see how the regulations here can be applied without considering the content of the banned speech. Indeed, and as we said in Wollschlaeger, "this is not a hard case in that respect." The regulations are plainly "speaker-focused and content-based restrictions on speech": they limit a category of people—therapists—from communicating a particular message. Consider again the similarities to Wollschlaeger. There, a Florida law prevented doctors from speaking to their patients about firearm ownership. Whether a doctor violated that law turned solely on the content of the message conveyed to the patient. Here too. Whether therapy is prohibited depends only on the content of the words used in that therapy, and the ban on that content is because the government disagrees with it. And whether the government's disagreement is for good reasons, great reasons, or terrible reasons has nothing at all to do with it. All that matters is that a therapist's speech to a minor client is legal or illegal under the ordinances based solely on its content.

The governments point out that the therapists have other, similar avenues of expression. To be sure, the therapists remain free to describe SOCE to the public or recommend that a client receive SOCE in another jurisdiction. But (contrary to the dissent's contention) the ordinances plainly prohibit the therapists from having certain conversations with clients. In any event, the constitutional problem posed by speech bans like this one is not mitigated when closely related forms of expression are considered acceptable. Imagine, for instance, if the government of Skokie, Illinois had defended the state court's injunction on a pro-Nazi parade by assuring the Supreme Court that people were welcome to advocate for a pro-Nazi demonstration; it's just that they could not actually hold the demonstration. See Nat'l Socialist Party of Am. v. Village of Skokie, 432 U.S. 43 (1977). The First Amendment does not protect the right to speak about banned speech; it protects speech itself, no matter how disagreeable that speech might be to the government. And what good would it do for a therapist whose client sought SOCE therapy to tell the client that she thought the therapy could be helpful, but could not offer it? It only matters that some words about sexuality and gender are allowed, and others are not.

Equally irrelevant is the district court's observation that plaintiffs retain "their right and prerogative to seek greater acceptance of SOCE." The plaintiffs in Wollschlaeger who wished to talk with their patients about gun safety also retained the "right and prerogative" to seek wider

appreciation for their desire to do so. But speech does not need to be popular in order to be allowed. The First Amendment exists precisely so that speakers with unpopular ideas do not have to lobby the government for permission before they speak.

So the ordinances discriminate on the basis of content—at a minimum. They also discriminate on the basis of viewpoint. After all, the plaintiffs' counseling practices are grounded in a particular viewpoint about sex, gender, and sexual ethics. The defendant governments obviously hold an opposing viewpoint—one that they surely have the right to promote. But they cannot engage in "bias, censorship or preference regarding [another] speaker's point of view." Messer v. City of Douglasville, 975 F.2d 1505, 1509 (11th Cir. 1992).

That the defendants did precisely that becomes even more obvious when considering the "exception" outlined in both ordinances. The exception expressly allows "counseling that provides support and assistance to a person undergoing gender transition." No such carveout exists for sexual orientation. The ordinances thus codify a particular viewpoint—sexual orientation is immutable, but gender is not—and prohibit the therapists from advancing any other perspective when counseling clients. That viewpoint may be widely shared in the communities that passed the ordinances, but widespread agreement is beside the point; the question is whether a speaker's viewpoint determines his license to speak. Here, the answer is yes.

Viewpoint-based regulations like these are "an egregious form of content discrimination." Indeed, there is an argument that such regulations are unconstitutional per se; the Supreme Court has said that "the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984). In that case, it applied heightened scrutiny only after finding that the challenged law was viewpoint neutral. As Rosenberger said, "government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." 515 U.S. at 829. And we have not shied away from the same point: "The prohibition against viewpoint discrimination is firmly embedded in first amendment analysis." Searcey v. Harris, 888 F.2d 1314, 1325 (11th Cir. 1989). Those holdings do not leave a lot of breathing room for viewpoint-based speech restrictions.

Still, the Supreme Court has not explicitly adopted a per se rule, and we have no need to do so here. We only conclude that these ordinances are content- and viewpoint-based restrictions on speech.

B.

The district court and the defendants suggest that the ordinances here—even if based on the content of a therapist's speech—fall into a kind of twilight zone of "professional speech" or "professional conduct." To be sure, certain types of speech receive either less protection or no protection under the First Amendment. Unprotected categories include obscenity, defamation, fraud, incitement, and speech integral to criminal conduct. See Stevens, 559 U.S. at 468. No one has argued that the ordinances fall into these categories of unprotected speech, and we do not see how they could.

Lesser-protected categories include commercial speech, as well as incidental speech swept up in the regulation of professional conduct. But neither of these existing categories are a good fit for the ordinances, and we decline the invitation to recognize a new category of less protected speech. To begin, the ordinances do not regulate commercial speech. Here, what is being regulated is not, say, an advertisement for therapy, but the therapy itself. No one argues that commercial speech is at issue.

As for "incidental speech swept up in the regulation of conduct," the ordinances are direct, not incidental, regulations of speech. Moreover, they are not connected to any regulation of separately identifiable conduct. We recognize, of course, the long-standing principle that valid regulations of conduct might sweep up some speech at their margins. A law against discriminatory hiring would prohibit a "White Applicants Only" sign, a local ordinance against setting outdoor fires would cover flag burning, and an antitrust law directed against "agreements in restraint of trade" would restrict the speech necessary to form such an agreement. See Sorrell v. IMS Health Inc., 564 U.S. 552, 567 (2011). And there is no doubt that "States may regulate professional conduct, even though that conduct incidentally involves speech." NIFLA, 138 S. Ct. at 2372. That is because "words can in some circumstances violate laws directed not against speech but against conduct." R.A.V., 505 U.S. at 389.

But there is a real difference between laws directed at conduct sweeping up incidental speech on the one hand and laws that directly regulate speech on the other. The government cannot regulate speech by relabeling it as conduct. As we have said, "characterizing speech as conduct is a dubious constitutional enterprise," and "labeling certain verbal or written communications 'speech' and others 'conduct' is unprincipled and susceptible to manipulation." Wollschlaeger, 848 F.3d at 1308–09.

The local governments are not entirely wrong when they characterize speech-based SOCE as a course of conduct. SOCE, after all, is a therapy, and plaintiffs say they want to "engage" in it. But plaintiffs have the better of the argument. What the governments call a "medical procedure" consists—entirely—of words. As the district court itself recognized, plaintiffs' therapy "is not just carried out in part through speech: the treatment provided by Drs. Otto and Hamilton is entirely speech." If SOCE is conduct, the same could be said of teaching or protesting—both are activities, after all. Debating? Also an activity. Book clubs? Same answer. But the law does not require us to flip back and forth between perspectives until our eyes hurt. Our precedent says the opposite: "Speech is speech, and it must be analyzed as such for purposes of the First Amendment." Wollschlaeger, 848 F.3d at 1307.

Cohen v. California is a good example. See 403 U.S. 15, 18 (1971). There, the Supreme Court reviewed the violation of a state law prohibiting "maliciously and willfully disturbing the peace or quiet of any neighborhood or person by offensive conduct." The defendant had worn a profanity-emblazoned jacket in front of women and children. Because the "only 'conduct' which the State sought to punish" was "the fact of communication," the Court invalidated the conviction as "resting solely upon 'speech,' not upon any separately identifiable conduct." So putting on the shirt was not the issue; it was the message communicated by the shirt.

The defendants' ordinances also target a message: the advice that therapists may give their clients. As the Supreme Court said in another case purportedly addressing conduct, if "the acts of 'disclosing' and 'publishing' information do not constitute speech, it is hard to imagine what does fall within that category." Bartnicki v. Vopper, 532 U.S. 514, 527 (2001) The same is true here. If speaking to clients is not speech, the world is truly upside down. These ordinances sanction speech directly, not incidentally—the only "conduct" at issue is speech. Simply put, it is never enough for the government to show how speech can also be framed as conduct. "Saying that restrictions on writing and speaking are merely incidental to speech is like saying that limitations on walking and running are merely incidental to ambulation." Wollschlaeger, 848 F.3d at 1308.

Declaring itself "stymied by the Eleventh Circuit's analysis in Wollschlaeger," the district court found refuge in a proposed category of less protected speech, which it described as "professional speech." The problem is that courts do not have a "freewheeling authority to declare new categories of speech outside the scope of the First Amendment." United States v. Alvarez, 567 U.S. 709, 722 (2012) (quoting Stevens, 559 U.S. at 472). And "professional speech" is not a traditional category of speech that falls within an exception to normal First Amendment principles. We have already rejected the suggestion that the government's ability to regulate entry into a profession entitles it to regulate the speech of professionals. See Wollschlaeger, 848 F.3d at 1309. In Wollschlaeger, the fact that the speech about gun safety was offered in the context of a profession did not mean the government could restrict that speech. This case, like Wollschlaeger, is not about licensure requirements. It is about speech.

Indeed, if professional speech were not protected under normal First Amendment principles, the government might "easily tell architects that they cannot propose buildings in the style of I.M. Pei, or general contractors that they cannot suggest the use of cheaper foreign steel in construction projects, or accountants that they cannot discuss legal tax avoidance techniques." The list could go on. Perhaps examples from areas that are not enmeshed in political controversy make the risks easier to see. But the same limits apply everywhere.

The Supreme Court's decision in NIFLA also refused to recognize professional speech as a new speech category deserving less protection. There, the Court refused to give governments "unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement." NIFLA, 138 S. Ct. at 2375. The First Amendment's core speech protections could not very well withstand that sort of restriction-via-professionalization.

In fact, the NIFLA decision not only addressed similar doctrinal issues to those we face here—it directly criticized other circuit decisions approving of SOCE bans. In Pickup v. Brown, the Ninth Circuit reviewed California's anti-SOCE law under the rational basis standard. See 740 F.3d 1208, 1231 (9th Cir. 2014). And in King v. Governor of New Jersey, the Third Circuit reviewed New Jersey's similar law under intermediate scrutiny. See 767 F.3d 216, 234–37 (3d Cir. 2014). NIFLA disapproved of both courts' willingness to "except professional speech from the rule that content-based regulations of speech are subject to strict scrutiny." 138 S. Ct. at 2371. "Speech is not unprotected merely because it is uttered by 'professionals.'"

We take that statement to heart. The idea that the ordinances target "professional speech" does not loosen the First Amendment's restraints. Although NIFLA did "not foreclose the possibility" that some reason might exist for finding that professional speech is a "unique category that is exempt from ordinary First Amendment principles," the defendants have not provided one. And because NIFLA directly criticized Pickup and King—cases with very close facts to this one—we do not think there is much question that, even if some type of professional speech might conceivably fall outside the First Amendment, the speech at issue here does not. But to whatever extent NIFLA failed to bind us with a direct holding on that point, we now make that holding ourselves. These ordinances are content-based regulations of speech and must satisfy strict scrutiny.

C.

Under strict scrutiny, content-based restrictions "are presumptively unconstitutional." And they can be justified "only if the government proves that they are narrowly tailored to serve compelling state interests." It is indisputable "that a State's interest in safeguarding the physical and psychological well-being of a minor is compelling. We have no doubt that the local governments here have a strong interest in protecting children. Their legitimate authority to protect children, however, "does not include a free-floating power to restrict the ideas to which children may be exposed." Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 794–95 (2011). So while protecting children is a crucial government interest, speech "cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." Erznoznik v. City of Jacksonville, 422 U.S. 205, 213–14 (1975).

Additionally, it is not enough for the defendants to identify a compelling interest. To survive strict scrutiny, they must prove that the ordinances "further" that compelling interest and are "narrowly tailored to that end." Reed, 576 U.S. at 171. According to the Supreme Court, it is "rare that a regulation restricting speech because of its content will ever be permissible." Brown, 564 U.S. at 799. The government carries the burden of proof and, "because it bears the risk of uncertainty, ambiguous proof will not" satisfy the "demanding standard" it must meet. And as this Court has explained, our review under strict scrutiny is "properly skeptical of the government's ability to calibrate the propriety and utility of speech on certain topics." Wollschlaeger, 848 F.3d at 1308.

Defendants say that the ordinances "safeguard the physical and psychological well-being of minors." Together with their amici, they present a series of reports and studies setting out harms. But when examined closely, these documents offer assertions rather than evidence, at least regarding the effects of purely speech-based SOCE. Indeed, a report from the American Psychological Association, relied on by the defendants, concedes that "non-aversive and recent approaches to SOCE have not been rigorously evaluated." In fact, it found a "complete lack" of "rigorous recent prospective research" on SOCE. As for speech-based SOCE, the report notes that recent research indicates that those who have participated have mixed views: "there are individuals who perceive they have been harmed and others who perceive they have benefited from non-aversive SOCE." What's more, because of this "complete lack" of rigorous recent research, the report concludes that it has "no clear indication of the prevalence of harmful

outcomes among people who have undergone" SOCE. We fail to see how, even completely crediting the report, such equivocal conclusions can satisfy strict scrutiny and overcome the strong presumption against content-based limitations on speech.

Still, they say, our confidence should not be shaken: the "relative lack of empirical studies on SOCE is not evidence of lack of harm .... If anything, the lack of studies on SOCE may be indicative of the risk of harm." The district court agreed: "Requiring Defendants to produce specific evidence that engaging in SOCE through talk therapy is as harmful as aversive techniques would likely be futile when so many professional organizations have declared their opposition to SOCE." In other words, evidence is not necessary when the relevant professional organizations are united.

But that is, really, just another way of arguing that majority preference can justify a speech restriction. The "point of the First Amendment," however, "is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content." R.A.V., 505 U.S. at 392. Strict scrutiny cannot be satisfied by professional societies' opposition to speech. Although we have no reason to doubt that these groups are composed of educated men and women acting in good faith, their institutional positions cannot define the boundaries of constitutional rights. They may hit the right mark—but they may also miss it.

Sometimes by a wide margin, too. It is not uncommon for professional organizations to do an about-face in response to new evidence or new attitudes, but one example stands out as we consider this case. In the first three printings of the Diagnostic and Statistical Manual of Mental Disorders, the American Psychiatric Association considered homosexuality a paraphilia, disorder, or disturbance.

Only in 1987 was homosexuality completely delisted from the Manual. The Association's abandoned position is, to put it mildly, broadly disfavored today. But the change itself shows why we cannot rely on professional organizations' judgments—it would have been horribly wrong to allow the old professional consensus against homosexuality to justify a ban on counseling that affirmed it. Neutral principles work both ways, so we cannot allow a new consensus to justify restrictions on speech. Professional opinions and cultural attitudes may have changed, but the First Amendment has not.

We pause to note that this can be a difficult conclusion. But it does not mean that society is powerless to remedy harmful speech. While the First Amendment rejects the governments' approach here, it does not stand in the way of "[l]ongstanding torts for professional malpractice" or other state-law penalties for bad acts that produce actual harm. NIFLA, 138 S. Ct. at 2373. People who actually hurt children can be held accountable, but "[b]road prophylactic rules in the area of free expression are suspect." Button, 371 U.S. at 438. In other words, "[e]ven where the protection of children is the object, the constitutional limits on governmental action apply." Brown, 564 U.S. at 804–05.

One final point. We do understand the temptation to say that some speech goes too far and is too risky to permit. But the First Amendment requires that content-based speech restrictions satisfy strict scrutiny. And unless restrictions meet that "demanding standard,"

whether the speech they target should be tolerated is simply not a question that we are allowed to consider, or a choice that we are allowed to make. "The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it."

IV.

So the therapists meet the first requirement for a preliminary injunction. They also meet the remaining requirements as a necessary legal consequence of our holding on the merits. The second requirement is "irreparable injury." Because the ordinances are an unconstitutional "direct penalization" of protected speech, continued enforcement, "for even minimal periods of time," constitutes a per se irreparable injury.

The nonmovant is the government, so the third and fourth requirements—"damage to the opposing party" and "public interest"—can be consolidated. It is clear that neither the government nor the public has any legitimate interest in enforcing an unconstitutional ordinance. See, e.g., KH Outdoor, LLC v. City of Trussville, 458 F.3d 1261, 1272 (11th Cir. 2006).

V.

Aside from their First Amendment claims, plaintiffs argue that the ordinances are ultra vires because they regulate an area—the licensure of mental health professionals—preempted by the State of Florida's licensure scheme. It's true that federal courts should "avoid reaching constitutional questions if there are other grounds upon which a case can be decided." BellSouth Telecomms., Inc. v. Town of Palm Beach, 252 F.3d 1169, 1176 (11th Cir. 2001). That doctrine, however, is not implicated here. It only comes into play when "a dispositive nonconstitutional ground is available." Hagans v. Lavine, 415 U.S. 528, 547 (1974).

The main reason the doctrine is not implicated, then, is that the state preemption claim is not dispositive here. In considering that claim, the district court ruled that the plaintiffs failed to show irreparable harm, but it did not address the other preliminary injunction factors. Were we to reverse, we would need to remand to the district court to evaluate the remaining factors on remand—we are "a court of review, not a court of first view." Thus, the state law issue presented on appeal—whether the plaintiffs are suffering irreparable injury from local legislation in an area impliedly preempted by state law—is not dispositive.

What's more, even if the district court ultimately issued a preliminary injunction on state-preemption grounds, the plaintiffs would suffer the delay of further proceedings in the meantime. Relief is definitionally incomplete if it forces the plaintiffs to continue holding their First Amendment rights in abeyance.

* * *

This decision allows speech that many find concerning—even dangerous. But consider the alternative. If the speech restrictions in these ordinances can stand, then so can their inverse. Local communities could prevent therapists from validating a client's same-sex attractions if the

city council deemed that message harmful. And the same goes for gender transition—counseling supporting a client's gender identification could be banned. It comes down to this: if the plaintiffs' perspective is not allowed here, then the defendants' perspective can be banned elsewhere. People have intense moral, religious, and spiritual views about these matters—on all sides. And that is exactly why the First Amendment does not allow communities to determine how their neighbors may be counseled about matters of sexual orientation or gender.

"If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." Texas v. Johnson, 491 U.S. 397, 414 (1989). The challenged ordinances violate that principle, and the district court should have enjoined their enforcement. We therefore REVERSE the district court's order and REMAND for entry of a preliminary injunction consistent with this opinion.

MARTIN, Circuit Judge, dissenting:

Today's majority opinion puts a stop to municipal efforts to regulate "sexual orientation change efforts" (commonly known as "conversion therapy"), which is known to be a harmful therapeutic practice. The majority invalidates laws enacted to curb these therapeutic practices, despite strong evidence of the harm they cause, as well as the laws' narrow focus on licensed therapists practicing on patients who are minors. Although I am mindful of the free-speech concerns the majority expresses, I respectfully dissent from the decision to enjoin these laws. [Justice Martin's lengthy dissent is worth reading but is omitted here since has an opinion by the 9th Circuit setting out views contrary to the majority opinion on relevant points.]

Notes and Questions

1. A petition for rehearing en banc was pending before the 11th Circuit at the time of writing. Are you convinced that the same 1st Amendment standard used to challenge content-based regulations of political speech – strict scrutiny – should be used as well to evaluate regulation of professional practice in counseling, psychology and psychiatry? Who has the better argument as to this, the 9th Circuit in Pickup or the 11th Circuit in Otto. So far, the Supreme Court has denied all petitions to review lower court decisions rejecting 1st Amendment challenges to statutory bans on performing SOCE on minors.

2. Despite the opinion in Otto, jurisdictions continued to consider and enact proposals to ban the performance of conversion therapy on minors, with several such measures being adopted during the first half of 2021.]

3. Consider the issue of SOCE from a different perspective. A group of individuals who had paid a New Jersey organization to subject them to conversion therapy joined together to sue the organization for violation of the state's Consumer Fraud law, claiming that they had been induced to pay for useless and harmful treatment based on the representations of the organization. After a lengthy trial, a jury ruled in favor of the plaintiffs, finding that the

defendants had engaged in "unconscionable business practice," and during ensuing settlement negotiations the defendants agreed to dissolve their organization and refrain from performing or making referrals to perform conversion therapy. The defendants stipulated that in the absence of the settlement agreement, they would be liable to the plaintiffs for attorneys' fees and expenses totaling $3.5 million, and the settlement agreement was incorporated into a formal order by the court. When the plaintiffs subsequently presented evidence to the court that the defendants had breached the settlement agreement by establishing an "alter ego" organization and continuing to promote and make referrals for conversion therapy, the court issued a new, stricter injunction, and upheld a damage award of $3.5 million, which was affirmed by the New Jersey Appellate Division. M.F. v. JONAH, 2021 WL 2795427 (N.J. App. Div., July 6, 2021), affirming 2019 WL 5459860 (N.J. Super. Ct., Hudson Co., June 20, 2019).