IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA

ALEXANDRIA DIVISION

RAPIDES PARISH SCHOOL BOARD, Plaintiff, v. UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al*., Defendants.	Case No. 1:25-CV-00070-DDD-JPM

NOTICE OF SUPPLEMENTAL AUTHORITY

Defendants respectfully notify the Court of several decisions, agency actions, and other developments emerging after the conclusion of briefing on the pending motions to dismiss and for partial summary judgment.

1. *Neese v. Kennedy*. Throughout their briefing, Defendants rely on the Fifth Circuit's opinion in *Neese v. Becerra*, 123 F.4th 751 (5th Cir. 2024). On October 6, 2025, the Supreme Court denied the *Neese* plaintiffs' petition for a writ of certiorari. *Neese v. Kennedy*, 146 S. Ct. 104 (Mem) (2025).

2. *Tennessee v. Kennedy* (Challenge to Section 1557 Regulations). In Count II of the Complaint, Plaintiff Rapides Parish School Board (the "School Board") seeks facial pre-enforcement judicial review under 5 U.S.C. § 706(2) of certain provisions of U.S. Department of Health and Human Services ("HHS") regulations interpreting Section 1557 of the Affordable Care Act. Compl. ¶¶ 338-67. On October 22, 2025, another district court considering a similar challenge issued a final judgment vacating the relevant provisions of these regulations. *Tennessee v. Kennedy*, 807 F. Supp. 3d 613, 630 (S.D. Miss. 2025). The *Tennessee* court ordered that those

regulations "are VACATED to the extent that they expand Title IX's definition of sex discrimination to include gender-identity discrimination[.]" *Id.*

3. *McComb Children's Clinic, LTD v. Kennedy* (Challenge to Section 1557 Regulations). As in Count II of the Complaint here, in *McComb Children's Clinic, LTD v. Kennedy*, the plaintiff clinic sought pre-enforcement judicial review of a putative "gender identity mandate" included in HHS Section 1557 regulations. *See* Compl. ¶¶ 72-119, *McComb Children's Clinic, LTD. v. Kennedy*, No. 5:24-cv-00048-KS-LGI (S.D. Miss. May 13, 2024), ECF No. 1. Notably, the plaintiff clinic in *McComb* is represented by the same counsel as the School Board in this matter.

After the *Tennessee* court vacated the relevant gender identity discrimination provisions of HHS's Section 1557 regulations, the *McComb* court ordered the parties to show cause why the case should not be dismissed as moot. Order Requiring All Parties to Show Cause Why This Lawsuit Should Not Be Dismissed as Moot, *McComb Children's Clinic, LTD. v. Kennedy*, No. 5:24-cv-00048-LG-ASH (S.D. Miss. Dec. 23, 2025), ECF No. 60. On January 13, 2026, plaintiff responded. *See* Plaintiff McComb Children's Clinic's Response to Order to Show Cause, *McComb Children's Clinic, LTD. v. Kennedy*, No. 5:24-cv-00048-LG-ASH (S.D. Miss. Jan. 13, 2026), ECF No. 61. In the response, the *McComb* plaintiff raised many of the same arguments that the School Board (improperly) raised in a recent filing in this case. *Compare id.*, *with* ECF No. 45 at 2.[1]

In February 2026, the *McComb* court dismissed the case as moot. *McComb Children's Clinic, LTD. v. Kennedy*, No. 5:24-cv-00048-LG-ASH, 2026 WL 381193 (S.D. Miss. Feb. 6, 2026). The *McComb* court rejected, among other arguments, the plaintiff's contention that the case was not moot because the *Tennessee* court "did not include 45 C.F.R. § 92.101(a)(2)(v), which

[1] On January 20, 2026, the Government submitted a brief in response to the *McComb* court's order to show cause. *See* Defendants' Memorandum Addressing Mootness, *McComb Children's Clinic, LTD. v. Kennedy*, No. 5:24-cv-00048-LG-ASH (S.D. Miss. Jan. 20, 2026), ECF No. 62.

defines 'sex discrimination' to include 'sex stereotypes' in the list of regulations the Court partially vacated in the *Tennessee* case." *Id*. at *2-3.

The *McComb* plaintiff has appealed the district court's dismissal. The appeal is pending in the Fifth Circuit, docketed as Case No. 26-60101.

4. *Florida v. HHS* (Challenge to Section 1557 Regulations). As in Count II of the Complaint here, in *Florida v. HHS*, plaintiffs sought pre-enforcement judicial review of the gender identity discrimination provisions included in HHS Section 1557 regulations. Notably, one of the plaintiffs joined in *Florida* is represented by the same counsel as the School Board in this matter.

After the change in presidential administration, on June 9, 2025, the district court dismissed the case as moot. Endorsed Order, *Florida v. HHS*, No. 8:24-cv-01080-WFJ-TGW (M.D. Fla. June 9, 2025), ECF No. 79. Specifically, the court concluded that the case was "moot and not capable of repetition within any reasonable time frame." *Id*.

The *Florida* plaintiffs appealed. The appeal is pending in the Eleventh Circuit, docketed as Case No. 25-12095. Briefing concluded on February 13, 2026.

5. *Equal Employment Opportunity Commission Action Rescinding 2024 Guidance.* In Count V of the Complaint, the School Board seeks facial pre-enforcement judicial review under 5 U.S.C. § 706(2) of certain provisions of a guidance document issued by the Equal Employment Opportunity Commission ("EEOC") in 2024. Compl. ¶¶ 427-66. On January 22, 2026, the EEOC voted to rescind the challenged guidance document. EEOC, *Commission Votes: January 2026*, https://www.eeoc.gov/commission-votes-january-2026; EEOC, *EEOC Commission Votes to Rescind 2024 Harassment Guidance* (Jan. 23, 2026), https://www.eeoc.gov/newsroom/eeoc-commission-votes-rescind-2024-harassment-guidance. The harassment guidance rescission was effective on the day of the vote, January 22, 2026.

6. *EEOC Decision: Selina S. v. Driscoll*. In the Complaint, the School Board alleges that EEOC requires employers to provide gender-identity based "access to single-sex intimate spaces like restrooms, locker rooms, and lactation rooms[.]" Compl. ¶ 181. On February 26, 2026,

the EEOC voted to approve a federal sector appellate decision in *Selina S. v. Driscoll* holding that "a federal agency employer [may] . . . maintain single-sex bathrooms and similar intimate spaces." A copy of the *Selina S.* decision is attached.

7. *EEOC Decision: Sam T. v. Kupor.* On March 24, 2026, the EEOC voted to approve a federal sector decision holding that the Office of Personnel Management's "decision to permit less than full coverage for sex-rejecting services and procedures [did not] discriminate[] against trans-identifying employees in violation of Title VII's prohibition against sex-based discrimination." A copy of the *Sam T.* decision is attached.

8. *HHS Section 504 Proposed Rule.* In Count III of the Complaint, the School Board seeks facial pre-enforcement judicial review under 5 U.S.C. § 706(2) of language in the preamble to a regulation issued by HHS stating: "gender dysphoria … may be considered a physical or mental impairment." Compl. ¶¶ 117, 368-392. On December 19, 2025, HHS issued a Notice of Proposed Rulemaking seeking to clarify that HHS interprets the statutory exclusion of "gender identity disorders not resulting from physical impairments" from the definition of disability set forth in 29 U.S.C. § 705(9) & (20)(F)(i) to encompass gender dysphoria and proposed to amend the Section 504 regulations at 45 CFR § 84.4 to state the statutory exclusion "includes gender dysphoria not resulting from physical impairments." Nondiscrimination on the Basis of Disability in Programs or Activities Receiving Federal Financial Assistance, 90 Fed. Reg. 59,478, 59,483 (December 19, 2025) (to be codified at 45 C.F.R. § 84.4).

Dated: April 23, 2026

Respectfully submitted,

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

[redacted]
Selina S.,[1]
Complainant,

v.

Daniel Driscoll,
Secretary,
Department of the Army,
Agency.

Appeal No. 2025003976

Agency No. ARRILEY25JUL000171

DECISION

It is the policy of the United States that "intimate spaces [in federal workplaces] . . . are designated by sex and not identity." Exec. Order 14168, § 4(d), 90 Fed. Reg. 8615 (Jan. 20, 2025). This policy most typically applies to workplace bathrooms, but it also includes locker rooms, changing areas, sleeping quarters, etc. A trans-identifying federal employee claims the policy is unlawful sex-based discrimination in violation of Title VII of the Civil Rights Act of 1964. The Equal Employment Opportunity Commission takes up this employee's appeal in our quasi-

[1] This case has been randomly assigned a pseudonym which will replace Complainant's name when the decision is published to non-parties and the Commission's website.

judicial capacity. *See* 42 U.S.C. § 2000e-16(c) (providing for E.E.O.C. to act "upon an appeal" from a federal employee alleging unlawful employment discrimination).

In a typical Title VII case, discharging our quasi-judicial responsibility is a relatively straightforward exercise. The statute has old roots, and the scope of its meaning has been thoroughly tilled by the federal courts over the decades. For our part, we recognize the special "province and duty of the judicial department to say what the law is." *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 384 (2024) (quoting *Marbury v. Madison*, 1 Cranch 137, 177 (1803)). This means that in most complaints and appeals arising under Title VII, all we need to do is apply longstanding precedent, often from the Supreme Court, to the facts before us.

This appeal presents a rare exception. No federal court has yet authoritatively addressed whether Title VII permits single-sex bathrooms and other intimate spaces in the workplace. Nor has any federal court yet authoritatively addressed whether Title VII requires employers to permit trans-identifying employees to access bathrooms and other intimate spaces otherwise reserved for the opposite sex.

To be sure, the Supreme Court in *Bostock v. Clayton County* recently held that under Title VII a covered employer's decision to discharge or refuse to hire "someone simply for being . . . transgender" constitutes discrimination "because of . . . sex." 590 U.S. 644, 681 (2020). But the Court took care to emphasize, "[W]e do not purport to address bathrooms, locker rooms, or anything else of the kind." *Id.*

And in the handful of years since—a blink of an eye in judicial time—no other federal court has yet authoritatively addressed whether single-sex bathrooms are lawful under the general principles announced in *Bostock*. In the absence of guiding precedent, we have no choice but to undertake our own interpretation of the statute in order to adjudicate this appeal.

That said, we do not view the absence of authoritative precedent as an invitation to act without restraint. Our aim must be to accurately predict how a responsible court would interpret the statute on this issue. Accordingly, we will use "the traditional tools of statutory construction, not individual policy preferences." *Loper Bright*, 603 U.S. at 374. Along those lines, we expect that a responsible court would turn first to the ordinary meaning of the statute's text. And we expect that a responsible court would take care to ensure that its holding is further anchored by the Supreme Court's other precedents in analogous areas of law.

When we follow this path to its logical conclusion—and as applied to the facts presented before us—we find that Title VII permits a federal agency employer to maintain single-sex bathrooms and similar intimate spaces. And it permits a federal agency employer to exclude employees, including trans-identifying employees, from opposite-sex facilities.

Before embarking on that analysis, we again stress the limited reach of our quasi-judicial authority. In the run of federal sector complaints and appeals, the

E.E.O.C. does not interpret the statute: we only apply established precedent to facts. We undertake our own interpretation of the statute here only because circumstances dictate we must. There is an active controversy before us, and we cannot simply press the pause button to await authoritative guidance from the courts. The appeal must be decided, one way or the other.

Our decision, however, applies only to federal agencies subject to the E.E.O.C.'s administrative complaint process for federal employees. It does not apply to any other type of employer, including private sector employers. And our decision does not bind any federal court.

I

The underlying facts to this appeal are basic and undisputed. The Complainant has worked for the Army for some time as a civilian IT specialist at Fort Riley, Kansas. Complainant is male, and for most of his tenure Complainant voluntarily used the Army's male-designated bathrooms and locker rooms without incident. In summer 2025, Complainant informed his local management he now identified as a woman, and he requested to use female-designated bathrooms and locker rooms. Management denied the request, relying on recent instructions from the President to ensure that "intimate spaces . . . are designated by sex and not identity." Exec. Order 14168, § 4(d).

Complainant filed a formal EEO complaint which the Army dismissed for failure to state a claim. Complainant appeals. We review de novo. *See* 29 C.F.R. § 1614.405(a).

II

We do not write on a blank slate. In 2015, a majority of the E.E.O.C.'s then-Commissioners held federal agencies "must allow [trans-identifying employees] access to the . . . [opposite sex] restroom." *Lusardi v. Dep't of the Army*, EEOC Appeal No. 0120133395, 2015 WL 1607756, at *8 (Apr. 1, 2015).

On bathrooms, *Lusardi's* reasoning was concerningly threadbare. No analysis allegedly was needed because, in the then-Commissioners' view, the core conclusion was undisputed: "the [Agency] acknowledges that Complainant's transgender status was *the* motivation for its decision to prevent Complainant from using the common women's restroom." *Lusardi*, 2015 WL 1607756, at *7 (emphasis in original). To sustain this conclusion, however, the Commissioners simply quoted the responsible management official, who explained that female employees would be uncomfortable with the Complainant using the women's bathroom because "despite the fact that [the Complainant] is conducting herself as a female, [the Complainant] is still basically a male, physically." *Id*. No other evidence was discussed.

As a basic matter of evidence, we cannot connect the dots to see how this statement would tend to "make it more or less probable," Fed R. Evid. 401(a), that

the Complainant's "transgender status" motivated the decision to exclude him from the women's bathroom. Quite the opposite. The preposition "despite" does a lot of work here. It is not, as the *Lusardi* Commissioners apparently believed, a synonym for because. By leading with "despite," the responsible management official averred that the Complainant's "transgender status" and conduct did *not* figure into the decision. Nor was the Complainant's "transgender status" and conduct the source of his female coworkers' discomfort. Rather it was the Complainant's sex, which was still immutably male, that was the sole reason his female coworkers did not want him in the women's bathroom.[2]

What the *Lusardi* Commissioners viewed as a smoking-gun was no more than a commonsense acknowledgment that changing one's conduct does not, and cannot, change one's sex. Not only is this too slender a reed to sustain the decision, it is no reed at all. We now undertake the fulsome analysis the *Lusardi* Commissioners eschewed.

III

For the sixty-plus years of Title VII's existence, it has been unerringly accepted that employers and other public-facing entities may lawfully maintain

[2] We have no occasion here to revisit whether it is unlawful to exclude a trans-identifying employee from the bathroom corresponding to their sex. Executive Order 14168 does not permit agencies to do so and the Agency in the instant appeal has not done so. We revisit *Lusardi* only insofar as it held it unlawful for an employer to exclude a trans-identifying employee from the *opposite-sex* bathroom.

single-sex bathrooms.[3] However, in recent years, it has been observed, prospectively, that if Title VII is eventually held to forbid employers from excluding trans-identifying employees from opposite-sex bathrooms, it must necessarily also forbid employers from excluding *non*-trans-identifying employees from opposite-sex bathrooms. *Wittmer v. Phillips 66 Co.*, 915 F.3d 328, 334 (5th Cir. 2019) (Ho, J., concurring) (predicting that single-sex bathrooms in the workplace are likely altogether unlawful if a court adopts a "[sex] blindness approach to Title VII"). In other words, it would be unlawful to even have men's and women's bathrooms in the first place. All bathrooms would be mixed-sex by law, and every employee would be required to perform bodily and other private functions in the presence of the opposite-sex.

But we think the contrapositive is also true, that if Title VII does *not* forbid an employer from excluding non-trans-identifying employees from opposite-sex bathrooms, then Title VII also does *not* forbid an employer from excluding trans-

[3] While no federal court has yet authoritatively addressed this issue under Title VII, a number of courts have acknowledged this assumption, in both cases involving Title VII and in cases addressing other statutes and Constitutional provisions. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 550 n.19 (1996) (noting that admitting women to a previously all-male military academy "would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements") (Equal Protection Clause challenge); *Chaney v. Plainfield Healthcare Ctr.*, 612 F.3d 908, 913 (7th Cir. 2010) ("[T]he law tolerates same-sex restrooms or same-sex dressing rooms, but not white-only rooms, to accommodate privacy needs.") (analyzing Title VII race discrimination claim); *Faulkner v. Jones*, 10 F.3d 226, 232 (4th Cir. 1993) ("[Society has given its] undisputed approval of separate public rest rooms for men and women based on privacy concerns.") (Equal Protection Clause challenge).

identifying employees from opposite-sex bathrooms. Put another way, if an employer can lawfully bar some men from using the women's bathroom (or some women from using the men's bathroom), then an employer can lawfully bar *all* men from using the women's bathroom (and *all* women from using the men's bathroom). A particular man's or woman's "self-identification" would be irrelevant. A man who identifies as a "transwoman" is still a man; a woman who identifies as a "transman" is still a woman. Both may be excluded from opposite-sex bathrooms as such.

Our task then is to thoroughly explain why a responsible federal court, if asked, would agree with our conclusion that under Title VII, federal agency employers may lawfully exclude men from the women's bathroom, and women from the men's bathroom. And once this is established, it follows that a responsible federal court would agree with our conclusion that under Title VII, federal agency employers may lawfully maintain the same rule—and equal treatment—for their trans-identifying employees.

IV

Title VII itself is silent on the topic of single-sex bathrooms, as it is silent on most of the more prosaic details of the workplace. Congress instead spoke in more general and arguably grander terms to target a wide gamut of workplace "discriminat[ion] . . . based on . . . sex." 42 U.S.C. § 2000e-2(a); *see also* § 2000e-16 (extending coverage to federal agency employers). Before we can even begin to

discuss bathrooms and intimate spaces specifically, we need to ascertain what "discrimination based on sex" actually means.

We start with the bedrock principle "that a legislature says in a statute what it means and means in a statute what it says[.]" *Conn. Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992). And the most natural and accurate way to understand what a statute says is to apply "the ordinary public meaning of its terms at the time of its enactment." *Bostock*, 590 U.S. at 654. The key terms here are "sex" and "discriminate."

Sex defined

Title VII does not define the word sex. And the Supreme Court has yet to fix its meaning under Title VII. In *Bostock*, the Court did encounter parties disputing the definition of sex under Title VII. 590 U.S. at 655. But the Court declined to resolve the dispute, concluding that "nothing in our approach . . . turns on the outcome of the parties' debate [over the definition of sex]." *Id*. To advance its decision, the Court assumed for the sake of argument that sex in Title VII "refer[red] only to the biological distinctions between male and female." *Id*.[4]

[4] The *Bostock* Court's assumption about the definition of "sex" under Title VII was consistent with the Supreme Court's view of "sex" in other contexts. *See, e.g.*, *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) ("[S]ex, like race and national origin, is an immutable characteristic determined solely by the accident of birth.") (Equal Protection Clause challenge).

The appeal we face cannot advance on assumptions alone and requires that we fix the definition of sex under Title VII. What the Court assumed in *Bostock*, we think is conclusive: sex, as the term is used in Title VII, "refer[s] to an individual's immutable biological classification as either male or female." Exec. Order 14168, § 2(a).

We base our conclusion on ordinary public meaning. The word sex is common in everyday English, and definitions from reputable dictionaries—contemporaneous with Title VII's passage—provide probative insight. The Eleventh Circuit, looking for the ordinary public meaning of the word circa 1972, has helpfully collected numerous entries. *Adams by & through Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 812 (11th Cir. 2022) (citing *Sex*, American Heritage Dictionary of the English Language (1976) ("The property or quality by which organisms are classified according to their reproductive functions."); *Sex*, American Heritage Dictionary of the English Language (1979) (same); *Sex, Female, Male,* Oxford English Dictionary (re-issue ed. 1978) (defining "sex" as "[e]ither of the two divisions of organic beings distinguished as male and female respectively," "female" as "[b]elonging to the sex which bears offspring," and "male" as "[o]f or belonging to the sex which begets offspring, or performs the fecundating function of generation"); *Sex,* Webster's New World Dictionary (1972) ("[E]ither of the two divisions, male or female, into which persons, animals, or plants are divided, with

reference to their reproductive functions."); *Sex, Female, Male,* Webster's Seventh New Collegiate Dictionary (1969) (defining "sex" as "either of two divisions of organisms distinguished respectively as male or female," "female" as "an individual that bears young or produces eggs as distinguished from one that begets young," and "male" as "of, relating to, or being the sex that begets young by performing the fertilizing function"); *Sex*, Random House College Dictionary (rev. ed. 1980) ("[E]ither the male or female division of a species, esp. as differentiated with reference to the reproductive functions.")).[5]

These entries unambiguously and unanimously acknowledge two sexes, male and female, each defined by its unique reproductive role and related innate physical characteristics.[6] We cannot find any contemporaneous definition to establish otherwise, let alone that sex is defined by non-biological distinctions such as self-identity or personal preference. Nor could we independently find any persuasive alternative usage in the contemporaneous English corpus to contradict the

[5] Dictionaries are not authoritative just because they say so. A given dictionary's persuasiveness rests on its methodology. The best dictionaries, we think, will infer meaning, including ordinary public meanings and non-ordinary specialized meanings, by surveying usage throughout the English corpus. Naturally some dictionaries will be better at this than others, and "courts must take care [when relying on dictionaries]." Antonin Scalia, Bryan A. Garner, *A Note on the Use of Dictionaries*, 16 Green Bag 2d 419, 422 (2013). The Eleventh Circuit's foray demonstrates adequate care by surveying multiple reputable dictionaries that define sex at its core, not its periphery.

[6] We do not here have occasion to apply Title VII to intersex individuals born with both male and female sex characteristics. We anticipate that these rare and unique circumstances can be evaluated on a case-by-case basis.

established dictionary definition. Under this definition, Complainant's sex is male, from the moment of his conception and continuing even after he began to identify as transgender.[7]

Discrimination defined

As with the word sex, Title VII does not define the word discrimination or any derivative. Thankfully, we do not need to peel back layers of dictionary definitions to arrive at a fixed meaning.[8] Per one of the Supreme Court's most recent decisions on Title VII, "The words 'discriminate against,' . . . refer to 'differences in treatment that injure' employees." *Muldrow v. City of St. Louis, Mo.*, 601 U.S. 346, 354 (2024) (quoting *Bostock*, 590 U.S. at 681). In other words, "[an anti-discrimination] statute targets practices that 'treat[] a person worse' because of sex or other protected trait.'" *Id.* (quoting *Bostock* at 658).

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[7] Previously, the *Lusardi* Commissioners held, "[T]here is no cause to question that [someone]—who was assigned the sex of male at birth but identifies as female—*is* female." 2015 WL 1607756, at *8 (emphasis in original). The *Lusardi* Commissioners did not explain how they came to this paradoxical conclusion; they simply floated it as a self-evident axiom untethered from the statute's text and structure. In the absence of rigorous analysis, the *Lusardi* Commissioners gave the impression that they were simply foisting their personal policy preference as an ukase on the rest of the federal government. To ignore the ordinary public meaning of Title VII's text is not just wrong, it is deeply disrespectful both to Congress, who chose the text, and the President, who signed it. Our approach, in stark contrast, rests on Title VII's text. We reaffirm our role as Congress's and the President's instrument, bound to apply the law as it was passed and as it is interpreted by the courts. Until newly enacted law or authoritative court decision says otherwise, we must conclude that one's sex, under Title VII, is immutable and enduring.

[8] Dictionaries are most useful when defining literal concepts like sex, *supra*; less when applied to abstractions, like the concept of discrimination.

To determine whether "differences in treatment" have occurred, and whether they leave employees "worse" off, naturally invites a comparison of similarly situated employees. Indeed, similarly-situatedness has always been the keystone of the Court's discrimination jurisprudence. It figures in time-tested cases like *Yick Wo v. Hopkins*, where the Court addressed "unjust and illegal [race] discrimination between persons in similar circumstances." 118 U.S. 356, 374 (1886). And it continues to ground decisions of more recent vintage leading up to *Bostock*. *See, e.g., Alabama Dept. of Revenue v. CSX Transp., Inc.* (*CSX II*), 575 U.S. 21, 26 (2015) ("[A] tax discriminates . . . when it treats groups [that] are similarly situated differently without sufficient justification for the difference in treatment.") (quotations omitted); *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298 (1997) (noting that "[c]onceptually, of course, any notion of discrimination assumes a comparison of substantially similar entities") (footnote omitted).

And the focus on similarly-situatedness has proved essential to every substantive type of discrimination under federal law. *See, e.g., Flowers v. Mississippi*, 588 U.S. 284, 311–13 (2019) (criminal defendant deprived of right to a fair trial when state strikes jurors of one race but not similarly situated jurors of another); *Dawson v. Steager*, 586 U.S. 171, 175 (2019) (unlawful tax discrimination occurs when state favors state employees over similarly situated federal employees); *CSX II*, 575 U.S. at 26 (unlawful tax discrimination occurs when state favors water

carriers over similarly situated railroad); *Bank of Am. Corp. v. City of Miami, Fla.*, 581 U.S. 189, 194 (2017) (unlawful housing discrimination occurs when bank favors borrowers of one race over similarly situated borrowers of others); *Califano v. Goldfarb*, 430 U.S. 199, 204 (1977) (unlawful sex discrimination occurs when state favors female widows over similarly situated male widowers); *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 70 (1963) (dormant Commerce Clause violated when state favors in-state taxpayers over similarly situated out-of-state taxpayers); *L. T. Barringer & Co. v. United States*, 319 U.S. 1, 6 (1943) (in setting interstate tariffs, United States may not discriminate between similarly situated shippers). It follows then that discrimination under Title VII traces the same arc; it means to treat an employee less favorably than other similarly situated employees.

V

With these definitions in hand, we can more fully flesh out what is meant by Title VII's proscription of discrimination based on sex. It means that sex is determined by reproductive and related innate physical traits. And it means that discrimination based on sex occurs when "members of one sex are exposed to disadvantageous terms or conditions of employment to which [similarly situated] members of the other sex are not exposed." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) (quotations omitted).

On bathrooms, undoubtedly single-sex facilities differentiate between the sexes, at least in a literal sense. But the Supreme Court has long understood that Title VII "does not require either asexuality or androgyny in the workplace." *Oncale*, 523 U.S. at 80. And sex-based differences in treatment in the workplace are not disadvantageous or discriminatory when they reflect the "genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex." *Id.*

More fundamentally, men and women are not *similarly situated* when it comes to bathrooms and other intimate spaces, including locker rooms, changing facilities, showers, sleeping quarters, etc. To start, we need not exhaustively list all the circumstances when men and women *are* similarly situated, either in life generally or in the workplace. In the run of cases, they are. Today, it is the rule, not the exception, that "the sex characteristic . . . bears no relation to [an individual's] ability to perform or contribute to society." *Frontiero*, 411 U.S. at 686; *see also Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989) (plurality opinion) ("Sex . . . [is] not relevant to the selection, evaluation, or compensation of employees."). The market no longer broadly operates in terms of women's work or jobs suited only to men.[9] No more may employers make "overbroad generalizations based on sex which

[9] Except in the "extremely narrow" case where sex is a "bona fide occupational qualification." *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977) (applying 42 U.S.C. § 2000e-2(e)).

are entirely unrelated to any differences between men and women or which demean the ability or social status of [one sex over the other]." *Parham v. Hughes*, 441 U.S. 347, 354 (1979) (considering sex-discrimination under the Equal Protection Clause).

But *often* similarly situated is not *always* similarly situated. "Physical differences between men and women . . . are enduring: The two sexes are not fungible." *United States v. Virginia*, 518 U.S. 515, 533 (1996) (Ginsburg, J.). And separating men and women is not invidious or discriminatory when it "realistically reflects the fact that the sexes are not similarly situated in certain circumstances." *Michael M. v. Superior Ct. of Sonoma Cnty.*, 450 U.S. 464, 469 (1981). Those "certain circumstances" very often depend on the innate physical differences between men and women. *C.f.*, *Virginia*, 518 U.S. at 533.

In *Michael M.*, for instance, the Court relied on those innate physical differences to uphold a statutory rape law that exclusively protected young women. The Court observed, "We need not be medical doctors to discern that young men and young women are not similarly situated with respect to the problems and the risks of sexual intercourse. Only women may become pregnant, and they suffer disproportionately the profound physical, emotional and psychological consequences of [underage] sexual activity." *Id.* at 471–72.

In another example, the Court found, "Fathers and mothers are not similarly situated with regard to the proof of biological parenthood." *Tuan Anh Nguyen v.*

I.N.S., 533 U.S. 53, 63 (2001). Only a mother can bear a child, and the act alone establishes the fact of her biological parenthood. *Lehr v. Robertson*, 463 U.S. 248, 260 n.16 (1983). A father, because of his different reproductive role, must necessarily resort to different means to prove his biological parenthood. *Id*. Differential treatment that follows from these different biological functions would not be discrimination within the ordinary meaning of the word.

In this vein, we restate the obvious: because of their innate physical differences, men and women are not similarly situated when it comes to using bathrooms and other intimate spaces in the workplace.

Those physical differences don't just functionally impact how men and women use these spaces, they also establish a powerful expectation that those functions be undertaken in private without the opposite sex present. It should go without saying that "[t]he desire to shield one's unclothed figure from view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity." *York v. Story*, 324 F.2d 450, 455 (9th Cir. 1963); *see also Doe v. Luzerne Cnty.*, 660 F.3d 169, 177 (3d Cir. 2011) ("[Female deputy sheriff] had a reasonable expectation of privacy [when disrobed], particularly while in the presence of members of the opposite sex."); *Fortner v. Thomas*, 983 F.2d 1024, 1030 (11th Cir. 1993) (recognizing a "constitutional right to bodily privacy because most people have 'a special sense of privacy in their genitals, and

involuntary exposure of them in the presence of people of the other sex may be especially demeaning and humiliating'" (quoting *Lee v. Downs*, 641 F.2d 1117, 1119 (4th Cir. 1981))).[10]

This vital privacy interest did not evaporate in the wake of Title VII's passage. Rather, "[t]he lower federal courts . . . have consistently recognized that privacy interests may justify sex-based requirements [in the workplace]." *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 219 n.8 (1991) (White, J., concurring) (collecting cases). On bathrooms, for instance, Title VII does not disturb the commonsense expectation that a washroom attendant should be of the same sex as the customers and employees using the washroom they are attending. *Norwood v. Dale Maint. Sys., Inc.*, 590 F. Supp. 1410, 1421 (N.D. Ill. 1984).

As a rejoinder, it has been argued that these privacy interests are immaterial when it comes to bathrooms because of lockable stalls. Outside the Title VII context, the Fourth Circuit, for one, believes a lockable stall is all it takes to cancel out the

[10] Courts have even acknowledged that prisoners, who generally have more limited privacy expectations, still have a legitimate interest in not being exposed to members of the opposite sex in intimate circumstances. *See Robino v. Iranon*, 145 F.3d 1109, 1111 (9th Cir. 1998) (Title VII did not prohibit state prison from excluding male prison guards from posts monitoring female inmates in bathrooms, showers, and other intimate spaces); *Jordan v. Gardner*, 986 F.2d 1521, 1530–31 (9th Cir. 1993) (en banc) (clothed searches of prisoners, when performed by guards of the opposite sex, constituted cruel and unusual punishment); *Cornwell v. Dahlberg,* 963 F.2d 912, 916–17 (6th Cir. 1992) (male inmate strip-searched before female guards raised a valid fourth amendment privacy claim).

government's normally compelling interest in protecting the privacy of school-age students. *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 613–14 (4th Cir. 2020), *as amended* (Aug. 28, 2020) (holding that when bathrooms are equipped with lockable stalls, schools are required to allow trans-identifying boys to use girl's bathroom). This is a narrow and mechanical view, and what a court thinks about schools is not a reliable indicator of what matters in the workplace. This view is not compatible with Title VII or with the realities of the modern workplace.

For starters, we are not just looking at bathrooms. The claim before us also includes shared spaces like locker rooms, where lockable stalls are not prevalent. And in any event, bathrooms are not used exclusively for excretory functions performed behind a stall door. Workplace bathrooms often provide employees a space to change clothes, address medical needs, or undertake other personal hygiene. The interest in single-sex privacy is especially heightened for women attending to hygiene related to menstruation, pregnancy, or lactation. No man will ever experience a period, bear a child, or nurse an infant, and we do not think it improper that female employees would expect to manage their unique needs in a space accessible only to other women.

The weight of this analogous precedent unquestionably shows that women have a vital privacy interest in using a workplace bathroom or similar intimate space outside the presence of men. And men have a vital privacy interest in using a

workplace bathroom or similar intimate space outside the presence of women. Because their interests have different polarities, men and women cannot be similarly situated in this instance. To separate men and women in the workplace under these circumstances is not discriminatory under Title VII.[11]

VI

Having established that under Title VII employers may in general maintain single-sex bathrooms and similar intimate spaces, we ask whether the statute would compel them to make a specific exception for trans-identifying employees. We think no.

Bostock is the natural starting point for this part of the analysis. As already noted, under *Bostock*, it is now established that a Title VII-covered employer may not fire or refuse to hire someone because they are trans-identifying. 590 U.S. at 681. Under *Bostock*, this constitutes "discrimination . . . because of sex." *Id.* Crucially, the rule announced in *Bostock* is one of equal treatment. The rule is violated "if changing the employee's sex would have yielded a different choice by the

[11] We have assumed, and Complainant has given us no reason to think otherwise, that the single-sex bathrooms provided by the Agency here are of substantially equal quality. It remains the case that the intimate facilities offered to one sex cannot be of such material inferiority that they impose an "unequal burden" on the members of the sex using those facilities. *Accord Jespersen v. Harrah's Operating Co., Inc.*, 444 F.3d 1104, 1110 (9th Cir. 2006) (en banc) (upholding employer's sex-specific dress and grooming code that did not impose unequal burdens); *see also Carroll v. Talman Fed. Sav. & Loan Ass'n of Chi.*, 604 F.2d 1032 (7th Cir. 1979) (Title VII violated when female employees were required to wear "clearly identifiable uniform[s]" while male employees were allowed to wear "normal business attire").

employer." *Id.* at 659–60. The *Bostock* test, when applied to Complainant's circumstances, does not advance his case. The employer in *Bostock* treated its trans-identifying employees *differently* than non-trans-identifying employees. The Agency here treats Complainant and other trans-identifying employees *the same* as non-trans-identifying employees. Changing Complainant's sex from male to female would not change the result; if Complainant were a woman asking to use the opposite-sex bathroom, the Agency still would have said no. And the same result follows if Complainant's trans-identifying status is the only variable changed. If a non-trans-identifying man asked to use the women's bathroom, the Agency surely would have rebuffed the request. That the Agency gives the same answer to male and female employees alike, and to trans-identifying and non-trans-identifying employees alike, only goes to show its evenhandedness.

At bottom, Complainant seeks an interpretation of Title VII granting most-favored status to trans-identifying employees. He claims entitlement to more-than-equal treatment compared to his coworkers. He asserts that they must continue to follow the established rules of workplace conduct by using bathrooms corresponding to their sex while he is exempted. We can find no support for such special treatment anywhere in the text of Title VII or in any precedential court decision.

It is not as if Congress does not know how to grant most-favored status under Title VII and similar statutes; it has for religion and pregnancy. *See E.E.O.C. v.*

Abercrombie & Fitch Stores, Inc., 575 U.S. 768, 775 (2015) ("Title VII does not demand mere neutrality with regard to religious practices—that they be treated no worse than other practices. Rather, it gives them favored treatment[.]"); 42 U.S.C. § 2000e(j) (entitling religious employees to reasonable accommodation for their beliefs and practices); 42 U.S.C. § 2000gg-1 (entitling female employees to reasonable accommodation for pregnancy and related conditions). That Congress has declined to bestow most-favored treatment for trans-identifying employees under Title VII is not an open invitation for us to usurp the legislative function and manufacture it. Under *Bostock*, the Court made it clear that trans-identifying employees are entitled to equal treatment in the workplace, no more and no less. This means still following workplace rules that are applicable to all employees, including a rule to use the bathroom corresponding to one's sex.

VII

Critics of today's opinion may attempt to argue that excluding trans-identifying individuals from opposite-sex bathrooms would turn the civil rights clock back to a time when whites-only signs were ubiquitous on bathroom doors. *See, e.g., Adams*, 57 F.4th at 860 (Pryor, J., dissenting) (equating single-sex bathrooms in schools to race-segregated bathrooms). However, that an employer is permitted to maintain single-sex bathrooms in no way opens the door to segregated bathrooms based on other protected characteristics, including race. As we have

carefully explained, single-sex bathrooms are permissible only because the sexes are not similarly situated in this specific context. Again, this is because "[p]hysical differences between men and women . . . are enduring." *Virginia*, 518 U.S. at 533. In contrast, physical distinctions between individuals of different races are not enduring; they are literally skin-deep. When it comes to bathrooms, there can be no doubt that members of different races *are* similarly situated. To separate bathrooms by race would serve "no legitimate overriding purpose independent of invidious racial discrimination." *Loving v. Virginia*, 388 U.S. 1, 11 (1967). But the same cannot be said for separating bathrooms by sex: "[a] sign that says 'men only' looks very different on a bathroom door than a courthouse door." *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 468–69(1985) (Marshall, J., concurring in part). Whereas race-segregated bathrooms promote naked favoritism for one race over another, single-sex bathrooms do "not . . . favor one sex over another, but [rather] . . . protect the privacy of *both* sexes." *Wittmer*, 915 F.3d at 334 (Ho, J., concurring) (emphasis added). Single-sex bathrooms continue to provide trans-identifying employees with the same benefits and privacy protections as their non-trans-identifying coworkers. This is equality, not bigotry.

VIII

Accordingly, we affirm the Agency's dismissal. Within the EEOC's administrative complaint process, that an employee is excluded from an opposite-

sex bathroom or similar intimate space does not by itself state a plausible claim for relief under Title VII.

STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (M1125)

The Commission may, in its discretion, reconsider this appellate decision if Complainant or the Agency submits a written request that contains arguments or evidence that tend to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or
2. The appellate decision will have a substantial impact on the policies, practices, or operations of the agency.

Requests for reconsideration must be filed with EEOC's Office of Federal Sector (OFS) **within thirty (30) calendar days** of receipt of this decision. If the party requesting reconsideration elects to file a statement or brief in support of the request, **that statement or brief must be filed together with the request for reconsideration**. A party shall have **twenty (20) calendar days** from receipt of another party's request for reconsideration within which to submit a brief or statement in opposition. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B (Aug. 5, 2015).

Complainant should submit their request for reconsideration, and any statement or brief in support of their request, via the EEOC Public Portal, which can be found at https://publicportal.eeoc.gov/Portal/Login.aspx. Alternatively, Complainant can submit their request and arguments to the Director, Office of Federal Sector, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, a complainant's request to reconsider shall be deemed timely filed if OFS receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

An agency's request for reconsideration must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Either party's request and/or statement or brief in opposition must also include proof

of service on the other party, unless Complainant files their request via the EEOC Public Portal, in which case no proof of service is required.

Failure to file within the 30-day time period will result in dismissal of the party's request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. **Any supporting documentation must be submitted together with the request for reconsideration.** The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(f).

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0124)

You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by their full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. If you file a request to reconsider and also file a civil action, **filing a civil action will terminate the administrative processing of your complaint**.

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:

RAYMOND WINDMILLER

Digitally signed by RAYMOND WINDMILLER
Date: 2026.02.26 13:53:34 -05'00'

Raymond Windmiller
Executive Officer
Executive Secretariat

February 26, 2026
Date

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

[redacted]
Sam T.,[1]
Complainant,

[redacted]
Chad R.,
Complainant,

[redacted]
Mindy F.,
Complainant,

and

[redacted]
Gwendolyn G.,
Complainant,

v.

Scott Kupor,
Director,
Office of Personnel Management,
Agency.

Appeal Nos. 0120172750, 0120172751, 2020000643, 2021005019

Agency Nos. 2016-023, 2016-024, 2018-040, 2018-021

[1] These cases have been randomly assigned pseudonyms which will replace Complainants' names when the decision is published to non-parties and the Commission's website.

DECISION

These consolidated[2] appeals ask whether Title VII and the Rehabilitation Act require the Office of Personnel Management (OPM), in its role as steward of health benefits for federal employees, to provide for unlimited coverage of sex-rejecting services and procedures (sometimes referred to as "gender-affirming care," "gender-transition procedures," or "sex transformation services").

Complainants are current and former employees of federal agencies. They identify as transgender, and they share a diagnosis of gender dysphoria, presently defined by the American Psychiatric Association as "the distress that may accompany the incongruence between one's experienced or expressed gender and one's assigned gender." Diagnostic and Statistical Manual of Mental Disorders 511 (5th ed. 2022) (DSM-V). And each sought—and was denied—coverage for a sex-rejecting procedure under a health plan purchased through the Federal Employees Health Benefits (FEHB) program administered by OPM. Complainants contend OPM, by allowing FEHB carriers to provide less than full coverage for sex-rejecting services and procedures, has committed unlawful sex discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and unlawful disability discrimination in violation of the Rehabilitation Act of 1973, 29 U.S.C. § 791 *et seq*. After careful review, we find no violation.

STANDARD OF REVIEW

After their complaints were investigated, each Complainant requested a final decision from OPM.[3] In each case, OPM concluded the Complainant had not demonstrated actionable unlawful discrimination. The instant appeals followed.

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[2] EEOC regulations allow the Commission to consolidate for joint processing complaints consisting of substantially similar allegations of discrimination or relating to the same matter. 29 C.F.R. § 1614.606. For the sake of clarity and administrative efficiency, we exercise our discretion and consolidate Complainants' appeals.

[3] One Complainant moves for sanctions and default judgment against OPM based on the untimeliness of its eventual final decision. Though OPM's decision was

On appeal we review OPM's decisions de novo. *See* 29 C.F.R. § 1614.405(a). This means we "review the documents, statements, and testimony of record" with fresh eyes, and we make our decision based on "[our] own assessment of the record[.]" U.S. Equal Emp. Opportunity Comm'n, Management Directive 110, Ch. 9, § VI.A.2 (Aug. 5, 2015).

ANALYSIS

Over the years OPM has varied its approach to covering sex-rejecting services and procedures under FEHB plans. In 1985, OPM required carriers to exclude all sex-rejecting services and procedures from plans (referred to at that time as "sex transformation services"). *See Lawrence v. Off. of Pers. Mgmt.*, Appeal No. 0120162065, 2024 WL 3040129, at 2 (EEOC May 30, 2024) (recounting the "exclusion of coverage for '[s]ervices, drugs, or supplies related to sex transformations . . .'"). In 2015, OPM shifted to a permissive approach, allowing carriers to offer plans with coverage for sex-rejecting services and procedures if they wished, or no coverage if they wished. *See* FEHB Program Carrier Letter No. 2014-17 (June 13, 2014) (using the "sex transformation" terminology). And a year later, OPM instructed that "no carrier participating in the [FEHB] Program may have a general exclusion of services, drugs or supplies related to gender transition or sex transformations." FEHB Program Carrier Letter No. 2015-12 (June 23, 2015) (citation modified). In other words, starting in the 2016 plan year, every FEHB carrier had to provide at least some coverage for sex-rejecting services and procedures.

Between 2016 and 2018, Complainants enrolled in FEHB plans that covered some, but not all, sex-rejecting services and procedures. Each Complainant in turn requested, but was denied, coverage for an out-of-plan sex-rejecting procedure, such as an elective mastectomy or elective facial plastic surgery. Plans covering these procedures for purposes of sex-rejection were available, but Complainants chose narrower plans for one reason or another. For example, one Complainant explained that the plans with broader coverage for sex-rejecting services and procedures did not include the Complainant's preferred primary care physician.

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untimely, we are not persuaded the lapse was in bad faith or materially prejudicial to this Complainant. The request for sanctions is DENIED.

A. Complainants have not shown unlawful discrimination based on sex or trans-identifying status

Complainants first contend OPM's decision to permit less than full coverage for sex-rejecting services and procedures discriminates against trans-identifying employees in violation of Title VII's prohibition against sex-based discrimination. The EEOC recently addressed a similar argument in *Lawrence v. Office of Personnel Management*. In *Lawrence*, the Commission considered OPM's pre-2015 exclusion of all sex-rejecting services and procedures from the FEHB program. And a majority of the then-Commissioners held, "the Exclusion is discriminatory because it is an impermissible, sex-based rule for allocating employment benefits." Appeal No. 0120162065, 2024 WL 3040129, at 6.

Skrmetti overrules Lawrence

The decision in *Lawrence*, however, did not have the benefit of the Supreme Court's analysis in *United States v. Skrmetti*, 605 U.S. 495 (2025). *Skrmetti* is binding precedent, and when applied here it requires overruling *Lawrence*. And, it bears noting, the circuit court cases the Commissioners relied upon in *Lawrence* have since been vacated and are no longer precedential. *See Kadel v. Folwell*, 100 F.4th 122 (4th Cir. 2024), *vacated sub nom.*, *Crouch v. Anderson*, 145 S. Ct. 2835 (June 30, 2025) (remanding for further consideration in light of *Skrmetti*); *Lange v. Houston County*, 101 F.4th 793 (11th Cir. 2024), *rev'd en banc*, 152 F.4th 1245 (11th Cir. 2025) (holding county's health insurance plan that excluded sex-rejecting services and procedures did not facially violate Title VII (citing *Skrmetti*)).

Under Skrmetti, regulation of a medical procedure is not equivalent to discrimination based on sex or trans-identifying status

In *Skrmetti*, the Court considered whether a Tennessee law proscribing certain services and procedures, such as hormones and puberty blockers, to treat gender dysphoria in minors violated the Equal Protection Clause. *See* U.S. Const. amend. XIV, § 1. In upholding the law, the Court distinguished between classifications based on a medical diagnosis, which do not necessarily trigger heightened scrutiny under the Equal Protection Clause, and classifications based on sex, which do. *Skrmetti*, 605 U.S. at 510–11; *compare Dobbs v. Jackson Women's Health Org.*, 597

U.S. 215, 236 (2022) (absent evidence of pretext, heightened scrutiny is not triggered by "regulation of a medical procedure that only one sex can undergo"), *with Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 723 (1982) (heightened scrutiny triggered by "policy expressly discriminat[ing] among applicants on the basis of gender").

The Court first concluded the Tennessee law was not an express classification based on sex or even trans-identifying status. *See Skrmetti*, 605 U.S. at 518–19. Rather, the law distinguished between two groups, minors who sought the procedures and services in question to treat gender dysphoria and related diagnoses, and minors who sought the procedures and services to treat unrelated conditions. The first group would incidentally consist exclusively of trans-identifying minors, since "only transgender individuals seek treatment for gender dysphoria [and related diagnoses]." *Id.* at 519. But the second group would consist of a mix of trans-identifying and non-trans-identifying minors. For example, both a trans-identifying and non-trans-identifying minor might receive "puberty blockers or hormones" for reasons unrelated to sex-rejection, such as "to treat a . . . congenital defect, precocious (or early) puberty, disease, or physical injury." *Id.* at 507. Because trans-identifying minors belonged to *both* groups, the Court found there was "a 'lack of identity' between transgender status and the excluded medical diagnoses." *Id.* (quoting *Geduldig v. Aiello*, 417 U.S. 484, 497 n.20 (1974)). The *Skrmetti* plaintiffs therefore could not equate their diagnosis of gender dysphoria with their sex or their trans-identifying status, and they could not rest their case solely on the grounds that the law expressly classified minors based on a diagnosis of gender dysphoria.

"The Supreme Court's reasoning in *Skrmetti* applies equally [to Title VII]." *Lange*, 152 F.4th at 1252; *see also Anderson v. Crouch*, 2026 WL 667919, at *10–11 (4th Cir. Mar. 10, 2026) (concluding *Skrmetti*'s reasoning controlled the analysis of sex-discrimination claims under the Affordable Care Act). While the Equal Protection Clause and Title VII have salient textual differences, "both target the same conduct: treating people who are otherwise similarly situated differently because of their membership in a protected class." *Kadel*, 100 F.4th at 179 (Richardson, J., dissenting).[4] The takeaway from *Skrmetti* is that taking a medical diagnosis like

[4] The laws differ chiefly in the defenses available once discriminatory treatment has been shown. Under Title VII an employer will not be liable if the discriminatory treatment is shown to arise from "a bona fide occupational qualification reasonably

gender dysphoria into consideration is not tantamount to discrimination because of sex or trans-identifying status. Applied here, this means Complainants cannot prevail under Title VII merely by showing that OPM and FEHB plans took gender dysphoria into account when making coverage decisions.

Moreover, this is not a case involving "a classification that is so obviously a proxy for a suspect class that 'an intent to disfavor that class can be readily presumed.'" *Anderson*, 2026 WL 667919, at *3 (quoting *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993)). Discrimination-by-proxy can be presumed only when an act "*both* overwhelmingly affects a suspect class *and* there's no logical reason for the distinction the law makes other than targeting that suspect class." *Id.* at *3 (emphasis in original) (citing *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 275 (1979)). It is not inherently suspicious for a health insurance plan to make distinctions based on medical diagnosis and treatment purposes. And it is not illogical for a health plan to cover surgical procedures when used to treat severe physical ailments but decline to underwrite the risk from these procedures when used to treat "conditions [like gender dysphoria] that only manifests themselves through psychological or psychosocial symptoms." *Id.* at *7.

To resist this result, Complainants turn to the Supreme Court's earlier decision in *Bostock v. Clayton County*, 590 U.S. 644 (2020). *Bostock* held that under Title VII discriminating "against a person for being . . . transgender" can, when employees are otherwise similarly situated, amount to "discriminating against that individual based on sex." *Id.* at 660. But *Bostock's* holding does not mean that every action that happens to affect a trans-identifying employee with gender dysphoria is discriminatory. In fact, the Court in *Skrmetti* found ample support from *Bostock* to conclude that gender dysphoria is not a proxy for sex or trans-identifying status. *Bostock* posits a simple test as one way to identify discrimination based on sex or trans-identifying status. Such discrimination has occurred "if changing the

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necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-2(e). And under the Equal Protection Clause a government defendant can avoid liability by showing their actions pass "rational basis scrutiny, intermediate scrutiny, or strict scrutiny," depending on the nature of the underlying protected characteristic. *United States v. Virginia*, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting) (describing the history of the tiers of scrutiny).

employee's sex would have yielded a different choice by the employer." *Id.* at 659–60. Applied to Complainants here, the test does not show discriminatory treatment based on sex or trans-identifying status. Consider a female employee who is denied coverage for an elective mastectomy for the purposes of sex-rejection. If the employee's sex is changed to male, they are still denied coverage for the procedure for lack of a qualifying diagnosis, such as breast cancer or gynecomastia. It follows that "neither [the employee's] sex nor [their] transgender status is the but-for cause of [their] inability to obtain [the procedure]." *Skrmetti*, 604 U.S. at 521.

OPM's decision-making was not otherwise tainted by discriminatory bias

Since Complainants' coverage denials do not expressly discriminate based on sex or trans-identifying status, and since they do not pass the *Bostock* test, all that remains is to determine whether Complainants can nevertheless show that their trans-identifying status was a "motivating factor" tainting OPM's decision-making. 42 U.S.C. § 2000e-2(m); *see also* § 2000e-16(a) (providing that personnel actions by federal agency employers shall be "free from" discrimination based on sex). They have not.

Instead, the record persuasively shows that OPM carefully tailored its policy to balance biological reality with the evolving views of the medical community. "[R]ecognizing biological reality is 'not a stereotype.'" *Anderson*, 2026 WL 667919, at *2 (quoting *Nguyen v. INS*, 533 U.S. 53, 68 (2001)). And the government is permitted to rationally credit (or discount) the views of the medical community as it sees fit. The permissive approach OPM eventually settled on, which allowed carriers largely to make their own decisions regarding coverage of sex-rejecting services, promoted market diversity to the benefit of all FEHB participants, including Complainants. In our close review of the record, we do not find convincing evidence to suggest that OPM's market-based approach was tainted by animus against trans-identifying individuals. We must reject Complainants' Title VII claims.

B. Complainants have not shown unlawful discrimination based on disability

As a second string to their bow, Complainants alternatively contend that OPM's decision to allow less than full coverage for sex-rejecting services and procedures constituted unlawful disability discrimination. It did not.

These claims arise under the Rehabilitation Act, which incorporates the liability standards of the Americans with Disabilities Act (ADA). 29 U.S.C. § 791(f).[5] Under the ADA, "[n]o covered employer shall discriminate against a qualified individual on the basis of disability in regard to . . . terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a).

Does the ADA cover gender dysphoria?

The threshold question is whether Complainants have a disability within the meaning of the statute. The ADA defines disability generally as "a physical or mental impairment that substantially limits one or more major life activities." 42 U.S.C. § 12102(1), (1)(A); *accord* 29 U.S.C. § 705(20)(B). However, it also has an excepting clause that excludes "transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, [and] other sexual behavior disorders." *Id.* § 12211(b)(1); *accord* 29 U.S.C. § 705(20)(F)(i). Complainants allege they have gender dysphoria, which they define as the distress caused by the incongruence between their sex and their perceived gender. Assuming—without deciding—that gender dysphoria meets the

[5] Congress has called for coordinated interpretation of the Rehabilitation Act and the ADA to "prevent[] imposition of inconsistent or conflicting standards for the same requirements" under the two statutes. 42 U.S.C. § 12117(b). Accordingly, "cases construing one statute are instructive in construing the other." *McPherson v. Mich. High Sch. Athletic Ass'n*, 119 F.3d 453, 460 (6th Cir. 1997) (quoting *Andrews v. Ohio*, 104 F.3d 803, 807 (6th Cir. 1997)).

general definition of a disability, we consider whether it falls under the excepting clause.

Only one circuit, the Fourth, has addressed in a published decision whether gender dysphoria falls within the ADA's excepting clause. In *Williams v. Kincaid*, a divided panel held it does not. 45 F.4th 759 (4th Cir. 2022), *reh'g en banc denied*, 50 F.4th 429 (2022).

The Fourth Circuit panel majority defined its task as "determin[ing] whether 'gender identity disorders' includes gender dysphoria, [using] the meaning of the ADA's 'terms at the time of its enactment.'" *Kincaid*, 45 F.4th at 766–67 (quoting *Bostock*, 590 U.S. at 643). The panel majority observed that at the time of the ADA's passage, circa 1990, the medical community acknowledged a class of "gender identity disorders . . . the essential feature of [which] is an incongruence between assigned sex . . . and gender identity." *Id.* at 767 (quoting Am. Psych. Ass'n, Diagnostic and Statistical Manual 71 (3d ed., rev. 1987) (DSM-III-R)). Turning to the more recent literature, the panel majority noted the medical community no longer refers to "gender identity disorders" and instead favors the term "gender dysphoria." This restyled modern diagnosis is, by the panel majority's lights, defined by *both* an incongruence between sex and identity *and* "clinically significant distress." *Id.* (quoting DSM-V (2013)). The panel majority thus distinguished, "[t]he obsolete diagnosis [of gender identity disorder] focused *solely* on cross-gender identification; the modern one [of gender dysphoria] on clinically significant distress." *Id.* at 769 (emphasis added). The panel majority ultimately concluded this difference in diagnostic factors means gender dysphoria is categorically distinct from the class of gender identity disorders described in the older DSM-III-R and therefore not covered by the ADA's excepting clause. *Id.* at 769–70.

We do not agree with the Fourth Circuit panel majority's foundational premises nor its conclusions. Our disagreement rests on traditional principles of statutory construction. We have no role to play or input to offer on the wisdom or desirability of the excepting clause. That is Congress's, and the public's, exclusive domain. Our purpose in voicing our disagreement is simply to give full and faithful effect to the law as Congress has written it, not as we or anyone else would wish it written.

The Fourth Circuit panel majority's faulty reasoning can be restated syllogistically:

- All individuals who experience an incongruence between their assigned sex and their gender identity have a gender identity disorder, as understood by the medical community from 1983 to 2013 and by Congress in 1990, regardless of accompanying distress.

- Gender dysphoria requires incongruity *and* accompanying distress, therefore not every individual who experiences an incongruence between their assigned sex and their gender identity has gender dysphoria, as presently understood by the medical community,

- Since gender identity disorders affect a wider population than gender dysphoria, the two conditions are different.

The panel majority drew its flawed starting premise, that all trans-identifying individuals have a gender identity disorder even without any accompanying distress, from the DSM-III-R's remark that incongruence between sex and gender identity is an "essential feature" of "gender identity disorders." While the DSM is not a statute, it is still a text, and its exegesis must be fashioned using the traditional tools of construction. Unlike the panel majority, we do not limit our field of vision to a single sentence. The interpretation of a text is necessarily a "holistic endeavor," *United Sav. Assn. of Tex. v. Timbers of Inwood Forest Assocs., Ltd.,* 484 U.S. 365, 371 (1988), and "must not be guided by a single sentence or member of a sentence, but [must] look to the provisions of the whole [text.]" *Kelly v. Robinson,* 479 U.S. 36, 43 (1986).

Turning to the DSM-III-R's wider text, we note there is, in fact, no specific diagnosis for gender identity disorder per se. Rather, the DSM-III-R posits a general category of gender identity disorders, plural, followed by specific diagnoses. Though each specific diagnosis has at least one unique criterion, they all share a common element of distress:

- Gender Identity Disorder in Children requires "persistent and intense distress about being a girl [or] a boy;"

- Gender Identity Disorder in Adolescence or Adulthood, Nontranssexual, requires "persistent discomfort and sense of inappropriateness about one's assigned sex;" and

- Transsexualism requires "persistent discomfort and sense of inappropriateness about one's assigned sex."[6]

DSM-III-R at 71–77.

Careful attention to the entire text shows, contrary to the Fourth Circuit's unduly narrow view, the historical understanding of gender identity disorders was *not* "focused solely on cross-gender identification" without regard for accompanying distress. Distress was, in fact, an essential element of *each* specific gender identity disorder as they were understood in 1983 when the DSM-II-R was published and in 1990 when Congress passed the ADA. It was erroneous for the Fourth Circuit to credit commentators who claimed that "being trans alone . . . could [sustain] a diagnosis of gender identity disorder under [earlier versions of the DSM]." *Kincaid*, 45 F.4th at 769 (quoting Ali Szemanski, Note, *Why Trans Rights Are Disability Rights: The Promises and Perils of Seeking Gender Dysphoria Coverage Under the Americans with Disabilities Act*, 43 HARV. J. L. & GENDER 137, 147 (2020)). Neither the DSM-III-R nor the ADA pathologized trans-identifying status qua trans-identifying status. It is irrelevant to our interpretation of the statute that the American Psychiatric Association, a private entity, came to "believe[] that the phrase 'gender identity disorder' carried a stigma," and that it changed its terminology "to eliminate that stigma." *Kincaid*, 50 F.4th 429 (Mem.) (Quattlebaum, J., dissenting to denial of rehearing en banc). Regardless of this shift in phrasing, the key underlying diagnostic criteria remain the same for gender identity disorders and gender dysphoria. Any distinction the panel majority drew between the two was illusory.

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[6] The primary difference between Gender Identity Disorder in Adults and Transsexualism is that a diagnosis of Transsexualism has an additional criterion of "a persistent preoccupation . . . with getting rid of one's primary and second sex characteristics and acquiring the sex characteristics of the other sex." *Id.* at 76. Had Complainants presented their symptoms to a provider circa 1990, they likely would have been diagnosed with "Transsexualism," one of the diagnoses specifically excluded from ADA coverage. 42 U.S.C. § 12211(b)(1).

If we table the Fourth Circuit's faulty premises and return to square one, we find, as a matter of basic statutory interpretation, that gender dysphoria must fall within the ADA's excepting clause. True, nowhere in the statute does Congress use the term gender dysphoria. But we can draw no negative inference from this absence since the term did not exist at the time of the ADA's passage. And in any event, Congress did not structure the excepting clause as a wholly self-contained list. In addition to specific conditions like pedophilia, transvestism, and transsexualism, the clause includes, first, the general category of gender identity disorders, plural, not resulting from a physical impairment, and second, an even broader category of "other sexual behavior disorders." 42 U.S.C. § 12211(b)(1). Gender dysphoria, as Complainants and the medical community presently define it, fits comfortably under either general term.

We have already discussed the historical understanding of gender identity disorders at the ADA's passage circa 1990. Congress is unlikely to legislate in a vacuum, and given the DSM's influential role in setting the medical community's lexicon, "[t]here is no reason to think Congress's use of the descriptive term 'gender identity disorders' was an accident." *Lange v. Houston County*, 608 F. Supp. 3d 1340, 1361 (M.D. Ga. 2022) (appealed on other grounds). Using the DSM-III-R as the most fitting gloss, we find that gender identity disorders were understood, circa 1990, to encompass *several* conditions characterized by distress caused by an incongruence between sex and identity. Therefore, "what [each Complainant] alleges [they] experience as a person with gender dysphoria—discomfort or distress 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)—falls precisely under the DSM-III-R's description of, and diagnostic criteria for, gender identity disorders." *Kincaid*, 45 F.4th at 782 (Quattlebaum, J., dissenting in part) (quotations omitted). As far as the ADA is concerned, gender dysphoria is at most a consolidated and restyled diagnosis that still squarely falls within the original ambit of the excepting clause's understanding of gender identity disorders.[7] To hold otherwise would allow mere "linguistic drift"

[7] Complainants here do not allege or otherwise establish that their gender dysphoria "result[s] from [a] physical impairment." 42 U.S.C. § 12211(b)(1).

to thwart clear Congressional intent. *Id.* at 780. And it would give the unelected drafters of the DSM an effective veto over Congress. *See id.* at 785.

We find further support in the excepting clause's terminating catch-all term "other sexual behavior disorders." "Under the rule of *ejusdem generis*, where general words follow an enumeration of specific items, the general words are read as applying only to other items akin to those specifically enumerated." *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 588 (1980). Applied here, the term "sexual behavior disorders" does not necessarily mean every conceivable disorder implicating a sexual behavior. Rather, the catch-all encompasses only those sexual behavior disorders similar in kind to those already listed. Still, the listed disorders cover a lot of ground, including conditions ranging from pedophilia, exhibitionism, and voyeurism on one end, to transvestism, transsexualism, and gender identity disorders on the other. By putting all these conditions into a single list and terminating that list with the catch-all term "other sexual behavior disorders," Congress evinced an intent to paint with a "broad brush." *Kincaid v. Williams*, 143 S. Ct. 2414, 2417 (2023) (Alito, J., dissenting from the denial of certiorari). Gender dysphoria is so directly akin to the range of enumerated conditions that it must fall within the catch-all's reach.

The Fourth Circuit's incorrect interpretation still receives deference

Though the Fourth Circuit was wrong on the history and the law, we cannot rest our decision here on our disagreement with their interpretation of the statute. As it happens, the underlying complaints possibly arise within the Fourth's geographic jurisdiction, and we think it prudent to yield to their interpretation.

The Rehabilitation Act, 29 U.S.C. § 794a(a)(1), borrows Title VII's remedial provisions, including its special venue provision, 42 U.S.C. § 2000e-5(f)(3), allowing a civil action in "any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice."

At first blush, these elements most likely place venue in the district court for the District of Columbia. The alleged unlawful employment practice, OPM's decision-

making on FEHB coverage, occurred in D.C. The records related to that decision are in D.C. And each Complainant worked in D.C.

However, each Complainant resided in either Virginia or Maryland, states within the Fourth Circuit. And here is where they ostensibly felt the effects of the alleged unlawful employment practice. A few district courts, albeit none yet under the Fourth Circuit that we could find, have found that an unlawful employment practice occurs both in the place where the malefactor committed discrimination and in the place where the victim felt the effects of discrimination. *See Tamashiro v. Harvey*, 487 F. Supp. 2d 1162, 1165 (D. Haw. 2006); *Berry v. Potter,* 2006 WL 335841, *3 (D. Ariz. 2006); *but see Whipstock v. Raytheon Co.*, 2007 WL 2318745, at *3 (E.D. Mich. 2007) (holding that "under the plain unambiguous language of the statue, venue is proper only where the unlawful employment practice is alleged to have been committed, regardless of where its effects are felt"). Though the chance is remote, it is not impossible that a district court in Virginia or Maryland could find venue along these lines.

We are therefore faced with two possible venues, the D.C. Circuit or the Fourth Circuit. The links to the D.C. Circuit are stronger, but it has not yet addressed the excepting clause. The links to the Fourth Circuit are tenuous, but it has addressed the issue head-on. Without guidance from the Supreme Court or any other circuit to anchor our decision, and in an abundance of caution, we defer to the Fourth Circuit's incorrect view for the instant appeals. Despite the Commission's disagreement with the Fourth Circuit's interpretation, we therefore assume, without deciding, that Complainants' gender dysphoria does *not* fall within the ADA's excepting clause.

It may seem strange for us to go to such great efforts to explain why the Fourth is wrong only to, in the end, apply its interpretation. Our disagreement is more than mere sound and fury. As much as we recognize that the judiciary has the final say on the law, we still embrace our complementary role as an executive agency to contribute our voice on "a question of great national importance." *Kincaid*, 143 S. Ct. at 2414 (Alito, J., dissenting). Other circuits will inevitably face this issue, and we offer our analysis as "a body of experience and informed judgment to which courts and litigants may properly resort[.]" *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

Even if gender dysphoria is covered, OPM's decision-making is protected by the ADA's safe-harbor provision

Applying the Fourth Circuit's view that gender dysphoria is a covered disability under the ADA (and by extension under the Rehabilitation Act) does not automatically resolve these claims. Complainants must still show the Agency committed an unlawful discriminatory act because of their gender dysphoria.

By Complainants' lights, the FEHB plans they purchased were discriminatorily flawed because the plans covered their sought-after procedures for some treatment purposes but not for the purpose of sex-rejection. To illustrate, while female Complainants were denied coverage for elective mastectomies for the purpose of sex-rejection, their plans would have covered the same procedure to treat or prevent breast cancer. And while male Complainants were denied coverage for elective facial plastic surgery for the purpose of presenting a more feminine appearance, their plans would have covered facial plastic surgery to correct a congenital defect or repair a serious injury.

Congress in passing the ADA anticipated that employer-sponsored insurance plans might need to exclude treatments or limit them for certain purposes in line with "well-established" practices in the insurance industry. *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1116 (9th Cir. 2000). The Act therefore provides a safe harbor for "bona fide benefits plan not subject to State laws that regulate insurance," unless the plan was adopted "as a subterfuge to evade the purposes of the [Act's prohibition on disability discrimination]." 42 U.S.C. § 12201(c). On the facts here, the FEHB program falls well within the safe harbor's aegis.

First, the FEHB program provides bona fide benefits plans. In an analogous context the Supreme Court has explained that a benefits plan is "bona fide" so long as it "exists and pays benefits." *Pub. Emps. Ret. Sys. of Ohio v. Betts*, 492 U.S. 158, 166 (1989) (citation omitted), *superseded by statute on other grounds*. Each FEHB plan undisputedly does this.

Second, FEHB plans are not subject to state laws that regulate insurance. The FEHB program's enabling statute "supersede[s] and . . . preempt[s] any State or local law . . . which relates to health insurance or plans." 5 U.S.C. § 8902(m)(1); *see also Coventry Health Care of Mo., Inc. v. Nevils*, 581 U.S. 87, 96 (2017) (finding that

FEHB's enabling statute preempted state law which did not permit reimbursement and subrogation of insurance claims); *cf. Rouse v. Berry*, 848 F.Supp.2d 4, 7 (D.D.C. 2012) (holding that the Federal Long Term Care Insurance Program, established by federal statute and administered by OPM, falls within the ADA's safe harbor for insurance plans).

The remaining question is whether OPM, by permitting FEHB plans to place some limits on coverage for sex-rejecting purposes, has manufactured a "subterfuge" against the Act's non-discriminatory purpose. *See* 42 U.S.C. § 12201(c). Past EEOC federal sector decisions *presumed* that all limitations were a subterfuge unless OPM could prove they were "justified . . . by legitimate actuarial data, or by actual or reasonably anticipated experience." *Theo B. & Cathie K. v. Office of Pers. Mgmt.,* EEOC Appeal No. 0520080057, 2018 WL 7201478, at *6 (Dec. 21, 2018) (voted decision); *see also Polifko v. Office of Pers. Mgmt.*, Appeal No. 01960976, 1997 WL 165687, at *9 (EEOC Apr. 3, 1997) (voted decision) (plan limitations are a subterfuge unless agency meets its "burden" to prove otherwise).

This interpretation of the safe harbor provision has been rejected "by every . . . circuit to have considered the issue," *E.E.O.C. v. Aramark Corp.*, 208 F.3d 266, 271 (D.C. Cir. 2000); s*ee Johnson v. K Mart Corp.*, 273 F.3d 1035, 1057 (11th Cir. 2001) (placing burden on employee to "establish that [the employer] specifically intended to use [the safe harbor] as a subterfuge to evade the purposes of [the statute]"), *vacated pending reh'g en banc*, 273 F.3d 1035, 1070 (11th Cir. 2001) (decision suspended as a result of the automatic stay imposed by Kmart Corp.'s bankruptcy petition); *Leonard F. v. Israel Discount Bank of New York*, 199 F.3d 99, 105 (2d Cir. 1999) ("In the context of the subterfuge clause of Section 501(c) of the ADA, neither the dictionary definition nor the Supreme Court's reasonably suggests that absence of actuarial justification for differential insurance benefits is sufficient to demonstrate a 'subterfuge' to evade the purposes of an Act[.]"); *Rogers v. Dep't of Health and Envtl. Control,* 174 F.3d 431, 437 (4th Cir. 1999) ("[W]e do not find anything in § 501(c) of the ADA (or anywhere else in the Act) that requires a plan sponsor or administrator to justify a plan's separate classification of mental disability with actuarial data."); *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 611–12 (3rd Cir. 1998) ("[W]e will not construe section 501(c) to require a seismic shift in the insurance business, namely requiring insurers to justify their coverage plans in court after a mere allegation by a plaintiff."); *Parker v. Metropolitan Life Ins. Co.*, 121 F.3d 1006, 1012 n.5 (6th Cir. 1997) (rejecting as

inconsistent with the statutory text the view expressed in the Department of Justice Technical Assistance Manual that different insurance benefit or coverage levels based on disability are permitted only where "based on sound actuarial principles" or "related to actual or reasonably anticipated experience"); *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 678–79 (8th Cir. 1996) (rejecting the EEOC's interim guidance on the actuarial justification defense as contrary to the plain language of the statute and not entitled to deference).

It is puzzling to see prior Commissioners, even as recently as 2018, advancing an interpretation of the statute that has been so uniformly and emphatically rejected by the courts. As we discussed with *Kincaid*, *supra*, the EEOC, when exercising its quasi-judicial authority, must yield interpretative authority to the courts. On the safe harbor provision, the courts have squarely rejected the EEOC's atextual view that a "mere[] . . . lack of actuarial justification" is presumptively a "subterfuge[.]" *Aramark*, 208 F.3d at 271. Any prior federal sector decisions based on this view, including *Theo B.* and *Polifko*, are overruled.

The correct approach, in line with the courts, is to simply give the term "subterfuge" its ordinary meaning as "a scheme, plan, stratagem, or artifice of evasion." *Betts*, 492 U.S. at 167 (citation omitted) (defining "subterfuge" as used in the ADEA's safe harbor provision); *Aramark*, 208 F.3d at 271 (finding that *Betts's* definition of subterfuge under the ADEA controls an analogous provision in ADA). From this ordinary meaning it follows that the term "subterfuge includes a specific intent to circumvent or evade a statutory purpose." *Aramark*, 208 F.3d at 269; *see also Betts* at 170 (the term subterfuge "includes a subjective element").

Complainants have not persuasively established that OPM acted out a subterfuge. In our close review, the record instead shows OPM acted carefully and rationally as it sought to balance costs, medical needs, and other actuarial considerations.

This is exactly the sort of reasoned decision-making protected by the safe harbor. To hold otherwise would "invite challenges to virtually every exercise of OPM's discretion with respect to the allocation of benefits amongst an encyclopedia of illnesses." *Modderno v. King*, 871 F. Supp. 40, 43 (D.D.C. 1994), *aff'd*, 82 F.3d 1059 (D.C. Cir. 1996). This would amount to a wholesale repeal of Congressional designs for the FEHB program. In the absence of authoritative precedent, we decline to go down that road. In provisioning for health benefits for federal employees,

Congress mandated that OPM "*shall* include such maximums, limitations, exclusions, and other definitions of benefits as the Office considers necessary or desirable." 5 U.S.C. § 8902(d) (emphasis added). So long as OPM operates without subterfuge, the disability-discrimination statutes enforced by the EEOC do not erode its broad Congressionally endorsed authority to make necessary and oftentimes difficult decisions about what to cover.

CONCLUSION

We AFFIRM the Agency's final order in each complaint. OPM's June 2015 Program Letter permitting FEHB plans to provide less than full coverage for sex-rejecting services and procedures was not unlawful sex or disability discrimination.

On the sex-based claims, we correct the erroneous decision in *Lawrence* and align the EEOC with binding precedent from the Supreme Court in *Skrmetti*. On the disability-based claims, we rest our decision narrowly on the federal courts' consistent interpretation of the safe-harbor provision for insurance plans while still deferring to the very limited circuit authority on the threshold (and largely unsettled) issue of whether gender dysphoria is a covered disability.

STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (M1125)

The Commission may, in its discretion, reconsider this appellate decision if Complainant or the Agency submits a written request that contains arguments or evidence that tend to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or
2. The appellate decision will have a substantial impact on the policies, practices, or operations of the agency.

Requests for reconsideration must be filed with EEOC's Office of Federal Sector (OFS) **within thirty (30) calendar days** of receipt of this decision. If the party requesting reconsideration elects to file a statement or brief in support of the request, **that statement or brief must be filed together with the request for reconsideration**. A party shall have **twenty (20) calendar days** from receipt of

another party's request for reconsideration within which to submit a brief or statement in opposition. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B (Aug. 5, 2015).

Complainant should submit their request for reconsideration, and any statement or brief in support of their request, via the EEOC Public Portal, which can be found at https://publicportal.eeoc.gov/Portal/Login.aspx. Alternatively, Complainant can submit their request and arguments to the Director, Office of Federal Sector, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, a complainant's request to reconsider shall be deemed timely filed if OFS receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

An agency's request for reconsideration must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Either party's request and/or statement or brief in opposition must also include proof of service on the other party, unless Complainant files their request via the EEOC Public Portal, in which case no proof of service is required.

Failure to file within the 30-day time period will result in dismissal of the party's request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. **Any supporting documentation must be submitted together with the request for reconsideration.** The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(f).

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0124)

You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by their full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. If you file a request to

reconsider and also file a civil action, **filing a civil action will terminate the administrative processing of your complaint**.

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:

RAYMOND WINDMILLER
Digitally signed by RAYMOND WINDMILLER
Date: 2026.03.24 09:13:34 -04'00'

Raymond Windmiller
Executive Officer
Executive Secretariat

March 24, 2026
Date