U.S. Department of Justice
Civil Division, Federal Programs Branch
950 Pennsylvania Ave., NW
Washington, DC 20530

By ECF

July 16, 2021

The Honorable Frederic Block
United States District Judge
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 10007

Re: *Tanya Asapansa-Johnson Walker, et al. v. Xavier Becerra, et al*, No. 20-cv-02834 (FB) (SMG)

Dear Judge Block:

The Department of Justice represents defendants Xavier Becerra, in his official capacity as the Secretary of the United States Department of Health and Human Services ("HHS"), and HHS (collectively, the "Defendants" or the "agency"). Defendants respectfully submit this letter as to the status of this case in response to the Court's Status Report Order dated July 7, 2021. The Court directed that "counsel shall notify the court by letter as to the status of their appeal and whether the stay i[n] this case can now be lifted and discovery can begin." Defendants' appeal of this Court's preliminary injunction orders remains pending. In addition, the agency's planned rulemaking regarding Section 1557 independently warrants a continued stay of these proceedings.

1. Background

In this case, two transgender individual New York City residents—Tanya Asapansa-Johnson Walker and Cecilia Gentili—challenge the validity of a 2020 rule (the "2020 Rule") promulgated by HHS to implement Section 1557 of the Affordable Care Act, the statute's anti-discrimination provision. Plaintiffs live in a State with laws explicitly prohibiting healthcare providers and health insurers from discriminating on the basis of gender identity. *See* 10 NYCRR § 405.7(b)(2); 11 NYCRR § 52.75(b)(2); *see also* Decl. of Tanya Asapansa-Johnson Walker ¶ 6, ECF No. 1-2. Plaintiffs sought a preliminary injunction, focusing on the alleged future impact of the 2020 Rule's repeal of a 2016 definition of discrimination on the basis of sex. Defendants argued, *inter alia*, that Plaintiffs lack standing, and that they were unlikely to succeed on the merits of their challenge. On August 17, 2020, this Court preliminarily enjoined defendants from enforcing the repeal of this provision (the "PI Order"). ECF No. 23. The Court found that Plaintiffs' fear of being discriminated against on the basis of gender identity by their healthcare providers when seeking future medical treatment was a sufficiently concrete and imminent injury to form the basis of their standing. *Id.* The Court also found that this alleged injury was fairly traceable to HHS's decision to decline to define "on the basis of sex" by rule because, in the Court's view, "HHS understood that some providers would refuse treatments to transgender patients following the repeal [of the explicit definition of "on the basis of sex"]." *Id.*

Plaintiffs thereafter asked the Court to "confirm" that its preliminary injunction extended to the 2020 Rule "in its entirety," not just the repeal of the 2016 definition. On October 29, the Court issued an order staying the repeal of 45 C.F.R. § 92.206, which requires healthcare providers to treat individuals consistent with their gender identity; the Court explained that this provision was "a specific implication of the 2016 Rules' definition of sex discrimination." ECF No. 34 at 7-8 (the

"Supplemental PI Order"). The Court otherwise denied Plaintiffs' request to expand the preliminary injunction, concluding, among other things, that Plaintiffs lacked standing to challenge at least seven provisions of the 2020 Rule. *Id.* at 4-7.

Defendants appealed the Court's PI Order and Supplemental PI Order to the Second Circuit Court of Appeals. On November 2, 2020, this Court granted Defendants' request to stay proceedings pending the resolution of Defendants' appeal.

2. Events Occurring Since the Change in Presidential Administrations

On January 20, 2021, President Biden issued Executive Order 13988: Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation. 86 Fed. Reg. 7,023, 7,023 (Jan. 25, 2021) ("EO 13988") (attached as Appendix 1). In section 1, EO 13988 explained that "[u]nder *Bostock*'s reasoning, laws that prohibit sex discrimination—including Title IX of the Education Amendments of 1972, as amended . . . along with their respective implementing regulations—prohibit discrimination on the basis of gender identity or sexual orientation, so long as the laws do not contain sufficient indications to the contrary." *Id.* Section 1 further explained that "[i]t is the policy of [the Biden] Administration to prevent and combat discrimination on the basis of gender identity or sexual orientation, and to fully enforce Title VII and other laws that prohibit discrimination on the basis of gender identity or sexual orientation." Section 2 of EO 13988 required "[t]he head of each agency" to "consider whether to . . . promulgate new agency actions, as necessary to fully implement statutes that prohibit sex discrimination and the policy set forth in section 1 of th[e] order." *Id.* at 7,023-24.

On May 10, 2021, HHS issued a "Notification of Interpretation and Enforcement of Section 1557 of the Affordable Care Act and Title IX of the Education Amendments of 1972." 86 Fed. Reg. 27,984, 27,984 (May 25, 2021) (attached as Appendix 2). The notice provided that "[c]onsistent with the Supreme Court's decision in *Bostock* and Title IX, beginning today, OCR will interpret and enforce Section 1557's prohibition on discrimination on the basis of sex to include: (1) Discrimination on the basis of sexual orientation; and (2) discrimination on the basis of gender identity." *Id.* at 27,985.

3. Status of Defendants' Appeal

On January 19, 2021, Defendants filed their opening brief before the Second Circuit. On March 18, 2021, the court granted the parties' joint motion to stay appellate proceedings "while new leadership at [HHS] evaluates the issues this case presents, especially in light of [EO 13988]," Joint Motion to Stay Appeal, *Walker v. Becerra*, Case No. 20-3580, ECF No. 54 (2d Cir. Mar. 15, 2021). Motion Order, *Walker v. Becerra*, Case No. 20-3580, ECF No. 60 (2d Cir. Mar. 18, 2021). The court required the parties to file a joint status report no later than May 14, 2021. *Id.*

On May 14, 2021, the parties filed a joint status report. Joint Status Report, *Walker v. Becerra*, Case No. 20-3580, ECF No. 62 (2d Cir. May 14, 2021). The Report asked the court to request another status report in 90 days and explained that "HHS … intends to initiate a rulemaking proceeding on Section 1557 of the Affordable Care Act," which "is the subject of Plaintiffs' Administrative Procedure Act claims in this case." *Id.* ¶ 3. Defendants also expressed their view that "HHS's Notification appears to moot Plaintiffs' alleged injuries in this case." *Id.* ¶ 4. "Accordingly, the government has suggested that Plaintiffs consider dismissing their claims, but Plaintiffs" declined. *Id.* The court granted the parties' request that the court continue the stay of appellate proceedings and require the parties to file a joint status report by August 16, 2021. Order, *Walker v. Becerra*, Case No. 20-3580, ECF No. 66 (2d Cir. May 18, 2021).

4. The Stay of District Court Proceedings Should Remain in Effect

This Court has stayed proceedings because the Second Circuit's disposition of "issues of standing and the correctness of the 2020 rulemaking . . . will have a significant impact on the litigation going forward." Electronic Order (Nov. 2, 2020). That appeal remains pending.

In addition, the agency's planned rulemaking regarding Section 1557 independently warrants a stay of these proceedings. HHS has inherent authority to reconsider past decisions and to revise, replace, or repeal a decision. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 42 (1983); *Macktal v. Chao*, 286 F.3d 822, 826 (5th Cir. 2002). Further, an agency's regulation is not "carved in stone" but must be evaluated "on a continuing basis," for example, "in response to . . . a change in administrations." *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (internal quotation marks and citations omitted).

HHS is in the process of reconsidering the challenged rule and has been working diligently and making substantial progress in efforts to promulgate a new Section 1557 rule. HHS anticipates issuing a Notice of Proposed Rulemaking in early 2022. The hardship associated with requiring HHS to focus on the demands of proceeding with this litigation would substantially detract from those rulemaking efforts. *See Ashcroft v. Iqbal*, 556 U.S. 662, 685 (2009) (explaining that litigation "exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government"); *Clinton v. Jones*, 520 U.S. 81, 707 (1997) (quotation omitted) ("[E]specially in cases of extraordinary public moment, a plaintiff may be required to submit to delay not immoderate in extent and not oppressive in consequences if the public welfare or convenience will thereby be promoted."). On the other hand, as this Court has recognized, hardship to Plaintiffs from delay "is mitigated by the extant preliminary injunction." Electronic Order (Nov. 2, 2020). And as discussed below, Plaintiffs' alleged harms have independently been addressed by the agency's 2021 Notification of Interpretation and Enforcement of Section 1557. 86 Fed. Reg. 27,984.

If the Court decides to lift the stay, it should do so only for the limited purpose of ordering Plaintiffs to show cause why this case should not be dismissed as moot given the agency's recently promulgated Notification about *Bostock*. *See Muhammad v. City of New York Dep't of Corrections*, 126 F.3d 119, 122 (2d Cir. 1997) (quotation omitted) (explaining that because mootness "is a constitutional question, [courts] must examine the issue *sue sponte* when it emerges from the record"). This Court previously found that Plaintiffs Walker and Gentili "have experienced discrimination from healthcare providers in the past, and their medical conditions will require them to interact with at least some of those same medical providers in the future, or to delay or forgo treatment" and that the 2020 Rule's repeal of the explicit regulatory definition of "on the basis of sex" would predictably result in those medical providers "refus[ing] treatments to [Plaintiffs]" because of Plaintiffs' gender identities. *Walker v. Azar*, 480 F. Supp. 3d 417, 426-27 (E.D.N.Y. 2020). But on May 10, 2021, HHS notified the public that "beginning today, OCR will interpret and enforce Section 1557's prohibition on discrimination on the basis of sex to include: (1) Discrimination on the basis of sexual orientation; and (2) discrimination on the basis of gender identity." 86 Fed. Reg. at 27,985. The Notification of Interpretation and Enforcement of Section 1557 addresses the very type of discrimination Plaintiffs complain of here. Plaintiffs cannot "explain why [their] providers . . . would be willing to risk revising their practices or policies to discriminate against [Plaintiffs] in light of the Supreme Court's recent guidance in *Bostock* and" HHS's May 10, 2021, Notification of Interpretation and Enforcement of Section 1557. *See Washington v. HHS*, 482 F. Supp. 3d 1104, 1115 (W.D. Wash. 2020).

For the foregoing reasons, the stay should remain in effect. But if the Court decides to lift the stay, it should do so only for the limited purpose of ordering Plaintiffs to show cause why this case should not be dismissed as moot. And, in that circumstance, the Court should grant Defendants leave to file a response to Plaintiffs' submission (if any). Alternatively, if the Court decides to lift the stay but finds motion practice preferable, Defendants are willing to move to dismiss the case for lack of subject matter jurisdiction.

5. Discovery is Unavailable in this Record Review Case

In its Status Report Order dated July 7, 2021, this Court requested that counsel notify the Court as to whether "discovery can begin." But each of Plaintiffs' claims in this case arises under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 702, 706, *see* Complaint, ECF No 1, ¶¶ 257-314, and is thus governed by the APA's judicial review provisions. Under the APA, "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973). The agency supplies the court with the record that was built before the agency in the process of making the challenged action. *See, e.g.*, *Fla. Power & Light v. Lorion*, 470 U.S. 729, 744 (1985) (explaining that the APA provides for review "based on the record the agency provides to the reviewing court"). Accordingly, Plaintiffs are precluded from discovery as to Defendants except with leave of court, sought under the stringent standards of the APA. *See Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2574 (2019) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971)) (explaining that a plaintiff "may justify extra-record discovery" only if it makes a "'strong showing of bad faith or improper behavior'").

In this case, the Administrative Record, like administrative records supporting many complex rulemaking proceedings, is a considerable size. Defendants have an important interest in avoiding being unnecessarily burdened with the production of complex administrative records in cases like this one where the Court lacks jurisdiction over Plaintiffs' claims in light of events that have mooted Plaintiffs' injuries or where other threshold issues make judicial review improper. "Without jurisdiction the court cannot proceed at all in any cause." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1988) (quoting *Ex parte McCardle*, 7 Wall. 507, 514 (1868)). Accordingly, if this Court decides to lift the stay, Defendants urge the Court to follow the ordinary course and permit Defendants to produce the Administrative Record to Plaintiffs only after the Court discerns its "statutory or constitutional *power* to adjudicate the case" by resolving Defendants' mootness or other threshold objections. *See id.* at 89; *see also Lumbermens Mut. Cas. Co. v. RGIS Inventory Specialists, LLC*, 356 F. App'x 452, 454 (2d Cir. 2009) ("[B]ecause mootness is a jurisdictional question, it must precede the determination of substantive issues"); Order, *Whitman-Walker Clinic Inc. v. U.S. Dep't of Health and Human Servs.*, No. 20-1630 (JEB), ECF No. 65 (D.D.C. Nov. 3, 2020) (denying Plaintiffs' motion to compel production of the administrative record before resolving Defendants' motion to dismiss).

Respectfully submitted,

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CC: All Counsel of Record (by ECF)

Presidential Documents

Executive Order 13988 of January 20, 2021

Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. *Policy.* Every person should be treated with respect and dignity and should be able to live without fear, no matter who they are or whom they love. Children should be able to learn without worrying about whether they will be denied access to the restroom, the locker room, or school sports. Adults should be able to earn a living and pursue a vocation knowing that they will not be fired, demoted, or mistreated because of whom they go home to or because how they dress does not conform to sex-based stereotypes. People should be able to access healthcare and secure a roof over their heads without being subjected to sex discrimination. All persons should receive equal treatment under the law, no matter their gender identity or sexual orientation.

These principles are reflected in the Constitution, which promises equal protection of the laws. These principles are also enshrined in our Nation's anti-discrimination laws, among them Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e *et seq.*). In *Bostock* v. *Clayton County,* 590 U.S.__(2020), the Supreme Court held that Title VII's prohibition on discrimination ''because of . . . sex'' covers discrimination on the basis of gender identity and sexual orientation. Under *Bostock's* reasoning, laws that prohibit sex discrimination—including Title IX of the Education Amendments of 1972, as amended (20 U.S.C. 1681 *et seq.*), the Fair Housing Act, as amended (42 U.S.C. 3601 *et seq.*), and section 412 of the Immigration and Nationality Act, as amended (8 U.S.C. 1522), along with their respective implementing regulations—prohibit discrimination on the basis of gender identity or sexual orientation, so long as the laws do not contain sufficient indications to the contrary.

Discrimination on the basis of gender identity or sexual orientation manifests differently for different individuals, and it often overlaps with other forms of prohibited discrimination, including discrimination on the basis of race or disability. For example, transgender Black Americans face unconscionably high levels of workplace discrimination, homelessness, and violence, including fatal violence.

It is the policy of my Administration to prevent and combat discrimination on the basis of gender identity or sexual orientation, and to fully enforce Title VII and other laws that prohibit discrimination on the basis of gender identity or sexual orientation. It is also the policy of my Administration to address overlapping forms of discrimination.

Sec. 2. *Enforcing Prohibitions on Sex Discrimination on the Basis of Gender Identity or Sexual Orientation.* (a) The head of each agency shall, as soon as practicable and in consultation with the Attorney General, as appropriate, review all existing orders, regulations, guidance documents, policies, programs, or other agency actions (''agency actions'') that:

(i) were promulgated or are administered by the agency under Title VII or any other statute or regulation that prohibits sex discrimination, including any that relate to the agency's own compliance with such statutes or regulations; and

(ii) are or may be inconsistent with the policy set forth in section 1 of this order.

(b) The head of each agency shall, as soon as practicable and as appropriate and consistent with applicable law, including the Administrative Procedure Act (5 U.S.C. 551 *et seq.*), consider whether to revise, suspend, or rescind such agency actions, or promulgate new agency actions, as necessary to fully implement statutes that prohibit sex discrimination and the policy set forth in section 1 of this order.

(c) The head of each agency shall, as soon as practicable, also consider whether there are additional actions that the agency should take to ensure that it is fully implementing the policy set forth in section 1 of this order. If an agency takes an action described in this subsection or subsection (b) of this section, it shall seek to ensure that it is accounting for, and taking appropriate steps to combat, overlapping forms of discrimination, such as discrimination on the basis of race or disability.

(d) Within 100 days of the date of this order, the head of each agency shall develop, in consultation with the Attorney General, as appropriate, a plan to carry out actions that the agency has identified pursuant to subsections (b) and (c) of this section, as appropriate and consistent with applicable law.

Sec. 3. *Definition.* ''Agency'' means any authority of the United States that is an ''agency'' under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(5).

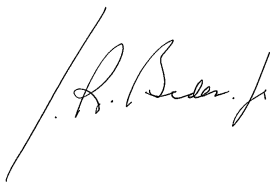
Sec. 4. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

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

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

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

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



THE WHITE HOUSE,
January 20, 2021.

[FR Doc. 2021–01761
Filed 1–22–21; 11:15 am]
Billing code 3295–F1–P

review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. *See* section 307(b)(2).

List of Subjects in 40 CFR Part 81

Environmental protection, Air pollution control, National parks, Wilderness areas.

Dated: May 17, 2021.

John Blevins,

Acting Regional Administrator, Region 4.

For the reasons stated in the preamble, EPA amends 40 CFR part 81 as follows:

PART 81—DESIGNATION OF AREAS FOR AIR QUALITY PLANNING PURPOSES

■ 1. The authority citation for part 81 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

■ 2. In § 81.343, the table titled ''Tennessee–2010 Sulfur Dioxide NAAQS (Primary)'' is amended by revising the entry for ''Sumner County, TN'' to read as follows:

§ 81.343 Tennessee.

* * * * *

TENNESSEE—2010 SULFUR DIOXIDE NAAQS

[Primary]

Designated area	Designation	
	Date [1]	Type
* *	* * *	* *
Sumner County, TN [2] ..... Sumner County	June 24, 2021	Attainment/Unclassifiable.
* *	* * *	* *

[1] This date is April 9, 2018, unless otherwise noted.
[2] Excludes Indian country located in each area, if any, unless otherwise specified.

* * * * *

[FR Doc. 2021–10983 Filed 5–24–21; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 112

Definitions

CFR Correction

■ In Title 40 of the Code of Federal Regulations, Protection of Environment, Parts 100 to 135, revised as of July 1, 2020, on page 26, in section 112.2, reinstate the definition of ''worst case discharge,'' in alphabetical order, to read as follows:

* * * * *

Worst case discharge for an on-shore non-transportation related facility means the largest foreseeable discharge in adverse weather conditions as determined using the worksheets in Appendix D to this part.

[FR Doc. 2021–11115 Filed 5–24–21; 8:45 am]

BILLING CODE 0099–10–D

DEPARTMENT OF HEALTH AND HUMAN SERVICES

45 CFR Parts 86 and 92

Notification of Interpretation and Enforcement of Section 1557 of the Affordable Care Act and Title IX of the Education Amendments of 1972

AGENCY: Office of the Secretary, Department of Health and Human Services (HHS).

ACTION: Notification of interpretation and enforcement.

SUMMARY: This Notification is to inform the public that, consistent with the Supreme Court's decision in *Bostock* and Title IX, beginning May 10, 2021, the Department of Health and Human Services (HHS) will interpret and enforce section 1557 of the Affordable Care Act prohibition on discrimination on the basis of sex to include: Discrimination on the basis of sexual orientation; and discrimination on the basis of gender identity. This interpretation will guide the Office for Civil Rights (OCR) in processing complaints and conducting investigations, but does not itself determine the outcome in any particular case or set of facts.

DATES: This notification of interpretation became effective May 10, 2021.

FOR FURTHER INFORMATION CONTACT: Rachel Seeger at (202) 619–0403 or (800) 537–7697 (TDD).

SUPPLEMENTARY INFORMATION: HHS is informing the public that, consistent with the Supreme Court's decision in *Bostock* [1] and Title IX,[2] beginning May 10, 2021, the Department of Health and Human Services (HHS) will interpret and enforce Section 1557's [3] prohibition on discrimination on the basis of sex to include: (1) Discrimination on the basis of sexual orientation; and (2) discrimination on the basis of gender identity.

I. Background

The Office for Civil Rights (OCR) at the U.S. Department of Health and Human Services (the Department) is responsible for enforcing Section 1557 of the Affordable Care Act (Section 1557) and regulations issued under Section 1557, protecting the civil rights of individuals who access or seek to access covered health programs or activities. Section 1557 prohibits discrimination on the bases of race, color, national origin, sex, age, and

[1] *Bostock* v. *Clayton County,* 140 S. Ct. 1731 (2020). *https://www.supremecourt.gov/opinions/19pdf/17-1618_hfci.pdf.*

[2] Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq. https://www.govinfo.gov/content/pkg/CFR-2011-title45-vol1/pdf/CFR-2011-title45-vol1-part86.pdf.*

[3] Section 1557 of the Patient Protection and Affordable Care Act. *https://www.govinfo.gov/content/pkg/USCODE-2010-title42/pdf/USCODE-2010-title42-chap157-subchapVI-sec18116.pdf.*

disability in covered health programs or activities. 42 U.S.C. 18116(a).

On June 15, 2020, the U.S. Supreme Court held that Title VII of the Civil Rights Act of 1964 (Pub. L. 88–352) (Title VII)'s [4] prohibition on employment discrimination based on sex encompasses discrimination based on sexual orientation and gender identity. *Bostock* v. *Clayton County, GA,* 140 S. Ct. 1731 (2020). The *Bostock* majority concluded that the plain meaning of ''because of sex'' in Title VII necessarily included discrimination because of sexual orientation and gender identity. *Id.* at 1753–54.

Since *Bostock,* two federal circuits have concluded that the plain language of Title IX of the Education Amendments of 1972's (Title IX) prohibition on sex discrimination must be read similarly. See *Grimm* v. *Gloucester Cnty. Sch. Bd.,* 972 F.3d 586, 616 (4th Cir. 2020), *as amended* (Aug. 28, 2020),[5] *reh'g en banc denied,* 976 F.3d 399 (4th Cir. 2020), *petition for cert. filed,* No. 20–1163 (Feb. 24, 2021); *Adams* v. *Sch. Bd. of St. Johns Cnty.,* 968 F.3d 1286, 1305 (11th Cir. 2020), *petition for reh'g en banc pending,* No. 18–13592 (Aug. 28, 2020).[6] In addition, on March 26, 2021, the Civil Rights Division of the U.S. Department of Justice issued a memorandum to Federal Agency Civil Rights Directors and General Counsel [7] concluding that the Supreme Court's reasoning in *Bostock* applies to Title IX of the Education Amendments of 1972. As made clear by the Affordable Care Act, Section 1557 prohibits discrimination ''on the grounds prohibited under . . . Title IX.'' 42 U.S.C. 18116(a).

Consistent with the Supreme Court's decision in *Bostock* and Title IX, beginning today, OCR will interpret and enforce Section 1557's prohibition on discrimination on the basis of sex to include: (1) Discrimination on the basis of sexual orientation; and (2) discrimination on the basis of gender identity. This interpretation will guide OCR in processing complaints and conducting investigations, but does not itself determine the outcome in any particular case or set of facts.

In enforcing Section 1557, as stated above, OCR will comply with the Religious Freedom Restoration Act, 42 U.S.C. 2000bb *et seq.,*[8] and all other legal requirements. Additionally, OCR will comply with any applicable court orders that have been issued in litigation involving the Section 1557 regulations, including *Franciscan Alliance, Inc.* v. *Azar,* 414 F. Supp. 3d 928 (N.D. Tex. 2019); [9] *Whitman-Walker Clinic, Inc.* v. *U.S. Dep't of Health & Hum. Servs.,* 485 F. Supp. 3d 1 (D.D.C. 2020); [10] *Asapansa-Johnson Walker* v. *Azar,* No. 20–CV–2834, 2020 WL 6363970 (E.D.N.Y. Oct. 29, 2020); [11] and *Religious Sisters of Mercy* v. *Azar,* No. 3:16–CV–00386, 2021 WL 191009 (D.N.D. Jan. 19, 2021).[12]

OCR applies the enforcement mechanisms provided for and available under Title IX when enforcing Section 1557's prohibition on sex discrimination. 45 CFR 92.5(a). Title IX's enforcement procedures can be found at 45 CFR 86.71 (adopting the procedures at 45 CFR 80.6 through 80.11 and 45 CFR part 81).

If you believe that a covered entity violated your civil rights, you may file a complaint at *https://www/hhs.gov/ocr/complaints.*

Dated: May 13, 2021.

Xavier Becerra,

Secretary, Department of Health and Human Services.

[FR Doc. 2021–10477 Filed 5–24–21; 8:45 am]

BILLING CODE 4153–01–P

[4] Title VII of the Civil Rights Act of 1964 (Pub. L. 88–352) (41 CFR part 60–20). *https://www.govinfo.gov/content/pkg/FR-2015-01-30/pdf/2015-01422.pdf.*

[5] *Grimm* v. *Gloucester Cnty. Sch. Bd.,* 972 F.3d 586, 616 (4th Cir. 2020). *https://www.ca4.uscourts.gov/opinions/191952.P.pdf.*

[6] *Adams* v. *Sch. Bd. of St. Johns Cnty.,* 968 F.3d 1286, 1305 (11th Cir. 2020). *https://media.ca11.uscourts.gov/opinions/pub/files/201813592.pdf.*

[7] March 26, 2021, the Civil Rights Division of the U.S. Department of Justice memorandum to Federal Agency Civil Rights Directors and General Counsel re: Application *of Bostock* v. *Clayton County* to Title IX of the Education Amendments of 1972. *https://www.justice.gov/crt/page/file/1383026/download.*

[8] Religious Freedom Restoration Act, 42 U.S.C. 2000bb *et seq. https://www.govinfo.gov/content/pkg/USCODE-2010-title42/pdf/USCODE-2010-title42-chap21B-sec2000bb-1.pdf.*

[9] *Franciscan Alliance, Inc.* v. *Azar,* 414 F. Supp. 3d 928 (N.D. Tex. 2019). *https://www.govinfo.gov/content/pkg/USCOURTS-nyed-1_20-cv-02834/pdf/USCOURTS-nyed-1_20-cv-02834-0.pdf.*

[10] *Whitman-Walker Clinic, Inc.* v. *U.S. Dep't of Health & Hum. Servs.,* 485 F. Supp. 3d 1 (D.D.C. 2020). *http://www.ca5.uscourts.gov/opinions/unpub/20/20-10093.0.pdf.*

[11] *Asapansa-Johnson Walker* v. *Azar,* No. 20–CV–2834, 2020 WL 6363970 (E.D.N.Y. Oct. 29, 2020). *https://www.govinfo.gov/content/pkg/USCOURTS-nyed-1_20-cv-02834/pdf/USCOURTS-nyed-1_20-cv-02834-0.pdf.*

[12] *Religious Sisters of Mercy* v. *Azar,* No. 3:16–CV–00386, 2021 WL 191009 (D.N.D. Jan. 19, 2021). *https://www.hhs.gov/sites/default/files/document-124-memorandum-opinion-and-order.pdf.*

NATIONAL SCIENCE FOUNDATION

45 CFR Part 670

RIN 3145–AA59

Conservation of Antarctic Animals and Plants

AGENCY: National Science Foundation.

ACTION: Final rule.

SUMMARY: Pursuant to the Antarctic Conservation Act of 1978, as amended, the National Science Foundation (NSF) is amending its regulations to reflect changes to Annex II to the Protocol on Environmental Protection to the Antarctic Treaty (Protocol) agreed to by the Antarctic Treaty Consultative Parties. These changes reflect the outcomes of a legally binding Measure already adopted by the Parties at the Thirty-Second Antarctic Treaty Consultative Meeting (ATCM) in Baltimore, MD (2009).

DATES: Effective May 25, 2021.

FOR FURTHER INFORMATION CONTACT: Bijan Gilanshah, Assistant General Counsel, Office of the General Counsel, at 703–292–8060, National Science Foundation, 2415 Eisenhower Avenue, W 18200, Alexandria, VA 22314.

SUPPLEMENTARY INFORMATION: Measure 16 (2009) was adopted at the Thirty-Second ATCM at Baltimore, MD, on April 17, 2009 and amends Annex II to the Protocol. The revisions were composed primarily of minor clarifying, editorial and technical updates which would result in generally insignificant changes in current practice or legal requirements. For example, Antarctic terrestrial and freshwater invertebrates (generally microscopic or miniscule) are already protected by statute and regulation from ''harmful interference'' and related permitting requirements. These Annex II changes brought such protections in line with other Antarctic species for purposes of ''takes'' of such organisms. Other changes would also result in no significant change in U.S. practice, including changes to language in Annex II regarding criteria for taking zoo specimens, criteria for introduction of non-native species, and criteria for lethal takings of specially protected species, etc. Finally, one change removes an erroneous reference to ''marine algae'' in the current regulation and a new section is added specifically designating Antarctic native invertebrates.

The Antarctic Conservation Act of 1978, as amended (''ACA'') (16 U.S.C. 2401, *et seq.*) implements the Protocol. Section 2405 of title 16 of the ACA directs the Director of the National