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**Written Comments on the Commission’s November 2, 2018 briefing,  
“Are Rights A Reality? Evaluating Federal Civil Rights Enforcement”  
December 17, 2018**

The National Center for Transgender Equality (NCTE) appreciates the opportunity to submit this testimony regarding the enforcement of federal civil rights laws by federal agencies. Founded in 2003, NCTE is one of the nation’s leading social justice organizations working for life-saving change for the nearly two million transgender people in the United States and their families.

**Transgender Americans face widespread discrimination that impedes their ability to fully participate in American society**

Transgender people are part of every community in America. They are teachers and doctors, parents and grandparents, civic leaders and public servants. As a community, transgender people have made historic strides forwards in raising our visibility, sharing our stories, and calling attention to the widespread harassment, discrimination, and violence that too many of us face.

For example, the 2015 U.S. Transgender Survey, a study of nearly 28,000 transgender adults in the United States found widespread and pervasive discrimination throughout the lives of transgender people.<sup>1</sup> For example:

- Nearly one in seven (13%) respondents had **lost a job** because of being transgender.<sup>2</sup>
- Just in the year prior to the survey, one third (33%) of those who saw a doctor were **turned away, denied health care, harassed, or faced another form of mistreatment** due to being transgender. Nearly one quarter (23%) of all respondents avoided seeking medical treatment when they needed it because of fear of mistreatment.<sup>3</sup>
- Out of those who were out or perceived as transgender in a K-12 school, more than three quarters (77%) were **mistreated in school** because of being transgender, including 24% who were physically attacked and 13% who were sexually assaulted because of being transgender. For many students, the harassment was so severe that they needed to leave a school, with nearly one in five (17%) leaving a K-12 school because of mistreatment.<sup>4</sup>
- More than half (57%) of respondents reported that they would **feel uncomfortable seeking help from police**. And just in the past year, out of those who interacted with law enforcement officers that believed they were transgender, more than half (58%) were mistreated because of being transgender.<sup>5</sup>

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<sup>1</sup> James, S. E., Herman, J. L., Rankin, S., Keisling, M., Mottet, L., & Anafi, M. (2016). The Report of the 2015 U.S. Transgender Survey (hereinafter *2015 U.S. Transgender Survey Report*). Washington, DC: National Center for Transgender Equality.

<sup>2</sup> *Id.* at 149.

<sup>3</sup> *Id.* at 98.

<sup>4</sup> *Id.* at 132.

<sup>5</sup> *Id.* at 189.

The pervasive discrimination that transgender people face contributes to substantial disparities in health outcomes and increased poverty and economic instability. For example:

- The unemployment rate among USTS respondents (15%) was three times the national rate at the time of the survey (5%).<sup>6</sup>
- Nearly one third (29%) lived in poverty, nearly three times the poverty rate among adults at the time the survey was fielded (12%).<sup>7</sup>
- Nearly one third (30%) had experienced homelessness over their lifetime, and one in eight (12%) had experienced homelessness in the past year due to being transgender.<sup>8</sup>

These factors were multiplied for transgender people of color, transgender people with disabilities, and undocumented transgender people, who face severe rates of harassment and violence because of who they are.<sup>9</sup>

Similarly, the 2017 National School Climate Survey, a biannual study of current lesbian, gay, bisexual, transgender, and queer students, also revealed the mistreatment that far too many transgender young people face in our nation's schools.<sup>10</sup> A full 84% of transgender students in the survey were bullied or harassed in school because of their gender identity.<sup>11</sup> Further, nearly half faced discriminatory policies and practices from their school, like being prevented from using the name and pronoun corresponding to their gender or being excluded from school restrooms<sup>12</sup>—even though child health and education experts say that being able to be themselves at school is critical for transgender students' wellbeing.<sup>13</sup>

Such mistreatment touches every community. Here are just three such stories:

Earlier this year, a school in Oklahoma was shut down for two days when a group of parents made violent online threats against a twelve-year-old transgender girl named Maddie. On her first day of seventh grade, she was told to use the staff bathroom but had not yet been told where it was, so naturally she used the girls' room. Shortly thereafter, adults in the community began making violent threats online towards Maddie, a child who wanted nothing more than to

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<sup>6</sup> *Id.* at 56.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 178.

<sup>9</sup> *See, e.g.*, James, S. E., Brown, C., & Wilson, I. (2017). 2015 U.S. Transgender Survey: Report on the Experiences of Black Respondents. Washington, DC and Dallas, TX: National Center for Transgender Equality, Black Trans Advocacy, & National Black Justice Coalition.

<sup>10</sup> Kosciw, J. G., Greytak, E. A., Zongrone, A. D., Clark, C. M., & Truong, N. L. (2018). The 2017 National School Climate Survey: The experiences of lesbian, gay, bisexual, transgender, and queer youth in our nation's schools. New York: GLSEN.

<sup>11</sup> *Id.* at 95.

<sup>12</sup> *Id.* at 40-42.

<sup>13</sup> *See, e.g.*, Rafferty J et al. Ensuring comprehensive care and support for transgender and gender-diverse children and adolescents. *Pediatrics* 2018 Sep 17; [e-pub]. (<https://doi.org/10.1542/peds.2018-2162>); American Psychological Association. Guidelines for psychological practice with transgender and gender nonconforming people. *Am Psychol.* 2015;70(9):832–864pmid:26653312.

attend a safe school. While Maddie has a wonderful family who love and support her, they were forced to relocate to Houston following these threats.<sup>14</sup>

One mother in Knoxville, Tennessee has been advocating for her transgender daughter to have access to the girls' restroom for three years. School administrators continue to segregate this third grade student from her peers by requiring her to use only the isolated facilities in the nurse's office—in spite of the school's own policy of having students use restrooms according to their birth certificates, a policy that itself would subject many transgender students to discrimination. This mother has been persistent in advocating for her daughter's civil rights—and as a response, the school has gone so far as to ban the mother from all school properties, meaning that she was not even able to take her younger son to his day of kindergarten in August and now has to drop off and pick up her two children a block away from school.

In Texas, an eleven-year-old transgender boy had been using the boys' restroom at school without issue since he transitioned when he was six years old. However, four weeks into this school year, a teacher outed him as transgender to his classmates and told him he had to use the girls' restroom from now on. His mother met with the principal to file a complaint against the teacher for violating her son's privacy and to confirm that her son can continue to use the boys' restroom, as he had done for nearly as long as he could remember. The principal, however, claimed—falsely—that there were no laws that would require him to grant a transgender student access to restrooms that matched their gender, and that this boy would now need to start using the girls' restroom or a segregated nurse's bathroom.

These incidents illustrate the climate of fear endured by transgender children and adults and fostered by this administration. The Trump administration has waged a constant campaign against the civil rights of transgender people, it has perpetuated dangerous lies about them, and it has fueled discrimination against them. As a leaked internal memo reported on by the *New York Times* in October makes clear, these actions are part of a coordinated strategy that aims to erase transgender people from the protections of federal law.<sup>15</sup>

### **The federal government plays a unique and central role in safeguarding civil rights**

Since the Reconstruction Amendments reordered our Constitutional system to protect core civil rights, the federal government has had a unique and central role in safeguarding these rights. The landmark 1964 Civil Rights Act, and the many key civil rights laws that have followed, have strengthened and expanded that role.

The Trump Administration has claimed that when it comes to the civil rights of transgender Americans, “there must be due regard for the primary role of the States and local school districts.”<sup>16</sup> Although this

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<sup>14</sup> Alexander Kacala, After violent threats, family of transgender girl looks to leave town, *NBC News*, Aug. 20, 2018, available at: <https://www.nbcnews.com/feature/nbc-out/after-violent-threats-family-transgender-girl-looks-leave-town-n902216>.

<sup>15</sup> Erica L. Green, Katie Brenner, and Robert Pear, ‘Transgender’ Could Be Defined Out of Existence Under Trump Administration, *New York Times*, Oct. 21, 2018.

<sup>16</sup> Departments of Justice and Education, Dear Colleague Letter, February 22, 2017, available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

is true in many areas, when it comes to civil rights and the enforcement of federal law it is flat wrong. While the fifty states and U.S. territories face different circumstances and needs in important respects, the dignity and worth of each person do not vary from state to state. While the states should and do serve as laboratories of democracy in many ways, the core guarantees of equal opportunity secured by federal civil rights laws should not depend on where you live.

### **The Trump administration has promoted discrimination against transgender people**

There are robust federal laws in place to protect the rights of transgender people across many aspects of life, and the federal government plays a unique role in safeguarding and enforcing those civil rights. The dignity of a student, a patient, a worker is no more or less in one state than another. This administration, however, is systematically undermining our civil rights laws. From the earliest days of this presidency, President Trump and his administration have tried to strip transgender people of life-saving protections in health care, education, employment, and other vital parts of our daily lives. In doing so, they have ignored the voices of the medical community that recognize that transgender people should be respected for who they are. They have brushed off thoughtful, fact-based policies and federal court precedents with vague, sweeping memos or—as was the case for transgender service members—mere thoughtless tweets. They have instilled fear among transgender Americans and their loved ones and emboldened those who view them with prejudice and hate.

#### *Educational opportunity*

One of the first attacks came just days after the inauguration of President Trump, when the administration rescinded a lifesaving guidance letter clarifying providing practical guidance to schools on the rights of transgender students under Title IX.<sup>17</sup> The 2016 guidance, issued in response to specific requests by educators and school administrators, synthesized decades of case law that reaffirmed that sex nondiscrimination laws like Title IX protect students from discrimination based on transgender status, clarified key applications of that principle, and presented best practices that have been successfully implemented in schools across the country.<sup>18</sup> The decision to rescind this guidance defied well-established law, created confusion in schools about how to comply with the law and treat transgender students respectfully, and brought fear and uncertainty to many transgender students and their families. The Department of Education has since confirmed that it is rejecting complaints by students alleging discrimination based on transgender status.<sup>19</sup>

More recently, the Department of Education has published a proposed rule that would make school campuses more dangerous for students facing sexual harassment and assault and make it easier for schools to avoid liability for not enforcing Title IX protections for survivors.<sup>20</sup> This proposed rule would have a unique impact on transgender students, who face both high rates of sexual assault and

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<sup>17</sup> *Id.*

<sup>18</sup> Departments of Justice and Education, Dear Colleague Letter, May 13, 2016, available at: <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>.

<sup>19</sup> Dominic Holden, The Education Department Officially Says It Will Reject Transgender Student Bathroom Complaints, *Buzzfeed*, Feb. 12, 2018, available at: <https://www.buzzfeednews.com/article/dominicholden/edu-dept-trans-student-bathrooms>.

<sup>20</sup> Department of Education, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance; Proposed Rule, 83 Fed. Reg. 61462, Nov. 29, 2018.

harassment and heightened barriers to reporting such experiences to school authorities. According to the 2015 U.S. Transgender Survey, nearly half (47%) of respondents had been sexually assaulted in their lifetime, and one in ten (10%) had been sexually assaulted in just the past year.<sup>21</sup>

The Department's proposed Title IX rule would also roll back the requirement that religiously-affiliated colleges and universities notify by the Department of Education, and by extension the public, of their intention to invoke potentially sweeping exemptions from this critical civil rights law.<sup>22</sup> Under current law, schools must provide such notice, which helps ensure that students, including transgender students, seeking a religiously-affiliated education fully understand their options and rights.<sup>23</sup> Nearly two-thirds of respondents in the U.S. Transgender Survey reported having a religious or spiritual affiliation,<sup>24</sup> and many transgender students wish to identify a religiously-affiliated institution where they will not risk discipline or expulsion for coming out or being outed while pursuing an education. Permitting schools to assert an exemption only after they face a complaint of discrimination risks subjecting students to fundamentally unfair surprises and betrayals. In comparison, educational institutions are well aware of their own religious tenets and requiring notification imposes no hardship on schools entitled to an exemption under current law.

### *Equal employment*

In October 2017, the Department of Justice withdrew a 2014 memo issued by then-Attorney General Eric Holder, which stated that the best reading of Title VII's prohibition on sex discrimination in the workplace encompasses anti-transgender discrimination.<sup>25</sup> The withdrawn memo was replaced with a new memo instructing Department of Justice attorneys to take the legal position that federal law does not protect transgender workers from discrimination, relying contradicting the position taken by the vast majority of courts to have considered the issue over the past two decades.<sup>26</sup> The Department of Justice has also taken its outlier view to the courts, including by filing a brief in front of the Supreme Court arguing that it is legal under Title VII to discriminate against employees for being transgender.<sup>27</sup>

In November 2018, the Office of Personnel Management (OPM) quietly and without explanation, withdrew longstanding guidance on equal employment opportunity for transgender federal employees. This guidance, which OPM first issued in 2011,<sup>28</sup> was replaced with a guidance page on its website that omits any mention of transgender people, is cryptically worded, and in part specifically recommends

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<sup>21</sup> 2015 U.S. Transgender Survey Report, *supra* note 1, at 205.

<sup>22</sup> Department of Education, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance; Proposed Rule, 83 Fed. Reg. 61462, 61496, Nov. 29, 2018 (proposed § 106.12).

<sup>23</sup> 34 C.F.R. § 106.12.

<sup>24</sup> 2015 U.S. Transgender Survey Report, *supra* note 1, at 54.

<sup>25</sup> Office of the Attorney General, Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964 (Dec. 14, 2014), available at: <https://www.justice.gov/file/188671/download>.

<sup>26</sup> Office of the Attorney General, Revised Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964, Oct. 4, 2017, available at: <https://www.justice.gov/ag/page/file/1006981/download>.

<sup>27</sup> R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission, No. 18-107, Brief for the Federal Respondents in Opposition, Oct. 24, 2018).

<sup>28</sup> Office of Personnel Management, Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace, archived Oct. 8, 2018, available at: <http://web.archive.org/web/20181008163607/https://www.opm.gov/policy-data-oversight/diversity-and-inclusion/reference-materials/gender-identity-guidance/>.

illegal discriminatory practices.<sup>29</sup> While OPM has explained the change as promoting more “discretion” for agencies,<sup>30</sup> equal opportunity for transgender federal workers is not optional—it is explicitly protected by Executive Order 11478 (as amended), as well as by multiple federal circuit and district court rulings. Agencies across the government have reported to NCTE and other organizations over the last seven years that the previous guidance helped solve common problems and created none. OPM has given no indication of any evidence of a need for this change, or any legal basis for it. While the guidance change in no way alters the clear legal rights of federal employees, it has sent a shockwave of fear through the thousands of federal workers who are transgender.

### *Access to health care*

The Department of Health and Human Services has also targeted transgender people’s access to equal, nondiscriminatory health care, not only attempting to dismantle its enforcement of the Affordable Care Act<sup>31</sup> but also, in a proposed regulation that is expected to be issued soon, to undermine nondiscrimination protections for transgender people under Section 1557 of the Affordable Care Act.<sup>32</sup> While existing regulations clarify that Section 1557’s prohibition on sex discrimination encompasses anti-transgender discrimination—such as being turned away or refused care by a doctor or denied insurance coverage for medically necessary care because of being transgender<sup>33</sup>—the new proposed regulation is expected to assert that Section 1557’s prohibition of sex discrimination does not extend to anti-transgender discrimination.<sup>34</sup>

### *Abuse of the cherished principle of religious liberty to justify discrimination*

NCTE strongly supports the core principles of religious liberty and pluralism. As previously noted, like Americans generally, a large majority of transgender Americans have a religious or spiritual identity while a large minority do not, and all should enjoy freedom in matters of belief. Religious freedom should be a shield against excessive intrusion into, or entanglement with, matters of religious belief by the government.

The hallowed principle of religious liberty is diluted and undermined when it is wrongly invoked in efforts to infringe upon the civil rights of others. The Supreme Court has repeatedly rejected the notion of allowing individuals or businesses to opt out of following civil rights laws based on personal

<sup>29</sup> Office of Personnel Management, Guidance Regarding Non-Discriminatory Practices in Federal Employment, available at: <https://www.opm.gov/policy-data-oversight/diversity-and-inclusion/reference-materials/guidance-regarding-non-discriminatory-practices-in-federal-employment/>.

<sup>30</sup> Eric Katz, Trump Administration Removes Guidance Supporting Transgender Feds, *Government Executive*, December 7, 2018, available at: <https://www.govexec.com/pay-benefits/2018/12/trump-administration-removes-guidance-supporting-transgender-feds/153384/>.

<sup>31</sup> See, e.g., Amy Goldstein, Trump administration won’t defend ACA in case brought by GOP states, *Washington Post*, June 7, 2018, available at: [https://www.washingtonpost.com/national/health-science/trump-administration-wont-defend-aca-in-cases-brought-by-gop-states/2018/06/07/92f56e86-6a9c-11e8-9e38-24e693b38637\\_story.html](https://www.washingtonpost.com/national/health-science/trump-administration-wont-defend-aca-in-cases-brought-by-gop-states/2018/06/07/92f56e86-6a9c-11e8-9e38-24e693b38637_story.html).

<sup>32</sup> HHS Fall 2018 Regulatory Agenda, Nondiscrimination in Health Programs or Activities, RIN 0945-AA11, available at: <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201810&RIN=0945-AA11>.

<sup>33</sup> 42 C.F.R. Part 92 (2016).

<sup>34</sup> Robert Pear, Trump Plan Would Cut Back Health Care Protections for Transgender People, *New York Times*, Apr. 21, 2018, available at: <https://www.nytimes.com/2018/04/21/us/politics/trump-transgender-health-care.html>.

beliefs.<sup>35</sup> Yet the current Administration, not content to falsely claim that our laws offer no protection to transgender Americans in the first place, has also sought to carve out sweeping new exemptions amounting to a license to discriminate.

In October 2017, the Justice Department issues a sweeping memorandum that mixed uncontroversial statements of established law with aggressive new legal claims, including the claim that claimed there is no compelling government interest in prohibiting anti-LGBTQ discrimination.<sup>36</sup> Based on this argument, the DOJ memo implied that Justice Department lawyers should support a free pass to ignore civil rights laws when it comes to LGBTQ people.

In January 2018, the Department of Health and Human Services rushed out a vaguely worded proposed rule that purported to interpret established law but could instead serve to promote sweeping exemptions from federal civil rights laws and even overturn state civil rights laws.<sup>37</sup> While HHS Civil Rights Director Roger Severino publicly claimed the rule was not intended to promote anti-LGBTQ discrimination and “mentioned LGBT issues a grand total of zero times,”<sup>38</sup> the proposed rule’s preamble expressly identified state efforts to protect transgender people from unlawful discrimination as an example of the “problem” the rule sought to change. In particular, the proposed rule cited the case of *Minton v. Dignity Health*, in which hospital administrators overruled medical personnel and canceled a scheduled hysterectomy for a transgender patient just hours in advance—while allowing the same procedure for a non-transgender patient, by the same medical professionals, to proceed.<sup>39</sup> Even though this case involved administrators overruling medical providers, HHS falsely characterized it as a case of “health care personnel ... being targeted for their religious beliefs,” and a reason for adopting new exemptions.<sup>40</sup> In a sign of the Administration’s haste to advance these new exemptions, HHS published this proposed rule without ever listing it in a regulatory agenda, and without analyzing over 12,000 public comments it had received just weeks before in response to a closely related Request for Information.<sup>41</sup> Once HHS published its sweeping refusal proposal, it received more than 200,000 additional public comments overwhelmingly opposing the move, including from the American Medical

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<sup>35</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2783 (2014); *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 n. 5 (1968).

<sup>36</sup> Office of the Attorney General, Federal Law Protections for Religious Liberty, 13a, Oct. 6, 2017, available at: <https://www.justice.gov/opa/press-release/file/1001891/download>.

<sup>37</sup> Department of Health and Human Services, Protecting Statutory Conscience Rights in Health Care; Delegations of Authority; Proposed Rule, 83 Fed. Reg. 3880, Jan. 26, 2018.

<sup>38</sup> Jessie Hellman, Trump appointee at center of fight over religious freedom, *The Hill*, Apr. 10, 2018, available at: <https://thehill.com/policy/healthcare/382383-trump-appointee-at-center-of-fight-over-religious-freedom>.

<sup>39</sup> *Minton v. Dignity Health*, No. 17–558259 (Calif. Super. Ct. Apr. 19, 2017).

<sup>40</sup> Department of Health and Human Services, Protecting Statutory Conscience Rights in Health Care; Delegations of Authority; Proposed Rule, 83 Fed. Reg. 3880, 3888, Jan. 26, 2018.

<sup>41</sup> See Department of Health and Human Services, Removing Barriers for Religious and Faith-Based Organizations To Participate in HHS Programs and Receive Public Funding; Request for Information, 82 Fed. Reg. 49300, Oct. 25, 2017; see also Harper Jean Tobin, Medical and Mental Health Groups Tell HHS: No License to Discriminate!, *Trans Equality Now!*, Jan. 3, 2018, available at: <https://transequality.org/blog/medical-and-mental-health-groups-tell-hhs-no-license-to-discriminate>; Dan Diamond, HHS defends withholding comments critical of abortion, transgender policy, *Politico*, Dec. 18, 2017, available at: <https://www.politico.com/story/2017/12/18/hhs-faith-based-rule-withholding-comments-236759>.

Association, American Psychiatric Association, American Psychological Association, American Association of Medical Colleges, American Nurses Association, and American Academy of Nursing.<sup>42</sup>

In August 2018, the Department of Labor’s Office of Federal Contract Compliance Programs (OFCCP) issued a directive suggesting that federal contractors may be entitled to religious exemptions to engage in discrimination on the basis of race, color, sex, sexual orientation, or gender identity.<sup>43</sup> By misrepresenting the state of the law and creating ambiguity regarding federal contractors’ obligations to comply with nondiscrimination requirements, this guidance may encourage unlawfully discriminatory practices by businesses and organizations receiving federal funds. This guidance, along with the deletion of key language from a related OFCCP Frequently Asked Questions document,<sup>44</sup> undermines the clear and consistent enforcement of Executive Order 11247 and other nondiscrimination laws. OFCCP has not cited any applicable authority regarding Title VII or the Executive Order that would justify such an approach, nor any evidence that federal contractors need, have been denied, or have even sought such exemptions. Rather, the directive appears to be aimed at encouraging new entities to bid for federal contracts with the express purpose of engaging in employment discrimination with taxpayer dollars.

These Administration efforts to promote a “license to discriminate” go far beyond established law and represent an abuse of the hallowed principle of religious liberty. They are a solution in search of a problem, and they threaten to undermine both public understanding and acceptance of religious liberty as it has previously been understood—as a shield and not a sword—as well as the ability of transgender Americans and others to work and get health care free from discrimination.

### **The Administration’s actions are spreading fear and promoting discrimination**

Regretfully, President Trump has made it a hallmark of his presidency to denigrate and attack anyone he can paint as “different” or “other,” using lies, fear, and dangerous policies that put lives at risk. He has targeted immigrants and asylum seekers, Muslims, women, survivors of sexual violence, people of color, and—again and again—transgender people.

Today, transgender people and their families do not trust federal officials to protect their rights. In fact, the Administration’s statements and actions have instilled fears among transgender people and their loved ones around the country. A transgender student at the University of Maryland recently recalled harassment on her campus and the fear that the Administration’s actions could make things worse. “This emboldens people,” she said in response to October 21 *New York Times* story about the leaked HHS memo. “That’s what scares me most.”<sup>45</sup> Speaking of the fear and anxiety in Philadelphia’s transgender community, a member of the Mayor’s Commission on LGBT Affairs said, the same week,

<sup>42</sup> See Luc Athayde-Rizzaro, Medical Experts and Faith Groups to Trump Administration: Stop Promoting Discrimination, *Trans Equality Now!*, Apr. 18, 2018, available at <https://medium.com/transequalitynow/medical-experts-and-faith-groups-to-trump-administration-stop-promoting-discrimination-d67f86fb2aa9>.

<sup>43</sup> Office of Federal Contract Compliance Programs, Directive 2018-03: Executive Order 11246 § 204(c), religious exemption, Aug. 10, 2018, available at: [https://www.dol.gov/ofccp/regs/compliance/directives/dir2018\\_03.html](https://www.dol.gov/ofccp/regs/compliance/directives/dir2018_03.html).

<sup>44</sup> Compare [https://www.dol.gov/ofccp/LGBT/LGBT\\_FAQs.html](https://www.dol.gov/ofccp/LGBT/LGBT_FAQs.html) with [http://web.archive.org/web/20180308221555/https://www.dol.gov/ofccp/LGBT/LGBT\\_FAQs.html](http://web.archive.org/web/20180308221555/https://www.dol.gov/ofccp/LGBT/LGBT_FAQs.html).

<sup>45</sup> Jillian Atelsek, “It feels terrible”: Trans UMD community members fear Trump’s change on gender policy, *The Diamondback*, Oct. 26, 2018, available at: <http://www.dbknews.com/2018/10/26/trump-trans-redefine-gender-rights-legal-umd-lgbt-equity-center>.

“It is actually making me angry and worried for my community. ... On some level, I can’t help but to be scared.”<sup>46</sup> A Virginia mother with a transgender son in middle school said of the pattern of Administration actions hitting the news, one after another, “It’s always like, what’s coming next? ... Every day we’re worrying about the safety of our kid—every single day,” and that seeing these actions “gives you this sinking feeling in your gut.”<sup>47</sup> Dr. Jenny Siegel, medical director of the Center for Transgender Medicine and Surgery at Boston Medical Center, said of these attacks, “We have significant fear that it will seriously dehumanize this already vulnerable population of patients and potentially put peoples’ lives at risk.”<sup>48</sup>

The actions outlined in this memo serve not only to impede the administration of equal justice and to sow confusion about the law—they also embolden those seeking to discriminate, and send young people the terrifying message that their government does not think they are worthy of respect.

### **The Trump Administration’s actions fail to respect the rule of law and federal courts**

The administration has refused to enforce or even follow the law, ignoring binding appeals court precedents. Over forty federal court rulings over the last two decades, from circuit and district courts across the country, have held that anti-transgender bias violates federal sex discrimination laws.<sup>49</sup> The Education and HHS have refused to investigate complaints of anti-transgender discrimination, *even in federal circuits where binding precedent protects the complainants*. Department officials have given no explanation for this selective refusal to follow circuit court precedents. Instead, officials such as Education Secretary DeVos has mechanically repeated that they are waiting “until either the Supreme

<sup>46</sup> Natalie Hope McDonald, Local outrage, fear over Trump Administration's transgender proposal, *Philly Voice*, Oct. 23, 2018, available at: <https://www.phillyvoice.com/transgender-proposal-philadelphia-reaction-outrage-trump-administration>.

<sup>47</sup> Samantha Schmidt, For parents of transgender children, Trump administration policy would be a ‘punch to the gut’, *Washington Post*, Oct. 25, 2018, available at: <https://www.washingtonpost.com/local/social-issues/for-parents-of-transgender-children-trump-administration-policy-would-be-a-punch-to-the-gut/2018/10/23>.

<sup>48</sup> Michael Levenson and Matt Stout, Transgender advocates decry possible Trump administration rollback, *Boston Globe*, Oct. 22, 2018, available at: <https://www.bostonglobe.com/metro/2018/10/22/transgender-advocates-decry-possible-trump-administration-rollback/XLo4w9cqhCGjyjVhPZGe3L/story.html>.

<sup>49</sup> *See, e.g.*, E.E.O.C. v. Harris Funeral Homes, 884 F.3d 560 (6th Cir. 2018) (Title VII of the 1964 Civil Rights Act); Whitaker v. Kenosha Unified School District, 858 F.3d 1034 (7th Cir. 2017) (holding discrimination against transgender students constitutes sex discrimination under Title IX of the Education Amendments Act of 1972 and Equal Protection Clause of the U.S. Constitution); Dodds v. U.S. Dept. of Educ., 845 F.3d 217 (6th Cir. 2016) (Title IX and Equal Protection Clause); Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011) (Equal Protection Clause); Barnes v. City of Cincinnati, 401 F.3d 729 (6th Cir. 2005) (Title VII); Rosa v. Park West Bank & Trust Co., 214 F.3d 213 (1st Cir. 2000) (Equal Credit Opportunity Act); Schwenk v. Hartford, 204 F.3d 1187 (9th Cir. 2000) (Gender Motivated Violence Act); E.E.O.C. v. A & E Tire, Inc., 325 F.Supp.3d 1129 (D. Colo. 2018) (Title VII); M.A.B. v. Board of Educ. of Talbot County, 286 F.Supp.3d 704 (D. Md. 2018) (Title IX); F.V. v. Barron, 286 F.Supp.3d 1131 (D. Idaho 2018) (Equal Protection Clause); Fabian v. Hosp. of Cent. Conn., 172 F.Supp.3d 509 (D. Conn. 2016) (Title VII); Cruz v. Zucker, 195 F.Supp.3d 554 (S.D.N.Y. 2016) (ACA); Rumble v. Fairview Health Servs., No. 14–cv–2037, 2015 WL 1197415 (D. Minn. Mar. 16, 2015); Finkle v. Howard Cty., 12 F. Supp. 3d 780 (D. Md. 2014) (Title VII); Lopez v. River Oaks Imaging & Diagnostic Group, Inc., 542 F. Supp. 2d 653 (S.D. Tex. 2008) (Title VII); Schroer v. Billington, 577 F. Supp. 2d 293 (D.D.C. 2008) (Title VII). *But see* Etsitty v. Utah Transit Auth., 502 F.3d 1215 (10th Cir. 2007) (holding that discrimination against transgender workers may sometimes be covered under Title VII but that such discrimination was not covered in all cases); Texas v. United States, 201 F.Supp.3d 810 (N.D. Tex. 2016) (Title IX); Johnston v. Univ. of Pittsburgh, 97 F.Supp.3d 657 (W.D. Pa. Mar. 31, 2015), *continued validity questioned by* Evancho v. Pine-Richland Sch. Dist., 237 F. Supp. 3d 267 (W.D. Pa. Feb. 27, 2017).

Court or Congress clarifies the law”<sup>50</sup>—as though the circuit courts, which are the final arbiters of the vast majority of cases and legal issues, simply do not exist.

### **The Administration talks out of both sides of its mouth on nationwide injunctions**

The Administration has been particularly hypocritical on federal courts’ entry of nationwide injunctions with respect to federal policies. In speeches in March and September of this year, then-Attorney General Jeff Sessions said that such injunctions “gravely threaten the rule of law,” citing numerous rulings against Trump Administration policies held to be unlawful—including President Trump’s proposed ban on military service members who are transgender.<sup>51</sup> A September Justice Department memo directed Department attorneys to challenge such injunctions without exception.<sup>52</sup> The Administration has followed this approach in aggressively fighting multiple federal court rulings that the President’s proposed military ban is constitutional.

But as even a cursory examination of cases involving the rights of transgender Americans shows, the Administration is talking out of both sides of its mouth on this issue, and has exploited nationwide injunctions when it sees fit. The Administration has refused to defend a duly adopted HHS rule that enforces protections for transgender patients against a nationwide injunction from a single, outlier district court. In *Franciscan Alliance et al. v. Department of Health and Human Services*, state officials and conservative religious organizations brought a facial challenge to HHS’s ACA nondiscrimination rule. Although dozens of federal circuit and district court rulings have embraced the 2016 rule’s premise that sex discrimination laws apply to anti-transgender bias, the district court entered a nationwide injunction directing HHS not to enforce the law to protect transgender people.<sup>53</sup> The Trump Administration elected not to challenge that ruling or the scope of the injunction, despite its cursory reasoning and a mountain of contrary case law. Instead, HHS swiftly reopened a final rule it had developed over several years and finalized just months before. For nearly two years, HHS has completely ignored complaints from patients alleging violations of their legal right to equal access to health care, disingenuously claiming its hands are tied.<sup>54</sup> During that time, other courts have continued to rule that the ACA prohibits anti-transgender bias.<sup>55</sup>

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<sup>50</sup> Testimony of Secretary Betsy DeVos, House Committee on Appropriations, Hearing on FY19 Budget – Department of Education, March 20, 2018, available at:

<https://appropriations.house.gov/calendararchive/eventsingle.aspx?EventID=395133>.

<sup>51</sup> Attorney General Sessions Delivers Remarks Announcing New Memo on Nationwide Injunctions, September 13, 2018, available at: <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-announcing-new-memo-nationwide-injunctions>; Attorney General Sessions Delivers Remarks at the Federalist Society’s Student Symposium, March 10, 2018, available at: <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-federalist-society-student-symposium>.

<sup>52</sup> Office of the Attorney General, Litigation Guidelines for Cases Presenting the Possibility of Nationwide Injunctions, September 13, 2018, available at: <https://www.justice.gov/opa/press-release/file/1093881/download>.

<sup>53</sup> *Franciscan Alliance, Inc. v. Burwell*, 227 F. Supp. 3d 660 (N.D. Tex. 2016).

<sup>54</sup> See, e.g., Robert Pear, Trump Plan Would Cut Back Health Care Protections for Transgender People, *New York Times*, April 21, 2018, available at: <https://www.nytimes.com/2018/04/21/us/politics/trump-transgender-health-care.html>.

<sup>55</sup> *Tovar v. Essentia Health*, --- F.Supp.3d ---, No. 16-100, 2018 WL 4516949 (D. Minn. Sept. 20, 2018); *Boyden v. Conlin*, No. 17-cv-264-WMC, --- F.Supp.3d ---, 2018 WL 4473347 (W.D. Wis. Sept. 18, 2018); *Flack v. Wis. Dep’t of Health Servs.*, 328 F.Supp.3d 931 (W.D. Wis. 2018); *Prescott v. Rady Children’s Hospital-San Diego*, 265 F.Supp.3d 1090 (S.D. Cal. 2017).

Our point is here not that nationwide injunctions regarding nationwide regulations are necessarily good or bad. By opportunistically embracing nationwide injunctions in select cases, while claiming to oppose them on principle in others, the current Administration is seeking to evade public accountability and skirt Administrative Procedure Act requirements for rollbacks of civil rights enforcement.

### **Concluding remarks**

This Administration's attacks on transgender people embolden those seeking to discriminate, and send young people the terrifying message that their government does not think they are worthy of respect. Though the harm already done is undeniable, it is not irreparable. Transgender people are resilient. Together with their families, friends and allies, transgender people sent a loud and clear public message that they won't be erased.

The federal government has a critical role in protecting the civil rights of every person. Concerted action is needed to ensure that that role won't be erased either.