HAWAII DEMANDS CIVIL RIGHTS PROTECTIONS FOR TRANSGENDER PEOPLE

Honolulu, Hawaii – Attorney General Russell A. Suzuki joined a coalition of 20 state attorneys general urging the Trump Administration to abandon efforts to adopt a definition of “sex” that would exclude transgender and gender nonconforming individuals from the protections of federal civil rights laws.

Last month, it was reported that key officials in the U.S. Department of Health and Human Services were considering adopting a definition of sex as an immutable, binary biological trait determined by or before birth—and that the Department was urging other agencies, including the Department of Education, to do the same. Such a restrictive definition would effectively exclude transgender and gender nonconforming individuals from the protections of critical federal civil rights laws, including Title IX and the nondiscrimination provisions of the Affordable Care Act.

“Federal laws and policies must protect transgender people from harassment and discrimination,” said Attorney General Suzuki.

In the letter to the U.S. Secretary of Health and Human Services Alex Azar and U.S. Secretary of Education Betsy DeVos, the attorneys general agree that “despite clear evidence of the serious harms that discrimination continues to inflict on the transgender community, the Administration seems intent not only on rolling back existing federal civil rights protections for this vulnerable population, but also denying transgender people even basic recognition.”

This multistate letter was led by AG Healey of Massachusetts and was joined by attorneys general from California, Connecticut, District of Columbia, Delaware, Hawaii, Illinois, Iowa, Maryland, Minnesota, New Jersey, New York, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, and Washington.
A copy of the letter is attached.

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The Honorable Alex M. Azar II  
Secretary of Health and Human Services  
U.S. Department of Health and Human Services  
330 C Street, SW  
Washington, D.C. 20201  

The Honorable Betsy DeVos  
Secretary of Education  
U.S. Department of Education  
400 Maryland Avenue, SW  
Washington, D.C. 20202  

Re: Civil Rights Protections for Transgender and Gender Nonconforming People  

Dear Secretary Azar and Secretary DeVos:

The undersigned Attorneys General for Massachusetts, California, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Iowa, Maryland, Minnesota, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, and Washington, write to express our deep concern over recent reports that your Departments are contemplating adopting a narrow definition of “sex” that would have the purpose and effect of excluding transgender and gender nonconforming people from the protections of critical federal civil rights laws like Title IX and the nondiscrimination provisions of the Affordable Care Act. The definition reportedly under consideration—which would constrain prohibitions on sex discrimination in federally funded programs and activities to exclude discrimination based on gender identity—is contrary to medical consensus, unsupported by any legitimate governmental interest, and against the weight of applicable law. We urge you to reject it.

There are an estimated 1.4 million transgender people living in the United States, and many more who do not conform to traditional gender norms. Transgender people are our

coworkers, neighbors, friends, and family members. Transgender people contribute to our communities in countless ways—as parents, educators, public safety officers, artists, medical professionals, and business owners, to name a few. They also serve in our Armed Forces. These residents are worthy of dignity and respect, and deserve the full protection of our laws.

The transgender community has suffered, and continues to suffer, “severe persecution and discrimination.” Doe v. Trump, 275 F. Supp. 3d 167, 208-09 (D.D.C. 2017). According to the 2015 United States Transgender Survey, transgender people face verbal harassment and physical violence at home, in school, and in their communities; grapple with mistreatment in the workplace and unemployment; confront difficulty obtaining and maintaining housing; and endure myriad other forms of discrimination due to their gender identity. To combat such discrimination, at least twenty states and hundreds of municipalities have enacted civil rights protections for transgender people in education, employment, health care, housing, and/or public accommodations. These laws have strengthened our states and localities by making us more fair and inclusive places to live, work, and attend school. Still, too many jurisdictions lack meaningful legal protections for transgender and gender nonconforming people, to the detriment of our society at large. Having protections in place at the federal level is critical in this context. Our federal laws and policies should promote basic principles of nondiscrimination and inclusion rather than single out people for disparate treatment and exclusion.

Despite clear evidence of the serious harms that discrimination continues to inflict on the transgender community, the Administration seems intent not only on rolling back existing federal civil rights protections for this vulnerable population, but also denying transgender people even basic recognition. There is no sound basis in science, policy, or law for taking such a drastic step backward. And the sort of prejudice and intolerance reflected in this effort is antithetical to our values as Americans.

Defining “sex” as an immutable, binary biological trait determined by or before birth is inconsistent with current medical consensus. The American Medical Association, for example, recognizes that “gender is ‘incompletely understood as a binary selection’ because gender, gender identity, sexual orientation, and genotypic and phenotypic sex are not always aligned.”

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and instead encourages education on “the medical spectrum of gender identity.”\textsuperscript{4} The American Psychological Association likewise recognizes that “diverse gender expressions, regardless of gender identity, and diverse gender identities, beyond a binary classification, are normal and positive variations of the human experience.”\textsuperscript{5} The AMA also recently passed resolutions that, among other things, support health insurance coverage for transgender people, call for the adoption of nondiscrimination policies by hospitals and other health care providers, and oppose any “policies preventing transgender individuals from accessing basic human services and public facilities in line with one’s gender identity.”\textsuperscript{6} The APA has done the same.\textsuperscript{7} In short, there is no medical or scientific justification for such a narrow definition of sex.\textsuperscript{8}

Nor does it serve any legitimate governmental interest to define sex so as to exclude transgender people from accessing health care, education, employment, and other aspects of daily life on equal terms with non-transgender people. To the contrary, in the experience of the undersigned states, the full inclusion of all people, irrespective of gender identity or expression, makes our jurisdictions more vibrant and more productive. Legal protections for transgender people also improve public safety. Transgender and gender nonconforming people are frequently the targets of criminal activity, particularly in public places. Having strong laws in place that prohibit discrimination has the added effect of reducing hate crimes and other attacks on these populations.\textsuperscript{9} On the other hand, effectively eliminating protections against gender-identity-based discrimination in connection with federally funded programs and activities would send the unmistakable and dangerous message that the federal government views these populations as unworthy of protection.


The proposed definition is also contrary to an established and growing body of federal law. For decades, federal caselaw has tracked our evolving collective understanding that sex discrimination necessarily encompasses invidious gender-based assumptions and stereotypes. Nearly thirty years ago, in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the Supreme Court recognized that gender stereotyping may constitute unlawful sex discrimination in the employment context. Several years later, in concluding that it was unconstitutional for a state military college to exclude women, the Court affirmed the principle that “[s]tate actors controlling gates to opportunity . . . may not exclude qualified individuals based on ‘fixed notions concerning the roles and abilities of males and females.’” *United States v. Virginia*, 518 U.S. 515, 541 (1996) (citation omitted). More recently, the vast majority of federal courts to have considered the question have found that disparate treatment based on gender identity (i.e., discrimination against transgender individuals) constitutes unlawful sex discrimination in employment, education, and health care because it is grounded in impermissible gender-based stereotypes. 10 Thus, defining “sex” to exclude any concept of gender identity is contrary to the weight of applicable law.

Finally, in light of the fact that legal protections for transgender and gender nonconforming people generally have been expanding in recent years, there is no hiding that the Administration’s attempt now to narrow the definition of “sex” to exclude these populations is really nothing more than discrimination for its own sake and thus contrary to basic principles of equal protection. See, e.g., *Romer v. Evans*, 517 U.S. 620, 633 (1996) ("[L]aws singling out a

certain class of citizens for disfavored legal status or general hardships are rare. A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.”); *Dept. of Agriculture v. Moreno*, 413 U. S. 528, 534 (1973) (“[I]f the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare ... desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”); see also *Doe v. Trump*, supra, (holding that reinstating a prohibition on open military service by transgender individuals likely violates the Equal Protection Clause); *Stockman v. Trump*, 2017 WL 9732572 (C.D. Cal. Dec. 22, 2017) (same); *Karnoski v. Trump*, 2017 WL 6311305 (W.D. Wash. Dec. 11, 2017) (same); *Stone v. Trump*, 280 F. Supp. 3d 747 (D. Md. 2017) (same).

For these reasons, we urge your Departments to forego any efforts to further marginalize transgender and gender nonconforming people by defining the term “sex” in a manner meant to deny them the full rights, protections, and recognition of federal civil rights laws.

Sincerely,

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