

**STATEMENT OF FATIMA GOSS GRAVES,  
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**U.S. COMMISSION ON CIVIL RIGHTS BRIEFING:  
“FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORTS IN THE UNITED STATES”**

**NOVEMBER 2, 2018**

My name is Fatima Goss Graves, and I am the President and CEO of the National Women’s Law Center. For more than 45 years, the Law Center has been involved in virtually every major effort to secure and defend the civil rights of women and girls in employment, education, and health care. I appreciate this opportunity to discuss the current state of federal civil rights enforcement efforts.

Now, more than ever, federal agencies should reaffirm their commitment to ending systemic inequality and denouncing white supremacy, misogyny, ableism, and other forms of discrimination.

Instead, we have seen federal agencies abandon their obligations to protect and uphold civil rights and even take steps to erode those rights. This Administration has forcefully separated immigrant families; banned immigrants and refugees based on their religion; expressed support for white supremacists after their violent protests in Charlottesville, Virginia; and demonstrated its disregard for sexual assault survivors. The federal agencies charged with enforcing civil rights laws have deemphasized civil rights investigation efforts, rescinded guidance documents that clarify the civil rights obligations of schools, health providers, and employers, and implemented regulations that allow and even encourage the violation of civil rights. Most recently, according to news reports, the Administration is preparing to limit the definition of sex, as used in civil rights laws and by federal agencies, to male or female, based on the genitals a person is born with. This extreme position, which goes against science, medicine, and numerous federal court decisions, would impose irreparable harm on transgender people, as well as threaten the rights of any cisgender woman or girl who does not conform to traditional gender stereotypes.

My remarks today will focus on the many ways in which the civil rights offices of five federal agencies have failed to enforce these critical civil rights, undermining opportunities for students, patients, and workers in this country.

**I. The Department of Education’s Office of Civil Rights has all but abandoned many of its civil rights enforcement duties.**

The Office for Civil Rights (OCR) at the Department of Education enforces Title VI of the Civil Rights Act of 1964, which prohibits discrimination based on race, color, ethnicity or national origin; Title IX of the Education Amendments of 1972, which prohibits discrimination based on sex (and includes discrimination based on sex stereotypes, sexual orientation, gender identity, and pregnancy status); and Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act of 1990, which prohibit discrimination on the basis of

disability. Its efforts to “ensure equal access to education and promote educational excellence through vigorous enforcement of civil rights in our nation’s schools” are felt throughout this country. OCR has met its enforcement obligations through rigorous investigations and documents guiding schools at all levels on their responsibilities under the law. For example, between October 2015 and January 2017, OCR investigated thousands of complaints and resolved over 8,000 of them.<sup>1</sup> OCR also took proactive steps in that period to deter discrimination by issuing guidance to remind schools of their obligations under the law. In addition to clarifying the law, these guidance documents also communicated to students that OCR takes seriously its duties to protect their educational rights and affirm their dignity. OCR’s proactive approach also included reviewing systemic issues that emerged through individual complaints and initiating its own compliance reviews based on media reports indicating widespread educational injustice.<sup>2</sup>

Unfortunately, since February 2017, OCR has retreated from its proactive commitment to enforcing civil rights. For example, OCR has:

- Rescinded guidance clarifying that Title IX protects against discrimination on the basis of gender identity and refused to investigate claims of discrimination for denying students access to facilities that match their gender identity – even in jurisdictions where appellate courts have held that such conduct violates Title IX.<sup>3</sup>
- Rescinded sexual harassment guidance clarifying the steps schools must take to address sexual violence and what constitutes a fair process,<sup>4</sup> and instead issued interim guidance that gives students named in harassment complaints more rights than survivors.<sup>5</sup>
- Rescinded guidance on race-conscious admissions policies that clarified the ways in which colleges can ensure diversity in their classrooms.<sup>6</sup>

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<sup>1</sup> U.S. Dep’t of Educ., Office for Civil Rights, Securing Equal Education Opportunity: Report to the President and Secretary of Education, at 5 (December 2016), <https://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2016.pdf>.

<sup>2</sup> See, e.g., Lisa Gartner, *U.S. Education Department Opens Civil Rights Investigation into Pinellas Schools*, TAMPA BAY TIMES (April 5, 2016), <https://www.tampabay.com/news/education/k12/us-education-department-opens-civil-rights-investigation-into-pinellas/2271842>. In fiscal year 2016, OCR initiated 13 proactive investigations (called compliance reviews) to ensure that school districts are adequately safeguarding civil rights. U.S. Dep’t of Educ., Securing Equal Education Opportunity, *supra* note 1, at 5.

<sup>3</sup> U.S. Dep’t of Educ., Office for Civil Rights, Dear Colleague Letter (Feb. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>; see *Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034 (7<sup>th</sup> Cir. 2017); *Dodds v. U.S. Dep’t of Educ.*, 845 F.3d 217 (6<sup>th</sup> Cir. 2016).

<sup>4</sup> U.S. Dep’t of Educ., Office for Civil Rights, Dear Colleague Letter: Title IX (Sept. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf>.

<sup>5</sup> U.S. Dep’t of Educ., Department of Education Issues New Interim Guidance on Campus Sexual Misconduct (Sept. 22, 2017), <https://www.ed.gov/news/press-releases/departments-education-issues-new-interim-guidance-campus-sexual-misconduct>.

<sup>6</sup> U.S. Dep’t of Educ., Office for Civil Rights, Dear Colleague Letter: Title VI (July 8, 2018), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-vi-201807.pdf>.

- Revised its case processing manual to allow officials to dismiss—without investigation—hundreds of complaints per a new rule purportedly targeting those who file complaints against multiple recipients. OCR showed its hand by applying this rule to bar a disability rights advocate from filing complaints against multiple schools to ensure website accessibility as required by law,<sup>7</sup> while choosing to investigate multiple complaints filed by one individual against multiple universities for affirmative action programs that advance gender equity, which are permissible under Title IX.<sup>8</sup>
- Informally (and improperly) applied the narrow legal standard that applies in peer sexual harassment cases seeking money damages to dismiss at least one Title IX administrative complaint alleging a school's mishandling of a sexual assault investigation.<sup>9</sup> For decades, OCR has used a broader standard when investigating administrative complaints involving sexual harassment of students (as compared to the narrower standard that courts apply in cases seeking money damages). By using the same standard, OCR is allowing schools to ignore harassment until it becomes so extreme that a student is denied educational opportunities as a result of the harassment.

It also appears that OCR is likely to take additional actions that would further marginalize students who are already facing discrimination:

- OCR recently announced that it is investigating a Title IX complaint against a school in Decatur, Georgia for its response to a reported sexual assault. But instead of investigating whether the school responded appropriately to the allegation, OCR appears to be using this case to question whether the trans-friendly bathroom policy played a role and discriminates against girls.<sup>10</sup>
- According to leaked documents, OCR is considering promulgating regulations to codify even more rules that would make it even harder for survivors of sexual assault to come forward and be treated fairly by their schools.<sup>11</sup>

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<sup>7</sup> Erica L. Green, *DeVos Education Dept. Begins Dismissing Civil Rights Cases in Name of Efficiency*, N.Y. TIMES (Apr. 20, 2018), <https://www.nytimes.com/2018/04/20/us/politics/devos-education-department-civil-rights.html>.

<sup>8</sup> Jeremy Bauer-Wolf, *Student Wants to 'End Affirmative Action for Women,'* INSIDE HIGHER ED (May 21, 2018), <https://www.insidehighered.com/news/2018/05/21/yale-being-investigated-discrimination-against-men-unusual-title-ix-complaint>.

<sup>9</sup> See Stephen Gruber-Miller, *Federal Government Drops Complaint of Iowa State's Handling of Sexual Assault*, DES MOINES REGISTER (July 31, 2018), <https://www.desmoinesregister.com/story/news/education/2018/07/31/federal-government-drops-complaint-iowa-state-sexual-assault-title-ix-isu-ames/870105002/>.

<sup>10</sup> See Moriah Balingit, *After Alleged Sexual Assault, Officials Open Investigation of Transgender Bathroom Policy*, THE WASHINGTON POST (Oct. 9, 2018), [https://www.washingtonpost.com/local/education/after-alleged-sexual-assault-officials-open-investigation-of-transgender-bathroom-policy/2018/10/09/431e7024-c7fd-11e8-9b1c-a90f1daae309\\_story.html?noredirect=on&utm\\_term=.d432fc86c6f0](https://www.washingtonpost.com/local/education/after-alleged-sexual-assault-officials-open-investigation-of-transgender-bathroom-policy/2018/10/09/431e7024-c7fd-11e8-9b1c-a90f1daae309_story.html?noredirect=on&utm_term=.d432fc86c6f0).

<sup>11</sup> See Erica L. Green, *New U.S. Sexual Misconduct Rules Bolster Rights of Accused and Protect Colleges*, N.Y. TIMES (Aug. 29, 2018), <https://www.nytimes.com/2018/08/29/us/politics/devos-campus-sexual-assault.html>.

- OCR and the Department of Justice, at the direction of the White House, have been asked to consider whether to rescind guidance clarifying that racially discriminatory school discipline violates Title VI.<sup>12</sup>

And with every new rescission of a civil rights guidance document and every dismissal of a credible civil rights complaint, women, people of color, transgender and nonconforming students, and students with disabilities are told that the Department of Education is no longer committed to protecting their rights.

In addition to retreating from its civil rights enforcement obligations, under the Trump Administration OCR has failed to adequately report on its enforcement activities. For example, for the last two years, OCR has not produced its required annual report summarizing “the compliance and enforcement activities of the Office for Civil Rights and identifying significant civil rights or compliance problems as to which such Office has made a recommendation for corrective action and as to which, in the judgment of the Assistant Secretary, adequate progress is not being made.”<sup>13</sup>

OCR’s reports are an important tool to inform the Department, Congress, the President, and the public of OCR’s priorities and enforcement efforts. Without them, the Law Center has been forced to submit FOIA requests to try to learn more about the number of complaints filed, the types of discrimination alleged, and their resolution. Rather than providing this information only when requested and in piecemeal form, OCR should continue its commitment to annually and publicly reporting on its enforcement activities.

## **II. The Equal Employment Opportunity Commission has failed to collect crucial equal pay data from employers, has been unable to provide desperately needed guidance on workplace sexual harassment, and its enforcement agenda is threatened by the nomination of Janet Dhillon as its Chair.**

The Equal Employment Opportunity Commission (EEOC) is charged with advising members of the public about their rights at work under Title VII of the 1964 Civil Rights Act (including the Pregnancy Discrimination Act), the Equal Pay Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, and the Genetic Information Nondiscrimination Act; helping them file charges of employment discrimination; properly investigating the charges; and attempting to mediate or conciliate where appropriate. The public expects that the EEOC will bring cases against discriminatory employers to vindicate the rights of workers and prioritize cases affecting multiple workers, address unsettled areas of the law, and remedy egregious discrimination. The public also expects that the EEOC will provide guidance on employment discrimination laws through its regulations, collect and share data regarding

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<sup>12</sup> See *Fact Sheets: President Donald J. Trump is Taking Immediate Actions to Secure our Schools*, WHITE HOUSE (Mar. 12, 2018), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-taking-immediate-actions-secure-schools/>.

<sup>13</sup> 20 U.S.C. § 3413(b)(1).

employment and pay, use that information in its enforcement efforts, and provide quality training to employers and employees.

Two positive outcomes from the EEOC during this time period stand out. First, the number of cases of sexual harassment brought by the agency have increased, as have the number of charges and the number of trainings done by the EEOC regarding sex harassment.<sup>14</sup> Second, the agency filed a brief in *Zarda v. Altitude Express*<sup>15</sup> correctly arguing that Title VII of the Civil Rights Act protects against discrimination based on sexual orientation.<sup>16</sup>

Beginning in January 2017, however, the EEOC's enforcement efforts have been blocked and threatened in three critical ways. First, the EEOC's pay data collection efforts have been stopped, depriving the agency of a key enforcement tool. Second, the agency has been unable to release desperately needed updates to sexual harassment guidance for employers. Third, this Administration's nominee for EEOC Chair threatens the advances the EEOC has made in civil rights enforcement.

*A. This Administration had stopped EEOC's pay data collection efforts.*

The EEOC's data collection efforts with respect to equal pay data have been blocked without justification by this Administration. In 2016, the EEOC revised the EEO-1—a form it had used for several decades to collect employee demographic information from large employers—to solicit additional information about compensation. As approved by the Office of Management and Budget (OMB), the EEO-1 equal pay data collection would have allowed the EEOC to confidentially collect pay data by race, gender, and occupational category from large employers and federal contractors. This pay data collection would have given the EEOC a new tool to identify and challenge pay discrimination, which can otherwise flourish in secret for years, and would have created a powerful incentive for employers to analyze and correct unjustified race and gender wage gaps in their workforces.

But in August 2017, without any notice or opportunity for public comment, OMB issued a “review and stay” of the pay data collection in a terse one-and-a-half page memo to the EEOC.<sup>17</sup> Despite the fact that the EEOC had determined that the pay data collection was

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<sup>14</sup> EEOC, *EEOC Releases Preliminary FY 2018 Sexual Harassment Data* (Oct. 4, 2018), <https://www.eeoc.gov/eeoc/newsroom/release/10-4-18.cfm>. While the EEOC is undertaking increased levels of work on sexual harassment, significant work remains to help educate the public about their rights and understand how the EEOC operates, particularly for individuals from marginalized communities with less access to education and resources. Without this public education, individuals may not understand that their rights are being violated or how to go about accessing resources.

<sup>15</sup> 883 F.3d 100 (2d Cir. 2018).

<sup>16</sup> See <https://www.eeoc.gov/eeoc/litigation/briefs/zarda.html>.

<sup>17</sup> Office of Management and Budget, Office of Information and Regulatory Affairs, *EEO-1 Form; Review and Stay* (August 29, 2017), [https://www.reginfo.gov/public/jsp/Utilities/Review\\_and\\_Stay\\_Memo\\_for\\_EEOC.pdf](https://www.reginfo.gov/public/jsp/Utilities/Review_and_Stay_Memo_for_EEOC.pdf).

“necessary” and “an effective and appropriate tool” to enforce pay discrimination laws,<sup>18</sup> OMB claimed the data collection “lacked practical utility” and was too burdensome for businesses—before any employer had even submitted any data—without offering an explanation or justification for its decision.<sup>19</sup> OMB instructed the EEOC to submit a new proposal and justification for information collection through the EEO-1; the EEOC has not done so to date. The EEOC’s inability to collect this crucial data has stalled its efforts to combat pay discrimination—requiring reporting of compensation data would improve enforcement of pay discrimination laws and increase voluntary employer compliance with those laws, helping to close the gender pay gap.

*B. Crucial workplace harassment guidance has been inexplicably stalled by the Administration, causing the EEOC to miss out on a critical moment to inform employers and clarify the law.*

In 2016, the EEOC began the process of updating guidance for employers on their legal obligations to address sexual harassment and other forms of unlawful harassment in the workplace. That update was long overdue—the EEOC has not updated its harassment guidance in over 20 years. In the #MeToo era, when public awareness and outrage surrounding the prevalence of workplace sexual harassment is in sharp focus, employers and employees alike would greatly benefit from new guidance on this issue. Although the EEOC’s updated guidance went through significant comment and review—a rare hurdle for guidance documents usually reserved for formal regulations—review has stalled with OMB, which has refused to issue the final guidance for over a year, with no explanation as to why, and no estimated date of release. OMB’s failure to finalize this critical EEOC guidance has hampered the ability of employers to ensure that they are fully complying with federal harassment law, and is a disservice to employees who would benefit from clarity as to the scope of their legal rights.

*C. Janet Dhillon, the Administration’s pick for EEOC Chair, is not committed to civil rights enforcement.*

Advances the EEOC has made in civil rights enforcement are threatened by the nomination of Janet Dhillon as Chair. Dhillon’s record reveals that her career has been solely dedicated to fighting on behalf of corporate interests, with no public sector service, and a lack of experience in civil rights enforcement. Her limited experience and the views expressed at her confirmation hearing on critical civil rights issues, combined with her role in founding and leading the Retail Litigation Center, an organization dedicated to advancing narrow legal interpretations of critical antidiscrimination and labor protections, render her unsuitable for the position to which she has been nominated. Dhillon has consistently worked to narrow the scope

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<sup>18</sup> EEOC, Agency Information Collection Activities; *Notice of Submission for OMB Review, Final Comment Request: Revision of the Employer Information Report (EEO-1)* (July 14, 2016), <https://www.federalregister.gov/documents/2016/07/14/2016-16692/agency-information-collection-activities-notice-of-submission-for-omb-review-final-comment-request>.

<sup>19</sup> *Id.*

of rights and remedies under crucial discrimination laws enforced by the EEOC, including those providing protection from sex discrimination, sexual harassment, and retaliation.

**III. The Department of Labor’s Office of Federal Contract Compliance Programs has blocked key monitoring efforts for equal pay, prioritized the religious freedoms of employers at the expense of employees’ civil rights, and retreated from its most basic enforcement duties.**

The Office of Federal Contract Compliance Programs (OFCCP) at the Department of Labor monitors federal contractors for employment discrimination through audits and enforcement activities. The public expects that OFCCP will robustly enforce the executive orders in its enforcement authority so that public funds are not used to finance employment discrimination.

Under the current Administration, OFCCP has taken several steps backwards in its enforcement of civil rights. First, through Directive 2018-05,<sup>20</sup> OFCCP reversed itself regarding the key issue of monitoring and enforcing equal pay requirements among contractors. The OFCCP has significantly diluted the requirements regarding what contractors must report and has committed to limiting its enforcement authority if pay discrepancies are found.

Second, by issuing Directive 2018-03,<sup>21</sup> OFCCP weakened civil rights protections, especially for LGBTQ individuals, by instructing its employees to emphasize the religious freedoms of employers regardless of the civil rights ramifications. Issued under the guise of updating its employees on new case law, the Directive pushes for greater protection for religious freedom even when that leads to federal dollars being used in a discriminatory manner.

Finally, by issuing documents such as “What Federal Contractors Can Expect,”<sup>22</sup> OFCCP has signaled a dangerous shift from civil rights enforcement to compliance assistance for employers that does not seek to hold employers accountable or to obtain necessary remedies for workers.

**IV. The Department of Justice has reversed itself on several key civil rights enforcement issues.**

The Civil Rights Division of the Department of Justice (DOJ) enforces bedrock civil rights protections regarding voting rights, housing, employment, education, disability access, protection of incarcerated individuals, and policing practices. The public expects the Civil Rights Division to enforce these protections to ensure participation in elections and in civic life.

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<sup>20</sup> Available at [https://www.dol.gov/ofccp/regs/compliance/directives/dir2018\\_05.html](https://www.dol.gov/ofccp/regs/compliance/directives/dir2018_05.html).

<sup>21</sup> 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>22</sup> Available at [https://www.dol.gov/ofccp/regs/compliance/posters/FS\\_WhatFedContractorsCanExpect-v2ESQA508c.pdf](https://www.dol.gov/ofccp/regs/compliance/posters/FS_WhatFedContractorsCanExpect-v2ESQA508c.pdf).

Beginning in January 2017, the DOJ began undertaking concerted efforts to limit and undermine the enforcement of civil rights laws, including through reversing itself on several key civil rights enforcement issues. For example, the DOJ has:

- Reversed its position in *Texas NAACP v. Steen*, dropping its challenge to the voter ID laws in Texas that one judge described as “a poll tax.”<sup>23</sup>
- Reversed its position that Title VII covers gender identity discrimination.<sup>24</sup>
- Backed away from the consent decree it negotiated with Baltimore regarding discriminatory police practices.<sup>25</sup>
- Filed a brief opposing the EEOC’s position in *Zarda v. Altitude Express*, taking the (ultimately rejected) position that Title VII does not prohibit discrimination based on sexual orientation.<sup>26</sup>
- Used its resources to start a “religious liberty” task force and has issued guidelines to all agencies to make it easier for employers, organizations, insurance companies, and hospitals to use their religious or moral beliefs to justify discrimination, regardless of existing civil rights provisions.<sup>27</sup>
- Abandoned its lawsuit challenging North Carolina’s discriminatory law restricting transgender individuals’ access to public bathrooms following the state’s modification of the law to repeal the bathroom bill and replace it with other harmful measures, including a provision banning local governments from passing measures aimed at protecting LGBT people until 2020.<sup>28</sup>

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<sup>23</sup> Manny Fernandez & Eric Lichtblau, *Justice Dept. Drops a Key Objection to a Texas Voter ID law*, N.Y. TIMES (Feb. 27, 2017), <https://www.nytimes.com/2017/02/27/us/justice-dept-will-drop-a-key-objection-to-a-texas-voter-id-law.html>; Ryan J. Reilly, *Federal Court Blocks Texas Voter ID Law, Calling it a ‘Poll Tax,’* HUFFINGTON POST (Oct. 09, 2014), [https://www.huffingtonpost.com/2014/10/09/texas-voter-id\\_n\\_5962674.html](https://www.huffingtonpost.com/2014/10/09/texas-voter-id_n_5962674.html).

<sup>24</sup> Alan Feuer, *Justice Department Says Rights Law Doesn’t Protect Gays*, N.Y. TIMES (July 27, 2017), <https://www.nytimes.com/2017/07/27/nyregion/justice-department-gays-workplace.html>.

<sup>25</sup> Kevin Rector, *Justice Department Registers ‘Grave Concerns’ with Baltimore Consent Decree, Even as Residents Express Hope*, THE BALTIMORE SUN (Apr. 6, 2017), <http://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-ci-consent-decree-thursday-20170406-story.html>.

<sup>26</sup> See Mark Joseph Stern, *Trump Administration Argues Federal Civil Rights Law Does Not Protect Gay Employees*, SLATE (July 26, 2017), [http://www.slate.com/blogs/outward/2017/07/26/trump\\_administration\\_argues\\_federal\\_law\\_doesn\\_t\\_protect\\_gay\\_employees.html](http://www.slate.com/blogs/outward/2017/07/26/trump_administration_argues_federal_law_doesn_t_protect_gay_employees.html).

<sup>27</sup> See Office of the Attorney General, *Federal Law Protections for Religious Liberty Memo* (Oct. 6, 2017), <https://www.justice.gov/opa/press-release/file/1001891/download>.

<sup>28</sup> Mark Berman, *Just Dept. Drops Federal Lawsuit over North Carolina’s ‘bathroom bill,’* THE WASHINGTON POST (Apr. 14, 2017), [https://www.washingtonpost.com/news/post-nation/wp/2017/04/14/justice-dept-drops-federal-lawsuit-over-north-carolinas-bathroom-bill/?noredirect=on&utm\\_term=.e756aaaa7ec9](https://www.washingtonpost.com/news/post-nation/wp/2017/04/14/justice-dept-drops-federal-lawsuit-over-north-carolinas-bathroom-bill/?noredirect=on&utm_term=.e756aaaa7ec9); see also Zack Ford, *Department of Justice Sues North Carolina Over Its Anti-Transgender Law*, THINKPROGRESS (May 9, 2016), <https://thinkprogress.org/departement-of-justice-sues-north-carolina-over-its-antitransgender-law->



- Changed its position and stopped defending regulations implementing the key non-discrimination provision of the Affordable Care Act (ACA) from a lawsuit brought by entities and individuals who claim that they should be allowed to discriminate against someone because of their gender identity or because they have had or are seeking an abortion.<sup>29</sup>
- Changed its position and is now refusing to defend the ACA's contraceptive coverage requirement, resulting in the entry of a dozen permanent injunctions blocking enforcement of the requirement.<sup>30</sup>
- Entered into unlawful settlement agreements with employers and universities who had challenged the ACA's contraceptive coverage requirement, promising those entities that they would never have to comply with existing regulations or with any regulations that might be issued in the future by new administrations requiring insurance coverage of birth control.<sup>31</sup>
- Refused to defend the ACA in a lawsuit in the Northern District of Texas challenging the constitutionality of the statute.<sup>32</sup>

## **V. The Department of Health and Human Services' Office for Civil Rights has retreated from its commitment to protect against discrimination in health care.**

The Office for Civil Rights (OCR) at the Department of Health and Human Services is responsible for ensuring that the health programs and activities it regulates comply with key civil rights laws that prohibit discrimination on the basis of race, color, national origin, sex, disability, and age.<sup>33</sup>

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229e81f39e09/; Complaint, *United States v. State of North Carolina*, Case No. 1:16-cv-00425 (M.D.N.C. May 9, 2016), <http://files.eqcf.org/cases/116-cv-00425-1/>.

<sup>29</sup> *Franciscan Alliance, Inc. v. Azar*, 227 F.Supp.3d 660, 2016 WL 7638311 (N.D. Tex.) (Dec. 31, 2016).

<sup>30</sup> *Wheaton College v. Burwell*, 13-cv-8910 (N.D. Ill.) (Feb. 22, 2018); *Catholic Benefits Association v. Burwell*, 14-cv-240, 14-cv-00685 (W.D. Okla.) (Mar. 7, 2018); *Reaching Souls International, Inc. v. Burwell*, 13-cv-01092 (W.D. Okla.) (Mar. 15, 2018); *Sharpe Holdings Inc. v. Sebelius*, 12-cv-92 (E.D. Mo.) (Mar. 28, 2018); *Southern Nazarene University v. Burwell*, 13-cv-1015 (W.D. Okla.) (May 15, 2018); *Little Sisters of the Poor v. Burwell*, 13-cv-02611 (D. Colo.) (May 29, 2018); *Grace Schools v. Burwell*, 12-cv-459 (N.D. Ind.) (June 1, 2018); *Dordt College v. Sebelius*, 13-cv-4100 (N.D. Iowa) (June 12, 2018); *Geneva College v. Sebelius*, 12-cv-00207 (W.D. Pa.) (July 5, 2018); *Ave Maria School of Law v. Sebelius*, 13-cv-795 (M.D. Fla.) (July 11, 2018); *Ave Maria University v. Sebelius*, 13-cv-630 (M.D. Fla.) (July 11, 2018); *Colorado Christian University v. Sebelius*, 13-cv-2105 (D. Colo.) (July 11, 2018).

<sup>31</sup> See Settlement Agreement, *Irish 4 Reproductive Health v. Azar*, No. 3:18-cv-491-PPS-MGG, Dkt. 1-1 (N.D. Ind.).

<sup>32</sup> Amy Goldstein, *Trump Administration Won't Defend ACA in Case Brought by GOP States*, THE WASHINGTON POST (June 7, 2018), [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?noredirect=on&utm\\_term=.008f0ac5d64a](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?noredirect=on&utm_term=.008f0ac5d64a).

<sup>33</sup> OCR enforces: Section 504 of the Rehabilitation Act of 1973, which prohibits discrimination on the basis of disability; Title IX of the Education Amendments of 1972 which prohibits discrimination on the basis of sex in education programs; Title VII of the Civil Rights Act of 1964, which has been interpreted to prohibit employers who offer otherwise comprehensive health benefits to their employees, including

Through robust enforcement of civil rights laws, OCR has historically worked to reduce discrimination in health care by ending overtly discriminatory practices such as racial segregation and segregation of people with disabilities in health care facilities. In the years immediately prior to the Trump Administration, OCR took steps to remedy pervasive sex discrimination in health care and end discriminatory practices, such as categorical insurance coverage denials for transition-related services,<sup>34</sup> insurance benefit designs that discriminate against people who are HIV positive,<sup>35</sup> and the exclusion of maternity coverage for dependent children.<sup>36</sup> OCR also upheld states' ability to ensure comprehensive health coverage for its residents.<sup>37</sup>

However, beginning in January 2017, OCR has failed to carry out its core duty to ensure that those seeking health care and health insurance do not face discrimination. For example:

- OCR has prioritized enforcement of laws that allow entities and individuals to use their religious and personal beliefs to dictate patient care, including by creating a new "Conscience and Religious Freedom" Division focused only on protecting those who refuse to provide patient care,<sup>38</sup> and proposing regulations to expand existing, harmful religious exemption laws. These moves only serve to embolden discrimination and make it easier for institutions and individuals to refuse to provide comprehensive health care,<sup>39</sup> which endangers the health and lives of ciswomen, transgender individuals, and LGBTQ people across the country.

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coverage of prescription drugs and devices generally, from excluding coverage of prescription contraceptives; the Age Discrimination Act of 1976, which prohibits discrimination on the basis of age; Title VI and XVI of the Public Health Service Act, which requires health facilities that receive certain Federal funds to provide certain services to members of its designated community; and the ACA's Health Care Rights Law, also known as Section 1557, which prohibits discrimination on the basis of race, color, national origin, age, and disability and marks the first-time sex discrimination was broadly prohibited in health care.

<sup>34</sup> 45 C.F.R. § 92.207(b)(3) (RIN 31472). *See also* Sharita Gruberg & Frank J. Bewkes, *The ACA's LGBTQ Nondiscrimination Regulations Prove Crucial*, CENTER FOR AMERICAN PROGRESS (March 7, 2018), <https://www.americanprogress.org/issues/lgbt/reports/2018/03/07/447414/acas-lgbtq-nondiscrimination-regulations-prove-crucial/>.

<sup>35</sup> Gruberg & Bewkes, *supra* note 34.

<sup>36</sup> Nat'l Women's Law Ctr., *Victory in Sex Discrimination Complaints Brought by NWLC: After Investigation by HHS, Employers Change Policies* (Jan. 26, 2017), <https://nwlc.org/press-releases/victory-in-sex-discrimination-complaints-brought-by-nwlc-after-investigation-by-hhs-employers-change-policies/>.

<sup>37</sup> U.S. Dep't of Health and Human Servs., Office for Civil Rights, Re: OCR Transaction Numbers: 14-193604, 15-193782, & 15-195665 (June 21, 2016), <https://adfllegal.blob.core.windows.net/web-content-dev/docs/default-source/documents/resources/media-resources/cdmhc-investigation-closure-letter.pdf?sfvrsn=2>.

<sup>38</sup> *See* Alison Kodjak, *Trump Admin Will Protect Health Workers Who Refuse Services on Religious Grounds*, NPR (Jan. 18, 2018), <https://www.npr.org/sections/health-shots/2018/01/18/578811426/trump-will-protect-health-workers-who-reject-patients-on-religious-grounds>.

<sup>39</sup> 45 C.F.R. §§ 88.3880-3931 (RIN 0945-ZA03).

- Despite its focus on increasing enforcement of existing laws “protecting the rights of conscience,”<sup>40</sup> OCR has not acknowledged its duty to enforce federal law that protects those who support abortion or sterilization.<sup>41</sup> By failing to even acknowledge this protection, OCR has seemingly abandoned its responsibility to protect from employment discrimination healthcare professionals who hold views with which the Administration does not agree.
- OCR has deleted language from its website that provided guidance to individuals and covered entities on the ACA’s non-discrimination provision<sup>42</sup> and its application to sex discrimination, and is poised to issue regulations that will roll back this important protection.<sup>43</sup>

## VI. Conclusion

Under the Trump Administration, federal agencies have failed to enforce civil rights laws for the benefit of individuals whom the laws were designed to protect. Instead, these agencies have redefined their missions and are perversely using these laws to attack marginalized communities. Even though some agencies and civil rights offices recently received increased appropriations, they are not using these resources to fulfill the purposes for which they were created. These agencies must reverse course and reaffirm their commitment to meaningful enforcement of the civil rights laws. The American public expects and deserves no less.

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<sup>40</sup> U.S. Dep’t of Health and Human Servs., *HHS Announces New Conscience and Religious Freedom Division* (Jan. 18, 2018), <https://www.hhs.gov/about/news/2018/01/18/hhs-ocr-announces-new-conscience-and-religious-freedom-division.html>.

<sup>41</sup> The law, known as the Church Amendments, prohibits entities receiving certain federal funds from discriminating against health care personnel because they perform or assist in the performance of an abortion or sterilization procedure, or because of their religious or moral convictions regarding abortion.

<sup>42</sup> 42 USC 300a-7 (2018).

<sup>43</sup> See *Language Removals Pertaining to Sex Discrimination from HHS’s Office for Civil Rights Webpages about Section 1557 of the Affordable Care Act*, WEB INTEGRITY PROJECT (July 17, 2018), <http://sunlightfoundation.com/wp-content/uploads/2018/07/CCR-9-HHS-OCR-1557-180716.pdf>.

<sup>43</sup> Katie Keith, *More Courts Rule on Section 1557 as HHS Reconsiders Regulations*, HEALTH AFFAIRS, (October 2, 2018) <https://www.healthaffairs.org/doi/10.1377/hblog20181002.142178/full/>.