United States Senate
WASHINGTON, DC 20510

November 2, 2018

The Honorable Alex M. Azar II
Secretary
U.S. Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, DC 20201

Dear Secretary Azar:

We write to express our strong concern about reports that the U.S. Department of Health and Human Services (HHS) is engaged in an effort to redefine "sex" to exclude transgender and gender nonconforming people from federal civil rights laws. This action would have grave consequences for millions of individuals and families—depriving transgender and gender nonconforming people of critical protections under federal law. When asked about this on *PBS News Hour*, you said, "I would caution, do not believe everything you read in *The New York Times,"* yet gave evasive, indirect responses when pressed.[1] We ask that you immediately bring an end to this effort and unequivocally disavow the reported memo.

In an article dated October 21, 2018, *The New York Times* reported that an internal memo circulated by HHS proposes to redefine "sex" under Title IX of the Education Amendments of 1972 (Title IX), which prohibits discrimination on the basis of sex in education programs. Section 1557 of the Affordable Care Act (ACA) prohibits discrimination in covered health programs "on the grounds prohibited under [...] title IX," so redefining "sex" for purposes of Title IX would also impact a broad array of health programs.

The report states that HHS is considering redefining sex as "a person's status as male or female based on immutable biological traits identifiable by or before birth."[2] Furthermore, the press report states that your Department argues "[t]he sex listed on a person's birth certificate, as originally issued, shall constitute definitive proof of a person's sex unless rebutted by reliable genetic evidence"[3] and that disputes about an individual's sex would be clarified using genetic testing. The redefinition of "sex" described by *The New York Times* embraces an outdated view of sex and gender, and ignores the overwhelming consensus within the medical and scientific community that gender identity may, or may not, align with the sex assigned at birth.

Furthermore, the American Psychological Association has called this redefinition of sex "wrongheaded" and said it "ignores the complexity of the spectrum of sex, including natural

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[1] William Brangham Interview Transcript with Secretary Azar, *HHS Secretary on Medicare Drug Pricing, Gender Definitions*, PBS News Hour (Oct. 25, 2018), *available at https://www.pbs.org/newshour/show/dhhs-secretary-on-medicare-drug-pricing-gender-definitions*

[2] Erica L. Green, Katie Benner and Robert Pear, *Transgender Could be Defined Out of Existence Under Trump Administration*, The New York Times (Oct. 21, 2018), *available at* https://www.nytimes.com/2018/10/21/us/politics/transgender-trump-administration-sex-definition.html

[3] *Id.*

variation in gender identity and the existence of people with differences in sex development."[4] When asked about the report, even your own Director of the Centers for Disease Control and Prevention said, "stigmatizing individuals is not in the interest of public health."[5] We are concerned that this effort to redefine "sex" is putting politics ahead of science and access to health care.

Redefining "sex" to include only "a person's status as male or female based on immutable biological traits identifiable by or before birth" is an absurd approach to the law and is inconsistent with precedent. Title VII of the Civil Rights Act of 1964 (Title VII) prohibits discrimination in employment on the basis of race, color, religion, national origin, or sex. In 1989, the Supreme Court recognized in *Price Waterhouse v. Hopkins* that employment discrimination based on sex stereotypes (e.g., assumptions or expectations about how persons of a certain sex should dress, behave, etc.) is unlawful sex discrimination under Title VII.[6] Furthermore, in 1998, the Supreme Court held in *Oncale v. Sundowner Offshore Services* that same-sex harassment is sex discrimination under Title VII.[7] Justice Scalia noted in the majority opinion that, while same-sex harassment was "assuredly not the principal evil Congress was concerned with when it enacted Title VII . . . statutory prohibitions often go beyond the principal evil [they were passed to combat] to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."[8]

Since 2012, the U.S. Equal Employment Opportunity Commission (EEOC), which enforces Title VII and other civil rights laws, has taken the position that discrimination on the basis of sex prohibits discrimination on the basis of sexual orientation and gender identity. The EEOC's guidance states, "Discrimination against an individual because of gender identity, including transgender status, or because of sexual orientation is discrimination because of sex."[9] We agree with this approach, and so do many federal Courts.[10]

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[4] Press Release, APA Decries Apparent Administration Attempt to Erase Transgender Definition in Federal Programs (Oct. 22, 2018), *available at* https://www.apa.org/news/press/releases/2018/10/erase-transgender-definition.aspx.

[5] Ike Swetlitz, *CDC's Redfield on Trump's transgender proposal: Stigma is 'not in the interest of public health'*, StatNews (Oct. 23, 2018), *available at* https://www.statnews.com/2018/10/23/cdc-director-on-trump-transgender-proposal/.

[6] 490 U.S. 228 (1989).

[7] 523 U.S. 75 (1998).

[8] *Id.*, at 79-80.

[9] Sex-Based Discrimination, EEOC, (N.D.), *available at https://www.eeoc.gov/laws/types/sex.cfm.*

[10] *See, e.g.*, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Oncale v. Sundowner Offshore Servs. Inc.*, 523 U.S. 75, 79 (1998); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215–16 (1st Cir. 2000); *G.G. v. Gloucester Cnty. Sch. Bd.*, No. 15-2056, 2016 WL 1567467, at *8 (4th Cir. Apr. 19, 2016); *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018); *Smith v. City of Salem*, 378 F.3d 566, 572-75 (6th Cir. 2004); *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005); *Dodds v. U.S. Dept. of Education*, 845 F.3d 217 (6th Cir. 2016); *Whitaker v. Kenosha Unified School* District, 858 F.3d 1034 (7th Cir. 2017); *Schwenk v. Hartford*, 204 F.3d 1187, 1201–02 (9th Cir. 2000); *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011); *Schroer v. Billington*, 577 F. Supp. 2d 293, 306-08 (D.D.C. 2008); *Tovar v. Essentia Health*, cv-16-100-DWF-LIB (D. Minn. Sept. 20, 2018) *Smith v. Avanti*, 249 F. Supp. 3d 1149, (D. Colo. 2017); *Lopez v. River Oaks Imaging & Diagnostic Group, Inc.*, 542 F. Supp. 2d 653 (S.D. Tex. 2008); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267 (W.D. Pa. Feb. 27, 2017); *Tronetti v. Healthnet Lakeshore Hosp.*, No. 03–CV–0375E, 2003 WL 22757935 (W.D.N.Y. Sept. 26, 2003);

The redefinition of sex reported in *The New York Times* would have devastating consequences for millions of people who do not recognize themselves as the sex assigned to them at birth or who are gender nonconforming.[11] Transgender and gender nonconforming people already experience harassment and discrimination at high rates.[12] We are also concerned that this arbitrary definition of "sex" could invite unlawful intrusions into individual medical and genetic privacy. Instead of dedicating HHS resources to increase discrimination in education and health care, you should be working to vigorously enforce the civil rights laws that Congress has enacted to protect the rights of transgender and gender nonconforming people, including under Title IX and Section 1557 of the ACA.

We also ask for the following information no later than November 16, 2018:

1. Provide a copy of the reported HHS memo proposing to redefine sex referred to in *The New York Times* article published on October 21, 2018.

2. Identify all HHS personnel who were involved in drafting the memo referred to in *The New York Times* article published on October 21, 2018.

3. Did HHS consult with any other federal agencies regarding the reported memo prior to October 21, 2018? If so, please identify each agency and its personnel that HHS consulted.

4. Did HHS consult with any other federal agencies regarding the reported memo after *The New York Times* article was published on October 21, 2018? If so, please identify each agency and its personnel that HHS consulted.

5. Did HHS consult with any medical experts in developing the reported redefinition of sex? If so, please identify all such experts and provide all reports, memos, proposals, correspondence, and other information that any such experts provided to HHS in connection with HHS' leaked redefinition of "sex."

6. Did HHS consult with any individuals or organizations outside of the federal government in developing the leaked redefinition of sex? If so, please identify all individuals and all reports, memos, proposals, correspondence, and other information that any such individuals provided to HHS in connection with HHS' leaked redefinition of "sex."

Cruz v. Zucker, 195 F.Supp.3d 554 (S.D.N.Y. 2016); *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509 (D. Conn. 2016); *Finkle v. Howard Cty.*, 12 F. Supp. 3d 780 (D. Md. 2014); *Adams v. School Board of St. Johns County*, 318 F.Supp.3d 1293 (M.D. Fla. Jul. 26, 2018); *M.A.B. v. Board of Education of Talbot County*, 286 F. Supp. 3d 704 (D. Md. 2018); *Prescott v. Rady Children's Hospital-San Diego*, 265 F. Supp. 3d 1090 (S.D. Cal. 2017); *E.E.O.C. v. Rent-a-Center East, Inc.*, 264 F. Supp. 3d 952 (C.D. Ill. 2017).

[11] Flores, Herman, Gates & Brown, *How Many Adults Identify as Transgender in the United States?*, The Williams Institute (June 2016), *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf.

[12] Haas & Rodgers, Suicide Attempts among Transgender and Gender Non-Conforming Adults, The Williams Institute (Jan. 2014), *available at* https://williamsinstitute.law.ucla.edu/wp-content/uploads/AFSP-Williams-Suicide-Report-Final.pdf.

7. Identify all medical and scientific evidence HHS used to reach the conclusion that a person's gender should be determined by "immutable biological traits identifiable by or before birth."

Given the seriousness of these reports, we hope you will speak out against any proposal that will lessen nondiscrimination protections based on sex, including sexual orientation, gender identity, or gender nonconformity, and unequivocally disavow the reported memo. Should you have any questions about this request, please contact Jake Cornett with Senator Murray's Committee on Health, Education, Labor, and Pensions staff at (202) 224-0767 or Aparna Patrie with Senator Blumenthal's Committee on the Judiciary staff at (202) 224-9132. Thank you for your attention to this important matter.

Sincerely,

Patty Murray
United States Senator

Dianne Feinstein
United States Senator

Tammy Baldwin
United States Senator

Richard Blumenthal
United States Senator

Chris Van Hollen
United States Senator

Thomas R. Carper
United States Senator

Jack Reed
United States Senator

Robert P. Casey, Jr.
United States Senator

Mazie K. Hirono
United States Senator

Edward J. Markey
United States Senator

Christopher A. Coons
United States Senator

Jeffrey A. Merkley
United States Senator

Christopher S. Murphy
United States Senator

Catherine Cortez Masto
United States Senator

Amy Klobuchar
United States Senator

Bernard Sanders
United States Senator

Sheldon Whitehouse
United States Senator

Kirsten Gillibrand
United States Senator

Patrick J. Leahy
United States Senator

Benjamin L. Cardin
United States Senator

Tim Kaine
United States Senator

Kamala D. Harris
United States Senator

Cory A. Booker
United States Senator

Ron Wyden
United States Senator

Richard J. Durbin
United States Senator

Tammy Duckworth
United States Senator

Robert Menendez
United States Senator

Brian Schatz
United States Senator

Sherrod Brown
United States Senator

Michael F. Bennet
United States Senator