



# COMMONWEALTH of VIRGINIA

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Gentlemen:

I am responding to your requests for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*. Given the similarity of the questions you ask, I have consolidated my response into a single opinion.

## Issues Presented

Senator Garrett and Delegate LaRock have each asked whether Virginia's anti-discrimination statutes, by prohibiting discrimination on the basis of "sex," thereby also proscribe discrimination on the basis of sexual orientation and gender identity. They state that their inquiry is prompted by recent rulings by the U.S. Equal Employment Opportunity Commission (EEOC), which they characterize as holding that the term "sex" includes both sexual orientation and gender identity for purposes of determining violations of Title VII of the Civil Rights Act. Specifically, they ask whether that conclusion is true with respect to use of the term "sex" in Virginia Code § 2.2-3901—part of the Virginia Human Rights Act—as well as other anti-discrimination provisions in the *Code of Virginia*. If my response to their first question is in the affirmative, Senator Garrett and Delegate LaRock additionally ask how the terms "sexual orientation" and "gender identity" are defined for the purposes of applying Virginia's various statutes prohibiting sex discrimination. Delegate Plum also requested an opinion regarding, generally, whether gender-identity and sexual-orientation discrimination are prohibited under Virginia's various anti-discrimination statutes.

## Background

The General Assembly has repeatedly enacted legislation to prohibit discrimination based on “sex.” The Virginia Human Rights Act (VHRA or the “Act”) declares that it is the “policy of the Commonwealth” to:

Safeguard all individuals within the Commonwealth from unlawful discrimination because of race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, or disability, in places of public accommodation, including educational institutions and in real estate transactions [and] in employment . . . .<sup>[1]</sup>

To that end, the Act generally prohibits discrimination on the basis of “sex,” among other characteristics. Although the Act does not define the term “sex,” it specifically provides that “[c]onduct that violates any Virginia or federal statute or regulation governing discrimination on the basis of . . . sex . . . shall be an ‘unlawful discriminatory practice’ for the purposes of” the Act.<sup>2</sup> The General Assembly also directed that the provisions of the Act “shall be construed liberally for the accomplishment of its policies.”<sup>3</sup> In interpreting the Act, the Supreme Court of Virginia has recognized that “[t]he General Assembly has declared this Commonwealth’s strong public policy against employment discrimination based upon race or gender.”<sup>4</sup>

Without question, it is the public policy of this Commonwealth that all individuals within this Commonwealth are entitled to pursue employment free of discrimination based on race or gender. Indeed, racial or gender discrimination practiced in the work place is not only an invidious violation of the rights of the individual, but such discrimination also affects the property rights, personal freedoms, and welfare of the people in general.<sup>[5]</sup>

A number of other provisions in the *Code of Virginia* prohibit sex discrimination in specific areas. For instance, the Virginia Fair Housing Law states that it “is the policy of the Commonwealth of Virginia to provide for fair housing throughout the Commonwealth, to all its citizens, regardless of . . . sex,” and that law prohibits “discriminatory practices with respect to residential housing by any person or group of persons.”<sup>6</sup> The Fair Employment Contracting Act likewise declares that it is the “policy of the

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<sup>1</sup> VA. CODE ANN. § 2.2-3900(B) (2014). The VRHA does not create an independent or private cause of action to enforce its provisions, except as specifically provided in Code § 2.2-3903(B) and (C). VA. CODE ANN. § 2.2-3903(A) (2014). Among other things, those subsections prohibit an employer employing “more than five but less than 15 persons” from discharging an employee on the basis of sex, and permit a discharged employee to bring an action in a general district court or circuit court with jurisdiction over the employer. VA. CODE ANN. § 2.2-3903(B)-(C) (2014).

<sup>2</sup> VA. CODE ANN. § 2.2-3901 (2014).

<sup>3</sup> VA. CODE ANN. § 2.2-3902 (2014).

<sup>4</sup> *Lockhart v. Commonwealth Educ. Sys. Corp.*, 247 Va. 98, 105 (1994).

<sup>5</sup> *Id.* See also *Bailey v. Scott-Gallaher, Inc.*, 253 Va. 121, 125 (1997) (“That it is the strongly held public policy of this Commonwealth to protect employees against employment discrimination based upon race or gender is beyond debate or challenge.”).

<sup>6</sup> VA. CODE ANN. § 36-96.1 (2014). See also *id.* § 36-96.3(A) (2014) (defining unlawful discriminatory housing practices based on sex); § 36-96.4(A) (2014) (prohibiting sex-based discrimination by “any person or other entity, including any lending institution, whose business includes engaging in residential real estate-related transactions”); § 36-96.6 (2014) (prohibiting restrictive covenants that restrict occupancy or ownership of property on the basis of

Commonwealth to eliminate all discrimination on account of . . . sex . . . from the employment practices of the Commonwealth, its agencies, and government contractors.”<sup>7</sup> The Virginia Public Procurement Act (VPPA) forbids discrimination “[i]n the solicitation or awarding of contracts” and provides that “no public body shall discriminate against a bidder or offeror because of . . . sex.”<sup>8</sup> The State Grievance Procedure states that a grievance qualifies for a hearing if it relates to “discrimination on the basis of . . . sex.”<sup>9</sup> And the Virginia Equal Credit Opportunity Act makes it “unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction” on the basis of sex.<sup>10</sup> The term “sex” is not defined in any of these statutes.

### Applicable Law and Discussion

Like Virginia’s other anti-discrimination statutes that Senator Garrett and Delegate LaRock cite in their opinion requests, the Virginia Human Rights Act prohibits discrimination based on “sex.” Although the General Assembly did not define the term “sex” in the Act, it directed that the Act’s provisions “shall be construed liberally for the accomplishment of its policies.”<sup>11</sup> Also, unlike those other anti-discrimination statutes, the Act specifically provides that “[c]onduct that violates any . . . federal statute or regulation governing discrimination on the basis of . . . sex . . . shall be an ‘unlawful discriminatory practice’ for the purposes of” the Act.<sup>12</sup> Thus, the General Assembly has instructed that the scope of discriminatory conduct prohibited by the Act includes all discriminatory conduct prohibited by federal law—or, as one court put it, “[t]he VHRA essentially makes any federal violation a violation of Virginia law as well.”<sup>13</sup>

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sex). The Fair Housing Law provides that “[n]othing in this chapter shall abridge the federal Fair Housing Act of 1968 (42 U.S.C. § 3601 et seq.) as amended.” VA. CODE ANN. § 36-96.23 (2014).

<sup>7</sup> VA. CODE ANN. § 2.2-4200(A) (2014). *See also id.* § 15.2-1604 (2012) (providing generally that it constitutes an unlawful employment practice for constitutional officers to make employment decisions based on sex). The Fair Employment Contracting Act requires generally that, as a condition of the contract, contractors agree not to discriminate on the basis of sex. *See id.* § 2.2-4201(1) (2014) (“The contractor will not discriminate against any employee or applicant for employment because of race, religion, color, sex, or national origin, except where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of the contractor.”).

<sup>8</sup> VA. CODE ANN. § 2.2-4310(A) (Supp. 2015). Like the Fair Employment Contracting Act, the VPPA requires generally that, as a condition of the contract, contractors agree not to discriminate on the basis of sex. *See id.* § 2.2-4311(1)(a) (2014) (“The contractor will not discriminate against any employee or applicant for employment because of race, religion, color, sex, national origin, age, disability, or other basis prohibited by state law relating to discrimination in employment, except where there is a bona fide occupational qualification reasonably necessary to the normal operation of the contractor.”).

<sup>9</sup> VA. CODE ANN. § 2.2-3004 (2014). *See also id.* § 15.2-1507 (2012) (grievance procedure for employees of localities required where complaint relates to discrimination on the basis of sex).

<sup>10</sup> VA. CODE ANN. § 6.2-501(A) (2010).

<sup>11</sup> VA. CODE ANN. § 2.2-3902.

<sup>12</sup> VA. CODE ANN. § 2.2-3901. When it was first enacted in 1987, the Act provided that “[c]onduct which violates Virginia statute or regulation governing discrimination or Title 7 of the Civil Rights Act of 1964 as amended or the Fair Labor Standards Act on the basis of . . . sex . . . shall be an ‘unlawful discriminatory practice’ for the purposes” of the Act. 1987 Va. Acts ch. 581 (codified at former § 2.1-716). Four years later, the Act was amended to broaden the scope of covered conduct to that which violates “any Virginia or federal statute or regulation governing discrimination . . . on the basis of . . . sex” 1991 Va. Acts ch. 457 (codified at current § 2.2-3901).

<sup>13</sup> *See Grimes v. Canadian Am. Transp., C.A.T. (U.S.), Inc.*, 72 F. Supp. 2d 629, 634 (W.D. Va. 1999).

Consequently, answering Senator Garrett and Delegate LaRock's first question with respect to the VHRA, in particular, requires determining whether sex discrimination on the basis of gender identity and sexual orientation is prohibited under federal law. I discuss that VHRA-specific analysis in the first section below. The second section of this Opinion provides information applicable to Virginia's other statutes prohibiting sex-based discrimination. The third section addresses their question regarding the definitions of "sexual orientation" and "gender identity."

At the outset, I emphasize that the law in these areas continues to develop. A host of cases testing the limits of federal anti-discrimination law are pending in courts throughout the country, and decisions in those cases could shift the legal landscape and directly or indirectly impact the analysis provided below. As federal and state courts create a more robust body of case law, the scope of discriminatory conduct prohibited under federal and state law should become clearer.

In the meantime, the discussion and analysis provided in this Opinion are intended to describe the current state of the law. As more fully set forth below, a strong argument could be made that "sex" categorically includes "gender identity" and "sexual orientation" for purposes of applying federal anti-discrimination statutes, and therefore the VHRA, because gender-identity and sexual-orientation discrimination necessarily involves treating individuals less favorably on account of sex-based considerations. That argument has prevailed in a number of federal courts and has been affirmatively asserted by the EEOC in litigation. But the question has not yet been conclusively resolved by the Fourth Circuit or the Supreme Court of Virginia.

The limited precedent available similarly does not permit a definitive answer to Senator Garrett and Delegate LaRock's question with respect to the scope of "sex" within Virginia's other anti-discrimination statutes. Numerous federal courts have concluded, however, that discrimination against lesbian, gay, bisexual, and transgender (LGBT) individuals constitutes impermissible "sex" discrimination when it is based on sex-stereotyping or on treating those individuals less favorably on account of their gender. In light of those decisions and their reasoning, it is my opinion that courts interpreting the VHRA and Virginia's other statutory prohibitions on sex discrimination would most likely conclude that discrimination against LGBT individuals constitutes impermissible sex discrimination when it is similarly based on sex-stereotyping or treating individuals less favorably on account of their gender.

**A. The VHRA prohibits all sex-based discrimination prohibited by federal law, including, in certain circumstances, sexual-orientation discrimination and gender-identity discrimination.**

Numerous federal statutes and regulations prohibit sex-based discrimination. For instance, Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against employees on the basis of "sex."<sup>14</sup> The federal Fair Housing Act of 1968, as amended, prohibits discrimination in housing practices on the basis of sex.<sup>15</sup> Title IX of the Education Amendments of 1972 provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance."<sup>16</sup> And the Equal Credit Opportunity Act makes it "unlawful for any creditor to discriminate

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<sup>14</sup> See 42 U.S.C. § 2000e-2 (providing that it constitutes an unlawful employment practice to discriminate based on an "individual's race, color, religion, sex, or national origin").

<sup>15</sup> 42 U.S.C. § 3604.

<sup>16</sup> 20 U.S.C. § 1681(a).

against any applicant, with respect to any aspect of a credit transaction . . . on the basis of . . . sex.”<sup>17</sup> Other federal statutes and regulations prohibit sex discrimination in a variety of other areas. Like their corresponding provisions in Virginia law, these federal statutes do not define the term “sex.”

The Virginia Human Rights Act makes clear that, to the extent discriminatory conduct is prohibited by federal law, it is also prohibited by the VHRA. As discussed below, the law is unsettled whether “sex,” as used in federal anti-discrimination statutes, includes “gender identity” or “sexual orientation” as a categorical matter. Consequently, the scope of that term for purposes of applying the VHRA is likewise unsettled.

But while it would be premature at this time to offer a definitive opinion on the question whether sex discrimination categorically includes sexual-orientation and gender-identity discrimination, I note that the unmistakable trend in federal courts is towards construing anti-sex-discrimination statutes to prohibit discrimination against LGBT individuals in many circumstances. As described below, in the first decades after the enactment of Title VII and Title IX,<sup>18</sup> some courts were skeptical that prohibitions on “sex” discrimination could also ban such discriminatory conduct. But more recently, a growing number of federal courts have held, drawing on the reasoning of Supreme Court cases, that discrimination against LGBT individuals is prohibited when the conduct depends on impermissible sex-stereotyping, or on treating the individuals less favorably because of their sex. What changed was not an expansion of the definition of “sex,” but courts’ understanding of how conduct can be “based on” sex. While it would be impossible to identify all factual circumstances in which discrimination against LGBT individuals may violate sex-discrimination bans under federal law—and therefore under the VHRA—the cases discussed below provide some illustrative examples.

**1. To the extent gender-identity discrimination is prohibited by federal law, it is likewise prohibited by the VHRA.**

Neither the Supreme Court nor the Fourth Circuit has decided whether Title VII’s prohibition on sex-based discrimination *per se* bars discrimination based on gender identity.<sup>19</sup> But a number of federal

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<sup>17</sup> 15 U.S.C. § 1691(a)(1).

<sup>18</sup> Title IX’s language prohibiting discrimination “on the basis of sex” is interpreted by courts in the same manner as similar language in Title VII. *See* *Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007) (“We look to case law interpreting Title VII of the Civil Rights Act of 1964 for guidance in evaluating a claim brought under Title IX.”) (citing *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 651 (1999); *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 74 (1992)); *Murray v. N.Y. Univ. Coll. of Dentistry*, 57 F.3d 243, 248-49 (2d Cir. 1995) (noting the Supreme Court’s citation to a Title VII case in discussing the standard of liability in a Title IX case). The scope of the Fair Housing Act may also be interpreted through case law on Title VII. *See, e.g.*, *Smith v. Town of Clarkton, N.C.*, 682 F.2d 1055, 1065 (4th Cir. 1982) (in Fair Housing Act case, importing and applying standard for demonstrating Title VII violation because “the anti-discrimination objectives of Title VIII are parallel to the goals of Title VII”).

<sup>19</sup> *See* *Lewis v. High Point Reg’l Health Sys.*, 79 F. Supp. 3d 588, 589 (E.D.N.C. 2015) (“[N]either the Supreme Court nor the Fourth Circuit’s Title VII jurisprudence has addressed transgender status . . .”). A panel of the U.S. Court of Appeals for the Fourth Circuit recently issued an opinion in a case touching on whether gender-identity discrimination constitutes unlawful sex discrimination under Title IX, but the opinion did not squarely resolve that issue. *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, No. 15-2056, 2016 WL 1567467 (4th Cir. Apr. 19, 2016). A petition for rehearing by the *en banc* Fourth Circuit is currently pending in that case. *See* *Pet. for Reh’g En Banc, G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, No. 15-2056 (4th Cir. May 3, 2016), ECF No. 76.

courts, including within the Fourth Circuit, have held that federal law prohibits gender-identity discrimination when it relies on impermissible sex-stereotyping of the kind rejected by the Supreme Court in its 1989 decision *Price Waterhouse v. Hopkins*.<sup>20</sup>

In *Price Waterhouse*, the Supreme Court found a Title VII violation where a woman was denied entry into the partnership of an accounting firm based on her nonconformance with traditional sex stereotypes. In a plurality opinion, the Court held that its conclusion as to the plaintiff's burden of proof in a Title VII action was dictated by the statute's plain text: "Congress' intent to forbid employers to take gender into account in making employment decisions appears on the face of the statute."<sup>21</sup> Concluding that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group,"<sup>22</sup> the Court noted that "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."<sup>23</sup>

Nine years later, a unanimous Supreme Court held in *Oncale v. Sundowner Offshore Services, Inc.*, that "sex-related, humiliating actions" by one man against another was discriminatory conduct actionable under Title VII.<sup>24</sup> Writing for the Court, Justice Scalia underscored that the scope of Title VII's prohibition on sex discrimination is defined by its text, rather than legislative intent:

[M]ale-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil 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.<sup>[25]</sup>

In the wake of those decisions, lower courts began recognizing that Title VII and other anti-discrimination statutes forbid sex discrimination based on an individual's nonconformance with stereotypical gender norms.<sup>26</sup> The reasoning of *Price Waterhouse* undermined the decisions by some courts that Title VII did not protect transgender individuals from sex discrimination.<sup>27</sup> Indeed, courts

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<sup>20</sup> 490 U.S. 228 (1989).

<sup>21</sup> *Id.* at 239 (plurality opinion).

<sup>22</sup> *Id.* at 251.

<sup>23</sup> *Id.* (quoting *L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978) (quoting *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971))).

<sup>24</sup> 523 U.S. 75, 77 (1998).

<sup>25</sup> *Id.* at 79.

<sup>26</sup> *See, e.g.*, *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874 (9th Cir. 2001) (Title VII violation where harassment was "based upon the perception that [the male plaintiff] is effeminate"); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 262-63 (3d Cir. 2001) (basis for sex-discrimination claim where "harasser's conduct was motivated by a belief that the victim did not conform to the stereotypes of his or her gender"); *Doe v. City of Belleville*, 119 F.3d 563, 581 (7th Cir. 1997), *vacated and remanded on other grounds*, 523 U.S. 1001 (1998) ("In the same way [that Hopkins had stated a sex-discrimination claim against Price Waterhouse based on harassment for appearing unacceptably 'masculine'], a man who is harassed because his voice is soft, his physique is slight, his hair is long, or because in some other respect he exhibits his masculinity in a way that does not meet his coworkers' idea of how men are to appear and behave, is harassed 'because of' his sex.").

<sup>27</sup> *See, e.g.*, *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748 (8th Cir. 1982); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir. 1977).

since then have recognized that “the approach in [those cases was] eviscerated by *Price Waterhouse*.”<sup>28</sup> The Sixth Circuit summarized well the resulting legal landscape:

After *Price Waterhouse*, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim’s sex. It follows that employers who discriminate against men because they *do* wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim’s sex.<sup>[29]</sup>

Federal courts now regularly hold that transgender plaintiffs can bring claims under Title VII and other federal statutes barring sex-based discrimination when the claims allege impermissible sex-stereotyping.

For instance, the First Circuit has held that a transsexual loan applicant stated a claim under the Equal Credit Opportunity Act when it could reasonably be inferred that he did not “receive the loan application because he was a man, whereas a similarly situated woman would have received the loan application” and that “the Bank [had] treat[ed], for credit purposes, a woman who dresses like a man differently than a man who dresses like a woman.”<sup>30</sup> The Sixth Circuit has likewise ruled in a Title VII case that “discrimination against a plaintiff who is a transsexual—and therefore fails to act and/or identify with his or her gender—is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse*, who, in sex-stereotypical terms, did not act like a woman.”<sup>31</sup> The Ninth Circuit has held that a transsexual plaintiff can state a sex-based discrimination claim under the Gender Motivated Violence Act because discrimination against transgender females—“anatomical males whose outward behavior and inward identity [do] not meet social definitions of masculinity”—is discrimination “because of sex.”<sup>32</sup> And the Eleventh Circuit relied in part on Title VII jurisprudence for its conclusion that “a government agent violates the Equal Protection Clause’s prohibition of sex-based discrimination when he or she fires a transgender or transsexual employee because of his or her gender non-conformity.”<sup>33</sup> It further

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<sup>28</sup> *Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004). *See also, e.g.*, *Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000) (“The initial judicial approach taken in cases such as *Holloway* [and *Ulane*] has been overruled by the logic and language of *Price Waterhouse*.”); *Finkle v. Howard Cty.*, 12 F. Supp. 3d 780, 788 (D. Md. 2014) (“In light of *Price Waterhouse*, it is unclear what, if any, significance to ascribe to the conclusion that ‘transsexuals are not protected under Title VII as *transsexuals*.’ Indeed, it would seem that any discrimination against transsexuals (as transsexuals)—individuals who, by definition, do not conform to gender stereotypes—is proscribed by Title VII’s proscription of discrimination on the basis of sex as interpreted by *Price Waterhouse*.” (citation omitted) (quoting *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1222 n.2 (10th Cir. 2007))).

<sup>29</sup> *City of Salem*, 378 F.3d at 574.

<sup>30</sup> *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000). *See id.* at 215 (“In interpreting the ECOA, this court looks to Title VII case law, that is, to federal employment discrimination law.”).

<sup>31</sup> *City of Salem*, 378 F.3d at 575. *See also id.* (“Sex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as “transsexual,” is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity.”); *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005) (following *City of Salem*; holding that transsexual police officer stated a claim for sex discrimination by alleging adverse employment decision for his non-conformity with sex stereotypes).

<sup>32</sup> *Schwenk*, 204 F.3d at 1201-02. *See also id.* at 1200-01 (“Congress intended” a claim under the Act “to proceed in the same way that proof of discrimination on the basis of sex or race is shown under Title VII.”).

<sup>33</sup> *Glenn v. Brumby*, 663 F.3d 1312, 1320 (11th Cir. 2011).

explained that “discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether [it is] described as being on the basis of sex or gender.”<sup>34</sup>

Federal district courts around the country, including in a majority of federal judicial circuits, have similarly allowed sex-discrimination claims by transgender plaintiffs to proceed based on a sex-stereotyping theory. Below, for your reference, are some of those authorities:

#### Second Circuit

- *Fabian v. Hospital of Central Connecticut* (“On the basis of the plain language of the statute, and especially in light of the interpretation of that language evident in *Price Waterhouse*’s acknowledgement that gender-stereotyping discrimination is discrimination ‘because of sex,’ I conclude that discrimination on the basis of transgender identity is cognizable under Title VII.”).<sup>35</sup>
- *Tronetti v. TLC HealthNet Lakeshore Hospital* (“Transsexuals are not gender-less, they are either male or female and are thus protected under Title VII to the extent that they are discriminated against on the basis of sex . . . . Accordingly, Tronetti’s Title VII claim—based on the alleged discrimination for failing to ‘act like a man’— is actionable.”).<sup>36</sup>

#### Third Circuit

- *Mitchell v. Axcan Scandipharm, Inc.* (“Having included facts showing that his failure to conform to sex stereotypes of how a man should look and behave was the catalyst behind defendant’s actions, [the transsexual] plaintiff has sufficiently pleaded claims of gender discrimination.”).<sup>37</sup>

#### Fourth Circuit

- *Finkle v. Howard County* (“[O]n the basis of the Supreme Court’s holding in *Price Waterhouse*, and after careful consideration of its sister courts’ reasoned opinions, this Court finds that Plaintiff’s claim that she was discriminated against ‘because of her obvious transgendered status’ is a cognizable claim of sex discrimination under Title VII.”).<sup>38</sup>

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<sup>34</sup> *Id.* at 1317. See also *id.* at 1316 (acknowledging a “congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms”).

<sup>35</sup> No. 3:12-cv-1154, 2016 WL 1089178, at \*14 (D. Conn. Mar. 18, 2016).

<sup>36</sup> No. 03-CV-0375E, 2003 WL 22757935, at \*4 (W.D.N.Y. Sept. 26, 2003); cf. *Miles v. N.Y. Univ.*, 979 F. Supp. 248, 250 (S.D.N.Y. 1997) (in case where biological male was subject to discriminatory sex-based conduct while perceived as a female, holding that conduct “related to sex and sex alone. Title IX was enacted precisely to deter that type of behavior, even though the legislators may not have had in mind the specific fact pattern here involved”).

<sup>37</sup> No. Civ.A. 05-243, 2006 WL 456173, at \*2 (W.D. Pa. Feb. 17, 2006).

<sup>38</sup> 12 F. Supp. 3d 780, 788 (D. Md. 2014); see also *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, No. 15-2056, 2016 WL 1567467, at \*12 (4th Cir. Apr. 19, 2016) (Davis, J., concurring) (“In light of the weight of circuit authority concluding that discrimination against transgender individuals constitutes discrimination ‘on the basis of sex’ in the context of analogous statutes . . . , G.G. has surely demonstrated a likelihood of success on the merits of his Title IX claim.”); cf. *Hart v. Lew*, 973 F. Supp. 2d 561, 579 (D. Md. 2013) (because employer defendant did not contend that transsexual plaintiff was not protected by Title VII, assuming without deciding that plaintiff’s claim of sex-based discrimination was “within Title VII’s aegis”).

#### Fifth Circuit

- *Lopez v. River Oaks Imaging & Diagnostic Group, Inc.* (“Lopez’s transsexuality is not a bar to her sex stereotyping claim. Title VII is violated when an employer discriminates against any employee, transsexual or not, because he or she has failed to act or appear sufficiently masculine or feminine enough for an employer.”).<sup>39</sup>

#### Sixth Circuit

- *E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc.* (concluding that, “having alleged that [the transgender plaintiff’s] failure to conform to sex stereotypes was the driving force behind the Funeral Home’s decision to fire [the plaintiff], the EEOC has sufficiently pleaded a sex-stereotyping gender-discrimination claim under Title VII”).<sup>40</sup>

#### Tenth Circuit

- *Michaels v. Akal Security, Inc.* (assuming without deciding that “a *Price Waterhouse* gender stereotyping claim is available” under Title VII to transgender plaintiff, and declining to dismiss claims relating to gender stereotyping).<sup>41</sup>

#### Eleventh Circuit

- *Parris v. Keystone Foods, LLC* (recognizing that “Title VII covers [the transgender plaintiff’s] claim[.]” that she was discharged “because she failed to adhere to conventional gender roles and stereotypes” but concluding that the plaintiff “failed to present evidence to establish her prima facie case”).<sup>42</sup>

#### D.C. Circuit

- *Schroer v. Billington* (“Even if the decisions that define the word ‘sex’ in Title VII as referring only to anatomical or chromosomal sex are still good law—after that approach has been eviscerated by *Price Waterhouse*—the Library’s refusal to hire Schroer after being advised that she planned to change her anatomical sex by undergoing sex reassignment surgery was *literally* discrimination ‘because of . . . sex.’”).<sup>43</sup>

As Senator Garrett and Delegate LaRock note in their opinion requests, the Equal Employment Opportunity Commission has also issued decisions in this area. The EEOC—whose reasonable interpretation of Title VII is entitled to deference<sup>44</sup>—has agreed with the “steady stream of district court decisions recognizing that discrimination against transgender individuals on the basis of sex stereotyping

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<sup>39</sup> 542 F. Supp. 2d 653, 660 (S.D. Tex. 2008) (citation and punctuation omitted).

<sup>40</sup> 100 F. Supp. 3d 594, 603 (E.D. Mich. 2015).

<sup>41</sup> No. 09-cv-01300-ZLW-CBS, 2010 WL 2573988, at \*4 (D. Colo. June 24, 2010).

<sup>42</sup> 959 F. Supp. 2d 1291, 1303 (N.D. Ala. 2013).

<sup>43</sup> 577 F. Supp. 2d 293, 308 (D.D.C. 2008) (citation and punctuation omitted).

<sup>44</sup> *E.E.O.C. v. Commercial Office Prods. Co.*, 486 U.S. 107, 115 (1988) (“[I]t is axiomatic that the EEOC’s interpretation of Title VII, for which it has primary enforcement responsibility, need not be the best one by grammatical or any other standards. Rather, the EEOC’s interpretation of ambiguous language need only be reasonable to be entitled to deference.”).

constitutes discrimination because of sex.”<sup>45</sup> But the EEOC has also gone further, explaining in its 2012 decision *Macy v. Holder* that “evidence of gender stereotyping is simply one means of proving sex discrimination” based on transgender status.<sup>46</sup>

[A] transgender person who has experienced discrimination based on his or her gender identity may establish a prima facie case of sex discrimination through any number of different formulations. These different formulations are not, however, different claims of discrimination that can be separated out and investigated within different systems. Rather, they are simply different ways of describing sex discrimination.

For example, Complainant could establish a case of sex discrimination under a theory of gender stereotyping by showing that she did not get the job . . . because the employer believed that biological men should consistently present as men and wear male clothing.

Alternatively, if Complainant can prove that the reason that she did not get the job . . . is that the Director was willing to hire her when he thought she was a man, but was not willing to hire her once he found out that she was now a woman—she will have proven that the Director discriminated on the basis of sex. Under this theory, there would actually be no need, for purposes of establishing coverage under Title VII, for Complainant to compile any evidence that the Director was engaging in gender stereotyping.<sup>47</sup>

On this reasoning, the EEOC concluded that “intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination ‘based on . . . sex,’ and such discrimination therefore violates Title VII.”<sup>48</sup> Federal courts continue to debate whether the EEOC’s position is the correct one: some courts have declined to allow transgender plaintiffs to bring sex-based discrimination claims that do not depend on sex-stereotyping,<sup>49</sup> while others have concluded that gender-identity discrimination is *per se* discrimination “based on sex.”<sup>50</sup> As noted above, the Fourth Circuit has

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<sup>45</sup> See *Macy v. Holder*, EEOC Appeal No. 0120120821, 2012 WL 1435995, at \*9 (Apr. 20, 2012).

<sup>46</sup> *Id.* at \*10.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at \*11. The EEOC reiterated that conclusion last year in *Lusardi v. McHugh*, EEOC Appeal No. 0120133395, 2015 WL 1607756 (Apr. 1, 2015), where it reversed an agency decision denying a transgender employee’s access to the common women’s bathroom and ruled that the denial of access had been “on account of her gender identity [and] violated Title VII.” *Id.* at \*10.

<sup>49</sup> See, e.g., *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1222 (10th Cir. 2007) (holding that “transsexuals may not claim protection under Title VII from discrimination based solely on their status as a transsexual”; assuming without deciding that a sex-stereotyping “claim is available”); *Johnston v. Univ. of Pittsburgh of Commw. Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 680 (W.D. Pa. 2015) (“Plaintiff has not alleged that Defendants discriminated against him because of the way he looked, acted or spoke. Instead, Plaintiff alleges only that the University refused to permit him to use the bathrooms and locker rooms consistent with his gender identity rather than his birth sex. Such an allegation is insufficient to state a claim for discrimination under a sex stereotyping theory.”), *appeal pending*, No. 15-2022 (3d Cir.); *Eure v. Sage Corp.*, 61 F. Supp. 3d 651, 661 (W.D. Tex. 2014) (declining to “extend the sex stereotyping theory to cover circumstances where the plaintiff is discriminated against because [of] the plaintiff’s status as a transgender man or woman, without any additional evidence related to gender stereotype non-conformity”).

<sup>50</sup> See, e.g., *Finkle v. Howard Cty.*, 12 F. Supp. 3d 780, 788 (D. Md. 2014) (“[I]t would seem that any discrimination against transsexuals (as transsexuals)—individuals who, by definition, do not conform to gender stereotypes—is proscribed by Title VII’s proscription of discrimination on the basis of sex as interpreted by *Price*

yet to resolve that issue, but litigation currently pending within the Fourth Circuit could lead to more settled law.<sup>51</sup>

In the absence of binding case law, it is unsettled whether the term “sex,” as used in federal anti-discrimination statutes, categorically includes “gender identity.” Nonetheless, as set forth above, a growing number of federal courts have concluded that prohibitions on sex discrimination do, in many circumstances, prohibit discrimination against transgender individuals. Given the General Assembly’s express intent that the VHRA reach any discriminatory conduct proscribed by federal statutes or regulations, and its direction that the terms of the VHRA be “construed liberally” to further its objectives, it is my opinion that courts applying the VHRA would most likely conclude that discrimination against transgender individuals is prohibited to the extent that it is based on sex-stereotyping or on treating those individuals less favorably on account of their sex, and may well conclude that gender-identity discrimination is *per se* discrimination on the basis of sex.

**2. To the extent sexual-orientation discrimination is prohibited by federal law, it is likewise prohibited by the VHRA.**

Whether sexual-orientation discrimination is categorically prohibited by the VHRA also remains an open question, for the same reasons described with respect to gender-identity discrimination. I am not aware of any Supreme Court or Fourth Circuit decision concluding that Title VII’s prohibition on sex-based discrimination necessarily bars discrimination on the basis of sexual orientation.<sup>52</sup> Indeed, a handful of courts have held that Title VII does not *per se* prohibit sexual-orientation discrimination.<sup>53</sup> But

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*Waterhouse.*”); *Schroer v. Billington*, 577 F. Supp. 2d 293, 308 (D.D.C. 2008) (“[T]he Library’s refusal to hire Schroer after being advised that she planned to change her anatomical sex by undergoing sex reassignment surgery was *literally* discrimination ‘because of . . . sex.’”).

<sup>51</sup> For instance, just yesterday the U.S. Department of Justice filed an action against North Carolina, the North Carolina Department of Public Safety, the University of North Carolina, and various State officials asserting that the State’s implementation of 2016 legislation restricting transgender individuals’ access to restrooms consistent with their gender identity violates Title VII, Title IX, and the Violence Against Women Reauthorization Act of 2013. *See* Complaint, *United States v. North Carolina*, Case No. 1:16-cv-00425 (M.D.N.C. May 9, 2016), ECF No. 1. North Carolina’s Governor and its Secretary of Public Safety have also brought a declaratory judgment action challenging the validity of the Department of Justice’s interpretation. *See* Complaint for Declaratory Judgment, *McCrary v. United States*, Case No. 5:16-cv-00238-BO (E.D.N.C. May 9, 2016), ECF No. 1. *See also* Brief for the United States as Amicus Curiae Supporting Plaintiff-Appellant and Urging Reversal, *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, No. 15-2056 (4th Cir. Oct. 28, 2015), ECF No. 25-1 (advocating position that a school district violates Title IX’s prohibition on sex-based discrimination when it bars a student from accessing the restrooms that correspond to his gender identity because he is transgender).

<sup>52</sup> *See* *Lewis v. High Point Reg’l Health Sys.*, 79 F. Supp. 3d 588, 589 (E.D.N.C. 2015) (“High Point is correct in that neither the United States Supreme Court nor th[e] Fourth Circuit Court of Appeals has recognized Title VII as protecting individuals because of their sexual orientation.”).

<sup>53</sup> *See, e.g.,* *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 764 (6th Cir. 2006) (rejecting sex-stereotyping claim that “would have the effect of *de facto* amending Title VII to encompass sexual orientation as a prohibited basis for discrimination”; noting that “all homosexuals, by definition, fail to conform to traditional gender norms in their sexual practices”); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 143 (4th Cir. 1996) (“Title VII does not afford a cause of action for discrimination based on sexual orientation . . .”); *Henderson v. Labor Finders of Va., Inc.*, No. 3:12cv600, 2013 WL 1352158, at \*5-6 & n.4 (E.D. Va. Apr. 2, 2013) (noting that Title VII does not prohibit sexual-orientation discrimination, but permitting a claim by a heterosexual plaintiff who was subject to “obviously gendered epithets (e.g. ‘bitch’ and ‘woman’) as well as those more traditionally associated with sexual orientation (e.g. ‘faggot,’ ‘homo,’ and ‘gay’) [that] were all intended to denote accusations of effeminacy”).

as with gender-identity discrimination, more and more courts around the country have applied *Price Waterhouse's* sex-stereotyping analysis in cases involving discriminatory conduct against gay and lesbian individuals, concluding that such conduct constitutes sex discrimination:

- In *Heller v. Columbia Edgewater Country Club*, the U.S. District Court for the District of Oregon ruled that a lesbian plaintiff had stated a claim under Title VII where she alleged discharge because she “did not conform to [the employer’s] stereotype of how a woman ought to behave. [She was] attracted to and dates other women, whereas [the employer] believe[d] that a woman should be attracted to and date only men.”<sup>54</sup>
- In *Koren v. Ohio Bell Telephone Co.*, the U.S. District Court for the Northern District of Ohio denied the defendant’s motion for summary judgment where a gay employee had alleged he was discriminated against because he “took his husband’s last name—failing to conform with the male stereotype,” which “is a claim of discrimination because of sex.”<sup>55</sup>
- In *Boutillier v. Hartford Public Schools*, the U.S. District Court for the District of Connecticut permitted a claim under Title VII to proceed where a plaintiff claimed she was “subjected to sexual stereotyping . . . on the basis of her sexual orientation”; the court found she had set forth a plausible claim of discrimination “based on her non-conforming gender behavior.”<sup>56</sup>
- In *Terveer v. Billington*, the U.S. District Court for the District of Columbia denied a motion to dismiss where a plaintiff alleged sex discrimination because he was “a homosexual male whose sexual orientation is not consistent with the Defendant’s perception of acceptable gender roles.”<sup>57</sup> The court concluded that, because the plaintiff had pleaded that he was denied promotions because of his “nonconformity with male sex stereotypes,” he had adequately made out a sex-discrimination claim.<sup>58</sup>

Other case law also supports the same conclusion.<sup>59</sup>

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<sup>54</sup> 195 F. Supp. 2d 1212, 1224 (D. Or. 2002).

<sup>55</sup> 894 F. Supp. 2d 1032, 1037 (N.D. Ohio 2012).

<sup>56</sup> No. 3:13CV1303, 2014 WL 4794527, at \*2 (D. Conn. Sept. 25, 2014).

<sup>57</sup> 34 F. Supp. 3d 100, 116 (D.D.C. 2014) (quoting the amended complaint).

<sup>58</sup> *Id.*

<sup>59</sup> See, e.g., *Deneffe v. Skywest, Inc.*, No. 14-cv-00348, 2015 WL 2265373, at \*6 (D. Colo. May 11, 2015) (homosexual plaintiff’s claim under Title VII permitted to proceed where he alleged discrimination based on his “failure to conform to male stereotypes,” such as by designating his male domestic partner as a recipient of benefits); *Latta v. Otter*, 771 F.3d 456, 474 (9th Cir. 2014) (in case holding that same-sex-marriage bans in Idaho and Nevada violated Equal Protection Clause, noting that “the constitutional restraints the Supreme Court has long imposed on sex-role stereotyping . . . may provide another potentially persuasive answer to defendants’ theory”); *id.* at 495 (Reinhardt & Berzon, JJ., concurring) (“[S]ocial exclusion and state discrimination against lesbian, gay, bisexual, and transgender people reflects, in large part, disapproval of their nonconformity with gender-based expectations.”); *Centola v. Potter*, 183 F. Supp. 2d 403, 409-10 (D. Mass. 2002) (denying summary judgment to an employer where a plaintiff was discriminated against “because he failed to meet . . . gender stereotypes of what a man should look like, or act like”; concluding that if his “co-workers leapt to the conclusion that [he] ‘must’ be gay

Some federal courts have recognized that discriminatory conduct targeting gay and lesbian individuals can be a form of sex discrimination not just when it relies on sex stereotypes, but when it involves treating individuals less favorably because of their sex. For instance, in *Hall v. BNSF Railway Co.*, the U.S. District Court for the Western District of Washington allowed a plaintiff's sex-discrimination claim under Title VII to proceed because the plaintiff had alleged discrimination in the denial of a spousal health benefit to his same-sex spouse. The court reasoned, "[i]f Michael Hall were female, the benefit would be provided; BNSF provides it to female employees who are married to males but denied it to Hall[,] who is married to a male."<sup>60</sup> Most recently, in *Videckis v. Pepperdine University*,<sup>61</sup> the U.S. District Court for the Central District of California likewise held that, under Title IX, sexual-orientation discrimination "is a form of sex or gender discrimination" on both grounds described above.<sup>62</sup>

It is impossible to categorically separate "sexual orientation discrimination" from discrimination on the basis of sex or from gender stereotypes; to do so would result in a false choice. Simply put, to allege discrimination on the basis of sexuality is to state a Title IX claim on the basis of sex or gender.<sup>[63]</sup>

The court explained that the plaintiffs, lesbian members of a basketball team, had stated "a straightforward claim of sex discrimination" because they alleged they had been told that "'lesbianism' would not be tolerated on the team. If Plaintiffs had been males dating females, instead of females dating females, they would not have been subjected to the alleged different treatment."<sup>64</sup>

Those decisions by federal courts are in line with the recent EEOC decision referenced in Senator Garrett and Delegate LaRock's opinion request, *Baldwin v. Foux*.<sup>65</sup> There the EEOC concluded that sexual-orientation discrimination constitutes discrimination based on sex:

When an employee raises a claim of sexual orientation discrimination as sex discrimination under Title VII, the question is not whether sexual orientation is explicitly listed in Title VII as a prohibited basis for employment actions. It is not. Rather, the question for purposes of Title VII coverage of a sexual orientation claim is the same as any other Title VII case involving allegations of sex discrimination—whether the agency has "relied on sex-based considerations" or "take[n] gender into account" when taking the challenged employment action.<sup>[66]</sup>

The EEOC went on to explain that "[d]iscrimination on the basis of sexual orientation is premised on sex-based preferences, assumptions, expectations, stereotypes, or norms," and therefore "'[s]exual orientation' as a concept cannot be defined or understood without reference to sex."<sup>67</sup> In recent months,

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because they found him to be effeminate, Title VII's protections should not disappear"; noting in dicta that "stereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women").

<sup>60</sup> *Hall v. BNSF Ry. Co.*, No. C13-2160, 2014 WL 4719007, at \*2 (W.D. Wash. Sept. 22, 2014).

<sup>61</sup> No. CV 15-00298, 2015 WL 8916764 (C.D. Cal. Dec. 15, 2015).

<sup>62</sup> *Id.* at \*7.

<sup>63</sup> *Id.* at \*7.

<sup>64</sup> *Id.* at \*8.

<sup>65</sup> EEOC Appeal No. 0120133080, 2015 WL 4397641 (July 15, 2015).

<sup>66</sup> *Id.* at \*4.

<sup>67</sup> *Id.* at \*5. See also *Isaacs v. Felder Servs. LLC*, No. 2:13cv693, 2015 WL 6560655, at \*4 (M.D. Ala. Oct. 29, 2015) (citing *Baldwin* and agreeing that "[t]o the extent that sexual orientation discrimination occurs not because of

the EEOC has followed on its *Baldwin* decision by filing two lawsuits in federal courts alleging discrimination on the basis of sexual orientation.<sup>68</sup> Those cases remain pending.

Thus, there are strong arguments that discrimination against gays and lesbians is always on account of “sex.” But most courts that have permitted sexual-orientation claims to proceed under federal anti-sex-discrimination statutes have not done so because they have concluded that “sex” should be read to include “sexual orientation” as a categorical matter. Rather, that remains an open question in the courts.

But the decisions cited above demonstrate that discriminatory conduct against gay and lesbian individuals can constitute sex discrimination under federal law when the conduct relies on impermissible sex-stereotyping or on treating victims less favorably on account of their sex. Given the General Assembly’s determination that such conduct is “an ‘unlawful discriminatory practice’ for the purposes of” the VHRA<sup>69</sup>—and its additional direction that the terms of the VHRA be liberally construed to further the VHRA’s objectives<sup>70</sup>—it is my opinion that courts applying the VHRA would most likely conclude that the VHRA prohibits discrimination against gay and lesbian individuals when such discrimination is based on sex-stereotyping or on treating them less favorably on account of their sex. Courts may well conclude too that sexual-orientation discrimination is *per se* discrimination on the basis of sex.

**B. Although it is also not settled whether “sex” categorically includes “gender identity” or “sexual orientation” in Virginia’s other anti-discrimination statutes, in many circumstances discriminatory conduct against LGBT Virginians is already prohibited by those statutes’ bans on sex-based discrimination.**

Unlike with the VHRA, the General Assembly did not expressly provide that Virginia’s other anti-discrimination statutes reach any discriminatory conduct prohibited under federal law.<sup>71</sup> Nonetheless, in the absence of relevant Virginia case law, the reasoning and growing weight of decisions interpreting the reach of federal anti-discrimination statutes, discussed above, is persuasive authority. Although Virginia courts have not yet held that gender-identity discrimination and sexual-orientation discrimination are *per se* prohibited, they could well reach that conclusion—and, in any event, they would be likely to find that discriminatory conduct against LGBT individuals violates Virginia’s anti-discrimination laws in many circumstances.<sup>72</sup>

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the targeted individual’s romantic or sexual attraction to or involvement with people of the same sex, but rather based on her or his perceived deviations from ‘heterosexually defined gender norms,’ this, too, is sex discrimination, of the gender-stereotyping variety”).

<sup>68</sup> Complaint, EEOC v. Scott Med. Health Ctr., P.C., No. 2:16-cv-00225 (W.D. Pa. Mar. 1, 2016), ECF No. 1; Complaint, EEOC v. Pallet Cos., No. 1:16-cv-00595 (D. Md. Mar. 1, 2016), ECF No. 1.

<sup>69</sup> VA. CODE ANN. § 2.2-3901.

<sup>70</sup> VA. CODE ANN. § 2.2-3902.

<sup>71</sup> Those statutes include the Virginia Fair Housing Law, the Fair Employment Contracting Act, the Public Procurement Act, the State Grievance Procedure, and the Virginia Equal Credit Opportunity Act. Given that the VHRA makes it the policy of the Commonwealth to safeguard all individuals from sex-based discrimination in places of public accommodation, education, real estate transactions, and employment, VA. CODE ANN. § 2.2-3900, the VHRA may itself prohibit much of the same discriminatory conduct prohibited under those statutes.

<sup>72</sup> Thus, even if the VHRA did not specifically prohibit “[c]onduct that violates any . . . federal statute or regulation governing discrimination on the basis of . . . sex,” VA. CODE ANN. § 2.2-3901—the basis for the analysis set forth in Section A—my overall conclusion would be the same with respect to the VHRA.

## 1. Gender-identity discrimination.

Although the Supreme Court of Virginia has determined “beyond debate or challenge” that “it is the strongly held public policy of this Commonwealth to protect employees against employment discrimination based upon . . . gender,”<sup>73</sup> I am not aware of Virginia case law addressing whether “sex” includes “gender identity” as a categorical matter. I note, however, that in many circumstances, discriminatory conduct against transgender individuals may, under current law, be prohibited by Virginia’s anti-discrimination statutes.

First, it is obvious that when an employer takes adverse action against an individual on the basis of the individual’s gender, that is “*literally* discrimination ‘because of . . . sex.’”<sup>74</sup> Anti-discrimination statutes do not just prohibit “discrimination against men because they are men, and discrimination against women because they are women”; such a reading would “represent an elevation of ‘judge-supposed legislative intent over clear statutory text,’” which “is no longer a tenable approach to statutory construction.”<sup>75</sup> If an entity were to refuse to hire an individual simply because she plans to “change her anatomical sex by undergoing sex reassignment surgery” to reflect her gender identity, a Virginia court may well agree that is prohibited discrimination.<sup>76</sup>

One federal court faced with that scenario explained that discrimination “because of sex” could be analogized to discrimination “because of religion.” It reasoned that, if an employer harbored bias against employees who had converted from one religion to another, “[t]hat would be a clear case of discrimination ‘because of religion.’ No court would take seriously the notion that ‘converts’ are not covered by the statute. Discrimination ‘because of religion’ easily encompasses discrimination because of a *change* of religion.”<sup>77</sup> Under the same logic, discrimination against individuals because they have changed their sex is discrimination “on the basis of” sex.

Second, discrimination against transgender individuals is prohibited when it relies on impermissible sex-stereotyping of the kind rejected by the Supreme Court of the United States in *Price Waterhouse*. The Court’s assessment there cannot be gainsaid: “[w]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.”<sup>78</sup> If presented with such a case, a Virginia court may well find persuasive the reasoning of the Sixth Circuit:

[D]iscrimination against a plaintiff who is a transsexual—and therefore fails to act and/or identify with his or her gender—is no different from the discrimination directed against

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<sup>73</sup> *Bailey v. Scott-Gallaher, Inc.*, 253 Va. 121, 125 (1997).

<sup>74</sup> *Schroer v. Billington*, 577 F. Supp. 2d 293, 308 (D.D.C. 2008). *See also* *Macy v. Holder*, EEOC Appeal No. 0120120821, 2012 WL 1435995, at \*10 (Apr. 20, 2012) (“[I]f Complainant can prove that the reason that she did not get the job . . . is that the Director was willing to hire her when he thought she was a man, but was not willing to hire her once he found out that she was now a woman--she will have proven that the Director discriminated on the basis of sex.”).

<sup>75</sup> *Schroer*, 577 F. Supp. 2d at 307 (internal citations and footnotes omitted).

<sup>76</sup> *Id.* at 308.

<sup>77</sup> *Id.* at 306. *See also* *Macy*, 2012 WL 1435995, at \*11 (Apr. 20, 2012). (also analogizing religious discrimination and sex discrimination; noting that it would be impermissible for an employer to terminate an employee because she has chosen a different religion from her parents: “No one would doubt that such an employer discriminated on the basis of religion.”).

<sup>78</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (plurality opinion).

Ann Hopkins in *Price Waterhouse*, who, in sex-stereotypical terms, did not act like a woman. Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior . . . .<sup>[79]</sup>

Under that theory, when discriminatory conduct stems from a belief that, e.g., "a man who 'failed to act like' one," that is discrimination "related to the sex of the victim."<sup>80</sup> Thus, "discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether [it is] described as being on the basis of sex or gender."<sup>81</sup>

For either or both of those reasons, in an appropriate case a Virginia court could well conclude that discrimination on account of an individual's transgender status is an impermissible form of sex discrimination that violates Virginia's public policy and various anti-discrimination statutes.<sup>82</sup>

## 2. Sexual-orientation discrimination.

I am also not aware of any Virginia case law yet that holds that the definition of "sex" in Virginia's anti-discrimination statutes includes "sexual orientation" as a categorical matter. But I note that, in two ways, many instances of discrimination against gay and lesbian Virginians may already be violations of the Commonwealth's prohibitions on sex discrimination.

First, as a number of courts have recognized, discrimination against gay and lesbian individuals often involves treating a similarly situated individual less favorably on account of the individual's sex. For instance, if an employer provides a benefit to a male employee who is married to a woman, but withholds the benefit from an otherwise similarly situated woman employee who is married to a woman, a court may consider that discrimination on the basis of sex.<sup>83</sup> Likewise, if individuals "would not have been subjected to the alleged different treatment" if they had been "males dating females, instead of females dating females," that is discrimination on the basis of sex.<sup>84</sup>

Second, many courts have concluded that sexual-orientation discrimination is a form of sex discrimination when it relies on impermissible sex-stereotyping. They reason that discrimination on the basis of an individual's sexual orientation rests on gender-specific assumptions about how a person should behave.<sup>85</sup> For example, discrimination against a female employee for dating other females,<sup>86</sup> or a

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<sup>79</sup> *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004).

<sup>80</sup> *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000). See also the cases cited in nn.30-43, *supra*.

<sup>81</sup> *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011).

<sup>82</sup> See *Lewis v. High Point Reg'l Health Sys.*, 79 F. Supp. 3d 588, 590 (E.D.N.C. 2015); *Finkle v. Howard Cty.*, 12 F. Supp. 3d 780, 788 (D. Md. 2014) ("Plaintiff's claim that she was discriminated against 'because of her obvious transgendered status' is a cognizable claim of sex discrimination . . . . To hold otherwise would be to deny transsexual employees the legal protection other employees enjoy merely by labeling them as transsexuals.") (some internal citations and punctuation omitted).

<sup>83</sup> See *Hall v. BNSF Ry. Co.*, No. C13-2160, 2014 WL 4719007, at \*2 (W.D. Wash. Sept. 22, 2014).

<sup>84</sup> *Videckis v. Pepperdine Univ.*, No. CV 15-00298, 2015 WL 8916764, at \*8 (C.D. Cal. Dec. 15, 2015). See also *Baldwin v. Foxx*, EEOC Appeal No. 0120133080, 2015 WL 4397641, at \*6 (July 15, 2015) (indicating that suspension of a "lesbian employee for displaying a photo of her female spouse on her desk, but . . . not . . . a male employee for displaying a photo of his female spouse on his desk" would be "a legitimate claim under Title VII that sex was unlawfully taken into account.").

<sup>85</sup> See *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002) ("[S]tereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women.").

male employee for taking his male partner's last name,<sup>87</sup> is often based on faulty stereotypes about gender-conforming behavior. To the extent such a claim relies on impermissible sex-stereotypes, it "is a claim of discrimination because of sex."<sup>88</sup> Federal courts not only have acknowledged that the line between discrimination based on gender stereotyping and sexual-orientation discrimination is blurry;<sup>89</sup> they have begun to recognize that the supposed line is "illusory and artificial."<sup>90</sup>

For those reasons, it is my opinion that a Virginia court faced with the issue would likely find that discriminatory conduct against gay and lesbian Virginians based on sex-stereotyping or on treating them less favorably on account of their sex violates the Commonwealth's anti-discrimination statutes.

### C. Definitions

Senator Garrett and Delegate LaRock have also specifically asked how the terms "gender identity" and "sexual orientation" are defined for the purposes of applying Virginia's anti-discrimination statutes. As noted above, the General Assembly has not defined the term "sex" in the context of the VHRA and Virginia's other anti-discrimination statutes—let alone the terms "gender identity" and "sexual orientation." The Supreme Court of Virginia has not defined those terms in this context, either, but it has characterized the VHRA, with its ban on "sex"-based discrimination, as prohibiting discrimination based on "gender."<sup>91</sup> Similarly, *Black's Law Dictionary* treats "gender" as one meaning of "sex," which it defines as "[t]he sum of the peculiarities of structure and function that distinguish a male from a female organism,"<sup>92</sup> and states that "gender identity" is "a person's internal sense of gender."<sup>93</sup> *Black's Law Dictionary* also defines "sexual orientation" as a "person's predisposition or inclination towards sexual activity or behavior with other males or females; heterosexuality, homosexuality, or bisexuality."<sup>94</sup> Other definitions of those terms, including those that may be adopted by courts, could also be accurate.

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<sup>86</sup> *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1224 (D. Or. 2002).

<sup>87</sup> *Koren v. Ohio Bell Telephone Co.*, 894 F. Supp. 2d 1032, 1037 (N.D. Ohio 2012).

<sup>88</sup> *Id.* See also *Boutillier v. Hartford Pub. Sch.*, No. 3:13CV1303, 2014 WL 4794527, at \*2 (D. Conn. Sept. 25, 2014); *Terveer v. Billington*, 34 F. Supp. 3d 100, 116 (D.D.C. 2014).

<sup>89</sup> See, e.g., *Christiansen v. Omnicom Grp., Inc.*, No. 15 Civ. 3440 (KPF), 2016 WL 951581, at \*15 (S.D.N.Y. Mar. 9, 2016) ("In light of the EEOC's recent decision on Title VII's scope [*Baldwin v. Foxx*], and the demonstrated impracticability of considering sexual orientation discrimination as categorically different from sexual stereotyping, one might reasonably ask—and, lest there be any doubt, this Court is asking—whether that line should be erased."); *Henderson v. Labor Finders of Va.*, No. 3:12cv600, 2013 WL 1352158, at \*4 (E.D. Va. Apr. 2, 2013) ("Of course, it is often difficult to draw the distinction between discrimination on the basis of gender stereotyping and discrimination on the basis of sexual orientation."); *Centola*, 183 F. Supp. 2d at 408 ("[T]he line between discrimination because of sexual orientation and discrimination because of sex is hardly clear.").

<sup>90</sup> *Videckis v. Pepperdine Univ.*, No. CV 15-00298, 2015 WL 8916764, at \*5 (C.D. Cal. Dec. 15, 2015).

<sup>91</sup> *Bailey v. Scott-Gallaher, Inc.*, 253 Va. 121, 125 (1997) ("That it is the strongly held public policy of this Commonwealth to protect employees against employment discrimination based upon race or gender is beyond debate or challenge."); *Lockhart v. Commonwealth Educ. Sys. Corp.*, 247 Va. 98, 105 (1994) ("Without question, it is the public policy of this Commonwealth that all individuals within this Commonwealth are entitled to pursue employment free of discrimination based on race or gender.").

<sup>92</sup> *Id.* at 1583. See also *id.* at 567 (stating that "sex discrimination" is "[a]lso termed *gender discrimination*").

<sup>93</sup> BLACK'S LAW DICTIONARY 567 (Bryan A. Garner et al. eds., 10th ed. 2014).

<sup>94</sup> *Id.* at 1584.

### Conclusion

For more than a quarter-century, since the General Assembly enacted the Virginia Human Rights Act, it has been our Commonwealth's policy to protect all individuals within the Commonwealth from unlawful discrimination on the basis of sex. Numerous other Virginia statutes also prohibit sex-based discrimination in areas such as employment, housing, and contracting. For the reasons set forth above, I conclude that those statutes most likely prohibit discriminatory conduct against LGBT Virginians when that conduct is based on sex-stereotyping or on treating them less favorably on account of their gender. That conclusion is particularly well-founded with respect to the Virginia Human Rights Act, the scope of which includes all discriminatory conduct prohibited under federal law. Additionally, while a strong argument could be made that discrimination on the basis of gender identity or sexual orientation is always sex discrimination within the meaning of Virginia's anti-discrimination statutes, the Supreme Court of Virginia has not considered and resolved that question.

I am aware that some persons argue that those who enacted the Commonwealth's anti-discrimination statutes did not intend for their prohibitions on sex-based discrimination to protect LGBT individuals. But as the late Justice Scalia noted in *Oncale v. Sundowner Offshore Services, Inc.*, "statutory prohibitions often go beyond the principal evil 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."<sup>95</sup> Many federal courts have followed that reasoning and concluded that prohibitions against sex-based discrimination in many cases protect LGBT individuals from discrimination. What has expanded is not the definition of "sex," but instead courts' recognition that many instances of discriminatory conduct against LGBT individuals are fundamentally "based on" sex.

As to Senator Garrett and Delegate LaRock's second question, *Black's Law Dictionary* defines "gender identity" as a person's internal sense of gender, and "sexual orientation" as an individual's predisposition or inclination towards sexual activity or behavior with other males or females, such as heterosexuality, homosexuality, or bisexuality, but other definitions may also be accurate.

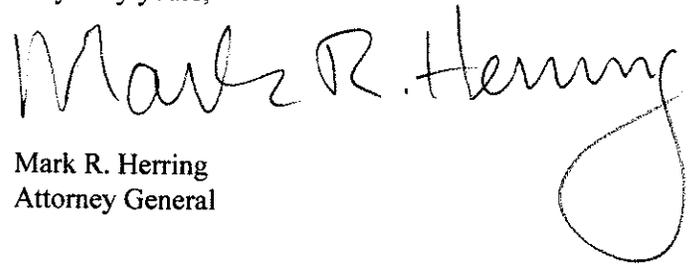
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<sup>95</sup> 523 U.S. 75, 79 (1998). For those same reasons, it is irrelevant that the General Assembly has on numerous occasions in the last 20 years considered revising Virginia's anti-discrimination statutes to expressly prohibit discrimination on the basis of "sexual orientation" but has not done so. See 2006 Op. Va. Att'y Gen. 36, 41 & n.37. Indeed, recent legislative attempts to reduce the scope of conduct swept within Virginia's prohibition on "sex"-based discrimination have themselves failed. See, e.g., H.B. 397, 2016 Reg. Sess.; H.B. 77, 2016 Reg. Sess.; cf. 2002 Op. Va. Att'y Gen. 107, 108 (repeating the requester's representation that he was "advised [by a legislative committee member] that [amending Virginia Code §§ 15.2-853 and 15.2-854 to add "sexual orientation"] was unnecessary" because individual rights are already protected).

Thus, it is unnecessary to resolve what meaning to ascribe to that legislative inaction. Compare *Tabler v. Bd. of Sup'rs of Fairfax Cty.*, 221 Va. 200, 202 (1980) ("In determining legislative intent, we have looked both to legislation adopted and bills rejected by the General Assembly."), with *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650, (1990) ("[S]ubsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress. It is a particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns, as it does here, a proposal that does not become law. Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change." (internal citations and quotation marks omitted)), and *Fabian v. Hosp. of Cent. Conn.*, No. 3:12-cv-1154, 2016 WL 1089178, at \*14 n.12 (D. Conn. Mar. 18, 2016) (interpreting language in a Connecticut anti-discrimination statute the same way as Title VII, and noting that the legislature's addition of "gender identity or expression" to the list of protected classes "does not require the conclusion that gender identity was not already protected by the plain language of the statute, because legislatures may add such language to clarify or to settle a dispute about the statute's scope rather than solely to expand it").

With kindest regards, I am

Very truly yours,

A handwritten signature in black ink that reads "Mark R. Herring". The signature is written in a cursive style with a large, looping flourish at the end of the word "Herring".

Mark R. Herring  
Attorney General