ETHICS AND PUBLIC POLICY CENTER

January 20, 2026

Via Federal eRulemaking Portal

Director Paula M. Stannard
U.S. Department of Health and Human Services
Office for Civil Rights
Attention: Disability NPRM, RIN 0945-AA27
Hubert H. Humphrey Building
Room 509F
200 Independence Avenue SW
Washington, DC 20201

Re: HHS Proposed Rule, Nondiscrimination on the Basis of Disability in Programs or Activities Receiving Federal Financial Assistance, RIN 0945-AA27

Dear Director Stannard:

We are scholars at the Ethics and Public Policy Center (EPPC) and we write in response to the U.S. Department of Health & Human Services' (HHS) proposed rule, "Nondiscrimination on the Basis of Disability in Programs or Activities Receiving Federal Financial Assistance" (Proposed Rule).[1]

Eric Kniffin is an EPPC Fellow, member of the Administrative State Accountability Project (ASAP) and a former attorney in the U.S. Department of Justice's Civil Rights Division. Rachel N. Morrison is a Fellow at the Ethics and Public Policy Center (EPPC), director of EPPC's Administrative State Accountability Project (ASAP) and a former attorney with the Equal Employment Opportunity Commission. Mary Rice Hasson is the Kate O'Beirne Senior Fellow at EPPC, an attorney, and co-founder of EPPC's Person and Identity Project (PIP), an initiative that equips parents and faith-based institutions to counter gender ideology and promote the truth of the human person.

This Proposed Rule addresses one aspect of a 2024 HHS final rule by the same title, referred to in the Proposed Rule and this comment as the 2024 Final Rule.[2] This aspect involves what qualifies as a protected "disability" under Section 504 of the Rehabilitation Act and, by extension, under the Americans with Disability Act (ADA).

[1] 90 Fed Reg 59478 (Dec. 19, 2025), https://www.federalregister.gov/d/2025-23484.

[2] 89 Fed. Reg 40066 (May 9, 2024) ("2024 Final Rule"), https://www.govinfo.gov/app/details/FR-2024-05-09/2024-09237.

Under Section 504, an "individual with a disability" must have "a physical or mental impairment which for such individual constitutes or results in a substantial impediment to employment."[3] Excluded from this definition is "an individual on the basis of homosexuality or bisexuality[,] . . . transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders."[4]

Likewise, under the ADA, a qualifying disability must be "a physical or mental impairment that substantially limits one or more major life activities of such individual."[5] Like Section 504, the term "disability" in the ADA "shall not include transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorder."[6]

Though the preamble of the 2024 Final Rule acknowledged these statutory provisions, HHS nonetheless claimed that the exclusion for "gender identity disorders not resulting from physical impairments" does not apply to gender dysphoria and that therefore, despite Congress' clear language, "gender dysphoria may constitute a disability under section 504."[7]

This Proposed Rule would revisit this aspect of the preamble from the 2024 Final Rule "to remedy the ambiguity" that it created. Having "reevaluated the statutory language," HHS now finds the 2024 Final Rule's claim about gender dysphoria "unpersuasive," contrary to the statutory text, and therefore creates a "litigation risk."[8] **We agree.** In response, the Proposed Rule would modify the regulatory text to "clarify that, where 'gender identity disorders not resulting from physical impairments' is used in part 84, it encompasses 'gender dysphoria not resulting from physical impairments,' because the statutory text states as much."[9] **We support this proposal.**

We are grateful for the Trump Administration's efforts to combat gender ideology, to base federal policy on basic facts about human biology, and to end government funding and support for sex-rejecting procedures.[10] We are also grateful for the Trump Administration's efforts to rein in the administrative state and ensure that federal regulations reflect the will of the American people as expressed through the legislative process. As detailed below, we believe this

[3] 29 U.S.C. § 705(20)(A).

[4] 29 U.S.C. § 705(20)(F)(i).

[5] 42 U.S.C. § 12102(1)(A).

[6] 42 U.S.C. § 12211(b)(1).

[7] 90 Fed. Reg. at 59480.

[8] *Id*. at 59482.

[9] *Id*.

[10] For instance, the Trump Administration has taken bold actions to fight gender ideology. *See, e.g.,* Exec. Order 14168, Defending Women From Gender Ideology Extremism and Restoring Biological Truth to the Federal Government, 90 Fed. Reg. 8615 (Jan. 20, 2025), https://www.federalregister.gov/d/2025-02090; Exec. Order 14187, Protecting Children From Chemical and Surgical Mutilation, 90 Fed. Reg. 8771 (Jan. 28, 2025), https://www.federalregister.gov/d/2025-02194; Press Release, DOJ, The Department of Justice Proposes Legislation to Protect Children from Gender Mutilation, https://www.justice.gov/opa/pr/department-justice-proposes-legislationprotect-children-gender-mutilation (proposing "Victims of Chemical or Surgical Mutilation Act").

Proposed Rule does both. As such, we support the Proposed Rule and write to offer a few additional points for your consideration.

I. We support the Trump Administration's work to protect Americans from the dangers of gender ideology.

EPPC focuses on the most important questions affecting human dignity, identity, and flourishing. Its scholars work on promoting a full and true account of the human person. Through public comments, amicus briefs, and advocacy EPPC scholars have challenged gender ideology, which rests on a radical and dangerously false conception of what it means to be human.

We believe that the public policy battles over gender ideology are, at their heart, a disagreement about what it means to be a human person. That is why we are so grateful for the Trump Administration's boldness in speaking clearly and truthfully as to what a human person is.

Our convictions align with the understanding of the person the Department expressed in "Defining Sex: Guidance for Federal Agencies, External Partners, and the Public Implementing Executive Order 14168, *Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government*."[11] That document states,

> There are only two sexes, female and male, because there are only two types of gametes. An individual human is either female or male based on whether the person is of the sex characterized by a reproductive system with the biological function of producing eggs (ova) or sperm.
>
> The sex of a human, female or male, is determined genetically at conception (fertilization), and is observable before birth. Having the biological function to produce eggs or sperm does not require that eggs or sperm are ever produced. Some females or males may not or may no longer produce eggs or sperm due to factors such as age, congenital disorders or other developmental conditions, injury, or medical conditions that cause infertility.
>
> A person's sex is unchangeable and determined by objective biology. The use of hormones or surgical interventions do not change a person's sex because such actions do not change the type of gamete that the person's reproductive system has the biological function to produce. Rare disorders of sexual development do not constitute a third sex because these disorders do not lead to the production of a third gamete. That is, the reproductive system of a person with such a disorder does not produce gametes other than eggs or sperm.
>
> The Department has long recognized that the biological differences between females and males require sex-specific practices in medicine and research to ensure

[11] HHS, Defining Sex: Guidance for Federal Agencies, External Partners, and the Public Implementing Executive Order 14168, Feb. 19, 2025, https://womenshealth.gov/sites/default/files/_images/2025/2.19.25%20Defining%20Sex%20Guidance%20for%20Federal%20Agencies%2C%20External%20Partners%2C%20and%20the%20Public%20FINAL.pdf.

> optimal health outcomes and rigorous research, including by considering sex as a biological variable.
>
> Recognizing the immutable and biological nature of sex is essential to ensure the protection of women's health, safety, private spaces, sports, and opportunities. Restoring biological truth to the Federal government is critical to scientific inquiry, public safety, morale, and trust in government itself.[12]

This statement accurately reflects biological reality and the truth about the human person.

We are grateful for this Proposed Rule and believe that finalizing this rule upholds the rule of law and will help advance President Trump's efforts to protect America and Americans from gender ideology.

II. The 2024 Final Rule's claim that Section 504 prohibits discrimination on the basis of "gender dysphoria" is arbitrary and capricious and not supported by law.

The Proposed Rule does an excellent job of addressing the 2024 Final Rule's flawed claim that "gender dysphoria may constitute a disability under section 504."[13] We offer here some additional points for your consideration.

A. The Fourth Circuit's opinion in *Kincaid* is deeply flawed and should not serve as the basis of HHS's interpretation of 42 U.S.C. § 12211.

As the Proposed Rule notes, the 2024 Final Rule's claim that gender dysphoria is a disability under Section 504 rests in substantial part on the Fourth Circuit's opinion in *Williams v. Kincaid*.[14] In that case, Williams, a male prisoner who claimed to have gender dysphoria, sued Kincaid, the Sheriff of Fairfax County, Virginia, alleging discrimination because the Fairfax County Adult Detention Center referred to him with male pronouns, declined to provide sex-rejecting procedures, and housed him with other men.

The Fourth Circuit ruled for Williams, holding that gender dysphoria is a disability protected by the Americans with Disabilities Act (ADA). As HHS notes in the Proposed Rule, *Kincaid* claimed that the ADA's explicit exclusion of "gender identity disorders not resulting from physical impairments" from the law's definition of "disability" does not apply to gender dysphoria.[15] Because HHS relied on *Kincaid* to justify its claim that people with gender dysphoria may seek accommodations under Section 504, understanding the decision's analytical flaws is essential.

Our EPPC colleague Ed Whelan has twice dismantled the Fourth Circuit's opinion in *Kincaid.* Writing in August 2022, after the Fourth Circuit issued its divided opinion, Whelan rejected the majority opinion's claim that "gender dysphoria is categorically *not* a 'gender

[12] *Id*. at 1.

[13] 90 Fed. Reg. at 59480.

[14] 45 F.4th 759 (4th Cir. 2022), cert. denied, 143 S. Ct. 2414 (2023).

[15] 90 Fed. Reg. at 59479-80.

identity disorder' at all" because "when the ADA was enacted in 1990, the concept of 'gender identity disorders' did not include gender dysphoria."[16]

> By [Judge] Motz's illogic, the fact that the American Psychiatric Association removed "gender identity disorders" from its revised diagnostic manual in 2013 and substituted a narrower diagnosis of "gender dysphoria" somehow means that gender dysphoria is not a "gender identity disorder" under the ADA.

Whelan highlights Judge Marvin Quattlebaum's dissent, which exposes the majority's flawed analysis:

> But as Judge Marvin Quattlebaum explains in dissent (slip op. at 38-47), the gender dysphoria that [plaintiff] Williams alleges—"discomfort or distress that is caused by a discrepancy between a person's gender identity and that person's sex assigned at birth (and the associated gender role and/or primary and secondary sex characteristics)"—"falls precisely under the [American Psychiatric Association's] description of, and diagnostic criteria for, gender identity disorders" in its diagnostic manual in effect in 1990. Indeed, Quattlebaum shows more broadly that "[f]rom 1990 to today, gender identity disorder has been understood to include distress and discomfort from identifying as a gender different from the gender assigned at birth."
>
> What's more, a gender identity disorder wouldn't even fall within the general definition of an ADA "disability" in the first place unless it resulted in an "impairment that substantially limits one or more major life activities of [an] individual." So it's precisely because the subcategory of gender dysphoria involves "clinically significant stress" that the exclusion comes into play.
>
> Second, Motz maintains that even if gender dysphoria is a gender identity disorder under the ADA, Williams's complaint can plausibly be read to support the inference that his gender disorder "result[ed] from physical impairments." (Slip op. at 15-20.) But as Quattlebaum objects, the complaint does not identify any part of Williams's body that is impaired or even allege any physical impairment. (Slip op. at 50-53.)

Whelan wrote on the *Kincaid* decision again in 2023, after the Supreme Court declined the Fairfax County Sheriff's petition for certiorari.[17] Whelan highlights Justice Alito's dissent, which draws on Judge Quattlebaum's opinion and warns that the Fourth Circuit had "effectively invalidated a major provision of the Americans with Disabilities Act, and that decision is certain to have far-reaching and highly controversial effects."[18]

---

[16] Ed Whelan, *Fourth Circuit's Transgender Dysphoria*, National Review (Aug. 17, 2022), https://www.nationalreview.com/bench-memos/fourth-circuits-transgender-dysphoria/.

[17] Ed Whelan, *Fourth Circuit's Transgender Dysphoria Evades Supreme Court Review*, National Review (July 3, 2023), https://www.nationalreview.com/bench-memos/fourth-circuits-transgender-dysphoria-evades-supreme-court-review/.

[18] *Kincaid v. Williams*, 143 S. Ct. 2414, 2415 (2023) (Alito, J., dissenting).

Alito concludes: "In short, the Fourth Circuit's ruling leaves a great many people and institutions under the looming threat of liability, forcing them to change their behavior—behavior that may be deeply rooted in moral or religious principles—or face an unending stream of lawsuits."[19]

Justice Alito's warning applies in full to the challenged portion of the 2024 Final Rule.

B. Contemporary evidence rejects the 2024 Final Rule's claim that the 2013 DSM change reflected a "change in medical understanding."

As HHS notes in the Proposed Rule, the American Psychiatric Association swapped out the term "gender identity disorder" for the new term "gender dysphoria" when it updated the DSM by issuing the DSM-5 in 2013.[20] The 2024 Final Rule had claimed that this shift in terminology "reflected a shift in medical understanding."[21] But contemporaneous evidence proves otherwise.

In 2010, the WPATH Working Group assessing potential changes to the DSM recommended that the DSM replace "gender identity disorder" with "gender dysphoria" not for clinical reasons but as a political strategy to reduce stigma while ensuring continued access to sex-rejecting procedures.

> The dilemma facing the work group was well articulated in an interview with Dr. Drescher (Jeffrey, 2009), a member of the APA's Work Group on Sexual and Gender Identity Disorders (WGSGID): "The guiding principle in medicine is first, do no harm . . . The harm of retention of the diagnosis is stigma, and the harm of removal is potential loss of access to care. So that's the dilemma, how to create a situation where access can be not only available but increased, and discrimination can be reduced."[22]

WPATH's proposed solution—adopted by the APA—recommended a change in terminology to reflect a different emphasis.

> Rather than keeping the diagnosis as is or removing it, we propose changing the diagnosis to one based on distress, rather than the current diagnosis based on identity. A transgender identity or gender variant expression is not a pathology; rather, it is the distress that is the psychological problem. To reflect this change, we propose changing the name from Gender Identity Disorder to Gender Dysphoria.[23]

---

[19] *Id.* at 2419.

[20] 90 Fed. Reg. at 59479.

[21] HHS, Nondiscrimination on the Basis of Disability in Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 40066, 40069 (May 9, 2024), https://www.federalregister.gov/d/2024-09237 (hereinafter "2024 Final Rule").

[22] Lin Fraser, et al, *Recommendations for Revision of the DSM Diagnosis of Gender Identity Disorder in Adults*, 12 Int'l J. of Transgenderism 80, 82 (2010), https://doi.org/10.1080/15532739.2010.509202.

[23] *Id*. at 83.

Moreover, whereas the 2024 Final Rule claimed that there is discontinuity between "gender identity disorder" and the DSM-5's replacement term, "gender dysphoria," the WPATH Working Group stressed that it was critical that the DSM retain continuity between the two terms in order to protect insurance coverage for sex-rejecting procedures:

> In many parts of the world, transgender-specific care is covered by health insurance, and without a diagnosis this would likely be in jeopardy. If no longer considered a psychiatric disorder or medical condition, transgender-specific care such as hormone therapy and surgery may no longer be considered medically necessary but, rather, elective and cosmetic.[24]

Indeed, *The Advocate*, "the world's leading source of LGBT news and information," reinforces the political nature of the DSM change in terminology. According to *The Advocate*, the DSM "replace[d] the diagnostic term 'Gender Identity Disorder' with the term 'Gender Dysphoria'" to remove the stigma that transgender persons face, not to designate a different condition: "the new term implies a temporary mental state rather than an all-encompassing disorder, a change that helps remove the stigma transgender people face by being labeled 'disordered.'"[25]

C. There is no evidence that Congress was aware of the term "gender dysphoria" when it adopted the statutory exclusion in 1990.

The 2024 Final Rule credited the Fourth Circuit's claim that there is "no legitimate reason why Congress would intend to exclude from the ADA's protections transgender people who suffer from gender dysphoria."[26] This argument presumes, without any evidence or citation, that Congress considered this issue. That itself presupposes that Congress—in 1990,[27] when this exclusion was adopted—was even aware of the term "gender dysphoria."

But there is no evidence to support this claim. To the contrary, according to Congress.gov, the term "gender dysphoria" first appeared in the Congressional Record in 2008, nearly two decades after Congress adopted the definition at issue in *Kincaid*.[28]

In light of this evidence, EPPC scholar Eric Kniffin's public comment asked the Biden HHS to consider and answer the following questions before finalizing its rule:

---

[24] *Id*. at 82.

[25] Camille Beredjick, *DSM-V To Rename Gender Identity Disorder 'Gender Dysphoria'*, The Advocate (July 12, 2012), https://www.advocate.com/politics/transgender/2012/07/23/dsm-replaces-gender-identity-disorder-gender-dysphoria.

[26] 89 Fed. Reg. at 40069 (quoting *Kincaid*, at 773).

[27] Pub. L. 101-336, Title V, § 512 (including the ADA statutory exclusion now found at 42 U.S.C.A. § 12211).

[28] *See* Congress.gov, search term "gender dysphoria": https://www.congress.gov/search?pageSort=dateOfIntroduction%3Aasc&q=%7B%22search%22%3A%22%5C%22gender+dysphoria%5C%22+%22%7D.

- Does HHS believe that the members of Congress that voted to pass the ADA in 1990 were aware of the term "gender dysphoria" and had an opinion on how that term related to "gender identity disorders not resulting from physical impairments?"

- If not, does HHS claim that it has authority, consistent with the APA, to broaden the reach of a federal statute based on whether it sees "no legitimate reason why Congress would intend to exclude" from a statutory interpretation a novel term that there is no reason to believe Congress was aware of?

- If not, why does HHS believe that it may, consistent with its obligations under the APA, rely on the Fourth Circuit's decision in *Kincaid*?[29]

HHS ignored these questions in the 2024 Final Rule.

III. The 2024 Final Rule infringes on religious liberty.

The 2024 Final Rule is also flawed because it failed to account for its impact on religious liberty and HHS's obligation under the Religious Freedom Restoration Act (RFRA).

HHS was well aware in 2024 that its previous efforts to create new legal rights for people that identify as transgender had a profound impact on this country's religious institutions. For example, its efforts to create a transgender services mandate under Section 1557 of the Affordable Care Act led to significant litigation across the country. In 2022, the Fifth Circuit held that HHS's efforts to coerce religious healthcare providers into performing and insuring sex-rejecting procedures violated RFRA and affirmed the district court's issuance of a permanent injunction protecting the plaintiffs from HHS's illegal mandate,[30] and the Eighth Circuit issued a similar decision upholding a permanent injunction in favor of religious healthcare institutions, religious schools, and other religious employers.[31] HHS chose not to appeal these decisions, accepting them as final.[32]

Yet the 2024 Final Rule attempted to create another "transgender mandate" through other means. The religious liberty implications of a mandate under the ADA or Section 504 are even more troubling for religious liberty protections because, unlike Title IX incorporated into Section 1557, Section 504 contains no express religious exemption.

The practical impact of this difference between Title IX and Section 504 is massive. Consider a religious school confronted with a parent demanding that staff use a student's preferred pronouns, grant the student access to the other sex's bathrooms and changing facilities, and provide other accommodations fundamentally at odds with the school's religious convictions about the nature of the human person. That school has a clear religious exemption under Title

---

[29] EPPC April 2024 Public Comment at 8-9, https://eppc.org/wp-content/uploads/2024/04/EPPC-Scholar-Comments-for-EO-12866-Meeting-HHS-Disability-Rule.pdf.

[30] *Franciscan All., Inc. v. Becerra*, 47 F.4th 368, 380 (5th Cir. 2022).

[31] *Religious Sisters of Mercy v. Becerra*, 55 F.4th 583, 609 (8th Cir. 2022).

[32] Press Release: Federal Government Backs Down on Transgender Mandate, Becket (June 21, 2023), https://www.becketlaw.org/media/federal-government-backs-down-on-transgender-mandate/.

IX.[33] But that religious school has no similar defense if the parents seek the exact same accommodations under Section 504.[34]

The 2024 Final Rule recognized that Section 504 applies to schools that receive federal financial assistance.[35] Many religious schools are thus subject to Section 504 because they participate in programs like the National School Lunch Program or the Community Eligibility Provision.[36] HHS acknowledged that its claim that children with gender dysphoria were disabled under federal law would require covered schools to update their Section 504 procedures "to identify children with disabilities," including children who claim to be disabled on the basis of gender dysphoria.[37]

In light of these foreseeable conflicts, Eric Kniffin submitted public comments asking HHS to clarify its position on what its new interpretation of Section 504 would mean for schools, including religious schools.[38] He also called on HHS to clarify how it would honor its obligations under the First Amendment and RFRA if it proceeded with its claim that gender dysphoria is now a disability under Section 504. Kniffin noted it would be irresponsible and unlawful for HHS to create new burdens on religious liberty without explaining how it would respect the rights of religious healthcare institutions, healthcare providers, medical professionals, schools, employers, employees, and other entities and individuals with sincere religious objections to complying with this mandate.[39]

Yet the 2024 Final Rule sidestepped these concerns. HHS acknowledged "concerns about religious freedom and conscience," but admitted that its 2024 Final Rule "does not contain provisions on those issues."[40]

President Trump has declared that "it shall be the policy of the executive branch to vigorously enforce the history and robust protections for religious liberty enshrined in Federal

---

[33] 20 U.S.C. § 1681(a)(3) ("this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization").

[34] The fact that neither the ADA nor Section 504 have religious liberty provisions provides further evidence that Congress did not intend to allow people to bring nondiscrimination claims on the basis of gender dysphoria. As Title VII and Title IX show, when Congress passes nondiscrimination laws that will have foreseeable impacts on religious liberty, it includes statutory provisions to address those religious liberty concerns.

[35] *See, e.g.*, 89 Fed. Reg. at 40078.

[36] *See, e.g.*, National Catholic Educational Association, Federal Nutrition and Safety Programs, https://ncea.org/NCEA/NCEA/Who_We_Are/About_Catholic_Schools/Public_Policy/Federal_Nutrition_and_Safety_Programs.aspx; Christian Educators Journal, Bringing National School Lunch Programs to Christian Schools, https://www.cejonline.com/article/bringing-national-school-lunch-programs-to-christian-schools/.

[37] 88 Fed. Reg. at 63440.

[38] EPPC Nov. 2023 Public Comment at 17-18 https://eppc.org/wp-content/uploads/2023/11/EPPC-HHS-Disability-Pub-Comment-2023-11-13.pdf; EPPC Apr. 2024 Public Comment at 11-12, https://eppc.org/wp-content/uploads/2024/04/EPPC-Scholar-Comments-for-EO-12866-Meeting-HHS-Disability-Rule.pdf.

[39] *Id.*

[40] 89 Fed. Reg. at 40069.

law."[41] Federal agencies, like HHS, have an affirmative obligation to ensure that their rules comply with their obligations under the First Amendment's Free Exercise Cause and the federal Religious Freedom Restoration Act (RFRA). HHS's obligations under the First Amendment and RFRA provide yet another reason for HHS to finalize the Proposed Rule.

IV. The 2024 Final Rule placed unreasonable and unlawful burdens on women and private and public entities.

The 2024 Final Rule's claim that "gender dysphoria may constitute a disability" has created significant legal and operational uncertainty for a wide variety of covered entities, not just religious ones. Gender ideology advocates have weaponized disability discrimination claims to demand far-reaching accommodations from prisons, hospitals, schools, and other covered entities—often circumventing the protections for women and religious-liberty built into sex-discrimination statutes. The examples below demonstrate that this is not a theoretical concern but an active litigation strategy with profound consequences for women and a wide variety of public and private institutions.

A. Male prisoners are using disability nondiscrimination law to seek "accommodations" that harm women.

Male prisoners have invoked the Section 504 to demand to be housed with women, access to women's clothing, and cross-sex pat-down searches. These "accommodations" have violated women's rights, resulting in assaults, invasions of privacy, and pregnancies.

In the early months of the Biden administration,[42] New Jersey entered into a settlement agreement with the ACLU that required the state to adopt a system-wide policy to house prisoners according to their self-determined gender identity, not their sex.[43] About a month later, the Biden DOJ's Civil Rights Division entered a settlement that closed its parallel investigation into New Jersey's prisons.[44] Within a year, female inmates were reporting instances of sexual assault by trans-identifying prisoners.[45] One male inmate who was transferred to the women's facility on the basis of his self-asserted female gender identity subsequently impregnated two female prisoners.[46] Incredibly, although the settlement requires the facility to "ensure that

---

[41] Exec. Order 14291, Establishment of the Religious Liberty Commission, 90 Fed. Reg. 19417 (May 1, 2025), https://www.federalregister.gov/d/2025-08134.

[42] The following examples of harm to female prisoners at the hands of male prisoners claiming rights under the ADA or Section 504 are detailed in: Andrea Picciotti Bayer and Eric Kniffin, *Biden's Justice Department Puts Incarcerated Women at Risk*, Newsweek (June 27, 2024), https://www.newsweek.com/bidens-justice-department-puts-incarcerated-women-risk-opinion-1917150.

[43] Press Release, Settlement of NJ Civil Rights Suit Promises Necessary Reform Affirming Transgender, Intersex, and Non-Binary People in Prison, ACLU New Jersey (June 29, 2021), https://www.aclu-nj.org/en/press-releases/settlement-nj-civil-rights-suit-promises-necessary-reform-affirming-transgender.

[44] Settlement Agreement, *United States v. New Jersey* (D. N.J. Aug. 10, 2021), https://www.justice.gov/crt/case-document/file/1423041/dl?inline.

[45] Alyssa Guzman, *New Jersey Inmate Claims She was Sexually Assaulted by Trans Prisoner in Women's Prison*, New York Post (Sept. 6, 2023), https://nypost.com/2023/09/06/new-jersey-prisoner-claims-she-was-sexually-assaulted-by-trans-prisoner-lawsuit/.

[46] *Id.*

prisoners are protected from harm due to sexual abuse and sexual harassment," the Biden Civil Rights Division took no action to reopen its investigation or enforce the settlement's terms to protect the female inmates.

In California, a trans-identifying convict with a "lengthy record of criminal violence" was transferred to a women's prison and subsequently indicted for raping a female inmate in the shower.[47] Hector Bravo, a former California corrections officer, was "initially hopeful that the new policy would provide necessary protections and accommodations for inmates who identified as transgender."[48] But what he saw instead was "a system rife with negligence and disregard for both inmate safety and the well-being of correctional staff."[49] Instead of protecting women from being sexually assaulted by prisoners with penises, California's women's prisons responded instead by *passing out condoms*.[50]

In April 2024, weeks before HHS released the 2024 Final Rule, the Biden U.S. Department of Justice sued the State of Utah and the Utah Department of Corrections (UDOC), alleging that Utah violated the ADA because Utah declined to provide a prescription for estrogen to a male prisoner with gender dysphoria, and denied his requests to be housed with females, have access to female clothing, and to be patted down by women.[51] According to DOJ's complaint, denying the prisoner's requests led him to "remove[] her own testicles."[52]

In July 2024, the Biden DOJ filed a brief opposing Utah's motion to dismiss. The brief in opposition recited many of the arguments that HHS made the 2024 Final Rule.[53] On January 29, 2025—just nine days after President Trump took office and signed Executive Order 14168, "Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government"—DOJ voluntarily dismissed the case.[54]

---

[47] Chris Pandolfo & Michael Ruiz, *3rd-Strike 'Trans' Rape Suspect Prompts Rebellion Against CA Law After Attack in Women's Prison*, Fox News (June 3, 2024), https://www.foxnews.com/us/third-strike-trans-rape-suspect-prompts-rebellion-against-ca-law-after-attack-womens-prison.

[48] Hector Bravo Ferrer, *Resigning In Protest: Whistleblower Exposes Corruption In California's Prison System*, Daily Wire (June 4, 2024), https://www.dailywire.com/news/resigning-in-protest-whistleblower-exposes-corruption-in-californias-prison-system.

[49] *Id*.

[50] Amie Ichikawa, *Why Are Women's Prisons in California Passing Out Condoms?*, New York Post (Mar. 16, 2024), https://nypost.com/2024/03/16/opinion/why-are-womens-prisons-passing-out-condoms/.

[51] Complaint, *United States v. Utah*, No. 2:24-cv-241 (D. Utah April 2, 2024), https://www.justice.gov/crt/media/1346436/dl.

[52] *Id*. ¶ 42.

[53] United States' Opposition to Motion to Dismiss, *United States v. Utah*, No 2:24-cv-241 (D. Utah July 10, 2024), https://www.justice.gov/crt/media/1359946/dl.

[54] Notice of Voluntary Dismissal, *United States v. Utah*, No 2:24-cv-241 (D. Utah Jan. 28, 2025), https://storage.courtlistener.com/recap/gov.uscourts.utd.147391/gov.uscourts.utd.147391.33.0.pdf.

B. Advocacy groups are using disability nondiscrimination law to demand "gender-affirming" accommodations in schools.

Advocacy organizations have explicitly instructed schools, families, and legal advocates to use Section 504 and IDEA to secure accommodation for students with gender dysphoria. We provide several examples below.

The California Teachers Association, in guidance updated December 2, 2024, claimed that "if a student is diagnosed with the condition of gender dysphoria, and that condition negatively impacts their learning, they may meet the definition of a student with a disability which would qualify them for an IEP or 504 plan."[55] The guidance further states that students "suffering from anxiety, depression, or other such conditions that may result from being bullied at school or not being accepted because of their sexual orientation and/or gender identity" may be entitled to IEP or 504 accommodations.[56]

The National Center for Lesbian Rights' guide, "Advocating for LGBTQ Students with Disabilities" states that "LGBTQ+ students may qualify for an IEP under the categories of 'other health impairment' or 'emotional disability' due to the anxiety, depression and psychological distress resulting from not having their identities affirmed and respected at school."[57] The guide recommends accommodations including "consistent use of affirmed name and pronouns in all school records, classrooms and other activities," "access to bathrooms and sex-segregated spaces consistent with gender identity," and identification of "a safe space and a supportive adult" for check-ins.[58] The guide was last updated in November 2020, but has been circulated widely after the 2024 Final Rule was published.[59]

A legal guide prepared by the Equality Florida Institute and Southern Legal Counsel, "Utilizing Special Education Plans to Support LGBTQ+ Youth," explicitly states that gender dysphoria and related mental health conditions can qualify students for Section 504 Plans and IEPs.[60] The guide claims that such accommodations include mandatory pronoun use, bathroom access, GSA participation, and LGBTQ+ cultural competency training for all staff.[61]

---

[55] *Understanding 504 Plans*, California Teachers Association, https://www.cta.org/understanding-504-plans.

[56] *Id.*

[57] NCLR, Advocating for LGBTQ Students with Disabilities (2020), https://www.nclrights.org/wp-content/uploads/2020/11/LGBTQ-Students-wDisabilities_111620_Final.pdf.

[58] *Id.*

[59] *See, e.g., Inclusive Schools Week*, San Francisco Unified School District (2020), https://www.sfusd.edu/sped/inclusion-resources/inclusive-schools-week; *PA Parent & Family Alliance*, https://www.paparentandfamilyalliance.org/lgbtqia-family-resources; *Blog Topic: Youth*, National Center for LGBTQ Rights, https://www.nclrights.org/topic/youth/page/2/.

[60] Equality Florida Institute and Southern Legal Counsel, *Utilizing Special Education Plans to Support LGBTQ+ Youth*, https://slcdraft.squarespace.com/s/Legal_Notes_8_-_Utilizing_Special_Education_Plans_to_Support_Trans_Youth.pdf.

[61] *Id.*

The Wisconsin ADA Coordinators Association produced training materials acknowledging that schools are using Section 504 Plans to formalize gender-identity accommodations, including pronoun mandates, bathroom access, and GSA participation.[62]

A University of Richmond Law Review article published in May 2024 (contemporaneous with the Biden Final Rule) analyzed "504 Plans, School Gender Policy, and Gender Dysphoria," exploring how Section 504 Plans could be used to secure gender-affirming accommodations in schools.[63]

C. Advocates are using disability nondiscrimination law to force hospitals to perform sex-rejecting procedures.

An article published last November in the Harvard Law and Gender Journal argues that "there is a viable Americans with Disabilities Act (ADA) claim against both public and private medical providers for the effective denial caused by inordinate delay in providing gender-affirming medical care," including sex-rejecting surgeries.[64] The article reasons that people with gender dysphoria are "qualified person[s] with a disability," and may bring claims under the ADA if their requests for sex-rejecting procedures are not granted promptly.

The *Harvard Law Review* pushed this legal strategy in a 2021 article published on the Harvard Law Review Blog, "Embracing the ADA: Transgender People and Disability Rights,"[65] A 2024 Harvard Law Review Forum essay, "Bending Gender: Disability Justice, Abolitionist Queer Theory, and ADA Claims for Gender Dysphoria," similarly defends the ADA as "a viable path for trans plaintiffs in prison to seek accommodations based on gender dysphoria," and is framed as guidance for "trans litigants and their advocates" considering ADA claims after *Williams v. Kincaid*.[66]

Advocacy groups likewise push this strategy. "Transgender Health & Medical-Legal Partnerships," published in 2024 by the Fenway Institute's National LGBTQIA+ Health

---

[62] Gender Dysphoria and Section 504, Wisconsin ADA Coordinators Association, https://adawicoordinators.org/wp-content/uploads/2025/08/082025-ppt-handout-section504.pdf.

[63] Clifford Clapp, *504 Plans, School Gender Policy, and Gender Dysphoria: How the Case of Kesha T. Williams May Change Education Policy*, 27 Rich. Pub. Int. L. R. 203 (2024), https://scholarship.richmond.edu/cgi/viewcontent.cgi?article=1589&context=pilr.

[64] D. Dangaran, *Inordinate Delay as Denial: Lessons from Seeking Gender-Affirmation Surgery in Prisons*, Harv. J. L. & Gender (Nov. 3, 2025), https://journals.law.harvard.edu/jlg/2025/11/inordinate-delay-as-denial-lessons-from-seeking-gender-affirmation-surgery-in-prisons.

[65] Kevin Barry & Jennifer L. Levi, *Embracing the ADA: Transgender People and Disability Rights*, Harv. L. Rev. Blog (Feb. 22, 2021), https://harvardlawreview.org/blog/2021/02/embracing-the-ada-transgender-people-and-disability-rights/.

[66] D. Dangaran, Bending Gender: Disability Justice, Abolitionist Queer Theory, and ADA Claims for Gender Dysphoria, 137 Harv. L. R. 237 (2024), https://harvardlawreview.org/forum/vol-137/bending-gender-disability-justice-abolitionist-queer-theory-and-ada-claims-for-gender-dysphoria/.

Education Center, recommends ADA-based legal arguments as part of the "armor available to TGD [transgender and gender diverse] communities in fighting for fairness and freedom."[67]

D. Employees are using disability nondiscrimination law to seek health insurance coverage of sex-rejecting procedures.

Employees are likewise using disability nondiscrimination law to seek health insurance coverage of sex-rejecting procedures. We provide three examples below.

In *Bernier v. Turbocam, Inc*., a male employee represented by GLAD Law brought federal sex discrimination and disability discrimination claims against his employer, challenging his employer's total exclusion of medical coverage for sex-rejecting procedures.[68] The case survived a motion to dismiss in June 2024—after the May 2024 Final Rule was published—allowing the disability-based claim to proceed alongside sex-discrimination claims.

In *Doe v. Independence Blue Cross*, a male employee sued because his employer-sponsored health plan denied him coverage for facial feminization surgery, asserting sex and disability discrimination under the ACA, Section 504, the ADA, ERISA, and state law. In January 2024 the court allowed his ACA sex-discrimination claim to proceed but dismissed the Section 504 claim on evidentiary grounds.[69]

In *Lange v. Houston County*, a male employee challenged a Georgia sheriff's office health plan's exclusion for "sex change surgery." The employee asserted claims under Title VII, ADA, and the Equal Protection Clause. The district court found that the sheriff was entitled to Eleventh Amendment immunity from Lange's ADA claim but ruled for the plaintiff under Title VII. An Eleventh Circuit panel affirmed, but in August 2024, the court granted rehearing en banc and vacated the panel opinion.[70]

EPPC scholar Rachel Morrison explains why health insurance coverage exclusions of sex-rejecting procedures does not violate disability discrimination law in a forthcoming article in the *Catholic University Law Review* titled "Avoiding Pandora's Box: Why Federal Nondiscrimination Statutes Don't Prohibit Health-Insurance Coverage Exclusions of Sex-Rejecting Procedures."[71] Morrison writes:

> [C]ourts should be skeptical of these claims because, if taken to their logical outcome, they would become unlimited in reality and unworkable in practice. If courts accept that sex-rejecting coverage exclusions are unlawful, they will open a Pandora's box of

---

[67] Fenway Institute, *Transgender Health & Medical-Legal Partnerships*, https://www.lgbtqiahealtheducation.org/publication/transgender-health-medical-legal-partnerships/.

[68] *Bernier v. Turbocam, Inc.*, No. 1:23-523 (D. N.H. filed Nov. 21, 2023), https://www.gladlaw.org/cases/bernier-v-turbocam-inc/. https://www.gladlaw.org/cases/bernier-v-turbocam-inc/

[69] Memorandum, *Doe v. Independence Blue Cross,* No. 23-1530 (E.D. Pa. filed Jan. 22, 2024), https://law.justia.com/cases/federal/district-courts/pennsylvania/paedce/2:2023cv01530/608671/84/.

[70] *Lange v. Houston County,* 101 F.4th 793 (11th Cir. 2024).

[71] Rachel N. Morrison, *Avoiding Pandora's Box: Why Federal Nondiscrimination Statutes Don't Prohibit Health-Insurance Coverage Exclusions of Sex-Rejecting Procedures*, 75 Catholic U. L. Rev. ___ at 45-54 (forthcoming 2026, last updated Apr. 15, 2025), https://ssrn.com/abstract=5141509.

coverage requirements for virtually every medical procedure in practically every health plan.[72]

V. The 2024 Final Rule is especially problematic in the medical context, as it would force covered entities to render patients permanently disabled.

While the new liability created by the 2024 Final Rule places unlawful and unreasonable burdens on a wide range of public and private institutions, it is especially unreasonable in the medical context. **We are aware of no other situation where HHS has mandated a course of treatment that renders a patient—either invariably or necessarily—"disabled" under its understanding of federal law. Under the 2024 Final Rule, federal disability rights law requires covered entities to render people with gender dysphoria permanently disabled.**

Because section 1557 of the Affordable Care Act incorporates Section 504, every "health program or activity" that receives federal financial assistance—including nearly all hospitals and most employer health plans—is subject to the 2024 Final Rule's claims about gender dysphoria. In HHS's final rule interpreting Section 1557 of the ACA, it claimed that sex-rejecting procedures (which HHS referred to as "gender-affirming care") are "medically necessary" to treat gender dysphoria, citing a "robust consensus in the medical community."[73] HHS further said that "explicit, categorical exclusions" for "gender transitions or other gender-affirming care" were prohibited under Section 1557 of the ACA.[74]

However, as Kniffin documented in his 2023 and 2024 comments on what became the 2024 Final Rule, sex-rejecting procedures can have profound and permanent effects on the human body, which is one important reason why clinicians have increasingly been raising concerns over gender-transition interventions.[75] HHS highlighted many of these concerns in its November 2025 report, *Treatment for Pediatric Gender Dysphoria Review of Evidence and Best Practices*.[76]

- **Puberty blockers**, originally praised as safe and fully reversible, are known to have negative effects on bone density, social and emotional maturation, and other aspects of neuro-development.[77]

---

[72] *Id.* at 54.

[73] 89 Fed. Reg. 37522, 37672 (May 6, 2024), https://www.govinfo.gov/content/pkg/FR-2024-05-06/pdf/2024-08711.pdf.

[74] *Id.* at 37602.

[75] EPPC Nov. 2023 Public Comment at 14-15, 18 https://eppc.org/wp-content/uploads/2023/11/EPPC-HHS-Disability-Pub-Comment-2023-11-13.pdf; EPPC Apr. 2024 Public Comment at 10-12, https://eppc.org/wp-content/uploads/2024/04/EPPC-Scholar-Comments-for-EO-12866-Meeting-HHS-Disability-Rule.pdf; William Malone, *Puberty Blockers for Gender Dysphoria: The Science is Far from Settled*, 5 Lancet Child & Adolescent Health 33 (2021), https://pubmed.ncbi.nlm.nih.gov/34418372/.

[76] HHS, Treatment for Pediatric Gender Dysphoria: Review of Evidence and Best Practices 82-100 (Nov. 19, 2025), https://opa.hhs.gov/sites/default/files/2025-11/gender-dysphoria-report.pdf.

[77] *See id.* at 89-91 (citing sources). *See also* Evidence Review: Gonadotrophin Releasing Hormone Analogues for Children and Adolescents with Gender Dysphoria, NICE (2021), https://cass.independent-review.uk/wp-content/uploads/2022/09/20220726_Evidence-review_GnRH-analogues_For-upload_Final.pdf.

- Moreover, nearly all children who begin puberty blockers go on to receive cross-sex hormones, with life-altering consequences.[78] Blocking a child's natural puberty prevents maturation of genitals and reproductive organs; subsequently introducing cross-sex hormones renders the child permanently sterile.[79] Puberty suppression may also impair the child's later sexual functioning as an adult.[80]

- **Cross-sex hormones** carry numerous health risks and cause significant irreversible changes in adolescents' bodies, including genital or vaginal atrophy, hair loss (or gain), voice changes, and impaired fertility.[81] They increase cardiovascular risks and cause liver and metabolic changes.[82] The flood of opposite sex hormones has variable emotional and psychological effects as well. Females taking testosterone experience an increase in gender dysphoria, particularly regarding their breasts, which heightens the likelihood they will undergo double mastectomies—as young as thirteen.[83]

- Cross-sex hormones in adolescent females have been linked to increased dysphoria and the likelihood that the female will proceed to have her breasts **amputated**.[84]

In short, sex-rejecting procedures—including puberty blockers, cross-sex hormones, and surgical interventions—can render a patient permanently sterile and impair sexual function.

All of this is relevant here because the 2024 Final Rule defined disability to include a physical or mental impairment that substantially limits an individual's major life activities, including his or her reproductive system.[85] The 2024 Final Rule also states that "anatomical loss affecting one or more body systems" renders one disabled.[86]

As Eric warned HHS in his 2023 and 2024 comments, it thus seems that under HHS' interpretation of federal law, **people with gender dysphoria are "disabled"** under Section 504

---

[78] *Id.*at 91.

[79] *Id*. at 119-23. *See also* Stephen B. Levine, *Ethical Concerns About Emerging Treatment Paradigms for Gender Dysphoria*, 44 J. Sex & Marital Therapy 29 (2018), https://pubmed.ncbi.nlm.nih.gov/28332936/.

[80] *Id*. at 122 and n. 51.

[81] *Id*. at 123-28.

[82] *Gender-Affirming Hormone in Children and Adolescents*, BJM EBM Spotlight (Feb. 25, 2019), https://blogs.bmj.com/bmjebmspotlight/2019/02/25/gender-affirming-hormone-in-children-and-adolescents-evidence-review/.

[83] Johanna Olson-Kennedy et al., *Chest Reconstruction and Chest Dysphoria in Transmasculine Minors and Young Adults: Comparisons of Nonsurgical and Postsurgical Cohorts*, 172 JAMA Pediatrics 431 (2018), https://pubmed.ncbi.nlm.nih.gov/29507933/ (Figure: Age at Chest Surgery in the Post-surgical Cohort).

[84] Olson-Kennedy J, Warus J, Okonta V, Belzer M, Clark LF. Chest Reconstruction and Chest Dysphoria in Transmasculine Minors and Young Adults: Comparisons of Nonsurgical and Postsurgical Cohorts. JAMA Pediatr. 2018 May 1;172(5):431-436. doi: 10.1001/jamapediatrics.2017.5440. PMID: 29507933; PMCID: PMC5875384. https://pubmed.ncbi.nlm.nih.gov/29507933/.

[85] 89 Fed. Reg. at 40180 (45 C.F.R. 84.4(a)(1)(i)); *id*. (45 C.F.R. 84.4(c)(1)(ii) ("'Major life activities' includes … the operation of a major bodily function such as … reproductive systems")).

[86] *Id*. (45 C.F.R. 84.4(b)(1)(i)).

and the ADA; *and* **the "medically necessary" treatment for this "disability" *also* renders patients disabled** under the Section 504 and the ADA.[87]

In light of this concern, Eric asked HHS in April 2024 to answer the following questions:[88]

- Does HHS agree or disagree that people who receive what it calls "gender affirming care" are, depending on the procedure, either invariably or necessarily rendered "disabled" under the definitions proposed in this Proposed Rule?

- Are there any other disabilities HHS is aware of where HHS claims that that the "medically necessary" treatment for that disability renders the medical patient disabled in another way?

- Is it reasonable for a medical provider to refuse to render a patient disabled under Section 504 and the ADA if the medical provider believes there are other treatments available for the diagnosed condition that would not render the patient disabled?

- What, if any, additional informed consent protections are required before a medical provider can prescribe a pharmaceutical or perform a surgery that might or necessarily will render someone permanently disabled under Section 504?

- What impact, if any, do these observations and questions have on HHS's assertion that it is "discriminatory on its face" for a medical provider to categorically refuse to perform what HHS calls "gender affirming care," even when the medical provider in good faith believes there are alternative treatments for someone with gender dysphoria that would not render the patient permanently disabled?

HHS failed to acknowledge, let along address, these important questions in the 2024 Final Rule.

HHS's November 2025 final report on pediatric gender dysphoria notes that psychotherapy "is a noninvasive alternative" way to treat "pediatric gender dysphoria" and "[s]ystematic reviews of evidence have found no evidence of adverse effects of psychotherapy in this context."[89] Indeed, many European guidelines "recommend psychotherapy, not hormones or surgeries, for children and adolescents" with gender dysphoria.[90] In this context, it is scandalous that the 2024 Final Rule suggested that federal disability rights laws require that hospitals render children permanently disabled instead of recommending noninvasive alternatives.

---

[87] *Cf.* Kevin M. Barry, *Challenging Transition-Related Care Exclusions Through Disability Rights Law*, 23 U.D.C. L. Rev. 1, 11 (2000) (pointing out that sex-rejecting hormones and surgeries for gender dysphoria "substantially limits major life activities such as reproduction").

[88] EPPC Apr. 2024 Public Comment at 10-11, https://eppc.org/wp-content/uploads/2024/04/EPPC-Scholar-Comments-for-EO-12866-Meeting-HHS-Disability-Rule.pdf.

[89] HHS, Treatment for Pediatric Gender Dysphoria at 16.

[90] *Id.* at 21.

VI. The 2024 Final Rule violates the Supreme Court's major question doctrine.

For all the reasons discussed thus far, the challenged portion of the 2024 Final Rule violates the Supreme Court's major questions doctrine. The 2024 Final Rule's claim that "gender dysphoria may constitute a disability" under Section 504 and the ADA was not a modest clarification but a sweeping policy shift that reordered the structure of federal civil-rights law, triggered massive new regulatory obligations, made not provision for its obvious religious liberty implications, and directly contradicted Congress's express statutory exclusions. The major questions doctrine provides an additional, independent reason why HHS should finalize this Proposed Rule and explicitly repudiate this aspect of the 2024 Final Rule.

A. The Supreme Court's major questions doctrine.

In a line of recent cases culminating in *West Virginia v. EPA*, 597 U.S. 697 (2022), and *Biden v. Nebraska*, the Supreme Court has made clear that when an agency claims the power to resolve questions of "vast economic and political significance," courts will "expect Congress to speak clearly" before treating statutory silence or ambiguity as a delegation of authority. The Court has been especially skeptical when agencies purport to find in "long-extant" statutes "unheralded power" to transform entire regulatory regimes.[91]

This principle, called the major questions doctrine, is rooted in the basic premise that Congress normally "intends to make major policy decisions itself, not leave those decisions to agencies."[92] This doctrine, relying on both the constitutional separation of powers and common sense,[93] precludes agencies from using vague phrases or general grants of authority to accomplish policy goals that Congress has either squarely rejected or declined to enact over many years.

B. President Trump has pledged to vigorously enforce the major questions doctrine.

President Trump has pledged to honor this constitutional principle. In Executive Order 14219, *Ensuring Lawful Governance and Implementing the President's "Department of Government Efficiency" Deregulatory Initiative*, President Trump instructed agencies to identify and recommend for repeal "regulations that implicate matters of social, political, or economic significance that are not authorized by clear statutory authority."[94]

---

[91] *West Virginia*, 597 U.S. at 724.

[92] *United States Telecom Assn. v. FCC*, 855 F.3d 381, 419 (CADC 2017) (Kavanaugh, J., dissenting from denial of reh'g en banc).

[93] *See also West Virginia*, 597 U.S. at 700 (the major questions doctrine rests on "both separation of powers principles and a practical understanding of legislative intent").

[94] Exec. Order 14219, Ensuring Lawful Governance and Implementing the President's "Department of Government Efficiency" Deregulatory Initiative, 90 Fed. Reg. 10583 (Feb. 19, 2025), https://www.federalregister.gov/d/2025-03138.

President Trump's April 9, 2025, Presidential Memorandum, *Directing the Repeal of Unlawful Regulations*, implements EO 14219 in even more concrete terms.[95] The Memorandum instructs agencies to prioritize their deregulatory efforts in light of ten specific Supreme Court decisions, including *West Virginia v. EPA*, *Biden v. Nebraska*, and the Court's recent decisions curtailing *Chevron* deference (including *Loper Bright v. Raimondo* relied on in the Proposed Rule[96]). In doing so, the President has expressly tied agency repeal and revision of existing rules to the major questions doctrine and related separation of powers decisions, making clear that regulations lacking "clear statutory authority" on matters of "social, political, or economic significance" are not merely disfavored, but presumptively unlawful.

C. HHS's effort to rewrite federal disability rights laws to cover gender dysphoria is a "major question."

As noted above, the 2024 Final Rule attempts to make an end-run around Congress' explicit decision to exclude "gender identity disorders not resulting from physical impairments" from the federal definition of disability under the ADA and Section 504. This effort to treat "gender dysphoria" as a covered disability despite Congress's judgment to the contrary is a paradigmatic example of the kind of regulatory overreach that the major questions doctrine, EO 14219, and the *Directing the Repeal of Unlawful Regulations* Memorandum instruct agencies to unwind.

Both the Supreme Court and the current Administration have made clear that agencies may not exploit vague language or implied powers to resolve major policy questions that Congress expressly addressed. HHS should therefore finalize this Proposed Rule not only because it is required by the text and structure of Section 504 and the ADA, but also because it fulfills the Department's obligation—under binding Supreme Court precedent and presidential direction—to respect the major questions doctrine.

VII. Following the rule of law does not diminish civil rights for the disabled.

Some groups on the Left, like the Center for American Progress, are claiming that this Administration's efforts to protect children from gender ideology are part of a broader attack on disability rights.[97] We find this framing manipulative and unhelpful.

The ADA and Section 504 are important laws that recognize the inherent worth and dignity of all people and help people with disabilities participate in society. We were pleased to see HHS and others in the Trump Administration show their support for disability rights in

---

[95] Mem. for the Heads of Exec. Dep'ts & Agencies, Directing the Repeal of Unlawful Regulations (Apr. 9, 2025), https://www.whitehouse.gov/presidential-actions/2025/04/directing-the-repeal-of-unlawful-regulations/.

[96] *See* 90 Fed. Reg. at 59,480-81.

[97] *See* Center for American Progress, The Trump Administration's War on Disability (2025), https://www.americanprogress.org/article/the-trump-administrations-war-on-disability/. *See also* E. Tammy Kim, *Donald Trump's Assault on Disability Rights*, New Yorker (Sept. 16, 2025), https://www.newyorker.com/news/deep-state-diaries/donald-trumps-assault-on-disability-rights.

celebrating the 35th anniversary of the ADA.[98] As EEOC Chair Andrea Lucas recognized on this occasion, the ADA has "empowered millions to pursue their full potential and fully participate in the American workforce."[99]

Nor is it true that finalizing this rule would weaken protections for those Americans that do qualify for federal disability protections. It merely clarifies that, as written by Congress, gender dysphoria is not a protected disability under the ADA and Section 504. HHS has been explicit that the Proposed Rule is motivated by its respect for the rule of law and Congress' judgment in passing the relevant exclusion.[100]

In fact, there are reasons to believe that this rule would strengthen disability rights, not weaken them. By decoupling gender dysphoria, which is not a protected disability, from civil rights laws prohibiting disability discrimination, HHS is ensuring that disability rights are not diluted through conceptual overextension. For instance, disability rights advocates have expressed concerns that untrained, "fake service dogs" are "exacerbating the challenges that people with disabilities who rely on service animals already face."[101] Likewise, HHS would make disability rights laws stronger, not weaker, by ensuring that these important civil rights protections are reserved for those who meet the definition of disability established by Congress.

Nonetheless, we encourage HHS to consider opportunities, including perhaps in the final rule, to address the spurious claims that the Trump Administration does not care about individuals with disabilities and to clarify that this rule does not impact disability rights under the ADA and Section 504 rightly understood. Any efforts by HHS and the White House to reassure Americans with disabilities that the Administration values disability rights would help assuage concerns and allow those groups to better direct their energies toward actual issues.

---

[98] *See, e.g.*, Office of Civil Rights, HHS, *OCR Commemorates the Americans with Disabilities Act 35th Anniversary* (2025), https://www.hhs.gov/civil-rights/for-individuals/disability/ocr-ada-anniversary/index.html; DOL, *Affirming the Right to Work: 35 Years of the Americans with Disabilities Act*, DOLhttps://blog.dol.gov/2025/07/16/affirming-the-right-to-work-35-years-of-the-americans-with-disabilities-act; *See, e.g.*, Office of Civil Rights, HHS, *OCR Commemorates the Americans with Disabilities Act 35th Anniversary* (2025), https://www.hhs.gov/civil-rights/for-individuals/disability/ocr-ada-anniversary/index.html; DOL, *Affirming the Right to Work: 35 Years of the Americans with Disabilities Act*, DOL Blog (July 16, 2025), https://blog.dol.gov/2025/07/16/affirming-the-right-to-work-35-years-of-the-americans-with-disabilities-act; U.S. Access Board, *Celebrating 35 Years of Americans with Disabilities Act* (July 21, 2025), https://www.access-board.gov/news/2025/07/21/celebrating-35-years-of-americans-with-disabilities-act/; Press Release, U.S. Census Bureau, *Anniversary of Americans with Disabilities Act: July 26, 2025* (June 24, 2025), https://www.census.gov/newsroom/facts-for-features/2025/disabilities-act.html.

[99] EEOC, *A Message from EEOC Acting Chair Andrea Lucas on the 35th Anniversary of the ADA* (2025), https://www.eeoc.gov/wysk/message-eeoc-acting-chair-andrea-lucas-35th-anniversary-ada.

[100] 90 Fed. Reg. at 59481-82.

[101] Marc Ramirez, *'Doors are Being Shut': Fake Service Dogs Hurt Real Service Animals' Credibility, Advocates Warn*, USA Today (April 15, 2025), https://www.usatoday.com/story/news/nation/2025/04/15/fake-service-dogs-hurt-credibility-harm-users/83050280007/; *see also* Ann L. McNary, *"Vetting" Service Dogs and Emotional Support Animals*, 15 Innov. Clin. Neuro. 49 (2018), https://pubmed.ncbi.nlm.nih.gov/33996248/.

VIII. HHS should consider ways to ensure that Congress' "physical impairment" exception is not abused.

Finally, we note that some have argued that people who identify as transgender meet the federal definition of disability not because the DSM-III term "gender identity disorder" does not map with the DSM-5 term "gender dysphoria," but because some or all people with gender dysphoria *actually have a physical impairment.*

These arguments both precede[102] and build on language from *Kincaid*, which noted that while Congress' exclusion of "gender identity disorders not resulting from physical impairments" did not provide a definition of "physical impairments," EEOC had defined that term expansively to include "[a]ny physiological disorder or condition ... affecting one or more body systems, such as neurological ... and endocrine."[103]

Using this definition, advocates have claimed that people with gender dysphoria have a "physical impairment" and are therefore can assert rights under the ADA and Section 504 because:

- The use of cross-sex hormones to treat gender dysphoria implies that gender dysphoria is an endocrine disorder (i.e. a male suffering from healthy levels of testosterone and a lack of estrogen);
- Some studies claim that people with gender dysphoria have a brain structure that does not reflect their biological sex;
- A person's belief that he or she should not have biologically appropriate genitals indicates that the person has the wrong body parts; and
- Medical professionals have sometimes coded gender dysphoria as an "unspecified endocrine disorder" to justify hormone therapy.

These arguments are flawed. We note that the Department of Justice[104] and the Federal Trade Commission[105] have suggested that this last practice—coding gender dysphoria as an

---

[102] *See generally* Kevin M. Barry, *Challenging Transition-Related Care Exclusions Through Disability Rights Law*, 23 U.D.C. L. Rev. 1 (2000) (arguing gender dysphoria results from a physical impairment); Rachel N. Morrison, *Avoiding Pandora's Box: Why Federal Nondiscrimination Statutes Don't Prohibit Health-Insurance Coverage Exclusions of Sex-Rejecting Procedures*, 75 Catholic U. L. Rev. ___ at 48-51 (forthcoming 2026, last updated Apr. 15, 2025), https://ssrn.com/abstract=5141509 (collecting examples of cases and DOJ actions finding gender dysphoria may result from a physical impairment).

[103] *Kincaid*, 45 F.4th at 770 (quoting 28 C.F.R. § 35.108(b)(1)(i)).

[104] DOJ, Press Release: Department of Justice Subpoenas Doctors and Clinics Involved in Performing Transgender Medical Procedures on Children (July 9, 2025), https://www.justice.gov/opa/pr/department-justice-subpoenas-doctors-and-clinics-involved-performing-transgender-medical.

[105] Federal Trade Commission, Call for Public Comment Regarding "Gender-Affirming Care" for Minors: Docket ID FTC-2025-0264 (July 28, 2025), https://www.regulations.gov/document/FTC-2025-0264-0001.

"unspecified endocrine disorder"—constitutes medical fraud. EPPC scholars filed a public comment supporting the FTC's investigation in this regard.[106]

We also note that *Kincaid's* deference to the EEOC's definition is even less persuasive in light of the Supreme Court's 2024 decision in *Loper Bright*. *Kincaid* claimed that, applying *Chevron* deference, the Fourth Circuit was required to "defer to the EEOC's reasonable interpretations of ambiguous terms in the ADA."[107] But the Supreme Court has since overruled *Chevron*, repudiating *Chevron* deference as "fundamentally misguided" and "unworkable."[108] Contrary to *Kincaid*, the Supreme Court said in *Loper Bright* that courts "must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires."[109] This is yet another reason for HHS to disavow the 2024 Final Rule's reliance on *Kincaid.*

We encourage HHS to draw on DOJ's and FTC's work in this area and consider whether addressing this "physical impairment" potential loophole—as part of this rulemaking or elsewhere—would help guard congressional intent and advance HHS's efforts to protect children from gender ideology.

We also encourage HHS to ask DOJ's Office of Legal Counsel for its opinion on what "physical impairment" means and whether gender dysphoria is protected disability under Section 504 and the ADA.

Conclusion

We thank HHS for this opportunity to provide comment and for the Department's efforts to use the authority you have been delegated by Congress and President Trump to advance the rule of law, honor the Constitution's separation of powers, and protect Americans from gender ideology.

We urge HHS to finalize the Proposed Rule and encourage the Department to take the matters discussed in this comment into account as it does so.

Sincerely,

Eric N. Kniffin, J.D.
Fellow
Administrative State Accountability Project
Ethics and Public Policy Center

Rachel N. Morrison, J.D.

---

[106] EPPC, Public Comment regarding FTC's Call for Public Comment Regarding "Gender-Affirming Care" for Minors (Sept. 26, 2025), https://eppc.org/wp-content/uploads/2025/09/EPPC-Comment-re-FTC-GAC-for-Minors.pdf.

[107] *Kincaid*, 45 F.4th at 770.

[108] *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 407 (2024).

[109] *Id*. at 412.

Fellow and Director
Administrative State Accountability Project
Ethics and Public Policy Center

Mary Rice Hasson, J.D.
Kate O'Beirne Senior Fellow and Director
Person and Identity Project
Ethics and Public Policy Center