

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION

Equal Rights Amendment

April 2025

The purpose of this tentative recommendation is to solicit public comment on the Commission's tentative conclusions. A comment submitted to the Commission will be part of the public record. The Commission will consider the comment at a public meeting when the Commission determines the content of the recommendation it will submit to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made to it.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN **MAY 16, 2025**.

The Commission will often substantially revise a proposal in response to comment it receives. Thus, this tentative recommendation is not necessarily the report the Commission will submit to the Legislature.

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SUMMARY OF TENTATIVE RECOMMENDATION

In 2022, the Legislature adopted [Senate Concurrent Resolution 92](#) (2022 Cal. Stat. ch. 150) directing the Commission to “undertake a comprehensive study of California law to identify any defects that prohibit compliance with the [Equal Rights Amendment.]” The Legislature specifically requested the Commission to study, report on, and prepare recommended legislation to revise California law to remedy defects related to (i) inclusion of discriminatory language on the basis of sex, and (ii) disparate impacts on the basis of sex. In doing so, the Legislature directed the Commission to consult with experts and interested parties, including, but not limited to, members of the academic community and research organizations.

The Commission commenced work on this topic in 2022 in two stages: first, the Commission examined the possibility of enacting a provision in state law to achieve the effect of the Equal Rights Amendment, and second, the Commission used the sex equality provision to evaluate existing California law, to identify and remedy defects.

Following this study, the Commission is tentatively proposing a sex equality provision for each California code section that clarifies the existing definitions of sex discrimination. The Commission tentatively concludes there are no existing laws with discriminatory language or disparate impacts appropriate for revision at this time.

EQUAL RIGHTS AMENDMENT

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BACKGROUND

LEGISLATIVE ASSIGNMENT

1 In 2022, the Legislature adopted [Senate Concurrent Resolution \(SCR\) 92](#) (2022
2 Cal. Stat. ch. 150) directing the Commission to “undertake a comprehensive study
3 of California law to identify any defects that prohibit compliance with the [Equal
4 Rights Amendment.]” More specifically:

5 [The] Legislature authorizes and requests that the California Law
6 Revision Commission study, report on, and prepare recommended
7 legislation to revise California law (including common law, statutes
8 of the state, and judicial decisions) to remedy defects related to (i)
9 inclusion of discriminatory language on the basis of sex, and (ii)
10 disparate impacts on the basis of sex upon enforcement thereof. In
11 studying this matter, the commission shall request input from experts
12 and interested parties, including, but not limited to, members of the
13 academic community and research organizations. The commission’s
14 report shall also include a list of further substantive issues that the
15 commission identifies in the course of its work as topics for future
16 examination....¹

17 The study’s underlying rationale was explained by the resolution’s co-sponsors²
18 in SCR 92’s legislative policy committee analysis:

19 Californians have advocated tirelessly for women’s equal rights
20 under the law. Indeed, California was among the earliest states to
21 ratify the Equal Rights Amendment to the United States Constitution
22 (ERA), doing so in the same year that Congress approved it—1972.
23 The ERA states simply: “Equality of rights under the law shall not be
24 denied or abridged, by the United States or any state on account of
25 sex.”

26 Nationally, the fight for women’s equality is ongoing. Upon
27 Virginia’s ratification of the ERA on January 27, 2020, the ERA
28 satisfied the two requirements imposed by Article V of the U.S.
29 Constitution to become an amendment: i) approval of two-thirds of
30 each chamber of Congress and ii) ratification by three-fourths of the
31 states. However, the U.S. Archivist, an appointed official, declined to
32 certify and formally publish the ERA, citing a Department of Justice

1. 2022 Cal. Stat. res. ch. 150, [SCR 92](#).

2. California Women’s Law Center and the Feminist Majority.

1 memo that advised a ratification timeline in the ERA’s preamble was
2 binding. The final three states to ratify the ERA filed suit to require
3 that the Archivist perform his ministerial duties. That case is now
4 pending in a federal appellate court, where 16 distinguished
5 constitutional law scholars have submitted an amicus brief that argues
6 the timeline in the preamble does not render subsequent ratifications
7 invalid. In addition, both chambers of the U.S. Congress introduced
8 joint resolutions in January 2021 to eliminate the ratification deadline
9 noted in the preamble of the ERA; the House resolution passed in
10 March 2021.

11 This resolution seeks to ensure the principles of gender equality
12 already enshrined in the California Constitution, and soon to be
13 reflected in the U.S. Constitution, are not violated by the language or
14 impact of California’s laws. At a moment when these principles
15 remain contested in national debate, this resolution clearly
16 announces that the California legislature upholds the legal rights and
17 equal dignity of its citizens regardless of sex.³

18 The Legislature’s primary directive to the Commission was to ensure
19 California’s laws align with the ERA. In doing so, the Legislature directed the
20 Commission propose legislation that effectuates the ERA’s goals and suggest
21 remedies for existing laws with discriminatory language or disparate impacts on the
22 basis of sex. The Commission approached the study in two stages: first, the
23 Commission examined the possibility of codifying a provision in state law to
24 achieve the effect of the ERA (“the sex equality provision”), and second, the
25 Commission would apply that codified provision to existing California law to
26 remedy defects (i.e., provisions that have discriminatory language or disparate
27 impacts).

DEFINING “SEX EQUALITY”

28 The Commission first determined the scope of the ERA’s guarantee in
29 considering how to codify its effects. Section 1 of the ERA provides that “[e]quality
30 of rights under the law shall not be denied or abridged by the United States or by
31 any state on account of sex.”⁴ Understanding the ERA’s effect required close

3. [Assembly Committee on Judiciary Analysis](#) of SCR 92 (August 4, 2022), pp. 6-7.

4. [H.J. Res. 208 \(1972\)](#), 86 Stat. 1523. The remainder of the ERA provides:

SEC. 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

1 analysis of the meaning of “equality of rights” and “on account of sex.”

EXPLORING “EQUALITY OF RIGHTS” THROUGH EQUAL PROTECTION LAW

2 The ERA’s guarantee of “[e]quality of rights under the law”⁵ is similar to the
3 language in the state and federal constitutions’ equal protection clauses, which also
4 promise equal protection of the laws.⁶

5 In assessing whether there has been a denial of equal protection, courts have
6 developed different tests depending on the particular right or classification at issue.

7 In general, equal protection case law assesses equal protection claims using one
8 of the following levels of scrutiny, listed in order from most to least stringent:

- 9 • *Strict scrutiny*. Strict scrutiny is used when a fundamental right or
10 suspect classification is at issue in the case. Strict scrutiny requires
11 that the law be necessary to satisfy a “compelling state interest”
12 and that the law be “narrowly tailored” to achieve that interest.⁷
- 13 • *Intermediate scrutiny*. Intermediate scrutiny is used for certain
14 protected classes that are not deemed suspect (in some cases,
15 referred to as quasi-suspect). Intermediate scrutiny requires an
16 “important government interest” and that the law further that
17 interest by means “substantially related” to the interest.⁸
- 18 • *Rational basis review*. Rational basis review is used when no
19 fundamental rights, suspect classes, or protected classes are at
20 issue. To satisfy this test, the law must further a “legitimate state
21 interest” and there must be a “rational connection” between the
22 law and the interest.⁹

23 These distinctions are helpful to understand how courts scrutinize equal

SEC. 3. This amendment shall take effect two years after the date of ratification. See also Congressional Research Service, The Proposed Equal Rights Amendment: Contemporary Ratification Issues 14-15, R42979 (Updated Dec. 23, 2019) (“CRS Report”), available at <https://sgp.fas.org/crs/misc/R42979.pdf> (reproducing text of House Joint Resolution 208 from 92nd Congress, 1972).

5. See supra fn. 4.

6. U.S. Const. amend. XIV (“No State shall ... deny to any person within its jurisdiction the equal protection of the laws.”); Cal. Const. art. I § 7 (“A person may not be ... denied equal protection of the laws....”).

7. See generally https://www.law.cornell.edu/wex/strict_scrutiny; see also, e.g., *Adarand Constructors v. Peña* (1995) 515 U.S. 200.

8. See generally https://www.law.cornell.edu/wex/intermediate_scrutiny; see also, e.g., *Craig v. Boren* (1976) 429 U.S. 190; *United States v. Virginia* (1996) 518 U.S. 515.

9. See generally https://www.law.cornell.edu/wex/rational_basis_test.

1 protection claims, although not all equal protection case law fits cleanly within these
2 tiers.¹⁰

THE U.S. CONSTITUTION’S EQUAL PROTECTION CLAUSE

3 The Fourteenth Amendment of the U.S. Constitution provides, in part:

...[N]or shall any State ... deny to any person within its
jurisdiction the equal protection of the laws.¹¹

4 Under the U.S. Constitution equal protection case law, sex-based classifications
5 are subject to intermediate scrutiny.¹² To satisfy intermediate scrutiny, the law must
6 further an “important government interest” and do so by means that are
7 “substantially related to that interest.”¹³

8 The intermediate scrutiny test was described in the U.S. Supreme Court decision
9 in *Craig v. Boren*.¹⁴ That case involved a challenge to the different treatment of
10 males and females under an Oklahoma law that prohibited the sale of 3.2% beer to
11 males under 21 and females under 18.¹⁵ In summarizing the previous case law, the
12 decision set out an intermediate scrutiny standard:

13 To withstand constitutional challenge, previous cases establish
14 that classifications by gender must serve important governmental
15 objectives and must be substantially related to achievement of those
16 objectives. Thus, in *Reed*, the objectives of “reducing the workload on
17 probate courts” and “avoiding intrafamily controversy” were deemed
18 of insufficient importance to sustain use of an overt gender criterion
19 in the appointment of administrators of intestate decedents' estates.
20 Decisions following *Reed* similarly have rejected administrative ease
21 and convenience as sufficiently important objectives to justify gender-
22 based classifications. And only two Terms ago, *Stanton v. Stanton*...,
23 expressly stating that *Reed v. Reed* was “controlling” held that *Reed*
24 required invalidation of a Utah differential age-of-majority statute,
25 notwithstanding the statute's coincidence with and furtherance of the
26 State's purpose of fostering “old notions” of role typing and preparing

10. See generally, e.g., [J. Mitten et al., Equal Protection, 23 Geo. J. Gender & L. 267, 277–78 \(2022\)](#) (describing a fourth tier of “active” rational basis or rational basis “with bite,” as well as broad alternative understanding of the equal protection case law as involving a “fluid, fact-intensive standard”).

11. [U.S. Const. amend. XIV, § 1.](#)

12. See generally supra fn. 10.

13. See [Craig v. Boren](#) (1976) 429 U.S. 190, 191-92.

14. 429 U.S. 190.

15. Id. at 191-92.

1 boys for their expected performance in the economic and political
2 worlds.

3 *Reed v. Reed* has also provided the underpinning for decisions that
4 have invalidated statutes employing gender as an inaccurate proxy for
5 other, more germane bases of classification. Hence, “archaic and
6 overbroad” generalizations concerning the financial position of
7 servicewomen and working women could not justify use of a gender
8 line in determining eligibility for certain governmental entitlements.
9 Similarly, increasingly outdated misconceptions concerning the role
10 of females in the home rather than in the “marketplace and world of
11 ideas” were rejected as loose-fitting characterizations incapable of
12 supporting state statutory schemes that were premised upon their
13 accuracy. In light of the weak congruence between gender and the
14 characteristic or trait that gender purported to represent, it was
15 necessary that the legislatures choose either to realign their
16 substantive laws in a gender-neutral fashion, or to adopt procedures
17 for identifying those instances where the sex-centered generalization
18 actually comported with fact.¹⁶

19 More recently, in *United States v. Virginia* (1996), the U.S. Supreme Court
20 considered a constitutional challenge to the Virginia Military Institute’s male-only
21 admissions policy.¹⁷ In that case, the majority opinion (drafted by former Justice
22 Ginsberg) applied what some have described as a more exacting level of
23 intermediate scrutiny (focusing on the requirement of an “exceedingly persuasive”
24 justification, from language in earlier Supreme Court case law¹⁸). Specifically, the
25 decision states:

26 Without equating gender classifications, for all purposes, to
27 classifications based on race or national origin, the Court, in post-
28 *Reed* decisions, has carefully inspected official action that closes a
29 door or denies opportunity to women (or to men). To summarize the
30 Court's current directions for cases of official classification based on
31 gender: Focusing on the differential treatment for denial of
32 opportunity for which relief is sought, the reviewing court must
33 determine whether the proffered justification is “exceedingly
34 persuasive.” The burden of justification is demanding and it rests
35 entirely on the State. The State must show “at least that the
36 [challenged] classification serves ‘important governmental objectives

16. *Id.* at 197-99 (citations omitted).

17. *United States v. Virginia* (1996) 518 U.S. 515.

18. See *Miss. Univ. for Women v. Hogan* (1982) 458 U.S. 718, 724 (citing *Kirchberg v. Feenstra* (1981) 450 U.S. 455 and *Personnel Administrator of Mass. v. Feeney* (1979) 442 U.S. 256).

1 and that the discriminatory means employed’ are ‘substantially related
2 to the achievement of those objectives.’” The justification must be
3 genuine, not hypothesized or invented post hoc in response to
4 litigation. And it must not rely on overbroad generalizations about the
5 different talents, capacities, or preferences of males and females.

6 The heightened review standard our precedent establishes does not
7 make sex a proscribed classification. Supposed “inherent differences”
8 are no longer accepted as a ground for race or national origin
9 classifications. Physical differences between men and women,
10 however, are enduring: “[T]he two sexes are not fungible; a
11 community made up exclusively of one [sex] is different from a
12 community composed of both.”

13 “Inherent differences” between men and women, we have come to
14 appreciate, remain cause for celebration, but not for denigration of the
15 members of either sex or for artificial constraints on an individual’s
16 opportunity. Sex classifications may be used to compensate women
17 “for particular economic disabilities [they have] suffered,” to
18 “promot[e] equal employment opportunity,” to advance full
19 development of the talent and capacities of our Nation’s people. But
20 such classifications may not be used, as they once were to create or
21 perpetuate the legal, social, and economic inferiority of women.¹⁹

22 In specifying that any sex-based distinction “must not rely on overbroad
23 generalizations about ... males and females,” the opinion suggests that distinctions
24 based on sex stereotypes would also be subject to intermediate scrutiny. And, in
25 noting situations where sex classifications would be permitted (e.g., to
26 “compensate...for particular economic disabilities” suffered by women), the
27 opinion implicitly rejects an anticlassification view of equal protection.

28 In a dissenting opinion in this case, former Justice Scalia suggested that this
29 decision applied a higher level of scrutiny to sex-based equal protection claims than
30 previous case law, and indicated that the better course would be to reduce the level
31 of scrutiny for sex-based classifications to rational basis review.²⁰ In a later

19. *United States v. Virginia* (1996) 518 U.S. 515, 532-34 (citations and footnotes omitted).

20. See *United States v. Virginia*, 518 U.S. at 574-75 (Scalia, J., dissenting) (“[I]f the question of the applicable standard of review for sex-based classifications were to be regarded as an appropriate subject for reconsideration, the stronger argument would be not for elevating the standard to strict scrutiny, but for reducing it to rational-basis review.”).

1 interview, Justice Scalia suggested that the U.S. Constitution does not prohibit sex
2 discrimination at all.²¹

3 In short, under the U.S. Constitution, sex- and gender- based equal protection
4 claims have been subject to an intermediate level of scrutiny, although the case law
5 indicates some disagreement about the precise contours of the intermediate scrutiny
6 test. While some on the Supreme Court have suggested that the level of scrutiny for
7 these claims should be increased, others have suggested the opposite. Finally, it is
8 worth noting that the U.S. Supreme Court, considering an equal protection claim
9 around the time that Congress passed the ERA, discussed how the ERA should be
10 understood to affect the level of scrutiny accorded to sex- and gender- based equal
11 protection claims.²² This decision came prior to the U.S. Supreme Court’s
12 application of the intermediate scrutiny test in *Craig v. Boren* (discussed above).

Limitations on the Application of Intermediate Scrutiny under the Equal Protection Clause

13 The Equal Protection Clause does not include the word “sex,” and under equal
14 protection case law, many characteristics typically associated as within the scope of
15 “sex” have either been assessed using a lower level of scrutiny in the equal
16 protection jurisprudence or the U.S. Supreme Court has either not considered or not
17 clearly identified the level of scrutiny that would apply.

18 For example, pregnancy discrimination has been scrutinized at a lower level in
19 equal protection case law. In the 1974 case *Geduldig v. Aiello*, the U.S. Supreme
20 Court declined to apply intermediate scrutiny to a claim involving the exclusion of
21 pregnancy-related disability from a disability insurance program, noting that:

22 [T]his case is thus a far cry from cases like *Reed v. Reed*
23 [challenging a law that gave preference to males to be named estate
24 administrators] and *Frontiero v. Richardson* [involving different
25 standards for male and female military spouses to be deemed
26 dependents and receive benefits] involving discrimination based upon
27 gender as such. The California insurance program does not exclude
28 anyone from benefit eligibility because of gender but merely removes
29 one physical condition — pregnancy — from the list of compensable
30 disabilities. While it is true that only women can become pregnant it

21. See P. Courson, “Scalia comments show need for new rights amendment, backers say” CNN (Jan. 6, 2011), available at <https://www.cnn.com/2011/POLITICS/01/06/era.scalia/index.html> (Scalia is “quoted as saying, ‘Certainly the Constitution does not require discrimination on the basis of sex. The only issue is whether it prohibits it. It doesn’t.’”).

22. See plurality and concurring opinions in *Frontiero v. Richardson* (1973) 411 U.S. 677.

1 does not follow that every legislative classification concerning
2 pregnancy is a sex-based classification like those considered in *Reed*
3 and *Frontiero*. Normal pregnancy is an objectively identifiable
4 physical condition with unique characteristics. Absent a showing that
5 distinctions involving pregnancy are mere pretexts designed to effect
6 an invidious discrimination against the members of one sex or the
7 other, lawmakers are constitutionally free to include or exclude
8 pregnancy from the coverage of legislation such as this on any
9 reasonable basis, just as with respect to any other physical condition.²³

10 It is worth noting, however, that the disability program at issue did not simply
11 exclude all sex-specific conditions.²⁴ More recent case law cites to *Geduldig* for the
12 proposition that equal protection claims involving pregnancy do not receive
13 heightened scrutiny.²⁵

14 Some Courts of Appeal have subjected equal protection claims related to sexual
15 orientation and gender identity to intermediate scrutiny, or a similar heightened
16 scrutiny test.²⁶ The Supreme Court has yet to directly address the question of what
17 level of scrutiny applies to such claims.²⁷

18 One important effect of ERA ratification would be increasing the level of scrutiny
19 accorded to sex-based equal protection claims under the U.S. Constitution — often
20 noted in materials discussing the ERA’s effects.²⁸ This effect was also

23. *Geduldig v. Aiello* (1974) 417 U.S. 484, 496 n. 20 (citations omitted).

24. *Geduldig*, 417 U.S. at 499-501 (Brennan, J., dissenting).

25. See, e.g., *Dobbs v. Jackson Women’s Health Org.* (2022) 597 U.S. 215, 236-237 (citing *Geduldig* for the proposition that “[t]he regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a ‘mere pretext[t] designed to effect an invidious discrimination against members of one sex or the other.’”).

26. See, e.g., *Glenn v. Brumby* (11th Cir. 2011) 663 F.3d 1312; *Windsor v. United States* (2nd Cir. 2012) 699 F.3d 169, aff’d 570 U.S. 744; *SmithKline Beecham Corp. v. Abbott Laboratories* (9th Cir. 2014) 740 F.3d 471 (referring to the test as “heightened scrutiny”); see also J.P. Cole, Congressional Research Service, *Transgender Students and School Bathroom Policies: Equal Protection Challenges Divide Appellate Courts* LSB10902 (Jan. 17, 2023), available at <https://crsreports.congress.gov/product/pdf/LSB/LSB10902>.

27. See *Windsor v. United States* (2013) 570 U.S. 744, 769-70 (finding that the Defense of Marriage Act violated equal protection without identifying level of scrutiny applied); *Lawrence v. Texas* (2003) 539 U.S. 558, 580 (O’Connor, J., concurring) (noting that the Court, in striking down laws that exhibit “a desire to harm a politically unpopular group,” has applied “a more searching form of rational basis review.”); *Romer v. Evans* (1996) 517 U.S. 620, 632 (concluding that a Colorado constitutional provision seeking to prohibit state or local government action to extend protections on the basis of sexual orientation would fail “even th[e] conventional inquiry [of rational basis review]” as it “lacks a rational relationship to legitimate state interests”).

28. See generally, e.g., R. Bleiweis, Center for American Progress, [The Equal Rights Amendment: What You Need to Know](https://www.americanprogressaction.org/equal-rights/amendment/what-you-need-to-know/) (Jan. 29, 2020); K. Fossett, What Would the ERA Change?, *Politico* (Feb. 4, 2022), available at <https://www.politico.com/newsletters/women-rule/2022/02/04/what-would-the-equal-rights-amendment-do-00005702>; J. Neuwirth, *Equal Means Equal: Why the Time for an Equal Rights Amendment is Now* (2015); <https://www.equalrightsamendment.org/why/>.

1 acknowledged in the opinions in the U.S. Supreme Court’s 1973 case, *Frontiero v.*
2 *Richardson*.²⁹

3 The ERA, however, is an entirely separate constitutional protection. While
4 adjusting the treatment of sex-based equal protection claims may be a practical
5 effect of the ERA, the ERA does not itself adjust the language of the U.S.
6 Constitution’s Equal Protection Clause, nor should its effects be understood only in
7 the context of changing the treatment of sex-based equal protection claims.

OTHER U.S. CONSTITUTIONAL PROTECTIONS RELEVANT TO SEX EQUALITY

8 Under the U.S. Constitution, the Equal Protection Clause is not the only provision
9 that extends protections related to sex equality.

10 In general, although the U.S. Constitution does not contain express language
11 about privacy, the constitutional case law has recognized that the Constitution
12 provides some protection for autonomy privacy (i.e., the right of an individual to
13 make decisions about important personal matters free from government
14 interference).³⁰

15 The exact contours of this right are difficult to define. The U.S. Supreme Court’s
16 assessment of the relevant constitutional language for the privacy right, as well as
17 the scope of that right in practice, has changed over time. A decision in a 1965 case
18 involving the right to contraceptives discussed “specific guarantees in the Bill of
19 Rights hav[ing] penumbras, formed by emanations from those guarantees that help
20 give them life and substance. Various guarantees create zones of privacy.”³¹ The
21 constitutional privacy right is also discussed as an aspect of liberty protected by the
22 Due Process Clauses³² or a component of “substantive due process.”³³

29. Compare *Frontiero v. Richardson* (1973) 411 U.S. 677, 688 (plurality opinion, citing to Congress’ passage of the ERA and other legal protections for sex, states “[w]ith these considerations in mind, we can only conclude that classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny.”) with *id.* at 692 (Powell, J., concurring) (opinion concurring in the judgment declines to apply strict scrutiny to the claim, noting “[t]here is another, and I find compelling, reason for deferring a general categorizing of sex classifications as invoking the strictest test of judicial scrutiny. The [ERA], which if adopted will resolve the substance of this precise question, has been approved by the Congress and submitted for ratification by the States.”).

30. See generally <https://www.justia.com/constitutional-law/docs/privacy-rights/>.

31. *Griswold v. Connecticut* (1965) 381 U.S. 479, 484.

32. See also [U.S. Const. amends. 5, 14](#).

33. “Substantive due process asks the question of whether the government’s deprivation of a person’s life, liberty or property is justified by a sufficient purpose. Procedural due process, by contrast, asks whether

1 Below is an excerpt from the 1973 U.S. Supreme Court decision in *Roe v. Wade*,
2 summarizing the prior case law on the constitutional privacy right.

3 The Constitution does not explicitly mention any right of privacy.
4 In a line of decisions, however, going back perhaps as far as [an 1891
5 case], the Court has recognized that a right of personal privacy, or a
6 guarantee of certain areas or zones of privacy, does exist under the
7 Constitution. In varying contexts, the Court or individual Justices
8 have, indeed, found at least the roots of that right in the First
9 Amendment; in the Fourth and Fifth Amendments; in the penumbras
10 of the Bill of Rights; in the Ninth Amendment; or in the concept of
11 liberty guaranteed by the first section of the Fourteenth Amendment.
12 These decisions make it clear that only personal rights that can be
13 deemed ‘fundamental’ or ‘implicit in the concept of ordered liberty,’
14 are included in this guarantee of personal privacy. They also make it
15 clear that the right has some extension to activities relating to
16 marriage; procreation; contraception; family relationships; and child
17 rearing and education.³⁴

18 The constitutional privacy right case law has addressed a variety of issues,
19 including access to contraception,³⁵ access to abortion,³⁶ sexual privacy rights,³⁷ and
20 the right to marry.³⁸

21 However, the U.S. Supreme Court’s 2022 decision in *Dobbs v. Jackson Women’s*
22 *Health Organization* dramatically shifted the jurisprudence in this area, expressly
23 overruling two cases involving abortion: *Roe v. Wade* and *Planned Parenthood v.*
24 *Casey*.³⁹ In addition, a concurring opinion in that case called into question the
25 constitutional privacy right protections more broadly. Specifically, the concurring
26 opinion provided, in part:

the government has followed the proper procedures when it takes away life, liberty or property. Substantive due process looks to whether there is a sufficient substantive justification, a good enough reason for such a deprivation.” E. Chemerinsky, Substantive Due Process, 15 *Tuoro L. Rev.* 1501, 1501 (1999), available at https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1638&context=faculty_scholarship.

34. *Roe v. Wade* (1973) 410 U.S. 113, 152-54, overruled by *Dobbs v. Jackson Women's Health Org.* (2022) 597 U.S. 215, and holding modified by *Planned Parenthood of Se. Pennsylvania v. Casey* (1992) 505 U.S. 833.

35. See, e.g., *Griswold v. Connecticut* (1965) 381 U.S. 479; *Eisenstadt v. Baird* (1972) 405 U.S. 438.

36. See, e.g., *Roe v. Wade* (1973) 410 U.S. 113; *Planned Parenthood of Se. Pennsylvania v. Casey* (1992) 505 U.S. 833; *Dobbs v. Jackson Women's Health Org.* (2022) 597 U.S. 215.

37. See, e.g., *Bowers v. Hardwick* (1986) 478 U.S. 186; *Lawrence v. Texas* (2003) 539 U.S. 558.

38. See, e.g., *Loving v. Virginia* (1967) 388 U.S. 1; *Zablocki v. Redhail* (1978) 434 U.S. 374; *Obergefell v. Hodges* (2015) 576 U.S. 644.

39. (2022) 597 U.S. 215, 302. (“The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. *Roe* and *Casey* arrogated that authority. We now overrule those decisions and return that authority to the people and their elected representatives.”).

1 The Court today declines to disturb substantive due process
2 jurisprudence generally or the doctrine's application in other, specific
3 contexts. Cases like *Griswold v. Connecticut* (right of married persons
4 to obtain contraceptives); *Lawrence v. Texas* (right to engage in
5 private, consensual sexual acts); and *Obergefell v. Hodges* (right to
6 same-sex marriage), are not at issue. The Court's abortion cases are
7 unique and no party has asked us to decide “whether our entire
8 Fourteenth Amendment jurisprudence must be preserved or
9 revised[.]” Thus, I agree that “[n]othing in [the Court's] opinion
10 should be understood to cast doubt on precedents that do not concern
11 abortion.”

12 For that reason, in future cases, we should reconsider all of this
13 Court's substantive due process precedents, including *Griswold*,
14 *Lawrence*, and *Obergefell*. Because any substantive due process
15 decision is “demonstrably erroneous,” we have a duty to “correct the
16 error” established in those precedents. After overruling these
17 demonstrably erroneous decisions, the question would remain
18 whether other constitutional provisions guarantee the myriad rights
19 that our substantive due process cases have generated.⁴⁰

CALIFORNIA CONSTITUTION’S EQUAL PROTECTION CLAUSE

20 California’s equal protection doctrine generally accords a higher level of scrutiny
21 to sex-based equal protection claims.

22 California’s Constitution specifies: “A person may not be ... denied equal
23 protection of the laws[.]”⁴¹

24 When evaluating equal protection claims under the state Constitution, California
25 courts have treated sex-based classifications as suspect classifications and subjected
26 such classifications to strict scrutiny.⁴²

40. Id. at 332-333 (Thomas, J., concurring) (citations and footnote omitted).

41. [Cal. Const. art. I § 7\(a\)](#).

42. See, e.g., *In re Marriage Cases* (2008) 43 Cal.4th 757, 833 (“[T]he governing California cases long have established that statutes that discriminate on the basis of sex or gender are subject to strict scrutiny under the California Constitution....” (citations omitted)); *Molar v. Gates* (4th Dist. 1979) 98 Cal.App.3d. 1, 13 (“In *Sail’er Inn, Inc. v. Kirby*, a female citizen challenged the constitutionality of a California law prohibiting women from tending bar unless they or their husbands held the liquor license on equal protection grounds. Our Supreme Court held that the bartending law was indeed unconstitutional under the equal protection clauses of the state and federal Constitutions and in doing so declared that ‘classifications based upon sex should be treated as suspect.’ *Sail’er Inn* thus clearly established the principle that gender-based differentials are to be treated as ‘suspect classifications’ which must be subjected to intense judicial scrutiny to determine if they violate the right to equal protection guaranteed by the state Constitution. The Supreme Court has consistently reaffirmed this principle. Thus, in *Arp v. Workers’ Comp. Appeals Bd.*, the court stated that ‘the strict scrutiny/compelling state interest test must govern sex discrimination challenges under Article

1 In a 2008 California Supreme Court case involving the right to marry, the court
2 applied strict scrutiny to equal protection claims involving sexual orientation,
3 concluding that sexual orientation was itself a suspect classification for equal
4 protection purposes.⁴³

CALIFORNIA CONSTITUTIONAL PROTECTIONS RELEVANT TO SEX EQUALITY

5 The California Constitution has multiple provisions relevant to the issue of sex
6 equality more broadly. Several such provisions are noted briefly below, presented
7 in the order that they are found in the California Constitution.

8 **Right to Privacy**

9 California’s Constitution includes an express right to privacy, enacted in 1972
10 (Proposition 11).⁴⁴ That provision provides:

11 All people are by nature free and independent and have inalienable
12 rights. Among these are enjoying and defending life and liberty,
13 acquiring, possessing, and protecting property, and pursuing and
14 obtaining safety, happiness, and privacy.⁴⁵

15 It is particularly important to note that California’s constitutional protection of
16 privacy is separate and distinct from any protection of privacy derived from the
17 federal constitution.⁴⁶ As one commentator described:

18 The California constitutional right to privacy is distinct from the
19 federal right. Like its federal counterpart, the state right to privacy

I, section 7, of the California Constitution,’ and in *Hardy v. Stumpf*, the court acknowledged that ‘(c)lassifications predicated on gender are deemed suspect in California.’” (citations omitted); *Boren v. Dep’t of Emp. Dev.* (3rd Dist. 1976) 59 Cal.App.3d 250, 255-256 (“According to California decisional law, a statute establishing ‘suspect classifications’ or trenching upon ‘fundamental interests’ is vulnerable to strict judicial scrutiny; it may be sustained by a showing of a compelling state interest which necessitates the distinction; a sex-based classification is treated as suspect.” (citations omitted)).

43. *In re Marriage Cases* (2008) 43 Cal.4th 757, 783-84 (“[W]e conclude that strict scrutiny nonetheless is applicable here because (1) the statutes in question properly must be understood as classifying or discriminating on the basis of sexual orientation, a characteristic that we conclude represents — like gender, race, and religion — a constitutionally suspect basis upon which to impose differential treatment, and (2) the differential treatment at issue impinges upon a same-sex couple’s fundamental interest in having their family relationship accorded the same respect and dignity enjoyed by an opposite-sex couple.”).

44. See [Cal. Const. art. I § 1](#).

45. *Id.*

46. See [Cal. Const. art. I § 24](#) (“Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution.”); see also generally D.A. Carrillo et al., *California Constitutional Law: Privacy*, 59 San Diego L. Rev. 119 (2022).

1 extends to both [] informational and autonomy privacy.⁴⁷ Yet the
2 federal right is only implied, while the California right is codified in
3 the state constitution. The California Supreme Court has taken this to
4 suggest the state right should be broader than its federal counterpart.
5 As a result, in theory Californians have privacy protections that extend
6 beyond the “penumbral” protections under the federal charter, in both
7 liberty and informational privacy.⁴⁸

Reproductive Freedom

8 In the aftermath of the U.S. Supreme Court’s decision in *Dobbs*, California
9 enacted a constitutional provision in November 2022 to protect reproductive
10 freedom. That provision provides:

11 The state shall not deny or interfere with an individual’s
12 reproductive freedom in their most intimate decisions, which includes
13 their fundamental right to choose to have an abortion and their
14 fundamental right to choose or refuse contraceptives. This section is
15 intended to further the constitutional right to privacy guaranteed by
16 Section 1, and the constitutional right to not be denied equal
17 protection guaranteed by Section 7. Nothing herein narrows or limits
18 the right to privacy or equal protection.⁴⁹

Protection for Employment and Professions

19 California’s Constitution protects the right to pursue employment and enter
20 professions. The provision expressly includes sex as a protected class:

21 A person may not be disqualified from entering or pursuing a
22 business, profession, vocation, or employment because of sex, race,
23 creed, color, or national or ethnic origin.⁵⁰

24 This provision has been cited as an example of a state constitutional equal rights
25 amendment.⁵¹ However, it is important to note that the tailored scope of this

47. Informational and autonomy privacy have been described as follows: Informational privacy involves “‘interests in precluding the dissemination or misuse of sensitive and confidential information;” and ‘autonomy privacy[]’ ... encompasses the ‘interests in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference.’” D.A. Carrillo et al., 59 San Diego L. Rev. at 136 (quoting Justice Lucas’ opinion in *Hill v. Nat’l Collegiate Athletic Ass’n* (1994) 7 Cal.4th 1).

48. R.R. Aquino, California’s constitutional privacy guarantee needs a reset, SCOCABlog (Apr. 9, 2021), <http://scocablog.com/californias-constitutional-privacy-guarantee-needs-a-reset/>.

49. Cal. Const. art. I § 1.1; see also 2022 Cal. Stat. res. ch. 97 (SCA 10 (Atkins)).

50. Cal. Const. art. I § 8.

51. See generally, e.g., <https://www.brennancenter.org/our-work/research-reports/state-level-equal-rights-amendments>.

1 provision, focusing specifically on employment and professions, is significantly
2 different from the federal ERA, which addresses equal rights more generally.

Prohibition on Discrimination or Preferential Treatment for Public Employment, Public Education, and Public Contracting

3 In 1996, California enacted Proposition 209. This provision provides in part:

4 The State shall not discriminate against, or grant preferential
5 treatment to, any individual or group on the basis of race, sex, color,
6 ethnicity, or national origin in the operation of public employment,
7 public education, or public contracting.⁵²

8 Proposition 209 effectively prohibits affirmative action programs in the areas
9 specified.⁵³ However, the Legislative Analyst’s Office noted that the measure
10 provides exceptions to the ban on preferential treatment in the following situations:

- 11 • To keep the state or local governments eligible to receive money
12 from the federal government.
- 13 • To comply with a court order in force as of the effective date of
14 this measure (the day after the election).
- 15 • To comply with federal law or the United States Constitution.
- 16 • To meet privacy and other considerations based on sex that are
17 reasonably necessary to the normal operation of public
18 employment, public education, or public contracting.⁵⁴

Admission to University of California

19 The California Constitution includes a provision related to the University of
20 California that provides, in part, that: “[N]o person shall be debarred admission to
21 any department of the university on account of race, religion, ethnic heritage, or

52. [Cal. Const. art. I § 31\(a\)](#).

53. See Legislative Analyst’s Office Analysis of Proposition 209: Prohibition Against Discrimination or Preferential Treatment by State and Other Public Entities (Nov. 1996), available at https://lao.ca.gov/ballot/1996/prop209_11_1996.html (hereafter, “LAO Analysis of Prop 209”) (“This measure would eliminate state and local government affirmative action programs in the areas of public employment, public education, and public contracting to the extent these programs involve ‘preferential treatment’ based on race, sex, color, ethnicity, or national origin. The specific programs affected by the measure, however, would depend on such factors as (1) court rulings on what types of activities are considered ‘preferential treatment’ and (2) whether federal law requires the continuation of certain programs.”); see also, e.g., T. Watanabe, California banned affirmative action in 1996. Inside the UC struggle for diversity, L.A. Times (Oct. 31, 2022), available at <https://www.latimes.com/california/story/2022-10-31/california-banned-affirmative-action-uc-struggles-for-diversity>.

Regarding the effects of Proposition 209 in California, see generally materials discussed at <https://www.ucop.edu/academic-affairs/prop-209/>.

54. See LAO Analysis of Prop 209, *supra* fn. 73.

1 sex.”⁵⁵

EXPLORING “ON ACCOUNT OF SEX”

2 Section 1 of the ERA provides that “[e]quality of rights under the law shall not be
3 denied or abridged by the United States or by any state on account of sex.”⁵⁶ This
4 portion of the report will explore the meaning of “on account of sex.”

TERMINOLOGY

5 Terminology relating to “sex” includes gender, sexual orientation, and sex or
6 gender stereotypes. While related, these terms are distinct concepts.

“Sex”

7 Traditionally in western cultures, “sex” has been understood as referring to
8 biological sex, which was regarded as a binary characteristic whereby an individual
9 would be classified as either male or female based on biological attributes.

10 The website for the U.S. Centers for Disease Control (“CDC”) currently provides
11 the following definition for “sex”: “[a]n individual’s biological status as male,
12 female, or something else. Sex is assigned at birth and associated with physical
13 attributes, such as anatomy and chromosomes.”⁵⁷

14 The “something else” in the CDC’s definition highlights the growing awareness
15 about the incomplete nature of the sex binary and the wider biological variation of

55. [Cal. Const. art. IX § 9\(f\)](#).

56. [H.J. Res. 208 \(1972\)](#), [86 Stat. 1523](#). The remainder of the ERA provides:

SEC. 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

SEC. 3. This amendment shall take effect two years after the date of ratification.

See also Congressional Research Service, *The Proposed Equal Rights Amendment: Contemporary Ratification Issues 14-15*, R42979 (Updated Dec. 23, 2019) (“CRS Report”), available at <https://sgp.fas.org/crs/misc/R42979.pdf> (reproducing text of House Joint Resolution 208 from 92nd Congress, 1972).

57. See CDC Adolescent and School Health, <https://www.cdc.gov/healthy-youth/lgbtq-youth/terminology.html>. That webpage includes the following disclaimer:

Per a court order, HHS is required to restore this website as of 11:59PM ET, February 14, 2025. Any information on this page promoting gender ideology is extremely inaccurate and disconnected from the immutable biological reality that there are two sexes, male and female. The Trump Administration rejects gender ideology and condemns the harms it causes to children, by promoting their chemical and surgical mutilation, and to women, by depriving them of their dignity, safety, well-being, and opportunities. This page does not reflect biological reality and therefore the Administration and this Department rejects it.

1 individuals, whose biological traits do not fully align with this binary.⁵⁸ “Intersex”
2 is an “umbrella term for differences in sex traits or reproductive anatomy.”⁵⁹

“Gender”

3 Very generally, while “sex” involves biological traits, “gender” involves social
4 or cultural characteristics or expectations, which can involve binary categories as
5 discussed above.⁶⁰ For instance, the World Health Organization defines gender as
6 “the characteristics of women, men, girls and boys that are socially constructed.
7 This includes norms, behaviors and roles associated with being a woman, man, girl
8 or boy, as well as relationships with each other.”⁶¹

9 Gender is also used in the context of gender identity and gender expression.
10 Gender identity refers to “One’s innermost concept of self as male, female, a blend
11 of both or neither – how individuals perceive themselves and what they call
12 themselves. One’s gender identity can be the same or different from their sex
13 assigned at birth.”⁶² This can include a wider range of options that may combine
14 different masculine and feminine characteristics, reject the binary notion of gender,
15 or encompasses multiple genders.⁶³ Gender expression is “[h]ow an individual
16 chooses to present their gender to others through physical appearance and behaviors,
17 such as style of hair or dress, voice, or movement.”⁶⁴ Gender expression can also

58. See generally <https://interactadvocates.org/faq/>; C. Ainsworth, Sex Redefined: The Idea of 2 Sexes is Overly Simplistic, *Nature Magazine* (Oct. 22, 2018), available at <https://www.nature.com/articles/518288a> (article includes a spectrum with 9 categories of biological sex; the spectrum is bookended by the “typical male” and “typical female” categories); see also <https://medlineplus.gov/ency/article/001669.htm> (defining “intersex” and identifying four intersex categories).

59. See interACT, Advocates for Intersex Youth, at <https://interactadvocates.org/faq/>.

60. See, e.g., Becker T., Chin M., Bates N, ed., *Measuring Sex, Gender Identity, and Sexual Orientation*. National Academies Press (2022). <https://www.ncbi.nlm.nih.gov/books/NBK581050/>.

61. World Health Organization, *Gender and health*, available at https://www.who.int/health-topics/gender#tab=tab_1. This source also states:

Gender interacts with but is different from sex, which refers to the different biological and physiological characteristics of females, males and intersex persons, such as chromosomes, hormones and reproductive organs. Gender and sex are related to but different from gender identity. Gender identity refers to a person’s deeply felt, internal and individual experience of gender, which may or may not correspond to the person’s physiology or designated sex at birth.

62. See Human Rights Campaign, *Resources: Sexual Orientation and Gender Identity Definitions*, <https://www.hrc.org/resources/sexual-orientation-and-gender-identity-terminology-and-definitions>

63. See generally, e.g., definitions of gender-related terms at Human Rights Campaign, available at <https://www.hrc.org/resources/glossary-of-terms>; PFLAG, <https://pflag.org/glossary>; It Gets Better, available at <https://itgetsbetter.org/glossary/>; see also Laurel Wamsley, A Guide to Gender Identity Terms, NPR (2021) <https://www.npr.org/2021/06/02/996319297/gender-identity-pronouns-expression-guide-lgbtq>.

64. Centers for Disease Control, *Terminology*, available at <https://www.cdc.gov/healthyouth/terminology/sexual-and-gender-identity-terms.htm>; see also fn. 59, *supra*.

1 relate to gender stereotypes (i.e., when an individual’s gender expression is different
2 from the stereotypical expectations associated with gender).⁶⁵

3 “Cisgender” and “transgender” refer to the relationship between an individual’s
4 assigned sex and gender identity.⁶⁶ Different gender categories can recognize that a
5 person’s gender identity and gender expression may change over time and can
6 include an explicit rejection of the idea of a binary assignment.⁶⁷ And, some gender
7 identities are culture specific.⁶⁸

“Sexual Orientation”

8 Sexual orientation is defined as “the desire one has for emotional, romantic,
9 and/or sexual relationships with others based on their gender expression, gender
10 identity, and/or sex.”⁶⁹ “[S]exual orientation is usually discussed in terms of three
11 categories: heterosexual (having emotional, romantic or sexual attractions to
12 members of the other sex), gay/lesbian (having emotional, romantic or sexual
13 attractions to members of one’s own sex) and bisexual (having emotional, romantic
14 or sexual attractions to both men and women).”⁷⁰ But, as in the cases above, the
15 traditional (binary-focused) understanding of sexual orientation is expanding to
16 encompass a more diverse set of identities that reflect our growing understanding of

65. See, e.g., id. (defining gender nonconforming as “[t]he state of one’s physical appearance or behaviors not aligning with societal expectations of their gender (a feminine boy, a masculine girl, etc.)”; see also supra, [fn. 59](#)).

66. See generally American Psychological Association (APA), APA Dictionary of Psychology, available at <https://dictionary.apa.org/cisgender> (defining “cisgender” as “having or relating to a gender identity that corresponds to the culturally determined gender roles for one’s birth sex”); <https://dictionary.apa.org/transgender> (defining “transgender” as “having or relating to a gender identity that differs from the culturally determined gender roles for one’s birth sex.”).

67. See, e.g., E. Matsuno et al., Am. Psychol. Ass’n Div. 44 (Soc’y for the Psychol. of Sexual Orientation and Gender Diversity), Nonbinary Fact Sheet, available at <https://www.apadivisions.org/division-44/resources/nonbinary-fact-sheet.pdf> (“The term nonbinary is used both as an umbrella term and a gender identity label to refer to people whose gender does not fall within the binary categories of man and woman. ... There are several different identity labels and experiences that fall under the nonbinary umbrella. For example, some people experience an absence of gender (e.g., agender, genderless), others experience a presence of multiple genders (e.g., bigender, pangender), others fluctuate between different genders (e.g., genderfluid, genderflux), or identify with third gender in-between or outside the gender binary (e.g., genderqueer, neutrois), and some partly identify with being a man or woman (e.g., demiboy, demigirl).”).

68. See generally [J.A. Clarke, They, Them, Theirs, 132 Harv. L. Rev. 894](#), 932 (Jan. 2019) (“Researchers highlight that nonbinary genders have existed ‘across time and place’ to challenge the view that humanity is naturally and inevitably divided into male and female categories. Historical and present-day examples include Indian Hijra, Thai Kathoey, Indonesian Waria, various Two-Spirit identities of First Nations tribes, and South American Machi identities, among others, each with a distinct meaning not reducible to man or woman.”); https://www.pbs.org/independentlens/content/two-spirits_map-html/.

69. It Gets Better, Glossary, available at <https://itgetsbetter.org/glossary/>.

70. American Psychological Association, Understanding sexual orientation and homosexuality (2008), available at <https://www.apa.org/topics/lgbtq/orientation>.

1 the complexities of sex, gender, and orientation.⁷¹

“Sex or Gender Stereotypes”

2 Sex or gender stereotypes are cultural and societal expectations about attire,
3 behavior, and related matters that involve a person’s perceived sex or gender. Much
4 of the discussion of sex or gender stereotypes focuses on stereotypes connected to
5 the male/female binary.

6 The website of the United Nations Office of the High Commissioner for Human
7 Rights includes a discussion of gender stereotypes, which provides, in part:

8 A gender stereotype is a generalized view or preconception about
9 attributes or characteristics, or the roles that are or ought to be
10 possessed by, or performed by, women and men. A gender stereotype
11 is harmful when it limits women’s and men’s capacity to develop their
12 personal abilities, pursue their professional careers and/or make
13 choices about their lives.

14 Whether overtly hostile (such as “women are irrational”) or
15 seemingly benign (“women are nurturing”), harmful stereotypes
16 perpetuate inequalities. For example, the traditional view of women
17 as care givers means that child care responsibilities often fall
18 exclusively on women.

19 Further, gender stereotypes compounded and intersecting with
20 other stereotypes have a disproportionate negative impact on certain
21 groups of women, such as women from minority or indigenous
22 groups, women with disabilities, women from lower caste groups or
23 with lower economic status, migrant women, etc.

24 ...

25 Wrongful gender stereotyping is a frequent cause of
26 discrimination against women. It is a contributing factor in violations
27 of a vast array of rights such as the right to health, adequate standard
28 of living, education, marriage and family relations, work, freedom of
29 expression, freedom of movement, political participation and
30 representation, effective remedy, and freedom from gender-based
31 violence.⁷²

32 Gender stereotypes can involve broad expectations about an individual’s societal

71. See Becker T., Chin M., Bates N., ed. *Measuring Sex, Gender Identity, and Sexual Orientation*, National Academies Press, available at <https://www.ncbi.nlm.nih.gov/books/NBK581050/>; APA style, *Sexual Orientation*, available at <https://apastyle.apa.org/style-grammar-guidelines/bias-free-language/sexual-orientation>.

72. United Nations Human Rights, Office of the High Commissioner, *Gender stereotyping*, available at <https://www.ohchr.org/en/women/gender-stereotyping>.

1 role and responsibilities based on gender but can also involve specific expectations
2 related to appearance and clothing choices.

FEDERAL STATUTES RELATED TO SEX DISCRIMINATION

3 Federal employment discrimination laws have a significant body of case law that
4 address many key issues as to the scope of “sex.”

5 The history and development of Title IX of the Education Amendments of 1972
6 (“Title IX”), the federal Equal Pay Act of 1963, and the federal Civil Rights Act of
7 1964 (and amendments of that Act by the Pregnancy Discrimination Act of 1978)
8 provided a helpful context to inform the sex equality provision’s development.

Title IX of the Education Amendments of 1972

9 Title IX of the Education Amendments of 1972 (“Title IX”) provides protections
10 from discrimination based on sex “in education programs or activities that receive
11 federal financial assistance.”⁷³ On a national level, the law prohibits discrimination
12 against students based on sex, while providing various exceptions, including for
13 public educational institutions founded with a policy of admitting only students of
14 one sex.⁷⁴

Equal Pay Act of 1963

15 In 1963, Congress enacted the federal Equal Pay Act of 1963. Section 2 of the
16 Act declares its purpose is to correct wage differentials based on sex.⁷⁵ The Act
17 provides, in part,

18 No employer having employees subject to any provisions of this
19 section shall discriminate, within any establishment in which such
20 employees are employed, between employees on the basis of sex by
21 paying wages to employees in such establishment at a rate less than
22 the rate at which he pays wages to employees of the opposite sex in
23 such establishment for equal work on jobs the performance of which
24 requires equal skill, effort, and responsibility, and which are
25 performed under similar working conditions, except where such
26 payment is made pursuant to (i) a seniority system; (ii) a merit system;
27 (iii) a system which measures earnings by quantity or quality of

73. See generally U.S. Department of Education, Title IX and Sex Discrimination, available at https://www2.ed.gov/about/offices/list/oer/docs/tix_dis.html.

74. [20 U.S.C. 1681](#).

75. [P.L. 88-38, 77 Stat. 56](#).

1 production; or (iv) a differential based on any other factor other than
2 sex: Provided, That an employer who is paying a wage rate differential
3 in violation of this subsection shall not, in order to comply with the
4 provisions of this subsection, reduce the wage rate of any employee.⁷⁶

5 While this law was intended to be a sweeping remedy to address long-standing
6 inequities in pay based on an “ancient, but outmoded belief” relating to male and
7 female roles in society, the law’s practical effect has been more limited in scope.⁷⁷

8 One important way the Equal Pay Act’s effect has been blunted is the broad
9 interpretation that courts have accorded to the “factor other than sex” defense.
10 Courts have found that employers may consider prior salaries as a “factor other than
11 sex,” thereby perpetuating existing sex-based salary inequities.⁷⁸ Some courts have
12 even concluded that employers are not required to demonstrate that the “factor other
13 than sex” offered to justify disparate treatment is related to a legitimate business
14 purpose.⁷⁹

15 Since 1997, federal legislation to address these issues, as well as others, has been
16 introduced repeatedly, but has yet to become law.⁸⁰

The Federal Civil Rights Act of 1964 (Title VII)

17 Title VII of the federal Civil Rights Act of 1964 (“Title VII”) includes a provision
18 that protects against sex discrimination in employment. That provision provides, in
19 part:

20 It shall be an unlawful employment practice for an employer--

76. [29 U.S.C. § 206\(d\)\(1\)](#).

77. See generally Nat’l Womens L. Center, Closing the “Factor Other than Sex” Loophole in the Equal Pay Act (Apr. 11, 2011), available at https://nwlc.org/wp-content/uploads/2015/08/4.11.11_factor_other_than_sex_fact_sheet_update.pdf; American Bar Association, The Paycheck Fairness Act, https://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/discrimination/the-paycheck-fairness-act/.

78. See generally Nat’l Womens L. Center, Closing the “Factor Other than Sex” Loophole in the Equal Pay Act (Apr. 11, 2011), available at https://nwlc.org/wp-content/uploads/2015/08/4.11.11_factor_other_than_sex_fact_sheet_update.pdf.

79. Id.

80. See The Paycheck Fairness Act, available at https://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/discrimination/the-paycheck-fairness-act/; Summary of H.R. 7 (Paycheck Fairness Act) (2021-2022), available at <https://www.congress.gov/bill/117th-congress/house-bill/7>; H.R. 7, § 2(b)(4) (“The bona fide factor defense ... shall apply only if the employer demonstrates that such factor (i) is not based upon or derived from a sex-based differential in compensation; (ii) is job-related with respect to the position in question; (iii) is consistent with business necessity; and (iv) accounts for the entire differential in compensation at issue.”), available at <https://www.congress.gov/bill/117th-congress/house-bill/7/text>.

1 (1) to fail or refuse to hire or to discharge any individual, or
2 otherwise to discriminate against any individual with respect to his
3 compensation, terms, conditions, or privileges of employment,
4 because of such individual's race, color, religion, sex, or national
5 origin...⁸¹

6 The scope of what constitutes “discriminat[ion] against any individual ...
7 because of ... sex” has been heavily litigated, and the case law helps clarify the
8 definition.

9 Early on, courts and the Equal Employment Opportunity Commission
10 (“EEOC”), the federal agency created to enforce Title VII,⁸² considered the types of
11 acts constituting discrimination because of sex. Initially, the courts and EEOC took
12 a very narrow view, effectively finding that only rules treating the entire class of
13 women differently than the entire class of men would constitute prohibited
14 discrimination under the Act.

15 For instance, “the EEOC officially opined that listing men’s positions and
16 women’s positions separately in job postings was simply helpful rather than
17 discriminatory.”⁸³

18 And, initially, courts found that rules discriminating against married women or
19 mothers did not constitute sex discrimination, as these classifications were
20 purportedly based on marital status or being a parent.⁸⁴

81. [42 U.S.C. § 2000-e2\(a\)](#).

82. See U.S. Equal Employment Opportunity Commission (EEOC), Timeline of Important EEOC events, available at <https://www.eeoc.gov/youth/timeline-important-eeoc-events>.

83. See *Bostock v. Clayton County* (2020) 590 U.S. 644, 678 citing C. Franklin, Inventing the “Traditional Concept” of Sex Discrimination, 125 Harv. L. Rev. 1307, 1340 (2012) (which, in turn, cites a Sept. 22, 1965 EEOC press release); see also National Organization for Women, Founding, available at <https://now.org/about/history/founding-2/>.

84. See generally C. Franklin, Living Textualism, 2020 Sup. Ct. Rev. 119, 173-174. Compare, e.g., *Stroud v. Delta Air Lines, Inc.* (5th Cir. 1977) 544 F.2d 892, 893 (finding plaintiff suffered no sex discrimination being subject to a no marriage rule; “[C]ertain women stewardesses who are unmarried are favored over certain other women stewardesses who are married. As one of the all-female group of flight attendants employed by Delta, plaintiff suffered a discrimination, but it was based on marriage and not sex. Men were not favored over women; they simply were not involved in the functioning of the policy.”) with *Sprogis v. United Air Lines, Inc.* (7th Cir. 1971) 444 F.2d 1194, 1198, cert. denied 404 U.S. 991 (“It is irrelevant to this determination of discrimination that the no-marriage rule has been applied only to female employees falling into the single, narrowly drawn ‘occupational category’ of stewardess. Disparity of treatment violative of Section 703(a)(1) may exist whether it is universal throughout the company or confined to a particular position. Nor is the fact of discrimination negated by United’s claim that the female employees occupy a unique position so that there is no distinction between members of opposite sexes within the job category.”). See also Smithsonian National Air and Space Museum, Meet the Flight Attendants Who Fought for Equality During the Civil Rights Era, (2021), available at <https://airandspace.si.edu/stories/editorial/meet-flight-attendants-who-fought-equality-during-civil-rights-era>.

1 This narrow view of prohibited sex discrimination under Title VII was troubling
2 to many and prompted organizing related to civil rights for women, including the
3 founding of the National Organization for Women.⁸⁵

2025 Executive Orders

4 On January 20, 2025, a new federal administration was sworn into office and
5 issued a number of executive orders relevant to this study.⁸⁶ The staff concluded,
6 however, these executive orders do not impact California law nor the staff’s analysis
7 of state law or staff recommendations.⁸⁷

Sex-Plus Discrimination

8 In time, courts began to recognize that sex discrimination encompassed more
9 than discrimination against the entire class of women and began to acknowledge
10 nuances. For example, treating married women different from married men or
11 mothers different from fathers could also constitute prohibited sex discrimination
12 under Title VII. The shorthand term used to describe this type of discrimination
13 against a distinct segment of women (e.g., mothers, married women) has been

85. See National Organization for Women, Founding, available at <https://now.org/about/history/founding-2/>.

86. Executive Order [14187](#), among other directives, defines “sex” as “an individual’s immutable biological classification as either male or female.” This executive order is subject to at least one legal challenge. See *Tirrell v. Edelbut* (U.S. D.N.H., 2025), [Case No. 1:24-cv-00251](#).

[Executive Order 14173](#), entitled Ending Illegal Discrimination and Restoring Merit-Based Opportunity, directs the Attorney General and the Secretary of Education to issue guidance to all institutions of higher learning, and state and local educational agencies receiving federal funds that they must comply with *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* (2023) 600 U.S. 181. This order is subject to several legal challenges. See [National Association of Diversity Officers in Higher Education v. Trump](#), No. 25-333 (D. Md.); [National Association of Diversity Officers in Higher Education v. Trump](#), No. 25-1189 (4th Cir.); [National Urban League v. Trump](#), No. 25-471 (D.D.C.); and [Chicago Women In Trades v. Trump](#), No. 25-2005 (N. D. Ill.).

[Executive Order 14187](#), entitled Protecting Children From Chemical and Surgical Mutilation, among other items, states “it is the policy of the United States that it will not fund, sponsor, promote, assist, or support the so-called ‘transition’ of a child from one sex to another, and it will rigorously enforce all laws that prohibit or limit these destructive and life-altering procedures.” This order is subject to at two legal challenges. See *Washington v. Trump*, (U.S. W.D. Wash., 2025) Case No. 2:25-cv-00244-LK ([granting in part a preliminary injunction](#)); *PFLAG Inc. v. Trump* (D. Md. 2025) [Case No. 1:25-cv-00337-BAH](#).

Executive Order [14201](#), “Keeping Men Out of Women’s Sports,” declared it the policy of the United States to rescind funding for educational programs “that deprive women and girls of fair athletic opportunities...” But see Educ. Code § [221.5\(f\)](#) which provides “A pupil shall be permitted to participate in sex-segregated school programs and activities, including athletic teams and competitions, and use facilities consistent with his or her gender identity, irrespective of the gender listed on the pupil’s records.” This executive order is subject to at least one legal challenge. See *Tirrell v. Edelbut* (U.S. D.N.H., 2025), [Case No. 1:24-cv-00251](#).

87. As a result of the Executive Orders, some, but not all, of the federal websites the previous memoranda for this study cited to have been changed, including removal of some content. When possible, the staff has found other sources for the information for this Tentative Recommendation.

1 referred to as “sex-plus discrimination.” Initially, the theory was that sex-plus
2 discrimination was not “sex discrimination.”⁸⁸

3 In *Phillips v. Martin Marietta Corporation*, the U.S. Supreme Court considered
4 a case in which an employer implemented different hiring policies for women and
5 men who had pre-school age children. The *per curiam* opinion stated:

6 Section 703(a) of the Civil Rights Act of 1964 requires that
7 persons of like qualifications be given employment opportunities
8 irrespective of their sex. The Court of Appeals therefore erred in
9 reading this section as permitting one hiring policy for women and
10 another for men—each having pre-school-age children. The existence
11 of such conflicting family obligations, if demonstrably more relevant
12 to job performance for a woman than for a man, could arguably be a
13 basis for distinction under s 703(e) of the Act. But that is a matter of
14 evidence tending to show that the condition in question ‘is a bona fide
15 occupational qualification reasonably necessary to the normal
16 operation of that particular business or enterprise.’⁸⁹

17 While this decision acknowledged that a hiring policy that treated mothers
18 differently from fathers could run afoul of the law, it also left open the possibility
19 that the policy could be justified as a bona fide occupational qualification. Justice
20 Marshall’s concurring opinion addressed the bona fide occupational qualification
21 exception and the need for the exception to be construed narrowly:

22 ...I cannot agree with the Court's indication that a ‘bona fide
23 occupational qualification reasonably necessary to the normal
24 operation of’ Martin Marietta's business could be established by a
25 showing that some women, even the vast majority, with pre-school-
26 age children have family responsibilities that interfere with job
27 performance and that men do not usually have such responsibilities.
28 Certainly, an employer can require that all of his employees, both men
29 and women, meet minimum performance standards, and he can try to
30 insure compliance by requiring parents, both mothers and fathers, to
31 provide for the care of their children so that job performance is not
32 interfered with.

33 But the Court suggests that it would not require such uniform
34 standards. I fear that in this case, where the issue is not squarely before
35 us, the Court has fallen into the trap of assuming that the Act permits

88. See B. Friedan, Testimony before the Senate Committee on the Judiciary (Jan. 29, 1970), available at <https://awpc.cattcenter.iastate.edu/2017/03/21/judge-carswell-and-the-sex-plus-doctrine-jan-29-1970/>.

89. (1971) 400 U.S. 542, 544.

1 ancient canards about the proper role of women to be a basis for
2 discrimination. Congress, however, sought just the opposite result.

3 By adding the prohibition against job discrimination based on sex
4 to the 1964 Civil Rights Act Congress intended to prevent employers
5 from refusing ‘to hire an individual based on stereotyped
6 characterizations of the sexes.’ Even characterizations of the proper
7 domestic roles of the sexes were not to serve as predicates for
8 restricting employment opportunity. The exception for a ‘bona fide
9 occupational qualification’ was not intended to swallow the rule.

10 That exception has been construed by the [EEOC], whose
11 regulations are entitled to ‘great deference,’ to be applicable only to
12 job situations that require specific physical characteristics necessarily
13 possessed by only one sex. Thus the exception would apply where
14 necessary ‘for the purpose of authenticity or genuineness’ in the
15 employment of actors or actresses, fashion models, and the like. If the
16 exception is to be limited as Congress intended, the Commission has
17 given it the only possible construction.

18 When performance characteristics of an individual are involved,
19 even when parental roles are concerned, employment opportunity may
20 be limited only by employment criteria that are neutral as to the sex
21 of the applicant.⁹⁰

22 The *Phillips* case is generally recognized as the beginning of courts recognizing
23 sex-plus discrimination as “sex discrimination” under Title VII.⁹¹ In a 2009 legal
24 journal article, the sex-plus doctrine under Title VII was summarized as follows:

25 Under Title VII, courts have recognized specific protections for
26 some “sex-plus” plaintiffs, that is, employees who are classified on
27 the basis of sex plus some ostensibly neutral characteristic. Minority
28 women, married women, and women with young children receive
29 special protection under the “sex-plus” doctrine but not all gender
30 subclasses are protected. To prevail on a “sex-plus” claim, a plaintiff
31 must demonstrate that individuals of the opposite sex who did not
32 possess the plaintiff’s additional characteristic were treated more
33 favorably.⁹²

90. Id. at 544-47 (Marshall, J., concurring) (citations omitted).

91. See, e.g., F. Valdes, Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex,” “Gender,” and “Sexual Orientation” in Euro-American Law and Society, [83 Calif. L. Rev. 1](#), 148 (1995).

92. L.C. Bornstein, Title VII of the Civil Rights Act of 1964, 10 *Geo. J. Gender & L.* 639, 643 (2009) (footnotes omitted). The example cited for a gender subclass that is not protected is men with long hair. Id. at n. 31 (citing *Willingham v. Macon Tel. Publ'g Co.* (5th Cir. 1975) 507 F.2d 1084, 1092).

1 The universe of characteristics constituting “plus” characteristics for the
2 purposes of this doctrine remain unclear, however. Court decisions from the years
3 following the *Phillips* decision declined to recognize certain “plus”
4 considerations,⁹³ and a recent Supreme Court decision suggests a broad view of the
5 types of characteristics that could be “plus” considerations.⁹⁴

Pregnancy Discrimination

6 The legal history of Title VII’s treatment of pregnancy has been more
7 complicated, involving both litigation and legislation.

8 This complication seems to arise, at least in part, because pregnancy can only be
9 experienced by certain workers.⁹⁵ As indicated below, courts seem to struggle to
10 identify to whom a worker claiming pregnancy discrimination should be
11 compared.⁹⁶ Viewed in one light, simply failing to address and accommodate
12 pregnancy in the workplace could be, as in the material quoted below, described as
13 facially nondiscriminatory, as the rule applies equally to everyone, but this ignores
14 the very real practical consequences that such a rule will fall entirely on pregnant
15 workers, a class that is necessarily circumscribed based on sex-based reproductive
16 traits.

17 In 1976, the U.S. Supreme Court considered whether an employer’s exclusion
18 of pregnancy-related disabilities from its disability insurance “package” constituted
19 sex discrimination under Title VII. The Court found, contrary to EEOC guidelines,
20 that this exclusion was not sex discrimination:

21 The “package” ... is facially nondiscriminatory in the sense that
22 “(t)here is no risk from which men are protected and women are not.
23 Likewise, there is no risk from which women are protected and men
24 are not.” ... For all that appears, pregnancy-related disabilities
25 constitute an additional risk, unique to women, and the failure to

93. See, e.g., *Smith v. Liberty Mut. Ins. Co.* (5th Cir. 1978) 569 F.2d 325, 327 (declining to find sex discrimination where “the claim is not that Smith was discriminated against because he was a male, but because as a male, he was thought to have those attributes more generally characteristic of females and epitomized in the descriptive ‘effeminate’”).

94. See, e.g., *Bostock v. Clayton County* (2020) 590 U.S. 644, 140 S.Ct. 1731, 1742 (“Nor does it matter that, when an employer treats one employee worse because of that individual’s sex, other factors may contribute to the decision. Consider an employer with a policy of firing any woman he discovers to be a Yankees fan. Carrying out that rule because an employee is a woman and a fan of the Yankees is a firing “because of sex” if the employer would have tolerated the same allegiance in a male employee.”).

95. See generally C.M Cahill, [The New Maternity](#), 133 Harv. L. Rev. 2221, 2284-88 (May 2020).

96. See generally W.W. Williams, Equality’s Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate, 13 N.Y.U. Rev. of L. & Social Change 325 (1984-85), available at https://socialchangenyu.com/wp-content/uploads/2017/12/WENDY-W.-VILLIAMS_RLSC_13.2.pdf.

1 compensate them for this risk does not destroy the presumed parity of
2 the benefits, accruing to men and women alike, which results from the
3 facially evenhanded inclusion of risks.⁹⁷

4 Not long after that decision, Congress amended Title VII by enacting the
5 Pregnancy Discrimination Act of 1978.⁹⁸ That Act included a provision that
6 expressly defined sex to include pregnancy. Specifically, the act added the following
7 language to the law:

8 The terms “because of sex” or “on the basis of sex” include, but
9 are not limited to, because of or on the basis of pregnancy, childbirth,
10 or related medical conditions; and women affected by pregnancy,
11 childbirth, or related medical conditions shall be treated the same for
12 all employment-related purposes, including receipt of benefits under
13 fringe benefit programs, as other persons not so affected but similar
14 in their ability or inability to work.....⁹⁹

15 Although this law now makes clear that pregnancy discrimination is sex
16 discrimination for the purposes of Title VII,¹⁰⁰ this law did not fully resolve the
17 obligations of employers with respect to pregnant employees, as can be seen in later
18 case law. In particular, courts were asked to consider the responsibility of an
19 employer, under this law, to provide accommodations to pregnant workers in their
20 workplace (e.g., a stool to avoid extended periods of standing) or assignments (e.g.,
21 light duty assignment to avoid heavy lifting).

22 In 2015, the U.S. Supreme Court considered a pregnancy discrimination claim
23 based on the employer’s failure to offer an accommodation to a pregnant employee.
24 In *Young v. United Parcel Service (UPS)*, the pregnant employee, a UPS driver, was
25 directed by medical practitioners not to lift more than 20 pounds, due to
26 pregnancy.¹⁰¹ This limitation conflicted with a general requirement of UPS that

97. *General Electric Co. v. Gilbert* (1976) 429 U.S. 125, 138-39 (citations omitted).

98. See [Pub. L. 95-555](#) (1978).

99. [42 U.S.C. § 2000e\(k\)](#).

100. See J.C. Suk, [Justice Ginsberg’s Cautious Legacy for the Equal Rights Amendment](#), 110 *Geo. L. J.* 1391, 1410-11 (2022) (“In the years following the ERA’s adoption by Congress, the number of women elected to Congress doubled, and they formed a bipartisan Congresswomen’s Caucus in 1977, which organized efforts to advance legislation on women’s issues, including pregnancy discrimination and the ERA deadline extension. Congress overruled *Gilbert v. General Electric* by adopting the Pregnancy Discrimination Act in 1978, in the same month that it voted to extend the ERA deadline. The statute provided that discrimination because of sex under Title VII encompassed discrimination because of pregnancy, childbirth, or related medical conditions. But the statutory intervention did not change the status of pregnancy discrimination under the Equal Protection Clause.” (citations omitted)).

101. *Young v. United Parcel Serv.* (2015) 575 U.S. 206, 211.

1 drivers be able to lift 70 pounds.¹⁰² Rather than offer an accommodation (e.g., a
2 temporary light duty assignment), UPS simply told Young that she could not work
3 while under a lifting restriction.¹⁰³ In assessing whether UPS’s practice of granting
4 accommodations to certain classes of workers (i.e., those injured on the job, those
5 with a disability covered by the Americans with Disabilities Act,¹⁰⁴ those who lost
6 their Department of Transportation certification), but not pregnant workers was
7 discriminatory,¹⁰⁵ the court stated:

8 In our view, the [Civil Rights] Act requires courts to consider the
9 extent to which an employer's policy treats pregnant workers less
10 favorably than it treats nonpregnant workers similar in their ability or
11 inability to work. And here — as in all cases in which an individual
12 plaintiff seeks to show disparate treatment through indirect evidence
13 — it requires courts to consider any legitimate, nondiscriminatory,
14 nonpretextual justification for these differences in treatment.
15 *Ultimately the court must determine whether the nature of the*
16 *employer's policy and the way in which it burdens pregnant women*
17 *shows that the employer has engaged in intentional discrimination.*¹⁰⁶

18 The decision indicates that the lower courts considered whether, as a pregnant
19 worker, Young was similarly situated to the workers granted accommodation under
20 UPS policy versus other injured workers who would not be granted

102. Id.

103. Id.

104. The decision indicates that the Americans with Disabilities Act (“ADA”) was amended in a manner that could affect the treatment of pregnancy-related disabilities. See id. at 218 (ADA “then protected only those with permanent disabilities”), 218-19 (“We note that statutory changes made after the time of Young’s pregnancy may limit the future significance of our interpretation of the Act. In 2008, Congress expanded the definition of ‘disability’ under the ADA to make clear that ‘physical or mental impairment[s] that substantially limi[t]’ an individual’s ability to lift, stand, or bend are ADA-covered disabilities. As interpreted by the EEOC, the new statutory definition requires employers to accommodate employees whose temporary lifting restrictions originate off the job.” (citation omitted)).

Later commentary (and enactment of the Pregnant Workers Fairness Act) indicates that, in practice, these 2008 ADA changes did not sufficiently address the law governing pregnancy-related accommodation. See A Better Balance, The Pregnant Workers Fairness Act Legal Backgrounder (updated Jan. 12, 2023), available at <https://www.abetterbalance.org/wp-content/uploads/2020/02/Long-Overdue-Primer-PWFA.pdf> (“[E]ven though Congress expanded the ADA in 2008 and in theory it should provide accommodations for workers with pregnancy-related disabilities, courts have interpreted the ADA Amendments Act in a way that did little to expand coverage even for those pregnant workers with serious health complications.

As one court recently concluded in 2018, “Although the 2008 amendments broadened the ADA’s definition of disability, these changes only have had a modest impact when applied to pregnancy-related conditions.” (citation omitted)).

105. *Young*, 575 U.S. at 211-212.

106. Id. at 210-11 (emphasis added and citation omitted).

1 accommodation.¹⁰⁷ While commentary indicates that the *Young v. UPS* decision was
2 an important step forward for pregnant workers because the decision indicates that
3 pregnancy accommodations may be required in some circumstances, the decision’s
4 multi-step balancing test for assessing when such accommodations must be
5 extended to pregnant employees left many questions unanswered.¹⁰⁸

6 The federal Pregnant Workers Fairness Act was enacted in 2022,¹⁰⁹ which
7 provided more clarity as to when employers are obligated to provide
8 accommodations to pregnant workers. Specifically, the Pregnant Workers Fairness
9 Act provides an employer must “make reasonable accommodations to the known
10 limitations [of an employee] related to the pregnancy, childbirth, or related medical
11 conditions...unless...the accommodation would impose an undue hardship on the”
12 employer’s business operations.¹¹⁰

Harassment

13 In describing the legal history regarding Title VII sex discrimination claims
14 based on harassment, Professor Reva B. Siegel wrote:

15 At first, courts simply refused to acknowledge that sexual
16 harassment had anything to do with employment discrimination on
17 the basis of sex. Sexual harassment was rejected as a personal matter
18 having nothing to do with work or a sexual assault that just happened
19 to occur at work. Alternatively, judges reasoned that sexual

107. Id. at 217-18 (summarizing the Fourth Circuit opinion and conclusions regarding to whom Young should be compared as follows:

[I]t believed that Young was different from those workers who were “disabled under the ADA” (which then protected only those with permanent disabilities) because Young was “not disabled”; her lifting limitation was only “temporary and not a significant restriction on her ability to perform major life activities.” Young was also different from those workers who had lost their DOT certifications because “no legal obstacle stands between her and her work” and because many with lost DOT certifications retained physical (i.e., lifting) capacity that Young lacked. And Young was different from those “injured on the job because, quite simply, her inability to work [did] not arise from an on-the-job injury.” Rather, Young more closely resembled “an employee who injured his back while picking up his infant child or ... an employee whose lifting limitation arose from her off-the-job work as a volunteer firefighter,” neither of whom would have been eligible for accommodation under UPS’ policies (citations omitted).

108. Nat’l Women’s Law Center, *The Pregnant Workers Fairness Act: Making Room for Pregnancy on the Job Factsheet* (Aug. 2021), available at <https://nwlc.org/wp-content/uploads/2021/02/PWFA-Making-Room-for-Pregnancy-v4.2-2021.pdf>; see also [Nat’l Partnership for Women and Families, *The Pregnant Workers Fairness Act Factsheet*](#) (Mar. 2021) ; see also L. Prine, L. Morris, & G. deFiebre, *Helping Pregnant Women Keep Their Jobs*, 94 *Am. Family Physician* 494 (Sept. 15, 2016), available at <https://www.aafp.org/dam/brand/aafp/pubs/afp/issues/2016/0915/p494.pdf>.

109. Pregnant Workers Fairness Act, enacted as part of H.R. 2617, 117th Cong. (2022), [Pub. L. No. 117-328](#); see also J.L. Grossman, *The Pregnant Workers Fairness Act: A Long-Awaited Victory for Pregnant Workers*, *Verdict from Justia* (Jan. 6, 2023) <https://verdict.justia.com/2023/01/06/the-pregnant-workers-fairness-act-a-long-awaited-victory-for-pregnant-workers>.

110. [H.R. 2617, Division II § 103\(1\)](#).

1 harassment was natural and inevitable and nothing that law could
2 reasonably expect to eradicate from work. But the central ground on
3 which courts resisted recognizing the claim was simply that sexual
4 harassment was not discrimination “on the basis of sex.” It could
5 happen to a man or woman or both; even if its harms were inflicted
6 on women only, they were not inflicted on all women, only those who
7 refused their supervisors’ advances.¹¹¹

8 This initial reluctance of courts to recognize harassment as sex discrimination is
9 similar to the issues discussed above (and relies on similar objections to those for
10 sex-plus discrimination claims, i.e., the harassment only affects a subclass of
11 women).

12 In the mid-1980s, U.S. Supreme Court case law recognized that, consistent with
13 EEOC guidelines, sexual harassment was a form of prohibited sex discrimination
14 under Title VII.¹¹² The decision describes the history leading up to the court’s
15 determination:

16 [I]n 1980 the EEOC issued Guidelines specifying that “sexual
17 harassment,” as there defined, is a form of sex discrimination
18 prohibited by Title VII. ... The EEOC Guidelines fully support the
19 view that harassment leading to noneconomic injury can violate Title
20 VII.

21 In defining “sexual harassment,” the Guidelines first describe the
22 kinds of workplace conduct that may be actionable under Title VII.
23 These include “[u]nwelcome sexual advances, requests for sexual
24 favors, and other verbal or physical conduct of a sexual nature.”
25 Relevant to the charges at issue in this case, the Guidelines provide
26 that such sexual misconduct constitutes prohibited “sexual
27 harassment,” whether or not it is directly linked to the grant or denial
28 of an economic quid pro quo, where “such conduct has the purpose or
29 effect of unreasonably interfering with an individual’s work
30 performance or creating an intimidating, hostile, or offensive working
31 environment.”

32 In concluding that so-called “hostile environment” (i.e., non quid
33 pro quo) harassment violates Title VII, the EEOC drew upon a
34 substantial body of judicial decisions and EEOC precedent holding

111. R.B. Siegel, Introduction: A Short History of Sexual Harassment to C.A. MacKinnon & R.B. Siegel, eds., *Directions in Sexual Harassment Law*, at 11 (2003) (citations omitted), available at https://law.yale.edu/sites/default/files/documents/pdf/Faculty/Siegel_IntroductionAShortHistoryOfSexualHarassmentLaw.pdf.

112. See *Meritor Sav. Bank v. Vinson* (1986) 477 U.S. 57.

1 that Title VII affords employees the right to work in an environment
2 free from discriminatory intimidation, ridicule, and insult. ...

3 Since the Guidelines were issued, courts have uniformly held, and
4 we agree, that a plaintiff may establish a violation of Title VII by
5 proving that discrimination based on sex has created a hostile or
6 abusive work environment.¹¹³

7 In more recent cases, the U.S. Supreme Court provided more detail as to what
8 harassment is actionable under Title VII, as well as addressing liability questions.¹¹⁴

9 In *Oncale v. Sundowner Offshore Services, Inc.*, the Court concluded that same-
10 sex sexual harassment claims are covered by Title VII's sex discrimination
11 prohibition.¹¹⁵ The decision provides some additional explanation as to what forms
12 of harassment could be sex discrimination:

13 Courts and juries have found the inference of discrimination easy
14 to draw in most male-female sexual harassment situations, because
15 the challenged conduct typically involves explicit or implicit
16 proposals of sexual activity; it is reasonable to assume those proposals
17 would not have been made to someone of the same sex. The same
18 chain of inference would be available to a plaintiff alleging same-sex
19 harassment, if there were credible evidence that the harasser was
20 homosexual. But harassing conduct need not be motivated by sexual
21 desire to support an inference of discrimination on the basis of sex. A
22 trier of fact might reasonably find such discrimination, for example,
23 if a female victim is harassed in such sex-specific and derogatory
24 terms by another woman as to make it clear that the harasser is
25 motivated by general hostility to the presence of women in the
26 workplace. A same-sex harassment plaintiff may also, of course, offer
27 direct comparative evidence about how the alleged harasser treated
28 members of both sexes in a mixed-sex workplace. Whatever
29 evidentiary route the plaintiff chooses to follow, he or she must
30 always prove that the conduct at issue was not merely tinged with
31 offensive sexual connotations, but actually constituted
32 "discrimina[tion] ... because of ... sex."¹¹⁶

113. Id. at 65-66 (citations omitted).

114. See, e.g., *Harris v. Forklift Sys., Inc.* (1993) 510 U.S. 17; *Burlington Industries, Inc. v. Ellerth* (1998) 524 U.S. 742.

115. *Oncale v. Sundowner Offshore Services, Inc.* (1998) 523 U.S. 75.

116. Id. at 80-81.

Sex/Gender Stereotype Discrimination

1 Another important legal development in employment discrimination law was the
2 U.S. Supreme Court’s 1989 decision in *Price Waterhouse v. Hopkins*, a case
3 involving a claim of sex discrimination based on the imposition of sex or gender
4 stereotypes. As indicated below, these stereotypes can involve differentiated
5 behavior expectations or dress and grooming standards for employees.

6 In *Price Waterhouse v. Hopkins*, the Court found that Title VII’s prohibition on
7 sex discrimination covered discrimination due to failure to conform to sex
8 stereotypes.¹¹⁷

9 In that case, the plaintiff, Ms. Hopkins, had been advised to “walk more
10 femininely, talk more femininely, dress more femininely, wear make-up, have her
11 hair styled, and wear jewelry” to improve her chances for partnership.¹¹⁸ The
12 plurality opinion stated:

13 It takes no special training to discern sex stereotyping in a
14 description of an aggressive female employee as requiring “a course
15 at charm school.” Nor, turning to Thomas Beyer’s memorable advice
16 to Hopkins, does it require expertise in psychology to know that, if an
17 employee’s flawed “interpersonal skills” can be corrected by a soft-
18 hued suit or a new shade of lipstick, perhaps it is the employee’s sex
19 and not her interpersonal skills that has drawn the criticism.

20 ...

21 The District Judge acknowledged that Hopkins’ conduct justified
22 complaints about her behavior as a senior manager. But he also
23 concluded that the reactions of at least some of the partners were
24 reactions to her as a *woman* manager. Where an evaluation is based
25 on a subjective assessment of a person’s strengths and weaknesses, it
26 is simply not true that each evaluator will focus on, or even mention,
27 the same weaknesses. Thus, even if we knew that Hopkins had
28 “personality problems,” this would not tell us that the partners who
29 cast their evaluations of Hopkins in sex-based terms would have
30 criticized her as sharply (or criticized her at all) if she had been a man.
31 It is not our job to review the evidence and decide that the negative
32 reactions to Hopkins were based on reality; our perception of Hopkins’
33 character is irrelevant. We sit not to determine whether Ms. Hopkins
34 is nice, but to decide whether the partners reacted negatively to her
35 personality because she is a woman.¹¹⁹

117. (1989) 490 U.S. 228.

118. *Id.* at 235.

119. *Id.* at 256-58.

1 Later cases applying the reasoning in *Price Waterhouse* concluded Title VII’s
2 sex discrimination protection should be understood to encompass gender and sexual
3 orientation discrimination, as these forms of discrimination involve a failure to
4 conform to expectations and stereotypes based on sex.¹²⁰ In a more recent U.S.
5 Supreme Court case, discussed below, the Court determined that sexual orientation
6 and gender discrimination are “sex discrimination” for the purposes of Title VII.

Sexual Orientation and Gender Identity Discrimination

7 In 2020, the U.S. Supreme Court considered three consolidated cases involving
8 claims of employment discrimination on the basis of sexual orientation and gender
9 identity.¹²¹ In *Bostock v. Clayton County*, the Court concluded that such
10 discrimination was prohibited sex discrimination under Title VII.

11 The statute's message for our cases is equally simple and
12 momentous: An individual's homosexuality or transgender status is
13 not relevant to employment decisions. That's because it is impossible
14 to discriminate against a person for being homosexual or transgender
15 without discriminating against that individual based on sex. Consider,

120. See, e.g., *Schwenck v. Hartford* (9th Cir. 2000) 204 F.3d 1187, 1202 (“Thus, under *Price Waterhouse*, ‘sex’ under Title VII encompasses both sex — that is, the biological differences between men and women — and gender. Discrimination because one fails to act in the way expected of a man or woman is forbidden under Title VII.”); *Glenn v. Brumby* (11th Cir. 2011) 663 F.3d 1312, 1317 (“Accordingly, discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it’s described as being on the basis of sex or gender. Indeed, several circuits have so held. ... These instances of discrimination against plaintiffs because they fail to act according to socially prescribed gender roles constitute discrimination under Title VII according to the rationale of *Price Waterhouse*.”); *Macy v. Holder* (April 20, 2012) EEOC Appeal No. 0120120821, 2012 WL 1435995, at *7 (“Since *Price Waterhouse*, courts have widely recognized the availability of the sex stereotyping theory as a valid method of establishing discrimination ‘on the basis of sex’ in many scenarios involving individuals who act or appear in gender-nonconforming ways. And since *Price Waterhouse*, courts also have widely recognized the availability of the sex stereotyping theory as a valid method of establishing discrimination ‘on the basis of sex’ in scenarios involving transgender individuals.” (footnote omitted)); *Baldwin v. Foxx* (July 16, 2015) EEOC Appeal No. 0120133080, 2015 WL 4397641, at *7–8 (“Sexual orientation discrimination also is sex discrimination because it necessarily involves discrimination based on gender stereotypes. In the wake of *Price Waterhouse*, courts and the Commission have recognized that lesbian, gay, and bisexual individuals can bring claims of gender stereotyping under Title VII if such individuals demonstrate that they were treated adversely because they were viewed — based on their appearance, mannerisms, or conduct — as insufficiently ‘masculine’ or ‘feminine.’ But as the Commission and a number of federal courts have concluded in cases dating from 2002 onwards, discrimination against people who are lesbian, gay, or bisexual on the basis of gender stereotypes often involves far more than assumptions about overt masculine or feminine behavior.

Sexual orientation discrimination and harassment ‘[are] often, if not always, motivated by a desire to enforce heterosexually defined gender norms.’” (footnotes omitted)); see also cases identified at <https://www.eeoc.gov/wysk/examples-court-decisions-supporting-coverage-lgbt-related-discrimination-under-title-vii>.

See also generally S. Buchert, Alliance for Justice Blog Post, *Price Waterhouse v. Hopkins* at Thirty (May 1, 2019), <https://www.afj.org/article/price-waterhouse-v-hopkins-at-thirty/>.

121. *Bostock v. Clayton County* (2020) 590 U.S. 644.

1 for example, an employer with two employees, both of whom are
2 attracted to men. The two individuals are, to the employer's mind,
3 materially identical in all respects, except that one is a man and the
4 other a woman. If the employer fires the male employee for no reason
5 other than the fact he is attracted to men, the employer discriminates
6 against him for traits or actions it tolerates in his female colleague. Put
7 differently, the employer intentionally singles out an employee to fire
8 based in part on the employee's sex, and the affected employee's sex
9 is a but-for cause of his discharge. Or take an employer who fires a
10 transgender person who was identified as a male at birth but who now
11 identifies as a female. If the employer retains an otherwise identical
12 employee who was identified as female at birth, the employer
13 intentionally penalizes a person identified as male at birth for traits or
14 actions that it tolerates in an employee identified as female at birth.
15 Again, the individual employee's sex plays an unmistakable and
16 impermissible role in the discharge decision.¹²²

17 Prior to and since the *Bostock* decision, there have been efforts to amend Title
18 VII to expressly list sexual orientation and gender identity as prohibited grounds for
19 discrimination.¹²³

20 In early 2021, after the *Bostock* decision, former President Biden issued an
21 executive order addressing SOGI discrimination. That order provided, in part:

22 All persons should receive equal treatment under the law, no
23 matter their gender identity or sexual orientation.

24 These principles are reflected in the Constitution, which promises
25 equal protection of the laws. These principles are also enshrined in
26 our Nation's anti-discrimination laws, among them Title VII of the
27 Civil Rights Act of 1964, as amended. In *Bostock v. Clayton County*,
28 the Supreme Court held that Title VII's prohibition on discrimination
29 "because of . . . sex" covers discrimination on the basis of gender
30 identity and sexual orientation. Under *Bostock's* reasoning, laws that
31 prohibit sex discrimination — including Title IX of the Education
32 Amendments of 1972, as amended, the Fair Housing Act, as amended,
33 and section 412 of the Immigration and Nationality Act, as amended,
34 along with their respective implementing regulations — prohibit
35 discrimination on the basis of gender identity or sexual orientation, so
36 long as the laws do not contain sufficient indications to the contrary.

122. (2020) 590 U.S. 644 at 660.

123. See generally Federal Register, Preventing and Combating Discrimination on the Basis of Gender
Identity or Sexual Orientation, (2021), available at
<https://www.federalregister.gov/documents/2021/01/25/2021-01761/preventing-and-combating-discrimination-on-the-basis-of-gender-identity-or-sexual-orientation>.

1 Discrimination on the basis of gender identity or sexual orientation
2 manifests differently for different individuals, and it often overlaps
3 with other forms of prohibited discrimination, including
4 discrimination on the basis of race or disability. For example,
5 transgender Black Americans face unconscionably high levels of
6 workplace discrimination, homelessness, and violence, including fatal
7 violence.

8 It is the policy of my Administration to prevent and combat
9 discrimination on the basis of gender identity or sexual orientation,
10 and to fully enforce Title VII and other laws that prohibit
11 discrimination on the basis of gender identity or sexual orientation. It
12 is also the policy of my Administration to address overlapping forms
13 of discrimination.¹²⁴

14 The order directed federal agencies to review agency actions (including regulations
15 and policies) to “fully implement statutes that prohibit sex discrimination and the
16 policy set forth in section 1 of this order [reproduced, in part, above].”¹²⁵

CALIFORNIA STATUTES RELATED TO SEX DISCRIMINATION

17 California broadly prohibits sex discrimination, and this is reflected through the
18 passage of various bills that expressly protect “sex” and related categories. For
19 instance, Assembly Bill 887 (Atkins 2011) made changes across several codes
20 (Government, Civil, Labor, and Insurance Codes) regarding the scope of certain
21 anti-discrimination protections to make clear that these protections covered gender
22 identity and gender expression.

23 California law use inconsistent terms in identifying the scope of the protection,
24 though. For instance, the Education Code includes provisions governing “sex-
25 segregated” activities and “single gender” schools.

26 Despite various smaller differences across its anti-discrimination provisions,
27 California law in general, broadly extends protections for sex and gender.

124. Exec. Order No. 13988, § 1, 86 Fed. Reg. 7023 (Jan. 20, 2021), available at <https://www.federalregister.gov/documents/2021/01/25/2021-01761/preventing-and-combating-discrimination-on-the-basis-of-gender-identity-or-sexual-orientation>

125. Id. § 2(b). For examples of agency actions consistent with this directive, see, e.g., U.S. Dep’t of Justice Memorandum from Principal Deputy Assistant Attorney General Pamela S. Karlan, re Application of *Bostock v. Clayton County* to Title IX of the Education Amendments of 1972 (Mar. 26, 2021), available at <https://www.ed.gov/sites/ed/files/about/offices/list/ocr/docs/202106-titleix-noi.pdf>; U.S. Dep’t of Food and Ag. Food and Nutrition Serv. Policy Memo CRD 01-2022, Application of *Bostock v. Clayton County* to Program Discrimination Complaint Processing – Policy Update (May 5, 2022), available at <https://www.fns.usda.gov/cr/crd-01-2022>.

1 California’s commitment can be seen across two decades of efforts expressly
2 including and defining language to extend the widest level of protections.

Gender Nondiscrimination Act (AB 887 (Atkins 2011))

3 In 2011, the Legislature enacted Assembly Bill 887, the Gender
4 Nondiscrimination Act.¹²⁶ This bill amended numerous provisions in the California
5 Codes requiring equal rights and opportunities in various areas, including education,
6 housing, and employment, regardless of gender and prohibit discrimination based
7 on specified characteristics, including sex and gender.¹²⁷ The bill defined “gender”
8 to mean a person’s gender identity and gender expression.¹²⁸ AB 887 also amended
9 prohibitions on discrimination to expressly include gender, gender identity, and
10 gender expression among the enumerated protected characteristics.¹²⁹

11 For example, the Gender Nondiscrimination Act amended the Unruh Civil
12 Rights Act¹³⁰ to clarify that “sex” includes “gender” and that “gender,” in turn,
13 includes a “person’s gender identity and gender expression.”¹³¹

14 The goal of the Gender Nondiscrimination Act, as described by the bill’s author,
15 then-Assembly Member Toni Atkins, was to reduce uncertainty and ambiguity
16 about the scope of the protections of California’s anti-discrimination laws by
17 expressly protecting gender identity and gender expression.¹³² An analysis of the bill
18 noted that “[w]hile the Unruh Act and other similar anti-discrimination statutes
19 protect non-enumerated classifications such as transgender[] Californians, this fact
20 is not always known by those the law was intended to protect, or by employers,
21 housing authorities, and others vested with the responsibility of ensuring that current
22 anti-discrimination laws are enforced.”¹³³

23 Thus, this legislation clarifies that “gender identity” and “gender expression” are
24 expressly protected categories under the Unruh Civil Rights Act and other anti-

126. [2011 Cal. Stat. ch. 719](#); see also [Senate Judiciary Committee Analysis of AB 887](#) (Jun. 13, 2011), p. 6 (quoting bill author).

127. [2011 Cal. Stat. ch. 719](#).

128. The bill also defined “gender expression” to mean “a person’s gender-related appearance and behavior whether or not stereotypically associated with the person’s assigned sex at birth.” See, e.g., [2011 Cal. Stat. ch. 719](#), § 1 (amending Civil Code Section 51).

129. *Id.*

130. [Civ. Code § 51](#).

131. Civ. Code § [51](#), as amended by [2011 Cal. Stat. ch. 719](#), § 1. “Gender expression” is also defined to mean “a person’s gender-related appearance and behavior whether or not stereotypically associated with the person’s assigned sex at birth.” *Id.*

132. See [Assembly Floor Analysis of AB 887](#) (Aug. 31, 2011), pp. 2-3 (quoting bill author).

133. *Id.* at p. 2.

1 discrimination statutes in California,¹³⁴ some of which are discussed individually
2 below.

Fair Employment and Housing Act

3 In general, California’s Fair Employment and Housing Act (“FEHA”) prohibits
4 employment discrimination on the basis of “sex, gender, gender identity, gender
5 expression...and sexual orientation.”¹³⁵ The Act also prohibits the owner of any
6 housing accommodation from discriminating or harassing any person based on
7 those traits.¹³⁶

General Protections under FEHA Relating to Scope of “Sex” and “Gender”

8 When the FEHA was enacted, it prohibited discrimination because of sex,¹³⁷ but
9 did not define the term sex.¹³⁸ Subsequent amendments added a definition of sex
10 that included pregnancy and related issues¹³⁹ and amended the protection against
11 discrimination to expressly cover sexual orientation and added a definition of sexual
12 orientation.¹⁴⁰

13 In 2003, Assembly Bill 196 clarified that the scope of sex discrimination and
14 harassment prohibited under the FEHA includes discrimination and harassment
15 based on the person’s gender. Specifically, AB 196 expanded “the prohibition on

134. See [Lab. Code § 3600\(c\)](#) in which the addition of AB 887 clarified that in the scope of conditions for workers’ compensation liability “no personal connection can be deemed to exist between the employee and the third party based solely on the third party’s personal belief relating to their perception of the employee’s ... sex, gender, gender identity, gender expression, or sexual orientation”; see also Ins. Code §§ [676.10](#), [10140](#), [10140.2](#), and [12693.28](#) in which AB 887 amended provisions that define “gender,” including Section 10140 which states that “no admitted insurer, licensed to issue life or disability insurance, shall fail or refuse to accept an application for that insurance, to issue that insurance to an applicant therefor, or issue or cancel that insurance, under conditions less favorable to the insured than in other comparable cases, except for reasons applicable alike to persons of every race, color, religion, sex, gender, gender identity, gender expression, national origin, ancestry, or sexual orientation.”

135. Gov’t Code § [12940](#); see also id. § 12940(j)(1) (noting that in addition to prohibiting discrimination, the FEHA also prohibits harassment because of these characteristics); [42 U.S.C. § 2000e](#) (describing similar protections under federal law).

136. [Gov’t Code § 12955](#).

137. The law also prohibited discrimination because of “race, religious creed, color, national origin, ancestry, physical handicap, medical condition, [and] marital status.” See, e.g., [Gov’t Code § 12940](#), as added by 1980 Cal. Stat. ch. 992, § 4.

138. See, e.g., [Gov’t Code §§ 12925-12928](#) (definitions); [12940](#) (governing employment discrimination); [12955](#) (governing housing discrimination), as added by 1980 Cal. Stat. ch. 992, § 4; see also Gov’t Code § [12945](#) (providing employment protections for pregnancy, childbirth, and related medical conditions), as added by 1980 Cal. Stat. ch. 992, § 4.

139. [1990 Cal. Stat. ch. 15](#), § 1.

140. [1999 Cal. Stat. ch. 592](#), §§ 3.7, 7.5.

1 sexual discrimination and harassment by including gender, as defined, in the
2 definition of sex.”¹⁴¹

3 AB 196’s author, Assembly Member Mark Leno, noted the importance of this
4 bill given the effect that gender-based discrimination has on one’s ability to obtain
5 housing and employment. Assembly Member Leno also stated that the intention of
6 this bill was to protect transgender individuals, as well as those who do not “possess
7 traits or project conduct stereotypically associated with his or her sex.”¹⁴²

8 Importantly, AB 887, the Gender Nondiscrimination Act, also requires an
9 employer to allow an employee to appear or dress “consistently with the employee’s
10 gender expression.”¹⁴³ This contrasts with previous statutory language requiring
11 “consisten[cy] with the employee’s gender identity.”¹⁴⁴

Pregnancy-Related Protections

12 As indicated above, FEHA offers protections against discrimination for
13 pregnancy and related conditions. Originally, some of these pregnancy protections
14 used gender-specific language (e.g., referring to a pregnant “female employee”).¹⁴⁵

15 In 2017, FEHA was amended to use more inclusive language for the pregnancy-
16 related provisions. Assembly Bill 1556 revised the FEHA provisions for pregnancy-
17 related employment protections by deleting gender-specific personal pronouns and
18 making these provisions gender neutral. More specifically, the bill deleted
19 references to “female person” and “female employee,” replacing them with
20 “person” and “employee.”¹⁴⁶

21 The bill’s author, Assembly Member Mark Stone, noted that AB 1556 was
22 consistent with “previous legislative efforts to remove gender-specific terms from
23 California’s Codes, and is consistent with the FEHA’s goals of ensuring that the Act
24 is broadly construed.”¹⁴⁷ The analysis also notes that, without AB 1556, the FEHA
25 would be inconsistent with California’s Unruh Civil Rights Act. Prior to AB 1556,
26 the FEHA protected pregnant individuals through gender-specific language, despite
27 the fact that the Unruh Act prohibits discrimination based on gender identity. Given

141. Legislative Counsel’s Digest for [AB 196](#), 2003 Cal. Stat. ch. 164; see also [2003 Cal. Stat. ch. 164](#), § 1.

142. [Assembly Committee on Labor and Employment Analysis of AB 196](#) (Mar. 18, 2003), p. B (quoting bill author).

143. Legislative Counsel’s Digest for [AB 887](#), 2011 Cal. Stat. ch. 719.

144. Id.

145. See, e.g., [Gov’t Code § 12945](#), as amended by 2011 Cal. Stat. ch. 678, § 1.5.

146. [2017 Cal. Stat. ch. 799](#).

147. [Assembly Floor Analysis of AB 1556](#) (Aug. 31, 2017), p. 1 (quoting bill author).

1 the broader policy considerations supporting the use of gender-neutral terms in the
2 FEHA generally, the bill analysis notes that “it makes sense to apply that change
3 across the breadth of the Act, rather than merely limiting that change to a few
4 provisions of the Act.”¹⁴⁸ Thus, this bill replaced *all* gender-specific references in
5 the FEHA with gender-neutral language.

6 Along these lines, a later bill analysis notes that “California is moving toward
7 greater recognition that a rigid, fixed, and binary conception of gender neither
8 describes reality well nor promotes the truest and fullest expressions of
9 ourselves.”¹⁴⁹ This changing understanding is reflected in California’s civil rights
10 laws that prohibit discrimination on the grounds of gender identity.¹⁵⁰ With these
11 amendments, the FEHA would be consistent with this approach by ensuring the
12 statutory language does not “in and of itself exclude people who are not, or do not
13 identity, as male or female,” thereby producing “a more inclusive and respectful
14 civil rights statute.”¹⁵¹

Educational Equity

15 California protections against discrimination in education are found in the
16 “Educational Equity” chapter of the Education Code.¹⁵² Section 220 specifically
17 provides:

18 [n]o person shall be subjected to discrimination on the basis of
19 disability, gender, gender identity, gender expression ... or any other
20 characteristic that is contained in the definition of hate crimes set forth
21 in Section 422.55 of the Penal Code ... in any program or activity
22 conducted by an educational institution that receives, or benefits from,
23 state financial assistance, or enrolls pupils who receive state student
24 financial aid.¹⁵³

148. [Senate Committee on Judiciary Analysis of AB 1556](#) (Jun. 12, 2017), p. 5 (noting how the bill author agreed to accept amendments in Committee that replaced all gender-specific references in FEHA with gender-neutral language).

149. [Senate Floor Analysis of AB 1556](#) (Jun. 21, 2017), p. 2.

150. *Id.* (describing the importance of the bill in remedying previous inconsistency in California’s civil rights laws that prohibited discrimination on the grounds of gender identity but only expressly extended workplace protection against discrimination to “female” employees who were pregnant).

151. *Id.*

152. [Educ. Code §§ 220-270](#). Federal Title IX has protections that may also apply to California educational institutions if they receive federal funding. In addition, California law mandates school districts adopt policies prohibiting discrimination, harassment, intimidation and bullying based on the above categories at school or in any other school activity. See [Educ. Code § 234.1](#).

153. Although the language of this provision does not include the term “sex,” [Education Code Section 210.7](#) defines “gender” to mean “sex.”

Protection of Gender

1 As indicated above, the discrimination protections in Education Code Section
2 220 expressly apply to gender, which is defined to mean in part, sex. In the
3 Education Code provisions, “gender” seems to be the more commonly used term,
4 but different provisions may also refer to “sex.”

5 Prior to 2007, Education Code Section 220 expressly prohibited discrimination
6 on the basis of sex.¹⁵⁴

7 In 2007, Senate Bill 777 (Kuehl) revised the list of prohibited bases of
8 discrimination. Most notable for the Commission’s work is that this legislation
9 removed the term “sex” and added the term “gender.”¹⁵⁵ The bill also added a
10 definition of the term “gender” to mean “sex, and include[] a person’s gender
11 identity and gender related appearance and behavior whether or not stereotypically
12 associated with the person’s assigned sex at birth.”¹⁵⁶

13 The bill analysis indicates that these changes were needed to provide “better
14 guidance by creating consistency among the statutes prohibiting various forms of
15 discrimination by revising the list of prohibited bases of discrimination” in the
16 Education Code.¹⁵⁷ Another reason cited for the changes was to ensure consistency
17 with the protected characteristics identified in the hate crimes statute.¹⁵⁸

18 In addition to amending lists of protected characteristics to include “gender,” SB
19 777 also expressly included “sexual orientation,” which it defined as
20 “heterosexuality, homosexuality, or bisexuality.”¹⁵⁹ The inclusion of a definition for
21 “sexual orientation” also made the language consistent with the hate crimes
22 statute.¹⁶⁰

The referenced Penal Code provision includes actual or perceived gender and sexual orientation. See [Pen. Code § 422.55\(a\)\(2\), \(6\)](#).

Discrimination also includes harassment. See [Educ. Code § 231.5](#) (“[P]ursuant to Section 200, that all persons, regardless of their sex, should enjoy freedom from discrimination of any kind in the educational institutions of the state. The purpose of this section is to provide notification of the prohibition against sexual harassment as a form of sexual discrimination and to provide notification of available remedies.”).

154. [Educ. Code § 220](#), as amended by 2004 Cal. Stat. ch. 700, § 3.

155. [SB 777](#), 2007 Cal. Stat. ch. 569, § 11.

The bill also made other terminology changes related to educational equity. For instance, the bill modified the terminology related to disabled individuals, replacing references to “handicapped pupils” with references to “pupils with disabilities.” See Legislative Counsel’s Digest for SB 777, 2007 Cal. Stat. ch. 569.

156. [SB 777](#), 2007 Cal. Stat. ch. 569, § 4 (adding Educ. Code § 210.7).

157. [Assembly Floor Analysis of SB 777](#) (Sept. 7, 2007), p. 2 (describing the effect of the bill).

158. Id.; see also [Pen. Code § 422.55](#).

159. [SB 777](#), 2007 Cal. Stat. ch. 569, §§ 9 (adding definition of “sexual orientation”), 11 (amending Educ. Code § 220 to include sexual orientation).

160. Id.; see also [Pen. Code §§ 422.55\(a\)\(6\), 422.56\(h\)](#).

1 In 2011, AB 887, the Gender Nondiscrimination Act, further amended Education
2 Code Section 220 (and a number of other related provisions)¹⁶¹ to expressly include
3 gender identity and gender expression as protected categories.¹⁶² This bill also
4 amended the definition of “gender” in Education Code Section 210.7 to expressly
5 include “gender expression” and to define “gender expression” as “a person’s
6 gender-related appearance and behavior whether or not stereotypically associated
7 with the person’s assigned sex at birth.”¹⁶³

8 Thus, within the Education Code, California has supported its goals of extending
9 broad protections by amending statutory language to include “gender” and to
10 expressly include gender identity, gender expression, and sexual orientation as
11 protected characteristics.

Sex-Segregated and Single-Gender Schools

12 As noted above, different Education Code provisions vary in their use of the
13 terms “sex” and “gender.” For instance, the Education Code includes provisions on
14 both sex-segregated and single-gender schools.

15 Education Code Section 221.5 notes that general state policy is that “elementary
16 and secondary school classes and courses, including nonacademic and elective
17 classes and courses, be conducted, without regard to the sex of the pupil enrolled in
18 these classes and courses.”¹⁶⁴

19 Education Code Section 232.2, added by AB 23 in 2017, permits Los Angeles
20 Unified School District¹⁶⁵ to maintain existing single-gender schools and classes for
21 enrollment, consistent with Title IX rules.¹⁶⁶ AB 23 was sought by the Los Angeles

161. See [Educ. Code §§ 200, 210.2, 210.7, 220, 47605.6, 51007, 66260.6, 66260.7](#), and [66270](#); see also [id. § 47605\(e\)\(1\)](#) (prohibiting charter schools from discriminating on student’s actual or perceived sex, gender, sexual orientation, and gender identity or expression).

162. [AB 887](#), 2011 Cal. Stat. ch. 719.

163. [AB 877](#), 2011 Cal. Stat. ch. 719, § 4. The pre-existing definition of “gender” from [SB 777](#) (2007) expressly included gender identity. See [Educ. Code § 210.7](#), as added by 2007 Cal. Stat. ch. 569, § 4.

164. [Educ. Code § 221.5\(a\)](#).

165. By its terms, [Education Code Section 232.2](#) currently applies to “a school district with an average daily attendance of 250,000 or more pupils.” The legislative history of this provision indicates that the only school district that would meet the specified attendance threshold is Los Angeles Unified. See [Senate Judiciary Committee Analysis of AB 23](#) (Jul. 17, 2017), p. 6. (describing attendance threshold of 400,000 and presenting data that show that “this bill’s provisions would only apply to the Los Angeles Unified School District for the foreseeable future.”); [Senate Floor Analysis of SB 913](#) (Aug. 22, 2022), p. 6 (“Los Angeles Unified School District (LAUSD) is the only school district in the state with an ADA of 250,000 or more. As mentioned in the author’s statement, LAUSD’s ADA has declined and has dropped below 400,000; therefore it is necessary to adjust the ADA threshold in certain statutes to maintain LAUSD’s use of flexibility provided by those statutes.”); see also 2022 Cal. Stat. ch. 920 ([SB 913](#) (Hertzberg)).

166. [AB 23](#), 2017 Cal. Stat. ch. 654.

1 Unified School District after the District was denied a waiver from the State Board
2 of Education to operate an all-girl school focused on STEM classes (to address
3 under-enrollment of girls in STEM).¹⁶⁷ However, the provisions authorizing single-
4 gender schools and classes to continue are set to repeal January 1, 2031, by their
5 own terms.¹⁶⁸

6 As compared to other anti-discrimination laws, the Education Code provisions
7 are somewhat unusual in that they more commonly use the term “gender,” as a
8 replacement for the term “sex.”

Athletics and School Facilities

9 Concerns about sex and gender equity in schools extend include extracurricular
10 activities, in particular, school athletics, and access to facilities (e.g., bathrooms and
11 locker rooms). Although equity in athletics and facilities has been a concern for
12 some time, especially involving opportunities for girls and young women to
13 participate in school sports,¹⁶⁹ much of the recent attention on school athletics and
14 facilities has focused specifically on transgender students.

15 Education Code Section 221.5 requires a student be permitted to “participate in
16 sex-segregated school programs and activities, including athletic teams and
17 competitions, and use facilities consistent with their gender identity, irrespective of
18 the gender listed on the student’s records.”¹⁷⁰ This provision was added by
19 Assembly Bill 1266 (Ammiano) in 2013.¹⁷¹ Assembly Member Ammiano described
20 the need for this legislation:

21 Although current California law already protects students from
22 discrimination in education based on sex and gender identity, many
23 school districts do not understand and are not presently in compliance
24 with their obligations to treat transgender students the same as all
25 other students in the specific areas addressed by this bill.

167. See [Assembly Committee on Education Analysis of AB 23](#) (Mar. 13, 2017), p. 2.

168. [Educ. Code § 232.6](#).

169. See generally U.S. Government Accountability Office, Report on K-12 Education: High School Sports Access and Participation, GAO-17-754R, p. 1 (Sept. 14, 2017), available at <https://www.gao.gov/assets/gao-17-754r.pdf> (“Organized sports have long been a part of the American high school experience for boys. However, the same has not been historically true for girls, who began playing high school sports in large numbers only after the passage of Title IX of the 1972 Education Amendments (Title IX).”); U.S. Government Accountability Office, [Intercollegiate Athletics: Status of Efforts to Promote Gender Equity](#), GAO/HEHS-97-10, p. 1 (Oct. 1997) (“More than 100,000 American women now participate in intercollegiate athletics each year. This is a four-fold increase since enactment of title IX of the Education Amendments of 1972.”).

170. [Educ. Code § 221.5\(f\)](#).

171. [AB 1266](#), 2013 Cal. Stat. ch. 85, § 1.

1 As a result, some school districts are excluding transgender students
2 from sex-segregated programs, activities and facilities. Other school
3 districts struggle to deal with these issues on an ad hoc basis. Current
4 law is deficient in that it does not provide specific guidance about how
5 to apply the mandate of non-discrimination in sex-segregated
6 programs, activities and facilities.

7 The Education Code also includes several other provisions relating to equal
8 access to athletics or facilities, but these provisions have been largely unchanged
9 since the late 1970s or early 1980s.¹⁷² The terminology used in these older
10 provisions (i.e., using the terms “sex” or “male” and “female” students) is notably
11 different from other Education Code provisions that expressly refer to “gender.”

Pregnancy and Childbirth

12 Education Code Section 221.51 provides for the treatment of pregnant and
13 parenting pupils:

14 (a) A local educational agency shall not apply any rule concerning
15 a pupil’s actual or potential parental, family, or marital status that
16 treats pupils differently on the basis of sex.

17 (b) A local educational agency shall not exclude nor deny any
18 pupil from any educational program or activity, including class or
19 extracurricular activity, solely on the basis of the pupil’s pregnancy,
20 childbirth, false pregnancy, termination of pregnancy, or recovery
21 therefrom.

22 Education Code Section 221.51 was added by Assembly Bill 2289 (Weber
23 2018). In addition to the provisions above related to equal treatment and access, the
24 bill declares that “pregnant and parenting pupils are entitled to accommodations that
25 provide them with the opportunity to succeed academically while protecting their
26 health and the health of their children.”¹⁷³ The bill’s authors noted that this bill,
27 consistent with the protections of Title IX and California’s Sex Equity in Education
28 Act, would help to ensure all students’ rights to equal and educational opportunities,
29 regardless of sex.¹⁷⁴ AB 2289 “codifies federal and state regulations that outline
30 specific sex discrimination prohibitions in the context of pregnant and parenting

172. See, e.g., [Educ. Code § 231](#) (allowing separate bathroom, locker room, and living facilities for different sexes, so long as the facilities are comparable); see also id. §§ [221.7](#), [230](#).

173. Legislative Counsel’s Digest for [AB 2289](#), 2018 Cal. Stat. ch. 942.

174. [Assembly Floor Analysis of AB 2289](#) (May 26, 2018), p. 3 (quoting bill author).

1 students,” thereby helping to provide more consistent protections for these
2 students.¹⁷⁵

Unruh Civil Rights Act

3 In addition to the protections for employment, housing, and education,
4 California law also includes anti-discrimination provisions applicable to business
5 establishments.

6 Civil Code Section 51, also known as the Unruh Civil Rights Act, provides, in
7 part, that:

8 [a]ll persons within the jurisdiction of this state are free and equal, and
9 no matter what their sex, race, color, religion, ancestry, national
10 origin, disability, medical condition, genetic information, marital
11 status, sexual orientation, citizenship, primary language, or
12 immigration status are entitled to the full and equal accommodations,
13 advantages, facilities, privileges, or services in all business
14 establishments of every kind whatsoever.¹⁷⁶

15 As indicated above, this provision expressly prohibits discrimination on the
16 bases of both sex and sexual orientation. “Sex,” under this Act, is defined as
17 including, but not limited to, “pregnancy, childbirth, or medical conditions related
18 to pregnancy or childbirth,” as well as “a person’s gender.”¹⁷⁷ “Gender” is, in turn,
19 defined to include “a person’s gender identity and gender expression.”¹⁷⁸ “Sexual
20 orientation” is defined, by reference to the definition in the FEHA (discussed
21 previously), to mean “heterosexuality, homosexuality, and bisexuality.”¹⁷⁹

22 For the purpose of the Act, the protections for the listed categories (e.g., sex and
23 sexual orientation) include protections from different treatment due to a “perception
24 that the person has any particular characteristic or characteristics within the listed
25 categories or that the person is associated with a person who has, or is perceived to
26 have, any particular characteristic or characteristics within the listed categories.”¹⁸⁰

175. [Senate Floor Analysis of AB 2289](#) (Aug. 27, 2018), p. 6 (noting the importance of this bill in how it creates more consistent protections for pregnant individuals across California).

176. [Civ. Code § 51\(b\)](#). Federal law has similar general protections. See [42 U.S.C. § 2000a](#).

177. [Civ. Code § 51\(e\)\(5\)](#).

178. Id. This definition was added by [AB 887](#) (2011), the Gender Nondiscrimination Act. 2011 Cal. Stat. ch. 719, § 1.5.

179. [Civ. Code § 51\(e\)\(7\)](#) (referencing the definition in [Gov’t Code § 12926\(s\)](#)).

180. Id. § [51\(e\)\(6\)](#).

Hate Crimes

1 Penal Code Section 422.55 defines “hate crime” for purposes of both the title of
2 the Penal Code that contains it and “all other state law unless an explicit provision
3 of law or the context clearly requires a different meaning.”

4 Section 422.55 defines hate crimes to be criminal acts “committed, in whole or
5 in part, because of one or more of the following actual or perceived characteristics
6 of the victim.”¹⁸¹ The listed characteristics include gender, sexual orientation and
7 “association with a person or group with one or more of these actual or perceived
8 characteristics.”¹⁸²

9 Consistent with the other reforms discussed above, AB 887, the Gender
10 Nondiscrimination Act, amended Penal Code Section 422.56 to clarify the
11 definition of “gender.” As amended by AB 887, the definition of “gender” includes
12 sex and includes a person’s gender identity and gender expression.¹⁸³ “Gender
13 expression” is defined as “a person’s gender-related appearance and behavior
14 whether or not stereotypically associated with the person’s assigned sex at birth.”¹⁸⁴

15 AB 887 also amended other provisions of the Penal Code to include these same
16 terms.¹⁸⁵ One such provision is Penal Code Section 186.21, which contains a
17 legislative declaration “that it is the right of every person, regardless of ... gender,
18 gender identity, gender expression, ... [or] sexual orientation ... to be secure and
19 protected from fear, intimidation, and physical harm caused by the activities of
20 violent groups and individuals.”

PROPOSED SEX EQUITY PROVISION

21 SCR 92 directed the Commission to study California law to “undertake a
22 comprehensive study of California law to identify any defects that prohibit
23 compliance with the [Equal Rights Amendment.]”¹⁸⁶

24 Based on the foregoing review, California law generally appears to be aligned
25 with the ERA. California’s Constitution currently contains several provisions

181. [Pen. Code § 422.55\(a\)](#).

182. Id. § [422.55\(a\)\(2\), \(6\), \(7\)](#).

183. Id. § [422.56\(c\)](#).

184. Id.

185. See also, e.g., id. §§ [422.85, 3053.4, 11410](#).

186. 2022 Cal. Stat. res. Ch. 150 ([SCR 92](#)).

1 related to sex equality¹⁸⁷ and its equal protection doctrine subjects sex-based claims
2 to strict scrutiny.¹⁸⁸

3 Additionally, California’s statutory anti-discrimination laws (related to
4 employment, housing, education, and state action) expressly protect against
5 discrimination based on pregnancy, sexual orientation, and gender identity.¹⁸⁹

6 Taken together, these provisions provide for significant sex equality protections.

7 While California’s broad discrimination prohibitions contain significant detail as
8 to the scope of those rules, not all of California’s anti-discrimination laws contain
9 the same level of detail. California law includes a number of discrimination
10 prohibitions that apply in other, often narrower and more specific, contexts.¹⁹⁰ These
11 provisions often include less detail regarding the scope of protected characteristics

187. E.g., [Cal. Const. art. I](#), §§ [1](#), [1.1](#), [7](#), [8](#), and [31](#). See also discussion of “Status of State Constitutional Amendments” in [Memorandum 2023-40](#), p. 10 and discussion of “California Constitution” in [Memorandum 2023-17](#), pp. 16-19.

188. See, e.g., *In re Marriage Cases* (2008) 43 Cal.4th 757, 833 (“[T]he governing California cases long have established that statutes that discriminate on the basis of sex or gender are subject to strict scrutiny under the California Constitution...” (citations omitted)); *Catholic Charities of Sacramento v. Superior Court* (2004) 32 Cal.4th 527, 564 (indicating that the Women’s Contraceptive Equity Act “serves the compelling state interest of eliminating gender discrimination” and that gender discrimination “violates the equal protection clause of the California Constitution and triggers the highest level of scrutiny” (citation omitted)); *Molar v. Gates* (4th Dist. 1979) 98 Cal.App.3d. 1, 13 (“*In Sail’er Inn, Inc. v. Kirby*, a female citizen challenged the constitutionality of a California law prohibiting women from tending bar unless they or their husbands held the liquor license on equal protection grounds. Our Supreme Court held that the bartending law was indeed unconstitutional under the equal protection clauses of the state and federal Constitutions and in doing so declared that ‘classifications based upon sex should be treated as suspect.’ *Sail’er Inn* thus clearly established the principle that gender-based differentials are to be treated as ‘suspect classifications’ which must be subjected to intense judicial scrutiny to determine if they violate the right to equal protection guaranteed by the state Constitution. The Supreme Court has consistently reaffirmed this principle. Thus, in *Arp v. Workers’ Comp. Appeals Bd.*, the court stated that ‘the strict scrutiny/compelling state interest test must govern sex discrimination challenges under Article I, section 7, of the California Constitution,’ and in *Hardy v. Stumpf*, the court acknowledged that ‘[c]lassifications predicated on gender are deemed suspect in California.’” (citations omitted)); *Boren v. Dep’t of Emp. Dev.* (3rd Dist. 1976) 59 Cal.App.3d 250, 255-256 (“According to California decisional law, a statute establishing ‘suspect classifications’ or trenching upon ‘fundamental interests’ is vulnerable to strict judicial scrutiny; it may be sustained by a showing of a compelling state interest which necessitates the distinction; a sex-based classification is treated as suspect.” (citations omitted)).

189. See [Memorandum 2023-21](#); see also, e.g., [Gov’t Code §§ 11135\(a\)](#) (No person in the State of California shall, on the basis of sex, race, color, religion, ancestry, national origin, ethnic group identification, age, mental disability, physical disability, medical condition, genetic information, marital status, or sexual orientation, be unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is conducted, operated, or administered by the state or by any state agency, is funded directly by the state, or receives any financial assistance from the state.”); [12926\(r\)](#) (defining “sex” to include pregnancy, childbirth, breastfeeding, and gender, which, in turn, includes gender identity and gender expression).

190. See, e.g., [Bus. & Prof. Code §§ 23425-23438](#) (related to alcohol licenses for various clubs and associations, many provisions contain an anti-discrimination rule); [Health & Safety Code § 1586.7](#) (adult day health care centers), and [Pub. Util. Code § 40121](#) (labor contracts for Orange County Transit District).

California law also includes provisions that describe a right to be free from discrimination on specified grounds. See, e.g., [Health & Safety Code § 1562.01\(h\)\(2\)\(C\)](#).

1 encompassed by sex discrimination, although some may incorporate definitions and
2 characteristics from California’s broader anti-discrimination laws by reference.¹⁹¹

3 The Commission is proposing a statutory rule that clarifies the scope of
4 California’s sex discrimination prohibitions to help ensure a uniform understanding
5 of the scope of California laws governing sex discrimination. This “sex equity
6 provision,” is proposed to be codified in all codes. In each case, the provision would
7 specify that the rule applies broadly to the entire code (i.e., the provision specifies
8 that the rule is “for the purposes of [the] code”). However, the provision is not
9 intended to exhaustively define the scope of sex discrimination. Rather, it is crafted
10 to make clear that discrimination on certain grounds constitutes sex discrimination
11 under the law, while not foreclosing the possibility that sex discrimination may also
12 encompass characteristics that are not listed.

13 The draft of the proposed amendments to each code appears at the end of this draft
14 Tentative Recommendation. The draft comment language notes that there are
15 identical sections in all other codes to provide consistency across all California laws
16 governing sex discrimination.

IDENTIFYING AND REMEDYING SPECIFIC DEFECTS

17 SCR 92 further directs the Commission to remedy defects related to (i) inclusion
18 of discriminatory language on the basis of sex, and (ii) disparate impacts on the
19 basis of sex upon enforcement thereof. For the second phase of the study, the
20 Commission examined existing California laws to ensure they comply with the sex
21 equality provision’s nondiscrimination goals.

DISCRIMINATORY LANGUAGE

22 SCR 92 directs the Commission to address “defects ... related to the inclusion of
23 discriminatory language” in California law. The staff understands “discriminatory
24 language” as words and phrases that foster stereotypes of individuals or groups of
25 people, predominately in ways that demean or ignore them.¹⁹² Gender biased

191. See, e.g., [Lab. Code § 1156.3\(h\)\(1\)](#) (incorporating definitions and characteristics from the California Fair Employment and Housing Act by reference).

192. See, e.g., https://eige.europa.eu/publications-resources/toolkits-guides/gender-sensitive-communication/first-steps-towards-more-inclusive-language/terms-you-need-know?language_content_entity=en (European Institute for Gender Equality, Gender-sensitive communication).

1 language is a type of discriminatory language that “either implicitly or explicitly
2 favors one gender over another.”¹⁹³ Examples of gender biased language are terms
3 such as “he” or “she” or “husband” and “wife.”¹⁹⁴

4 The Legislature is continually making efforts to remove gender biased language
5 through specific legislation¹⁹⁵ and general bill drafting policies,¹⁹⁶ and the
6 Commission determined no additional work was appropriate in this area at this
7 time.¹⁹⁷ However, stakeholders presented an example of discriminatory language in
8 the California Department of Corrections and Rehabilitation’s (CDCR) Operation
9 Manual that could be clarified, and the Commission notes it in this report for the
10 Legislature’s consideration.

CDCR’S OPERATIONS MANUAL

11 The ACLU of Southern California (ACLU) suggested that the California
12 Department of Corrections and Rehabilitation’s (CDCR) Operations Manual should
13 be updated and clarified. Although current law acknowledges gender as female,
14 male or nonbinary¹⁹⁸ and a person’s gender may be different from an individual’s

193 . Id.

194. See, e.g., [Fam. Code § 11](#) (“A reference to ‘husband’ and ‘wife,’ ‘spouses,’ or ‘married persons,’ or a comparable term, includes persons who are lawfully married to each other and persons who were previously lawfully married to each other, as appropriate under the circumstances of the particular case.”).

When proposing a new Family Code, the Commission recommended to the Legislature adding the terms “spouses” and “married persons” to this code section, but the terms “husband” and “wife” remain. [1994 Family Code](#), 23 Cal. L. Revision Comm’n Reports 1 (1993).

195. See, e.g., 2016 Cal. Stat. ch. 50 ([SB 1005](#) (Jackson 2016)) (replacing references to a “husband” or “wife” with references to a “spouse”) and 2013 Cal. Stat. ch. 510 ([AB 1403](#) (Committee on Judiciary 2013)), (updating statutory terms within the Uniform Parentage Act to replace “father” and “mother” with “parent,” among other amendments).

The Legislature also placed Proposition 11, Miscellaneous Language Changes Regarding Gender, on the ballot in 1974. This proposition amended the California Constitution to recast masculine gendered terms to instead refer to the “person” or individual referred to. It passed successfully with 50.43% of the vote. [https://ballotpedia.org/California_Proposition_11,_Gender-Neutral_Language_in_State_Constitution_Amendment_\(1974\)](https://ballotpedia.org/California_Proposition_11,_Gender-Neutral_Language_in_State_Constitution_Amendment_(1974)).

196. See [ACR 260](#) (Low 2018), which encouraged the Legislature to engage in a coordinated effort to revise existing statutes and introduce new legislation with inclusive language by using gender-neutral pronouns or reusing nouns to avoid the use of gendered pronouns. Bills with content not otherwise related to sex and gender typically contain technical amendments to update terms such as “he or she.” See e.g., [AB 2582](#) (Pellerin), the Elections Omnibus Bill of 2024, which changes references to “he or she” with “the voter,” among other amendments.

197. [Minutes](#) of Commission Meeting on May 2, 2024, p. 5 (“In light of the Office of Legislative Counsel efforts, consistent with 2018 Cal. Stat. ch. 190 (ACR 260 (Low 2018)), to revise existing statutes and introduce new legislation with inclusive language, the Commission did not direct staff to move forward with a proposal to remove and replace these terms in the codes.”)

198. See, e.g., [2017 Cal. Stat. ch. 853](#) (SB 179) and Penal Code § [2605](#).

1 sex assigned at birth,¹⁹⁹ CDCR’s Operations Manual uses the term “biological sex”
2 interchangeably with “gender” and does not include “nonbinary” in its definition of
3 “gender identity.”

4 For example, the Operations Manual’s definitions include the following:

- 5 • Cross-Gender: Of the opposite biological sex. Example: Male
6 Custody Staff patting down female inmates is cross-gender
7 searching.
- 8 • Gender Identity: Distinct from sexual orientation and refers to a
9 person’s internal, deeply felt sense of being male or female.²⁰⁰

10 ACLU recommends the Operations Manual be updated to reflect current laws
11 by adding a definition for “nonbinary,”²⁰¹ amending its definitions as follows, and
12 conforming the manual’s provisions accordingly:

- 13 • Cross-Gender: Of ~~the opposite biological sex~~ a different gender.
14 Example: ~~Male-identifying~~ Custody Staff patting down ~~female-~~
15 ~~identifying~~ inmates is cross-gender searching.
- 16 • Gender Identity: Distinct from sexual orientation and refers to a
17 person’s internal, deeply felt sense of being male, ~~or~~ female, or
18 nonbinary.

DISPARATE IMPACT

19 SCR 92 also directs the Commission to address “defects related to ... disparate
20 impacts” in California law.

21 Disparate impact theory is primarily used to challenge practices based on state
22 and federal employment and housing discrimination laws. Generally, a “disparate
23 impact” occurs when a facially neutral law disproportionately adversely affects
24 members of a protected class. A law fails the disparate impact legal test when there

199. California Civil Rights Department, [The Rights of Employees Who are Transgender or Gender Nonconforming: Fact Sheet](#) p. 3, (November 2022). Gender identity is defined as “each person’s internal understanding of their gender, such as being male, female, a combination of male and female, neither male nor female, and/or nonbinary. A person may have a gender identity different from the sex the person was assigned at birth.” See also [2017 Cal. Stat. ch 853](#) (SB 179).

200. State of California, California Department of Corrections and Rehabilitation, Adult Institutions, Programs, and Parole, Operations Manual, § [54040.3](#), p. 478, (updated through January 1, 2021).

201 Email from Amanda Goad, November 8, 2024, see Exhibit 4-9. ACLU recommends using the definition of “nonbinary” from the Federal Racial and Identity Profiling Act of 2015 Regulations ([11 CCR 999.226](#)) which states: “a person with a gender identity that falls somewhere outside of the traditional conceptions of strictly either female or male. People with nonbinary gender identities may or may not identify as transgender, may or may not have been born with intersex traits, may or may not use gender-neutral pronouns, and may or may not use more specific terms to describe their genders, such as agender, genderqueer, gender fluid, Two Spirit, bigender, pangender, gender nonconforming, or gender variant.”

1 is no legitimate business reason for the law or policy and no less discriminatory
2 means are available to achieve the law’s purpose.

State and Federal Employment Laws on Disparate Impact

3 California’s Fair Employment and Housing Act (“FEHA”)²⁰² declares it a civil
4 right for an individual to seek, obtain, and hold employment without discrimination
5 because of “race, religious creed, color, national origin, ancestry, physical disability,
6 mental disability, medical condition, genetic information, marital status, sex,
7 gender, gender identity, gender expression, age, sexual orientation, reproductive
8 health decisionmaking, or veteran or military status.”²⁰³

9 Title VII of the federal Civil Rights Act of 1964 prohibits employment
10 discrimination based on race, color, religion, sex, or national origin.²⁰⁴

11 FEHA regulations describe the process to prove unlawful employment
12 discrimination based on disparate impact. First, the policy being challenged must be
13 facially neutral.²⁰⁵ Following an allegation of disparate impact based on that policy,
14 an employer can provide an affirmative defense that the policy is necessary for the
15 safe and efficient operation of the business and the policy effectively fulfills its
16 intended business purpose.²⁰⁶ This is known as the “business necessity” defense.
17 However, the policy may still be impermissible if an alternative practice is shown
18 to exist that would accomplish the business purpose equally well with a less
19 discriminatory impact.²⁰⁷ Both state and federal law follow similar disparate impact
20 tests.

Disparate Impact Theory

Griggs v. Duke Power Company

21 Disparate impact theory was developed by the U.S. Supreme Court in *Griggs v.*
22 *Duke Power Company*,²⁰⁸ an employment discrimination case. This was a class
23 action by Black individuals who alleged that Duke Power Company (“Duke”)

202. Gov’t Code §§ [12900 - 12999](#).

203. Gov’t Code § [12921\(a\)](#). The characteristics noted above includes a perception that the person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics. Id. § [12926\(o\)](#).

204. 42 U.S.C.A. § [2000e-2](#).

205. 2 Cal. Code Regs. § [11010\(b\)](#).

206. Id.

207. Id.

208. *Griggs v. Duke Power Company* (1971) 401 U.S. 424.

1 violated their civil rights by requiring irrelevant preconditions to employment. The
2 requirements, completing high school and passing an aptitude test,
3 disproportionately impeded Black individuals' employment opportunities.²⁰⁹ The
4 Court of Appeals considered Duke's subjective intent in establishing the
5 requirements and found no discriminatory purpose. The Appeals Court thus
6 determined that there was no civil rights violation.

7 In its decision, the Supreme Court noted that Duke did not study whether the
8 requirements were positively related to job performance prior to imposing them. A
9 company executive testified that the requirements were instituted with the idea that
10 they "generally would improve the overall quality of the work force."²¹⁰ In fact, the
11 education and testing requirements were shown to have no relation to successful job
12 performance.²¹¹ Individuals who lacked these credentials and held their jobs prior
13 to the requirements continued to perform well. The Supreme Court acknowledged
14 that Duke Power Company seemed to lack intent to discriminate but decided that
15 their mindset was irrelevant. Instead, it was the impact of the requirements that
16 mattered.

17 ... Congress directed the thrust of the [Civil Rights] Act to the
18 consequences of employment practices, not simply the motivation.
19 More than that, Congress has placed on the employer the burden of
20 showing that any given requirement must have a manifest relationship
21 to the employment in question.²¹²

22 The Court found Duke in violation of the Civil Rights Act for imposing
23 requirements that were unnecessary and did not fulfill their intended purpose,
24 disproportionately harming a protected class. Disparate impact theory was born.

Mahler v. Judicial Council of California

25 Employment law cases under FEHA follow this approach. A recent disparate
26 impact case, *Mahler v. Judicial Council of California*,²¹³ highlights the importance
27 of providing evidence that the policy at issue caused a statistically significant
28 adverse effect on a protected group. This case was brought by retired superior court
29 judges alleging age discrimination in the Temporary Assigned Judges Program

209. Id. at 425-426.

210. Id. at 431.

211. Id.

212. Id. at 432.

213. *Mahler v. Judicial Council of California* (2021) 67 Cal.App.5th 82.

1 (“TAJP”). In their complaint, the plaintiffs claimed that changes to the case
2 assignment policy based on numbers of days worked (the “1320 limit”)²¹⁴
3 disproportionately impacted judges over age 70, resulting in fewer assigned cases.
4 Although the policy allowed for exceptions, the plaintiffs alleged that younger, more
5 recently retired judges would not have to get an exception to participate in the TAJP
6 program and the assignments given to individuals granted an exception were less
7 desirable.²¹⁵ However, the Appeals Court found the plaintiffs failed to present
8 sufficient data to establish a prima facie case.

9 [T]he complaint must allege facts or statistical evidence
10 demonstrating a causal connection between the challenged policy and
11 a significant disparate impact on the allegedly protected group....
12 There are, for example, no specifics as to the total number of
13 participants in the TAJP, or the number of participants allegedly
14 adversely impacted by the challenged changes to the program, or even
15 the age “group” allegedly adversely impacted. Nor are there any
16 “basic allegations” of statistical methods and comparison, or even any
17 anecdotal information of a significant *age*-based disparity.²¹⁶

18 The Appeals Court remanded the case and allowed the plaintiffs to amend their
19 complaint.

20 The plaintiffs' amended claim presented an expert report to bolster their
21 allegations. However, the Court found the report deficient in several ways. First, it
22 failed to include the impact of another aspect of the case assignment policy that
23 resulted in the plaintiffs rejecting offered assignments.

24 The reallocation policy [also] changed the geography of the TAJP
25 by reducing or halting assignments to counties with well-staffed
26 courts, which formerly used a high share of the TAJP resources, and
27 increased assignments to counties with a deficit of active judges....
28 Notably, when Plaintiffs were offered assignments in understaffed
29 courts, including San Bernardino and Riverside, they declined to
30 serve, reducing their days worked. [The expert report] did not control
31 for the geographic assignment differences after 2019. Given this
32 analytical gap, it cannot be said that but for the 1320 limit, participants
33 over age 70 would necessarily have enjoyed more opportunities to

214. Individuals with more than 1,320 days’ experience in the TAJP will not get assignments unless they receive an ‘exception’ to the policy. *Id.* at 114.

215. *Id.* at 113-114.

216. *Id.* at 115.

1 serve and would have worked more days.²¹⁷

2 Second, it failed to establish a case for the plaintiffs’ age-discrimination claim.
3 While the report showed the 1320 limit’s impact on TAJP participants over 70 who
4 met the limit, it did not show the limit’s impact on participants under 70, or those
5 over 70 who had not met the limit. The Court noted that the analysis “does not allow
6 an inference of discrimination based on age, i.e., that Defendants’ enforcement of
7 the 1320 limit has a significant disparate impact on TAJP participants over 70 as
8 compared to participating judges under 70.”²¹⁸ When the Court analyzed the figures,
9 it found “the 1320 limit had no effect on a supermajority of participants over age
10 70.”²¹⁹

11 The Superior Court dismissed the case, granting summary judgment to the
12 defendants.²²⁰ Thus, although allegations may facially appear to present a disparate
13 impact case, it is vital to assess the full picture.

State and Federal Housing Laws on Disparate Impact

14 FEHA²²¹ declares it a civil right for an individual to seek, obtain, and hold housing
15 without discrimination because of race, religion, color, national origin, ancestry,
16 disability, medical condition, genetic information, source of income, marital status,
17 sex,²²² veteran or military status, primary language, citizenship, or immigration
18 status.²²³

19 FEHA prohibits housing practices that have a discriminatory effect without a
20 legally sufficient justification.²²⁴ “Practices” are defined to include written and
21 unwritten policies, acts, or failures to act.²²⁵

22 A practice has a discriminatory effect where it actually or

217. *Mahler v. Judicial Council of California* (2024) No. CGC-19-575842 (Super. Ct. San Francisco Cty., Cal.), at 5-6.

218. *Id.* at 6.

219. *Id.* at 7.

220. *Id.*

221. Gov’t Code §§ [12900 -12999](#).

222. For the purposes of this section, “sex” includes gender, gender identity, gender expression, sexual orientation, and reproductive decision making. Gov’t Code § [12921\(b\)](#).

223. *Id.* Any of the characteristics mentioned above also includes a perception that the person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics. Gov’t Code § [12955\(m\)](#) and Civil Code § [51\(e\)\(6\)](#).

224. 2 Cal. Code Regs. § [12060](#). “Discriminatory effect” has the same meaning as disparate impact and the codes use the terms interchangeably. California law permits exemptions for certain circumstances, such as an individual sharing living areas in a single dwelling unit expressing a sex preference for a roommate, or a person stating an age-based preference for senior housing. See 2 Cal. Code Regs. § [12051](#).

225. 2 Cal. Code Regs. § [12005\(x\)](#).

1 predictably results in a disparate impact on a group of individuals, or
2 creates, increases, reinforces, or perpetuates segregated housing
3 patterns, based on membership in a protected class. A practice
4 predictably results in a disparate impact when there is evidence that
5 the practice will result in a disparate impact even through the practice
6 has not yet been implemented.²²⁶

7 FEHA regulations establish the burdens of proof in disparate impact cases.²²⁷
8 First, the complainant has the burden of proving a challenged practice caused or
9 predictably will cause a discriminatory effect.²²⁸ The burden then shifts to the
10 defendant to show the practice is justified despite the discriminatory effect. This
11 justification must show that the practice is necessary to achieve one or more
12 substantial, legitimate, and nondiscriminatory business interests. Second, the
13 defendant must show the practice effectively carries out the identified business
14 interest. Finally, the defendant must prove there is no feasible alternative that would
15 equally or better accomplish the identified purpose with less discriminatory
16 effect.²²⁹ This is similar to the structure of disparate impact in employment claims.

17 The federal Fair Housing Act (“FHA”) prohibits housing providers from
18 discriminating based on race, color, religion, sex, national origin, familial status, or
19 disability,²³⁰ similar to FEHA.

*Texas Department of Housing and Community Affairs v. Inclusive Communities
Project*

20 The U.S. Supreme Court affirmed that disparate impact claims may be brought
21 under the federal FHA in *Texas Department of Housing and Community Affairs v.*
22 *Inclusive Communities Project*.²³¹ In this case, a Texas nonprofit that helps low-
23 income individuals obtain housing sued the Texas Department of Housing and
24 Community Affairs (“TDHCA”) for perpetuating housing segregation by allocating
25 a disproportionate number of federal housing credits in predominantly Black inner-
26 city areas. Relying on *Griggs*, the Supreme Court held that disparate impact claims
27 are cognizable under the FHA:

28 Just as an employer may maintain a workplace requirement that

226. 2 Cal. Code Regs. § [12060\(b\)](#).

227. 2 Cal. Code Regs. §§ [12061](#) - [12062](#).

228. 2 Cal. Code Regs. § [12061](#).

229. 2 Cal. Code Regs. § [12062](#).

230. 42 U.S.C. §§ [3601](#) - [3619](#).

231. *Tex. Dep’t of Hous. and Cmty. Affairs v. Inclusive Cmty. Project* (2015) 576 U.S. 519.

1 causes a disparate impact if that requirement is a ‘reasonable
2 measure[ment] of job performance,’ [citations omitted] so too must
3 housing authorities and private developers be allowed to maintain a
4 policy if they can prove it is necessary to achieve a valid interest. To
5 be sure, the [Civil Rights Act] Title VII framework may not transfer
6 exactly to the fair-housing context, but the comparison suffices for
7 present purposes.²³²

8 On remand to the Northern District of Texas,²³³ however, the Court found that
9 Inclusive Communities Project (“ICP”) failed to prove a prima facie case for
10 disparate impact. Through a detailed analysis of the TDHCA’s point system for
11 awarding tax credits, the Court found that ICP was arguing that TDHCA was
12 abusing its discretion in awarding the federal tax credits. However, exercising
13 discretion is not a specific, facially neutral policy for purposes of a disparate impact
14 claim.²³⁴

15 ...regardless of the label ICP places on its claim, it is actually
16 complaining about disparate treatment, not disparate impact. The
17 purpose of disparate impact liability is to root out a facially neutral
18 policy that has an unintended discriminatory result. But a claim for
19 intentional discrimination is evaluated under the disparate treatment
20 framework, which requires a showing of targeted discrimination.
21 Where the plaintiff establishes that a subjective policy, such as the use
22 of discretion, has been used to achieve a racial disparity, the plaintiff
23 has shown disparate treatment. ...

24 If ICP were challenging the existence of TDHCA’s discretion
25 rather than how the discretion is used, ICP would seek to enjoin that
26 discretion and to mandate a points-only system or another wholly
27 objective method of awarding tax credits. Instead, ICP maintains that
28 TDHCA’s exercise of discretion should be the means to achieve a
29 specific end: to provide increased opportunities for desegregated low-
30 income housing.²³⁵

31 The Court also determined that ICP failed to prove it was TDHCA’s exercise of
32 discretion, and not other factors such as local zoning rules, community preferences,

232. Id. at 541.

233. *Inclusive Cmty. Project v. Tex. Dep’t of Hous. And Cmty. Affairs, et al.* (N.D. Tex. 2016) No. 3:2008cv00546 - Document 271, available at <https://law.justia.com/cases/federal/district-courts/texas/txndce/3:2008cv00546/175622/271/>.

234. Id. at 16.

235. Id. at 16-17 (citations omitted), 18.

1 or developers’ choices, caused the statistical disparity.²³⁶ The Court dismissed the
2 case.

Martinez v. City of Clovis

3 A California appellate decision under FEHA, *Martinez v. City of Clovis*, provides
4 an example of a successful case for disparate impact theory under FEHA.²³⁷ In this
5 case, a resident sued the City of Clovis for failing to zone for low-income housing,
6 resulting in disparate impacts for people of color.²³⁸ The Appeals Court noted that
7 FEHA makes it unlawful for the city “to discriminate through public ... land use
8 practices, decisions, and authorizations,”²³⁹ because of protected characteristics
9 including race. The law further states that discrimination includes zoning laws “that
10 make housing opportunities unavailable.” Previously, the trial court determined that
11 “[f]ailing to meet the [Regional Housing Needs Allocation] obligation for zoning
12 does not make a housing opportunity ‘unavailable’ in any material sense.”²⁴⁰ The
13 Appeals Court disagreed and determined that the City’s failure to zone for low-
14 income housing did make housing opportunities unavailable for purposes of the
15 law.²⁴¹ The Appeals Court remanded for further action and the parties eventually
16 settled out of court.²⁴²

17 As noted in the cases above, the analysis for disparate impact is a heavily fact-
18 based inquiry. The Commission reached out to stakeholders for assistance in
19 identifying California laws with uneven burdens and did not find any appropriate
20 for Commission action.

CONCLUSION

21 Based on the foregoing review, the Commission concluded that California law is
22 aligned with the ERA. California’s Constitution contains several provisions related

236. Id. at 20.

237. *Martinez v. City of Clovis* (5th Dist. 2019) 90 Cal.App.5th 193.

238. Id. at 253.

239. Gov’t Code § [12955\(l\)](#).

240. 90 Cal.App.5th at 271.

241. Id. at 271.

242. The City of Clovis and the plaintiff, Desiree Martinez, came to a settlement agreement on Feb. 20, 2024. The City agreed to comprehensively plan for affordable housing options and, among other items, would establish a Local Housing Trust Fund, dedicate city-owned lots for the development of affordable housing, and require that up to 10% of units in new housing projects will be affordable to low-income families. <https://cityofclovis.com/settlement-agreement-desiree-martinez-v-city-of-clovis/>.

1 to sex equality²⁴³ and its equal protection doctrine subjects sex-based claims to strict
2 scrutiny.²⁴⁴ Further, its statutory laws provide extensive protections for individuals
3 based on a broad array of sex characteristics.

4 However, not all of California’s anti-discrimination laws contain the same level
5 of detail, so the Commission is proposing a sex quality provision that clarifies the
6 scope of California’s sex discrimination prohibitions to help ensure a uniform
7 understanding of the scope of California laws governing sex discrimination across
8 all code sections. The Commission also determined there were no laws ripe for
9 revision due to discriminatory language or disparate impacts on the basis of sex.

243. E.g., [Cal. Const. art. I](#), §§ 1, 1.1, 7, 8, and 31. See also discussion of “Status of State Constitutional Amendments” in [Memorandum 2023-40](#), p. 10 and discussion of “California Constitution” in [Memorandum 2023-17](#), pp. 16-19.

244. See, e.g., *In re Marriage Cases* (2008) 43 Cal.4th 757, 833 (“[T]he governing California cases long have established that statutes that discriminate on the basis of sex or gender are subject to strict scrutiny under the California Constitution...” (citations omitted)); *Catholic Charities of Sacramento v. Superior Court* (2004) 32 Cal.4th 527, 564 (indicating that the Women’s Contraceptive Equity Act “serves the compelling state interest of eliminating gender discrimination” and that gender discrimination “violates the equal protection clause of the California Constitution and triggers the highest level of scrutiny” (citation omitted)); *Molar v. Gates* (4th Dist. 1979) 98 Cal.App.3d. 1, 13 (“*In Sail’er Inn, Inc. v. Kirby*, a female citizen challenged the constitutionality of a California law prohibiting women from tending bar unless they or their husbands held the liquor license on equal protection grounds. Our Supreme Court held that the bartending law was indeed unconstitutional under the equal protection clauses of the state and federal Constitutions and in doing so declared that ‘classifications based upon sex should be treated as suspect.’ *Sail’er Inn* thus clearly established the principle that gender-based differentials are to be treated as ‘suspect classifications’ which must be subjected to intense judicial scrutiny to determine if they violate the right to equal protection guaranteed by the state Constitution. The Supreme Court has consistently reaffirmed this principle. Thus, in *Arp v. Workers’ Comp. Appeals Bd.*, the court stated that ‘the strict scrutiny/compelling state interest test must govern sex discrimination challenges under Article I, section 7, of the California Constitution,’ and in *Hardy v. Stumpf*, the court acknowledged that ‘[c]lassifications predicated on gender are deemed suspect in California.’” (citations omitted)); *Boren v. Dep’t of Emp. Dev.* (3rd Dist. 1976) 59 Cal.App.3d 250, 255-256 (“According to California decisional law, a statute establishing ‘suspect classifications’ or trenching upon ‘fundamental interests’ is vulnerable to strict judicial scrutiny; it may be sustained by a showing of a compelling state interest which necessitates the distinction; a sex-based classification is treated as suspect.” (citations omitted)).

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PROPOSED LEGISLATION

BUSINESS AND PROFESSIONS CODE

Bus. & Prof. Code § 14.3 (added). Scope of sex discrimination

SEC. ____. Section 14.3 is added to the Business and Professions Code, to read:

14.3. (a)(1) Any provision that prohibits discrimination on the basis of sex, discrimination on the basis of gender, or similar discrimination shall also be interpreted as prohibiting sex discrimination, as defined in subdivision (b).

(2) In case of a conflict between the provisions of this section and other provisions of this code that set forth the scope of “sex discrimination,” the provisions of this section shall prevail over provisions with a narrower scope.

(b) For the purposes of this section, the following definitions apply:

(1) “Discrimination” includes, but is not limited to, harassment.

(2) “Pregnancy or related medical conditions” includes, but is not limited to, childbirth, abortion, lactation, miscarriage, fertility, and contraception.

(3) “Sex discrimination” includes, but is not limited to, discrimination based on any of the following actual or perceived characteristics or actions:

(A) Assigned sex or gender category, including female, male, or nonbinary.

(B) Degree of conformity to sex or gender stereotypes.

(C) Gender, including gender identity, gender expression, and access to, and use of, gender affirming care and other related health care.

(D) Pregnancy or related medical conditions.

(E) Decision-making, access to care, or potential or actual use of a drug, device, product, or service relating to pregnancy or related medical conditions.

(F) Sexual orientation.

(G) Variations in sex characteristics, including intersex traits or differences in sex development.

(c) This section reflects the existing protections of the California Constitution recognizing the individual rights to pursue and obtain safety, happiness, and privacy (Art. I, § 1), ensuring equal protection of the laws (Art. I, § 7), protecting the ability to enter or pursue a business, profession, vocation, or employment (Art. I, § 8), and protecting an individual’s reproductive freedom (Art. I, § 1.1). This section shall be liberally construed to effectuate the purposes of these constitutional protections.

Comment. Section 14.3 is added to reflect California’s commitment to the equality of rights under the law. While this section applies specifically to the Business and Professions Code, there are identical sections in each of the other California codes to clarify and provide consistency across all California laws governing sex discrimination.

This section is derived from existing California constitutional protections, but not by way of limitation, and intended to provide express language confirming that California’s laws prohibiting and protecting against sex discrimination address, at a minimum, discrimination based on the listed characteristics. The scope of this rule is consistent with the broad scope of anti-discrimination protections in the Unruh Civil Rights Act (Civil Code Section 51), the California Fair Employment and Housing Act (Government Code Sections 12900-12999), California’s laws on Educational Equity (Education Code Sections 200-270).

CIVIL CODE

Civ. Code § 14.1 (added). Scope of sex discrimination

SEC. ____. Section 14.1 is added to the Civil Code, to read:

14.1. (a)(1) Any provision that prohibits discrimination on the basis of sex, discrimination on the basis of gender, or similar discrimination shall also be interpreted as prohibiting sex discrimination, as defined in subdivision (b).

(2) In case of a conflict between the provisions of this section and other provisions of this code that set forth the scope of “sex discrimination,” the provisions of this section shall prevail over provisions with a narrower scope.

(b) For the purposes of this section, the following definitions apply:

(1) “Discrimination” includes, but is not limited to, harassment.

(2) “Pregnancy or related medical conditions” includes, but is not limited to, childbirth, abortion, lactation, miscarriage, fertility, and contraception.

(3) “Sex discrimination” includes, but is not limited to, discrimination based on any of the following actual or perceived characteristics or actions:

(A) Assigned sex or gender category, including female, male, or nonbinary.

(B) Degree of conformity to sex or gender stereotypes.

(C) Gender, including gender identity, gender expression, and access to, and use of, gender affirming care and other related health care.

(D) Pregnancy or related medical conditions.

(E) Decision-making, access to care, or potential or actual use of a drug, device, product, or service relating to pregnancy or related medical conditions.

(F) Sexual orientation.

(G) Variations in sex characteristics, including intersex traits or differences in sex development.

(c) This section reflects the existing protections of the California Constitution recognizing the individual rights to pursue and obtain safety, happiness, and privacy (Art. I, § 1), ensuring equal protection of the laws (Art. I, § 7), protecting the ability to enter or pursue a business, profession, vocation, or employment (Art. I, § 8), and protecting an individual’s reproductive freedom (Art. I, § 1.1). This section shall be liberally construed to effectuate the purposes of these constitutional protections.

Comment. Section 14.1 is added to reflect California’s commitment to the equality of rights under the law. While this section applies specifically to the Civil Code, there are identical sections in each of the other California codes to clarify and provide consistency across all California laws governing sex discrimination.

This section is derived from existing California constitutional protections, but not by way of limitation, and intended to provide express language confirming that California’s laws prohibiting and protecting against sex discrimination address, at a minimum, discrimination based on the listed characteristics. The scope of this rule is consistent with the broad scope of anti-discrimination protections in the Unruh Civil Rights Act (Civil Code Section 51), the California Fair Employment and Housing Act (Government Code Sections 12900-12999), California’s laws on Educational Equity (Education Code Sections 200-270).

CODE OF CIVIL PROCEDURE

Code Civ. Proc. § 17.5 (added). Scope of sex discrimination

SEC. ____ . Section 17.5 is added to the Code of Civil Procedure, to read:

17.5. (a)(1) Any provision that prohibits discrimination on the basis of sex, discrimination on the basis of gender, or similar discrimination shall also be interpreted as prohibiting sex discrimination, as defined in subdivision (b).

(2) In case of a conflict between the provisions of this section and other provisions of this code that set forth the scope of “sex discrimination,” the provisions of this section shall prevail over provisions with a narrower scope.

(b) For the purposes of this section, the following definitions apply:

(1) “Discrimination” includes, but is not limited to, harassment.

(2) “Pregnancy or related medical conditions” includes, but is not limited to, childbirth, abortion, lactation, miscarriage, fertility, and contraception.

(3) “Sex discrimination” includes, but is not limited to, discrimination based on any of the following actual or perceived characteristics or actions:

(A) Assigned sex or gender category, including female, male, or nonbinary.

(B) Degree of conformity to sex or gender stereotypes.

(C) Gender, including gender identity, gender expression, and access to, and use of, gender affirming care and other related health care.

(D) Pregnancy or related medical conditions.

(E) Decision-making, access to care, or potential or actual use of a drug, device, product, or service relating to pregnancy or related medical conditions.

(F) Sexual orientation.

(G) Variations in sex characteristics, including intersex traits or differences in sex development.

(c) This section reflects the existing protections of the California Constitution recognizing the individual rights to pursue and obtain safety, happiness, and privacy (Art. I, § 1), ensuring equal protection of the laws (Art. I, § 7), protecting the ability to enter or pursue a business, profession, vocation, or employment (Art. I, § 8), and protecting an individual’s reproductive freedom (Art. I, § 1.1). This section shall be liberally construed to effectuate the purposes of these constitutional protections.

Comment. Section 17.5 is added to reflect California’s commitment to the equality of rights under the law. While this section applies specifically to the Code of Civil Procedure, there are identical sections in each of the other California codes to clarify and provide consistency across all California laws governing sex discrimination.

This section is derived from existing California constitutional protections, but not by way of limitation, and intended to provide express language confirming that California’s laws prohibiting and protecting against sex discrimination address, at a minimum, discrimination based on the listed characteristics. The scope of this rule is consistent with the broad scope of anti-discrimination protections in the Unruh Civil Rights Act (Civil Code Section 51), the California Fair Employment and Housing Act (Government Code Sections 12900-12999), California’s laws on Educational Equity (Education Code Sections 200-270).

COMMERCIAL CODE

Com. Code § 36.5 (added). Scope of sex discrimination

SEC. ____ . Section 36.5 is added to the Commercial Code, to read:

36.5. (a)(1) Any provision that prohibits discrimination on the basis of sex, discrimination on the basis of gender, or similar discrimination shall also be interpreted as prohibiting sex discrimination, as defined in subdivision (b).

(2) In case of a conflict between the provisions of this section and other provisions of this code that set forth the scope of “sex discrimination,” the provisions of this section shall prevail over provisions with a narrower scope.

(b) For the purposes of this section, the following definitions apply:

(1) “Discrimination” includes, but is not limited to, harassment.

(2) “Pregnancy or related medical conditions” includes, but is not limited to, childbirth, abortion, lactation, miscarriage, fertility, and contraception.

(3) “Sex discrimination” includes, but is not limited to, discrimination based on any of the following actual or perceived characteristics or actions:

(A) Assigned sex or gender category, including female, male, or nonbinary.

(B) Degree of conformity to sex or gender stereotypes.

(C) Gender, including gender identity, gender expression, and access to, and use of, gender affirming care and other related health care.

(D) Pregnancy or related medical conditions.

(E) Decision-making, access to care, or potential or actual use of a drug, device, product, or service relating to pregnancy or related medical conditions.

(F) Sexual orientation.

(G) Variations in sex characteristics, including intersex traits or differences in sex development.

(c) This section reflects the existing protections of the California Constitution recognizing the individual rights to pursue and obtain safety, happiness, and privacy (Art. I, § 1), ensuring equal protection of the laws (Art. I, § 7), protecting the ability to enter or pursue a business, profession, vocation, or employment (Art. I, § 8), and protecting an individual’s reproductive freedom (Art. I, § 1.1). This section shall be liberally construed to effectuate the purposes of these constitutional protections.

Comment. Section 36.5 is added to reflect California’s commitment to the equality of rights under the law. While this section applies specifically to the Commercial Code, there are identical sections in each of the other California codes to clarify and provide consistency across all California laws governing sex discrimination.

This section is derived from existing California constitutional protections, but not by way of limitation, and intended to provide express language confirming that California’s laws prohibiting and protecting against sex discrimination address, at a minimum, discrimination based on the listed characteristics. The scope of this rule is consistent with the broad scope of anti-discrimination protections in the Unruh Civil Rights Act (Civil Code Section 51), the California Fair Employment and Housing Act (Government Code Sections 12900-12999), California’s laws on Educational Equity (Education Code Sections 200-270).

CORPORATIONS CODE

Corp. Code § 12.4 (added). Scope of sex discrimination

SEC. ____. Section 12.4 is added to the Corporations Code, to read:

12.4. (a)(1) Any provision that prohibits discrimination on the basis of sex, discrimination on the basis of gender, or similar discrimination shall also be interpreted as prohibiting sex discrimination, as defined in subdivision (b).

(2) In case of a conflict between the provisions of this section and other provisions of this code that set forth the scope of “sex discrimination,” the provisions of this section shall prevail over provisions with a narrower scope.

(b) For the purposes of this section, the following definitions apply:

(1) “Discrimination” includes, but is not limited to, harassment.

(2) “Pregnancy or related medical conditions” includes, but is not limited to, childbirth, abortion, lactation, miscarriage, fertility, and contraception.

(3) “Sex discrimination” includes, but is not limited to, discrimination based on any of the following actual or perceived characteristics or actions:

(A) Assigned sex or gender category, including female, male, or nonbinary.

(B) Degree of conformity to sex or gender stereotypes.

(C) Gender, including gender identity, gender expression, and access to, and use of, gender affirming care and other related health care.

(D) Pregnancy or related medical conditions.

(E) Decision-making, access to care, or potential or actual use of a drug, device, product, or service relating to pregnancy or related medical conditions.

(F) Sexual orientation.

(G) Variations in sex characteristics, including intersex traits or differences in sex development.

(c) This section reflects the existing protections of the California Constitution recognizing the individual rights to pursue and obtain safety, happiness, and privacy (Art. I, § 1), ensuring equal protection of the laws (Art. I, § 7), protecting the ability to enter or pursue a business, profession, vocation, or employment (Art. I, § 8), and protecting an individual’s reproductive freedom (Art. I, § 1.1). This section shall be liberally construed to effectuate the purposes of these constitutional protections.

Comment. Section 12.4 is added to reflect California’s commitment to the equality of rights under the law. While this section applies specifically to the Corporations Code, there are identical sections in each of the other California codes to clarify and provide consistency across all California laws governing sex discrimination.

This section is derived from existing California constitutional protections, but not by way of limitation, and intended to provide express language confirming that California’s laws prohibiting and protecting against sex discrimination address, at a minimum, discrimination based on the listed characteristics. The scope of this rule is consistent with the broad scope of anti-discrimination protections in the Unruh Civil Rights Act (Civil Code Section 51), the California Fair Employment and Housing Act (Government Code Sections 12900-12999), California’s laws on Educational Equity (Education Code Sections 200-270).

EDUCATION CODE

Educ. Code § 212.4 (added). Scope of sex discrimination

SEC. ____. Section 212.4 is added to the Education Code, to read:

212.4. (a)(1) Any provision that prohibits discrimination on the basis of sex, discrimination on the basis of gender, or similar discrimination shall also be interpreted as prohibiting sex discrimination, as defined in subdivision (b).

(2) In case of a conflict between the provisions of this section and other provisions of this code that set forth the scope of “sex discrimination,” the provisions of this section shall prevail over provisions with a narrower scope.

(b) For the purposes of this section, the following definitions apply:

(1) “Discrimination” includes, but is not limited to, harassment.

(2) “Pregnancy or related medical conditions” includes, but is not limited to, childbirth, abortion, lactation, miscarriage, fertility, and contraception.

(3) “Sex discrimination” includes, but is not limited to, discrimination based on any of the following actual or perceived characteristics or actions:

(A) Assigned sex or gender category, including female, male, or nonbinary.

(B) Degree of conformity to sex or gender stereotypes.

(C) Gender, including gender identity, gender expression, and access to, and use of, gender affirming care and other related health care.

(D) Pregnancy or related medical conditions.

(E) Decision-making, access to care, or potential or actual use of a drug, device, product, or service relating to pregnancy or related medical conditions.

(F) Sexual orientation.

(G) Variations in sex characteristics, including intersex traits or differences in sex development.

(c) This section reflects the existing protections of the California Constitution recognizing the individual rights to pursue and obtain safety, happiness, and privacy (Art. I, § 1), ensuring equal protection of the laws (Art. I, § 7), protecting the ability to enter or pursue a business, profession, vocation, or employment (Art. I, § 8), and protecting an individual’s reproductive freedom (Art. I, § 1.1). This section shall be liberally construed to effectuate the purposes of these constitutional protections.

Comment. Section 212.4 is added to reflect California’s commitment to the equality of rights under the law. While this section applies specifically to the Education Code, there are identical sections in each of the other California codes to clarify and provide consistency across all California laws governing sex discrimination.

This section is derived from existing California constitutional protections, but not by way of limitation, and intended to provide express language confirming that California’s laws prohibiting and protecting against sex discrimination address, at a minimum, discrimination based on the listed characteristics. The scope of this rule is consistent with the broad scope of anti-discrimination protections in the Unruh Civil Rights Act (Civil Code Section 51), the California Fair Employment and Housing Act (Government Code Sections 12900-12999), California’s laws on Educational Equity (Education Code Sections 200-270).

ELECTIONS CODE

Elec. Code § 353.7 (added). Scope of sex discrimination

SEC. ____ . Section 353.7 is added to the Elections Code, to read:

353.7. (a)(1) Any provision that prohibits discrimination on the basis of sex, discrimination on the basis of gender, or similar discrimination shall also be interpreted as prohibiting sex discrimination, as defined in subdivision (b).

(2) In case of a conflict between the provisions of this section and other provisions of this code that set forth the scope of “sex discrimination,” the provisions of this section shall prevail over provisions with a narrower scope.

(b) For the purposes of this section, the following definitions apply:

(1) “Discrimination” includes, but is not limited to, harassment.

(2) “Pregnancy or related medical conditions” includes, but is not limited to, childbirth, abortion, lactation, miscarriage, fertility, and contraception.

(3) “Sex discrimination” includes, but is not limited to, discrimination based on any of the following actual or perceived characteristics or actions:

(A) Assigned sex or gender category, including female, male, or nonbinary.

(B) Degree of conformity to sex or gender stereotypes.

(C) Gender, including gender identity, gender expression, and access to, and use of, gender affirming care and other related health care.

(D) Pregnancy or related medical conditions.

(E) Decision-making, access to care, or potential or actual use of a drug, device, product, or service relating to pregnancy or related medical conditions.

(F) Sexual orientation.

(G) Variations in sex characteristics, including intersex traits or differences in sex development.

(c) This section reflects the existing protections of the California Constitution recognizing the individual rights to pursue and obtain safety, happiness, and privacy (Art. I, § 1), ensuring equal protection of the laws (Art. I, § 7), protecting the ability to enter or pursue a business, profession, vocation, or employment (Art. I, § 8), and protecting an individual’s reproductive freedom (Art. I, § 1.1). This section shall be liberally construed to effectuate the purposes of these constitutional protections.

Comment. Section 353.7 is added to reflect California’s commitment to the equality of rights under the law. While this section applies specifically to the Elections Code, there are identical sections in each of the other California codes to clarify and provide consistency across all California laws governing sex discrimination.

This section is derived from existing California constitutional protections, but not by way of limitation, and intended to provide express language confirming that California’s laws prohibiting and protecting against sex discrimination address, at a minimum, discrimination based on the listed characteristics. The scope of this rule is consistent with the broad scope of anti-discrimination protections in the Unruh Civil Rights Act (Civil Code Section 51), the California Fair Employment and Housing Act (Government Code Sections 12900-12999), California’s laws on Educational Equity (Education Code Sections 200-270).

EVIDENCE CODE

Evid. Code § 212 (added). Scope of sex discrimination

SEC. ____ . Section 212 is added to the Evidence Code, to read:

212. (a)(1) Any provision that prohibits discrimination on the basis of sex, discrimination on the basis of gender, or similar discrimination shall also be interpreted as prohibiting sex discrimination, as defined in subdivision (b).

(2) In case of a conflict between the provisions of this section and other provisions of this code that set forth the scope of “sex discrimination,” the provisions of this section shall prevail over provisions with a narrower scope.

(b) For the purposes of this section, the following definitions apply:

(1) “Discrimination” includes, but is not limited to, harassment.

(2) “Pregnancy or related medical conditions” includes, but is not limited to, childbirth, abortion, lactation, miscarriage, fertility, and contraception.

(3) “Sex discrimination” includes, but is not limited to, discrimination based on any of the following actual or perceived characteristics or actions:

(A) Assigned sex or gender category, including female, male, or nonbinary.

(B) Degree of conformity to sex or gender stereotypes.

(C) Gender, including gender identity, gender expression, and access to, and use of, gender affirming care and other related health care.

(D) Pregnancy or related medical conditions.

(E) Decision-making, access to care, or potential or actual use of a drug, device, product, or service relating to pregnancy or related medical conditions.

(F) Sexual orientation.

(G) Variations in sex characteristics, including intersex traits or differences in sex development.

(c) This section reflects the existing protections of the California Constitution recognizing the individual rights to pursue and obtain safety, happiness, and privacy (Art. I, § 1), ensuring equal protection of the laws (Art. I, § 7), protecting the ability to enter or pursue a business, profession, vocation, or employment (Art. I, § 8), and protecting an individual’s reproductive freedom (Art. I, § 1.1). This section shall be liberally construed to effectuate the purposes of these constitutional protections.

Comment. Section 212 is added to reflect California’s commitment to the equality of rights under the law. While this section applies specifically to the Evidence Code, there are identical sections in each of the other California codes to clarify and provide consistency across all California laws governing sex discrimination.

This section is derived from existing California constitutional protections, but not by way of limitation, and intended to provide express language confirming that California’s laws prohibiting and protecting against sex discrimination address, at a minimum, discrimination based on the listed characteristics. The scope of this rule is consistent with the broad scope of anti-discrimination protections in the Unruh Civil Rights Act (Civil Code Section 51), the California Fair Employment and Housing Act (Government Code Sections 12900-12999), California’s laws on Educational Equity (Education Code Sections 200-270).

FAMILY CODE

Fam. Code § 136 (added). Scope of sex discrimination

SEC. ____. Section 136 is added to the Family Code, to read:

136. (a)(1) Any provision that prohibits discrimination on the basis of sex, discrimination on the basis of gender, or similar discrimination shall also be interpreted as prohibiting sex discrimination, as defined in subdivision (b).

(2) In case of a conflict between the provisions of this section and other provisions of this code that set forth the scope of “sex discrimination,” the provisions of this section shall prevail over provisions with a narrower scope.

(b) For the purposes of this section, the following definitions apply:

(1) “Discrimination” includes, but is not limited to, harassment.

(2) “Pregnancy or related medical conditions” includes, but is not limited to, childbirth, abortion, lactation, miscarriage, fertility, and contraception.

(3) “Sex discrimination” includes, but is not limited to, discrimination based on any of the following actual or perceived characteristics or actions:

(A) Assigned sex or gender category, including female, male, or nonbinary.

(B) Degree of conformity to sex or gender stereotypes.

(C) Gender, including gender identity, gender expression, and access to, and use of, gender affirming care and other related health care.

(D) Pregnancy or related medical conditions.

(E) Decision-making, access to care, or potential or actual use of a drug, device, product, or service relating to pregnancy or related medical conditions.

(F) Sexual orientation.

(G) Variations in sex characteristics, including intersex traits or differences in sex development.

(c) This section reflects the existing protections of the California Constitution recognizing the individual rights to pursue and obtain safety, happiness, and privacy (Art. I, § 1), ensuring equal protection of the laws (Art. I, § 7), protecting the ability to enter or pursue a business, profession, vocation, or employment (Art. I, § 8), and protecting an individual’s reproductive freedom (Art. I, § 1.1). This section shall be liberally construed to effectuate the purposes of these constitutional protections.

Comment. Section 136 is added to reflect California’s commitment to the equality of rights under the law. While this section applies specifically to the Family Code, there are identical sections in each of the other California codes to clarify and provide consistency across all California laws governing sex discrimination.

This section is derived from existing California constitutional protections, but not by way of limitation, and intended to provide express language confirming that California’s laws prohibiting and protecting against sex discrimination address, at a minimum, discrimination based on the listed characteristics. The scope of this rule is consistent with the broad scope of anti-discrimination protections in the Unruh Civil Rights Act (Civil Code Section 51), the California Fair Employment and Housing Act (Government Code Sections 12900-12999), California’s laws on Educational Equity (Education Code Sections 200-270).

FINANCIAL CODE

Fin. Code § 23 (added). Scope of sex discrimination

SEC. ____ . Section 23 is added to the Financial Code, to read:

23. (a)(1) Any provision that prohibits discrimination on the basis of sex, discrimination on the basis of gender, or similar discrimination shall also be interpreted as prohibiting sex discrimination, as defined in subdivision (b).

(2) In case of a conflict between the provisions of this section and other provisions of this code that set forth the scope of “sex discrimination,” the provisions of this section shall prevail over provisions with a narrower scope.

(b) For the purposes of this section, the following definitions apply:

(1) “Discrimination” includes, but is not limited to, harassment.

(2) “Pregnancy or related medical conditions” includes, but is not limited to, childbirth, abortion, lactation, miscarriage, fertility, and contraception.

(3) “Sex discrimination” includes, but is not limited to, discrimination based on any of the following actual or perceived characteristics or actions:

(A) Assigned sex or gender category, including female, male, or nonbinary.

(B) Degree of conformity to sex or gender stereotypes.

(C) Gender, including gender identity, gender expression, and access to, and use of, gender affirming care and other related health care.

(D) Pregnancy or related medical conditions.

(E) Decision-making, access to care, or potential or actual use of a drug, device, product, or service relating to pregnancy or related medical conditions.

(F) Sexual orientation.

(G) Variations in sex characteristics, including intersex traits or differences in sex development.

(c) This section reflects the existing protections of the California Constitution recognizing the individual rights to pursue and obtain safety, happiness, and privacy (Art. I, § 1), ensuring equal protection of the laws (Art. I, § 7), protecting the ability to enter or pursue a business, profession, vocation, or employment (Art. I, § 8), and protecting an individual’s reproductive freedom (Art. I, § 1.1). This section shall be liberally construed to effectuate the purposes of these constitutional protections.

Comment. Section 23 is added to reflect California’s commitment to the equality of rights under the law. While this section applies specifically to the Financial Code, there are identical sections in each of the other California codes to clarify and provide consistency across all California laws governing sex discrimination.

This section is derived from existing California constitutional protections, but not by way of limitation, and intended to provide express language confirming that California’s laws prohibiting and protecting against sex discrimination address, at a minimum, discrimination based on the listed characteristics. The scope of this rule is consistent with the broad scope of anti-discrimination protections in the Unruh Civil Rights Act (Civil Code Section 51), the California Fair Employment and Housing Act (Government Code Sections 12900-12999), California’s laws on Educational Equity (Education Code Sections 200-270).

FISH AND GAME CODE

Fish & Game Code § 9.4 (added). Scope of sex discrimination

SEC. ____ . Section 9.4 is added to the Fish and Game Code, to read:

9.4. (a)(1) Any provision that prohibits discrimination on the basis of sex, discrimination on the basis of gender, or similar discrimination shall also be interpreted as prohibiting sex discrimination, as defined in subdivision (b).

(2) In case of a conflict between the provisions of this section and other provisions of this code that set forth the scope of “sex discrimination,” the provisions of this section shall prevail over provisions with a narrower scope.

(b) For the purposes of this section, the following definitions apply:

(1) “Discrimination” includes, but is not limited to, harassment.

(2) “Pregnancy or related medical conditions” includes, but is not limited to, childbirth, abortion, lactation, miscarriage, fertility, and contraception.

(3) “Sex discrimination” includes, but is not limited to, discrimination based on any of the following actual or perceived characteristics or actions:

(A) Assigned sex or gender category, including female, male, or nonbinary.

(B) Degree of conformity to sex or gender stereotypes.

(C) Gender, including gender identity, gender expression, and access to, and use of, gender affirming care and other related health care.

(D) Pregnancy or related medical conditions.

(E) Decision-making, access to care, or potential or actual use of a drug, device, product, or service relating to pregnancy or related medical conditions.

(F) Sexual orientation.

(G) Variations in sex characteristics, including intersex traits or differences in sex development.

(c) This section reflects the existing protections of the California Constitution recognizing the individual rights to pursue and obtain safety, happiness, and privacy (Art. I, § 1), ensuring equal protection of the laws (Art. I, § 7), protecting the ability to enter or pursue a business, profession, vocation, or employment (Art. I, § 8), and protecting an individual’s reproductive freedom (Art. I, § 1.1). This section shall be liberally construed to effectuate the purposes of these constitutional protections.

Comment. Section 9.4 is added to reflect California’s commitment to the equality of rights under the law. While this section applies specifically to the Fish and Game Code, there are identical sections in each of the other California codes to clarify and provide consistency across all California laws governing sex discrimination.

This section is derived from existing California constitutional protections, but not by way of limitation, and intended to provide express language confirming that California’s laws prohibiting and protecting against sex discrimination address, at a minimum, discrimination based on the listed characteristics. The scope of this rule is consistent with the broad scope of anti-discrimination protections in the Unruh Civil Rights Act (Civil Code Section 51), the California Fair Employment and Housing Act (Government Code Sections 12900-12999), California’s laws on Educational Equity (Education Code Sections 200-270).

FOOD AND AGRICULTURE CODE

Food & Agric. Code § 52 (added). Scope of sex discrimination

SEC. ____ . Section 52 is added to the Food and Agriculture Code to read:

51. (a)(1) Any provision that prohibits discrimination on the basis of sex, discrimination on the basis of gender, or similar discrimination shall also be interpreted as prohibiting sex discrimination, as defined in subdivision (b).

(2) In case of a conflict between the provisions of this section and other provisions of this code that set forth the scope of “sex discrimination,” the provisions of this section shall prevail over provisions with a narrower scope.

(b) For the purposes of this section, the following definitions apply:

(1) “Discrimination” includes, but is not limited to, harassment.

(2) “Pregnancy or related medical conditions” includes, but is not limited to, childbirth, abortion, lactation, miscarriage, fertility, and contraception.

(3) “Sex discrimination” includes, but is not limited to, discrimination based on any of the following actual or perceived characteristics or actions:

(A) Assigned sex or gender category, including female, male, or nonbinary.

(B) Degree of conformity to sex or gender stereotypes.

(C) Gender, including gender identity, gender expression, and access to, and use of, gender affirming care and other related health care.

(D) Pregnancy or related medical conditions.

(E) Decision-making, access to care, or potential or actual use of a drug, device, product, or service relating to pregnancy or related medical conditions.

(F) Sexual orientation.

(G) Variations in sex characteristics, including intersex traits or differences in sex development.

(c) This section reflects the existing protections of the California Constitution recognizing the individual rights to pursue and obtain safety, happiness, and privacy (Art. I, § 1), ensuring equal protection of the laws (Art. I, § 7), protecting the ability to enter or pursue a business, profession, vocation, or employment (Art. I, § 8), and protecting an individual’s reproductive freedom (Art. I, § 1.1). This section shall be liberally construed to effectuate the purposes of these constitutional protections.

Comment. Section 52 is added to reflect California’s commitment to the equality of rights under the law. While this section applies specifically to the Food and Agriculture Code, there are identical sections in each of the other California codes to clarify and provide consistency across all California laws governing sex discrimination.

This section is derived from existing California constitutional protections, but not by way of limitation, and intended to provide express language confirming that California’s laws prohibiting and protecting against sex discrimination address, at a minimum, discrimination based on the listed characteristics. The scope of this rule is consistent with the broad scope of anti-discrimination protections in the Unruh Civil Rights Act (Civil Code Section 51), the California Fair Employment and Housing Act (Government Code Sections 12900-12999), California’s laws on Educational Equity (Education Code Sections 200-270).

GOVERNMENT CODE

Gov't Code § 27 (added). Scope of sex discrimination

SEC. ____ . Section 27 is added to the Government Code, to read:

27. (a)(1) Any provision that prohibits discrimination on the basis of sex, discrimination on the basis of gender, or similar discrimination shall also be interpreted as prohibiting sex discrimination, as defined in subdivision (b).

(2) In case of a conflict between the provisions of this section and other provisions of this code that set forth the scope of “sex discrimination,” the provisions of this section shall prevail over provisions with a narrower scope.

(b) For the purposes of this section, the following definitions apply:

(1) “Discrimination” includes, but is not limited to, harassment.

(2) “Pregnancy or related medical conditions” includes, but is not limited to, childbirth, abortion, lactation, miscarriage, fertility, and contraception.

(3) “Sex discrimination” includes, but is not limited to, discrimination based on any of the following actual or perceived characteristics or actions:

(A) Assigned sex or gender category, including female, male, or nonbinary.

(B) Degree of conformity to sex or gender stereotypes.

(C) Gender, including gender identity, gender expression, and access to, and use of, gender affirming care and other related health care.

(D) Pregnancy or related medical conditions.

(E) Decision-making, access to care, or potential or actual use of a drug, device, product, or service relating to pregnancy or related medical conditions.

(F) Sexual orientation.

(G) Variations in sex characteristics, including intersex traits or differences in sex development.

(c) This section reflects the existing protections of the California Constitution recognizing the individual rights to pursue and obtain safety, happiness, and privacy (Art. I, § 1), ensuring equal protection of the laws (Art. I, § 7), protecting the ability to enter or pursue a business, profession, vocation, or employment (Art. I, § 8), and protecting an individual’s reproductive freedom (Art. I, § 1.1). This section shall be liberally construed to effectuate the purposes of these constitutional protections.

Comment. Section 27 is added to reflect California’s commitment to the equality of rights under the law. While this section applies specifically to the Government Code, there are identical sections in each of the other California codes to clarify and provide consistency across all California laws governing sex discrimination.

This section is derived from existing California constitutional protections, but not by way of limitation, and intended to provide express language confirming that California’s laws prohibiting and protecting against sex discrimination address, at a minimum, discrimination based on the listed characteristics. The scope of this rule is consistent with the broad scope of anti-discrimination protections in the Unruh Civil Rights Act (Civil Code Section 51), the California Fair Employment and Housing Act (Government Code Sections 12900-12999), California’s laws on Educational Equity (Education Code Sections 200-270).

HARBORS AND NAVIGATION CODE

Harb. and Nav. Code § 26 (added). Scope of sex discrimination

SEC. ____ . Section 26 is added to the Harbors and Navigation Code, to read:

26. (a)(1) Any provision that prohibits discrimination on the basis of sex, discrimination on the basis of gender, or similar discrimination shall also be interpreted as prohibiting sex discrimination, as defined in subdivision (b).

(2) In case of a conflict between the provisions of this section and other provisions of this code that set forth the scope of “sex discrimination,” the provisions of this section shall prevail over provisions with a narrower scope.

(b) For the purposes of this section, the following definitions apply:

(1) “Discrimination” includes, but is not limited to, harassment.

(2) “Pregnancy or related medical conditions” includes, but is not limited to, childbirth, abortion, lactation, miscarriage, fertility, and contraception.

(3) “Sex discrimination” includes, but is not limited to, discrimination based on any of the following actual or perceived characteristics or actions:

(A) Assigned sex or gender category, including female, male, or nonbinary.

(B) Degree of conformity to sex or gender stereotypes.

(C) Gender, including gender identity, gender expression, and access to, and use of, gender affirming care and other related health care.

(D) Pregnancy or related medical conditions.

(E) Decision-making, access to care, or potential or actual use of a drug, device, product, or service relating to pregnancy or related medical conditions.

(F) Sexual orientation.

(G) Variations in sex characteristics, including intersex traits or differences in sex development.

(c) This section reflects the existing protections of the California Constitution recognizing the individual rights to pursue and obtain safety, happiness, and privacy (Art. I, § 1), ensuring equal protection of the laws (Art. I, § 7), protecting the ability to enter or pursue a business, profession, vocation, or employment (Art. I, § 8), and protecting an individual’s reproductive freedom (Art. I, § 1.1). This section shall be liberally construed to effectuate the purposes of these constitutional protections.

Comment. Section 26 is added to reflect California’s commitment to the equality of rights under the law. While this section applies specifically to the Harbors and Navigation, there are identical sections in each of the other California codes to clarify and provide consistency across all California laws governing sex discrimination.

This section is derived from existing California constitutional protections, but not by way of limitation, and intended to provide express language confirming that California’s laws prohibiting and protecting against sex discrimination address, at a minimum, discrimination based on the listed characteristics. The scope of this rule is consistent with the broad scope of anti-discrimination protections in the Unruh Civil Rights Act (Civil Code Section 51), the California Fair Employment and Housing Act (Government Code Sections 12900-12999), California’s laws on Educational Equity (Education Code Sections 200-270).

HEALTH AND SAFETY CODE

Health & Safety Code § 29 (added). Scope of sex discrimination

SEC. ____ . Section 29 is added to the Health and Safety Code, to read:

29. (a)(1) Any provision that prohibits discrimination on the basis of sex, discrimination on the basis of gender, or similar discrimination shall also be interpreted as prohibiting sex discrimination, as defined in subdivision (b).

(2) In case of a conflict between the provisions of this section and other provisions of this code that set forth the scope of “sex discrimination,” the provisions of this section shall prevail over provisions with a narrower scope.

(b) For the purposes of this section, the following definitions apply:

(1) “Discrimination” includes, but is not limited to, harassment.

(2) “Pregnancy or related medical conditions” includes, but is not limited to, childbirth, abortion, lactation, miscarriage, fertility, and contraception.

(3) “Sex discrimination” includes, but is not limited to, discrimination based on any of the following actual or perceived characteristics or actions:

(A) Assigned sex or gender category, including female, male, or nonbinary.

(B) Degree of conformity to sex or gender stereotypes.

(C) Gender, including gender identity, gender expression, and access to, and use of, gender affirming care and other related health care.

(D) Pregnancy or related medical conditions.

(E) Decision-making, access to care, or potential or actual use of a drug, device, product, or service relating to pregnancy or related medical conditions.

(F) Sexual orientation.

(G) Variations in sex characteristics, including intersex traits or differences in sex development.

(c) This section reflects the existing protections of the California Constitution recognizing the individual rights to pursue and obtain safety, happiness, and privacy (Art. I, § 1), ensuring equal protection of the laws (Art. I, § 7), protecting the ability to enter or pursue a business, profession, vocation, or employment (Art. I, § 8), and protecting an individual’s reproductive freedom (Art. I, § 1.1). This section shall be liberally construed to effectuate the purposes of these constitutional protections.

Comment. Section 29 is added to reflect California’s commitment to the equality of rights under the law. While this section applies specifically to the Health and Safety Code, there are identical sections in each of the other California codes to clarify and provide consistency across all California laws governing sex discrimination.

This section is derived from existing California constitutional protections, but not by way of limitation, and intended to provide express language confirming that California’s laws prohibiting and protecting against sex discrimination address, at a minimum, discrimination based on the listed characteristics. The scope of this rule is consistent with the broad scope of anti-discrimination protections in the Unruh Civil Rights Act (Civil Code Section 51), the California Fair Employment and Housing Act (Government Code Sections 12900-12999), California’s laws on Educational Equity (Education Code Sections 200-270).

INSURANCE CODE

Ins. Code § 49 (added). Scope of sex discrimination

SEC. ____ . Section 49 is added to the Insurance Code, to read:

49. (a)(1) Any provision that prohibits discrimination on the basis of sex, discrimination on the basis of gender, or similar discrimination shall also be interpreted as prohibiting sex discrimination, as defined in subdivision (b).

(2) In case of a conflict between the provisions of this section and other provisions of this code that set forth the scope of “sex discrimination,” the provisions of this section shall prevail over provisions with a narrower scope.

(b) For the purposes of this section, the following definitions apply:

(1) “Discrimination” includes, but is not limited to, harassment.

(2) “Pregnancy or related medical conditions” includes, but is not limited to, childbirth, abortion, lactation, miscarriage, fertility, and contraception.

(3) “Sex discrimination” includes, but is not limited to, discrimination based on any of the following actual or perceived characteristics or actions:

(A) Assigned sex or gender category, including female, male, or nonbinary.

(B) Degree of conformity to sex or gender stereotypes.

(C) Gender, including gender identity, gender expression, and access to, and use of, gender affirming care and other related health care.

(D) Pregnancy or related medical conditions.

(E) Decision-making, access to care, or potential or actual use of a drug, device, product, or service relating to pregnancy or related medical conditions.

(F) Sexual orientation.

(G) Variations in sex characteristics, including intersex traits or differences in sex development.

(c) This section reflects the existing protections of the California Constitution recognizing the individual rights to pursue and obtain safety, happiness, and privacy (Art. I, § 1), ensuring equal protection of the laws (Art. I, § 7), protecting the ability to enter or pursue a business, profession, vocation, or employment (Art. I, § 8), and protecting an individual’s reproductive freedom (Art. I, § 1.1). This section shall be liberally construed to effectuate the purposes of these constitutional protections.

Comment. Section 49 is added to reflect California’s commitment to the equality of rights under the law. While this section applies specifically to the Insurance Code, there are identical sections in each of the other California codes to clarify and provide consistency across all California laws governing sex discrimination.

This section is derived from existing California constitutional protections, but not by way of limitation, and intended to provide express language confirming that California’s laws prohibiting and protecting against sex discrimination address, at a minimum, discrimination based on the listed characteristics. The scope of this rule is consistent with the broad scope of anti-discrimination protections in the Unruh Civil Rights Act (Civil Code Section 51), the California Fair Employment and Housing Act (Government Code Sections 12900-12999), California’s laws on Educational Equity (Education Code Sections 200-270).

LABOR CODE

1 **Lab. Code § 12.3 (added). Scope of sex discrimination**

2 SEC. ____ . Section 12.3 is added to the Labor Code, to read:

3 12.3. (a)(1) Any provision that prohibits discrimination on the basis of sex, discrimination on
4 the basis of gender, or similar discrimination shall also be interpreted as prohibiting sex
5 discrimination, as defined in subdivision (b).

6 (2) In case of a conflict between the provisions of this section and other provisions of this code
7 that set forth the scope of “sex discrimination,” the provisions of this section shall prevail over
8 provisions with a narrower scope.

9 (b) For the purposes of this section, the following definitions apply:

10 (1) “Discrimination” includes, but is not limited to, harassment.

11 (2) “Pregnancy or related medical conditions” includes, but is not limited to, childbirth, abortion,
12 lactation, miscarriage, fertility, and contraception.

13 (3) “Sex discrimination” includes, but is not limited to, discrimination based on any of the
14 following actual or perceived characteristics or actions:

15 (A) Assigned sex or gender category, including female, male, or nonbinary.

16 (B) Degree of conformity to sex or gender stereotypes.

17 (C) Gender, including gender identity, gender expression, and access to, and use of, gender
18 affirming care and other related health care.

19 (D) Pregnancy or related medical conditions.

20 (E) Decision-making, access to care, or potential or actual use of a drug, device, product, or
21 service relating to pregnancy or related medical conditions.

22 (F) Sexual orientation.

23 (G) Variations in sex characteristics, including intersex traits or differences in sex development.

24 (c) This section reflects the existing protections of the California Constitution recognizing the
25 individual rights to pursue and obtain safety, happiness, and privacy (Art. I, § 1), ensuring equal
26 protection of the laws (Art. I, § 7), protecting the ability to enter or pursue a business, profession,
27 vocation, or employment (Art. I, § 8), and protecting an individual’s reproductive freedom (Art. I,
28 § 1.1). This section shall be liberally construed to effectuate the purposes of these constitutional
29 protections.

30 **Comment.** Section 12.3 is added to reflect California’s commitment to the equality of rights
31 under the law. While this section applies specifically to the Labor Code, there are identical sections
32 in each of the other California codes to clarify and provide consistency across all California laws
33 governing sex discrimination.

34 This section is derived from existing California constitutional protections, but not by way of
35 limitation, and intended to provide express language confirming that California’s laws prohibiting
36 and protecting against sex discrimination address, at a minimum, discrimination based on the listed
37 characteristics. The scope of this rule is consistent with the broad scope of anti-discrimination
38 protections in the Unruh Civil Rights Act (Civil Code Section 51), the California Fair Employment
39 and Housing Act (Government Code Sections 12900-12999), California’s laws on Educational
40 Equity (Education Code Sections 200-270).

MILITARY AND VETERANS CODE

Mil. & Vet. Code § 20 (added). Scope of sex discrimination

SEC. ____ . Section 20 is added to the Military and Veterans Code, to read:

20. (a)(1) Any provision that prohibits discrimination on the basis of sex, discrimination on the basis of gender, or similar discrimination shall also be interpreted as prohibiting sex discrimination, as defined in subdivision (b).

(2) In case of a conflict between the provisions of this section and other provisions of this code that set forth the scope of “sex discrimination,” the provisions of this section shall prevail over provisions with a narrower scope.

(b) For the purposes of this section, the following definitions apply:

(1) “Discrimination” includes, but is not limited to, harassment.

(2) “Pregnancy or related medical conditions” includes, but is not limited to, childbirth, abortion, lactation, miscarriage, fertility, and contraception.

(3) “Sex discrimination” includes, but is not limited to, discrimination based on any of the following actual or perceived characteristics or actions:

(A) Assigned sex or gender category, including female, male, or nonbinary.

(B) Degree of conformity to sex or gender stereotypes.

(C) Gender, including gender identity, gender expression, and access to, and use of, gender affirming care and other related health care.

(D) Pregnancy or related medical conditions.

(E) Decision-making, access to care, or potential or actual use of a drug, device, product, or service relating to pregnancy or related medical conditions.

(F) Sexual orientation.

(G) Variations in sex characteristics, including intersex traits or differences in sex development.

(c) This section reflects the existing protections of the California Constitution recognizing the individual rights to pursue and obtain safety, happiness, and privacy (Art. I, § 1), ensuring equal protection of the laws (Art. I, § 7), protecting the ability to enter or pursue a business, profession, vocation, or employment (Art. I, § 8), and protecting an individual’s reproductive freedom (Art. I, § 1.1). This section shall be liberally construed to effectuate the purposes of these constitutional protections.

Comment. Section 20 is added to reflect California’s commitment to the equality of rights under the law. While this section applies specifically to the Military and Veterans Code, there are identical sections in each of the other California codes to clarify and provide consistency across all California laws governing sex discrimination.

This section is derived from existing California constitutional protections, but not by way of limitation, and intended to provide express language confirming that California’s laws prohibiting and protecting against sex discrimination address, at a minimum, discrimination based on the listed characteristics. The scope of this rule is consistent with the broad scope of anti-discrimination protections in the Unruh Civil Rights Act (Civil Code Section 51), the California Fair Employment and Housing Act (Government Code Sections 12900-12999), California’s laws on Educational Equity (Education Code Sections 200-270).

PENAL CODE

Penal Code § 5.5 (added). Scope of sex discrimination

SEC. ____ . Section 5.5 is added to the Penal Code, to read:

5.5. (a)(1) Any provision that prohibits discrimination on the basis of sex, discrimination on the basis of gender, or similar discrimination shall also be interpreted as prohibiting sex discrimination, as defined in subdivision (b).

(2) In case of a conflict between the provisions of this section and other provisions of this code that set forth the scope of “sex discrimination,” the provisions of this section shall prevail over provisions with a narrower scope.

(b) For the purposes of this section, the following definitions apply:

(1) “Discrimination” includes, but is not limited to, harassment.

(2) “Pregnancy or related medical conditions” includes, but is not limited to, childbirth, abortion, lactation, miscarriage, fertility, and contraception.

(3) “Sex discrimination” includes, but is not limited to, discrimination based on any of the following actual or perceived characteristics or actions:

(A) Assigned sex or gender category, including female, male, or nonbinary.

(B) Degree of conformity to sex or gender stereotypes.

(C) Gender, including gender identity, gender expression, and access to, and use of, gender affirming care and other related health care.

(D) Pregnancy or related medical conditions.

(E) Decision-making, access to care, or potential or actual use of a drug, device, product, or service relating to pregnancy or related medical conditions.

(F) Sexual orientation.

(G) Variations in sex characteristics, including intersex traits or differences in sex development.

(c) This section reflects the existing protections of the California Constitution recognizing the individual rights to pursue and obtain safety, happiness, and privacy (Art. I, § 1), ensuring equal protection of the laws (Art. I, § 7), protecting the ability to enter or pursue a business, profession, vocation, or employment (Art. I, § 8), and protecting an individual’s reproductive freedom (Art. I, § 1.1). This section shall be liberally construed to effectuate the purposes of these constitutional protections.

Comment. Section 5.5 is added to reflect California’s commitment to the equality of rights under the law. While this section applies specifically to the Penal Code, there are identical sections in each of the other California codes to clarify and provide consistency across all California laws governing sex discrimination.

This section is derived from existing California constitutional protections, but not by way of limitation, and intended to provide express language confirming that California’s laws prohibiting and protecting against sex discrimination address, at a minimum, discrimination based on the listed characteristics. The scope of this rule is consistent with the broad scope of anti-discrimination protections in the Unruh Civil Rights Act (Civil Code Section 51), the California Fair Employment and Housing Act (Government Code Sections 12900-12999), California’s laws on Educational Equity (Education Code Sections 200-270).

PROBATE CODE

Prob. Code § 71 (added). Scope of sex discrimination

SEC. ____ . Section 71 is added to the Probate Code, to read:

71. (a)(1) Any provision that prohibits discrimination on the basis of sex, discrimination on the basis of gender, or similar discrimination shall also be interpreted as prohibiting sex discrimination, as defined in subdivision (b).

(2) In case of a conflict between the provisions of this section and other provisions of this code that set forth the scope of “sex discrimination,” the provisions of this section shall prevail over provisions with a narrower scope.

(b) For the purposes of this section, the following definitions apply:

(1) “Discrimination” includes, but is not limited to, harassment.

(2) “Pregnancy or related medical conditions” includes, but is not limited to, childbirth, abortion, lactation, miscarriage, fertility, and contraception.

(3) “Sex discrimination” includes, but is not limited to, discrimination based on any of the following actual or perceived characteristics or actions:

(A) Assigned sex or gender category, including female, male, or nonbinary.

(B) Degree of conformity to sex or gender stereotypes.

(C) Gender, including gender identity, gender expression, and access to, and use of, gender affirming care and other related health care.

(D) Pregnancy or related medical conditions.

(E) Decision-making, access to care, or potential or actual use of a drug, device, product, or service relating to pregnancy or related medical conditions.

(F) Sexual orientation.

(G) Variations in sex characteristics, including intersex traits or differences in sex development.

(c) This section reflects the existing protections of the California Constitution recognizing the individual rights to pursue and obtain safety, happiness, and privacy (Art. I, § 1), ensuring equal protection of the laws (Art. I, § 7), protecting the ability to enter or pursue a business, profession, vocation, or employment (Art. I, § 8), and protecting an individual’s reproductive freedom (Art. I, § 1.1). This section shall be liberally construed to effectuate the purposes of these constitutional protections.

Comment. Section 71 is added to reflect California’s commitment to the equality of rights under the law. While this section applies specifically to the Probate Code, there are identical sections in each of the other California codes to clarify and provide consistency across all California laws governing sex discrimination.

This section is derived from existing California constitutional protections, but not by way of limitation, and intended to provide express language confirming that California’s laws prohibiting and protecting against sex discrimination address, at a minimum, discrimination based on the listed characteristics. The scope of this rule is consistent with the broad scope of anti-discrimination protections in the Unruh Civil Rights Act (Civil Code Section 51), the California Fair Employment and Housing Act (Government Code Sections 12900-12999), California’s laws on Educational Equity (Education Code Sections 200-270).

PUBLIC CONTRACT CODE

Pub. Cont. Code § 1105 (added). Scope of sex discrimination

SEC. ____. Section 1105 is added to the Public Contract Code, to read:

1105. (a)(1) Any provision that prohibits discrimination on the basis of sex, discrimination on the basis of gender, or similar discrimination shall also be interpreted as prohibiting sex discrimination, as defined in subdivision (b).

(2) In case of a conflict between the provisions of this section and other provisions of this code that set forth the scope of “sex discrimination,” the provisions of this section shall prevail over provisions with a narrower scope.

(b) For the purposes of this section, the following definitions apply:

(1) “Discrimination” includes, but is not limited to, harassment.

(2) “Pregnancy or related medical conditions” includes, but is not limited to, childbirth, abortion, lactation, miscarriage, fertility, and contraception.

(3) “Sex discrimination” includes, but is not limited to, discrimination based on any of the following actual or perceived characteristics or actions:

(A) Assigned sex or gender category, including female, male, or nonbinary.

(B) Degree of conformity to sex or gender stereotypes.

(C) Gender, including gender identity, gender expression, and access to, and use of, gender affirming care and other related health care.

(D) Pregnancy or related medical conditions.

(E) Decision-making, access to care, or potential or actual use of a drug, device, product, or service relating to pregnancy or related medical conditions.

(F) Sexual orientation.

(G) Variations in sex characteristics, including intersex traits or differences in sex development.

(c) This section reflects the existing protections of the California Constitution recognizing the individual rights to pursue and obtain safety, happiness, and privacy (Art. I, § 1), ensuring equal protection of the laws (Art. I, § 7), protecting the ability to enter or pursue a business, profession, vocation, or employment (Art. I, § 8), and protecting an individual’s reproductive freedom (Art. I, § 1.1). This section shall be liberally construed to effectuate the purposes of these constitutional protections.

Comment. Section 1105 is added to reflect California’s commitment to the equality of rights under the law. While this section applies specifically to the Public Contract Code, there are identical sections in each of the other California codes to clarify and provide consistency across all California laws governing sex discrimination.

This section is derived from existing California constitutional protections, but not by way of limitation, and intended to provide express language confirming that California’s laws prohibiting and protecting against sex discrimination address, at a minimum, discrimination based on the listed characteristics. The scope of this rule is consistent with the broad scope of anti-discrimination protections in the Unruh Civil Rights Act (Civil Code Section 51), the California Fair Employment and Housing Act (Government Code Sections 12900-12999), California’s laws on Educational Equity (Education Code Sections 200-270).

PUBLIC RESOURCES CODE

Pub. Res. Code § 19 (added). Scope of sex discrimination

SEC. ____ . Section 19 is added to the Public Resources Code, to read:

19. (a)(1) Any provisions that prohibit discrimination on the basis of sex, discrimination on the basis of gender, or similar discrimination shall also be interpreted as prohibiting sex discrimination, as defined in subdivision (b).

(2) In case of a conflict between the provisions of this section and other provisions of this code that set forth the scope of “sex discrimination,” the provisions of this section shall prevail over provisions with a narrower scope.

(b) For the purposes of this section, the following definitions apply:

(1) “Discrimination” includes, but is not limited to, harassment.

(2) “Pregnancy or related medical conditions” includes, but is not limited to, childbirth, abortion, lactation, miscarriage, fertility, and contraception.

(3) “Sex discrimination” includes, but is not limited to, discrimination based on any of the following actual or perceived characteristics or actions:

(A) Assigned sex or gender category, including female, male, or nonbinary.

(B) Degree of conformity to sex or gender stereotypes.

(C) Gender, including gender identity, gender expression, and access to, and use of, gender affirming care and other related health care.

(D) Pregnancy or related medical conditions.

(E) Decision-making, access to care, or potential or actual use of a drug, device, product, or service relating to pregnancy or related medical conditions.

(F) Sexual orientation.

(G) Variations in sex characteristics, including intersex traits or differences in sex development.

(c) This section reflects the existing protections of the California Constitution recognizing the individual rights to pursue and obtain safety, happiness, and privacy (Art. I, § 1), ensuring equal protection of the laws (Art. I, § 7), protecting the ability to enter or pursue a business, profession, vocation, or employment (Art. I, § 8), and protecting an individual’s reproductive freedom (Art. I, § 1.1). This section shall be liberally construed to effectuate the purposes of these constitutional protections.

Comment. Section 19 is added to reflect California’s commitment to the equality of rights under the law. While this section applies specifically to the Public Resources Code, there are identical sections in each of the other California codes to clarify and provide consistency across all California laws governing sex discrimination.

This section is derived from existing California constitutional protections, but not by way of limitation, and intended to provide express language confirming that California’s laws prohibiting and protecting against sex discrimination address, at a minimum, discrimination based on the listed characteristics. The scope of this rule is consistent with the broad scope of anti-discrimination protections in the Unruh Civil Rights Act (Civil Code Section 51), the California Fair Employment and Housing Act (Government Code Sections 12900-12999), California’s laws on Educational Equity (Education Code Sections 200-270).

PUBLIC UTILITIES CODE

Pub. Util. Code § 23 (added). Scope of sex discrimination

SEC. ____ . Section 23 is added to the Public Utilities Code, to read:

23. (a)(1) Any provision that prohibits discrimination on the basis of sex, discrimination on the basis of gender, or similar discrimination shall also be interpreted as prohibiting sex discrimination, as defined in subdivision (b).

(2) In case of a conflict between the provisions of this section and other provisions of this code that set forth the scope of “sex discrimination,” the provisions of this section shall prevail over provisions with a narrower scope.

(b) For the purposes of this section, the following definitions apply:

(1) “Discrimination” includes, but is not limited to, harassment.

(2) “Pregnancy or related medical conditions” includes, but is not limited to, childbirth, abortion, lactation, miscarriage, fertility, and contraception.

(3) “Sex discrimination” includes, but is not limited to, discrimination based on any of the following actual or perceived characteristics or actions:

(A) Assigned sex or gender category, including female, male, or nonbinary.

(B) Degree of conformity to sex or gender stereotypes.

(C) Gender, including gender identity, gender expression, and access to, and use of, gender affirming care and other related health care.

(D) Pregnancy or related medical conditions.

(E) Decision-making, access to care, or potential or actual use of a drug, device, product, or service relating to pregnancy or related medical conditions.

(F) Sexual orientation.

(G) Variations in sex characteristics, including intersex traits or differences in sex development.

(c) This section reflects the existing protections of the California Constitution recognizing the individual rights to pursue and obtain safety, happiness, and privacy (Art. I, § 1), ensuring equal protection of the laws (Art. I, § 7), protecting the ability to enter or pursue a business, profession, vocation, or employment (Art. I, § 8), and protecting an individual’s reproductive freedom (Art. I, § 1.1). This section shall be liberally construed to effectuate the purposes of these constitutional protections.

Comment. Section 23 is added to reflect California’s commitment to the equality of rights under the law. While this section applies specifically to the Public Utilities Code, there are identical sections in each of the other California codes to clarify and provide consistency across all California laws governing sex discrimination.

This section is derived from existing California constitutional protections, but not by way of limitation, and intended to provide express language confirming that California’s laws prohibiting and protecting against sex discrimination address, at a minimum, discrimination based on the listed characteristics. The scope of this rule is consistent with the broad scope of anti-discrimination protections in the Unruh Civil Rights Act (Civil Code Section 51), the California Fair Employment and Housing Act (Government Code Sections 12900-12999), California’s laws on Educational Equity (Education Code Sections 200-270).

REVENUE AND TAXATION CODE

Rev. & Tax. Code § 12.3 (added). Scope of sex discrimination

SEC. ____. Section 12.3 is added to the Revenue and Taxation Code, to read:

12.3. (a)(1) Any provision that prohibits discrimination on the basis of sex, discrimination on the basis of gender, or similar discrimination shall also be interpreted as prohibiting sex discrimination, as defined in subdivision (b).

(2) In case of a conflict between the provisions of this section and other provisions of this code that set forth the scope of “sex discrimination,” the provisions of this section shall prevail over provisions with a narrower scope.

(b) For the purposes of this section, the following definitions apply:

(1) “Discrimination” includes, but is not limited to, harassment.

(2) “Pregnancy or related medical conditions” includes, but is not limited to, childbirth, abortion, lactation, miscarriage, fertility, and contraception.

(3) “Sex discrimination” includes, but is not limited to, discrimination based on any of the following actual or perceived characteristics or actions:

(A) Assigned sex or gender category, including female, male, or nonbinary.

(B) Degree of conformity to sex or gender stereotypes.

(C) Gender, including gender identity, gender expression, and access to, and use of, gender affirming care and other related health care.

(D) Pregnancy or related medical conditions.

(E) Decision-making, access to care, or potential or actual use of a drug, device, product, or service relating to pregnancy or related medical conditions.

(F) Sexual orientation.

(G) Variations in sex characteristics, including intersex traits or differences in sex development.

(c) This section reflects the existing protections of the California Constitution recognizing the individual rights to pursue and obtain safety, happiness, and privacy (Art. I, § 1), ensuring equal protection of the laws (Art. I, § 7), protecting the ability to enter or pursue a business, profession, vocation, or employment (Art. I, § 8), and protecting an individual’s reproductive freedom (Art. I, § 1.1). This section shall be liberally construed to effectuate the purposes of these constitutional protections.

Comment. Section 12.3 is added to reflect California’s commitment to the equality of rights under the law. While this section applies specifically to the Revenue and Taxation Code, there are identical sections in each of the other California codes to clarify and provide consistency across all California laws governing sex discrimination.

This section is derived from existing California constitutional protections, but not by way of limitation, and intended to provide express language confirming that California’s laws prohibiting and protecting against sex discrimination address, at a minimum, discrimination based on the listed characteristics. The scope of this rule is consistent with the broad scope of anti-discrimination protections in the Unruh Civil Rights Act (Civil Code Section 51), the California Fair Employment and Housing Act (Government Code Sections 12900-12999), California’s laws on Educational Equity (Education Code Sections 200-270).

STREETS AND HIGHWAYS CODE

Sts. and Hy. Code § 37 (added). Scope of sex discrimination

SEC. ____ . Section 37 is added to the Streets and Highways Code, to read:

37. (a)(1) Any provision that prohibits discrimination on the basis of sex, discrimination on the basis of gender, or similar discrimination shall also be interpreted as prohibiting sex discrimination, as defined in subdivision (b).

(2) In case of a conflict between the provisions of this section and other provisions of this code that set forth the scope of “sex discrimination,” the provisions of this section shall prevail over provisions with a narrower scope.

(b) For the purposes of this section, the following definitions apply:

(1) “Discrimination” includes, but is not limited to, harassment.

(2) “Pregnancy or related medical conditions” includes, but is not limited to, childbirth, abortion, lactation, miscarriage, fertility, and contraception.

(3) “Sex discrimination” includes, but is not limited to, discrimination based on any of the following actual or perceived characteristics or actions:

(A) Assigned sex or gender category, including female, male, or nonbinary.

(B) Degree of conformity to sex or gender stereotypes.

(C) Gender, including gender identity, gender expression, and access to, and use of, gender affirming care and other related health care.

(D) Pregnancy or related medical conditions.

(E) Decision-making, access to care, or potential or actual use of a drug, device, product, or service relating to pregnancy or related medical conditions.

(F) Sexual orientation.

(G) Variations in sex characteristics, including intersex traits or differences in sex development.

(c) This section reflects the existing protections of the California Constitution recognizing the individual rights to pursue and obtain safety, happiness, and privacy (Art. I, § 1), ensuring equal protection of the laws (Art. I, § 7), protecting the ability to enter or pursue a business, profession, vocation, or employment (Art. I, § 8), and protecting an individual’s reproductive freedom (Art. I, § 1.1). This section shall be liberally construed to effectuate the purposes of these constitutional protections.

Comment. Section 37 is added to reflect California’s commitment to the equality of rights under the law. While this section applies specifically to the Streets and Highways Code, there are identical sections in each of the other California codes to clarify and provide consistency across all California laws governing sex discrimination.

This section is derived from existing California constitutional protections, but not by way of limitation, and intended to provide express language confirming that California’s laws prohibiting and protecting against sex discrimination address, at a minimum, discrimination based on the listed characteristics. The scope of this rule is consistent with the broad scope of anti-discrimination protections in the Unruh Civil Rights Act (Civil Code Section 51), the California Fair Employment and Housing Act (Government Code Sections 12900-12999), California’s laws on Educational Equity (Education Code Sections 200-270).

UNEMPLOYMENT INSURANCE CODE

Unemp. Ins. Code § 22 (added). Scope of sex discrimination

SEC. ____ . Section 22 is added to the Unemployment Insurance Code, to read:

22. (a)(1) Any provision that prohibits discrimination on the basis of sex, discrimination on the basis of gender, or similar discrimination shall also be interpreted as prohibiting sex discrimination, as defined in subdivision (b).

(2) In case of a conflict between the provisions of this section and other provisions of this code that set forth the scope of “sex discrimination,” the provisions of this section shall prevail over provisions with a narrower scope.

(b) For the purposes of this section, the following definitions apply:

(1) “Discrimination” includes, but is not limited to, harassment.

(2) “Pregnancy or related medical conditions” includes, but is not limited to, childbirth, abortion, lactation, miscarriage, fertility, and contraception.

(3) “Sex discrimination” includes, but is not limited to, discrimination based on any of the following actual or perceived characteristics or actions:

(A) Assigned sex or gender category, including female, male, or nonbinary.

(B) Degree of conformity to sex or gender stereotypes.

(C) Gender, including gender identity, gender expression, and access to, and use of, gender affirming care and other related health care.

(D) Pregnancy or related medical conditions.

(E) Decision-making, access to care, or potential or actual use of a drug, device, product, or service relating to pregnancy or related medical conditions.

(F) Sexual orientation.

(G) Variations in sex characteristics, including intersex traits or differences in sex development.

(c) This section reflects the existing protections of the California Constitution recognizing the individual rights to pursue and obtain safety, happiness, and privacy (Art. I, § 1), ensuring equal protection of the laws (Art. I, § 7), protecting the ability to enter or pursue a business, profession, vocation, or employment (Art. I, § 8), and protecting an individual’s reproductive freedom (Art. I, § 1.1). This section shall be liberally construed to effectuate the purposes of these constitutional protections.

Comment. Section 22 is added to reflect California’s commitment to the equality of rights under the law. While this section applies specifically to the Unemployment Insurance Code, there are identical sections in each of the other California codes to clarify and provide consistency across all California laws governing sex discrimination.

This section is derived from existing California constitutional protections, but not by way of limitation, and intended to provide express language confirming that California’s laws prohibiting and protecting against sex discrimination address, at a minimum, discrimination based on the listed characteristics. The scope of this rule is consistent with the broad scope of anti-discrimination protections in the Unruh Civil Rights Act (Civil Code Section 51), the California Fair Employment and Housing Act (Government Code Sections 12900-12999), California’s laws on Educational Equity (Education Code Sections 200-270).

VEHICLE CODE

Veh. Code § 552 (added). Scope of sex discrimination

SEC. ____ . Section 552 is added to the Vehicle Code, to read:

552. (a)(1) Any provision that prohibits discrimination on the basis of sex, discrimination on the basis of gender, or similar discrimination shall also be interpreted as prohibiting sex discrimination, as defined in subdivision (b).

(2) In case of a conflict between the provisions of this section and other provisions of this code that set forth the scope of “sex discrimination,” the provisions of this section shall prevail over provisions with a narrower scope.

(b) For the purposes of this section, the following definitions apply:

(1) “Discrimination” includes, but is not limited to, harassment.

(2) “Pregnancy or related medical conditions” includes, but is not limited to, childbirth, abortion, lactation, miscarriage, fertility, and contraception.

(3) “Sex discrimination” includes, but is not limited to, discrimination based on any of the following actual or perceived characteristics or actions:

(A) Assigned sex or gender category, including female, male, or nonbinary.

(B) Degree of conformity to sex or gender stereotypes.

(C) Gender, including gender identity, gender expression, and access to, and use of, gender affirming care and other related health care.

(D) Pregnancy or related medical conditions.

(E) Decision-making, access to care, or potential or actual use of a drug, device, product, or service relating to pregnancy or related medical conditions.

(F) Sexual orientation.

(G) Variations in sex characteristics, including intersex traits or differences in sex development.

(c) This section reflects the existing protections of the California Constitution recognizing the individual rights to pursue and obtain safety, happiness, and privacy (Art. I, § 1), ensuring equal protection of the laws (Art. I, § 7), protecting the ability to enter or pursue a business, profession, vocation, or employment (Art. I, § 8), and protecting an individual’s reproductive freedom (Art. I, § 1.1). This section shall be liberally construed to effectuate the purposes of these constitutional protections.

Comment. Section 552 is added to reflect California’s commitment to the equality of rights under the law. While this section applies specifically to the Vehicle Code, there are identical sections in each of the other California codes to clarify and provide consistency across all California laws governing sex discrimination.

This section is derived from existing California constitutional protections, but not by way of limitation, and intended to provide express language confirming that California’s laws prohibiting and protecting against sex discrimination address, at a minimum, discrimination based on the listed characteristics. The scope of this rule is consistent with the broad scope of anti-discrimination protections in the Unruh Civil Rights Act (Civil Code Section 51), the California Fair Employment and Housing Act (Government Code Sections 12900-12999), California’s laws on Educational Equity (Education Code Sections 200-270).

WATER CODE

Water. Code § 27 (added). Scope of sex discrimination

SEC. ____ . Section 27 is added to the Water Code, to read:

27. (a)(1) Any provision that prohibits discrimination on the basis of sex, discrimination on the basis of gender, or similar discrimination shall also be interpreted as prohibiting sex discrimination, as defined in subdivision (b).

(2) In case of a conflict between the provisions of this section and other provisions of this code that set forth the scope of “sex discrimination,” the provisions of this section shall prevail over provisions with a narrower scope.

(b) For the purposes of this section, the following definitions apply:

(1) “Discrimination” includes, but is not limited to, harassment.

(2) “Pregnancy or related medical conditions” includes, but is not limited to, childbirth, abortion, lactation, miscarriage, fertility, and contraception.

(3) “Sex discrimination” includes, but is not limited to, discrimination based on any of the following actual or perceived characteristics or actions:

(A) Assigned sex or gender category, including female, male, or nonbinary.

(B) Degree of conformity to sex or gender stereotypes.

(C) Gender, including gender identity, gender expression, and access to, and use of, gender affirming care and other related health care.

(D) Pregnancy or related medical conditions.

(E) Decision-making, access to care, or potential or actual use of a drug, device, product, or service relating to pregnancy or related medical conditions.

(F) Sexual orientation.

(G) Variations in sex characteristics, including intersex traits or differences in sex development.

(c) This section reflects the existing protections of the California Constitution recognizing the individual rights to pursue and obtain safety, happiness, and privacy (Art. I, § 1), ensuring equal protection of the laws (Art. I, § 7), protecting the ability to enter or pursue a business, profession, vocation, or employment (Art. I, § 8), and protecting an individual’s reproductive freedom (Art. I, § 1.1). This section shall be liberally construed to effectuate the purposes of these constitutional protections.

Comment. Section 27 is added to reflect California’s commitment to the equality of rights under the law. While this section applies specifically to the Water Code, there are identical sections in each of the other California codes to clarify and provide consistency across all California laws governing sex discrimination.

This section is derived from existing California constitutional protections, but not by way of limitation, and intended to provide express language confirming that California’s laws prohibiting and protecting against sex discrimination address, at a minimum, discrimination based on the listed characteristics. The scope of this rule is consistent with the broad scope of anti-discrimination protections in the Unruh Civil Rights Act (Civil Code Section 51), the California Fair Employment and Housing Act (Government Code Sections 12900-12999), California’s laws on Educational Equity (Education Code Sections 200-270).

WELFARE AND INSTITUTIONS CODE

1 **Welf. & Inst. Code § 28 (added). Scope of sex discrimination**

2 SEC. ____ . Section 28 is added to the Welfare and Institutions Code, to read:

3 28. (a)(1) Any provision that prohibits discrimination on the basis of sex, discrimination on the
4 basis of gender, or similar discrimination shall also be interpreted as prohibiting sex
5 discrimination, as defined in subdivision (b).

6 (2) In case of a conflict between the provisions of this section and other provisions of this code
7 that set forth the scope of “sex discrimination,” the provisions of this section shall prevail over
8 provisions with a narrower scope.

9 (b) For the purposes of this section, the following definitions apply:

10 (1) “Discrimination” includes, but is not limited to, harassment.

11 (2) “Pregnancy or related medical conditions” includes, but is not limited to, childbirth, abortion,
12 lactation, miscarriage, fertility, and contraception.

13 (3) “Sex discrimination” includes, but is not limited to, discrimination based on any of the
14 following actual or perceived characteristics or actions:

15 (A) Assigned sex or gender category, including female, male, or nonbinary.

16 (B) Degree of conformity to sex or gender stereotypes.

17 (C) Gender, including gender identity, gender expression, and access to, and use of, gender
18 affirming care and other related health care.

19 (D) Pregnancy or related medical conditions.

20 (E) Decision-making, access to care, or potential or actual use of a drug, device, product, or
21 service relating to pregnancy or related medical conditions.

22 (F) Sexual orientation.

23 (G) Variations in sex characteristics, including intersex traits or differences in sex development.

24 (c) This section reflects the existing protections of the California Constitution recognizing the
25 individual rights to pursue and obtain safety, happiness, and privacy (Art. I, § 1), ensuring equal
26 protection of the laws (Art. I, § 7), protecting the ability to enter or pursue a business, profession,
27 vocation, or employment (Art. I, § 8), and protecting an individual’s reproductive freedom (Art. I,
28 § 1.1). This section shall be liberally construed to effectuate the purposes of these constitutional
29 protections.

30 **Comment.** Section 28 is added to reflect California’s commitment to the equality of rights under
31 the law. While this section applies specifically to the Welfare and Institutions Code, there are
32 identical sections in each of the other California codes to clarify and provide consistency across
33 all California laws governing sex discrimination.

34 This section is derived from existing California constitutional protections, but not by way of
35 limitation, and intended to provide express language confirming that California’s laws prohibiting
36 and protecting against sex discrimination address, at a minimum, discrimination based on the listed
37 characteristics. The scope of this rule is consistent with the broad scope of anti-discrimination
38 protections in the Unruh Civil Rights Act (Civil Code Section 51), the California Fair Employment
39 and Housing Act (Government Code Sections 12900-12999), California’s laws on Educational
40 Equity (Education Code Sections 200-270).