United States Senate
WASHINGTON, DC 20510

November 2, 2017

The Honorable Jeff Sessions
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Dear Attorney General Sessions:

We write to express our grave concern over your reversal of the U.S. Department of Justice's ("the Department" or "DOJ") position that transgender employment discrimination claims are protected under Title VII of the Civil Rights Act of 1964. Your statement that "Title VII does not prohibit discrimination based on gender identity *per se*"[1] critically undermines transgender individuals' established legal protection from workplace discrimination.

According to recent surveys, the transgender community experiences unemployment at rates three times as high as the general population.[2] Ninety percent of transgender employees report experiencing workplace harassment, or taking active steps to avoid it.[3] Additionally, 27 percent of transgender employees were fired, refused a job, or passed over for a promotion due to their gender identity.[4] Your reversal of the Department's prior sound legal position places those workers at risk for further discrimination.

This most recent action by the Department to roll back protections for transgender persons is anathema to the Civil Rights Act's purpose. When President Johnson signed the Act into law on July 2, 1964, he wisely observed, "those who founded our country knew that freedom would be secure only if each generation fought to renew and enlarge its meaning."[5] Your Department has repeatedly undermined those very words. This memo denying legal protections on the basis of gender identity comes on the heels of the Department's amicus brief in *Zarda v. Altitude Express* arguing that Title VII does not cover sexual orientation. Actions that roll back the rights of LGBTQ Americans are not consistent with the values of equality and dignity or with Congress's goals in passing the Civil Rights Act.

Further, your actions contravene past policy of the Department, conflict with decisions from the circuit courts and the U.S. Equal Employment Opportunity Commission ("EEOC"), and send a dangerous message to employers about their obligations under federal law.

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[1] Memorandum from Jeff Sessions, Attorney Gen., to U.S. Attorneys, Heads of Dep't Components, (Oct. 4, 2017).
[2] SANDY E. JAMES ET AL., NATIONAL CENTER FOR TRANSGENDER EQUALITY, THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 3 (2016).
[3] JAIME M. GRANT, PH.D. ET AL., NATIONAL CENTER FOR TRANSGENDER EQUALITY, NATIONAL GAY AND LESBIAN TASK FORCE, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 51 (2011).
[4] James, *supra* note 2, at 10.
[5] President Lyndon B. Johnson, Remarks Upon Signing the Civil Rights Bill (July 2, 1964).

Title VII of the Civil Rights Act of 1964 precludes employers from discriminating against employees on the basis of race, color, religion, national origin, or sex. As noted by your predecessor, "Following the Supreme Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), courts have interpreted Title VII's prohibition of discrimination because of 'sex' as barring discrimination based on a perceived failure to conform to socially constructed characteristics of males and females."[6] Numerous circuit courts of appeal have held that laws prohibiting discrimination because of sex, including Title VII, prohibit discrimination against an individual for being transgender.[7] Additionally, the EEOC has clarified that Title VII's prohibition against sex discrimination encompasses claims of discrimination on the basis of gender identity.[8] By reversing the Department's enforcement of Title VII on behalf of transgender people, you are sending a signal that DOJ will now condone and defend those who discriminate on the basis of an individual's gender identity or history of gender transition.

The Civil Rights Division, charged with enforcement of Title VII of the Civil Rights Act of 1964, states its purpose is "to uphold the civil and constitutional rights of all Americans, particularly some of the most vulnerable members of our society." Transgender individuals are among the most vulnerable Americans. Your Department would best serve its mission by clarifying that employees should be hired or fired based on their ability to do the job—not because of their gender identity.

Accordingly, we urge the Department to reverse its position and acknowledge that the plain meaning of Title VII—as demonstrated by decisions following the precedent of the Supreme Court, the EEOC, your predecessor, and the law's text—prohibits discrimination based on gender identity. Furthermore, we request that you disclose a list of all cases that have been investigated by the Department in the past year for complaints of gender identity discrimination. Please include the status of each case and whether you intend to resolve or simply close those open investigations as a result of your October 4th memo.

We strongly urge you to change course and to ensure that transgender individuals are protected from such discrimination through a proper interpretation of the Civil Rights Act.

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[6] Memorandum from Eric Holder, Attorney Gen., to U.S. Attorneys, Heads of Dep't Components, (Dec. 15, 2014).

[7] *See* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. Of Educ., 858 F.3d 1034 (7th Cir. 2017); Chavez v. Credit Nation Auto Sales, L.L.C., 2016 WL 158820 (11th Cir. 2016); Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011); Barnes v. City of Cincinnati, 401 F.3d 729 (6th Cir. 2005); Smith v. Salem, 378 F.3d 566 (6th Cir. 2004); Rosa v. Parks W. Bank & Trust Co., 214 F.3d 213 (1st Cir. 2000); Schwenk v. Hartford, 204 F.3d 1187 (9th Cir. 2000).

[8] *See* Macy v. Dep't of Justice, 2012 WL 1435995 (E.E.O.C. Apr. 20, 2012) ("When an employer discriminates against someone because the person is transgender, the employer has engaged in disparate treatment 'related to the sex of the victim.' This is true regardless of whether an employer discriminates against an employee because the individual has expressed his or her gender in a non-stereotypical fashion, because the employer is uncomfortable with the fact that the person has transitioned or is in the process of transitioning from one gender to another, or because the employer simply does not like that the person is identifying as a transgender person.") (internal citations omitted); *see also* Lusardi v. Dep't of the Army, 2015 WL 1607756 (E.E.O.C. Apr. 1, 2015).

Sincerely,

KAMALA D. HARRIS
United States Senator

PATTY MURRAY
United States Senator

AL FRANKEN
United States Senator

CHARLES E. SCHUMER
United States Senator

EDWARD J. MARKEY
United States Senator

TAMMY BALDWIN
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RICHARD BLUMENTHAL
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United States Senator