

disability in covered health programs or activities. 42 U.S.C. 18116(a).

On June 15, 2020, the U.S. Supreme Court held that Title VII of the Civil Rights Act of 1964 (Pub. L. 88–352) (Title VII)’s ⁴ prohibition on employment discrimination based on sex encompasses discrimination based on sexual orientation and gender identity. *Bostock v. Clayton County, GA*, 140 S. Ct. 1731 (2020). The *Bostock* majority concluded that the plain meaning of “because of sex” in Title VII necessarily included discrimination because of sexual orientation and gender identity. *Id.* at 1753–54.

Since *Bostock*, two federal circuits have concluded that the plain language of Title IX of the Education Amendments of 1972’s (Title IX) prohibition on sex discrimination must be read similarly. See *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020), *as amended* (Aug. 28, 2020),⁵ *reh’g en banc denied*, 976 F.3d 399 (4th Cir. 2020), *petition for cert. filed*, No. 20–1163 (Feb. 24, 2021); *Adams v. Sch. Bd. of St. Johns Cnty.*, 968 F.3d 1286, 1305 (11th Cir. 2020), *petition for reh’g en banc pending*, No. 18–13592 (Aug. 28, 2020).⁶ In addition, on March 26, 2021, the Civil Rights Division of the U.S. Department of Justice issued a memorandum to Federal Agency Civil Rights Directors and General Counsel ⁷ concluding that the Supreme Court’s reasoning in *Bostock* applies to Title IX of the Education Amendments of 1972. As made clear by the Affordable Care Act, Section 1557 prohibits discrimination “on the grounds prohibited under . . . Title IX.” 42 U.S.C. 18116(a).

Consistent with the Supreme Court’s decision in *Bostock* and Title IX, beginning today, OCR will interpret and enforce Section 1557’s prohibition on discrimination on the basis of sex to include: (1) Discrimination on the basis of sexual orientation; and (2) discrimination on the basis of gender identity. This interpretation will guide OCR in processing complaints and

conducting investigations, but does not itself determine the outcome in any particular case or set of facts.

In enforcing Section 1557, as stated above, OCR will comply with the Religious Freedom Restoration Act, 42 U.S.C. 2000bb *et seq.*,⁸ and all other legal requirements. Additionally, OCR will comply with any applicable court orders that have been issued in litigation involving the Section 1557 regulations, including *Franciscan Alliance, Inc. v. Azar*, 414 F. Supp. 3d 928 (N.D. Tex. 2019);⁹ *Whitman-Walker Clinic, Inc. v. U.S. Dep’t of Health & Hum. Servs.*, 485 F. Supp. 3d 1 (D.D.C. 2020);¹⁰ *Asapansa-Johnson Walker v. Azar*, No. 20–CV–2834, 2020 WL 6363970 (E.D.N.Y. Oct. 29, 2020);¹¹ and *Religious Sisters of Mercy v. Azar*, No. 3:16–CV–00386, 2021 WL 191009 (D.N.D. Jan. 19, 2021).¹²

OCR applies the enforcement mechanisms provided for and available under Title IX when enforcing Section 1557’s prohibition on sex discrimination. 45 CFR 92.5(a). Title IX’s enforcement procedures can be found at 45 CFR 86.71 (adopting the procedures at 45 CFR 80.6 through 80.11 and 45 CFR part 81).

If you believe that a covered entity violated your civil rights, you may file a complaint at <https://www.hhs.gov/ocr/complaints>.

Dated: May 13, 2021.

Xavier Becerra,

Secretary, Department of Health and Human Services.

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⁸ Religious Freedom Restoration Act, 42 U.S.C. 2000bb *et seq.* <https://www.govinfo.gov/content/pkg/USCODE-2010-title42/pdf/USCODE-2010-title42-chap21B-sec2000bb-1.pdf>.

⁹ *Franciscan Alliance, Inc. v. Azar*, 414 F. Supp. 3d 928 (N.D. Tex. 2019). https://www.govinfo.gov/content/pkg/USCOURTS-nyed-1_20-cv-02834/pdf/USCOURTS-nyed-1_20-cv-02834-0.pdf.

¹⁰ *Whitman-Walker Clinic, Inc. v. U.S. Dep’t of Health & Hum. Servs.*, 485 F. Supp. 3d 1 (D.D.C. 2020). <http://www.ca5.uscourts.gov/opinions/unpub/20/20-10093.0.pdf>.

¹¹ *Asapansa-Johnson Walker v. Azar*, No. 20–CV–2834, 2020 WL 6363970 (E.D.N.Y. Oct. 29, 2020). https://www.govinfo.gov/content/pkg/USCOURTS-nyed-1_20-cv-02834/pdf/USCOURTS-nyed-1_20-cv-02834-0.pdf.

¹² *Religious Sisters of Mercy v. Azar*, No. 3:16–CV–00386, 2021 WL 191009 (D.N.D. Jan. 19, 2021). <https://www.hhs.gov/sites/default/files/document-124-memorandum-opinion-and-order.pdf>.

NATIONAL SCIENCE FOUNDATION

45 CFR Part 670

RIN 3145–AA59

Conservation of Antarctic Animals and Plants

AGENCY: National Science Foundation.

ACTION: Final rule.

SUMMARY: Pursuant to the Antarctic Conservation Act of 1978, as amended, the National Science Foundation (NSF) is amending its regulations to reflect changes to Annex II to the Protocol on Environmental Protection to the Antarctic Treaty (Protocol) agreed to by the Antarctic Treaty Consultative Parties. These changes reflect the outcomes of a legally binding Measure already adopted by the Parties at the Thirty-Second Antarctic Treaty Consultative Meeting (ATCM) in Baltimore, MD (2009).

DATES: Effective May 25, 2021.

FOR FURTHER INFORMATION CONTACT:

Bijan Gilanshah, Assistant General Counsel, Office of the General Counsel, at 703–292–8060, National Science Foundation, 2415 Eisenhower Avenue, W 18200, Alexandria, VA 22314.

SUPPLEMENTARY INFORMATION: Measure 16 (2009) was adopted at the Thirty-Second ATCM at Baltimore, MD, on April 17, 2009 and amends Annex II to the Protocol. The revisions were composed primarily of minor clarifying, editorial and technical updates which would result in generally insignificant changes in current practice or legal requirements. For example, Antarctic terrestrial and freshwater invertebrates (generally microscopic or miniscule) are already protected by statute and regulation from “harmful interference” and related permitting requirements. These Annex II changes brought such protections in line with other Antarctic species for purposes of “takes” of such organisms. Other changes would also result in no significant change in U.S. practice, including changes to language in Annex II regarding criteria for taking zoo specimens, criteria for introduction of non-native species, and criteria for lethal takings of specially protected species, etc. Finally, one change removes an erroneous reference to “marine algae” in the current regulation and a new section is added specifically designating Antarctic native invertebrates.

The Antarctic Conservation Act of 1978, as amended (“ACA”) (16 U.S.C. 2401, *et seq.*) implements the Protocol. Section 2405 of title 16 of the ACA directs the Director of the National

⁴ Title VII of the Civil Rights Act of 1964 (Pub. L. 88–352) (41 CFR part 60–20). <https://www.govinfo.gov/content/pkg/FR-2015-01-30/pdf/2015-01422.pdf>.

⁵ *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020). <https://www.ca4.uscourts.gov/opinions/191952.P.pdf>.

⁶ *Adams v. Sch. Bd. of St. Johns Cnty.*, 968 F.3d 1286, 1305 (11th Cir. 2020). <https://media.ca11.uscourts.gov/opinions/pub/files/201813592.pdf>.

⁷ March 26, 2021, the Civil Rights Division of the U.S. Department of Justice memorandum to Federal Agency Civil Rights Directors and General Counsel re: Application of *Bostock v. Clayton County* to Title IX of the Education Amendments of 1972. <https://www.justice.gov/crt/page/file/1383026/download>.

Science Foundation to issue such regulations as are necessary and appropriate to implement Annex II to the Protocol. Accordingly, these revisions reflect the changes to Annex II as formally adopted by the ATCM.

Public Participation

The changes merely reflect decisions already made by the Antarctic Treaty Parties. Because these amendments involve a foreign affairs function, the provisions of Executive Order 12866 and the Administrative Procedure Act (5 U.S.C. 553), requiring notice of proposed rulemaking, opportunity for public participation, and delay in effective date, are inapplicable. Further, because no notice of proposed rulemaking is required for this rule, the Regulatory Flexibility Act (5 U.S.C. 601–612) does not apply.

Environmental Impact

This final rule makes conforming changes to the National Science Foundation's regulations to reflect the outcomes of the Antarctic Treaty Consultative Meeting in 2009. No assessment is required under Executive Order 12114 of January 4, 1979.

No Takings Implications

The Foundation has determined that the final rule will not involve the taking of private property pursuant to Executive Order 12630.

Civil Justice Reform

The Foundation has considered this final rule under Executive Order 12988 on civil justice reform and determined the principles underlying and requirements of Executive Order 12988 are not implicated.

Federalism and Consultation and Coordination With Indian Tribal Governments

The Foundation has considered this final rule under the requirements of Executive Order 13132 on federalism and has determined that the final rule conforms with the federalism principles set out in this Executive Order; will not impose any compliance costs on the States; and will not have substantial direct effects on the States, the relationship between the Federal government and the States, or the distribution of power and responsibilities among the various levels of government. Therefore, the Foundation has determined that no further assessment of federalism implications is necessary. Moreover, the Foundation has determined that promulgation of this final rule does not require advance consultation with

Indian Tribal officials as set forth in Executive Order 13175, Consultation and Coordination with Indian Tribal Governments.

Energy Effects

The Foundation has reviewed this final rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. The Foundation has determined that this final rule does not constitute a significant energy action as defined in the Executive Order.

Unfunded Mandates

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538), the Foundation has assessed the effects of this final rule on State, local, and Tribal governments and the private sector. This final rule will not compel the expenditure of \$100 million or more by any State, local, or Tribal government or anyone in the private sector. Therefore, a statement under section 202 of the Act is not required.

Controlling Paperwork Burdens on the Public

This final rule does not contain any recordkeeping or reporting requirements or other information collection requirements as defined in 5 CFR part 1320 that are not already required by law or not already approved for use. Accordingly, the review provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) and its implementing regulations at 5 CFR part 1320 do not apply.

Congressional Review Act

The Office of Information and Regulatory Affairs in the Office of Management and Budget has determined that this action is not a major rule as defined by Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (known as the Congressional Review Act or CRA), 5 U.S.C. 804(2). This action will not result in: “an annual effect on the economy of \$100,000,000 or more; a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.” However, pursuant to the CRA, NSF will submit a copy of this final rule to both Houses of Congress and to the Comptroller General.

List of Subjects in 45 CFR Part 670

Administrative practice and procedure, Antarctica, Exports, Imports, Plants, Wildlife.

Pursuant to the authority granted by 16 U.S.C. 2405(a)(1), NSF hereby amends 45 CFR part 670 as set forth below:

PART 670—[AMENDED]

■ 1. The authority citation for part 670 continues to read as follows:

Authority: 16 U.S.C. 2405, as amended.

■ 2. Amend § 670.2 by revising paragraphs (a) and (d) to read as follows:

§ 670.2 Scope.

* * * * *

(a) Taking mammals, birds, plants, or invertebrates native to Antarctica.

* * * * *

(d) Receiving, acquiring, transporting, offering for sale, selling, purchasing, importing, exporting or having custody, control, or possession of any mammal, bird, plant or invertebrate, native to Antarctica that was taken in violation of the Act.

* * * * *

■ 3. Revise § 670.3 to read as follows:

§ 670.3 Definitions.

In this part:

Act means the Antarctic Conservation Act of 1978, Public Law 95–541 (16 U.S.C. 2401 *et seq.*) as amended by the Antarctic Science, Tourism, and Conservation Act of 1996, Public Law 104–227.

Antarctic Specially Protected Area means an area designated by the Antarctic Treaty Parties to protect outstanding environmental, scientific, historic, aesthetic, or wilderness values or to protect ongoing or planned scientific research, designated in subpart F of this part.

Antarctica means the area south of 60 degrees south latitude.

Director means the Director of the National Science Foundation, or an officer or employee of the Foundation designated by the Director.

Harmful interference means—

(1) Flying or landing helicopters or other aircraft in a manner that disturbs concentrations of native birds or seals;

(2) Using vehicles or vessels, including hovercraft and small boats, in a manner that disturbs concentrations of native birds or seals;

(3) Using explosives or firearms in a manner that disturbs concentrations of native birds or seals;

(4) Willfully disturbing breeding or molting birds or concentrations of native birds or seals by persons on foot;

(5) Significantly damaging concentrations of native terrestrial plants by landing aircraft, driving vehicles, or walking on them, or by other means; and

(6) Any activity that results in the significant adverse modification of habitats of any species or population of native mammal, native bird, native plant, or native invertebrate.

Import means to land on, bring into, or introduce into, or attempt to land on, bring into or introduce into, any place subject to the jurisdiction of the United States, including the 12-mile territorial sea of the United States, whether or not such act constitutes an importation within the meaning of the customs laws of the United States.

Management plan means a plan to manage the activities and protect the special value or values in an Antarctic Specially Protected Area designated by the United States as such a site consistent with plans adopted by the Antarctic Treaty Consultative Parties.

Native bird means any member, at any stage of its life cycle, of any species of the class Aves which is indigenous to Antarctica or occurs there seasonally through natural migrations, that is designated in subpart D of this part. It includes any part, product, egg, or offspring of or the dead body or parts thereof excluding fossils.

Native invertebrate means any member of any species of terrestrial or freshwater invertebrate, at any stage of its life cycle, which is indigenous to Antarctica. It includes any part thereof, but excludes fossils.

Native mammal means any member, at any stage of its life cycle, of any species of the class Mammalia, which is indigenous to Antarctica or occurs there naturally through migrations, that is designated in subpart D of this part. It includes any part, product, offspring of or the dead body or parts thereof but excludes fossils.

Native plant means any member of any species of terrestrial or freshwater vegetation, including bryophytes, lichens, fungi, and algae, at any stage of its life cycle which is indigenous to Antarctica that is designated in subpart D of this part. It includes seeds and other propagules, or parts of such vegetation, but excludes fossils.

Person has the meaning given that term in section 1 of title 1, United States Code, and includes any person subject to the jurisdiction of the United States and any department, agency, or other instrumentality of the Federal Government or of any State or local government.

Protocol means the Protocol on Environmental Protection to the

Antarctic Treaty, signed October 4, 1991, in Madrid, and all annexes thereto, including any future amendments to which the United States is a Party.

Specially Protected Species means any native species designated as a Specially Protected Species that is designated in subpart E of this part.

Take or *taking* means to kill, injure, capture, handle, or molest a native mammal or bird, or to remove or damage such quantities of native plants or invertebrates that their local distribution or abundance would be significantly affected or to attempt to engage in such conduct.

Treaty means the Antarctic Treaty signed in Washington, DC on December 1, 1959.

United States means the several states of the Union, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, the Virgin Islands, Guam, the Commonwealth of the Northern Mariana Islands, and other commonwealth, territory, or possession of the United States.

■ 4. Amend § 670.4 by revising paragraphs (a), (d), and (e) to read as follows:

§ 670.4 Prohibited acts.

* * * * *

(a) Taking of native mammal, bird, plants or invertebrates. It is unlawful for any person to take within Antarctica a native mammal, a native bird, native plants or native invertebrates.

* * * * *

(d) Possession, sale, export, and import of native mammals, birds, plants and invertebrates. It is unlawful for any person to receive, acquire, transport, offer for sale, sell, purchase, export, import, or have custody, control, or possession of, any native bird, native mammal, native plant or native invertebrate which the person knows, or in the exercise of due care should have known, was taken in violation of the Act.

(e) Introduction of non-indigenous species into Antarctica. It is unlawful for any person to introduce into Antarctica any species which is not indigenous to Antarctica or which does not occur there naturally through migrations, as specified in subpart H of this part, except as provided in §§ 670.7 and 670.8.

* * * * *

■ 5. Revise § 670.6 to read as follows:

§ 670.6 Prior possession exception.

(a) *Exception.* Section 670.4 shall not apply to:

(1) Any native mammal, bird, plant or invertebrate which is held in captivity on or before October 28, 1978; or

(2) Any offspring of such mammal, bird, plant or invertebrate.

(b) *Presumption.* With respect to any prohibited act set forth in § 670.4 which occurs after April 29, 1979, the Act creates a rebuttable presumption that the native mammal, bird, plant or invertebrate involved in such act was not held in captivity on or before October 28, 1978, or was not an offspring referred to in paragraph (a) of this section.

■ 6. Revise § 670.8 to read as follows:

§ 670.8 Foreign permit exception.

Section 670.4(d) and (e) shall not apply to transporting, carrying, receiving, or possessing native mammals, native plants, native invertebrates or native birds or to the introduction of non-indigenous species when conducted by an agency of the United States Government on behalf of a foreign national operating under a permit issued by a foreign government to give effect to the Protocol.

■ 7. Amend § 670.11 by revising paragraphs (a)(2) and (5) to read as follows:

§ 670.11 Applications for permits.

(a) * * *

(2) Where the applicant seeks to engage in a taking:

(i) The scientific names, numbers, and description of native mammals, native birds, native plants or native invertebrates to be taken; and

(ii) Whether the native mammals, birds, plants, invertebrates or part of them are to be imported into the United States, and if so, their ultimate disposition.

* * * * *

(5) Where the application is for the introduction of non-indigenous living organisms, the scientific name and number to be introduced;

* * * * *

■ 8. Revise § 670.17 to read as follows:

§ 670.17 Specific issuance criteria.

With the exception of specially protected species of mammals, birds, plants and invertebrates designated in subpart E of this part, permits to engage in a taking or harmful interference:

(a) May be issued only for the purpose of providing—

(1) Specimens for scientific study or scientific information; or

(2) Specimens for museums, or other educational uses; or

(3) Specimens for zoological gardens, but with respect to native mammals or

birds, only if such specimens cannot be obtained from existing captive collections elsewhere, or if there is a compelling conservation requirement; and

(4) For unavoidable consequences of scientific activities or the construction and operation of scientific support facilities; and

(b) Shall ensure, as far as possible, that—

(1) No more native mammals, birds, plants or invertebrates are taken than are necessary to meet the purposes set forth in paragraph (a) of this section;

(2) No more native mammals or native birds are taken in any year than can normally be replaced by net natural reproduction in the following breeding season;

(3) The variety of species and the balance of the natural ecological systems within Antarctica are maintained; and

(4) The authorized taking, transporting, carrying, or shipping of any native mammal or bird is carried out in a humane manner.

§ 670.21 [Amended]

■ 8. Amend § 670.21 by removing the term “Marine algae”.

■ 9. Add § 670.22 to read as follows:

§ 670.22 Designation of native invertebrates.

The following are designated native invertebrates:

Mites
Nematodes
Rotifers
Springtails
Tardigrades

■ 10. Amend § 670.23 by revising the introductory text and paragraph (c) to read as follows:

§ 670.23 Specific issuance criteria.

Permits authorizing the taking of mammals, birds, plants, or invertebrates designated as a Specially Protected Species of mammals, birds, and plants in § 670.25 may only be issued if:

* * * * *

(c) The taking involves non-lethal techniques, where appropriate. Lethal techniques may only be used on Specially Protected Species where there is no suitable alternative technique; and

* * * * *

■ 11. Amend § 670.25 by revising the section heading to read as follows:

§ 670.25 Designation of specially protected species of native mammals, birds, plants, and invertebrates.

* * * * *

■ 12. Revise § 670.31 to read as follows:

§ 670.31 Specific issuance criteria for imports.

Subject to compliance with other applicable law, any person who takes a native mammal, bird, plant or invertebrate under a permit issued under the regulations in this part may import it into the United States unless the Director finds that the importation would not further the purpose for which it was taken. If the importation is for a purpose other than that for which the native mammal, bird, plant or invertebrate was taken, the Director may permit importation upon a finding that importation would be consistent with the purposes of the Act, the regulations in this part, or the permit under which they were taken.

■ 13. Revise § 670.32 to read as follows:

§ 670.32 Specific issuance criteria for exports.

The Director may permit export from the United States of any native mammal, bird, plant or invertebrate taken within Antarctica upon a finding that exportation would be consistent with the purposes of the Act, the regulations in this part, or the permit under which they were taken.

■ 13. Amend § 670.33 by revising the introductory text to read as follows:

§ 670.33 Content of permit applications.

In addition to the information required in subpart C of this part, an applicant seeking a permit to import into or export from the United States a native mammal, a native bird, native plants or native invertebrates taken within Antarctica shall include the following in the application:

* * * * *

■ 14. Amend § 670.34 by revising paragraph (a) introductory text to read as follows:

§ 670.34 Entry and exit ports.

(a) Any native mammal, native bird, native invertebrates or native plants taken within Antarctica that are imported into or exported from the United States must enter or leave the United States at ports designated by the Secretary of Interior in 50 CFR part 14. The ports currently designated are:

* * * * *

■ 15. Revise § 670.36 to read as follows:

§ 670.36 Specific issuance criteria.

(a) For purposes consistent with the Act, only the following species may be considered for a permit allowing their introduction into Antarctica:

(1) Cultivated plants and their reproductive propagules for controlled use; and

(2) Species of living organisms including viruses, bacteria, yeasts, and fungi, for controlled experimental use.

(b) Living non-indigenous species of birds shall not be introduced into Antarctica.

■ 16. Revise § 670.37 to read as follows:

§ 670.37 Content of permit application.

Applications for the introduction of non-indigenous species into Antarctica must describe:

(a) The species, numbers, and if appropriate, the age and sex, of the species to be introduced into Antarctica;

(b) The need for the species;

(c) What precautions the applicant will take to prevent escape or contact with native fauna and flora; and

(d) How the species will be removed from Antarctica or destroyed after they have served their purpose.

■ 17. Revise § 670.38 to read as follows:

§ 670.38 Conditions of permits.

All permits allowing the introduction of non-indigenous species will require that the species be kept under controlled conditions to prevent its escape or contact with native fauna and flora and that after serving its purpose the species shall be removed from Antarctica or be destroyed in manner that protects the natural system of Antarctica.

■ 18. Add § 670.39 to read as follows:

§ 670.39 Other introductions of non-indigenous species.

(a) Reasonable precautions shall be taken to prevent the accidental introduction of microorganisms not present naturally in the Antarctic Treaty area.

(b) Any species, including progeny, not native to the Antarctic Treaty area, that is introduced without a permit, shall be removed or disposed of, whenever feasible, unless the removal or disposal would result in a greater adverse environmental impact. Reasonable steps shall be taken to control the consequences of an introduction to avoid harm to native fauna or flora.

Dated: May 18, 2021.

Suzanne H. Plimpton,
Reports Clearance Officer, National Science Foundation.

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