Essay

(Con)textual Interpretation: Applying Civil Rights to Healthcare in Section 1557 of the Affordable Care Act

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Abstract

When Congress passed the Affordable Care Act in 2010, Section 1557 of the legislation promised powerful nondiscrimination protections in healthcare on the bases of race, color, national origin, sex, age, and disability. This was a thrilling new development, as Congress had already extended civil rights protections against discrimination to other areas, such as education, housing, workplaces, voting, and government services. However, in the years since the legislation's passage, regulations have struggled to clarify how such extensive protections should apply in the specific context of healthcare. Regulations from multiple administrations have faced litigation, particularly regarding their application to the healthcare of transgender individuals.

Previous judicial statutory interpretations have failed to fully capture the proper healthcare context of the statute. This Essay argues that nuances of healthcare should be used to clarify statutory interpretation in three areas: (1) the scope of Section 1557, (2) Section 1557's definition of "sex discrimination," and (3) provision of additional religious freedom exemptions. A properly contextualized interpretation of Section 1557 considers healthcare's universality, personal nature, and emergency potential. This Essay will

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demonstrate that, in light of the Supreme Court's decision in Bostock v. Clayton County*, the Obama administration's 2016 application of the statutory text to the healthcare context was correct.*

Table of Contents

Introduction

Since the 1960s, Congress has extended protections against discrimination based on specific characteristics to many areas, including education, housing, workplaces, voting, and government services.[1] When Congress passed the Patient Protection and Affordable Care Act ("ACA") in 2010, it extended civil rights protections on the bases of race, color, national origin, sex, age, and disability to health programs receiving federal dollars.[2] These health programs include Medicare and Medicaid, which together cover around thirty-five percent of Americans.[3] The ACA antidiscrimination provisions—known as Section 1557—require that "any health program or activity" conform to four major civil rights laws.[4] Specifically, Section 1557 extends the protections afforded by Title VI of the Civil Rights Act of 1964, Title IX

1 *See* Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (prohibiting discrimination on the basis of disability in federal government-funded programs); Fair Housing Act of 1968, Pub. L. No. 90-284, §§ 804–806, 82 Stat. 73, 83–84 (prohibiting housing discrimination on the basis of race, color, religion, or national origin); Voting Rights Act of 1965, Pub. L. No. 89-110, §§ 2, 4, 79 Stat. 437, 437–38 (prohibiting voting restrictions based on race); Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 201, 401, 407, 703, 83 Stat. 241, 243, 246, 248, 255 (prohibiting discrimination based on race, color, religion, or national origin in public education, workplaces, and public accommodations).

2 Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1557, 124 Stat. 119, 260 (2010).

3 Katherine Keisler-Starkey & Lisa N. Bunch, U.S. Census Bureau, *Health Insurance Coverage in the United States: 2019*, at 4 (Sept. 2020), https://www.census.gov/content/dam/Census/library/publications/2020/demo/p60-271.pdf [https://perma.cc/T9XL-X725].

4 42 U.S.C. § 18116.

of the Education Amendments of 1972, the Age Discrimination Act, and Section 504 of the Rehabilitation Act to healthcare.[5] However, these Acts address public accommodation and government-funded services broadly, including education.[6] Section 1557 does not specify how their prohibitions on discrimination should apply in the context of healthcare.

Current interpretation of Section 1557 is far from clear. The political nature of civil rights enforcement virtually ensures that new administrations in the White House or congressional leadership changes will result in regulatory modifications.[7] Furthermore, regulations regarding Section 1557 have been subject to numerous lawsuits, which resulted in conflicting holdings that complicate interpretation further.[8] Specifically, disagreement rests on three major areas of Section 1557: (1) the statute's scope, (2) definition of "sex discrimination," and (3) provisions of additional religious freedom exemptions. These disagreements have harmed transgender patients seeking gender-affirming care because Section 1557's scope impacts insurance coverage for gender-affirming surgery. For transgender Medicaid patients, such procedures are often cost-prohibitive outside of federal coverage.[9] Af-

5 *Id.* § 18116(a) (prohibiting discrimination on the grounds covered by those Acts).

6 *See* Age Discrimination Act of 1975, 42 U.S.C. § 6102 (prohibiting discrimination on the basis of age in programs or activities receiving federal financial assistance); Rehabilitation Act of 1973, 29 U.S.C. § 794 (prohibiting discrimination on the basis of disability in programs or activities receiving federal financial assistance); Education Amendments of 1972, 20 U.S.C. § 1681 (prohibiting discrimination on the basis of sex in "education program[s] or activit[ies] receiving Federal financial assistance"); Civil Rights Act of 1964, 42 U.S.C. § 2000a (prohibiting discrimination or segregation based on "race, color, religion, or national origin" in places of public accommodation).

7 *See* Mark Febrizio, *Biden is Using Multiple Mechanisms to Reverse Trump's Regulatory Agenda*, GEO. WASH. U. REG. STUD. CTR. (Apr. 21, 2021), https://regulatorystudies.columbian.gwu.edu/biden-using-multiple-mechanisms-reverse-trumps-regulatory-agenda [https://perma.cc/G9JW-ALA2].

8 *See* Religious Sisters of Mercy v. Azar, 513 F. Supp. 3d 1113, 1135 (D.N.D. 2021) (finding that reinstating the 2016 rule violated RFRA as it "provoke[d] a credible threat of enforcement for refusal to provide or insure gender-transition procedures"); Whitman-Walker Clinic, Inc. v. U.S. Dep't of Health & Hum. Servs., 485 F. Supp. 3d 1, 61–64 (D.D.C. 2020) (preliminarily enjoining the 2020 rule's elimination of protections against discrimination on the basis of "sex stereotyping" and expansive religious exemptions); Walker v. Azar, 480 F. Supp. 3d 417, 426–30 (E.D.N.Y. 2020) (partially enjoining the 2020 rule for reevaluation in the context of *Bostock*); Complaint at 6, New York v. U.S. Dep't of Health & Hum. Servs., No. 1:20-cv-05583 (S.D.N.Y. July 20, 2020); Complaint at 4, Bos. All. of Gay, Lesbian, Bisexual, & Transgender Youth v. U.S. Dep't of Health & Hum. Servs., No. 1:20-cv-11297 (D. Mass. July 9, 2020); Franciscan All., Inc. v. Burwell, 227 F. Supp. 3d 660, 694–95 (N.D. Tex. 2016) (preliminarily enjoining the 2016 rule's prohibition of discrimination on the basis of "gender identity" and "termination of pregnancy").

9 *See* Ronni Sandroff, *Paying for Transgender Surgeries*, INVESTOPEDIA (Feb. 23, 2022),

ter *Bostock v. Clayton County*,[10] Section 1557's "sex discrimination" definition arguably covers transgender discrimination; however, the application to the healthcare context remains contentious. In addition, the degree to which statutory religious freedom exemptions in Title IX are imported impacts a religious hospital's requirement to provide nondiscriminatory care.

Courts and political administrations have differed greatly in applying Section 1557 to healthcare. Some courts have weighed the overall ACA goals heavily.[11] Some have insisted on a strict textual definition.[12] Likewise, in many respects, the 2016 Obama administration took the healthcare context into account when promulgating regulations,[13] but the Trump administration in 2020 largely did so inconsistently.[14]

An appropriate statutory interpretation of Section 1557 should consider a nuanced understanding of the healthcare context in three ways. First, healthcare's universal nature, as described below, should guide statutory interpretation of Section 1557's scope to construe Section 1557 coherently with other provisions of the ACA, avoid absurd results, and take similar legislation regarding all four civil rights Acts into account. Second, the intensely personal nature of healthcare should guide statutory interpretation of the definition of "sex discrimination," aligning interpretation of Section 1557 with recent Title VII and Title IX court decisions and considering the overall barrier-busting intent of the ACA. Third, the potential for emergency needs in healthcare should guide statutory interpretation of religious exemption requirements, harmonizing the contextual differences among Ti-

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https://www.investopedia.com/paying-for-transgender-surgeries-5184794 [https://perma.cc/RY6L-RG85] (gender-affirming surgeries cost about $25,000 for bottom surgeries and up to $10,000 for top surgeries). Medicaid eligibility differs by state; thirty-eight states and the District of Columbia have adopted the ACA's Medicaid expansion to cover adults with incomes up to 138% of the federal poverty level, or $17,774 in 2021. *Status of State Medicaid Expansion Decision: Interactive Map*, KAISER FAM. FOUND. (Feb. 24, 2022), https://www.kff.org/medicaid/issue-brief/status-of-state-medicaid-expansion-decisions-interactive-map/ [https://perma.cc/D9JX-WGWE].

10 140 S. Ct. 1731 (2020).

11 *See, e.g.*, Fain v. Crouch, 545 F. Supp. 3d 338, 342–43 (S.D. W.Va. 2021); Flack v. Wis. Dep't of Health Servs., 328 F. Supp. 3d 931, 947 (W.D. Wis. 2018).

12 *See Walker*, 480 F. Supp. 3d at 421.

13 *See* Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31,376, 31,376, 31,380, 31,389 (May 18, 2016) [hereinafter 2016 Rule].

14 *See* Nondiscrimination in Health and Health Education Programs or Activities, 85 Fed. Reg. 37,160, 37,177–81 (June 19, 2020) [hereinafter 2020 Rule] (emphasizing the need for medical treatment to take into account the "biological binary of male and female" while declining to consider LGBTQ "gender identity" needs in the medical context).

tle IX, the Religious Freedom Restoration Act ("RFRA"), and Section 1557 in healthcare. Under this analysis, the three primary disagreements involving Section 1557 should properly be resolved to incorporate an expansive scope, an expansive definition of "sex discrimination" reflective of Title VII, and not carry over the blanket religious exemptions in Title IX.

Part I of this Essay will present a brief regulatory history of Section 1557. Part II will show how healthcare's universality, personal nature, and emergency potential should guide statutory interpretation of Section 1557's scope, definition of "sex discrimination," and religious freedom exemptions. Clarifying the application of major civil rights laws to healthcare in Section 1557 regulations would lessen interpretive fluctuations, producing stability and clarity for impacted patients.

I. Section 1557 Background

On March 23, 2010, the ACA was signed into law by then-President Barack Obama.[15] The final bill, over 900 pages long, was the result of extensive negotiations.[16] Buried within the lengthy text laid a little-discussed provision on nondiscrimination: Section 1557. In its general provision, Section 1557 reads:

> Except as otherwise provided for in this title (or an amendment made by this title), an individual shall not, on the ground prohibited under title VI of the Civil Rights Act of 1964 . . . , title IX of the Education Amendments of 1972 . . . , the Age Discrimination Act of 1975 . . . , or [Section 504 of the Rehabilitation Act], be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title (or amendments). The enforcement mechanisms provided for and available under such title VI, title IX, section [504], or such Age Discrimination Act shall apply for purposes of violations of this subsection.[17]

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15 Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

16 *Id.*; Glenn Kessler, *History Lesson: How the Democrats Pushed Obamacare through the Senate*, Wash. Post (June 22, 2017), https://www.washingtonpost.com/news/fact-checker/wp/2017/06/22/history-lesson-how-the-democrats-pushed-obamacare-through-the-senate [https://perma.cc/EU63-HVU9] (describing the negotiations that took place over the twenty-five days of debate that preceded the ACA's passage).

17 42 U.S.C. § 18116 (footnotes omitted).

Unlike many ACA provisions that required extensive implementing regulations, Section 1557 went into effect when the law was signed.[18] Prior to the issuance of regulations, the United States Department of Health and Human Services ("HHS") Office for Civil Rights ("OCR") received and investigated complaints alleging violations of the law.[19]

In these early case-by-case efforts to enforce the nondiscrimination provision, the Obama administration tailored application of Section 1557 to the healthcare context. The HHS OCR reported various efforts, from investigations to voluntary resolution agreements, addressing instances in which transgender individuals alleged discrimination on the basis of sex.[20] Most of the complaints made between the year of ACA's passage and the year of the first Section 1557 regulations were denials of care or insurance based on the patient's gender identity, including against transgender individuals.[21]

In May 2016, the Obama administration issued regulations to clarify and codify implementation of Section 1557,[22] ("the 2016 rule"). These regulations aptly considered the application of civil rights to the healthcare context to (1) assert an expansive definition of the entities to which the regulations apply, (2) define sex discrimination to include, among other things, discrimination based on "gender identity," "sex stereotyping," and "termination of pregnancy," and (3) decline to apply Title IX's blanket religious freedom exemption.[23] Additionally, the rule appropriately interpreted Section 1557 in the healthcare context by providing examples of prohibited practices, including denying insurance coverage for gender transitions and abortion-related services.[24]

In defining "gender identity" and "sex stereotyping," the Obama administration's rule explicitly protected transgender and gender nonconforming persons from healthcare discrimination. "Gender iden-

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18 *Id.*

19 *See* Sharita Gruberg & Frank J. Bewkes, *The ACA's LGBTQ Nondiscrimination Regulations Prove Crucial*, Ctr. for Am. Progress (Mar. 7, 2018), https://www.americanprogress.org/article/acas-lgbtq-nondiscrimination-regulations-prove-crucial [https://perma.cc/GX3M-4E35]; Off. for C.R., U.S. Dep't Health & Hum. Servs., The Brooklyn Hospital Center Implements Non-Discriminatory Practices to Ensure Equal Care for Transgender Patients (2015), https://www.hhs.gov/sites/default/files/ocr/civilrights/activities/agreements/TBHC/statement.pdf [https://perma.cc/KTM8-SLUZ].

20 Gruberg & Bewkes, *supra* note 19.

21 *Id.*

22 2016 Rule, *supra* note 13, at 31,376.

23 *Id.* at 31,376, 31,386–87.

24 *See id.* at 31,380, 31,456.

tity" was defined as "an individual's internal sense of gender . . . which may be different from an individual's sex assigned at birth."[25] "Sex stereotyping" was defined as "stereotypical notions of masculinity or femininity, including expectations of how individuals represent or communicate their gender to others . . . [and] the expectation that individuals will consistently identify with only one gender and that they will act in conformity with the gender-related expressions stereotypically associated with that gender."[26] The rule did not separately define "termination of pregnancy" but rather elected to mirror Title IX regulations prohibiting discrimination in educational facilities based on a student's termination of pregnancy.[27]

In August 2016, in *Franciscan Alliance v. Burwell*,[28] a group of religiously affiliated healthcare providers challenged the 2016 rule, asserting that requiring them to perform and provide insurance coverage for gender transitions and abortion-related services violated RFRA.[29] The providers also claimed that the rule exceeded HHS's statutory authority by extending Title IX's prohibition of sex discrimination without including Title IX's religious and abortion exemptions.[30] On December 31, 2016, the Northern District of Texas granted a nationwide preliminary injunction on the prohibition of discrimination on the basis of "gender identity" and "termination of pregnancy."[31] The Northern District of Texas later vacated these portions of the regulation,[32] and the *Franciscan Alliance* plaintiffs appealed to the Fifth Circuit.[33]

Three years later in 2019, the Trump administration indicated that it was reconsidering the Section 1557 implementation regulations and issued a notice of proposed rulemaking.[34] After extensive commentary, the final rule was printed on June 19, 2020[35] ("the 2020 rule").

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25 *See id.* at 31,467.

26 *See id.* at 31,468.

27 *See id.* at 31,387 (citing 45 C.F.R. § 86.40(b) (2005)).

28 Franciscan All., Inc. v. Burwell, 227 F. Supp. 3d 660 (N.D. Tex. 2016), *vacated sub nom.* Franciscan All., Inc. v. Azar, 414 F. Supp. 3d 928 (N.D. Tex. 2019).

29 *Id.* at 671–72; Complaint at 1, Franciscan All., Inc. v. Burwell, 227 F. Supp. 3d 660 (N.D. Tex. 2016) (No. 7:16-cv-00108-O).

30 *Franciscan All.*, 227 F. Supp. 3d at 685.

31 *Id.* at 695.

32 Franciscan All., Inc. v. Azar, 414 F. Supp. 3d 928 (N.D. Tex. 2019), *vacating* Franciscan All., Inc. v. Burwell, 227 F. Supp. 3d 660 (N.D. Tex. 2016).

33 Private Plaintiffs' Notice of Appeal, Franciscan All., Inc. v. Azar, 414 F. Supp. 3d 928 (N.D. Tex. 2019).

34 Nondiscrimination in Health and Health Education Programs or Activities, 84 Fed. Reg. 27,846, 27,846 (proposed June 14, 2019).

35 2020 Rule, *supra* note 14, at 37,160.

This final rule failed to consider the specific context of healthcare, and: (1) narrowed the entities to which the regulations applied, (2) eliminated the 2016 definition of "sex discrimination," and (3) applied extensive religious freedom and abortion-specific exemptions.[36] The final rule was a sharp contrast to the Supreme Court's June 15, 2020 decision just four days earlier in *Bostock v. Clayton County*, which held that discrimination on the basis of "sex" in Title VII included instances of gender identity and sex stereotyping.[37] Numerous lawsuits, including one brought by twenty-three state attorneys general, challenged the 2020 rule as inconsistent with federal law, in excess of statutory authority, and arbitrary and capricious in its execution.[38] On August 17, 2020, the Eastern District of New York enjoined part of the 2020 rule from going into effect.[39]

Following the injunction, a group of religiously affiliated providers was concerned that the 2016 rule might come back into effect. They sued for declaratory relief to prevent HHS from interpreting Section 1557 to require them "to perform and provide insurance coverage for gender-transition procedures."[40] The District of North Dakota granted this declaratory relief on January 19, 2021, one day prior to President Biden's inauguration.[41]

On May 10, 2021, the Biden administration announced that it would enforce Section 1557 consistent with *Bostock* and include discrimination based on sexual orientation and gender identity.[42] Although this notice indicated that those interpreting Section 1557 should abide by both *Bostock* and RFRA, patients and healthcare providers still lack contextual clarity. The notice stated vaguely that "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."[43]

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36 *See id.* at 37,171, 37,162, 37,177.

37 Bostock v. Clayton County, 140 S. Ct. 1731, 1754 (2020).

38 *See* Whitman-Walker Clinic, Inc. v. U.S. Dep't of Health & Hum. Servs., 485 F. Supp. 3d 1, 16 (D.D.C. 2020); Walker v. Azar, 480 F. Supp. 3d 417, 426–30 (E.D.N.Y. 2020); Complaint at 6, New York v. U.S. Dep't of Health & Hum. Servs., No. 1:20-cv-05583 (S.D.N.Y. July 20, 2020); Complaint at 4, Bos. All. of Gay, Lesbian, Bisexual, & Transgender Youth v. U.S. Dep't of Health & Hum. Servs., No. 1:20-cv-11297 (D. Mass. July 9, 2020).

39 *Walker*, 480 F. Supp. 3d at 430.

40 Religious Sisters of Mercy v. Azar, 513 F. Supp. 3d 1113, 1134, 1141 (D.N.D. 2021).

41 *Id*. at 1153–54.

42 Notification of Interpretation and Enforcement of Section 1557 of the Affordable Care Act and Title IX of the Education Amendments of 1972, 86 Fed. Reg. 27,984, 27,984 (May 25, 2021).

43 *Id*. at 27,985.

Because "the legal landscape ha[d] shifted significantly" following this announcement, the Fifth Circuit remanded the pending appeal to the Northern District of Texas to re-hear *Franciscan Alliance*.[44] On August 9, 2021, the court held that RFRA entitled the *Franciscan Alliance* plaintiffs to relief from Section 1557's requirements to cover gender transition procedures.[45] In doing so, the court declined to consider the specific healthcare context of Section 1557, instead applying Title IX and RFRA requirements wholesale.[46]

This Essay revisits the statutory interpretation of Section 1557 post-*Bostock*, incorporating discussion of the 2016 and 2020 rules. In applying extensive civil rights protections to healthcare, particular aspects of healthcare are instructive. This Essay identifies nuances of healthcare that should inform interpretation of Section 1557 in contentious areas.

II. In the Context of Healthcare

Healthcare is distinct from the other contexts in which antidiscrimination provisions have long applied. In applying Section 1557 to healthcare, three qualities must be given proper attention: (1) the universal need for healthcare, (2) the personal nature of healthcare, and (3) the emergency nature of healthcare. This section argues that given the ongoing conflict over statutory interpretation for Section 1557, courts should use these qualities to guide their determination of what canons and principles to prioritize.

A. The Universality of Healthcare: The Scope of "Health Programs and Activities"

In November 2020, Christopher Fain, a forty-four-year-old transgender man, and Zachary Martell, a thirty-three-year-old transgender man, filed suit under Section 1557 against the West Virginia Department of Health and Human Resources for discriminatory denial of gender-confirming healthcare.[47] Mr. Fain is a Medicaid recipient and Mr. Martell is a dependent under the state employee health plan.[48] The state filed a motion to dismiss, claiming that under the 2020 rule, Section 1557 did not extend to Medicaid or employment-based health

44 Franciscan All., Inc. v. Becerra, 843 F. App'x 662, 662 (5th Cir. 2021).

45 Franciscan All., Inc. v. Becerra, 553 F. Supp. 3d 361, 375–78. (N.D. Tex. 2021).

46 *See id.* at 377.

47 Complaint ¶¶ 6–10, Fain v. Crouch, 545 F. Supp. 3d 338 (S.D. W. Va. 2021). Additional plaintiffs included Mr. Martell's husband, Mr. McNemarv; the plaintiffs also filed as a class action. *Id.*

48 *Id*. ¶¶ 8–9.

insurance.[49] The statutory interpretation question here turned on whether Medicaid and employment-based health insurance providers were included or omitted from Section 1557's scope.[50] Resolution of the question of the scope of Section 1557 should specifically consider the universal nature of healthcare needs, as seen in the drafters' intent and references to other Acts of Congress.

Discrimination in healthcare is distinct from discrimination in other contexts, such as higher education, employment, or government services. First and foremost is the universal nature of healthcare needs, meaning that nearly everyone is guaranteed to need healthcare at some point or will be otherwise required to interact with the healthcare system.[51] Upholding the ACA's individual mandate in 2012, the Supreme Court noted that: "Everyone will eventually need health care at a time and to an extent they cannot predict."[52] This universal nature should drive statutory interpretation of Section 1557's scope, with a particular focus on such principles as the intent of the drafters, avoidance of an absurd result, and comparison to similar laws indicated in the text. As discussed below, under this interpretive scheme, interpretations follow the expansive 2016 rule. The narrow interpretation of the 2020 rule conflicts with the intention of the drafters, runs into an absurd result, and creates dissonance with similar laws indicated in the text. A correct definition would also address residual confusion between the section's application to insurance companies, Medicaid, Medicare, and other HHS-funded programs.

Section 1557 applies to "any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established

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49 *Fain*, 545 F. Supp. 3d at 340.

50 *See id.* ("The crux of the parties' dispute is about the scope of Section 1557, and in particular, the meaning of 'any health program or activity.'").

51 By contrast, Title IX, Title VI, Section 504, and the Age Discrimination Act protect against discrimination in less universally applicable areas, particularly public education (Title IX), use of public accommodations (Title VI), and government-funded programs (Section 504 of the Rehabilitation Act and the Age Discrimination Act). *See* Education Amendments of 1972, 20 U.S.C. § 1681; Civil Rights Act of 1964, 42 U.S.C. § 2000a; Rehabilitation Act of 1973, 29 U.S.C. § 794; Age Discrimination Act of 1975, 42 U.S.C. § 6102.

52 NFIB v. Sebelius, 567 U.S. 519, 547 (2012). In defending the ACA before the Court, General Verilli noted that "[e]veryone . . . is in or will be in the health care market." Transcript of Oral Argument at 111, U.S. Dep't of Health & Hum. Servs. v. Florida (2012). Justice Sotomayor agreed that "absent some intervention from above . . . virtually everyone will use health care." *Id.* at 69.

under [Title I]."[53] The 2016 rule interpreted this language to mean "if *any part* of a health care entity receives Federal financial assistance, then *all of its programs and activities* are subject to the discrimination provision."[54] Under this interpretation, the rule would "likely cover almost all licensed physicians because they accept Federal financial assistance."[55] Conversely, the 2020 rule interpreted Section 1557 to apply only to two categories of covered entities. The first was entities "principally engaged in the business of providing healthcare," encompassing hospitals, nursing facilities, and other providers—but not insurance companies.[56] The second category was ACA exchanges established under Title I of the ACA, which does not encompass employer-based group health plans, Medicaid, and other HHS-funded programs.[57]

The narrow scope of the 2020 rule, if found valid, could have a major impact on a large swath of Americans. Medicaid enrollees and employees enrolled in employer-based group health plans would be effectively regulated out of Sections 1557's protections by the 2020 change. Individual employer-based insurance plans constitute the largest source of health coverage for the non-elderly, accounting for over 183 million individuals in 2019.[58] Medicaid covers low-income families and certain other qualified individuals.[59] Medicaid is the largest provider of health coverage from a single source in the United States,[60] with over 82 million individuals enrolled as of April 2021.[61] Together, they account for around seventy percent of health insurance coverage of the U.S. population.[62]

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53 42 U.S.C. § 18116(a).

54 2016 Rule, *supra* note 13, at 31,386 (emphasis added).

55 *Id.* at 31,445.

56 2020 Rule, *supra* note 14, at 37,171.

57 *Id.* at 37,173.

58 Katherine Keisler-Starkey & Lisa N. Bunch, U.S. Census Bureau, *Health Insurance Coverage in the United States: 2019*, at 5 (Sept. 2020), https://www.census.gov/content/dam/Census/library/publications/2020/demo/p60-271.pdf [https://perma.cc/UAZ3-57DY]; *see also* Matthew Rae, et al., *Long-Term Trends in Employer-Based Coverage*, PETERSON-KFF (April 1, 2020), https://www.healthsystemtracker.org/brief/long-term-trends-in-employer-based-coverage [https://perma.cc/W6CR-JMFG].

59 *See Eligibility*, CTRS FOR MEDICARE & MEDICAID SERVS., https://www.medicaid.gov/medicaid/eligibility/index.html [https://perma.cc/48QM-QNC7].

60 *Id.*

61 CTRS. FOR MEDICARE & MEDICAID SERVS., MAY 2021 MEDICAID AND CHIP ENROLLMENT TRENDS SNAPSHOT (2021), https://www.medicaid.gov/medicaid/national-medicaid-chip-program-information/downloads/may-2021-medicaid-chip-enrollment-trend-snapshot.pdf [https://perma.cc/EXH5-B2JP].

62 *Health Insurance Coverage of the Total Population*, KAISER FAM. FOUND., https://www.kff.org/other/state-indicator/total-population/?dataView=0&currentTimeframe=0&se-

To best interpret the drafter's intent, courts must consider the whole act rule. The whole act rule of statutory interpretation provides that "[a] statute should be construed in light of the other provisions in the statute so as to achieve a coherent whole."[63] The universal nature of healthcare was specifically considered by the ACA drafters, leading to extensive debates around healthcare coverage for communities often left out of coverage like undocumented populations.[64] Congressional acknowledgment of healthcare's universality was so strong that a core contention in ACA negotiations was how coverage could meet the needs of undocumented persons, which led to the collapse of the Gang of Eight negotiations and Representative Joe Wilson screaming "you lie" during President Obama's address of the Joint Session of Congress.[65] Such political carve-outs exempted some communities from eligibility, so the ACA drafters noted that the insurance coverage mandate "requirement achieves *near*-universal coverage."[66] A central purpose of the ACA was to increase health access by addressing lax coverage by employers and in Medicaid programs.[67] Specifically, ACA Title I, referenced in Section 1557, is titled "Quality, Affordable Healthcare For All Americans,"[68] stating a clear intent to address universal, not limited, healthcare needs. While headings are not positive law, courts may rely upon them to clarify the drafters' intent.[69]

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lectedDistributions=employer--medicaid&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D [https://perma.cc/QM8F-TQWN].

63 RICHARD E. LEVY & ROBERT L. GLICKSMAN, STATUTORY ANALYSIS IN THE REGULATORY STATE 129 (2014).

64 *See* Maggie Severns, '*Exceedingly Deep Convictions': Inside Xavier Becerra's Quest for Health Care for Immigrants*, POLITICO (Feb. 22, 2021, 4:30 AM), https://www.politico.com/news/2021/02/22/xavier-becerra-immigrant-health-care-470423 [https://perma.cc/DQ8E-Q3BP]; STEVEN P. WALLACE ET AL., UCLA CTR. FOR HEALTH POL'Y RSCH., UNDOCUMENTED IMMIGRANTS AND HEALTH CARE REFORM 2 (2012) ("Health insurance coverage is lower for undocumented immigrant than US-born citizens and other US immigrant groups.").

65 *See* Severns, *supra* note 64; *see also* BARACK OBAMA, THE PRESIDENT'S ADDRESS BEFORE A JOINT SESSION OF CONGRESS, H.R. Doc. No. 111-62, at 5 (2009) ("There are also those who claim that our reform effort will insure illegal immigrants. This, too, is false—the reforms I'm proposing would not apply to those who are here illegally.").

66 42 U.S.C. § 18091(2)(D) (emphasis added).

67 *See, e.g.*, 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII) (expanding Medicaid coverage); 42 U.S.C. § 18031(b)(1) (creating insurance exchanges for individuals without employer coverage); 26 U.S.C. § 4980H (mandating employers to provide qualifying healthcare or pay a tax).

68 Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1001, 124 Stat. 119, 130 (2010).

69 *See* Carter v. Liquid Carbonic Pac. Corp., 97 F.2d 1, 4 (9th Cir. 1938) (finding the table of contents and headings instructive in reviewing tax legislation).

In the case of unclear text, courts may consider if either interpretation leads to an absurd result.[70] The absurdity canon assumes that the legislature would not intend an absurd result.[71] Under the 2020 rule, the exclusion of Medicaid and employer-based plans from Section 1557 nondiscrimination requirements holds insurers to different nondiscrimination standards for different categories of enrollees.[72] Many health insurers offer both employer-sponsored plans and ACA Title I exchange plans. Under an expansive interpretation, every plan offered by such an insurer would be subject to Section 1557; while under a narrow interpretation, only the ACA exchange plans would be covered by Section 1557. Thus, under the 2020 rule, many insurers would be prevented from certain coverage and certain denials for only part of their enrollees.[73] Given the huge potential for harm to these groups that could result from the narrow construction and considering the efforts by the ACA to expand coverage, particularly Medicaid and employer-based coverage, limiting nondiscrimination protection to Exchange plans seems a patently absurd result inconsistent with the original purpose and intent of ACA.

The scope of Section 1557 should also be interpreted consistently with similar statutes.[74] The *in pari materia* canon provides that statutes dealing with the same subject matter should be interpreted consistently.[75] This consistency may be especially persuasive when Congress uses echoing language in the subsequent statute.[76] Section 1557 mir-

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70 *See* Holy Trinity Church v. United States, 143 U.S. 457, 459 (1892) ("It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.").

71 LEVY & GLICKSMAN, *supra* note 63, at 108.

72 *Compare* 2020 Rule, *supra* note 14, at 37,173 ("To the extent that employer-sponsored group health plans do not receive Federal financial assistance and are not principally engaged in the business of providing healthcare . . . , they would not be covered entities."), *with id.* at 37,174 ("A [Qualified Health Plan] would be covered by the rule because it is a program or activity administered by an entity established under Title I (*i.e.*, an Exchange), pursuant to § 92.3(a)(3).").

73 *Id.* at 37,174 ("Regarding ACA-compliant plans sold off-Exchange, because a health insurance issuer is not principally engaged in the business of providing healthcare, its operations would be subject to this rule only for the portion that receives Federal financial assistance. The issuer's components (*e.g.*, off-Exchange plans) that do not directly receive Federal financial assistance would not be subject to this rule.").

74 *See* Smith v. United States, 508 U.S. 223, 234–35 (1993) (interpreting "use" by reference to similar statutes).

75 LEVY & GLICKSMAN, *supra* note 63, at 136.

76 *See* Lorillard v. Pons, 434 U.S. 575, 581 (1978) (holding that when "Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute").

rors the Civil Rights Restoration Act of 1987 ("CRRA")[77] in requiring that the underlying nondiscrimination statutes (Title IX, Title VI, Section 504, and the Age Discrimination Act) apply to "any health program or activity, *any part of which* is receiving Federal financial assistance."[78] The CRRA modifies the same statutes that Section 1557 incorporates and similarly applies to all of the operations of covered entities, "*any part of which* is extended Federal financial assistance."[79]

Given the interrelatedness of the CRRA and Section 1557, the expansive interpretation which has long applied to the CRRA should be similarly extended to Section 1557. The CRRA was expressly passed to restore broad coverage of civil rights provisions after the Court had narrowly interpreted the scope of underlying statutes in *Grove City College v. Bell*[80] and *Consolidated Rail Corp. v. Darrone*.[81] In *Grove City College*, the Court found that the statutory language of Title IX only subjected an institution receiving funds to Title IX nondiscrimination requirements for the precise program receiving funds, not the entire institution.[82] The Court held similarly for the Rehabilitation Act in *Darrone* in addressing disability claims.[83] Congress moved to correct the statutory language and passed the CRRA to move from a "program-specific approach and reinstate[] an institution-wide application" to rights under the underlying statutes.[84] Current interpretations of Title IX are therefore quite broad in holding that if any part of an educational institution receives federal financial assistance, any education program within the entire institution is subject to Title IX requirements.[85] Section 1557's direct link to the CRRA indicates that the drafters intended to assert a similar scope. The 2016 rule correctly indicates that the CRRA "establishes that *the entire program or activity* is required to comply with the prohibitions on discrimination if any part of the program or activity receives Federal financial assistance."[86]

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77 Civil Rights Restoration Act of 1987, Pub. L. 100-259, 102 Stat. 28 (1988).

78 42 U.S.C. § 18116(a) (emphasis added).

79 20 U.S.C. § 1687 (emphasis added).

80 465 U.S. 555 (1984).

81 465 U.S. 624 (1984); *see* Doe v. Salvation Army in U.S., 685 F.3d 564, 571–72 (6th Cir. 2012) ("Congress passed the Civil Rights Restoration Act of 1987 to restore the previously broad scope of coverage of the four statutes that used the word 'program or activity[.]'").

82 Grove City Coll. v. Bell, 465 U.S. 555, 573–74 (1984).

83 *See* Consol. Rail Corp. v. Darrone, 465 U.S. 624, 636 (1984).

84 Cohen v. Brown Univ., 991 F.2d 888, 894 (1st Cir. 1993).

85 *See, e.g.*, Mansourian v. Bd. of Regents of Univ. of Cal. at Davis, 816 F. Supp. 2d 869, 917 (E.D. Cal. 2011).

86 2016 Rule, *supra* note 13, at 31,386 (emphasis added).

Returning to *Fain v. Crouch*, the Southern District of West Virginia declined attempts by The Health Plan to dismiss charges brought under Section 1557 as inapplicable to them.[87] The court found that the underlying statutory language of Section 1557 indicated it applied to The Health Plan, effectively discrediting the 2020 rule's interpretation.[88] The court credited the intent of the ACA as a whole, such as its aims to "increase the number of Americans covered by health insurance."[89] The court found the ACA's extensive focus on health insurance reform supported an interpretation of "health program or activity" that includes health insurers.[90]

B. The Personal Nature of Healthcare: The Definition of "Sex Discrimination"

In April 2018, Cody Flack and Sara Ann Makenzie, transgender individuals and Wisconsin Medicaid recipients, filed suit against the Wisconsin Department of Health Services.[91] They had each been denied gender-affirming, medically necessary treatment for their gender dysphoria and challenged those denials under Section 1557.[92] The question before the court in *Flack v. Wisconsin Department of Health Services* was whether such denials were within the definition of "sex discrimination."[93] The recent Supreme Court decision in *Bostock* and the cases following suggest sex discrimination under Section 1557 must include discrimination on the basis of gender identity and sex stereotyping.[94] When considering the implications of *Bostock* in the context of healthcare, courts should consider the deeply personal nature of physician-patient interactions, as seen in the drafters' intent and in references to other Acts of Congress. The necessary judicial result of such a statutory and contextualized interpretation is required coverage of gender-confirming services.

Healthcare decisions and needs are highly personal, individualized, and private. This principle undergirds privacy protections, such as the Health Insurance Portability and Accountability Act, which

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87 Fain v. Crouch, 545 F. Supp. 3d 338, 342–43 (S.D. W. Va. 2021).

88 *See id.* at 340–41.

89 *Id.* at 342 (citing NFIB v. Sebelius, 567 U.S. 519, 538 (2012)).

90 *Id.*

91 Complaint ¶¶ 1–2, Flack v. Wis. Dep't of Health Servs., 328 F. Supp. 3d 931 (W.D. Wis. 2018) (No. 3:18-cv-00309).

92 *Id.* ¶¶ 2, 4, 12.

93 *Flack*, 328 F. Supp. 3d at 947 ("[T]he parties dispute whether plaintiffs' transgender status falls under 'sex.'").

94 *See* Bostock v. Clayton County, 140 S. Ct. 1731, 1754 (2020).

place the protection of healthcare information above and beyond that of other information.[95] Yet realistically, healthcare needs cannot be hidden from one's physicians or insurance provider. Because highly individualized and deeply personal characteristics must be shared with healthcare providers for effective care, an expanded definition of "sex discrimination" should cover related discrimination in healthcare.

Such deeply personal discussions often arise in the context of care for transgender and nonconforming individuals. Physicians often must ask detailed, personal questions addressing the patient's lifestyle and habits, whether for a sprained ankle or gender-confirming services.[96] In this setting, LGBTQ patients are particularly vulnerable to negative comments and refusals of care, as occurred regularly prior to the ACA's passage.[97] In the case of blanket denials of coverage for transgender-related surgery, hospitals and insurance carriers have effectively denied coverage based on the status of the patient.[98] But this gap in healthcare need not persist—an understanding of the deeply personal nature of healthcare, supported through statutory principles such as consideration of related statutes, textualism, and drafters' intent, should guide courts in determining the proper extent of coverage under "sex discrimination."

Interpretation of "sex discrimination" should be aligned with similar statutes under the *in pari materia* canon.[99] Section 1557 incorporates Title IX and courts look to Title VII for guidance in interpreting

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95 *See generally* Health Insurance Portability and Accountability Act (HIPAA) of 1996, Pub. L. 104-191, 110 Stat. 1936.

96 *See* Fallon E. Chipidza, Rachel S. Wallwork & Theodore A. Stern, *Impact of the Doctor-Patient Relationship*, PRIMARY CARE COMPANION FOR CNS DISORDERS (Oct. 22, 2015), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4732308/ [https://perma.cc/9U5U-PP7L] ("The doctor-patient relationship involves vulnerability and trust. . . . Patients sometimes reveal secrets, worries, and fears to physicians that they have not yet disclosed to friends or family members. Placing trust in a doctor helps them maintain or regain their health and well-being.").

97 *See* Shabab Ahmed Mirza & Caitlin Rooney, *Discrimination Prevents LGBTQ People From Accessing Health Care*, CTR. FOR AM. PROGRESS (Jan. 18, 2018), https://www.americanprogress.org/article/discrimination-prevents-lgbtq-people-accessing-health-care/ [https://perma.cc/GJ6C-KQKH]; INSTITUTE OF MEDICINE, THE HEALTH OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER PEOPLE 62 (2011), [https://perma.cc/V8U4-HRMG].

98 *See* Brief of Plaintiffs-Appellants at 3, Franciscan All., Inc. v. Becerra, 843 F. App'x 662 (5th Cir. 2021) (No. 7:16-cv-00108) (asserting that provision of gender-confirming care by objecting doctors is "forbidden by their faith and harmful to their patients"); Matthew Bakko & Shanna K. Kattari, *Transgender-Related Insurance Denials as Barriers to Transgender Healthcare: Differences in Experience by Insurance Type*, 35 J. GEN. INTERNAL MED. 1693, 1694 (2020) (showing that while gender-affirming care is universally understood to be medically necessary, twenty-five percent of individuals surveyed experienced a coverage denial or other barrier related to their transgender status in the past year).

99 LEVY & GLICKSMAN, *supra* note 63, at 136.

Title IX.[100] Title VII addresses workplace discrimination, which the Supreme Court held bars discrimination based on sex-stereotyping in the 1989 case *Price Waterhouse v. Hopkins*.[101] That opinion stated, "[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their [sex] group."[102] Following *Price Waterhouse*, a number of courts held that Title VII and Title IX protected transgender individuals from discrimination in workplaces and education.[103] Similarly, a case of first impression applied *Price Waterhouse* to Section 1557 to extend discrimination protections to transgender individuals in healthcare.[104] The 2016 rule applied an expanded definition, defining "sex" to include "gender identity," "sex stereotyping," and "termination of pregnancy."[105] The rule also detailed specific discriminatory actions prohibited under Section 1557, including categorical coverage exclusions for gender transition services and coverage or claim denial for services specific to transgender individuals.[106]

The statutory definition of "sex" was subsequently clarified by the Supreme Court's decision in *Bostock*, which definitively held that Title VII protections extend to discrimination on the basis of sexual orientation and gender identity.[107] Based on this decision, the Eastern

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100 *See, e.g.*, Franklin v. Gwinnett Cnty. Pub. Schs., 503 U.S. 60, 75 (1992) (interpreting Title IX discrimination on the basis of sex to include harassment of a subordinate because of the subordinate's sex, based on *Meritor Savings Bank, FSB v. Vinson*, a Title VII case); Jennings v. Univ. of N.C., 482 F.3d 686, 695 (4th Cir. 2007).

101 490 U.S. 228 (1989).

102 *Id.* at 251.

103 *See, e.g.*, Prescott v. Rady Child.'s Hosp.–San Diego, 265 F. Supp. 3d 1090, 1099 (S.D. Cal. 2017) (interpreting *Price Waterhouse* to mean that "[b]ecause Title VII, and by extension Title IX, recognize that discrimination on the basis of transgender identity is discrimination on the basis of sex, the Court interprets the ACA to afford the same protections"); Grimm v. Gloucester Cnty. Sch. Bd., 822 F.3d 709, 715 (4th Cir. 2016) (reversing dismissal of Title IX sex discrimination claim by transgender student); Schroer v. Billington, 577 F. Supp. 2d 293, 306–08 (D.D.C. 2008) (holding that the withdrawal and revocation of job offer due to applicant's transgender status violated Title VII); Barnes v. City of Cincinnati, 401 F.3d 729, 737 (6th Cir. 2005) (holding that a transgender individual produced sufficient evidence to "establish[] that he was a member of a protected class by alleging discrimination against the City for his failure to conform to sex stereotypes"). *But see* Johnston v. Univ. of Pittsburgh, 97 F. Supp. 3d 657, 671 (W.D. Pa. 2015) (holding that a student failed to establish a Title IX discrimination claim based on his transgender status).

104 *Prescott*, 265 F. Supp. 3d at 1105.

105 2016 Rule, *supra* note 13, at 31,388 (noting that "[a]s the Supreme Court made clear in *Price Waterhouse v. Hopkins*, in prohibiting sex discrimination, Congress intended to strike at the entire spectrum of discrimination against men and women resulting from sex stereotypes"); *id.* at 31,389 (applying the *Price Waterhouse* sex stereotyping theory to healthcare).

106 *See id.* at 31,472.

107 Bostock v. Clayton County, 140 S. Ct. 1731, 1754 (2020).

District of New York blocked parts of the 2020 rule from going into effect in *Walker v. Azar*.[108] Moreover, the court found that even if the 2020 rule did not adopt a new definition of "on the basis of sex," the rule's preamble showed it understood the rule to focus on biological sex, which needed to be reevaluated in the context of *Bostock*.[109] Since then, the Fourth Circuit and other courts have applied *Bostock* to extend Title IX to transgender students.[110] Attempts to interpret Title IX to cover only "sex discrimination on the basis of the biological differences between males and females" as in *Franciscan Alliance*[111] and the 2020 rule[112] will fail.[113] Courts will find that *Bostock* means Section 1557 provides expansive coverage of claims of alleged sex discrimination. The Department of Justice and HHS of the Biden Administration have indicated their intention to follow a similar interpretation.[114]

Consideration of the personal and private nature of healthcare should allow protections from Title IX and Title VII, in the education and workplace context, to extend to the healthcare context. The *Price Waterhouse* Court was concerned that workplace criticisms of a transgender individual were coded, sex-specific language attesting to al-

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108 *See* Walker v. Azar, 480 F. Supp. 3d 417, 430 (E.D.N.Y. 2020).

109 *See id.* at 429–30.

110 *See* Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 619–20 (4th Cir. 2020); *see also* Clark Cnty. Sch. Dist. v. Bryan, 478 P.3d 344, 354 (Nev. 2020) (holding that *Bostock* extends to Title IX's prohibition of discrimination "on the basis of sex"); N.H. v. Anoka-Hennepin Sch. Dist. No. 11, 950 N.W.2d 553, 563, 570 (Minn. Ct. App. 2020) (holding that *Bostock* extends to Title IX, such that "preventing a transgender student from using a school restroom or locker room consistent with the student's gender identity violates Title IX").

111 Franciscan All., Inc. v. Burwell, 227 F. Supp. 3d 660, 687 (N.D. Tex. 2016) ("It is . . . clear from Title IX's text, structure, and purpose that Congress intended to prohibit sex discrimination on the basis of the biological differences between males and females.").

112 Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority, 85 Fed. Reg. at 37,161 (narrowing the plain meaning of "sex" in Title IX by rescinding the 2016 Rule's definition of "on the basis of sex" without providing a replacement regulatory definition). Without giving a new definition, the preamble extensively discussed and asserted that the "original and ordinary public meaning" of "sex" refers only to "the biological binary of male and female," and cited dictionary definitions, common usage, and current Title IX interpretation. *Id.* at 37,178–79. The 2016 Rule's protections against denial of claims or restricting benefits based on transgender status were also rescinded, as "[i]n [HHS]'s current view, the 2016 Rule did not give sufficient evidence to justify, as a matter of policy, its prohibition on blanket exclusions of coverage for sex-reassignment procedures." *Id.* at 37,198.

113 *See Walker*, 480 F. Supp. 3d at 430.

114 *See* Memorandum from Principal Deputy Assistant Att'y Gen. Pamela S. Karlan, Civ. Rts. Div., U.S. Dep't of Just., to Fed. Agency Civ. Rts. Dirs. & Gen. Couns. (Mar. 26, 2021) (interpreting *Bostock* to apply to Title IX); Notification of Interpretation and Enforcement of Section 1557 of the Affordable Care Act and Title IX of the Education Amendments of 1972, 86 Fed. Reg. 27,984 (May 25, 2021) (announcing interpretation and enforcement Section 1557 consistent with *Bostock* and Title VII).

leged "personality problems," at least some of which were "reactions to her as a *woman* manager."[115] *Bostock* held that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."[116] Similarly, denials of care, such as gender-affirming procedures, if that care would have been granted for persons whose genders matched those assigned at birth, are categorically denials based on the transgender status of the patient.

Additionally, the whole act rule should be applied to find that the intent of the ACA was to increase access for persons historically denied care. Section 1557 should help address the problem that the ACA meant to address: gaps in health insurance coverage.[117] The ACA categorically identified and addressed barriers to health insurance availability, like requiring coverage for pre-existing conditions and preventing coverage determinations based on an individual's age, disability, and expected length of life.[118] Section 1557 mirrors the ACA's overall efforts to require plans to consider the healthcare needs of diverse segments of the population, including "women, children, [people] with disabilities, and other groups."[119]

Returning to *Flack v. Wisconsin Department of Health Services*, in August 2019, the court interpreted the Section 1557 statutory language to cover gender-affirming services, granting declaratory and permanent injunctive relief.[120] The court found the gender-confirming surgery exclusion in Wisconsin's Medicaid program violated Section

115 Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989).

116 Bostock v. Clayton County, 140 S. Ct. 1731, 1741 (2020).

117 *See* BARACK OBAMA, THE PRESIDENT'S ADDRESS BEFORE A JOINT SESSION OF CONGRESS, H.R. Doc. No. 111-62, at 1, 3 (2009) ("Everyone understands the extraordinary hardships that are placed on the uninsured, who live every day just one accident or illness away from bankruptcy. . . . These are middle-class Americans. Some can't get insurance on the job. Others are self-employed, and can't afford it, since buying insurance on your own costs you three times as much as the coverage you get from your employer. Many other Americans who are willing and able to pay are still denied insurance due to previous illnesses or conditions that insurance companies decide are too risky or expensive to cover. . . . The plan I'm announcing tonight would meet three basic goals: It will provide more security and stability to those who have health insurance. It will provide insurance to those who don't.").

118 *See* 42 U.S.C. § 300gg-3 (prohibiting discrimination based on health status including preexisting conditions); 42 U.S.C. § 18022(b)(4)(B) (prohibiting "discriminat[ion] against individuals because of their age, disability, or expected length of life" in coverage decisions, reimbursement rates, incentive programs, or benefit design).

119 42 U.S.C. § 18022(b)(4)(C) (requiring plans to "take into account the health care needs of diverse segments of the population, including women, children, persons with disabilities, and other groups").

120 Flack v. Wis. Dep't of Health Servs., 328 F. Supp. 3d 931, 955 (W.D. Wis. 2018).

1557 by discriminating on the basis of sex.[121] Vaginoplasty and phalloplasty were covered in cases such as reconstructions after a car accident.[122] However, vaginoplasty and phalloplasty as gender-affirming surgery for transgender persons were not covered by the Medicaid program.[123] Thus, the court found the coverage restraint violated the statutory text of Section 1557.[124]

C. The Emergency Potential of Healthcare: Religious Exemptions from Section 1557

In September 2016, Katharine Prescott filed suit against Rady Children's Hospital of San Diego ("RCHSD"), on her own behalf and that of her deceased son, Kyler Prescott, under Section 1557.[125] Kyler Prescott was fourteen years old, transgender, and suffering from suicidal ideation when he was admitted to RCHSD in 2015.[126] Kyler and his mother informed staff that he was a boy and repeatedly insisted that he be addressed and treated as such during his stay.[127] This did not occur.[128] After staff repeatedly misgendered Kyler and denied or ignored his correct gender identity, Kyler's providers decided to end his seventy-two-hour suicide hold early due to his distress at his treatment.[129] Six weeks later, Kyler died by suicide.[130] This case illustrates the specific difference between healthcare and other contexts: healthcare's emergency potential. The potential for emergency situations in healthcare should guide interpretation of the provision of religious exemptions to discrimination rules because discriminatory services in the context of immediate medical need can present dangerous delays or gaps in care.

The discriminatory care that Kyler experienced is common.[131] Fifteen percent of LGBTQ Americans and thirty percent of transgender

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121 *Id.* at 948.

122 *See id.*

123 *Id.*

124 *Id.*

125 Complaint at 1, Prescott v. Rady Child.'s Hosp.–San Diego, 265 F. Supp. 3d 1090 (S.D. Cal. 2017) (No. 16-cv-02408-BTM-JMA).

126 *Prescott*, 265 F. Supp. 3d at 1096.

127 *Id.* at 1096–97.

128 *Id.*

129 *Id.*

130 *Id.*

131 *See, e.g.*, Rumble v. Fairview Health Servs., No. 14-cv-2037, 2015 WL 1197415, at *15–16 (D. Minn. Mar. 16, 2015) (finding the plaintiff plausibly asserted actionable discriminatory care based on transgender status, based on a physician's "hostility," "aggression," "disparaging comments about [Plaintiff]'s use of hormones," and an "assaultive exam"); Sharita Gruberg, Lindsay Mahowald & John Halpin, *The State of the LGBTQ Community in 2020*, CTR. FOR AM. PRO-

individuals report "postponing or avoiding medical treatment due to discrimination."[132] Many Catholic hospitals in particular follow guidance dictated by the United State Conference of Catholic Bishops,[133] which could result in refusal to provide gender-affirming care and discriminatory refusals to treat transgender patients.[134] Courts facing claims resulting from such refusals must weigh patient nondiscrimination against provider religious freedom protections borrowed from RFRA and Title IX.[135] Apparent conflicts between Title IX, RFRA, and Section 1557 should be settled by the harmonization of statutes canon, allowing RFRA's case-by-case determination of religious exemptions but not Title IX's wholesale exemptions, due to the healthcare context of Section 1557.

A clear contextual difference between healthcare and other contexts in which antidiscrimination provisions apply is the potential for individuals to need healthcare on an emergency basis. When a person chooses a school, a workplace, or other government services, delays may be frustrating. However, in healthcare, delays in care or refusals to treat a patient can result in life-and-death situations.[136] This is the basis for healthcare statutes like the Emergency Medical Treatment and Labor Act ("EMTALA"), requiring emergency departments to stabilize all persons coming through their doors.[137] This is not a small issue: across the country, one in six acute care hospital beds is in a

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GRESS (Oct. 6, 2020), https://www.americanprogress.org/article/state-lgbtq-community-2020/ [https://perma.cc/HSF2-6QJQ].

132 Gruberg, Mahowald & Halpin, *supra* note 131.

133 *See Created Male and Female: An Open Letter from Religious Leaders*, U.S. CONF. OF CATH. BISHOPS (Dec. 15, 2017), https://www.usccb.org/topics/promotion-defense-marriage/created-male-and-female [https://perma.cc/D9A8-QJGF] (rejecting the "false idea [] that a man can be or become a woman or vice versa" and calling for a rejection of "[g]ender ideology"); U.S. CONF. OF CATH. BISHOPS, ETHICAL AND RELIGIOUS DIRECTIVES FOR CATHOLIC HEALTH CARE SERVICES (Nov. 17, 2009), https://www.usccb.org/issues-and-action/human-life-and-dignity/health-care/upload/Ethical-Religious-Directives-Catholic-Health-Care-Services-fifth-edition-2009.pdf [https://perma.cc/SYX6-82TL].

134 *See, e.g.*, Minton v. Dignity Health, 252 Cal. Rptr. 3d 616, 620 (Cal. Ct. App. 2019) (noting that a Catholic hospital that refused to provide a hysterectomy to treat gender dysphoria was "bound to follow . . . 'Ethical and Religious Directives for Catholic Health Care Services'").

135 *Id.* at 624–25 (weighing Minton's personal civil rights against Dignity Health's religious principles to find that "upholding Minton's claim does not compel Dignity Health to violate its religious principles if it can provide all persons with full and equal medical care at comparable facilities not subject to the same religious restrictions").

136 *See* Cara Murez, *Long Emergency Room Waits May Raise Risk of Death*, UPI (Jan. 19, 2022, 4:30 PM), https://www.upi.com/Health_News/2022/01/19/emergency-room-delays-death-risk/9731642622635 [https://perma.cc/A2B3-TDU7] ("[T]he death rate within 30 days for patients who are eventually admitted starts to rise five hours after arrival [at an ER].").

137 *See, e.g.*, 42 U.S.C. § 1395dd (2018).

Catholic-owned or affiliated hospital, with forty-six Catholic-restricted hospitals serving as sole community providers for short-term acute care.[138] The hospital's Catholic affiliation may not be apparent, as less than three percent of the nation's 652 Catholic hospital websites are immediately identifiable as Catholic.[139] The emergency potential of healthcare suggests the proper statutory interpretation should disallow a blanket religious exemption for treatment of transgender patients.

Application of Title IX to Section 1557 should consider both the borrowing canon and the harmonization canon. Under the borrowing canon, settled interpretations of a borrowed statute also apply under the new statute.[140] Thus, incorporation of Title IX would seem to adopt all of Title IX's exemptions. The most troubling result of this borrowing is Title IX's exemption of educational institutions controlled by religious organizations from the prohibition of sex discrimination, if the application would be inconsistent with the organization's religious tenets.[141] *Franciscan Alliance* utilized this canon to support their interpretation that Section 1557 should include blanket religious exemptions from Title IX.[142] The 2020 rule similarly removed specific protections and reiterated strong protections for RFRA and Title IX religious exemption.[143] Concerningly, these interpretations seem to withdraw discrimination protections at the hospital's whim, contrary to the ACA and Section 1557's antidiscrimination purpose.[144]

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138 Lois Uttley & Christine Khaikin, MergerWatch, Growth of Catholic Hospitals and Health Systems: 2016 Update of the Miscarriage of Medicine Report 1 (2016). In five states—Alaska, Iowa, Washington, Wisconsin, and South Dakota—"more than 40 percent of acute care beds are in hospitals operating under Catholic health restrictions." *Id.*

139 Katie Hafner, *As Catholic Hospitals Expand, So Do Limits on Some Procedures*, N.Y. Times (Aug. 10, 2018), https://www.nytimes.com/2018/08/10/health/catholic-hospitals-procedures.html [https://perma.cc/NUJ8-EQXC].

140 Levy & Glicksman, *supra* note 63, at 136; Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 65–66 (1987) (finding that ERISA language incorporated into the LMRA indicated incorporation of judicial understanding of that ERISA provision).

141 *See* 2016 Rule, *supra* note 13, at 31,379.

142 Franciscan All., Inc. v. Burwell, 227 F. Supp. 3d 660, 689–92 (N.D. Tex. 2016) (finding that the text of Section 1557 implied that all of Title IX's provisions should be extended to the healthcare context, including religious exemptions). *Franciscan Alliance* also considered the canon disfavoring surplusage to interpret "on the ground prohibited under" to show Title IX was meant to be incorporated in its entirety. *Id.*

143 *See* 2020 Rule, *supra* note 14, at 37,192 (eliminating a regulatory definition of sex-based discrimination and declining to give specific examples of covered services). Ignoring concerns by commentors about leaving undefined the areas covered by sex-based discrimination, the final rule asserted that a case-by-case determination would be sufficient, prohibiting clear guidance and leaving determination to OCR. *See id.*

144 *See supra* Section II.B.

Under the harmonization of statutes canon, courts may consider how to balance the two laws. The harmonization canon encourages courts to interpret statutes in a way that harmonizes conflicting provisions.[145] In harmonization, courts should find that differences between educational facilities under Title IX and healthcare facilities under Section 1557 warrant different approaches, namely that persons selecting religious educational institutions have the benefit of choice, while religious hospitals are the main or only source of care for many individuals, particularly in rural settings or emergency circumstances.[146] A blanket religious exemption could lead to denial or delay of care in the healthcare context or discourage persons from seeking care, both of which could have serious or life-threatening consequences. The 2016 rule reflected this conclusion, declining requests by religiously affiliated organizations to extend Title IX's exemption to the healthcare context.[147]

Courts interpreting Section 1557 must consider it through the lens of RFRA, as RFRA contains a provision explicitly modifying all other federal statutes.[148] The *Franciscan Alliance* court, in determining that the 2016 rule likely violated RFRA,[149] failed to properly apply RFRA's "least restrictive means" test in considering implementation of Section 1557. The court found that the 2016 rule likely violated RFRA based on the RFRA requirement that the "[g]overnment may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person . . . is the least restrictive means of furthering [a] compelling governmental interest."[150] The court determined the government did not employ the least restrictive means to achieve its goals—arguing that if it wanted to expand access to transition procedures, the government could fund the procedures themselves.[151]

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145 LEVY & GLICKSMAN, *supra* note 63, at 140; *see* Massachusetts v. EPA, 549 U.S. 497, 531–32 (2007) (harmonizing conflicting EPA and DOT regulations of carbon dioxide emissions as allowing validly different standards, even if their purview seems to overlap).

146 *See* UTTLEY & KHAIKIN, *supra* note 138, at 1 ("There are 46 Catholic-restricted hospitals that are the sole community providers of short-term acute hospital care for people living in their geographic regions.").

147 *See* 2016 Rule, *supra* note 13, at 31,379–80.

148 42 U.S.C. § 2000bb-3.

149 Franciscan All., Inc. v. Burwell, 227 F. Supp. 3d 660, 693 (N.D. Tex. 2016).

150 42 U.S.C. § 2000bb-1(b).

151 *Franciscan All.*, 227 F. Supp. 3d at 693. The court also found that requiring case-by-case determinations effectively made the practice of religious belief more expensive than non-religion. *See id.* at 692; *see also* Religious Sisters of Mercy v. Azar, 513 F. Supp. 3d 1113, 1135 (D.N.D.

The *Franciscan Alliance* court failed to consider the goals of the ACA: to ensure that all patients can properly access care. Cases of discrimination against transgender individuals often result in their unwillingness or hesitancy to utilize healthcare facilities where they are unsure about receiving appropriate care.[152] EMTALA, which specifically addresses basic, limited hospital emergency room obligations in emergency circumstances, does not provide an exemption for religious objections.[153] While a case-by-case determination may be appropriate in other contexts, Congress has properly prioritized all patient urgent healthcare needs through statutes like EMTALA and extended that to other healthcare settings through blanket nondiscrimination coverage in the ACA.

The *Franciscan Alliance* court's improper RFRA evaluation extends to the purported "least restrictive means." Unfortunately, this potential solution misses the context of emergency situations in healthcare, wherein a religiously-affiliated provider's denial of care could have tragic consequences. Realistically, a person might not know their condition was related to their gender identity or that they needed a therapeutic abortion until well into an emergency room visit, thus rendering separate funding for government provision of those benefits unrealistic. Because there are no other less restrictive means to allow discrimination in the context of healthcare emergencies, *Franciscan Alliance* improperly evaluated Section 1557 under RFRA by issuing a blanket ban.

2021) (finding reinstatement of the 2016 rule "provoke[d] a credible threat of enforcement for refusal to provide or insure gender-transition procedures" and thus violated RFRA).

152 *See, e.g.*, Rumble v. Fairview Health Servs., 14-cv-2037, 2015 WL 1197415, at *7 (D. Minn. Mar. 16, 2015) (addressing claims that, as a result of discriminatory treatment, the transgender plaintiff "will never go to Fairview Southdale Hospital again, 'even in an emergency' although it is the nearest hospital to his home"); Prescott v. Rady Child.'s Hosp.–San Diego, 265 F. Supp. 3d 1090, 1103–04 (S.D. Cal. 2017) (finding valid claims for misrepresentation of "being capable of working with transgender patients and patients with dysphoria" as Kyler's parent "would not have sought medical care for Kyler at RCHSD had she known that [such] claims were false").

153 *See* 42 C.F.R. § 489.24 (2016); *see also* CTRS. FOR MEDICARE AND MEDICAID SERVS., *Appendix V—Interpretive Guidelines—Responsibilities of Medicare Participating Hospitals in Emergency Cases*, *in* STATE OPERATIONS MANUAL (2009) ("Hospitals are responsible for treating and stabilizing, within their capacity and capability, any individual who presents him/herself to a hospital with an [emergency medical condition]. The hospital must provide care until the condition ceases to be an emergency or until the individual is properly transferred to another facility. An inappropriate transfer or discharge of an individual with an [emergency medical condition] would be a violation of EMTALA.").

Conclusion

The application of civil rights to healthcare is necessarily contextual. The specific concerns, issues, and unique nature of healthcare should guide interpretation of Section 1557 of the Affordable Care Act. The Biden administration will likely issue regulations to clarify interpretation of Section 1557 after *Bostock*, which may trigger litigation over contentious issues like abortion and gender-affirming care. The context of healthcare should guide judicial application of interpretive tools and canons such as plain meaning, avoidance of an absurd result, furthering the intention of the drafters, and considering similar statutes. Specifically, healthcare's universality, personal nature, and emergency potential support an expansive interpretation of Section 1557's scope, an expansive definition of sex discrimination, and limited deference for religious refusals.

American civil rights laws have focused on protecting communities vulnerable to mistreatment by service providers, educational institutions, and employers. In extending civil rights to healthcare in Section 1557, Congress protected communities most at risk of mistreatment by medical providers. Subsequent litigation has shown that the transgender community faces a disproportionate burden of such mistreatment. Interpretations of Section 1557 should specifically consider the unique aspects of healthcare and hold that such high stakes necessitate extensive civil rights protections.