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The Case for Preserving Transgender and Gender Nonconforming Health Care Protections

Bailey Metzger[†]

LGBT Americans face numerous barriers to health—from providers who just don't understand their unique health needs, to difficulty getting health insurance because they can't get coverage through a partner or a spouse. And unfortunately way too many LGBT individuals face discrimination and bigotry in the health care system.

—Kathleen Sebelius, Former Secretary of Health and Human Services¹

Introduction

On May 18, 2016, the U.S. Department of Health and Human Services Office for Civil Rights (OCR) published the final rule implementing § 1557 of the Patient Protection and Affordable Care Act (ACA)² in the Federal Register.³ The final rule addressed a wide variety of discrimination in the health care context, including discrimination on the basis of race, color, national origin, sex, age, and disability.⁴ Perhaps the most notable part of the rule finds that discrimination on the basis of gender identity constitutes discrimination on the basis of sex.⁵ For the purposes of § 1557, gender identity is defined as:

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1. Kellan E. Baker, *Open Doors for All: Sexual Orientation and Gender Identity Protections in Health Care*, CTR. FOR AM. PROGRESS 1 (Apr. 30, 2015), <https://cdn.americanprogress.org/wp-content/uploads/2015/04/OpenDoorsForAll.pdf>.

2. 42 U.S.C. § 18116 (2016).

3. Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31376 (May 18, 2016) (codified at 45 C.F.R. pt. 92 (2016)).

4. *Id.*

5. See 45 C.F.R. § 92.4 (2016). See also Kellan Baker, *LGBT Protections in Affordable Care Act Section 1557*, HEALTH AFFAIRS (June 6, 2016), <http://healthaffairs.org/blog/2016/06/06/lgbt-protections-in-affordable-care-act-section-1557/> (calling the final rule “historic”).

[A]n individual's internal sense of gender, which may be male, female, neither, or a combination of male and female, and which may be different from an individual's sex assigned at birth. The way an individual expresses gender identity is frequently called "gender expression," and may or may not conform to social stereotypes associated with a particular gender. A transgender individual is an individual whose gender identity is different from the sex assigned to that person at birth.⁶

Following the publication of the proposed rule in 2015, law professor Samuel Bagenstos said that the rule "contain[ed] the most significant affirmation of the rights of transgender individuals of equal treatment in health care and health insurance that has existed anywhere in the law."⁷

In addition to providing ample protections to individuals on the basis of gender identity, the OCR decided not to implement a blanket religious exemption despite several comments asking the OCR to do so.⁸ While the OCR did not impose any new religious exemptions, it noted that religious organizations still had protections under federal law: the OCR pointed to the protections afforded by the Religious Freedom Restoration Act (RFRA),⁹ provider conscience laws, and other ACA provisions regarding abortion and preventative health care.¹⁰ Notably, the OCR declined to implement the blanket exemptions found in Title IX,¹¹ which allow religious institutions and organizations with "contrary religious tenets" to be exempted from those provisions of Title IX that violate their religious doctrines.¹²

On December 21, 2016, less than twenty-four hours before the regulations went into full effect,¹³ Judge Reed O'Connor of the U.S. District Court for the Northern District of Texas issued an injunction on the basis that § 1557 likely violates the Religious

6. § 92.4.

7. Abby Goodnough & Margot Sanger-Katz, *Health Care Rules Proposed to Shield Transgender Patients from Bias*, N.Y. TIMES (Sept. 3, 2015), http://www.nytimes.com/2015/09/04/us/health-care-rules-proposed-to-shield-transgender-patients-from-bias.html?_r=0.

8. 81 Fed. Reg. 31376.

9. 42 U.S.C. §§ 2000bb–2000bb–4 (2015).

10. See 81 Fed. Reg. at 31379; 42 U.S.C. § 18023 (2010); 45 C.F.R. § 147.131 (2016).

11. 81 Fed. Reg. at 31379.

12. 20 U.S.C. § 1681(a)(3) (2015).

13. 81 Fed. Reg. at 31378 ("[T]o the extent that provisions of this rule require changes to health insurance or group health plan benefit design . . . such provisions, as they apply to health insurance or group health plan benefit design, have an applicability date of the first day of the first plan year (in the individual market, policy year) beginning on or after January 1, 2017.").

Freedom Restoration Act (RFRA).¹⁴ This injunction effectively halted the provisions of § 1557 that pertain to insurance agencies, particularly provisions that prevented insurance agencies from wholesale denying transition-related care.¹⁵

This Note argues that neither health care providers nor reviewing courts should find that the religious concerns protected by RFRA supersede the gender identity protections granted by § 1557, especially considering the concerns articulated by the OCR when it declined to import the blanket restrictions under Title IX. In particular, health care providers and reviewing courts should be wary of broad exemptions that “could result in a denial or delay in the provision of health care to individuals and in discouraging individuals from seeking necessary care, with serious and, in some cases, life threatening results.”¹⁶ Further, this Note will explain why the Supreme Court’s decision in *Burwell v. Hobby Lobby*,¹⁷ which interpreted RFRA, should be distinguished from the exemptions in the final rule.

I. Background

In specifically addressing discrimination on the basis of gender identity, the OCR spoke to years of discrimination in health care against transgender and gender nonconforming (TGNC) individuals.¹⁸ To fully understand the impact of § 1557, it is imperative to understand the history of transgender discrimination

14. *Franciscan Alliance, Inc. v. Burwell*, 227 F. Supp. 3d 660, 670 (N.D. Tex. 2016). RFRA generally prohibits the government from “substantially burden[ing]” the free exercise of religion, with some exceptions. 42 U.S.C. § 2000bb-1.

15. Michelle E. Phillips, Lisa M. deFilippis & Joshua Rafsky, *Federal Court Enjoins Health and Human Services Department from Enforcing ACA Protections for Transgender Individuals*, JACKSON LEWIS (Jan. 13, 2017), <https://www.jacksonlewis.com/publication/federal-court-enjoins-health-and-human-services-department-enforcing-aca-protections-transgender-individuals>

(“Furthermore, the HHS rule requires health insurance policies and certain self-insured employee health insurance plans to remove any categorical exclusions for services related to gender transition.”).

16. 81 Fed. Reg. at 31380.

17. 134 S. Ct. 2751 (2014).

18. See, e.g., Lindsey Bever, *Transgender Boy’s Mom Sues Hospital, Saying He ‘Went into Spiral’ After Staff Called Him a Girl*, WASH. POST (Oct. 3, 2016), <https://www.washingtonpost.com/news/to-your-health/wp/2016/10/03/mother-sues-hospital-for-discrimination-after-staff-kept-calling-her-transgender-son-a-girl/> (discussing a lawsuit filed after a 14-year-old transgender boy committed suicide following discrimination at a hospital); Daniel Trotta, *Transgender Patients Face Fear and Stigma in the Doctor’s Office*, REUTERS, Sept. 15, 2016, <http://www.reuters.com/article/us-usa-lgbt-medicine-idUSKCN11L0AJ> (discussing Tanya Walker’s, a transgender woman with lung cancer, emergency room experience).

leading up to the promulgation of the final rule alongside the development of religious exemptions under Title IX and the application of RFRA. It is also important to note that due to changing perceptions, public awareness of TGNC individuals, and the highly political discussions surrounding transgender identities, this history is difficult to track.¹⁹

The fight against discrimination on the basis of gender identity has been arduous: spanning from health care to employment, housing, education, and beyond.²⁰ Even now, one only needs to look to the news to see arguments about civil rights and privileges and how they apply to TGNC individuals.²¹ However, the popular concept of “being transgender”—at the time called “transsexualism”—is relatively new and did not emerge until the late 1940s.²² Even before the emergence of the term, the general public may have been aware of individuals who “passed” for a gender other than that which they were assigned at birth and those who underwent “sex change” procedures, despite the fact that these procedures were rarely performed in the United States.²³

While the increase in activism and visibility may benefit TGNC individuals by creating familiarity in the minds of the general public,²⁴ the increased awareness has also led, in part, to greater pushback.²⁵ In particular, the fact that many people

19. See Genny Beemyn, *A Presence in the Past: A Transgender Historiography*, 25 J. WOMEN'S HIST. 113 (2013) for a discussion of the sources of transgender history and the social dimension of those sources.

20. See e.g., Shanna K. Kattari et al., *Policing Gender Through Housing and Employment Discrimination: Comparison of Discrimination Experiences of Transgender and Cisgender LGBQ Individuals*, 7 J. SOC'Y FOR SOC. WORK AND RESEARCH 427 (2016) (discussing employment and housing discrimination); Kristie L. Seelman, *Transgender Individuals' Access to College Housing and Bathrooms: Findings from the National Transgender Discrimination Survey*, 26 J. GAY & LESBIAN SOC. SERVICES 186 (2014) (discussing education discrimination).

21. See e.g., Adam Liptak, *Supreme Court to Rule on Transgender Access Case*, N.Y. TIMES (Oct. 28, 2016), http://www.nytimes.com/2016/10/29/us/politics/supreme-court-to-rule-in-transgender-access-case.html?_r=0 (discussing the U.S. Supreme Court's announcement that it would hear the case of a transgender student and decide whether he was allowed to use the male restroom at school).

22. JOANNE MEYEROWITZ, *HOW SEX CHANGED: A HISTORY OF TRANSEXUALITY IN THE UNITED STATES* 15 (2002).

23. *Id.* (“Stories of ‘sex reversals,’ ‘sex changes,’ and ‘sexual metamorphoses’ appeared in American newspapers and magazines from at least the 1930s on.”).

24. Liz Halloran, *Survey Shows Striking Increase in Americans Who Know and Support Transgender People*, HUM. RTS CAMPAIGN (Apr. 24, 2015), <http://www.hrc.org/blog/survey-shows-striking-increase-in-americans-who-know-and-support-transgende>.

25. Jos Truitt, *Transgender People are More Visible than Ever. So Why Is There More Anti-Trans Legislation than Ever, Too?*, THE NATION (Mar. 4, 2016), <https://www.thenation.com/article/transgender-people-are-more-visible-than-ever->

became aware of TGNC individuals through transitioning narratives did not translate into greater access or protection for TGNC individuals in the health care realm.²⁶ Particularly, following the passage of the ACA, multiple authors pointed out gaps in protection for TGNC individuals.²⁷

Keeping this longstanding history of discrimination and changing vulnerability of TGNC individuals in mind, the OCR issued a request for information on August 1, 2013.²⁸ This was followed by a notice of proposed rulemaking (NPR) for nondiscrimination in health care, issued on September 8, 2015.²⁹ As in the final rule,³⁰ the NPR listed gender identity among the types of discrimination that can constitute discrimination on the basis of sex.³¹ In doing so, the OCR looked to several other agency interpretations of “sex” that included gender identity, such as interpretations by the Department of Labor and the Department of Education.³² Notably, this was not the first time the OCR stated that discrimination on the basis of gender identity was discrimination on the basis of sex.³³ In articulating this view, the OCR referenced *Rumble v. Fairview Health Services*, a case in which the plaintiff utilized § 1557, prior to the promulgation of

so-why-is-there-more-anti-trans-legislation-than-ever-too/.

26. See, e.g., LAMBDA LEGAL, WHEN HEALTH CARE ISN'T CARING: LAMBDA LEGAL'S SURVEY ON DISCRIMINATION AGAINST LGBT PEOPLE AND PEOPLE LIVING WITH HIV 9 (2010), <http://www.lambdalegal.org/health-care-report> (finding “patterns of discrimination and substandard [health] care” for lesbian, gay, bisexual and transgender communities); HUMAN RIGHTS CAMPAIGN FOUNDATION, HEALTHCARE EQUALITY INDEX 2016: PROMOTING EQUITABLE AND INCLUSIVE CARE FOR LESBIAN, GAY, BISEXUAL AND TRANSGENDER PATIENTS AND THEIR FAMILIES (2016), http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/HEI_2016_FINAL.pdf (stating there is “so much more work left to do . . . to clos[e] the gap in ensuring equal care to LGBTQ patients and their families”).

27. See, e.g., Sarah E. Gage, *The Transgender Eligibility Gap: How the ACA Fails to Cover Medically Necessary Treatment for Transgender Individuals and How HHS Can Fix It*, 49 NEW ENG. L. REV. 499 (2015) (highlighting the ACA's discriminatory access outcomes); Rachel C. Kurzweil, “Justice is What Love Looks Like in Public:” *How the Affordable Care Act Falls Short on Transgender Health Care Access*, 21 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 199 (2014) (advocating for legislative and judicial action to repair the ACA's coverage disparity).

28. Request for Information, 78 Fed. Reg. 46558 (Aug. 1, 2013).

29. 80 Fed. Reg. 54172 (Sept. 8, 2015) (to be codified at 45 C.F.R pt. 92).

30. 45 C.F.R § 92.4 (2016).

31. 80 Fed. Reg. at 54176.

32. *Id.* at 54176 n.20.

33. Letter from Leon Rodriguez, Director, U.S. Department of Health & Human Services, Office for Civil Rights, to Maya Rupert, Federal Policy Director, National Center for Lesbian Rights (July 12, 2012) (“We agree that Section 1557's sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity and will accept such complaints for investigation.”).

regulations, to address discrimination based on transgender status.³⁴ Upon releasing the final rule on nondiscrimination, the OCR declined to import the sweeping religious exemptions found in Title IX, but rather noted that § 1557 did not displace the religious protections found in statutes like RFRA.³⁵

RFRA was passed in November 1993,³⁶ in part as a response to the Supreme Court decision in *Employment Division v. Smith*.³⁷ In *Smith*, members of the Native American Church were fired from their jobs at a private drug rehabilitation organization and denied unemployment compensation after ingesting peyote, a controlled substance in Oregon, for sacramental purposes.³⁸ Ultimately, the Court held that the denial of unemployment compensation was consistent with the Free Exercise Clause³⁹ and was therefore constitutional.⁴⁰

In passing RFRA, Congress found, *inter alia*, that “laws ‘neutral’ toward religion may burden religious exercise . . . [and that] governments should not substantially burden religious exercise without compelling justification.”⁴¹ RFRA itself seeks to provide the basis for a claim or defense for those who feel that their religious freedom has been infringed by the government.⁴² In order to achieve this goal, Congress sought to restore the compelling interest test found in *Sherbert v. Verner*⁴³ and *Wisconsin v. Yoder*.⁴⁴ In *Sherbert* the Court first asked whether the government had burdened an individual’s free exercise of religion.⁴⁵ Upon finding that the government had, the Court considered whether the burden could be justified by “some compelling state interest.”⁴⁶ This test is reproduced in RFRA:

(a) IN GENERAL.—Government shall not substantially burden a person’s exercise of religion even if the burden results from a

34. No. 14-CV-2037 (SRN/FLN), 2015 WL 1197415 (D. Minn. 2015) (denying motion to dismiss).

35. 81 Fed. Reg. 31376, 31379 (May 18, 2016) (codified at 45 C.F.R pt. 92 (2016)).

36. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488.

37. Scott C. Idleman, *The Religious Freedom Restoration Act: Pushing the Limits of Legislative Power*, 73 TEX. L. REV. 247, 248 (1994).

38. 494 U.S. 872, 874 (1990).

39. U.S. CONST. amend. I.

40. *Smith*, 494 U.S. at 890.

41. Religious Freedom Restoration Act § 2.

42. *Id.*

43. 374 U.S. 398 (1963).

44. 406 U.S. 205 (1972).

45. 374 U.S. at 403.

46. *Id.* at 406.

rule of general applicability, except as provided in subsection (b).

(b) EXCEPTION.—Government may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.⁴⁷

RFRA was met with incredible support from both religious groups and civil liberties organizations,⁴⁸ was passed by a unanimous House and a nearly unanimous Senate, and subsequently signed into law by President Clinton.⁴⁹ However, this wildly popular act was not free from initial criticism, especially in regard to its constitutionality.⁵⁰

This criticism has grown alongside the continuing application of RFRA, with much of the pertinent criticism emerging following the Supreme Court’s decision in *Burwell v. Hobby Lobby Stores, Inc.*⁵¹ The Court’s decision in *Hobby Lobby* ignited popular debate about the role of religious belief in guiding large-scale health care decisions.⁵² Some organizations have been outspoken about their

47. Religious Freedom Restoration Act § 3.

48. Idelman, *supra* note 37, at 248–249 (“RFRA was warmly received and intensely celebrated by a remarkably diverse group of supporters—from secular liberals in the ACLU to religious conservatives in the Traditional Values Coalition. Indeed, not since the anti-pornography movement of the 1980s . . . had such unusual bedfellows emerged from the legislative process.”).

49. Peter Steinfels, *Clinton Signs Law Protecting Religious Practices*, N.Y. TIMES (Nov. 17, 1993), <http://www.nytimes.com/1993/11/17/us/clinton-signs-law-protecting-religious-practices.html>.

50. *See, e.g.*, Marci A. Hamilton, *The Religious Freedom Restoration Act: Letting the Fox into the Henhouse Under Cover of Section 5 of the Fourteenth Amendment*, 16 CARDOZO L. REV. 357, 357 (1994) (“RFRA is an understandable, but unconstitutional, attempt to supplement the contemporary Supreme Court’s crabbed reading of the Free Exercise Clause.”); Lino A. Graglia, *City of Boerne v. Flores: An Essay on the Invalidation of the Religious Freedom Restoration Act*, 68 MISS. L.J. 675, 675 (1998) (calling RFRA “perhaps the most unconstitutional statute in the history of the nation”).

51. 134 S. Ct. 2751 (2014). *See, e.g.*, Ira C. Lupu, *Hobby Lobby and the Dubious Enterprise of Religious Exemptions*, 38 HARV. J.L. & GENDER 35 (2015); Talya Seidman, *The Strictest Scrutiny: How the Hobby Lobby Court’s Interpretation of the “Least Restrictive Means” Puts Federal Laws in Jeopardy*, 14 CARDOZO PUB. L. POLY & ETHICS J. 133 (2015).

52. *See, e.g.*, Erika Eichelberger & Molly Redden, *In Hobby Lobby Case, the Supreme Court Chooses Religion Over Science*, MOTHER JONES (June 30, 2014, 4:09 PM), <http://www.motherjones.com/politics/2014/06/supreme-court-hobby-lobby-decision>. Compare C.H., *Aborted, Once More*, ECONOMIST: DEMOCRACY IN AMERICA (June 30, 2014), <http://www.economist.com/blogs/democracyinamerica/2014/06/hobby-lobby-and-obamacare>, with Robert Jeffress, *Hobby Lobby Ruling: Why Supreme Court Got it Right*, FOX NEWS (June 30, 2014), <http://www.foxnews.com/>

waning support for RFRA. For example, the American Civil Liberties Union (ACLU)—a self-proclaimed “guardian of liberty” for Constitutional freedoms⁵³—criticized the Supreme Court’s application of RFRA in *Hobby Lobby*, distinguishing it from earlier cases where “[a]ccommodating [their] faith doesn’t hurt anyone else; it just requires making an exception to a rule of uniformity that was never truly uniform. Not so in these other cases [including *Hobby Lobby*].”⁵⁴

The view expressed by the ACLU has been echoed by legal scholars. In their article, Douglas NeJaime and Reva B. Siegel wrote:

In the free exercise cases that RFRA invokes, claims were advanced by religious minorities who sought exemptions based on unconventional beliefs generally not considered by lawmakers when they adopted the challenged laws; the costs of accommodating their claims were minimal and widely shared. Complicity-based [religious] conscience claims differ in form. Because the claims concern the conduct of citizens outside the faith community, accommodating the claims can harm those whose conduct the claimants view as sinful.⁵⁵

These recent cases and their implementation of RFRA seem to have turned the understanding of the law upside down.

This harmful jurisprudence has been furthered with the issuance of the injunction in *Franciscan Alliance, Inc. v. Burwell*,⁵⁶ where the potential conflict between RFRA and § 1557 has come to a head. *Franciscan Alliance* was brought by a coalition of religiously affiliated organizations and several states—Texas, Wisconsin, Nebraska, Kentucky, and Kansas—claiming that the antidiscrimination provisions under the ACA would require them to “cast aside their medical judgment” and “violate their deeply held religious beliefs.”⁵⁷ The non-state parties in this case are Franciscan Alliance, Inc., a Roman Catholic nonprofit hospital

opinion/2014/06/30/hobby-lobby-ruling-why-supreme-court-got-it-right.html.

53. *About the ACLU*, ACLU, <https://www.aclu.org/about-aclu> (last visited Oct. 23, 2017).

54. Louise Melling, *ACLU: Why We Can No Longer Support the Federal ‘Religious Freedom’ Law*, WASH. POST (June 25, 2015), https://www.washingtonpost.com/opinions/congress-should-amend-the-abused-religious-freedom-restoration-act/2015/06/25/ee6aaa46-19d8-11e5-ab92-c75ae6ab94b5_story.html?utm_term=.0e47c434ca24.

55. Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2520 (2015).

56. 227 F. Supp. 3d 660 (N.D. Tex. Dec. 31, 2016).

57. Complaint at 2–3, *Franciscan Alliance, Inc. v. Burwell*, No. 7:16-CV-00108-O (N.D. Tex. Aug. 23, 2016).

system,⁵⁸ Specialty Physicians of Illinois, LLC, a member-managed health care provider of which Franciscan is the only member,⁵⁹ and the Christian Medical & Dental Society, a nonprofit corporation.⁶⁰ The plaintiffs argued that through promulgating regulations on § 1557, the U.S. Department of Health and Human Services (HHS) “attempt[ed] to preempt the serious medical and moral debate”⁶¹ regarding transition-related care and that the requirements of § 1557 “turn[ed] the venerable medical oath to ‘do no harm’ on its head.”⁶² The plaintiffs also took hardship with the fact that HHS declined to incorporate the religious exemptions under Title IX.⁶³

On December 31, 2016, Judge O’Connor issued a nationwide injunction on the prohibition of discrimination on the basis of “gender identity.”⁶⁴ The next day, insurance agencies and health care providers would have been required to come into compliance with § 1557.⁶⁵ Notably, Judge O’Connor supported the issuance of this injunction by stating that the injunction would simply maintain the status quo rather than disrupt health care.⁶⁶ Judge O’Connor also depended on *Hobby Lobby* to support his decision.⁶⁷

With these recent developments and interactions between RFRA and § 1557 in mind, it becomes easier to see why RFRA should be applied as sparingly as possible, so as to not derogate from nondiscrimination on the basis of gender identity.

II. Judge O’Connor Improperly Held that Religious Freedoms Protections Offered by RFRA Can Infringe on Access to Health Care for TGNC Individuals Under § 1557

By finding that HHS acted improperly by utilizing Title IX protections on the basis of sex, while declining to incorporate Title

58. *Id.* at ¶ 5.

59. *Id.* at ¶ 8.

60. *Id.* at ¶ 4. See *Transgender Identification Ethics Statement*, CHRISTIAN MED. & DENTAL ASS’N, <https://cnda.org/resources/publication/transgender-identification-ethics-statement> (last visited Oct. 21 2017) (elaborating the Christian Medical & Dental Society’s views on transition-related care).

61. Complaint, *supra* note 57, at ¶ 28.

62. *Id.* at ¶ 30.

63. *Id.* at ¶ 49.

64. *Franciscan Alliance, Inc. v. Burwell*, 227 F. Supp. 3d 660, 670 (N.D. Tex. Dec. 31, 2016). O’Connor also issued the injunction on the prohibition of discrimination on the basis of “termination of pregnancy,” however, this provision is not discussed in this Note.

65. 20 U.S.C. § 1681(a)(3) (2015).

66. *Franciscan Alliance*, 227 F. Supp. 3d at 692.

67. *Id.* at 69192.

IX religious exemptions, Judge O'Connor improperly conflated the considerations used in an education context with those in a health care context. Health care law should receive special considerations when determining when and how health care providers can refuse service. This is not to say that it is not important to eliminate discrimination against TGNC individuals in education, but rather that health care has a greater chance of dealing with issues of life and death.

a. Without the Protections Offered by § 1557, There Will Be Continued Health Care-Related Harms to Transgender and Gender Nonconforming Individuals

By stating that the injunction would simply maintain the status quo for TGNC individuals, Judge O'Connor has indicated a fundamental misunderstanding of how § 1557 protections work to protect TGNC patients. As was noted by the ACLU in a motion to intervene, filed a little more than a week after the injunction was issued, many of the protections offered by § 1557 have been in effect since July 18, 2016, and therefore the injunction "significantly alters the status quo."⁶⁸ After the protections went into effect, organizations like Lambda Legal and the Human Rights Campaign issued publications directed toward health care providers with the purpose of helping them comply with the protections afforded by § 1557.⁶⁹ If, during this time, TGNC individuals relied upon § 1557 to obtain safe and affirming health care, then placing an injunction on that care would invariably alter the status quo.

Even if the injunction were to maintain the status quo, that status quo is unacceptable to maintain. According the National Center for Transgender Equality's (NCTE) to the 2011 National Transgender Discrimination Survey, 19% of respondents reported being refused medical care because they were transgender, 50% reported having to teach their doctors about transgender health care, and 28% reported postponing medical care due to discrimination.⁷⁰ The NCTE released another survey report in

68. Proposed Intervenor's Motion for Ruling on Intervention and Stay of Preliminary Injunction Pending Appeal at 7, *Franciscan Alliance, Inc. v. Burwell*, No. 7:16-CV-00108-O (N.D. Tex. Jan. 9, 2016).

69. See LAMBDA LEGAL ET AL., *TRANSGENDER-AFFIRMING HOSPITAL POLICIES* (2016), http://www.lambdalegal.org/sites/default/files/publications/downloads/hospital-policies-2016_5-26-16.pdf.

70. JAMIE M. GRANT ET AL., *INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 6* (2011), http://www.thetaskforce.org/static_html/downloads/reports/reports/ntds_full.pdf.

2016,⁷¹ and while there have been some improvements between 2011 and 2016, health care remains an area where transgender individuals face a great deal of discrimination.⁷² These problems often arise when TGNC individuals seek insurance coverage, with 25% of respondents reporting some trouble with insurance due to being transgender and 55% of respondents reporting being denied coverage for transition-related surgery.⁷³ It should be noted that although the NCTE published the more recent numbers in 2016, it distributed the survey in the summer of 2015, before HHS promulgated the § 1557 regulations.⁷⁴

b. Rights Protected by RFRA Should Not Be Used to Interfere with Access to Health Care

The Supreme Court has already ruled on a case revolving around a conflict between HHS and RFRA. In *Burwell v. Hobby Lobby Stores, Inc.*, the Court held that an HHS mandate requiring closely held corporations to provide coverage for specific contraceptives violated RFRA.⁷⁵ Some may try to argue that *Hobby Lobby* and *Franciscan Alliance* are substantially similar, in that *Hobby Lobby* dealt with the religious beliefs of individual actors and providing health insurance for more “controversial” medications and *Franciscan Alliance* incorporated “controversial” health care—i.e., transition care—with both health care and health insurance providers. However, viewing these similarities as necessitating the halt of health care and insurance for transgender individuals, as was done in *Hobby Lobby*, is inappropriate. In *Hobby Lobby*, the Court clearly identified an alternative program that evidenced that the HHS contraceptive mandate was not the least restrictive method to further the government’s interest.⁷⁶ No such alternative exists for the § 1557 protections against discrimination.

71. SANDY E. JAMES ET AL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY (2016), <http://www.transequality.org/sites/default/files/docs/usts/USTS%20Full%20Report%20-%20FINAL%201.6.17.pdf>.

72. *Id.* at 8 (showing that 23% of respondents put off seeking medical care due to fear of discrimination).

73. *Id.* (“25% of those who sought coverage for hormones in the past year were denied.”).

74. *Id.* at 2.

75. 134 S. Ct. 2751, 2759 (2014).

76. *Hobby Lobby*, 134 S. Ct. at 2759 (“In fact, HHS has already devised and implemented a system that seeks to respect the religious liberty of religious nonprofit corporations while ensuring that the employees of these entities have precisely the same access to all FDA-approved contraceptives as employees of companies whose owners have no religious objections to providing such coverage We therefore conclude that this system constitutes an alternative that achieves all of the

In his opinion issuing the injunction, Judge O'Connor looked to *Hobby Lobby* to support his assertion that by requiring health care providers and insurers to provide or cover transition-related care, HHS did not further its objective by the least restrictive means.⁷⁷ Judge O'Connor wrote, “[i]f the government wishes to expand access to transition and abortion procedures, [t]he most straightforward way of doing this would be for the government to assume the cost of providing the [procedures] at issue to any [individuals].”⁷⁸ The original text of the *Hobby Lobby* decision read, “[t]he most straightforward way of doing this would be for the Government to assume the cost of providing the *four contraceptives* at issue to any *women*.”⁷⁹

In reality, the comparison between paying for four specific medications and the entirety of transition-related care for an individual is not as directly analogous as Judge O'Connor portrays.⁸⁰ Transition-related care costs are much greater, with the price estimate being \$140,450 for transgender women and \$124,400 for transgender men.⁸¹ Apart from being able to afford to provide transition-related care to every TGNC patient who faces religiously-motivated discrimination, the government is not in the position to perform surgeries in the same way it is in the position to pay for medical care. It should be noted that the number of employees of closely held for-profit corporations, to which these rulings apply, is not inconsequential, due to the large number of small businesses in America.⁸² However, the number of religiously-affiliated—particularly Catholic—hospitals and hospital systems is also significant, with the number of Catholic-sponsored or Catholic-

Government’s aims while providing greater respect for religious liberty.”).

77. *Franciscan Alliance, Inc. v. Burwell*, 227 F. Supp. 3d 660, 693 (N.D. Tex. Dec. 31, 2016).

78. *Id.* (citing *Hobby Lobby*, 134 S. Ct. at 2780) (last three alterations in original).

79. *Hobby Lobby*, 134 S. Ct. at 2780 (emphasis added).

80. For the costs of the types of birth control addressed in *Hobby Lobby*, see CTR. FOR AM. PROGRESS, THE HIGH COSTS OF BIRTH CONTROL 2 (2012), https://cdn.americanprogress.org/wp-content/uploads/issues/2012/02/pdf/BC_costs.pdf (stating that intrauterine devices cost about \$1,000 every five-to-ten years without insurance); AM. SOC’Y FOR EMERGENCY CONTRACEPTION, THE COST OF EMERGENCY CONTRACEPTION: RESULTS FROM A NATIONWIDE SURVEY 1 (2013), <http://americansocietyforec.org/uploads/3/2/7/0/3270267/asecpricingreport.pdf> (stating that emergency contraceptives cost on average between \$40 and \$50).

81. Alyssa Jackson, *The High Cost of Being Transgender*, CNN (July 31, 2015, 3:40 PM), <http://edition.cnn.com/2015/07/31/health/transgender-costs-irpt/>.

82. Aaron Blake, *A LOT of People Could be Affected by the Supreme Court’s Birth Control Decision—Theoretically*, WASH. POST (June 30, 2014), https://www.washingtonpost.com/news/the-fix/wp/2014/06/30/a-lot-of-people-could-be-affected-by-the-supreme-courts-birth-control-decision/?utm_term=.095ef2bdb363 (“[C]losely held corporations employed 52[%] of the American workforce.”).

affiliated hospitals increasing sixteen percent within a recent ten-year period,⁸³ and one-in-six hospital beds being located at a Catholic hospital.⁸⁴ There are some communities in the United States where Catholic institutions are the only hospitals available to visit.⁸⁵

It should be noted that there are several metropolitan areas around the United States where there are a multitude of both religiously-affiliated hospitals and non-religious hospitals. There may be an argument that in these localities, the government interest in ensuring access to nondiscriminatory health care can be achieved without requiring the religiously-affiliated hospitals to provide services that they deem contrary to their religious tenets. In these areas, the non-religious hospitals would not be able to bring a RFRA challenge and thus would be required to provide nondiscriminatory care. However, the fact that there are these densely populated areas where the risk of health care discrimination may be alleviated due to the sheer number of hospitals does not mean that the calculus changes for those where a religiously-affiliated hospital is the only available facility.

In rejecting the direct incorporation of religious exemptions, the OCR discussed the potential problems that may arise by incorporating Title IX-like religious exemptions into § 1557:

First, students or parents selecting religious educational institutions typically do so as a matter of choice; a student can attend public school (if K-12) or choose a different college. In the health care context, by contrast, individuals may have limited or no choice of providers, particularly in rural areas or where hospitals have merged with or are run by religious institutions. Moreover, the choice of providers may be even further circumscribed in emergency circumstances.

Second, a blanket religious exemption could result in a denial or delay in the provision of health care to individuals and in discouraging individuals from seeking necessary care, with

83. LOIS UTTLEY ET AL., MISCARRIAGE OF MEDICINE: THE GROWTH OF CATHOLIC HOSPITALS AND THE THREAT TO REPRODUCTIVE HEALTH CARE 4 (2013), https://www.aclu.org/sites/default/files/field_document/growth-of-catholic-hospitals-2013.pdf.

84. Sandhya Somashekhar & Julie Zauzmer, *Report: 1 in 6 Hospital Beds in U.S. Is in a Catholic Institution, Restricting Reproductive Care*, WASH. POST (May 5, 2016), https://www.washingtonpost.com/news/acts-of-faith/wp/2016/05/05/report-1-in-6-hospital-beds-in-u-s-is-in-a-catholic-hospital-restricting-reproductive-care/?utm_term=.851c26eed58b.

85. *Id.* (“In 46 regions in the United States, according to the report, the federal government has labeled a Catholic institution the ‘sole community hospital.’”).

serious and, in some cases, life threatening results.⁸⁶

If anything, the high percentage of people working for closely-held corporations, who are thus subject to a potential limitation on health care coverage under RFRA, could be seen as an exception that swallows the rule. However, when just looking at percentages, it may seem as though there can be no real distinction drawn between the limitation on health care allowed by the Supreme Court in *Hobby Lobby* for employees at closely held corporations and those resulting from the injunction in *Franciscan Alliance*. There are significant differences at play. *Hobby Lobby* dealt purely with insurance provided by an employer⁸⁷ and while about half of the people in the United States have health care coverage through an employer,⁸⁸ individuals are able to seek health care coverage elsewhere.⁸⁹ While the possibility of obtaining insurance from a source other than an employer might be burdensome to those seeking coverage, the alternative at least exists.

There are those who argue that religiously-affiliated hospitals, hospital systems, and the medical professionals who work there should not be required to provide care that is contrary to their sincerely held religious beliefs.⁹⁰ In fact, this is a core part of plaintiffs' arguments.⁹¹ However, this should not and cannot be the case, especially when these hospitals are the only place for individuals to receive medically-necessary care. To do so would place individuals at an unacceptable risk.

Furthermore, in its motion to intervene, the ACLU disagreed with Judge O'Connor's suggestion analogizing the case to Title VII, arguing:

No one would suggest that the federal government should not enforce Title VII because it could simply match victims of employment discrimination with new, nondiscriminatory employers. So too, here, requiring the federal government to match transgender people and women with nondiscriminatory

86. 81 Fed. Reg. 31376, 31380 (May 18, 2016) (codified at 45 C.F.R. pt. 92 (2016)).

87. 134 S. Ct. 2751, 2759 (2014).

88. *Health Insurance Coverage of the Total Population*, HENRY J. KAISER FAMILY FOUND., <http://kff.org/other/state-indicator/total-population/> (last visited Oct. 21, 2017).

89. See, e.g., *5 Ways to Apply for Health Insurance*, <https://www.healthcare.gov/apply-and-enroll/how-to-apply/> (last visited Oct. 21, 2017) (listing how individuals can apply for health care coverage); see also *Hobby Lobby*, 134 S.Ct. at 2759 (explaining that "employees of these religious nonprofit corporations still have access to insurance coverage without cost sharing for all FDA-approved contraceptives").

90. Ryan E. Lawrence & Farr A. Curlin, *Physicians' Beliefs About Conscience in Medicine: A National Survey*, 84 ACAD. MED. 1276 (2009).

91. *Franciscan Alliance, Inc. v. Burwell*, 227 F. Supp. 3d 660, 675 (N.D. Tex. Dec. 31, 2016).

healthcare providers is not a satisfactory alternative to enforcement of anti-discrimination protections.⁹²

Even if matching TGNC patients with nondiscriminatory healthcare providers were a satisfactory alternative, it does not appear to be feasible or even possible. The government cannot perform surgeries and it cannot create new hospitals staffed with new doctors within the communities of TGNC individuals. By requiring healthcare providers to treat TGNC patients and provide gender-affirming care, HHS has identified the least restrictive means to further its legitimate objective.

c. Recent Actions by the Federal Government, in Regard to Health Care Coverage and TGNC Individuals, Highlight the Need for Comprehensive Protections

It is critical to examine the ever-growing need for comprehensive protections for TGNC individuals in health care settings in light of recent actions taken by the federal and state governments in the form of agency actions and state legislation. These actions emphasize the importance of preserving the protections for TGNC individuals in health care settings through § 1557, as they exemplify a recently empowered movement to degrade protections and rights for marginalized communities.

On February 22, 2017, the U.S. Department of Justice (DOJ) and U.S. Department of Education (ED) issued a joint “Dear Colleague Letter” withdrawing important guidance offered in two earlier interpretations of Title IX protections against discrimination “on the basis of sex” that required individuals be able to access sex-segregated facilities that conform with their gender identity.⁹³ The first of these now-revoked guidance letters stated that “[w]hen a school elects to separate or treat students differently on the basis of sex in those situations, a school generally must treat transgender students consistent with their gender identity.”⁹⁴ The second “Dear Colleague Letter” issued jointly by the DOJ and ED provided comprehensive definitions and extensive guidance.⁹⁵ Although the

92. Proposed Intervenor’s Motion, *supra* note 68, at 6–7.

93. U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., & U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, DEAR COLLEAGUE LETTER (Feb. 22, 2017) [hereinafter DEAR COLLEAGUE LETTER (Feb. 2017)].

94. U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, OPINION LETTER ON TRANSGENDER RESTROOM ACCESS (Jan. 7, 2015).

95. U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., & U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, DEAR COLLEAGUE LETTER ON TRANSGENDER STUDENTS (May 13, 2016) (defining “gender identity,” “sex assigned at birth,” “transgender,” and “gender transition,” and providing guidance on how schools can comply with Title IX).

2017 revocation letter noted that “all students, including LGBT students” are still protected from discrimination, bullying, and harassment,⁹⁶ rights organizations cautioned that the lack of guidance may confuse school administrators as to their obligations to protect TGNC students and that students and their families lacked a “powerful tool” to protect against discrimination.⁹⁷ In response to the revocation of the earlier guidance, the National Center for Transgender Equality wrote that “unfortunately, the harmful message sent by the Trump administration’s rollback of the guidance could encourage some students, staff, and administrators to bully and discriminate against transgender students.”⁹⁸

In addition to recent agency action, there has been a recent proliferation of proposed state and federal legislation targeting transgender individuals. Among the most contentious of these was a Texas bill that would require those in state-owned facilities, including public schools, to use sex-segregated facilities such as bathrooms and locker rooms in accordance with the sex designated on their birth certificate, rather than their gender identity.⁹⁹ Although the bill failed during the regular session and failed again after being revived in a special session,¹⁰⁰ there has been recent state legislation such as the Alabama Child Placing Agency Inclusion Act which allows religiously-affiliated child placement agencies to discriminate against LGBTQ individuals and

96. DEAR COLLEAGUE LETTER (Feb. 2017), *supra* note 93.

97. NAT’L CTR. FOR TRANSGENDER EQUALITY, FAQ ON THE WITHDRAWAL OF FEDERAL GUIDANCE ON TRANSGENDER STUDENTS (Feb. 2016), http://www.transequality.org/sites/default/files/docs/resources/FAQ%20on%20the%20withdrawal%20of%20federal%20guidance%20on%20transgender%20students%203_0.pdf.

98. *Id.*

99. Sandhya Somashekhar, *Transgender ‘Bathroom Bill’ Fails Again in Texas as Special Session Ends*, WASH. POST (Aug. 16, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/08/16/transgender-bathroom-bill-fails-again-in-texas-as-special-session-ends/?utm_term=.5571bf930217.

100. *Id.*

families.¹⁰¹ The anti-LGBTQ nature of the law is highlighted by both its supporters¹⁰² and critics.¹⁰³

These recent actions by both federal and state governments indicate a hostility towards LGBTQ individuals—particularly TGNC individuals—and in the case of the Alabama Child Placing Agency Inclusion Act, further the use of purported religious freedom considerations to smother the rights of LGBTQ individuals. In light of these actions, Judge O'Connor's order carries further negative implications for TGNC individuals.

Conclusion

The clash between RFRA and protections for TGNC individuals is not isolated to the health care realm.¹⁰⁴ Following in the same vein as § 1557, other areas of nondiscrimination law should be examined to determine how the protections of religious freedoms for one group work to actively harm the essential freedoms of another. Legal professionals should take care that RFRA is not used as an instrument to harm others.

Transgender and gender nonconforming individuals have faced decades of stigmatization and discrimination in the United States, from housing, to employment, to public accommodations. By issuing an injunction against the antidiscrimination provisions in § 1557 designed to protect TGNC individuals, Judge O'Connor improperly placed the religious ideologies of hospitals and their

101. See ALA. CODE § 26-10D-5(a) (2017) (“The state may not refuse to license or otherwise discriminate or take an adverse action against any child placing agency . . . on the basis that the child placing agency declines to make, provide, facilitate, or refer for a placement in a manner that conflicts with, or under circumstances that conflict with, the sincerely held religious beliefs of the child placing agency.”).

102. *Statement on the Alabama Child Placing Agency Inclusion Act*, ALA. POL'Y INST. (May 4, 2017), <https://www.alabamapolicy.org/statement-on-the-alabama-child-placing-agency-inclusion-act/> (“[A]ccording to the new law, [child placement agencies] will not be required to make placements violating their sincerely held religious beliefs that marriage is between one man and one woman.”).

103. Nick Morrow, *Breaking: Alabama's Anti-LGBTQ H.B. 24 Signed Into Law*, HUMAN RIGHTS CAMPAIGN (May 3, 2017), <https://www.hrc.org/blog/alabamas-anti-lgbtq-hb-24-signed-into-law>.

104. See Jonathan H. Adler, *Court Blocks Federal Government's 'Guidance' on Transgender Bathrooms*, VOLOKH CONSPIRACY (Aug. 22, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/22/court-blocks-federal-governments-guidance-on-transgender-bathrooms/?utm_term=.ebd5772e49ba; Justin Wm. Moyer, *Transgender Embalmer's Lawsuit Thrown Out After Funeral Home Fired Her*, WASH. POST (Aug. 19, 2016), https://www.washingtonpost.com/news/acts-of-faith/wp/2016/08/19/religious-freedom-trumps-transgender-rights-in-michigan-case-federal-court-rules/?utm_term=.fc08d68e7444.

doctors over the health and welfare of transgender individuals. In promulgating its regulations, HHS identified the least restrictive means of furthering the objective of the ACA and ensuring access to health care, and therefore those regulations pass the strict scrutiny test and should stand.