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Sex, Religion, and Politics, or the Future of Healthcare Antidiscrimination Law

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SEX, RELIGION, AND POLITICS, OR THE FUTURE OF HEALTHCARE ANTIDISCRIMINATION LAW

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I. INTRODUCTION

Sex discrimination in healthcare is, to put it mildly, a moving target. The healthcare system is in flux. The year 2017 saw multiple efforts to repeal (and/or replace) the Affordable Care Act (ACA),[1] including the successful removal of the ACA's individual mandate[2]—with more such attempts expected in late 2018. New regulations abound. Of particular relevance, the U.S. Department of Health and Human Services (HHS) has proposed authorizing wide-ranging refusal of abortion and sterilization and granted businesses with moral or religious objections exemption from duties to cover contraception in employee health insurance plans.[3]

At the same time, the meaning of "sex" within antidiscrimination law inspires heated contests. Some seek to revert to a binary conception of "sex" defined by anatomy; others employ a comprehensive definition, according to which "sex" includes sexual orientation and gender identity.[4] Multiple courts of appeals have been called upon to decide whether discrimination "on the basis of sex" under Title VII of the Civil Rights Act includes sexual orientation discrimination.[5] The "bathroom wars"—over whether Title IX of the Education

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1. HEALTH REFORM TRACKER, *ACA Repeal and Replace Efforts Timeline 2017*, http://www.healthreformtracker.org/ahca-timeline/ [https://perma.cc/8BHP-W8B6] (last visited Feb. 11, 2018).

2. H.R. 1, Pub. L. No. 115-97, §11081, 131 Stat. 2054, 2092 (2017).

3. *See* Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 83 Fed. Reg. 3880, 3880, 3901 (Jan. 26, 2018) (to be codified at 45 C.F.R. 88); Moral Exemptions and Accommodations for Coverage of Certain Preventative Services Under the Affordable Care Act, 82 Fed. Reg. 47838, 47838 (Oct. 13, 2017) (to be codified at 26 C.F.R. 54); Religious Exemptions and Accommodations for Coverage of Certain Preventative Services Under the Affordable Care Act, 82 Fed. Reg 47792, 47792 (Oct. 13, 2017) (to be codified as 26 C.F.R. 54).

4. *Compare* Verified Complaint for Declaratory and Injunctive Relief at 1-2, Privacy Matters v. U.S. Dep't of Educ., 16-CV-03015 (D. Minn. Sept. 7, 2016) (using theory of anatomical sex binary challenge Department of Education Title IX guidance permitting students to use restrooms consistent with their gender identity as ultra vires), *with* U.S. EQUAL EMP. OPPORTUNITY COMM'N, *Sex-Based Discrimination*, https://www.eeoc.gov/laws/types/sex.cfm [https://perma.cc/FS94-XR8J] (last visited Feb. 7, 2018) ("Discrimination against an individual because of gender identify, including transgender status, or because of sexual orientation is discrimination because of sex in violation of Title VII.").

5. *Compare* Zarda v. Altitude Express, Inc., 883 F.3d 100 (2d Cir. 2018) (*en* bac); Hively v. Ivy Tech Cmty. Coll. Of Ind., 853 F.3d 339, 359 (7th Cir. 2017) (*en banc*) (holding that sexual orientation discrimination is sex discrimination under Title VII); *with* Evans v. Ga. Reg'l Hosp., 850 F.3d 1248, 1255 (11th Cir. 2017) (holding that it is not).

Amendments permits transgender children to use a school restroom consistent with their gender identity—remain before the courts.[6] Religious objections to sex equality proliferate.[7]

The future of Section 1557 of the Affordable Care Act—the first healthcare civil rights law—is implicated in each of these legal contests. Though it builds on existing civil rights laws, Section 1557 also breaks new ground in prohibiting sex discrimination across the healthcare sector—as Part I of this article explains.[8] Section 1557 bars discrimination "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 of 1973—that is on the ground of race, color, national origin, sex, age, or disability.[9] A new set of regulations issued in 2016 interpreted "sex" to encompass sex stereotyping, pregnancy (and termination of pregnancy), and gender identity—pointing to judicial precedent under Title IX of the Education Amendments and its sister statutes.[10] This Nondiscrimination Rule immediately faced resistance on the grounds that it read "sex" impermissibly broadly and failed to incorporate the exceptions of Title IX so as to permit religious objectors to engage in sex discrimination.[11] At the time of writing, HHS under the Trump administration has declared its intention to "reassess" the

6. With the Supreme Court seemingly poised to resolve this legal question in *Gloucester County School Board v. GG*, the Trump administration rescinded the Department of Education's guidance, effectively ending the case for Gavin Grimm, a transgender boy (and by that point graduating senior), who had sought to use the boys' bathroom. Gloucester Cty. Sch. Bd. v. G.G. *ex rel.* Grimm, 137 S. Ct. 1239 (2017) (remanding to the Court of Appeals for the Fourth Circuit for consideration in light of new guidance).

7. In a recent case now pending before the Sixth Circuit, an employer argued that the enforcement of sex antidiscrimination law burdened its religious beliefs in violation of the Religious Freedom Restoration Act, and the district court agreed. E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc., 201 F. Supp. 3d 837 (E.D. Mich. 2016), *rev-d by* 884 F.3d 560 (6th Cir. 2018).

8. *See generally* Valarie K. Blake, *Civil Rights as Treatment for Health Insurance Discrimination*, 2016 WIS. L. REV. FORWARD 37 (2016) (discussing the merits of a civil rights approach to combatting discrimination in health insurance); Sidney D. Watson, *Section 1557 of the Affordable Care Act: Civil Rights, Health Reform, Race, and Equity*, 55 HOW. L.J. 855, 870-72 (2012) (exploring the Section 1557's potential for remedying discrimination and disparities in healthcare based on race).

9. 42 U.S.C. § 18116(a) (2012) (internal citations omitted).

10. Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31375, 31376 (2016) (to be codified at 45 C.F.R. 92).

11. Franciscan All., Inc. v. Burwell, 227 F. Supp. 3d 660, 690-91 (2016).

definition of "sex" and the availability of religious exemptions from sex nondiscrimination obligations under Section 1557.[12]

We argue that any future interpretation of sex discrimination under Section 1557 will be significantly constrained by long-standing judicial and agency recognition that "sex" under Title IX of the Education Amendments prohibits sex stereotyping and, therefore, encompasses some discrimination linked to gender identity and sexual orientation. While the contours of the relationship between Title IX of the Education Amendments and its regulations and Section 1557 of the ACA are debatable, the statutory language is clear that Section 1557 does not incorporate the limitations of Title IX wholesale. In particular, its text unambiguously excludes the possibility of adopting Title IX's religious exemption.

Because Section 1557 refers to Title IX to establish "sex" as a prohibited ground for discrimination, the HHS and courts reviewing its interpretation must look to Title IX in defining sex. As Part II demonstrates, while judicial interpretation of sex discrimination under existing civil rights laws is evolving, it is clear that sex discrimination bars sex stereotyping and does not define sex as a binary of male and female assigned at birth. Ironically, given the fierce resistance to providing care and insurance for transgender people,[13] HHS has limited leeway to exclude gender identity discrimination from Section 1557.[14] By contrast, HHS might permissibly take the perspective that sexual orientation discrimination in the absence of gender-bending falls outside Section 1557—a position consistent with the law in most circuits.[15]

As Part III contends, Section 1557 does not merely import the referenced statutes and their limitations.[16] The example of Title IX's religious exemption shows that the wholesale incorporation of Title IX into healthcare nondiscrimination would make nonsense of the statute. Moreover, the ACA

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12. Franciscan All., Inc. v. Price, No. 7:16-CV-00108-O, 2017 WL 3616652, at *5 (N.D. Tex. July 10, 2017).

13. *See generally* Jordan Aiken, *Promoting an Integrated Approach to Ensuring Access to Gender Incongruent Health Care*, 31 BERKELEY J. GENDER L. & JUST. 1 (2016) (discussing barriers to gender congruent health care).

14. *See infra* Part III.B.

15. *See infra* Part III.C.

16. *Compare* Se. Pa. Transp. Auth. v. Gilead Sciences, Inc., 102 F. Supp. 3d 688, 699-702 (E.D. Pa. 2015) (holding that disparate standards and scope apply to different protected classes), *with* Memorandum Opinion and Order at 18-46, Rumble v. Fairview Health Services, 14-CV-2037 (D. Minn. Mar. 16, 2015).

unambiguously provides an exclusive set of religious exemptions,[17] such that any new rule may not grant the wide-ranging exemptions that religious objectors seek.

These interpretations are supported by their consistency with Section 1557's statutory context and the Affordable Care Act's cross-cutting purpose of eliminating discrimination.[18] Statutory interpretation "must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy."[19] The ACA's focus on nondiscriminatory access to healthcare on the basis of sex appears in the numerous provisions designed to improve women's health generally,[20] and reproductive health in particular.[21] Moreover, while the legislative history of the ACA is limited, Congress unmistakably manifested the intent to eradicate health disparities.[22] Legislators frequently emphasized the ACA's goal of eradicating sex discrimination.[23]

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17. *See infra* notes 162-167 and accompanying text.

18. *See* 42 U.S.C. 18116 § 1557 (2010).

19. Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 51 (1987); *see also* Util. Air Regulatory Grp. v. E.P.A., 573 U.S. 302, 320 (2014) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000)) (noting the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.").

20. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1302(C), 124 Stat. 119 (2010) (in defining essential health benefits, the Secretary should "take into account the health care needs of . . . women"). Other provisions further equalize coverage and treatment. *See id.* at § 2713 (requiring all new insurance plans to cover any preventative care and screening for women without cost-sharing); *id.* at § 10413 (providing support for breast health awareness for young women); *id.* at § 3509 (creating an Office for Women's Health within the Department of Health and Human Services).

21. *Id.* at § 4102(a) (including pregnant women among target populations for oral healthcare prevention education provision); *id.* at § 2952 (providing support for post-partum depression education and research); *id.* at § 4107 (requiring states to provide Medicaid coverage for tobacco cessation programs for pregnant women without cost-sharing); *id.* at § 10212 (creating a Pregnancy Assistance Fund to award grants to States for offering support to pregnant and parenting teenagers and women).

22. 145 CONG. REC. H1854, H1886 (Mar. 21, 2010) (statement of Rep. James Clyburn) (calling healthcare reform "the Civil Rights Act of the 21st century.").

23. *See, e.g.*, 145 CONG. REC. S11918 (Nov. 21, 2009) (statement of Sen. Kristen Gillibrand) ("This bill also ends discrimination against women, which we have faced in our health care system for far too long."); 145 CONG. REC. S11946 (Nov. 21, 2009) (statement of Sen. Kay Hagan) ("I think one of the key points is the fact that this bill is going to eliminate discrimination based on gender and preexisting conditions."); 145 CONG. REC. S11963 (Nov. 21, 2009) (statement of Sen. Maxwell Baucus) ("No longer will insurance companies be able to discriminate based on gender or health status."); 145 CONG. REC. H1865 (Mar. 21, 2010) (statement of Rep. Michael

Section 1557 must be interpreted in light of this overarching purpose and in the context of the statute as a whole.[24]

II. HEALTHCARE NONDISCRIMINATION AND THE AFFORDABLE CARE ACT

Section 1557 is the central civil rights provision of the Affordable Care Act.[25] It extends antidiscrimination protections in three meaningful ways. First, it is the first federal law to prohibit discrimination on the basis of sex in healthcare. Second, it applies more broadly than previous civil rights laws.[26] Unlike its predecessors, Section 1557 specifies that "contracts of insurance" constitute federal financial assistance and require recipients to refrain from discrimination.[27] Nondiscrimination duties thus extend to any health program receiving federal funds, including providers like clinics and hospitals, insurance companies that participate in the exchanges, and public programs.[28] Third, by contrast to older civil rights statutes, Section 1557 contains an explicit private right of action against discrimination in healthcare, authorizing individuals to enforce the law.[29]

Section 1557 references several long-standing civil rights statutes.[30] The first and most influential of these is Title VI of the Civil Rights Act, which prohibits discrimination on the ground of race, color, or national origin by programs receiving

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Thompson) (noting new prohibitions against "discriminating on the basis of domestic violence" and requirements to cover "maternity srvices").

24. *See* N.Y. State Dept. of Social Services v. Dublino, 413 U.S. 405, 419-20 (1973) ("We cannot interpret federal statutes to negate their own stated purposes.").

25. Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119, § 1557 (2010).

26. *Id.*

27. 42 U.S.C. § 18116(a) (2012); *see also* 20 U.S.C. § 1682 (2012); 42 U.S.C. §§ 2000d, 2000d-4 (2012); 42 U.S.C. §§ 6102, 6103 (2012) (all excluding contracts of insurance). Title IX also excludes contracts of insurance from its definition of federal financial assistance. *See* Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (2012).

28. Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119 § 1557 (2010).

29. 42 U.S.C. § 18116(a) (2012) ("The enforcement mechanisms provided for and available under such title VI, title IX, section 794, or such Age Discrimination Act shall apply for purposes of violations of this subsection."); *see, e.g.*, Cannon v. Univ. of Chi., 441 U.S. 677 (1979) (holding that, by reference to Title VI, Congress meant to incorporate an implied private right of action under Title IX).

30. 42 U.S.C. § 18116(a) (2012).

federal financial assistance.[31] With the enactment of Medicare and Medicaid, it came to apply broadly to hospitals and other healthcare institutions.[32] Title VI then served as a model for subsequent antidiscrimination statutes linked to federal funding, including Section 504 of the Rehabilitation Act[33] and the Age Discrimination Act,[34] which bar disability and age discrimination, respectively.[35] Title IX of the Education Amendments also is patterned after Title VI,[36] but has a more limited scope, applying to educational programs, not federally funded entities generally.[37] Before the ACA, no federal law barred sex discrimination across federally funded healthcare.

The first sentence of Section 1557 states:

> 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 of 1973, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity.[38]

The most natural reading of Section 1557's language is that it prohibits discrimination "on the ground" of race, color, national origin, disability, age, and sex—not that it prohibits discrimination exactly as each of the referenced statutes and their regulations do.[39] This reading is bolstered by the fact that the phrase "on the ground of" mirrors Title VI, which reads "on

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31. 42 U.S.C. § 2000d (2012) ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.").

32. David Barton Smith, *Racial and Ethnic Health Disparities and the Unfinished Civil Rights Agenda*, 24 HEALTH AFFAIRS 317, 318 (2005).

33. 20 U.S.C. § 1681(a) (2012); U.S. Dep't of Transp. V. Paralyzed Veterans of America, 477 U.S. 597, 600 n.4 (1986) (noting that courts have "relied on case law interpreting Title VI as generally applicable to later statutes"); Consol. Rail Corp. v. Darrone, 465 U.S. 624, 625 (1984) (Section 504 patterned after Titles VI and IX).

34. 42 U.S.C. § 6103 (2012).

35. 42 U.S.C. § 6102 (2012).

36. Grove City Coll. v. Bell, 465 U.S. 555, 566 (1984).

37. 20 U.S.C. § 1681(a) (2012).

38. 42 U.S.C. § 18116(a) (2012) (internal citations omitted).

39. *Id.*

the ground of race, color, or national origin" and formed the model for the other referenced statutes.[40] Title IX of the Educational Amendments, as interpreted by the courts, thus informs the definition of "sex" under the Affordable Care Act.

As Section 1557 allows,[41] the Secretary of HHS issued a final rule interpreting health programs' antidiscrimination obligations in May 2016.[42] Much of this Nondiscrimination Rule focused on the new obligation of sex nondiscrimination.[43] Rather than break new ground, HHS relied on "existing regulation and previous Federal agencies' and courts' interpretations that discrimination on the basis of sex includes discrimination on the basis of gender identity and sex stereotyping."[44]

The preamble to the Nondiscrimination Rule makes clear that "sex" is not limited to a binary between biological male and female.[45] The rule restricts discrimination based on "atypical sex characteristics and intersex traits (i.e., people born with variations in sex characteristics, including in chromosomal, reproductive, or anatomical sex characteristics that do not fit the typical characteristics of binary females or males)."[46] Sex is also defined to encompass sex stereotypes, which as the agency explained:

> means stereotypical notions of masculinity or femininity, including expectations of how individuals represent or communicate their gender to others, such as behavior, clothing, hairstyles, activities, voice, mannerisms, or body characteristics. These stereotypes can include 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. Sex stereotypes also include gendered expectations related to the appropriate

40. 42 U.S.C. § 2000d (2012).

41. 42 U.S.C. § 18116(c) (2012) ("The Secretary may promulgate regulations to implement this section.").

42. Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31375, 31376 (2016) (to be codified at 45 C.F.R. 92).

43. *Id.*

44. *Id.* at 31388.

45. *Id.* at 31435.

46. *Id.* at 31389.

roles of a certain sex.[47]

Consistent with interpretations of the federal courts and agencies, HHS concluded that gender identity discrimination falls within the scope of impermissible sex discrimination.[48] Thus, for example, healthcare programs must deliver services to transgender people that they would otherwise provide to patients (e.g., hysterectomies).[49] Insurers may not categorically exclude coverage for all health services related to gender transition, but must cover them to the "extent coverage is available when the same service is not related to gender transition."[50] Anticipating the continued tradition of sex segregation in bathrooms and changing rooms, the agency required recipients of federal funds to permit individuals to use bathrooms consistent with their gender identity.[51]

HHS tread quite carefully with regard to sexual orientation. As the agency said, while gender identity discrimination clearly constitutes sex discrimination under well-accepted civil rights laws, "current law is mixed on whether existing federal nondiscrimination laws prohibit discrimination on the basis of sexual orientation."[52] HHS thus concluded that "Section 1557's prohibition of discrimination on the basis of sex includes, *at a minimum*, sex discrimination related to an individual's sexual orientation where the evidence establishes that the discrimination is based on gender stereotypes."[53] The agency determined not to decide "whether discrimination on the basis of an individual's sexual orientation status alone is a form of sex discrimination under Section 1557."[54] It left the door open for the definition of sex to evolve and for the agency to review complaints with the changing law in mind.[55] Given the

47. *Id.* at 31392.

48. *Id.* at 31388.

49. *Id.* at 31455.

50. *Id.* at 31429.

51. *Id.* at 31428 (explaining that under the rule "covered entities must treat all individuals consistent with their gender identity, including with regard to access to facilities.").

52. *Id.* at 31388.

53. *Id.* at 31390 (emphasis added).

54. *Id.*

55. *Id.* at 31390 ("We anticipate that the law will continue to evolve on this issue, and we will continue to monitor legal developments in this area. We will enforce Section 1557 in light of those developments and will consider issuing further guidance on this subject as appropriate.")

inauguration of the Republican administration in 2017, the Office of Civil Rights is unlikely to take the perspective that sexual orientation discrimination is per se sex discrimination in the near future.

During the rule-making process, some organizations sought to exempt religious healthcare providers, health plans, and other health programs so as to allow them to discriminate on the basis of sex.[56] They singled out particular services—such as gender transition services and reproductive healthcare.[57] The agency rejected the possibility that Section 1557 meant to allow broad exemptions from sex antidiscrimination obligations, but no others.[58]

Before the rule went into effect, five states, a Catholic-affiliated healthcare system, and an organization of individual religious providers filed suit, challenging the portion of the rule prohibiting sex discrimination, in *Franciscan Alliance, Inc. v. Burwell*.[59] They specifically objected to the agency's interpretation of "sex" to include "gender identity" and sought to refuse to provide abortion-related and gender-transition-related services and health insurance coverage.[60] The plaintiffs argued that "sex" as used in Title IX unambiguously means "the immutable, biological differences between males and females 'as acknowledged at or before birth.'"[61] They further contended that even if HHS's interpretation were permissible, because Title IX exempts religious institutions Section 1557 necessarily must do so as well.[62]

In December 2016, a district court agreed and issued a nationwide injunction on that basis.[63] It found that no deference was due to the rule, because, the court said, Title IX unambiguously prohibits only discrimination "on the basis of the biological differences between males and females" and the ACA's reference to Title IX "unambiguously adopted the binary definition of sex."[64] Thus, the court held, the Nondiscrimination

56. *Id.* at 31379.
57. *Id.*
58. *Id.*
59. 227 F. Supp. 3d 660, 670 (N.D. Tex. 2016).
60. *Id.* at 670-71.
61. *Id.* at 671.
62. *Id.*
63. *Id.* at 695.
64. *Id.* at 687-89.

Rule could not prohibit gender identity discrimination.[65] It further determined that Section 1557 "incorporate[d] the entire statutory structure [of Title IX]"—including its religious exemptions.[66] As a result, HHS could not require religious objectors to comply with duties not to discriminate against women based on termination of pregnancy.[67]

Under the new Republican administration, HHS in 2017 indicated its "desire to reassess the reasonableness, necessity, and efficacy" of the interpretation contained in the Nondiscrimination Rule, and the *Franciscan* litigation was stayed.[68] One can anticipate that the definition of "sex" and the availability of religious exemptions will be reconsidered. HHS, however, is not unconstrained. The next Parts of this Article explore the limited leeway that HHS has to interpret the statute so as to more narrowly define sex or more broadly exempt religious actors.

III. DEFINING SEX DISCRIMINATION

As Part II explained, Title IX provides one of the grounds—"sex"—on which discrimination is prohibited under Section 1557.[69] Title IX states, "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ."[70] As the Supreme Court has instructed, because Title IX's plain text covers all discrimination "on the basis of sex," courts must "accord it a sweep as broad as its language."[71]

As the Trump Administration reassesses sex discrimination under the Nondiscrimination Rule, three issues are in play. First, can sex be limited to biological sex at birth under Section 1557? Second, does sex encompass gender identity? And, third, does sex reach sexual orientation? This Part considers the boundaries of agency decision-making for each of these three

65. *Id.* at 689.

66. *Id.* at 690.

67. *Id.*

68. Franciscan All., Inc. v. Price, No. 7:16-CV-00108-O, 2017 WL 3616652, at *5 (N.D. Tex. July 10, 2017).

69. *Supra* Part II.

70. 20 U.S.C. § 1681(a) (2012).

71. N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 521 (1982).

questions.

A. Sex Stereotyping and Antidiscrimination Law

The central claim of the *Franciscan* plaintiffs was that "sex" can only be biological sex at birth.[72] Under this interpretation, discrimination must be evaluated based on anatomical differences between males and females.[73] While sorting women into one category and men into another is generally impermissible, other distinctions (for example, between women) do not fall within the definition of "sex" discrimination.[74] As a matter of biology, this notion of binary sex denies the spectrum of chromosomal and hormonal sex differences and the existence of intersex people. As a matter of law, the binary interpretation defies decades of judicial interpretations of sex discrimination.[75]

Courts have long interpreted civil rights statutes, including Title IX, to bar the use of sex stereotypes. Approximately thirty years ago, the Supreme Court in *Price Waterhouse v. Hopkins* rejected the view that sex discrimination is limited to sorting people along a binary determined by biological difference.[76] Interpreting Title VII of the Civil Rights Act, which prohibits workplace discrimination because of sex, the Court held that "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."[77] Unlawful discrimination included requiring women to "walk more femininely, talk more femininely, [and] dress more femininely" or acting on the "basis of a belief that a woman cannot be aggressive, or that she must not be."[78] As the Ninth Circuit said almost two decades ago, *Price Waterhouse* confirmed "that Title VII barred not just discrimination based on the fact that [the plaintiff] was a woman, but also discrimination based on the fact that she failed

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72. Franciscan All., Inc. v. Burwell, 227 F. Supp. 3d 660, 671 (2016).

73. *Id.*

74. Price Waterhouse v. Hopkins, 490 U.S. 228, 239 (1989).

75. *Id.* at 251. *See also* Sprogis v. United Air Lines, Inc., 444 F. 2d 1194, 1198 (7th Cir. 1971) ("In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotrypes.").

76. *Id.* at 251.

77. *Id.*

78. *Id.* at 235, 250.

'to act like a woman.'"[79]

Since that time, courts have recognized a cause of action when an adverse action is taken because of a person's failure to conform to sex stereotypes.[80] They have understood sex stereotyping to protect women and men from gendered expectations about parenting—such as the view that motherhood is incompatible with working or that fathers should not care for infants.[81] Sex stereotyping theory has also protected individuals against harassment based on nonconformity to sex stereotypes.[82]

Title IX of the Education Amendments—like Title VII—prohibits sex stereotyping.[83] In passing Title IX, Congress explicitly undertook to target gender stereotypes that interfered with equal educational opportunities for women and girls.[84] Regulations enforcing Title IX bar decision-making based not only on biological sex, but also on actual or potential marital, parental or family status, pregnancy, childbirth, and termination of pregnancy, among other things.[85]

In construing Title IX, the Supreme Court and courts of appeals have consistently looked to Title VII case law.[86] They

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79. Schwenk v. Hartford, 204 F.3d 1187, 1201 (9th Cir. 2000).

80. *See, e.g.*, Christiansen v. Omnicom Grp., Inc., 852 F.3d 195, 201 (2d Cir. 2017); Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 263-64 (3d Cir. 2001); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 261 n.4 (1st Cir. 1999).

81. *See, e.g.*, Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107 (2d Cir. 2004); Knussman v. Maryland, 272 F.3d 625 (4th Cir. 2001).

82. Oncale v. Sundowner Offshore Services., Inc., 523 U.S. 75, 77-79 (1998).

83. 20 U.S.C. § 1681 (2012).

84. 118 CONG. REC. 5803-04 (Feb. 28, 1972) (statement of Sen. Bayh) (noting the need to remedy the use of stereotypes); *see* N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 526-27 (1982) ("Senator Bayh's remarks, as those of the sponsor of the language ultimately enacted, are an authoritative guide to the statute's construction.").

85. *See, e.g.*, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 34 C.F.R. § 106.40(b) (2018) (defining sex discrimination to reach discrimination against students on "the basis of such student's pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom."); *id.* at § 106.51(b)(6) (barring employment discrimination with respect to "[g]ranting and return from leaves of absences, leave for pregnancy, childbirth, false pregnancy, termination of pregnancy, leave for persons of either sex to care for children or dependents."); *id.* at. § 106.40(a) ("A recipient shall not apply any rule concerning a student's actual or potential parental, family, or marital status which treats students differently on the basis of sex.").

86. *See, e.g.*, Franklin v. Gwinnett Cty. Pub. Sch., 503 U.S. 60 (1992); Jennings v. Univ. of N.C., 482 F.3d 686 (4th Cir. 2007); Gossett v. Okla ex rel. Bd. of Regents for Langston Univ., 245 F.3d 1172 (10th Cir. 2001); Schmedding v. Tnemec Co., Inc., 187 F.3d 862 (8th Cir. 1999); Smith v. Metro. Sch. Dist. Perry Twp., 128 F.3d 1014 (7th Cir. 1997); Torres v. Pisano, 116 F.3d 625 (2d Cir. 1997).

have held harassment based on nonconformity with sex stereotypes to be a legally cognizable claim under Title IX, as it is under Title VII.[87] The Department of Education also relies on Title VII precedent.[88] For example, in an official guidance document issued in 2001, the Department followed Title VII precedent and instructed that sex discrimination under Title IX "include[s] acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping," such as "failing to conform to stereotypical notions of masculinity and femininity."[89] A dear colleague letter in 2010 again affirmed this understanding, saying "it can be sex discrimination if students are harassed either for exhibiting what is perceived as a stereotypical characteristic for their sex, or for failing to conform to stereotypical notions of masculinity and femininity."[90] As one court said, "[i]t is undisputed that Title IX forbids discrimination on the basis of gender stereotypes."[91]

In passing the ACA, Congress would have known that the interpretation of "sex" under Title IX of the Education Amendments aligns with Title VII of the Civil Rights Act—and includes sex stereotyping.[92] While the district court in *Franciscan* questioned why Congress would have referenced Title IX, instead of Title VII, if it wanted to incorporate judicial interpretations of Title VII, the answer is straightforward.[93] Section 1557 lists only those statutes attached to federal funding and modeled on Title VI of the Civil Rights Act.[94] The language of section 1681(a) of Title IX is "virtually identical" to that of

87. Doe v. Dallas Indep. Sch. Dist., 153 F.3d 211 (5th Cir. 1998) ("[S]ame-sex sexual harassment is actionable under Title IX as well as Title VII."); Roe *ex rel.* Callahan v. Gustine Unified Sch. Dist., 678 F. Supp. 2d 1008, 1026 (E.D. Cal. 2009) ("Harassment on the basis of sex can be perpetrated by an individual of the same sex as the victim" under Title IX).

88. U.S. DEP'T OF EDUC. OFF. FOR C.R., *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, (Jan. 19, 2001), http://www.ed.gov/about/offices/list/ocr/docs/shguide.html [https://perma.cc/WB74-MNEM].

89. *Id.*

90. U.S. Dep't of Educ. Off. of C.R., Dear Colleague Letter (Oct. 26, 2010) *printed at* http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf [https://perma.cc/3H8R-Z3JH].

91. Videckis v. Pepperdine Univ., 150 F. Supp. 3d 1151, 1160 (C.D. Cal. 2015).

92. Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246, 258 (2009); Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989).

93. Franciscan All., Inc. v. Burwell, 227 F. Supp. 3d 660, 689 n.28 (N.D. Tex. 2016).

94. 42 U.S.C. § 18116(a) (2012).

Title VI,[95] except for the substitution of the word "sex" and for the limitation to education programs or activities.[96] Title VII of the Civil Rights Act, by contrast, applies irrespective of funding source and impacts only employment.[97]

B. Gender Identity

While the status of gender identity discrimination as sex discrimination remains politically fraught, it is an accepted part of modern antidiscrimination law. The Nondiscrimination Rule's prohibition on discrimination against transgender people flows from a relatively straightforward application of sex stereotyping theories: transgender individuals tend to defy stereotypes of the sex that they were assigned at birth by virtue of their appearance, dress, or behavior.

By the time of the ACA's enactment, courts across the country understood the Supreme Court's sex stereotyping doctrine to preclude discrimination against transgender people.[98] This interpretation cuts across civil rights statutes. In 2000, interpreting the Gender Motivated Violence Act, the Ninth Circuit held that discrimination against transgender females "as anatomical males whose outward behavior and inward identity [do] not meet social definitions of masculinity" is actionable sex discrimination under *Price Waterhouse*.[99] As the court explained, early cases—which had narrowly limited sex discrimination to discrimination based on the status of being a man or a woman—were "overruled by the logic and language of *Price Waterhouse*."[100] A series of cases under Title VII have determined, as the Eleventh Circuit said, that "[a] person is defined as transgender precisely because of the perception that

95. N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 538 (1982).

96. *Compare* 42 U.S.C. § 2000d (2012), *with* 20 U.S.C. § 1681(a) (2012). *See also* Fitzgerald, 555 U.S. at 258 ("[Congress] passed Title IX with the explicit understanding that it would be interpreted as Title VI was").

97. *See* 42 U.S.C. § 2000e-2(a)(1) (2012).

98. *See* Roberts v. Clark Cty. Sch. Dist., 215 F. Supp. 3d 1001, 1014 (D. Nev. 2016); Fabian v. Hosp. of Cent. Conn., 172 F. Supp. 3d 509, 527 (D. Conn. 2016); Lopez v. River Oaks Imaging & Diagnostic Grp., Inc., 542 F. Supp. 2d 653, 660 (S.D. Tex. 2008); Schroer v. Billington, 577 F. Supp. 2d 293, 305 (D.D.C. 2008).

99. Schwenk v. Hartford, 204 F.3d 1187, 1201-05 (9th Cir. 2000).

100. *Id.* at 1201. *See also* Rosa v. Park W. Bank & Tr. Co., 214 F.3d 213, 214–16 (1st Cir. 2000) (determining that refusal to give a loan application to a biologically-male plaintiff dressed in "traditionally feminine attire" because his "attire did not accord with his male gender" stated a claim of illegal sex discrimination in violation of the Equal Credit Opportunity Act).

his or her behavior transgresses gender stereotypes"—in other words, that gender identity discrimination amounts to sex impermissible stereotyping.[101] Out of the six courts of appeals to reach the issue of gender identity discrimination, five have found "a congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms."[102]

Gender identity discrimination may equally be impermissible under the Supreme Court's "simple test" for what constitutes sex discrimination under Title VII— "whether the evidence shows 'treatment of a person in a manner which but for that person's sex would be different.'"[103] As one court explained, firing an employee for converting from Christianity to Judaism would be a clear case of discrimination because of religion, even though the employer did not discriminate against Christians or Jews generally.[104] Likewise, refusing to hire an employee due to a change of sex must mean discrimination because of sex, even though the employer otherwise employs both men and women.[105] In 2018 the Sixth Circuit adopted this approach, saying "it is analytically impossible to fire an employee based on that employee's status as a transgender person without being motivated, at least in part, by the employee's sex."[106] Faced with a transgender employee who sought to wear skirts to work, the court asked whether she would have been fired if her sex at birth had been female and she sought to comply with the women's dress code: "The answer quite obviously is no."[107]

While less case law exists that involves transgender students, Title IX's definition of "sex" follows Title VII.[108] In

101. Glenn v. Brumby, 663 F.3d 1312, 1316 (11th Cir. 2011). *See* Roberts v. Clark Cty. Sch. Dist., 215 F. Supp. 3d 1001, 1014 (D. Nev. 2016); Fabian v. Hosp. of Cent. Conn., 172 F. Supp. 3d 509, 527 (D. Conn. 2016); Lopez v. River Oaks Imaging & Diagnostic Grp., Inc., 542 F. Supp. 2d 653, 660 (S.D. Tex. 2008); Schroer v. Billington, 577 F. Supp. 2d 293, 305 (D.D.C. 2008).

102. *Glenn*, 663 F.3d at 1316. *See* Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1048–49 (7th Cir. 2017); Smith v. City of Salem, 378 F.3d 566, 575 (6th Cir. 2004); *Schwenk*, 204 F.3d at 1202; *Rosa*, 214 F.3d at 215-16. *But see* Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1221 (10th Cir. 2007) (relying upon pre-*Price Waterhouse* precedent to deny transgender people protection under Title VII).

103. L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 704, 711 (1978).

104. Schroer v. Billington, 577 F. Supp. 2d 293, 306 (D.D.C. 2008).

105. *Id.* at 306-07.

106. EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 575 (2018).

107. *Id.*

108. *See, e.g.*, 42 U.S.C. § 2000e (2012).

addressing a Title IX claim brought by a transgender boy, the Fourth Circuit, for example, highlighted the "weight of circuit authority concluding that discrimination against transgender individuals constitutes discrimination 'on the basis of sex' in the context of analogous statutes."[109] In 2017, the Seventh Circuit squarely held that Title IX prohibits gender identity discrimination under the line of doctrine dating from *Price Waterhouse*.[110] Most recently, the Third Circuit squarely rejected the binary conception of "sex" in addressing the meaning of Title IX.[111] Just like Title VII, the court said, Title IX bars discriminating against a person who does not conform to gender stereotypes and thus "prohibits discrimination against transgender students in school facilities.[112] The U.S. Department of Education also explained "Title IX's sex discrimination prohibition extends to claims of discrimination based on gender identity."[113]

In circuits where courts of appeals have not reached the issue of gender identity discrimination, some district courts have attempted to draw fine lines between, for example, discrimination motivated by a transgender man's transgender status and discrimination motived by a transgender man's "failure to act as a stereotypical man would"[114]—a line-drawing exercise similar to that courts often do with regard to sexual orientation as we will see in the next section. Under Title IX, some courts have employed this distinction to conclude that transgender students may be denied access to sex-segregated bathrooms based on birth sex—but that they cannot be

109. G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 727 (4th Cir. 2016); *see also* Dodds v. U.S. Dep't of Educ., 845 F.3d 217, 221 (6th Cir. 2016) (refusing to stay a preliminary injunction ordering school district to treat a transgender girl as female, because the district was unlikely to succeed on the merits because "settled law" prohibits sex stereotyping related to gender identity).

110. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1047–49 (7th Cir. 2017).

111. Doe by & through Doe v. Boyertown Area Sch. Dist., 893 F.3d 179, 199 (3d Cir. 2018) ("Contrary to the appellants' assertions, 'sex' has not been narrowly limited to a person's anatomy under Title VII—nor by analogy is it so limited under Title IX."), rehearing granted, 897 F.3d 515 (2018).

112. *Id.*

113. U.S. DEP'T OF EDUC., *Questions and Answers on Title IX and Sexual Violence*, http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf [https://perma.cc/86F6-MB7V] (last visited Jan. 21, 2018).

114. Eure v. Sage Corp., 61 F. Supp. 3d 651, 661-63 (W.D. Tex. 2014) ("*Price Waterhouse* provides a vehicle for transgender persons to seek recovery under Title VII").

discriminated against because of the way they "looked, acted, or spoke."[115] Even under this cramped reading, "sex" includes gender expression.

In light of this precedent, several district courts took Section 1557 to prohibit gender identity discrimination before the Nondiscrimination Rule was promulgated.[116] The Office of Civil Rights of HHS agreed.[117] And other agency documents align with this understanding of sex. For example, a 2015 joint fact sheet from HHS, the Department of Labor, and the Department of the Treasury indicated that plans must cover medically necessary preventive services for transgender individuals even where it is inconsistent with their gender identity recorded with the plan or with their sex assigned at birth (for example, a pap smear for a transgender man who has an intact cervix).[118] Other federal agencies had similarly interpreted related civil rights statutes.[119] That sex encompasses gender identity was amply supported in precedent and practice.

C. Sexual Orientation

The bar on sex stereotyping also applies to at least certain forms of sexual orientation discrimination. In recent years, relying on *Price Waterhouse*, courts sometimes have concluded that, in discriminating against a lesbian, gay, or bisexual person, an entity impermissibly relied on stereotypical sex-based expectations of dress or behavior.[120] But sex stereotyping

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115. *See, e.g.*, Johnston v. Univ. of Pittsburgh of Commonwealth Sys. of Higher Educ., 97 F. Supp. 3d 657, 680 (W.D. Pa. 2015) (referring to Title VII cases).

116. *See, e.g.*, Se. Pa. Transp. Auth. v. Gilead Sci.'s, Inc., No. 2:14-cv-06978-SD, 2015 WL 1963588, at *7-10 (E.D. Pa. May 4, 2015); Rumble v. Fairview Health Serv.'s, No. 14-cv-2037 SRN/FLN, 2015 WL 1197415, at *12-15 (D. Minn. Mar. 16, 2015).

117. Letter from Leon Rodriguez, Dir. of Office for Civil Rights, Dep't of Health & Human Servs. to Maya Rupert, Fed. Pol'y Dir., Nat'l Ctr. for Lesbian Rights (July 12, 2012), http://www.nachc.com/client/OCRLetterJuly2012.pdf [http://perma.cc/RB8V-ACZU].

118. DEP'T OF LABOR, DEP'T OF HEALTH & HUMAN SERV.'S, & DEP'T OF THE TREASURY, *About the Affordable Care Act Implementation (Part XXVI)* (May 11, 2015), https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/aca_implementation_faqs26.pdf [https://perma.cc/964N-4S4K].

119. *See, e.g.*, U.S. OFFICE OF PERS. MGMT., *Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace*, https://www.opm.gov/policy-data-oversight/diversity-and-inclusion/reference-materials/gender-identity-guidance/ [https://perma.cc/5U8Q-HZSP] (last visited June 2, 2018).

120. *See, e.g.*, Nichols v. Azteca Ret. Enter., 256 F.3d 864, 869 (9th Cir. 2001);

theories have offered inconsistent protection against sexual orientation discrimination.[121] And, as the preamble to the Nondiscrimination Rule noted, no appellate court had yet held that Title IX of the Education Amendments or Title VII of the Civil Rights Act prohibited sexual orientation discrimination per se at the time the rule was issued.[122]

Using a sex stereotyping theory, many courts allowed plaintiffs to proceed only where gender presentation or deviance—rather than anti-LGBT bias alone—formed the basis for the discrimination.[123] Under this interpretation, as the Second Circuit explained, sex stereotyping does "not bootstrap protection for sexual orientation into Title VII because not all homosexual men are stereotypically feminine, and not all heterosexual men are stereotypically masculine. But, under this theory, relief would be available for discrimination based upon sexual stereotypes."[124]

Interpreting Title IX, courts and executive agencies mirrored this approach. Lower courts long-ago concluded that students may allege discrimination based on their failure to meet stereotyped expectations of masculinity or femininity and may pursue claims of same-sex harassment as under Title VII.[125]

Videckis v. Pepperdine Univ., 150 F. Supp. 3d 1151, 1160 (C.D. Cal. 2015).

121. *See, e.g.*, Prowel v. Wise Bus. Forms, Inc., 579 F.3d 285, 292 (3rd Cir. 2009); Dawson v. Bumble & Bumble, 398 F.3d 211, 218 (2nd Cir. 2005); Simonton v. Runyon, 232 F.3d 33, 35 (2nd Cir. 2000).

122. Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31375, 31389 (May 18, 2016) (to be codified at 45 C.F.R. 92); *but see* Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 340-41 (7th Cir. 2017) (*en banc*) (holding that sexual orientation discrimination is sex discrimination under Title VII).

123. Burrows v. Coll. of Cent. Fla., No.5:14-cv-197-Oc-30PRL, 2015 U.S. Dist. LEXIS 90576, at *8 (M.D. Fla. July 13, 2015); *see also Nichols*, 256 F.3d at 869-74 (allowing gay employee's claims of discrimination to proceed because referring to him as "she" and her" "reflected a belief that [he] did not act as a man should act").

124. *Simonton*, 232 F.3d at 38. *See, e.g., Prowel*, 579 F.3d at 292 ("[E]very case of sexual orientation discrimination cannot translate into a triable case of gender stereotyping discrimination . . . ."); *Simonton*, 232 F.3d at 35 ("The law is well-settled in this circuit and in all others to have reached the question that . . . . Title VII does not prohibit harassment or discrimination because of sexual orientation."); *but see* Brian Soucek, *Perceived Homosexuals: Looking Gay Enough for Title VII*, 63 AM. U. L. REV. 715, 731 (2014) (arguing that courts separate antigay bias from sex stereotyping "solely by fiat").

125. *See* Frazier v. Fairhaven Sch. Comm., 276 F.3d 52, 65–66 (1st Cir. 2002) (relying on Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998), interpreting Title VII to hold that a hostile environment claim based upon same-sex harassment is cognizable under Title IX); Doe *ex rel.* Doe v. Dallas Indep. Sch. Dist., 153 F.3d 211, 219 (5th Cir. 1998) (noting that the defendants conceded in light of *Oncale* that same-sex sexual harassment is actionable under Title IX). For a

A study of twenty-one cases addressing whether LGBT (or perceived LGBT) students had cognizable Title IX claims for sex discrimination based on harassment concluded that courts agree that such claims are actionable under a gender stereotyping theory.[126] In 2001, the Department of Education's Sexual Harassment Guidance drew this distinction as well, saying "Title IX does not prohibit discrimination on the basis of sexual orientation," but does protect lesbian and gay students from sexual harassment.[127] Consistent with judicial doctrine, the Department in 2010 noted that discrimination against LGBT students could occur where it was based "partly on the target's actual or perceived sexual orientation" and partly based on failure to conform to sex stereotypes (i.e., act as "a boy should act").[128] Within healthcare, this interpretation would mean, for example, that a gay male patient could complain of discrimination from providers consisting of slurs directed partly at his sexual orientation and partly at his masculinity—for example, references to "she," "her," or "female whore."[129] But claims of sexual orientation discrimination could not proceed unless paired with gender deviance.

Even as they drew lines between permissible sexual orientation discrimination and impermissible sex stereotyping, courts had acknowledged that LGBT people's "gender stereotyping claims can easily present problems for an adjudicator. This is for the simple reason that '[s]tereotypical

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selection of district courts reaching the same conclusion prior to 2010, see Riccio v. New Haven Bd. of Educ., 467 F. Supp. 2d 219, 226 (D. Conn. 2006); Theno v. Tonganoxie Unified Sch. Dist No. 464, 377 F. Supp. 2d 952, 964 (D. Kan. 2005) ("[S]ame-sex student-on-student harassment is actionable under Title IX to the same extent that same-sex harassment is actionable under Title VII."); Montgomery v. Indep. Sch. Dist. No. 709, 109 F.Supp.2d 1081, 1092–93 (D. Minn. 2000) (complaint stated Title IX same-sex harassment claim under gender stereotyping theory where plaintiff did not meet his peers' stereotyped expectations of masculinity).

126. Adele P. Kimmel, *Title IX: An Imperfect but Vital Tool to Stop Bullying of LGBT Students*, 125 YALE L.J. 2006, 2015 (2016).

127. U.S. DEP'T OF EDUC. OFF. FOR C.R., *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, (Jan. 19, 2001), http://www.ed.gov/about/offices/list/ocr/docs/shguide.html [https://perma.cc/WB74-MNEM].

128. U.S. Dep't of Educ. Off. of C.R., Dear Colleague Letter (Oct. 26, 2010), *printed at* http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf [https://perma.cc/3H8R-Z3JH].

129. These examples are drawn from Nichols v. Azteca Restaurant Enterprises, 256 F.3d 864, 869–74 (9th Cir. 2001), where a gay male restaurant server's claims were allowed to go to trial because they were framed in ways that separated sexual orientation from gender bending.

notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality."'[130] Given this reality, courts and administrative agencies began to decide that sex stereotyping cannot be so limited. A handful of district courts abandoned the distinction between stereotyping based on sexual orientation and that based on sex and concluded that sexual orientation discrimination is intimately linked to stereotypes of how men and women behave—namely, that women are sexually attracted to men, and men to women.[131] The EEOC took this view as well.[132] In 2017, the Seventh Circuit *en banc* became the first court of appeals to hold that sexual orientation discrimination inherently relies on sex stereotypes.[133] In 2018, the Second Circuit *en banc* followed in *Zarda v. Altitutde Express, Inc.*[134]

Sex stereotyping is not the only plausible basis on which to decide that sexual orientation discrimination is discrimination because of sex. Like gender identity, sexual orientation discrimination also can be understood to fit within the Supreme Court's "simple test" for what constitutes sex discrimination.[135] As the EEOC decided, "sexual orientation is inherently a 'sex-based consideration' because when an employer takes a person's sexual orientation into account the employer necessarily considers a person's sex."[136] In *Zarda,* the Second Circuit

130. Dawson v. Bumble & Bumble, 398 F.3d 211, 218 (2nd Cir. 2005).

131. Centola v. Potter, 183 F. Supp. 2d 403, 410 (D. Mass. 2002) ("[S]tereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women.") *See also* Terveer v. Billington, 34 F. Supp. 3d 100, 115-16 (D.D.C. 2014) (denying motion to dismiss a federal employee's Title VII sex discrimination claim based on a sex-stereotyping theory related only to sexual orientation and not to his "behavior, demeanor or appearance"); Heller v. Columbia Edgewater Country Club, 195 F. Supp. 2d 1212, 1224 (D. Or. 2002) (allowing Title VII sex stereotyping suit by lesbian plaintiff due to stereotype that plaintiff expressed masculine traits by dating a woman).

132. Castello v. U.S. Postal Serv., EEOC Doc. 0520110649, 2011 WL 6960810, at *2 (U.S. Equal Emp't Opp. Comm'n Dec. 20, 2011) (noting relevant stereotype was that "having relationships with men is an essential part of being a woman"); Veretto v. U.S. Postal Serv., EEOC Doc. 0120110873, 2011 WL 2663401, at *2 (U.S. Equal Emp't Opp. Comm'n July 1, 2011) (noting that discrimination was "motivated by the sexual stereotype that marrying a woman is an essential part of being a man").

133. Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 351–52 (7th Cir. 2017) (en banc).

134. 883 F.3d 100, 121-22 (2d Cir. 2018) (en banc) (overruling Simonton and Dawson's holdings that claims of sexual orientation discrimination are not cognizable under Title VII).

135. L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 711 (1978).

136. Baldwin v. Dep't of Transp., EEOC App. No. 0120133080, at *6 (U.S. Equal Emp't Opportunity Comm'n July 15, 2015).

adopted this position, holding that "sexual orientation discrimination is motivated, at least in part, by sex and is thus a subset of sex discrimination" under Title VII.[137] The court explained:

> Because one cannot fully define a person's sexual orientation without identifying his or her sex, sexual orientation is a function of sex. Indeed sexual orientation is doubly delineated by sex because it is a function of both a person's sex and the sex of those to whom he or she is attracted. Logically, because sexual orientation is a function of sex and sex is a protected characteristic under Title VII, it follows that sexual orientation is also protected."[138]

Title IX's interpretation shows a similar phenomenon with several courts now concluding that sexual orientation discrimination is sex discrimination per se, even as others reject such claims. In *Videckis v. Pepperdine University,* a district court explained, "[I]t is impossible to categorically separate 'sexual orientation discrimination' from discrimination on the basis of sex or from gender stereotypes . . . . Stereotypes about lesbianism, and sexuality in general, stem from a person's views about the proper roles of men and women—and the relationships between them."[139] Moreover, the court held that sexual orientation discrimination involved a sex-based consideration and, therefore, was a "straightforward claim of discrimination under Title IX."[140] In that case, if the student-athletes "had been males dating females, instead of females dating females, they would not have been subjected to the alleged different treatment."[141]

While these more comprehensive theories of sexual orientation discrimination have not carried the day at this time, the doctrine is clear that sex stereotyping of LGBT people is barred across civil rights statutes, including Title IX of the Education Amendments.

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137. *Zarda,* at 113.

138. *Id.*

139. Videckis v. Pepperdine Univ., 150 F. Supp. 3d 1151, 1160 (C.D. Cal. 2015); *see* Kimmel, *supra* note 126, at 2017–18 (discussing split between courts over whether anti-LGB animus is sex discrimination per se).

140. *Videckis,* 150 F. Supp. 3d at 1161.

141. *Id.*

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Despite heated resistance to antidiscrimination duties with regard to gender identity, thirty years of sex stereotyping jurisprudence makes clear that discrimination on the basis of sex includes discrimination against transgender people who do not act consistent with stereotypes about the sex assigned to them at birth. Sexual orientation, by contrast, stands on shakier ground. While sex stereotyping theories must remain available to LGBT plaintiffs, HHS through its Office of Civil Rights might—as Francisco Valdes puts it—create "a sexual orientation loophole" that "enable[s] defendants and decision-makers to (re)characterize, at will, a plaintiff's sex and gender discrimination claim as involving only permissible sexual orientation discrimination"[142]—to the detriment of their full and equal treatment in federally funded healthcare.

IV. RELIGIOUS EXEMPTIONS AND SECTION 1557

While interpreting "sex" to exclude gender identity and sexual orientation would authorize discrimination across health programs subject to Section 1557, the question of religious exemptions applies to a subset of health programs. Nonetheless, a regime of religious exemption from sex discrimination could have significant impact. Catholic healthcare entities—which are most likely to have policies against LGBT and reproductive healthcare—have a large market share, particularly in certain cities and markets.[143] Even where institutions with religious objections do not dominate a market, patients are likely to encounter them unexpectedly and involuntarily due to constraints of insurance and emergency.[144] In this Part, we demonstrate that, while its statutory language refers to Title IX to establish "sex" as a prohibited ground for discrimination, Section 1557 does not incorporate the limitations of Title IX. Its text unambiguously excludes the possibility of adopting Title

142. Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1, 18 (1995).

143. Elizabeth Sepper, *Zombie Religious Institutions*, 112 NW. U. L. REV. 929, 934–35 (2018) (noting numbers and percentage of Catholic facilities nationally and in various states).

144. *Id.* at 976–78 (describing limitations on patients' access and information).

IX's religious exemption.

Title IX takes the form of a broad prohibition on discrimination on the basis of sex, followed by a list of exceptions.[145] As is relevant here, Title IX provides that nondiscrimination obligations do not apply to "an educational institution which is controlled by a religious organization" if application of the law "would not be consistent with the religious tenets of such organization."[146] Title IX's regulations further define a religious educational institution as one devoted to the study of religion; that requires faculty, students, or employees to share or espouse the religion of the organization; or that is controlled by, governed by, and financially supported in a significant manner by a religious organization.[147]

Disagreement over whether—and to what extent—religious objectors are exempted from sex antidiscrimination obligations raises the issue of the degree to which Section 1557 merely reiterates the referenced statutes and their limitations. The *Franciscan* district court understood Section 1557's use of the phrase "on the ground prohibited under" Title IX to bring all of that statute's exceptions into the ACA.[148] Because "a religious organization refusing to act inconsistent with its religious tenets on the basis of sex does not discriminate on the ground prohibited by Title IX," the court said, Section 1557's text necessarily does not reach such refusals by religious organizations.[149] It thus held that "[t]he Rule's failure to include Title IX's religious exemptions renders the Rule contrary to law."[150]

In considering the relationship between Section 1557 and Title IX, the Supreme Court's decision in *In re Consolidated Rail Corp. v. Darrone*[151] is instructive. There, the Court was called upon to determine whether the Rehabilitation Act—which made available the "'remedies, procedure, and rights set forth in Title VI of the Civil Rights Acts of 1964'"—also incorporated Title VI's limits on remedies and rights in the employment setting.[152] The

145. 20 U.S.C. § 1681(a) (2012).

146. 20 U.S.C. § 1681(a)(3) (2012).

147. DEP'T. OF EDUC., OFFICE FOR C.R., *Exemptions From Title IX*, https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/index.html [https://perma.cc/UAU2-D2K6] (last visited Mar. 1, 2018).

148. Franciscan All., Inc. v. Burwell, 227 F. Supp. 3d 660, 690 (N.D. Tex. 2016).

149. *Id.*

150. *Id.* at 691.

151. 465 U.S. 624 (1984).

152. *Id.* at 626 (quoting 29 U.S.C. § 794(a)(2) (1982)).

Court held that referring to Title VI did not import its limitations.[153] The text of the Rehabilitation Act contained no explicit limitation or reference to Title VI's limiting language, but "instead prohibit[ed] discrimination against the handicapped under 'any program or activity receiving Federal financial assistance.'"[154] Looking to legislative history and the Act's broad nondiscrimination purpose, the Court determined that "it would be anomalous to conclude that the section, 'designed to enhance the ability of handicapped individuals to assure compliance with [disability nondiscrimination requirements],' silently adopted a drastic limitation on the handicapped individual's right to sue federal grant recipients for employment discrimination."[155]

Even more clearly than the Rehab Act, Section 1557's text does not import restrictions on its reach through its reference to existing civil rights laws.[156] In Section 1557, Congress was careful to distinguish between the "enforcement mechanisms provided for and available under such title VI, title IX, section 504, or such Age Discrimination Act," which "apply for purposes of violations of this subsection," and the "rights, remedies, procedures, or legal standards" of these four statutes and their regulations, which are not affected by the passage of the ACA.[157] This separation indicates that Congress regarded these two phrases as having different meanings. If Congress had meant for Section 1557(a) to import the "rights, remedies, procedures, or legal standards" of the referenced statutes with all their limitations, it would have used the term "rights, remedies, procedures, or legal standards" in Section 1557(a), rather than "enforcement mechanisms."[158] Section 1557 does more than merely reiterate existing statutes and their limitations.

The Nondiscrimination Rule generally manifested the agency's intention "to ensure that we are providing the same protections from race, color, national origin, and age discrimination as are provided with respect to sex and disability

153. *Consol. Rail Corp.*, 465 U.S. at 631-32.

154. *Id.* at 632 (quoting 29 U.S.C. § 794 (1982)).

155. *Consol. Rail Corp.*, 465 U.S. at 635 (quoting S. REP. NO. 95-890, at 19 (1978)).

156. Util. Air Regulatory Grp. v. E.P.A., 573 U.S. 302, 321 (2014) (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997)) ("[R]easonable statutory interpretation must account for both 'the specific context in which . . . language is used' and 'the broader context of the statute as a whole'").

157. 42 U.S.C. §§ 18116(a)-(b) (2012).

158. 42 U.S.C. § 18116(b) (2012).

discrimination."[159] For example, whereas Title VI has been understood not to include a private right of action for disparate impact claims,[160] the Nondiscrimination Rule makes disparate impact and treatment claims available across prohibited bases of discrimination.[161] The Rule further clarified that harassment based on any protected characteristic violates the statute.[162]

In some ways, however, HHS interpreted the statute to allow variation across prohibited bases. The Rule adopts exceptions applicable to Title VI and the Age Act, respectively, which already applied to federally funded healthcare.[163] Thus, it allows the continuation of affirmative action programs for people disadvantaged by race, color, or national origin; aids, benefits, and services limited by federal law to people with disabilities; and special benefits for the elderly or children.[164] With regard to age in particular, the agency incorporated wide-ranging exceptions from the referenced statute.[165] The rule adopts a constitution-like intermediate scrutiny standard for sex classifications, creating a strong presumption that they are invalid.[166] The *Franciscan* court pointed to these exceptions in support of its conclusion that Title IX's exemptions must similarly apply to Section 1557.[167]

The problem with incorporating Title IX wholesale is two-

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159. Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31375, 31409 (May 18, 2016) (to be codified at 45 C.F.R. 92).

160. Alexander v. Sandoval, 532 U.S. 275, 293 (2001).

161. Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. at 31440.

162. *Id.* at 31406.

163. Nondiscrimination on the Basis of Race, Color, National Origin, Sex, Age, or Disability in Health Programs or Activities Receiving Federal Financial Assistance and . . . Under Title I of the Patient Protection and Affordable Care Act, 45 C.F.R. § 92.101(c) (2017) (referring to 45 C.F.R. § 80.3(d); 45 C.F.R. § 84.4(c); 45 C.F.R. § 85.21(c); 45 C.F.R. § 91.17).

164. *See* Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. at 31404.

165. Nondiscrimination on the Basis of Age in Programs or Activities Receiving Federal Financial Assistance from HHS, 45 C.F.R. § 91.13 (2017) (allowing recipients of federal funding to "reasonably take[] into account age as a factor necessary to the normal operation or the achievement of any statutory objective of a program or activity"). *See also id.* at § 91.14 (authorizing actions with a "disproportionate effect on persons of different ages" "based on a factor other than age" so long as "factor bears a direct and substantial relationship to the normal operation of the program or activity or to the achievement of a statutory objective").

166. *Id.* at § 91.14.

167. Franciscan All., Inc. v. Burwell, 227 F. Supp.3d 660, 690 n.29 (N.D. Tex. 2016).

fold. First and fundamentally, Section 1557's text and context precludes importing a religious exemption from Title IX. The language of Section 1557 is clear that nondiscrimination protections apply "[e]xcept as otherwise provided for in this title (or an amendment made by this title)."[168] Title I of the ACA, in which 1557 is found, specifically incorporates existing federal conscience protections[169] and exemptions for objections to assisted suicide;[170] it also allows states to prohibit abortion coverage in the state exchanges.[171] Title I further indicates that the ACA shall not "preempt or otherwise have any effect on State laws regarding the prohibition of (or requirement of) coverage, funding, or procedural requirements on abortions, including parental notification or consent for the performance of an abortion on a minor."[172] The ACA, including Section 1557, is also subject to Religious Freedom Restoration Act—which permits religious objectors to seek exemptions from federal laws that substantially burden their exercise of religion.[173]

Congress specifically considered and rejected broader religious exemptions in the context of the Women's Health Amendment.[174] In so doing, it refused to expand the federal conscience clause to prohibit "requir[ing] an individual or institutional healthcare provider to provide, participate in, or refer for an item or service to which such provider has a moral or religious objection, or require such conduct as a condition of contracting with a qualified health plan."[175] Expanded exemptions would be inconsistent with Congress's considered judgment in enacting Section 1557.[176]

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168. 42 U.S.C. § 18116(a) (2012).

169. 42 U.S.C. § 18023(c)(2)(A)(i) (2010) ("Nothing in this Act shall be construed to have any effect on Federal laws regarding—conscience protection . . . .").

170. 42 U.S.C. § 18113(a) (2012).

171. 42 U.S.C. § 18023(a)(1) (2012).

172. 42 U.S.C. § 18023(c)(1) (2012).

173. 42 U.S.C. § 2000bb-3(a) (2012) (stating that the RFRA "applies to all Federal law").

174. *See, e.g.*, 155 CONG. REC. S13,193-01 (daily ed. Dec. 14, 2009) (amendment by Sen. Brownback); Elizabeth B. Deutsch, *Expanding Conscience, Shrinking Care: The Crisis in Access to Reproductive Care and the Affordable Care Act's Nondiscrimination Mandate*, 124 YALE L.J. 2470, 2497 (2015).

175. 155 CONG. REC. S13,193-01 (daily ed. Dec. 14, 2009) (amendment by Sen. Brownback).

176. INS v. Cardoza-Fonseca, 480 U.S. 421, 444 (1987) (quoting Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359, 392-93 (1980) (Stewart, J., dissenting)) ("'Few principles of statutory construction are more compelling than the proposition that Congress does not intend sub silentio to enact statutory language that it has

Second, because Title IX is education-specific, its exemptions don't make any sense for healthcare. The district court in *Franciscan* determined that HHS would have to "adapt Title IX from the educational realm to the healthcare context," for example, by changing "student" to "individual."[177] But the vast majority—and perhaps all—of Title IX's exceptions do not lend themselves to translation. They recognize the distinct social tradition of single-sex education. The exemptions include fraternities, sororities, beauty pageants, and voluntary associations like the Boy Scouts and Girl Scouts.[178] Exemptions apply to, for example, institutions devoted to "training [] individuals for military services or merchant marine."[179] Private undergraduate institutions are entirely excluded from duties of sex nondiscrimination in admissions.[180]

In healthcare, no parallel exists to the many exempted educational programs that are characterized by exclusion of one sex.[181] Health programs typically admit patients of all sexes and only focus on patients of a particular sex where health purposes require (for example, in birthing centers). Other difficulties arise. For example, how would one adapt the exception for private undergraduate institutions into the healthcare context? Would this mean private healthcare facilities—at least those not engaged in graduate education—could discriminate based on sex in the admission of patients? Not surprisingly, given the particularity of Title IX's exemptions to education, not a single commentator on the proposed Nondiscrimination Rule asked for HHS to adopt wholesale the exemptions under Title IX wholesale.[182]

The futility of incorporating Title IX's religious educational institution exemption into the ACA is made manifest by considering the *Franciscan* litigation. If the Section 1557 simply reiterates Title IX religious educational institutions alone would be eligible for exemption.[183] Even if adapted to apply to

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earlier discarded in favor of other language.'"); *see also* William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 84-89 (1988) (analyzing the Supreme Court's use of the rejected proposal rule).

177. Franciscan All., Inc. v. Burwell, 227 F. Supp.3d 660, 691 (N.D. Tex. 2016).

178. 20 U.S.C. §§ 1681(a)(6)-(9) (2012).

179. *Id.* at § 1681(a)(4).

180. *Id.* at § 1681(a)(1).

181. *See* 20 U.S.C. § 1681(a) (2012).

182. Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31375, 31409 (May 18, 2016) (to be codified at 45 C.F.R. 92).

183. 20 U.S.C. § 1681(a)(3) (2012).

healthcare institutions, the vast majority of health care institutions do not unite co-religionists, devote themselves to religious education, or receive significant financial support from a religious organization—as Title IX's regulations would seem to require.[184] Looking to *Franciscan*, the Christian Medical Association and its members are not institutions—let alone institutions "controlled by a religious organization."[185] Nor would the Franciscan Alliance likely qualify, assuming a typical organizational structure with no religious test for patients or employees and little financial assistance from the Catholic Church.

Of course, to the extent that healthcare programs have religious objections to compliance with antidiscrimination requirements under Section 1557, they are not without recourse. They continue to enjoy existing conscience accommodations.[186] They may also seek exemption under RFRA. Courts can balance RFRA and nondiscrimination in healthcare on a case-by-case basis, but no blanket exemption for religious health programs should apply.[187]

V. CONCLUSION

Questions of sex, religion, and politics are roiling the regulatory process and likely to provoke controversy in courts in the near- to medium- term. Section 1557 extends healthcare antidiscrimination protection to sex, a change made all the more path-breaking by its potential to target discrimination related to reproduction, sexual orientation, and gender identity. Its promise, however, is imperiled by resistance from conservative states and religiously affiliated providers and hostility to the ACA from the current administration.

As HHS moves to reassess the Obama administration's rule interpreting the provision, the agency is not unfettered. Religious exemptions beyond those in Title I may not be granted

184. *See Exemptions From Title IX*, *supra* note 147.

185. Franciscan All., Inc. v. Burwell, 227 F. Supp. 3d 660, 689-90 (N.D. Tex. 2016).

186. 42 U.S.C. §§ 18023(b)(4), 18113(a) (2012); DEP'T OF HEALTH & HUMAN SERV.'S, *Conscience Protections For Health Care Providers*, https://www.hhs.gov/conscience/conscience-protections/index.html [https://perma.cc/BN55-A4LA] (last visited Mar. 1, 2018).

187. *See generally* Deutsch, *supra* note 174 (arguing that exclusions of contraception, tubal ligation, and abortion discriminate on the basis of sex and evaluating potential RFRA defenses).

consistent with the statute and Congressional intent. Nor can the agency reduce sex discrimination to a binary biological conception of sex. Given the current state of legal doctrine, however, HHS permissibly might interpret Section 1557 to permit discrimination and/or harassment on the ground of sexual orientation alone, even as it must recognize that LGBT people are protected from sex discrimination to the extent that such discrimination relies on sex stereotypes.