

# Health Care in Motion

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## Non-Discrimination: Where are we in the courts?

From its inception, the Affordable Care Act (ACA) has been ripe with [legal controversy](#). As we have discussed [before](#), the ACA's non-discrimination provision, Section 1557, is no exception. Section 1557 prohibits discrimination in federally funded health programs and activities on the basis of race, color, national origin, sex, age, or disability. This provision has generated a slew of litigation: conservatives and liberals alike have debated its scope and application. [Conflicting rules](#) put forth by the federal Department of Health & Human Services (HHS) interpreting and implementing Section 1557 have made the issue even more confusing. And although the Biden administration has promised to reverse the Trump administration's interpretation of Section 1557, this likely won't mean a return to the status quo. To the contrary, litigation about the meaning of Section 1557 shows no sign of slowing down any time soon.

### What is Section 1557?

[Section 1557](#) of the ACA prohibits "any health program or activity, any part of which is receiving federal financial assistance" from discriminating against an individual on the basis of race, color, national origin, sex, age, or disability. While this language may appear straightforward enough, shifting Presidential administrations have interpreted and implemented the rule in dramatically different ways. Since the ACA was first passed in 2010, HHS has finalized two major rules interpreting Section 1557, and those rules have been at the bottom of most of the litigation. The [2016 rule](#), promulgated by the Obama administration, explained that Section 1557's prohibition against sex-based discrimination includes gender identity discrimination and sex stereotyping. Additionally, the 2016 rule interpreted "health program or activity" very broadly. The 2016 rule also required healthcare facilities to provide notices to patients of their rights in multiple languages.

The [2020 rule](#), promulgated under the Trump administration, reversed many components of the 2016 rule, including removing the majority of protections for transgender individuals. HHS removed protections for gender identity and deleted the rule's definition of "on the basis of sex," removed prohibitions against exclusions of gender affirming treatments, facilitated the denial of care by covered entities based on religious and moral objections, and removed requirements for notices and taglines, weakening protections for people with limited English proficiency. The 2020 rule also drastically limited the scope of covered entities, freeing many entities and providers from non-discrimination obligations that had applied to them under the 2016 Rule. You can find more of CHLPI's coverage of the Trump rule [here](#).

Unsurprisingly, both rounds of rulemaking for Section 1557 generated numerous lawsuits. In many of those lawsuits, plaintiffs on both sides of the ideological spectrum have targeted the rulemaking process itself, arguing that HHS did not follow the correct process under the Administrative Procedures Act (APA) when the rules were promulgated. Other cases focus on the actual content of the discrimination provision. For example, when a plaintiff alleges that a covered entity has discriminated against individuals on the basis of gender identity in violation of Section 1557, or when a covered entity claims that Section 1557 violates its religious freedom. The next two sections will give an overview of the current state of each category of cases, focusing on cases that implicate protections for transgender and gender non-conforming people.

## Section 1557 in the Courts

### 1. Discrimination Lawsuits

Most cases alleging discrimination against transgender people under Section 1557 follow a consistent formula. The plaintiff, a transgender person, is denied a gender affirming service from the defendant. The defendant or defendants in these cases might be an [insurance company](#) that refuses to cover gender affirming services, a [hospital](#) that does not authorize or perform such care, or a [health care provider](#) who discriminates against a transgender patient due to their gender identity. In these cases, plaintiffs argue that the defendant(s) violate Section 1557 by discriminating against them on the basis of their gender identity, and thus on the basis of sex. So far, a number of courts have ruled in favor of transgender plaintiffs on this issue. This is, in part, thanks to the Supreme Court's decision in [Bostock v. Clayton County](#) from June 2020, in which the Court held that discrimination "because of . . . sex" includes discrimination based on gender identity and sexual orientation. *Bostock* was specifically about sex discrimination in the context of employment—forbidden under Title VII of the Civil Rights Act of 1964. Since *Bostock*, a number of lower courts, as well as the Ninth Circuit, have applied the same reasoning to other federal nondiscrimination laws, including Section 1557. In [Doe v. Snyder](#), the Ninth Circuit noted that "a faithful application of *Bostock*" leads to the conclusion that Section 1557's prohibition on sex discrimination also includes discrimination on the basis of transgender status.

Unfortunately, not all courts agree with this straightforward reading of *Bostock*. Two federal courts in Texas [have suggested](#) Section 1557 does not prohibit discrimination against transgender people, because it incorporates Title IX of the Civil Rights Act, not Title VII. Both courts made much of the difference in phrasing between Title IX (prohibiting discrimination "on the basis of" sex) versus Title VII (prohibiting discrimination "because of" sex). Purporting to interpret "the ordinary public meaning conveyed when Congress enacted Title IX" by applying "judicially accepted principles of linguistics," both courts concluded that Title IX "operate[s] in binary terms—male and female—when it references sex." Of course, the Supreme Court rejected similar arguments in *Bostock*—and even used both phrases interchangeably throughout the *Bostock* opinion. It remains to be seen how different jurisdictions will approach this question going forward.

### 2. Rulemaking Lawsuits

Turning next to rulemaking cases, litigation in this space shows no sign of slowing down. In the wake of *Bostock*, LGBTQ and reproductive justice organizations brought [a number of lawsuits](#) against the Department of Health and Human Services (HHS), arguing that the 2020 Rule violated the APA. Although the claims vary slightly case to case, a common argument is that the 2020 Rule's promulgation was "arbitrary and capricious," because HHS did not explain

on a reasoned basis why it implemented these changes. Another argument—relying on *Bostock’s* rationale that sex discrimination includes discrimination on the basis of transgender status—is that the 2020 Rule, to the extent that it permits such discrimination, contradicts Section 1557 itself. Regulations, which purport to be a more specific interpretation of a law passed by Congress, can be struck down if they contradict that law. Although some courts have accepted these arguments, many Section 1557 rulemaking cases are currently in flux due to the change in Presidential administrations. After President Biden took office, HHS sought to remand many of these cases. The Department claimed that it would reevaluate and revise the 2020 Rule, making ongoing litigation about the Rule moot. Initially, the government told the courts that a rule was expected to be released by April 2022. This led many courts to “stay” these [cases](#), which pauses the litigation rather than ending it completely.

Of the five cases that were put on hold, four remain stayed as of today. However, on June 2, 2022, one of these cases was returned to active status. In *BAGLY v. HHS*, Judge Saris ended the stay she had previously imposed, allowing litigation to proceed. (CHLPI, along with other legal advocates, represents the plaintiffs in *BAGLY*. Read more about the case [here](#).) While HHS has submitted the rule to the Office of Management and Budget, the proposed rule is not yet publicly available and remains under review. While the rule remains unreleased, the *BAGLY* parties have submitted a schedule to the court to reimpose deadlines for the case to proceed.

### 3. *Lawsuits Seeking License to Discriminate*

Progressives are not alone in pursuing Section 1557 litigation. Religious conservatives are also actively suing HHS for its interpretation and implementation of Section 1557. In a case filed last August, [American College of Pediatrics v.](#)

#### What is Next for Section 1557?

The actions of the Biden administration will be pivotal in determining the provision’s fate. On the one hand, the new administration has indicated its support for transgender and gender non-conforming people by [requiring](#) all administrative agencies and departments to apply *Bostock’s* reasoning to their work. The administration has also issued guidance that [notifies](#) the public that it interprets Section 1557 to include gender identity and sexual orientation protections, including access to [gender-affirming care](#). Most recently, on June 15, President Biden [signed an Executive Order](#) directing HHS to address anti-trans discrimination in health care, and to ban conversion therapy in federally funded programs. On the other hand, the administration’s actions have not fully aligned with their stated understanding of nondiscrimination protections. For example, in guidance to insurers who plan to submit proposals to provide the government’s employee health plan in 2023, the Office of Personnel Management merely “encourages,” but [does not require](#), its carriers to cover gender-affirming health care. Additionally, the federal government [certified](#) 2022 qualified health plans for the Healthcare.gov marketplace that include explicit categorical bans against gender-affirming care.

The Administration has also left open many questions regarding other aspects of Section 1557. For example, the Administration has not yet addressed the 2020 Rule’s incorporation of various “[conscience provisions](#),” which extend protections to health care providers and entities that refuse to provide abortions and other medical care for moral or religious reasons. ([Two cases](#) challenging the Trump administration’s provider conscience rule are [currently on hold](#) in the Second and Ninth Circuits, and a notice of proposed rulemaking regarding the provider conscience rule was [submitted](#) to the Office of Management and Budget in March 2022 but has not been released to the public yet.)

[Becerra](#), two religious medical organizations and a private doctor sued HHS after HHS announced it would interpret and enforce Section 1557's prohibition on sex discrimination to include protections for trans patients. In an alternate mirror image of the lawsuits challenging the 2020 Rule, the plaintiffs argue that this change in policy violates the APA because it is contrary to law and because it is arbitrary, capricious, and an abuse of discretion. Plaintiffs further argue that the change in policy violates the Religious Freedom Restoration Act, and the First Amendment's free speech and free exercise of religion clauses. No decision has yet been issued, but this case is not the first of its kind: religious groups have fought against an expansive reading of sex-based discrimination since the 2016 rule's promulgation. In the first year of the Biden administration, courts in two [cases permanently enjoined](#) HHS from enforcing Section 1557 against the religious plaintiffs, finding that to do so would violate RFRA and substantially burden the plaintiffs' beliefs; although the government appealed, no decision has yet issued in either case. Last month, a federal district court in North Dakota followed suit in [Christian Employers v. EEOC](#), enjoining both HHS and EEOC from enforcing Title VII or Section 1557 in a way that would require members of the plaintiff membership organization to provide gender-affirming care for their employees.

These cases highlight the next big question in Section 1557 litigation, and LGBTQ advocacy more broadly: where will the courts fall when faced with enforcing non-discrimination laws against religious freedom exercise claims? So far, the answer seems to be trending in favor of religious freedom claims in both the Section 1557 context and [beyond](#). In recent years, the Supreme Court has faced similar questions in cases like [Masterpiece Cake Shop](#) and [Fulton v. The City of Philadelphia](#). The Court has always found a loophole, ruling narrowly in favor of the religious plaintiffs while avoiding the controversial question of whether non-discrimination laws are more or less important than religious freedom. For instance, in *Fulton*, the Court ruled in favor of a Catholic adoption agency that had violated Philadelphia's non-discrimination policy by disallowing same-sex couples from adopting a child through its program. The Supreme Court seized on the fact that the City's policy had been written to permit exceptions. This allowed the Court to find that the policy was not "generally applicable" and thus subject to a higher standard of review that made it far easier to rule for the religious entity. It is unclear what the Court will do when faced with a case that pits nondiscrimination law directly against religious freedom.

## Looking Beyond Section 1557

A handful of upcoming cases could further impact access to health care for trans people. On June 15, 2022, the Eighth Circuit heard [oral arguments](#) in *Brandt v. Rutledge*, a case challenging an Arkansas law that would have prohibited health care professionals from providing gender affirming care to minors. (The law [was enjoined](#) by the district court back in July 2021, preventing it from coming into effect.) *Brandt v. Rutledge* is the first of several cases challenging [state efforts to ban gender-affirming care](#) for transgender youth—despite the fact that such care is [crucial to their health and well-being](#). This year, lawsuits have arisen in [a handful of other states](#)—including Alabama and Texas—challenging similar state actions. As courts weigh principles of state sovereignty and federalism against federal civil rights protections, these cases will surely impact the future enforceability of health care rights.

Next term, the Supreme Court will hear a case that could have broad implications for health care rights enforcement under the Medicaid Act, including access to gender-affirming care. In *Health & Hospital Corporation of Marion County v. Talevski*, a patient's family sued a state-run nursing facility for alleged violations of the Federal Nursing Home Reform Act. The [issue on appeal](#) is whether private parties—like patients and their families—may ever bring private lawsuits for money damages to enforce rights contained in federal Spending

Clause legislation. While *Talevski* involves the Federal Nursing Home Reform Act, the Supreme Court’s decision could hamstring private parties’ ability to enforce their rights under the Medicaid Act as well.

Many LGBTQ individuals—particularly transgender people of color—rely on Medicaid for health care coverage. Approximately 1,171,000 LGBT adults ages 18-64 have Medicaid [as their primary source of health insurance](#), and transgender, non-binary, and gender nonconforming people are three times more likely to [have a household income under \\$10,000](#), and three times more likely to be unemployed. Just a few years ago, transgender Medicaid enrollees won a key victory in [Flack v. Wisconsin Department of Health Services](#), when a district court in Wisconsin invalidated Wisconsin Medicaid’s categorical exclusion of gender-affirming care, greatly expanding access to care for trans Medicaid beneficiaries in Wisconsin—and sending a strong message to Medicaid programs in other states.

The Supreme Court’s decision in *Talevski* could determine whether transgender people will be able to continue to vindicate their rights by bringing private lawsuits under the Medicaid Act.

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