1-2021

Sex Discrimination in Healthcare: Section 1557 and LGBTQ Rights After *Bostock*

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INTRODUCTION

Sex discrimination in health care was banned in 2010 with the passage of Section 1557 of the Affordable Care Act ("ACA"),[1] more than 40 years after the civil rights movement. Since its passage, there have been disputes over whether Section 1557's ban on sex discrimination, which derives from Title IX, encompasses gender identity and sexual orientation discrimination. In 2016, the Department of Health and Human Services ("HHS"), under the Obama administration, interpreted the statute to be broadly inclusive of LGBTQ identity.

DOI: https://doi.org/10.15779/Z38S46H66P

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1. Affordable Care Act (ACA), 42 U.S.C. § 18116 (2010).

Almost immediately after, several states and health care providers successfully challenged and stayed that part of the rule.

HHS under the Trump administration finalized a new rule in June 2020 that officially stripped sexual orientation and gender identity from Section 1557's safeguards. Whether the position taken by the Trump administration can stand is now the subject of several legal challenges, particularly in light of the recent Supreme Court decision *Bostock v. Clayton Co*.,[2] which held that sexual orientation and gender identity discrimination are forms of sex discrimination for purposes of Title VII employment discrimination.[3]

The Biden administration is likely to propose its own Section 1557 rule that again protects LGBTQ people, prompting further legal challenges. The stage is set for an eventual Supreme Court review of the question of whether Section 1557, and Title IX, necessarily ban LGBTQ discrimination after *Bostock*.

The stakes could not be higher for LGBTQ people. Health insurers have singled out people with HIV or AIDS from coverage or imposed harsh annual and lifetime caps on benefits, using sexual orientation as a proxy for HIV status.[4] Insurers historically excluded coverage for gender-affirming care, even lower-cost measures like hormonal therapy, based on outdated notions that such treatment was experimental.[5] LGBTQ people confront verbal harassment, physical abuse, and denials of care at the bedside.[6] Unsurprisingly, these inequalities drive significant health disparities for LGTBQ people who collectively are more likely to suffer from mental illness, substance use disorders, suicidality, and a host of other chronic diseases.[7]

This Article argues that sex discrimination under Section 1557 necessarily encompasses gender identity and sexual orientation discrimination after *Bostock*. The Article begins by summarizing Section 1557, the Obama-era rule, and the progress that rule achieved for LGBTQ persons before it was judicially stayed. Then, the Article turns to the new definition of sex put forth by HHS under the Trump administration. Lastly, the Article advances several law and policy arguments for why sexual orientation and gender identity must be a part of the

2. 140 S. Ct. 1731, 1739 (2020).

3. *Id.* at 1737.

4. For common practices of insurers at the time of the HIV/AIDS crisis, see Samuel A. Marcosson, *Who is "Us "and Who is "Them"–Common Threads and the Discriminatory Cut-Off of Health Care Benefits for AIDS Under ERISA and the Americans With Disabilities Act*, 44 AM. U. L. REV. 361 (1994).

5. Liza Khan, Note, *Transgender Health at the Crossroads: Legal Norms, Insurance Markets, and the Threat of Healthcare Reform*, 11 YALE J. HEALTH POL'Y L. & ETHICS 375, 393 (2011).

6. Lambda Legal, *When Health Care Isn't Caring: Lambda Legal's Survey on Discrimination Against LGBT People and People Living With HIV*, LAMBDA LEGAL 1, 5, (2010), https://www.lambdalegal.org/sites/default/files/publications/downloads/whcic-report_when-health-care-isnt-caring.pdf [https://perma.cc/GF2F-PWW9].

7. U.S. Dep't. of Health & Hum. Servs. Office of Disease Prevention and Health Promotion, *Lesbian, Gay, Bisexual, and Transgender Health*, HEALTHY PEOPLE (Sept. 25, 2020), https://www.healthypeople.gov/2020/topics-objectives/topic/lesbian-gay-bisexual-and-transgender-health [https://perma.cc/MWQ7-449F].

definition of sex under Section 1557 after *Bostock*. Specifically, we argue that the Court's reasoning in *Bostock* logically extends to Title IX and Section 1557 and that Congress, in drafting Section 1557, did not embrace a health-specific definition of sex. Even as the makeup of the Supreme Court shifts,[8] Justice Gorsuch's infallible reasoning in *Bostock* should afford broad protections for LGBTQ people in the variety of federal laws that ban sex discrimination.

I.
SECTION 1557 AND THE 2016 RULE

Section 1557 of the ACA provides that:

> . . . an individual shall not, on the ground prohibited under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), or section 794 of title 29, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title (or amendments) . . . [9]

Section 1557 applies broadly to health care entities, as most doctors, hospitals, and even private insurers accept some form of federal financial assistance, whether it be Medicare, Medicaid, or insurance subsidies. Notably, Section 1557's ban on sex discrimination is achieved by extending Title IX, which traditionally governed educational institutions, to health care entities. Section 1557 offers very little statutory text, leaving ample room for the courts and regulators to interpret its breadth.[10]

A. The 2016 Rule's Definition of Sex Discrimination

Although Section 1557 is one of the few ACA provisions that went into effect on the day the law was signed, HHS under the Obama administration did not issue a final rule until 2016.

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8. Tucker Higgins, *Amy Coney Barrett Is Sworn In, Swinging Supreme Court Further to the Right,* CNBC (Oct. 26, 2020, 11:37 AM), https://www.cnbc.com/2020/10/26/amy-coney-barrett-supreme-court-confirmation.html [https://perma.cc/7XWK-VVN4].

9. 42 U.S.C. § 18116 (2010).

10. Valarie K. Blake, LEXISNEXIS CIVIL RIGHTS AND STRATEGY SERIES: FEDERAL HEALTH CARE LAWS 39 (2020). It's worth noting that Section 1557 is under some legal threat with the Supreme Court's review of *California v. Texas*. However, Section 1557 has little in common with the market reforms in the ACA that relate to the individual mandate. Section 1557 is likely to be struck down only if the whole of the ACA is, a position that would be a major departure from the Court's views on severability in the past. Sarah Kliff & Margot Sanger Katz, *Without Ginsburg, Supreme Court Could Rule Three Ways on Obamacare*, N.Y. TIMES (Sept. 21, 2020), https://www.nytimes.com/2020/09/21/upshot/ginsburg-supreme-court-future-obamacare.html [https://perma.cc/M7BV-ZUZG].

The 2016 Rule interpreted the definition of sex discrimination to include "discrimination on the basis of pregnancy, false pregnancy, termination of pregnancy, or recovery therefrom, childbirth or related medical conditions, sex stereotyping, and gender identity."[11] The 2016 Rule defined gender identity as "one's internal sense of gender, which may be male, female, neither, or a combination of male and female."[12] Further, the 2016 Rule clarified that HHS would "interpret references to the term 'gender identity' as encompassing 'gender expression' and 'transgender status' . . . consistent with the position taken by courts and Federal agencies."[13] Gender expression meant "the way an individual expresses gender identity,"[14] and transgender status/identity meant "when the individual's gender identity is different from the sex assigned to that person at birth."[15] HHS believed gender identity was clearly covered by "sex" discrimination but was less certain about sexual orientation. Instead, rule makers stopped short of explicitly including sexual orientation in their definition of sex but presumed this form of discrimination to be covered as a form of sex stereotyping.[16]

A few cases illustrate what is possible when a broad meaning is given to sex discrimination under Section 1557. In one, a mother was permitted to seek damages on behalf of her deceased son for sex discrimination under Section 1557 where hospital workers repeatedly refused to use the patient's preferred pronouns despite the patient's clear distress, with one worker saying, "Honey, I would call you 'he,' but you're such a pretty girl."[17] In another case, a transgender male successfully alleged facts supporting a claim for sex discrimination under Section 1557 where health care workers roughly and unnecessarily examined his genitalia and failed to use his preferred pronouns, among other allegations.[18] On the financing side, an insurer was found to violate Section 1557 when it failed to cover vaginal reconstruction surgery for a transgender female seeking gender-confirming surgery, but covered the same procedure for infants born without vaginas.[19] HHS also took firm stances against certain forms of gender identity-based insurance discrimination in its 2016 Rule. Insurers were not permitted to categorically exclude treatment for gender transitions, or to limit eligibility for benefits to one's natal sex.[20]

11. 45 C.F.R. § 92.4 (2016).
12. Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. at 31,384.
13. *Id.* at 31,385.
14. *Id.*
15. *Id.* at 31,384.
16. *Id.* at 31,389.
17. Prescott v. Rady Childs. Hosp.–San Diego, 265 F. Supp. 3d 1090, 1097 (S.D. Cal. 2017).
18. Rumble v. Fairview Health Servs., No. 14-CV-2037, 2015 WL 1197415 at *18 (D. Minn. Mar. 16, 2015).
19. Flack v. Wis. Dept. of Health Servs., 328 F. Supp. 3d 931, 948 (W.D. Wisc. 2018).
20. 45 C.F.R. §§ 92.207(b)(3)–(5) (2016).

B. Franciscan Alliance: Texas Case Puts Obama Rule on Hold

The Obama-era sex discrimination protections for LGBTQ persons did not stand for long. Several states and religious-based health care providers sued to enjoin portions of the 2016 Rule, arguing that gender identity discrimination should not be considered sex discrimination, and that religious organizations should enjoy greater exemptions from Section 1557.[21] The U.S. District Court for the Northern District of Texas agreed and issued a nationwide preliminary injunction against the enforcement of the provisions that defined sex. The court reasoned that the rule failed to incorporate the religious exemptions found in Title IX, and was contrary to the applicable civil rights law at the time.[22] Shortly after the court issued the preliminary injunction, a new administration took office, and in May 2017, under the leadership of President Trump, HHS filed a motion for voluntary remand to reconsider the 2016 Rule. The court granted HHS's request to "assess the reasonableness, necessity, and efficacy" of the 2016 Rule.[23]

On October 15, 2019, after HHS had failed to publish a new rule, the court granted plaintiffs' motion for summary judgment and reaffirmed its preliminary conclusion that the 2016 Rule violated the Administrative Procedure Act.[24] The court converted its preliminary injunction into a permanent one, vacated the offending provisions, and sent the matter back to HHS for further consideration.[25]

II.
THE 2020 RULE AND *BOSTOCK*

In June 2019, HHS published a new proposed rule on Section 1557, which sought "to eliminate provisions that are inconsistent or redundant with pre-existing civil rights statutes and regulations prohibiting discrimination on the basis of race, color, national origin, sex, age, and disability."[26] The final rule, published on June 19, 2020, removes the 2016 definition of sex and its explicit references to "gender identity" and "sex stereotyping."[27]

A. The 2020 Rule and Sex Discrimination

While the new rule fails to define the term "sex," it clearly intends to embrace a narrower definition than the Obama administration by excluding the

21. *See* Franciscan All., Inc. v. Burwell, 227 F. Supp. 3d 660 (N.D. Tex. 2016).
22. *Id.* at 687–96.
23. Franciscan All., Inc. v. Price, No. 7:16-cv-00108, at 1, ECF No. 92 (N.D. Tex. May 2, 2017).
24. Franciscan All., Inc. v. Azar, 414 F. Supp. 3d. 928, 942 (N.D. Tex., 2019).
25. *Id.* at 944–45.
26. *See* Nondiscrimination in Health & Health Education Programs or Activities, 84 Fed. Reg. 27,846, at 27,848–49 (proposed June 14, 2019).
27. *See* Nondiscrimination in Health Programs and Activities, Delegation of Authority, 85 Fed. Reg. 37,160, 39,179 (June 19, 2020).

specific references to sex stereotyping and gender identity. Additionally, throughout the preamble, the agency references the idea that sex is binary and that the meaning is one related to the sex organs one is born with.[28]

Anticipating the Supreme Court's decision in *Bostock*, in the final 2020 Rule, HHS acknowledged that "Title VII case law has often informed Title IX case law with respect to the meaning of discrimination 'on the basis of sex.'"[29] Yet, HHS determined that it could publish the rule, regardless of the outcome of *Bostock*, because it believed the Court might favor their view and, if not, HHS argued that Section 1557 is distinct from Title VII because the binary biological character of "sex" has "special importance in the health context."[30] In effect, HHS argued that anti-LGBTQ health care discrimination is legal *even if* anti-LGBTQ employment discrimination is not.

B. Bostock v. Clayton Co.

Before *Bostock*, it was disputed whether Title VII gave federal protection against employment discrimination to LGBTQ individuals, and protection at the state level varied. But on June 15, 2020, the Supreme Court held in *Bostock v. Clayton County* that Title VII — which prohibits employment discrimination based on race, color, religion, sex, and national origin — protects individuals against discrimination on the basis of sexual orientation and transgender status.[31]

Justice Neil Gorsuch authored the 6–3 majority opinion, in which the Court determined that employment discrimination on the basis of sexual orientation or transgender status is necessarily discrimination "because of . . . sex." In its analysis, the Court expressly declined to decide the definition of "sex" under Title VII, and instead established that, because the case did not turn on the textual definition of "sex,"[32] the Court would proceed on the assumption that "sex" within Title VII "refer[red] only to biological distinctions between male and female."[33]

The Court clarified that "Title VII's legal analysis . . . asks simply whether sex was a but-for cause."[34] Utilizing several hypotheticals demonstrating sex as a but-for cause, the Court concluded that "homosexuality and transgender status are inextricably bound up with sex . . . because to discriminate on these grounds

28. *Id.* at 39,179.
29. *Id.* at 37,168.
30. *Id.*
31. Bostock v. Clayton Co., 140 S. Ct. 1731, 1744–45 (2020).
32. In *Bostock*, the employers argued the term "sex" in 1964 referred to "status as either male or female [as] determined by reproductive biology." *Id.* at 1739. The employees argued the term "sex" in 1964 "bore a broader scope, capturing more than anatomy and reaching at least some norms concerning gender identity and sexual orientation. . . . [T]he employees concede the point for argument's sake. . . ." *Id.*
33. *Id.*
34. *Id.* at 1745.

requires an employer to intentionally treat individual employees differently because of their sex."[35]

It is important to emphasize that *Bostock's* holding is limited to Title VII. Both the employers (appellees) and the dissenters expressed worry that the Court's "decision [would] sweep beyond Title VII to other federal or state laws that prohibit sex discrimination."[36] However, the Majority addressed this head-on, explaining that "none of these other laws are before us; . . . and we do not prejudge any such question today. Under Title VII . . . we do not purport to address bathrooms, locker rooms, or anything else of the kind."[37]

III.
LEGAL CHALLENGES TO THE 2020 RULE POST-*BOSTOCK*

Although the Supreme Court's ruling in *Bostock* narrowly focuses on Title VII, it has prompted a number of legal challenges to the 2020 Rule. In particular, litigants dispute whether "on the basis of sex" can or should mean different things under Title VII versus under Section 1557 vis-à-vis Title IX.

So far, the U.S. District Court for the Eastern District of New York has preliminarily enjoined the 2020 Rule before it could take effect, citing *Bostock.* The Human Rights Campaign brought the suit against HHS on behalf of two transgender women, Tanya Asapansa-Johnson Walker and Cecilia Gentili,[38] seeking a declaration that the new rule is invalid under the Administrative Procedure Act as well as a vacatur of the rule.[39] Both Walker and Gentili were diagnosed with serious medical conditions that require chronic care.[40] The initial complaint alleged discrimination based on their transgender status in the receipt of medical treatment and services, citing a long history of transphobic harassment, misgendering, and physical and emotional abuse.[41]

In his opinion, Judge Block was critical of HHS for hurrying to publish a proposed rule, when the agency knew a Supreme Court review was pending.[42] HHS itself made clear in its preamble that Title VII and Title IX are often interpreted hand-in-hand, tacitly acknowledging the importance of *Bostock* to Section 1557.[43] Commenters urged HHS to wait until the *Bostock* decision came down before "publishing a rule that deals with the same subject matter. . . ."[44]

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35. *Id.* at 1742.
36. *Id.* at 1753.
37. *Id.* at 1753.
38. Nick Morrow, *HRC Files Federal Lawsuit Against Trump-Pence Administration*, HUM. RTS. CAMPAIGN (June 26, 2020), https://www.hrc.org/news/hrc-files-federal-lawsuit-against-trump-pence-administration [https://perma.cc/N2E4-D35A].
39. Walker v. Azar, No. 20-CV-2834, 2020 WL 4749859, at *5 (E.D.N.Y. Aug. 17, 2020).
40. *Id.*
41. Complaint at 16, *Walker*, 2020 WL 4749859 (No. 20-CV-2834).
42. *Walker*, 2020 WL 4749859 at *5.
43. *Id* at *4.
44. Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority, 85 Fed. Reg. 37,160, 37,168 (June 19, 2020).

However, HHS declined to wait because it was confident the Supreme Court would endorse its interpretation of sex discrimination and the agency "need not delay a rule based on speculation as to what the Supreme Court might say about a case dealing with related issues."[45]

Likewise, the agency published its final rule just four days after the Supreme Court's decision, making no mention of the decision in either the rule or its preamble. Judge Block found that HHS's failure to mention the *Bostock* ruling and offer any reasoned explanation why it should not be followed was likely "arbitrary and capricious," and in violation of the Administrative Procedure Act.[46] "When the Supreme Court announces a major decision, it seems a sensible thing to pause and reflect on the decision's impact," Judge Block wrote in his order.[47] "Since HHS has been unwilling to take that path voluntarily, the court now imposes it."[48] He also noted that while HHS is entitled to its interpretation and position, its rationale for the rule was based solely on its pre-*Bostock* understanding of "sex," which Judge Block believed the Supreme Court firmly rejected.[49]

While generally a federal court can reinstate prior definitions, Judge Block noted that he could not reinstate the 2016 definition of sex as it speaks to gender identity because *Franciscan Alliance* vacated that definition.[50] However, he noted that that court had not vacated the language surrounding "sex stereotyping," suggesting that LGBTQ litigants still have protections in that respect.[51]

A number of health care providers and LGBTQ coalitions have filed similar challenges to the 2020 rule in other districts.[52] Additionally, twenty-two states and the District of Columbia have filed suit in the Southern District of New York; the state of Washington has likewise challenged the 2020 Rule in Washington federal court.[53] Most litigants are seeking declaratory relief and injunctions and generally raise similar objections, namely that the agency's failure to consider *Bostock* in promulgating the rule is "arbitrary and capricious" and "not in accordance with law" in violation of the Administrative Procedure Act.[54] Some litigants also argue that the 2020 Rule violates equal protection and due process

45. *Walker*, 2020 WL 4749859 at *5.
46. *Id.* at *11.
47. *Id.* at *10.
48. *Id.*
49. *Id.* at *9.
50. *Id.* at *7.
51. *Id.*
52. *See* Whitman-Walker Clinic, Inc. v. U.S. Dep't of Health & Hum. Servs., No. 20-1630, 2020 WL 5232076 (D.D.C. Sept. 2, 2020); *see also* Boston All. of Gay, Lesbian, Bisexual and Transgender Youth v. Azar, No. 1:20-cv-11297, 2020 WL 3891426 (Mass. Dist. Ct. filed July 9, 2020).
53. *See* N.Y. v. U.S. Dep't of Health & Hum. Servs., 1:20-CV-5583, 2020 WL 4059929 (S.D.N.Y. filed July 20, 2020); Wash. v. Azar, No. C20-1105JLR, 2020 WL 5095467 (W.D. Wash. Aug. 28, 2020).
54. Administrative Procedure Act § 706(2)(a), 5 U.S.C. § 706(a)(2).

rights of LGBTQ individuals because the rule change was motivated by discriminatory animus. Plaintiffs point to statements of President Trump and people in his administration, including HHS Office of Civil Rights Director Roger Severino, as well as actions of the administration to remove protections for LGBTQ people across a variety of different domains.

IV.
IMPLICATIONS FOR SEX DISCRIMINATION CLAIMS MOVING FORWARD

We anticipate the Biden administration proposing a new rule for Section 1557 that unequivocally includes nondiscrimination protections for LGBTQ people under the ban on sex discrimination. This will likely prompt legal challenges, just like the Obama rule was challenged in *Franciscan Alliance*. Rule makers during the Obama era were less certain about the laws surrounding the intersection between LGBTQ identity and sex. These rule makers ultimately decided that gender identity discrimination was a form of sex discrimination, while sexual orientation discrimination would be considered sex stereotyping.[55] Under the leadership of President Biden, we expect that HHS will define "sex" broadly to encompass both gender identity and sexual orientation, relying on *Bostock*. Whether hearing challenges to a Biden or a Trump rule, the question before the courts will be the same: does Section 1557 (and related, Title IX) ban LGBTQ discrimination as sex discrimination after *Bostock*.

Two core issues are at the heart of the matter as to whether the 2020 version of the rule can stand and how Section 1557 must be read by future administrations: (1) does *Bostock* control Section 1557 and (2) is there any justification for treating sex discrimination differently in health care?

A. Bostock and Section 1557

A long precedent exists in which Title VII and Title IX are treated the same with respect to the interpretation of the meaning of sex, which suggests that Title VII precedent should extend to Section 1557.[56] Courts likewise have historically relied on Title VII precedent when interpreting Section 1557.[57] In the aftermath

55. Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. at 31,389.

56. *See* Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 616 n.1, (1999) (Thomas, J., dissenting); *see, e.g.*, Franklin v. Gwinnett Cnty. Pub. Schs., 503 U.S. 60, 75 (1992) (applying, in the context of a Title IX claim, Title VII's conception of sexual harassment as sex discrimination); *see also Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007); *cf. Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 258 (2009) ("Congress modeled Title IX after Title VI . . . and passed Title IX with the explicit understanding that it would be interpreted as Title VI was." (citation omitted)).

57. *See* Prescott v. Rady Childs. Hosp., 265 F. Supp. 3d 1090, 1099 (S.D. Cal. 2017) ("[b]ecause Title VII, and by extension Title IX, recognize that discrimination on the basis of transgender identity is discrimination on the basis of sex, the Court interprets the ACA to afford the same protections."); *see also* Tovar vs. Essentia Health, 342 F. Supp. 3d 947, 953, 957 (D. Minn. 2018) (denying an insurance company's motion to dismiss a Section 1557 challenge where it failed to cover gender reassignment surgery, arguing that Title VII permits sex stereotyping claims and this informs Section 1557). *But see* Baker v. Aetna Life Ins., 228 F. Supp. 3d 764, 769–70 (N.D. Texas 2017) (dismissing a challenge to an

of *Bostock*, several circuits have concluded that *Bostock* applies with equal force to Title IX cases.[58] In a case deciding whether a transgender high schooler should have access to a restroom of their choice, the Eleventh Circuit concluded that "Title IX like Title VII prohibits discrimination against a person because [they are] transgender, because this constitutes discrimination based on sex."[59] Quoting *Bostock*, the Court determined that "it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex."[60] The Fourth Circuit also held that *Bostock* controls Title IX in another transgender bathroom case, applying the same reasoning as the Eleventh Circuit. [61] The long-standing principle that Title VII informs Title IX should be enough to decide the issue that, post-*Bostock*, Section 1557 necessarily bans LGBTQ discrimination.

Bostock's reading of the plain language of Title VII is equally applicable to Title IX (and thus Section 1557). Title VII's text bans discrimination "because of . . . sex" and Title IX bans discrimination "on the basis of sex," but this difference shouldn't alter the outcome. Justice Gorsuch interprets "because of" to mean "by reason of" or "on account of" and, throughout the opinion, he substitutes "because of" for "on the basis of" many times, suggesting that these phrases are synonymous.[62] Additionally, Justice Gorsuch states that "Title VII's legal analysis . . . asks simply whether sex was a but-for cause."[63] The use of the but-for causation standard means that "[s]o long as the plaintiff's sex was one but-for cause of [the challenged employment] decision, that is enough to trigger [Title VII]."[64] The very same but-for analysis also applies to Title IX; Title IX does not require that sex be the sole reason for the discrimination.

While the Court agreed that "sex" means biological distinctions between male and female, it reasoned that it is impossible to discriminate on the basis of sexual orientation and gender identity without discriminating based on sex because of how intertwined these categories are:

> By discriminating against homosexuals, the employer intentionally penalizes men for being attracted to men and women for being attracted to women. By discriminating against transgender persons, the employer unavoidably discriminates against persons with one sex identified at

insurer for failure to cover breast augmentation for a transgender enrollee on the basis that Section 1557 has no available precedent regarding sex discrimination).

58. Adams v. Sch. Bd. of St. Johns Cnty., 968 F.3d 1286, 1305 (11th Cir. 2020).

59. *Id.* at 1305.

60. *Id.* at 1296 (quoting Bostock v. Clayton Co., 140 S. Ct. 1731, 1741 (2020)).

61. Grimm v. Gloucester Cnty. Sch. Bd., No. 19-1952, 2020 WL 5034430, at *21 (4th Cir. Aug. 26, 2020).

62. See *Bostock*, 140 S. Ct. at 1737 where Justice Gorsuch states that "in Title VII, Congress outlawed discrimination in the workplace *on the basis of*. . . sex" (emphasis added), and "[a]n employer's intentional discrimination *on the basis of* sex is no more permissible." *Id.* at 1743 (emphasis added).

63. *Id.* at 1745.

64. *Id.* at 1739.

> birth and another today. Any way you slice it, the employer [discriminates] because of the affected individuals' sex . . . [65]

Discrimination may take a different form in employment, education, and health care settings, but no matter the setting, *Bostock's* logic applies equally to the idea that discrimination against an LGBTQ individual is always because of their sex. When a school denies a transgender student's choice in bathrooms, it is because that student's sex is different than their sex assigned at birth. When a health insurer covers a service like hormone therapy for women in menopause, but not for transgender people seeking gender-affirming care, that difference in treatment is because the transgender person's identity does not correspond with their assigned sex. When a doctor mistreats or refuses to treat an LGBTQ individual because of their sexual orientation or gender identity, the doctor is motivated by the fact that the patient is attracted to people of the same sex or the patient does not identify with their sex assigned at birth.

The Majority makes clear in *Bostock* that they are not deciding the issue with respect to other statutes besides Title VII, keeping with their tradition of not deciding matters not before the Court.[66] Nonetheless, a court or an agency, tasked with interpreting Title IX and Section 1557, would have a hard time denying *Bostock's* logic that LGBTQ discrimination and sex discrimination are forever one and the same.

The Senate recently confirmed Amy Coney Barrett to the Supreme Court, filling the vacancy created by the late Justice Ruth Bader Ginsburg and cementing a 6–3 conservative majority on the bench. Justice Barrett's training at the feet of America's foremost textualist, Justice Antonin Scalia, suggests that she too would embrace Justice Gorsuch's textual reasoning in *Bostock* were she to preside over a legal challenge to the meaning of sex discrimination under Title IX or Section 1557.

B. A Health-Specific Standard for Sex Discrimination

In the preamble to the 2020 Rule, HHS argued that it need not wait for *Bostock* to be decided, and *Bostock* may not control because sex has a special meaning in health care: a binary biological characteristic. Among other things, the agency points to medical dictionaries that define sex as binary and biological, and discusses the importance of sex to certain medical procedures and norms. For example, according to HHS, there is a need to limit access to lactation and gynecological services to females.[67]

Bostock's logic remains equally true in health care, however, because *discriminatory* treatment based on LGBTQ identity is *discriminatory* treatment based on sex. *Bostock* reaches that conclusion, all while conceding the same

65. *Id.* at 1746.
66. *Id.* at 1753.
67. Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority, 85 Fed. Reg. 37,160, 37,178–79 (June 19, 2020).

position held by HHS in the Trump rule that "sex" means binary biological traits, because discrimination on the basis of LGBTQ identity necessarily implicates the more traditional, binary definition. Considering this, some of HHS's examples rightly may be seen as discriminatory after *Bostock*. For instance, a transgender male who can lactate may require access to lactation rooms, the same as an individual who was born as and identifies as female. To provide otherwise would be to treat the transgender individual differently based in part on the fact that their natal sex and gender identity do not match.

The idea of a health-specific meaning of sex put forth by HHS runs afoul of proper judicial and Congressional deference. Congress did not create a different definition of sex for purposes of health care when it passed the ACA and Section 1557. Congress could have drafted the law to ban sex, age, race, and disability discrimination in health care, unmoored from other statutes or precedent, but it did not. Instead, it adopted Title IX's sex discrimination framework, suggesting that it saw no difference between sex discrimination in education than in health care (or employment, as Title VII so frequently informs Title IX). If Congress did not see sex as having special meaning in health care, then neither should regulators for purposes of rulemaking. Likewise, once sex is defined by the highest Court to have a particular meaning in civil rights laws, agencies have no room for further interpretation of that term, whether in health care or another setting.

A special meaning for sex in health care is illogical from a policy perspective as well. Studies on LGBTQ health demonstrate that health care providers are no more immune to discriminating on the basis of LGBTQ identity than any other facet of society. If health care deserves a different definition of sex, it is hard to see why it should be a less inclusive one.

CONCLUSION

Bostock's reach will be litigated frequently in the months to come. The Biden administration is likely to introduce a new Section 1557 rule broadening LGBTQ rights that will inevitably lead to further legal challenges. Ultimately, the Supreme Court may need to decide the matter, and we believe *Bostock* necessitates the view that health care entities receiving federal funds cannot discriminate against individuals on the basis of LGBTQ identity.