

[ORAL ARGUMENT NOT SCHEDULED]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

TANYA ASAPANSA-JOHNSON WALKER
and CECILIA GENTILI,

Plaintiffs-appellees,

v.

XAVIER BECERRA, in his official capacity as
Secretary of the United States Department of
Health and Human Services, and UNITED
STATES DEPARTMENT OF HEALTH AND
HUMAN SERVICES,

Defendants-appellants.

Nos. 20-3580,
20-3827

JOINT STATUS REPORT

The parties respectfully submit this Joint Status Report pursuant to the Court's Order on March 18, 2021. In light of Defendants' ongoing reassessment of the challenged rule and the developments discussed below, the parties jointly request that the Court order the parties to file another joint status report in 90 days.

As previously addressed, new leadership began arriving at the U.S. Department of Health and Human Services ("HHS") and the U.S. Department of Justice on January 20, 2021 and have been reassessing the issues that this case presents.

Defendants report that HHS's reassessment remains ongoing. Defendant Secretary Becerra took office less than two months ago, on March 19, 2021, and HHS

continues to await a permanent director of the HHS Office for Civil Rights.

Nevertheless, Defendants report the following two substantive developments arising from their ongoing reassessment.

1. HHS has determined that it intends to initiate a rulemaking proceeding on Section 1557 of the Affordable Care Act. Section 1557 prohibits discrimination on the basis of race, color, national origin, sex, age, or disability in certain health programs or activities, and a final rule on Section 1557 is the subject of Plaintiffs' Administrative Procedure Act claims in this case. The anticipated rulemaking proceeding will provide for the reconsideration of the changes to existing Section 1557 regulations that Plaintiffs challenge here. HHS anticipates issuing a Notice of Proposed Rulemaking as expeditiously as reasonably possible. An anticipated timeframe for issuing a Notice of Proposed Rulemaking must account for HHS's limited resources, including the resources expended on litigation.

2. On May 10, 2021, HHS issued a notification ("Notification") to inform the public that, consistent with the Supreme Court's decision in *Bostock* and Title IX, beginning on May 10, HHS will interpret and enforce Section 1557's prohibition on discrimination on the basis of sex to include: (1) discrimination on the basis of sexual orientation; and (2) discrimination on the basis of gender identity. A copy of the Notification is attached and will be published in the Federal Register.

3. Plaintiffs state separately that in light of both HHS's Notification and subsequent stated intent to issue a Notice of Proposed Rulemaking, as described

above, the substantive basis of HHS's appeal—namely, seeking to overturn entry of an order enjoining the applicable sections of the current HHS rule that were disputed in the District Court—has been mooted. Further, the current injunction is necessary to protect Plaintiffs from the harm caused by the current rule until such time Defendants finalize and promulgate new rules that are consistent with *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020) and other applicable law. As such, Plaintiffs asked the Defendants to withdraw the instant appeal and believe this is the appropriate course of action under the circumstances. Nonetheless, Plaintiffs are willing to accommodate Defendants' request for a 90-day extension of the present stay of the appeal.

4. The government respectfully disagrees with the views that Plaintiffs express above. HHS's Notification and intent to issue a Notice of Proposed Rulemaking have not mooted the government's appeal from a preliminary injunction that is currently in effect and that the government believes is legally erroneous. Instead, HHS's Notification appears to moot Plaintiffs' alleged injuries in this case. Accordingly, the government has suggested that Plaintiffs consider dismissing their claims, but Plaintiffs have indicated that they do not believe their claims or requests for injunctive relief are moot.

CONCLUSION

For the foregoing reasons, the parties respectfully request that the Court continue the stay and propose that they file a joint status report in 90 days.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this joint status report complies with the type-volume limit of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 590 words.

This joint status report also complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 27(d)(1)(E) and 32(a)(5)-(6) because it was prepared using Microsoft Word 2013 in Garamond 14-point font, a proportionally spaced typeface.

s/ Joshua Dos Santos

JOSHUA DOS SANTOS

CERTIFICATE OF SERVICE

I hereby certify that on May 14, 2021, I filed and served the foregoing with the Clerk of the Court by causing a copy to be electronically filed via the appellate CM/ECF system. I also hereby certify that the participants in the case are registered CM/ECF users and will be served via the CM/ECF system.

s/ Joshua Dos Santos

JOSHUA DOS SANTOS

ATTACHMENT

Billing Code: XXXX-XX-X

DEPARTMENT OF HEALTH AND HUMAN SERVICES

42 U.S.C. § 18116(a)

Notification of Interpretation and Enforcement of Section 1557 of the Affordable Care Act and Title IX of the Education Amendments of 1972

AGENCY: Office of the Secretary, HHS.

ACTION: Notification of Interpretation and Enforcement.

SUMMARY: This Notification is to inform the public that, consistent with the Supreme Court’s decision in *Bostock* and Title IX, beginning May 10, 2021, the Department of Health and Human Services (HHS) will interpret and enforce Section 1557’s prohibition on discrimination on the basis of sex to include: (1) discrimination on the basis of sexual orientation; and (2) discrimination on the basis of gender identity. This interpretation will guide OCR in processing complaints and conducting investigations, but does not itself determine the outcome in any particular case or set of facts.

DATES: This Notification is effective May 10,2021.

FOR FURTHER INFORMATION CONTACT: Rachel Seeger at (202) 619–0403 or (800) 537–7697 (TDD).

SUPPLEMENTARY INFORMATION: HHS is informing the public that, consistent with the Supreme Court’s decision in *Bostock*¹ and Title IX², beginning May 10, 2021, the Department of

¹ *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020). https://www.supremecourt.gov/opinions/19pdf/17-1618_hfci.pdf

² Title IX of the Education Amendments of 1972, 20 U.S.C. §1681 *et seq.*
<https://www.govinfo.gov/content/pkg/CFR-2011-title45-vol1/pdf/CFR-2011-title45-vol1-part86.pdf>

Health and Human Services (HHS) will interpret and enforce Section 1557's³ prohibition on discrimination on the basis of sex to include: (1) discrimination on the basis of sexual orientation; and (2) discrimination on the basis of gender identity.

I. Background

The Office for Civil Rights (OCR) at the U.S. Department of Health and Human Services (the Department) is responsible for enforcing Section 1557 of the Affordable Care Act (Section 1557) and regulations issued under Section 1557, protecting the civil rights of individuals who access or seek to access covered health programs or activities. Section 1557 prohibits discrimination on the bases of race, color, national origin, sex, age, and disability in covered health programs or activities. [42 U.S.C. § 18116\(a\)](#).

On June 15, 2020, the U.S. Supreme Court held that Title VII of the Civil Rights Act of 1964 (Pub. L. 88-352) (Title VII)⁴'s prohibition on employment discrimination based on sex encompasses discrimination based on sexual orientation and gender identity. [Bostock v. Clayton County, GA, 140 S. Ct. 1731 \(2020\)](#). The *Bostock* majority concluded that the plain meaning of “because of sex” in Title VII necessarily included discrimination because of sexual orientation and gender identity. *Id.* at 1753-54.

Since *Bostock*, two federal circuits have concluded that the plain language of Title IX of the Education Amendments of 1972's (Title IX) prohibition on sex discrimination must be read similarly. See *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020), *as*

³ Section 1557 of the Patient Protection and Affordable Care Act. <https://www.govinfo.gov/content/pkg/USCODE-2010-title42/pdf/USCODE-2010-title42-chap157-subchapVI-sec18116.pdf>

⁴ Title VII of the Civil Rights Act of 1964 (Pub. L. 88-352) (41 CFR Part 60-20). <https://www.govinfo.gov/content/pkg/FR-2015-01-30/pdf/2015-01422.pdf>

amended (Aug. 28, 2020),⁵ *reh'g en banc denied*, 976 F.3d 399 (4th Cir. 2020), *petition for cert. filed*, [No. 20-1163 \(Feb. 24, 2021\)](#); *Adams v. Sch. Bd. of St. Johns Cnty.*, 968 F.3d 1286, 1305 (11th Cir. 2020), *petition for reh'g en banc pending*, No. 18-13592 (Aug. 28, 2020).⁶ In addition, on March 26, 2021, the Civil Rights Division of the U.S. Department of Justice issued a memorandum to Federal Agency Civil Rights Directors and General Counsel⁷ concluding that the Supreme Court's reasoning in *Bostock* applies to Title IX of the Education Amendments of 1972. As made clear by the Affordable Care Act, Section 1557 prohibits discrimination "on the grounds prohibited under . . . Title IX." [42 U.S.C. § 18116\(a\)](#).

Consistent with the Supreme Court's decision in *Bostock* and Title IX, beginning today, OCR will interpret and enforce Section 1557's prohibition on discrimination on the basis of sex to include: (1) discrimination on the basis of sexual orientation; and (2) discrimination on the basis of gender identity. This interpretation will guide OCR in processing complaints and conducting investigations, but does not itself determine the outcome in any particular case or set of facts.

In enforcing Section 1557, as stated above, OCR will comply with the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*,⁸ and all other legal requirements. Additionally, OCR will comply with all applicable court orders that have been issued in litigation involving the Section 1557 regulations, including *Franciscan Alliance, Inc. v. Azar*, 414 F. Supp. 3d 928

⁵ *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020).

<https://www.ca4.uscourts.gov/opinions/191952.P.pdf>

⁶ *Adams v. Sch. Bd. of St. Johns Cnty.*, 968 F.3d 1286, 1305 (11th Cir. 2020).

<https://media.ca11.uscourts.gov/opinions/pub/files/201813592.pdf>

⁷ March 26, 2021, the Civil Rights Division of the U.S. Department of Justice memorandum to Federal Agency Civil Rights Directors and General Counsel re: Application of *Bostock v. Clayton County* to Title IX of the Education Amendments of 1972. <https://www.justice.gov/crt/page/file/1383026/download>

⁸ Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.* <https://www.govinfo.gov/content/pkg/USCODE-2010-title42/pdf/USCODE-2010-title42-chap21B-sec2000bb-1.pdf>

(N.D. Tex. 2019)⁹; *Whitman-Walker Clinic, Inc. v. U.S. Dep't of Health & Hum. Servs.*, 485 F. Supp. 3d 1 (D.D.C. 2020)¹⁰; *Asapansa-Johnson Walker v. Azar*, No. 20-CV-2834, 2020 WL 6363970 (E.D.N.Y. Oct. 29, 2020)¹¹; and *Religious Sisters of Mercy v. Azar*, No. 3:16-CV-00386, 2021 WL 191009 (D.N.D. Jan. 19, 2021)¹².

OCR applies the enforcement mechanisms provided for and available under Title IX when enforcing Section 1557's prohibition on sex discrimination. [45 C.F.R. § 92.5\(a\)](#). Title IX's enforcement procedures can be found at [45 C.F.R. § 86.71](#) (adopting the procedures at 45 C.F.R. §§ 80.6 through 80.11 and 45 C.F.R. Part 81).

If you believe that a covered entity violated your civil rights, you may file a complaint at <https://www.hhs.gov/ocr/complaints>.

Dated:

Xavier Becerra,
Secretary, Department of Health and Human Services

⁹ *Franciscan Alliance, Inc. v. Azar*, 414 F. Supp. 3d 928 (N.D. Tex. 2019).
https://www.govinfo.gov/content/pkg/USCOURTS-nyed-1_20-cv-02834/pdf/USCOURTS-nyed-1_20-cv-02834-0.pdf

¹⁰ *Whitman-Walker Clinic, Inc. v. U.S. Dep't of Health & Hum. Servs.*, 485 F. Supp. 3d 1 (D.D.C. 2020).
<http://www.ca5.uscourts.gov/opinions/unpub/20/20-10093.0.pdf>

¹¹ *Asapansa-Johnson Walker v. Azar*, No. 20-CV-2834, 2020 WL 6363970 (E.D.N.Y. Oct. 29, 2020).
https://www.govinfo.gov/content/pkg/USCOURTS-nyed-1_20-cv-02834/pdf/USCOURTS-nyed-1_20-cv-02834-0.pdf

¹² *Religious Sisters of Mercy v. Azar*, No. 3:16-CV-00386, 2021 WL 191009 (D.N.D. Jan. 19, 2021).
<https://www.hhs.gov/sites/default/files/document-124-memorandum-opinion-and-order.pdf>