

# COMMENT

## HEALTH CARE PROVIDER DISCRIMINATION AGAINST LGBT PATIENTS IN THE 2019 HHS CONSCIENCE RIGHTS RULE

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## INTRODUCTION

In 2015, new parents Jami and Krista Contreras took their six-day-old daughter to her newborn checkup.<sup>1</sup> The couple arrived with their newborn at their chosen pediatrician's office and were directed to the examination room.<sup>2</sup> While a pediatrician entered the room, the doctor with whom Jami and Krista made their appointment never arrived.<sup>3</sup> The pediatrician explained the original doctor prayed about whether to see their child as a patient and decided she could not, thus asserting her conscience rights and refusing to see a newborn infant because her parents were lesbians.<sup>4</sup>

On May 2, 2019, the U.S. Department of Health and Human Services (HHS) moved towards limiting protections against discrimination for lesbian, gay, bisexual, and transgender (LGBT) individuals by announcing its final rule on conscience rights in health care.<sup>5</sup> The current administration announced that the rule will implement enforcement and promote religious freedom protections for providers, individuals, and other health care entities refusing to participate in certain procedures on religious grounds.<sup>6</sup>

While President Barack Obama worked to shield the LGBT community from discrimination through measures like Section 1557 of the Patient Protection and Affordable Care Act (ACA), HHS under the Trump Administration is working to actively enforce conscience rights at the expense of an LGBT population already facing challenges to health care access.<sup>7</sup> For now,

1. Abby Phillip, *Pediatrician Refuses to Treat Baby with Lesbian Parents and There's Nothing Illegal About It*, WASH. POST (Feb. 19, 2015), [https://www.washingtonpost.com/news/morning-mix/wp/2015/02/19/pediatrician-refuses-to-treat-baby-with-lesbian-parents-and-theres-nothing-illegal-about-it/?noredirect=on&utm\\_term=.8175097e9062](https://www.washingtonpost.com/news/morning-mix/wp/2015/02/19/pediatrician-refuses-to-treat-baby-with-lesbian-parents-and-theres-nothing-illegal-about-it/?noredirect=on&utm_term=.8175097e9062) (discussing conscience rights' harmful effects on the children of lesbian, gay, bisexual, and transgender (LGBT) parents).

2. *Id.*

3. *Id.*

4. Ctr. for Am. Progress, *Their Baby Was Refused Care Because They Are Gay*, YOUTUBE (July 21, 2015), [https://www.youtube.com/watch?time\\_continue=144&v=ICvqg6-yXEQ](https://www.youtube.com/watch?time_continue=144&v=ICvqg6-yXEQ).

5. Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 84 Fed. Reg. 23,170 (May 21, 2019) (to be codified at 45 C.F.R. pt. 88) [hereinafter 2019 Conscience Rights Rule]; Press Release, U.S. DEP'T OF HEALTH & HUM. SERVS., *HHS Announces Final Conscience Rule Protecting Health Care Entities and Individuals* (May 2, 2019), <https://www.hhs.gov/about/news/2019/05/02/hhs-announces-final-conscience-rule-protecting-health-care-entities-and-individuals.html>.

6. See U.S. DEP'T OF HEALTH & HUM. SERVS., *supra* note 5.

7. Compare Press Release, WHITE HOUSE OFFICE OF THE SECRETARY, *Fact Sheet: Obama Administration's Record and the LGBT Community* (June 9, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/06/09/fact-sheet-obama-administrations-record-and-lgbt-community> (summarizing President Obama's development of the first comprehensive National Human Immunodeficiency Virus (HIV) and Acquired Immunodeficiency Syndrome (AIDS)

Section 1557 of the ACA precludes health care providers from denying treatment to or harassing a patient based on sex; however, the 2019 Conscience Rights Rule conflicts with it.<sup>8</sup>

This Comment details the negative effects the 2019 Conscience Rights Rule will likely have on the LGBT community and recommends the federal government's next steps. This Comment also illustrates the conscience rights evolution and provides actions the Legislative and Judicial Branches, the states, and a future administration should take to mitigate the effects of the 2019 Conscience Rights Rule on LGBT individuals. Part II reviews the evolution of conscience rights in health care and protections against discrimination for LGBT individuals and then analyzes the 2019 HHS Conscience Rights Rule. Part III lays out the roadmap for Congress, the courts, the states, and a future administration to reaffirm a commitment to protect LGBT individuals from discrimination in health care. Part IV concludes that a future administration must take steps to protect LGBT individuals from

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strategy, support for the ban on “conversion therapy” for minors, signing legislation to repeal Don’t Ask Don’t Tell, and among other things, establishing an anti-bullying task force with resources for LGBT youth), with Sabrina Siddiqui, “Death by a Thousand Cuts”: LGBT Rights Fading Under Trump, *Advocates Say*, GUARDIAN (Mar. 30, 2017), <https://www.theguardian.com/us-news/2017/mar/30/lgbt-rights-under-trump> (discussing the Trump Administration’s decision to delete LGBT-related questions on the 2020 Census and other government surveys), and Press Release, U.S. DEP’T OF HEALTH & HUM. SERVS., *HHS Proposes to Revise ACA Section 1557 Rule to Enforce Civil Rights in Healthcare, Conform to Law, and Eliminate Billions in Unnecessary Costs* (May 24, 2019), <https://www.hhs.gov/about/news/2019/05/24/hhs-proposes-to-revise-aca-section-1557-rule.html> (proposing to revert the definition of sex so transgender individuals no longer receive protections against discrimination). This 2019 Conscience Rights Rule is just one of several actions to further enforce conscience rights. See, e.g., Press Release, WHITE HOUSE, *President Donald J. Trump Stands Up for Religious Freedom in the United States* (May 3, 2018), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-stands-religious-freedom-united-states/> (announcing President Trump’s executive order to provide faith-based and community organizations with strong advocates in the White House); @realDonaldTrump, TWITTER (July 26, 2017, 6:04 AM), <https://twitter.com/realDonaldTrump/status/890196164313833472> (declaring the military transgender ban); @realDonaldTrump, TWITTER (July 26, 2017, 6:08 AM), <https://twitter.com/realDonaldTrump/status/890197095151546369> (justifying the ban due to the “tremendous medical costs and disruption” that the military allegedly faces from transgender service members).

8. See Dana Holle, Comment, *Health is Health: Section 1557 of the Affordable Care Act and Transgender Healthcare Rights in Wisconsin and the United States*, 32 WIS. J.L. GENDER & SOC’Y 239, 244–45 (2017) (expanding on additional background about the Section 1557 rule); see *infra* Part I(B). *Contra* Press Release, U.S. DEP’T OF HEALTH & HUM. SERVS., *HHS Proposes to Revise ACA Section 1557 Rule to Enforce Civil Rights in Healthcare, Conform to Law, and Eliminate Billions in Unnecessary Costs* (May 24, 2019), <https://www.hhs.gov/about/news/2019/05/24/hhs-proposes-to-revise-aca-section-1557-rule.html>.

health care discrimination and reallocate resources from conscience rights complaints to other types of discrimination.<sup>9</sup>

## I. BACKGROUND

### A. *The Transformation of Conscience Rights*

The modern debate about conscience rights is not significantly different from the Founding Fathers' original beliefs.<sup>10</sup> Tension between nondiscrimination and religious liberty continues to exist; conscience rights today still favor the beliefs of Christian-based religions.<sup>11</sup> However, the substance of the conscience rights debate is drastically different today than those matters discussed in the late 1700s.<sup>12</sup> Conscience rights and clauses are found in state and federal regulations and laws.<sup>13</sup> Today, the conscience rights debate

9. While solutions may come from other parts of the government, a future administration presents perhaps the quickest route to a solution.

10. Some Founding Fathers felt conscience rights applied selectively to Protestants and limited to religious beliefs, while others advocated that an equal right should protect the conscience based on both religious and nonreligious beliefs. See Nathan S. Chapman, *Disentangling Conscience and Religion*, 2013 U. ILL. L. REV. 1457, 1463–70 (2013) (expanding on the beliefs of the Founding Fathers about liberty of conscience and religious liberty); see also Carl H. Esbeck, *Uses and Abuses of Textualism and Originalism in Establishment Clause Interpretation*, 2011 UTAH L. REV. 489, 534–35 (2011) (providing Madison's logic behind including nonreligious beliefs in conscience protections).

11. Nancy K. Kubasek et al., *The Questionable Constitutionality of Conscientious Objection Clauses for Pharmacists*, 16 J.L. & POL'Y 225, 247 n.101 (2007) (providing an example of the bias against non-Christian religious beliefs). But see Emma Green, *Trump Backs Health-Care Workers Who Object to Providing Abortions*, ATLANTIC (Jan. 18, 2018), <https://www.theatlantic.com/politics/archive/2018/01/conscience-objections/550775/> (citing an Orthodox rabbi who feels members of his religion should support the renewed focus on conscience rights and pointing to support from members outside conservative Christian circles).

12. Compare Esbeck, *supra* note 10, at 534–37 (summarizing Madison's fears that the absence of an equal right of conscience may lead to inadequate protections for the "non-Christian and the nonreligious" based on his knowledge of the public opposition to clauses like the Religious Test Clause that would enable "Jews, Turks, and infidels' to serve in government"), with Courtney Miller, Note, *Reflections on Protecting Conscience for Health Care Providers: A Call for More Inclusive Statutory Protection in Light of Constitutional Considerations*, 15 S. CAL. REV. L. & SOC. JUST. 327, 328–29, 355–62 (2006) (detailing the genesis of modern conscience clauses since the legalization of abortion and recommending a broadening of conscience protections while also maintaining patient protections).

13. See Martha S. Swartz, "Conscience Clauses" or "Unconscionable Clauses": Personal Beliefs versus Professional Responsibilities, 6 YALE J. HEALTH POL'Y, L. & ETHICS 269, 281 n.56 (2006) (citing ARIZ. REV. STAT. ANN. § 36-2151 (2005) (enacted 1973); N.J. STAT. ANN. §§ 2A:65A-1—2A:65A-2 (West 2005) (enacted 1974); NEV. REV. STAT. ANN. § 632.475 (West 2005)

revolves around issues in health care and marriage that did not exist at the birth of the Nation.<sup>14</sup> The modern debate involves a physician's right to refuse to perform an abortion or a sterilization procedure,<sup>15</sup> a pharmacist's right to refuse to fill an abortifacient medicine,<sup>16</sup> and among other things, a health care provider's right to refuse to participate in physician-assisted suicide.<sup>17</sup>

In modern times, conscience rights are most often associated with abortion rights.<sup>18</sup> Although past presidents played a major role in conscience rights development, the catalyst to the perceived need to strengthen these rights emerged when the Supreme Court of the United States issued its opinion in *Roe v. Wade*.<sup>19</sup> Thus, while abortion rights are beyond the scope of this Comment, an objective consideration of this debate is vital to understanding how conscience rights may affect discrimination against LGBT individuals. Following *Roe v. Wade*, members of the U.S. Congress worried that the Supreme Court's opinion would force health care providers to participate in abortions

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(enacted 1973); UTAH CODE ANN. § 76-7-306(2) (West 2005) (enacted 1974)); *see also* *Conscience and Refusal Clauses*, REWIRE.NEWS (Sept. 12, 2018), <https://rewire.news/legislative-tracker/law-topic/conscience-and-refusal-clauses> (discussing the reach of conscience rights); *see also infra* notes 20–22 and accompanying text (outlining existing federal laws and regulations).

14. *Conscience Protections for Health Care Providers*, U.S. DEP'T OF HEALTH & HUM. SERVS. (Mar. 22, 2018), <https://www.hhs.gov/conscience/conscience-protections/index.html> (explaining that an individual may file a complaint to the U.S. Department of Health and Human Services (HHS) Office of Civil Rights (OCR) if the individual experiences discrimination based on, among other things, an objection to participating in abortion and sterilization or a refusal to provide health care items or services that may cause the death of an individual); *see* Nancy K. Kubasek et al., *supra* note 11, at 225–32 (comparing the breadth of conscience rights laws across states and concluding four major conscientious objection laws exist in states: 1) conscientious objection laws that do not include birth control, 2) conscientious objection laws that could apply to birth control, 3) statutes that apply to birth control and not pharmacists, and 4) statutes that apply to birth control and pharmacists).

15. *See* Mara Gordon, *For Doctors Who Want to Provide Abortions, Employment Contracts Often Tie Their Hands*, NPR (Nov. 26, 2018), <https://www.npr.org/sections/health-shots/2018/11/26/668347657/for-doctors-who-want-to-provide-abortion-employment-contracts-often-tie-their-h>.

16. *See* Elizabeth Chuck, *Can a Pharmacist Legally Deny a Patient a Prescription? It Depends*, NBC NEWS (July 28, 2018), <https://www.nbcnews.com/news/us-news/can-pharmacist-legal-ly-deny-patient-prescription-it-depends-n894871>.

17. *See* Alex Schadenberg, *Proposed Bill Will Cause Explosion of Physician Assisted Suicide in New Mexico*, LIFE SITE (Dec. 21, 2018), <https://www.lifesitenews.com/opinion/proposed-bill-will-cause-explosion-of-assisted-suicide-in-new-mexico>; *see also* Swartz, *supra* note 13, at 269–77 (illustrating situations where conscience rights have been asserted).

18. *See* Maya M. Noronha, *Removing Conscience from Medicine: Turning the Hippocratic Oath into a Hypocrite's Pledge*, 23 GEO. J. LEGAL ETHICS 733, 736 (2010) (explaining that conscience clauses came into existence to ensure physicians could not be coerced to perform abortions).

19. *See* 410 U.S. 113 (1973) (legalizing abortion); *see also* Noronha, *supra* note 18, at 734–36.

against their will and contrary to their religious beliefs.<sup>20</sup> As a result, Congress passed the first modern federal conscience clause through the Church Amendments, and several other provisions followed.<sup>21</sup> In total today, approximately twenty-five federal conscience rights laws exist.<sup>22</sup> However, President George W. Bush enacted a previous iteration of the 2019 Conscience Rights Rule shortly before leaving office—the controversial midnight provider refusal rule asserting a broad interpretation of conscience rights.<sup>23</sup>

Upon taking office, President Obama returned a focus to providers' conscience rights, patient protections against discrimination, and the midnight

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20. See Noronha, *supra* note 18, at 736 (detailing the birth of modern conscience rights).

21. The Church Amendments, passed following *Roe v. Wade*, stated that the federal government may not impose any requirements to perform sterilizations or abortions against moral convictions or religious beliefs to receive federal grants, loans, or contracts. See Church Amendments, 42 U.S.C. § 300a-7 (2012) (the earliest of modern conscience rights statute). *But see* William L. Saunders & Michael A. Frago, *Conscience Protection in Health and Human Services*, 10 ENGAGE: J. FEDERALIST SOC'Y PRACT. GROUPS 115, 115 n.3 (2009) (describing the congressional climate in 2009 and stating that the Weldon Amendment as an appropriations rider is more "vulnerable in a hostile Congress, which can simply remove it during the next round of appropriations"). See generally Shawna S. Baker, *Where Conscience Meets Desire: Refusal of Health Care Providers to Honor Health Care Proxies for Sexual Minorities*, 31 WOMEN'S RTS. L. REP. 1, 14-15 (2009) (discussing early conscience rights). Congress then passed the Coats-Snowe Amendment during the Clinton Administration, and then the Weldon Amendment passed for the first time during President George W. Bush's term. The Coats-Snowe Amendment applies conscience rights requirements to federal, state, or local programs receiving federal funds and prohibits residency programs and other training programs from discriminating against residents and physicians who decline abortion training. 42 U.S.C. § 238n. The Weldon Amendment, which appears in each annual HHS appropriations bill, prohibits appropriations to any government agency—local, state, or federal—that discriminates against health care entities that refuse to provide abortion services. Consolidated Appropriations Act, Pub. L. No. 108-447, 118 Stat. 2809 (2005).

22. Katie Keith, *Trump Administration Finalizes Religious and Moral Exemptions for Health Care Workers*, HEALTH AFFAIRS BLOG (May 3, 2019), <https://www.healthaffairs.org/doi/10.1377/hblog20190503.960127/full/>.

23. This broad interpretation meant that any employee of a health care provider fell under conscience rights protections. The rule also stated that funding recipients would need to certify compliance with this law to receive funding. See Jane W. Walker, Comment, *The Bush Administration's Midnight Provider Refusal Rule: Upsetting the Emerging Balance in State Pharmacist Refusal Laws*, 46 HOUS. L. REV. 939, 961 (2009) (establishing that referral clauses have existed since 1973 and reasoning that in 2008, HHS became concerned with violations of federal nondiscrimination laws); see also Baker, *supra* note 21, at 18 (examining the impact of the Weldon Amendments); Robert Pear, *Protests Over a Rule to Protect Health Providers*, N.Y. TIMES (Nov. 17, 2008), <https://www.nytimes.com/2008/11/18/washington/18abort.html?sq=stuart+is+himaru&sc=1&st=cse> (explaining the motivation behind the final midnight rule).

provider refusal rules.<sup>24</sup> Through the ACA, Congress redefined conscience rights and directed HHS to promulgate rules to further clarify nondiscrimination protections.<sup>25</sup> HHS, under the Obama Administration, issued a rule to rescind the Bush midnight provider refusal rule because of its potential effect on limiting access to reproductive health treatment, including emergency services and treatment for patients with Human Immunodeficiency Virus (HIV) and Acquired Immunodeficiency Syndrome (AIDS).<sup>26</sup>

### *B. Nondiscrimination Protections for LGBT Individuals in Health Care*

Major nondiscrimination provisions in health care were first enacted through the Civil Rights Act of 1964.<sup>27</sup> Prior to the passage of the Civil Rights Act, dentists' offices, nursing homes, and hospitals remained segregated.<sup>28</sup> The law prohibited the use of federal money to support patient segregation by race, which in turn led to nearly ninety-two percent of American hospitals integrated by 1966; however, Title VI did not prohibit discrimination on the basis of gender or eliminate racial discrimination.<sup>29</sup>

In 2008, the Obama Administration sought an active role in limiting festering discrimination.<sup>30</sup> The LGBT community benefitted from this work through inclusion in nondiscrimination clauses and equality in health care, particularly through Section 1557 of the ACA.<sup>31</sup> The statute directed HHS

24. See Douglas Nejaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 *YALE L.J.* 2516, 2541 n.101 (2015); see also Matthew S. Nosanchuk, *The Endurance Test: Executive Power and the Civil Rights of LGBT Americans*, 5 *ALB. GOV'T L. REV.* 440, 461–63 (2012) (demonstrating President Obama's work to advance LGBT rights in health care and other areas of society).

25. This measure is also commonly known as Section 1557 of the Patient Protection and Affordable Care Act (ACA). 42 U.S.C. § 18116.

26. See Sameer Ahmed, *Religious Right to Refuse Service: Accommodating Muslims in a "Christian" America*, 7 *ALB. GOV'T L. REV.* 379, 406 (2014).

27. Civil Rights Act of 1964, Pub. L. 88–352, 78 Stat. 241 (1964).

28. See Sidney D. Watson, *Section 1557 of the Affordable Care Act: Civil Rights, Health Reform, Race, and Equity*, 55 *HOW. L.J.* 855, 860 (2012).

29. Hospitals also no longer asked patients whether they preferred to share a room with a person of another race. See Watson, *supra* note 28, at 863–65 (discussing the effects of the hospital desegregation campaign).

30. Holle, *supra* note 8, at 243.

31. Section 1557 addressed persistent discrimination and previous iterations of conscience rights rules through both statutory and regulatory provisions, incorporating several preexisting statutes into its nondiscrimination protections. This Section prohibits discrimination on the basis of race, color, national origin, age, disability, and sex in health programs receiving federal assistance. Section 1557 applies to providers accepting Medicare, insurance companies, hospitals, and clinics, among other groups. Section 1557 of the ACA, 42 U.S.C.

to promulgate a rule to clarify the classification of groups included within the nondiscrimination protections of Section 1557.<sup>32</sup> The final rule, issued on July 18, 2016, asserted that LGBT individuals fall within the nondiscrimination clause of the ACA, including one's internal sense of gender and sex stereotyping.<sup>33</sup> The rule prohibited the categorical exclusion of insurance coverage for gender transitions, gender dysphoria, and related conditions.<sup>34</sup> It also explicitly asserted that Section 1557 created a private right of action with a single standard for discrimination claims in health care.<sup>35</sup>

Unfortunately, victory was short-lived. Judge Reed O'Connor issued a nationwide preliminary injunction on December 31, 2016, to prohibit the HHS Office of Civil Rights (OCR) from enforcing portions of the nondiscrimination clause.<sup>36</sup> He opined that the HHS rule exceeded the statutory definition of sex in Section 1557.<sup>37</sup> As a result of this case, HHS recently issued a new proposed rule to limit the definition of sex in Section 1557.<sup>38</sup> Additionally, the ACA remains under judicial review.<sup>39</sup>

### C. *The HHS Conscience Rights Rule for Health Care Providers*

Under the Trump Administration, HHS is working to not only fortify conscience rights, but also to ensure they are actively asserted and upheld at the expense of the vulnerable.<sup>40</sup> On May 2, 2019, HHS announced a final rule

§ 18116; Walker, *supra* note 23, at 961.

32. 42 U.S.C. § 18116.

33. See 45 C.F.R. § 92.4 (2016) (“On the basis of sex includes, but is not limited to, discrimination on the basis of pregnancy, false pregnancy, termination of pregnancy, or recovery therefrom, childbirth or related medical conditions, sex stereotyping, and gender identity.”).

34. 45 C.F.R. § 92.207.

35. 45 C.F.R. § 92.301.

36. See *Franciscan All. v. Burwell*, 227 F. Supp. 3d 660, 689 (N.D. Tex. 2016) (finding that HHS expanded the definition of sex discrimination beyond the definition in Section 1557). *But see* *Flack v. Wis. Dep’t of Health Servs.*, 328 F. Supp. 3d 931, 950–51 (W.D. Wis. 2018) (clarifying that discrimination based on transgender status is included under Section 1557’s “on the basis of sex”); *Boyden v. Conlin*, 341 F. Supp. 3d 979, 999 (W.D. Wis. 2018) (dismissing defendant’s claim that Section 1557’s “on the basis of sex” excludes transgender status); *Prescott v. Rady Children’s Hosp.*, 265 F. Supp. 3d 1090, 1099 (S.D. Cal. 2017) (deciding gender discrimination claim stands under the ACA for transgender man); *infra* Part (II)(B)(1) (expanding on Section 1557).

37. *Franciscan All.*, 227 F. Supp. 3d at 689.

38. Press Release, U.S. DEP’T OF HEALTH & HUM. SERVS., *supra* note 7.

39. The Fifth Circuit Court of Appeals recently heard oral arguments justifying why the entire ACA should be gutted. Oral Argument, *Texas v. United States*, No. 19-10011 (5th Cir. July 9, 2019), [http://www.ca5.uscourts.gov/OralArgRecordings/19/19-10011\\_7-9-2019.mp3](http://www.ca5.uscourts.gov/OralArgRecordings/19/19-10011_7-9-2019.mp3).

40. This 2019 Conscience Rights Rule is just one of several actions taken to strengthen



entitled “Protecting Statutory Conscience Rights in Health Care: Delegation of Authority” (2019 Conscience Rights Rule).<sup>41</sup> Through this rule, HHS aims to raise awareness and enforcement of federal health care conscience rights laws and related anti-discrimination laws to mitigate the confusion they allege that the 2011 Obama rule created over the requirements of the conscience laws and the OCR’s enforcement authority.<sup>42</sup> Through strengthened enforcement, this rule facilitates health care entities to refuse to participate in abortions, hysterectomies for both LGBT and non-LGBT individuals, and assisted suicides, among other things.<sup>43</sup> Although the rule and announcement do not explicitly acknowledge that it will allow for discrimination against LGBT individuals, new definitions will protect health care providers refusing to treat LGBT individuals based on the discussion accompanying the rule, specifically citing a case involving an LGBT individual seeking medical care related to their status as a member of the LGBT community.<sup>44</sup> Ultimately, this rule will create additional barriers to accessing health care for the LGBT community and protect providers who refuse to treat LGBT individuals.<sup>45</sup>

In considering the rule’s effect on the LGBT community, several important concepts stand apart from other provisions within the rule. First, the rule reverts the definition of the phrase “assist in the performance” to a more forceful definition that was used in the 2008 Bush midnight provider refusal rule, widening its reach by stating that an individual is protected from discrimination for refusing to participate in a procedure or activity with a “specific, reasonable, and articulable connection to furthering a procedure or a part of a health service program or research activity . . . .”<sup>46</sup> The

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enforcement of conscience rights, while the current Administration has not discussed increasing enforcement for other areas of discrimination. See 2019 Conscience Rights Rule, 84 Fed. Reg. 23,170 (May 21, 2019) (to be codified at 45 C.F.R. pt. 88).

41. *Id.*

42. *Id.*

43. See *id.* at 23,170, 23,178 (citing to, among other cases and statutes, 42 U.S.C. § 18113 (2012) (assisted suicide), *ACLU v. Trinity Health Corp.*, 178 F. Supp. 3d 614 (E.D. Mich. 2016) (abortion), and *Minton v. Dignity Health*, No. CGC 17-558259 (Cal. Super. Ct. filed Sept. 19, 2017) (hysterectomy for an LGBT individual)).

44. 2019 Conscience Rights Rule, 84 Fed. Reg. 23,170; accord *Minton*, No. CGC 17-558259 (patient sought a hysterectomy but provider refused due to patient’s gender identity despite performing the same procedure on cisgender patients).

45. Sharita Gruberg & Frank J. Bewkes, *The ACA’s LGBTQ Nondiscrimination Regulations Prove Crucial*, CTR. FOR AM. PROGRESS (Mar. 7, 2018), <https://www.americanprogress.org/issues/LGBTQ/reports/2018/03/07/447414/acas-LGBTQ-nondiscrimination-regulations-prove-crucial/>.

46. Compare 2019 Conscience Rights Rule, 84 Fed. Reg. at 23,263 (defining the phrase assist in the performance), with HHS Complaint Handling and Investigating, 45 C.F.R. § 88.2

announcement of the final rule establishes the rule is broad and clarifies that individuals such as ambulance drivers and those who prepare a surgery room for a procedure such as an abortion would qualify as assisting in the performance of an abortion.<sup>47</sup>

Assisting in the performance of a procedure or service may include counseling and referrals within the rule.<sup>48</sup> The proposed rule expands the definition of referrals to include the provision of any type of information that may lead to a patient obtaining a health care service or procedure that the health care entity opposes.<sup>49</sup> Thus, a health care entity may restrict information provided to a patient about the procedure if the entity believes that information could assist the patient in obtaining the objected service.<sup>50</sup> OCR directly addresses the effects on LGBT individuals, stating that Congress did not tie conscience rights to specific treatments but instead evaluates claims on a case-by-case basis.<sup>51</sup>

Further, the rule broadens the scope of individuals included in the term health care entity and creates a new definition for the term entity.<sup>52</sup> This definition includes health care professionals traditionally protected by conscience rights; however, the rule also includes persons (including individuals and corporations), states, public agencies, and foreign nongovernmental organizations, allowing for a larger number of potential assertions of conscience rights.<sup>53</sup>

HHS justifies the need for this rule by citing that no private right of action exists for health care entities whose conscience rights are violated.<sup>54</sup> To address this perceived problem, HHS included specific enforcement authorities within the rule.<sup>55</sup> OCR may temporarily withhold or deny federal funds,

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(2009) (defining “assist in the performance” as participating “in any activity with a reasonable connection to a procedure, health service, or health service program, among other things).

47. 2019 Conscience Rights Rule, 84 Fed. Reg. at 23,188.

48. *Id.* at 23,263.

49. *Id.* at 23,264.

50. *Id.* at 23,263–64.

51. *Id.* at 23,189.

52. *Id.* at 23,263–64.

53. *Id.*

54. Courts have consistently held that the conscience rights statutes do not create a private right of action for enforcement. *Cf.* *Cenzon-DeCarlo v. Mount Sinai Hosp.*, 626 F.3d 695, 699 (2d Cir. 2010) (Church Amendment); *Nat’l Inst. of Family & Life Advocates v. Rauner*, No. 3:16-cv-50310, slip op. at 4 (N.D. Ill. July 19, 2017) (dismissing several issues and holding that the Coats-Snowe Amendment does not include a private right of action); *and* *Vt. All. for Ethical Healthcare, Inc. v. Hoser*, 274 F. Supp. 3d 227, 240 (D. Vt. 2017) (ACA conscience rights provisions, 42 U.S.C. § 18113 (2012)).

55. 2019 Conscience Rights Rule, 84 Fed. Reg. at 23,271.

suspend award activities, or among other things, refer the matter to the Attorney General of the United States for proceedings to enforce the rights of the United States or obligations of federal contracts on grant recipients.<sup>56</sup>

Prior to announcing this rulemaking, the Trump Administration publicized the creation of a Conscience and Religious Freedom Division within the OCR to focus on federal enforcement of conscience rights claims.<sup>57</sup> HHS also proposed rules finalized in November 2018 to protect conscience rights in health insurance coverage, allowing for insurance companies to offer insurance coverage that excludes services and treatments like abortion, potentially indicating a turning tide on this issue.<sup>58</sup> The federal government must take corrective action to address this major policy shift.

## II. A ROADMAP TO CORRECT AN UNJUSTIFIED RULE

Ideally, the Trump Administration would amend the 2019 Conscience Rights Rule, but it will likely ignore this recommendation.<sup>59</sup> Thus, Congress, courts, states, and a future administration must mitigate the problems arising from this rule's adoption.

### A. *U.S. Congress*

In Congress, solutions take years to become law. To address the 2019 Conscience Rights Rule, Congress should consider legislative fixes to solidify LGBT protections through statute. If this is not politically tenable, Congress should at least strengthen nondiscrimination protections in emergency medical situations. Without action, Congress will see new challenges arise because the LGBT population is aging, and health care needs will continue to increase; an

56. *Id.*

57. At its inception, OCR Director Roger Severino stated that conscience claims will no longer be met with “hostility instead of protection” through the work of this division. *HHS Announces New Conscience and Religious Freedom Division*, U.S. DEP’T OF HEALTH & HUM. SERVS. (Jan. 18, 2018), <https://www.hhs.gov/about/news/2018/01/18/hhs-ocr-announces-new-conscience-and-religious-freedom-division.html>.

58. Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57,592 (Nov. 15, 2018) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, and 45 C.F.R. pt. 147); *Trump Administration Issues Final Rules Protecting Conscience Rights in Health Insurance*, U.S. DEP’T OF HEALTH & HUM. SERVS. (Nov. 7, 2018), <https://www.hhs.gov/about/news/2018/11/07/trump-administration-issues-final-rules-protecting-conscience-rights-in-health-insurance.html>.

59. See generally Michael D. Shear & Charlie Savage, *In One Day, Trump Administration Lands 3 Punches Against Gay Rights*, N.Y. TIMES (July 27, 2017), <https://www.nytimes.com/2017/07/27/us/politics/white-house-lgbt-rights-military-civil-rights-act.html> (detailing actions taken by the Trump Administration that may negatively impact LGBT rights).

estimated six million LGBT individuals will be sixty-five years and older by 2030.<sup>60</sup> This segment of the population will critically need health care.<sup>61</sup>

To address the health care access problem from this rule, Congress should make a stronger commitment to the LGBT community by passing a legislative measure that clearly extends antidiscrimination protections to LGBT individuals. Codifying a provision similar to the 2016 HHS rules that clearly include LGBT individuals under Section 1557's "on the basis of sex" provision would solidify the legislative intent of Congress.<sup>62</sup> While political viability of such a bill is difficult to measure currently, one of the more promising vehicles proposed in the 116th Congress is the Equality Act.<sup>63</sup> Senator Jeff Merkley (D-OR) and Representative David Cicilline (D-RI-1) introduced this Bill, which received wide support from Democrats.<sup>64</sup> The Equality Act would extend the prohibition of discrimination or segregation of Section 201 of the Civil Rights Act of 1964 to discrimination based on sex, sexual orientation, and gender identity in public accommodations or programs that receive federal funding, among other things.<sup>65</sup> These public accommodations would include any establishment that provides health care.<sup>66</sup>

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60. See Nancy J. Knauer, *LGBT Elder Law: Toward Equity in Aging*, 32 HARV. J.L. & GENDER 1, 8 (2009).

61. See *id.* at 3-4 (describing limited research demonstrating that LGBT elders are often isolated from family and more susceptible to discrimination and hostility from health care providers).

62. See generally Alexis M. Florczak, Note, *Make America Discriminate Again? Why Hobby Lobby's Expansion of RFRA is Bad Medicine for Transgender Health Care*, 28 HEALTH MATRIX 431, 455-57 (2018) (providing a discussion of the viability of Section 1557's sex protections).

63. In the 116th Congress, Senator Kamala Harris (D-CA) and Representative Joseph Kennedy (D-MA-4) introduced a similar Bill with a different statutory mechanism—the Do No Harm Act, which would have amended the Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. § 2000bb (2012)), so that it could not be used to discriminate against certain groups, including discrimination based on sexual orientation or gender identity. See Florczak, *supra* note 62, at 462-66 (offering the Do No Harm Act as a solution to LGBT discrimination in health care). Compare Equality Act, S. 788, 116th Cong. (2019) (receiving support from a total of forty-seven Senators, including forty-four Democrats, two Independents, and one Republican), and Equality Act, H.R. 5, 116th Cong. (2019) (receiving support from 241 Representatives, including 238 Democrats and three Republicans), with Do No Harm Act, S. 593, 116th Cong. (2019) (receiving support from twenty-eight Democratic Senators), and Do No Harm Act, H.R. 1450, 116th Cong. (2019) (receiving support from 136 Democratic Representatives).

64. Although it is unlikely for a bill on this issue to move beyond a Republican Senate, the House already passed its version of the bill, which could place pressure moderate Senators for their support. Equality Act, S. 788, 116th Cong. (2019); Equality Act, H.R. 5, 116th Cong. (2019).

65. The Bill would also allow the U.S. Department of Justice to take civil actions against individuals who deny equal protection to LGBT individuals. Equality Act, H.R. 5, 116th Cong. (2019).

66. See *id.* ("(4) any establishment that provides a good, service, or program, including a

The policy behind the Equality Act is strong, but, based on current support, it likely will not stand the trials of the current Republican Senate in the 116th Congress.<sup>67</sup> Thus, a weaker bill with increased viability might serve as a temporary solution to minimize the harm of this 2019 Conscience Rights Rule. Such a bill could come in the form of a strengthened Emergency Medical Treatment and Active Labor Act (EMTALA).<sup>68</sup>

When health care providers refuse medical care to LGBT individuals, patients turn to emergency rooms; these patients may be the victims of both intentional and unintentional patient dumping based on sexual orientation or gender identity.<sup>69</sup> Congress enacted EMTALA to combat these problems.<sup>70</sup> However, under EMTALA, physicians may still refuse to provide preventative services to LGBT individuals through emergency rooms but the Act ensures patients receive the minimum required care.<sup>71</sup>

Congress should strengthen EMTALA and require hospitals to move beyond stabilization to ensure patients receive adequate treatment, regardless of their LGBT status, and increase the burden of proof required of hospitals to defend against claims of discrimination.<sup>72</sup> This legislation must state that

store, shopping center, online retailer or service provider, salon, bank, gas station, food bank, service or care center, shelter, travel agency, or funeral parlor, or establishment that provides health care, accounting, or legal services.<sup>73</sup>)

67. However, with additional Democrats in the Senate, even without a majority, it could again be possible to gain the support of moderate Senators. Equality Act, S. 788, 116th Cong. (2019); Equality Act, H.R. 5, 116th Cong. (2019).

68. The Emergency Medical Treatment and Active Labor Act (EMTALA) became law through the Consolidated Omnibus Budget Reconciliation Act of 1985, 42 U.S.C. § 1395dd (2012). See Derek Waller, Note, *Recognizing Transgender, Intersex, and Nonbinary People in Healthcare Antidiscrimination Law*, 103 MINN. L. REV. 467, 516–17 n.339 (2018) (explaining the purpose of EMTALA).

69. In 1986, Congress enacted EMTALA to avoid patient dumping that resulted from economic discrimination in hospital emergency departments. Patient dumping is when hospitals inappropriately release individuals either to other hospitals or without alternative care. See Nathan S. Richards, *Judicial Resolution of EMTALA Screening Claims at Summary Judgment*, 87 N.Y.U. L. REV. 591, 597 (2012).

70. EMTALA requires emergency departments to provide medical screening and stabilization in a nondiscriminatory way. See Victoria K. Perez, Comment, *EMTALA: Protecting Patients First by Not Deferring to the Final Regulations*, 4 SETON HALL CIR. REV. 149, 151–52, 155, 159 (2007) (detailing the history of EMTALA).

71. Waller, *supra* note 68, at 516–17 (2018).

72. But see Tristan Dollinger, *America's Unraveling Safety Net: EMTALA's Effect on Emergency Departments, Problems and Solutions*, 98 MARQ. L. REV. 1759, 1772 (2015) (highlighting the funding strains on hospitals as a result of EMTALA). See generally Richards, *supra* note 69, at 591 (supporting an increased evidentiary burden on hospitals to establish standard stabilization procedures under the current EMTALA).

EMTALA preempts any conscious rights protection.<sup>73</sup> It would not allow an individual to choose to visit a provider consistently, but it would ensure emergency care is always available.<sup>74</sup>

Some have considered whether the legislative branch should adopt a law requiring health care institutions to place patients on notice that they may not receive treatment or receive medical advice contrary to the beliefs held by certain health care providers within the practice.<sup>75</sup> This legislative approach fails to provide access to health care and instead allows persistent discrimination.<sup>76</sup> While LGBT individuals should not be forced to face discrimination directly, the problem of access to health care is not solved—or even limited—by the suggestion. Above all, conscience rights must not conflict with patient care.<sup>77</sup> While Congress may continue to lack the political will for this type of legislation, the courts are already receiving litigation challenging the rule and must prepare for the increased burden of litigation certain to come from the 2019 Conscience Rights Rule.

### B. The Courts

The courts possess the most potential to remedy the conscience rights protection issues caused by the 2019 Conscience Rights Rule. Many states are

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73. OCR states that EMTALA and conscience rights do not conflict and intends to “give all laws their fullest possible effect.” 2019 Conscience Rights Rule, 84 Fed. Reg. 23,170, 23,183 (May 21, 2019) (to be codified at 45 C.F.R. pt. 88). However, the inclusion of emergency protection provisions within the rule had the support of the American College of Emergency Physicians. See Paul D. Kivela, American College of Emergency Physicians President, Comment Letter on 2019 Proposed Conscience Rights Rule (Mar. 27, 2018), <https://www.regulations.gov/contentStreamer?documentId=HHS-OCR-2018-0002-71219&attachmentNumber=1&contentType=pdf> (stating that the rule will force hospitals to maintain additional personnel around-the-clock to serve as substitutes for conscience objectors).

74. See Nejaime & Siegel, *supra* note 24, at 2574–78 (2015) (discussing the intangible dignitary harms of refusal of care).

75. Note that this approach was originally considered with the aim of allowing conscience rights assertions while attempting to inform patients that conscience rights assertions may affect their treatment recommendations. The approach sought to avoid situations where a patient is simply not made aware that other treatment options are available due to conscience rights assertions. Nadia N. Sawicki, *Mandating Disclosure of Conscience-Based Limitations on Medical Practice*, 42 AM. J.L. & MED. 85, 127–28 (2016) (discussing the resulting harms patients may face if disclosures about conscience limitations in health care settings were mandated).

76. Sawicki acknowledges that this approach fails to address access and also admits that it will not protect patients from indignity. *Id.* at 128.

77. Jill Morrison & Nicole Allekotte, *Duty First: Towards Patient-Centered Care and Limitations on the Right to Refuse for Moral, Religious or Ethical Reasons*, 9 AVE MARIA L. REV. 141, 168 (2010).

already filing lawsuits over the final rule.<sup>78</sup> In issuing their opinions, the courts must establish a consistent approach on conscience rights and LGBT protections against discrimination under Section 1557. The courts' judicial review of agency actions should include the congressional intent of the ACA.

### 1. *Considering Congressional Intent*

The 2019 Conscience Rights Rule is at odds with congressional intent. The rule directly conflicts with the congressional intent of previous iterations of the Conscience Rights Rule and Section 1557 of the ACA in cases where a health care provider asserts conscience rights and denies a transgender patient care.<sup>79</sup> When the ACA became law in 2010, it included conscience rights and protections for LGBT individuals against discrimination.<sup>80</sup> This rule upset the balance once existing between these two priorities through its broadened definitions of terms.<sup>81</sup> While previous conscience rights statutes and rules never included such a broad swath of individuals, this rule will protect individuals objecting to a procedure regardless of involvement—or lack thereof—in performing the procedure.<sup>82</sup> Unlike the 2008 rule, the 2019 rule may embolden health care entities covered under the rule to refuse to treat LGBT patients simply based on their LGBT status.<sup>83</sup> It would also protect

78. *E.g.*, Complaint for Declaratory and Injunctive Relief, *California v. Azar*, No. 3:19-cv-02769 (N.D. Cal. May 21, 2019); Complaint for Declaratory and Injunctive Relief, *New York v. Azar*, No. 1:19-cv-04676 (S.D.N.Y. May 21, 2019). As of this writing, the U.S. Department of Justice on behalf of OCR agreed to postpone the effective date of the rule until November 22, 2019, as a result of these cases. Katie Keith, *Provider Conscience Rule Delayed Due to Lawsuits*, HEALTH AFF. (July 2, 2019), <https://www.healthaffairs.org/doi/10.1377/hblog.20190702.497856/full/>.

79. Steve Gorman, *U.S. Judge Blocks Transgender, Abortion-Related Obamacare Protections*, REUTERS (Dec. 31, 2016), <https://www.reuters.com/article/us-usa-obamacare/u-s-judge-blocks-transgender-abortion-related-obamacare-protections-idUSKBN14L0OP>.

80. U.S. DEP'T OF HEALTH & HUM. SERVS. OFF. FOR C.R. FACT SHEET: YOUR RIGHTS UNDER THE FEDERAL HEALTH CARE PROVIDER CONSCIENCE PROTECTION LAWS (May 2012), [https://www.hhs.gov/sites/default/files/ocr/civilrights/provider\\_conscience\\_factsheet.pdf](https://www.hhs.gov/sites/default/files/ocr/civilrights/provider_conscience_factsheet.pdf).

81. *See supra* Part I(C) (expanding on the differences between definitions).

82. James L. Madara, American Medical Association Chief Executive Officer and Executive Vice President, Comment Letter on 2019 Proposed Conscience Rights Rule (Mar. 27, 2018), <https://www.regulations.gov/contentStreamer?documentId=HHS-OCR-2018-0002-70564&attachmentNumber=1&contentType=pdf>.

83. Arthur C. Evans Jr., American Psychological Association Chief Executive Officer, Comment Letter on 2019 Proposed Conscience Rights Rule (Mar. 26, 2018), <https://www.regulations.gov/contentStreamer?documentId=HHS-OCR-2018-0002-71132&attachmentNumber=1&contentType=pdf>.

health care entities who refuse to provide information to the patients seeking medical care.<sup>84</sup>

Several district courts have issued opinions supporting the conclusion that Section 1557 alone, without considering any accompanying regulations, creates a private right of action and specifically protects transgender individuals from discrimination by health care entities.<sup>85</sup> However, the district courts are not in a consensus that Section 1557's "on the basis of sex" includes gender identity and protections from sex stereotyping.<sup>86</sup>

In 2016, Judge Reed O'Connor issued a nationwide preliminary injunction in *Franciscan Alliance v. Burwell*<sup>87</sup> to halt the inclusion of sexual orientation and gender identity within the definition of sex as found in the 2016 rule.<sup>88</sup> Judge O'Connor eventually issued an order to reopen the case.<sup>89</sup> Despite the holding of *Franciscan Alliance v. Burwell*, the court's opinion remains inconsistent with Congress's intent to include gender identity in its definition of sex discrimination and makes claims inconsistent with prevailing standards of treatment.<sup>90</sup> The courts have already upheld the discrimination claims of

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84. *Id.*

85. *See* *Flack v. Wis. Dep't of Health Servs.*, 328 F. Supp. 3d 931, 946–51 (W.D. Wis. 2018) (holding that Congress created a private right of action in Section 1557 and found that denial of medically necessary gender reassignment for transgender individuals with gender dysphoria are protected under Section 1557's "on the basis of sex"); *see also* *Boyden v. Conlin*, 341 F. Supp. 3d 979, 995–98 (W.D. Wis. 2018) (holding that differential treatment based on sex characteristics and a law treating transgender individuals differently on the basis of sex triggers both Title VII of the Civil Rights Act of 1964 and Section 1557 of the ACA); *see also* *Prescott v. Rady Children's Hosp.*, 265 F. Supp. 3d 1090, 1098–100 (2017) (holding that Section 1557 protects gender identity from discrimination by health care entities).

86. *See, e.g.*, Wyatt Fore, *Trans/Forming Healthcare Law: Litigating Antidiscrimination Under the Affordable Care Act*, 28 YALE J.L. & FEMINISM 243, 251 (2017) (discussing Judge Reed O'Connor's decision to enforce a national injunction in *Franciscan Alliance v. Burwell*).

87. 227 F. Supp. 3d 660 (N.D. Tex. 2018).

88. As a result, the court stayed the proceedings to allow HHS to reexamine and revise the rule. *Id.* at 695–96 (granting joint motion to lift stay).

89. *See* *Franciscan All. v. Azar*, Civil Action No. 7:16-cv-00108-O (N.D. Tex. Dec. 17, 2018) (ordering stay lifted). However, Judge O'Connor has not yet issued a decision on whether the American Civil Liberties Union (ACLU) and the River City Gender Alliance will be allowed permissive intervention in the case; he already denied their request to intervene as of right. *See generally* Renewed Motion to Intervene, *Franciscan All. v. Azar*, Civ. Action No. 7:16-cv-00108-O (N.D. Tex. Feb. 1, 2019) (motion filed by the ACLU); Katie Keith, *Section 1557 Litigation: Latest Developments*, HEALTH AFF. (Sept. 18, 2019), <https://www.healthaffairs.org/doi/10.1377/hblog20190918.101914/full/> (providing a general update on Section 1557 legal actions).

90. *Franciscan All.*, 227 F. Supp. 3d at 687. *See* Waller, *supra* note 68, at 498–513 (exploring various interpretations of sex discrimination to determine whether Congress intended to



transgender individuals based solely on the statute, both before the 2016 rule was issued and the definition of sex became contested.<sup>91</sup>

Section 1557 seeks to maximize the number of individuals who can receive health care, but the 2019 Conscience Rights Rule enforces discrimination against LGBT individuals and discourages these individuals from seeking health care. Judge O'Connor states that Section 1557 intrudes upon the physician-patient relationship, yet the 2019 Conscience Rights Rule exponentially increases the threat to that relationship.<sup>92</sup>

## 2. *Judicial Review*

### a. *Deference*

Congress expressed its intent to provide reasonable conscience rights while extending nondiscrimination protections to LGBT individuals. Congressional intent outweighs deference to an agency's interpretation of statutes; Congress did not intend to allow discrimination against LGBT individuals but it did intend to allow specific and narrowly defined conscience rights to exist.<sup>93</sup> With that in mind, this rule should not survive judicial review due to the broad reach of the rule and its close relationship with Section 1557.

The future of agency deference is uncertain because of several recent Supreme Court opinions affecting agency deference.<sup>94</sup> Courts would likely

include gender identity); *see also* Holle, *supra* note 8, at 249–50.

91. *See* Rumble v. Fairview Health Servs., No. 14-cv-2037 (SRN/FLN), 2015 WL 1197415, at \*1, \*12 (D. Minn. Mar. 16, 2015) (deferring to HHS OCR's stated interpretation of Section 1557 rather than the 2016 rule not yet promulgated).

92. *Franciscan All.*, 227 F. Supp. at 669–70.

93. William W. Buzbee, *The Tethered President: Consistency and Contingency in Administrative Law*, 98 B.U. L. REV. 1357, 1396 n.196 (2018) (explaining that judges consider consistency even when *Chevron* deference applies); *see supra* Part (II)(B)(1) (arguing that Congress's intent in enacting Section 1557 was to protect LGBT individuals from discrimination and to ensure health care access with or without additional regulations).

94. The broadest deference courts give to agencies are those agency actions committed to agency discretion. *McCarthy v. Merit Sys. Prot. Bd.*, 809 F.3d 1365, 1370–71 (Fed. Cir. 2016). Last year, the Supreme Court heard *Weyerhaeuser Co. v. United States Fish and Wildlife Service*, 139 S. Ct. 361 (2018), which provided further guidance on the “committed to agency discretion” principle. The Court's opinion discussed how few regulations are truly committed to agency discretion. *See id.* at 370 (discussing the parameters and explaining that the “committed to agency discretion” principle means that certain actions should not be subject to judicial review under the Administrative Procedure Act (APA)). Many anticipated *Chevron* and *Auer* could meet their end through these cases, particularly *Carlton & Harris Chiropractic v. PDR Network* and *Kisor v. Wilkie* respectively. *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019); *Carlton & Harris Chiropractic v. PDR Network*, 139 S. Ct. 2051 (2019);

exercise the power of judicial review over the 2019 Conscience Rights Rule and would likely use an agency deference framework to analyze the facts; a court would likely find that, unlike the rule, the conscience rights statutes are not drawn broadly and, in fact, historically include very specific provisions.<sup>95</sup>

In this case, a court may review either the 2019 Conscience Rights Rule or Section 1557. Under *Chevron* deference, the reviewer first asks whether the legislative intent of a statute is ambiguous and if not, whether the agency interpreted the ambiguity within a reasonable construction of the law.<sup>96</sup> A court may determine that the legislative intent of Section 1557 is ambiguous, which would trigger *Chevron*.<sup>97</sup> The court would then face the question of whether HHS's interpretation of congressional intent is reasonable.<sup>98</sup> If a court determines it is unreasonable to hold that Section 1557 does not include gender identity, then the 2019 Conscience Rights Rule would conflict with Section 1557.<sup>99</sup> If the court instead reviews the regulations related to conscience rights, a court may also hold it unreasonable to allow physicians to discriminate against LGBT individuals.<sup>100</sup>

In considering Section 1557, *Chevron* deference is particularly important because of its role in several cases involving the ACA. Although he failed to consider that other district courts have held that the congressional intent of Section 1557 goes beyond sex assigned at birth, Judge O'Connor held *Chevron* deference did not apply in *Franciscan Alliance v. Burwell*.<sup>101</sup> Also, in *King v.*

*Auer v. Robbins*, 519 U.S. 452 (1997); *Chevron v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Ultimately, the Court left *Chevron* deference untouched in *Carlton & Harris Chiropractic*, 139 S. Ct. at 2055. However, the Court's *Kisor* opinion, 139 S. Ct. at 2415, created a new variation of deference, holding a court should not apply *Auer* deference unless it exhausts all "traditional tools" of construction" and among other things, the "regulation is genuinely ambiguous." To further understand the implications of *Kisor*, see Dan Deane & Nathan Warecki, *In High Court's Kisor Ruling, 2 Important Doctrines Survive*, LAW360 (June 28, 2019), <https://www.law360.com/articles/1173910/in-high-court-s-kisor-ruling-2-important-doctrines-survive>.

95. Deane & Warecki, *supra* note 94.

96. See Ronald A. Cass, *Auer Deference: Doubling Down on Delegation's Defects*, 87 FORDHAM L. REV. 531, 543 (2018) (explaining the *Chevron* deference two-step test for judicial review).

97. Based on lower court determinations of this issue, it appears a court would in fact reach this conclusion. *Supra* Part (II)(B)(1).

98. Cass, *supra* note 96, at 543.

99. *Id.*

100. See *infra* Part (II)(B)(2) (discussing why HHS's interpretation of conscience rights is arbitrary and capricious).

101. He concluded that the rule promulgated from Section 1557 of the ACA was not entitled to *Chevron* deference based on the provision specifically allowing HHS to promulgate the rule. *Franciscan All. v. Burwell*, 227 F. Supp. 3d 660, 685–88 (N.D. Tex. 2016).

*Burwell*,<sup>102</sup> the Supreme Court decided against applying *Chevron* deference and held instead to that it should interpret the ACA consistent with the intent to improve health insurance markets.<sup>103</sup> Although nondiscrimination is not the focus of the ACA, it is now a centerpiece of the statute, and its balance may be considered in the court's evaluation of other federal court decisions.

*b. Procedure and Substance*

A judicial review of the 2019 Conscience Rights Rule will require a review of the procedure used to enact this rule and the substance of the rule. In our polarized political climate, the agencies under the Trump and Obama Administrations contrast sharply against each other; this divergence is acceptable because administrative agencies have the discretion to shift their policies under changing administrations.<sup>104</sup>

However, agencies lack the discretion to change these policies without justification.<sup>105</sup> HHS approached its 2019 Conscience Rights Rule in an arbitrary and capricious manner.<sup>106</sup> Under the Administrative Procedure Act (APA), a reviewing court must set aside any final agency action if that action is found to be arbitrary and capricious.<sup>107</sup> The arbitrary and capricious standard is narrow and requires an agency to articulate reasonable analyses for regulatory changes.<sup>108</sup> Courts will deem a rule arbitrary and capricious if it fails to consider an important part of a problem.<sup>109</sup>

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102. 135 S. Ct. 2480 (2015).

103. The Court held that the ACA became law “to improve health insurance markets, not to destroy them.” *Id.* at 2496.

104. *See Buzbee, supra* note 93, at 1362 (noting that politics may play a role in agency policy changes).

105. *See id.* at 1360 (characterizing a presidential edict as insufficient to justify major policy change).

106. Nonprofit organizations reached this conclusion as well in response to the notice of proposed rulemaking (NPRM). *See* National Center for Transgender Equality, Comment Letter on 2019 Proposed Conscience Rights Rule (Mar. 27, 2018), <https://www.regulations.gov/contentStreamer?documentId=HHS-OCR-2018-0002-71274&attachmentNumber=1&contentType=pdf>.

107. APA, 5 U.S.C. § 706 (2012); *see supra* Part (II)(B)(1).

108. *See* Ronald J. Krotoszynski, Jr., *If Judges were Angels: Religious Equality, Free Exercise, and the (Underappreciated) Merits of Smith*, 102 NW. U. L. REV. 1189, 1266–68 (2008) (outlining the arbitrary and capricious standard and supporting its use in cases of religious discrimination through government action).

109. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983). Mere post hoc rationalizations or pretextual rationales do not satisfy courts' reviews of whether an agency has acted arbitrarily and capriciously. *See* U.S. Dept. of Commerce v. New York, 139 S. Ct. 2551, 2574–76 (2019); *see also* Krotoszynski, Jr., *supra* note 108, at 1266–67.

Both the 2018 Proposed Conscience Rights Rule and the final rule failed to consider an important part of the conscience rights problem by mischaracterizing complaints submitted to OCR, stating that OCR received forty-four complaints from health care workers regarding health care conscience laws since 2008 including thirty-four filed since November 2016.<sup>110</sup> The notice failed to mention, however, that OCR received over 30,000 complaints in total in 2017, many of which involved privacy breaches and discrimination against patients.<sup>111</sup> Overall, complaints to OCR have risen by twenty-three percent from Fiscal Year (FY) 2016 to FY 2017.<sup>112</sup> Considering that fewer than fifty of these complaints were related to health care entities, the problem exists outside of discrimination against health care entities based on their religious beliefs.<sup>113</sup>

Despite complaints focusing on discrimination issues affecting patients, the rule expands protections for health care entities but not for patients.<sup>114</sup> Under an arbitrary and capricious review, courts should also review the rule's definition of "health care entity" because it will allow a vast array of individuals to file complaints on the basis of conscience rights.<sup>115</sup> "Health care entity" is treated in stark contrast from previous conscience rights rules and would now include anyone remotely associated with a health care profession.<sup>116</sup> The term "health care entity" in the Weldon Amendment<sup>117</sup> and the

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110. Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 83 Fed. Reg. 3880 (proposed Jan. 26, 2018) (to be codified at 45 C.F.R. pt. 88).

111. See Emmarie Huetteman, *At New Health Office, 'Civil Rights' Means Doctors' Right to Say No to Patients*, KAISER HEALTH NEWS (Mar. 5, 2018), <https://khn.org/news/at-new-health-office-civil-rights-means-doctors-right-to-say-no-to-patients/> (detailing the mischaracterization of complaints).

112. See Fiscal Year 2019 Budget in Brief, U.S. DEP'T OF HEALTH & HUM. SERVS. 1, 124 (2019) (justifying budget requests and detailing the number of complaints received by HHS).

113. Huetteman, *supra* note 111.

114. See *supra* Part I.

115. Several national organizations share these concerns. See Paul D. Kivela, American College of Emergency Physicians, Comment Letter on 2019 Proposed Conscience Rights Rule (Mar. 27, 2018), <https://www.regulations.gov/contentStreamer?documentId=HHS-OCR-2018-0002-71219&attachmentNumber=1&contentType=pdf> (highlighting concerns about the use of the term health care entities); see also National Center for Transgender Equality, Comment Letter on 2019 Proposed Conscience Rights Rule (Mar. 27, 2018), <https://www.regulations.gov/contentStreamer?documentId=HHS-OCR-2018-0002-71274&attachmentNumber=1&contentType=pdf> (discussing similar concerns about definitions such as "assist in the performance" and "sterilization" in the NPRM and its compliance with the APA).

116. *Supra* Part I(C).

117. See Consolidated Appropriations Act, Pub. L. No. 108-447, 118 Stat. 2809 (2005) (characterizing "health care entity" as an "individual physician or other health care

Coats-Snowe Amendment<sup>118</sup> are similar, while the proposed rule defines the term much more broadly and unclearly.<sup>119</sup>

Although it has not been applied in court, the courts might consider approaching conscience rights using a balancing test.<sup>120</sup> A multitude of theories exist on the delicate line that exists between when conscience rights may be asserted and when the assertion of these rights should be prohibited.<sup>121</sup> When considering claims of conscience rights, the argument surrounds whether these asserted conscience rights are religious or secular,<sup>122</sup> which some argue poses constitutional flaws based on the Equal Protection Clause.<sup>123</sup> Rather than relying on the distinction between religious and secular conscience rights, courts should balance the interests of the individual asserting conscience rights against government interests and the interests of those negatively affected by the assertion of the conscience rights.<sup>124</sup> While this line of reasoning may result in a piecemeal approach, a body of case law

professional, a hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, or any other kind of health care facility, organization, or plan”).

118. See Coats-Snowe Amendment, 42 U.S.C. § 238n (2012) (defining health care entity as “an individual physician, a postgraduate physician training program, and a participant in a program of training in the health professions”).

119. See 2019 Conscience Rights Rule, 84 Fed. Reg. 23,170, 23,194 (May 21, 2019) (to be codified at 45 C.F.R. pt. 88) (including in the definition of health care entity “[an] individual physician . . . , a [health profession training] participant, . . . , a hospital, . . . , a provider-sponsored organization, . . . , a health insurance plan (including group or individual plans), a plan sponsor, issuer, or third-party administrator . . .”).

120. Courts may balance action against inaction for a conscience objector, the weight and interests of “religious and secular claims of conscience,” and harm inflicted upon others beyond the objector. See generally Nadia N. Sawicki, *The Hollow Promise of Freedom of Conscience*, 33 CARDOZO L. REV. 1389, 1430–43 (2012) (discussing conscience rights and additional approaches to considering them).

121. Among the most interesting theories, one might weigh action against inaction, harm to others, and considering religious claims of conscience. See generally *id.* at 1430–42 (outlining six approaches to weighing conscience rights against other rights).

122. The Constitution protects a right of religious freedom, not a right of freedom of conscience. However, some say American law protects both religious and secular beliefs while also providing no protection for some religious beliefs at times. See *id.* at 1438–39 (“Another possible account of why we only grant some conscience-based accommodations is based on the distinction between religious and secular claims of conscience.”).

123. See *id.* at 1439 (stating the government should treat “non-religious moral claims” like religious claims because treating them differently based on a “theological premise . . . that religious beliefs and actions are more deserving than nonreligious views” might violate the Equal Protection Clause”) (quoting Kent Greenawalt, *Moral and Religious Convictions as Categories for Special Treatment: The Exemption Strategy*, 48 WM. & MARY L. REV. 1605, 1626, 1636 (2007)).

124. *Id.* at 1445.

will begin to form to guide conscience rights consistent with the values of the American legal system.<sup>125</sup>

In October 2019, the Supreme Court heard two oral arguments for cases that may affect the future of the 2019 Conscience Rights Rule. Both arguments discussed LGBT employees who lost their jobs due to their transgender status or sexual orientation; the cases seek to answer whether discrimination on the basis of transgender status or sexual orientation violates Title VII of the Civil Rights Act of 1964.<sup>126</sup> These opinions may settle inconsistent district courts' decisions on protections against discrimination for LGBT individuals.<sup>127</sup> Lower federal courts have held that Section 1557 of the ACA includes LGBT individuals in the nondiscrimination provisions of the law.<sup>128</sup> The Supreme Court should, either through a broad or narrow opinion, find that discrimination against individuals on the basis of sexual orientation or gender identity in health care settings is not permitted. The Court's previous holdings have occasionally supported LGBT-related issues, which indicates that the Court could potentially extend nondiscrimination protections to LGBT individuals.<sup>129</sup>

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125. *Id.* (“[O]nly a content-neutral approach to accommodation of conscience, such as a balancing of interests approach, is consistent with the principles of a pluralistic society that respects the inherent value of conscience.”).

126. Question Presented, *Bostock v. Clayton Cty.*, No. 17–1618 (U.S. Oct. 8, 2019); Question Presented, *Altitude Express, Inc. v. Zarda*, No. 17–1623 (U.S. Oct. 8, 2019); Questions Presented, *Harris Funeral Homes, Inc. v. EEOC*, No. 18–107 (U.S. Oct. 8, 2019). *See generally* Transcript of Oral Argument, *Bostock v. Clayton Cty.*, No. 17–1618 (U.S. Oct. 8, 2019), [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2019/17-1618\\_7k47.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/17-1618_7k47.pdf) (providing full oral argument); Transcript of Oral Argument, *Harris Funeral Homes, Inc. v. EEOC*, No. 18–107 (U.S. Oct. 8, 2019), [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2019/18-107\\_c18e.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/18-107_c18e.pdf) (providing full oral argument). *Cf.* *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (holding that all states must grant and recognize same sex marriages) *and* *United States v. Windsor*, 570 U.S. 744 (2013) (resolving that the limitations of the interpretation of marriage and spouse to apply only in heterosexual marriages imposed by the Defense of Marriage Act violated the Due Process Clause of the U.S. Constitution).

127. *Infra* Part (II)(C).

128. *See* Waller, *supra* note 68, at 491 n.176 (outlining recent opinions issued by the federal district courts).

129. *See, e.g., id.* at 504 n.254 (discussing the evolution of minorities once excluded from constitutional protections and identifying cases where actions taken by LGBT individuals once considered illegal are now legal through Supreme Court opinions on the issue). *But see* Florczak, *supra* note 62, at 460–61 (discussing the addition of Justice Neil Gorsuch as upsetting the balance between LGBT rights and religious liberty, quoting him as saying “we must answer for ourselves whether and to what degree we are willing to be involved in the wrongdoing of others”).

### C. *The States*

Each state must ensure that its laws effectively prohibit discrimination based on sexual orientation and gender identity. While many states do, thirty-six states still do not have laws protecting LGBT individuals from discrimination in the insurance industry.<sup>130</sup> LGBT individuals in states without nondiscrimination protections face discrimination from places like adoption agencies.<sup>131</sup> Since unbridled conscience rights means that discrimination is certain to occur, states must eliminate protections for discrimination based on gender identity and sexual orientation.<sup>132</sup>

### D. *Future Administrations*

The current Administration will likely not amend this rule, so a future administration must mitigate its damage.<sup>133</sup> A future administration may consider leaving the 2016 Section 1557 rule in place, repealing the 2016 Section 1557 rule, adopting a rule strengthening Section 1557 regulations, or adopting an explicit rule protecting LGBT individuals, among many other options.<sup>134</sup> If a future administration decides to promulgate a new rule, it must

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130. *Health Care Law and Policies*, MOVEMENT ADVANCEMENT PROJECT, [http://www.lgbtmap.org/equality-maps/healthcare\\_laws\\_and\\_policies](http://www.lgbtmap.org/equality-maps/healthcare_laws_and_policies) (last updated Oct. 25, 2019). Six states allow discrimination in adoption and foster care, and Mississippi enacted a bill to allow conscience rights to protect religious individuals in their discrimination against LGBT people. “*All We Want is Equality*” *Religious Exemptions and Discrimination Against LGBT People in the United States*, HUM. RIGHTS WATCH 1, 14–15 (Feb. 2018), [https://www.hrw.org/sites/default/files/report\\_pdf/lgbt0218\\_web\\_1.pdf](https://www.hrw.org/sites/default/files/report_pdf/lgbt0218_web_1.pdf) [hereinafter *All We Want is Equality*].

131. *United States: State Laws Threaten LGBT Equality*, HUM. RIGHTS WATCH (Feb. 19, 2018), <https://www.hrw.org/news/2018/02/19/united-states-state-laws-threaten-lgbt-equality>.

132. *All We Want is Equality*, *supra* note 130, at 14.

133. Currently, eight percent of lesbian, gay, or questioning patients reported that health care providers refused to see them because of their sexual orientation, and twenty-nine percent of transgender patients also reported that health care providers declined to see them. Shabab Ahmed Mirza & Caitlin Rooney, *Discrimination Prevents LGBTQ People from Accessing Health Care*, CTR. FOR AM. PROGRESS (Jan. 18, 2018), <https://www.americanprogress.org/issues/lgbt/news/2018/01/18/445130/discrimination-prevents-lgbtq-people-accessing-health-care/>.

134. This future administration should consider relying on presidential directives to drive agency policy before the commencement of agency action. This methodology is a recent phenomenon developed by the Reagan Administration and expanded upon by the Clinton Administration. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2281–82, 2294, 2385 (2001) (comparing the number of rules issued by President George H.W. Bush and President Bill Clinton). Through this framework, the next president must prioritize redirecting conscience rights and solidifying Section 1557 to include sex stereotyping and gender identity. See *generally id.* at 2315–19 (analyzing the different strategies presidents employed and the methodology behind presidential administration).

carefully follow prescribed administrative procedures and tailor the rule within the agency's authority.<sup>135</sup>

At a granular level, the future administration should first adhere more closely to the intent of the statutes driving conscience rights by reverting the definition of health care entity to limit those who can assert conscience rights to individuals actually closely involved in a procedure.<sup>136</sup> The administration must also revert the phrase "assist in the performance" to limit the types of procedures where conscience rights may be asserted.<sup>137</sup> To avoid the manipulation of patients, the administration must revert the definition of referrals to ensure patients receive factual information about their health conditions and are informed of all medical options.<sup>138</sup>

Most importantly, a future administration must guarantee that health care entities may not discriminate against LGBT individuals based on gender identity or sexual orientation.<sup>139</sup> The administration should issue a provision to ensure that conscience rights do not impede upon access to health care for LGBT patients.<sup>140</sup> A future administration may consider politics in its rulemaking; however, all administrations must prioritize considering the overall public value of a new rule instead of favoring one group over the another.<sup>141</sup> Rather than valuing the rights of individuals within a profession and industry to broadly refuse health care to the LGBT community, the future administration should prioritize a widely accepted public value: access to health care.<sup>142</sup>

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135. See *supra* Part (II)(B)(2) (discussing the true characterization of OCR complaints). The agency must explain inconsistencies with previous administrative policies by discussing justification for past agency actions, science, and underlying facts. Buzbee, *supra* note 93, at 1401.

136. *Supra* Part (II)(B)(2).

137. *Id.*

138. *Id.*

139. See National Center for Transgender Equality, Comment Letter on 2019 Proposed Conscience Rights Rule (Mar. 27, 2018), <https://www.regulations.gov/contentStreamer?documentId=HHS-OCR-2018-000271274&attachmentNumber=1&contentType=pdf>.

140. *Id.*

141. Protecting conscience rights at the expense of LGBT access to health care validates James Madison's fears about discrimination against the non-majority. Esbeck, *supra* note 10, at 534–35.

142. Regulatory shifts in the federal government may be politically motivated rather than the result of ineffective rules or programs. Some argue that courts should consider citing an administrative change in position as a valid reason for such a shift. See Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 53 (2009). For an explanation of the challenges faced by the LGBT community and suggested strategies for health care staff, see *Providing Inclusive Services and Care for LGBT People*, NAT'L LGBT HEALTH EDUC. CTR., <https://www.lgbthealtheducation.org/wp-content/uploads/Providing-Inclusiv>



## CONCLUSION

As of this writing, the future of LGBT rights appears uncertain. With a Republican majority in the Senate, a Supreme Court considered by many to be conservative, and a Republican in the White House, the fight for protections for LGBT individuals against discrimination is an uphill battle. Although facing this uphill battle, those advocating for LGBT rights must remain steadfast in their efforts and ascertain where political candidates—regardless of party—truly stand on LGBT issues. Advocates must continue to strategize how to correct any perceived wrongs during the current Administration on LGBT rights. A future administration must establish as a priority correcting the 2019 Conscience Rights Rule and distributing funds in an equitable manner to address the problems arising from this rule.