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Insights

Religious Health Care Providers, The ACA, And Gender Transition Procedures

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In The Religious Sisters of Mercy v. Xavier Becerra, the 8th Circuit Court of Appeals recently upheld a permanent injunction against the Department of Health and Human Services ("HHS") and the Equal Employment Opportunity Commission's ("EEOC") enforcement of Section 1557 of the Affordable Care Act ("Section 1557"). The Court prohibited either agency from using Section 1557 to require Catholic organizations and providers to provide or pay for gender transition procedures under threat of prosecution for sex discrimination. The Court held that HHS' and the EEOC's interpretation of Section 1557 violated the Religious Freedom Restoration Act of 1993 ("RFRA") and the First Amendment to the U.S. Constitution.

By way of background, Section 1557 prohibits any entity that operates a health program or activity, any part of which receives Federal financial assistance, from discriminating on the basis of sex. In 2020, the Supreme Court determined in *Bostock v. Clayton County* 140 S. Ct. 1731 that for sexual discrimination purposes, "sex" includes gender identity and sexual orientation. However, the Supreme Court cautioned the government against substantially burdening the exercise of religion without identifying a compelling government interest and the least restrictive means for furthering that interest. *Id*. at 1753. In May 2021, HHS issued a statement that it would interpret Section 1557's prohibition of discrimination "on the basis of sex" consistent with the Supreme Court's decision in *Bostock*. HHS further confirmed that its interpretation and enforcement would comply with the RFRA. Earlier this year, HHS issued a statement advising that a refusal to offer gender-reassignment procedures violated Section 1557.

On appeal, HHS represented to the 8th Circuit Court of Appeals that it had not yet taken a position on whether the Plaintiffs' refusal to provide such procedures violates Section 1557 and did not yet threaten enforcement against the Plaintiffs. HHS urged the Court to overturn the lower court's permanent injunction. However, Court determined that HHS' position was a concession that it may enforce Section 1557, rather than an outright guarantee to the contrary. The Court went on to state that HHS's promise to comply with the RFRA, while promising to enforce Section 1557, was vague and prevents the Plaintiffs from knowing their scope of liability for refusing to provide or insure gender transition procedures. The Court, relying heavily on the 5th Circuit's similar determination in ***Franciscan Alliance v. Becerra***, further confirmed the lower court's determination that the potential loss of freedoms guaranteed by the RFRA constitutes irreparable harm, per se, and upheld the permanent injunction.

The Court's opinion represents a significant recognition of religious liberties set forth in the First Amendment to the U.S. Constitution and the RFRA as society continues to wrestle with the care and support of transgender individuals. If you have questions regarding the Eighth Circuit's Opinion or the matters addressed by it you may

contact **Robert A. Anderson** or **Hillary N. Buchler**.

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