UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TANYA D. BALLENGER, *Plaintiff*, v. PROVIDENCE HOSPITAL, *et al.* *Defendants*.	Civ. No. 15-950

TENDERED BRIEF OF *AMICUS CURIAE*
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
IN SUPPORT OF PLAINTIFF'S PARTIAL MOTION FOR SUMMARY JUDGMENT
AND IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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STATEMENT OF INTEREST[1]

Formed in 1973, Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is the nation's oldest and largest legal organization committed to achieving full recognition of the civil rights of lesbian, gay, bisexual, and transgender ("LGBT") people and people living with HIV through impact litigation, education, and public policy work. Lambda Legal has served as counsel of record or *amicus curiae* in some of the most important cases regarding the rights of LGBT people and people living with HIV. *See, e.g., Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *United States v. Windsor*, 133 S. Ct. 2675 (2013); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Bragdon v. Abbott*, 524 U.S. 624 (1998); *Taylor v. Rice*, 451 F.3d 898 (D.C. Cir. 2006). In particular, Lambda Legal has served as *amicus curiae* in multiple cases addressing the proper interpretation of the Patient Protection and Affordable Care Act ("ACA") and the significance of its protections for LGBT people and people living with HIV. *See, e.g., Zubik v. Burwell*, 136 S. Ct. 1557 (2016); *King v. Burwell*, 135 S. Ct. 2480 (2015); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) ("*NFIB*"); *East v. Blue Cross and Blue Shield of Louisiana*, No. 14-CV-00115, 2014 WL 8332136 (M.D. La. Feb. 24, 2014) (counsel).

Lambda Legal has made health care fairness for LGBT people and people living with HIV a priority because too often these individuals experience discrimination in health care services and violations of their personal autonomy regarding health care decisions. Accordingly, Lambda Legal submitted comments to the Notice of Proposed Rulemaking Regarding Nondiscrimination in Health Programs and Activities, 80 Fed. Reg. 54,172 (Sept. 8, 2015). In its

[1] No counsel for a party authored this brief, in whole or in part, and no person other than *amicus curiae* and its counsel made any monetary contribution to fund the preparation or submission of this brief.

comments, Lambda Legal not only addressed the discrimination faced by LGBT people and people living with HIV, but also provided legal analysis responsive to agency questions and commented on the most appropriate interpretations of the ACA's nondiscrimination provisions, including with respect to issues in this case.

This case is among the first in the nation calling on the Court to interpret and enforce the ACA's nondiscrimination provisions. Accordingly, Lambda Legal offers the following analysis, which complements the parties' briefing, to assist the Court in determining the legal standard and burden of proof applicable to claims of discrimination brought pursuant to the ACA's nondiscrimination provisions.

INTRODUCTION

"[T]he government has a compelling interest in ensuring that individuals have nondiscriminatory access to health care and health coverage." Nondiscrimination in Health Programs and Activities; Final Rule, 81 Fed. Reg. 31,376, 31,380 (May 18, 2016) (to be codified at 45 C.F.R. pt. 92) ("Final Rule"). In 2010, Congress enacted the ACA "to increase the number of Americans covered by health insurance and decrease the cost of health care." *NFIB*, 132 S. Ct. at 2580. "A central goal of the Affordable Care Act is to help all Americans access quality, affordable health care." Press Release, U.S. Dep't of Health & Human Servs., *HHS Finalizes Rule to Improve Health Equity Under the Affordable Care Act* (May 13, 2016), *available at* http://1.usa.gov/1X7iAnQ. As part of its efforts to achieve these goals, Congress enacted Section 1557, 42 U.S.C. § 18116, within the ACA—a broad new civil rights remedy meant to protect patients and other health care consumers from discrimination on the basis of race, ethnicity, gender, disability, and age.

In so doing, Congress expressed in no uncertain terms that "a fundamental purpose of the ACA is to ensure that health services are available broadly on a nondiscriminatory basis to individuals throughout the country." 81 Fed. Reg. 31,379. Section 1557 not only incorporated the grounds on which discrimination is prohibited from four other civil rights statutes, it also made clear that the remedies available under any of the statutes it referenced were available to patients and other health care consumers who suffered discrimination in health care. That intent is evident not only from Section 1557's statutory text and the ACA's "fundamental purpose," but also in the interpretation of Section 1557 by the Department of Health and Human Services ("HHS"), as made apparent by the Final Rule it recently promulgated.

In the present case, Defendants urge this Court to hold that the legal standard and burden of proof applicable to a claim of discrimination under Section 1557 depends upon the statute from which the basis for the claim was incorporated. Defendants' constrained reading of Section 1557 would subvert the ACA's statutory text and purpose and lead to absurd results that shield many health care providers from liability. Instead, Section 1557 should be understood to establish a private right of action subject to a *single* legal standard and burden of proof, regardless of the particular protected classification targeted for discrimination, that is no less protective of health care consumer rights than any of the standards separately available under the four civil rights statutes incorporated into Section 1557. *See* 45 C.F.R. § 92.3(a) (Section 1557 cannot be "construed to apply a *lesser standard* for the protection of individuals from discrimination than the standards applied under" any of the four civil rights statutes it references.") (emphasis added). Such a holding would be faithful to Section 1557's statutory text and implementing regulations, as well as to the ACA's purpose and Congress's intent.

Amicus addresses three interrelated points about how to interpret Section 1557 appropriately and evaluate claims of discrimination brought pursuant to it. First, in enacting Section 1557, Congress specifically intended to provide a private right of action for which claims should be evaluated under a single legal standard and burden of proof, regardless of the basis of the alleged discrimination. Second, institutional liability for claims of discrimination under Section 1557 must be based on *respondeat superior* and agency principles. And third, the Court should reject efforts to engraft an actual notice and deliberate indifference standard onto Section 1557, which would be contrary to Section 1557's language, the health care context in which it applies, and Congress's express goal to eliminate discrimination against health care consumers.[2]

Finally, *amicus* strongly agrees with Plaintiff that Section 1557's prohibition on sex-based discrimination *necessarily* encompasses discrimination on the basis of gender identity or transgender status.

ARGUMENT

I. CLAIMS OF DISCRIMINATION UNDER SECTION 1557 SHOULD BE EVALUATED USING A SINGLE LEGAL STANDARD, REGARDLESS OF THE BASIS OF THE DISCRIMINATION ALLEGED.

"Section 1557 creates a private cause of action" to address claims of discrimination on the basis of race, color, national, origin, sex, age, or disability. *Callum v. CVS Health Corp.*, 137 F. Supp. 3d 817, 848 (D.S.C. 2015); *see also S.E. Pennsylvania Transp. Auth. v. Gilead Scis., Inc.*, 102 F. Supp. 3d 688, 698 (E.D. Pa. 2015) ("*SEPTA*"); *Rumble v. Fairview Health Servs.*, No. 14-CV-2037, 2015 WL 1197415, at *7 n.3 (D. Minn. Mar. 16, 2015); *East*, 2014 WL

[2] This brief confines its focus to the errors in Defendants' arguments regarding the contours of the single legal standard and burden of proof applicable to Section 1557 claims. While *amicus* agrees with Plaintiff's articulation of the elements and burden of proof applicable to Section 1557 claims, *see* Pl.'s Br. at 6, 10, *amicus* does not address all of the contours of the legal standard and burden of proof applicable to such claims beyond the propriety of a single standard and the use of agency principles for institutional liability.

8332136, at *2. The ACA's statutory text, context, and structure, along with the Final Rule, together make plain that Section 1557 claims should be subject to a *single* legal standard and burden of proof regardless of the basis of the alleged discrimination.

A. The ACA's Statutory Text, As Well As Its Context And Structure, Evinces A Clear Intent To Create A Single Legal Standard And Burden Of Proof For Any Basis Of Prohibited Discrimination Incorporated Into Section 1557.

Section 1557's context, structure, and text make evident that Congress did not intend to import multiple piecemeal legal standards and burdens of proof derived from different statutory contexts into the doctrinal crazy quilt Defendants propose. Rather, "looking at Section 1557 and the Affordable Care Act as a whole, it appears that Congress intended to create a new, health-specific, anti-discrimination cause of action that is subject to a *singular* standard, regardless of a plaintiff's protected class status." *Rumble*, 2015 WL 1197415, at *10 (emphasis added). *See King*, 135 S. Ct. at 2492 (in interpreting the ACA and Section 1557, "we must do our best, bearing in mind the fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.") (internal quotation omitted).

That intent is evident from the structure and language of the statute. Section 1557 incorporates "title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), or section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794)" to delineate "the ground[s] prohibited under" it. 42 U.S.C. § 18116(a). As another district court recently concluded, "Congress likely referenced the four civil rights statutes mainly in order to identify the 'ground[s]' on which discrimination is prohibited—i.e., race, sex, age, and disability." *Rumble*, 2015 WL 1197415, at *12. Section 1557 does not set forth separate

remedies, legal standards, and burdens of proof applicable to each prohibited basis of discrimination based on the statutes from which each was incorporated. *See* Sarah G. Steege, *Finding A Cure in the Courts: A Private Right of Action for Disparate Impact in Health Care*, 16 Mich. J. Race & L. 439, 462 (2011) ("[T]here is no indication in § 1557 that each listed statute's enforcement mechanisms apply only to its own protected classes."). To the contrary, Congress specified that "[t]he enforcement mechanisms provided for and available under such title VI, title IX, section 504, ***or*** such Age Discrimination Act shall apply for purposes of violations of this subsection." 42 U.S.C. § 18116(a) (emphasis added).

The use of the disjunctive "or" indicates that the enforcement mechanisms applicable under any of the incorporated statutes are available to every claim of discrimination under Section 1557, regardless of the particular type of discrimination triggering the claim. "In its elementary sense, the word 'or,' as used in a statute, is a disjunctive particle indicating that the various members of the sentence are to be taken separately." 73 Am. Jur. 2d Statutes § 147; *see also United States v. Woods*, 134 S. Ct. 557, 567 (2013) ("ordinary use [of the word 'or'] is almost always disjunctive"); *In re Espy*, 80 F.3d 501, 505 (D.C. Cir. 1996) (*per curiam*) ("Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings and a statute written in the disjunctive is generally construed as setting out separate and distinct *alternatives*.") (internal citations and quotations omitted) (emphasis added). Thus, applying standard rules of construction, all the enforcement mechanisms provided for and available under each of the generally incorporated statutes in Section 1557 are available to *every* claim of discrimination under Section 1557.[3]

[3] By expressly stating that nothing in Section 1557 "'shall be construed to invalidate or limit the rights, remedies, procedures, or legal standards available to individuals aggrieved under [any of the four existing civil rights statutes],' . . . Congress likely intended to create a new right and

The creation of a single legal standard and burden of proof applicable to Section 1557 claims is also evident from Congress's obvious desire to avoid absurd results. It is important to "recognize[] the absurd inconsistency that could result if the Court interpreted Section 1557 as Defendants [in this case] do." *Rumble*, 2015 WL 1197415, at *12 (rejecting argument that standards and burdens of proof applicable to Section 1557 claims depend upon the protected class at issue).

Mainly relying on *SEPTA*, 102 F. Supp. 3d at 699, Defendants unpersuasively urge the Court to adopt a reading of Section 1557 that "would lead to an illogical result, as different enforcement mechanisms and standards would apply to a Section 1557 plaintiff depending on whether the plaintiff's claim is based on her race, sex, age, or disability." *Rumble*, 2015 WL 1197415, at *11; Defs.' Mem. Supp. Summ. J. at 5.[4] Such "absurd inconsistency" would lead to a situation in which "a plaintiff bringing a Section 1557 race discrimination claim could allege only disparate treatment, but plaintiffs bringing Section 1557 age, disability, or sex discrimination claims could allege disparate treatment or disparate impact." *Rumble*, 2015 WL 1197415, at *11. Moreover, "if different standards were applied based on the protected class status of the Section 1557 plaintiff, then courts would have no guidance about what standard to apply for a Section 1557 plaintiff bringing an intersectional discrimination claim." *Id.* at *12.

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remedy in a new context without altering existing laws." *Rumble*, 2015 WL 1197415, at *11 n.6 (quoting 42 U.S.C. § 18116(b)). *See also* Sidney D. Watson, *Section 1557 of the Affordable Care Act: Civil Rights, Health Reform, Race, and Equity*, 55 How. L.J. 855, 870 (2012) (Section 1557 "does not merely extend Title VI to additional health programs; [rather,] it creates a new civil right and remedy while leaving in place Title VI and other existing civil rights laws.").

[4] In *SEPTA*, the court held that "Congress's express incorporation of the enforcement mechanisms from [] four federal civil rights statutes, as well as its decision to define the protected classes by reference thereto, manifests an intent to import the various different standards and burdens of proof into a Section 1557 claim, depending upon the protected class at issue." 102 F. Supp. 3d at 698-99. However, that holding not only conflicts with *Rumble* and Section 1557's statutory text, but also occurred *before* promulgation of the Final Rule, which reaffirms the existence of a single legal standard and burden of proof.

But "[n]o rule of construction necessitates our acceptance of an interpretation resulting in patently absurd consequences." *United States v. Brown*, 333 U.S. 18, 27 (1948).

"Congress [] likely intended . . . the *same standard and burden of proof* to apply to a Section 1557 plaintiff, regardless of the plaintiff's protected class status." *Rumble*, 2015 WL 1197415, at *12 (emphasis added). It did so because it sought to "create a new right and remedy in a new context." *Id.* at *11 n.6. Section 1557's statutory text mandates that conclusion. Section 1557's context and structure only reinforce it.

B. The Final Rule For Nondiscrimination In Health Programs And Activities Establishes A Single Legal Standard For Every Basis Of Discrimination Incorporated Into Section 1557.

The Final Rule further demonstrates that a single legal standard applies to every Section 1557 claim, regardless of the protected classification at issue.

HHS's Final Rule was published in the Federal Register on May 18, 2016 after extensive notice and comments. *See* 81 Fed. Reg. 31,376.[5] In it, HHS expressly addressed comments discussing a single legal standard for Section 1557 claims and explicitly acknowledged the holding in *Rumble* that a single legal standard applies to Section 1557 claims, regardless of the basis of discrimination alleged. *Id.* at 31, 439-40. HHS's responses to the comments in the preamble of the Final Rule as well as the text of the Final Rule make clear that a single legal standard applies to *all* Section 1557 discrimination claims, regardless of the basis for such claims.

In its preamble to the Final Rule, HHS explained that it "interprets Section 1557 as authorizing a private right of action for claims of disparate impact discrimination on the basis of

[5] The Proposed Rule was issued on September 8, 2015. 81 Fed. Reg. 31,376. The comment period ended on November 9, 2015. *Id.* HHS received and evaluated approximately 24,875 comments to the Proposed Rule before issuing the Final Rule. *Id.*

any of the criteria enumerated in the legislation." *Id.* at 31,440 (emphasis added). This interpretation by HHS directly contradicts the interpretation of Section 1557 urged by Defendants (and adopted by the *SEPTA* Court prior to publication of HHS's Final Rule). Under Defendants' interpretation, private rights of action for race discrimination would be "available only for allegations of intentional discrimination and not disparate impact." *SEPTA*, 102 F. Supp. 3d at 701; *see also Rumble*, 2015 WL 1197415, at *11. However, in the Final Rule's preamble, HHS noted that commenters "requested that OCR clarify that *all* enforcement mechanisms available under the statutes listed in Section 1557 are available to each Section 1557 plaintiff, regardless of the plaintiff's protected class." 81 Fed. Reg. 31,439. HHS noted that "[u]nder this approach, given that the Age Act authorizes a private right of action for disparate impact claims, a private right of action would exist for disparate impact claims of discrimination on the basis of race, color, or national origin." *Id.* Thus, HHS's interpretation of "Section 1557 as authorizing a private right of action for claims of disparate impact discrimination on the basis of any of the criteria enumerated in the legislation" clearly demonstrates the adoption of a single legal standard for all Section 1557 claims. *Id.* at 31,440.

Similarly, the Final Rule confirms that "[c]ompensatory damages for violations of Section 1557 are available in appropriate administrative and judicial actions brought under this rule." 45 C.F.R. § 92.301(b). The Rule does not limit the availability of compensatory damages to only some of the incorporated prohibited bases of discrimination, as would be necessary if Defendants' interpretation were adopted. Defendants' unduly restrictive reading of Section 1557 would mean that "a plaintiff bringing a Section 1557 age discrimination claim . . . would be barred from recovering damages, but plaintiffs bringing Section 1557 race, disability, or sex discrimination claims . . . would not be barred from recovering damages." *Rumble*, 2015 WL

1197415, at *11. The availability of compensatory damages further demonstrates that a single legal standard applies to all claims of discrimination under Section 1557, regardless of the protected classification at issue.

Furthermore, the availability of intersectional claims—that is, claims alleging discrimination based on more than one protected characteristic—further supports the availability of a single legal standard for Section 1557 claims. "[I]f different standards were applied based on the protected class status of the Section 1557 plaintiff, then courts would have no guidance about what standard to apply for a Section 1557 plaintiff bringing an intersectional discrimination claim." *Rumble*, 2015 WL 1197415, at *12. Yet HHS clarified in the preamble to the Final Rule "that Section 1557's prohibition of discrimination reaches intersectional discrimination." 81 Fed. Reg. 31,405.

Finally, the Final Rule specifically sets forth that "[t]he enforcement mechanisms available for and provided under Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, *or* the Age Discrimination Act of 1975 *shall* apply for purposes of Section 1557." 45 C.F.R. § 92.301(a) (emphasis added). As discussed, the use of the disjunctive particle "or" delineates alternatives and means that all the judicial enforcement mechanisms provided for and available under each of the generally incorporated statutes in Section 1557 are available to every claim of discrimination under Section 1557. HHS's unambiguous statement that its approach to the administrative investigation of Section 1557 violations "is not intended to limit the availability of judicial enforcement mechanisms" further supports this conclusion. 81 Fed. Reg. 31,450.

C. The Court Should Accord *Chevron* Deference To The Final Rule's Establishment Of A Single Legal Standard And Burden Of Proof For Every Basis Of Discrimination Incorporated Into Section 1557.

Because HHS promulgated the Final Rule pursuant to an explicit delegation of authority within Section 1557, 42 U.S.C. § 18116(c) ("The Secretary may promulgate regulations to implement this section."), the Final Rule qualifies for *Chevron* deference, *see Chevron U.S.A., Inc. v. Nat. Res. Defense Council, Inc.*, 467 U.S. 837 (1984), and carries the force of law. "*Chevron* deference is appropriate 'when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.'" *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 57 (2011) (quoting *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001)). The Final Rule was adopted through formal rulemaking after notice and comment. *See supra*, note 3. "Because notice-and-comment rulemaking is a formal process," HHS's Final Rule, "to the extent [it] involve[s] the reasonable resolution of ambiguities," must "be afforded *Chevron* deference." *BCCA App. Grp. v. EPA*, 355 F.3d 817, 825 (5th Cir. 2003), *as amended on denial of reh'g and reh'g en banc* (Jan. 8, 2004); *see also Mead Corp.*, 533 U.S. at 230-31 (noting significance of notice-and-comment in pointing to *Chevron* authority). "[R]eview under this standard is highly deferential, with a presumption in favor of finding the agency action valid." *King v. Burwell*, 759 F.3d 358, 373 (4th Cir. 2014), *aff'd*, 135 S. Ct. 2480. *See also Chamber of Com. of U.S. of Am. v. NLRB*, 118 F. Supp. 3d 171, 183 (D.D.C. 2015) ("The review is highly deferential and it presumes the validity of agency action.") (internal alterations and quotations omitted).

Thus, to the extent there is any ambiguity with regard to what legal standard applies to claims of discrimination under Section 1557, the Court "must accord considerable weight" to

HHS's construction of the ACA's Section 1557, "a statutory scheme it has been entrusted to administer." *Chamber of Com. of U.S. of Am.*, 118 F. Supp. 3d at 183 (internal quotations omitted). Here, the Final Rule promulgated by HHS confirms that a single legal standard applies to claims of discrimination under Section 1557, regardless of the basis of discrimination asserted.

II. INSTITUTIONAL LIABILITY FOR CLAIMS OF DISCRIMINATION UNDER SECTION 1557 IS BASED ON *RESPONDEAT SUPERIOR* AND AGENCY PRINCIPLES.

The Court should hold that *respondeat superior* and agency principles apply for purposes of liability under Section 1557. "[T]he general rule regarding actions under civil rights statutes is that *respondeat superior* applies." *Bonner v. Lewis*, 857 F.2d 559, 566 (9th Cir. 1988); *see also Hill v. Shell Oil Co.*, 78 F. Supp. 2d 764, 778 (N.D. Ill. 1999) ("[C]ourts . . . have recognized the continuing viability of vicarious liability in the civil rights context."). The Court should hold health care providers liable on the basis of *respondeat superior* and agency principles, the standard most likely to achieve Section 1557's purpose to eliminate discrimination in health care, most appropriately protective among the statutory standards incorporated into Section 1557, and widely applied in analogous contexts involving provision of goods or services. "In the absence of a Congressional directive to the contrary, this court can assume only that Congress intended the judiciary to use every available tool to eliminate discrimination" against health care consumers on the basis of race, color, national, origin, sex, age, or disability. *Bonner*, 857 F.2d at 567.

A. As With Section 504 Of The Rehabilitation Act, *Respondeat Superior* And Agency Principles Provide The Institutional Liability Standard Most Likely To Achieve The Purposes Of The ACA.

The standard followed under Section 504 of the Rehabilitation Act, which Congress incorporated into Section 1557, is most appropriate to further the purposes of Section 1557 and the ACA as a whole. Under Section 504, courts "apply the doctrine of *respondeat superior* to claims brought directly under the statute, in part because the historical justification for exempting municipalities from *respondeat superior* liability does not apply to the Rehabilitation Act, and in part because the doctrine would be entirely consistent with the policy of th[e] statute, which is to eliminate discrimination." *Duvall v. Cty. of Kitsap*, 260 F.3d 1124, 1141 (9th Cir. 2001) (internal citations and quotations omitted). "The justification for imposing vicarious liability on employers for the acts of employees is well-known. It creates an incentive for the employer to exercise special care in the selection, instruction and supervision of his employees, thereby reducing the risks of accidents." *Bonner*, 857 F.2d at 567 (internal citations and quotations omitted).

Not only does Section 504 of the Rehabilitation Act apply *respondeat superior* liability to claims of discrimination, but the Final Rule implementing Section 1557 specifically states,

> Neither Section 1557 nor this part shall be construed to apply a *lesser standard* for the protection of individuals from discrimination than the standards applied under Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, or the regulations issued pursuant to those laws.

45 C.F.R. § 92.3(a) (emphasis added). This "directive requires [the Court] to construe [Section 1557] to grant *at least* as much protection as provided by" any of the statutes incorporated into Section 1557, and their implementing regulations. *Bragdon*, 524 U.S. at 632 (holding it must "construe the ADA to grant at least as much protection as provided by the regulations implementing the Rehabilitation Act" in light of the "lesser standard" language of 42 U.S.C. § 12201); *see also Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312 (6th Cir. 2012); 42 U.S.C. §

12201 ("nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 790 et seq.) or the regulations issued by Federal agencies pursuant to such title.").

B. Institutional Liability For Claims Of Discrimination In Similar Contexts, Particularly Access To Services, Is Based On *Respondeat Superior* And Agency Principles.

Importantly, courts have routinely applied *respondeat superior* liability and agency principles in other civil rights contexts, particularly with respect to access to services. This further supports application of the same standard to claims of discrimination arising under Section 1557. Indeed, as courts have repeatedly noted in cases involving access to public accommodations and housing, *respondeat superior* liability is needed to root out discrimination in these contexts. The same is true where access to health care is at stake.

Arguello v. Conoco, Inc., 207 F.3d 803 (5th Cir. 2000), *cert. denied*, 531 U.S. 874 (2000), is particularly instructive in this context. In *Arguello*, the Court of Appeals for the Fifth Circuit held that *respondeat superior* applied to claims of discrimination under Title II of the Civil Rights Act, 42 U.S.C. §2000a, which prohibits discrimination in places of public accommodation. The court reasoned that "in a public accommodation case [], a rule that only actions by supervisors are imputed to the employer would result, in most cases, in a no liability rule. . . . [I]t is rare that in a public accommodation setting[] a consumer will be mistreated by a manager or supervisor. Most consumer encounters are between consumers and clerks who are non-supervisory employees." 207 F.3d at 810; *see also, e.g., Grant v. Alperovich,* No. C12-1045RSL, 2014 WL 221807 (W.D. Wash. Jan. 21, 2014); *Laroche v. Denny's Inc.*, 62 F. Supp. 2d 1366 (S.D. Fla. 1999); *Bobbitt by Bobbitt v. Rage Inc.*, 19 F. Supp. 2d 512, 522 (W.D. N.C. 1998). Such is the case with claims of discrimination under Section 1557.

"In enacting the Patient Protection and Affordable Care Act (ACA), Congress comprehensively reformed the national market for health-care products and services. By any measure, that market is immense." *NFIB*, 132 S. Ct. at 2609 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part). "Unlike the market for almost any other product or service, the market for medical care is one in which all individuals inevitably participate. Virtually every person residing in the United States, sooner or later, will visit a doctor or other health-care professional." *Id.* at 2610. As in this case, most health care consumer interactions are with doctors, nurses, medical technicians, and receptionists, not with top hospital administrators. Indeed, in the health care context, many interactions are one-on-one, occurring in examining rooms and similarly private settings, without administrators present. Thus, as in *Arguello*, adoption of the actual notice and deliberate indifference standard urged by Defendants in the Section 1557 context "would result, in most cases, in a no liability rule." 207 F.3d at 810. *See also* Section III (B)-(D), *infra*.

Likewise, "[f]ederal courts have routinely applied" *respondeat superior* and agency "principles in fair housing cases and held principals liable for the discriminatory acts of their agents." *City of Chicago v. Matchmaker Real Est. Sales Ctr., Inc.*, 982 F.2d 1086, 1096 (7th Cir. 1992). In so doing, they have applied a "general rule . . . that the duty of a property owner not to discriminate in the leasing or sale of that property is non-delegable." *Walker v. Crigler*, 976 F.2d 900, 904 (4th Cir. 1992); *see also Coates v. Bechtel*, 811 F.2d 1045, 1051 (7th Cir. 1987); *Phiffer v. Proud Parrot Motor Hotel, Inc.*, 648 F.2d 548, 552 (9th Cir. 1980); *Marr v. Rife*, 503 F.2d 735, 741 (6th Cir. 1974) ("The discriminatory conduct of an apartment manager or rental agent is, as a general rule, attributable to the owner and property manager of the apartment complex, both under the doctrine of *respondeat superior* and because the duty to obey the law is non-

delegable."); *Saunders v. Gen. Servs. Corp.*, 659 F. Supp. 1042, 1059 (E.D. Va. 1987) ("Under the Fair Housing Act, a corporation and its officers 'are responsible for the acts of a subordinate employee . . . even though these acts were neither directed nor authorized . . . because the statutory duty not to discriminate is non-delegable.") (citations omitted). Such a rule makes even more sense in the health care context.

Assuming *arguendo* that Defendants did not have actual notice of the discriminatory acts alleged in this case, "[t]he central question to be decided in a case such as this . . . is which innocent party . . . will ultimately bear the burden of the harm caused." *Walker*, 976 F.2d at 904. In other words, is it health care institutions with a non-delegable duty to ensure health care services are provided in a non-discriminatory manner, or health care consumers who feel the direct harm of discriminatory acts, who must ultimately bear the burden of the discriminatory acts and corresponding harms from such acts? As with the Fair Housing Act, the answer in this case is clear. The "overriding societal priority" of ensuring that individuals have nondiscriminatory access to health care and health coverage "clearly set out" in the ACA's Section 1557 "indicates that the . . . party with the power to control the acts of the agent, . . . must act to compensate the injured party for the harm, and to ensure that similar harm will not occur in the future." *Id.* at 904-05.

Thus, faced with similar circumstances, courts have concluded it necessary and appropriate to hold owners and institutions liable for the discriminatory acts of their agents and employees under *respondeat superior* and agency principles in the housing and public accommodation contexts. *See, e.g.*, *Arguello*, 207 F.3d at 810; *Walker*, 976 F.2d at 905. This Court should similarly conclude that health care providers such as Defendants, which benefit from the market for health care products and services, must be held "to the specific mandates of

anti-discrimination law if the goal of [ensuring nondiscriminatory access] is to be reached." *Walker*, 976 F.2d at 905.

Accordingly, Defendants and other covered health care entities should be liable for the discriminatory acts of their agents and employees.

III. THERE IS NO ACTUAL NOTICE AND DELIBERATE INDIFFERENCE STANDARD FOR INSTITUTIONAL LIABILITY UNDER SECTION 1557.

The Court should reject Defendants' attempts to engraft an actual notice and deliberate indifference standard onto Section 1557 for purposes of institutional liability. In making this argument, Defendants rely on *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998), a Title IX case involving sexual harassment of a student by a teacher in a public school. Defendants' reliance on *Gebser* is misplaced for several reasons. First, even under Title IX, the actual notice and deliberate indifference standard adopted in *Gebser* does not apply except in cases involving individual sexual harassment. Second, the reasons for requiring actual notice and deliberate indifference when assessing claims of sexual harassment in educational settings are not applicable to claims of discrimination under Section 1557. Third, applying an actual notice and deliberate indifference standard to claims brought under Section 1557 would discourage health care institutions from creating grievance procedures and taking other steps to discover, address, and eliminate discrimination. Finally, requiring health care consumers to identify and notify the official within a healthcare institution with the requisite authority to address the alleged discrimination would place an unreasonable burden on those Congress intended should be protected from discrimination by institutions that have accepted this nondiscrimination obligation as a condition of receipt of federal funds.

A. Actual Notice And Deliberate Indifference Are Not Required Under Title IX Except In Limited Cases Involving Individual Sexual Harassment.

Defendants improperly assert that Title IX requires actual notice and deliberate indifference for institutional liability. However, while it is true that actual notice and deliberate indifference are required for individual sexual harassment cases under Title IX, *see Gebser*, 524 U.S. 274; *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999), actual notice and deliberate indifference are not required for all cases brought under Title IX. "[P]re-litigation notice of an alleged violation [is not] a prerequisite to recovery in every Title IX case, or even in every sexual harassment case." *Mansourian v. Regents of the Univ. of California*, 602 F.3d 957, 967 (9th Cir. 2010).

Courts have rejected the imposition of an actual notice and deliberate indifference standard under Title IX in cases involving retaliation claims, equal opportunity in athletic programs, and employment discrimination, to name a few. For example, in *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005), the Supreme Court held that no pre-litigation notice is required in the retaliation context. Courts similarly have rejected the actual notice and deliberate indifference standard in the athletic programs context. *See, e.g.*, *Mansourian*, 602 F.3d 957; *Pederson v. Louisiana State Univ.*, 213 F.3d 858 (5th Cir. 2000). Likewise, in the employment context, courts have expressly held that Title VII, 42 U.S.C. § 2000e et seq., *respondeat superior* standard is "the most appropriate analogue when defining Title IX's substantive standards." *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 832 (10th Cir. 1993).

B. The Bases For Applying Actual Notice And Deliberate Indifference To Claims Of Sexual Harassment In Educational Settings Are Inapplicable To Claims Of Discrimination Under Section 1557.

In holding that actual notice and deliberate indifference were required to sustain sexual harassment claims under Title IX, the Supreme Court relied on a number of factors inapplicable to the Section 1557 health care context. In *Gebser*, the Court relied, *inter alia*, not only on the

fact that the private right of action and availability of compensatory damages under Title IX were judicially crafted, but also on the administrative enforcement scheme provided under Title IX. These bases do not apply to the Section 1557 context.

In refusing to adopt a constructive notice standard, the Supreme Court observed that it had significant leeway in interpreting the statute's scope because the private right of action for damages under Title IX was judicially crafted. *Gebser*, 524 U.S. at 284-85. The Court thus looked to Congress's likely intention with respect to the scope of Title IX, which was passed in an era when civil rights statutes expressly provided for private remedies that were limited to injunctive and equitable relief. *Id*. at 285-86. Thus, the Court reasoned, because Congress had not expressly created a private right of action under Title IX at a time when it had done so in other civil rights statutes—and none of these statutes allowed for the recovery of damages until years later—it would be inappropriate to permit recovery of damages in the Title IX sexual harassment context absent actual notice and deliberate indifference.

In contrast with the passage of Title IX, when Congress enacted the ACA and Section 1557, it *knowingly* incorporated four statutes, each of which provides for both a private right of action as well as compensatory damages. In so doing, Congress demonstrated its clear intent to create a private right of action for Section 1557 claims. *See Callum*, 137 F. Supp. 3d at 847 ("Congress intended to create a private right and private remedy for violations of Section 1557 by expressly incorporating the enforcement provisions of the four federal civil rights statutes."); *SEPTA*, 102 F. Supp. 3d at 698; *Rumble*, 2015 WL 1197415, at *7 n.3; *see also Barnes v. Gorman*, 536 U.S. 181, 185 (2002) (finding that although neither Section 202 of the ADA nor Section 504 of the Rehabilitation Act explicitly provides for a private cause of action, they implicitly create one due to their cross-references to each other and to Title VI of the Civil

Rights Act of 1964). A familiar canon of statutory construction states that "evaluation of congressional action must take into account its contemporary legal context." *Morse v. Republican Party of Virginia*, 517 U.S. 186, 230 (1996) (plurality opinion) (citing *Cannon v. Univ. of Chicago*, 441 U.S. 677, 698–99 (1979)); *see also Motorcity of Jacksonville, Ltd. v. Southeast Bank N.A.*, 83 F.3d 1317, 1331 (11th Cir. 1996) (*en banc*) (recognizing principle that "Congress legislates against the background of the existing common law"). When Congress enacted Section 1557, "it did so against the backdrop of" Supreme Court precedents and regulations making clear that each of the statutes incorporated into Section 1557 provided for a private right of action and compensatory damages. *McNely v. Ocala Star-Banner Corp.*, 99 F.3d 1068, 1076 (11th Cir. 1996).

The Final Rule promulgated by HHS confirms this intent by specifically providing for a private right of action and compensatory damages. *See* 45 C.F.R. §§ 92.301(b), 92.302(d). Therefore, unlike the educational institutions at issue in *Gebser* and *Davis*, covered health care entities, like Defendants, were on clear notice that Section 1557 created private rights of action along with a multitude of remedies, including compensatory damages.

Second, in refusing to adopt a constructive notice standard in *Gebser*, the Supreme Court considered the administrative enforcement scheme of Title IX, which requires the administrative agency to provide the educational institution notice and an opportunity to comply voluntarily before taking enforcement action. 524 U.S. at 289. However, under the Final Rule implementing Section 1557, the Director of HHS's Office for Civil Rights may require an entity that has violated the statute to take certain remedial actions without prior notice and an opportunity for voluntary compliance. 45 C.F.R. § 92.6. In addition, the Final Rule expressly states that HHS's "approach [regarding the administrative processing of complaints] is not

intended to limit the availability of judicial enforcement mechanisms." 81 Fed. Reg. 31,440. Thus, *Gebser*'s reliance on Title IX's administrative enforcement procedure to support the adoption of an actual notice/deliberate indifference standard shows why that standard does *not* apply to Section 1557.

Thus, primary considerations the Supreme Court took into account in requiring actual notice and deliberate indifference for sexual harassment cases under Title IX are not present in the Section 1557 context.

C. Applying An Actual Notice And Deliberate Indifference Standard To Section 1557 Claims Discourages Health Care Institutions From Creating Grievance Procedures And Taking Other Steps To Discover, Address, And Eliminate Discrimination.

Adopting an actual notice and deliberate indifference institutional liability standard would discourage health care providers, programs, and activities from creating, disseminating, and implementing nondiscrimination policies and grievance procedures to discover, address, and eliminate discrimination in order to avoid potential liability. Indeed, the application of actual notice and deliberate indifference would create an incentive for covered health care entities to "insulate themselves from knowledge about" discriminatory conduct so that "they can claim immunity from damages liability." *Gebser*, 524 U.S. at 300-01 (Stevens, J., dissenting).

In fact, courts have recognized that applying *respondeat superior* in other similar contexts creates incentives for employers and principals to take steps to discover and prevent discriminatory acts by their employees and agents. For example, in *Bonner v. Lewis*, 857 F.2d 559 (9th Cir. 1988), a case involving allegations of disability-based discrimination under Section 504 of the Rehabilitation Act, the Ninth Circuit stated:

> The justification for imposing vicarious liability on employers for the acts of their employees is well-known. It creates an incentive for the employer to exercise special care in the selection, instruction and supervision of his employees, ... [i]n

> the absence of Congressional directive to the contrary, this court can assume only that Congress intended the judiciary to use every available tool to eliminate discrimination against the handicapped in federally funded programs.

Bonner, 857 F.2d at 566-67 (quoting *Patton v. Dumpson*, 498 F. Supp. 933 (S.D.N.Y.1980)); *Glanz v. Vernick*, 756 F. Supp. 632, 636-37 (D. Mass. 1991) (citing same policy rationale in finding hospital liable for discriminatory actions of its employee doctor on *respondeat superior* basis); *see also Am. Soc'y of Mech. Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556, 572 (1982) (reasoning that if an organization "is civilly liable for the . . . violations of its agents acting with apparent authority, it is much more likely that similar . . . violations will not occur in the future. [P]ressure [will be] brought [on the organization] to see to it that [its] agents abide by the law.") (alterations in original; internal citations omitted). The same is true in this context. Adopting *respondeat superior* and agency principles would help protect consumers from discrimination in the health care setting because holding health care institutions liable for the acts of their employees and agents would deter the institutions from shutting their eyes to their employees' and agents' discriminatory actions.

Refusing to apply agency principles and instead adopting an actual notice and deliberate indifference standard would be particularly problematic in the instant case, where Defendants have failed to adopt a policy banning discrimination based on sexual orientation or gender identity or to train their employees accordingly. *See* Pl.'s Mem. at 4-5. Allowing Defendants to avoid liability by invoking an actual notice and deliberate indifference standard would incentivize them to avoid knowledge of discrimination against LGBT people seeking health care at their facility. This would contravene Congress's intent in passing the ACA to deter discrimination in federally funded health programs and activities.

D. Requiring Health Care Consumers To Identify And Notify An Official Within A Health Care Institution With The Requisite Authority To Address The Alleged Discrimination Imposes An Unreasonable Burden.

In addition to the reasons stated above, requiring a person who faces discrimination while seeking health care treatment to identify and give notice to the appropriate person within a health care institution places an unfair and unreasonable burden on that person in a situation where they are likely to be particularly vulnerable.[6] This is especially true because *Gebser* requires giving notice while the discrimination is still ongoing; notice provided after the discriminatory conduct ends is insufficient. *See, e.g.*, *Bello v. Howard Univ.*, 898 F. Supp. 2d 213, 222-22 (D.D.C. 2012) (holding that plaintiffs failed to prove actual notice where no appropriate employee knew of the harassment until after it ended); *Blue v. Dist. of Columbia*, 850 F. Supp. 2d at 32-33 (D.D.C. 2012), *aff'd*, 811 F.3d 14 (D.C. Cir. 2015). Applying *Gebser* in this context would mean that a patient unfairly treated by hospital staff while admitted for treatment—potentially in an incapacitated state—who reports the discriminatory treatment later after discharge and the discriminatory treatment has ended, would not be able to recover damages from the hospital, even though the patient may not have been reasonably capable of identifying the appropriate hospital administrator and reporting the discrimination to that person while it was ongoing.

Indeed, in this case, it is unreasonable to expect that Plaintiff would have been able to identify an appropriate person to whom to report the discrimination she experienced, especially where Defendants did not have (and still do not have) an applicable grievance procedure or a

[6] The unreasonableness of importing an actual notice and deliberate indifference standard in this context is also compounded by the fact that, unlike in the school context (where the potential victims of discrimination constitute a discrete group of people who have developed a relationship with the institution), in the health care context, the potential pool is much broader, encompassing anyone who seeks care from the institution. *See* Pl.'s Mem. at 27. That pool is also likely to be much more diverse in terms of racial and ethnic background, income level, age, educational attainment, etc., and therefore potentially even more vulnerable to discriminatory treatment and even less likely to be able to identify an appropriate person to whom to report ill-treatment.

nondiscrimination policy related to gender identity.[7] *See* Pl.'s Mem. at 4-5. To allow Defendants to escape liability under these circumstances would thwart Congress's intent in passing the ACA, the "fundamental purpose" of which is to "ensure that health services are available broadly on a nondiscriminatory basis to individuals throughout the country." 81 Fed. Reg. 31,379; *see also id.* at 31,431 (Section 1557 "reflects the fundamental policy" that covered entities operating health programs and activities cannot use federal funds to discriminate).[8]

IV. SECTION 1557'S PROHIBITION ON SEX DISCRIMINATION NECESSARILY ENCOMPASSES DISCRIMINATION ON THE BASIS OF GENDER IDENTITY OR TRANSGENDER STATUS.

Plaintiff rightly asserts that the ACA's ban on discrimination "on the basis of sex" includes and prohibits discrimination based on gender identity. *See* 45 C.F.R. § 92.4 ("*On the basis of sex* includes, but is not limited to, discrimination on the basis of . . . sex stereotyping,

[7] The unreasonable burden Defendants seek to impose on consumers is especially apparent in the context of discrimination in health care settings against transgender people, who report a high level of harassment in medical settings. *See* M. Grant et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, at 72 (2011), *available at* http://bit.ly/1oM5Q3h ("28% of respondents were subjected to harassment in medical settings and 2% were victims of violence in doctor's [sic] office[s]."); *see also* Lambda Legal, *When Health Care Isn't Caring: Lambda Legal's Survey on Discrimination Against LGBT People and People Living with HIV*, at 5 (2010), *available at* http://bit.ly/1Y5bY9R (reporting that "over a quarter of all transgender and gender-nonconforming respondents (almost 27 percent) reported being denied care" in health care settings).

[8] Were the Court to require a showing of deliberate indifference for claims of discrimination under Section 1557, such a showing should be limited *solely* to the issue of compensatory damages, as is the case with Section 504 of the Rehabilitation Act. *See Liese v. Indian River Cty. Hosp. Dist.*, 701 F.3d 334, 342 (11th Cir. 2012); *Delano-Pyle v. Victoria Cty.*, 302 F.3d 567, 575 (5th Cir. 2002); *Duvall*, 260 F.3d at 1138; *Powers v. MJB Acquisition Corp.*, 184 F.3d 1147, 1152 (10th Cir. 1999); *Wilkins-Jones v. Cty. of Alameda*, 859 F. Supp. 2d 1039, 1044 (N.D. Cal. 2012). Deliberate indifference should not be required for purposes of liability or any of the other remedies available under Section 1557.

Moreover, deliberate indifference does not require actual knowledge of the discriminatory acts. Instead, mere "benign neglect" to comply with the non-delegable duty not to discriminate suffices. *Deck v. City of Toledo*, 56 F. Supp. 2d 886, 895 (N.D. Ohio 1999); *see also Duvall*, 260 F.3d at 1139 (requiring only "knowledge that a harm to a federally protected right is substantially likely and a failure to act upon that likelihood").

and gender identity."). HHS's definition of "on the basis of sex" within the Final Rule must be accorded "considerable weight" under *Chevron* deference. *Chamber of Com. of U.S. of Am.*, 118 F. Supp. 3d at 183; *see also* Section I.A, *supra*. Moreover, the soundness of the Final Rule cannot reasonably be disputed. As Plaintiff points out, multiple federal courts, including the District Court for the District of Columbia, have held that discrimination against transgender people based on their gender identity, transgender status, or nonconformity with gender stereotypes is sex discrimination. *See, e.g., G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, No. 15-2056, 2016 WL 1567467, at *12 (4th Cir. Apr. 19, 2016) (Davis, J., concurring) (noting "weight of circuit authority concluding that discrimination against transgender individuals constitutes discrimination 'on the basis of sex'"), *reh'g en banc denied*, 2016 WL 3080263 (May 31, 2016); *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011); *Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004); *Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000); *Rumble*, 2015 WL 1197415, at *2; *Finkle v. Howard Cty.*, 12 F. Supp. 3d 780, 788 (D. Md. 2014); *Schroer v. Billington*, 577 F. Supp. 2d 293, 305 (D.D.C. 2008).

CONCLUSION

For the foregoing reasons, Lambda Legal respectfully submits that the Court, in resolving the pending cross-motions for summary judgment, should confirm that Section 1557 provides a private right of action subject to a single legal standard and burden of proof, regardless of the particular basis for the unlawful discrimination being asserted, that is no less protective against discrimination than any of the standards available under the four civil rights statutes incorporated into Section 1557. The Court should further confirm that Section 1557 prohibits discrimination on the basis of gender identity as a form of sex discrimination.

Dated this 8th day of June, 2016.

Respectfully submitted,

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