No. 20-1409

IN THE

United States Court of Appeals for the Fourth Circuit

MAXWELL KADEL; JASON FLECK; CONNOR THONEN-FLECK, by his next friends and parents; JULIA MCKEOWN; MICHAEL D. BUNTING, JR.; C.B., by his next friends and parents; SAM SILVAINE,

Plaintiffs-Appellees,

v.

NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES,

Defendant-Appellant,

and

DALE FOLWELL, in his official capacity as State Treasurer of North Carolina; UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL; NORTH CAROLINA STATE UNIVERSITY; DEE JONES, in her official capacity as Executive Administrator of the North Carolina State Health Plan for Teachers and State Employees; UNIVERSITY OF NORTH CAROLINA AT GREENSBORO,

Defendants.

On Appeal from the U.S. District Court for the Middle District of North Carolina
No. 1:19-cv-00272-LCB-LPA

PLAINTIFFS-APPELLEES' RESPONSE BRIEF

Counsel for Plaintiffs-Appellees listed on following page.

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
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- Counsel has a continuing duty to update the disclosure statement.

No. 20-1409 Caption: Kadel, et al. v. NC State Health Plan for Teachers and State Employees

Pursuant to FRAP 26.1 and Local Rule 26.1,

Maxwell Kadel
(name of party/amicus)

who is Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
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4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

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Signature: /s/ Amy E. Richardson Date: September 30, 2020

Counsel for: Appellees

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No. 20-1409 Caption: Kadel, et al. v. NC State Health Plan for Teachers and State Employees

Pursuant to FRAP 26.1 and Local Rule 26.1,

Jason Fleck
(name of party/amicus)

who is Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

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Signature: /s/ Amy E. Richardson Date: September 30, 2020

Counsel for: Appellees

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Pursuant to FRAP 26.1 and Local Rule 26.1,

Connor Thonen-Fleck, by his next friends and parents
(name of party/amicus)

who is Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

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Signature: /s/ Amy E. Richardson Date: September 30, 2020

Counsel for: Appellees

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No. 20-1409 Caption: Kadel, et al. v. NC State Health Plan for Teachers and State Employees

Pursuant to FRAP 26.1 and Local Rule 26.1,

Julia McKeown
(name of party/amicus)

who is Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

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Signature: /s/ Amy E. Richardson Date: September 30, 2020

Counsel for: Appellees

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Pursuant to FRAP 26.1 and Local Rule 26.1,

Michael D. Bunting, Jr.
(name of party/amicus)

who is Appellee, makes the following disclosure:
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Signature: /s/ Amy E. Richardson Date: September 30, 2020

Counsel for: Appellees

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C.B., by his next friends and parents
(name of party/amicus)

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Counsel for: Appellees

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Pursuant to FRAP 26.1 and Local Rule 26.1,

Sam Silvaine
(name of party/amicus)

who is Appellee, makes the following disclosure:
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Signature: /s/ Amy E. Richardson Date: September 30, 2020

Counsel for: Appellees

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331. Appellant North Carolina State Health Plan for Teachers and State Employees ("NCSHP") took this interlocutory appeal to challenge the district court's denial of its motion to dismiss on sovereign immunity grounds. This Court has jurisdiction under 28 U.S.C. § 1291. *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993).

STATEMENT OF THE ISSUES

Whether Section 1557 of the Affordable Care Act, 42 U.S.C. § 18116, and the Civil Rights Remedies Equalization Act, 42 U.S.C. § 2000d-7, placed the North Carolina State Health Plan for Teachers and State Employees on notice that acceptance of federal financial assistance would constitute a waiver of sovereign immunity.

STATEMENT OF THE CASE

A. Procedural History

Plaintiffs are state employees in North Carolina who are transgender or have transgender dependents. This suit challenges Defendants' exclusion of coverage for the treatment of gender dysphoria under the health plans available to state employees. In relevant part, the suit alleges that the exclusion violates Section 1557

of the Affordable Care Act, 42 U.S.C. § 18116 ("Section 1557"). Section 1557 provides:

> an individual shall not, on the ground prohibited under … title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), . . . be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance.

42 U.S.C. § 18116(a). NCSHP, the state entity that operates the state health plans, moved to dismiss on Eleventh Amendment grounds. The district court held that NCSHP had waived its sovereign immunity by accepting federal funds.

B. Statement of Facts

As part of compensation for employment, the State of North Carolina provides health coverage for more than 720,000 employees, dependents, and retirees through NCSHP, a self-funded state health plan. J.A. 18–19 (Compl. ¶ 1). NCSHP categorically deprives transgender enrollees of coverage for the treatment of gender dysphoria—the clinically significant distress that can result from the dissonance between an individual's gender and their sex assigned at birth. J.A. 19 (Compl. ¶ 1). NCSHP thus unlawfully discriminates against people who are transgender, and those who have transgender family members who depend on them for health care coverage. In doing so, NCSHP denies equal compensation to employees based on transgender status and sex. J.A. 19 (Compl. ¶ 1).

Being transgender "is natural and is not a choice." *Grimm v. Gloucester Cty. Sch. Bd.*, No. 19-1952, 2020 WL 5034430, at *2 (4th Cir. Aug. 26, 2020) (as amended Aug. 28, 2020). "Being transgender is . . . not a psychiatric condition, and implies no impairment in judgment, stability, reliability, or general social or vocational capabilities." *Id.* (quote omitted). Nonetheless, denying transgender people access to medically necessary care for gender transition can cause "debilitating distress and anxiety." *Id.* (quote omitted). This is because "[l]eft untreated, gender dysphoria can cause, among other things, depression, substance use, self-mutilation, other self-harm, and suicide," and being subjected to "discrimination exacerbates these negative health outcomes." *Id.* NCSHP's refusal to cover medically necessary and sometimes lifesaving care for transgender enrollees—even though the same care is covered for cisgender[1] enrollees—inflicts this distress on Plaintiffs and other transgender enrollees.

The World Professional Association for Transgender Health has developed "authoritative standards of care" for gender transition, which this Court recognizes as "the consensus approach of the medical and mental health community." *Id.* at *3. These standards of care "outline appropriate treatments for persons with gender

[1] A cisgender person is one whose "gender identity—their 'deeply felt, inherent sense' of their gender—aligns with their sex-assigned-at-birth." *Id.* at *1. In other words, cisgender refers to a person who is not transgender.

dysphoria," which are individualized and may include counseling, hormone therapy, and surgery.[2] *Id.*

Despite these "modern accepted treatment protocols for gender dysphoria," *id.*, the exclusion within NCSHP's employee health plans is sweeping and absolute, banning coverage for therapy, hormone treatment, surgery, and any other transition-related health care for transgender people. J.A. 19 (Compl. ¶ 2). Other cisgender NCSHP enrollees do not face a categorical exclusion barring coverage for health care that is medically necessary for them based on their sex. J.A. 19 (Compl. ¶ 2).

Before the current State Treasurer assumed office, the State Treasurer's Office ("Treasurer's Office") and NCSHP's Board of Trustees removed the exclusion of treatment for gender-confirming care from the 2017 health plans; they did so because they believed that such a step was necessary to comply with the Affordable Care Act ("ACA"). J.A. 31 (Compl. ¶ 50). The Treasurer's Office took its action after it received a report from a consulting firm, which advised NCSHP that it was likely a covered entity within the meaning of the ACA and needed to comply with the statute's non-discrimination provisions. J.A. 32 (Compl. ¶ 51). The consulting firm also advised that the cost of removing the exclusion would be a *de minimis* .011% to .027% of the annual premium. J.A. 32 (Compl. ¶ 52). By contrast, if the NCSHP

[2] This care is also commonly referred to as gender-confirming, or transition-related care.

did *not* remove the exclusion, the Treasurer's Office believed it would "have risked losing millions of dollars in federal funding and faced discrimination lawsuits for non-compliance." J.A. 31–32 (Compl. ¶ 50).

But Defendant Folwell abruptly reversed that position when he took office as State Treasurer in 2017; he reinstated the exclusion beginning in health plan year 2018. J.A. 32 (Compl. ¶ 53). In a public statement, Folwell stated, "Until the court system, a legislative body or voters tell us that we 'have to,' 'when to,' and 'how to' spend taxpayers' money on sex change operations, I will not make a decision" to treat transgender health care equally under the NCSHP health plans. J.A. 33 (Compl. ¶ 54). The exclusion has remained in NCSHP's health plans each year since then. J.A. 33 (Compl. ¶ 55).

Plaintiffs filed suit alleging, as relevant here, that NCSHP's blanket exclusion of care for transgender people violates Section 1557 of the Affordable Care Act, 42 U.S.C. § 18116. J.A. 52–54 (Compl. ¶¶ 148–157). NCSHP moved to dismiss that claim on sovereign immunity grounds. J.A. 58, 82–85. The district court denied that motion. J.A. 215–39.

The district court relied, in particular, on this Court's repeated holdings that the Civil Rights Remedies Equalization Act ("CRREA"), 42 U.S.C. § 2000d-7, codified an unambiguous waiver of sovereign immunity from ACA claims in exchange for receipt of federal funding. J.A. 231–232. The CRREA provides:

> [a] State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973, title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, title VI of the Civil Rights Act of 1964, *or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance*.

42 U.S.C. § 2000d-7(a)(1) (emphasis added). The district court concluded that Section 1557 is a "Federal statute prohibiting discrimination by recipients of Federal financial assistance," and thus that CRREA's waiver of sovereign immunity extends to that statute. J.A. 232–233.

SUMMARY OF ARGUMENT

When Congress explicitly conditions an offer of federal funds on a state's waiver of sovereign immunity, the state's acceptance of those funds waives its Eleventh Amendment protections. Both Section 1557 of the Affordable Care Act, 42 U.S.C. § 18116, and the Civil Rights Remedies Equalization Act, 42 U.S.C. § 2000d-7, unambiguously provide that a health program or activity that accepts federal financial assistance will not be immune from suit under Section 1557. Because NCSHP accepted federal funds, it has no immunity against this suit.

The text of Section 1557 is clear. It provides that "[t]he enforcement mechanisms provided for and available under . . . title IX, . . . shall apply for purposes of violations of this subsection." 42 U.S.C. § 18116(a). Since the CRREA's enactment in 1986, suits against states—with an accompanying waiver of sovereign

immunity—have been "provided for and available under" Title IX. This Court has so held. *See Litman v. George Mason Univ.*, 186 F.3d 544, 549, 554 (4th Cir. 1999). The NCSHP's argument to the contrary rests on a grudgingly narrow interpretation of the phrase "available under" that conflicts with the plain meaning and with the jurisprudence of both this Court and the Supreme Court. The NCSHP's argument also disregards Congress's choice to use different, narrower language in other closely related statutes.

Wholly independent of Section 1557's "enforcement mechanisms" language, the CRREA is itself unambiguous that a state waives sovereign immunity against suits under Section 1557. The CRREA provides:

> [a] State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973, title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, title VI of the Civil Rights Act of 1964, *or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance*.

42 U.S.C. § 2000d-7(a)(1) (emphasis added). Section 1557 is unambiguously a "statute prohibiting discrimination by recipients of Federal financial assistance." It even employs precisely the same linguistic formulation for describing prohibited discrimination, as do Section 504, Title IX, the Age Discrimination Act, and Title VI—the "Federal statute[s] prohibiting discrimination by recipients of Federal financial assistance" specifically listed in the CRREA. That the Affordable Care

Act as a whole does many things *in addition to* prohibiting discrimination does not make it, or Section 1557, any less a "Federal statute prohibiting discrimination."

Finally, this Court should reject the NCSHP's late-presented argument that Section 1557 does not apply to health insurers. For one thing, the NCSHP did not raise that argument below. For another, the relevant statutory text—"health program or activity," 42 U.S.C. § 18116(a)—plainly includes health insurance. Indeed, the principal purpose of the Affordable Care Act, of which Section 1557 forms a key part, was to increase access to health insurance. It is thus not surprising that every court to have considered the question has held that Section 1557 prohibits discrimination in health insurance.

ARGUMENT

UNDER THE PLAIN TEXT OF THE AFFORDABLE CARE ACT AND THE CIVIL RIGHTS REMEDIES EQUALIZATION ACT, THE NCSHP HAS WAIVED ITS SOVEREIGN IMMUNITY.

A. Congress May Demand a Waiver of Sovereign Immunity in Exchange for the Receipt of Federal Funds, So Long as the Consequences of Accepting the Funds are Clear from the Statutory Text.

It is well settled that "[a] State may waive its Eleventh Amendment immunity and consent to suit in federal court." *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 491 (4th Cir. 2005). Because "Congress has no obligation to use its Spending Clause power to disburse funds to the States," it may

demand that states waive their sovereign immunity in exchange for receiving federal financial assistance. *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686–87 (1999). When a state decides to accept federal funds subject to such a condition, the federal government has not overcome the state's sovereign authority. Rather, the state has *exercised* its sovereign authority by making the decision that it would prefer to get the money than to keep its immunity against certain suits. *See Madison v. Virginia*, 474 F.3d 118, 129 (4th Cir. 2006) (waiver of Eleventh Amendment immunity "reflects an exercise, rather than a limitation of, State sovereignty").

Applying that principle, this Court has held that a state may waive its sovereign immunity "implicitly 'by voluntarily participating in federal spending programs when Congress expresses a clear intent to condition participation in the programs … on a State's consent to waive its constitutional immunity.'" *Constantine*, 411 F.3d at 491 (quoting *Litman v. George Mason Univ.*, 186 F.3d 544, 550 (4th Cir. 1999). To determine whether Congress has demanded a waiver of sovereign immunity as a condition of receiving federal funds, this Court looks to the text of the statute at issue. A "condition on federal spending must be clearly and unambiguously expressed so that the State accepting federal funds can be certain of its obligations upon receipt of such funds." *Constantine*, 411 F.3d at 495. A state's "voluntary acceptance of federal funds in the face of" such an "unambiguous waiver

condition" is sufficient to waive a state's sovereign immunity. *Id.* The clear statutory text "ensure[s] that a State's agreement to federal funding conditions is both knowing and voluntary." *Id.* As we show below, both Section 1557 itself and the Civil Rights Remedies Equalization Act contain text that makes perfectly clear that the NCSHP's acceptance of federal funds waived any immunity against this suit.

B. The Text of Section 1557 Makes Clear that a State that Accepts Federal Funds Waives its Sovereign Immunity Against Suits Under the Statute.

Plaintiffs brought this case under Section 1557 of the Affordable Care Act, 42 U.S.C. § 18116. Section 1557 explicitly provides that "[t]he enforcement mechanisms provided for and available under … title IX, … shall apply for purposes of violations of this subsection." 42 U.S.C. § 18116(a). Since 1986, suits against states for money damages—with an accompanying waiver of sovereign immunity—have been "provided for and available under" Title IX. In that year, Congress adopted the Civil Rights Remedies Equalization Act, 42 U.S.C. § 2000d-7. That statute "amended Title IX to make explicit that '[a] State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of … title IX of the Education Amendments of 1972.'" *Litman*, 186 F.3d at 549 (quoting 42 U.S.C. § 2000d-7(a)(1)). The effect of the CRREA, as this Court has explicitly held, is to make a money damages remedy against the state available under Title IX. *See id.* at 554. Because suits against states

are an "enforcement mechanism[]" that is "provided for and available under … title IX," the text of Section 1557 makes clear that they "shall apply for purposes of violations of this subsection." 42 U.S.C. § 18116(a).

The NCSHP contests this point. It does not appear to deny that the CRREA "provide[s] for" a waiver of sovereign immunity to enforce Title IX. It focuses instead on Section 1557's "available under" phrase. The NCSHP asserts that an enforcement mechanism is not available "under" Title IX unless it appears in the text of Title IX or Section 504 itself. Def.'s Br. 17–18. Because the waiver of sovereign immunity appears in "a separately enacted law"—one that the NCSHP characterizes as merely "referenc[ing]," but "not amend[ing], the enumerated statutes"—it argues that the damages remedy is available only "under" the CRREA rather than Title IX. Def.'s Br. 18.

That argument makes no sense. For one thing, this Court has itself characterized the CRREA as actually amending, and not merely referencing, the statutes for which it provided damages remedies. *See Litman*, 186 F.3d at 549 (CRREA "amended Title IX" to make clear that a state waived sovereign immunity by receiving federal funds under that statute).

More importantly, there is nothing in the plain meaning of "available under" in Section 1557 that requires that the enforcement mechanisms at issue appear in the same title or section of the United States Code as the statutes that are being enforced.

In deciding whether relief is "available under" a statute, the Supreme Court recently held, courts should look to "substance," not to form. *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743, 755 (2017). And there is no question, after the CRREA, that a party who brings a lawsuit under Title IX or Section 504 may recover money damages against a state on an appropriate showing. Such a remedy is thus "available" to that party—it is "accessible or may be obtained" by a successful plaintiff under either statute. *See Ross v. Blake*, 136 S. Ct. 1850, 1858–59 (2016) (citing various dictionary definitions to the effect that "the ordinary meaning of the word 'available' is '"capable of use for the accomplishment of a purpose,' and that which 'is accessible or may be obtained.'") (citations omitted). And it is available "under" either statute because it is provided "in accordance with" the remedial principles Congress has directed to apply to those statutes. *See* Webster's Third New Int'l Dictionary Unabridged 2487 (1993) (relevantly defining "under" as "required by: in accordance with: bound by"). *See also Pereira v. Sessions*, 138 S. Ct. 2105, 2117 (2018) (cited at Def.'s Br. 17) (defining "under" as "'in accordance with' or 'according to'"). The remedies available "in accordance with" Title IX include money damages against states; that is true even though those remedies are set forth in Title 42 rather than Title 20 of the U.S. Code. Similarly, a remedy is available "under" a contract if a party can recover it in the event of a breach; that is true even if the remedy is not explicitly mentioned in the contract but instead is an off-the-rack

term supplied by the Uniform Commercial Code or other provisions of law or contract.

Following this plain meaning, the Supreme Court has explained that the CRREA "abrogated the States' Eleventh Amendment immunity *under* Title IX, Title VI, § 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975," *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 72 (1992) (emphasis added), because it provided a damages remedy against states for claims brought under any of those statutes. Indeed, the Court specifically held that "a money damages remedy is *available under* Title IX," even though the text of Title IX does not even expressly provide a cause of action, much less provide any specific remedies. *Id.* at 75 n.8 (emphasis added).

A comparison with the language of other, closely related statutes bolsters the conclusion that Congress did not intend to limit Section 1557's remedies to those that were listed expressly in the particular sections or titles to which it refers. Section 1557 incorporates enforcement mechanisms "provided for and available under" the listed statutes. 42 U.S.C. § 18116(a). By contrast, the remedial provision of Title II of the Americans with Disabilities Act incorporates "[t]he remedies, procedures, and rights *set forth in* section 794a of Title 29." 42 U.S.C. § 12133 (emphasis added). The remedial provision attached to Section 504 of the Rehabilitation Act similarly incorporates "[t]he remedies, procedures, and rights *set forth in* title VI of the Civil

Rights Act of 1964 (42 U.S.C. 2000d et seq.)." 29 U.S.C. § 794a(a)(2) (emphasis added). If Congress had intended for Section 1557 of the ACA to limit its remedies to those set forth in the precise sections of the statutes it referenced, then it would have used similar "set forth in" language, rather than the broader "available under" language it in fact chose to use. The contrast between the language of these sections is especially notable because Section 1557 explicitly refers to, and incorporates the remedies available under, Section 504 of the Rehabilitation Act, *see* 42 U.S.C. § 18116(a), but without using the narrower "set forth in" language of the Rehabilitation Act itself. That fact suggests the drafters were aware of the differences in language and intended Section 1557 to have a broader meaning. *Cf. Loughrin v. United States*, 573 U.S. 351, 358 (2014) ("When Congress includes particular language in one section of a statute but omits it in another—let alone in the very next provision—this Court presume[s] that Congress intended a difference in meaning") (internal quotation marks omitted).

The NCSHP relies on *Ardestani v. I.N.S.*, 502 U.S. 129 (1991), but that case actually supports the conclusion that Section 1557 exacts a waiver of sovereign immunity. Def.'s Br. 19. In *Ardestani*, the Court held that deportation proceedings were not adjudications "under [5 U.S.C.] section 554," 502 U.S. at 132 (internal quotation marks omitted), because those proceedings were not "'subject to' or 'governed by' § 554," *id.* at 135. Here, by contrast, the enforcement mechanisms

"available" in proceedings "subject to" or "governed by" Title IX include damages suits against states (with an accompanying waiver of sovereign immunity). Section 1557 thus expressly incorporates those remedies.

Quoting *Sossamon v. Texas*, 563 U.S. 277, 287 (2011), the NCSHP argues that "'where a statute is susceptible of multiple plausible interpretations, including one preserving immunity, we will not consider a State to have waived its sovereign immunity.'" Def.'s Br. 21. But there are not "multiple plausible interpretations" here. Damages remedies against states are, by any plausible interpretation, "provided for and available under" Title IX. They thus "apply for purposes of violations of" Section 1557 by that statute's plain language. 42 U.S.C. § 18116(a).

Similarly, the fact that Section 1557 itself does not expressly mention sovereign immunity (Def.'s Br. 20) is irrelevant. Section 1557 expressly incorporates the remedies available under Title IX, and those remedies plainly include a waiver of sovereign immunity. This Court has held that states can be expected to read Title IX "in conjunction with" the CRREA, and that the plain legal effect of the two statutes together puts states on notice that they are waiving Eleventh Amendment immunity. *Litman*, 186 F.3d at 554 (concluding that "any state reading § 2000d–7(a)(1) in conjunction with 20 U.S.C. § 1681(a) would clearly understand the following consequences of accepting Title IX funding: (1) the state must comply with Title IX's antidiscrimination provisions, and (2) it consents to resolve disputes

regarding alleged violations of those provisions in federal court."); *see also Fryberger v. Univ. of Ark.*, 889 F.3d 471, 476 (8th Cir. 2018) (text of Title IX's waiver of sovereign immunity is unambiguous even though state officials must read Title IX and CRREA together). Precisely the same point applies here.

C. The Text of the CRREA Independently Makes Clear that a State that Accepts Federal Funds Waives its Sovereign Immunity Against Suits Under Section 1557 of the ACA.

Even if Congress had not adopted the "enforcement mechanisms" provision of Section 1557, a state that received federal funds would still waive its sovereign immunity against suits under that statute. The CRREA's text itself is unambiguous on this point.

The CRREA provides:

> [a] State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973, title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, title VI of the Civil Rights Act of 1964, *or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance*.

42 U.S.C. § 2000d-7(a)(1) (emphasis added). Both the Supreme Court and this Court have recognized that the CRREA unambiguously demands a waiver of sovereign immunity in exchange for the receipt of federal funds. *See Lane v. Pena*, 518 U.S. 187, 200 (1996); *Litman*, 186 F.3d at 554; *Gruver v. La. Bd. of Supervisors for La. State Univ. Agric. & Mech. Coll.*, 959 F.3d 178, 180–81 (5th Cir. 2020)

("Every circuit to consider the question—and all but one regional circuit has—agrees that section 2000d–7 validly conditions federal funds on a recipient's waiver of its Eleventh Amendment immunity.").

Section 1557 is, on its face, a "statute prohibiting discrimination by recipients of Federal financial assistance." That provision specifies that "an individual shall not . . . be excluded from participation in, be denied the benefits of, *or be subjected to discrimination under*, any health program or activity, any part of which *is receiving Federal financial assistance*." 42 U.S.C. § 18116(a) (emphasis added). The statutory language could hardly be clearer.

Indeed, Section 1557 uses exactly the same linguistic formulation for describing prohibited discrimination as do Section 504, Title IX, the Age Discrimination Act, and Title VI—the "Federal statute[s] prohibiting discrimination by recipients of Federal financial assistance" specifically listed in the CRREA. Thus, Section 504 states that no qualified individual with a disability shall, based on disability, "be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). Title IX sets forth the general rule that no person "shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). The Age

Discrimination Act provides that no individual "shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving Federal financial assistance." 42 U.S.C. § 6102. And Title VI provides that no person "shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. Not only that, but Section 1557 explicitly incorporates the forbidden bases of discrimination listed in those statutes. *See* 42 U.S.C. § 18116(a) (prohibiting discrimination "on the ground prohibited under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), or section 794 of Title 29").

> Under the established interpretative canons of *noscitur a sociis* and *ejusdem generis*, where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.

Madison, 474 F.3d at 133 (internal quotation marks omitted). Here, there can be no doubt that Section 1557 is "similar in nature" to the specific federal statutes prohibiting discrimination that are enumerated in the text of the CRREA. Section 1557 uses precisely the same language as they do to describe forbidden

discrimination, and it prohibits that discrimination on precisely the same grounds that they do.[3]

In this regard, Section 1557 is very different than the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1 ("RLUIPA"). In *Madison*, 474 F.3d at 132, this Court held that the CRREA did "not clearly and unambiguously apply to RLUIPA." The Court explained that RLUIPA, unlike the statutes specifically named in the CRREA, does not by its terms prohibit discrimination:

> Instead, it forbids a state from imposing substantial and unjustified religious burdens on prisoners. And, in contrast to the non-discrimination statutes listed in the CRREA—which require identical treatment of similarly situated individuals—RLUIPA requires that States treat religious accommodation requests more favorably than non-religious requests.

Madison, 474 F.3d at 133; *see also Sossamon*, 563 U.S. at 292 ("Unlike [RLUIPA], each of the statutes specifically enumerated in [the CRREA] explicitly prohibits 'discrimination.'").

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[3] The NCSHP argues that the statutes enumerated in the CRREA "prohibit a certain type of discrimination in *any* federally-funded program," while Section 1557 is different because it prohibits discrimination only "in a *specific* type of program." Def.'s Br. 28. That Section 1557 prohibits discrimination only in "health program[s] or activit[ies]" that "receiv[e] Federal financial assistance," 42 U.S.C. § 18116(a), does not make it any less a "Federal statute prohibiting discrimination by recipients of Federal financial assistance," 42 U.S.C. § 2000d-7(a)(1). And at least one of the statutes enumerated in the CRREA—Title IX—also applies only in a specific type of program. *See* 20 U.S.C. § 1681(a) (applying to "any education program or activity receiving Federal financial assistance").

Section 1557, by contrast, *does* prohibit discrimination, and it does so in virtually identical terms to those used by the non-discrimination statutes listed in the CRREA. There is simply no ambiguity here: The CRREA's "any other Federal statute prohibiting discrimination by recipients of Federal financial assistance" language, 42 U.S.C. § 2000d-7(a)(1), plainly reaches Section 1557.

The NCSHP specifically concedes that Section 1557 "prohibits discrimination." Def.'s Br. 28. But it argues that the ACA as a whole "is most assuredly not a similar antidiscrimination statute." *Id.* That makes no sense. The ACA does many things. But the inclusion of Section 1557 meant that *one* of the things it does is prohibit discrimination by recipients of Federal financial assistance. Even if it is considered as a whole, the ACA Section 1557 is thus a "Federal statute" that—among other things—"prohibit[s] discrimination by recipients of Federal financial assistance." 42 U.S.C. § 2000d-7(a)(1). Considered on its own, Section 1557 is itself such a statute. The CRREA contains no language that *excludes* a statute that prohibits discrimination by recipients of federal financial assistance simply because it also does other things—or is part of a larger bill that also does other things.

And, indeed, two of the four "statute[s] prohibiting discrimination by recipients of Federal financial assistance" explicitly referenced in the CRREA are narrow provisions or titles of broader statutes directed at many things other than

discrimination. The Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355, is almost entirely devoted to authorizing funding for, and setting the rules governing, state vocational rehabilitation systems. Section 504—the provision prohibiting discrimination by recipients of federal financial assistance—occupies only a few lines tacked onto the end of a long bill devoted to other issues. *See* Lisa Eichhorn, *Major Litigation Activities Regarding Major Life Activities: The Failure of the "Disability" Definition in the Americans with Disabilities Act of 1990*, 77 N.C. L. Rev. 1405, 1419 (1999) ("This single sentence, appearing at the very end of the Act, was no more than a legislative afterthought in a complex spending bill.") (internal quotation marks omitted). Similarly, Title IX is but a small part of a large and complex bill authorizing education programs. *See* Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 235. By describing these provisions as "Federal statute[s] prohibiting discrimination by recipients of Federal financial assistance," 42 U.S.C. § 2000d-7(a)(1), Congress made clear that the CRREA does not require courts to engage in the inherently malleable exercise of determining whether an enacted public law *as a whole* can be understood as a nondiscrimination law. Rather, the relevant question is whether the *provision at issue* prohibits discrimination by recipients of federal money. By its plain terms, Section 1557 of the ACA satisfies that test.

This case is thus entirely unlike *Levy v. Kan. Dep't of Soc. & Rehab. Servs.*, 789 F.3d 1164 (10th Cir. 2015), the principal case on which Appellant relies. *See* Def.'s Br. 28–29. There, the Tenth Circuit held that the CRREA did not apply "to a *retaliation* claim under [42 U.S.C.] § 12203(a)." *Levy*, 789 F.3d at 1169–70 (emphasis added). But Section 12203(a) prohibits retaliation, not discrimination based on particular characteristics, and it does not in any way target recipients of federal money. Section 1557 of the ACA, by contrast, prohibits discrimination based on individual characteristics by recipients of federal financial assistance—and indeed appears carefully drafted to mirror the "Federal statute[s] prohibiting discrimination by recipients of Federal financial assistance" that are explicitly listed in 42 U.S.C. § 2000d-7(a)(1). *See* pp. 17–19, *supra*. It thus is plainly encompassed within the language of the CRREA.

Every federal court to have considered this issue has held that Section 1557 is indeed a "Federal statute prohibiting discrimination by recipients of Federal financial assistance," for which the CRREA conditions the acceptance of federal funds on a waiver of sovereign immunity. *See Boyden v. Conlin*, 341 F. Supp. 3d 979, 998 (W.D. Wis. 2018); *Esparza v. Univ. Med. Ctr. Mgmt. Corp.*, Civil Action No. 17-4803, 2017 WL 4791185, at *9 (E.D. La. Oct. 24, 2017) ("[t]he Court holds that § 2000d-7 applies to § 1557 of the ACA."). *Cf. Edmo v. Idaho Dep't of Corr.*, No. 1:17-CV-00151-BLW, 2018 WL 2745898, at *8–9 (D. Idaho June 7, 2018)

(affirming state's liability to private suit under Section 1557 and denying motion to dismiss without expressly considering sovereign immunity).

Appellant notes that Congress adopted Section 1557 many years after it adopted the CRREA. Def.'s Br. 25–26. That is irrelevant. By its plain terms, the CRREA applies to "*any* other Federal statute prohibiting discrimination by recipients of Federal financial assistance." 42 U.S.C. § 2000d-7(a)(1) (emphasis added). It does not specify that it applies only to those statutes that were on the books at the time it was adopted. The word "any" is "broadly inclusive," *Nat. Res. Def. Council v. E.P.A.*, 755 F.3d 1010, 1019 (D.C. Cir. 2014), and "signal[s] expansive reach," *New York v. E.P.A.*, 443 F.3d 880, 885 (D.C. Cir. 2006). It would be inconsistent with the plain meaning of that word to read it as applying only to federal statutes that were on the books at the time the CRREA was enacted. To do so would be to disregard the language Congress chose to adopt. "[W]hen Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule." *Bostock v. Clayton Cty.,* 140 S. Ct. 1731, 1747 (2020); *see also Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998) ("[T]he fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.") (internal quotation marks omitted). Because Congress unambiguously used broad language reaching "any" statute prohibiting discrimination by recipients of federal funds—without any limitation to statutes then

existing on the books—Section 1557 "unequivocally come[s] within the scope of" the CRREA. *Sossamon*, 563 U.S. at 292.

Nor does applying the plain text of the CRREA mean that Appellant's "decision to accept federal funds in 2003" constituted a waiver of sovereign immunity. *Cf.* Def.'s Br. 26. In 2003, the ACA was not yet on the books. But Appellant's decision to accept federal funds *after* the ACA's 2010 enactment *did* constitute a waiver. At that point, "any state reading § 2000d–7(a)(1) in conjunction with" the ACA "would clearly understand" that continued receipt of federal funds would both require them to "comply with [Section 1557's] antidiscrimination provisions" and constitute "consent[] to resolve disputes regarding alleged violations of those provisions in federal court." *Litman*, 186 F.3d at 554. Accordingly, the CRREA's plain text exacts an unambiguous waiver of sovereign immunity against suits under Section 1557. *See Esparza*, 2017 WL 4791185, at *8 ("So yes, Congress does indeed know how to draft an effective waiver—and Congress did so with § 1557.").

D. Section 1557's Application to Health Insurers Like the NCSHP is Clear from the Statutory Text and Offers No Basis for Reversal.

The NCSHP asserts that it is not clear that Section 1557 applies to this suit. In particular, it says that the statute does not unambiguously apply to health insurers. Def.'s Br. 21. But the NCSHP waived that argument by not presenting it below.

This Court has "repeatedly held that issues raised for the first time on appeal generally will not be considered." *Karpel v. Inova Health Sys. Servs.*, 134 F.3d 1222, 1227 (4th Cir. 1998).

Moreover, the NCSHP's argument goes to the merits of this lawsuit, not to whether it has waived sovereign immunity. *See F.D.I.C. v. Meyer*, 510 U.S. 471, 483–84 (1994) (stating that "whether there has been a waiver of sovereign immunity" and whether there is "a cause of action for damages" are "analytically distinct inquiries") (internal quotation marks omitted). Both the Supreme Court and this Court have made clear that the existence of arguable questions on the *merits* of a lawsuit under Spending Clause legislation do not render the legislation impermissibly *ambiguous* under the rule that "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). This Court has explained that "Congress need not spell out every condition with flawless precision for a provision to be enforceable." *W. Va. Dep't of Health & Human Res. v. Sebelius*, 649 F.3d 217, 223 (4th Cir. 2011). The Supreme Court, too, has held that Congress has no obligation to "prospectively resolve every possible ambiguity concerning particular applications of the requirements of" Spending Clause legislation. *Bennett v. Ky. Dep't of Educ.*, 470 U.S. 656, 669 (1985).

If the NCSHP has an argument that Section 1557 does not reach the conduct in which they engaged, that is a merits question it can raise in the district court (though it is an argument that should fail based on the plain statutory text). But that argument does not, in any event, provide a basis for impugning the explicit statutory waiver of sovereign immunity. This Court should thus reject the NCSHP's late-presented assertion that Section 1557 does not apply to them.

In any event, Section 1557's text unambiguously does apply to NCSHP. The statute covers "any health program or activity, any part of which is receiving Federal financial assistance." 42 U.S.C. § 18116(a). Health insurance obviously is a "health program or activity" under the plain meaning of those terms. It is a "schedule or system under which action may be taken toward [the] desired goal" of health. *See* Webster's Third, *supra*, at 1812 (relevantly defining "program" as "a schedule or system under which action may be taken toward a desired goal"). And it is a "function or operation" related to health. *See id.* at 22 (relevantly defining "activity" as a "natural or normal function or operation"). The NCSHP makes *absolutely no attempt* to reconcile its argument on this point with the plain statutory text.

Additionally, the proposition that health insurance is not a "health program or activity" covered by Section 1557 is not credible in light of the ACA's purpose. Congress enacted the ACA primarily "to expand coverage in the individual health insurance market." *King v. Burwell*, 576 U.S. 473, 478–79 (2015). By adopting the

broad term "health," Congress intended for Section 1557 to apply expansively, including to health insurance. Reading "health insurance" out of the scope of covered entities under Section 1557 defies the plain text of Section 1557 and the ACA's broader purpose of eliminating barriers to health care, including discrimination in the insurance context. Section 1557's text must be considered in the context of the ACA as a whole. In that light, there can be no question that Section 1557 was intended to apply to health insurance. Indeed, the purpose of the ACA is to increase health care access and coverage, not narrow it. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 538–39 (2012). And *health* insurance is what enables the vast majority of Americans to access health care.

Federal courts have consistently interpreted Section 1557, by its plain text, to apply to health insurance. *See*, *e.g.*, *Schmitt v. Kaiser Found. Health Plan of Wash.*, 965 F.3d 945, 948, 954–55 (9th Cir. 2020) (holding that Section 1557 "prohibits discrimination . . . in the health care system—as relevant here, in health insurance contracts"); *Tovar v. Essentia Health*, 857 F.3d 771, 779 (8th Cir. 2017) (reversing dismissal of Section 1557 claims against insurer). No court has held otherwise.

The NCSHP notes that the U.S. Department of Health and Human Services ("HHS") currently interprets Section 1557 as not applying to entities "principally or otherwise engaged in the business of providing health insurance." Def.'s Br. 21 (internal quotation marks omitted). But that novel and atextual interpretation

reversed the agency's prior position and is currently being challenged under the Administrative Procedure Act in numerous cases. *See*, *e.g.*, *Whitman-Walker Clinic, Inc. v. U.S. Dep't of Health & Human Servs.*, Civil Action No. 1:20-cv-01630, 2020 WL 3444030 (D.D.C. filed June 22, 2020); *New York v. U.S. Dep't of Health & Human Servs.*, No. 1:20-cv-5583, 2020 WL 4059929 (S.D.N.Y. filed July 20, 2020); *BAGLY v. U.S. Dep't of Health & Human Servs.*, No. 1:20-cv-11297, 2020 WL 3891426 (D. Mass. filed July 9, 2020). More to the point, as shown above, that interpretation directly conflicts with the plain text of Section 1557 and the purpose of the ACA. It also violates Section 1554 of the ACA, which explicitly prohibits the Secretary of HHS from promulgating any regulation that "creates any unreasonable barriers to the ability of individuals to obtain appropriate medical care" or "impedes timely access to health care services." 42 U.S.C. § 18114. A regulation narrowing the scope of covered entities clearly violates this command. An agency cannot manufacture an ambiguity in a statute by adopting an interpretation that disregards the law's own language.

CONCLUSION

The judgment of the district court should be affirmed.

REQUEST FOR ORAL ARGUMENT

Plaintiffs-Appellees respectfully request oral argument on the issues presented herein because this appeal concerns serious issues regarding waiver of sovereign immunity.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing filing complies with the relevant type-volume limitation and typeface requirements of the Federal Rules of Appellate Procedure and Federal Circuit Rules.

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(f), the brief contains 6,769 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2006 in 14 point Times New Roman font. As permitted by Fed. R. App. P. 32(g)(1), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

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