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How Conservatives Oppose Health Care Civil Rights

As I waited in the lobby to interview Erica, a patient advocate who was also the Section 1557 coordinator, I watched workers taking down the large hanging logo and name of the hospital system and replacing it with the logo and name of the Catholic hospital system that was taking it over. Later, as we were talking, I asked Erica if she had noticed anything about the changeover to Catholic ownership in her role as the Section 1557 coordinator. She replied that no, she had not been told anything, "but I did bring it up, because the implementation that 1557 holds is kind of against the Catholic religion." Erica wondered if her job enforcing health care civil rights based on gender identity would have to change because of the new Catholic ownership of her hospital.

What Erica noticed is a national debate playing out across our courts, state legislatures, and administrative agencies—will conservative religious opposition to trans health care rights block and deny care? When religious freedom means not providing gender-affirming care or even making its provision a crime, what happens to civil rights based on gender identity? Religious opposition to health care civil rights based on gender identity is a major problem for American healthcare because bishops run entire healthcare systems. Religious entities are also both employers and health insurers in the United States. Their interpretation of trans health care civil rights turns the antidiscrimination model completely on its head. In their version, they are the victims of discrimination when civil rights law protects people on the basis of gender identity. In this chapter, we move up to the higher levels of governance where additional structures—healthcare systems, federal and state laws, and constitutional law—and the highly organized and well-funded law firms of the conservative legal movement refract health care civil rights.

Refracting rights happens through absorption frames, such as patient experience, and deflection frames, such as medical necessity. It also happens through defeat frames, when opposing interpretations of rights meet in court and one side loses. Discrimination law can fail patients because it has been weakened and dismantled by its opponents. Religious opposition to gender-affirming care as a health care civil right—melded almost completely with Republican party politics—has rolled back rights at the national political and legal levels and across many conservative states. There are many reasons that opponents have been able to push back against health care civil rights protections for gender identity in health care. There are long-standing religious rights protections in our laws and Constitution, so the tension here is between different concepts of rights that are incompatible with each other. The United States is a relatively religious nation among similar democracies, and despite our religious pluralism, the religious opposition to trans health care rights is unusually united around conservative evangelical Christianity and conservative Catholicism. The first Trump administration was successful at making the federal judiciary more conservative and thus inviting to opponents of transgender rights, and many features of our political system make it vulnerable to minority rule or at least veto power by well-organized interest groups. Opponents of trans health care civil rights thus have formidable legal and political tools available to fight on religious grounds, and a second Trump term in which to do it.

My focus in this chapter is primarily on the religious opponents of health care civil rights because explicitly religious legal arguments and institutions like the Catholic Church have been critical in challenging and sometimes dismantling trans health care civil rights. But in what Joanna Wuest and Briana Last call a politics of "church against state," religious and business interests have long been aligned in a broad antiregulatory agenda with the goal of dismantling the administrative state.[1] The right-wing industrialists in this coalition oppose the regulation of fossil fuels and dietary supplements just as much as they oppose religious employers covering contraception in their insurance plans. A government too weak to regulate discrimination by employers and the healthcare industry is also too weak to regulate Wall Street, polluters, misleading advertisers, or predatory lenders. Sometimes anti-trans advocates hide their religious views to seem more secular and thus more scientifically credible. Religious opponents of a wide range of LGBTQ+ rights have created professional organizations and publications with an importantly secular gloss and then mobilized them in an alternate story of expertise to use in litigation to create doubt and justify denying gender-affirming care. They also promote scientific and medical uncertainty about gender-affirming care alongside secular opponents such as trans-exclusionary radical feminists, an anti-trans activism that has been stronger in the United Kingdom than in the United States.[2] Religious opposition to trans health care civil rights flourishes in a rich political economy, in other words, as well as draws strength from built-in features of the US healthcare and legal system. This chapter explains

how these forces have done their work so that discrimination law cannot really protect patients.

FRAMEWORKS FOR CONTESTING TRANS HEALTH CARE CIVIL RIGHTS

As I have argued throughout this book, when civil rights refract through health care and healthcare systems, they become weakened and diverted in distinct ways. The patient experience framework is an absorption that is not overtly hostile, but it is overwhelming and digestive as it takes in the civil rights obligation and processes it according to alternative organizational priorities. Insurance companies can also absorb civil rights, perhaps changing their policies to cover gender-affirming care but then deflecting the actual provision of care using industry tools such as medical necessity determinations that are untouched by civil rights obligations. In this chapter, I analyze how religious structures within the American healthcare system support denials of care and have come into direct tension with health care civil rights laws. Health care civil rights can fail because they are simply defeated in a head-to-head contest with religion. Religious control of health care has a long institutional history in the development of Catholic clinics and hospitals in the United States.[3] Organized opposition to abortion in the last half century has resulted in many federal legal protections for religiously based objections to providing care and referrals.[4] Constitutional religious freedoms and free speech protections are also powerful foundations for religious groups opposed to trans health care rights. A conservative federal judiciary and an ultraconservative Supreme Court are inviting grounds for conservative impact litigation, which has been well funded and impactful.

Conservatives resist the idea that health and health care are civil rights contexts that should offer legal protection to statuses, acts, and needs they object to, typically on white evangelical Protestant or conservative Catholic religious grounds.[5] The United States is home to many different religious groups and traditions, and in some ways, we display an outward commitment to religious pluralism. Christian groups provide social services, such as refugee resettlement, for religiously diverse groups of people, for example.[6] Yet because of the near-complete overlap between a deeply conservative Republican party and white evangelicals and Catholic traditionalists, opposition to trans health care rights is a unified political project for the religious right wing beyond the influence of religious pluralism. Conservative Catholics and white evangelicals have become more politically unified under this banner over the past few decades, overcoming historical political divisions and prejudices between them. I present religious opposition arguments as I find them in their own words, focusing on the most influential groups and structures even though they represent a small minority of the American public overall.

Religious groups and religious healthcare institutions have strongly resisted a health care frame for issues from contraception and abortion to trans and nonbinary people's needs. Instead, they frame providing and accessing abortion care and gender-affirming care as deviant and morally indefensible actions that defy theological mandates. They counter health care civil rights with a religious objection frame. The religious objection frame turns the civil rights question around, placing religious healthcare workers and religious institutions in the victim role. The civil rights violation is the interference with their religious freedom and freedom of conscience if they are required to provide or participate in care that they define as theologically abhorrent.

The religious objection frame has a fully institutionalized version in which large Catholic healthcare systems are the claimants asserting the right not to provide entire categories of health care to certain groups of people because the treatments violate Catholic religious doctrine. It also has a more individualized version that health care providers, many of them evangelical or conservative Christians who are not employed in a Catholic healthcare system, invoke as plaintiffs in impact litigation. Objectors are large healthcare systems, insurance providers, professional groups, and individual providers.

This mobilization also draws on an alternative professional expertise frame, in which spin-off professional organizations participate in litigation for conservative causes, such as the right to practice conversion therapies and support for bans on gender-affirming care for youth and adults. This alternative professional expertise frame is the secular version of their religious arguments, enabling conservative opponents to argue that gender-affirming care is harmful and not evidence based without mentioning the underlying religious basis for opposition. Pushing just a little bit ("Well, *why* is it harmful?") gets to the answer: any challenge to God-given, biologically fixed, and heterosexual gender roles is harmful both to the individual and to society. Conservative religious objection also draws on a free speech frame, in which having to use the right pronouns for a trans patient or calling them by the name they go by is forced speech that violates their rights. Free speech—meaning speech in opposition to LGBTQ rights—can now trump antidiscrimination protections according to our ultraconservative Supreme Court, and there is no reason to think this framework could not expand to eat up nearly all discrimination protections. If a doctor or therapist who accepts federal funds can say, "I think you're deluded and not really trans" while refusing to use a person's correct name and pronouns or provide any gender-affirming care, then health care civil rights do not really exist, which is the goal.

We saw how hospital-level priorities and professional structures refract health care civil rights, downgrading them to patient experience problems. Health insurers refract civil rights by continuing to use coverage-denial justifications to throw up barriers to care even without fully excluding gender-affirming care. Even if

we fixed these problems at the first two levels entirely, all the barriers I describe here would still be there. In this chapter, we see health care civil rights refracted through sociopolitical structures at the top governance level in a state or at the federal level. These sociopolitical structures are governmental and legal: state legislatures, state courts, governors, Congress, the Supreme Court, lower federal courts, the presidency, and the administrative state. These structures are shaped by and shape what organized groups and social movements do too. Conservative religious law firms have waged well-planned impact litigation plans, strategically recruiting plaintiffs and bringing lawsuits against health care civil rights in venues where they are likely to win. Features of American politics such as the electoral college, lifetime appointments for Supreme Court justices by the president with confirmation by the Senate, Senate rules such as the filibuster or placing a hold on a confirmation by one senator, and the fact that each state gets two senators regardless of population have driven us into minority rule. These pressures have created a national context in which civil rights opponents have considerable leverage through the judiciary, in red state legislatures, and in the Supreme Court.

THE ORIGINS, CONTENT, AND EFFECTS OF RELIGIOUS OBJECTIONS TO TRANS HEALTH CARE RIGHTS

When religious conservatives object to health care civil rights for trans and nonbinary people, what are their arguments? Why is excluding gender identity from health care civil rights protections important to them? Transgender rights and cultural acceptance of them expanded considerably in the last twenty years. Conservative opponents find this trend alarming and have mobilized their own constituencies around an anti-trans agenda. They have also convinced more of the moderate and right-leaning American public that transgender rights have moved too fast.[7] Religious conservatives have found transgender rights opposition politically convenient, to be sure. Their opposition is not simply manufactured as a political wedge issue, however, nor are they pawns in a broader movement towards authoritarianism or to demolish the regulatory state. My aim is not to construct a clear causal story for the rise in anti-trans sentiment. But there are a few central elements that opponents define for themselves, around which I have wrapped additional interpretation.

Religious opposition reflects understandings of biblical teachings about sex as obviously, biologically binary and gender roles as given by God to match those two male and female options. Only heterosexual sex in marriage is religiously sanctioned. Conservative Catholics and evangelical Protestants share this religious sex-essentialism view even though their religious doctrines differ (and they have a history of distaste between them that has been overcome by their agreement in recent decades on antiabortion, anti-gay, and anti-trans perspectives). In this view,

people who experience same-sex attraction or discomfort with their sex assigned at birth are simply confused. They need pastoral counseling and Christian religious salvation to return to being godly men and women, fulfilling complementary roles defined by male dominance and female submission and, for Catholics, continual openness to conceiving children in marital sex.

Conservative opponents of health care civil rights for LGBTQ people understand themselves to be fighting to defend "one of the most foundational realities of what it means to be human: the fact that we are created male and female."[8] "Christian Healthcare cannot prescribe cross-sex hormones to facilitate a gender transition or use pronouns that do not accord with a person's biological sex," opponents of gender-affirming care argue in a complaint, "as that would violate its belief in the immutability of biological sex."[9] Nor should the body be changed through gender-affirming care. "The body is God's creation," the Catholic Health Care Leadership Alliance argues, "and to remove, impede or interrupt functioning body parts that are effectively participating in the biological unity of the body, according to their physiological purposes, would be to blaspheme God as the supreme Artist, Creator and sanctifier of the flesh."[10] Seen through this religious objection frame, homosexuality and transgenderism are recent, corrupt inventions of far-left ideology that are not real or legitimate. Invented by academic feminists and queer theorists, opponents argue "radical gender theory" celebrates pornography and pedophilia and teaches kids to break down the gender binary.[11] Youth and adults who have become confused about their gender or sexuality due to these influences would then be drawn into believing that they are trans, non-binary, or queer by other adults—educators, therapists, doctors, and others outside the family and church.

By deconstructing "any and all boundaries and taboos around sexuality," as conservatives see it, feminist and queer theories celebrate dangerous social change. Conservatives tend to value long-standing traditional arrangements because they fear chaos and disorder. These values are even linked to measurable personality types: more conservative people tend to be more fearful of change, intolerant of ambiguity, and drawn to strong authority, while liberals are more likely to value novel experiences, tolerate ambiguity, and to experience change as interesting rather than scary.[12] Ideas about the fluidity of gender and sexuality are dangerous for religious conservatives because they define them as sinful, but they would also be threatening under this psychological account. As Catholic healthcare ethical and religious directives warn, "[S]ocial change . . . can lead to policies and actions that are contrary to the true dignity and vocation of the human person."[13] People of all ages feeling free to abandon stifling gender roles and to love beyond religiously sanctioned heterosexual marriage seems like liberating progress for liberals, but for religious conservatives, it creates victims. Their victims are female athletes who lose competitions to trans women ("biological males") and confused and mutilated children and adults who wrongly thought gender-affirming care was the answer to their distress.[14]

Fear of trans youth and adults has also been a relentlessly marketed idea in recent years, as powerful fundraising groups and political candidates saturated our media with depictions of gender-affirming care as deviant, spreading, and dangerous, and more mainstream media outlets covered the issue as a "both sides" debate. Conservative politicians and their funders have found trans health care rights to be a highly salient issue that speaks to their constituencies. Republicans are much less likely than Democrats to favor trans rights or to believe that it is possible to have a gender identity that is different from sex assigned at birth. Even though there is overall majority support for antidiscrimination protections for trans people (sixty-four percent in a 2022 Pew Research survey), support is lower for trans athletes to participate on teams that align with their gender identity or to get medical care in transitioning before age eighteen.[15]

The success of these opponents' arguments has had devastating effects on trans and non-binary people, their families, and the professionals who care for them. By 2024, twenty-two states had passed legislation banning provision of gender-affirming care for youth, though not all the laws are in effect due to ongoing litigation.[16] Some of the arguments to exclude trans and non-binary youth and adults from gender-affirming care are presented in secular terms. But when Alabama governor Kay Ivey signed the Alabama bill criminalizing gender-affirming care, she said that she signed it because "if the Good Lord made you a boy, you are a boy, and if he made you a girl, you are a girl."[17] The conservative legal movement has been gaining strength for decades, but as I explain below, they have been particularly successful recently in winning lawsuits and in helping to produce and then making the most of the rightward turn in the federal judiciary.

RELIGIOUS CONSERVATIVE IMPACT LITIGATION: WHAT ARE THE ARGUMENTS?

Mobilized religious conservatives are a well-funded and well-organized political and legal movement.[18] Alliance Defending Freedom touts fifteen recent wins at the Supreme Court in pro-religious rights, antiabortion, and anti-LGBTQ cases, including *Dobbs, 303 Creative*, and *Masterpiece Cakeshop*.[19] The Becket Fund for Religious Liberty, a smaller organization, has notched wins against the Affordable Care Act. They play to win in everything from injunctions to full-scale shifts in the Supreme Court's fundamental jurisprudence on the balance of power in our government. The first line of argument in the religious objection frame is that it is a constitutional violation of religious exercise to require religious physicians and hospitals to provide gender-affirming care. This argument also extends to religious employers who provide health insurance coverage, so that no coverage would be available for any treatments objectionable to the religion. A second constitutional objection is that it is a violation of their free speech for the government to ban conversion therapies meant to turn people from gay to straight or trans to cis or to

direct healthcare workers to address trans people according to the trans person's gender identity rather than their sex assigned at birth (that is, with the pronouns the person uses).

The statutory arguments against gender identity protections in civil rights law are that Section 1557 is limited to its reading through Title IX, where conservatives find multiple instances of judges endorsing binary gender essentialism and plenty of accommodations for single-sex dormitories and sports teams, father-son and mother-daughter school dances, and beauty pageant scholarships.[20] Conceding that under *Bostock*, "sex is irrelevant to hiring or firing decisions," Alliance Defending Freedom attorneys argue that "sex *is* relevant in contexts like sports."[21] Hospitals, they argue, also "naturally provide medical care 'according to the biological differences between men and women.'"[22] Just as educational institutions can have separate dorms and sports teams for men and women based on biological sex, states, hospitals, and employers should be able to "tailor their health care or insurance coverage according to biological sex."[23] In this view, there is not really a new health care civil right in Section 1557 that affirms trans and non-binary people in equal access to health care as they are but rather only narrow protections for biological men and biological women that are static and fixed from birth to death.

Moreover, religious opponents of health care civil rights typically invoke the statutory law that protects religious rights, the Religious Freedom Restoration Act or RFRA. RFRA (pronounced "rif-ra") was passed in 1993 by an enthusiastically bipartisan Congress to turn back a Supreme Court that would have allowed neutral laws of general applicability to apply to religious practices (in the case in question, it was use of peyote in the Native American Church that violated drug laws). In other words, it was a different world back then. RFRA defends religious exercise by banning substantial burdens on it and requiring that any federal law that burdens it must further a compelling governmental interest in the least burdensome way. The Department of Health and Human Services Office for Civil Rights (OCR) has always acknowledged that RFRA applies to its interpretations of Section 1557 to include gender-identity protections.

These are strong protections for religious exercise indeed, but a big question has been how exactly religion is burdened in the case of gender-affirming-care provision. Religious healthcare objectors have sometimes lost their cases because they could not describe anything more than a hypothetical future injury.[24] No one had asked them to perform any gender-affirming procedure and it was not clear there would be any enforcement action against them. Their claims and some judicial decisions in their favor are replete with dramatic hypotheticals, including the abjectly farcical claim that doctors will be forced to perform sex change surgeries on infants.[25]

OCR has pursued a strategy of specification, that is, insisting that whether a religious exercise is substantially burdened and if that burden can be justified is a fact-specific inquiry that can only be resolved in a case-by-case approach.

Religious opponents of gender-affirming care have always wanted a blanket religious exemption that excuses them from any civil rights obligations in a way that they can control and do not have to explain. Republican administrations will give them that, but Democratic administrations prefer to resolve conflicts between religion and health care in the tightest, most specific factual instances. This strategy makes sense if one assumes that these very strong religious protections are not going anywhere, so the best way to try to carve out some continued health care access is to dispute on the specifics. For example, a University of Maryland health system that is public and nonreligious was not able to deny a trans man his hysterectomy even though the Catholic hospital they had merged with did not want to provide it.[26] The specific facts about public versus religious status were determinative, suggesting that details of merger agreements with Catholic hospital systems and secular ones really matter. It could also matter if there were other nearby facilities that would provide the care and whether those providers are in the same health insurance network, for example.

If courts and OCR are inclined to push for specific-fact situations, they will eliminate many far-fetched hypotheticals that play well in right-wing media and campaigns. This strategy forces some separation between politics and law, moving the conflict into legal terrain on which specific types of reasons must be offered in detail with the grounds for those reasons defended in certain ways. As I have argued in my previous work on vaccine injury conspiracy theorizing, the law and legal process can do a very nice job at narrowing what counts as an argument and a reason and dismantling those that fail to qualify.[27] Here, the OCR under Democratic administrations—if it is allowed to enforce the regulations at all—will require religious opponents to defend specific denials of care for specific patients who are supported by medical professionals (and their families in the case of minors) to obtain that care. Specification is a route to permit greater power for expertise and sympathy to play a role in humanizing and elevating gender-affirming care and those who seek it and to lay bare the unequal treatment that someone who is trans will experience in religious settings.

Religious conservatives are also "playing for rules," that is, using impact litigation to reshape the power balances between the executive and the administrative state.[28] They see civil rights bureaucrats in departments like Health and Human Services as hostile to their religious exercise because of rulemaking under Section 1557 to advance trans rights as part of sex discrimination, for example. Religious conservatives argued against the power of the administrative state to regulate more generally, and now they have won.[29] The Supreme Court ruling in *Loper Bright Enterprises* that courts need not defer to agency fact-finding and expertise in implementing laws like Section 1557 (and many others) makes it much more difficult for Democratic administrations who support trans health rights to implement regulations that accomplish anything. The win in *Loper Bright* is part of a conservative legal mobilization against the administrative state and its powers

generally to regulate and enforce its regulations for the environment, the economy and business markets, healthcare, and more.[30]

In *Texas v. EEOC*, Judge Matthew Kacsmaryk (a federal district court judge well known for delivering far-right-wing judicial pronouncements) attempted to offer a way around the *Bostock* ruling for trans health care civil rights by arguing that the *Bostock* ruling may protect trans people "for being" transgender in the Title VII context, but that does not bar discrimination against them for "conduct" in health care. Judge Kacsmaryk's stark arguments are useful for exposing the ways that the religious objection frame simultaneously builds itself up while undercutting forms of rights expression for a wide range of LBGTQ+ people's being in the world as well as their health care needs. Going beyond "being" trans in health care would involve "conduct" such as seeking and receiving health care. Much like the Catholic healthcare systems' insistence that they treat everyone with dignity and respect while not providing the health care that many trans people need, this distinction offers a way to claim nondiscrimination while excluding, misgendering, and refusing care to anyone who is not cisgender.[31]

I have argued that health care civil rights require provision and recognition, and this form of anti-trans argument is precisely the opposite formulation that shows why both are so important. Imagine, for example, the claim that one is not discriminating against a pregnant person for "being" pregnant but for the "conduct" of demanding prenatal care, care during delivery, and health insurance for it. Of course, religious arguments for their own protection to discriminate could not possibly rely on such a distinction. For the religious conservative, there is no merely "being" religious, either. The religious entity is a person but also a sprawling healthcare system, an employer, and a health insurer, all with a set of practices that impact other people. All these entities, in their view, are entitled both to be and to do (meaning to believe, to proclaim, to draw and enforce boundaries, and to give and to withhold goods and services). In "being" a religious rights-holder, all these entities claim the right to enact discrimination in "conduct," such as deadnaming, misgendering, declining care, issuing denials, turning away patients, informing people that they are confused and that their condition does not really exist and that they are not who they understand themselves to be, and enforcing Catholic directives for all employees and patients, including hiring and firing to ensure religious actions are taken and sinful ones are not. In other words, the argument is that their religious freedom requires being able to discriminate and to enact that discrimination in speech, business, and health care.

Health care civil rights protecting religious conservatives offer both provision and recognition in many forms, in other words, singling out their beliefs for protection in federal legislation and constitutional interpretation, providing federal funding directly in healthcare and indirectly through tax policy, and creating exemptions from civil rights and employment laws that apply to everyone else so that they may undertake conduct that is otherwise illegal.

Distinguishing between status and conduct is unhelpful for understanding what everyone needs rights for. Rather, the challenge is to manage these conflicts and tensions better and more equitably so that everyone has a chance to enact an authentic vision of themselves—people living their genders in all variations and people of all faiths (overlapping categories, let's not forget)—within systems that still protect the more vulnerable and restrain those who would harm people who are different.

SECULAR AND RELIGIOUS TENSIONS FOR CATHOLIC HEALTHCARE SYSTEMS

Catholic healthcare systems fit uneasily into the American healthcare landscape in many ways and have evolved significantly over time. Religious sisters started hospitals for the poor in the early years of the United States and its westward expansion, establishing Catholic hospitals widely at a time of no national regulation or economic organization.[32] Catholic hospitals were well organized and poised to take advantage of Hill-Burton funding at mid-century, quadrupling their patient load and expanding their facilities.[33] Now, one in seven patients in the United States is treated in a Catholic facility, and in twelve states more than thirty percent of hospital beds are in Catholic facilities.[34] There are more than 600 Catholic hospitals and 1,600 other facilities, such as nursing homes, run by the Catholic Church in the United States.[35] They receive the same types of federal funding as other entities, such as billing to Medicare and Medicaid. Catholic hospitals and systems face the same challenges to remain profitable as other hospitals do, balancing caring for the poor and uninsured with trying to attract patients with better-paying private insurance and merging and consolidating to achieve a larger scale of operations. Despite claims of extra concern for the poor, Catholic healthcare systems provide less care to the poor than average.[36]

Some challenges for Catholic healthcare systems operating in the US marketplace are specific to their Catholic roots, such as the quickly dwindling supply of women willing to work as sisters in these facilities. The biggest challenge internally for the bishops who run these systems has been how to maintain Catholic values, which operate in practice as restrictions on forms of care that are popular with patients or seen as medically necessary in the contemporary healthcare marketplace.[37] The no doubt carefully selected plaintiffs in impact litigation are groups like Little Sisters of the Poor, a group of nuns providing mostly eldercare in small facilities, who can put forth a sympathetic face that hearkens back to the feminized, consecrated, impoverished roots of Catholic care provision. Critics point out, however, that the Catholic Church and its expansive healthcare businesses that the sisters represent are "neither little, nor poor,"[38] nor do women hold positions of power in the hierarchy.

That is, there are multiple ways of understanding and depicting what Catholic healthcare is in the contemporary United States, and the more it looks like a big, consolidated business that operates like its secular counterparts and relies on federal funding, the harder it is to justify its refusals to provide care to whole categories of people. But if it is more like a small order of devout nuns caring for the elderly, then allowing religious diversity to flourish even if it impacts care in some ways looks more acceptable in a pluralistic society. When the Becket Fund for Religious Liberty makes Little Sisters of the Poor their plaintiffs, they are perfectly aware of the need to emphasize that role to the public. My view is that religious rights in health care have expanded too much, and the balance is off. The realities of healthcare operation mean that allowing one religious view to dominate so much of our health care delivery is unfair to everyone else and especially cruel to vulnerable people such as trans and non-binary people and people who need abortion, fertility, and contraceptive care. The Supreme Court has been going the opposite way, however, so it looks like our healthcare system will continue to pull apart, with large swaths of it offering religiously restricted care to ever-larger networks and geographic areas. The main way this dual system could break down would then not be through law and policy but through economic pressures as providers—most of whom do not share the religious views of their employers—choose to work elsewhere.

What the US Conference of Catholic Bishops calls "an effective Catholic presence in health care" exemplifying "authentic neighborliness to those in need" is from another perspective a large healthcare system that receives federal funding and operates in many ways indistinguishably from other nonprofit healthcare systems but with a list of services it will not provide, most of which are popular reproductive health services.[39] The bishops publish the ethical and religious directives that Catholic healthcare entities must follow. They prioritize promoting and defending human dignity. The Catholic view of the right to life from the moment of conception to death "entails a right to the means for the proper development of life, such as adequate health care."[40] Catholic institutions must adopt the directives and require adherence to them for employment and medical privileges. Medical expertise and innovation are subject to religious control. "In consultation with medical professionals," the directives explain, "church leaders review these developments [new medical discoveries and technologies and the social change they bring], judge them according to the principles of right reason and the ultimate standard of revealed truth, and offer authoritative teaching and guidance about the moral and pastoral responsibilities entailed by the Christian faith."[41]

More specifically, the directives ban contraception, abortion, advance directives that are contrary to teachings (because they would hasten natural death, for example), creation of embryos in fertility treatments such as in vitro fertilization if they will not be used, use of donor gametes by a married couple, fertilizing gametes

from a married couple outside of their bodies and distinct from "the marital act," surrogate motherhood, prenatal testing or diagnosis when abortion would be an outcome if there is an unwelcome diagnosis, and sterilization (except when such a procedure would cure or alleviate a present and serious pathology for which a simpler treatment is not available). The directives also envision healthcare collaborations with non-Catholics in detail, requiring that the local bishop assess whether those relationships could be immoral, scandalous, or "undermine the Church's witness."[42] Collaborations "must be operated in full accord with the moral teaching of the Catholic Church," and it is not permissible to create another entity to perform "immoral procedures."[43]

The directives do not mention gender-affirming care by name or specifically prohibit it. However, the Catholic Health Care Leadership Alliance explains that "[t]he body is God's creation, and to remove, impede or interrupt functioning body parts that are effectively participating in the biological unity of the body, according to their physiological purposes, would be to blaspheme God as the supreme Artist, Creator and sanctifier of the flesh."[44] They oppose all the standard treatments for gender dysphoria for people of all ages, from social transition to hormones to surgery.[45] Religious hospitals do not offer highly specialized genital surgeries, which are typically only offered by providers in gender-identity clinics or by well-known private surgeons whose primary practice is focused on these procedures. These specialized providers do not work in systems that restrict their care.

Instead, religious institutions object to providing care that their employees widely and commonly provide to cisgender people and that is not specific to gender-affirming care for trans people. Examples of the overlapping categories of care that religious hospitals want to deny only to trans people as gender-affirming care are hysterectomy, mastectomy, and hormone therapies. Removal of the uterus and removal of breast tissue is indicated for transgender men as treatment for the distress of gender dysphoria that these body parts can bring. In cisgender women, breast tissue removal is most often a cancer treatment or preventative. Hysterectomies for cisgender women are a very common procedure, with six hundred thousand performed each year as treatment for fibroids, excessive bleeding, endometriosis, and cancer.[46] While Catholic hospitals do not perform hysterectomies for sterilization, these institutions provide hysterectomies for other medically indicated reasons. Nothing in civil rights law requires doctors to perform procedures that are outside their expertise, but hysterectomies are so common that it is well within the practice competency of many gynecologists. Hormone therapies for cisgender youth with conditions like gynecomastia (breast development in boys) that are gender-affirming care for cisgender youth are part of standard care across all types of institutions. Hormone therapies are not controversial as treatments for menopausal symptoms or as growth treatments in children with very small stature. When lawyers for religious healthcare institutions argue that their hospitals and doctors will be forced to provide

care they object to, they are talking about these forms of care that are well within their practice areas and regularly provided to cisgender people. Under Section 1557's principle of parity, care that would be provided to a cisgender person cannot be denied on the basis of gender identity to a trans or non-binary person. A religious exemption would be needed to allow them to discriminate in ways that would otherwise be illegal under Section 1557.

As Catholic hospital systems have downplayed the restrictions that the Church places on their care and moved to resemble other hospitals in many outward ways, their strong market position and even dominance in some areas has become controversial. Simply put, some patients must give over their care to the dictates of the Catholic Church whether they want to or not. Some Catholic hospitals operate as the sole community hospital in rural areas, with more than two hundred thousand patient discharges and one million emergency room visits annually.[47] Employer-sponsored health insurance provider networks can be narrow, and in some areas the only places where one's insurance is accepted is at a Catholic facility. Recall that Joshua in the previous chapter had to change jobs to get different insurance coverage so his mastectomy would be covered because the Catholic provider would not cover it. There is no legal requirement of access to a nonreligious hospital, and religious providers are not required to make referrals for the care that they will not provide. Patients frequently are unaware of the differences in care offered at Catholic facilities and may not even know they are using a Catholic hospital. Many do not realize that the care they expect and is widely provided elsewhere is not available. Most facilities do not post any details about the religious restrictions they follow, and only the state of Washington requires posting about reproductive care restrictions.[48] Section 1557 requires posting a nondiscrimination notice, for example, but it does not require that a religious healthcare institution that has opted out of providing gender-affirming care add an asterisk to that policy, explaining how some patients will be treated differently (because of course, as I explained above, the goal of the religious exemption is to engage in discrimination that is otherwise prohibited under Section 1557). No laws require explaining any of this to the public or to patients and their families.

When hospitals merge to form larger and more profitable systems, a secular system may acquire a Catholic facility or the other way around. Which collaborator will adapt its values and medical care for the other? One option would be for the system to disengage from the Catholic Church. Another option is for the new system to govern itself by the directives as a Catholic facility. In some recent merger cases, it has been too controversial to expand Catholic restrictions through hospital-system growth. Catholic Healthcare West was a large Catholic hospital system operating in northern California in competition with Sutter Health, a secular system there. To grow, it ended its governing relationship with the Catholic Church and became Dignity Health. Some parts of the system continue to operate as Catholic hospitals, but others, including a major center for gender-affirming

care in San Francisco, do not. Overall, however, the growth has been in the more religious direction, with the Catholic systems in the more favorable position to absorb secular hospitals and require them to follow the directives.[49] Some arrangements involve public systems, often university teaching hospitals, consolidating with Catholic hospitals so that some part of the public hospital system is governed by Catholic bishops.[50] My own employer, the University of Michigan, has adopted an agreement like this to absorb the once-secular community hospital in the nearby town of Chelsea in a collaboration with a Catholic healthcare system. It is now run by Trinity Health, a Catholic hospital system.

We saw in chapter 2 that the threat of not being able to participate in the new Medicare program was a major force behind hospital desegregation across the South. The stick for civil rights compliance has long been federal funding in healthcare and education. The Supreme Court's objections to the Affordable Care Act, however, have presumptively removed or at least severely curtailed that mechanism for enforcing the antidiscrimination provisions of Section 1557. In *National Federation of Independent Business v. Sebelius*, the 2012 case challenging the Affordable Care Act's requirement to expand Medicaid eligibility in all states to adults earning less than 133 percent of the federal poverty rate, the Supreme Court held that the threat of removing all of a state's Medicaid funding if they did not expand their program was unduly coercive.[51] The Catholic Health Care Leadership Alliance, expanding on the coercion language from *National Federation of Independent Business v. Sebelius* beyond the federalism issue of coercing states, argues that "[t]he penalties that will be levied against hospitals for not complying with the [Biden administration's] proposed rule's gender-identity affirmance policy will be so substantial and financially threatening as to amount to an overtly coercive condition upon religious health care professionals."[52] States were allowed to decide without compulsion if they wanted to expand their Medicaid programs or not, and many more conservative states did not.

The question of how coercive it is for the Department of Health and Human Services to threaten to remove the ability of a hospital to bill Medicare, for example, is up for debate in a way that it was not when President Johnson moved forcefully to enforce racial nondiscrimination in access to facilities in the summer of 1966 as the Medicare program began. Even then, officials had worried that "the sanction may be deemed so extreme as to suggest it will never be employed."[53] Not only are there multiple layers of statutory and constitutional protections for religious exercise that arose since then—including the right to withhold many categories of care around reproduction but likely also gender-affirming care—but the threat of enforcement is significantly weakened even if those protections did not apply. The threat is weakened because the sanction of cutting off federal healthcare dollars is indeed dramatic, has not been used, would meet with furious opposition, and would harm patients. Just as we saw that physicians are out of reach of the hospital grievance handlers because only physicians can discipline other physicians, health

care civil rights can fail at the national level of enforcement because the primary mechanism of enforcement has been significantly undercut.

REBRANDING RELIGION, PROMOTING UNCERTAINTY, AND CONTESTING EXPERTISE

Most of this chapter focuses on the explicitly religious arguments against health care civil rights under the religious objection frame. I have argued that there is, in practical terms and in our courtrooms, a head-to-head matchup of rights in which they are substantively incompatible: religious freedom as conservatives claim it means denying gender-affirming recognition and care provision.[54] The case of Catholic healthcare systems trying to maintain religious rules while competing in the healthcare systems marketplace reveals some tensions that this contest exposes, even under favorable legal conditions now. There are additional tensions, though, rooted in the fact that the dominance of the brand of religious conservativism that has notched so many wins against trans health care civil rights is more politically achieved than broadly popular. That is, these religious conservatives represent at best about fifteen percent of the US population and dominate in groups like Republican primary voters, but overall, their views are not widely shared, especially not among younger people. Some rebranding is required. Making claims about gender-affirming care in religious terms is not enough when the broader context for evaluating health care is evidence-based medicine.

A brief detour into another closely related issue gives us an example of rebranding of religious claims into secular language. Because religious conservatives believe that only a married father and mother can rear children into proper roles and self-understandings of themselves as boys and girls, same-sex marriages are also illegitimate. The Supreme Court upheld marriage equality for same-sex couples in the 2015 *Obergefell v. Hodges* decision and surveys show it is widely accepted (seventy-one percent support overall and even among weekly churchgoers it's forty-one percent).[55] Alliance Defending Freedom, staunchly opposed to marriage equality, has been hard at work on this needed rebranding. "Marriage is about equality and diversity," they claim, because it joins "the two equally important and diverse halves of humanity represented in men and women."[56] Legalizing same-sex marriage hurts children and "the underprivileged."[57] Even though their reasoning is based on biblical foundations, Alliance Defending Freedom borrows progressive terms in equality, diversity, and concern for the marginalized and repackages them to justify excluding same-sex couples from marriage.

The organizations bringing impact litigation from the right wing clearly have their sights set on overturning *Obergefell*. They are in a tricky position, however, because even though the lower federal courts are easy picking grounds for wins in certain district courts and the more conservative appeals courts, there are risks of pushing too fast. The electoral popularity of abortion in statewide elections and

ballot measure votes after the *Dobbs* decision overturned *Roe* has shown that the public generally does not like rights being taken away. Trans youth and adults are a much smaller group than people who have had abortions and an even smaller group than people who are in a same-sex marriage or know someone who is. Winning cases opposing trans health care civil rights is much easier for groups like Alliance Defending Freedom than eradicating same-sex marriage because they do not have to argue for overturning a recent Supreme Court precedent. Rolling back marriage equality using frameworks of equality and diversity may seem far-fetched. The point is to supply cover post-*Dobbs*, recognizing that rolling back rights that are broadly popular will work best if shaped within progressive terms. Opposition to gender-affirming care has been an easier rebranding, however, because evidence-based medicine itself supplies alternate terms of contestation, and opponents have been able to produce professional organizations, experts, and research to argue on those terms.[58]

The religious objection frame directly contradicts a mainstream medical expertise frame. The mainstream medical expertise frame explains being trans as having a diagnosable condition that is treatable with therapy, hormones, and surgery to align the person's gender identity with their body. It takes a firmly realist view of trans identity in which gender dysphoria is a real phenomenon that presents with certain characteristics, persistence, and duration that are clear enough to meet medical definitions. Major medical societies in the United States support gender-affirming care and insurance coverage for it, including the American Medical Association, the American Academy of Pediatrics, the Endocrine Society, and the American Society of Plastic Surgeons.[59]

The mainstream medical expertise framework is contested from within the trans community and within the broader coalition of those supportive of trans health care needs, as trans activists within medicine and on its outskirts argue that there is still too much gatekeeping and pathologizing from cisgender medical experts and that they ought to be able to give consent to treatments without having to claim a diagnosis, for example.[60] Non-binary people have struggled under the medical expertise frame because of its presumption that what trans people want is to move cleanly from one side of the gender binary to the other rather than to live in between or beyond it.[61] The medical expertise frame has shifted in response from being more paternalistic and gatekeeping toward greater acceptance of trans and non-binary people as experts themselves and as capable of consenting to and directing their own care without pathologization. This trend has meant expanding treatment options over the last quarter century, including for youth, and shifting power away from gatekeeping and toward expanding access.

Religious opponents of gender-affirming care as a health care civil right have mobilized alternative frameworks of expertise to argue that gender-affirming care is ideological rather than scientific, capriciously handed out by advocates rather than carefully extended by detached professionals, damaging to youth, and not

well supported by long-term studies that meet the gold standard of evidence in medicine.[62] They see increases in people identifying as trans or non-binary and expansions in gender-affirming care as sudden and faddish, spreading like a disease in the culture. Lawyers and activists have worked very hard to generate controversy and then characterize gender-affirming care as "controversial and dangerous."[63] As I discuss in the next chapter, partisans on the religious side have run into trouble presenting themselves in court as the scientific and medical experts that groups like Alliance Defending Freedom need to fully mobilize an alternative account of expertise, however.

The American College of Pediatricians (ACPeds) has been a leader in the conservative effort to push gender-affirming care outside the mainstream medical expertise frame. It describes itself as a reputable medical organization and not a religious or political organization.[64] In amicus briefs on behalf of their approximately six hundred members, they oppose provision of gender-affirming care for youth on the grounds that it is not evidence based, is insufficiently studied, and is harmful. ACPeds assiduously presents itself using all the cues of neutrality and expertise rather than religion or politics, with the aim of destabilizing the mainstream consensus that gender-affirming care, including hormones and puberty blockers for youth, is the recommended course of treatment for gender dysphoria. Its founding tells a different story, however. ACPeds was founded in 2002 by a small breakaway group of conservative doctors who objected to the American Academy of Pediatrics' endorsement of second-parent adoption by gay and lesbian couples. The Southern Poverty Law Center designates ACPeds an anti-LGBTQ hate group because of their leadership's statements opposing family formation, marriage, and parenting by LGBTQ people, that the LGBTQ movement is intrinsically in support of pedophilia, that trans people are mentally ill, that gender-affirming care is child abuse, and in support of conversion therapies for LGBTQ people.[65] The group's entire existence has been devoted to anti-LGBT politics.

Opponents of gender-affirming care have put forth experts with sufficient credibility to clear the bar of creating uncertainty, at least for conservative judges and legislators. At least twenty-two state legislatures have agreed with ACPeds' view, enacting legislation prohibiting gender-affirming care for minors.[66] Judges hearing cases challenging these bans have ruled both for and against them with starkly different levels of deference to and framing of the mainstream medical consensus in support of care. There have been some full-scale bench trials with expert witnesses.[67] Findings in favor of the bans on care concede that the medical organizations support care but refuse to import that consensus into constitutional law. "What is it in the Constitution, moreover," asked the Sixth Circuit panel upholding bans in Tennessee and Kentucky, "that entitles experts in a given field to overrule the wishes of elected representatives and their constituents?"[68] One option to defend these bans on care is to simply disregard what mainstream medical and scientific professionals think. Judges note that the Food and Drug Administration has

not approved hormone therapy specifically for gender dysphoria so that doctors are prescribing it "off label," which they interpret as uncertainty among experts.[69]

Producing just enough uncertainty ("dueling affidavits," as the Sixth Circuit put it) to justify dismissing mainstream consensus is helpful for opponents. Conservative movement litigation has already spelled out the constitutional arguments the Supreme Court will need to find against the parents and youth who need gender-affirming care. Lower federal courts have found that there is no protected class status under the equal protection clause for trans youth or adults, so these restrictions clearly pass the low standard of rational basis review given some level of medical concern or uncertainty. Nor are these bans a burden on one sex or the other because they apply to both sexes, in this argument, so there is no access to heightened scrutiny as a sex classification. Restricting medical treatments that only one sex would need does not even trigger heightened scrutiny under the equal protection clause anyway, a conclusion nicely laid out for the conservative canon in *Dobbs* (removing the right to an abortion despite its impact on cisgender women). Substantive due process could offer grounds for affirming parents' rights to direct care for their children. But it is always possible to select a preferred level of generality to describe a right in a substantive due process analysis that makes it seem new and weird and therefore not rooted in our nation's history and tradition. Parental rights over children are certainly long-standing, but the right to puberty blockers is not. A court that upheld a ban pointed to "regulatory debate" and preferred to leave such matters in the hands of the state legislatures.[70]

Alliance Defending Freedom promptly sued the Biden administration over its most recent Section 1557 regulations with a Mississippi pediatrics practice as the plaintiff. Their publicity photos feature Black babies prominently. Complying with Section 1557's civil rights protections for trans people, their complaint argues, would "effectively prevent [the pediatricians] from treating the most vulnerable children in Mississippi unless they ascribe to the radical gender ideology imposed by the president and his bureaucrats in Washington, D.C."[71] Promoting their cause through Black children on Medicaid and the Children's Health Insurance Program is useful because it counterposes the interests of low income (Black) children against (white) trans people while erasing the long history of anti-Black racism in white evangelicalism justified by the Bible.[72] It also hides the fact that the arguments dismantling the ability of the federal government to legislate and regulate against gender-identity discrimination undermine civil rights based on any other trait including race too. Open arguments that interracial dating violates God's commands are out of fashion now, but Bob Jones University defended its ban all the way to the Supreme Court in 1982 and only lifted its ban in 2000 when it received bad publicity after George W. Bush's campaign visit there.[73] Separating racialization from transness is a rhetorical, political, and legal strategy of white cisgender supremacy to disguise itself and its broader implications.

In the next chapter, I turn to the arguments at the governmental level that have prevailed in defense of trans health care civil rights. But it should be clear that religious opponents have multiple sources of powerful arguments that are more than capable of defeating the foundational underpinnings as well as practices of health care civil rights for anyone who deviates from cisgender heterosexuality and binary, acceptable gender presentation. If groups like Alliance Defending Freedom have their way, there will be no gender-affirming care, no name changes, and no changes to pronouns at all. They are well on their way to securing expanded exemptions for religious individuals and healthcare systems to discriminate on the basis of gender identity (and sexual orientation, gender expression, and gender stereotypes too), exemptions that restrict statutory and constitutional protections based on "sex" only to binary male and female categories assigned at birth. A Supreme Court majority likely shares their policy preferences against gender-identity protections in civil rights. The Court has already given itself the power to ignore the regulations of the administrative state, developed through years of information seeking and tens of thousands of public comments from experts and ordinary people. The religious protection arguments are sufficiently strong in their favor that the efforts to destabilize the medical consensus behind gender-affirming care function more as backup and facade but are likely enough for a judicial nod of approval. The core argument is that health care civil rights for trans people cannot exist because trans people do not legitimately exist.