No. 21-674

IN THE

Supreme Court of the United States

NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES,
Petitioner,
v.
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; AND SAM SILVAINE,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

Christopher J. Wright
Amy E. Richardson
Lauren E. Snyder
HARRIS, WILTSHIRE & GRANNIS LLP
1919 M Street NW, Fl. 8
Washington, DC 20036

David P. Brown
Ezra Cukor
TRANSGENDER LEGAL DEFENSE & EDUCATION FUND, INC.
520 8th Ave., Ste. 2204
New York, NY 10018

Omar Gonzalez-Pagan
Counsel of Record
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
120 Wall Street, 19th Fl.
New York, NY 10005
(212) 809-8585
ogonzalez-pagan@lambdalegal.org

Tara L. Borelli
Carl S. Charles
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
1 West Court Sq., Ste. 105
Decatur, GA 30030

December 27, 2021

Counsel for Respondents

LEGAL PRINTERS LLC ● Washington, DC ● 202-747-2400 ● legalprinters.com

QUESTION PRESENTED

The health care nondiscrimination law, enacted as Section 1557 of the Patient Protection and Affordable Care Act ("ACA"), Pub. L. No. 111-148, 124 Stat. 119 (Mar. 23, 2010), prohibits discrimination on the basis of race, national origin, sex, age, and disability in "any health program or activity, any part of which is receiving Federal financial assistance." 42 U.S.C. § 18116(a).

The Civil Rights Remedies Equalization Act ("CRREA"), enacted as Section 1003 of the Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, 100 Stat. 1807 (Oct. 21, 1986), in turn provides that a State "shall not be immune under the Eleventh Amendment … from suit in Federal court" for violations of "the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance." 42 U.S.C. § 2000d-7(a).

The question presented is:

Whether Petitioner, a state health care plan that receives Federal financial assistance, waived its sovereign immunity from a suit in Federal court alleging discrimination in violation of Section 1557 of the ACA by applying for, accepting, and receiving Federal financial assistance?

PARTIES TO THE PROCEEDING

Petitioner is the North Carolina State Health Plan for Teachers and State Employees ("State Health Plan" or "Plan"). The State Health Plan is a Defendant in the district court below and was the appellant in the Fourth Circuit.

Defendants in the district court below include: the State Health Plan, against which there are claims under the health care nondiscrimination law and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.; Dale Folwell, in his official capacity as Treasurer of the State of North Carolina; Dee Jones, in her official the Executive Administrator of the State Health Plan; and the State of North Carolina, Department of Public Safety.

Respondents are Maxwell Kadel, Jason Fleck, Connor Thonen-Fleck, Julia McKeown, Michael D. Bunting, Jr., C.B., by his next friends and parents, and Sam Silvaine. Respondent Connor Thonen-Fleck, who as a minor initially sued by and through his next friends and parents, is now over 18 years of age and brings suit on his own behalf. Respondents are Plaintiffs in the district court below and were the appellees in the Fourth Circuit.

Respondents are joined in the district court below by Plaintiff Dana Caraway who asserts claims against the State Health Plan under the health care nondiscrimination law and Title VII.

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INTRODUCTION

This case presents a straightforward question of statutory construction: Does a state health care plan waive its sovereign immunity from suit under Section 1557 of the ACA when it receives Federal financial assistance? As the Fourth Circuit below and every other federal court to have considered this question have held, the answer is yes.

Faithfully applying this Court's precedents and the laws enacted by Congress, the Fourth Circuit came to the inescapable conclusion that, by receiving Federal financial assistance, Petitioner North Carolina State Health Plan for Teachers and State Employers waived any claim of sovereign immunity from suit under the health care nondiscrimination law. The health care nondiscrimination law is a federal law "prohibiting discrimination by recipients of Federal financial assistance" within the meaning of CRREA. 42 U.S.C. § 2000d–7(a)(1). And as this Court has recognized, CRREA "expressly waives state sovereign immunity for violations of … '*the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance*.'" *Sossamon v. Texas*, 563 U.S. 277, 291 (2011) (quoting 42 U.S.C. § 2000d–7(a)(1) (emphasis in original)).

There is no disagreement among the lower courts on this point. No other court of appeals has considered the question and every federal district court to have done so has concluded that state health entities, like Petitioner, that receive federal financial assistance waive their Eleventh Amendment immunity from discrimination suits by doing so. That is not surprising. The health care nondiscrimination law is

the only law Congress has enacted pursuant to the Spending Clause to prohibit discrimination by a recipient of Federal financial assistance since enacting CRREA.

Petitioner attempts to fabricate a conflict among the lower courts by misreading cases rejecting CRREA's application to legislation that neither stems from Spending Clause authority nor prohibits discrimination by a recipient of Federal financial assistance. But there is no conflict. No circuit court of appeals, aside from the Fourth Circuit here, has considered the question presented by this case. And every circuit court of appeals agrees that CRREA conditions the receipt of federal funds on a recipient's waiver of its Eleventh Amendment immunity.

To the extent this case involves a question of federal law of some importance, the lower courts' rulings do not indicate any need for clarification by the Court at this time. And given the question's recency, this Court would benefit from further percolation of the issue among the lower courts. Indeed, the "sound exercise of discretion" would be for the Court to allow "the issue [to] receive[] further study before it is addressed by this Court." *McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J., opinion respecting the denial of the petitions for writs of certiorari).

In addition, this case presents an unsuitable vehicle for the Court to consider the question presented. First, this case could become moot *before* the Court has an opportunity to hear it. Second, the district court case below, in which Petitioner must participate regardless of the outcome of this petition, is far advanced and includes factual development of a record that would be of assistance to this Court in

evaluating the question presented, including Petitioner's own assessments as to whether it waived sovereign immunity. This record, not presently before the Court, would be available once the case is decided on the merits.

For these and the following reasons, the petition for a writ of certiorari should be denied.

STATEMENT OF THE CASE

A. Legal Background

1. As this Court has recognized, "Congress has broad power to set the terms on which it disburses federal money to the States." *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006). This includes the ability to "attach conditions on the receipt of federal funds," *S. Dakota v. Dole*, 483 U.S. 203, 206 (1987), such as the waiver of sovereign immunity.

Congress passed CRREA in 1986 in response to this Court's decision in *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985), which held that Congress had not unmistakably expressed its intent to abrogate the States' Eleventh Amendment immunity in the Rehabilitation Act, and that the States therefore were not "subject to suit in federal court by litigants seeking retroactive monetary relief under § 504." *Id.* at 235. By enacting CRREA, "Congress sought to provide the sort of unequivocal waiver that [this Court's] precedents demand," *Lane v. Pena*, 518 U.S. 187, 198 (1996), and waived the States' Eleventh Amendment immunity under the provisions of four statutes: Title IX, Title VI, § 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975.

Franklin v. Gwinnett Cnty. Pub. Sch., 503 U.S. 60, 72 (1992).

In addition to conditioning the receipt of federal funds upon the waiver under those four statutes, Congress also conditioned the receipt of federal funds upon the waiver of sovereign immunity with respect to "the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance." 42 U.S.C. § 2000d–7(a)(1). This latter provision has come to be known as CRREA's "residual clause." See *Sossamon*, 563 U.S. at 292.

2. In the years following 1986, Congress did not pass any legislation pursuant to the Spending Clause "prohibiting discrimination by recipients of Federal financial assistance." That is, until 2010, when Congress enacted the health care nondiscrimination law, as Section 1557 of the ACA. The health care nondiscrimination law employs precisely the same linguistic formulation for describing prohibited discrimination as Title IX, Title VI, Section 504 of the Rehabilitation Act, and the Age Discrimination Act of 1975—the "Federal statute[s] prohibiting discrimination by recipients of Federal financial assistance" specifically listed in CRREA.

Specifically, the health care nondiscrimination law provides that:

> [A]n individual shall not, 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, 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, or under any program or activity that is administered by an Executive Agency or any entity established under this title (or amendments). The enforcement mechanisms provided for and available under such title VI, title IX, section 794, or such Age Discrimination Act shall apply for purposes of violations of this subsection.

42 U.S.C. § 18116(a).

B. Factual Background

1. The State of North Carolina provides its employees and their dependents with health care coverage through a self-funded plan, the North Carolina State Health Plan for Teachers and State Employees. Pet. App. 6. The Plan covers nearly three-quarters of a million teachers, state employees, retirees, current and former lawmakers, state university personnel, community college personnel, hospital staff members, and their dependents. *Ibid*. The Plan purports to cover "medically necessary pharmacy benefits, mental health benefits, and medical care." Pet. App. 8.

2. Respondents Maxwell Kadel, Jason Fleck, Connor Thonen-Fleck, Julia McKeown, Michael D. Bunting, Jr., C.B., and Sam Silvaine are all enrollees in the Plan. Pet. App. 7. They are either current or former state employees, or the dependents thereof. Pet. App. 97. They are also either transgender persons diagnosed with the medical condition of gender

dysphoria, or the parents of such a transgender person. *Ibid*.

3. Gender dysphoria is a recognized medical condition which, if left untreated, may result in severe anxiety, depression, or suicidal ideation. Pet. App. 97. It manifests as "a feeling of clinically significant stress and discomfort" that arises from the "incongruence between gender identity and the body's other sex characteristics." Pet. App. 7–8. Medical treatment for gender dysphoria varies based on an individual assessment of the specific patient and can include one or more of the following forms of treatment: (1) counseling; (2) hormone therapy; and (3) surgical care. Pet. App. 8. These treatments are "safe, effective, and often medically necessary." *Ibid*. They can be a "critical part" of a transgender person's gender transition, meant to alleviate the dysphoria by "bring[ing] the sex-specific characteristics of a transgender individual's body into alignment with their gender identity." *Ibid.*; Pet. App. 98.

4. The Plan, however, excludes coverage of the gender-affirming care that is often medically necessary to treat a transgender person's gender dysphoria (hereinafter "the Exclusion"). Pet. App. 8–9; Pet. App. 98. More specifically, the Plan denies coverage for medically necessary treatment if the need stems from gender dysphoria, as opposed to any other condition. Pet. App. 98.

The Plan's third-party administrators maintain coverage policies for the treatment of gender dysphoria, outside of the Plan. Pet. App. 98. But for the Plan's Exclusion, claims for gender-affirming care would be evaluated under the third-party administrators' criteria for individual medical

necessity and covered in the same manner as other claims. *Ibid*.

5. The Plan has not always had its Exclusion of gender-affirming care as treatment for gender dysphoria.

In 2016, North Carolina's State Treasurer, joined by a majority of the Plan's Board of Trustees, voted to remove the Exclusion for the 2017 health plans offered by Petitioner. Pet. App. 9. Thus, in 2017, the Plan did not mandate coverage for all gender-affirming care, but simply allowed claims for gender-affirming care to be reviewed under the same criteria and in the same manner as claims for any other medical, mental health, or pharmacy benefits. *Ibid*.

In 2017, however, a new State Treasurer took office, who ensured that the State Health Plan reinstated the exclusion of gender-affirming care. Pet. App. 9.

6. Notably, the Plan receives millions of dollars in Federal funding. More specifically, the Plan receives federal funding through "federal payments under the Retiree Drug Subsidy Program" of the U.S. Department of Health and Human Services. Pet. 14, n.4.

Based on its receipt of federal funding, Petitioner was aware in 2016 that the health care nondiscrimination law, enacted as part of the ACA, applied to the Plan, and that the Plan's exclusion of gender-affirming care risked "millions of dollars in federal funding" and "discrimination lawsuits for non-compliance." Pet. App. 9.

C. Procedural Background

1. On March 11, 2019, Plaintiffs filed suit against the Plan, the Plan's administrators, and their employers, alleging that the exclusion of gender-affirming health care unlawfully discriminated against them on the basis of sex in violation of the health care nondiscrimination and other federal laws. Pet. App. 6, 99. They sought both money damages and equitable relief. Pet. App. 10.

The Plan filed a motion to dismiss, arguing, in relevant part, that it was immune from suit under the Eleventh Amendment. Pet. App. 99–100.

2. The district court denied the motion, holding that the Plan waived its immunity against this claim by accepting Federal financial assistance. The district court "conclude[d] that Section 1557, when read in conjunction with CRREA, effectuates a valid waiver of sovereign immunity," and held that Plaintiffs had "succeeded in stating a plausible claim of discrimination under Section 1557." Pet. App. 119.The district court did so because, "[l]ike the four statutes named in CRREA, Section 1557 is a nondiscrimination provision which is directly aimed at recipients of federal funding." Pet. App. 116.

3. The U.S. Court of Appeals for the Fourth Circuit affirmed. Pet. App. 33. The court held that "Section 1557 of the ACA unequivocally conditions the receipt of federal financial assistance upon a state's waiver of sovereign immunity against suits for money damages," and that Petitioner, "being a recipient of federal funds, is not immune from suit here." Pet. App. 32–33. Each judge wrote a separate opinion.

In Chief Judge Gregory's opinion, which was joined

"in part" by Judge Díaz, Pet. App. 3, the majority affirmed the district court and held "that, when read alongside CRREA, § 1557 clearly conditions the receipt of federal funds upon [the Plan's] waiver of sovereign immunity against suits for money damages," and that "by accepting federal financial assistance, [the Plan] effectuated that waiver." Pet. App. 13; see also Pet. App. 33 (Díaz, J., concurring).

a. Chief Judge Gregory also expressed the view that "§ 1557 also stands as a clear and unequivocal sovereign immunity waiver when standing alone." Pet. App. 13. That is because, as he explained, "§ 1557 incorporates by reference" the enforcement mechanisms provided for and available under Title IX and an "enforcement mechanism provided for and available under Title IX is one that permits states receiving federal financial assistance to be haled into court for money damages." Pet. App. 21. Thus, "[e]ven when read on its own, § 1557 plainly conditions the receipt of federal funds on NCSHP's waiver of sovereign immunity." *Ibid.*

Chief Judge Gregory found that CRREA's "residual clause imposes but two conditions: that the law be federal and that it prohibit discrimination by recipients of Federal financial assistance." Pet. App. 26. Because the "Affordable Care Act is undoubtedly federal" and "it prohibits discrimination by recipients of Federal financial assistance," *ibid.*, he concluded that Section 1557 of the ACA unequivocally conditions the receipt of Federal financial assistance upon a state's waiver of sovereign immunity against suits for money damages," and that Petitioner, "being a recipient of federal funds, is not immune from suit here." Pet. App. 32–33.

Chief Judge Gregory "d[id] not find it necessary" "to resolve a battle of the canons" concerning the appropriate reading of the residual clause, namely, whether one ought to "read the phrase 'prohibiting discrimination by recipients of Federal financial assistance' to modify 'provision' instead of 'statute.'" Pet. App. 27, n.4. He did not need to resolve that issue, on which Judges Díaz and Agee disagreed, because "the sovereign immunity waiver contained in CRREA's residual clause clearly applies to [the Plan] regardless of whether 'prohibiting discrimination by recipients of Federal financial assistance' modifies 'provision' or 'statute.'" Pet. App. 27–28, n.4.

b. Judge Díaz unequivocally joined Chief Judge Gregory in holding that "Section 1557 of the Affordable Care Act, when read in conjunction with the Civil Rights Remedies Equalization Act of 1986 ('CRREA'), constitutes a waiver of sovereign immunity for states (and state agencies) that choose to accept federal funds for a health program or activity[.]" Pet. App. 33. Judge Díaz, however, wrote separately to express his "narrower interpretation" of the residual clause – that "the phrase 'prohibiting discrimination by recipients of Federal financial assistance' modifies the entire preceding integrated clause, 'provisions of any other Federal statute,' rather than the word 'statute' alone." Pet. App. 38. Thus, Judge Díaz explained, the district court was "correct to hold that 'Section 1557, when read in conjunction with CRREA, effectuates a valid waiver of sovereign immunity,'" Pet. App. 47 (citation omitted), because "Section 1557 is a provision of a broader federal statute that explicitly 'prohibit[s] discrimination by recipients of Federal financial assistance.'" Pet. App. 46 (quoting 42 U.S.C. § 2000d-7(a)(1)).

Judge Díaz found it "unnecessary to decide whether Section 1557 constitutes such a waiver standing alone" and "join[ed] only those portions of Chief Judge Gregory's opinion that affirm the district court's reasoning." Pet App. 49-50.

c. Judge Agee dissented. In his view, it is appropriate to "read the Residual Clause to require that the relevant legislative enactment *as a whole*—not just one of its individual provisions—be solely aimed at prohibiting discrimination by recipients of federal financial assistance." Pet. App. 66. Therefore, he concluded that the Residual Clause was inapplicable to the health care nondiscrimination law because the health care nondiscrimination law was enacted as part of the ACA. In his view, "it is not the *clause* that must prohibit discrimination by these recipients; it is the *legislative act* as a whole that must do so." Pet. App. 68.

4. Following the Fourth Circuit's affirmance, Petitioner filed the petition at hand. Petitioner did not seek a stay, however, and the Fourth Circuit issued its mandate on September 23, 2021. The judgment of the Fourth Circuit took effect that same day.

REASONS FOR DENYING THE PETITION

The Fourth Circuit correctly held that the State Health Plan waived its Eleventh Amendment immunity from a discrimination suit under the health care nondiscrimination law by choosing to receive Federal financial assistance. Congress very clearly provided in CRREA's residual clause that "a State shall not be immune under the Eleventh Amendment … for a violation of the provisions of any other Federal

statute prohibiting discrimination by recipients of Federal financial assistance." 42 U.S.C. § 2000d-7(a)(1). The health care nondiscrimination law is such a provision prohibiting discrimination and the Plan is a recipient of Federal financial assistance.

There is no conflict in the circuits. As an initial matter, the cases Petitioner cites to support its claim that there is a conflict did not involve the ACA. Nor did they involve discrimination claims against recipients of Federal financial assistance under a provision comparable to the health care nondiscrimination law. Unless and until a court concludes that a state health entity that receives Federal financial assistance is not subject to a discrimination suit under Section 1557 of the ACA, there is no need for review by this Court.

Moreover, Petitioner knew that it could lose millions of dollars and risk federal lawsuits if it discriminated, Pet. App. 9, so there is no merit to Petitioner's suggestion that it was unaware that its Federal financial assistance was conditioned on its compliance with the health care nondiscrimination law. And as explained below, Petitioner will continue to be involved in the litigation below based on claims involving other statutes and arising out of its discriminatory actions, even if the Court were to grant the petition and reverse the judgment below.

There is no other reason supporting review by this Court.

A. The decision below was correctly decided.

The Fourth Circuit's holding in this case is straightforward: "when read alongside CRREA, § 1557

clearly conditions the receipt of federal funds upon [the Plan's] waiver of sovereign immunity against suits for money damages." Pet. App. 13. The Fourth Circuit correctly decided this question of first impression in any circuit court by faithfully applying this Court's precedents and the laws enacted by Congress.

1. The Fourth Circuit properly applied the canons of statutory interpretation in interpreting the health care nondiscrimination law in conjunction with CRREA.

The health care nondiscrimination law was enacted as Section 1557 of the ACA. And as Judge Díaz explained, "the phrase 'prohibiting discrimination by recipients of Federal financial assistance' [in CRREA's residual clause] modifies the entire preceding integrated clause, 'provisions of any other Federal statute,' rather than the word 'statute' alone." Pet. App. 38. Indeed, reading CRREA's text such that the phrase "prohibiting discrimination by recipients of Federal financial assistance" modifies only the word "statute" would render "the provisions of" superfluous. Pet. App. 40. "One can't violate a statute without violating one (or more) of its provisions." *Ibid*. Accordingly, state health plans waive their Eleventh Amendment immunity from suit under Section 1557 by choosing to receive Federal financial assistance.

Contrary to Judge Agee's contention, the last antecedent rule does not negate this reasoning. Indeed, such a "canon doesn't apply when 'the modifier directly follows a concise and 'integrated' clause.'" Pet. App. 42 (quoting *Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund*, 138 S.Ct. 1061, 1077 (2018)). As Judge Díaz

observed, "the phrase 'the provisions of any other Federal statute' hangs together as a unified whole, referring to a single thing (a type of provision)." Pet. App. 42 (citations and alterations omitted). Simply put, "the most natural way to view the modifier is as applying to the entire preceding clause." *Cyan*, 138 S.Ct. at 1077. This "narrower interpretation is also the most faithful to CRREA's text." Pet. App. 41.[1]

The approach advocated by Petitioner would read "the provisions of" out of the phrase "the provisions of any other statute," contrary to the cardinal principle of statutory construction that every word be given effect. See, e.g., *Williams v. Taylor*, 529 U.S. 362, 404 (2000) ("It is … a cardinal principle of statutory construction that we must give effect, if possible, to every clause and word of a statute." (quotation marks omitted)). "[O]ne of the most basic interpretive canons" is "that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Corley v. United States*, 556 U.S. 303, 314 (2009) (cleaned up).

2. The health care nondiscrimination law is itself a federal statute subject to CRREA, rendering

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[1] There is no need to decide between the approaches to reading of the residual clause adopted by Chief Gregory and Judge Díaz. Under either, the health care nondiscrimination law, when read in conjunction with CRREA, would provide the requisite waiver of Eleventh Amendment immunity. However, to the extent it is necessary, Judge Díaz's approach could be viewed as the controlling one in the Fourth Circuit given its "narrower" scope. As this Court has observed, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193 (1977) (quotation marks omitted).

unnecessary any discussion of whether the ACA as a whole is solely concerned with prohibiting discrimination. The word "statute" means "[a]n act of the legislature declaring, commanding, or prohibiting something." *Statute*, Black's Law Dictionary (5th ed. 1979). That is exactly what the health care nondiscrimination law is – an act of the legislature prohibiting discrimination of various sorts. To be sure, "a statute may mean a single act of a legislature or a body of acts," "[d]epending upon its context in usage." *Ibid*. But it is neither surprising nor particularly illuminating that the health care nondiscrimination law was passed as part of the ACA, an omnibus piece of legislation. CRREA itself, which all the circuits courts reference as an Act, was enacted as part of the Rehabilitation Act Amendments of 1986. This is a common modern occurrence. For example, the Elder Justice *Act*, 42 U.S.C. § 1397 et seq., was also passed as part of the ACA. Pub. L. No. 111–148, 124 Stat. 119 (Mar. 23, 2010). And the Digital Equity *Act* of 2021, 47 U.S.C. § 1721 et seq., was passed as part of the Infrastructure Investment and Jobs Act. Pub. L. No. 117-58 (Nov. 15, 2021).

3. Moreover, as this Court's precedents direct, it is of no consequence that the waiver of sovereign immunity necessitates the reading of the health care nondiscrimination law alongside CRREA. That is true of every waiver of sovereign immunity under CRREA, including the four statutory provisions listed before the residual clause. CRREA did not amend the *text* of these four other statutes though CRREA was intended to close the loophole of immunity established by some of this Court's decisions, like *Atascadero*. Still, CRREA establishes a clear waiver of immunity from suit under each of these statutes.

This Court has already read several of the statutes *in conjunction* with CRREA to find "the sort of unequivocal waiver that [this Court's] precedents demand." *Lane*, 518 U.S. at 198. For example, in *Franklin*, 503 U.S. at 72, and *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 284 (1998), this Court noted how Congress effectively conditioned the receipt of Federal financial assistance upon the waiver of sovereign immunity with regard to claims under Title IX.

4. In any event, one can find the requisite waiver of sovereign immunity contained within the health care nondiscrimination law itself based on this Court's Title IX precedents. Per its text, the health care nondiscrimination law incorporates the enforcement mechanisms provided for and available under Title IX. As this Court has recognized, CRREA in effect *amended* Title IX. See *Franklin*, 503 U.S. at 72 (referring to CRREA as one "of the two amendments to Title IX enacted after *Cannon* [*v. Univ. of Chicago*, 441 U.S. 677 (1979)]"); see also *Litman v. George Mason Univ.*, 186 F.3d 544, 549 (4th Cir. 1999).

As Chief Judge Gregory cogently explained, "[t]he enforcement mechanism provided for and available under Title IX is one that permits states receiving federal financial assistance to be haled into court for money damages." Pet. App. 21. Thus, the waiver of sovereign immunity is expressly incorporated into the health care nondiscrimination law.

It is irrelevant that the health care nondiscrimination law does not make "explicit reference to state sovereign immunity or the Eleventh Amendment." *Dellmuth v. Muth*, 491 U.S. 223, 233 (1989) (Scalia, J., concurring). As Justice Scalia noted

in his controlling opinion in *Dellmuth*, what is necessary for "congressional elimination of sovereign immunity" is "statutory text that clearly subjects States to suit for monetary damages," which can occur "without explicit reference to state sovereign immunity or the Eleventh Amendment." *Ibid.*

Here, that statutory text is clear and unambiguous given CRREA's amendment of Title IX and the health care nondiscrimination law's incorporation of Title IX's enforcement mechanisms.

5. Finally, any debate about whether "provision" or "statute" is the "last antecedent" before the phrase "prohibiting discrimination by recipients of Federal financial assistance" does not matter because the literal text of the residual clause plainly covers discrimination under either approach. Judge Agee's approach, in contrast, requires substantial amendment of the text. In his view, Congress meant to add "and nothing else" to the residual clause, so that it covered only statutes "prohibiting discrimination by recipients of Federal financial assistance *and nothing else*." But Congress did not write the statute that way. And there is no sound reason to think that Congress wanted to provide for federal court review of discriminatory behavior by recipients of Federal financial assistance only when that is the only conduct addressed by a statute.

B. No conflict exists among the lower courts.

Contrary to Petitioner's claim, no conflict exists among the lower courts on the question presented.

1. "Every circuit to consider the question—and all but one regional circuit has—agrees that [CRREA]

validly conditions federal funds on a recipient's waiver of its Eleventh Amendment immunity." *Gruver v. Louisiana Bd. of Supervisors for Louisiana State Univ. Agric. & Mech. Coll.*, 959 F.3d 178, 181 (5th Cir. 2020), *cert. denied sub nom. Bd. of Supervisors of Louisiana State Univ. & Agric. & Mech. Coll. v. Gruver*, 141 S.Ct. 901 (2020). Accordingly, there is no disagreement that, under CRREA, a recipient of federal funds waives its Eleventh Amendment immunity from suits alleging discrimination in violation of a nondiscrimination provision in a separate statute that prohibits discrimination by recipients of Federal financial assistance.

2. And, most relevant here, every federal court to have considered whether a state entity operating a health program or activity waives its sovereign immunity from suit under health care nondiscrimination law when it receives Federal financial assistance has answered the question in the affirmative. In addition to the Fourth Circuit, this includes a multitude of federal district courts. See, e.g., *Fain v. Crouch*, No. 3:20-cv-00740, 2021 WL 2004793, at *4 (S.D.W. Va. May 19, 2021) ("In sum, the Court finds that West Virginia waived its immunity from suit under Section 1557 by accepting federal assistance under the ACA, as provided by Section 1003's Residual Clause."); *Michelle v. California Dep't of Corr. & Rehab.*, No. 1:18-CV-01743, 2021 WL 1516401, at *11 (E.D. Cal. Apr. 16, 2021) ("Thus, by receiving federal funds …, CDCR and CCHS waived their immunity from suit for violations of ACA's nondiscrimination provision."), *report and recommendation adopted sub nom. Concepcion v. California Dep't of Corr. & Rehab.*, No. 1:18-CV-01743, 2021 WL 3488120 (E.D. Cal. Aug. 9, 2021); *Kadel v.*

Folwell, 446 F.Supp.3d 1, 17 (M.D.N.C. 2020) ("In sum, the Court concludes that Section 1557, when read in conjunction with CRREA, effectuates a valid waiver of sovereign immunity."), *aff'd sub nom. Kadel v. N. Carolina State Health Plan for Tchrs. & State Emps.*, 12 F.4th 422 (4th Cir. 2021), as amended (Dec. 2, 2021); *Boyden v. Conlin*, 341 F.Supp.3d 979, 998 (W.D. Wis. 2018) (noting that, under 42 U.S.C. § 2000d-7(1), "the State's acceptance of federal funds acts as a waiver of immunity" and that "Section 1557 of the ACA is such a federal statute prohibiting discrimination against an entity receiving federal financial assistance"); *Esparza v. Univ. Med. Ctr. Mgmt. Corp.*, No. 17-cv-04803, 2017 WL 4791185, at *8 (E.D. La. Oct. 24, 2017) ("§ 2000d-7 is an example of a valid waiver of state sovereign immunity, and the plain text of § 1557 fits within the four corners of that waiver. So yes, Congress does indeed know how to draft an effective waiver—and Congress did so with § 1557." (internal citations omitted)); cf. *Edmo v. Idaho Dep't of Corr.*, No. 1:17-CV-00151, 2018 WL 2745898, at *1 (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); *Huffman v. Univ. Med. Ctr. Mgmt. Corp.*, No. 17-cv-04480, 2017 WL 4960268, at *2 (E.D. La. Nov. 1, 2017) ("Section 1557 of the ACA extends the protections of Section 504 of the Rehabilitation Act to entities associated with the government in the context of the ACA.").[2]

Petitioner cannot point to any decision holding to

[2] Prior to this case, neither the Fourth Circuit "nor any of [its] sister circuits ha[d] addressed the relationship between CRREA and § 1557." Pet. App. 22.

the contrary because no conflict exists among the lower courts on this issue.

In light of the present unanimous agreement that state health entities, like the Plan, waive their Eleventh Amendment immunity from discrimination suits under the health care nondiscrimination law by accepting Federal financial assistance, there is no need for further review by this Court.

3. Petitioner seeks to fabricate a conflict among the lower courts by arguing that the Fourth Circuit's decision below conflicts with decisions of the Fifth and Tenth Circuits that do not involve the health care nondiscrimination law. That is not the case, however.

a. Petitioner argues that the Fourth Circuit's decision conflicts with the Fifth Circuit's statement in *dicta* that CRREA's "residual clause reaches only 'statutes that deal *solely* with discrimination by recipients of federal financial assistance.'" Pet. at 18, quoting *Sullivan v. Texas A&M Univ. Sys.*, 986 F.3d 593, 597 (5th Cir. 2021), *cert. denied*, 142 S.Ct. 216 (2021). *Sullivan*, in turn cited to the Fifth Circuit's decision in *Cronen v. Texas Department of Human Services*, 977 F.2d 934, 937 (5th Cir. 1992). But Petitioner misreads both *Cronen* and *Sullivan*.

As Judge Díaz explained, "[t]he plaintiff [in *Cronen*] didn't allege discrimination; rather, he alleged that the state violated the [Food Stamp] Act [, 7 U.S.C. § 2011 et seq.,] by refusing to allow him to deduct certain expenses from his income for purposes of computing his food stamp benefits," Pet. App. 35, and then claimed Eleventh Immunity was waived under CRREA because the Food Stamp Act contained a provision requiring "certification of applicant

households for the food stamp program" not to discriminate. *Cronen*, 977 F.2d at 937. But, as the Fifth Circuit noted, "the [Food Stamp] Act is not the kind of statute Congress was referring to in [CRREA]." *Id.* at 938. For one, the violation for which the plaintiff sued did not arise from an antidiscrimination provision of any kind. For another, unlike Section 1557, Title IX, Title VI, the Rehabilitation Act, and the Age Discrimination Act of 1975, no provision of the Food Stamp Act targetedly prohibits discrimination based on a protected characteristic by a recipient of Federal financial assistance.

The same is true with regard to the Fifth Circuit's decision in *Sullivan*. That case addressed whether sovereign immunity was waived under CRREA for claims under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 et seq., and the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2601. Relying on *Cronen*, the Court noted that the statutes covered by CRREA "all limit their substantive antidiscrimination provisions to recipients of federal funding." *Sullivan*, 986 F.3d at 597. The Fifth Circuit in *Sullivan* thus held that "Title I of the ADA does not fall within the residual clause of § 2000d-7(a)(1)" because "Title I's substantive provisions prohibit discrimination by a wide range of entities, not just those receiving federal funding." *Id.* at 598. The Fifth Circuit further noted that, "[l]ike the ADA, the FMLA's substantive provisions cover a far broader range of entities than 'recipients of Federal financial assistance.'" *Ibid.*; see also Pet. 45–46.

Notably, neither the ADA nor the FMLA are federal statutes enacted pursuant to the Spending Clause, unlike the health care nondiscrimination law,

Title IX, Title VI, the Rehabilitation Act, and the Age Discrimination Act of 1975.

b. Petitioner also argues that the decision below conflicts with the Tenth Circuit's decision in *Levy v. Kansas Department of Social & Rehabilitation Services*, 789 F.3d 1164 (10th Cir. 2015). Once again, Petitioner is mistaken. In *Levy*, the Tenth Circuit addressed whether CRREA effectively waived sovereign immunity for claims of discrimination under the ADA. In doing so, the Tenth Circuit held that sovereign immunity was not waived because a) the ADA was not one of the statutes listed in CRREA; and b), most relevant here, the ADA did not fall within CRREA's residual because its nondiscrimination provision has "a much broader focus" than those of the statutes covered by CRREA, which apply solely to recipients of federal financial assistance. *Id.* at 1170. That is true, in large part, because the ADA is not legislation enacted pursuant to the Spending Clause.

Indeed, the Tenth Circuit noted that the Rehabilitation Act, for which sovereign immunity is waived under CRREA, and the ADA "were enacted for slightly different purposes and under wholly different provisions of the Constitution." *Ibid.* (citing *Shotz v. City of Plantation, Fla.*, 344 F.3d 1161, 1174–75 (11th Cir. 2003) (noting that the ADA was enacted pursuant to the Fourteenth Amendment and the Rehabilitation Act was enacted pursuant to the Spending Clause)).

Moreover, as the district court below rightly observed, "the provision analyzed by the Tenth Circuit in that case—Section 12203 of the Americans with Disabilities Act—neither mentions federal funding nor the statutes named in CRREA, and therefore could not have provided the link necessary to effectuate a

waiver." Pet. App. 116, n.8. In fact, the plaintiff in *Levy* did not allege discrimination, but instead claimed that the defendant retaliated against him in violation of ADA, which is what Section 12203 of the ADA addresses. 789 F.3d at 1167; see also Pet. App. 46, n.10.

c. In sum, neither the Fifth Circuit's decisions in *Cronen* and *Sullivan* nor the Tenth Circuit's decision in *Levy* conflict with the Fourth Circuit's decision below. The health care nondiscrimination law is indisputably a federal law prohibiting discrimination by recipients of Federal financial assistance, unlike the statutes at issue in those cases.

As the district court explained, "[l]ike the four statutes named in CRREA, Section 1557 is a nondiscrimination provision which is directly aimed at recipients of federal funding." Pet. App. 116. Judge Diaz, in turn, "join[ed] only those portions of Chief Judge Gregory's opinion that affirm the district court's reasoning." Pet. App. 49-50. Therefore, the Fourth Circuit's decision does not extend beyond suits alleging discrimination by a recipient of federal funding. The Fifth and Tenth Circuits have not held to the contrary.

Petitioner's claim of a conflict in the circuits depends on the erroneous contention that Fourth Circuit held that CRREA's waiver encompasses *any* provision of a federal statute if that federal statute prohibits discrimination by recipients of federal funds. Pet. 21 (referring to the "panel opinion"), 23 (referring to "the panel's broad interpretation").[3] But Judge Díaz

[3] Petitioner's reliance (see Pet. 13) on Chief Judge Gregory's

wrote separately to note that, in his view, the "correct[] reading [of CRREA's residual clause] is that Congress sought to waive sovereign immunity for claims brought under statutory *provisions* that target discrimination by recipients of federal financial assistance." Pet. App. 34 (emphasis in original). The Fourth Circuit's decision therefore does not extend beyond the ability of a plaintiff to bring a claim of *discrimination* under the provision of a federal statute prohibiting discrimination by a recipient of Federal financial assistance.

This view, and the Fourth Circuit's holding, is also consistent with the "commonsense canon of *noscitur a sociis*—which counsels that a word is given more precise content by the neighboring words with which it is associated." *United States v. Williams*, 553 U.S. 285, 294 (2008). Here, the residual clause is applicable to statutory provisions prohibiting discrimination by recipients of Federal financial assistance that are similar to Title IX, Title VI, § 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975. As the district court and the Fourth Circuit emphasized, the health care nondiscrimination law is very much like the other four statutes listed in CRREA. Pet. App. 22–23, 116–117; see also *Sossamon*, 563 U.S. at 292 ("General words, such as the residual clause [], are construed to embrace only objects similar

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observation about the Fourth Circuit taking "a different view of the residual clause than two of [its] sisters circuits," Pet. App. 25, n.4, for the proposition that there is conflict among the circuits is unavailing. As noted above, the Fourth Circuit's decision can be read harmoniously with the approach taken by the Fifth and Tenth Circuits in cases involving other statutes. And, in any event, Chief Judge Gregory's opinion on this point is not the controlling opinion. See *supra*, note 1.

in nature to those objects enumerated by the preceding specific words. … [E]ach of the statutes specifically enumerated in CRREA explicitly prohibits 'discrimination.'" (cleaned up)).

Contrary to Petitioner's assertions, the Fourth Circuit's decision is therefore entirely consistent with the Fifth and Tenth Circuits' view that CRREA validly conditioned Federal funding on a recipient's waiver of sovereign immunity with regards to statutes that "limit *their substantive antidiscrimination provisions to recipients of federal funding*." *Sullivan*, 986 F.3d at 597 (emphasis added).

Against this background, it simply is not credible to say that there is a conflict among the lower courts on the issue at hand. To the contrary, the lower courts are of one mind with regard to the question presented.

C. This case is an unsuitable vehicle.

This petition presents a poor vehicle for adjudication of the question presented.

1. For one, there is a realistic possibility that this case could become moot with regard to the question presented. Petitioner never moved to stay the judgment of the Fourth Circuit and recently moved for summary judgment on Plaintiffs' claim under the health care nondiscrimination law on other grounds not at issue in the Petition. See Defs.' Mem. in Supp. of Mot. for Partial Summ. J., at 28-32, *Kadel v. Folwell*, No. 1:19-cv-00272-LCB-LPA (M.D.N.C., filed Nov. 30, 2021) (ECF No. 137) (moving for summary judgment on the grounds that the Plan is not a health program or activity under Section 1557 of the ACA). Similarly, Plaintiffs have moved for summary judgment on all their remaining claims in the district

court below. See Pls.' Mot. for Summ. J., *Kadel v. Folwell*, No. 1:19-cv-00272-LCB-LPA (M.D.N.C., filed Dec. 20, 2021) (ECF No. 178). There is therefore the possibility that either Petitioner or Plaintiffs could prevail below on other grounds in a manner that renders the question presented moot before this Court has an opportunity to hear the case.

Indeed, such a possibility exists even in the absence of the pending motions for summary judgment, as trial is scheduled in this case for July 2022.

2. Furthermore, while this Court allows interlocutory review of matters involving claims of sovereign immunity because of a "concern that States not be unduly burdened by litigation," *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993), such a concern is wholly inapplicable here. As Petitioner acknowledges, at least one of the Plaintiffs in the case below has a pending claim against Petitioner under Title VII. Pet. at ii. Thus, regardless of the outcome of this petition, Petitioner will have to participate in the court below and will continue to be "burdened by litigation."

3. Given that review at this time does not have the potential to free Petitioner from the litigation below, the Court would benefit from reviewing the question presented with the advantage of a fully developed record. This Court has cautioned that when evaluating cases involving waiver of sovereign immunity based on the receipt of federal funds, "we must view the statute from the perspective of a state official who is engaged in the process of deciding whether the State should accept federal funds and the obligations that go with those funds." *Sossamon*, 563

U.S. at 295 (quoting *Arlington Cent. Sch. Dist. Bd. of Educ.*, 548 U.S. at 296 (alterations omitted)).

In addition, Petitioner inaccurately suggests that it was unaware of its potential liability because Congress allegedly provided only "'coy hints'" that it would waive its Eleventh Amendment immunity from suit under the health care nondiscrimination law by accepting Federal financial assistance. Pet. 31 (quoting Pet. App. 90). Not true. See Pet. App. 9. The record below, which is not currently before this Court given the interlocutory nature of the petition, provides greater insight into the perspective of the relevant state officials regarding the Plan's susceptibility to suit under the health care nondiscrimination law. For example, the record below reveals that Petitioner believed that if it did not comply with the health care nondiscrimination law, "the Plan risks losing millions of dollars in federal funding and *could face discrimination lawsuits for non-compliance*." Ex. 37 to Decl. of Amy Richardson in Supp. Pls.' Mot. for Summ. J., *Kadel v. Folwell*, No. 1:19-cv-00272-LCB-LPA (M.D.N.C., filed Dec. 20, 2021) (ECF Nos. 180–81) (emphasis added); see also Ex. 40 to Decl. of Amy Richardson in Supp. Pls.' Mot. for Summ. J., *Kadel v. Folwell*, No. 1:19-cv-00272-LCB-LPA (M.D.N.C., filed Dec. 20, 2021) (ECF Nos. 180–81) (noting that should the Plan continue to exclude coverage for the treatment of gender dysphoria while receive federal funding could result in "*the possibility of civil action by someone challenging the violation*" (emphasis added)). The record below, currently unavailable to the Court, would therefore be of tremendous assistance in helping the Court to assess the question presented from "the perspective of a state official who is engaged in the process of deciding whether the State

should accept federal funds." *Sossamon*, 563 U.S. at 295.

D. While the Fourth Circuit's decision is correct and there is no conflict among the lower courts, further percolation might be informative.

As noted above, the Fourth Circuit correctly decided the question presented here and its holding is the same as that of every federal district court to have considered the question. Given that "[t]here is presently no conflict of decision within the federal system," there is no reason to grant review. *McCray v.*, 461 U.S. at 962 (Stevens, J., opinion respecting the denial of the petitions for writs of certiorari). Nor is there any reason to think that other courts will come out differently.

However, to the extent that the question presented is one of some recency, further percolation among the lower courts would be informative. Members of this Court "have in many instances recognized that when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court." *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting); see also Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. Rev. 681, 716 (1984) ("The process of percolation allows a period of exploratory consideration and experimentation by lower courts before [this Court] ends the process with a nationally binding rule.").

Thus, even if the Court considers the question presented to be ultimately of some importance, intervention by the Court at this time is unwarranted, as "further consideration" of this question "by other courts will enable [the Court] to deal with the issue more wisely at a later date." *McCray*, 461 U.S. at 962 (Stevens, J.).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Christopher J. Wright
Amy E. Richardson
Lauren E. Snyder
HARRIS, WILTSHIRE & GRANNIS LLP
1919 M St. NW, Fl. 8
Washington, DC 20036

David P. Brown
Ezra Cukor
TRANSGENDER LEGAL DEFENSE & EDUCATION FUND, INC.
520 8th Ave., Ste. 2204
New York, NY 10018

Omar Gonzalez-Pagan
Counsel of Record
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
120 Wall St., 19th Fl.
New York, NY 10005
(212) 809-8585
ogonzalez-pagan@lambdalegal.org

Tara L. Borelli
Carl S. Charles
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
1 W. Court Sq., Ste. 105
Decatur, GA 30030

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Counsel for Respondents